

INTERNATIONAL CHAMBER OF COMMERCE

ICC Case No. 20355/MCP

OLIN HOLDINGS LIMITED V. STATE OF LIBYA

PARTIAL AWARD ON JURISDICTION

28 June 2016

Tribunal:

[Nayla Comair-Obeid](#) (President)

[Roland Ziadé](#) (Appointed by the investor)

[Ibrahim Fadlallah](#) (Appointed by the State)

Table of Contents

Partial Award on Jurisdiction.....	0
LIST OF MAIN DEFINITIONS, ABBREVIATIONS & ACRONYMS	1
Applicable Law and Procedural Rules	1
Parties, Counsels, Experts, ICC and Arbitral Tribunal	1
General	2
Parties' Submissions	2
1. PREAMBLE.....	3
a) The Parties and their legal representatives	3
i. The Claimant.....	3
ii. The Respondent	4
b) The arbitral Tribunal	5
i. The Arbitral Tribunal	5
ii. The President.....	5
iii. The Co-Arbitrators	6
c) The BIT and Agreement to Arbitrate.....	6
i. The BIT	6
ii. The Arbitration Agreement	7
d) Place of Arbitration, Language and Law	7
i. Place of Arbitration.....	8
ii. Language of the Proceedings	8
iii. Applicable Substantive Law.....	9
iv. Applicable Procedural Rules	9
2. PROCEDURAL HISTORY.....	10
a) Events leading to the appointment of the Arbitral Tribunal.....	10
b) Events preceding the conclusion of the Terms of Reference meeting.....	12
c) The Preliminary Meeting	13
d) Events following the Preliminary Meeting	13
e) Time Limit for Rendering the Partial Award.....	14
f) Procedural Orders	14
3. PARTIES' SUBMISSIONS	15
a) The Respondent	15
b) The Claimant	15
4. PARTIES' RELIEF SOUGHT.....	15
a) The Respondent	15
b) The Claimant	17
5. RELEVANT PROVISIONS OF THE BIT AND THE APPLICABLE LAW.....	18
a) The BIT	18
b) THE APPLICABLE LAW.....	19
6. ISSUES TO BE DECIDED IN THIS PARTIAL AWARD	20
7. ISSUE NO. 1: CAN THE CLAIMANT BE CONSIDERED AS AN "INVESTOR" UNDER THE BIT?	20
a) Summary of the Parties' positions.....	20
b) The Parties' Positions	20

Table of Contents

c) The arbitral Tribunal's Analysis and Decision	27
i. Review of the evidence on the record	27
ii. The Criteria for determining an Investor's Nationality under the BIT	30
iii. The Claimant's Nationality in this arbitration	33
8. ISSUE NO. 2: IS THE CLAIMANT PRECLUDED FROM BRINGING FORTH THESE ARBITRAL PROCEEDINGS DUE TO THE FACT THAT IT HAS ALREADY PURSUED COURT PROCEEDINGS IN LIBYA AND THAT IT DOESN'T MEET THE REQUIREMENTS OF ARTICLE 9 OF THE BIT?	35
a) Summary of the Parties' positions.....	35
b) The Parties' Positions	36
c) The Arbitral Tribunal's Analysis AND Decision	47
9. ISSUE NO. 3: IS THE RESPONDENT ENTITLED TO USD 10,000,000.00 IN DAMAGES?	56
a) The Parties' Positions	57
b) The Arbitral Tribunal's Analysis and Decision	57
10. ISSUE NO. 4: WHO SHOULD BEAR, AND IN WHAT PROPORTION, THE COSTS OF THE JURISDICTIONAL PHASE IN THESE ARBITRAL PROCEEDINGS?	58
11. THE DECISIONS OF THE TRIBUNAL.....	58

Partial Award on Jurisdiction

LIST OF MAIN DEFINITIONS, ABBREVIATIONS & ACRONYMS

Applicable Law and Procedural Rules

Law No. 5 of 1426 PB (1997) for the Promotion of Investment of Foreign Capital (“Law No. 5”):	The Law No. 5 passed by Libya’s General People Congress on 9 March 1997.
Law No. 7 of 1371 PB (2003) (“Law No. 7”):	The Law No. 7 passed by Libya’s General People Congress in 2003, amending Law No. 5.
Agreement on the Promotion and the Reciprocal Protection of Investments between the Government of the Republic of Cyprus and the Great Socialist Libyan Arab Jamahirya (“BIT”):	The BIT signed by the Republic of Cyprus and the Respondent on 30 June 2004.
Law No. 9 of 1378 PD (2010) on Investment Promotion (“Law No. 9”):	The Law No. 9 passed by Libya’s General People Congress in 2010, replacing law No. 5.
French Code of Civil Procedure (“CPC”):	The French Code of Civil Procedure adopted by Decree No. 75-112 of 5 December 1975 with its subsequent amendments.
2012 International Chamber of Commerce Rules of Arbitration (“ICC Rules”):	The ICC Rules of Arbitration in force as of 1 January 2012.
Procedural Rules:	The Procedural Rules issued by the Arbitral Tribunal on 3 July 2015 as Appendix No. 1 to Procedural Order No. 2.
Procedural Timetable:	The Procedural Timetable issued by the Arbitral Tribunal on 3 July 2015 as Appendix No. 2 to Procedural Order No. 2 and corrected on 29 July 2015.

Parties, Counsels, Experts, ICC and Arbitral Tribunal

Claimant:	Olin Holdings Limited (Cyprus).
-----------	---------------------------------

Respondent:	State of Libya (Libya).
Claimant's First Counsel:	Fasken Martineau SELAS represented by Mr Serge Gravel and Mrs Anne Granger.
Claimant's Second Counsel:	King & Spalding LLP represented by Ms Caline Mouawad, Mr Ken Fleuriet and Mr Rami Chahine.
Respondents' Counsel:	Dr Aburrazek Ballow assisted by Mrs Valerie Contri.
Arbitral Tribunal (or the "Tribunal"):	The Arbitral Tribunal formed of Mrs Nayla Comair-Obeid (President), Mr Ibrahim Fadlallah (Co-Arbitrator) and Mr Roland Ziade (CoArbitrator).
Partial Award on Jurisdiction ("Partial Award"):	The Partial Arbitral Award hereby rendered by the Arbitral Tribunal.
International Court of Arbitration of the International Chamber of Commerce ("ICC Court"):	The ICC Court located in Paris, France.
Secretariat of the International Court of Arbitration of the International Chamber of Commerce ("Secretariat"):	The Secretariat of the ICC Court located in Paris, France.

General

General People's Committee ("GPC"):	The executive branch of the Libyan government (the equivalent of a cabinet) during the era of the Libyan Arab Jamahariya. Several Peoples Committee competent in a specific field (the equivalent of ministries) were also under the authority of the GPC (e.g. the GPC for Housing and Infrastructure; the GPC for Economy and Commerce; etc.).
Libyan Foreign Investment Board ("LFIB"):	The governmental body established pursuant to Article 5 of Law No. 5 for the encouragement of foreign capital investment in Libya and the promotion of investment projects.
Mr Akram Said Mohammad Abughamja Abughamja):	(Mr A Libyan citizen who is/was the sole shareholder of the Claimant share from 15 January 2001 until 1 July 2008; the sole owner of SATA Entreprises, the Claimant's majority shareholder since 1 July 2008; and the Claimant's Director from 2 January 2001 to 30 March 2011 and again from 10 April 2013 until 5 October 2015.

Parties' Submissions

Request for Arbitration (“RFA”):	The Request for Arbitration submitted by the Claimant on 3 July 2014.
Answer to the Request for Arbitration (“Answer to RFA”):	The Answer to the Request for Arbitration submitted by the Respondent on 10 November 2014.
Preliminary Meeting (“PM”):	The Preliminary Meeting which took place in Paris on 29 June 2015.
Terms of Reference (“TOR”):	The Terms of Reference signed by the Parties and the Tribunal on 29 June 2015.
Respondent’s Submission on Jurisdiction (“Submission”):	The Submission filed by the Respondent on 7 August 2015.
Claimant’s Answer on Jurisdiction (“Answer”):	The Answer submitted by the Claimant on 11 September 2015.
Respondent’s Reply on Jurisdiction (“Reply”):	The Reply submitted by the Respondent on 30 September 2015.
Claimant’s Rejoinder on Jurisdiction (“Rejoinder”):	The Rejoinder submitted by the Claimant on 16 October 2015.

1. PREAMBLE

a) The Parties and their legal representatives

i. The Claimant

1. Olin Holdings Limited, a Limited Liability Company organized and existing under the laws of the Republic of Cyprus, with its registered office at 9 Perikleous Street, Egkomi, 2413 Nicosia, Cyprus, hereinafter referred to as the *“Claimant”*.
2. Pursuant to a Power of Attorney dated 7 May 2015, the Claimant was, until 20 August 2015, represented by:
Mr Serge Gravel
Ms Anne Granger
FASKEN MARTINEAU SELAS
32, avenue de l’Opéra
75002 Paris
France
Tel: +33(0)44 94 96 98
Fax: +33 (0) 44 94 96 98
Email: sgravel@fasken.com

agranger@fasken.com

(hereinafter referred to as the "*Claimant's First Counsel*").

3. On 24 August 2015, the Tribunal was informed that King & Spalding LLP had been appointed as the Claimant's legal representative in this arbitration, pursuant to a Power of Attorney dated 21 August 2015 empowering the following lawyers to act on the Claimant's behalf:

Ms Caline Mouawad

KING & SPALDING LLP

1185 Avenue of the Americas

New York, New York 10036

United States

Tel: +1 212 556 2172

Fax: +1 212 556 2222

Email: cmouawad@kslaw.com

Mr Ken Fleuriet

Mr Rami Chahine

KING & SPALDING LLP

12, cours Albert ler

75008 Paris

France

Tel: +33(1)73 00 39 00

Fax: +33 (1) 73 00 39 59

Email: kfleuriet@kslaw.com

rchahine@kslaw.com

(hereinafter referred to as the "*Claimant's Second Counsel*").

ii. The Respondent

4. The State of Libya, a sovereign state hereinafter referred to as the "*Respondent*", with its contact details as follows:

State of Libya

Ministry of Justice

Swani Road

Alaflah area

Tripoli

Libya

State of Libya

Libyan Embassy in Cyprus

7, Stassinou Avenue

1522 Nicosia

Cyprus

5. Pursuant to a Power of Attorney dated 27 October 2014, the Respondent is represented by:

Dr Abdurrazek Ballow
Avocat au Barreau de Paris
72, boulevard de Courcelles
75017 Paris
France
Tel: +33 (0) 1 47 66 11 00
Fax: +33 (0) 1 47 66 08 88
Emails: balavocats@gmail.com
balow.avocats@gmail.com

Assisted by

Ms Valérie Contri
Lake Geneva Business Park
7, route de Crassier
1262 Eysins
Switzerland
Tel: +41 (0)22 595 13 15
Emails: valeriecontri@aol.com

b) The arbitral Tribunal

i. The Arbitral Tribunal

6. The arbitration clause referred to in paragraph 11 below is silent as to the number of arbitrators. As further discussed in paragraph 31 *et seq.* below, the Parties agreed that the Arbitral Tribunal consist of a panel of three arbitrators.

ii. The President

7. Mrs Nayla Comair-Obeid, a Lebanese and French national, was appointed by the ICC International Court of Arbitration on 26 March 2015, as President of the Arbitral Tribunal pursuant to [Article 13\(4\)\(a\) of the 2012 International Chamber of Commerce Rules of Arbitration](#) (the “*ICC Rules*”). Mrs Comair-Obeid’s address and contact details are:

OBEID LAW FIRM

Stratum Office Building
Omar Daouk Street, Mina El Hosn Area
Beirut Central District, Beirut
Lebanon
Tel:+961 1 36 37 90 Ext.101
Fax:+961 1 36 37 91
Email: info@obeidlawfirm.com
nayla@obeidlawfirm.com

iii. The Co-Arbitrators

8. Mr Roland Ziadé, a Lebanese, French and Ecuadorian national, was nominated by the Claimant and confirmed as Co-Arbitrator by the Secretary General of the ICC on 1 December 2014. Mr Ziadé's address and contact details are:

LINKLATERS LLP
25, rue Marignan
75008 Paris
France
Tel:+ 33 (0) 1 56 43 56 43
Email: roland.ziade@linklaters.com

9. Mr Ibrahim Fadlallah, a Lebanese and French national, was nominated by the Respondent and confirmed as Co-Arbitrator by the Secretary General of the ICC on 1 December 2014. Mr Fadlallah's address and contact details are:

61, rue de la Boétie
75008 Paris
France
Tel:+33 (0) 1 40 76 00 40
Fax: +33 (0) 1 40 76 02 50
Email: ibrahim.fadlallah@wanadoo.fr

c) The BIT and Agreement to Arbitrate

i. The BIT

10. This arbitration is brought forth pursuant to the Agreement on the Promotion and the Reciprocal Protection of Investments between the Government of the Republic of Cyprus and the Great Socialist Libyan Arab Jamahiriya dated 30 June 2004 (the "*BIT*").¹

ii. The Arbitration Agreement

11. This arbitration was commenced in accordance with the arbitration provision contained in Article 9 of the BIT, invoked by the Claimant as the basis for the jurisdiction of the Arbitral Tribunal in its Request for Arbitration dated 3 July 2014 (the “RFA”).

12. [Article 9 of the BIT](#) states:

“Settlement of Disputes between one of the Contracting Parties and Investors of the Other Party

1. Disputes that may arise between one of the Contracting Parties and an investor of the other Contracting Party with regard to an investment in the sense of the present Agreement, shall be notified in writing, including a detailed information, by the investor to the former Contracting Party. As far as possible, the parties concerned shall endeavour to settle these disputes amicably.

2. If it is not possible to settle the dispute in this way within six months from the date of the written notification, it shall be submitted, at the choice of the investor concerned to:

(a) the competent court of the Contracting Party in whose territory the investment was made; or

(b) the Arbitral Tribunal of the International Chamber of Commerce in Paris; or

(c) the International Centre for the Settlement of Investment Disputes (ICSID) established by the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States; or

(d) the Arbitration Institute of the Arbitral Tribunal of the Chamber of Commerce in Stockholm,

3. During arbitration proceedings or the enforcement of the award, a Contracting Party involved in the dispute shall not raise the objection that the investor of the other Contracting Party has received compensation under an insurance contract in respect of all or part of the damage.

4. The arbitral tribunal shall issue its decision in accordance with the provisions of this Agreement, other relevant agreements in force between the Contracting Parties, the applicable rules and principles of international law and domestic law of the contracting party provided that it does not conflict with the rules of international law.

5. The awards of arbitration shall be final and binding on both Parties to the Dispute. The Contracting Party shall carry out without delay any such award and such award shall be enforced in accordance with domestic law.”²

d) Place of Arbitration, Language and Law

¹ On 12 February 2005, the BIT came into force.

² Article 9 of the BIT of the Contract, Exhibit C-8.

i. Place of Arbitration

13. Article 9.2 of the BIT provides that disputes between one of the Contracting Parties and an investor of the other Contracting Party in relation to an investment “[...] shall be submitted, at the choice of the investor concerned to: [...] (b) the Arbitral Tribunal of the International Chamber of Commerce in Paris [...]”.
14. At Section VI paragraph 4 of its RFA, the Claimant proposed Paris, France, as the place of arbitration.
15. At page 2 of its Answer to the Request for Arbitration dated 10 November 2014 (the “*Answer to RFA*”), the Respondent agreed to the Claimant’s proposal, with the possibility of holding hearings in Tunisia or Turkey.
16. Therefore, Paris, France, is the legal seat of this arbitration in accordance with the Parties’ agreement and Article 9.2(b) of the BIT, as reflected in paragraph 63 *et seq.* of the TOR.

ii. Language of the Proceedings

17. The arbitration agreement referred to in paragraph 11 above (Article 9 of the BIT) is silent as to the language of the proceedings.
18. In its RFA, the Claimant proposed English as the language of arbitration.
19. In its Answer, the Respondent proposed French as the language of arbitration, with the possibility of using English or Arabic.
20. In its correspondence to the Parties dated 18 November 2014, the ICC Secretariat stated that “[t]he arbitration agreement does not specify the language of arbitration” and that “[a]s the parties disagree [on the language of arbitration], the arbitral tribunal will determine the language or languages of arbitration (Article 20)”.
21. In its first correspondence to the Parties dated 23 April 2015, the Arbitral Tribunal, *inter alia*, invited both Parties to provide more detailed positions, in either English or French, on the language of arbitration, in two rounds of submissions.
22. On 4 May 2015, both Parties filed their first submissions in which they each set out their respective preferences and the reasons in support of their positions.
23. On 5 May 2015, the Claimant submitted that the Respondent had changed its position and now proposed Arabic as the language of arbitration despite the fact that “the arbitral tribunal was being asked to decide whether English or French should be the language of arbitration” as “was clear from [the Arbitral Tribunal’s] April 23, 2015 letter as well as from the positions expressed by both parties” until 4 May 2015 and the Respondent’s first submission on the matter as referred to above.³ The

Claimant thus requested that the Arbitral Tribunal rule on the admissibility of the *“Respondent’s belated request for the Arabic language”*.

24. On 8 May 2015, the Arbitral Tribunal granted the Parties *“until **Wednesday, 13 May 2015** to make their submissions in Reply with regard to the language of these proceedings”*.
25. On 13 May 2015, both Parties submitted their submissions in Reply on the language of arbitration, by virtue of which they maintained their positions as set out above.
26. In Procedural Order No. 1 dated 29 May 2015, the Arbitral Tribunal reviewed the relevant principles and criteria applicable to the determination of the language of the proceedings, and determined that the language of these proceedings shall be English and, in particular, that:
 - a) English shall be the language used by the Arbitral Tribunal in the correspondence to the Parties, TOR, Procedural Orders, Award(s) and other official documents;
 - b) The Parties’ written submissions shall be in English and the exhibits appended thereto, if originally in Arabic or French, shall be submitted in their original version together with English translations of the relevant excerpts;
 - c) Witness Statements and Expert Reports shall be submitted in their original language together with English translation;
 - d) Oral debates and examinations/cross-examinations of factual or expert witnesses shall take place in English, with simultaneous interpretation if necessary; and
 - e) The cost of translation and simultaneous interpretation shall be included in the costs of arbitration.

iii. Applicable Substantive Law

27. Article 9.4 of the BIT, reproduced at 69 of the TOR, provides that:

“4. The arbitral tribunal shall issue its decision in accordance with the provisions of this Agreement, other relevant agreements in force between the Contracting Parties, the applicable rules and principles of international law and domestic law of the contracting party provided that it does not conflict with the rules of international law.”

iv. Applicable Procedural Rules

³ See Claimant’s email correspondence to the Arbitral Tribunal dated 5 May 2015. See also the Arbitral Tribunal’s correspondence to the Parties dated 23 April 2015 (ref.: AT/P/001) and, in particular, the following excerpt:

*“In light of the foregoing, prior to issuing its determination on the matter, the Arbitral Tribunal invites both Parties to provide more detailed positions on the language of arbitration, in either English or French in two rounds of submissions. In the first, to be submitted on or before **04 May 2015**, each Party is to set out its preference and the reason(s) for its position. Each Party will then be given the opportunity to respond to the other Party’s submission on or before **11 May 2015**”* [original emphasis].

28. The Parties confirmed in paragraph 70 of the TOR. that, subject to any mandatory rules of law of the place of arbitration, most notably the French Code of Civil Procedure, these arbitration proceedings be governed by:
- a) The ICC Rules;
 - b) The Procedural Rules adopted by the Parties;⁴ and, where such rules are silent,
 - c) Any other rules as agreed in writing by the Parties or, failing such agreement, as may be determined by the Tribunal in its discretion.
29. In accordance with [Article 19 of the ICC Rules](#), where these Rules are silent, the present arbitration shall be governed by the rules of procedure of the substantive law to be applied to this arbitration, i.e. the French Code of Civil Procedure.

2. PROCEDURAL HISTORY

30. The procedural history of this arbitration is summarised below. This summary is not intended to cover every step of these proceedings but rather should be read in conjunction with the Arbitral Tribunal's Procedural Orders which contain further details of many of the issues outlined below.

a) Events leading to the appointment of the Arbitral Tribunal

31. On 3 July 2014, the Claimant submitted its RFA in which it *inter alia*:
- a) Sought the sum of US\$ 147,882,000.00 as compensation for the damages it incurred as a result of alleged breaches of the BIT and Libyan foreign investment law by the Respondent; and
 - b) Nominated Mr. Roland Ziadé as Co-Arbitrator.
32. On 17 July 2014, the Secretariat attempted to notify the Claimant's RFA to the Respondent (at the Ministry of Justice in Tripoli, Libya), inviting it to *inter alia*:
- a) File its Answer to the Claimant's RFA within thirty (30) days of the receipt of the Claimant's RFA; and
 - b) Confirm whether it agreed to have an Arbitral Tribunal composed of three (3) arbitrators and, if so, to nominate its Co-Arbitrator.
33. On 20 August 2014, the Secretariat advised the Claimant that its RFA could not be delivered at the Respondent's address in Libya and that it would be sent instead to the Libyan embassy in Cyprus.

⁴ Issued by the Arbitral Tribunal on 3 July 2015 as Appendix No.1 to Procedural Order No.2 (the "*Procedural Rules*").

34. On 3 September 2014, the Libyan embassy in Cyprus advised the Secretariat that it had received the Claimant's RFA on 25 August 2014 but that it had not been able to forward it to the Ministry of Justice in Libya due to the on-going events in Libya and the lack of air and postal communication.
35. On 1 November 2014, the Respondent's Counsel advised that it had been instructed to represent the Respondent in these proceedings, requesting to be provided with all documents related thereto and enclosing a free French translation of his Power of Attorney dated 27 October 2014.
36. On 4 November 2014, the Secretariat advised the Parties that *inter alia* a copy of the RFA and all the correspondence had been sent to the Respondent's Counsel.
37. On 10 November 2014, the Respondent filed its Answer to the RFA (the "*Answer*") in which it *inter alia*:
 - a) Asserted that it could not file its Answer within the time-limit prescribed by [Article 5\(1\) of the ICC Rules](#) due to the armed conflict and political instability in Libya;
 - b) Confirmed that it agreed to the Arbitral Tribunal being composed of three (3) arbitrators; and
 - c) Submitted a copy of the original Arabic version of its Counsel's PoA.
38. On 14 November 2014, the Respondent advised the Secretariat that it nominated Mr Ibrahim Fadlallah as Co-Arbitrator.
39. On 26 November 2014, the Claimant *inter alia* suggested that the Parties be granted with the opportunity to designate the President of the Arbitral Tribunal.
40. On 1 December 2014, the Secretariat:
 - a) Advised the Parties that Messrs Ziade and Fadlallah had been confirmed as CoArbitrators;
 - b) Requested the Respondent to comment on the Claimant's suggestion of 26 November 2014; and
 - c) As the case may be, invited the Parties to indicate the deadline by which such nomination should occur.
41. On 5 December 2014, the Respondent confirmed that it agreed to the Claimant's suggestion that the Parties nominate the President of the Arbitral Tribunal, and on 9 December 2014, the Secretariat granted the Parties until 12 January 2015 to jointly nominate the President of the Arbitral Tribunal, failing which the ICC Court would do so.
42. On 11 December 2014, the Secretariat advised the Parties that the ICC Court had fixed the advance on costs at US\$ 650,000.00, subject to potential readjustments depending on the evolution of the arbitration.
43. On 9 January 2015, the Claimant informed the Secretariat that the Parties would not be able to agree on the nomination of the President of the Arbitral Tribunal by 12 January 2015. The Claimant

further requested an extension of time until 27 January to complete this exercise, to which the Respondent agreed and which was granted by the Secretariat on 12 January 2015.

44. On 27 January 2015, the Respondent advised the Secretariat that the Parties were unable to reach an agreement on the nomination of the President of the Arbitral Tribunal; and on 3 February 2015, the Secretariat informed the Parties that the ICC Court would nominate the President of the Arbitral Tribunal, unless the Parties agreed upon another procedure.
45. On 26 March 2015, the ICC Court appointed Mrs Nayla Comair-Obeid as President of the Arbitral Tribunal, which was fully constituted as of this date.

b) Events preceding the conclusion of the Terms of Reference meeting

46. On 7 April 2015, the full case file was delivered by the Secretariat to the Arbitral Tribunal.
47. In its first letter to the Parties dated 23 April 2015, the Arbitral Tribunal requested the Parties to indicate their availability for the Preliminary Meeting (the "*PM*") on 18 or 19 June 2015.
48. On 4 May 2015, both Parties confirmed that they would be available for the PM on either 18 or 19 June 2015, with the Claimant proposing that such meeting be held at Fasken Martineau's premises in Paris.
49. On 29 May 2015, the Arbitral Tribunal issued Procedural Order No. 1 and invited both Parties to submit, by 5 June 2015, a two/three (2/3) pages summary of their respective claims and relief sought, with an indication of the amounts claimed or counterclaimed, for integration in the TOR. In its above-mentioned letter, the Tribunal informed the Parties that an urgent matter would prevent a member of the Arbitral Tribunal from attending the PM on the dates of 18 or 19 June 2015, proposing the alternative dates of 20 or 29 June 2015.
50. On 1 June 2015, the Claimant advised the Arbitral Tribunal that the Parties had agreed to hold the PM on 29 June 2015 at Fasken Martineau's offices in Paris and, on 2 June 2015, the Respondent confirmed the same.
51. On 5 June 2015, the Parties submitted the summaries of their respective claims and relief sought for incorporation in the TOR.
52. On 15 June 2015, the Respondent's Counsel informed the Arbitral Tribunal that he would be assisted by Mrs Valérie Contri and that they would both attend the PM.⁵
53. On 17 June 2014, the Arbitral Tribunal:

⁵ Ms. Valérie Contri is a member of the Paris Bar and Lausanne Bar and a partner at Contri Marchand Avocats, located at Lake Geneva Business Park, Route de Crassier 7, 1262 Eysins, Switzerland. Dr. Ballou's PoA dated 27 October 2014 allows him to "*be assisted by any person, expert or technician, and to conduct any necessary and useful consultation for the defense of the interests of the Libyan party*" (free translation of the Arbitral Tribunal).

- a) Invited the Claimant to confirm the representative(s) who would be attending the PM on its behalf;
- b) Circulated draft versions of the TOR and Procedural Rules for the Parties comments and/or approval; and
- c) Invited the Parties to liaise with a view to proposing an agreed Provisional Timetable or, failing which, for each Party to make a proposal for the Provisional Timetable.

- 54. On 24 June 2015, the Claimant provided its comments on the TOR and Procedural Rules and advised that Mrs Anne Granger, Mr Serge Gravel and Mrs Liria Martinez would be attending the PM on its behalf. On the same date, the Respondent confirmed that it agreed to and had no comments to make on the TOR and Procedural Rules.
- 55. On 27 June 2015, the Arbitral Tribunal circulated the Agenda of the PM, and advised the Parties that the changes to the TOR suggested by the Claimant had been integrated where appropriate.

c) The Preliminary Meeting

- 56. The PM was held on 29 June 2015, in the presence of the Parties and the Arbitral Tribunal at the offices of Fasken Martineau in Paris, France. There appeared for the Claimant: Mrs Anne Granger, Mr Serge Gravel and Mrs Liria Martinez; and for the Respondents: Dr Abdurrazek Ballow and Mrs Valerie Contri.
- 57. At this PM, the Arbitral Tribunal and the Parties discussed the TOR, the Procedural Rules and the Provisional Timetable. The TOR was executed at the PM, sent to the Secretariat on 1 July 2015 and transmitted to the ICC Court at its session of 9 July 2015.

d) Events following the Preliminary Meeting

- 58. On 3 July 2015, the Arbitral Tribunal circulated the Procedural Rules and Provisional Timetable to the Parties (as Appendix 1 and 2 respectively of Procedural Order No. 2) together with the Minutes of the PM.
- 59. On 7 August 2015, the Respondent filed its Submission on Jurisdiction together with Exhibits R-1 to R-10.
- 60. On 20 August 2015, the Claimant's First Counsel advised the Arbitral Tribunal that it was no longer representing the Claimant in this arbitration.
- 61. On 24 August 2015, the Claimant informed the Arbitral Tribunal that it had engaged its Second Counsel (Mrs Caline Mouawad, Mr Ken Fleuriet and Mr Rami Chahine of King & Spalding LLP),

submitting a copy of the PoA empowering those individuals to represent the Claimant in this arbitration.

62. On 11 September 2015, the Claimant filed its Answer to the Respondent's Submission on Jurisdiction (the "*Answer*") together with a Consolidated Index of Exhibits, an Index of Legal Authorities, Exhibits C-75 to C-95 and Legal Exhibits CL-1 to CL-36. At paragraphs 104 to 111 of its Answer, the Claimant requested the issuance of a Partial Award on Costs.
63. On 16 and 25 September 2015, the Arbitral Tribunal invited the Respondent to provide its position on the Claimant's request for the issuance of a Partial Award on Costs.
64. On 25 September 2015, the Respondent submitted preliminary observations on the Claimant's request for the issuance of a Partial Award on Costs, stating that it would provide its full answer in its Reply to the Claimant's Answer on Jurisdiction due on 30 September 2015 (the "*Reply*").
65. On 30 September 2015, the Respondent submitted its Reply together with a List of Exhibits and Exhibits R-11 to R-15.
66. On 16 October 2015, the Claimant submitted its Statement of Rejoinder on Jurisdiction (the "*Rejoinder*") together with a Consolidated Index of Legal Authorities, a Consolidated Index of Exhibits, Exhibits C-96 to C-98 and Legal Exhibits CL-37 to CL47.
67. On 20 April 2016, the Arbitral Tribunal declared the proceedings closed in accordance with [Article 27 of the ICC Rules](#).

e) Time Limit for Rendering the Partial Award

68. The deadline for the issuance of this Final Award by the Arbitral Tribunal was initially on 29 December 2015, i.e. six (6) months after the signature of the Terms of Reference on 29 June 2015. This deadline for rendering the Final Award was subsequently extended until 29 February 2016 (ICC Court decision of 10 December 2015); 30 March 2016 (ICC Court decision of 11 February 2016); 29 April 2016 (ICC Court decision of 10 March 2016); 31 May 2016 (ICC Court decision of 14 April 2016); 30 June 2016 (ICC Court decision of 12 May 2016); and 29 July 2016 (ICC Court decision of 9 June 2016).
69. This Partial Award was rendered within the above deadline for rendering the Final Award in this arbitration.

f) Procedural Orders

70. The Arbitral Tribunal issued two (2) Procedural Orders during the jurisdictional phase of these proceedings. A chronology of these procedural orders is set out below.

71. On 29 May 2015, the Arbitral Tribunal issued Procedural Order No. 1 in which it set out its determination on the language of arbitration, as discussed in paragraph 26 above.
72. On 3 July 2015, the Arbitral Tribunal issued Procedural Order No. 2, enclosing as Appendix No. 1 and No. 2 the mutually agreed Procedural Rules and Provisional Timetable, as discussed in paragraph 58 above.

3. PARTIES' SUBMISSIONS

a) The Respondent

73. During the course of the jurisdictional phase of these proceedings, the Respondent filed its Submission on 7 August 2015, and its Reply on 30 September 2015.

b) The Claimant

74. During the course of the jurisdictional phase of these proceedings, the Claimant filed its Answer on 11 September 2015, and its Rejoinder on 16 October 2015.

4. PARTIES' RELIEF SOUGHT

a) The Respondent

75. In its Submission, the Respondent sought the following relief:

"1/ The Respondent asks the Arbitral Tribunal to decline its jurisdiction:

1- because of Investor's and investment's nationality

- *Find that Olin Holdings Ltd is a "nut shell" and is a screen,*
 - *Find that SATA Enterprises Ltd belongs to M. Akram Said Mohammed ABUGHAMJA, a Libyan citizen,*
 - *Find that PROLAC is the only company with a technical competence in the field of activity of dairy products,*
 - *Find that the SOUFFLET GROUP is the only company which controls and manages the project.*
-

In consequence,

- *Rule that Olin Holdings Ltd is not the investor, and that the investment is controlled by a French company,*
- *Rule that neither the investor nor the investment are Cypriot,*
- *Rule that Olin Holdings Ltd could not file the request for Arbitration on the basis of the BIT of June 2014. [sic]*
- *Rule that the Request for arbitration filed by Olin Holdings Ltd is abusive and fraudulent as typical of "Treaty shopping". [sic]*
- *Decline its competence [sic]*

2- Response of the competence given by Olin Holdings Ltd to the libyan counts

- *Find that Olin Holdings Ltd not comply with the provisions of Article 24 of the Law no 5/1997.*
- *Find that Olin Holdings Ltd decided knowingly to submit the dispute to the Libyan judges.*
- *Find that according to the provisions of article 9 of the BIT Olin Holdings Ltd made a definitive and irrevocable choice.*
- *Find that Olin Holdings Ltd could not modify this procedural option.*
- *Find that Olin Holdings Ltd had to filed [sic] an appeal against the judgment rendered by the south Tripoli Court of first Instance instead of filed [sic] a request for Arbitration on the basis of the BIT.*
- *Find that Olin Holdings Ltd took advantage of the political situation in Libya in 2014 to try to obtain abusively the condemnation of the state of Libya.*

In consequences,

- *Rule that Olin Holdings Ltd gave in 2010, 2012 and 2014, jurisdiction to the Libyan judges to settle the dispute.*
- *Rule that Olin Holdings Ltd could not modify its irrevocable choice.*
- *Decline its competence.*

34. II/The Respondent asks the Arbitral tribunal to allow the following counter claims.

1-Concerning the condemnation of the Claimant to pay US \$10.000.000.

- *Find that the Request for arbitration is abusive and fraudulent*
- *Find that the request for arbitration constitutes an attack against the Libyan State*

In consequence.

- *Condemn the Claimant to pay USS 10.000.000 damages*

2-Concerning the condemnation of the Claimant to support all the costs and fees of the proceedings

- Find that the Claimant's behaviour is unacceptable
- Rule that the Respondent is well-founded to claim the condemnation of the Claimant to pay all the costs and fees relating to the proceedings.

In consequence.

- Condemn the Claimant to pay all the costs and fees."

76. In its Reply, the Respondent made the following prayer for relief:

"On the basis of its full argumentation based on its two Submissions, Respondent respectfully asks the Arbitral Tribunal to:

- *Reject Claimant's assertions relating to the tribunal, jurisdiction over dispute. [sic]*
- *Condemn Claimant's [sic] to pay the amount of USD 10,000 damages [sic] because of its behaviour,*
- *Note that according to the ICC Rules Respondent has no compulsory obligation to pay its share of advances on costs [sic],*
- *State that the issue of payment of Respondent's share of the advance on costs can be settled within the Award on Jurisdiction.*
- *Condemn the Claimant to pay all the costs and fees in relation with this arbitration".*

b) The Claimant

77. In its Answer, the Claimant sought the following relief:

"For the foregoing reasons, Olin respectfully requests the following relief in the jurisdictional phase of the arbitration, namely that the Tribunal:

- Reject Libya's jurisdictional objections in their entirety and confirm its jurisdiction over the dispute;*
- Dismiss Libya's counterclaim in its entirety;*
- Order Libya to pay all costs and expenses of the jurisdictional phase of this arbitration, including the fees and expenses of Olin's legal representatives in respect of this phase and any other costs;*
- Find that Libya failed to pay its share of the advance on costs fixed by the ICC Court in breach of the arbitration agreement set forth at Article 9 of the Treaty, and issue a Partial or Interim Award ordering Libya to pay Claimant USD 325,000, plus compound interest at a commercial rate until Libya makes the payment; and,*

e. Order any further relief that the Tribunal deems just and appropriate.

Olin reserves the right to seek other or additional relief to which it may be entitled.”

78. In its Rejoinder, the Claimant formulated its prayer for relief as follows:

“For the foregoing reasons. Olin respectfully requests the following relief in the jurisdictional phase of the arbitration, namely that the Tribunal:

a. Reject Libya’s jurisdictional objections in their entirety and confirm the Tribunal’s jurisdiction over the dispute;

b. Dismiss Libya’s counterclaim in its entirety;

c. Order Libya to pay all costs and expenses of the jurisdictional phase of this arbitration, including the fees and expenses of Olin’s legal representatives in respect of this phase and any other costs;

d. Find that Libya failed to pay its share of the advance on costs fixed by the ICC Court in breach of the arbitration agreement set forth at Article 9 of the Treaty, and issue a Partial or Interim Award ordering Libya to pay Claimant USD 325,000, plus compound interest at a commercial rate until Libya makes the payment, in respect of the payment made by Claimant on Libya’s behalf; and,

e. Order any further relief that the Tribunal deems just and appropriate.

Olin reserves the right to seek other or additional relief to which it may be entitled.”

5. RELEVANT PROVISIONS OF THE BIT AND THE APPLICABLE LAW

79. The following paragraphs reproduce the main provisions of the BIT and Applicable Law that are relevant to the present dispute.

a) The BIT

80. Article 1 of the BIT notably defined the terms “Investment” and “Investor” as follows:

a) Investment:

“[E]very kind of assets invested, in connection with economic activities by an investor of one Contracting Party in the territory of another Contracting Party in accordance with the laws and regulations of the latter and in particular, although not exclusively, the following:

(a) Movable and immovable property and any other property rights such as mortgages, liens, pledges, leases and similar rights.

(b) Shares in companies, stocks and debentures of a company or any other form of participation in a company or business enterprise.

(c) Claims to money or to any performance under contract having economic value and associated with an investment.

(d) Intellectual property rights, technical processes, know-how and goodwill including copyrights, patents and rights of inventions, signs, secrets and business names, designs and manufacturing procedures and technical knowledge.

(e) Any rights conferred by law or by virtue of a contract, including concessions to search for, cultivate, extract or exploit natural resources.

Investments made in the territory of one Contracting Party by any legal entity of that same Contracting Party which is actually owned or controlled by investors of the other Contracting Party shall likewise be considered as investments of investors of the latter Contracting Party if they have been made in accordance with the laws and regulations of the former Contracting Party.

Any change in the form of the assets that are invested or reinvested does not affect their character as investments.”

b) Investor:

“[...] with regard to either Contracting Party:

- Any natural person having the citizenship of that Contracting party [sic] in accordance with its law;

- Any legal person constituted or incorporated in compliance with the law of that Contracting Party and having their seat in the territory of the same Contracting Party;

who in compliance with this Agreement, are making investments in the territory of the other Contracting Party.”

81. Article 9 of the BIT, reproduced in paragraph 12 above, sets out the mechanism for the *“Settlement of Disputes between one of the Contracting Parties and Investors of the Other Party”*.

82. Article 11 of the BIT, entitled *“Scope of Application”*, provides that *“[t]his Agreement shall apply to all investments made by investors of either Contracting Party, whether existing at or made after the date of its entry into force. It shall not, however, apply to disputes that have arisen before the entry into force of the present Agreement”*.

b) THE APPLICABLE LAW

83. Article 9.4 of the BIT provides that:

“The arbitral tribunal shall issue its decision in accordance with the provisions of this Agreement, other relevant agreements in force between the Contracting Parties, the applicable rules and principles of international law and the domestic law of the contracting party provided that it does not conflict with the rules of international law.”

6. ISSUES TO BE DECIDED IN THIS PARTIAL AWARD

84. The Arbitral Tribunal, having considered all the written submissions filed by the Parties, in addition to the Parties’ respective relief sought, sets out hereunder the Issues to be determined in this Partial Award, as follows:

a) Issue No. 1: *“Can the Claimant be considered as an “Investor” under the BIT?”*

b) Issue No. 2: *“Is the Claimant precluded from bringing forth these arbitral proceedings due to the fact that it has already pursued court proceedings In Libya, and that it doesn’t meet the requirements of Article 9 of the BIT?”*

c) Issue No. 3: *“Is the Respondent entitled to USD 10,000,000.00 in damages?”*

d) Issue No. 4: *“Who should bear, and in what proportion, the costs of the jurisdictional phase in these arbitral proceedings?”*

7. ISSUE NO. 1: CAN THE CLAIMANT BE CONSIDERED AS AN “INVESTOR” UNDER THE BIT?

a) Summary of the Parties’ positions

85. The Respondent challenged the jurisdiction of the Arbitral Tribunal on the basis that the Claimant does not qualify as a Cypriot investor under the terms of the BIT and therefore cannot avail itself of the remedies provided therein.

86. The Claimant rejected the Respondent’s allegations, arguing that it does qualify as a Cypriot investor under the terms of the BIT and therefore can avail itself of the remedies provided therein.

b) The Parties’ Positions

87. In its RFA, the Claimant notably submitted that it qualified as an ‘investor’ pursuant to Article 1.2 of the BIT given that it was incorporated in Cyprus and that its registered office is located in Nicosia,

Cyprus.⁶

88. In its Answer to the RFA, the Respondent notably contested the validity of the RFA due to the inapplicability of the BIT in the present dispute as well as the basis of the allegations and claims put forth in the RFA.
89. In its Submission, the Respondent contested the Arbitral Tribunal's jurisdiction, contending that the Claimant cannot be considered as an 'investor' under Article 1.2 of the BIT as it does not meet the criterion of 'nationality' set out therein and that, therefore, it is precluded from relying on the BIT to bring forth these proceedings.
90. In support of its position, the Respondent provided the following chronology of the Claimant's shareholding:
- a) The Claimant was incorporated in Cyprus on 28 February 1994 and its two current shareholders are: SATA Enterprises, "a Cyprus company with Libyan shareholders" ("SATA") and the French company PROLAC ("PROLAC");⁷
 - b) From 1994 to 2001 "the shares of [the Claimant] were owned equally by two nominees" both located in Cyprus;
 - c) On 15 January 2001, those two nominees transferred their respective shares (500 each) to Mr Akram Said Mohammed Abughamja ("*Mr Abughamja*"), a Libyan citizen, who then became the "sole owner of the [Claimant's] 1000 shares";⁸
 - d) On 1 July 2008, Mr Abughamja transferred 975 shares to SATA and 25 shares to PROLAC;⁹
 - e) On 11 February 2014, the Claimant's share capital was increased to 10,975 shares held by SATA and 25 shares held by PROLAC;¹⁰
 - f) Mr Abughamja was the Claimant's Director from 2 January 2001 to 30 March 2011 and again from 10 April 2013 to 5 October 2015.¹¹
91. The Respondent then examined the structure of the two current shareholders of the Claimant, i.e. SATA and PROLAC.
92. On the one hand, the Respondent asserted that SATA is controlled by a sole Libyan shareholder, Mr Abughamja, who owns one hundred percent (100%) of its share capital and who held the position of Director from 1998 to 2011 and again from 10 April 2013 to date.¹²

⁶ RFA, p. 6 para. 4.

⁷ Submission, p. 7 para. 8 (quoting RFA, p. 4 para. 1).

⁸ Submission, p. 8 para. 11; Exhibit R-1. In this regard, the Respondent pointed out that, from January 2001 to July 2008, the Claimant's sole owner was "a Libyan citizen to the exclusion of a Cypriot citizen or a Cyprus Company".

⁹ *Id.*; Exhibit R-2.

¹⁰ Submission, p. 8 para. 12.

¹¹ *Id.*; Exhibit R-3. The Respondent further noted that, on 16 January 2013, Mr. Abughamja was described as "*a partner and general manager of Olin Holdings, a family-owned business operating in Libya*" (Submission, p. 9 para. 11 (quoting Exhibit R-4)).

¹² Submission, p. 9 para. 13; Exhibit R-5.

93. On the other hand, the Respondent argued that the Claimant acted as a “screen” while PROLAC, a subsidiary of the French conglomerate SOUFFLET GROUP (“SOUFFLET”), was “*the only company with the technical competence in the field of activity of dairy products*” and SOUFFLET was the “*only company which really control[led] and manage[d] this project*”.¹³ In this regard, the Respondent underlined *inter alia* that:

a) The Claimant’s Memorandum of Association “*shows that it has no specific activity, especially in the field of dairy products and of fruit juice products*”;¹⁴

b) PROLAC is a French company which was created on 24 May 1995 and its main sector of activity is the “*wholesale deal[ing] (Business to Business) of dairy products, eggs, oil and fat foodstuffs ...*”;¹⁵

c) PROLAC’s President is Mr Jean-Francois Lepy, who concurrently holds the position of President of SOUFFLET NEGOCE and Corporate Manager of ETABLISSEMENTS J. SOUFFLET ET CIE (SOCOMAC), two French companies with the same registered office in Nogent Sur Seine;¹⁶

d) Exhibits C-25,¹⁷ C-39,¹⁸ C-40¹⁹ and C-41²⁰ to the Claimant’s RFA indicate that the Claimant is actually a member of SOUFFLET (Id., para. 15); and

e) SOUFFLET “*is an agro-industrial group with more than 4.000 employees, with a revenue of 4’7 billions €, with 42 plants around the worlds [sic]*” and “*a significant actor in the field of international trade of cereal, of oilseeds and of dairy products [...]*”.²¹

94. The Respondent also contended that, pursuant to Article 1.2 of the BIT, “*the only investors who may initiate a proceeding against Libya, are either natural persons having the citizenship of Cyprus or any company registered or incorporated in Cyprus*” and that,²² pursuant to Article 1.1 of the BIT, if an investment is made through a Libyan legal entity, then such investment must be owned or controlled by Cypriot investors. The Respondent further argued that such requirements were not met in the present case since:

a) “[T]here is no link with Cyprus either through the main shareholder [SATA] or through the minority one [PROLAC]”;²³

b) “[B]ehind the legal entity incorporated in Cyprus [the Claimant], the effective investor is a Libyan citizen [Mr Abughamja] who cannot take advantage of the BIT because of his nationality;”²⁴ and

¹³ Submission, p. 11 para. 17.

¹⁴ Submission, pp. 7-8 para. 9 (citing the Claimant’s Memorandum of Association, Exhibit C-50),

¹⁵ Submission, p. 10, para. 14 (ellipses in original).

¹⁶ *Id.*

¹⁷ This Exhibit provides, in its relevant part, that “*Olin Holdings Co. Ltd. One of the companies owned by the French Soufflet [sic] group*”.

¹⁸ This Exhibit provides, in its relevant part, that “*A number [sic] meetings were held with the said company through its branch manager in Great Jamahiriya together with the manager of Soufflet Group*”.

¹⁹ This Exhibit provides, in its relevant part, that “*Olin Holdings LTD, one of the French SOUFFLET Group-owned companies*”.

²⁰ This Exhibit provides, in its relevant part, that “*the permission was given to Olin Holdings LTD of Cypriot (owned by French Soufflet Group) to carry out an investment activity*”.

²¹ Submission, p. 11 para. 16; Exhibit R-9.

²² Submission, p. 12 para. 19.

²³ Submission, p. 12 para. 20.

²⁴ Submission, p. 12 para. 22.

c) “[T]he investment made by the Libyan citizen [Mr Abughamja] is not owned or controlled by a company registered in Cyprus but a company registered in France [i.e. PROLAC]”.²⁵

95. Based on the above, the Respondent concluded that the Claimant failed to comply with “the imperative provisions of Article 1 of the BIT with respect to the definition of the investor and the investment”, stating that:

a) The Claimant is “Treaty shopping” in that it “abusively and wrongfully” pursues this arbitration based on the BIT; and

b) The RFA “results from a purely artificial and subtle scheme” where the Claimant acts as a “nut shell company [...] designed to hide reality” that neither Mr Abughamja nor SOUFLLET have the required “true link of nationality with the home Contracting State”, i.e. Cyprus, and thus cannot benefit from the provisions of the BIT.

96. In its Answer, the Claimant rejected the Respondent’s contentions discussed above, averring instead that it should be considered as a “protected Cypriot “Investor” pursuant to the terms of the BIT. In support of its position, the Claimant put forth the following three (3) arguments:²⁶

a) Its nationality under the BIT should be “determined solely by reference to its place of incorporation”;

b) The criteria invoked by the Respondent of “ultimate ownership, ultimate control, and the extent of the Claimant’s economic activities with Cyprus are irrelevant for purposes of establishing jurisdiction under the [BIT]”;

c) It has rightfully invoked the BIT without “engag[ing] in any kind of treaty shopping or any other fraudulent scheme”.

97. In support of its first argument, the Claimant notably asserted that:

a) Pursuant to [Articles 31 to 33 of the Vienna Convention on the Law of Treaties](#), the interpretation of treaties should be made “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”;²⁷ and

b) Pursuant to Article 1.2 of the BIT,²⁸ the only two criteria which should be considered for determination of the Claimant’s nationality are (1) its place of incorporation and (2) its seat.²⁹

98. Based on the foregoing, the Claimant argued that it fulfilled the above two requirements in that:

a) It was incorporated in Cyprus, as it appears from its Memorandum and Articles of Association

²⁵ *Id.*

²⁶ Answer, pp. 4-5 paras. 13-16.

²⁷ Answer, pp. 5-6 para. 20; Exhibit CL-1.

²⁸ See paragraph 80.b) for the definition of “Investor” under Article 1.2 of the BIT.

²⁹ Answer, p. 6 para. 22.

and its Certificate of Incorporation;³⁰

b) Its seat is located in Cyprus,³¹ as evidenced by its Certificate of Registered Office,³² its certificate from the Nicosia Chamber of Commerce and its auditors.³³

99. Notwithstanding the above, the Claimant reiterated its position that the purported criteria raised by the Respondent in its Submission ("*ultimate ownership*", "*control*", "*substantial economic activities*" or "*genuine link*") have no bearing in this case.³⁴

100. In relation to this second argument, the Claimant pointed out that "[u]nlike other Libyan investment treaties, Article 1.2 of the [BIT] contains no "*control*" requirement, no requirement that [the Claimant] conduct "*substantial economic activities or the like within Cyprus, and no requirement concerning the identity or location of [the Claimant's] ultimate shareholders. Nor does it contain any "denial of benefits" clause that might enable Libya to refuse to extend treaty protections to investors controlled or owned by nationals of the host State or a third State*".³⁵

101. In this regard, the Claimant pointed out that such language and limitations, which are absent from the BIT, have been explicitly included in various other bilateral investment treaties signed by Libya.³⁶ The Claimant also referred to several ICSID and UNCITRAL precedents in which arbitral tribunals "*refus[ed] to look beyond the definition of "investor" of the applicable treaty and insert a "control", "ultimate owner", "substantial economic activities", or "genuine link" component where there was none*".

102. Furthermore, the Claimant referred to a number of cases in which the "*ultimate ownership or control of the claimant lie[d] with a national of the respondent State*", yet arbitral tribunals invariably determined that in the absence of clear and express provisions in the relevant treaty relating to control, it is not for tribunals to write new and additional provisions not included in the treaty.³⁷

103. The Claimant also highlighted that, in cases where "*the ultimate ownership or control of the Claimant lie [lay] with a national of a [...] third State*", tribunals also adopted a similar approach in determining the claimant's nationality. In this respect, the Claimant referred to the following cases: *Saluka v. Czech Republic*,³⁸ *ADC v. Hungary*,³⁹ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*

³⁰ Exhibits C-50 and C-51.

³¹ At the following address: Perikleous 9, Egkomi, 2413, Nicosia, Cyprus.

³² Issued by the Nicosia Registrar of Companies and dated 13 May 2013; Exhibit C-75.

³³ Exhibits C-76 and C-77.

³⁴ Notably, the Respondent's argument regarding the nationality of Mr. Abughamja, the nationality of PROLAC or SOUFFLET or the Claimant's scope of activities in Cyprus.

³⁵ Answer, p. 7 para. 25.

³⁶ The Claimant notably referred to Article 1 (2)(b) of the Libya-Croatia BIT, Article 1 (2)(b) of the Libya-Ethiopia BIT, Article 1(2)(b) of the Libya-Slovakia BIT and Article 9 of the Libya-Austria BIT. See Answer, pp. 8-9 paras. 26-29; Exhibits C-78, C-79, C-80 and C-81.

³⁷ Namely, *Tokios Tekeles v. Ukraine* case; *Rompetrol v. Romania* case; *KT Asia v. Kazakhstan* case; *Longreef v. Venezuela* case; *Yukos v. Russia* case,

³⁸ Answer, p. 15 para. 40; Exhibit CL-7. In this case, the tribunal held *inter alia* that it could not "*in effect impose upon the parties a definition of 'investor' other than that which they themselves agree. That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) The Netherlands, and it is not open to the Tribunal to add other requirements which the parties could*

and *Aguas del Tunari v. Bolivia*.⁴⁰

104. Based on the foregoing, the Claimant argued that, in the present case, the Arbitral Tribunal should only take into account the criteria set out at Article 1.2 of the BIT, i.e. the place of incorporation and seat, in order to determine the Claimant's nationality and refuse to apply the other considerations purported by the Respondent ("*ultimate ownership*", "*control*", "*substantial economic activities*" or "*genuine link*").⁴¹

105. In addition to the above, the Claimant also rejected the Respondent's contentions that it had engaged in treaty shopping or other fraudulent schemes, arguing that it had rightfully invoked the BIT and that:

a) "[a]bsent a finding of fraud or abuse, there is no basis to disregard the corporate form of an entity [i.e. pierce the corporate veil] and instead look above the entity in the corporate chain";⁴²

b) Arbitral precedents indicate that the corporate veil should not be pierced, except in cases of "*very serious and blatant misconduct such as a claimant concealing its corporate nationality in its interactions with the host State, or creating a legal entity for purposes of gaining access to arbitration under a treaty*";⁴³

c) Its incorporation in 1994, the acquisition of shares by Mr Abughamja in 2001, its decision to invest in Libya in 2002 and the authorization and licence it received from Libyan authorities in 2002 and 2003 (pursuant to the Libyan Law No. 5 of 1997 for the Promotion of Investment of Foreign Capital ("*Law No. 5*") all predate the signature of the BIT in 2004;

d) Its incorporation and Mr Abughamja's acquisition of its shares predate the signature of the BIT and, therefore, it "*cannot be said that Claimant was incorporated in Cyprus for the sole purpose of availing itself of the protections under the [BIT] and gaining supposed fraudulent access to the present arbitral forum*"; and

e) It had always been transparent with Libyan authorities as to its Cypriot nationality and it was recognized as such in various documents issued throughout the course of the investment by the Libyan Ministry of Economy and Trade and the Libyan Foreign Investment Board.⁴⁴

106. In its Reply, the Respondent clarified that, while it did not dispute the fact that the Claimant was incorporated and seated in Cyprus and that it had been treated and recognized as a Cypriot

themselves have added but which they omitted to add."

³⁹ Exhibit CL-8. In this case, the arbitral tribunal only took into consideration the state of incorporation of the Claimant in determining its nationality and refused to apply a "*genuine link*" criterion, stating notably that such requirement was absent from the Cyprus-Hungary BIT and that it could not "*read more into the BIT than one can discern from its plain text*".

⁴⁰ In the *Gold Reserve* case, the tribunal also refused to apply a "*genuine link*" criterion which was not included in the definition of "investor" under the Canada-Venezuela BIT. In the *Aguas del Tunari* case, the tribunal "*was not inclined*" to pierce the corporate veil in the absence of fraud or abuse, stating that the use of holding companies was "*both a common and legal device for corporate organizations*".

⁴¹ Answer, pp. 17-18 paras. 44-49. The Claimant further contended that Article 1.1 of the BIT only extends the protections of the BIT "*to investments made by 'investors' through locally-incorporated vehicles*", without restricting its scope of application and without any bearing on the definition of 'investors' at Article 1.2 of the BIT.

⁴² Answer, p. 19 para. 52.

⁴³ Answer, p. 19 para. 52. In this regard, the Claimant referred to *Tokios Tokeles* (discussed in paragraph 98, *Rumeli and Telsim v. Kazakhstan* (CL-11) and *ADC v. Hungary* (discussed in paragraph 103).

⁴⁴ In this regard, the Claimant referred to Exhibits C-3, C-5, C-11, C-48, C-12 and C-19.

company by Libyan authorities, it still had “*some reason to suspect the nationality of the investor and of the investment*” in relation to these proceedings.

107. in this regard, the Respondent invited the Arbitral Tribunal to consider Articles (1) and (2) of Law No. 5,⁴⁵ pointing out that the objective of this legislation was to attract investments from the Libyan diaspora and foreigner investors and that “*Libyan citizens living in Libya could invest in foreign projects, but only foreign capital, otherwise it would not constitute a foreign investment*”.
108. In this regard, the Respondent maintained that the Claimant failed to comply with Law No. 5 in that:
- a) Throughout the whole duration of the project, the “foreign capital” was owned by Mr Abughamja, a Libyan citizen residing in Tripoli, either directly or through SATA;⁴⁶
 - b) Mr Abughamja owned the piece of land on which the dairy products factory (subject of the investment) was built;⁴⁷ and
 - c) The “*law of 21/10/2013*” lifted restrictions on the ownership of land by foreigners in Libya but the Claimant still entered into the lease contract (2005), usufruct contract (2006) and property sale contract (2007) (all in relation to the dairy products factory).⁴⁸
109. Based on the above elements, the Respondent concluded that this “*dispute is a pure manipulation, on the one hand of the facts and, on the other hand of the provisions of [Law No. 5, as amended in 2003 and of the BIT]*”.
110. In its Rejoinder, the Claimant further reiterated that it qualifies as a protected investor as per the terms of the BIT, asserting that:
- a) The Respondent had acknowledged that it is incorporated and seated in Cyprus, the only two requirements set out at Article 1.2 of the BIT to be considered as a protected investor;⁴⁹
 - b) The Respondent had failed to address the arbitral case law presented by the Claimant in its Answer;⁵⁰ and
 - c) The Respondent attempted to circumvent the clear terms of the BIT by importing criteria for the definition of “investor” that are absent therefrom (e.g. original of capital, corporate control, effective seat).⁵¹

⁴⁵ Article 1: “*This law aims at promotion of investment of foreign capital for construction of investment project within the framework of the general policy of the State and the objectives of economic and social developments [...]*” (as quoted by the Respondent at Reply, p. 13 para. 28). Article 2: “*This law shall be applicable to investment of foreign capital owned by Libyan citizens and nationals of Arab and Foreign States in investment projects. The national may participate with the foreign capital in investment*” (as quoted by the Respondent at Reply, p. 13 para. 28).

⁴⁶ Exhibits R-1, R-2 and R-3.

⁴⁷ Exhibits C-9, C-13 and C-55.

⁴⁸ Reply, p. 15 para. 34. The Respondent also contended that the Claimant’s contention that it had to buy a piece of land through Mr Abughamja then rent this land from the latter and ultimately buy it back from him “*misrepresents the reality and does not take into account the provisions of a Law promulgated on 21/10/2003 which had for effect to lift the previous prohibition for a foreign citizen to own a piece of land in Libya*”. The Respondent further referred to the RFA at p. 7 para. 5 and to Exhibit R-13.

⁴⁹ Rejoinder, p. 6 para. 20.

⁵⁰ Rejoinder, p. 6 para. 21.

⁵¹ The Claimant reiterated that it had not been created for the purpose of gaining access to arbitration and that it had never concealed its

111. The Claimant further averred that the Respondent had not demonstrated any kind of fraudulent behaviour on the Claimant's part which would justify piercing the Claimant's corporate veil (e.g. *"improper access to arbitration or abuse of corporate formalities"*).⁵²
112. Notwithstanding the above, the Claimant asserted that, at all times, it remained in compliance with the 'foreign capital' requirement under Law No. 5,⁵³ pointing out that:
- a) The Registrar of the Libya Foreign Investment Board (*"LFIB"*) indicates the Claimant's participation in the project amounted to USD 8 million in 'foreign' capital;⁵⁴
 - b) Its dairy and juice production factory was built with materials procured abroad and the materials it used for the project were also imported;⁵⁵ and
 - c) The Libyan Ministry of Economy and Trade and the LFIB both acknowledged and accepted the Claimant's Cypriot nationality on multiple occasions.⁵⁶

c) The arbitral Tribunal's Analysis and Decision

i. Review of the evidence on the record

113. The Arbitral Tribunal provides below a review of the evidence submitted on the record in this arbitration regarding the Claimant's nationality. This review is not intended to be a comprehensive account of all the matters discussed in these documents, but rather an outline of the various references to the Claimant's nationality and the factual elements which are relevant to this Issue No. 1.
114. In this regard, the Arbitral Tribunal specifically refers to:
- a) The General People's Committee (*"GPC"*) for Economy and Commerce's Resolution No. 365 of 12 November 2002 (*"Resolution No. 365"*) entitled *"Of permission for an investor to execute the investment activity in the Great Jamahiriya"* which notably:
 - (i) Referred to, *inter alia*, *"law No. (5) year 1997 regarding investment furtherance the foreign capitals [sic] "Law No. 5" and its executive regulation"*;
 - (ii) Authorized under its Article 1 *"Olin Holdings Limited Company / Cyprus nationality with sharing percentage 100% to execute a factory for producing the dairy products and its derivatives"*;⁵⁷ and

Cypriot nationality in its dealings with Libyan authorities. Rejoinder, pp. 7-8 paras. 26-29.

⁵² Rejoinder, p. 8 para. 27.

⁵³ The Claimant referred to Articles 3 and 4 of Law No. 5. See Rejoinder, pp. 10-13 paras. 35-40.

⁵⁴ Exhibit C-48.

⁵⁵ Exhibits C-61 (at FL-4.1, 4.2 and 5), C-21 (at paras. 23-25); and C-7.

⁵⁶ Exhibits C-3, C-5, C-11, C-48, C-12, C-19 and C-96.

⁵⁷ Exhibit C-3.

(iii) Provided in its Article 2 that *“the investment furtherance body [i.e. the LFIB] will give the licenses and approvals necessary to establish the investment project in accordance with the provisions of [Law No. 5] and its executive regulation”*;

b) The notification, on 18 November 2002, of GPC Resolution No. 365 by the LFIB to the Claimant was addressed to *“Messrs. OLIN HOLDINGS Ltd. - CYPRIOT”* and notably requested the Claimant *“[...] to proceed to implement [its] project, and complete the required legal procedures, in order to enable us to issue the necessary license in this regard, under the terms and conditions stipulated in [Law No. 5] and its Executive Regulation”*;⁵⁸

c) The LFIB Licence No. 044 dated 3 March 2003 (*“License No. 44”*) which was entitled *“Investment project license to establish investment project [sic]”* and was issued to *“Investor: Olin Holdings, Ltd. /Cyprus”* for the establishment of its dairy products factory in Tripoli, in accordance with Law No. 5 and Resolution No. 365;⁵⁹

d) The letter from the LFIB to the *“Secretary of People’s Committee of Tripoli Shabiat”* dated 29 September 2003 which refers to *“the investor Olin Holdings Company Ltd. Nationality Cyprus”*;⁶⁰

e) The Registration Confirmation Certificate issued by the Tripoli Chamber of Commerce, Industry and Agriculture on 7 June 2004, which attests to the registration of the *“Branch of Olin Holdings Limited Company, Cyprus”* as a *“Foreign Company Branch”*, with Mr. Abughamja as *“General Director”* and *“Licensee”*;⁶¹

f) The General People’s Committee for Economy and Trade’s Resolution No. 697 of 30 October 2005 (*“Resolution No.697”*), which amended Article 1 of Resolution No. 365 by:

(i) Expanding the scope of the Claimant’s investment project from the production of dairy products only (see 114.a)(ii) above) to *“the production of dairy products and juices of all kinds”* (emphasis added);

(ii) Specifying that the Claimant’s investment would be implemented through a *“branch of a foreign company”* named *“Olin Holdings, Ltd.”*;⁶²

g) The LFIB License No. 093 of 21 November 2005 (renewal) which was issued in favour of: *“The Investor: Olin Holdings, Ltd./ Country of Origin: Cyprus”*, noting that the legal form of the investment was a *“branch of a foreign company”*;⁶³

h) The extract from the Investment Projects Register of the LFIB which provides that *“Olin Holdings, Ltd”*, of nationality *“Cyprus”*, contributed USD 8,000,000.00 in *“foreign capital”* to the investment project and the attached *“Certificate of Fees Paid”* dated 3 July 2006 which was made in the name of *“Branch of Olin Holdings, Ltd./Cyprus”*;⁶⁴

⁵⁸ Exhibit C-4.

⁵⁹ Exhibit C-5.

⁶⁰ Exhibit C-35.

⁶¹ Exhibit C-6.

⁶² Exhibit C-11.

⁶³ Exhibit C-12.

⁶⁴ Exhibit C-48.

i) The GPC Resolution No. 241 of 19 October 2006 ("*Resolution No. 241*") which ordered the expropriation for public interest of the plot of land on which the Claimant's factory was built to make way for the establishment of a housing project;⁶⁵

j) The letter from the LFIB to the GPC for Housing and Infrastructure dated 14 November 2006 which referred to "*the notice to vacate the property used by Olin Holdings, Ltd./Cyprus [...]*", stating notably that "*we [the LFIB] hope that you [the GPC for Housing and Infrastructure] would not take any measures to harm the project and the investor which would reflect on the climate for foreign investments in our country and damage the reputation of the Great Jamahiriya before the world, especially as our country has become a preferred destination for investors and businessmen in view of its state of security and stability*";⁶⁶

k) The letter from the LFIB to the People's Committee for Economy, Trade and Investment dated 16 November 2006 in which the Claimant is referred to as "*Olin Holdings Ltd./Cyprus*";⁶⁷

l) The LFIB License No. 20/2006 dated 26 November 2006 (renewal) which was issued in favour of "*Branch of Olin Holdings, Ltd./Cyprus*" notwithstanding the expropriation measures taken through Resolution No. 241;⁶⁸

m) The expert report submitted by Messrs Murad Salim Al-Ghunaymi and Omar Ahmad Abdul-Hadi to the South Tripoli Court of First Instance on 30 November 2006, which was filed "[a]s per the request of Mr. the legal representative of the Cypriot company Olin Holdings Limited/Jamahiriya branch Against The People General Committee Secretary (In his capacity) and others";⁶⁹

n) The letters from the LFIB to the GPC of the Public Properties Authority and the GPC for Housing and Infrastructure respectively dated 7 and 10 December 2006 which mentioned "*the notice to vacate the property used by Olin Holdings, Ltd. Cyprus [...]*", reiterating the content of the LFIB's letter of 14 November 2006 referred to in paragraph 114.j) above;⁷⁰

o) The letter from the LFIB to the Manager of the Sahara Bank dated 11 March 2007 which mentions the "*factory owned by the investor: Olin Holdings. Ltd./Cyprus*";⁷¹

p) The letter from the LFIB to the Director of the Public Property Authority Office (Tripoli) dated 12 March 2007 which referred to the "*project owned by the investor. Olin Holding Ltd/Cyprus*" and to the "property utilized by Olin Holding Ltd/Cyprus", requesting that the Claimant be exempted from the expropriation measures order under Resolution No. 241 in accordance with "the law issued by the Primary People's Congresses protecting the legal obligations of foreign investors and avoiding the negative consequences that would reflect on attracting foreign and local investments in the Great Jamahiriya";⁷²

⁶⁵ Exhibit C-14.

⁶⁶ Exhibit C-16.

⁶⁷ Exhibit C-2.

⁶⁸ Exhibit C-19.

⁶⁹ Exhibit C-21.

⁷⁰ Exhibits C-46 and C-22.

⁷¹ Exhibit C-53.

⁷² Exhibit C-24.

q) The letter from the GPC for Economy, Trade and Investments to the Secretary of the GPC dated 19 June 2007 which notably states that:

The executive body in Jamahiriya [sic], at its various levels, is now before a real test towards respect of the legislations governing the economic activity and its credibility through the case currently on hand of Olin Holdings of Cypriot [sic] which has constructed a Milk, Dairy Products and Juice Factory under [Law No. 5] following completion of all the administrative and legal procedures.

Non-literally implementation [sic] of the investment law towards this case shall result in a negative and bad effect on foreign investors currently operating in the country, what would alienate any new investor thinking of investing in Jamahiriya [sic] and would make international investment guarantee agencies reconsider their classification of Jamahiriya [sic] by rising the risks levels and their consequences on increasing the insurance premiums and thus resulting in reduction of investors to come to Jamahiriya, particularly at this time during which Jamahiriya [sic] seeks to develop such activity by all ways and means as confirmed by the letter of the [GPC] NO. (4770) dated 01/05/2007 regarding entry and existence of the foreign investor in various economic, production, servicing and tourism activities";⁷³

r) The LFIB License No. 20 of 18 November 2008 (renewal) which mentions “branch of Olin Holdings, Ltd./Cyprus” as the “Legal Form”;⁷⁴ and

s) The letter from the GPC for Justice to the “Committee for the Management of the Real Estate & State Property Department” dated 24 October 2010 which refers to the administrative appeal brought forth by “the legal representative of the Olin Holdings Company Ltd of Cyprus [...]”.⁷⁵

115. The above-mentioned correspondence and documents clearly indicate that, from the issuance of its first authorization (Resolution No. 365) and licence (License No. 44) until the start of this arbitration, the Claimant has consistently and continuously been considered by various Libyan governmental authorities and institutions, as a foreign investor of Cypriot nationality which sought to implement a foreign investment in Libya (dairy products and juice factory) in accordance with Libyan Law No. 5 on foreign investments.

ii. The Criteria for determining an Investor’s Nationality under the BIT

116. Article 9 of the BIT, i.e. the arbitration agreement in these proceedings, limits the scope of application of the dispute resolution mechanism set out therein to “[d]isputes that may arise between one of the Contracting Parties and an investor of the other Contracting Party with regard to an investment in the sense of the present Agreement [...]” (Article 9.1 of the BIT).

117. In turn, Article 1.2 of the BIT defines an ‘investor’ as:

⁷³ Exhibit C-47.

⁷⁴ Exhibit C-60.

⁷⁵ Exhibit C-67.

“[...] with regard to either Contracting Party:

- Any natural person having the citizenship of that Contracting party [sic] in accordance with its law;

- Any legal person constituted or incorporated in compliance with the law of that Contracting Party and having their seat in the territory of the same Contracting Party;

who in compliance with this Agreement, are making investments in the territory of the other Contracting Party.”

118. The Parties disagreed as to how the above provision of the BIT should be interpreted:
- a) On the one hand, the Respondent argued that Claimant should not be considered as a Cypriot investor pursuant to the BIT due to the fact that its ultimate shareholders, i.e. Mr Abughamja and the Soufflet Group, both lacked the required *“true link of nationality with the home Contracting State”*; ⁷⁶ and
 - b) On the other hand, the Claimant maintained that only the criteria explicitly listed at Article 1.2 of the BIT should be considered to determine its nationality, i.e. the place of incorporation and the seat.
119. In determining this issue, the Arbitral Tribunal should accordingly consider the provisions of the BIT and the criteria provided thereunder in relation to the nationality of an investor. In doing so, the Arbitral Tribunal should also consider whether it should apply further nationality thresholds (e.g. ‘denial of benefits’) that were not explicitly included by the Republic of Cyprus and the Respondent when drafting the BIT.
120. In this regard, the Arbitral Tribunal first notes that the clear wording of Article 1.2 of the BIT indicates that the following two criteria should be applied to assess the nationality of a legal person:
- a) The legal person must have been constituted or incorporated in accordance with the laws of a Contracting Party, i.e. the Republic of Cyprus or the State of Libya; and
 - b) The seat of the legal person must be located within the territory of the same Contracting Party.
121. The criteria retained by the Republic of Cyprus and the Respondent should be compared with those found in other bilateral investment treaties entered into by the Respondent, both before and after the BIT. In this regard, similar incorporation criteria have been adopted in the following bilateral investment treaties entered into by the Respondent, including but not limited to:
- a) Article 1(b)(2) of the 2001 Libya-Algeria BIT which defines ‘investor’ notably as *“the companies of a contracting party, any legal entity, organisation, firm, association incorporated or constituted in accordance with the laws of that contracting party”*;
 - b) Article 1(l)(b) of the 2002 Libya-Austria BIT which defines an ‘investor’ as *“an enterprise*

⁷⁶ The Arbitral Tribunal notes that the Respondent has used several different formulations to make this point, including but not limited to: *“ultimate ownership”, “control”, “substantial economic activities” or “genuine link”*.

constituted or organised under the applicable law of a Contracting Party making or having made an investment in the other Contracting Party's territory";⁷⁷ and

c) Article 1(2)(b) of the 2004 Libya-France BIT which provides the following definition of 'investor': *"any legal entity constituted in the territory of one of the Contracting Parties in accordance with its legislation and having its seat in such territory".⁷⁸*

122. However, in other bilateral investment treaties, the Respondent added further requirements to the definition of an "investor", including a criterion of 'genuine link':

a) Article 1(2)(b) of the 2002 Libya-Croatia BIT notably defines 'investor' as a *"legal entity incorporated, constituted or otherwise duly organized in accordance with the laws and regulations of one Contracting Party, having its headquarters and performing real business activity in the territory of that Contracting Party"* (emphasis added);⁷⁹

b) Article 1(2)(b) of the 2004 Libya-Ethiopia BIT states that the term 'investor' comprises notably *"[a] legal entity including companies, corporation, business associations, enterprises, which are constituted or otherwise duly organized under the laws of that Contracting Party and have their seat, together with their economic activities, in the territory of that same Contracting Party"* (emphasis added);⁸⁰

c) Article 1 (2)(b) of the 2009 Libya-Slovakia BIT sets out the following definition of 'investor': *"[...] any entity, which is incorporated or constituted in accordance with the laws and regulations of one of the Contracting Parties and which has its registered office, central administration or principal place of business in the territory of one of the Contracting Parties. However, should such a legal person have only its registered office in the territory of one of the Contracting Parties, its operations must possess a real and continuous link with the economy of one of the Contracting Parties."* (emphasis added).⁸¹

123. The above-referenced treaties pursuant to which the nationality of an 'investor' is determined on the basis of either the incorporation and/or seat (e.g. the treaties signed with Algeria, France and Austria) or a more elaborate criteria of 'effective control' and/or 'genuine link' (e.g. the treaties signed with Croatia, Ethiopia and Slovakia) were entered into by the Respondent both before and after the BIT.

124. These different definitions therefore indicate that, at the time of signing the BIT with the Republic of Cyprus, the Respondent deliberately chose not to include any criteria other than the country of incorporation and the location of the seat. Had the Respondent wanted to include a criterion of 'effective control' or 'genuine link' in the definition of an investor under the BIT, it could have done so explicitly, as it did in its agreements with Croatia, Ethiopia and Slovakia.

⁷⁷ Exhibit C-81.

⁷⁸ Exhibit C-82, free translation of the Arbitral Tribunal of: "[...] *toute personne morale constituée sur le territoire de l'une des Parties contractantes conformément à la législation de celle-ci et y possédant son siège social*"

⁷⁹ Exhibit C-78.

⁸⁰ Exhibit C-79.

⁸¹ Exhibit C-80.

125. Moreover, at the time of adoption of the BIT, i.e. 30 June 2004, the Claimant had already been recognized as a ‘foreign investor’ implementing a ‘foreign investment’ in Libya in accordance with Law No. 5 on foreign investments, as indicated by Resolution No. 365 (of 2002) and License No. 44 (of 2003).
126. In this regard, the Arbitral Tribunal refers to [Article 31\(1\) of the Vienna Convention on the Law of Treaties](#) which provides that “[a] *treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*”.
127. In the absence of any ambiguity or uncertainty, the Arbitral Tribunal considers that it should not go beyond the clear wording or ordinary meaning of Article 1.2 of the BIT and only apply the criteria explicitly listed therein, i.e. the incorporation and the seat, to determine whether or not the Claimant should be considered as a protected investor under the BIT. The Respondent approved such limitative definition when it signed the BIT and it cannot argue now that the Arbitral Tribunal lacks *ratione personae* jurisdiction over the dispute due to an alleged absence of genuine link or effective control.
128. This position finds support in several precedents in the field of investment arbitration where tribunals have refused to go beyond the clear terms of a bilateral investment treaty. Multiple arbitral awards submitted on the record of this arbitration, mentioned in paragraphs 102 and 103 above, also go in the same direction: *Tokios Tokeles v. Ukraine*, *Rompetro v. Romania*, *KT Asia v. Kazakhstan*, *Longreef v. Venezuela*,⁸² *Yukos v. Russia*, *Saluka v. Czech Republic*, *ADC v. Hungary*, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* and *Aguas del Tunuri v. Bolivia*.

iii. The Claimant’s Nationality in this arbitration

129. Taking into consideration the findings set out in Section c)ii above, the Arbitral Tribunal considers that the following criteria should be assessed in order to determine the Claimant’s nationality under Article 1.2 of the BIT:
- a) The country in which the Claimant was incorporated; and
 - b) The location of the Claimant’s seat.
130. In this regard, the Arbitral Tribunal notes that:
- a) The Claimant’s Certificate of Incorporation and its Articles of Association indicate that it was duly incorporated on 28 February 1994 as a Limited Liability Company in accordance with the Cypriot “*Companies Law, Cap. 113*”,⁸³ and
 - b) The Claimant’s Memorandum of Association, Certificate of Registered Office (issued by the Nicosia Registrar of Companies) and Membership Certificate for the Nicosia Chamber of Commerce and

⁸² Exhibit CL-5.

⁸³ Exhibits C-50 (at p. 11) and C-51.

Industry show that its seat is located in Nicosia, Cyprus.⁸⁴

131. The Arbitral Tribunal further notes that, while the Respondent explicitly recognized that the Claimant was incorporated and seated in Cyprus,⁸⁵ it nonetheless averred that the Claimant is a nutshell company which “*abusively and wrongfully*” sought to take advantage of the dispute resolution mechanism of the BIT and of Law No. 5 by filing a “*fraudulent*” RFA.
132. The Arbitral Tribunal rejects the Respondent’s contentions in this regard as it failed to demonstrate satisfactorily that:⁸⁶
- a) The Claimant engaged in any fraudulent behaviour or serious and blatant misconduct in initiating this arbitration;
 - b) The Claimant was created for the sole purpose of gaining access to this arbitration or benefiting from the BIT, having been incorporated *ca. ten* (10) years prior to the signature of the BIT; and
 - c) Mr Abughamja acquired his shares in the Claimant for the sole purpose of gaining access to this arbitration or benefiting from the BIT via the Claimant, such acquisition having taken place *ca. three* (3) years prior to the signature of the BIT.
133. The Arbitral Tribunal further considers that the documents mentioning the involvement of the French Soufflet Group in the Claimant’s investment and activities demonstrate that the Libyan authorities were well aware of such involvement and, yet, still recognized the Claimant as a Cypriot entity.⁸⁷
134. Furthermore, the Arbitral Tribunal also notes that Resolution No. 365 and License No. 44 (as well as its subsequent renewals) were granted to the Claimant in accordance with and consideration of Law No. 5, which was adopted with the aim of promoting the “*investment of foreign capital for construction of investment projects within the framework of the general policy of the State and the objectives of economic and social development [...]*” (Article 1). The scope of application of Law No. 5 is defined as follows under its Article 2:
- “This law shall be applicable to investment of foreign capital owned by Libyan Arab citizens and nationals of Arab and Foreign states in investment projects.*
- The national capital may participate with the foreign capital in investment. The executive regulation for this law shall specify the basics and rules for such participation.”*
135. This Law No. 5 also defines:
- a) ‘Foreign Capital’ under its Article 3(6) as the “[t]otal financial value entered into the Great

⁸⁴ Exhibits C-50 (at p. 2, Item 2) and C-75.

⁸⁵ Reply, p. 12 para. 26.

⁸⁶ Exhibit CL-2 para. 56, CL-11 para 328, CL-8 para 358, CL-29 para. 158 (*a contrario*) and CL-42 para. 140-142 (*a contrario*).

⁸⁷ Exhibits C-25, C-26, C-39 and C-40.

Jamahiriya in whether owned by Libyans or foreigners for performing investment activities”; and

b) ‘Investor’ under its Article 3(9) as “[a]ny national or foreign natural or juridical person investing under the provision of this law”.

136. In this regard, the Arbitral Tribunal notes that the extract of the LFIB Registrar submitted on the record shows that the sums invested by the Claimant were considered as ‘foreign capital’ pursuant to Article 3(6) of Law No. 5.
137. It thus appears that Law No. 5, similarly to the BIT, does not retain any criteria of ‘effective control’ or ‘genuine link’ in its definition of ‘Investor’ and, on the contrary:
- a) Explicitly includes both national and foreign individuals or entities in its scope of application; and
 - b) Focuses instead on the origins of the funds to be invested in a project in order to determine whether or not such funds constitute ‘foreign capital’.
138. Based on the foregoing, the Arbitral Tribunal finds that the Respondent failed to present any evidence or a legal basis that would justify piercing the Claimant’s corporate veil and examining the Claimant’s nationality with regards to that of its ultimate shareholders. Accordingly, the Arbitral Tribunal determines that the Claimant does qualify as a Cypriot investor pursuant to Article 1.2 of the BIT, given that it is incorporated and seated in Cyprus, as set out above.

8. ISSUE NO. 2: IS THE CLAIMANT PRECLUDED FROM BRINGING FORTH THESE ARBITRAL PROCEEDINGS DUE TO THE FACT THAT IT HAS ALREADY PURSUED COURT PROCEEDINGS IN LIBYA AND THAT IT DOESN’T MEET THE REQUIREMENTS OF ARTICLE 9 OF THE BIT?

a) Summary of the Parties’ positions

139. The Respondent challenged the jurisdiction of the Arbitral Tribunal on the basis that the Claimant already exercised a final and irrevocable choice in favour of Libyan courts to resolve the dispute arising out of its investment, thereby foregoing its right to submit such dispute to an arbitral tribunal.
140. The Claimant rejected the Respondent’s allegations, arguing that it did not exercise a final and irrevocable choice in favour of Libyan courts to resolve the dispute arising out of its investment or forego its right to submit such dispute to an arbitral tribunal.

b) The Parties' Positions

141. In its RFA, the Claimant notably averred that:

a) After the issuance of Resolution No. 365 by the GPC for Economy, Trade and Investment on 12 November 2002, it proceeded with its investment project, built its factory and entered into a manufacturing and distribution agreement with French supplier Candia;⁸⁸

b) On 12 November 2006, it was notified of the issuance of GPC Resolution No. 241 dated 19 October 2006 which ordered the expropriation of the plot of land on which it had built its factory for public purposes;

c) On 25 November 2006, GPC Resolution No. 266 was issued, replacing Resolution No. 241 and confirming the expropriation of a larger land area;

d) *Following the issuance of Resolution No. 266, the Claimant decided to challenge this decision it considered as "wonderful under applicable Libyan laws and /or the BIT provisions";*⁸⁹

e) *It adopted a two fold strategy to challenge the expropriation measures:*

(i) *"it took actions vis-a-vis the Libyan authorities, in particular the [LFIB]"*

(ii) *"it instituted judicial proceedings to protect [its] rights";*

f) *"In addition, one should recall the political surroundings and the fear atmosphere which was prevailing during the days of the Great Socialist People's Libyan Arab Jamahiriya.*

*Olin knew that it had no other alternative but to oppose the demolition of its plant since, in these days, it was almost impossible to sue the Libyan state to obtain compensation; otherwise, the Libyan shareholders of Olin would have been under an obligation to leave Libya if they had sued the State. It would have been impossible to initiate ICC arbitration proceedings against Libya during these Libya during these days".*⁹⁰

g) *On 13 November 2006, the President of the South Tripoli Court of First instance nominated two experts to evaluate the value of the Claimant's plants and materials. The two experts rendered their report on 30 November 2006, evaluating the value of the Claimant's factory and assets respectively at LYD 4,844,018,018 and LYD 8,609,130,285;*⁹¹

h) *"Immediately after the issuance of the expert reports [the Claimant] initiated judicial proceedings before the Tripoli Appeal Court seeking annulment of the two successive unlawful administrative decisions of dispossession issued by the [GPC] in breach [GPC] in breach of Law";*⁹²

i) *"Having no illusion vis-a-vis the Libyan judicial process, [the Claimant] tried through numerous combats and meetings, to obtain the repeal of the dispossession decision or, at least, an exemption*

⁸⁸ RFA, pp. 4-9 paras. 1 -8.

⁸⁹ RFA, PP.11-12 paras. 9-10.

⁹⁰ RFA, PP. 12 paras. 100.

⁹¹ RFA, PP.12-13 paras. 9-11.

⁹² RFA, PP.12-13 paras. 11.

*from the dispossession decision like other plants which had been specifically exempted[.,,]”;*⁹³

*j) On 13 April 2010, the Tripoli Court of Appeal issued its judgement in the case brought forth by the Claimant, finding that Resolution No.266 was null and void. This decision was notified to the Claimant on 12 August 2010;*⁹⁴

*k) On 31 August 2010, it received a letter from the Social Land Registry and Authentication Authentication Department, requesting the evacuation of its property within a week and referring to Resolution No. 266, despite the judgment issued by the No. 266, despite the judgment issued by the Tripoli Court of Appeal;*⁹⁵

l) Faced with the Respondent's failure to acknowledge and comply with the judgment of the Tripoli Court of Appeal, the Claimant “had to continue to fight on two levels at the same time” by:

(i) “protect[ing] its investment against expropriation and from destruction even though the decision of the [GPC] had been declared unlawful, null and void”; and

(ii) “obtain[ing] compensation and indemnification, on the basis of Law(5), for the damages suffered by Olin because its plant could not be operated in the normal course of business”;

m) On 7 December 2010, it filed to obtain for compensation based on domestic Libyan laws laws before the South Tripoli Court of First Instance, seeking LYD 76,900,971.642 for losses of revenues and lost opportunities, LYD 10,000,000.00 for material damages resulting from the dispossession and LYD 7,000,000.00 for moral damages;

n) “No hearings, and only one exchange of briefs ever took place in these proceedings [before the South Tripoli Court of First Instance]”;

o) In January 2014, the Claimant filed a motion to submit additional evidence at a hearing scheduled to take place on 4 February 2014;

p) On 4 February 2014, the South Tripoli Court of First Instance disregarded the Claimant’s motion and issued its ruling immediately, dismissing the Claimant’s claims and ignoring Article 23 of Laws No. 5 and 7 regarding protections against expropriations, as well as the judgment of the Tripoli Court of Appeal in the administrative case;

q) The judgment issued by the South Tripoli Court of First Instance is tantamount to a denial of justice since it ignored:

(i) the Claimant’s entitlement to compensation under Article 173 of the Libyan Civil Code for the unlawful expropriation measures suffered as a result of Resolution No. 266;

(ii) the judgment of the Tripoli Court of Appeal in the Claimant's administrative case; and

(iii) Article 23 of Law No. 5 and Law No. 9 regarding the protection against expropriation for foreign investments;

⁹³ RFA, P.13 paras.12.

⁹⁴ RFA, P.20 paras.18.

⁹⁵ *Id.*

r) "Faced with such denial of justice after more than 7 years of legal battles, Olin decided to initiate proceedings to obtain the acknowledgement of the international wrongful acts which are attributable to Libya on the basis of international law and of the provisions of the BIT";

s) The Respondent is being sued in this arbitration for the acts and/or omissions of several Libyan state organs, attributable to the Respondent, in relation to the dispossession measures it suffered;⁹⁶

t) On 13 March 2014, the Claimant issued a notice to the Respondent pursuant to Article 9.1 of the BIT, inviting the latter to endeavour to settle the dispute amicably and attaching a draft copy of the RFA;

u) On 14 April 2014, the Privatization and Investment Board (*PIB*) (i.e. not the Respondent) replied to the Claimant's letter of 13 March 2013, advising that it was ready to hold a meeting with the Claimant's representatives in order to settle the dispute;

v) On 22 April 2014, the Claimant replied to the PIB's letter of 14 April 2014, acknowledging the Respondent's offer to negotiate within the framework of the BIT and setting out conditions for holding such meeting;

w) On 12 May 2014, the PIB replied to the Claimant's letter of 22 April 2014, advising that it had "contacted the Ministry of Economy in order to form a delegation to discuss and negotiate with the [Claimant]";

x) On 13 May 2014, the Claimant advised the Respondent, stating notably that it had yet to receive a confirmation that the PIB was authorized to negotiate on behalf of the Respondent and, by separate letter of the same day, provided the PIB with a copy of its letter to the Respondent;

y) Having received no firm answer from the Respondent regarding the settlement negotiations, the Claimant considered that the involvement of the PIB was a dilatory technique, and that the Respondent had failed to engage in good faith settlement negotiations.

142. In its Answer to the RFA, the Respondent notably contested the validity of the RFA due to the inapplicability of the BIT in the present dispute as well as the basis of the allegations and claims put forth in the RFA.

143. In its Submission, the Respondent argued that the settlement of the dispute between the Parties should be analysed on the basis of the following provisions:⁹⁷

a) Articles 1 and 2 of Law No. 5, as amended in 2003, which set out its objectives and general scope of application;

b) Article 20 of Law No. 5, as amended in 2003; which provides a mechanism for an investor to file

⁹⁶ RFA, p. 4. The Claimant referred to the following State organs and officials: the Prime Minister (f. k.a. Secretary of GPC), the Prime Minister Cabinet (f. k.a. GPC), the Privatization and Investment Board (f. k.a. LFIB), the Ministry of Finance (f. k.a. GPC of Finance), the Ministry of Housing and Infrastructure (f. k.a. GPC for Housing and Infrastructure), the Social Land Registry and Authentication Authorities, the Tripoli Municipality Properties Office, the Ministry of Economy, Trade and Investment (f. k.a. the GPC for Economy, Trade and Investment) and the Minister of Industry (f. k.a. Secretary of the GPC for Industry and Minerals).

⁹⁷ Submission, pp. 14-15.

a complaint or appeal decisions taken by the LFIB;⁹⁸

c) Article 24 of Law No. 5, as amended in 2003, which defines the mechanism for the resolution of disputes between a foreign investor and the Respondent;⁹⁹ and

d) Article 9 of the BIT, reproduced at paragraph 12 above.

144. In this regard, the Respondent contended that:

a) *“Libyan law is much more favorable to the foreign investor and investment since, when a Bilateral Agreement has been signed by Libya with a foreign State to whom they belong, the dispute has to be directly presented to the competent court in accordance with the provisions of the BIT. It must be noted that in such a case, no choice is given to the foreign investor; it is excluded that the national Libyan courts can settle this kind of disputes [sic]”*;¹⁰⁰

b) Article 9 of the BIT provides an investor with two procedural options for the settlement of dispute, i.e. court proceedings or arbitration, a *“mechanism of irrevocable choice which is alternative and not cumulative or successive”* and pursuant to which *“[t]he investor has to make a definitive choice between national and international tribunal and to comply with its choice”*, underlining the use of the word “or” in this Article.¹⁰¹

145. The Respondent further noted that, in its RFA, the Claimant contended that:

a) It had been dispossessed of its investment by the Libyan authorities, in contravention of Article 23 of Law No. 5 regarding expropriation;¹⁰² and

b) It adopted a two-fold strategy whereby it *“took actions vis-a-vis the Libyan authorities”* (notably the LFIB) and initiated court proceedings in Libya.¹⁰³

146. Taking the above into consideration, the Respondent averred that the *“Claimant choose [sic] to submit the dispute to Libyan courts and gave definitely and irrevocably jurisdiction to the latter”*, stating *inter alia* that:

⁹⁸ In relation to the decision taken under Article 18 (re. violations of this Law by the investor) or Article 19 (re. withdrawal of investment permit or liquidation of the project) of Law No. 5, as amended in 2003.

⁹⁹ Article 24 of Law No. 5, as amended in 2003, reads as follows: *“Any dispute arising between the foreign investor and the State, either by action of the investor or as a result of procedures taken against by the State shall be presented to the Competent courts in the Great Jamahiriya, unless there is a bilateral agreement between the Great Jamahiriya and the State of the investor are parties thereof [sic], including provisions for conciliation, arbitration or special agreement between the investor and the State providing for arbitration clause [sic]”*. See Exhibit C-1 (at p. 10).

¹⁰⁰ Submission, p. 14.

¹⁰¹ Submission, p. 15 para. 29.

¹⁰² Submission, p. 15 para. 30.

¹⁰³ The Respondent referred notably to:

- The decision of Court of Appeal dated 12 August 2010;
- The claim filed by the Claimant before the South Tripoli Court of First Instance on 7 December 2012 and again on 3 March 2012; and
- The Claimant’s motion of January 2014 *“to be authorized to adduce additional documents and evidence at the hearing scheduled on February 4, 2014”*.

(Submission, p. 16 para. 31. and p. 18 para. 36).

a) “[...] *in contravention to the provisions of Article 24 of [Law No. 5] which governs the investment, deliberately and knowingly, [the Claimant] decided not to take advantage of the BIT but to submit the dispute to Libyan Courts*”;¹⁰⁴

b) When it filed its submission before Libyan courts, the Claimant was aware of the existence of the BIT and the dispute resolution mechanism to which it could resort pursuant thereto;¹⁰⁵

c) From 2010 until January 2014, the Claimant consistently exercised its option to pursue court proceedings and “[i]n front of the choice to submit the dispute before the international judge or before the national judge (*fork-in-the-road*) the Claimant had to make a final and irrevocable choice. It had to choose a way (*Electa una via*)”;¹⁰⁶

d) “[...] [T]he *‘triple test of identity’* shows the same identity of the parties, of the cause and of the object”;¹⁰⁷

e) After the issuance of the judgment of the South Tripoli Court of First Instance on 4 February 2014 and due to the political situation in Libya at that point in time, the Claimant changed its strategy and decided to submit this dispute to an arbitral tribunal;¹⁰⁸

f) When it initiated its court proceedings, the Claimant *“knew perfectly the Libyan legal system”* and nonetheless decided to pursue its claim in such forum;¹⁰⁹

g) The Claimant was aware that it did not meet the conditions set out in the BIT and therefore decided to pursue court proceedings.¹¹⁰

147. Based on the above, the Respondent concluded that *“the Libyan court have only competence to settle the dispute to the exclusion of the Arbitral Tribunal”*, requesting the Arbitral Tribunal *“to decline jurisdiction with regard of [sic] the [RFA]”*.¹¹¹

148. In its Answer, the Claimant first rejected the Respondent’s reliance on Law No. 5 as amended in 2003, arguing that the claims it brings forth in this arbitration are solely based on the BIT from which the Arbitral Tribunal derives its jurisdiction.¹¹²

149. The Claimant further rejected the Respondent’s contention that, by resorting to court proceedings prior to arbitration, it had breached Article 24 of Law No. 5, as amended in 2003. In this respect, the Claimant pointed out that the Libyan courts had actually rendered a decision on the merits of its case rather than dismissing its claims or referring it to arbitration.¹¹³

¹⁰⁴ Submission, p. 16 para. 32.

¹⁰⁵ Submission, p. 16 para. 33.

¹⁰⁶ Submission, p. 17 para. 33.

¹⁰⁷ *Id.*

¹⁰⁸ Respondent further argued that, in such circumstances, the Claimant should have continued to pursue its claim before Libyan courts by submitting its case to the Court of Appeal in Tripoli (Submission, p. 17 para. 34 and p. 18 para. 36).

¹⁰⁹ Submission, p. 17 para. 35.

¹¹⁰ Submission, p. 18 para. 36.

¹¹¹ *Id.*

¹¹² Answer, p. 22 para. 63.

¹¹³ Answer, p. 23 para. 64.

150. The Claimant further argued that Article 9.2 of the BIT does not constitute a “fork-in-the-road” clause in that it does not *“provide for an irrevocable choice for dispute resolution as between the various options listed therein”*.¹¹⁴ In support of its position, the Claimant averred notably that:

a) The language of Article 9.2 of the BIT does not indicate that the choice offered therein is final, definitive and preclusive of other choices, arguing that such indication is usually spelt out in typical “fork-in-the-road” clauses;¹¹⁵

b) “Fork-in-the-road” clauses found in other bilateral investment treaties *“use specific and unambiguous language to that effect”*;¹¹⁶

c) It *“must be presumed”* that Cyprus and the Respondent deliberately chose not to include the words *“definitive” or “irrevocable”, or “any other words suggesting that the choice of one forum would preclude the use of another”* in Article 9.2 of the BIT;¹¹⁷

d) The word “or” is used in Article 9.2 of the BIT as a *“disjunctive word”* in order to *“enumerate a list of four options for dispute resolution, all of which are available to a qualifying “investor”*;¹¹⁸

e) In the *Murphy II v. Ecuador* case, Ecuador similarly argued that the dispute resolution provision of the US-Ecuador BIT was a “fork-in-the-road” clause and that the use of the word “or” indicated a final choice. This argument was rejected by the arbitral tribunal which opined *“that ‘or’ could plausibly have an inclusive meaning, and that Ecuador carried the burden of proving otherwise”*;¹¹⁹

f) The word “or” is absent from the Arabic version of Article 9.2 of the BIT, indicating that this Article *“is nothing more than a simple list of different fora that are all available to the investor in case of a dispute with the host State”*.¹²⁰ and

g) In view of Article 7.4 of the BIT which provides investors with the right to pursue court proceedings in specific circumstance, *“reading Article 9(2) of the [BIT] as an alleged “fork-in-the-road” provision [...] would yield the absurd result that an investor would forfeit its [BIT]-guaranteed right to international arbitration by exercising another [BIT]-guaranteed right to resort to local courts”*.¹²¹

151. The Claimant further posited that, even if Article 9 of the BIT is to be considered as a “fork-in-the-road” clause, the mechanism set out therein was never triggered since the case it brought forth before Libyan courts and the present arbitration are *“entirely distinct”* in that *“they have different parties and different causes of actions”*.¹²²

¹¹⁴ Answer, pp. 23-24 paras. 65-66.

¹¹⁵ Answer, p. 25 para. 70. The Claimant referred to the opinion expressed by Prof. Schreuer on the matter (Exhibit CL-12).

¹¹⁶ Answer, pp. 25-26 paras. 71-73. In this regard, the Claimant referred to [Article 8\(2\) of the France-Argentina BIT \(Exhibit C-83\)](#), [Article XIII.3 of the Chile-Indonesia BIT \(Exhibit C-84\)](#) and [Article 7\(2\) of the Libya-Ethiopia BIT \(Exhibit C-85\)](#).

¹¹⁷ Answer, p. 26 para. 74.

¹¹⁸ Answer, p. 27 para. 75. The Claimant referred to the definition of the word “or” provided in the American Heritage Dictionary of the English Language (Exhibit CL-15) and the Webster Dictionary (Exhibit CL-14).

¹¹⁹ Exhibit CL-16.

¹²⁰ Answer, p. 28 para. 78; Exhibit C-86.

¹²¹ Answer, p. 29 para. 80.

¹²² Answer, p. 24 para. 67.

152. In support of its position, the Claimant contended that arbitral tribunals have applied the “Triple Identity Test” to determine whether or not a “fork-in-the-road” mechanism has been triggered and, pursuant to this test, *“a previously-filed domestic action will bar a subsequent treaty claim only when the (i) parties, (ii) causes of action, and (iii) object of the dispute in both proceedings are identical”*.¹²³
153. Applying the above to the facts of the case, the Claimant averred that its Case No. 1786/2010 filed before the South Tripoli Court of First Instance (*“Case 1786”*) is not identical to the dispute at hand in these arbitral proceedings, notably with regards to the parties involved and the causes of action, noting that:¹²⁴
- a) Case 1786 was filed against several Libyan public officials in their personal capacity while this arbitration is brought against the Respondent in its quality as a sovereign state;¹²⁵ and
- b) Case 1786 was initiated to remedy violations of Libyan municipal law by Libyan public officials while this arbitration was commenced for breaches of the BIT by the Respondent.¹²⁶
154. The Claimant further pointed out that *“[a]rbitral tribunals has [sic] held consistently that claims based on breaches of domestic statutory law are not identical to claims grounded in the provisions of investment treaties”*. The Claimant cited a number of arbitral precedents in which arbitral tribunals distinguished between court proceedings initiated concerning the validity of an action taken by the host nation based on municipal law and the obligations of the host nation under the relevant investment treaty.¹²⁷
155. In its Reply, the Respondent reiterated that the Claimant had made a deliberate and irrevocable choice in favour of court proceedings in Libya, precluding it from resorting to international arbitration, and concluded that:
- a) The Claimant’s contention that it was impossible to sue the Respondent when the dispute arose is baseless in view of the court proceedings initiated and pursued by the Claimant;¹²⁸
- b) The decisions reached by Libyan courts demonstrate *“the independence of the Libyan judicial power; the well-functioning of the Libyan jurisdictions, and the possibility for a Libyan lawyer to*

¹²³ Answer, p. 30 para. 84; Exhibits CL-18 (at para. 52) and CL-19 (at para. 483).

¹²⁴ Answer, p. 31 paras. 86-87 and p. 24 para. 67.

¹²⁵ In Case 1786, the Claimant notably sued the Prime Minister, the Minister of Housing, the Minister of Planning and the Minister of Finance (Answer, p. 34 para. 93).

¹²⁶ The Claimant specified that Case 1786 was brought forth *“pursuant to the rules of the Libyan Civil Code governing tortious liability for personal acts (‘responsabilité extra-contractuelle du fait personnel’)*”. The Claimant also pointed out that

- It explicitly relied on Article 172 of the LCC in its Amended Claim of 3 March 2015;
- The South Tripoli Court of First Instance similarly relied on Article 166 of the LCC; and
- Both Articles 172 and 166 are found in the section of the LCC entitled *“Unlawful Acts - Liability Arising from Personal Acts”*.

The Claimant also stated that its case in the present arbitration was based on breaches by the Respondent of Articles 2.2, 3 and 7 of the BIT (fair and equitable treatment, full investment protection and security, national treatment, most-favored nation treatment, protection against discriminatory measure and protection against expropriation).

(Answer, pp. 34-36 paras. 93-94)

¹²⁷ The cases cited by the Claimant are: *Middle East Cement v. Egypt*; *Total v. Argentina*; *Genin v. Estonia*; *Pan American v. Argentina*; and *Toto v. Lebanon*.

¹²⁸ Reply, p. 18 paras. 42-43, referring to RFA, p. 12 para. 10.

sue in 2006 the higher Libyan body before domestic courts”;¹²⁹

c) From the beginning of the dispute in 2006 until the filing of the RFA in 2014, the Claimant deliberately, permanently and continuously chose to pursue its claim for compensation on the basis of a breach of Law No. 5 (unlawful dispossession of its investment) before Libyan domestic courts, suing several Ministers “*in their capacity*”;¹³⁰ and

d) The Claimant renounced its right to submit the dispute before an arbitral tribunal, as provided for in Article 24 of Law No. 5 “*which clearly refers to Clause 9 of the [BIT]*”¹³¹.

156. In this respect, the Respondent referred to the position adopted by Mr Walid Ben Hamida in relation to the “*negative effect of the arbitration clause*” and conflicts “*between international arbitral jurisdictions and domestic jurisdictions*”.¹³² The Respondent also quoted Prof. Fadlallah on the need for unity in investment arbitration proceedings.¹³³

157. Furthermore, the Respondent also posited that the conditions of the “Triple Identity Test” are fulfilled in the present case, in that the parties, the cause of action and the object of the claim in court litigations initiated by the Claimant are identical to that in the present arbitration.

158. Regarding the identity of the Parties, the Respondent argued that:

a) ‘State Responsibility’ arising out of acts committed by State organs and persons or entities exercising elements of governmental authority is governed by the Draft Articles on the Responsibility of States for Internationally Wrongful Acts prepared by the International Law Commission (the *Draft Articles*”);¹³⁴

b) In the *Toto v. Lebanon* case, the tribunal held that it had ‘*jurisdiction ratione personae pursuant to Article 7 of the Treaty for acts committed by the CEGP and the CDR*’;¹³⁵

c) Pursuant to both Libyan domestic law and Articles 4.1 and 4.2 of the Draft Articles referred to above, the GPC should be considered as a State organ which exercises executive functions and

¹²⁹ Reply, p. 21 para. 51.

¹³⁰ Reply, pp. 21-23 paras. 54-58.

¹³¹ Reply, p. 23 paras. 58-59.

¹³² The excerpt quoted by the Respondent notably provides as follows:

“*According to arbitration law, the problem has been resolved by referring to the principle of the negative effect of the clause of arbitration. One should consider that the conclusion of an arbitral agreement prevents domestic jurisdictions from settling disputes deriving from this agreement. It must be stressed that under this principle, national judges would declare themselves not competent, without any analysis of the applicable law as to the substance of the case...*

One should also consider that the parties give up implicitly the arbitration agreement when, despite a clause of arbitration, one of them refers the dispute to a domestic court and the other party defend itself of the merits without questioning the competence of this jurisdiction.” See p. 27 para. 67.

¹³³ The Respondent quoted the following excerpt from Prof. Fadlallah without providing a reference: “*one should refrain from specializing jurisdictions in charge of resolving the disputes about investments, by referring to the ground of the claims. Otherwise, disputes would be artificially set into pieces.*”

¹³⁴ The Respondent reproduced Articles 4 (“*Conduct of Organs of a State*”), 5 (“*Conduct of Persons or Entities Exercising Elements of Governmental Authority*”), 7 (“*Excess of Authority or Contravention of Instructions*”) and 8 (“*Conduct Directed or Controlled by a State*”) (Reply, pp. 28-29 para. 72).

¹³⁵ Reply, p. 29 para. 73.

whose Ministers operate under its control (and that of the Prime Minister);¹³⁶

d) Resolution 241 “was issued by the GPC and was implemented by various Ministers and public organs exercising their power within the control of the Council of Ministers. Therefore the acts of ‘the Prime Minister, the Minister of Housing, the Minister of Planning and the Minister of Finance’, are acts of the State of Libya as confirmed by Article 5 of the [Draft Articles]”;¹³⁷ and

e) States are liable for acts committed by the legislative and executive powers within the scope of their respective mission and “[p]ursuant to Article 7 of the [Draft Articles], the State’s organ (an individual or an institution) which acts under its official status, open [sic] the door to the State’s liability”.¹³⁸

159. Regarding the identity of the cause of action, the Respondent asserted that, both in the court proceedings and in the present arbitration, the dispute was related to the “*measure of dispossession*” taken by the Respondent and its consequences on the Claimant’s¹³⁹ investment.

160. Regarding the identity of claims, the Respondent contended that the Claimant sought to obtain compensation for an alleged dispossession of its investment both in the court proceedings and in this arbitration, referring to the relief sought by the Claimant in its RFA and the judgment of the Tripoli Court of First Instance dated 4 February 2014.¹⁴⁰

161. Based on the foregoing, the Respondent concluded that this arbitration is tantamount to an “*abuse of process*”, “*a procedural misappropriation and a “fraudulent application of the rules of jurisdictions”*”.¹⁴¹ The Respondent further averred that the Claimant sought to take advantage of the situation in Libya, described by the Respondent as a “*second civil war*”, to “*misrepresent and distort the facts*” of the case in this arbitration.¹⁴²

162. In its Rejoinder, the Claimant reiterated its position as set out in its Answer, rejecting the arguments raised by the Respondent in its Reply and further arguing that:

a) It “*had no obligation to forego litigation and resort to arbitration*”;

b) It “*did not waive its right to arbitrate its treaty claims by pursuing purely domestic claims in the Libyan Courts*”; and

¹³⁶ Reply, p. 29 para. 74.

¹³⁷ Reply, p. 29 para. 75.

¹³⁸ Reply, pp. 29-30 para. 76.

¹³⁹ Reply, p. 30 para. 78. The Respondent referred to an excerpt from Schreuer and Reinisch which reads as follows : “*the cause of action should not be identified according to [sic] investment in question but on the substance of the rule regarded as applicable. Therefore, one would face an identical dispute if the content of the rule (for instance the non-expropriation) is identical whatever its source. On his side, A. Crivellaro proposes to privileged [sic] the economic unit of the dispute and to consider contentious measure to determine the cause. To the unit of the cause must correspond the unit of proceedings...*”

¹⁴⁰ Reply, pp. 31-32 paras. 79-82. The Respondent further noted that while the Administrative Court of Appeal had accepted the Claimant’s administrative appeal and confirmed the invalidity of Resolutions 241 and 266, the Tripoli Court of First instance rejected the civil case brought forth by the Claimant for lack of evidence.

¹⁴¹ Reply, p. 33 paras. 83-86.

¹⁴² *Id.*

c) Its treaty claims in this arbitration are not identical to its claims before Libyan Courts and do not meet the “Triple Identity Test”.

163. In relation to its first argument, the Claimant notably contended that the Respondent’s reliance on Article 24 of Law No. 5, as amended in 2003, to challenge the Arbitral Tribunal’s jurisdiction is “*ill-conceived and misguided*” since the BIT is the only legal instrument which should be considered to make such determination.¹⁴³

164. In relation to its second argument, the Claimant asserted that, in the absence of any explicit or conclusive behaviour on its part, it cannot be deemed to have waived its right to treaty arbitration, stating *inter alia* that the Respondent’s arguments in this respect:

a) Are not supported by any legal authorities;¹⁴⁴ and

b) Would render Article 7.4 of the BIT (which guarantees a right for investor to initiate court litigation in specific circumstances) meaningless.¹⁴⁵

165. In relation to its third argument, the Claimant denied that its claims before local courts and those it pursues in this arbitration meet the “Triple Identity Test”, arguing notably that:

a) The Respondent failed to address the case law presented by the Claimant in its Answer in relation to the triggering of “fork-in-the-road” clauses, discussed in paragraph 154 above;¹⁴⁶ and

b) The criteria of “*contentious measure*” or “*substance of the applicable rule*” proposed by the Respondent to assess the “*identity of causes of action*” are baseless.¹⁴⁷

166. On the Respondent’s contention that the Claimant does not meet the requirements of Article 9 of the BIT, the Claimant submitted that it had complied with all the requirements set out at Article 9 of the BIT in that:

a) It qualifies as protected “investor” pursuant to the BIT;

¹⁴³ Rejoinder, pp. 18-19 paras. 57-59. The Respondent further argued that Article 24 of Law No. 5, as amended in 2003, does not stipulate that arbitration is compulsory when a BIT between the Respondent and the investor’s home state exists and rather “*acknowledge[s] an exception to the exclusive jurisdiction of the Libyan courts*” in such cases,

¹⁴⁴ Rejoinder, p. 19 para. 62.

¹⁴⁵ Rejoinder, p. 21 paras. 66-67. The Claimant further contended that:

- It is an established principle that a waiver of treaty rights must “*(at a minimum) be categorical and explicit*” and, in the present case, would have required the Claimant to present its BIT claims before the Libyan Courts (referring to *SGS v. Paraguay* (Exhibit CL-44 at para. 178), *Aguas del Tunari* (Exhibit CL-10 at paras. 119 and 122) and *Duker Energy v.* (Exhibit CL-45 Ecuador at para. 159); and
- The Arbitral Tribunal “*should not interpret one provision of the [BIT] in a manner that renders another provision of the [BIT] a nullity*”.

¹⁴⁶ Rejoinder, pp. 25-26 paras. 78-80; Exhibit CL-47. The Claimant further asserted that the quotes of Profs. Schreuer and Reinisch relied upon by the Respondent were taken from their legal expert opinion in the *CME v. Czech Republic* case and were made in a context where the issue at hand was the “*applicability of res Judicata as between international tribunals*”, which is irrelevant in the present case “*where an investor first resorted to domestic courts for domestic claims, and then to arbitration for violations of international law*”. The Claimant further underlined that the same authors also opined that “*res judicata applies [only] to tribunals operating within the same legal orders*” (Exhibit CL-46 at para. 17).

¹⁴⁷ The Claimant quoted the following excerpt from Prof. Schreuer: “*if the dispute before the domestic courts or tribunals concerns a different claim, such as a contract claim or an appeal against a decision by a regulatory authority, the fork in the road provision will not apply and the arbitral tribunal will be free to proceed*” (Exhibit CL-12 at para. 248).

b) It made substantial investments in Libya through the construction of its dairy and juice production factory and the purchase of the plot of land on which such factory was built; and

c) It notified the Respondent of the dispute in writing on 16 March 2014 and attempted to engage in settlement negotiations,¹⁴⁸ ultimately initiating this arbitration on 3 July 2014.¹⁴⁹

167. In its Reply, the Respondent first presented the political system in place in Libya prior to the 2011 events and the economic situation of the country after the lifting of international sanctions in 2003 and 2004.¹⁵⁰ The Respondent underlined that, around this period of time, Libya undertook a liberalization process and notably amended Law No. 5 in 2003, lifting restrictions on property ownership by foreigners and entered into the BIT in 2004.¹⁵¹

168. The Respondent also highlighted similarities between Law No. 5 (as amended in 2003) and the BIT regarding provisions related to expropriation, arguing that:

a) *“only the legislative or the judicial powers, to the exclusion of the political one, can decide a measure of expropriation or equivalent to an expropriation”* as per article 23 of Law No. 5 as amended in 2003; and

b) Such decision should *“determine whether or not the expropriation has been decided for public interest and if the compensation is in conformity with the provisions of article 7 (2 and 3)”*.¹⁵²

169. The Respondent further compared the dispute resolution provisions of Law No. 5, as amended in 2003, and the BIT, contending that:

a) Article 24 of Law No. 5 *“operates an immediate and compulsory reference to the Bilateral Treaty when a dispute arises between the host State and the investor”*;¹⁵³ and

b) Article 5 of BIT sets out two condition precedents in that it requires the investor to notify the dispute in writing and to engage in amicable settlement for at least six months, regardless of whether the investor intends to pursue court proceedings or arbitration.¹⁵⁴

170. In its Rejoinder, the Claimant rejected the Respondent’s attempt *“to impose a ‘doublebarrel’ test that requires Claimant to pass through the eye of the needle of the Libyan Investment Law before it can*

¹⁴⁸ The Claimant stated that further to several exchanges with the Libya Private Investment Board, it *“became evident that all negotiation efforts were futile”*.

¹⁴⁹ The Claimant noted that the Respondent had raised an objection in this regard in the Terms of Reference but had not pursued such argument in its Submission. The Claimant further asserted that such *“cooling-off”* requirement:

- Has been considered by the arbitral tribunal to have a ‘procedural’ nature in that its non-respect has no bearing on the Tribunal’s jurisdiction, referring to *Lauder v. Czech Republic* (Exhibit CL-27 at para. 187).

- Does not affect the Tribunal’s jurisdiction *“when negotiations are obviously futile and when the notice period set forth in the Treaty has elapsed by the time the tribunal considers the matter”*, referring to *Daimler v. Argentina* (Exhibit CL-28 at para. 188) and the position expressed by Professor Christoph Schreuer on the matter (Exhibit CL-12 at pp. 248-249).

¹⁵⁰ Reply, pp. 4 to 7.

¹⁵¹ Reply, pp. 7-8.

¹⁵² Reply, p. 9.

¹⁵³ Reply, p. 10.

¹⁵⁴ Reply, pp. 11-12.

bring a claim under the Cyprus-Libya BIT"¹⁵⁵ arguing that:

a) Such position is baseless and contrary to the "most basic principles of investment arbitration";¹⁵⁶

b) The Tribunal's jurisdiction should be determined solely upon the basis of the "instrument expressing the parties' consent to [...] arbitration";¹⁵⁷ and

c) It was pursuing this arbitration on the basis of the violations of the BIT and the remedies set out therein and not through Libyan domestic investment law.¹⁵⁸

171. Moreover, the Claimant reiterated that it complied with all the requirements set out at Article 9 of the BIT as follows:

a) It made substantial investments in Libya, as defined in Article 1.1 of the BIT, through the construction of its factory, the purchase of the land plot on which such factory was built and the signature of franchise agreement with Candia;¹⁵⁹

b) It notified the Respondent of the present dispute in writing on 16 March 2014 and attempted in vain to negotiate a solution with the Libyan Privatization and Investment Board prior to initiating this arbitration on 3 July 2014;¹⁶⁰ and

c) "More than six months have passed since Claimant's notice of the present dispute".¹⁶¹

c) The Arbitral Tribunal's Analysis AND Decision

172. The Arbitral Tribunal notes that on 19 October 2006, the GPC issued Resolution No. 241, pursuant to which the plot of land on which the Claimant had its factory was "expropriated for the public interest [in order to] establish a housing project pursuant to the Secretary of the Public Property Authority Management Committee letter [of 11 October 2006] and the design plan attached to this resolution".¹⁶²

173. On 12 November 2006, the Claimant received a notification from the Secretary of the GPC for Housing and Infrastructure (the "Evacuation Notice"), pursuant to which it was requested to evacuate its property and hand it over within three (3) days.¹⁶³

¹⁵⁵ Rejoinder, pp. 1 -2 paras. 4-5.

¹⁵⁶ Rejoinder, p. 2 para. 5.

¹⁵⁷ Rejoinder, p. 2 para. 6; quoting *Azurix Corp. v. Argentine Republic* (Exhibit CL-38), *Camuzzi international S.A. v. Argentine Republic* (Exhibit CL-39) and *Jan de Nul N. V. and Dredging International N. V. v. Arab Republic of Egypt* (Exhibit CL-40).

¹⁵⁸ Rejoinder, p. 2 para 5-7.

¹⁵⁹ Rejoinder, pp. 13-14 paras. 42-53.

¹⁶⁰ Rejoinder, p. 14 para. 44; Exhibits C-51 and C-70 to C-74.

¹⁶¹ The Claimant reiterated its position as set out in footnote 94 above, further referring to *Biwater Gauff v. Tanzania* (Exhibit CL-43 at para. 343) and *Pey Casado v. Chile* (Exhibit CL-19 at para. 573).

¹⁶² Exhibit C-14. The Arbitral Tribunal notes that the letter of the Secretary of the Public Property Authority Management Committee of 11 October 2006 was not submitted on the record.

¹⁶³ Exhibit C-15.

174. On 13 November 2006, the “*legal representative of the Cyprus Olin Holdings, Ltd., Al Jamahiriya branch, with its offices at Airport Road-Al Fallah*” filed an “*Application for art order on a petition to appoint two experts to recognize a situation on an expedited basis*” before the South Tripoli Court of First Instance, in which it notably:¹⁶⁴

a) Referred to the issuance of Resolution No. 365 and the steps it undertook thereafter for the implementation of its investment;

b) Referred to the Resolution No. 241 and the Evacuation Notice;

c) Argued that Resolution No. 241 and the Evacuation Notice were issued in contravention of Article 23 of Law No. 5 on expropriation and of “Law No. 116 of the year 1972 concerning urban planning”; and

d) Requested the appointment of an engineering expert and an accounting expert to inspect and evaluate its property before the enforcement of the expropriation measures.

175. The Arbitral Tribunal notes that this application was brought against a number of Libyan public officials in their respective official capacities.

176. On 13 November 2006, the President of the South Tripoli Court of First instance accepted this application, ordering the appointment of Messrs Murad Salim Al Ghunaymi (accounting) and Omar Ahmad Abdul Hadi (engineering) to execute the requested assessment.¹⁶⁵

177. On 25 November 2006, the GPC issued Resolution No. 266 which replaced Resolution No. 241, further confirming that the urban development project (for which expropriation measure were adopted under Resolution No. 241) was “*deemed a work of public interest*”.¹⁶⁶

178. On 30 November 2006, Messrs Al Ghunaymi and Abdul Hadi submitted their expert report to the South Tripoli Court of First Instance in which they notably found that the Claimant’s total investment amounted to LYD 18,609,130.285.¹⁶⁷

179. On 9 December 2006, the “*legal representative of Olin Holdings, Ltd./Cyprus*” initiated administrative proceedings by filing an application before the Administrative Court at the Tripoli Court of Appeal,¹⁶⁸ in which it sought the annulment of Resolutions No. 241 and 266 on the basis that:

a) The said resolutions were made in violation of Article 23 of Law No. 5 on expropriation; and

¹⁶⁴ Exhibit C-56.

¹⁶⁵ The Arbitral Tribunal notes that the order of the President of the South Tripoli Court of First instance was not submitted on the record in this arbitration. However, the appointed experts referred to such order in their report (Exhibit C-21 at p. 5).

¹⁶⁶ Exhibit C-23.

¹⁶⁷ Exhibit C-21. This amount comprised of: LYD 4,844,018.18 for the plot of land and the facilities built thereon; LYD 7,231,671.292 for machinery and equipment; LYD 101,000.00 for transportation costs; LYD 84,136.650 for furniture and office equipment; LYD 2,617,916.642 for “*goods stock from operation material*” and LYD 3,640,387.701 for “*establishing, general, administrative expenses and deferred revenue expenses [...]*”.

¹⁶⁸ The Arbitral Tribunal notes that the Claimant’s appeal petition was not submitted on the record of this arbitration. However, the Court of Appeal’s judgment mentions such petition (Exhibit C-30 at p. 1).

- b) The GPC, as an administrative body, lacked the required competence to issue a decision of expropriation for public interest, which can only be made through a law or a judicial ruling.¹⁶⁹
180. The Arbitral Tribunal notes that this appeal was again brought against a number of Libyan public officials in their respective official capacities.
181. From 26 December 2006 to 30 March 2010, a number of hearings took place before the Tripoli Court of Appeal and written submissions were exchanged.¹⁷⁰
182. On 20 April 2010, the Tripoli Court of Appeal (Administrative Chamber) rendered its judgement in which it declared Resolution No. 266 to be invalid and notably:
- a) Found that such Resolution was issued in violation of Article 23 of Law No. 5, pursuant to which an expropriation measure for public interest can only be implemented through a law or a judicial decision;¹⁷¹ and
- b) Noted that “*the [BIT] relays in Article 7 the same meaning as in Article 23 of [Law No. 5]*”.¹⁷²
183. On 7 December 2010 and in his capacity as “*legal representative of Holdings Ltd Co [sic]*”, Mr Abughamja initiated a civil lawsuit before the South Tripoli Court of First Instance (Civil Circuit) in which it *inter alia* sought compensation in the amount of LYD 76,900,971.624 for the loss of revenue it incurred as a result of the stoppage of operations at its factory from 2006 to 2010 and the lost opportunity to reinvest such revenues, as well as LYD 10,000,000.00 for the “*financial harm of ownership expropriation*” and LYD 7,000,000.00 for “*moral compensation of ownership expropriation*”;¹⁷³
184. The Arbitral Tribunal notes that this claim was brought against: the “*General popular Secretary of general popular committee in his capacity*”, the “*housing, utilities & real estate executing projects secretary*” and the “*General popular committee of Finance & planning secretary*”.¹⁷⁴
185. On 28 April 2012 and “*in his capacity as the legal representative of Olin Holdings, Ltd., located at on Airport Rd., Tripoli [...]*”, Mr Abughamja filed a “*Writ of Summon to Rectify the Form of the Lawsuit*” before the South Tripoli Court of First Instance in which it reiterated the entire content of its 7 December 2010 claim.¹⁷⁵
186. The Arbitral Tribunal notes that the only change made in this ‘re-stated claim’ was the identity of the respondents in that it was filed against the “*President of the Transitional Government*”, the

¹⁶⁹ The Arbitral Tribunal notes that the Claimant ultimately withdrew its appeal against Resolution No. 241 on the basis that it was “*voided and rendered ineffective*” pursuant to Article 2 of Resolution No. 266 (Exhibit C-23), pursuing its appeal in respect of the latter only (Exhibit C-30 at p. 7).

¹⁷⁰ Exhibit C-30 (at pp. 5-6).

¹⁷¹ Exhibit C-30 (at pp. 8-9 and 11-12).

¹⁷² Exhibit C-30 (at p. 9).

¹⁷³ Exhibit C-33 (at p. 6).

¹⁷⁴ Exhibit C-33 (at p. 1).

¹⁷⁵ Exhibit C-34.

*“Minister of Housing and Infrastructure, in his capacity”, the “Minister of Planning, in his capacity” and the “Minister of Finance, in his capacity”.*¹⁷⁶

187. Hearings were held subsequently, with the parties exchanging submissions, and on 4 February 2014, the South Tripoli Court of First Instance rendered its judgment in which it notably:
- a) Noted that the claims brought forth were based on Article 166 of the LCC;
 - b) Determined that the plaintiff had failed to provide supporting evidence to corroborate the damages it claimed, relying only on Resolution No. 266 and the judgment issued by the Tripoli Court of Appeal (Administrative Chamber);
 - c) Found the certain documents, including the renewal of its LFIB license on 18 November 2008, contradicted its claim that it had halted production at its factory; and
 - d) Concluded that the plaintiff had not satisfactorily demonstrated that the Libyan public administration had abused its authority.¹⁷⁷
188. On 13 March 2014, the Claimant issued its [Notice of Dispute](#) in relation to the present arbitration.
189. On 3 July 2014, the Claimant submitted its RFA.
190. Having carefully examined the above chronology of events, the Tribunal deems that the relevant Article that ought to be thoroughly consulted and examined is Article 9 of the BIT, as it has a direct bearing on the Tribunal’s decisions and determinations of the issues involved in this Partial Award.
191. The Tribunal notes that Article 9 of the BIT, entitled “Settlement of Disputes between one of the Contracting Parties and Investors of the Other Party”, provides as follows:
- “....
- 2. If it is not possible to settle the dispute in this way within six months from the date of the written notification, it shall be submitted, at the choice of the investor concerned to:*
- (a) the competent court of the Contracting Party in whose territory the investment was made; or*
 - (b) the Arbitral Tribunal of the International Chamber of Commerce in Paris; or*
 - (c) the International Centre for the Settlement of Investment Disputes (ICSID) established by the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States; or*
 - (d) the Arbitration Institute of the Arbitral Tribunal of the Chamber of Commerce in Stockholm.*
192. The question is: does the above Article provide for four (4) mutually exclusive venues available to a Contracting Party to initiate its claim under the BIT? In other words, is a Contracting Party who

¹⁷⁶ Exhibit C-34.

¹⁷⁷ Exhibit C-57.

chose a certain forum out of the four listed in Article 9.2 above precluded for pursuing the same claim against the same respondent before another forum?

193. In the instant case, the Tribunal notes that the Claimant filed its claim before South Tripoli Court of First Instance challenging Resolution No. 266, which replaced Resolution No. 241 and confirmed the expropriation of the land on which the investment was erected. The Respondent contended that in doing so, the Claimant has made a conscious decision to seek relief through Libyan Courts and hence is barred from filing its RFA in the instant case.

194. Having examined the various Articles of the BIT, the Tribunal notes that Article 7, entitled “Expropriation”, provides that:

”1) ...

2) ...

3) ...

4) *The investor affected shall have the right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial authority or other competent and independent authority of that Contracting Party, of its case, including the valuation of its investment and the payment of compensation, in accordance with the principles set out in this Article.*

5) ... ”.

195. In order to determine whether the Claimant is precluded from bringing forth these arbitral proceedings, the Arbitral Tribunal must first determine whether Article 9.2 of the BIT constitutes a fork-in-the-road clause. In order for a dispute resolution contained in an investment treaty to be considered as a fork-in-the-road clause, it must be carefully worded in an unequivocal manner so as to expressly provide for a mutually exclusive dispute resolution mechanism.

196. In this regard, the Arbitral Tribunal refers to [Article 31 \(1\) of the 1969 Vienna Convention on the Law of Treaties](#) which provides that “[a] *treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*”. The Arbitral Tribunal therefore considers that, in order to interpret Article 9.2 of the BIT, it is relevant to take into account the clear wording of the BIT, which reflects the intent of the Contracting Parties when drafting the BIT. The Arbitral Tribunal further considers that reference should be made to the other bilateral investment treaties entered into by the Respondent (as an indication of the Respondent’s intention regarding the choice of forum in bilateral investment treaty disputes) and/or other bilateral investment treaties in general (as an indication of how fork-in-the-road clauses have been worded in other bilateral investment treaties).

197. [Article 7\(2\) of the Libya-Algeria BIT](#) expressly states that:¹⁷⁸

“If the dispute is not amicably resolved within six (6) months after written notice of the dispute has

¹⁷⁸ Exhibit C-85, free translation of “*Si ce différend n’est pas réglé à l’amiable dans un délai de six (6) mois, à compter de la notification écrite de ce différend, il sera soumis à la demande de l’investisseur, soit à l’autorité judiciaire compétente relevant de la partie contractante concernée par ce différend soit à l’arbitrage international. Le choix de Tune de ces deux procédures est définitif.*”

been given, it may be submitted, by the investor, either to a competent judicial authority of the State party to the dispute or to international arbitration. The choice of one of these two procedures is definitive.”

198. [Articles 9.2 and 9.3](#) of the Libya-Ethiopia BIT also expressly provide that: ¹⁷⁹

“9.2 If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to competent court of the Contracting Party accepting the investment”.

“9.3 If a dispute involving the amount of compensation for expropriations cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc Arbitral Tribunal. The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in the Paragraph 2 of this Article.”

199. [Article 8\(2\) of the France-Argentina BIT](#) expressly states that: ¹⁸⁰

“Once an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final.”

200. [Article IX.3 of the Chile-Indonesia BIT](#) provides that: ¹⁸¹

“Once the investor has submitted the dispute to the competent tribunal of the Contracting Party in whose territory the investment was made or to international arbitration, that election shall be final.”

201. All the aforementioned bilateral investment treaties specifically provide for the election of one agreed dispute resolution forum, to the exclusion of the others, and that this choice is final and definitive. The wording of the above provisions is clear and unambiguous to this effect, and such provisions are what are customarily referred to as constituting a “fork-in-the-road” clause.

202. After careful review of the submissions of the Parties as well as the wording of the Cyprus-Libya BIT, the Tribunal has determined that Article 9.2 of the BIT does not constitute a “fork-in-the-road” clause and that it does not provide for an irrevocable choice for dispute resolution as between the various options listed under this article.

203. Indeed, the language of Article 9.2 of the BIT does not indicate that the choice offered therein is final, definitive or preclusive of other choices, while such indication is usually spelt out in typical

¹⁷⁹ Exhibit C-79.

¹⁸⁰ Exhibit C-83, free translation of *“Une fois qu’un investisseur a soumis le différend soit aux juridictions de la Partie contractante concernée, soit à l’arbitrage international, le choix de l’une ou de l’autre de ces procédures reste définitif.”*

¹⁸¹ Exhibit C-84.

“fork-in-the-road” clauses, as mentioned in paragraph 195 *above*.

204. In particular, “fork-in-the-road” clauses in other bilateral investment treaties concluded by Libya use clear and specific language to that effect, including the Libya-Algeria and the Libya-Ethiopia BITs. Accordingly, if Cyprus and Libya, the contracting states, chose not to include the words definitive, irrevocable, or any other words suggesting that the choice of one forum would preclude the use of another under Article 9.2 of the BIT, the Tribunal should give plain and full effect to their will.
205. Moreover, the use of the word “or” in Article 9.2 of the English version of the BIT is not determinative since the word “or” “could plausibly have an inclusive meaning” and the Respondent has not submitted convincing pleadings or evidence to the contrary.¹⁸² It is also worth noting that the word “or” is absent from the Arabic version of Article 9.2 of the BIT, which is a further indication that Article 9.2 is only laying down a list of different fora that are all available to the investor in case of a dispute with the host State and is not a “fork-in-the-road” clause,
206. Lastly and in any event, it should be noted that Article 7.4 of the BIT specifically grants investors the right to pursue court proceedings in the event of an expropriation. This would be inconsistent with holding Article 9.2 of the BIT as a “fork-in-the-road” clause for the purpose of pursuing legal remedies against expropriation measures.
207. For all the above reasons, Respondent’s objection that Article 9.2 of the BIT constitutes a “fork-in-the-road” clause is dismissed.
208. However, the objection raised by the Respondent was not only limited to the referral of the dispute to the Libyan courts, but also pertains to the decisions handed down by these courts. After extensive deliberations, the Tribunal has determined that it would be advisable to defer making a final determination of this issue until such time that it is in a position to fully assess the impact, if any, the Libyan court decisions may have on the Claimant’s case beyond the issue of jurisdiction which has been finally determined in this Partial Award. The Tribunal reached this decision after carefully considering the fact that the Respondent’s contentions in relation to these decisions are rather intertwined with the merits of the case.
209. Regarding the Respondent’s contentions that the Claimant does not meet the requirements of Article 9 of the BIT, the Arbitral Tribunal notes that this Article sets out certain conditions which must be met for a dispute between an investor and a Contracting State be submitted to arbitration. These conditions are:
- a) The investor must qualify as a protected investor, as defined under Article 1(2) of the BIT;
 - b) The investor must have made an ‘investment’, as defined under Article 1(1) of the BIT; and
 - c) The investor must notify (in writing) the Contracting Party of the dispute and attempt to reach an

¹⁸² In this regard, the Arbitral Tribunal notes that the Claimant has referred to the arbitral tribunal’s decision in the *Murphy II v. Ecuador* UNCITRAL case and that the Respondent adduced, at CL-16, a commentary on this decision by Jarrod Hepburn published in the IAI Reporter, given that the decision is not publicly available (see Answer, p. 27-28, para. 76-77). The Arbitral Tribunal has not seen the actual decision in the *Murphy II v. Ecuador* case and, therefore, it cannot rely on the information reported by Hepburn as authoritative or binding. However, the Arbitral Tribunal considers that the contents of CL-16 are reasonable and that they can be relied upon for guidance. For the avoidance of any doubt, the Arbitral Tribunal notes that the Respondent has not challenged reliability or the weight to be given to CL-16.

amicable settlement within a period of six (6) months, as set out in Article 9 (1) and (2) of the BIT.

210. Regarding the first criterion, the Arbitral Tribunal has already determined in Section 7 above that the Claimant does qualify as a protected investor under the terms of the BIT.

211. Regarding the second criterion, the Arbitral Tribunal notes that Article 1 (1) of the BIT defines the term “investment” as *“every kind of assets invested, in connection with economic activities by an investor of one Contracting Party in the territory of another Contracting Party in accordance with the laws and regulations of the latter and in particular, although not exclusively, the following:*

(a) Movable and immovable property and any other property rights such as mortgages, liens, pledges, leases and similar rights.

(b) Shares in companies, stocks and debentures of a company or any other form of participation in a company or business enterprise.

(c) Claims to money or to any performance under contract having economic value and associated with an investment.

(d) Intellectual property rights, technical processes, know-how and goodwill, including copyrights, patents and rights of inventions, signs, secrets and business names, designs and manufacturing procedures and technical knowledge.

(e) Any rights conferred by law or by virtue of a contract, including concessions to search for, cultivate, extract or exploit natural resources.

Investments made in the territory of one Contracting Party by any legal entity of that same Contracting Party which is actually owned or controlled by investors of the other Contracting Party shall likewise be considered as investments of investors of the latter Contracting Party if they have been made in accordance with the laws and regulations of the former Contracting Party.

Any change in the form of the assets that are invested or reinvested does not affect their character as investments.”

212. In this regard, the Arbitral Tribunal notes that the Claimant has constructed its dairy products and juice factory in Tripoli, leased then purchased the land plot on which its factory was built and signed a franchise agreement with Candia.¹⁸³ The Arbitral Tribunal further notes that the LFIB Registrar indicates that the Claimant injected US\$ 8 million in its project.¹⁸⁴ Based on the evidence on the record, the Arbitral Tribunal considers that the Claimant has lawfully invested in assets, in connection with economic activities within the territory of the Respondent, including but not limited to the purchase of movable and immovable properties and the acquisition of technical processes, know-how, manufacturing procedures and technical knowledge. The Arbitral Tribunal therefore finds that the Claimant did make an investment in accordance with Article 1 (1) of the BIT.

¹⁸³ Exhibits C-7, C-9, C-13, C-32, C-36 and C-55

¹⁸⁴ Exhibit C-48.

213. Regarding the third criterion, the Arbitral Tribunal notes that:
- a) The Claimant issued its Notice of Dispute on 13 March 2014 and submitted its RFA on 7 July 2014;¹⁸⁵ and
 - b) At paragraphs 40 and 41 of the Terms of Reference, the Respondent argued that the Claimant had failed to comply with the six (6) months ‘cooling-off period provided for under Article 9(2) of the BIT, stating that the RFA “was prematurely registered and therefore has to be declared inadmissible”.
214. Moreover, in its Answer, the Claimant expressly noted that the Respondent’s objection should be considered withdrawn.¹⁸⁶ While the Respondent did not expressly object to this statement in its Reply, it did refer to the amicable settlement mechanism set out in Article 9 of the BIT.¹⁸⁷
215. The Arbitral Tribunal further notes that, while the Claimant may not have strictly complied with the six (6) months ‘cooling-off period, it did attempt to engage the Respondent in amicable settlement negotiations without any success.¹⁸⁸ In this regard, the Arbitral Tribunal refers to the correspondence exchanged between the Parties during the settlement negotiations, as mentioned in paragraphs 141.t) to 141.y) above,¹⁸⁹ and notes that:
- a) In its RFA, the Claimant stated that its attempts at amicable negotiations appeared futile in view of (i) the political situation in Libya and (ii) the Respondent’s apparent disregard or inability to enter into good faith settlement negotiations following the issuance of its notice of arbitration on 13 March 2014;¹⁹⁰ and
 - b) In its Reply, the Respondent confirmed that, around the time of the amicable settlement negotiations, the Respondent was confronted with a political crisis due to a conflict between two rival authorities and that decision-making was therefore paralyzed.¹⁹¹
216. Taking into account the above, the Arbitral Tribunal notes that the Claimant filed its RFA on 3 July 2014, i.e. almost four (4) months after the issuance of its notice of arbitration on 13 March 2014, and

¹⁸⁵ Exhibit C-52

¹⁸⁶ Answer, p. 37-38, para. 98

¹⁸⁷ Reply, p.11-12, para. 21-25.

¹⁸⁸ Exhibits C-70, C-71, C-72, C-73 and C-74.

¹⁸⁹ *Id.*

¹⁹⁰ RFA, p. 27, para. 24:

“To put an end to such dilatory proceedings, and because it appears that no settlement can be reached with the State of Libya, Olin has decided to launch ICC arbitration proceedings in accordance with article 9 of the BIT.

Any further or extended attempts to reach a negotiated solution with Libya appear futile given the circumstances and the chaotic situation of the central government of Libya. There is no evidence that the State of Libya intends or is able to initiate good faith negotiations leading to a settlement.

If Libya had been willing to engage in good faith negotiations with Olin, in the spirit of article 9 of the BIT, it had the opportunity to do so during the months following the notification of Olin, i.e. since March 13, 2014.”

¹⁹¹ Reply, p. 35 para. 90:

“Indisputably an exceptional situation prevails in Libya since January 2014. Nobody can challenge the fact that for several months the State of Libya [has been] in the hands of two rival authorities. Libya is governed by two rival governments and confronted with a deep political crisis: institutions are disorganized and paralyzed.

Because of the division of power, decisions are slow and not easy to take, especially financial ones. Therefore, Respondent is confronted to financial difficulties and is not in position to take any decision relating to any kind of payment.

Claimant was perfectly aware of this context when it decided to initiate this proceeding.”

that the Parties' attempts at amicable settlement had produced no concrete results. In view of the political situation in Libya at that time (as acknowledged by both Parties), the Arbitral Tribunal considers that it was reasonable for the Claimant to expect that no settlement would be reached before the elapse of the cooling-off period. The Arbitral Tribunal is thus of the view that it would not be appropriate to reject the Claimant's claim on the basis that its RFA was premature since the Respondent had the opportunity to negotiate a settlement with the Claimant but elected not to do so or was unable to do so and any further negotiation would have been futile based on the available evidence and the ongoing situation in Libya.

217. Furthermore, there is a body of investment arbitration case law which considers 'coolingoff periods as a procedural requirement rather than a jurisdictional requirement.¹⁹² In circumstances where negotiations appear to be futile and the 'cooling-off period has in any event passed by the time that an award on jurisdiction is rendered, international tribunals have consistently held that non-compliance with such period is not considered as a valid ground for challenging the jurisdiction of an arbitral tribunal or the admissibility of a request for arbitration.¹⁹³
218. Based on the foregoing, the Arbitral Tribunal determines that the Claimant does meet the requirements of Article 9 of the BIT and, consequently, rejects the Respondent's contentions in this respect.
219. The Arbitral Tribunal further notes that, by entering into the BIT, the Respondent has made an offer to arbitrate any dispute arising thereunder, which the Claimant accepted by filing its RFA.
220. Therefore, the Arbitral Tribunal determines that it has jurisdiction over the present dispute.

9. ISSUE NO. 3: IS THE RESPONDENT ENTITLED TO USD 10,000,000.00 IN DAMAGES?

¹⁹² In this regard, the Arbitral Tribunal refers to the following cases:

- In *Ronald S. Lauder v. Czech Republic* (Exhibit CL-27 at para. 187), the tribunal held that the "six-month waiting period of Article VI(3)(a) of the [1991 USA-Czechoslovakia] Treaty is not a jurisdictional provision, i.e. a limit set to the authority of the Arbitral Tribunal to decide on the merits of the dispute, but a procedural rule that must be satisfied by the Claimant", referring to the *Ethyl Corp. v. Canada* case (UNCITRAL, 24 June 1998, 381.M. 708 (1999), paragraphs 74-88); and
- In *Daimler Financial Services AG v. Argentine Republic* (CL-28 at para. 188), the tribunal determined that, "with respect to negotiation periods, the prevailing line of reasoning appears to rest upon two considerations: 1) the futility of the provision in the circumstances of the case, and 2) whether the period has in any event passed". In support of this conclusion, the tribunal in this case referred to the following precedents: *Ronald S. Lauder v. Czech Republic* (discussed above), *Bayinder Insaat Turizm Ticaret Fe Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 Nov 2005), paras 97-102), *Link-Trading Joint Stock Company v. Moldova*, (UNCITRAL, Award on Jurisdiction (16 Feb 2001), pp. 5-6), *Ethyl Corporation v. Canada* (UNCITRAL/NAFTA, Award on Jurisdiction (24 June 1998), para. 84-85) and *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4, Decision on Jurisdiction (29 June 1999), 41 ILM 881, 885-86 (2002)). The tribunal also referred to Professor Schreuer's position in this respect: "It would seem that the decisive question is whether or not there was a promising opportunity for a settlement. There is little point in declining jurisdiction and sending the parties back to the negotiating table if negotiations are obviously futile. Negotiations remain possible while the arbitration proceedings are pending. Even if the institution of arbitration was premature, the waiting period will often have expired by the time a decision on jurisdiction is rendered. Under these circumstances, compelling the claimant to start the proceedings anew would be uneconomical. A better way to deal with non-compliance with a waiting period is a suspension of proceedings to allow additional time for negotiations if these appear promising." (Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001), p.239)
- *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (CL43 at para. 343)
- *Pey Casado & President Allende Foundation v. Chile* (CL-19 at para. 573)

¹⁹³ Ibid.

a) The Parties' Positions

221. In its Submission, the Respondent sought USD 10,000,000.00 in damages as a result of the alleged “*abusive and fraudulent [arbitral] proceedings*” initiated by the Claimant pursuant to the BIT, referring to the Claimant’s alleged fraudulent manoeuvres (see Section 7.b) above) and the Claimant’s “*attempt to escape the natural Libyan judge despite the definitive and irrevocable choice of jurisdiction made in 2010 and confirmed in 2012 and in 2014*”.¹⁹⁴

222. In its Answer, the Claimant rejected the Respondent’s counterclaim, arguing that:

a) Its allegations of fraud and abusive behaviour are unsubstantiated, for the same reasons discussed in Section 7.b) above in that it had never concealed its Cypriot nationality;¹⁹⁵ and

b) There is “*no legal basis in the [BIT] or in international law for Respondent’s counterclaim*”.¹⁹⁶

223. In its Reply, the Respondent reiterated the position it adopted in its Submission.¹⁹⁷

224. In its Rejoinder, the Claimant reiterated its position as set out in its Answer, rejecting the Respondent’s counterclaim as baseless and “*frivolous*” and further stating *inter alia* that:

*“There is nothing “fraudulent” or “abusive” in an investor resorting first to national courts to advance purely domestic claims, and then turning to treaty arbitration to engage the host State’s international responsibility. This is even more the case when the local courts’ behaviour has been patently unfair toward the investor and thus form an integral part of the investor’s treaty claims.”*¹⁹⁸

b) The Arbitral Tribunal’s Analysis and Decision

225. In light of the Tribunal’s finding that Article 9.2 of the BIT does not constitute a “fork-in-the-road” clause, as set out in Paragraphs 201 to 206 above, the Tribunal determines that the Claimant’s initiation of these arbitral proceedings cannot be construed as “*abusive and fraudulent*”

¹⁹⁴ Submission, p. 19 paras. 37-38.

¹⁹⁵ Answer, pp. 38-39 para. 101.

¹⁹⁶ The Claimant referred to the *Cementownia v. Turkey* case (Exhibit CL-29) in which the arbitral tribunal:

- Found that the claimant’s claims were fraudulent and brought in bad faith;
- Yet refused to award the respondent moral damages due to the lack of legal basis for such remedy; and
- Noted that “*it is doubtful that such general principle [i.e. abuse of process] may constitute a sufficient legal basis for granting compensation for moral damages*”, differentiating “*from the Desert Line v. Yemen case (in which moral damages were awarded to an investor), where the investor’s claim was based on obligations contained in the applicable treaty*”.

The Claimant also referred to *Chevron v. Ecuador* (Exhibit CL-17) in which the tribunal notably held that “*“the dispute” in this context must mean ‘the same dispute’; it is not suggested that the submission of a different dispute between the Claimants and the Respondent could trigger the fork in the road provision in relation to the Parties’ dispute before this Tribunal.*”

¹⁹⁷ Reply, p. 34 para. 87. The Arbitral Tribunal further notes that the Respondent also stated that:

“Obviously the decisions concerning jurisdiction of the Arbitral tribunal and on the counterclaim are closely linked. Indisputably the Preliminary Award [...] will settle concomitantly these two issues. The counterclaim is inseparable of the issue of the jurisdiction of the Arbitral Tribunal, challenged by the Respondent.” (see p. 36 para. 93).

¹⁹⁸ Rejoinder, p. 29 para. 86.

proceedings”, as alleged by the Respondent. Accordingly, the Tribunal moves to dismiss the Respondent’s aforementioned claim for damages.

10. ISSUE NO. 4: WHO SHOULD BEAR, AND IN WHAT PROPORTION, THE COSTS OF THE JURISDICTIONAL PHASE IN THESE ARBITRAL PROCEEDINGS?

226. The Tribunal defers making a determination on this issue and decides to join its decision on Costs to the merits and the Final Award.

11. THE DECISIONS OF THE TRIBUNAL

227. Based on the above, the Tribunal finds, determines and rules as follows:

- a) The Claimant is considered an “Investor” under the BIT.
- b) Clause 9.2 of the BIT does not constitute a ‘fork-in-the-road’ clause.
- c) The Claimant meets the requirements of Article 9 of the BIT.
- d) Any further objection by the Respondent to the Claimant’s claims in relation to the decisions handed down by Libyan courts is joined to the merits.
- e) The Respondent’s claim for damages resulting from the alleged fraudulent and abusive nature of this arbitration is dismissed.
- f) The Apportionment of Costs is deferred until the Final Award.

228. The Arbitral Tribunal’s determination of any other claims made by the Parties thus far is hereby reserved until the issuance of the Final Award.