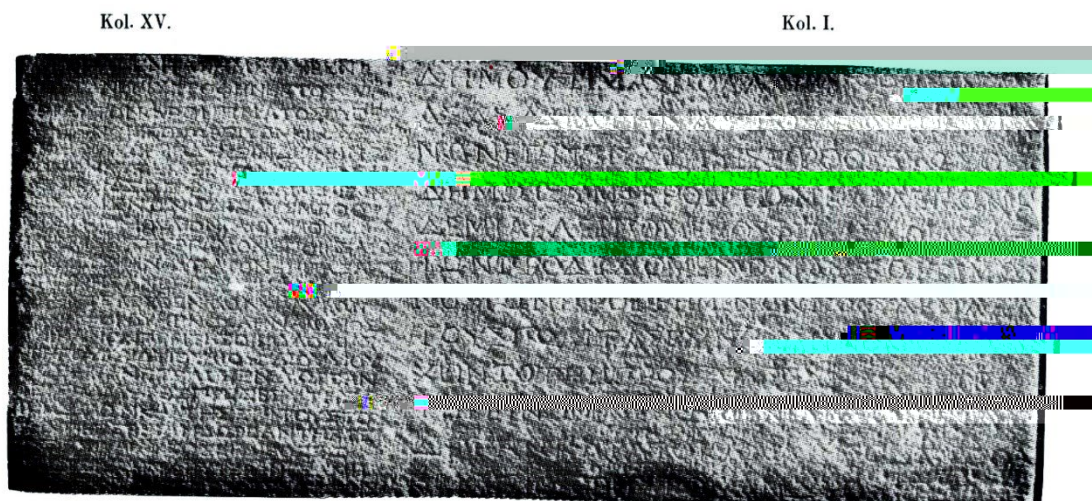


- 1 The period of 130 BC to 30 BC was a tumultuous one for Rome. While it brought a significant gain of territory, it also destroyed the Republic. After a century of almost continuous civil wars, Italy had lost around 20% of its free population.² The decline was even more drastic in the ruling classes in Rome.³ The Roman Republic was exhausted and no longer resisted the usurpation of power by the man later called Augustus.
- 2 The Roman civil wars are the background for the dispute on which this Case-Study is based.
- 3 The Krates and Herakleitos Decrees of Priene were recorded in two inscriptions in the City of Priene in the Eastern Mediterranean, today's .4 As only fragments of the inscriptions have survived, their precise content is disputed amongst classicists scholars. For the purposes of the Moot, we will adopt the view that the dispute between the Roman *publicani* and the City of Priene was about whether the salt pans in Priene were covered by the concession agreement rather than about whether they were subject to taxation.⁵ The below shows lines 6-28 of the original inscriptions of the Krates Decrees of Priene⁶:



Links: Beschluß für Krates, Z. 6—28.
Rechts: Beschluß für Athenopolis, Z. 12—23.

¹ Special thanks to Johanna Röhl and Dr. Niko Sapoutzis for their great help with the footnotes and Greek translations. All errors are my own.

² Philip Kay, *Rome's Economic Revolution*, p. 178 has 4.5 million in 150 BC, 5.1 million in 100 BC and only 4 million in 28 BC.

³ The Augustean *Lex Iulia et Papia* with its massive interference with reproductive choices must be seen in this context, see Manthe, "Lex Iulia et Papia", in: Brill's New Pauly, <https://referenceworks.brillonline.com/entries/brill-s-new-pauly/lex-iulia-et-papia-e703210#>.

⁴ I. Priene 111 (Krates) and 117 (Herakleitos).

⁵ Christopher Wallace, *Ager Publicus in the Greek East*, p. 38: "A reappraisal suggests that it was not an issue of taxation, but rather a dispute about who owned these salt-pans."

⁶ The photo shows an original section of the Decrees of Priene and can be found in Hiller von Gaertringen, *Inschriften von Priene*, p. 83, <https://archive.org/details/inschriftenvonpr00hill/mode/2up>.

- 4 The historical dispute was ultimately decided by the Roman Senate in favor of Priene. Krates was honored by the City of Priene – amongst other things - for his representation of the City's interests in Rome.
- 5 For the purposes of the Moot, the dispute did not end here. The *publicani* resort to investment arbitration under a (fictional) codicil in the testament of Attalos III and the equally fictional treaty between the Roman Republic and the Kingdom of Pergamon.
- 6 Although the facts of the case and the proceedings take place in the 1st century BC, treaties, customary public international law and case law are those of the 21st century. The Roman Republic is not a party to any human rights treaties. The Kingdom of Pergamon ratified the Eastern-Mediterranean Convention on Human Rights and Fundamental Freedoms (EMCHR) in 150 BC. It entered into force and was never terminated.⁷
- 7 The excerpts from historical texts in this Case-Study form part of the Case-Study. However, none of the texts is truly contemporaneous. All of them reflect to a certain extent the author's personal biases and the political climate of the time in which they were written. Participants in the Moot should exercise professional caution as to their evidentiary value. In case of discrepancies between the Case-Study and the historical texts, the Case-Study prevails.
- 8 While the concession with the *publicani* and the *senatus consultum* are historical, these documents did not survive the centuries or have at least not yet been found. The excerpts which form part of the Case-Study were created for the purposes of the Moot.
- 9 History does not tell us who the *manceps* and the other stakeholders of the Salt Lease were. For the Moot, the name of the *manceps* is irrelevant.
- 10 The Claimant in the fictional arbitration is, however, a historical person. Titus Pomponius and his son (and heir) Titus Pomponius Atticus were Roman equites.⁸ When Titus Pomponius died around 86 BC, his son Atticus inherited around 2 million sesterces.⁹ We know that Atticus refrained from himself becoming a *publicanus*,¹⁰ but he did engage (successfully) in lending. It would not have been unusual for either father or son to lend to *publicani* and to other businesses. Also non-recourse loans would not have been an anomaly.¹¹ Also, it would not have been surprising for either one to become a *participes* in a *societas publicanorum*. However, the fact that Titus Pomponius had given a non-recourse loan to the *publicani* that was to be repaid from the proceeds of the Salt Lease, is our invention.

⁷ For the purposes of the Moot, the EMCHR is identical to the ECHR.

⁸ Nepos, Atticus, 1.1., <http://www.attalus.org/translate/atticus.html>;
<https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.02.0136%3A1ife%3Datt>.

⁹ Nepos, Atticus, 14.2, 2. 1-2.

¹⁰ Nepos, Atticus, 6,3: „Ad hastam publicam numquam accessit. Nullius rei neque praes neque *manceps* factus est.“ (He never participated in public auctions, for no matter did he act as guarator or *manceps*.)

¹¹ Cohen, Edward. Athenian Economy and Society: A Banking Perspective, p. 161: “a maritime loan must necessarily contain a provision freeing the borrower from the obligation of repayment if this security is lost at sea (the so-called “ship survival” clause)”.

- 11 King Attalos III Philometor Euergetes of Pergamon had no male heirs. When he died in 133 BC he left his Kingdom and his royal assets to the Roman Republic.¹²
- 12 At the beginning of summer of 133 BC, Attalos' testament was brought to Rome by Eudemos of Pergamon.¹³
- 13 However, this happened shortly after an agrarian reform law had been passed on the proposal of the tribune of the people Tiberius Gracchus.¹⁴ These reforms were very costly. Given the need for funds, Gracchus was advocating to accept the inheritance and proposed to use the inheritance to finance his reforms.¹⁵
- 14 The *lex agraria* was not just very expensive, it was also very controversial. It was seen as an attempt to overthrow the traditional system of government by harnessing the poor. When Gracchus sought re-election as Tribune of the People (which was thought to be in breach of the electoral customs if not laws), he was killed. The mob was led by Publius Cornelius Scipio Nasica, the pontifex maximus.¹⁶
- 15 However, the *lex agraria* was not repealed after his death. The inheritance was accepted. Walser dates the passing of the bill between 16 October and 11 November 132 BC.¹⁷
- 16 Around autumn of 133 BC, a delegation of five was sent by the Senate to Asia in order to assess the options for how to move forward with the inheritance of Attalos.¹⁸ P. Cornelius Scipio Nasica was amongst the delegates and died in Pergamon. The other four delegates returned to Rome and were able to brief the Senate.
- 17 In 132 BC the Senate accepted the inheritance on the proposal by the Consul Publius Popillius Laenas in the *Senatus Consultum Popillianum*. The full dossier on the matter of Pergamon comprised three texts, the *Senatus Consultum* being the middle one. Of the *Senatus Consultum*, the following text has been preserved:¹⁹

¹² Strab. 13.4.2,

<http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0198%3Abook%3D13%3Achapter%3D4%3Asection%3D2>.

¹³ Plutarch, Lives, Tiberius Gracchus, 14,

<http://www.perseus.tufts.edu/hopper/text?doc=Plut.%20TG%2014&lang=original>; Livius, Periochae, Book 58 (English: <https://www.livius.org/sources/content/livy/livy-periochae-56-60/>

Latin: <https://www.thelatinlibrary.com/livy/liv.per58.shtml>. See also Plutarch, Lives, Tiberius Gracchus, 14,

<http://www.perseus.tufts.edu/hopper/text?doc=Plut.%20TG%2014&lang=original>); see also Philip Kay, Rome's Economic Revolution, p. 62.

¹⁴ Philip Kay, Rome's Economic Revolution, p. 62.

¹⁵ Philip Kay, Rome's Economic Revolution, p. 62.

¹⁶ Plutarch, Lives, Tiberius Gracchus, 14 et seq.,

<http://www.perseus.tufts.edu/hopper/text?doc=Plut.%20TG%2014&lang=original>.

¹⁷ Andreas Victor Walser, Das sogenannte *Senatus Consultum Popillianum*, in: Die *senatus consulta* in den epigraphischen Quellen, 2021, p. 158.

¹⁸ *Ibid.*, p. 148; Schleussner, Die Gesandtschaftsreise P. Scipio Nasicas im Jahr 133/2 v. Chr. und die Provinzialisierung des Königreichs Pergamon, 1976, p. 98 et seq.; Wörrle, Pergamon um 133 v. Chr., 2000, p. 568.

¹⁹ Andreas Victor Walser, Das sogenannte *Senatus Consultum Popillianum*, in: Die *senatus consulta* in den epigraphischen Quellen, 2021, p. 162.

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The Consul Publius Popillius, son of Gaius, consulted with the Senate on -- of November. As to the matters about which he spoke, regarding the affairs in Asia, which orders should be transmitted to those carriers of the Empire that travel to Asia, and whether what was directed, given, given away or fixed as punishments by the Kings until the death of Attalos, the Senate decided as follows:

As to the matters about which the Consul Publius Popillius, son of Gaius, spoke, the following was decided: what was given away, directed, fixed as punishments -- given by King Attalos and the other Kings shall remain valid if happened by the day before the death of Attalos; and those carriers of the Empire that travel to Asia should not alter these matters without reason (?), but let them remain valid as was decided by the Senate.

18 While the Ancient Greek version of the above speaks of "the day before the death of King Attalos" it is not known whether the Latin original did as well. The phrase in Ancient Greek may be a translation of either *pridie quam* (the day before) or simply *antequam* (before). The Latin original is lost.²⁰

19 Also, the text of the testament itself is lost. For the purposes of the Moot, participants will assume that it contained the following sentence:

"The Agreement between the Roman Republic and the Kingdom of Pergamon on the Promotion and Protection of Investment shall continue to apply with full force in perpetuity."

20 According to Trogus, Attalos suffered a heat stroke the construction of a monument for his mother and died seven days later.²¹

²⁰ Andreas Victor Walser, Das sogenannte *Senatus Consultum Popillianum*, in: Die *senatus consulta* in den epigraphischen Quellen, 2021, p. 166.

²¹ Justinus: Epitome of Pompeius Trogus' Philippic Histories, Translated by Rev. J.S.Watson (1853), 36.4, <http://www.attalus.org/translate/justin5.html>; <https://www.forumromanum.org/literature/justin/texte36.html#1>.

- 21 Participants will also assume that when Attalos' dead body was discovered, the servants also found a document that contained a donation of the saline in Priene to the Temple of Athene. It is unknown whether Attalos executed the donation on the day of his death or before.
- 22 For the purposes of the Moot, it shall be assumed that said document, signed by the late King Attalos, stated:
- "I, King Attalos III Philometor Euergetes of Pergamon, in my capacity as lawful proprietor and possessor, do hereby bestow upon Athena Polias, the temple of Athena at the Free City of Priene, the Salt Works in the area."
- 23 Both an honorary decree for Apollonios of Metropolis²² as well as speech of Marcus Antonius in 41 BC,²³ state that the cities (poleis) of the Kingdom of Pergamon (including Priene) had been given the status of free cities after the death of Attalos. It is unknown whether Attalos granted this in his testament and that the Senate of Rome only ratified Attalos' will, or the Senate of Rome itself granted this freedom.²⁴ For the purposes of the Moot, participants will assume it was done in execution of the testament.
- 24 The succession was subsequently disputed by an alleged illegitimate brother of Attalos III by the name of Aristonikos.²⁵ Aristonikos initially made progress defeating an army led by Consul Publius Licinius Crassus Mucianus, who died in the battle in 131 BC.²⁶
- 25 The senate then sent the Consul Marcus Perperna who defeated Aristonikos in 130 BC.²⁷ Aristonikos was taken prisoner and later executed.²⁸

²² Walser, op. cit., p. 164, 165.

²³ Appian, Civil Wars, 5,4; see also Kay, op. cit., p. 60.

²⁴ Walser, op. cit., p. 22.

²⁵ Livius, Periochae, Book 59,3 (English: <https://www.livius.org/sources/content/livy/livy-periochae-56-60/>; Latin: <https://www.thelatinlibrary.com/livy/liv.per59.shtml>).

²⁶ Livius, Periochae, Book 59,4

(English: <https://www.livius.org/sources/content/livy/livy-periochae-56-60/>;

Latin: <https://www.thelatinlibrary.com/livy/liv.per59.shtml>).

Livius notes that Publius Licinius Crassus Mucianus was also pontifex maximus and, therefore, his leading an army into battle was "something that had never happened before" ("adversus eum P. Licinius Crassus cos., cum idem pontifex max. esset, quod numquam antea factum erat, extra Italiam profectus proelio victus et occisus est. M. Perperna cos. victum Aristonicum in deditionem accepit"); see also Cicero, Philippicae 11.18: there was a dispute between him and his colleague in office Consul Lucius Valerius Flaccus who would lead the army. Flaccus was flamen dialis at the time. Mucianus having the higher religious office ordered Flaccus to stay. According Aulus Gellius, Noctes Atticae 1, 13, 11 et seq., Mucianus may not have been someone to appreciate proactive thinkers amongst his soldiers.

²⁷ Livius, Periochae, Book 59,5

(English: <https://www.livius.org/sources/content/livy/livy-periochae-56-60/>;

Latin: <https://www.thelatinlibrary.com/livy/liv.per59.shtml>).

²⁸ Velleius Paterculus, II.4.1

(English: http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Velleius_Paterculus/2A*.html,

Latin: https://penelope.uchicago.edu/Thayer/L/Roman/Texts/Velleius_Paterculus/2A*.html).

- 26 Rome acquired its first non-Italian province, Sicilia, in 241 BC.²⁹ By the time of the Case-Study, the Roman Republic had acquired a number of additional provinces.
- 27 Despite having become a province and therefore under Roman sovereignty, the local communities retained a degree of self-rule. This degree varied though throughout the provinces and even within a province.³⁰
- 28 The provinces were governed by so-called promagistrates, at the time proconsuls or propraetors³¹, by men that had served as praetors or consuls in the year before. In later years, with the growth of the Roman empire, the duration for the promagistrates' offices was extended beyond one year.³²
- 29 Promagistrates differed when it came to how they exercised their offices. Perhaps one of the most (in)famous propraetors was Caius Verres. Marcus Tullius Cicero prosecuted him in 70 BC in an *actio de repetundis*. Verres, who was defended by Quintus Hortensius, a famous attorney at the time, fled after Cicero's first speech.³³ While this victory made Cicero one of the preeminent lawyers of his time (and his long sentences the scourge of many Latin students), Cicero did not do well on damages. Only 3 million sesterces of the overall claim of 40 million were awarded as fine.³⁴

²⁹ Appian, *The Foreign Wars*, Sic. 1.2,

<http://www.perseus.tufts.edu/hopper/text?doc=urn:cts:greekLit:tlg0551.tlg006.perseus-eng1:1.2>.

³⁰ For tax aspects see Malmendier, *Societas publicanorum*, pp. 38 - 39.

³¹ Caius Iulius Caesar praetor served as proconsul even though he had only been praetor before. The syllable^{o7}

"pro" does not stand for "former" but indica</MCID 21 7Paginati51(l)-11.4t623.4 ((n)-0.i)-11.192 0.919.8 (M)-a6 (i)-11.g0.8 (l)C

- 30 Roman civil servants were elected for one year. Each office had at least two office holders who would collaborate (or not) and hold each other in check. The consul was the highest regular political office. Roman authors therefore date events by referring to the consuls for that year. At the time of the beginning of our Case-Study the *cursus honorum*, i.e. the career path for young men with political ambition, was less strictly regulated. The office of praetor was not yet a strict precondition for becoming a consul. This may be surprising as in addition to military service, work as an advocate was important to gain recognition and visibility for the subsequent political career.
- 31 Sulla later cemented the career pathway and set up certain requirements.³⁵
- 32 An exception to annual election was the office of censor. The two censors served for a term of 18 months, but were only elected every five years.³⁶ This five-year period was called a *lustrum*. The office of the two censors was – as the title implies – to conduct a census and to allocate the citizenry to their (asset based) voting classes, to appoint new senators and also to purge the senate of persons who no longer qualified. They were also in charge of curbing luxury spending and holding Romans to good austere lifestyle in line with ancestral morals.
- 33 The Censors were also in charge of public procurement and the exploitation of public assets, such as land or in our case salt works.³⁷ It is in this function that we encounter them in this Case-Study.

Publicani

- 34 The Roman Republic was a much ‘leaner’ State than we are used to from the present day. It relied heavily on what we would today call procurement procedures and “PPPs”, public private partnerships. It tendered out public works (such as the maintenance of the roofs of temples), the supply of goods (for example the provision of horses for religious processions), and used private individuals to collect customs and taxes.³⁸ It also tendered out the exploitation of public property such as mines and farmland.³⁹
- 35 This system not only applied in Rome itself as well as in Italy but also in the provinces. With the exception of Sicily, the private parties to the contracts were Roman citizens as well as *societates* of Roman citizens.⁴⁰

³⁵ This was changed by Sulla (Appian, Civil Wars, 1, 100).

³⁶ Under the lex Aemilia de censura, Der Große Pauly, Supp. XI, 1187, lines 49, 50, https://elexikon.ch/RE/SXI_1189?Big.

³⁷ With the exception of the period between 86-70 BC, see Cicero, In Verrem II, 1, 50, 130 and 3, 7, 18; Malmendier, *Societas publicanorum*, p. 78.

³⁸ Malmendier, op. cit., pp. 4-5, 26-27, 29, 48, 62.

³⁹ For example Dietrich, *Beiträge zur Kenntnis des römischen Staatspächtersystems*, p. 23, with further references.

⁴⁰ Malmendier, op. cit., p. 79 et seq.; for Sicily the lex Hieronica applied, Cic. Ver. 2.3.18 et seq.

- 36 Livius talks of at least three *societates* already in 215 BC.⁴¹
- 37 However, the *societates* themselves were technically not themselves the parties to the contract with the censors. Roman law at the time did not know the concept of a juridical person or a partnership that could act in a similar way to a corporation. A *societas* was merely a contractual connection between the *socii*⁴², i.e. the partners of *societas*.⁴³ Therefore the *societas* as such was not able to act towards the outside world. Vis-à-vis the outside world, only individuals would act.
- 38 For the contracts for taxes leases or the exploitation of public property, the person that would conclude the contract was called *manceps*.
- 39 Besides the *socii*, at least the large *societates publicanorum*, allowed a participation that was below the level of a *socius*. Contemporaneous authors speak of *adfines*⁴⁴ or *participes*,⁴⁵ i.e. persons that take a *pars* or *partes* in the society. This kind of participation did not allow a holder to be involved in the decision making of the *societas*, but it also limited the exposure for losses also to the value of the *pars*. Whether this can be described as an early form of shares is unclear. While we know that a number of persons of senatorial rank owned partes in the *societates publicanorum*, the *equites* obtained a quasi-monopoly which lead to an increase in power of this class.⁴⁶
- 40 Obviously, the *manceps* himself would not travel to the province and dig for metals, inspect incoming cargo to assess the *portoria*, or collect taxes. The *societates* used both Roman citizens, freedmen and foreigners to administer the business abroad.⁴⁷ We find the term *magister* used for a managerial position,⁴⁸ but also the term *promagister*.⁴⁹ How the contracts between them and the *manceps* or the members of the *societas* functioned precisely is unknown. However, in addition the *societates* also used - sometimes large numbers of - slaves. Indeed, we have evidence that for the exploitation of mines, the number of workers was limited to 5000 to avoid an over-exploitation of the mine during the five-year contract.⁵⁰

⁴¹ Livius, *Ab urbe condita*, 23, 49.1: "Ubi ea dies venit, ad conducendum tres societates aderant hominum undeiginti, quorum duo postulata fuere"
(<https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.02.0161%3Abook%3D23%3Achap%3D49%3Asection%3D1>).

⁴² Singular *socius*. – The same word is also used for "ally" in the military sense.

⁴³ Malmendier, *op. cit.*, p. 227 et seq.

⁴⁴ Plautus, *Trin.*, 330-331; Livius, *Ab urbe condita*, 43, 16.

⁴⁵ Cicero, *In Verrem II*, 2, 15, 40; Cicero, *Rab. Post.*, 2, 4; Given that unlike Plautus was a lawyer, we will use the term *participes* for the purposes of the case-study.

⁴⁶ Cicero, *In P. Vatinius*, XII, 29; Val. Max, *Facta et dicta memorabilia*, 6,9,7.

⁴⁷ Malmendier, *op. cit.*, p. 265.

⁴⁸ Cicero, *In Verrem II*, 2, 74, 182; 3, 71, 167-168, Malmendier, *op. cit.*, pp. 261, 262.

⁴⁹ Cicero, *In Verrem II*, 2, 70, 171; 2, 76, 186; Malmendier, *op. cit.*, p. 263.

⁵⁰ Plinius, *Naturalis Historia*, XXXIII, 4, 21, § 78: "Italiae parci vetere interdicto patrum diximus; alioqui nulla fecundior metallorum quoque erat tellus. Exstat lex censoria Victumularum aurifodinae in Vercellensi agro, qua cavebatur, ne plus quinque milia hominum in opere publicani haberent." ("I have already mentioned that by an ancient decree of the senate, the soil of Italy has been protected from these researches; otherwise, there would be no land more fertile in metals. There is extant also a censorial law relative to the gold mines of Victumulae, in the territory of Vercellae, by which the farmers of the revenue were forbidden to employ more than five thousand men at the works.").

- 41 Not all slaves worked in mines or under similarly harsh conditions. Having a slave conduct business for his master was a way to circumvent the absence of the concept of power of attorney in Roman law. A *pater familias* (head of the family, which included not only the slaves but also the children of the father) could be obligated by the actions of those slaves or children.⁵¹ Slaves therefore often worked in responsible and leadership positions of a business. There were even cases in which a free foreigner would voluntarily become a slave – either to be manumitted (i.e. set free) which entailed the acquisition of Roman citizenship, or to qualify for a managerial position.⁵²
- 42 The Censors held public auctions to award the contracts to the respective *manceps*. These auctions took place at the beginning of their tenure. Many entered into force at the Ides of March or the Ides of January of the following year.⁵³ The auction was public. It was conducted in Rome and *sub hasta* (“under the spear”) and using a *praeco* (herald/auctioneer). This formal process also guaranteed transparency as it was before the eyes of the Roman people.⁵⁴ For leases of publica property (such as the salt pans), the contract was awarded (“*addictio*”) to the highest bidder; for public works to the lowest offeror.⁵⁵
- 43 Traditionally, the auction started with the lease of the fisheries of the lacus Lucrinus.⁵⁶
- 44 The bidder and contract party was an individual, *manceps*, not the *societas* which as explained above at para. 37-38 could not itself enter into contracts. He had to furnish *praedes* (guarantors) and *praedia* (land as collateral).⁵⁷

⁵¹ See Kaser, op. cit., § 62, p. 262. Absent an emancipatio, a son remained under the patria potestas (the authority) of his father until the death of the father. A daughter until marriage (except if the marriage for so-called manus free, in which case she remained under the authority of her father), see Kaser, op. cit., § 83 (82), III. 1. (p. 349) and § 76 I-II. 1. (pp. 321-324).

⁵² Ulpian, D. 28, 3, 6, 5 (ad actum gerendum).

⁵³ Dietrich, op. cit., p. 57, 58; Malmendier, op. cit., p.85; see Alfenus Varus, D. 39,4,15 (

- 45 The *manceps* had bilateral contracts with the other members of his *societas* (and the guarantors who could be members of the *societas* but did not have to).⁵⁸
- 46 Despite the fact that the contract was concluded with the *manceps*, the conditions of the auction required that not only the names of the guarantors, but all members of the *societas*, its *participes* had to be disclosed.⁵⁹
- 47 The terms of the contract were determined before the auction in the *lex censoria*. These *leges* were standard terms.⁶⁰ They developed over time: the Monumentum Ephesenum which contains the *lex portoria* (i.e. the standard terms for the customs in the province Asia) shows how each generation made changes and additions to it over time.⁶¹
- 48 The contract award was recorded in the *tabulae censoriae* and archived in the Aerarium.⁶²
- 49 Throughout the era of government contracting and tax farming in Rome, the legal nature of the contracts was disputed. For the purposes of this case, we will keep aside the procurement of services to the State, such as *sarta tecta* (construction) or provision of goods (horses for races/temples).⁶³ It was undisputed that the contract was a mutual contract: payment was made in exchange for the opportunity to generate income or the undertaking of services. Each party was both debtor and creditor.⁶⁴ What is delicate, however, is the applicable type of contract. Particularly, the sources and academic literature show a dispute whether such contracts were an *emptio venditio* or a *locatio conductio*.⁶⁵
- 50 As to the sources, the *lex agraria* of 133 BC contains both the terms *vendere* and *locare*. Correspondingly, it appears that the terms *emere*, *redimere* and *conducere* are used interchangeably. Also, Festus noted:

“Manceps dicitur, qui quid a populo emit conductive, quia manu sublata significat se auctorem emptionis esse.”⁶⁶

“*Manceps* is called who buys or rents something from the people, because he indicates it with his raised hand to be highest bidder of the purchase.”

“Redemptores proprie atque antiqua consuetudine dicebantur, qui, cum quid

“*Redemptores* were called correctly and also with old custom those who, if it was

⁵⁸ See Malmendier, op. cit., p. 238.

⁵⁹ Cf. Livius, *Ab urbe condita*, 39, 44, 8; 43, 16, 2; see also Malmendier, op. cit., p. 88.

⁶⁰ Cf. Cicero, *In Verrem* II, 1, 55, 143 and II, 3, 7, 18.

⁶¹ The Customs Law of Asia, pp. 26 et. seq.; see also Dietrich, op. cit., p. 62 for the *lex metalli Vipascensis* from the imperial period.

⁶² Plinius, *Naturalis Historia*, XVIII, 3, 11; Cicero, *de lege agraria*, 1.4; see Dietrich, op. cit., p. 63.

⁶³ Dietrich, op. cit., pp. 48 et seq.

⁶⁴ Malmendier, *Societas Publicanorum*, p. 73.

⁶⁵ *Ibid.*

⁶⁶ Festus, reprinted in Malmendier, p. 79.

publice faciendum, <a>ut praebendum condixerant effecerantque, tum demum pecunias accipiebant. Nam antiquitus emere pro accipere ponebatur: at hi nunc dicuntur redemptores, qui quid conduxerunt praebendum utendumque.”⁶⁷

to be done publicly, had fixed and raised together what was to be shown, then finally received the sums of money. For in ancient times buying was depicted instead of receiving: but now those are called *redemptores* who have rented anything to show and use.”

51 Gaius agrees that the characterization is difficult. In the end, however, he reaches the conclusion that the understanding as *locatio conductio* would be preferable.⁶⁸ Indeed, this view is supported by numerous sources dated towards the end of the Republic.⁶⁹

52 Yet, one cannot say that the term *locatio conductio* was used consistently.⁷⁰ Indeed, the very opposite– *emptio venditio* – may be the original understanding. An argument in support of this is that the tender auctions were held *sub hasta* (under the spear/lance), just as the auctions and sales of spoils of war.⁷¹

53 For the purposes of the Moot the contract was awarded by the Censores Gnaeus Domitius Ahenobarbus and Lucius Licinius Crassus (92BC – 88 BC) in early 92 BC.

54 The censorship of the two was not the most harmonious. Crassus, whom Cicero revered as teacher and advocate, was said to have been a man of fine taste and erudition.⁷² Domitius was reputed by contrast to be of a violent temper and in favor of a more Catonian lifestyle.⁷³ Crassus reportedly quipped about his colleague “that it was no wonder that a man had a beard of brass, who had a mouth of iron and a heart of lead.”⁷⁴

55 Both agreed on one thing, they issued a decree to banish Greek rhetoricians that had opened schools for advocacy in Rome:

“In the consulship of Gaius Fannius Strabo and Marcus Valerius Messala the following decree of the senate was passed regarding Latin speaking philosophers and rhetoricians:

⁶⁷ Festus, reprinted in Malmendier, pp. 73.

⁶⁸ Gaius, *Institutiones*, III 145.

⁶⁹ Malmendier, *op. cit.*, p. 74; cf. Gaius, *Institutiones*, III 147 (“operarum autem locationem et conductionem”); see Dietrich, *op. cit.*, p. 59; Karlowa, *Römische Rechtsgeschichte*, 2. Band: Privatrecht und Civilprozess, p. 636; Kniep, *Societas publicanorum*, p. 233, pp. 93 et seq.; Leonhard, RE 13, Sp. 938-942; Rostovtzeff, *Geschichte der Staatspacht in der römischen Kaiserzeit bis Diokletian*, p. 368; Schwab, RE 7A, Sp. 65; Ürödgi, RE Suppl. 11, Sp. 1184 et seq.

⁷⁰ Cf. Cimma, *Società di publicani*, p. 114; Malmendier, p. 75.

⁷¹ Malmendier, p. 74.

⁷² Cicero, *de oratore*, III, 82 et seq.

⁷³ Plinius, *Naturalis Historia* XVII, 1, 5.

⁷⁴ Plinius, *Naturalis Historia* XVII, 1, 5; Suetonius, *Nero*, 2.

‘The praetor Marcus Pomponius laid a proposition before the senate. As the result of a discussion about philosophers and rhetoricians, the senate decreed that Marcus Pomponius, the praetor, should take heed and provide, in whatever way seemed to him in accord with the interests of the State and his oath of office, that they should not remain in Rome.’

Then some years 3 after that decree of the senate Gnaeus Domitius Ahenobarbus and Lucius Licinius Crassus the censors issued the following edict for restraining the Latin rhetoricians:

‘It has been reported to us that there be men who have introduced a new kind of training, and that our young men frequent their schools; that these men have assumed the title of Latin rhetoricians, and that young men spend whole days with them in idleness. Our forefathers determined what they wished their children to learn and what schools they desired them to attend. These innovations in the customs and principles of our forefathers neither please us nor seem proper. Therefore it seems necessary to make our opinion known, both to those who have such schools and to those who are in the habit of attending them, that they are displeasing to us.’⁷⁵

- 56 Given that the incident described below at paras 59 *et seq.* occurred under the pro-consulate of Caius Caesar praetor, we assume for the purposes of the Moot that the contract’s start date were the Ides of January 91 BC (13 January 91 BC). It was made subject to the lex censoria that

⁷⁵ Aulus Gellius, xv. 11, 561, 562, see here:

<https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2007.01.0071%3Apage%3D561> (561, Latin),

<https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2007.01.0072%3Apage%3D557> (561, English),

<https://www.perseus.tufts.edu/hopper/text?doc=Gel.+562&fromdoc=Perseus%3Atext%3A2007.01.0071> (562, Latin),

<https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2007.01.0072%3Apage%3D558> (562, English); also Cicero, de oratore, III, 93 et seq: "As for choosing and arranging words, and forming them into proper periods, the art is easy, or, I may say, the mere practice without any art at all. Of matter, the quantity and variety are infinite; and as the Greeks were not properly furnished with it, and our youth in consequence almost grew ignorant while they were learning, even Latin teachers of rhetoric, please the gods, have arisen within the last two years; a class of persons whom I had suppressed by my edict, when I was censor, not because I was unwilling (as some, I know not who, asserted,) that the abilities of our youth should be improved, but because I did not wish that their understandings should be weakened and their impudence strengthened. For among the Greeks, whatever was their character, I perceived that there was, besides exercise of the tongue, some degree of learning, as well as urbanity suited to liberal knowledge; but I knew that these new masters could teach youth nothing but effrontery, which, even when joined with good qualities, is to be avoided, and, in itself, especially so; and as this, therefore, was the only thing that was taught by the Latins, their school being indeed a school of impudence, I thought it became the censor to take care that the evil should not spread further. I do not, however, determine and decree on the point, as if I despaired that the subjects which we are discussing can be delivered, and treated with elegance, in Latin; for both our language and the nature of things allows the ancient and excellent science of Greece to be adapted to our customs and manners; but for such a work are required men of learning, such as none of our countrymen have been in this department; but if ever such arise, they will be preferable to the Greeks themselves" (<http://www.attalus.org/old/deoratore3B.html>).

was in force at the time for the exploitation of mines and saltpans by publicani salinarum.⁷⁶ This lex censoria decreed that praedia and praedes – taken together – had to amount to five times the contract sum.⁷⁷

57 For the purposes of the Moot, as to the description of the object of the contract, it states that it extends to:

“[...] all the salt pans, which King Attalus the son of Eumenes worked. The publicanus is to use them as the King did. The former holder shall hand over to the incoming publicanus the workers whatever of these he may take over.”⁷⁸

58 It also stated that the exploitation of the salt pans was by “locare vendereve” (by lease and/or sale).⁷⁹

59 In 91 BC, the *publicani* holding the Salt Lease sent members of their *familia* to take physical possession of the salt pans in the City of Priene.⁸⁰

60 As to what happened after the *publicani* arrived in Priene, we only have limited, fragmentary information.

61 The Herakleitos decree describes the incident between the City of Priene and the *publicani*:

-] 15	-]	Magistrates preventing... and wounds
	-]	and murders... of the governor by
		inquiring
		about... at the appointed time, about
-]		the complaint... of the indicated
	- -	together... having returned, he himself

⁷⁶ Dietrich, op. cit., p. 23; The Krates decree speaks of _____, see p. [15]; see also Gaius, dig. XXXIX, 4, 13 “sed hi, qui Salinas et cretifodinas et metalla habent, publicanorum loco sunt” (but those that have salt pans, clay/chalk pits and mines for metals, are [also] considered to be publicani).

⁷⁷ This is modelled on the lex portoria, recorded in the Monumentum Ephesenum, see The Customs Law of Asia, ed. M. Cottier, M. H. Crawford, C. V. Crowther, J.-L. Ferrary, B. M. Levick, O. Salomies, M. Wörrle and with papers by M. Corbier, S. Mitchell, O. van Nijf, D. Rathbone, G. D. Rowe, Monumentum Ephesenum / Lex Portoria, ll. 124-126, §55, p. 75 (although this part of the lex portoria post-dates the facts of the case significantly).

⁷⁸ This is again modelled on the lex portoria, recorded in the Monumentum Ephesenum, see The Customs Law of Asia, ed. M. Cottier, M. H. Crawford, C. V. Crowther, J.-L. Ferrary, B. M. Levick, O. Salomies, M. Wörrle and with papers by M. Corbier, S. Mitchell, O. van Nijf, D. Rathbone, G. D. Rowe, Monumentum Ephesenum / Lex Portoria, ll. 67-72, §§28-30, pp. 53 & 126.

⁷⁹ This is modelled on lex agraria 643, 111 BC, lin. 87 (“vectigalia publica fruenda locare vendereve”), see in English translation Hardy, Six Roman laws, p. 81, lin. 87: <https://archive.org/details/sixromanlaws00harduoft/page/80/mode/2up> (“sell or lease”), Malmendier, op. cit., p. 73.

⁸⁰ Inscriptions honoring Herakleitos report that the *publicani* (presumably their *familia*) arrived in Priene. See I. Priene 117.14; Wallace, p. 50.

- 20

-]

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went [to... and was our ambassador]
to Ephesus...⁸²

81

62 Herakleitos' decree states that *publicani* were not welcomed with open arms by the Prieneian citizens. When the *publicani* arrived to physically seize control of the salt pans, the Prieneian Magistrates resisted. The ensuing fights and conflict were violent and resulted in wounds as well as murders.

63 The *publicani* came out on top or at least were not driven off completely by the physical resistance of the City of Priene.

64 To resolve the dispute with the *publicani* over the local salt pans of Priene, the City of Priene sent a diplomatic embassy to the Roman proconsul of Asia. At the time, this proconsul was Caesar praetor.⁸³

65 The City of Priene chose Krates to plead(e)-3 1.2 (e)-3 (ad(e)-3 1. 6-3 (,)A1.3 (l)(e)-3 (.)e)-3 (K)-2.299 (h)-0 (an

67 Krates' arguments were successful before Caesar praetor as Krates' decree states:

[...] he preserved prevailing upon the governor not to heed the arguments of the salt-contractors, but to [release] the installation to the city until we learned what had been decided [by the senate]; and he persuaded the proconsul personally to declare that the land possessed by us ought to be fully retained.⁸⁸

87

68 Caesar praetor issued a temporary injunction in favor of the City of Priene, ordering that the salt pans should remain in Priene's possession until the dispute would ultimately be decided by the senate.

69 The City of Priene's position in the dispute can be derived from the fragmentary inscriptions handed down in the Krates decree. The City of Priene considered that the salt pans had once been the property of King Attalos III who worked them. After his death, the salt pans did not become the property of the City of Priene but had been the property of Athene Polias, for a long time. Moreover, the City of Priene considered that the "senate" did not issue any lease of the salt pans to the *publicani*.

70 Since we only have the City of Priene's position on the dispute inscribed in the Krates' decree, we have no primary historical evidence what the *publicani* argued before Caesar praetor. The only thing that is known is that the *publicani* were indeed heard.⁸⁹ For the purposes of the Moot, it shall be assumed that the *publicani* based their argumentation primarily on the wording of the Salt Lease, stating that "all the salt pans, which King Attalus the son of Eumenes worked" were comprised in the Lease.⁹⁰

71 In addition, Herakleitos' decree mentions that Caesar praetor also decided that the killing of a slave in relation to the incident was lawful. It st (i)-11 (j10.)sr

[...]

- 77 Following the term of Caesar praetor, Lucius Lucilius, the son of Lucius, became the proconsul of Asia.⁹⁷ The dispute between the City of Priene and the *publicani* was also argued before him. The inscription of the Krates decree reads:

[c.27] [] ?
 [c.4] [c.4]
 []
 [] [] [] [] ,
 []
 [] [] [] []
 c.15] []
 [c.5] [c.2] [c.3]
 ['] []
 c.12] [] [c.4]
 [c.4] ,
 [c.35]
 ,
 [c.19] [c.10]
 []
 [c.13]
 []
 [] ,
 [—] []
 [] [] ,
 []
 [] [] [] []
 [c.2] [c.2] [c.3] [c.1]
 [] [] ,
 [c.7] [] [c.8]⁹⁸

[...] and throughout, as the publicani ... of us, and always kept pestering the governors who [were sent] to Asia, and they had an audience with the governor Lucius Lucilius, son of Lucius ... he [replied] to the envoys who were sent to him by [us that] he . . . about the salt-pans, of which they accused ... to his fatherland, and when he travelled to Ephesos ... nothing of the places that fell to them. The publicani ... then the people had sent an embassy to the senate about the salt-pans, which ... the business to the city, until the senate determined about the salt-pans, by which the governor was persuaded ... to leave the matters intact for the city⁹⁹

- 78 Lucius Lucilius issued the same injunction in favor of the City of Priene until the senate would ultimately decide.
- 79 The decision of the Roman senate on the dispute does no longer exist or at least has not yet been found. In the absence of primary historic evidence, that the hypothesis is that the senate must have ultimately decided in favor of the City of Priene. Otherwise, Krates' decree would not have honored him and described the incident at such length.

⁹⁷ See for more information below, at para. 86-87.

⁹⁸ I. Priene 111.133 *et seq.*, <https://epigraphy.packhum.org/text/252936?bookid=520&location=1688>.

⁹⁹ Priene 56, I. Priene 111, translation based on http://www.attalus.org/docs/other/inscr_175.html.

- 80 The proconsul Caius Iulius Caesar had been praetor in 92 BC. As we know from an inscription (*elogium*) on the forum that Augustus built, he had previously been questor and military tribune.¹⁰⁰
- 81 Iulius Caesar was married to Aurelia (probably the daughter of M. Aurelius Cotta).¹⁰¹ According to Suetonius, they had three children, two daughters and a son (Caius Iulius Caesar).¹⁰² The latter was born on 13 July 100 BC.
- 82 For the purposes of the Moot, we will refer to Caius Iulius Caesar praetor (“Caesar praetor”) for the father and Caius Iulius Caesar filius (“Caesar filius”) for the son. To complicate matters further, the Krates inscription refers to the father as “son of Caius”¹⁰³ Grandfather, father and son bore the same first name. The idea that first names could be used to distinguish individuals was not one that Roman society thought highly of. Distinction as an individual was something one earned but was not born into.
- 83 We do not have any historical evidence where Caesar praetor’s wife and children were in 91/90 BC while he was promagistrate (“strathegos” per the Krates inscription). However, given the emphasis Roman society placed on being able to speak and write Greek to perfection, it is not unlikely that they accompanied or followed him to his province. Also, Rome was already in political turmoil in the run-up war with its allies in Italy (*bellum sociale*

¹⁰⁰ Elogia, Inscr. Ital. 13.3.7: [C(aius) Iu]lius [C(aii) f(ilius) Caesar] | pater di[vi Iulii] | [p]r(aetor) q(uaestor) tr(ibunus) [mil(itum) - - -] | [C]olones Cerce[nam] deduxit]. See here: <https://macsphere.mcmaster.ca/bitstream/11375/11826/1/fulltext.pdf>, p. 110 and https://db.edcs.eu/epigr/epi_url.php?s_sprache=en&p_publication=CIL+06,%2040954. An alternative reading has a reference to proconsul instead of praetor. As we know that the province Asia was governed by a former praetor as proconsul, this makes no difference for the case study.

¹⁰¹ Plutarch, Caesar, 10,2; Sueton, Caesar, 74,2. See Paulys Realencyclopädie der classischen Altertumswissenschaft, Aurelius 248, Band II,2 (1896) Sp. 2543, https://de.wikisource.org/wiki/RE:Aurelius_248. Klebs identification of C. Aurelius Cotta (https://de.wikisource.org/wiki/RE:Aurelius_96) as uncle of Aurelia could make it a possibility that he was involved esp. in the legal education of his nephew (especially after the death of his father). C. Aurelius Cotta died only in 73 BC. Cicero’s description of his advocacy style (“nihil nisi siccum ac sanum”, Cicero, Brutus, 202) would fit equally that of the Bellum Gallicum.

¹⁰² Suetonius, Caesar, 83, 2 (sisters in plural). When the two sisters were born is unclear. If the two other heirs mentioned by Sueton, Quintus Pedius and Lucius Pinarius Scarpus, were indeed the older sister’s grandchildren, then this sister must have been considerably older than Caesar filius. Münzer suggests that the two heirs were actually the sons of Julia maior from two different marriages, Paulys Realencyclopädie der classischen Altertumswissenschaft, Iulia 545, Band X,1 (1918) Sp. 893–894, https://de.wikisource.org/wiki/RE:Iulius_545#X,1. Octavius was the grandson of Caesar’s other sister.

¹⁰³ The Krates inscription transliterates the name as Gaius. The reason for that is that in older Latin C could be pronounced k or g. The letter G was introduced in the 3rd century BC (see Paulys Realencyclopädie der classischen Altertumswissenschaft, Band I,2 (1894) Sp. 1612 (IA)–1629 (IA), https://de.wikisource.org/wiki/RE:Alphabet#i_Lateinisches_Alphabet).

Caius was one of the few words where the old spelling persisted. The Greek alphabet differentiated between the two sounds. A Greek transliteration of Caius Iulius Caesar would have been (in modern Latin alphabet) Gaiou Ioulious Kaisar. The c pronunciation that is most common in modern languages for the name Caesar, did not exist at the time. We know that because, again, Greek did have a letter for the sound. But it was never used for the name Caesar. Caesar would not recognise his own name when it is spoken today. Considering the value that Romans put on *gloria*, the reputation that survived a person’s death, this is actually quite sad.

or Italian war).¹⁰⁴ Asia was beautiful and rich with a considerable Latin expatriate population. Also, until a few years later it was a relatively peaceful one. Moreover, Roman nobility also believed in learning by observing. It would have made sense for the father to bring alongo(i)-2 (o)1.8 (g)-3 (e

Columbi o

88 Titus Sempronius is not very happy when he learns of the decision of the senate in favour of Priene. His son's best friend tells him about the testament of Attalos, which he reads as providing for the continued application of the Agreement between the Roman Republic and the Kingdom of Pergamon of 153BC ("BIT").

89 Titus Sempronius writes to the City of Priene:

"Titus Sempronius to the magistrates of Priene, greetings.

I hereby accept the offer to arbitrate with the Free City of Priene as legal successor of the Kingdom of Pergamon under Article 10 of the Agreement between the Roman Republic and the Kingdom of Pergamon of [153BC] and notify a dispute under said treaty inviting negotiations in relation to the incident concerning the salt pans located at Priene in which I have invested."

90 The letter is received in Priene but no negotiations are held.

91 Counsel for Claimants submits his Request for Registration to the ICSID Secretariat. The case is then registered.

92 Claimant appoints Hortensius Hortalus as his party-appointed arbitrator having obtained Priene's consent to appoint a Roman.

93 Priene appoints Alex.891 0 T(n)-0.8 (s4.7 7 0 Tw ()Tj/TT0 1 T-11.n)-0.7 (9 (l)-11.1 (e)0.8 (t)4.2 (art)7..5 (e)-f J(t)

87 BC.¹¹⁴ In early 87 BC, Sulla crossed the Adriatic and marched against Greece. Sulla beat the Mithridatic armies in the battles of Chaironeia and Oromenos.¹¹⁵ The Peace Treaty of Dardanos of 85 BC ended this stage of the war. As the Roman civil war between the party of Caius Marius (he himself had died in 86 BC) and Sulla continued, the conditions of the peace treaty were unexpectedly mild.¹¹⁶

- 99 Mithridates was not punished for the murder of the Romans. He had to cede some territory, pay some tribute and in exchange received the title of king and friend of the Roman people. Nikomedes IV of Bithynia and Ariobarzanes I of Kappadokia were restored as kings.
- 100 Sulla's soldiers were not happy with the result.¹¹⁷ Sulla justified the conditions with the need to return to Rome. Sulla and Mithridates had met in person, but the treaty was never put in writing and also not submitted to the Senate in Rome for ratification.¹¹⁸
- 101 The Greek free cities in Asia retained their legal position but collectively had to pay 20,000 talents in tributes.¹¹⁹
- 102 Sometimes before 88 BC,¹²⁰ Titus Sempronius died and was succeeded by his son Titus Sempronius Atticus. Atticus, aware of the dangerous political situation in Rome, moves to Athens.¹²¹
- 103 He informs the Tribunal of his succession, which is recorded by ICSID. Priene conveys its condolences and raises no objections.
- 104 After the Treaty of Dardanos, the arbitration is resumed.

The alleged investment does not meet the criteria of Article 25(1) of the ICSID Convention and Article 1(5) of the BIT. The tender was awarded as an *emptio/venditio*, i.e. a sales of goods. The applicable Roman law is decisive for determining the nature of the transaction. The Censors specifically did not use the term *locatio/conductio*, i.e. lease agreement. Given the characterization in local law, it is not possible to look behind this classification to the content of the contract. As everyone knows ICSID has a test for the meaning of 'Investment' that is separate from the BIT. The contract also fails on the other criteria of Article 25(1) of the ICSID

¹¹⁴ Plutarch, Lives, Sulla, 8 et seq. See

<http://www.perseus.tufts.edu/hopper/text?doc=Perseus:abo:tlg,0007,033:8>.

¹¹⁵ Plutarch, Lives, Sulla, 17-21.

¹¹⁶ Plutarch, Lives, Sulla, 22 et seq.

¹¹⁷ Plutarch, Lives, Sulla, 24.4.

¹¹⁸ Robert Kallet-Marx: Hegemony to Empire: The Development of the Roman Imperium in the East from 148 to 62 B.C., Berkeley 1995, S. 262-264, see here:

<https://publishing.cdlib.org/ucpressebooks/view?docId=ft1x0nb0dk&chunk.id=d0e19300&toc.id=d0e19300&brand=ucpress>.

¹¹⁹ Plutarch, Lives, Sulla, 25.2 describes also the financial burden on cities in which soldiers were quartered.

¹²⁰ Nepos, Atticus, 2.

¹²¹ Nepos, Atticus, 2.

Convention. Notably, the risk assumed is not an investment risk, but an ordinary commercial risk.

The alleged investment does not fall under the scope of the Contract. Whether or not, the salt pans belonged to the scope of the Contract (*quod non*), is a matter for jurisdiction, not for the merits. Had the matter not already been decided by the *Senatus Consultum*, this Tribunal would have to assess the scope of the Contract in the jurisdictional phase, including the taking of evidence. However, in the present case, this falls under the scope of *res iudicata* of the decision by the Senate. If the claimant makes the case that the investment was in Priene and only sues Priene, then the question whether or not the contract extended to these salt pans is relevant. Priene cannot be sued for an investment somewhere else in Asia for acts not affecting such assets. If there was no investment in Priene, that is the end of the story.

Priene requests Claimant to disclose the books of account that are in his custody, control or possession. The request is permitted under the IBA Rules on the Taking of Evidence in International Arbitration. It is known that *publicani, societates* and, indeed, private parties are obligated to have such books of account.¹²² These are relevant and material to verify the allegations of Claimant about his purported investment and financial results until the war.

The mandatory requirements under Article 10(1) of the BIT are not complied with. The negotiation precondition for investment arbitrations in this provision refers clearly to negotiations between Rome and Priene when it speaks of "*the Contracting Parties*".

In any event, in the period from the commencement of the war against Mithridates (at least 2 years of the 5 year period), it is undisputed that the salt pans could not have been operated anyway, whether or not Claimant had been able to operate them before the outbreak of hostilities. Most of the local agents of the Roman companies in Asia had either been killed or fled during Mithridates' invasion. Given how the conditions in Italy and Asia were disturbed, it is unlikely that they have returned in strength by or around the year 84 BC.¹²³

Claimant has presented an *ex ante* valuation for undisturbed operation for the entire time of the alleged contract period. Such *ex ante* valuation becomes irrational when subsequent events show that even but for the alleged measure the alleged investment would not have yielded any profit. Priene did operate the salt pans itself, even though under more difficult conditions as exports were more difficult and for less than the usual profit. The Tribunal should give a decision on quantum principles. Even if the case were to proceed to the merits, this would reduce costs immensely as both experts would start from the same hymn sheet.

Claimant did not conduct a proper due diligence before entering into the Salt Lease. It had ample time to at least travel to and examine the situation in Priene before accepting it. He chose not to. However, such a due diligence is required to establish a breach of Respondent's substantive obligations *vis-à-vis* the investor under the Treaty.

. Respondent raises a counter-claim against Claimant for the killed slave of the Temple of Athene. Such counter-claim must be admissible, at least when the violation of fundamental human rights such as the right to life is concerned. Respondent demands just satisfaction.

¹²² Große Pauly, Supp XI, 1206, line 32ff, https://elexikon.ch/RE/SXI_1205?Big.

¹²³ This fact is undisputed for the purposes of the Moot. For the historical context, see Brunt, *Sulla and the Asian Publicans*, p. 18.

The contract is indisputably an asset under Article 1(1) of the BIT. As “everyone knows”, it is by no means certain that a double-barreled test applies, let alone one based on formalities alone. If that test shows one thing, it is designed to look at substance, not form. The contract is certainly one that meets the criteria.

Whether or not, the salt pans belonged to the scope of the Contract (*quod non*), is a matter for the merits. For jurisdiction it is sufficient that the Claimant alleges facts which create a *prima facie* case on jurisdiction. Claimant was not a party to the decision of the Senate (which is a political, not a legal one). Even if it were jurisdiction, it has double relevancy, if Claimant wins on the merits question whether the salt pan of Priene were part of the contract, then it wins on the claim. However, even if the salt pans were not part of the contract, Claimant had the rights and successfully exploited other salt pans in Asia. So, it did have an investment in the province.

Claimant objects against Respondent’s document production request regarding the books of account. The request is too broad. Moreover, the books of account contain business secrets. Claimant proposes that, if at all, an independent expert be appointed by the Tribunal to look at the books of account and testify before the Tribunal.

The negotiation provision under Art. 10(1) of the BIT is irrelevant for the Tribunal’s jurisdiction. First, Respondent’s allegation that it would require State-State negotiations before an investment dispute is illogical. The full phrase relied upon by Respondent speaks of the “Contracting Parties *in dispute*”. The only sensible reading is that the signatories meant to speak of the ‘parties’, *i.e.* the investor and the respondent State. Second, even if the negotiation precondition were not complied with (*quod non*), this would not deprive the tribunal of its jurisdiction or render the claim inadmissible. The existence of this dispute and the parties’ positions show that a further negotiation would be a waste of everyone’s time.

Claimant welcomes the proposal of Respondent to invite the Tribunal to give a quantum principles decision on the valuation method (*ex ante / ex post*) before the case moves to its evidentiary phase. The case is about a taking of the investment, subsequent acts therefore fall in the sphere of responsibility of the host State that took the investment. In case of a complete deprivation of the possession of an asset the principles for valuing compensation of an (illegal) expropriation must apply, whether the case is for expropriation or for a violation of FET. While it is indeed undisputed that the salt pans could not have been operated by Romans during the war, even if the City of Priene did not take part in the hostilities against Roman civilians,¹²⁴ Priene cannot rely on such flagrant breach by the other Free Cities of the investment treaty, customary law and basic decency. *Nemo auditor turpitudinem suam allegans*. Also, it enjoyed proceeds from the salt pans during that time, even though it argued these were less.

Claimant had no duty to conduct any due diligence. Such precondition for investment protection does not exist. Furthermore, Claimant recalls that it is, *inter alia*, bringing a claim

¹²⁴ We have no information in the historical sources, but for the purposes of the Moot, Priene did not take part in the massacres despite its geographical location.

Claimant agrees with Respondent. Given the parties' agreement, Rome may not be allowed to displace a party in these proceedings.

* * *

105 In 82 BC, Sulla again marched on Rome and, after the Battle of the Colline Gates on 1 November of the same year, took power.¹²⁵ What followed was a reign of terror.¹²⁶ The formal justification was based on the *Lex Valeria de Sulla dictatore* of 82 BC and the *Lex Cornelia de proscriptione*.¹²⁷

106 As Plutarch and others describe political opponents (as well as people whose wealth made them attractive targets) were "proscribed":

"Sulla now busied himself with slaughter, and murders without number or limit filled the city. Many, too, were killed to gratify private hatreds, although they had no relations with Sulla, but he gave his consent in order to gratify his adherents. At last one of the younger men, Caius Metellus, made bold to ask Sulla in the senate what end there was to be of these evils, and how far he would proceed before they might expect such doings to cease. 'We do not ask thee,' he said, 'to free from punishment those whom thou hast determined to slay, but to free from suspense those whom thou hast determined to save.' And when Sulla answered that he did not yet know whom he would spare, 'Well, then,' said Metellus in reply, 'let us know whom thou intendest to punish.' This Sulla said he would do. Some, however, say that it was not Metellus, but Fufidius, one of Sulla's fawning creatures, who made this last speech to him. Be that as it may, Sulla at once proscribed eighty persons, without communicating with any magistrate; and in spite of the general indignation, after a single day's interval, he proscribed two hundred and twenty others, and then on the third day, as many more. Referring to these measures in a public harangue, he said that he was proscribing as many as he could remember, and those who now escaped his memory, he would proscribe at a future time. He also proscribed any one who harboured and saved a proscribed person, making death the punishment for such humanity, without exception of brother, son, or parents, but offering any one who slew a proscribed person two talents as a reward for this murderous deed, even though a slave should slay his master, or a son his father. And what seemed the greatest injustice of all, he took away the civil rights from the sons

¹²⁵ Appian, *Civil Wars*, 1.92-93.

Velleius Paterculus, *Compendium of Roman History*, 2.27.1-6.

¹²⁶ Plutarch, *Lives*, 31 et seq.

¹²⁷ Cicero is highly critical: Cicero, *De legibus* 1.42, see

<http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2007.01.0030%3Abook%3D1%3Asection%3D42> (Latin), <https://books.google.de/books?id=AdAIAAAQAAJ&hl=de&pg=PA416#v=onepage&q&f=false>

(English); Cicero, *de lege agraria*, 3.2.5, see

<http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.02.0019%3Atext%3DAgr.%3Aspeec%3D3%3Achapter%3D2%3Asection%3D5> (English); Appian, *Civil Wars*, 1, 95 et seq.,

https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Appian/Civil_Wars/1*.html#ref32.

and grandsons of those who had been proscribed, and confiscated the property of all. Moreover, proscriptions were made not only in Rome, but also in every city of Italy, and neither temple of God, nor hearth of hospitality, nor paternal home was free from the stain of bloodshed, but husbands were butchered in the embraces of their wedded wives, and sons in the arms of their mothers. Those who fell victims to political resentment and private hatred were as nothing compared with those who were butchered for the sake of their property, nay, even the executioners were prompted to say that his great house killed this man, his garden that man, his warm baths another. Quintus Aurelius, a quiet and inoffensive man, who thought his only share in the general calamity was to condole with others in their misfortunes, came into the forum and read the list of the proscribed, and finding his own name there, said, 'Ah! woe is me! my Alban estate is prosecuting me.' And he had not gone far before he was dispatched by some one who had hunted him down."¹²⁸

107 As Plutarch reports, not only those whose names had already appeared on the proscription list, but also others who feared being proscribed in the future, were scared. Some of them fled. This included the son of Caius Iulius Caesar praetor.

Plutarch, Lives, Caesar 1, reports:

"The wife of Caesar was Cornelia, the daughter of the Cinna who had once held the sole power at Rome, and when Sulla became master of affairs, he could not, either by promises or threats, induce Caesar to put her away, and therefore confiscated her dowry. Now, the reason for Caesar's hatred of Sulla was Caesar's relationship to Marius. For Julia, a sister of Caesar's father, was the wife of Marius the Elder, and the mother of Marius the Younger, who was therefore Caesar's cousin. Moreover, Caesar was not satisfied to be overlooked at first by Sulla, who was busy with a multitude of proscriptions, but he came before the people as candidate for the priesthood, although he was not yet much more than a stripling. To this candidacy Sulla secretly opposed himself, and took measures to make Caesar fail in it, and when he was deliberating about putting him to death and some said there was no reason for killing a mere boy like him, he declared that they had no sense if they did not see in this boy many Mariuses. When this speech was reported to Caesar, he hid himself for some time, wandering about in the country of the Sabines. Then, as he was changing his abode by night on account of sickness, he fell in with soldiers of Sulla who were searching those regions and arresting the men in hiding there. Caesar gave their leader, Cornelius, two talents to set him free, [and at once went down to the sea and sailed to King Nicomedes in Bithynia]."¹²⁹

¹²⁸ Plutarch, Lives, Sulla, 31. See also Velleius Paterculus, Compendium of Roman History, 2.28, https://penelope.uchicago.edu/Thayer/e/roman/texts/velleius_paterculus/2a*.html.

¹²⁹ https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Plutarch/Lives/Caesar*.html#ref4 For the purposes of the Moot, participants will disregard the text in square brackets and assume that he is still on the run somewhere in Italy.

Suetonius, Caesar, 1, has a slightly different story:

“In the course of his sixteenth year he lost his father. In the next consulate, having previously been nominated priest of Jupiter, he broke his engagement with Cossutia, a lady of only equestrian rank, but very wealthy, who had been betrothed to him before he assumed the gown of manhood, and married Cornelia, daughter of that Cinna who was four times consul, by whom he afterwards had a daughter Julia; and the dictator Sulla could by no means force him to put away his wife. Therefore besides being punished by the loss of his priesthood, a his wife's dowry, and his family inheritances, Caesar was held to be one of the opposite party. He was accordingly forced to go into hiding, and though suffering from a severe attack of quartan ague, to change from one covert to another almost every night, and save himself from Sulla's detectives by bribes. [But at last, through the good offices of the Vestal virgins and of his near kinsmen, Mamercus Aemilius and Aurelius Cotta, he obtained forgiveness. Everyone knows that when Sulla had long held out against the most devoted and eminent men of his party

filius as a witness in Alexandria. Otherwise, it would decide on evidence it had no chance to hear and that had no chance to be tested in cross-examination. Rome as a member State of the ICSID Convention can be ordered to abide by Article 22 of the ICSID Convention even if it is not a party to the proceedings. This is even more so when a State is so blatantly violating human rights.

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Caius Iulius Caesar filius was a child when the events happened. While we accept that he may have been very observant even at a young age, his testimony is not material. Also, it is premature as the hearing is some time away and Priene's conduct is contradictory as they object to jurisdiction. We also suspect that the application is purposefully designed to exploit Article 22 of the ICSID Convention. We suspect that for reasons other than preserving his testimony, the City of Priene seeks to protect the son of the man that decided in its favor after the incident.

The Tribunal has no jurisdiction over the Roman Republic. The Roman Republic did not consent to a party. Measures against a non-party are not possible even when a party appears as an amicus. This has been decided even for cases when the background to the case were war crimes of the claimant party carried out in the state of the amicus.

¹³¹ For the purposes of the Moot, participants will assume that Atticus made such an objection. If Nepos and Cicero are to be believed, such an objection would have been out of character for the historical Atticus. He usually kept out of politics, but despite this helped Marius filius (son of Caius Marius and cousin of Caesar filius) when he fled from Sulla. See Nepos, Atticus, 1.2., <http://www.attalus.org/translate/atticus.html>.

Whereas the Parties have submitted their arguments on jurisdiction and admissibility, the Tribunal decides to hold a Hearing on Jurisdiction and Admissibility from .¹³²

The Tribunal asks the Parties to submit skeleton arguments by .¹³³

The Tribunal further requests the parties to reserve for an Evidentiary Hearing, should the need arise.

The Tribunal intends to focus the Oral Hearing on the nine issues, set out in (pp. 21-28).

It expects the Parties to address these in their skeleton arguments in preparation for the Hearing.

On behalf of the Tribunal

¹³² Participants in the Moot will assume that the hearing takes place in March 80 BC.

¹³³ For the avoidance of doubt, Participants in the Moot are required to submit skeleton arguments on behalf of both Parties, *i.e.* Claimant and Respondent.