International Chamber of Commerce (ICC)

Case No. 20355/MCP

OLIN HOLDINGS LIMITED (*Claimant*)
(Cyprus)

Vs.

STATE OF LIBYA (*Respondent*)
(Libya)

FINAL AWARD

25 May 2018

Issued in accordance with the ICC Rules of Arbitration (2012)

RENDERED IN PARIS, FRANCE
BY AN ARBITRAL TRIBUNAL COMPOSED OF:

Mrs Nayla Comair-Obeid (President)

Mr Roland Ziadé (Co-Arbitrator)

Mr Ibrahim Fadlallah (Co-Arbitrator)

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1. 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 (The "**BIT**" or the "**Cyprus-Libya 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, Counsel, 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 Valérie Contri.
Arbitral Tribunal (or the "**Tribunal**"):	The Arbitral Tribunal formed of Mrs Nayla Comair-Obeid (President), Mr Ibrahim

	Fadlallah (Co-Arbitrator) and Mr Roland Ziadé (Co-Arbitrator).
Partial Award on Jurisdiction ("**Partial Award**"):	The Partial Arbitral Award 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.

<u>General: Relevant entities and individuals</u>

<u>Entities</u>

General People's Committee ("**GPCO**"):	The executive branch of the Libyan government (the equivalent of a cabinet) during the era of the Libyan Arab Jamahariya. A number of People's Committees focusing on specific fields (the equivalent of ministries) were also under the authority of the GPCO (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.
Libyan Investment and Development Company ("**LIDCO**")	Formerly known as the Libyan-Arab Domestic Investment Company, the LIDCO is a State-owned investment and development company.
Olin Holdings Limited ("**Olin**"):	Olin is a company registered in Cyprus and the Claimant in this Arbitration.

<u>Individuals</u>

Mr Akram Said Mohammad Abughamja ("**Mr Akram Abughamja**"):	A Libyan citizen who is/was the sole shareholder of the Olin 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.
Mr Said Abughamja:	
Mr Jean-Luc Deher (Mr Deher):	A Libyan citizen and the father of Mr Akram Abughamja.

A French citizen, principal of Deher Entreprise, a company that he founded in 2015, and that provides consulting services in the field of international strategy and development. In the mid-1990s, he was appointed as director of the international division of Candia and supervised the creation and development of the Candia franchise network in this capacity, until 2015 when he decided to retire.

Mrs Afafa A. Abughofa (Mrs Abughofa):	A Libyan citizen and an attorney with Al Mashoura Office for Law and Legal Consultations. Her firm was retained by Olin Holdings Ltd to file an action against each of the Prime Minister, the Minister of Housing, the Minister of Planning, and the Ministry of Finance, seeking compensation for the damages resulting from the expropriation of the land on which Olin was built.
Mr James Nicholson:	Mr Nicholson is a Chartered Financial Analyst and head of the Paris disputes team of FTI Consulting Inc. ("**FTI**"), a global expert services firm specialising among other things in litigation and arbitration support, and valuation.
Mr Matthias Cazier-Darmois:	Mr Cazier-Darmois is a Senior Director in the Paris office of FTI Consulting. Mr Cazier-Darmois has 12 years of experience in providing expert evidence and valuation advice in the context of complex commercial disputes and commercial and treaty arbitrations.

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:	The Submission filed by the Respondent on 7 August 2015.
Claimant's Answer on Jurisdiction:	The Answer submitted by the Claimant on 11 September 2015.

Respondent's Reply on Jurisdiction:	The Reply submitted by the Respondent on 30 September 2015.
Claimant's Rejoinder on Jurisdiction:	The Rejoinder submitted by the Claimant on 16 October 2015.
Claimant's Statement of Claim ("**SoC**"):	The Statement of Claim submitted by the Claimant on 7 October 2016.
First Witness Statement of Mr Akram Abughamja:	The Witness Statement of Mr Akram Abughamja, submitted by the Claimant on 7 October 2016.
Witness Statement of Mr Deher:	The Witness Statement of Mr Deher, submitted by the Claimant on 7 October 2016.
Witness Statement of Mrs Abughofa:	The Witness Statement of Mrs Abughofa, submitted by the Claimant on 7 October 2016.
First Expert Report of James Nicholson and Matthias Cazier-Darmois from FTI Consulting ("First Expert Report"):	The Expert report of James Nicholson and Matthias Cazier-Darmois submitted by the Claimant on 7 October 2016.
Respondent's Statement of Defense and Counterclaims ("**SoD**"):	The Statement of Defense and counterclaims submitted by the Respondent on 7 December 2016.
Claimant's Statement of Reply and Defense to Counterclaims ("**Reply**"):	The Reply and Defense to counterclaims submitted by the Claimant on 2 March 2017.
Second Witness Statement of Mr Akram Abughamja:	The Witness Statement of Mr Akram Abughamja, submitted by the Claimant on 2 March 2017
Second Expert Report of James Nicholson and Matthias Cazier-Darmois from FTI Consulting ("**Second Expert Report**"):	The Expert report of James Nicholson and Matthias Cazier-Darmois submitted by the Claimant on 2 March 2017.
Respondent's Statement of Rejoinder and Reply to Counterclaims ("**Rejoinder**"):	The Rejoinder and Reply to counterclaims submitted by the Respondent on 2 May 2017.
Claimant's Statement of Rejoinder to Counterclaims ("**Rejoinder to Counterclaims**"):	The Rejoinder to counterclaims submitted by the Claimant on 2 June 2017.
Evidentiary Hearing:	The Evidentiary Hearing which took place at the ICC Hearing Centre in Paris, France, from 3 July 2017 until 5 July 2017.
Claimant's Post-Hearing Brief:	The Claimant's answers to the Tribunal's Post-Hearing Questions submitted on 15 September

	2017.
Respondent's Post-Hearing Brief:	The Respondent's Post-Hearing Brief submitted on 15 September 2017.
Respondent's Reply to Post-Hearing Brief:	The Respondent's Reply to Claimant's answers to the Tribunal's questions, submitted on 13 October 2017.
Claimant's Reply to Post-Hearing Brief:	The Claimant's Reply to Respondent's Post-Hearing Brief, dated 14 October 2017.
Respondent's Submissions on costs:	The Respondent's Submission on costs, dated 14 October 2017.
Claimant's Submission on costs:	The Claimant submitted its Submission on costs on 23 October 2017.

Other Abbreviated terms

Most Favoured Nation ("**MFN**")

Fair and Equitable Treatment ("**FET**")

Full Protection and Security ("**FPS**")

Weighted Average Costs of Capital ("**WACC**")

2. 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 1er
75008 Paris
France

Tel: +33 (1) 73 00 39 00
+33 (0) 1 73 00 39 16
Fax: +33 (1) 73 00 39 59
+33 (0) 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, Stassinos 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

Ms Valérie Contri-Marchand
Contri-Marchand Avocats

9, Rue Juste-Olivier
CP 2567
1260 Nyon

Switzerland

Tel: +41 (0) 43 399 95 44
Emails: valeriecontri@aol.com

B) The Arbitral Tribunal

i. The Number of Arbitrators

6. The arbitration clause referred to in **paragraph 111** below is silent as to the number of arbitrators. As further discussed in **paragraph 17** ***et seq.*** below, the Parties agreed that the Arbitral Tribunal should consist of a panel of three arbitrators.[1]

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
Lebanon
Tel: +961 (0) 1 36 37 90 Ext.101
Fax: +961 (0) 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

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[1] The Respondent agreed in its Answer to the Claimant's RFA dated 10 November 2014 that the Arbitral Tribunal would consist of a panel of three arbitrators.

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. These arbitration proceedings were initiated pursuant to Article 9 of 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**" or the "**Cyprus-Libya BIT**").[2]

11. Article 9 of the BIT, which the Claimant invoked as a basis for the Tribunal's jurisdiction in its Request for Arbitration dated 3 July 2014 (the "**RFA**") 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

[2] On 12 February 2005, the BIT came into force.

(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."[3]

D) Place of Arbitration, Language and Law

i. Place of Arbitration

12. Paris, France, is the legal seat of this arbitration in accordance with the Parties' agreement[4] and Article 9.2(b) of the BIT, as reflected in paragraph 63 *et seq.* of the Terms of Reference ("**TOR**").

ii. Language of the Proceedings

13. 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 its correspondence with the Parties and for the TOR, Procedural Orders, Award(s) and other official documents;

[3] **Exhibit C-8,** Cyprus-Libya BIT, Article 9.

[4] The Respondent agreed in its Answer to the Claimant's RFA dated 10 November 2014 to have Paris, France, as the legal seat of the arbitration.

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 an 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 and Procedural Rules

14. Article 9.4 of the BIT, reproduced at paragraph 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.*"

15. 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;[5] 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.

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

3. PROCEDURAL HISTORY

16. The procedural history of this arbitration is summarised below. This summary is not intended to cover every step of the 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

17. On 3 July 2014, the Claimant filed its RFA in which it *inter alia*:

    a) Claimed the sum of USD 147,882,000.00 as compensation for the damages it incurred as a result of alleged breaches of the BIT and the Libyan foreign investment law by the Respondent; and

    b) Nominated Mr Roland Ziadé as Co-Arbitrator.

18. 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 designate its Co-Arbitrator.

19. 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 power of attorney.

20. On 14 November 2014, the Respondent advised the Secretariat of Mr Ibrahim Fadlallah's nomination as Co-Arbitrator.

21. On 11 December 2014, the Secretariat advised the Parties that the ICC Court had fixed the advance on costs at USD 650,000.00, subject to potential readjustments depending on the evolution of the arbitration.

22. On 26 March 2015, the ICC Court appointed Mrs Nayla Comair-Obeid as President of the Arbitral Tribunal, which was fully constituted as of that date.

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

23. On 7 April 2015, the case file was transmitted by the Secretariat to the Arbitral Tribunal.

24. On 29 May 2015, the Arbitral Tribunal issued Procedural Order No. 1 and invited both Parties to submit, by 5 June 2015, a short summary of their respective claims and relief sought in this arbitration, with an indication of the amounts claimed or counterclaimed, for integration in the TOR.

25. On 5 June 2015, the Parties submitted the summaries of their respective claims and relief sought for incorporation in the TOR.

26. 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 Preliminary Meeting ("**PM**").[6]

27. On 27 June 2015, the Arbitral Tribunal circulated an Agenda for 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

28. 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

[6] Ms Valérie Contri is a member of the Paris Bar and Lausanne Bar and a partner at Contri-Marchand Avocats, located at 9, Rue Juste-Olivier, CP 2567, 1260 Nyon, Switzerland. Dr Ballow'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 by the Arbitral Tribunal).

Claimant: Mrs Anne Granger, Mr Serge Gravel and Mrs Liria Martinez; and for the Respondents: Dr Abdurrazek Ballow and Mrs Valérie Contri.

29. 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 and leading to the Partial Award on Jurisdiction and the Partial Award on the Advance on Costs

30. 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.

31. On 7 August 2015, the Respondent filed its Submission on Jurisdiction together with Exhibits R-1 to R-10.

32. On 20 August 2015, the Claimant's First Counsel advised the Arbitral Tribunal that it was no longer representing the Claimant in this arbitration.

33. 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 power of attorney empowering the aforementioned individuals to represent the Claimant in this arbitration.

34. On 11 September 2015, the Claimant filed its Answer to the Respondent's Submission on Jurisdiction 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.

35. On 30 September 2015, the Respondent submitted its Reply to the Claimant's Answer on Jurisdiction together with a List of Exhibits and Exhibits R-11 to R-15.

36. On 16 October 2015, the Claimant submitted its Statement of Rejoinder on Jurisdiction 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 CL-47.

37. On 20 April 2016, the Arbitral Tribunal issued Procedural Order No. 3 declaring the proceedings closed in relation to the jurisdictional phase in accordance with Article 27 of the ICC Rules.

E) Partial Award on Jurisdiction and Partial Award on the Advance on Costs

38. On 28 June 2016, the Arbitral Tribunal issued a Partial Award on Jurisdiction, in which it made the following determinations:

a) The Claimant is considered an "Investor"[7] 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 ultimate Apportionment of Costs is deferred until the Final Award.

39. The Arbitral Tribunal reserved its determination regarding any other claims made by the Parties until the issuance of the present Final Award.

40. On 28 June 2016, the Arbitral Tribunal issued a Partial Award on the Advance on Costs,[8] deciding and ruling as follows:

a) The Respondent is ordered to pay the sum of USD 325,000.00 to the Claimant.

b) The Respondent is ordered to pay simple interest on the amount of USD 325,000.00 and the said-interest shall be calculated at the 12-month USD

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[7] An "investor" is defined as follows in Article 1 of the Cyprus-Libya BIT:
"[...] *with regard to either Contracting Party:*
- *Any natural person having the citizenship of that Contracting party [sic] in accordance with its law; or 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.*"

The fact that Olin had made an investment in Libya, in the form of a dairy products and juice factory, has not been contested.

[8] The Partial Award was notified to the Parties on 30 June 2016 and received by the Parties on 1 July 2016.

LIBOR benchmark rate and shall start accruing from 4 September 2015 until full and final payment by the Respondent to the Claimant.

c) The Arbitral Tribunal's determination of any other claims made by the Parties is hereby reserved until the issuance of the Final Award.

F) Events following the Partial Awards on Jurisdiction and on the Advance on Costs leading to the Evidentiary Hearing

41. On 22 July 2016, the Parties advised the Arbitral Tribunal that they had agreed on a Procedural Timetable for the second phase of this arbitration, culminating in a three-day Evidentiary Hearing. They however emphasized a point of contention between them regarding Respondent's entitlement to bring a counterclaim at this stage of the proceedings.

42. After two rounds of comments on the matter of the counterclaim, on 29 August 2016, the Arbitral Tribunal issued Procedural Order No. 4, whereby, on the basis of Article 23 (4) of the ICC Rules and the TOR, it ruled as follows:

a) The Respondent is allowed to submit its counterclaim for "ill-grounded proceedings" during the second phase of this arbitration; and,

b) The Parties shall liaise in order to include a further step allowing the Claimant to submit a Rejoinder limited to the Respondent's counterclaim.

43. On 20 September 2016, the Parties confirmed their agreement on a deadline for the Claimant's submission of a Rejoinder limited to the Respondent's counterclaim, as directed in Procedural Order No. 4. They further agreed on a one-week extension for filing their Statements of Claim ("**SoC**") and Statement of Defense and Counterclaims ("**SoD**").

44. On 7 October 2016, the Claimant submitted its SoC together with a Consolidated List of Exhibits, Exhibits C-99 to C-162, CL-37, the expert report of FTI Consulting (with its eight annexes and exhibits FTI-1 to FTI-38), the witness statements of Mr Akram Abughamja, Afafa Abdurrazak Abughofa and Jean-Luc Deher (CWS-1 to CWS-3).

45. On 7 December 2016, the Respondent submitted its SoD together with Exhibits R-16 to R-37.

46. On 17 February 2017, the Claimant sent a letter together with Exhibits C-163 and C-164 regarding the new court proceedings initiated by the Respondent against the Claimant before the Libyan Supreme Court.

47. On 3 March 2017, the Claimant submitted its Reply together with Exhibits C-165 to C-187, Cl-31 and CL-91 to CL-106, FTI's Second Expert Report, CER-2, with exhibits FTI-39 to FTI-43, and CWS-4, the second Witness Statement of Mr Akram Abughamja.

48. On 2 May 2017, the Respondent submitted its Rejoinder together with Exhibits R-38 to R-59.

49. On 15 May 2017, the Arbitral Tribunal circulated an Agenda for the Pre-Hearing Conference Call to be held on 27 May 2017. Subsequently, the Parties confirmed that they had liaised and conferred regarding the points on the Agenda.

50. On 26 May 2017, the Arbitral Tribunal acknowledged the Parties' agreement and confirmed that no Pre-Hearing Conference Call would be held.

51. On 2 June 2017, the Claimant submitted its Rejoinder on Respondent's Counterclaim together with Exhibits C-188 to C-195.

52. On 24 June 2017, the Respondent submitted a document titled "written pleadings". After reviewing the same, the Arbitral Tribunal considered such document can be considered as a written opening submission, a step which was not contemplated in the Procedural Timetable agreed by the Parties. After receiving Claimant's comments on the issue, the Arbitral Tribunal decided not to admit the Respondent's aforementionned document on the record.

G) The Evidentiary Hearing

53. Between 3 and 5 July 2017, the Parties and the Arbitral Tribunal attended a 3-day Evidentiary Hearing at the ICC Hearing Centre in Paris. There appeared for the Claimant: Mrs Mouawad, Mr Fleuriet and Mr Chahine (counsel), Mr Akram Abughamja and Mr Deher (witnesses), Mr Nicholson and Mr Cazier-Darmois (experts); for the Respondent: Ms Contri and Mr Ballow (counsel).

54. On 5 July 2017, the Claimant submitted with the agreement of Respondent the Official Notification of the Decision of the Tripoli Court of Appeal of 13 April 2010, dated 30

May 2010 as Exhibit C-196. The English translation of the decision was subsequently submitted on 10 July 2017.

H) Events Following the Evidentiary Hearing

55. On 14 July 2017, the Arbitral Tribunal sent a list of questions addressed to the experts and the Parties about asking, *inter alia*, the submission of feasibility study from Candia as well as a number of factual clarifications and questions.

56. On 11 August 2017, the Claimant's experts transmitted their response to the Arbitral Tribunal's questions.

57. On 19 August 2017, the Claimant's witness, Mr Deher, submitted his answer to the Tribunal's questions on the basis of Olin's business plan prepared by Candia in early 2007.

58. On 15 September 2017, the Respondent submitted its Post-Hearing Brief together with Exhibits R-60 to R-63 in which it provided further responses to the questions raised by the Arbitral Tribunal after the Evidentiary Hearing. On the same day, the Claimant submitted its response to the Tribunal's Post-Hearing questions.

59. On 5 October 2017, the Claimant provided its comments on the Respondent's Post-Hearing Brief dated 15 September 2017, claiming it had raised new arguments and submitted new documents, disregarding the Procedural Rules. On the same day, the Respondent rejected such allegations and sought the Tribunal's permission to submit new documents – in the limited number of 7 – to provide a substantiated answer to the Tribunal's questions.

60. On 10 October 2017, the Tribunal rejected the Respondent's request to submit additional documents.

61. On 13 October 2017, the Respondent submitted its Reply Post-Hearing Brief together with its submission on costs. On the next day, the Claimant submitted its Reply Post-Hearing Brief together with an updated Index of Exhibits, Exhibits C-197 to C-204 and Legal Authorities CL-107 to CL-109.

62. On 23 October 2017, the Claimant submitted its Submission on costs.

I) Time Limits for Rendering the Final Award

63. The deadline for the issuance of this Final Award by the Arbitral Tribunal was initially set as 29 December 2015, i.e. six (6) months after the signature of the TOR on 29 June 2015. This deadline for rendering the Final Award was subsequently extended to 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); 29 July 2016 (ICC Court decision of 9 June 2016); 30 June 2017 (ICC Court decision of 21 July 2016); 31 October 2017 (ICC Court decision of 8 June 2017); 29 December 2017 (ICC Court decision of 12 October 2017); 31 January 2018 (ICC Court decision of 14 December 2017); 28 February 2018 (ICC Court decision of 11 January 2018); 30 April 2018 (ICC Court decision of 8 February 2018); 31 May 2018 (ICC Court decision of 19 April 2018) and 29 June 2018 (ICC Court decision of 24 May 2018).

J) Procedural Orders

64. The Arbitral Tribunal issued four (4) Procedural Orders in the course of this arbitration. A chronology of these procedural orders is set out below.

65. 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 13** above.

66. On 3 July 2015, the Arbitral Tribunal issued Procedural Order No. 2, enclosing as Appendices No. 1 and No. 2 the mutually agreed Procedural Rules and Provisional Timetable.

67. On 20 April 2016, the Arbitral Tribunal issued Procedural Order No. 3 declaring the proceedings closed in relation to the jurisdictional phase as per Article 27 of the ICC Rules, as discussed in **paragraph 37** above.

68. On 29 August 2016, the Arbitral Tribunal issued Procedural Order No. 4 which dealt with the Respondent's ability to submit a counterclaim, as discussed in **paragraph 42** above.

69. On 15 March 2018, the Arbitral Tribunal issued Procedural Order No. 5 which declared the closure of the arbitral proceedings.

4. PARTIES' SUBMISSIONS ON THE MERITS

A) The Claimant

70. During the course of the merits phase of these proceedings, the Claimant filed its SoC on 7 October 2016 and its Reply on 2 March 2017.

B) The Respondent

71. During the course of the merits phase of these proceedings, the Respondent filed its SoD on 7 December 2016 and its Rejoinder on 2 May 2017.

5. PARTIES' RELIEF SOUGHT

A) The Claimant

72. Olin requests sought the following relief in this arbitration:[9]

(A) A declaration that Libya has breached the Cyprus-Libya BIT, and more specifically: (1) Libya's obligations under Article 2(2) not to impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, expansion, or sale of Olin's investments; to extend fair and equitable treatment to Olin's investments; and to extend full protection and security to Olin's investments; (2) Libya's obligation under Article 3 to treat Olin's investments no less favourably than it treats the investments of Libyan nationals; and (3) Libya's obligation under Article 7 not to expropriate Olin's investments, directly or indirectly, except for a public interest, in accordance with due process of law, on a non-discriminatory basis, and against payment of prompt, adequate, and effective compensation;

(B) EUR 104.9 million as compensation for the losses suffered by Olin as a result of Libya's breaches of the Cyprus-Libya BIT;

(C) An award to Olin for all costs associated with this proceeding, including attorneys' fees and the fees of the ICC, Tribunal, and experts;

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[9] Claimant's Reply at para 171.

(D) Post-award interest on all of the foregoing amounts at the commercial rate of interest applicable in Cyprus, compounded quarterly, until Libya pays the award in full; and

(E) Any further relief that the Tribunal deems just and appropriate.

73. With regard to the Respondent's counterclaim, the Claimant requested that the Tribunal to:

(A) Confirm that the Respondent's "counterclaim" has been withdrawn, with prejudice;

(B) Reject the Respondent's claim for payment of an amount of USD 2 million;

(C) Award Olin all of its costs associated with defending against the Respondent's spurious counterclaim, including attorneys' fees; and

(D) Award Olin any further relief that the Tribunal deems just and appropriate.

B) The Respondent

74. Libya asks the Arbitral Tribunal to:

(A) State that:

- the Expropriation Order is lawful;

- the investor and its investment have never been dispossessed because of the Expropriation Order of 2006;
- the investor and its investment have not undergone an unequal treatment;
- the investor and its investment did not suffer because of the host State's misconduct and mistreatment;
- the host State did not violate the Cyprus-Libya Treaty neither in 2006 nor after and even less in 2017;
- the investor did not suffer losses because of the host State actions or inactions.

(B) Dismiss all Claimant's Claims.

(C) Condemn the Claimant to pay damages amounting to EUR 2million as a result of the Claimant's behaviour.

(D) Condemn the Claimant to bear all the costs and fees related to these arbitral proceedings.[10]

6. RELEVANT PROVISIONS OF THE BIT AND THE APPLICABLE LAW

75. The following paragraphs reproduce the main provisions of the BIT that are relevant to the present dispute.

76. Article 2.2 of the BIT contains three different standards of protection, namely the "Fair and Equitable Treatment" ("**FET**") standard, the "Full Protection and Security" ("**FPS**") standard as well as a non-impairment clause, which are together defined as follows:

> *Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security according to the law. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, expansion or disposal of such investments.*

77. Articles 3.1 and 3.2 of the BIT define the "Most Favourable Nation" and "National Treatment" standards as follows:

> *1. Once a Contracting Party has admitted an investment in its territory in accordance with its laws and regulations, it shall accord to such investment made by investors of the other Contracting Party treatment not less favourable than that accorded to investments of its own investors or of investors of any third State, whichever is more favourable to the investor concerned.*
>
> *2. Each Contracting Party shall in its territory accord to investors of the other Contracting Party, as regards to their management, maintenance, use, enjoyment, expansion or disposal of their investment, treatment not less favourable than that accorded to its own investors or to investors of any third State, whichever is more favourable to the investors concerned.*

78. Article 7 of the BIT sets out the conditions for a legal nationalization or expropriation in the following terms:

> *1. Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be nationalized, expropriated or subjected to measures having equivalent effect to nationalization or expropriation, except*

[10] Respondent's Rejoinder, page 73.

for public interest, in accordance with due process of law, on a non-discriminatory basis and against the payment of prompt, adequate and effective compensation.

2. Such compensation shall amount to the fair market value of the investment expropriated immediately before the expropriation or impending expropriation became publicly known, whichever is the earlier (hereinafter referred to as the "valuation date").

3. Such market value shall be calculated in a freely convertible currency at the market rate of exchange prevailing for that currency on the valuation date. Compensation shall include interest calculated on the basis of the 6-month LIBOR rate applicable on the date of expropriation, from the date of expropriation until the date of payment. Compensation shall be paid without delay, be effectively realizable and freely transferable.

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. Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of this Article are applied so as to guarantee prompt, adequate and effective compensation in respect of their investment to such investors of the other Contracting Party who are owners of those shares.

7. FACTUAL BACKGROUND

79. The Arbitral Tribunal provides below a factual background concerning the Parties' dispute in this arbitration. This overview is not intended to be a comprehensive account of all the issues debated during the course of the proceedings, but rather an outline containing some significant events and undisputed facts. As such, it should be read in conjunction with the other sections of this Final Award, which contain further details in relation to the disputed matters (as well as the Arbitral Tribunal's findings in relation thereto).

80. In the 1990s, Libya initiated a series of legislative and economic reforms and stabilization measures designed to attract foreign investment. In addition to changing the international legal landscape through the conclusion of BITs, Libya also modified its domestic legislation to foster foreign investments.

81. On 9 March 1997, the Libyan Government enacted Law No. 5 for the Promotion of Investment of Foreign Capital, (subsequently amended with Law No. 7 in 2003) (the "**Libyan Investment Law**").[11]

82. In this context, Olin decided to invest in a dairy and juice factory in Libya and sought to obtain governmental approvals to build and operate its factory in the vicinity of Tripoli. Olin subsequently obtained all necessary licenses and authorizations from the relevant governmental authorities, in accordance with local laws.

83. On 12 November 2002, the Ministry of Economy and Trade issued Decision No 365 for 2002, authorising Olin to establish a local branch and to proceed with its investment in Libya.[12]

84. On 3 March 2003, the LFIB issued its Investment Project License No 44 (for 2003), granting Olin an *"investment project license"* that allowed it to proceed with the implementation of a dairy products factory project in Tripoli.[13]

85. On this basis, Olin selected in 2005 a site (Plot No. 11) for its factory in Tripoli's industrial area, Al-Fallah.[14] In this arbitration, while the Claimant asserts that Mr Said Abughamja (father of Mr Akram Abughamja) purchased this land,[15] Libya for its part considers that Mr Said Abughamja had in fact obtained this land through a donation on 24 April 2005.[16] It is not contested, however, that the land on which Olin's factory has been erected belonged to Mr Said Abughamja and not to Olin at the time.[17]

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[11] **Exhibit C-1,** Law No. 5 of 1426 PB (1997) as Amended by Law No. 7 of 1371 PD (2003) for Promotion of Investment of Foreign Capital; **Exhibit R-32**, The Executive Regulations for Law No. 5 of 1426 PB (1997) as Amended by Law No. 7 of 1371 PD (2003) for Promotion of Investment of Foreign Capital.

[12] **Exhibits C-3**, Decision No. 365 of 2002 of the Minister of Economy; **Exhibit C-4,** Letter from the Libyan Foreign Investment Board to Olin; **Exhibit C-11**, Resolution No. 697 for 2005 of the Minister of Economy & Trade (amending Decision No. 365 of 2002).

[13] **Exhibits C-5**, LFIB's Investment Project License No. 44 (for 2003) dated 3 March 2003.

[14] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 13 and **CWS-2**, Witness Statement of Mr Deher at para 11.

[15] See Claimant's SoC, para 24: *"Mr. Said Abughamja, Olin's ultimate shareholder, purchased Plot 11 and immediately leased it to Olin on May 16, 2005"*. **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 13. Claimant's SoC at para 23: *"After an extensive search, Olin ultimately purchased a second-hand factory and demolished it at its own costs so as to benefit from the industrial classification of the land and from access to water, electricity, and sewage."*

[16] Respondent's SoD at para 39.

[17] **Exhibit R-21**, Real Estate Certificate issued by the Board of Registration of Real Estate at the General People's Committee of Justice dated 27 April 2005.

86. On 16 May 2005, Mr Said Abughamja leased Plot No. 11 to Olin,[18] and later entered into a contract of usufruct with Olin on 10 May 2006 in respect of the same plot.[19]

87. On 25 June 2005, Olin received a building permit from the Tripoli People's Committee, giving it the green light to commence the construction of its factory on Plot No. 11 in the industrial zone of Al Fallah.[20] At that time, Olin had partnered with PROLAC, a major French milk powder producer and exporter and a subsidiary of the French conglomerate SOUFFLET GROUP,[21] as well as with ACTINI, a French manufacturer of sterilizing equipment, to assist Olin in designing and building the factory and purchasing the necessary machines.[22]

88. On 21 November 2005, the LFIB issued a new investment license adding the production of juices to the scope of Olin's investment project.[23] From that point onwards, the license was regularly renewed by decisions of the LFIB, until April 2017 (see **paragraph 128** below).[24]

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[18] **Exhibit C-9**, Lease Contract between Mr Said Abughamja and Olin dated May 16, 2005. Respondent's SoD at para 45-63; Claimant's SoC at para 24.

[19] **Exhibit C-13**, Contract of usufruct between Mr Said Abughamja and Olin dated May 10, 2006. Respondent's SoD at para 45-63; Claimant's SoC at para 24.

[20] **Exhibit C-10**, Building Permit from the Tripoli People's Committee, dated 25 June 2005.

[21] **Exhibit C-113**, Letter from Soufflet Négoce to Olin dated 1 June 2005 and attached term sheet.

[22] **CWS-1**, First Witness Statement of Mr Akram Abughamja at paras 12-14. **CWS-2**, Witness Statement of Mr Deher at paras 13-14. Claimant's SoC, para 26.

[23] **Exhibit C-12**, LFIB's Investment Project License No. 093 for 2005 dated 21 November 2005.

[24] In November 2006, the LFIB issued a further license (No. 020 for 2006) to Olin (**Exhibit C-19**, LFIB's Investment Project License No. 020 for 2006 dated 26 November 2006), which was then renewed in 2008, for two years (**Exhibit C-60,** LFIB's Renewal of Investment Project License No. 020 for 2006 dated November 18, 2008) and then in 2010, 2011, 2012 and 2013 for successive periods of one year (*see* **Exhibit C-105**, LFIB's Renewal of Investment Project License No. 020 for 2006 dated December 19, 2010; **Exhibit C-106**, LFIB's Renewal of Investment Project License No. 020 for 2006 dated March 22, 2012; **Exhibit C-107**, LFIB's Renewal of Investment Project License No. 020 for 2006 dated December 12, 2012). In November 2014 the LFIB renewed Olin's investment project license for a period of two months (**Exhibit C-108**, LFIB's Renewal of Investment Project License No. 020 for 2006 dated November 26, 2014); in January 2015, for a period of six months (**Exhibit C-109**, LFIB's Renewal of Investment Project License No. 020 for 2006 dated January 7, 2015); in June 2015, for a period of three months (**Exhibit C-110**, LFIB's Renewal of Investment Project License No. 020 for 2006 dated June 16, 2015); in October 2015, for a period of seven months (**Exhibit C-111**, LFIB's Renewal of Investment Project License No. 020 for 2006 dated October 28, 2015); and finally, in July 2016, for a period of four months (**Exhibit C-112**, LFIB's Renewal of Investment Project License No. 020 for 2006 dated July 13, 2016).

89. In late 2005, Olin actively prepared for the launch of its products and hired an advertising company called"Memac-Ogilvy" to plan a USD 1 million launch marketing campaign.[25]

90. During the construction of the factory, Olin was introduced to Candia which was looking at the time to establish a franchise in Libya, and on 30 January 2006, Olin and Candia entered into a Manufacturing and Distribution Franchise Agreement (the "Candia Franchise Agreement").[26]

91. By the end of 2006, Olin had completed the construction of its factory and was ready to start production.

92. On 12 November 2006, Olin received an eviction order from the Tripoli's People Committee for Housing & Utilities informing it that its factory had been "dispossessed" and requesting it to vacate the premises within 3 days.[27]

93. According to the Claimant, it is only then that Olin became aware of Decision No. 241 of 2006,[28] issued by the General People's Committee ("**GPCO**") on 19 October 2006 (the "**Expropriation Order**"), which expropriated a parcel of land along the Tripoli Airport Road, including Olin's factory (the "**Expropriated Area**").[29] In its Article 1, the Expropriation Order stipulates that:

> *The property on aerial map No. 13-52 located between the employee housing project and [Al-Sawani] Road, People's Congress of Bab [Akkara] Municipality, Tripoli district, shall be expropriated for the public interest to establish a housing project pursuant to the Secretary of the Public Property Authority Management Committee letter and the design plan attached to this resolution.*

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[25] **CWS-1**, First Witness Statement of Mr Akram Abughamja; **CWS-2**, Witness Statement of Mr Deher; **Exhibit C-150**, Packaging designs and Commercials of Olin's Candia UHT Milk, Fruity Juices, and Candy Juices.
[26] **Exhibit C-7**, Candia Franchise Agreement dated 30 January 2006.
[27] **Exhibit C-15**, Evacuation Order dated 12 November 2006, addressed to Olin Company Limited, ordering the eviction as follows: *"[Y]ou are requested to evacuate the property and deliver it free of any obstacles or people to the concerned committee within a period not exceeding 3 days from the date of the notification."*
[28] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 22; Claimant's SoC at para 22.
[29] **Exhibit C-14**, Decision No. 241 for 2006 of the GPCO dated 19 October 2006.

94. Within three days of Olin's receipt of the eviction notice, the Libyan army had destroyed several buildings around Olin's factory and expelled thousands of occupants in the process. [30]

95. On 25 November 2006, the GPCO issued Decision No. 266 of 2006 (the "**Revised Expropriation Order**"), expanding the Expropriated Area to cover a surface of 340 hectares, *"for the public interest"* and *"for the execution of the urban development in the area located to the west and east of the airport road in Tripoli"*.[31]

96. The next day, on 26 November 2006, the LFIB issued a renewal of Olin's license to operate.[32]

97. Within three months of receipt of the Expropriation Order in November 2006, Libya had demolished the quasi totality of the Expropriated Area, leaving Olin's factory as one of the few buildings standing.[33]

98. Between November 2006 and June 2009, Olin sent several letters to the LFIB and to the Minister of Economy, Trade and Investment in Libya, seeking a formal exemption from the Expropriation Order.[34]

99. The LFIB supported Olin's request for an exemption through a series of letters in 2006, addressed to different Libyan public authorities, namely the People's Committee for Housing and Infrastructure;[35] the Tripoli Authority for Public Property;[36] the Ministry of Housing;[37] the Public Electricity Company;[38] and to the Minister of Economy, Trade and Investment.[39]

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[30] Claimant's SoC at para 43. Respondent's SoD at para 95.
[31] **Exhibit C-23**, Decision No. 266 for 2006 of the GPCO dated 25 November 2006; **Exhibit C-59**, Google map of the expropriated area (undated).
[32] **Exhibit C-19**, LFIB's Investment Project License No. 020 for 2006 dated 26 November 2006.
[33] Claimant's SoC at para 43. Respondent's SoD at para 95.
[34] **Exhibit C-117**, Letter from Olin to the LFIB dated 12 November 2006; **Exhibit C-42**, Letter from Olin to Minister of Economy, Trade and Investment dated 15 November 2008; **Exhibit R-31**, Letter from Olin to the LFIB, 16 June 2009.
[35] **Exhibit C-16**, Letter from the LFIB to the People's Committee for Housing and Infrastructure, dated 14 November 2006.
[36] **Exhibit C-46**, Letter from the LFIB to the Tripoli Authority for Public Property dated 7 December 2006.
[37] **Exhibit C-22**, Letter from the LFIB to the Ministry of Housing dated 10 December 2006.
[38] **Exhibit C-45**, Letter from the LFIB to the Public Electricity Company dated 10 December 2006.
[39] **Exhibit C-2**, Letter from the LFIB to the Minister of Economy, Trade and Investment dated 16 November 2006.

100. Between 2006 and 2009, the Minister of Economy, Trade and Investment and the General Organization for Housing & Utilities also supported Olin's request for an exemption from the Expropriation Order by addressing letters to the Secretary of the GPCO.[40]

101. On 9 December 2006, Olin initiated judicial proceedings before the Tripoli Court of Appeal, First Administrative Circuit (the "**Tripoli Court of Appeal**") challenging the legality of the Expropriation Order.[41]

102. On 13 May 2007, the Secretary of the Administration Committee of the LFIB wrote to Olin, referring to a letter dated 28 April 2007, sent to the assistant secretary of the Public Establishment of Housing and Utilities, granting Olin *"a deadline of at least six months to move the equipment, machines on another site, with the obligation to provide [Olin] with a suitable alternative"*.[42]

103. On 30 May 2007, the Administrative Committee for Public Property, in application of the 2006 Expropriation Order, formally transferred the property title of Plot No.11, on which Olin's factory was built, to the LIDCO.[43]

104. On 31 October 2007, Mr Said Abughamja signed a contract for the sale of the same Plot to Olin.[44]

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[40] **Exhibit C-18**, Letter from the Minister of Economy, Trade and Investment to the Secretary of the GPCO, dated 26 November 2006; **Exhibit C-39**, Letter from the General Organization for Housing & Utilities to the Secretary of the GCPO (Prime Minister) dated 14 February 2008; **Exhibit C-40**, Letter to the Secretary of the Organization's Management Committee from the General Organization for Housing and Utilities dated 3 February 2008; **Exhibit C-28**, Letter from the General Organization for Housing to the Secretary of the GPCO (Prime Minister) dated 25 January 2009).

[41] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 43.

[42] **Exhibit R-26**, Letter from the Secretary of the Administration Committee at the Libyan Foreign Investment Board to Olin dated 13 May 2007.

[43] **Exhibit C-118**, Decision no. 157 for year 1375 from the Secretary of the Administrative Committee for Public Property dated 30 May 2007: *"the property located at Bab Akarra Basic Popular Congress in Shabiat Tripoli, which is a plot of (91,4793 hectares) [...] shall be allocated in favor of the Libyan Arab Company for Internal Investments for execution of Housing Project."*

[44] **Exhibit C-55,** Land Sales Contract between Mr Said Abughamja and Olin dated 31 October 2007. The Respondent questions the validity of the Land Sales Contract of 31 October 2007, because it was signed after the transfer of property to the LIDCO in May 2007.

105. On 8 November 2007 and 10 December 2007, Olin wrote to the LFIB, stating that the uncertainty as to the future of its factory as well as the lack of a suitable alternative site and the lack of compensation, caused Olin to incur financial losses on a daily basis.[45]

106. On 10 January 2008, Olin sent a similar letter to the General Organization for Housing & Utilities.[46]

107. On 15 February 2008, the GPCO decided to create a committee, *"for the purpose of discussing with Olin the terms of its eviction"*, including the identification of a replacement location and the payment of adequate compensation.[47]

108. While the Parties disagree as to whether the GPCO ultimately exempted Olin from expropriation, they do agree that the Libyan authorities accepted to expressly exempt two of Olin's competitors from any destruction or relocation: Al-Aseel Juice Plant, a privately-owned Libyan company,[48] as well as the State-owned OKBA Dairy Factory in 2008.[49]

109. On 13 April 2010, the Tripoli Court of Appeal cancelled the 2006 Expropriation Order on the ground that it was unlawful under Libyan law, since it did not adopt the appropriate process for the expropriation of foreign investors under the Libyan Investment Law.[50]

110. On 31 August 2010, notwithstanding the decision of the Tripoli Court of Appeal, the General Authority for Public Property sent Olin a letter, asking it to *"evacuate the site on top urgent basis and deliver it free of all obstacles and people within a week of today to the Libyan Company for Development and Investment"*.[51] When Olin notified the LFIB on the same day that the Expropriation Order had been cancelled,[52] the LFIB

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[45] **Exhibit C-121**, Letter from Olin to the Libyan Foreign Investment Board dated 10 December 2007 (updated translation).
[46] **Exhibit C-41**, Letter from Olin to the General Organization for Housing & Utilities dated 10 January 2008.
[47] **Exhibit C-26**, Minutes of the Meeting of the Joint Committee; **Exhibit C-25**, Letter from the Undersecretary of Technical Affairs of the General Organization for Housing dated 13 February 2008.
[48] **Exhibit C-43 and R-30**, Letter from the GPCO to the General Organization for Housing dated 22 July 2008.
[49] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 31; Respondent's SoD at paras 97; 102; 134; 172.
[50] **Exhibit C-30**, Decision of the Tripoli Court of Appeal (1st Administrative Circuit) dated 13 April 2010.
[51] **Exhibit C-31**, Letter from the General Authority for Public Property to Olin dated 31 August 2010.
[52] **Exhibit C-126**, Letter from Olin to the LFIB dated 31 August 2010.

nevertheless asked Olin to contact the LFIB's real estate department affirming that it had found a replacement location for Olin.[53]

111. As from October 2010, a number of Libyan governmental departments endorsed the Tripoli Court of Appeal's decision.[54]

112. On 7 December 2010, Olin initiated judicial proceedings before the South Tripoli Court of First Instance (the "**South Tripoli Court**") against the President of the Transitional Government, the Minister of Housing and Infrastructure, the Minister of Planning, and the Minister of Finance, seeking compensation for the harm it had suffered as a result of the Expropriation Order.[55]

113. A first hearing was held on 11 January 2011, rescheduled for 1 March 2011, and then to 26 April 2011, at which point the South Tripoli Court decided to close the proceedings and informed Olin that it would render its decision on 20 September 2011.[56]

114. On 17 February 2011, the period of revolution and civil unrest started in Libya.[57]

115. On 15 June 2011, the Libyan authorities transferred back to Mr Said Abughamja the property title of Plot No.11 on which the Olin factory was erected.[58]

116. On 20 September 2011, the South Tripoli Court decided to reopen the proceedings on the basis that the judges responsible for the case had changed after the 2011 revolution.[59]

117. A hearing was subsequently held on 17 January 2012, when Olin was told that it had to re-file its case as the respondents' official titles had changed since the revolution. Olin

[53] **Exhibit C-127**, Letter from the LFIB to Olin dated 2 September 2010.
[54] **Exhibit C-67**, Letter from the Ministry of Justice to the General Authority for Public Property dated 24 October 2010; **Exhibit C-68**, Letter from the General Authority for Public Property to the GPCO dated 9 January 2011.
[55] **Exhibit C-135**, Olin Complaint before the South Tripoli Court dated December 7, 2010; **CWS-3**, Witness Statement of Mrs Abughofa dated 7 October 2016 at paras 1-2.
[56] **CWS-3**, Witness Statement of Mrs Abughofa at para 5.
[57] See e.g. Respondent's SoD at para 9.
[58] **Exhibit C-32**, Certificate from the Real Estate Registry dated 15 June 2011.
[59] **CWS-3**, Witness Statement of Mrs Abughofa at para 6; Respondent's Rejoinder dated 2 May 2017 at para 206.

complied and resubmitted its case on 13 March 2012, which prompted the respondents to request another extension to present their defense.[60]

118. A new court hearing scheduled for 19 June 2012 was further rescheduled in the absence of the respondents, a scenario which according to the Claimant, repeated itself in July, September, October, December 2012 and in January, February, March and April 2013.[61]

119. The court proceedings continued to be postponed until a hearing was finally held on 4 February 2014.[62]

120. Following this last court hearing, in a judgment dated 14 February 2014, the South Tripoli Court ruled that Olin had failed to prove the harm it suffered as a result of the cancelled Expropriation Order, and consequently, that no indemnification was due.[63]

121. In October 2015, Olin ceased all operations in its factory.[64]

122. On 13 July 2016, the LFIB informed Olin that it would renew its operational license for four months.[65]

123. On 26 July 2016, the LFIB sent a separate letter to Olin informing it that its project had to be liquidated in accordance with the Libyan Investment Law because Olin's cumulative losses since 2007 had been greater than 84% of its capital.[66]

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[60] *Id.* at para 6; **Exhibit C-34**, Re-stated claim for compensation dated 3 March 2012; Respondent's SoD at para 207.
[61] **CWS-3**, Witness Statement of Mrs Abughofa at para 7. Respondent's Rejoinder dated 2 May 2017 at para 206.
[62] *Id.* at para 8; **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 48; Respondent's Rejoinder at para 199.
[63] **Exhibit C-57**, Judgment of the South Tripoli Court of First Instance in Case 1786-2010 dated 14 February 2014.
[64] See Claimant's Answers to the Tribunal's Post Hearing Questions dated 15 September 2017; Claimant's Reply Post-Hearing Brief dated 13 October 2017; Respondent's Answer to the Tribunal Post Hearing Questions dated 15 September 2017; Respondent's Answer to Claimant's Post-Hearing Brief dated 13 October 2017.
[65] **Exhibit C-112**, LFIB's Renewal of Investment Project License No. 020 for 2006 dated 13 July 2016.
[66] **Exhibit C-134**, Letter from the LFIB to Olin dated 26 July 2016; **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 54.

124. On 26 October 2016, the LFIB renewed Olin's operational license for a short period of time until April 2017, contingent on Olin's participation in the specific committee tasked with inspecting Olin's records.[67]

125. In November 2016, the LFIB refused to renew Olin's operational license past April 2017 unless Olin could provide evidence that it injected additional capital into its investment to cover the financial losses it sustained.[68]

126. On 5 December 2016, Libya appealed before the Libyan Supreme Court the appellate judgment that had cancelled the Expropriation Order on 13 April 2010, and requested the Supreme Court to issue an immediate and urgent stay of execution of the Tripoli Court of Appeal's decision cancelling the Expropriation Order.[69] However, the Tribunal has not been informed of the outcome of the appeal to the Libyan Supreme Court, if any.[70]

127. On 6 February 2017, Olin's shareholders adopted a special resolution approving the increase in capital of its Libyan branch by LYD 9,179,386.142 to avoid liquidation.[71]

128. Olin's license has not been renewed past April 2017 and Olin does not plan to resume operations in the future.[72]

8. ISSUES TO BE DECIDED IN THIS FINAL AWARD

129. The Arbitral Tribunal, having considered all the written submissions filed by the Parties, in addition to the Parties' respective reliefs sought, sets out hereunder the Issues to be determined in this Final Award, as follows:

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[67] **Exhibit C-178**, Decision of the LFIB dated 26 October 2016; **Exhibit R-40**, LFIB's Renewal of Investment Project License No. 020 for 2006 dated 13 November 2016.

[68] **Exhibit C-163**, Meeting Minutes of the Committee Constituted for Handling and Studying the Losses of Olin, dated 13, 20, and 24 November 2016.

[69] **Exhibit C-164**, Report of Appeal by Cassation filed by Libya's Litigation Department against Olin dated 5 December 2016.

[70] At the Evidentiary Hearing, the Parties informed the Tribunal that the decision had not been issued yet. See Hearing Transcript, Volume I, at page 20 and Volume II, at pages 328-329.

[71] **Exhibit C-179**, Olin Special Resolution of Extraordinary General Meeting dated 6 February 2017.

[72] **CWS-4**, Second Witness Statement of Mr Akram Abughamja, para 14; Claimant's Answers to the Tribunal's Post-Hearing Questions dated 15 September 2017 at paras 1-16; Respondent's Answers to the Tribunal's Post-Hearing Questions dated 15 September 2017; Claimant's Reply Post-Hearing Brief at para 5; Evidentiary Hearing, Transcript page 299-300.

a) Has Libya breached **Article 7** of the BIT relating to expropriation as a result of the unlawful and discriminatory interim legal and economic dispossession of Olin's foreign investment from November 2006 through June 2011 without due process of law and without prompt, adequate and effective compensation?

b) Has Libya failed to grant Olin's investment the national treatment that was afforded to Libyan investors as well as the MFN treatment under **Article 3** of the Cyprus-Libya BIT?

c) Has Libya breached **Article 2.2** of the Cyprus-Libya BIT, by failing to accord FET, FPS and/or by impairing the management, maintenance, use, enjoyment, and expansion of the Olin investment in Libya with unreasonable and discriminatory measures?

d) How should the Tribunal compensate Olin for its losses, if any?

e) Did Olin breach any of its obligations under the Cyprus-Libya BIT or during this arbitration? Should the Tribunal compensate Libya for any losses as a result of Olin's behavior?

f) Should the Tribunal order the payment of pre-award and post-award interest on the amount of compensation granted to Olin, if any?

g) How should the Tribunal allocate the legal and arbitration costs incurred in these proceedings?

130. In discussing in this Final Award the Parties' respective contentions and the issues arising therefrom, the Arbitral Tribunal will refer to various parts of the submissions of the Parties. However, the fact that the Arbitral Tribunal has not reflected a specific part of such submissions does not mean that it has not considered such part in rendering its conclusions in this final award. Indeed, the Arbitral Tribunal has carefully considered all of the Parties' oral and written submissions as well as all of the evidence both oral and documentary, in its consideration of the issues to be determined and the Parties' requests for relief, including those which are not expressly referred to below.

9. ISSUE NO. 1: HAS LIBYA BREACHED ARTICLE 7 OF THE BIT RELATING TO EXPROPRIATION?

A) Summary of the Parties' Positions

i. The Claimant

131. The Claimant asserts that the issuance of the Expropriation Order in 2006 violates Article 7 of the Cyprus-Libya BIT, which prohibits the expropriation of investments *"except for public interest, in accordance with due process of law, on a non-discriminatory basis and against the payment of prompt, adequate and effective compensation."*[73]

132. The Claimant contends first that the Expropriation Order was not for public interest. The Claimant cites the decision in *ADC v. Hungary*[74] according to which *"a treaty requirement for 'public interest' requires some genuine interest of the public. If mere reference to 'public interest' can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met."*[75] According to the Claimant, the State's alleged justification for the Expropriation Order, i.e. the construction of a housing project for public interest, "*was only a pretext to conceal Libya's true motive to give the land to LIDCO to develop high-yield luxury apartments*".

133. Second, the Claimant argues that the Expropriation Order was not in accordance with due process of law, as Olin was neither provided with a "*notice nor an opportunity to be heard before its investment was declared dispossessed*". Moreover, according to the Claimant, *"Libya flouted the 'due process' safeguards contained in its Libyan Investment Law when it issued the Expropriation Order in the form of an order from the GPCO, rather than a law or judicial decision"*.[76]

134. Third, the Claimant asserts that Olin's treatment stands in contrast to the permanent exemptions granted by Libya to the government-owned OKBA factory and the privately-owned, Libyan Al-Aseel factory which were located in the vicinities of Olin's factory.[77]

[73] Claimant's SoC at para 95, citing **CL-7**, *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ("***Saluka* Partial Award**") at paras 458-59.
[74] **CL-8**, *ADC Affiliate Limited, et. al., v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para 435 ("***ADC* Award**").
[75] Claimant's SoC at para 96.
[76] *Id.* at para 97.
[77] Claimant's Reply at para 85.

135. Finally, the Claimant considers that Libya's expropriation was not taken against prompt, adequate, and effective compensation, which renders any expropriation unlawful and gives rise to international liability.[78]

136. Based on the above assertions, the Claimant concludes that Libya's expropriation of Olin's investment was an unlawful act under the Cyprus-Libya BIT and the Libyan Investment Law.[79]

ii. The Respondent

137. In its submissions, the Respondent refers to both the Expropriation Order of October 2006 and the Revised Expropriation Order of November 2006 expanding the Expropriation Area, as the 2006 Expropriation Orders.[80] The Respondent advances first that the 2006 Expropriation Orders did not affect the Claimant, since Olin was not the owner of the plot on which the plant was erected. Instead, according to the Respondent, the land belongs to Said Abughamja, as shown by the Lease contract of May 2005 between Said Abughamja and Olin, which was followed by the usufruct contract between the same parties in May 2006 (see **paragraph 86** of the Factual Background).[81]

138. The Respondent further argues that *"the transfer of the land owned by Mr Said Abughamja to the Libyan State had no effect for the investor and its investment"* since:

- The plot has never been occupied by anyone except from Olin's staff;
- The buildings have not been demolished;
- The materials and equipment have never been requisitioned;
- The investor has never been formally deprived of its investment;
- The investor kept all its rights on its investment.[82]

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[78] Claimant's SoC at para 95.
[79] *Id.* at para 98.
[80] As mentioned in the factual background (Section 7 above), the GPCO issued Decision No. 241 of 2006 on 19 October 2006 (the Expropriation Order), which expropriated a parcel of land along the Tripoli Airport Road, including Olin's factory (the Expropriated Area) and on 25 November 2006, the GPCO issued Decision No. 266 of 2006 (the Revised Expropriation Order), expanding the Expropriated Area to cover a surface of 340 hectares.
[81] Respondent's SoD at para 168.
[82] *Id.* at para 169.

139. The Respondent also contests the Claimant's allegations as to the purported illegality of the 2006 Expropriation Orders.

140. The Respondent argues in this regard that the urban project of the Al-Fallah zone was driven by public interest with the urban development of the zone and the modernization of the associated utilities (water, electricity, sewage).[83] The Respondent explains that Tripoli has been affected by a quick urbanization especially between 1969 and 2005 and that *"the Government decided to modernize different sectors in favor of the population."* Thus, *"the object of these great projects was to solve the problems of unhealthy housing environment, to boost the economy and create jobs, and to reduce social tensions. Such projects are decided by the Government in favor of the general and public interest, in view to develop: the condition of life of the population, the employment, public utilities."*[84] The Respondent adds that *"the Claimant cannot allege that the decision of expropriation had not been issued for public interest and was illicit because it does not bring any evidence that the urban plan constituted an obvious misuse of private and foreign interests to the only personal interest of governmental authorities and in breach of the law"*.[85]

141. The Respondent further maintains that *"the [Expropriation Orders] comply with the requirement of due process of law"* since they were motivated, published, and that the possibility of a legal action was likewise offered.[86]

142. The Respondent also denies that there was a discrimination to Olin's detriment. According to the Respondent, *"the [Expropriation Orders] concerned the whole Al Fallah zone"*, and *"all the people and plants located in this area were concerned by the urban planning"*. The Respondent adds that if discrimination had existed, *"it would have been positive and in favor of Olin's interest and its two direct Libyan competitors"*, since *"Olin, thanks to its Cyprus nationality and its capacity as foreign investor, has been protected and exempted from any kind of expropriation"*.[87]

143. With regard to the absence of financial compensation, the Respondent considers that *"since Olin has never been forced to move and since it has never interrupted its activity*

[83] *Id.* at para 170.
[84] *Id.* at paras 20 to 22.
[85] *Id.* at para 171.
[86] *Id.* at para 193.
[87] *Id.*

there was no room for any financial compensation." The Respondent adds that in case Olin had not been exempted from expropriation and had been forced to move, the competent authorities in Libya have considered an alternative site to locate Olin's plant and "*have mentioned their intention to compensate [Olin] of all the costs linked to such a transfer from Al Fallah to another industrial zone*".[88]

144. On this basis, the Respondent concluded in its SoD that there was no unlawful expropriation in breach of Article 7 of the BIT.

iii. The Parties' Rebuttal Arguments

145. In reply to Respondent's argument that the plot did not belong to Olin, the Claimant maintains that it has lawfully acquired the land but that the Libyan authorities had delayed the registration process until June 2011. Prior to this date, Olin was not allowed to start the process of registering its property title over the land on which the factory was built.[89]

146. In reply to Respondent's argument that Olin was not the addressee of the Expropriation Order, but instead Mr Said Abughamja who is a Libyan national and the land's owner, the Claimant contended that "*both Article 23 of the Libyan Investment Law and Article 7 of the Treaty protected Olin from any measure having the same effect as or tantamount to an expropriation, subject to certain specific requirements*". The Claimant concluded that "*[e]ven if Olin was not the addressee, the Expropriation Order was clearly tantamount to an expropriation of Olin, as multiple Libyan agencies immediately recognized*".[90]

147. Finally, in reply to Respondent's argument that there was no expropriation at all, since Olin's factory was not destroyed, did not have to relocate and therefore that Mr Said Abughamja's land was in fact exempted from the Expropriation Order, the Claimant reiterated that despite the support of several Libyan governmental agencies, the GPCO never formally exempted Olin from the Expropriation Order[91] but maintained Olin in a state of uncertainty as to its expropriation,[92] and failed to provide Olin with any suitable

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[88] *Id.*
[89] **Exhibit C-32**, Certificate from the Real Estate Registry dated 15 June 2011.
[90] *Id.* at para 36.
[91] *Id.* at para 84 to 90.
[92] *Id.* at para 87.

alternative location.[93] The Claimant further contended that the impact of Libya's illegal expropriation of Olin was at least threefold: (a) it resulted in the demolition of the area immediately surrounding Olin's factory, which led to in electricity and water cuts as well as in a loss of access to the sewage system; (b) it had an immediate chilling effect, placing Olin in a state of paralysis and forcing it to downscale its operations dramatically; and (c) it significantly impacted Olin's relationships with both its commercial partners and competitors.[94]

148. In its Rejoinder, the Respondent reiterated its arguments in relation to the absence of a *direct* expropriation, stressing that the Libyan authorities intended to expropriate the land on which Olin was built, belonging to Mr Said Abughamja, and not Olin itself, underlying the fact that such land was not a component of Olin's investment.[95]

149. The Respondent further developed its view that the transfer of the land owned by Mr Said Abughamja to the Libyan State between 2007 and 2011 had no effect on Olin and its investment, and therefore could not amount to an indirect expropriation. According to the Respondent, when an investor has *"free choice of the economic strategy"*, pursues its *"daily management of the operations"*, has *"access to the benefits generated by the operations"* and is granted *"freedom of movement for the managers and the employees in the absence of occupation, requisition, eviction from the site"*, it cannot avail itself from an indirect expropriation. In particular, Libya argued that the Claimant failed to prove that it had suffered a *"substantial"*, *"serious"* and *"severe"* infringement, and failed to prove that it had lost the entire control over its investment, concluding that there can be no indirect expropriation in the circumstances.[96]

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[93] *Id.* at para 81.
[94] *Id.* at para 40.
[95] Respondent's Rejoinder at paras 15-18.
[96] *Id.* at paras 22 to 90, referring notably to the following arbitration decisions: *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 ("***CME* Award**"), at para 591 and 604; *SD Myers v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, at para 282-283; *Tecmed v. United Mexican States*, ICSID Case No. ARB/(AF)/00/2 ("***Tecmed* Award**") at para 115; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 at para 285; *Fireman's Funds Insurance Company v. United Mexican States*, Decision on the Preliminary Question, Decision No ARB(AF)/02/1 at para 176. PSEG Global v. Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007 at para 279; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 21 November 2000, at para 26; *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, 22 December 2003.

150. The Respondent finally reiterated its position that the Expropriation Order was not illegal since it had a public purpose,[97] was not discriminatory,[98] and was in compliance with due process of law.[99] The Respondent confirmed that Olin was neither forced to cease its activities, nor was it obliged to destroy its factory, to remove its materials and equipment, or ultimately to reorganise its activity on another site, and therefore that no compensation had to be paid by the host State in the circumstances.[100]

B) The Arbitral Tribunal's Analysis and Decision

151. As a starting point for its analysis, the Tribunal sets out below **Article 7.1** of the Cyprus-Libya BIT:

> *Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be nationalized, <u>expropriated or subjected to measures having equivalent effect to nationalization or expropriation</u>, except for <u>public interest</u>, <u>in accordance with due process of law</u>, on a <u>non-discriminatory basis</u> and against the <u>payment of prompt, adequate and effective compensation</u>* (emphasis added).

152. The Tribunal further refers to **Article 23** of the Libyan Investment Law:

> *The project may not be nationalized, dispossessed, seized, expropriated, received, reserved, frozen, or subjected to actions of the same impact <u>except by force of law or court decision against an immediate and just compensation</u>, provided that such actions are taken <u>indiscriminately</u>; the compensation will be calculated on the basis of the fair market value of the project in the time of action taken. The value of the compensation in convertible currencies may be transferred within a period not exceeding one year and according to the rate of exchange prevailing at the time of transfer* (emphasis added).

[97] Respondent's Rejoinder at paras 124 to 140.
[98] *Id.* at paras 155 to 172.
[99] *Id.* at paras 144 to 150.
[100] *Id.* at para 143.

153. In the following paragraphs, the Tribunal will first proceed to determine whether Libya has expropriated Olin's foreign investment, or imposed on Olin's foreign investment measures having an effect equivalent to expropriation.

154. The Tribunal refers to Article 1 of the Expropriation Order, issued by the GPCO in October 2006 that defined the expropriated land on which Olin's factory was built as *"the property on aerial map No. 13-52 located between the employee housing project and [Al-Sawani] Road, People's Congress of Bab [Akkara] Municipality, Tripoli district"*.[101] This Order was notified to Olin by way of an <u>evacuation order</u> dated 12 November 2006 (see **paragraph 157** below).

155. The evidence on record shows that steps were in fact taken to formally execute the 2006 Expropriation Order when the property title of the land on which Olin's factory was built was transferred to the LIDCO on 30 May 2007[102] and Libya took active measures to expel Olin from the premises, as further discussed below.[103]

156. At the time, the land which was chosen for the location of the factory belonged to Mr Said Abughamja and not to Olin, a fact admitted both by the Claimant and the Respondent.[104] However, *in fine*, the Tribunal considers that the Expropriation Order necessarily entailed an expropriation of all buildings on the land in question. In particular, the Tribunal notes the operative part of the Expropriation Order which provided that the land was being expropriated *"for the public interest to <u>establish a housing project</u>"*.[105]

157. As such, the legal consequence of the 2006 Expropriation Order followed by the transfer of the land to the LIDCO, necessarily implied the ultimate demolition and relocation of Olin's factory, as demonstrated by a number of eviction notices and letters <u>addressed to Olin directly</u> between 2006 and 2011, and not to Mr Said Abughamja. In particular, the Tribunal refers to the following exhibits:

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[101] **Exhibit C-14**, Decision No. 241 for 2006 of the GPCO dated 19 October 2006.
[102] **Exhibit C-118**, Decision no. 157 for year 1375 from the Secretary of the Administrative Committee for Public Property dated 30 May 2007.
[103] See **Exhibits C-15; C-120; C-58; C-31; C-127** listed at **paragraph 157**.
[104] **Exhibit R-21**, Real Estate Certificate issued by the Board of Registration of Real Estate at the General People's Committee of Justice dated 27 April 2005.
[105] *Ibid.*

- **Exhibit C-15**, Evacuation Order dated **12 November 2006**, addressed to Olin, ordering its eviction as follows:

  "[Y]ou are requested to evacuate the property and deliver it free of any obstacles or people to the concerned committee within a period not exceeding 3 days from the date of the notification."

- **Exhibit C-120**, Letter from the Libyan Foreign Investment Board to Olin dated **13 May 2007**, in which the LFIB informed Olin that it had six months to dismantle its factory and move to another location.

- **Exhibit C-58**, Eviction Notice from the General Authority for Public Property to Olin dated **6 April 2010**, stating the following:

  "We hope that you would vacate the site as soon as possible and turn it over free of persons within one week of this date and thereafter consult the Libyan Corporation for Development and Investment to settle your financial status".

- **Exhibit C-31**, Eviction Notice from the General Authority for Public Property to Olin dated **31 August 2010**, reading as follows:

  "We do hope from you that you evacuate the site on top urgent basis and deliver it free of all obstacles and people within a week of today to the Libya Company for Development and Investment with the financial settlement to your affairs with them in case there is a compensation to be paid."

- **Exhibit C-127**, Letter from the LFIB to Olin dated **2 September 2010**, asking Olin to contact the LFIB's real estate department, stating that it had found a replacement location for Olin, despite Olin's notification on 31 August 2010 that the Expropriation Order had been cancelled by a decision of the Tripoli Court of Appeal dated 13 April 2010.[106]

158. During the period which followed the issuance of the 2006 Expropriation Order, and the successive eviction notices sent to Olin as outlined above, Olin was effectively

[106] **Exhibit C-126**, Letter from Olin to the LFIB dated 31 August 2010.

deprived of the guarantee of an unfettered ownership of its investment. Olin further substantially lost control of its ability to properly conduct and plan its business.

159. Olin's ability to conduct its business under normal conditions was impeded by Libya in multiple aspects, as further outlined in the Tribunal's analysis on FET in **Section 11 below**. The Tribunal specifically refers to the following evidence from November 2006 and onwards:

- Evidence showing the demolitions around Olin's factory and the impact that such demolitions had on Olin's operations, notably in terms of electricity and water cuts and temporary loss of access to the sewage system (as documented in Olin's letter to the LFIB dated 6 December 2006;[107] LFIB's letter to the Tripoli Branch of the Libyan General Electric Corporation dated 10 December 2006;[108] and the compilation of Olin's Internal Destruction Reports for 2008 due to Electricity Cuts).[109]
- Decision of the Libyan authorities in mid-February 2008 to create a committee (composed of the Ministry of Industry and Mines, the Ministry of Economy and Trade and the General Authority For Housing & Utilities), *"for the purpose of discussing with [Olin] the terms of [its] eviction"*, including the identification of a replacement location and the payment of adequate compensation, neither of which ultimately led to any concrete result.[110]

160. Thus, while Olin managed to avoid the destruction of its factory and did not totally interrupt its activities, it is undeniable that the repeated requests for relocation and demolition, combined with other Libyan measures listed at **paragraph 159**, significantly impacted Olin's business, undermined its ability to plan for the future and paralysed its activities.[111]

[107] **Exhibit C-155**, Letter from Olin to the LFIB dated 6 December 2006.
[108] **Exhibit C-156,** Letter from the LFIB to the Tripoli Branch of the Libyan General Electric Corporation dated 10 December 2006.
[109] **Exhibit C-157,** Compilation of Olin's Internal Destruction Reports for 2008 due to Electricity Cuts.
[110] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 29; **Exhibit C-26**, Minutes of the Meeting of the Joint Committee composed of Ministry of Industry and Mines, Ministry of Economy and Trade and General Authority For Housing & Utilities dated 15 February 2008.
[111] The Claimant proved that it had to maintain only the strict minimum level of production necessary to safeguard its relationship with Candia, avoid losing the raw materials it had already purchased, and prevent the authorities from raiding its plant. In its Statement of Reply, para 50, the Claimant stated: "*The ambiguity and lack of transparency created by the Expropriation Order and Libya's conflicting, inconsistent statements and positions*

161. The Tribunal therefore considers that the issuance of the Expropriation Order combined with the events that followed severely impaired the use and enjoyment of Olin's investment.

162. The Tripoli Court of Appeal in its decision of 13 April 2010 recognized that Olin, as a foreign investor, was directly concerned by the 2006 Expropriation Order and proceeded to invalidate it on the basis that it violated the Libyan Investment Law, in the following terms:[112]

> *Since the Appellant project falls within the area included in the appealed resolution No. 266 of 2006, the body that expropriated the property should have conducted an on-site survey to determine the facts of the property where structures were established, including the appellant's project. Also, this body should have referred to the provisions of Law No. 5 of 1426 on promoting foreign capital investments, particularly Article 23 which stipulates specific restrictions for a specific case. Therefore, it becomes clear that the two appealed resolutions are in violation of the law, rendering it imperative to, first, halt their execution and, second, cancel their content.* (emphasis added)

163. Notwithstanding that the Tripoli Court of Appeal decision had cancelled the 2006 Expropriation Order, the Tribunal notes that the Claimant continued to receive eviction notices after the decision was rendered. The Tribunal refers to the eviction notice of 31 August 2010 (**Exhibit C-31**) and the LFIB's letter of 2 September 2010 requesting Olin to relocate its factory (**Exhibit C-127**) despite Olin's prior notification to the LFIB on 31 August 2010 that the Expropriation Order had been cancelled (**Exhibit C-126**). The Tribunal therefore concludes that the Tripoli Court of Appeal's decision issued in April 2010 cannot be deemed to have put an immediate end to the effects of the 2006 Expropriation Order.[113]

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in the years following the order prevented Olin from committing to production levels over the long term, resulting in abandonment of new investments, the underutilization of Olin's machines, and stoppages in production." Reference is also made to the following exhibits: **CWS-1**, First Witness Statement Mr Akram Abughamja at paras 19, 34. *See also* **Exhibit C-149**, Email from Sonia Barbaria (Label) to A. Abughamja (Olin) dated 24 November 2005, with attachments; **Exhibit C-150**, Packaging Designs and Commercials of Olin's Candia UHT Milk, Fruity Juices and Candy Juice; **Exhibit C-166**, Presentation from Memac Ogilvy "Olin status 2006-2007" dated 22 May 2008. The agency's variable fee represented a percentage of Olin's spending on marketing and advertising activities.

[112] **Exhibit C-30**, Decision of the Tripoli Court of Appeal (1st Administrative Circuit) dated 13 April 2010.

[113] The Tribunal has considered the Report of Appeal by Cassation filed by Libya's Litigation Department against Olin on 5 December 2016, showing that Libya initiated court proceedings against Olin to challenge the 2010

164. The Tribunal instead considers that the *legal* effects of the Expropriation Order ceased on 15 June 2011, when the Libyan authorities transferred back title to the land to Said Abughamja, thus enabling Olin to give effect to the Land Sales Contract concluded earlier on 31 October 2007 between Mr Said Abughamja and Olin (see **paragraph 104** in the Factual Background). [114] Accordingly, Libya's measures that followed the registration of the land on 15 June 2011 are analysed in more detail under **Section 11** below.

165. In assessing the overall impact of the Expropriation Order on Olin's investment, the Tribunal is of the view that State measures, even if temporary, can have an effect equivalent to expropriation if their length and impact on the investment are sufficiently important.[115] In the present case, the foregoing Libyan measures considerably impaired Olin's investment between November 2006 and June 2011, which is a significant period of time for a business that had just started its operations. These measures coincided with Olin accumulating a negative cash flow of LYD 18,8 million during the period between 2006 and 2010 (Olin's losses are discussed in more detail in **Section 12** below).

166. Indeed, the Tribunal is convinced that owing to the delays in the launch of Olin's products and its inability to realise the benefits of its investment during the four years and a half of uncertainty that followed the application of the 2006 Expropriation Order, Olin was overtaken by its competitors on the Libyan market and had lost the advantage of being one of the first entrants as a local private producer.[116] Therefore, Olin bore the *economic* consequences of Libyan's expropriation measures beyond 2011.

Libyan Court decision cancelling the Expropriation Order. Given that the challenge was initiated after Olin's cessation of activities in 2015, and given that the Tribunal has no information about the outcome of such challenge, the Tribunal has decided not to draw any conclusion from this decision while analyzing the issue of the breach of Article 7. The 2016 Appeal will be dealt with under Section 11 below, dealing with the issue of the alleged breach of Article 2.2 of the Cyprus-Libya BIT, describing the State's obligation to ensure FET of foreign investors' investments.

[114] **Exhibit C-55,** Land Sale Contract between Said Abughamja and Olin Holdings dated 31 October 2007. See also explanations in Hearing Transcript, Volume III, pages 611 to 624.

[115] See e.g., *SD Myers v. Canada*, Partial Award (13 November 2000), paras 283-284: "*An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary*".

[116] In FTI's First Expert Report, para 3.24, in which the Experts describe the following: "*After just a few years of local production, three local producers (Al Mazraa, Judi and Al Rayhan) together controlled approximately 65% of the Libyan juice market. Two of these market leaders, Judi and Al Mazraa, started producing locally in 2006-2007, when Olin had intended to. Al Rayhan started only one or two years earlier. In contrast, Olin, which had to delay the launch of its products, limit its marketing expenses and was confronted with distribution difficulties*

167. Based on the foregoing, the Tribunal concludes that the issuance of the 2006 Expropriation Order combined with Libya's measures that followed had an effect equivalent to an expropriation of Olin's foreign investment. Following this determination, the second step is for the Tribunal to determine whether the Respondent complied with the conditions for a lawful expropriation, imposed by the Cyprus-Libya BIT and the Libyan Investment Law.

- **Claimant's contention that the 2006 Expropriation Order was not for the public interest**

168. The Tribunal has noted the Respondent's contention that the 2006 Expropriation Order was issued for the purpose of proceeding with the urban development of the Al Fallah zone and the modernization of its public utilities, including water supply, electric power, sewage and roads.[117] The Tribunal has further reviewed the evidence submitted by the Claimant in support of its allegation that the 2006 Expropriation Order was not driven by a public purpose and that Libya's true motive was *"to give the land to LIDCO to develop high-yield luxury apartments", "designed for Tripoli's wealthiest residents"*.[118]

169. The Tribunal considers, however, that the Parties failed to adduce sufficiently compelling evidence allowing it to make a conclusive finding regarding the public purpose nature of Libya's project in the Al Fallah zone. The Tribunal will accordingly determine whether Libya's expropriatory measures were illegal by reference to the remaining criteria provided for under Article 7 of the BIT.

- **Claimant's contention that the expropriation was not in accordance with due process of law**

170. Evidence shows that on 12 November 2006, Mr Akram Abughamja received an eviction order from the Tripoli's People Committee for Housing & Utilities informing him that his factory had been *"dispossessed"* and requesting Olin to vacate the premises

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never gained more than approximately 3% of the market, substantially less than any of its competitors". See also **CWS-2**, Witness Statement of Mr Deher, paras 18 and 39.

[117] Respondent's SoD at para 171.

[118] Claimant's SoC, para 96 and Claimant's Reply, para 78. **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 22. **Exhibit C-174**, Photographs excerpted from 5+ Design's website (last accessed on 19 February 2017). **Exhibit C-175**, Excerpts from Jo Franzke's website (last accessed on 19 February 2017).

within 3 days.[119] The Claimant argues that it is only then that Olin became aware of the Expropriation Order, [120] issued by the GPCO on 19 October 2006, which expropriated a parcel of land along the Tripoli Airport Road, including Olin's factory.[121] The Respondent did not challenge these facts nor submit evidence to the contrary.

171. The Tribunal refers in this regard to Article 23 of the Libyan Investment Law (cited at **paragraph 152**),[122] which provides that a foreign investment cannot be expropriated without a law or judicial decision. The Tribunal, having examined the 2006 Expropriation Order, concurs with the Tripoli Court of Appeal's observations in its 2010 decision that:

> *"<u>The resolution under appeal [i.e. the Expropriation Order] is neither a law nor a judicial ruling. Rather, it is an administrative resolution issued by the General People's Committee and does not have jurisdiction in the matter according to Article 23 of Law No. 5 of 1426 regarding the promotion of foreign capital investments.</u> The appealed resolution is therefore not valid for lack of jurisdiction: the function of legislative power to issue a law as stated in Article 23 mentioned above, which is the function of the General People's Congress; and the function of judicial power to issue judicial ruling as stated in Article 23 mentioned above, which is the function of the courts. The entity that issued the resolution under appeal did not only usurp one power, but also usurped the functions of two powers through just one administrative resolution. It is a given according to jurisprudence and justice that the lack of jurisdiction in the form of usurpation of power is a virtual attack of one authority against another"* (emphasis added).[123]

172. The Tribunal concludes that by failing to comply with the provisions of its Investment Law with regard to the procedural requirements in Article 23 of the Libyan Investment Law, Libya did not comply with its obligation to ensure that the 2006 Expropriation Order was issued in accordance with due process of law.

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[119] **Exhibit C-15**, Evacuation Order dated 12 November 2006, addressed to Olin Company Limited, ordering the eviction as follows: *"[Y]ou are requested to evacuate the property and deliver it free of any obstacles or people to the concerned committee within a period not exceeding 3 days from the date of the notification."*

[120] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 22; Claimant's SoC at para 40.

[121] **Exhibit C-14**, Decision No. 241 for 2006 of the GPCO dated 19 October 2006.

[122] The Tribunal applies the 2003 version of the Investment Law which is the version applicable at the time of the issuance of the Expropriation Order in 2006.

[123] **Exhibit C-30,** Decision of the Tripoli Court of Appeal (1st Administrative Circuit) dated 13 April 2010.

- **Claimant's contention that the expropriation was discriminatory**

173. The Tribunal notes that both the Cyprus-Libya BIT and the Libyan Investment Law of 1997 provide that an expropriation decision should not discriminate against the foreign investor.

174. For reasons developed in more detail in **Section 10 below**, the Tribunal considers that the Expropriation Order is discriminatory.

- **Claimant's contention that the expropriation was not taken against prompt, adequate, and effective compensation**

175. The Tribunal refers to **Article 7.2** of the Cyprus-Libya BIT according to which the amount of compensation for expropriation *"shall amount to the fair market value of the investment expropriated immediately before the expropriation or impending expropriation became publicly known, whichever is the earlier (hereinafter referred to as the 'valuation date')."*

176. The Tribunal has noted the Claimant's contention that the Libyan authorities did not find an alternative location nor compensate Olin for expropriatory measures, evidenced notably by a series of letters sent by Olin to the LFIB and the General Organization for Housing and Utilities.[124]

177. The Tribunal has also noted the judgment of the South Tripoli Court dated 14 February 2014, ruling that Olin failed to prove the harm it had suffered as a result of the cancelled Expropriation Order, and consequently, that no indemnification was due.[125]

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[124] Claimant's SoC at paras 52-54. **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 29 (*"In early 2008, the Libyan authorities created a committee for the purpose of discussing with us the terms of our eviction. We were dragged into long and unsuccessful discussions with the Libyan authorities regarding the possibility of relocating Olin's factory to another site and regarding the level of compensation to which Olin was entitled in case of relocation. Despite several meetings and discussions over the next two years, the Libyan authorities never offered Olin a suitable alternative site or adequate compensation for its potential relocation"*). See also **Exhibit C-121**, Letter from Olin to the Libyan Foreign Investment Board dated 10 December 2007; **Exhibit C-122**, Letter from Olin to the Libyan Foreign Investment Board dated 8 November 2007; **Exhibit C-41**, Letter from Olin to the General Organization for Housing & Utilities dated 10 January 2008; **Exhibit C-176**, Letter from Olin to the LFIB dated May 16, 2010. **CWS-4**, Abughamja Second Witness Statement at paras 11-13.

[125] While the Tripoli Court of Appeal which rendered a decision in April 2010 on the cancellation of the Exrpopriation Order was an Administrative Court, the South Tripoli Court is a Civil Court which dealt with the issue of Olin's compensation only. **Exhibit C-57**, Judgment of the South Tripoli Court of First Instance in Case 1786-2010 dated 14 February 2014.

178. The Tribunal considers that by allowing Olin to register title over the land on which it was built in 2011, Libya has put an end to the legal effects of the Expropriation Order, which obviates the need to compensate Olin for the fair market value of the land expropriated as per Article 7.2 of the Cyprus-Libya BIT.

179. It remains however that there was no *prompt* nor *effective* compensation in compliance with Article 7 of the BIT, since the Claimant's investment was affected by measures equivalent to expropriation without any compensation for more than four years. Furthermore, the Expropriation Order was issued in breach of due process[126] and on a discriminatory basis,[127] as underlined above, thereby causing harm to the Claimant's investment that has not been compensated.

180. Based on the foregoing, the Tribunal therefore finds that Libya's expropriatory measures were not in compliance with the conditions for a lawful expropriation listed in Article 7 of the Cyprus-Libya BIT.

181. The Tribunal accordingly concludes that the expropriatory measures implemented by Libya between November 2006 and June 2011 were in breach of Article 7 of the Cyprus-Libya BIT.

10. ISSUE NO. 2: HAS LIBYA FAILED TO GRANT OLIN'S INVESTMENT THE NATIONAL TREATMENT THAT WAS AFFORDED TO LIBYAN INVESTORS UNDER ARTICLE 3 OF THE CYPRUS-LIBYA BIT?

A) Summary of the Parties' Positions

i. The Claimant

182. The Claimant relies on Article 3 of the Cyprus-Libya BIT to *"National Treatment and Most Favoured Nation Treatment"* and maintains that Libya was required to accord Olin and its investment a *"treatment no less favourable than that which Libya accords to domestic investors and investments in accordance with its bilateral investment treaties with third States."*[128]

[126] See above **paragraphs 170 to 172.**
[127] See above **paragraphs 173-174.**
[128] Claimant's SoC at para 101.

183. The Claimant supports its position by referring to Libya's alleged discriminatory expropriatory measures when compared with the treatment accorded to Olin's local competitors. It argues that discrimination is generally understood by tribunals to mean *"not based on justifiable distinctions or arbitrary"*,[129] and that *"tribunals generally analyze whether a claimant is "similarly situated" to its comparators."*[130]

184. In the present case, the Claimant asserts that *"there can be no doubt that Olin was similarly situated to OKBA and Al-Aseel such that Libya's differential treatment of Olin had no rational justification whatsoever"*.[131] The Claimant explains that *"OKBA and Al-Aseel are competitors operating in the same business and economic sector as Olin, namely the dairy and juice market in Libya."* The Claimant adds that *"not only OKBA and Al-Aseel are in the same business sector as Olin, but also they are physically located in the same Fallah industrial area—the OKBA factory adjoins Olin's own, while the Al-Aseel factory is only a few hundred meters away"*.[132]

185. Having argued that the Claimant, OKBA and Al-Aseel are all similarly situated, the Claimant goes on to say that Libya treated Olin less favourably than OKBA and Al-Aseel by exempting the local factories from the Expropriation Order but refusing to extend the same treatment to Olin.[133] The Claimant states that Libya's own factual exhibits show that the GPCO granted OKBA and Al-Aseel factories *"unequivocal, permanent exemptions from the Expropriation Order"*.[134] In response to Libya's argument that Olin's factory was not demolished and remains onsite today, the Claimant stresses that Olin remained in a state of uncertainty regarding its fate and that *"[t]here is no factual basis for Libya's assertion that Olin was either officially or de facto exempted from the expropriation."*[135] The Claimant adds that *"Libya's inability to*

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[129] *Id.* at para 102. The Claimant cites **CL-43**, *Biwater Gauff (Tanzania) Limited v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 ("***Biwater* Award**") at para 602 (referring to *Saluka* Partial Award, at para 164, *Waste Management* Award, at para 98; *CME* Award, at para 611).
[130] Claimant's Statement of Claim at para 102. The Claimant cites **CL-78**, Kenneth J. Vandevelde, BILATERAL INVESTMENT TREATIES, 2010, at 387 *("[T]he unreasonable or discriminatory measures provision does not explicitly identify the relevant comparator. Obviously, a comparator must be used.")*. *See, e.g.*, **CL-21**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, n.258 (citing to the International Law Commission, Draft Articles on Most- Favoured-Nation Clauses with Commentaries, Y.B. ILC 1978, Vol. II(2), 8-72.
[131] Claimant's SoC at para 102.
[132] *Id.* at para 103.
[133] *Id.* at para 104.
[134] **Exhibit C-43**, Letter from the GPCO to General Organization for Housing dated 22 July 2008; **Exhibit R-29**, Letter from the General Organization for Housing to the GPCO dated 25 January 2009.
[135] Claimant's Reply at para 85.

submit such evidence stands in stark contrast to the exhibits that Libya in fact submitted in this arbitration, namely unequivocal, permanent exemptions granted by Libya to the government-owned OKBA factory and the privately-owned, Libyan Al-Aseel factory".[136]

186. The Claimant finally sates that *"Libya cannot show that it had legitimate reasons that justified the difference in treatment or that the disparate treatment of exempting OKBA and Al-Aseel but not Olin from the Expropriation Order bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments".*[137]

187. For these reasons, the Claimant considers that Libya's treatment of Olin violated Article 3 of the BIT, entitled "National Treatment and Most Favoured Nation Treatment".[138]

ii. The Respondent

188. The Respondent contests the Claimant's assertion that it was treated differently from Al-Aseel or OKBA. The Respondent maintains that the Claimant was exempted from the Expropriation Order, and that it was accorded a treatment which is, on the contrary, more favourable than that which Libya accorded to its domestic investors.

189. The Respondent quotes the Claimant which admitted that *"[w]ithin three days of Olin's receipt of the eviction notice, the Libyan army had destroyed several buildings and homes next to the Olin factory and expelled thousands of occupants in the process, and that [w]ithin three months, Libya had demolished the quasi totality of the Expropriated area, leaving Olin's factory as one of the few buildings standing."*[139] The Respondent relies on this statement to reaffirm that Olin's factory was not demolished contrary to most buildings in the expropriated area, which shows (according to the Respondent) that the Olin was accorded a favourable treatment.

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[136] *Id.*
[137] Claimant's SoC at para 105.
[138] *Id.* at para 101.
[139] Respondent's SoD at para 95.

190. The Respondent further refers to several correspondence showing that the Libyan public authorities officially supported Olin's exemption from the Expropriation Order.[140]

191. The Respondent also refers to a letter sent by Olin on 16 June 2009 to prove that the factory was still on site. It argues that Olin *"speaks only about future and hypothetic damages in case it should move on another industrial zone"*, quoting the following passage from the aforementioned letter:

> *"As the expropriation of the company will cause us great material and moral damages...the investor will support huge amounts for the implementation of the project and its future extension...and the losses in terms of profits and costs of creation will amount to the sum of LYD 23 million in case of evacuation and demolition.*
>
> *The GPC agreed to exempt similar companies; we hope to benefit from an identical treatment... "*[141]

192. The Respondent adds that Olin itself admits in its SoC that it remained on the site, that no reference is made to any transfer of its activity to another industrial site, that Olin was not forced to stop its activity, nor dismantle its materials and equipment, nor re-install such materials and equipment somewhere else.[142]

193. The Respondent thus considers that Olin's plant has been exempted *de facto* from expropriation contrary to most other plants that were demolished, and therefore that it received FET similarly to OKBA and Al- Aseel.[143]

iii. The Parties' Rebuttal Arguments

194. The Claimant considers that there is no factual basis for Libya's assertion that it was either officially or *de facto* exempted from the expropriation.

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[140] *Id.* at paras 98-100. **Exhibit R-28**, Letter from the Public Establishment for Housing & Utilities dated 3 August 2008; **Exhibit R-29**, Letter from the Public Establishment for Housing & Utilities dated 29 January 2009; **Exhibit R-30**, Letter from the GPCO to the Public Establishment for Housing & Utilities dated 22 July 2008.
[141] Respondent's SoD at para 101.
[142] *Id.* at para 103.
[143] *Id.* at para 172.

195. Regarding the existence of an official exemption, the Claimant states that Libya cannot point to *"an exemption that would have reassured Olin that its investment was safe from expropriation and demolition, because none was ever issued."*[144]

196. The Claimant further rejected Libya's argument regarding a *de facto* exemption, underlining that *"Libya's argument implies that a State may expropriate the title to the property upon which an investment sits, openly and repeatedly threaten a foreign investor with dismantling and dislocation, paralyze its production, cause it to sustain significant losses, and yet remain shielded from liability under the guise that it 'de facto' exempted the investor from ultimate dispossession or permitted it to carry on a minimum level of operations to simply survive."*

197. The Claimant finally referred to the decision of the Tripoli Court of Appeal decision of 2010, cancelling the Expropriation Order, which acknowledged that the GPCO took *"no action at all"* to exempt Olin from the illegal Expropriation Order.[145] The Claimant further refer to Libya's initiation of legal proceedings before the Libyan Supreme Court to appeal the Tripoli Court of Appeal's judgment that had cancelled the Expropriation Order in 2010, more than six years after its issuance.[146] This in itself, according to the Claimant, clearly belies the Respondent's exemption claims.[147]

198. The Claimant concluded in its Reply that the GPCO's implementation of the expropriation was patently discriminatory.[148]

199. In its Rejoinder, the Respondent reiterated its position as set out in its SoD, stating that Olin had never been forced to relocate and therefore that it was protected by the Libyan authorities, similarly to Al Aseel and OKBA factories.[149]

B) The Arbitral Tribunal's Analysis and Decision

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[144] Claimant's Reply at para 85. According to the Claimant, Libya's inability to submit such evidence *"stands in stark contrast to the exhibits that Libya in fact submitted in this arbitration, namely unequivocal, permanent exemptions granted by Libya to the government-owned OKBA factory and the privately-owned, Libyan Al-Aseel factory"*.

[145] **Exhibit C-30**, Decision of the Tripoli Court of Appeal (1st Administrative Circuit) dated 13 April 2010 at pp. 7-8.

[146] **Exhibit C-164**, Report of Appeal by Cassation filed by Libya's Litigation Department against Olin dated 5 December 2016.

[147] Claimant's Reply at para 89.

[148] *Id.* para 82.

[149] Respondent's Rejoinder, paras 155 to 172.

200. The Tribunal cites, for ease of reference, **Articles 3.1** and **3.2** of the Cyprus-Libya BIT:

1. Once a Contracting Party has admitted an investment in its territory in accordance with its laws and regulations, it shall accord to such investment made by investors of the other Contracting Party treatment not less favourable than that accorded to investments of its own investors or of investors of any third State, whichever is more favourable to the investor concerned.

2. Each Contracting Party shall in its territory accord to investors of the other Contracting Party, as regards to their management, maintenance, use, enjoyment, expansion or disposal of their investment, treatment not less favourable than that accorded to its own investors or to investors of any third State, whichever is more favourable to the investors concerned (emphasis added).

201. In its analysis of whether Libya has breached Article 3 of the Cyprus-Libya BIT, the Tribunal will thus address the issue of whether Libya accorded to Olin a treatment less favourable than that which it accorded to its domestic investors, namely OKBA and Al-Aseel.

202. In *Total S.A. v. Argentine Republic*, the tribunal considered that a discriminatory treatment can be demonstrated if the investor proves that the State has been treating *differently* persons who are *similarly situated.* In essence, the tribunal found that:

"In order to determine whether treatment is discriminatory, it is necessary to compare the treatment challenged with the treatment of persons or things in a comparable situation. In economic matters the criterion of "like situation" or "similarly-situated" is widely followed because it requires the existence of some competitive relation between those situations compared that should not be distorted by the State's intervention against the protected foreigner. This is inherent in the very definition of the term "discrimination" under general international law that: "Mere differences of treatment do not necessarily constitute discrimination…discrimination may in general be said to arise where those who are in all material respects the same are treated differently, or where those who are in material respects different are treated in the same way."[R. Jennings, A. Watts (eds.), Oppenheim's International Law, 9th ed. (Longman, 1992), Vol. I, p. 378]. (emphasis added). *The elements that are at the basis of likeness*

vary depending on the legal context in which the notion has to be applied and the specific circumstances of any individual case. "[150]

203. Accordingly, if the Claimant can prove that it was treated less favourably than a person similarly situated, then there would be discriminatory treatment, unless the Respondent can prove that such different treatment was justified.[151]

204. In its assessment of the alleged breach of Article 3 of the Cyprus-Libya BIT in the present case, the Tribunal has therefore to answer three questions:

(1) Has the Claimant proved that Olin, OKBA and Al-Aseel are similarly situated?

(2) Has the Claimant proved that Libya treated Olin less favourably than OKBA and Al-Aseel?

(3) If the answer to these two questions is yes, has the Respondent proved that the difference in treatment is justified?

- **Has the Claimant proved that Olin, OKBA and Al-Aseel are similarly situated?**

205. The Tribunal notes that Olin, OKBA and Al-Aseel operate in the same business sector, namely the dairy and juice market in Libya. This fact which was put forward by the Claimant,[152] was not contested by the Respondent.[153]

206. Olin, OKBA and Al-Aseel are also very closely situated on the map of Tripoli, in the same industrial zone.[154]

207. The fact that these factories operated in the same business sector is, in the Tribunal's view an appropriate comparator,[155] reinforced by the existence of a similar location.

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[150] **CL-21**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para 210 (emphasis added).
[151] **CL-79**, Andrew Newcombe & Lluis Paradell, Law and Practice of Investment Treaties—Standards of Treatment 162 (Wolters Kluwer 2009).
[152] Claimant's SoC at para 103.
[153] See e.g. Respondent's SoD at paras 95-97.
[154] See Evidentiary Hearing, Claimant's Opening Statement, page 36.
[155] **CL-79**, Andrew Newcombe & Lluis Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES – STANDARDS OF TREATMENT 161 (Wolters Kluwer 2009) 234; **CL-80**, Campbell McLachlan, Lawrence Shore & Matthew Weiniger, International Investment Arbitration—Substantive Principles 253 (Oxford University Press 2007).

208. In response to the first question identified at **paragraph 204** above, the Tribunal therefore determines that Olin, OKBA and Al-Aseel are similarly situated.

- **Has the Claimant proved that Libya treated Olin less favourably than OKBA and Al-Aseel?**

209. The Claimant considers that Olin was never formally exempted from expropriation, contrary to OKBA and Al-Aseel, and therefore that Olin was treated differently and less favourably than its national competitors.

210. It is uncontested by both Parties that OKBA and Al-Aseel were formally exempted from any demolition and were allowed to remain on-site permanently.[156] The Parties however differ on whether Olin's factory was likewise exempted from expropriation.[157]

211. As explained above, the Tribunal finds that Olin did not receive a formal and official expropriation exemption from the GPCO, similar to the ones accorded to its two national competitors. Such exemption would have given Olin the assurance that the land on which its factory was erected would not be expropriated, nor would its building risk destruction. In the Tribunal's assessment, the fact that Olin's factory was not ultimately demolished or relocated does not justify a departure from the treatment accorded to OKBA and Al-Aseel.

212. Notwithstanding that Olin's operational license was continuously renewed until April 2017, and that some evidence on record suggests that the Libyan authorities did support Olin's requests for a formal exemption, the fact remains that such actions co-existed with other State measures which clearly demonstrated that Libya was adamant to execute the 2006 Expropriation Order until June 2011. The Tribunal notably refers to the various eviction notices and letters addressed to Olin by the Libyan authorities as quoted in **Section 9** above,[158] together with the uncontested evidence that title to the

[156] See Claimant's SoC at para 104 and Respondent's SoD at paras 95-97. In support of this argument, the Claimant submitted a letter from the GPCO dated 22 July 2008, enabling Al-Aseel to *"instruct the competent officials in the Corporation to keep the site of the project of Aseel Company for manufacturing food stuffs [...] and not take any actions regarding the expropriation and exempt it from process of elimination for development."* See also **Exhibit C-43**, Letter from the GPCO to General Organization for Housing dated 22 July 2008; **Exhibit R-29**, Letter from the General Organization for Housing to the GPCO dated 25 January 2009.

[157] See Claimant's SoC at para 104 and Respondent's SoD at paras 95-97.

[158] See also Section 11 below on the breach of the FET standard.

land on which Olin's factory was built was transferred to the LIDCO from May 2007 to June 2011.

213. The Tribunal further acknowledges that the Libyan courts ultimately cancelled the Expropriation Order in April 2010, and that the Claimant was able to register the land on which Olin was erected under its name in June 2011. However, this was following four years and half of uncertainty, during which a number of correspondence with the Libyan authorities were exchanged, notices of evacuation were received, and court proceedings had to be engaged. The evidence on record further shows that Libya revived the threat of the Expropriation Order, by opening court proceedings against Olin on 5 December 2016 to challenge the Libyan Court's decision cancelling the Expropriation Order.[159]

214. Against this background, the Tribunal finds that Olin was clearly operating in less favourable circumstances than its competitor Al-Aseel, which received a formal and definitive expropriation exemption from the Libyan Government as early as July 2008.

215. As regards OKBA, although the precise date on which the company was formally exempted from expropriation is unknown to this Tribunal, both the Claimant and the Respondent agree that the Libyan government exempted Al-Aseel and OKBA in similar circumstances. The Tribunal, noting that Olin did not receive a formal and definitive exemption from demolition and interference, similar to the ones accorded to OKBA and to Al-Aseel, concludes that the Claimant was treated less favourably than its two national competitors.

- **Did the Respondent prove that the difference in treatment was justified?**

216. In relation to this question, the Tribunal notes that the Respondent simply denied that Olin was treated less favourably than the national investors OKBA and Al-Aseel. It did not address, on an alternative basis, the issue of whether the different treatment accorded to Olin was justified. Likewise, the Respondent did not submit any evidence in this regard.

[159] **Exhibit C-164**, Report of Appeal by Cassation filed by Libya's Litigation Department against Olin dated 5 December 2016.

217. The Tribunal therefore considers that the Respondent has failed to prove that the difference between the treatment accorded to Olin and the treatment accorded to its national competitors was justified. The Respondent has accordingly failed to discharge its burden of proof in this regard.

- **Conclusion**

218. In light of the above, the Tribunal determines that Libya accorded to Olin's investment a treatment less favourable than that accorded to the investments of its own investors, namely OKBA and Al-Aseel, and therefore breached Article 3 of the Cyprus-Libya BIT.

11. ISSUE NO. 3: HAS LIBYA BREACHED ARTICLE 2.2 OF THE CYPRUS-LIBYA BIT, BY FAILING TO ACCORD FET, FPS AND/OR BY IMPAIRING THE MANAGEMENT, MAINTENANCE, USE, ENJOYMENT, AND EXPANSION OF OLIN'S INVESTMENT IN LIBYA WITH UNREASONABLE AND DISCRIMINATORY MEASURES?

219. In this section the Tribunal will contemplate the alleged breaches addressed by the Claimant under Article 2.2 of the Cyprus-Libya BIT, namely: (1) Libya's failure to accord Olin FET, (2) Libya's failure to accord Olin FPS and (3) Libya's impairment of the management, maintenance, use, enjoyment and expansion of Olin's investment in Libya with unreasonable and discriminatory measures.

(1) Has Libya failed to accord Olin FET?

A) Summary of the Parties' Positions

i. The Claimant

220. The Claimant argues that Libya's conduct, through the issuance of the Expropriation Order in October 2006 and the events which followed, breached its obligation to accord Olin FET by (1) frustrating Olin's legitimate expectations, (2) inflicting a constant climate of uncertainty upon Olin, (3) failing to act in a transparent manner, (4) harassing Olin, (5) failing to treat Olin in accordance with due process and denying justice to Olin, and (6) discriminating against Olin.

1. Frustration of Olin's legitimate expectations

221. The Claimant argues that the Expropriation Order issued in 2006 by the Libyan authorities in and of itself constituted a breach of the FET standard.

222. The Claimant contends that since the *Tecmed v. Mexico* decision which was *"the first decision to spell out that FET treatment encompasses protections of expectations"*,[160] tribunals have consistently found that protection of an investor's legitimate expectations is part of the FET standard.[161]

223. The Claimant further relied on the *Thunderbird v. Mexico* award, arguing that the following questions are relevant for determining whether a host State breached the FET standard by frustrating an investor's legitimate expectations:

(i) Did the host State's conduct create legitimate expectations on the part of the investor?

(ii) Did the investor rely on the State's conduct at the time it invested?

(iii) Did the host State subsequently fail to honor the expectations it created?[162]

224. In the present case, the Claimant contends that Libya frustrated its legitimate expectations by issuing an expropriation order despite the enactment of Investment Law of 1997, which gives sufficient assurances to foreign investors that reliable investments can be made in Libya. The Claimant accordingly argues that:

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[160] Claimant's SoC at para 88, citing **CL-54**, *Tecmed* Award, at para 153 *("The Arbitral Tribunal considers that this provision of the Agreement [fair and equitable treatment], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment")* and **CL-62**, Michele Potestà, *Legitimate Expectations in Investment Treaty law: Understanding the Roots and the Limits of Controversial Concept*, ICSID REVIEW, No. 28(1), 2013 at 99.

[161] SoC at para 88, citing **CL-7**, *Saluka* Partial Award at para 302 ("*The standard of "fair and equitable treatment" is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard.*"); **CL-63**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, at para 216 *("The Tribunal shares the view expressed by other tribunals that one of the major components of the FET standard is the parties' legitimate and reasonable expectations with respect to the investment they have made")*; **CL-64**, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, at para 348 ("*As can be seen, there is a broad range of conceptions of FET emerging from ICSID case law. However, the legitimate expectations of the investors have generally been considered central in the definition of FET, whatever its scope. There is an overwhelming trend to consider the touchstone of fair and equitable treatment to be found in the legitimate and reasonable expectations of the Parties, which derive from the obligation of good faith*").

[162] Claimant's SoC at para 89, citing **CL-65**, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Final Award, Jan. 26, 2006, at para 147 ("the concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages").

(i) By liberalizing its economy, enacting the Libyan Investment Law in 1997 and making numerous public statements in subsequent years, Libya created a legitimate expectation on Olin's part that it would not be expropriated without a valid cause and without a law or judicial decision.

(ii) The legal rights granted under the investment framework and various assurances made by top governmental officials in Libya regarding the treatment of foreign investments were fundamental to Olin's decision to invest in Libya.

(iii) Libya failed to honor the expectations it created by enacting an Expropriation Order which did not comply with the provisions of the Libyan Investment Law.[163]

225. Overall, the Claimant therefore considers that Libya's issuance of the Expropriation Order frustrated Olin's legitimate expectation and thus breached the FET standard.[164]

2. Infliction of a climate of uncertainty

226. According to the Claimant, it is well established that the stability of an investment and its business framework are important components of the FET standard, as they are *"directly linked to the investor's legitimate expectations"*.[165]

227. The Claimant argues that before the 2006 Expropriation Order, Olin invested over LYD 12 million (over USD 9 million at the historical exchange rate) to build its production plant in Libya. It also hired qualified personnel, to help with the finalization of the factory's construction and then with its operation. Several employees were thereafter sent by Olin to train with Candia in France,[166] and contacted various distributors with the goal of creating an exclusive distributor network throughout the country.[167]

228. The Claimant alleges that after the issuance of the Expropriation Order in November 2006, *"the legal uncertainty that plagued Olin's investment for years severely affected*

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[163] Claimant's SoC at para 90.
[164] *Id.* at para 91.
[165] Later cites *Occidental v. Ecuador* and *Duke Energy v. Ecuador*. *MTD v. Chile*, *EnCana v. Ecuador* and *Tecmed* Award.
[166] **CWS-1**, First Witness Statement of Mr Akram Abughamja; **CWS-2**, Witness statement of Mr Deher; **Exhibit C-152**, Letter from Al Majd (Distributor) to Olin dated 13 June 2006; **Exhibit FTI-8**, Feasibility Study for a milk factory in Libya, 2003, p5.
[167] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 19; **Exhibit C-152**, Letter from Al Majd (Distributor) to Olin dated 13 June 2006; **Exhibit FTI-8**, Feasibility Study for a milk factory in Libya, page 5.

its relationship with all of its commercial partners or competitors".[168] It states that the Expropriation Order *"ushered a five-year era of doubt, anxiety, confusion, and paralysis for Olin and its management, which was largely due to the Libyan authorities' erratic and inconsistent behavior".*[169] Notably, the Claimant contends that while some Libyan authorities supported Olin's request for an expropriation exemption,[170] and regularly renewed Olin's operational license until April 2017,[171] Libya dragged Olin into protracted and fruitless discussions of a possible relocation and compensation;[172] transferred legal title to the land to the LIDCO in 2007;[173] and repeatedly attempted to evict Olin from the land in question even after the cancellation of the Expropriation Order by the Tripoli Court of Appeal.[174]

229. The Claimant further argues that the demolitions around the plant had a significant impact on the Claimant's activities because they resulted in power cuts as well as loss of access to water and sewage leading to several production stoppages during 2007 and 2008.[175]

230. As examples of impaired management, Olin puts forward the following:

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[168] Claimant's SoC at para 61.
[169] *Id.* at para 108.
[170] **Exhibit C-22**, Letter from the LFIB to the Ministry of Housing dated 10 December 2006; **Exhibit C-45**, Letter from the LFIB to the Public Electricity Company dated 10 December 2006; **Exhibit C-2**, Letter from the LFIB to the Minister of Economy, Trade and Investment dated 16 November 2006; **Exhibit C-18**, Letter from the Minister of Economy, Trade and Investment to the Secretary of the GPCO, dated 26 November 2006; **Exhibit C-39**, Letter from the General Organization for Housing & Utilities to the Secretary of the GCPO (Prime Minister) dated 14 February 2008; **Exhibit C-40**, Letter to the Secretary of the Organization's Management Committee from the General Organization for Housing and Utilities dated 3 February 2008; **Exhibit C-28**, Letter from the General Organization for Housing to the Secretary of the GPCO (Prime Minister) dated 25 January 2009.
[171] See para 88 above.
[172] Claimant's SoC at para 29.
[173] **Exhibit C-118**, Decision no. 157 for year 1375 from the Secretary of the Administrative Committee for Public Property dated 30 May 2007.
[174] **CWS-1**, First Witness Statement of Mr Akram Abughamja at paras 22 and 30; **Exhibit C-117**, Letter from Olin to the LFIB dated 12 November 2006; **Exhibit C-31**, Letter from the General Authority for Public Property to Olin dated 31 August 2010.
[175] *Id.* at para 56. See also **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 32; **Exhibit C-155**, Letter from Olin to the LFIB dated 6 December 2006; **Exhibit C-156**, Letter from the LFIB to the Tripoli Branch of the Libyan General Electric Corporation dated 10 December 2006; **Exhibit C-157**, Compilation of Olin's Internal Destruction Reports for 2008 due to Electricity Cuts.

- Olin was unable to secure exclusive distribution agreements with capable partners, who were deterred from doing business with Olin due to a lack of assurance regarding Olin's stability and the abundance of its supply.[176]
- Because Olin did not know from one day to the next whether it would survive the Expropriation Order, it could not extend a credit line to its customers which frustrated them and made them less inclined to purchase Olin's products.[177] Olin's ability to secure payment instruments from its bank was also affected.[178]
- Olin lost access to preferential terms from its suppliers, which felt that Olin's long-term survival was uncertain due to the illegal expropriation and its aftermath.[179]
- Olin's competitors took advantage of the situation. Olin's direct competitors in Libya perpetuated the belief in the marketplace that Olin was going to be out of business soon. As of late, Candia's Tunisian franchisee even commenced importing Candia UHT milk illegally to meet the demand that Olin was forced to leave unfulfilled.[180]
- In addition to these difficulties, Olin also struggled to retain its best-qualified employees, including employees that Olin had sent to train with Candia, because of the doubts as to Olin's fate.[181] The Expropriation Order also made it very difficult for Olin to convince new employees to join.[182]

231. Consequently, the Claimant maintains that Libya breached the FET standard through the infliction of a climate of uncertainty on Olin.[183]

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[176] Claimant's SoC at para 61; Claimant's Reply at paras 55-56. *Id.* at para 38; **CWS-2**, Witness Statement of Mr Deher at para 31; **Exhibit C-158**, Letter from Al Majd (Distributor) to Olin dated 11 November 2006 *("We tried many times to contact the administration to ask about updates regarding the company products, and plant ability to cover the amounts agreed upon it during the current condition of you plant. So we kindly asking you respond as soon as possible")*.

[177] Claimant's SoC at para 61; Claimant's Reply at para 61.

[178] Claimant's SoC at para 61; Claimant's Reply at paras 57-58. **Exhibit C-162**, Letter from the Sahara Bank to Olin dated 12 July 2010. **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 39.

[179] Claimant's SoC at para 61; Claimant's Reply at paras 59-60. *Id.* at para 40; **CWS-2**, Witness Statement of Mr Deher at para 32; **Exhibit C-123**, Invoice Tetra Pak No 290224-03 dated 24 February 2009.

[180] Claimant's SoC at para 61; Claimant's Reply at para 63.

[181] Evidentiary Hearing, Cross-Examination of Mr Akram Abughamja, page 262.

[182] Claimant's SoC at para 61; Claimant's Reply at para 62. **Exhibit C-137**, Email from Olin to Sodiaal dated 6 April 2011; **Exhibit C-138**, Email from Olin to Sodiaal dated 6 April 2011; **Exhibit C-139**, Email from Olin to Sodiaal dated July 27, 2011; **Exhibit C-136**, Email from Olin to Sodiaal dated 10 January 2012; **Exhibit C-124**, Email from Olin to Sodiaal dated 29 May 2013; **Exhibit C-140**, Email from Olin to Sodiaal dated 6 June 2013.

[183] Claimant's SoC at para 111.

3. Lack of transparency

232. The Claimant asserts that transparency requires that investors are informed of decisions before they are imposed on investors.[184] The Claimant relied on a number of arbitral decisions demonstrating that the obligation to act in a transparent manner towards foreign investors is part of the FET standard.[185]

233. The crux of the Claimant's argument regarding lack of transparency is that the GPCO never notified Olin of its decision to issue an Expropriation Order on 19 October 2006.[186]

234. The Claimant contends that Olin's general manager, Mr Akram Abughamja, first discovered military officers painting the word *"removal"*[187] on the walls of Olin's factory and all adjacent buildings in early November 2006.

235. The Claimant contents that it only became aware of the Expropriation Order on 12 November 2006, a month after its issuance, when the Tripoli's People Committee for Housing and Utilities informed Olin that its factory had *already* been *"dispossessed"* and that Olin had three days to vacate the premises.[188]

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[184] *Id.* at para 84; **CL-55**, UNCTAD, *Fair and Equitable Treatment, Series on Issues in International Investment Agreements*, at 51, UNCTAD/ITE/IIT/11 (Vol. III) (1999) ("First, transparency may be required, as a matter of course, by the concept of FET. If laws, administrative decisions and other binding decisions are to be imposed upon a foreign investor by a host State, then fairness requires that the investor is informed about such decisions before they are imposed.")

[185] **Exhibit C-8**, Cyprus-Libya BIT, Article 2.2; The Claimant cites notably **CL-9**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014, para 570 ("***Gold Reserve* Award**"); **CL-49**, *Bosh International et al. v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, para 212; **CL-50**, *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, Dec. 1, 2011, para 314; **CL-51**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability ("***Lemire v. Ukraine* Award**"), 14 January 2010, para 284; **CL-52**, *Bayindir v. Islamic Republic of* Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009, para 178; **CL-11**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetler A.S. v. The Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para 609; **CL-43**, *Biwater* Award; **CL-53**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc., v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006, para 128; **CL-54**, *Técnicas Medioambientales Tecmed S.A., v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, para 154 ("***Tecmed* Award**").

[186] Claimant's SoC at para 83.

[187] **Exhibit C-119**, Video of the demolition (undated). **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 22.

[188] Claimant's SoC at para 83.

236. Likewise, the Claimant's asserts that the GPCO revised the Expropriation Order in November 2006, without informing Olin of the changes in complete disregard of due process of law.[189]

237. The Claimant concludes that this conduct, combined with other acts of mistreatment of Olin,[190] together constitute a breach of Libya's obligation to act in a transparent manner and therefore of its obligation to afford it FET.

4. Harassment

238. According to the Claimant, *"the LFIB appears to have embarked on a personal crusade against Olin since 2013"*,[191] and in a *"harassment campaign against Olin in retaliation for the commencement of this arbitration"*.[192]

(i) The LFIB refused to allow Olin to import a new production line

239. According to the Claimant, the LFIB first refused to issue a customs clearance that would have allowed Olin to import a new production line that it had purchased from Combibloc. Olin contends that such production line would have enabled it to *"maximize and develop the productivity of the company"*. The LFIB, however, failed to formally authorize the importation of this new production line[193] and Olin was ultimately left with no choice but to cancel its contract with Combibloc in early 2015.[194]

240. The Claimant contends that as a consequence, the equipment never cleared customs, and Olin was ultimately forced to return the Combibloc equipment to the seller.[195]

(ii) The LFIB persistently refused to allow Olin to repatriate profits

[189] *Id.* at para. 84.
[190] Claimant's Reply at para 27.
[191] Claimant's SoC at para. 117.
[192] Claimant's Reply at para 27.
[193] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 55; **Exhibit C-128**, Letter from Olin to the LFIB dated 21 May 2013; **Exhibit C-141**, Letter from the LFIB to Olin dated 23 May 2013; **Exhibit C-142**, Letter from Olin to the LFIB dated 11 June 2013; **Exhibit C-143**, Letter from Olin to the LFIB dated 25 June 2013.
[194] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 55; **Exhibit C-144**, Letter from Combibloc to Olin dated 19 January 2015.
[195] *Id.*

241. The Claimant alleges that the LFIB consistently prevented Olin from managing its investment by *"repeatedly refusing to allow Olin to repatriate its profits to Cyprus"*.[196]

242. Olin asserts that it wrote to the LFIB several times asking it to communicate with Sahara bank, so that Olin could repatriate the profits it generated in 2010, 2012, and 2013, but the LFIB failed to do so,[197] although it used to cooperate with Olin for the repatriation of its profits in the previous years.[198]

243. The Claimant further explains that following its adoption of a resolution to repatriate a total of LYD 1.38 million on 18 September 2014,[199] Olin asked the LFIB to write to Sahara Bank (BNP Paribas's Libyan correspondent) on 11 January 2015, and then again on 29 June 2015, so that Olin could repatriate its profits.[200] According to the Claimant, however, Olin has not received any response from the LFIB to date.[201]

(iii) The LFIB refused to assist Olin in accessing foreign currency

244. The Claimant further contends that for more than a year, the LFIB *"prevented Olin from accessing foreign currency, an essential element of its operation since it allows it to import raw materials and/or machines and equipment"*.[202]

245. The Claimant argues in this regard that it needed in 2015 a letter from the LFIB certifying that Olin's project was subject to the Libyan Investment Law and that Olin was accordingly to be treated like a national company for the purpose of banking transactions. Olin argues that this letter was necessary for it to obtain foreign currency to import raw materials, machines and equipment, and the LFIB failed to issue such certificate and did not coordinate with Olin's bank.[203]

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[196] Claimant's SoC at para 77.
[197] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 52; **Exhibit C-129**, Minutes of Olin's Board Meeting dated 18 September 2014; **Exhibit C-130**, Letter from Olin to the LFIB dated 11 January 2015, **Exhibit C-131**, Letter from Olin to the LFIB dated 29 June 2015.
[198] **Exhibit R-36**, Letter from the LFIB to the Ministry of Trade and Economy dated 26 November 2007.
[199] **Exhibit C-129**, Minutes of Olin's Board Meeting dated 18 September 2014.
[200] **Exhibit C-130**, Letter from Olin to the Libyan Board of Investment Promotion dated 11 January 2015; **Exhibit C-131**, Letter from Olin to the Libyan Board of Investment Promotion dated 29 June 2015.
[201] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 52.
[202] Claimant's SoC at para 78.
[203] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 53; **Exhibit C-132**, Letter from Olin to the LFIB dated 22 July 2015; **Exhibit C-145**, Letter from Olin to the LFIB dated 23 August 2015; **Exhibit C-146**, Letter from Olin to the LFIB dated 13 September 2015.

(iv) The LFIB sought Olin's liquidation

246. According to the Claimant, Libya undertook several actions which were aimed towards Olin's liquidation:

(i) On 13 July 2016, the LFIB informed Olin that it would renew its operational license for only four months;[204]

(ii) The LFIB sent a separate letter to Olin informing it that its project had to be liquidated in accordance with the Libyan Investment Law because Olin's cumulative losses since 2007 had been greater than 84% of its capital;[205]

(iii) The LFIB then agreed to a short-time renewal of Olin's license to operate until April 2017, contingent on Olin's participation in the specific committee tasked with inspecting Olin's records. The LFIB thereafter refused to renew Olin's operational license in the absence of evidence of additional capital injected;[206]

(iv) Libya's authorities' determination to destroy Olin's investment is confirmed by recent proceedings which Libya has commenced against Olin before the Libyan Supreme Court.[207]

247. The Claimant therefore concludes that *"Libya's continued mistreatment of Olin without any explanation constitutes a clear case of harassment which the FET standard prohibits."*[208]

5. Lack of due process and denial of justice

248. The Claimant has also raised the issue of denial of justice and lack of due process before the Libyan national courts, a protection which it contends falls within the scope of the FET standard set out at Article 2(2) of the Cyprus-Libya BIT.[209]

249. In advancing such argument, the Claimant relied on the definition of denial of justice as an *"improper administration of civil and criminal justice as regards an alien,*

[204] **Exhibit C-112,** LFIB's Renewal of Investment Project License No. 020 for 2006 dated July 13, 2016; Claimant's Reply at para 117.
[205] **Exhibit C-134**, Letter from LFIB to Olin dated 26 July 2016; Claimant's Reply at para 117.
[206] **Exhibit C-163**, Meeting Minutes of the Committee Constituted for Handling and Studying the Losses of Olin dated 13, 20, and 24 November 2016; Claimant's Reply at para 118.
[207] Claimant's Reply at para 121.
[208] Claimant's SoC at para 118.
[209] *Id.* at para 116.

including denial of access to courts, inadequate procedures, and unjust decisions".[210] The Claimant further refers to Professor Alwyn Freeman, the author of the first comprehensive study on denial of justice, who considers that denial of justice occurs *"whenever proceedings are permeated with judicial fraud, venality, and corruption"*.[211]

250. The Claimant argues that the South Tripoli Court (before which the Claimant has sought compensation for the harm it had suffered as a result of the Expropriation Order previously cancelled by the Tripoli Court of Appeal) conducted its proceedings without any regard to due process of law and denied Olin justice, for a number of reasons.

251. First, the Claimant contends that it suffered undue delays before the South Tripoli Court which systematically granted postponements, a situation which repeated itself at least a dozen times over a period of nearly three years.[212]

252. Second, according to the Claimant, during the last hearing before the Court held on 4 February 2014, the judge asked Olin's legal representative *"what good it would do him to award Olin the substantial compensation that it had requested"*, thus making a *"barely-veiled solicitation of a bribe"* to which Olin refused to answer.[213]

253. Third, the Claimant contends that the content of the South Tripoli Court decision of 14 February 2014, which followed the hearing of 4 February 2014, constitutes an abusive refusal to indemnify Olin for the harm it suffered because of the cancelled Expropriation Order.[214] According to the Claimant, the South Tripoli Court *"wholly and unjustifiably ignored the impact of Libya's actions on Olin's ability to operate its plant"* and *"based its shocking conclusion on the mere fact that Olin had obtained an operational license from the LFIB in 2008 and allegedly was operating during the time that the Expropriation Order was in place"*.[215] Mr Akram Abughamja stated that it was

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[210] The Claimant cites **CL-88**, A.V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 268 (Kraus Reprint Co. 1970) (1938). See Claimant's SoC at para 116.
[211] Claimant's SoC at para 116.
[212] Claimant's Reply at para 94.
[213] Claimant's SoC at para 73. **CWS-3**, Witness Statement of Mrs Abughofa at para 8.
[214] Hearing Transcript, Claimant's Opening Statement Presentation, Day 1, page 60.
[215] Claimant's SoC at para 74.

clear that *"the judge issued this decision because [Olin] had refused his request for a bribe"*.[216]

254. According to the Claimant, contrary to Libya's assertions:

- Free access to the courts is necessary but not sufficient to defend against a denial of justice claim;
- Olin is not asking the Tribunal to sit as a court of appeal, but rather to consider the procedural irregularities which led to an unfair decision; and
- The changes in political regime had no impact on the court's functioning.[217]

255. The Claimant concludes that the aforementioned conduct constitutes a clear violation of due process and therefore of the FET standard under the BIT.

6. Discrimination

256. The Claimant also considers that the FET standard encompasses an obligation not to discriminate against a foreign investor, which it also alleges has been breached by the Respondent.[218] The issue of the discriminatory treatment of Olin is developed in more detail in Section 8.D. below.

ii. The Respondent

257. The Respondent considers that it fulfilled its obligation to accord FET to Olin and denies all the allegations advanced by the Claimant.

1. The alleged frustration of Olin's legitimate expectations

258. The Respondent relies on the fact that Mr Abughamja is a Libyan national who engaged in commercial activities in Libya prior to the period of nationalizations. For this reason,

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[216] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 49.
[217] Hearing Transcript, Claimant's Opening Statement Presentation, Day 1.
[218] Claimant's SoC at para 101: *"This conduct also violated Libya's obligation to treat Olin and its investment fairly and equitably, which is recognized to encompass the obligation not to discriminate"*. The Claimant cites the following legal authorities in support of this argument: **CL-37**, Rudolf Dolzer and Christoph H. Schreuer, *Principles Of International Investment Law* (2nd ed. 2012) at 144 *("[d]iscrimination against foreigners has been regarded as an important indicator of failure to grant fair and equitable treatment")*; see also **CL-43**, *Biwater* Award at para 602; **CL-7**, *Saluka* Partial Award, at para 460; **CL-75**, *Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 para 135; **CL-69**, *Waste Management* Award, at para 98; **CL-76**, *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/07, Award, 25 May 2004, at para 109 ("***MTD* Award**"); **CL-77**, *Grand River Enterprises Six Nations, Ltd., et al., v. United States of America*, UNCITRAL, Award, 12 January 2011, at para 209.

the Respondent contends that Mr Abughamja must have had full knowledge of the situation in Libya including the functioning of the Libyan institutions and the provisions governing the sector of urbanization.[219] On this basis, the Respondent argues that Mr Abughamja could not ignore the enactment of Law No. 3/2001 relating to the urbanization and the conditions for obtaining parcels of lands for the implementation of an industrial activity.[220]

259. Further, as stated earlier, the Respondent maintains that the Libyan authorities exempted Olin from the Expropriation Order,[221] thereby defeating the Claimant's argument according to which Libya's issuance of the Expropriation Order frustrated Olin's legitimate expectation and thus further breached the FET standard.

<u>2. The alleged infliction of a climate of uncertainty and ambiguity</u>

260. The Respondent denies that it inflicted a climate of uncertainty and ambiguity upon Olin. It maintains that the Claimant's operational licenses were continuously renewed and that the map reproducing the demolitions in the Al-Fallah zone shows that Olin is one of the few factories still standing to date. In summary, the Respondent raised the following points in support of its position.

261. First, the Respondent argues that the fact that Olin was unable to secure exclusive distribution agreements with capable partners is grounded on the Witness Statement of Mr Abughamja and on a letter from Mr Al Majd (Olin's distributor).[222] The Respondent doubts the validity of Mr Al Majd's letter and contends that, in any case, such letter does not show that the Expropriation Order had an impact on the Contract of Distribution. [223]

262. Second, the Respondent contests the Claimant's affirmation that *"Olin's ability to secure credit lines and payment instruments from its bank also was affected"*. According to the Respondent, this assertion is based on the same witness statement

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[219] Respondent's SoD at para 34.
[220] *Id.* at para 35.
[221] *Id.* at para 92: *"with the support of the LFIB, of the Ministry of Economy, Trade and Investment, and of the General Organization for Housing and Utilities, as reminded by the Claimant in its SoC, Olin as a foreign company has immediately benefited from the expected exemption"*.
[222] **Exhibit C-158**, Letter from Al Majd (Distributor) to Olin dated 11 November 2006
[223] Respondent's SoD at para 120.

mentioned above and on a letter from Sahara Bank BNP Paribas Group which *"does not underline any link with the Expropriation Order"*. The document, as the Respondent views it, simply requests Olin to provide a number of explanations regarding certain sums that it had lost and other documents for a loan, including Olin's financial projections. All requests which the Respondent considers *"quite normal"*. [224]

263. Third, the Respondent contests the fact that Olin lost access to preferential terms from suppliers because of the Libyan government's actions. Libya argues that the Witness Statement of Mr Deher confirms the lack of experience of Olin in the field of dairy and fruit juice products through strategic errors, notably the purchase of inadequate equipment. The Respondent refers to paragraphs 16 and 17 of Mr Deher's Witness Statement, where he explains that the Candia team told Olin that it would have to upgrade its equipment to Tetra Pak machines, and that *"while Olin was not pleased to learn it had to replace machines it had just purchased"*, Olin agreed to *"purchase a demonstration model"*.[225]

264. Fourth, regarding Olin's allegation that it *"did not know from one day to the next whether it would survive the Expropriation Order"* and *"could not extend a credit line to its customers which upset them and made them less willing to purchase from Olin"*, the Respondent considers that the Claimant provides no evidence of this apart from the Witness Statement of Mr Akram Abughamja.[226]

265. Fifth, regarding Olin's allegation that *"Olin's competitors took advantage of the situation"* and that *"Candia's Tunisian franchisee has been importing Candia UHT milk illegally to meet demand that Olin has been forced to leave unfulfilled"*, the Respondent argues that the Claimant attempts to integrate events which occurred between April 2011 and April 2013 and which could potentially be the result of the 2011 Libyan Revolution rather than the result of an Expropriation Order of 2006, many years before the facts.[227]

266. Finally, regarding the adverse effect on Olin's employees, the Respondent considers that *"the Claimant refrain[ed] from producing the personnel register including all*

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[224] *Id.* at para 121.
[225] *Id.* at para 122.
[226] *Id.* at para 125.
[227] *Id.* at para 126.

details about the number of employees, their nationality, their professional qualification, the salary, and the period of employment".[228] Furthermore, the Respondent considers that the Claimant's assertion that it hired qualified personnel and sent several employees to train with Candia in France is not supported by accounting documents, airplane tickets, or by the required declaration to the competent Libyan services, thereby rendering such assertions untrustworthy.[229]

3. The alleged lack of transparency

267. The Respondent, citing the decision in *Middle East Cement Shipping & Handling Co S.A (Greece) v. Egypt,*[230] admits that administrative decisions have to be notified to the investor in order to be considered valid by an arbitral tribunal.[231]

268. The Respondent however contends that, in the present case, and contrary to the Claimant's assertions, the competent authorities notified Mr Abughamja of the Expropriation Order *"immediately after the issuance of the decision",*[232] therefore upholding their obligations towards Olin.[233]

4. The alleged harassment

269. In its defense, Libya draws a line between the pre-Revolution period (i.e. pre-February 2011) and the post-Revolution period (i.e. post-February 2011), underlying the fact that a number of actions or omissions imputed to Libya by the Claimant, are not the result of Libya's fault but rather from the chaos and trouble which was prevailing in the country at the time.[234]

270. Moreover, Libya considers that it did not interfere with the management of Olin, highlighting that Olin's managers have kept their positions, have not been deprived of the the company's full management and have not been replaced by local managers.[235]

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[228] *Id.* at para 128.
[229] *Id.* at para 130.
[230] Middle East Cement Shipping and Handling Co S.A v. Republic of Egypt- ICSID Case n° ARB/99/6-12/04/2002 paras 143,144, available at: http://italaw.com/sites/default/files/case-documentss/ita0531.pdf
[231] Respondent's SoD at para 195.
[232] Respondent's Rejoinder at para 196.
[233] *Id.*
[234] Respondent's SoD at para 147.
[235] *Id.* at para 145.

271. The Respondent quotes Mr Akram Abughamja who states in his witness statement, after describing his decision to purchase a new production line from Combibloc in 2012, that *"[t]his line which costs EUR 1.5 million (with a down payment of 300,000 and the remainder payable over three years), was intended to expand our production capacity..."*.[236] According to the Respondent, this declaration shows first that *"six years, after alleged great difficulties, harassment and pressure, the investor was still running its investment and was able to decide to make new investment"*. It accordingly demonstrates that *"[o]bviously, the investor was free to manage its investment, to make decision and that he was confident"*.[237]

272. Regarding the alleged refusal to allow Olin to import a new production line (i), the alleged refusal to allow Olin to repatriate profits (ii), the alleged refusal to assist Olin with accessing foreign currency (iii) and the alleged wilful provocation of Olin's liquidation (iv), the Respondent raises the following arguments which are summarised below.

(i) The alleged refusal to allow Olin to import a new production line

273. In its SoD, Libya questions the veracity of the Claimant's assertion that it was forced to return the equipment and to cancel the contract with Combibloc in 2015.

274. The Respondent mainly argues that the cancellation agreement concluded between Olin and Combibloc in January 2015 mentions that *"Combibloc shall de-install the line and retrieve all delivered equipment"*. According to Libya, this sentence shows that the Combibloc equipment was not retained by customs but in fact installed in Olin's factory and subsequently "de-installed".[238]

(ii) The alleged refusal to allow Olin to repatriate profits

275. The Respondent accepts that it refused to allow Olin to repatriate profits but contends that this was because such repatriation would have been illegal under Libyan law.

[236] Respondent's Rejoinder at para 83, quoting the First Witness Statement of Mr Akram Abughamja at para 55.
[237] Respondent's Rejoinder at para 83.
[238] Respondent's SoD at para 148.

276. According to Libya, foreign investors may repatriate profits and capital invested in a project only in the following cases:

(a) If the project comes to its end, or is under liquidation or assignment, or,

(b) If within the six months after the date of the investment, the investor has not carried out the project because of external reasons not imputable to it.[239]

277. As none of these conditions were satisfied, the Respondent argues that Olin could not have been authorized to repatriate its profits and capital invested.[240]

(iii) The alleged refusal to assist Olin with accessing foreign currency

278. While the Respondent did not answer the Claimant's argument with regard to access to foreign currency in its SoD or in its Rejoinder, it ultimately addressed this issue in its Answers to the Tribunal's Post-Hearing Questions.

279. In essence, Libya advanced that Olin had all of the necessary documentation and did not need any additional documents from the LFIB. Libya further argued that *"[t]he Claimant does not refer to documents and letters which would have previously been delivered by the LFIB for similar requests."*[241]

280. Libya finally argued that Olin could have accessed foreign currency through its Cyprus headquarters.[242]

(iv) Olin's liquidation

281. The Respondent considers that *"nothing allows the Claimant to conclude, as it does, that the LFIB is seeking Olin's liquidation."*, and that *"such an allegation is groundless"*.[243]

282. According to the Respondent, such declaration is fully contradicted by the facts and if Libya intended to *"intimidate"* or *"punish"* Olin, it could have done it earlier.

[239] *Id.* at para 151.
[240] *Id.*
[241] Libya's Answers to the Tribunal's Post-Hearing Questions, para 14.
[242] *Id.* at paras 49-52.
[243] Respondent's Rejoinder at para 252.

283. The Respondent adds that *"the non-interrupted renewal of the license n° 020/2006 since November 2006"* is the better proof that the Libyan authorities have provided FET to Olin's investment.[244]

284. In these circumstances, the Respondent considers that Olin's liquidation was rather caused by *"Olin's lack of diligence and prudence in the management of its project"*. The Claimant would have *"incurred costs related to its business judgement irrespective of an alleged breach of the fair and equitable treatment under the Cyprus-Libya BIT"*, and as such, Olin has *"made decisions that increased the situation for which it bears responsibility regardless of the treat given by the Libyan authorities to the investment"*.[245]

5. The alleged lack of due process and denial of justice

285. Regarding judicial due process, the Respondent finds surprising that the Claimant did not directly initiate arbitral proceedings to obtain an immediate and efficient decision.[246] According to the Respondent, the investor, by bringing a claim before Libyan courts, *"decided to act as a Libyan national"*, and in doing so, the Claimant have renounced to the benefits deriving from its status of foreign investor. As any Libyan investor, the Claimant had to go through the Libyan court system which implies long proceedings.[247] In light of the fact that neither Olin's managers nor its French partners could have ignored the relief provided under the BIT, the Respondent concludes that the Claimant should not take advantage of its own errors and/or deliberate choices to claim now that it was mistreated by the Libyan courts and especially by the judgment rendered in 2014.[248]

286. The Respondent further notes that the Claimant never initiated emergency proceedings to put an end to the alleged harm and never claimed any compensation before the administrative authorities, neither prior to the decision of the Tripoli Court of Appeal of April 2010, nor after it.[249]

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[244] *Id.* at para 263.
[245] *Id.* at para 268.
[246] Respondent's SoD at para 182.
[247] *Id.* at para 184.
[248] *Id.* at para 185.
[249] *Id.*

287. On the merits, Libya argues that the national judges rendered a reasoned decision based on all the documents submitted by the Claimant and rightly concluded that there was no damage resulting from the Expropriation Order, which is why Olin's claim was ultimately dismissed. Furthermore, according to the Respondent, the fact that the Claimant waited eight years to file an arbitration claim in itself shows the lack of damage.[250]

288. The Respondent adds that the recent accusations made by the Claimant against the Libyan judge regarding bribery solicitation are groundless[251] and not supported by valid evidence.[252] The Respondent therefore concludes that these accusations have the obvious object to *"take undue advantage of a denial of justice and of a breach of the BIT"*,[253] in addition to being defamatory.[254]

<u>6. The alleged discriminatory treatment</u>

289. As explained in more detail above, the Respondent considers that Olin beneficiated from an exemption from the Expropriation Order, just like Al-Aseel and OKBA, thus denying any discriminatory treatment of Olin (see **Section 10** above).

iii. Parties' Rebuttal Arguments

290. The Tribunal provides below additional important points raised by the Parties in relation to the alleged harassment campaign against Olin from 2013 onwards.

291. Regarding the LFIB's alleged refusal to allow Olin to import a new production line in 2013, the Respondent in its Answers to the Tribunal's Post-Hearing Questions, further questioned whether the Combibloc line was truly purchased by Olin and shipped to Libya, arguing that the Claimant has not submitted any evidence in support of this fact.[255]

292. In its Reply Post-Hearing Brief, the Claimant responded to this argument by submitting the following documents relating to the purchase and shipment of the packaging line:[256]

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[250] *Id.* at para 157.
[251] *Id.* at para 189.
[252] *Id.* at para 225.
[253] *Id.* at para 188.
[254] Respondent's Rejoinder at para 275.
[255] Respondent's Answers to the Tribunal's Post-Hearing Questions at para 24.
[256] Claimant's Reply Post-Hearing Briefs, para 13.

a) a quote from Combibloc for a packaging line dated 14 June 2012;

b) amendment No. 2 to the Combibloc Contract dated 29 August 2012;

c) a commercial invoice of EUR 1,5 million from Combibloc for a packaging line dated 1 April 2013 (indicating a down payment of USD 300 000);

d) a packing list for the Combibloc packaging line dated 1 April 2013;

e) a certificate of origin for the Combibloc packaging line (Germany) dated 10 April 2013 issued by the German Chamber of Commerce and legalized by the Libyan Ministry of Foreign Affairs;

f) a certificate of marine insurance for the Combibloc packaging line dated 14 April 2013;

g) a bill of lading for the Combibloc packaging line dated 16 April 2013; and

h) a certificate stating that the vessel carrying the packaging line is allowed to enter Libyan ports dated 16 April 2013.[257]

293. The Claimant further rejected Libya's argument that Olin was not entitled to repatriate its profits because the alleged legal conditions for such repatriation were not satisfied. It maintained that *"Libya knows that these conditions do not apply to the repatriation of profits or revenues but only to the 're-export' of the 'invested foreign capital' as is clear from Article 12 of the 2010 Libyan Investment Law"*.[258] The Claimant further asserted that Olin's right to freely repatriate its profits is enshrined under Article 6 of the Cyprus-Libya BIT which requires Libya to "guarantee" Olin *"the free transfer of all payments related to [Olin's] investments abroad"*, including *"(a) the initial capital and additional amounts of profits and any other related amounts, (b) investments returns including the income gained from the investment"*.[259]

294. In its Rejoinder, the Respondent further argued that all foreign investors had an obligation to pay certain sums to the Libyan administration on their net profits and that a failure to comply with this obligation precludes the investor from repatriating its

[257] **Exhibit C-200,** Combibloc Purchase and Shipping Documents.
[258] **Exhibit C-29**, Libyan Investment Law, Article 12, according to which: *"The investor shall have the right to : (...) (3) Re-export the invested foreign capital in case of expiry of the project's duration, liquidation, or sale thereof, either in part or in whole ... (5) Transfer the net annual dividends or returns achieved by the foreign capital invested in the project."*
[259] Claimant's Reply at para 115.

profits. In support of this argument, the Respondent submitted a letter dated 27 June 2013, which reads as follows:

> *"In reference to the GCP of Economy and Trade' decision n° 530/2007 related to the taxes and fees [...] and of the general budget and final account closing on October 31, 2010 which has been communicated to us, we thank you to:*
>
> *1-transfer the amount of LYD 1,840.500 by certified check in favor of the LFIB*
>
> *2-communicate the general account closing on December 31, 2012."*[260]

295. Olin for its part denies that it failed to pay the amounts requested by the LFIB. Olin maintained that it had promptly paid such sums as evidenced by the check submitted as **Exhibit C-195**.[261]

296. On the same issue, the Respondent further argued that Olin (1) had to request the repatriation of its profits annually (and not for three years at a time) and (2) directed its request to the wrong entity.[262]

297. In its Reply Post-Hearing Brief, the Claimant rejected such contentions.[263] It argued that in 2013, the LFIB requested Olin to pay a 0.5% tax on "distributable profits," and accepted Olin's corresponding payment. This, according to the Claimant, is a clear indication that Olin had not corresponded with the wrong entity.[264] The Claimant added that *"in any event, if Olin's request to repatriate its profits had truly failed to comply with Libya's regulations or had truly been addressed to the wrong Libyan entity, then the LFIB should have said so", and that "Libya's Treaty obligation to treat foreign investors transparently (as required by the fair and equitable standard) required Libya to inform Olin as to why its request was being rejected or to communicate the correct procedure to follow"*, concluding that *"Libya's failure to do so in this case, at the time, falls severely short of Libya's Treaty obligations."*[265]

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[260] **Exhibit R-39**, LFIB's letter to Olin dated 27 June 2013.
[261] Claimant's Rejoinder on Respondent's Counterclaim, para 11. See also **Exhibit C-195,** Letter from Olin to the LFIB dated 25 July 2013 and enclosed check.
[262] Respondent's Answers to the Tribunal's Post-Hearing Questions, paras 30 to 38.
[263] Claimant's Reply Post-Hearing Brief, para 16.
[264] *Id.*
[265] *Id.* at para 17.

298. Finally, with regard to Libya's alleged refusal to assist Olin in accessing foreign currency, the Claimant replied as follows:

a) First, Libya's argument that no certification from the LFIB was required for Olin to access foreign currency is belied by past certifications that the LFIB *has* issued.[266]

b) Second, purchasing raw material through Olin Cyprus was not a viable option. The Claimant's argument in this regard is that:

> *Having Olin Cyprus purchase raw materials in foreign currency to then resell them to its Libyan branch would not have resolved the issue in any event. This is because these raw materials are ultimately used by Olin's Libyan branch to manufacture products that are sold locally, i.e., in Libyan dinars. But Olin's Libyan branch would still face the same difficulties in converting those revenues into foreign currency in order to repay Olin Cyprus. Not to mention that, since late 2014, the LFIB has been consistently refusing to allow Olin to repatriate freely the very modest profits that it generated in 2010, 2012, and 2013.*

B) The Arbitral Tribunal's Analysis and Decision

299. Having taken note of the Parties' contentions in relation to the alleged breach of Article 2.2 of the Cyprus-Libya BIT, the Tribunal sets out below its determinations in relation thereto.

300. The Tribunal cites, for ease of reference, Article 2.2 of the Cyprus-Libya BIT:

Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security according to the law. Neither Contracting Party shall

[266] See Claimant's Reply Post-Hearing Brief, para 22: *"For instance, on June 20, 2005, the LFIB issued a letter to the National Commercial Bank asking it to proceed with the opening of a bank account for Olin in both Libyan dinars and foreign currency. The LFIB specifically stated that Olin "should be treated as national companies for the purpose of opening letters of credits in order import raw materials as well as for money deposits." Likewise, on November 26, 2007, the LFIB did not hesitate to issue a letter to the Ministry of Trade and Economy requesting it to afford Olin "the treatment granted to Libyan companies for the opening of Letter of credit for importation of raw material, and for the financial deposits." Clearly, the LFIB's own past conduct (i.e., past certifications) confirms Olin's position (not Libya's) that certifications from the LFIB were required for Olin to access foreign currency."*

in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, expansion or disposal of such investments.

301. This Article thus requires the host State:

(1) To ensure that investors in its territory are accorded FET at all times;

(2) To ensure that investors in its territory enjoy FPS according to the law; and

(3) Not to impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, expansion or disposal of investments.

302. The Tribunal will assess each of the foregoing points in turn below to assess whether Libya has breached Article 2.2 of the BIT.

(1) Has Libya failed to accord Olin FET?

303. In this part, the Tribunal will consider whether the 2006 Expropriation Order and Libya's subsequent measures constitute a breach of the FET standard set out in the Cyprus-Libya BIT.

i. FET and the frustration of the investor's legitimate expectations

304. As previously observed, the Tribunal having examined the decision in *Tecmed v. Mexico*,[267] as well as other legal authorities submitted by the Claimant regarding the protection of an investor legitimate expectations in investor-State arbitration, finds that respect for an investor's legitimate expectations is widely acknowledged as being part of the FET standard.[268]

305. In the *Thunderbird v. Mexico* award, cited by the Claimant, the arbitral tribunal, approaching the concept of legitimate expectations within the NAFTA framework, stated as follows:

"Having considered recent investment case law and the good faith principle of international customary law, the concept of "legitimate expectations" relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or

[267] **Exhibit CL-54**, *Tecmed* Award, 29 May 2003.

[268] **Exhibit CL-7**, *Saluka* Partial Award, para 302; **Exhibit CL-63**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, Oct. 8, 2009, at para 216; **Exhibit CL-64**, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, at para 348. **Exhibit CL-65**, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Final Award, 26 January 2006, at para 147.

investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages."[269]

306. In *Gold Reserve v. Venezuela*, the arbitral tribunal further stated:

The investor's legitimate expectations are based on undertakings and representations made explicitly or implicitly by the host State. As authoritatively held, "specific representations play a central role in the creation of legitimate expectations. Undertakings and representations made explicitly or implicitly by the host State are the stronger basis for legitimate expectations. A reversal of assurances by the host State that have led to legitimate expectations will violate the principle of fair and equitable treatment."[270]

307. Based on these findings, the Tribunal considers that the legitimate expectations of a foreign investor would be frustrated if:

(1) The host State's conduct created reasonable and justifiable expectations on the part of the investor;

(2) The investor acted in reliance on the said conduct;

(3) The host State failed to honour those expectations.

308. Having reviewed the evidence submitted by both Parties, the Tribunal considers that:

(1) The changes in Libya's national and international legislative frameworks in the 1990s, and in particular the enactment of the Libyan Investment Law of 1997, combined with public declarations and various assurances by the Libyan authorities, created legitimate expectations that Libya was willing to establish an environment favourable to foreign investments. While the Tribunal acknowledges that these expectations should be analyzed in light of the risks inherent to a country newly opening its doors to foreign investors, the Tribunal considers that it was reasonable and legitimate for Olin to expect that Libya would not act in breach of its newly enacted Investment Law. The Tribunal considers that the issuance by the Libyan State of all necessary permits and licenses to build and operate Olin's

[269] This approach has been adopted by other tribunals and notably in *Total S.A. v. Argentina*. See **Exhibit CL-21**, *Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, para 118.
[270] **Exhibit CL-9**, *Gold Reserve* Award, para 571, referring to Dolzer and Schreuer, Principles of International Investment Law, 2012, p. 145.

factory also reinforced the Claimant's expectations that Libya would abide by its laws and respect Olin's fundamental rights as an investor.

(2) It is fair to consider that the changes in the public discourse and the legal framework undertaken by Libya in the 1990s, as well as the issuance of permits and licenses by Libya, were fundamental to Olin's decision to invest in Libya.

(3) By issuing a decision expropriating the land on which Olin's factory was erected, in breach of its Investment Law, without ultimately finding an alternative location for Olin's factory and without payment of any compensation, Libya did not honour the legitimate expectations it had created.

309. As a consequence, the Tribunal determines that the issuance of the Expropriation Order in 2006, and the measures following the Expropriation Order including those which were tantamount to an expropriation of Olin's investment, constituted a frustration of the investor's legitimate expectations and therefore a breach of the FET standard set out in Article 2.2 of the Cyprus-Libya BIT.

ii. FET and the infliction of a climate of uncertainty

310. The Tribunal has noted the decision in *Occidental v. Ecuador*, where the arbitral tribunal held that the "*stability of the legal and business framework is ... an essential element of fair and equitable treatment*".[271] The Tribunal has also taken note of the decision in *Duke Energy v. Ecuador*, where the tribunal considered that "*[t]he stability of the legal and business environment is directly linked to the investor's justified expectations. The Tribunal acknowledges that such expectations are an important element of fair and equitable treatment.*"[272]

311. The Tribunal considers that the FET provision contained in the Cyprus-Libya BIT entails respect for the investor's ability to operate its investment with a minimum level of certainty as to its fate and as to the ability to implement basic business decisions in an unfettered manner.

312. Having examined the evidence provided by both Parties in relation to the expropriatory measures, the Tribunal considers that, on the one hand, as put forward by both the

[271] **Exhibit CL-18**, Occidental Exploration and Production Co. v. Republic of Ecuador, LCIA Case No. UN3467, Final Award, 1 July 2004 ("***Occidental*** **Award**"), para 183.
[272] **Exhibit CL-45**, *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para 340.

Claimant and the Respondent, a number of Libyan authorities supported Olin's exemption requests,[273] and regularly renewed Olin's operational license until April 2017.[274]

313. On the other hand, however, it is not contested that the Libyan authorities transferred legal title of the land to the LIDCO between May 2007 and June 2011.[275] It is also not contested that the authorities attempted to evict Olin from its premises on several occasions, including following the cancellation of the Expropriation Order by the Tripoli Court of Appeal in 2010.[276] Furthermore, it is not contested that Libya's discussions regarding a potential relocation or compensation did not lead to any concrete result.[277]

314. The evidence on record further shows that, within three days of the notification of the Expropriation Order, several buildings and structures next to Olin's factory were destroyed and the factory was surrounded by the army. On this point, the Tribunal notes Mr Abughamja's testimony, according to which the army's bulldozers were parked in Olin's yard and military officers would come and have lunch inside the factory, a fact which has not been contested by the Respondent.[278] Under cross-examination, Mr Abughamja further testified that following the three-day eviction notice issued in November 2006, a six-month period ensued during which the army was mingling with Olin's employees in the factory, and almost telling them every day: *"this is our job, we have to destroy the area."*[279] The Respondent did not contest these allegations either.

[273] **Exhibit C-22**, Letter from the LFIB to the Ministry of Housing dated 10 December 2006; **Exhibit C-45**, Letter from the LFIB to the Public Electricity Company dated 10 December 2006; **Exhibit C-2**, Letter from the LFIB to the Minister of Economy, Trade and Investment dated 16 November 2006; **Exhibit C-18**, Letter from the Minister of Economy, Trade and Investment to the Secretary of the GPCO, dated 26 November 2006; **Exhibit C-39**, Letter from the General Organization for Housing & Utilities to the Secretary of the GCPO (Prime Minister) dated 14 February 2008; **Exhibit C-40**, Letter to the Secretary of the Organization's Management Committee from the General Organization for Housing and Utilities dated 3 February 2008; **Exhibit C-28**, Letter from the General Organization for Housing to the Secretary of the GPCO (Prime Minister) dated 25 January 2009); **Exhibit R-28**, Letter from the Public Establishment for Housing and Utilities dated 3 August 2008; **Exhibit R-29**, Letter from the Public Establishment for Housing dated 29 January 2009; **Exhibit R-30**, Letter from the GPCO dated 22 July 2008.

[274] See **paragraph 128** above.

[275] **Exhibit C-118**, Decision no. 157 for year 1375 from the Secretary of the Administrative Committee for Public Property dated 30 May 2007.

[276] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 22 and 30; **Exhibit C-117**, Letter from Olin to the LFIB dated 12 November 2006; **Exhibit C-31**, Letter from the General Authority for Public Property to Olin dated 31 August 2010.

[277] See above para 174.

[278] Evidentiary Hearing, Opening Statement, Transcript page 94, Evidentiary Hearing, Cross-Examination of Mr Akram Abughamja, page 263.

[279] Evidentiary Hearing, Cross-Examination of Mr Akram Abughamja, page 263.

The Tribunal notes the unusual psychological circumstances and context in which the Claimant had to operate with the logical adverse consequences of such circumstances on its business.[280]

315. During his cross-examination, Mr Deher explained how the climate of uncertainty impacted Olin's partners as well: *"We learned that there was an expropriation order which had been issued. We moved from being in a mode of competition to survival mode"*,[281] concluding that *"Olin had the sword of Damocles of expropriation hanging over its head which meant it couldn't plan for the future"*.[282]

316. The Tribunal has further examined the evidence on record which unambiguously shows that diverse measures taken by the Libyan State rendered the fate of Olin's factory uncertain and undermined Olin's ability to plan and to gain the confidence of its business partners, even after the Expropriation Order ceased from being effective in 2011. The Tribunal most notably refers to the following evidence:

- **Exhibit C-158:** The letter from Olin's distributor (Al Majd) dated 11 November 2006 in which it was stated that Al Majd *"tried many times to contact the Administration to ask about updates regarding the Company products, and plant ability to cover the amounts agreed upon it during the current condition of your plant."*

- Evidence showing Claimant's inability to implement business decisions, and notably its inability to import a new production line in 2013;[283] its inability to repatriate profits in 2010, 2012 and 2013;[284] and its inability to access foreign currency in 2015.[285]

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[280] Evidentiary Hearing, Opening Statement, Transcript page 95.
[281] Evidentiary Hearing, Cross-Examination of Mr Deher, page 346.
[282] *Id.* p. 353.
[283] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 55; **Exhibit C-128**, Letter from Olin to the LFIB dated 21 May 2013; **Exhibit C-141**, Letter from the LFIB to Olin dated 23 May 2013; **Exhibit C-142**, Letter from Olin to the LFIB dated 11 June 2013; **Exhibit C-143**, Letter from Olin to the LFIB dated 25 June 2013.
[284] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 52; **Exhibit C-129**, Minutes of Olin's Board Meeting dated 18 September 2014; **Exhibit C-130**, Letter from Olin to the LFIB dated 11 January 2015, **Exhibit C-131**, Letter from Olin to the LFIB dated 29 June 2015.
[285] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 52; **Exhibit C-129**, Minutes of Olin's Board Meeting dated 18 September 2014; **Exhibit C-130**, Letter from Olin to the LFIB dated 11 January 2015, **Exhibit C-131**, Letter from Olin to the LFIB dated 29 June 2015.

317. The report filed by Libya's Litigation Department against Olin on 5 December 2016 also shows that Libya initiated court proceedings against Olin to challenge the 2010 Libyan Court decision cancelling the Expropriation Order.[286] The Tribunal considers, however, that such action ought to be assessed in the context of Olin having ceased operations in 2015.

318. While the Respondent has proved that the Claimant's operating license had been renewed until April 2017, that some Libyan authorities supported Olin's exemption from expropriation, and that the factory had never been actually destroyed, the Respondent has submitted no evidence which would contradict the fact that Olin remained - for a number of years - in a state of uncertainty as to its fate after the issuance of the 2006 Expropriation Order.

319. Based on the foregoing, the Tribunal concludes that while Olin's factory was ultimately spared from physical destruction, Libya's aforementioned measures prevented Olin from operating its plant under normal business conditions and maintained it in a situation of heightened uncertainty following the issuance of the Expropriation Order in 2006. In doing so, Libya further breached the FET standard.

iii. FET and the lack of transparency

320. The fact that an obligation to act in a transparent manner derives from the FET standard is largely admitted in investor-State arbitration, and endorsed by this Tribunal.[287]

321. The Tribunal accepts that the threshold applicable to this obligation of transparency may vary depending on the specific requirements of the clause containing the FET standard. In *Waste Management v. Mexico*, for example, the tribunal interpreting the FET clause in the NAFTA Agreement and commenting on the minimum standard of treatment, stated as follows:

> *"the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to Claimant if the conduct is*

[286] As mentioned above at **paragraph 126**, the Tribunal has not been informed of the outcome of this decision.
[287] The Claimant cites a number of cases in support of this allegation: **Exhibit CL-9**, *Gold Reserve* Award, para 570; **Exhibit CL-49**, *Bosh International et al. v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, para 212; **CL-50**, *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 1 December 2011, para 314; **Exhibit CL-51**, *Lemire v. Ukraine* Award, 14 January 2010, para 284; **Exhibit CL-52**, *Bayindir v. Islamic Republic of* Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009, para 178; **Exhibit CL-11**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetler A.S. v. The Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para 609; **Exhibit CL-43**, *Biwater* Award at para 602; **CL-53**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc., v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para 128; **Exhibit CL-54**, *Tecmed* Award at para 154.

arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes Claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by Claimant."[288]

322. In the Tribunal's view (without entering into a discussion as to whether a minimum or higher threshold is applicable in this case, a point which was not discussed by the Parties and is not material to the outcome of the case), a minimum requirement of fairness and equity would entail that investors are informed in advance that a decision to expropriate their investment is contemplated, and are given a reasonable opportunity to engage in a dialogue with the government to find an adapted solution.[289]

323. In this case, the Tribunal has considered the evidence showing that the word *"removal"* has been painted on the walls of Olin's factory.[290]

324. The Tribunal has also examined the evidence on record showing that Olin was only notified of the Expropriation Order on 12 November 2006, although the GPCO had decided to issue an Expropriation Order on 19 October 2006. Olin therefore learned one month later that the factory had been *already* "dispossessed" and that it had three days to vacate the premises.[291] The Respondent did not provide any evidence showing that it notified the Claimant of the Expropriation Order before 12 November 2017, nor that it made a clear proposal for an alternative site.

325. The Tribunal concludes that the Respondent further breached the FET standard by failing to engage in a transparent administrative process while expropriating the land on which Olin's plant had been erected.

iv. FET and harassment

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[288] **Exhibit CL-69,** *Waste Management* Award, para 98.

[289] The UNCTAD, *Fair and Equitable Treatment, Series on Issues in International Investment Agreements*, at 51, UNCTAD/ITE/IIT/11 (Vol. III) (1999) *("First, transparency may be required, as a matter of course, by the concept of FET. If laws, administrative decisions and other binding decisions are to be imposed upon a foreign investor by a host State, then fairness requires that the investor is informed about such decisions before they are imposed.")*

[290] **Exhibit C-119**, Video of the demolition (undated). **CWS-1**, Abughamja Witness Statement at para 22.

[291] Claimant's SoC at para 83.

326. The Tribunal has considered Claimant's allegation according to which the LFIB would have embarked on a personal crusade against Olin since 2013, and a harassment campaign against Olin.

327. The Tribunal has first examined the evidence submitted by the Claimant in support of its assertion that the LFIB failed to issue a customs clearance and never formally authorised the importation of a new production line that Olin had purchased from Combibloc. Such evidence includes notably a series of letters from Olin to the LFIB repeatedly asking for a customs clearance,[292] as well as the witness testimony of Mr Akram Abughamja.[293]

328. The Tribunal further refers to the termination letter addressed by Combibloc to Olin which reads as follows:

> *"In order to terminate our contract, we propose the following terms:*
> *- Both parties have incurred expenses and losses as a result of the ongoing conflict.*
> *- SIG Combibloc Obeikan <u>shall de-install the line and retrieve all delivered Equipment,</u> spare parts, manuals, instructions etc.*
> *- SIG Combibloc Obeikan shall return the down-payment in full which is Euro 300,000 prior to loading the line for retrieval."*[294] (emphasis added).

329. The Tribunal has considered Libya's argument according to which the letter provides for a *"de-installment"* which would demonstrate that the Combibloc equipment was not held up at the customs but was in fact *installed* in Olin's factory and later on *de-installed.* The Tribunal however finds this argument inconclusive and insufficient to rebut the evidence submitted by the Claimant.

330. Furthermore, the Tribunal is satisfied that the Claimant has sufficiently evidenced that it purchased this new production line and imported the same into Libya.[295] The Respondent has failed to prove otherwise.

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[292] **CWS-1**, First Witness Statement of Mr Abughamja at para. 55; **Exhibit C-128**, Letter from Olin to the LFIB dated 21 May 2013; **Exhibit C-141**, Letter from the LFIB to Olin dated 23 May 2013; **Exhibit C-142**, Letter from Olin to the LFIB dated 11 June 2013; **Exhibit C-143**, Letter from Olin to the LFIB dated 24 June 2013.
[293] Hearing transcript, pages 265-266.
[294] **Exhibit C-144**, Letter from Combibloc to Olin dated 19 January 2015.
[295] See **Exhibit 200.**

331. The Tribunal accordingly concludes that the evidence on record supports the Claimant's assertion that it was unable to install a new line from Combibloc, due to the LFIB's failure to issue a customs clearance.

332. Second, the Tribunal has examined the evidence submitted by the Claimant in support of its allegation that the LFIB persistently refused to allow Olin to repatriate profits (i.e. Olin's Minutes of Board Meeting evidencing the decision to repatriate profits, followed by letters to the LFIB asking for an authorization to repatriate profits), a fact which is uncontested by Libya.[296]

333. The Tribunal has noted Libya's argument that Olin did not fulfil the conditions allowing it to repatriate profits under Libyan law.

334. The Tribunal considers, however, that Libya failed to refer to specific legal provisions which set out the conditions that Olin had to contemplate with. Libya further failed to prove that it had explained to Olin the reasons for which its profits could not be repatriated.

335. Further, the argument advanced by Libya in its Rejoinder, according to which Olin did not pay the sums due to the administration on the net profits before repatriating its profits was not supported by evidence.[297]

336. Finally, the Respondent's allegation in its Answers to the Tribunal's Post-Hearing Questions that Olin did not comply with Libya's local regulations governing the repatriation of dividends remains unsubstantiated.

337. On balance, the Tribunal concludes that the evidence on record (as referred to in **paragraph 332**) supports the Claimant's allegation that Libya unjustifiably refused to allow Olin to repatriate the profits it had generated in 2010, 2012 and 2013.

338. Third, the Tribunal has examined Olin's allegation that the LFIB did not assist Olin in accessing foreign currency. In particular, the Tribunal has considered Claimant's arguments that:

[296] **Exhibit C-129**, Minutes of Olin's Board Meeting dated 18 September 2014; **Exhibit C-130**, Letter from Olin to the LFIB dated 11 January 2015, **Exhibit C-131**, Letter from Olin to the LFIB dated 29 June 2015. See also Respondent's SoD at para 151.

[297] **Exhibit C-195**, Letter from Olin to the LFIB, 25 July 2013 and enclosed check.

- Olin needed a certificate from the LFIB certifying that its project was subject to the Libyan Investment Law and that Olin was to be treated like a national company for the purpose of banking transactions, in order to obtain foreign currency to import raw materials, machines and equipment,[298] and

- The LFIB failed to issue such certificate.

339. The Respondent responded to this allegation in its Answers to the Tribunal's Post-Hearing Questions for the first time, arguing that:

- Olin did not need any additional documents from the LFIB to access foreign currency;

- Olin could have accessed foreign currency through its Cyprus headquarters.

340. While the first argument has been proved wrong with the evidence submitted by the Claimant,[299] the Tribunal finds that the second one deserves more attention.

341. The Tribunal has carefully reviewed the Claimant's allegations and accepts that raw materials are ultimately used by Olin's Libyan branch to manufacture products that are sold locally. That said, the Tribunal finds that the Claimant has not adequately particularized this aspect of its claim, as further explained at **paragraphs 465** *et seq.* below.

342. The Tribunal concludes that the evidence on record, as referenced in **paragraphs 338 and 340 above**) supports the Claimant's allegation that Libya did not assist Olin in accessing foreign currency in 2015. The Tribunal, however, cannot rule out the

[298] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 53; **Exhibit C-132**, Letter from Olin to the LFIB dated 22 July 2015; **Exhibit C-145**, Letter from Olin to the LFIB dated 23 August 2015; **Exhibit C-146**, Letter from Olin to the LFIB dated 13 September 2015.

[299] The Claimant submitted an exchange of correspondence in 2015 between national banks and the Libyan authorities showing that a certificate was required as well as past correspondence showing that the LFIB had indeed issued such certificates previously. **Exhibit C-201,** Letter from the Libyan Bank of Commerce & Development to the LFIB, 24 Jun2 2015; **Exhibit C-202,** Letter from the LFIB to the Libyan Bank of Commerce and Development, 5 July 2015; **Exhibit C-203,** Letter from the Libyan Bank of Commerce & Development to Olin Holdings, 6 July 2015; **Exhibit C-132**, Letter from Olin to the Libyan Foreign Investment Board, 22 July 2015; **Exhibit C-145**, Letter from Olin to the Libyan Foreign Investment Board, 23 August 2015; **Exhibit C-146**, Letter from Olin to the Libyan Foreign Investment Board, 13 Septeber 2015; **Exhibit C-204,** Letter from the LFIB to the National Commercial Bank, 20 June 2005; **Exhibit R-36**, Letter from the LFIB to the Ministry of Trade and Economy, 26 November 2007.

possibility that Olin could have accessed foreign currency through alternative channels, a fact which the Claimant did not expressly deny.

343. Finally, the Tribunal has examined Claimant's evidence in support of its allegation that Libya sought its liquidation in 2017.[300]

344. Although the evidence on record shows that Libya acted towards the liquidation of Olin almost two years after Olin had effectively ceased its operations, the Tribunal remains unconvinced that sufficient proof was adduced by the Claimant to support the allegation that Libya's motive was to do so <u>hostilely</u>.

345. To conclude, the Tribunal finds that the diverse measures of Libya relating to its failure to authorize the importation of a new production line from Combibloc, its refusal to allow the repatriation of Olin's profits and to assist Olin in accessing foreign currency, were in breach of its obligation to accord FET to Olin, although the Tribunal would be reluctant to go as far as saying that they amounted to harassment.

vi. FET, due process and denial of justice

346. The Tribunal refers to the Claimant's contention according to which Libya's *"abrupt and opaque"* decision to issue the Expropriation Order failed to afford Olin procedural fairness and due process as required by the FET provision,[301] and that the lack of coordination among the various Libyan governmental authorities was *"glaring"*.[302]

347. The Tribunal considers that its findings regarding the lack of transparency of the Libyan authorities' decision-making process, combined with the contradictory approaches of different Libyan governmental entities as demonstrated by the Claimant,[303] and the failure to issue the Expropriation Order in compliance with the Libyan Investment Law, led the Tribunal to reach the conclusion that the Respondent did not meet the requirements of administrative due process.

[300] **Exhibit C-112**, LFIB's Renewal of Investment Project License No. 020 for 2006 dated 13 July 2016; **Exhibit C-134**, Letter from the LFIB to Olin dated 26 July 2016; **Exhibit C-163**, Meeting Minutes of the Committee Constitute for Handling and Studying the Losses of Olin, dated 13, 20 and 24 November 2016.
[301] *Id.*
[302] Claimant's SoC at para 86.
[303] See **Section 11 (1) ii.** above.

348. With regard to lack of due process before the Libyan courts and denial of justice, the Tribunal has reviewed the legal authorities submitted by the Claimant and notably A.V. Freeman's approach according to which denial of justice is an *"improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions"*.[304]

349. The Tribunal is of the view that the standard to establish a denial of justice is high. A Party claiming that denial of justice has occurred should be able to prove that court proceedings were in breach of due process, and that the way in which the court proceedings were conducted was so unfair that they amount to justice being denied.

350. Regarding the undue postponements and delays before the South Tripoli Court, the Tribunal, upon examination of the facts in the context of the Libyan Revolution which started in 2011, considers that the Claimant has failed to prove that a three-year delay in court proceedings, combined with repeated postponements, amounted to a denial of justice in the present case.

351. The Tribunal further notes that the alleged bribery solicitation made by the Libyan judge is only supported by Mr Abughamja and Mrs Abughofa's witness statements.[305] The Tribunal is not convinced, however, that these testimonies constitute sufficient evidence that a bribery solicitation occurred before Libyan Courts.[306]

352. Furthermore, the Tribunal agrees with the Respondent that it cannot act as a court of appeal for decisions of Libyan courts and as such, cannot review the merits of the South Tripoli court's decision on damages. The Tribunal would only consider that an unfair decision constitutes a denial of justice if its shocking nature implies a breach of due process. The fact that the Libyan Court refused to indemnify Olin does not allow this

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[304] **Exhibit CL-88**, A.V. Freeman, *The International Responsibility Of States For Denial Of Justice* 268 (Kraus Reprint Co. 1970) (1938).

[305] At the Evidentiary Hearing, the Counsel for Claimant, in its Opening Statement explained that: "The judge asked Olin's legal representative, Mrs Abughofa, what good it would do him to award Olin the compensation it requested", thereafter asking "What is in it for me?". As put forward by Claimant's Counsel, "Olin understood this message as a barely veiled bribe solicitation, an accusation that Olin does not make lightly. Olin was stunned, refused to answer, and became definitively convinced that these court proceedings were nothing more than a charade and that Olin would never receive justice or fair treatment for what it had endured. When the Tribunal asked "Who heard the judge saying that?", Counsel for Claimant answered: *"It was Ms Abughofa, it's in her witness statement. And then she reported it to Mr Abughamja right away. It's also mentioned in his witness statement."*

[306] Respondent's SoD at para 225.

Tribunal to conclude, on the basis of this decision only, that there was a denial of justice under international law.

353. The Tribunal is therefore of the view that the Claimant did not satisfy the burden and relatively high threshold of proving a denial of justice under international law.

v. FET and discrimination

354. Having reviewed the legal authorities submitted by the Claimant, the Tribunal agrees that the FET standard encompasses an obligation not to discriminate.[307]

355. The Tribunal refers to its determinations in **Section 9** above and concludes that the Respondent breached the FET standard by treating Olin in a discriminatory manner.

vi. Conclusions on the breach of the FET provision

356. In summary, the Tribunal considers that the FET provision has been breached both as a result of the effects of the Expropriation Order *between November 2006 and June 2011*, and as a result of Libya's measures *after June 2011*.

357. Libya breached the FET provision between November 2006 and June 2011:

a) By issuing an Expropriation Order in breach of Libya's Investment Law and thereby frustrating Olin's legitimate expectations;

b) By inflicting a climate of uncertainty upon Olin, regarding the fate of its investment and regarding whether it would have to relocate and demolish the factory it had only recently built;

c) By failing to act in a transparent manner by timely informing Olin of the Expropriation Order in 2006 and the status of the expropriation decision afterwards;

[307] **Exhibit CL-37**, Rudolf Dolzer and Christoph H. Schreuer, Principles of International Investment Law (2nd ed. 2012) at 144 *("[d]iscrimination against foreigners has been regarded as an important indicator of failure to grant fair and equitable treatment"); see also* **Exhibit CL-43**, *Biwater* Award, para 602; **Exhibit CL-7**, *Saluka* Partial Award, para 460; **CL-75**, *Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 at para 135; **Exhibit CL-69**, *Waste Management* Award, para 98; **Exhibit CL-76**, *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/07, Award, 25 May 2004, para 109 ("***MTD* Award**"); **Exhibit CL-77**, *Grand River Enterprises Six Nations, Ltd., et al., v. United States of America*, UNCITRAL, Award, 12 January 2011, para 209.

d) By treating Olin less favourably than its national investors OKBA and Al-Aseel.

358. Further, Libya breached the FET provision after June 2011:

a) By not allowing Olin to import a new production line from Combibloc in 2013;

b) By not allowing Olin to repatriate the profits it had generated in 2010, 2012 and 2013;

c) By not assisting Olin in accessing foreign currency in 2015; and

d) By filing a Report of Appeal by Cassation on 5 December 2016, opening court proceedings against Olin to challenge the 2010 Libyan Court decision cancelling the Expropriation Order.

(2) Has Libya failed to ensure FPS of Olin's investment?

A) Summary of the Parties' Positions

i. The Claimant

359. The Claimant contends that the FPS standard contained in Article 2(2) of the Cyprus-Libya BIT, protects investors from *"unjustified administrative and legal actions taken by a government, or its subdivisions, that injure the rights of the investor or its investment, irrespective of the State's intent."*[308] The Claimant cites the decision in *CME v. Czech Republic*,[309] where the Tribunal held that the host State *"is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued"*.[310]

360. According to the Claimant, *"the deplorable manner in which Libya has been mistreating Olin and its investment since 2006"*[311] as well as the GPCO's refusal to

[308] Claimant's SoC at para 107.
[309] **Exhibit CL-84**, *CME* Partial Award, at para 613.
[310] Claimant's SoC at para 107.
[311] *Id.* at para 8.

exempt Olin from the Expropriation Order constitutes a breach of the FPS standard contained in Article 2(2) of the Cyprus-Libya BIT.[312]

ii. The Respondent

361. The Respondent denies that it treated Olin in a deplorable manner and on the contrary, considers that "*Olin received a full protection from the Libyan authorities*", in accordance with Libya's national and international undertakings towards investors. According to the Respondent, the renewal of Olin's license to operate is the best proof of the protection granted to Olin and its investment by the Libyan authorities as per the law and the BIT.[313]

B) The Arbitral Tribunal's Analysis and Decision

362. The Tribunal agrees with the Claimant that a host State under the Cyprus-Libya BIT is obligated to ensure a climate of protection and security and has noted Olin's position that Libya failed to comply with this obligation.

363. The Tribunal has also noted the position of the Respondent which denies any breach of the FPS provision.

364. Having reviewed the legal authorities submitted by the Parties in this arbitration, the Tribunal refers to the decision in *Saluka Investments BV v. The Czech Republic*,[314] in which the tribunal found:

> *"The 'full protection and security' standard applies essentially when the foreign investment has been affected by civil strife and physical violence.... the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force."*[315]

365. The Tribunal concurs with the approach of the tribunal in *Saluka Investments BV v. The Czech Republic* and notes that in the context of Olin's investment, the physical integrity

[312] **Exhibit CL-84**, *CME* Partial Award, at para 613.
[313] Respondent's SoD at para 178.
[314] **Exhibit CL-7,** *Saluka* Partial Award.
[315] *Id.* para 483-484.

and the use of force were not directly at stake here. Olin's factory continued to function albeit at a slower pace.

366. The Tribunal therefore considers that the evidence on record does not allow it to conclude that there was a violation of the FPS standard.

(3) Has Libya impaired the management, maintenance, use, enjoyment, and expansion of Olin's investment in Libya with unreasonable and/or discriminatory measures?

A) Summary of the Parties' Positions

i. The Claimant

367. The Claimant submits that a breach of the impairment clause in Article 2.2 of the Cyprus-Libya BIT can be established if the Tribunal is convinced that two elements are demonstrated. First, the Respondent must have impaired the management, maintenance, use, enjoyment, and expansion of the Claimant's investment. Second, the Respondent must have done so through unreasonable and/or discriminatory measures.[316]

368. Regarding the first element, the Claimant cited the *Saluka v. Czech Republic*[317] partial award in which the tribunal explained that *"[i]mpairment means, according to its ordinary meaning (Article 31 of the Vienna Convention on the Law of Treaties), any negative impact or effect caused by the 'measures' taken by the Czech Republic. The term 'measures' covers any action or omission of the Czech Republic."*[318]

369. According to the Claimant, *"[i]t is unquestionable that the issuance of the Expropriation Order impaired Olin's management, maintenance, use, enjoyment, expansion, or disposal of its investment"*, since it *"significantly impacted all aspects of Olin's operations"*.[319] Furthermore, the Claimant considers that Libya's infliction of a climate of uncertainty regarding Olin's future, its subsequent disregard for the decision of the Tripoli Court of Appeal cancelling the Expropriation Order, and its harassment campaign against Olin in retaliation for the commencement of these arbitration

[316] Claimant's Closing Statement, Evidentiary Hearing of 3-5 July, see Transcript at pages 587-590.
[317] **Exhibit CL-7**, *Saluka* Partial Award at para 302.
[318] Claimant's SoC at para 94.
[319] *Id.*

proceedings further impaired Olin's investments.[320] More generally, the Claimant considers that it has put forward *"overwhelming factual evidence", "to demonstrate the myriad ways in which Libya's misconduct severely impaired Olin's ability to manage its investments and curtailed its growth and development."*[321]

370. Regarding the second element, the Claimant submits that a State's measure, in addition to causing an impairment, have to be either unreasonable or discriminatory.

371. The Claimant argues that the Expropriation Order was unreasonable because (1) it was taken in wilful disregard to due process and proper procedure,[322] *"providing Olin with neither notice nor an opportunity to be heard before its investment was declared dispossessed,*[323] and (2) it bore no rational to its stated purpose,[324] since it was taken *"for reasons that are different from those put forward by the decision-maker".* [325]

372. Furthermore, the Claimant considers that the measures taken by Libya were discriminatory, since the evidence in this case shows that the other two milk and juice producers, OKBA and Al-Aseel - both local companies situated in the same expropriated area - were given express exemptions[326] (see **Section 9** above for a more developed analysis of the Claimant's position on discrimination).

ii. The Respondent

373. The Respondent denies that the Expropriation Order or any measure adopted by Libya impacted Olin's activity. According to the Respondent, the fact that the Claimant's licenses have constantly been renewed and that the investor has always been able to carry out its business show that its investment was not impaired.[327]

B) The Arbitral Tribunal's Analysis and Decision

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[320] Claimant's Reply at para 27.
[321] *Id.* at para 39.
[322] Claimant's SoC at para 91.
[323] Claimant's SoC at para 92.
[324] *Id.* at para 91.
[325] *Id.* at para 93.
[326] Hearing of 3-5 July 2017, Claimant's Closing Statement, at pages 591-592.
[327] Respondent's Rejoinder at paras 99-100.

374. The Tribunal agrees with the Claimant's contention that a breach of the impairment clause in Article 2.2 of the Cyprus-Libya BIT can be established if two elements are demonstrated:

a) First, the Respondent must have *impaired the management, maintenance, use, enjoyment, and expansion of the Claimant's investment.*

b) Second, the Respondent must have done so *through unreasonable or discriminatory measures.*[328]

375. The Tribunal refers to its analysis and determinations developed in Sections 8 and 9 above, and finds that the Claimant has established the first element of the impairment clause, identified in the preceding paragraph. The Tribunal thus concludes that Libya's measures negatively impacted Olin and that the management, maintenance, use, enjoyment or expansion of the Claimant's investment have accordingly been impaired.

376. Second, the Tribunal refers to its analysis and determinations developed in Sections 8 and 9 above, and concludes that Libya's measures proved to be in violation of the Libyan Investment Law, and the Cyprus-Libya BIT. Such measures were both unreasonable and discriminatory.

377. The Tribunal is therefore satisfied that Libya has violated the impairment clause set out in Article 2.2 of the Cyprus-Libya BIT.

12. ISSUE NO. 4: HOW SHOULD THE TRIBUNAL COMPENSATE FOR OLIN'S LOSS, IF ANY?

A) Summary of the Parties' Positions

i. The Claimant

378. The Claimant contends that Libya's conduct in breach of the Cyprus-Libya BIT caused severe damage to Olin and its investment. Indeed, after the issuance of the Expropriation Order, the Claimant argue that "*Olin's sole focus shifted to preserving a minimum level of activity in order to prevent the authorities from raiding the factory, to safeguard its relationship with Candia, and to avoid losing the raw materials that it had purchased*".[329]

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[328] Claimant's Closing Statement, Evidentiary Hearing of 3-5 July, see Transcript at pages 587-590.

[329] Claimant's SoC at para 120. **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 120.

379. According to the Claimant, Libya's misconduct caused Olin a negative cash flow of LYD 7.3 million in 2016, and a cumulative negative cash flow of LYD 17.5 million for 2006-2016.[330]

380. The Claimant states that under international law, it is entitled to full compensation for the losses that it has suffered as a result of Libya's measures. The Claimant cites the *Chorzow* case,[331] widely considered to provide the international law standard for damages, which are intended to *"wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"*.[332] The Claimant adds that the International Law Commission ("**ILC**") Articles on State Responsibility[333] also require a State *"to make a full reparation for the injury caused by the internationally wrongful act"* and that reparation must *"cover any financially assessable damage including loss of profits insofar as it is established"*.[334]

381. The Claimant further asserts that investment tribunals have consistently acknowledged the importance of awarding *"full compensation"*,[335] and cited the Tribunal's decision in *AALP v. Sri Lanka* which determined that *"the amount of the compensation due has to be calculated in a manner that adequately reflects the full value of the investment lost as a result of said destruction and the damages incurred as a result thereof"*. [336]

382. The valuation of Olin's damages is based on the Expert Reports of Messrs. James Nicholson and Matthias Cazier-Darmois of FTI Consulting.

383. In a First Expert Report, dated 7 October 2016, the experts considered that *"full compensation"* or *"wiping out the consequences of the breach"* required that Olin

[330] **FTI-2**, Appendix 3, Revised lost profits assessment.
[331] **Exhibit CL-89**, *Case Concerning factory at Chorzów (Germany v. Poland)*, PCIJ, Judgment, 13 September 1928, 1928 PCIJ, Ser. A. No. 17 ("***Chorzów* Judgment**").
[332] Claimant's SoC at para 121.
[333] **Exhibit CL-48**, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th sess., sup. No. 10, UN Doc A/56/10 (2001).
[334] Claimant's SoC at para 121, citing the ILC Articles on State Responsibility, Art. 31(1) ("1. *The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.*").
[335] **Exhibit CL-18**, *Occidental* Award, at paras 198-201 (awarding full compensation for Ecuador's withholding of Occidental's VAT refunds, which it found to violate the national treatment and fair and equitable treatment standards in the relevant BIT).
[336] Claimant's SoC at para 121, citing **CL-90**, *AAPL* Award, at paras 87-88.

receive damages in an amount between **EUR 50.8 million** and **EUR 81.4 million,** which comprises past and future losses. [337]

384. In a Second Expert Report dated 2 March 2017,[338] the experts updated their initial estimates of Olin's losses based on additional financial information that had become available. This additional financial information included (i) Olin's sales reports for 2016 and 2017, (ii) Olin's invoices for 2016 and 2017, and (iii) Olin's draft financial statements for 2016.[339] The Second Expert Report also updated the damages based on the fact that the assumption taken in the First Expert Report that Olin would continue operations in 2017 is no longer correct. As such, the experts considered in the Second Expert Report that Olin's losses are between **EUR 57.0 million** and **EUR 104.9 million.**

385. Using a discounted cash flow ("**DCF**") method, FTI compared (a) the value to Olin *"of the cash flows that it has generated and will in fact generate given the breaches"* (the "actual scenario") and (b) the value to Olin *"of the cash flows that it would have generated but for Libya's breaches"* (the *"but-for scenario"*).[340]

1. Olin's Past Losses (between November 2006 and December 2016)

386. The Claimant considers that "Past Losses" correspond to the difference between Olin's cash flows in the but-for scenario and Olin's actual cash flows.[341]

387. **But-for scenario:** For FTI, the benchmark for assessing Olin's cash flows in the but-for scenario *"is the performance of Candia franchises in several markets similar to Libya"*. According to FTI, in markets where the Candia franchisee entered the market first, *"Candia generally became the leading brand with a market share greater than 50%. In Algeria, a market closely comparable to Libya, Candia's franchisee gained more than 80%"* of the domestic UHT milk market in a few years,[342] which suggests

[337] **CER-1**, FTI's First Expert Report at para 2.29.
[338] **CER-2**, FTI's Second Expert Report.
[339] *Id.* at para 2.1.
[340] **CER-1**, FTI's Second Expert Report at para 2.12.
[341] *Id.* at para 2.15.
[342] *Id.* at para 2.16.

that *"a competent first entrant to the Libyan UHT market could have achieved a very substantial share of that market"*.[343]

388. According to FTI, the Algerian franchise was the most similar to the Libyan franchise because both markets had (i) little domestic production of UHT milk, (ii) very similar distribution networks, and (iii) a relatively comparable market size.[344] Further, the Libyan market *"had the additional advantage over its Algerian counterpart of already having a significant imported UHT milk market—a new entrant did not need to create a UHT milk market since it existed already"*. [345]

389. As explained by the Claimant in its SoC, in a first but-for scenario, the FTI experts considered that Olin would have been able to emulate the success of Candia's Algerian franchisee and thus to capture most of the UHT milk market, i.e. an 80% market share (the "**Algerian Market Share Scenario**").[346] In a second but-for scenario, the FTI experts considered that Olin would have captured "only" 50% of the market (the minimum that Candia's franchisees have achieved in other markets) (the "**50% Market Share Scenario**").[347]

390. With respect to juices, the FTI experts considered that Olin *"would have realized a growth in sales volumes as in the milk market."*[348] Between 2008 and 2015, Olin sold 0.8 liters of juice for every liter of milk.[349] Applying this ratio, the experts estimated that Olin would have reached a share of 13.8% of the total estimated juice market in the 50% Market Share Scenario, and a share of approximately 22.2% in the Algerian Market Share Scenario.[350]

391. The FTI experts estimate that Olin would have achieved these market shares over a period of 7 years.

[343] *Id.* at para 2.17.
[344] *Id.* at para 5.2.
[345] *Id.* at para 5.4.
[346] *Id.* at paras 5.6 and 2.19. Claimant's SoC at para 126.
[347] *Id.* at paras 5.6 and 2.19. Claimant's SoC at para 126.
[348] *Id.* at para 5.6.
[349] *Id.* at para 5.10.
[350] *Id.* at para 5.11.

392. **Actual scenario:** Because of Libya's measures, the FTI experts observe that Olin's share in the milk market remained at approximately 15%.[351] With respect to juices, the experts comment that Olin was never able to gain more than 3.2% of the market.[352]

393. **Olin's past losses of cash flows:** In their First Expert Report, the FTI experts estimated Olin's past losses at between **EUR 24.3 million** (50% Market Share) and **EUR 41.7 million** (Algerian Market Share).[353] In their Second Expert Report, with the updated information described above, the FTI experts estimated Olin's past losses at between **EUR 27.8 million** (50% Market Share Scenario) and **EUR 44.8 million** (Algerian Market Share Scenario).

2. Olin's Future Losses (2017-2026)

394. **But-for scenario:** Similarly to the approach taken with regard to past losses, the FTI experts assumed that Olin would have been able to maintain a 50% market share in the 50% Market Share Scenario and 80% in the Algerian Market Share Scenario. The FTI experts then forecasted the size of the fruit juice and milk market *"based on the assumption that these markets grow in line with Libyan GDP forecasts"*.[354]

395. **Actual scenario:** Olin was not operating at the date of the FTI Report. However, on the assumption that Olin would resume operations in the near future, the experts estimated that Olin would recover a substantial share of the market *"after a few years of sufficient investment"*.[355] However, the FTI experts assumed that Olin's market share *"will grow at a slower pace in the Actual Scenario"* than it would have in the but-for scenario.[356] To *"account for the added difficulty of gaining market shares in an already mature and competitive market with established players"*, the FTI experts assumed that Olin will *"reach a level equivalent to the But For Scenario after a period of ten*

[351] *Id.* at para 2.19; see also *id.* at Table 4-1.
[352] *Id.* at para 2.19; see also *id.* at Table 4-2.
[353] *Id.* at para 2.21. See also para 6.7 and Figure 6-1. By comparing Olin's estimated cash flows in the But For Scenario and in reality, the experts concluded that Olin's Past losses are between LYD 35.1 million (in the 50% Market Share Scenario) and LYD 60.7 million (in the Algerian Market Share Scenario) or between EUR 22.7 million and EUR 39.3 million (converted at the average of the official EUR LYD exchange rate in 2016). After adding interest at a Libyan deposit rate, the experts estimated Olin Holdings' past losses at between LYD 37.4 million and LYD 64.3 million, or between EUR 24.3 million and EUR 41.7 million.
[354] *Id.* at para 6.10.
[355] *Id.* at para 6.12.
[356] *Id.* at para 6.13; see also *id.* at para 2.24.

years"—rather than seven years from 2006—*"at which point Olin's losses would cease"*.[357]

396. **Olin's future losses of cash flows:** The experts discounted Olin's estimated future cash flows at Olin Holdings' weighted average costs of capital ("**WACC**"), which they have assessed by reference to the risks of similar listed juice and milk producing companies, adjusting for the specific risks associated with doing business in Libya.

397. The WACC of 14.7% that the FTI experts applied reflects the very high country risk premium currently applicable to Libya.[358]

398. According to FTI, Olin's cessation of business activities also affected their initial damages calculations in two principal ways.[359]

399. First, the FTI experts initially assumed that, in the absence of the measures, Olin would have been able to gain progressively over the next ten years a normal market share in the actual scenario. FTI have assumed in their second report that no operations will be taking place and therefore no cash flows over the next ten years in the actual scenario. In doing so, the experts have considered that Olin will be able to recover the full accounting value of its assets upon closing of its factory.[360] According to the Claimant, this latter *"very conservative"* assumption seems unlikely *"given the costs associated with moving all or parts of the equipment."*[361]

400. Second, in their First Expert Report, the FTI experts had previously assumed no loss of cash flows after 2026, on the basis that Olin would have gained a normal market share after ten years of operations unaffected by the measures. However, considering that Olin is now definitively out of the market, the FTI experts calculated Olin's losses based on the assumption that they will extend beyond 2026 in the Second Expert Report. The experts thus incorporated this additional loss by adding in its assessment the present value of the cash flows that Olin would have generated after 2026 but for the measures.

[357] *Id.* at para 6.13; see also *id.* at para 2.24.
[358] *Id.* at para 6.20.
[359] **CER-2,** FIT's Second Expert Report at para 3. Claimant's Reply at para 158.
[360] *Id.* at Table 3-1.
[361] Claimant's Reply at para 158.

In doing so, the experts assumed that Olin cash flows would have remained constant at their estimated 2026 level.[362]

401. FTI therefore estimated Olin's discounted future loss at between **EUR 26.5 million** and **EUR 39.7 million**[363] in the First Expert Report and at between **EUR 29.1 million** and **EUR 60.1 million** in the Second Expert Report.[364]

3. The causal link between Libya's misconduct and Olin's damages

402. The Claimant challenges Libya's main line of defense in relation to damages whereby Libya contents that there is no causal link between Olin's damages as described above and its alleged misconduct.

403. In responding to this point, the Claimant first cites the *Inmaris v. Ukraine*[365] case which analyzed the notion of causation under international law. In this case, the tribunal considered that Ukraine's wrongful ban of ships led to the claimant's insolvency, which led the tribunal to award the claimant lost profits for the additional ten years of operation that would have followed had the claimant not gone into bankruptcy.[366]

404. The Claimant further cites the decision in *Lemire v. Ukraine*.[367] In addressing causality, the tribunal in this case noted that *"if it can be proven that in the normal cause of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other"*. The *Lemire* tribunal found that causation was established and went on to compensate the claimant by assessing damages as the difference in value between the worth of Lemire's company had it succeeded in obtaining the radio frequencies pursued and the actual worth of the company as a result of Ukraine's measures.[368]

405. According to the Claimant, in the present case, causation is more direct and obvious than it was in the *Inmaris* or *Lemire* cases.

[362] **CER-2**, FTI's Second Expert Report at paras 3.4-3.5.
[363] *Id.* at para 6.21.
[364] *Id.* at Table 3-1.
[365] **Exhibit CL-97** *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, 1 March 2012 ("***Inmaris v. Ukraine*** **Award**")..
[366] Claimant's Reply at para 133.
[367] **Exhibit CL-51**, *Lemire v. Ukraine* Award.
[368] Claimant's Reply at para 134.

406. The Claimant considers that evidence of this causal link includes *inter alia*:[369]

a) The witness testimony of Olin's General Manager who details how Olin was forced to downscale its operations because of the legal uncertainty created by Libya's measures and how the constant threat of evacuation impacted Olin's relationships with commercial partners;[370]

b) The witness testimony of Mr Deher from Candia who attests that Olin *"had everything to succeed"* but was forced to delay investments in its production facilities due to the uncertainty caused by the expropriation;[371]

c) Documentation showing that Olin had ambitious commercial plans before the expropriation, both in terms of distribution and advertisement; and subsequent correspondence and documentation showing that some distributors no longer wished to work with Olin due to the situation of Olin's factory; and that Olin significantly downscaled its advertisement plans after the issuance of the Expropriation Order;[372]

d) Contemporaneous correspondence with Sahara Bank, which shows that Olin's lenders were reluctant to accept Olin's request to secure an overdraft as a consequence of the expropriation;[373]

e) Contemporaneous correspondence from Olin to various Libyan administrations explicitly stating that the uncertainty resulting from the expropriation was causing Olin significant harm and preventing it from planning and operating its business efficiently;[374]

[369] *Id.* at para 135.
[370] **CWS-1**, First Witness Statement of Mr Akram Abughamja.
[371] **CWS-2**, Witness Statement of Mr Deher.
[372] **Exhibits C-149; C-167; C-158; C-166.**
[373] **Exhibits C-159** and **C-162.**
[374] **CWS-1**, First Witness Statement of Mr Akram Abughamja; **Exhibits C-137, C-138, C-139, C-136, C-124, C-140.**

f) Documentation showing the loss of preferential terms from suppliers on the basis that Olin's long-term survival was uncertain due to the expropriation situation;[375]

g) The performance of competitors in Libya who entered the milk market at around the same time, and that of Candia franchises in comparable markets;[376]

h) Documentation showing the illegal importation in Libya by Candia's Tunisian franchisee of Candia UHT milk to meet the demand that Olin has been forced to leave unfulfilled;[377]

i) The expert evidence and fuller explanation provided by FTI about many of these subjects.

407. The Claimant further notes that the vast majority of this evidence has not been rebutted or challenged by Libya and that Libya's attempt to blame other factors unrelated to its conduct are almost entirely unsupported by evidence. The Claimant also contends that Libya's defense ignores the fact that in calculating Olin's losses, FTI isolated the effects of Libya's measures by excluding the impact of extrinsic factors from its damages model. [378]

4. Summary of Olin's Total Losses

408. The Claimant submits that in order to *"wipe out all the consequences"* of Libya's unlawful conduct, the Tribunal should award Olin the damages calculated in the Algerian Market Share Scenario, namely **EUR 104.9 million.**[379] The Claimant refers to Mr Deher's Witness Statement, in which he states that the Algerian market is the most comparable to the Libyan market, and that Olin *"had everything to succeed"* to achieve the same 80% market share as Candia's Algerian franchisee: a state-of-the-art

[375] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 40; **CWS-2**, Witness Statement of Mr Deher at para 32; **Exhibit C-123**, Invoice Tetra Pak No. 290224-03 dated February 24, 2009.
[376] **CWS-2**, Witness Statement of Mr Deher at paras 34-45.
[377] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 42; **Exhibit C-137**, Email from Olin to Sodiaal dated 6 April 2011; **Exhibit C-138**, Email from Olin to Sodiaal dated 6 April 2011; **Exhibit C-139**, Email from Olin to Sodiaal dated 27 July 2011; **Exhibit C-136**, Email from Olin to Sodiaal dated 10 January 2012; **Exhibit C-124**, Email from Olin to Sodiaal dated 29 May 2013; **Exhibit C-140**, Email from Olin to Sodiaal dated 6 June 2013.
[378] Claimant's Reply at para 137. See **CER-1,** FTI's First Expert Report at A6.7 and A6.8, Tables 4-1 and 4-2.
[379] See **CER-2**, FTI's Second Expert Report, at Table 3-1.

factory; sufficient financial resources; the "winning combination" of a locally-produced product with the name of an international brand; a first-mover advantage; and competitors that could not compete *"with the Olin-Candia combination, in terms of quality, marketing, brand recognition and loyalty"*.[380] The Claimant therefore concludes that the principle of full reparation militates in favour of awarding Olin the damages calculated in the Algerian Market Share Scenario.[381]

409. In the alternative, and at a very minimum, Olin should be awarded the damages calculated in the 50% Market Share, namely **EUR 57 million**.

5. The Expert's answers to the Tribunal's post-hearing questions

410. On 14 July 2017, following the Evidentiary Hearing, the Tribunal put the following questions to the experts:

*"1. The experts are invited to assess Olin's losses on the basis of phase 1 of the initial feasibility study by Candia **(FTI-8)** (the "**Initial Feasibility Study**") considered as a benchmark, and taking into consideration the fact that Olin would be selling Candia products.*

2. With reference to page 15 of the Expert Presentation submitted during the Hearing, the experts are requested to explain how the net profit was determined with reference to Olin's actual costs from 2007 to 2016."

411. The experts submitted their reply to the Tribunal's questions on 11 August 2017.

412. In response to the Tribunal's first question, the experts considered that *"the Initial Feasibility Study assumes both higher sales volumes and higher profits than we have assumed in our own assessment of Olin's losses. As a result, using the Initial Feasibility Study as a benchmark increases Olin's losses."* Having conducted their analysis, the experts estimated that *"Olin Holdings' losses, after interest, range from **EUR 117.0 million** to **EUR 267.3 million**."*[382]

413. In answer to the Tribunal's second question, the experts determined that in Section 5 of their First Report, they had estimated Olin's revenues in the "but-for" scenario based on the market shares that they consider Olin would have achieved absent Libya's

[380] **CWS-2**, Witness Statement of Mr Deher at paras 34-44.
[381] Claimant's SoC at para 140.
[382] Experts' answer to the Tribunal's Post-Hearing Questions, para 1.26.

measures. For this purpose, the experts have divided Olin's costs into two broad categories: (1) Olin's operating costs, which are determined by reference to Olin's actual operating costs; and (2) additional expenses that Olin would have incurred.[383] Having conducted their analysis, the experts concluded that *"when all costs are considered [...], our estimate of Olin's net profit margin in the But For Scenario (net profit divided by revenue) ranges from negative 2.9% in 2007 to 11.3% in 2011. On average, Olin's net profit margin in the Algerian Market Share Scenario between 2007 and 2016 is 4.9%."*[384]

ii. The Respondent

414. The Respondent considers that Olin did not incur any damages as a result of a direct or indirect expropriation and therefore cannot claim any compensation for expropriation, since there was no expropriation in the first place[385] and the procedure applied to Olin's investment was lawful and in accordance with due process of law.[386]

415. The Respondent underlines first that Olin's right of *"usus"* of the investment has never been restricted.[387]

416. Second, the Respondent challenges the causal link between Libyan's measures and the losses sustained by Olin.

417. The Respondent argues that Olin's losses were due to its own incapacity to make profits and inexperience in the field of dairy products rather than to Libya's misconduct.[388]

418. According to the Respondent, Olin's incapacity to generate profits because of the Expropriation Order is not proved. The Respondent argues that Olin's managers lacked the 'know-how' of the field of activity, and for this reason, entered into contact with Prolac, the Soufflet Group and Candia. It is therefore because of Olin's inexperience that errors were made in terms of efficiency and costs, which in turn caused the loss of profits.[389]

[383] *Id.*, para 2.4.
[384] *Id.*, para 2.24.
[385] Respondent's SoD at para 190.
[386] *Id.* at para 193.
[387] *Id.* at para 196.
[388] Evidentiary Hearing, Cross-examination by Counsel for Respondent, Transcript page 366.
[389] Respondent's SoD at paras 197-199.

419. Further, according to the Respondent, a distinction should be made between two periods:

- **2006-2011 period**: in this period the Respondent contends that he Claimant did not submit any document proving without any doubt that it could not generate profits as a result of the Expropriation Order of 2006. The Respondent asserts as stated in *Maffezini v. Spain,* that '*bilateral investment treaties are not insurance policies against bad business judgments*'.[390]

- **Post-2011 period**: the Respondent relies on the situation in Libya after the 2011 Revolution to argue that the Claimant cannot place any liability on the Libyan State because of alleged losses it encountered during this period.[391]

420. The Respondent further considers that the FTI Expert Report is based on wrong assumptions of facts, starting with the expropriation of Olin's investment which did not occur.[392]

421. The Respondent considers that the experts have been instructed to assess losses concerning two periods, the second of which being outside the scope of the RFA and the TOR since it does not refer to the Expropriation Order but to the *"non-renewal of Olin's license"*.[393]

422. The Respondent adds that the experts (at paragraphs 2.6 and 2.7 of FTI's First Expert Report) base their analysis on a wrong factual background when they say that the Tripoli land registrar transferred the legal ownership of Olin's land to the State of Libya and subsequently to the LIDCO. The Respondent takes the view that Olin has never been the owner of the land and that the land register transferred the legal ownership of Mr Abughamja's land to the State.[394]

423. Regarding the analysis of the Libyan market by reference to the different scenarios, the Respondent comments as follows:

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[390] *Id.* at paras 202-205.
[391] *Id.* at para 201.
[392] *Id.* at para 219.
[393] *Id.* at para 210.
[394] *Id.* at para 212.

- Algeria is the biggest dairy consumer in the Maghreb region and the country consumes 6 billion liters of dairy per year including 3 billion liters of imported milk powder.[395]

- Moreover, Algeria was not affected by the Arab Spring. Contrary to Algeria and Lebanon, Libya is "*currently divided between two governments, two parliaments and the army, all pretending to impose their power*".[396]

- The Respondent gives some figures from the World Bank showing the deterioration of the Libyan situation.[397]

- The figures presented by the Claimant show that Libya has a lower consumption of milk than Algeria.[398]

424. The Respondent further refers to paragraph 3.24 of FTI's First Expert Report according to which after a few years of local production, three local producers together controlled approximately 65% of the Libyan juice market. According to the Respondent, this information proves that Olin was not the first one to implement a juice activity in Libya and was preceded by local producers, which means that Olin had to compete with local and potentially cheaper producers.[399]

425. The Respondent adds that the fact that "*distributors, which had previously reached verbal agreements with Mr Abughamja, now refused to do business with Olin*" (at paragraph 4.7 of FTI's First Expert Report), is not evidenced by any document except the witness statements of Mr Abughamja and Mr Deher. According to the Respondent, the exhibit put forward by the Claimant concerns only two letters from Al Majd as distributor, dated June and November 2006. The Respondent argues that neither letter mention Al Majd's reluctance to do business with Olin from the end of 2006 because of alleged uncertainties.[400]

[395] *Id.* at para 213.
[396] *Id.*
[397] *Id.*
[398] *Id.* at para 213.
[399] *Id.* at para 216.
[400] *Id.* at para 217.

426. Another part of Respondent's argumentation challenges the fact that Olin incurred losses, at least in the period between 2006 and 2011.

427. The Respondent refers to FTI's First Expert Report in which it is stated at paragraph 4.18 that according to the article by the Irish food Board, Olin became the third biggest local milk producer in Libya in 2011 behind Judi and Al Rayha. The Respondent argues that *"this remark is of great interest"* because it shows that despite the existence of local competitors Olin was immediately behind them in terms of competition.[401] The Respondent draws the same conclusions from the comment in Table 4-1 that Olin's share of Libyan UHT milk market is significant and from the comment at para 4.21 that *"In the period 2006 to 2016, Olin generated a cumulative EBITDA gain of LYD 7.5 million"*.[402]

428. Regarding the comments under *"Olin Holdings' losses due to the Measures"*[403], the Respondent considers that despite the reference to adverse measures the current shareholders of Olin have decided to go on with the operation and resume it in 2017, concluding that *"obviously they trust in the Libyan economy and market and they are convinced of the profitability of the project"*.[404]

429. Regarding the Claimant's statements of financial position, the Respondent contends the following:

- The value accounted for the land corresponds to the Property sale contract dated 31 October 2007 which could not enter into effect since the ownership of the land was transferred on 20 March 2007 to the LIDCO (the Claimant could not have sold a land which was already owned by a third party).

- As the land was expropriated, following the Claimant's reasoning, Olin had no right to put this land as an asset in its accounts.

[401] *Id.* at para 218.
[402] *Id.* at para 220.
[403] **CER-1**, FTI's First Expert Report at paras 6.11 and 6.12
[404] Respondent's SoD at para 220.

- The accounts show that Olin has a debt towards Mr Abughamja amounting to LYD 11,655,600 whilst the land was not owned by him but by the Libyan State.[405]

- The Respondent concludes that *"all these contradictions between law and accounts lead the [Claimant] to a total contradiction which enables the Respondent to suspect the claim to hide a fraudulent manoeuver to the detriment of the Libyan state"*.[406]

430. Consequently, the Respondent requests from the arbitral tribunal the dismissal of all financial claims advanced by the Claimant.

B) The Arbitral Tribunal's Analysis and Decision

431. Having established a breach of Articles 2, 3 and 7 of the Cyprus-Libya BIT, the Tribunal will start by addressing (i) the issue of the causation between these breaches and the damages allegedly sustained by Olin, before (ii) determining the methodology followed by the Tribunal to evaluate the damages sustained by Olin and (iii) applying the methodology followed by the Tribunal to the facts of the case). The Tribunal will finally draw its conclusions regarding the damages due to Olin (iv).

i. Causation

432. The Claimant contends that, as a result of Libya's breaches of the Cyprus-Libya BIT, it has suffered harm—which it defines as a *"clear underperformance"*—and ultimately had to cease its activities in 2015.[407]

433. The Tribunal will analyse successively (1) the causal link between the Respondent's wrongful conduct and the Claimant's underperformance followed by (2) the causal link between the Respondent's wrongful conduct and Olin's cessation of activities in 2015 through to the non-renewal of its operational license past-April 2017.

1. Libya's wrongful conduct and Olin's underperformance

434. The Tribunal has examined the legal authorities submitted by the Claimant, which highlight the criteria applied by investor-State arbitration tribunals when establishing a causal link between the wrongful acts of a State and the harm suffered by an investor.

[405] *Id.* at para 222.
[406] *Id.* at para 223.
[407] Claimant's Answers to the Tribunal's Post-Hearing Questions at para 31.

435. The Tribunal considers that in order to prove that Libya's measures caused an underperformance on the part of Olin, the Claimant had to establish (1) the causality between Libya's breaches of the BIT and Olin's underperformance and (2) that Libya's breaches are the proximate cause of Olin's underperformance, or in other words, that the underperformance was a foreseeable consequence of Libya's breaches.

436. The Tribunal has considered Olin's arguments that Libya *"imposed years of mixed signals, confusion, paralysis, and uncertainty on Olin and its management"*, which caused *"much poorer performance than otherwise would have been the case"*.[408]

437. The Tribunal will first proceed with defining the harm suffered by Olin and then consider the causal link between such harm and Libya's measures.

- **The harm suffered by Olin**

438. The Tribunal will approach the harm suffered by Olin by distinguishing two time periods during which Libya's measures affected Olin's activities:

- first, the period running from November 2006 (when Olin's managers learnt about the Expropriation Order) to June 2011 (when Olin was able to register title over the land on which its factory was built); and
- second, the period following June 2011, during which Libya implemented a number of measures in breach of the FET standard as demonstrated in Section 9 above.

439. The Tribunal considers that the Claimant has proved that it has suffered the following harm between November 2006 and June 2011:

- An uncertainty as to whether its factory was going to be demolished and relocated resulting, notably in abandonment of new investments in Olin's business,[409] stoppages in production and postponement of marketing campaigns which had a paralysing effect on Olin's activities;[410]
- a fundamental inability by Olin to plan and manage its investments;[411]

[408] Olin's SoC at para 57; Claimant's Reply, paras 48-53
[409] Olin's SoC, paras 58-59; Claimant's Reply, para 49.
[410] **CWS-1**, First Witness Statement Mr Akram Abughamja at paras 19, 34. *See also* **Exhibit C-149**, Email from Sonia Barbaria (Label) to A. Abughamja (Olin) dated November 24, 2005, with attachments; **Exhibit C-150**, Packaging Designs and Commercials of Olin's Candia UHT Milk, Fruity Juices and Candy Juice; **Exhibit C-166**, Presentation from Memac Ogilvy "Olin status 2006-2007" dated May 22, 2008. The agency's variable fee represented a percentage of Olin's spending on marketing and advertising activities.
[411] Olin's SoC, paras 57, 60; Claimant's Reply, paras 50-53.

- loss of its "first-mover" advantage in the market;[412] and
- strained relations with stakeholders such as lenders, suppliers, and distributors.[413]

440. The Tribunal is unconvinced by Respondent's argument that Olin's relationship with its suppliers, and notably with its distributors, was not impacted by the measures. The Tribunal refers *inter alia* to the letter by Al Majd (Olin's distributor) which was sent contemporaneously to Olin, in which it was stated that they: *"tried many times to contact the Administration to ask about updates regarding the Company products, and plant ability to cover the amounts agreed upon it during the current condition of your plant."*[414]

441. The Tribunal further considers that Olin suffered the following harm after June 2011:

- Inability to obtain a customs clearance to import its new production line from Combibloc resulting in another decrease of its planned investment;
- Inability to repatriate in 2014 the profits Olin had generated in 2010, 2012, and 2013; and inability to access foreign currency in 2015.

442. The Tribunal finnaly considers that Libya's argument according to which the facts from mid-2011 onwards fall outside the scope of this arbitration and that the TOR's scope encompasses only the effects of the Expropriation Order is groundless. The Tribunal refers to paragraph 26 (a) of the TOR and to pages 2 et seq. of the RFA in this regard, which confirm that the scope of this arbitration is not limited to the facts occurring until mid-2011 only.

- **Causal link between Libya's measures and the harm suffered by Olin**

443. The Tribunal has reviewed the evidence submitted by the Claimant in support of the existence of such causal link, and particularly, has considered the following documents:

[412] Hearing Transcript, Day 2, Testimony of Mr Deher: *"We had really wasted our chance by leaving the market more or less open to others by poorly operating our distribution networks. We hadn't done what was necessary, and we had only implemented a small part of the mix that was necessary to succeed."*; see also Claimant's Reply, para 135.
[413] See Olin's SoC, para 61; Claimant's Reply, paras 54-63.
[414] **Exhibit C-158**, Letter from Al Majd (Distributor) to Olin dated 11 November 2006.

1) The witness testimony of Olin's General Manager who explains how Olin had to downscale its operations because of the legal uncertainty created by Libya's measures and how the constant threat of evacuation impacted Olin's relationships with commercial partners, banks and employees, as well as supporting evidence;[415]

2) The witness testimony of Mr Deher from Candia who attests that Olin was forced to delay investments in its production facilities due to the uncertainty caused by the expropriation, as well as supporting evidence;[416]

3) Documentation showing Olin's commercial plans before the expropriation and subsequent correspondence and documentation showing that some distributors stopped working with Olin; as well as evidence that Olin significantly downscaled its advertisement plans after the issuance of the Expropriation Order;[417]

4) Correspondence from Olin to various Libyan administrations explicitly stating that the uncertainty resulting from the expropriation was causing Olin significant harm and preventing it from planning and operating its business efficiently;[418]

5) Documentation showing the loss of preferential terms from suppliers;[419]

6) The performance of competitors in Libya who entered the milk market at around the same time, and that of Candia franchises in comparable markets;[420]

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[415] **CWS-1**, First Witness Statement of Mr Akram Abughamja.
[416] **CWS-2**, Witness Statement of Mr Deher.
[417] **Exhibit C-149,** Email from Sonia Barbaria (Label) to A. Abughamja (Olin) with attachments, dated 24 November 2005; **Exhibit C-167**, Candia Mission Report; **Exhibit C-158**, Letter from Al Majd (Distributor) to Olin dated 6 November 2006; **Exhibit C-166,** Presentation from Memac Ogilvy "Olin status 2006-2007".
[418] **CWS-1**, First Witness Statement of Mr Akram Abughamja, para 25. **Exhibit C-121**, Letter from Olin to the Libyan Foreign Investment Board dated 10 December 2007 (updated translation); **Exhibit C-122**, Letter from Olin to the Libyan Foreign Investment Board dated 8 November 2007; **Exhibit C-41**, Letter from Olin to the General Organization for Housing & Utilities dated 10 January 2008; **Exhibit C-180**, Letter from the LFIB to the Ministry of Economy, Trade and Industry dated 12 November 2007.
[419] **CWS-1**, First Witness Statement of Mr Akram Abughamja, at para 40; **CWS-2**, Witness Statement of Mr Deher at para 32; **Exhibit C-123**, Invoice Tetra Pak No. 290224-03 dated 24 February 2009.
[420] **CWS-2**, Witness Statement of Mr Deher at paras 34-45.

7) Evidence of Olin's inability to import a new production line from Combibloc because of the absence of issuance of the required certificate by Libya;[421]

8) Evidence of Libya's refusal to allow Olin to repatriate profits;[422]

9) Evidence that Libya did not assist Olin in accessing foreign currency;[423]

10) Evidence that Libya reopened court proceedings in 2016 to challenge the decision of the Tripoli Court of Appeal cancelling the Expropriation Order in 2010.[424]

444. The Tribunal is convinced, based on the evidence on record, that Libya's measures contravened the Claimant's full enjoyment of its investment, and foreseeably undermined its ability to perform as well as it could.

445. The Tribunal concludes that the Claimant did establish that Libya's measures have caused an underperformance by Olin, and that the measures are the proximate cause of its underperformance.

446. The Tribunal shall accordingly assess whether the Respondent has proved that the chain of causation established by the Claimant was broken by an external event, by an act of a third party or an act of the Claimant itself.

447. In this regard, the Tribunal has noted the Respondent's argument that Olin never had to relocate its factory and had its license renewed until 2017, meaning that the Expropriation Order had no practical effect on Olin's investment. For the reasons developed in more detail above, the Tribunal does not accept such argument. The Tribunal is indeed convinced that while Olin's factory was spared from physical

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[421] **CWS-1**, Abughamja Witness Statement at para 55; **Exhibit C-128**, Letter from Olin to the LFIB dated 21 May 2013; **Exhibit C-141**, Letter from the LFIB to Olin dated 23 May 2013; **Exhibit C-142**, Letter from Olin to the LFIB dated 11 June 2013; **Exhibit C-143**, Letter from Olin to the LFIB dated 25 June 2013; **Exhibit C-144**, Letter from Combibloc to Olin dated 19 January 2015; **Exhibit C-200**, Combibloc Purchase and Shipping Documents.

[422] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 52; **Exhibit C-129**, Minutes of Olin's Board Meeting dated 18 September 2014; **Exhibit C-130**, Letter from Olin to the LFIB dated 11 January 2015, **Exhibit C-131**, Letter from Olin to the LFIB dated 29 June 2015.

[423] **CWS-1**, First Witness Statement of Mr Akram Abughamja at para 53; **Exhibit C-132**, Letter from Olin to the LFIB dated 22 July 2015; **Exhibit C-145**, Letter from Olin to the LFIB dated 23 August 2015; **Exhibit C-146**, Letter from Olin to the LFIB dated 13 September 2015.

[424] **Exhibit C-164**, Report of Appeal by Cassation filed by Libya's Litigation Department against Olin dated 5 December 2016.

destruction or relocation, Olin was clearly prevented from operating its plant under normal business conditions following the issuance of the Expropriation Order in November 2006 until 15 June 2011 when Olin was able to regain title to the land. Additionally, adverse unlawful measures affected Olin's operations after 2011.

448. The Tribunal has further considered the Respondent's view that the chaos resulting from the Revolution in Libya did have an impact on the investment climate and investors after 2011. The Tribunal considers however that if the Libyan crisis and civil war may have subsequently contributed in affecting the Claimant's business, these events do not solely justify Olin's clear underperformance prior to 2011 when compared to other competitors in Libya which entered the market at around the same time with similar levels of investment.

449. The Tribunal refers for example to the performance of Judi, a local competitor to Olin, which sells UHT milk and juice and has also started its operations in 2006 with similar initial investments than Olin. Between 2006 and 2010, Judi realised EUR 40 million in profits in only five years,[425] and maintained its position until today as a market leader in Libya.[426]

450. As such, the Arbitral Tribunal is of the view that the Libyan crisis cannot be considered as an event that breaks the causal link between Libya's breaches of the BIT and Olin's underperformance after 2011. The Tribunal finds nonetheless that the occurrence of such crisis and its impacts should be taken into account when assessing the damages due to Olin.

451. The Tribunal finally considered Libya's contentions according to which Olin's losses and unsuccessful venture was the result of its inexperience as well as of its own mistakes. According to Libya, this lack of experience was reflected in Olin's strategic errors, notably the purchase of inadequate equipment at the beginning of the investment. The Respondent referred to Mr Deher's Witness Statement where he explains that after the signature of the Franchise Agreement, Candia asked Olin to upgrade its equipment to Tetra Pak machines, and that *"while Olin was not pleased to*

[425] **Exhibits C-188 to C-192.**

[426] See **CER-1**, FTI's First Expert Report at para 3.13.

learn it had to replace machines it had just purchased", Olin agreed to *"purchase a demonstration model"*.[427]

452. The Tribunal however considers that the Claimant's purported inexperience in the field[428] does not justify an inability to maintain a sustainable business, given that Olin had collaborated notably with SOUFFLET GROUP and Candia, which both provided guidance and support to Olin and identified Olin as a company having the potential to successfully conduct its business.[429]

453. Nevertheless, the Tribunal accepts that Olin had a limited production capacity resulting from its too limited investment in machinery and equipment at the beginning of its operations in 2006.

454. In its written Witness Statement, Mr Deher explained how Candia asked Olin to replace two machines it had already bought, as illustrated in the following abstracts:

"In 2005, Olin had decided to build its factory *__with machines from French Actini__* *(for the sterilization part)* *__and from the Italian IPI__* *(for the packaging part). I understand that Actini was acting as an engineer/technical advisor and was supervising the construction of the factory."*[430] (emphasis added).

"__As soon as the Franchise Agreement was signed, we stepped in to redesign the entire factory plan__. We were not convinced by the Actini and IPI machines (as we generally prefer to use machines from Tetra Pak or eventually from Combi-Bloc), and *__we rapidly told Olin that it would have to upgrade its equipment to Tetra Pak machines to sustain a high quality production in the long run__."*[431] (emphasis added).

"While Olin was not pleased to learn that it had to replace machines it had just purchased, it nevertheless confirmed its willingness to build a state-of-the-art factory meeting all of Candia's standards, and therefore accepted to make the investment."[432]

[427] Respondent's SoD at para 122.
[428] See Evidentiary Hearing, Day 2, page 367.
[429] Note for instance the witness testimony of Mr Deher who said during the Hearing that Candia's team as *"confident in the commercial future of Olin"*. See Hearing Transcript, Day 2, page 374.
[430] **CWS-2**, Witness Statement of Mr Deher, at para 14.
[431] **CWS-2**, Witness Statement of Mr Deher, at para 16.
[432] **CWS-2**, Witness Statement of Mr Deher at para 17.

455. Although Olin originally planned to buy two Tetra Pak machines, as a replacement of the Actini and IPI machines, the Tribunal notes that Olin's book accounts show that it ultimately bought only one Tetra Pak machine in 2006, following Candia's redesign of the factory.[433]

456. Yet, one machine alone could not allow Olin to meet its production expectations in the long run. During the Evidentiary Hearing, Mr Deher explained that:

> *"[...] with only one Tetra Pak machine, Olin could not contend with market demand. What was originally planned when we started working with Olin was to* ***invest quickly*** *in two Tetra Pak machines and, after that, to start to program investments after that. If you like, in a franchise which is starting up, we could look at the curve relating to the startup. Once you start, you have to invest one production line, one machine per year to keep up with production demand."*[434] (emphasis added).

457. In its first Witness Statement, Mr Abughamja explained that Olin had only one machine (used for the production of milk and juice) and ultimately bought the second Tetra Pak machine only at the end of 2008:

> *"Because UHT milk cannot be stored more than two months (as it expires after six months), you need to have extra production capacity to face this peak season and take advantage of it. However, once again, we were not able to make these investments in a context where our factory could be destroyed the next day (and our machines completely lost). At the end of 2008, we gave in to Candia's insistence and accepted to purchase a second Tetra Pak machine and a sterilizer."*[435]

458. Furthermore, the Tribunal notes that the second Tetra Pak machine bought at the end of 2008 was a second-hand machine, which did not perform as expected. During the Evidentiary Hearing, Mr Cazier-Darmois from FTI testified that:

> *"Perhaps one thing to bear in mind is that we understand that the second machine that they eventually acquired was a second-hand machine that apparently didn't perform in the way that was expected."* (emphasis added).

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[433] Book accounts of 2007.
[434] Hearing Transcript at page 399.
[435] **CWS-1**, First Witness Statement of Mr Abughamja at para 36.

459. The Tribunal has considered the experts' view that the Claimant's delay in acquiring a second Tetra Pak machine and its decision to purchase a second-hand machine were due to the state of uncertainty in which Olin was operating and its impact on the fate of Olin's investment. At the Evidentiary Hearing, Mr Cazier-Darmois, testified that:

> *[...] the counterfactual scenario is one where we assume the additional investments would have been made. And so the second Tetra Pak machine would have been bought earlier than it actually was, and so that capacity would have been available. And the reason for it, we think, is that, <u>absent the measures, Olin would have invested in these machines, because it wouldn't have been worried of potentially being out of business after that.</u>*[436]

460. The Tribunal understands that the Libyan measures have influenced the business decisions of the Claimant *following the Expropriation Order*, including its decision to invest in new equipment. As such, the Tribunal believes that it is fair and reasonable to assume that Olin would probably not have bought a second-hand machine but for the constant threat of eviction and difficult conditions in which it had to operate.

461. The Tribunal considers, however, that the Claimant cannot impute entire responsibility to Libya for a limited production resulting from its own decision not to buy the required second machine before the end of 2008. This is particularly the case since Candia's redesign of the factory and requirement that two Tetra Pak machines be bought took place before the issuance of the Expropriation Order in 2006.[437]

462. In light of the above, the Tribunal considers Olin's business decision to invest in a sufficient number of machines of adequate quality, did not break the causal link established by the Claimant, but did contribute to cause Olin's underperformance, a factor which will be taken into consideration by the Tribunal when assessing the amount of damages owed to Olin.

<u>2. Libya's wrongful conduct and Olin's cessation of activity in October 2015</u>

463. The Tribunal has carefully considered the Claimant's Answers to the Tribunal's Post-Hearing Questions (submitted on 15 September 2017) as well as its Reply Post-Hearing Brief (submitted on 13 October) in which it has expanded its answer to the Tribunal's

[436] Hearing Transcript at page 451.
[437] **CWS-2**, Witness Statement of Mr Deher at paras 16-17.

first post-hearing question submitted on 14 July 2017, which read as follows: ***"The Parties are invited to further explain and to put into context what triggered Olin's cessation of operations in October 2015."***

464. In response to this question, the Tribunal has noted the Claimant's argument that *"[w]hile Olin was able to continue operating with limited production capacity in 2014 and during the first half of 2015, the definitive coup de grâce to Olin's operations came during the summer of 2015, when the LFIB refused to issue the necessary certificate to allow Olin to obtain foreign currency to import raw materials and equipment."*[438] The Tribunal has further noted Claimant's assertion that *"[w]ithout foreign currency or letters of credit, Olin's Libyan branch could not purchase or import raw materials, and without raw materials, Olin could no longer operate, which led Olin to stop production in October 2015."*[439]

465. The Tribunal, however, remains unconvinced that Olin has identified and proved with sufficient detail (1) the raw materials it needed in order to operate its factory, (2) that it had attempted to acquire such raw materials but could not procure the same due to its lack of access to foreign funds, and (3) that it has exhausted all alternative avenues of sourcing the requisite funds or materials.

466. The Tribunal accepts that Olin's cessation of activities in 2015, originally thought to be temporary, may have been in part due to its inability to access foreign currency in 2015, resulting from Libya's lack of assistance. The Tribunal, however, is not able to conclude with certainty that the lack of access to foreign currency and other measures implemented by Libya are the only cause of Olin's cessation of activities in 2015.

467. The Tribunal acknowledges that Libya's refusal to allow Olin access foreign currency was followed by the LFIB's attempt to liquidate Olin, based on the losses accumulated by Olin since 2007.[440]

[438] Claimant's Answers to the Tribunal's Post-Hearing Questions, para 7.
[439] *Id.*, para 10.
[440] *Id.*

468. The Tribunal further took into consideration Libya's decision not to renew Olin's operational license past April 2017, and its decision to challenge the 2010 decision of the Tripoli Court of Appeal cancelling the Expropriation Order in 2016.[441]

469. The majority of the Tribunal, however, remains unsure of the reason why Olin has stopped operations already in 2015 before the liquidation process and is not satisfied that Libya's post facto non-renewal of the operational license was the root cause of Olin's cessation of activities.

470. The Tribunal concludes that the Claimant has established that Libya's breaches of the Cyprus-Libya BIT at the very least contributed to cause its cessation of activities in 2015, but is not convinced that Libya is responsible alone for this cessation of activities.

ii. The methodology followed by the Tribunal

471. The Tribunal has noted the Claimant's argument that under international law, it is entitled to full compensation for the losses that it has suffered as a result of Libya's measures. Further, the Tribunal has noted Claimant's argument that the Cyprus-Libya BIT establishes a clear hierarchy between international law and domestic law.[442]

472. The Tribunal has reviewed the legal authorities submitted by the Claimant, and refers to the *Chorzow* case,[443] according to which damages shall *"wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"*.[444]

473. The Tribunal has also reviewed the ILC Articles on State Responsibility[445] which require a State *"to make a full reparation for the injury caused by the internationally*

[441] **Exhibit C-164**, Report of Appeal by Cassation filed by Libya's Litigation Department against Olin dated 5 December 2016.

[442] Claimant's Reply to the Tribunal's Post-Hearing Questions, at paras 24-25, citing Article 9.4 of the BIT between Libya and Cyprus which provides:

"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."

[443] **Exhibit CL-89**, *Chorzów* Judgment.

[444] Claimant's SoC at para 121.

[445] **Exhibit CL-48**, ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th sess., sup. No. 10, UN Doc A/56/10 (2001).

wrongful act", covering *"any financially assessable damage including loss of profits insofar as it is established"*.[446]

474. The Tribunal has finally noted the decision in *AALP v. Sri Lanka* which determined that *"the amount of the compensation due has to be calculated in a manner that adequately reflects the full value of the investment lost as a result of said destruction and the damages incurred as a result thereof"*. [447]

475. The Tribunal considers that the DCF method, adopted by the FTI experts in their report, comparing (a) the value to Olin *"of the cash flows that it has generated and will in fact generate given the breaches"* (the "actual scenario") and (b) the value to Olin *"of the cash flows that it would have generated but for Libya's breaches"* (the "but-for scenario"),[448] is the most appropriate method to quantify the amount of damages, since it is the only method which would put Olin *"in the financial position in which it would have found itself in the absence of breach or breaches."*[449]

476. The Tribunal recognises that the application of this method will require some approximations and confirms that it will retain a certain amount of discretion or a 'margin of appreciation' when assessing the damages incurred by Olin.[450] In doing so, the majority of the Tribunal has elected to adopt a conservative approach to the evaluation of damages.

iii. Application of the methodology followed by the Tribunal

477. Having established the causal link between Libya's breaches of the BIT and Olin's underperformance and cessation of activities in 2015, as well as the application of the

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[446] Claimant's SoC at para 121, citing the ILC Articles on State Responsibility, Art. 31(1) *("1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.")*.
[447] Claimant's SoC at para 121, citing **Exhibit CL-90**, *AAPL* Award, at paras 87-88.
[448] **CER-2**, FTI's Second Expert Report at para 2.12.
[449] **CER-1**, FTI's First Expert Report at para 2.11.
[450] See Claimant's Reply, para 145, citing the Tribunal's decision in the *Gold Reserve* Award at para 686: "*...the assessment of damages is often a difficult exercise and it is seldom that damages in an investment situation will be able to be established with scientific certainty. This is because such assessments will usually involve some degree of estimation and the weighing of competing (but equally legitimate) facts, valuation methods and opinions, which does not of itself mean that the burden of proof has not been satisfied. Because of this element of imprecision, it is accepted that tribunals retain a certain amount of discretion or a 'margin of appreciation' when assessing damages, which will necessarily involve some approximation . . . the tribunal exercises its judgment in a reasoned manner so as to discern an appropriate damages sum which results in compensation to Claimant in accordance with the principles of international law that have been discussed earlier.*"

DCF method for the quantification of damages, the Tribunal turns to its analysis on quantum.

478. The Tribunal will start by assessing the existence of past and future losses (1) before drawing its conclusions regarding the evaluation of the losses sustained by Olin (2) and on the compensation due (3).

1. Past and future losses

479. As underlined in the recital above, the FTI experts calculated Olin's damages by adding Olin's past and future losses. Applying a lost profits approach, the experts calculated Olin's damages as but-for profits less actual profits before and after Olin's definitive cessation of activities in 2017.

480. The experts define past losses as follows:

We refer to losses incurred by Olin Holdings between November 2006 and 31 December 2016 as Olin Holdings' "Past Losses". Olin Holdings' Past Losses correspond to the difference between Olin's cash flows in the But For Scenario (i.e. without the Measures) and Olin's actual cash flows (i.e. the cash flows actually generated by Olin).[451] (emphasis added).

481. The experts explain the reason for which future losses are comparable in addition to past losses as follows:

Although title to the land was eventually transferred back to Olin on 15 June 2011, Olin was unable to retrieve by 2016 the market share that it would have had but for the Measures. Furthermore, we understand that additional adverse unlawful measures (namely the non-renewal of Olin's operating licences and a refusal to grant Olin access to foreign currency) affected Olin's operations in 2015 and 2016. We understand that these further measures prevented Olin from operating at all from October 2015 onwards.

The Measures therefore not only affected Olin's performance until today, they will have effects in the future, the ("Future Losses"), which we also quantify."[452] (emphasis added).

[451] **CER-1**, FTI's First Expert Report at para 2.15.
[452] *Id.* at paras 2.22 and 2.23.

482. The experts have further assumed in their first report *"that Olin's actual performance will converge with that of the But For Scenario within 10 years, such that Olin will not incur any damages past year 2026"*. This assumption was modified in FTI's second report, drafted under the alternative assumption that Olin will cease its operations at the end of the first quarter of 2017 and therefore that Olin's losses extend after 2026.[453]

483. The Tribunal acknowledges the fact that the value of Olin's losses cannot be determined with absolute certainty and that a certain degree of discretion as well as the use of assumptions will be necessary to reach a result that is as close as possible to a full reparation of Olin's harm. The Tribunal is however not prepared to award damages whose amount cannot be established with a reasonable degree of certainty.

484. The Tribunal notes that the Expropriation Order was issued when Olin was just starting its operations. Therefore, the Tribunal has no means of reliably assessing Olin's actual performance in the absence of measures affecting its activities.

485. Nevertheless, the Tribunal considers that the Claimant has proved that it was operating based on a Franchise Agreement with Candia, which contributed to the design of its factory and that the Olin factory was built and was ready to operate by the end of 2006.[454] As such, the Tribunal finds that the damages sustained by Olin during the period running from November 2006 to December 2016 (or past losses) can be assessed with a reasonable degree of certainty by comparing Olin's performance to the performance of other Candia franchisees in similar markets, as well as those of competitors during the same period in Libya.

486. The majority of the Tribunal, however, approaches the experts' conclusions on future losses with much more reluctance. Indeed, not only are such damages aimed at compensating the Claimant for a work it has never undertaken, but they also assume that Olin would have worked for at least ten additional years and would need to be compensated accordingly. While the Claimant's witnesses stated during the Evidentiary Hearing that the Franchise Agreement with Candia was renewed,[455] the majority of the

[453] **CER-2**, FTI's Second Expert Report at para 3.2.
[454] **CWS-1**, Witness Statement of Mr Abughamja at para 18; **CWS-2**, Witness Statement of Mr Deher at para 22. This fact is not contested by the Respondent (See Hearing Transcript, Day 1, page 202).
[455] Hearing Transcript, Day 2, at pages 299 and 407.

Tribunal notes that Claimant has not submitted any document confirming said renewal under the same terms.

487. Moreover, the FTI experts note that one "*difficulty that arises in estimating Olin Holdings' Future Losses is how to estimate the future size of the Libyan milk and juice markets*"[456] and that "*the future size of the milk and juice market will therefore largely depend on the pace and extent of the recovery of the Libyan economy*". [457] In this context, the experts accepted that "*there is considerable uncertainty over future developments in Libya*"[458] and have accordingly "*relied on the latest forecasts from the International Monetary Fund ("IMF") to predict these developments*".[459] The experts have then discounted Olin's estimated future losses at a rate of approximately 15% to account for the risks associated with the future development of the Libyan economy. The majority of the Tribunal is however not persuaded that such discounting will adequately remove or eliminate the uncertainty that is inherent with such assessment of future damages.

488. Finally, the majority of the Tribunal further believes that the Claimant has not proved with reasonable certainty the extent of Libya's responsibility for its cessation of activities in 2015.

489. The majority of the Tribunal is therefore not convinced that the Claimant has satisfied its burden of proof with regard to the amount of its future losses with a reasonable degree of certainty.

490. The Tribunal therefore determines that the Claimant shall be awarded compensation for past losses and not for future losses.

<u>2. Evaluation of Olin's losses</u>

491. The Tribunal has noted the FTI experts' view that where a Candia franchisee entered a market first, "*Candia generally became the leading brand with a market share greater than 50%*" and that "*[i]n Algeria, a market closely comparable to Libya, Candia's*

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[456] **CER-1**, FTI's First Expert Report at para 2.25 *et seq.*
[457] *Ibid.*
[458] *Ibid.*
[459] *Ibid.*

franchisee gained more than 80%" of the domestic UHT milk market in a few years,[460] which suggests that *"a competent first entrant to the Libyan UHT market could have achieved a very substantial share of that market"*.[461] The Tribunal has examined the past losses incurred by Olin in the 50% Market Share Scenario and in the Algerian Market Share Scenario.

492. Having examined the expert evidence on record, the Tribunal is not convinced that the Algerian franchise should be used as a benchmark.

493. The Tribunal believes not only that Libya and Algeria are originally very different markets, but also that the 2011 Libyan revolution additionally influenced the market in Libya. The Tribunal acknowledges the fact that the experts took into consideration the consequences of the crisis in Libya on the Libyan economy while evaluating Olin's losses, mainly by adjusting the *patterns of growth of the milk and juice markets*.[462] However, the experts do not appear to have taken into consideration the impact of the revolution on *Olin's position in the market*. The Tribunal is of the view that there is uncertainty as to whether an international brand such as Candia would have reached an 80% market share given the context of revolution in Libya.

494. The Tribunal has also reviewed Olin's 2003 Feasibility Study for a milk factory in Libya (the "**Initial Feasibility Study**"). The Tribunal has noted that the margin estimate in the Initial Feasibility Study (approximately 16% on average between 2003 and 2008[463]) is significantly higher than in the 50% Market Share Scenario and in the Algerian Market Share Scenario, in which the estimate is on average 4.1% in the 50% Market Share Scenario over the first ten years of operation and 4.9% in the Algerian Market Share Scenario.[464] The Tribunal has also reviewed the 2007 Candia Business Plan, submitted to the Tribunal on 18 August 2017, whose estimates also are more ambitious than the FTI experts' estimates. The Tribunal considers that these studies, although useful to understanding Olin's original business plans, cannot be used as a reliable benchmark, given that they do not take into consideration the context in which Olin was subsequently operating.

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460 **CER-1**, FTI's First Expert Report at para 2.16.
461 *Id.* at para 2.17.
462 *Id.* at paras 2.25, 3.19, 3.22, 6.16, 6.17.
463 *Id.* para 1.10.
464 Experts' Response to the Tribunal's Post-Hearing Questions, para 1.12.

495. Moreover, as mentioned above, knowing that the 2006 Expropriation Order was notified to Olin in November 2006, when Olin was just starting its operations, there is no evidence of Olin's actual performance in the absence of State measures affecting its activities. This means that the experts' determinations with regard to the production of milk in the "but for" scenario are mere projections as to the performance of Olin based on that of other franchisees in comparable markets.

496. The Tribunal considers that the bar against speculative damages prompts the adoption of a conservative approach to the calculation of damages in these circumstances.

497. Based on the foregoing and considering that in none of the countries where a Candia franchisee entered the market first did the local franchisee gain less than a 50% market share, the Tribunal accepts that the **50% Market Share** approach be considered in the sections below as a benchmark for the Tribunal's assessment of Olin's performance but for Libya's breaches of the BIT.

498. In its First Expert Report, FTI estimated that Olin suffered past losses of LYD 35.1 million in total over the period 2006-2016, in the **50% Market Share Scenario**. After interest is added at the Libyan deposit rate, the experts estimated Olin's past losses at LYD 37.4 million, which equates to **EUR 24. 3 million** (converted at the average of the official EUR LYD exchange rate in 2016). In its Second Expert Report, FTI estimated that Olin suffered past losses of LYD 43 million, which equates to **EUR 27. 8 million** (converted at the average of the official EUR LYD exchange rate in 2016). The experts justify this increase mainly by the fact that Olin repaid its suppliers at a faster pace than anticipated in earlier projections, concluding that they have updated their analysis to reflect this point. This in turn resulted in lower cash flows in the Actual Scenario in 2016 than originally predicted, and therefore slightly higher losses. The experts draw these conclusions from a draft financial statement provided under **Exhibit FTI-43**, which does not appear to have been audited.[465] The Tribunal does not consider that the draft financial statement submitted by the Claimant is sufficiently reliable evidence to justify an increase of EUR 3.5 million in the claimed amount. The Tribunal

[465] The Claimant has submitted one sheet of paper entitled "Draft Balance Sheet as of 31 December 2016" as opposed to Financial Statements with Accountant Report for previous periods of time.

will therefore retain the amount of EUR 24.3 million as a basis for the compensation of Olin's past losses.

499. The majority of the Tribunal however is not prepared to accept such an assessment of past losses to face value given the assumptions contained in the experts' reports and the variables between the actual investment conditions and the reference scenarios adoped by the experts. Indeed, the majority considers that the experts have not fully considered the risk factor associated notably with the Libyan Revolution and with the Claimant's specific situation. The majority of the Tribunal thus believes that the experts' valuation should be subject to abatement for the reasons developed below:

a) As stated above at **paragraph 493**, the experts' reports purported to take into consideration the consequences of the crisis in Libya on the Libyan economy when evaluating Olin's losses, mainly by adjusting the *patterns of growth of the milk and juice markets*.[466] The experts however proceeded as such without considering the effect of such crisis on Olin's *position* in the Libyan market. The Tribunal is not convinced that Olin's increase in market share would have continued to follow the same pattern following the Libyan revolution.

b) The 50 % Market Share Scenario assumes that the second machine bought by Olin late in 2008 would have come on line at an earlier point in time but for Libya's measures, thereby increasing Olin's production and sales capabilities. The evidence on record does not support however, the assumption that such delay in buying appropriate machinery is solely due to the adverse effect of Libya's measures.[467] Indeed, for the reasons outlined in its analysis on causality above, the Tribunal is not convinced that but for Libyan's measures, Olin would have bought all the appropriate equipment on time, which means that the difference between its profits in the "but for" scenario and its profits in the actual scenario would be necessarily lower than what the experts accounted for in their reports (**see above paragraph 498**).

c) Regarding the production of juice, the 50 % Market Share Scenario does not rely on comparable data in other markets but rather assumes that a linear

[466] **CER-1**, FTI's First Expert Report at paras 2.25, 3.19, 3.22, 6.16, 6.17.
[467] See explanations at paras 150 to 159 above.

correlation exists between the sales of milk and juice in the Libyan market. The experts noted that between 2008 and 2015, Olin sold approximately 0.8 liters of juice for every liter of milk. The experts then applied this percentage to the estimated yearly sales of milk to derive the estimated volume of juice sales. In doing so, the experts assumed that there would be a correlation between the increase in Olin's milk market share over the years with the increase of its juice market share. The Tribunal is not persuaded however that Olin's revenues from juice would have grown as fast as its revenues from milk if Olin had managed to gain a greater market share.

d) Finally, having examined the evidence on record, and notably the Minutes of the Meeting organised between Candia and Olin on 18 July 2007, the Tribunal understands that Olin expected to reach a capacity of 80,000 million liters per year in the "medium term". [468] Given that the Franchise Agreement between Olin and Candia was originally of a duration of ten (10) years, the Tribunal considers that the "medium term" would logically refer to around five (5) years of operations, or to between four (4) and six (6) years of operation in a broader sense. In spite of this fact, the experts estimate that in the 50% Market Share Scenario, Olin would have reached a capacity of 80,000,000 liters in 2011 after four (4) years of activity; a capacity of 100,000,000 liters in 2012 after five (5) years of activity and a capacity of 100,000,000 liters in 2013 after six (6) years of activity.[469] Therefore, considering that the "medium term" would be reached between four and six years of activity, the experts estimated that Olin would have a capacity of 93,333,333 liters on average during those years, a capacity which is higher than Olin's own expectations in 2007, although Olin was operating without the specter of the Libyan civil war at the time.

500. For the reasons outlined in **paragraph 499** above, the majority of the Tribunal concludes that, on balance, the amount of past losses as assessed in the 50% Market Share Scenario, exceeds the amount of losses actually suffered.

[468] **CER-1**, FTI's First Expert Report at para 4.11; **Exhibit FTI-32** to **CER-1**, Meeting minutes Candia and Olin, July 2007. See also **CWS-2**, Mr Deher's Witness Statement, para 26.
[469] Appendix 1 – Assessment of Olin Holding's losses, submitted with the experts' response to the Tribunal Post-Hearing Questions on 11 August 2017.

501. In particular, the majority of the Tribunal has given due regard to the following data when exercising its discretion to determine the level of abatement:

a) Olin's revenues in the But For Scenario as set out in Table 5-1 of FTI's report of 7 October 2016.[470]

b) Olin's net profit margin in the 50 % Market Share Scenario as set out in Table 2 of FTI's letter of 11 August 2017.[471]

c) Olin's milk market share projections in the 50 % Market Share Scenario as set out in the excel file titled "Appendix 1 – Assessment of Olin Holdings losses", sheet "But For Production".[472]

d) Olin's actual milk and juice sales, cash flows and production capacity as set out in the excel file titled "Appendix 1 – Assessment of Olin Holdings losses", sheets "Act_cash flows" and "Act_Sales".[473]

e) Actual currency exchange rates as set out in the excel file titled "Appendix 1 – Assessment of Olin Holdings losses", sheets "Exchange Rates".[474]

502. As a consequence, the majority of the Tribunal, considers that the experts' assessment of Olin's past losses (as set out at **paragraph 498** above) should be subject to an abatement. The majority of the Tribunal has weighted the impact of Libyan's measures against the contributing factors listed in **paragraphs 499 and 501** and applying its discretion in the evaluation of damages,[475] considers that a 25 % abatement (equivalent to 6.075 million euros) is an adequate, appropriate and reasonable level of abatement that would negate the impact of the foregoing issues.

iv. Conclusions on the amount of damages due

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[470] **CER-1**, FTI's First Expert Report at para 5.15.
[471] FTI Experts' response to the Tribunal Post-Hearing Questions, Letter of 11 August 2017, para 1.12.
[472] Appendix 1 – Assessment of Olin Holding's losses, submitted with the experts' response to the Tribunal Post-Hearing Questions on 11 August 2017.
[473] *Ibid.*
[474] *Ibid.*
[475] See footnote 466 above: In *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, cited by the Claimant, the arbitral tribunal describes arbitrators' discretionary power in the evaluation of damages as well as the reasons behind such discretion at para 686.

503. The majority of the Tribunal, applying a 25% abatement to the sum of **EUR 24.3 million**, concludes that the Claimant should be awarded **EUR 18.225 million** in compensation for the losses it incurred between 2006 and 2016 as a result of Libya's measures.

13. ISSUE NO. 5: DID OLIN BREACH ANY OBLIGATION(S) UNDER THE CYPRUS-LIBYA BIT? HOW SHOULD THE TRIBUNAL COMPENSATE FOR LIBYA'S LOSS, IF ANY?

A) Summary of the Parties' Positions

i. The Respondent

504. The Respondent submitted a counterclaim in its SoD and in its Rejoinder.

505. According to the Respondent, the Claimant abusively:

- *"[Claims a] direct/indirect expropriation and more generally mistreatment from the Libyan authorities;*
- *Alleges that its financial difficulties encountered from 2006 are imputable to the host State;*
- *Tries to assimilate two different periods in order to prevail from the alleged negative effect of the Expropriation Orders of 2006 until now;*
- *Prevails from a "solicitation of bribe", and the latter is not supported by any valid proof;*
- *Presents questionable accounts to support its claim of condemnation of the host State."*[476]

506. The Respondent expressed its suspicion that Olin is trying to *"obtain an unduly huge amount of money for alleged violation of its obligations, and that it would then take advantage of this payment to resume its operation as soon as the situation in Libya will be back to normal"*.[477]

[476] Respondent's Rejoinder at para 225.
[477] *Id.* at para 228.

507. The Respondent concluded that the condemnation of the Claimant to pay a sum of USD 10,000,000 in compensation for Olin's behavior and for the reputational damage caused to the Libyan State's institutions is well grounded.[478] In its Rejoinder, the Respondent reduced the amount of its claim to USD 2,000,000.[479]

ii. The Claimant

508. According to the Claimant, Libya's counterclaim is frivolous and should be summarily dismissed by the Tribunal,[480] underlining that the *"lack of seriousness of Libya's vague allegations is evident"*.[481]

509. The Claimant contends first that there is no legal basis for Libya's counterclaim. To Claimant's knowledge, no State has ever succeeded in asserting a counterclaim in an investor-State treaty arbitration.[482]

510. Second, the Claimant says that the counterclaim is substantially the same counterclaim that the Tribunal has rejected during the jurisdictional phase.[483]

511. Third, the Claimant views Libya's counterclaim as a mere denial of liability and as constituting a repetition of its defense rather than a real counterclaim.[484]

512. Fourth, Libya's assertion that Olin's claim is *"abusive and unfounded"* and defamatory has no merits whatsoever. According to the Claimant, the facts it alleges are thoroughly demonstrated and supported by evidence.[485] In addition, the Claimant considers that the Respondent *"fails to rebut any these facts"*.[486]

513. Finally, according to the Claimant, Libya in its counterclaim (i) asserts no specific or clear claim, (ii) points to no international obligation violated by Olin and provides no facts to substantiate a breach, (iii) fails to prove that Libya has suffered any type of injury and (iv) fails to particularize the claim.[487]

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[478] *Id.* at para 229.
[479] *Id.* at para 275.
[480] Claimant's Reply at para 165.
[481] *Id.* at para 166. Claimant's Rejoinder on Respondent's Counterclaim at para 4.
[482] *Id.* at para 167.
[483] *Id.* at para 168.
[484] *Id.* at para 169.
[485] Claimant's Rejoinder on Respondent's Counterclaim at paras 5-11.
[486] *Id.* at para 8.
[487] Claimant's Reply at para 170. Claimant's Rejoinder on Respondent's Counterclaim at para 12.

B) The Arbitral Tribunal's Analysis and Decision

514. The Tribunal has carefully considered the arguments put forward by the Respondent in support of its counterclaim, as well as the Claimant's position.

515. The Tribunal however considers that the Respondent's allegations are not substantiated by evidence.

516. The Tribunal further refers to its assessment of Libya's breaches of Articles 2.2, 3 and 7 of the Cyprus-Libya BIT and concludes that the Respondent's counterclaim is not justified, thereby warranting its dismissal.

14. INTEREST

A) Summary of the Parties' Positions

i. The Claimant

517. In its SoC, the Claimant sought post-award interest on all of the amounts claimed *"at the commercial rate of interest applicable in Cyprus, compounded quarterly, until Libya pays in full."*[488]

518. In its Reply, Olin maintained its *"request for post-award interest on all amounts awarded, at the commercial rate of interest applicable in Cyprus, compounded quarterly, until Libya pays the award in full."* The Claimant added that Olin's request is consistent with international law and investment treaty practice, which recognizes that compound interest is the generally-accepted standard in treaty arbitrations.[489]

[488] Claimant's SOC, para 142.

[489] Claimant's Reply, para 164. Reference is made to **Exhibit CL-104**, *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, 15 ICSID Rev.–Foreign Inv. L.J. 169 (2000) para 104 *("[W]here an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect [...] the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest [...] [Compound interest] is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.* "); **Exhibit CL-91**, *Wena Hotels v. Egypt* Award at para 129 ("*[A]n award of compound (as opposed to simple) interest is generally appropriate in most modern, commercial arbitrations [...] [A]lmost all financing and investment vehicles involve compound interest. [...] If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest.* "); **Exhibit CL-74**, *Vivendi I* Award at para 9.2.6 ("*a number of international tribunals have recently expressed the view that compound interest should be available as a matter of course if economic reality requires such an award to place the claimant in the position it would have been in had it never been injured.* "); **Exhibit CL-20**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No.

519. In its Post-Hearing Brief, the Claimant further discussed the law governing the award of interest and the basis for its interest request at the commercial rate applicable in Cyprus.

520. The Claimant noted, for instance, that the Cyprus-Libya BIT was silent on the question of interest and therefore that international law should apply.

521. The Claimant went on to underline the arbitral tribunal's "*discretion to grant interest on any amount of money they award*".[490]

522. The Claimant cited the decision in *Santa Elena v. Costa Rica,* according to which "*the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness which must form part of the law to be applied by this Tribunal*".[491] The Claimant concluded that "*the guiding principle for the Tribunal, therefore, is to impose an interest rate that takes into account all circumstances and achieves the result of full reparation.*"[492]

523. The Claimant further explained that in Olin's case, "*the commercial rate of interest applicable in Cyprus is the interest rate that will make Olin whole*", since it "*represents Olin's cost of borrowing this same sum from Cypriot banks*", underlining that this interest rate is currently of 5%.[493]

ii. The Respondent

524. In its Post-Hearing Brief, the Respondent contested the use of the interest rate applicable in Cyprus. According to the Respondent, Olin invested in Libya based on the Libyan Investment Law, the investor's project is located in Libya and Olin was

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ARB/99/6, Award, 12 April 2002 at para 174 *("interest is an integral part of the compensation due [...] and [...] compound (as opposed to simple) interest is at present deemed appropriate as the standard of international law in such expropriation cases.")*; **Exhibit CL-105**, *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, para 103 *("In addition, the Tribunal is of the opinion that compound interest would better compensate the Claimants for the actual damages suffered since it better reflects contemporary financial practice")*; **Exhibit CL-8**, *ADC* Award at para 522 (*"As to post-Award interest, contrary to Respondent's submission, the current trend in investor-State arbitration is to award compound interest."*).

[490] Claimant's Reply to the Tribunal's Post-Hearing Questions at para 44.

[491] **Exhibit CL-104**, *Santa Elena v. Costa Rica* at para 103.

[492] Claimant's Reply to the Tribunal's Post-Hearing Questions at para 45.

[493] *Id.* at para 46.

subject to Libyan laws and regulations. The Respondent therefore concluded that the law applicable to interest was indisputably Libyan law.[494]

525. The Respondent also argued in its Post-Hearing Brief that Article 235 of the Libyan Civil Code expressly excludes compound interest in the following terms:

Subject to any commercial rules or practice to the contrary, interest does not run on outstanding interest and in no case shall the total interest that the creditor may collect exceed the amount of the capital.

iii. Parties' Rebuttal Arguments

526. In its Reply Post-Hearing Brief, the Claimant noted the Parties' disagreement on the law applicable to the question of post-award interest.[495] The Claimant argued that Libya did not cite any supporting authority or put forward any analysis in support of its assertion that the applicable law to interests is the Libyan law. The Claimant concluded that *"[w]hile Olin wholly rejects the application of Libyan law, it notes, however, that the commercial interest rate in Libya is also 5%"*,[496] and therefore that *"while the Parties disagree on the law applicable to post-award interest, they are nevertheless in agreement regarding the applicable rate of post-award interest"*.[497]

527. The Claimant further addressed in its Reply Post-Hearing Brief the Respondent's position on whether any interest awarded should be compounded.[498] The Claimant argues that the Respondent's assertion that Libyan law forbids the award of compounded interest is incorrect. It maintained that Libyan law allows the award of compounded interest whenever there is a commercial practice to that effect.[499]

528. The Claimant concluded on this issue that Olin's request for post-award interest at 5%, compounded quarterly, is wholly consistent both with Libyan law and with investment treaty practice.

[494] Respondent's Reply to the Tribunal's Post-Hearing Questions at para 112.
[495] Claimant's Reply Post-Hearing Brief at para 52.
[496] *Id.*
[497] *Id.*
[498] *Id.* at para 53.
[499] The Claimant refers to Article 235 of the Libyan Civil Code.

529. The Respondent did not deal with the question of interest in its Reply Post-Hearing Brief dated 15 September 2017.

B) Arbitral Tribunal's Analysis and Decision

530. The Tribunal refers to Article 9.4 of the Cyprus-Libya BIT (See Article 9 of the Cyprus-Libya BIT on the *"Settlement of Disputes between one of the Contracting Parties and Investors of the Other Party"*) according to which:

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.

531. The Tribunal further refers to Article 38.1 of the ILC Articles on State Responsibility, formulating the basic rules of international law concerning the responsibility of States for their internationally wrongful acts, according to which:

Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

532. The Tribunal has noted the Parties' positions in relation to the rate of interest, and considers that the five percent (5%) commercial rate of interest applicable in Cyprus would achieve the result of ensuring full compensation pursuant to the ILC Articles on State Responsibility for the following reasons:

(1) The Tribunal acknowledges that neither the Cyprus-Libya BIT nor international law more generally prompts the Tribunal to award interest based on the commercial rate of interest applicable in Libya;

(2) The Tribunal recognizes that Olin is a Cypriot company and the interest rate applicable in Cyprus represents Olin's cost of borrowing this same sum from Cypriot banks and that as such, awarding interests at the commercial rate applicable in Cyprus would enable the Claimant to achieve the result of full reparation.

533. Regarding the Claimant's request for compound interest, the Tribunal further determines that in this specific instance, where interests have already been accounted in the amount of compensation calculated by the Claimant's experts and awarded by the Tribunal for the past losses incurred by the Claimant, simple interest would enable the Claimant to achieve the result of full compensation.

534. For the reasons stated above, the Tribunal hereby decides that simple interest at the rate of 5%, shall be paid by the Respondent on the amount of **EUR 18.225** million awarded by the Tribunal, starting from the date at which this Award is signed, until full and final payment.

15. COSTS, ATTORNEY'S FEES AND EXPENSES

A) Summary of the Parties' Positions

i. The Claimant

1. Legal costs

535. In its Costs Submission of 23 October 2017 ("**Claimant's Costs Submission**"), the Claimant claimed **EUR 1,317,106.20** in fees and **EUR 94,345.71** in expenses incurred by Olin up to the date of its submission, on an aggregate basis.

536. The Claimant submitted a table detailing its fees and expenses which is reproduced below:

Entity	Fees	Expenses
Olin Holdings Ltd.	N/A	EUR 34,147.42
King & Spalding International LLP	EUR 775,000	EUR 43,624.95
Fasken Martineau	EUR 260,000	EUR 8,819.35
FTI	EUR 192,106.20	EUR 326.97
Fairlinks	EUR 90,000	EUR 7,427.02
Total	**EUR 1,317,106.20**	**EUR 94,345.71**

537. On 5 December 2017, the Claimant requested the Tribunal to take into account that the total amount of fees paid by Olin to FTI is of EUR 206 904.55 instead of EUR 192,106.20, bringing the total amount of fees paid by Olin in relation to these proceedings to **EUR 1,331,904.55** instead of EUR 1,317,106.20.

2. Arbitration costs

538. In its Costs Submission, the Claimant confirmed that it had paid entirely the ICC's administrative fees and the fees and expenses of the Arbitral Tribunal which amount to **USD 735,000**, subject to readjustment at a later stage.[500] In an email correspondence dated 5 December 2017, the Claimant requested the Tribunal to take into account an additional payment of USD 85,000 made to the ICC, resulting in a total amount of **USD 820,000** paid by the Claimant for the ICC administrative fees and the fees and expenses of the Tribunal.[501]

3. Relief sought

539. The Claimant sought *"an award to Olin for all costs associated with these proceeding, including attorneys' fees and the fees of the ICC, Tribunal, and experts"*.[502]

ii. The Respondent

1. Legal costs

540. In its Costs Submission of 13 October 2017 (**Respondent's Costs Submission**), the Respondent argues that "because of the current circumstances in Libya, the Respondent's Counsels *"have decided to calculate their fees and costs on a fixed basis for all their diligences since the beginning of the arbitral proceeding initiated by Olin Holdings Ltd against the Libyan State on July 3, 2014"*.

541. The Respondent therefore claimed the sum of **EUR 200,000** for its legal costs and expenses, covering the following:

1. Respondent's counsel participation in the Preliminary Meeting held in Paris on 29 June 2015, during which the Arbitral Tribunal and the Parties discussed, reviewed and agreed on the Procedural Rules and procedural timetable and signed the TOR;

[500] See Claimant's Costs Submission at footnote 4.
[501] Claimant's email correspondence of 5 December 2017 and Letter of the ICC Secretariat dated 28 December 2017, acknowledging receipt of USD 85,000 from the Claimant and confirming that the advance on costs readjusted and fixed by the Court at USD 825,000 had been entirely paid by the Claimant.
[502] Claimant's SoC at para 142.

2. Respondent's statements submitted during the first phase limited to the issue of Jurisdiction;

3. Respondent's statements submitted during the second phase relating to the merits;

4. Respondent's counsel participation in the Hearing held in Paris on July 2017

5. Respondent's Post-Hearing Briefs.[503]

2. Relief Sought

542. The Respondent further requested *"the condemnation of the Claimant to support all the costs and fees incurred by the parties because of the proceedings."*[504]

B) Arbitral Tribunal's Analysis and Decision

i. The ICC Rules

543. This arbitration is conducted in accordance with the ICC Rules. The matter of the determination and the allocation of costs is addressed in Article 37 of the ICC Rules:

1. *The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.*

2. *The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case.*

3. *At any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment.*

4. *The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.*

5. *In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.*

[503] Respondent's Costs Submission, points 1 to 5.
[504] Respondent's SoD at para 224.

544. Accordingly, pursuant to Article 37(4) of the ICC Rules the allocation of arbitration costs and legal fees is a matter which falls fully within the discretion of the Arbitral Tribunal.

545. Based on Article 37 of the ICC Rules, the arbitration costs *stricto sensu* (which correspond to category (1) above) are fixed by the ICC Court. In contrast, the ICC Rules do not provide detailed rules or guidelines with regard to the Parties' legal fees and rather provide that such legal fees must be "*reasonable*".

546. With regard to the allocation of these costs, the ICC Rules do not provide for any specific allocation test but rather leave matters of allocation to the broad discretion of the Arbitral Tribunal, which may take into account all the relevant circumstances of the case.

ii. ICC Costs

547. The Arbitral Tribunal finds it equitable that the Respondent be ordered to pay the Claimant the total costs of the arbitration fixed by the ICC, including the amounts awarded to the Claimant in the Partial Award on Costs, in view of the fact that the Claimant was left with no alternative but to initiate the present arbitration proceedings in order to recover the damages suffered as a result of the Respondent's breaches of the BIT.

548. In a letter dated 15 May 2018, the ICC Secretariat informed the Parties and the Tribunal that the total costs of arbitration fixed by the ICC Court on 14 May 2018 amounted to USD 773,000, with a reimbursement of **USD 47,000** made to the Claimant. Accordingly, the Tribunal considers that the Respondent shall pay the Claimant the amount of **USD 773,000**.

iii. Legal Costs and Expenses

549. The Tribunal has reviewed the Parties' legal costs and expenses which it finds reasonable.

550. In light of the fact that the Claimant was successful on the merits but only partially successful on quantum, the Tribunal considers that the Claimant should be awarded 75% of its legal costs and expenses (amounting to **EUR 1,426,250.26**), i.e. **EUR 1,069,687.7**, with the Respondent bearing its own legal costs.

16. OPERATIVE PART/THE DECISION OF THE TRIBUNAL

551. Based on the foregoing, having carefully reviewed all the written and oral submissions made by the Parties in respect of the dispute between them as detailed in this Final Award, the Arbitral Tribunal hereby **declares that**:

a) The Respondent has breached:

1. Its obligations under Article 2(2) of the Cyprus-Libya BIT not to impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, expansion, or sale of Olin's investments; and to extend fair and equitable treatment to Olin's investments;

2. Its obligation under Article 3 of the Cyprus-Libya BIT to treat Olin's investments no less favourably than it treats the investments of Libyan nationals; and

3. Its obligations under Article 7 of the Cyprus-Libya BIT not to expropriate Olin's investments, directly or indirectly, except for a public interest, in accordance with due process of law, on a non-discriminatory basis, and against payment of prompt, adequate, and effective compensation.

b) The Respondent's Counterclaim is dismissed.

552. Based on the above, the Arbitral Tribunal orders that the Respondent pay the Claimant:

a) The amount of **EUR 18,225,000** as compensation for the losses suffered by Olin as a result of Libya's breaches of the Cyprus-Libya BIT;

b) The amount of **USD 773,000** in respect of the ICC costs of arbitration, including the amount awarded to the Claimant in the Partial Award on Costs;

c) The amount of **EUR 1,069,687.7** representing seventy-five percent (75 %) of the Claimant's legal costs and expenses;

d) Simple interests on all of the foregoing amounts at the commercial rate of five percent (5%) *per annum* as applicable in Cyprus, from the date of signature of this Final Award until full payment.

553. The Arbitral Tribunal rejects all other requests, claims or counterclaims submitted by the Parties.

Date: 25 May 2018

Place of Arbitration: Paris, France

For the Arbitral Tribunal:

Roland Ziadé
Co-arbitrator

Ibrahim Fadlallah
Co-arbitrator

Nayla Comair-Obeid
President