INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Gustav F W Hamester GmbH & Co KG
Claimant

v.

Republic of Ghana
Respondent

(ICSID Case No. ARB/07/24)

AWARD

Tribunal

Professor Brigitte Stern, President
Mr. Bernardo Cremades, Arbitrator
Mr. Toby Landau Q.C., Arbitrator

Secretary of the Tribunal
Ms. Martina Polasek

Representing Claimant:
Mr. Akbar Ali
AFA Law
20 Hillside Road
Cheam Surrey SM2 6ET
United Kingdom
and
Mr. Andrew Goddard Q.C. and
Mr. Riaz Hussain
Atkin Chambers
1 Atkin Building
Gray's Inn
London WC1R 5AT
United Kingdom

Representing Respondent:
Hon. Mrs. Betty Mould-Iddrisu
Attorney-General and Minister for Justice
Republic of Ghana
and
Messrs. Arthur Marriott QC,
Thomas Geuther, Paul Cohen and
Ms. Christina Loucas
Dewey & LeBoeuf
No 1 Minister Court
Mincing Lane
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Date of Dispatch to the Parties: June 18, 2010

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I. INTRODUCTION AND PARTIES

A. Introduction

1. This case concerns a dispute submitted to the International Centre for the Settlement of Investment Disputes ("**ICSID**") on the basis of the Treaty between the Federal Republic of Germany and the Republic of Ghana for the encouragement and reciprocal protection of investments of February 24, 1995 (the "**BIT**" or "**Treaty**"), which entered into force on 23 November 1998, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**"). The dispute relates to a cocoa beans processing and trade joint-venture between a German investor and a statutory company established under the laws of Ghana. The joint-venture partners created a company registered in Ghana which took over the assets of an existing factory for the processing of cocoa beans, sheanuts and other related products. The Ghanaian partner supplied cocoa beans to the joint-venture company and the German partner contributed to the modernisation of the factory and purchased the refined products.

2. The dispute arises out of the contractual relationship between the joint-venture partners and concerns claims for breaches of the joint-venture agreement as well as breaches of the BIT.

B. Parties

3. The Claimant is Gustav F W Hamester GmbH & Co KG, a limited partnership company organised under the laws of the Federal Republic of Germany, based at Hosta Werk für Schokoladenspezialitäten GmbH & Co, An der B290, 74597 Stimpfach-Randenweiler, Germany (the "**Claimant**" or "**Hamester**"). Hamester is the successor to Walter Schröder GmbH & Co. KG Kakao- und Schokoladen-Werk ("**Schröder**"), a German limited partnership company, which merged with Gustav F W Hamester GmbH, a German limited liability company, in 1995. As many of the facts relating to this case occurred prior to the merger agreement, Schröder will also be referred to as the Claimant for the purposes of this Award.

4. The Claimant is involved in the international trade of cocoa and cocoa products, as well as cocoa processing. It has been represented in this proceeding by Mr. Akbar Ali, AFA Law, and by Mr. Andrew Goddard Q.C. and Mr. Riaz Hussain, both of Atkin Chambers.

5. The Respondent is the Republic of Ghana (the "**Respondent**", "**ROG**" or "**Ghana**"), In its Counter-Memorial, it was described in the following manner:

> "The Republic of Ghana is a democratic nation state in West Africa with a population of approximately 23 million people. It was the first state in sub-Saharan Africa to gain its independence, becoming independent from the British Empire in 1957. It inherited a legal system based on the English common law. Ghana is well known internationally for its world-leading cocoa industry and its political stability and successful transition to democracy.
>
> Ghana is one of the world's poorest countries …"

The ROG is represented in this case by Mr. Arthur Marriott Q.C., Mr. Thomas Geuther, Mr. Paul Cohen and Ms. Christina Loucas, all of the law firm of Dewey & LeBoeuf.

6. The Federal Republic of Germany and the Republic of Ghana have been Parties to the ICSID Convention since 1969 and 1966, respectively.

II. PROCEDURAL HISTORY

7. The Claimant's Request for Arbitration submitted against Ghana was registered by the Secretary-General of ICSID on September 24, 2007 pursuant to Article 36(3) of the ICSID Convention. The notice of registration invited the parties to communicate to ICSID any provisions agreed by them regarding the number of arbitrators and the method of their appointment. The parties having failed to agree on the number of arbitrators and the method of their appointment, on December 17, 2007, in accordance with Rule 2(3) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), the Claimant invoked Article 37(2)(b) of the ICSID Convention for the constitution of the Tribunal. Accordingly, the Tribunal was to consist of three arbitrators, one appointed by each party and the presiding arbitrator to be appointed by agreement of the parties.

8. On December 17, 2007, the Claimant appointed Dr. Bernardo M. Cremades, a Spanish national, as an arbitrator and, soon thereafter, the Respondent appointed Mr. Toby Landau Q.C., a British national. The parties subsequently agreed on the appointment of

Professor Brigitte Stern, a French national, as the President of the Tribunal. The Tribunal was thus constituted on February 4, 2008. Ms. Martina Polasek, Senior Counsel, ICSID, was designated as the Tribunal's Secretary.

9. Pursuant to Arbitration Rule 13(1), the Tribunal held its first session with the parties in London on April 2, 2008. Among other things, it was agreed that the Arbitration Rules in force since April 10, 2006 would apply; that the place of proceedings would be London; and that the procedural language would be English. In addition, the parties agreed on a timetable for the filing of written pleadings on the merits. In the event there were to be raised objections to jurisdiction and the proceeding was bifurcated, the parties agreed that there would be an alternative timetable. The Respondent stated that such objections would be notified promptly to the Tribunal. The period of June 29 through July 7, 2009 was reserved for a Hearing on the merits.

10. The Claimant having requested an extension for the submission of the Memorial on the merits, on August 5, 2008 the Tribunal issued directions amending the timetable for the written phase of the proceeding. The Claimant filed its Memorial on September 16, 2008, with one day of delay. On November 4, 2008, the Respondent notified the Tribunal that it intended to raise jurisdictional objections and asked that the objections be joined to the merits of the dispute. By letter of November 11, 2008, the Respondent identified its central jurisdictional objections. The Tribunal invited the Respondent to submit the objections with the ROG's Counter-Memorial on the merits due on January 14, 2009, and reserved its decision on the bifurcation of the proceedings.

11. On January 5, 2009, the ROG applied for an extension of the time limit to submit its Counter-Memorial due to the change of Government in Ghana. The Tribunal granted the extension until February 9, 2009 and amended the procedural timetable accordingly. The Respondent filed its Counter-Memorial, including objections to jurisdiction, on February 2, 2009.

12. By letter of February 20, 2009, the Tribunal informed the parties that the Respondent's objections to jurisdiction would be joined to the merits of the dispute and should be addressed in the Reply and Rejoinder, unless a party requested that the objections be dealt with as a preliminary question. The Tribunal further invited the Claimant to indicate whether it wished to file a further submission (Rejoinder on jurisdiction) before the oral

Hearing. Neither party applied for the bifurcation of the proceeding by February 27, 2009, the time limit fixed by the Tribunal. The Claimant stated that it reserved its position generally until it had made a full and detailed assessment of the Respondent's arguments.

13. On March 9, 2009, the Claimant requested that the Tribunal deal with the Respondent's objections to jurisdiction as a preliminary question in a bifurcated proceeding. The Respondent opposed the application. Having considered the parties' positions, on March 16, 2009, the Tribunal decided that the objections to jurisdiction should be joined to the merits. The Tribunal again invited the Claimant to notify whether it wished to file a Rejoinder on jurisdiction. The Claimant made no such notification.

14. Following another request for an extension, the Tribunal moved the date for the filing of the Claimant's Reply to April 9, 2009. However, on April 3, 2009, Claimant's counsel informed the Tribunal that it had been instructed to put the preparation and completion of the Reply on hold. Thereafter, the same counsel explained by letter of April 16, 2009 that "the Claimant company no longer trades and is effectively reliant on others to fund the current dispute proceeding before ICSID." The same letter stated that the funding issues had been resolved and that the Claimant had made arrangements to transfer the advance payment that the Centre had requested on March 2, 2009. The Claimant requested a further extension for the filing of the Reply until May 11, 2009.

15. The Claimant's letters prompted the Respondent's request for provisional measures, filed on April 17, 2009, concerning security for costs under ICSID Arbitration Rule 39(1) and Article 47 of the ICSID Convention. In the Respondent's view, the letters indicated that the Claimant would be unable to satisfy a potential award of costs and requested the Tribunal to recommend that the Claimant post, within fourteen days, a letter of credit for US$ 2 million as security. The Tribunal invited the Claimant's observations on the request and, subsequently, the Respondent's reply and the Claimant's rejoinder. The parties filed the pleadings as scheduled.

16. On June 11, 2009, the Tribunal held a pre-hearing conference call with the parties. The Tribunal subsequently issued Procedural Order No. 1 concerning the organisation of the Hearing and Procedural Order No. 2, concerning the admissibility of an Expert Report on Ghanaian law from Dr. SKB Asante submitted by the Respondent with its Rejoinder, and the production of documents requested by the Claimant.

17. The Tribunal ruled on the Respondent's request for provisional measures in Procedural Order No. 3 issued on June 24, 2009, upon ICSID's receipt of the Claimant's advance payment shortly before the Hearing. It ruled that there was a serious risk that an order for security for costs would stifle the Claimant's claims and that, in any event, it had not been shown that the measures requested were necessary and urgent. An order for security for costs would not serve its purpose without cancelling or postponing the Hearing, which was neither requested nor practicable at that stage of the proceeding.

18. After several requests for extensions partially granted by the Tribunal, the Claimant submitted its Reply on April 30, 2009, excluding certain witness statements and exhibits. The submission was completed on May 7 and 13, 2009. An extension was equally granted to the Respondent for the filing of its Rejoinder, which was submitted on June 9, 2009.

19. The oral Hearing on jurisdiction and the merits was held at the International Dispute Resolution Centre in London from June 29 through July 3. In addition to the Tribunal and the Secretary, the following persons were present:

On behalf of Claimant:	On behalf of Respondent:
Mr. Akbar Ali, AFA Law	The Honourable Betty Mould-Iddrisu, Attorney General, Republic of Ghana
Mr. Andrew Goddard Q.C., Atkin Chambers	Mrs. Amma Gaisie, Solicitor General, Republic of Ghana
Mr. Riaz Hussain, Atkin Chambers	Ms. Naana Dontoh, Chief State Attorney, Republic of Ghana
Mr. Bernd Diesterweg, Hosta AG	Mr. Tony Fofie, Chief Executive, Ghana Cocoa Board
Mr. Hermann Opferkuch, witness	Mr. Charles Amenyaglo, Legal Manager, Ghana Cocoa Board
Mr. Michael Holzaepfel, witness	Mr. EDM Amegashie, Managing Director (London), Cocoa Marketing Company
	Mr. Paul H. Cohen, Dewey & LeBoeuf LLP
	Mr. Thomas Geuther, Dewey & LeBoeuf LLP
	Ms. Christina Loucas, Dewey & LeBoeuf LLP
	Mr. Arthur Marriott Q.C., Dewey & LeBoeuf LLP
	Mr. Kwame Sarpong, witness
	Dr. Sammy Ohene, witness
	Mr. Felix Quaye, witness
	Mr. Isaac Osei, witness
	Mr. Reinhold Mueller, witness
	Mr. John Ellison, expert

20. Messrs. Goddard Q.C. and Hussain pleaded the case on behalf of the Claimant and cross-examined all of the Respondent's witnesses (with the exception of Mr. Felix Quaye) as well as its expert. Messrs. Marriott Q.C., Geuther and Cohen and Ms. Loucas pleaded the case on behalf of the Respondent and cross-examined the Claimant's witnesses. The Hon. Mould-Iddrisu, Attorney General of the Republic of Ghana, made a closing statement. The Hearing was recorded and a verbatim transcript was made.

21. Pursuant to the Tribunal's directions in Procedural Order No. 2, the Claimant filed an Expert Report on Ghanaian law from Professor Gordon R. Woodman on July 31, 2009. Also pursuant to the Tribunal's directions, the parties filed simultaneous Post-Hearing Briefs on August 17, 2009 and statements of costs on August 31, 2009. The proceeding was closed on June 2, 2010.

III. FACTS

A. The Joint-Venture Agreement and the incorporation of Wamco I

22. On August 26, 1992, Hamester, through its predecessor Schröder[1], concluded a Joint-Venture Agreement (the "**JVA**") with the Ghana Cocoa Board ("**Cocobod**," "**Cocoa Board**" or "**GCB**"). Cocobod was established by the Ghana Cocoa Board Law of May 3, 1984, amended in 1991 (the "**GCB Law**"), as a successor to the Ghana Cocoa Marketing Board. The primary function of Cocobod under the GCB Law is to purchase cocoa beans from Ghanaian cocoa farmers and to market and export them. Other functions include the encouraging of cocoa production; the undertaking of cocoa cultivation; the regulation of the marketing and export of cocoa; the establishment of industrial processing factories for the processing of cocoa; and the assistance in the development of the cocoa industry.[2] Cocobod sells the beans through its subsidiary, Cocoa Marketing Company Limited ("**CMC**").

[1] The JVA was signed on August 26, 1992 by Schröder, but after its merger with Hamester, the latter, by letter dated June 2, 1997, wrote to Wamco stating: "We refer to the JV Agreement. We also refer to the Regulations of WAMCO … For the record we wish to advise hereby that Messrs Gustav F W Hamester GmbH & Co. of Postfach 26 14 64, 20504 Hamburg are the legal successors/legal representatives of Walter Schroeder GmbH & Co.," Claimant's Memorial, para. 31.

[2] Part II(2) of the GCB Law of 1984, Exh. 6 to the Claimant's Request for Arbitration.

23. The purpose of the JVA was to rehabilitate an old cocoa processing factory located at Takoradi in Ghana, CPC West African Mills ("**CPC/WAM**"), owned by Cocobod, so that it could process by the most advanced technology all grades and qualities of cocoa beans produced in Ghana, in order to maximise Ghana's cocoa beans processing capacity.[3] To this effect, the JVA parties incorporated a company organised under the laws of Ghana, West African Mills Company Limited ("**Wamco I**"), which would take over the assets and titles of the old factory. Hamester was to provide technology, know-how and funding to modernise Wamco I, while Cocobod contributed the assets of the old factory and was to supply beans for processing at the plant.

24. Wamco I was incorporated on December 1, 1992 with 50,000 ordinary shares. Under the JVA, it was agreed that the shareholding structure would be divided so that Cocobod held 40 percent and Hamester held 60 percent.[4] Accordingly, upon the incorporation of Wamco I, 20,000 shares were issued to Cocobod and 30,000 shares were issued to Hamester. The share capital corresponded to DM 13,563,000. The payment for the shares was, in the case of Cocobod, made by its contribution of the fixed assets from CPC/WAM and, in the case of Hamester, by the funding of the rehabilitation of the factory. The total investment in the joint-venture project was estimated at DM 16,050,021.[5] The Claimant asserts that its investment in the rehabilitation works amounted to approximately EUR 19,030,720, while the Respondent states that the true modernisation cost was much lower.[6]

25. Wamco I had seven directors, of which four were to be appointed by Hamester.[7] Out of its appointees, Hamester was also to designate the Managing Director. The first Managing Director appointed by Hamester was Mr. Reinhold Müller, who was involved in the negotiations that preceded the conclusion of the JVA.

26. The supply and price of the beans sold by Cocobod to Wamco I was addressed in Article 7 of the JVA as follows:

> "Cocobod shall sell to the factory for processing the desired grades and quantities of cocoa beans (including cocoa waste, substandard cocoa, grades II and III cocoa, and mid crop cocoa). Should such grades of cocoa not be available, Cocobod shall then sell main crop grade I cocoa. The Factory shall at all times be supplied with all its requirements of cocoa beans to

[3] JVA, Preamble, Exh. 2 to the Claimant's Request for Arbitration.
[4] JVA, Article 2.2.3.
[5] JVA, Article 3.2.
[6] Claimant's Memorial, para. 62, Respondent's Counter-Memorial, paras. 40-41.
[7] JVA, Article 4.

> enable it to operate at its full capacity. The conditions on which cocoa beans shall be sold, and the methods by which their prices shall be determined are to be agreed upon by the Company [Wamco I] and Cocobod. These conditions and prices shall be based on the takeover prices approved by the Cocoa Producer Price Review Committee."

As will be seen below, it is this provision of the JVA that is at the heart of the dispute.

27. The JVA was governed by the laws of Ghana. The dispute-settlement clause provided, in the first instance, for the amicable resolution of disputes and controversies (Article 12(a)) and, in the second instance:

> "Where any disputes arise between the parties hereto which cannot be amicably settled, then the dispute shall be referred to the International Centre for the Settlement of Investment Disputes." (Article 12(b))

Prior to this arbitration, the Claimant had sought, initially, to commence ICSID arbitral proceedings pursuant to the above-quoted provision of the JVA. Thereafter, however, the Claimant invoked the arbitration provisions of the BIT instead. The reason for not relying on the JVA dispute resolution clause was confirmed in the Claimant's Post-Hearing Brief, where it is stated that:

> "Arbitrator Cremades asked why Hamester had not brought an ICSID claim under the JVA. The answer is that Hamester did try to submit such a claim but the Centre declined jurisdiction on the grounds that Cocobod is not a designated constituent subdivision or agency of Ghana under Article 25(1) of the Convention."[8]

28. In 1988, prior to the conclusion of the JVA, Hamester and Cocobod had already started a project to modernise the CPC/WAM (Wamco I) factory. To that effect, they concluded a loan agreement which provided that Hamester would lend Cocobod DM 24.9 million, subject to an interest rate of approximately 8 percent per annum.[9] Hamester was also to provide certain initial engineering consulting work, but it was not to be involved in the operation of CPC/WAM. At that time, Hamester was managed by Mr. Hermann Opferkuch's father, who passed away in 1990. Mr. Opferkuch Junior has since been the controlling shareholder of Hamester. By the entry into force of the JVA, the previous loan agreement between the same parties ceased to have effect.[10]

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[8] Claimant's Post-Hearing Brief, para. 211.
[9] Respondent's Counter-Memorial, Exh. Core Bundle Vol. I(1) – Exh. RC1 (the exhibits in the Respondent's Core Bundle are hereafter referred to as "**Exh. RC**").
[10] JVA, Article 17.

B. The initial years of the Joint-Venture and Wamco II and III

29. Wamco I is an expeller plant that is designed to produce expeller cocoa butter and expeller cocoa cake, principally using the smaller light crop cocoa beans, but also lower quality substandard beans. The rehabilitation works involved the installation of expellers and other machinery. The plant commenced operations in late 1993 and was fully operational in early 1994.

30. On December 15, 1993, Wamco I (with the approval of the Claimant) purchased from Cocobod assets in another cocoa processing factory at Takoradi that required modernisation, CPC Taksi, which became known as Wamco II.[11] According to the Claimant, the investment was financed directly from profits generated by Wamco I.[12] According to the Respondent, the financing constituted part of a fraudulent scheme: on paper, Hamester was falsely portrayed as having contributed more than its share for Wamco I, and on this basis it claimed that it was entitled to loan repayments of DM 7,692,205 from Wamco; this (alleged fraudulently inflated) loan was then deployed in order to acquire 120,000 shares in Wamco II.[13] For the Respondent, this was one element of a fraud that permeated the acquisition of the investment:

> "This is how Mr Opferkuch eventually decided to use Hamester's fraudulently inflated DM 7,692,205 loan – it was cancelled to pay for Hamester's new 120,000 shares."[14]

31. The second plant was designed to produce high quality pure prime press butter and high quality cocoa cake using Grade I and II main crop cocoa beans. The beans were to be changed into a cocoa mass or liquor during a grinding process and then pot pressed and split into butter and cake. Wamco II became operational in 1994 as a result of a modernisation funded by Hamester, which was completed in 1997. Hamester claims that it invested approximately EUR 35,259,161 in the rehabilitation, while the Respondent states that the amount is unsupported and grossly inflated.[15] According to the Respondent, the terms of the JVA did not extend to cover Wamco II, while the Claimant argues that the purchase of Wamco II was expressly subject to the terms and conditions of the JVA.[16]

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[11] Exh. RC30 and RC31.
[12] Request, para. 18.
[13] Respondent's Post-Hearing Brief, para. 31.
[14] Respondent's Post-Hearing Brief, para. 33.
[15] Claimant's Memorial, para. 66 and Respondent's Counter-Memorial, para. 45.
[16] Respondent's Counter-Memorial, para. 44, Claimant's Reply, para. 33.

32. A third plant, Wamco III, which was similar to Wamco II, was constructed in 1998. Hamester claims that it invested EUR 11,871,093 in this respect. All three plants are collectively referred to as "**Wamco**" for the purposes of this Award. Their maximum capacity in terms of the quantity of cocoa beans that could be processed annually is disputed between the parties.

33. As soon as the Wamco I plant became operational in 1993/1994, the entire output of the plant was sold exclusively to Hamester at prices communicated by Hamester. There was no written contract between Hamester and Wamco I governing the supply and purchase price of Wamco I's products, which was not regulated by the JVA. In 1997, Mr. Müller was dismissed as the Managing Director of Wamco I and replaced by Mr. Jelle Kuiper. By that time, Wamco was in financial difficulties and indebted to Cocobod. This indebtness, according to the Respondent, was due to Hamester's failure to pay Wamco for products supplied. The Respondent asserts that Wamco's annual accounts for the year 1997 show a debt of DM 50.656 million by Wamco to Cocobod, and a debt of DM 44.195 million by the Claimant to Wamco.[17] In 1998, Wamco's debt to Cocobod was alleged to be approximately USD 30 million.[18] The Claimant denies that any debt was owed by Hamester to Wamco, but does not deny that Wamco was indebted to Cocobod in 1998.[19] According to correspondence from Wamco to Cocobod, Wamco's non-payment of invoices for products received from Cocobod was due to the fact that Wamco and Cocobod had not reached a firm agreement on pricing.[20] Subsequently, on July 22, 1998, Cocobod and Wamco concluded a 'Without Prejudice' Agreement on the pricing of beans, which amended and renewed a pricing agreement dated July 11, 1997 regulating the price of beans supplied from January 1, 1996 to June 30, 1998.[21]

34. While Wamco and Cocobod concluded several agreements concerning the methods by which prices for cocoa sold to Wamco were to be determined during a certain time period,[22] it appears that they had difficulty in reaching agreements on the actual prices.[23] On October 14, 1999, the Chief Executive of Cocobod, Mr. Newman, stated in a letter to Wamco that a new policy under the Ghana Cocoa Sector Development Strategy prescribed that, with effect

[17] Respondent's Counter-Memorial, para. 63, Exh. RC367.
[18] Respondent's Counter-Memorial, para. 66.
[19] Claimant's Reply, paras. 60-62. Exh. RC61 and RC64.
[20] Exh. RC61 and RC64.
[21] Claimant's Memorial, para. 78. Exh. RC44 and RC70.
[22] Exh. RC44, RC70 and RC122.
[23] Exh. RC35, RC133 and RC159.

from July 1, 1999, local processing factories would be required to purchase cocoa beans at FOB (Free On Board) prices from CMC.[24] Hamester argued that the new policy was not applicable to Wamco in view of Article 7 of the JVA, but indicated that it was prepared to consider amendments to the JVA.[25]

C. The 2001 Price Agreement

35. In late 2000, a new Government took office in Ghana, which led to a change in Cocobod's management. In 2001, Mr. Newman was replaced by Mr. Kwame Sarpong as the Chief Executive of Cocobod. During the same year, Mr. Kuiper was replaced by Mr. Michael Holzäpfel as Wamco's Managing Director.

36. During 2000 and 2001, Hamester and Cocobod attempted to reach agreement on an amendment to the JVA, however the attempts failed due to the parties' divergent views on the pricing of the beans. Regardless of the new Government's policy launched in 1999, a price agreement between Cocobod and Wamco was concluded on October 27, 2000, covering the supply of beans in the period January to September of that year.[26] Negotiations continued for the year 2001. By letter of March 9, 2001, Hamester proposed that the pricing formula be based on a farmgate price, suggesting that the supply to Wamco "shall neither generate a profit nor a loss to Cocobod."[27]

37. Cocobod replied by letter of March 30, 2001 that:

> "although the pricing formula in the proposal is at variance with current government policy [...], it could form the basis for negotiating an interim price agreement pending the formal review of the JVA to incorporate the new government policy."[28]

38. In further correspondence concerning deliveries made to Wamco in January 2001, Hamester calculated the price of the delivery based on a farmgate price + 10 percent and sent a cheque with the amount in Ghanaian Cedis to Cocobod.[29] Cocobod returned the cheque, as it was in Cedis when previously such payments had always been in foreign currency, as

[24] Exh. RC99.
[25] Exh. RC108 and RC116.
[26] Exh. RC122.
[27] Exh. RC133.
[28] Exh. RC135.
[29] Exh. RC141.

required by the Ghanaian legislation. By the same letter, Cocobod suggested further discussions on the pricing of the beans.[30]

39. On August 10, 2001, Cocobod informed Wamco that it had run out of funds needed to meet operational requirements, and therefore requested a payment of DM 20 million to cover costs of the beans supplied in 2001, pending a resolution of the pricing problem.[31] Wamco first offered to pay the equivalent of DM 10 million in Cedis, but subsequently made a down payment of DM 20 million in November 2001. The CMC had in the meantime calculated that Wamco owed Cocobod DM 44.321 million.[32] Cocobod thus claimed the difference (DM 24 million), to be paid by November 30, 2001, and stated that it would cease supplies to Wamco in case of non-payment of this debt.[33] Wamco took the position that it only owed an additional DM 17.230 million and paid that sum on December 5, 2001, at which point Cocobod stopped its deliveries of beans.[34] Wamco wrote to Cocobod on December 7, 2001, stating that the stoppage of supply was a breach of Article 7 of the JVA, and that it would be forced to close down the factory and lay off workers by the end of December if deliveries were not resumed. Wamco's letter was copied to the President, the Vice President, as well as the Minister of Finance of the ROG.[35] Hamester had previously (on November 19, 2001) set out its position in a letter to the Minister of Finance, proposing that Article 7 of the JVA be amended to provide for FOB pricing applicable from January 1, 2003.[36]

40. This situation led to the conclusion of a Price Agreement between Cocobod and Wamco on December 14, 2001 (the "**2001 Price Agreement**").[37] This Agreement, which provided for fixed prices up until December 31, 2002, stated the following:

> "NOW THEREFORE IT IS AGREED AS FOLLOWS:
>
> i. All types of Cocoa beans sold by COCOBOD to WAMCO for the period 1st January 2001 to 30th September 2001 shall be at a price of DM 1,150 per tonne. Provided that the outstanding bill of DM 3,545,70 in respect of the 35,475.5 tonnes Cocoa beans delivered to WAMCO between January and September 2001 shall be settled by WAMCO on or by 31st January 2002.

[30] Exh. RC143.
[31] Exh. RC146.
[32] Exh. RC154.
[33] Exh. RC174.
[34] Exh. RC178.
[35] Exh. RC179.
[36] Exh. RC166.
[37] Exh. RC182.

ii. All types of Cocoa Beans sold by COCOBOD to WAMCO for the period 1st October 2001 to 31st December 2001 shall be at a price of DM 1,250 per tonne.

iii. All types of Cocoa beans sold by COCOBOD to WAMCO for the period 1st January 2002 to 31st December 2002 shall be at a price of DM 1,450 per tonne.

All types of Cocoa beans sold by COCOBOD to WAMCO from 1st January 2003 shall be at FOB price."

41. The Claimant contends that the 2001 Price Agreement is invalid because it was concluded under duress, namely the threat of cessation of supply to Wamco.[38]

D. The shortage of supply in 2002

42. Following the conclusion of the 2001 Price Agreement, Cocobod resumed its supply of beans to Wamco. By letter of January 2, 2002, Wamco stated that it intended to process a total of 70,000 tonnes of cocoa beans and suggested that they be delivered in equal monthly deliveries.[39] On March 7, 2002, Cocobod held a meeting with cocoa processing factories in Ghana to inform them of a shortage facing the industry and to request that they take precautionary actions.[40] The shortage, according to the Respondent, was due to smuggling of cocoa to the Ivory Coast and an outbreak of black pod disease.[41]

43. By letter of April 23, 2002, Wamco, through its lawyers, wrote to Cocobod stating that the intermittent supplies below the quantities requested were in breach of the JVA and were causing Wamco to incur losses.[42] Wamco asked Cocobod to take steps to insure that the factories were supplied with a sufficient quantity of beans. It subsequently quantified its claimed losses due to insufficient supply, stating that it would deduct those losses from CMC's invoices, and that it was not prepared to make any payment unless Cocobod restored the supplies.[43] By letter of July 3, 2002, Cocobod requested that Wamco settle its outstanding invoices in the amount of EUR 8,462,329.68 by July 31 or Cocobod would stop supplies altogether and initiate legal action.[44]

[38] Claimant's Memorial, paras. 111-112.
[39] Exh. RC191.
[40] Exh. RC208.
[41] Respondent's Counter-Memorial, para. 99.
[42] Exh. C30.
[43] Exh. RC212 and RC215.
[44] Exh. RC213; by that time the Deutschmark was no longer legal tender and prices were therefore converted into Euros (see Exh. RC207).

44. By the end of July 2002, Wamco estimated its losses at EUR 4,771,971 and offered to pay the balance of CMC's invoices and its loss after the supply resumed. Cocobod resumed its supply but did not meet the quantity of 70,000 tonnes desired by Wamco for the year 2002. At the same time, Wamco's debt to Cocobod grew. On December 16, 2002, Wamco claimed a shortage of delivery of 34,500 tonnes and requested that this quantity be supplied at 2002 prices before the FOB price according to the 2001 Price Agreement came into effect.[45] According to the Respondent, in January 2003, Wamco's debt to Cocobod for cocoa beans supplied during 2002 and January 2003 was EUR 24.3 million, and Hamester's debt to Wamco for cocoa products supplied was EUR 31.6 million.[46] It is the Respondent's position that:

> "Wamco was rendered insolvent in late 2002, because for the entirety of 2002 Hamester forced Wamco to deliver all of its products to Hamester or Hamester's customers without Wamco receiving any payment whatsoever."[47]

45. The reason for Wamco's insolvency by the end of 2002 does not seem to be contested by the Claimant, as appears from Mr. Holzäpfel's Second Witness Statement:[48]

> "… also Hamester was not paying Wamco because of the non-delivery losses.
> 101. I had chased Hamester for the sums owed. Hamester told us that payment was not being made due to contra-charges arising from the non delivery of orders by Wamco and losses suffered by Hamester on forward contracts as a result of this non delivery."

46. This issue was discussed during the Hearing, when the President asked Mr. Holzäpfel on what legal basis these penalties were charged:

> "THE CHAIRMAN: … *on what basis were you, as a company, charging penalties?*
>
> A. *The charging of penalties was not based on any, let us say, contract saying, "If you do not make this I will have a chance or a right to do that" …*"[49]

47. The Respondent addressed this exchange in its Post-Hearing Brief, submitting that:

> "Hamester refused to pay the € 31.6 million because of "*penalties*" which it unilaterally imposed on Wamco without having any contractual basis for doing so. It is an odd coincidence – not the only one in this case – that these supposed penalties came to exactly €31.6 million, and thus cancelled out Hamester's entire debt to Wamco."[50]

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[45] Exh. RC231.
[46] Respondent's Counter-Memorial, paras. 103 and 105.
[47] Respondent's Rejoinder, para. 71.
[48] Holzäpfel Second Witness Statement, paras 100-102.
[49] Hearing Transcripts, Day 3, p. 88, lines 19-24.
[50] Respondent's Post-Hearing Brief, para. 131.

E. The end of the Joint-Venture

48. By letter of January 14, 2003, Hamester set out its position concerning the outstanding issues between the Wamco joint-venture partners.[51] It claimed that the amount due by Wamco to Cocobod as of December 12, 2002 was EUR 9,725,770, because of losses incurred by Wamco during 2002 due to the non-supply of beans. It also stated that the 30,000 tonnes of cocoa that Wamco had requested in 2002 but which had not been delivered should be supplied during 2003 at 2002 prices. It further expressed a concern that the FOB price set out in the 2001 Price Agreement was not viable. These issues, Hamester wrote, needed to be resolved before Hamester would make any payment for deliveries in 2002.

49. If there was no resolution of the issues, Hamester stated that it wanted to abandon the joint-venture:

> "… we want to express our strong will to abandon this Joint-Venture by 31.01.2003, if there is no holistic solution to our above mentioned areas of concern."

A second notice of the intention to pull out was sent to the Minister of Finance of Ghana on February 10, 2003:

> "… the present 60% shareholder of West African Mills Company Ltd, herewith states that we intend to pull out of the Joint Venture by 31 March 2003."

50. Hamester's concerns were discussed during a Wamco Board meeting held on January 16, 2003, chaired by Dr. Sammy Ohene, Wamco's Chairman of the Board of Directors since June 2002.[52] It was noted that Wamco had not made any payment since August 2002, but it was also decided that the company "should be kept afloat," and that Cocobod would supply beans for a limited period of time. At the meeting, Cocobod representatives on the Board objected to the rescheduling of a loan facility extended to Wamco, which had been arranged by the Managing Director of Wamco, Mr. Holzäpfel. As a result, on the same date, Dr. Ohene wrote to the relevant bank on behalf of Wamco requesting the suspension of any loan facility without formal Board approval.[53] Concurrently, Dr. Ohene and Mr. Sarpong, Chief Executive of Cocobod and its appointees to the Wamco Board of Directors, wrote a letter on Wamco's letterhead to Mr. Holzäpfel, objecting to certain investments made and loan facilities contracted by Wamco's Hamester representatives which had not received Board

[51] Exh. RC237.
[52] Exh. RC238.
[53] Exh. RC239.

approval.[54] The letter was copied to the Office of the President, Ministry of Finance, the Ministry of Trade & Industries and the German Embassy. Hamester responded that any decision by the Managing Director could be corrected by a majority decision of the Wamco Board of Directors.[55] Since Hamester had appointed four of the seven Wamco Board directors, it was of the view that an approval was superfluous as the majority of the Board would have in any event approved the contested actions.

51. By letter of January 29, 2003, Hamester wrote to the Minister of Finance of Ghana to request discussions:

> "to find ways and means how Hamester *can pull out of the Joint-Venture*, so that all persons involved, especially the customers and the employees of WAMCO see a clear way for the future."[56]

52. The same day, Wamco's Managing Director again requested Cocobod to supply to Wamco the 30,000 tonnes of cocoa requested in 2002 at the 2002 price. Cocobod denied that it owed any cocoa beans to Wamco for the year 2002.[57]

53. On January 30, 2003, Dr. Ohene wrote to Wamco's Director of Operations that a resolution of the issues raised in Hamester's letter of January 14, 2003 seemed unlikely before the date by which Hamester had indicated that it would wish to abandon the joint-venture.[58] Dr. Ohene therefore decided to suspend any exports with effect from January 31, 2003 and to award no new contracts for procurement. Subsequently, by letter of February 6, 2003, Dr. Ohene requested Hamester to immediately send its notice of withdrawal from the JVA. Mr. Holzäpfel objected to Dr. Ohene's directions by letter of February 7, 2003, noting that

> "[t]he fact that Hamester wants to pull out, does not mean, that it already had pulled out, as Hamester is still holding 60% of the shares until they have sold them."[59]

He further questioned Dr. Ohene's power to issue directions under the JVA.

54. On February 10, 2003, Hamester informed the Minister of Finance of Ghana of its intention to pull out of the joint-venture by March 31, 2003. Should the parties fail to agree

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[54] Exh. RC240.
[55] Exh. RC241.
[56] Exh. RC245. Emphasis in the original.
[57] Exh. RC249.
[58] Exh. RC247.
[59] Exh. RC252.

on the terms of the transfer of Hamester's shares in Wamco before March 15, 2003, Hamester stated that the "field is open for legal steps."[60] Wamco and Cocobod met on February 14, 2003 to discuss the terms of temporary measures pending negotiations concerning Hamester's pull out. A document was drafted but signed only by Cocobod.[61] On the same date, in view of Hamester's notice of its intention to withdraw from the JVA and Dr. Ohene's request to the Ministry of Finance to suspend Wamco's exports, the Ministry wrote to Wamco stating that:

> "you are not to allow any shipment of cocoa in the name of WAMCO out of the country except otherwise directed."[62]

55. Differences between the two joint-venture partners concerning the management of Wamco continued with conflicting instructions to the Operating Manager. Mr. Holzäpfel sought to shut down the factories while Dr. Ohene ordered the continuation of production. On March 8, 2003, Mr. Holzäpfel, the Managing Director of Wamco, departed from Ghana. According to the Respondent:

> "(o)n 8 March 2003, Mr Holzäpfel left Ghana without notice to the GCB or Wamco's Board and without the GCB or Wamco's Board ever having been given an explanation for his sudden departure."[63]

56. According to the Claimant, Mr. Holzäpfel had to leave Ghana along with his family because he:

> "was made to fear for his own and his family's safety and well being in Ghana as a result of Cocobod's actions and also by the Respondent apparently pursuing baseless allegations of wrongdoing against Mr. Holzäpfel with the intent of forcing the Claimant to abandon its control over WAMCO and its rights under the JV Agreement." [64]

57. The alleged threatening actions consisted of an enquiry into an alleged fraud committed in relation to a transaction concerning a German football club.

58. In Cocobod's view, Mr. Holzäpfel had thus abandoned his position as the Managing Director of Wamco. Through lawyers in Germany, he continued to dispute decisions made by Dr. Ohene. In a letter of April 9, 2003, Hamester's German counsel notified Cocobod that

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[60] Exh. RC254.
[61] Exh. RC255.
[62] Exh. RC256.
[63] Respondent's Counter-Memorial, para. 123.
[64] Claimant's Memorial, para. 140.

it had breached Articles 4 and 7 of the JVA.[65] The letter attached a document entitled "interim agreement" the terms of which had allegedly been agreed between Hamester and the Ministry of Finance of Ghana. Hamester requested Cocobod to sign the document by April 11, 2003 or Hamester would commence legal action against it pursuant to the dispute-settlement provisions of the JVA. On April 22, Cocobod stated that it would not sign the agreement.[66] According to the Claimant, the Minister of Finance was at that time directly instructing Wamco as to the operations of the company.[67]

59. On August 1, 2003, Mr. Holzäpfel resigned from his function as Managing Director of Wamco with immediate effect. By letter of October 8, 2003, Dr. Ohene authorised the Operating Manager, Mr. Clement, to take on additional duties. While continuing to dispute the authority of Cocobod representatives on the Wamco Board of Directors to interfere with Wamco's management, Hamester did not participate in Wamco's affairs. The parties disagree on whether or not Hamester repudiated the JVA in 2003 or abandoned Wamco.

F. Developments after 2003

60. According to the Respondent, Hamester was chronically indebted towards Wamco, and the Claimant utilised manifold devices in order not to pay what it owed. In particular, the Respondent states that:

> "Moreover, Hamester's indebtedness to Wamco for cocoa products supplied to Hamester had reached €31,614,501.68 by early 2003. Hamester failed to make any payment to Wamco for these products. Late in 2004, Hamester seized upon its traditional expedient of fabricating debts owed by Wamco to Hamester to cancel out Hamester's debts for the products taken from Wamco. Without any explanation of the forward contracts as a result of which these liabilities allegedly arose, Hamester suddenly sent Wamco two one-page invoices in German for €18.7 million and €12,612,644.13, with a cover letter stating that they were "*penalties for the non-supply of products.*" A third invoice for €300,526.47112 was also sent to Wamco. It is undoubtedly no coincidence that Hamester's penalty invoices come to €31,613,170.60 and thus almost exactly cancel out Hamester's debts to Wamco of €31.614 million."

61. The Claimant, for its part, contends that it was entitled to deduct amounts that it considered as losses due to contractual failures of its joint-venture partner, from the sums owed to it. As explained in the Claimant's Post-Hearing Brief:

> "Hamester was entitled to set-off its alleged losses against Wamco; and Wamco would be entitled to pass these up to Cocobod by way of set-off, such to include loss of profits and

[65] Exh. RC271.
[66] Exh. RC275.
[67] Claimant's Memorial, para. 145. Exh. C53.

> penalties incurred by reason of being unable to fulfil its forward contracts. Of course, the purported set-offs would not be conclusive as to liability or quantum. Such could be decided only by a court enjoying appropriate jurisdiction. However, there being no prohibition on set-off in the JVA, Wamco was entitled to withhold payment to Cocobod on the basis of such set-offs. Accordingly, Wamco's alleged failure to pay for supplies affords no lawful excuse for Cocobod/Ghana to detain its goods."[68]

62. On May 14, 2004, Hamester submitted a Request for Arbitration against the Republic of Ghana, represented by Cocobod, to ICSID on the basis of the dispute-settlement provision of the JVA. The registration of the request was refused as the Centre found that there was manifestly no consent given by the ROG to ICSID arbitration under the JVA, nor any designation of Cocobod as a subdivision or an agency by the ROG for the purposes of Article 25(1) of the ICSID Convention, or any approval of Cocobod's consent by the ROG for the purposes of Article 25(3) of the ICSID Convention.

63. At a Wamco emergency Board meeting in London on March 2, 2005, it was suggested that the dispute between Hamester, Wamco and Cocobod be resolved by arbitration, and that Cocobod seek the approval of the ROG for commencing the arbitration.[69] Hamester also informed the Board that there was potentially an interested buyer of its shares in Wamco. Mr. Opferkuch later informed Cocobod that Hamester might itself be sold as a company, instead of a transfer of its shares in Wamco, which would not have been possible under the JVA without the approval of Cocobod.[70]

64. On September 26, 2006, by a "final demand notice," Wamco, through legal counsel, demanded Hamester to pay EUR 31,614,501.68 for cocoa products supplied between February 27, 2002 and January 24, 2003.[71] In January 2007, Wamco submitted a statement of claim before the Superior Court of Judicature in the High Court of Justice in Ghana seeking to recover the amount.[72] Hamester and Mr. Opferkuch, the defendants in the proceedings, contested the jurisdiction of the Superior Court and submitted a counter-claim for their damages and loss of profit resulting from the alleged failure by Wamco to honour its supply obligations.[73] It is unclear whether the proceedings are still pending.

65. In November 2007, Cocobod and CMC jointly sought to recover USD 32,649,058.29 from Wamco. That law suit was settled and the settlement was incorporated in a judgment

[68] Claimant's Post-Hearing Brief, para. 69.
[69] Exh. RC292. The Minutes of the Meeting were not accepted, see Exh. RC336.
[70] Exh. RC300.
[71] Exh. RC301.
[72] Exh. RC303.
[73] Exh. RC314.

providing that Wamco pay the entire amount of USD 32,649,058.29 and interest at 5% on that sum from January 2003 to the date of final payment.[74] Cocobod is entitled to enforce the judgment against Wamco at any time.[75]

66. In the meantime, in May 2007, the Claimant submitted its second Request for Arbitration against the Republic of Ghana before ICSID, this time on the basis of the BIT.

67. On July 1, 2008, the Claimant transferred its 60% ownership in Wamco to Hosta International AG, Muenchenstein, Switzerland.[76]

IV. SUMMARY OF THE PARTIES' CLAIMS AND THE RELIEF SOUGHT

A. The Claimant's position

68. The Claimant's case is that it is entitled to damages as a result of alleged breaches by the ROG of the BIT and of the JVA (through the application of the BIT).

69. In its Memorial, the Claimant claims, as a general statement, that the ROG has breached the BIT, and in particular:

> "(i) Article 9, which provides that the Government will observe obligations with regard to investments (and which includes the obligations of Ghana Cocoa Board under the Joint Venture Agreement).
>
> (ii) Article 2(1), which guarantees fair and equitable treatment of investments.
>
> (iii) Article 2(2), which prohibits impairing by arbitrary or discriminatory measures the management, maintenance, use or enjoyment of investments.
>
> (iv) Article 3(1), which prohibits less favourable treatment.
>
> (v) Article 4(1), which guarantees full protection and security.
>
> (vi) Article 4(2), which prohibits expropriation or measures equivalent to expropriation."[77]

70. In terms of the specific acts of which the Claimant complains, the Memorial sets out a detailed elaboration of conduct that is said to be a "*Breach of the JV Agreement*," developed

[74] Exh. RC333.
[75] Respondent's Counter-Memorial, para. 285.1.
[76] Undated letter from Hamester to Cocobod received by Cocobod on March 1, 2010 and submitted to the Tribunal on April 27, 2010.
[77] Claimant's Memorial, para. 13.

from paragraphs 82 to 151. The Memorial then goes on to describe alleged "*Breaches of the Treaty by the Respondent*," which are developed more briefly from paragraphs 152 to 169. Among the alleged breaches of the Treaty, the first ones are particularised as "Breaches of Article 9(2) – Breaches of the JV Agreement" (dealt with in paragraphs 152 to 154) – or, in other words, the same allegations of breach of contract, elevated, according to the Claimant, into treaty breaches by the "umbrella" clause. The contract claims which are said to have been transformed into treaty claims are summarised by the Claimant as follows:

> "In breach of the JV Agreement the Respondent acting directly and/or via the state entity Cocobod:
>
> (i) Failed in violation of Article 7 of the JV Agreement to agree a price properly or at all which would guarantee profitability of the Joint Venture for the Claimant
>
> (ii) Failed in violation of Article 7 of the JV Agreement to provide properly or at all the supplies of cocoa required and requested by WAMCO
>
> (iii) Failed to observe the agreed means of management of WAMCO and to allow the Claimant to enjoy proper management of WAMCO without due interference."[78]

71. The very same three categories of acts are thereafter analysed "further and/or in the alternative" as:

(i) a violation of the fair and equitable treatment standard (FET) provided for in Article 2(1) of the BIT (dealt with in paragraphs 155 to 161);

(ii) a violation of Article 2(2) of the BIT concerning arbitrary measures (dealt with in paragraphs 162 and 163);

(iii) a violation of Article 3 of the BIT concerning national treatment (dealt with in paragraph 164);

(iv) a violation of the full protection and security standard (FPS) provided for in Article 4(1) (dealt with in paragraph 165); and finally

(v) a violation of Article 4 (2) and (3) dealing with expropriation and measures having an effect equivalent to expropriation (dealt with in paragraphs 166 to 169).

72. In its Post-Hearing Brief, the Claimant sets out, again separately, alleged violations of the JVA (Section 1), and of the Treaty (Section 2).

[78] Claimant's Memorial, para. 154.

73. According to Hamester, the principal breaches of the JVA, as analysed in Section 1 of its Post-Hearing Brief, concern:[79]

(i) the suspension of bean deliveries from December 1, 2000;

(ii) the purported imposition of the 2001 Price Agreement;

(iii) the failure to deliver the required tonnage in 2002 and Cocobod's general refusal to honour its supply obligations under Article 7 of the JVA; and

(iv) the interference with Hamester's management rights over Wamco via its majority shareholding.

74. According to Section 2 of Hamester's Post-Hearing Brief, the following acts and omissions are said also to constitute breaches of the BIT:

(i) the purported imposition of the 2001 Price Agreement;

(ii) the failure to deliver the required tonnage in 2002;

(iii) the imposition of the export ban on Wamco's products in January 2003;

(iv) the usurpation of Wamco's management functions from January 2003 to date;

(v) the harassment of Mr. Holzäpfel in 2002/2003.

75. The breaches of the JVA are, on the Claimant's case, elevated to breaches of the BIT through the "umbrella clause" in Article 9(2), which explains that the violations of the JVA are also listed as so-called Treaty claims (i), (ii) and (iv).

76. Overall, only two complaints are not characterised as a violation of the JVA – the export ban and Mr. Holzäpfel's alleged harassment.

[79] Claimant's Post-Hearing Brief, para. 3.

77. All the acts complained of are, according to the Claimant, acts of the ROG. Some have been performed by its Ministers or its police. As far as the acts of Cocobod are concerned, the Claimant considers that they are attributable to the Respondent under international law. Its position is that Cocobod is a State organ under Ghanaian law and international law and that, therefore, its conduct is to be considered an act of the ROG. Alternatively, Cocobod was exercising governmental authority or acted on the instructions of, or under the control of, the ROG.

78. As a result of the breaches of the BIT, the Claimant asserts that it "has suffered substantial losses in excess of € 100 million"[80] and claims:[81] (i) compensation for losses due to the non-supply of cocoa beans in 2002 in the total sum of EUR 33,045,031.29; (ii) loss of profits from 2003 to 2008 in the sum of EUR 27,984,000.00; (iii) loss of share of Wamco's profits from 2002 to 2008 in the sum of EUR 13,396,555.00; and (iv) loss of future profits in the range of EUR 37,768,000.00 to 67,042,000.00. In the alternative to (ii) and (iii), Hamester claims the value of its shareholding in Wamco in 2001 prior to the alleged breaches of the BIT, in the amount of EUR 18.3 million.

79. Accordingly, in its Memorial, the Claimant requests that the Tribunal:

> "(i) Declare that the Respondent is in breach of the aforesaid Bilateral Investment Treaty in the manner set out above.
>
> (ii) Award the Claimant damages and interest thereon in the sums set out above.
>
> (iii) Order that the Claimant's costs and expenses of the reference herein and the costs and expenses of the Tribunal be paid by the Respondent."[82]

B. The Respondent's position

80. Ghana objects to the jurisdiction of the Tribunal, and also rejects Hamester's claims on their merits.

81. The Respondent's main jurisdictional objection is that there was no "investment" in accordance with Ghanaian law under Article 10 of the BIT. It alleges that the JVA was

[80] Claimant's Memorial, para. 14.
[81] Claimant's Post-Hearing Brief, para. 110.
[82] Claimant's Memorial, para. 195.

procured by fraud and that the Claimant and Mr. Opferkuch continued to defraud Wamco and Cocobod throughout the joint-venture.

82. The Respondent also objects to jurisdiction on the ground that certain alleged breaches of the BIT, including the expropriation claim; the non-delivery claim; and the alleged imposition of the 2001 Price Agreement, are not attributable to the ROG under international law. Cocobod is not an organ of the State, but a public corporation set up as a commercial venture under Ghanaian law. Cocobod exercised no governmental authority, and there is no evidence that the ROG exercised any control over the specific conduct in question.

83. In addition, the Respondent disputes the Claimant's interpretation of the "umbrella clause" in Article 9(2) of the BIT. In the Respondent's view, the provision does not cover any contractual obligations under the JVA.

84. Even if there were jurisdiction and the acts complained of were attributable to the ROG, the Respondent claims that Hamester's case must fail on its merits, in light of the factual evidence and the applicable law. In the Respondent's submission, the facts show that (i) Hamester was perfectly content with its commercial bargain (the 2001 Price Agreement) until it no longer suited Mr. Opferkuch; (ii) there was a continuous failure by Hamester to pay for goods supplied; and (iii) Hamester abandoned the joint-venture.

85. Consequently, by way of relief, the Respondent requests that the Tribunal:[83]

> "373.1 DECLARE that Hamester's claims are not within the jurisdiction of the Tribunal;
>
> 373.2 DECLARE, alternatively, that the Goverment has not breached any of its obligations under this Treaty and dismiss all of Hamester's claims in their entirety;
>
> 373.3 DECLARE, alternatively, that even if the Government has breached any of its obligations under this Treaty that Hamester's damages should be assessed at zero;
>
> 373.4 DECLARE, alternatively, that Hamester and/or Mr Opferkuch breached their fiduciary duties to the GCB and/or Wamco and that Hamester breached the JVA;
>
> 373.5 DECLARE, alternatively, that Hamester repudiated the JVA in 2003 that the GCB has no further contractual obligations under it and/or is entitled to terminate the JVA immediately upon receipt of the Tribunal's award;
>
> 373.6 ORDER Hamester to pay to the Government damages, moral or otherwise, for losses it and/or the GCB have sustained as a result of Hamester's conduct in such sum as the

[83] Respondent's Counter-Memorial, para. 373.

> Tribunal during the course of this arbitral proceeding may determine as a result of its inquiry into damages, plus interest per annum;
>
> 373.7 ORDER Hamester to pay in full the fees and expenses of the Arbitrators and all costs in connection with this arbitration by the Government (including, without limitation, the fees and expenses of all experts whether appointed by counsel or by the Tribunal, and all counsel's fees and expenses), as well as the costs charged by ICSID on a full indemnity basis plus interest per annum accruing from the date on which the Government incurred the costs in question until paid; and
>
> 373.8 AWARD the Government such further relief as the Tribunal may consider appropriate in the circumstances of this case."

V. THE LEGAL GROUNDS FOR JURISDICTION

86. As is appropriate when jurisdictional objections are raised by a party, the Tribunal will first analyse whether it has jurisdiction over the dispute under Article 25(1) of the ICSID Convention and Article 12 of the BIT.

87. The relevant jurisdictional requirements of the ICSID Convention are contained in its Article 25, which reads, in pertinent part, 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."

88. The jurisdictional requirements of the BIT are contained in its Article 12, read together with Articles 1 and 10. Article 12 provides in pertinent part, as follows:

> "(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Treaty in relation to an investment of the former shall as far as possible be settled amicably between the parties to the dispute.
>
> "(2) If the dispute cannot be settled within six months of the date of written notification by one of the parties to the dispute, it shall be submitted for arbitration if either party to the dispute so requests.
>
> "(3) Unless the parties agree otherwise, the aggrieved party shall have the right to refer the dispute to: (a) [ICSID] arbitration under the provisions of the [ICSID Convention]."

89. In addition, Article 1 and Article 10 of the BIT in turn define the "investments" that are covered by the BIT.

Article 1 is the general definition clause:

> "(1) the term "investments" comprises every kind of asset, in particular:
>
> (a) movable and immovable property, as well as any other rights in rem such as mortgages, liens and pledges;
>
> (b) shares of companies and other kinds of interest in companies;
>
> (c) claims to money which has been used to create an economic value or claims to any performance having an economic value;
>
> (d) copyrights, industrial property rights, technical processes, trade-marks, trade names, know-how and good will;
>
> (e) business concessions under public law, including concessions to search for, extract and exploit natural resources …
>
> (2) the term "returns" means the amounts yielded by an investment for a definite period such as profit, dividends, interest, royalties or fees."

Article 10 adds that the Treaty applies to investments existing prior to the date of the Treaty:

> "This Treaty shall also apply to investments made prior to its entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party consistent with the latter's legislation."

90. The Tribunal notes that the Claimant had previously submitted to ICSID a request for arbitration against the Respondent, based on the dispute-settlement clause in the JVA, the registration of which was refused by the ICSID Secretariat.[84] Therefore, the Claimant seeks to found its case on the basis of the BIT, claiming both "pure" Treaty breaches (Articles 2, 3 and 4 of the BIT) and breaches of the JVA (through Article 9(2) of the BIT). These breaches, the Claimant asserts, are attributable to the ROG through the conduct of its State organ, Cocobod. Hamester alternatively claims that the acts complained of are sovereign acts of Ghana.[85]

91. The Respondent presents two principal jurisdictional objections. The first principal objection is based on the principles of attribution under customary international law. The Respondent considers that:

[84] See above, paras. 27 and 62.
[85] Claimant's Post-Hearing Brief, para. 97.

> "(t)he Tribunal lacks jurisdiction to consider Hamester's claims because the conduct complained of was that of the GCB, not of the Ghanaian state."[86]

This may be characterised as an objection based on the lack of jurisdiction *ratione personae*.

92. The second principal jurisdictional objection rests upon serious allegations that from the very outset the investment was planned through fraud and breaches of fiduciary duty.[87] This may be characterised as an objection based on the lack of jurisdiction *ratione materiae*, or, in other words, on the absence of a protected investment. Although presented in this order in the general section of the Counter-Memorial, these submissions were then developed in reverse order: 1. No investment in accordance with Ghanaian law (which will be addressed in Section VI below); 2. No jurisdiction according to the principles of attribution (which will be addressed in Section VII below).

93. Before considering the two principal jurisdictional objections, the Tribunal wishes to address the Claimant's sale in 2008 of its entire interest in Wamco to Hosta International AG. On April 27, 2010, the Respondent submitted an undated letter from Hamester to Cocobod, received by Cocobod on March 1, 2010, stating that:

> "we want to inform you herewith that [Hamester] has transferred the owned 60% share capital of West African Mills Ltd. (FZE), Takoradi to Hosta International AG, Muenchenstein, Switzerland by the 1st of July 2008. Since that date Hosta International is the shareholder and owner of 60% of the share capital of West African Mills Ltd. Takoradi."

The Respondent stated that the transfer was in contravention of the JVA and indicated that the Tribunal should consider the implications it may have "on the arbitration and the relationship between the parties." The Claimant did not comment on the transfer, but did not dispute that it was made.

94. Although the parties have made no submissions on the possible legal implications of the transfer (other than an alleged breach of the JVA), the Tribunal is of the view that it should, in accordance with Article 41(1) of the ICSID Convention and Arbitration Rule 41(2), examine whether the fact that the Claimant no longer owns the investment could result in a lack of jurisdiction *rationae personae*.

95. Under Article 25(1) of the ICSID Convention, jurisdiction is extended to a national of a Contracting State. Juridical persons which are nationals of a Contracting State other than

[86] Respondent's Counter-Memorial, para. 10.
[87] Respondent's Counter-Memorial, para. 12.

the respondent State must be so on the date on which the parties consented to submit such dispute to arbitration (Article 25(2)(b) of the ICSID Convention). It is not contested that the Claimant was a German national on the date of consent to arbitration. Nor can the Claimant's *jus standi* be affected by the fact that it no longer owns the shares. As noted in *El Paso v. Argentina*, "no continuous ownership is required, as the ICSID Convention was meant, among other things, to protect against nationalisations and expropriations, *i.e.* in cases where the national no longer owns the investment but seeks compensation for having been deprived of it by the host State."[88] Consequently, although the Tribunal recognizes that there may be legal implications concerning issues of quantum in a case in which the claimant no longer owns the investment, it concludes that its jurisdiction is unaffected in this case. Having reached this conclusion, the Tribunal nevertheless considers that Hamester should have brought the fact to the Tribunal's attention as soon as the transfer of the shares was made.

VI. THE FIRST JURISDICTIONAL OBJECTION: FRAUD

96. As just stated, the Respondent objects to this Tribunal's jurisdiction on the basis that there was no "investment" in this case in accordance with Ghanaian law, for the purposes of Article 10 of the BIT, because the investment was tainted with substantial fraud, both in its initiation and in its performance throughout the years.

A. The Respondent's position on the first jurisdictional objection: fraud

97. The allegations of fraud have been presented with varying emphasis, but great insistence, as acknowledged by the Claimant, when noting that:

> "the word 'fraud' or a derivative or synonym for it is used over 100 times in the pleading [the Counter-Memorial]."[89]

98. The Respondent's Counter-Memorial focuses on what is said to have been "ruthless and fraudulent oppression,"[90] by the Claimant, as the majority shareholder, of Cocobod, the

[88] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, April 27, 2006, para. 126.
[89] Claimant's Reply, para. 4.
[90] Respondent's Counter-Memorial, para. 1.

minority shareholder, during the performance of the JVA. The Respondent viewed the venture in a different light from the Claimant. It stated, for example, that:

> "(t)he very purpose underlying the JVA was clearly that Hamester and the GCB would each receive a share of the overall profits generated by Wamco's operations corresponding to each party's interest in Wamco (40% in the case of the GCB), not that Hamester would appropriate up to 95.7% of the venture's profits exclusively for itself."[91]

99. According to the Respondent, the Claimant's oppression is illustrated by multiple frauds:

(i) Firstly, "Hamester was abusing its control over Wamco to take Wamco's entire output at artificially low prices and then – without taking delivery of Wamco's products or adding any value to them through further processing – selling them to its own customers at a substantially higher price."[92];

(ii) Secondly, "(a)lthough Hamester purchased Wamco's entire annual output and retained the resale profits for itself, Hamester also charged Wamco sales fees and commissions for selling all of Wamco's products to itself. These fees at times exceeded Wamco's entire annual net profits. This was simply fraud."[93];

(iii) Thirdly, the Claimant "found a myriad of other unlawful means of extracting profits from Wamco and running the company solely in [its] own interests," and in particular:

> "Mr Opferkuch caused Wamco to reduce Hamester's debts to it in exchange for shares [the Neuhaus shares] in a Belgian company which Wamco has never received. He caused Wamco to transfer Wamco's funds into his personal Swiss bank account by forcing Wamco to purchase two buildings, for which Wamco has never received the title deeds. And when a German football club which he sponsors had to pay a player transfer fee, Mr Opferkuch caused the fee to be paid from Wamco's funds …
>
> As if this were not enough, Hamester also persistently delayed payments to Wamco to the point of jeopardising the company's financial position and leaving it unable to pay for the cocoa beans received from the GCB. As a result, the GCB at times found itself unable to pay farmers for their cocoa deliveries. To date, Hamester still owes Wamco over € 31 million for cocoa products which it took from Wamco in 2002-2003."[94]

100. The Counter-Memorial provides more detail concerning the key transactions in question.

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[91] Respondent's Rejoinder, para. 46.
[92] Respondent's Counter-Memorial, para. 51.
[93] Respondent's Counter-Memorial, para. 4.
[94] Respondent's Counter-Memorial, paras. 7 and 8.

101. *Sale of Properties:* According to the Respondent, in June 2000, Mr. Opferkuch sold two properties that he owned in Accra to Wamco, without Board approval and by simply ordering Wamco's staff to transfer USD 700,000 to his Swiss bank account.[95] The Respondent states that:

> "(t)hese transactions represent a further gross breach of fiduciary duty by Mr Opferkuch, who was at the relevant time a director of Wamco – or simply theft of Wamco's funds."[96]

102. *Neuhaus Shares:* In late 2001, Hamester had accumulated a significant debt of DM 14.081 million towards Wamco for cocoa products delivered to it but not paid for. In order to set off that debt, Hamester transferred 120,000 shares in Neuhaus, a Belgian chocolate company, to Wamco. According to the Respondent, the purchase price, which equalled Hamester's debt of DM 14.081 million, exceeded the market value of the Neuhaus shares and was not approved by Wamco's Board of Directors.[97] In other words, while Cocobod badly needed money for its activities,

> "the debt of Hamester to Wamco was extinguished in late 2001 by the sale to Wamco of the Neuhaus shares for the price of DM 14.081 million."[98]

Wamco has allegedly never received a share certificate showing the transfer nor any distribution of dividends. On June 1, 2003, Mr. Holzäpfel informed Wamco that the Neuhaus shares had been sold back for EUR 2.52 million, which was a loss of approximately EUR 4.6 million.[99] The sale of the shares was allegedly not approved by Wamco's Board. This whole transaction was again the subject of stringent criticism in the Post-Hearing Brief:

> "This astonishing circular sale and repurchase transaction simply transferred € 7.2 million from Wamco to Hamester, without the Cocoa Board and its directors on Wamco's board ever being asked for their approval or having the details of the transaction explained to them. The supposed € 2.52 million repurchase price has never in fact been paid to Wamco. The Neuhaus transaction involved a flagrant, shameless and fraudulent breach of fiduciary duty."[100]

103. *Transfer of Football Player:* In October 2000, Mr. Opferkuch mediated an agreement for the transfer of a player (Mr. Justice Ampah) from a leading Ghanaian football club to a German football club which was sponsored by the Claimant. According to the Respondent, the transfer fee was paid by Wamco. Wamco's employees appointed by

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[95] Respondent's Counter-Memorial, para. 70, Exhs. RC112 and RC113.
[96] *Ibidem*.
[97] Respondent's Counter-Memorial, para. 84, Exh. RC240.
[98] Respondent's Counter-Memorial para.105.
[99] Exh. RC283.
[100] Respondent's Post-Hearing Brief, para. 115.

Hamester allegedly gave instructions that the company pay DM 30,000 each to the Ghanaian football club and the Ghana Football Association, stating that the payment was being made for "public relations" purposes.[101] Furthermore, the Ghanaian football club issued an invoice of DM 90,000 for "consulting services," which was paid by Wamco. According to the Respondent, Wamco, overall, paid a total of DM 150,000 as the transfer fee for Mr. Ampah – a sum which should properly have been paid by the German football club. The incident was reported as fraud and led to the arrest of Mr. Holzäpfel. According to the Respondent, despite promises by Mr. Opferkuch, the funds have not been repaid.[102]

104. Subsequently, in June 2001, Mr. Ampah was appointed Deputy Production Manager in Wamco's "Confectionary Department," for future confectionary imports and production in Ghana.[103] Mr. Ampah, who was then stationed in Germany, was allegedly added to Wamco's payroll as a new employee, with an annual salary of 83 million Ghanaian Cedis. The Respondent claims that this is further evidence of fraud, as Wamco never had a "Confectionary Department."

105. *False Invoice:* Also, in one paragraph of the Counter-Memorial, a reference is made to the falsification of an invoice, albeit without much elaboration on this issue:

> "But as long ago as 1990, Hamester had drawn up a secret agreement for signature with the machinery supplier de Smet Rosedowns Limited ("Rosedowns"), which expressly provided that the discount of DM 497,625 which Hamester was to receive from Rosedowns on the purchase price of DM 2,484,625 was not to appear on invoices and was not to be disclosed to the GCB."[104]

106. This issue was then heavily emphasised in the Rejoinder, with nineteen paragraphs being devoted to it.

107. The Respondent presented two documents from 1990[105] concerning an order for "Expeller-Pressen," from Hamester to De Smet Rosedowns. The first document is a Purchase Order dated January 4, 1990 for the acquisition of the machinery for DM 1,987,000. The second is a "Confidential Side Letter for the Purchase Order" dated January 12, 1990, in which it is stated:

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[101] Respondent's Counter-Memorial, para. 89. Exh. RC137.
[102] Exh. RC257.
[103] Exh. RC142.
[104] Respondent's Counter-Memorial, para. 42.
[105] Exh RC7 and RC8.

> "The Contractor will grant Schröder a confidential discount of DM 497, 625 on the machinery/asset value of DM 2,484,625.00.
> The discount shall not appear or be reflected in the invoices.
> In addition to an invoice for 100%, Schröder shall receive a credit note for the difference from the amounts that are actually paid.
> …
> The side letter shall be treated as strictly confidential and shall not be disclosed to any third party (including Cocobod)."

108. The Respondent also emphasises that, during the Hearing, Mr. Opferkuch tried to shift all responsibility for this transaction onto his father, and explained that the 20% discount represented a "normal" remuneration for the German company's extension of a loan, but had no economic justification in the context of the JVA. After admitting that his father had considered a 20% discount on the Loan Agreement, he stated that, when the JVA was negotiated, there was no such discount:

> "*I am 100% sure that at that time there was no 20% in sight, at that time not, because what would be the sense to cheat us, ourself? I mean, that does not make any sense. Why we should inflate the invoices for ourself by 20%? That is completely crazy. That does not make any sense."*

109. In addition, a letter dated December 10, 1990, signed by Mr. Opferkuch and addressed to the company De Smet Rosedowns, requested that the bills should not reflect the price actually paid by Schröder:[106]

> "DE SMET will invoice 100% while issuing a credit for 20% at the same time. No third party – including also the Ghana Cocoa Board (WAM) – may learn of these 20%."

110. The Respondent also pointed to a confidential letter dated February 12, 1991 sent by the company De Smet Rosedowns to Hosta, explaining how to handle the 20% discount on contracts for the rehabilitation of Wamco, to be given to Schröder but concealed from Cocobod:[107]

> "The way the 20% is organised to-day (see your letter … dated 10. 12 1990) is not safe for both of us.
>
> 1) Our fiscal authorities consider that automatic credit notes on invoices are secret commissions and they tax us 200%. So unacceptable for us.
>
> 2) What they accept: discounts, BUT these discounts are to figure <u>ON</u> the invoice. This is of course unacceptable for you as COCOBOD will see the net price.

[106] Exh. RC381.
[107] Exh. RC382.

> 3) What we propose is to sign an agency contract with HOSTA for the Schröder contract.
> This agency contract will specify that HOSTA is entitled to get 20% commission on each amount paid by Schröder. On a legal point of view it is 100% safe for you and for us."

111. *Other Allegations:* The Respondent also relied upon allegations as to fraudulent resale benefits (noted earlier), as well as the other violations of fiduciary duty set out in the Counter-Memorial.

112. *JVA Itself Procured by Fraud:* Finally in its Post-Hearing Brief, the Respondent again emphasises its allegation that "(t)he JVA was procured by fraud". According to the Respondent:

> "it is clear that Hamester induced the Cocoa Board to enter into the JVA through a fraudulent misrepresentation."[108]

B. The Claimant's position on the first jurisdictional objection: fraud

113. The Claimant asserts that it has made an "investment" and that

> "(a)side from the issue of legality, there is no dispute by Ghana that Hamester's investments otherwise qualify as investments defined under the BIT and under the Convention."[109]

In particular, it is stated in the Request for Arbitration that Hamester's investment fulfils the different factors that may be taken into account towards the characterisation of an investment: contribution by the investing party; duration; risk; and contribution to the economic development of the host State.[110]

114. As far as the conformity of its investment with Ghanaian legislation is concerned, Hamester accepts in principle that:

> "qualifying investments must have been made in substantial compliance with the substantive provisions of Ghanaian law."[111]

115. Applying this to the facts of the case, the Claimant argues that its investment was in full compliance with Ghanaian law. The Claimant refutes any allegation of fraud committed by Hamester in effectuating its investment in 1992. Moreover, it does not consider that the

[108] Respondent's Post-Hearing Brief, para. 13.
[109] Claimant's Reply, para. 77.
[110] Request for Arbitration, para. 40.
[111] Claimant's Reply, para. 79.

profits made under the forward contracts during the operation of the investment can be analysed as a violation of the fiduciary duties owed to a partner in a joint-venture, as:

> "(t)here was no profit sharing agreement between Cocobod and Hamester under the JVA nor was Hamester obliged to account for its resale profits to Cocobod under the JVA."[112]

116. The Claimant does not deny having made enormous profits by the resale, but does not see anything wrong in this situation. According to Hamester:

> "Ghana's Counter-Memorial does not point to any article in the JVA whereby Hamester was to share with Cocobod its profits from marketing and re-sale of the processed cocoa or its end products outside Ghana."[113]

In fact, the Claimant asserts that:

> "(t)he primary economic value of Hamester's investment was in the supply of Wamco products to Hamester for forward sales."[114]

Mr. Opferkuch even declared somewhat bluntly in his Second Witness Statement that:

> "I would never have committed Schroeder/Hamester to an agreement whereby Hamester would … somehow agree that the money it made from selling on the processed beans realized from its ongoing investment would be shared with Ghana. This is complete nonsense."[115]

117. In its Post-Hearing Brief, the Claimant also explains that "Hamester does not assert an *entitlement* to be supplied with Wamco's products,"[116] but that such practice developed with the full knowledge of Cocobod. It appears indeed that most of the profits made by Hamester were due to its resale of Wamco's products, according to its own statements. In its Memorial, it is stated that "(d)uring the four years prior to 2002, Hamester made on average annual profits in the sum of EUR 4,664,000.00 from the re-sale of WAMCO products," while the profits from its shareholding in Wamco were less, *i.e.* "Hamester's average annual 60% share computes to EUR 1,792,748.00."[117]

118. Overall, none of the complaints raised by the Respondent concerning the Claimant's intention to use the JVA for its sole benefit seem to impress the Claimant, which, to the contrary, asserts more than once in its submissions that it was indeed the purpose of the joint-venture to work to <u>its</u> exclusive benefit, and not to the shared benefit of both partners. Hence

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[112] Claimant's Reply, para. 88 (vii).
[113] Claimant's Reply, para. 48.
[114] Claimant's Reply, para. 217.
[115] Mr. Opferkuch's Second Witness Statement, para. 50.
[116] Post-Hearing Brief, para. 13. Emphasis in the original.
[117] Claimant's Memorial, paras 80-81.

it is stated in the Claimant's Memorial that the "fundamental purpose of the JV Agreement was to supply cocoa at a price ensuring a profit to the Claimant."[118] This has been stated repeatedly by the Claimant, for example, when complaining about the request of Cocobod to use FOB prices, which according to it was "in breach of the express requirements of Article 7 of the JV Agreement and also in breach of the stated purpose of the JV Agreement to guarantee a properly profitable venture for the Claimant."[119] Quite noticeable also, in order to understand the state of mind of the Claimant's management, is a letter dated March 9, 2001 from Hamester to Cocobod[120] which included the Claimant's proposal for amendment of the JVA concerning supply and pricing of cocoa beans. In this letter, Hamester proposes that "Cocobod shall deliver cost-neutral (farmgate + costs). In other words the delivery to Wamco shall neither generate a profit nor a loss to Cocobod."

119. The Claimant's Post-Hearing Brief argues that the Respondent's allegations of fraud are not a valid defence to claims under the BIT. According to the Claimant, the claims of fraud, if established, are matters of company law which must be contested in Ghanaian courts.[121] The Claimant, however, denies that any fraud was perpetrated.

120. *Sale of Properties:* As to the two properties sold by Mr. Opferkuch to Wamco in 2000, the Claimant states that the transfer made sense because one of them was used as a guesthouse, and the price reflected a reasonable market value. In addition, the Claimant asserts that one of the acquisitions was mentioned at a Wamco Board meeting before the transaction was made.

121. *Transfer of Football Player:* The Claimant further rebuts the Respondent's allegations in respect of the transfer fee for the Ghanaian football player, which was allegedly paid by Wamco. According to the Claimant, a payment of DM 30,000 by Wamco to a Ghanaian football club and to the Ghana Football Association was made for public purposes, because the Chair of the Club was an important political actor who might assist Wamco in its negotiations with the Government. A further payment to the football club of DM 90,000 was also justified for the same reasons.[122] According to the Claimant, the football player's subsequent appointment as an employee of Wamco did not lead to any expense for the

[118] Claimant's Memorial, para. 88.
[119] Claimant's Memorial, para. 94.
[120] Exh RC133.
[121] Claimant's Post-Hearing Brief, para. 181.
[122] Claimant's Post-Hearing Brief, para. 188.

company, but was made for the purpose of assisting the player to obtain a visa at the German Consulate. Hamester claims that the true relevance of the football club payments in this case is its use as an excuse for the Respondent's harassment of Mr. Holzäpfel and the Claimant.

122. *Neuhaus Shares:* As to the sale by Hamester to Wamco of shares in a Belgian chocolate factory, Neuhaus, the Claimant does not deny the substance of the transaction. In its Post-Hearing Brief, the Claimant states that it is:

> "accepted that Wamco did not pay for the shares but instead set off the purchase value against sums owed by Hamester to Wamco,"[123]

Moreover, the Claimant asserts that Wamco and Cocobod were informed of the transaction, which is supported by Wamco's 2001 accounts. Mr. Holzäpfel testified that he had approval by a majority of the Wamco Board at the time the shares were acquired, and that the purchase was seen as a beneficial step for Wamco. The subsequent sale of the shares was allegedly also approved by the Board of Wamco and entered into its accounts. On Hamester's case, the shares were neither overvalued at the time of purchase nor undervalued at the time of sale. Therefore, even if the Respondent's claim was relevant, it has failed to establish any fraud or breach of fiduciary duty.

C. The Tribunal's position on the first jurisdictional objection: fraud

123. The Tribunal considers, as was stated for example in *Phoenix v. Czech Republic*, that:

> "States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith."[124]

An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law (as elaborated, *e.g.* by the tribunal in *Phoenix*).

124. These are general principles that exist independently of specific language to this effect in the Treaty.

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[123] Claimant's Post-Hearing Brief, para. 204.
[124] *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5 (Israel/Czech Republic BIT), Award, April 15, 2009, para. 106.

125. In addition, however, it is clear that States may specifically and expressly condition access of investors to a chosen dispute settlement mechanism, or the availability of substantive protection. One such common condition is an express requirement that the investment comply with the internal legislation of the host State. This condition will typically appear in the BIT where this is the instrument that contains the State's consent to ICSID arbitration. The precise effect of any such express condition will obviously depend upon the wording used.

126. In this case, Article 10 of the BIT contains an express requirement for compliance with the host State's legislation. It states that:

> "[t]his Treaty shall also apply to investments **made** prior to [the Treaty's] entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party **consistent with the latter's legislation.**" (Emphasis added).

127. The Tribunal considers that a distinction has to be drawn between (1) legality as at the *initiation* of the investment ("made") and (2) legality *during the performance* of the investment. Article 10 legislates for the scope of application of the BIT, but conditions this only by reference to legality at the initiation of the investment. Hence, only this issue bears upon this Tribunal's jurisdiction. Legality in the subsequent life or performance of the investment is not addressed in Article 10. It follows that this does not bear upon the scope of application of the BIT (and hence this Tribunal's jurisdiction) – albeit that it may well be relevant in the context of the substantive merits of a claim brought under the BIT. Thus, on the wording of this BIT, the legality of the creation of the investment is a jurisdictional issue; the legality of the investor's conduct during the life of the investment is a merits issue. In the Tribunal's view, the broader principle of international law identified in paragraphs 123-124 above does not change this analysis of Article 10, and in particular its distinction between legality at different stages of the investment.

128. It may be noted that the award in *Fraport v. Philippines* was particularly clear on this distinction. Although the question was not raised by the facts of that case, the respondent State had contended that in principle "an investment, in order to maintain jurisdictional standing under the BIT, must not only be 'in accordance' with relevant domestic law at the time of commencement of the investment but must continuously remain in compliance with domestic law, such that a departure from some laws or regulations in the course of the

operation of the BIT would deprive a tribunal under the BIT of jurisdiction."[125] The tribunal considered it appropriate to clarify this point of law, and presented the following analysis, with which this Tribunal is in full agreement:

> "Although this contention is not relevant to the analysis of the problem which the Tribunal has before it, namely the *entry* of the investment and not the way it was subsequently conducted, the Tribunal would note that this part of the Respondent's interpretation appears to be a forced construction of the pertinent provisions in the context of the entire Treaty … the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed *substantive* violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction."[126] (Emphasis in the original)[127]

129. Therefore, in this first step of the analysis of the case relating to jurisdiction, the Tribunal is only concerned with allegations of fraud in the initiation of the investment, and not with the multiple allegations of fraudulent conduct during the life of the investment: violations of the fiduciary duties owed to its partner in a joint-venture; violations of the Ghanaian criminal law and so on, allegedly committed by the Claimant in the performance of the JVA, during the years of its existence. In order to ascertain jurisdiction, the only question here is whether Hamester perpetrated a fraud, and thereby procured the signing of the JVA (as was the case, for example, in *Inceysa v. El Salvador*,[128] where the contract was procured through fraudulent misrepresentation). *If the JVA was obtained on the basis of fraud*, it is an illegal investment that does not benefit from the protection of the ICSID/BIT mechanism. However, the question whether fraudulent behaviour has been committed *during the performance of the joint-venture* is a different issue that has to be taken into account when judging the merits of the dispute.

130. The main contention of the Respondent concerning the illegality of the initial investment is that:

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[125] *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25 (Germany/Philippines BIT), Award, August 16, 2007, para. 344. See, however, dissenting opinion attached to the Award.
[126] *Ibidem*, para. 345.
[127] This distinction was also endorsed by Mr. Bernardo Cremades in his dissenting opinion in *Fraport*, where he stated: "As a matter of principle, therefore, the legality of the investor's conduct is a merits issue. The inquiry at the jurisdictional phase required by the phrase *«in accordance with the laws and regulations of the Host State»* is limited to determining whether the type of asset is legal in domestic law," para. 38.
[128] *Inceysa Vallisoletana S.L v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006.

> "(t)he documents in this arbitration confirm that Hamester presented false invoices to the GCB and to Wamco and that Hamester did indeed obtain loan repayments from Wamco to which it was not entitled. Messrs Opferkuch and Erhardt and Hamester thereby committed the felony of obtaining property by false pretences, in contravention of section 131 of Ghana's Criminal Code of 1960. They also breached Ghana's common law rules against fraud and the statutory fiduciary duties under the Companies Code 1963."[129]

As a result of this alleged scheme by Hamester to defraud its partner, the Respondent argues that the Tribunal has no jurisdiction over Hamester's claims:

> "The very core of Hamester's so-called investment activities in Ghana – the modernisation of Wamco I, largely through the installation of new machinery – was thus from the outset planned and executed fraudulently. That is fatal to Hamester's case in this arbitration, since investments not made in accordance with Ghanaian law fall outside the GGBIT by virtue of Article 10. Fraudulent investments are in any event repugnant to the fundamental principle of good faith under international law."[130]

131. The Tribunal must thus examine whether the investment was illegal from its very inception, because of the foreign investor's alleged fraudulent behaviour in manipulating the invoices for the machinery to be transferred to Wamco under the JVA.

132. Having carefully considered all the evidence, the Tribunal considers that the Respondent has not fully discharged its burden of proof in this regard. It certainly appears from the documents in the record that Hamester over-stated an invoice sent to Cocobod for some of the machinery it had to provide for the rehabilitation of Wamco I. Based on the documents in the record, this inflation (or failure to record a discount) goes back to one operation initiated in January 1990, when Mr. Opferkuch Senior was still alive, and when the scheme for the rehabilitation was based on a Loan Agreement and did not envisage a joint-venture.[131] Mr. Opferkuch stated during the Hearing that the discount in question (which was not reflected in the invoice) stopped after the death of his father in February 1990. However, the evidence shows differently as at least this particular operation was finalised at the time of the JVA.

133. The discounts seem indeed to have been put in place without Cocobod's knowledge, as is evidenced by three documents. The first is the invoice No. 9184 dated April 30, 1991 for an amount of DM 2,535,499.00, issued by De Smet Rosedowns to Schröder for machinery to be forwarded to West African Mills Ldt. [132] The second is a document dated

[129] Respondent's Rejoinder, para. 4.
[130] Respondent's Rejoinder, para. 5.
[131] Hearing Day 2, p. 170, lines 10-16.
[132] Exh. RC384.

May 8, 1991[133] which refers to a "(r)eduction in our invoice N° 9184" for a total of DM 548,499.00. The third document dated April 30, 1991 indicates what was conveyed to Ghana at the time of the import into the country. In the "Combined Certificate of Value and Invoice in respect of goods for importation in Ghana," De Smet Rosedowns indicates that the invoice amounting to DM 2,535,499.00 "is in all respect correct and contains a true and full statement of the price actually paid or to be paid for the said goods." And, presumably for the avoidance of any doubt, this is then expanded in the following terms:

> "De Smet … certifies as follows
> …
> That no different invoice of the goods mentioned in the said invoice has been or will be furnished to anyone; and that no arrangement or understanding affecting the purchase price of the said goods has been or will be made or entered into between exporter and purchaser or by anyone on behalf of either of them either by way of discount, rebate, compensation or in any manner whatsoever other than as fully shown in this invoice."

134. This may imply that all invoices were dealt with in the same manner, but the Tribunal has not been provided with any other evidence concerning the fraud in the initial investment in the JVA. In addition, the total amount of Hamester's investment in Wamco – even if one considers the Respondent's position that the amounts were lower than the ones asserted by the Claimant – was significantly higher than the relevant invoice. The Tribunal can only decide on substantiated facts, and cannot base itself on inferences.

135. Moreover, there is no conclusive evidence proving that Cocobod would not have entered into the joint-venture had it known that some of the figures were overstated. In other words, there is no proof that the alleged fraud was decisive in securing the JVA. For example, Ghana complains that the initial investment only had a value of DM 13,567,600.00 while Cocobod was told that the value of the machinery was DM 15,830,005.00, which is close to the total estimated amount of the investment in the project, as set forth in Article 3.2 of the JVA. However, this article refers to an Appendix I which was to detail the investment. The Tribunal has not been provided with Appendix I and the Respondent stated in its Post-Hearing Brief that "(t)he Government has been unable to locate any such document."[134] There is no indication of the valuation of the factory provided by Cocobod to Wamco, nor has the Tribunal been provided with the financing plan, which according to Article 3.3 of the JVA was to be set out in Appendix II but was not submitted with the JVA.

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[133] Exh. RC385.
[134] Respondent's Post-Hearing Brief, para. 22.

136. Absent further information as to the Claimant's alleged behaviour and on the different parameters of the initial balance between the assets transferred by Hamester and those transferred by Cocobod, there is insufficient basis for the Tribunal to conclude that there was an overall scheme of deceit orchestrated by the Claimant in the initiation of its investment.

137. In any event, and more importantly, even if the alleged scheme to inflate invoices was fully proven – with details in respect of invoices for all deliveries of machinery or services – the Tribunal would still not be prepared to analyse these practices as amounting to a fraud such as to deprive the Tribunal of its jurisdiction in the present case. According to the Respondent, this would make "the present case indistinguishable from *Inceysa v. El Salvador*,"[135] where the Tribunal declined jurisdiction because the contractor had caused the Government of El Salvador to award it a contract by misrepresenting its finances and qualifications. The Tribunal does not agree. As noted above, it was not established by the Respondent that Cocobod would not have entered into the JVA if it had known that Hamester was making a pre-profit on its contribution. The Tribunal accepts the Claimant's statement that:

> "(t)here is not a single witness from Ghana attesting to the alleged fraudulent action having induced the JVA as was the case with the misrepresentations in the Inceysa and Klockner cases."[136]

138. Hamester's practices might not be in line with what could be called "*l'éthique des affaires*," but, in the Tribunal's view, they did not amount, in the circumstances of the case, to a fraud that would affect the Tribunal's jurisdiction. The Tribunal sees the over-statement of invoices as an issue bearing upon the balance of equities between the two parties, rather than the existence itself of the contract or the investment. Such elements would have been taken into consideration by the Tribunal when discussing the merits, if it had found that any compensation was due to Hamester.

139. In conclusion, the Tribunal does not consider that the dispute concerning Hamester's investment in Ghana is outside its jurisdiction because the initial investment was fraudulent, as argued by the Respondent.

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[135] *Inceysa Vallisoletana S.L v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006.
[136] Claimant's Post-Hearing Brief, para. 164. Emphasis in the original.

VII. THE SECOND "JURISDICTIONAL OBJECTION": NON-ATTRIBUTION - A GENERAL APPROACH

140. The second jurisdictional objection advanced by the Respondent is based on an analysis of the different acts complained of, which the Respondent does not consider to be attributable to the ROG. The question whether the issue of attribution is, in a given case, one of jurisdiction or of merits is not, in the Tribunal's view, susceptible of a clear-cut answer.

141. For a jurisdictional objection to prosper, it has to be such a definitive impediment that the Tribunal has no right to entertain, or enquire into, the dispute. If, for example, one takes the jurisdictional requirements *ratione personae* as set out in Article 25 of the ICSID Convention, *i.e.* that the dispute is a legal dispute between a Contracting State of the ICSID Convention and investors of another Contracting State, the determinative criteria are clear and easily answered: the two Parties must respectively be a foreign investor from a Contracting State, and a Contracting State, for jurisdiction to exist. Here, as jurisdiction depends on the German/Ghana BIT, the Tribunal can deal with a dispute between the German company Hamester and the Republic of Ghana. In other words, if Hamester was not a German company, or if the case had been brought against a State other than Ghana, there would evidently have existed a clear jurisdictional objection.

142. Not all issues, however, are so discrete or easily answered. Many – as is the case with attribution – entail more complex considerations, which could be characterised both as jurisdictional and relevant to the merits (and so to be considered only if the Tribunal has jurisdiction).

143. In order to clarify the distinction between a jurisdictional question and a merits' question, it is useful to consider the different burden of proof required for each. If jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage. However, if facts are alleged in order to establish a violation of the relevant BIT, they have to be accepted as such at the jurisdictional stage, until their existence is ascertained (or not) at the merits stage. The question of "attribution" does not, itself, dictate whether there has been a violation of international law. Rather, it is only a means to ascertain whether the State is involved. As such, the question of attribution looks more like a jurisdictional question. But in many instances, questions of attribution and questions of legality are closely

intermingled, and it is then difficult to deal with the question of attribution without a full enquiry into the merits.

144. In any event, whatever the qualification of the question of attribution, the Tribunal notes that, as a practical matter, this question is usually best dealt with at the merits stage, in order to allow for an in-depth analysis of all the parameters of the complex relationship between certain acts and the State. This is the same approach as that adopted in *Jan de Nul v. Egypt*, where the tribunal held that, according to the usual *prima facie* test at the jurisdictional level:

> "it is not for the Tribunal at the jurisdictional stage to examine whether the case is in effect brought against the State and involves the latter's responsibility. An exception is made in the event that it is manifest that the entity involved has no link whatsoever with the State."[137]

145. This approach – to deal with the question of attribution as a merits question – is particularly appropriate, in the Tribunal's view, in this case. The Tribunal is not faced here with a situation where it is readily evident that the State is not involved at all, or where the issue is capable of an answer based upon a limited enquiry (akin to other jurisdictional issues). On the contrary, the evidential record in this case is more complex. In fact, the Respondent itself recognises that some acts are attributable to the Ghanaian Government, while denying that they amount to international illegal behaviour[138]. In other words, while the extent of the State's involvement is unclear, it is not contested that some acts are attributable to Ghana. In such a situation, the Tribunal considers that it has jurisdiction over the case brought against Ghana and jurisdiction to decide which acts are attributable and which are not.

146. As the Tribunal has not accepted bifurcation and has joined the jurisdictional objections to the merits, it now has the benefit of the parties' full pleadings in order to deal with the question of attribution in any event.

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[137] Jan *de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 28, 2006, para. 85. Another exception, where tribunals have dealt with the question of attribution at the jurisdictional level, is when the Parties have fully pleaded it at that stage. A good example is the Decision on jurisdiction in *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, July 23, 2001, para. 30.

[138] In the Respondent's Reply, while not denying that some acts are indeed attributable, the Respondent states: "There are no acts of the Government itself which could possibly provide a factual basis for Hamester's Expropriation Claim, because all of the acts listed in paragraph 174 above are entirely justified or simply inconsequential," para. 175.

147. In order to constitute a violation of the BIT, an act has to be both attributable to the State and a violation of an international obligation provided for in the BIT. Sometimes, the two questions of attribution and illegality are not clearly distinguished, but the Tribunal considers that they should be. Therefore, the first question to be addressed is the question of attribution of certain acts to the State. As States are juridical persons, the question necessarily arises whether acts committed by natural persons or separate entities, which are allegedly in violation of international law, are attributable to the State. Only after such analysis has answered this question in the affirmative, may the Tribunal address the second question, which is the qualification of the act attributed to the State as an illegal act. The question of attribution/non-attribution will be dealt with in Sections VIII and IX, and the question of legality/illegality in Sections X and XI.

A. The Claimant's position on the question of attribution

148. To summarise the Claimant's position is simple: it considers that Cocobod must be completely assimilated to the Government of Ghana. The analysis leading to this conclusion has, however, been somewhat imprecise and has evolved in the course of the case.

149. In the Request for Arbitration, the analysis of Cocobod's nature is brief. According to the Claimant, because Cocobod is controlled by the State and is empowered by internal law to carry out rights and obligations in relation to the cocoa industry in Ghana which would otherwise be undertaken by the State, it follows that:

> "(f)rom a structural point of view, Cocobod is accordingly a State entity. In discharging essentially governmental functions delegated to it by the State, Cocobod also satisfied the functional requirement of a State entity. Under applicable principles of international law, the satisfaction of the structural and functional tests demonstrate conclusively that Cocobod is a State entity. Accordingly for the purpose of the BIT, Cocobod is the Government of the Republic of Ghana …"[139]

150. In its Memorial, the Claimant starts by presenting Cocobod as "a monopolistic statutory public body with administrative responsibility for controlling and regulating the cocoa industry in Ghana,"[140] and, after analyzing the Ghana Cocoa Board Law of 1984 creating Cocobod, concludes that:

[139] Request for Arbitration, paras 15-16.
[140] Claimant's Memorial, para. 35.

> "Cocobod meets both the structural test of State creation, ownership and control and the functional test of performing activities of a governmental nature. Cocobod is a state entity acting at all material times on behalf of the Respondent.
>
> The actions and omissions of Cocobod complained of in this Memorial are actions and omissions by Cocobod as a state entity carrying out governmental functions.
>
> *Further* the obligations undertaken by Cocobod under the JV Agreement are obligations undertaken by the Respondent towards the Claimant under Article 9(2) of the Treaty." (Emphasis added)[141]

It therefore seems that the Claimant considers that the acts of Cocobod, a State entity, are attributable to the Government as sovereign acts. Furthermore, it considers that, as contractual acts, they are capable of violating the obligation in Article 9(2) of the BIT to respect contractual obligations undertaken by the Government. A few paragraphs later, without any legal analysis, the Claimant also states that Cocobod "at all times acted as an organ of the Respondent."[142]

151. In its Reply, the Claimant's analysis is expanded, but the main contention seems to be that Cocobod is a State organ, either *de jure* or *de facto*.

152. A reference is made, in order to prove that it is a *de jure* organ to, among others, Article 195 of the Ghana Constitution which empowers the President to appoint persons to act in public service office and to Section 32 of the 1984 Law creating Cocobod, which states:

> "The Minister [responsible for Trade] may, after consultation with the directors or the management give to the Board in writing directions of a general character which are not inconsistent with this Act or with the contractual or any other legal obligations of the Board relating to the performance of its functions and the Board shall give effect to those directions."

153. The Claimant also relies on *Eureko v. Poland*[143] as well as *Jan de Nul NV v. Egypt.*[144] The latter case was the subject of extensive discussion, on the basis of which the Claimant has endeavoured to distinguish the different aspects of the Suez Canal Authority's (SCA) situation from that of Cocobod.

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[141] Claimant's Memorial, para. 37.
[142] Claimant's Memorial, para. 44.
[143] *Eureko B.V. v. Republic of Poland* (Netherlands/Poland BIT), Partial Award and Dissenting Opinion, August 19, 2005.
[144] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, November 6, 2008.

154. Relying on the ICJ decisions in *Bosnia v. Serbia*[145] and *Nicaragua v. United States of America*,[146] the Claimant also seems to suggest that Cocobod was an organ *de facto* of the Government, being in complete dependence on, or at least unable to function independently from, the Government:

> " … Cocobod, as a creature of statute, has its Board appointed by Government, received its starting funds and capital from Government, requires Government approval to set up a budget, establish (sic) credits and loans, has to follow Government pricing and so on. It cannot properly be argued that Cocobod can function independently of Government."[147]

155. After analysing the status of Cocobod in light of Article 4 of the ILC Article, the Claimant asserts that:

> "(f)urther and/or in the alternative to the position under Article 4 ILC, above, Cocobod was in all material instances exercising governmental authority such that the acts complained of by Hamester are attributable to Ghana under Article 5 ILC."[148]

156. According to the Claimant, not only was Cocobod entrusted with governmental functions, but its acts in relation to Hamester were all acts performed in the exercise of governmental functions. The Claimant sees the hand of the Government in all of Cocobod's dealings with Hamester, and considers that:

> "(t)he expropriation of and interference with Hamester's corporate governance rights were part of a plan by the Government acting through Cocobod to remove or diminish a foreign company's [Hamester's] control and holding in Wamco under the JVA."[149]

157. To support this analysis, the Claimant again seeks to distinguish *Jan de Nul*, and relies upon *Nykomb v. The Republic of Latvia*.[150] In this latter case, the acts of the State enterprise Latvenergo were considered attributable to the State, because, among others, "Latvenergo had no commercial freedom. It had no freedom to negotiate electricity prices …"[151] The Claimant also invokes *Noble Ventures v. Romania*,[152] in which the tribunal assimilated a

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[145] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of February 26, 2007.
[146] *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), Merits Judgment of June 27, 1986.
[147] Claimant's Reply, para. 160.
[148] Claimant's Reply, para. 176.
[149] Claimant's Reply, para. 182 (v).
[150] *Nykomb Synergetics Technology Holding AB (Nykomb) v. The Republic of Latvia*, Award, December 16, 2003 (under the ECT).
[151] *Ibidem*, p. 31.
[152] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11 (US/Romania BIT), Award, October 12, 2005.

governmental agency with the government, on the basis that they both exercised governmental functions.

158. Further still, the Claimant submits that:

> "(i)f contrary to Hamester's case above, the acts and omissions complained of are not attributable to Ghana under Article 4 and/or Article 5 ILC, these acts and omissions are attributable to Ghana under Article 8 ILC."[153]

159. The Claimant argues that "the fact of State instruction and direction or 'effective control' ... is objectively established,"[154] without elaborating on the basis for this conclusion.

160. As noted by the Respondent in its Rejoinder, the Claimant's analysis, overall, is somewhat unclear, as "Hamester appears to be confusing ILC Article 5 with Articles 4 and 8."[155]

161. In fact, the Claimant's analysis extends even further, since it also relies upon Article 2 of the ILC Articles. This article provides that an internationally wrongful act of a State can consist of an action or omission. The Claimant argues that, because of this article, the other articles on attribution are not even necessary, as there was, corresponding to each act of Cocobod, an omission of the Ghanaian Government to prevent it from so acting:

> "It should be uncontroversial that internationally wrongful acts may comprise both acts and omissions: see ILC Article 2 ILC.
>
> At the very least Ghana omitted to direct Cocobod against the actions complained of by Hamester. Such direction would have been binding upon Cocobod under the 1984 Law.
>
> Each of these omissions constitutes an internationally wrongful act under Article 2 in breach of Ghana's obligations under the BIT.
>
> If Hamester's case in this regard is correct, no question of attribution under Article 4 arises, as the omissions are by Ghana itself."[156]

162. In summary, the Claimant presents four alternative analyses of the status of Cocobod, based respectively on Articles 4, 5, 8 and 2 of the ILC Articles.

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[153] Claimant's Reply, para. 205.
[154] Claimant's Reply, para. 211.
[155] Respondent's Rejoinder, para. 115.
[156] Claimant's Reply, para 167 and paras 172-174.

B. The Respondent's position on the question of attribution

163. In its Counter-Memorial, the Respondent relies on the ILC Articles on State Responsibility, noting that "(o)ddly, the Memorial does not even mention the International Law Commission's *Articles on Responsibility of States for Internationally Wrongful Acts.*"[157]

164. The Respondent denies that Cocobod can be qualified as an organ of the State – either *de jure* or *de facto* – and that the acts of Cocobod complained of can be attributed to Ghana, stating that "it is obvious that the GCB is not a state organ,"[158] under Article 4 of the ILC Articles. Further, the Respondent argues that Cocobod's acts are not attributable to the ROG under Article 5 of the ILC Articles.

165. According to the Respondent:

> "GCB is a commercial trading corporation, although it has certain monopoly rights and regulatory powers. Its primary function is to purchase cocoa beans from Ghanaian cocoa farmers and, through its subsidiary, the Cocoa Marketing Company Limited ("CMC"), to sell them on the world market for a profit. The GCB is run as a commercial enterprise …"[159]

166. As to Article 4 of the ILC Articles, the Respondent contends that Cocobod is not a State organ, either *de jure*, as it has a separate legal personality, or *de facto*. The Respondent refers to the analysis of the status of the Suez Canal Authority (SCA) in the award on the merits in *Jan de Nul NV v. Egypt*,[160] which concluded that structurally the SCA was not a State organ, arguing that "(t)he position of the GCB under Ghanaian law is essentially identical to that of the SCA under Egyptian law."[161]

167. Although, according to the Respondent, Cocobod can be considered a public entity under Article 5 of the ILC Articles, because it has some governmental powers under the GCB Law, such as the power under section 34(2)(a) to "make regulations … prescrib[ing] the form of all licences or permits to be issued under this Law," the acts complained of by the Claimant have not been performed in the exercise of such governmental authority. The Respondent insists that the performance of an act in the exercise of governmental authority is a necessary condition for it to be attributable to the State. It relies on the award in *Maffezini*

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[157] Respondent's Counter-Memorial, para. 177.
[158] Respondent's Counter-Memorial, para. 151.
[159] Respondent's Counter-Memorial, para. 22.
[160] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, November 6, 2008.
[161] Respondent's Counter-Memorial, para. 194.

v. Spain for this proposition,[162] which has been, in its view, misinterpreted by the Claimant. In the Respondent's view, with respect to all Cocobod's acts complained of:

> "it is immediately obvious that these were all purely private and commercial acts which were not done under the exercise or purported exercise of any specific governmental power conferred by law. They were purely commercial acts which could have been performed by any purely private company in relation to a joint venture which it has entered into with another private party."[163]

168. Finally, the Respondent also refutes the attribution of Cocobod's acts to Ghana under Article 8, arguing that the effective test of control under this article is very demanding. It states that:

> "... conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation"[164]

and that:

> "Hamester has presented no evidence whatsoever that could possibly satisfy the test under ILC Article 8."[165]

169. In its Rejoinder, the Respondent follows the same line of analysis. As for the Claimant's reliance upon Article 2 of the ILC Articles as an autonomous basis of attribution of an act to the State, the Respondent submits as follows:

> "If the suggestion is that ILC Article 2 is somehow an ***alternative*** to ILC Articles 4, 5 and 8 for attributing the GCB's conduct to Ghana, then it is incoherent.
>
> It would amount to the suggestion that every State has a positive duty constantly to monitor and remedy every single potentially harmful act done on its territory in any way in relation to a foreign investment ***by any private person*** not in any way falling within Articles 4, 5 and 8."[166] (Emphasis in the original)

170. In summary, it is the Respondent's case that Cocobod is a separate public entity empowered with governmental powers, as described in Article 5 of the ILC Articles.

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[162] *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, January 25, 2000.
[163] Respondent's Counter-Memorial, para. 208.
[164] Paragraph 3 of the Commentary to ILC Article 8.
[165] Respondent's Counter-Memorial, para. 218.
[166] Respondent's Rejoinder, paras 113-114.

C. The Tribunal's general approach to the question of attribution

171. The Tribunal must decide the issue of attribution under international law, and is guided by the Articles on State Responsibility adopted on second reading in 2001 by the International Law Commission and commended to the attention of Governments by the UN General Assembly in Resolution 56/83 of 12 December 2001 (the "**ILC Articles**") as a codification of customary international law.

172. In order for an act to be attributed to a State, it must have a close link to the State. This close link can result from the fact that the person performing the act is part of the State's organic structure (Article 4); or is utilising the State's specific governmental powers to perform such act, even if it is a separate entity (Article 5); or is acting under the effective control (on the instructions, or under the direction or control) of the State, even if it is a private or public party (Article 8).

173. The Tribunal will first deal with the Claimant's suggestion that, because a State can be responsible for an omission to act, it is responsible every time it omits to prevent any act that interferes with certain investor rights, regardless of who committed such act. It is worth recalling the whole text of Article 2 of the ILC Articles:

> "*Article 2.*
> *Elements of an internationally wrongful act of a State*
> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
> (*a*) is attributable to the State under international law; and
> (*b*) constitutes a breach of an international obligation of the State."

It is clear that Article 2 is not an autonomous basis for attribution. Rather, its purpose is to give a general definition of what constitutes an internationally wrongful act of a State. Article 2 does not create a general obligation on the part of States to prevent any act interfering with an investor's rights. The article only articulates the elements of the definition of an internationally wrongful act of a State, which can be an action or an omission. Either has to fulfil two cumulative conditions: it must be attributable to the State and it must violate an international obligation of the State.

174. The first relevant rule in the ILC Articles is the attribution to a State of *all the acts of all the State's organs*, according to Article 4:

> "*Article 4*

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

175. According to Article 5, *some acts of persons or entities exercising elements of governmental authority* can also be attributed to the State:

> *"Article 5*
> *Conduct of persons or entities exercising elements of governmental authority*
> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

176. It is clear that two cumulative conditions have to be present for an attribution under Article 5:

> - an entity empowered with governmental authority; and
>
> - an act performed through the exercise of governmental authority.

177. The Commentary to Article 5 elaborates upon this, making it clear that:

> "(a) [Entities falling under ILC Article 5] may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise *functions of a public character* normally exercised by State organs, ***and*** the conduct of the entity relates to the *exercise of the governmental authority* concerned. For example, in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine.
> …
> (c) (5) … [F]or example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling stock)." (Emphasis added) [167]

178. Moreover, the State can also be responsible under certain circumstances for the act of a private or public person – if the State has a significant involvement, before the commission of the act in question, such that the act can be considered as controlled by, and thus performed by the State. According to Article 8:

[167] RA, Volume 1, Tab 4, See ILC Article 5, page 43.

> "*Article 8*
> *Conduct directed or controlled by a State*
> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct."

179. The jurisprudence of the ICJ sets a very demanding threshold in attributing the act of a private entity to a State, as it requires both general control of the State over the entity, and specific control of the State over the particular act in question. This is known as the "effective control" test.[168] International criminal jurisprudence, in contrast, has asserted that, at least for military or para-military groups, general control is sufficient, as to control the head of a group is to control the whole group, and there is no need for specific control over the acts committed by members of such groups.

180. It is useful to summarise the rules on attribution, as presented in the preceding paragraphs, before applying the general principles to the facts of this case. The following acts are attributable to the State, under the rules of international law:

- all acts – including acts de *jure gestionis* – of State organs;
- acts of public or private entities or persons exercising governmental authority, if executed in the exercise of such authority – which by definition cannot include acts de *jure gestionis*;[169]

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[168] *Case concerning military and paramilitary activities in and against Nicaragua*, (Nicaragua v. United States of America), Merits, Judgment of June 27, 1986, *ICJ Reports* 1984, paras 113 and 115:
"108. … the Court holds it established that the United States authorities largely financed, trained, equipped, armed and organized" the contras ...
113. The question of the degree of control of the *contras* by the United States Government is relevant to the claim of Nicaragua attributing responsibility to the United States for activities of the *contras* whereby the United States has, it is alleged, violated an obligation of international law ...
115. The Court has taken the view … that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed." Emphasis added.

[169] For an isolated contrary position, see *Noble Ventures v. Romania*, Award, October 12, 2005, para. 82: " … in the context of responsibility, it is difficult to see why commercial acts, so called *acta iure gestionis*, should by definition not be attributable while governmental acts, so called *acta iure imperii*, should be attributable."

- acts of public or private entities or persons done on the instructions of, or under the direction or control of that State – which can encompass acts de *jure gestionis* as well as acts de *jure imperii*.

VIII. THE TRIBUNAL'S ANALYSIS ON ATTRIBUTION: THE STATUS OF COCOBOD

181. As already noted, the Claimant asserts that Cocobod is either an organ *de jure* or *de facto* under Article 4 of the ILC Articles or an entity qualifying under Article 5 of the ILC Articles, or that the acts of Cocobod are attributable to the ROG because they were performed on the instructions of, or under the direction or control of that State, under Article 8 of the ILC Articles. The Respondent denies that Cocobod can be considered a State organ, either *de jure* or *de facto*, and does not consider either that its acts can be attributed to Ghana on the basis of Article 8, as there is no evidence of any effective control of the Government over the acts performed by Cocobod in its dealings with Hamester. According to the Respondent, it cannot be doubted that Cocobod is a State entity under Article 5 of the ILC Articles, but the acts complained of cannot be attributed to Ghana on the basis of Article 5 in this case. Faced with these conflicting views, the Tribunal has therefore to ascertain the status of Cocobod.

A. Is Cocobod a State organ under Article 4 of the ILC Articles?

182. An organ is part of the structure of the State itself, whether its central organisation (*i.e.* its legislative, executive or judicial structures), or decentralised organisation. (*e.g.* territorial entities such as federated States; provinces; municipalities; etc.). In the present case, it is clear that the Tribunal has jurisdiction over the acts of the Ministers and over the acts of the police, which are part of the executive power of the Ghanaian State. The question is whether Cocobod is a State organ, as the Claimant contends.

183. In order to ascertain whether Cocobod is an organ of the Ghanaian State, the Tribunal must first look at Ghanaian law, as Article 4 of the ILC Articles provides that "(a)n organ includes any person or entity which has that status in accordance with the internal law of the State."

184. Cocobod was created by the GCB Law (see paragraph 22 above). It appears that the Ghana Cocoa Board is not classified as a State organ under Ghanaian law, but was created as a "corporate body," which can be "sued in its corporate name" (Section 1(2)). Cocobod is a

commercial corporation whose principal purpose is to trade in cocoa beans and generate a profit for the Government, as provided for in Section 6(1):

> "It shall be the duty of the Board to conduct its affairs on sound commercial lines and in such a manner as to ensure a reasonable return on its capital."

185. Moreover, Cocobod, as a public entity, can hold assets and open bank accounts. Section 11 provides that "the Board of Directors shall be charged with the management of the property, business and finances [of Cocobod] …" Section 24(1), provides for Cocobod to open its own bank accounts, stating "[Cocobod] may have bank accounts in such banks as the Board of Directors may determine." Section 37(2) vests the Ghana Cocoa Marketing Board's assets – which was the body existing before the creation of Cocobod – in Cocobod.

186. Most likely in recognition of Law 1984, the Claimant's main focus is on Cocobod's status as State organ *de facto.* The Claimant relies in this regard on the case of *Eureko v. Poland.*[170] The Tribunal does not consider this decision pertinent here. The contract in that case was signed by "the State Treasury of the Republic of Poland represented by the Minister of the State Treasury," which is quite different from the situation of the JVA which was signed by the Claimant and Cocobod, and did not involve any Minister of Ghana. The award in *Eureko* discussed the status of the State Treasury because under Polish Law the State Treasury had a separate personality. In fact, however, the tribunal did not expressly decide on the status of the State Treasury, but rather canvassed a range of possible analyses. It suggested that the State Treasury could be classified as a State organ (citing Professor Crawford, that the State is responsible for acts of "all the organs, instrumentalities and officials which form part of its organisation and act in that capacity, whether or not they have separate legal personality under its internal law.")[171] However, the tribunal also suggested that acts of the State Treasury could be attributed to the State under Article 5 or 8:

> "Professor Crawford further observed that the principles of attribution are cumulative so as to embrace not only the conduct of any State organ but the conduct of a person or entity which is not an organ of a State but which is empowered by the law of that State to exercise elements of governmental authority. It embraces as well the conduct of a person or group of persons if he or it is in fact acting on the instructions of, or under the direction or control of, that State."[172]

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[170] *Eureko B.V. v. Republic of Poland* (Netherlands/Poland BIT), Partial Award and Dissenting Opinion, August 19, 2005.
[171] Report of the ILC on the Responsibility of States for Internationally Wrongful Acts, page 83, para. 7.
[172] *Eureko*, Partial Award, para. 132.

In other words, the decision in *Eureko* does not, in itself, support the Claimant's contention that Cocobod is a State organ: first, because the situation of the State Treasury was very different from the situation of Cocobod; and second, because even if it were the same, the tribunal did not actually decide that the State Treasury was a State organ. The tribunal indeed concluded:

> "In brief, *whatever may be the status of the State Treasury* in Polish law, in the perspective of international law, which this Tribunal is bound to apply, the Republic of Poland is responsible for the actions of the State Treasury."[173] (Emphasis added).

187. Another argument advanced by the Claimant to the effect that Cocobod is an organ of the State *de facto*, is Article 32 of Law 1984. This provides as follows:

> "The P.N.D.C. [Provisional National Defence Council] Co-ordinating Secretary may, after consultation with the Board of Directors or the Management, give the Board in writing directions of a general character not being inconsistent with the provisions of this Law or with the contractual or other legal obligations of the Board relating to the exercise of the Board of its functions under this Law and the Board shall give effect to such directions."

The Tribunal does not accept the conclusion drawn by the Claimant from this provision. First, Article 32 provides that the Government can only give "directions of a general character" and not specific instructions to Cocobod. Second, these general policy directions can only be made "after consultation with the Board of Directors or the Management" of Cocobod. Third, these directions of a general character cannot be "inconsistent with the contractual and other obligations" of Cocobod, which means that the commitments of Cocobod, accepted in contracts and dealings with other economic actors, prevail over the Government's directions.

188. Having analysed all the circumstances put forward by both parties, the Tribunal concludes that Cocobod can by no means be considered an organ of the Ghanaian State, either *de jure* or *de facto*.

B. Is Cocobod a State entity under Article 5 of the ILC Articles?

189. It is obvious, in the Tribunal's view, that Cocobod has a whole range of objects and functions, as detailed in Section 2 of the Law 1984. This provides as follows (the Tribunal having underlined those objects and functions which are essentially commercial, the remaining objects and functions being essentially governmental in nature):

[173] *Eureko*, Partial Award, para. 134.

"2. *Objects and Functions of the Board.*

(a) to encourage the production of cocoa, coffee and sheanuts;
(b) to undertake the cultivation of cocoa, coffee and sheanuts;
(c) to initiate programmes aimed at controlling pests and diseases of cocoa, coffee and sheanuts;
(d) to purchase, import, undertake and encourage the manufacture in Ghana of, and distribute and market inputs used in the production of cocoa, coffee and sheanuts;
(e) to undertake, promote and encourage scientific research aimed at improving the quality and yield of cocoa, coffee, sheanuts and other tropical crops;
(f) to regulate the marketing and export of cocoa, coffee and sheanuts;
(g) to secure the most favourable arrangements for the purchase, inspection, grading, sealing and certification, export and sale of cocoa, coffee, and sheanuts;
(h) to purchase, market and export cocoa produced in Ghana which is graded under the Cocoa Industry (Regulation) (Consolidation) Decree, 1968 (NLCD 278) or any other enactment as suitable for export;
(i) to establish or encourage the establishment of industrial processing factories for the processing of cocoa and cocoa waste into marketable cocoa products;
(j) to purchase, market and export cocoa, cocoa products, coffee, sheanuts and shea-butter produced in Ghana;
(k) to assist in the development of the cocoa, coffee and sheanuts industries of Ghana; and
(l) to promote the general welfare of cocoa, coffee and sheanuts farmers in Ghana." (Emphasis added)

190. From this section, it appears to the Tribunal that Cocobod is indeed entrusted with governmental functions. Among others, it has the mission to regulate the marketing and export of cocoa, coffee and sheanuts; to encourage the development of all aspects of cocoa production and transformation; and to fight diseases of cocoa beans. In order to fulfil these functions, Cocobod was granted governmental powers. Section 34(1) is quite clear when it states that "(t)he Board of Directors may, *by legislative instrument*, make such regulations as it may see fit for the purpose of giving effect to the provisions of this Law" (Emphasis added). The purpose of these regulations can be to "prescribe the form of all licences or permits to be issued under this Law," and to "regulate the control of the issue of such licences or permits and determine the conditions under which they may be used, produced, revoked or returned" (Section 34(2)). Moreover, if the regulations enacted by Cocobod are violated, it can impose penalties. All these entitlements make it clear that, besides its economic and commercial objects, Cocobod was endowed with elements of "*puissance publique*."

191. The Tribunal, however, agrees with the Respondent's statement, referring to *UPS v. Canada Post*:[174]

[174] *United Parcel Services of America Inc v. Government of Canada*, Award on the merits, May 24, 2007, paras 63-78.

> "Like Canada Post and the Suez Canal Authority, the GCB is a public corporation, dominates a particular economic activity, and has some governmental powers (such as the power to make regulations). But that does not, and cannot, lead to the conclusion that all of its conduct, including purely commercial business decisions in relation to a joint venture for processing agricultural commodities, are governmental in nature."[175]

192. The Tribunal concludes from the preceding analysis that Cocobod is an entity exercising elements of governmental authority, as described in Article 5 of the ILC Articles.

193. Having found that Cocobod is a public entity empowered with some "*prérogatives de puissance publique*," this in itself clearly does not resolve the issue of attribution. The distinction between a State organ and a separate public entity is fundamental in this context. As "organs" participate in the structural setting of the State, all their acts are attributed to the State, whether commercial or not. In contrast, it is well established that for an act of a separate entity exercising elements of governmental authority to be attributed to the State, it must be shown that the precise act in question was an exercise of such governmental authority and not merely an act that could be performed by a commercial entity. This approach has been followed in national as well as international case law.

194. National precedents include the famous case of *Rolimpex*, which concerned the status of a Polish state trading organisation (called Rolimpex). Although Rolimpex was under the strict control of the State in a centralised economy – much more dependent on the State than Cocobod – Lord Denning did not consider that <u>all</u> its acts could be attributed to the State:

> "I do not think that Rolimpex can be considered to be a department of the Government of Poland … Rolimpex is a State trading agency."[176]

195. Another case to the same effect is *Trendtex v. Central Bank of Nigeria*, where a distinction was made between the activities performed by the Bank as a central monetary authority, and the act of buying cement for the construction of offices, which could not be attributed to the State.[177]

196. This approach has also been adopted by numerous ICSID tribunals. A good example of the rationale to be applied can be found in the *Maffezini v. Spain* case,[178] where the

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[175] Respondent's Rejoinder, para. 123.
[176] *C. Czarnikow Ltd v. Centrala Handlu Zagranicnego 'Rolimpex'*, May 26, 1977, *ILR*, 1983, vol. 64, p. 195; [1979] AC 351 (English Court of Appeal). See also House of Lords, July 6, 1978, *id.*, p. 204
[177] *Trendtex Trading Corporation v. Central Bank of Nigeria*, January 13, 1977, *ILR*, vol. 64, p. 122; [1977] 1 QB 529 (English Court of Appeal).
[178] *Maffezini v. Spain*, ICSID Case No. ARB/97/7 (Argentina/Spain BIT), Award, November 13, 2000.

different acts performed by a separate State entity (SODIGA), having been entrusted with some governmental powers, were analysed:

> "In dealing with these questions, the Tribunal must again rely on the functional test, that is, *it must establish whether specific acts or omissions are essentially commercial rather than governmental* in nature or, conversely, whether their nature is essentially governmental rather than commercial. Commercial acts cannot be attributed to the Spanish State, while governmental acts should be so attributed."
>
> "At the time EAMSA was established, SODIGA was in the process of transforming itself from a State-oriented to a market-oriented entity. While originally a number of SODIGA's functions were closer to being governmental in nature, they must today be considered commercial in nature. But at the time of transition, there was in fact a combination of both, some to be regarded as functions essentially governmental in nature and others essentially commercial in character. As mentioned above, this is the *dividing line between those acts or omissions that can be attributed to the Spanish State and those that cannot.* The Tribunal must accordingly categorize the various acts or omissions giving rise to the instant dispute."[179](Emphasis added)

197. The conclusion that flows from these decisions is that only the acts of Cocobod utilising State prerogatives are attributable to the State for the purpose of international responsibility, and that the Tribunal therefore only has jurisdiction over acts of Cocobod that would have been performed in the exercise of elements of governmental authority. This, in turn, requires an inquiry into the nature of each and every act of which the Claimant complains.

198. At the same time, for all the acts complained of, in case they are not attributable to the State under Article 5, the Tribunal must also determine whether they are attributable under Article 8, the attribution or non-attribution under Article 8 being independent of the status of Cocobod, and dependent only on whether the acts were performed "on the instructions of, or under the direction or control" of that State. Such acts could therefore be attributable not because they are the result of the use of governmental power, but because they are under the direct command or effective control of the State.

199. As a general remark, the Tribunal notes that it has not seen in the evidence any compelling sign of such a strong control by the State, as would be required by Article 8. It is not denied that the Government was informed, mainly at the initiative of the Claimant, of the developments taking place in the last phase of the dispute, before the departure of Mr. Holzäpfel from Ghana. However, being informed and discussing the case with the parties – both the Claimant and Cocobod – does not mean that the latter was under the effective

[179] *Idem*, paras 52 and 57.

control of the Government, and that the acts of Cocobod could be attributed to the State of Ghana, on the basis of Article 8 of the ILC Articles.

200. The Tribunal therefore concludes, as a starting point, that the acts of Cocobod do not appear to have been exercised under the direct command of the ROG, and do not appear to be attributable to the Government under Article 8 of the ILC Articles. This general conclusion, however, requires to be verified in relation to each of the acts complained of, where the Claimant has denounced an intervention of the Government.

201. Therefore, as will be examined in the next Section, and by way of summary:

(i) Under Article 5 of the ILC Articles, if the acts of Cocobod which are the subject of complaint were performed in the exercise of governmental power, they will be attributed to the State. If they were performed in the fulfilment of commercial relations, they will not be attributable on that basis to the State.

(ii) In so far as acts are not attributable under Article 5, they could also be attributed to the State under Article 8 of the ILC Articles, if they can be shown as having been performed "on the instructions of, or under the direction or control" of the State.

IX. THE TRIBUNAL'S ANALYSIS ON ATTRIBUTION: ARE THE ACTS OF COCOBOD ATTRIBUTABLE TO THE STATE UNDER ILC ARTICLES 5 OR 8?

202. In considering the application of Article 5 of the ILC Articles, the Tribunal has carefully assessed whether, in its dealings with Hamester in relation to the JVA, Cocobod acted like any contractor/shareholder, or rather as a State entity enforcing regulatory powers. It must be observed that this analysis has necessarily concentrated on the utilisation of governmental power. It is not enough for an act of a public entity to have been performed in the general fulfilment of some general interest, mission or purpose to qualify as an attributable act. In this regard, the Tribunal shares the view expressed by the tribunal in *Jan de Nul*, when it stated that:

> "(w)hat matters is not the "*service public*" element, but the use of "*prérogatives de puissance publique*" or governmental authority."[180]

203. In so far as any act of Cocobod has been found not attributable to the State because it is an act *de jure gestionis*, the Tribunal has then considered whether it has been performed under the direct command of the State, such as to be attributable by application of Article 8 of the ILC Articles.

204. The first task in this enquiry is to identify the Claimant's exact claims, and the individual acts which are said to be the basis for each claim. This task is not easy as the claims have been presented by the Claimant in different and overlapping ways. The Tribunal has attempted to organise the claims by classifying them in the following general categories:

(i) the 2001 Price Agreement claim;

(ii) the 2002 Shortage in delivery of beans claim;

(iii) the 2003 Expropriation of the right of management claim,[181] including the harassment of Mr. Holzäpfel claim.

A. The 2001 Price Agreement claim

1. The Claimant's position

205. The Claimant puts great emphasis on the change of Government in Ghana, which according to it brought about a change of policy, especially with respect to the pricing of cocoa beans, and the subsequent and consequential imposition of a new price on Wamco in violation of Article 7 of the JVA.

206. According to the Claimant, the 2001 Price Agreement was:

> "concluded under duress and otherwise without proper process. Specifically, it was concluded under Cocobod's threat of a continuing cessation of supply to WAMCO …"[182]

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[180] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, November 6, 2008, para. 170. Emphasis in the original.

[181] The Tribunal has to explain that the "Expropriation claim" does not simply comprise a claim that some acts have violated Article 4(2) of the BIT on expropriation. Rather, it is a claim that the Claimant has been deprived of its rights of management of Wamco, which - as with the two other categories of claim - is said to be a violation of several articles of the BIT, *i.e.* Articles 9, 2(1), 2(2), 3(1), 4(1) and 4(2).

[182] Claimant's Memorial, para. 112.

207. The duress resulted from the threat to suspend delivery of cocoa beans and the implementation of this threat at the beginning of December 2001. The Claimant's Post-Hearing Brief identifies two violations of the JVA in this regard, that were linked, namely:

> "(i) the suspension of bean deliveries from December 1, 2000;
>
> (ii) the purported imposition of the 2001 Price Agreement."

2. The Respondent's position

208. The Respondent considers that "Hamester's arguments that the agreement amounted to a violation of the GGBIT are hopeless." To justify this position, it has made three points:

> "First, the GCB's conduct in relation to the 2001 Price Agreement is not attributable to the Government. Secondly, even if the behaviour is attributable to the Government, Hamester's complaints are entirely contractual in nature and cannot amount to breaches of the GGBIT. Thirdly, the 2001 Price Agreement did not breach the JVA."[183]

209. According to the Respondent, the request to use FOB prices went back to 1994 and had nothing to do with a supposed new policy implemented after the departure of President Jerry Rawlings, and imposed by the ROG on Wamco through Cocobod:

> "The GCB had repeatedly stated from 1994 onwards that Wamco had to pay the normal FOB world market price."[184]

210. The ROG also considers that the 2001 Price Agreement was adopted after lengthy negotiations and was quite favourable to Wamco. This, it is suggested, is proven by the fact that:

> "(f)or at least eighteen months after it was signed, Hamester did not complain about the 2001 Price Agreement, and in fact relied on the agreement and the prices set there under. It was not until eighteen months after the 2001 Price Agreement was signed that Hamester objected to it."[185]

211. Moreover, the Respondent argues that both decisions – the decision to stop the supply of beans in December 2001 and the decision to enter into the 2001 Price Agreement – were purely commercial decisions and did not result from the exercise of governmental functions. As for the decision to stop the supply of beans:

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[183] Respondent's Counter-Memorial, para. 332.
[184] Witness Statement of Reinhold Müller, para. 11.
[185] Respondent's Counter-Memorial, para. 340.

> "The GCB's decision to stop the supply of cocoa beans to Wamco was an entirely commercial decision taken by Mr Sarpong when faced with the classic commercial predicament of a buyer that was continuing to receive goods and refusing to pay for them. It involved no exercise of governmental authority."[186]

The same is true for the adoption of the Price Agreement:

> "Hamester's complaint about the 2001 Price Agreement, like the Non-Delivery Claim, is a purely commercial claim based solely on an allegation of breach of the JVA. It is based solely on the allegation that the GCB breached Article 7 of the JVA by entering into an agreement with Wamco to sell cocoa beans to it at FOB prices."[187]

3. The Tribunal's analysis

212. The two parties to the JVA, Hamester and Cocobod, could not agree on a precise methodology to fix the price of cocoa beans, and included therefore in Article 7 of the JVA a provision for fixing of the price by agreement between Wamco, the joint-venture company, and Cocobod:

> "The conditions on which cocoa beans shall be sold, and the methods by which their prices shall be determined are to be agreed upon by the Company [Wamco I] and Cocobod. These conditions and prices shall be based on the takeover prices approved by the Cocoa Producer Price Review Committee [PPRC]."

213. As stated in the Request for Arbitration, "(t)he price for the cocoa beans was to be based on the takeover prices approved by the Cocoa Producer Review Committee controlled by the Government of Ghana."[188] This indicates that the Claimant was aware of the important role played by Ghana in the fixing of the reference price, although the actual commercial price had to be decided by agreement between Wamco I and Cocobod. It can be underscored that the Claimant had no direct role in the fixing of the commercial price, in which it could only intervene through its control of Wamco, and had no control at all of the PPRC.

214. The JVA states in its Article 7 that the purchase price for beans will "be based on" the takeover price set by the Producer Price Review Committee. The parties disagree on the implication of the formula "be based on." Mr. Opferkuch took the position during the Hearing that this language entitled Wamco to purchase beans using the very specific formula of PPRC price plus evacuation and transport costs. During the negotiation of the 2001

[186] Respondent's Counter-Memorial, para. 334.
[187] Respondent's Counter-Memorial, para. 328.
[188] Request for Arbitration, para. 4.

pricing agreement, Mr. Holzäpfel suggested that the incidental costs on top of the PPRC price amounted to a premium of 10%. In other words, the position of the Claimant is that the PPRC price should be the reference price with some adjustment of 10% or so. The Respondent has an altogether different analysis and considers that "(t)he phrase 'based on the takeover prices' is flexible enough to contemplate a wide range of prices – up to and including a price equivalent to FOB." Mr. Sarpong developed this view in his oral testimony.[189]

215. The Tribunal notes that this article was the source of endless difficulties, and it appears that the fixing of a price at which cocoa beans were to be sold by Cocobod to Wamco was a matter of confrontation throughout the parties' relationship.

216. The relation between the FOB price and the PPRC price is described in the following manner by the Respondent:

> "Each year, the Producer Price Review Committee ("PPRC"), in conjunction with the CMC, makes a projection as to what the average FOB price of exportable Grade I and II cocoa beans will be over the next year. On the basis of this projection, the PPRC determines the "PPRC Price", which is the price that will be paid by licensed buying companies ("LBCs") when purchasing cocoa beans from Ghana's cocoa farmers ..." [190]

If it is true that the PPRC price was itself based on the FOB price, the proposals of Cocobod to use the FOB price as a reference cannot be considered fundamentally at variance with Article 7 of the JVA.

217. Whatever the exact meaning of these contractual words, it is the view of the Tribunal that Article 7 of the JVA does not provide a definitive answer on the issue of price. Rather, the basic mechanism in the JVA was that the price was to be agreed between Wamco and Cocobod, and that the PPRC price was to be taken into account as one of the parameters of the discussion. In other words, Article 7 provided for a specific mechanism – *i.e.* agreement after negotiations considering the PPRC price – but did not impose an obligation of result – *e.g.* to arrive more or less at the PPRC price with some minor adjustments. Also, it must be noted that the PPRC price was entirely in the hands of the Ghanaian authorities and as underscored by the Respondent, "(n)othing in the JVA or Article 7 or in any document in this arbitration suggests that the Cocoa Board was not entitled to increase the PPRC price paid to

[189] Day 3, pp. 121-22, Lines 17-25, 1.
[190] Respondent's Counter-Memorial, para. 23.

farmers to 70% of the projected FOB price."[191] As a result, the Claimant was not entitled to have the price it proposed to Wamco imposed upon Cocobod.

218. Underlying the Claimant's specific complaint relating to the Price Agreement are, as understood by the Tribunal, two ideas:

- The Price Agreement was the result of a new Government policy imposed through Cocobod, *i.e.* the imposition of the Price Agreement can be attributed to Ghana;

- The Price Agreement was imposed on Wamco through duress and therefore violated Article 7 of the JVA.

The first question is a pure matter of attribution; the second a mixed question of attribution and legality.

1. Has the 2001 Price Agreement been imposed on Wamco by Government policy?

219. The Tribunal first wishes to deal with the alleged intervention of a new policy, heavily relied upon by the Claimant. Among other things, Hamester suggests that:

> "Holzäpfel's description of a feeling in Ghana that the new administration considered Hamester as too close to the Rawlings regime, and that 'all friends of the old system are enemies of the new system' is convincing [Transcript, 3/79/8 – 3/79/11] and offers further explanation as to why Sarpong *et al* were so hostile to Hamester."

220. In the Tribunal's view, the chronology of events does not support these allegations. Indeed, it was in late 2000 that a new Government under President Kufuor replaced Flight Lieutenant Jerry Rawling's administration, but the change of policy in the pricing of cocoa beans had already been discussed much earlier. The Minutes of a meeting held on April 21, 1999 stated that, in the discussions concerning the price, first "COCOBOD's proposal that pricing should be based on CIF London Terminal market was accepted" and second that Cocobod "pointed out that Government policy on pricing of beans for processing allowed NO DISCOUNTS."[192] That policy was again insisted upon in a letter of October 14, 1999[193] –

[191] Respondent's Post-Hearing Brief, para. 58. This is indeed what has happened since 2004-2005, according to the Respondent: "In accordance with the Government's and GCB's policy, the PPRC Price has since the 2004-2005 season been set at over 70% of the projected FOB world market price." Respondent's Counter-Memorial, para. 24.
[192] Exh. RC88.
[193] Claimant's Post-Hearing Brief, para. 16.

and before that, in a London meeting referred to in this letter, but without indication of a date – and was supposed to take effect on July 1, 1999.

221. The next question that remains is whether, if there was no new policy resulting from a change of Government, there was still a Government policy imposed by the use of governmental authority on Wamco. In order to answer this question, the Tribunal has examined the evidence to see how the different agreements were reached under the JVA, and whether the 2001 Price Agreement was adopted in any different way.

222. The Tribunal first observes that, when informed by Cocobod that it was insisting on the implementation of the Government's policy concerning the FOB prices – and this insistence might be seen as the result of a policy of the new Government, wishing to secure a long overdue implementation of a former policy – Hamester understood that Cocobod was going to negotiate the fixing of the price in light of the Government policy on the pricing of beans to local processors. This policy was that the price be based on the FOB price which was supposed to take effect from July 1, 1999. This has been acknowledged in a letter dated March 9, 2001, from Hamester to Cocobod:

> "It has been observed that since 1996 the relation between the two [JV] partners has not been all that smooth.
>
> One of the reasons is undoubtedly the absence of a pricing agreement …
>
> Both partners did make several attempts to come to a pricing formula, but it never came to a mutual price agreement. As a result there has been unstructured, yearly and/or half-yearly pricing arrangements, much to the disappointment of both partners.
> …
> Now with a new government and a new Cocobod management in place, *we have to find a definite price formula to satisfy both partners* ..." (Emphasis added)

223. The Tribunal next notes that, when one tries to understand how prices were fixed during the years the JVA functioned before the 2001 Price Agreement, this appears almost impossible. Despite several agreements to this effect, it seems to the Tribunal that Article 7 was always applied with a great deal of flexibility and unpredictability.

224. The following is the Tribunal's understanding of the "methods" used to fix the prices, which – it must be underscored – were almost always fixed after the sales had actually occurred:

- The period 1993 – 1995: Memorandum of Understanding dated January 23, 1997[194]

225. It is not contested that during the entire 1993-1997 period, Cocobod and Wamco had been unable to reach agreement on the price for cocoa beans under Article 7.

226. The first proposal for a pricing policy was contained in a letter of Cocobod, dated March 19, 1993. Another proposal was put forward by Wamco in a letter of April 28, 1994, without any agreement being reached by the parties. In a letter sent by Mr. Müller, Managing Director of Wamco, to Cocobod, on February 16, 1996, the ongoing disagreement between Wamco and Cocobod on the price was acknowledged: Cocobod from the start insisted on a price based on FOB prices while Wamco proposed a "cost-based pricing," or alternatively a formula based on the producer price + 60%. Without any price fixed for the whole period, Cocobod and Wamco finally arrived at a Memorandum of Understanding on January 23, 1997, deciding on a lump-sum amount due by Wamco for the years 1993 (crop 92/93), 1994 (crop 93/94) and 1995 (crop 94/95), but, it is insisted upon, without a reference to any price.

- The period January 1, 1996 – June 30, 1998: Agreement dated July 11, 1997[195] and Agreement dated July 22, 1998[196]

227. In the Agreement of July 11, 1997, there was both a method for setting the price and effective prices given for the different periods. The method was described in the following manner:

> "WAMCO and COCOBOD have negotiated and agreed on the methods by which prices for cocoa sold to WAMCO shall be determined."
>
> NOW THEREFORE IT IS AGREED AS FOLLOWS:
>
> "All cocoa sold by COCOBOD to WAMCO shall be at a price which is the equivalent of a discount of eleven per centum (11%) on Government's projected FOB price in US dollars for cocoa which forms the basis for the determination of Cocoa Producer Prices by Government for the relevant Cocoa Crop sold to WAMCO."

The prices were the following:

Period	PROJECTED FOB $	WAMCO PRICE $
1/1/96-30/6/96	1300	1157
1/7/96-31/12/96	1350	1202

[194] Exh. RC40.
[195] Exh. RC44.
[196] Exh. RC70.

1/1/97-30/6/97	1350	1203
1/7/97-30/6/98	1450	1290

The Tribunal notes that the price was fixed by reference to the FOB price without any complaint from the Claimant.

228. This Agreement was complemented and retroactively modified a year later, in an Agreement adopted "Without prejudice" on July 22, 1998. This agreement provides that, considering that "1996 and 1997 products were well sold by WAMCO (*i.e.* forward sales) prior to the Agreement of the 11th of July, 1997 the balance due to Cocobod from WAMCO on 1997 cocoa deliveries shall be four million US dollars (US$ 4) instead of ten million, seven hundred and ninety-three thousand, five hundred and thirty-two US dollars (US$ 10,793,532,00)." Moreover, the agreement states that "(h)aving regard to the fact that several changes have occurred in the cocoa trade both locally and international [sic] there is a need to review the Joint Venture Agreement … and subsequent agreements thereon to enable the partners have a clearer view of the future of WAMCO."

- The period July 1, 1998 – June 30, 1999: Agreement dated September 13, 1999[197]

229. Two different periods were considered, but again no method was devised for setting the price, the total invoice being based on the quantity of already processed beans: for July 1, 1998 – December 31, 1998, no price was set, just the quantity of processed cocoa beans and the "corresponding US $ amount" were indicated; for January 1 – June 30, 1999, the same approach prevailed; no price was set, just the quantity of processed cocoa beans and the "corresponding US $ amount" were indicated.

- The period July 1 – December 30, 1999: Agreement dated October 27, 2000[198]

230. It must be noted that the policy on FOB prices was supposed to be implemented by July 1, 1999. However, no specific reference is made to such price. Again, no specific price was set through an explained methodology; the agreement only comprised an indication of quantities (including outstanding quantities not paid for the preceding period) plus an amount in DM.

[197] Exh. RC96.
[198] Exh. RC111.

- The period January 1 – September 30, 2000: Agreement dated October 27, 2000[199]

231. This Agreement was arrived at after lengthy discussions. Many discussions were focused upon modifying the JVA in order to take into account the Government's change of policy. The mere fact that such lengthy negotiations did occur shows that the Government did not impose any coercive change on Wamco through Cocobod, via its powers of *puissance publique*, but rather that Wamco and Cocobod, as economic actors, engaged in discussions to adapt to the new legal framework. Some of the steps of these negotiations can be recalled here.

232. By facsimile sent March 14, 2000 Cocobod wrote to Wamco, stating:

> "You may recall that during our meeting in London, the COCOBOD delegation indicated to your delegation that there was a new Government policy on the pricing of beans to local processors based on the FOB price which was to take effect from 1st July 1999 …
>
> In the light of the above and the bleak market situation with possible dire consequences for all players, we have to state that future delivery of cocoa beans to WAMCO can only be done on the basis of a contract (with Quantity, Price and Delivery Period) between our two parties."

233. Hamester responded to Cocobod's facsimile of March 14, 2000 on the same date, stating:

> "… this new policy of pricing for local processing does not affect WAMCO because there is an existing legal Joint Venture Agreement which has different regulations concerning supply and pricing of cocoa beans for local processing than your new government policy.
>
> We told you that we are open to discuss any changes of the Joint Venture Agreement in detail, but we are not willing to accept any new government strategies of pricing of cocoa beans for local processing and without our acceptance."

234. By a facsimile sent July 10, 2000, Cocobod again proposed changes to the JVA to shift to FOB pricing:

> "5. Article 7
>
> Ref: Supply of Beans
>
> In view of change in cocoa policy, COCOBOD's original proposal is revised as follows:
>
> i. Beans are to be supplied against contract on basis FOB.
> ii. Obligation to supply at all times all WAMCO's requirements of cocoa beans should be deleted.

[199] Exh. RC122.

iii. Option for WAMCO to import cocoa beans from outside Ghana in view of their free zone status must be enshrined in the article.
iv. All cocoa bought by the marketing chain in Ghana are exported. Hence the concept of non-exportable cocoa should be obviated.

Article 7 (Amended) In view of the above (5, 6, and 7), article 7 is being amended to read as follows:

COCOBOD shall through its wholly owned subsidiary company Cocoa Marketing Company (Gh) Ltd sell cocoa beans to the factory for local processing. Such sale shall be against contract on F.O.B basis.

The factory may procure its cocoa beans requirements from any other Licensed Exporter of Cocoa Beans or may import same."

235. Hamester rejected these proposals, but finally the two parties signed the Agreement dated October 27, 2000. No methodology explained the price arrived at, which was established at DM 1.05/kg for the whole period and for all types of cocoa beans, and no specific reference was made to the FOB price, although during that period, the Government policy on FOB prices was at the centre of the discussions.

- The period September 30, 2000 – December 14, 2001: The situation deteriorates

236. No agreement was reached before the start of 2001. During the entirety of 2001, Hamester and Cocobod were engaged in tough commercial negotiations, and they debated the terms of a new price agreement, with the Claimant proposing a price based on farmgate or takeover prices as per the JVA, and Cocobod insisting on a price based on FOB pricing, as stated in its letter to Wamco dated February 14, 2001:

'The supply of cocoa to you in the early part of this week was predicated on you ensuring also that the issue of pricing of beans would be resolved shortly.

Incidentally I informed you verbally that the pricing of the 2000/1 Main Crop cocoa delivered to you will be based on FOB prices, as per the policy directives that had been communicated to you per our letters dated 14th October 1999 and 14th March 2000 ."

237. By letter dated March 9, 2001, Hamester wrote to Cocobod, copying the Minister of Finance, proposing a price based on farmgate prices marked up by ten per cent:

"… we propose the following price formula:

- Base: Farmgate price, to be determined by Cocobod
- Mark-up: Direct cost as percentage of the farmgate price
- The farmgate price plus the mark-up will then be the take-over price to be paid by WAMCO."

238. Cocobod responded by letter dated March 30, 2001:

> "We have studied the proposal, and are of the view that *although the pricing formula in the proposal is at variance with current government policy* (*i.e.* selling beans to local processors on FOB basis), *it could form the basis for negotiating* an interim price agreement pending the formal review of the JVA to incorporate the new government policy …" (Emphasis added)

This shows, again, that the FOB price was not imposed by the Government through Cocobod. This was a general policy, which economic actors had to try to implement through agreements reached in different contexts. It can be recalled that the policy was announced by the Government to be implemented in July 1999 and that the discussions were still ongoing in the last trimester of 2001.

239. Due to the absence of an agreement on a price, Wamco did not pay for any of the beans delivered during the year 2001, and did not even make a partial payment based on the minimum price which Wamco accepted it would have to pay, until the middle of the year. In fact, on June 28, 2001, it sent a partial payment, not only based on the farmgate price plus 10%, but also in Cedis, when the usual practice between Cocobod and Wamco had been to make payments in foreign currency. On July 10, Cocobod returned the cheque in Cedis and insisted on being paid in foreign currency, and on August 10, 2001, Cocobod wrote again to Wamco requesting an interim payment:

> "COCOBOD has continued to supply beans since January to date, and we have run out of funds needed to meet operational requirements especially payments to farmers and LBCs for bringing in the cocoa from farm gate to the take over centres.
>
> We would therefore be grateful if WAMCO could pay about DM 20 million on account to cover beans supplied from January to May 2001 pending the final solution of the pricing problem for the year 2001."

240. The negotiations continued. In a letter sent by Mr. Opferkuch to the Ministry of Finance on November 19, 2001,[200] certain offers were made concerning the prices for 2001 and 2002, in order for Wamco to accept FOB prices for 2003. The proposal of Hamester was to pay DM 1,050.00/ton for the year 2001 and DM 1,250.00 for the year 2002; and it added that "(b)ased on the above we are prepared and willing to change Article 7 of the existing JVA from 1st January 2003." In other words, Hamester accepted to pay:

- DM 1.050,00/ton for the year 2001;

[200] Exh. RC166.

- DM 1.250,00 for the year 2002; and

- FOB prices for the year 2003 and following years.

241. This letter makes it clear that the Claimant was willing to agree to FOB pricing from 2003 onwards, provided that Wamco received certain discounts on cocoa beans supplied before 2003. That is exactly what the 2001 Price Agreement achieved, with some slightly enhanced prices, as will be examined below.

- The December 14, 2001 Price Agreement

242. The Tribunal was made aware that, before the adoption of the 2001 Price Agreement, there was another draft Agreement, dated November 9, 2001. This document must be considered as a "work in progress" and has no binding effect as it was not signed by Wamco but only by Cocobod. Moreover, it includes in part an agreement and in part an "agreement to disagree." The proposed agreement was:

> - that all types of cocoa beans for the year 2001 would be sold at DM 1,250/tonne (according to Hamester this is a 20% increase on 2000 prices)
>
> - that all types of cocoa beans for the year 2002 would be sold at DM 1,450/tonne (according to Hamester this is a 40% increase on 2000 prices)

The agreement to disagree was expressed in Article 3, which stated that for 2003, Wamco was offering a price equivalent to the farmgate price plus 10%, while Cocobod was insisting on the FOB price, failing which agreement there would be no supply of beans.

243. Based on this draft agreement, Cocobod sent an invoice to Wamco requesting payment for bean deliveries from January 1 to September 30, 2001,[201] which had still not been paid for, based on the price of DM 1,250/tonne, *i.e.* the sum of DM 44,321,875.00. In the accompanying letter, a reference is made to discussions on November 6, 2001, where an agreement was reached on prices that was formalised in the November 9, 2001 draft agreement, followed by a statement that "(t)o our total surprise … you refused on Friday 9th November 2001 to execute the formal Agreement drawn up to incorporate the above agreed prices." The letter added that the price for 2001 on which the invoice was based was "a price that was in fact proposed by you and accepted by Cocobod."

[201] Exh. RC164.

244. At that point in time, the dispute was limited to a difference in the price offered by Wamco – DM 1.050,00/ton for the year 2001 – and the price requested by Cocobod – DM 1.250,00/ton for the year 2001, which Wamco had only accepted for 2002. Cocobod requested the payment based on "its price," while Wamco refused to pay more than the amount based on "its price."

245. Meanwhile, a payment for the beans delivered in 2001 was made by Wamco on November 27, 2001, but Cocobod considered this only as a partial payment and requested the remaining sum owed to it, based on the FOB prices, which amounted to DM 24,321,875.00. Wamco, basing itself on its own pricing proposal, considered that it owed only DM 17,230,375.00, and, accordingly, transferred that sum to Cocobod's account on December 5, 2001.

246. On December 14, 2001, the 2001 Price Agreement was signed, which was a compromise between the proposals of Cocobod, as expressed in the November 7, 2001 document (DM 1,250/tonne for the year 2001 and DM 1,450/tonne for the year 2002) and the proposals of Wamco on November 19, 2010 (DM 1,050/ton for the year 2001 and DM 1,250 for the year 2002), as it provided only the "Cocobod price" starting from the last trimester of 2001, and accepted a compromise between Wamco's and Cocobod's proposals for the major part of 2001.

247. In the 2001 Price Agreement, it was agreed that:

- From 1st January 2001 to 30th September 2001, the price will be DM 1,150 per tonne.
- From 1st October 2001 to 31st December 2001, the price will be DM 1,250 per tonne.
- From 1st January 2002 to 31st December 2002, the price will be DM 1,450 per tonne.

248. This account of the negotiations shows beyond doubt that the Government was not using its "*puissance publique*" to modify the JVA and disregard alleged rights of the investor, but rather that two commercial actors were engaged in "arms-length" negotiations in order to take into account a general policy of Ghana. One party retained the payment of the already delivered beans; the other party retained the delivery of beans to be processed. No act of the Government can be found that would have imposed the FOB price on Wamco, through the actions of Cocobod.

249. The Claimant has referred to several communications with the Minister of Finance during the month of November/December 2001, while the 2001 Price Agreement was being negotiated, in order to support the idea that Cocobod was under the Government's control. However, it is the view of the Tribunal that it was mainly Hamester that tried to involve the Government. In the event, the Government did not interfere with the negotiations, requesting instead to be informed of its outcome. For example, in a letter dated November 28, 2001 from the Ministry of Finance to Mr. Holzäpfel, it is stated without ambiguity that the Minister did not want to intervene in the relations between Wamco and Cocobod:

> "I wish to inform you that, henceforth, you are to deal directly with the Chief Executive of Ghana Cocoa Board on all issues concerning the supply and payment of cocoa delivered to WAMCO by Cocobod and keep me informed."[202]

250. In other words, all the acts of Cocobod in the negotiation and finalising of the 2001 Price Agreement are properly characterised as acts *de jure gestionis*, and as such are not attributable to the Government of Ghana.

2. Was the 2001 Price Agreement signed under Duress?

251. The Tribunal must then address Hamester's claim that the 2001 Price Agreement was signed under duress, implying that it was imposed on Hamester by a sovereign act of the Ghanaian authorities, in disregard of the JVA. To assess this claim, it is important to examine all the surrounding circumstances. While the Tribunal has already analysed what happened before the signing of the 2001 Price Agreement and at the moment of signing, the analysis below focuses more closely on what happened after its adoption.

252. It is relevant to note that, contrary to what had happened with another price agreement, there was no reservation on the part of Wamco when signing the 2001 Price Agreement. There was no wording such as "reservation of rights" or "without prejudice." It is also worth noting that, judged objectively, the 2001 Price Agreement can be considered a good bargain for Wamco, since it successfully negotiated the non-application of FOB pricing for three and a half years – from July 1, 1999 to January 1, 2003. Neither was there any protest from Wamco after that agreement was signed. On the contrary, it appears that, on more than one occasion, Wamco relied on that agreement in its dealings with Cocobod. For example, in a letter dated December 16, 2002,[203] Wamco specifically relied on the 2001 Price

[202] Exh. RC175.
[203] Exh. RC231.

Agreement ("We signed a price agreement for the year 2002 on 14.12.01.") in order to obtain the 34,500 tons of beans that in its view should have been received in 2002 at the price of 1,450 (*i.e.* as agreed upon for that year in the 2001 agreement). Also, by letter dated January 29, 2003,[204] Wamco wrote to Cocobod, copying the Minister of Finance:

> "Based on the Joint-Venture Agreement between Gustav Hamester and Cocobod and the price agreement (Article 2 iii) between WAMCO and Cocobod, dated 14th December 2001, we ask you to supply WAMCO with the still outstanding quantities of 30.000 tons at the agreed price of 741,37 € / ton by 3rd February 2003." (Emphasis added)

253. The Tribunal thus concludes that the evidence does not support Hamester's allegation of duress. There is no evidence showing that Hamester was harassed or coerced by the conduct of Cocobod, and even less so by conduct of the Ghanaian Government. Clearly, there were negotiations between two partners, each of them deploying its bargaining power with the aim of having its views prevail. Hamester put pressure on Wamco by abstaining from paying for the beans which had been delivered for almost a year, and Cocobod threatened to stop delivery of beans, and even stopped delivery for a short period of time. As stated by the Respondent:

> "the impetus to suspend supply of beans, as Mr Sarpong so eloquently put it in the testimony quoted at the beginning of this brief and above, was Wamco's consistent refusal to pay for the beans it had already."[205]

These are strategies regularly employed by economic actors exercising their bargaining power. And it is far from evident that Cocobod had the strongest bargaining power in view of Hamester's majority shareholding in Wamco, as was indeed recognised by Mr. Opferkuch himself during the Hearing, when he stated:

> "I do not know who puts more pressure on which side, Cocobod on us or we on Cocobod."[206]

254. The core controversy here concerns the amount of payments to be made under a contract. The Tribunal notes that, with regard to an analogous situation of payments under a contract, an ECT tribunal in *Amto v. Ukraine* found that:

> "(t)he payment or non-payment by a state entity of contractual debts owed to a service provider involves no exercise of sovereign authority or *puissance publique,* and cannot be attributed to the Ukraine."[207]

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[204] Exh. RC246.
[205] Respondent's Post-Hearing Brief, para. 64.
[206] Hearing Transcripts, Day 2, pp. 130-31, lines 18-25, 1.

255. In conclusion, the Tribunal finds that, in relation to the adoption of the 2001 Price Agreement, Cocobod did not perform any act in the exercise of governmental functions, which could be attributed to Ghana under Article 5 of the ILC Articles.

256. Moreover, although there was a general policy in favour of FOB prices, the Tribunal was provided with no evidence of any directive or instruction of the Government, by which Cocobod was obliged unilaterally to impose a price upon Wamco, using, among other means, the pressure of the cessation of bean delivery. The long negotiations that took place over several years demonstrates the contrary. Likewise, no direct Governmental control has been demonstrated to the satisfaction of the Tribunal, whether in respect of the different proposals presented in the course of the negotiations, or the decision to stop the delivery of beans in December 2001. It follows that the different acts complained of in relation to the 2001 Price Agreement cannot be attributed to Ghana under Article 8 of the ILC Articles.

B. The 2002 non-delivery of beans claim

1. The Claimant's position

257. According to the Claimant, Article 7 of the JVA expressly entitled Wamco "at all times [to] be supplied with all its requirements of cocoa beans to enable it to operate at its full capacity." The Claimant considers that this contractual right has been violated and has advanced a claim alleging a shortfall of 29,531 tonnes in cocoa bean deliveries in 2002.

258. On the Claimant's case, this shortfall did not result from a shortage of beans in Ghana, but from a new policy of the State to treat all local processors equally. Mr. Sarpong made it very clear during the Hearing that it was Ghana's policy to treat all local processors, including Wamco, "*equally and equitably*."[208] However, the Claimant considers that:

> "(t)reating Wamco the same as other domestic processors necessarily meant acting as if Article 7 JVA did not exist, this is precisely what Cocobod arbitrarily did."[209]

Hamester added:

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[207] *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, March 26, 2008, para. 107.
[208] Hearing Transcripts, Day 3, p. 201, line 12, and Day 3, p. 211, line 7.
[209] Claimant's Post Hearing Brief, para. 16.

> "that Sarpong may have considered that it was more equitable to put all domestic processors on the same footing as regards cocoa supply and pricing, is immaterial to the questions whether, in driving that policy through, the JVA was breached and Hamester's Treaty rights infringed."[210]

2. The Respondent's position

259. As far as the non-delivery claim is concerned, the Respondent's defence first addressed merits, before dealing with the question of jurisdiction. On the merits, it is the Respondent's case that no obligation of delivery that was capable of being violated actually existed. According to its analysis, the obligation to deliver cocoa beans only related to Wamco I. As a consequence, the Respondent had no obligation to deliver the 70,000 tonnes, which had been requested by Wamco for the three factories. Moreover, in the Respondent's view, even if all three factories were taken into consideration, "the total volume of beans processed annually on average by all three factories is only 51,607 tonnes"[211] and the request was thus greatly exaggerated.

260. Even if a contractual obligation to deliver beans in the amount requested existed, according to the ROG, there were objective factors that meant that this obligation could not be fulfilled:

> "The GCB informed the cocoa processing factories in Ghana of an impending shortage facing the industry at a meeting on 7 March 2002, so that appropriate precautionary steps could be taken by them. The GCB's advice was that they should reduce their throughput or import beans from outside Ghana. At a Wamco management meeting in June 2002, Mr Holzäpfel acknowledged the shortage and the advice Wamco had been given in this regard, commenting that it would have to take those problems into consideration and plan ahead."[212]

261. In other words, there is sufficient evidence that "(t)he failure to supply in 2002 was caused by a country-wide shortage of cocoa beans."[213] In its Post-hearing Brief, the Respondent further qualified the situation as resulting from "an Act of God – Black Pod disease …"

262. As to the jurisdictional question, the Government states:

> "that even if the failure to supply 29,531 tonnes of cocoa beans was a breach of the JVA, it falls outside the Tribunal's jurisdiction. First, the GCB's failure to supply cocoa beans is clearly not attributable to the Government. Alternatively, purely contractual claims of this

[210] Claimant's Post Hearing Brief, para. 17.
[211] Respondent's Counter-Memorial, para. 270.
[212] Respondent's Counter-Memorial, para. 100.
[213] Respondent's Counter-Memorial, para. 305.

> nature simply do not amount to breaches of any of the provisions of the GGBIT which Hamester has invoked."[214]

3. The Tribunal's analysis

263. The Tribunal notes that whether or not Wamco had a right to receive all the beans that it required is disputed. Article 7 of the JVA provides in relation to this issue:

> "The Factory shall at all times be supplied with all its requirements of cocoa beans to enable it to operate at its full capacity."

264. *Prima facie*, it appears that Hamester had a right to receive the beans that it requested. This assumption finds some support in a proposal made by Cocobod, in a facsimile sent on July 10, 2000 (mentioned earlier), suggesting certain changes to the JVA:

> "5. Article 7
>
> In view of change in cocoa policy, COCOBOD's original proposal is revised as follows:
>
> …
>
> ii. Obligation to supply at all times all WAMCO's requirements of cocoa beans should be deleted."

265. The Tribunal considers that certain comments are appropriate here. First, on a reasonable interpretation, the parties to the JVA cannot have contemplated that Wamco would be free to request any quantity of beans. On a reasonable construction of the terms used, any request had to be related, objectively, to the factory's production capacity. The actual producing capacities were in issue in this dispute, as was the scope of Article 7. As to the latter issue, the Respondent contended that Article 7 only refers to Wamco I, relying on the reference to the "Factory" which could only have been Wamco I at the moment of the signing of the JVA. The Claimant, on the other hand, contended that Article 7 refers to all three factories, Wamco I, Wamco II, and Wamco III, basing itself on Article 1.2 of the JVA, which provides that "(t)he objects of the Company [Wamco] may be extended and expanded into other operational activities by decision of the Company's Board of Directors."

266. However, the Tribunal does not consider that it needs to resolve these controversies. This is so because, in the Tribunal's view, even if the shortage of beans could have amounted to a violation of Article 7 of the JVA, this would be a violation of a purely contractual right. The Tribunal considers that the supply of cocoa beans is not an act in the exercise of

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[214] Respondent's Counter-Memorial, para. 300.

governmental authority, and therefore, such act of Cocobod cannot be attributed to the State. In other words, all the acts of Cocobod, a public entity as described in Article 5 of the ILC Articles, dealing with the shortage of beans during the year 2002 are acts *de jure gestionis* and as such not attributable to the Government of Ghana.

267. Moreover, although there was a general policy of equitable distribution of the cocoa beans, the Tribunal has found no evidence in the record showing any instruction or direction from the Government or control over the representatives of Cocobod, directing Cocobod to deprive Wamco of the beans it had required at the beginning of the year 2002. It follows that there is no basis to attribute to the ROG the non-delivery of the cocoa beans required by Wamco under Article 8 of the ILC Articles.

268. The Tribunal's conclusions on this issue, albeit based upon the specific facts of this case and the specific terms of the BIT, accords with the general observation of the Respondent that:

> "(d)isputes about non-delivery of agricultural commodities, like other simple sale of goods claims, are quintessentially disputes which should be resolved in municipal courts or by commodity arbitration bodies. They are not the sort of dispute with which an Arbitral Tribunal constituted under the ICSID Convention or a bilateral investment treaty should be burdened."[215]

C. The 2003 expropriation claim

1. The Claimant's position

269. It is the the Claimant's case that it has been deprived of its rights of management of Wamco by the different actions of the minority shareholder's representative, Dr. Ohene. After describing the events that took place at the beginning of 2003, the Claimant states in its Memorial that:

> "(t)he state of affairs set out above has continued to the present day. The Claimant's control over its investment in WAMCO, its rights of management through nominated Directors of WAMCO as per the JV Agreement and all other rights under the JV Agreement have effectively and/or actually been denied and lost as a result of the Respondent's actions and omissions."[216]

[215] Respondent's Counter-Memorial, para. 301.
[216] Claimant's Memorial, para. 149.

270. The main expropriation claim is related to the events that took place at the beginning of 2003, and concerns what the Claimant describes in its Post-Hearing Brief as "(t)he impairment and expropriation of Hamester's management rights over Wamco under the JVA." This is more precisely described in the following manner:

> "The JVA expressly gave Hamester a majority shareholding in Wamco and thereby management control. The management control was two fold. Firstly, under Article 4.3 (b) of the JVA Hamester's appointed Managing Director shall have 'responsibility for the day to day management of the Company to enable it to perform as a viable commercial enterprise.' Secondly, under Article 4.11 of the JVA, decisions by the Board of Directors required a simple majority; Hamester's appointed directors formed a majority under Article 4.1 of the JVA."[217]

271. The Claimant's thesis is that it was deprived of its management rights in early 2003, and it submits that:

> "Cocobod's strategy was now to make Wamco its effective puppet and to emasculate Hamester."[218]

2. The Respondent's position

272. In its Counter-Memorial, the Respondent objects to the allegation of expropriation with respect to the rights to manage Wamco. On the Respondent's case, the expropriation claim is without merit,[219] as the Claimant in fact abandoned the joint-venture, before any of the acts complained of. It insists on the following events:

> "Hamester's voluntary and wrongful repudiation of the JVA and its abandonment of its management responsibilities in relation to Wamco in early 2003 because Mr Opferkuch found that he could no longer plunder Wamco and hoped to make higher profits in the European chocolate market."[220]

273. The Claimant does not deny that (as asserted by the Respondent):

> "(o)n 8 March 2003, Mr Holzäpfel left Ghana without notice to the GCB or Wamco's Board and without the GCB or Wamco's Board ever having been given an explanation for his sudden departure. Despite Dr. Ohene's express request that Mr. Holzäpfel return to his post immediately, Mr. Holzäpfel never returned to Ghana."[221]

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[217] Claimant's Post-Hearing Brief, para. 47.
[218] Claimant's Post-Hearing Brief, para. 90.
[219] Respondent's Counter-Memorial, para. 164.
[220] Respondent's Counter-Memorial, para. 1.
[221] Respondent's Counter-Memorial, para. 123.

274. This issue goes to the question of the legality of Cocobod's and the Government's actions in 2003. But even if a deprivation had occurred, which the Respondent denies, its main contention is that most of the acts that allegedly resulted in Hamester's losses are not attributable to the ROG, and that concerning the "limited allegations that the Government itself was involved in the expropriation … these are trivial."[222] These arguments, in the Respondent's view, go to the Tribunal's jurisdiction. Having concluded that the acts are not attributable, the Respondent, however, returns to the question of the legality of the acts complained of, stating that:

> "the Government clearly has not directly expropriated Hamester's investment. Hamester retains ownership of its shares in Wamco."[223]

275. Finally, in assessing potential damages for the expropriation claim, the Respondent addresses what it characterises as unlawful and bad faith acts committed by Hamester, which in its view have to be taken into account to annul any possible compensation:

> "Even if Hamester's investment in Wamco and the JVA has been expropriated and even if the expropriatory acts are attributable to the Ghanaian Government under the ILC Articles, Hamester's Expropriation Claim should still be dismissed in its entirety because the value of Hamester's investment from Hamester's perspective is *negative*. This conclusion results from several factors, which are explained in turn below."[224]

276. The different factors mentioned are essentially that Hamester's resale profits were unlawful; that the sale of the Neuhaus shares was unacceptable; and that Hamester was unduly charging sales and marketing fees to Wamco without rendering any commercial service in exchange.

3. The Tribunal's analysis

277. The Tribunal deals here only with the question of attribution, leaving the question of the legality of the acts complained of for the next Section.

278. It is to be noted, at the outset, that, in its initial presentation of its case under the title "2003 – Interference with and Expropriation of Claimant's Management of WAMCO," which set out its overall thesis on this issue, the Claimant made no reference whatsoever to

[222] Respondent's Counter-Memorial, para. 174.
[223] Respondent's Counter-Memorial, para. 221.
[224] Respondent's Counter-Memorial, para. 227.

any action of the Government. Instead, it only advanced a complaint about the behaviour of Cocobod and its representative, which was said to be a violation of the contract:

> "From the beginning of 2003, following Cocobod's failures to make supplies as per the JV Agreement, *Cocobod* acting in concert with its representative on the WAMCO board of directors *Dr Sammy Ohene*, in breach of the WAMCO Regulations and in breach of the JV Agreement progressively impaired and ultimately expropriated the Claimant's management of WAMCO and its proper use, management and investment (sic) of its investment therein."[225] (Emphasis added)

279. Of the different actions which the Claimant submits resulted in its expropriation, two categories may be distinguished:

- the first category comprises different actions by the Chairman of Wamco's Board of Director, Dr. Ohene;

- the second category comprises acts performed by different Ghanaian authorities.

280. As previously mentioned, the following analysis is limited to the question of attribution of these different acts to the ROG.

1. Acts of Wamco's Chairman

281. The issue here is whether these different acts can be attributed to Ghana, as acts committed in the exercise of governmental authority, or whether they are properly characterised as acts of a commercial nature (and so not attributable). As per the analysis of other elements of the Claimant's claim, in so far as acts are not considered attributable under Article 5 of the ILC Articles, the position under Article 8 of the ILC Articles must then be assessed.

282. The Claimant complains of a series of acts, which allegedly deprived it of its investment in early 2003. It is to be recalled that Dr. Ohene was one of Cocobod's representatives on Wamco's Board of Directors, and the Chairman of Wamco's Board of Directors since June 2002. Among the acts complained of are:

- A letter dated 16 January 2003, written by Dr. Ohene to Hamester complaining about the latter's violations of the JVA;

[225] Claimant's Memorial, para. 126.

- A letter dated January 30, 2003 from Dr. Ohene to Mr. Clement, Wamco's General Manager of Operations, to instruct him to suspend the exports by Wamco effective January 31, 2003;

- A letter dated February 9, 2003 in which Dr. Ohene requested Hamester to give formal notice of withdrawal, and thereby render official Hamester's desire to withdraw as previously expressed in a letter of January 14, 2003;

- A letter dated March 9, 2009 from Dr. Ohene to Mr. Clement, asking him to continue production, despite the order Mr. Holzäpfel had given the day before he left Ghana for Germany to stop all production until further notice;

- A letter dated March 11, 2009 from Dr. Ohene to Mr. Clement, asking him to continue production, despite a new order issued by Mr. Holzäpfel (by letter from Germany the day before) to cease all activities;

- A letter dated April 22, 2003, in which Cocobod refused an interim agreement proposed by Hamester on April 9 for the interim management of Wamco;

- A letter dated October 8, 2009 from Dr. Ohene appointing Mr. Clement as Managing Director of Wamco.

283. To the Tribunal, these letters are clearly part of a general corporate battle, between the shareholders of Wamco. On one side was the majority shareholder, Hamester, which expressed a desire to withdraw from the company and whose representative (the Managing Director of Wamco) had, at a certain point in time, physically abandoned his post, and had given orders to shut down Wamco. On the other side was the minority shareholder, Cocobod, which was trying to keep the business going. Not one of these letters contains an act of *puissance publique* which could be attributed to the State. All of these letters could have been written by a frustrated private minority shareholder who was compelled to run the company, faced with the withdrawal of the majority shareholder. Corporate life is replete with such examples of shareholder disputes. The position is akin to that in *Jan de Nul*, where it was held that certain acts of SCA complained of by the investor could not be attributed to Egypt on the basis that:

"(a)ny private contract partner could have acted in the same way."[226]

284. The Tribunal concludes that the letters written by representatives of Cocobod, a public entity as described in Article 5 of the ILC Articles, constitute purely commercial acts, which cannot therefore be attributed to the ROG.

285. Further, the Tribunal has found no evidence in the record of any instruction or direction from the Government to write the letters in question, or any control over their content or even their existence. The acts, therefore, cannot be attributed to Ghana under Article 8 of the ILC Articles.

2. Acts of Ghanaian authorities

286. The Tribunal has had some difficulty following the claims brought by Hamester against the Government itself, as distinct from those brought against Cocobod. In its Post-Hearing Brief, the Claimant points to three actions of organs of the Government:

> "Hamester's further alternative case is that the acts complained of are clearly such sovereign acts made by Ghana and for the perceived interests of Ghana rather than 'purely' commercial decisions made by Cocobod/Ghana acting as a commercial actor:
>
> (i) A principled decision to issue a directive that Cocobod could no longer offer any domestic processors discounts from world market prices and to not allow any negotiation in this regard;
>
> (ii) A principled decision to issue a directive that domestic processors could share bean supply in proportion to their market share and to therefore ignore the supply guarantee to Wamco under Article 7 JVA;
>
> (iii) A decision by the Government not only to get involved in the dispute between Hamester and Cocobod regarding Wamco but to actively side with Cocobod and arbitrarily ban export of Wamco's products and to keep this ban in place until Cocobod's representatives asked for it to be lifted."[227]

287. As the Tribunal understands it, the Claimant's complaint centres on the Government's general pricing policy (FOB prices with no discount); the Government's policy of bean distribution, which was to ensure that Wamco's share of the total cocoa processing capacity in Ghana was proportional to other local processing plants; and, finally, the Government's involvement at the beginning of 2003 and its decision to ban exports of Wamco's products.

288. It is to be noted that the general policy on pricing and the general policy on distribution are not said by the Claimant to have been imposed through acts of the Ghanaian

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[226] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, November 6, 2008, para. 170.

[227] Claimant's Post-Hearing Brief, para. 97. References to documents omitted.

authorities directly upon Wamco. Rather, they are the subject of complaint as being the genesis of "directives" addressed to Cocobod. However, the Tribunal has already come to the conclusion that no general pricing policy was imposed by the Government on Wamco through Cocobod, and that no general policy of the Government imposed upon Cocobod the policy of non-delivery of beans for the year 2002. It therefore only remains for the Tribunal to examine whether the Government's involvement at the beginning of the year 2003 brought about the expropriation of Hamester's rights under the JVA.

289. Before entering into this examination, it is to be recalled that certain other acts were also articulated by the Claimant during the course of the proceedings as being part of an expropriatory scheme. In particular, in its Memorial, it was suggested by the Claimant that the Respondent had used its police to threaten Mr. Holzäpfel, inducing him to leave the country.[228] In the same submission, Hamester also stated that the Respondent had been instructing directly officers of Wamco.

290. It is not entirely clear whether all these allegations are still pursued, but in any event each has been carefully considered by the Tribunal.

291. The only acts that the Tribunal has found to be attributable to the Republic of Ghana are first, the police investigation and the alleged harassment of Mr. Holzäpfel; second, the alleged acts of a Ghanaian Minister during an April 14, 2003 meeting; and third, the export ban imposed by the Government.

- *The police investigation*

292. The Claimant complains that the ROG launched a police investigation against Mr. Holzäpfel, as part of a general scheme whose purpose was to expropriate the Claimant's investment. The police force is clearly a State organ and the acts performed during a police investigation are therefore attributable to the State. The question of the legality of such investigation is analysed in the next Section.

- *The meeting with the Ministry of Finance of April 14, 2003*

293. As with the police, State Ministers are clearly organs of the State and, therefore, all their acts are attributable to the State. The question of whether an illegal act has been

[228] Claimant's Memorial, para. 140.

committed by a Minister in instructing a representative of Cocobod to violate the BIT is analysed in the next Section.

- *The export ban of February 14, 2003*

294. Ghana does not deny that, upon Dr. Ohene's request, it sent a letter on February 14, 2003 to the Ghanaian Customs Service (CEPS) ordering them to prevent all of Wamco's products to be shipped by Hamester until further notice:

> "We refer to a letter dated 10th February from the Chairman of the Board of Directors of West African Mills Company Limited (WAMCO) asking for the suspension of any planned shipments by the company.
>
> Hamester, the joint partners in the company, has notified COCOBOD of their intention to withdraw from the Joint Venture Agreement (JVA). In view of Hamester's outstanding obligations to COCOBOD and to WAMCO, the Chairman of the company wrote to the Management of WAMCO to suspend all shipments after 31st January, 2003 pending the resolution of these matters. In the interim, a temporary agent was to be appointed to market and to ship the products on behalf of the company.
>
> On the basis of the foregoing, I am directed by the Hon Minister of Finance to inform you that you are not to allow any shipment of cocoa in the name of WAMCO out of the country except otherwise directed.
>
> Please treat as urgent."

295. This letter sent by a Minister of the Ghanaian Government to the Custom Services is clearly an act attributable to the Ghanaian State. The question whether this ban was an expropriatory act as claimed by Hamester is dealt with in the next Section.

X. THE INTERNATIONAL LEGALITY OF THE ACTS ATTRIBUTED TO THE STATE

296. The question addressed here is whether any of the acts which have been found attributable to Ghana constitute a violation of the BIT.

A. The police investigation and the alleged harassment of Mr. Holzäpfel

297. There is no evidence that this investigation was contrary to any international duty of Ghana. A State may obviously exercise its sovereign powers to investigate and prosecute criminal actions. According to the Respondent, this investigation was based on objective facts:

> "Messrs Holzäpfel and Opferkuch have given incoherent and patently dishonest explanations as to why they caused false receipts for '*consultancy services*' and "*public relations*" to be issued to Wamco. The criminal proceeding was entirely justified."[229]

298. Considering certain documents submitted to the Tribunal which were at best ambiguous, the criminal proceedings do not appear, *prima facie*, to have lacked a foundation. Moreover, the question of the legality of the criminal proceedings is in any event irrelevant because Mr. Holzäpfel stated himself that "*the matter was not pursued by the police.*"[230]

299. Further, the Tribunal finds that the allegations concerning physical threats to his life and his family from the then Chief Executive of Cocobod and the employees of Wamco were completely unsubstantiated. Moreover, the Tribunal does not see how acts of disgruntled employees who had not been paid, if indeed such acts occurred, could be attributed to the Government of Ghana.

300. The Tribunal concludes that, although police investigations are undoubtedly attributable to the Government, the investigation of Mr. Holzäpfel's conduct cannot, in the circumstances of this case, be analysed as contributing to an alleged expropriation of Hamester, in violation of the BIT.

B. The meeting with the Ministry of Finance of April 14, 2003

301. In its Memorial, the Claimant refers to a meeting with the Ministry of Finance that is said to have entailed the giving of direct instructions by the Minister to an officer of Wamco ("the Minister"):

> "The minutes of a meeting between the General Manager Operations at WAMCO and the Finance Minister on 14 April 2003 makes clear that the Respondent was now directly instructing the Operations Minister (sic) of WAMCO, without proper approval from the Board of Directors."[231]

302. It is not clear whether the Claimant is implying that this instruction is in itself an act of the Government that could be contrary to its international obligations under the BIT, or that the existence of the instruction renders the acts done in performance of such instruction attributable under Article 8 of the ILC Articles. Be that as it may, the explanation given by

[229] Respondent's Rejoinder, para. 90.2.
[230] Holzäpfel First Witness Statement, para. 44.
[231] Claimant's Memorial, para. 145.

the Respondent in the Counter-Memorial contradicts the Claimant's characterisation of this meeting:

> "As Mr Clement explains in his witness statement, the meeting minutes cited by Hamester relate to a meeting with the Minister requested, and attended, by various Ghanaian cocoa processing companies (including Barry Callebaut and CPC Tema) for the purpose of requesting discounts on cocoa beans supplied to them. The Minister declined to grant discounts. The minutes then record what was said at an internal Wamco meeting as to how Wamco could improve its financial performance. In no way did the Minister of Finance personally take control of Wamco. Nor did he give instructions to Mr Clement at any time."[232]

303. The Tribunal has carefully examined the "Minutes of the meeting held on 14th April 2003 at the Office of the GM (OPS) on the viability of cocoa processing in Ghana and WAMCO's position on maximising of production"[233] and has come to the conclusion that the inferences drawn by the Claimant from this meeting are totally unwarranted. The meeting with the Minister was a general meeting with three cocoa processing companies, with the aim of reviewing the pricing policies of cocoa beans sales. The companies were asking for a premium on beans to be waived for local producers, and the Government said that it would give the necessary consideration to this proposal. The companies also asked for discounts, a proposal that the Finance Minister rejected, as prices were dictated by market forces. The Minutes of the meeting state that:

> "(t)he Minister then *advised* the processing factories on the need to (i) process more of low-grade cocoa beans and (ii) increase the grinding capacities of their factories." (Emphasis added).

304. It is difficult to read into such language the imposition of instructions on Cocobod, or a direct instruction by the Minister that resulted in the expropriation of Hamester's management rights.

305. The Tribunal concludes that the Minutes of the meeting of April 14, 2003 do not reveal any act that could have resulted in the expropriation of Hamester's management rights or control of Wamco, in violation of the BIT.

E. The export ban of February 14, 2003

306. Among the acts complained of, most emphasis has been put on the export ban enacted by the Minister of Finance. The Claimant requests the Tribunal:

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[232] Respondent's Counter-Memorial, para. 174.3.
[233] Exh. C53.

> "to find, that the export ban had both an expropriatory effect and an expropriatory intention."[234]

307. The export ban is clearly an act of the State that interferes with the parties' commercial relationship. The proper mechanism to avoid abuse by the investor would probably have been to have recourse to Ghanaian courts and not direct action by the Government, intervening in a commercial dispute. The question raised by this intervention is in fact two-fold: whether this action could be a proof of such a strong governmental involvement that it results in an attribution of the acts of Cocobod to the Government; and whether this interference by the export ban with the rights of the foreign investor is of such a magnitude that it qualifies as a breach of any of the substantive protection clauses of the BIT, and more precisely of the prohibition on indirect expropriation. The Tribunal considers the answers to these two questions to be in the negative, as will be explained.

308. The Tribunal is not convinced that the existence of the export ban, being an isolated action of the Governement, can be an indicia of an overall control of the Government over Cocobod, and sees therefore no reason to modify the general conclusion reached so far to the effect that there is no convincing evidence of an overwhelming control of the Government over Cocobod.

309. In order to answer the question whether the export ban has resulted in an expropriation of the Claimant, the Tribunal will look more closely at the scope and extent of such measure. Without entering into sophisticated discussions on the contours of indirect expropriation, it is sufficient for the Tribunal to state its conclusion that the export ban was an act of protection of the joint-venture, in view of the fact that Hamester had already made known its desire to withdraw, and considering that there was a legitimate fear that before withdrawal, as much value as possible would be taken out of the country by the foreign partner. More importantly, the ban was a *temporary* decision, which was only in force for six weeks. The Tribunal agrees with the Respondent that "(i)t is impossible for Hamester to base its Expropriation Claim on these temporary export restrictions."[235] Moreover, it was only a *partial ban*, as a temporary agent, CMC, Cocobod's trading company, was allowed to market and export Wamco's products. As stated by the Respondent:

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[234] Claimant's Post-Hearing Brief, para. 68.
[235] Respondent's Rejoinder, para. 90.1.

> "(t)he only effect of the export restrictions was to prevent Hamester from wrongfully appropriating Wamco's products without payment – as Hamester had done since February 2002."[236]

310. It is the Tribunal's view that Hamester had no right itself under the JVA to market the products, and that it was not denied its right to 60% of the benefits made by Wamco during the period of the so-called "ban."

311. May it be added that this measure intervened at a time when the Claimant had already clearly manifested its intention to abandon the joint-venture, and had already taken steps to implement this intention. It was precisely in order to avoid negative effects on Wamco that the ban was introduced.

312. The Tribunal concludes that, although the decision to impose a temporary and partial ban on the exports of Wamco is attributable to the Government, in the circumstances of this case, it cannot be characterised as an act of expropriation in violation of Article 4(2) of the BIT, which prohibits expropriation or measures equivalent to expropriation.

XI. FURTHER ANALYSIS: THE INTERNATIONAL LEGALITY OF THE ACTS NON-ATTRIBUTABLE TO THE STATE

A. The Tribunal's approach

313. Naturally, if an act is considered attributable to the State, the Tribunal must then determine whether such an act is illegal and entails the international responsibility of the State (as this has just been done in the preceding Section). If the Tribunal finds that an act is not attributable to the State, this should be the end of the matter. However, considering the parties' detailed submissions on the existence of different violations of the JVA and/or the BIT, the Tribunal considers it appropriate to expand its analysis, in order to address the position on the assumption (contrary to its conclusions) that all the acts complained of could be considered attributable to the Respondent.

314. This is the same approach as that taken in *Plama*, where the Tribunal helpfully explained why it had decided to proceed in this way:

[236] Respondent's Rejoinder, para. 90.1.

> "The Parties have extensively documented their allegations; numerous exhibits, witness statements and expert reports have been submitted by both Parties. The factual and legal arguments have been discussed in detail during the Final Hearing, in which a number of witnesses and experts were also examined by the Parties and the arbitrators. The Tribunal has therefore decided that, in acknowledgement of the Parties efforts, it will consider their further allegations on the merits. This consideration will lead to the conclusion that, even if the Claimant would have had the benefit of the substantive protection of the ECT, Claimant's claims on the merits would have failed."[237]

315. As set out below, the Tribunal concludes that even if the acts which were not found attributable to the Respondent could somehow be considered so attributable – for example if they are assumed to have been effected under an instruction or under the control of the State – no international responsibility of the ROG could have arisen in any event from these acts, because of *their very nature*.

316. In continuing its analysis in this way, however, the Tribunal has not followed Ghana's suggestion in its Post-Hearing Brief that it deal with every aspect of the Claimant's conduct in this case:

> "The Government feels strongly that the clearest possible message must be sent to Mr Opferkuch and Hamester that their conduct cannot be tolerated and will not be endorsed by the international investment community. That is why the Government was willing to pay Hamester's share of the advance on costs for this arbitration when ICSID invited it to do so.
>
> The Government thus contends that, even though Hamester's claims fail at every jurisdictional and substantive hurdle, this Tribunal should undertake a full accounting of Mr Opferkuch's misdeeds."[238]

317. Rather, the Tribunal will examine whether, on the facts of the case, there could have been international responsibility on the part of the ROG towards Hamester for the different claims raised as to the JVA's performance. It is only if any of the acts complained of raises or could have raised an international responsibility of the ROG, that it then becomes relevant to analyse in detail the investor's behaviour and the accusations of fraud, in order to determine whether the investor has claimed with clean hands, and whether this could have consequences on any relief.

318. The Tribunal recalls that the Claimant asserts three main claims (as set out earlier):

- the 2001 Price Agreement claim;

- the 2002 Shortage in delivery of beans claim;

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[237] *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24 (ECT), Award, August 27, 2008, para. 147. The issue of jurisdiction was dealt with from page 21 to 43, the discussion of the merits from page 43 to page 92.

[238] Respondent's Post-Hearing Brief, paras. 5-6.

- the 2003 Expropriation claim.

319. Each of these three categories of claim comprises allegations of breach of the JVA. However, the Claimant has presented no contract claims as such. Instead, it pursues claims based on the contract in two ways.

320. First, the Claimant asserts that these apparent *contract claims* have been *transformed,* in its view, into treaty claims by virtue of the "umbrella clause" contained in Article 9(2) of the BIT.

321. Secondly (and in the alternative), the exact same claims are also analysed as different so-called "free-standing breaches of Hamester's Treaty rights."[239] In particular:

(i) The claims are presented as a breach of the FET standard:

> "Further and/or in the alternative, the matters alleged above constitute a failure by the Respondent in breach of Article 2(1) of the Treaty to accord fair and equitable treatment to the Claimant's investment."[240]

(ii) The same claims are also asserted as a violation of Article 2(2) of the BIT, prohibiting arbitrary or discriminatory treatment; Article 3(1) prohibiting less favourable treatment; and Article 4(1) guaranteeing full protection and security (FPS).

(iii) The same claims are also been presented as violations of Articles 4(2) and 4(3) of the BIT, on expropriation.

322. At the outset, the Tribunal makes clear that it only has jurisdiction over treaty claims. This remark is important, given the focus of the parties – and thus of the Tribunal – upon contract issues. In other words, given the nature of the parties' submissions, the Tribunal has to examine alleged violations of the JVA, in order to assess whether there could have been violations of the BIT. In doing so, however, it adopts a similar approach to the one followed in *Bayindir v. Pakistan*, where the tribunal recalled that:

> "its jurisdiction covers treaty and not contract claims. This does not mean that it cannot consider contract matters. It can and must do so to the extent necessary to rule on the treaty claims. It takes contract matters, including the contract's governing municipal law, into

[239] Claimant's Post-Hearing Brief, para. 93.
[240] Claimant's Memorial, para. 155.

> account as facts as far as they are relevant to the outcome of the treaty claims. Doing so, it exercises treaty not contract jurisdiction."[241]

323. The Tribunal will first deal briefly with the allegations mentioned in paragraph 318(ii) above. Considering that, as far as alleged arbitrary or discriminatory treatment is concerned, the Claimant has not substantiated in which way it was arbitrarily or discriminatorily treated; that as far as less favourable treatment is concerned, the Claimant has not explained how the ROG has treated its own nationals, or nationals of any other State more favourably than the Claimant; and as far as the FPS violation is concerned, the Claimant's allegations remain completely unparticularised, the Tribunal, accordingly, considers that the Claimant has failed to establish its case under this head, and that these claims would therefore have been dismissed in any event, even if the acts complained of had been found attributable to Ghana.

324. It remains, then, for the Tribunal to determine whether the acts complained of – if attributed to the Respondent – could have violated the other standards of protection of the BIT, *i.e.* the prohibition on expropriation without compensation; the FET standard; and the so-called "umbrella clause" invoked by the Claimant.

B. Contract claims and treaty claims

325. The remaining issues raise the question as to the manner in which commercial acts, if attributed to the State, and if proven, should be dealt with. Here more precision is needed as to the kinds of acts that constitute the "commercial acts" of a State organ or a public entity.

326. The conduct of Cocobod that is the subject of complaint by Hamester comprises alleged acts and omissions as a contracting party, in the performance of the JVA, and acts and omissions as shareholder in the functioning of a company. All such acts and omissions boil down to alleged violations of the JVA. Given that the Claimant has advanced all of these claims as "treaty claims," as opposed to "contract claims," the question then is the following: can the contractual behaviour of Cocobod, assuming it could have been attributed to the State, engage the State's international responsibility under the investment treaty?

327. ICSID tribunals have given different answers to the question whether contractual behaviour attributed to the State according to international rules of attribution can be, either

[241] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29 (Turkey/Pakistan BIT), Award, August 27, 2009, para. 135.

ipso facto or under certain circumstances, not only a contract claim but also a violation of the BIT, and hence a "treaty claim." This Tribunal will now analyse this question.

1. As a general rule, a violation of a contract is not a violation of international law

328. The starting premise is that only the State as a sovereign can be in violation of its international obligations. This principle has been re-stated by many ICSID tribunals. A few pertinent citations are given by way of select examples, in chronological order:

> *Waste Management v. Mexico*:
>
> "In the Tribunal's view, an enterprise is not expropriated just because its debts are not paid or other contractual obligations towards it are breached. There was no outright repudiation of the transaction in the present case, and if the City entered into the Concession Agreement on the basis of an over-optimistic assessment of the possibilities, so did Acaverde. It is not the function of Article 1110 to compensate for failed business ventures, absent arbitrary intervention by the State amounting to a virtual taking or sterilising of the enterprise."[242]
>
> *Joy Machinery Limited v. Egypt*:
>
> "A basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some forms of State interference with the operation of the contract involved."[243]
>
> *Impregilo v. Pakistan*:
>
> "Only the State in the exercise of its sovereign authority ("*puissance publique*"), and not as a contracting party, may breach the obligations assumed under the BIT. In other words, the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behaviour of the Host State acting in breach of the obligations it had assumed under the treaty."[244]
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> *Noble Venture v. Romania*:

[242] *Waste Management, Inc. v. United Mexican States* (Number 2), ICSID Case No. ARB(AF)/00/3, Final Award, April 30, 2004, para. 160.

[243] *Joy Mining Machinery Limited v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, August 6, 2004, para. 72.

[244] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3 (Italy/Pakistan BIT), Decision on Jurisdiction, April 22, 2005, para. 260, citing, *inter alia*, the review of jurisprudence in Stephen M. Schwebel "*Justice in International Law*" (Grotius / CUP), Chapter 26 : "*On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law*" : "… there is more than doctrinal authority in support of the conclusion that, while mere breach by a State of a contract with an alien (whose proper law is not international law) is not a violation of international law, a 'non-commercial' act of a State contrary to such a contract may be. That is to say, the breach of such a contract by a State in ordinary commercial intercourse is not, in the predominant view, a violation of international law, but the use of the sovereign authority of a State, contrary to the expectations of the parties, to abrogate or violate a contract with an alien, is a violation of international law. … when the State employs its legislative or administrative or executive authority as only a State can employ governmental authority to undo the fundamental expectation on the basis of which parties characteristically contract – performance, not non-performance – then it engages its international responsibility.".

> "The Tribunal recalls the well established rule of general international law that in normal circumstances *per se* a breach of a contract by the State does not give rise to direct international responsibility on the part of the State. This derives from the clear distinction between municipal law on the one hand and international law on the other, two separate legal systems."[245]

Azurix v. Argentina:

> "The Tribunal agrees that contractual breaches by a State party or one of its instrumentalities would not normally constitute expropriation. Whether one or series of such breaches can be considered to be measures tantamount to expropriation will depend on whether the State or its instrumentality has breached the contract in the exercise of its sovereign authority, or as a party to a contract."[246]

329. As noted earlier in this Award, almost all of the allegations which make up Hamester's claim of breach of the BIT, whether relating to allegations of arbitrary or discriminatory treatment; unfair and inequitable treatment; or expropriation, concern the conduct of Cocobod, in relation to Article 7 of the JVA. This conduct was contractual and not sovereign in nature. It is the Tribunal's view that Hamester's so-called "treaty claims," however skilfully repackaged, are inextricably linked to the JVA and are in reality contract claims. To use the language of the award in the *Vivendi* Annulment case, "the essential basis" of Hamester's claims is purely contractual.[247]

330. In order for a violation of the contract to constitute a violation of the BIT, there must be an act taken by the State or a separate entity entailing the use of governmental powers. To this end, the Tribunal agrees entirely with the statement in *Bayindir* that:

> "because a treaty breach is different from a contract violation, the Tribunal considers that the Claimant must establish a breach different in nature from a simple contract violation, in other words one which the State commits in the exercise of its sovereign power."[248]

331. It may be that there were violations of the JVA committed by the Claimant, and it may be that Cocobod violated the JVA in failing or refusing to deliver the requested amount of cocoa beans, but these are contractual matters and not treaty matters. As a result, the commercial acts of Cocobod, even if they had been attributable to the Respondent, could still not have constituted a breach of the BIT engaging the international responsibility of the

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[245] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, October 12, 2005, para. 53.
[246] *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006, para. 315.
[247] *Compañia de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, Decision on Annulment, July 3, 2002, para. 101.
[248] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29 (Turkey/Pakistan BIT), Award, August 27, 2009, para 180. See also, para. 377: "For the sake of completeness, the Tribunal adds that a breach of FET requires conduct in the exercise of sovereign powers."

ROG. This constitutes a complete answer to the Claimants allegations with regard to Articles 2(1), 4(2) and 4(3) of the BIT (FET and expropriation).

2. The existence of a contract does not per se create legitimate expectations protected by the BIT

332. The Claimant's allegations under Article 2(1) of the BIT (FET), however, warrant a further comment.

333. One of the ways in which the Claimant has presented its three claims based on the breach of the JVA is as a violation of the fair and equitable treatment standard in the BIT, on the basis that the mere existence of a contract creates legitimate expectations protected at the international level. According to Hamester:

> "These expectations were based upon the Respondent and/or Cocobod's undertakings in the JV Agreement and the Respondent and/or Cocobod's representations to the Claimant at the time of the Joint Venture Agreement upon which the Claimant reasonably relied in making its investment.
>
> These expectations are relevant to deciding the standards of fair and equitable treatment required under the Treaty. Actions and omissions inconsistent with these legitimate expectations amount to a failure to provide fair and equitable treatment of the Claimant's investment."[249]

334. The Tribunal wishes to make clear that it considers this analysis as no more than one of several attempts to present what are in truth "contract claims" as "treaty claims." It agrees with the Respondent that:

> "Hamester's approach to an FET clause is striking, for it appears to equate every FET clause into an umbrella clause interpreted in the most extreme "transformative" manner."[250]

335. It is important to emphasise that the existence of legitimate expectations and the existence of contractual rights are two separate issues. This has been highlighted by the *Parkerings v. Lithuania* tribunal, which made a clear distinction between contractual obligations under national law and legitimate expectations under international law:

> "It is evident that not every hope amounts to an expectation under international law. The expectation a party to an agreement may have of the regular fulfilment of the obligation by the other party is not necessarily an expectation protected by international law. In other

[249] Claimant's Memorial, paras. 158-159.
[250] Respondent's Counter Memorial, para. 315.

> words, contracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law."[251]

336. Christoph Schreuer also explains that contractual rights are not to be equated with legitimate expectations:

> "Taken to its logical conclusion this argument would put all agreements between the investor and the host State under the protection of the FET standard. If this position were to be accepted, the FET standard would be nothing less than a broadly interpreted umbrella clause."[252]

337. The Tribunal fully endorses this comment, and concludes that it is not sufficient for a claimant to invoke contractual rights that have allegedly been infringed to sustain a claim for a violation of the FET standard. Thus, even if attributed to Ghana, and even if the impugned acts were "sovereign" in nature, the alleged contract violations could not have amounted to a violation of the FET standard based on a theory of "legitimate expectations."

338. The question that has to be asked next is whether this general approach has exceptions, when specific language is used in a BIT, such as a so-called "umbrella clause."

3. Is there an exception to the general rule for all contractual claims when there is a so-called "umbrella clause"?

1. The Claimant's position

339. The Claimant has relied on Article 9(2), a so-called "umbrella clause", in order to argue that even if all its claims were contract claims, they have been elevated into treaty claims by this article.

2. The Respondent's position

340. According to the Respondent, even if the umbrella clause:

> "applied to purely contractual obligations assumed by a State under its domestic law, it could apply only to contracts entered into by the ***Republic of Ghana*** under Ghanaian law."[253]

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[251] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, September 11, 2007, para 344.
[252] C. Schreuer, "Fair and Equitable Treatment: Interactions with other Standards," Transnational Dispute Management, Vol. 4, Issue 5 at 18 (September 2007).
[253] Respondent's Counter-Memorial, para. 311. Emphasis in the original.

341. As the JVA was signed by Cocobod, which is a separate public entity, Article 9(2) cannot transform the contractual obligations in question into obligations whose violation constitutes a treaty breach.

3. The Tribunal's analysis

342. Article 9(2), commonly referred to as an "umbrella clause", states that:

> "Each Contracting Party shall observe any other obligation it has assumed with regard to its investments in its territory by nationals or companies of the other Contracting Party."

343. It is well known that there are divergent views, and divergent decisions, on the interpretation of the so-called "umbrella clauses", including the approach to the international law rules of attribution in this context. The Tribunal is resolutely in favour of a reasonable interpretation of such clauses, and concurs with the position taken, for example, in *Impregilo v. Pakistan*, in which it was held that contracts concluded between an investor and a legal entity separate from the Islamic Republic of Pakistan did not fall within the scope of an umbrella clause:

> "In the Tribunal's view, given that the Contracts were concluded by Impregilo with WAPDA, and not with Pakistan, Impregilo's reliance upon Article 3 of the BIT takes the matter no further."[254]

344. This approach is not isolated, as can be seen for example in the decision of *Amto v. Ukraine*, rendered under the Stockholm Chamber of Commerce, where the tribunal considered that:

> "the contractual obligations have been undertaken by a separate legal entity, and so the umbrella clause has no direct application."[255]

345. It is also an approach adopted in *William Nagel v. Czech Republic*[256], in which the Tribunal noted (albeit in an observation unnecessary for its final decision, since it declined jurisdiction on unrelated grounds), that a contract was not attributable to the State, for the purposes of an "umbrella clause", since the contracting enterprise had a separate personality from the State, and the latter was not involved in the contract's conclusion.

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[254] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, para. 223.
[255] *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005 (ECT), Final Award, March 26, 2008, para. 110.
[256] *William Nagel v. Czech Republic*, Award, September 10, 2003, paras 162-163.

346. The Tribunal further notes the position taken by the *ad hoc* Committee in the *CMS v. Argentina* case,[257] which also made it clear that, in its understanding, a contractual obligation between a public entity distinct from the State and a foreign investor cannot be transformed by the magic of the so-called "umbrella clause" into a treaty obligation of the State towards a protected investor:

> "The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the *parties* to the obligation (*i.e.* the persons bound by it and entitled to rely on it) are likewise not changed because of the umbrella clause."[258]

347. The JVA was signed by Hamester and Cocobod, with no implication of the ROG. The ROG was not named as a party, and did not sign the contract. There has been no suggestion that the ROG was intended to be a party thereto (and indeed there may well have been reasons why it was not a party thereto). Having considered carefully all relevant circumstances, the Tribunal concludes as follows:

(i) Applying the actual words of Article 9(2) of the BIT, the contractual obligations which the Claimant seeks to impose upon the ROG were not "assumed by ***it***". Given that the umbrella clause in this BIT is specifically delimited by reference to obligations that have been "assumed by the State," the Tribunal sees no basis to ignore these words, and to extend the ambit of the provision to contractual obligations assumed by other separate entities.

(ii) If the municipal law obligations which were negotiated between the parties to the JVA, and assumed by Cocobod in this case, are to be taken as obligations assumed by the State to Hamester, this would – in effect – completely transform their nature, extent, and governing law. The Tribunal considers that nothing in Article 9(2) of the BIT here would justify this. Put the other way, given the wording of Article 9(2) of this BIT, the Tribunal concludes that the Contracting States did not intend to so transform domestic law contractual obligations concluded by separate entities.

(iii) The Tribunal is aware that some tribunals in this area have extended the ambit of "umbrella clauses" to contracts concluded by separate entities, by reference to the

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[257] Annulment Decision in the case *CMS Gas Transmission Company v. The Argentine Republic*, (hereafter *CMS* Annulment), ICSID Case No. ARB/01/8, September 25, 2007.
[258] *CMS* Annulment, para. 95. Emphasis by the *ad hoc* Committee.

international law principles of attribution.[259] The Tribunal notes that this approach was not followed in the decisions cited above, and has been the subject of detailed debate in recent years. Without rehearsing all the arguments at play on this issue, it suffices for the Tribunal to state that even if the international law principles of attribution are applicable in construing the ambit of Article 9(2) of the BIT here, it is clear that Cocobod's act of concluding the JVA was not attributable to the ROG, whether under Article 5 or Article 8 of the ILC Articles. With regard to Article 5, there is nothing to suggest that the JVA was concluded by Cocobod in the exercise of governmental authority. With regard to Article 8, there is no evidence that the JVA was concluded by Cocobod on the instructions of, or under the direction or control of that State.

348. In these circumstances, the contractual commitments of Cocobod, being a separate entity from the State, cannot be considered as elevated – and transformed in nature – by Article 9(2) of the BIT, into treaty commitments of the State itself. It follows that a violation by Cocobod – if such a violation had been found – could not have constituted a violation of the BIT.

349. As a concluding remark, the Tribunal wishes to point out that the consequence of an automatic and wholesale elevation of any and all contract claims into treaty claims risks undermining the distinction between national legal orders and international law.[260] In the Tribunal's view, this is not a result that is in line with the general purpose of the ICSID/BIT mechanism for the international protection of foreign investments.

350. Given the analysis above and the conclusion that no responsibility can be incurred by Ghana under the BIT, there is therefore no need to address the Respondent's defences based upon the alleged fraudulent acts and violations of fiduciary duties by the Claimant during the life of the investment.

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[259] E.g. *Noble Ventures v. Romania*, Award, October 12, 2005, paras 68 and 79-80; *Eureko BV v. Republic of Poland*, Partial Award, August 19, 2005, paras 115-134; *Nykomb Synergetics Technology Holding AB v. Latvia*, Award, December 16, 2003), section 4.2.

[260] See for example, *Noble Venture v. Romania*, Award, October 12, 2005, para. 53: "An umbrella clause is usually seen as transforming municipal law obligations into obligations directly cognizable in international law."

XII. THE RESPONDENT'S COUNTERCLAIM

351. In the relief section of its Counter-Memorial, the Respondent presents a counterclaim, requesting the Tribunal to:

> "ORDER Hamester to pay to the Government damages, moral or otherwise, for losses it and/or the GCB have sustained as a result of Hamester's conduct in such sum as the Tribunal during the course of this arbitral proceeding may determine as a result of its inquiry into damages, plus interest per annum."

352. The Respondent did not develop its arguments in support of this relief. It neither specified the basis for the Tribunal's jurisdiction over the counterclaim nor the losses allegedly suffered by the ROG and/or Cocobod.

353. Under Article 46 of the ICSID Convention, the Tribunal shall determine any counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre. It has in theory been accepted that a respondent State could have a right of action to file a counterclaim against an investor under a bilateral investment treaty.[261] In this case, the scope of consent in Article 12(1) of the BIT is limited to disputes:

> "concerning an obligation of [one Contracting Party] under this Treaty in relation to an investment of [a national or company of the other Contracting Party]."

354. Despite the restricted scope of covered disputes, the BIT recognises that the State party may be "aggrieved" and "shall have the right to refer the dispute to" arbitration (Article 12(3) and (4) of the BIT).

355. However, in the absence of any submissions on the nature of the Respondent's counterclaim under the BIT, the Tribunal is unable to analyse whether it is capable, in accordance with Article 46 of the Convention, of falling within the parties' scope of consent.

356. In any event, it would appear that the counterclaim is based on Hamester's alleged fraudulent conduct and breach of fiduciary duty in connection with the initiation of and performance under the JVA. The ROG is not a party to the JVA and the Tribunal has

[261] *Saluka Investments B.V. v. Czech Republic* (Dutch-Czech BIT), Decision on Jurisdiction over the Czech Republic's Counterclaim, May 7, 2004. The dispute settlement provision in the BIT in that case referred to consent to "all disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter."

concluded that Cocobod is not an organ of the Ghanaian State. The acts of which the Respondent principally complains concern alleged losses suffered by Cocobod – not the ROG. Since, as noted, Cocobod is neither a Party to the arbitration nor an organ of the State, the Tribunal does not have jurisdiction over claims in respect of its alleged losses arising out of the JVA.

357. Further, the ROG has failed to particularise and substantiate the basis for, and quantum of, any losses that are said to have been suffered by the ROG itself.

358. The Respondent's counterclaim is therefore rejected.

XIII. COSTS

359. Hamester claims costs in the total amount of GBP 697,801.45 while the ROG claims a total of GBP 2,326,712.84.[262] Both Parties' claims include their respective arbitration costs (advances paid to ICSID) of USD 305,000 each.

360. In the exercise of its discretion in the allocation of costs pursuant to Article 61(2) of the ICSID Convention, the Tribunal has considered all the circumstances of this case, including the request for provisional measures by Ghana; the rejection of the Respondent's jurisdictional objections; and the outcome on the merits in favour of Ghana.

361. Taking all these elements into consideration, the Tribunal concludes that it is fair overall that the Parties bear the costs of the arbitration in equal shares, and that each Party bears its own legal and other costs expended in connection with this arbitration.

XIV. AWARD

362. For the reasons stated above, the Tribunal unanimously decides that:

(i) The Tribunal has jurisdiction over the dispute as presented by the Claimant;

[262] The Parties' Statements of Costs of August 31, 2009.

(ii) The Tribunal has no jurisdiction over the Respondent's counterclaim;

(iii) The acts of Cocobod relating to the 2001 Price Agreement claim; the 2002 Shortage in delivery of beans claim; and the 2003 Expropriation claim are not attributable to the Republic of Ghana;

(iv) The acts of the Republic of Ghana relating to the police investigation; the meeting with the Minister of Finance of April 14, 2003; and the export ban of February 14, 2003, which are attributable to the Republic of Ghana, do not amount to a violation of the BIT;

(v) The Parties shall bear the costs of the arbitration in equal shares;

(vi) Each Party shall bear its own legal fees and expenses;

(vii) All other claims are dismissed.

Mr. Bernardo M. Cremades

Date: 8 June 10

Mr. Toby Landau Q.C.

Date: 7 JUNE '10

Professor Brigitte Stern

Date: 10 June 2010