INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

HELA SCHWARZ GMBH

Claimant

and

PEOPLE'S REPUBLIC OF CHINA

Respondent

ICSID Case No. ARB/17/19

AWARD

Members of the Tribunal
Sir Daniel Bethlehem KC, Presiding Arbitrator
Professor Campbell McLachlan KC, Arbitrator
Mr. Roland Ziadé, Arbitrator

Secretary of the Tribunal
Ms. Geraldine R. Fischer

Date of dispatch to the Parties: 10 December 2025

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* Indicates representatives and counsel who made oral submissions during the Hearing.

+ In addition to Mr. Emmanuel Jacomy and Mr. Edward Taylor, Mr. Garreth Wong also made oral submissions on behalf of the Respondent in the Hearing.

TABLE OF ABBREVIATIONS / DEFINED TERMS

AAR	Claimant's Application for Administrative Review dated 17 November 2014
Administrative Complaint	JHSF's Administrative Complaint to the Jinan Intermediate People's Court dated 3 May 2016
Agreement / BIT (Germany – PRC BIT)	Agreement between the Federal Republic of Germany and the People's Republic of China on the Encouragement and Reciprocal Protection of Investments dated 1 December 2003
Application to Amend	Claimant's "Clarification to the Request for Arbitration" filed on 26 February 2018
Appraisal Report	Appraisal Report of Shandong Zhongan dated [19] September 2014
AR Decision	Administrative Reconsideration Decision issued on 15 April 2016
August 2015 Liquidation Agreement	JHSF joint venture was to be terminated by an agreement of 6 August 2015 with both Hela Schwarz and JHSF to be liquidated.
Bifurcation Decision	Procedural Order No. 3 dated 17 December 2018
Bifurcation Request	Respondent's Memorial on preliminary Objections and Request for Bifurcation dated 1 October 2018
Binhe Group	Jinan Binhe New Area Investment and Construction Group established by the Jinan Municipality to secure financing for Jinan public interest projects
Buildings	JHSF constructed buildings on state-owned land where it had use rights.
Claim	The Claimant's direct expropriation, indirect expropriation and FET claims
Claimant's PHS	Claimant's Post-Hearing Submission dated 14 February 2023
Compensation Decision	Housing Expropriation Compensation Decision dated 29 August 2016

Counter-Memorial	Respondent's Counter-Memorial on the Merits dated 17 April 2019
CPS	Constant Protection and Security
Eastern Foundation	Eastern Foundation for International Art
Evacuation Notice	Evacuation Notice dated 1 March 2017, Evacuation notice issued by Jinan Municipal Government to JHSF
Expropriation Decision	Jinan Expropriation Announcement [2014] No. 9 dated 11 September 2014
Expropriation Regulations	Regulations on Expropriation of and Compensation for Houses on State-owned Lands
FET	Fair and Equitable Treatment
Food Licence Regulation	Regulation issued by the Jinan Municipal Food and Drug Administration, in force as of 1 April 2018, cancelling the food production licences of food producers that had terminated food production
2013 Freezing Notice	Third Expropriation Freezing Notice (Huashan Area Reconstruction Project – Levy and Freeze Notice) dated 1 November 2013
Hearing	Hearing held in London from 5-9 December 2022
Hela	Hela Gewürzwerk Hermann Laue GmbH (formerly Herman Lau GmbH)
Hela Schwarz/Claimant	Hela Schwarz GmbH
Hela Spice Jinan	Hela Spice (Jinan) Co. Ltd
Huashan Development Project / Huashan project / Huashan Area Reconstruction Project	Development project in the City of Jinan that led to the expropriation of the Claimant's Land, Land Use Rights and Buildings
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965

ICSID Rules	ICSID Arbitration Rules in force as of 10 April 2006
Investigative Record	Investigative Record of the Jinan's Intermediate People's Court dated 19 July 2016 addressing the Administrative Complaint
JHSF / Jinan Hela	Jinan Hela Schwarz Food Co., Ltd.
JHSF's Financial Statement	JHSF Financial Statement for the period 1 January 2018 to 31 May 2018, dated 9 January 2019
Jinan Appraisal Commission	Jinan Appraisal Expert Commission for Expropriation and Demolition of Houses on State-owned Land
Jinan IPC Ruling	Administrative Ruling of the Jinan's Intermediate People's Court dated 19 July 2016
Jinan Municipality	Jinan Municipal Government
Jinan Committee	Jinan City Urban and Rural Construction Committee
JMFGC	Jinan Meat & Food General Corporation
Judgment No. 72	Administrative Judgment of the Jinan Intermediate People's Court dated 30 April 2015
JV	Joint Venture between Jinan Meat & Food General Corporation and Hela Schwarz
JV Contract	Joint Venture Contract, dated 29 June 1995, concluded in accordance with the "Law of the People's Republic of China on Joint Venture Using Chinese and Foreign Investment"
Land / Land Use Rights	JHSF use rights on certain state-owned land
Landplot	The five parcels of land that are the subject of the Transfer Agreement
Letter of Intent	Letter of Intent concluded between Eastern Foundation and JHSF dated 10 February 2000
Memorial	Claimant's Memorial dated 29 June 2018
MFN	Most-Favoured Nation

Municipal Authorities	The town and municipal authorities that had been consulted on the Transfer Agreement
New Elements of Claim	Elements of claim advanced in the Claimant's Application to Amend
Order to Vacate	30 November 2017 "Public Announcement" from the Jinan Municipality ordering JHSF to evacuate the premises within five days
People's Republic of China / PRC	Respondent
PHS	Post-Hearing Submissions
PO1	Procedural Order No. 1 dated 9 March 2018 [Rules Governing the Arbitration]
PO2	Procedural Order No. 2 dated 10 August 2018 [Provisional Measures]
PO3 / Bifurcation Decision	Procedural Order No. 3 dated 17 December 2018 [Bifurcation]
PO4	Procedural Order No. 4 dated 15 May 2019 [Request to Amend]
PO5	Procedural Order No. 5 dated 29 July 2019 [Production of Documents]
PO6	Procedural Order No. 6 dated 25 September 2020 [Postponement of the Hearing]
PO7	Procedural Order No. 7 dated 27 January 2022 [Postponement of the Hearing]
PO8	Procedural Order No. 8 dated 8 November 2022 [Organisation of the Hearing]
PO Counter-Memorial / Reply	Claimant's Reply on the Merits and Counter-Memorial on Preliminary Objections dated 6 December 2019
PO Rejoinder	Claimant's Rejoinder on Preliminary Objections dated 18 May 2020
PO Reply / Rejoinder	Respondent's Rejoinder on the Merits and Reply on Preliminary Objections dated 13 April 2020
Protocol	Protocol to the Germany – PRC BIT

PM Request	Claimant's Urgent Request for Provisional Measures dated 4 December 2017
Removal Notice	Notice dated 26 September 2013 requiring JHSF to vacate the Huashan Development Project area
Respondent	People's Republic of China / PRC
Respondent's PHS	Respondent's Post-Hearing Submission
RfA	Request for Arbitration
RfA Claim	Request for Relief expressed in the RfA
Schwarz	Schwarz Cranz GmbH & Co. KG
Shandong HPC Ruling	Administrative Ruling of the Shandong Higher People's Court dated 6 December 2016
Shulz Law	Schulz Noack Bärwinkel, described as "JHSF's law firm"
SNB	Schulz Noack Bärwinkel, described as "JHSF's law firm"
Transfer Agreement	Land Use Right and Building Transfer Agreement dated 10 May 2001
Transfer Agreement Buildings	The Buildings and attachments thereto on the Landplot addressed in the Transfer Agreement
Updated Appraisal Report	Updated Appraisal Report darted 19 April 2016 which increased the value of the compensation awarded to JHSF
VCLT	Vienna Convention on the Law of Treaties 1969

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I. INTRODUCTION

1. The claimant in these proceedings is Hela Schwarz GmbH ("**Hela Schwarz**" or "**Claimant**"), a joint venture company incorporated in March 1995 under the laws of the Federal Republic of Germany ("**Germany**"). The respondent is the People's Republic of China ("**Respondent**" or "**PRC**"); Hela Schwarz and the PRC together being "**the Parties**"). As expressed in the Request for Arbitration dated 18 April 2017 ("**RfA**"), the claim concerns the alleged expropriation of property owned by the Claimant's wholly-owned subsidiary, Jinan Hela Schwarz Food Co., Ltd. ("**JHSF**") that operated in Jinan, Shandong in the PRC ("**Jinan**"). The claim as advanced in the RfA "concerns compensation resulting from housing expropriation and the recovery of land use rights."[1] The interest in property in question was described as "the use right of a piece of state-owned industrial land" ("**Land**" and "**Land-use right"**) on which JHSF constructed various buildings ("**Buildings**").[2] The claimed expropriation was said to have taken place by various acts of the Jinan Municipal Government ("**Jinan Municipality**") between 11 September 2014 and 29 August 2016,[3] to which the Claimant objected on the grounds that the "expropriation is illegitimate and the compensation amount has been largely undervalued."[4] The request for relief expressed in the RfA was for Orders that "the Respondent pay justifiable expropriation compensation" and "all the costs of this arbitration" ("**RfA Claim**").[5]

2. The Respondent resists the Claim both on jurisdictional and admissibility grounds, having advanced four objections to jurisdiction and one to admissibility, as well as on substantive grounds based on contentions of both fact and law. The details of these are addressed below. Despite the dispute, the Parties, through their representatives and

[1] RfA, ¶ 2.

[2] RfA, ¶¶ 9–10. The description of the Land-use right and Buildings as the "Claimant's Investment" or the "Investment" is without prejudice to the Respondent's first jurisdictional objection, addressed below. This contends that the Tribunal lacks jurisdiction *ratione materiae* over the Claimant's claims because they do not arise directly out of a cognisable investment for the reason that the interests in question are held by JHSF, a company incorporated in the PRC, rather than by the Claimant itself.

[3] RfA, ¶¶ 11–14. The expropriation timeline was extended in the Claimant's Memorial from November 2013, when the "expropriation measures" were said to have "first hit the Claimant", to December 2017, when the expropriation was said to have been enforced. Memorial, *inter alia*, at ¶¶ 3, 9, 65 and 142–145.

[4] RfA, ¶ 15.

[5] RfA, ¶ 36.

counsel, have conducted themselves throughout the proceedings in an exemplary professional manner, with welcome courtesy and accommodation.

3. The Claim is brought under the Agreement between the Federal Republic of Germany and the People's Republic of China on the Encouragement and Reciprocal Protection of Investments dated 1 December 2003 ("**Agreement**" or "**BIT**").[6] The Agreement was concluded in Chinese, English and German. In the event of divergent interpretations between the Chinese and German texts, the Agreement provides that "the English text shall prevail." Pursuant to Paragraph 12.1 of the Tribunal's Procedural Order No. 1 ("**PO1**"), addressed further below, the language of the proceedings is English. The Tribunal will accordingly refer to the English text of the Agreement.

4. The Claimant also relies upon the Protocol to the Agreement of the same date ("**Protocol**"), which forms an integral part of the Agreement.[7] The RfA further cites the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965 ("**ICSID Convention**") and rules and regulations made thereunder. Both Germany and the PRC are parties to the ICSID Convention. The Claimant, being incorporated in Germany, is a national of Germany for purposes of the ICSID Convention and the Agreement.

5. Shortly after the filing of the RfA, the Claimant changed its counsel. Through its new counsel, as will be elaborated further below, the Claimant filed a "Clarification to the Request for Arbitration" on 26 February 2018 by which it applied "to clarify and/or amend certain aspects" of its RfA ("**Application to Amend**").[8] By its Application to Amend, the Claimant sought, *inter alia*, to clarify, revise and expand upon the request for relief set out in the RfA. By Section I.7 of its Application to Amend, under the heading "Relief to be requested in the Claimant's Memorial", the Claimant indicated that it "intends to expand upon its request for relief" to include the following:[9]

[6] Agreement between the Federal Republic of Germany and the People's Republic of China on the Encouragement and Reciprocal Protection of Investments ("BIT (Germany – PRC BIT)"), CL-0003.

[7] BIT (Germany – PRC BIT), CL-0003. The relationship between the Protocol and the Agreement is addressed in Article 14 of the Agreement and the *chapeau* of the Protocol.

[8] Application to Amend, ¶ 1.

[9] Application to Amend, ¶ 22.

(a) a declaration that the Respondent breached Article 4 of the Agreement, addressing expropriation and compensation, by unlawfully expropriating the Claimant's investment;

(b) a declaration that the Respondent breached Articles 2 and 3 of the BIT, Article 2 addressing the promotion and protection of investments, including constant protection and security ("**CPS**"), and Article 3 addressing the treatment of investments, including fair and equitable treatment ("**FET**"), national treatment, and most-favoured nation ("**MFN**") treatment;

(c) a declaration that the Respondent breached its procedural duties by deliberately aggravating the dispute;

(d) restitution of Jinan Hela Schwarz's Land-use right and damages for the loss of value of its investment caused by the physical taking of the Buildings;

(e) in the alternative to restitution, full reparation, including compensation and damages, including for lost profits.

6. In its Memorial dated 29 June 2018 ("**Memorial**"), the Claimant's Requests for Relief were further refined to include, *inter alia*, the following:[10]

(a) a declaration that the Respondent breached Article 3(1), addressing FET, Article 4(2), addressing direct and indirect expropriation and compensation therefor, and Article 9, addressing the settlement of disputes;

(b) an Order for restitution or, alternatively, the payment of "a sum exceeding EUR 25,000,000.00 including pre-award interest, or such other sum as the Tribunal determines will ensure full reparation of the Claimant's loss";[11]

(c) an Order for post-award interest;

(d) any other relief as the Tribunal considers appropriate; and

[10] Memorial, ¶ 545.

[11] Memorial, ¶ 545(b).

(e) an Order that the Respondent pay all the costs and expenses of the arbitration.

7. These requests were maintained in the Claimant's Reply on the Merits and Counter-Memorial on Preliminary Objections dated 6 December 2019 ("**Reply**") save that the alternative reparation damages claim was revised to EUR 90,850,008.00 (RMB 715,886,166) and the post-award interest claim was said to be "at a rate of 6.8%, compounded quarterly, until full payment of the award."[12] These requests were essentially maintained in the Claimant's Post-Hearing Submission dated 14 February 2023 ("**Claimant's PHS**"), although the amount claimed was increased slightly to RMB 716,724,104.78.[13]

8. It follows from the preceding that the *petita* of the Claimant's case rests on alleged breaches by the Respondent of Articles 3(1), 4(2) and 9 of the BIT, but not Article 2, as previously notified.[14] For purposes of this Award, the Tribunal accordingly confines its review, analysis and findings to the Parties' contentions in respect of these provisions.

II. THE CONSTITUTION OF THE TRIBUNAL AND KEY PROCEDURAL DEVELOPMENTS

9. It is useful to identify at the outset headline procedural developments in summary form. In so doing, the Tribunal considers that a detailed, event-by-event account of the procedural history of the case is neither required nor warranted. The Tribunal's Procedural Orders are already in the public domain on the ICSID webpage for the case, as well as elsewhere. While close detail cannot always be avoided in arbitral awards, the Tribunal considers that prolixity should be avoided, where possible.

10. The Claimant's RfA was transmitted to ICSID on 18 April 2017 and, following enquiries, registered by the ICSID Acting Secretary-General on 21 June 2017. On 21 September 2017, the Claimant appointed Mr Roland Ziadé, of French, Lebanese

[12] Reply, ¶ 454(b) and (c).

[13] Claimant's PHS, ¶ 167.

[14] This is addressed by the Claimant at ¶ 428 of the Memorial.

and Ecuadorian nationality, as arbitrator. Mr Ziadé accepted appointment on 27 September 2017. On 17 October 2017, the Respondent appointed Professor Campbell McLachlan KC, of New Zealand nationality, as arbitrator. Professor McLachlan accepted appointment on 27 October 2017.

11. On 4 December 2017, before the appointment of a presiding arbitrator and the constitution of the Tribunal, the Claimant filed an Urgent Request for Provisional Measures ("**PM Request**"). Pursuant to a timetable indicated by the ICSID Secretary-General on 5 December 2017, the Parties filed written submissions on the PM Request on 13 December 2017 (the Respondent), 18 December 2017 (the Claimant) and 22 December 2017 (the Respondent). For reasons that will become apparent, the urgency of the PM Request was overtaken by events.

12. On 28 December 2017, further to the Parties' agreement, the ICSID Secretary-General appointed Sir Daniel Bethlehem KC, a United Kingdom national, as presiding arbitrator. Sir Daniel accepted appointment on 8 January 2018, at which point the ICSID Secretary-General informed the Parties that the Tribunal had been constituted. Ms Lindsay Gastrell, ICSID Legal Counsel, was appointed Secretary of the Tribunal. Ms Gastrell was subsequently replaced as Tribunal Secretary by Mr Francisco Abriani, who was thereafter replaced by Ms Geraldine Fischer on 23 November 2022.

13. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a First Session with the Parties on 1 February 2018. As noted above, on 26 February 2018, the Claimant submitted its Application to Amend.

14. On 9 March 2018, the Tribunal issued PO1. This provides, *inter alia*, that the applicable ICSID Arbitration Rules are those in force as of 10 April 2006 ("**ICSID Rules**"). It also, *inter alia*, approved the appointment of Dr Paolo Busco as Assistant to the Tribunal,[15] addressed the applicable rules concerning provisional measures (noting the Claimant's outstanding PM Request), addressed the applicable rules concerning objections to jurisdiction and admissibility (noting that the Respondent had raised certain such objections in correspondence dated 21 June 2017), laid down the specific procedural rules applicable to the proceedings, and set out alternative schedules

[15] Dr Busco resigned as Assistant to the Tribunal on 30 July 2019.

for the proceedings. Absent bifurcation of the proceedings, this contemplated a hearing in the period 22 June to 1 July 2020.

15. Following written pleadings by the Parties on the Claimant's PM Request and Application to Amend, the Tribunal, by letter to the Parties dated 10 April 2018, considering that "it may assist the Parties to be informed of the Tribunal's decisions on these applications in advance of transmittal of the fully reasoned and elaborated Decisions of the Tribunal", denied the Claimants PM Request but granted the Claimant's Application to Amend without prejudice to any objection to jurisdiction or preliminary objection that the Respondent may wish to advance.[16] Procedural Order No. 2, setting out the Tribunal's detailed reasons for denying the Claimant's PR Request, was issued on 10 August 2018 ("**PO2**").

16. As noted above, the Claimant submitted its Memorial on 29 June 2018. On 1 October 2018, the Respondent filed its Memorial on Preliminary Objections and Request for Bifurcation ("**Preliminary Objections**" and "**Bifurcation Request**") raising four preliminary objections said to go to jurisdiction and one preliminary objection said to go to admissibility. Following exchanges of written submissions on the Bifurcation Request, in accordance with the scheduled indicated in PO1, the Tribunal issued Procedural Order No. 3 on 17 December 2018 ("**PO3**" or "**Bifurcation Decision**"), *inter alia*, denying the request for bifurcation and joining the Respondent's objections to jurisdiction and admissibility to the proceedings on the merits. In so deciding, the Tribunal stated, *inter alia*, as follows:

> "… the Tribunal is not in a position to conclude, and does not consider, that any of the objections advanced by the Respondent is either frivolous or otherwise self-evidently lacking in merit. … Nothing in the Tribunal's decision to reject the Respondent's request for bifurcation should thus be taken as reflecting a view that any objection does not properly warrant careful scrutiny."[17]

17. By Procedural Order No. 4 ("**PO4**"), dated 15 May 2019, the Tribunal set out its detailed reasons for granting the Claimant's Application to Amend. Amongst the reasons given, the Tribunal stated as follows:

[16] Tribunal letter dated 10 April 2018.

[17] PO3, ¶ 76.

> "Although the proposed revisions are extensive, the Tribunal considers that they are properly to be regarded as additional claims arising directly from the subject-matter of the dispute. Notwithstanding the scope of the proposed revisions, they would not, if admitted, transform the dispute into one of a fundamentally different nature to that of which the Tribunal is already seised, in the sense of going beyond the subject-matter of the original Request for Arbitration, as opposed to adding new legal claims. The Tribunal considers therefore that the proposed revisions come within the implicit scope of Article 46 of the ICSID Convention and Rule 40 of the ICSID Arbitration Rules in that they are to be construed as ancillary claims that the Claimant would be entitled to advance and that the Tribunal would be expected to determine in the normal course of the exercise of its functions."[18]

18. Following the Tribunal's Bifurcation Decision, the Respondent filed its Counter-Memorial on the Merits on 17 April 2019 ("**Counter-Memorial**"). In the Production of Documents procedure that followed, the Tribunal ruled on the Parties' contested Requests for the production of documents in Procedural Order No. 5 on 29 July 2019 ("**PO5**"). The Claimant filed its Reply on the Merits and Counter-Memorial on Preliminary Objections on 6 December 2019 ("**Reply**" and "**PO Counter-Memorial**"). The Respondent filed its Rejoinder on the Merits and Reply on Preliminary Objections on 13 April 2020 ("**Rejoinder**" and "**PO Reply**"). The Claimant filed its Rejoinder on Preliminary Objections on 18 May 2020 ("**PO Rejoinder**").

19. As noted above, a hearing window of 22 June to 1 July 2020 had been laid down in PO1. Given COVID-19 health concerns and restrictions, and the Parties' agreement on holding the hearing in person, the PO1 hearing dates were vacated. By Procedural Order No. 6 ("**PO6**"), dated 25 September 2020, the Tribunal rescheduled the hearing to take place in person in the period 5 – 16 July 2021.

20. By correspondence to the Tribunal in early May 2021, the Parties wrote to the Tribunal to request a postponement of the hearing, given continuing COVID-19 health concerns and restrictions. Reflecting the Parties' agreement, the Tribunal vacated the July 2021 hearing dates by Procedural Order No. 7 ("**PO7**"), dated 27 January 2022, and, having canvassed the Parties' availability, and anticipated continuing COVID-19-related concerns, rescheduled the hearing for 3 – 11 December 2022.

[18] PO4, ¶ 44.

21. A pre-hearing organisation meeting was held by video conference on 28 September 2022. The Tribunal issued Procedural Order No. 8 on the Organisation of the Hearing on 8 November 2022 ("**PO8**").

22. In accordance with the prescribed schedule, an in-person hearing on jurisdiction and merits was held in London from 5 to 9 December 2022 ("**Hearing**"). The Parties' Representatives and Counsel in the proceedings are given at the front of this Award. The Tribunal heard submissions from the following Party Representatives and Counsel in the course of the Hearing:

- Claimant: Dr Philipp Wagner, Dr Florian Dupuy and Ms Laura Halonen;
- Respondent: Director Sun Zhao, Mr Emanuel Jacomy, Mr Gareth Wong and Mr Edward Taylor.

23. The following witnesses and experts were examined in the course of the Hearing:

- Claimant's Witness: Mr. Helmut Naujoks;
- Claimant's Experts: Professor Lin Feng (City University of Hong Kong), Mr. David Faulkner (formerly, Colliers International (Hong Kong) Limited), and Mr. Heiko Ziehms (FTI Consulting);
- Respondent's Witness: Ms. Huang Bei (Jinan Industrial Development Investment Group Co., Ltd);
- Respondent's Experts: Professor He Haibo (Tsinghua University Law School), Professor Lou Jianbo (Peking University Law School), and Mr. Neill Pail Poole (Ankura).

24. On the penultimate day of the Hearing, in advance of the Parties' closing submissions, the Tribunal gave the Parties 19 written questions to assist in guiding their closing arguments and to inform their Post-Hearing Submissions ("**PHS**").

25. Following the Hearing, the Parties filed simultaneous PHS on 14 February 2023.

26. By letter dated 10 March 2023, the Respondent asserted that the Claimant had introduced a number of new arguments in its PHS "that were neither raised at the hearing … nor in its previous written submissions". In so contending, the Respondent made no application to the Tribunal but "reserve[d] all of its rights, including with

respect to due process."[19] By letter dated 27 March 2023, the Claimant submitted that the Respondent's contention with respect to new arguments "appears misplaced" for reasons addressed by the Claimant, including, *inter alia*, that the Claimant was responding to the Tribunal's questions, "including where they related to issues that had not been addressed extensively in the parties' previous submissions."[20] For reasons that will become apparent, nothing in this Award has turned on the arguments advanced in the Parties' PHS.

27. By correspondence to the Tribunal dated 31 March 2023, the Parties, *inter alia*, indicated their agreement that "the Tribunal shall treat the Parties' costs in a confidential manner (i.e., to prevent public disclosure). This may involve, for example, the Tribunal issuing a separate confidential Award dealing exclusively with the issue of costs."[21] By correspondence to the Parties of the same date, the Tribunal, *inter alia*, "confirm[ed] the Parties' agreement … to treat the Parties' costs in a confidential manner."[22] The Parties filed their submissions on costs on 28 April 2023. In accordance with the Parties' agreement, the issue of costs in respect of these proceedings is addressed in a Confidential Codicil on Costs appended to this Award with the direction that it shall not be made public.

28. By letter to the Parties dated 17 October 2025, the Tribunal declared the proceedings closed.

III. THE PARTIES' HEADLINE ARGUMENTS

29. Before turning to address certain interlocutory matters noted above in further detail, it is useful to set out the Parties' headline arguments. In so doing, the Tribunal recalls that the Respondent raised five preliminary objections that the Tribunal joined to the proceedings on the merits. Although these fall to be addressed first in sequence in the Tribunal's analysis, they are better understood in the light of the Claimant's case, as summarised below.

[19] Respondent's letter dated 10 March 2023.

[20] Claimant's letter dated 27 March 2023.

[21] Email from the Respondent to the Tribunal dated 31 March 2023, confirmed by an email from the Claimant to the Tribunal of the same date.

[22] Email from the Tribunal Secretary to the Parties dated 31 March 2023.

A. THE CLAIMANT'S HEADLINE ARGUMENTS

30. The Claimant is a joint venture food enterprise established in March 1995 "to explore the market for spices, food additives and meat products in China".[23] To this end, JHSF was established in June 1995 as a Joint Venture between Jinan Meat & Food General Corporation ("**JMFGC**"), a company organised under the laws of the PRC, with its registered office in Jinan, and Hela Schwarz ("**JV Contract**").[24] JHSF became a wholly-owned subsidiary of Hela Schwarz following a share transfer agreement dated 4 June 1999 pursuant to which JMFGC transferred all of its registered shares to Hela Schwarz.[25] The objectives of JHSF were, *inter alia*, "to produce and market spice mixtures, seasonings, additives for the meat processing and food industry" and related purposes and functions.[26] From November 1995, JHSF is said to have developed new products in the Chinese market, and increased its stake in the PRC spice market, on the premises of JMFGC, described in the JV Contract.[27]

31. Given its success and wish "to explore new sites suitable for its goal of increasing production capacity through the establishment of a new spice and meat production facility",[28] JHSF concluded a Land Use Right and Building Transfer Agreement on 10 May 2001 ("**Transfer Agreement**") with the then holder of the rights, the Eastern Foundation for International Art ("**Eastern Foundation**").[29] In its Preambular Paragraphs ("**PP**"), the Transfer Agreement describes the Eastern Foundation as "the owner of allocated Land Use rights for a Landplot of a total area of 26,663 m^2 located in the east of Wodang Village, Hushan Town, Licheng District and in the north of

[23] Memorial, ¶ 2. The origins of the Hela Schwarz joint venture are addressed in the Memorial at ¶¶ 21 – 25. As there described, Hela Schwarz was incorporated on 8 March 1995 in Ahrensberg, Germany, *inter alia*, "to hold a stake in a joint venture company in the People's Republic of China" (Articles of Association, C-0020; Commercial Register, C-0022). The joint venture was between Herman Lau GmbH, subsequently Hela Gewürzwerk Hermann Laue GmbH ("**Hela**"; C-0017), and Schwarz Cranz GmbH & Co. KG ("**Schwarz**"; C-0019).

[24] Joint Venture Contract, dated 29 June 1995, concluded in accordance with the "Law of the People's Republic of China on Joint Venture Using Chinese and Foreign Investment" (C-0026).

[25] Articles of Association, 25 June 1999, Article 1; C-0021.

[26] Articles of Association, 25 June 1999, Article 7; C-0021.

[27] JV Contract, Article 20.1–20.3; C-0026.

[28] Memorial, ¶ 35.

[29] Transfer Agreement, C-0033.

Hehua Road".[30] These five parcels of land are defined in the Transfer Agreement as the "**Landplot**".

32. Describing the individual parcels of land,[31] the Transfer Agreement goes on to state that Eastern Foundation "erects and/or has erected buildings and various attachments totaling a construction area of approximately 3,000 m^2" ("**Transfer Agreement Buildings**").[32] Differentiating between the Land-use rights and the Transfer Agreement Buildings, the Transfer Agreement further states that Eastern Foundation and its subsidiaries are "willing, prepared, able and entitled" to transfer the Land-use rights "as well as all attachments" to Jinan Hela.[33]

33. In its preambular parts, the Transfer Agreement goes on further to record, *inter alia*, the following:

    (a) JHSF's plans to conduct its business on the Landplot and to use the land and facilities for industrial purposes;[34]

    (b) the Letter of Intent that had been concluded between Eastern Foundation and JHSF on 10 February 2000 to transfer "the Land Use rights for said Landplot and all attachments" ("**Letter of Intent**");[35]

[30] Transfer Agreement, PP1; C-0033. The area numerical notation used in various pleadings and documents is inconsistent in the use of punctuation points and commas to differentiate thousands from hundreds, e.g., 26**.**663 m^2 and 26**,**663 m^2. For clarity and consistency, the Tribunal adopts the use of a comma for purposes of such differentiation, including in its quotation of text quotations from the pleadings and documents in question.

[31] Transfer Agreement, PP2; C-0033.

[32] Transfer Agreement, PP3; C-0033.

[33] Transfer Agreement, PP4; C-0033.

[34] Transfer Agreement, PP6; C-0033.

[35] Transfer Agreement, PP7; C-0033. Addressing the "price proposal" for the Land-use rights, the buildings, and related fees and costs, the Letter of Intent indicates a "Net purchase price for the property: RMB 128,000.00 per mu" and a "flat rate of RMB 600,000.00" for the "total building area 3000m^2" (Letter of Intent, §9; C-0027). The Tribunal understands the designation "mu" to refer to a traditional Chinese unit of land area, sometimes referred to as a Chinese acre, that equates to approximately 666.67 m^2. An internal Schulz Noack Bärwinkel ("**Schulz Law**") legal memorandum of 24 January 2014 (C-0035) records the acquisition cost "of the land use right" as "3,592 TRMB", i.e., RMB 3,592,000, and of the "cost of the buildings" as "17,430 TRMB", i.e., RMB 17,430,000. Schulz Law is described as "JHSF's law firm", also referred to as "**SNB**" (Memorial, ¶ 295, footnote 233). Simply for purposes of Tribunal orientation, these figures correspond, respectively, to approximately EUR 490,041.00 and EUR 2,377,899.00, on the basis of a EUR/RMB exchange rate of RMB 7.33 / 1 EUR on 10 May 2001, the date of the Transfer Agreement. Nothing turns on this exchange rate calculation.

(c) the Transfer Agreement transaction, and the stipulations set out therein, had been discussed with the relevant town and municipal authorities (together "**the Municipal Authorities**");[36]

(d) the Municipal Authorities have "given related letters of commitment as attached to this Agreement which among other items form basis of [JHSF]'s decision to enter into this Agreement";[37] and

(e) the Municipal Authorities "fully support the contents and the conclusion of this Agreement by the Parties and, thus, will sign it in addition as set out below".[38]

34. The operative provisions of the Transfer Agreement go on to describe in detail the Site that was the subject of "the allocated Land Use rights"[39] and the "buildings and other attachments on and of the Site – whether or not under construction".[40] It thereafter goes on to address, *inter alia*, the following, with respect to the "Transfer of the Land Use Rights and Buildings":[41]

(a) the Transferor's (i.e., Eastern Foundation's) obligations to secure a change in the purpose of the Land from "public interest" to "industrial use", with a corresponding change in the Land-use rights to industrial use rights;[42]

(b) the duration of the revised industrial Land-use rights, specified to be 50 years ("**Duration Period**");[43]

(c) JHSF's exclusive and transferrable rights, including for mortgage, transfer and lease;[44]

[36] Transfer Agreement, PP8; C-0033.
[37] Transfer Agreement, PP9; C-0033.
[38] Transfer Agreement, PP10; C-0033.
[39] Transfer Agreement, Article 1.1; C-0033.
[40] Transfer Agreement, Article 1.2; C-0033.
[41] Transfer Agreement, Article 2; C-0033.
[42] Transfer Agreement, Article 2.1; C-0033.
[43] Transfer Agreement, Article 2.2.1; C-0033.
[44] Transfer Agreement, Article 2.2.3; C-0033.

(d) JHSF's priority right to extend the Land-use rights at the expiration of the Duration Period;[45] and

(e) JHSF's right to construct "any buildings and other facilities required for JHSF's operation".[46]

35. The signatories of the Transfer Agreement were Eastern Foundation (the Transferor), JHSF, Jinan Municipality (Licheng District Government), and Jinan Municipality (Licheng District, Huashan Township Government).

36. The essence of the Claimant's case is that, from the point of its purchase of the Land-use rights and Transfer Agreement Buildings on 10 May 2001, until the beginning of 2009, it operated a successful business that "enjoyed a consistent growth in revenue."[47] Obstacles to the development of its business began to emerge, however, the Claimant contends, "when the Respondent decided to implement a massive development project in the city of Jinan" ("**Huashan Development Project**").[48] The temporal dimension of the Claimant's case is tied more closely to the issuing of what the Claimant describes as the "third expropriation freezing notice[]" issued by the Jinan City Urban and Rural Construction Committee ("**Jinan Committee**"), dated 1 November 2013, titled "Huashan Area Reconstruction Project – Levy and Freeze" ("**2013 Freezing Notice**").[49] This, the Claimant says, "explicitly affected JHSF".[50]

37. It is apparent from documentation on the record of these proceedings that it was evident prior to the 2013 Freezing Order that JHSF Land was covered by the Huashan Development Project. A Shulz Law document dated 2 January 2013, addressing "Relocation Circumstances Review", provides a Figure (sketch map) said to be

[45] Transfer Agreement, Article 2.2.4; C-0033.

[46] Transfer Agreement, Article 2.2.5; C-0033.

[47] Memorial, ¶¶ 48 – 52.

[48] Memorial, ¶ 53. Although the Memorial ties "serious obstacles to the development of its business" to 2009, this temporal link appears to be associated not with the emergence of "serious obstacles" but to the date of the announcement by the Jinan Urban Planning Bureau of the Huashan Development Project, stated in a 2 January 2013 memorandum by Schulz Law to have been in 2009 (C-0046, at Section II (p.4); addressed in Memorial, ¶ 62).

[49] Third Expropriation Freezing Notice, C-0049.

[50] Memorial, ¶ 65.

published on the official website of the Jinan Urban Planning Bureau and makes the following observation:

> "Jinan Hela Schwarz is within the area planned to be used by the Huashan Project. The general location of the land being currently used by Jinan Hela Schwarz in the Huashan Project is marked as "A". According to the above planning map, the detailed planned use for this 'A' area is for 'housing arrangement […]' and 'commercial & financial use […]'."[51]

38. The Claimant also refers to what it described as an "Expropriation Notice" dated 26 September 2013 notifying JHSF that its premises were situated within the designated area of the Huashan Development Project ("**Removal Notice**"). This reads as follows:

> "Removal Notice to Jinan Hela Schwarz Food Co., Ltd.
>
> Jinan Hela Schwarz Food Co., Ltd. is located within the Huashan Park construction scope. Hereby we declair [sic]: according to Huashan Area Removal Process Plan, all enterprises and public organizations within the construction scope should accomplish the Removal process within the end of 2014."[52]

39. Pursuant to the 2013 Freezing Notice that followed, the Jinan Committee froze all construction and development "within the scope of the expropriation", which was defined and described in the Notice. The Notice also implicitly anticipated the payment of compensation but for certain specified costs.[53]

40. Given these developments, the Claimant states that it "sought to enter into negotiations with the relevant authorities in relation to the calculation of adequate compensation" but that it was "never able to engage the appropriate individual or entity with which to negotiate."[54] Addressing further attempts to engage with relevant authorities under what is described as the "land repurchase procedure" in the period February – August 2014,[55] the Claimant states that "[d]espite the Jinan authorities' failure to show any interest in or intention to conclude an agreement, or to conduct constructive

[51] Relocation Circumstance Review Memorandum from SNB, p.3; C-0046. The ellipses in the extract cover Chinese script.

[52] Expropriation Notice to JHSF by the Hushan Construction Headquarters of Licheng District, C-0050.

[53] Third Expropriation Freezing Notice, C-0049.

[54] Memorial, ¶ 70.

[55] Memorial, from ¶ 83.

negotiations, the Claimant continued to make further, but again unsuccessful efforts towards reaching an agreement on compensation in the weeks that followed."[56]

41. Addressing the Administrative Procedures that followed to set appropriate compensation for the expropriation, the Claimant refers to two documents, the Jinan Expropriation Announcement [2014] No. 9 dated 11 September 2014, headed "Decision" ("**Expropriation Decision**"),[57] and valuation Appraisal Report that followed, dated [19] September 2014 ("**Appraisal Report**").[58] The Expropriation Decision described the scope of the expropriation. The Appraisal Report valued the real estate and the annexes at a total of RMB 26,373,880 as of 11 September 2014.[59] Within this figure, the Land was valued at RMB 14,178,425.4.[60]

42. The Claimant asserts that the appraisal "significantly undervalued" its property at "up to ten times less" than plots in the same area and "appeared to have been calculated on the wrong basis."[61] The essence of this claim was that the Jinan Municipality adopted an "appraisal" valuation methodology with respect to compensation rather than the more appropriate "proceeds sharing" methodology, resulting in the significant undervaluation.

43. Addressing the applicable legal framework under Chinese law relevant to compensation valuations, the Claimant says, *inter alia*, as follows:

> "Order No. 249 sets out the procedure for a land repurchase agreement, whereby the expropriating party enters into a contract with the expropriated party for the repurchase of the relevant land plot. Article 12 of Order No. 249 provides for two different methods of calculating the repurchase price; namely, the evaluation or 'proceed sharing' method.
>
> The evaluation method considers the remaining years of the land use right and the costs of rebuilding all structures on the land. A lump sum purchase price is estimated based upon these considerations.

[56] Memorial, ¶ 113.

[57] Official Expropriation Decision, C-0085.

[58] Appraisal Report of Shandong Zhongan, C-0086. In its Application for Administrative Review of November 2014, and elsewhere, the Claimant refers to the date of the Appraisal Report as 20 September 2014, which is variously described as the date on which the Report was "issued" or was "received" by the Claimant. As there do not appear to be any other relevant documents that carry these dates, and as nothing turns on the issue, the Tribunal adopts the notation "[19] September 2014" when referring to the date of the Appraisal Report.

[59] Appraisal Report of Shandong Zhongan, p.5; C-0086.

[60] Appraisal Report of Shandong Zhongan, p.16; C-0086.

[61] Memorial, ¶¶ 116 – 117.

> The proceed sharing method, which is in turn specified in Order No. 161, relates to an allocation of revenue between the owner of the land use right and the expropriating party. This is to be achieved by a further sale of the land, typically after its conversion and the resulting increase in value.
>
> However, Article 8 of Order No. 249 imposes a condition on both methods, namely, that both parties must come to an agreement as to the allocation of compensation based upon this regulation within a period of 45 days. Otherwise, compensation based on this Order is not possible and the expropriated party must rely on the compensation methods provided under Order No. 248.
>
> The proceed sharing method of calculation, based upon Order No. 249 in conjunction with Order No. 161, is the most favourable method for the expropriated party. Accordingly, the Claimant sought its application."[62]

44. Rooted in this contention, the Claimant contested the Appraisal Report by way of appeal of the Appraisal Report, administrative review of the Expropriation Decision, mediation, and ultimately judicial challenge.[63]

45. Addressing the judicial challenge before the Jinan Intermediate People's Court, the Claimant contends that "the Court did not examine the merits of the case, in that it did not allow any substantive hearing, or deliver any substantive judgment. Instead, the Court issued a procedural ruling dismissing JHSF's request."[64] The same point is made in respect of the "final decision dated 6 December 2016 [of] the Shandong Higher People's Court" which refused the appeal against the Jinan Intermediate People's Court decision also on procedural grounds.[65]

46. While the judicial challenge was still pending, the Claimant states that the Jinan Municipality issued its Housing Expropriation Compensation Decision, dated 29 August 2016 ("**Compensation Decision**").[66] By this Decision, the total compensation offered to the Claimant was set at RMB 32,954,380. The Compensation Decision was followed by what the Claimant describes as an Evacuation Notice, dated 1 March 2017, which required Jinan Hela, *inter alia*, to "empty out the expropriated buildings and

[62] Memorial, ¶¶ 78 – 82.

[63] Memorial, ¶¶ 118 – 129.

[64] Memorial, ¶ 128.

[65] Memorial, ¶ 129.

[66] The People's Government of Jinan Municipality Housing Expropriation Compensation Decision Ji Zheng Bu Zi [2016] No.5 (now referred to as "Compensation Decision"), C-0007.

deliver the buildings to the housing expropriation service center" ("**Evacuation Notice**").[67]

47. Following receipt of the Evacuation Notice, by correspondence dated 10 March 2017, Jinan Hela notified the Jinan Municipality that it had initiated an investment arbitration,[68] transmitting its RfA to ICSID on 18 April 2017. Notwithstanding this development, the Jinan Municipality initiated enforcement proceedings.[69] On 30 November 2017, the Jinan Municipality issued a "Public Announcement" ordering JHSF to evacuate the premises within five days, noting that the compensation amount of RMW 32,954,380.34 had been deposited with the People's Court of Licheng District, Junan City, which could be collected "after demolition of your buildings is completed" ("**Order to Vacate**").[70]

48. On 4 December 2017, in advance of the constitution of the Tribunal, the Claimant submitted its Urgent Request for Provisional Measures to ICSID. The JHSF production facility was, however, demolished by mid-late December 2017, before the Tribunal was constituted on 8 January 2018. In denying the Claimant's request for provisional measures in PO2, the Tribunal addressed the circumstances in issue, as recorded further below.

49. The Claimant further records that, by "a regulation applicable to all food manufacturers" issued by Jinan Municipal Food and Drug Administration shortly after the demolition of the Jinan Hela premises, which entered into force on 1 April 2018, a food producer which had terminated food production, "shall apply" to the relevant authority "for the cancellation" of its licence ("**Food Licence Regulation**").[71] On this basis, the Claimant states that, "[h]aving stopped production, JHSF was compelled to return its production licence, which means that it was effectively prevented from selling its remaining stocks."[72]

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[67] Evacuation notice issued by Jinan Municipal Government (now referred to as "Evacuation Notice issued by Jinan Government"), C-0009.

[68] Jinan Hela Schwarz's complaint against the Evacuation Notice of 1 March 2017 (now referred to as "Complaint from JHSF against the Evacuation Notice to the Jinan Government"), C-0010.

[69] Memorial, ¶¶ 135 *et seq.*

[70] Public Announcement by the Jinan Licheng District Municipal People's Government, C-0013.

[71] Memorial, ¶ 145. The Claimant exhibited extracts of the Regulation at C-0100. The Respondent exhibited the full text at R-0133.

[72] Memorial, ¶ 145.

50. The remainder of the Claimant's case is legal argument. The Claimant avers that jurisdiction under the BIT is established, *inter alia*, on the basis that the Claimant owned 100% of JHSF as well as being the indirect holder of the Land-use rights and the Buildings and facilities constructed on the Land.[73] It also contends that it complied with all the preliminary, pre-RfA requirements under the BIT.[74]

51. On the merits, the Claimant advances its case by reference to its headline expropriation claim under Article 4(2) of the BIT,[75] contending that the expropriation was unlawful as "none of the conditions of legality set out in Article 4(2) have been met by the Respondent."[76] The expropriation claim includes both a claim of direct expropriation (the termination of JHSF's "rights relating to use of the land … accompanied by the physical acquisition over that piece of land")[77] and of indirect expropriation ("effectively depriv[ing] JHSF of the means to carry out its business and thereby indirectly expropriate[ing] the value of the Claimant's shares in JHSF").[78] The Claimant further alleges that the Respondent "failed to observe due process throughout the expropriation process."[79]

52. In addition to, and overlapping with, its due process contentions "throughout the expropriation process", the Claimant additionally advances an FET claim by reference to Article 3(1) of the BIT,[80] contending, *inter alia*, that the Respondent "violated the FET standard by failing to act in accordance [with] consistency, transparency and good faith … and by failing to apply provisions of domestic law …."[81] In respect of the latter element of the Claim, the Claimant advances a denial of justice claim on the contention that "the shortcomings in the judicial procedure initiated by JHSF were so serious as to amount to an outright refusal by the courts to carry out their mandate."[82] For ease of

[73] Memorial, ¶¶ 151 *et seq*. Reply, ¶¶ 155 *et seq.*
[74] Memorial, ¶¶ 172 *et seq*. Reply, ¶¶ 173 *et seq.*
[75] Memorial, Section III.
[76] Memorial, ¶ 250. Reply, ¶¶ 236 *et seq.*
[77] Memorial, ¶ 227. Reply, ¶¶ 229 – 230.
[78] Memorial, ¶ 236. Reply, ¶¶ 231 – 235.
[79] Reply, ¶¶ 296 – 341.
[80] Memorial, ¶¶ 427 *et seq*. Reply, ¶¶ 342 *et seq.*
[81] Memorial, ¶ 437.
[82] Memorial, ¶ 488.

reference, the Claimant's direct expropriation, indirect expropriation and FET claims are referred to compendiously as the Claimant's "**Claim**".

53. Having regard to issues of overlap between the indirect expropriation and FET limbs of the Claimant's case, counsel for the Claimant in the Hearing addressed the overlap between the indirect expropriation and FET limbs of the Claimant's case as follows:

> "The Claimant is not seeking separate damages for the indirect expropriation and the breaches of the FET. The same facts constitute both breaches and it is thus natural that the same loss flows from both.
>
> The same amount of reparation is required to wipe out the consequences of those illegal acts, however categorised as a matter of law."[83]

54. The Tribunal returns to this issue below in its analysis of the Claimant's liability case.

55. Separate from its expropriation and FET claims, the Claimant also advances a claim that "the Respondent's unilateral decision to enforce the physical taking and immediate demolition of JHSF's premises constituted a breach of the Respondent's procedural obligations in this arbitration" and that the Respondent's "aggravation of the dispute" will impact on the taking of evidence and the merits of the dispute.[84] In this regard, the Claimant contends, *inter alia*, that "the enforcement of the expropriation in December 2017 constituted a further (indirect) expropriation of the entirety of the Claimant's investment."[85]

56. On the issue of reparations, the Claimant contends that it is entitled to "full restitution of its investment" or, if this is not available, "full monetary reparation for its loss".[86] On the issue of monetary compensation, the Memorial did not attach expert valuation

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[83] Transcript, Day 1, p.100, line 23 to p.101, line 4 (Ms Halonen). In its PHS, the Claimant stated that "[m]any of the acts that formed part of the creeping expropriation of JHSF's shares also constituted breaches of the FET obligation." This position was elaborated later in the PHS as follows: "The Respondent's indirect expropriation and the breaches of the FET obligation caused the loss of JHSF's business and thus the value of its shareholding. While the creeping expropriation is a cumulative breach, the FET violations were several and separable. Yet the damage suffered as a result of any of the individual FET breaches is difficult to quantify. That does not matter here, however, as they together resulted in the loss of the value of the business. There is thus no separate claim for damages being made for the two breaches." (Claimant's PHS, ¶¶ 2, 122).

[84] Memorial, ¶¶ 506 – 508.

[85] Memorial, ¶ 513.

[86] Memorial, ¶ 521.

evidence,[87] addressing the issue in summary terms only at a high-level of abstraction, on the basis that the Claimant would "explain the underlying methodology of the expert analysis in further detailed submissions."[88] On this basis, the Claimant, in its Memorial, requested reparations "exceed[ing] the amount of EUR 25,000,000.00 by far, including pre-award interest."[89] Following expert valuation evidence submitted for the first time with the Reply, the Claimant increased and particularised its reparations claim to a total of EUR 90,850,008 / RMB 715,886,166,[90] with a breakdown given for the "direct expropriation of the Claimant's indirectly held land use right" (RMB 498 million / EUR 64,239,500) and for the "indirect expropriation of the shares in JHSF" (RMB 145.3 million / EUR 17.7 million), as well as claims for "pre-award interest for the indirect expropriation" (RMB 76.6 million / EUR 9.4 million) minus "the value of the payments made for the land use rights" (RMB 4,013,834 / EUR 489,492).[91]

57. This is the Claimant's case in outline. It is developed in more detail in the Claimant's written and oral submissions, as well as through the witness evidence of Mr Helmut Naujoks and the expert evidence of Professor Lin Feng, on Chinese law, and on valuation by Mr David Faulkner and Mr Heiko Ziehms.

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[87] The absence of valuation evidence with the Memorial was addressed by the Respondent in a letter to the Tribunal dated 21 August 2018 noting, *inter alia*, that "[t]he Claimant's decision to withhold its quantum report and supporting materials makes it impossible for the Respondent to fully consider and challenge the Claimant's allegations." The Respondent went on to request the Tribunal "to order the Claimant to submit its expert report together with all supporting documents without further delay." The Tribunal addressed the Respondent's request in a letter to the Parties dated 17 December 2018 in, *inter alia*, the following terms:

> "Insofar as the Claimant did not, or does not, submit evidence in support of its claim, this may in due course give rise to questions of burden and/or standard of proof and the evidential underpinnings of the Claimant's case.
>
> This said, save where applicable procedural rules establish a more specific requirement, it is ultimately for each party to present its case as it sees fit, including as regards the presentation of evidence in support of that case. A failure to present evidence is ultimately likely to be to the disadvantage of the party that adopts that course. …
>
> Having regard to the preceding, the Tribunal considers that it would not be appropriate to order the Claimant to submit valuation evidence at this point. If and when the Claimant does submit such evidence, the Respondent will have an opportunity to address that evidence in writing on equal terms."

[88] Memorial, ¶ 543.

[89] Memorial, ¶ 544.

[90] Reply, ¶¶ 446, 454(b). As noted above, there was a small increase in the headline amount claimed by way of reparation in the Claimant's PHS.

[91] Reply, ¶ 446.

B. THE RESPONDENT'S HEADLINE ARGUMENTS

58. The Claimant's Memorial was submitted on 29 June 2018. Prior to this, two interlocutory procedures had taken place in respect of which the Parties had joined argument. The first was the Claimant's PM Request of 4 December 2017. The second was the Claimant's Application to Amend of 26 February 2018. In respect of the PM Request, the Respondent submitted Observations, dated 13 December 2017, and a Rejoinder, dated 22 December 2017. As noted above, the PM Request was overtaken by events and the Tribunal's decision denying the Request was communicated to the Parties on 10 April 2018. In respect of the Application to Amend, the Respondent submitted Observations on 22 March 2018. The Tribunal's decision granting the Application was similarly communicated to the Parties on 10 April 2018, together with summary reasons therefor, with the detailed reasons following in PO4.

59. Pursuant to § 16.2 of PO1 and Alternative Schedule 2 thereof, in response to the Claimant's Memorial, the Respondent filed its Preliminary Objections and Bifurcation Request on 1 October 2018. The Claimant filed Observations on the Bifurcation Request on 29 October 2018. The Respondent thereafter submitted a Reply on the Bifurcation Request on 5 November 2018 and the Claimant a Rejoinder on the Bifurcation Request on 12 November 2018. By PO3, the Tribunal denied the Bifurcation Request and joined the Respondent's objections to jurisdiction and admissibility to the proceedings on the merits. In so doing, the Tribunal stated expressly that there was nothing in the Tribunal's Bifurcation Decision that should be taken "as reflecting a view that any objection does not properly warrant careful scrutiny."[92]

60. In its Preliminary Objections, the Respondent advanced four objections to jurisdiction and one objection to admissibility. The objection to admissibility is, however, a belt-and-braces pleading to the effect that the circumstances advanced in support of the Respondent's objections to jurisdiction go also, and separately, to the issue of admissibility, and that it follows that, "regardless of the Tribunal's classification of the Respondent's objections as pleas to jurisdiction or to admissibility, the practical result

[92] PO3, ¶ 76.

of the non-fulfilment of the requirements is the same: the dismissal of the case."[93] To this end, the recharacterization of the jurisdictional objections as admissibility objections rests on the premise that, as the Claimant "instigated international arbitration without making an attempt to amicably resolve the matters that it now alleges", it is "undeserving of protection under the BIT or the ICSID Convention as vindicated by the arbitral process." It is further said that the Tribunal "should not countenance the Claimant's attempt to misuse the ICSID system as an appellate mechanism that superimposes itself on domestic proceedings in China to extract undue gains."[94]

61. In its Preliminary Objections, under the heading "facts relevant to jurisdiction", the Respondent addresses five issues of factual background that are said to be relevant to jurisdiction,[95] as follows.

(a) The Claimant is not as it portrays itself,[96] being rather a holding company "to set up and hold the shares in JHSF" that "seeks to make a profit out of an abortive venture on top of the compensation JHSF was already awarded in lawful recovery and expropriation proceedings within China."[97] It is further said that there was a falling out between the two joint venture partners, Hela and Schwarz, with the result that Hela established its own fully-owned separate entity in the PRC in 2014 "to jettison JHSF",[98] namely, Hela Spice (Jinan) Co. Ltd ("**Hela Spice Jinan**"),[99] which was formally established on 19 August 2014. The JHSF joint venture was to be terminated by an agreement of 6 August 2015 with both Hela Schwarz and JFSH to be liquidated ("**August 2015 Liquidation Agreement**"),[100] with the result that "long before this arbitration

[93] Preliminary Objections, ¶ 181.

[94] Preliminary Objections, ¶ 179.

[95] The Respondent elaborates on its contentions of fact in respect of the Claimant's expropriation allegations in Section II of its Counter-Memorial and Sections II and III of its Rejoinder in terms that build on its factual contentions going to jurisdiction.

[96] Preliminary Objections, ¶¶ 16 – 31.

[97] Preliminary Objections, ¶¶ 16, 18.

[98] Preliminary Objections, ¶ 20. Also, *inter alia*, Counter-Memorial, ¶¶ 3, 21 – 36; Rejoinder, Section II.A.

[99] Consolidated Annual Report 2016 – Hela, 31 May 2017, R-0018.

[100] Judgment of the Higher Regional Court Schleswig-Holstein, File No. 9 U 36/16, 28 September 2016, R-0016. At the start of the hearing, the Respondent made preliminary submissions to the effect that Hela Schwarz had gone into liquidation but had been revived in August 2022 "only for purposes of this hearing and the subsequent award." The Respondent did not, however, make any application to the Tribunal in this regard. (Transcript, Day 1, page 11, lines 19 – 21; page 15, line 15 – page 16, line 2)

was instigated, Hela had already premeditated and made precautions for JHSF's shutdown amid the falling-out of its ultimate shareholders and a wider economic slowdown."[101]

(b) JHSF failed to cooperate with the public interest Huashan Development Project and obstructed the redevelopment,[102] JHSF being "the only holder of land use rights in the area involved in the project that refused to comply with the relevant recovery and compensation decisions and compelled the Jinan Municipality to apply to the court to enforce the expropriation."[103] In this context, the Respondent's account of key developments from 1 November 2013 to 30 November 2017 largely overlaps with those of the Claimant, set out above, save that the Respondent frames the developments differently. Addressing Hela Spice Jinan and other companies in the area of the Huashan Development Project, the Respondent states that they obtained new land use rights in Jinan at a reasonable price, and that "[h]ad the Claimant genuinely desired to continue its spice business, JHSF could have easily obtained another land use right at a cost well-below the compensation granted by the local government."[104]

(c) On the Respondent's contention, the Claimant failed both to notify or negotiate the alleged breaches of the BIT in discussions with local authorities;[105] "the treaty violations that the Claimant now puts forward in this ICSID arbitration were never raised."[106] As regards the new elements of claim advanced pursuant to the Claimant's accepted Application to Amend, "including the claims relating to the expropriation of shares, the court proceedings and the procedural violations, the Claimant did not and could not raise or negotiate such issues with the Respondent before the initiation of the arbitration. The Respondent only

[101] Preliminary Objections, ¶ 27.

[102] Preliminary Objections, ¶¶ 32 – 51. Also, *inter alia*, Counter-Memorial, ¶¶ 128 – 139; Rejoinder, ¶¶ 238 – 253.

[103] Preliminary Objections, ¶ 44.

[104] Preliminary Objections, ¶ 51.

[105] Preliminary Objections, ¶¶ 52 – 58.

[106] Preliminary Objections, ¶ 57.

became aware of the alleged dispute in relation to these issues through the Claimant's submissions in this arbitration."[107]

(d) Neither JHSF nor the Claimant applied for administrative review of the Compensation Decision or of any other relevant administrative acts.[108]

(e) JHSF challenged the Expropriation Decision before the domestic courts on alleged grounds that "the recovery and expropriation were unlawful, procedurally improper and not in the public interest".[109] This challenge was rejected by the Jinan Intermediate People's Court,[110] the Administrative Ruling of which was confirmed on final appeal by the Shandong Higher People's Court.[111]

62. Having regard to these "facts relevant to jurisdiction", the Respondent advanced four objections to jurisdiction, all of which remain live in these proceedings and are addressed by the Tribunal below.[112] In advance of the discussion to come, the jurisdictional objections can be summarised as follows:

- **First Objection** — The Tribunal lacks jurisdiction because the Claim does not arise directly out of the Claimant's investment.[113] In this regard, the Respondent states that JHSF's rights and assets are not the Claimant's property or investment and the Claimant has not shown even a *prima facie* treaty violation in respect of any shareholding. Although particular provisions of the BIT are not expressly invoked in this objection, it goes to the language of "investments of investors" and "investments by investors" in, respectively, Articles 3(1) and 4(2) of the BIT, the definitions of "investment" and

[107] Preliminary Objections, ¶ 58.

[108] Preliminary Objections, ¶¶ 59 – 67.

[109] Preliminary Objections, ¶ 68.

[110] Preliminary Objections, ¶ 70 and Ruling of the Jinan Intermediate People's Court, 19 July 2016, C-0005.

[111] Preliminary Objections, ¶ 71 and Decision of the Shandong Higher People's Court, 6 December 2016, C-0006.

[112] Addressing its objections to jurisdiction and admissibility in its Counter-Memorial, the Respondent simply "refers the Tribunal to the detailed developments contained in its memorial on preliminary Objections" and recalled those objections on summarily, in headline terms. In response to the Claimant's case on jurisdiction and admissibility, the Respondent elaborates on its objections in Section IV of its Reply.

[113] Preliminary Objections, ¶¶ 80 – 108; Rejoinder, ¶¶ 259 – 317.

"investors" given in Article 1(1) and (2) of the BIT, and the terms of Article 25 of the ICSID Convention.

- **Second Objection** — The Tribunal lacks jurisdiction because the Claimant failed to comply with the BIT's negotiation requirements.[114] This objection is based on Article 9(1) and (2) of the BIT and the contention that the Claimant failed to show that it properly notified the Respondent of the BIT claims raised in these proceedings or that it made meaningful attempts to settle the dispute amicably over a period of at least six months. This objection contains two strands, the first regarding the Claimant's direct expropriation claim, the second regarding the indirect expropriation claim, characterised by the Respondent as "the new elements of claim" introduced pursuant to the Claimant's Application to Amend ("**New Elements of Claim**"). As regards these New Elements of Claim, the Respondent contends that the Claimant did not and could not raise or negotiate such issues with the Respondent before the initiation of the arbitration.

- **Third Objection** — The Tribunal lacks jurisdiction because the Claimant failed to comply with the BIT's administrative review requirements.[115] This objection is based on Ad Article 9(a) of the Protocol and Article 26 of the ICSID Convention to the effect that "domestic administrative review of the issues averred in the international legal proceedings is a compulsory precondition qualifying the Respondent's offer to arbitrate."[116]

- **Fourth Objection** — The Tribunal lacks jurisdiction because JHSF irreversibly elected to pursue domestic litigation.[117] This objection is based on Ad Article 9(c) of the Protocol which is said to preclude an investor "resorting initially to the State courts and then another time to arbitration under the BIT, should it not be satisfied with the outcome of the first attempt before the municipal judiciary".[118]

[114] Preliminary Objections, ¶¶ 109 – 147; Rejoinder, ¶¶ 318 – 339.
[115] Preliminary Objections, ¶¶ 148 – 163; Rejoinder, ¶¶ 340 – 352.
[116] Preliminary Objections, ¶ 151.
[117] Preliminary Objections, ¶¶ 164 – 175; Rejoinder, ¶¶ 353 – 363.
[118] Preliminary Objections, ¶ 166.

63. As noted above, in addition to these objections to jurisdiction, the Respondent also advances an objection to admissibility based on the same grounds.[119]

64. Distinct from its "preliminary" objections to jurisdiction and admissibility, the Respondent, in its Rejoinder, advances a new objection that the Claimant's case "is an abuse of process"[120] on the grounds that (a) "the Claimant and its sole witness have made misleading submissions to the Tribunal in an attempt to advance its case",[121] and (b) "the Claimant has repeatedly breached its document production obligations in a clear attempt to conceal the misleading nature of its submissions and witness evidence from the Tribunal."[122] While this contention, in its essence, overlaps with the Respondent's admissibility objection, it is not advanced explicitly in these terms and the relief requested in respect thereof goes more broadly than jurisdiction and admissibility to include findings in respects of the merits as well, findings in respect of alleged misconduct by the Claimant, and a request for the payment of indemnity costs.[123]

65. Turning to the Respondent's headline arguments on the merits, reflecting key elements of the facts recounted as relevant to jurisdiction, the Respondent characterises the Claim as a "thinly veiled attempt" by the Claimant "to blame China for the failure of their joint venture", JHSF.[124] "Far from being unusual, the government measures in question were warranted on the facts, legally sound and in the public interest. They were conducted in good faith, applied equally and complied with due process. JHSF was compensated fully and fairly."[125]

66. On the issue of compensation for the direct expropriation of the Land-use rights and the Buildings, the Respondent contends that JHSF demanded treatment that deviated "from the standard procedure of valuation by an independent third party appraiser", that

[119] Rejoinder, ¶ 363.
[120] Rejoinder, ¶¶ 364 – 391.
[121] Rejoinder, ¶¶ 368, 371 – 376.
[122] Rejoinder, ¶¶ 369, 377 – 386.
[123] Rejoinder, ¶ 391.
[124] Counter-Memorial, ¶ 3; Section II.A; *inter alia*, Rejoinder, Section II.B.
[125] Counter-Memorial, ¶ 4; Section II.C; *inter alia*, Rejoinder, Section III.

was applied "to all other parties expropriated in the context of the Huashan Project", in favour of "the so called proceeds sharing method", that "would have led to compensation for JHSF well above the market value of its land use rights prior to expropriation."[126] Further, and in any event, the Respondent contends that the compensation that JHSF received was "adequate and reasonable … based on a careful appraisal of JHSF's land use rights and assets … [undertaken by] an independent valuation company that had been selected by the expropriated parties themselves".[127]

67. On the issue of the claim of the indirect expropriation of the Claimant's business, "no alleged indirect expropriation has ever taken place." On the Respondent's case, JHSF was no longer a thriving and profitable business and the Claimant accordingly "simply let matters escalate", by refusing to accept compensation and to cooperate with the domestic authorities, "because JHSF had already been jettisoned" by the Claimant.[128]

68. Returning to its contention that the Hela Schwarz joint venture had "long turned sour", the Respondent points, *inter alia*, to the incorporation of Hela Spice Jinan in August 2014 and a December 2015 Report by Hela to the Jinan Municipality which documents the fallout between Hela and Schwarz.[129] This states, in its concluding section, as follows:

> "Hela: takes root in Jinan, focus on the future, invests to build new factory, continues sustainable development. Schwarz: keeps the eye on demolition compensation, skilled at sensationalization, focuses on negotiation, leaving after compensated."[130]

69. On the issue of the August 2015 Liquidation Agreement, the Respondent contends that this "foundered on the amount of compensation that Schwarz would receive from Hela."[131] This notwithstanding, "long before this arbitration was instigated", Hela had "made precautions for JHSF's shutdown".[132] Asserting that the evidence shows that the Claimant had a far from "flourishing business", the Respondent points to a failure

[126] Counter-Memorial, ¶¶ 7 – 8; Section II.C.2; *inter alia*, Rejoinder, Section III.B.2.
[127] Counter-Memorial, ¶¶ 9, 119 – 127; *inter alia*, Rejoinder, Section III.B.
[128] Counter-Memorial, ¶¶ 6, 178 – 192; *inter alia*, Rejoinder, Section VI.A.
[129] Counter-Memorial, ¶¶ 24 – 26; *inter alia*, Rejoinder, Section II.A; ¶ 441.
[130] Report to Jinan Government by Hela, 16 December 2015, R-0043.
[131] Counter-Memorial, ¶ 28.
[132] Counter-Memorial, ¶ 31.

on the part of the Claimant to provide any relevant financial information supporting the claim that JHSF was a going concern.[133]

70. The Respondent goes on to address the public purpose of the Huashan Development Project, as a factual matter,[134] and allege that the Claimant and JHSF "sought to secure preferential treatment by exerting pressure on the Jinan authorities, in order to make an extra profit on top of the normal and appropriate expropriation compensation."[135] Addressing the procedures governing the expropriation of buildings and the recovery of land-use rights,[136] the Respondent contends that, in a procedure that was well-known, transparent and fair, JHSF was awarded a sum of nearly RMB 33 million in compensation, a sum that would have allowed the Claimant to relocate and pursue its activities normally elsewhere.[137] JHSF, however, pursued a claim for "undue compensation" based on a "proceeds sharing" valuation methodology rather than accept the "appraised acquisition" valuation methodology that was appropriate to the circumstances and had been used in the valuation of JHSF's interest. The difference between these two valuation methodologies is that, whereas the "proceeds sharing" methodology provides that "the repurchase price is based on the profits generated from the subsequent resale of the land use rights", the "appraised acquisition methodology provides that "the repurchase price is based on an appraisal of the land use rights and buildings carried out by a third party".[138] Addressing this issue further, the Respondent says that the proceeds sharing methodology is subject to mandatory statutory preconditions that did not entitle JHSF to compensation assessed on this basis.[139]

71. Addressing the decision to adopt the appraised acquisitions valuation methodology with respect to the interests expropriated to make way for the Huashan Development Project, the Respondent states, *inter alia*, that, in the Huashan Development Project, "which involved tens of thousands of expropriated entities and individuals, … it would be unfair and discriminatory to apply the proceeds sharing method only to the few

[133] Counter-Memorial, ¶ 35.
[134] Counter-Memorial, ¶¶ 37 – 44; *inter alia*, Rejoinder, ¶¶ 104 – 144.
[135] Counter-Memorial, ¶ 45.
[136] Counter-Memorial, ¶¶ 50 – 52.
[137] Counter-Memorial, ¶¶ 53 – 84.
[138] Counter-Memorial, ¶ 51.
[139] Counter-Memorial, ¶¶ 51 -52; *inter alia*, Rejoinder, Section III.B.2.

entities located on sections of the land that will be developed for operational use after the expropriation."[140] The Respondent says further that "JHSF was never entitled to the application of the proceeds sharing method as a matter of Chinese law, and the Claimant knew it", noting that officials met the Claimant's representatives multiple times between June and August 2014, including to propose alternative options "such as the relocation of its premises or preferential treatment for the construction of new facilities (which would have allowed JHSF to pursue its activities, just like [Hela Spice Jinan] did)."[141]

72. Against this factual background, the Respondent contends that the Claimant's complaints against the administrative review proceedings lack merit as the Claimant's case was properly dismissed on the substance, there being no irregularities in the review process.[142]

73. In similar vein, the Respondent says that the Claimant's complaint against the [19] September 2014 Appraisal Report and the 19 April 2016 updated appraisal report, which increased the value of the compensation awarded to JHSF ("**Updated Appraisal Report**"),[143] lack merit as the procedures were established in accordance with applicable Chinese laws and that the Claimant's attempts to secure compensation on the basis of the proceeds sharing valuation methodology "could only be rejected".[144]

74. The Respondent makes the same point with regard to the Claimant's case against the court proceedings before the Jinan Intermediate People's Court, which, the Respondent says, dismissed the JHSF challenge "by way of summary judgment … applying rules governing administrative litigation in China."[145] This was permitted under Chinese law, *inter alia*, in the circumstances as "the subject matter of the challenge (… the legality of the Expropriation Decision) [had] already been ruled on in an earlier judgment."[146] It is further said:

[140] Counter-Memorial, ¶ 77.
[141] Counter-Memorial, ¶ 84.
[142] Counter-Memorial, ¶¶ 85 – 94; Rejoinder, ¶¶ 197 – 202.
[143] Updated Appraisal Report of Shandong Zhong'an, 19 April 2016, R-0044.
[144] Counter-Memorial, ¶¶ 95 – 110, at 110; Rejoinder, ¶¶ 213 – 222.
[145] Counter-Memorial, ¶ 115.
[146] Counter-Memorial, ¶ 116.

> "After full and fair proceedings, the Shandong Higher People's Court upheld the Jinan Intermediate People's Court's ruling and reasoning in December 2016.
>
> Whereas JHSF could have applied for retrial of this decision on the basis of Articles 90 and 91 of China's Administrative Procedure Law, it chose not to do so."[147]

75. The Respondent further contends that the compensation awarded to JHSF was in any event "plainly adequate, and would have allowed JHSF to relocate its activities had it genuinely wanted to do so."[148]

76. Addressing events that took place after the Compensation Decision, the Respondent says that JHSF refused to cooperate with the result that the Jinan Municipality "had no choice but to go to court to seek compulsory enforcement of the Compensation Decision."[149] The Respondent concludes as follows:

> "By that time, construction of the Huashan Project had already been ongoing for a long time. JHSF's tactics caused significant delay to the construction of roads and a school that are planned for this specific location.
>
> Unrelatedly, in March 2018, the Jinan Municipal Food and Drug Administration Bureau (the 'Jinan Food Bureau') announced a local regulation in relation to the management of food production licences. The regulation was based on national legislation that had been adopted in August 2015 and was amended in November 2017. Its content is unremarkable: if a food producer terminates food production, it shall apply for cancellation of its food production licence. That regulation was applied without discrimination to JHSF and other companies."[150]

77. The remainder of the Respondent's case is legal argument. The Respondent first submits that the Claimant's case fails for lack of jurisdiction and admissibility, as recounted above.[151] Addressing the substance of the Claimant's case, the Respondent goes on to contend that the Claim is meritless and should be dismissed in its entirety, arguing that there was no unlawful expropriation, that China accorded FET, that there was no denial of justice, nor any procedural violations in the course of the

[147] Counter-Memorial, ¶ 118.

[148] Counter-Memorial, ¶¶ 119 – 127, at 126.

[149] Counter-Memorial, ¶ 130. Also, *inter alia*, Rejoinder, ¶¶ 238 – 253.

[150] Counter-Memorial, ¶¶ 137 – 138.

[151] Counter-Memorial, ¶¶ 140 – 145. Rejoinder, ¶¶ 258 – 363.

proceedings.[152] The Respondent also contends that the Claimant failed to properly plead its case,[153] including for the reason that "the Claimant completely changed its narrative and claims nearly a year into this arbitration to allege the eradication of a local business … [and] then also asserted State-sponsored harassment and discrimination."[154]

78. In response to the Claimant's expropriation case, the Respondent contends, *inter alia*, that (a) "the Claimant's indirect expropriation claim fails because its local business or shares in JHSF were never expropriated", (b) that its "direct expropriation claim is baseless because the premises and the land use rights in question belong to JHSF and not the Claimant", and (c) that "the measures undertaken in the course of the Huashan Project were throughout compliant with China's treaty obligations. Among other things, they were for the public benefit, properly compensated and compliant with due process."[155] As regards the Claimant's FET case, the Respondent asserts (a) that the Claimant was not entitled to compensation on the basis of a proceeds sharing valuation methodology, and (b) that China acted fairly and equitably at all times.[156] On the issue of the Claimant's denial of justice claim, the Respondent contends, *inter alia*, that (a) the Claimant failed to exhaust judicial remedies, (b) the Claimant has not shown that exhaustion was futile, and (c) the Chinese courts, in any event, did not deny the Claimant due process.[157]

79. Addressing the events of December 2017 and the Claimant's Article 9 claim alleging procedural violations, the Respondent contends, *inter alia*, that the enforcement of the Compensation Decision, Evacuation Notice, and Order to Vacate did not in any way undermine the Claimant's ability to participate in this arbitration.[158]

80. Finally, the Respondent contends that the Claimant's damages claim is unsupported by fact or law, and is unsound.[159] As advanced in its Counter-Memorial, this contention is in part based on the Claimant's failure to plead its damages claim in its Memorial in

[152] Counter-Memorial, ¶¶ 146 *et seq.* Rejoinder, ¶¶ 594 – 646.
[153] Counter-Memorial, ¶¶ 148 – 176.
[154] Counter-Memorial, ¶ 152.
[155] Counter-Memorial, ¶ 177.
[156] Counter-Memorial, ¶ 250.
[157] Counter-Memorial, ¶ 281 *et seq.*
[158] Counter-Memorial, ¶ 301.
[159] Counter-Memorial, ¶¶ 305 *et seq.*

anything other than the most perfunctory manner, leading the Respondent to contend, *inter alia*, that the Claimant has not established any entitlement to restitution or compensation.[160] This aspect of the Respondent's case is developed more fully in its Rejoinder, in response to the Claimant's evidential case first set out in detail in its Reply.[161]

81. This is the Respondent's case in outline. It is developed in more detail in the Respondent's written and oral submissions, and through the witness evidence of Mr Huang Bei and the expert evidence of Mr Yang Bin on real estate appraisal, of Professor He Haibo and Professor Lou Jianbo on Chinese law, and of Mr Neill Poole on valuation. As with the Claimant's evidential case, the Tribunal notes that the fact and expert evidence advanced by the Respondent did not engage with key issues at the heart of the case.

C. TRIBUNAL OBSERVATIONS

82. Three observations are warranted in light of the preceding.

83. First, the above high-level summaries of the Parties' respective contentions are just that – high-level summaries. Their purpose is to frame the case of which the Tribunal is seised and to identify its principal contours. They do not purport to capture or reflect the full detail of the Parties' arguments and evidence.

84. In providing this overview, the Tribunal is both mindful of its responsibility to give careful consideration to all relevant details of the Parties' arguments and evidence but also of a good practice appreciation that fairness and due process in these proceedings neither require nor warrant a close recitation by the Tribunal of every fine detail of the Parties' respective submissions.

85. For purposes of this Award, the Tribunal has had careful regard to the Parties' arguments and evidence, in all of their aspects. In both the preceding and in what follows, the Tribunal describes and addresses only those elements of the Parties' arguments and evidence that it considers necessary for it to arrive at a full, fair, and

[160] Counter-Memorial, ¶¶ 324 *et seq.*

[161] Rejoinder, Section VIII.

impartial assessment of the Claim of which it is seised. The absence of express reference to any point of argument or evidence is not an indication that it was overlooked by the Tribunal; only that the Tribunal considered that the point in question was not one on which its decision (or relevant portion thereof) turned.

86. Second, a number of points follow uncontroversially from the preceding summary of the Parties' arguments, including, *inter alia*, the following.

87. There is no dispute between the Parties about the law applicable to these proceedings, even if there is a dispute about the relevance and application of certain elements of the Respondent's domestic law.

88. Further, it is not disputed that the Respondent, through the acts of the Jinan Municipality, expropriated the Land-use rights and Buildings of JHSF. It is not disputed that compensation was properly due for that direct expropriation. It is not disputed that a measure of compensation was offered for this expropriation. Nor is it disputed that there was a process for the evaluation of the compensation that was offered, even if there is a dispute about the fairness of that process by reference to the requirements of the Treaty. It is not ultimately disputed that the Claimant's direct expropriation claim, assuming jurisdiction and admissibility, ultimately turns on the adequacy of the compensation that was offered for the direct expropriation and on the consistency of that payment with the wider requirements of Article 4(2) of the BIT. The fact of key acts and decisions concerning the asserted direct expropriation are not disputed.

89. It is also not disputed that the Claimant enlarged its case through its Application to Amend, granted by the Tribunal, even if the consequences of that enlargement are contested. Further, it is not disputed that the facts that the Claimant advance in support of its FET claim are essentially the same facts that it advances in support of its indirect expropriation claim. Nor is it contested that the indirect expropriation claim and the FET claim fully overlap in terms of the loss alleged and that the indirect expropriation claim and the FET claim correspond in terms of the damages that the Claimant is seeking. As the Tribunal has observed above, while there is a distinction, as a matter of abstract appreciation, between a claim of indirect expropriation and one alleging a

breach of FET, on the Claimant's case in these proceedings, its indirect expropriation and FET claims are not readily distinguishable.

90. Noting the preceding elements of evidential concordance, the Tribunal also observes that there are material issues both of fact and going to questions of the interpretation and application of Chinese law that were not canvassed, or not sufficiently canvassed, in the evidence advanced by both Parties in the proceedings. The Tribunal enquired closely on such matters, both of the Parties directly and of their fact witnesses and experts on Chinese law, in the course of the Hearing as well as through written questions in advance of the Parties' closing oral submissions.[162] This said, for purposes of its evidential evaluation, the Tribunal has had to make do with the evidential record presented in the proceedings.

91. Third, the task of the Tribunal is to evaluate and reach a decision on those points of the Claim of which it is seised, and of the Respondent's answer thereto, that are necessary for it to reach a final outcome of that Claim. It is neither necessary nor desirable for the Tribunal to reach a decision on every point that is in contention between the Parties or on issues the resolution of which is not necessary for purposes of a final decision. While alternative points of decision may be appropriate, there is merit in an economy of reasoning that addresses only those issues that need to be addressed for purposes of a final award. In what follows, the Tribunal adopts this approach.

IV. APPLICABLE LAW, CERTAIN INTERLOCUTORY MATTERS, AND A PRELIMINARY APPRECIATION OF THE ISSUES TO BE ADDRESSED

92. It is convenient to turn next to the issues of the applicable law in these proceedings, to certain interlocutory matters, and, in the light of the Tribunal's observations

[162] The Tribunal questioned the Parties extensively in the course of their opening and closing oral submissions: Transcripts, Days 1 and 5. As noted above, at the end of the witness evidence portion of the Hearing, at the conclusion of the fourth day of the Hearing, in advance of the Parties' closing oral submissions, the Tribunal put 19 written questions to the Parties for response in their closing oral submissions and in their PHS. Tribunal also closely questioned to the Parties' fact witnesses and experts on Chinese law in the course of the Hearing: Tribunal questions to Mr Helmut Naujoks, Transcript, Day 2, pages 94 – 119; Tribunal questions to Ms Huang Bei, Transcript, Day 2, pages 169 – 178; Tribunal questions to Professor Lin Feng, Transcript, Day 3, pages 74 – 83; Tribunal questions to Professor He Haibo, Transcript, Day 3, pages 130 – 132; Tribunal questions to Professor Lou Jianbo, Transcript, Day 3, pages 185 – 188.

immediately above, to some preliminary observations on the sequence and elements of the Tribunal's examination of the key issues that require decision.

A. APPLICABLE LAW

93. This Claim arises under the Germany – PRC BIT, Article 9(2) of which provides that a dispute that remains unresolved within six months of the date of it being raised by one of the parties in dispute, shall, at the request of the investor, be submitted to arbitration under the ICSID Convention unless the parties agree otherwise. It follows that the BIT constitutes the principal source of law applicable in these proceedings. The dispute having been submitted under the ICSID Convention, that Convention also forms part of the law applicable to these proceedings.

94. Pursuant to the express terms of Article 14 of the BIT and the *chapeau* of the Protocol thereto, the Protocol attached to the BIT forms an "integral part" of the BIT. This is relevant and important as it makes clear that the Protocol is not simply an aid to the interpretation of the BIT, in the form of a subsequent agreement between the Parties, relevant pursuant to the interpretative principle reflected in Article 31(3)(a) of the Vienna Convention on the Law of Treaties ("**VCLT**"), or in some other manner. Rather, it is a source of substantive commitments between the Parties in own right, qualifying the terms of the BIT. The application of the Protocol as part of the BIT is not therefore a source of interpretative discretion for the Tribunal but must be applied as part-and-parcel of the BIT concluded between Germany and the PRC.

95. As noted above, the key provisions in issue in these proceedings are Article 3(1), 4(2) and 9 of the BIT and Ad Article 9 of the Protocol, although other provisions of the BIT, notably the definitional provisions in Article 1, will also be relevant to the Tribunal's analysis. For ease of reference, Article 3(1), 4(2) and 9 of the BIT and Ad Article 9 of the Protocol provide as follows:[163]

> "**Article 3**
> **Treatment of Investment**
>
> (1) Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.

[163] BIT (Germany – PRC BIT), CL-0003.

Article 4
Expropriation and Compensation

[…]

(2) Investments by investors of either Contracting Party shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party (hereinafter referred to as expropriation) except for the public benefit and against compensation. Such compensation shall be equivalent to the value of the investment immediately before the expropriation is taken or the threatening expropriation has become publicly known, whichever is earlier. The compensation shall be paid without delay and shall carry interest at the prevailing commercial rate until the time of payment; it shall be effectively realizable and freely transferable. Precautions shall have been made in an appropriate manner at or prior to the time of expropriation for the determination and payment of such compensation. At the request of the investor the legality of any such expropriation and the amount of compensation shall be subject to review by national courts, notwithstanding the provisions of Article 9.

[…]

Article 9
Settlement of Disputes between Investors and one Contracting Party

(1) Any dispute concerning investments between a Contracting Party and an investor of the other Contracting Party should as far as possible be settled amicably between the parties in dispute.

(2) If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other Contracting State, be submitted for arbitration.

(3) The dispute shall be submitted for arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), unless the parties in dispute agree on an ad-hoc arbitral tribunal to be established under the Arbitration Rules of the United Nations Commission on the International Trade Law (UNCITRAL) or other arbitration rules.

(4) Any award by an ad-hoc tribunal shall be final and binding. Any award under the procedures of the said Convention shall be binding and subject only to those appeals or remedies provided for in this Convention. The awards shall be enforced in accordance with domestic law."

Protocol Ad Article 9

"With respect to investments in the People's Republic of China an investor of the Federal Republic of Germany may submit a dispute for arbitration under the following conditions only:

(a) the investor has referred the issue to an administrative review procedure according to Chinese law,

(b) the dispute still exists three months after he has brought the issue to the review procedure, and

(c) in case the issue has been brought to a Chinese court, it can be withdrawn by the investor according to Chinese law."

96. Addressing the "Governing Law" of the dispute, the Claimant, in its RfA, referring to the Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, says as follows: "The governing law of the dispute is the law of the PRC and such rules of international law as may be applicable."[164]

97. The Tribunal does not apprehend there to be any difference or dispute between the Parties on the question of applicable law. Both Parties address the BIT and the Protocol. Both Parties address the ICSID Convention. Both Parties address relevant and applicable Chinese law. Both Parties address what they assert to be other principles of relevant and applicable international law.

98. From the Tribunal's perspective, its competence and authority are derived from the BIT and the ICSID Convention, pursuant to which it is established. In the exercise of its functions, and the interpretation and application of the provisions of these instruments, the Tribunal may have regard to relevant and applicable Chinese law and relevant and applicable principles of international law. In this regard, whereas the Tribunal is an institution of international law, with an inherent competence to construe and apply international law as the law of the Tribunal, it is not a court, tribunal or other review or adjudicatory mechanism of Chinese law. This being the case, for the Tribunal, where Chinese law is applicable to a particular issue requiring its determination, the content of that law is to be established to the satisfaction of the Tribunal through evidence and reasoned submissions. To this end, the Tribunal has had careful regard to the expert evidence on Chinese law adduced by the Parties through the Expert Opinions and Reports of Professor Lin Feng, for the Claimant, and Professor He Haibo and Professor Lou Jianbo, for the Respondent. On issues on which the evidence of Chinese law is in

[164] RfA, ¶ 32.

dispute, the Tribunal has applied its judgement. On issues on which the expert evidence of Chinese law is silent, the Tribunal has had careful regard to the submissions of the Parties, observing that questions of the implications of Chinese law for a BIT claim are properly matters for appreciation by the Tribunal.[165]

99. This said, the Tribunal highlights and emphasises that it is not a court, tribunal or other review or adjudicatory body of Chinese law. Nor is it an appellate tier in respect of decisions of Chinese administrative or judicial bodies. It is not the task of the Tribunal to review the decisions of national courts save where there is clear evidence of egregious or shocking conduct that rises to the level of a denial of justice, in which it will be appropriate for the Tribunal to assess such conduct against the Respondent's obligations under the BIT.[166]

B. CERTAIN INTERLOCUTORY MATTERS

100. As noted in **Part II** above, the Tribunal issued three interlocutory decisions in the course of the proceedings, one each on the Claimant's PM Request (PO2), the Respondent's Bifurcation Request (PO3), and the Claimant's Application to Amend (PO4). No further discussion is needed on the Bifurcation Request, the Preliminary Objections component of which will be the subject of detailed discussion in the context of the Tribunal's analysis and decision on jurisdiction and admissibility in **Part V** below. It will, though, be useful to recall at this point in a little more detail the Tribunal's decisions on both the Claimant's PM Request and its Application to Amend as the former is relevant to Claimant's aggravation of the dispute allegation in breach of Article 9 and the latter is relevant to the discussion below on the Respondent's second jurisdictional objection.

(1) The Tribunal's decision on the Claimant's PM Request

101. As recounted above, the Claimant submitted an urgent PM Request on 4 December 2017, more than a month before the Tribunal was constituted. In light of the 30 November 2017 Order to Vacate, the PM Request asked for an Order, *inter alia*,

[165] *MTD Equity Sdn Bhd. & MTD Chile S.A. v. The Republic of Chile,* ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, ¶¶ 72 – 75; RL-0126.

[166] Although the legal framework of the analysis was different, the Tribunal, in this respect, has had regard for the analysis of the tribunal in *Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017, at 224; RL-0197.

requiring the Respondent "to suspend the enforcement of the Expropriation Decision" and to "refrain from taking any other action that may prevent [JHSF] from pursuing its business or otherwise aggravate the dispute or prejudice the integrity of the proceedings".[167]

102. In the period that followed, again before the Tribunal was constituted, the Respondent demolished the JHSF Buildings, a process that was complete by mid-late December 2017.

103. On 17 January 2018, the Claimant wrote to the by then constituted Tribunal noting that "most buildings belonging to [JHSF's] premises in Jinan have been demolished and that, for the most part, the machinery and stocks are now stored in a different location."[168]

104. Noting these developments, the Tribunal informed the Parties

> "that it would hear, in the course of the first session, brief oral submissions on the issues of (a) the form, necessity and urgency of the provisional measures sought and resisted; and (b) whether it would be appropriate for the Tribunal to exercise its powers under ICSID Convention Article 47 and ICSID Arbitration Rule 39(3) to recommend provisional measures of its own initiative, and if interim provisional measures were warranted, the form they should take."[169]

105. At the point of the first session, the Parties were agreed that (a) JHSF's premises had been fully evacuated, (b) all the Buildings had been demolished, and (c) machinery that had been located on JHSF's premises was stored and under the Claimant's control.[170]

106. The Claimant nonetheless maintained its request for provisional measures, especially with regard to its request that the Tribunal order such measures as may be appropriate to order the Respondent to refrain from taking action that aggravates the dispute.[171] In its submissions, the Claimant, *inter alia*, addressed the application of the various elements that needed to be satisfied before provisional measures could be ordered.

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[167] PM Request, ¶ 64(a) and (b).

[168] Claimant's letter dated 17 January 2018.

[169] PO2, ¶ 30.

[170] PO2, ¶ 50.

[171] PO2, ¶ 71.

107. This said, in response to a question from the Tribunal in the course of the first session as to whether the Claimant had "reason to think that there is some danger of a future action, and what kind of future action", Claimant's counsel stated that "as of today, we have no clear indication of any further aggravation of whatever kind."[172]

108. The Respondent contested the Claimant's request on multiple factual and legal grounds the details of most of which are not germane for purposes of this Award. In response to the Claimant's contention that the demolition of the Buildings posed a threat to the Claimant's ability to have its case before the Tribunal fairly decided, the Respondent objected saying that "the only possible consequence of the demolition of the Buildings is financial loss, which can be easily compensated by monetary damages."[173]

109. The Tribunal set out its detailed reasons for denying the PM Request in PO2 in the following terms:

> "Given the developments on the ground since the PM Request and the written submissions of the Parties, the Tribunal is in a position to reach its decision on the PM Request with an economy of analysis. Principles of judicial economy, equally relevant in arbitral proceedings such as this, dictate that the Tribunal does not engage in analyses and conclusions of law where none is necessary. The Tribunal accordingly refrains from an analysis of the legal requirements of provisional measures or of other issues not strictly necessary for its decision. Further, as noted above, the Tribunal takes no position with respect to disputed facts and this decision does not constitute a finding of fact on any issue by the Tribunal.
>
> Whether in ICSID proceedings or in proceedings before other international courts and tribunals, the recommendation (or indication, or other relevant term) of provisional measures is an exceptional measure of interim relief that is necessary to preserve the rights of a party in circumstances of urgency. Different language may be used in different circumstances or before different fora to describe the test for provisional measures and it may be that, in some circumstances, the decision will turn on the nuanced formulation. The Tribunal is satisfied, however, in the circumstances of the present case, that its decision does not turn on nuance and the Tribunal accordingly sees no need to engage in a jurisprudential review about the precise scope of the relief contemplated in Article 47 of the ICSID Convention and Article 39 of the ICSID Arbitration Rules. What is plain is that the fundamental requirement for provisional measures is that such measures can only ever be warranted in circumstances in which the need for such measures is urgent and the measures in contemplation are necessary, *inter alia*, to prevent imminent harm to a

[172] PO2, ¶ 78.

[173] PO2, ¶ 99.

> party. Although there is no uniformity of jurisprudence on this point, the Tribunal considers that the exceptional nature of provisional measures warrants consideration of whether the rights to be preserved are at real and imminent risk of irreparable harm, this being material to both the necessity and the urgency of the relief in contemplation.
>
> In the present case, whatever may have been the situation when the Claimant submitted its PM Request, and without prejudice to whether a recommendation of provisional measures may or may not have been warranted at that stage, there is no longer anything onto which a recommendation of provisional measures could properly fasten. The Parties appear to agree that the buildings that were the subject of the PM Request were vacated and have since been destroyed, and that the related machinery and materials are now stored and under the Claimant's control. As recounted above, the Claimant submitted its urgent PM Request on 4 December 2017. Demolition of the buildings began on 6 December 2017, with production at JHSF's facilities having stopped completely in the second week of December 2017. By all accounts, the demolition of the buildings was largely complete by around this time. The Tribunal was constituted on 8 January 2018.
>
> Mindful of these developments, the Tribunal explored with the Parties, in the first session on 1 February 2018, the continuing basis of the request for provisional measures. The Respondent submitted that there was none. The Claimant maintained its request, however, expressing concern about the possibility of aggravation of the dispute in the future. When pressed by the Tribunal about the reality of the risk of aggravation, however, counsel for the Claimant very properly stated that 'as of today, we have no clear indication of any further aggravation of whatever kind.'
>
> In the circumstances, the conclusion is unavoidable that a recommendation of provisional measures is not warranted in this case at this time. The Claimant's PM Request must accordingly be denied. There is at present no right that requires interim protection pending a determination on the merits of this case. A recommendation of provisional measures cannot be used as a basis to restore the Claimant to the *status quo ante*, before the buildings that were the subject of the PM Request were demolished. If the Claimant can sustain its allegation on the merits, the Tribunal will determine the appropriate at that stage. Whatever may be the prejudice to the Claimant, it is prejudice that has already been suffered."[174]

110. The Tribunal returns to this issue in the context of its discussion of the Claimant's non-aggravation merits claim below. The Tribunal nonetheless takes this opportunity to emphasise that PO2, setting out the Tribunal's detailed reasoning for rejecting the Claimant's PM Request, was limited to addressing that Request. It did not address the justifiability or otherwise of the Respondent's conduct in demolishing the Buildings.

[174] PO2, ¶¶ 109 – 113.

Without entering into such an assessment at this point, the Tribunal nevertheless considers it appropriate to express its disquiet about those developments.

(2) The Tribunal's decision on the Claimant's Application to Amend

111. The Claimant filed its RfA with ICSID on 18 April 2017 and paid the remainder of the lodging fee on 2 May 2017. Shortly thereafter, the Claimant's then counsel informed ICSID that it had withdrawn and would no longer represent the Claimant in the arbitration. Following the Claimant's responses to various inquiries raised by ICSID, the ICSID Secretary-General registered the RfA on 21 June 2017.[175]

112. During the first session on 1 February 2018, in response to a question from the Tribunal, the Claimant confirmed that it was planning to file an application to amend its request for relief. The Tribunal directed that this should be filed expeditiously.[176]

113. As recounted above, on 26 February 2018, the Claimant submitted its Application to Amend. On 22 March 2018, the Respondent filed its Observations on the Application to Amend. By correspondence dated 10 April 2018, the Tribunal communicated its decision granting the Application to Amend, with the Tribunal's detailed reasoning following in PO4.

114. In the RfA, the Claimant alleged, and sought remedies for, the direct expropriation of the Land-use rights and Buildings held by JHSF. The relief requested in respect of that Claim was for an "ORDER that the Respondent pay justifiable expropriation compensation".[177]

115. As taken from PO4, the Claimant's Application to Amend sought to include the following allegations in its RfA:

> "a. The expropriation described in the Request for arbitration was an *unlawful* expropriation. Thus, 'the dispute is not solely about the determination of the amount of proper compensation for the Expropriation, but also about the lawfulness of the Expropriation'.

[175] PO4, ¶¶ 1 – 3.
[176] PO4, ¶ 6.
[177] PO4, ¶ 20.

b. There was both a direct and an indirect expropriation. The direct expropriation of JHSF's land-use right and the demolition of its Buildings resulted in an indirect expropriation of the Claimant's business in the PRC.

c. The Respondent's actions breached its obligation to accord fair and equitable treatment to the Claimant's investment under Article 3 of the BIT.

d. The Respondent's actions were contrary to Article 2 of the BIT, which sets forth the Respondent's duty [] to refrain from taking any arbitrary or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the Claimant's investment.

e. The Respondent may have failed to accord the same level of treatment to the Claimant's investment as to the investments of Chinese investors, in violation of Article 3 of the BIT.

f. The Respondent breached its procedural duties, including the obligation to refrain from aggravating the dispute while arbitration proceedings are pending, by allowing local authorities to take over and demolish JHSF's premises in December 2017.

With regard to the relief requested, the Claimant now seeks relief beyond compensation based on the fair market value of the Land, as stated in the Request for Arbitration. In particular, the Claimant now requests restitution of its rights and damages for the loss in value of its investment. The Claimant indicates that the amendments will 'result in a considerable increase as compared to the figures mentioned in the Request for Arbitration'.

According to its expanded request for relief in the RfA Revision Request, the Claimant intends to seek:

'(a) A declaration that the Respondent has breached Article 4 of the BIT by unlawfully expropriating the Claimants' investment;

(b) A declaration that the Respondent has breached Articles 2 and 3 of the BIT;

(c) A declaration that the Respondent has breached its procedural duties by deliberately aggravating the dispute while these proceedings were pending;

(d) Restitution of Jinan Hela Schwarz's land-use right and damages for the loss of value of its investment caused by the physical taking of its premises by the Chinese authorities;

(e) Alternatively, if restitution is no longer possible, full reparation, i.e. compensation for the expropriation of the land-use right and

> damages for the loss of value of the Claimant's investment, including lost profits.'"[178]

116. The Respondent resisted the Application to Amend contending, *inter alia*, that "the Claimant has essentially re-written its Request for Arbitration by changing its factual assertions, legal theory, quantification and request for relief almost a year into this arbitration."[179]

117. The Tribunal addressed the Application to Amend through the prism of Article 46 of the ICSID Convention and Rule 40 of the ICSID Rules concluding, *inter alia*, as follows:

> "It follows from these provisions that incidental or additional claims arising directly out of the subject-matter of the dispute are presumptively admissible provided they are within the scope of the consent of the parties and otherwise within the Tribunal's jurisdiction. In such circumstances, and subject to timely procedural notification, the Tribunal 'shall' determine such claims.
>
> The Tribunal notes that the Claimant's new counsel of record signalled at an early stage, after having been appointed, that the Claimant would be seeking an additional form of relief not mentioned in the Request for Arbitration. The RfA Revision Request was thereafter made reasonably expeditiously, on 22 February 2018, following the first procedural hearing on 1 February 2018, and before Procedural Order No.1 was issued on 9 March 2018. The RfA Revision Request was accordingly made before the submission of the Claimant's Memorial. In the Tribunal's view, the RfA Revision Request was made in a timely manner.
>
> As noted in Section II above, the scope of the Claimant's proposed revisions is extensive. The Claimant seeks to enlarge the ambit of its case beyond the claim of expropriation advanced in the original Request for Arbitration to include claims of discriminatory treatment and for breach of the fair and equitable treatment provisions of the BIT, as well as claims alleging a breach of procedural duties by the Respondent in consequence of the demolition of the Claimant's JHSF premises during the pendency of this arbitration.
>
> The first question to consider is whether the Claimant's proposed extensive revisions of its Request for Arbitration constitute incidental or additional claims that can properly be said to arise directly out of the subject-matter of the dispute. If they are, the Claimant is entitled to advance such claims, provided that it does so in a timely procedural manner, and the Tribunal is required to determine those claims. If, however, the proposed revisions cannot properly be said to arise directly

[178] PO4, ¶¶ 22 – 24.

[179] PO4, ¶ 30.

out of the subject-matter of the dispute, or if they were not notified in a timely procedural manner, the matter would fall to be considered by reference to general principles of procedural fairness and efficiency governing the conduct of the arbitration, having regard, *inter alia*, to Articles 41, 44 and 46 of the ICSID Convention, and Rule 40 of the ICSID Arbitration Rules.

Although the proposed revisions are extensive, the Tribunal considers that they are properly to be regarded as additional claims arising directly from the subject-matter of the dispute. Notwithstanding the scope of the proposed revisions, they would not, if admitted, transform the dispute into one of a fundamentally different nature to that of which the Tribunal is already seised, in the sense of going beyond the subject-matter of the original Request for Arbitration, as opposed to adding new legal claims. The Tribunal considers therefore that the proposed revisions come within the implicit scope of Article 46 of the ICSID Convention and Rule 40 of the ICSID Arbitration Rules in that they are to be construed as ancillary claims that the Claimant would be entitled to advance and that the Tribunal would be expected to determine in the normal course of the exercise of its functions.

The Respondent submits that it would suffer serious injustice if the proposed revision of the Request for Arbitration were to be accepted and that to do so would undermine the integrity and orderly conduct of these proceedings.

The Tribunal notes, however, that the RfA Revision Request was made at an early stage, and before the submission of the Claimant's Memorial, and that, as such, accepting the request would give rise to little, if any, disadvantage, cost or inconvenience to the Respondent. The Tribunal notes further that denying the Claimant's RfA Revision Request would have the effect of requiring the Claimant to submit a fresh request for arbitration notifying the new legal claims in a manner that would not be in the interests of an efficient and effective adjudicatory procedure.

It follows from the preceding that, in the Tribunal's view, the proposed revision of the Request for Arbitration would not alter the character of the claim submitted by the Claimant, for the reason that the proposed revisions address additional claims arising directly out of the subject-matter of the dispute, and that it was notified in a timely manner, such as would neither give rise to material, if any, hardship or disadvantage to the Respondent nor undermine the integrity or orderly conduct of the arbitration proceedings. For completeness, the Tribunal considers that general principles of procedural fairness and efficiency governing the conduct of the arbitration in any event militate in favour of acceptance of the RfA Revision Request.

The preceding notwithstanding, there remains to be considered the question of whether the Claimant's proposed revisions come 'within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre', as stated in Article 46 of the ICSID Convention and Rule 40 of the ICSID Arbitration Rules regarding the determination of ancillary claims.

> The Respondent, in email correspondence to the ICSID Secretariat dated 21 June 2017, before the Tribunal was constituted on 8 January 2018, raised certain objections which were jurisdictional in character. The fact of these objections was addressed in §16 of Procedural Order No.1, adopted on 9 March 2018, which established a procedure in respect of objections to jurisdiction and/or admissibility, whether subject to a request that they be heard as a preliminary matter or that fell to be addressed as part of the proceedings on the merits. The Respondent thus indicated at an early stage, before the Claimant's RfA Revision Request, albeit only in headline terms at that point, that it contested the Tribunal's jurisdiction and, implicitly, that it would be submitting preliminary objections to jurisdiction.
>
> The Tribunal considers that the requirement in Article 46 of the ICSID Convention that the Tribunal 'shall … determine' any additional claims arising directly out of the subject-matter of the dispute 'provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre' does not impose a threshold test for the admission of additional claims, by way of revision of a request for arbitration, that otherwise meets the requirement of "arising directly out of the subject-matter of the dispute'. Rather, it addresses the Tribunal's substantive determination of the merits of such claims.
>
> This being the case, the Tribunal considers that the fact or actuality of objections to jurisdiction cannot operate as a bar to the revision of a request for arbitration. Equally, however, the admission of the Claimant's proposed revisions to its Request for Arbitration cannot prejudice the Respondent's latitude to raise objections to jurisdiction or admissibility."[180]

118. Plainly, the accepted amendment to the Claimant's case had a significant effect on the scope of that case, the significance of which the Tribunal returns to below in the context of its discussion of the Respondent's second jurisdictional objection.

C. A PRELIMINARY APPRECIATION OF THE ISSUES TO BE ADDRESSED

119. The Tribunal turns, below, first to the issues of jurisdiction and admissibility, recalling that the Respondent's admissibility objection advances the same grounds as its jurisdictional objections but under the head of admissibility. As the Tribunal observed in its Bifurcation Decision, the Tribunal's appreciation of the issues going to jurisdiction and admissibility was that joinder of these issues to the merits phase of the proceedings would better inform the Tribunal of the issues to enable it to take a considered decision on the Respondent's objections. Linked to this, the Tribunal

[180] PO4, ¶¶ 40 – 51.

considered that bifurcation of the proceedings was unlikely to be procedurally efficient.[181]

120. The first two of the Respondent's jurisdictional objections go to the application of the BIT – whether the Claimant has standing under the BIT to bring its Claim (First Objection) and, if so, whether it satisfied the BIT's pre-arbitration requirements regarding amicable settlement (Second Objection). The last two of the jurisdictional objections turn on the interpretation and application of Ad Article 9 in the Protocol. These objections respectively require the Tribunal's assessment of the Claimant's resort to an administrative review procedure according to Chinese law (Third Objection) and, in the event that the issue had been brought before the Chinese courts, whether it could be withdrawn by the Claimant according to Chinese law (Fourth Objection).

121. For ease of analysis in what follows, the Tribunal groups its analysis of the objections under two headings: (A) Threshold Objections – encompassing the First and Second Objections, and (B) Chinese Law Objections – encompassing the Third and Fourth Objections.

122. If the proceedings are to advance to a liability analysis, one of two conditions must be satisfied – either the Respondent's jurisdictional and admissibility objections must fail or one or more of them must be joined to the liability analysis.

123. The BIT Article 4(2) compensation standard – which, for ease of reference the Tribunal describes hereafter as "**adequate compensation**" or the "**BIT compensation standard**" – is compensation "equivalent to the value of the investment immediately before the expropriation is taken or the threatening expropriation has become publicly known, whichever is earlier." The Tribunal considers it to be an axiomatic and implied requirement in respect of the application of the BIT compensation standard that the standard must not be applied in an arbitrary or discriminatory manner.

124. For completeness, Article 4(2) also requires that the compensation "shall be paid without delay and shall carry interest at the prevailing commercial rate until the time of

[181] PO3, ¶¶ 77 – 80.

payment; it shall be effectively realizable and freely transferable" and that "[p]recautions shall have been made in an appropriate manner at or prior to the time of expropriation for the determination and payment of such compensation." Further, Article 4(2) requires that, at the request of the investor "the legality of any such expropriation and the amount of compensation shall be subject to review by national courts …".

V. JURISDICTION AND ADMISSIBILITY

125. The Tribunal turns now to address the Respondent's objections to jurisdiction and admissibility. As just noted, it addresses the jurisdictional objections under two headings: the Respondent's "Threshold Objections" (A), encompassing the First and Second Objections, and its "Chinese Law Objections" (B), encompassing the Third and Fourth Objections. The Tribunal will thereafter address the Respondent's admissibility objection.

126. As a preliminary matter, the Tribunal observes that it has a *proprio motu* responsibility to satisfy itself that it has jurisdiction in respect of the dispute of which it has been purportedly seised. That responsibility encompasses an evaluation of the Tribunal's jurisdiction in circumstances in which no objection to jurisdiction has been advanced as well as looking beyond any objection to jurisdiction that has been advanced to assess whether jurisdiction stands or falls on some other basis.

A. THE RESPONDENT'S THRESHOLD OBJECTIONS

127. The Respondent's Threshold Objections are two; first, that the Tribunal lacks jurisdiction because the Claim does not arise directly out of the Claimant's investment (**First Objection**); second, that the Tribunal lacks jurisdiction because the Claimant failed to comply with the BIT's pre-arbitration amicable settlement requirements (**Second Objection**). With regard to the First Objection, the Respondent says that JHSF's rights and assets are not the Claimant's property or investment, and the Claimant has not shown even a *prima facie* treaty violation in respect of any shareholding. With regard to the Second Objection, the Respondent says that the Claimant failed to show that it properly notified the Respondent of the BIT claims raised in these proceedings or that it made meaningful attempts to settle the dispute

amicably over a period of at least six months. In this regard, the Respondent contends further that the Claimant did not and could not raise or negotiate the New Elements of Claim with the Respondent before the initiation of the arbitration, these elements of the Claim only having been notified with the Claimant's Application to Amend of 26 February 2018, some eight months after the RfA had been registered by ICSID.

(1) First Objection — the Claim does not arise directly out of the Claimant's investment

a. The Parties' arguments

128. The core of the Respondent's First Objection is that the dispute in issue is a dispute that "solely concerns the assets of the Chinese company JHSF" and that "JHSF is neither an investor under the BIT nor a claimant in this arbitration, and its assets are not the Claimant's assets or investment."[182] The Respondent says further that the dispute "does not concern or arise directly out of any shareholding issues, but out of JHSF's land use right and buildings."[183] In this regard, the Respondent says that the Claimant must meet the requirements of both the BIT and the ICSID Convention in respect of protected investments, and fails to do so.

129. Referring to the definition of "investor" in Article 1(2) of the BIT,[184] the Respondent says that "[l]ocal subsidiaries incorporated in China (in this case, JHSF) do not qualify as investors under the BIT."[185] Referring to the jurisdictional requirements of Article 25(1) of the ICSID Convention, the Respondent further contends that the Claimant has failed to satisfy these requirements.[186] "The Claimant, as the shareholder of JHSF and a legal person separate from JHSF, only has legal rights over its shares in JHSF, but has no legal rights over JHSF's assets, and thus no standing to pursue claims over

[182] Preliminary Objections, ¶¶ 82, 88 *et seq*.

[183] Preliminary Objections, ¶ 82.

[184] Agreement between the Federal Republic of Germany and the People's Republic of China on the Encouragement and Reciprocal Protection of Investments, Article 1(2); CL-0003. Article 1(2) provides, *inter alia*, that the term "investor" means "any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany".

[185] Preliminary Objections, ¶ 84.

[186] Preliminary Objections, ¶¶ 85 – 87. Article 25(1) of the ICSID Convention provides: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."

these."[187] In this regard, the Claimant does not own JHSF's Land-use right of movable or immovable property.[188] Referring to both Chinese law and international law, and citing a number of investment arbitration decisions, the Respondent says that "[i]t has been repeatedly held by arbitral tribunals that an investor has no enforceable right in arbitration over the assets belonging to the company in which it owns shares."[189] While economic links may exist between the Claimant and JHSF, "[a] parent company cannot simply arrogate for itself its subsidiary's legal rights".[190] Referencing the definition of the term "investment" in Article 1(1) of the BIT – "the term 'investment' means every kind of asset invested directly or indirectly by investors" – the Respondent contends that the Claimant's position is not aided by the word "indirectly" in the BIT, citing to *El Paso v. Argentina*, in which the tribunal is said to have "confirmed that a local company's right and assets did not qualify for treaty protection".[191]

130. In its PO Counter-Memorial, the Claimant contends that it "owns two sets of assets in the PRC, out of which the present dispute arises: JHSF's land use right and other immovable assets … and the Claimant's shares in JHSF".[192] On the former, referencing Article 1(1) of the BIT and Ad Article 1(b) of the Protocol,[193] the Claimant avers that it "is an investor of Germany, it is the 100% shareholder of JHSF, and JHSF has its seat in China. The Protocol thus clarifies that the land use right and other property acquired by JHSF are the Claimant's indirect investment covered by the Germany-PRC BIT."[194] Addressing the Respondent's case citations, the Claimant says that "[t]he objection misses the mark, as the Claimant is not asserting rights in this arbitration over assets belonging to JHSF, but instead brings a claim relating to its own investments under the BIT."[195] The Claimant further contends that "JHSF is the vehicle specifically set up by the Claimant to invest in China, because it was required to do so under Chinese law in

[187] Preliminary Objections, ¶ 88.

[188] Preliminary Objections, ¶ 89.

[189] Preliminary Objections, ¶¶ 91 – 95.

[190] Preliminary Objections, ¶ 96.

[191] Preliminary Objections, ¶ 97.

[192] PO Counter-Memorial, ¶ 154.

[193] Ad Article 1(b) of the Protocol provides: "Invested indirectly" means invested by an investor of one Contracting Party through a company which is fully or partially owned by the investor and having its seat in the territory of the other Contracting Party."

[194] PO Counter-Memorial, ¶ 162.

[195] PO Counter-Memorial, ¶¶ 164, 165.

order to carry out its food production activity. In particular, under Chinese law, foreign investors cannot own land use rights or buildings for industrial purposes directly and in any other way than through the establishment of a local legal entity."[196]

131. Addressing its shares in JHSF, the Claimant contends that these "constitute a direct investment and are also covered by the BIT". Referencing JHSF's financial statement to 31 May 2018 ("**JHSF Financial Statement**"),[197] the Claimant avers that this proves, *inter alia*, that JHSF's paid-in capital from the Claimant, as of the date of the financial statement, was EUR 1,708,000 (equivalent to RMB 14,814,876), with a further EUR 1,700,000 shareholder loan.[198] Referring to a 19 June 1995 Contract on Know-How Transfer between the Claimant and JHSF, the Claimant states that it "also transferred its know-how to JHSF".[199] This equity and loan capital contribution, and know-how transfer, constituted a "substantial economic contribution [by the Claimant] in respect of its investment."[200]

132. In its PO Reply, the Respondent revisits its case that "the Claimant and JHSF are separate legal entities with distinct rights and obligations" and that the Claimant cannot therefore "simply stand in the shoes of JHSF as regards the latter's property and make a proxy BIT claim on JHSF's behalf."[201] Addressing Ad Article 1(b), the Respondent contends that this "confines indirect investing to investments made through a local vehicle, i.e. to share-linking via in-between entities"[202] and, *inter alia*, that "the BIT does not state anywhere that a direct or indirect shareholder has a right in respect of the property of a company in which it has shares (i.e. to JHSF's land use right and other assets)."[203] What is protected under the BIT, the Respondent says, are only the shares in JHSF, not JHSF's Land-use right and Buildings.[204] Nor can the Claimant bring itself within the scope of an "investment" under Article 25 of the ICSID Convention as the Claimant has been unable to show, for example, that it contributed capital and assumed

[196] PO Counter-Memorial, ¶ 167.
[197] JHSF Financial Statement for the period 1 January 2018 to 31 May 2018, dated 9 January 2019 (C-0140).
[198] PO Counter-Memorial, ¶ 171. JHSF Financial Statement, 1 – 2, 26 – 27 (C-0140).
[199] PO Counter-Memorial, ¶ 171; Contract on Know-How Transfer, 19 June 1995 (C-0141).
[200] PO Counter-Memorial, ¶ 172.
[201] PO Reply, ¶ 263.
[202] PO Reply, ¶ 269.
[203] PO Reply, ¶ 270.
[204] PO Reply, ¶¶ 270 – 277.

risk in respect of the Land-use right and Buildings.[205] In support of its position, the Respondent revisits the case referenced in its Preliminary Objections with which the Claimant took issue or distinguished.[206] Citing the International Court of Justice ("**ICJ**") *Barcelona Traction* case, the Respondent submits that "international law does not conflate a shareholding parent with its subsidiary (or the latter's rights and assets)."[207]

133. The Respondent further contends that the Claimant's construction of the BIT is both unreasonable and impractical, stating, *inter alia*, that "[a] foreign shareholder can, in appropriate circumstances, claim for harm suffered to its own rights in the local company, i.e. its shareholding"[208] and that "the Claimant's version would open the floodgates for quasi-automatic treaty proceedings by parent companies that seek to litigate or re-litigate every municipal property issue that a local subsidiary might encounter before a panel of arbitrators."[209] Finally, the Respondent contends that the Claimant "has not presented a valid shareholder claim" as the Claimant "still holds all the equity in JHSF, and there has never been any interference with its control or management of JHSF."[210]

134. In its PO Rejoinder, the Claimant revisits its contention that the dispute of which the Tribunal is putatively seised arises out of both the Claimant's indirect investments in JHSF's Land-use right and other real property and the Claimant's direct investment through its shareholding in JHSF.[211] Returning to the terms of the BIT and Protocol, as the applicable law on the issue, the Claimant contends that, given that it "owns the land use right and other real property 'through' JHSF, 'a company […] having its seat in the territory of' the PRC, such assets qualify as the Claimant's investment under the Germany-PRC BIT."[212] Addressing the arbitral decisions on which the Respondent relies, the Claimant contends, *inter alia*, that "[t]he first critical difference between

[205] PO Reply, ¶ 278.
[206] PO Reply, ¶¶ 279 – 292.
[207] PO Reply, ¶¶ 293 – 300.
[208] PO Reply, ¶ 303.
[209] PO Reply, ¶ 307.
[210] PO Reply, ¶ 311.
[211] PO Rejoinder, ¶ 5.
[212] PO Rejoinder, ¶ 11.

those cases and the present is that the tribunals in the three cases relied on by the Respondent do not provide their own interpretation of the term 'indirectly', even if this was included in the treaty definition. These tribunals do not therefore assist the present Tribunal, which has to interpret that exact term. *Ad* Article 1(b) provides the answer to the question of what the term means in the present circumstances."[213] Further, in all the cases in question, the claimant in the proceedings "was a minority shareholder in the local companies, meaning that it would have been difficult for the tribunals to evaluate the impact of, say, an expropriation of an asset of the subsidiary on the minority shareholder. In the present circumstances where Hela-Schwarz is the 100% shareholder of JHSF, the 'flow through' of the damage is easy to establish …"[214]

135. The Claimant goes on to take issue, *inter alia*, with the Respondent's reliance on *Barcelona Traction*, on the relevance of which it casts doubt,[215] and on the Respondent's contentions on a reasonable reading of the BIT.[216] The Claimant, further, revisits its contention that its shares in JHSF "also constitute a qualifying investment for purposes of the German-PRC BIT."[217]

136. While the Parties addressed issues of jurisdiction in the course of their oral submissions during the hearing and in their PHS, nothing material was said on the issue of the First Objection in those submissions that requires comment for purposes of this Award.

b. The Tribunal's analysis and conclusions

137. The Tribunal is not persuaded by the Respondent's First Objection.

138. The dispute of which the Tribunal is seised is a dispute in respect of the Claimant's allegations of (a) the direct expropriation of the interests, rights and property of JHSF, notably JHSF's Land-use right and Buildings, contrary to Article 4(2) of the BIT, (b) the indirect expropriation of the Claimant's shareholding in JHSF, contrary to Article 4(2) of the BIT, (c) the Respondent's alleged breach of the FET provisions of the BIT in respect of that shareholding, contrary to Article 3(1) of the BIT, and (d) the

[213] PO Rejoinder, ¶ 17.
[214] PO Rejoinder, ¶ 18.
[215] PO Rejoinder, ¶¶ 7, 21 – 22.
[216] PO Rejoinder, ¶¶ 24 – 28.
[217] PO Rejoinder, ¶¶ 29 – 33.

Respondent's alleged aggravation of the dispute. The Tribunal sees no reason or basis to revisit its decision on the Claimant's Application to Amend, in which it concluded, *inter alia*, as follows:

> "Although the proposed revisions are extensive, the Tribunal considers that they are properly to be regarded as additional claims arising directly from the subject-matter of the dispute. Notwithstanding the scope of the proposed revisions, they would not, if admitted, transform the dispute into one of a fundamentally different nature to that of which the Tribunal is already seised, in the sense of going beyond the subject-matter of the original Request for Arbitration, as opposed to adding new legal claims. The Tribunal considers therefore that the proposed revisions come within the implicit scope of Article 46 of the ICSID Convention and Rule 40 of the ICSID Arbitration Rules in that they are to be construed as ancillary claims that the Claimant would be entitled to advance and that the Tribunal would be expected to determine in the normal course of the exercise of its functions."[218]

139. JHSF is the Claimant's wholly-owned PRC subsidiary. It was initially established on 29 June 1995 as a joint venture between the Claimant and JMFGC "[i]n accordance with the 'Law of the [People's Republic of China] on Joint Ventures Using Chinese and Foreign Investment', and other relevant Chinese laws and regulations".[219] It became a wholly-owned subsidiary of the Claimant following a share transfer agreement dated 4 June 1999 pursuant to which JMFGC transferred all of its registered shares to the Claimant.[220]

140. From the documents on the record of this arbitration, it is evident that the Claimant contributed both equity and loan capital, and know-how, to JHSF. Although the JHSF Financial Statement on the record, dated 9 January 2019, is caveated by the auditors, KPMG, having regard to the circumstances of the expropriation, the following additional information is given in Note 1, under the heading "Company information", which the Tribunal has no basis to question or doubt:

> "Jinan Hela Schwarz Food Company Limited is a joint venture enterprise established in Shandong Province in the People's Republic of China (PRC) by Hela Schwarz GmbH and Jinan Meat Products (Group) Corporation. The Company obtained an approval certificate Wai Jing Mao Lu Fu Ji Zi [1995] No. 1349 from the People's Government of Jinan, Shandong Province in 1995. On 13 November 1995, the Company has

[218] PO4, ¶ 44.

[219] JV Contract, Chapter 1 (General provisions) and Chapter 2, Article 2; C-0026.

[220] Articles of Association, 25 June 1999, Article 1; C-0021.

obtained a business licence 'Qi Du Lu Ji Zong Fu Zi No. 002809 1/1' issued by Jinan, Shandong Province Administration of Industry and Commerce. The original registered capital was Deutsche Mark 700,000.

Jinan Meat Products (Group) Corporation resolved to sell its ownership equity to Hela Schwarz GmbH on 4 June 1999 according to equity transfer agreement. The Company obtained an approval from Jinan Municipal Foreign Economic and Trade Commission on 20 July 1999. The contract and Articles of Association were revised on 14 June 1999. The Company also obtained a revised approval certificate Wai Jing Mao Lu Fu Ji Zi [1995] No. 1349 and a revised business license 'Qi Du Lu Ji Zong Fu Zi No. 002809 1/1' on 20 July 1999 and 9 September 1999 respectively.

In 2001, the Company's Board of Directors resolved to increase the Company's registered capital by Deutsche Mark 800,000. The registered capital was increased from Deutsche Mark 700,000 to Deutsche Mark 1,500,000 in 2001. The Company obtained approval from the Ministry of Commerce People's Government of Jinan on 13 August 2001. The Company also obtained a revised approval certificate Wai Jing Mao Lu Fu Ji Zi [1995] No. 1349 on 13 August 2001. In August 2001, the Company has obtained a revised business license 'Qi Du Lu Ji Zong Fu Zi No. 002809 1/1'.

In 2004, the Company resolved to change the Company's registered capital to EUR 750,000. The Company obtained approval from Jinan, Administration of Industry and Commerce for the change on 9 September 2004. The Company also obtained a revised approval certificate Shang Wai Zi Lu Fu Ji Zi [1995] No. 1349 and a revised business license 'No. 370100400003844' on 11 May 2004 and 23 June 2004, respectively.

On 8 December 2009, the Company resolved to increase the Company's registered capital by EUR 520,000. The registered capital was increased to EUR 1,270,000. The Company also obtained a revised approval certificate Shang Wai Zi Lu Fu Ji Zi [1995] No. 1349 and a revised business license (No. 370100400003844) on 9 December 2009 and 21 January 2010.

On 19 June 2012, the Company has obtained approval from Jinan Municipal Foreign Economic and Trade Commission to increase the Company's registered capital by EUR 438,000. The registered capital was increased to EUR 1,708,000. The Company also obtained a revised approval certificate Shang Wai Zi Lu Fu Ji Zi [1995] No. 1349 on 13 July 2012 and a revised business license (No. 370100400003844) on 23 August 2012."[221]

141. The Claimant comes within the definition of "investor" in Article 1(2)(a) of the BIT, being a juridical person having its seat in Germany.

[221] JHSF Financial Statement, page 6, Note 1; C-0140.

142. The term "investment" is widely defined in Article 1(1) of the BIT to include "every kind of asset invested directly or indirectly by investors of one Contracting Party in the territory of the other Contracting Party", expressly including, *inter alia*, "property rights", any kind of "interests in companies", "claims to money or to any other performance having an economic value associated with an investment", and "know-how and good-will". It is further stated that "any change in the form in which assets are invested does not affect their character as investments."

143. Although not going to the definition of an "investment", germane to its scope are the terms of Article 4(2) of the BIT, which preclude the direct or indirect expropriation of investments, the latter component of which would be denuded of material content were it to exclude per se from the purview of the clause the expropriation of the rights and interests of a wholly-owned subsidiary of an investor while leaving the shareholding intact.

144. The Tribunal considers that Ad Article 1(a) and (b) of the Protocol puts the issue beyond doubt. These provide:

> "(a) For the avoidance of doubt, the Contracting Parties agree that investments as defined in Article 1 are those made for the purpose of establishing lasting economic relations in connection with an enterprise, especially those which allow to exercise effective influence in its management.
>
> (b) 'Invested indirectly' means invested by an investor of one Contracting Party through a company which is fully or partially owned by the investor and having its seat in the territory of the other Contracting Party."[222]

145. The Tribunal considers that the Claimant comes within the scope of both of these paragraphs, and thus of the definition of "investment" in Article 1(1) of the BIT, having regard to the economic contribution it made to JHSF and that JHSF is its wholly-owned subsidiary. The Tribunal further considers that this also fully satisfies the jurisdictional requirements of Article 25(1) of the ICSID Convention, being a "legal dispute arising directly out of an investment". In view of the specific requirement of "lasting economic relations in connection with an enterprise" provided in Ad Article 1(a), the Tribunal does not consider that, in the context of this case, Article 25(1) of the ICSID Convention

[222] BIT (Germany – PRC BIT), Ad Article 1(a) and (b); CL-0003.

imposes substantive requirements as regards the character of a qualifying "investment" beyond those found in the BIT.

146. For completeness, the Tribunal is not persuaded by the arbitral cases to which it has been referred by the Respondent, by which it is in any event not bound, noting that the decisions in question do not provide useful guidance on the interpretation of the relevant provisions of the BIT and Protocol in issue in this arbitration. Further, as a review of a number of those decisions disclose, the tribunals were there concerned about "claiming twice for damage caused by the same events: once for the taking of rights … and once for the diminution in the value of the shares …"[223] While the Tribunal acknowledges that there is potential for an issue of double-counting in the case of parallel claims for rights held by the local subsidiary of a qualifying investor and the investor's shareholding in that subsidiary, it considers that this issue does not fall to be addressed as a jurisdictional matter but rather in the course of the liability and/or damages phases of the proceedings, at which point the Tribunal would be well placed to be attentive to and disregard any possible overclaiming.

147. The Tribunal observes, additionally, that documents in the arbitration file of these proceedings record representatives of the Claimant participating in meetings with representatives of Jinan Municipality bodies with a role in the expropriation process, as part of the Claimant's, and JHSF's, engagement to secure a better compensation outcome.[224]

148. Having regard to the preceding, the Tribunal dismisses the Respondent's First Objection. The Claimant meets the requirements of an "investor" under the BIT. The Claim, in each of its direct expropriation, indirect expropriation, and FET aspects, properly meet the requirements of an "investment" under both Article 1(1) of the BIT, including Ad Article 1 of the Protocol, and of Article 25(1) of the ICSID Convention.

[223] *El Paso International Energy Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 175, RL-0071.

[224] PO Counter-Memorial, ¶¶ 69 – 83; also, C-0144.

(2) Second Objection — the Claimant failed to comply with the BIT's pre-arbitration amicable settlement requirements

a. The Parties' arguments

149. The Respondent's Second Objection turns on Article 9(1) and (2) of the BIT, which require, the Respondent contends, that three conditions are satisfied: (i) the Claimant must inform the Respondent that an investment treaty dispute exists; (ii) the Claimant must try to settle the dispute amicably as far as possible through negotiations; and (iii) at least six months must have elapsed, with the dispute remaining unresolved.[225] Article 9(1) and (2) read as follows:

> "(1) Any dispute concerning investments between a Contracting Party and an investor of the other Contracting Party should as far as possible be settled amicably between the parties in dispute.
>
> (2) If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other Contracting State, be submitted for arbitration."[226]

150. By reference to both arbitral and ICJ jurisprudence, the Respondent emphasises the importance of these provisions, including for the reason that they indicate "the limit of consent given by States."[227] It also states that the "should as far as possible" language in Article 9(1) "does not militate against a mandatory jurisdictional requirement." That the Parties intended "these negotiations to be mandatory is clear from the first sentence of Article 9(2) of the BIT, which provides that the dispute shall be submitted to arbitration only '*if the dispute cannot be settled within six months of the date when it has been raised by one of the parties*'."[228]

151. Qualifying the amicable settlement requirements for purposes of this case, the Respondent says as follows:

> "Briefly put, the treaty allegations the Claimant now raises must have been negotiated between the Claimant (as opposed to its local subsidiary) and the competent authorities of the Respondent (as opposed to local officials) for at least six months, and the substantive obligations contained in the

[225] Preliminary Objections, ¶ 110.

[226] BIT (Germany – PRC BIT), Article 9(1) and (2); CL-0003.

[227] Preliminary Objections, ¶ 112.

[228] Preliminary Objections, ¶ 123.

> BIT must have been presented as the legal basis for the Claimant's contentions (as opposed to Chinese laws and regulations). Otherwise the Tribunal cannot hear this case."[229]

152. The Respondent proceeds to emphasise the following: (a) the wording of Article 9(1) and (2) "is clear and categorical";[230] (b) the Claimant's approach would make the provisions redundant, contrary to settled canons of treaty interpretation;[231] (c) the Claimant's reliance of the words "as far as possible" does not relieve it "from at least making the effort";[232] and (d) the Claimant accepts that the provisions are relevant to the issue of jurisdiction *ratione voluntatis*.[233]

153. From here, the Respondent contends that the Claimant failed to satisfy the Article 9 requirement as a factual matter, for the reasons that follow.[234]

154. First, the Claimant attempts to "repurpose what it elsewhere admits were purely domestic 'compensation negotiations' … in or about 2014 with local officials from the Jinan municipality" to "create an appearance of 'negotiations' concerning the alleged treaty breaches".[235]

155. Second, the documents on which the Claimant relies in support of its claim that there were negotiations were at the most "negotiations regarding a domestic valuation dispute and not an alleged public international law violation by the Respondent."[236] Further, the correspondence does not mention the vast majority of the many factual allegations now advanced by the Claimant.[237] The timing of the correspondence, before the occurrence of key circumstances of which the Claimant complains, show that the negotiations that they purport to evidence could not have addressed the relevant

[229] Preliminary Objections, ¶ 120 (emphasis by the Tribunal).
[230] Preliminary Objections, ¶ 127.
[231] Preliminary Objections, ¶ 128.
[232] Preliminary Objections, ¶ 129.
[233] Preliminary Objections, ¶ 130.
[234] Preliminary Objections, ¶¶ 131 – 147.
[235] Preliminary Objections, ¶ 133.
[236] Preliminary Objections, ¶¶ 138, 141.
[237] Preliminary Objections, ¶¶ 139, 141.

claims.[238] Further, in one case, the correspondence relied upon by the Claimant "did not even meet the six-month negotiation requirement".[239]

156. Third, with regard to the New Elements of Claim – *inter alia*, that the direct expropriation was unlawful and the indirect expropriation claim / FET claim – the Respondent contends that "[t]his ambush deprived the Respondent of the opportunity to dispel those allegations amicably".[240]

157. In response, the Claimant recharacterizes the requirements of Article 9(1) and (2), saying that they give rise to two conditions: (a) that the dispute be raised, and (b) that six months must have elapsed. It further says that cases "confirm[] that the 'cooling off' period is not to be treated as mandatory."[241]

158. On the issue of notification of the dispute, the Claimant says that there is no requirement of form or content to such notification in the BIT, in contrast to amicable settlement provisions in other investment treaties. Nor does the BIT require that the claims be spelt out in terms of specific alleged treaty breaches, a proposition for which the Claimant draws support from arbitral jurisprudence.[242] The Claimant continues:

> "It follows that the Respondent's contention that the Claimant should have previously specified the breaches of the Treaty in order to comply with Article 9(2) of the BIT is inaccurate. The 'dispute' raised by the Claimant must pertain to its investment, and the term 'dispute' encompasses **any** dispute that relates to how investments protected under the Treaty are treated by authorities of the host State. In the present case, any notification by the Claimant to the PRC in which it raises complaints about the Chinese authorities' conduct in relation to its protected investment meets this definition.
>
> In its Memorial, the Claimant established that it had raised the existence of a dispute on multiple occasions in 2014 before submitting it to arbitration in 2017. Accordingly, the Respondent was sufficiently informed of the dispute to trigger the waiting period under the BIT."[243]

[238] Preliminary Objections, ¶¶ 140, 141.
[239] Preliminary Objections, ¶ 142.
[240] Preliminary Objections, ¶ 145.
[241] PO Counter-Memorial, ¶ 176.
[242] PO Counter-Memorial, ¶¶ 177 – 182.
[243] PO Counter-Memorial, ¶¶ 183 – 184.

159. The Claimant goes on to say that it expressed concerns about the lawfulness of the Expropriation Decision to the Respondent on "multiple occasions", including "specifically with reference to the Germany-PRC BIT and by expressing its views that the conduct of the authorities was in breach of specific standards contained in the Treaty."[244] In this regard, the Claimant cites, *inter alia*, to a meeting on 28–29 July 2014 between Mr Rudolph Scharping, a former German Minister of Defence who was advising and acting for the Claimant,[245] as well as others representing the Claimant, and representatives of the Jinan Land Reserve Tianqiao Centre ("**Transaction Centre**"), described as the Jinan Municipality "decision-makers" with respect to the expropriation and the "competent authority to conclude a repurchase agreement".[246] The partial transcript of this meeting refers to bringing the dispute "to Washington" and to the "China-Germany Economic Trade Agreement" in the context of a discussion about securing an improved compensation valuation.[247] In similar vein, the Claimant also references correspondence it sent to the Transaction Centre on 28 August 2014 and 10 November 2014,[248] both of which expressly address the BIT in the context of what is said to be arbitrary and unjustified treatment concerning the question of adequate compensation.[249]

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[244] PO Counter-Memorial, ¶¶ 83, 185.

[245] PO Counter-Memorial, ¶¶ 69 *et seq, and* Power of Attorney from Hela-Schwarz to Mr. Naujoks, Mr. Scheil, Mr. Huth, Mr. Scharping and Ms. Xu, C-0052.

[246] PO Counter-Memorial, ¶¶ 59, 76, 77; also, Minutes of the meeting with the Foreign Affairs Office of Shandong Province of 2 July 2014, C-0072.

[247] Extracts of the 28 July 2014 meeting transcript, C-0144.

[248] Respectively, Letter from JHSF to the Transaction Centre dated 28 August 2014, C-0084; and Application for Administrative Review dated 10 November 2014, C-0002.

[249] The Minutes of a meeting held on 2 July 2014 between advisers and representatives of JHSF and Ms Huang Bei, described as the Vice General Manager and Executive Director of the Binhe Group, representing the Transaction Centre, similarly record the following: "[The JHSF representatives] also mentioned that a sole reduction of all legal possibilities to the 'appraisal method' would be against the spirit of the Investment Protection Treaty if no room for negotiation was given by the 'Transaction Center'. This should be avoided and was also agreed upon differently by the 'Jinan side' during all the meetings in the presence of Mr Scharping before." Minutes of Meetings, 2 July 2014, p.2; C-0073. The Minutes go on record in greater detail issues going to the negotiation between the Claimant/JHSF and the Jinan Municipality/PRC. The Jinan Binhe New Area Investment and Construction Group ("**Binhe Group**") is described in the First Witness Statement of Ms Huang Bei, dated 17 April 2019 ("**Huang Bei WS1**"), as having been "established by the Jinan Municipality and fully owned by it. Its main mission was to secure the financing for public interests projects of the Jinan Municipality, including the Xiaoqing River Project, carry out their development and construction, and implement any other public interest tasks assigned to it by the Jinan Municipal Government." (Huang Bei WS1, ¶ 5). As the Deputy General Manager and Principal Engineer of the Binhe Group, Ms Huang attests that she was involved in the planning of the Huashan Development Project (Huang Bei WS1, ¶ 6). Ms Huang further attests that the Transaction Center was "in charge of repurchasing the land use rights" (Huang Bei WS1, ¶ 8). She further attests that one of her responsibilities "was to supervise the conclusion of repurchase agreements by the [Transaction Center], since I had been carrying out that type of work previously in my functions … I was therefore involved in the procedures concerning the

160. Addressing the Respondent's contention that the dispute must have been notified to "the ministry in charge of international arbitration on behalf of the State",[250] the Claimant states as follows:

> "Nothing in international law, nor in the text of Article 9 of the BIT supports the Respondent's insistence that the obligation rested on the Claimant to investigate and discover which entity within the State administration of the PRC would be responsible and to notify this specific entity. The issue is rather one of effectiveness of the obligation, which suggests that the dispute should be notified to the State entity that is involved in it and that can thus resolve it. This is what the Claimant and JHSF did: their notifications were addressed to the local authorities in Jinan involved in the expropriation and with the power to reverse course, or otherwise ensure that the Treaty breaches were fixed."[251]

161. Addressing the six-month period in Article 9(2), the Claimant contends that Article 9(1) does not impose an obligation to seek an amicable settlement but rather "express[es] a preference" for such settlement, as is evidenced by the use of the term "should" in the provision. The Claimant says, further, that the provision does not mandate "negotiation" or "consultation", referring simply to "should as far as possible be settled amicably".[252] In the Claimant's contention, referencing arbitral decisions, the Respondent was given every "opportunity to redress the problem" following the Claimant's notification thereof to the relevant Jinan authorities.[253] As a concluding point, again referencing arbitral decisions, the Claimant says that the "cooling off" period "is procedural rather than jurisdictional in nature".[254]

162. The engagement between the Claimant and Respondent, in the form of the Jinan Municipality authorities, on the issue of expropriation and compensation was addressed in the witness evidence submitted by both Parties. In his Witness Statement for the Claimant, dated 2 December 2019, Mr Helmut Naujoks described a series of detailed meetings, from 20 March to 28 July 2014, between representatives of the Claimant and

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repurchase of land-use rights on state-owned land in the area covered by the Huashan Project." (Huang Bei WS1, ¶ 9)

[250] PO Counter-Memorial, ¶ 189.

[251] PO Counter-Memorial, ¶ 190.

[252] PO Counter-Memorial, ¶¶ 193 – 194.

[253] PO Counter-Memorial, ¶¶ 196 – 197, referencing *Burlington Resources Inc. v. The Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction of 2 June 2010, para. 315, CL-0006.

[254] PO Counter-Memorial, ¶ 200, referencing *Biwater Gauff (Tanzania) Ltd. v. The United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008, para. 343, CL-0012.

JHSF, including Mr Scharping, on the one side, and representatives of the relevant bodies of the Jinan Municipality, the Licheng District, and the Shandong Provincial Government, on the other side ("**Naujoks WS**"). On his evidence, the search for a solution to the dispute over the valuation, for purposes of compensation, of the JHSF Land-use right and Buildings foundered in a meeting on 18 July 2014 when it became clear to the Claimant's representatives that those with whom they were engaged on the PRC side were not in a position to make the necessary decisions and had "no power at all to negotiate".[255] He concludes on this point:

> "Mr. Scharping complained that the lady in charge of the Transaction Center, Ms. Huang Bei, had refused any conversation since 2 July 2014, claiming each time that it was all within the jurisdiction of the land resource bureau. Mr. Scharping made it clear that this was outrageous behavior as the Germans were being tricked."[256]

163. Mr Naujoks goes on to contest the witness evidence submitted by Ms Huang Bei.

164. In her witness evidence, Ms Huang Bei, in her First Witness Statement, addresses, *inter alia*, the compensation valuation methodology adopted in respect of the Huashan Development Project, as well as various meetings in which she participated by the Claimant's/JHSF's representatives. In her Second Witness Statement, dated 13 April 2020 ("**Huang Bei WS2**"), responsive to Mr Naujoks WS, addressing various meetings in July 2014, Ms Huang Bei states, *inter alia*, as follows:

> "… I, like many other colleagues involved in the Huashan Project, went out of our way to help JHSF by meeting its representatives in good faith multiple times to hear their requests and try to find a solution.
>
> This process was occasionally frustrating because JHSF appeared only interested in obtaining compensation calculated on the basis of proceeds sharing, to which it was not entitled, rather than considering alterative commercial options that we proposed that would help its business, such as relocating its business to a new site (as I describe in more detail below). JHSF repeatedly insisted on the application of the proceeds sharing method, and we repeatedly explained to them why this was not possible.
>
> […]
>
> I met JHSF's representatives again on 28 and 29 July 2014, together with officials of the Licheng District Government and the Licheng Branch of

[255] Naujoks WS, ¶¶ 55 – 56.

[256] Naujoks WS, ¶ 57.

> the Jinan Municipal Land Resources Bureau, and other representatives. During that meeting, we discussed in detail why the proceeds sharing method would not be applied in the context of the Huashan Project – neither to JHSF nor to any other affected entity."[257]

165. The Second Objection is the subject of further argument by the Parties in their second round written submissions, their oral submissions during the hearing (in passing), and their PHS (in passing). These further submissions do not, however, materially elaborate on the Parties' contentions as outlined above and do not, therefore, require further summary for purposes of this Award.

b. The Tribunal's analysis and conclusions

166. The Tribunal is not persuaded by the Respondent's Second Objection.

167. As a preliminary matter, the Tribunal emphasises that it considers that the amicable settlement provisions in the BIT are important and must be given due weight. They reflect the Parties' agreement and cannot simply be read down or read out of the BIT through inattentive interpretation, disregard for the facts, or a sense that requirements of this kind are to be read as being "merely" procedural, or that they do not otherwise give rise to black-letter obligations. Treaty provisions must be given appropriate effect.

168. Equally, however, amicable settlement clauses, such as that in Article 9(1) and (2), must be construed according to their terms, not beyond, and cannot be elevated to totemic importance in circumstances in which it is evident that no amicable settlement is likely.

169. The Tribunal construes Article 9(1) and (2) as requiring efforts to achieve an amicable settlement. It is not merely hortatory or discretionary. The putative respondent must be apprised of the claim in sufficient detail to be able to identify the putative claimant, to understand the essence of the claim, to appreciate the settlement requests of that putative claimant, and to have a counterparty with whom to engage. The express terms of Article 9(1) and (2) do not impose on the Claimant a requirement to notify the central government authorities of the Respondent and to particularise in detail the elements of a potential treaty-based claim. It is more than sufficient, in the Tribunal's view, that the Claimant takes steps to ensure that the authorities of the Respondent that have

[257] Huang Bei WS2, ¶¶ 26 – 27, 31.

responsibility for the matter in contention are aware of the fact of the dispute, and of its essence, what the Claimant considers would be necessary to settle the dispute amicably, and a channel to pursue settlement discussions, if appropriate. Article 9(1) neither specifies nor implies any formalities beyond this, in terms of notification, nor imposes any modalities to take forward settlement discussions. It does not require an amicable settlement, only that an avenue for a potential settlement is meaningfully stood up. If the engagement of particular decision-makers on either side is required, it is the responsibility of the first points of appropriate contact on each side to ensure that the relevant authorities or personnel are involved (or at least that the relevant authorities or personnel are informed). The purpose of amicable settlement clauses, such as the one in issue, is to ensure that the possibility of amicable settlement is not lost through ignorance of either party of the fact of the dispute and the position of the other party.

170. From the record presented in these proceedings, the Tribunal considers that the Claimant more than sufficiently met its burden under Article 9(1) and (2). Even if the full details and extent of the Claimant's BIT claim were not spelt out in the multiple exchanges between the Party representatives, by the point at which the RfA was transmitted, the Respondent was not materially in ignorance of the fact of the dispute, of the Claimant's contentions, or of what would be necessary from the Claimant's perspective to reach an amicable settlement. The fact that, when the Claimant came to particularise its claim in detail in BIT terms, elements of claim and nuance were added, is not surprising. Nor does it serve to undermine the Claimant's compliance with the amicable settlement imperative in Article 9(1) and (2). By the end of July 2014, the Respondent would have been under no illusion (a) of the fact of the dispute, (b) of its essence, (c) of the Claimant's inclination to avail itself of claimed BIT rights, (d) of what the Claimant considered would be the necessary contours of an amicable settlement, and (e) of the Claimant's representatives with whom to pursue any settlement discussions. That the Claimant sought subsequently to add braces to its belt, through its Application to Amend, does not call into question its compliance with its Article 9(1) and (2) obligations. The Tribunal did not, in the course of the proceedings, detect any material possibility that the dispute might have been settled amicably but for the notification by the Claimant of some point of detail before the filing of the RfA.

171. Having regard to the preceding, the Tribunal dismisses the Respondent's Second Objection. The Claimant satisfied the requirements of Article 9(1) and (2) of the BIT with respect to the requirements to provide for the possibility of an amicable settlement.

B. THE RESPONDENT'S CHINESE LAW OBJECTIONS

172. The Tribunal turns now to the Respondent's Chinese Law Objections. These are rooted in Ad Article 9 of the Protocol to the BIT, which, to the extent there stated, contains a *renvoi* to Chinese law. This as follows:

> "With respect to investments in the People's Republic of China an investor of the Federal Republic of Germany may submit a dispute for arbitration under the following conditions only:
>
> (a) the investor has referred the issue to an administrative review procedure according to Chinese law,
>
> (b) the dispute still exists three months after he has brought the issue to the review procedure, and
>
> (c) in case the issue has been brought to a Chinese court, it can be withdrawn by the investor according to Chinese law."

173. The Respondent's Third Objection invokes Ad Article 9(a), contending that the Claimant failed to refer the dispute to an administrative review procedure in accordance with Chinese law. The Respondent's Fourth Objection invokes Ad Article 9(c), contending that JHSF irreversibly elected to pursue domestic litigation and, its claim having been dismissed by a final decision of the Chinese courts, the Claimant is precluded from resorting to arbitration. The Respondent roots both Objections in the second sentence of Article 26 of the ICSID Convention,[258] which provides as follows:

> "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."

174. Ad Article 9 thus goes to the issue of the Respondent's consent to arbitration for purposes of Article 25(1) of the ICSID Convention. If the Claimant cannot satisfy the

[258] Preliminary Objections, ¶ 151.

requirements of the Ad Article 9, the Respondent's case is that its deemed consent to arbitration under the ICSID Convention will have been vitiated.

175. Ad Article 9 establishes three conditions: (i) the investor must have referred the issue to an administrative review procedure according to Chinese law, (ii) the dispute still exists three months after the issue has been referred to the review procedure, and (iii) in the event that the issue has been brought before a Chinese court, it can only be withdrawn from that proceeding in accordance with Chinese law. In these proceedings, the Respondent advances its Third and Fourth Objections under distinct heads. Ad Article 9(a) establishes a requirement to refer the issue in dispute to a municipal administrative review procedure. Ad Article 9(c), while not requiring municipal court proceedings, operates in circumstances in which the issue in dispute has been brought before a municipal court.

176. Without prejudice to these provisions, the Tribunal notes that the final sentence of Article 4(2) of the BIT provides as follows: "At the request of the investor the legality of any such expropriation and the amount of compensation shall be subject to review by national courts, notwithstanding the provisions of Article 9." While this provision, too, does not compel resort to municipal courts, it requires that such review procedures shall be available to an investor.

(1) Third Objection — the Claimant failed to resort to an administrative review procedure according to Chinese law

a. The Parties' arguments

177. Addressing the facts going to the application of Ad Article 9(a), the Respondent asserts that "the investor", here the Claimant, made no effort to comply with the administrative review requirements of this provision.[259] The Respondent goes on to say that JHSF "is not a claimant in this arbitration, and is not a protected investor under the BIT. Yet, whatever administrative proceedings were held in China were undisputedly instigated by JHSF (and not the Claimant)."[260]

[259] Preliminary Objections, ¶¶ 155 – 156.
[260] Preliminary Objections, ¶¶ 157 – 158.

178. Beyond this, and separately, the Respondent contends that, while JHSF applied for administrative review of the Expropriation Decision, it failed to apply for review of the key 29 August 2016 Compensation Decision,[261] which is central to the Claimant's case. It was the Compensation Decision that found, *inter alia*, that the expropriation was lawful and that compensation has been assessed in full compliance with applicable Chinese laws and regulations. It was also the Compensation Decision that "set the monetary recompense due to JHSF … [and] a time limit for removal and was the basis for the evacuation notice of 1 March 2017 and the subsequent enforcement measures that became necessary due to JHSF's refusal to comply."[262] The Respondent notes further that the Compensation Decision itself expressly provides for the possibility of administrative review or litigation challenge of the Decision,[263] the operative text reading as follows:

> "If not satisfied with the Decision, the Expropriated Party may apply for administrative reconsideration to Shandong Province People's Court withing 60 days after service of the decision, or lodge an administrative litigation to Jinan Intermediate People's Court within 6 months after service of the decision. Where the Expropriated Party does not move after expiration of the abovementioned period, Jinan People's Court shall apply to the People's Court for compulsory execution."[264]

179. Noting the Claimant's contention that administrative review of the Compensation Decision would have been futile, the Respondent observes that "[t]his allegation that the executive and judiciary of China are incapable of administrating effective justice is not only entirely baseless, it was not a view shared by the Federal Republic of Germany when it agreed to the administrative review requirement in *Ad* Article 9(a) of the BIT Protocol."[265]

180. In its response to this Objection, the Claimant notes that Ad Article 9(a) does not require that the administrative review procedure has been completed, let alone that administrative remedies have been exhausted, but only that the issue has been submitted

[261] Compensation Decision, 29 August 2016, C-0007.
[262] Preliminary Objections, ¶¶ 159 – 160.
[263] Preliminary Objections, ¶ 160.
[264] Compensation Decision, 29 August 2016, p.4; C-0007.
[265] Preliminary Objections, ¶ 162.

to the administrative authority for review. The Claimant, in any event, contends that the administrative review requirement has been met in this case.[266]

181. To this end, the Claimant points to JHSF's Application for Administrative Review of 17 November 2014 ("**AAR**") which sought review of the 11 September 2014 Expropriation Decision[267] on grounds of the "erroneous application of the law and regulations and also because legal procedure has been violated".[268] In addition to addressing applicable Chinese law, the AAR also expressly references both the Claimant's interest in JHSF and the BIT, in the following terms:

> "Especially, we have already elaborated under Sec. 3 of the application that Jinan Hela Schwarz Food Co., Ltd. is a German invested company, the only foreign invested company in the Hua Shan Area concerned by this expropriation. As such, the investment of our company is specifically protected by the Agreement between the Federal Republic of Germany and the People's Republic of China on the Encouragement and Reciprocal Protection of Investment concluded in 2003. The treaty prohibits an arbitrary and unjustified treatment to the investment of a German investor in China. Our investor shall not be deprived of his rights given by the treaty as well as by the Property Law, as explained above."[269]

182. Addressing its decision not to challenge the Compensation Decision, the Claimant rejects the Respondent's contention that each and every administrative act had to be referred for administrative review, contending that such an approach

> "would force investors to wait until the very last act relating to the original wrongdoing before they can refer the issue to an administrative review procedure. In a number of situations, this would significantly postpone the time when investors can initiate administrative review procedures and ultimately submit a dispute to arbitration. Alternatively, it would force investors to commence a string of separate administrative review procedures for each separate act, in order not to lose the right to challenge the earlier ones as new ones kept occurring. This could also be seen as offering the possibility for States to postpone such a procedural sequence for as long as they wish by simply taking new administrative acts. This would prevent investors from seeking justice under the BIT."[270]

[266] PO Counter-Memorial, ¶¶ 206 – 207.

[267] Official Expropriation Decision, 11 September 2014, C-0085.

[268] Application for Administrative Review, November 2014, p.1; C-0002.

[269] Application for Administrative Review, November 2014, pp. 5 – 6; C-0002.

[270] PO Counter-Memorial, ¶ 212.

183. In this regard, the Claimant also queries why the Compensation Decision was issued when it was, on 29 August 2016, almost two years after the initiation of administrative proceedings in November 2014,[271] noting further that "the Compensation Decision simply had the purpose of confirming the amount of compensation".[272]

184. On the issue of whether the request for administrative review had been made by "the investor" (the Claimant), the Claimant says, *inter alia*, as follows:

> "… JHSF is the vehicle used by Hela-Schwarz to carry out its investment in China. Indeed, the Claimant **had to** invest through a local company under Chinese law. As such, the holder of the expropriated land use right and owner of the buildings was, formally, JHSF. As a logical consequence, the Expropriation Decision was directed to JHSF, which therefore was the entity entitled to file a request for administrative review. It follows that, if the Claimant wanted to carry out an administrative review as provided in the BIT, it had no other choice but to file the administrative review request through JHSF. This, however, does not alter the fact that it was the Claimant that in substance referred 'the issue' (the legality of the expropriation) to administrative review. The local advisors that were mandated to pursue the issue were authorised to do so by the Claimant directly."[273]

185. The issue of whether the Claimant could have applied for administrative review in its own right is the subject of expert evidence by Professor He Haibo, for the Respondent ("**He Haibo ER**"), and in the Second Expert Report of Professor Lin Feng, for the Claimant ("**Lin Feng ER2**"). While there are elements of difference between these experts, their conclusions overlap, as the following makes clear:

> **Conclusion of Professor He Haibo**
>
> "Based on the provisions and cases discussed above, we can conclude that, despite that the Expropriation Decision and Compensation Decision are directed to JHSF, if the Claimant, as the sole shareholder of JHSF, had filed an application by itself or jointly with JHSF for administrative review of the Expropriation Decision and the Compensation Decision, its application could possibly have been accepted."[274]

[271] Memorial, ¶ 130.

[272] PO Counter-Memorial, ¶ 210.

[273] PO Counter-Memorial, ¶ 216.

[274] He Haibo ER, ¶ 19.

Conclusion of Professor Lin Feng

> "In conclusion, it's not clear under Chinese administrative law that the applicant as a shareholder is eligible to bring an application to challenge the expropriation decision through administrative reconsideration. A shareholder's eligibility to bring an application for administrative reconsideration depends on whether he/she has material interests in the subject matter. If the company has brought an application for administrative reconsideration, it is better then for a shareholder to be joined as a third party instead of another/joint applicant."[275]

186. As the Tribunal will come to address below, it is not persuaded that any clarity can be found in the expert evidence but in any event, for the reasons set out below, the Tribunal is satisfied that it does not need to resolve this question of Chinese law as the point ultimately turns on a matter of treaty interpretation.

187. There was little substantive elaboration on the issues going to this Objection in the Parties' second round written submissions. A number of points of detail emerged, however, in the Parties' oral submissions, including in response to written questions from the Tribunal in advance of the Parties' closing oral submissions.

188. In its opening oral submissions, the Respondent stated, *inter alia*, as follows:

> "The Claimant has not submitted to administrative review either the compensation decision, which we say is the real complaint, or secondly, the revocation of the food production licence which, according to Dr Dupuy in paragraph 269 of the Claimant's Reply, is the central plank of the indirect expropriation for the business, and the ultimate reason why the Claimant was unable to pursue its business further.
>
> We say therefore those issues, compensation for land use right and the indirect expropriation of the business, are not within this Tribunal's jurisdiction.
>
> Members of the Tribunal, could I develop one point very briefly, and it is my final point. Whether the Expropriation Decision, the compensation decision and the food production licence decision are separate issues for the purposes of this BIT is important because if these decisions are separate issues, then the Claimant has not referred the compensation decision or the food production licence decision to administrative review, and therefore we say are barred by Ad Article 9(a). That's our second jurisdictional submission I have just developed.
>
> If these decisions are not separate issues, but they are the same issue, then that issue, we say, has been litigated in the Chinese courts, and therefore,

[275] Lin Feng ER2, ¶ 30.

> the Claimant is barred pursuant to Ad Article 9(c), and that is our first jurisdictional submission. Either way, we say this Tribunal, with respect, has no jurisdiction."[276]

189. In its closing oral submissions, the Respondent elaborated on this point, *inter alia*, as follows:

> "… not every element that forms the basis of a subsequent BIT arbitration must be referred to administrative review. However, where the administrative review procedure is available under Chinese law, the investor must, for the reasons I have explained, refer to administrative review all the issues which the investor subsequently relies on as constituting either, firstly, a breach of a BIT obligation; or secondly, the core elements of a breach of a BIT obligation.
>
> … in this case there are two, possibly three key decisions that could have been but were not referred to administrative review. Firstly, the compensation decision itself; secondly, the food production licence measure; and thirdly, and this is on the Claimant's case, which is not accepted by us, on the Claimant's case, the failure by the LAR Agency to conclude a land repurchase contract is an administrative decision that can be referred to administrative review.[277]
>
> [As regards] … the food production licence measure, [Claimant's counsel] said in closing … that this decision cannot be referred to administrative review.
>
> With respect, we disagree. I have two points to make on that briefly.
>
> First, Exhibit R-133, … the general measure that was promulgated by the Jinan Food and Drug Administrative Bureau on 2nd March 2018 … provides specifically that:
>
> > 'If [a] food producer refuses to accept the decision to withdraw the food production licence, it shall be entitled to apply for administrative review ...'
>
> So we say that recourse was clearly available to JHSF.
>
> The second point … is this: at R-53, we see there the application by JHSF to apply to cancel its own food production licence, dated 3rd July 2018.
>
> So we say not only was there no referral of the measure to administrative review, which was expressly possible, not only was that the case, JHSF willingly applied for a cancellation of its own food production licence."[278]

[276] Transcript, Day 1, page 196, line 2 to page 197, line 4.

[277] The "**LAR Agency**" is the Land Acquisition and Reserving Agency that is responsible for the repurchase of land use rights and buildings on State-owned land in the Huashan area.

[278] Transcript, Day 5, page 80, line 6 to page 82, line 1.

190. The Respondent elaborated upon these submissions in its PHS, notably distinguishing between the Expropriation Decision, which was referred for administrative review, and the Compensation Decision, which was not.[279]

191. The Claimant added little beyond the headline arguments noted above in its PO Rejoinder.[280] In its closing oral submissions,[281] the Claimant differentiated between the "dispute" and the "issue" that had to be referred for administrative review, contending that

> "[t]he dispute can be brought before an arbitral tribunal if the issue has been brought to administrative review. So the issue is something different than the dispute. The issue is also in the singular. If it was to denote all administrative measures that the investors contended breached international law, then the wording 'measures' or 'acts' would have been used, but the term 'the issue' is used instead.
>
> The issue is the core of the dispute. It is not the legal classification, and it is not every single administrative act that may or may not amount to or form part of a breach of international law.
>
> Here, the issue is the expropriation of the land use right. If there were no expropriation, we would not be here. While there have been other acts that may or may not be suitable for determination by administrative review, those are not 'the issue' in the present proceedings."[282]

192. In its PHS, the Claimant addressed the argument advanced by the Respondent in its closing oral submissions, as follows:

> "In their closing submission the Respondent introduced, for the first time, the argument that 'the compensation decision is the de jure taking of JHSF's land use right', and that, accordingly, **that** was the 'issue' that Hela-Schwarz should have challenged. This is an argument concocted at the last minute for the purposes of trying to deny the Tribunal's jurisdiction with no basis in Chinese or international law. This is apparent not only from the fact that the Respondent has not raised it during the past nearly six years of proceedings, but also the Respondent's own closing presentation, which unequivocally gave 11 September 2014 as the date of the direct expropriation. This is the date of the Expropriation Decision. The Compensation Decision is dated 29 August 2016.

[279] Respondent's PHS, *inter alia*, ¶¶ 82 – 94.

[280] PO Rejoinder, ¶¶ 52 – 72.

[281] Transcript, Day 1, page 117, lines 7 – 16; Day 5, page 69, line 23 to page 72, line 4.

[282] Transcript, Day 5, page 70, line 10 to page 71, Line 3.

> The Respondent's further (new) argument that if the Expropriation Decision is 'the issue' that needs to be challenged in administrative review proceedings, then only the public benefit can be challenged in this arbitration is equally unavailing. It distorts the meaning of 'the issue' in Ad Article 9 to mean any issue, measure, act or policy in dispute, which in itself is contrary to the Respondent's own agreement that 'the issue' is the "core element of a breach of a BIT obligation'."[283]

b. The Tribunal's analysis and conclusions

193. Ad Article 9(a) of the BIT Protocol requires an investor to refer "the issue" to "an administrative review procedure" in accordance with Chinese law. It is limited to "administrative review" proceedings, which will not always be available. It conditions the Respondent's consent to arbitration on the investor fulfilling its obligation to refer. It is self-evidently a carefully conceived and formulated provision that must be given appropriate content and weight. It must be construed to achieve its evident purpose of affording Chinese administrative review procedures an opportunity to address, and potentially resolve, disputes before they are referred to arbitration. That construction, though, must be reasonable, and cannot effectively subject an investor to the potential jeopardy of a multiplicity of connected administrative acts, each of which must be individually referred to administrative review before arbitration proceedings can be commenced.

194. The Tribunal is not fully persuaded by the Claimant's textual argument distinguishing between the "dispute" and the "issue" that must be referred to administrative review insofar as the differentiation is advanced for purposes of characterising the "issue" in broad, generic terms as anything that is proximately connected to the "dispute". This, in the Tribunal's view, takes Ad Article 9(a) too far from its purpose of affording an opportunity for Chinese administrative review procedures to address the "dispute" before it is referred to arbitration.

195. This said, the Tribunal considers that there may well be an important distinction of a narrower kind to be drawn between the "dispute" and the "issue" for two reasons. The first is that the "issue" to be referred for administrative review will fall to be characterised as an issue under Chinese law. The "dispute" to be referred to arbitration, however, will almost certainly fall to be differently characterised, by reference to the

[283] Claimant's PHS, ¶¶ 157 – 158.

terms of the BIT. The second reason is that the "issue" properly referred to administrative review may be either narrower or broader than the "dispute" to which it relates, notably in circumstances in which there are multiple administrative acts.

196. Noting this, there must, in the Tribunal's view, be a sufficiently close and proximate connection between the "dispute" and the "issue" referred to administrative review such that the resolution of the "issue" through administrative review would amount also to a resolution of the "dispute" that would have been referred to arbitration. If there is not a sufficiently close and proximate connection of this nature between the "dispute" and the "issue", Ad Article 9(a) would not serve its purpose.

197. In broad terms, the dispute between the Parties arises from what the Claimant considers to be the inadequate compensation offered by the Respondent for the latter's expropriation of the Land-use right and Buildings of the Claimant's wholly-owned subsidiary, JHSF, these constituting the principal elements of the Claimant's "investment" in issue in this Claim. The asserted inadequacy of the compensation is both the origin of the dispute and its gravamen.

198. While there are multiple administrative acts that contributed to the expropriation of the investment, the key and critical act in the sequence was undoubtedly the Expropriation Decision of 11 September 2014 as this Decision communicated the Jinan Municipality's decision to expropriate, *inter alia*, JHSF's Land-use right and Buildings for purposes of the Huashan Development Project.[284] The Expropriation Decision also, *inter alia*, described the basis of the compensation to be paid for the expropriation (at Section IV), and, additionally, provided that an "expropriated owner" could "apply for administrative reconsideration within 60 days … or file an administrative action before the people's court within three months …" (at Section V).

199. The Expropriation Decision was followed in short order by the Appraisal Report dated [19] September 2014, which valued the JHSF Land-use rights and buildings for purposes of compensation.[285]

[284] Official Expropriation Decision, 11 September 2014, C-0085.

[285] Appraisal Report of Shandong Zhongan, 19 September 2014, C-0086.

200. The Claimant, through JHSF, sought a review of both of these decisions.

201. As regards the Appraisal Report, JHSF initially requested a review of the valuation by the "Appraising Party", the Shandong Zhongan Land Real Estate Appraisal Co. Ltd, on 26 September 2014.[286] That requested review was rejected by a Reply from the Appraising Party on 8 October 2014, the concluding line of which read: "In case of any objection to this reply, please apply for appraisement to Jinan Appraisal Expert Commission for Expropriation and Demolition of Houses on State-owned Land ["**Jinan Appraisal Commission**"] within 10 days after the receipt of this reply."[287] In light of this Reply, JHSF, on 13 October 2014, applied to the Jinan Appraisal Commission "for review of the appraisal."[288]

202. The Jinan Appraisal Commission acknowledged receipt and the sufficiency of the "application for expert review" on 3 November 2014, identifying the members of the expert panel who have been appointed to undertake the review.[289] On 11 November 2014, the Jinan Appraisal Commission responded to the application for expert review noting that two of the points raised in the application – the first addressing the relevance and application of the BIT; the second addressing the effect of JHSF's repurchase application submitted to the Transaction Centre – did not come within the scope of the expert review. On the substantive points raised by JHSF regarding the approach to valuation, the Jinan Appraisal Commission concluded, *inter alia*, that:

- the valuation appraisal complied with the relevant legal provisions;
- the appraisal procedure complied with the applicable appraisal codes; and
- there were minor problems with the valuation details, which should be corrected and a new appraisal report issued.[290]

[286] Objections to the Appraisal Report from JHSF to Shandong Zhongan, 26 September 2014, C-0087.

[287] Reply from Shandong Zhongan to the objections to the Appraisal Report from JHSF, 8 October 2014, C-0088.

[288] Application for review of the Appraisal Report from JHSF to the Jinan Appraisal Expert Commission, 13 October 2014, C-0089.

[289] Acceptance Notice of JHSF's application for review of the Appraisal Report, 3 November 2014, C-0090.

[290] Opinion of the Jinan Appraisal Expert Commission regarding the application for review of the Appraisal Report from JHSF, 11 November 2014, C-0091. An Updated Appraisal Report was subsequently issued, dated 19 April 2016 (R-0044) – said (by the Compensation Decision) to have been served on JHSF on 27 April 2016 – following the Administrative Reconsideration Decision addressed below, increasing the value of the compensation awarded to JHSF.

203. As regards the Expropriation Decision, the Claimant, through JHSF, submitted an Application for Administrative Review initially on 10 November 2014 and subsequently, in a corrected version, to the Shandong Provincial People's Government Administrative Review Office on 17 November 2014.[291] The AAR is a detailed and wide-ranging document that particularises the details of the complaint by reference to both Chinese law and regulations (Section 1), and procedure (Section 2), in connection with the latter of which reference is also made both to the BIT and to the interests of "[o]ur investor", i.e., the Claimant, in the context of the BIT. The AAR also refers to the Appraisal Report and the application for review thereof, and attaches the relevant documents. It additionally raises the issue of the potential liability for damages and "reserve[s] the right to pursue this claim in a separate civil litigation."[292] As such, the "issues" referred in the AAR correspond closely to the "dispute" raised in this arbitration.

204. Following delays in the administrative review process and unsuccessful attempts at mediation,[293] an Administrative Reconsideration Decision was issued on 15 April 2016 ("**AR Decision**").[294] This maintained the Jinan Municipality decision on the issues of the public interest of the Huashan Development Project, the basis of compensation for expropriation, and the alleged violation of statutory procedures. It concludes by noting that the Decision may be challenged by way of "administrative litigation".

205. The Respondent's case on its Ad Article 9(a) Objection has two principal components, namely, that (a) insofar as any issue was referred for administrative review, it was referred by JHSF, not the Claimant, and (b) while JHSF referred the Expropriation Decision for review, it did not refer for review the Compensation Decision or other key administrative acts of which it complains.

206. On the first of these issues, the Tribunal accepts the Claimant's contention that, as JHSF was the vehicle used by the Claimant to carry out its investment in China, and as the relevant decisions were addressed to JHSF, the reference of a relevant "issue" for

[291] Memorial, ¶ 121.

[292] Application of Administrative Review (now referred to as "Application for Administrative Review"), C-0002.

[293] Memorial, ¶¶ 123 – 125.

[294] The People's Government of Shandong Province, Administrative Reconsideration Decision (now referred to as "Administrative Review Decision of the Shandong Government dated 15 April 2016"), C-0003.

administrative review by JHSF was an amply sufficient fulfilment of its Ad Article 9(a) obligation. In this regard, the Tribunal does not consider that it needs to reach a conclusion on the contested expert evidence on whether, had it wished to do so, the Claimant would itself have been in a position to refer a relevant "issue" for administrative review. The Tribunal accepts that JHSF's references of issues for administrative review were in substance references by the Claimant. Any other interpretation would be both unreasonable and could potentially allow the Respondent to preclude resort to arbitration altogether by excluding an investor from referring for administrative review an issue directed at its Chinese investment subsidiary.

207. On the second component of the Respondent's Objection – whether the administrative review gateway required the Claimant to seek review of every administrative act of which it complains – the Tribunal considers that the Claimant's referral of the Expropriation Decision, along with the Appraisal Report, for review, and, importantly, the detailed and express terms of those referrals, were sufficient to meet the Claimant's Ad Article 9(a) obligation in respect of (a) its claim regarding the lawfulness of the expropriation of the JHSF Land-use right and Buildings, (b) the adequacy of the compensation offered in respect of that expropriation, (c) the alleged procedural shortcomings of expropriation and compensation process, and (d) related and ancillary administrative acts along the way. The scope of the issues identified in the AAR overlap materially and sufficiently with the issues raised in the dispute referred to arbitration in these proceedings. The Claimant's failure to challenge the Compensation Decision or other related and ancillary administrative acts with respect to the Claimant's JHSF expropriation claim does not therefore render the AAR inadequate or incomplete.

208. While the Compensation Decision clearly included elements that went beyond the Expropriation Decision and Appraisal Report, it was expressly, in clear and specific terms, based on and rooted in the Expropriation Decision and the Appraisal Report, as well as in the administrative review decisions that followed in respect thereof. In the circumstances, the Tribunal considers that it was entirely reasonable for the Claimant to have reached the conclusion that there was neither further mileage in nor further Ad Article 9(a) necessity to apply for administrative review of the Compensation Decision. On the Tribunal's reading of the issues, the Claimant's apprehension of futility was not,

as the Respondent characterised it, an "allegation that the executive and judiciary of China are incapable of administrating effective justice",[295] but simply an appreciation that the Compensation Decision stood squarely on administrative review decisions that had already been taken.

209. In the Tribunal's view, Ad Article 9(a) does not require an investor to pursue administrative review of each and every administrative act to which it objects as long as there is a sufficiently close and proximate connection between the "issue" referred to administrative review and the "dispute" subsequently referred to arbitration such that the resolution of the "issue" through administrative review would amount to a resolution of the "dispute" that would have been referred to arbitration. On the facts of this case, the Tribunal concludes that the Compensation Decision was sufficiently close and proximate to the Expropriation Decision, the Appraisal Report, and the administrative review decisions in respect of each, as not to have required an independent reference to an administrative review procedure.

210. The same cannot be said, however, with regard to the Food Production Regulation that led to the cancellation of JHSF's food production licence, an administrative act that is central to the Claimant's indirect expropriation and FET claims in respect of its shareholding in JHSF. That Food Production Regulation was issued on 2 March 2018. Although it affected JHSF, it was addressed to all food manufacturers rather than to JHSF directly. The measure was not associated, directly or otherwise, with the Expropriation Decision, being a food production, management and safety measure. It contemplates, on its face, the possibility of objection by any food producer, Article 12 of the Regulation stating as follows: "If the food producer refuses to accept the decision to withdraw the food production license, it shall be entitled to apply for administrative review or to file an administrative lawsuit in accordance with the law."[296]

211. In the circumstances, the Tribunal concludes that before the Claimant could properly submit to arbitration a dispute concerning the alleged indirect expropriation of, or FET breaches concerning, its shareholding in JHSF in consequence of the cancellation of its

[295] Preliminary Objections, ¶ 162.

[296] Several Provisions on Cancellation of Licenses of the Food Manufacturers no longer in compliance with Production Conditions by the Jinan Food and Drug Supervision Administration Bureau (Trial Application), 2 March 2018, R-0133.

food production licence, it was required, whether through JHSF or directly, to apply for administrative review of the Food Production Regulation of 2 March 2018. It did not do so. The consequence of this is that the Claimant's case of indirect expropriation and FET in respect of its shareholding in JHSF in consequence of the cancellation of its food production licence does not meet the jurisdictional requirements of the BIT and Protocol. The Tribunal accordingly dismisses this element of the Claimant's case on jurisdictional grounds.

212. This said, it remains to be assessed whether the Claimant's indirect expropriation case falls in its entirety with the dismissal of its claim based on the cancellation of its food production licence. While the Claimant's allegations in respect of the cancellation of its food production licence are material to its indirect expropriation case, they are not the only allegations that go to this element.[297] This issue is addressed further below.

213. Having regard to the preceding, the Tribunal dismisses the Respondent's Third Objection insofar as this concerns the application of Ad Article 9(a) in respect of administrative acts concerning the expropriation of the JHSF Land-use right and Buildings, the adequacy of the compensation offered in respect of that expropriation, and the alleged procedural shortcomings of that expropriation and compensation process, and other related and ancillary administrative acts. The Claimant satisfied the requirements of Ad Article 9(a) with respect to such measures. The Tribunal, however, upholds the Respondent's Third Objection insofar as this concerns the Claimant's indirect expropriation and FET allegations in respect of the cancellation of JHSF's food production licence in consequence of the Food Production Regulation of 2 March 2018.

(2) Fourth Objection – the Claimant irreversibly elected to pursue remedies before a Chinese court

214. The Respondent's Fourth Objection is that the Tribunal lacks jurisdiction because JHSF irreversibly elected to pursue domestic litigation. This objection is based on Ad Article 9(c) of the Protocol, which the Respondent says precludes an investor from resorting initially to municipal courts but thereafter to BIT arbitration if it is dissatisfied with the outcome of the municipal proceedings. Ad Article 9(c) provides:

[297] *Inter alia*, Memorial, ¶¶ 236, 245 – 249.

> "With respect to investments in the People's Republic of China an investor of the Federal Republic of Germany may submit a dispute for arbitration under the following conditions only:
>
> […]
>
> (c) in case the issue has been brought to a Chinese court, it can be withdrawn by the investor according to Chinese law."

a. The Parties' arguments

215. Although the Parties' written submissions on this Objection were reasonably succinct, the interpretation of this provision was the subject of close enquiry by the Tribunal in the course of the hearing.

216. The Claimant addresses the issue of judicial proceedings in its Memorial, referring to JHSF's Administrative Complaint to the Jinan Intermediate People's Court dated 3 May 2016,[298] the Administrative Ruling of that Court dated 19 July 2016 rejecting the complaint,[299] and the Administrative Ruling of the Shandong Higher People's Court dated 6 December 2016 rejecting JHSF's appeal against the first instance decision.[300] These proceedings, the Claimant contends, were "marked by the most blatant disregard of the Claimant's due process rights",[301] which saw JHSF's claims "rejected … on purely procedural grounds, without giving JHSF any opportunity to fully present its legal case or to be heard in an oral hearing."[302] The "alleged ground" for the dismissal of JHSF's claim was that "a decision had already been rendered in a case brought by other expropriated holders of land use rights in the Huashan Project area".[303] This "*res judicata*" decision[304] is said to be "manifestly misplaced" on the grounds that the prior invoked decision (a) was rendered in proceedings that involved different parties, (b) concerning different subject-matter, (c) failed to address the legal grounds invoked by JHSF, and (d) had not led to a final decision on the merits of the case.[305] The Claimant

[298] Administrative Complaint (now referred to as "Complaint from JHSF to the Jinan Intermediate People's Court"), C-0004.

[299] Shandong Ji'nan Intermediate People's Court, Administrative Ruling (2016) No. 296 (now referred to as "Decision of the Jinan Intermediate People's Court"), C-0005.

[300] Decision of the Shandong Higher People's Court, 6 December 2016, C-0006.

[301] Memorial, ¶¶ 301, 309.

[302] Memorial, ¶ 310.

[303] Memorial, ¶ 311.

[304] Memorial, ¶ 312.

[305] Memorial, ¶¶ 314 – 318.

notes further that "JHSF's claim was brought in full conformity with applicable procedural law and that the court did not mention any procedural irregularity on which to base its rejection."[306]

217. Having regard to these flaws and shortcomings, the Claimant contends that "the court's outright dismissal of JHSF's claim must be treated as an unjustified denial of the Claimant's right to be heard, in obvious violation of the principle of due process and of Article 4(2) of the Germany-PRC BIT",[307] the reference to Article 4(2) of the BIT being to the final sentence of this provision which provides that "[a]t the request of the investor the legality of any such expropriation and the amount of compensation shall be subject to review by national courts."

218. Addressing the Claimant's case, the Respondent says that Ad Article 9(c) imposes a condition that, if an investor has submitted the issues it subsequently wishes to submit to BIT arbitration, it must be possible to withdraw these as a matter of Chinese law, and that a claim that was brought and litigated to completion "can no longer be withdrawn".[308] Addressing the judicial proceedings, the Respondent says as follows:

> "Thus, this investment arbitration is at least the third bite of the cherry by the Claimant concerning the Expropriation Decision. Successive Chinese courts have independently ruled that the recovery and expropriation decided by the Expropriation Decision were lawful and valid, yet the Claimant again challenges those assessments in this arbitration."[309]

219. Addressing the substance of the judicial decisions, the Respondent states as follows:

> "After deliberating the matter, the court dismissed JHSF's claims. The court noted that the legality of the Expropriation Decision had already been ruled on by the Jinan Intermediate People's Court in a previous case brought by Ms Kang Xiaomei and others. In that case, the Jinan Intermediate People's Court concluded that the Expropriation Decision was '*based on facts supported by evidence, applying the laws and regulations correctly and in accordance with the legal procedures*'. In particular, the court rejected the plaintiffs' argument that the expropriation was not in the public interest.

[306] Memorial, ¶ 319.

[307] Memorial, ¶ 320.

[308] Preliminary Objections. ¶ 169.

[309] Preliminary Objections, ¶ 172.

Having ruled on the legality of the Expropriation Decision in a previous case, the Jinan Intermediate People's Court dismissed JHSF's challenge against the legality of the Expropriation Decision by way of summary judgment. Contrary to the Claimant's allegations, this was in full compliance with Chinese law and judicial practice. The Jinan Intermediate People's Court did not dismiss JHSF's challenge '*seemingly applying the principle of res judicata*', as the Claimant contends, but in applying rules governing administrative litigation in China. In particular, Article 3 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Administrative Procedure Law of the People's Republic of China … makes plain, a challenge brought before an administrative court can be rejected by way of summary judgment if the subject matter of the challenge (in the present case, the legality of the Expropriation Decision) has already been ruled on in an earlier judgment. Contrary to the Claimant's allegations, the identity of the parties bringing the challenge is irrelevant. Equally misconceived is the Claimant's argument that the Jinan Intermediate People's Court did not take into account its specific situation with respect to compensation, which the Claimant contends '*must be assessed separately for each aggrieved party, as it is dependent on a number of considerations, such as the location of the expropriated land, the remaining time until expiration of the land use rights, the category of the expropriated land* […] *sufficient prior notice and effective payment, etc*'. As mentioned above, the Expropriation Decision did not address the specific amount of compensation granted to each individual party. This is addressed in the Compensation Decision. Therefore, JHSF's specificities in that respect were entirely irrelevant to its challenge against the Expropriation Decision.

The compensation awarded to each individual party is determined in specific compensation decisions, and JHSF deliberately chose not to challenge the Compensation Decision that was addressed to it. If the Claimant and JHSF were not heard by Chinese Courts on the amount of compensation awarded to JHSF, thus, they can only blame themselves. On the other hand, far from showing a '*blatant disregard of due process of law*', the decision of the Jinan Intermediate People's Court to dismiss JHSF's challenge against the legality of the Expropriation Decision was entirely proper and in accordance with Chinese law. As a matter of fact, Chinese administrative courts routinely dismiss cases brought by litigants against administrative decisions, when the legality of such decisions has already been confirmed in an earlier case. The Claimant's allegation that '*the court's outright dismissal of JHSF's claim must be treated as an unjustified denial of the Claimant's right to be heard*' is therefore based on a fundamental misunderstanding of Chinese administrative litigation.

As was its right, JHSF appealed the Jinan Intermediate People's Court's ruling. After full and fair proceedings, the Shandong Higher People's Court upheld the Jinan Intermediate People's Court's ruling and reasoning in December 2016. Whereas JHSF could have applied for retrial of this decision on the basis of Articles 90 and 91 of China's Administrative Procedure Law, it chose not to do so."[310]

[310] Counter-Memorial, ¶¶ 114 – 118.

220. Noting that the issues addressed in the municipal court proceedings are essentially the same as those raised in the arbitration, and that the appellate judgment was explicitly stated to be "final",[311] the Respondent contends that the Claimant is

> "precluded from submitting this issue to arbitration under *Ad* Article 9(c) of the BIT Protocol because JHSF litigated this issue in the Chinese courts to completion."[312]

221. In its PO Counter-Memorial, the Claimant, *inter alia*, reiterates its argument that JHSF's claim was dismissed on procedural grounds without proceeding to the substance of the claim[313] and that reliance on the principle of *res judicata* "was misplaced, as one of the conditions to dismiss a claim on that ground, namely the identity of the parties, was missing."[314] It says, further:

> "Moreover, the Respondent is mistakenly reducing this to an issue of Chinese law, whereas the Chinese courts' conduct must be assessed in light of the specific rights conferred to the Claimant by the BIT. The alleged conformity of the dismissal with Chinese law could not distract from the fact that the Claimant's due process rights, in particular its right to be heard, were thwarted by the courts' failure to take its arguments on the substance into consideration. While it is true that the legality of the Expropriation Decision had already been ruled on by the Jinan Intermediate People's Court in a previous case, it bears noting that the Claimant was not given the opportunity to intervene and present its grievances in that earlier case. The result was that, in spite of the due process rights expressly conferred by the BIT, the Claimant's grievances were **never** taken into consideration by any Chinese court."[315]

222. The Claimant additionally says, *inter alia*, that

> "[w]hile, in theory, the Claimant could have applied for a retrial, this procedure – which must be distinguished from an appeal – would not have been an effective remedy in a context where no trial was carried out in the first place and where, most likely, the same issue would have been ruled upon by the same court again."[316]

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[311] Decision of the Shandong Higher People's Court, 6 December 2016, final sentence; C-0006.

[312] Preliminary Objections, ¶ 174.

[313] PO Counter-Memorial, ¶ 111.

[314] PO Counter-Memorial, ¶ 114.

[315] PO Counter-Memorial, ¶ 115.

[316] PO Counter-Memorial, ¶ 118.

223. Referring to the final sentence of Article 4(2) of the BIT, quoted above, the Claimant says that the Respondent "ignores Article 4(2) and instead focuses exclusively on *Ad* Article 9(c)"[317] and that, "[w]hatever the reach or meaning of *Ad* Article 9(c), proceedings aimed at reviewing the legality of an expropriation are excluded from its scope, as set out in the last sentence of Article 4(2). An investor who has referred the legality of an expropriation to a national court is entitled to submit a claim regarding the same State measures to international arbitration."[318]

224. In its PO Reply, the Respondent, addressing the Claimant's Article 4(2) argument, contends, *inter alia*, that this provision "does not say that the Claimant can pursue the same claim both domestically and in international arbitration. … [It] simply confirms that legal proceedings in the host State should generally be provided for so that foreign investors can question the legality of an expropriation and the amount of compensation, despite the fact that the treaty also foresees the possibility of arbitral recourse in appropriate circumstances."[319] Further, if the Claimant avails itself of its right under Article 4(2) to apply to the municipal courts, the consequences of Article 9(c) apply, namely, if the case can no longer be withdrawn from the Chinese courts, "the dispute shall not be referred to arbitration."[320] The Respondent concludes that "[i]nternational tribunals are not appellate bodies for municipal legal or regulatory matters by advocating successive proceedings in respect of the same issue until the alleged investor obtains its desired outcome."[321]

225. In its PO Rejoinder, the Claimant rejects the Respondent's interpretation of Article 4(2), contending that the concluding phrase of the last sentence of Article 4(2) – "At the request of the investor the legality of any such expropriation and the amount of compensation shall be subject to review by national courts, **notwithstanding the provisions of Article 9**" – "can only mean 'without prejudice to the investor's rights under Article 9'. In other words, referral of an expropriation to domestic judicial review does not affect the Claimant's right to submit the same expropriation dispute to

[317] PO Counter-Memorial, ¶ 221.
[318] PO Counter-Memorial, ¶ 222.
[319] PO Reply, ¶¶ 358 – 359.
[320] PO Reply, ¶ 359.
[321] PO Reply, ¶ 361.

arbitration."[322] Referring to other PRC investment protection treaties with similar language, notably the PRC – South Korea BIT, the Claimant contends that, insofar as the Tribunal might consider these provisions to be more favourable to the investor than Article 4(2) of the Germany-PRC BIT, those provisions are "imported into the [BIT] by operation of the most-favoured-nation clause in Article 4(3)."[323]

226. The Fourth Objection was the subject of particular enquiry by the Tribunal in the course of the hearing, notably with regard to the meaning to be given to the phrase "it can be withdrawn by the investor according to Chinese law." In response to inquiry by the Tribunal, the Respondent contended as follows:

> "The way it works is this, that it is open, we say, to an investor to bring Chinese court proceedings and to pursue international arbitration up until the point that the Chinese court proceedings can no longer be withdrawn. So before that stage, at some stage it can be withdrawn, and at that stage it's possible to ride two horses, as it were. But at some point, according to Ad Article 9(c), if the case can no longer be withdrawn, then Article 9(c) precludes arbitration from that point onwards.
>
> So Ad Article 9(c), sir, says that arbitration can be permitted, is permitted 'under the following conditions only', where the issue has been brought before a Chinese court and it can be withdrawn. So the contrary is when it can no longer be withdrawn, that precludes arbitration."[324]

227. On the issue of the meaning of the term "withdrawn", the Tribunal, in a series of questions, inquired whether, if the investor elects to use the procedure made available in the last sentence of Article 4(2), and institutes proceedings before a domestic court, it must withdraw those proceedings prior to the decision at first instance? Counsel for the Respondent replied as follows:

> "I think that must be right, sir. It must be withdrawn before a final judicial decision. Even if that decision can be appealed, a judicial decision is final up until the point it is appealed.
>
> […]
>
> China does not want to have a final decision of its courts being reviewed by international arbitrators, and that's the reason why, as a condition to

[322] PO Rejoinder, ¶ 77.

[323] PO Rejoinder, ¶ 80.

[324] Transcript, Day 1, page 181, lines 6 – 22.

> being able to file arbitration before arbitral tribunals, the investor must have withdrawn its case before going to international arbitration …
>
> […]
>
> Now, the investor also has the right to go to Chinese courts, and it's perfectly possible that Chinese courts of first instance, for example, would decide that indeed an Expropriation Decision is illegal, and then reverse the decision, and in that case, the case is over, there's no point going for international arbitration.
>
> Now, if the investor wants to go for international arbitration, what this Treaty requires is that either before they get their first instance decision they might also be negotiating with the administration in the meantime, before they get their first instance decision, or after they get the first instance decision but before they get the appeal decision, after which it's binding and the decision is final and it cannot be withdrawn, before they get to that point they have to withdraw their case, so that decisions of Chinese courts will not be reviewed by international arbitral tribunals. That's the way I understand the rationale behind this provision.
>
> […]
>
> … you can withdraw your proceedings after the first instance decision has been made, so once you have a first instance decision and the proceedings continue, you can withdraw, that's possible. But once you have an appeal decision, then you cannot withdraw your case anymore. So the withdrawal needs to happen either before the first instance decision or after the first instance decision."[325]

228. In the course of the hearing, in advance of the Parties' closing oral submissions, the Tribunal put the following written question to the Parties:

> "Under '[Ad] Article 9(c)' of the BIT Protocol (and having regard to the object and purpose of the clause pursuant to Art 31(1) VCLT) what does 'it can be withdrawn … according to Chinese law' mean and why? In particular, but without prejudice to other possible meanings, does it mean:
>
> a. after a first instance decision but before an appeal decision (as Respondent contends;
> b. or no longer pursued prior to the submission of the dispute to arbitration;
> c. or withdrawn pursuant to a legally mandated latitude to withdraw?"

[325] Transcript, Day 1, page 184, line 22 to page 188, line 18.

229. The Parties responded to this inquiry both in their closing oral arguments and, in more detail, in their PHS. Referencing Article 62 of the Administrative Procedure Law of the People's Republic of China,[326] the Respondent states, *inter alia*, as follows:

> "Under Chinese law, an administrative case can be withdrawn under certain conditions and subject to the consent of the court. At first instance, the plaintiff can withdraw its case and before the court pronounces its judgment or ruling, subject to the court's permission. The case cannot be withdrawn after the court pronounces its judgment or ruling, unless the plaintiff appeals. Where the judgement or ruling of first instance is appealed, the plaintiff can apply to the appellate court to withdraw the whole case (including the complaint at first instance) before the appellate court pronounces its ruling or judgment, subject to the court's and all other parties' permission. The case cannot be withdrawn after the appellate court pronounces its judgment or ruling.
>
> […]
>
> JHSF challenged the legality of the Expropriation Decision before Chinese courts, and in doing so brought to the courts the issue of whether the Expropriation Decision served a public benefit, on which Chinese courts made a final and binding determination. It is not in dispute that these issues can no longer be withdrawn in accordance with Chinese law. For that reason, the Tribunal lacks jurisdiction to rule on Claimant's allegations (i) that the Expropriation Decision did not comply with Chinese law, (ii) that the Expropriation Decision did not serve a public benefit, and (iii) all other issues relating to the Expropriation Decision."[327]

230. In its PHS, the Claimant addresses the issue in the following terms:

> "There is no question that 'the issue', namely the Expropriation Decision, 'had been brought to a Chinese court', as provided in Ad Article 9(c). However, this does not deprive this Tribunal of hearing the present dispute for three reasons.
>
> First, because the wording of the last sentence of Article 4(2) of the BIT expressly overrides the wording of Ad Article 9 as far as a challenge to a decision to expropriate is concerned. A procedural restriction cannot take away a substantive right.
>
> Secondly, because of the denial of justice suffered by Hela-Schwarz in those very proceedings before Chinese courts.

[326] Administrative Procedure Law of the People's Republic of China, 1 November 2014, R-0173. Article 62 reads: "Where, before a people's court pronounces its judgment or ruling for an administrative case, the plaintiff requests the withdrawal of the case, or the defendant modifies its administrative act and, as a result, the plaintiff agrees to and applies for the withdrawal of the case, the people's court shall enter a ruling on whether to allow the withdrawal."

[327] Respondent's PHS, ¶¶ 97, 100.

> Thirdly, because 'it can be withdrawn (…) according to Chinese law' in Ad Article 9(c), while unclear, refers to cases where the issue is concurrently before Chinese courts and international arbitration. If this risks being the case, the investor must withdraw the case (or cause for it to be withdrawn) before it can initiate international proceedings, and it must do so in accordance with Chinese law. The purpose of the provision is to prevent parallel proceedings and the risk of inconsistent decisions. If the Tribunal were to find that the issue that was central to the dispute before it was also *lis pendens* before a domestic court in China, it would have to decline jurisdiction to hear the case. Thus, from the choices provided by the Tribunal in Question 10, the correct interpretation is '(b)' (and not 'c' as suggested by the Respondent at the hearing).
>
> Accordingly, Ad Article (c) is of no relevance in the precent [sic] proceedings.
>
> The Respondent argued in its closing submission that the meaning of Ad Article 9(c) is that only where an investor has the permission of the Chinese court to withdraw its case can it bring the matter before an international tribunal, based on a nuanced and novel reading of the Chinese version of the BIT. The Respondent proposed not to fetter that discretion of the Chinese courts to refuse such permission in any way, leaving investors potentially hostage to the caprice of the very courts of the host state that they wish to avoid by bringing the matter to international arbitration. There is no way that Germany would have accepted such limited protection for its investors and the PRC has introduced no evidence that it did.
>
> The Respondent suggesting that this is the proper interpretation of the provision at this late stage in the proceedings is an apt illustration of the opacity of its system and goes to further reinforce the lack of due process that JHSF experienced. Nothing more."[328]

231. For completeness, the Tribunal notes that the lawfulness, according to Chinese law, of the decisions of the Jinan Intermediate People's Court and the Shandong Higher People's Court was addressed in expert evidence by both Professor Lin Feng, for the Claimant, and Professor He Haibo, for the Respondent. Both were also cross-examined on the issue. Neither expert, however, addressed the specific point here in focus, namely, the withdrawal of an issue, in accordance with Chinese law, that has been presented to a Chinese court. The matter was, however, addressed in both written and oral submissions by the Parties in response to express enquiry by the Tribunal. The Tribunal has accordingly exercised its judgement on this matter having careful regard to the Parties' submissions on the matter and subject to the appreciation that the point is ultimately one of treaty interpretation for decision by the Tribunal, namely, the

[328] Claimant's PHS, ¶¶ 160 – 166.

construction of Ad Article 9(c) of the Protocol. The issues that were the subject of expert evidence are addressed by the Tribunal addressed in **Part VI** of this Award, below.

b. The Tribunal's analysis and conclusions

232. Ad Article 9(c) is a self-evidently carefully conceived and formulated provision of the BIT and must be given due weight. It goes fundamentally to the Respondent's consent to arbitration under Article 25(1) of the ICSID Convention. Provisions on this nature cannot be swept aside by an appreciation simply that there is a triable issue under the BIT that remains in dispute. The Respondent is entitled to be able to rely on a provision that has been expressly agreed in the BIT and the Protocol.

233. There is an undeniable degree of opacity both in Ad Article 9(c) itself and in its interaction with the final sentence of Article 4(2) and Articles 9 of the BIT. The contentions of both Parties are arguable, and the Tribunal is not assisted in its interpretation of the clause by the expert evidence on Chinese law tendered by either Party.

234. This said, the Tribunal considers that the construction of these provisions, their interaction, and their application in the circumstances of this case, are amenable to ready clarification as follows.

235. First, the Claimant, through JHSF, undoubtedly brought the issue of the lawfulness of both the Expropriation Decision and the 15 April 2016 Administrative Review Decision to the Chinese courts.[329] In reaching this conclusion, the Tribunal recalls the conclusions that it has already reached in relation to the "investor" and the "issue" under Ad Article 9(a) and applies them to the same words used in Ad Article 9(c).[330] As will be recalled, while the Expropriation Decision addressed JHSF's property interests, in the form of its Land-use right and Buildings, it was not directed to JHSF by name but rather to all persons holding interests that were to be expropriated.

[329] Administrative Complaint of 3 May 2016, C-0004.

[330] *Supra*, ¶¶ 193–196 and 206.

236. Second, that JHSF complaint was dismissed by the first instance court, the Jinan Intermediate People's Court, in a summary judgment of 19 July 2016 on the ground that the lawfulness of the Expropriation Decision had already been challenged in court proceedings and had been upheld.[331]

237. Third, JSHF appealed the judgment of the Jinan Intermediate People's Court to the Shandong Higher People's Court, both on the substance of the original complaint and on the alleged procedural shortcomings and irregularities of the first instance judgment. The appellate court dismissed the appeal in a reasoned judgment of 6 December 2016. The appellate judgment was final.[332]

238. Fourth, whatever nuance may apply to the phrase "withdrawn by the investor according to Chinese law", JHSF at no time sought or applied to withdraw its complaint before the Chinese courts, whether pursuant to Article 62 of the Administrative Procedure Law of the People's Republic of China[333] or on some other basis.

239. Fifth, as a consequence of the preceding, the Tribunal need not reach a conclusion on the meaning of the phrase "withdrawn by the investor according to Chinese law". This said, the Tribunal considers that, if a claimant attempted, on reasonable grounds, to withdraw a complaint before a final decision, but was precluded from doing so as a matter of Chinese law or judicial practice, or some other conduct by the Respondent, that constraint could in principle itself give rise to an allegation of denial of justice. The Tribunal put just such a possibility to the Parties in the course of the Hearing without contradiction.[334] In the present case, however, the Claimant did not attempt to withdraw its case before the Chinese courts. This consideration does not therefore arise in the present proceedings.

240. Sixth, as noted above, the Protocol is an integral part of the BIT, not simply an aid to the latter's interpretation. Ad Article 9 of the Protocol supplements and qualifies Article 9 of the BIT. While Ad Article 9(c) does so in permissive terms, it does so subject to the constraint that the issue "brought to a Chinese court" may only thereafter

[331] Jinan Intermediate People's Court, Administrative Ruling of 19 July 2016, C-0005.

[332] Shandong Higher People's Court, Administrative Ruling of 6 December 2016, C-0006.

[333] Administrative Procedure Law of the People's Republic of China, 1 November 2014, R-0173.

[334] Transcript, Day 5, page 90, lines 16 – 23; ¶ 267 *infra.*

be submitted to international arbitration if it has first been "withdrawn by the investor according to Chinese law."

241. Seventh, the Tribunal considers that there is a readily coherent relationship between the final sentence of Article 4(2) and Ad Article 9(c). The final sentence of Article 4(2) requires the Respondent to make judicial review procedures available, at the request of an investor, and thereby implicitly provides an investor with a right to such procedures. Article 4(2) does not, however, require an investor to resort to such procedures. If, however, an investor does resort to such procedures, it is taken into Ad Article 9(c) territory. Ad Article 9(c) accordingly only arises if an investor relies on the last sentence of Article 4(2). The "notwithstanding" clause in Article 4(2) says simply that a claimant's right to arbitration under Article 9 is not undermined by resort to national courts, i.e., that Article 4(2) is not itself a fork-in-the-road provision. However, drawing in Ad Article 9(c), if a claimant does resort to judicial procedures under Article 4(2), and those procedures run their course, Ad Article 9(c) then operates to preclude resort arbitration thereafter.

242. Eighth, it follows that Ad Article 9(c) must be read as a qualified, but effective, fork-in-the-road provision – qualified, as the investor may apply to withdraw a review complaint brought to the Chinese courts, pending final decision; effective, as, if the review complaint cannot be withdrawn in accordance with Chinese law in advance of a final decision, resort to arbitration is excluded.

243. Ninth, on this basis, in the light of the preceding, save only for a material caveat that follows, the Claimant is precluded by Ad Article 9(c) from pursuing its claim in respect of the Expropriation Decision in arbitration proceedings under Article 9 of the BIT.

244. Tenth, the material caveat to the preceding is that, as intimated by the fifth point above, the Tribunal considers that Ad Article 9(c) cannot operate to preclude arbitration in circumstances in which there has been a denial of justice in respect of the relevant court proceedings, whether those proceedings were brought pursuant to the final sentence of Article 4(2) or on some other basis. The Tribunal considers this principle to be implicit in both the final sentence of Article 4(2) and Ad Article 9(c), and consonant with a good faith interpretation of their terms, and indeed also of Article 9 itself. A denial of justice

would additionally, and in any event, trigger the FET requirement in Article 3(1) of the BIT.

245. The importance of this caveat in the present proceedings arises as the Claimant has advanced an express denial of justice claim in respect of the judicial proceedings on which the Respondent relies to found its Ad Article 9(c) jurisdictional objection.[335]

246. As the Tribunal's assessment of the Claimant's denial of justice claim necessarily engages an examination of the merits of the Claimant's case, this aspect of the Fourth Objection is joined to the liability analysis that follows in **Part VI** below.

C. THE RESPONDENT'S ADMISSIBILITY AND ABUSE OF PROCESS OBJECTIONS

247. As noted above, the Respondent's Admissibility Objection is a supplemental pleading that rests on the same grounds as advanced in respect of the Respondent's jurisdictional objections. The recharacterization of the jurisdictional objections as admissibility objections rests on the premise that the Claimant is "undeserving of protection under the BIT or the ICSID Convention as vindicated by the arbitral process" as the Claimant is attempting to "misuse the ICSID system as an appellate mechanism that superimposes itself on domestic proceedings in China to extract undue gains."[336] The Respondent does not develop its Admissibility Objection beyond the few paragraphs in its Preliminary Objections.

248. Although not characterised in these terms, the Respondent's Admissibility Objection is a bare bones objection in equity, akin to an unclean hands or an abuse of rights or abuse of process assertion. Indeed, although not advanced as part of its Admissibility Objection, the Respondent, in its Rejoinder, contends that the Claimant's case "is an abuse of process".[337] This assertion rests on two claims: first, that "the Claimant and its sole witness have made misleading submissions to the Tribunal in an attempt to advance its case"; and, second, that the Claimant "has repeatedly breached its document

[335] *Inter alia*, at Memorial, ¶¶ 320 – 324, 476 *et seq.*, notably 488 *et seq.* The linkage of the denial of justice claim to the application of Ad Article 9(c) is made expressly, even if summarily in the Claimant's PHS, at ¶ 162.

[336] Preliminary Objections, ¶ 179.

[337] Rejoinder, ¶¶ 364 *et seq.* See ¶ 64 *supra.*

production obligations in a clear attempt to conceal the misleading nature of its submissions and witness evidence from the Tribunal".[338]

249. While the Tribunal notes this element of the Respondent's case, having regard both to the narrow character of the abuse of process contention and that it is not advanced as an element of the Respondent's admissibility case, the Tribunal considers that this contention does not engage issues of admissibility writ large, relevant to an assessment of the Claimant's case as a whole.

250. The Tribunal has dismissed the Respondent's First and Second Objections as unfounded. The Tribunal does not consider that there is any basis in the asserted conduct of the Claimant that engages questions of admissibility on the asserted grounds. The Tribunal accordingly summarily dismisses the Respondent's Admissibility Objection advanced in respect of these elements. The same conclusion applies in respect of the Respondent's abuse of process objection, insofar as this may be said to go wider that the admissibility objection. Whatever the merits of the Claimant's substantive claim, there is nothing in the Claimant's conduct within the purview of the Tribunal that rises to the level of misuse of the ICSID system or that would support a conclusion that the Claimant is undeserving of protection under the BIT, whether on abuse of process or other grounds.

251. The Tribunal has partially dismissed and partially upheld the Respondent's Third Objection, with a consequential issue arising from the Third Objection being joined to the liability enquiry. The Tribunal has also joined a material issue arising from the Respondent's Fourth Objection to the liability enquiry. Given these findings, the Tribunal considers that there is no material basis that would sustain a parallel admissibility objection based on the same considerations. Again, whatever the merits of the Claimant's substantive claim, there is nothing in the Claimant's conduct within the purview of the Tribunal that rises to the level of misuse of the ICSID system or that would support a conclusion that the Claimant is undeserving of protection under the BIT.

[338] Rejoinder, ¶¶ 368, 369.

252. The Tribunal accordingly dismisses the Respondent's Admissibility Objection as well as its abuse of process objection.

VI. LIABILITY

253. The preceding analysis and conclusions in respect of the Respondent's Third and Fourth Objections to jurisdiction move the Claimant's case to a liability enquiry. As regards the Claimant's direct expropriation claim in respect of JHSF's Land-use right and Buildings, having regard to Article 9(c) of the Protocol, the question of whether the claim can move forward will turn on whether the Claimant's denial of justice claim is sustainable with regard to the proceedings before the Jinan Intermediate People's Court and the Shandong Higher People's Court. As regards the Claimant's indirect expropriation and FET claim in respect of its shareholding in JHSF, having regard to Article 9(a) of the Protocol, the question of whether the claim can proceed will depend on whether the substance of the claim rests on more than the allegations relating to the cancellation of JHSF's food production licence as a consequence of the Food Production Regulation of 2 March 2018. It is to an examination of these issues that the Tribunal now turns.

A. THE CLAIMANT'S DENIAL OF JUSTICE CLAIM

(1) The Parties' arguments

254. The Claimant did not advance a denial of justice claim in its RfA. With respect to the proceedings before the Jinan Intermediate People's Court and the Shandong Higher People's Court between May – December 2016, the RfA says as follows:

> "To challenge the Review Decision, Hela brought an administrative lawsuit against the Ji'nan Municipal Government to the Ji'nan Intermediate People's Court. The Court did not give any substantive hearing, nor did it deliver any substantive judgment, instead, the Court issued a procedural Ruling dismissing Hela's request. The Ruling has been upheld by the High Court on Dec. 6, 2016 and is final."[339]

255. The Claimant's Application to Amend made no mention of a denial of justice claim.

[339] RfA, ¶ 13.

256. The allegation of a denial of justice first arises in the Memorial in the context of the Claimant's contentions that "[t]he Respondent has failed to observe due process throughout the expropriation process."[340] Referencing commentaries that address "due process", the Claimant contends, *inter alia*, that

> "a refusal to hear a claim brought by a different party, on a different subject matter, or on other legal grounds than any previous decision, constitutes a violation of the claimant's right to be heard, or even a denial of justice."[341]

257. Addressing what it describes as the "conspicuous conduct of domestic courts in the present case",[342] the Claimant contends, *inter alia*, as follows:

> "Finally, it should be noted that JHSF's claim was brought in full conformity with applicable procedural law and that the court did not mention any procedural irregularity on which to base its rejection.
>
> In other words, there was no basis whatsoever upon which to refuse hearing the case on the merits, or for failing to grant JHSF a full proceeding, including an oral hearing. In such circumstances, the court's outright dismissal of JHSF's claim must be treated as an unjustified denial of the Claimant's right to be heard, in obvious violation of the principle of due process and of Article 4(2) of the Germany-PRC BIT.
>
> The summary denial of JHSF's attempts to access judicial relief constitute a serious violation of the due process standard, in particular, the fundamental requirement that honest consideration be given to each party's legal arguments in order to objectively determine the merits of a case in accordance with the law. This requirement is at the foundation of the rule of law, whereby all individuals must be treated in accordance with clearly defined and objectively applied rules, instead of being at the mercy of arbitrary decision-makers.
>
> The fact that this requirement is explicitly spelled out in the wording of the Treaty leaves no doubt as to the parties' intention in this respect. In accordance with the spirit of the Treaty, the phrase 'the legality of any such expropriation and the amount of compensation shall be subject to review by national courts…' (Article 4(2), last sentence) must be read as meaning that 'the legality of any such expropriation and the amount of compensation shall be subject to **actual and independent** review by national courts.'
>
> It is evident that, in the present case, JHSF's objections to the legality of the expropriation were not give [sic] proper consideration by domestic courts. In spite of appearances, no actual judicial review has taken place and JHSF has been denied its fundamental right to be heard.

[340] Memorial, ¶¶ 252 *et seq.*

[341] Memorial, ¶ 313.

[342] Memorial, ¶¶ 309 *et seq.*

> It can be concluded from the above that multiple organs of the Respondent have breached their obligation to observe due process in the conduct of JHSF's expropriation: first by failing to properly apply substantive local law in respect of applicable methods of determination of compensation; then by committing multiple procedural irregularities during the course of administrative review proceedings; and finally by denying the Claimant's right to be heard in the judicial proceedings."[343]

258. Setting out more directly its allegation of a breach of due process later in its Memorial, the Claimant, quoting commentators such as Paulsson and others,[344] and citing to international cases, including *Azinian v. Mexico*, the Claimant contends that "[o]ne of the clearest instances of denial of justice is the outright refusal by a court to entertain a claim, without a valid justification for doing so."[345] Acknowledging that "not every breach of due process results in a denial of justice",[346] the Claimant contends that "the shortcomings in the judicial procedure initiated by JHSF were so serious as to amount to an outright refusal by the courts to carry out their mandate. Instead of hearing the Claimant's complaints about the conduct of administrative bodies vis-à-vis JHSF, as they should have done, the courts summarily rejected the claim on procedural grounds, without examining the case on the merits."[347] This contention is developed in further detail in the paragraphs that follow in the Memorial.

259. Addressing the Claimant's denial of justice allegations, the Respondent makes a number of points: (a) the Claimant failed to exhaust local remedies – *inter alia*, by its failure to challenge the Compensation Decision – the fact of which per se excludes a denial of justice;[348] (b) the Claimant has not met its burden that exhaustion was futile;[349] and (c) in any event, the Chinese courts did not deny due process to the Claimant.[350] On this last element, the Respondent, referencing the Claimant's Memorial, says that three points flowing from established cases are common ground between the Parties:

> "*First*, claims impugning the conduct of the host State's judicial institutions are only assessed against the denial of justice standard. This

[343] Memorial, ¶¶ 319 – 324.

[344] Paulsson, *Denial of Justice in International Law*, Cambridge University Press (2005), CL-0053; RL-0166.

[345] Memorial, ¶ 484.

[346] Memorial, ¶ 488.

[347] Memorial, ¶¶ 488 – 489.

[348] Counter-Memorial, ¶¶ 281 – 283.

[349] Counter-Memorial, ¶¶ 284 – 285.

[350] Counter-Memorial, ¶¶ 286 *et seq.*

> must not be confounded with an appeal on a point of Chinese law. Considerable deference is afforded to municipal courts deciding matters of municipal law, and the gravity of the charge means that the evidentiary threshold is extremely high. *Second*, denial of justice is, above all, a procedural standard (i.e. not concerned with the correct application of substantive law), which requires a showing of a serious breakdown in the host State's justice system. *Third*, the substance of the impugned decision is relevant only insofar as it is in itself proof of outrageous injustice; an error of law is not a denial of justice."[351]

260. Addressing the proceedings before the Jinan Intermediate People's Court, the Respondent takes issue with the Claimant's detailed allegations, contending, *inter alia*, that the allegations are "false", "manifestly untrue", and that the Claimant is "improperly targeting the substance of the Jinan ruling (rather than its procedural aspects …)."[352]

> "… [A]fter full and fair proceedings, the Jinan Intermediate People's Court concluded after deliberations that JHSF's claim regarding the Expropriation Decision "*should be rejected according to law*". It did so on the basis that the matter at issue (i.e. the legality of the Expropriation Decision) had already been affirmed upon consideration in a prior court case.
>
> … Rejecting a claim succinctly (e.g. because the subject matter has already been ruled on by the court, as here) is not the same as refusing to hear a case. Nor must a court deal in its judgment with every single irrelevant and immaterial argument a party decides to make.
>
> […]
>
> … the fact that JHSF's claim was plainly without merit is not an international due process issue or denial of justice. It is just Chinese law being applied normally."[353]

261. Addressing the appellate proceedings before the Shandong Higher People's Court, the Respondent contends, *inter alia*, that "the Claimant cannot meet its heavy onus of showing that the appellate decision was obviously improper and discreditable."[354]

262. In its Reply, the Claimant acknowledges that "the mere misapplication of domestic law is not sufficient as such for a finding of denial of justice and that arbitral tribunals are

[351] Counter-Memorial, ¶ 287.

[352] Counter-Memorial, ¶¶ 288 – 294.

[353] Counter-Memorial, ¶¶ 288, 289, 293.

[354] Counter-Memorial, ¶ 296.

accordingly not appellate bodies for points of domestic law. However, deference to the domestic courts is not absolute and arbitral tribunals will examine the legality of decisions within the context of an alleged breach of international law."[355] Citing to expert evidence submitted by Professor Lin Feng, the Claimant contends that the basis, in Chinese law, of the decision on the Jinan Intermediate People's Court was clearly "improper and discreditable" (citing the *Mondev* tribunal) such as to constitute a denial of justice,

> "as it effectively resulted in denying the Claimant, as a foreign investor protected by due process standards under an investment treaty, access to the courts. In addition, given that there was absolutely no doubt that JHSF had not been a party to the proceeding on the basis of which the summary dismissals were issued, one cannot but conclude that the misapplication of the law must have been intentional so as to deprive the foreign investor of its right to be heard behind the appearance of a proper legal proceeding."[356]

263. The Claimant goes on to say that it was never granted a fair opportunity to present its case and "decidedly contests the Respondent's allegation that JHSF had a chance to 'present its case' before the Jinan Intermediate People's Court."[357] It contends, further, that the Respondent "was simply not entitled, either under international law or under its own law, to invoke domestic law and its domestic legal system to insulate itself from its obligations of basic fairness and access to justice in accordance with international law."[358] The Claimant finally avers that it exhausted all reasonably available local remedies and was not required to exhaust futile remedies.[359]

264. In its Rejoinder, the Respondent develops its contentions that (a) the Claimant did not exhaust local remedies,[360] (b) the Claimant has not established that local remedies were futile, [361] and (c) there was in any event no denial of due process or justice to the Claimant.[362] On the last of these points, the Respondent contends, *inter alia*, as follows:

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[355] Reply, ¶ 374.
[356] Reply, ¶ 376.
[357] Reply, ¶ 383.
[358] Reply, ¶ 388.
[359] Reply, ¶¶ 390 – 399.
[360] Rejoinder, ¶¶ 597 *et seq.*
[361] Rejoinder, ¶¶ 605 *et seq.*
[362] Rejoinder, ¶¶ 617 *et seq.*

> "The Chinese courts summarily dismissed JHSF's challenge to the legality of the Expropriation Decision by validly applying domestic law that permits claims to be dismissed when the subject matter of the claim has already been subject to a decision. Further, JHSF could have applied to the Chinese courts to challenge the amount of compensation awarded to it in the Compensation Decision, which had not been subject to a prior court decision and therefore would not have been subject to summary dismissal, but chose not to do so."[363]

265. Referencing arbitral decisions on denial of justice, and expert evidence by Professor He Haibo, the Respondent contends that (a) the Chinese courts properly applied Chinese law, (b) even if they had misapplied Chinese law, this was not an error that no competent judge could reasonably have made, and (c) the Claimant had a right to initiate judicial proceedings regarding the amount of compensation (by challenging the Compensation Decision) but failed to exercise that right.[364] Finally, the Respondent contends, *inter alia*, that the Claimant was not denied a right to be heard, and that its application was summarily dismissed on the basis of Chinese law that was not inconsistent with international law.

266. The issue of denial of justice was only summarily addressed in the Parties' oral arguments. In its closing oral submissions, the Claimant, addressing the interpretation of Ad Article 9(c) in response to enquiry from the Tribunal, contended that the provision "doesn't prevent, for example, claims of denial of justice, and in our submission, it certainly doesn't prevent a claim for illegal expropriation due to lack of due process in court proceedings under Article 4(2)."[365] Addressing the same issue, the Respondent contended that Ad Article 9(c) was to be construed as addressing a situation in which a plaintiff had applied to withdraw its case from the municipal courts, the court had granted permission, and the plaintiff had thereafter withdrawn the case.[366] This prompted the following observation from the Tribunal:

> "That though surely must be subject to at least one or perhaps more exceptions, because if there is, for example, an application to withdraw a case which is then irrationally denied, then presumably there would be a denial of justice or some kind of case. So it cannot be that the Chinese

[363] Rejoinder, ¶ 618.

[364] Rejoinder, ¶¶ 624 – 632.

[365] Transcript, Day 5, page 72, lines 13 – 16 (Ms Halonen).

[366] Transcript, Day 5, page 90, lines 11 – 14 (Mr Wong).

> courts, by refusing to allow a withdrawal, [can] effectively have a bar on all prospect of arbitral proceedings."[367]

267. These observations, and the Tribunal's questions, notwithstanding, denial of justice was not materially addressed in the Parties' PHS.

268. While the issue of denial of justice per se was not addressed in expert evidence, the question of whether the decisions of the Jinan Intermediate People's Court and the Shandong Higher People's Court were in accordance with Chinese law was addressed in expert evidence by Professor Lin Feng, for the Claimant, and Professor He Haibo, for the Respondent. Perhaps unsurprisingly, the two experts, after detailed analysis, reached different conclusions, their respective summary conclusions being as follows:

> **Professor Lin Feng**
>
> "In conclusion, the decisions of Jinan Intermediate People's Court and Shandong Higher People's Court were not made properly in accordance with Chinese law because they have wrongly applied the doctrine of res judicata under Article 3(9) of the SPC Interpretation to JHSF's administrative litigation case."[368]
>
> **Professor He Haibo**
>
> "In conclusion, the summary dismissals made on the ground of the 2015 Judicial Interpretations by the Jinan Intermediate Court and the Shandong Higher Court of the case brought by JHSF against the Expropriation Decision was consistent with Chinese law."[369]

269. On the Tribunal's reading of these Expert Reports, the differences between the Experts appears most notably to be that, whereas Professor Lin considers that the courts wrongly applied the doctrine of *res judicata* in the Claimant's case by reference to an earlier decision on the lawfulness of the Expropriation Decision, Professor He considers that what he describes as the need of "single review" of an administrative act properly warranted dismissal of the Claimant's case by way of summary judgment. The following extracts capture the essence of the two Expert Reports:

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[367] Transcript, Day 5, page 90, lines 16 – 23.

[368] Lin Feng ER1, ¶ 79.

[369] He Haibo ER, ¶ 59.

Professor Lin Feng

> "As far as JHSF is concerned, it was not a party in No. 72 Judgment of Jinan Intermediate People's Court. It was not one of the Plaintiffs. Nor was it joined as a third party in that case. Accordingly, the first condition is not satisfied. Article 3(9) of the SPC Interpretation is therefore not applicable to JHSF's administrative litigation case before Jinan Intermediate People's Court and Shandong Higher People's Court."[370]

Professor He Haibo

> "The principle of comprehensive review in administration litigation further justifies the need of 'single review' for one administrative act. In litigation proceedings, Chinese courts are obliged to undertake a comprehensive review of the legality of the administrative act (including the facts on which the administrative act is based, the applicable laws and the procedure followed), not limited to the issues challenged by the plaintiff only. Similarly, the court of second instance is obliged to undertake a comprehensive review of the judgment or ruling rendered by the court of first instance as well as the administrative act itself in litigation, not limited to what is appealed by the appellant only. Under such circumstance, if the court is asked to review the same administrative act in another case, the contents under review will be fully repetitive."[371]

(2) The Tribunal's analysis and conclusions

270. The Tribunal has given close and careful attention to the Parties' submissions and evidence on the issue of denial of justice. It has also carefully reviewed, *inter alia*, the following: (a) JHSF's Administrative Complaint to the Jinan Intermediate People's Court dated 3 May 2016 ("**Administrative Complaint**");[372] (b) the Investigative Record of the Jinan's Intermediate People's Court dated 19 July 2016 addressing the Administrative Complaint ("**Investigative Record**");[373] (c) the Administrative Judgment of the Jinan Intermediate People's Court dated 30 April 2015, referred to in the Investigate Record just referenced, which upheld the lawfulness of the Expropriation Decision ("**Judgment No. 72**");[374] (d) the Administrative Judgment of the Shandong Higher People's Court dated 14 December 2015 approving the withdrawal of the appeal against the 30 April 2015 Judgment on the ground that a

[370] Lin Feng ER1, ¶ 73.

[371] He Haibo ER, ¶ 51.

[372] Administrative Complaint of 3 May 2016, C-0004.

[373] Investigative Record, Jinan Municipal Intermediate People's Court, 19 July 2016, R-0015.

[374] Administrative Judgment (2015) Ji Xing Chu Zi No. 72 of 30 April 2015, R-0068.

settlement had been reached;[375] (e) the Administrative Ruling of the Jinan's Intermediate People's Court dated 19 July 2016 rejecting the Administrative Complaint ("**Jinan IPC Ruling**");[376] (f) the Administrative Ruling of the Shandong Higher People's Court dated 6 December 2016 dismissing JHSF's appeal against the Administrative Ruling of the Jinan Intermediate People's Court dated 19 July 2016 ("**Shandong HPC Ruling**"); (g) the First Expert Report of Professor Lin Feng, *inter alia*, on the issue of the accordance or otherwise with Chinese law of the decisions of the Jinan Intermediate People's Court and the Shandong Higher People's Court; and (h) the Expert Report of Professor He Haibo, *inter alia*, on the issue of the accordance or otherwise with Chinese law of the decisions of the Jinan Intermediate People's Court and the Shandong Higher People's Court.

271. As a preliminary matter, the Tribunal is not persuaded by the Respondent's exhaustion of local remedies analysis *apropos* Ad Article 9(c) as this provision is not on any reading an exhaustion of local remedies provision. It is in essence a fork-in-the-road provision. The contention that the Claimant has not exhausted local remedies for the reason that it failed to request review, *inter alia*, of the Compensation Decision, or that the Claimant has failed in its burden to show that the local remedies avenues that were not pursued were futile, therefore has no substance. As the Tribunal has found with respect of the Respondent's Third Objection to jurisdiction regarding the Claimant's decision not to seek administrative review, it was entirely reasonable for the Claimant to have reached the conclusion that administrative review of the Compensation Decision held no prospect of success given the administrative review decisions that had already been taken in respect of the Expropriation Decision and the Appraisal Report. It follows that, for purposes of a denial of justice analysis under Ad Article 9(c), and indeed under the BIT more generally, the Claimant's failure to pursue a judicial challenge to the Compensation Decision or other post-Expropriation Decision administrative acts, does not in and of itself preclude the Claimant's denial of justice allegation. This issue is addressed further below.

[375] Administrative Judgment (2015) Lu Xing Zhong Zi No. 444 of 14 December 2015, C-0136.

[376] Jinan Intermediate People's Court, Administrative Ruling of 19 July 2016, C-0005.

272. As both Parties have acknowledged, a denial of justice claim has a high hurdle to surmount. This will not be overcome simply by showing procedural shortcomings, or substantive errors, in municipal court proceedings. It will require clear evidence of a manifest and egregious violation of due process that strikes at the core of the judicial process or of a misapplication of the law of such fundamental effect and ready apprehension as to raise a red flag over the decision that would be clearly visible to any independent and sufficiently informed international tribunal. This falls to be assessed, further, in the context of the proper and limited function of such international tribunal, as addressed above, being neither a tribunal of municipal law nor an appellate tribunal with a remit to review the decisions of municipal courts.

273. This appreciation echoes that expressed by other international courts and tribunals that have considered the matter. The Tribunal references in particular two awards which, although rendered in the context of NAFTA proceedings, addressed the legal standard of denial of justice in general terms with clarity and authority that the present Tribunal is happy to embrace, namely, *Azinian v. Mexico* and *Mondev v. United States*.[377] The *Azinian* tribunal expressed the principle in the following terms:

> "The possibility of holding a State internationally liable for judicial decisions does not […] entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. […] What must be shown is that the court decision itself constitutes a violation of the treaty. […]
>
> […]
>
> A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way. […]
>
> There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of 'pretence of form' to mask a violation of international law."[378]

274. The *Mondev* tribunal, echoing *Azinian*, expressed the principle as follows:

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[377] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award of 1 November 1999 ("***Azinian***"), CL-0093; *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002 ("***Mondev***"), CL-0096.

[378] *Azinian*, ¶¶ 99, 102 – 103; CL-0093 (emphasis omitted).

> "It is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State. Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal. […]
>
> […]
>
> In the *ELSI* case, a Chamber of the [ICJ] described as arbitrary conduct that which displays 'a wilful disregard of due process of law, … which shocks, or at least surprises, a sense of judicial propriety'. […] The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment."[379]

275. This is the standard that the Claimant must meet. For its part, the Claimant avers that it satisfies such a standard. It contends that the Jinan Intermediate People's Court's refusal to hear the JHSF complaint on the merits and its failure grant a full proceeding, including an oral hearing, meant that JHSF was denied its fundamental right to be heard. On first appreciation, this is a strong argument.

276. On careful examination of the record, however, through the prism of its properly limited review competence in respect of municipal court decisions, the Tribunal is not persuaded of the Claimant's denial of justice claim. In so saying, the Tribunal considers it appropriate to add that this assessment is not a narrow, on-balance assessment. It is a clear finding that, whatever shortcomings there might be said to have been in the municipal proceedings when seen through the lens of a foreign investor pursuing an individual remedy under a treaty, those shortcomings do not reach the level that would be necessary to establish a denial of justice claim.

277. JHSF's 3 May 2016 Administrative Complaint requested cancellation of the Expropriation Decision alleging, *inter alia*, that the Decision did not meet the

[379] *Mondev*, ¶¶ 126 – 127; CL-0096.

expropriation conditions of the Regulations on Expropriation of and Compensation for Houses on State-owned Lands ("**Expropriation Regulations**"). In particular, it was alleged that the Expropriation Decision did not satisfy or provide sufficient evidence to support the public interest requirements for such expropriation. In doing so, the Complaint expressly addressed the prior complaint that resulted in Judgment No. 72.[380]

278. The Jinan Intermediate People's Court held a pre-trial investigative meeting on the JHSF Complaint on 19 July 2016 in which JHSF was represented by counsel. The Claimant alleges that this investigative meeting was procedurally irregular – brief, shallow in its inquiry, all efforts at substantive argument blocked, and held for the sole purpose to "seek confirmation of [the Court's] preconceived views".[381]

279. The Tribunal appreciates the Claimant's genuinely held frustration at the inability of its counsel to advance the arguments of substance that he wished to pursue on JHSF's behalf in the investigative meeting, and it is clear from the Investigative Record that the meeting was short and focused on issues that ultimately informed the Court's summary judgment issued later that same day. This said, the Tribunal does not read the Investigative Record as showing, on its face, either a sham or manifestly irregular process. The investigating judge raised with the parties' counsel the issue of the effect of Judgment No. 72 on the Administrative Complaint, the receipt of which JHSF's counsel confirmed. After further exchanges, the investigating judge asked of JHSF's counsel: "is the object of litigation in this case [i.e., JHSF's Administrative Complaint] consistent with that of Case No. 72?", to which JHSF's counsel responds: "The request of Case No. 72 is consistent with this one."[382] The Record then shows the following exchanges:

> "Judge: In the case of an administrative litigation where an administrative action involves multiple persons subjected to the administrative action, the court will only review it once. Do you agree?
>
> Entrusted agent of the Plaintiff: Disagree. Notwithstanding Case No. 72 has been heard, whereas the Appellant made an appeal and then withdrew, therefore, which cannot prove the Expropriation Decision legal.
>
> Judge: Whereas the Case No. 72 has already been tried.

[380] Administrative Complaint of 3 May 2016, C-0004.

[381] Reply, ¶¶ 116, 383.

[382] Investigative Record, page 3; R-0015.

Entrusted agent of the Plaintiff: I have no objection to that; it has come into force legally.

Judge: The Defendant, do you have any supplement?

Entrusted agent of the Defendant: We insist on the first opinion in the Answer to Civil Complaint.

Judge: The Plaintiff, do you have any supplement?

Entrusted agent of the Plaintiff: Based on my understanding, 1. Case No. 72 is the equivalent of an effective judgment. Whether the case has direct guiding significance to our case, and I think the object of the parties is different and procedures that followed are different. 2. Even if it is an effective judgment, there is still a retrial, an appeal, a complaint available regarding legal remedies, therefore, it cannot prove it in conformity with fact.

Entrusted agent of the Defendant: Administrative litigation differs from civil litigation. The administrative litigation depends on whether it is the same object of litigation to decide whether to proceed to merits examination, rather than depends on whether it is the same plaintiff therewith to continue examination. Therefore, we think the litigation claim of the Plaintiff shall be rejected.

Judge: We will not hold trail [sic] for this case.

Entrusted agent of the Plaintiff: On procedure: 1. In accordance with provisions of Article 12 of *Regulations on the Administration of Expropriation*, there are so many people subject to the expropriation in Huashan Area , and there should be a remover for decision, namely upon discussion of Standing Committee of the Municipal Government. We didn't find the evidence about this. 2. For the purpose of the whole Expropriation Decision stated in the pleadings about whether it is for public interest, we can find the land interest after demolition should not be considered as public interest projects from its planning to publicity, and from the submitted enquiry to reply. In the process of real estate development, some are used for settling the returned households which cannot prove it public interest, and there is no dilapidated or aging problems regarding the house.

Judge: This investigation has been finished. All parties have fully declared their respective opinions, and the court has recorded them all. After reviewed by the collegiate bench, the court will choose a date to announce its decision. The time and place of announcement will be notified separately. After the investigation, the parties shall read the Investigative Record and sign it."[383]

[383] Investigative Record, pages 3 – 4; R-0015.

280. Following the investigative meeting, a three-person bench of the Jinan Intermediate People's Court handed down its summary judgment in response to JHSF's Administrative Complaint later on the same day. The judgment addresses the terms and effect of Judgment No. 72 on JHSF's Complaint, concluding, *inter alia*, as follows:

> "In this case, Ji Zheng Zi (2014) No. 9 House Expropriation Decision complained by the Plaintiff Jinan Hela Schwarz Food Co., Ltd. has been restricted by the Court's (2015) Ji Xing Chu Zi No. 72 Effective Administrative Judgment, so the Plaintiff's claims should be rejected according to law. In accordance with the provisions of Article 3 of the Interpretation of the Supreme People's Court on the Issues Concerning the Application of the Administrative Litigation Law of the People's Republic of China, we hereby make the following judgment:
>
> To reject the complaint of the Plaintiff Jinan Hela Schwarz Food Co., Ltd..
>
> If not satisfied with the Decision, the Plaintiff may, within ten days since the service of written decision, submit to the Court an appeal and corresponding number of duplicates according to the counterpart's persons, and appeal to Shandong Higher People's Court."[384]

281. JHSF appealed the first instance summary judgment to the Shandong Higher People's Court. As reflected on the face of the appellate judgment, amongst the grounds of appeal was that JHSF was not informed of the proceedings that led to Judgment No. 72, that it accordingly did not participate in those proceedings and that the Judgment "should not produce restrictive force on the Appellant [JHSF] … [and that it was] not compliant with basic jurisprudence for the Court to use the judgment of one case to restrict the parties concerned of another case." On this basis, JHSF requested the appellate court to cancel the first instance judgment and send it back for retrial.[385]

282. In a reasoned judgment that engaged expressly with JHSF's grounds of appeal, the appellate court rejected the appeal and upheld the first instance judgment, finding that that judgment "was made based on clear fact finding, correct application of law, and shall be maintained."[386]

283. Before drawing some conclusions from the preceding, it is useful to note key elements of Judgment No. 72, the consequences of which JHSF sought to extricate itself from by

[384] Jinan Intermediate People's Court, Administrative Ruling, 19 July 2016, page 3; C-0005.

[385] Shandong Higher People's Court, Administrative Ruling, page 3; C-0006.

[386] Shandong Higher People's Court, Administrative Ruling, page 5; C-0006.

its complaint and appeal. The complaint that led to that Judgment challenged the lawfulness of the Expropriation Decision on multiple grounds, including the public interest characterisation of the expropriation and the approach to compensation valuation.[387]

284. In a detailed, reasoned judgment, the Jinan Intermediate People's Court dismissed the applicant's challenge to the Expropriation Decision. In doing so, the Court noted expressly that "there were 43 state-owned land parcels" involved in the Huashan Development Project, among which "there were 1466 citizen-households", with the total monetary compensation amounting of RMB 460,000,000.[388] The Court was therefore, it appears, fully cognisant of the wider consequences of its judgment.

285. As the preceding indicates, JHSF's Administrative Complaint was afforded process – an investigative meeting, a summary judgment at first instance, and an appellate judgment. The dismissal of the Complaint and appeal turned on the controlling effect, as a matter of Chinese law, of a prior reasoned judgment of the Jinan Intermediate Peoples's Court rejecting a challenge to the lawfulness of the Expropriation Decision on multiple grounds, including on grounds that appear to overlap, at least in part, with grounds subsequently raised by JHSF and the Claimant.

286. The question for the Tribunal is whether the process that was afforded to JHSF, and the decisions of substance that emerged from that process, show clear evidence of a manifest and egregious procedural violation that strikes at the core of the judicial process or whether that process and the decisions otherwise exhibit a misapplication of the law of such fundamental effect and ready apprehension as to raise a red flag over the decision that is clearly visible to the Tribunal, having regard also to the Tribunal's proper and limited review function.

287. On the Tribunal's appreciation of the circumstances, they do not rise to the level of this exacting standard. The Tribunal's side-by-side reading of the expert evidence of Professors Lin Feng and He Haibo supports these conclusions. Although the Experts disagree on the accordance of the impugned court decisions with Chinese law, their

[387] Judgment No. 72, pages 3 – 5; R-0068.

[388] Judgment No. 72, pages 7 – 8; R-0068.

respective conclusions are based on points of detailed analysis and nuanced interpretations of the relevant and applicable Chinese law, including by reference to wide-ranging extra-judicial commentary on what has been referred to in these proceedings as the doctrine of *res judicata*.

288. Materially, in his assessment, Professor Lin, while acknowledging certain exceptional circumstances pursuant to which prior administrative rulings will apply as *res judicata* beyond the parties to the original case, concludes that "JHSF does not fall within any one of the exceptional circumstances under which No. 72 judgment of Jinan Intermediate People's Court will apply under the doctrine of *res judicata*."[389]

289. Professor He takes issue with Professor Lin's analysis and conclusion that JHSF does not fall within one of the exceptional circumstances pursuant to which the doctrine of *res judicata* would operate to apply Judgment No. 72 to JHSF. Professor He also addresses the underlying rationale for the binding judicial interpretation provisions of Chinese law and the remedies that would be available to a claimant that is bound by an administrative judgment in expropriation proceedings to which it was not a party – including an administrative challenge to the compensation decision that would be individually addressed to each expropriated party that would follow the more generic expropriation decision.[390]

290. For purposes of the denial of justice enquiry presently in focus, the Tribunal does not need to reach a decision on the expert evidence here referenced. It is sufficient for present purposes to note that there is credible duelling expert evidence on the given point of Chinese law, one challenging the judgments of the Chinese courts, the second endorsing them. This leads unavoidably to the appreciation that there is no sound and reliable basis on which the Tribunal could reach a conclusion that there is clear evidence of a manifest and egregious procedural violation in these proceedings that strikes at the core of the judicial process or that the judgments in question otherwise exhibit a misapplication of the law of such fundamental effect and ready apprehension as to raise a red flag over them that is clearly visible to the Tribunal. In these circumstances, whatever due process shortcomings there may arguably have been, the Tribunal would

[389] Lin Feng ER1, ¶ 79.
[390] He Haibo ER, ¶ 58.

be acting some way beyond its review competence to come to a finding that there had been a denial of justice by the Chinese courts, either per se or the effect of which was to oust the application of Ad Article 9(c).

291. Two other observations are warranted. First, notwithstanding the Tribunal's conclusions above on the issue of whether this Claimant was required to challenge the Compensation Decision in issue in this case, the Tribunal accepts Professor He's evidence that *a* claimant would have the ability to challenge *a* compensation decision, providing a potential remedial avenue of some importance to an aggrieved claimant, even after a general expropriation decision.

292. Second, and related, the Tribunal observes that the Claimant was not left without other potential remedies in the circumstances in which it found itself, with Judgment No. 72 apparently blocking an effective challenge of the Expropriation Decision before the Chinese courts. While Ad Article 9(a) required the investor to refer the issue to administrative review, neither Article 4(2), final sentence, nor Ad Article 9(c), nor indeed Article 9(1) and (2), required the Claimant to bring the issue to a Chinese court before initiating arbitration proceedings. This was its fork-in-the-road decision, with – in the light of the Tribunal's analysis and conclusions above – significant consequences for the Claimant's subsequent ability to bring arbitral proceedings under the BIT.

293. Having regard to the preceding, the Tribunal dismisses the Claimant's claim of a denial of justice. This goes both to the Claimant's case on Article 4(2), final sentence of the BIT and under Article 3(1) of the BIT.[391]

294. The Tribunal concluded above that the Respondent's case on Ad Article 9(c) ultimately turned on an assessment of the Claimant's liability case on denial of justice.[392] As the Claimant's challenge to the Expropriation Decision is at the heart of its direct expropriation case, it follows from the Tribunal's conclusions on denial of justice that the Claimant's direct expropriation case cannot go forward. The implications of the Tribunal's rejection of the denial of justice claim for the Claimant's indirect expropriation and FET claims are addressed below.

[391] *Inter alia*, Memorial, ¶¶ 427 *et seq*., 488.
[392] *Supra,* ¶ 246.

B. THE CLAIMANT'S INDIRECT EXPROPRIATION AND FET CLAIMS

295. In its analysis above of the Respondent's Third Objection, the Tribunal concluded that before the Claimant could properly submit to arbitration a dispute concerning the alleged indirect expropriation of, or FET breaches concerning, its shareholding in JHSF in consequence of the cancellation of its food production licence, it was required by Ad Article 9(a) to apply for administrative review of the Food Production Regulation of 2 March 2018, whether through JHSF or directly. As the Claimant had not done so, its indirect expropriation and FET claims in respect of its shareholding in JHSF in consequence of the cancellation of its food production licence failed to meet the jurisdictional requirements of the BIT. The Tribunal accordingly concluded that this element of the Claimant's case must be dismissed on jurisdictional grounds.

296. The question that follows is whether the Claimant has a claim of indirect expropriation or of FET breach without its case on the cancellation of the food production licence. This requires the Tribunal to consider whether the Claimant's indirect expropriation claim, shorn of its food licence cancellation complaint, retains any independent basis, distinguishable from the Claimant's direct expropriation claim. If the two expropriation claims are materially indistinguishable in the circumstances of this case, the indirect expropriation claim falls with the direct expropriation claim. The question that follows is whether the Claimant's FET claim is materially distinguishable from its indirect expropriation claim such as to found a sustainable cause of action independent of the indirect expropriation claim.

(1) The Claimant's indirect expropriation case

297. As an initial matter, the Tribunal considers that, by reference to the Claimant's pleaded case, its indirect expropriation claim is not confined to the cancellation of its food production licence. It is both broader but also more mercurial, the basis of which evolved in the course of the proceedings. As the Claimant's case came to be articulated, the cancellation of the food production licence was said to be an interference with the Claimant's business, after the direct expropriation had taken place, rather than being an element in the taking of the Claimant's investment per se. While, however, this differentiates the Claimant's direct and indirect expropriation claims, it leaves open the question of whether, shorn of the food production licence cancellation, there is anything

material left of the indirect expropriation claim to enable it to move forward independently of the direct expropriation claim.

298. The indirect expropriation claim is addressed in the Memorial as follows:

> "In addition to the direct expropriation of the Claimant's land property rights, the conduct of the local Chinese authorities in December 2017 resulted in a further deprivation of the value of the Claimant's investment. The nature of the State's conduct, in enforcing its 2014 Official Expropriation Decision, was such that the Chinese authorities effectively deprived JHSF of the means to carry out its business and thereby indirectly expropriated the value of the Claimant's shares in JHSF." [393]

299. This formulation differentiates the facts relevant to the indirect expropriation claim – the conduct of the local Chinese authorities in December 2017, i.e., the demolition of the Buildings – from the prior facts relevant to the alleged direct expropriation going back, *inter alia*, to the Expropriation Decision.

300. In the Reply, the Claimant's characterisation of its indirect expropriation claim evolved to the following:

> "The Claimant's entire business was destroyed following the direct expropriation of JHSF's site and the subsequent actions of the Jinan authorities, in particular the cancelation [sic] of JHSF's food production license which meant that the Claimant could no longer sell its remaining stock of products."[394]

301. This formulation placed the cancellation of the food production licence at the centre of the indirect expropriation claim, a point emphasised by the Respondent in the course of its opening oral submissions in the hearing, viz., "the revocation of the food production licence … is the central plank of the indirect expropriation for the business, and the ultimate reason why the Claimant was unable to pursue its business further.[395]

302. In the Claimant's closing oral submissions at the hearing, the formulation of the indirect expropriation claim evolved further. The direct expropriation and indirect expropriation claims were there described as "connected in terms of facts" but that they

[393] Memorial, ¶ 236 (Tribunal's emphasis).

[394] Reply, ¶ 269.

[395] Transcript, Day 1, page 196, line 2 to page 197, line 4.

occurred "at two quite different moments on the timeline … the indirect expropriation is a creeping expropriation of the Claimant's business", which took place over time as a result of "the measures taken by the local authorities [which] resulted in the demolition of the value of the [Claimant's] business."[396] This submission closely interweaves the factual matrices of the direct expropriation and indirect expropriation claims, differentiating the two claims on a temporal basis by reference to the asserted taking of the property interests of the Claimant's wholly-owned subsidiary (the direct expropriation claim) and the taking of the value of the Claimant's shareholding in that subsidiary (the indirect expropriation claim).

303. This alignment of the factual matrices of the direct and indirect expropriation claims was stated more clearly in response to a question posed by the Tribunal in the course of the Claimant's closing submissions in the hearing, as follows:

> [Tribunal:] "You have just spoken about creeping expropriation, so apart from the taking of the land and the taking of the building on the land, the one aspect that seems to potentially loom large about a creeping expropriation, because it would be the taking of something which wasn't the physicality of the land, is the food production licence, and we put this to you on three or four occasions in the opening submissions […]
>
> I have to say, I am still a little bit confused in my own mind as to what your indirect expropriation and direct expropriation is, apart from FET, which is not an expropriation case, that's a FET claim, and then you have got your expropriation case."
>
> [Claimant's counsel:] "The Claimant's view is that the food production licence is not an investment in itself, it is a means to an end, which was to carry out this food production business in Jinan.
>
> So you are right to say that the Claimant does not have a separate claim for the expropriation of the food production licence in itself.
>
> But it forms an integral part of the creeping expropriation of the value of the business which in itself is an investment, and this is how the Claimant is valuing the investment that was taken indirectly, as a result of measures that began in December 2017, when it was forced to stop production, and it was forced out of its premises, and that further materialised when the food production licence was withdrawn, which I believe was April 2018, but I may be wrong, and this was -- I think we have referred to it as the final nail in the coffin, it was the final step in the creeping expropriation of the Claimant's business."[397]

[396] Transcript, Day 5, page 39, line 6 to page 40, line 3.

[397] Transcript, Day 5, page 40, line 16 to page 42, line 5 (Tribunal's emphasis).

304. On this formulation, the cancellation of the food production licence is cast as an interference with the Claimant's business, rather than as the taking of an investment interest. The indirect expropriation claim is also here tied to the "measures that began in December 2017".

305. Two points flow from this. The first is that the Claimant's indirect expropriation case is not limited to its case on the cancellation of the food production licence. It is a broader "interference with the Claimant's business" claim. Second, this interference with the Claimant's business claim is said to have followed "as a result of the measures that began in December 2017". Excluding the cancellation of the food production licence that followed the Food Production Regulation of 2 March 2018, however, the "measures that began in December 2017" concern only a short period of about a fortnight in which JHSF was excluded from its premises and its Buildings demolished, bringing to an end whatever might have remained of its food production at that point. Indeed, by December 2017, on the Claimant's case, JHSF had already "lost nearly all of its value".[398]

306. On this basis, while the Claimant's indirect expropriation claim is distinguishable from its direct expropriation claim by reference to more than just the legal theory on which it is advanced, and is not limited to its claim in respect of the cancellation of the food production licence, it is nonetheless difficult to differentiate, to a point of artificiality, the two claims in substance. The question that needs to be asked is whether anything was left of the value of the Claimant's shareholding interest in JHSF after the direct expropriation of JHSF's business that is capable of sustaining an indirect expropriation claim.

307. The direct expropriation of JHSF's business concerned its Land-use right and the Buildings thereon. As the Tribunal has found, the Claimant is precluded from advancing a claim based on the alleged taking of its food production licence. On the Claimant's own case, JHSF had already "lost nearly all of its value" by December 2017, the point at which the Claimant's indirect expropriation claim is said to have arisen. Once these two matters are considered, there is no evident basis on which the Claimant

[398] Claimant's PHS, ¶ 85.

can advance and sustain an independent indirect expropriation claim. Insofar as the indirect expropriation claim has roots in the Expropriation Decision and the facts that are advanced to support the direct expropriation claim, is not an independent claim. In the particular circumstances of this case, the Claimant's "successive stages of expropriation"[399] analysis does not imbue the indirect expropriation claim with an independent character, distinct from the direct expropriation claim, such that it can survive the fall of the direct expropriation claim.[400]

308. Having regard to the issues raised by this case, the Tribunal considers that the following further observations are warranted on the Claimant's expropriation case.

309. The Claimant's case began life as a narrow, self-contained claim for an Order that the Respondent pays "justifiable expropriation compensation", the dispute between the Parties having focused initially on whether compensation for the Claimant's investment interests should have been calculated by reference to the proceeds sharing valuation, methodology favoured by the Claimant, or the appraisal methodology adopted by the Jinan Municipality. On the Tribunal's reading of the papers, this was a narrow dispute that might have played out simply by reference to the adequate compensation language in Article 4(2) of the BIT.

310. Subsequently, the Claimant significantly expanded its case to include an unlawful expropriation allegation cast in both direct and indirect expropriation terms, as well as an allegation of FET violation, all rooted in essentially the same facts. The unlawful expropriation claim advanced three broad strands of complaint: (i) that the Huashan Development Project was not in the public interest, or at least not wholly in the public interest in all of its aspects because it is "a commercial development project of residential and commercial units, whose primary aim is to benefit the developer's shareholders";[401] (ii) the expropriation was not accompanied by adequate, prompt and

[399] Reply, ¶ 227.

[400] In its Reply, the Claimant states the following: "In its Memorial, the Claimant demonstrated that the Respondent's expropriatory measures resulted in the indirect expropriation of Hela-Schwarz's entire investment because the Claimant's shares in JHSF were substantially deprived of their value as a consequence of the direct expropriation of JHSF and the acts of the Respondent's authorities that followed." Reply, ¶ 231.

[401] Reply, ¶¶ 238 – 264, at 239.

effective compensation;[402] and (iii) the Respondent failed to observe due process throughout the expropriation process.[403]

311. Article 4(2) of the BIT is not cast in standard terms insofar as it includes a compensation valuation formula that goes beyond traditional boilerplate language such as "adequate compensation" or "prompt, adequate and effective compensation", providing in relevant part as follows: "Such compensation shall be equivalent to the value of the investment immediately before the expropriation is taken or the threatening has become publicly known, whichever is earlier." On this formulation, compensation would have fallen to be assessed under the BIT, on the Claimant's compensation claim, at some point between the 2013 Freezing Notice, dated 1 November 2013, which the Claimant says, "explicitly affected JHSF",[404] and the 11 September 2014 Expropriation Decision, which notified the expropriation of JHSF's Land-use right and Buildings. At some point between these two dates, on the Respondent's case, it is said that there was a falling out between Hela and Schwarz, with Hela establishing Hela Spice Jinan on 19 August 2014. This may or may not have been relevant notably to a going concern analysis of JHSF for purposes of its damages claim.

312. It warrants observation that the shortcomings of the present claim extend to the Claimant's wider expropriation case, including as regards the "public benefit" requirement in Article 4(2), the issue of the methodology appropriate to the valuation of compensation, and important aspects (though not all) of the Claimant's due process allegations. As the issue of the Claimant's due process allegations are closely tied to its FET claim, the Tribunal addresses these issues together below.

(2) The Claimant's "public benefit" contentions

313. On the Claimant's "public benefit" contentions, the Tribunal is not persuaded that the "public benefit" formulation in Article 4(2) of the BIT requires, warrants or indeed permits the Tribunal to undertake a plot-by-plot / land parcel by land parcel, revised use review of the Huashan Development Project to determine whether individual subplot re-zoning determinations can be justified in "public benefit" terms or whether

[402] Reply, ¶¶ 265 – 295.
[403] Reply, ¶¶ 296 – 341.
[404] Memorial, ¶ 65.

the re-zoning of any given subplot previously designated for "industrial use" to mixed "commercial use" or "residential use" meets the "public benefit" requirement only in part. The task of an international tribunal is not to be an appellate municipal land use zoning authority. Municipal authorities must be permitted an appropriately wide margin of appreciation when determining what is in the best developmental interests of the community they govern. The role of an international tribunal in applying a treaty-based "public benefit" litmus test is to ensure that a governmental authority does not expropriate a protected investment for a private purpose or a clearly illegitimate public purpose under the guise of public interest.

314. Having reviewed the arguments of the Parties and the evidence advanced in these proceedings, including the public interest element of the administrative complaint addressed in Judgment No. 72, the Tribunal is not persuaded that the Claimant has come close to meeting the burden of showing that the expropriation was not for the public benefit. There is ample evidence on the record to demonstrate a public benefit intention and purpose in the Huashan Development project writ large, and the Tribunal apprehends that in any urban redevelopment project of the intended scale, re-zoning across the expanse of the previously zoned-industrial area may properly re-zone individual parcels of land for residential use and for commercial use – and that re-zoning of areas for commercial use may include associated benefits for the commercial occupants of the land. It is not for the Tribunal to substitute its judgement on the issue of public benefit, land parcel by land parcel, for that of the Jinan municipal authorities. This would be to turn the Treaty into a municipal zoning regulation.

(3) The Claimant's quantum of compensation contentions

315. On the Claimant's contention that the quantum of compensation offered was inadequate on the ground that the wrong methodology was applied to the valuation of JHSF's Land-use right and Buildings – the Claimant contending that the "proceeds sharing" methodology should have been adopted by the Jinan municipal authorities rather than the "appraisal" valuation methodology. The Claimant further contends that the Appraisal Report was in any event flawed in the appraisal methodology that was undertaken.

316. The conundrum of whether inadequate compensation, without more, is sufficient to cause an otherwise lawful expropriation to become unlawful and in consequence require the payment of damages is well known to students of international law, the circularity of the proposition opening the door to claims of unlawful expropriation on such grounds as a relatively cost-free punt in pursuit of increased monetary recompense. In this case, what began life as a simple allegation of inadequate compensation, and a request for an order that the Respondent pays "justifiable expropriation compensation", morphed into a claim of an unlawful expropriation, both direct and indirect, and a breach of FET, said to entitle an award of damages of EUR 90.85 million on initial acquisition costs in November 2001 of around EUR 2.9 million, and in circumstances in which credible going-concern issues about the Claimant's long-term business have been identified.

317. Article 4(2) of the BIT requires the payment of compensation, in the case of a lawful expropriation, calculated as "the value of the investment immediately before the expropriation is taken or the threatening expropriation has become publicly known, whichever is earlier." The value to be attributed to the investment at that point is of course a contestable issue and reasonable alternative valuation methodologies may be apparent. Without putting its finger on the scale either way, the Tribunal apprehends reason in both the "appraisal" and the "proceeds sharing" methodologies ascribed to Chinese law applicable in the circumstances of this case. Having regard to the Expert Report on Real Estate Appraisal by Mr Yang Bin,[405] for the Respondent, which addresses, *inter alia*, the issue of real estate appraisal methodologies,[406] the Tribunal also apprehends a spectrum of potentially applicable professional real estate "appraisal" methodologies, dependent on the circumstances of the real estate to be appraised.

318. In these circumstances, the Tribunal does not conclude that the adoption by the Jinan municipal authorities of an "appraisal" valuation methodology, as opposed to the "proceeds sharing" methodology favoured by the Claimant, of itself caused an otherwise lawful expropriation to become unlawful, thereby warranting the payment of damages. The Tribunal is also not persuaded by any evidence on the record of the

[405] Expert Report on Real Estate Appraisal, 13 April 2020 ("**Yang Bin ER**").

[406] The Expert Report submitted by Mr David Faulkner, for the Claimant, advanced (on instructions) a "market value" of JHSF's property interests, assuming residential land-use rights ("**Faulkner ER**").

proceedings that the compensation valuation procedure was itself either arbitrary or discriminatory, or that it was otherwise self-evidently indefensible in the circumstances of the expropriation.

319. In any event, the Tribunal notes that, as part of the expropriation–compensation process, it appears that the Claimant was offered a choice of suitable alternative location for its business. By way of example, an email message from Mr Li Guoxiang, the Deputy Governor of Licheng, dated 23 July 2014, to the Claimant's representative, Mr Rudolph Sharping, stated expressly: "If you accept the plan of compensation proposed on 18 July 2014 by us, we will provide necessary support for the establishment of a new plant in the Lingang development zone of the Licheng District in Jinan, in accordance with the laws and regulations."[407] The testimony given in the Hearing by the Respondent's fact witness, Ms Huang Bei, similarly supports the appreciation that assistance with relocation to an alternative site was offered by the Jinan Municipality and others on more than one occasion, even if this did not ripen to a concrete, site-specific offer, given the Claimant's lack of engagement.[408] From the record, the Claimant appears to have been reluctant to engage in such discussions on the ground that a precondition for doing so would be acceptance of the compensation plan that had been offered.[409] Be that as it may, the offer of a suitable alternative site, coupled with a financial compensation package, raises a question about the inadequacy of the compensation offered and available to the Claimant.

320. The Tribunal has given close attention, *inter alia*,[410] to the Appraisal Report,[411] JHSF's challenge to this Report,[412] the appraiser's response to that challenge,[413] JHSF's administrative review challenge to the Appraisal Report,[414] the Jinan Appraisal

[407] Letter from Mr. Li to Mr. Scharping, 23 July 2014, R-0106.

[408] Transcript Day 2, page 163, line 20 to page 167, line 1.

[409] Transcript Day 2, page 165, lines 10 – 20.

[410] For the avoidance of doubt, the Tribunal has also carefully reviewed, for these purposes, the Claimant's submissions, evidence, and expert reports.

[411] Appraisal Report of Shandong Zhongan, 19 September 2014, C-0086.

[412] Objections to the Appraisal Report from JHSF to Shandong Zhongan, 26 September 2014, C-0087.

[413] Reply from Shandong Zhongan to the objections to the Appraisal Report from JHSF, 8 October 2014, C-0088.

[414] Application for review of the Appraisal Report from JHSF to the Jinan Appraisal Expert Commission, 13 October 2014, C-0089.

Commission's response to JHSF's administrative review challenge to the Report,[415] the Updated Appraisal Report,[416] the Administrative Reconsideration Decision addressing the Expropriation Decision (including as regards compensation valuation methodology),[417] the Compensation Decision,[418] and the Yang Bin ER addressing (*inter alia*) real estate appraisal methodologies. On the basis of this review, the Tribunal cannot conclude that the appraisal of JHSF's Land-use right and Buildings was arbitrary, discriminatory or procedurally self-evidently irregular.

321. This said, by way of an *obiter* comment, expressly without prejudice to the foregoing, the Tribunal observes that Article 4(2) of the BIT requires compensation "equivalent to the value of the investment immediately before the expropriation…". On the Tribunal's appreciation, such compensation cannot be confined to an appraisal simply of the value of the use right of the land and the buildings thereon but must address the value of the investment. In this regard, the Tribunal observes and underlines that the express purpose of the BIT is "the encouragement, promotion and protection" of investments, by creating "favourable conditions" for such investments,[419] and, importantly, that this goes beyond simply affording to a covered foreign investor the treatment due to a domestic investor (i.e., national treatment). National treatment is the floor but not the ceiling, and the BIT commits to more.

(4) The Claimant's FET and due process claims

322. This brings the Tribunal to the issue of the Claimant's FET and due process claims, the starting point of which is the enquiry of whether the Claimant's FET claim is materially distinguishable from its indirect expropriation claim such as to found a sustainable cause of action independent of the indirect expropriation claim. In this regard, the Tribunal recalls also that the Claimant advances due process claims both as an element of its expropriation claim and as part of its FET claim.

[415] Opinion of the Jinan Appraisal Expert Commission regarding the application for review of the Appraisal Report from JHSF, 11 November 2014, C-0091.

[416] Updated Appraisal Report of Shandong Zhong'an, 19 April 2016, R-0044.

[417] Administrative Review Decision of the Shandong Government dated 15 April 2016, C-0003.

[418] Compensation Decision, 29 August 2016, C-0007.

[419] BIT Preamble.

323. In the course of the hearing, the Claimant made it clear that it was "not seeking separate damages for the indirect expropriation and the breaches of the FET. The same facts constitute both breaches and it is thus natural that the same loss flows from both."[420] This follows also from the Claimant's pleaded FET case in which its alleged FET breaches are closely intertwined with its indirect expropriation claim. In its PHS, for example, the Claimant states that that its (there described) "creeping expropriation" case "also constituted breaches of the FET obligation."[421] It further describes its FET case in terms of the Respondent's failure to accord "the required administrative fairness" to the Claimant "by obstructing good faith negotiations concerning the value of compensation" and "violated the requirements of substantive fairness by a compensation decision that ordered JHSF to vacate its premises before receiving compensation … [and] also failed to provide the Claimant with the basic standard of judicial justice required by international law …"[422] Subsequently, in its PHS, the Claimant differentiates its indirect expropriation and FET cases on the following basis: "While the creeping expropriation is a cumulative breach, the FET violations were several and separable."[423] This said, the Claimant goes on to state that "the damage suffered as a result of the individual FET breaches is difficult to quantify" and that "[t]here is thus no separate claim for damages being made" for the indirect expropriation and FET claims.[424] The claims in respect of the two alleged breaches are accordingly run together.

324. As an initial matter, having regard to the basis on which the Claimant has advanced its case on indirect expropriation and FET, there is an artificiality to the distinction between the two claims. Essentially the same facts are relied upon. The same breaches are alleged. Causation and damages are not differentiated. The two claims are for all intents and purposes run together, albeit invoking different provisions in the BIT to root each claim, Article 4(2), in the case of indirect expropriation, and Article 3(1), in the case of FET. As with the direct and indirect expropriation enquiry, the question that needs to be asked is whether the FET claim is in practice distinguishable from the

[420] Transcript, Day 1, p.100, line 23 to p.101, line 4 (Ms Halonen).
[421] Claimant's PHS, ¶ 2.
[422] Claimant's PHS, ¶ 87.
[423] Claimant's PHS, ¶ 122.
[424] Claimant's PHS, ¶ 122.

indirect expropriation claim such as to found an independent and sustainable cause of action.

325. The FET case is based on essentially the same facts and concerns the same loss as the expropriation claims. The alleged due process and administrative fairness failings that are advanced in support of the FET claim are also advanced in support of the expropriation claims.[425]

326. The Tribunal has already addressed, and dismissed, the Claimant's denial of justice claim. This goes both to the Claimant's case on Article 4(2), final sentence of the BIT and under Article 3(1) of the BIT, i.e., to both its expropriation and FET claims.

327. Separate from its denial of justice claims, the Claimant's non-denial of justice due process allegations underpin, without distinction, its wider indirect expropriation and FET claims. As regards these claims concerning the expropriation process – hinged on allegations of a "fail[ure] to provide administrative due process during the negotiations phase" and "an administrative review process that was riddled with procedural irregularities"[426] – the Tribunal, in a series of questions in the course of the hearing, enquired of the Claimant about where in the BIT the Claimant rooted its due process argument, given that due process is nowhere mentioned in Article 4(2).[427] The Claimant's response was as follows:

> [Claimant:] "… it is implicit, it is imported into this BIT by operation of the most favoured nation clause, and there is a specific most favoured nation clause within Article 4. This is Article 4(3). And other BITs concluded by China, from memory one of them is the China-South Korea BIT, contains in the expropriation clause an explicit requirement of due process.
>
> […]
>
> This is part of the answer, and this is with regard to the broader concept of due process of law.
>
> But there is also a specific provision in Article 4(2), and this is the last sentence of that paragraph, that provides that: 'At the request of an investor

[425] *Inter alia*, Reply, ¶¶ 296 – 341 (addressing the Respondent's alleged failure to observe due process throughout the expropriation process); 342 – 399 (addressing, *inter alia*, the Respondent's alleged breach of administrative fairness, substantive fairness, and judicial fairness in support of the Claimant's FET case).

[426] *Inter alia*, Reply, ¶¶ 297 – 319.

[427] Transcript, Day 1, page 35, line 14 to page 36, line 5.

the legality of any such expropriation and the amount of compensation shall be subject to review by national courts ...', and so on.

Which is one of the aspects of due process of law."[428]

[Tribunal:] "What does the word 'legality' there denote? Does it denote legality under public international law or legality under host State law, here Chinese law?

[…]

How does the reference to legality, at the request of the investor, being subjected to review by national courts, import a due process standard?

[…]

In paragraph (2) you reinforce your submission about the reference to due process by reference to the final clause. The final sentence of paragraph (2) refers to an ability on the investor to elect a testing of the legality of the expropriation and the amount of compensation to be subject to review by national courts.

My question is: how does that import a due process standard under international law?"[429]

[Claimant:] "So the Claimant's position is that the last sentence of Article 4(2) is a reflection of a portion of the international concept of due process, and whether we qualify this last sentence as a reflection of due process or not is not so important for the Claimant's case, because the situation that is covered by this sentence is precisely the situation in which the Claimant was, that it did apply for judicial review, and that this application was denied. There was no substantive judicial review.

So I am not necessarily saying that this sentence imports a broader due process standard, but Article 4(3) does, and this sentence covers an aspect of due process that is particularly relevant for this case."[430]

[Tribunal:] "… as will be apparent both the Tribunal's question[s] … we are very aware that this is a central plank of Claimant's case, and you should be aware from the questions that we would like the underpinnings of that plank to be further addressed. Whether it is in the last sentence of 4(2) or implicit elsewhere in 4(2) or derived from 4(3), or indeed derived from 3(1), it would be helpful to hear you further on that."[431]

[428] Transcript, Day 1, page 36, lines 16 to 23 and page 37, lines 4 to 12.

[429] Transcript, Day 1, page 37, line 14 to page 38, line 18.

[430] Transcript, Day 1, page 38, line 8 to page 39, line 8.

[431] Transcript, Day 1, page 39, lines 13 – 22.

328. The Tribunal returned to this issue in its written questions to the Parties in advance of their closing oral submissions and PHS. On the source and meaning of due process, the Claimant submitted, *inter alia*, as follows:

> "The expropriation must be in accordance with due process, for three reasons: (a) the wording of Article 4(2) in effect requires due process to be respected; (b) the express words 'due process' are imported into the BIT using the MFN clause (in case, and to the extent, that the Tribunal finds that there is no such requirement there already); and (c) the requirement exists under customary law and the FET clause in Article 3(1) of the BIT."[432]

329. On the alleged lack of due process in this case, the Claimant contends, *inter alia*, as follows:

> "The Jinan authorities failed to carry out the expropriation of the land use right in accordance with 'international standard of due process of law'. The PRC failed to provide an effective mechanism that took the specific rights and interests of Hela-Schwarz into account in four separate ways: (i) the administrative negotiations for the proceeds sharing method were a sham; (ii) no alternative plot of land was ever proposed to JHSF; (iii) the Chinese courts refused to even consider the substance of JSHF's [sic] application challenging the legality of the expropriation; and (iv) the way the compensation was determined and (not) paid ruled out the relocation of JHSF's business before its premises were bulldozed.
>
> […]
>
> Hela-Schwarz' position is, and has been throughout, that the compensation standard in Article 4(2) of the BIT only applies to lawful expropriations. It is only where **all** the conditions in Article 4(2) – including those that may be imported or clarified by the use of the MFN clause – are cumulatively fulfilled that the expropriation is lawful. The compensation in Article 4(2) does not apply if the expropriation is unlawful because it is either (a) not for public purpose; (b) lacking in due process, or (c) compensation is either not paid or the method of its calculation or payment is in breach of Article 4(2). To find otherwise would render these individual, cumulative conditions effectively superfluous: an investor could be made subject to the most egregious process of expropriation, for an unacceptable purpose (such as handing over a successful business to a relative of a public official instead), but as long as the compensation paid was largely 'equivalent to the value of the investment immediately before the expropriation [wa]s taken', it would have no recourse."[433]

330. For its part, the Respondent, in its PHS, contends, *inter alia*, as follows:

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[432] Claimant's PHS, ¶ 18.

[433] Claimant's PHS, ¶¶ 29, 92.

> "The question whether a 'due process obligation can be imported or read implicitly into Article 4 of the BIT […]cannot be discussed in the abstract, but by reference to whether the specific obligations of due process invoked by Claimant can be imported or read into the BIT. Claimant has only specifically identified '*two main examples*' of 'due process' obligations which it claims were binding on, and breached by, Respondent. *First*, in the context of the expropriation process, Claimant alleges that Respondent had an obligation to negotiate the method and amount of compensation for expropriation with Claimant in good faith, which it claims Respondent breached since Respondent allegedly never had any intention to negotiate the amount of compensation with JHSF '*on the basis of the proceeds sharing method*'. *Second*, in the context of the court proceedings, Claimant alleges that Respondent had an obligation to afford JHSF with a full review of the merits of its challenge against the Expropriation Decision, which it claims Respondent breached in dismissing JHSF's challenge by way of summary proceedings. Respondent demonstrates below that neither of these alleged 'due process' obligations can be read or imported into the BIT, or otherwise imposed on Respondent.
>
> Neither the BIT nor customary international law imposes on Respondent an obligation to negotiate the method or amount of compensation for expropriation with Claimant."
>
> […]
>
> Neither the BIT nor customary international law imposes on Respondent an obligation to afford Claimant with a full review of the merits of its challenge against the Expropriation Decision.
>
> It is not disputed that the BIT does not contain any express requirement that, in case of a challenge of the legality of the expropriation or amount of compensation by an investor, such challenge be subject to a full merits review by the national courts of the host State. The last sentence of Article 4(2) of the BIT only expressly requires that, at the request of the investor, the legality of the expropriation and amount of compensation be subject to review by national courts. The BIT language does not impose any specific requirements concerning the content of such court review. In particular, it does not require that an investor's challenge be subject to a full merits review, nor does it exclude that the investor's challenge be subject to summary proceedings."[434]

331. On the hypothesis that a due process standard both applied and had been breached, the Respondent says that the Claimant "would not be entitled to compensation since JHSF has already been awarded, and has collected, adequate compensation", in accordance with the standard mandated in Article 4(2). Referencing the Claimant's opening oral submissions, the Respondent observes:

[434] Respondent's PHS, ¶¶ 16 – 17; 28 – 29.

> "In the present case, Claimant does not dispute that the compensation awarded to JHSF for the expropriated industrial land use rights and buildings was adequate (except in relation to interest). […]
>
> Even if the Tribunal were to consider, as Claimant contends, that in case of a breach of the non-compensation requirements of Article 4(2) of the BIT, the standard of customary international law (namely full reparation) applies, a breach of the alleged due process obligations invoked by Claimant would in any event not entitle Claimant to the damages it claims in this arbitration. Customary international law only allows the investor to recover damages that were caused by the wrongful act. It is furthermore well established that '*no reparation for speculative or uncertain damage can be awarded*'. Thus, Respondent would only be obliged to make reparation for non-speculative damages caused by Respondent's alleged breaches of due process."[435]

332. The FET standard in Article 3(1) of the BIT includes an obligation to act fairly, precluding arbitrary and discriminatory treatment, and requiring due process in circumstances in which process is required. There is no need to look to provisions in other investment treaties to import into the BIT, via an MFN clause, a due process clause. This said, a requirement to afford due process necessarily applies only in circumstances in which the BIT requires a process to be followed.

333. The Tribunal agrees with the Claimant that the final sentence of Article 4(2) implies due process in the judicial review that is contemplated. The Tribunal further considers that Ad Article 9(a) and (c) imply procedures that would be properly attentive to due process principles and requirements.

334. The Tribunal has, however, already dismissed the Claimant's denial of justice allegations in respect of the judicial review proceedings addressed in Ad Article 9(c) and does not consider there to be any such egregious shortcomings in the administrative review proceedings addressed in Ad Article 9(a). The Tribunal, further, agrees with the Respondent that neither the BIT nor, insofar as this may be relevant and applicable, customary international law imposes on the Respondent an obligation to negotiate with the Claimant either the valuation method in respect of or the amount of compensation due for expropriation, nor imposes an obligation to afford Claimant a full review of the

[435] Respondent's PHS, ¶¶ 40 – 41.

merits of its challenge against the Expropriation Decision in circumstances in which a summary procedure may properly be warranted and required by municipal law.

335. In the circumstances, whatever due process shortcomings there may arguably have been in the expropriation process, the Tribunal does not consider that they rose to the level of calling into question the lawfulness of the expropriation per se. It is not every procedural or due process shortcoming that vitiates the entirety of the process. And the Tribunal does not, in this case, apprehend vitiating procedural or due process shortcomings.

336. In reaching this conclusion the Tribunal has had careful regard to the Parties' arguments and evidence, including the expert opinion evidence on these issues submitted by Professor Lin Feng, for the Claimant, and Professors Lou Jianbou and He Haibo, for the Respondent.

(5) The Claimant's allegation that the Respondent breached the procedural obligations of the arbitration

337. Separate from its expropriation and FET claims, the Claimant also advances a claim that the Respondent's physical taking and demolition of JHSF's premises in December 2017 constituted a breach of its procedural obligations in the arbitration.[436] This allegation was bound up with the Claimant's PM Request of 4 December 2017 which sought to enjoin the Respondent from demolishing JHSF's Buildings. By the time of the filing of the Claimant's Memorial, the PM Request issue had fallen away, and as recorded in PO2 the Claimant had averred that it did not at that point apprehend a risk of any (further) alleged aggravation of the dispute by the Respondent.

338. The Claimant nonetheless maintained the breach of procedural obligation allegation on the asserted basis that the Respondent's conduct "was in contravention of its obligation under international law not to aggravate the dispute while arbitration proceedings were pending."[437] As regards the alleged impact of the Respondent's conduct addressed in this complaint, the Claimant says that "the enforcement of the expropriation in

[436] Memorial, ¶ 506.

[437] Memorial, ¶ 507.

December 2017 constituted a further (indirect) expropriation of the entirety of the Claimant's investment."[438]

339. The Tribunal considers that this allegation cannot be disentangled from the Claimant's indirect expropriation claim. In its PM Request context, the allegation may have had a life of its own, although even then, had the Request not been rendered otiose by events, the question that would have had to be addressed would have been whether the anticipated harm that was alleged could not have been meaningfully addressed through damages, in the event that the Claimant's expropriation case would have been upheld. Even in this context, therefore, the breach of procedural obligations allegation would not have been easily separated from the indirect expropriation claim.

340. Further, it is not simply that the allegation of a breach of procedural obligations cannot be separated from the indirect expropriation claim, it is that it is contingent on the indirect expropriation claim being upheld. It is accordingly dismissed.

VII. COSTS

341. Article 61(2) of the ICSID Convention provides for the Tribunal's assessment of costs in arbitration proceedings "except as the parties otherwise agree". In correspondence to the Tribunal dated 31 March 2023, the Parties indicated their agreement that "the Tribunal shall treat the Parties' costs in a confidential manner (i.e., to prevent public disclosure)." The Tribunal accordingly addresses the issue of costs in these proceedings in a Confidential Codicil on Costs attached to this Award ("**Costs Codicil**"). The Costs Codicil is an integral part of this Award. Having regard to Article 61(2) of the ICSID Convention, as well as to ICSID Rules 28(1) and 48(4), the Tribunal directs that this Cost Codicil shall not be made public.

VIII. DECISION

342. In setting out its Decision below, the Tribunal observes that, in the preceding analysis, it dismissed the Respondent's objections to jurisdiction, admissibility and abuse of process, save that the Respondent's objection to jurisdiction in respect of the Claimant's

[438] Memorial, ¶ 513.

Food Production Licence was upheld by reference to Ad Article 9(a) of the Protocol. The Respondent's objection to jurisdiction under Ad Article 9(c) was joined to the Tribunal's liability analysis, having regard to the Claimant's denial of justice claim. The Tribunal went on to dismiss the Claimant's denial of justice claim in respect of its direct expropriation claim. The Tribunal thereafter proceeded to address whether the Claimant's indirect expropriation and FET claims survived the dismissal of its direct expropriation claim, concluding that they did not.

343. For the reasons set out above, the Tribunal decides as follows:

(1) The Respondent's objection that the Tribunal lacks jurisdiction because the Claim does not arise directly out of the Claimant's investment is dismissed.

(2) The Respondent's objection that the Tribunal lacks jurisdiction because the Claimant failed to comply with the BIT's pre-arbitration amicable settlement requirements is dismissed.

(3) The Respondent's objection that the Tribunal lacks jurisdiction because the Claimant failed to comply with the BIT's administrative review requirements in Ad Article 9(a) of the Protocol is dismissed save in respect of the cancellation of JHSF's food production licence.

(4) The Respondent's objection to admissibility is dismissed.

(5) The Respondent's abuse of process objection is dismissed.

(6) The Claimant's denial of justice claim is dismissed and, in consequence, the Respondent's objection under Ad Article 9(c) is upheld.

(7) The Claimant's allegation that the Respondent breached the procedural obligations of the arbitration is dismissed.

(8) Any and all other claims in this arbitration are dismissed.

(9) The issue of costs is addressed in the Confidential Codicil on Costs attached to this Award, which forms an integral part of the Award.

[Signed]

Mr. Roland Ziadé Arbitrator	Professor Campbell McLachlan KC Arbitrator
Date: 10 December 2025	Date:

Sir Daniel Bethlehem KC
President of the Tribunal

Date:

[Signed]

Mr. Roland Ziadé Arbitrator	Professor Campbell McLachlan KC Arbitrator
Date:	Date: 10 December 2025

Sir Daniel Bethlehem KC
President of the Tribunal

Date:

Mr. Roland Ziadé
Arbitrator

Date:

Professor Campbell McLachlan KC
Arbitrator

Date:

[Signed]

Sir Daniel Bethlehem KC
President of the Tribunal

Date: 10 December 2025