

ALSA INTERNATIONAL MOOT COURT COMPETITION

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International Chamber of Commerce International Court of Arbitration

Permanent Court of Arbitration

International Centre for Settlement of Investment Disputes

Samuel Seow Law Corporation

International Arbitration Asia



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**INTERNATIONAL CHAMBER OF COMMERCE
INTERNATIONAL COURT OF ARBITRATION**

Harry Ltd. Co.,
Claimant

v.

The Socialist Democratic Republika,
Respondent

REQUEST FOR ARBITRATION

[EXCERPTED]

18 March 2019

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REQUEST FOR ARBITRATION

1. Harry Ltd. Co. (“Harry Ltd. Co.” or “Claimant”) respectfully submits this Request for Arbitration against the Socialist Democratic Republika (“Republika” or “Respondent”). Claimant and Respondent shall jointly be referred to as the “Parties.”

I. INTRODUCTION

2. Harry Ltd. Co. is a multinational company that designs, develops, manufactures and markets specialty chemicals. For more than 50 years, Harry Ltd. Co. has strived to create value through its diversified, market-driven portfolio of unique chemicals, advanced materials, and plastics businesses. To that end, Harry Ltd. Co. built a large chemical facility in Republika in 1991, and completed a substantial expansion of the facility in 2008. However, as the result of a combination of unreasonable legislative and judicial measures by Republika in violation of its international obligations, Harry Ltd. Co.’s investment has been irreparably harmed. In particular, Republika’s actions violate the Agreement between the Government of the Kingdom of Potterland and the Socialist Democratic Republika for the Promotion and Reciprocal Protection of Investments dated 19 August 1996 (the “BIT”).

II. PROCEDURAL ISSUES

A. Parties to the Arbitration

1. Claimant

3. Harry Ltd. Co. is a multinational company headquartered at 132 Dobby Place, Three Brooms, Hogwarsh 94021, Potterland, and incorporated under the laws of Hogwarsh.
4. The contact information for Harry Ltd. Co.’s counsel is as follows:

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2. Respondent

5. The Respondent is the Socialist Democratic Republika.

B. Arbitration Agreement

6. Despite Harry Ltd. Co.'s best efforts, this dispute has not been resolved amicably. Article 23 of the BIT provides in relevant part that:

1. If an investment dispute cannot be resolved amicably, the disputing investor may submit a claim that the disputing Contracting Party has breached an obligation under Articles 9 through 15, and that the disputing investor has incurred loss or damage by reason of, or arising out of, that breach. The disputing investor may submit such a claim:

[. . .]

(b) to the International Court of Arbitration under the ICC Arbitration Rules.

C. Place and Language of the Arbitration

7. The BIT provides that the place of the arbitration shall be Tribeca.
8. English is the applicable language of the arbitration.

D. Applicable Substantive Law

9. Article 23(7) of the BIT further provides that the Tribunal shall decide the dispute on the basis of, *inter alia*, the “laws in force of the Contracting Party concerned,” “the provisions of this Agreement, and other relevant Agreements between the Contracting Parties” and “general principles of international law.”

E. Number and Selection of Arbitrators

10. The BIT provides that the arbitration shall be conducted by three arbitrators. Each Party is entitled to nominate one arbitrator, to be appointed by the ICC. After the ICC has

appointed the two Party-nominated arbitrators, those two arbitrators will, in consultation with the Parties, nominate for appointment by the ICC a presiding arbitrator.

11. Harry Ltd. Co. nominates Mr. Albus Dumblescreen as its party-nominated arbitrator. Mr. Dumblescreen is a national of Baklavastan.

III. FACTUAL BACKGROUND OF THE DISPUTE

12. Harry Ltd. Co. built a large chemical facility in Republika in 1991; it has operated the facility since then until 2018. The facility is located in Chooth, a medium-sized city that serves as the capital for one of Republika's larger provinces. Harry Ltd. Co. is currently one of two major chemical companies operating in Republika, though it is by far the largest. Harry Ltd. Co. has provided numerous jobs in the region, as 80% of Harry Ltd. Co.'s employees are Republikans.
13. On 20 May 1990, Harry Ltd. Co. was invited to attend a presentation in Chelswan by the Department of Promotion of Investments (DPI) of Republika. Harry Ltd. Co. was presented with a PowerPoint by DPI which included a slide stating that foreign investors can expect a "[l]egal system [that] is stable and effective" and courts that "are independent and able to intervene to protect economic and other rights." *See CL-1*. This assurance, together with a generous investment incentive package offered by the Republika government, led Harry Ltd. Co. to decide to invest in Republika in 1991. Contemporaneous documents noted the Republika government's warm welcome to Harry Ltd. Co. at the time of its investment in Republika. *See CL-2*.
14. To operate a chemicals facility in Republika, several licenses are required, including environmental and safety permits. These must be renewed before the expiration of the license term, with renewal subject to passing governmental inspections as well as a condition that the investor comply with the laws of Republika at all times. Harry Ltd. Co. complied with all these requirements and conducted its operations in a responsible manner. Harry Ltd. Co. most recently renewed its licenses in 2012, with an eight-year term until 2020.
15. In a series of meetings beginning in 2007 between Republikan officials from the Ministry of Industry and Harry Ltd. Co. executives, Harry Ltd. Co. informed Republika that it was

considering adding a substantial amount of new capacity by expanding the plant. Republican officials overwhelmingly and enthusiastically welcomed the addition and stated that they would do all they could to ensure Harry Ltd. Co.'s construction was permitted as efficiently as possible within the bounds of the law and that ongoing operations could continue smoothly.

16. Harry Ltd. Co. has even been recognized by the Republican government for its positive impact on the country. At a conference on foreign investment in 2010, the Republican Minister of Industry awarded Harry Ltd. Co. with the "Investor of the Year" award, which the Ministry hands out annually to "companies that, through their hiring of Republicans, production of useful goods or rendering of vital services, and overall commitment to Republika, make the country better." Harry Ltd. Co. naturally welcomed the award and kind words from the government and took these events to mean that Republika was as committed as Harry Ltd. Co. was to a long and sustainable economic partnership, and Harry Ltd. Co. undertook its expansion of the facility with gusto, investing millions of dollars into the facility over five years of construction.
17. In 2012, Harry Ltd. Co. completed the substantial expansion of its facility, which included the addition of a new plant to meet increasing demand for its products. Several citizens of Republika were also recruited for leadership positions in Harry Ltd. Co.'s subsidiary in Republika. The finished expansion represented nearly a doubling of the total capital invested by Harry Ltd. Co. into the facility. To begin operating this second plant, Harry Ltd. Co. was required to, and did, undergo the full process for obtaining new environmental and safety permits.
18. In 2014, at the instigation of a small group of disgruntled residents living near the Harry Ltd. Co. facility, a local NGO commissioned a purported "study" of air and water quality in the neighborhoods surrounding the facility. This "study" was deeply flawed in its design and methodology. The study purported to show that various environmental damage was linked to the facility. In the aftermath of the study's release, neighborhood residents began to unjustly protest at the plant, which quickly escalated. Further, a nascent political movement in Republika, with an anti-globalization agenda, seized on the

environmental issue, and used it to win a large majority in the city and provincial governments in 2015.

19. Also in 2015, an activist group of citizens, which is ideologically opposed to globalization and foreign investment, brought a suit against Harry Ltd. Co. for alleged negligence in caring for its facility. However, the suit was based almost exclusively on the same flawed “study” noted above. Hoping to cause as much disruption as possible, the group eventually brought an identical suit against the only other major chemical company in Republika, Crabbe Inc. (a Narnian corporation), as well. Harry Ltd. Co. vigorously defended against the suit as it has at all times ensured that its facilities comply with the highest safety and ethical standards. While damages are supposed to be the standard remedy, the law is extremely broad and allows courts to fashion any “appropriate remedy” they see fit. Seizing on this vague language, the activist group unjustifiably sued for both damages and “appropriate equitable relief,” to seek its broader goals of preventing foreign investments in Republika.
20. Part of the citizens’ suit was based on an incorrect and unjustified allegation that Harry Ltd. Co. had bribed environmental officials to renew the various licenses necessary for its expansion project. Indeed, the lack of credibility of these claims can be discerned from the words of the former Minister of Justice who dismissed the allegations as “nonsense” when they were brought to his attention in 2010. *See* **CL-3**.
21. Also in early 2016, the Government of Republika suddenly announced it was “reviewing its environmental regulations, including chemicals.” As noted in the local media at the time, the decision to review its regulations was a transparent attempt to head off the political movement that had already won local elections and was threatening to unseat the sitting government in the 2020 national elections. The Government did not publish any sort of proposed rule or otherwise give interested parties notice of the type and extent of rules being considered. Nonetheless, based on limited information from the Government and media reports, Harry Ltd. Co. submitted a comment under the Republikan Administrative Fairness Act. Harry Ltd. Co.’s comment stated in relevant part that “equipment used at the Chooth facility has been subjected to rigorous testing and meets regulatory standards in advanced economies around the world, including in

Potterland Recent scientific studies suggesting health and environmental risks at the Chooth facility have been widely decried by the scientific community and should not be relied on.” And it continued, noting that “labeling requirements are unlikely to change customer behavior and even may mislead them, distorting the market.”

22. Ignoring Harry Ltd. Co.’s input, in early 2017 the Government of Republika proceeded to publish a series of new environmental regulations, which, among other things, required significantly more enhanced and expensive safety controls and treatments for several chemicals used in the operations of the Facility. These requirements, implemented to appease those criticizing the government’s environmental record, were not based on proper and scientific testing. The regulations also included new labelling requirements for products that included the primary output from Harry Ltd. Co.’s facility and therefore targeted Harry Ltd. Co. These combined measures had a devastating impact on Harry Ltd. Co.’s profitability.
23. Within the statutorily required six-month period, Harry Ltd. Co. filed an administrative complaint against the Government alleging that the regulations were arbitrary in that they did not properly weigh costs and benefits in light of available science, and they were also beyond the regulators’ authority. Because of a long-standing Republika law, the regulations could not be stayed pending the administrative challenge. Therefore, Harry Ltd. Co. expended significant capital implementing the enhanced safety controls and treatment processes at the Facility (in both the original and new plants). While adding the new label only required a small capital investment, Harry Ltd. Co.’s sales dropped by sixty percent in the year following implementation, leading to a large operating loss for the facility. Harry Ltd. Co.’s share price on the Potterland Stock Exchange (PSX) fell by fifty eight percent in the six months after implementation.
24. Despite Harry Ltd. Co.’s compliance with all of Republika’s environmental laws and regulations, the Supreme Court of Republika issued in late 2018 a broad decision in which it not only awarded significant monetary damages to locals, but also went so far as to hold that Harry Ltd. Co.’s environmental licenses had been improperly granted. This holding was based, with little reasoning, on the chemical facility being “below standard” and because it found that the citizens had presented enough evidence to make out a case

that the licenses “may well have been obtained through corrupt means.” Harry Ltd. Co. notes that while it was able to present limited evidence in defence on the negligence claims, the government and plaintiffs invoked a series of evidentiary and governmental privilege rules to achieve a grossly unfair procedure on the corruption claim: the three-Justice panel heard unrebutted testimony by government and law enforcement officials who had investigated alleged corruption by the Deputy Environmental Minister for Industrial Safety, Dr. V. Stange. Harry Ltd. Co. was prohibited from cross-examining these officials, or even from knowing their specific identities. Harry Ltd. Co. could only submit witness statements to the Justices in an ultimately futile effort to rebut the unexamined testimony of the officials.

25. And most egregiously, by invoking its vague “appropriate remedy” power, the Court also cancelled the existing licenses for Harry Ltd. Co. and the one other chemical company operating in Republika at the time (Crabbe Inc.).
26. 67.5% of the ultimate owners of Crabbe Inc. were also non-nationals of Republika. Since the court ruling, Harry Ltd. Co. has been unable to operate its facility at all due to the cancelled licenses. Harry Ltd. Co. has made numerous effort to reach a settlement with the Republikan government, but to no avail.

IV. NOTICE OF CLAIMS

27. Republika’s unfair, unreasonable, and expropriatory actions *vis-à-vis* Harry Ltd. Co.’s investment in its territory contravene Articles 11 (Treatment of Investment) and 14 of the BIT (Expropriation and Compensation). Republika’s actions have destroyed Harry Ltd. Co.’s investments, have been undertaken in an arbitrary and capricious manner, and have denied justice to Harry Ltd. Co. As a corporation organised under the laws of Potterland, Harry Ltd. Co. has recourse to arbitration to remedy Republika’s utter failure to protect Harry Ltd. Co.’s investment in accordance with its treaty obligations. *See* Article 1(e) of the BIT.

V. PREEMPTIVE RESPONSE TO POTENTIAL JURISDICTIONAL ARGUMENTS

28. From press articles, it appears that Republika attempts to rely on corruption as a defence. The allegations of corruption are baseless and are denied. In addition, if Republika

challenges jurisdiction on such unsupported claims of corruption, Harry Ltd. Co. points out that Republika is estopped from raising such an objection because Republika was aware of the allegations of corruption but nevertheless encouraged Harry Ltd. Co. to continue investing and operating in Republika. While these allegations of corruption are baseless, Republika was apparently aware of them as early as 2010, which was well before Harry Ltd. Co. completed the expansion of its second plant. *See CL-3.*

VI. OVERVIEW OF LEGAL ARGUMENTS

[Not included in this excerpt]

VII. REQUEST FOR RELIEF

29. For the reasons stated and on the grounds specified above, Harry Ltd. Co. respectfully requests that the Arbitral Tribunal issue an award:
- 1) Declaring that Republika has breached Articles 11 and 14 of the BIT;
 - 2) Ordering Republika to compensate Harry Ltd. Co. for these violations in an amount to be determined at the appropriate stage of the proceedings, plus pre-award and post-award interest;
 - 3) Ordering Republika to pay the costs of the arbitration and to reimburse Harry Ltd. Co. for all legal fees, expenses, and other costs incurred in connection with the arbitration; and
 - 4) Granting any other relief the Arbitral Tribunal may deem appropriate.
30. Harry Ltd. Co. reserves the rights to supplement and amend its claim in the course of the proceeding.

Respectfully submitted,

[signed]

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Invest in Republika

Department of Promotion of Investments
Republika Ministry of Industry

May 20, 1990

Why Invest in Republika?

1. Attractive labor force
2. Generous economic incentives
3. Stable and well-developed political and legal environment
4. Growing domestic market

Republika Is Open for Business: Labor Force

- Republika has a young, dynamic workforce
 - 30% of the population is between ages 15-30
- Education rates are rising rapidly
 - 60% of Republikans now complete secondary school, with rates doubling in the last ten years
- Citizenship is largely English-speaking

Republika Is Open for Business: Economic Incentives

- Foreign investors eligible for tax deferrals
 - Eligible investors may not pay corporate taxes for five to ten years, depending on conditions
 - Employment of local managers, other actions may gain further benefits
- Land is affordable and plentiful
 - No property taxes in designated economic zones

Republika Is Open for Business: Stable Governance

- Government is predictable and transparent
 - Regulation is made only after consultation with stakeholders and review of all available information
- Legal system is stable and effective
 - Courts are independent and able to intervene to protect economic and other rights

Republika Is Open for Business: Domestic Market

- Republika's economy is growing rapidly
 - GDP per capita has grown an average of 4% annually over last six years
 - Consumer spending is up 10% over 1985
- Republika continues to invest heavily in infrastructure, including transport and power

Republika provides investors with a substantial market domestically and access to even larger markets in the region

For Further Questions . . .

Contact:

investment@republika.rk*

* Please seek legal assistance before investing.

The Chooth Times

New Chemical Facility to Open in Chooth

Chooth, Provincia, Republika; January 2, 1991 -- Several senior members of the federal and provincial governments joined senior executives from Harry Ltd. Co., a multinational chemicals conglomerate, for a ribbon-cutting ceremony in the outskirts of Chooth today. The ceremonies mark the beginning of construction on a sizeable new chemical facility that Harry, headquartered in Potterland, plans to have operational by early next year.

Government officials have welcomed the foreign investment in Chooth and Republika more broadly; officials at the ceremony spoke hopefully of an influx of jobs to the city. “We welcome Harry as an important partner in Republika’s ongoing economic growth and development,” said Prime Minister Antonio Stark at the event.

Dr. Cornelius Dudge, president of Harry Republika Ltd., spoke appreciatively of the warm treatment his company had received at the hands of Republikan officials: “We could have gone to any number of countries in the region, but Republika won us over with its promising workforce and existing infrastructure, as well as a really strong incentive package that showed us they were serious about building a long-term, mutually beneficial relationship.” “There are always substantial risks — new governments, changing rules, uncertain economics — inherent in investing in a new country, and Republika is no different,” he continued, “but we feel good about what we can accomplish alongside the government here.”

Harry has stated in public filings that it will be producing some of its most broadly sold chemical compounds at the facility, substantially expanding its capacity while doubling its existing footprint in Asia overnight. It is one of the first major multinational industrial companies to invest in Republika, and is the first of Potterland’s 100 largest companies to invest.

The Republika City Post-Gazette

Major NGO Alleges Corruption Rampant in Republikan Government

Republika City, Federal District, Republika; March 13, 2010 -- A global anti-corruption watchdog, CleanWorld, has published a report alleging damning amounts of corruption and illegality within the Republikan government.

...

Among its most aggressive critiques was its evaluation of the Environmental Ministry, with special focus placed on the permitting process. Dr. V. Stange, Deputy Minister for Industrial Safety and thus final authority for approval of industrial permits, is alleged to have amassed a small fortune through illicit means. CleanWorld points out that Stange has been seen repeatedly in major cities around the globe enjoying luxury goods and experiences: his appearance in a VIP box owned by Harry, a major industrial operator in Republika, particularly drew the attention of the NGO.

...

The government has come out strongly against the report, with a spokesperson emphasizing that the report drew only on circumstantial evidence and that the government has robust anti-corruption measures in place. The Minister of Justice (who was not named in the report), stated emphatically that "the CleanWorld report's findings are total nonsense."

**INTERNATIONAL CHAMBER OF COMMERCE
INTERNATIONAL COURT OF ARBITRATION**

Harry Ltd. Co.,
Claimant

v.

The Socialist Democratic Republika,
Respondent

RESPONSE TO REQUEST FOR ARBITRATION

[EXCERPTED]

12 April 2019

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RESPONSE TO REQUEST FOR ARBITRATION

1. The Socialist Democratic Republika (“Republika” or “Respondent”) hereby submits its response to the Request for Arbitration (“Request”) submitted by Harry Ltd. Co.. (“Harry Ltd. Co.”) dated 18 March 2019.

2. This response does not aim to provide a definitive factual or legal assessment of the claims made by Harry Ltd. Co., and Republika reserves its right to present in due course new or additional facts, evidence, arguments, counter-claims and legal defenses to any and all of Harry Ltd. Co.’s assertions. Moreover, the absence of a response to a given allegation made by Claimant in the Request should not be taken as agreement with or acceptance by Republika of any such allegation.

I. INTRODUCTION

3. Harry Ltd. Co. is a multinational company that designs, develops, manufactures and markets specialty chemicals. Harry Ltd. Co. built a large chemical facility in Republika in 1991 and invested in a substantial expansion of the facility between 2008 and 2012. Republika subsequently discovered that, in the course of that latter investment, Harry Ltd. Co. engaged in bribery and corruption in order to obtain necessary licenses. Accordingly, Harry Ltd. Co.’s investment was not made in accordance with the laws of Republika, and this arbitration must be dismissed for lack of jurisdiction. Harry Ltd. Co.’s claims concerning certain new environmental regulations are also inadmissible in light of Harry Ltd. Co.’s decision to challenge those regulations before the domestic courts in Republika. Even if the Tribunal were to reach the merits of this dispute, Harry Ltd. Co.’s claims should be dismissed because the measures by Republika were in conformity with international law and were taken by Republika in the exercise of its sovereign functions to protect the health of its citizens and the environment. There was no breach of the Potterland-Republika BIT (“BIT”).

II. PROCEDURAL ISSUES

A. Place and Language of the Arbitration

4. Republika agrees with Harry Ltd. Co.'s proposal that Tribeca be the place of arbitration and that English be the language of the arbitration.

B. Selection of Arbitrator

5. In accordance with the BIT, Republika nominates Dr. N. Eymar, a national of Alchovia, as its party-appointed arbitrator.

III. FACTUAL BACKGROUND OF THE DISPUTE

6. Harry Ltd. Co. has operated, and greatly profited from, a chemical facility in Chooth, Provincia, Republika, since 1991.

7. As Harry Ltd. Co. states in its Request, several licenses are required to operate a chemicals facility in Republika, including environmental and safety permits. These licenses explicitly require that the investor comply with the laws of Republika **at all times**. Harry Ltd. Co. last renewed its eight-year licenses in 2012, at the time of a major expansion of the facility.

8. In 2014, a leading Republikan NGO, GreenForce, conducted a study of air and water quality in the neighborhoods surrounding the chemical facility in Chooth. The results of the study revealed various forms of pollution in both the air and water, including particulate matter and dissolved harmful chemical compounds. The study identified several vectors by which the pollutants could be, and likely were being, transmitted from the Harry Ltd. Co. facility. Understandably concerned by the study's findings, affected locals began staging regular protests outside the facility. See **Exhibit R-1**.

9. Republika's Constitution, in an effort to bolster the individual and collective human rights of its citizens, permits citizens to bring environmental claims in court against polluters. One such citizen suit was brought in 2015 against Harry Ltd. Co. for alleged negligence in caring for its facility, with the suit later amended to include the other major chemical manufacturer operating in Republika, Crabbe Inc. (a Narnian

corporation), on similar charges. The plaintiffs in the citizen suit pointed to the NGO study's findings, among other evidence, as support for their claims. Republican law provides that its courts, in exercising their sound discretion to achieve just resolutions to disputes, may fashion an "appropriate remedy" where needed. Such remedies are typical in the equity courts of many countries.

10. Separately, in 2016, the Republican Ministry of Justice's Anticorruption Authority commenced and completed a thorough and complex investigation leading to the arrest of Deputy Environmental Minister for Industrial Safety, Dr. V. Stange, who was indicted on bribery, fraud, and money laundering charges, among others. Dr. Stange was the official responsible for final approval of all chemical permits between 2008 and 2016; he gave final approval to permits related to Harry Ltd. Co.'s chemical facility, including those needed to begin operating the expanded plant capacity in 2012. Offshore bank accounts alleged to be controlled by Dr. Stange show substantial inflows at the time of major permitting milestones related to the expansion, including the final permitting in 2012. Dr. Stange and Mr. Cornelius Dudge, President of Harry Ltd. Co.'s Republican subsidiary (Harry Republika Ltd.), are known to have been social acquaintances for several years. See **Exhibit R-2**, Press Articles on the Corruption.

11. In the aftermath of the indictment of Dr. Stange, the citizens suing Harry Ltd. Co. amended their complaint to add new allegations that Harry Ltd. Co. had bribed environmental officials to renew the various licenses necessary for its expansion project.

12. Concurrently in 2016, the Republican Environmental Ministry notified the public that it was "reviewing its environmental regulations, including chemicals," as the regulations were somewhat outdated. After receiving and considering over one thousand comments in a ninety day period and reviewing available data in a manner in accordance with the Republican Administrative Fairness Act, the Ministry published a series of new environmental regulations. (In response to the Claimant's objection that it did not receive "notice" of the content of the rules, Republika notes that there is no obligation to publish preliminary rules under Republican administrative law, and Harry had more than enough notice to be able to comment on the new rules in any event.)

13. As stated in the Ministry's "Notice of Final Rule," the new regulations were based on "the weight of scientific evidence" and were the "clear outcome of a cost-benefit analysis showing that benefits to public health and the environment outweighed the costs to businesses, which in any event are better able to bear such costs than the people and natural gifts of Republika." These regulations addressed important gaps in the regulatory regime regarding safety controls and labelling; they also sought to remedy and prevent leaks at facilities across the country, including at the facility in Chooth. As noted by the Ministry, these reforms were critically necessary in light of the risks to public health and the environment associated with chemicals production, as highlighted by the 2014 GreenForce report.

14. As Harry Ltd. Co. stated in its Request, it filed an administrative complaint against the Republikan Government challenging the regulations within six months of their being published.

15. In late 2018, following a full and fair proceeding in accordance with Republikan law, the Supreme Court of Republika issued a unanimous decision in the citizen suit, not only awarding damages to locals, but also holding that Harry Ltd. Co.'s environmental licenses had been improperly granted because the chemical facility was below standard and because the citizens had presented sufficient evidence to make out a case that the licenses "may well have been obtained through corrupt means." The Court used its constitutional "appropriate remedy" power to cancel the existing licenses for Harry Ltd. Co. and Crabbe Inc.. The Court did so by applying rules of general applicability, enforceable against all companies operating in Republika, requiring them to at all times operate in a safe and legal manner. Moreover, and contrary to what Harry Ltd. Co. would have this Tribunal believe, the Court followed Republikan law in all aspects of its proceedings and in such a way as to clearly give both Harry Ltd. Co. and Crabbe the process they were due. A full seven-day hearing was undertaken, with both sides able to present evidence on all claims. The Justices announced their rulings with sufficient explanation of all legal principles and factual findings. The citizens put forth more than enough evidence to justify the rulings. The Republikan Supreme Court ruled in a wholly lawful manner.

16. Following the cancellation of its licenses, Harry Ltd. Co. ceased operating its facilities in Republika.

17. The Government participated in good faith in amicable consultations with Harry Ltd. Co., after receiving Harry Ltd. Co.'s notice of dispute under the BIT. Unfortunately, those discussions were not successful because of unreasonable demands by Harry Ltd. Co., and Harry Ltd. Co. subsequently initiated this arbitration.

IV. JURISDICTION

18. As an initial matter, this Tribunal does not have jurisdiction over this dispute.

19. First, the Tribunal lacks jurisdiction because Harry Ltd. Co. procured its investment through illegal and corrupt means and, pursuant to Article 1(a) of the BIT and customary international law, Harry Ltd. Co.'s purported investment therefore is not entitled to investment protection under the BIT. Republika emphasizes that it did not learn of the corruption until 2016, at which point a thorough investigation, leading to the arrest of Dr. Stange, was immediately undertaken.

20. Second, because it first challenged the 2017 regulations in a competent court of Republika, rather than in an arbitral tribunal, Harry Ltd. Co. is barred by Article 23(1) of the BIT from bringing its claims concerning those regulations before this Tribunal.

21. For these reasons, the Tribunal should find that it lacks jurisdiction to adjudicate this dispute and/or that Harry Ltd. Co.'s claims are inadmissible, and should dismiss all claims brought by Harry Ltd. Co. against Republika.

V. RESPONSE TO CLAIMS

22. In the alternative, in the event this Tribunal determines it does have jurisdiction to reach the merits of this dispute, Harry Ltd. Co.'s claims should be dismissed on the merits. Republika entirely rejects Harry Ltd. Co.'s claims that (1) the 2018 Supreme Court decision and 2017 regulations amounted to an unlawful expropriation of Harry Ltd. Co.'s facility and (2) that these actions amounted to a

violation of the “fair and equitable treatment” standard enunciated in Article 11 of the BIT.

VI. OVERVIEW OF LEGAL ARGUMENTS

[Not included in this excerpt]

VII. REQUEST FOR RELIEF

23. For the reasons stated and on the grounds specified above, Harry Ltd. Co. respectfully requests that the Arbitral Tribunal issue an award:

- 1) Declaring that the Tribunal does not have jurisdiction over this dispute per the terms of the Potterland-Republika BIT; or, in the alternative
- 2) Denying the claims raised by Harry Ltd. Co. under Articles 11 and 14 of the BIT on the merits; and
- 3) Ordering Harry Ltd. Co. to pay the costs of the arbitration and to reimburse Republika for all legal fees, expenses, and other costs incurred in connection with the arbitration; and
- 4) Granting any other relief the Arbitral Tribunal may deem appropriate.

24. Republika reserves the right to supplement and amend this response in the course of the proceeding.

Respectfully submitted,

[signed]

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Ministry of Foreign Affairs
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98213
Republika

The Chooth Times

NGO Study Shows Substantial Pollution in Chooth; Harry Facility to Blame?

Chooth, Provincia, Republika; March 11, 2014 -- GreenForce, a Chooth-based NGO, released a scathing report documenting the results of a years-long investigation and study of air and water pollution in Chooth. The report found substantially elevated levels of particulate matter in the air, as well as dissolved compounds in the water, with the NGO stating that “sustained exposure to these types of particles in the air has been shown to cause long-term lung damage” and that “Choothians, especially children, are at risk for several chronic health concerns due to the polluted water.” The report continued to identify several potential vectors by which the pollutants were escaping Harry’s facility — including at the newly built secondary plant, completed in 2012 — and reaching the water supply. The air particulate matter was chemically similar to a known byproduct of the primary pesticide produced at Harry’s facility.

The governor of Provincia stated that his office “was aware” of the study and was in consultations with local officials, as well as Harry, regarding the findings. A spokesperson for the recently formed People’s Green Party, which is fielding candidates in the Provincia elections due later this year, called the findings “outrageous” and stated that “unlike our current government, the PGP will fight for the health and safety of all Republikans rather than being captured by special interests and foreign profiteers.”

In a statement, a Harry spokesperson rejected the study’s conclusions regarding the links between the facility and the pollution, stating that “Harry has always taken, and will continue to take, the utmost precautions throughout the chemical manufacturing process, from intake to storage and treatment.”

The Chooth Times

A Year of Protests: How a Chooth Grandmother Began a National Movement

Chooth, Provincia, Republika; March 13, 2015 -- A year ago, Carol Canvers set up a folding chair just beyond the gated entry to Chooth's largest industrial facility, the Harry chemical plant, and held up a sign: "My grandchildren deserve better." The next day, she was joined by two friends; as word of the GreenForce report on air and water pollution began to spread, however, her small, personal protest grew into something much larger. Now, on Saturdays or important landmark dates (such as the anniversary of the plant's opening two weeks ago), Carol is joined by crowds of fellow protesters numbering in the thousands.

The protests have become rallying points for the People's Green Party, a young political movement that swept to power in Provincia last year on the backs of popular frustration with pollution, health harms, and the government's lack of response, and now has national ambitions. The protests have remained largely peaceful, though police and small numbers of more aggressive protesters have clashed near the gates to the facility; last September, five teenaged protesters were arrested after they climbed an exterior fence and attempted to enter an office structure.

For her part, Carol just wants to see something change: she says she still has not seen or heard anything from either Harry or the national government that leads her to believe the pollution is improving. As a result, she plans on voting for the PGP, hoping her protest movement can change the direction of not only her small and neglected neighborhood in Chooth, but also the entire country.

The Potterland Daily Quibbler

Civil Servants' Lives of Luxury: Spotted in Hogwarsh

July 8, 2008 -- While our cameras often find themselves trained on actors, athletes, and billionaires, we've recently spotted a range of unexpected government-types traipsing around Hogwarsh, living the rich and famous lifestyle for at least a day. Below is a collection of some of our most recent catches:

...

8. Dr. V. Stange, Ministry of the Environment, Republika

Dr. Stange holds a powerful position in Republika's Ministry of the Environment, with his decisions making or breaking which companies receive permits to operate in Republika's rapidly growing economy. No wonder he needed a breather, then: our eagle-eyed photojournalists caught him toting bags from Versace and Cartier down Diagon Alley, before attending a football match in a VIP box normally occupied by some of Hogwarsh's corporate titans.

...

The Republika City Post-Gazette

High-level Environmental Minister Arrested for Corruption

Republika City, Federal District, Republika; January 18, 2016 -- Dr. V. Stange, Deputy Environmental Minister for Industrial Safety, was arrested in a pre-dawn raid by special police of the anti-corruption force and charged with bribery, fraud, and money laundering, among other offenses. Stange was responsible for issuing final permits for all major industrial facilities in Republika.

Prosecutors from the anti-corruption force announced the arrest in a press conference this morning, praising the investigative team and stating “this might just be the tip of the iceberg.” “Our team uncovered a complex and sophisticated web of bank accounts, within Republika and across a number of offshore locations, that had clear markers of years of corrupt dealings.” The prosecutors continued, noting that “major inflows” were timed with “certain significant permitting decisions.”

Stange’s dealings have previously come under scrutiny: he was the subject of a critical report by global NGO CleanWorld in 2010, in which the NGO highlighted his incongruously lavish lifestyle. Stange has also been criticized for being overly close to the parties he is meant to regulate, including being seen at a VIP football box owned by Potterland multinational Harry and being a long-standing social acquaintance of Cornelius Dudge, President of Harry’s Republikan subsidiary.

While the implications of Stange’s arrest for the governing party, as well as for his associates, were unclear, experts predicted the arrest would have significant after-effects. “This is huge,” said Professor Pym Hank, of Chooth University, “Stange’s money was coming from somewhere, and now we know for sure it was from somewhere it wasn’t supposed to be from: heads are going to roll.”

TERMS OF REFERENCE

Pursuant to Article 23 of the ICC Arbitration Rules in force as of
1 March 2017

ICC Arbitration No. 101/AF

Harry Ltd. Co. v The Socialist Democratic Republika

The Parties and their Representatives

Claimant

Harry Ltd. Company

Represented by

Weenley Brothers LLP
3 Diagon Alley, 10th Floor
Chelswan, Hogwarsh 940224
Kingdom of Potterland
+14 24 4799 3100

Respondent

The Socialist Democratic Republika

Represented by

Republika Ministry of Justice
at.torney@moj.republika.gov
Republika City, Fed. Dist. 98213
Republika
+66 32-444-8001

The Arbitral Tribunal

Prof. Charles Reus III
(President)

Xavier Arbitrators LLP
Salem Center, 2nd Floor
Empireland
professorx@xavierarb.el

Mr. Albus Dumblescreen
(Claimant-Nominated)

Dumblescreen Disputes LLP
55 Armenian St., Fifth Floor
Baklavastan
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Dr. N. Eymar
(Respondent-Nominated)

Maracana Arbitration Ltd.
Av. Maracanã 242
Rio de Yaan, Alchovia
neymar@maracana.com

I. Defined Terms

1. The following defined terms are used in these Terms of Reference:

- International Chamber of Commerce (“ICC”)
- International Court of Arbitration of the International Chamber of Commerce (“Court”)
- Secretariat of the International Court of Arbitration (“Secretariat”)
- ICC Arbitration Rules in force as of 1 March 2017 (“Rules”)
- Arbitral Tribunal (“Tribunal”)
- Claimant and Respondent together (“Parties”)
- Harry Ltd. Co., a company incorporated under the laws of the Kingdom of Potterland, Claimant (“Harry Ltd. Co.”)
- Kingdom of Potterland, home state of Harry (“Potterland”)
- Democratic Socialist Republika (“Republika”)
- Agreement between the Government of the Kingdom of Potterland and the Socialist Democratic Republika for the Promotion and Reciprocal Protection of Investments dated 19 August 1996 (“BIT”)

II. The Parties and their Representatives

2. Any addition or change to the registered office of any party or to a party’s legal representation after the date of these Terms of Reference must be notified to the other Parties, the Tribunal and the Secretariat in writing immediately after such addition or change.
3. When a relationship exists between a new party representative and an arbitrator which in the Tribunal’s view may create a conflict of interest, the Parties agree that the Tribunal may take appropriate measures to ensure the integrity of the arbitration, including the exclusion of the new party representative from participating in all or part of the arbitration.

III. Constitution of the Tribunal

4. The Tribunal was constituted as follows:

On 22 March, 2019, Mr. Albus Dumblescreen was confirmed as co-arbitrator by the Secretary General upon nomination by Claimant, pursuant to Article 13(1).

On 30 April, 2019, Dr. N. Eymar was confirmed as co-arbitrator by the Secretary General upon nomination by Respondent, pursuant to Article 13(1).

On 14 May, 2019, Professor Charles Reus III was confirmed as president of the Tribunal by the Secretary General upon joint nomination by the Parties, pursuant to Article 13(1).

IV. Notifications and Communications

5. Pursuant to Article 3 of the Rules, the Parties and the Tribunal must send copies of all written correspondence directly to all other Parties’ representatives, each arbitrator and the Secretariat simultaneously to the addresses indicated herein.
6. Communications shall be sent to the Party representatives’ email addresses as set out above on or before any date set by the Tribunal and by courier only when required.
7. Documents must be sent to the Secretariat in electronic form only.

8. Subject to any requirements of mandatory law that may be applicable, and unless the Parties agree otherwise, (1) the Terms of Reference may be signed in counterparts and (2) such counterparts may be scanned and communicated to the Secretariat pursuant to Article 3 of the Rules by email or any other means of telecommunication that provides a record of the sending thereof.
9. Likewise, subject to any requirements of mandatory law that may be applicable, the Parties may agree (1) that any award be signed by the members of the Tribunal in counterparts and/or (2) that all such counterparts be assembled in a single electronic file and notified to the parties by the Secretariat by email or any other means of telecommunication that provides a record of the sending thereof, pursuant to Article 34 of the Rules.

V. Procedure to Date

10. On 18 March 2019, the Secretariat received a Request for Arbitration filed by Claimant.
11. In its Request, Claimant indicated that, in accordance with the Parties' arbitration agreement, the arbitration is submitted to a three-member Tribunal, and nominated Mr. Albus Dumblescreen as its co-arbitrator.
12. The Secretariat notified the Request for Arbitration to Respondent on 20 March 2019 and asked the Respondent to prepare its Answer to the Request by 12 April 2019.
13. On 12 April 2019, the Secretariat received an Answer to the Request for Arbitration filed by Respondent.
14. In the Answer, Respondent agreed with Claimant to submit the arbitration to a three-member Tribunal and nominated Dr. N. Eymar as co-arbitrator.
15. Pursuant to Article 16 of the Rules, the file was transmitted to the Tribunal on 15 May 2019.
16. As required by Article 24 of the Rules, the Tribunal convened a case management conference, which took place via telephone conference on 30 April 2019.

VI. Arbitration Agreement

17. Claimant, Harry Ltd. Co., raises claims under the arbitration agreement contained at Article 23 of the Potterland-Republika Bilateral Investment Treaty ("**BIT**"), signed 19 August, 1996 and entered into force on 1 January 2000, which provides:

1. If an investment dispute cannot be resolved amicably, the disputing investor may submit a claim that the disputing Contracting Party has breached an obligation under Articles 9 through 15, and that the disputing investor has incurred loss or damage by reason of, or arising out of, that breach. The disputing investor may submit such a claim:

- a) to the courts or administrative tribunals of the disputing Contracting Party, provided that such courts or tribunals have jurisdiction over such claims; or*
- b) to the International Court of Arbitration under the ICC Arbitration Rules.*

VII. Applicable Substantive Law

18. Article 23.7 of the Potterland-Republika Bilateral Investment Treaty includes the following provision regarding applicable law:

7. The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:

- a) the law in force of the Contracting Party concerned;*
- b) the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;*
- c) the provisions of special agreements relating to the investment;*
- d) the general principles of international law.*

VIII. Applicable Procedural Rules

19. Pursuant to Article 19 of the Rules, the proceedings shall be governed by the Rules and, where the Rules are silent, by any rules which the Parties or, failing them, the Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

IX. Language of the arbitration

20. In their respective Request for Arbitration and Response, the Parties have jointly agreed that the language of the arbitration shall be English.

X. Place of Arbitration

21. The place of arbitration was not provided in the arbitration agreement. The Parties subsequently agreed on Tribeca as place of arbitration.
22. Pursuant to Article 18(2) of the Rules, the Tribunal may, after consultation with the Parties, conduct hearings and meetings at any location it considers appropriate.
23. Pursuant to Article 18(3) of the Rules, the Tribunal may deliberate at any location it considers appropriate.

XI. Parties' Respective Positions and Relief Sought

24. The purpose of the following summaries is to satisfy the requirement of Article 23(1) of the Rules, without prejudice to any other or further allegations, arguments, contentions and denials contained in the submissions already on record, and in future pleadings or submissions in this arbitration, subject to Article 23(4) of the Rules.
25. No Party shall make new claims which fall outside the limits of these Terms of Reference once they have been signed or approved, unless it has been authorized to do so by the Tribunal who shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances.
26. No statement or omission in the summary of any Party is to be interpreted as a waiver or admission of any issue of fact or law. The summary neither reflects any fact finding by the Tribunal nor any admission by any other Party.
27. The summaries of the Parties' respective positions and relief sought provided in these Terms of Reference are based on the submissions made by the Parties to date: Claimant's Request

for Arbitration dated March 18, 2019 and Respondent's Response to the Request for Arbitration dated April 12, 2019.¹

28. Based on the Parties' submissions, a summary of facts is hereafter provided.

- a) In March 1991, Harry Ltd. Co. ("**Harry**"), a firm incorporated under the laws of the Kingdom of Potterland and having its headquarters in that country, began construction on a large-scale chemical facility, which it opened for operations a year later on March 1, 1992. The facility is located in Chooth, the capital of the state of Provincia, Republika. As of 2018, Harry was one of two chemical facility operators in Republika, with an 85% market share (Crabbe Inc., a Narnian corporation, is the other operator in Republika). Eighty percent of Harry Ltd. Co.'s employees are Republikans; 75% of the senior management roles are occupied by citizens of Potterland.
- b) On June 30, 1996, the governments of Potterland and Republika signed the Potterland-Republika Bilateral Investment Treaty ("**BIT**") with the agreement entering into force on January 1, 2000. Relevant provisions of the BIT are included as an Annex to this document.
- c) Republikan law requires that chemical facility operators obtain and maintain several licenses. Most relevant to this Arbitration, each facility must obtain an environmental permit for operation ("**EPO**") and a certificate of safety. These licenses require initial evaluation and approval from the Republikan Environmental Ministry, and are valid for eight-year terms. Renewal of these licenses is subject to governmental inspections, and the licenses are contingent on the operator "complying with the laws of Republika at all times."
- d) Harry Ltd. Co. renewed its licenses and permits in 1996,² 2004, and 2012. In a series of meetings beginning in 2007 between Republikan officials from the Ministry of Industry and Harry Ltd. Co. executives, the executives informed Republika that they were considering adding a substantial amount of new capacity by expanding the plant. The Claimant states that Republikan officials promised their support for the addition and stated that they would do all they could to ensure Harry Ltd. Co.'s construction was permitted as efficiently as possible within the bounds of the law and that ongoing operations could continue smoothly. The Claimants also highlight that the Republikan Minister of Industry, at a conference on foreign investment in 2010, awarded Harry Ltd. Co. with the "Investor of the Year" award, which the Ministry hands out annually to "companies that, through their hiring of Republikans, production of useful goods or rendering of vital services, and overall commitment to Republika, make the country better."
- e) In 2010, the Republikan Constitution was amended. Most relevant to this Arbitration, Article XXXIII of the Constitution, entitled "Rights of Citizens to Healthy Future," was amended to allow "affected citizens," "after exhausting any administrative requirements established by the Republikan Parliament," to "seek remedy in court for harms to the environment and health caused in breach of the laws of Republika." Per the amendment, "the court may provide any appropriate remedy" in response to such suit.
- f) On September 9, 2012, Harry Ltd. Co. completed the five-year construction of a substantial expansion of its facility, which included the addition of a new manufacturing plant, and began operations in the new plant. The finished expansion represented nearly a doubling of the total capital invested by Harry Ltd. Co. into the facility. To begin operating this second

¹ Parts of the pleadings by the Claimant and the Respondent have been excerpted in the version included with this problem. The necessary factual background is presented in summary form herein.

² Chemical licenses issued or renewed before 1994 had to be renewed every four years, rather than eight.

plant, Harry Ltd. Co. successfully underwent the full process for obtaining new environmental and safety permits.

- g) In 2014, an NGO, GreenForce, published a report detailing pollution in Chooth and linking this pollution to the Harry Ltd. Co. facility. Harry denies the accuracy of the findings. As a result of the report, small protests have occurred on a regular basis outside the Chooth facility.
- h) On April 2, 2015, a class of residents of Chooth brought a suit under the amended Article XXXIII against Harry Ltd. Co., alleging negligence in its operations and maintenance of the facility. The plaintiffs subsequently added Crabbe Inc., the other chemical manufacturer in Republika, as a defendant, raising similar claims.
- i) On January 18, 2016, Doctor V. Stange, the sitting Deputy Environmental Minister for Industrial Safety of Republika, was indicted on charges of bribery, fraud, and money laundering, among other related charges. The plaintiff's class in the above-mentioned lawsuit against Harry Ltd. Co. moved to amend their complaint to include allegations that Harry Ltd. Co. "paid bribes to Dr. Stange and other officials" at the time of the 2012 licensing for the expanded facility and renewals of Harry Ltd. Co.'s existing licenses.
- j) On March 15, 2016, the Government of Republika notified the public that it was "reviewing its environmental regulations, including chemicals." The Environmental Ministry, in accordance with the Republikan Administrative Fairness Act, posted a "notice of rulemaking" and solicited comments from the public over the statutorily required ninety-day period. The Ministry publicly announced it had received and considered over one thousand comments.
- k) On January 31, 2017, the Environmental Ministry promulgated regulations under the Republikan Environmental and Safety Act; these regulations included, *inter alia*:
 - a. Requirements that "all chemical facilities be fitted with storage, piping, and processing equipment that is considered 'world class'";
 - b. Requirements that "all byproducts of chemical reactions be treated, stored, and disposed of in a manner eliminating contamination risk";
 - c. Requirements that a list of chemicals, among which are the main outputs of Harry Ltd. Co.'s Chooth facility, "be labelled in clearly visible font as 'hazardous' and listing all known potential side effects of exposure, ingestion, or inhalation, as appropriate."
- l) The Ministry stated in its "Notice of Final Rule" that it relied on "the weight of scientific evidence" and the "clear outcome of a cost-benefit analysis showing that benefits to public health and the environment outweighed the costs to businesses, which in any event are better able to bear such costs than the people and natural gifts of Republika." Harry Ltd. Co. submitted comments to the Ministry (which Harry Ltd. Co. also posted on its website and in its 2016 Annual Report); the comments stated, in relevant part, that "equipment used at the Chooth facility has been subjected to rigorous testing and meets regulatory standards in advanced economies around the world, including in Potterland ... recent scientific studies suggesting health and environmental risks at the Chooth facility have been widely decried by the scientific community and should not be relied on." It continued, noting that "labeling requirements are unlikely to change customer behavior and even may mislead them, distorting the market."
- m) The regulations took effect sixty days after promulgation, on April 1, 2017. Harry Ltd. Co. alleges that these regulations required substantial capital expenditures, and that the labeling

led to a sixty percent loss in sales of its products and a corresponding operating loss at the facility. Harry Ltd. Co.'s share price dropped fifty-eight percent by October 1, 2017.

- n) The Republican Administrative Fairness Act requires challenges to new regulations be made within six months of promulgation. On April 14, 2017, Harry Ltd. Co. sued the Environmental Ministry alleging that the regulations were arbitrary in that they did not properly weigh costs and benefits in light of available science, and they were also beyond the regulators' authority. Harry Ltd. Co. also claimed that the new regulations could not lawfully be applied to it in light of the assurances it had received from the Republican government at the time of its initial investment in Republika, on which it claimed to have relied in making its investment. Under a long-standing Republican precedent, Republican regulations are not stayed during challenge.
 - o) In October 2018, the Supreme Court of Republika held proceedings in the citizen suit after completion of two years of discovery. A seven-day hearing was held in front of a three-Justice panel. On the issue of negligent operations, the citizen-plaintiffs presented testimony of experts from GreenForce as well as former government officials who stated the inspection process was haphazard. Harry Ltd. Co. presented evidence in its defense including testimony from executives regarding the extent of Harry Ltd. Co.'s expenditure on safety, as well as expert scientists who provided reports contradicting the findings of the NGO and plaintiffs' experts. On the corruption issue, under a provision of Republican evidence law and governmental privilege, the Justices heard *in camera* testimony from government and law enforcement officials who had investigated Dr. Stange in 2016. Harry Ltd. Co. was allowed to offer witness statements in response but could not cross-examine the officials giving *in camera* testimony.
 - p) On December 11, 2018, the Supreme Court of Republika issued its judgment in the citizen suit: it awarded USD 60 million in damages to the plaintiff class and used its "appropriate remedy" power to cancel the existing licenses for Harry Ltd. Co. and the one other chemical company operating in Republika at the time. The court found that "Harry Ltd. Co.'s environmental licenses had been improperly granted" because the chemical facility was "below standard" and because "the citizens ha[d] presented sufficient evidence to make out a case that the licenses may well have been obtained through corrupt means."
 - q) Since the court ruling, the Chooth facility has ceased operations and has been mothballed.
 - r) On January 3, 2019, Harry Ltd. Co. and Republika began consultations on resolving the dispute under the requirements of the BIT. On March 18, 2019, after consultations ended without arriving at an agreement, Harry Ltd. Co. filed a Request for Arbitration with the ICC. On April 12, 2019, Republika filed its Response.
29. By signing these Terms of Reference, the Parties neither subscribe nor acquiesce to the summary of the other Party's position set forth below.

A- Claimant's Position and Relief sought

30. Claimant raises two distinct claims, as described in its Request for Arbitration:
- a) Republika violated Article 14 of the Potterland-Republika BIT by engaging in an unlawful expropriation of Harry Ltd. Co.'s investment through the Supreme Court judgment of December 11, 2018 as well as the implementation of the 2017 regulations.
 - b) Republika violated Article 11 of the Potterland-Republika BIT by breaching the standard of "fair and equitable treatment" required by the BIT through, among other measures, the

regulations promulgated on January 31, 2017 and the Supreme Court judgment of December 11, 2018.

31. Claimant alleges that it was harmed through its expenditure of capital (alleged to be “at least 50 million USD”) on facility upgrades and new labels in order to be in compliance with the January 31, 2017 regulation, as well as the fair market value of its Provincia City facility that it alleges was expropriated (to be quantified, but estimated for present purposes to be in excess of USD300 million).
32. Claimant also preemptively addressed Respondent’s jurisdictional objection based on illegality (outlined below), denying the allegations of corruption and alleging that Republika had knowledge of the alleged corruption at the time of Claimant’s investment in the expansion of the facility and thus is estopped from now asserting a jurisdictional objection on that basis.

B- Respondent’s Position and Relief sought

33. Respondent Potterland raises jurisdictional objections on the grounds that:
 - a) Harry Ltd. Co.’s investment was not made “in accordance with” the laws of Republika because Harry Ltd. Co. participated in corruption and otherwise engaged in unlawful activities in regards to the procurement of licenses in connection with its 2008-2012 expansion and 2012 license renewals.
 - b) Because Harry Ltd. Co. has pursued a challenge to the January 31, 2017 regulations in “a court[] or administrative tribunal[]” of Republika, under Article 23.1(a) of the BIT, it has waived its rights to submit this dispute to arbitration and thus the Tribunal lacks jurisdiction (and/or the claims are inadmissible).
34. Any question of jurisdiction or admissibility shall be decided by the Tribunal. By signing these Terms of Reference, Respondent does not waive its jurisdictional objections.
35. If this Tribunal finds that it has jurisdiction, Respondent denies Claimant’s claims that it unlawfully expropriated Claimant’s facility in violation of Article 17 of the BIT and that it accorded Claimant’s investment treatment that fell below the standard required under Article 11 of the BIT.

XII. Amount in Dispute

36. The amount in dispute is currently unquantified but for present purposes is estimated to be in excess of USD300 million. The Claimant will quantify its alleged damages in a later phase of the arbitration.

XIII. Issues to be determined

37. The issues to be determined by the Tribunal may include but are not limited to the following:
 - a) Whether this Tribunal has jurisdiction, under the Potterland-Republika BIT and relevant provisions of international law, to adjudicate this dispute;
 - b) Whether Republika committed an unlawful expropriation of Harry Ltd. Co.’s investment under Article 14 of the BIT; and
 - c) Whether Republika committed a breach of the “fair and equitable treatment” standard in regards to Harry Ltd. Co.’s investment under Article 11 of the BIT.

38. Issues of quantum will be decided in a subsequent phase of the arbitration.
39. The Tribunal shall be free to decide any issue by way of partial or interim awards, or by a final award as it may deem appropriate and after having provided the Parties a reasonable opportunity to present their case.

XIV. Other Procedural Matters

40. Any procedural matter may be determined by way of procedural orders after consultation with the Parties.
41. Any procedural order may be made by the President alone on behalf of the Tribunal, after consulting with the co-arbitrators. In case of urgency, the President may, after attempting to consult with the co-arbitrators, issue procedural orders and directions alone.
42. In accordance with Article 22(1) of the Rules, the Tribunal and the Parties agree to make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

XV. Signature of the Terms of Reference

Place of Arbitration: Tribeca, Tribeca

Signatures:

[Signed]
Fred Weenley
For and on behalf of Claimant
20 May 2019

[Signed]
A.T. Torney
For and on behalf of Respondent
20 May 2019

[Signed]
Mr. Albus Dumblescreen
(Co-Arbitrator)
20 May 2019

[Signed]
Prof. Charles Reus III
(President)
20 May 2019

[Signed]
Dr. N. Eymar
(Co-Arbitrator)
20 May 2019

**THE AGREEMENT BETWEEN THE GOVERNMENT OF THE KINGDOM OF
POTTERLAND AND THE GOVERNMENT OF THE SOCIALIST DEMOCRATIC
REPUBLIKA FOR THE PROMOTION AND RECIPROCAL PROTECTION OF
INVESTMENTS DATED 19 AUGUST 1996**

Preamble

The Government of the Kingdom of Potterland and the Government of Socialist Democratic Republika (hereinafter referred to as the “Contracting Parties” or the “Parties”),

Desiring to intensify the economic cooperation to the mutual benefit of both Contracting Parties,

Intending to create and maintain favorable conditions for the investments of investors of one Contracting Party in the territory of the other Contracting Party;

Recognizing the need to promote and protect foreign investments with the aim to foster the economic prosperity of both Contracting Parties;

Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment and the promotion of consumer protection and internationally recognized labor rights,

Have agreed as follows:

Article 1: Definitions

For the purpose of this Agreement:

(a) “**covered investment**” means, with respect to a Contracting Party, an investment in its territory of an investor of any other Contracting Party in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, provided that the investment has been made in accordance with the laws and regulations of the Contracting Party;

(b) “**freely usable currency**” means a freely usable currency as determined by the International Monetary Fund (“IMF”) under its Articles of Agreement and any amendments thereto;

(c) “**investment**” means every kind of asset, owned or controlled, by an investor, including but not limited to the following:

(i) movable and immovable property and other property rights such as mortgages, liens or pledges;

(ii) shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights or interest derived therefrom;

(iii) intellectual property rights which are conferred pursuant to the laws and regulations of each Contracting Party;

(iv) claims to money or to any contractual performance related to a business and having financial value;

(v) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; and

(vi) business concessions required to conduct economic activities and having financial value conferred by law or under a contract, including any concessions to search, cultivate, extract or exploit natural resources.

The term “investment” also includes amounts yielded by investments, in particular, profits, interest, capital gains, dividend, royalties and fees. Any alteration of the form in which assets are invested or reinvested shall not affect their classification as investment;

(d) “**investor**” means a natural person of a Contracting Party or a juridical person of a Contracting Party that is making, or has made an investment in the territory of any other Contracting Party;

(e) “**juridical person**” means any legal entity duly constituted or otherwise organised under the applicable law of a Contracting Party, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any enterprise, corporation, trust, partnership, joint venture, sole proprietorship, association, or organisation;

(f) “**measures**” means any measure of a Contracting Party, whether in the form of laws, regulations, rules, procedures, decisions, and administrative actions or practice, adopted or maintained by:

(i) central, regional or local government or authorities; or

(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

(g) “**natural person**” means any natural person possessing the nationality or citizenship of, or right of permanent residence in the Contracting Party in accordance with its laws, regulations and national policies

Article 11: Treatment of Investment

1. Each Contracting Party shall accord to covered investments of investors of any other Contracting Party, fair and equitable treatment and full protection and security.
2. For greater certainty:
 - (a) fair and equitable treatment requires each Contracting Party not to deny justice in any legal or administrative proceedings in accordance with the principle of due process; and
 - (b) full protection and security requires each Contracting Party to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments.
3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

Article 14: Expropriation and Compensation¹

1. A Contracting Party shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation (“expropriation”), except:
 - (a) for a public purpose;
 - (b) in a non-discriminatory manner;
 - (c) on payment of prompt, adequate, and effective compensation; and
 - (d) in accordance with due process of law.
2. The compensation referred to in sub-paragraph 1(c) shall:
 - (a) be paid without delay;
 - (b) be equivalent to the fair market value of the expropriated investment immediately before or at the time when the expropriation was publicly announced, or when the expropriation occurred, whichever is applicable; and
 - (c) not reflect any change in value because the intended expropriation had become known earlier.

¹ This Article shall be read with Annex B (Expropriation and Compensation).

3. In the event of delay, the compensation shall include an appropriate interest in accordance with the laws and regulations of the Contracting Party making the expropriation. The compensation, including any accrued interest, shall be payable either in the currency in which the investment was originally made or, if requested by the investor, in a freely usable currency.

Article 17: General Exceptions

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Contracting Parties or their investors where like conditions prevail, or a disguised restriction on investors of any other Contracting Party and their investments, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Contracting Party of measures:

- (a) necessary to protect public morals or to maintain public order;²
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with this Agreement, including those relating to:
 - (i) the prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract;
 - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
 - (iii) safety;
- (d) aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of investments or investors of any Contracting Party;
- (e) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (f) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

² The public order exception may be invoked by a Member State only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

Article 23: Submission of a Claim

1. If an investment dispute cannot be resolved amicably, the disputing investor may submit a claim that the disputing Contracting Party has breached an obligation under Articles 9 through 15, and that the disputing investor has incurred loss or damage by reason of, or arising out of, that breach. The disputing investor may submit such a claim:

(a) to the courts or administrative tribunals of the disputing Contracting Party, provided that such courts or tribunals have jurisdiction over such claims; or

(b) to the International Court of Arbitration under the ICC Arbitration Rules.

...

7. The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:

(a) the law in force of the Contracting Party concerned;

(b) the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;

(c) the provisions of special agreements relating to the investment;

(d) the general principles of international law.

ANNEX 2: Expropriation and Compensation

1. An action or a series of related actions by a Contracting Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment.

2. Article 14(1) addresses two situations:

(a) the first situation is where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and

(b) the second situation is where an action or series of related actions by a Contracting Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

3. The determination of whether an action or series of actions by a Contracting Party, in a specific fact situation, constitutes an expropriation of the type referred to in sub-paragraph 2(b), requires a case-by-case, fact-based inquiry that considers, among other factors:

(a) the economic impact of the government action, although the fact that an action or series of actions by a Contracting Party has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred;

(b) whether the government action breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal document; and

(c) the character of the government action, including, its objective and whether the action is disproportionate to the public purpose referred to in Article 14(1).

4. Non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation of the type referred to in sub-paragraph 2(b).