PCA Case No. 2012-06

IN THE MATTER OF AN ARBITRATION

PURSUANT TO ARTICLE XIII OF THE AGREEMENT BETWEEN THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF BARBADOS FOR THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS, SIGNED ON 29 MAY 1996

-and-

THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ARBITRATION RULES AS ADOPTED IN 1976

-between-

PETER A. ALLARD

("Claimant")

-and-

THE GOVERNMENT OF BARBADOS

("Respondent," and together with Claimant, the "Parties")

Award on Jurisdiction

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13 June 2014

Tribunal

Dr. Gavan Griffith QC (President)
Professor Andrew Newcombe
Professor W. Michael Reisman

GLOSSARY OF DEFINED TERMS / LIST OF ABBREVIATIONS

Barbados	the Government of Barbados
BIT	the Agreement between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investments
BVI	British Virgin Islands
Claimant	Mr. Peter A. Allard
EMP	Environmental Management Plan
Exchange Control Authority or **ECA**	the Exchange Control Authority of Barbados
FET	fair and equitable treatment
First Certificate	a share certificate of GHNSI submitted by the Claimant with his Memorial on Jurisdiction, Exhibit C-127
GHBSI	Graeme Hall Bird Sanctuary Inc.
GHBVI	a corporation allegedly created by the Claimant under the laws of British Virgin Islands
GHNSI	Graeme Hall Nature Sanctuary Inc.
Haberman Report(s)	Expert Reports of Mr. Philip Haberman
Objections	three jurisdictional objections made by the Respondent in its submission of 24 May 2013
PCA	the Permanent Court of Arbitration
Respondent	the Government of Barbados
Sanctuary	a bird sanctuary and nature reserve within the 240 acres of wetlands and green space that comprise the former Graeme Hall Plantation on the south coast of Barbados
Second Certificate	a share certificate of GHNSI submitted by the Claimant with his Statement of Claim, Exhibit C-11
UNCITRAL Rules	the Arbitration Rules of the United Nations Commission on International Trade Law as adopted in 1976
2003 Plan	Amended National Physical Development Plan of 2003

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I. INTRODUCTION

1. The Claimant is Mr. Peter A. Allard, a retired attorney and businessman ("Mr. Allard" or "Claimant") with Canadian nationality, represented in this arbitration by Mr. Robert Wisner and Mr. Jeffrey Levine of McMillan LLP, Barristers and Solicitors, Brookfield Place, Suite 4400, Bay Wellington Tower, 181 Bay Street, Toronto, Ontario, M5J 2T3, Canada, and by Mr. M. Tariq Khan of Khan Chambers, Chancery House, Bridgetown, Barbados.

2. The Respondent in this arbitration is the Government of Barbados ("Barbados" or "Respondent"), represented in this arbitration by Mr. Robert Volterra, Mr. Graham Coop, Mr. Bernhard Maier, and Ms. Jessica Pineda of Volterra Fietta, 1 Fitzroy Square, London W1T 5HE, England.

3. The claims arise under the Agreement between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investments dated 29 May 1996 (the "BIT")[1] concerning Mr. Allard's investment of C$18.8 million in the acquisition and development of an eco-tourism site in Barbados ("Sanctuary").[2] The claims are that the Respondent has "failed to take reasonable and necessary environmental protection measures and, through its organs and agents, has directly contributed to the contamination of the Claimant's eco-tourism site, thereby destroying the value of his investment",[3] and that these "actions and omissions violate Barbados' international obligations to Canadian investors"[4] under the BIT.

4. Article XIII of the BIT provides:

> (1) Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach, shall, to the extent possible, be settled amicably between them.
>
> (2) If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph (4). For the purposes of this paragraph, a dispute is considered to be initiated when the investor of one Contracting Party has delivered notice in writing to the other Contracting Party alleging that a measure taken or not

[1] The Canada-Barbados BIT entered into force on 17 January 1997; Exhibit C-1.

[2] Statement of Claim, ¶ 153.

[3] Notice of Arbitration, ¶ 2.

[4] Notice of Arbitration, ¶ 2.

taken by the latter Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

[…]

(4) The dispute may, at the election of the investor concerned, be submitted to arbitration under:

[…]

(c) an international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

II. PROCEDURAL HISTORY

5. On 21 May 2010, the Claimant delivered a Notice of Arbitration to the Respondent pursuant to Article XIII(4)(c) of the BIT and invoking the Arbitration Rules of the United Nations Commission on International Trade Law as adopted in 1976 ("UNCITRAL Rules").

6. The Claimant appointed Professor Andrew Newcombe as arbitrator on 24 November 2011. The Respondent appointed Professor W. Michael Reisman as arbitrator on 5 January 2012. Dr. Gavan Griffith QC was appointed Presiding Arbitrator on 14 March 2012.

7. On 22 May 2012, the Tribunal and the Parties signed Terms of Appointment, which, among other matters, designated the Permanent Court of Arbitration (the "PCA") as registry for the proceedings.

8. Following a procedural hearing convened in New York on 7 June 2012, the Tribunal issued its Procedural Order No. 1 dated 26 June 2012.

9. On 18 December 2012, the Claimant filed his Statement of Claim followed by the exchange of pleadings between the Parties.

10. On 24 May 2013, the Respondent requested bifurcation of the proceedings to determine three jurisdictional objections ("the objections").

11. Following exchanges of submissions between the Parties, on 10 June 2013 the Tribunal granted the Respondent's request for bifurcation and the preliminary determination of the objections. Thereafter pleadings were exchanged on the objections issues as follows:

12 September 2013, Claimant's Memorial
7 November 2013, Respondent's Counter-Memorial
3 January 2014, Claimant's Reply
3 February 2014, Respondent's Rejoinder on Jurisdiction

12. Between 16 December 2013 and 13 January 2014, the Tribunal made orders in respect of the production to, and inspection by, the Respondent and its forensic experts of documents, including share certificates, requested of the Claimant by the Respondent.

13. An exchange of forensic experts' reports on 31 January 2014 was followed by the experts' joint-report filed 6 February 2014.

14. Hearings on the objections were held in New York over the period 18 to 21 February 2014.

15. The Parties were represented as follows:

Claimant
Robert Wisner
Jeffrey Levine
McMillan LLP

Tariq Khan
Khan Chambers

Respondent
Robert Volterra
Graham Coop
Bernhard Maier
Jessica Pineda
Volterra Fietta

Adriel Brathwaite QC
Attorney General and Minister of Home Affairs, Government of Barbados

Corlita Babb-Schaefer
Principal Crown Counsel, Attorney General's Chambers, Barbados

III. FACTUAL BACKGROUND

16. This part briefly summarizes the facts and contentions of the Parties on the objections. However, in making this determination, the Tribunal has had regard to the entirety of the pleadings, documents, exhibits, transcripts, submissions, citations of law and decisions made by and between the Parties.

17. In October 1996, the Claimant incorporated a Barbadian company, Graeme Hall Bird Sanctuary Inc., later renamed Graeme Hall Nature Sanctuary Inc. ("GHNSI"),[5] to acquire 34.24 acres of

[5] Allard Statement, ¶ 8.

wetlands to establish a bird sanctuary and nature reserve, within some 240 acres of wetlands and open space that comprised the former Graeme Hall Plantation on the south coast of Barbados.[6]

18. The chain of ownership of the Sanctuary is a disputed fact in these proceedings. The Claimant claims ownership within the terms of the BIT in the circumstances he was, and remains, the President and a director of GHNSI[7] as a wholly owned subsidiary of Graeme Hall (B.V.I.), ("GHBVI"), a British Virgin Islands company incorporated in 1996, and of which the Claimant was, and remains, the sole shareholder, President, and a director.[8]

19. Although the Barbados 1986 National Development Plan had designated a "buffer zone" around the perimeter of the Sanctuary for recreational and agricultural use, in 2003 the Respondent issued a proposed Amended Plan (the 2003 Plan) proposing the division of the buffer zone by designating the area adjacent to the Sanctuary for predominantly residential use and the outer area as an urban corridor.

20. In 2007, the 2003 Plan was enacted by the Barbadian Parliament to come into force on 15 April 2008.[9]

21. A sluice gate located at the end of the canal that bisects the Graeme Hall wetlands was long intended both to regulate water levels and to control the exchange of water to and from the sea.[10] It is common ground that in the event the sluice gate is closed or inoperable the regulation of water levels and tidal flow in and out of the wetlands and the sea is inhibited and the integrity of the Sanctuary is thereby liable to be adversely affected.

22. Environmental drainage issues arising from the inappropriate operation of the sluice gate were known to the Parties before the opening of the Sanctuary,[11] and were noted in the Claimant's 1999 Environmental Management Plan ("EMP") and Amended EMP in 2000.[12] Indeed, the

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6 Memorial on Jurisdiction, ¶ 9; Allard Statement, ¶ 7; Certificate of Incorporation, Exhibit C-9.

7 Statement of Claim, ¶ 11.

8 GHBVI Certificate of Incorporation, dated 18 October 1996, Exhibit C-126.

9 Statutory Instruments Supplement No. 14, Supplement to Official Gazette No. 31 dated 7 April 2008, Exhibit C-76.

10 Heaslet Statement, ¶ 10.

11 Statement of Claim, ¶¶ 39-40; Graeme Hall Bird Sanctuary Environmental Management Plan, Exhibit C-43; Amended Graeme Hall Bird Sanctuary Environmental Management Plan dated April 2000, Exhibit C-44; Witness Statement of Mr. Mark Cummins dated 13 June 2013, ¶ 25.

12 Statement of Claim, ¶ 41.

Claimant was required to submit an Amended EMP to address in greater detail the potential drainage issues.[13]

23. In 2005, a failure at the South Coast Sewerage Treatment Plant operated by the Barbados Water Authority resulted in a discharge of raw sewage that seriously contaminated the Sanctuary.[14] According to the Claimant, the negative effects of this pollution were exacerbated by the sluice gate not preventing water flow between the swamp and the sea.[15] Tests conducted by GHNSI's experts at the time confirmed heavy bacterial growths in the water leading to stresses to the ecological systems of the wetlands.[16]

24. The Claimant maintains that such events and functions concerning drainage issues and deficiencies in the operations of the sluice gate led to the serious degradation of the water and swamp areas within the Sanctuary. This, together with the elimination of the buffer zone under the 2003 Plan, especially upon its implementation, has both caused and aggravated continuing damage to the Sanctuary's environment and operations to the point of its destruction as a viable environmental facility. These developments and events collectively led to the postponement of completion of a visitors' centre adjacent to the Sanctuary and also to other consequential damages to the Sanctuary project to the extent that by June 2007 the Claimant contemplated abandoning the Sanctuary as a viable environmental facility, and explored the possibility of a sale of the Sanctuary.[17] As no sale eventuated, the Claimant thereafter decided to permanently close the Sanctuary on 29 October 2008.[18]

25. In summary, the Claimant claims that the Respondent's actions and omissions as particularized in his memorials and evidence breached the Respondent's explicit obligations under Article XIII of the BIT:

    (1) to provide fair and equitable treatment;

    (2) to provide full protection and security; and

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[13] Witness Statement of Mr. Mark Cummins dated 13 June 2013, ¶ 25.

[14] Master Plan for the Graeme Hall Ecosystem authored by the Coastal Zone Management Unit in the Ministry of Energy and the Environment, September 2007, Chapter 3, Exhibit C-72, p. 2.

[15] Statement of Claim, ¶¶ 72-74.

[16] Statement of Claim, ¶ 71.

[17] Statement of Claim, ¶¶ 86-88; Sales advertisement dated 5 June 2007, and email correspondence from S. Heaslet to the International Herald Tribune dated 5 June 2007, Exhibit C-77; Allard Statement, ¶ 67.

[18] GHNSI Press Release dated 29 October 2008, Exhibit C-78.

(3) not to expropriate an investment without compensation.

Further, the Claimant claims that the Respondent violated a principle of customary international law prohibiting a host country from permitting the use of its territory in such a manner as to cause injury to the property of a foreign investor.

26. Apart from Article XIII issues for dispute in the merits phase, a principal provision of the BIT for consideration or objection is Article I(f) and its definition of an "investment" for purposes of protection under the substantive sections of the BIT defining "investment" as:

> any kind of asset owned or controlled either directly, or indirectly through an investor of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws and, in particular, though not exclusively, includes:
>
> i. movable and immovable property and any related property rights, such as mortgages, liens or pledges;
>
> ii. shares, stock, bonds and debentures or any other form of participation in a company, business enterprise or joint venture;
>
> iii. money, claims to money, and claims to performance under contract having a financial value;
>
> iv. goodwill;
>
> v. intellectual property rights;
>
> vi. rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources.
>
> but does not mean real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purposes.[19]

Article XIII(3) of the BIT, also provides for a limitation period:

> An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if:
> […]
> (d) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.[20]

[19] Canada-Barbados BIT, Exhibit C-1.

[20] Canada-Barbados BIT, Exhibit C-1.

IV. JURISDICTIONAL OBJECTIONS AND RELIEF REQUESTED

27. The Respondent requests as a dispositive award that the Tribunal:

> (1) Declare that the Claimant has failed to prove his ownership or control of the Sanctuary at any relevant date and that the Tribunal therefore lacks jurisdiction *ratione personae* and *ratione materiae;*
>
> (2) Declare that the Claimant did not acquire the Sanctuary in the expectation or use it for the purpose of economic benefit or other business purposes and that the Tribunal therefore lacks jurisdiction *ratione materiae*; and
>
> (3) Declare that the Claimant's claims in relation to the Respondent's purported breaches of the BIT fall outside the Tribunal's jurisdiction *ratione temporis* because at the date when these proceedings were initiated (21 May 2010), more than three years had elapsed after the Claimant first acquired or should have acquired knowledge of the alleged breaches (and any consequential loss or damage) on which these claims are based;

with final orders for dismissal of the claim, with costs.[21]

28. In answer, the Claimant requests that the Tribunal issue an award rejecting the Respondent's objections, with costs, to be followed by the merits phase of the proceedings.

29. As the Parties accept that apart from compliance with Article 1(f) the Claimant otherwise qualifies as an "investor", the objections for determination are:

> **(1) Whether the Sanctuary qualifies as an "investment" by the Claimant within Article 1(f); and if so,**
>
> **(2) Whether at the relevant times the Claimant owned or controlled the investment in accordance with Article 1(f); and also**
>
> **(3) Whether the Claimant's claim is within time under Article XIII(3) of the BIT (set out in paragraph 26 above).**

30. In this determination of the objections the Tribunal accepts the general approach as to onus expressed by the *Phoenix Action* case, namely that "if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage", but, nonetheless, that where

[21] Counter-Memorial on Jurisdiction, ¶ 112; Rejoinder on Jurisdiction, ¶ 107.

disputed facts are intermingled with merits issues, as a matter of discretion, the determination of contested jurisdictional objections, may be held over to the merits phase.[22]

A. Objection (1): Whether the Sanctuary Qualifies as an "Investment"

The Respondent's arguments

31. Article 1(f) explicitly excludes the Sanctuary from the ambit of the BIT's protection, as the Claimant did not expect or intend to use, and did not use, the Sanctuary "for the purpose of economic benefit or other business purposes". Hence the Claimant's "investment" is excluded from the protections of the BIT, and the Tribunal has no jurisdiction *ratione materiae* over the Claimant's claim.[23]

32. The terms of the exclusion to Article 1(f), interpreted and applied in accordance with their ordinary meaning and context,[24] require, *inter alia*, an element of profit and purpose,[25] as is established by the expert report of Mr. Philip Haberman, an experienced accountant familiar with concepts of commercial profit.

33. To broaden the scope of the BIT to include not-for-profit ventures and not-for-profit enterprises "artificially commingles the Tribunal's jurisdiction *ratione personae* with its jurisdiction *ratione materiae*". [26]

34. Contemporaneous statements by the Claimant and persons on his behalf repeatedly disclaim any motivation and purposes, original and continuing, by Mr. Allard to develop the Sanctuary for profit making or any other business purposes. Mr. Allard's motivations and intentions in this regard admittedly were exclusively altruistic for the non-commercial purposes of protecting and preserving the environment of the Sanctuary for public purposes.

35. In particular, the Respondent relies upon:[27]

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[22] Phoenix Action v. Czech Republic, ICSID Case No. ARB/06/5, Award of 15 April 2009, ¶ 61.

[23] Jurisdictional Objections and Request for Bifurcation, ¶ 35.

[24] Counter-Memorial on Jurisdiction, ¶ 88.

[25] Counter-Memorial on Jurisdiction, ¶¶ 89-90, *referring to* Black's Law Dictionary 226 (9th ed. 2009), Exhibit RLA-24 and Third Expert Report of Mr. Haberman dated 6 November 2013.

[26] Counter-Memorial on Jurisdiction, ¶ 83.

[27] Other cited statements include: (1) on one occasion, the Claimant proclaimed that he has "great affection and regard for the people of Barbados, and the Sanctuary effort has always been a philanthropic mission". Graeme Hall Nature Sanctuary Press Release "Graeme Hall Nature Sanctuary in Barbados to Close" October

(1) A statement in the Claimant's Statement of Claim, that "Mr. Allard believed that by purchasing a part of the wetlands, developing them to showcase their unique attributes and protecting the eco-system, he would be able to preserve an important part of the environmental heritage of Barbados";[28]

(2) A statement repeated in the Claimant's submissions, evidence, and expert reports, to the effect that "[t]he purpose of [the Claimant's] investment was to create a financially self-sustaining enterprise that would be able to conserve the environmental heritage of Barbados in perpetuity";[29]

(3) A letter from the Claimant to the Respondent's former deputy prime minister, Dame Billie Miller, in which the Claimant stated: "While I firmly believe that this project should be made to financially 'stand on its own feet' (i.e. sustainability), I want to assure the government that my prime motivation is the preservation of Graeme Hall as there are many daily opportunities for me to invest in projects with minimal risk, good security and government procedures already in place";[30]

(4) A letter from the Claimant to the Respondent's former prime minister, stating that the "the nature of [GHNSI's] charitable and technical contributions to Government is by design" and that "[t]he conservation of Graeme Hall Swamp's historic and environmentally sensitive lands is fundamentally a nonprofit endeavor, and not consistent with high revenue tourism or other commercial activities";[31]

(5) A comment by Mr. Harry Roberts, the former general manager of GHNSI, admitting that money was not a consideration for the Sanctuary;[32]

(6) An article by Mr. Heaslet suggesting that the Sanctuary had no interest in making money;[33] and

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29, 2008, Exhibit C-78; (2) Mr. Heaslet, the Claimant's representative, in a newspaper article dated 1 July 2007 confirmed that: "Philanthropically speaking, we respect the sovereign responsibility of Barbados for its environmental legacy, and generally disagree with those who seek to transfer the responsibility for preserving the Barbados environment to private, for-profit interests". Heaslet, "Profit not all that Matters", 1 July 2007, *Sunday Sun*, Exhibit R-8; and (3) following an open day on 1 December 2008, the Claimant's general manager Harry Roberts told the Daily Nation newspaper explicitly that money was not a consideration: "I am glad to see these high numbers [of visitors on the open day]. We saw close to 10 000 people passing through today, and money is not important. The fact that Barbadians can come here with their children and witness something extraordinary makes all the difference". Aimey Phillippe, "Thousands turn up at the Sanctuary again", 2 December 2008, *Daily Nation*, Exhibit R-10.

[28] Statement of Claim, ¶ 14. A similar statement cited by the Respondent reads: "The motivation [for the Claimant's endeavors] is simple. Private investment combined with a conservation ethic can permanently preserve the last mangrove and sedge swamp on the island of Barbados and be supported by its international conservation, research and education facility". Private Ownership Justification, essay authored by S. Heaslet, 26 January 2001, Exhibit C-64, cited in Jurisdictional Objections and Request for Bifurcation, ¶ 42.

[29] Jurisdictional Objections and Request for Bifurcation, ¶ 43, *referring to* Notice of Dispute, 8 September 2009, ¶ 7, Exhibit C-2; Expert Report of Howard N. Rosen and Chris Milburn of FTI Consulting Inc., dated 13 December 2012, ¶ 3.4; Correspondence from Peter Allard to Denis Lowe, MP re RAMSAR Convention dated 30 November 2009, p. 2, ¶ A1., Exhibit C-86. See also Letter from the Claimant to The Right Honourable David Thompson, dated 15 October 2008, p. 3, Exhibit R-7, in which the Claimant emphasized the Sanctuary's "goal of self-sustainability".

[30] Letter from Mr. Allard to the Hon. Billie Miller, 19 July 1995, Exhibit C-30.

[31] Letter from Mr. Allard to the Hon. Owen Arthur, 1 April 2005, p. 6, Exhibit R-11.

[32] Memorial on Jurisdiction, ¶ 33, *referring to* Supplemental Allard Statement, ¶ 13.

[33] Heaslet, "Profit not all that Matters", 1 July 2007, *Sunday Sun*, Exhibit R-8.

(7) An online video entitled "Graeme Hall Nature Sanctuary – Barbados," explaining that "money earned from visitor operations helps pay for environmental management of the 30 acre wetland within the Sanctuary".[34]

36. In summary, the Claimant has failed to establish that the Sanctuary project was established for anything other than for philanthropic or public benefit purposes related to the preservation of the environment;[35] and most certainly not for the purpose of deriving an economic benefit to the requisite level of being directed to derive a commercial profit or for other business purposes.

The Claimant's arguments

37. Mr. Allard's investment in the Sanctuary project falls within the meaning of "investment" because:[36]

(1) His business plans and financial projections for the Sanctuary contemplated (at least) a modest surplus;[37]

(2) He expected that the Sanctuary would generate an economic return;[38]

(3) The Sanctuary was registered as a for-profit business corporation; and

(4) The Sanctuary in fact operated as a for-profit business.

38. A broad meaning of "investment" is supported by the fact that under the BIT, any "enterprise" established under Canadian law may be an "investment," regardless of its "for profit" status or otherwise. This is consistent with the BIT's objective of strengthening "the development of economic cooperation" between Canada and Barbados, including "the promotion of sustainable development that is sensitive to environmental concerns".[39] Indeed, an investment in a non-profit enterprise may fall within the scope of the BIT's protections.[40]

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[34] Rejoinder on Jurisdiction, ¶ 46, *referring to* Video entitled "Graeme Hall Nature Sanctuary – Barbados" uploaded 17 September 2010, Exhibit R-26.

[35] Counter-Memorial on Jurisdiction, ¶¶ 77-78.

[36] Memorial on Jurisdiction, ¶¶ 60-61.

[37] Allard Statement, ¶ 18; GHNSI Amended Business Plan, 15 September 2003, Exhibit C-23; GHNSI Financial Projections for the year ending December 31, 2000, Exhibit C-22. The Respondent also cited Exhibits C-22 and C-23 in its Request on Bifurcation, ¶¶ 37-38.

[38] Allard Statement, ¶ 12; Supplemental Allard Statement, ¶ 9.

[39] Memorial on Jurisdiction, ¶¶ 58-59; Claimant's Observations on Request for Bifurcation, ¶¶ 37-39; Reply on Jurisdiction, ¶ 135.

[40] Memorial on Jurisdiction, ¶ 59; Reply on Jurisdiction, ¶ 135.

39. Further, as the exception has two limbs contrasting the purpose of "economic benefit" under the first with "other business purpose" under the second, the alternative of the second limb of the exception embracing "business purposes" includes objectives beyond mere economic benefit under the first limb.[41]

40. In focusing upon profit maximization or a projected rate of return, as by Mr. Haberman's evidence, the Respondent imports requirements as to a profitable purpose that are not found in the text of the BIT.[42]

41. Even if profits are not paid to the shareholder as dividends, GHNSI's surpluses may still be regarded as generated for economic benefit or for a business purpose.

The Tribunal's findings

42. The Tribunal's analysis of the Respondent's objections is driven by Article 1(f) of the BIT, (set out in paragraph 26 above), interpreted as need be by reference to, and in accordance with, Article 31(1) of the Vienna Convention on the Law of Treaties, which provides:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

43. In summary, it is for the Tribunal itself to construe the terms of Article 1(f) in accordance with their ordinary meaning within the context, and in the light, of the BIT's "object and purpose."

44. Plainly, the principal definitions of "investment" under Article 1(f) – "any kind of asset" – in their ordinary meaning suffice to include the Claimant's investment in the Sanctuary, both as to the real estate and also as to the cash advances made for the Sanctuary's operations, unless such matters fall within the final exception, namely if those assets were "*not acquired in the expectation or used for the purpose of economic benefit or other business purposes*".

45. For the reasons that follow, the Tribunal holds that the Claimant satisfies the criteria in (i) "acquired in the expectation . . . of economic benefit" and therefore the Claimant's assets do not fall within the exception in Article 1(f). Although the Claimant seemed to enjoy wearing the

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[41] Memorial on Jurisdiction, ¶ 57. See also Reply on Jurisdiction, ¶¶ 130-134; Hearing transcript, pp. 632-633.

[42] Reply on Jurisdiction, ¶¶ 128, 131.

public mantle of a philanthropist, the preponderance of objective indicators shows clearly that he was not creating a not-for-profit corporation.

46. In making its determination whether assets were "acquired in the expectation … of economic benefit", the reference point for the first element (the Claimant's expectations) remains subjective and personal to Mr. Allard's actual expectations and intentions as may be ascertained at the time of the acquisition of the investment. The enquiry is not whether this Tribunal, or some other rational investor, would, or may have been, of the same disposition in acquiring the asset. In contrast, the enquiry with respect to "used" focuses on the actual use of the asset and requires an objective enquiry into whether the assets in question were used for economic benefit or other business purposes.

47. In engaging in the analysis the Tribunal is not assisted by Mr. Haberman's views and opinions as to the meaning or content of economic benefit framed by reference to conventional risk/return analysis as reflected by Canadian bond rates or some other objective measures of financial return. It may be assumed that few, if any, Canadian investors would have been minded to invest offshore in Barbados in a "soft" venture such as that constituted by Mr. Allard establishing the Sanctuary in 1996. However, for his own reasons and motivations, Mr. Allard elected to do so, and the issue of characterization for determination by the Tribunal remains whether the peculiar corporate structure adopted for holding the assets falls within the definition of "investment" with Article 1(f), and is not excluded by the exception.

48. As to the general issue of onus: on one view, not advanced by the Parties, as an exclusion to the principal definitions, the Respondent carries the onus to establish that the exception applies. However, as in any event the Tribunal concludes that it is in a position to make a determinative finding, the Tribunal finds it unnecessary to express a view on onus.

49. On balance, and despite the matters of first impression to the contrary arising from the Respondent's references to factual indicia, noted in paragraph 35 above, mostly sourced to the Claimant's own statements and materials, the conclusion of the Tribunal is that the funds for the purchase of the real estate constituting the Sanctuary, and thereafter making loans for its operations were made by Mr. Allard "for the purpose of economic benefit".

50. In this regard, it suffices for the Tribunal to refer to the following matters establishing this conclusion –

(1) GHBSI was formed in 1996 as a for-profit corporation under Barbadian law.[43]

(2) GHBVI was incorporated as a British Virgin Islands ("BVI") company at the same time to serve as a holding company, a common structure for foreign investors to limit their tax exposures in their home jurisdiction.[44] This structure would be unnecessary were the venture intended to be non-profit-making.

(3) The letter from the Claimant to the Barbados Minister of Finance dated 26 February 1996, requests a waiver of tax on dividends (and also tax exemptions).[45]

(4) The Claimant's successive business plans from 1998 contemplated an emerging surplus and even repayment of capital advances, albeit with a low rate of return.[46]

(5) The Claimant's later offers to transfer as a gift part of the Sanctuary lands, but to retain the commercial and income generating parts,[47] presumably was intended to retain future income.

(6) The Claimant's unchallenged statements in evidence that he had an expectation of getting his money back:

> PRESIDENT GRIFFITH: Mr. Allard, as I understand your evidence, you intended that you should derive income to provide for operating expenses going forward; is that right?
>
> THE WITNESS: Yes, sir. And then some.
>
> PRESIDENT GRIFFITH: And then do I understand that you intended any surplus income will be put into reserves to enable the long-range operation of the Sanctuary when it became as you referred to somewhere an endeavour of your estate?
>
> THE WITNESS: To improve--to improve the asset, yes.
>
> PRESIDENT GRIFFITH: Yes. Now, did you intend that you would be, as part of that process of generating return, be repaid all or any part of the 35 million you referred to in Paragraph 3 of this letter?
>
> THE WITNESS: That I intend to be part of it?
>
> PRESIDENT GRIFFITH: Did you intend to get your money back?
>
> THE WITNESS: Over time, yes.[48]

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[43] Allard Statement, ¶ 8; Certificate of Incorporation, Exhibit C-9.

[44] Hearing transcript, p. 213, line 25 – p. 214, line 12.

[45] Letter from Joseph Ward to the Right Hon. Owen Arthur, Minister of Finance, dated 26 February 1996, Exhibit C-32.

[46] GHNSI Amended Business Plan, 15 September 2003, Exhibit C-23; GHNSI financial projections for the year ending 31 December 2000, Exhibit C-22.

[47] Hearing transcript, p. 651, lines 6-25, referring to Hearing transcript, p. 381, line 23 – p. 383, line 3.

Followed by an exchange with the Respondent's counsel:

> Is it your testimony that you cannot be self-sustaining without having more money come in than goes out?"
>
> Your answer was: "Well, your self-sustainment has to be involved in a business that has to involve reserves and monies coming forward for the next year." I questioned: "Those are revenues, though, isn't it? Not profit. Self-sustaining doesn't require profit, does it?" So, my question to you is: Are you not talking about revenue and instead of profit and that self-sustaining might require revenues meeting expenditures, even possibly capital reserves, but it doesn't require a profit per se to be self-sustaining? That's my question.
>
> A. Not per se, but that was--that was our goal, was profit.[49]

51. The somewhat ambivalent language embracing benefaction and philanthropy expressed by the Claimant and his advisors and other staff during the course of formation and operations of the Sanctuary project invoked by the Respondent is not perceived by the Tribunal to be determinative as to the findings to be made as to the original intentions and continuing motivations of Mr. Allard. Notwithstanding that the Tribunal might not be inclined to have formed the same expectations as to future profit or repayments of investments, the contemporaneous indicia are sufficiently confirmed by Mr. Allard's evidence to the Tribunal, as to what were his intentions at that time. However unreasonable it may now appear to the Tribunal following the failure of the Sanctuary project, the Tribunal accepts that those expectations of an eventual profit were honestly held by Mr. Allard when establishing the Sanctuary in 1996 and thereafter, notwithstanding that during the Sanctuary's establishment and operations factors of profit were considered secondary and in the background to his principal motivations of environmental and public purposes.

52. The BIT does not require any quantification of economic benefit, let alone one measured against an estimate of a rational return as may be sought by a disinterested investor. Mr. Allard was a committed environmentalist.[50] It suffices to find that the exception to Article 1(f) is not made because the Claimant's contemporaneous expectations were, and remained, that in the long run the Sanctuary would pay a return on, or even eventually repay, the monies committed for the Sanctuary project. Accordingly, the Tribunal finds that the Claimant acquired the Sanctuary "in the expectation . . . of economic benefit". In light of this determination, it is unnecessary for the Tribunal to determine whether the Sanctuary was actually used for the purpose of economic benefit during its operations. Further, it is unnecessary for the Tribunal to determine the

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[48] Hearing transcript, p. 276, lines 9-25.

[49] Hearing transcript, p. 277, lines 1-25.

[50] Allard Statement, ¶¶ 10-12.

meaning of "other business purpose" and whether such purpose requires profit-making over and above the making of revenues to allow operations to be self-sustaining.

B. Objection (2): Whether the Claimant Owns the Sanctuary in Accordance with the Laws of Barbados

The Respondent raises two issues, namely that:

(1) The Claimant has not established that he owns GHNSI (and the Sanctuary) through GHBVI; and

(2) The Claimant does not own GHNSI through GHBVI "in accordance with Barbadian law".

This second issue raises also significant issues of non-compliance with Barbados exchange control laws.

Issue 1: The Respondent's arguments

53. The Claimant has not established that he owns the Sanctuary, directly or indirectly, in accordance with Article 1(f). There are many inconsistencies in the Claimant's documents and evidence, individually and taken together, to support adverse findings of proof of the Claimant's purported corporate ownership chain through GHNSI and GHBVI.

54. The authenticity of the share certificate in GHNSI dated 17 October 1996 submitted by the Claimant with his Statement of Claim (the "first certificate") as proof to substantiate GHBVI's ownership of GHNSI is challenged. The first certificate bears only the Claimant's signature as "Director" with a blank space for the Secretary's signature and also is unsealed.[51] And, as GHNSI was not incorporated until 18 October 1996, one day after the date of the first certificate, GHNSI could not have issued any shares to GHBVI on the day prior to its incorporation.[52] Further, the name change to GHNSI took place only five years later on 18 December 2001.[53] The first certificate should be rejected as "a fraudulent concoction conjured

[51] Jurisdictional Objections and Request for Bifurcation, ¶ 33, citing By-Law No. 1 of Graeme Hall Bird Sanctuary Inc. enacted October 17, 1996, Exhibit C-139.

[52] Jurisdictional Objections and Request for Bifurcation, ¶ 25.

[53] Statement of Claim, ¶ 11. The Claimant's witness, Mr. Trevor Carmichael admits that "[t]here is a discrepancy in name undoubtedly"; Witness Statement of Mr. Carmichael QC dated 10 September 2013, ¶ 12.

up *ex post facto* by the Claimant to manufacture the Tribunal's jurisdiction where it would not otherwise have existed".[54]

55. The later share certificate submitted with the Claimant's Memorial on Jurisdiction (the "second certificate") both sealed and bearing the Secretary's signatures, and otherwise identical to the first certificate, also excites suspicion of recent concoction. The correspondence between the Parties and the witness statement of Sir Trevor Carmichael support inferences and conclusions that Sir Trevor signed the completed the second certificate only after the deficiencies of the first certificate were exposed in the pleadings.[55]

56. It is inconsequential that Barbadian laws allow pre-incorporation agreements in written contracts entered into by a person in the name of or on behalf of a company to be incorporated, as the share certificates do not constitute a written contract and do not qualify for this exception.[56]

57. The issues adverse to the validity and effect of the share certificates are not merely "technical issues . . . of no import".[57] The Claimant has used the corporate names GHNSI and GHBSI "completely interchangeably"[58] and, at the least, has failed to adduce credible evidence of his indirect ownership or control of either company.

58. In summary, the Claimant's production of the two share certificates and of other documentation and evidence and explanations falls short of proof of ownership. As Sir Trevor Carmichael conceded, it is possible there was never any issue or transfer of shares in 1996 as is now sought to be evidenced by the first certificate.[59] The record suggests that the Claimant did not decide until 2005 to constitute GHBVI as the sole shareholder of GHNSI, and only then constructed the ownership documents of retrospective effect. At the least, the chain of ownership is not established.

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54 Jurisdictional Objections and Request for Bifurcation, ¶ 24.

55 See, e.g., Carmichael Statement, ¶¶ 6-7.

56 Memorial on Jurisdiction, paragraph 10, relying on Section 16 of the Companies Act CAP 308 of the Laws of Barbados, Exhibit C-131.

57 Counter-Memorial on Jurisdiction, ¶ 56, citing Memorial on Jurisdiction, Heading I.C and ¶ 48.

58 Counter-Memorial on Jurisdiction, ¶ 49.

59 Hearing transcript, p. 479, line 21 – p. 481, line 19.

Issue 1: The Claimant's arguments

59. The Sanctuary is an investment owned or controlled by Mr. Allard through the corporate chain of:

(1) GHNSI having bought and taken transfer title to the lands of the Sanctuary;

(2) as a wholly-owned subsidiary of GHBVI; and

(3) of which the Claimant is the owner.

60. Any inconsistencies in the name of GHBVI (Limited or Inc.) are inconsequential. The description and title Limited and Inc. are inter-changeable when referring to a British Virgin Islands' corporate entity.[60]

61. The Claimant has presented contemporaneous evidence from the original incorporations in 1996 comprising: GHBSI's Certificate of Incorporation, 16 October 1996; GHBVI's Certificate of Incorporation, 18 October 1996; and also GHBVI list of directors (including the Claimant), and GHBVI's Share Certificate, issuing shares to the Claimant, both dated 23 October 1996.[61]

62. That GHBVI had not been incorporated when GHNSI issued the first certificate is inconsequential. The formal requirements concerning validation of pre-incorporation contracts do not vitiate the unchallenged circumstances of share issuance and sole ownership, where, as here, none of the parties to the investment takes any issue as to the invalidity of deficiencies in form. In any event, the laws of the British Virgin Islands apply to determine GHBVI's contractual rights, and these laws recognize that a BVI company may elect to adopt any pre-incorporation transactions within a reasonable time after its incorporation.[62]

63. The second certificate is *prima facie* evidence of GHBVI's title to GHNSI's shares under Barbadian law. In the absence of any rebutting evidence, GHBVI's legal ownership, and Mr. Allard's indirect ownership, of the investment in GHNSI is established. Other filed documents and direct evidence of witnesses, including Mr. Allard himself, also confirm Mr. Allard's indirect ownership of GHNSI.[63]

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[60] Claimant's Observations on Request for Bifurcation, ¶ 18, referring to Request, ¶ 21; Share Certificate of GHNSI, Exhibit C-11.

[61] Claimant's Opening Statement at the Hearing, presentation slide 4.

[62] Section 69 of the International Business Companies Act CAP 291 of the Laws of the British Virgin Islands, Exhibit C-132.

[63] See, e.g., Allard Statement, ¶¶ 6-9; Allard Supplemental Statement, ¶¶ 5-11.

64. As the BIT allows an investor to bring a claim based on either "ownership" or "control" of an investment, the Claimant's legal "ownership" of GHNSI is not determinative to jurisdiction.

65. Here there is no challenge to Mr. Allard's control of the company. No entity except GHNSI and GHBVI has ever claimed any interest in the Sanctuary. It is Mr. Allard who has funded the acquisition and the development and operations of the Sanctuary and conducted its affairs through these corporate entities, and who is the "owner" of the investments.

66. The Claimant's cash advances for the Sanctuary's development and operations are proven by the bank statements and the witness statement of the Claimant's assistant and bookkeeper. The making of these loans by Mr. Allard directly to the Sanctuary project are unchallenged.

Issue 2: The Respondent's arguments

67. Under Section 13.2 of the 1984 (Barbados) Companies Regulations, a share certificate must be co-signed by the secretary or an assistant secretary holding office at the time of signing. As the first certificate does not contain such a signature and is not sealed by the company it was not issued in accordance with Barbadian laws and is invalid.

68. The expert evidence of Mr. Griffith establishes that the second certificate also is invalid under Barbadian law because it issued in the name of a company which did not exist at the time of the alleged signature; it is signed by a person who did not hold the office of secretary at the time of signature; and it does not comply with the requisite formalities for the issuance of a replacement certificate.

69. In addition, Mr. Griffith's evidence establishes that the undated shareholders' resolution (appointing Sir Trevor Carmichael to the Board of GHNSI) cannot serve as evidence of share ownership under Barbadian law. Under Barbadian law, the production of a resolution by the board such as that submitted by the Claimant cannot stand on its own as evidence of share ownership.[64]

70. The Respondent further argues that under the 1976 Exchange Control Act, a Barbadian person or entity may not issue any security to a non-Barbadian person or entity without seeking the prior approval of the Exchange Control Authority of Barbados (the "Exchange Control Authority" or "ECA"). Any such transaction performed without the Exchange Control

[64] First Legal Expert Opinion of Mr. Michael Griffith dated 6 November 2013, ¶ 10.

Authority's prior approval is void.[65] The Respondent draws the Tribunal's attention to Sir Trevor Carmichael's admission at the hearing that ECA approval is necessary.[66] Since the Claimant has failed to provide any evidence that any issuance of shares in GHNSI to GHBVI was approved by the Exchange Control Authority, any such transfer was void under Barbadian law.[67] Consequently, the Claimant has failed to prove that he owned or controlled an investment in the territory of the Respondent in accordance with the Respondent's laws.[68]

Issue 2: The Claimant's arguments

71. The Respondent does not prove any Barbadian law that establishes a mandatory requirement that a particular form be used let alone that to be valid a share certificate has to be sealed.[69]

72. The second certificate bearing the signatures of Mr. Allard as the sole director, Sir Trevor Carmichael as secretary, and sealed by the company is complete and regular, and suffices to prove ownership. There is no regulatory requirement that a lost, or assumed lost, share certificate be formally cancelled.

73. In any event, the first and second certificates essentially are the same document, with additions to the second certificate made as part of routine regularization of corporate records, a practice consistent with the relevant corporate laws and practice in Barbados.

74. The fact that some of the documents underlying the investment contain technical deficiencies in form with the respect to an investment plainly made by Mr. Allard, and no other person, is not a ground to exclude his investment from protection as unproven. Technical issues with respect to the documentation supporting Mr. Allard's ownership or control of the Sanctuary are inconsequential and not decisive.

75. It is the Claimant's position that non-compliance with the Exchange Control Act of Barbados does not void ownership. According to the Claimant, section 11 of the Exchange Control Act does not provide, as the Respondent contends, that securities issued without permission of the proper authority are void *ab initio*. Rather, this provision serves to ensure that foreign

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[65] Counter-Memorial on Jurisdiction, ¶ 53, *referring to* First Legal Expert Opinion of Mr. Michael Griffith dated 6 November 2013, Section I.

[66] Hearing transcript, p. 471, lines 13-18.

[67] Counter-Memorial on Jurisdiction, ¶ 54. See also Rejoinder on Jurisdiction, ¶¶ 31-32.

[68] Counter-Memorial on Jurisdiction, ¶ 55.

[69] Claimant's Observations on Request for Bifurcation, ¶¶ 27-28.

investment records are kept.[70] None of the cases relied upon by the Respondent were decided by a Barbadian court. The Claimant argues that as a matter of international law, the Respondent must show that the Claimant has breached a fundamental principle of Barbadian law to render the rights of ownership void *ab initio*, which it has not done. Finally, the Respondent's argument based on the Exchange Control Act is untimely in the Claimant's view, according to Article 21 of the UNCITRAL Rules, which requires that jurisdictional objections be raised no later than the filing of the Statement of Defense.[71]

The Tribunal's findings on issues 1 and 2

Issue 1: Ownership

76. The Respondent challenges both the authenticity of the documents presented by the Claimant to substantiate his ownership as well as their effectiveness.

77. In this regard, the Parties contest what the Claimant has to establish to prove ownership. The Claimant asserts that it is sufficient for him to make a *prima facie* showing in relation to his ownership of the shares in GHBVI, and, through it, of GHNSI. In contrast, the Respondent demands strict and convincing proofs of legal ownership under Barbadian corporation laws and regulations.

78. Admittedly, there is very little contemporaneous evidence from 1996 to substantiate the chain of certified share ownership under the first certificate. In particular, there is no documentary record to confirm the assumptions made, or the process by which Sir Trevor's staff reconstructed the corporate documents during 2005 and 2006. Sir Trevor has no personal knowledge. Moreover, the documents produced, explained as intended to replace certificates and records assumed to have been in existence, but lost, are not at all consistent (e.g., they used the name of a company, GHNSI, that did not exist at the time).

79. The explanations given by Sir Trevor are limited to surmise and conjecture that there was complete original documentation that had been mislaid. There is no evidence to establish these facts. Sir Trevor explained that, under the somewhat loose standards of corporate compliance and practice in Barbados, it is common enough for corporate custodians, such as his firm, to

[70] Reply on Jurisdiction, ¶¶ 87-88.

[71] Reply on Jurisdiction, ¶¶ 99-104.

remedy retrospectively emerging deficiencies, particularly where, as here, a sole shareholder and owner undoubtedly is the proprietor and owner of corporate entities.[72]

80. The Tribunal accepts that much of the corporate documentary history remains conflicting and based on mere assumptions of prior regularity and assumed gap-filling. The records of corporate structure, the issuance of shares, and for the constitution of the board of directors and of shareholders are incomplete. It is unlikely that any board meetings were convened beyond the circulation of purported minutes. And the evidence and explanations of Sir Trevor comprise a loose amalgam of assumption as to what had, or, as more likely, should have, occurred in the two attorneys' offices to put corporate records, including share certificates, into order.

81. Nonetheless, in the Tribunal's opinion, the Claimant's stated intentions and the evidence of actions taken by Mr. Allard's attorneys go to confirm the direct links between the two corporate entities and Mr. Allard's ultimate ownership. The only asset of GHBVI was its ownership of GHNSI, as a shell BVI company, created as the holding company for the Sanctuary, as a tax efficient vehicle for the Claimant to make his investment in the Sanctuary project.

82. At the least, there is no reason to find that the first or second share certificates are fraudulent or have been deliberately withheld from the Tribunal, or that the replacement copies were created in anticipation of this arbitration.

83. As noted above, the Tribunal also accepts the Claimant's argument in the alternative that even if the Tribunal were to find that the contemporaneous documents to fall short of demonstrating ownership from 1996, the Claimant undoubtedly owned the Sanctuary through his shareholding in GHBVI by 2005 when the corporate documents were regularized.

84. Although it was contended by the Respondent before the Tribunal that under Barbadian law, upon a company's incorporation, no shares need to be issued for the company lawfully to exist,[73] as a matter of principle the Tribunal cannot accept that, under either Barbadian or BVI laws, a private company may exist as an ownerless entity. Here, the Tribunal does not have any evidence as to the issuance or transfer of subscriber's shares, but in the absence of evidence to the contrary the Tribunal concludes that GHBVI was the owner of the shares of GHNSI or, at least, was entitled to call for a transfer of those shares. In either case, GHBVI's ownership of GHNSI is sufficiently established. The question of who owns the shares in GHBVI begets of but one answer: namely Mr. Allard. It is undisputed that GHNSI owns the Sanctuary. Hence, the

[72] Carmichael Statement, ¶¶ 10-13.

[73] Hearing transcript, p. 698, lines 7-10.

Tribunal recognizes that as a Canadian investor it was Mr. Allard who made the investment within Article 1 of the BIT, which he owned and controlled indirectly through GHBVI.

85. In any event, Mr. Allard directly made successive loans to fund the operations of the Sanctuary project to the extent of some C$18.8 million.[74] The Tribunal accepts that these loans separately may constitute a direct investment by the Claimant within the terms of the BIT.

Issue 2: Exchange Control Issue

86. The Tribunal refers to its conclusion above that the Claimant has satisfied his burden of showing that he meets the Treaty's requirements in terms of ownership and control of the Sanctuary at the appropriate times. What remains to be decided is whether the failure to obtain permission from the Exchange Control Authority for the share issuance between GHNSI and GHBVI deprives this Tribunal of jurisdiction.

87. The Tribunal rejects the Claimant's submission that the Respondent's argument with respect to the Exchange Control Act is untimely. The Respondent's first pleading in the bifurcated jurisdictional phase was its Counter-Memorial on Jurisdiction of 7 November 2013. In this pleading, Respondent elaborated on its argument that the Tribunal lacked jurisdiction based on the Claimant's non-compliance with Respondent's law.[75] The original plea as to lack of jurisdiction based on non-compliance with law had been made in the Respondent's Preliminary Objections to Jurisdiction and Request for Bifurcation of 24 May 2013. Article 21(3) of the UNCITRAL Rules does not require that every single jurisdictional argument be raised in the Statement of Defense, only that the plea of lack of jurisdiction be made. The Respondent raised the issue of non-conformity with the Exchange Control Act in its Counter-Memorial on Jurisdiction.

88. The Respondent submits that the Claimant's shares in GHNSI were not owned or controlled "in accordance with the latter's laws" because any issue of shares by GHNSI to GHBVI required prior approval of the Exchange Control Authority and that any transaction performed without approval is void.

89. The Tribunal has been presented with conflicting authorities on the effect of the issuance of securities without the Exchange Control Authority's permission. The Respondent's expert, Mr.

[74] Statement of Claim, ¶ 153.

[75] Jurisdictional Objections and Request for Bifurcation, ¶¶ 31-33.

Griffith, relying on a number of Commonwealth cases, opines that the share issue is invalid.[76] The Claimant relies on the 2011 decision of the Barbadian Court of Appeal in *King's Beach Hotels Limited v. Johanna Kesmin Marks*[77] and academic commentary,[78] which it submits confirms that the modern approach to the interpretation of exchange control legislation is that any contravention does affect the validity of the underlying transaction.

90. The question of whether the Claimant's investment was owned or controlled in accordance with Barbadian law for the purposes Article 1(f) raises two separate issues: (i) the effect of GHNSI's issuance of securities to GHNSI without the Exchange Control Authority's permission; and (ii) the more general question of the effect of the Claimant's failure to ensure that the GHNSI's share issuance was "in accordance" with the Exchange Control Act.

91. With respect to (i), it is unnecessary for the Tribunal to make a determinative finding whether the issuance of shares in GHNSI to GHBVI was void under Barbadian law for failure to obtain the approval of the Exchange Control Authority. First, whatever view is taken with respect to the Claimant's ownership of GHNSI through GHBVI (whether the issuance of shares was void or not under Barbadian law), it is established that the Claimant in fact controlled GHNSI and the Sanctuary.[79] Indeed, Barbadian government officials appear to have consistently acted as if the Claimant controlled the Sanctuary. Other than the question of Exchange Control Authority approval, there does not appear to be any Barbadian law that prohibits Mr. Allard from acquiring, owning, controlling or operating the Sanctuary in the manner that he did. The Respondent has not suggested that there are any other mandatory requirements under Barbadian law that would restrict Mr. Allard's ability to control GHNSI and the Sanctuary. Second, as held above at paragraph 85, Mr. Allard directly made successive loans to fund the operations of the Sanctuary to the extent of some C$18.8 million.[80] The Tribunal accepts that these loans separately constitute a direct investment by the Claimant within the terms of the BIT.

92. With respect to (ii), the Tribunal recognizes that Barbados has a legitimate interest in tracking and regulating monies being remitted into its territory. However, there is no basis for finding

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[76] First Legal Expert Opinion by Mr. Michael Griffith dated 6 November 2013, ¶¶ 12-28 and Second Legal Expert Opinion by Mr. Michael Griffith dated 3 February 2014, ¶¶ 21-36.

[77] Kings Beach Hotels Limited v. Marks, Civil Appeal No. 23 of 2006, issued 11 February 2011, ¶ 4, Exhibit CLA-31.

[78] Kodilinye and Kodilinye, Commonwealth Caribbean Contract Law, (New York: Routledge, 2014), p. 187, Exhibit CLA-30.

[79] Statement of Claim, ¶¶ 13-92 and accompanying exhibits and witness statements.

[80] Statement of Claim, ¶ 153.

that GHNSI's issuance of shares to GHBVI is offensive to public policy or tainted with criminality. Further, nothing in the Exchange Control Act appears to prevent the Authority from granting an approval with retrospective effect. The Tribunal notes that the Claimant applied for exchange control approval for loans to GHNSI in 2008 and that the Exchange Control Authority wrote to the Claimant's accountant in 29 August 2008 seeking further information.[81] As of the date of the hearing, the Exchange Control Authority had not granted its approval.

93. Although the corporate documentary history remains conflicting and incomplete, the Tribunal is satisfied that Mr Allard made an investment in good faith in the Sanctuary. There is no evidence of any misconduct by the Claimant in making the investment. The Claimant did not attempt to conceal his investment in the Sanctuary. The record in these proceedings includes correspondence between Mr. Allard and his advisors and senior government officials regarding Mr. Allard's investment in the Sanctuary.[82]

94. In the particular circumstances of this case, the Tribunal is of the view that non-compliance with the Exchange Control Act should be characterized as an inadvertent and technical breach of local law that does not deprive this Tribunal of jurisdiction. The non-compliance at issue in this case does not involve the breach of fundamental legal principles of Barbados.[83]

95. The Tribunal therefore concludes that the Claimant owns and controls assets in accordance with the laws of Barbados and that these assets constitute investments for the purposes of Article 1(f).

Objection (3): Limitation

96. The objection is that under Article XIII (set out in paragraph 26 above) the Tribunal lacks jurisdiction *ratione temporis* since the claim of 21 May 2010 was more than three years after the Claimant acquired, or should have acquired, knowledge of his claims, and thereby the claim is time barred.

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[81] Central Bank of Barbados Exchange Control Act Form FI stamped 5 June 2008, Exhibit C-135.

[82] Statement of Claim, ¶¶ 22-35; Correspondence at Exhibits C-30 to C-36 and C-55.

[83] LESI, S.p.A. and Astaldi S.p.A. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/05/3, Decision on Jurisdiction dated 12 July 2006, at para. 83(3).

The Respondent's arguments

97. NAFTA cases (*Grand River v. USA*[84] and *Mondev v. USA*[85]) confirm that a limitation period similar to the one in Article XIII(3)(d) contains two cumulative requirements, namely:

(1) Constructive notice of the alleged breach; and

(2) Constructive notice that a claimant has incurred loss or damage.

98. On any view, the Claimant was aware of the constitutive elements for his claims before 21 May 2007.[86]

99. *Zoning issue.* The Claimant first learned of a possible reclassification of the lands in the buffer zone when the proposed amendments to the 1986 plan were announced in 2003.[87] The 2003 Plan was officially approved by ministerial decree on 19 October 2006 and at the very least the Claimant must have by then become aware of the changed planning policy.[88] Further, public meetings were held in 1998 and 1999 to enable potentially affected stakeholders to comment on the proposals, which also were published in the Official Gazette in May 1998.[89] As on any view, the Claimant must be taken to have had constructive notice of the legislative changes before 2007.[90] To fix the limitation period under Article XIII(3)(d) to the later time of the issuance of statutory instrument (2008 No.16),[91] in the words of the *Grand River* tribunal, would "render the limitations provisions ineffective".[92]

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[84] Grand River Enterprises Six Nations Ltd. v. United States of America (Decision on Objections to Jurisdiction), UNCITRAL, 20 July 2006, ¶ 73.

[85] Mondev International Ltd. v. United States of America (Award), ICSID Case No. ARB (AF)/99/2, 11 October 2002, ¶ 87.

[86] Jurisdictional Objections and Request for Bifurcation, ¶¶ 61-62.

[87] Jurisdictional Objections and Request for Bifurcation, ¶ 70, *referring to* Statement of Claim, ¶ 82.

[88] Jurisdictional Objections and Request for Bifurcation, ¶ 74; S.I. 2006, Notice of Approval by the Minister of the Barbados Physical Development Plan as amended in 2003, Exhibit R-13. See also Counter-Memorial on Jurisdiction, ¶ 97; Rejoinder on Jurisdiction, ¶¶ 85-89.

[89] Jurisdictional Objections and Request for Bifurcation, ¶ 71, *referring to* Advertisement published in The Advocate and The Nation newspapers giving Notice of Physical Development Plan for Barbados, dated 20 May 1998, Exhibit R-12, p.1.

[90] Jurisdictional Objections and Request for Bifurcation, ¶¶ 72-73.

[91] According to the Claimant, the 2003 Plan did not come into operation until the issuance of the statutory instrument on 15 April 2008. See Memorial on Jurisdiction, footnote 85.

[92] Counter-Memorial on Jurisdiction, ¶ 101, referring to Grand River Enterprises Six Nations Ltd. v. United States of America (Decision on Objections to Jurisdiction), UNCITRAL, 20 July 2006, ¶ 81.

100. *Sluice gate issue.* The Claimant was aware of environmental damage arising from the sluice gate issue before 21 May 2007:[93] At all times he had notice that the sluice gate and other pre-existing risk factors might negatively affect the wetlands. Letters from April 2000 noted continuing concerns about the "deficient operation of the sluice gate".[94] Later letters from the Claimant's consultant, Mr. Heaslet, to both the Permanent Secretary in the Ministry of Public Works and the Chief Environmental Health Officer in the Ministry of Health of Barbados between 2004 and 2005 explicitly addressed the sluice gates issue by "urgently requesting assistance for interim sealing of the sluice gate in the drainage canal" and warning of "warm stagnant [water] conditions [that] may cause a catastrophic decline of fish".[95] On any view, any claim pertaining to the 2005 sewage spill must be "excluded from the ambit of the BIT".[96]

101. It is untenable to contend that continuing actions by reference to zoning and sluice gate issues may in themselves constitute breaches of legal obligation, and thus renew the limitation period each day that they occur.[97] Reliance upon the rules of general international law as well as on Article 14(2) of the International Law Commission Articles on State Responsibility in this regard ignores the principle *lex specialis derogat legi generali.*[98]

102. Plainly, the *UPS v. Canada* decision[99] on which the Claimant relies misapplies the relevant law and ignores the purpose of the limitation period.[100] The *UPS* case concerned very specific measures implemented by the host country; whilst here, the Claimant has not identified any

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93 Jurisdictional Objections and Request for Bifurcation, ¶ 86, *referring to* Graeme Hall Bird Sanctuary Environmental Management Plan, 11 November 1998, Exhibit C-43, p. 2, which confirms that the Sanctuary as early as 11 November 1998 had "been subjected to considerable human induced stress and severe damage".

94 Jurisdictional Objections and Request for Bifurcation, ¶ 67, *referring to* Statement of Claim, ¶ 137(b). See also Jurisdictional Objections and Request for Bifurcation, ¶ 68, *referring to* Letter from Stuart Heaslet to the Permanent Secretary in the Ministry of Public Works dated 25 March 2004, Exhibit C-49.

95 Jurisdictional Objections and Request for Bifurcation, ¶ 66, *referring to* Letter from Stuart Heaslet to the Permanent Secretary in the Ministry of Public Works, 12 January 2004, Exhibit C-48; Letter from Stuart Heaslet to the Permanent Secretary in the Ministry of Public Works, 25 March 2004, Exhibit C-49; Letter from Stuart Heaslet to the Chief Environmental Health Officer in the Ministry of Health, 14 April 2004, pp.1-2, Exhibit C-50; Letter from Stuart Heaslet to the Permanent Secretary in the Ministry of Public Works dated 31 January 2005, Exhibit C-52.

96 Jurisdictional Objections and Request for Bifurcation, ¶ 85.

97 Counter-Memorial on Jurisdiction, ¶ 103, *referring to* Memorial on Jurisdiction, ¶ 70.

98 Counter-Memorial on Jurisdiction, ¶¶ 104-105.

99 United Parcel Service of America, Inc. v. Canada (Award on the Merits), UNCITRAL, 24 May 2007, ¶ 28, cited in Claimant's Memorial on Jurisdiction, footnote 89.

100 Counter-Memorial on Jurisdiction, ¶¶ 106-107.

specific conduct on the part of the Respondent to support his allegations of a continued breach of the substantive protection provisions under the BIT within the period allowed by Article XIII(3)(d).[101] Further, the *Trail Smelter Case* (*U.S. v. Canada*) cited by the Claimant[102] concerns a State-to-State dispute in relation to hazardous effects of transboundary damage and is "highly remote, legally and factually, from the present dispute."[103]

The Claimant's arguments

103. While various documents gave earlier notice of the proposed changes to land use, the limitation period does not start to run until the measure is adopted.[104] The Respondent may have elected not to implement the 2003 Plan.[105] The fact that the Claimant knew that something might occur, did not engage the limitation period.[106] As the 2003 Plan was not formally adopted until 15 April 2008 upon the issuance of the statutory instrument (2008 No. 16), in 2009, claims based upon its adoption must fall within the three-year limitation period.[107]

104. As to the sluice gate issues, the Claimant only became aware of the Government's refusal to protect the Sanctuary in June 2007.[108] The claims for mismanagement of the sluice gate is for lack of due diligence by the host State[109] and could only arise when the lack of due diligence became known to Mr. Allard, and not merely when the environmental difficulties were anticipated as likely to rise or first perceived.[110]

105. As soon as Mr. Allard became aware of a possible breach of the BIT, he took steps to mitigate resulting damage first by listing the Sanctuary for sale in June 2007, and then by closing it.[111]

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[101] Rejoinder on Jurisdiction, ¶¶ 102-104.

[102] Trail Smelter Case (U.S. v. Canada), 3 R. Int'l Arb. Awards 1905, Exhibit CLA-15.

[103] Counter-Memorial on Jurisdiction, ¶ 108.

[104] Memorial on Jurisdiction, ¶ 66, *referring to* Jurisdictional Objections and Request for Bifurcation, ¶¶ 38-41.

[105] Reply on Jurisdiction, ¶ 144.

[106] Memorial on Jurisdiction, ¶ 67; Claimant's Observations on Request for Bifurcation, ¶ 52; Reply on Jurisdiction, ¶¶ 160-165, citing Ethyl v. Canada, UNCITRAL, Award on Jurisdiction, 24 June 1998, and *Pope & Talbot v. Canada*, UNCITRAL, Preliminary Award, 24 February 2000.

[107] Memorial on Jurisdiction, ¶ 66; Reply on Jurisdiction, ¶¶ 143-146.

[108] Claimant's Observations on Request for Bifurcation, ¶ 54; Memorial on Jurisdiction, ¶ 68; Reply on Jurisdiction, ¶ 148.

[109] Claimant's Observations on Request for Bifurcation, ¶ 55; Memorial on Jurisdiction, ¶ 69.

[110] Claimant's Observations on Request for Bifurcation, ¶ 55; Memorial on Jurisdiction, ¶ 69.

[111] Reply on Jurisdiction, ¶ 155.

106. Alternatively, the failure of the Respondent to operate the sluice gate in a responsible manner or to exercise due diligence in the enforcement of its environmental laws constitutes a continuing breach of legal obligations under the BIT, which renews the limitation period each day that it occurs.[112] The limitation period only begins to run when the breaches cease.

107. Principles under Canadian and English law that limitation periods renew each day that a continuing violation of a legal obligation occurs must be given special weight given that the BIT came into force soon after the entry into force of the NAFTA, and is based on the same model used for all of Canada's post-NAFTA bilateral investment treaties.[113] The *UPS* and the *Trail Smelter* Case (*U.S. v. Canada*) decisions are persuasive.[114] The *UPS* Tribunal considered the identical language of NAFTA, Article 1116, with respect to the three-year limitation period and held that "continuing courses of conduct constitute continuing breaches of legal obligation and renew the limitation period accordingly".[115] The decisions relied upon by the Respondent address the issue of whether the limitation period in the NAFTA could be suspended or prolonged, not the date on which the limitation period began to run.[116] The *Trail Smelter* confirms that State responsibility is triggered when environmental damage is the result of the failure of a State to take action.[117]

The Tribunal's findings

108. Despite being on notice of its potential to cause damage, the Tribunal accepts that prior to the 2003 Plan's final adoption no damage may be said to have arisen. Without presently deciding whether its adoption constituted a breach of the BIT as claimed, and whether the Claimant has incurred any damage as a result, the Tribunal finds that the Claimant nonetheless could not bring a claim premised on the 2003's Plan before its formal adoption.

109. The language of the BIT does not give much guidance to the Tribunal on the continuous breach and timing issue.

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[112] Claimant's Observations on Request for Bifurcation, ¶ 56; Memorial on Jurisdiction, ¶ 70, citing United Parcel Service of America v. Government of Canada, Award on the Merits (24 May 2007), UNCITRAL Rules, NAFTA Chapter Eleven, para. 28; Draft ILC Articles of Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Exhibit CLA-1, Article 14(3) and Commentary citing *Trail Smelter*, p. 1905. See also Reply on Jurisdiction, ¶ 147.

[113] Reply on Jurisdiction, ¶¶ 166-172.

[114] Reply on Jurisdiction, ¶¶ 174-183.

[115] Reply on Jurisdiction, ¶ 175, citing *UPS v. Canada*, ¶ 28.

[116] Reply on Jurisdiction, ¶ 177.

[117] Reply on Jurisdiction, ¶ 183.

110. The original GHBSI Environmental Management Plan, and its 2000 Amended Environmental Management Plan referenced the sluice gate as a potential problem.[118] The Claimant focuses on the Respondent's promise to manage and to take responsibility for resolving those problems. In his Statement of Claim, the Claimant alleges a marked change over time in the Respondent's commitment and approach.[119]

111. The Tribunal regards the sluice gate issue as pleaded as giving rise to challenging issues for decision as it is premised on claims of continuing breach. Although Mr. Allard knew about the potential defects of the sluice gate, the claim now is that the breach arose from the Government's lack of due diligence to carry out the necessary repairs.

112. In the result, the Tribunal confirms its jurisdiction *ratione temporis* in respect of the claims relating to the 2003 Amended Plan. However, it is inclined to regard the limitation issue for the sluice gate claims as impleading issues intertwined with those that will arise for determination under the merits phase. In the result, and even if it is plainly framed to side-step an obvious limitation defense, the Tribunal cannot at this phase of a bifurcation hearing on objections dismiss the pleading as untenable.

113. In all circumstances, the Tribunal defers and holds over the sluice gate aspect of objection (3) for further consideration and determination on the merits phase.

[118] Graeme Hall Bird Sanctuary Environmental Management Plan, Exhibits C-43; Amended Graeme Hall Bird Sanctuary Environmental Management Plan dated April 2000, Exhibit C-44. Letter from Roger Sweeney to Chief Town Planner dated 24 October 2000, Exhibit C-68.

[119] Statement of Claim, ¶¶ 138-140.

DECISION

The objections set out in para 29 above are answered –

Objections (1) and (2)

Yes.

Objection (3)

Partly Yes, with the 'sluice gate' issue held over to the merits phase.

COSTS reserved to final costs orders.

MICHAEL REISMAN

ANDREW NEWCOMBE

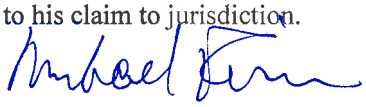
GAVAN GRIFFITH

DATED 13 June 2014

DECLARATION BY PROFESSOR REISMAN

Mr. Allard does not provide a model of how to initiate a direct foreign investment and he encounters a number of jurisdictional problems under a technical analysis of the BIT. Along with key employees, he indulged in presenting himself as a philanthropist, yet was, by all of the objective indicators specified in paragraph 50 of the award, pursuing, from the outset, a business that met the requirements of BIT Article 1(f). (Whether, by holding out to be a philanthropist, he may have secured concessions that would otherwise not have been forthcoming is not a jurisdictional question.) He also failed, inter alia, to comply timeously with currency exchange requirements. In some of these and other technical non-compliances, he may have been less than well-served by some of his various legal counselors.

Yet, although Mr. Allard encounters jurisdictional problems with some of the technical requirements of the BIT, there is no indication in the record that he engaged in any effort to mislead, even less to defraud the Government or to gain an unlawful advantage by means of the various technical non-compliances. Nor did the Government seem to have reason to entertain any question as to the bona fides of his activities. For those reasons, I think the Tribunal is correct in being generous with respect to his claim to jurisdiction.



MICHAEL REISMAN