

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

CASCADE INVESTMENTS NV

Claimant

and

REPUBLIC OF TURKEY

Respondent

ICSID Case No. ARB/18/4

AWARD

Members of the Tribunal

Ms. Jean E. Kalicki, President of the Tribunal
Professor Albert Jan van den Berg, Arbitrator
Professor Jan Paulsson, Arbitrator

Secretary of the Tribunal

Ms. Martina Polasek

Assistant to the Tribunal

Dr. Joel Dahlquist

Date of dispatch to the Parties: 20 September 2021

REPRESENTATION OF THE PARTIES

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Mr. Scott Macpherson
Ms. Nicole Geldenhuys
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United Kingdom

Representing Republic of Turkey:

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Mr. Sajid Ahmed
Mr. Viren Mascarenhas
Mr. Ben Williams
Ms. Charity Kirby
Mr. Kabir Bhalla
Ms. Erin Collins
Mr. Julian Ranetunge
Ms. Pui Yee (Lisa) Wong
King & Spalding International LLP
125 Old Broad Street
London EC2N 1AR
United Kingdom

and

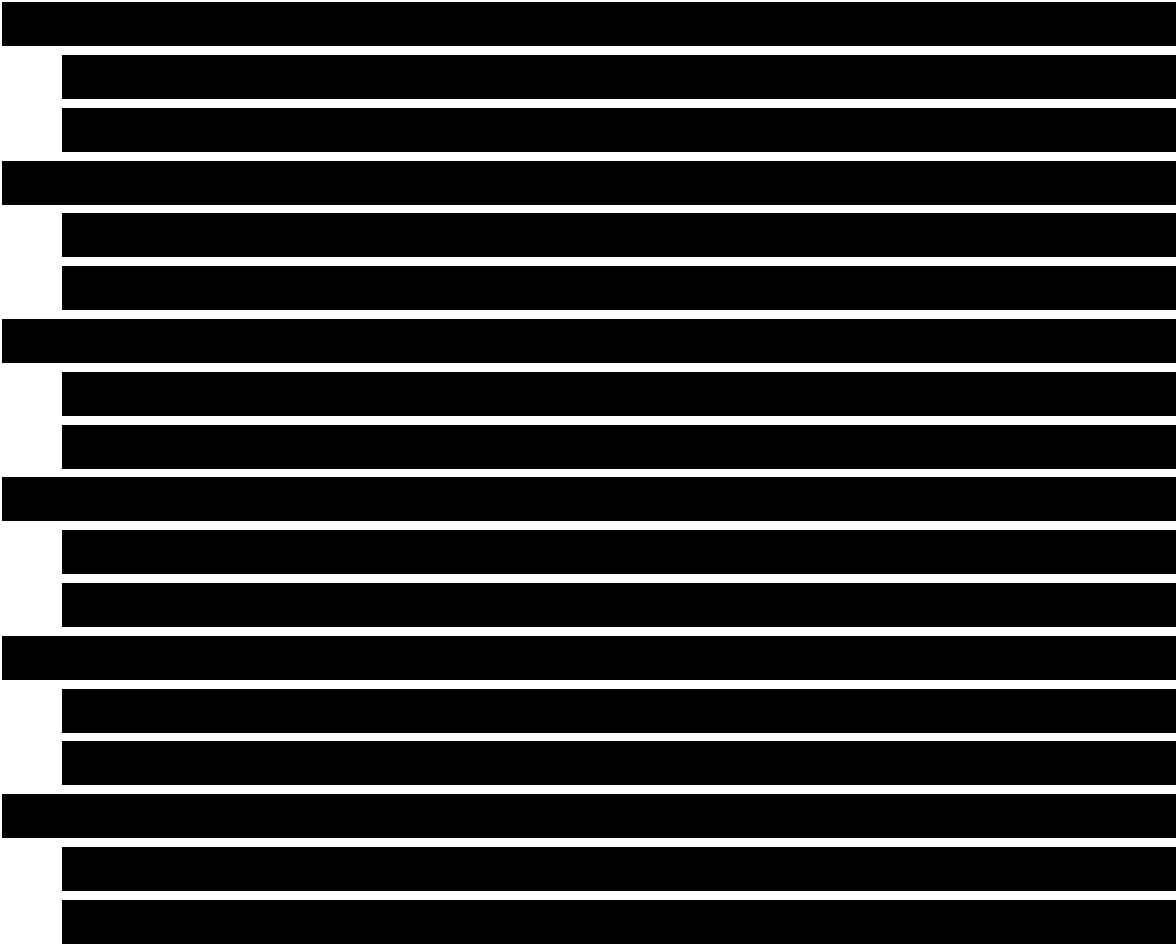
Dr. Eyüp Kul
Mr. Mustafa Doğan İnal
Mr. Murat Erbilen
Mr. Turgut Aycan Özcan
Mr. Numan Genç
Ms. Alya Yamakoğlu
Mr. Sezer Yakut
Ms. Eylül Ataoğlu
Ms. Alya Yamakoğlu
Ms. Hayrunnisa Ravlı
Mr. Batuhan Kaplan
LEXIST
Levent Mah. Büyükdere
Cad. Bahar Sok. Özdilek
AVM River Plaza No:13/22
Istanbul
Republic of Turkey

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings [2006]
	
BIT or the Treaty	Agreement between the Belgo-Luxembourg Economic Union and the Government of the Republic of Turkey for Promotion and Protection of Mutual Investments, entered into force on 4 May 1990
C-[#]	Claimant's Exhibit
CL-[#]	Claimant's Legal Authority
Claimant or Cl. or Cascade	Cascade Investments NV
Claimant's Memorial on the Merits or Cl. Mem. Mer.	Claimant's Memorial on the Merits dated 17 December 2018
Claimant's Counter-Memorial on Jurisdiction and Reply on the Merits or Cl. C-Mem. on Jur. & Rep. on Mer.	Statement of Defense on Preliminary Objections and Reply on Liability and Quantum dated 5 November 2019
Claimant's PHB or Cl. PHB	Claimant's Post-Hearing Brief dated 19 October 2020
Claimant's Reply PHB or Cl. Rep. PHB	Claimant's Reply Post-Hearing Brief dated 2 November 2020
Claimant's Rejoinder on Jurisdiction or Cl. Rej. Jur.	Claimant's Rejoinder on Preliminary Objections dated 26 May 2020
Cl. Resp. to RfB	Claimant's Response to the Request for Bifurcation dated 11 February 2019
Cl. Rej. on RfB	Claimant's Rejoinder on Bifurcation dated 11 March 2019
Cl. Sub. Costs	Claimant's Submission on Costs dated 16 November 2020
	
	

[REDACTED]	[REDACTED]
Hearing	Hearing jurisdiction, merits and quantum held from 27 July 2020 to 14 August 2020
[REDACTED]	[REDACTED]
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
R-[#]	Respondent's Exhibit
[REDACTED]	[REDACTED]
Request	Claimant's Request for Arbitration dated 19 February 2018
Respondent or Resp.	The Republic of Turkey
Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits or Resp. Mem. Jur. & C-Mem. Mer.	Respondent's Memorial on Preliminary Objections and Statement of Defense on Liability and Quantum dated 25 June 2019
Respondent's PHB or Resp. PHB	Respondent's Post-Hearing Brief dated 19 October 2020
Respondent's Reply PHB or Resp. Rep. PHB	Respondent's Reply Post-Hearing Brief dated 2 November 2020
Respondent's Reply on Jurisdiction and Rejoinder on the Merits or Resp. Rep. Jur. & Rej. Mer.	Reply on Preliminary Objections and Rejoinder on Liability and Quantum dated 17 March 2020
Resp. Reply to RfB	Respondent's Reply on Bifurcation dated 25 February 2019

Respondent's Request for Bifurcation or Resp. RfB	Respondent's Request for Bifurcation dated 14 January 2019
Resp. Sub. Costs	Respondent's Submission on Costs dated 16 November 2020
RL-[#]	Respondent's Legal Authority
[REDACTED]	[REDACTED]
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 5 July 2018

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Agreement between the Belgo-Luxembourg Economic Union and the Government of the Republic of Turkey for Promotion and Protection of Mutual Investments signed on 27 August 1986, entered into force on 4 May 1990 (the “**BIT**” or “**Treaty**”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, entered into force on 14 October 1966 (the “**ICSID Convention**”).
2. The claimant is Cascade Investments NV (“**Cascade**” or the “**Claimant**”), a company incorporated in Belgium.
3. The respondent is the Republic of Turkey (“**Turkey**” or the “**Respondent**”).
4. The Claimant and the Respondent are collectively referred to as the “**Parties**.” The Parties’ representatives and their addresses are listed above on page (i).

II. PROCEDURAL HISTORY

5. On 19 February 2018, ICSID received a request for arbitration dated the same day from Cascade against Turkey (the “**Request**”).
6. On 28 February 2018, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
7. On 21 March 2018, the Claimant appointed Prof. Albert Jan van den Berg, a national of the Kingdom of the Netherlands, as arbitrator. By letter of the same day, the Centre informed the Parties that it would seek Prof. van den Berg’s acceptance of his appointment as soon as the method of constituting the Tribunal was established.

8. By letter of 9 April 2018, following an exchange of correspondence between the Parties, the Centre confirmed the Parties' agreement on the method of appointment of the Tribunal.
9. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by agreement of the two co-arbitrators.
10. On 12 April 2018, the Centre informed the Parties that Prof. van den Berg had accepted his appointment as arbitrator and shared with the Parties a copy of Prof. van den Berg's signed declaration and accompanying statement.
11. On 29 May 2018, the Respondent notified ICSID of its counsel in the proceeding: Lexist and King & Spalding LLP.
12. By letter of 30 May 2018, the Respondent appointed Professor Jan Paulsson, a national of France, Sweden and Bahrain, as arbitrator. Prof. Paulsson accepted his appointment on 4 June 2018. His signed declaration and an accompanying statement were shared with the Parties on the same day.
13. On 5 June 2018, ICSID shared with the Parties Prof. van den Berg's additional transparency statement.
14. On 29 June 2018, the co-arbitrators proposed to appoint Ms. Jean Kalicki, a national of the United States of America, as the third arbitrator to serve as President of the Tribunal. The Parties indicated their agreement to the appointment of Ms. Kalicki by respective emails of 2 July 2018.
15. On 3 July 2018, Ms. Kalicki accepted her appointment to serve as President of the Tribunal.
16. On 5 July 2018, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings ("**Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Martina Polasek, Deputy Secretary-General, ICSID, was designated to serve as Secretary of the Tribunal.

17. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 27 August 2018 by teleconference.
18. Following the first session, on 31 August 2018, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be London, the United Kingdom. Procedural Order No. 1 also included a procedural timetable in Annex B, containing three alternative scenarios which reflected possible procedural timetables depending on whether the Respondent requested bifurcation and whether the Tribunal granted such a request.
19. In accordance with Procedural Order No. 1, Cascade submitted its Memorial on the Merits on 17 December 2018, together with factual exhibits C-0001 through C-0290, legal authorities CL-0001 through CL-0135, the witness statements of [REDACTED], [REDACTED], and [REDACTED], and the expert report of [REDACTED] (“**Claimant’s Memorial on the Merits**” or “**Cl. Mem. Mer.**”).
20. On 14 January 2019, the Respondent filed a request to address the objections to jurisdiction as a preliminary question, together with legal authorities RL-1 through RL-28 (“**Request for Bifurcation**” or “**Resp. RfB**”). The Claimant filed its Response to the Request for Bifurcation on 11 February 2019, together with exhibits C-291 and C-292 and legal authorities CL-0136 through CL-0161, opposing the Request for Bifurcation (“**Cl. Resp. to RfB**”).
21. On 25 February 2019, the Respondent filed its Reply on Bifurcation, together with factual exhibits R-0001 through R-0010 and legal authorities RL-0029 through RL-00060 (“**Resp. Reply to RfB**”). The Claimant submitted a Rejoinder on Bifurcation on 11 March 2019, together with factual exhibits C-0293 through C-0305 and legal authorities CL-0162 through CL-0180 (“**Cl. Rej. on RfB**”).
22. On 20 March 2019, the Tribunal issued its Decision on the Respondent’s Request for Bifurcation. The Tribunal denied the Respondent’s Request for Bifurcation and joined the

objections to jurisdiction to the merits. The Tribunal also invited the Parties to consider and discuss a possible bifurcation between jurisdiction and liability (on the one hand) and quantum (on the other hand) and to submit brief statements by 3 April 2019.

23. Following the Parties' respective submissions of 3 April 2019 concerning the possible bifurcation of the quantum phase, on 5 April 2019, the Tribunal decided that it would not bifurcate the proceedings on quantum and that the case would proceed in accordance with the schedule outlined in Procedural Order No. 1, Annex B, Scenario 3. Under Scenario 3, the Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits was scheduled to be submitted on 17 June 2019.
24. On 3 June 2019, the Respondent submitted a request for a two-week extension of time to file its Memorial on Jurisdiction and Counter-Memorial on the Merits. The Claimant objected to the Respondent's request. The Tribunal granted a one-week extension for the filing of the Respondent's submission in Procedural Order No. 3 dated 6 June 2019. The Tribunal also granted a corresponding extension for the Claimant to file its Counter-Memorial on Jurisdiction and Reply on the Merits.
25. On 25 June 2019, the Respondent submitted its Memorial on Jurisdiction and Counter-Memorial on the Merits dated 24 June 2019, together with factual exhibits R-0013 through R-0196, legal authorities RL-0061 through RL-0220, the expert reports of [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED], and of [REDACTED], and the witness statements of [REDACTED], [REDACTED] and [REDACTED] (**"Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits"** or **"Resp. Mem. Jur. & C-Mem. on Mer."**).
26. Between 8 July 2019 and 22 July 2019, the Parties exchanged document production requests, followed by responses and replies. The Parties submitted their completed schedules concerning their respective document requests to the Tribunal on 5 August 2019.
27. On 19 August 2019, the Tribunal issued Procedural Order No. 4 concerning the Parties' requests for document production. The Tribunal's decisions on the Parties' respective

requests were set out in Annexes A and B accompanying the Order. It granted some requests and rejected others.

28. On 5 November 2019, the Claimant filed its Counter-Memorial on Jurisdiction and Reply on the Merits, together with factual exhibits C-0327 through C-0444, legal authorities CL-0189 through CL-0279, the expert reports of [REDACTED], [REDACTED], [REDACTED] and the second expert report of [REDACTED], the second witness statements of [REDACTED], [REDACTED], [REDACTED], [REDACTED] and the witness statement of [REDACTED] (“**Claimant’s Counter-Memorial on Jurisdiction and Reply on the Merits**” or “**Cl. C-Mem. Jur. & Rep. Mer.**”).
29. On 20 December 2019, the Respondent submitted a request for an eight-week extension of time to file its Reply on Jurisdiction and Rejoinder on the Merits. On 21 December 2019, the Tribunal invited the Claimant to comment on the Respondent’s request for extension. By letter of 30 December 2019, the Claimant opposed the request for extension.
30. On 13 January 2020, the Tribunal issued Procedural Order No. 5, granting three additional weeks to the Respondent for its Reply on Jurisdiction and Rejoinder on the Merits, moving the deadline from 25 February 2020 to 17 March 2020, and one additional week to the Claimant for its Rejoinder on Jurisdiction.
31. By separate letter of the same date, the Tribunal inquired whether the Parties would agree to the appointment of Dr. Joel Dahlquist as an assistant to the Tribunal in this case. By respective emails of 15 January and 22 January 2020, the Claimant and the Respondent confirmed their agreement to the appointment of Dr. Dahlquist.
32. On 23 January 2020, the Tribunal advised the Parties that Dr. Dahlquist had been appointed as Assistant to the Tribunal and circulated Dr. Dahlquist’s signed declaration.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

35. In accordance with the revised procedural timetable, the Respondent filed its Reply on Jurisdiction and Rejoinder on the Merits on 17 March 2020, together with factual exhibits R-209 through R-426, legal authorities RL-237 through RL-286, the second witness statements of [REDACTED] and [REDACTED], the witness statements of [REDACTED] and [REDACTED], the second expert reports on [REDACTED], [REDACTED], [REDACTED] and of [REDACTED], and the expert report of [REDACTED] (“Respondent’s Reply on Jurisdiction and Rejoinder on the Merits” or “Resp. Rep. Jur. & Rej. Mer.”).

[REDACTED]

[REDACTED]

¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

45. On 26 May 2020, the Claimant filed its Rejoinder on Jurisdiction, together with factual exhibits C-445 through C-504, legal authorities CL-300 through CL-349, the witness statements of [REDACTED] and [REDACTED], the second witness statement of [REDACTED] and the third witness statement of [REDACTED], the second expert report of [REDACTED] and the expert report of [REDACTED] (“Claimant’s Rejoinder on Jurisdiction” or “Cl. Rej. Jur.”). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

48. On 1 June 2020, the Secretary of the Tribunal circulated a draft agenda for the first pre-hearing conference and invited the Parties to consider the use of certain options and potential service providers. In subsequent weeks, the ICSID Secretariat scheduled demonstrations and test sessions with the Parties and various service providers to identify the appropriate technological means for the remote hearing. The details of the test sessions and the Parties' related requests and comments are contained in Procedural Order No. 11.

49. On 5 June 2020, the Tribunal held a first pre-hearing conference (“**First Pre-Hearing Conference**”) with the Parties, which focused on remote hearing matters. Later that day, the Tribunal confirmed its directions announced during the First Pre-Hearing Conference, that the Parties (i) liaise with the ICSID Secretariat regarding any additional testing of the proposed platforms; (ii) provide the expected sequence of their witnesses and experts, as well as their estimated time for cross-examination by 12 June 2020; (iii) finalize and submit to the Tribunal a complete hyperlinked index of all submissions and supporting documents by 19 June 2020; and that (iv) the Respondent state its final position regarding the use of a

third-party provider for presentation of evidence at the Hearing and the provision of rental equipment.

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

54. On the same day, the Tribunal issued Procedural Order No. 11 reconfirming that the Hearing would be held remotely in the period 27 July through 14 August 2020. It also decided various procedural issues debated by the Parties with respect to the conduct of the Hearing.

55. [REDACTED]

56. The Tribunal held a Second Pre-Hearing Conference with the Parties on 23 June 2020 (“**Second Pre-Hearing Conference**”) to discuss the matters on the agenda circulated to the Parties on 19 June 2020, including three additional items added by the Parties on 22 June 2020.

57. [REDACTED]

58. On 26 June 2020, the Tribunal issued Procedural Order No. 12, setting out the Parties’ agreements on certain matters discussed during the Second Pre-Hearing Conference and the Tribunal’s decision on other matters.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

74. The Hearing was held by video conference from 27 July 2020 to 14 August. The following persons attended the Hearing:

Tribunal:

Ms. Jean E. Kalicki
Professor Albert Jan van den Berg
Professor Jan Paulsson

President of the Tribunal
Arbitrator
Arbitrator

Assistants to the Tribunal:

Dr. Joel Dahlquist
Ms. Tracey Strokes

Assistant to the Tribunal
Assistant to Professor Paulsson

ICSID Secretariat:

Ms. Martina Polasek
Ms. Maria-Rosa Rinne

Secretary of the Tribunal
Paralegal

For the Claimant:

Dr. Markus Burgstaller
Mr. Scott Macpherson
Mr. Giorgio Risso
Ms. Nicole Geldenhuys
Mr. Joshua Lister
[REDACTED]
[REDACTED]

Hogan Lovells International LLP
Hogan Lovells International LLP
Hogan Lovells International LLP
Hogan Lovells International LLP
Hogan Lovells International LLP
[REDACTED]
[REDACTED]

Mr. Jermaine Berchie

IT support, Hogan Lovells International
LLP

Mr. Lloyd Parfoot

IT support, Hogan Lovells International
LLP

Mr. Trushal Patel

IT support, Hogan Lovells International
LLP

For the Respondent:

Mr. Thomas Sprange QC
Mr. Sajid Ahmed
Mr. Julian Ranetunge
Mr. Kabir Bhalla
Ms. Charity Kirby
Mr. Viren Mascarenhas
Ms. Pui Yee (Lisa) Wong
Ms. Erin Collins
Ms. Ema Vidak Gojkovic
Mr. Ben Williams
Mr. Turgut Aycan Özcan
Mr. Numan Genç
Mr. Mustafa Doğan İnal
Mr. Eyüp Kul
Mr. Murat Erbilen
Mr. Sezer Yakut
Ms. Eylül Ataol
Ms. Alya Yamakoğlu
Hayrunnisa Ravlı
Batuhan Kaplan

King & Spalding
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Ms. Eda Manav Özdemir
Ms. Açelya Şahin
Mr. Güray Özsu

The Presidency
The Presidency
The Presidency

Mr. Recep Akbayır	The Presidency
Ms. Süslü Hızmalığül	The Presidency
Ms. Melek Küreeminoğlu	TMSF
Ms. Sena Görgülü	TMSF
Ms. Serap Kullar	TMSF
Ms. Eda Akış	TMSF
Mr. Şeref Şamil Daniş	TMSF
Mr. Onur Yorulmaz	TMSF
Ms. Asude Akgül	TMSF
Mr. Tefik Emrah Kuyumcu	Turkish Transcriber
Mr. Mehmet Sertaç Ayhan	Turkish Transcriber
Mr. Recep Ertaş	Turkish Transcriber
Mr. Cullen McClure	King & Spalding, IT Support
Mr. Giles Kwei	King & Spalding, IT Support
Mr. Sean Butterworth	Sr Technical Analyst, King & Spalding
Mr. Todd Greenfield	AV Engineer, King & Spalding
Ms. Salma Causey	Business Systems Analyst II, King & Spalding
Mr. Muta'Ali Muhammad	Technical Analyst, King & Spalding
Mr. Ertuğrul Salıcı	TMSF, IT support
Mr. Emre Ergenç	TMSF, IT Support
Mr. İsa Demirci	TMSF, IT Support
Mr. Sinan Aktaş	TMSF, IT Support
Mr. Gökhan Bektaş	TMSF, IT Support
Mr. Alper Gökçen	TMSF, IT Support
Mr. Turgay Sönmez	TMSF, IT Support
<i>Court Reporter:</i>	
Mr. David Kasdan	WW Reporting, Official Court Reporter
<i>Interpreters:</i>	
Ms. Esra Ozsoy Kaya	Enterkon
Ms. Ahu Latifoglu Dogan	Enterkon
Ms. Hande Güner	Enterkon
<i>FTI – Trial services:</i>	
Mr. Jamey Johnson	FTI Consulting, Trial Services
Mr. TJ Loebbaka	FTI Consulting, Trial Services
Mr. Steve Schwartz	FTI Consulting, Trial Services
Mr. Matt Simmons	FTI Consulting, Trial Services

75. During the Hearing, the following persons were examined:

On behalf of the Claimant:

[Redacted]

[Redacted]

[Redacted]

[Redacted]

On behalf of the Respondent:

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

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[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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82. The Parties filed simultaneous post-hearing briefs on 19 October 2020 (“**PHB**” or “**Cl. PHB**” and “**Resp. PHB**”).

█ [REDACTED]

[REDACTED]

[REDACTED]

86. The Parties filed their simultaneous Reply post-hearing briefs on 2 November 2020 (“**Reply PHB**” or “**Cl. Rep. PHB**” and “**Resp. Rep. PHB**”).

87. The Parties filed their respective submissions on costs on 16 November 2020 (“**Submission on Costs**” or “**Cl. Sub. Costs**” or “**Resp. Sub. Costs**”).

88. The proceeding was closed on 1 September 2021.

III. **FACTUAL BACKGROUND**

█ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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C. THE DISPUTE BETWEEN THE PARTIES

117. While the previous sections have dealt principally with the general background to the dispute, the following is an account of the facts, as pleaded by the Parties, concerning the specific dispute between Cascade and the Republic of Turkey.

[REDACTED]

[REDACTED]

[REDACTED]

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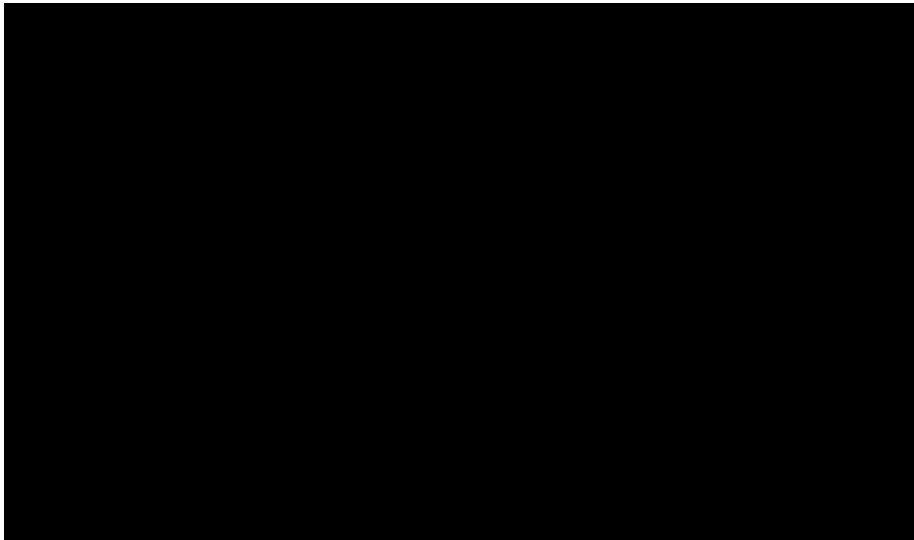
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IV. THE PARTIES' REQUESTS FOR RELIEF

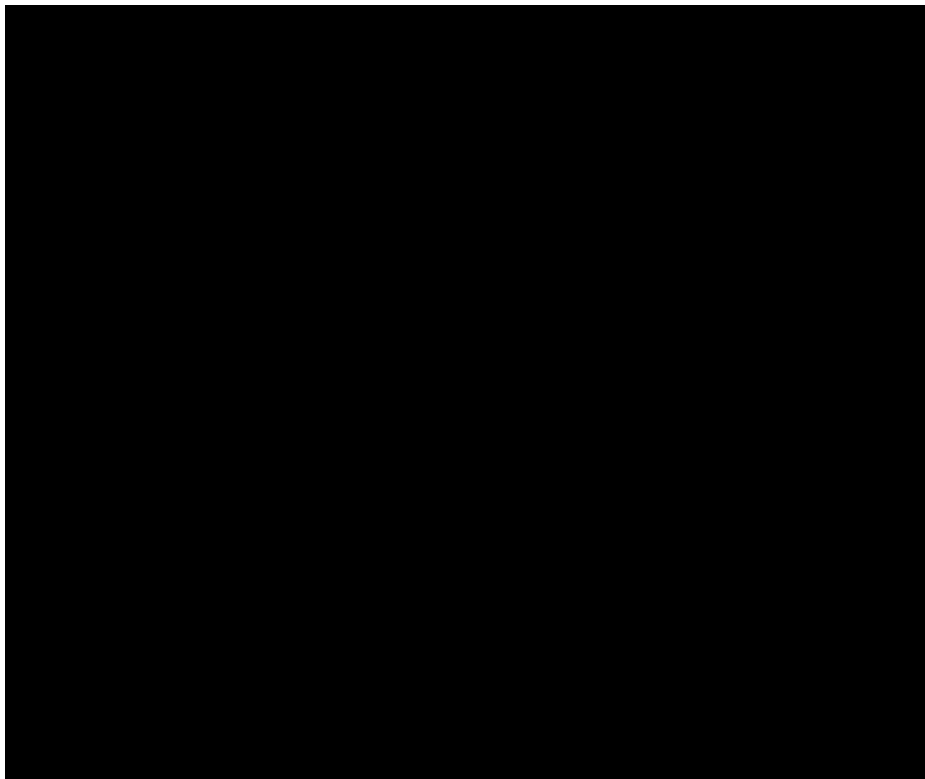
166. The Claimant requests the following relief:

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167. The Respondent requested that the Tribunal render an award:



V. JURISDICTION AND ADMISSIBILITY



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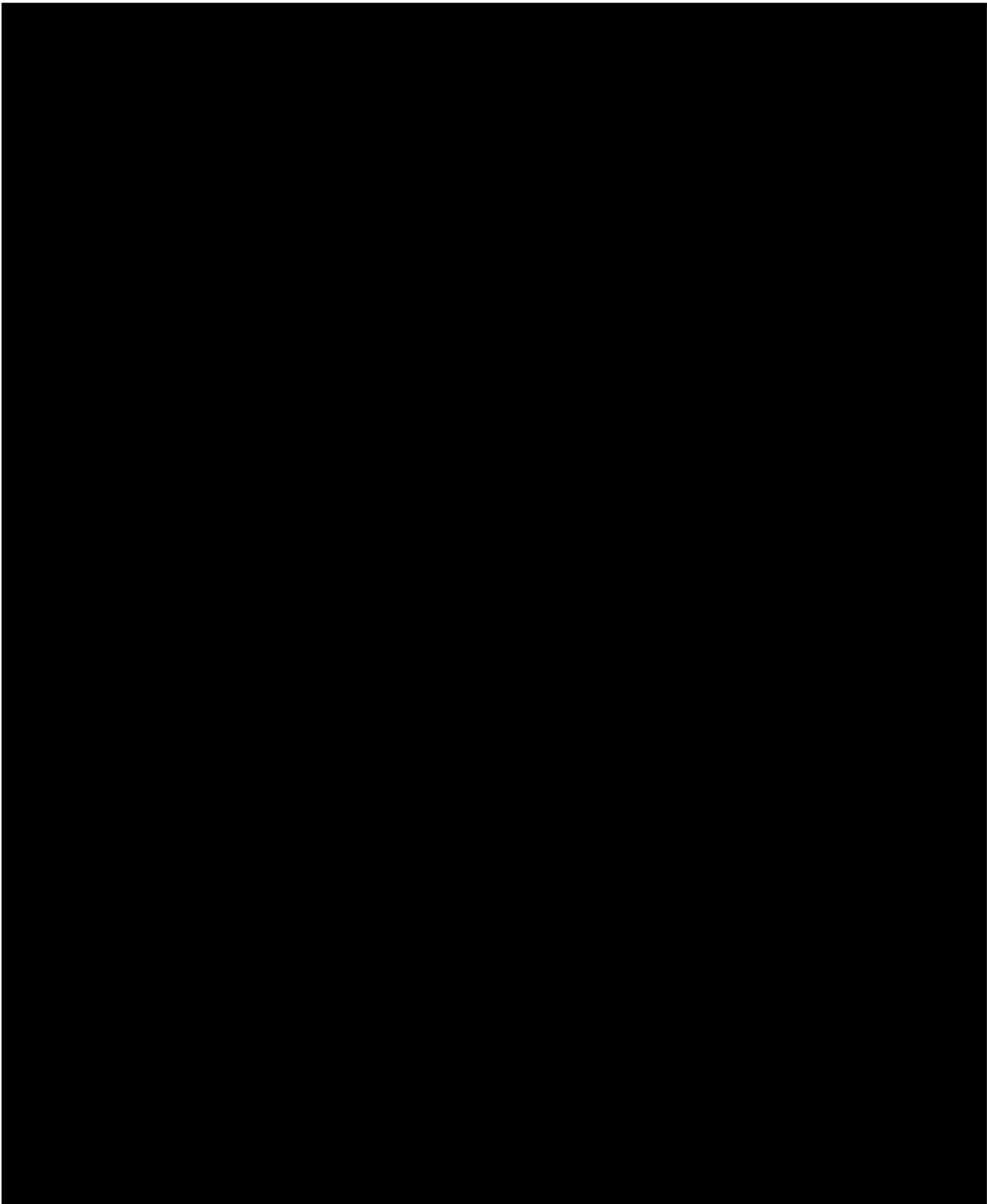
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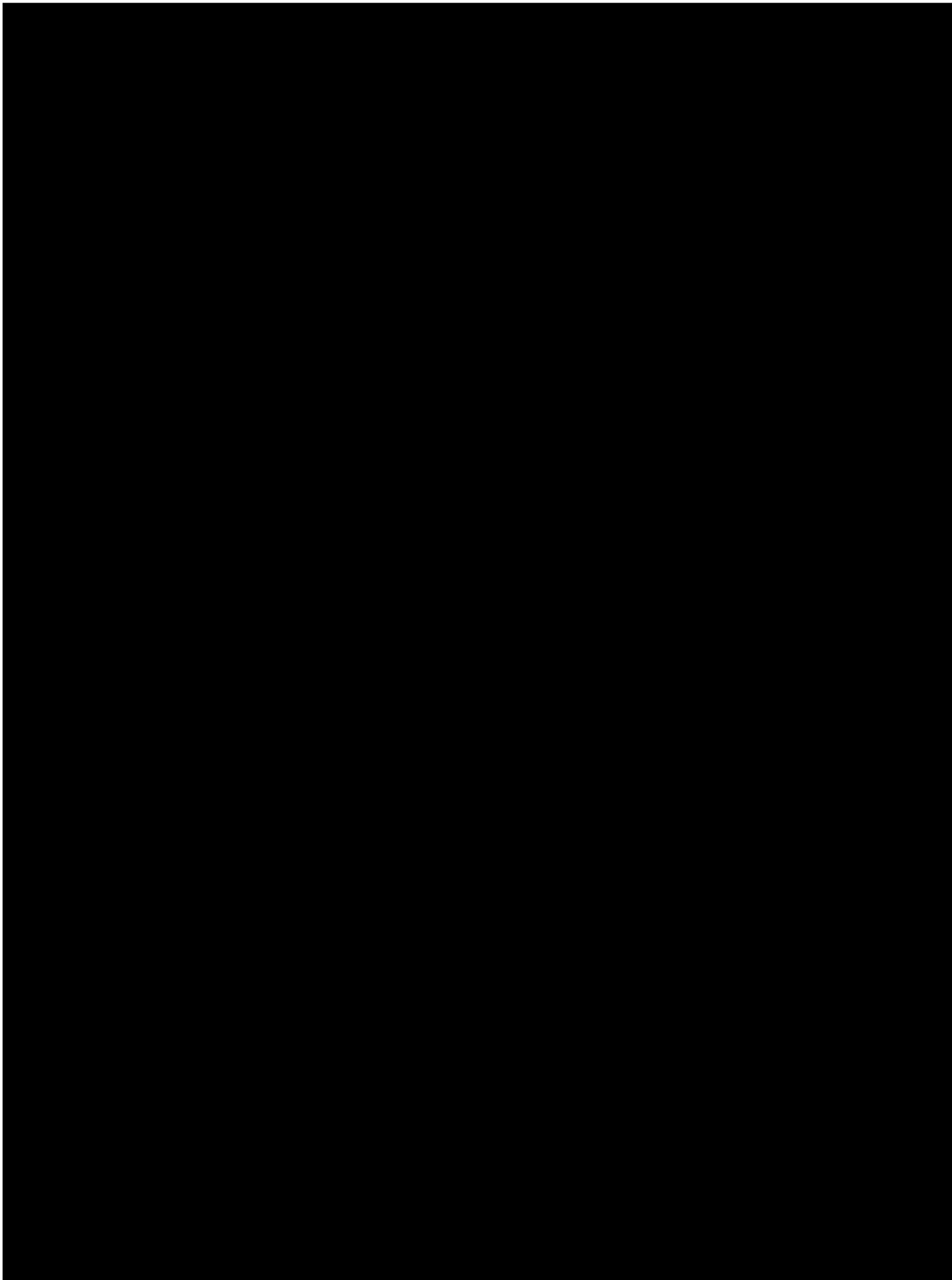
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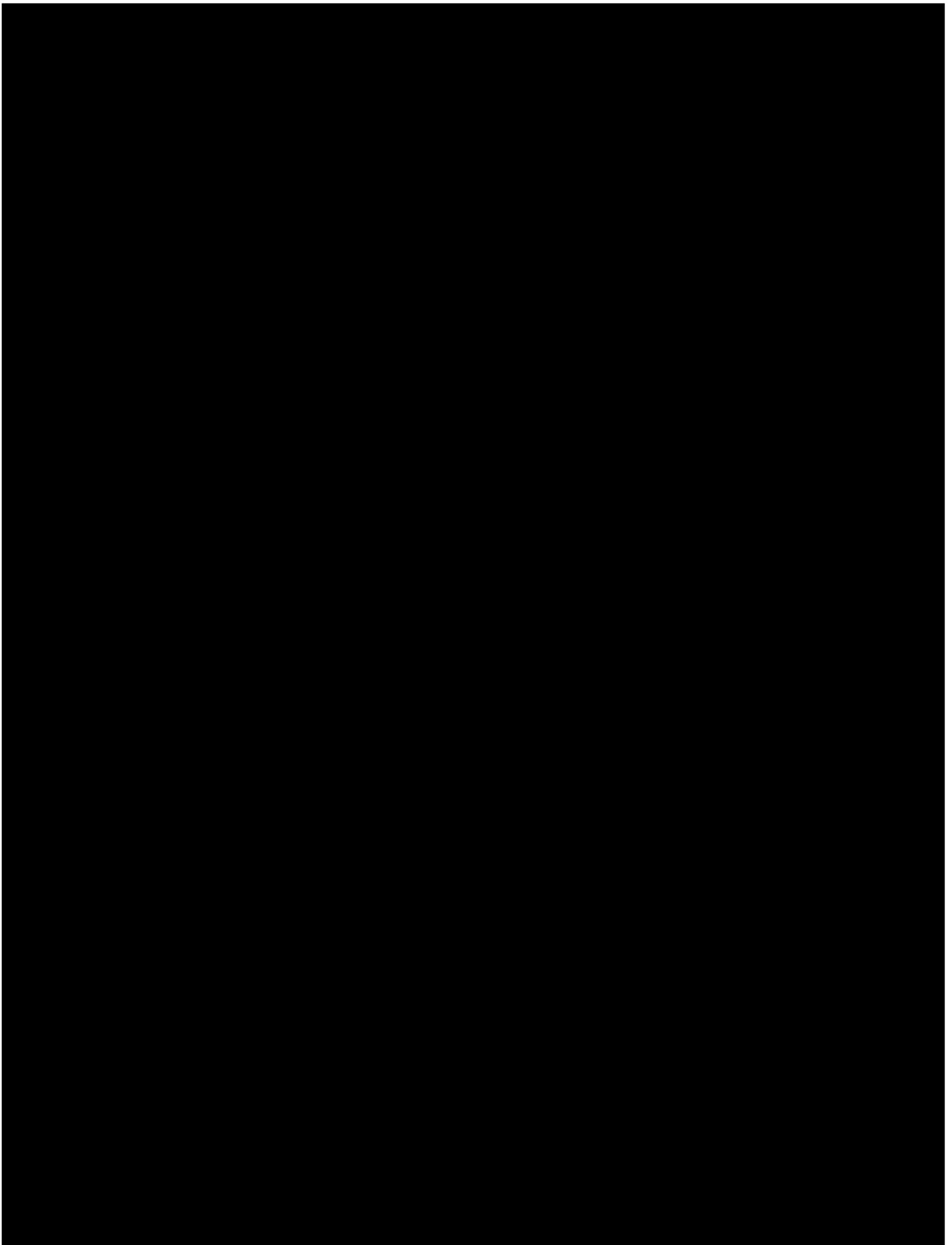
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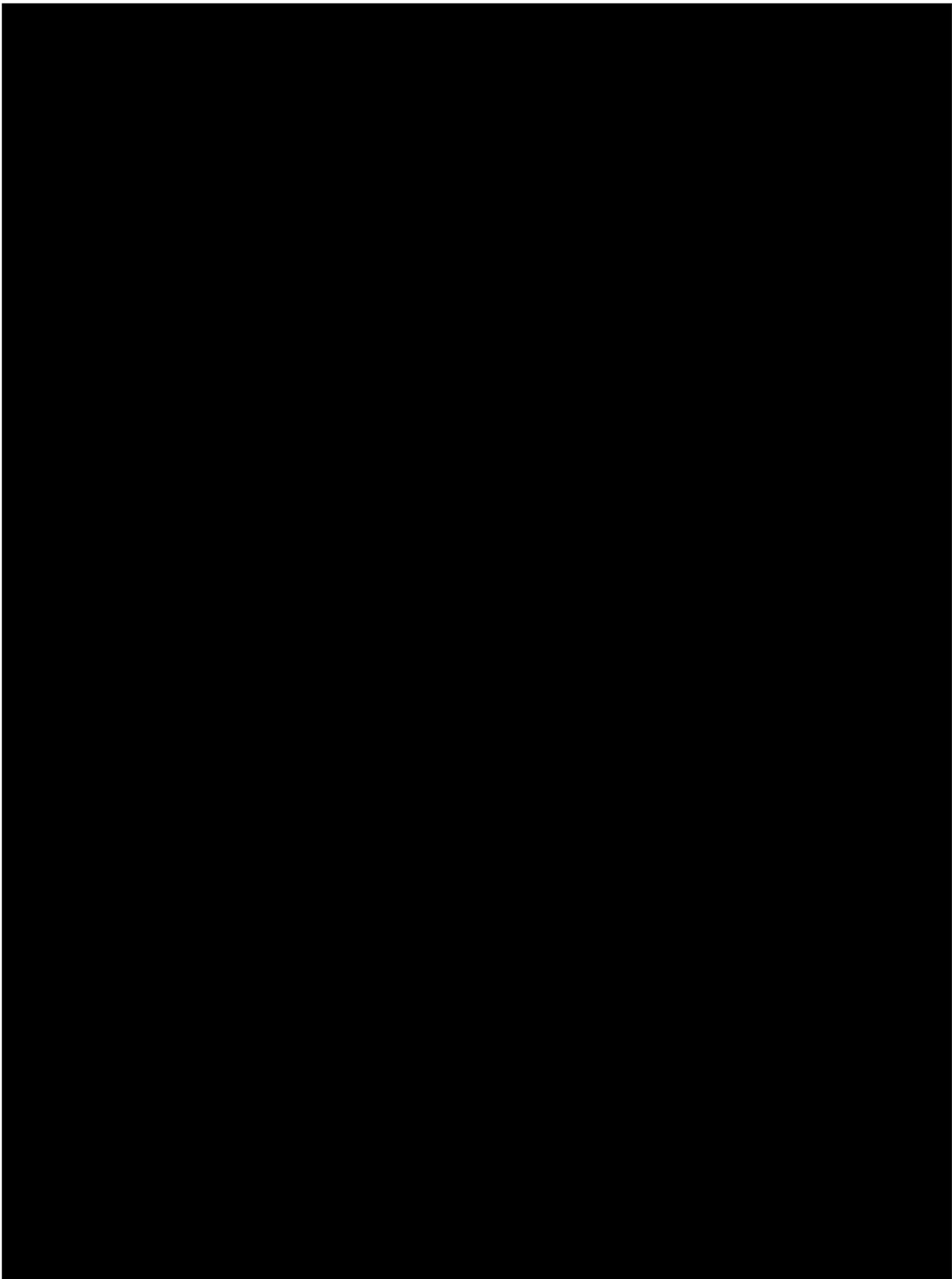
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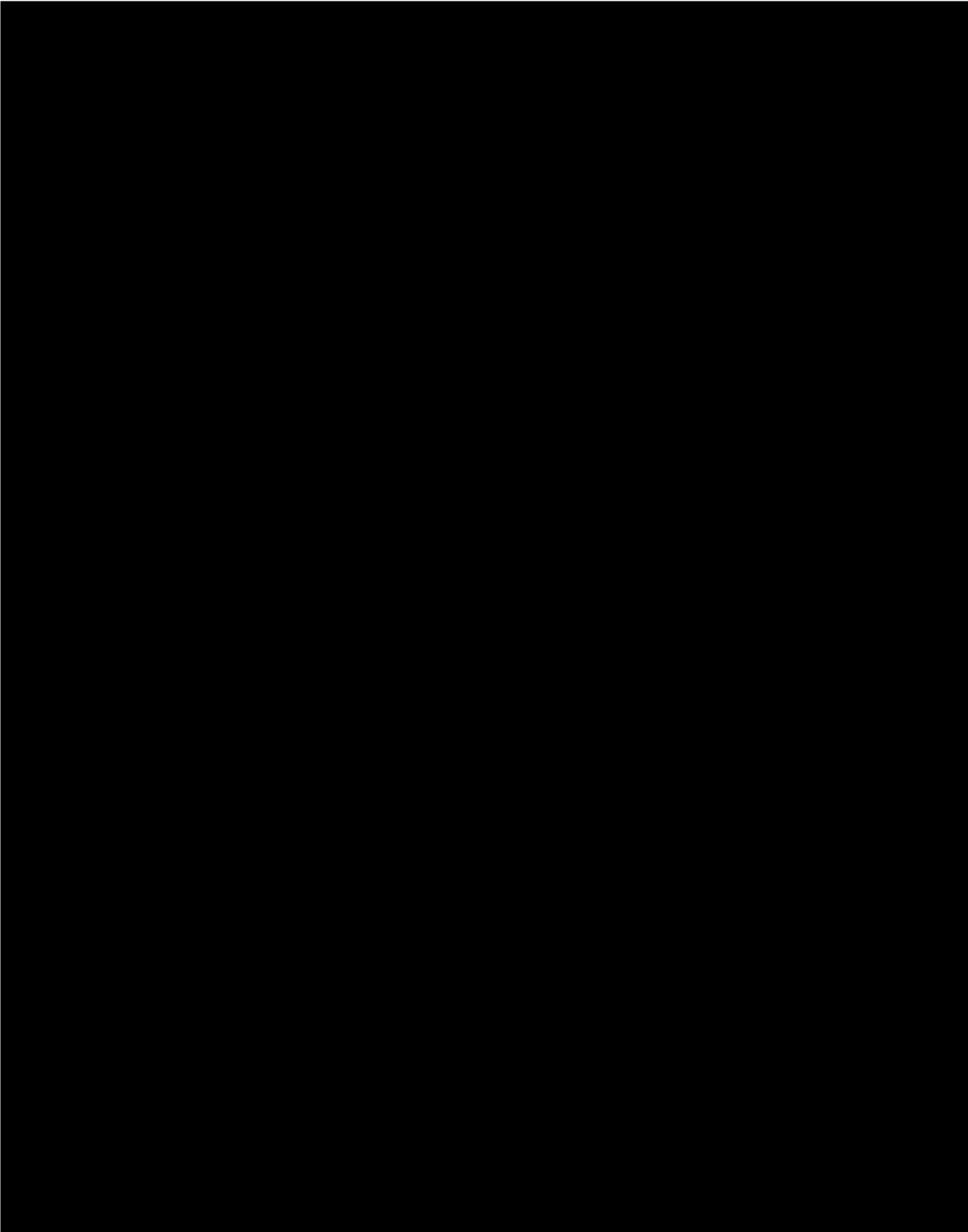
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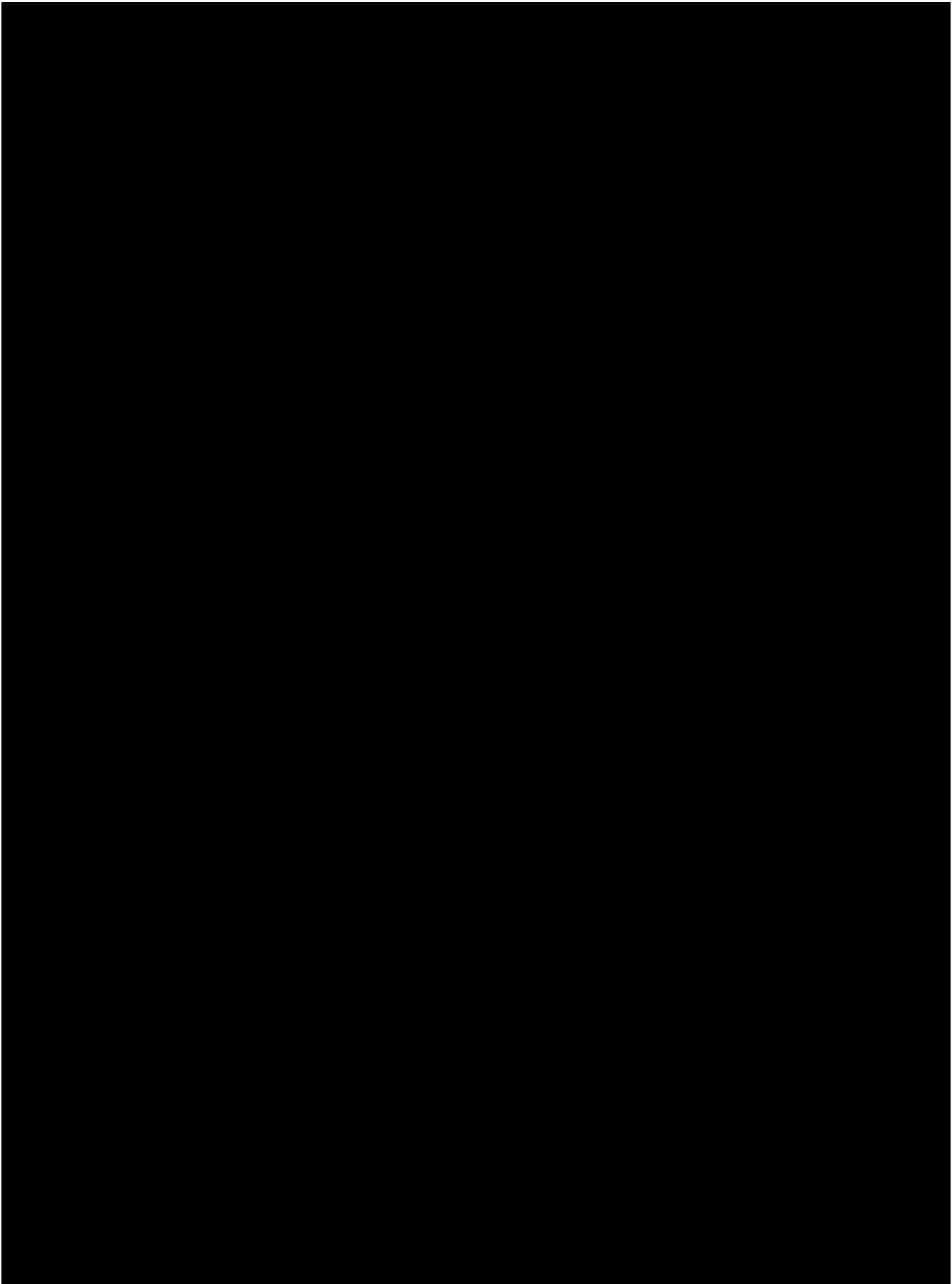
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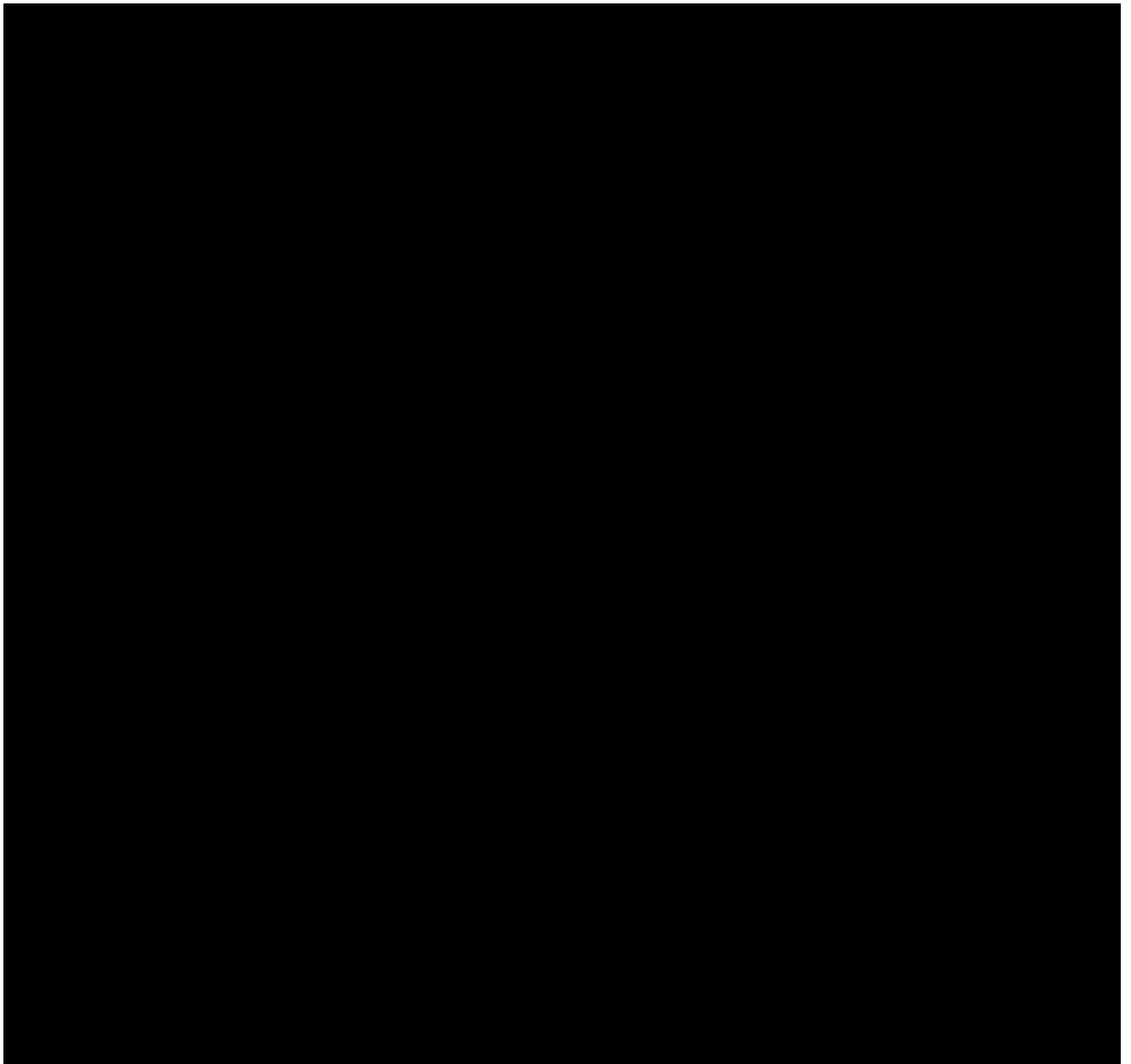












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VI. OVERVIEW OF THE PARTIES' POSITIONS ON LIABILITY

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VII. THE TRIBUNAL'S ANALYSIS ON JURISDICTION AND ADMISSIBILITY

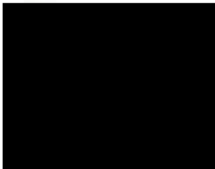
A. PRELIMINARY OBSERVATIONS

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323.

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[REDACTED] As discussed further below, an ICSID tribunal is not empowered to resolve disputes over the investments of a State’s own nationals within their home State, but only to resolve disputes involving genuine, *bona fide* “foreign” investments, meeting the requirements for protection that are established in the ICSID Convention and an applicable investment treaty or other instrument of consent. The Respondent’s abuse of process objection raises precisely that issue in connection with the facts of this case.

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B. ABUSE OF PROCESS

(1) Relevance of the Inquiry

325. The Respondent contends that “Cascade’s claims are inadmissible and/or the Tribunal lacks jurisdiction to determine them because they amount to an abuse of process.”⁴³¹ The Claimant does not dispute that the abuse of process doctrine can apply in investment arbitration, but strongly contests both the Respondent’s depiction of the requirements to find an abuse of process and the Respondent’s proposed conclusion based on the evidence. Before addressing these issues, the Tribunal ventures a few words about the relevance of this inquiry in BIT arbitrations under the ICSID Convention.
326. First, neither Party has taken a position on whether a proven abuse of process results in a lack of jurisdiction, or alternatively is a basis for a tribunal’s declining to admit a claim over which it has jurisdiction. The Respondent pleaded each in the alternative,⁴³² and the Claimant does not address the issue either way. The *Pac Rim* tribunal suggested that abuse of process “does not, in legal theory, operate as a bar to the existence of the Tribunal’s jurisdiction; but, rather, as a bar to the exercise of that jurisdiction, necessarily assuming jurisdiction to exist.” It added, however, that “[f]or present purposes, [it] considers this to be a distinction without a difference.”⁴³³ Other tribunals have likewise found no need to decide the issue.⁴³⁴ The Tribunal agrees that both approaches would lead to the same outcome if the test for abuse of process is met, and therefore that there is no need to resolve the matter here, in the absence of any relevant and decisive briefing from either Party.
327. Second, the Parties have not sought to identify the normative source of the abuse of process doctrine, at least with any precision. The Respondent briefly describes it as a subset of “abuse of right,” derived from “the parties’ duties of good faith under international law,

⁴³¹ Resp. Mem. Jur. & C-Mem. Mer., Section III.A (initial capitals removed).

⁴³² *Id.*

⁴³³ RL-20, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012 (“*Pac Rim*”), ¶ 2.10.

⁴³⁴ See, e.g., RL-24, *Renée Rose Levy*, ¶ 181 (quoting *Pac Rim*); CL-192, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador*, PCA Case No. 34877, Interim Award, 1 December 2008, ¶ 137 (characterizing abuse of process, estoppel and waiver as “defenses to what may otherwise be a valid claim,” even though “there does not appear to be complete agreement . . . on whether these defenses should, as a general rule, be considered issues of jurisdiction, admissibility, or the merits.”).

and international investment law, in particular.”⁴³⁵ Some tribunals have indeed described the doctrine that way.⁴³⁶ The Tribunal understands the appeal of this approach.

328. At the same time, the Tribunal sees no need to examine the contours of any broader notion of “abuse of right,” or of the role generally of good faith in international law. That is because the particular “abuse of process” issue presented here – *i.e.*, whether the circumstances of the Claimant’s acquisition of CMD shares result in an investment that is protected under the ICSID Convention and the BIT – need not depend on establishing a broader doctrine of “abuse of right.” Rather, it can be addressed through a traditional VCLT analysis of the operative instruments. Under such an approach, each treaty is to be “interpreted in good faith in accordance with the ordinary meaning [of its terms] in their context and in light of its object and purpose.”⁴³⁷ The Convention and the BIT provide a particular dispute resolution process in support of a particular object and purpose.
329. Beginning with the ICSID Convention, while this does not include a specific definition of investment, it is broadly accepted that the absence of a definition does not rob the term of inherent meaning; rather, it leaves the term to be ascribed its ordinary meaning, in accordance with Article 31(1) of the VCLT. The ordinary meaning of the term “investment” is an objective one, which sets the outer boundaries beyond which the Convention cannot apply, even if individual parties were to seek to agree otherwise. While minds may differ regarding the proper formulation of a definition – and this case does not require the Tribunal to articulate a formulation – the purpose of such an analysis is to determine whether a given investor made an investment – in reality and not just in form – of the nature that the ICSID Convention was intended to protect.

⁴³⁵ Resp. Mem. Jur. & C-Mem. Mer., ¶¶ 222-223.

⁴³⁶ See, e.g., CL-171, *Mobil Corporation et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 (“*Mobil*”), ¶¶ 169-173 (observing that “in all systems of law ... there are concepts framed in order to avoid misuse of the law. Reference may be made in this respect to ‘good faith’ (*bonne foi*), ‘*détournement de pouvoir*’ (misuse of power) or ‘*abus de droit*’ (abuse of right)”); RL-20, *Pac Rim*, ¶ 2.44 (“subscrib[ing] to the general approach set out” in *Mobil*); RL-22, *Phoenix*, ¶¶ 107, 113 (stating that “[n]obody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused,” and applying this “international principle of good faith ... to the international arbitration mechanism of ICSID,” to “ensur[e] that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected.”).

⁴³⁷ Article 31(1) of the VCLT.

330. For purposes of the abuse of process inquiry, there is likewise a focus on whether the investment is one the ICSID Convention was intended to protect, but in a somewhat different sense. The Preamble of the ICSID Convention refers to “the need for international cooperation for economic development, and the role of private *international investment* therein.”⁴³⁸ The designers of the ICSID system likewise made clear, in a report accompanying the Convention, that its purpose was not to protect nationals of a Contracting State against potential actions by their own State, but rather was “to facilitate the settlement of disputes between States and foreign investors,” with a view to “stimulating a larger flow of private international capital into those countries which wish to attract it.”⁴³⁹ As prior tribunals have observed, these provisions make clear – both as a matter of treaty text and in light of its object and purpose – that the inherent notion of “investment” in the Convention requires some *bona fide* transaction by a *foreign* investor, with the intention of engaging on an ongoing basis in some *real economic activity* in the host State. By contrast, the ICSID system was not intended to apply to investments made solely by domestic investors in their home State, even if later repackaged under a foreign flag in the face of an existing or looming dispute, in order not to conduct further economic activity but simply to obtain access to treaty protection and potential treaty arbitration.⁴⁴⁰
331. The same is true of BITs generally, and of the BLEU-Turkey BIT in particular. The title of that BIT confirms that its object and purpose was the “reciprocal promotion and protection of investments,” and the preamble explains that the Contracting States “desir[ed] to create favourable conditions for greater economic cooperation between them,” evidently to encourage investments by nationals of one State into the territory of the other.⁴⁴¹ In other words, the purpose of the BIT was not to protect an investment by domestic shareholders in a domestic company, but rather to promote and protect *bona fide* investments by investors of one State into the other State. This intention is further reflected in the BIT’s definition of investment, which presupposes a “contribution of capital and any other kind

⁴³⁸ ICSID Convention, preamble (emphasis added).

⁴³⁹ International Bank for Reconstruction and Development, “Report of the Executive Directors on the ICSID Convention,” 18 March 1965, ¶ 12.

⁴⁴⁰ See, e.g., RL-22, *Phoenix*, ¶¶ 87-89.

⁴⁴¹ C-1, BIT, title and preamble.

of assets, invested or reinvested in companies having an economic activity.”⁴⁴² In a context in which a foreign investor suddenly acquires a pre-existing domestic investment, it is entirely consonant with these provisions to examine whether the acquisition was made for *bona fide* commercial reasons, with a real intention of engaging in “economic activity” in the host State. This requirement would not be satisfied by transactions that appear aimed only at transferring ownership outside the host State, to manufacture jurisdiction over a domestic dispute that otherwise would not have been entitled to BIT protection.

332. In other words, as the *Phoenix* tribunal concluded:

The ICSID Convention/BIT system is not deemed to protect economic transactions undertaken and performed with the sole purpose of taking advantage of the rights contained in such instruments, *without any significant economic activity, which is the fundamental prerequisite of any investor’s protection*. Such transactions must be considered as an abuse of the system.⁴⁴³

333. The *ST-AD* tribunal likewise concluded that it would be an “abuse of the system of international investment arbitration” to grant BIT protection following a transfer of shareholding interests to a foreign company, which was made not for the purpose of stimulating new international investment, but simply so a hitherto domestic investment could seek protection under a BIT. In that tribunal’s view, accepting jurisdiction in such a case:

would go against the basic objectives underlying bilateral investment treaties. The Tribunal has to ensure that the BIT mechanism does not protect investments that it was not designed to protect, that is, domestic investments disguised as international investments or domestic disputes repackaged as international disputes for the sole purpose of gaining access to international arbitration.⁴⁴⁴

334. A similar observation was made by Professor Stern in *Alapli*, who concluded that there was “no protected investment” in that case capable of attracting international treaty protection,

⁴⁴² C-1, BIT, Article 1(3).

⁴⁴³ RL-22, *Phoenix*, ¶ 93 (emphasis added).

⁴⁴⁴ RL-56, *ST-AD*, ¶ 423.

because “the whole operation [of introducing a new Dutch owner into an investment chain] did not have any economic rationale, but had as its main purpose to gain access to ICSID arbitration at a time when there were already important disagreements between the Turkish company and the Turkish authorities,” which were “at the core of the present claim.” In those circumstances, the transaction “was, at the time it was performed, an abuse of the system of international investment protection.”⁴⁴⁵

335. It goes without saying, however, that a tribunal weighing an abuse of process objection must take care to distinguish abuse from legitimate nationality planning. As numerous tribunals have observed, there is nothing inherently inappropriate in structuring an investment through an entity with a particular nationality, so long as this is done for *bona fide* commercial reasons, whether they be business advantages or prudential protection against hypothetical future (but not already looming) adverse government acts.⁴⁴⁶ Such legitimate *ex ante* planning decisions must be distinguished from inappropriate efforts to “game” the investment arbitration system by artificially shifting a domestic investment into international hands, with no real intention of economic activity by the new owners, simply to shield the domestic operation from existing or already impending risks.⁴⁴⁷ At its heart, the abuse of process jurisprudence seeks to ensure that persons or entities who were not

⁴⁴⁵ CL-146, *Alapli Elektrik BV v. Republic of Turkey*, ICSID Case No. ARB/08/13, Award, 16 July 2012, ¶ 390.

⁴⁴⁶ See, e.g., CL-147, *Philip Morris*, ¶ 570 (“[I]t would not normally be an abuse of right to bring a BIT claim in the wake of a corporate restructuring, if the restructuring was justified independently of the possibility of bringing such a claim”); RL-19, *Orascom*, ¶ 542 (“[S]tructuring an investment through ... different states is not illegitimate. Indeed, the structure may well pursue legitimate corporate, tax, or pre-dispute BIT nationality planning purposes.”); RL-22, *Phoenix*, ¶ 94 (international investors can structure investments “which meet the requirement of participating in the economy of the host State, in a manner that best fits their need for international protection, in choosing freely the vehicle through which they perform their investment”); RL-24, *Renée Rose Levy*, ¶ 184 (“an organization or reorganization of a corporate structure designed to obtain investment treaty benefits is not illegitimate *per se*, including where this is done with a view to shielding the investment from possible future disputes with the host state.”); RL-181, *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013 (“*Tidewater*”), ¶¶ 184-185 (“it is a perfectly legitimate goal, and no abuse of an investment protection treaty regime, for an investor to seek to protect itself from the general risk of future disputes with a host state. Thus, the critical issue remains one of fact ...”).

⁴⁴⁷ CL-147, *Philip Morris*, ¶¶ 545, 584 (“At the same time, it may amount to an abuse of process to restructure an investment to obtain BIT benefits in respect of a foreseeable dispute [T]he Claimant has not been able to prove that tax or other business reasons were determinative for the restructuring.”); RL-24, *Renée Rose Levy*, ¶ 185 (“However, a restructuring carried out with the intention to invoke the treaty’s protections at a time when the dispute is foreseeable may constitute an abuse of process depending on the circumstances.”).

intended to receive the benefits of investment treaties do not do so, while leaving intact investment protections for those the treaties sought to protect.

336. The bottom line is that in distinguishing legitimate nationality planning (and legitimate acquisitions by new foreign owners) from abuse of process, the focus necessarily must be on the “*when*” and the “*why*” – the timing and circumstances under which shares in a local company, previously held by nationals of the host State, are transferred to new foreign ownership. The Tribunal addresses the scope of this inquiry further below, before turning to an application of the relevant factors to the specific evidence in this case.

(2) Scope of the Inquiry

337. The Tribunal starts with the observation that abuse of process is not confined to extreme scenarios where the adverse State action causing harm already had occurred by the time the investment changes hands. Obviously, that scenario presents the clearest case; as the *Pac Rim* tribunal accepted, “it is clearly an abuse for an investor to manipulate [ownership] to gain jurisdiction under an international treaty at a time when the investor is aware that *events have occurred* that negatively affect its investment.”⁴⁴⁸ In that situation, there is no need to engage with any foreseeability analysis, as the dispute already will have crystallized with the taking of the relevant State action; a subsequent transfer of ownership presents an easy case for detecting attempted abuse. This is the scenario in which a number of cases discussed by the Parties arose.⁴⁴⁹

338. Yet such scenarios do not “occupy the field” of abuse of process, which is precisely why many of the cases seek to examine the foreseeability of *post-transaction* State action.⁴⁵⁰ It

⁴⁴⁸ RL-20, *Pac Rim*, ¶ 2.100 (emphasis added).

⁴⁴⁹ See, e.g., RL-22, *Phoenix*, ¶¶ 136, 138 (noting that “Phoenix bought an ‘investment’ that was already burdened with ... the problems with the tax and customs authorities ... and the bank accounts had been frozen for eighteen months. ... In other words, all the damages claimed by Phoenix had already occurred and were inflicted on the two Czech companies, when the alleged investment was made. ... [W]hat was really at stake were indeed the pre-investment violations and damages.”); RL-56, *ST-AD*, ¶ 419 (finding that “all of the damaging facts occurred years before the Claimant acquired its investment ..., and that the only event that the Claimant could mention as having taken place after it entered on the scene was a fabrication reproducing an event that took place before the Claimant became a protected German investor”).

⁴⁵⁰ Indeed, immediately after its statement that “it is clearly an abuse” to restructure ownership after harm already has occurred, the *Pac Rim* tribunal went on to refer to “unacceptable manipulations by a claimant ... fully aware of an existing *or future* dispute.” RL-20, *Pac Rim*, ¶ 2.100 (emphasis added). The tribunal framed the question as about

is therefore ill-conceived for the Claimant to insist, in its closing submissions, that Cascade’s acquisition of CMD shares “[a]t best ... was legitimate nationality planning because a specific dispute had *fallen well short of crystallizing*” by the time it acquired shares.⁴⁵¹ “Crystallization” of a dispute is an important concept under *ratione temporis* analyses, where the issue often centers on whether a particular treaty may be applied to State conduct that occurred prior to a treaty’s entry into force. In the abuse of process context, by contrast, “crystallization” is not the applicable test, and the relevant inquiry is not limited to identifying the date that relevant State measures were taken and a particular dispute therefore “arose.” It extends, as well, to determining whether a dispute which has *not already* crystallized nonetheless was *foreseeable* to an investor, to a required standard of foresight.

339. For these reasons, numerous cases have emphasized the distinction between abuse of process and *ratione temporis* analysis, and recognized that the critical date for the former generally will be earlier in time than that for the latter. In *Renée Rose Levy*, for example, the tribunal stated that “[i]f a claimant acquires an investment after the date on which the challenged act occurred, the tribunal will normally lack jurisdiction *ratione temporis* and there will be no room for an abuse of process.” By contrast, where the claimant “acquired her investment prior to the challenged measure, ... a tribunal has jurisdiction *ratione temporis* but may be precluded from exercising its jurisdiction if the acquisition is abusive.”⁴⁵² The *Philip Morris* tribunal likewise emphasized the different analyses required for the two objections, with *ratione temporis* turning on whether the “dispute ... pre-dates the making of the investment,” and abuse turning on whether the claimant took steps to obtain treaty protection over a “reasonably foreseeable dispute.”⁴⁵³ It added that “[a]lthough it is sometimes said that an abuse of right might also exist in the case of restructuring in respect of an existing dispute, if the dispute already exists, then a tribunal

whether the claimant was “aware from [earlier] facts of an actual *or impending* dispute with the Respondent before its change of nationality.” *Id.*, ¶ 2.81.

⁴⁵¹ CI. PHB, ¶ 44 (emphasis added).

⁴⁵² RL-24, *Renée Rose Levy*, ¶ 182.

⁴⁵³ CL-147, *Philip Morris*, ¶ 351.

would normally lack jurisdiction *ratione temporis*.”⁴⁵⁴ The *Pac Rim* tribunal likewise emphasized that the inquiries are “materially different,” and that “the relevant date for deciding upon the Abuse of Process issue must necessarily be earlier in time than the date for deciding the Ratione Temporis issue.”⁴⁵⁵ It explained that *ratione temporis* typically turns on the date of government action, and therefore in circumstances of a continuous act a tribunal would have jurisdiction over that portion of State conduct that occurred after a change in ownership, “regardless of events or knowledge by the Claimant before” such a transaction; “this solution is different from that” in an abuse of process inquiry.⁴⁵⁶ The *Lao Holdings* tribunal echoed this approach:

[T]he time frame corresponding to a finding of abuse of process is not the same as the time frame corresponding to an objection *ratione temporis*. More precisely, if a company changes its nationality in order to gain ICSID jurisdiction at a moment when things have started to deteriorate so that a dispute is highly probable, it can be considered an abuse of process, but for an objection based on *ratione temporis* to be upheld, the dispute has to have actually arisen before the critical date⁴⁵⁷

340. The Tribunal agrees that a foreseeability analysis is a critical element in an abuse of process inquiry, and that it necessarily focuses on events prior to the date when a particular dispute “crystallized” or “arose” based on particular government action. The Tribunal also considers that a key objective in such analysis is to derive from the evidence a conclusion as to whether an investment transaction was made for the genuine “purpose of engaging in economic activity” in the host State,⁴⁵⁸ or only apparently to obtain treaty protection in the

⁴⁵⁴ *Id.*, ¶ 539; see also *id.*, ¶¶ 527, 529, 533, 539 (“the starting point for the Tribunal is to distinguish between” the two types of objections; “the test for a *ratione temporis* objection is whether a claimant made a protected investment before the moment when the alleged breach occurred,” for which “the critical date is the date when the State adopts the disputed measure”; by contrast, abuse of process occurs when “an investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute.”).

⁴⁵⁵ RL-20, *Pac Rim*, ¶¶ 2.101, 2.107.

⁴⁵⁶ *Id.*, ¶ 2.104.

⁴⁵⁷ CL-191, *Lao Holdings*, ¶ 76.

⁴⁵⁸ RL-22, *Phoenix*, ¶ 142.

face of a looming dispute, for an investment which (prior to the transaction) would not have been entitled to such protection.

341. The Parties' submissions raise three important questions about the contours of the applicable foreseeability analysis: (a) to whom must the dispute be foreseeable? (b) what is the applicable degree of foreseeability? and (c) what exactly is it that must be foreseeable, for the doctrine to be engaged? To these questions, which are common to many abuse of process cases, the Tribunal adds an additional one that arises on the special facts of this case: (d) is the notion of abuse of process limited to restructuring cases, or can it apply to an acquisition by a nominally new owner who is not connected to the prior owners through an ownership chain or other corporate affiliations? The Tribunal addresses these four questions in turn below, before concluding with some general observations about the scope of the inquiry.

a. Foreseeable to whom?

342. The Claimant contends that the test for foreseeability is subjective, requiring a conclusion that it actually foresaw a dispute with the Respondent to the required degree of probability.⁴⁵⁹ The Respondent contends that the test is objective, and will be met so long as a dispute would have been foreseeable to a reasonable investor.⁴⁶⁰

343. The Tribunal agrees with the Respondent in this regard. First, the very word “foreseeable” by definition is an objective concept: the word can be broken down syllabically as “*able* to foresee,” which is different from “actually foreseen.” The concept in its essence is thus focused on whether a development by its nature was capable (reasonably) of being foreseen. It does not require proof that a particular investor actually foresaw that which was objectively foreseeable.

344. Moreover, requiring definitive evidence that a particular investor actually foresaw a particular dispute would impose too high a threshold. Parties engaging in acts to manufacture qualifying nationality in anticipation of adverse government acts would have

⁴⁵⁹ See Cl. PHB, ¶¶ 105-107.

⁴⁶⁰ Resp. Rep. Jur. & Rej. Mer., ¶ 213, 228-229.

an incentive not to leave a paper trail of their subjective intent, and to deny such foresight (and not produce any evidence of it that may exist) once an abuse of process objection is actually raised in an arbitration proceeding. While a tribunal of course may take into account any persuasive evidence of subjective intent as may exist, subjective foresight also may be inferred from a showing that a reasonable investor, in the position of the claimant and after conducting appropriate inquiries and other due diligence, would or should have foreseen a dispute. While it is possible that such inferences may on occasion penalize an innocent but unreasonably naïve or sloppy investor – *i.e.*, one that failed to undertake reasonable inquiry before investing into risks that readily could have been ascertained with appropriate due diligence – that is not a basis for elevating the threshold to require active evidence of subjective knowledge. To the contrary, some tribunals have stated that an abuse of process finding “does not imply a showing of bad faith.”⁴⁶¹ The implication of that statement is that even absent positive evidence of bad faith, a particular investment may have been so unreasonable in the circumstances – because a dispute with the State already would have been foreseeable objectively to any reasonable investor – that it would not meet the treaty or Convention requirements for protection.

b. How foreseeable?

345. The Tribunal also agrees with the Respondent’s formulation of how foreseeable a dispute must be in order for the doctrine of abuse of process to attach: that it must be “reasonably foreseeable,” but not necessarily “highly probable,” as the Claimant contends.⁴⁶² The doctrine does not turn on the *precise odds* of adverse government action at the time of a decision to acquire a preexisting investment or operation in the host State. It can attach if the evidence shows that a reasonable investor, conducting an appropriate inquiry, should have understood that the investment it was acquiring already faced a *significant risk* of government action that would adversely affect its rights,⁴⁶³ but nonetheless chose to proceed in the *absence of any real commercial rationale* for doing so. The degree of

⁴⁶¹ See, e.g., CL-147, *Philip Morris*, ¶ 539.

⁴⁶² Cl. C-Mem. on Jur. & Rep. on Mer., ¶ 225.

⁴⁶³ “Significant” is here used in the qualitative sense – as referring to a real and credible risk, a notable risk – and not in a quantitative sense, of reflecting a particular calculation of the likelihood of adverse State action.

apparent risk may factor into a holistic evaluation of all the circumstances (as discussed further below), but it is not a rigid requirement of proof in and of itself.

346. This is consonant with the understanding that the purpose of the abuse of process doctrine is to ensure that treaty protection is afforded only to *bona fide* investment transactions by foreign investors, made with the intention of engaging in some real economic activity in the host State, and not to domestic (or other non-treaty qualifying) investments repackaged under a foreign (treaty-qualifying) flag, simply to obtain treaty protection in the face of a looming dispute. A genuine investor may decide to proceed with an objectively legitimate investment notwithstanding an appreciation of some impending threat, in the reasonable expectation of being able to forestall or survive the threat and of making a real contribution for real returns over a longer duration. By contrast, a putative investment transaction may be revealed as likely a sham, intended only to attract treaty protection in circumstances of an already foreseeable threat, even if the threat at that point is just brewing and not yet “highly probable” to result in adverse State action. A contrary finding in the latter scenario – that treaty protection attaches simply because the sham transaction was made before an already foreseeable threat developed into a more “highly probable” threat – would simply award alacrity and foresight (rather than last-minute action) in designing an abuse of process. It could also make abuse of process turn on how quickly the State itself acted to implement adverse measures after action became reasonably foreseeable, even though the focus of the inquiry should be on possible manipulation of ownership *by the investor*, not on the State’s efficiency (or lack of it) in moving forward with already foreseeable action.
347. In other words, the Tribunal agrees with prior awards that describe foreseeability *as a continuum* between unforeseeable disputes and highly probable disputes, with most cases falling somewhere between the two extremes (and thus, by definition, not precisely at either).⁴⁶⁴ That is because in many cases, specific government action is preceded by some period of deteriorating relationships, and the longer the relationship deteriorates, the more

⁴⁶⁴ CL-147, *Philip Morris*, ¶ 554 (“In the Tribunal’s view, foreseeability rests between the two extremes posited by the tribunal in *Pac Rim v. El Salvador* – ‘a very high probability and not merely a possible controversy’. On this basis, the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable.”).

foreseeable adverse State action may become. That is presumably why the *Pac Rim* tribunal described the exercise of drawing a line on the continuum as not necessarily clear cut, and “recognize[d] that, as a matter of practical reality, this dividing-line will rarely be a thin red line, but will include a significant grey area.”⁴⁶⁵ And that is precisely why it is necessary to conduct a holistic analysis that focuses on all relevant factors⁴⁶⁶ and not to focus too rigidly on just one, such as the precise degree of foreseeability on the date of investment. In considering all relevant factors, the Tribunal does agree that there will be a *high threshold* to meet the test for showing abuse of process,⁴⁶⁷ but that is because it will be only in unusual circumstances that the evidence points to a likely sham transaction, rather than one made for genuine commercial purposes. But a high threshold for proving abuse does not equate to a requirement to prove that adverse State action is already highly probable on the date of the investment.

c. What must be foreseeable?

348. The Parties also dispute what it is, exactly, that must have been foreseeable before a claimant’s subsequent act of investing will give rise to suspicions of abuse. For the Claimant, it is “the specific dispute,” by which it means a *particular* “conflict of legal views or interests ... which are susceptible of being stated in terms of a concrete claim” (quoting *Maffezini*).⁴⁶⁸ For the Respondent, it need not be the specific dispute that in fact later transpires; it is sufficient that what is foreseen are the “measures and/or facts that underlie the claims, generally.”⁴⁶⁹
349. The Tribunal starts by observing that both *Maffezini* and *Lucchetti* were *ratione temporis* cases, and therefore the relevant question was when the particular dispute raised in the proceedings “arose.” As discussed above, that is a different question from the one presented

⁴⁶⁵ RL-20, *Pac Rim*, ¶ 2.99.

⁴⁶⁶ See CL-147, *Philip Morris*, ¶¶ 431 (agreeing with *Pac Rim* on “the necessity to consider other circumstances, such as ‘whether particular facts and circumstances of the corporate restructuring provide evidence of ‘unacceptable manipulations’ or acts ‘in bad faith’.”), 586-588 (and further stating that its conclusion on foreseeability – that “there was at least a reasonable prospect” of adverse measures by which a dispute would arise – was “reinforced by a review of the evidence regarding the Claimant’s professed alternative reasons for the restructuring”).

⁴⁶⁷ See, e.g., CL-192, *Chevron*, ¶ 143; CL-147, *Philip Morris*, ¶ 539.

⁴⁶⁸ Cl. PHB, ¶¶ 108-109.

⁴⁶⁹ Resp. Mem. Jur. & C-Mem. Mer., ¶ 230.

here. Nonetheless, the Tribunal is content to start in the same place those tribunals started, namely with the ICJ's definition of a "dispute." As expressed in the *Case Concerning East Timor*, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or interests between parties."⁴⁷⁰ The first thing to note about this definition is that it contains two disjunctives ("or"), namely a "disagreement on a point of law *or* fact"⁴⁷⁰ and a "conflict of legal views *or* interests" (emphasis added). Applying the ordinary meaning of the disjunctive suggests that a dispute need not turn on different views of the law, but also could turn on different views of facts, or simply on conflicting interests, to meet the ICJ's definition. Of course, in order to be in a position to *file a claim*, some action that affects the claimant's legal rights must ultimately be taken that affects the claimant's legal rights; otherwise, conflicting views may remain (in Professor Schreuer's words, adopted in *Maffezini*) "merely academic" and not "susceptible of being stated in terms of a concrete claim."⁴⁷¹ But the fact that some specific action must lie for purposes of determining when a claim "arose," and therefore became actionable for *ratione temporis* purposes, does not really answer the question of whether an investment transaction should only be deemed an abuse of process if the *particular* action the State ultimately took was itself reasonably foreseeable as of the date of the investment. Such a conclusion, urged by the Claimant here, is a *non-sequitur* that arises from conflating analysis under two very different doctrines.

350. It bears recalling that States have many different legal and policy tools at their disposal, and the ultimate choice among those tools, in the context of a foreseeable "disagreement" or a "conflict of ... interests"⁴⁷² with a particular investor, may be quite difficult to predict. Requiring such foresight is not consistent with the purposes of the abuse of process doctrine. Logically, a domestic investor who artificially imposes a foreign entity in an ownership chain in the context of a developing disagreement with its own government, solely to allow itself to invoke an investment treaty in the event the State takes adverse action against its rights, is no less guilty of abuse of process because the State ultimately

⁴⁷⁰ International Court of Justice, *Case concerning East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, ICJ Reports 1995, 90, ("*Case concerning East Timor*"), ¶ 22.

⁴⁷¹ CL-155, *Maffezini*, ¶ 94 & fn. 69 (quoting C. Schreuer, "Commentary on the ICSID Convention, Article 25," *Foreign Investment Law Journal-ICSID Review*, Vol. 11, 1996, at 337).

⁴⁷² *Case concerning East Timor*, ¶ 22.

adopts measure X against the investment, rather than measure Y which the investor may have predicted. From the standpoint of the treaty or the ICSID Convention, either way this was not a true “foreign” investment that those instruments were designed to protect, because the adoption of a foreign flag was not made for the purpose of facilitating genuine additional economic activity, but simply to internationalize a brewing dispute involving a pre-existing domestic investment. The treaty and Convention are agnostic, in this sense, as between the State’s choice of measure X versus measure Y to crack down on the investor. What matters to the abuse analysis is the circumstances of the “internationalization” of the investment – was it *bona fide* or a sham? – and not whether the investor correctly predicted the precise tool the State might adopt in an already looming conflict.

351. Stated otherwise, and employing the Schreuer construct quoted in *Maffezini* for the abuse of process context rather than the *ratione temporis* context, what must be reasonably foreseeable is that the State will take some adverse action against the investment, on account of a disagreement or conflict of interests with the investor, which – when it transpires – will impact the investor’s rights and therefore be “susceptible of being stated in terms of a concrete claim.”⁴⁷³ This understanding is consistent with the *Philip Morris* tribunal’s conclusion that “a dispute is foreseeable when there is a reasonable prospect ... that a measure which may give rise to a treaty claim will materialise.”⁴⁷⁴ That formulation does not require foreseeability of the *precise measure* that the State eventually adopts, just “a measure” (emphasis added) that is capable of harming the investment to the degree that a treaty claim could be asserted.

d. Limited to restructuring cases?

352. The Claimant contends that there is a further requirement for abuse of process, namely that the original owner remain connected to the investment through some corporate or other ownership affiliation – in another words, that the transaction at issue be a restructuring of interests through related entities, and not an acquisition by an unaffiliated entity.⁴⁷⁵ This

⁴⁷³ CL-155, *Maffezini*, ¶ 94 & fn. 69 (quoting C. Schreuer, “Commentary on the ICSID Convention, Article 25,” *Foreign Investment Law Journal-ICSID Review*, Vol. 11, 1996, at 337).

⁴⁷⁴ CL-147, *Philip Morris*, ¶ 554.

⁴⁷⁵ Cl. C-Mem. on Jur. & Rep. on Mer., ¶ 249.

is because the original owners must gain something from the abuse.⁴⁷⁶ Because an “acquisition is not a restructuring,” the Claimant says, the doctrine simply cannot apply in this context.⁴⁷⁷

353. True enough, prior abuse of process cases have arisen in the restructuring context, and the decisions in such cases therefore address the issue of restructuring ownership interests within a corporate (or real) family. But the fact that a concern generally arises in a particular context does not mean, as a matter of either logic or law, that comparable concerns never could arise in a different context, which might justify application of the same core principles. The *Orascom* tribunal made such an observation when it concluded that the “general principle” of prohibiting abuse “may equally apply in contexts other than the one” in which it “[s]o far ... has found application in investment jurisprudence.”⁴⁷⁸

354. Of course, in a true arm’s-length sale of an existing investment for fair value, there generally will be no reason to suspect that the acquiror is not acquiring the investment for normal business purposes, with the intention of engaging on an ongoing basis in some real economic activity in the host State. The Tribunal therefore expects that abuse of process concerns would arise only rarely in the acquisition context. However, if the evidence in a particular case is sufficiently unusual as to raise concerns about the *bona fides* of a transaction which was made in the face of a reasonably foreseeable dispute with the host State, it remains appropriate for a tribunal to consider the suspicious circumstances. Certainly, the nature of any relationship between the seller and the acquiror will be an important element to probe, but that relationship need not be limited, analytically, to a corporate affiliation or shared beneficial ownership; a tribunal should examine the potential existence of other common interests between seller and buyer which might shed light on the real objectives of the transaction. Either way, the purpose of the inquiry remains the same: to determine whether the transaction results in a foreign investment of the sort that

⁴⁷⁶ Cl. Rej. on RfB, ¶¶ 63-65.

⁴⁷⁷ Cl. PHB, ¶ 115.

⁴⁷⁸ RL-19, *Orascom*, ¶¶ 540-541. In that case, the tribunal acknowledged that the doctrine mostly had been used “where an investment was restructured to attract BIT protection at a time when a dispute with the host state had arisen or was foreseeable,” but found that abuse also may exist where “an investor who controls several entities in a vertical chain of companies ... seeks to impugn the same host state measures and claims for the same harm at various levels of the chain in reliance on several investment treaties concluded by the host state.” *Id.*, ¶¶ 540, 542.

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357. But ultimately, there is no magic formula for weighing these various factors. The test for abuse of process is one that must evaluate all applicable circumstances,⁴⁸⁰ and this necessarily results in what the *Renée Rose Levy* tribunal described as “a global evaluation of the facts of th[e] case.”⁴⁸¹ In considering the evidence, the Tribunal of course bears in mind applicable burdens of proof, including that it is for the Claimant to prove its status as an investor holding an investment in Turkey of the nature that the BIT and the ICSID Convention generally protect, but it is for the Respondent to prove that the Claimant’s investment should not be entitled to protection because of abuse of process.⁴⁸²

(3) Application to the Evidence

[REDACTED]

⁴⁸⁰ See, e.g., CL-171, *Mobil*, ¶ 177; RL-181, *Tidewater*, ¶ 147; RL-24, *Renée Rose Levy*, ¶ 186; RL-28, *Transglobal*, ¶ 103 (all expressly referring to “all the circumstances of the case.”).

⁴⁸¹ RL-24, *Renée Rose Levy*, ¶ 193.

⁴⁸² See, e.g., CL-192, *Chevron*, ¶¶ 138-139; RL-20, *Pac Rim*, ¶¶ 2.12-2.15.

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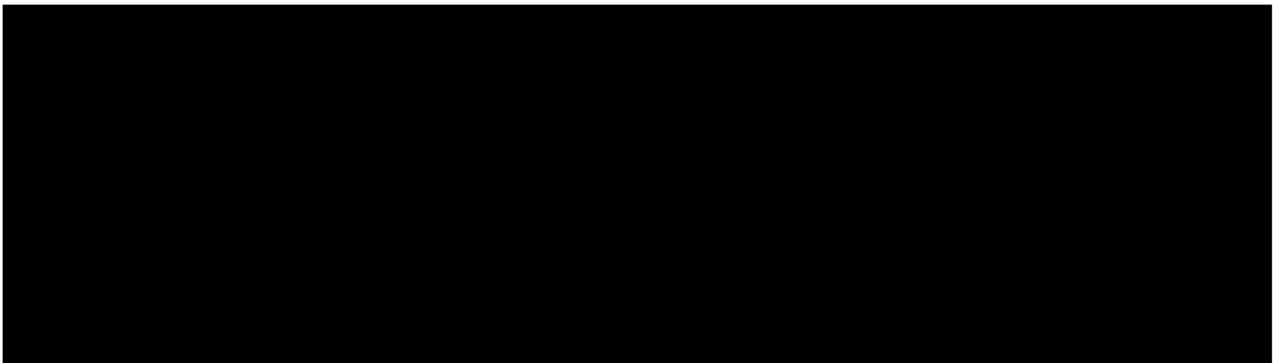
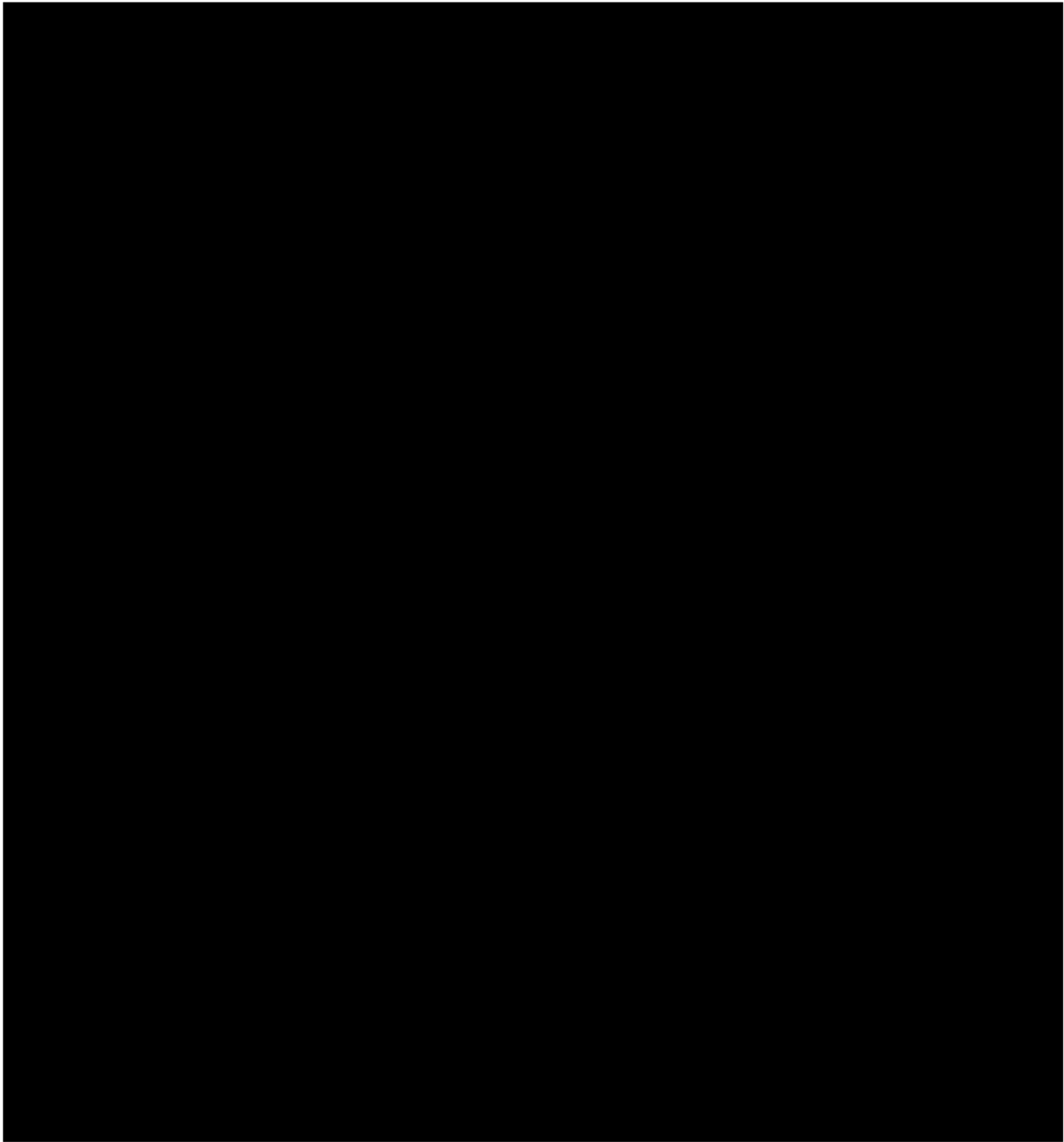
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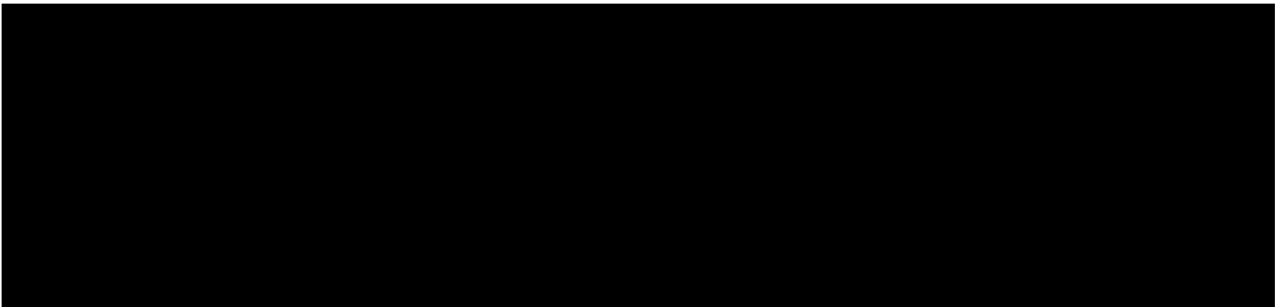
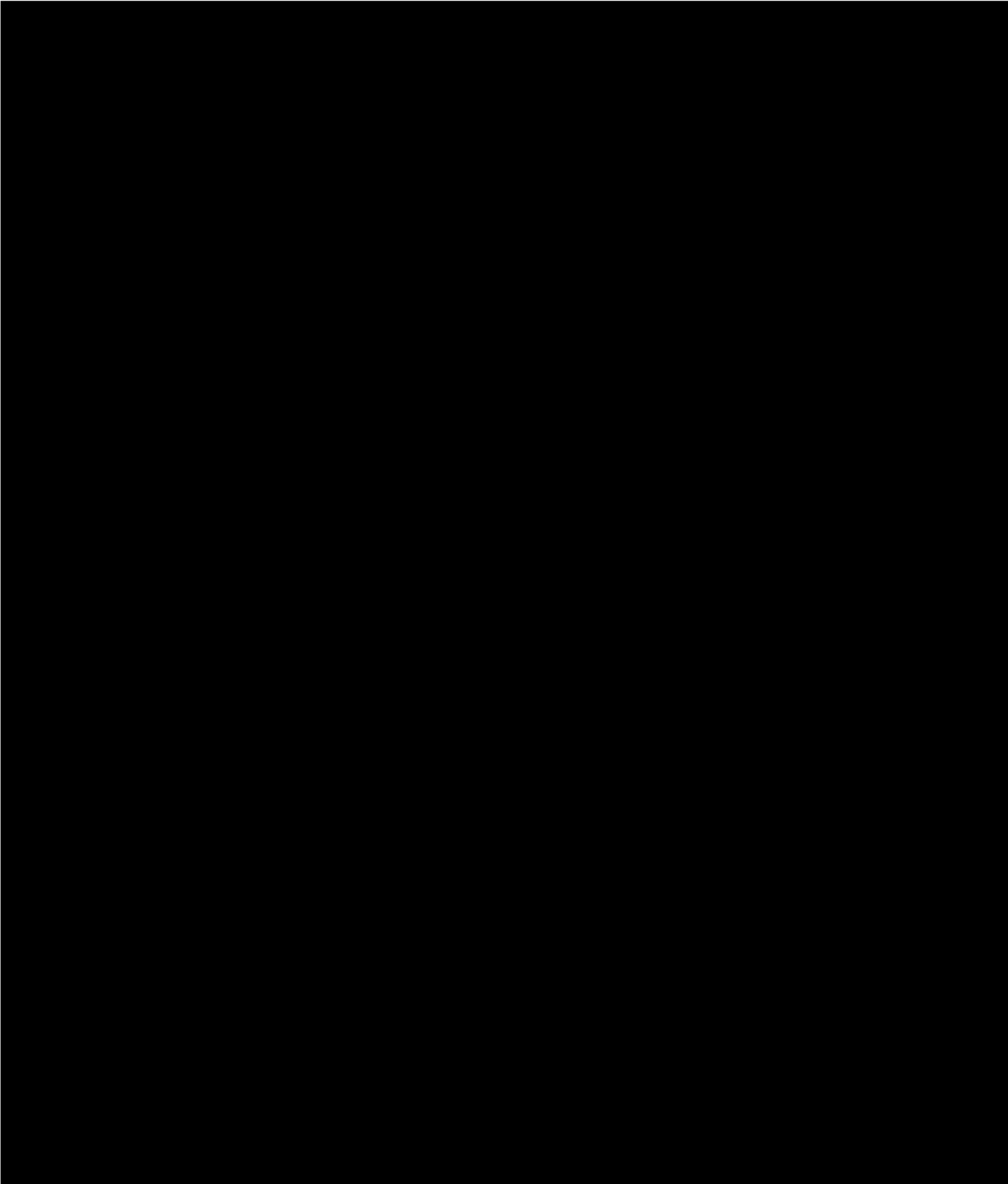
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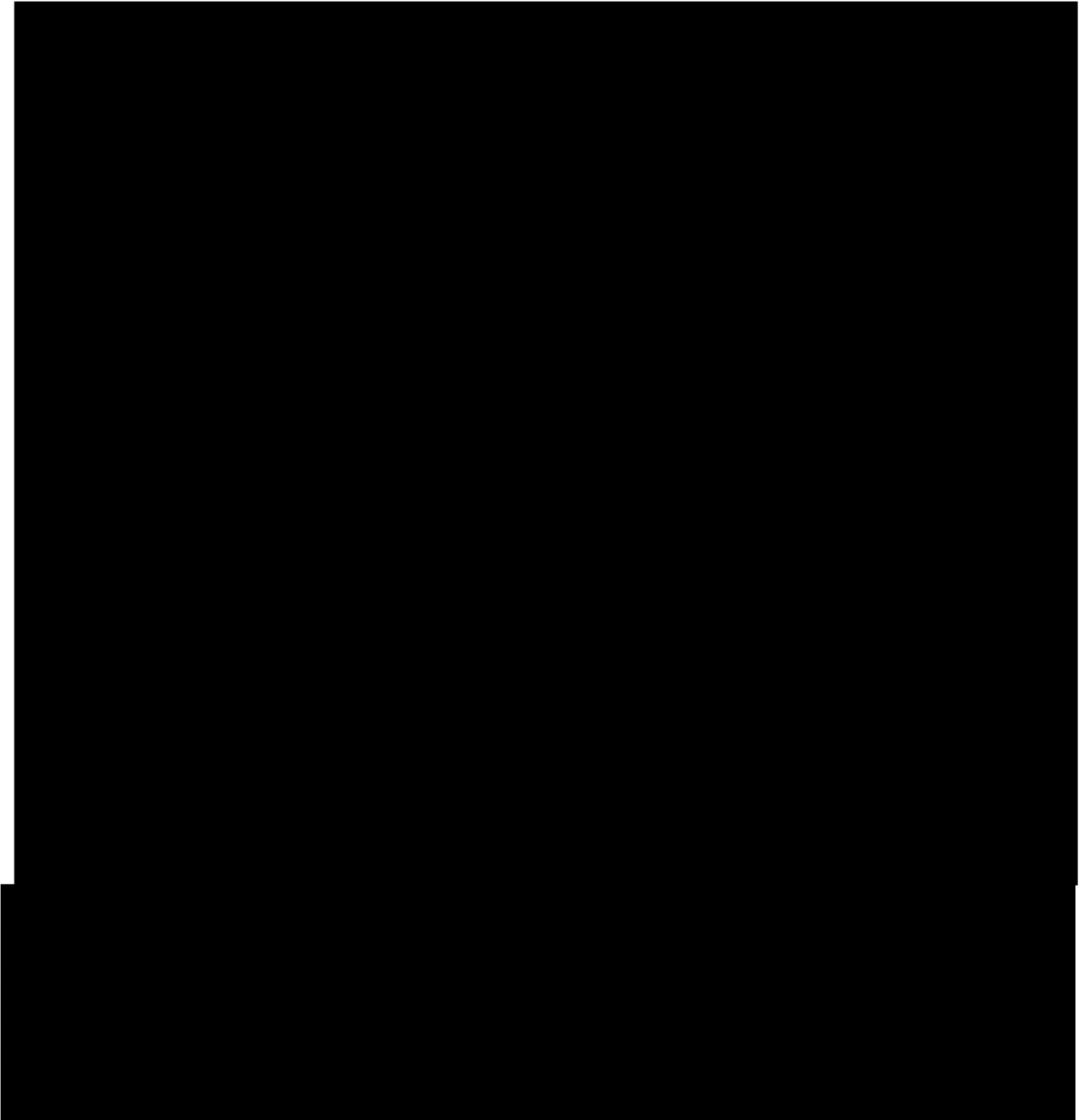
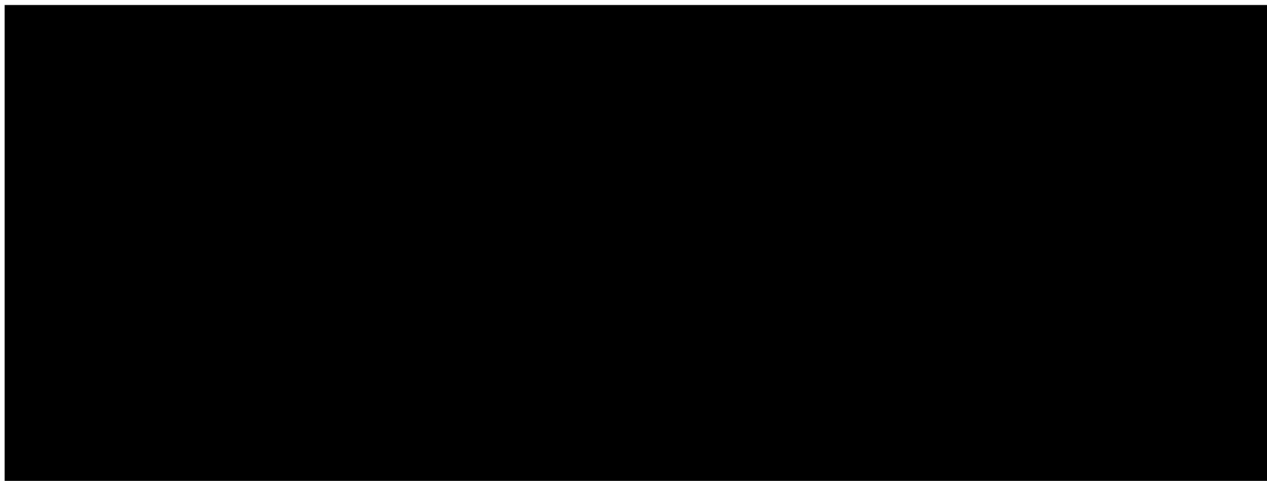
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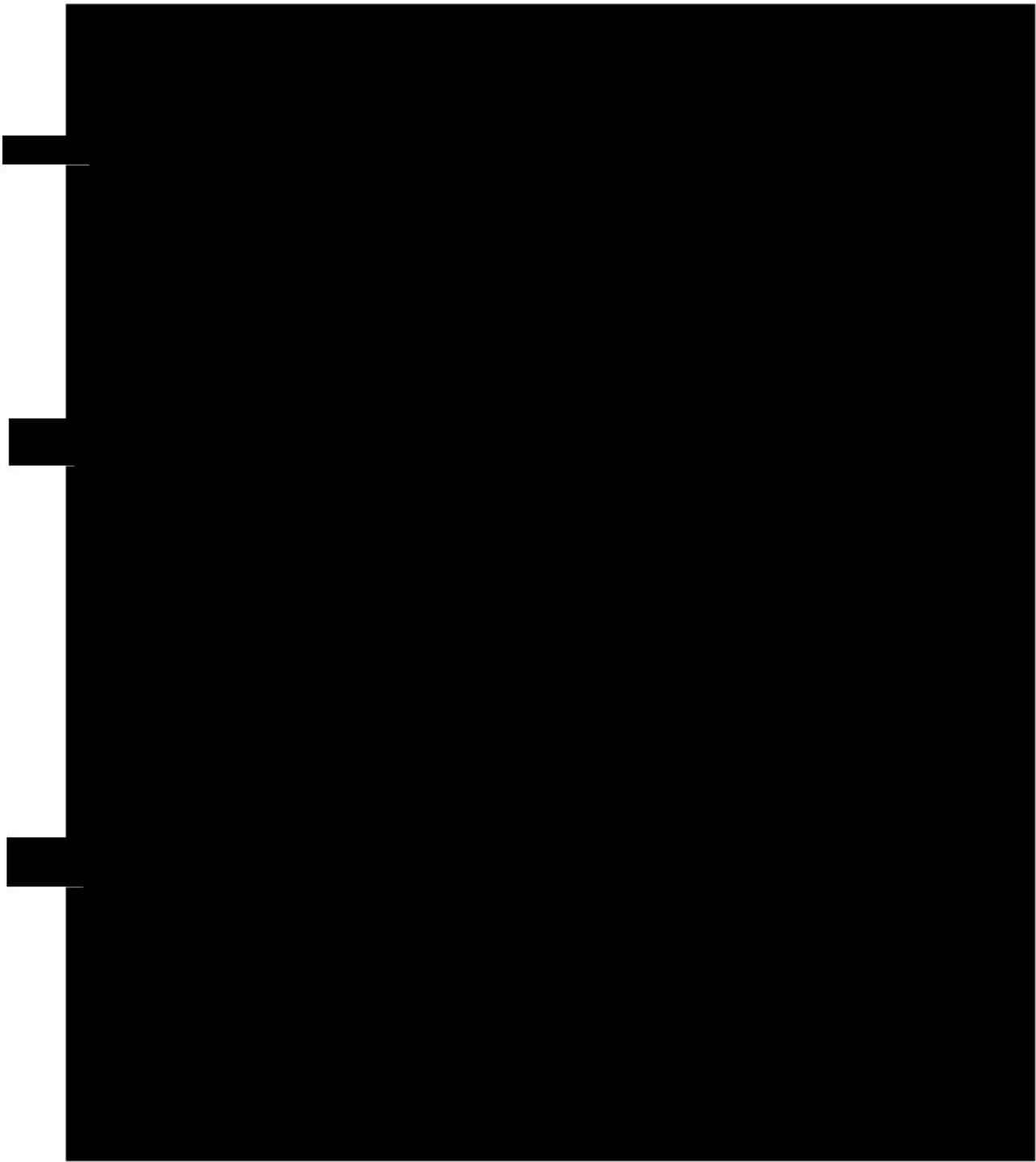
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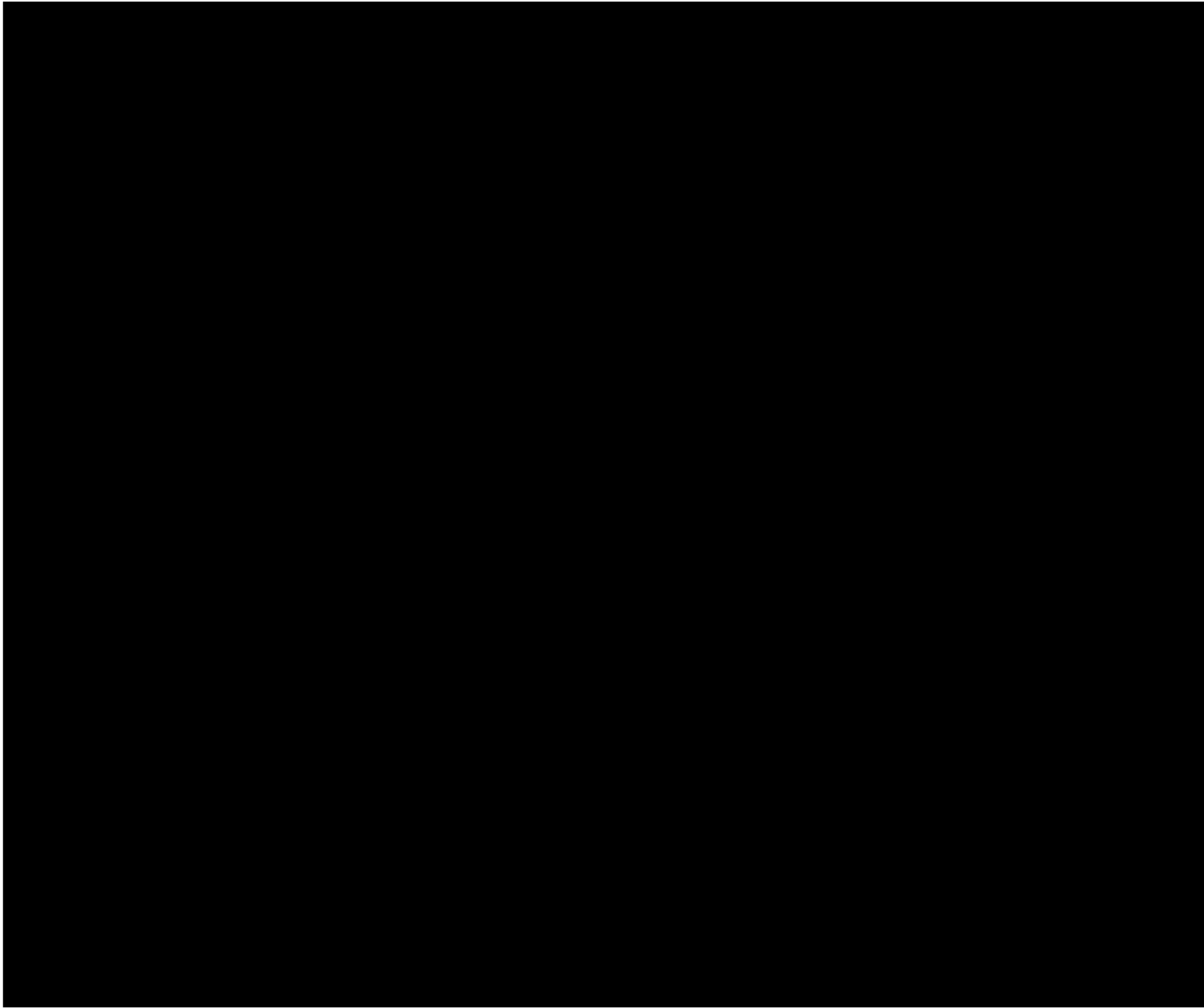
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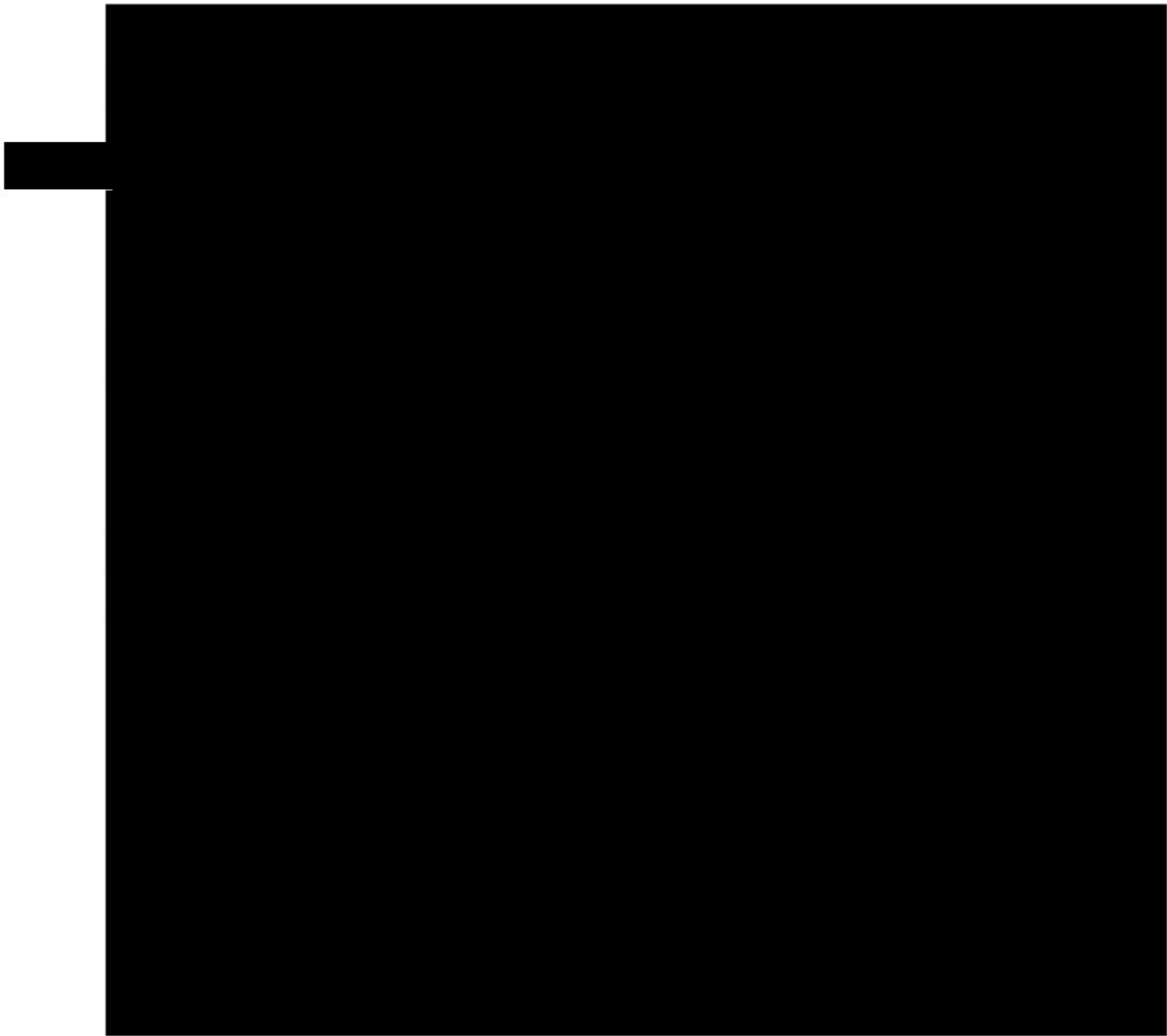
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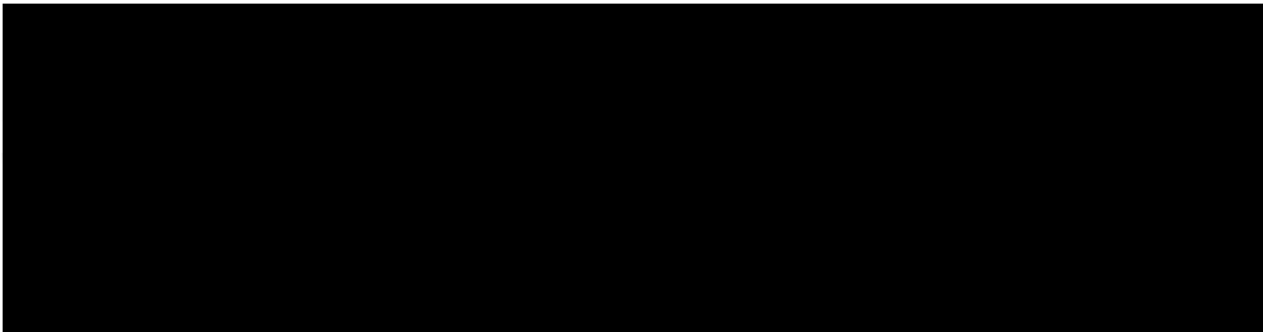
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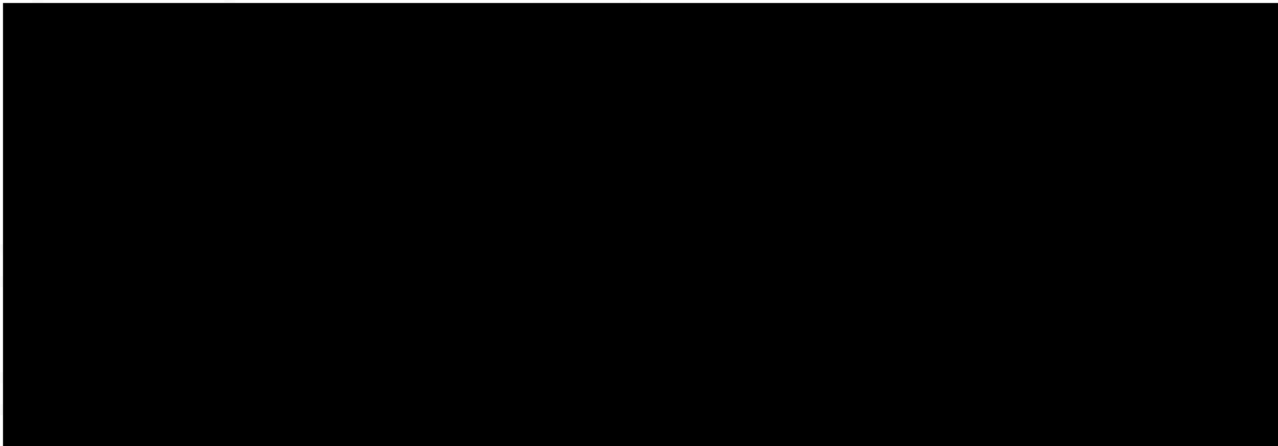


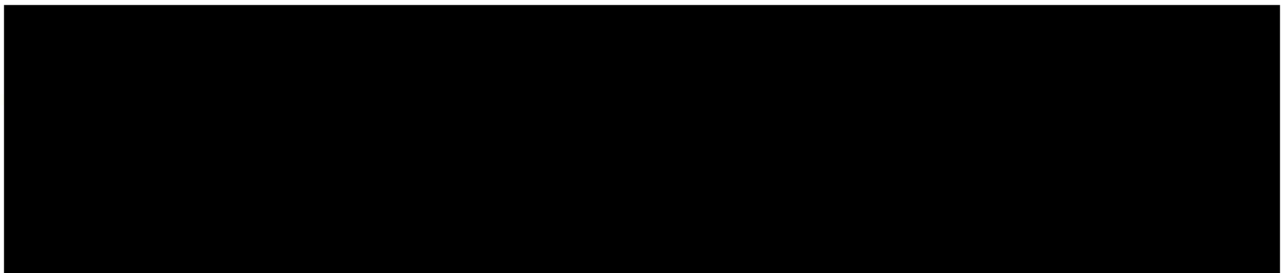
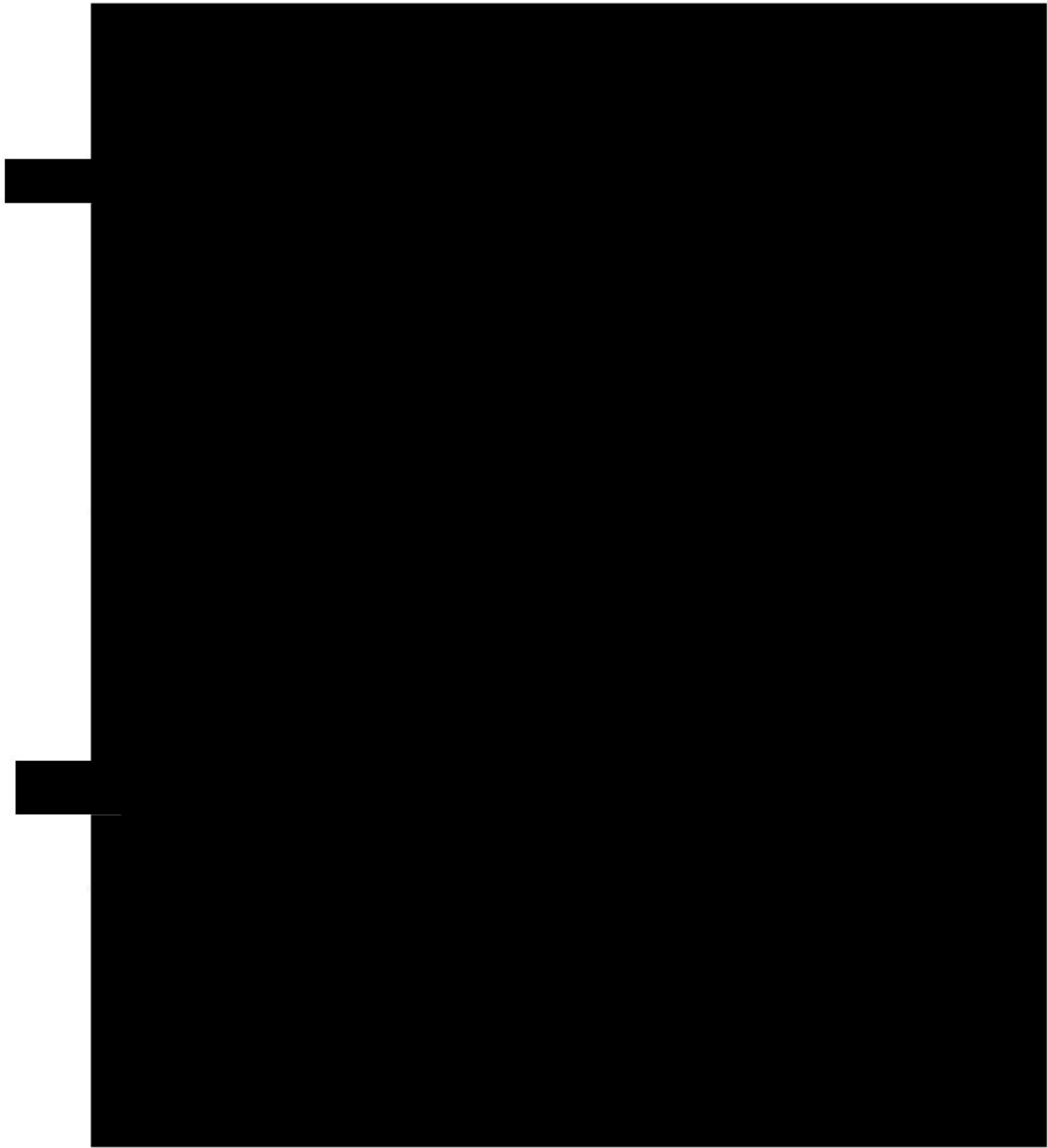


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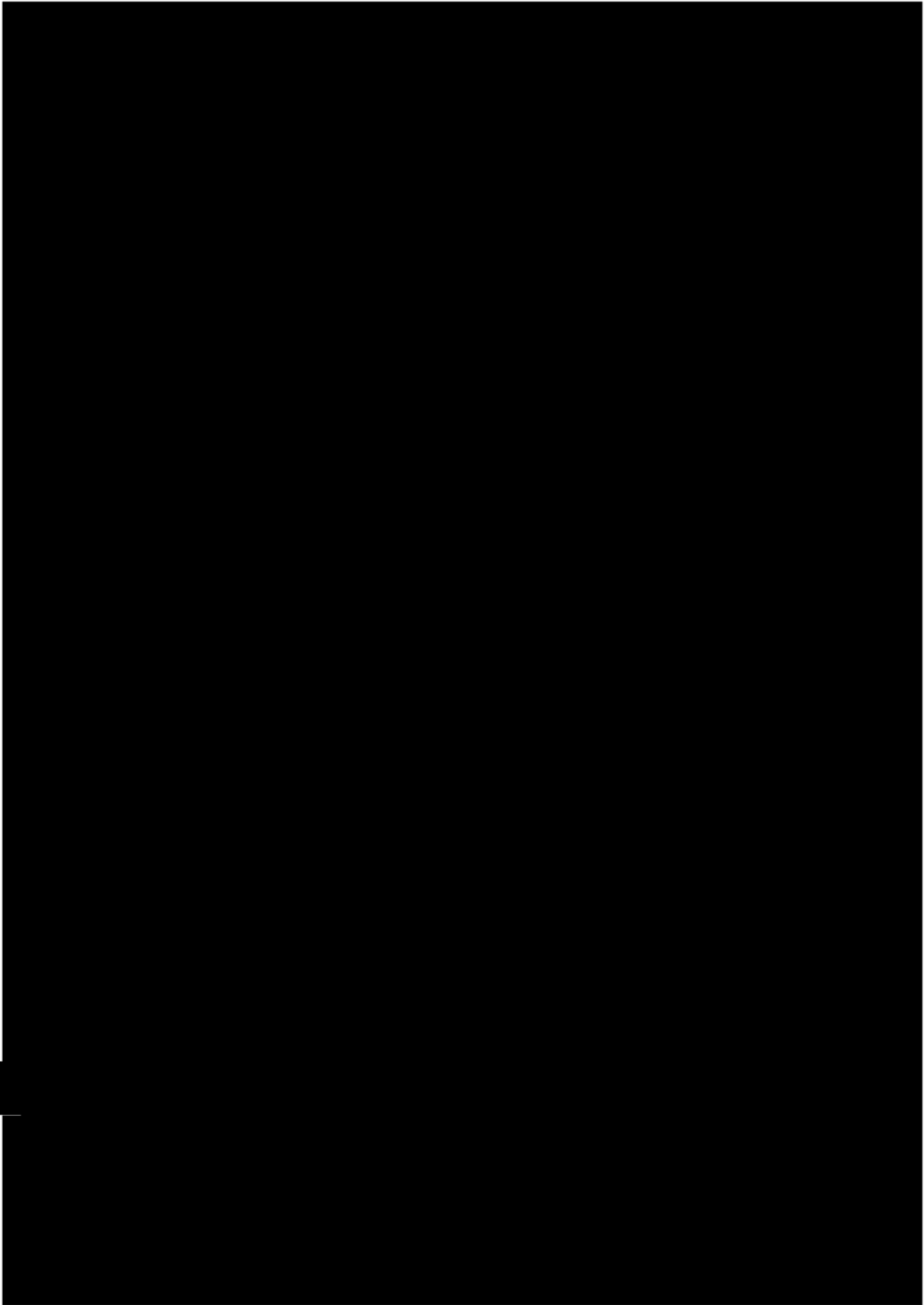


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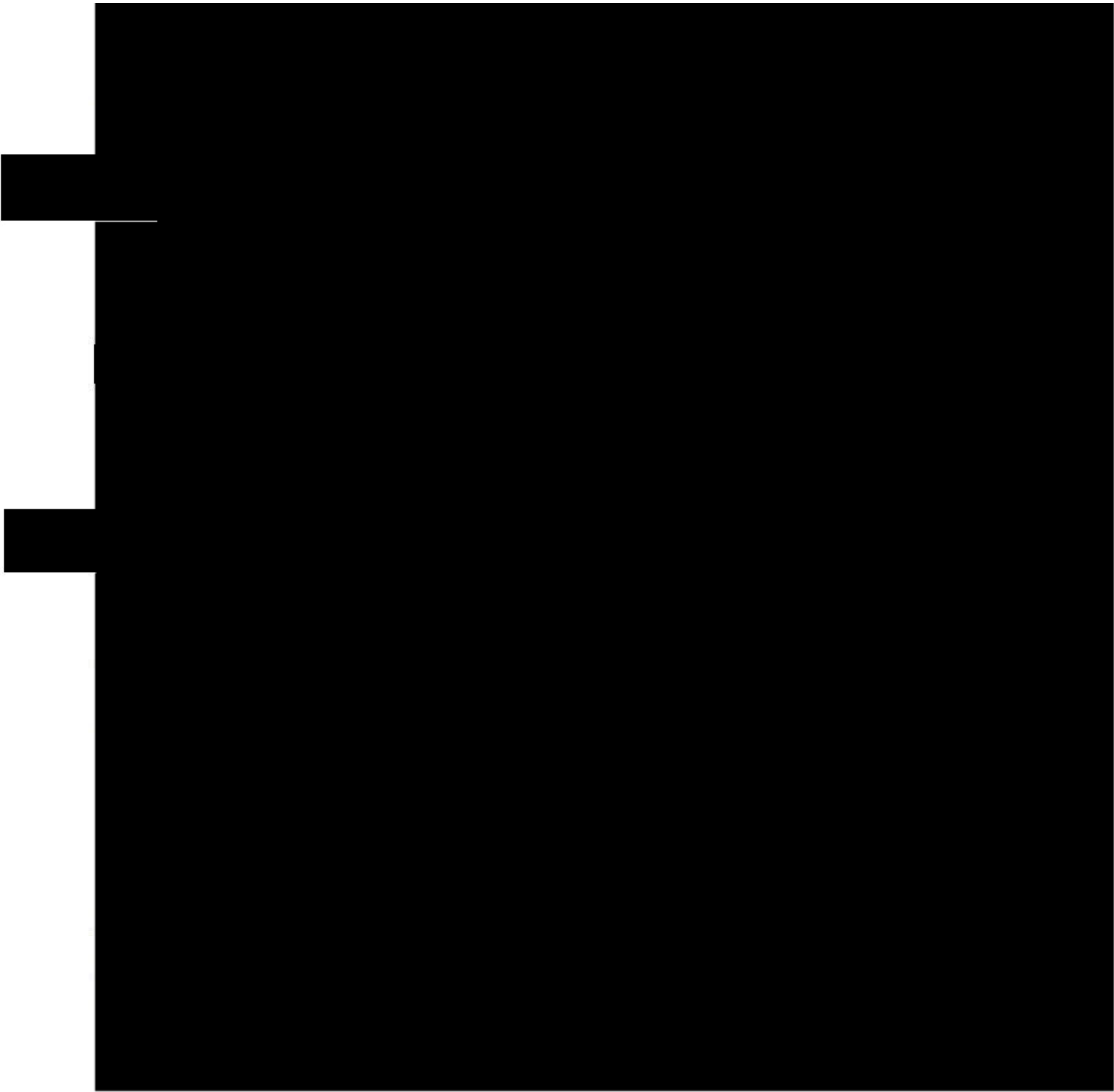


[REDACTED]

426. Of course, the fact that an investment is taken in risky circumstances does not necessarily prove that the investment was not genuine, but instead was undertaken in an abuse of process. While an abuse of process inquiry ultimately turns on objective rather than subjective foreseeability, a tribunal nonetheless may take into account persuasive evidence of subjective intent. As the *Phoenix* tribunal noted in this regard, an important factor in confirming the *bona fides* of a particular transaction is that “[t]he development of economic activities must have been foreseen or intended,” even if such activities later turned out to be impossible because of government interference. According to that tribunal, it is thus important to consider whether the investor “had really the intention to engage in economic activities, and made good faith efforts to do so.”⁶⁶⁷

427. [REDACTED]

⁶⁶⁷ RL-22, *Phoenix*, ¶ 133.



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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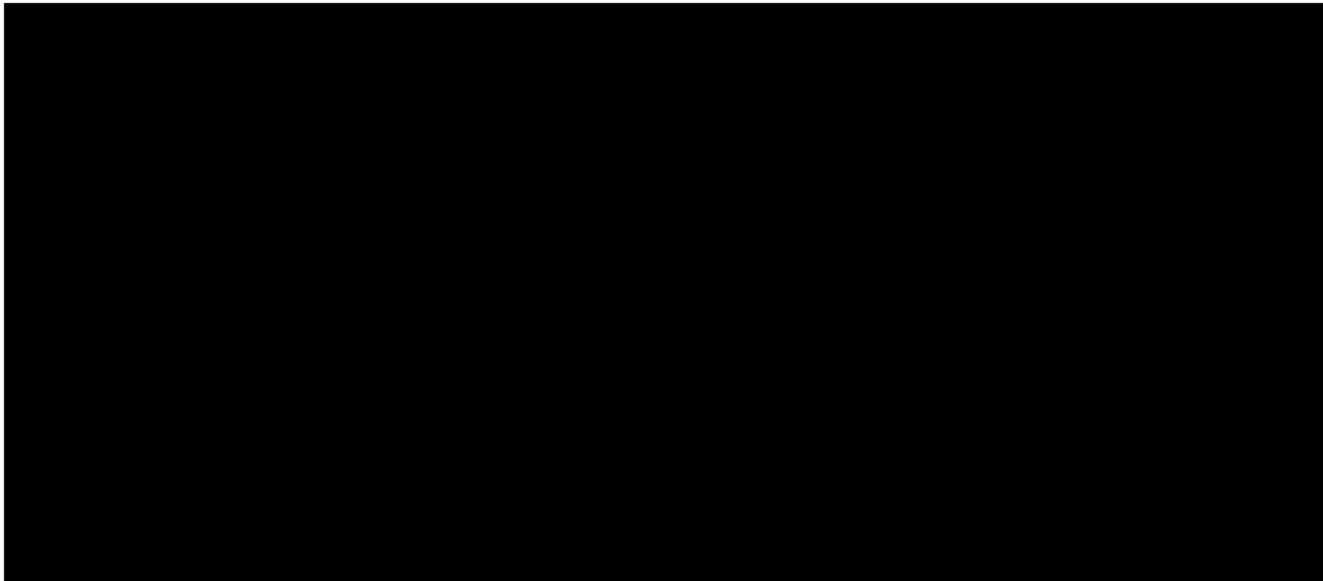
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[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(4) Conclusions and Consequences

444. For all of these reasons, the Tribunal concludes that Cascade’s investments in [REDACTED] [REDACTED], were not *bona fide* transactions by a foreign investor made with the intention of engaging on an ongoing basis in real economic activity in the host State. Rather, the Tribunal is persuaded that they were part of a broader scheme, implemented by [REDACTED] [REDACTED]. While these steps may be understandable from the perspective of those seeking to permit [REDACTED]’s operations to continue in another form, the fact remains that they were designed to repackage under a foreign flag an investment actually made by domestic investors in their home State, at a time and in an atmosphere when adverse actions by the [REDACTED] were reasonably foreseeable. In the Tribunal’s view, a transaction taken for these purposes does not result in an investment entitled to protection under the BIT and the ICSID Convention. As a consequence, Claimant’s attempt to seek such protection through the BIT constitutes an abuse of process.

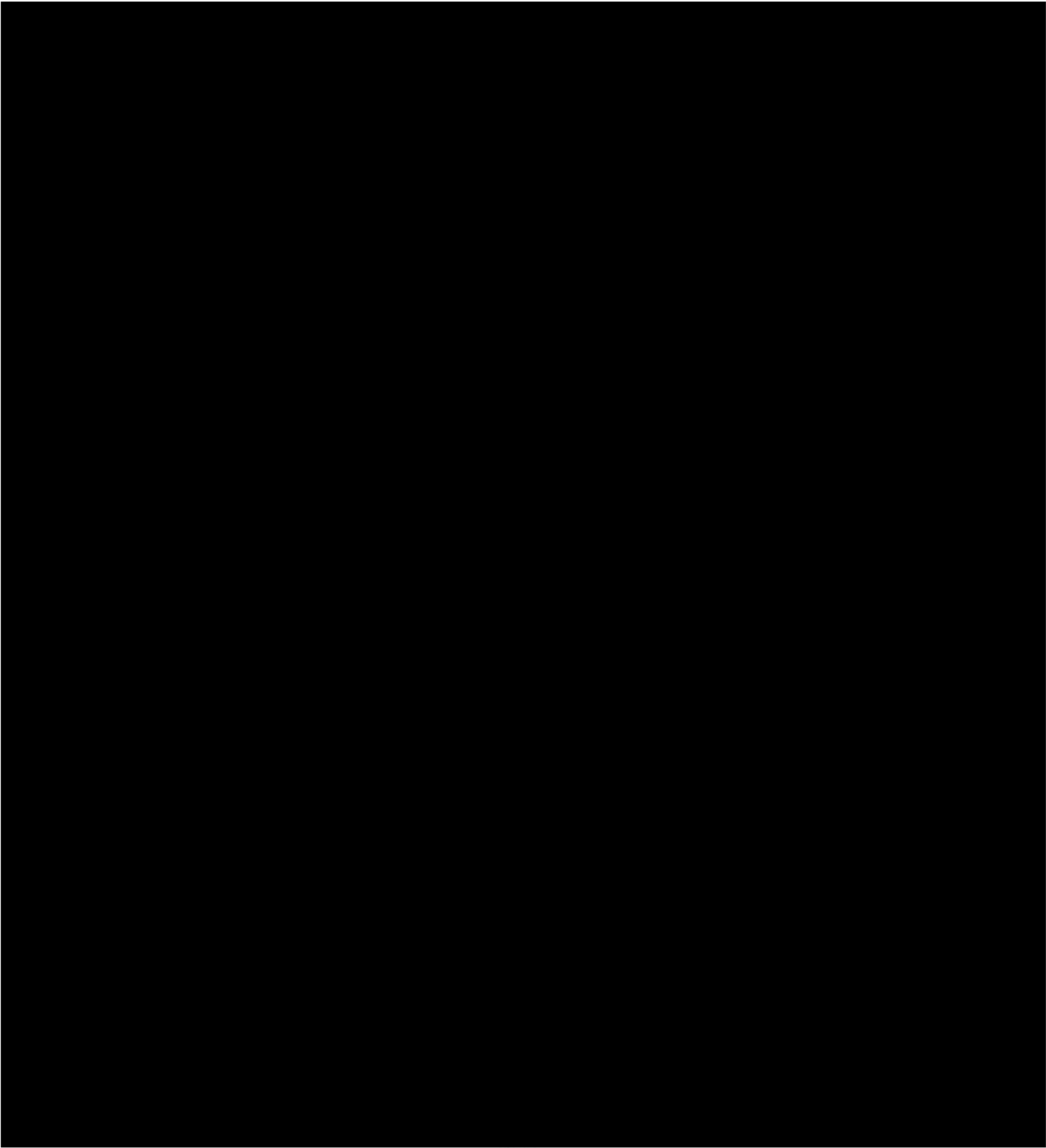
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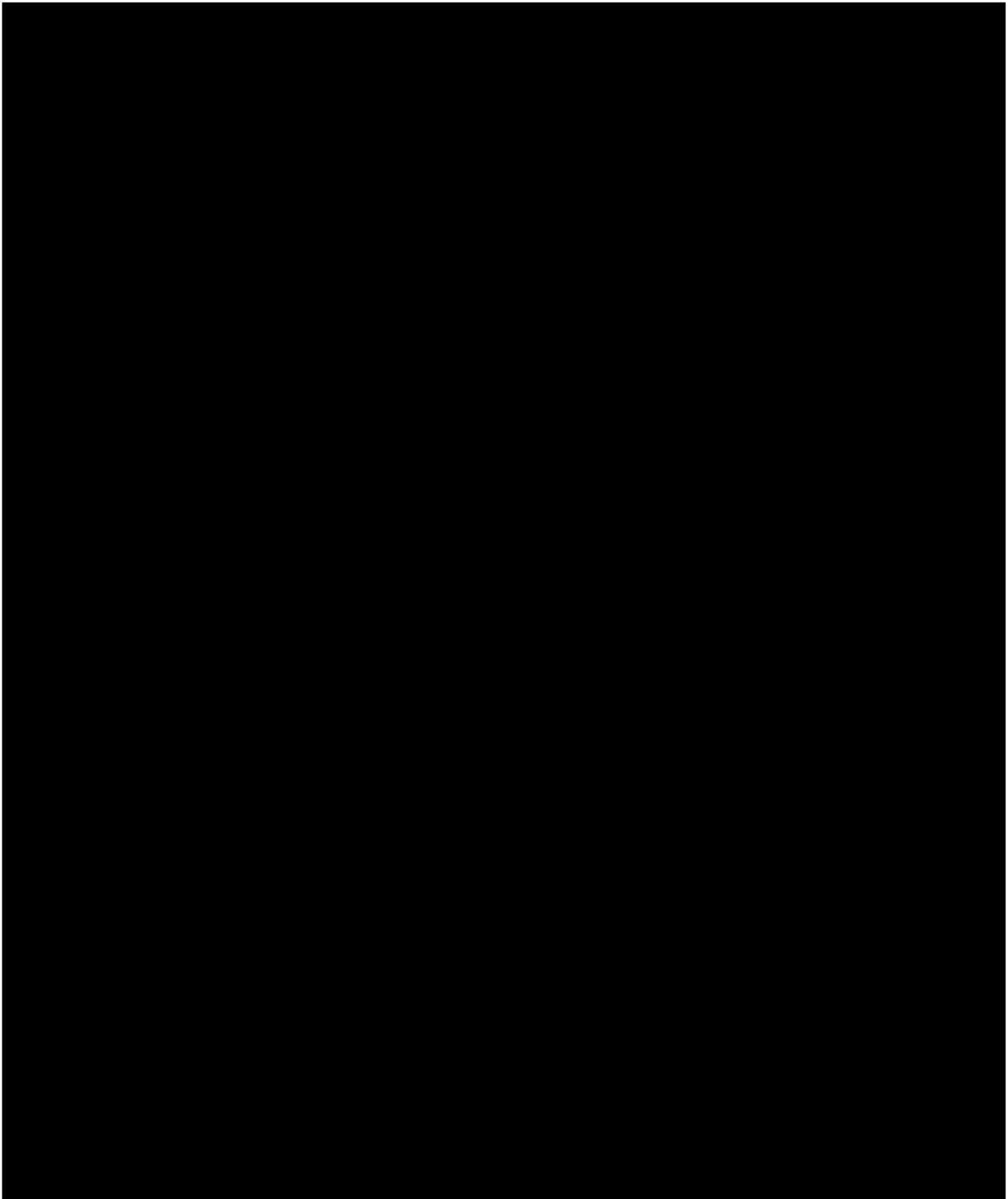
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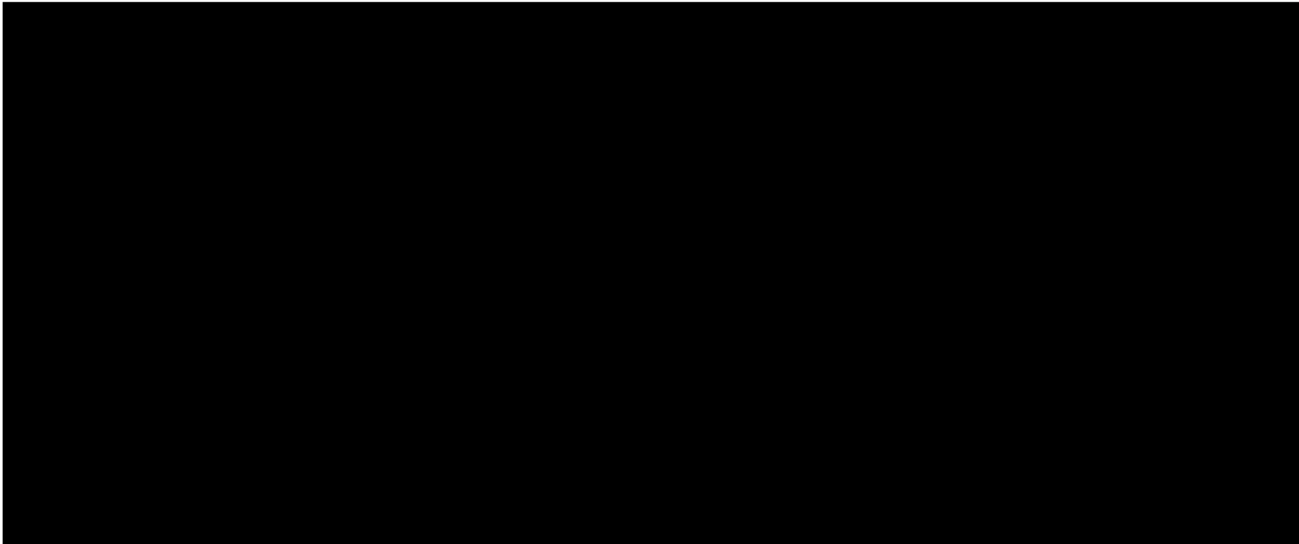


VIII. COSTS

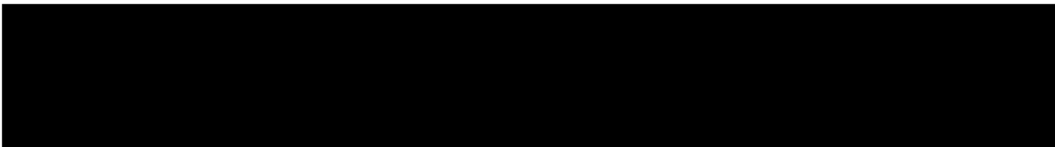
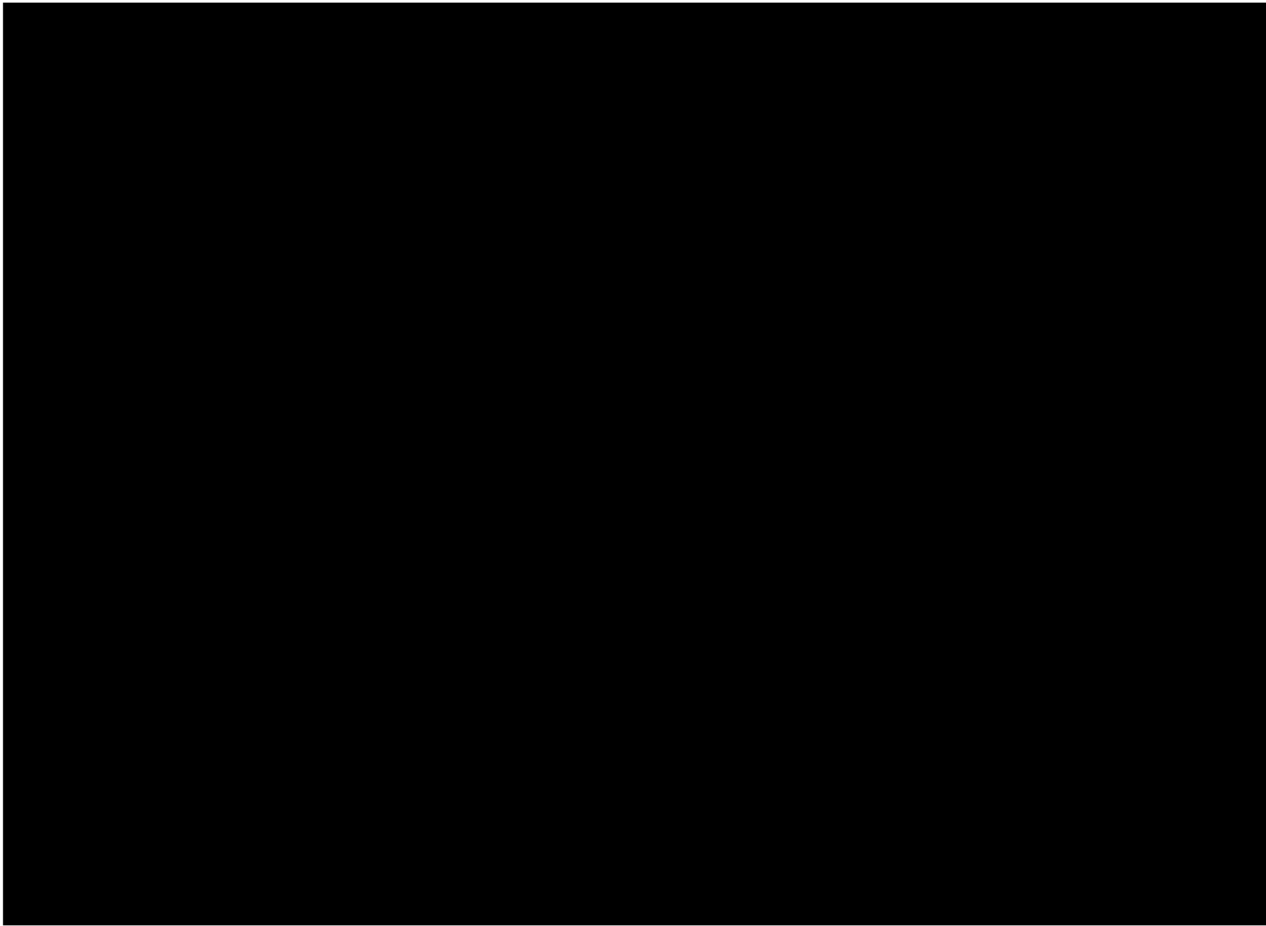
A. THE CLAIMANT'S POSITION

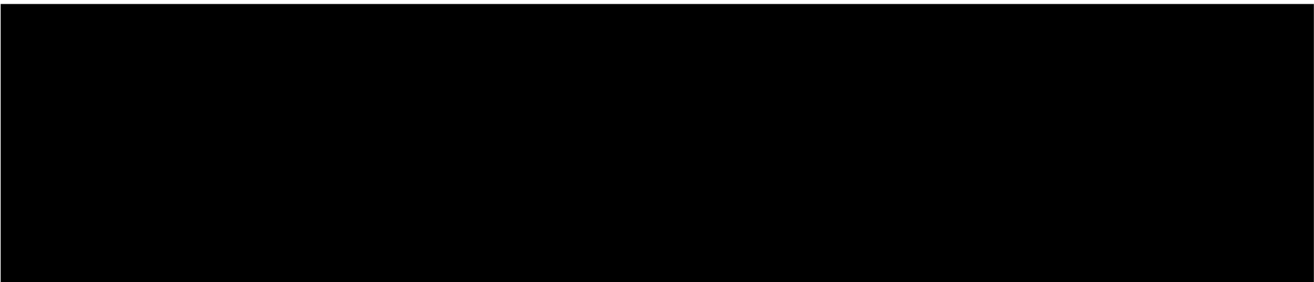
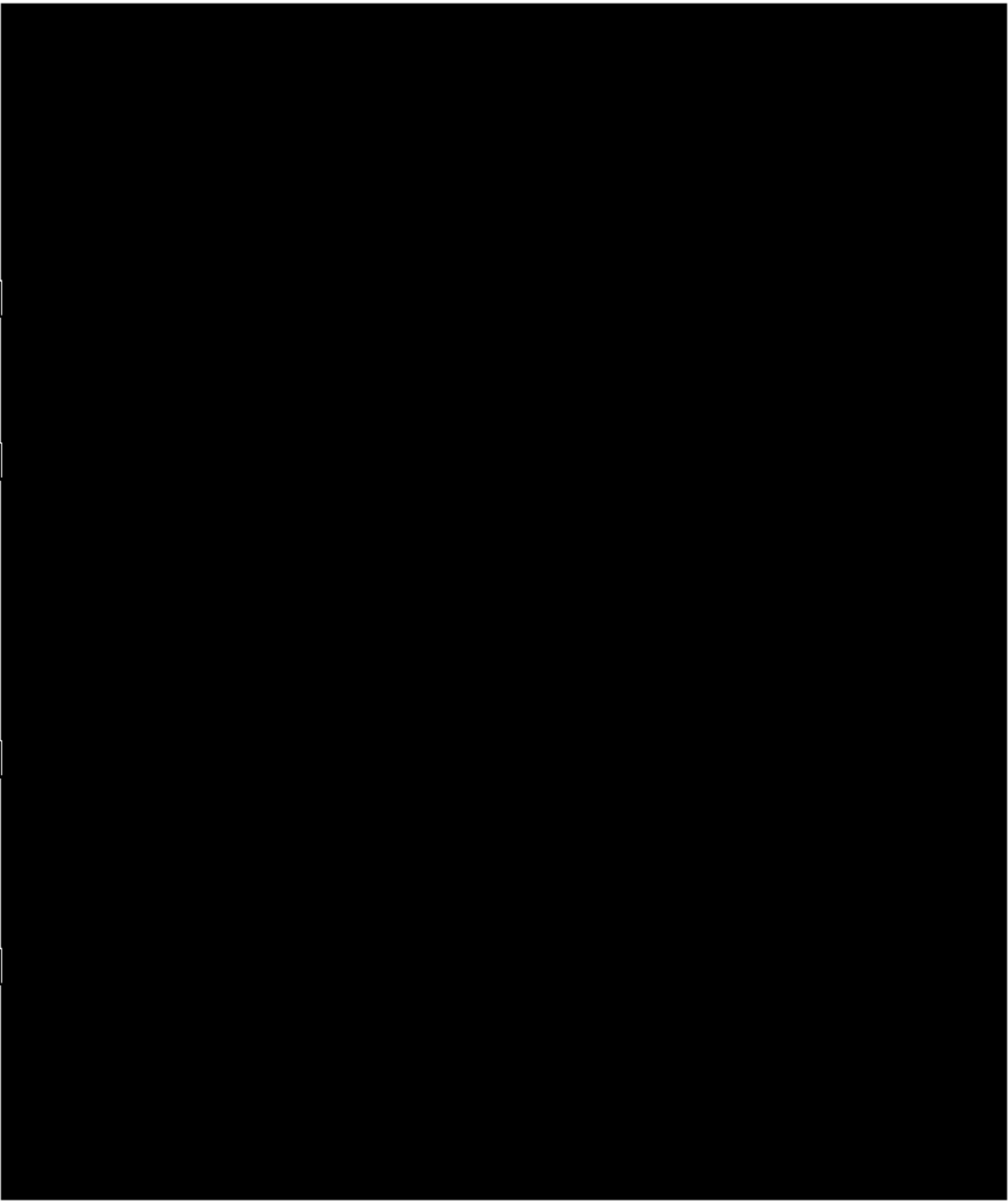






B. THE RESPONDENT'S POSITION





[REDACTED]

C. THE TRIBUNAL’S DECISION ON COSTS

457. Article 61(2) of the ICSID Convention provides:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

458. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney’s fees and other costs, between the Parties as it deems appropriate.

459. Given the outcome of this proceeding – a conclusion that the Claimant’s transactions for [REDACTED] shares do not result in a *bona fide* foreign investment entitled to protection under the BIT and the ICSID Convention – the Tribunal considers it appropriate that the Claimant bear the full costs of arbitration, including the fees and expenses of the Tribunal and the Tribunal’s Assistant, and ICSID’s administrative fees and direct expenses. These amount to the following (in USD):

[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

⁷¹⁸ *Id.*, ¶¶ 6-10.

460.

[REDACTED]

461. The Tribunal also considers it appropriate that the Claimant reimburse the Respondent for a reasonable proportion of the Respondent's legal fees and expenses.

[REDACTED]

Taking all factors into account, the Tribunal orders the Claimant to reimburse the Respondent for 50% of its legal fees and expenses (exclusive of the Respondent's advances to ICSID), namely

[REDACTED]

IX. AWARD

462. For the reasons set forth above, the Tribunal:

- a. DISMISSES the Claimant's claims for lack of jurisdiction;
- b. ORDERS the Claimant to pay the Respondent a total of [REDACTED] comprising [REDACTED] for the expended portion of the Respondent's advances to ICSID and [REDACTED] towards the Respondent's legal fees and expenses; and
- c. DENIES all other relief sought by both Parties.

⁷¹⁹ The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.



Professor Albert Jan van den Berg
Arbitrator

Date: 17 - SEPTEMBER - 2021

Professor Jan Paulsson
Arbitrator

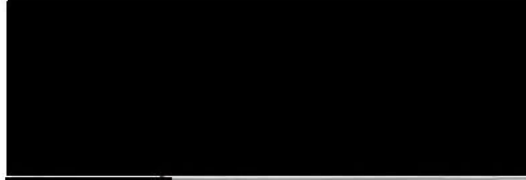
Date:

Ms. Jean E. Kalicki
President of the Tribunal

Date:

Professor Albert Jan van den Berg
Arbitrator

Date:



Professor Jan Paulsson
Arbitrator

Date: 19th September, 2021

Ms. Jean E. Kalicki
President of the Tribunal


Date:

Professor Albert Jan van den Berg
Arbitrator

Date:

Professor Jan Paulsson
Arbitrator

Date:



Ms. Jean E. Kalicki
President of the Tribunal

Date: *17 September 2021*