

**IN THE MATTER OF AN ARBITRATION
UNDER THE 2013 UNCITRAL ARBITRATION RULES
PCA 2021-15**

BETWEEN

**Beijing Everyway Traffic & Lighting Tech. Co., Ltd
(the “Claimant”)**

v.

**The Government of the Republic of Ghana
(the “Respondent”)**

(Together, the Respondent and the Claimant, the “Parties”)

**FINAL AWARD ON JURISDICTION
(SAVE AS TO COSTS)
30 January 2023**

Arbitral Tribunal

Mr V.K. Rajah SC, Arbitrator

Professor Richard Oppong, Arbitrator

Professor Stavros Brekoulakis, Presiding Arbitrator

Administrative Secretary to the Arbitral Tribunal

Ms Mihaela Apostol

ABBREVIATIONS/ DEFINED TERMS

Procedural Matters, Treaties, Rules, etc.

BIT(s)	Bilateral investment treatie(s)
China-Ghana Agreement or the Treaty	Agreement between the Government of the People's Republic of China and the Government of the Republic of Ghana Concerning the Encouragement and Reciprocal Protection of Investments concluded on 12 October 1989
CMC	Case Management Conference that took place remotely (or “virtually”) on 24 February 2022
Hearing	Hearing on Jurisdictional Objection that took place remotely (by agreement of the Parties) on 22 March 2022
LCIA Arbitration	Arbitration proceedings initiated on 17 May 2021 by the Claimant under the Rules of the London Court of International Arbitration based on Sub-Clause 20.8 of the General Conditions of the EPIC Contract
MFN Clause	Most Favoured Nation clause contained in Article 3(2) of the Treaty
PCA	Permanent Court of Arbitration
Rules	2013 UNCITRAL Arbitration Rules
Treaty Arbitration	Arbitration proceedings initiated by the Claimant on 10 February 2021 based on the Treaty
Umbrella Clause	Respondent's obligation to observe any obligation it has entered into with regard to investments made by foreign investors
VCLT	Vienna Convention on the Law of Treaties of 1969

Parties, Counsel, Tribunal, factual background

Arbitral Tribunal or Tribunal	Mr V.K. Rajah SC, Arbitrator Professor Richard Oppong, Arbitrator Professor Stavros Brekoulakis (Presiding Arbitrator)
AITMS Project or the Project	Accra Metropolitan Area Traffic Management Project
EPIC Contract	Engineering, Procurement, Installation and Commissioning Contract signed on 17 September 2012 by the Parties
Claimant or Everyway	Everyway Beijing Everyway Traffic & Lighting Tech. Co., Ltd
Counsel for Claimant	Mr Sun Wei, Mr Huang Xingyu, Ms Wang Ziyue, Ms Gong Huilanzi and Ms Cai Yunfei of Zhong Lun Law Firm of 28/F, South Tower of CP Center 20 Jin He East Avenue, Chaoyang District Beijing 100020, China
Representatives of the Respondent	Mr Godfred Yeboah Dame, Dr Sylvia Adusu, Ms Helen Akpene Awo Ziwu, Ms Grace Mbrokoh Ewoal, Ms Yvonne Bannerman and Ms Diana Asonaba Dapaah, members of the Office of the Attorney General of the Republic of Ghana of P.O. Box MB 60 Ministries, Accra, Ghana
Respondent or Ghana	The Government of the Republic of Ghana
Parties	Claimant and Respondent

Parties' Submissions

C-Main Jurisdiction	Claimant's Main Submission on Jurisdiction
C-PostHB Jurisdiction	Claimant's Post-Hearing Briefs

C-Rejoinder Jurisdiction	Claimant's Rejoinder on Jurisdiction
C-Skeleton Jurisdiction	Claimant's Pre-Hearing Skeleton
Exhibit C-[X]	Claimant's factual exhibits
Exhibit CL-[X]	Claimants' legal authorities
Exhibit R-[X]	Respondent's factual exhibits
Exhibit RL-[X]	Respondent's legal authorities
NoA	Claimant's Notice of Arbitration
Response NoA	Respondent's Response to the Notice of Arbitration
R-Main Jurisdiction	Respondent's Main Submission on Jurisdiction
R-PostHB Jurisdiction	Respondent's Post-Hearing Briefs
R-Reply Jurisdiction	Respondent's Reply on Jurisdiction
R-Skeleton Jurisdiction	the Respondent's Pre-Hearing Skeleton

Cases

Beijing Shougang	<i>Beijing Shougang and others v. Mongolia</i> , PCA Case No. 2010-20, Award, 30 June 2017
Berschader	<i>Vladimir Berschader and Moïse Berschader v. The Russian Federation</i> , SCC Case No. 080/2004, Final Award, 21 April 2016
BUCG	<i>Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen</i> , ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017
Czech Republic v. EMV	<i>Czech Republic v. EMV SA</i> , 2007 EWHC 2851 (Comm), 5 December 2007

Ecuador v. Occidental	<i>The Republic of Ecuador v. Occidental Petroleum Corporation and Occidental Exploration and Production Company</i> [2007] EWCA Civ 656, 7 April 2007
EMV	<i>European Media Ventures SA v. The Czech Republic</i> , UNCITRAL, Award on Jurisdiction, 15 May 2007
Maffezini	<i>Emilio Agustín Maffezini v. Kingdom of Spain</i> , ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000
Renta 4	<i>Renta 4 S.V.S.A and others v. Russia</i> , SCC Case No. 24/2007, Award on Preliminary Objections, 20 March 2009
RosInvest	<i>RosInvestCo UK Ltd. v. The Russian Federation</i> , SCC Case No. 079/2005, Award on Jurisdiction, 1 October 2007
Sanum Investments	<i>Sanum Investments Limited v. Lao People's Democratic Republic</i> , UNCITRAL, PCA Case No. 2013-13
Sanum v. Laos	<i>Sanum Investments Ltd v. Government of the Lao People's Democratic Republic</i> [2016] SGCA, 29 September 2016
SGS v. Philippines	<i>SGS v. Philippines</i> , ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004
Telenor	<i>Telenor Mobile Communications A.S. v. The Republic of Hungary</i> , ICSID Case No. ARB/04/15, Award 13 September 2006
Tza Yap Shum	<i>Señor Tza Yap Shum v. The Republic of Peru</i> , ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009
Wintershall	<i>Wintershall Aktiengesellschaft v. the Argentine Republic</i> , ICSID Case No. ARB/04/14, Award, dated 8 December 2008

Final Award on Jurisdiction

This arbitration concerns a dispute arising out of an investment treaty claim brought by Beijing Everyway Traffic & Lighting Tech. Co., Ltd (the “**Claimant**” or “**Everyway**”) against the Government of the Republic of Ghana (the “**Respondent**” or “**Ghana**”) under the Agreement between the Government of the People’s Republic of China and the Government of the Republic of Ghana Concerning the Encouragement and Reciprocal Protection of Investments concluded on 12 October 1989 (“**the China-Ghana Agreement**” or “**the Treaty**”).¹

The underlying contract between the Claimant and the Respondent is an Engineering, Procurement, Installation and Commissioning Contract signed on 17 September 2012 (the “**EPIC Contract**”). Under the EPIC Contract, the Claimant agreed to supply equipment and provide technical services to the Respondent for the planning, design, construction, supervision, operation and training for the “Accra Metropolitan Area Traffic Management Project” (the “**AITMS Project**” or the “**Project**”).² During the execution of the EPIC Contract, the Claimant issued two Interim Payment Certificates, which to date remain unpaid.³ On 19 November 2020, the Parliament of Ghana rescinded the EPIC Contract with the Claimant.⁴ According to the Claimant, the Respondent had decided to rescind the EPIC Contract and award the works for the AITMS Project to two third-party companies already from June 2019.⁵ On 30 December 2021, the Claimant served the Respondent with a notice purporting to terminate the EPIC Contract.⁶

In this arbitration, the Claimant seeks a declaration that the Tribunal has jurisdiction over the Claimant’s claims arising out of the China-Ghana Agreement. As regards the merits of the dispute, the Claimant seeks a declaration that the Respondent’s arbitrary decision to rescind the EPIC Contract with the Claimant and award the project to third parties as well as the Respondent’s failure to pay the Claimant for work performed under the EPIC Contract amount to:

- a. First, a direct or indirect expropriation of the Claimant’s investment,

¹ NoA, § 7.

² NoA, § 7.

³ Response NoA, §§ 30-32.

⁴ Response NoA, § 33.

⁵ NoA, § 54.

⁶ NoA, § 67.

which - according to the Claimant - is Everyway's entitlement to the EPIC Contract and to the performance of the EPIC Contract on the part of Ghana. According to the Claimant, Ghana's expropriation of Everyway's investment constitutes a breach of Article 4 of the Treaty;

- b. Second, a failure on the part of Ghana to provide equitable treatment and protection to the Claimant's investment that constitutes a breach of Article 3(1) of the Treaty;
- c. Third, a breach on the part of Ghana of its contractual obligations under the EPIC Contract which amounts to a breach of Ghana's duty under the Treaty to observe any obligation it has entered into with regard to investments made by Chinese investors ("**Umbrella Clause**"). According to the Claimant, Ghana's Treaty obligation to observe its contractual obligations under the EPIC Contract applies through Article 3(2) of the Treaty which contains a *Most Favoured Nation Treatment* clause ("**MFN**").

Finally, the Claimant seeks an order awarding Everyway the damages which it has incurred as a result of the above-mentioned breaches of the Treaty amounting to an estimate not lower than US\$ 55 million.⁷

The Respondent seeks a declaration that the Tribunal has no jurisdiction over the Claimant's claims.⁸ As regards the merits of the dispute, the Respondent contends that it has not breached the Treaty because, *inter alia*, the decision of the Parliament of Ghana to rescind the EPIC Contract was taken in the interests of Ghana's national security.⁹

This Final Award on Jurisdiction deals only with issues related to the jurisdiction of the Tribunal (save as to costs) and does not address the merits of the dispute.

⁷ NoA, § 96.

⁸ Response NoA, §§ 40-41.

⁹ R-PostHB Jurisdiction, § 30.

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I. INTRODUCTION

1. Pursuant to Article 23 of the 2013 UNCITRAL Arbitration Rules (the “**Rules**”), the Arbitral Tribunal (the “**Tribunal**”) issues the following Final Award on Jurisdiction.
2. Article 23 of the Rules provides as follows:

“Pleas as to the jurisdiction of the arbitral tribunal

The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause.

A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.”

II. THE PARTIES

A. The Claimant

3. The Claimant, **Beijing Everyway Traffic & Lighting Tech. Co., Ltd**, is a limited liability company incorporated under the laws of the People's Republic of China, with its address at No. 12 Shangdi Xinxu Road, Suite E1 11 Haidian District, Beijing 100085, China.
4. In these proceedings, the Claimant is represented by Mr Sun Wei, Mr Huang Xingyu, Ms Wang Ziyue, Ms Gong Huilanzi and Ms Cai Yunfei of Zhong Lun Law Firm of 28/F, South Tower of CP Center 20 Jin He East Avenue, Chaoyang District Beijing 100020, China.

B. The Respondent

5. The Respondent is the **Government of the Republic of Ghana**, a Contracting State of the China-Ghana Agreement.
6. In these proceedings, the Respondent is represented by Mr Godfred Yeboah Dame, Dr Sylvia Adusu, Ms Helen Akpene Awo Ziwu, Ms Grace Mbrokoh Ewoal, Ms Yvonne Bannerman and Ms Diana Asonaba Dapaah, members of the Office of the Attorney General of the Republic of Ghana of P.O. Box MB 60 Ministries, Accra, Ghana.
7. The Claimant and the Respondent are collectively referred to as the "**Parties**".

III. THE TRIBUNAL

8. In relevant part, Article 10(2) of the China-Ghana Agreement provides as follows:

"Such an arbitral tribunal shall be constituted for each individual case in the following way: each party to the dispute shall appoint an arbitrator, and these two shall select a national of a third State which has diplomatic relations with the two Contracting States as Chairman. The first two arbitrators shall be appointed within two months of the written notice for arbitration by either party to the dispute to the other, and the

Chairman be selected within four months. If within the period specified above, the tribunal has not been constituted, either party to the dispute may invite the Chairman of the Arbitration Institute of the Stockholm Chamber of Commerce to make the necessary appointments.”

9. On 8 April 2021, the Claimant nominated Mr V. K. Rajah SC as co-arbitrator.

10. The contact details of Mr V. K. Rajah SC are as follows:

19 Duxton Hill
Singapore 089602
Telephone: +65 6817 9173
Fax: +65 6920 7611
Email: vkrajah@duxtonhill.net

11. On 7 April 2021, the Respondent nominated Professor Richard Oppong as co-arbitrator.

12. The contact details of Professor Richard Oppong are as follows:

California Western School of Law
225 Cedar Street
San Diego, CA 92101
United States of America
Email: rfoppong@outlook.com

13. On 7 May 2021, the two Party-appointed arbitrators nominated Professor Stavros Brekoulakis as president of the Tribunal.

14. The contact details of Professor Stavros Brekoulakis are as follows:

3 Verulam Building, Gray's Inn
London, WC1R 5NT
Switchboard: +44 (0)20 7831 8441
Fax Number: +44 (0)20 7831 8479
Email: sbrekoulakis@3vb.com

15. By signing the Terms of Appointment dated 28 May 2021, the Parties - through counsel - appointed the members of the Tribunal to arbitrate the present dispute. In the Terms of Appointment, the members of the Tribunal confirmed that they accepted their appointment and submitted their declarations of independence and impartiality to the Parties. Neither Party raised an objection to any member of the Tribunal on the basis of lack of independence or impartiality.
16. As recorded in Procedural Order No. 1 of 28 June 2021, the Parties agreed to the appointment of Ms Mihaela Apostol as Tribunal Secretary.

IV. THE ARBITRATION AGREEMENT, THE RULES APPLICABLE TO THE PROCEDURE, THE PLACE OF ARBITRATION AND THE CHOICE OF LAW APPLICABLE TO THE MERITS

17. Article 10(1) of the China-Ghana Agreement provides as follows:

“Any dispute between either Contracting State and the investor of the other Contracting State concerning the amount of compensation for expropriation may be submitted to an arbitral tribunal.”

18. As recorded in paragraph 11 of Procedural Order No.1 of 28 June 2021, the Parties agreed that the arbitration shall be governed by the 2013 version of the UNCITRAL Arbitration Rules.¹⁰

19. As regards the applicable law, Article 10(5) of the China-Ghana Agreement provides as follows:

“The Tribunal shall adjudicate in accordance with the laws of the Contracting State to the dispute accepting the investment, including its rules on the conflict of laws, the provisions of this Agreement as well as the generally recognised principle of international law accepted by both Contracting States.”

20. Following the Parties’ submissions, the Tribunal fixed London (United

¹⁰ Without the application of the 2014 UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration (Procedural Order No. 4 of 30 August 2021).

Kingdom) as the seat (legal place) of the arbitration with Procedural Order No. 5 dated 13 September 2021.¹¹

V. THE BACKGROUND OF THE DISPUTE

21. The summary below is based on the information provided in the Parties' submissions and does not reflect any findings of the Tribunal.
22. The present dispute relates to an intelligent traffic management system project in Accra, Ghana, namely the AITMS Project.¹²
23. On 16 December 2011, the Government of Ghana signed a Master Facility Agreement and other related Finance Documents with the China Development Bank for a term loan facility to develop twelve infrastructure projects in Ghana, including the AITMS Project.¹³
24. The Claimant was awarded the AITMS Project on April 2012.¹⁴ Subsequently, on 17 September 2012, the Claimant and the Ministry of Roads and Highways of Ghana signed the EPIC Contract.¹⁵
25. Under the EPIC Contract, the Claimant agreed to supply equipment and provide technical services to the Respondent in respect of the planning, design, construction, supervision, operation and training for the AITMS Project in Accra.¹⁶
26. Under the EPIC Contract, the Parties agreed a Contract Price of US\$ 100 million and an advance payment of 30%.¹⁷ Specifically, the Project covered:¹⁸

¹¹ Procedural Order No. 5 of 13 September 2021.

¹² NoA, § 7.

¹³ Response NoA, § 27; NoA, § 22.

¹⁴ Response NoA, § 28.

¹⁵ NoA, § 7.

¹⁶ NoA, § 7.

¹⁷ NoA, § 18.

¹⁸ NoA, § 31.

- a. Traffic Signal Control Subsystem at 257 junctions;
 - b. Comprehensive Violation Capturing Subsystem of 394 Sets and Directions at selected junctions;
 - c. Traffic Guidance Display Subsystems at 20 locations and junctions;
 - d. Traffic Flow Collection and Speed Capturing Subsystem at 425 locations and junctions;
 - e. High-Definition Video Monitoring Subsystem at 259 locations and junctions;
 - f. Communication Subsystem of 240km of fibre optic;
 - g. 1718 wireless magnetic detectors; and
 - h. Certain lane marking, road signs and pedestrian handrails.
27. The Commencement Date of the EPIC Contract was fixed as 26 August 2019 and the works were scheduled to be completed in 24 calendar months.¹⁹
28. According to the Claimant, on 28 May 2012, the China Development Bank sent a letter to the Chairman of the Presidential Task Force of Ghana stating that it had no objection to Everyway undertaking the AITMS Project as a contractor under the Master Facility Agreement. In the same letter, the China Development Bank acknowledged that significant preliminary work for the AITMS Project, including the pre-feasibility and feasibility report, had been completed by Everyway.²⁰
29. On 28 June 2018, Everyway and the Ministry of Roads and Highways of Ghana entered into a Supplementary Agreement reducing the total advance payment from 30% to 15% of the Contract Price, while all other terms and conditions of the original EPIC Contract remained unchanged.²¹

¹⁹ NoA, § 9; Response NoA, § 29.

²⁰ NoA, § 23.

²¹ NoA, § 18.

30. On 22 December 2018, the Parliament of Ghana approved by resolution the EPIC Contract.²²
31. According to the Claimant, between 12 and 15 November 2019, a six-member team of the Ministry of Roads and Highways of Ghana conducted a technical visit to Everyway's factory and warehouses in China to inspect the production and inventory of the equipment for the AITMS Project. During the visit, the Ghanaian delegation observed, inspected and counted the manufactured equipment prior to shipment to Ghana.²³
32. In January 2020, the Department of Urban Roads of Ghana, under the instruction of the Ministry of Roads and Highways of Ghana, confirmed that Everyway could ship to Ghana the equipment inspected by the technical team in November 2019. It also requested Everyway to speed up the works to meet the schedule of the AITMS Project.²⁴
33. On 15 January 2020, the Department of Urban Roads of Ghana issued an on-site work permit to Everyway for the AITMS Project, covering the installation of new traffic signals, communication network and general civil works at signalized and non-signalized intersections in Accra.²⁵
34. On 3 February 2020, Everyway reported to the Department of Urban Roads of Ghana that it had loaded nineteen containers of equipment for shipment for the AITMS Project and asked it to prepare for import customs clearance in Ghana.²⁶
35. On 21 February 2020, about six months after the commencement of the AITMS Project, the first installations at two intersections in Accra were switched on, indicating the official launch of the AITMS Project in Ghana.²⁷
36. During the course of the AITMS Project, the Claimant issued two Interim Payment Certificates amounting in total to US\$ 21,995,728 for works that had

²² NoA, § 20.

²³ NoA, § 35.

²⁴ NoA, § 37.

²⁵ NoA, §§ 37-38.

²⁶ NoA, § 40.

²⁷ NoA, § 42.

been performed up to the date of issuance of each Interim Payment Certificate. The two Interim Payment Certificates which to date remain unpaid were as follows:²⁸

- a. Interim Payment Certificate No. 1 issued on 25 November 2019 in the amount of US\$ 16,822,641; and
 - b. Interim Payment Certificate No. 2 issued on 22 December 2020 in the amount of US\$ 5,173,087.
37. According to the Claimant, by the time of the Notice of Arbitration (i.e. 10 February 2021), Everyway had completed works with a contractual value of at least US\$ 21,995,728.²⁹
38. According to the Claimant, on 24 March 2020, the Minister of Finance of Ghana requested the Vice President of Ghana to convene a meeting to discuss the AITMS Project. Two meetings among the Vice President of Ghana, Minister of Finance of Ghana, Minister of Roads and Highways of Ghana, Minister of National Security of Ghana, and Deputy Attorney General of Ghana were subsequently called in early April 2020, where it was agreed that two technical teams from the Ministry of National Security and Ministry of Roads and Highways of Ghana would be formed to supervise the following aspects of the AITMS Project:³⁰
- a. Comprehensive Traffic Violation Capturing System;
 - b. High Definition Camera System;
 - c. Wireless Communication System;
 - d. Customization and other integration for other stakeholders; and
 - e. National Data Centre Expansion.

39. According to the Claimant, in those meetings, it was further agreed that the

²⁸ Response NoA, §§ 30-32.

²⁹ NoA, § 52.

³⁰ NoA, § 60.

Ministry of Roads and Highways of Ghana would remain responsible for the following aspects of the AITMS Project:³¹

- a. Traffic Signal Control Subsystem;
 - b. Traffic Flow Collection & Speed Capturing Subsystem;
 - c. Traffic Guidance Subsystem;
 - d. Traffic Control Centre, Intelligent Central Traffic Control Platform;
 - e. Traffic Facilities (Road line marking, Road signs, Crash barrier, Guardrails);
 - f. Pre-Implementation Survey & Engineering Design, Traffic Signal Timing;
 - g. Design, EPIC Training, General items; and
 - h. Extended Operations and Management.
40. On 24 April 2020, the Vice President of Ghana issued a decision letter to direct the Minister of Finance of Ghana to convey to the China Development Bank that the project would proceed as approved, with Everyway being the contractor and the Ministry of Roads and Highways of Ghana being the implementing agency on the part of Ghana. Moreover, the Vice President of Ghana asked the Ministry of Roads and Highways of Ghana to work with the Ministry of National Security of Ghana to rescope and submit the EPIC Contract to the Attorney General of Ghana for review.³²
41. However, on 19 November 2020, the Parliament of Ghana suddenly informed the Claimant of its decision to rescind the approval of the EPIC Contract.³³ According to the Respondent, the Parliament of Ghana had to take this decision in the interests of Ghana's national security.³⁴ According to the Claimant, the

³¹ NoA, § 60.

³² NoA, § 61.

³³ Response NoA, § 33.

³⁴ Response NoA, § 33.

Respondent had decided to rescind the EPIC Contract and award the works for the AITMS Project to two third-party companies already from June 2019.³⁵

42. On 30 December 2021, the Claimant served the Respondent with a notice purporting to terminate the EPIC Contract.³⁶
43. It is the Claimant's case that the Respondent has "*either directly or indirectly, unlawfully expropriated*" the Claimant's investment because the Parliament of Ghana, *inter alia*, "*rescinded approval for the valid and effective EPIC Contract under which Everyway had completed substantial amount of work with (a) no national security or public interest justification, (b) no due domestic legal procedure, (c) in a discriminatory manner, and (d) with no compensation whatsoever for the damages caused*".³⁷ Accordingly, the Claimant seeks a declaration that the Respondent has breached Article 4(1) of the China-Ghana Agreement.³⁸
44. Further, the Claimant claims and seeks a declaration that the decision of the Parliament of Ghana to arbitrarily rescind the EIPC Contract amounts to a failure on the part of Ghana "*to provide equitable treatment and protection to Everyway's investments*"³⁹ and therefore a breach of Article 3(1) of the Treaty.⁴⁰
45. Finally, the Claimant claims and seeks a declaration that Ghana has unlawfully repudiated the EPIC Contract and failed "*to make payment to Everyway for work completed*" which amounts to a breach of Ghana's duty under the Treaty to observe any obligation it has entered into with regard to investments made by Chinese investors (i.e. a breach of the Umbrella Clause). According to the Claimant, Ghana's Treaty obligation to observe its contractual obligations under the EPIC Contract applies through Article 3(2) of the Treaty which contains a

³⁵ NoA, § 54.

³⁶ NoA, § 69.

³⁷ NoA, §§ 75-76.

³⁸ "1. Either Contracting State may, for the national security and public interest, expropriate, nationalize or take similar measures (hereinafter referred to as "expropriation") against investment of investors of the other Contracting State in its territory, but subject to the following conditions:

(a) under domestic legal procedure;

(b) without discrimination;

(c) payment of compensation."

³⁹ NoA, § 78.

⁴⁰ "Investments and activities associated with investments of investors of either Contracting State shall be accorded equitable treatment and shall enjoy protection in the territory of the other Contracting State."

MFN clause.⁴¹

46. The Claimant seeks an order for the damages which Everyway has allegedly incurred as a result of the above-mentioned breaches of the Treaty, amounting to an estimate not lower than US\$55 million.⁴²
47. It is the Respondent's case that it has not breached the Treaty because, *inter alia*, the decision of the Parliament of Ghana to rescind the EPIC Contract with the Claimant was taken in the interests of Ghana's national security.⁴³ No further explanations as to the exact nature of interests of Ghana's national security, which were allegedly implicated in the EPIC Contract, have been offered by the Respondent at this stage of the arbitration.
48. In relevant parts, the Treaty provides as follows:

Preamble:

"The Government of the People's Republic of China and the Government of the Republic of Ghana.

Desiring to encourage, protect and create favourable conditions for investment by investors of one Contracting State in the territory of the other Contracting State based on the principle of mutual respect for sovereignty, equal and mutual benefit and for the purpose of the development of economic cooperation between both States.

Have agreed as follows:"

Article 3 – Protection of investments and most favoured nation treatment

"1. Investments and activities associated with investments of investors of either Contracting State shall be accorded equitable treatment and shall enjoy protection in the territory of the other Contracting State.

2. The treatment and protection referred to in Paragraph 1 of this Article shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State.

⁴¹ NoA, § 82.

⁴² NoA, § 96.

⁴³ R-PostHB Jurisdiction, § 30.

3. The treatment and protection as mentioned in Paragraphs 1 and 2 of this Article shall not include any preferential treatment accorded by the other Contracting State to investments of investors of a third State based on customs union, free trade, economic union, agreement relating to avoidance of double taxation or for facilitating frontier trade.”

Article 4 – Expropriation and compensation for losses:

“1. Either Contracting State may, for the national security and public interest, expropriate, nationalize or take similar measures (hereinafter referred to as “expropriation”) against investment of investors of the other Contracting State in its territory, but subject to the following conditions: (a) under domestic legal procedure; (b) without discrimination; (c) payment of compensation.

2. The compensation mentioned in Paragraph 1 (c) of this Article shall be equivalent to the value of the expropriated investments at the time when expropriation is proclaimed, be convertible and freely transferrable. The compensation shall be paid without unreasonable delay.

3. If an investor considers the expropriation mentioned in Paragraph 1 of this Article incompatible with the laws of the Contracting State taking such expropriation shall, upon the request of the investor, review the said expropriation.”

Article 9 – Settlement of disputes of Contracting States

“1. Dispute between the Contracting States concerning the interpretation or application of this Agreement shall, as far as possible, be settled by consultation through the diplomatic channel.

2. If a dispute cannot thus be settled within six months, it shall, upon the request of either Contracting State, be submitted to an ad hoc arbitral tribunal.

3. Such ad hoc tribunal comprises of three arbitrators. Within two months from the date on which either Contracting State receives the written notice requesting for arbitration from the other Contracting State, each Contracting State shall appoint one arbitrator. These two arbitrators shall, within further two months, together select a third arbitrator who is a national of a third State which has diplomatic relations with both Contracting States. The third arbitrator shall be appointed by the two Contracting

States as Chairman of the arbitral tribunal.

4. If the ad hoc arbitral tribunal has not been constituted within four months from the date of the receipt of the written notice for arbitration, either Contracting State may, in the absence of any other agreement, invite the President of the International Court of Justice to appoint the arbitrator(s) who has or have not yet been appointed. If the President is a national of either Contracting State or is otherwise prevented from discharging the said function, the next most senior member of the International Court of Justice who is not a national of either Contracting State shall be invited to make the necessary appointment(s).

5. The ad hoc arbitral tribunal shall determine its own procedure. The tribunal shall reach its award in accordance with the laws of the Contracting State accepting investment, the provisions of the Contracting State accepting investment, the provisions of this Agreement and the principles of international law recognized by both Contracting States.

6. The tribunal shall reach its award by a majority of votes. Such award shall be final and binding on both Contracting States. The ad hoc arbitral tribunal shall, upon the request of either Contracting State, explain the reasons of its award.

7. Each Contracting State shall bear the cost of its appointed arbitrator and borne in equal parts by the Contracting States.”

Article 10 - Settlement of dispute on quantum of compensation

“1. Any dispute between either Contracting State and the investor of the other Contracting State concerning the amount of compensation for expropriation may be submitted to an arbitral tribunal.

2. Such an arbitral tribunal shall be constituted for each individual case in the following way: each party to the dispute shall appoint an arbitrator, and these two shall select a national of a third State which has diplomatic relations with the two Contracting States as Chairman. The first two arbitrators shall be appointed within two months of the written notice for arbitration by either party to the dispute to the other, and the Chairman be selected within four months. If within the period specified above, the tribunal has not been constituted, either party to the dispute may invite the Chairman of the Arbitration Institute of the Stockholm Chamber of Commerce to make the necessary appointments.

3. *The tribunal shall determine its own procedure. However, the tribunal may, in the course of determination of procedure take as guidance the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce or Arbitration Rules of the International Centre for Settlement of Investment Disputes.*

4. *The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on both parties to the dispute. Both Contracting States shall commit themselves to the enforcement of the decision in accordance with their respective domestic law.”*

VI. THE PROCEDURAL BACKGROUND

49. On 10 February 2021, the Claimant commenced arbitration proceedings pursuant to the China-Ghana Agreement seeking the declarations and orders set out in paragraphs 43 - 46 above (the “**Treaty Arbitration**”).⁴⁴
50. On 17 May 2021, the Claimant commenced arbitration proceedings under the Rules of the London Court of International Arbitration based on Sub-Clause 20.8 of the General Conditions of the EPIC Contract, seeking the payment of the Interim Payment Certificates No. 1 and No. 2 along with other financial compensations arising from alleged breaches of the EPIC Contract (the “**LCIA Arbitration**”).
51. On 17 May 2021, the Claimant filed a Request to Suspend the Proceedings until the parallel LCIA Arbitration was concluded.⁴⁵
52. On 31 May 2021, the Respondent filed an Objection to the Request to Suspend the Proceedings.⁴⁶
53. On 18 June 2021, the Claimant filed a Reply to the Respondent’s Objection to the Request to Suspend the Proceedings.
54. On 21 June 2021, the Claimant re-filed its Reply to the Respondent’s Objection

⁴⁴ R-1.

⁴⁵ C-Request Suspension.

⁴⁶ R-Objection Suspension.

to the Request to Suspend the Proceedings.⁴⁷

55. On 28 June 2021, the Tribunal issued Procedural Order No.1 setting out directions for the conduct of this arbitration.
56. On 30 June 2021, the Respondent filed its Response to the Notice of Arbitration.⁴⁸ In its Response to the Notice of Arbitration, the Respondent raised a jurisdictional objection, claiming that the Claimant's claims in this arbitration are not covered by the scope of the China-Ghana Agreement.
57. On 1 July 2021, the Tribunal issued Procedural Order No. 2 confirming the appointment of the Permanent Court of Arbitration as the fund-holder institution in this arbitration.
58. On 15 July 2021, the Tribunal issued Procedural Order No. 3 setting out directions for the conduct of this arbitration.
59. On 19 July 2021, the Parties filed written submissions on the question of Bifurcation and Suspension of the Arbitration.
60. On 30 August 2021, the Tribunal issued Procedural Order No. 4 setting out directions in respect of the seat, the rules of evidence and the application of the UNCITRAL Rules on Transparency for Treaty based Investor State Arbitration in respect of this arbitration.
61. On 13 September 2021, the Tribunal issued Procedural Order No. 5 fixing London, UK, as the legal place (seat) of this arbitration.
62. On 17 September 2021, the Tribunal issued its Decision on Bifurcation and Suspension and decided by majority to (i) grant the Respondent's Request for Bifurcation and address the Respondent's jurisdictional Objection as a preliminary matter and (ii) reject the Claimant's Request for Suspension of the Treaty Arbitration.
63. On 8 October 2021, after consultation with the Parties, the Tribunal issued

⁴⁷ C-Reply Suspension.

⁴⁸ Response NoA.

Procedural Order No. 6 setting out the Procedural Calendar of this arbitration.

64. On 21 October 2021, the Tribunal issued Procedural Order No. 7 setting out directions for the second deposit of funds in this arbitration.
65. On 1 November 2021, the Respondent filed its Main Submission on Jurisdiction.⁴⁹
66. On 10 December 2021, the Claimant filed its Main Submission on Jurisdiction.⁵⁰
67. On 12 January 2021, the Respondent filed its Reply Submission on Jurisdiction.⁵¹
68. On 21 February 2022, the Claimant filed its Rejoinder Submission on Jurisdiction.⁵²
69. On 24 February 2022, the Parties and the Tribunal held a pre-hearing case management conference (the “**CMC**”) to discuss the conduct of the oral hearing on jurisdiction (the “**Hearing**”).
70. On 28 February 2022, the Tribunal issued Procedural Order No. 8 setting out directions for the conduct of the Hearing.
71. On 10 March 2022, the Tribunal issued Procedural Order No. 9 setting out further directions for the conduct of the Hearing.
72. On 15 March 2022, the Parties filed their pre-hearing skeleton submissions on jurisdiction.⁵³
73. Before the Hearing, the Parties agreed on the following list of issues in this arbitration:⁵⁴

⁴⁹ R-Main Jurisdiction.

⁵⁰ C-Main Jurisdiction.

⁵¹ R-Reply Jurisdiction.

⁵² C-Rejoinder Jurisdiction.

⁵³ C-Skeleton Jurisdiction; R-Skeleton Jurisdiction.

⁵⁴ Annex 3 to PO.9.

- a. First, which Party has the burden to prove that the Tribunal has jurisdiction to hear the Claimant's claims in this arbitration;
 - b. Second, whether the Tribunal has jurisdiction under Article 10(1) of the Treaty to hear the Claimant's claims in this arbitration;
 - c. Third, whether the Tribunal has jurisdiction under Article 3(2) of the China-Ghana Agreement to hear the Claimant's claims in this arbitration;
 - d. Fourth, to what extent (if any) should the parallel LCIA Arbitration affect the Tribunal's decision on jurisdiction in the current Treaty Arbitration;
 - e. Fifth, how should the costs of this arbitration be allocated pursuant to Article 10(6) of the China-Ghana Agreement.
74. On 22 March 2022, the Hearing took place remotely. At the Hearing, the Parties were represented by:
- a. For the Claimant: Mr Sun Wei, Mr Huang Xingyu, Ms Wang Ziyue, Ms Gong Huilanzi, Ms Cai Yunfei of Zhong Lun law firm, and Mr Pan Gang and Mr Pan Qizhao.
 - b. For the Respondent: Hon. Godfred Yeboah Dame, Hon. Diana Asonaba Dapaah, Mrs Helen Ziwu, Dr Sylvia Adusu, Mrs Grace Ewoal, Mrs Nana Abuaa B-Otchere, Ms Tricia Quartey, Ms Yvonne Bannerman, Ms Mother Theresa Brew, Ms Ama Asare Korang, Mr Kwabena Adu-Boahene, Mr Kwasi Dwira Nkansah, Mr Abass Awulu, Mr Yaw Tweneboah-Kodua and Ms Rita Sarfoh.
75. On 22 April 2022, the Parties submitted their Post Hearing Briefs.⁵⁵
76. On 27 September 2022, the Tribunal informed the Parties that its Award on Jurisdiction had been finalised. However, the Tribunal noted that before it released its Award, it had to confirm with the PCA as to whether the Parties' deposit on costs was sufficient to cover the fees and expenses of the Tribunal

⁵⁵ C-PostHB Jurisdiction; R-PostHB Jurisdiction.

and the PCA.

77. On 7 October 2022, the PCA informed the Tribunal and the Parties that the case deposit was insufficient to cover the fees and expenses of the Tribunal and the PCA, and it invited (under the instructions of the Tribunal) the Claimant and the Respondent to make a supplementary deposit on costs in the amounts of USD 15,000 and USD 25,000 respectively by 4 November 2022. It should be noted that the requested deposit from the Respondent included the amount of EUR 2,932.50 corresponding to the Respondent's outstanding share in the hearing costs on Jurisdiction.
78. On 18 November 2022, the Claimant confirmed that it had paid its share of supplementary deposit on costs.
79. While the Respondent confirmed on several occasions its willingness to pay its share of supplementary deposit on costs, such payment was not forthcoming for several weeks.
80. On 26 January 2023, the PCA informed the Parties and the Tribunal that the Respondent had made a partial payment of its share of the supplementary deposit. To address the slight deficit, the Tribunal decided to forego the equivalent amount from the Respondent's share of fees and release the Award on Jurisdiction.
81. On 29 January 2023, the Parties confirmed, upon invitation of the Tribunal, that they agreed to receive a signed electronic version of the Award on Jurisdiction with the image of the signatures of each of the arbitrators.

VII. THE PARTIES' POSITION

82. The Tribunal summarises below the Parties' submissions on the question of jurisdiction. The summaries do not purport to be exhaustive. In reaching its decision, the Tribunal has considered all arguments, legal authorities, and documentary exhibits submitted by the Parties.

A. The Claimant's Position

83. The Claimant's case is that the subject matter of the current dispute falls under the jurisdiction of the Tribunal. The legal premise of the Claimant's case is twofold:
- a. First, Article 10(1) of the Treaty which provides that an arbitral tribunal has jurisdiction on “[a]ny dispute ... concerning the amount of compensation for expropriation”; and
 - b. Second, the broad dispute resolution clauses contained in Ghana's treaties with other countries which, according to the Claimant, apply in this dispute through the MFN clause contained in Article 3(2) of the Treaty.
84. As regards Article 10(1) of the Treaty, the Claimant acknowledges that the scope of the provision is unclear and requires interpretation by reference to Article 31(1)⁵⁶ of the Vienna Convention on the Law of Treaties of 1969 (**the “VCLT”**).⁵⁷ According to the Claimant, Article 10(1) of the Treaty, when interpreted “*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*”, should be understood to include not only the question of amount of compensation for expropriation (i.e. the question of quantum), but also the question of unlawfulness of expropriation of the Claimant's investment (i.e. the question of entitlement).⁵⁸
85. The Claimant contends that, as per the Oxford English Dictionary, the ordinary meaning of the word “concerning” is “*on the subject of or in connection with; about*”. According to the Claimant, these terms have an inclusive rather than exclusive meaning.⁵⁹ The Claimant explains that the Chinese version of the Treaty (which, as explained below in detail, is one of the two authentic versions of the Treaty) uses the characters 有关 (“**You Guan**”) as the equivalent of the word “concerning” in the English version. The Claimant adds that the definition of “*You Guan*” in

⁵⁶ “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

⁵⁷ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

⁵⁸ C-Main Jurisdiction, § 6.

⁵⁹ C-Main Jurisdiction, § 7.

the Oxford Chinese Dictionary is very broad and means “*something to do with*”.⁶⁰

86. According to the Claimant, a good faith interpretation of the word “*concerning*” suggests that the term “*dispute*” in Article 10(1) of the Treaty must include the determination of both the question of quantum and entitlement of expropriation. In this respect, the Claimant relies on previous decisions of investment treaty tribunals including in the cases of *Señor Tza Yap Shum v. The Republic of Peru* (“***Tza Yap Shum***”)⁶¹ and *Sanum Investments Limited v. Lao People’s Democratic Republic* (“***Sanum Investments***”).⁶²
87. As regards the context of the Treaty, the Claimant claims that Articles 4(1)(a),⁶³ 4(3)⁶⁴ and 10(5)⁶⁵ of the Treaty, read independently or jointly, do not require the Claimant to submit a claim for expropriation to the competent courts of Ghana. According to the Claimant, when the investment of a Chinese investor is expropriated by Ghana, Article 4(3) of the Treaty and Article 20(2) of the Constitution of Ghana⁶⁶ simply give the investor an option (and not an obligation) to refer the matter to Ghanaian courts.⁶⁷
88. Further, the Claimant contends that if an investor was obliged to refer the underlying question of entitlement of expropriation to litigation, the courts of a Contracting State would necessarily need to address the question of quantum of

⁶⁰ C-PostHB Jurisdiction, § 11.

⁶¹ CL-1, *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, § 151.

⁶² CL-2, *Sanum Investments Limited v. Lao People’s Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, § 329; C-Main Jurisdiction, §§ 6-9.

⁶³ “1. Either Contracting State may, for the national security and public interest, expropriate, nationalize or take similar measures (hereinafter referred to as “expropriation”) against investment of investors of the other Contracting State in its territory, but subject to the following conditions: (a) under domestic legal procedure; (b) without discrimination; (c) payment of compensation.”

⁶⁴ “If an investor considers the expropriation mentioned in Paragraph 1 of this Article incompatible with the laws of the Contracting State taking such expropriation shall, upon the request of the investor, review the said expropriation.”

⁶⁵ “The tribunal shall adjudicate in accordance with the laws of the Contracting state to the dispute accepting the investment including its rules on the conflict of laws, the provisions of the Agreement as well as the generally recognized principles of international law accepted by both Contracting States.”

⁶⁶ “(2) Compulsory acquisition of property by the State shall only be made under a law which makes provision for (a) the prompt payment of fair and adequate compensation; and (b) a right of access to the High Court by any person who has an interest in or right over the property whether direct or on appeal from any other authority, for the determination of his interest or right and the amount of compensation to which he is entitled.”

⁶⁷ C-Main Jurisdiction, § 17.

expropriation, being one of the requirements of lawfulness under Article 4(1) of the Treaty. Accordingly, the Claimant contends that the courts' determination of the quantum would prevent an investor from referring the same question to an arbitral tribunal because of the legal principle of issue preclusion. According to the Claimant, the operation of the legal principle of issue preclusion amounts to an “invisible” fork-in-the-road clause in the Treaty, which would render Article 10(1) of the Treaty without effect and prevent an investor from having access to arbitration.⁶⁸

89. Even further, the Claimant argues that the object and purpose of the Treaty support the Claimant's case that an arbitral tribunal, under Article 10(1) of the Treaty, has jurisdiction to determine the question of both quantum and entitlement of expropriation. In this respect, the Claimant relies on previous decisions of investment treaty tribunals including in the cases of *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, (“**SGS v. Philippines**”),⁶⁹ *The Republic of Ecuador v. Occidental Petroleum Corporation and Occidental Exploration and Production Company* (“**Ecuador v. Occidental**”)⁷⁰ and *Czech Republic v. European Media Ventures SA* (“**Czech Republic v. EMV**”).⁷¹
90. According to the Claimant, the object and purpose of the China-Ghana Agreement are to “encourage, protect and create favourable conditions for investment by investors of one Contracting State in the territory of the other Contracting State”. Adopting a “narrow” interpretation of Article 10(1) of the Treaty, under which the question of entitlement would fall outside the Tribunal's jurisdiction, would restrict or effectively negate the object and purpose of the Treaty which, according to the Claimant, includes the investor's right to arbitration.⁷²
91. The Claimant contends that the criteria set out in Article 31 of the VCLT are sufficient to offer a clear and reasonable interpretation of Article 10(1) of the Treaty and there is no need to resort to supplementary means of interpretation

⁶⁸ C-Main Jurisdiction, § 27.

⁶⁹ CL-18, *SGS v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, § 116.

⁷⁰ CL-19, *Ecuador v. Occidental*, [2007] EWCA Civ 656, 7 April 2007, § 28.

⁷¹ CL-20, *Czech Republic v. EMV SA*, 2007 EWHC 2851 (Comm), 5 December 2007, § 23.

⁷² C-Skeleton Jurisdiction, § 23.

under Article 32 of the VCLT.⁷³ The Claimant adds that supplementary means of interpretation, such as the prior treaty practice of China or Ghana cannot self-evidently reveal the common assumptions of the Contracting States.⁷⁴ Nevertheless, the Claimant argues, even if the Tribunal were to rely on prior treaty practice, China's prior practice on bilateral investment treaties ("BITs") would not show that an arbitral tribunal's jurisdiction would be limited to disputes on quantum of expropriation.⁷⁵

92. Specifically, the Claimant states that before the China-Ghana Agreement, China concluded only 16 BITs which had investor-state dispute settlement provisions: (i) ten of those BITs used inclusive wording to qualify the terms "*the amount of compensation*"; and (ii) six of those BITs used restrictive wording limiting the jurisdiction of an arbitral tribunal strictly to the "*the amount of compensation*".⁷⁶ According to the Claimant, given that China has used restrictive wording in other BITs, before the China-Ghana Agreement, if China did wish to limit Article 10(1) of the Treaty to the amount of compensation only, it could easily have done so by adopting the same wording.⁷⁷
93. As regards the MFN clause in Article 3(2) of the Treaty,⁷⁸ the Claimant contends that this provision incorporates in the Treaty the broad and, therefore, more favourable dispute resolution clauses included in Ghana's international investment treaties with other countries. Specifically, the Claimant submits that, through Article 3(2) of the Treaty, the dispute resolution provisions of Ghana's investment treaties with the United Kingdom (Article 10)⁷⁹ and Denmark (Article 10)⁸⁰ apply in the dispute between the Claimant and the Respondent and

⁷³ "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

⁷⁴ C-Main Jurisdiction, § 41.

⁷⁵ C-Main Jurisdiction, § 43.

⁷⁶ C-Main Jurisdiction, § 45, Annex A.

⁷⁷ C-Main Jurisdiction, § 48; C-Skeleton Jurisdiction, § 32.

⁷⁸ "The treatment and protection referred to in Paragraph 1 of this Article shall not be less favourable than that accorded to investments and activities."

⁷⁹ "(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes."

⁸⁰ "(1) Disputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this agreement in relation to an investment of the former which have not been

accord this Tribunal jurisdiction over the Claimant's claims in this arbitration. According to the more favourable dispute resolution provisions in Ghana's investment treaties with the United Kingdom and Denmark, an investor is entitled to pursue claims in arbitrations arising from Ghana's breaches of all sorts of treaty obligations, including those concerning expropriation, equitable treatment, most favoured nation treatment, and contractual obligations (i.e. the Umbrella Clause).⁸¹

94. The Claimant states that Article 3(2) of the Treaty must also be interpreted "*in accordance with the ordinary meaning to be given to the terms of the treaty in their context*" pursuant to Article 31 of the VCLT. First, as regards the ordinary meaning, the Claimant pleads that the wording of Article 3(2) is intentionally broad and naturally covers all types of treatment and protection. Second, as regards the context of the provision, the Claimant submits that the exceptions to the application of the MFN protection are exhaustively listed in Article 3(3) of the Treaty and do not include dispute resolution provisions.⁸² Third, as regards the object and purpose of the Treaty, the Claimant argues that the scope of the MFN provision in the China-Ghana Agreement is to ensure that "*treatment and protection*" is accorded to "[i]nvestments and activities associated with investments of investors".⁸³ According to the Claimant, access to international arbitration is an important "*protection*" and, therefore, an important object and purpose of the Treaty.⁸⁴
95. Finally, the Claimant claims that the fact that Everyway initiated parallel arbitration proceedings under the LCIA Rules against Ghana under the EPIC Contract should not influence the question of whether the Tribunal in this arbitration has jurisdiction under the Treaty. According to the Claimant, the LCIA Arbitration is independent of the Treaty Arbitration in that the claims in the latter deals with breaches arising out of Ghana's obligations under an international investment treaty, whereas the claims in the former deal with contractual breaches arising out of the EPIC Contract.⁸⁵

amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes."

⁸¹ C-Main Jurisdiction, §§ 52, 53.

⁸² C-Main Jurisdiction, § 65.

⁸³ C-Main Jurisdiction, § 58.

⁸⁴ C-Skeleton Jurisdiction, §§ 40-41.

⁸⁵ C-Main Jurisdiction, §§ 97-101.

96. In summary, the Claimant's case is that the Tribunal has jurisdiction over the present dispute on the basis of first, the broad meaning of Article 10(1) of the Treaty which covers "*Any dispute... concerning the amount of compensation for expropriation*"; and second, the broad investor-state dispute settlement provisions contained in treaties signed by Ghana with other states which apply in this arbitration through Article 3(2) of the Treaty.

B. The Respondent's Position

97. The Respondent advances the following arguments.
98. The Respondent contends that the provision of Article 10(1) of the China-Ghana Agreement limits the Tribunal's jurisdiction to the determination of the quantum of expropriation.⁸⁶ On that basis, the Respondent's case is that the Tribunal has no jurisdiction to determine whether Ghana (i) expropriated the Claimant's investment in the AITMS Project pursuant to Article 4 of the Treaty; (ii) failed to afford equitable treatment and protection to the Claimant's investment pursuant to Article 3(1) of the Treaty; and (iii) breached its contractual obligations with the Claimant under the EPIC Contract pursuant to the Umbrella Clause obligations applicable in this arbitration through Article 3(2) of the Treaty. According to the Respondent, these issues do not concern the amount of compensation for expropriation and, therefore, fall outside the scope of Article 10(1) of the Treaty and the Tribunal's jurisdiction.⁸⁷
99. The Respondent agrees that Article 10(1) of the Treaty should be interpreted in accordance with the four elements of interpretation contained in Article 31 of the VCLT, namely (i) good faith (ii) the ordinary meaning of the treaty's terms (iii) the context of such terms and (iv) the object and purpose of the treaty. However, the Respondent claims that Article 10(1) of the Treaty should also be interpreted in accordance with Article 32 of the VCLT by taking into account supplementary means of interpretation such as the circumstances of the conclusion of the Treaty.⁸⁸

⁸⁶ R-Main Jurisdiction, § 4.

⁸⁷ R-Main Jurisdiction, § 35.

⁸⁸ R-Main Jurisdiction, § 8; RL-2, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005, § 196.

100. The Respondent argues that the ordinary meaning of the terms “*concerning the amount of compensation for expropriation*” represents an “*eminently sensible allocation of jurisdictional boundaries*” between the competent courts of the Contracting States which have jurisdiction to determine the question of entitlement of expropriation and arbitration tribunals which have jurisdiction to determine the question of quantum of expropriation.⁸⁹ The Respondent adds that in none of the cases cited by the Claimants the subject matter jurisdiction of the arbitral tribunal was restricted to disputes “*concerning the amount of compensation for expropriation*”.⁹⁰
101. As regards the context of Article 10(1) of the Treaty, the Respondent relies on Articles 4(1), 4(3) and 10(5) of the Treaty and claims that it is the Ghanaian courts that have jurisdiction over the question of lawfulness of an alleged expropriation, not an arbitral tribunal.⁹¹ According to the Respondent, if an investor brings a claim for expropriation under the Treaty, it must do so “*under domestic legal procedure*” and under Ghanaian law.⁹²
102. Relatedly, the Respondent contends that the China-Ghana Agreement does not include a “fork-in-the-road” clause and, therefore, in line with Article 4(3) of the Treaty, if an investor considers the expropriation unlawful under Ghanaian law, the investor can refer the question of lawfulness of the alleged expropriation to the High Court of Ghana. According to the Respondent, an investor is not precluded under the Treaty from subsequently referring the question of quantum to arbitration.⁹³
103. The Respondent contends that the object and purpose of the Treaty are not solely to protect foreign investments, but also to encourage foreign investment and foster economic cooperation between the two Contracting States. According to the Respondent, this requires a balanced approach to the interpretation of the Treaty’s substantive provisions, given that a focus only on protection of foreign investments may dissuade host States from admitting

⁸⁹ R-Post HB Jurisdiction, § 21.

⁹⁰ R-Skeleton Jurisdiction, § 37.

⁹¹ R-Main Jurisdiction, §§ 34-35.

⁹² R-Main Jurisdiction, § 34.

⁹³ R-Main Jurisdiction, §§ 23-29.

foreign investments and, thus, undermine the overall aim of intensifying the Contracting States' mutual economic relations.⁹⁴

104. Further, the Respondent argues that the Tribunal should distinguish the present dispute on jurisdiction from the prior decisions of investment treaty tribunals which the Claimant relies upon. Specifically, the Respondent contends that the dispute settlement provisions at issue in the arbitral awards in *TZA Yap Shum, Sanum Investments* and *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (“**BUCG**”) are “*vastly different*” from Article 10(1) of the China-Ghana Agreement which contains no fork-in-the-road provision and uses different terms.⁹⁵
105. Even further, the Respondent contends that the decision of the investment treaty tribunal in *RosInvestCo UK Ltd. v. The Russian Federation* (“**RosInvest**”) ⁹⁶ does not support the Claimant’s case. In *RosInvest*, the Tribunal had to interpret disputes “*concerning the amount or payment of compensation*” in Article 8.1 of the UK-Soviet BIT. Relying on Article 31 of the VCLT⁹⁷ and comparing arbitration clauses in BITs concluded by the UK and the Soviet Union with other countries,⁹⁸ the *RosInvest* tribunal concluded that Article 8.1 of the UK-Soviet BIT did not vest arbitral tribunals with jurisdiction on the question of entitlement of expropriation.⁹⁹
106. Finally, the Respondent argues that the Tribunal must place little or absolutely no value on the award of the investment treaty tribunal rendered in *Renta 4 S.V.S.A and others v. Russia* (“**Renta 4**”),¹⁰⁰ as the *Renta 4* award was set aside by the courts of the seat of the arbitration. Nevertheless, the Respondent claims that if the Tribunal was minded to rely on the *Renta 4* award, that award supports Ghana’s position. According to the Respondent, the treaty at issue in *Renta 4* did not expressly provide that national courts shall “*review*” the legality of an

⁹⁴ R-PostHB Jurisdiction, § 11.

⁹⁵ R-Main Jurisdiction, §§ 15-22.

⁹⁶ CL-7, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Award on Jurisdiction, 1 October 2007.

⁹⁷ CL-7, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Award on Jurisdiction, 1 October 2007, § 111.

⁹⁸ CL-7, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Award on Jurisdiction, 1 October 2007, § 113.

⁹⁹ CL-7, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Award on Jurisdiction, 1 October 2007, §§ 114, 123.

¹⁰⁰ CL-17, *Renta 4 S.V.S.A and others v. Russia*, SCC Case No. 24/2007, Award on Preliminary Objections, 20 March 2009.

expropriation and the *Renta 4* tribunal was clear that if the treaty contained a clause expressly providing that the national courts would have jurisdiction to determine the legality of an alleged expropriation, the jurisdiction of the national courts would have been upheld.¹⁰¹ According to the Respondent, the dispute in this arbitration should be distinguished from the dispute in the *European Media Ventures SA v. The Czech Republic* (“*EMV*”) case for the same reasons.¹⁰²

107. The Respondent further argues that, in interpreting Article 10(1) of the Treaty, the Tribunal should also “*take into account*” the supplementary means of interpretation such as the circumstances of the conclusion of the treaty as provided in Article 32 of the VCLT. In this regard, the Respondent argues that for both Contracting States the idea that an international arbitration tribunal would review the existence and unlawfulness of an alleged expropriation was alien in 1989 when China and Ghana entered into the Treaty.¹⁰³ Specifically, the Respondent argues that from the 20 BITs concluded by China prior to the China-Ghana Agreement,¹⁰⁴ 12 contain investor-state dispute resolution provisions. According to the Respondent, none of these BITs provide that an investor can submit any dispute, regardless of its nature, to arbitration. Rather, these BITs provide that investors may only refer the amount of compensation to arbitration, while the question of existence and unlawfulness of expropriation is reserved for amicable settlement, the competent national agencies, or courts of the respective contracting states. Thus, under previous BITs concluded by China, resorting to national legal procedures was not inconsistent with promoting foreign investments.¹⁰⁵
108. On its part, Ghana had concluded 3 BITs prior to the China-Ghana Agreement. Of these BITs, one provided for international arbitration (signed with the UK);¹⁰⁶ one required mutual consent for starting international arbitration (signed

¹⁰¹ R-PostHB Jurisdiction, § 35.

¹⁰² CL-21, *European Media Ventures SA v. The Czech Republic*, UNCITRAL, Award on Jurisdiction, 15 May 2007.

¹⁰³ R-Main Jurisdiction, § 14.

¹⁰⁴ According to the Respondent there are three additional BITs concluded by China prior to the Treaty, i.e. 23 in total, which, however, are not available in English. Accordingly, the Respondent was unable to review these three BITs for the purposes of these proceedings.

¹⁰⁵ R-Main Jurisdiction, § 12.

¹⁰⁶ R-Main Jurisdiction, § 13.

with the Netherlands);¹⁰⁷ and one provided for international arbitration limited to disputes “*regarding the amount of compensation*” following the final decision of national tribunals or any other competent authority (signed with Romania).¹⁰⁸

109. The Respondent submits that, from the circumstances of the conclusion of the China-Ghana Agreement, it is evident that neither China nor Ghana recognised the right of an investor to submit the question of existence and lawfulness of expropriation to international arbitration prior to 1989.¹⁰⁹
110. As regards the Claimant’s reliance on the MFN clause, the Respondent disputes that Article 3(2) of the China-Ghana Agreement extends to questions of jurisdiction. The Respondent submits that the ordinary meaning and context of Article 3(2) of the China-Ghana Agreement suggests that the Contracting States did not aim to expand the dispute settlement provisions of the Treaty by widening the scope of Article 10 to matters beyond those “*concerning the amount of compensation for expropriation*”.¹¹⁰
111. The Respondent argues that Article 3(2) of the Treaty does not extend its scope of application to dispute settlement. It does not envisage that all rights or all matters covered by the agreement would be subject to it. When contracting states in other BIT’s wanted the MFN clause to be applicable to dispute settlement, they did so expressly. Also, the MFN clauses in the cases on which the Claimant relies are different from Article 3(2) of the Treaty and the subject matter jurisdiction of the arbitral tribunals in those cases was not restricted, in the first place, to disputes “*concerning the amount of compensation for expropriation*”. The Respondent further argues that the Claimant has submitted nothing from which it might be established that it was the common intention of Ghana and China that Article 3(2) of the Treaty would apply to dispute settlement in order to eviscerate the express subject matter limitation on arbitration they agreed to in Article 10 of the Treaty. The Respondent further argues that many arbitral

¹⁰⁷ R-4, Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Ghana (1989).

¹⁰⁸ R-5, Agreement between the Government of The Republic of Ghana and The Government of The Socialist Republic of Romania on The Mutual Promotion and Guarantee of Investments (1989).

¹⁰⁹ R-Main Jurisdiction, § 14.

¹¹⁰ R-Main Jurisdiction, § 63.

tribunals have rejected arguments that their jurisdiction can be based on MFN clauses.¹¹¹

112. Finally, the Respondent contends that the Claimant has engaged in forum shopping by starting the parallel LCIA Arbitration.¹¹² According to the Respondent, if the LCIA is the appropriate forum to deal with the alleged breach of the EPIC Contract, as previously admitted by Claimant, then the Claimant's claim that Ghana has unlawfully failed to make payments under, and has repudiated, the EPIC contract should be dealt with in the LCIA Arbitration.¹¹³
113. In conclusion, the Respondent contends that the Claimant's contentions on jurisdiction are a call on the Tribunal to rewrite the bargain that China and Ghana struck in 1989. The Respondent states that rewriting a treaty does not give effect to the Contracting States' expressed intention.¹¹⁴

VIII. THE REQUESTS FOR RELIEF

114. The Claimant requests the Tribunal to:¹¹⁵
- a. Declare that the Tribunal have jurisdiction over Everyway's claims in this arbitration;
 - b. Declare that each Party bear the costs of its appointed member of the Tribunal and equally share the costs of the Chairman of the Tribunal and other costs incurred by the Tribunal; and
 - c. Award the Claimant the costs of its legal representation.

115. The Respondent requests the Tribunal to:¹¹⁶

¹¹¹ R-Main Jurisdiction, §§ 41-67.

¹¹² R-Reply Jurisdiction, § 63.

¹¹³ R-Main Jurisdiction, § 72.

¹¹⁴ R-Reply Jurisdiction, § 8.

¹¹⁵ C-Main Jurisdiction, § 102; C-PostHB Jurisdiction, § 56.

¹¹⁶ R-Main Jurisdiction, § 74; C-PostHB Jurisdiction, § 53.

- a. Declare that the Tribunal have no jurisdiction regarding Everyway's claims in this arbitration;
- b. Declare that each Party bear the costs of its appointed member of the Tribunal; and
- c. Award the Respondent the costs of its legal representation and the costs of its share of the Chairman's fees as well as its share of other administrative costs of this arbitration.

IX. THE TRIBUNAL'S ANALYSIS

116. From the Parties' submissions above, and as agreed between the Parties,¹¹⁷ the following issues arise for the Tribunal's determination:
- a. First, which Party has the burden to prove that the Tribunal has jurisdiction to hear the Claimant's claims in this arbitration;
 - b. Second, whether the Tribunal has jurisdiction under Article 10(1) of the Treaty to hear the Claimant's claims in this arbitration;
 - c. Third, whether the Tribunal has jurisdiction under Article 3(2) of the China-Ghana Agreement to hear the Claimant's claims in this arbitration;
 - d. Fourth, to what extent (if any) should the parallel LCIA Arbitration affect the Tribunal's decision on jurisdiction in the current Treaty Arbitration;
 - e. Fifth, how should the costs of this arbitration be allocated pursuant to Article 10(6) of the China-Ghana Agreement.

¹¹⁷ Annex 3 to PO.9.

117. The Tribunal addresses these issues (save as to the issue of costs) in turn below.

A. Burden of proof

118. The basic rule on the legal burden of proof in international law is the rule of *actori incumbit probatio*, namely that the party who asserts a claim must prove it.¹¹⁸ This fundamental proposition is a widely accepted principle of evidence in international law and equally applies in the resolution of disputes arising out of investment treaties.¹¹⁹
119. Further, this principle is enshrined in the Rules applicable to the present dispute. Specifically, Article 27 of the Rules provides that “*Each party shall have the burden of proving the facts relied on to support its claim or defence.*”
120. In this arbitration, it is the Claimant who seeks a declaration that the Respondent has breached the Treaty and seeks an order for damages amounting to US\$ 55 million.¹²⁰ The Claimant’s request that the Tribunal award damages necessarily rests on the premise that the Tribunal has jurisdiction under the Treaty to grant the requested relief. Indeed, the Claimant relies on Article 10(1) and Article 3(2) of the Treaty to make a positive case for jurisdiction in this arbitration. The Respondent does not make a positive case in respect of this Tribunal’s jurisdiction; rather, the Respondent denies by way of defence that the Tribunal has jurisdiction over the Claimant’s claims in this arbitration.
121. Therefore, the Tribunal considers that the Claimant has the burden to prove that the Tribunal has jurisdiction under the Treaty to make the requested declarations and award the requested damages.

¹¹⁸ Mojtaba Kazazi, *Burden of proof and related issues: a study on evidence before international tribunals*, (Kluwer Law International, 1996).

¹¹⁹ Kabir Duggal and Wendy W. Cai, *Principles of Evidence in Public International Law as Applied by Investor-State Tribunals* (2018); ‘Burden of Proof in Investor-State Arbitration’, in Frédéric G. Sourgens, Kabir Duggal et al., *Evidence in International Investment Arbitration*, (Oxford University Press, 2018) pp. 23-56.

¹²⁰ NoA, § 96.

122. On this point, it must be noted that the Tribunal has reached its decision on jurisdiction irrespective of its finding on the question of burden of proof. As explained in detail in the next two Sections, the Tribunal has decided to decline jurisdiction in this arbitration because it has accepted the Respondent's case on jurisdiction rather than because the Claimant has failed to discharge its burden of proof. Therefore, even if the Tribunal were wrong to find that the burden of proof on the question of jurisdiction rests on the Claimant, the outcome of the Tribunal's Final Award on Jurisdiction would be the same.

B. Jurisdiction of the Tribunal under Article 10(1) of the Treaty

123. The Tribunal notes, at the outset, that in this arbitration the Claimant brings claims under both *Article 4* for direct or indirect expropriation of its investment and *Article 3* of the Treaty in relation to breaches of equitable treatment and protection, MFN treatment and Umbrella Clause.
124. Specifically, the Claimant has commenced these arbitration proceedings alleging that Ghana has breached the China-Ghana Agreement by first, unlawfully expropriating the Claimant's entitlement to the EPIC Contract; second, failing to afford equitable treatment to the Claimant; and third, breaching the Umbrella Clause obligations as a consequence of failing to perform the EPIC Contract.
125. In the first place, the Claimant claims that the Respondent has "*either directly or indirectly, unlawfully expropriated*" the Claimant's investment because Ghana's Parliament, *inter alia*, "*rescinded approval for the valid and effective EPIC Contract under which Everyway has completed substantial amount of work with (a) no national security or public interest justification, (b) no due domestic legal procedure, (c) in a discriminatory manner, and (d) with no compensation whatsoever for the damages caused*".¹²¹
126. Accordingly, the Claimant claims that the Respondent has breached Article 4(1) of the China-Ghana Agreement which provides as follows:

"1. Either Contracting State may, for the national security and public interest, expropriate, nationalize or take similar measures (hereinafter referred to as

¹²¹ NoA, §§ 75-76.

“expropriation”) against investment of investors of the other Contracting State in its territory, but subject to the following conditions:

(a) under domestic legal procedure;

(b) without discrimination;

(c) payment of compensation.”

127. In the second place, the Claimant claims that the Respondent has *“failed to provide equitable treatment and protection to Everyway’s investments by arbitrarily cancelling the approval of the EPIC Contract between itself and Everyway and replacing Everyway with third parties for the same project and by delaying due payments to Everyway under the EPIC Contract”*.¹²²

128. Accordingly, the Claimant contends that the Respondent has breached Article 3(1) of the China-Ghana Agreement which provides as follows:

“Investments and activities associated with investments of investors of either Contracting State shall be accorded equitable treatment and shall enjoy protection in the territory of the other Contracting State.”

129. Finally, the Claimant claims that the Respondent has breached Article 3(2) of the China-Ghana Agreement which provides as follows:

“The treatment and protection referred to in Paragraph 1 of this Article shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State.”

130. According to the Claimant, Article 3(2) accords the Claimant *“certain more favourable treatments and protections”* for investments and associated activities offered in international investment agreements which Ghana has signed with other states, including the Umbrella Clause protection accorded in Article 3(3) of the Ghana-United Kingdom BIT and Article 3(3) of the Denmark-Ghana BIT which provide that *“[e]ach Contracting Party shall observe any obligation it may have*

¹²² NoA, § 78.

*entered into with regard to investments of nationals or companies of the other Contracting Party”.*¹²³

131. According to the Claimant, the Umbrella Clause contained in Ghana’s BITs with the United Kingdom and Denmark-Ghana is applicable in the present dispute pursuant to Article 3(2) of the China-Ghana Agreement. According to the Claimant, Ghana has breached its Umbrella Clause obligations “*by failing to make payment to Everyway for work completed and by repudiating the [EPIC] contract with neither just cause nor due procedure*”.¹²⁴
132. As already mentioned, the Claimant’s case on jurisdiction is two-fold: first, that the Tribunal has jurisdiction under Article 10(1) of the Treaty to determine the question of both entitlement and quantum of the alleged expropriation; and second, that the Tribunal has jurisdiction under Article 3(2) of the Treaty to determine the alleged expropriation as well as the alleged breaches of equitable treatment, protection and Umbrella Clause under the Treaty.
133. Thus, the Claimant’s reliance on Article 10(1) of the Treaty appears to be focusing on the question of jurisdiction over the Claimant’s claims for expropriation and does not appear to cover the Claimant’s claims for breach of equitable treatment, protection and Umbrella Clause under the Treaty. By contrast, the Claimant’s reliance on Article 3 of the Treaty is broader and covers the question of jurisdiction for both the Claimant’s claims for expropriation and the Claimant’s claims for breach of equitable treatment protection and Umbrella Clause under the Treaty.
134. The following section of the Final Award on Jurisdiction addresses the Claimant’s case for jurisdiction under Article 10(1) of the Treaty. Sub-section C below addresses the Claimant’s case for jurisdiction under Article 3(2) of the Treaty.

B.1. Jurisdiction of the Tribunal under Article 10(1) of the Treaty

135. Having carefully considered the Parties’ submissions, all relevant decided cases and literature on this matter, the Tribunal considers that it does not have

¹²³ NoA, §§ 79-81.

¹²⁴ NoA, § 82.

jurisdiction to decide the Claimant's claims for expropriation under Article 10(1) of the Treaty. The reasons for the Tribunal's decision are set out below.

B.1.1. Interpretation of Article 10(1) of the Treaty

136. The Parties disagree over the meaning and scope of Article 10(1) of the China-Ghana Agreement which provides as follows:

“Any dispute between either Contracting State and the investor of the other Contracting State concerning the amount of compensation for expropriation may be submitted to an arbitral tribunal.”

137. The Claimant contends that the Tribunal has jurisdiction to decide the Claimant's claims for expropriation under Article 10(1) of the China-Ghana Agreement. The Claimant claims that Article 10(1) of the China-Ghana Agreement gives the Tribunal jurisdiction to decide not only questions concerning the amount of compensation for expropriation but also questions concerning the existence and unlawfulness of expropriation.
138. The Respondent contends that the provision of Article 10(1) of the China-Ghana Agreement limits the jurisdiction of the Tribunal to the determination of the quantum of compensation for expropriation and does not include the question of the entitlement of expropriation.¹²⁵
139. Therefore, the Tribunal must interpret Article 10(1) of the Treaty and decide whether this provision accords the Tribunal jurisdiction to determine both the question of quantum and that of entitlement of the alleged expropriation in the present dispute.
140. It is common ground between the Parties that the Tribunal should apply the VCLT to construct Article 10(1) of the Treaty.¹²⁶ In any event, the VCLT applies through Article 10(5) of the Treaty which provides that:

¹²⁵ R-Main Jurisdiction, § 4.

¹²⁶ C-Main Jurisdiction, § 6; R-Main Jurisdiction, § 6.

“The tribunal shall adjudicate in accordance with the laws of the Contracting State to the dispute accepting the investment including its rules on the conflict of laws, the provisions of the Agreement as well as the generally recognized principles of international law accepted by both Contracting States.”

141. Both Ghana and China have signed,¹²⁷ or acceded to,¹²⁸ the VCLT and therefore the VCLT applies to this Treaty pursuant to Article 1 of the VCLT.¹²⁹
142. In any event, it is generally accepted that Articles 31 and 32 of the VCLT reflect basic principles of treaty interpretation in customary international law.
143. Articles 31 and 32 of the VCLT provide as follows:

“Article 31 - General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

¹²⁷ Ghana signed the VCLT on 23 May 1969.

¹²⁸ China acceded to the VCLT on 3 September 1997.

¹²⁹ *“The present Convention applies to treaties between States.”*

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 - Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.”

144. It is common ground that the starting point of the analysis is Article 31 of the VCLT. The Parties disagree over whether recourse needs to be made to Article 32 of the VCLT, and the Tribunal addresses this question further below.

B.1.1.1. The approach to interpretation

145. In interpreting the Treaty, the Tribunal is guided by the following considerations.
146. First, the terms of a treaty, being an agreement of international law, must be given a meaning which is independent of the characteristics of the legal system of either contracting party. Therefore, the outcome of the interpretation must be the same irrespective of whether the “Contracting State” in Article 10(1) is China or Ghana.
147. Secondly, the “*ordinary meaning*” must be the meaning attributed to those terms at the time when the treaty was concluded, a principle referred to as the principle of contemporaneity.¹³⁰

¹³⁰ Sir Gerald Fitzmaurice, ‘The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points’ (1957) 33 *Brit Yb Int’l L* 211–12.

148. Thirdly, a tribunal should endeavour to give a meaning to each of the terms interpreted.¹³¹
149. Fourthly, there are four relevant elements of interpretation identified in Article 31 of the VCLT, namely “*good faith*”, “*ordinary meaning*”, “*context*” and “*object and purpose*”. While it is generally accepted that the starting point of interpretation under Article 31 of the VCLT is to identify the “*ordinary meaning*” of a term, it is equally accepted that a textual interpretation does not enjoy primacy over the other three elements contained in Article 31 of the VCLT. Indeed, it is accepted that all the relevant elements should be given equal weight and be taken together in an iterative approach to interpretation which investment treaty tribunals have described as a “*process of progressive encirclement*”.¹³²
150. Fifthly, an investment treaty tribunal is not obliged to accept the decisions of previous investment treaty tribunals, even when they have ruled on similar matters. It is trite to observe that there is no *stare decisis* in investor-state dispute settlement. Investor-state dispute settlement is not a hierarchical or integrated system of dispute resolution where previous investment treaty awards establish legal principles or rules which are binding precedents for subsequent investment treaty tribunals. It is also important to bear in mind that each bilateral investment treaty is concluded between different contracting states and has a distinct context, object and purpose. Even when the terms used in one bilateral investment treaty are similar to those used in another bilateral investment treaty, they are rarely identical. Even small differences in the text, context, object and purpose may eventually entail different outcomes in the interpretation. Of course, an investment treaty tribunal has a duty to review previous investment treaty awards as part of its fundamental duty to carefully consider the authorities submitted by the parties in support of their cases. While a tribunal can find the reasoning and analysis of previous investment treaty awards helpful and potentially persuasive, a tribunal is not legally bound by their outcome, especially,

¹³¹ CL-2, *Sanum Investments Limited v. Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, 13 December 2013, § 333.

¹³² See for example, *Aguas del Tunari v. Bolivia*, ICSID Case No ARB/02/3, Decision on Jurisdiction, 21 October 2005, § 91: “*Interpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty’s object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation. [I]t is critical to observe [that] the Vienna Convention does not privilege any one of these three aspects of the interpretation method.*”

when a previous award concerns a treaty whose text, context, object and purpose are distinguishable from those of the treaty at hand.

151. In light of the above guiding considerations, the Tribunal's interpretation of Article 10(1) is as follows.

B.1.1.2. Ordinary meaning

152. Article 10(1) of the Treaty provides as follows:

“SETTLEMENT OF DISPUTE (sic) ON QUANTUM OF
COMPENSATION

Any dispute between either Contracting State and the Investor of the other Contracting State concerning the amount of compensation for expropriation may be submitted to an arbitral tribunal. (emphasis by underlining added)

153. It is plain, and indeed common ground, that Article 10(1) of the Treaty confers jurisdiction on “*an arbitral tribunal*”. The Parties, however, disagree on the scope of the jurisdiction conferred on an arbitral tribunal under this provision.
154. To interpret Article 10(1) of the Treaty and determine the scope of the arbitral tribunal's jurisdiction, the Tribunal starts by considering the width of the ordinary meaning of the terms: “*any dispute*”, “*concerning*” and “*amount of compensation for expropriation*”. As a matter of language, while the term “*any dispute*” has a wide ordinary meaning, the terms “*concerning*” and “*amount of compensation for expropriation*” clearly purport to limit the scope of jurisdiction of the arbitral tribunal.
155. The critical question is how far these two terms limit the scope of an arbitral tribunal's jurisdiction. Again, as a matter of language, there are two possible interpretations of the terms “*concerning*” and “*amount of compensation for expropriation*”:

- a. First, a broad interpretation according to which these terms must be read as meaning that any claim which *includes* a dispute on the amount of compensation for expropriation falls within the scope of jurisdiction of the arbitral tribunal. Under this broad interpretation, a dispute on the lawfulness of expropriation would fall within the scope of jurisdiction of an arbitral tribunal as long as the broader dispute between the two parties includes a question on quantum for expropriation. Therefore, under this broad interpretation, the Tribunal would have jurisdiction to decide both the amount of compensation to which the Claimant would be entitled and the question of whether the revocation of the EPIC Contract was a measure of unlawful expropriation which breached Article 4 of the Treaty.
 - b. Second, a narrow interpretation according to which these terms must be read as meaning that a dispute can be referred to an arbitral tribunal where the *only issue in dispute* is the amount of compensation for expropriation. Under this narrow interpretation, the Tribunal would have no jurisdiction to decide the Claimant's claims for expropriation in this arbitration because these claims would go to the question of entitlement in addition to the question of quantum.
156. There is authority suggesting that the ordinary meaning of the terms “*concerning*” and “*amount of compensation for expropriation*” is capable of supporting both a broad and a narrow interpretation. For example, in *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic* (“*Sanum v. Laos*”),¹³³ the Singapore Court of Appeal considered an appeal against a Singapore High Court decision that an arbitral tribunal, formed under the UNCITRAL Arbitration Rules, lacked jurisdiction over expropriation claims brought by the claimant under the 1993 bilateral investment treaty between China and Laos. The relevant article of the China-Laos treaty provided as follows: “*If a dispute involving the amount of compensation for expropriation cannot be settled through negotiation (...) may be submitted at the request of either party to an ad hoc arbitral tribunal.*” The Singapore Court of Appeal noted that the word “*involving*” (which is similar to the term “*concerning*” in the Treaty) could support either a broad or a narrow interpretation and, therefore,

¹³³ CL-22, *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic* [2016] SGCA, 29 September 2016, § 57.

to ascertain its meaning, consideration must be given to the context of these terms.¹³⁴

157. Similarly, in the *BUCG* case,¹³⁵ the arbitration tribunal, in considering whether it has jurisdiction to determine expropriation claims under the 1998 bilateral investment treaty between China and Yemen, found that the ordinary meaning of the terms “*any dispute relating to the amount of compensation for expropriation*” in Article 10 in the China-Yemen treaty supported both a broad and a narrow interpretation.¹³⁶
158. On the other hand, there is authority suggesting that the ordinary meaning of terms, which are similar to the terms in Article 10(1) of the Treaty, should be limited to the amount of compensation for expropriation. For example, in *RosInvest*,¹³⁷ Article 8 of the 1989 bilateral investment treaty between the Russian Federation and the United Kingdom provided as follows:

“Disputes between an Investor and the Host Contracting Party

- (1) This Article shall apply to any legal disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount or payment of compensation under Articles 4 (i.e. compensation for losses) or 5 (i.e. expropriation) of this Agreement, or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement, or concerning the consequences of the*

¹³⁴ “With great respect to the parties, we think the word ‘involve’ is certainly capable of supporting either of the Broad or Narrow Interpretations and to cavil over the possible dictionary definitions of the word “involve” will not help us interpret Art 8(3) of the PRC-Laos BIT. Rather, the words in Art 8(3) can only be accurately, and more meaningfully, understood by considering the context of the provision and it is to this which we now turn”, CL-22, *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic* [2016] SGCA, 29 September 2016, § 126.

¹³⁵ CL-3, *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017.

¹³⁶ CL-3, *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction: “The Tribunal concludes, as did a five judge panel of the Singapore Court of Appeal with respect to another similarly worded BIT in *Sanum v. Laos*, that the “ordinary meaning” and scope of the words “amount of compensation” is not conclusive either in favour of the “broad” interpretation or the “narrow” interpretation” CL-3, *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, § 77.

¹³⁷ CL-7, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Award on Jurisdiction, 1 October 2007.

non-implementation, or of the incorrect implementation, of Article 6 (i.e. repatriation of the Investments and Returns) of this Agreement.

(2) Any such disputes which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.”

159. The *RosInvest* tribunal considered that as a matter of ordinary meaning, the text of Article 8 limited the arbitral tribunal’s jurisdiction to the amount of compensation of expropriation.¹³⁸ The *RosInvest* tribunal further noted that it was common ground between the parties that the “*complicated wording*” in Article 8 presented a compromise between the UK’s intention to have a wide arbitration clause and the Russian Federation’s intention to have a limited one. Therefore, the *RosInvest* tribunal concluded that the wording of Article 8 “*does not include jurisdiction over the questions whether an expropriation occurred and was legal*”.¹³⁹
160. Similarly, the tribunal in *Austrian Airlines v. The Slovak Republic*¹⁴⁰ found that the ordinary meaning of the terms of the 1990 bilateral investment treaty between Austria and the Slovak Republic could not be read as meaning that an arbitral tribunal has jurisdiction over the question of entitlement of expropriation. Specifically, Article 8(1) of the Austria-Slovak Republic treaty provided as follows: “*any disputes arising out of an investment (...), concerning the amount or the conditions of payment of a compensation*”. The arbitral tribunal noted that:¹⁴¹

“The ordinary meaning of Article 8(1) arises from the words used in that provision which are clear by themselves. They mean that only disputes ‘concerning the amount or the conditions of payment of a compensation’ can be submitted to arbitration. The scope of Article 8 is therefore limited to disputes about the amount of the compensation and does not extend to the review of the principle of expropriation.”

¹³⁸ CL-7, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Award on Jurisdiction, 1 October 2007, § 110.

¹³⁹ CL-7, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Award on Jurisdiction, 1 October 2007, §§ 110 and 114.

¹⁴⁰ *Austrian Airlines v. The Slovak Republic*, UNCITRAL, Final Award, 9 October 2009.

¹⁴¹ *Austrian Airlines v. The Slovak Republic*, UNCITRAL, Final Award, 9 October 2009, § 96.

161. A narrow interpretation was adopted in *Vladimir Berschader and Moïse Berschader v. The Russian Federation* (“**Berschader**”),¹⁴² where the tribunal concluded that the ordinary meaning of the wording of Article 10(1) of the 1990 bilateral investment treaty between Belgium-Luxembourg and the Russian Federation, referring to “*Any dispute between (...) relating to the amount or method of payment of the compensation due*”, limited the tribunal’s jurisdiction only to questions of compensation of expropriation.¹⁴³
162. In *EMV*,¹⁴⁴ the tribunal was asked to interpret the meaning of Article 8(1) of the 1989 bilateral investment treaty between Belgium-Luxembourg and the Czech Republic. Article 8(1) of that treaty provided as follows:
- “Disputes between one of the Contracting Parties and an investor of the other Contracting Party concerning compensation due by virtue of Article 3 (i.e. expropriation) Paragraphs (1). and (3), shall be the subject of a written notification, accompanied by a detailed memorandum, addressed by the investor to the concerned Contracting Party. To the extent possible, such disputes shall be settled amicably. (2) If the dispute is not resolved within six months from the day of the written notification specified in Paragraph (1), and in the absence of any other form of settlement agreed between the parties to the dispute, it shall be submitted to arbitration before an ad hoc tribunal.”*
163. In dismissing an application to set aside the *EMV* award on jurisdiction pursuant to Section 67(1) of the (English) Arbitration Act 1996, Mr Justice Simon adopted a broad interpretation of the ordinary meaning of the terms included in Article 8(1) of the Belgium-Luxembourg and the Czech Republic investment treaty.

¹⁴² *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Final Award, 21 April 2016.

¹⁴³ “By virtue of Article 31 of the Vienna Convention, the Tribunal is, once again, obliged to interpret Article 10(1) in accordance with the ordinary meaning to be given to the terms thereof in their context and in light of the object and purpose of the Treaty. The Tribunal is of the view that the ordinary meaning of Article 10(1) is quite clear. Only disputes concerning the amount or mode of compensation (“*au montant ou au mode de paiement des indemnités*”) to be paid under Article 5 may be subjected to arbitration. The wording expressly limits the type of dispute, which may be subjected to arbitration under the Treaty, to a dispute concerning the amount or mode of compensation to be paid in the event of an expropriatory act occurring under the terms of Article 5.” *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Final Award, 21 April 2016, § 152.

¹⁴⁴ CL-21, *European Media Ventures SA v. The Czech Republic*, UNCITRAL, Award on Jurisdiction, 15 May 2007.

Crucially, however, the terms of that provision are markedly different from the terms of Article 10(1) contained in the China-Ghana Agreement in two important aspects.

164. First, Article 8(1) of the Belgium-Luxembourg and the Czech Republic treaty does *not* include the critical qualification “*amount of*” prior to the term “*compensation*”. Mr Justice Simon distinguished between the phrase “*concerning compensation*” and the phrase “*relating to the amount of compensation*” as a matter of ordinary meaning. Specifically, Mr Justice Simon pointed out:¹⁴⁵

“It is the [...] phrase ‘concerning compensation’ which gives rise to the most difficulty. The starting point is, in my judgment, the width of the ordinary meaning of the phrase. I am unable to accept that the phrase must be read as meaning ‘relating to the amount of compensation’ as a matter of its ordinary meaning.”

165. Second, the provision of Article 8(1) of the Belgium-Luxembourg and the Czech Republic treaty *does* include the equally critical qualification “*due by virtue of*” after the term “*compensation*” referring back to Article 3 which establishes the entitlement of expropriation under that treaty.¹⁴⁶ The importance of the phrase “*compensation due by virtue of*” a treaty provision which establishes the entitlement of expropriation is addressed below in detail as part of the context of Article 10(1) of the Treaty. However, it is worth noting that, in *Czech Republic v. EMV*, Mr Justice Simon considered the phrase “*compensation due by virtue of Article 3*” as part of the textual interpretation, placing significant emphasis on the fact that Article 8(1) referred back to the substantive terms of expropriation under Article 3 of the relevant treaty. On that basis, Mr Justice Simon concluded that the ordinary meaning of the phrase “*compensation due by virtue of Article 3*” contained

¹⁴⁵ CL-20, *Czech Republic v. EMV SA*, 2007 EWHC 2851 (Comm), 5 December 2007, § 43.

¹⁴⁶ It should be noted that Article 3 paragraphs (1) and (3) of the BIT in the *EMV* case are similar to Article 4 paragraphs (1) and (3) in the China-Ghana Agreement and provides as follows:

“Article 3

1. Investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party may not be expropriated or subjected to other measures of direct or indirect dispossession, total or partial, having a similar effect, unless such measures are:

(a) taken in accordance with a lawful procedure and are not discriminatory;

(b) accompanied by provisions for the payment of compensation, which shall be paid to the investors in convertible currency and without delay. The amount shall correspond to the real value of the investments on the day before the measures were taken or made public.

...

3. The provisions of paragraphs 1 and 2 are applicable to investors of each Contracting Party, holding any form of participation in any company whatsoever in the territory of the other Contracting Party.”

in Article 8(1) covered both issues of quantification and entitlement. According to Mr Justice Simon, it is the critical term “*compensation due by virtue of*” which connects, as a matter of ordinary meaning, compensation to entitlement:¹⁴⁷

“In my view the ordinary meaning of the words of Article 8, with its specific cross-reference to the terms of Article 3(1) suggests strongly that the jurisdiction is not confined to a single issue arising under Art 3(1) (ie item vi). The cross-reference to Article 3(3) reinforces the impression that the jurisdiction relates to issues or entitlement and not simply to issues of quantification.”

166. In the light of the above observations, the Tribunal considers that the ordinary meaning of Article 10(1) of the Treaty cannot be read as meaning to include the question of entitlement of expropriation. In this respect, the Tribunal notes the important qualification of the term “*the amount of*” prior to the terms “*compensation for expropriation*” which, as a matter of ordinary meaning, places clear limitations on the scope of questions which can be referred to arbitration. As such, the ordinary meaning of the phrase “*concerning the amount of compensation for expropriation*” does not include the question of entitlement.
167. The Tribunal notes that the investment treaty tribunals which adopted a broad interpretation of similar treaty terms found that the terms “*involving*”¹⁴⁸ and “*relating*”¹⁴⁹ had an inclusive rather than exclusive meaning. In the Tribunal’s view, the term “*concerning*” in Article 10(1) of the Treaty, even if it is inclusive, does not in itself broaden or limit the jurisdiction of an arbitral tribunal. Indeed, nothing turns on the term “*concerning*”.¹⁵⁰ The critical phrase, in the Tribunal’s view, is the phrase “*the amount of compensation for expropriation*” (emphasis added). The Tribunal cannot accept that as a matter of language the phrase “*concerning expropriation*” has an identical meaning to the phrase “*concerning the amount of compensation*”, which is what a broad interpretation would entail. If that were the case, the term “*the amount of*” would be rendered meaningless, which cannot be

¹⁴⁷ CL-20, *Czech Republic v. EMV SA*, 2007 EWHC 2851 (Comm), 5 December 2007, § 47.

¹⁴⁸ CL-22, *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic* [2016] SGCA, 29 September 2016; CL-2, *Sanum Investments Limited v. Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, 13 December 2013.

¹⁴⁹ CL-3, *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017.

¹⁵⁰ See also *Beijing Shougang and others v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017, § 446.

right. As already noted, the task of a tribunal is to give effect to each of the terms used in a treaty unless they are clearly otiose.

168. Further, and importantly in the view of the Tribunal, in ascertaining the ordinary meaning of Article 10(1) of the Treaty, consideration must be given to the heading of Article 10 which reads as follows:

“SETTLEMENT OF *DISPUTTE* (sic) ON QUANTUM OF COMPENSATION” (emphasis added).

169. The phrase “*DISPUTTE* (sic) ON QUANTUM OF COMPENSATION” in the heading of Article 10 of the Treaty underscores that the ordinary meaning of the terms “*concerning the amount of compensation for expropriation*” in the body of Article 10 is not capable of supporting an interpretation which includes anything other than disputes on quantum of compensation.
170. The Tribunal notes that the equivalent provisions in other bilateral investment treaties relied upon by the Claimant to support a broad interpretation of Article 10(1):
- a. Either had no heading at all;¹⁵¹
 - b. Or had a general heading referring to “*Disputes between an Investor and the Host Contracting Party*”;¹⁵² “*Disputes between one Party and investors of the other Party*”;¹⁵³ or “*Settlement of Investment Disputes*”.¹⁵⁴
171. The inclusion of the terms “SETTLEMENT OF *DISPUTTE* (sic) ON QUANTUM OF COMPENSATION” in the heading of Article 10 of the Treaty is an important point of distinction from previous investment treaty awards. In

¹⁵¹ CL-1, *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, (Peru-China BIT - 1994); CL-2, *Sanum Investments Limited v. Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, 13 December 2013 (China- Laos BIT - 1993).

¹⁵² CL-7, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Award on Jurisdiction, 1 October 2007, (UK- Russian Federation BIT -1998), Article 8.

¹⁵³ CL-17, *Renta 4 S.V.S.A and others v. Russia*, SCC Case No. 24/2007, Award on Preliminary Objections, 20 March 2009. (Spain – Russian Federation BIT -1990), Article 10.

¹⁵⁴ CL-3, *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, (China-Yemen BIT -1998) Article 10.

the view of the Tribunal, the terms in the heading of Article 10 further suggest that the ordinary meaning of the wording “[a]ny dispute ... concerning the amount of compensation for expropriation” in Article 10(1) of the Treaty cannot support a broad interpretation.

B.1.1.3. Context

172. The Tribunal now turns to another important element of interpretation under Article 31(1) of the VCLT, namely the context of the critical terms of Article 10(1) of the Treaty. Addressing the context of the critical terms requires the Tribunal to place Article 10(1) within the China-Ghana Agreement and systematically examine its meaning by reference to other relevant provisions of the Treaty.
173. The critical context of Article 10(1) can be found in the provisions of Article 4 of the Treaty which reads as follows:

“1. Either Contracting State may, for the national security and public interest, expropriate, nationalize or take similar measures (hereinafter referred to as “expropriation”) against investment of investors of the other Contracting State in its territory, but subject to the following conditions:

- (a) under domestic legal procedure;*
- (b) without discrimination;*
- (c) payment of compensation.*

2. The compensation mentioned in Paragraph 1 (c) of this Article shall be equivalent to the value of the expropriated investments at the time when expropriation is proclaimed, be convertible and freely transferrable. The compensation shall be paid without unreasonable delay.

*3. If an investor considers the expropriation mentioned in Paragraph 1 of this Article incompatible with the laws of the Contracting State taking such expropriation **shall**, upon the request of the investor, review the said expropriation.”* (emphasis added)¹⁵⁵

¹⁵⁵ RL-1, China-Ghana Agreement.

174. The Claimant has provided an English translation of the Chinese text of the provision of Article 4(3) of the Treaty which reads as follows:¹⁵⁶

“If an investor considers the expropriation mentioned in Paragraph 1 of this Article incompatible with the law of the Contracting State taking such expropriation, then, such expropriation may, upon request of the investor, be reviewed by competent courts in the Contracting State taking such expropriation.”

175. Both the English and the Chinese text are equally authentic under the Treaty. As the final sentence of the Treaty states, the Treaty was “[d]one in duplicate at Beijing on October 12th, 1989 in the Chinese and English languages, both texts being equally authentic”. The Respondent has not challenged the accuracy of the English translation of the Chinese text of the Treaty. Accordingly, the Tribunal accepts the English translation of the Chinese text of the Treaty as such translation was submitted by the Claimant.

176. The Tribunal makes the following observations on the provisions of Article 4 and their relationship with Article 10(1) of the Treaty.

177. First, under Article 4(3) of the Treaty, the question of lawfulness of expropriation is allocated to the “*competent courts in the Contracting State taking such expropriation*”. In the present dispute, these courts would be the competent courts in Ghana.

178. The English version of Article 4(3) of the Treaty is obviously incomplete. It is clear, also from the English translation of the Chinese text, that possibly due to a typographical error the words “*the competent courts in the Contracting State taking such expropriation*” are missing from the English text of Article 4(3) of the Treaty which should read as follows:

“If an investor considers the expropriation mentioned in Paragraph 1 of this Article incompatible with the laws of the Contracting State taking such expropriation, [the

¹⁵⁶ Chinese text of Article 4(3) reads: “本条第一款所述征收，如果投资者认为不符合采取征收措施缔约国一方的法律，应该投资者的请求，可由采取征收措施缔约国一方有管辖权的法院对该征收予以审查。”

competent courts in the Contracting State taking such expropriation] shall, upon the request of the investor, review the said expropriation.” [underlined text added]

179. Both Parties accept that these missing words should be read into the English text of Article 4(3) of the Treaty, and therefore nothing turns on this omission.¹⁵⁷ In any event, the Tribunal is content to accept the English translation of the Chinese text as the basis of its analysis and, when necessary, to refer to the English text by way of comparison.
180. Pursuant to Article 4(3) of the Treaty, the “*competent courts in the Contracting State taking such expropriation*” are vested with jurisdiction to review whether expropriation is lawful or compatible with the laws of the Contracting State taking such expropriation. There is no mention of an arbitral tribunal in Article 4(3) of the Treaty. There is nothing in this provision that would suggest, even by implication, that an arbitral tribunal would have jurisdiction to review the lawfulness of an alleged expropriation.
181. The Claimant places emphasis on the word “*may*” which is found in the English translation of the Chinese text of Article 4(3) of the Treaty to claim that the jurisdiction of the competent courts in the Contracting State is not mandatory and that litigating the question of lawfulness of expropriation is only an option. Specifically, the Claimant claims that “*Article 4(3) of the Treaty [...] simply afford[s] an option to, instead of imposing a requirement on, the investor to seek protection in competent courts in Ghana*”.¹⁵⁸
182. The Tribunal does not consider that the word “*may*” in the English translation of the Chinese text necessarily suggests that jurisdiction vested on the competent courts is permissive. Relatedly, the Tribunal notes that the English text of the Treaty uses the word “*shall*” not “*may*”. While both Parties accept that the English text of Article 4(3) of the Treaty is incomplete, there is no suggestion that the word “*shall*” in the English text of the provision is the result of a typographical error. The Tribunal further notes that Article 10(1) of the Treaty which confers jurisdiction on an arbitral tribunal also includes the word “*may*”: “*any dispute ... concerning the amount of compensation for expropriation may be submitted to an arbitral tribunal*” (emphasis added). There is no suggestion that Article 10(1) of

¹⁵⁷ C-Main Jurisdiction, § 13; R-Reply Jurisdiction, § 11.

¹⁵⁸ C- Main Jurisdiction, § 17.

the Treaty would vest an arbitral tribunal with permissive jurisdiction on the question of the amount of compensation for expropriation. Both Parties accept that a claim on quantum of an alleged expropriation would exclusively fall within the jurisdiction of an arbitral tribunal notwithstanding the use of the word “*may*” in Article 10(1) of the Treaty.

183. In any event, even on Claimant’s account, Article 4(3) of the Treaty clearly vests the competent courts in the “*Contracting State*” with jurisdiction to review the lawfulness of an alleged expropriation. As mentioned, there is no reference to arbitration in Article 4(3) of the Treaty. Thus, even if referring the question of lawfulness of expropriation to litigation were an option (as the Claimant contends), it would be the *only option* under Article 4(3) of the Treaty.
184. Secondly, the provision of Article 10(1) of the Treaty does not refer back to Article 4(1) of the Treaty to connect the question of compensation to the question of entitlement of expropriation. In almost all previous investment treaty awards which adopted a broad interpretation,¹⁵⁹ the provision vesting an arbitral tribunal with jurisdiction to determine “*compensation*” or “*the amount of compensation*” was expressly linked to another provision in the treaty setting out the entitlement of expropriation in the first place.
185. For example, in *Renta 4*, Article 10 of the 1990 bilateral investment treaty between the Russian Federation and Spain referred back to Article 6 of the same treaty connecting thus the question of “*the payment*” to the question of “*compensation due under Article 6*”.¹⁶⁰ Article 6 of the Russian Federation – Spain BIT (1990) provided as follows:

“Any nationalization, expropriation or any other measure having similar consequences taken by the authorities of either Party against investments made within its territory by investors of the other Party, shall be taken only on the grounds of public use and in accordance with the legislation in force in the territory. Such measures should on no

¹⁵⁹ With the exception of CL-2, *Sanum Investments Limited v. Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, 13 December 2013, and CL-3, *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017.

¹⁶⁰ Article 10 Russian Federation – Spain BIT (1990) “1. *Any dispute between one Party and an investor of the other Party relating to the amount or method of payment of the compensation due under Article 6*”.

account be discriminatory. The Party adopting such measures shall pay the investor or his beneficiary adequate compensation, without undue delay and in freely convertible currency.”

186. Similarly, in *EMV* (as discussed above), Article 8 of the 1989 BIT between Belgium-Luxembourg and the Czech Republic referred back to Article 3 setting out the entitlement of expropriation.
187. Specifically, Article 8 of that treaty provided that “1. *Disputes between one of the Contracting Parties and an investor of the other Contracting Party concerning compensation due by virtue of Article 3 Paragraphs (1) and (3)*”; and Article 3 of that treaty provided as follows:

“(1) Investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party may not be expropriated or subjected to other measures of direct or indirect dispossession, total or partial, having a similar effect, unless such measures are:

(a) taken in accordance with a lawful procedure and are not discriminatory;

(b) accompanied by provisions for the payment of compensation, which shall be paid to the investors in convertible currency and without delay, The amount shall correspond to the real value of the investments on the day before the measures were taken or made public.

(...)

(3) The provisions of paragraph 1 and 2 are applicable to investors of each Contracting Party, holding any form of participation in any company whatsoever in the territory of the other Contracting Party.”

188. In the above cases, the investment treaty tribunals considered (rightly in the view of the Tribunal) that the term “*due*” directly brought the underlying question of entitlement within the ambit of the term “*compensation*”. Under this formulation, an arbitral tribunal is given jurisdiction to determine the question of compensation *as is due* pursuant to another treaty provision which sets out the entitlement in the first place.
189. In the China-Ghana Agreement, Article 10(1) makes no express or implicit reference to Article 4 which sets out the entitlement of expropriation. The typical phrases “*compensation due by virtue of*” or “*compensation due under*” are missing from

the text of Article 10(1) of the Treaty. Against this context, it cannot be said that the issue of entitlement of expropriation is brought within the scope of a tribunal which is vested with jurisdiction to decide the issue of quantum.

190. Thirdly, read together, the provisions of Article 10(1) and Article 4(3) of the Treaty do not preclude an investor from submitting the question of quantum of expropriation to arbitration after it has submitted the question of lawfulness of expropriation to the competent courts of the host State.
191. In a number of previous investment treaty awards that adopted a broad interpretation, the equivalent provision of Article 10(1) contained a provision to the effect that if an investor submitted the question of lawfulness to the courts of the host State, the investor would no longer be entitled to submit any other dispute, including a dispute on the quantum of expropriation, to arbitration.¹⁶¹ The investment arbitral tribunals in those cases decided that this type of clauses were akin to a fork-in-the-road clause, which effectively precluded the investor from having access to an arbitral tribunal, once it had referred the question of entitlement to the courts of the host state.
192. For example, in *Tza Yap Shum*, Article 8 of the China-Peru BIT provided as follows:

“1. Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

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

3. If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party

¹⁶¹ CL-1, *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, §§ 156, 157; CL-2, *Sanum v. Laos*, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013, § 342; CL-3, *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, § 71.

*to the international arbitration of the International Center for Settlement of Investment Disputes (ICSID) [...]. Any disputes concerning other matters between an investor of either Contracting Party and the other Contracting Party may be submitted to the Center if the parties to the dispute so agree. **The provisions of this Paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article***” (emphasis added)

193. According to the *Tza Yap Shum* tribunal, the combined effect of Article 8(1)-(2) and the last paragraph of Article 8(3) of the China-Peru BIT was such that if an investor submitted the question of lawfulness to litigation, the investor would not be entitled to subsequently submit the question of quantum of expropriation to arbitration. As the *Tza Yap Shum* tribunal noted:¹⁶²

“These provisions, read together, seem to indicate that if an investor brings a dispute before a competent tribunal of the Contracting Party, it is totally precluded from having access to ICSID arbitration.”

194. Similarly, in *Sanum Investments*, Article 8 of the China-Laos BIT provided as follows:

“Article 8:

1. Any dispute between an investor of one Contracting State and the other Contracting State in connection with an investment in the territory of the other Contracting State shall, as far as possible, be settled amicably through negotiation between the parties to the dispute.

2. If the dispute cannot be settled through negotiation within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting State accepting the investment.

3. If a dispute involving the amount of compensation for expropriation cannot be settled through negotiation within six months as specified in paragraph 1 of this Article 1, it may be submitted at the request of either party to an ad hoc arbitral tribunal. The

¹⁶² CL-1, *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, §§ 156-157.

provision of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in the paragraph 2 of this Article.”

195. The *Sanum Investments* tribunal accepted that the fork-in-the-road provision at the end of Article 8(3) would preclude an investor from referring the question of quantum to arbitration, if the investor had first submitted the question of lawfulness to the competent court of the contracting state accepting the investment.¹⁶³
196. The same conclusion was reached by the Singapore Court of Appeal in the *Sanum v. Laos* case, which found as follows:¹⁶⁴

“In our judgment, the words “[t]he provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in paragraph 2” means that if any dispute is brought to the national court, the claimant will no longer be entitled to refer any aspect of that dispute to arbitration. Hence once an expropriation claim is referred to the national court, no aspect of that claim can then be brought to arbitration.”

197. Similarly, in the *BUCG* case, Article 10 of the China-Yemen BIT provided as follows:

“Article 10

1. Any dispute between one Contracting Party and an investor of the other Contracting Party relating to an investment shall, as far as possible, be settled amicably through deliberations and negotiations between the parties to the dispute.

2. If the dispute cannot be resolved by the parties through direct arrangements for amicable negotiations within six months from the date on which a request for settlement is submitted in writing, such dispute may be submitted at the choice of the investor to:

(a) a competent court of the Contracting Party in the territory of which the investment has been made; or

¹⁶³ CL-2, *Sanum Investments Limited v. Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, 13 December 2013, §§ 340-341.

¹⁶⁴ CL-22, *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic* [2016] SGCA, 29 September 2016, § 130.

(b) the International Centre for the Settlement of Disputes (ICSID) which was established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States opened for signature at Washington DC on March 18, 1965, for arbitration. For this purpose, either Contracting Party shall give its irrevocable consent to the submission of any dispute relating to the amount of compensation for expropriation for resolution under such arbitration procedure. Other disputes submitted under such procedure shall be mutually agreed upon between both Contracting parties.”

198. The BUCG tribunal held that “*having regard to the fork in the road, and the issue of quantum having then been decided by the courts of Yemen, the investor would be precluded from an ICSID arbitration to re-litigate the amount of compensation.*”¹⁶⁵
199. In the present case, there is nothing in the provisions of Articles 4(3) and 10(1) of the China-Ghana Agreement that would suggest that if an investor submitted the question of lawfulness to the competent courts of the host State, it would be subsequently precluded from having access to arbitration in respect of a dispute “*concerning the amount of compensation*”. There is no provision in the China-Ghana Agreement akin to a fork-in-the-road clause.
200. The Claimant claims that, while there is no express “fork-in-the-road” provision in the China-Ghana Agreement, there is an “*invisible fork-in-the-road clause*” resulting from the legal principle of issue preclusion which would render Article 10(1) of the Treaty without effect and would effectively preclude an investor from having access to arbitration.¹⁶⁶ Specifically, the Claimant contends that if the Claimant was obliged to refer the question of entitlement of expropriation to the courts of Ghana, the latter would necessarily address the question of quantum of expropriation, being one of the requirements of lawfulness under Article 4(1) of the Treaty. Accordingly, the Claimant contends, the Ghanaian courts’ determination of the quantum would effectively prevent the Claimant from referring the same question to arbitration because of the legal principle of issue preclusion.

¹⁶⁵ CL-3, *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, § 81.

¹⁶⁶ C-Main Jurisdiction, § 27.

201. The Tribunal does not agree with the Claimant's submission on this point. For a start, the Claimant has not demonstrated that the Ghanaian courts would indeed address the question of quantum of expropriation, if an investor submitted the question of lawfulness to litigation under Article 4(1) of the Treaty.
202. In any event, it is trite law that for a decision of a court to be binding on a subsequent court or arbitral tribunal (either in the form of *res judicata* or issue preclusion), the first court must have *jurisdiction* to decide on the relevant issue. In the present case, pursuant to Article 10(1) of the Treaty, jurisdiction on questions of quantum of expropriation is exclusively vested on an arbitral tribunal, not the national courts of the host State. Even if the latter made a determination on quantum, such determination would not be binding on a subsequent tribunal which under Article 10(1) of the Treaty has exclusive jurisdiction to decide all questions on quantum.
203. Overall, the Tribunal considers that there is nothing in the Treaty to suggest that an investor would be precluded from referring the question of quantum to arbitration under Article 10(1) of the Treaty, once it had referred the question of lawfulness of expropriation to litigation under Article 4(3) of the Treaty. In the view of the Tribunal, the Treaty contains neither an explicit nor an "*invisible*" fork-in-the-road clause.
204. In the view of the Tribunal, the critical question in this dispute is not whether an investor is precluded from referring the question of quantum to arbitration by way of the application of a fork-in-the-road provision (which, as found, is not included in the Treaty). Rather, the critical question is whether an investor is precluded from referring the question of quantum to arbitration by way of a *unilateral declaration on the part of the host State denying the existence of the expropriation*.
205. It is true that nowadays most expropriation disputes do not arise out of *direct* expropriation. Rather, they arise from state measures which may amount to *indirect* expropriation. In those cases, the occurrence of indirect expropriation has to be established either by the acknowledgement of the host state or by the determination of the courts of the host state. On that basis, investment treaty tribunals have ruled that a narrow interpretation of treaty provisions which are equivalent to Article 10(1) of the Treaty would effectively allow a host state to unilaterally deny that expropriation has occurred and, accordingly, negate the

jurisdiction of an arbitral tribunal to decide the quantum of expropriation.¹⁶⁷ Thus, and relying also on the principle of *effet utile*,¹⁶⁸ these investment treaty tribunals have decided to accept jurisdiction over the question of both entitlement and quantum of expropriation.

206. Possibly, the most characteristic decision in this respect is the decision of the arbitral tribunal in *Renta 4* which observed that adopting a narrow interpretation of a treaty provision, which vested arbitral tribunals with jurisdiction over disputes “relating to the amount or method of payment of the compensation” of expropriation, would be “impermissible” because such an interpretation would allow the “respondent State [to] simply declare whether there is an obligation to compensate”. Specifically, the arbitral tribunal in *Renta 4* noted that:¹⁶⁹

“It follows that it is impermissible to read Article 10 of the BIT as a vanishingly narrow internationalisation of either Russia’s or Spain’s commitment that would be the consequence if Russia - taken at the international level as a state composed of all of its organs including national courts - could determine unilaterally and conclusively whether the very predicate of the Tribunal’s jurisdiction were operative or not. That predicate is the existence of an obligation to make compensation. If there is no obligation to make compensation the arbitration clause would never operate. The dispute would not be internationalised if the respondent State could simply declare whether there is an obligation to compensate. Either signatory State could thus by its fiat (including that of its courts given the State’s responsibility for their acts under international law) ensure that there would never be an arbitration under Article 10.”

207. The arbitral tribunal in *Renta 4* went on to say this:¹⁷⁰

¹⁶⁷ CL-3, *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, § 81 “On the Respondent’s interpretation, Yemen can unilaterally deny a claimant access to an ICSID tribunal simply by refusing to admit some aspect of liability. If Yemen puts in doubt the alleged expropriation, the claim must go to the courts of Yemen for determination.”; See also CL-17, *Renta 4 S.V.S.A and others v. Russia*, SCC Case No. 24/2007, Award on Preliminary Objections, 20 March 2009, § 56.

¹⁶⁸ Upon which the Claimant relies too.

¹⁶⁹ CL-17, *Renta 4 S.V.S.A and others v. Russia*, SCC Case No. 24/2007, Award on Preliminary Objections, 20 March 2009, § 56.

¹⁷⁰ CL-17, *Renta 4 S.V.S.A and others v. Russia*, SCC Case No. 24/2007, Award on Preliminary Objections, 20 March 2009, § 58.

“Russia contends that two relevant fora may be available to determine whether compensation is due: the Russian courts or State-to-State arbitration. Yet each of these avenues is problematic. Remedies by means of diplomatic protection are from the investors’ perspective notoriously unreliable in practice.”

208. In the view of the Tribunal, there are difficulties with this approach in the context of the present dispute.
209. To begin with, it is not accurate to suggest that either Contracting State in the Treaty can unilaterally preclude an investor from referring the question of quantum to arbitration by denying the occurrence of expropriation in the first place. Under the Treaty, if an investor considers that a Contracting State has indirectly expropriated their property and the Contracting State denies the occurrence of such expropriation, the investor may refer the question of whether expropriation occurred to the competent court of the Contracting State pursuant to Article 4(3). Given that the scope of Article 4(1) and Article 4(3) of the Treaty is sufficiently wide to encompass both disputes on direct and indirect expropriation,¹⁷¹ the competent court of the Contracting State will decide whether an act amounting to indirect expropriation occurred or not. If the competent court of the Contracting State finds that no expropriation occurred, there will be no question for the investor to refer to arbitration. However, if the competent court of the Contracting State finds that the property of the investor has been indirectly and unlawfully expropriated, the investor may then refer the question of quantum to arbitration. Thus, the Contracting State may deny the occurrence of expropriation, but it cannot unilaterally preclude the investor from referring the matter of entitlement to the competent courts of the Contracting State pursuant to Article 4(3) of the Treaty and, subsequently, the matter of quantum to an arbitral tribunal pursuant Article 10(1) of the Treaty.
210. In this respect, the Tribunal agrees with the *Beijing Shougang* tribunal which found that a narrow interpretation of Article 8(3) of the China-Mongolia investment treaty, which is the equivalent provision of Article 10(1) in the Treaty, would not deprive the provision of any legal or practical effect in both claims concerning

¹⁷¹ As admitted by the Claimant who claims that Ghana has breached Article 4 of the Treaty by “either directly or indirectly, unlawfully expropriate[ing] Everyway’s investment”, NoA, §§ 75-76.

direct and indirect expropriation.¹⁷² The *Beijing Shougang* tribunal noted the following:¹⁷³

“Arbitration before an ad hoc arbitral tribunal would be available in cases where an expropriation has been formally proclaimed and what is disputed is the amount to be paid by the State to the investor for its expropriated investment. In other words, arbitration will be available where the dispute is indeed limited to the amount of compensation for a proclaimed expropriation, the occurrence of which is not contested. While it may be the case that formally proclaimed expropriations are a less common event than measures having an effect equivalent to nationalisation or expropriation (which are also prohibited by Article 4 of the Treaty), the Tribunal cannot see that an arbitration provision that would nevertheless encompass an entire category of disputes can fairly be said to be lacking effet utile.

Arbitration before an ad hoc arbitral tribunal would be available in the case of both direct and indirect expropriation; in the latter case, if an investor were to seek a proclamation from the courts (or from any appropriate administrative body) that an expropriation had occurred, or were to seek through judicial proceedings to protect its investment against measures having (in its view) an effect equivalent to expropriation, while reserving the issue of compensation for an out-of-court procedure. The Tribunal does not see that the fork-in-the-road provisions of Article 8, paragraph 3, would deprive an ad hoc arbitral tribunal of jurisdiction where an investor, in the course of prior judicial proceedings, had expressly sought to reserve the question of compensation for a decision in arbitration.”

211. In sum, the Tribunal does not consider that, under the Treaty, a Contracting State may unilaterally preclude an investor from referring the matter of quantum to international arbitration, after it has first referred the matter of entitlement to national litigation. If the implied suggestion here is that the courts of a Contracting State would decide *at the State’s behest* that an expropriation did not occur,¹⁷⁴ the suggestion goes to questions of bias or indeed denial of justice. This

¹⁷² *Beijing Shougang and others v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017, §§ 448 and 449.

¹⁷³ *Beijing Shougang and others v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017, §§ 448 and 449.

¹⁷⁴ The Tribunal notes here *Renta 4’s* passage that “Either signatory State could thus by its fiat (including that of its courts given the State’s responsibility for their acts under international law) ensure that there would never be an arbitration under Article 10”. CL-17, *Renta 4 S.V.S.A and others v. Russia*, SCC Case No. 24/2007, Award on Preliminary Objections, 20 March 2009, § 56.

Tribunal has no evidence to assess (and in fairness, the Claimant has not claimed) that the national courts of Ghana would accept to decide at the behest of their State with a view to depriving an investor of their rights under the Treaty. No tribunal should lightly make this kind of assumptions about national courts.

212. Of course, under the dispute resolution structure of the Treaty, if the competent court of a Contracting State denies that an indirect expropriation occurred, the only possible avenue of resolving the question of indirect expropriation would be “*by consultation through the diplomatic channel*” and, failing that, through *ad hoc* arbitration between the Contracting States pursuant to Article 9 of the Treaty, as is discussed in detail further below. Again, if the implied suggestion here is that an arbitral tribunal should assume jurisdiction on the basis that State-to-State arbitration is “*problematic*” and “*notoriously unreliable in practice*”, such a suggestion would amount to an attempt to correct rather than interpret the Treaty.
213. In the circumstances, the Tribunal has considerable sympathy for the position that the Claimant has found itself in. However, the task of the Tribunal is to interpret the Treaty in accordance with the guiding principles of Article 31 of the VCLT. The task of the Tribunal is not to render a decision on the basis of expedience or on the basis of what the Tribunal considers to be problematic or unreliable in practice.
214. There is a further interrelated contention which the Claimant advances in support of its case. Specifically, the Claimant contends that, under Article 4 of the Treaty, the issue of payment of compensation is an element of the claim for expropriation which cannot be entirely split from the question of liability of expropriation itself.¹⁷⁵
215. Some tribunals have accepted the argument that these two issues are inextricably linked and, relying again on the principle of *effet utile*, have accepted jurisdiction to decide the question of both quantum and lawfulness of expropriation.
216. For example, in *Sanum*, the arbitral tribunal held that:¹⁷⁶

¹⁷⁵ C-Rejoinder Jurisdiction, § 17.

¹⁷⁶ CL-2, *Sanum Investments Limited v. Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, 13 December 2013, § 333.

“Thus if Articles 8 (i.e. dispute between an Investor and a Contracting State) and Article 4(1) (i.e expropriation) are read together, an investor who would have recourse to a competent court to determine whether an expropriation has occurred would be precluded from submitting the dispute on the amount of compensation to international arbitration because the competent court would have already determined the compensation. There is an overlap between the conditions to be met by an expropriation under the Treaty and the Respondent’s reading of Article 8(3) in isolation of its context. The Respondent has ignored completely this overlap and has assumed that the jurisdiction may be split between the local courts and an arbitral tribunal. This principle of interpretation has been applied by investment arbitration tribunals and other international tribunals.”

217. In BUCG, the arbitral tribunal noted that:¹⁷⁷

“However, by reason of Article 4, the Yemeni court would not be able to determine the question of expropriation without addressing each of the four conditions listed in Article 4, including whether effective and appropriate compensation has been paid.”

218. As noted, in this arbitration, the Claimant contends that the issue of payment of compensation cannot be split from the question of lawfulness of expropriation.¹⁷⁸ While the Claimant makes this contention mainly to support the “invisible fork-in-the-road” contention (which the Tribunal addressed above), the implication of this contention is that the issue of entitlement of expropriation is so inextricably linked to the question of quantum, that effectively a tribunal cannot decide the latter without also deciding the former.¹⁷⁹ The broader claim

¹⁷⁷ CL-3, *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, § 81.

¹⁷⁸ C-Rejoinder Jurisdiction, § 17.

¹⁷⁹ C-Main Jurisdiction, § 27 “even if the China-Ghana BIT does not expressly provide for a “fork-in-the-road” clause, the invisible “fork-in-the-road” clause resulting from the legal principle of “issue preclusion” would still render Article 10.1 without effect and lead to an inconsistent conclusion that the investor could never in fact have access to arbitration”; C-Rejoinder Jurisdiction, §§ 14 et seq. Regarding the uniqueness of a claim of expropriation, in particular the inseparability of issues of liability and compensation under a claim of expropriation, the investment arbitration tribunal in *Sanum* rightfully states (...) “In view of the above, under Article 4 of the China-Ghana BIT, payment of compensation, being an element of a claim of expropriation, could not be truly split from the question of liability of expropriation itself. It follows that if the Claimant is obligated to bring a claim for expropriation in the courts of Ghana and receive the relevant judgment, the tribunals’ concern underlying the “fork-in-the-road” clause equally applies here as the Claimant could still be precluded from submitting the dispute on the amount of compensation to international arbitration pursuant to Article 10.1 of the China-Ghana BIT by the operation of the legal principle of “issue preclusion”, rendering Article 10.1 effectively meaningless”.

which arises from this contention is that the Tribunal should have *incidental jurisdiction* to decide the question of entitlement as a necessary preliminary matter to the question of quantum.

219. The Tribunal emphasises that the Claimant has not expressly advanced an argument for incidental jurisdiction in this arbitration. However, for completeness and because the question of incidental jurisdiction implicitly arises from the Claimant's contention about the inextricable linkage between entitlement and quantum, the Tribunal considers it appropriate to address this issue below.
220. As it is generally accepted, where an international tribunal has jurisdiction in a particular matter, it is also competent with regard to an external issue which is *necessarily antecedent* to the matter within the jurisdiction of the tribunal.¹⁸⁰ In this arbitration, for the Tribunal to assume incidental jurisdiction over the Claimant's claims for expropriation, the question of entitlement must be classified as a *necessary antecedent* to the question of quantum and, therefore, to fall within the scope of the Tribunal's jurisdiction under the principle of incidental jurisdiction.
221. However, the principle of incidental jurisdiction engages only when the antecedent matter is not otherwise excluded from the jurisdiction of the tribunal by the treaty itself.¹⁸¹ As already discussed, in the present case, Article 4(3) of the Treaty excludes, albeit by implication, the jurisdiction of an arbitral tribunal over the antecedent question of entitlement by providing that the lawfulness of an alleged expropriation will "*be reviewed by competent courts in the Contracting State taking such expropriation.*"
222. Importantly too, for a tribunal to exercise incidental jurisdiction over a necessarily antecedent matter, the latter must arise *incidentally* and as part of the examination of the main claims. In other words, a matter which is submitted as a main claim is not an incidental matter. Indeed, as is generally accepted, a

¹⁸⁰ See for example, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1987), 266. See also *Mavrommatis Palestine Concessions, Greece v. United Kingdom*, Jurisdiction of the Court (1924) PCIJ Ser A No 2, 28.

¹⁸¹ See e.g. *Aegean Sea Continental Shelf (Greece v. Turkey)* [1978] ICJ Rep 3, § 83.

tribunal's determination of an antecedent matter by way of incidental jurisdiction does not constitute *res judicata* and does not form part of the decision's *dispositif*.¹⁸²

223. In the present case, the Claimant has submitted the question of lawfulness of expropriation as a *primary claim*, seeking a declaration that the Respondent unlawfully expropriated the Claimant's investment in breach of Article 4 of the China-Ghana Agreement.¹⁸³ In other words, in this arbitration, the issue of lawfulness does not arise as an incidental antecedent question but as a primary matter. Therefore, and necessarily, the Tribunal's decision on the question of lawfulness would have to constitute *res judicata* and be part of the *dispositif*, which would be incompatible with the principle of incidental jurisdiction.
224. From the above observations, it becomes obvious that even if the Claimant had expressly advanced an argument for incidental jurisdiction, such argument would not eventually assist the Claimant's case on jurisdiction in this arbitration.
225. Overall, and for the reasons set out above, the Tribunal considers that the context surrounding Article 10(1) of the Treaty supports a narrow interpretation of the provision.
226. Before the Tribunal turns its focus on the object and purpose of the Treaty in the following section, it considers it necessary to address a contention on which the Respondent has placed significant importance in this arbitration. The Respondent's contention relates to Article 10(5) and Article 4(1)(a) of the Treaty, which the Respondent considers important context supporting its case for the interpretation of Article 10(1) of the Treaty.
227. Article 10(5) of the Treaty provides as follows:

“The tribunal shall adjudicate in accordance with the laws of the Contracting state to the dispute accepting the investment including its rules on the conflict of laws, the provisions of the Agreement as well as the generally recognized principles of international law accepted by both Contracting States.”

228. Article 4(1)(a) of the Treaty provides as follows:

¹⁸² Callista Harris, 'Incidental Determinations in Proceedings under Compromissory Clauses' (2021) 70 International & Comparative Law Quarterly 417 at 440-443.

¹⁸³ NoA, § 96(1).

“1. Either Contracting State may, for the national security and public interest, expropriate, nationalize or take similar measures (hereinafter referred to as “expropriation”) against investment of investors of the other Contracting State in its territory, but subject to the following conditions:

*(a) under domestic legal procedure;
(...)”*

229. The Respondent claims that the phrase “*in accordance with the laws of the Contracting State*” in Article 10(5) of the Treaty, read together with the phrase “*domestic legal procedure*” in Article 4(1)(a) of the Treaty, brings Article 20(2) of the Constitution of Ghana into effect so that any claim for expropriation must be submitted to the High Court of Ghana as a matter of Ghanaian constitutional law.¹⁸⁴

230. Article 20(2) of the Constitution of Ghana provides as follows:

“(2) Compulsory acquisition of property by the State shall only be made under a law which makes provision for –

(a) the prompt payment of fair and adequate compensation; and

(b) a right of access to the High Court by any person who has an interest in or right over the property whether direct or on appeal from any other authority, for the determination of his interest or right and the amount of compensation to which he is entitled.”

231. The Tribunal does not agree that the phrases “*in accordance with the laws of the Contracting State*” in Article 10(5) and “*under domestic legal procedure*” in Article 4(1)(a) should be read as meaning that every claim for expropriation must be referred to the High Court of Ghana as a matter of Ghanaian constitutional law. The references in the Treaty to “*domestic legal procedure*” and “*in accordance with the laws of the Contracting State*” lay down the *substantive legal standards* for the competent forum to determine the question of entitlement of expropriation. As is well-established, there is no international law of property.¹⁸⁵ Accordingly, the

¹⁸⁴ R-Main Jurisdiction, § 26.

¹⁸⁵ R Higgins, ‘The Taking of Property by the State: Recent Developments in International Law’ (1982) 176 RdC 264, 268. See also Zachary Douglas, ‘Property, Investment and the Scope of

determination of whether an asset is owned by an investor and whether such asset has been expropriated would necessarily be determined in accordance with the domestic laws of the Contracting State.

232. Therefore, neither Article 4(1)(a) nor Article 10(5) of the Treaty constitutes a jurisdictional rule on expropriation. The rules vesting jurisdiction on expropriation can be found in Article 4(3) and Article 10(1) of the Treaty which are distinct provisions from Article 4(1)(a) and Article 10(5) of the Treaty. As such, Article 4(1)(a) and Article 10(5) of the Treaty are not relevant considerations for the purposes of the contextual interpretation.
233. Having said that, the Tribunal's observations on Article 4(1)(a) and Article 10(5) of the Treaty do not change the conclusion which the Tribunal has reached by looking into other Treaty provisions as part of the Tribunal's contextual interpretation of Article 10(1).
234. In conclusion, the Tribunal considers that the examination of the provision of Article 10(1) within the context of the China-Ghana Agreement suggests that the phrase "*concerning the amount of compensation for expropriation*" cannot be interpreted as vesting an arbitral tribunal with jurisdiction to decide the question of whether the expropriation is lawful or unlawful.

B.1.1.4. Object and purpose

235. The Claimant relies on the preamble of the China-Ghana Agreement to claim that arbitration is part of the Treaty's common purpose to "*encourage, protect and create favourable conditions for investment by investors of one Contracting State in the territory of the other Contracting State*". The Claimant points out that, for foreign investors, access to a neutral arbitral tribunal is one of the key rights under an investment treaty. According to the Claimant, "*the lack of investor protection would then discourage investment and undermine achievement of the Treaty's object and purpose*".¹⁸⁶

Investment Protection Obligations', in Zachary Douglas et al (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 363.

¹⁸⁶ C-Main Jurisdiction, §§ 32-34.

236. Investment treaty tribunals have looked at the preamble of investment treaties to identify their object and purpose. Looking at the preamble of a treaty is, of course, in line with Article 31(2) of the VCLT, which expressly refers to “*The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes*”. (emphasis added)
237. In this respect, some investment treaty tribunals have found that, when the preamble of an investment treaty stated that the purpose of that treaty was to create favourable conditions for investors, the right of an investor to arbitrate was an important aspect of the treaty’s purpose. For example, in *Tza Yap Shum*,¹⁸⁷ the arbitral tribunal held as follows:¹⁸⁸

“Presumably, according to the language of the preamble to the APPRI, the objective sought in including the right to submit certain disputes to ICSID arbitration is to confer certain benefits to promote investment. In the event that the Contracting Parties had actually intended to exclude the important issues listed in Article 4 from the arbitral process, the Tribunal would of course so determine, albeit with a certain level of skepticism as to whether such a mechanism could possibly help to attract foreign investors.”

238. A similar approach was taken by the BUCG tribunal which noted: ¹⁸⁹

“Accordingly, while keeping the RosInvest caution in mind, the fact remains that in this case, the Respondent’s “narrow” interpretation would undermine achievement of the BIT’s object and purpose. The lack of investor protection would discourage investment. The BIT would be seen as a trap for unwary investors instead of an incentive for them to invest in “the other Contracting Party.”

239. However, other investment treaty tribunals have found that the purpose of a treaty to create favourable conditions for investors does not include the right to arbitrate. For example, the arbitral tribunal in *Beijing Shougang* held that: ¹⁹⁰

¹⁸⁷ CL-1, *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009.

¹⁸⁸ CL-1, *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, §§ 153, 156, 157.

¹⁸⁹ CL-3, *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, § 92.

¹⁹⁰ *Beijing Shougang and others v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017, § 451.

“Nothing in the Preamble suggests that the two Contracting States intended to confer upon an arbitral tribunal to be constituted under Article 8 a broad jurisdiction over all issues arising in connection with a claimed expropriation. If such had been their intention, they could have simply referred, in Article 8, paragraph 3, either to a dispute relating to Article 4 of the Treaty or a dispute concerning expropriation. Such formulations would have provided a tribunal with jurisdiction over any issue concerning an alleged expropriation, including the amount of compensation for expropriation.”

240. Further, the *Sanum* tribunal opted for a balanced approach between the investors and the host state noting that: *“The purpose and object of the Treaty covers two distinct aspects: the protection of investments and the development of economic cooperation between both States. The balance between these two aspects must be borne in mind by the Tribunal in the analysis of the text of the Treaty, but it does not mean that the Tribunal needs to give preponderance to one aspect over the meaning of a particular clause of the Treaty or leave a clause without effect.”*¹⁹¹

241. This was further confirmed by the Singapore Court of Appeal which reviewed the *Sanum* investment treaty award and held that: *“From the literal wording of the preamble, however, it is clear that although the promotion of investor protection is one of the key purposes of the PRC-Laos BIT, it is to be ‘based on the principles of mutual respect for sovereignty’. Therefore, as the Judge observed, one cannot simply rely on the objective of ‘protection of investments’ to resolve all ambiguities in favour of the investor).”*¹⁹²

242. In the present case, the Treaty’s preamble provides as follows:

“The Government of the People’s Republic of China and the Government of the Republic of Ghana.

Desiring to encourage, protect and create favourable conditions for investment by investors of one Contracting State in the territory of the other Contracting State based on the principle of mutual respect for sovereignty, equal and mutual benefit and for the purpose of the development of economic cooperation between both States.

Have agreed as follows:

¹⁹¹ CL-2, *Sanum Investments Limited v. Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, 13 December 2013, § 339.

¹⁹² CL-22, *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic* [2016] SGCA, 29 September 2016, § 149.

[...]"

243. In the view of the Tribunal, there is nothing in this preamble to suggest, even by implication, that an investor's right to arbitration is part of the object and purpose of the Treaty.
244. In this respect, an overview of the broader structure of the Treaty's substantive and dispute resolution provisions is instructive. Specifically, on the other hand, the Treaty's substantive protection of investors is set out in Article 3, Article 4, Article 5 and Article 6.
245. Article 3 is entitled "*Protection of Investments and most favoured nation treatment*"¹⁹³ and accords investors, under Article 3(1), the substantive protection of equitable treatment in respect of their investments and activities associated with the investments. Article 3(1) further guarantees the protection of such investments and associated activities in the territory of the Contracting State accepting the investment. Article 3(2) provides that the treatment and protection of the investments shall not be less favourable than that accorded to the investments of investors of a third State.
246. As already discussed in detail above, Article 4 sets out an investor's rights in the event the investor considers that their investment has been unlawfully expropriated, while Article 5 guarantees the repatriation of the investors' capital and returns held in the territory of the host State.¹⁹⁴ Finally, Article 6 addresses

¹⁹³ "1. *Investments and activities associated with investments and investors of either Contracting State shall be accorded equitable treatment and shall enjoy protection in the territory of the other Contracting State.*

2. *The treatment and protection referred to in Paragraph 1 of this Article shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State.*

3. *The treatment and protection as mentioned in Paragraphs 1 and 2 of this Article shall not include any preferential treatment accorded by the other Contracting State to investments of investors of a Third State based on customs union, free trade zone, economic union, agreement relating to avoidance of double taxation or for facilitating frontier trade."*

¹⁹⁴ Article 5. Repatriation of Capital and Returns: "*Each Contracting State shall, subject to its laws and regulations, guarantee investors of the other Contracting State the transfer of their investments and returns held in the territory of the one Contracting State, including: (a) Profits, dividends, interests and other legitimate income; (b) Amounts from liquidation of investment; (c) Payments made pursuant to a loan agreement in connection with investment; (d) Licence fee in item (iv) of (a) Article 1; item (iv) of (a) Article 1; (e) Payment of fees for management, technical assistance or technical service; (f) Payments in connection with projects on contract; (g) Normal earnings of*

the question of exchange rate that will apply in case there is a transfer of currency under Articles 4 or 5 of the Treaty.¹⁹⁵

247. On the other hand, the dispute resolution provisions of the Treaty are set out in Article 4(3), Article 9 and Article 10(1). The Tribunal has addressed the importance of Article 4(3) above, but it is necessary to also look at Article 9 which is a key provision in the Treaty including for the purposes of the Tribunal's decision on jurisdiction.
248. Specifically, Article 9 is entitled "*SETTLEMENT OF DISPUTES OF CONTRACTING STATES*" and reads as follows:

"1. Dispute between the Contracting States concerning the interpretation or application of this Agreement shall, as far as possible be settled by consultation through the diplomatic channel.

2. If a dispute cannot thus be settled within six months, it shall, upon the request of either Contracting State, be submitted to an ad hoc arbitral tribunal."

249. It follows from the text of Article 9 (and the Claimant has not claimed otherwise) that the primary means of resolving a dispute concerning the interpretation or application of the China-Ghana Agreement, including on whether the host State is in breach of its obligations to protect the investments of an investor of the other Contracting State, is "*by consultation through the diplomatic channel*" and, failing that, through *ad hoc* arbitration between the Contracting States.
250. Except for the limited scope of Article 10(1) concerning the quantum of compensation for expropriation, there is no provision which would give investors a distinct right to commence arbitration in respect of a breach of any substantive protection under the Treaty. By contrast, Article 9 of the Treaty expressly provides that the broad categories of disputes "*concerning the interpretation or application*" of the Treaty will be resolved through diplomatic consultation and State-to-State arbitration.

nationals of the other Contracting State who work in connection with an investment in the territory of the one Contracting State."

¹⁹⁵ Article 6. Transfer of Currency "*1. The transfer mentioned in Article 4 and 5 of this Agreement shall be made at the official exchange rate as determined by the Central Bank of the Contracting accepting investment on the date of transfer. Article 4 and 5 of this Agreement shall be made at the official exchange rate as determined by the Central Bank of the Contracting accepting investment on the date of transfer. 2. Market rate shall be applicable if no official exchange rate is available.*"

251. In other words, subject to successful resolution through diplomatic consultation, Article 9(2) of the Treaty accords broad and unrestricted jurisdiction to State-to-State arbitration. Therefore, with the exception of Articles 4(3) and 10(1) of the Treaty, which grant jurisdiction to national courts and investor-state arbitration respectively, State-to-State arbitration is the default forum to resolve the disputes concerning the interpretation or application of the Treaty.
252. These observations have two important implications for the jurisdiction of this Tribunal. The first is that Article 9 forecloses jurisdiction of this Tribunal over the Claimant's claims for breach of the provisions of Article 3 on equitable treatment, protection and most favoured nation treatment.
253. The second implication is on the proper interpretation of Article 10(1) of the Treaty: in the light of the broad scope of State-to-State jurisdiction established under Article 9 of the Treaty, it is difficult to see how investor-state arbitration could be a significant aspect of the purpose and object of the Treaty that would favour a broad meaning of Article 10(1).

B.1.1.5. Article 32 of the VCLT

254. As regards Article 32 of the VCLT, the Respondent submits that in order to interpret the provision of Article 10(1) of the China-Ghana Agreement, it is important for the Tribunal to analyse the circumstances of the conclusion of the Treaty.¹⁹⁶ The Respondent claims that prior to the China-Ghana Agreement, China had entered into BITs which mainly provided for international arbitration only regarding disputes about the amount of compensation.¹⁹⁷
255. By contrast, the Claimant argues that a clear and reasonable meaning of Article 10(1) of the Treaty can be ascertained on the basis of Article 31 of the VCLT and, therefore, it is not necessary to resort to "*supplementary means of interpretation*" under Article 31 of the VCLT. According to the Claimant, examining the prior unilateral treaty practice of Ghana and China may help the Tribunal to

¹⁹⁶ R-Main Jurisdiction, §§ 8 *et seq.*

¹⁹⁷ R-Reply Jurisdiction, § 35.

understand Ghana's and China's individual practices and approaches to resolving treaty disputes but it would not assist the Tribunal to ascertain the common intention of the two Contracting States in respect of resolving disputes arising out of the specific Treaty.¹⁹⁸

256. The Tribunal is of the view that the interpretation of Article 10(1) of the Treaty under Article 31 is sufficiently clear and does not require confirmation by recourse to supplementary means of interpretation. Equally, the Tribunal considers that the interpretation of Article 10(1) of the Treaty under Article 31 of the VCLT does not leave the meaning of the provision ambiguous or obscure and does not lead to a result which is manifestly absurd or unreasonable.
257. Accordingly, the Tribunal does not consider it necessary to look at “*supplementary means of interpretation*” under Article 32 of the VCLT, especially bearing in mind that neither Party provided the Tribunal with sufficient evidence, such as the preparatory work of the Treaty, which would assist the Tribunal to determine the meaning of Article 10(1) of the Treaty in the event the Tribunal considered it necessary.
258. While the Parties identified a number of investment treaties which China and Ghana had concluded with third states prior to the China-Ghana Agreement, the Tribunal considers that the text and provisions of these treaties is not consistent and, therefore, it is of limited value as supplementary means of interpretation of Article 10(1).

B.1.2. The Tribunal's Findings

259. In conclusion, for the reasons set out above, the Tribunal finds that it does not have jurisdiction to decide the Claimant's claims for expropriation under Article 10(1) of the Treaty.

C. Jurisdiction of the Tribunal under Article 3(2) of the Treaty

¹⁹⁸ C-Rejoinder Jurisdiction, §§ 33-35.

260. The Tribunal now turns to address the second aspect of the Claimant's case on jurisdiction, namely that the Tribunal has jurisdiction to determine the Claimant's claims in this arbitration under Article 3 of the Treaty.
261. Having carefully considered the Parties' submissions, including relevant investment treaty awards and literature on this matter, the Tribunal considers that it does not have jurisdiction to decide the Claimant's claims in this arbitration under Article 3 of the Treaty. The reasons for the Tribunal's decision are set out below.
262. As with the provision of Article 10(1), the Parties disagree over the meaning and scope of Article 3 of the China-Ghana Agreement which provides as follows:
- “1. Investments and activities associated with investments of investors of either Contracting State shall be accorded equitable treatment and shall enjoy protection in the territory of the other Contracting State.*
- 2. The treatment and protection referred to in Paragraph 1 of this Article shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State.*
- 3. The treatment and protection as mentioned in Paragraphs 1 and 2 of this Article shall not include any preferential treatment accorded by the other Contracting State to investments of investors of a third State based on customs union, free trade, economic union, agreement relating to avoidance of double taxation or for facilitating frontier trade.”*
263. Specifically, the Claimant contends that the provision of Article 3(2) of the Treaty sets out an MFN clause for investors, which in combination with Article 3(1) of the Treaty incorporates more favourable dispute resolution clauses included in Ghana's international investment treaties with other states.
264. In this respect, the Claimant argues that, through Articles 3(1) and 3(2) of the Treaty, the broad dispute resolution provisions contained in Ghana's investment treaties with the United Kingdom and Denmark apply in the dispute between the Claimant and the Respondent and vest this Tribunal with jurisdiction to decide the Claimant's claims in this arbitration.

265. On its part, the Respondent disputes that Article 3(2) of the Treaty extends to questions of jurisdiction. The Respondent submits that the reading of Article 3(2) shows that the Contracting States did not aim to expand the dispute settlement provisions of the Treaty by widening the scope of Article 10 to matters beyond those “concerning the amount of compensation for expropriation”.¹⁹⁹
266. Therefore, the Tribunal must interpret Article 3 of the Treaty and decide whether this Article vests the Tribunal with jurisdiction to determine the Claimant’s claims in this arbitration.
267. As found above,²⁰⁰ the VCLT applies to this Treaty and therefore to the interpretation of Article 3 of the Treaty. In any event, both Parties rely on Article 31 of the VCLT to argue their case in respect of Article 3 of the Treaty.²⁰¹
268. The question of whether an MFN clause in an investment treaty should be construed as extending not only the most favoured substantive treatment but also the most favoured procedural and jurisdictional treatment contained in other treaties have been the subject matter of several decisions of investment treaty tribunals, especially after the well-known decision in the *Emilio Agustín Maffezini v. Kingdom of Spain* (“**Maffezini**”).²⁰²
269. It should be recalled that the *Maffezini* tribunal decided that, through the MFN clause in Article VII of the Argentina-Spain BIT, the more favoured dispute settlement clause in the Chile-Spain BIT could be imported into the Argentina-Spain BIT to circumvent the procedural requirement, under Article X of the Argentina-Spain treaty, for an investor to exhaust the available local remedies for 18 months before commencing arbitration.²⁰³ In other words, the *Maffezini*

¹⁹⁹ R-Main Jurisdiction, § 63.

²⁰⁰ See §140 *et seq* above.

²⁰¹ C-Main Jurisdiction, §§ 5-37; R-PostHB, § 8.

²⁰² *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000.

²⁰³ Article X(2) Argentina/Spain BIT provided that a dispute that cannot be settled amicably ‘shall be submitted to the competent tribunal of the Contracting Party in whose territory the investment was made’. Art X (3) provided that the ‘dispute may be submitted to international arbitration in any of the following circumstances: a) at the request of one of the parties to the dispute, if no decision has been rendered on the merits of the claim after the expiration of a period of eighteen months from the date on which the proceedings referred to in paragraph 2 of this Art. have been initiated, or if such decision has been rendered, but the dispute between the parties continues; b) if both parties to the dispute agree thereto’.

decision relied on the MFN clause to import a less stringent arbitration clause from another treaty into a treaty which already provided for arbitration, albeit under the requirement of a condition precedent.

270. However, subsequent investment treaty tribunals held that an MFN clause does not incorporate a provision for investor-state dispute settlement through arbitration, unless it is clear that the contracting parties intended that the MFN clause extends to jurisdictional provisions of another treaty.²⁰⁴

271. For example, in *Berschader*, the tribunal noted:²⁰⁵

“The present Tribunal will apply the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties.”

272. A similar approach was followed by *ST-AD GmbH v. Republic of Bulgaria*.²⁰⁶

“In this sense, the Tribunal is in agreement with the Berschader tribunal, which observed that “an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties.”

273. The above observations are made by way of broader background and to point out that the legal issue of the scope of MFN clauses is a contested matter; there is no settled line of investment treaty decisions on this question. The Tribunal reiterates that while it may find the reasoning and analysis of previous investment treaty awards helpful and potentially persuasive, it is not legally bound by their

²⁰⁴ *Salini Costruttori SpA and Italstrade SpA v. Jordan* (n 33); *Telenor Mobile Communications AS v. Hungary* (n 30), 22 June 2006. RL-2, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005, § 196.

²⁰⁵ *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, *Final Award*, 21 April 2016 § 181.

²⁰⁶ *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013, § 391.

outcome especially, when a previous award concerns a treaty whose text, context, object and purpose are distinguishable from those of the treaty at hand.

274. With these observations in mind, the Tribunal starts the interpretation of Article 3(2) of the Treaty, which is at the core of the Claimant's case, by examining the ordinary meaning of the critical terms "*the treatment and protection*".
275. As a matter of ordinary meaning, there are again two possible interpretations of the terms "*the treatment and protection*": first, a narrow interpretation according to which these terms must be read as meaning to refer to *substantive* only treatment and protection accorded to investors in treaties which Ghana has signed with third states; second, a broad interpretation according to which these terms must be read as meaning to refer to both *substantive* and *jurisdictional* treatment and protection accorded to investors in treaties which Ghana has signed with third states.
276. The Claimant claims that the wording of Article 3(2), read together with Article 3(1), is intentionally broad and covers all types of treatment and protection for investors that can be found in treaties which Ghana has signed with third states.²⁰⁷
277. As already noted, the *Maffezini* tribunal adopted a broad interpretation of the MFN clause contained in the relevant treaty. Crucially, however, in *Maffezini*, the text of the MFN clause in the relevant treaty was markedly broader than that of the MFN clause contained in Article 3(2) of the China-Ghana Agreement.
278. Specifically, in *Maffezini*, the MFN clause in the Argentina – Spain BIT provided as follows:²⁰⁸

"In all matters subject to this Agreement, this treatment shall not be less favourable than that extended by each Party to the investments made in its territory by investors of a third country"

²⁰⁷ C-PostHB Jurisdiction, § 40.

²⁰⁸ Article IV(2) of the BIT.

279. The *Maffezini* tribunal accepted that the term “*all matters subject to this Agreement*” was broadly drafted and should be understood as meaning to include both substantive and procedural matters.²⁰⁹

“Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce. Consular jurisdiction in the past, like other forms of extraterritorial jurisdiction, were considered essential for the protection of rights of traders and, hence, were regarded not merely as procedural devices but as arrangements designed to better protect the rights of such persons abroad. It follows that such arrangements, even if not strictly a part of the material aspect of the trade and investment policy pursued by treaties of commerce and navigation, were essential for the adequate protection of the rights they sought to guarantee”

280. In the present dispute, Article 3(2) of the Treaty contains no equivalent broad reference to “*all matters subject to this agreement*”. Rather, the MFN clause in Article 3(2) of the Treaty is limited to “*the treatment and protection referred to in Paragraph 1*” (emphasis added). The provision of Article 3(1), in turn, sets out the substantive standards of “*equitable treatment*” and “*protection*” which the Contracting States must accord to “*investments and activities associated with investments*”.
281. There is nothing in the provision of Article 3(1) that would suggest that, as a matter of ordinary meaning, the terms “*treatment and protection*” should be understood as having a broad meaning which extends beyond the substantive standards of “*equitable treatment*” and “*protection in the territory of the other Contracting State*” which are the only kinds of treatment and protection set out in Article 3(1).
282. Therefore, in the view of the Tribunal, the terms “*treatment and protection*” in Article 3(2) must be given, as a matter of ordinary meaning, a narrow meaning according to which the MFN clause applies to substantive treatment and

²⁰⁹ *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000, § 54.

protection only and does include dispute resolution provisions contained in treaties which a Contracting State has concluded with third states.

283. The view of the Tribunal is supported by the approach taken by other tribunals, the reasoning of which the Tribunal finds persuasive. Specifically, in *Wintershall Aktiengesellschaft v. the Argentine Republic* (“**Wintershall**”),²¹⁰ the tribunal found that:²¹¹

“[t]he ordinary meaning of expressions such as “investment related activities” or “associated activities” used in BITs refer generally to activities of the investor for the conduct of his/its business in the territory of the host State rather than to activities related to or associated with the settlement of disputes between the investors and the Host State.”

284. Similarly, in *Telenor Mobile Communications A.S. v. The Republic of Hungary* (“**Telenor**”) the tribunal held that:²¹²

“In the first place, Article 31 of the 1969 Vienna Convention on Treaties requires a treaty to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purposes.” In the absence of language or context to suggest the contrary, the ordinary meaning of “investments shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State” is that the investor's substantive rights in respect of the investments are to be treated no less favourably than under a BIT between the host State and a third State, and there is no warrant for construing the above phrase as importing procedural rights as well. It is one thing to stipulate that the investor is to have the benefit of MFN investment treatment but quite another to use an MFN clause in a BIT to bypass a limitation in the very same BIT when the parties have not chosen language in the MFN clause showing an intention to do this, as has been done in some BITs.”

²¹⁰ *Wintershall Aktiengesellschaft v. the Argentine Republic*, ICSID Case No. ARB/04/14, Award, dated 8 December 2008.

²¹¹ *Wintershall Aktiengesellschaft v. the Argentine Republic* ICSID Case No. ARB/04/14, Award, dated 8 December 2008, § 171.

²¹² RL-3, *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award 13 September 2006, § 92.

285. The above conclusion is reinforced by the following considerations. For an interpretation to support the incorporation, through an MFN clause, of an arbitration clause into a treaty which provides for no arbitration, except for a very limited category of disputes (*i.e.* concerning the amount of compensation of expropriation), the parties' intention to extend the scope of an MFN clause to arbitration must be clear and unambiguous. This is because the operation of an arbitration provision in a treaty is markedly different from that of a provision setting out substantive standards of protection.
286. Specifically, while investment treaty provisions on substantive standards of protection confer rights on investors, they mainly operate between the two contracting states. As such, investment treaty provisions on substantive standards create obligations between the contracting states and do not create a separate direct legal relationship between a contracting state and an investor of another contracting state. By contrast, an arbitration clause in an investment treaty operates both at a level between the two contracting states and as an arbitration offer of a contracting state to an investor of the other contracting state. It is only by initiating arbitration against a contracting state that an investor accepts the arbitration offer and, thereby, a direct relationship between the claimant-investor and the respondent-state is created.
287. Similarly, an MFN clause operates at a level between the two contracting states only. Specifically, an MFN clause extends the scope of an undertaking which a contracting state offers to the other state in respect of substantive standards of protection of the investors of the other state. As such, an MFN clause does not create a separate direct relationship between an investor and a contracting state. Thus, an MFN clause cannot operate as a substitute of consent for arbitration which a state offers directly *to investors* and, thus, cannot extend the arbitration offer to categories of disputes beyond those set out in the investment treaty itself in the absence of clear language of the two contracting states. It is one thing for a tribunal to find that, through an MFN clause, the state's offer and consent to arbitration should not be subject to the procedural impediment of a prior condition precedent (as was the case in *Maffezini*); it is quite another thing to find that a state's consent to arbitration is established, through an MFN clause, in respect of certain categories of disputes in circumstances where the state's consent is missing in the first place.

288. In this respect, the Tribunal finds persuasive the example which the *European American Investment Bank AG v. The Slovak Republic* tribunal gave in order to demonstrate the limitations of the operation of an MFN clause:²¹³

“The full extent of that difference may be demonstrated by one example. If a BIT has no provision for investor-State arbitration, there is no offer of arbitration and thus no scope for the creation of an arbitration agreement. Even if that BIT contains a broadly worded MFN clause, that clause cannot substitute for the arbitration provision and make it possible for an investor successfully to bring arbitration proceedings against a State Party to the BIT, no matter what provisions for arbitration that State Party might have agreed to include in its other BITs. By contrast, if a BIT contains no provision on fair and equitable treatment, an investor may nonetheless be able to derive from the MFN clause contained in that BIT a right to be accorded such treatment by one of the States Parties, provided that there is at least one other BIT concluded by that State which contains a provision for fair and equitable treatment.”

289. The China-Ghana Agreement contains a provision for investor-state arbitration in Article 10(1) of the Treaty which, as discussed above in detail, is limited to disputes concerning the amount of compensation for expropriation. As such, neither China nor Ghana intended to arbitrate and made no arbitration offer to investors of the other Contracting State in respect of disputes concerning the entitlement of expropriation or the breach of equitable treatment and protection under the Treaty.
290. Turning to the context of Article 3(2) of the Treaty, the Claimant claims that the fact that Article 3(3) specifically lists certain matters, but not dispute settlement, by way of exclusion from the most favourable treatment under Article 3(2) suggests that the intention of the Contracting States was to include dispute settlement in the scope of Article 3(2) of the Treaty.²¹⁴
291. Article 3(3) provides as follows:

“The treatment and protection as mentioned in Paragraphs 1 and 2 of this Article shall not include any preferential treatment accorded by the other Contracting State to investments of investors of a third State based on customs union, free trade, economic

²¹³ *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17, 22 October 2012, § 447.

²¹⁴ C-Main Jurisdiction, § 65.

union, agreement relating to avoidance of double taxation or for facilitating frontier trade.”

292. The Claimant is correct to note that dispute resolution is not included in the list of treatment and protection which is excluded from the preferential treatment accorded by “*the other Contracting State to investments of investors of a third State*”. Thus, an argument could be made on the basis of the principle *expressio unius est exclusio alterius* that the Contracting States intended to extend the MFN clause in Article 3(2) to more favoured dispute resolution clauses in other treaties, since dispute resolution is not excluded from the list of Article 3(3).²¹⁵
293. However, the Tribunal does not consider that this would be the right approach to interpreting Article 3(2). It is clear from the text of Article 3(3) of the Treaty that the provision refers to the meaning that the terms “*treatment and protection*” have in “*Paragraphs 1 and 2 of this Article*”. In other words, Article 3(3) does not purport to expand or restrict the original meaning of the terms “*treatment and protection*” other than in respect to the specific areas which are listed in Article 3(3), namely “*customs union, free trade, economic union, agreement relating to avoidance of double taxation or for facilitating frontier trade*”.
294. As the Tribunal explained, the meaning of the terms “*treatment and protection*” in paragraphs 1 and 2 of Article 3 must be understood as referring to substantive matters only. In this sense, it is ordinary that Article 3(3) lists certain substantive matters by way of exclusion. Article 3(3) could not have listed dispute resolution as an item which is excluded from the treatment and protection of Article 3(2), because dispute resolution is not included, as a matter of ordinary meaning, in the scope of Article 3(2) in the first place. Thus, in the view of the Tribunal, nothing turns on Article 3(3) for the purposes of interpreting Article 3(2).

²¹⁵ Indeed, there are prior investment treaty tribunals which have adopted this approach in the interpretation of similar terms. See for example, *Tokios Tokeles v. Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction, April 29 2004, § 30, and *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, §§ 82 *et seq.*, and CL-7, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Award on Jurisdiction, 1 October 2007, § 135. Equally, there are prior investment treaty tribunals that have taken a different approach, RL-2, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005, § 191, and *Austrian Airlines v. The Slovak Republic*, UNCITRAL, Final Award, 9 October 2009, § 130.

295. Finally, turning to the object and purpose of the Treaty, the Tribunal's observations and findings in Section B.1.1.4 in respect of Article 10(1) apply equally to the interpretation of Article 3(2) of the Treaty. As the Tribunal found, there is nothing in the preamble of the Treaty to suggest, even by implication, that arbitration is part of the object and purpose of the Treaty.
296. Similarly, as explained above, the broader structure of the Treaty's substantive and dispute resolution provisions clearly suggests that the primary means of resolving a dispute concerning an alleged breach of the Treaty is "*by consultation through the diplomatic channel*" and, failing that, through *ad hoc* arbitration between the Contracting States.
297. Thus, in the light of the broad scope of Article 9 of the Treaty, it is difficult to see how investor-state arbitration can be a significant aspect of the purpose and object of the Treaty which would accord Article 3(2) of the Treaty a broad meaning to extend to investor-state arbitration provisions contained in other treaties.

C.1. Tribunal's findings

298. In conclusion, the Tribunal finds that the MFN provision in Article 3(2) of the Treaty cannot be used to extend the Tribunal's jurisdiction to the Claimant's claims in this arbitration.

D. The LCIA Arbitration

299. The Tribunal does not consider that the parallel arbitration proceedings between the Parties under the LCIA Rules affect the question of jurisdiction in this arbitration. While the factual background of the two arbitrations is similar, the LCIA Arbitration is a distinct matter which concerns the Respondent's obligations under the EPIC Contract, whereas this arbitration concerns the Respondent's obligations under the China-Ghana Agreement.

E. Costs

300. Both Parties have sought their costs in respect of the arbitration to date.²¹⁶ The Tribunal invites the Parties to directly confer and seek to agree on the issue of costs or, failing such agreement, to inform the Tribunal of their agreed format and timetable of their costs submissions within **thirty days** of receipt of this Award. In case the Parties fail to agree on the issue of costs, the Tribunal will address the matter and issue an award on costs covering the arbitration proceedings to date.

X. DECISION

301. For the reasons set out above, the Tribunal:
- a. Upholds the Respondent's objections to the Tribunal's jurisdiction and finds that it has no jurisdiction to decide the Claimant's claims in this arbitration;
 - b. Invites the Parties to directly confer on the issue of costs in respect of the arbitration to date, and failing such agreement, to inform the Tribunal of their agreed format and timetable of their costs submissions within **thirty days** of receipt of this Award.

²¹⁶ C-PostHB Jurisdiction, § 56. R-PostHB Jurisdiction, § 53, c.

Seat: London (United Kingdom)

Date: 30 January 2023

Mr V.K. Rajah SC
(Co-Arbitrator)



Professor Richard Oppong
(Co-Arbitrator)



Professor Stavros Brekoulakis
Presiding Arbitrator


