

The Moon Has Set¹

καὶ αὐτὴ ἤχλυσεν ἀκρέσπερος ἀντέλλουσα
μήνη, πένθος ἔδον νυκτὶ καλυψαμένη,
οὕνεκα τὴν χαρίεσσαν ὁμώνυμον εἶδε Σελήνην
ἄπνουν εἰς ζοφερὸν δυομένην αἶδην.
κείνη γὰρ καὶ κάλλος ἑοῦ κοινώσατο φωτὸς,
καὶ θάνατον κείνης μίξεν ἑῶ κνέφεϊ.²

The moon herself, rising at early eve, dimmed her light, veiling her mourning in night, because she saw her namesake, pretty Selene, going down dead to murky Hades. On her she had bestowed the beauty of her light, and with her death she mingled her own darkness.³

Whether or not the eclipse of the moon as described by Krinagoras of Mytilene coincided with her death is disputed, as is the year of her demise.

What is not disputed is that Kleopatra Selene was at least as important for Mauretania as her husband Iuba II. She minted her own coins as queen (*basilissa*, βασιλίτσα) using Greek script and Egyptian symbols, while her husband used Latin script and Roman symbols.⁴

Kleopatra Selene was interred in the royal tomb of Tipaza (Kbour-er-Roumia), today a UNESCO World Heritage Site.

Kleopatra Selene, a fascinating character in her own right, was the only daughter and last surviving child of Queen Kleopatra VII of Egypt and of Marcus Antonius. Born in c. 40 BC,⁵ Kleopatra and her twin brother Alexander were presented to their father in Antiochia in 36 BC when they presumably received their honorific names Selene (moon) and Helios (sun).

In the fall of 34 BC, Marcus Antonius re-organised the eastern part of the Roman world again granting significant additional territory, resources and power to Kleopatra VII and her children (so-called Donations of Alexandria). At the same ceremony, Kleopatra VII received the title “Queen of Kings” (“*βασιλίτσα βασιλέων*”) and her son by Caesar Ptolemaios Caesar (“*Kaisarion*”) the equivalent “King of Kings” (“*βασιλεύς βασιλέων*”). A coin minted by Marcus Antonius and Kleopatra VII after the defeat of Armenia describes Kleopatra as “Queen of Kings, her sons being kings.”⁶

¹ All the facts of the case are included in this Case-Study with its Annexes and the documents published on www.investmentmoot.org. In case of any discrepancy between the Case-Study and the historic documents published on the Moot’s website, the Case-Study prevails. Thanks go to my team in Frankfurt and Washington, D.C. All errors are my own.

² *Greek Anthology, Volume II* (W.R. Paton, ed.) (1917), available at <http://www.perseus.tufts.edu/hopper/text?doc=urn:cts:greekLit:tlg7000.tlg001.perseus-grc2:7.633>.

³ <http://www.attalus.org/poetry/crinagoras.html>.

⁴ Duane W. Roller, *The World of Juba II and Kleopatra Selene* (Routledge, 2003), p. 151.

⁵ Marcus Antonius left Alexandria in 40 BC before the birth of the twins; see also Plutarch, Antonius, 30, 2, available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Plutarch/Lives/Antony*.html.

⁶ *Reginae Regum Filiorum Regum Cleopatrae*, an image of the coin is available at <https://www.forumancientcoins.com/monetaromana/corresp/a632/a632.html>.

With this year's anniversary moot, we are returning to Kleopatra VII of Egypt and her financial prowess. Kleopatra VII was able to turn a near bankrupt country, in which people were taking to the streets,⁷ into the richest economy in the Mediterranean. Evidence of her smart economic policies is the decree of 33 BC, which was the topic of the inaugural Frankfurt Investment Arbitration Moot in 2006/2007.⁸

At their meeting in Antioch in 36 BC, Antonius had granted Kleopatra VII large estates, including plantations of balm and dates, near Jericho in Judaea as well as parts of the Kingdom of Nabataea that were rich in bitumen.⁹ Herod then leased these holdings from Kleopatra under a contract they concluded in 34 BC. When the tide turned against Kleopatra VII and Marcus Antonius in the civil war against Octavianus Caesar, Herod took hold of these possessions, giving rise to the (fictional) arbitration by Kleopatra Selene, which is the subject of this 10th Frankfurt Investment Arbitration Moot.

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. For the purposes of the Moot, Egypt, Judea and Rome are members of the UN. Rome is a permanent member of the Security Council.

Kleopatra VII and Herod the Great

It is safe to say that the relationship between Kleopatra VII, a woman who spoke at least nine languages,¹⁰ and Herod, a homo novus, was not the best, even if Flavius Josephus, our main antique (but not contemporaneous) source, cannot be seen as the most neutral chronicler. Flavius Josephus is accusing Kleopatra – amongst other things – of attempting to gain Judaea for her own and of meddling with Herod's family affairs by supporting his mother-in-law's and his wife's family.¹¹

⁷ See, for example, Stacy Schiff, *Cleopatra* (Little, Brown, 2010), p. 96 et seq.

⁸ <http://ww2.smb.museum/berlpap/index.php/05150/>. The reading of the decree of 33 BC is disputed amongst classics scholars. For the purposes of the 2006/2007 moot, we had adopted the reading of Peter van Minnen who argued that the beneficiary was a Publius Canidius Crassus, one of Marcus Antonius' generals who was later executed by Octavianus Caesar, that the decree had been signed in Kleopatra VII's own hand (for further references see the articles referenced at <http://ww2.smb.museum/berlpap/index.php/05150/>).

The truth is probably much more mundane and therefore much more significant for the queen's economic policies: a decree for the benefit of Q. Cascellius, a foreign merchant, signed by a civil servant, a document of the type of which many would have existed (although they may have been destroyed over time). Evidence of an administration that granted certain types investment protection and trade privileges in the course of their business as part of an organized foreign economic policy of Kleopatra VII.

⁹ Often these grants are equated with the Donations of Alexandria in 34 BC (see below). However, Plutarch (Antonius, 36 and 54) and Cassius Dio (49, 32, 4 – 5 and 49, 41), speak of two sets (*see also* Roller, *op. cit.*, p. 79). This chronology is also supported by Flavius Josephus, *Antiquities*, Book 15, Chap. 4, 2 *available at* https://ia800300.us.archive.org/11/items/theAntiquitiesOfTheJews_507/TheAntiquitiesOfTheJews-flaviusJosephus.pdf.

¹⁰ Plutarch, *Lives*, Antonius, 27. Latin is not mentioned in the catalogue which focuses on barbarian languages.

¹¹ The biography by Stacy Schiff, *Cleopatra*, pp. 197ff, puts a slightly different spin on the story: "For Cleopatra's visit we have only one source, hostile to his native East, much taken with Rome, working at least partially from Herod's account. The Jewish historian Josephus obscures but cannot entirely camouflage what transpired: Herod and Cleopatra spent some intensive time in each other's company, part of it hammering out the details of his obligations. Antony had granted Cleopatra the exclusive right to the Dead Sea bitumen, or asphalt, glutinous lumps of which floated to the surface of the lake. Bitumen was essential to mortar, incense, and insecticide, to embalming and caulking. A reed basket, smeared with asphalt, could hold water. Plastered with it, a boat is waterproof. The concession was a lucrative one. Also Cleopatra's were the proceeds of Jericho, the

In the spring of 34 BC, Kleopatra VII accompanied Marcus Antonius to the Euphrates river on his march to invade Armenia. She returned to Egypt, halting on the way back to visit King Herod. As Flavius Josephus reports, Herod leased the revenues of the holdings identified from her at this occasion.^{12 13}

The contract stipulated that Herod was to pay 200 talents per year in exchange for the right to collect revenues from Nabataea. However, Herod later discontinued making these payments. His excuse for discontinuing the payments is reflected in Flavius Josephus' report. However, how much of it – if anything –, was the truth will be a matter for the evidentiary hearing.¹⁴

What is reported by Flavius Josephus is that when Antonius allegedly turned down an offer by Herod to support him with troops in the Civil War against Octavianus Caesar, Herod switched sides after the Battle of Actium (31 BC) and hastened to meet Octavianus Caesar in Rhodes¹⁵. Octavianus Caesar not only confirmed his kingship, but gave him Kleopatra VII's properties in Judea and Nabataea which he had previously administered for her.

Kleopatra VII died in 30 BC – presumably by her own hand.¹⁶

popular winter resort, lush with date-palm groves and balsam gardens. ... All other scents paled in comparison to sweet balsam, which grew exclusively in Judaea. The fragrant shrub's oil, seed, and bark were precious. They constituted the region's most valuable export. As for Jericho's dates, they were the finest in the ancient world, the source of its most potent wine. In modern terms, it was as if Cleopatra had been granted no part of Kuwait, only the proceeds of its oil fields. Herod found the transaction particularly painful as Judaea was a poor country, parched and stony, with few fertile areas, no port, and a rapidly expanding population. His revenues were a risible fraction of Cleopatra's. At the same time his ambitions exceeded his territory; he had no desire to be "King of a wilderness." There appears to have been some bickering over terms, in a negotiation that proved Cleopatra more intently focused on bitumen deliveries than seductions. She was relentless and unsparing; the result was highly favorable to her. Herod agreed to lease the Jericho lands for 200 talents annually. He consented as well to guarantee and collect the rent on the bitumen monopoly from his neighbor, the Nabatean king. By agreeing to do so Herod spared himself the company of any of Cleopatra's agents or soldiers. Otherwise the arrangement worked entirely to her benefit, all the more so as it made both men miserable. It left Herod to extract funds from a sovereign who had denied him refuge during the Parthian invasion, and who made his payments only under duress. Purposely and effectively, Cleopatra set two men who disliked her, a Jew and an Arab, against each Other. (Malchus, the Nabatean sovereign, would have his revenge later.) Herod nonetheless upheld his end of the agreement with Cleopatra. He felt that "it would be unsafe to give her any reason to hate him."

¹² Flavius Josephus, *Antiquities*, Book 15, Chap. 4, 2 available at https://ia800300.us.archive.org/11/items/theAntiquitiesOfTheJews_507/TheAntiquitiesOfTheJews-flaviusJosephus.pdf.

¹³ For the purposes of the moot, we set the date of the visit to May 34BC. However, while it is known that the historical visit took place in spring of 34BC, the exact date is unknown.

¹⁴ Flavius Josephus, *Antiquities*, Book XV, Chap. 4 available at https://ia800300.us.archive.org/11/items/theAntiquitiesOfTheJews_507/TheAntiquitiesOfTheJews-flaviusJosephus.pdf: "4. But then, as to the tributes which Herod was to pay Cleopatra for that country which Antony had given her, he acted fairly with her, as deeming it not safe for him to afford any cause for Cleopatra to hate him. As for the king of Arabia, whose tribute Herod had undertaken to pay her, for some time indeed he paid him as much as came to two hundred talents; but he afterwards became very niggardly and slow in his payments, and could hardly be brought to pay some parts of it, and was not willing to pay even them without some deductions."

¹⁵ Flavius Josephus, *Antiquities*, Book XV, Chap. 6, 6 available at https://ia800300.us.archive.org/11/items/theAntiquitiesOfTheJews_507/TheAntiquitiesOfTheJews-flaviusJosephus.pdf.

¹⁶ Plutarch (*Lives*, Antonius, 83) is the source the often dramatized meeting between Octavianus Caesar and Kleopatra before her death (see for example Shakespeare, *Antonius and Cleopatra*, Act V, II). The question

Kleopatra Selene and Iuba II.

After the death of her mother, Kleopatra Selene was brought to Rome to be raised in the household of Octavia, the sister of Octavianus Caesar and the Roman widow of Marcus Antonius.¹⁷

While we have almost no information about Kleopatra Selene's upbringing, we know the names of several scholars at the court of Octavianus Caesar which are thought to have taught also the children in Octavia's household,¹⁸ which – according to Roller – was next door to her brother's.¹⁹

Iuba II had a fate not dissimilar from his future bride. Iuba II was born before 46 BC as the son of Iuba I of Numidia. His birthdate is unknown. Iuba's father, Iuba I, committed suicide shortly after the Battle of Thapsus (6 April = 7 February in the Julian calendar 46 BC).²⁰ Iuba II was rescued as an infant by the people of Zama that refused to deliver the royal family to his father Iuba.²¹

which would have been the language of such meeting has not been resolved. The logical choice would have been Greek, the language of the educated world. If so, the scene would likely have been more comic than tragic. As Suetonius (Lives, Augustus, 89,1) reports: "Yet [Augustus] never acquired the ability to speak Greek fluently or to compose anything in it; for if he had occasion to use the language, he wrote what he had to say in Latin and gave it to someone else to translate." (*available at* http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Suetonius/12Caesars/Augustus*.html).

¹⁷ Suetonius, Augustus, 17, 4, 5: "Although Antony tried to make terms at the eleventh hour, Augustus forced him to commit suicide, and viewed his corpse. He greatly desired to save Cleopatra alive for his triumph, and even had Psylli brought to her, to suck the poison from her wound, since it was thought that she had died from the bite of an asp. He allowed them both the honour of burial, and in the same tomb, giving orders that the mausoleum which they had begun should be finished. The young Antony, the elder of Fulvia's two sons, he dragged from the image of the Deified Julius, to which he had fled after many vain entreaties, and slew him. Caesarion, too, whom Cleopatra fathered on Caesar, he overtook in his flight, brought back, and put to death. But he spared the rest of the offspring of Antony and Cleopatra, and afterwards maintained and reared them according to their several positions, as carefully as if they were his own kin." (*available at* http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Suetonius/12Caesars/Augustus*.html)

¹⁸ Roller, op. cit. pp. 65 *et seq.*

¹⁹ Roller, op. cit. p. 64 with references to Suetonius and Pliny.

²⁰ Iuba I and Caesar are reported to have been in a physical altercation in the senate. Suetonius, Lives, Divus Iulius, 71: "Even when a young man he [Caesar] showed no lack of devotion and fidelity to his dependents. He defended Masintha, a youth of high birth, against king Hiempsal with such spirit, that in the dispute he caught the king's son Juba by the beard. On Masintha's being declared tributary to the king, he at once rescued him from those who would carry him off and kept him hidden for some time in his own house; and when presently he left for Spain after his praetorship, he carried the young man off in his own litter, unnoticed amid the crowd that came to see him off and the lictors with their faces." (*available at* http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Suetonius/12Caesars/Julius*.html)

For background, including the discussion on the validity a treaty made by a consul but not ratified by the senate as well as Iuba I hairstyle, see Cicero, De lege agrarian, 2nd speech, 2.58 *et seq.* (*available at* <http://perseus.uchicago.edu/perseus-cgi/citequery3.pl?dbname=PerseusLatinTexts&getid=1&query=Cic.%20Agr.%202.55>)

²¹ Caius Iulius Caesar, De bello Africo, translated from Latin to English by W. A. McDevitte and W. S. Bohn (New York: Harper & Brothers, 1869) *available at* <http://www.forumromanum.org/literature/caesar/africoe.html>.

"91 Meanwhile, king Juba, who had escaped from the battle with Petreius, hiding himself all day in the villages, and traveling only by night, arrived at last in Numidia. When he came to Zama, his ordinary place of residence, where were his wives and children, with all his treasures, and whatever he held most valuable, and which he had strongly fortified at the beginning of the war; the inhabitants, having heard of Caesar's victory, refused him

Iuba, a small infant (“νήπιος” /” βρέφος”) at the time, was displayed in Caesar’s triumph in Rome in late summer in 46 BC.²² While it is highly likely that Iuba II was also raised in Octavia’s household (at least after the assassination of Caesar), there is no direct proof.²³

admission, because, upon declaring war against the Romans, he had raised a mighty pile of wood in the middle of the forum, designing, if unsuccessful, to massacre all the citizens, fling their bodies and effects upon the pile, then setting fire to the mass, and throwing himself upon it, destroy all without exception, wives, children, citizens, and treasures, in one general conflagration. After continuing a considerable time before the gates, finding that neither threats nor entreaties would avail, he at last desired them to deliver up his wives and children, that he might carry them along with him. But receiving no answer, and seeing them determined to grant him nothing, he quitted the place, and retired to one of his country-seats with Petreius and a few horse.

92 Meantime the Zamians sent ambassadors to Caesar at Utica, to inform him of what they had done, and to request "that he should send them aid before the king could collect an army and besiege them; that they were determined to defend the town for him as long as life remained." Caesar commended the ambassadors, and sent them back to acquaint their fellow-citizens that he was coming himself to their relief. Accordingly, setting out the next day from Utica with his cavalry, he directed his march toward the kingdom. Many of the king's generals met him on the way, and sued for pardon; to all of whom a favorable hearing was given, and they attended him to Zama. The report of his clemency and mildness spreading into all parts, the whole Numidian cavalry flocked to him at Zama, and were there relieved from their fears.

93 During these transactions, Considius, who commanded at Tisdra, with his own retinue, a garrison of Getulians, and a company of gladiators, hearing of the defeat of his party, and terrified at the arrival of Domitius and his legions, abandoned the town; and privately withdrawing, with a few of the barbarians, and all his money, fled hastily toward the kingdom. The Getulians, to render themselves masters of his treasure, murdered him by the way, and fled every man where he could, Meantime, C. Virgilius, seeing himself shut up by sea and land, without the power of making a defense; his followers all slain or put to flight; M. Cato dead by his own hands at Utica; Juba despised and deserted by his own subjects; Sabura and his forces defeated by Silius; Caesar received without opposition at Utica; and that of so vast an army, nothing remained capable of screening him or his children; thought it his most prudent course, to surrender himself and the city to the proconsul Caninius, by whom he was besieged.

94 At the same time king Juba, seeing himself excluded from all the cities of his kingdom, and that there remained no hopes of safety; having supped with Petreius, proposed an engagement, sword in hand, that they might die honorably. Juba, as being the stronger, easily got the better of his adversary, and laid him dead at his feet: but endeavoring afterward to run himself through the body, and wanting strength to accomplish it, he was obliged to have recourse to one of his slaves, and, by entreaties, prevailed upon him to put him to death.”

²² The Parallel Lives by Plutarch, published in Vol. VII of the Loeb Classical Library edition 1919, *The Life of Caesar*, available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Plutarch/Lives/Caesar*.html: “55 1 But to resume, when Caesar came back to Rome from Africa, to begin with, he made a boastful speech to the people concerning his victory, asserting that he had subdued a country large enough to furnish annually for the public treasury two hundred thousand Attic bushels of grain, and three million pounds of olive oil. 2 Next, he celebrated triumphs, an Egyptian, a Pontic, and an African, the last not for his victory over Scipio, but ostensibly over Juba the king. 3 On this occasion, too, Juba, a son of the king, a mere infant, was carried along in the triumphal procession, the most fortunate captive ever taken, since from being a Barbarian and a Numidian, he came to be enrolled among the most learned historians of Hellas. 4 After the triumphs, Caesar gave his soldiers large gifts and entertained the people with banquets and spectacles, feasting them all at one time on twenty thousand dining-couches, and furnishing spectacles of gladiatorial and naval combats in honour of his daughter Julia, long since dead.”

The Greek text is available at https://el.wikisource.org/wiki/%CE%92%CE%AF%CE%BF%CE%B9_%CE%A0%CE%B1%CF%81%CE%AC%CE%BB%CE%BB%CE%B7%CE%BB%CE%BF%CE%B9/%CE%9A%CE%B1%CE%AF%CF%83%CE%B1%CF%81.

The Histories of Appian published in the Loeb Classical Library, 1913, available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Appian/Civil_Wars/2*.html:

Probably in 25 BC, Augustus gave Iuba the Kingdom of Mauretania and married him to Kleopatra Selene, who became Queen of Mauretania as well as titular queen of Kyrenaika.²⁴

Art and learning flourished in Mauretania. Iuba was recognized as “rex literatissimus” in antiquity and published widely on Mediterranean and North African geography. One of his most important works was *Libyca*, a monography about his new kingdom.²⁵ Kleopatra Selene is thought to have commissioned statues of her mother, including the famous busts in Berlin and the Vatican.²⁶ No confirmed image of herself, however, has survived, although it is entirely possible that the two busts with their softer features bear more than a passing likeness to the daughter.

We know that Kleopatra Selene bore a son whom she named Ptolemaios. He co-reigned with his father Iuba from 21 AD and succeeded him two years later.²⁷ He was killed by his cousin Caligula, probably in 40 AD.²⁸ We also know of a daughter, whose name has not been preserved.²⁹

HISTORICAL TEXTS

Several historic texts report on the Donations of Alexandria, which form the basis of the claim in the arbitration, and the relations between Kleopatra VII and Herod. We include these texts on the Moot’s website.

“101 1 This was the end of Caesar's war in Africa, and when he returned to Rome he had four triumphs together: one for his Gallic wars, in which he had added many great nations to the Roman sway and subdued others that had revolted; one for the Pontic war against Pharnaces; one for the war in Africa against the African allies of L. Scipio, in which the historian Juba (the son of King Juba), then an infant, was led a captive. Between the Gallic and the Pontic triumphs he introduced a kind of Egyptian triumph, in which he led some captives taken in the naval engagement on the Nile. Although he took care not to inscribe any Roman names in his triumph (as it would have been unseemly in his eyes and base and inauspicious in those of the Roman people to triumph over fellow-citizens), yet all these misfortunes were represented in the processions and the men also by various images and pictures, all except Pompey, whom alone he did not venture to exhibit, since he was still greatly regretted by all. The people, although restrained by fear, groaned over their domestic ills, especially when they saw the picture of Lucius Scipio, the general-in-chief, wounded in the breast by his own hand, casting himself into the sea, and Petreius committing self-destruction at the banquet, and Cato torn apart by himself like a wild beast. They applauded the death of Achilles and Pothinus, and laughed at the flight of Pharnaces.”

The Greek original is available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0231%3Abook%3D2%3Achapter%3D15%3Asection%3D101>: “ἐνθα καὶ Ἰόβα παῖς, Ἰόβας ὁ συγγραφεύς, βρέφος ὧν ἔτι παρήγετο.”

For the usage of νήπιος and βρέφος see also Roller, op. cit., p. 59, ft. 3.

²³ Roller, op. cit., p. 59 *et seq.*

²⁴ Duane W. Roller, *The World of Juba II and Kleopatra Selene*, p. ix, 154, 183.

²⁵ For a description of Iuba’s works and fragments, see Roller, pp. 163 – 227; 261 *et seq.*

²⁶ See also Roller, op. cit., p. 139.

²⁷ Roller, op. cit., p. 256.

²⁸ Roller, op. cit., p. 254 ft. 54; Suetonius, op. cit. Caligula, 26, available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Suetonius/12Caesars/Caligula*.html.

²⁹ Some have tried to identify this daughter with a Drusilla who was married for some time to Marcus Antonius Felix, see Tacitus, *Histories*, 5.9, available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Tacitus/Histories/5A*.html (Tacitus uses the term *neptis*, which can mean both granddaughter and niece, but also descendant.)

However, none of the texts is truly contemporaneous and 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.

While the holdings of Kleopatra VII, her fate and that of her children as well as the strained relations with Herod are historical, the arbitration, the treaty and the concession contract are not. Although it is very likely that a document describing the obligations of Herod towards Kleopatra VII existed, it has not been preserved, or at least not yet been found.

THE DISPUTE

Kleopatra Selene had recently given birth to a son, which she and her husband named Ptolemy.³⁰ Proud of her Lagide legacy, Selene tasks one of the scholars of her court to catalogue papers from her mother's court to make them accessible for the little prince when he grows up.

After a few weeks, the archivist comes across a contract between Kleopatra VII and King Herod concerning the lease of revenues for territories gifted to Kleopatra VII by Antony. The archivist brings this contract to the attention of the queen and her legal scholars. The legal scholars then explain that, in addition to the contract, there was a treaty between Egypt and Judea, concluded by Kleopatra VII and Herod, which concerned investments in Judea and opened the possibility of arbitration in case of disputes. Kleopatra Selene decides it is time for her to take action.

Kleopatra Selene addresses a letter to Herod of Judea:

“We, Kleopatra Selene, Philometor, Queen of Mauritania, rightful Queen of Egypt following our mother Kleopatra Philopatris Nea Isis, to Herod of Judea greetings.

We give hereby notice of a dispute under Article 9 of the Treaty of Friendship between the Kingdom of Egypt and Kingdom of Judea concluded on the occasion of my mother's visit to Judea on [13 of May of 34 BC] (“**Treaty of Friendship**”) as well as under the Contract between Kleopatra of Egypt and Herod of Judea of the same day regarding the Lease of Revenues of Certain Properties (“Revenue Lease Agreement”).³¹ We hereby accept the offer to arbitrate in accordance with Article 9 (2) (b) of the Treaty of Friendship.

As of [31 BC], you have ceased to make payments under the Revenue Lease Agreement in breach of said Agreement. In addition, as of the spring of [30BC] you have illegally claimed title to the property of our mother in the territory of Judea [as well as in the territory of the Nabateans].

Your actions violate the Treaty of Friendship. We task you to make amends and reinstate us in our rights and pay compensation for the time during which the benefits of our ownership and of our enjoyment under the Revenue Lease

³⁰ The year of birth of Ptolemy is unknown.

³¹ For ease of reference, dates are in the form of the Gregorian Calendar.

Agreement have been withheld from us. Should you not comply with this letter within three months from receipt of this letter, we will commence proceedings in accordance with Article 9 (2) (b) of the Treaty of Friendship. Done on the [1 January of 10 BC].”

The letter is delivered to Herod on [23 January of 10 BC]. Herod intends to answer immediately. However, before handing his response to Selene’s messenger, he consults his council of friends who – as previously – advise against rash action. Selene’s messenger returns to Mauretania unharmed but also without a message from Herod.

As no reaction is forthcoming from Jerusalem, Selene instructs her legal scholars to commence arbitration. A Notice of Arbitration of 31 July 10 BC under the UNCITRAL Rules, which states that it also serves as Statement of Claim, is submitted by hand-delivery both to Herod’s ambassadors to Mauretania and to Rome as well as to Herod’s court in Judea (the latter on 19 August of 10 BC). In this Notice, Selene appoints Comosicus of Dacia³² as her party-appointed arbitrator. Selene also has a stele engraved with the key-points of the Notice, which she erects on the market place of Iol/Caesarea, the capital of Mauretania, for everyone to see.

In its Response of 19 September 10 BC, which states that it shall also serve as Statement of Defence, Judea raises the following objections to jurisdiction and admissibility (his friends manage to dissuade Herod who initially insisted on writing the Response himself):

1. No jurisdiction *ratione materiae*. The properties that Kleopatra VII received through the actions of Marcus Antonius cannot be qualified as “investments”. Nothing was invested, no capital was inserted. As regards the properties in the territory of the Nabateans and the revenues therefrom, those are not investments in Judea.
2. Kleopatra Selene has no standing. Despite the irregular bestowment of the properties by Marcus Antonius, such gifts would naturally have been gifts to the Queen of Egypt and hence to the State of Egypt, not to Kleopatra VII as an individual. This means that they fell to Caesar Augustus when Egypt was conquered by him and could not have been inherited by Kleopatra Selene.
3. The case was brought against the wrong Respondent and must hence fail under the *Oil Platforms* test. Judea did not expropriate or take in any way the properties. The properties, which Kleopatra VII received by Marcus Antonius were reassigned by Caesar in [30 BC]. What Marcus Antonius gave, Caesar has taken away.
4. This Tribunal also does not have competence to decide this dispute: it concerns the legal position of the Republic of Rome, a most sovereign State which is not a party to these proceedings. No tribunal constituted under international law may decide a matter touching on the sovereignty of a State which has not submitted to its jurisdiction.
5. This Tribunal does not have competence to rule upon a dispute between two Roman citizens. Herod of Judea is a King and Friend of Rome and a Roman citizen. Kleopatra Selene is the daughter of Marcus Antonius, a Roman citizen. She is married to Iuba II, also a Roman citizen. This dispute should have been brought before the

³² Jordanes, Charles Christopher Mierow, ed., *Getica* XI, 73, see <http://people.ucalgary.ca/~vandersp/Courses/texts/jordgeti.html#X>.

praetor urbanus in Rome. In support of this argument, a letter from Gaius Ateius Capito rendering a responsum on behalf of Augustus Caesar is attached to this Response urging the tribunal to decline jurisdiction.

6. The case is filed out of time. Twenty years have passed since the alleged actions. The case must fail on grounds of limitation, waiver and laches.
7. Article 12 (2) of the Treaty of Friendship is not an “umbrella clause” which could “umbrella in” the content of the Revenue Lease Agreement. Also, if at all, the Revenue Lease Agreement would be “umbrella’d in” in its entirety, including its *force majeure* clause. The Nabateans prevented Herod – with force (!) – from complying with the payment obligations. Also, Kleopatra VII actively assisted the Nabateans and therefore lost all claims on the grounds of *unclean hands*.
8. Respondent strongly objects to the making public of this dispute. This is in breach of the principle that arbitration is private. Moreover, the placing of a commemorative stele on the market in Caesarea clearly shows Claimant’s intention to aggravate the dispute. Respondent asks the Tribunal to stop this unconscionable behavior. It requests an order from the Tribunal to oblige Claimant not to publicize the pleadings in this case. Also, it requests an order from the Tribunal that the hearing shall be held in camera. The Revenue Lease Agreement signed by Queen Kleopatra VII and Herod expressly provides that the arbitration be confidential. Such agreement between two sovereigns is valid and enforceable.

In its Response, Judea in turn nominates Marcus Tullius Tiro, Cicero’s freedman, as its arbitrator.

The Response is received in Iol Caesarea on 22 September 10 BC.

Kleopatra Selene is not at all happy when she sees that Tiro was appointed. Given that under the Treaty challenges are heard initially by the two other members of the Tribunal, Kleopatra Selene’s lawyers apply to the Permanent Court of Arbitration for appointment of the presiding arbitrator.

The PCA appoints Wang Mang of China as President of the Tribunal on 15 October 10 BC.

On receipt of the notification that the Tribunal has been constituted on 10 November 10 BC, Kleopatra’s counsel write to the Tribunal and Respondent:

9. “Respondent has appointed Marcus Tullius Tiro, a Roman citizen, as its party-appointed arbitrator. Besides the issue of his nationality, Tiro has failed to disclose that he sat as arbitrator in the case of Publius Canidius Crassus Filius and Middle East Fine Wines and Spirits Ltd. vs. Rome in [30 BC].³³ This case also dealt with the invasion of Egypt by Octavius Caesar and the status of Egypt. The relevancy of this is proven by Respondent’s objection no. 2. By the time of his appointment, Tiro must have been aware of these arguments, which should have prompted a disclosure. An issue conflict also arises in relation to further arguments that Claimant will make in its forthcoming Reply. Moreover, the award in the Canidius Crassus arbitration has been rendered, but has not been made public. Claimant has no means of determining how the tribunal in that case, including Tiro, decided.”

³³<http://investmentmoot.org/archive/1st-moot-court/case-study/>.

Herod is livid (and submits his reply on 2 December 10 BC before the lawyers have time to advise on it):

9. “With regard to the nationality of Tiro we point to the fact that both Claimant and myself are Roman citizens. Also, I appointed Tiro because he is a scholar, despite the fact that he was a close friend of Marcus Tullius Cicero. Obviously, he did not read our submission. Moreover, while certainly the impact of Article 2 (4) of the UN Charter was relevant as an underlying issue in the previous arbitration it was never raised expressly by the Parties as far as can be gleaned from the published arguments.³⁴ For the avoidance of doubt, I have also not seen the award. Nor have I asked Caesar Augustus, my most elevated friend for a copy.

Caesar Augustus rightfully transferred Egypt to his private dominion. It is not a part of the Republic of Rome and the Senate is not involved in its administration. The territory formerly known as the Kingdom of Egypt has a special status which must be recognised by public international law. It is administered by Praefectus Aegypti, appointed by Princeps, from the ranks of the knights. In cultural matters the Praefectus is perceived by Egyptians as successor of the pharaoh in his ritual functions. He also is in command over troops and in charge of judicial functions. The prefect allocates the taxes due for each district. Taxes are – as you are well aware – collected by publicani under concession agreements. Nobody can dispute this, surely not Kleopatra Selene who owes her life, education and marriage to the Caesar Augustus.

This is not an issue conflict. Nothing needed to be disclosed.”

Tiro submits a statement on 26 November 10 BC to the effect that he is independent and intends to remain so.

The Tribunal then issues Procedural Order No. 1 on 15 January 9 BC. As agreed by the Parties, the Tribunal decides to bifurcate the proceedings and to hold a hearing of jurisdiction and admissibility from [6] to [10] March [2017] in [Frankfurt am Main]. The majority of the Tribunal (Tiro abstaining) decide to hear oral arguments on the issue of the challenge of Marcus Tullius Tiro also at the hearing.

As foreseen in Procedural Order No. 1, Kleopatra Selene’s counsel files her Reply:

1. There is jurisdiction *ratione materiae*. The properties that Kleopatra VII received through the actions of Marcus Antonius are “investments”. The definition of “investment” in the Treaty does not require an insertion of capital. How an investment was acquired is irrelevant. All of the investments are in Judea. This is also true for the lease of the revenues for the bitumen. The bitumen is in the territory of the Nabateans. However, this is not the investment. Herod has leased the revenues in exchange for a fixed fee of 200 talents per annum, irrespective of the annual revenues from the bitumen residues. As Herod himself pointed out this practice is standard. He himself refers to comparable practices of the publicani.
2. Kleopatra Selene has standing. She is the only surviving child and therefore heir of her mother. This concerns both her mother’s private property and the Kingdom of Egypt. Kleopatra VIII Selene is the rightful queen of Egypt. Caesar Octavius’ taking

³⁴ Herod is referring to <http://investmentmoot.org/archive/1st-moot-court/case-study/>. Beyond this, nothing is known about that arbitration. An award was rendered, but has not been made public.

of Egypt was highly illegal. First, it violated Article 2 (4) of the UN Charter. Second, even if one were to set aside the treaty and customary rules against the use of force, the taking would be illegal. Octavius Caesar took Egypt as his “dominium”. Private parties cannot dissolve states. States are not hauls for robbers to carry away.

3. Judea is the right Respondent. Judea, through his king conspired in the taking of the investments. Moreover, even putting the conspiracy aside, Judea failed to protect the investments on its territory (as regards both the balsam and date plantations in Judea and the Revenue Lease Agreement).
4. This Tribunal has competence to decide this dispute: our case is solely against Judea. This case neither concerns the legal position of the Republic of Rome as we do not ask the Tribunal to issue an award against Rome, nor would Rome be bound by the *res iudicata* effect of the resulting award. Moreover, our case is just for monetary compensation, not for restitution.
5. This Tribunal has competence to rule upon a dispute. First, Kleopatra Selene is not a Roman citizen. Roman law never recognized the marriage of her mother with Marcus Antonius. Roman law does not recognize marriages between Roman citizens and non-citizens in the absence of *conubium*. For example, Octavius Caesar never recognized the birthright of Kleopatra Selene’s brother Ptolemaios Caesar. Moreover, Marcus Antonius was married at the time to Octavia, the sister of Octavius Caesar. In addition, children born out of wedlock are only recognized as Romans if the mother(!) was a Roman citizen. Whether the father was Roman is irrelevant.³⁵

Second, even if she were, such enforced citizenship would not be opposable against her. It is unclear whether Kleopatra Selene was awarded citizenship before (or at the time) her marriage with Iuba II, whether it was a matter of *conubium*, or whether her marriage allegedly made her a Roman citizen (*quod non*). In any event, such citizenship would not be opposable. After the death of her parents and the murder of her brother, Kleopatra Selene was hauled away from Egypt. From that point, her decisions were not her own but those of Octavius Caesar and his sister. Even if Roman citizenship was forced upon her, such bestowment would not be illegal and opposable under international law.

Third, even if both Herod of Judea and Kleopatra Selene were (also) Roman citizens (*quod non*), this would be irrelevant for the jurisdiction of this Tribunal. Egypt’s rape by Octavius Caesar cannot be recognized by international law. For the purposes of international law (and for this arbitration), Egypt remains an independent State. Moreover, the legal status of being *amici* of the Roman Republic does not deprive the “client states” of their statehood. They remain capable of concluding valid treaties between each other. Indeed, the conclusion of treaties of amity was actively encouraged by the Roman Republic. Rome’s (alleged) prerogative to act as arbitrator between such states, only relates to state-state disputes, not to disputes between an investor and a state. Moreover, a jurist writing a *responsum* at the behest of Caesar Augustus is not even internally competent to make such intervention under the Roman

³⁵ For a summary of the Roman law on citizenship see David Cherry, *The Minician Law: Marriage and the Roman Citizenship*, Phoenix, Vol. 44, No. 3 (Autumn, 1990), pp. 244-266 (free read-only version at <http://www.jstor.org/stable/1088935>). Participants of the Moot will **disregard** his chapter V (The Law in Egypt), which describes a state of the development of the law which came into force after the events described in the Case-Study.

constitution. This has been an issue in the case against Marcus Primus, a case in which Octavius Caesar himself testified.³⁶

Hence, such intervention is illegal. The submission of Gaius Ateius Capito on behalf of Rome as so-called *amicus* is not properly before this Tribunal.

6. The case is not “filed out of time”. First, there is no limitation period in the Treaty. Second, the concepts of limitation, waiver and laches have not been established by Respondent as applicable in this case. Third, given that Kleopatra Selene was not in a position to enforce her rights during her capture in Rome and was even unaware of the existence of the relevant contract until recently, those principles (even if they were generally applicable) cannot apply in the present case.
7. Article 12 (2) of the Treaty of Friendship is an “umbrella clause” which can “umbrella in” the content of the Revenue Lease Agreement. Indeed, UNCTAD “mapped” several treaties with clauses just like Article 12 (2) as having an umbrella clause. While we agree that the umbrella clause does not allow for raisin picking, there are two important things: the Treaty has to be taken into account when assessing the division of responsibility and the allocation of (political) risk between the parties. Second, the force majeure clause in the Revenue Lease Agreement is inapplicable in the present context. As we said above, this is a publicanus-type contract. Herod cannot “pass” on the risk of non-collection from the Nabateans to Kleopatra VII. That is a risk he assumed. As a matter of fact, we object to and dispute the allegation of Kleopatra VII interfering with Herod’s campaign against the Nabateans. As a matter of law, there is no dogmatic foundation for the alleged legal principle of “*clean hands*”, for the establishment of which Herod bears the onus.
8. Respondent’s insinuation that investment arbitration is a secretive process is ludicrous. There is no prohibition anywhere in investment treaties, or arbitration rules for a party to make public the existence of the dispute and describe it. Indeed, ICSID as a leading institution for investment arbitration does the same. Moreover, it is a requirement of good governance to publish *res gestae* (to use a Roman expression). In the present case, however, we have a treaty right not only to publish the existence of the dispute but also all submissions. Also the hearing shall be public! The Treaty makes the UNCITRAL Transparency Rules applicable and allows for no derogation.

³⁶ Cassius Dio, 54, 3, available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Cassius_Dio/54*.html.

Procedural Order No. 2

Whereas the Parties have submitted their arguments on jurisdiction and admissibility, the Tribunal decides to hold a hearing on jurisdiction and admissibility from 6 to 10 March [2017].

The Tribunal asks the Parties to submit skeleton arguments by 10 February [2017].

The Tribunal further requests the parties to reserve 11 March [2017] for an evidentiary hearing, should the need arise.

The Tribunal intends to focus the oral hearing on the nine issues, set out in 1.-9. (pp. 8 - 12). It expects the Parties to address these in their skeleton arguments in preparation for the hearing.

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Wang Mang on behalf of the Tribunal