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IN THE MATTER OF AN ARBITRATION BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

Coropi Holdings Limited,

Kalemegdan Investments Limited

(Cyprus)

and

Mr Erinn Bernard Broshko

(Canada)

(together the "**Claimants**")

-vs-

The Republic of Serbia

(the "**Respondent**")

ICSID Case No. ARB/22/14

RESPONDENT'S COUNTER-MEMORIAL (CORRECTED)

29 September 2023

Clifford Chance **Mikijelj Janković & Bogdanović** **Mihaj, Ilić & Milanović**

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A. INTRODUCTION

1. We hereby submit Respondent's Counter-Memorial on behalf of the Republic of Serbia ("**Serbia**" or the "**Respondent**").

2. Claimants' case is that Respondent has decided to use Claimants' land in central Belgrade for the construction of a bus loop and refuses to pay any compensation.[1]

3. Respondent requests the Tribunal to dismiss Claimants' claims in their entirety, on grounds of lack of jurisdiction, and/or that the claims are inadmissible, alternatively on the basis that they wholly lack any merit.

4. As summarised below and set out in greater detail in this Counter-Memorial, Claimants' claims suffer from many incurable procedural flaws.

5. Moreover, Claimants did not have any actionable rights under Serbian law and under the Serbia-Cyprus BIT or Serbia-Canada BIT, and there has been no breach of those treaties.

6. To fully appreciate the fallacy of Claimants' claims, Respondent briefly explains the history of property rights in Serbia going back eighty years, from the Communist era to the present (**Section B.** below). It is especially relevant to note that Serbian law differentiates the **right *of* use** of real property (similar to ownership rights) and the **right *to* use** (for example, contractual rights pursuant to a lease). Obnova, the Claimants' local company, had no right of use in relation to the relevant land plots ("**Dunavska Plots**"), as confirmed in the real property registers (the Land Books and the Cadastre) since 2003.

7. Further, Obnova had no rights of use in respect to the 'objects' that it allegedly built on the Dunavska Plots (i.e., buildings, sheds, canopies, etc.) ("**Objects**") as they were built without building permits and/or were only allowed to be temporary.

8. Accordingly, the 2013 Detailed Regulation Plan (the "**2013 DRP**") which decided to place a bus loop on the Dunavska Plots, cannot give rise to Obnova's right of compensation under Serbian law, nor could the 2013 DRP nor the 2021 letter from the Land Directorate stating that Obnova was not entitled to compensation (the "**2021 Land Directorate Letter**") give rise to rights under the BITs.

[1] Memorial, para 1.

9. Claimants claim is not supported by any witness evidence, as to the purported facts and matters on which they rely, or their purported legitimate expectations. Mr Broshko could have given evidence, but he has not. Nor has Mr Obradovic, nor Mr Rand. That is telling.

10. The Tribunal lacks jurisdiction to hear Claimants' claims under the Cyprus-Serbia BIT:

- *First*, Kalemegdan and Coropi have not shown that they meet the requirements of an investor in Cyprus. In particular, they have not met the "seat" requirement in the Cyprus-Serbia BIT, as they have failed to prove their effective management in Cyprus. Rather, according to Claimants' own statements, they are fully controlled by Mr Rand, who resides in Canada. (**Section C.I.1** below).
- *Second*, jurisdiction *ratione temporis* is lacking, because Claimants' claims concern fundamental events, including the 2003 inscription of the City of Belgrade as the holder of the right of use over the Objects and Dunavska Plots in the Cadastre, pre-dating (i) the entry into force of the Cyprus-Serbia BIT in 2005 and (ii) the Cypriot Claimants' alleged investments in Obnova in 2013 (Section **C.I.2** below). The 2013 DRP and the 2021 Land Directorate Letter are simply consequent upon the earlier events. The BIT cannot be applied retroactively.
- *Third*, jurisdiction *ratione materiae* is lacking, because Cyprus Claimants have failed to establish that they have a qualifying investment, because (**Section C.I.3** below);
    - They have failed to prove that they have made any concrete economic contribution in Serbia or incurred any risk;
    - And for Kalemegdan, failed to show that it has acquired investment in Serbia; and
    - The acquisition of Obnova's shares was in breach of the applicable Serbian legislation regarding takeovers, making the alleged investment illegal.

11. The Tribunal equally lacks jurisdiction as regards Mr Broshko's claims under the Canada-Serbia BIT:

- *First*, the Tribunal lacks jurisdiction *rationae voluntatis* (**Section C.II.1** below), because:
    - Mr Broshko failed to provide the required waiver of Obnova's local claims, as required by the Canada-Serbia BIT;

- He commenced this arbitration in 2022, outside the BIT's three-year limitation period from the time he should have acquired knowledge of his claims against Serbia.

- *Second*, jurisdiction *ratione temporis* is lacking, because his claims concern fundamental events, including the 2003 inscription of the City of Belgrade as the holder of the right of use over the Objects and Dunavska Plots in the Cadastre and the adoption of the 2013 DRP, both pre-dating (i) the entry into force of the Canada-Serbia BIT in 2015 and (ii) his acquisition of Obnova's shares in 2017 (**Section C.II.2** below). The 2021 Land Directorate Letter is simply consequent upon the earlier events. The BIT cannot be applied retroactively.

- *Third*, Mr Broshko's acquisition of Obnova's shares was in breach of Serbian company law and hence is not entitled to treaty protection (**Section C.II.3** below).

12. Further and/or alternatively, Claimants' claims are inadmissible. Claimants' investments and claims were not made in good faith and constitute are an abuse of process. At the time of Mr Obradovic's restructuring of his ownership of Obnova in April 2012, the dispute concerning the rights of use and conversion to ownership giving rise to a potential treaty claim, was foreseeable (**Section D.** below). Likewise, Mr Broshko must have been aware that the dispute over compensation was foreseeable at the time when he made his investment.

13. Further and/or alternatively, Respondent did not breach the BITs.

14. Cypriot Claimants now base their expropriation claim on the alleged effects of the 2013 DRP and their FET claim on the 2013 DRP and the 2021 Land Directorate Letter. Mr Broshko bases his FET claim only on the latter.

15. *First*, Respondent did not expropriate Cypriot Claimants' investment in Obnova (**Section E.I** below), because:

- Obnova had no property rights to the Dunavska Plots which were susceptible to an expropriation or that would be capable of conversion into ownership;

- In any event, the 2013 DRP was a legitimate exercise of Respondent's governmental powers, *bona fide* in the public interest, reasoned, and non-discriminatory;

- Obnova is still using the Dunavska Plots and Objects.

16. *Second*, Respondent did not violate the FET standard (**Section E.II** below), because:

- Claimants had no relevant legitimate expectations;

- Claimants failed to conduct proper due diligence as regards the status of the property rights and urban planning before they acquired their shares in Obnova; and
- In any event, the 2013 DRP and the subsequent 2021 Land Directorate Letter were reasonable, justified, and non-discriminatory.

17. *Third*, Claimants cannot rely on the MFN clause to claim breaches of new substantive rights not envisaged directly in the BITs. In any event, neither the 2013 DRP nor the 2021 Land Directorate Letter breached the non-impairment standard (**Section E.III** below) nor an umbrella clause (**Section E.IV** below).

18. Submitted with this Counter-Memorial are:

- Legal opinion on Serbian real property law by **Professor Radenko Jotanovic** (**RLO-001**);
- Legal opinion on Cyprus law by **Mr Kypros Ioannides** (**RLO-002**);
- Legal opinion on Serbian company law by **Professor Jelena Lepetic** (**RLO-003**);
- Exhibits **R-001 - R-140**;
- Legal authorities **RL-007 - RL-208**.

19. This submission is structured as follows:

- In **Section B.**, Respondent sets out the relevant factual background to the dispute.
- In **Section C.**, Respondent presents its objections on jurisdiction and admissibility.
- In **Section D.**, Respondent explains why Claimants' case lacks any merit.
- In **Section E.**, Respondent specifies its relief sought.

B. RELEVANT FACTUAL BACKGROUND

20. Claimants' case concerns alleged violations of treaty rights related to the premises of Enterprise for Collection, Processing and Trade of Secondary Raw Materials Obnova ad Belgrade ("**Obnova**") that was established in 1948 as "Otpad" City Enterprise for Waste Trade Belgrade.[2]

21. Claimants' case, which is rife with misrepresentations and omissions, can be summarized as follows:

- Obnova allegedly had the right *of* use of the land Dunavska Plots and the Objects. In particular, Claimants argue that in 1948 and in 1960s, the State allocated to Obnova, a socially-owned enterprise, the land at the Dunavska Plots and the allocation of land consisted in "*granting Obnova the right to use the land*";[3] Claimants also allege that in the late 1940s and 50s, as well as between 1988 and 1992, Obnova built a number of Objects on the Dunavska Plots over which Obnova automatically acquired the right *of* use (as an emanation of an ownership right);[4]
- Claimants then argue that when Obnova was privatised in September 2003, this transformed its right *of* use over the Objects into an ownership right;[5]
- In the meantime, in November 2003, Respondent and the City of Belgrade were unlawfully inscribed in the real property register (the Cadastre) as the owners/users of the Dunavska Plots and the Objects;[6]
- After the change of legislation in 2009, Obnova allegedly obtained the right to apply for conversion of the right *of* use over the land beneath the Objects and the land for regular use of the Objects, to the right of ownership;[7]

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[2] Memorial, para 31. In Serbian: Gradsko preduzeće za promet otpacima "Otpad". Confirmation from the Business Registers Agency dated 8 February 2021, **C-149**, p. 1. In 1953 Otpad changed its name to Commercial Enterprise for Trade of Industrial Raw and Waste Materials "Obnova" (Trgovinsko preduzeće za promet industrijskim sirovinama i otpacima "Obnova"). Confirmation from the Business Registers Agency dated 8 February 2021, **C-149**, p 1.

[3] Memorial, paras 33 and 41.

[4] Memorial, paras 35-40 and 44-45.

[5] Memorial, paras 49-50.

[6] Memorial, para 70.

[7] Memorial, paras 81-86.

- By the adoption of the 2013 DRP, Obnova was allegedly prevented from the conversion as the 2013 DRP designated the land at the Dunavska Plots for public use;[8]
- To protect its rights, Obnova initiated several proceedings before the Serbian courts and other authorities but has been unsuccessful to date.[9]

22. Claimants have misrepresented or omitted (which cannot have been inadvertent) to mention key facts of the case, while their interpretation of Serbian law is incorrect. As will be explained in the following summary of events:

- Obnova had no property rights over the Dunavska Plots or the Objects. Serbian law differentiates the right *of* use of real property as an emanation of the ownership right from the right *to* use the property, which merely refers to a contractual right derived from e.g. lease agreements. The latter does not create any property rights (**Section B.I.1.a) below**);
- Obnova was never granted the right *of* use over the Dunavska Plots but merely had the right *to* use the land pursuant to 12 lease agreements concluded between 1953 and 2006, with the City of Belgrade and the socially-owned enterprise Luka Beograd, respectively; unlike Obnova, the lessors had the right *of* use over the land (**Section B.I.1.b) below**);
- Claimants failed to prove which Objects were constructed by Obnova and in any event, even if Obnova did construct some Objects, this was done without the required permits or based on temporary construction permits (**Section B.II. below**);
- Obnova was never inscribed in the real property register, nor had a valid legal ground for inscription. Instead, the Republic of Serbia, the City of Belgrade and the enterprise Luka Beograd were inscribed (**Section III. below**);
- In view of the lease agreements for the Dunavska Plots, the temporary nature of the Objects as well as the fact that some were constructed without a permit, Obnova had no right *of* use over the Dunavska Plots and the Objects that could have been transformed to ownership right after Obnova's privatisation (**Sections B.IV and B.V below**);
- The 2013 DRP did not expropriate Obnova's objects and land, since Obnova had no rights that could have been expropriated (**Section B.VI below**);

[8] Memorial, para 109. **Živković Milošević ER-1**, para 123.

[9] Memorial, paras 87-89 and 147.

- Obnova does not fulfil the conditions for legalization of the Objects because it did not resolve property rights over the Dunavska Plots and the Objects (**Section B.VII below**);
- Obnova does not fulfil the conditions for conversion of the right *of* use over the land to the ownership right as it never had nor it was inscribed as the holder of the Dunavska Plots or the Objects (**Section B.VIII below**).

I. Obnova had no property rights over the Dunavska Plots or the Objects

1. Obnova had the contractual right *to* use the Dunavska Plots, but did not have any right *of* use over them

23. As will be explained below, contrary to Claimants' allegations, Obnova did not have any property (*in rem*) rights over the Dunavska Plots, including such that would be capable of being transformed into ownership. Serbian law clearly distinguishes between the property (*in rem*) right *of* use of the land from the rights stemming from a lease (rights to use the property), that do not bestow any property rights but merely allow for the use of property (see **Section a)** below). Obnova only had the right to use the Dunavska Plots, as is clear from several lease agreements Claimants failed to mention in the Memorial (see **Section b)** below).

a) Serbian law differentiates the right *of* use from the right *to* use

24. The right *of* use of real properties was introduced during the communist era in former Yugoslavia, as the surrogate right for ownership right. In the same way as an ownership right, the right *of* use is a property right in its nature.[10]

25. The right *of* use (i.e. the emanation of the ownership right) cannot be equated with the right of a certain person *to* use the property based on e.g. lease agreement. Unlike the right *of* use, which is a property right in its nature, the rights and obligations stemming from a lease agreement are contractual in nature. The right of the lessee to use the leased asset and the right *of* use as emanation of the ownership right are not the same types of civil law rights. As explained by Professor Jotanovic:

> *Therefore, the right to use that a lessee has under a lease agreement and the right of use that someone has as the holder of a property right are two entirely different legal categories, even though they may, in terms of language, appear as concepts with the same meaning and content - on the*

[10] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 12-14.

> *contrary, they are neither of the same meaning nor of the same content. The holder of the right to use under a lease agreement can only use the property (and collect fruits and benefits from it). The holder of the right to use under a lease agreement cannot: sell the property, donate the property, encumber the property, exchange the property for another property or property right, or change the purpose of the property. The lessee has the following obligations: to maintain the property, return the property to the lessor upon the expiration of the lease agreement and pay the rent (as the fee for using the property).*[11]

b) Obnova merely had the right *to* use the Dunavska Plots pursuant to lease agreements

26. Claimants argue that the State granted to Obnova the right *of* use of the land at Dunavska 17 - 19[12] and Dunavska 23.[13] No evidence was provided for these statements.[14] Claimants further allege that Obnova's rights *of* use over the Dunavska Plots created property rights that could have been converted into ownership (but for the adoption of the 2013 DRP).[15] This is all incorrect.

27. As will be shown below, Obnova was never granted the right *of* use over the land either at Dunavska 17-19, or at Dunavska 23.[16] Obnova always used the land based on lease agreements concluded with the City of Belgrade and the enterprise Luka Beograd, respectively, who, unlike Obnova, had the right *of* use over the land. In other words, Obnova had only contractual right *to* use the Dunavska Plots as the lessee and not the property right *of* use over the land as Claimants purport.

28. In the period from 1953 to 2006, Obnova, as the lessee, concluded (at least) 12 lease agreements for the Dunavska Plots. The agreements were concluded either with the City

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[11] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 14.

[12] Numbers 17-19 of Dunavska Street are located on the cadastral parcels nos. 47/1, 47/2 and 47/3. However, up until 2016, all these parcels were part of one parcel, no. 47. Partial Decision of Republic Geodetic Authority No. 952-02-3-7/15 dated 26 January 2016, **C-178** and Decision of the Republic Geodetic Authority of 17 August 2016, **R-001**.

[13] Dunavska 23 is located on the cadastre parcels nos. 39/1, 39/12 and 39/15. Parcel no. 39/12 formed the part of parcel no. 39/1 up until its division by the Decision of the Republic Geodetic Authority of 20 January 2021, **R-002**. Parcel no. 39/15 formed the part of parcel no. 39/1 up until its division by the Decision of the Republic Geodetic Authority dated 4 March 2021, **R-003**.

[14] Memorial, paras 32 and 33; Section A, heading 2.

[15] Memorial, paras 31-33, 44, 50-52; **Živković Milošević ER-1**, para 5.

[16] Memorial, para 33.

of Belgrade, or with the socially-owned enterprise Luka Beograd and its legal predecessor, the Directorate for Construction and Development of the Danube river bank[17] ("**Directorate**"), as the lessors. Tellingly, out of these 12 lease agreements Claimants and their Serbian law experts mention only two.[18]

29. In **April 1953**, Obnova concluded a lease agreement (as lessee) with the City of Belgrade (as lessor) for part of Dunavska 17-19, for an indefinite time period (i.e. binding until termination). According to this agreement, only objects of a temporary character (i.e. sheds, canopies etc.) could be constructed on the leased land and upon expiry of the lease, the lessee was obliged to remove all constructed objects with no right of compensation.[19]

30. Claimants acknowledge the existence of this agreement[20] but claim that it was "*pro forma"* (i.e. non-binding), since there is no evidence that Obnova ever paid any rent pursuant to it.[21] This is misplaced. First, lack of evidence of rent payments that have been made decades ago can hardly prove anything, let alone that the agreement was *pro forma*. In addition, the approach endorsed by Claimants would lead to the absurd conclusion that any party to any agreement could nullify its binding force by simply failing to perform its contractual obligations.[22]

31. In **September 1959** and **April 1960** Obnova concluded two lease agreements (as lessee) with the Directorate (as lessor) for the land – open warehouse space in Dunavska 17-19 and 23. The first agreement was concluded for the period January - December 1959 and

[17] A legal predecessor of Luka Beograd, the Directorate, was an institution established back in 1957 with the task to perform operations as the direct investor for construction of the Danube dock, coast, access roads, warehouse and stock space and other dock objects and facilities. In 1961, however, it was decided that the Directorate should cease to operate as of 31 December 1961 and that all of its fixed and other assets would be transferred to Preduzeća pristaništa "Beograd" which changed its name to Luka Beograd on 7 May 1964. Decision of foundation of the Directorate of 11 March 1957, **R-004**; Decision on cessation of operations of the Directorate of 24 November 1961, **R-005**; Decision of foundation of Preduzeće pristaništa, Beograd dated 27 November 1961, **C-158**; Decision on change of name of Luka Beograd, **R-006**.

[18] Memorial, para 137. **Živković Milošević ER-1**, paras 132-138 and 168.

[19] Lease Agreement between Obnova and Serbia dated 10 April 1953, **C-007**, Articles 4; 5.

[20] Lease Agreement between Obnova and Serbia dated 10 April 1953, **C-007**.

[21] **Živković Milošević ER-1**, paras 132-134.

[22] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 20-21.

the second for an indefinite time period.[23]

32. Subsequently, between 1962 and 2006, Obnova concluded nine lease agreements (as lessee) with Luka Beograd, since the City of Belgrade granted the right *of* use over the land at Dunavska 17-19 and 23 to Luka Beograd[24] in November 1961.[25]

33. In **January 1962** Obnova and Luka Beograd concluded another agreement for an indefinite time period, based on which Obnova leased the warehouse space at Dunavska 17-19. Claimants acknowledge this agreement, but also argue that it was not performed.[26] This is not accurate. In fact, as Obnova failed to pay rent, upon Luka Beograd's request, the court ordered Obnova to vacate the open warehouse space. Subsequently, in **March 1965** the parties concluded another agreement which obliged Obnova to pay the rent and vacate the plot free from any objects. Otherwise, Luka Beograd would be entitled to demolish and remove the objects at Obnova's expense.[27]

34. In **July 1983** Obnova concluded another lease agreement with Luka Beograd, this time for the warehouse space located at Dunavska 17 and for an indefinite time period. In this agreement, Obnova undertook to refrain from any adaptation of the warehouse space without prior consent of Luka Beograd, as well as from leasing the warehouse space to other persons.[28]

35. In **April 1985,** Luka Beograd and Obnova again concluded a lease agreement. The

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[23] Lease agreement between Obnova and the Directorate dated 29 September 1959, **R-007**, Article 1 and Lease agreement between Obnova and the Directorate dated 7 April 1960, **R-008**. Although it was not specified what land was the subject of the 1960 lease agreement, it could be plausibly concluded that it was the same land that was the subject of the lease agreement concluded in September 1959, because the total surface area of the land leased under both agreements was the same. Total surface area of the land – warehouse space that was the subject matter of the said lease agreement was 7,630 m^2. As can be seen from the Lease Agreement concluded in 1959 the surface area of the land located in Dunavska 17-19 was 6,730 m^2 and in Dunavska 23 was 900 m^2, which in total is equal to 7,630 m^2.

[24] Initially this entity was named Pristanista Beograd but changed its name to Luka Beograd, see Decision on change of name of Luka Beograd, **R-006**.

[25] Decision of foundation of Preduzeće pristaništa, Beograd dated 27 November 1961, **C-158**; **Živković Milošević ER-1**, para 136.

[26] **Živković Milošević ER-1**, para 138.

[27] Lease agreement between Luka Beograd and Obnova dated 10 March 1965, **R-009**, Articles 1, 3, 4.

[28] Agreement on Use of Warehouse Space and Performance of the Transhipment and Warehousing Services between Luka Beograd and Obnova dated 21 July 1983, **R-010**, Articles 9, 2, 11.

agreement relates parcel no. 47[29] and was entered into for a period of 5 years. The agreement envisaged that the previous agreement from 10 March 1965 and all other related agreements and annexes ceased to be valid.[30]

36. In **January 2000**[31] and **February 2000**[32] Luka Beograd and Obnova concluded two lease agreements for open warehouse space and the railway at Dunavska 17-19, and an open warehouse space at Dunavska 23, for indefinite period of time. Importantly, the agreement related to Dunavska 17-19 refers to another agreement from 15 March 1994 that ceased to be valid, so it appears that between 1985 and 2000, Obnova and Luka Beograd concluded at least one more lease agreement.[33]

37. Luka Beograd and Obnova continued to enter into lease agreements concerning the Dunavska Plots even after the privatisation of Obnova in September 2003.

38. In **November 2003**, Luka Beograd and Obnova concluded two lease agreements, both for an indefinite period of time. One agreement related to Dunavska 17-19,[34] while another related to Dunavska 23.[35] In **March 2006**, Luka Beograd and Obnova again concluded two lease agreements for Dunavska 17-19 and 23, for an indefinite period of time.[36]

39. Against this background, it is obvious that, in the period from 1953 until 2006, Obnova

[29] Luka Beograd leased to Obnova open warehouse space with the total surface area of 9,132 m^2 (the area corresponds to the area of the parcel no. 47. Land book insertion no. 1689 for parcel no. 47, **R-011**.

[30] Agreement on Provision and Use of Transhipment, Warehousing and Other Services between Luka Beograd and Obnova of 1 April 1985, **R-012**, Articles 2, 25.

[31] Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova of 25 January 2000, **R-013**.

[32] Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova of 3 February 2000, **R-014**, Article 1.

[33] See Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova of 25 January 2000, **R-013**, Article 16(2).

[34] Agreement for Providing and Using Port and Warehouse Services between Luka Beograd and Obnova for parcel no. 47, **R-015**, Article 1.

[35] Agreement on Provision and Use of Port and Warehousing Services between Luka Beograd and Obnova for parcel 39/1 dated 7 November 2003, **RJ-011**, Article 1.

[36] Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova for parcel no. 47 dated 16 March 2006, **R-016**, Article 1. Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova for parcel no. 39/1 dated 16 March 2006, **R-017**, Article 1.

regularly concluded lease agreements related to the premises at Dunavska 17-19 and 23, meaning that Obnova had no right *of* use or ownership rights over the Dunavska Plots, either before or after its privatisation. As confirmed by Prof Jotanovic:

> *Obnova acted as the lessee and undertook to pay the rent for the use of someone else's property. The cause or reason Obnova undertook to pay the rent is its legal objective to use someone else's property. The lessee is not the owner of the property which is the subject-matter of the lease, and that is the reason why, it pays the rent is it satisfies its needs by using someone else's property… By entering into the lease agreements, Obnova in a formal and material sense acknowledged in continuity (from 1953 to 2006) that it was not the owner, i.e. the holder of the right of use over the leased property.*[37]

40. Tellingly, in court proceedings in relation to rent payments between Obnova and Luka Beograd spanning over six years from 2009 to 2015,[38] Obnova admitted that it was a lessee and this was confirmed by the Serbian courts.[39] Only in some of the proceedings that were initiated in 2012 and later, Obnova began to argue that it had used the land at the Dunavska Plots for more than 70 years and that it was unclear why the lease agreements had been concluded at all. Importantly, in the course of the proceedings Obnova never stated that it had the right *of* use over the Dunavska Plots (even though Obnova was already owned by Claimants at the time[40]). Instead, Obnova argued that Respondent owned the Dunavska Plots and that the City of Belgrade (and not Luka Beograd, the plaintiff) was the holder of the right *of* use.[41] Claimants should be estopped

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[37] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 17-18.

[38] Motion for enforcement filed by Luka Beograd dated 23 February 2009, **R-018**; Motion for enforcement filed by Luka Beograd dated 16 December 2009, Motion for enforcement from 16 December 2009, **R-019**; Motion for enforcement filed by Luka Beograd dated 23 April 2012, **R-020**; Motion for enforcement filed by Luka Beograd dated 31 May 2012, **R-021**; Motion for enforcement filed by Luka Beograd dated 29 January 2013, **R-022**; Motion for enforcement filed by Luka Beograd dated 9 April 2013, **R-023**; Motion for enforcement filed by Luka Beograd dated 1 April 2014, **R-024**; Motion for enforcement filed by Luka Beograd dated 24 February 2015, **R-025**.

[39] Judgement of the Commercial Court of Appeal, Pz 1186/11 dated 9 February 2012, **R-026**; Judgement of the Commercial Court in Belgrade, P 3861/12 dated 4 October 2012, **R-027**; Judgement of the Commercial Court of Appeal, Pz 6411/14 dated 18 March 2016, **R-028**; Judgement of the Commercial Court of Appeal, Pz dated 28 August 2014, **R-029**.

[40] Kalemegdan has been the owner of Obnova since April 2012. Claimants state that Coropi has been an indirect beneficial owner of the Cypriot Obnova Shares since their acquisition by Kalemegdan in April 2012. In addition, Claimants argue that Mr Rand became the beneficial owner of Obnova already in 2005. Memorial, paras 20, 21, 73, 74.

[41] Obnova's submission in the court proceeding, P 5182/09 dated 15 January 2010, **R-030**; Obnova's objection in the court proceeding IV 2209/10 dated 26 April 2010, **R-031**; Obnova's objection in the court proceeding IV

from arguing to the contrary in this arbitration.

41. Finally, it should be noted that the lease agreements also make it clear that Obnova leased not only the land, but also the Objects. For example, in the lease agreement concluded in 1985, it was stipulated that the maintenance of Objects shall be entrusted to Luka Beograd.[42] The parties also agreed that any changes on the Objects, such as additional construction, could be performed only with the consent and supervision of Luka Beograd.[43] Furthermore, it was agreed that Luka Beograd had the right to control the manner in which Obnova uses the Objects.[44] Under the lease agreements from 2006, Luka Beograd also had certain obligations that are typical for owners of the Objects. For instance, Luka Beograd undertook to perform any extraordinary, investment maintenance of the objects at its own cost, as well as to perform control over their regular maintenance.[45] This clearly implies that Obnova had no right *of* use or even ownership of the Objects.

42. As will be further explained in Section II. below, Claimants also mischaracterize the status of the Objects and Obnova's rights stemming therefrom.

II. <u>The Objects were constructed either without any construction permits or based on temporary construction permits</u>

43. In this Section Respondent will explain the circumstances related to the construction of the Objects, in particular, it will show that the Objects were constructed either without construction permits or based on the permits for construction of the objects for temporary use and additionally, Claimants have failed to prove which, if any, of the Objects were actually constructed by Obnova (see **Sections 1.** and **2.** below). As will be further

5359/12 dated 4 May 2012, **R-032**; Obnova's objection in the court proceeding IV 928/13 dated 25 February 2013, **R-033**; Obnova's objection in the court proceeding IV 4355/13 dated 31 May 2013, **R-034**; Obnova's objection in the court proceeding IV 2872/14 dated 17 April 2014, **R-035**.

[42] Agreement on Provision and Use of Transhipment, Warehousing and Other Services between Luka Beograd and Obnova of 1 April 1985, **R-012**, Article 10.

[43] Agreement on Provision and Use of Transhipment, Warehousing and Other Services between Luka Beograd and Obnova of 1 April 1985, **R-012**, Article 11.

[44] Agreement on Provision and Use of Transhipment, Warehousing and Other Services between Luka Beograd and Obnova of 1 April 1985, **R-012**, Article 12.

[45] Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova for parcel no. 47 dated 16 March 2006, **R-016**, Articles 5(1) and 6(1); Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova for parcel no. 39/1 dated 16 March 2006, **R-017**, Articles 5 (1) and 6(1).

explained in Section IV. below, the existing permits did not confer upon Obnova any permanent rights of use over these Objects.

1. Objects at Dunavska 17-19

44. Claimants allege that, in the late 1940s and early 1950s, Obnova built 15 Objects at Dunavska 17-19.[46] They do not dispute that Obnova did not have construction permits for these objects, and instead emphasize that the construction permits that Obnova had were not temporary.[47] This is not correct. Permits were issued for objects for temporary use only (see **Section a)** below). Additionally, Claimants have failed to prove which (if any) of the Objects on parcel no. 47 were built by Obnova (see **Section b)** below).

a) Construction permits were issued for construction of objects for temporary use

45. Obnova obtained certain construction permits that authorised only the construction or completion of the objects "*FOR TEMPORARY USE*". These permits required Obnova to demolish the constructed objects upon the request of the City of Belgrade (see **Section aa)** below). These permits were issued in accordance with the relevant regulation in force at the time (see **Section bb)** below). Claimants' arguments that the objects are permanent due to the duration or construction material are misplaced (see **Section cc)** below).

aa) Overview of the construction permits

46. Between 1949 and 1954, Obnova obtained seven construction permits for the parcel no. 47. Taken together, these permits authorised the construction of five different objects for temporary use (three of them being canopies) and one plumbing installation for a temporary object. These objects were to be constructed on the land that Obnova was allowed to use only as lessee.[48]

47. All construction permits (but for the plumbing installation) expressly stipulated that they were issued for the objects "*FOR TEMPORARY USE*" as well as that "*the owner shall not be entitled to any damages from the Executive Council of the People's Committee of the City of Belgrade for the value of such building that the owner shall undertake to*

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[46] **Živković Milošević ER-1**, para 124. For a list of these buildings, see Annex A of the Memorial. Of these 15 objects, only 11 are inscribed in the Cadastre. Although Annex A lists 16 objects, as Claimants themselves explain, object 3 on cadastral parcel no. 47/2 is in fact a part of object 7 on cadastral parcel no. 47/1, extending partly to cadastral parcel no. 47/2, as inscribed in the Cadastre. See Memorial, footnote 461.

[47] Memorial, paras 68 and 134.

[48] See above Section B.I.1.b).

demolish as soon as so requested by the Executive Council of the People's Committee of the City of Belgrade." These seven permits are listed below:

- Obnova obtained its first temporary construction permit for Dunavska 17-19 in **October 1949**. This permit was issued for the construction of warehouse canopy for placement of baled paper;[49]
- In **April 1953** Obnova obtained the second temporary construction permit for construction of a canopy;[50]
- In **March 1954** a construction permit was issued for the construction of a building for offices;[51]
- In **May 1954** another construction permit was issued for the completion of the works on the warehouse for temporary use (in October 1949 Obnova obtained a permit for construction of the warehouse-canopy for paper, for temporary use, while in May 1954 Obnova was issued a permit for completion of the warehouse);
- In **July 1954** a construction permit was issued for the construction of plumbing installations and sewerage in a building,[52] for which a temporary construction permit had been issued on 22 March 1954.[53] This permit did not explicitly state that it was issued for the construction of a temporary facility, but as the installations were for a building which was of temporary character, according to the construction permit dated 22 March 1954, it follows that the installations were also of a temporary character;
- In **November 1954** a construction permit was issued for construction of another canopy;[54]
- in **December 1954** a construction permit was issued for construction of a building and press stand.[55]

[49] Construction permit No. 5034 dated 31 October 1949**, C-150.**

[50] Construction permit No. 1846 dated 21 April 1953, **C-151**.

[51] Construction permit No. 730 dated 22 March 1954, **C-152**.

[52] Construction permit No. 9358 dated 29 July 1954, **C-154**.

[53] Construction permit No. 4542 dated 31 May 1954, **C-153**.

[54] Construction permit No. 18578 dated 2 November 1954**, C-155.**

[55] Construction permit No. 21817 dated 24 December 1954**, C-156.**

48. These temporary permits allowed for construction of five objects: three canopies,[56] a building with a garbage press[57] and a building for offices.[58] Since canopies clearly cannot be equated with buildings, Obnova was in fact allowed to build only two buildings, albeit for temporary use.

49. In complete disregard of the content of the above-mentioned construction permits, Claimants' legal experts "*note that <u>some</u> of the building permits issued to Obnova do state that they were issued for the construction of objects for temporary use (in Serbian "na privremenu upotrebu")*" while "*<u>other</u> permits do not include such limitation.*"[59] This statement is misleading. Given that six out of seven construction permits were issued for construction of objects for temporary use, to state that only *some* of the permits were for objects for temporary use is clearly misleading. Equally misleading is the experts' reference to "*other permits*" when only one permit (for plumbing installation) did not explicitly state that it was issued for the construction of temporary facility (although the temporary nature of this installation was necessarily implied).[60]

bb) <u>The construction permits were issued in accordance with the relevant regulation in force at the time</u>

50. Claimants deny that the construction permits for Obnova's buildings at Dunavska 17-19 were temporary. They assert that they were issued pursuant to the Basic Regulation on Construction from 1948 and the Regulation on Construction from 1952, which did not allow for the issuance of "temporary" construction permits.[61] This argument is wrong for several reasons.

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[56] Construction permit No. 5034 dated 31 October 1949, **C-150**; Construction permit No. 4542 dated 31 May 1954, **C-153**; Construction permit No. 1846 dated 21 April 1953, **C-151**; Construction permit No. 18578 dated 2 November 1954, **C-155**.

[57] Construction permit No. 21817 dated 24 December 1954, **C-156**.

[58] Construction permit No. 730 dated 22 March 1954, **C-152**.

[59] **Živković Milošević ER-1**, para 165.

[60] In addition to that, Claimants' experts' reference to the occupancy permit from 30 May 1956 as a document that does not contain limitation that the objects in question are temporary, is evidently misleading. Tough this occupancy permit does not mention that the objects are temporary, it was issued for the objects that were constructed in accordance with the construction permits issued for temporary objects. **Živković Milošević ER-1**, para 165 and footnote 202; Occupancy permit No. 11169/56 dated 30 May 1956, **C-157**; Construction permit No. 730 dated 22 March 1954, **C-152**; Construction permit No. 21817 dated 24 December 1954, **C-156**.

[61] Memorial, para 134.

51. First, although these two Regulations did not expressly mention or regulate the issuance of construction permits for temporary objects, neither did they prohibit the issuance of such permits. At the same time, Claimants and their experts ignore that Obnova's temporary construction permits were also subject to the 1952 Regulation on Construction Design, which expressly refers to temporary construction objects:

> *A preliminary design does not have to be prepared for: business and residential buildings of private investors; <u>temporary construction objects</u> for needs of business enterprises, state bodies, institutions, cooperative and social organizations.*
>
> *For objects from the previous paragraph only a main design shall be prepared.*[62]

52. Indeed, Obnova prepared only the main designs in the process of obtaining the temporary construction permits for the objects at Dunavska 17-19, as required under Article 10(2) of the Regulation on Construction Design.[63]

53. Claimants further state that the notion of temporary construction permits was defined by Serbian law only decades later, by the 1997 Law on Special Conditions for the Issuing of Construction and Usage Permits for Certain Objects, and by the 2009 Law on Planning and Construction.[64] Respondent wonders why laws enacted in 1997 and 2009 should be relevant for construction permits issued 40-50 years earlier. Whatever conditions these two laws foresaw for the issuance of temporary construction permits is simply immaterial. This cannot change the fact that all construction permits issued to Obnova were for temporary objects, as clearly stated in all but one of these permits.

cc) <u>Neither the material with which an object is made nor its duration determine whether that object is permanent</u>

54. Claimants also argue that the objects at Dunavska 17-19 could not have been "temporary" because they had existed since as early as the 1940s.[65] However, they are unable to point to any legislation supporting their argument that after some time a temporary object loses its temporary character and transforms into a permanent object for purposes of Serbian

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[62] Regulation on Construction Design of 1952, Article 10, **R-036**, Article 10(2) (emphasis added). Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 25 and 26.

[63] Resolution on adoption of the Main Design dated 9 April 1953, **R-037**; Resolution on adoption of the Main Design dated 21 January 1954, **R-038**; Resolution on adoption of the Main Design dated 6 December 1954, **R-039**.

[64] Memorial, para 135.

[65] Memorial, para 132.

law or regulations. The Objects could only be converted to permanent status if the law provided for such conversion, but no such law exists.[66]

55. Claimants and their experts also assert that the Objects were not temporary "*in nature*",[67] and try to rely on a statement from a decision of Serbia's Constitutional Court which states that "*only smaller prefabricated buildings that are placed in public area (kiosks, gardens, mobile stalls, etc.) have a temporary character*".[68] Claimants also incorrectly claim that the Objects were brick-and-mortar warehouses, offices and other buildings that were permanently attached to the ground.[69]

56. Apart from the fact that the Objects are not "brick and mortar" constructions,[70] reliance on the Constitutional Court decision is also misleading and misplaced.

57. First, the decision in question refers to the 2003 Law on Planning and Construction, which does not apply to the construction permits issued to Obnova in the 1950s. Accordingly, the Constitutional Court's finding as regards what constitutes a temporary object under the 2003 Law on Planning and Construction is irrelevant and has no bearing upon the nature of the Objects built at Dunavska 17-19 based on construction permits issued several decades earlier. What is relevant is the abovementioned 1952 Regulation on Construction Design, which explicitly contemplated the construction of temporary construction objects "*for needs of business enterprises*", such as Obnova. Any later change of legislation cannot change the fact that Obnova was authorised to build temporary objects.[71]

58. Second, and in any case, the 2003 Law on Planning and Construction does not provide that only prefabricated buildings are to be considered as temporary. As noted by the Constitutional Court in the ruling cited by Claimants, "*the Law on Planning and Construction from 2003, as well as the Law on Planning and Construction in force, did*

[66] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 27-29.

[67] Memorial, para 133; **Živković Milošević ER-1**, para 169.

[68] Decision of the Constitutional Court, Case No. IUI 156/2009, Official Gazette of the Republic of Serbia, No. 55/10 dated 22 June 2010, **C-056**, p 6 (pdf).

[69] Memorial, para 133.

[70] As explained above, most of these buildings were canopies. See above paras 46-47.

[71] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 27.

not contain provisions defining the term temporary facilities."[72] Moreover, according to the Supreme Court of Serbia the type of material that an object has been made of is irrelevant for determining whether the object is temporary or not. What is relevant is its legal status, i.e. whether it has been characterized in law as in accordance with a temporary construction permit.[73] Therefore, Claimants' statement that Obnova's objects are "*buildings-consisting of brick-and-mortar warehouses, offices and other buildings"* is not only untrue (as explained, most of Obnova's Objects are canopies), but also irrelevant for the issue of whether the Objects in question are temporary or not, even under the 2003 Law on Planning and Construction.

dd) Inscription in the public records cannot convert temporary objects into permanent objects

59. Claimants' legal experts, Prof Zivkovic and Mr Milosevic, draw attention to the fact that the Objects on parcel no. 47 were registered in the Land Books and are now registered in the Cadastre without any notes about their temporary nature. In their view, because the 2018 Law on Procedure on Registration in the Cadastre and the 2009 Law on State Survey and Cadastre required such note to be inscribed, the objects on parcel no. 47 cannot be said to be temporary.[74] This argument is misplaced as both laws were enacted only after the inscription of the Objects in the Cadastre.[75] As Claimants' legal experts note, "*the regulations applicable before the 2009 Law on State Survey and Cadastre did not include the obligation to register the temporary nature of buildings*".[76]

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[72] Decision of the Constitutional Court, Case No. IUI 156/2009, Official Gazette of the Republic of Serbia, No. 55/10 dated 22 June 2010, **C-056**, p 6 (pdf). The Law on Planning and Construction from 2003 clearly distinguishes between prefabricated and temporary objects. Article 76 of the Law regulates the possibility of a temporary lease of the undeveloped public construction land and provides that a person who was granted such a lease may construct only temporary objects upon preparation of the main project for construction of a temporary object and the project for its demolition. Article 98 of the 2003 Law on Planning and Construction, on the other hand, regulates installation of prefabricated objects and provides that for installation of such objects there is no need to prepare the technical documentation in accordance with this law (unlike for temporary objects where a main project for construction and the project for its demolition are required). Articles 76 and 98 of the 2003 Law on Planning and Construction, **R-040**.

[73] Judgement of the Supreme Court of Serbia, No. 2903/2005 dated 15 December 2005, **R-041**, p 2 (PDF). See also Judgement of the District Court in Sabac, No. Gz. 2029/00 dated 22 January 2001, **R-042**.

[74] **Živković Milošević ER-1**, para 172.

[75] The objects were inscribed in the Land Books in 1972-1973 during the restoration of the Land Books which data were only taken over by the Cadastre when it was established in February 2003 for the cadastral municipality Stari grad. Land book insertion no. 1689 for parcel no. 47, **R-011**, pp 1 and 2 (pdf).

[76] **Živković Milošević ER-1**, para 174.

60. Claimants' legal experts also note that the Cadastre registered the City of Belgrade as the owner, and not as the holder, of these Objects. Because the Cadastre can only register persons that constructed temporary buildings as "*holders*" and not "*owners*", they argue that this inscription is additional proof that the objects could not have been temporary in nature. Claimants' legal experts again base their conclusion incorrectly on the 2009 Law on State Survey and Cadastre.[77] They disregard the fact that the inscription of the Objects back in 1972-1973[78] did not contain any reference to the objects' temporary character since "*the regulations applicable before the 2009 Law on State Survey and Cadastre did not include the obligation to register the temporary nature of buildings*".[79] The Cadastre could not have been expected to know that the objects were temporary. Nor was it obliged to review the decades-old inscription of these objects in order to determine whether it could inscribe certain rights over them in accordance with newly adopted regulations. In any event, the Cadastre's inscription of the ownership rights over the objects could not have changed their temporary character.[80]

b) Claimants have failed to prove which objects on parcel no. 47 were built by Obnova

61. Claimants claim that at parcel no. 47, on Dunavska 17-19, Obnova built a total of 15 objects, 11 of which are inscribed in the Cadastre.[81] However, (i) there are not 15 objects at Dunavska 17-19, (ii) 11 objects that are inscribed in the Cadastre were built before Obnova was established, (iii) it remains unproven which objects, if any, were built by Obnova.

62. **Claimants have failed to prove there are 15 objects at Dunavska 17-19.** There are 11 objects at Dunavska 17-19 that are inscribed in the Cadastre.[82] Beyond this, Claimants

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[77] **Živković Milošević ER-1**, para 173.

[78] Land book insertion no. 1689 for parcel no. 47, **R-011**, pp 1 and 2 (pdf).

[79] **Živković Milošević ER-1**, para 174.

[80] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 28 ("[T]*he legal status of an object is determined by the construction permit issued for its construction, i.e., whether the permit allows the construction of a temporary or permanent object, so accordingly, its temporary or permanent character is to be determined*").

[81] Chart in the Annex A of the Memorial. The Annex lists 16 objects, but as Claimants explain in footnote 461, object 3 on cadastral parcel no. 47/2 is in fact a part of object 7 on cadastral parcel no. 47/1, extending partly to cadastral parcel no. 47/2, as inscribed in the Cadastre.

[82] Excerpt from Cadaster dated 23 March 2023, relating to land plot No. 47/1 dated 23 March 2023, **C-162**; Excerpt from Cadaster dated 23 March 2023, relating to land plot No. 47/2 dated 23 March 2023, **C-163**; Excerpt from Cadaster dated 23 March 2023, relating to land plot No. 47/3 dated 23 March 2023, **C-164**.

have not furnished any evidence of the 15 objects which they claim Obnova built. Even the satellite image on which Claimants rely shows only these 11 objects on parcel no. 47.[83] Claimants' only evidence of the other four objects is their own mark-up of the satellite map of Dunavska 17-19 (Annex A of the Memorial), which clearly cannot serve as proof.[84]

63. **The 11 objects at Dunavska 17-19 were built before Obnova was established in December 1948.** These 11 objects were detected by a survey performed in 1946-1947.[85] Accordingly, Obnova's legal predecessor Otpad could plainly not have built them, since it was established in 1948. Claimants have neither alleged nor proven that Obnova acquired these objects in any other way.[86]

64. Based on the above, it can be concluded that there are 11 objects at Dunavska 17-19. All these objects were built before Obnova was established. Claimants failed to prove that Obnova constructed any objects on the parcel no. 47, although it had construction permits for construction of temporary objects on that parcel.

2. Objects at Dunavska 23

65. Without any credible basis, Claimants claim that between 1988 and 1992 Obnova constructed "*several buildings*" at Dunavska 23.[87] According to Annex A of the Memorial, these buildings consisted of four objects, only two of which are inscribed in the Cadastre.[88] As noted by Claimants' legal experts, none of these objects were issued construction permits.[89]

66. Other than the Privatisation Program, Claimants do not point to any other document that could serve as evidence that Obnova constructed the objects in Dunavska 23. As

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[83] Screenshots from Cadaster website dated 23 January 2023, **C-175**.

[84] Memorial, Annex A, para 408.

[85] Information from the Cadastre dated 31 July 2023, **R-043**.

[86] At the time of its establishment, Obnova was not allocated any objects. It was only granted the amount of RSD 200,000 as part of its fixed assets and the amount of RSD 20,000 as part of its current assets. See Decision on establishment of Obnova dated 28 December 1948, **R-044**.

[87] Memorial, paras 43 and 44.

[88] As Claimants themselves explain, object F is one object which extends over cadastral parcels nos. 39/12 and 22/4, while object no. 9 on cadastral parcel no. 40/5 is in fact a part of object no. 1 on cadastral parcel no. 39/12, extending partly to cadastral parcel no. 40/5. Memorial, Annex A, para 411.

[89] **Živković Milošević ER-1**, paras 197 and 201. A permit to use (*upotrebna dozvola*) grants permission to use the building; it is not a permit to occupy the building or dwell in it.

explained further below,[90] the Privatisation Program is not an appropriate or suitable document for proving the construction of the objects.[91] It is also useless in this particular case, as Obnova's Privatiation Program listed eight objects at Dunavska 23,[92] whereas Claimants identify only four objects in Annex A to the Memorial.[93] In other words, Claimants fail to show which of eight objects[94] from the Privatisation Program are now referred to in their Memorial.

67. Furthermore, the information on objects at Dunavska 23 in the Privatisation Program does not correspond entirely to the records of the Cadastre. Claimants alleged that Obnova built, inter alia, the objects designated in the Cadastre as object 1[95] on parcel no. 39/12 and object 9 on parcel no. 39/1.[96] However, when comparing the surface area of object 1 and object 9 from the Cadastre with the Privatisation Program, it is impossible to find two objects that would match.[97]

68. As for the remaining objects, which were not inscribed in the Cadastre, Claimants do not provide any information that would facilitate their precise identification, such as their surface area, construction year or designated purpose. Claimants only provide their own

[90] See below Section B.IV.2.c).

[91] Decision of the Appellate Court in Belgrade, No. Gz 15525/2010 from 19 July 2012, **R-045** (*"Privatization program cannot be considered as the proof of the ownership right, i.e. the permanent right of use of the privatization subject over the recorded property, having in mind that it was stipulated that the privatization subject must enclose to the privatization program the documentation that is the integral part of the privatization program, inter alia, the certified copies of the excerpts from the land books, i.e. other property and legal documentation for real estates over which the privatization subject has the ownership right or the permanent right of use."*).

[92] Privatisation Program, **R-046**, p 3 (of PDF).

[93] Memorial, Annex A. As Claimants themselves explain, object F is one object which extends over cadastral parcels nos. 39/12 and 22/4, while object no. 9 on cadastral parcel no. 40/5 is in fact a part of object no. 1 on cadastral parcel no. 39/12, extending partly to cadastral parcel no. 40/5.

[94] Of the objects at Dunavska 23 which are mentioned in the Privatisation Program (an office, a warehouse, three canopies, two containers and a toilet), only two can reasonably be identified as buildings (i.e. the office and the warehouse). Privatisation Program, **R-046**, p 3 (of PDF).

[95] And object 9 on parcel no. 40/5 which is in fact a part of object 1 on parcel no. 39/12, as Claimants explain in their Memorial, footnote 466.

[96] Memorial, Annex A.

[97] Objects from the Privatisation Program have the following surface area: 40 m^2, 60 m^2, 28 m^2, 36 m^2, 14 m^2, 9 m^2, 16 m^2 and 184 m^2. On the other hand, the surface area of the object 1 on parcel no. 39/12 (together with surface area of object 9 on parcel no. 40/5) is 20 m^2, and the surface area of object 9 on parcel no. 39/1 is 12 m^2.

mark-up of a satellite image,[98] which neither proves that these objects exist nor that Obnova constructed them.

III. Inscriptions in the Land Books and the Cadastre for the Dunavska Plots

69. In the previous Sections Respondent explained that Obnova only leased the Dunavska Plots and that it was allowed to construct only temporary Objects at Dunavska 17-19. In this Section, Respondent presents further reasons as to why Obnova had no property rights to the Dunavska Plots or the Objects. First, Respondent provides a brief overview on the rules and the meaning of the inscriptions in the Land Books and the Cadastre (**Section 1. below**). Then, Respondent provides a summary of the historic inscriptions over the Dunavska Plots, showing not even one inscription in favour of Obnova (**Sections 2.a) and 2.b)** below) and explains the reasons for the inscription of the City of Belgrade in 2003 (**Section 2.c)** below). Finally, Respondent explains why Obnova was not inscribed in the public registers (**Section 2.d)** below).

1. Serbian law rules on the inscriptions

70. As noted by Prof Jotanovic, "*there is a legal presumption that everything inscribed in the land book is true and accurate. Inscription is in itself proof of the persistence of the inscribed right*."[99]

71. The Land Books were introduced in the Kingdom of Yugoslavia in the 1930s, to which Serbia belonged at the time.[100] They represented the public records of property rights over real estate and were kept and maintained by the competent courts. If a Land Book or its part was destroyed, lost or became unusable, then the so-called process of its restoration would be conducted.[101] The Land Books for the cadastral parcels nos. 47 and 39/1 were restored in 1972-1973.[102]

72. The Land Books were replaced by the Cadastre, with the precise time depending on the cadastral municipality. The Cadastre for the municipality Stari Grad, where Dunavska

[98] Memorial, Annex A, para 410.

[99] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 31.

[100] **Živković Milošević ER-1**, para 96.

[101] Law on Interior Design, Establishment and Correction of Land Books from 1930**, R-047**, para 69.

[102] Land book insertion no. 1689 for parcel no. 47, **R-011**, pp 1 and 2 (of PDF); Land Book insertion no. 1893, **R-048**, pp 2 and 3.

Street is located, was formed from 2001 onwards.[103] During the formation of the Cadastre, the ownership rights, as well as other property rights and other data on the real estate, were copied from the Land Books, but then were made available to the public for inspection, so that interested persons had the possibility to dispute the data contained in the Cadastre.[104]

73. For formation or restoration of the Cadastre, the Cadastre performs a cadastral survey - a geodetic measuring and collection of the data about the real estate. Information collected through the survey are included in the survey report.[105]

74. Inscriptions of the property rights over the real estate are conducted based on a private or public document, which has to be substantially and formally suitable for inscription.[106] If one does not possess an appropriate document for inscription of the rights, the property rights over the real estate have to be determined by the court. When it comes to erroneous inscriptions in the Cadastre, such inscriptions could have been rectified by the competent cadastre office *ex officio*, or upon the request of a party within a deadline which changed over the time, and from 2015 onwards was 10 years as of the day of the inscription.[107] After the expiration of this deadline, a presumption of truthfulness of the inscription in the Cadastre applies, meaning that a party considering that its rights have been violated by the said inscription must initiate court proceeding for determination of its rights and change of the inscription.[108]

2. **Inscriptions for the Dunavska Plots never indicated Obnova as the owner or holder of the right of use over the Dunavska Plots or the Objects**

75. According to the Land Books and the Cadastre, the Dunavska Plots and Objects were always in state or social ownership, while Luka Beograd and the City of Belgrade were registered as the holders of the right of use over them. Claimants do not dispute that

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[103] Request for transfer of the right of use over the real estates submitted by the Beoland dated 6 August 2001, **R-049**.

[104] The 1992 Law on State Survey and Cadastre, **R-050** Article 59 (3). Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 38-42.

[105] 2009 Law on State Survey and Cadastre, **R-051**, Article 40(1), (3) and (4).

[106] 2009 Law on State Survey and Cadastre, **R-051**, Article 86(1).

[107] **Živković Milošević ER-1**, para 109.

[108] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 43.

Obnova has never been inscribed as the owner or as the holder of the right of use over the objects and the land.[109]

a) Overview of inscriptions at Dunavska 17-19

Time period	Inscription in the Land Books / Cadastre
Inscriptions for the land at Dunavska 17-19	
1948 – 1972	**State ownership**.[110] In 1966 Luka Beograd was inscribed as the holder of the right of use.[111]
1972 – 1998	**Social ownership**.[112] When the Land Books were restored in 1972-1973, the inscription of Luka Beograd was left out.[113] Until 2003 (see below), no entity was inscribed as the holder of the right of use over the land.[114]
1998 – 2011	**State ownership**.[115] In November 2003, the City of Belgrade was registered as the holder of the right of use over the land and remained to be registered until September 2011 (when it became the owner of the land).[116]
2011 onwards	**Ownership of the City of Belgrade**.[117]
Inscriptions for the Objects at Dunavska 17-19	
1972 – 2003	**Social ownership**. [118] The objects are mentioned for the first time in the inscriptions made during the process of restoration of the Land Books in 1972-1973. At that time, 16 objects were recorded in the Land Books as "*10 buildings, 6 sheds*", without any particular identification of each of these objects.

[109] Memorial, para 64.

[110] Land Book insertion no. 5, **R-052**, p 4 (of PDF).

[111] Land Book insertion no. 5, **R-052** p. 4 (of PDF).

[112] Land book insertion no. 1689 for parcel no. 47, **R-011**, pp 1 and 2 (of PDF).

[113] However, no one disputed Luka Beograd's right of use over the land on the cadastral parcel no. 47 until the City of Belgrade was registered as the new holder of the right of use in November 2003.

[114] Land book insertion no. 1689 for parcel no. 47, **R-011**, pp 1 and 2 (of PDF).

[115] Decision of the Land Book Court dated 20 May 1998, **R-053**.

[116] Cadaster decision No. 952-02-9-31/03 relating to Dunavska 17-19 dated 22 November 2003, **C-165** and the Decision of the Cadastre from 12 September 2011, **R-054**.

[117] Decision of the Cadastre from 12 September 2011, **R-054**.

[118] Land book insertion no. 1689 for parcel no. 47, **R-011**, pp 1 and 2 (of PDF).

2003 – 2020	**State ownership and City of Belgrade's right of use.**[119] In November 2003, each of the 16 objects was inscribed separately, however, they were also not identified in any way (e.g. the surface area was not specified). At that time, the City of Belgrade was inscribed as the holder of the right of use over these 16 objects, while the objects were subject to State ownership. At some point after 2003, the Cadastre erased five objects from its records. 11 objects remained inscribed and, for the first time, the objects were identified by their surface area. The City of Belgrade remained inscribed as the holder of the right of use over the objects.[120]
2020 onwards	**Ownership of the City of Belgrade** of 11 Objects.[121]

b) **Overview of inscriptions at Dunavska 23**

Time period	Inscription in the Land Books / Cadastre
	Inscriptions for the land at Dunavska 23
1950 – 1972/3	**State ownership.**[122] In 1968, Luka Beograd was inscribed as the holder of the right of use over the part of the parcel no. 39/1[123] with the surface area of 13,900 m^2.[124] It remained inscribed as the holder of the right of use until November 2003, when the City of Belgrade was inscribed.[125]
1972/3 – 1998	**Social ownership.** [126]
1998 – 2011	**State ownership.** [127] In 2003 the City of Belgrade was inscribed as holder of the right of use. [128]
2011 onwards	**Ownership of the City of Belgrade.** [129]

[119] Cadaster decision No. 952-02-9-31/03 relating to Dunavska 17-19 dated 22 November 2003, **C-165**.

[120] Excerpt from Cadaster dated 23 March 2023, relating to land plot No. 47/1 dated 23 March 2023, **C-162**; Excerpt from Cadaster dated 23 March 2023, relating to land plot No. 47/2 dated 23 March 2023, **C-163**; Excerpt from Cadaster dated 23 March 2023, relating to land plot No. 47/3 dated 23 March 2023, **C-164**.

[121] Decision of the Cadastre dated 10 January 2020, **R-055**.

[122] Land Book insertion no 2461, **R-056**.

[123] Land Book insertion no 2461, **R-056**.

[124] Land Book insertion no 2461, **R-056**.

[125] Cadaster decision No. 952-02-9-31/03 relating to Dunavska 23 dated 22 November 2003, **C-184**.

[126] Land Book insertion no. 1893, **R-048**, pp. 2 and 3 (of PDF).

[127] Decision of the Land Book Court dated 20 May 1998, **R-053** and Excerpt from the Land Books of 8 October 2002 for parcel no. 39/1, **R-057**.

[128] Cadaster decision No. 952-02-9-31/03 relating to Dunavska 23 dated 22 November 2003, **C-184**.

[129] Decision of the Cadastre from 12 September 2011, **R-054**.

Inscriptions for the Objects at Dunavska 23	
1950 – 1972/3	Land Books recorded seven objects and part of another object at the parcel no. 39/1.[130]
1972/3 – 2003	Only one object was recorded in the Land Books with the note that there is no proof of ownership.[131]
2003 onwards	In November 2003, **the City of Belgrade** was inscribed as the holder of the right of use over 34 objects that were inscribed in the Cadastre in February 2003, during the establishment of the Cadastre.[132] At present, the ownership status of the objects which are the subject of the present case, is as follows: (i) the owner i.e. holder of the object no. 9 on the parcel no. 39/1 is not determined;[133] (ii) object no. 1 on the parcel no. 39/12 is subject to State ownership with the City of Belgrade registered as the possessor[134] and (iii) the owner i.e. holder of the object no. 9 on the parcel no. 40/5 is not determined.[135]

c) Inscription of the City of Belgrade in 2003

76. As already noted, in 2001 the procedure of establishment of the Cadastre had begun. At that time, the inscription for the Dunavska Plots showed these to be in state ownership. No holders of the right of use were inscribed over the land at Dunavska 17-19, while Luka Beograd was inscribed as the holder of the right of use over the part of the land at Dunavska 23, i.e. the part of the parcel no. 39/1. At Dunavska 17-19, there were 16 objects jointly recorded in the Land Books without any identification. They were inscribed as social ownership. In Dunavska 23, only one object was recorded with the note that there was no proof of ownership.[136]

[130] Land Book insertion no 2461, **R-056**. The parcel no. 39/1 in 1950 had different surface area than the currently existing parcel no. 39/1 (the surface area of that parcel has been changed several times).

[131] Land Book insertion no. 1893, **R-048**, p. 2 (of PDF) and the Excerpt from the Excerpt from the Land Books of 8 October 2002 for parcel no. 39/1, **R-057**, p. 1 and 3 (of PDF).

[132] Cadaster decision No. 952-02-9-31/03 relating to Dunavska 23 dated 22 November 2003, **C-184**.

[133] Excerpt from Cadaster dated 23 March 2023, relating to landplot No. 39/1 dated 23 March 2023, **C-171** and Excerpt from the Cadastre from 4 September 2023 for the parcel no. 10678, **R-058**. It should be noted that the cadastral parcel no. 39/1 changed its designation number to no. 10678, whereas the object no. 9 changed its designation number to no. 16.

[134] Excerpt from Cadaster dated 23 March 2023, relating to landplot No. 39/12 dated 23 March 2023, **C-172**.

[135] Excerpt from Cadaster dated 23 March 2023, relating to landplot No. 40/5 dated 23 March 2023, **C-173**.

[136] Excerpt from the Land Books from 8 October 2002 for parcel no. 47, **R-059**, pp 1 and 3 (of PDF) and the Excerpt from the Land Books of 8 October 2002 for parcel no. 39/1, **R-057**, pp 1 and 3 (of PDF).

77. In August 2001, in the procedure of establishment of the Cadastre, the City of Belgrade addressed the relevant Cadastre unit at the Municipality of Stari Grad and requested transfer of the right of use over the land from Luka Beograd to the City of Belgrade,[137] in accordance with the 1975 Agreement entered between the City and Luka Beograd.[138] In October 2001 Luka Beograd opposed the City's request.[139] After conducting the relevant procedure, in November 2003, the Cadastre rendered a decision by which it allowed that instead of any unidentified holder(s) of the right of use, the City of Belgrade was inscribed in the Cadastre as the (sole) holder of the right of use over, inter alia, the parcel no. 47 and 16 Objects on it (Dunavska 17-19). This decision also provided for a change of the holder of the right of use over the parcel no. 39/1 (Dunavska 23). Specifically, the City of Belgrade became the new holder of the right of use over the land instead of Luka Beograd. Furthermore, the City of Belgrade was inscribed as the holder of the right of use over 34 objects on the parcel no. 39/1.[140] Luka Beograd appealed against the Cadastre's decision for reasons that related to parcels nos. 47 and 39/1, but also other parcels that were the subject of 1975 Agreement.[141] Acting as the second instance authority, in May 2004, the Republic Geodetic Authority rendered a decision by which it dismissed Luka Beograd's appeal, finding that the 1975 Agreement constituted a valid legal ground for inscription of the City of Belgrade.[142]

78. Claimants argue that these registrations of the City over the objects were erroneous.[143] However, unlike Luka Beograd, Obnova failed to address the Cadastre during its formation, i.e. in the public inspection procedure, and to dispute the inscription of the City of Belgrade. Therefore, as noted by Prof Jotanovic:

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[137] Request for transfer of the right of use over the real estates submitted by the Beoland dated 6 August 2001, **R-049**.

[138] Luka Beograd in an unhindered manner disposed of its real estate by concluding the Agreement on Regulation of the Property-Right Relationships Related to the Usage of the Construction Land Intended for the Spatial Development of the Port of Belgrade with the City of Belgrade on 6 March 1975. The 1975 Agreement concluded between the City of Belgrade and Luka Beograd on 6 March 1975, **R-060**.

[139] Request for suspension of changes in the Cadastre submitted by Luka Beograd on 12 October 2001, **R-061**.

[140] Cadaster decision No. 952-02-9-31/03 relating to Dunavska 23 dated 22 November 2003, **C-184** and Cadaster decision No. 952-02-9-31/03 relating to Dunavska 17-19 dated 22 November 2003, **C-165**. Claimants' Serbian law experts state that the said Decision provided to them was heavily redacted, however, it should be noted that the redacted part concerns only other cadastral parcels which are irrelevant for this case.

[141] Appeal against the Decision from 22 November 2003 submitted by Luka Beograd on 6 January 2004, **R-062**.

[142] Decision of the Republic Geodetic Authority of 31 May 2004, **R-063**.

[143] Memorial, paras 70 and 142; **Živković Milošević ER-1**, para 221.

> *the inscription of the City of Belgrade as the holder of right of use of the objects in Dunavska 17-19 and 23 in November 2003 did not infringe upon any rights of Obnova. Obnova did not apply as an interested party (a party with legal interest) during the public announcement for the presentation of data and for determination of ownership rights and other property rights over the real estate*[144]

79. It is also worth noting that the inscription of the City of Belgrade as the user of the objects did not bring any benefit to the City. The City already had rights over the land that were transferred to it by the 1975 Agreement[145] and that were registered in November 2003 when the City inscribed its right of use over the Dunavska Plots[146] (later on, in 2011, the City also inscribed its ownership right over that land).[147] At the same time, as explained in Section B.II above, all Objects at Dunavska 17-19 and 23 had to be demolished upon the request of the City since that was envisaged in the construction permits and since that is prescribed for the objects constructed on someone else's land.[148] In other words, even without being the owner of the Objects, nothing would change for the City as it would remain the owner of the land while, whoever built the Objects, would be required to demolish them.

80. Finally, for the sake of accuracy, Respondent notes that Claimant alleges that "*on 7 December 2003, the Cadastre, again in error, registered the City of Belgrade as the owner of most of Obnova's buildings at Dunavska 17-19 and certain of Obnova's buildings at Dunavska 23.*",[149] with reference to "*Cadaster decision No. 952-02-9-31/03 dated 7 December 2003, **C-166.***" As can be seen from this document, it was only a draft

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[144] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 42.

[145] The 1975 Agreement concluded between the City of Belgrade and Luka Beograd on 6 March 1975, **R-060**. From the Annex 1 to the 1975 Agreement it can be clearly seen that the subject of transfer from Luka Beograd to the City of Belgrade were cadastral parcels 47 and 39/1, Contract between Preduzeće luka i skladišta Beograd and Cityof Belgrade (1975), **C-167**, p. 9 (of PDF). However, according to the Annex 3 these parcels remained in temporary possession of Luka Beograd until the land is brought to its intended urban purpose. Annex 3 to the 1975 Agreement, **R-064**, p. 2 (of PDF).

[146] Cadaster decision No. 952-02-9-31/03 relating to Dunavska 23 dated 22 November 2003, **C-184**.

[147] Decision of the Cadastre from 12 September 2011, **R-054**.

[148] Construction permit No. 5034 dated 31 October 1949**, C-150**; Construction permit No. 1846 dated 21 April 1953, **C-151**; Construction permit No. 730 dated 22 March 1954, **C-152**; Construction permit No. 4542 dated 31 May 1954, **C-153**; Construction permit No. 18578 dated 2 November 1954, **C-155**; Construction permit No. 21817 dated 24 December 1954, **C-156**; 1980 Law on Basic Ownership Relations, **R-065**, Article 25(1).

[149] Memorial, para 70.

decision – it repeats the same sentences over and over again, and it has no signature nor stamp.[150] Most importantly, contrary to what Claimants state, the City was never registered based on this draft document. This exhibit should simply be ignored.

d) Obnova had no rights to be inscribed in the Cadastre

81. Claimants admit that Obnova "*started to take first steps to put its records in order*" only in March 2003.[151] At the same time, Claimants allege that before then, even though there was mandatory registration of State and social ownership, this obligation was ignored and so, Obnova's alleged property rights were not registered.[152] Claimants fail to provide any proof for this statement. In fact, it was Obnova itself that refrained from registering its alleged property rights. This is evidenced by the following.

82. First, the record shows that Obnova as a socially-owned enterprise was inscribed as the holder of the right of use over certain land in Valjevo, the city in western Serbia, in 1982. In other words, Obnova was careful to have its right of use registered where it could, and did so in Valjevo, but refrained from seeking registration with respect to Dunavska street properties, which it leased.[153] Second, Obnova refrained from taking part in the public inspection procedure during the establishment of the Cadastre for the municipality of Stari Grad where the Dunavska Plots are located. This is another indication that Obnova was probably aware at the time that it did not have any rights whose registration it could seek. On the other hand, the City of Belgrade and Luka Beograd participated in these proceedings, as they had the rights over the Dunavska Plots to register.[154]

83. Obnova has addressed the Cadastre twice, first time in 2003 and then in 2015. As will be explained below, in both cases, Obnova's request for inscription in the Cadastre was groundless.

aa) Obnova's request from March 2003 was groundless due to the lack of evidence

84. Only after the formation of the Cadastre for the Municipality Stari Grad, on 18 March 2003, Obnova (being still a socially-owned enterprise) filed the request for

[150] Cadaster decision No. 952-02-9-31/03 dated 4 December 2003**, C-166**.

[151] Memorial, para. 67.

[152] **Živković Milošević ER-1**, paras 98-99; Memorial, para 64.

[153] Land Book Excerpt for Valjevo land, **R-066**.

[154] See para 40 above.

inscription of the right of use over the Objects on parcel no. 47.[155] Claimants state that the Cadastre failed to act and simply ignored Obnova's request.[156] This is misleading.

85. With its application, Obnova submitted six temporary construction permits for Objects on parcel no. 47, but for 10 Objects on parcel no. 47 it failed to provide any documents. Obnova also requested inscription for one Object on parcel no. 39/1 in support of which it did not provide any documents.[157]

86. Immediately after receiving Obnova's request, in the period from 24 to 28 March 2003, the Cadastre tried to contact Obnova, however, no one responded to these calls at Obnova's phone numbers.[158] Eventually, the Cadastre managed to get in touch with Obnova's general manager who informed them that Obnova did not possess any other real properties except those mentioned in the Cadastre report from 9 April 2003 (i.e. the Objects at the Dunavska Plots), for which Obnova did not possess appropriate documentation.

87. Therefore, contrary to Claimants' allegations, Obnova's request was not ignored, it was simply baseless. Notably, even if the request had been indeed ignored, Obnova was entitled to file an appeal, on the account of the alleged "administrative silence".[159] Tellingly, it did not.

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[155] Request for registration of immovables to the Cadaster dated 18 March 2003, **C-013**.

[156] Memorial, para 67.

[157] Report of the Cadastre of 9 April 2003, **R-067**.

[158] Report of the Cadastre dated 28 March 2003, **R-068** (*"On March 24, 2003 SOE "Obnova" from Belgrade submitted a request to this authority for the registration of immovable property, and in connection with the accelerated privatization of the company. In the period from March 24, 2003 until March 28, 2003 attempts were made to contact the company in question by telephone from the letterhead, as well as telephone number 457-732 obtained through information 988, and based on the address from the letterhead, between 9:30 a.m. and 1:00 p.m. every day, but no one answered given phone numbers, considering the above, it is not possible to make a report for the mentioned company."*); Report of the Cadastre of 9 April 2003, **R-067** (*"The Real Estate Cadastre Department in Belgrade, as the actual and local competent authority, did not establish contact with the authorized persons of the company because no one answered the phone numbers on the company's letterhead. Along with the request, the Company submitted construction permits number 1846 dated April 21, 1953, 4542 from May 31, 1954, 5034 from October 31, 1949, 18578 from November 2, 1954, 730 from March 22, 1954 and 21817 from December 24, 1954 for buildings on cadastral plot number 47 of a temporary nature, while for all other buildings documentation has not been submitted (decisions on the allocation of land for use, urban planning, construction and use permits for buildings, facilities acquisition documents, etc)."*).

[159] Law on General Administrative Procedure, **R-069**, Article 208.

bb) Obnova's 2015 request for inscription was time-barred

88. The second time Obnova addressed the Cadastre for inscription of the ownership rights over the objects at parcel no. 47, was no less than 12 years later. On 24 September 2015, Obnova submitted a request[160] by which, as Claimants state, it "*tried to correct Cadastre records and register its ownership*".[161] On 22 March 2016, the Cadastre dismissed Obnova's request due to the expiry of the 10 years' deadline for rectification of alleged erroneous inscriptions of ownership rights, which started to run on 22 November 2003.[162] Obnova filed an appeal against the Cadastre decision but did not contest its conclusion that after expiry of the ten-years deadline. The Cadastre could not change the inscription.[163] The second instance authority, Republic Geodetic Authority, rejected Obnova's appeal, confirming that the Cadastre correctly referred to the ten-year prescription period for the rectification of the erroneous inscriptions.[164]

89. This approach was correct and in line with the relevant court practice.[165] If Obnova considered that the inscriptions of the right of use of the City of Belgrade and the ownership right of the Republic of Serbia from November 2003 were erroneous, as Claimants now state,[166] Obnova could request the rectification of the said "error" in administrative proceedings before Cadastre until November 2013. Since Obnova failed to do so, the Cadastre could not "correct" the inscription. After November 2013 this became an issue that only the courts could decide.[167]

90. Claimants also allege that in 2021, Obnova received some maps of the parcel no. 47 (including maps prepared by privately-owned enterprises[168]) from the Republic Geodetic Authority which contained annotations confirming that Obnova was, respectively, the

[160] Obnova's request for ownership registration in the Cadaster dated 18 May 2023, **C-035**.

[161] Request for Arbitration, heading N, p. 82 (of PDF).

[162] Decision of the Cadaster Office No. 952-02-6-1732/2015 dated 22 March 2016, **C-036**.

[163] Obnova's appeal dated 1 April 2016, **C-037**

[164] Decision of the Republic Geodetic Authority from 9 May 2016, **R-070**.

[165] Legal Interpretation of the Civil Law Department of the Appellate Court in Kragujevac dated 21 January 2013**, R-071**. Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 44 and 45.

[166] Memorial, paras 70-72.

[167] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 44 and 45.

[168] Letter from Geodetic Authority of Serbia to Obnova from 18 February 2021, **C-329**, pp. 8-9 (of PDF).

user or the owner of the premises at Dunavska 17-19.[169] However, the 2004 map was prepared by a privately-owned geodetic company. In any case, any annotations on maps have no legal significance with respect to property rights, which can be acquired solely by inscription in the Land Books or the Cadastre.[170] Thus, the maps or handwritings do not constitute any proof that Obnova ever acquired the right of use or the ownership right.

91. In summary, Obnova never had any rights to the Dunavska Plots or the Objects to register in the Land Books or the Cadastre.

IV. Obnova did not have any rights over the Objects

92. According to Claimants and their experts, Obnova acquired the right of use over the Objects by virtue of having built them.[171] Claimants also allege that after Obnova's privatisation in 2003, Obnova's (unsubstantiated) right of use over the Objects automatically converted into a right of ownership.[172] Both these conclusions are inaccurate.

93. First, Obnova did not have the right of use over the Objects before privatisation in 2003 (see **Section 1. below**). Second, Obnova did not acquire any rights of ownership over the Objects after or as a result of its privatisation (see **Section 2. below**).[173]

1. Obnova did not acquire any rights of use over the Objects before privatisation

94. Claimants' assertion that Obnova acquired a right of use over the Objects by virtue of having constructed them is without merit. There is no legal or factual basis to support this position. On the contrary, Obnova only had a right *to* temporarily use the objects on Dunavska 17-19 for which temporary construction permits had been issued (see **Section a)** below). As for the other Objects on Dunavska 17-19 and Dunavska 23, for

[169] Memorial, para 145.

[170] The Law on Land Books,**R-072** paragraph 4 (1); The 1992 Law on State Survey and Cadastre, **R-050**, Article 5 (1); 2009 Law on State Survey and Cadastre, **R-051**, Article 60 (1); Law on Procedure on Registration in the Real Estate and Utilities Cadastre 2018, **R-073**, Article 3 (1).

[171] Memorial, para 36.

[172] Memorial, paras 36, 44 and 50. **Živković Milošević ER-1**, paras 24, 25, 207, 143 and 215.

[173] Respondent's arguments are based on the assumption that Obnova indeed constructed the objects at Dunavska Street, which Respondent disputes. See above Section B.II (demonstrating that Claimants have not proven Obnova constructed the objects at Dunavska Street).

which no construction permits were issued, Obnova simply had no rights *of* use (see **Section b)** below).

a) Obnova only had had a right to temporarily use the Objects based on temporary construction permits

95. With respect to the Objects at Dunavska 17-19 for which Obnova received construction permits, Claimants' legal experts state that Obnova acquired rights of use over these buildings because it had built them as a public or in other cases as a socially-owned enterprise. They explain that "*the buildings built by Obnova while it was a state economic enterprise had the status of common people's property*". After Obnova became a socially-owned enterprise, these buildings became socially-owned property, while the *"buildings built by Obnova following the change were automatically recognized as being in social ownership. In both cases, Obnova had the right of use, as an emanation of social ownership, over these buildings*."[174]

96. Claimants' legal experts do not provide any explanation for their conclusion that before privatisation, Obnova had the right of use over the objects at Dunavska 17-19. They do not refer to a single piece of legislation to support their stance, nor do they explain how they were able to determine that Obnova actually built the objects for which the permits were issued.[175] The same goes for Claimants' Memorial. Their case in this regard is built upon unsupported assertions.

97. As explained in Section B.II, Obnova obtained seven construction permits for Dunavska 17-19, which allowed the construction of five Objects for temporary use (three of them being canopies) and one plumbing installation for a temporary object. All these Objects were constructed on the land that Obnova was allowed to use only as the lessee based on a series of lease agreements concluded with the City of Belgrade or Luka Beograd in the period from 1953 to 2006. The construction permits for all these Objects (but one plumbing installation) expressly stipulated that they had to be demolished at the request of the City of Belgrade without the right of its owner to request any damage compensation. Claimants' experts completely ignore these facts.

98. As explained by Respondent's expert, because these objects were built according to temporary construction permits, Obnova acquired a right to temporarily use the Objects. This right could not be converted to the permanent right of use (as emanation of the ownership right), as there is no legislation allowing for such conversion. Obnova's right

[174] **Živković Milošević ER-1**, paras 126-128.

[175] **Živković Milošević ER-1**, paras 126-138.

to temporarily use each object ceases to exist whenever the owner of the land (the City of Belgrade) requests that object's removal. This is supported by the fact that the temporary construction permits expressly stipulate that Obnova is not entitled to any damages for the value of the temporary objects that it is obliged to demolish as soon as so requested by the owner of the land.[176] Indeed, the City of Belgrade's Land Directorate notified Obnova that the Objects at Dunavska 17-19 had to be demolished by sending the letter from 24 February 2016.[177]

b) <u>Objects constructed without construction permits</u>

99. With respect to the objects constructed without any permits at Dunavska 17-19 and 23, Claimants and their experts again do not offer any legal basis to support their conclusion that Obnova obtained the right of use over them.[178] Nor do they provide any evidence to confirm which objects Obnova has built.

100. In any event, as of 1948, until today, the relevant legislation provided that construction of objects is only permitted with a construction permit and that objects that are constructed without such permits shall be demolished.[179]

2. <u>Obnova did not acquire ownership rights over the Objects after privatisation</u>

101. According to Claimants, as a consequence of privatisation, Obnova's alleged right of use over the Objects, which were all listed in the privatisation documents for Obnova, automatically (by force of law) converted into full private ownership of the buildings.[180] As a starting point, Claimants' are plainly wrong since, as explained above, Obnova did

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[176] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 27, 46-50.

[177] Letter from the Land Directorate to Obnova from 24 February 2016, **C-327**.

[178] **Živković Milošević ER-1**, paras 126-138, 200-213.

[179] Basic Regulation on Construction, Official Gazette of theFederal People's Republic of Yugoslavia, No. 46/48, **R-074**, Article 16(1); Regulation on Construction, Official Gazette of the Federal People's Republic of Yugoslavia, No. 14/52, **R-075**, Article 23; 1967 Basic Law on Construction of Investment Facilities, **R-076**, Article 18; Law on Construction of Investment Facilities from 1973, **R-077**, Article 7(1); (2); Law on Construction of Facilities from 1984, **R-078**, Articles 43(1), 95(2); Law on Construction of Facilities from 1995, **R-079**, Articles 24(1), 51; The 2003 Law on Planning and Construction, **R-040**, Articles 88(1), 141; Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 51-53.

[180] Memorial, para 50.

not have any rights of use over the Objects that could have been converted to ownership right at the time of privatisation.[181]

102. In addition, Respondent will show that: the Obnova's Privatisation Program (the "**Privatisation Program**") was prepared by Obnova (see **Section a)** below; the Privatisation Program did not indicate that Obnova had the right of use over the Objects which was capable of being converted into ownership rights (see **Section b)** below; the documentation enclosed to, and referred in, the Privatisation Program also made it clear that Obnova did not have a right of use over the Objects (see **Section c)** below). Obnova also failed to prove before the Serbian courts that it had such right (see **Section d)** below).

a) The Privatisation Program was prepared by Obnova

103. Claimants' legal experts describe the privatisation program as the main document in a privatisation which must be approved by the Privatisation Agency prior to privatisation.[182]

104. Under the Law on Privatisation, which was applicable in 2003, the privatisation program was to be prepared and adopted by the company undergoing privatisation, i.e. the privatisation subject.[183] The Privatisation Agency was then "*obliged to render a decision either on acceptance, return for corrections or amendments of the program...*".[184] The Law on Privatisation Agency provided that: "*[i]n performing of the tasks of control of the privatization procedure the Agency examines compliance of a privatization program or restructuring program with the regulations"*.[185] Further, the Regulation on Public Auction provided that "*[i]f the Privatization program has been prepared in accordance with the law and this regulation, the Agency shall render the resolution on approval of the Privatization program ...*".[186] In other words, the Privatisation Agency's task was not to examine whether the information provided for in the privatisation program by the subject of privatisation was accurate or not, but merely to verify whether the privatisation program contained all elements required by the law and respective by-laws.[187]

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[181] See above Section IV.1.

[182] **Živković Milošević ER-1**, para 143.

[183] 2003 Law on Privatisation, **R-080**, Article 21 (2) and Article 22 (2).

[184] 2003 Law on Privatisation, **R-080**, Article 22 (3); (4).

[185] Law on Privatisation Agency, **R-081**, Article 10 para 1 item 2) p 2.

[186] Regulation on the Sale of Capital and Property by Public Auction, **R-082**, Article 53.

[187] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 78.

105. This understanding was also confirmed by Serbian court practice. In one of its decisions, the Commercial Appellate Court concluded that the Privatisation Agency was obliged only to check whether the privatisation program had the content envisaged by the applicable regulations, i.e. whether it contained all the required data. However, the court clarified that the Privatisation Agency did not control the veracity of data contained in the program. Accordingly, the Privatisation Agency could not be held liable for damages resulting from the inaccuracy of the privatisation program.[188]

106. The Supreme Court of Serbia reached a similar conclusion, finding that the Privatisation Agency could not be held liable for damages related to inaccuracy of information on the privatisation subject because the buyer "*could have performed the inspection of the privatization documentation*". The Supreme Court also considered that the Agency did not give any representations and warranties other than those explicitly specified in the privatisation agreement, "*while the buyer confirmed that he had had the opportunity to perform the examination and review of the privatization subject, its funds and financial and business activities and that he fully relied on his own examination and review when buying the sales capital*".[189]

107. In Obnova's case, it was expressly stated in the Privatisation Program that the information contained therein had not been independently verified. The Privatisation Program contained a Notification on Limitation of Liability of the Privatisation Agency which, *inter alia*, stated that the program was meant for informational purposes only and that the data, information, statements and opinions contained therein were obtained from the privatisation subject, i.e. Obnova. It was also stated that the Privatisation Agency had not independently verified the Privatisation Program and did not take the responsibility for: (i) the accuracy and comprehensiveness of the data, information, statements and opinions contained in the Program or (ii) any direct or indirect damages, including loss of profit, due to the inaccuracy and incompleteness of such data, information, statements and opinions. Finally, the Notification stated that all prospective buyers were entitled to perform a scrutiny and analysis of the company, including the information contained in the Privatisation Program, and consult with their advisors before they submitted applications for participation in the public auction and took part in the bidding process.[190]

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[188] Judgement of the Commercial Appellate Court no. Pž. 10609/2010 from 27 January 2011, **R-083**; Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 80.

[189] Judgement of the Supreme Court of Serbia No. Prev 197/2007 from 27 December 2007, **R-084**; Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 80.

[190] Privatisation Program, **R-046**, p 1 (of PDF) (*"The Privatization Program is meant for informational purposes only [...] Having in mind, that the Privatization Program was submitted by the company itself and that is not independently verified by the Privatization Agency, the Agency does not take the responsibility for: 1. accuracy*

Also, the Privatisation Program contained a statement on accuracy of the given data which was signed by the general manager of Obnova.[191]

108. Thus, Mr Velickovic, who concluded the Privatisation Agreement for Obnova in 2003, and Mr Obradović, to whom the Privatisation Agreement was later assigned, were themselves responsible for conducting examinations of Obnova and its property and verifying the statements made in the Privatisation Program.[192]

109. The fact that Privatisation Agency did not assume any responsibility for the information contained in Obnova's Privatisation Program means that its approval of the Program did not signify any official conferral or confirmation of alleged property rights in favour of Obnova. The Privatisation Program merely indicated the views of Obnova's then-management as to the status of company's assets and liabilities, not the view of the Privatisation Agency.

b) Information in the Privatisation Program indicated that Obnova had no right *of* use over the Objects

110. The Privatisation Program (prepared by Obnova) contained 21 pages of information on, inter alia, Obnova's properties, land, and liabilities. It also included almost 300 pages of appendices, including excerpts from the Land Books and Cadastre, agreements on leasing of equipment, financial statements, and a list of fixed assets.[193] It expressly stated that

and comprehensiveness of the data, information, statements and opinions contained in the Privatization Program and 2. Any direct or indirect damages, loss of profit, i.e. costs incurred due to inaccuracy and incompleteness of the data, information, statements or opinions contained in the Privatization Program. […] All potential buyers may in person perform the checks and analysis of the company, as well as the information contained in the Privatization Program and to consult with their advisors before they submit applications for participation in the public auction and take part in bidding accordingly."). As Claimants submitted only part of the Privatisation Program as **Exhibit C-015**, the whole document is thus provided by the Respondent.

[191] Privatisation Program, **R-046**, p 10 (of PDF); Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 79 and 82.

[192] This was also provided in the Annex of the Privatisation Agreement concluded between the Privatisation Agency and Mr. Obradovic ("*The Buyer, also, confirms that the Assignor allowed him to conduct examinations and review of the of the privatization subject, its property and financial operations, and that he fully relies on his own examination and review when assuming the Basic Agreement, and that he will not raise any objections towards Agency in that regard*."). Annex to Obnova's privatization agreement dated 22 December 2005, **C-312**, Article 3(2); Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 81.

[193] Privatisation Program, **R-046**, pp 2 and 11 (of PDF).

Obnova did not own any land or have the right of use over any construction land.[194] It incorrectly stated that Obnova did not lease any property as a lessee.[195] At the same time, it contained a list of Obnova's largest creditors as of 31 December 2002, which included Luka Beograd.[196]

111. With respect to the objects at Dunavska Street, the Privatisation Program stated that Obnova was the user of 15 objects on land parcel no. 47 located at Dunavska 17-19 and 8 objects on land parcel no. 39/1 located at Dunavska 23. It noted these objects were in some cases of "*temporary nature*" or constructed "*without planning, construction, and use permits*":

> ***Annotation****: The report from the State Geodetic Authority No. 952-297/03 dated 9 April 2003, and the supplemental Report dated 20 May 2003, was submitted regarding the status of immovables. According to the Report from SGA[197], the subject of privatisation submitted the request for registration of objects listed in table 2.2 on cadastral parcels 39/1, 47, 42/35, and 1113 CM Stari Grad. With the request, the subject of privatisation submitted construction permits for objects on cad. parc. 47 that are of temporary character, while for all other objects it did not submit a single document that proves the right of use of facilities. Owners or holders of objects were not registered for the aforementioned cadastral parcels in the cadastral records of the immovable cadastre CM Stari Grad, and all facilities are of a temporary character and nearly all were constructed, with the exception of facilities on cad. parc. 47, without planning, construction, and use permits. Object listed in number 39 is prefabricated and, as stated in the report from the SGA, the subject of privatisation did not specify the grounds for use of office space at this address (subject of privatisation performs its business activities at Dunavska St. 17-19 in Belgrade). According to the statement of the subject of privatisation, dated 8 July 2003, one office was leased out while the remaining space in the facility is vacant. The facility is registered in the accounting sense in the ledgers of the affiliated entity of the subject of privatisation "Obnova-marketing" DOO"*[198]

112. The Privatisation Program thus made clear that Obnova's right to use the Objects was either temporary or unsupported by any documents.

[194] Privatisation Program, **R-046**, pp 6-7 (of PDF).

[195] Privatisation Program, **R-046**, p 9 (of PDF).

[196] Privatisation Program, **R-046**, p 8 (of PDF).

[197] SGA stands for State Geodetic Authority.

[198] Privatisation Program, **R-046**, pp 3-5 (of PDF) (emphasis added).

113. In any event, as explained by the Appellate Court of Belgrade, a privatisation program does not constitute proof of any property rights. To establish the existence of such rights, the privatisation subject must furnish the necessary documentation from the Land Books or Cadastre:

> *Privatisation program cannot be considered as the proof of the ownership right, i.e. the permanent right of use of the privatisation subject over the recorded property, having in mind that it was stipulated that the privatisation subject must enclose to the privatisation program the documentation that is the integral part of the privatisation program, inter alia, the certified copies of the excerpts from the land books, i.e. other property and legal documentation for real estates over which the privatisation subject has the ownership right or the permanent right of use.*[199]

114. As explained below, the Privatisation Program did not contain any documentation establishing that Obnova had an ownership right or right of use over the Objects.

c) Documentation enclosed to Obnova's Privatisation Program did not prove any ownership or rights of use over the Objects

115. Obnova enclosed to its Privatisation Program excerpts from the Land Books and the Cadastre (**Section aa)** below),[200] temporary construction permits for parcel no. 47 (**Section bb)** below),[201] and its accounting documentation (**Section cc)** below)[202]. However, none of these documents stated or implied that Obnova was the holder of the right of use over the Objects.

aa) Excerpts from the Land Books and Cadastre did not confirm any rights of use

116. The Land Books and Cadastre excerpts enclosed with the Privatisation Program do not show that Obnova was the holder of the right of use over the Objects.

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[199] Decision of the Appellate Court in Belgrade, No. Gz 15525/2010 from 19 July 2012, **R-045**; Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 85-87.

[200] Privatisation Program, **R-046**, pp 40-47 and 14-29 (of PDF).

[201] Privatisation Program, **R-046**, pp 30-37 (of PDF).

[202] Obnova Privatization Program dated July 2003, **C-015**, pp 26-53 (of PDF). According to Claimants' legal experts, Serbia confirmed that Obnova's right of use over the buildings at Dunavska 17-19 was in Obnova's books at the time of its privatisation and refer to Obnova's inventory lists as the part of accounting documentation enclosed to the Privatisation Program. **Živković Milošević ER-1**, para 143.

117. In particular, excerpts from the Land Books from October 2002, showed that 16 objects on land parcel no. 47 were in social ownership.[203] An excerpt from the Cadastre from April 2003 mentioned only one object at this parcel, and noted that the owner had not been determined.[204] Obnova was not mentioned as the user of the Objects in either of these two excerpts.

118. Only one object on parcel no. 39/1 was inscribed in the excerpts from the Land Books from October 2002, noting that there was no proof of ownership.[205] The excerpt from the Cadastre from April 2003 stated that 34 objects were inscribed on this cadastral parcel, that they were built without a construction permit, and that the owner of the objects had not been determined.[206] As with the excerpts for parcel no. 47, Obnova was not mentioned as the user of these objects.

119. Obnova also enclosed to its Privatisation Program the Cadastre's reports prepared following Obnova's request for inscription of the right of use over the Objects in 2003.[207] They stated that Obnova did not have the appropriate documentation necessary for the inscription of the right of use over the Objects and that the only documentation Obnova had were construction permits for temporary objects.[208]

120. An interested buyer of Obnova could therefore clearly ascertain the status of Obnova's rights over the Objects based on the documentation enclosed to the Privatisation Program, which showed that Obnova (i) was not inscribed in the Land Books and the Cadastre as the holder of the right of use over the Objects,[209] and (ii) did not have appropriate documentation for inscription of its alleged right of use in the Cadastre.[210]

121. At the same time, the Privatisation Program and the accompanying documentation were contradictory as to the number of the Objects, and thus warranted further investigation

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[203] Privatisation Program, **R-046**, p. 40-43 (of PDF).

[204] Privatisation Program, **R-046**, pp. 26-29(of PDF).

[205] Privatisation Program, **R-046**, pp. 44-47 (of PDF).

[206] Privatisation Program, **R-046**, pp. 14-25 (of PDF).

[207] See paras 84-87 above.

[208] Privatisation Program, **R-046**, pp. 30; 12-13; and 39 (of PDF).

[209] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 87.

[210] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 88-97.

on the part of an interested buyer.[211] Such inconsistencies are yet another reason why the Privatisation Program and its supporting documentation do not provide accurate information on which objects Obnova allegedly had the right of use before privatisation (or subsequent right of ownership).

bb) Temporary construction permits enclosed to the Privatisation Program were not proper evidence of Obnova's right of use

122. Claimants' legal experts state that according to the 2001 Regulation on Public Auction, a subject of privatisation was able to prove its right of use over socially-owned property by submitting to the Privatisation Agency "*certified photocopies of excerpts from the land registry books or legal documentation for the real estate*".[212] They further claim that in practice, the right of use over the privatised assets could be proven by, among other things, providing evidence of building and occupancy permits, such as those held by Obnova.[213] This is misleading.

123. Claimants' legal experts ignore the fact that Obnova's alleged right of use over the Objects could not be proven simply by providing construction permits, since Obnova's construction permits were (i) issued for construction of temporary objects and (ii) did not cover all the Objects. Temporary construction permits are not proof of the ownership right or the permanent right of use.[214] This was confirmed by the Cadastre[215] as well as by

[211] As regards to the objects on parcel no. 47 at Dunavska 17-19, the Privatisation Program listed 15 objects, the Land Book's excerpt listed 16 objects, while the Cadastre's excerpt referred to only one object. It was also not specified which objects were built based on the construction permits and which were built without it. The Privatisation Program was even more confusing when it comes to the object(s) on parcel no. 39/1 at Dunavska 23. The Privatisation Program mentioned eight objects on parcel no. 39/1, the excerpt from the Land Books inscribed only one object, while the excerpt from the Cadastre stated that there were 34 objects on parcel no. 39/1. Privatisation Program, **R-046**, pp. 3, 40, 29, 44, 23, 24 and 25 of (PDF).

[212] Experts fail to cite a critical part of the provision to which they refer. Article 52(1), item 5) of the Regulation on the Sale of Capital and Property by Public Auction, **R-082** reads as follows:

> *"Along with the program, the subject of privatization shall also submit the following documentation:*
>
> *[…]*
>
> *5) certified photocopies of excerpts from the land registry books or legal documentation for the real estate over which subject of privatization has the ownership right or the permanent right of use."*

[213] **Živković Milošević ER-1**, para 141.

[214] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 46-50.

[215] Privatisation Program, **R-046**, pp 38, 12-13, 39 (of PDF).

the Higher Court of Belgrade.[216] In addition, as explained above, because the temporary construction permits cannot be connected to any of the objects on parcel no. 47 that were inscribed in the Cadastre, these permits do not prove ownership right in favour of Obnova over any object on that parcel.

124. For the Objects on parcel no. 39/1, the Privatisation Program referred to no documentation whatsoever. Clearly, at the time of its privatisation, Obnova had not established its right *of* use over these objects as well.

cc) Accounting documentation enclosed to the Privatisation Program was not proper evidence of Obnova's right *of* use

125. According to Claimants' legal experts, Serbia confirmed that Obnova's right of use over the objects at Dunavska 17-19 was reflected in Obnova's accounting books at the time of its privatisation in 2003, as stated in the Privatisation Program.[217] This is untrue.

126. As explained above, the Privatisation Agency did not verify or confirm any of the information contained in the Privatisation Program, let alone in Obnova's books. In any event, the contents of Obnova's accounting books are completely irrelevant for the purpose of establishing Obnova's alleged rights over these objects since, they were created by Obnova itself. As confirmed by the Serbian courts, "*accounting documentation could not represent the proof of property rights.*"[218]

d) The Serbian courts rightfully found that Obnova had failed to prove any rights over the Objects

127. As elaborated above, the Privatisation Program does not constitute proof as a matter of Serbian law of any property rights of the privatisation subject.[219] Obnova also did not enclose to its Privatisation Program any documents which would entitle it to inscription of its alleged right of use in the Cadastre (as evidently it has no such documents).[220] For

[216] Decision of the Higher Court in Belgrade No. 23. P. no. 1724/16 dated 22 September 2022, **C-168**, p 16 (of PDF). See also para 86 above.

[217] **Živković Milošević ER-1**, para 143.

[218] Judgement of the Commercial Court of Appeal, No. Pz 58/16 from 25 May 2016, **R-085**. Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 90 and 93.

[219] See above para 66.

[220] See above paras 110 and following.

these reasons, Obnova's privatisation could not serve as a basis for inscription of Obnova's ownership rights over the Objects in the Cadastre.[221]

128. While Obnova was entitled to initiate court proceedings to establish that, at the time of its privatisation, it had the right of use over the objects (which could be transformed to private ownership), it did not do so until 13 years after the privatisation, when it initiated three court proceedings in Serbia. The first proceeding related to the objects at Dunavska 17-19 for which Obnova had temporary construction permits[222] (**Section aa)** below). The second related to the objects at Dunavska 17-19 for which it had no construction permits[223] (**Section bb)** below). The third related to the objects at Dunavska 23, for which there was also no construction permits (**Section cc)** below).[224]

aa) <u>Obnova's claim was rightfully dismissed by the first instance court</u>

129. In November 2016, Obnova submitted a claim to the Higher Court in Belgrade requesting determination of its ownership right over the Objects that Obnova had allegedly constructed at Dunavska 17-19 based on temporary construction permits.[225] It also requested recognition of its alleged ownership over the land beneath the objects, on the basis that this land was needed for the Objects' regular use.[226]

130. The first instance court rejected Obnova's claim. It concluded that Obnova had not acquired the buildings at Dunavska 17-19 through acquisitive prescription, since it did not satisfy the good faith requirement and its possession of buildings at Dunavska 17-19 was not lawful. Obnova did not satisfy the good faith requirement because its construction permits were of temporary character i.e., Obnova "*was aware of the fact that* [it] *was allowed to construct temporary facilities that have to be demolished at any time upon request of the competent authority*."[227]

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[221] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 85-87, 88-97. In addition, Obnova had failed to specify the grounds for its use of office space at this address.

[222] Obnova's submission to the Higher Court in Belgrade dated 15 November 2016, **C-038**.

[223] Obnova's submission to the Higher Court in Belgrade dated 13 August 2019, **C-051**.

[224] Obnova's submission to the Higher Court in Belgrade dated 16 July 2019, **C-050**.

[225] These objects are listed in Annex A of Claimants' Memorial and discussed above in Section B.II. Obnova's submission to the Higher Court in Belgrade dated 15 November 2016, **C-038**.

[226] Request for Arbitration, para 86.

[227] **Živković Milošević ER-1**, paras 155-157, quoting from Decision of the Higher Court in Belgrade No. 23. P. no. 1724/16 dated 22 September 2022, **C-168**, p. 16.

131. Claimants as well as their experts criticise the court's decision, claiming that Obnova did not argue that it had acquired ownership over the buildings at Dunavska 17-19 through acquisitive prescription.[228] This is erroneous, as can be seen from the submission to the court filed on 17 February 2022, in which Obnova expressly stated that "*Claimant did acquire the ownership right through acquisitive prescription*" and explained why it was so in three paragraphs.[229]

132. In any case, Obnova's claim based on acquisitive prescription was indeed without merit. As explained by the first instance court, and as will be discussed further below in relation to Dunavska 23, possession which is not in good faith cannot lead to acquisition of the ownership right.[230] The court also rightly concluded that Obnova neither acted in good faith, nor had ever been in lawful possession of the objects, since it built the objects and acquired possession over them only based on the temporary construction permits. Obnova was well aware of the temporary character of the permits and that it was obliged, upon the request of the competent authority and without the right to seek any damage compensation, to demolish the objects, as this limitation was noted on each permit.[231]

133. Obnova did not disclose its lease agreements related to Dunavska 17-19 to the court. These agreements support the court's conclusion that Obnova had neither acted in good faith, nor had ever been in lawful possession, since the agreements demonstrate unequivocally that Obnova knew or ought to have known it had limited contractual rights to use the land as the lessee.

134. Claimants' legal experts disagree with the court's conclusion because, in their view, Obnova's objects are not temporary.[232] However, as explained in detail in Section B.II above, this view is wrong as a matter of Serbian law. They also argue that it is irrelevant whether Obnova's buildings and permits were temporary, since Obnova had acquired the right of ownership *ex lege* upon its privatisation.[233] This argument is baseless, as privatisation is not a means of or legal ground for acquiring ownership rights.

[228] **Živković Milošević ER-1**, para 158.

[229] Obnova's submission from 17 February 2022, **R-086**, p. 4-5 (of PDF). Obnova's submission was filed on behalf of Obnova by the same attorneys representing Claimants in this arbitration proceedings. Nevertheless, that did not stop them from pursuing apparently incorrect argumentation.

[230] See below para 145.

[231] Decision of the Higher Court in Belgrade No. 23. P. no. 1724/16 dated 22 September 2022, **C-168**, p. 16 (of PDF).

[232] **Živković Milošević ER-1**, paras 160-174.

[233] **Živković Milošević ER-1**, paras 158 and 159.

Privatisation only allows for the transformation of an *existing* right of use into the right of ownership. In other words, it can lead to ownership of a certain asset only if the privatisation subject previously had the right of use over the asset. As set out above, Obnova failed to establish that before privatisation it had such pre-existing rights of use (as emanation of ownership right) over the objects.[234]

135. Claimants are not brining a claim for denial of justice.

bb) Obnova withdrew its claim related to the Objects at Dunavska 17-19 built without necessary permits

136. In August 2019, Obnova submitted a claim to the Higher Court in Belgrade requesting determination of its ownership right over 11 objects at Dunavska 17-19, which Obnova allegedly constructed without construction permits. It also requested recognition of its ownership over the land on the basis that it was needed for the objects' regular use.[235] According to Claimants, Obnova never received a decision on the merits in this case.[236] Once again, Claimants' assertions are misleading.

137. In fact, a hearing was scheduled for 26 September 2019, at which Obnova failed to appear. The court thus rendered the decision that the claim was withdrawn, in accordance with the Law on Civil Procedure.[237] Obnova therefore could not possibly receive a decision on the merits. Obnova could have resubmitted the claim but never did.

[234] Obnova's submission to the Higher Court in Belgrade dated 15 November 2016, **C-038**; Obnova's submission from 17 February 2022, **R-086**; Obnova's appeal against judgement from 15 November 2022, **R-087**. It is worth noting that Obnova did not disclose its lease agreements related to Dunavska 17-19 to the court. These agreements support the court's conclusion that Obnova had neither acted in good faith, nor ever been in lawful possession, since the agreements demonstrate unequivocally that Obnova knew or ought to have known it had limited contractual rights to use the land as the lessee.

[235] Request for Arbitration, para 95. Obnova's submission to the Higher Court in Belgrade dated 13 August 2019, **C-051**.

[236] Request for Arbitration, paras 95-96.

[237] Minutes from the hearing before the Higher Court in Belgrade, No. 5844/2019 from 26 December 2019, **R-088** and Decision of the Higher Court in Belgrade, No. 5844/2019 from 21 July 2021, **R-089**. According to the Law on Civil Procedure, if a properly summoned claimant fails to appear at the hearing, the claim shall be deemed withdrawn. Law on Civil Procedure, **R-090**, Article 311.

cc) Obnova's claim related to the objects at Dunavska 23 is still pending

138. In July 2019, Obnova submitted a claim requesting the Higher Court in Belgrade to determine its ownership right over eight objects at Dunavska 23.[238] This case is still pending before the first instance court.[239]

139. Obnova argues that these objects were the subject of appraisal in the privatisation procedure but neither provides documentation in support of this (false) statement or the allegation that it constructed these objects, nor explains how it obtained the right of use.[240] Without prejudging the possible outcome of this case, Respondent again notes that the Privatisation Program does not represent proof of ownership or any other property rights, as confirmed by the Serbian courts.[241]

V. Obnova had no property rights to the Dunavska Plots

140. Claimants further allege that Obnova acquired ownership of the Dunavska Plot pursuant to Serbian real estate law. For Dunavska 17-19, Claimants argue that by constructing certain Objects at Dunavska 17-19, Obnova acquired a so-called permanent right of use over that land based on Law on Planning and Construction (notably Claimants do not argue the same for Dunavska 23).[242] This is incorrect. As the Objects were temporary, Obnova could not have acquired any permanent right of use of the land at Dunavska 17-19 (**Section 1.** below). As regards Dunavska 23, Claimants argue that Obnova "automatically" acquired the right of use of land through acquisitive prescription. This is wrong, as Obnova did not fulfil the requirements for the prescription (**Section 2.** below).

1. Dunavska 17-19 – the construction of the Objects did not give Obnova any permanent rights of use over the land

141. Claimants argue that because Obnova constructed certain Objects on Dunavska 17-19, it had a "*permanent right of use*" of the plots beneath the Objects.[243] Claimants' legal experts claim that the owner or holder of the right of use over an object built on "developed construction land" had a permanent right of use over the land beneath that object and

[238] Claimants' Memorial mentions only four objects at Dunavska 23.

[239] Request for Arbitration, paras 94 and 96.

[240] Obnova's submission to the Higher Court in Belgrade dated 16 July 2019, **C-050**, p 2.

[241] See para 106 above.

[242] Memorial, para 39.

[243] Memorial, para 39.

adjacent land required for regular use of the building.[244] The experts refer to the 2003 Law on Planning and Construction which defined the term "developed construction land" as "*land on which buildings have been built in accordance with the law, intended for permanent use*".[245] To further support their conclusion, Claimants' legal experts also refer to definitions of developed construction land contained in the previous laws governing construction land – the Law on Construction Land from 1975 and the Law on Construction Land from 1990.[246] This is misleading.

142. Obnova could not acquire the permanent right of use over the land by way of construction of the Objects at Dunavska 17-19, because that land was not developed construction land. The 1975 Law on Construction Land was the first to introduce the distinction between developed and undeveloped construction land. Developed construction land was defined as the land on which objects meant for permanent use were built (while undeveloped construction land was defined as the land on which objects were not built or on which there were temporary objects and auxiliary objects).[247] According to this law, the right of use over the land beneath the object and adjacent land required for regular use of the building could exist only in case of developed construction land.[248] Two conclusions derive from the above: (i) the land at Dunavska 17-19 is not developed construction land because the objects on that land were *temporary* objects or objects built without permits, i.e. they were not meant for permanent use; (ii) Obnova thus could not have acquired the permanent right of use over that land on Dunavska 17-19 (or Dunavska 23).[249]

143. Claimants also allege that Obnova's right of use of the Dunavska 17-19 (stemming from construction of the Objects) had priority over Luka Beograd's right of use (being an emanation of social ownership that Luka Beograd "*supposedly"* had between 1961 and 1975).[250] This is misplaced. First, as Respondent already explained in Section III. above

[244] **Živković Milošević ER-1**, paras 176 and 177.

[245] 2003 Law on Planning and Construction**R-040**, Article 75(2).

[246] **Živković Milošević ER-1**, para 176.

[247] Law on Construction Land from 1975, **R-091**, Article 13(2).

[248] Law on Construction Land from 1975, **R-091**, Article 17(1).

[249] Subsequent laws, i.e. Law on Construction Land from 1990 and from 1995, as well as the Law on Planning and Construction from 2003, regulated this question in the same manner as the Law on Construction Land from 1975, so the same conclusion applies for subsequent legal regimes. Law on Construction Land from 1990**, R-092**, Article 13 (2); Law on Construction Land from 1995, **R-093**, Article 18 (3); **R-094**; and 2003 Law on Planning and Construction, **R-040**, Article 75 (2); Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023 **RLO-001**, paras 66-72.

[250] **Živković Milošević ER-1**, para 178.

Luka Beograd was inscribed as the holder of the right of use over the Dunavska Plots, and therefore had the right of use over the land. Second, Obnova recognized this right of use when it concluded the lease agreements with Luka Beograd (as explained in Section I. above). There is no logical explanation why Obnova would have leased the land over which it – as Claimants now claim – had (priority) permanent right of use.

2. **Dunavska 23 - Obnova did not acquire right of use through acquisitive prescription**

144. As regards Dunavska 23, Claimants' legal experts state that they "*understand from Counsel that Obnova has had undisturbed possession of both the buildings and the land at Dunavska 23 for several decades*".[251] According to the experts (who did not investigate the possession of Dunavska 23), Obnova acquired the right of use (ownership) because it acted in good faith (which is to be presumed under the applicable laws) and had 20 years of undisturbed possession.[252] This is wrong.

145. Acquisitive prescription represents a type of acquisition of ownership right (i.e. right of use) in a case where a good faith possessor had an undisturbed good faith possession of the assets for a certain statutory-defined period. Ordinary acquisitive prescription takes place following 10 years of good faith[253] and lawful possession[254] owned by someone else.[255] Extraordinary acquisitive prescription takes place in case of an unlawful, but good faith possession, and only after 20 years.[256]

146. Obnova does not meet the conditions for acquisitive prescription (either ordinary or extraordinary). This is because, as outlined above, prescription is conditioned on good faith, and Obnova cannot be considered as a *bona fide* possessor of the Dunavska Plots.

147. Under the applicable law, good faith possession exists only if the possessor is not or may not be aware of the fact that he has no ownership right (or right of use as emanation of the ownership right) over the asset it possesses. Here, Obnova used the land as the lessee

[251] **Živković Milošević ER-1**, paras 201 and 202.

[252] **Živković Milošević ER-1**, paras 202, 204, 205, 206.

[253] Possession shall be deemed as in good faith if the possessor is not or may not be aware of the fact that the asset that possesses is not its ownership. 1980 Law on Basic Ownership Relations, **R-065**, Article 72(2).

[254] Possession shall be deemed lawful if it is based on valid legal ground required for acquisition of the ownership right and if the possession has not been acquired through force, fraud or by abuse of trust. 1980 Law on Basic Ownership Relations, **R-065**, Article 72 (1).

[255] 1980 Law on Basic Ownership Relations, **R-065**, Article 28 (2).

[256] 1980 Law on Basic Ownership Relations, **R-065**, Article 28 (4).

based on the lease agreements concluded in the period from 1953 to 2006 (see Section I.1.b) above). In other words, Obnova was *always* aware of the fact that Dunavska Plots were not in its ownership and that it had no right of use over Dunavska Plots.[257]

148. Serbian courts confirm that acquisitive prescription is not possible if the possessor was actually a lessor of the immovables as such possession is not *bona fide* within the meaning of the Law on Basic Ownership Relations:

> *In this particular case, in the situation when there is the agreement on use, i.e. lease of the apartment concluded for definite or indefinite term, the claimant cannot become the owner of the real estate through acquisitive prescription, given the fact that he was aware that he was the lessee and that he knew who was the owner, i.e. lessor, and besides the passage of time necessary for acquisition of ownership through acquisitive prescription the existence of good faith is also required for the entire time period which is reflected in the existence of the reasonable belief that it holds and uses asset as the owner. To the contrary, from the presented evidence during the first instance procedure, i.e. claimant's statement, obviously he must have been aware that it uses the apartment based on the lease agreement of the service apartment. Therefore, the claimant did not have either lawful or bona fide possession as a result of which the conditions for acquisitive prescription were not met in terms of the cited statutory provisions. Thus, the circumstance that based on this agreement he leased the apartment for more than twenty years, cannot lead to the acquisition of the ownership right over the subject apartment through the acquisitive prescription, due to the fact that the claimant was aware that it holds and uses the real estate as the lessee, and not as the owner, so the passage of time itself without the existence of bona fide possession cannot lead to acquisition of the ownership through acquisitive prescription.*[258]

149. The fact that the lease agreements envisaged that Obnova was actually prohibited from constructing the Objects without the lessor's consent and obliged Obnova to demolish them[259] makes the Claimants' argument on acquisitive prescription even more misplaced.

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[257] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 61-65.

[258] Judgement of the Appellate Court in Belgrade, No. Gz 2792/2019 from 10 April 2019, **R-095** (emphasis added).

[259] The lease agreement that Obnova concluded in 1953 with the City of Belgrade provided that upon expiry of the lease, Obnova shall be obligated to remove all constructed facilities from the property it leased or that the lessor shall be entitled to remove these facilities by itself, at the lessee's expense. Lease Agreement between Obnova and Serbia dated 10 April 1953, **C-007**, Article 5. Likewise, in the agreement concluded between Obnova and Luka Beograd in 1965, Obnova undertook to vacate the land free from persons, belongings and objects and

150. Due to the fact that Obnova never had *bona fide* possession, it could never acquire the right of use over the land at Dunavska Street by way of ordinary or extraordinary acquisitive prescription.[260]

151. Finally, Claimants' legal experts are also wrong that Obnova could have acquired the right of use of the Dunavska 23 plot based on Article 268 of the 1976 Law on Joint Labour.[261] According to the experts, this provision provided that if a socially-owned company acquired possession of an asset without a legal basis, the return of such asset could only be requested no later than ten years from the date on which the company acquired the possession.[262] Based on this, Claimants' legal experts conclude that since Obnova was in possession of the land since 1968, and the State did not object, then Obnova gained the right of use of this land. [263] However, this is a misinterpretation of Article 268 of the 1975 Law on Joint Labour, since this provision regulates the situation in which an asset that is not in social ownership becomes socially-owned without legal basis ("*If real estate has become a socially-owned asset without a legal basis.*"). It does not regulate the situation in which an asset that is already socially-owned "changes hands" between socially owned companies. In any case, this provision does not apply to Obnova's situation, since, as explained above, Obnova's possession over the Dunavska 23 plot resulted from the lease agreements concluded with Luka Beograd (i.e. it had legal basis). In such situation, acquisition of the right of use on the basis of a lease agreement would be contrary to the principle of good faith, which applied in socialism, as well.

to hand it over to Luka Beograd or otherwise Luka Beograd would have the right to seek compulsory discharge of the land *i.e.* demolition and removal of all objects and removal of all persons and belongings, at Obnova's expense. Article 3 (1); Lease agreement between Luka Beograd and Obnova dated 10 March 1965, **R-009**, Articles 3(1), 4. Finally, in the lease agreements from July 1983 and May 1985, Obnova undertook to refrain from any changes at the leased property, which also meant that it could not have constructed any objects at the land it leased from Luka Beograd. Agreement on Use of Warehouse Space and Performance of the Transhipment and Warehousing Services between Luka Beograd and Obnova dated 21 July 1983, **R-010**, Article 11; Agreement on Provision and Use of Transhipment, Warehousing and Other Services between Luka Beograd and Obnova of 1 April 1985, **R-012**, Article 11.

[260] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 63-64.

[261] Article 268 of the Law on Associated Labor (Official Gazette of the SFRY No. 53/1976)**, C-092**.

[262] Article 268 of the Law on Associated Labor (Official Gazette of the SFRY No. 53/1976)**, C-092**.

[263] **Živković Milošević ER-1**, paras 208-209.

VI. The 2013 DRP was not arbitrary and did not expropriate Obnova's rights

152. As outlined above, Obnova had no rights to the Objects or the Dunavska Plots that could have been expropriated by the 2013 DRP (i.e. had no right of use or ownership).

153. In any event and contrary to Claimants' allegations,[264] the 2013 DRP was in line with the general urban plans adopted earlier (and later), which envisaged only that the predominant purpose of the covered area (including the Dunavska Plots) will be for commercial use. These general urban plans made it clear that parts of these areas could be used for traffic infrastructure as subsequently provided for in the 2013 DRP (**Section 1.** below).

154. Furthermore, the 2013 DRP was adopted after a careful review and study of available options. Though Obnova was aware of the possible use of the Dunavska Plots for the bus loop as early as in 2008 it did not object to the draft 2013 DRP as part of the public inspection (**Section 2.** below).

155. As discussed above, the 2013 DRP could not have expropriated Obnova because Obnova never had property rights over the Dunavska Plots. In addition, Obnova is still using the Objects and the Dunavska Plots. Hence, according to Serbian law, the expropriation never occurred due to that reason as well (**Section 3.** below).

156. Finally, contrary to what Claimants argue, the Land Directorate did not acknowledge Obnova's right to compensation (and was not competent to do so) (**Section 4.** below) and Obnova did not initiate proper court proceedings to actually claim expropriation or compensation (**Section 5.** below).

157. Before explaining why Claimants' position as to the 2013 DRP is wrong, Respondent summarizes the distinction between the following types of urban plans envisaged under the applicable laws, as it is relevant to understand that the 2013 DRP's designation of the Dunavska Plots was no surprise and in line with relevant regulations:

- **General Plan and General Urban Plan** – the General Plan was introduced with the 2003 Law on Planning and Construction, while the General Urban Plan is the same level document envisaged by the later 2009 Law on Planning and Construction. Both plans were to be adopted for the entire City of Belgrade[265] – the General Plan was

[264] Memorial, paras 104-105.

[265] 2003 Law on Planning and Construction, **R-040**, Article 36(2).

adopted in 2003 (the "**2003 General Plan**")[266] and it was subsequently replaced by the General Urban Plan from 2016 (the "**2016 General Plan**").[267] These documents are strategic development plans which determine, *inter alia*, construction regions and their predominant purpose.[268] They serve as a legal basis for rendering the lower-level urban plans.

- **General Regulation Plan** – the adoption of this plan is mandatory for the City of Belgrade,[269] this plan is more detailed and regulates boundaries of the plan and scope of the construction area; division of the space into specific units and zones; predominant purpose of the land in zones and units; zones for which the detailed regulations plans shall be adopted; development rules and construction rules for the entire scope of this planning document, etc.[270]

- **Detailed Regulation Plan** – this type of plan is adopted for parts of the settlements, in accordance with the General Regulation Plan.[271] It contains detailed purpose of the land and the list of specific cadastral parcels and description of the locations for public purposes.[272] In the hierarchy of urban plans, the detailed regulation plan is the lowest-level plan which must be harmonized with the general plan.[273]

1. <u>The 2013 DRP was in line with the 2003 General Plan</u>

158. Claimants state that, the 2003 General Plan created the potential for a very interesting development possibility for Obnova, because it designated "all of the land" at Dunavska Plots as *"commercial zones and city centres"*. Claimants support this statement by

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[266] General Plan of Belgrade 2013, **C-025**.

[267] 2016 General Plan, **R-096**.

[268] 2003 Law on Planning and Construction, **R-040**, Article 36; 2009 Law on Planning and Construction**, R-097**, Article 23(1) and Article 24(1), item 2).

[269] 2009 Law on Planning and Construction**, R-097**, Articles 25(1), (4).

[270] 2009 Law on Planning and Construction**, R-097**, Article 26.

[271] 2003 Law on Planning and Construction, **R-040**, Article 39, (1), (2). After the adoption of the 2009 Law on Planning and Construction, it is stipulated that the detailed regulation plan is adopted for parts of settlements, regulation of the informal settlements, infrastructure corridors and objects, and areas for which it is mandatory to be prepared pursuant to the previously adopted planning document. 2009 Law on Planning and Construction**, R-097**, Article 27, (1).

[272] 2009 Law on Planning and Construction**, R-097**, Article 28, (1) items 1)-10).

[273] 2009 Law on Planning and Construction**, R-097**, Article 11, (3), items 1)-3) and Article 33, (1).

pointing to a high-level map *"Planned land use"* enclosed to the 2003 General Plan.[274] Claimants further state that, on 20 December 2013, when the City of Belgrade adopted the 2013 DRP, which designated the majority of the Dunavska Plots for construction of a bus terminal and its access roads,[275] this was inconsistent with the 2003 General Plan.[276] Claimants conclude that this contradiction was not in compliance with the 2009 Law on Planning and Construction.[277]

159. Claimants' statements are blatantly wrong.

a) <u>The 2003 General Plan envisaged commercial zones as predominant purpose but also accepted other compatible purposes for the area in question</u>

160. The 2003 General Plan stated the following:

> *The planned purposes of the space are defined in the chapter of the same name as well as in the appropriate graphic appendix.*
>
> *The purposes defined by the graphic attachment "Land Use Plan 2021" represent the predominant purpose of that area, which means that they imply at least 50% coverage of the block area, i.e. the zone assigned for that purpose. Each purpose includes other compatible purposes, classified according to the table of compatibility of purposes and the corresponding conditions. At the level of individual parcels within a block, the purpose defined as compatible can be a predominant or a sole purpose.*[278]

161. Therefore, the purpose of the land that was designated by the 2003 General Plan's graphic schedule "*Planned land use*" (i.e. commercial zone),[279] was not meant to be the exclusive purpose for that area, but only the predominant purpose. Such predominant purpose must have occupied at least 50% of a certain area, while the purpose of the remaining land must have been compatible with the predominant purpose.

162. The compatibility between the predominant and other purposes was to be assessed in accordance with the compatibility chart from the 2003 General Plan.[280] The compatibility

[274] Memorial, para 53. The map *"Planned land use"* was provided in the General Plan of Belgrade 2013, **C-025**, p. 24.

[275] Memorial, para 101.

[276] Memorial, para 103.

[277] Memorial, para 104.

[278]General Plan of Belgrade 2013, **C-025**, p. 16 (of PDF).

[279]General Plan of Belgrade 2013, **C-025**, p. 24 (of PDF).

[280]General Plan of Belgrade 2013, **C-025**, pp. 16-17 (of PDF).

chart contained in the 2003 General Plan specifically indicated the purpose of *"traffic area and terminus"* as compatible with the predominant purposes of *"commercial zones"* and *"city centres"*.[281] This meant that (at least) 50% of space had to be used for *"commercial zones"* and *"city centres"*, while the other 50% could have been be used for *"traffic area and terminus"* (or for some other purpose marked in the compatibility chart as compatible with the *"commercial zones"* and *"city centres"*). This solution is in fact more than logical, as it would be absurd to assume that there are no traffic areas and terminuses at commercial zones and city centres.

163. Hence, contrary to Claimants allegations,[282] the 2013 DRP - which envisaged that the land in Dunavska, Tadeuša Košćuška, Dubrovačka, in Dorćol, Municipality of Stari Grad, will be used for trolleybus and bus terminus[283] - was fully in line with the 2003 General Plan and with its compatibility chart.

164. Finally, Claimants' assertion that they relied on the General Plan when making the investment decision, for which they provide no evidence whatsoever, only shows that they did not perform the required legal due diligence.[284] One cannot rely on the highest-level plan when choosing the location for possible construction, as the rules for development and rules for construction are set out by the detailed regulation plan.[285] Given that before the adoption of the 2013 DRP the Dunavska Plots were not encompassed by any detailed regulation plan, Claimants should have known that only when such detailed regulation plan were adopted, it would be known whether it was possible to develop the Dunavska Plots.

b) The 2013 DRP was also aligned with later urban plans - the 2016 General Plan and 2016 General Regulation Plan

165. Claimants allege that the 2016 General Plan, which replaced the 2003 General Plan, again zoned Obnova's premises as commercial facilities based on the map "*Planned land use*", enclosed to the 2016 General Urban Plan as schedule no. 3.[286] Claimants argue that

[281]General Plan of Belgrade 2013, **C-025**, p. 16-17 (of PDF).

[282] Memorial, para 104.

[283] 2013 DRP**, R-098**, p 1 (of PDF).

[284] Memorial, para. 258.

[285] 2009 Law on Planning and Construction**, R-097**, Article 27, (1) item 9).

[286] General Urban Plan of Belgrade dated 7 March 2016, **C-177**, pp 7, 122 (of PDF).

despite this, Respondent has still envisaged construction of the bus loop on the Dunavska Plots, as the 2013 DRP remained valid.[287] This is yet another misrepresentation.

166. Similar to the 2003 General Plan, the 2016 General Plan referred to the predominant purpose of certain area. At the same time, the 2016 General Plan envisaged preparation of the general regulation plans containing guidelines for preparation of detailed regulation plans, which would in detail define the predominant and compatible purposes:

> *Schedule no. 3 "Planned land use" provides combined overview of the planned purposes which represent predominant purposes in the certain spatial area. Minimal planned area displayed on this graphic schedule is 5 hectares. The general regulation plans with the guidelines for preparation of the detailed regulation plans, based on specific location conditions, shall define in detail the predominant and compatible purposes, as well as the specific conditions for development and use of the area.*[288]

167. Together with the 2016 General Plan, the City adopted the General Regulation Plan (the "**2016 GRP**")[289], specifying the purposes of the narrower parts of the areas covered with the 2016 General Plan.

168. The map enclosed to the 2016 General Plan designated the broader area where the Dunavska Plots are located for *"commercial facilities"* (marked with red colour), as the predominant purpose of that area.[290] On the other hand, according to the map enclosed to the 2016 GRP, the narrower area where the Dunavska Plots are located, is designated as the *"traffic area"* (marked with blue colour).[291] This was fully in line with the 2016 General Plan, as it designated the land as "*commercial facilities*" to be compatible with the traffic and infrastructure purposes (similarly as the 2003 General Plan, see para 160 above).[292]

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[287] Memorial, para 105. See General Urban Plan of Belgrade dated 7 March 2016, **C-177**, p 7 (of PDF).

[288] General Urban Plan of Belgrade dated 7 March 2016, **C-177**, p 26 (of PDF).

[289] Both plans were adopted on 7 March 2016. A general regulation plan represents a lower lever planning document in comparison to the general urban plan. While the general urban plan is a strategic planning document, the general regulation plan sets out the rules of development and construction. The 2009 Law on Planning and Construction**, R-097**, Article 23 (1); Article 25 (4).

[290] General Urban Plan of Belgrade dated 7 March 2016, **C-177**, p 7 (of PDF).

[291] 2016 General Regulation Plan, **R-099**, the map "Planned Land Use" attached as the graphic schedule.

[292] 2016 General Plan, **R-096**, pp 4-5 (of PDF).

169. The 2016 GRP also noted that the 2013 DRP will be implemented in its entirety.[293] This is why the Dunavska Plots remained zoned for traffic purposes, such as the bus loop.

170. Therefore, the contents of the 2016 GRP, completely disregarded by Claimants, show that the designated purpose of the Dunavska Plots envisaged in the 2013 DRP (bus loop) is compatible with the 2016 General Plan (and earlier 2003 General Plan), as well as with the 2016 GRP.

2. The 2013 DRP was adopted after a careful review of available options

171. Claimants allege that the City of Belgrade failed to explain why it decided to place the bus loop on the Dunavska Plots.[294] Contrary to these allegations, the City of Belgrade adopted the 2013 DRP after proper analysis of all available options and conducting studies showing that the Dunavska Plots are the most suitable area for placing the bus loop. Tellingly, Obnova did not raise any objections to such designation during the public review of the draft 2013 DRP.

a) The City of Belgrade conducted proper analysis and studies before deciding on the bus loop location

172. Already in 2005, the Urban Planning Bureau of Belgrade, at the request of the Land Directorate,[295] considered a possible location of the new trolleybus terminus near the central pedestrian zone, because the previous one was dislocated.[296]

173. In 2006, the Urbel prepared an analysis of suitability of the locations for organizing of the trolleybus terminus. The location at Dunavska 17-19, at the parcel 47 (location no. 3) was determined to be the second best choice for the location of the new trolleybus terminus.[297] When commenting on this location's suitability, it was expressly mentioned that one of the benefits was the fact that the City of Belgrade was inscribed as the holder of the right of use over that land and that the *"realization of the terminus at this location*

[293] 2016 General Regulation Plan, **R-099**, pp 1, 2 and 25, 26 (of PDF).

[294] Memorial, para 106.

[295] Program for rendering of the decision on preparation of the General Regulation Plan with elements of the detailed regulation plan for the area between streets: Francuska, Cara Dusana, T. Koscuskog and existing railway in Dorćol, Municipality Stari grad, **R-100**, p 1 (of PDF).

[296] Program for rendering of the decision on preparation of the General Regulation Plan with elements of the detailed regulation plan for the area between streets: Francuska, Cara Dusana, T. Koscuskog and existing railway in Dorćol, Municipality Stari grad, **R-100**, pp. 2 and 3 (of PDF).

[297] Analysis of suitability of the locations for organizing trolleybus terminus in Dorćol dated January 2006, **R-101**, p 19 (of PDF).

is easily feasible".[298] In November 2007, another study concerning not only the location of the new trolleybus terminus but also the bus loop,[299] confirmed that *"[t]he space that fully satisfies all the mentioned criteria is located at Dunavska Street across the street from the complex of GSP Beograd."* [300] Therefore, already at that time the Dunavska Plots location was singled out as the best one for a new public transportation (trolleybus and bus) terminus.

174. Finally, the 2013 DRP additionally explains that the Dunavska Plots were selected as they were conveniently located close to the central pedestrian zone:

> *In order for all of the above-mentioned criteria to be satisfied, a conclusion was reached that the existing terminus must be relocated to the location which should be in the immediate area of the central city zone. Given that the spatial capacities of the narrower city area, for establishment of the bus terminus, are relatively small, as the solution came out the area in the zone of intersection of the Francuska and Dunavska streets.*[301]

175. Specifically, the 2013 DRP identified Dunavska 17-19 and 23 as the location that fully satisfies all the requisite criteria.[302] Therefore, the choice of the Dunavska Plots for the

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[298] Analysis of suitability of the locations for organizing trolleybus terminus in Dorćol dated January 2006, **R-101**, p 18 (of PDF).

[299] Study - Cooperation related to preparation of the DRP of the area between the streets Cara Dusana, Tadeusa Koscuska and the existing railway in Dorcol (trolleybus and bus terminus) dated November 2007, **R-102**, pp 1, 9 (of PDF).

[300] Study - Cooperation related to preparation of the DRP of the area between the streets Cara Dusana, Tadeusa Koscuska and the existing railway in Dorcol (trolleybus and bus terminus) dated November 2007, **R-102**, p 8 (of PDF).

[301] *"The Traffic study of the Republic Square area has shown the necessity of relocation of the existing bus terminus the "Republic Square".*

The relocation of the terminus "Republic Square" may, to the great extent, endanger the quality of functioning of public transportation if that means that the routes that ends there should be redirected, extended or even completely cancelled.

In the course of searching for the most adequate solution it was taken into consideration that upon cancellation of the terminus "Republic Square" the needs of the users of public transportation should be satisfied on one hand, as well as the quality, economically justified, functioning of the routs on the other hand. 2013 DRP**, R-098**, p 4 (of PDF).

[302] *"In the course of searching of the adequate space for establishment of modern terminus for public transportation, so in the operational sense the needs for bus and trolleybus sub-system would be satisfied, the preparation of analyses and studies preceded, which have defined the wider spatial zone within which is qualitatively and quantitatively justified to establish the terminus.*

bus loop location was not arbitrary, but a result of a detailed consideration of the matter over several years.

176. Claimants also allege that the City of Belgrade adopted Detailed Regulation Plan in 2015 (the "**2015 DRP**") which rezoned the land across the street from the Dunavska Plots, owned by the City, where the bus depot was located, for residential development.[303] Although it is factually correct, this is irrelevant in the context of the 2013 DRP. At the time of preparation of the 2013 DRP (or before), the bus depot was not even considered as a possible location for a bus loop, and the relocation of the bus depot was considered only in June 2015, i.e. after the adoption of the 2013 DRP.[304]

b) <u>Obnova failed to raise objections to the location of the bus loop at Dunavska Plots</u>

177. Claimants admit that Obnova heard that the City was considering placing a bus loop on the Dunavska Plots soon after the City's 2006 decision on drafting the DRP.[305] According to Claimants, on 27 March 2008, Obnova asked the City to relocate the bus loop and adapt the land for building business facilities.[306] The City forwarded Obnova's letter to the Secretariat for Urban Planning and Construction (responsible for preparing the DRP) and confirmed in an accompanying communication that these premises were "*located in*

The main criteria for establishment of the modern terminus for public transportation were as follows:

securing the relatively close location along with the existing vital trolleybus and bus corridors in order to keep the current role and importance of the PCT system in the core of the primary city centre as the main pillar of the public transportation;

satisfaction of the transportation requirements in the gravitational field of the new trolleybus network;

usage of new location through securing suitable levelling and regulation elements of the contact roads, adequate condition of the road construction, eliminating of mutually cross spots, and as much as possible isolation from other types of traffic;

maintaining of the exploitation costs at the current level;

justification of investing from the aspect of the available funds for establishment of the new trolleybus – bus terminus with the accompanying content.

The space that completely satisfies all of the mentioned criteria is located at Dunavska Street across the complex of GSP "Beograd"." 2013 DRP, **R-098**, pp 4-5 (of PDF).

[303] Memorial, para 118.

[304] Minutes from the 74th session of the Commission for Plans dated 18 June 2015, **R-103**, pp 2-3 (of PDF).

[305] Memorial, paras 77-78.

[306] Letter from Obnova to City of Belgrade from 27 March 2008, **C-314**.

areas intended for commercial activities and urban centres".[307] Claimants allege that this instruction was completely ignored when the 2013 DRP was adopted.[308] This is wrong.

178. First of all, this shows that already in 2008 Obnova was aware of the possibility that the Dunavska Plots would be used for the bus loop (and likewise Claimants as Obnova's later shareholders must have known). Notably, at the time Obnova did not question the City's ownership of the Dunavska Plots, but rather admitted to being a lessee.[309]

179. Second, Claimants again misrepresent the documents when they state that the City gave "instruction" to the Secretariat for Urban Planning and Construction when forwarding Obnova's letter of 27 March 2008. As can be seen from the City's letter of 23 April 2008, it simply forwarded "*the subject initiative for the purpose of archiving and considering its justification in decision-making regarding the aforementioned Draft plan*."[310]

180. Finally, and most importantly, Obnova sent its letter to an authority that was incompetent to decide on questions concerning detailed regulation plan. On the other hand, Obnova failed to raise any objections to the draft of the 2013 DRP in the legally prescribed procedure that was conducted four years later. According to the 2009 Law on Planning and Construction, after completion of the expert control of a draft DRP, the draft is presented for public inspection.[311] During the public inspection every interested person could submit its objections with respect to the proposed solutions set out in the draft DRP.[312] After completion of the public inspection, the Commission for Plans[313] prepares a report containing information about the inspection, objections that were filed and its decisions with respect to the objections.[314]

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[307] Letter from City of Belgrade to Secretariat for Urban Planning and Construction from 24 April 2008**, C-315.**

[308] Memorial, paras 78-80.

[309] Letter from Obnova to City of Belgrade from 27 March 2008, **C-314**.

[310] Letter from City of Belgrade to Secretariat for Urban Planning and Construction from 24 April 2008**, C-315.**

[311] 2009 Law on Planning and Construction**, R-097**, Article 50 (1).

[312] Rulebook on Content, Manner and Procedure of Preparation of the Planning Documents, **R-104**, Article 67.

[313] This Commission is the expert body, formed by the Assembly of the City of Belgrade, and it comprises eminent experts for spatial planning and urbanism. The Commission is formed for the purpose of providing of professional assistance within the process of preparation and implementation of the urban plans. See 2009 Law on Planning and Construction**, R-097**, Article 52.

[314] 2009 Law on Planning and Construction**, R-097**, Article 50 (3).

181. In the procedure of adoption of the 2013 DRP, the City conducted the public inspection of the draft from 5 September to 5 October 2012.[315] However, Obnova did not participate in the public inspection and did not submit any objections to the solutions proposed in the draft 2013 DRP.[316] In light of the fact that Obnova had the opportunity to participate in the procedure of adoption of the 2013 DRP and failed to do so, Obnova's letter written four years before to an authority without competence in the matter is irrelevant.

3. <u>The 2013 DRP did not expropriate Obnova's rights</u>

182. Claimants also allege that, under Serbian law, the adoption of the 2013 DRP represented *de facto* expropriation of Obnova's rights. In particular, Claimants state that the 2013 DRP "stripped" Obnova of its rights to convert the right of use over their rights in respect of the Dunavska Plots into ownership. This is allegedly because the 2013 DRP designated that land for public purposes and under Serbian law, land designated for public purposes is excluded from the conversion process.[317]

183. Contrary to Claimants' allegations, the 2013 DRP did not expropriate Obnova under Serbian law.

a) *De facto* expropriation must be determined by the court

184. *De facto* expropriation is the concept that was recognised Serbian court practice in cases where the competent authorities fail to conduct a formal expropriation but undertake measures that amount to it.[318] Importantly, however, according to court practice, only the courts are competent to decide whether *de facto* expropriation occurred:

> *As the case at hand concerns de facto expropriation, then the civil court is competent for determining compensation, having in mind that within the litigation proceeding it is determined whether the de facto expropriation has occurred, through which the owner or the user of the land is protected against the municipality and other state authorities which themselves or through third parties organize the construction of public and other goods on the land which is not formally expropriated.*[319]

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[315] Report on Public Review for the 2013 DRP dated 8 November 2012, **R-105**, pp 2-3 (of PDF).

[316] Report on Public Review for the 2013 DRP dated 8 November 2012, **R-105**, p 3 (of PDF).

[317] Memorial, para 109.

[318] Memorial, para 113; **Živković Milošević ER-1**, para 240.

[319] Decision of the Higher Court in Belgrade, No. Gz 5266/2016 dated 14 June 2016, **R-106**.

185. Tellingly, Obnova did not ask the court to decide whether *de facto* expropriation occurred when the 2013 DRP was adopted. Thus, no determination of a *de facto* expropriation under the Serbian law could have been made.

b) In any case, there was no *de facto* expropriation as there were no Obnova's rights that could have been expropriated

186. In any event, Obnova had no rights over the Objects or the Dunavska Plots that could have been expropriated, as outlined in detail in Sections B.I. and B.III. above.

187. According to Serbian court practice, while an owner of the expropriated property indeed does not have to be inscribed as such in the public records in order to claim that its rights are *de facto* expropriated, it nevertheless must have a valid legal title for inscription of its rights in the Cadastre.[320] In addition, objects can be the subject of expropriation only if they were built in accordance with law.[321]

188. As explained in detail in Section B.III. above, Obnova does not have a valid legal title for inscription of ownership rights over the Objects in the Cadastre - the temporary construction permits do not represent a valid ground for inscription of the ownership, and for all other objects Obnova does not possess any documentation whatsoever. The only evidence Claimants keep referring to as proof of Obnova's ownership is the Privatisation Program, which, however, is not a document suitable to prove someone's property rights.[322]

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[320] Decision of the Appellate Court in Niš No. Gž 3097/2014 dated 8 January 2015, **C-189** (*"The fact that the claimant did not register his right immediately after acquiring the right of use over the land in question based on the Exchange Agreement does not have the impact on rendering a different decision of the court, because the owner and user of real estate do not have to be registered in the public registers in order to acquire the right to compensation for de facto expropriation, rather, it is enough that they have a valid legal basis for registration, which the claimant did have and subsequently made the registration in the real estate folio."*).

[321] Judgement of the Administrative Court, No. U 1886/2014 dated 20 March 2015, **R-107**, pp. 6-7 (of PDF) (*"If the land is in the state ownership or in social ownership, the expropriation cannot be conducted, but only the administrative transfer between two holders of the right of use. This stems from the cited provisions of the law pursuant to which within the expropriation proceeding of real estate, to the holders of the right of use over the construction land are applied provisions on administrative transfer, contained in the law governing expropriation, in accordance with the previously valid provision of Article 99a of the Law on Planning and Construction. This means that the right of use over the land is transferred from one, inscribed holder, to another, the expropriation beneficiary, whereas the objects are expropriated only if they are in the ownership, i.e. if they are built in accordance with the law."*).

[322] See Section IV.2.b) above.

189. Further, as explained above, Obnova did not have either the ownership right or the permanent right of use over the Dunavska Plots that could be the subject of *de facto* expropriation.[323] The only right Obnova ever had over the land was the right to use the Dunavska Plots based on the lease agreements concluded with the City of Belgrade and Luka Beograd in the period from 1953 to 2006.[324]

c) <u>Construction of the bus loop has not started and Obnova continues to be in possession of the premises</u>

190. Finally, for the existence of *de facto* expropriation, it is not sufficient that a planning document, such as the 2013 DRP, envisages that certain land is designed for construction of the facilities for public purposes. Serbian law also requires that the land envisaged for public purposes is actually brought to its intended purpose (i.e., that the construction of the facility for public use has commenced) and that the person who claims its immovable assets were expropriated is in fact dispossessed of those assets. These two conditions are cumulative.[325]

191. In this case, the Dunavska Plots was never "brought to purpose" of constructing the bus loop envisaged in the 2013 DRP.

192. In addition, although the City of Belgrade obtained the construction permit for both the construction of the trolleybus and bus terminal and for the demolition of the Objects on the parcel no. 47,[326] the City never even entered into possession of the land or the Objects.

4. <u>The Land Directorate never acknowledged Obnova's alleged rights</u>

193. Claimants state that, on 24 February 2016, Obnova received a letter from the Land Directorate informing it of the planned construction of the bus loop, and that Obnova's Objects affected by the 2013 DRP, were supposed to be demolished. Claimants allege that the Land Directorate did not assert that the City of Belgrade was the owner of Obnova's objects, just that it was registered as the user in the Cadastre. According to Claimants, this proves that the Land Directorate was well aware that the records did not

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[323] See Section VI.3.b) above.

[324] See Section I.2. above.

[325] Judgement of the Supreme Court of Serbia, No. Rev 1556/2022 dated 16 June 2022, **R-108**, pp 2-3 (of PDF) (*"In this specific case the decision on expropriation has not been rendered for the subject cadastral parcel, de facto expropriation has not occurred by bringing to purpose to of the subject parcel to intended use in accordance with the General Regulation Plan of the settlement Vladicin Han and its changes and amendments, nor the claimants have been dispossessed, due to which the claim has been rejected."*).

[326] Construction Permit from 26 December 2017, **R-109**.

correspond to the reality and that it did not dispute Obnova's rights to the Objects.[327] Claimants also state that the Land Directorate took the same position in a subsequent letter from 19 February 2018, in which it expressly stated that Obnova would be provided with compensation "*for facilities that need to be demolished, that is, removed from the location*".[328]

194. First of all, as indicated above, the Land Directorate was not even competent to determine whether Obnova had any property rights over the Objects or not, as this can be determined only by a court.

195. Second, contrary to Claimant's allegations, the Land Directorate never acknowledged Obnova's alleged rights over the Dunavska Plots. To the contrary. In its first letter from 24 February 2016, the Land Directorate noted that the City of Belgrade was inscribed as the holder of the right of use over the Objects at Dunavska 17-19, as well as that the Objects at Dunavska 17-19 were used by third parties based on the lease agreement concluded with Obnova. In that respect, the Land Directorate approached Obnova and stated:

> *Bearing in mind that all the above-mentioned objects in Dunavska street nos. 17-19 need to be removed from the land <u>in the public ownership of the city of Belgrade</u>, namely cadastral plot no. 47 CM Stari grad, it is necessary for you to submit to this Directorate the available documentation related to the basis of the use of the objects in question by DP "Obnova" AD (lease agreement, sale agreement, exchange agreement, etc.), i.e. to hand over to the Directorate the objects in question on which the city of Belgrade is registered as the holder of the right of use, empty of persons and belongings, for demolition during the construction of the trolleybus and bus terminus at Dorcol, municipality of Stari grad.*[329]

196. Clearly, this cannot be understood as the recognition of any rights but only as an inquiry about the grounds on which Obnova was using the Objects. This point is reinforced by the fact that the Land Directorate requested from Obnova to hand over the objects free from persons and belongings.[330]

197. The Land Directorate repeated this request in its letter from 19 February 2018:

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[327] Memorial, paras 121-122.

[328] Memorial, para 123.

[329] Letter from the Land Directorate to Obnova from 24 February 2016, **C-327**, p 2 (of PDF).

[330] Letter from the Land Directorate to Obnova from 24 February 2016, **C-327**, p 2 (of PDF).

> *Due to an urgent need to relocate the existing terminus from the Trg Republike and Studentski Trg to the newly planned location in Dunavska street, it is necessary for PD "OBNOVA" AD, before resolving the question of compensation for facilities that need to be demolished or removed from the location, to handover and give possession to the Directorate, together with the minutes, of all facilities located on the land planned for construction of a bus and trolleybus terminus in Dorcol and part of Dunavska street, in Dunavska St. 17-19, cad. parcel 47/1 and 47/2 CM Stari Grad, for the purpose of demolition of said facilities.*
>
> *Bearing in mind that evidence was secured for all facilities on the location, that is, that expert opinion of experts from the City Institute for Expert Evaluations provided a description and inventory of all relevant facilities, and that valuation of said facilities was carried out by the City Institute for Expert Evaluations and the Secretariat for Public Revenues of the City of Belgrade, it is our opinion that there are no obstacles for handover of possession of the relevant facilities to the Directorate for the purpose of their demolition.*[331]

198. Obviously, the Land Directorate did not negotiate, let alone accept to compensate Obnova for the Objects, but explained that if Obnova considered it had the right to be compensated, it would be able to later resolve that issue, since the Land Directorate obtained *a description and inventory of all relevant facilities, and that valuation of said facilities was carried out.* The Land Directorate never stated that it considered that Obnova should be compensated, nor did it offer any amount of money to Obnova. Rather, it insisted that the Objects be handed over and demolished, so that the construction of the bus loop could start, while the issue of *regulating the question of compensation for facilities that need to be demolished*, would be resolved after.[332]

5. Obnova did not initiate appropriate proceedings for the payment of compensation for alleged *de facto* expropriation

199. In any case, Obnova failed to initiate proper proceedings for obtaining compensation for the alleged expropriation.

200. On 19 April 2021, Obnova addressed several Serbian authorities requesting compensation for the alleged losses caused by the adoption of the 2013 DRP.[333] Claimants

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[331] Letter from the Land Directorate to Obnova from 19 February 2018, **C-328**, p 1 (of PDF).

[332] Letter from the Land Directorate to Obnova from 19 February 2018, **C-328**, p 1 (of PDF).

[333] Obnova's request for compensation dated 19 April 2021, **C-052**.

state that the Land Directorate rejected Obnova's request on 13 August 2021,[334] with a wrong explanation that Obnova's right to compensation depends on the outcome of the court proceedings that were initiated by Obnova. Claimants also criticize other reasons given by the Land Directorate in support of its position that Obnova's compensation request is unjustified.[335]

201. Respondent will first demonstrate that the Land Directorate is not competent for deciding about the compensation for the alleged expropriation, and which did not make any decision on compensation in its letter of 13 August 2021, but rather provided its views as to why it considered Obnova's request to be unjustified (**Section a)** below). In any case, the views provided are correct as far as Serbian law is concerned (**Section b)** below).

a) **The Land Directorate is not competent to decide on the request for compensation**

202. As Respondent explained, if a party considers that its rights have been *de facto* expropriated, it may request from the competent court in civil proceeding to provide a determination whether *de facto* expropriation has occurred and whether it is entitled to any compensation:

> *As this particular case concerns de facto expropriation, then the civil court is competent for determining compensation...*[336]

203. Therefore, a request for compensation could be resolved only before courts, and not before the Land Directorate.[337]

204. Moreover, the Land Directorate is a public company, but a separate legal entity which acts in its own name and on its own behalf, while the City of Belgrade is not liable for the Land Directorate's obligations, except in specific cases provided by the law. The Land Directorate does not have competence to decide on expropriation and compensation

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[334] Memorial, paras 126-129; Letter from the Letter from the Land Directorate of the City of Belgrade from 13 August 2021, **C-053**.

[335] Memorial, paras 130-152.

[336] Decision of the Higher Court in Belgrade, No. Gz 5266/2016 dated 14 June 2016, **R-106**.

[337] Land Directorate is a public enterprise founded by the City of Belgrade. According to its Statute from 27 August 2019, it performs utility services in order to provide the conditions for development, use, improvement and protection of the construction land, preparation and implementation of medium-term and annual land development programs in the territory of the City of Belgrade, as an activity of general interest and performs all professional tasks to provide the conditions for construction of the public facilities of particular importance for the City. The information on the Land Directorate are available on its official Internet page at the following link: https://www.beoland.com/.

because it only performs preparatory activities, the so-called expert activities (stručni poslovi) related to construction land acquisition.[338]

205. Similarly, Claimants are wrong, or even absurd, in suggesting that the Land Directorate could have addressed Obnova's ownership over the Objects as a preliminary question[339], in view of the fact that this authority is incompetent to decide on Obnova's request.

206. In this context, Claimants rely on their Legal Experts' opinion which merely states, without providing any reasons or references, that the experts *believe* that the Land Directorate could have addressed the ownership as a preliminary question and that the pending court proceedings did not represent an obstacle for providing compensation to Obnova.[340]. However, even if the Land Directorate was competent to decide on Obnova's compensation request, it would be obliged to suspend its proceedings, given that the court proceedings for declaration of ownership over the Objects (see Section IV.2.d)IV.2.d)cc) above) were still ongoing.[341]

b) <u>In any event, the Land Directorate provided a reasonable explanation why it considers Obnova's request to be unjustified</u>

207. The 2021 Land Directorate Letter noted that:

- The Objects were temporary and that it was obliged to demolish them at the request of the City of Belgrade, without the right to compensation;
- It was not possible to positively identify the Objects built under temporary construction permits compared to the current situation on the ground and that Obnova's requests for legalization of the existing objects were rejected;
- The Objects could not be regarded as the subject of privatisation; and
- Obnova's rights could not be expropriated because the Cadastre had registered the City of Belgrade as the owner of the Objects and Obnova's claim for correction of the registration was pending before Serbian courts.[342]

[338] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 122.

[339] Memorial, para 147; **Živković Milošević ER-1**, para 266.

[340] Memorial, para 147; **Živković Milošević ER-1**, para 266.

[341] Law on General Administrative Procedure, **R-069**, Article 107 (4).

[342] Letter from the Letter from the Land Directorate of the City of Belgrade from 13 August 2021, **C-053**, pp. 2-3 (of PDF).

208. Importantly, the answer of the Land Directorate was just a gesture of good will and a statement of its disagreement with Obnova's allegations. As such, it was not a formal decision on Obnova's request for compensation.

209. Contrary to Claimants' allegations, the Land Directorate's comments were correct and reasonable.[343] Although Obnova did not apply for compensation with the competent court, the below shows that Obnova would not have been entitled to any compensation.

210. First, as Obnova's buildings are temporary, Obnova had an obligation to demolish them. As explained in Section II., Claimants failed to point to any law which supports their stance that the Objects are not temporary. This is because the fact that an object was constructed with a temporary permit determines its temporary legal status.[344]

211. Claimants argue that the construction permits for the Objects – insofar as Obnova had any such permits – were not temporary, as temporary construction permits were defined by Serbian law only decades after Obnova obtained its permits. As Respondent already explained in Section IV. above, Claimants are wrong as temporary permits were regulated by the Regulation on Construction Design, which was applicable at the time of their issuance.

212. Claimants further state that the Land Directorate's argument that Obnova was obliged to demolish its buildings at the request of the City of Belgrade, without the right to compensation, is incorrect because it appears to be a reference to the 1953 Lease Agreement, which was terminated in November in 1961 (when the City granted the right of use over the land at Dunavska 17-19 to Luka Beograd). On this basis, Claimants concluded that this obligation no longer existed. As Respondent explained in Section I.1.b), after 1961, Obnova continued to conclude lease agreements with Luka Beograd, while the construction permits expressly oblige Obnova to demolish the objects at the request of the City of Belgrade.

213. Second, Claimants object to the Land Directorate's argument that it was not possible to positively identify the objects built under temporary construction permits compared to the current situation on the ground. They claim this was arbitrary as the Land Directorate did not explain what efforts it undertook to reconcile Obnova's permits with the existing buildings.[345] As explained by Respondent, Claimants themselves have failed to identify

[343] Memorial, paras 130-148.

[344] See paras 95 et seq.

[345] Memorial, para 138.

the objects that are the subject of this case.[346] Therefore, it is absurd that they are now arguing that the Land Directorate is to blame for not being able to do so.

214. Third, Claimants contest the relevance of the Land Directorate's argument that the buildings at Dunavska 17-19 could not be the subject of privatisation. They claim that after privatisation, Obnova *ex lege* acquired ownership of the buildings for which it had the right of use, even though the object of the privatisation was Obnova's shares, not its assets. Respondent addressed this issue in detailed in Section IV.2.b) above, explaining that the basis for Obnova's purported *ex lege* acquisition of ownership right over the buildings is wrong, as the Privatisation Program is not proof of any property rights of the subject of privatisation. Therefore, the list of objects in the Privatisation Program does not prove Obnova's ownership over these objects. Obnova did not enclose to the Privatisation Program any documents capable of proving its ownership right or the right of use, and to date it has not provided any such documents. On the other hand, the Privatisation Program indicated that Obnova only had temporary construction permits for some of these buildings and no supporting documentation for the other listed objects. It was also noted that all facilities were of a temporary character and almost all were constructed, with the exception of facilities on parcel no. 47, without permits, and that the object on parcel no. 39 was prefabricated and Obnova failed to specify the grounds for use of office space at this address.[347]

215. Fourth, according to Claimants, the Land Directorate's argument that the City of Belgrade was the owner of the buildings at Dunavska 17-19 is erroneous, because it was based on the proposition that as at Obnova's privatisation in 2003, Obnova did not have the right to use the buildings dating back to the 1940s and 1950s. However, what is clearly erroneous is Claimants' suggestion that the Land Directorate should have disregarded the inscription in the Cadastre, according to which the City of Belgrade was the user of the objects as of November 2003 and their owner as of January 2020, as it was inscribed as the owner of the land as of September 2011. In fact, the Land Directorate was effectively bound by this inscription, which could change only after Obnova proved otherwise in the court proceedings (which it has failed to do).[348]

216. Fifth, with respect to Obnova's premises at Dunavska 23, Claimants allege that the Land Directorate merely stated that the 2013 DRP did not cover Obnova's buildings on parcel no. 40/5, while this parcel was in fact affected by the 2013 DRP as is confirmed by data

[346] See Section B.II above.

[347] See paras 110 and following.

[348] See paras 127 and following.

from the Land Directorate's own website.[349] However, this was an inadvertent error: while the 2013 DRP indeed does not mention parcel no. 40/5, the cadastral parcel no. 40/**4** that was mentioned in the 2013 DRP, was subsequently divided for the purpose of implementation of the 2013 DRP, and after the division of two new parcels were formed – the cadastral parcels nos. 40/4 and 40/**5**.

VII. Obnova's requests to legalize its Objects were without merit

217. Claimants challenge Serbia's dismissal of Obnova's four proceedings to legalize its Objects, arguing that that Serbia wrongfully concluded that the Objects could not be legalized because they were encompassed by the 2013 DRP.[350] Claimants and their experts do not explain why they consider that, but for the adoption the 2013 DRP, Obnova would have fulfilled the conditions for legalization of the Objects.

218. Regardless of the adoption of the 2013 DRP, the Objects could not have been legalised because Obnova failed to obtain the court's decision on its ownership over the Objects and the Dunavska Plots.

1. Obnova's legalization requests from November 2003 were denied

219. Obnova made its first attempt to legalize the Objects in November 2003, when it filed an application to legalise an object on parcel no. 47 and another application to legalise an object on parcel no. 39/1. It did not describe these objects or provide any supporting documentation.[351] Claimants allege that as Obnova never received a response to these two applications,[352] it had to submit a request to reopen the legalization proceedings on 15 December 2008.[353] This is simply not true.[354]

220. After Obnova filed the legalization requests in November 2003, it was asked to supplement the requests because they were incomplete. Obnova's supplemented legalization requests were then considered at the session of the Committee for Legalization held on 26 November 2004, together with 47 other legalization requests.

[349] Memorial, paras 149-152.

[350] Memorial, paras 68, 69, 87, 88, 89 and 270. **Živković Milošević ER-1**, para 234.

[351] Obnova’s Legalization Request related to Dunavska 17-19 dated November 2003**, C-019**; Obnova’s Legalization Request related to Dunavska 23 dated November 2003, **C-020**.

[352] Memorial, para 68-69.

[353] Memorial, para 87.

[354] Letter from the Construction Department to Obnova from 27 November 2009**, C-317.**

The Committee decided that 25 requests, including Obnova's, could not be the subject of further legalization procedure.[355] As this happened almost 20 years ago, there is no available documentation indicating which documents Obnova submitted to supplement its request or what was the exact reasoning of the Committee for Legalization in denying the request.

221. Four years later, on 15 December 2008, Obnova filed a request to the Construction Department of the City of Belgrade to reopen the legalisation procedure. In its request, Obnova stated that (i) it had not been served with a final decision on its two requests from November 2003, (ii) it had not been given an opportunity to appeal the decision, and (iii) the legalization procedure had been concluded without its participation.[356]

222. In its response of 27 November 2009, the Construction Department explained that (i) the Committee's decision not to proceed with Obnova's legalization requests had been sent to Obnova on 27 December 2004, as evidenced in the Department's post records, and (ii) Obnova had been allowed to take part in the proceeding, as evidenced by the fact that Obnova had been requested to supplement its legalization requests, which it had done. As the original legalisation procedure had concluded, Obnova was invited to file a new request for legalization by 11 March 2010.[357]

2. Obnova's legalization request from January 2010 lacked evidence of ownership, which is the *conditio sine qua* non for legalization

223. Obnova submitted another request for legalization of one or more objects (this is unclear from the request) at Dunavska 17-19 on 26 January 2010.[358] In its decision from 25 April 2018, the Secretariat for Legalization rejected Obnova's request on the ground that the 14 objects at Dunavska 17-19 were encompassed by the 2013 DRP and thus meant for public purpose. Pursuant to the 2015 Law on Legalization, objects built on land meant for public purposes could not be the subject of legalization.[359] This reasoning was

[355] Minutes from the session of the Committee for legalization dated 26 November 2004, **R-110**, pp 1-2 (of PDF).

[356] Obnova's request for reopening of the legalization proceedings dated 15 December 2008, **C-316**, p 1 (of PDF).

[357] Letter from the Construction Department to Obnova from 27 November 2009**, C-317**, pp 1-2 (of PDF)

[358] Request for legalization of objects at Dunavska 17-19 dated 26 January 2010, **R-111**, p 1 (of PDF).

[359] Decision of the Secretariat for Legalization No. 351.21-19758/2010 dated 25 April 2018, **C-041**, pp 2-3 (of PDF).

confirmed by the City Council, being the second instance authority, upon Obnova's appeal,[360] as well as by the Administrative Court.[361]

224. Even if the 2013 DRP had not been adopted, Obnova could not have successfully legalized these objects since it did not fulfil the conditions for legalization. The main condition for legalization is that the applicant has resolved ownership of the object and land, before commencing the legalization procedure.[362] Obnova has not done so, as evidenced by the fact that the court proceedings for determination of Obnova's alleged rights of use over the Objects and Dunavska Plots are still pending[363] (and Obnova does not possess any documents to prove these rights).

225. For this reason, before rendering its first instance decision, the Secretariat for Legalization ordered Obnova to supplement its request and provide "*the proof of ownership right, right of use or the right of lease over the construction land, i.e. the proof of ownership over the objects*".[364] Obnova, however, failed to do so.

226. In its appeal against the first instance decision (by which the legalization request was denied because of the 2013 DRP), Obnova argued that the ownership issue over the objects and land at Dunavska 17-19 should be considered as a preliminary question in the legalization procedure. It also argued that it was not allowed to participate in the first instance proceeding or to present its arguments, facts and exhibits.[365] There are several points that need to be emphasized here.

227. First, the 2015 Law on Legalization sets out certain preconditions for legalization, including that the subject of the legalization request is not constructed on land meant for

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[360] Decision of the City Council of the City of Belgrade No. 351 –515/18-GV dated 19 June 2018, **C-046**, pp 6-7 (of PDF).

[361] Judgement of the Administrative Court dated 12 October 2022, **R-112**, p. 4-5 (of PDF). It also appears that Claimants do not dispute the stance that objects built on the land meant for public purposes cannot be the subject of legalization. **Živković Milošević ER-1**, paras 90, 93 and 94.

[362] Judgement of the Supreme Court of Serbia dated 13 May 2013, **R-113**, p 1 (of PDF); Judgement of the Administrative Court dated 5 June 2018, **R-114**, pp 3-4 (of PDF); Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 98-105.

[363] See para 138 above.

[364] Order for supplementation of the legalization request for objects at Dunavska 17-19 dated 23 June 2017, **R-115**. It is important to note here that though Obnova had the lease agreements with Luka Beograd it did not have right of lease over the construction land, as required by Article 10(2) of the 2015 Law on Legalization of Objects, **R-116**. The lease agreement referred to in the said Law (and the Order of the Secretariat for Legalization) can only be concluded with the holder of the public ownership right (and not with Luka Beograd).

[365] Obnova's appeal related to Dunavska 17-19 dated 30 May 2018, **C-043**, pp 2 and 3 (of PDF).

public purposes.[366] If the competent authority determines that a precondition is not met, then it need not consider whether other preconditions for legalization (such as ownership) are met.[367] In that respect, when rejecting Obnova's appeal, the second instance authority rightfully did not consider the documentation submitted by Obnova, because a precondition for legalization had already not been fulfilled, i.e. the objects were built on the land designated for public purposes by the 2013 DRP.

228. Second, Obnova failed to explain why it did not provide the proof of ownership earlier although it had been invited to do so by the first instance authority.[368] According to the Law on General Administrative Proceeding, Obnova was not allowed to submit new exhibits with the appeal without a reasonable explanation why it had omitted to provide those exhibits in the first instance proceedings.[369] In any case, the fact that Obnova had been invited to provide the exhibits proves that it had an opportunity to participate in the first instance proceeding.[370]

229. Third, the documents Obnova submitted with the appeal were in any case insufficient for legalization. Obnova submitted several documents, including the certificate of the ongoing court proceedings for determination of Obnova's alleged ownership rights over the land and objects based on the temporary construction permits at Dunavska 17-19.[371] However, as noted above, legalization proceedings can be initiated only after the person applying for legalization has resolved ownership issues regarding the object and the

[366] Subject of legalization also cannot be the object 1) built on the land unsuitable for construction (landslides, swampy ground, etc.); 2) built out of material which does not ensure durability and safety of the object; 3) built in the first and second level of protection of the natural good, i.e. in the zone of protection of the natural good of extraordinary importance and in the zone of protection of cultural goods, etc; 4) built in the protection zone alongside the road of a radio corridor in which it is not allowed construction or installation of other radio stations or other objects that may interfere the propagation of radio signal or cause detrimental interference. Law on Legalization of Buildings, **C-119**, Article 5 (1) items 1)-5).

[367] 2015 Law on Legalization of Objects, **R-116**, Article 24, Article 31 (1).

[368] Order for supplementation of the legalization request for objects at Dunavska 17-19 dated 23 June 2017, **R-115**.

[369] Law on General Administrative Procedure, **R-069**, Article 159(2). The said Article provides that "*New facts and new evidence may be presented in the appeal, but the appellant shall be required to explain why it has failed to present such facts and evidence during the first instance procedure*."

[370] Obnova's appeal related to Dunavska 17-19 dated 30 May 2018, **C-043**, p 2 (of PDF).

[371] Detailed list of all documents can be found on pages 3-4 of the exhibit C-043. For other objects, Obnova could not provide even this certificate since the corresponding court proceedings had not yet been initiated.

land.[372] Obnova did not fulfil that condition. In the same vein, Obnova's post-facto argument that the ownership issue be considered as a preliminary question by the first-instance authority deciding on legalization,[373] is wrong as it contradicts the rule that resolution of ownership status is a condition for initiation of the legalization procedure.

230. Accordingly, Obnova was unable to substantiate its ownership right over the objects and land at Dunavska 17-19, both at the time it initiated the legalization procedure in 2010 and at any later time, up until today. Without a final court decision establishing its ownership right over the objects and the land, Obnova cannot possibly obtain legalization of the objects in question.

3. Obnova's legalization request from January 2010 was unsubstantiated

231. In January 2010, Obnova filed a request for legalization of the object located on parcel no. 39/1 at Dunavska 23, stating that this object was built in accordance with the temporary construction permit. From the legalization request it can be concluded that it related to only one object at Dunavska 23.[374] To the best of Respondent's knowledge, this legalization procedure is still pending.

232. In July 2010, the company Kompresor filed an objection against Obnova's request for legalization, stating that Obnova built the object on land over which Kompresor had the right of use, without its consent.[375] The Secretariat for Legalization invited Obnova to respond to Kompresor's objection and supplement its request by providing proof of its right over the object and the land.[376] When Obnova failed to respond, the Secretariat repeated its request.[377] This time, Obnova supplemented its application, but, instead of

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[372] [Judgement of the Supreme Court of Serbia dated 13 May 2013, **R-113** p 2. Judgement of the Administrative Court dated 5 June 2018, **R-114**, pp 3-4 (of PDF).

[373] Obnova's appeal related to Dunavska 17-19 dated 30 May 2018, **C-043**, p 3 (of PDF).

[374] This statement is obviously false, as Respondent already showed that Obnova never had any construction permits for objects at Dunavska 23. Request for legalization of objects at Dunavska 17-19 dated 26 January 2010, **R-111**, p 1 (of PDF).

[375] Objection to Obnova's request for legalization submitted by Kompresor on 20 July 2010, **R-117**.

[376] Order for supplementation of the request for object at Dunavska 23 dated 13 December 2011, **R-118**, p 1 (of PDF).

[377] The proof of ownership right over the objects, i.e. the proof of ownership right or the proof of lease over the construction land in public ownership or the final court's decision by which the ownership right was determined on the land – if the object was built on land in someone else's ownership or the agreement on transfer of the right of use/agreement on sale of the land concluded between the former user and the applicant, certified by the court – if the object was built on the construction land. Order for supplementation of the request for object at Dunavska 23 dated 17 April 2018, **R-119**, p 1 (of PDF).

providing the requested proof, it provided the certificate on existence of the court proceeding related to the objects and land at Dunavska 17-19.[378] Regardless of whether this was done in error, it is clear that it lacked the requisite proof of ownership and thus did not fulfil the conditions for legalization.

4. **Obnova's legalization request from January 2014 was also unsubstantiated**

233. In January 2014, Obnova initiated yet another legalization procedure for an object at Dunavska 23 located on parcel no. 39/1[379] (it remains unclear if this was the same object that was the subject of Obnova's legalization request from 26 January 2010). In April 2018, the Secretariat for Legalization rejected Obnova's request, explaining that the object was located on parcels covered by the 2013 DRP.[380] This reasoning was confirmed by the second instance authority[381] and by the Administrative Court.[382]

234. As already explained, regardless of the 2013 DRP, Obnova could not have successfully legalized the object in question as it had not resolved ownership status of the object and the land before commencing the legalization procedure. Obnova initiated a court proceeding for determination of its alleged rights over the objects and the land at Dunavska 23 only in July 2019 (i.e. after it had initiated the legalization proceeding), which is still pending.[383] In other words, Obnova did not fulfil the conditions for legalization.

235. In this legalization procedure, Obnova also tried to mislead the relevant authority. In its appeal against the first instance decision, Obnova submitted the certificate on existence of the court proceeding related to the objects and land at Dunavska 17-19, even though the legalization concerned the objects at Dunavska 23.[384]

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[378] Obnova filed a claim for declaration of its ownership right over the objects and the land at Dunavska 23 only in July 2019, which court proceeding is still pending. Obnova's supplement submission from 24 May 2018, **R-120**.

[379] Obnova's request for legalization dated 29 January 2014, **C-034**, pp 1-2 (of PDF).

[380] Decision of the Secretariat for Legalization No. 351.21 –16194/2014 dated 25 April 2018, **C-042**, pp 2-3 (of PDF). Additionally, the Land Directorate, as the administrator of the public good, did not provide its consent for legalization.

[381] Decision of the City Council of the City of Belgrade No. 351-512/18 – GV dated 19 June 2018, **C-045**, pp 3-6 (of PDF).

[382] Decision of Administrative Court No. 11 U 14419/8 dated 11 January 2021, **C-049**, pp 2-4 (of PDF).

[383] Obnova's submission to the Higher Court in Belgrade dated 16 July 2019, **C-050**.

[384] Obnova's appeal related to Dunavska 23 dated 30 May 2018, **C-044**, p 3 (of PDF).

5. The 2015 Law on Legalization is inapplicable to the Objects

236. The 2015 Law on Legalization does not apply if the applicant built the permanent object on the land that was given for temporary use only.[385] As explained above, Obnova had been using the Dunavska Plots based on lease agreements. Claimants, however, state that the objects Obnova allegedly built were permanent and not temporary in nature. Hence, these temporary objects cannot be the subject of legalization pursuant to the 2015 Law on Legalization. In addition to that, it remains unclear why Obnova sought legalization of the objects for which it claims to have the construction permits.

VIII. Obnova never met the requirements for conversion

237. The 2006 Constitution of the Republic of Serbia ended state monopoly on ownership over construction land. Three years later, the 2009 Law on Planning and Construction introduced conversion of the right of use over the previously state-owned construction land into private ownership.[386] The law recognized two forms of conversion: without a fee and against a fee. The latter applied to privatised companies such as Obnova.[387]

238. Claimants and their experts maintain that Obnova was an unregistered holder of the right of use over the Dunavska Plots and that Obnova therefore had the right to convert this right into ownership.[388] They claim that the only reason Obnova was unable to exercise its conversion right and become the owner of the Dunavska Plots was the adoption of the 2013 DRP, which placed a bus loop on Obnova's premises and thereby "*eliminated the right to conversion*".[389] This is incorrect for the following reasons: Obnova never had the right of use over the Dunavska Plots and even if it had one, it had to inscribe it in the Cadastre in order to obtain conversion (**Section 1.** below); the construction land designated for construction of objects for public purpose cannot be converted into private ownership (**Section 2.** below); in any case, conversion was not possible between 2012 and 2015 (**Section 3.** below).

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[385] 2015 Law on Legalization of Objects**, R-116**, Article 4 (5).

[386] **Živković Milošević ER-1**, para 48.

[387] **Živković Milošević ER-1**, para 49.

[388] **Živković Milošević ER-1**, para 181.

[389] Memorial, para 100. **Živković Milošević ER-1**, paras 188 and 228.

1. Obnova never had the right of use and, even if it did, its inscription in the Cadastre was the precondition for conversion

239. Obnova never had the right of use over the Dunavska Plots, registered or not. It only had the right of lease over that land, which, obviously, was not capable of being converted into ownership (see Section B.V above).

240. However, even if Obnova had an unregistered right of use (which it did not have), it could not have requested conversion under the 2009 Law on Planning and Construction since only privatised entities whose right of use was inscribed in the public real estate records were entitled to apply for conversion. This is clear from the by-laws adopted based on the 2009 Law on Planning and Construction, which explicitly stipulated that the request for conversion submitted by the privatised entities must also contain the list of the cadastral parcels, or excerpts from the Cadastre or Land Books of the cadastral parcels, over which the privatised entity is inscribed as the holder of the right of use.[390]

241. Moreover, the 2015 Law on Conversion, which applied to conversion against a fee from 2015, expressly required that privatised entities that apply for conversion must be inscribed as the holders of the right of use over the land:

> *The right to conversion belongs to the persons referred to in Article 1 paragraph 2 of this Law, that are inscribed in the public records of real estate and rights over them, as the holders of the right of use over the construction land.* [391]

242. This provision remained in the 2015 Law on Conversion until its amendment in 2020. Since 2020, the law provides that an unregistered right of use over land can also be converted into the ownership right. However, there is yet another condition for conversion in such case: the unregistered holder of the right of use over the construction

[390] Regulation on Manner and Procedure of Exercising of the Right to Conversion over the Construction Land into Ownership Right, **R-121**, Article 2 (1) item 1) and Article 3 (2); Regulation on the Conditions, Criteria, and Manner of Exercising the Right to Convert the Right of Use into Ownership Right for a Fee, as well as on Determining the Market Value of Construction Land and the Amount of Fee for the Conversion of the Right of Use into Ownership Right for a Fee, **RJ-070** , Article 2(1) item 1) and Article 20(3); Regulation on the Criteria and Procedure for Determining the Amount of a Fee on the Basis of the Conversion of Rights for the Persons Entitled to the Conversion with the Fee, Official Gazette of the Republic of Serbia, Nos. 4/10, 24/10, 46/10**, R-122,** Article 9(2).

[391] 2015 Law on Conversion, **R-123**, Articles 4(1), (2).

land must be registered in the Cadastre as the owner of the object on the land.[392] This understanding is also confirmed by the Supreme Court of Serbia:

> *From the cited provisions stems that the claimant could have been entitled to acquisition of the right of use over the land (parcel) beneath the illegally constructed object, only in the case that such object has been already legalized and the claimant has been inscribed as the owner of the same.*[393]

243. Finally, following amendments of the 2009 Law on Planning and Construction in 2023, the 2015 Law on Conversion was abrogated. Privatised entities are now entitled to apply for conversion without a fee, which is regulated by the 2009 Law on Planning and Construction. This law, however, also clearly provides that only privatised entities that are inscribed as the holders of the right of use over the land, or that are inscribed as the owners of the objects on the land, may apply for conversion.[394]

244. Thus, according to Serbian law, privatised entities such as Obnova may apply for conversion of the right of use over land only if they have a registered right of use over the land or if they have a registered ownership right over the objects on that land. At no

[392] In 2020, the amendments to the 2015 Law on Conversion were adopted and introduced that, in addition to the registered holders of the right of use over the land, the person from Article 105(5) of the 2009 Law on Planning and Construction**, R-097** were also entitled to request conversion. The 2015 Law on Conversion as amended on 12 February 2020 , **R-124**, Article 4 (1). Article 105(5) of the 2009 Law on Planning and Construction reads as follows: *"A person whose status is governed by the law governing the conversion of the right of use into the ownership right over the construction land with a fee, and who is the owner of the object or part of the object on the construction land over which it is not inscribed as the holder of the right of use, acquires the ownership right over such land pursuant to the law which governs the conversion of the right of use into the ownership right over the construction land with a fee."* 2009 Law on Planning and Construction**, R-097**, as amended on 6 June 2019, Article 105(5). The cited provision thus allows for owners of the objects to apply for conversion with a fee, although they are not registered in the Cadaster as the holders of the right of use over the land. These owners can apply for conversion pursuant to the law which governs the conversion of the right of use, i.e., pursuant to the 2015 Law on Conversion. Having said this, Article 4. para 2 of the 2015 Law on Conversion prescribes that a person who applies for conversion must prove its standing by the excerpt from the Cadaster. In other words, the owner of the object who has an unregistered right of use over the construction land must prove its ownership over the object that is on that land, by providing the excerpt from the Cadaster. This is because that is the way for the applicant to prove that it has the right of use over the land. The 2015 Law on Conversion as amended on 12 February 2020 **, R-124**, as amended on 12 February 2020, Article 4 (2).

[393] Judgement of the Supreme Court, No. Rev 3644/2021 dated 25 November 2021, **R-125**, pp 3-4 (of PDF).

[394] 2009 Law on Planning and Construction**, R-097**, Article 93[s9], as amended on 5 August 2023; Article 102 (1) (7).

point did Obnova fulfil either of these two conditions.[395] As already explained, Obnova did not even have an unregistered right of use over land or objects which was capable of being converted. Therefore, it is irrefutable that regardless of the adoption of the 2013 DRP, Obnova never met the requirements for conversion.

2. <u>Conversion was subject to the condition that the land in question was not designated for construction of objects for a public purpose</u>

245. In 2011, the Law on Planning and Construction was amended[396] to include Article 103(7), which provided that the land designated for construction of objects in public interest and surfaces for public use was not available for conversion.[397]

246. This provision introduced an inherent limitation of conversion. The benefit of conversion of construction land to private ownership was available only if the land was not designated for public use by a planning document. The introduction of the "public interest" exception was a legitimate exercise of the legislative powers under the Serbian Constitution. Specifically, as conversion of the right of use to ownership is *de facto* disposal of the public land, the State, as its owner, had the right to impose conditions or limitations to its distribution.[398]

3. <u>In any case, conversion was not possible between 2012 and 2015</u>

247. From 2013 until 2015, conversion was not possible. In 2013, the Constitutional Court initiated a constitutional review of certain provisions of the 2009 Law on Planning and Construction which governed conversion against a fee and temporarily suspended their application.[399] The Constitutional Court also struck down part of Article 103, which regulated the fee for conversion, with the result that it was not possible to take decisions

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[395] 2009 Law on Planning and Construction**, R-097**, Article 92[s9], as amended on 5 August 2023, Article 102 (1) (7); Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 106-114.

[396] Article 48 of Amendments to the Law on Planning and Construction (Official Gazette No. 24/2011), **C-097**.

[397] **Živković Milošević ER-1**, para 56.

[398] The owner of the construction land was the Republic of Serbia, whose legislature was empowered to regulate transformation of the right of use over the construction land into private ownership, including by imposing certain conditions, The Constitutional Court of Serbia dismissed an initiative for examination of constitutionality of Article 103(6), Constitutional Court Decision IUz-68/2013 dated 23 May 2013**, C-104**, para 2 of dispositif and pp 5-6 (pdf); see, also Constitutional Court Decision Iuz-68/2013, **C-099**, p 8 (pdf). Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 115-117.

[399] **Živković Milošević ER-1**, paras 58-64.

on conversion until a new provision was adopted.[400] Accordingly, there was no legal basis to process applications for conversion against a fee until the adoption of the 2015 Law on Conversion, which reintroduced this type of the conversion.[401] As Claimants' experts note, municipalities did not process conversion requests until the adoption of new legislation in 2015.[402]

[400] See Constitutional Court Decision Iuz-68/2013, **C-099** & Judgement of the Administrative court no, 9U 7501/2014 dated 15 March 2016, **R-126**.

[401] 2015 Law on Conversion, **R-123**. The 2015 Law on Conversion also provided that all pending conversion procedures will be terminated, and the applicants will be directed to apply for conversion according to its provisions. **Živković Milošević ER-1**, para. 65. Conversion without a fee, on the other hand, was always and still is regulated by the 2009 Law on Planning and Construction.

[402] **Živković Milošević ER-1**, para. 64. This was not without justification, as the experts aver, but rather due to the Constitutional Court's decision mentioned above, as well as due to the fact that the 2014 amendment to the 2009 Law on Planning and Construction abolished conversion for fee and provided it should be subsequently regulated by a special law. See 2009 Law on Planning and Construction, **R-097**, as amended 30 December 2014; Articles 102(9), (10).

C. THE TRIBUNAL LACKS JURISDICTION TO HEAR CLAIMANTS' CLAIMS

248. The Tribunal lacks jurisdiction to hear this dispute equally under the Cyprus-Serbia BIT (**Section I.** below) and under the Canada-Cyprus BIT (**Section II.** below).

I. The Tribunal lacks jurisdiction under the Cyprus-Serbia BIT (as regards the First and Second Claimants, Coropi and Kalemegdan)

249. The Tribunal lacks jurisdiction under the Cyprus-Serbia BIT on several grounds. First, the Cypriot Claimants do not satisfy the definition of an "investor" under Article 1(3)(b) as they are not properly seated in Cyprus (**Section 1.** below). Second, the Cypriot Claimants' claims fall outside the temporal scope of the treaty, as such claims arise out of matters which occurred before the treaty's entry into force (**Section 2.** below). Third and finally, the Cypriot Claimants have, for several reasons, failed to establish that they have a protected "investment" within the meaning of both the BIT and Article 25(1) of the ICSID Convention (**Section 3.** below).

1. No jurisdiction *ratione personae*

250. Article 1(3)(b) of the Cyprus-Serbia BIT provides that the term "*investor*" shall mean:

> *a legal entity incorporated, constituted or otherwise duly organised according to the laws and regulations of one Contracting Party having its seat in the territory of that same Contracting Party and investing in the territory of the other Contracting Party.*[403]

251. Thus, to qualify as a foreign investor in Serbia, the Cyprus-Serbia BIT requires both (i) incorporation (or constitution) in accordance with the laws of Cyprus, and (ii) seat in Cyprus. Unlike incorporation, the term "*seat*" is not qualified in the treaty by the wording "*in accordance with the laws of Cyprus*", as is the case with the incorporation requirement. The requirement to have a "seat" in Cyprus is a separate jurisdictional requirement that should be assessed independently. Had the Contracting Parties intended that the "*laws and regulations of one Contracting Party*" to extend to seat requirement, they would have included wording that would reflect such intention.[404] Consequently, the "seat" requirement cannot be interpreted and given meaning in accordance with the "*laws and regulations of Cyprus*".

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[403] Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **CL-007(a)**, Article 1(3)(b) (emphasis added).

[404] *Alverley Investments Limited and Germen Properties Ltd v. Romania* (ICSID Case No. ARB/18/30). Award (Excerpts) dated 16 March 2022, **RL-007**, para 217.

252. Claimants failed to prove that they have registered office in Cyprus in accordance with the applicable requirements.[405] Furthermore, regardless of whether the Tribunal applies international law or Cyprus law to determine its meaning, the term "seat" means more than incorporation in Cyprus, requiring effective management by the Cyprus entity (**Section a)** below). Coropi and Kalemegdan failed to prove such effective management in Cyprus. Rather, as they are controlled or managed by a Canadian national (**Section b)** below).

a) The term "seat" requires the investor to prove effective management from Cyprus

aa) International law requires effective management

253. In accordance with Article 31(1) the Vienna Convention on the Law of Treaties ("**VCLT**"), treaty provisions shall be interpreted in good faith in accordance with ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[406] Further, Article 31(3)(c) of the VCLT requires that any relevant rules of international law applicable in relations between the Contracting Parties shall be taken into account.[407]

254. In international law, the concept of seat, in particular as a nationality criterion in investment agreements, has been understood as a criterion separate from incorporation and was understood to mean place of effective management. In this regard, scholars noted that:

> *Some BITs combine the place of incorporation test with criteria focusing on a company's "seat". This test attributes the nationality of the place where the siege social is located. <u>The "seat of a company" often refers to the place of effective management decision-making</u>, and as such, while more difficult to determine, reflects a more significant economic relationship between the corporation and the country granting nationality.*[408]
>
> *It has become more and more pertinent <u>to look at the aspect of the control</u> of a corporation when one wants to determine its nationality especially for purposes of international investment arbitration. [...] <u>The test of the seat of</u>*

[405] Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, para 8.33.

[406] Article 31(1) of the United Nations, Vienna Convention on the Law of Treaties, of 1970, **RL-008**.

[407] Article 31 of the United Nations, Vienna Convention on the Law of Treaties, of 1970, **RL-008**.

[408] P. Sauve, '*Trade and Investment Rules: Latin American Perspectives*', UN Economic Commission for Latin America and the Caribbean (2006), **RL-009**, p 22.

the corporation requires something more, whether some activities are taking place and whether the corporation is managed from that particular state.[409]

255. This is also in line with the position expressed by UNCTAD:

> *The seat of a company may not be as easy to determine as the country of organization, but it does reflect a more significant economic relationship between the company and the country of nationality. Generally speaking, "seat of a company" connotes the place where effective management takes place. The seat is also likely to be relatively permanent as well.*[410]

256. An overview of treaties concluded by Serbia and Cyprus, respectively, with other States, is particularly supportive of the interpretation that insertion of word "seat" in the Cyprus-Serbia BIT was for the purpose of enhancing jurisdictional requirements. This is because both Serbia and Cyprus have concluded BITs that contain different definitions of the term "investor". Some of the concluded BITs require only incorporation,[411] while others specifically require that the legal person is both incorporated and has its seat on the territory of the contracting party.[412] It is thus evident that both Cyprus and Serbia ascribe different meanings to the criteria of incorporation and seat.

[409] E. Schlemmer, 'Investment, Investor, Nationality, and Shareholders', in Muchlinsky/Ortino/Schreuer (EDS), *The Oxford Handbook of International Investment Law* (2008), **RL-010**, at 79, as cited in Central European Aluminium Company (CEAC) v. Montenegro, ICSID Case No. ARB/14/8, Award, 26 July 2016, **RL-011**, para 127 (emphasis added).

[410] Scope and Definition - UNCTAD Series on Issues in International Investment Agreements II UNITED NATIONS New York and Geneva, 2011, **RL-012**, p 83 (emphasis added).

[411] See for example, Agreement on the Promotion and the Reciprocal Protection of Investments between the Council of Ministers of the Republic of Albania and the Government of the Republic of Cyprus, **RL-013**, Article 1(2)(b); Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Republic of Belarus on the Reciprocal Promotion and Protection of Investments, **RL-014**, Article 1(3)(b).

[412] See for example, Agreement on reciprocal promotion and protection of investments between the Government of the Republic of Cyprus and the Government of the Islamic Republic of Iran, **RL-015**, Article 1(2)(b); Agreement on the reciprocal promotion and protection of investments between the Government of the Republic of Cyprus and the Government of the Republic of San Marino, **RL-016**, Article 1(1)(b); Agreement between the Kingdom of Spain and the Federal Republic of Yugoslavia on the Promotion and Reciprocal Protection of Investments, **RL-017**, Article 1(2)(b); Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of The Republic of Poland on Reciprocal Promotion and Protection of Investments, **RL-018**, Article 1(3)(b).

257. The practice of arbitral tribunals is also aligned with the view that the place of incorporation and seat are separate concepts,[413] and that "*seat*" represents the place of effective management of a corporation under investment-treaty law.[414] For example, in *AFT v. Slovakia*, arbitral tribunal noted that:

> *The fact that Article 1(1)(b) of the BIT requires a Swiss „seat" as a distinct element in addition to „constitution and organization under Swiss law" demonstrates that the mere incorporation in Switzerland is insufficient to constitute a "seat" in the terms of the BIT.*[415]

258. Finally, this means that the investor must in fact show where is the control over the company activity.[416] This is confirmed by the meaning of the terms management[417] and effective.[418] The tribunal in *AFT v. Slovakia* stated that the term seat and found that the seat entails "*effective centre of administration of business operations*"[419] i.e. that the

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[413] *Alps Finance and Trade AG v. The Slovak Republic* (UNCITRAL), Award (redacted version) dated 5 March 2011, **RL-019**, para. 216; *Mera Investment Fund Limited v. Republic of Serbia* (ICSID Case No. ARB/17/2), Decision on Jurisdiction dated 30 November 2018, **RL-020**, para 91.

[414] *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela I*, ICSID Case No. ARB/11/26, Award dated 29 January 2016, **CL-019**, para 154.

[415] *Alps Finance and Trade AG v. The Slovak Republic* (UNCITRAL), Award (redacted version) dated 5 March 2011, **RL-019**, para 216. On this point, *see also Mera Investment Fund Limited v. Republic of Serbia* (ICSID Case No. ARB/17/2), Decision on Jurisdiction dated 30 November 2018, **RL-020**, para 91.

[416] *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic* (PCA Case No. 2017-15), Final Award dated 11 May 2020, **RL-021**, para 441 ("*Concerning the meaning of the term "seat" under international law, the overwhelming majority of international law authorities concur that it encompasses the effective place of management and central administration of a company's business activities*"); *Alverley Investments Limited and Germen Properties Ltd v. Romania* (ICSID Case No. ARB/18/30), Excerpts of Award dated 16 March 2022, **RL-022**, para 230 ("*The Tribunal considers that the requirement that a company have its "real seat" in the unoccupied part of Cyprus means that the management and control of the company and its activities must in some sense be located in that part of Cyprus.*"); *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, (ICSID Case No. ARB/15/18), Award, **RL-023**, para 268 ("*the term "registered office" in Article 1(2)(a) of the Treaty refers to the place of the company's central administration, in other words the place where the company is actually managed*" (Translated from French); *WA Investments-Europa Nova Limited v. Czech Republic*, PCA Case No. 2014-19, Award, 15 May 2019, **RL-024**, para 239.

[417] Oxford Living Dictionaries, definition of management. https://www.oxfordlearnersdictionaries.com/definition/english/management?q=management

[418] Oxford Advanced Learner's Dictionary., definition of effective. https://www.oxfordlearnersdictionaries.com/definition/english/effective?q=effective

[419] *Alps Finance and Trade AG v. The Slovak Republic* (UNCITRAL), Award (redacted version) dated 5 March 2011, **RL-019**, para 217. On this point, *see also Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela I*, ICSID Case No. ARB/11/26, Award dated 29 January 2016, **CL-019**, para 154.

claimant cannot prove the existence of seat by simply obtaining an excerpt from the company's registry, tax declaration and by asserting that company books are kept in Switzerland.[420]

259. This shows that "seat" represents not a formal, but a substantial criterion - what is of relevance is who actually manages the business affairs of a company, even if they do not have an official capacity in a company.

bb) Cyprus law also requires effective management

260. If the Tribunal considers that national law is relevant to determine the meaning of the term "seat", Respondent submits that under Cyprus law "*seat*" equally means effective management.

261. As explained by Mr Kypros Ioannides, a practising lawyer qualified in both Cypriot and English law and specialising in Cypriot company law, the term "*seat*" under Cypriot law does not have a settled or specific meaning when used in relation to legal entities.[421] Therefore, the definition and the meaning of the term "*seat*" will depend on the instrument and the context in which the term "*seat*" is found.[422]

262. Against this background, Mr Ioannides explains that if the term "*seat*", as used in the Cyprus-Serbia BIT, is interpreted in accordance with Cypriot law, then it refers to the place where the corporation's central management and control is exercised.[423]

263. Mr Ioannides reaches this conclusion by considering that the term "*seat*" refers to the conflict of laws principle of "*residence*", which in respect of corporations under Cypriot law was shaped by the practice of English courts in corporate tax matters.[424] The case *De Beers Consolidated Gold Mines v Howe* is instructive on this point. There, Lord Loreburn LC set a test which provided that:

[420] *Alps Finance and Trade AG v. The Slovak Republic* (UNCITRAL), Award (redacted version) dated 5 March 2011, **RL-019**, para 215.

[421] Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, para 8.11.

[422] Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, para 8.11.

[423] Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, paras 8.19-31.

[424] Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, paras 8.22- 24.

> *[A] company resides, for the purposes of income tax where its real business is carried on. I regard that as the true rule; and the business is carried on where the central management and control actually abides.*[425]

264. Therefore, the residence of a corporation, or its seat, is the place where its central management and control abides.[426]

265. This interpretation of "*residence*" is consistent with subsequently adopted Cypriot laws. For example, the Income Tax Law of 2002[427] deems a "*resident*" in Cyprus, for purposes of income tax, to be "*a company whose management and control is exercised in the Republic*".[428]

266. Therefore, if one looks at the law of Cyprus, it becomes apparent that it also recognises the existence of, and difference between, the concepts of "*registered office*" and the "*seat*".

b) Coropi and Kalemegdan do not have their seat (effective management) in Cyprus

267. In an effort to prove that the Cypriot Claimants meet the requirements for a protected investor under Article 1(3)(b) of the Cyprus-Serbia BIT, Claimants have submitted copies from the Cyprus Company Register that show the state of affairs of each company as of 31 March 2022.[429]

268. The Company Register records show that the Cypriot Claimants are both registered and have registered offices in Cyprus. The records also show the name of the directors, secretaries, and their respective members. The Company Register record for Coropi shows Mr Rand, a resident of Canada,[430] as one of the directors of Coropi. In addition to Mr Rand, Igor Markicevich is another director of Coropi, residing outside Cyprus.[431] Igor Markicevich is also one of the directors of Kalemegdan.[432] Neither Coropi nor

[425] *De Beers Consolidated Mines v Howe (Surveyor of Taxes)* [1906] AC 455**, R-127**, pp 2-3.

[426] Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, para 8.28.

[427] Law No. 118(I)/2002, **RL-025**, Article 2.

[428] Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, para. 8.29.

[429] See Memorial, para 157. See also Corporate Register of Kalemegdan dated 31 March 2022, **C-063** and Corporate Register of Coropi dated 31 March 2022, **C-065**.

[430] The Company Register record indicates that Mr. Rand's address is 2136 SW Marine Drive, Vancouver, Canada. Corporate Register of Coropi dated 31 March 2022, **C-065**.

[431] Igor Markicevich resides in Serbia at 7 Nede Spacojevic, 11077 Beograd-Novi.

[432] See Corporate Register of Kalemegdan dated 31 March 2022, **C-063**.

Kalemegdan are "*controlled*" from Cyprus because all decisions regarding those two entities are made by Mr Rand, who resides in Canada.

269. This is evident in Claimants own statements as regards the decisive role of Mr Rand (Canadian national, but not claimant in these proceedings) in the affairs of both Coropi and Kalemegdan. In these proceedings, Claimants submitted that:

- Mr Rand "*fully controlled*" Coropi;[433]
- "*Mr. Obradovic acted according to directions from Mr. William Rand*";[434]
- "*Mr. Obradovic would acquire certain Serbian assets—including Obnova's shares—as a nominal owner", while the "beneficial owner of these assets was Mr. Rand—usually through various corporate entities <u>he owned and/or controlled</u>*";[435]
- "*In April 2012, <u>acting upon Mr. Rand's instruction</u>, Mr. Obradovic contributed the Cypriot Obnova Shares (i.e. 14,142 shares in Obnova, representing approximately 70% of Obnova's total share capital) to the capital of Kalemegdan*";[436]
- "*The beneficial owner of Kalemegdan was—and still is—Mr. Rand*";[437] and
- "*Mr. Rand further decided to involve Coropi in the beneficial ownership of the Cypriot Obnova Shares. <u>Mr. Rand is a director of Coropi and controls the company</u>.*"[438]

270. Therefore, according to Claimants' own admissions, Mr Rand was the person whose approval was necessary for any business decisions that could have been made on Coropi's and Kalemegdan's behalf.

271. In light of the requirements contained in Article 1(3)(b) of the Cyprus-Serbia BIT, as stated above, it is clear that neither Coropi's nor Kalemegdan's "seat" is in Cyprus. As seen above, all decisions regarding Coropi and Kalemegdan's activity were purportedly made by Mr Rand, who is a Canadian citizen residing in Canada. Mr Rand's Canadian

[433] Memorial, para 22.

[434] Memorial, para 74.

[435] Memorial, para 74.

[436] Memorial, para 90.

[437] Memorial, para 91.

[438] Memorial, para 92

residence is substantiated by Claimants' own evidence. Accordingly, Claimants do not qualify as investors under Cyprus-Serbia BIT.

2. No jurisdiction *ratione temporis*

272. Claimants allege that Obnova had the right of use over the Objects, which transformed into private ownership upon Obnova's privatisation in September 2003.[439] Respondent strongly opposes this contention and has shown that Obnova has never had the right of use over the Objects, which are temporary structures build on someone else's land.[440] It is, however, undisputed that in November 2003, the Cadastre decided to register the City of Belgrade as the holder of the right of use over the Objects and the Dunavska Plots ("**2003 Registration**"). To reach a decision on the Parties' arguments and, in particular, the alleged treaty violations, the Tribunal must first determine the validity of the 2003 Registration.

273. In view of the well-known distinction *"between (1) the jurisdiction* ratione temporis *of an ICSID tribunal and (2) the applicability* ratione temporis *of the substantive obligations contained in a BIT"*,[441] the Tribunal cannot make a decision about the alleged breaches without considering a dispute which arouse, and the matters which occurred, in 2003 and 2004, for which it lacks *ratione temporis* jurisdiction under the dispute resolution clause contained in the Cyprus-Serbia BIT (**Section 1.** below). Moreover, the substantive obligations contained in the Cyprus-Serbia BIT cannot be applied retroactively, so they did not bind Respondent at the time of the crucial events and therefore the Tribunal lacks *ratione temporis* jurisdiction also on this basis (**Section 2.** below). Finally, the Tribunal lacks *ratione temporis* jurisdiction because the crucial events predate the Cypriot Claimants' investments (**Section 3.** below).

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[439] Memorial, para 50 ("… *the socially-owned property that Obnova had the right to use was transferred to Obnova's private ownership*"); **Živković Milošević ER-1**, para 139 ("... *upon privatization, Obnova's right of use over the buildings at Dunavska 17-19 transferred into an ownership right*").

[440] See above B.IV.

[441] *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction**, RL-026**, para 309.

a) The dispute resolution clause of the Cyprus-Serbia BIT does not apply to matters that occurred before its entry into force

aa) The dispute resolution clause of the Cyprus-Serbia BIT does not have retroactive effect

274. The general rule on the temporal application of international treaties is set out in Article 28 of the VCLT, which provides

> *Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.*[442]

275. Article 28 of VCLT codifies the rule of general international law on non-retroactivity of treaties.[443]

276. This rule sets out a presumption against retroactivity and applies to both substantive and jurisdictional provisions of treaties.[444] Hence, "*[u]nless a different interpretation appears from the treaty or is otherwise established*", a dispute resolution clause does not have retroactive application to cover disputes that may have arisen prior to the entry into force of the treaty. Such was the situation in *Impreglio v. Pakistan* where the tribunal noted, with respect to a generally worded dispute resolution clause ("*any dispute arising between a contracting Party and the investors of the other*"), that

> *Such language – and the absence of specific provision for retroactivity – infers that disputes that may have arisen before the entry into force of the BIT are not covered…*[445]

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[442]United Nations, Vienna Convention on the Law of Treaties, of 1970**, RL-008,** Article 28.

[443]*Draft Articles on the Law of Treaties with commentaries* (1966)**, RL-027**, p. 211, para 1 ("*The general rule, however, is that a treaty is not to be regarded as intended to have retroactive effects unless such an intention is expressed in the treaty or is clearly to be implied from its terms*").

[444]*Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, International Law Commission, UN GA Doc A/56/10 (2001)**, CL-036**, Commentary of Article 13, para. 6, at p 58.

[445]*Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction**, RL-026**, paras 299-300; see, also, *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. Kingdom of Thailand* (UNCITRAL), Award dated 1 July 2009**, RL-028**, para 9.72; *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic* (LCIA Case No. UN 7927), Award on Preliminary Objections to Jurisdiction dated 19 September 2008**, RL-029,** para 82.

277. Article 9 of the Cyprus-Serbia BIT contains a dispute resolution clause, which in part provides the following:

> *1. Disputes that may arise between one of the Contracting Parties and an investor of the other Contracting Party with regard to an investment of the present Agreement, shall be notified in writing, including a detailed information, by the investor of the former Contracting Party. As far as possible, the parties concerned shall endeavour to settle these disputes amicably.*
>
> *2. If these disputes cannot be settled amicably within six months from the date of the written notification mentioned in paragraph 1, the dispute may be submitted, at the choice of the investor, to:*
>
> *[…]*
>
> *- the International Centre for the Settlement of Investment Disputes (ICSID) established by the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States."*[446]

278. As can be seen, the dispute resolution clause in the Cyprus-Serbia BIT does not contain any stipulation of retroactive application, which is therefore excluded in accordance with Article 28 of the VCLT.

279. In addition, the operation of all provisions of the Cyprus-Serbia BIT, including the dispute resolution clause in Article 9, is further limited by Article 12 which is entitled "Application of the Agreement":

> *The provisions of this Agreement shall apply to investments made by investors of one Contracting Party prior to as well as after the date of entry into force of this Agreement, but it shall only apply to matters occurring after the entry into force of the present Agreement.*

280. As the result of this provision, the whole of the Cyprus-Serbia BIT, including its dispute resolution clause, applies only to the *matters* occurring *after* its entry into force.

[446] Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **CL-007(a)**, Article 9.

281. The term "*matter*(s)" has been understood as "*a subject or situation that you must consider or deal with*"[447] or "*a subject under consideration*", "*a subject of disagreement or litigation*" or "*the events or circumstances of a particular situation*".[448]

282. On the other hand, with respect to the meaning of the term "dispute" in Article 12, one should recall a widely accepted definition that a dispute is

> *... a disagreement on a point of law or fact, a conflict of legal views or interests between the Parties.*[449]

283. It is clear that the term "*matter*(s)" has a wider meaning than the term "*dispute*(s)" and broadly covers all issues, subjects or situations that one deals with. The difference in meaning is also confirmed by the fact that the Cyprus-Serbia BIT uses both terms in Articles 9 and 12 respectively, so they must carry different meanings.

284. It is submitted that the effect of Article 12 on the dispute resolution clause in Article 9 is to further expand the general rule on non-retroactivity of treaties contained in Article 28 of the VCLT. Normally, under the general rule, the dispute resolution clause in Article 9 would apply only to the disputes that have arisen after the entry into force of the treaty. However, due to Article 12, the dispute resolution clause in question applies "*only to the matters occurring after the entry into force*", which is an additional expansion of non-retroactivity.[450] The result is a double restriction of the jurisdiction of an arbitral tribunal constituted under the Cyprus-Serbia BIT, which would have jurisdiction to deal only with disputes that have arisen after the treaty's entry into force *and* which concern matters occurring after the treaty's entry into force (23 December 2005[451]). Conversely, if a dispute (i) arose before the treaty entered into force *or* (ii) concerns a matter which

[447] Oxford Dictionary, Definition of "matter", available at <https://www.oxfordlearnersdictionaries.com/definition/english/matter_1>, last accessed 29 September 2023, **R-128**.

[448] Merriam-Webster, Definition of "matter", available at <https://www.merriam-webster.com/dictionary/matter>, last accessed 29 September 2023, **R-129**.

[449] *Mavrommatis Palestine Concessions (Greece v. U.K.),* Objection to the Jurisdiction of the Court, Judgment, PCIJ Series A no 2, ICJ dated 30 August 1924**, RL-030**, p. 13 (of PDF); *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947,* ICJ, Advisory Opinion, **RL-031,** para. 35.

[450] On this point, see *Empresas Lucchetti S.A. and Lucchetti Peru S.A. v. The Republic of Peru* (ICSID Case No. ARB/03/4), Decision on Annulment, **RL-032**, paras 94-95.

[451] UNTS, vol. 2371, No. 42771 (2006), **RL-033**.

occurred before the treaty entered into force, the arbitral tribunal would not have jurisdiction to hear it.

bb) Application to the present case

(i) The crucial facts and the existence of the dispute pre-date the Cyprus-Serbia BIT

285. Before applying the applicable international legal rules on temporal application of the dispute resolution clause in the Cyprus-Serbia BIT, it is important to note that the crucial events on which the Parties' rely in making their arguments about the existence of Obnova's property rights, or lack thereof, occurred *before* the treaty's entry into force.

286. For their part, Claimants contend that Obnova had acquired the right of use over the Objects upon their construction, which dates as far back as the late 1940s.[452]

287. Claimants further contend that "*[b]y constructing its buildings, Obnova also acquired the so-called 'permanent right of use' over the land at Dunavska 17-19 where these buildings were built.*"[453]

288. According to Claimants, the right of use automatically converted into private ownership upon Obnova's privatisation on 12 September 2003: "*... the socially-owned property that Obnova had the right to use was transferred to Obnova's private ownership*".[454]

289. Therefore, events that are, in Claimants' view, crucial for Obnova's acquisition of the right of use and ownership over the Objects and the Dunavska Plots occurred prior to 23 December 2005 when the Cyprus-Serbia BIT entered into force.

290. Respondent strongly rejects Claimants' factual account and, in particular, the contention that Obnova had acquired any rights over the Objects that could lead to its ownership, or similar property entitlements over the Dunavska Plots, either by privatisation or by other means. Respondent's case in this regard also focuses on the events and facts that took place *before* 23 December 2005, including, in particular, the registration of the City of

[452] Memorial, paras 35-36 ("*Starting in late 1940's, Obnova gradually built a number of buildings at Dunavska 17-19* […] *Upon construction, the buildings became part of people's common property and Obnova automatically acquired the right to use the buildings*") and para 44 ("*Obnova constructed several buildings at Dunavska 23 between 1988 and 1992. Since Obnova was still a socially-owned enterprise at that time, same as with respect to the buildings at Dunavska 17-19, the buildings at Dunavska 23 were in social ownership and Obnova automatically acquired the right of use over these buildings*").

[453] Memorial, para 39 (footnotes omitted).

[454] Memorial, para 50 (footnotes omitted).

Belgrade as the holder of the right of use over the Objects in November 2003.[455] This registration was one of the crucial moments because it extinguished any property entitlements that Obnova might have had over the Dunavska Plots and the Objects (*quod non*). The 2003 Registration also impacted subsequent decisions of the authorities, specifically their decision where to plan the new bus loop, as it was natural to place it on city property.[456]

291. On 18 March 2003, before the 2003 Registration which occurred on 22 November 2003, Obnova had filed a request for inscription of the right of use over the Objects at Dunavska 17-19 and 23, supported by temporary construction permits for some of the objects. After finally contacting Obnova's manager, the Cadastre concluded that Obnova lacked appropriate documentation for inscription of the right of use over the objects.[457] This information was also reproduced in Obnova's Privatisation Program in 2003.[458]

292. It should also be noted that Obnova's initial legalization requests were filed in 2003 – and denied in 2004 – before the entry into force of the Cyprus-Serbia BIT in 2005. Namely, Obnova submitted requests for legalization concerning the Objects in Dunavska 17-19 and 23 on 11 November 2003. The requests were denied on 26 November 2004, of which Obnova was notified on 27 December 2004.[459]

(ii) <u>Adjudication of the present claims would require the retroactive application of the dispute resolution clause</u>

293. As has already been shown, the Tribunal does not have jurisdiction under the Cyprus-Serbia BIT (i) if a dispute arose before 23 December 2005, when the treaty entered into force, *or* (ii) if it concerns a matter which occurred before that date. It is submitted that the Tribunal lacks jurisdiction on both counts.

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[455] See above B.III.2.c).

[456] See below E.I.2.b)aa)(i).

[457] See above B.III.2.d) , Report of the Cadastre from 20 May 2003, **R-130** ("*In a phone call with the Director of the company, Stetic Nikola, it was confirmed that the company does not own and does not use other real estate except those included in the principal report of the Republic Geodetic Authority number 952-297/03 from 09/04/2003, and <u>for which the real estate the company does not own corresponding documentation</u>*.") (emphasis added).

[458] Privatisation Program, **R-046**, pp 4-5 (of PDF).

[459] Letter from the Construction Department to Obnova from 27 November 2009**, R-131,** p 1; Letter from the Construction Department to Obnova from 27 November 2009, **C-317**.

294. *First,* as discussed above,[460] a *dispute* between Obnova and Respondent concerning the former's right of use over the Objects arose already in 2003-2004. Obnova asked the Cadastre for inscription of its right of use over the Objects in early 2003 but, instead, the Privatisation Program contained information that indicated that the Cadastre had disproved Obnova's rights over these Objects. Subsequently, the Cadastre inscribed the City of Belgrade as the holder of the right of use over the Objects. In addition, the authorities denied Obnova's legalization requests concerning the Objects in 2004. All this shows that there was a dispute concerning Obnova's property rights *vis-à-vis* the Dunavska Plots and the Objects, which arose already in 2003 and 2004.

295. The same dispute over Obnova's property rights is at the heart of the present investment arbitration where Claimants argue, and Respondent disagrees, that Obnova has property rights over the Objects and the Dunavska Plots, which Respondent denied by the adoption of the 2013 DRP and refusal to pay compensation in 2021, thereby violating Claimants' treaty rights. However, any finding of a violation of Claimants' treaty rights entails determination that Obnova, and by extension Claimants, have property rights over the Dunavska Plots, which necessitates adjudication of the ownership dispute which arose in 2003-2004. This is the first reason why the Tribunal cannot entertain the Cypriot Claimants' claims in the present dispute, since they in fact concern a dispute over Obnova's property rights over the Dunavska Plots which arose before 25 December 2005, the date on which the Cyprus-Serbia BIT entered into force.[461]

296. Second, according to both Claimants and Respondent, the crucial events ("*matters*") which concern the creation and existence of Obnova's alleged property entitlements, or lack thereof, occurred before 23 December 2005. On the one hand, Claimants themselves allege that Obnova's property entitlements over the Objects and the Dunavska Plots had been created during the time period which precedes the relevant date, at the latest at the time of privatisation in 2003.[462] On the other hand, Respondent's case is that Obnova did not acquire any property entitlements over the Objects and the Dunavska Plots and that, in any case, the City of Belgrade was registered as the holder of the right of use over the Objects and the Dunavska Plots in 2003, which is also before the relevant date.

297. Clearly aware of the temporal scope of application of the Cyprus-Serbia BIT and its dispute resolution clause, Claimants argue that the breaches of the BIT are the consequence of Respondent's actions that occurred subsequent to its entry into force.

[460]See above B.III.2.d).

[461] UNTS, vol. 2371, No. 42771 (2006), **RL-033**.

[462] Claimants' Memorial, para 50.

Specifically, Claimants point to (i) Respondent's designation of the Dunavska Plots for the construction of the bus loop by the 2013 DRP, and (ii) Respondent's refusal to provide compensation for alleged expropriation in 2021.[463]

298. However, it is impossible to make a determination on whether these actions constitute violations of the Cyprus-Serbia BIT without first answering the question whether Obnova did or did not have property rights over the Objects and the Dunavska Plots. Otherwise, Obnova could not claim that the Objects are its property, nor could Claimants claim that the Objects are even part of their investments, or that Respondent's actions concerning the Objects violated their rights in any way.

299. It is precisely for this reason that Claimants and their Legal Experts had, in the first place, to allege that Obnova had had the right of use over the Objects, which transformed into private ownership at the moment of Obnova's privatisation in September 2003.[464] While it is immaterial in the present context whether this is an accurate interpretation of Serbian law (it is not), what matters is that this shows that, in order to decide on Claimants' claims, the Tribunal would necessarily have to decide on Obnova's purported acquisition of the right of use, about privatisation, about the City of Belgrade's registration as the holder of the right of use over the Objects and the Dunavska Plots, as well as about various other matters, all of which occurred prior to 23 December 2005, the date on which the Cyprus-Serbia BIT entered into force.

300. All of these matters and the underlying facts are not something that the Tribunal could merely take into account when adjudicating the subsequent actions of Respondent which took place after the treaty entered into force. Rather, any discussion of the alleged breaches and Claimants' claims must involve a *determination* of whether Obnova – and by extension Claimants – had any property entitlements over the Objects and the Dunavska Plots, which necessitates extension of the Tribunal's jurisdiction to the matters which occurred prior to the entry into force of the treaty. This would be contrary to Articles 9 and 12 of the Cyprus-Serbia BIT.

301. Here, the Tribunal finds itself in a situation similar to that in the *Phosphates in Morocco* case, where the PCIJ was called upon to decide about the denial of justice suffered by Italian nationals before the French courts, but decided that it could not entertain this question without first determining the existence of the rights for which the French courts had refused judicial protection. Since this would involve consideration of situations or

[463] Claimants' Memorial, paras 171 and 172.

[464] Memorial, para 50; **Živković Milošević ER-1**, para 139.

facts that predated the acceptance by France of the relevant compulsory jurisdiction, the PCIJ decided that it had no jurisdiction to entertain the application.

302. The PCIJ started from a general proposition that:

> *… [i]t is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction disputes having actually arisen from situation or facts subsequent to its acceptance.* ***But it would be impossible to admit the existence of such a relationship between a dispute and subsequent factors which either presume the existence or are merely the confirmation or development of earlier situations or facts constituting the real causes of the dispute***.[465]

303. On this basis, the PCIJ stated, with respect to the issue before it, that:

> *… the Court could not regard the denial of justice established unless it had first satisfied itself as to the existence of the rights of the private citizens alleged to have been refused judicial protection. But the Court could not reach such a conclusion without calling in question the decision of the Department of Mines of 1925. It follows than an examination of the justice of this complaint could not be undertaken without extending the Court's jurisdiction to a fact which, by reason of its date, is not subject thereto.*[466]

304. In the present case, the Tribunal cannot consider Claimants' claims about the treaty breaches unless "*it had first satisfied itself as to the existence of the rights*" of Obnova over the Objects and the Dunavska Plots, which would necessitate "*extending [its] jurisdiction to a fact which, by reason of its date, is not subject thereto*". Such an extension of jurisdiction would be clearly in contravention of Article 12 of the Cyprus-Serbia BIT, which restricts the application of the treaty (including its dispute resolution clause in Article 9) to the matters occurring after its entry into force, i.e., 23 December 2005.

305. In conclusion, the Tribunal does not have *ratione temporis* jurisdiction under the Cyprus-Serbia BIT to adjudicate this dispute.

[465] *Phosphates in Morocco, Italy v France*, Preliminary objections, PCIJ Series A/B No 74, ICJ**, RL-034**, p 24.

[466] *Phosphates in Morocco, Italy v France*, Preliminary objections, PCIJ Series A/B No 74, ICJ**, RL-034**, p 22.

b) The substantive provisions of the Cyprus-Serbia BIT do not have retroactive effect

306. As already discussed, any property rights or entitlements that Obnova might have had over the Objects and the Dunavska Plots (*quod non*) were in any case definitively extinguished in 2003 when the Republic Geodetic Authority registered the City of Belgrade as the holder of the right of use over the Objects and the Dunavska Plots in the Cadastre.[467] This created a legal situation which continues to exist, with all subsequent events being its consequence. Since the 2003 Registration occurred before the entry into force of the Cyprus-Serbia BUT, and since there is no legal ground to apply the treaty retroactively, Respondent was not bound by its provisions at the relevant time in 2003, so it cannot be liable for the 2003 Registration or the treaty breaches alleged by Claimants, which would be its consequence.

307. In the following, Respondent will discuss the general rules of international law concerning the retroactive application of international treaties and state responsibility and will then show that any alleged rights of Claimants were extinguished before the Treaties entered into force, while the 2013 and 2021 measures Claimants invoke are a consequence of the situation created by the 2003 Registration.

aa) Applicable rules of international law

(i) The intertemporal principle requires conduct to be judged on the basis of the law in force at the time the relevant act is done

308. International state responsibility presupposes, *inter alia*, that a State was bound by an international obligation at the time of its act that breached the obligation in question. According to Article 13 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts,

> *An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.*[468]

309. As the ILC Commentary of the Draft Articles notes:

[467] See above, para. 77.

[468] See ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001)**, RL-035**, Article 13.

Article 13 states the basic principle that, for responsibility to exist, the breach must occur at a time when the State is bound by the obligation.[469]

310. According to the ILC, the principle is "*well established*"[470] as evidenced by practice of international courts and tribunals, state practice, and opinions of "*international law writers*".[471] The ILC Commentary notes that

[i]nternational law writers who have dealt with the question recognize that the wrongfulness of an act must be established on the basis of the obligations in force at the time when the act was performed.[472]

311. The principle that a State may be responsible only for the breaches of its obligations that were in force *at the time* when the act of the State occurred is closely connected to the principle of non-retroactivity of treaties.

312. As already mentioned, Article 28 of the VCLT[473] codifies the rule of general international law on the non-retroactivity of treaties.[474] The rule on non-retroactivity of treaties has been adopted in the practice of international investment tribunals.[475] For example, the

[469] *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), **RL-036**, Commentary of Article 13, para 1, at p 57.

[470] *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, International Law Commission, UN GA Doc A/56/10 (2001)**, CL-036**, Commentary of Article 13, para 9, at p 59.

[471] *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, International Law Commission, UN GA Doc A/56/10 (2001)**, CL-036**, Commentary of Article 13, paras 2-4 at pp 57-58.

[472] *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, International Law Commission, UN GA Doc A/56/10 (2001)**, CL-036**, Commentary of Article 13, para 4, at p 57, see, also, *ibid.*, note 226 for a list of relevant writings.

[473] United Nations, Vienna Convention on the Law of Treaties, of 1970**, RL-008,** Article 28 ("*Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."*).

[474] International Law Commission, *Draft Articles on the Law of Treaties with commentaries* (1966)**, RL-027**, p 211, para 1 ("*The general rule, however, is that a treaty is not to be regarded as intended to have retroactive effects unless such an intention is expressed in the treaty or is cleaerly to be implied from its terms*").

[475] Z. Douglas, *The International Law of Investment Claims* (Cambridge, 2009), **RL-037**, p 328. See, e.g., Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award dated 16 December 2002, **RL-038**, para 327; Generation Ukraine, Inc. v. Ukraine (ICSID Case No. ARB/00/9), Award, **RL-039**, para 11.2; *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction**, RL-026**, para 310; SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on jurisdiction dated 29 January 2004, **RL-040**, para 166; *OOO Manolium-Processing v. The Republic*

tribunal in *Impregilo v. Pakistan* referred to, and applied, "*the normal principle stated in Article 28 of the Vienna Convention on the Law of Treaties…*",[476] and stated that

> *[t]he legality of [the State's] acts must be determined, in each case, according to the law applicable at the time of their performance.*[477]

313. Similarly, the *Generation Ukraine* tribunal noted that

> *[t]he obligations assumed by the two state parties to the BIT… did not become binding, and hence legally enforceable, until the BIT entered into force…*[478]

(ii) <u>Retrospective application cannot be founded in the mere continuing effects of an act, rather than the act itself</u>

314. When applying the non-retroactivity rule in Article 28 of the VCLT, one needs to establish (i) the date on which a treaty entered into force, and (ii) whether an "*act or fact… took place*" or "*any situation… ceased to exist*" before that date. If the answer under (ii) is answered in the affirmative, then the treaty does not bind the party with respect to the conduct alleged, unless "a different interpretation appears from the treaty or is otherwise established".

315. One of the central questions, therefore, is whether an "act or fact… took place" or "any situation… ceased to exist" before the date of entry into force of a treaty. The issue was addressed in Article 14 of the ILC Draft Articles on State Responsibility and discussed in detail in the accompanying commentary. According to Article 14, paragraphs 1 and 2

> *(1) The breach of an international obligation by an act of state not having a continuing character occurs at the moment when the act is performed, even if its effects continue.*

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of Belarus (PCA Case No. 2018-06), Final Award**, RL-041,** para 268; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia* (UNCITRAL), Award on Jurisdiction and Liability**, RL-042,** para 431.

[476] *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction**, RL-026**, para 310.

[477] *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction**, RL-026**, para 311.

[478] Generation Ukraine, Inc. v. Ukraine (ICSID Case No. ARB/00/9), Award, **RL-039**, para 11.2.

(2) The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.[479]

316. The difference between continuing and non-continuing acts has been illuminated by the ILC's description of a continuing act:

[i]n essence, a continuing wrongful act is one which has been commenced but has not been completed at the relevant time.[480]

317. For instance, the failure of a State to pay sums due under a contract is a clear example of a continuing act.[481]

318. In contrast to that, an expropriation is a non-continuing act, since it has been completed once the title to the property has been transferred.[482] The essence of expropriation as a non-continuing act has been explained in the following way by a leading commentator:

An expropriation by its very nature requires a permanent deprivation of property and thus cannot be conceptualized as a continuing wrongful act – if the wrongful act is continuing it must be because the deprivation is not yet permanent and hence there is no expropriation.[483]

319. In the present context, it is important to distinguish between continuing violations and the prolonged effects of non-continuing violations. As noted in the ILC Commentary,

An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of international wrongful acts, their consequences may be prolonged. The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. [...] The prolongation of such effects will be relevant, for example in determining the

[479] ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001)**, RL-035**, Article 14.

[480] See *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, International Law Commission, UN GA Doc A/56/10 (2001)**, CL-036**, Article. 14, para 5, p 60.

[481] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on jurisdiction dated 29 January 2004, **RL-040**, para 167.

[482] *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, International Law Commission, UN GA Doc A/56/10 (2001)**, CL-036**, Commentary of, Article 14, para 4, p 60 (footnote omitted) ("*Where an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred, the expropriation itself will then be a completed act. The position with a de facto, 'creeping' or disguised occupation, however, may well be different*.").

[483] Z. Douglas, *The International Law of Investment Claims* (Cambridge, 2009), **RL-037**, p 334, para 626.

> *amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.*[484]

320. This view was espoused and quoted by the arbitral tribunal in *Impregilo v. Pakistan*, which stated that

> *the current dispute is to be compared with cases of expropriation as mentioned by the Rapporteur of the draft Articles in the International Law Commission… in which the effects may be prolonged, whereas the act itself occurred at a specific point in time, and must be assessed by reference to the law applicable at that time…*[485]

321. In other words, the continuation of the situation created by earlier conduct, which remains unremedied after the entry into force of the treaty, does not justify application of the treaty obligations "*retrospectively to that conduct*".

(iii) <u>The parties to the Cyprus-Serbia BIT did not agree to any retroactive effect</u>

322. There is nothing in the Cyprus-Serbia BIT that shows any intention of the States Parties that its provisions should be applied retroactively. As already mentioned, Article 12 of the treaty specifically excludes retroactive application of its provisions in a broad formulation stating that "*it shall only apply to matters occurring after the entry into force of the present Agreement.*"

323. Therefore, with reference to Article 28 of the VCLT, and since there is no indication that "*a different intention appears from the [Treaties] or is otherwise established*", the provisions of the Cyprus-Serbia BIT do not bind Respondent "*in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the [BIT] with respect to [Serbia]*".

bb) <u>This Tribunal does not have jurisdiction over the 2003 Registration or over the subsequent events which occurred as its consequence</u>

324. The following events are relevant for the present discussion:

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[484] *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, International Law Commission, UN GA Doc A/56/10 (2001), **CL-036**, p 60, para 6 (emphasis added).

[485] *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction, **RL-026**, para 313.

- On 22 November 2003, the City of Belgrade was registered as the holder of the right of use over the Objects;[486]
- On 23 December 2005, Cyprus-Serbia BIT entered into force;[487]
- On 20 December 2013, the City of Belgrade published the 2013 DRP.[488]
- On 13 August 2021, the Land Directorate sent a letter to Obnova.[489]

325. Obviously, the 2003 Registration occurred before the entry into force of the Cyprus-Serbia BIT, which does not apply retroactively so it cannot apply to the 2003 Registration.[490]

326. The 2003 Registration created a permanent situation, which was completed at the time of the entry of the registration into the Cadastre.[491] This had two fundamental consequences. First, the 2003 Registration definitively extinguished any property entitlements that other persons, including Obnova, might have had over the Objects. The registration of the right of use in the name of the City of Belgrade in the Cadastre created a legal presumption that this right belonged to the City.[492]

327. Second, the 2003 Registration determined the outcome of the subsequent actions of Respondent's authorities that would have impact on the Dunavska Plots, including the adoption of the 2013 DRP and the 2021 refusal to compensate Obnova for the alleged expropriation.

328. On the one hand, the 2013 DRP designated the Dunavska Plots for a public project (the bus loop) in part because the City of Belgrade was registered in the Cadastre as the holder of the right of use over the Dunavska Plots and the Objects since November 2003, and

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486 Cadaster decision No. 952-02-9-31/03 relating to Dunavska 17-19 dated 22 November 2003**, C-165**.

487 UNTS, vol. 2371, No. 42771 (2006), **RL-033**.

488 2013 DRP**, R-098.**

489 Letter from the Land Directorate of the City of Belgrade from 13 August 2021**, C-053**.

490 The request was denied on 27 November 2004 of which Obnova was notified on 27 December 2004. See, Letter from the Construction Department to Obnova from 27 November 2009**, C-317**; Letter from the Construction Department to Obnova from 27 November 2009, **R-131.**

491 The 2003 Registration became final in law on 31 May 2004**.** Decision of the Republic Geodetic Authority of 31 May 2004**, R-063.**

492 Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 45.

as the owner of the plots since September 2011.[493] One of the criteria for selecting the location of the bus loop was "*maintaining of the exploitation costs at the current level*".[494] Obviously, the Dunavska Plots were a simple, cheap and logical choice for the public transportation terminus, since the land was inscribed as the ownership of the City of Belgrade.

329. On the other hand, the Land Directorate's letter stating its views about Obnova's request for compensation was expressly justified by the fact that the City was registered in the Cadastre in 2003:

> *Your allegations that through adoption of the Detailed regulation plan… real estate on the location at 17-19 Dunavska St. was effectively expropriated from you are unfounded because… public ownership over, inter alia, the land parcels nos.: 47/1, 47/2, and 47/3, as well as over Objects already erected on those parcels, was registered in favor of the City of Belgrade.*[495]

330. This clearly shows that both alleged breaches (the adoption of the 2013 DRP and the refusal to compensate Obnova in 2021) were a consequence of the 2003 Registration of the City of Belgrade as the holder of the right of use over the Objects on the Dunavska Plots. The application of the Cyprus-Serbia BIT to these actions of Respondent would also entail its retroactive application to the 2003 Registration. On this basis, as well, the Tribunal lacks jurisdiction *ratione temporis* in the present case.

c) This Tribunal does not have jurisdiction over breaches of the Cyprus-Serbia BIT that took place before the alleged investment was made

aa) The 2003 Registration took place before Claimant made any alleged investment

331. This Tribunal also does not have jurisdiction to consider Claimants' claims because the 2003 Registration, of which all of the violations alleged by Claimants are merely a consequence, occurred before the dates on which Claimants made their investments.

332. According to the arbitral tribunal in *Phoenix Action v. Czech Republic*

> *The Tribunal is limited ratione temporis to judging only those acts and omissions occurring after the date of the investor's purported investment. The*

[493] Decision of the Cadastre from 12 September 2011, **R-054**.

[494] 2013 DRP**, R-098**, p 11 (of PDF).

[495] Letter from the Land Directorate of the City of Belgrade from 13 August 2021**, C-053**, pp 2-3. Claimants agree. see Memorial, paras 130 and 140.

> *proposition that bilateral investment treaty claims cannot be based on acts and omissions occurring prior to the claimant's investment results from the nature of the host State's obligations under a bilateral investment treaty. All such obligations relate to the host State's conduct regarding the investments of nationals of the other contracting party. Therefore, such obligations cannot be breached by the host State until there is such an investment of a national of the other State.*[496]

333. There is ample practice of investment arbitration tribunals holding that a claimant must have made the investment before the alleged violations occurred.[497] As noted by the arbitral tribunal in *Gallo v Canada*,

> *Investment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted.*[498]

334. In this context, it is also of importance whether the conduct complained of, which occurred *after* the investment was made, is merely a consequence of some earlier conduct, which had occurred *before* the investment was made.[499] If the impugned conduct is merely a consequence of some earlier conduct, then the relevant conduct for the purpose of jurisdiction *ratione temporis* is that earlier conduct and not its consequence. This would be in line with the judgment of the PCIJ in the *Certain Phosphates in Morocco* case where that court underlined the distinction between "*the real causes of the dispute*" and "*subsequent factors which either presume the existence or are merely the*

[496] *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5), Award dated 15 April 2009**, RL-043**, para 68.

[497] *Saluka Investments B.V. v. The Czech Republic,* UNCITRAL, PartialAward dated 17 March 2006**, CL-063**, p 244; *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic* (LCIA Case No. UN 7927), Award on Preliminary Objections to Jurisdiction dated 19 September 2008**, RL-029**, p 105; *Europe Cement Investment & Trade S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/07/2), Award**, RL-044**, para. 140 *Vito G. Gallo v. The Government of Canada* (PCA Case No. 55798), Award (redacted version)**, RL-045**, pp 326-328; *Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12*, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012**, RL-046**, para 3.34; *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia* (PCA Case No. 2015-40), Award**, RL-047**, p 108; *B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia*, ICSID Case No. ARB/15/5, Excerpts of Award dated 5 April 2019**, CL-003**, p 613; *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Final Award**, RL-048,** p 148; *President Allende Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile* (PCA Case No. 2017-30), Award**, RL-049**, p 262.

[498] *Vito G. Gallo v. The Government of Canada* (PCA Case No. 55798), Award (redacted version)**, RL-045**, para 328.

[499] See above, paras 55-64.

confirmation or development of earlier situations or facts", to conclude that it could not adjudicate the "subsequent factors" if the "real causes of the dispute" did not fall within its jurisdiction *ratione temporis*.[500]

bb) <u>This Tribunal is precluded from assessing the 2003 Registration, of which the adoption of the 2013 DRP in 2013 and the refusal to compensate Obnova in 2021 are consequences</u>

335. According to Claimants, Kalemegdan became the owner of 70% of Obnova's shares in April 2012, whilst Coropi became the beneficial owner of these shares around the same time.[501]

336. Considering the settled practice of investment arbitration tribunals that their jurisdiction extends only to breaches subsequent to the date on which the investment was made, the jurisdiction in the present case covers only the purported breaches of the rights of the Cypriot and Canadian Claimants which occurred after April 2012.

337. Knowing this, Claimants have singled out two alleged breaches of the Treaties, the adoption of the 2013 DRP in 2013 and the refusal to compensate Obnova in 2021. However, as already discussed, both of these measures are a consequence of the 2003 Registration, when the City of Belgrade was registered in the Cadastre as the holder of the right of use over the Objects and the Dunavska Plots.[502] Taking into account the 2003 Registration and the state of affairs recorded in the Cadastre as its consequence, the 2013 DRP designated the parcel in Dunavska 17-19 for the bus loop. Also, the Land Directorate's view that Obnova's request for compensation was not justified was based, *inter alia*¸ on the same fact.[503] As can be seen, the alleged measures "*either presume the existence or are merely the confirmation or development of earlier situations or facts*", i.e., the 2003 Registration, which is "*the real cause of the dispute*".[504]

338. Thus, in order to consider the purported breaches of investors' rights, the Tribunal would have to assess the 2003 Registration, its legality and legal consequences. Since the 2003

[500] See *Phosphates in Morocco, Italy v France*, Preliminary objections, PCIJ Series A/B No 74, ICJ**, RL-034***,* p 18; see, also, on this point *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID Case No. ARB/14/14), Award of the Tribunal**, RL-050**, para 453.

[501] Memorial, paras 90-96 & 164-165.

[502]See above, paras 77-79.

[503] Letter from the Land Directorate of the City of Belgrade from 13 August 2021**, C-053**, pp 2-3.

[504] See *Phosphates in Morocco, Italy v France*, Preliminary objections, PCIJ Series A/B No 74, ICJ**, RL-034***,* p 18.

Registration occurred years before the investment were made by the Cypriot Claimants in 2012, it is obviously outside the Tribunal's jurisdiction *ratione temporis* and the same applies to the subsequent Respondent's measures which came as the consequence of the 2003 Registration, i.e. the adoption of the 2013 DRP and the 2021 refusal to grant compensation to Obnova.

3. <u>No jurisdiction *ratione materiae*</u>

339. The investor bears the burden of proving that it has satisfied the criteria for an investment under both the BIT and ICSID Convention. This includes proving the facts necessary to meet these requirements.[505] The Cypriot Claimants must therefore prove conclusively, and not to the prima facie evidential standard, that they meet the jurisdictional requirements under Article 1(1) of the Cyprus-Serbia BIT (**Section a)** below) and under Article 25 of the ICSID Convention (**Section b)** below).[506] The Cypriot Claimants have fallen short of satisfying these requirements, both under the BIT and under the ICSID Convention.

340. First, Kalemegdan's acquisition of Mr Obradović's shares in Obnova does not constitute a protected investment as there is no proof of contribution or risk involved which is attributable to Kalemegdan (**Section c)** below). Second, Coropi's (alleged) indirect beneficial ownership of Obnova does not constitute a protected investment, as there is no evidence that Coropi ever acquired an interest in Obnova (**Section d)** below). Third and finally, the Cypriot Claimants' alleged acquisition of shares in Obnova violated Serbian law and was thus not made "*in accordance with the laws and regulations*" (**Section e)** below).

[505] *Anglo-Adriatic Group Limited v. Republic of Albania* (ICSID Case No. ARB/17/6), Award dated 7 February 2019, **RL-051**, para 208.

[506] *Marko Mihaljevic v. Republic of Croatia* (ICSID Case No. ARB/19/35), Award dated 19 May 2023, **RL-052**, para 65; *National Gas S.A.E. v. Arab Republic of Egypt* (ICSID Case No. ARB/11/7), Award dated 3 April 2014, **RL-053**, para 118 (this approach means that the burden of establishing jurisdiction, including consent, lies primarily upon the Claimant. Although it is the Respondent which has here raised specific jurisdictional objections, it is not for the Respondent to disprove this Tribunal's jurisdiction).

a) <u>**Requirements of an "investment" under Article 1(1) of the Cyprus-Serbia BIT**</u>

341. The jurisdiction of the Tribunal, by virtue of Article 9(1) of the Cyprus-Serbia BIT, is limited to disputes concerning "*investments*" as defined in the BIT.[507]

342. Cyprus Claimants assert jurisdiction on the basis that their protected "investment" are the shares in Obnova.[508]

343. Article 1(1) of the Cyprus-Serbia BIT defines an "*investment*" as:

> <u>*every kind of asset invested by investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter*</u> *and in particural, though not exclusively, shall include:*
>
> *a) movable and immovable property and any other in rem property rights such as mortgages, liens or pledges;*
>
> *b) shares, bonds and other form of securities;*
>
> *c) claims to money or to any performance under contract having economic value;*
>
> *d) intellectual property rights such as copyrights and other related rights and*
>
> *[…].*[509]

344. This provision stipulates four requirements for the existence of "investment" that is afforded protection under the Cyprus-Serbia BIT: (i) an investor must acquire assets; (ii) assets must be invested (iii) in the territory of the other Contracting Party (iv) in accordance with its laws and regulations. Applying the standard rule of treaty interpretation, it follows that only assets which were invested by the investor in the host State, in a manner compliant with host State law, will be protected under the treaty.

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[507] Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **CL-007(a)**. Article 9(1) provides that "[d]*isputes that may arise between one of the Contracting Parties and an investor of the other Contracting Party with regard to an investment in the sense of the present Agreement, shall be notified in writing, including a detailed information, by the investor to the former Contracting Party. As far as possible, the parties concerned shall endeavour to settle these disputes amicably*".

[508] Memorial, paras 164-166.

[509] Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **CL-007(a)** (emphasis added).

345. As to the requirement that the assets must be invested by the investor, this entails that the investor show that it *caused* an investment to be made in the territory of the respondent State.[510]

346. To satisfy the requirement that an investment was made in the territory of the host State, it is necessary to establish that the rights comprising the investment have a nexus with the host State. As explained by Professor Zachary Douglas KC, there must be a connection to the host State so that the investment is within the domestic jurisdiction of the host State:

> *[t]he legal materialisation of an investment is the acquisition of a bundle of rights in property that has the characteristics of one or more of the categories of an investment defined by the applicable investment treaty where such property is situated in the territory of the host state or is recognized by the rules of the host State's private international law to be situated in the host state or is created by the municipal law of the host state.*[511]

347. In respect of intangible property rights such as shares in a company, Professor Douglas further explains that the territorial requirement will be satisfied if the host state's rules of private international law locate the intangible property rights in the host state.[512]

348. Compliance with the host State's laws and regulations is the final requirement for an investment under the BIT. It is uncontroversial that legality of the investment "*constitutes a condition of the respondent State's consent*", particularly when, as here, "*the applicable treaty specifies that the investment must be made "in accordance with host State law" in order to qualify as an "investment" under the treaty*".[513] According to scholars, when the

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[510] *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18), Decision on Jurisdiction dated 29 April 2004, **RL-054**, paras 74-75 ("*The ordinary meaning of 'invest' is to 'expend (money, effort) in something from which a return or profit is expected...' The ordinary meaning of 'by' is 'indicating agency, means, [or] cause...' Thus, an investment under the BIT is read in ordinary meaning as 'every kind of asset' for which 'an investor of one Contracting Party' caused money or effort to be expended and from which a return or profit is expected in the territory of the other Contracting Party. In other words, the Claimant must show that it caused an investment to be made in the territory of the Respondent*") (emphasis added).

[511] Z. Douglas, *The International Law of Investment Claims* (Cambridge, 2009), **RL-037**, p 170.

[512] Z. Douglas, *The International Law of Investment Claims* (Cambridge, 2009), **RL-037**, p 172.

[513] S. W. Schill, Loretta Malintoppi, August Reinisch, Christoph H Schreuer, Anthony Sinclair, *Schreuer's Commentary on the ICSID Convention* (Cambridge, 2022) **RL-055**, p 251, para 452.

definition of "investment" under the treaty contains such requirement, "*this specification simultaneously limits the host State's consent to compliant investments*".[514]

b) <u>Requirements of an investment under the ICSID Convention</u>

349. In addition to the definitional requirements under the BIT, the concept of an investment is circumscribed under Article 25(1) of the ICSID Convention, which requires that the dispute arises "*directly out of an investment*".[515] While Article 25(1) does not define the term "investment", an investment should exhibit certain inherent characteristics, which distinguish it from ordinary commercial operations.[516] It is well settled that "*the disputing parties cannot extend the Centre's jurisdiction by agreeing on a wider notion of investment. They are limited to submit disputes arising out of transactions to the Centre that qualify as an investment in the sense of Art. 25(1)*."[517]

350. Claimants, without justification, attempt to bypass the threshold requirement for a covered investment under Article 25(1) by incorrectly insisting that "*the definition under the relevant investment treaty* (…) *is determinative for the existence of an investment*

[514] S. W. Schill, Loretta Malintoppi, August Reinisch, Christoph H Schreuer, Anthony Sinclair, *Schreuer's Commentary on the ICSID Convention* (Cambridge, 2022), **RL-055**, p 252, para 455.

[515] S.W. Schill, L. Malintoppi, A. Reinisch, C. H. Schreuer, A. Sinclair, *Schreuer's Commentary on the ICSID Convention (*Cambridge, 2022), **RL-056**, p 161, para 186.

[516] C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary* (Cambridge, 2009), **RL-057**, p 117, para 124; P. Bernardini, "Investment Arbitration under the ICSID Convention and BITs" in *Global Reflections on International Law, Commerce and Dispute Resolution* (ICC, 2005), **RL-058**, p. 99; *Fedax N.V. v. The Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision of the Tribunal on Objections to Jurisdiction dated 11 July 1997, **RL-059**, para 43, relying on C Schreuer, 'Commentary on the ICSID Convention' (1996) 11 ICSID Rev 372; *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award dated 17 October 2013, **RL-060**, paras 161–173; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania* (ICSID Case No. ARB/11/24), Award dated 30 March 2015, **RL-061**, paras 285–288; *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35), Final Award dated 31 May 2017, **RL-062**, para 370; *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/13/1), Award dated 22 August 2017, **RL-063**, paras 633, 636; *Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal* (ICSID Case No. ARB/08/20), Decision on Jurisdiction of the Arbitral Tribunal dated 16 July 2010, **RL-064**, para 80; *Noble Energy Inc. and Machala Power Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad* (ICSID Case No. ARB/05/12), Decision on Jurisdiction dated 5 March 2008, **RL-065**, para 128; *RENERGY S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/14/18), Award dated 6 May 2022, **RL-066**, para 562; *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award dated 1 November 2013, **RL-067**, para 192.

[517] S.W. Schill, L. Malintoppi, A. Reinisch, C. H. Schreuer, A. Sinclair, *Schreuer's Commentary on the ICSID Convention (*Cambridge, 2022), **RL-056**, p. 161, para 186.

under the ICSID Convention".[518] On the contrary, an "investment" under Article 25(1) of the ICSID Convention has been construed as having an autonomous and objective meaning, which exists apart from the definition contained in the relevant treaty.[519] A tribunal shall thus apply "*a dual test*"[520] to determine whether the considered dispute arises out of a qualified investment, i.e., "*(1) whether the activity in question is covered by the parties' consent; and (2) whether it meets the Convention's independent requirement*".[521] According to a prominent commentary, this dual test is applied "*by most arbitral tribunals*".[522]

351. The characteristics that have come to be widely considered to be necessary elements of an "investment" under Article 25(1) are (i) a contribution of resources of economic value in the territory of the host State, (ii) that extends over a certain period of time, and (iii) involves some risk.[523] Accordingly, in order to access arbitration under ICSID, the

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[518] Memorial, para 180.

[519] See e.g. S.W. Schill, L. Malintoppi, A. Reinisch, C. H. Schreuer, A. Sinclair, *Schreuer's Commentary on the ICSID Convention (*Cambridge, 2022), **RL-056**, p 161, 186; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]* (ICSID Case No. ARB/00/4), Decision on Jurisdiction dated 31 July 2001, **RL-068**, para 52; *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine* (ICSID Case No. ARB/09/11), Award dated 1 December 2010, **RL-069**, para 45; *Rasia FZE and Joseph K. Borkowski v. Republic of Armenia* (ICSID Case No. ARB/18/28), Award dated 20 January 2023, **RL-070**, paras 370-371; *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/15/41), Award of the Tribunal dated 11 October 2009, **RL-071**, para 194; *Saba Fakes v. Republic of Turke (* ICSID Case No. ARB/07/20), Award dated 14 July 2010, **RL-072**, para 108; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisdiction dated 27 September 2012, **RL-073**, para 212; *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35), Final Award dated 31 May 2017, **RL-062**, para 370; *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania* (ICSID Case No. ARB/07/21), Award dated 30 July 2009, **RL-074**, para 41.

[520] S.W. Schill, L. Malintoppi, A. Reinisch, C. H. Schreuer, A. Sinclair, *Schreuer's Commentary on the ICSID Convention (*Cambridge, 2022), **RL-056**, p 161, para 186.

[521] S.W. Schill, L. Malintoppi, A. Reinisch, C. H. Schreuer, A. Sinclair, *Schreuer's Commentary on the ICSID Convention (*Cambridge, 2022), **RL-056**, p 161, para 186.

[522] S.W. Schill, L. Malintoppi, A. Reinisch, C. H. Schreuer, A. Sinclair, *Schreuer's Commentary on the ICSID Convention (*Cambridge, 2022), **RL-056**, p 161, para 186.

[523] S. W. Schill, L. Malintoppi, A. Reinisch, C. Schreuer, A. Sinclair, *Schreuer's Commentary on the ICSID Convention* (Cambridge, 2022), **RL-075**, p 181, para 245-254; *Rand Investments Ltd. and others v. Republic of Serbia* (ICSID Case No. ARB/18/8), Award dated 29 June 2023, **RL-076**, para 228; *Rogelio Barrenechea Cuenca, Antonio Cosío Ariño, Luis de Garay Russ and others v. Kingdom of Spain* (PCA Case No. 2019-17), Final Award dated 13 March 2023, **RL-077**, para 372; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (ICSID Case No. ARB/10/25), Award dated 28 July 2015, **RL-078**, para 286; *Saipem S.p.A. v. The People's Republic of Bangladesh* (ICSID Case No. ARB/05/07), Award dated 30 June 2009, **RL-079**, para 99; *Ioannis Kardassopoulos v. The Republic of*

Cypriot Claimants must show that they have made a substantial contribution in an operation involving a certain duration, which involves the assumption of economic or operational risk.[524]

352. While the nature of the contribution is relatively broad, tribunals are clear there must be some form of economic contribution[525] which is "*concrete, material* ".[526]. A mere transfer of funds will be insufficient in proving a contribution when the alleged investor did not actively allocate resources.[527]

Georgia (ICSID Case No. ARB/05/18), Decision on Jurisdiction dated 6 July 2017, **RL-080**, para 116; *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award dated 17 October 2013, **RL-060**, paras 161–173; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania* (ICSID Case No. ARB/11/24), Award dated 30 March 2015, **RL-061**, paras 285–288; *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35), Final Award dated 31 May 2017, **RL-062**, para 370; *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/13/1), Award dated 22 August 2017, **RL-063**, paras 633, 636; *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon* (ICSID Case No. ARB/07/12), Decision on Jurisdiction dated 11 September 2009, **RL-081**, para 84; *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)* (ICSID Case No. ARB/08/12), Award dated 5 June 2012, **RL-082**, paras 360, 434; *Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/16/25), Award dated 5 March 2020, **RL-083**, paras 293-294; Z. Douglas, *The International Law of Investment Claims* (Cambridge, 2009), **RL-037**, p 191, paras 403 and 407.

[524] S. W. Schill, L. Malintoppi, A. Reinisch, C. Schreuer, A. Sinclair, *Schreuer's Commentary on the ICSID Convention* (Cambridge, 2022), **RL-075**, p 181, paras 245-254.

[525] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisdiction dated 27 September 2012, **RL-073**, para 219; *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35), Final Award dated 31 May 2017, **RL-062**, para 376; *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)* (ICSID Case No. ARB/08/12), Award dated 5 June 2012, **RL-082**, para 435; *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5), Award dated 15 April 2009, **RL-043**, para 83; *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award dated 17 October 2013, para 113.

[526] S. W. Schill, L. Malintoppi, A. Reinisch, C. Schreuer, A. Sinclair, *Schreuer's Commentary on the ICSID Convention* (Cambridge, 2022), **RL-075**, p 181, para 245.

[527] *Komaksavia Airport Invest Ltd. v. Republic of Moldova* (SCC Case No. 2020-074), Final Award dated 3 August 2022, **RL-084**, para 175 (the tribunal concluded that as there had been no convincing evidence of payment of the nominal value of shares, the claimant did not have a protected investment under the applicable BIT); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisdiction dated 27 September 2012, **RL-073**, para 232 (the tribunal concluded that Allan Fosk did not meet the contribution requirement for the "investment" test of Article 25(1) of the ICSID Convention, as there was no evidence that Allan Fosk made any payments in order to acquire his share.); *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award dated 17 October 2013, **RL-060**, para 206 (the tribunal found that the claimant had failed to prove that it had made any payment for the

353. Additionally, the contribution must be proven conclusively, and not on a prima facie basis.[528]

354. As regards the element of risk, tribunals typically require the claimant investor to show the assumption of an investment-specific risk, as opposed to "*the ordinary commercial or business risk assumed by all those who enter into a contractual relationship*".[529] This helps to circumscribe the activities and assets for foreign nationals warranting treaty protection by excluding short-term, one-off, or purely commercial transactions that face risks which are "*no different from that involved in any commercial contract*".[530]

c) Kalemegdan did not make an investment under Article 1(1) of the Cyprus-Serbia BIT and Article 25(1) of the ICSID Convention

355. While it is not disputed that Kalemegdan is the nominal owner of 70% of Obnova's share capital, its mere ownership of shares is not sufficient to satisfy the requirements of an investment under Article 1(1) of the Cyprus-Serbia BIT and Article 25(1) of the ICSID Convention, as decided by several ICSID tribunals in other cases.[531]

356. The Tribunal in *Komaksavia v Moldova*, for example, was unable to find any contribution of Komaksavia in connection with its acquisition of 95% of the shares in Avia Invest. The tribunal noted that the shares had been transferred to Komaksavia without proof of payment of any consideration, and without Komaksavia having the ability to pay this amount or to fund Avia Invest in the future. In the absence of any evidence of a

transfer of shareholding. Although the consideration to be paid had been covered by a loan, neither the capital nor the interest had been paid); *Société Civile Immobilière de Gaëta v. Republic of Guinea* (ICSID Case No. ARB/12/36), Award dated 21 December 2015, **RL-085**, paras 217-218 and 224.

[528] *Marko Mihaljevic v. Republic of Croatia* (ICSID Case No. ARB/19/35), Award dated 19 May 2023, **RL-052**, para 65.

[529] *Romak S.A. v. The Republic of Uzbekistan* (PCA Case No. AA280), Award dated 26 November 2009, **RL-086**, para 231.

[530] *Joy Mining Machinery Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Award on Jurisdiction dated 6 August 2004, **RL-087**, para 57.

[531] *Rand Investments Ltd. and others v. Republic of Serbia* (ICSID Case No. ARB/18/8), Award dated 29 June 2023, **RL-076**, para 271; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisdiction dated 27 September 2012, **RL-073**, para 233; *Anglo-Adriatic Group Limited v. Republic of Albania* (ICSID Case No. ARB/17/6), Award dated 7 February 2019, **RL-051**, para 246 (observing that " Several investment tribunals have concluded that investors who had not paid any consideration, or only a nominal price, were not entitled to investment protection").

contribution having been paid, the Tribunal found that Komaksavia had no qualifying investment within the particular terms of Article 1(1) of the BIT.[532]

357. Claimants assert that Mr Obradović acquired ownership of the Obnova shares in December 2005 by way of assignment of the Obnova privatisation agreement.[533] According to Claimants, Mr Obradović had a long-standing business relationship with Mr Rand whereby Mr Obradović would acquire assets in Serbia on Mr Rand's behalf and for his benefit. On 26 April 2012 – less than one month after Kalemegdan was registered in the Cypriot corporate register[534] – Mr Obradović contributed his shares in Obnova and in four other Serbian companies to Kalemegdan, of which he was the sole legal owner, in exchange for additional share capital in Kalemegdan.[535]

358. Kalemegdan's acquisition of the Obnova shares through the contribution of its sole shareholder does not satisfy the definition of "investment" under Article 1(1) of the Cyprus-Serbia BIT. Claimants have failed to show that Kalemegdan "caused" an investment to be made in Serbia, whether through the expenditure of money or some other effort in exchange for the Obnova shares.

359. Claimants have equally failed to show that Kalemegdan made a contribution in Serbia, and therefore do not meet the requirements for an investment under Article 25(1) of the ICSID Convention. When Kalemegdan subsequently acquired Mr Obradović's shares in Obnova in April 2012, the transfer of the shares to Kalemegdan was made without payment of any consideration and there was no new injection of capital into the company.

360. Kalemegdan has also not made a substantial (or any) subsequent contribution after acquiring the Obnova shares which would amount to an economic contribution in its own right.[536] Kalemegdan did not contribute any capital or other resources such as know-how, equipment, personnel, or services, to Obnova. In the circumstances, Kalemegdan has

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[532] *Komaksavia Airport Invest Ltd. v. Republic of Moldova* (SCC Case No. 2020-074), Final Award dated 3 August 2022, **RL-084**, para 175.

[533] Memorial, para 74.

[534] Corporate Register of Kalemegdan dated 31 March 2022, **C-063**.

[535] Memorial, para 91 ("*Mr. Obradović was the nominal owner of Kalemegdan. The beneficial owner of Kalemegdan was—and still is—Mr. Rand. As a result of the contribution, Kalemegdan became both the nominal and the direct beneficial owner of the Cypriot Obnova Shares.*"), citing Minutes of a meeting of the board of directors of Kalemegdan dated 26 April 2012, **C-318**.

[536] *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award dated 17 October 2013, **RL-060**, para 198.

failed to establish it has made an investment within the meaning of Article 1(1) of the Cyprus-Serbia BIT or Article 25(1) of the ICSID Convention.

d) Coropi's alleged indirect beneficial ownership of Obnova is not a protected investment

361. Claimants have placed two trust deeds onto the record to show that Coropi beneficially owns 100% of the shares in Kalemegdan and is thus an indirect beneficial owner of shares in Obnova.[537] They allege that Coropi's putative indirect beneficial ownership of these shares constitutes a covered investment under Article 1(1) of the Cyprus-Serbia BIT (and, by implication, Article 25(1) of the ICSID Convention).[538] This is incorrect for several reasons.

362. Coropi's alleged indirect ownership of the Obnova shares through the trust deeds does not satisfy the criteria of an "*investment*" under Article 1(1) of the Cyprus-Serbia BIT. First, there is no evidence that Coropi ever acquired an interest in Kalemegdan or, for that matter, in Obnova (**Section aa)** below). Second, the trust deeds have no effect under Serbian law, which does not recognise or allow for beneficial ownership of shares (**Section bb)** below). Coropi also has not made an investment in the territory of Serbia (**Section cc)** below).

363. Finally, Coropi's alleged interest does not satisfy the criteria for an "investment" under Article 25(1) of the ICSID Convention (**Section dd)** below).

aa) Coropi did not acquire an interest in Obnova

364. According to Claimants, Coropi invested in Serbia by acquiring beneficial ownership of Kalemegdan and by extension, its shares in Obnova. They alleged that Coropi's beneficial ownership of Obnova shares was based on the effects of the two trust deeds dated 26 April 2012 and 16 August 2012 and ostensibly subject to Cypriot law.[539] For reasons given below, the trust deeds were simply unable to produce any effect on the ownership of Obnova's shares.

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[537] Trust Deed dated 26 April 2012, **C-066**; Trust Deed dated 16 August 2012, **C-067**; Letter of Instructions from 26 March 2012, **C-319**.

[538] Memorial, paras 21, 95.

[539] Trust Deed dated 26 April 2012, **C-066**; Trust Deed dated 16 August 2012, **C-067**. Respondent notes that the trust deeds do not specify an applicable law. As both the grantor and subject matter of the trust are Cypriot companies, and further given that trusts are not recognised under Serbian law, Respondent assumes that the trust deeds are governed by Cypriot law.

365. As a preliminary matter, Respondent notes that under Cypriot law, the principal methods of constituting an express trust are through an express declaration of trust by the settlor, or through a transfer of property by the settlor to the trustee, to hold on trust. In both instances, the settlor of a trust must have an interest – either legal or beneficial – in the property it purports to place into the trust.[540] While there are no formal requirements for an express trust, the settlor or grantor of the trust must, with reasonable certainty, establish (i) an intention to create a trust, (ii) the property which is the subject matter of the trust, (iii) the intended beneficiaries, and (iv) the purpose of the trust.[541]

366. The documents relied on by Claimants to demonstrate Coropi's indirect ownership of shares in Obnova consist of two trust deeds and a letter of instruction signed by Coropi as "*beneficial owner*".[542] None of these documents establish Coropi's alleged beneficial ownership of Kalemegdan and its indirect beneficial ownership of the Obnova shares. Moreover, Claimants' explanations of these documents are inconsistent and do not reflect the content of the documents.

367. Claimants first point to a letter sent by Coropi on 26 March 2012 to the then directors of Kalemegdan, instructing them to "*always obtain instructions, directions and written consent from COROPI HOLDINGS LIMITED (the 'Beneficiary') for the implementation of any administration and fiduciary services*".[543] The letter further instructed Kalemegdan's directors to obtain "*written permission of the Beneficiary*" before any decisions or resolutions are taken. As Claimants observe, Kalemegdan's then directors, Mr Christodoulos Michaelides and Mr Xanthos Sarantis, counter-signed the letter, purportedly confirming their acceptance of the instructions.[544] Notably absent is the signature or acknowledgement of the actual owner of Kalemegdan's shares, Mr Obradović. Additionally, no context or background is given for this letter. The letter neither specifies the assets over which Coropi is stated to be a "beneficiary" nor identifies the basis on which Coropi became a beneficiary. In view of the uncertainty as to purpose of this arrangement and the subject matter, this letter does not establish that Coropi is

[540] Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, paras 7.13-16, 7.17.

[541] Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, para 7.5, footnote 14.

[542] Trust Deed dated 26 April 2012, **C-066**; Trust Deed dated 16 August 2012, **C-067**; Letter of Instructions from 26 March 2012, **C-319**.

[543] Letter of Instructions from 26 March 2012, **C-319**.

[544] Memorial, para 93.

beneficially interested in Kalemegdan or any shares in Kalemegdan, whether by way of a trust or similar arrangement.[545]

368. It also bears noting that Kalemegdan's Articles of Association expressly prohibit the recognition by Kalemegdan (including its directors) of any trust over or beneficial interest its shares. Article 12 of the Articles of Association provides that Kalemegdan may only recognise the "*absolute right*" of the registered holder of shares in the company, i.e. Mr Obradović:

> *Save from the circumstances provided for in the Law, <u>no person may be recognised by the Company as holding any shares on the basis of any trust</u>; the Company itself is neither bound nor in any way obliged to recognize (even if notified) of any equitable interest, conditional, future or partial such interest, on any share or any interest in any fraction of a share, or (save as otherwise provided in these Regulations or in any law), except the absolute right of its registered holder absolutely*.[546]

369. Accordingly, the letter of instructions is neither binding on Kalemegdan's directors, nor sufficient to establish that Coropi has a beneficial interest in Kalemegdan or its assets.[547]

370. Claimants also rely on two trust deeds concluded between Coropi, as "Grantor", and Mr Obradović, as the "Trustee". The first trust deed was concluded between Mr Obradović and Coropi on 26 April 2012). By virtue of this deed, Coropi (as "the Grantor") declared and directed Mr Obradović (as "the Trustee") to hold the Shares (defined as four thousand fully paid-up shares of the nominal value of Euro 1,00 each, in the undertaking called Kalemegdan Investments Limited) upon trust. [548]

371. The second trust deed was concluded between Coropi and Mr Obradović on 16 August 2012. The subject of this trust deed were the remaining 500 shares of Kalemegdan Investments Limited of same nominal value of Euro 1,00 each. The remainder of the second trust deed is identical to the first trust deed.[549]

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[545] Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, paras 7.19-23.

[546] Memorandum and Articles of Association of Kalemegdan Investments Limited dated 19 March 2012, **R-132**.

[547] Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, para 7.23.

[548] Trust Deed dated 26 April 2012, **C-066**.

[549] Trust Deed dated 16 August 2012, **C-067**.

372. According to Claimants, the purpose of both trust deeds was for Coropi to acquire beneficial ownership of Kalemegdan's Obnova shares.[550] However, the trust deeds were simply unable to produce any effect on the ownership of Obnova's shares.

373. Both trust deeds state, in their preamble, that as grantor, "*for consideration given*", Coropi was "*beneficially interested and entitled to*" the shares in Kalemegdan. According to Claimants, the same day the first trust deed was concluded, on 26 April 2012, Mr Obradović contributed his shares in Obnova, representing approximately 70% of Obnova's total share capital, to the capital of Kalemegdan.[551] On this basis, Claimants allege that "[b]*ased on the trust deeds, Coropi therefore became the 100% beneficial owner of Kalemegdan*".[552]

374. Insofar as Claimants contend that the beneficial interest was acquired through the creation of the trust, based on the two trust deeds, this does not hold up to scrutiny.

375. First, there is no clear declaration of any trust by the owner of Kalemegdan's shares, which are the subject of the trust. Rather, it is Coropi, the alleged beneficiary, that has purported to make a positive declaration of a trust. The trust deeds themselves assume – and the existence of the trust requires – that Coropi's alleged beneficial interest in the Kalemegdan shares was pre-existing, as the preamble states that "[t]*he Grantor for consideration given is beneficially interested and entitled to* […]".[553] If indeed Coropi's beneficial interest was pre-existing, then it could not be created by the trust deeds. But if the trust deeds themselves do not create a valid beneficial interest in the Kalemegdan shares in favour of Coropi, this leaves open the question of how and under what conditions Coropi acquired such interest. Claimants have furnished no evidence in this regard.[554]

376. In the present case, there is no evidence on the record of a transfer of beneficial ownership of shares in Kalemegdan to Coropi or payment by Coropi of consideration in exchange for the shares. In other words, there is no evidence that Coropi was in fact a beneficial owner prior to the conclusion of the trust deeds. Neither the trust deeds nor the letter of instruction can remedy this defect in Claimants' case, as they do not establish when or

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[550] Memorial, para 95.

[551] Memorial, para 90.

[552] Memorial, para 95.

[553] Trust Deed dated 26 April 2012, **C-066**; Trust Deed dated 16 August 2012, **C-067**.

[554] Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, paras 7.28 (c) and (d), 7.29.

how any beneficial interest was created, whether there were any conditions or qualifications to the beneficial interest at the time of creation, and to whom and under what circumstances any consideration was given.[555] Absent evidence of Coropi's pre-existing beneficial interest in Kalemegdan, it must be presumed that Mr Obradović, as the nominal owner of the Kalemegdan shares, is also the beneficial owner.[556]

377. Although Coropi is named as the grantor in the trust deeds, it is not clear what it is that is being granted (or settled) in these deeds. It is not the legal title of the shares in Kalemegdan, as at the time it was in the name of Mr Obradović. Nor can it be a beneficial interest in the shares, as the deeds presuppose that Coropi was already beneficially interested (and continued to be interested) in the shares. Even if Coropi and Mr Obradović had intended to establish a trust over his shares in Kalemegdan, the trust deeds do not, as a matter of Cypriot law, create indirect beneficial ownership of the Obnova shares in favour of Coropi.[557] No trust is established over the assets of the subject of the trust. In other words, the assets of the trust subject do not form part of the trust.

378. The present case recalls *Anglo-Adriatic Group Limited v. Republic of Albania*.[558] There, AAG alleged that the shares in AAIF had been transferred through four trust deeds governed by English law. When analysing these documents, the tribunal verified that AAG appeared both as settlor and beneficiary under the trust deed. The trust deeds did not support AAG's position that the foreign shareholders had transferred beneficial ownership of their shares in AAIF to AAG.[559] The tribunal therefore concluded that AAG had not acquired a beneficial interest in the AAIF shares and thus did not own the investment.[560]

379. Similarly, in *Alverley v. Romania*, the tribunal observed that the trust deeds presented by the claimant did not confer the purported beneficial interest constituting the investment, as the terms of the deeds made clear that they were written on the basis that Alverley had

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[555] Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, para 7.28 (d).

[556] Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, para 7.24-25.

[557] Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, para 7.32.

[558] *Anglo-Adriatic Group Limited v. Republic of Albania* (ICSID Case No. ARB/17/6), Award dated 7 February 2019, **RL-051**, paras 230-247.

[559] *Anglo-Adriatic Group Limited v. Republic of Albania* (ICSID Case No. ARB/17/6), Award dated 7 February 2019, **RL-051**, paras 233-236.

[560] *Anglo-Adriatic Group Limited v. Republic of Albania* (ICSID Case No. ARB/17/6), Award dated 7 February 2019, **RL-051**, para 247.

already acquired that beneficial interest "*for consideration*". As is the case with the Kalemegdan trust deeds, there was no explanation or evidence of how Alverley acquired the beneficial interest or from whom. Despite the attempts of Alverley's counsel to explain the circumstances surrounding the reference to Alverley's "*consideration*", the tribunal ultimately decided that questions as to "*who assigned the beneficial interest to Alverley and what was the consideration to which the deeds refer to*" remained unanswered.[561]

380. As Claimants have failed to provide any credible and direct evidence of Coropi's acquisition of an indirect beneficial interest in Obnova (or in Kalemegdan for that matter), this prevents any finding that such interest constitutes an "*investment*" under Article 1(1) of the Cyprus-Serbia BIT.

bb) Coropi's alleged indirect beneficial ownership of Obnova is not a recognised investment under Serbian law

381. As noted above, Claimants allege that Coropi's indirect beneficial ownership of Obnova is based on the effects of the two trust deeds. While neither of the two trust deeds have a choice of law provision, one has to take into consideration that for a property right to be entitled to protection under an investment treaty, a territorial link to the host State must be established.[562] For intangible property rights, it is crucial that the rights have a basis under the national law of the host State.[563] Stated differently, the requirements contained in the legislation of the host State inform the existence and acquisition of a property right that enjoys protection under the treaty. Therefore, to ascertain whether or not Coropi has property rights in Serbia that are capable of investment protection, it is necessary to consider whether those rights were created or acquired under Serbian law.

382. In the present case, Claimants have failed to establish that Coropi acquired an interest in Obnova as a matter of Serbian law.

383. The trust deeds purport to transfer beneficial ownership of Mr Obradović's shares in Kalemegdan to Coropi and to impose certain obligations on Mr Obdradovic, as trustee of those shares. Among other things, Mr Obradović was obliged to transfer dividends in

[561] *Alverley Investments Limited and Germen Properties Ltd v. Romania* (ICSID Case No. ARB/18/30). Award (Excerpts) dated 16 March 2022, **RL-007**, para 428.

[562] See above para 346.

[563] See *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Annulment dated 9 March 2017, **RL-088**, paras 168 and 170; Z. Douglas, *The International Law of Investment Claims* (Cambridge, 2009), **RL-037**, p 52.

respect of the shares to Coropi and to exercise any other right or power with regards to the shares in consultation with Coropi. He was also obliged to vote in accordance with the written instructions of Coropi and in a manner not prejudicial to the interest of Coropi. The trust deeds also provided that Mr Obradović would receive from Coropi an agreed remuneration for acting in accordance with the Trust Deed.

384. As explained by Prof Jelena Lepetic, a professor on company law and insolvency law at the University of Belgrade, the trust deeds purport to transfer all the rights deriving from Mr Obradović's shares in Kalemegdan to Coropi, leaving Mr Obradović with only "*bare ownership*". Because trusts are an alien concept under Serbian law, the trust deeds do not have the effect of granting or transferring share ownership rights to Coropi under Serbian law. Instead, the deeds must be viewed as a contractual arrangement as between Coropi and Mr Obradović.[564]

385. As a consequence, the trust deeds do not create an interest in Kalemegdan or Obnova in favour of Coropi under Serbian law. This is because the trust deeds create only *inter partes* obligations as between Mr Obradović and Coropi; they do not produce any effect on third parties, including Kalemegdan or Obnova. The rights of Coropi under the trust deeds are thus merely contractual and are not binding or opposable to Serbia.

386. Furthermore, since Serbian company law does not distinguish between legal and beneficial ownership of shares, ownership of Kalemegdan remains with Mr Obradović. Any other qualification relating to the rights of owners of shares is thus irrelevant under Serbian law. Since Coropi is not an owner of shares in Kalemegdan, it is not entitled to any rights deriving from these shares, including rights related to the Obnova shares.[565]

cc) <u>Coropi also did not invest in the territory of Serbia</u>

387. To enjoy protection of the Cyprus-Serbia BIT, Coropi must also prove that it invested in the territory of Serbia, as required under Article 1(1) of the BIT. This implies the existence of investment activities by the investor. Claimants have not shown that it was involved in any investment activities in Serbia.

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[564] See Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-003**, paras 82 and 84.

[565] Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-003**, para 100.

388. The term "*invested*" has been treated as a synonym for the term "made".[566] In *Standard Chartered Bank v. Venezuela,* an ICSID tribunal concluded that making of investment requires an active involvement of an investor:

> *Having considered the ordinary meaning of the BIT's provision for ICSID arbitration when a dispute arises between a Contracting State to the BIT and a national of the other Contracting State concerning an investment "of" the latter set out in Article 8(1) of the UK Tanzania BIT, the context of that provision and the object and purpose of the BIT, the Tribunal interprets the BIT to require an active relationship between the investor and the investment. To benefit from Article 8(1)'s arbitration provision, a claimant must demonstrate that the investment was made at the claimant's direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner.*[567]

389. In a similar vein, the tribunal in *Mera v. Serbia* found that "*making investments*" under the Cyprus-Serbia BIT requires "*…more than the funding and acquisition of investments, but as well, the holding and management of investments*."[568]

390. Likewise, the territorial requirement centres on the need of economic activities of an investor in the territory of the host State. According to Jeswald W. Salacuse the requirement of territorial nexus is aimed at providing states with benefits in connection with foreign investments:

> *The rationale behind this practice is to ensure that the host state obtains the benefits from the operation of foreign investments within its territory, whether such benefits consist of obtaining new technologies, developing important economic sectors, creating new jobs, or collecting additional tax revenues.*[569]

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[566] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB 12/20), Award dated 26 April 2017, **RL-089**, paras 157, 158.

[567] *Standard Chartered Bank v. The United Republic of Tanzania* (ICSID Case No. ARB/10/12), Award dated 2 November 2012, **RL-071**, para. 230. See also para 232 ("*for an investment to be "of" an investor in the present context, some activity of investing is needed, which implicates the claimant's control over the investment or an action of transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to the other*").

[568] *Mera Investment Fund Limited v. Republic of Serbia* (ICSID Case No. ARB/17/2), Decision on Jurisdiction dated 30 November 2018, **RL-020**, para 107.

[569] J. W. Salacuse, *The Law of Investment Treaties* (2015), **RL-091**, p 188.

391. This is why investment tribunals use the place of economic activity as a main criterion when establishing whether an investment was made in the territory of the respondent state.[570]

392. In the case at hand there is no evidence on the record that Coropi has ever invested anything of value in the territory of Serbia. More importantly, no investment activity was ever conducted by Coropi in the territory of Serbia. Claimants have not provided any evidence that Coropi ever made any expenditure for the benefit of Kalemegdan's activities in Serbia.

393. As stated earlier, Claimants submitted two trust deeds and a letter of instruction which they might try to use to show Coropi's active involvement in managing Kalemegdan's business affairs.[571] However such argument must fail.

394. As explained above[572], Kalemegdan's Articles of Association do not allow Kalemegdan and its Directors to recognise any trust or equitable interest on its shares. Accordingly, neither the trust deeds nor the letter of instruction are binding on Kalemegdan. Additionally, Mr Ioannides in his legal opinion identified several issues with the letter of instruction, which further call into question Claimants' assertion that the letter entitled Coropi to control Kalemegdan's affairs.[573] Mr Ioannides stated that the letter does not:

> *(a) Clearly specify exactly what it is that Coropi is the beneficiary of,*
>
> *(b) Identify the basis of which Coropi is, as alleged, a beneficiary of any asset, and*
>
> *(c) Is not in any way acknowledged by the actual shareholder of the Kalemegdan shares, i.e., Mr Djura Obradovic.*[574]

395. Consequently, neither the trust deeds nor the letter of instruction can be used to prove that Coropi actively managed Kalemegdan's business affairs.

396. Even if it was possible for Coropi to acquire indirect beneficial ownership of Obnova's shares under Serbian law (which it was not), its passive ownership would not be enough

[570] See, for instance, *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No. ARB/07/16), Award dated 8 November 2010, **RL-092**, paras 279-281.

[571] See above para 361.

[572] See above paras 368-369.

[573] Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, para 7.19-23.

[574] Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, para 7.21.

to qualify as an investment made in the territory of Serbia. To label Coropi even as a shell company would overstate its role since it has never held the legal title over Obnova's shares. Respondent respectfully submits that granting Coropi the status of protected investor under the Cyprus – Serbia BIT would stretch the boundaries of protection far from the scope intended by the BIT.

dd) Coropi's alleged indirect beneficial ownership of Obnova does not meet the criteria set forth in Article 25(1) ICSID Convention

397. Claimants' failure to furnish proof of Coropi's acquisition of an interest in Obnova prevents any finding that Coropi has an "investment" within the meaning of Article 25(1) of the ICSID Convention. This is because Coropi's alleged beneficial interest in the Obnova shares does not exhibit the essential characteristics of an investment, namely the allocation of resources (Section (i) below) and assumption of risk (Section (ii) below).

(i) Coropi did not make a contribution

398. Claimants must prove the existence of a contribution in money or assets on the part of Coropi. As noted above, a claimant investor must put forward evidence of the underlying transaction comprising the economic contribution. Tribunals have consistently found that an investor which has not demonstrated proven the payment of consideration with respect to an alleged investment will not fulfil the requirements of an investment under Article 25(1) of the ICSID Convention.[575]

399. The tribunal's findings in *Alverley Investment v. Romania* are, again, apposite. In Alverley, the claimant relied on a deed it stated that the beneficial interest was transferred "*for consideration*" but did not provide any explanation of what, for whom, or how much the consideration was paid. The tribunal found several deficiencies with regards to the trust deeds, including the lack of direct evidence of consideration, and concluded that the claimant did not acquire beneficial ownership of the investment through these deeds.[576]

400. The tribunal in *Anglo-Adriatic v. Albania*, also discussed above,[577] came to a similar conclusion, considering that irrespective of other deficiencies in the trust deeds, there was no evidence that AAG had paid the "*appropriate consideration*" in exchange for receiving beneficial ownership of shares in the AAIF:

[575] See above para 352.

[576] *Alverley Investments Limited and Germen Properties Ltd v. Romania* (ICSID Case No. ARB/18/30). Award (Excerpts) dated 16 March 2022, **RL-007**, para 428.

[577] See above para 378.

> *This failure is especially striking, because it should have been easy for AAG, a corporation with a duty to keep accounts, to prove the existence of such payments (e.g. by submitting its accounting books or certificates from the bank which handled the payments). The Tribunal agrees with Albania that the record does not show Claimant paying any 'consideration under the Alleged Trust Deeds in return for (allegedly) receiving beneficial ownership of shares in AAIF'.*[578]

401. As in these cases, Coropi has not discharged its burden of proof with respect to its alleged interest in Obnova. Claimants' contention that Coropi had an indirect beneficial interest in Obnova, through its alleged beneficial ownership of Kalemegdan is based solely on a letter of instruction and the two trust deeds, neither of which proves that Coropi ever contributed money or other assets. No evidence of the consideration that was purportedly given by Coropi in exchange for its putative and unsubstantiated beneficial interest has been put forward by Claimants. This is far from sufficient to discharge Claimants' burden of proof in establishing the existence of an investment under Article 25(1) of the ICSID Convention.

402. Coropi also did not make any other contribution within the meaning of Article 25(1). Legal ownership of the shares in Kalemegdan remained with Mr Obradović, whereas ultimate beneficial ownership and full control over these shares is stated to have remained with Mr Rand.

403. This is further supported by the lack of any evidence of Coropi's involvement in or subsequent contribution to Obnova. Coropi's alleged contribution is limited to the vague and unsupported reference to a "*contribution*" in the trust deed, for which – again – there is no direct evidence.

(ii) <u>Coropi did not assume any risk in relation to its purported investment</u>

404. Coropi's purported investment also does not entail participation in or assumption of the risks of an investment, as its exposure was limited to the consideration allegedly paid for its beneficial interest in Kalemegdan. As noted above, tribunals typically require more than the assumption of ordinary commercial or business risk, such as non-performance, and instead look for whether the investor undertook an investment risk.[579] Additionally,

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[578] *Anglo-Adriatic Group Limited v. Republic of Albania* (ICSID Case No. ARB/17/6), Award dated 7 February 2019, **RL-051**, paras 244-247.

[579] *Joy Mining Machinery Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Award on Jurisdiction dated 6 August 2004, **RL-087**, para 57; *Romak S.A. v. The Republic of Uzbekistan* (PCA Case No. AA280), Award dated 26 November 2009, **RL-086**, paras 229-231; *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic* (PCA Case No. 2017-15), Final Award dated 11 May 2020, **RL-021**, para 475; *Christian*

the *KT Asia v. Kazakhstan* tribunal observed that the absence of an investor's contribution implies the absence of risk.[580]

405. In the present case, because Coropi made no contribution of its own to acquire the alleged beneficial interest in the Obnova shares or to fund its operations, it undertook no cognizable risk. For Coropi, the failure of Obnova would simply result in its not receiving the profits it had hoped to receive under the trust deeds. Coropi's alleged one-off payment of consideration entailed no element of risk beyond the ordinary commercial risk of doing business generally.

e) The Cypriot Claimants do not have a legal investment in Serbia

406. Article 1(1) of the Cyprus-Serbia BIT makes clear that the conformity of investments with the national law of the host State of the investment is part of the notion of investment. Accordingly, the jurisdiction of this Tribunal only covers disputes concerning legal investment (**Section aa)** below). The Cypriot Claimants breached the Serbian Law on Takeover of Joint Stock Companies when (allegedly) acquired shares in Obnova. This fact deprives the Tribunal of jurisdiction *ratione materiae* under the Cyprus-Serbia BIT (**Section bb)** below).

aa) The Tribunal's jurisdiction only covers disputes concerning legal investments

407. As noted above, the express wording of the Cyprus-Serbia BIT makes clear that any investments made by an investor from another Contracting Party must comply with the laws and regulations of the Contracting Party at the time the investment is acquired.

Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius (PCA Case No. 2018-37), Award on Jurisdiction dated 23 August 2019, **RL-093**, para 145; *Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/16/25), Award dated 5 March 2020, **RL-083**, para 302; *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru* (ICSID Case No. UNCT/18/2), Dissenting Opinion of Professor Brigitte Stern dated 6 December 2022, **RL-094**, paras 93-95 ("*an investment risk is a risk depending on the expectation of a profit flowing from the economic operation. In other words, there is a distinction between a risk inherent in the investment operation in its surrounding – meaning that the profits are not ascertained but depend on the success or failure of the business operation constituting the investment – and all the risks coming from outside the investment operation*."); *Mercuria Energy Group Limited v. The Republic of Poland (II)* (SCC Case No. 2019/126), Final Award dated 29 December 2022, **RL-095**, para 544; *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic* (ICSID Case No. ARB/13/8), Award dated 9 April 2015, **RL-096**, para 368.

[580] *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award dated 17 October 2013, **RL-060**, para 219. See also *Komaksavia Airport Invest Ltd. v. Republic of Moldova* (SCC Case No. 2020-074), Final Award dated 3 August 2022, **RL-084**, paras 173, 177.

Article 1(1) further stipulates that "[a] *change in the form in which assets are invested or reinvested shall not affect their character as investments, provided that such change does not contradict the laws and regulations of the Contracting Party in the territory*".[581] The treaty contains no other qualifications, requirements, or restrictions as the type of laws and regulations or the nature of the violations. Failure to acquire an investment in accordance with Serbian law is enough to disqualify the investment from protection under the treaty.

408. When an investment treaty contains a legality provision, as under the Cyprus-Serbia BIT, disputes arising out of an investment acquired or established in violation of the host State's law are generally outside the treaty's scope and thus beyond the jurisdiction of the tribunal constituted under the treaty. This is an established principle in international investment law.[582]

409. The existence of a covered investment – and by extension, the Tribunal's jurisdiction *ratione materiae* – under the Cyprus-Serbia BIT thus depends on compliance with the legislation of the host State, here, Serbian law.

bb) <u>The Cypriot Claimants breached Serbian law when they acquired shares in Obnova</u>

410. The Cypriot Claimants do not have a qualifying "investment" within the meaning of Article 1(1) of the Cyprus-Serbia BIT, as they breached the Serbian Law on Takeover of Joint Stock Companies when they acquired their respective shares in Obnova in 2012.

411. Prof Lepetic explains that the acquisition and transfer of ownership of shares in a joint stock company incorporated in Serbia are regulated by the Law on Takeover of Joint Stock Companies (the "**Law on Takeover**").[583] As per Article 6 of the Law on Takeover, where the total amount of shares to be acquired exceeds a certain threshold (more than

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[581] Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **CL-007(a)**.

[582] S. W. Schill, Loretta Malintoppi, August Reinisch, Christoph H Schreuer, Anthony Sinclair, *Schreuer's Commentary on the ICSID Convention* (Cambridge, 2022), **RL-055**, p 252, para 455; see also *Fynerdale Holdings BV v. The Czech Republic* (PCA Case No. 2018-18), Award dated 29 April 2021, **RL-097**, paras 553, 554; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award dated 18 June 2010, **RL-099**, para 123; *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award dated 2 August 2006, **RL-100**, paras 208-213; *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5), Award dated 15 April 2009, **RL-043**, paras 100-104; *Anglo-Adriatic Group Limited v. Republic of Albania* (ICSID Case No. ARB/17/6), Award dated 7 February 2019, **RL-051**, paras 281-296.

[583] Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-003**, para 15.

25% of the voting shares of the target company), the person making the acquisition must launch a takeover bid. The obligation to launch of takeover bid also applies if two or more persons act in concert to acquire the shares.[584] Each of the persons acting in concert has an obligation to launch a takeover bid,[585] and thereby enable minority shareholders to sell their shares to the acquirer.

412. Persons are deemed to be acting in concert if "*one of them, indirectly or directly, exercises control*" over the other, being a legal entity. This applies, for example, if one person owns more than 25% of the equity capital of the entity, exercises 25% or more of the voting rights, manages its business and financial policy, or exercises a "*prevailing influence*" on the business and decision-making process of the entity.[586] Persons are also deemed to be acting in concert if they are connected by certain circumstances in relation to the share acquisition, including the time or period in which the shares were acquired, the method of the acquisition, and other circumstances indicating coordination in the acquisition or the common intention of the persons.[587]

413. As explained by Prof Lepetic, Kalemegdan's acquisition of the Obnova shares in April 2012 through the in-kind contribution of its sole shareholder, Mr Obradović, constituted a takeover. This is because the acquisition exceeded the 25% threshold specified in the Law on Takeover. As Kalemegdan was required to launch a takeover bid but did not do so, its acquisition of Mr Obradović's shares in Obova was not in accordance with Serbian law.

414. Additionally, Prof Lepetic considers that in the context of the 2012 share acquisition, both Coropi and Mr Rand constituted persons "*acting in concert*" within the meaning of the Law on Takeover. With the Letter of Instructions dated 26 March 2012, Coropi purported to exercise a prevailing influence on the conduct of Kalemegdan's business and its decision-making process. Without commenting on the validity or enforceability of this agreement as a matter of Cypriot law, Prof Lepetic concludes that this letter satisfies the

[584] Law on Takeover of Joint Stock Companies, *Official Gazette of Republic of Serbia*, No. 46/2006, 107/2009, 99/2011 and 108/2016 (as amended), **R-133**, Article 6; Law on Takeover of Joint Stock Companies, *Official Gazette of Republic of Serbia*, No. 46/2006, 107/2009, 99/2011, **R-134**, Article 6.

[585] Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-003**, para 23.

[586] Law on Takeover of Joint Stock Companies, *Official Gazette of Republic of Serbia*, No. 46/2006, 107/2009, 99/2011 and 108/2016 (as amended), **R-133**, Articles 4(4) and 4(5); Law on Takeover of Joint Stock Companies, *Official Gazette of Republic of Serbia*, No. 46/2006, 107/2009, 99/2011, **R-134**, Articles 4(4) and 4(5).

[587] Law on Takeover of Joint Stock Companies, *Official Gazette of Republic of Serbia*, No. 46/2006, 107/2009, 99/2011, **R-134**, Article 4(2). See also Law on Takeover of Joint Stock Companies, *Official Gazette of Republic of Serbia*, No. 46/2006, 107/2009, 99/2011 and 108/2016 (as amended), **R-133**, Article 4(2) (as amended in 2016).

statutory presumption that a person exercises control over company and is thereby acting in concert with that company.[588] She also considers that Coropi and Kalemegdan should be deemed to have acted in concert by reason of the circumstances which led to the share acquisition, having regard to the following:

- the terms of the Letter of Instructions,[589] which purported to oblige Kalemegdan to obtain the written consent or instructions of Coropi in effecting any transfer of securities;[590]
- the terms of the trust deed dated 26 April 2012, concluded on the same day of the share acquisition, which provided that Mr Obradović should not exercise rights as a shareholder of Kalemegdan without consulting Coropi "*regarding the distribution of any property of the Company* [Kalemegdan]";[591] and
- the timing of Kalmegdan's acquisition of shares, which also connected Coropi and Kalemegdan. The acquisition of shares coincided with the first trust deed, while the Letter of Instructions was issued only a month earlier.[592]

415. Prof Lepetic also finds that Mr Rand, as the purported beneficial owner of Kalemegdan and director of Coropi "who controls the company" (according to Claimants),[593] is a presumptive persona acting in concert with regard to the acquisition of shares in Obnova. As such, he too was subject to the requirement to launch a takeover bid.[594]

416. As persons acting in concert, Mr Rand, Coropi, and Kalemegdan were obliged to launch a takeover bid in 2012 when Kalemegdan acquired the shares in Obnova from Mr Obradović. This is due to the fact that Kalemegdan's acquisition of the shares exceeded the control threshold of 25%. Because they failed to launch a takeover bid, the acquisition of shares in Obnova was not in accordance with the Law on Takeover.[595]

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[588] Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-003**, para 40.

[589] Letter of Instructions from 26 March 2012, **C-319**. This argument is made without prejudice to Respondent's position that the Letter of Instructions is not binding on Kalemegdan. See above paras 368-369.

[590] Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-003**, para 44.

[591] Trust Deed dated 26 April 2012, **C-066**. This argument is made without prejudice to Respondent's position that the trust deeds are not binding on or opposable to Serbia. See above paras 367-369.See above paras 374-377.

[592] Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-003**, para 47.

[593] Memorial, paras 91-92.

[594] Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-003**, para 54.

[595] Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-003**, para 54.

417. In accordance with the express language of Article 1(1) of the Cyprus-Serbia BIT, this breach operates to remove the Cypriot Claimants' investment in Obnova from the protective scope of the BIT.

II. The Tribunal lacks jurisdiction under the Canada-Serbia BIT (as regards the Third Claimant, Mr Broshko)

418. The Tribunal lacks jurisdiction under the Canada-Serbia BIT on several grounds. First, Mr Broshko has failed to satisfy all the conditions precedent for submitting a dispute to international arbitration under Article 22 of the BIT (**Section 1.** below). Second, Mr Broshko's claims fall outside the temporal scope of the treaty (**Section 2.** below). Third, Mr Broshko's claims are inadmissible as his investment in Serbia was not made in accordance with Serbian law (**Section 3.** below).

1. No jurisdiction *rationae voluntatis*

419. Serbia did not consent to arbitration as regards Mr Broshko's claims. Serbia's consent to arbitration is conditioned on specific requirements set forth in Article 22 of the Canada Serbia BIT. These conditions precedent include the requirement for the investor to (i) bring to arbitration claims not later than three years from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby, and (ii) provide a waiver of local claims of the local enterprise (here, Obnova) (see **Section a)** below). Mr Broshko brought the arbitration claims in 2022, even though he should have first acquired, and indeed had, knowledge of the alleged breach and damage (ultimately, resulting from the 2013 DRP) at least in the moment of making his alleged investment in Obnova in 2017 (**Section b).aa)** below). Furthermore, Mr Broshko failed to provide the requisite Obnova's waiver of the local claims which also hinders Serbia's consent (**Section b).bb)** below).

a) <u>Serbia's consent to arbitration is dependent on investors fulfilling conditions precedent set forth in Article 22 of the Canada-Serbia BIT</u>

420. States must give their consent to investment arbitration.[596] As outlined in the case law:

> *consent is not to be presumed [and] ... must be established by an express manifestation of intent or impliedly by the conduct that demonstrates consent*[597]

421. Serbia's consent to arbitrate disputes with Canadian nationals is included in Article 24(1)(a) of the Canada-Serbia BIT, which states that:

> *1. An investor that meets the conditions precedent in Article 22 may submit a claim to arbitration (...)*[598]

422. Therefore, Serbia's consent to arbitration under the Canada-Serbia BIT requires strict compliance with conditions precedent set out in Article 22. This is also clearly established in the wording of Article 22, which is entitled "<u>Conditions Precedent</u> to

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[596] *ST-AD GmbH v. Republic of Bulgaria* (PCA Case No. 2011-06), Award on Jurisdiction dated 18 July 2013, **RL-101**, para 336 ("*In order for a claimant to benefit from the jurisdictional protection granted by an arbitration mechanism, there is a condition ratione voluntatis: the State must have given its consent to such procedure, which allows a foreign investor to sue the State directly at the international level*.").

[597] *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea* (ICSID Case No. ARB/14/22), Award dated 18 May 2022, **RL-102**, para 292. See also *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Award dated 22 August 2012, **RL-103**, para 174 ("*General respect for State consent is also manifested by the fundamental principle of public international law according to which international courts and tribunals can only exercise jurisdiction over a State on the basis of its consent. As noted by the Permanent Court of International Justice in one of its first judgments, '[i]t is well established in international law that no State can, without its consent, be compelled to submit its disputes... either to mediation or to arbitration, or to any other kind of pacific settlement'*.") (quoting *Status of Eastern Carelia Case*, Advisory Opinion, (1923) P.C.I.J. Series B. No. 5, p. 27); *Garanti Koza LLP v. Turkmenistan* (ICSID Case No. ARB/11/20), Decision on the Objection to Jurisdiction for Lack of Consent dated 3 July 2013, **RL-104**, para 16 ("*The starting point for deciding whether this ICSID Tribunal has jurisdiction to hear the dispute between the Claimant and the Respondent is the text of the BIT under which the claim is brought. As the tribunal in Daimler v. Argentina explained: 'BITs constitute an exercise of sovereignty by which States strike a delicate balance among their various internal policy considerations. For this reason, the Tribunal must take care not to allow any presuppositions concerning the types of international law mechanisms (including dispute resolution clauses) that may best protect and promote investment to carry it beyond the bounds of the framework agreed upon by the contracting state parties. It is for States to decide how best to protect and promote investment. The texts of the treaties they conclude are the definitive guide as to how they have chosen to do so*.'") (quoting *Daimler*, para 164).

[598] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CL-001**, Article 24(1). See also *Rand Investments Ltd. and others v. Republic of Serbia* (ICSID Case No. ARB/18/8), Award dated 29 June 2023, **RL-076**, paras 284-285.

Submission of a Claim to Arbitration", thereby reaffirming that the set of conditions imposed thereunder must be complied with *before* any arbitration proceeding may even commence. Furthermore, Article 24 of the Canada-Serbia BIT also explicitly ties a claimant investor's compliance with the right to submit a claim to arbitration.

423. As a result, Mr Broshko may only submit a claim to arbitration under the Canada-Serbia BIT if he has complied with all the conditions precedent in Article 22.

424. Should there be any lingering doubt about the Contracting Parties' intention, Article 25 of the Canada-Serbia BIT states that:

> *[f]ailure to meet a condition precedent listed in Article 22 nullifies that consent.*[599]

425. Article 22(2) of the Canada-Serbia BIT sets forth the following conditions precedent:

> *2. An investor may submit a claim to arbitration under Article 21 only if:*
>
> *(a) the investor and, where a claim is made under Article 21(2), the enterprise, consent to arbitration in accordance with the procedures set out in this Agreement;*
>
> *(b) at least six months have elapsed since the events giving rise to the claim;*
>
> *(….)*
>
> *(e) in the case of a claim submitted under Article 21(1):*
>
> > *<u>(i) not more than three years have elapsed</u> from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby,*
> >
> > *(ii) the investor waives its right to initiate or continue before an administrative tribunal or court under the domestic law of a Party, or other dispute settlement procedures, proceedings with respect to the measure of the respondent Party that is alleged to be a breach referred to in Article 21, and*
> >
> > *(iii) if the claim is for loss or damage to an interest in an enterprise of the respondent Party that is a juridical person that the investor owns or controls directly or indirectly, <u>the enterprise waives the right referred to under subparagraph (ii);</u>*

[599] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CL-001**, Article 25 (emphasis added).

(f) in the case of a claim submitted under Article 21(2):

> *(i) not more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage thereby, and*
>
> *(ii) both the investor and the enterprise waive their right to initiate or continue before an administrative tribunal or court under the domestic law of a Party, or other dispute settlement procedures, proceedings with respect to the measure of the respondent Party that is alleged to be a breach referred to in Article 21.*[600]

426. Decisions of tribunals interpreting identical or near identical wording under other investment treaties confirm that these provisions constitute a clear and strict limitation period which forms a fundamental basis of the State's consent to arbitration disputes.[601] Express limitation periods provided in BITs are "clear" and "rigid" jurisdictional requirements that are not subject to qualification.[602]

427. As will be explained below, Mr Broshko failed to fulfil conditions precedent set forth in Articles 22 of the Canada-Serbia BIT.

b) Mr Broshko failed to fulfil the conditions precedent set in Article 22 of the Canada-Serbia BIT

428. Mr Broshko failed to fulfil conditions precedent set forth in Articles 22(2)(e)(i) and Article 22(2)(f)(i) (three years limitation period) (Section aa) below) as well as Article 22(2)(e)(iii) and Article 22(f)(ii) (waiver of rights of the local enterprise) (Section bb) below).

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[600] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CL-001** (emphasis added).

[601] *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Interim Decision on Preliminary Jurisdictional Issues dated 6 December 2000, **RL-105**, para 41; *Clayton and Bilcon of Delaware Inc. v. Government of Canada* (PCA Case No. 2009-04), Award on Jurisdiction and Liability dated 17 March 2015, **RL-106**, paras 258-282 (where tribunal found that certain decisions and actions by government officials relating to the claimants' investments in a proposed quarry could not form the basis of a NAFTA claim because they fell outside of the three-year limitations period set out in Article 1116, despite the claimants arguing that such actions were part of a continuing course of conduct).

[602] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL), Decision on Objections to Jurisdiction dated 20 July 2006, **RL-107**, para 29; *Michael Ballantine and Lisa Ballantine v. The Dominican Republic* (PCA Case No. 2016-17), Final Award dated 3 September 2019, **RL-108**, para 265; *Ansung Housing Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/14/25), Award dated 9 March 2017, **RL-109**, paras 74 and 122.

aa) Mr Broshko's claims were not brought within the limitation period under Articles 22(2)(e)(i) and 22(2)(f)(i) of the Canada-Serbia BIT

429. Under Articles 22(2)(e)(i) and 22(2)(f)(i) of the Canada-Serbia BIT, a claimant may only submit a dispute to arbitration, and a tribunal can only assume jurisdiction over the dispute, if no more than three years have elapsed since the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and of loss or damage arising out of that breach.

430. In this case, the relevant date to calculate the three years period from is 27 April 2022, when Mr Broshko filed the Request for Arbitration. Thus, in accordance with Article 22 of the Canada-Serbia BIT, Mr Broshko may only bring claims for breaches of which he knew or should have first known on 27 April 2019. Any claims based on alleged breaches occurring before this date are therefore time-barred.

431. To establish when the investor should have known of the alleged breach, it is enough if the investor should have been aware that there would be expropriatory consequences of a given action, even if the damage extent or quantification is still unclear.[603] What is relevant for the starting moment of the limitation period, is when the individual act causing the breach in question took place, and not whether its consequences are prolonged in time.[604] In *Corona Materials v. Dominican Republic*, the tribunal considered that as all claims stemmed from the denial of a permit, the later alleged failure to reconsider the case should be considered merely as an implicit confirmation of this initial decision, and that initial decision should be the starting point to calculate the limitation period.[605]

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[603] *Corona Materials LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3), Award dated 31 May 2016, **RL-110**, para 194; *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica* (ICSID Case No. UNCT/13/2), Interim Award of the Tribunal on Jurisdiction dated 25 October 2016, **RL-111**, para 213; *Apotex Inc. v. The Government of the United States of America* (ICSID Case No. UNCT102), Award dated 14 June 2013, **RL-112**, para 320 and discussion at paras 317-334.

[604] *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic* (LCIA Case No. UN 7927), Award on Preliminary Objections to Jurisdiction dated 19 September 2008, **RL-029**, para 88.

[605] *Corona Materials LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3), Award dated 31 May 2016, **RL-110**, paras 210-16.

432. Mr Broshko alleges that Serbia breached the Canada-Serbia BIT due to the refusal to provide Obnova with compensation,[606] and that since this happened in April 2021, the limitation period has not lapsed.[607] This is misplaced.

433. First, it is abundantly clear that the decision to refuse the compensation is intrinsically linked with the issuance of the 2013 DRP, which Claimants themselves identify as the first treaty breach (under the Cyprus-Serbia BIT) which happened long before the Canada-Serbia BIT entered into force, and before Mr Broshko acquired Obnova's shares. In addition, the claim that the 2013 DRP was a treaty breach is based on the assumption that Obnova had ownership or the right of use over the Dunavska Plots which had been taken away by the 2003 inscription of the City of Belgrade as the holder of the rights in the Cadastre. Hence, the underlying dispute dates back to 2003.

434. The specific point about an intrinsic connection between the 2003 Registration and the refusal to compensate Obnova in April 2021 is supported by the following:

- Obnova's request for compensation states that "*Obnova suffered damages due to the factual expropriation of its property"* because *"city of Belgrade adopted the Detailed Regulation Plan for the roads: Dunavska* (...) *which entered into force on 28th December 2013*";[608]
- The City of Belgrade's decision states that "*allegations that through adoption of the Detailed regulation plan* (…) *was effectively expropriated from you are unfounded*";[609]
- Claimants' Damages Expert, Dr Hern, specifically states that he was instructed to "[e]*stimate the reduction in the fair market value (FMV) of the Claimants' interest in Obnova (i.e., losses to the Claimants) as a result of the adoption of the 2013 DRP*".[610]

[606] Memorial, para 386.

[607] Memorial, para 192.

[608] Obnova's request for compensation dated 19 April 2021, **C-052**, p 4.

[609] Letter from the Land Directorate of the City of Belgrade from 13 August 2021, **C-053**, p 2.

[610] *Expert Report-Dr. Richard Hern-Memorial on Quantum-ENG* dated 31 March 2023, **Hern ER-1**, para 9.

435. Furthermore, even in their Request for Arbitration, the Claimants framed their claims in this - linked - manner. At that time, Claimants argued that Serbia failed to provide fair and equitable treatment to Claimants' (including Mr Broshko's) investments because:

> *Serbia expropriated Obnova's property and rights when it adopted the 2013 DRP. Since the expropriation, Obnova has had a right, under Serbian law, to compensation for expropriation of its premises caused by adoption of the 2013 DRP. The Claimants legitimately expected that Serbia would abide by its own law and provide the necessary compensation to Obnova. However, Serbia refused to do so.*[611]

436. Only in the Memorial had the Claimants changed their procedural strategy, indicating that Mr Broshko now "invokes" the breaches of the Canada-Serbia pertaining only to the refusal of compensation.[612] At the same time however, the Claimants admitted that:

> *The City of Belgrade adopted the 2013 DRP (...) Serbia's violations of Obnova's rights continued after that date and culminated om the express refusal to provide Obnova compensation for expropriation of its premises on 13 August 2021.*[613]

437. Second and in any event, there should be no doubt that at the time of the acquisition of the shares in Obnova in 2017, Mr Broshko should have been aware of, and indeed knew, the consequences of the adoption of the 2013 DRP (see also Section D.II.2 below). As Claimants admit:

> *Mr Broshko decided to invest in Obnova's shares because he believed that the company would either be able to resolve the issue with the 2013 DRP or would be awarded compensation due under Serbian law.*[614]

438. Putting aside the fact how Mr Broshko's expectations play into the substance of the alleged breaches (see paras 508-520), this statement shows that Mr Broshko was (or should have been) aware of the consequences of the 2013 DRP already in 2017, upon the acquisition of Obnova's shares, including about the grounds for compensation (as he believed that Obnova will be awarded that compensation). The sole fact that Obnova decided to file the request for compensation only in 2021 and that it was refused compensation in 2021, does not mean that Mr Broshko did not know about the damage incurred long before. As described in Section D.II.2 below in detail, Mr Broshko must

[611] Request for Arbitration, para 157.

[612] Memorial, para 386.

[613] Memorial, para 172.

[614] Memorial, para 125.

have been familiar with the Obnova's situation, including that in 2003 the City of Belgrade was inscribed in the Cadastre, at the time of acquisition.

439. Notably, to assess the level of the investor's knowledge with regard to the status of the purchased properties that were subjected to an expropriation, tribunals consider the personal or business ties between the investors involved in given venture. For example, in *Spence International v. Costa Rica*, for that particular purpose, the tribunal concluded that claimants' being friends or business colleagues likely impacts the level of such knowledge:

> *As emerges from their Witness Statements, Ronald Copher and Bob Spence are friends and business colleagues (...) Given that Mr Spence is a professional real estate developer, that he and the Cophers are friends and business colleagues, that they visited Costa Rica together to explore property purchases, that they did so with the assistance of a real estate agent and obtained other professional assistance in respect of their purchases, the Tribunal considers that, at the very least, Mr Spence and the Cophers would and should have been aware that it was highly likely that the properties they purchased fell within the boundaries of the Las Baulas National Park and were therefore at risk of expropriation in due course.*[615]

440. As a result, the Tribunal has no temporal jurisdiction over Mr Broshko's claims.

bb) <u>Obnova did not submit a waiver of local remedies required by Articles 22(2)(e)(iii) and 22(2)(f)(ii) of the Canada-Serbia BIT</u>

441. Under Articles 22(2)(e)(iii) and 22(2)(f)(ii) of the Canada-Serbia BIT both the investor and – to the extent it has suffered loss or damages due to the alleged breach – the local enterprise must submit a waiver of their rights to local remedies in order to proceed to arbitration. The clear purpose of this provision is "*to ensure that there will be no multiplicity of claims in domestic and international fora*".[616]

442. This dispute concerns Obnova's assets and Claimants' alleged reflective loss as Obnova's shareholders. Claimants claim losses stemming from Obnova's total losses (losses of Obnova's premises actual value) resulting from the adoption of the 2013 DRP, multiplied

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[615] *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica* (ICSID Case No. UNCT/13/2), Interim Award of the Tribunal on Jurisdiction dated 25 October 2016, **RL-111**, paras 196 and 199.

[616] *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala* (ICSID Case No. ARB/18/43), Partial Dissenting Opinion of Zachary Douglas dated 13 March 2020, **RL-113**, para 5.

by Claimants' respective shareholding.[617] For Mr Broshko, Claimants raise that as he allegedly owns 10% of Obnova's shares through MLI, he incurred loss in the amount of EUR 3.7 million.[618] Therefore, Mr Broshko's claim is his reflective loss as Obnova's shareholder. It is the same loss that Obnova would be able to claim in the local proceedings in Serbia.

443. Despite that, no waiver of local remedies was submitted on behalf of Obnova – only on behalf of Broshko and MLI (Obnova's direct minority shareholder).[619] According to Claimants:

> *Mr. Broshko and MLI submitted their waivers (…) together with the Request for Arbitration. As MLI and Mr. Broshko are only minority shareholders of Obnova and do not exert any control over Obnova, Mr. Broshko did not, and could not, submit a waiver for Obnova.*[620]

444. Mr Broshko therefore hides behind the shield of being a minority shareholder of Obnova. This is misplaced.

445. First, the only excuse to the mandatory condition precedent requiring the provision of a waiver of the local enterprise is if the respondent Party has deprived the investor of control of the enterprise, as provided for in Article 22(4):

> *A waiver from the enterprise under subparagraphs 2(e)(iii) or 2(f)(ii) is not required if the respondent Party has deprived the investor of control of the enterprise.*[621]

446. Second, considering that majority shareholders of Obnova (the Cypriot Claimants) are also Claimants in this Arbitration and decided to pursue their remedies in the international forum, there should be no issue with providing Obnova's waiver of local remedies, considering that Mr Broshko and Kalemegdan are acting jointly and have the same counsel. In fact, lack of such waiver likely suggests that the Claimants at least do not exclude the possibility to initiate local claims. The waiver requirement contained in Articles 22(2)(e)(iii) and 22(2)(f)(ii) of the Canada-Serbia BIT is specifically aimed at

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[617] *Expert Report-Dr. Richard Hern-Memorial on Quantum-ENG* dated 31 March 2023, **Hern ER-1**, paras 31-34.

[618] Memorial, para 404.

[619] Memorial, para 194; Mr. Broshko's waiver dated 15 April 2021, **C-071**; MLI's waiver dated 15 April 2022, **C-064**.

[620] Memorial, para 194.

[621] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CL-001**.

avoiding such scenario. Therefore, Serbia's consent for arbitration as regards Mr Broshko's claims cannot be assumed just because Mr Broshko is only a minority shareholder in Obnova.

447. Tellingly, Mr Broshko did not even attempt to prove any efforts to obtain a requisite waiver of Obnova, nor attempted to cure the lack of waiver after submission of the Request for Arbitration.

448. In *Bacilio Amorrortu v. Peru*, the tribunal ruled that the lack of the required waiver means that there is no arbitration agreement and failure to comply with the waiver requirement cannot be cured:

> *In view of the express and unequivocal language of Article 10.18.2(b) providing that the submission of a valid waiver is a precondition to a State's consent to arbitration, it follows that, if an invalid or non-compliant waiver is submitted, a State's offer of arbitration and an investor's acceptance of the same do not meet. No arbitration agreement is formed and, by way of necessary implication, any arbitral tribunal that is constituted on the basis of such non-existent arbitration agreement will be deprived of jurisdiction ab initio. Since this Tribunal has been constituted on the basis of such a non-existent arbitration agreement, the Tribunal has no jurisdiction over the Parties and has in fact never had any jurisdiction from the very beginning of these proceedings.*[622]

449. As a result, due to the fact that Mr Broshko failed to submit the waiver for Obnova, this Tribunal has no jurisdiction over Mr Broshko's claims.

2. No jurisdiction *ratione temporis*

450. The Tribunal also lacks jurisdiction ratione temporis with regard to Mr Broshko's claims as the dispute resolution clause contained in the Canada-Serbia BIT does not apply to matters that occurred before its entry into force in 2015 (**Section a)** below) and the substantive provisions of the BIT do not have retroactive effect (**Section b)** below). Furthermore, the Tribunal has no jurisdiction over breaches of the Canada-Serbia BIT that took place before the alleged investment was made (**Section c)** below) and Mr Broshko's claims fall outside the three-year limitation period provided for in the Canada-Serbia BIT (**Section d)** below).

[622] *Bacilio Amorrortu v. Republic of Peru* (PCA Case No. 2020-11), Partial Award on Jurisdiction dated 5 August 2022, **RL-114**, paras 236-237.

a) The dispute resolution clause of the Canada-Serbia BIT does not apply to the matters that occurred before its entry into force

aa) The dispute resolution clause of the Canada-Serbia BIT does not have retroactive effect

451. As already discussed in the context of the Cyprus-Serbia BIT, temporal application of international treaties is governed by Article 28 of the VCLT, which codifies a rule of general international law.[623] This rule contains a presumption against retroactivity, hence "*[u]nless a different interpretation appears from the treaty or is otherwise established*", a dispute resolution clause does not have retroactive application to cover disputes that may have arisen before the treaty entered into force.

452. According to Article 21(1) of the Canada-Serbia BIT, an investor[624] may submit a claim to arbitration that:

> *(a) the respondent Party has breached an obligation under Section B, other than an obligation under Articles 8(3), 12, 15 or 16; and*
>
> *(b) the investor has incurred loss or damage by reason of, or arising out of, that breach.*

453. The Canada-Serbia BIT does not contain a provision on retroactivity either in Article 21 or elsewhere. Moreover, since the dispute resolution clause expressly applies to claims for breach of "an obligation under Section B…" of the treaty, it follows that it cannot apply to the time period when there was no treaty obligation of Respondent to be breached in the first place, i.e., to the time before the Canada-Serbia BIT entered into force.[625]

454. Accordingly, and in line with Article 28 of the VCLT, the dispute resolution clause in the Canada-Serbia BIT cannot apply retroactively to disputes that have arisen before its entry into force on 27 April 2015.[626]

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[623] See above C.I.2.a).

[624] The investor may submit a claim also "on behalf of an enterprise of the respondent party that is a juridical person that the investor owns or controls directly or indirectly", Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CL-001**, Article 21(2).

[625] *Rand Investments Ltd. and others v. Republic of Serbia* (ICSID Case No. ARB/18/8), Award dated 29 June 2023**, RL-076**, para 443.

[626] UNTS, vol. 3313, No. 55911 (2019), **RL-115**.

bb) Application to the present case

455. As has been discussed above in the context of the Cyprus-Serbia BIT, a dispute between Obnova and Respondent concerning Obnova's property entitlements on the Objects arose already in 2003-2004 when Respondent's authorities denied Obnova's requests for recognition of the right of use and ownership and inscribed the City of Belgrade as the holder of the right of use over the Objects and the Dunavska Plots.[627] The same disagreement is at the heart of the present proceeding, since the Tribunal cannot make a decision about the alleged treaty violations unless it also makes a decision about the validity of the 2003 Registration. Since neither the dispute resolution clause nor other provisions of the Canada-Serbia BIT apply retroactively, the Tribunal has jurisdiction only with respect to disputes which arose after its entry into force on 27 April 2015 and has no jurisdiction *ratione temporis* to entertain a dispute which had arisen already in 2003-2004.

456. Further, Mr Broshko alleges violations of his treaty rights only with respect to one event, i.e., Respondent's refusal to provide Obnova with compensation in August 2021.[628] However, this action should not be considered as an independent treaty violation. Indeed, it presents a good example of the PCIJ's point about an event being merely "*a confirmation or development of an earlier situation*".[629]

457. As already mentioned, the 2021 Land Directorate Letter Obnova was based on the fact that the City of Belgrade and not Obnova was registered in the Cadastre as the holder of the right of use of the Objects.[630] On the other hand, Obnova's request for compensation was based on the allegation that the adoption of the 2013 DRP constituted *de facto*

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[627]See above para 77.

[628] Memorial, paras 171-172.

[629] *Phosphates in Morocco, Italy v France*, Preliminary objections, PCIJ Series A/B No 74, ICJ**, RL-034**, p 24.

[630] Letter from the Land Directorate of the City of Belgrade from 13 August 2021, **C-053**, p 2 ("*Your allegations that through adoption of the Detailed regulation plan for the roads in: Dunavska, Tadeuša Košcuška, Dubrovacka, trolleybus and bus terminal in Dorcol ("Official Gazette of the City of Belgrade", No.: 69/13) a real estate on the location at 17-19 Dunavska St. was effectively expropriated from you are unfounded because, based on the Agreement 0303 No.: 463-74/74 of March 6th 1975, stipulated by and between the City of Belgrade and the company "Luka i Skladišta Beograd" and verified under Cert. No.: 30/75, public ownership over, inter alia, the land parcels nos.: 47/1, 47/2, and 47/3, as well as over Objects already erected on those parcels, was registered in favor of the City of Belgrade.*").

expropriation which *caused* damages to Obnova.[631] This was the position Claimants themselves took in the Request for Arbitration.[632]

458. Therefore, both Obnova's request for compensation and its alleged denial by Land Directorate are intrinsically linked to events which pre-date the entry into force of the Canada-Serbia BIT and constitute their development, not an independent treaty violation. In other words, what Mr Broshko alleges was a violation of his treaty rights (the refusal to compensate) was merely a consequence of actions (the 2003 Registration and the 2013 DRP) which occurred before the Canada-Serbia BIT entered into force, over which this Tribunal does not have jurisdiction.

b) <u>The substantive provisions of the Canada-Serbia BIT do not have retroactive effect</u>

459. The applicable rules of international law concerning the retroactive application of substantive provisions of international treaties have been discussed in detail above.[633] According to Article 13 of the ILC Draft Articles on State Responsibility, an act of a State may constitute a breach of its international obligation only if the State was bound by the obligation in question at the time of the act, while Article 28 of the VCLT provides that treaty provisions do not bind a party "*in relation to any act or fact which took place or any situation which ceased to exist*" before its entry into force in respect to that party unless "*a different intention appears from the [Treaties] or is otherwise established*".

460. The Canada-Serbia BIT provides in its Article 42(2) simply that each State Party shall notify another about completion of the required internal procedures for the entry into force of the treaty, which shall enter into force upon later of these notifications. Clearly, there is no indication that the States Parties to the Canada-Serbia BIT intended its retroactive application, i.e. its application to acts or facts which took place before 27 April 2015.

461. As is clear from the previous discussion, virtually all events relevant for determination of the present case took place before the Canada-Serbia entered into force, including, in particular, the 2003 Registration and the adoption of the 2013 DRP. Only one event of relevance post-dates the treaty's entry into force, which is the 2021 Land Directorate

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[631] See Obnova's request for compensation dated 19 April 2021, **C-052**, p 4.

[632] "*Serbia expropriated Obnova's property and rights when it adopted the 2013 DRP. Since the expropriation, Obnova has had a right, under Serbian law, to compensation for expropriation of its premises caused by adoption of the 2013 DRP*." Request for Arbitration, para 157 (emphasis added).

[633] See above Section **a)**).

Letter. As has been discussed in the previous section, the refusal is intrinsically linked to the events that pre-date the treaty's entry into force and, as such, is nothing but "*a confirmation or development of an earlier situation*",[634] and cannot constitute an independent treaty violation. Accordingly, on this basis, as well, the Tribunal has no jurisdiction *ratione temporis* to consider Mr Broshko's claims.

c) <u>This Tribunal does not have jurisdiction over breaches of the Canada-Serbia BIT that took place before the alleged investment was made</u>

462. As already discussed, it is widely accepted that investment arbitration tribunals do not have jurisdiction to deal with claims by investors who made their investment after the alleged violations occurred.[635] In this context, it is also of importance whether the conduct complained of is merely a consequence of State action which occurred before the investment was made. If so, then the relevant conduct for the purpose of jurisdiction *ratione temporis* is the earlier conduct and whether it occurred before the investment was made.[636]

463. Mr Broshko purchased 10% of Obnova's shares through MLI, a Serbian company, in November 2017.[637] As mentioned, his claims only concern the 2021 Land Directorate Letter.

464. However, as already discussed, this State action is not an independent violation but merely a continuation or a consequence of its previous actions, i.e. the adoption of the 2013 DRP and the 2003 Registration. Since both events occurred before Mr Broshko

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[634] *Phosphates in Morocco, Italy v France*, Preliminary objections, PCIJ Series A/B No 74, ICJ**, RL-034**, p 24.

[635] *Saluka Investments B.V. v. The Czech Republic,* UNCITRAL, PartialAward dated 17 March 2006**, CL-063**, para 244; *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic* (LCIA Case No. UN 7927), Award on Preliminary Objections to Jurisdiction dated 19 September 2008**, RL-029**, para 105; *Europe Cement Investment & Trade S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/07/2), Award**, RL-044**, para 140; *Vito G. Gallo v. The Government of Canada* (PCA Case No. 55798), Award (redacted version)**, RL-045**, paras 326-328; *Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12*, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012**, RL-046**, para 3.34; *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia* (PCA Case No. 2015-40), Award**, RL-047**, p 108; *B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia*, ICSID Case No. ARB/15/5, Excerpts of Award dated 5 April 2019**, CL-003**, para 613; *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Final Award**, RL-048,** para 148; *President Allende Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile* (PCA Case No. 2017-30), Award**, RL-049**, para 262.

[636] See *Phosphates in Morocco, Italy v France*, Preliminary objections, PCIJ Series A/B No 74, ICJ**, RL-034***,* p 24; see also *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID Case No. ARB/14/14), Award of the Tribunal**, RL-050**, para 453.

[637] Memorial, paras 124-125.

made his investment in 2017, they are obviously outside the Tribunal's jurisdiction *ratione temporis*, and so are their consequences, including the 2021 Land Directorate Letter.

465. For this reason, as well, the purported breaches of Mr Broshko's rights fall outside the jurisdiction *ratione temporis* of the Tribunal under the Canada-Serbia BIT.

d) In any case, Mr Broshko's claims fall outside the three-year limitation period under Article 22(2)(e)(i) of the Canada-Serbia BIT

466. As set out above, Articles 22(2)(e)(i) and 22(2)(f)(i) of the Canada-Serbia BIT impose a clear time limitation on a tribunal's jurisdiction over an investment dispute under the treaty.[638] Mr Broshko's claims under the Canada-Serbia BIT relate to the 2021 Land Directorate Letter concerning compensation in relation to the 2013 DRP. The alleged breach is intrinsically tied to the adoption of the 2013 DRP, which happened before the Canada-Serbia BIT entered into force (in 2014) and before Mr Broshko acquired Obnova's shares (in 2017). Mr Broshko should have first acquired knowledge of the alleged breach and damage at least at the time of making his alleged investment in Obnova in 2017, if not earlier. His claims, submitted to arbitration in April 2022, thus fall outside the mandatory three-year limitation period in Articles (2)(e)(i) and 22(2)(f)(i) of the Canada-Serbia BIT and thus, the Tribunal has no temporal jurisdiction.

3. No jurisdiction over investments made illegally

467. The legality of the investment is a prerequisite for its protection under the applicable investment treaties (**Section a) below**). As Mr Broshko breached the Serbian Law on Takeover of Joint Stock Companies when he acquired his shares in Obnova through MLI, his investment is illegal and outside the scope of the Canada-Serbia BIT (**Section b) below**).

a) An investment made in disregard of legal requirements is not entitled to treaty protection

468. It is a well-established principle of international law that an investment tribunal treaty has no jurisdiction over a claimant's investment which was made in violation of the laws and regulations of the Contracting State. The rationale of this principle was aptly provided by the tribunal in *Phoenix v Czech Republic*, which clarified that violations of the host State's law in the making of the investment has the effect of removing the host

[638] See above Section C.II.1.b)aa).

State's offer to arbitrate: "*States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws*".[639]

469. Even in the absence of an express provision in the treaty, tribunals have considered illegal investments to be outside the scope of the applicable treaty.[640] Therefore, the fact that the Canada-Serbia BIT contains no express wording to this effect should not be taken as agreement by Serbia to arbitrate disputes relating investments that were made in breach of its laws.

b) Mr Broshko's investment was not made in accordance with Serbian law

470. According to Claimants, Mr Broshko's investment consists of his 10% shareholding in Obnova, which he holds indirectly through MLI. While Respondent does not dispute that shares in Obnova satisfy in principle the definition of "investment", this is not sufficient for purposes of establishing the Tribunal's jurisdiction over Mr Broshko's investment. This is because his acquisition of shares in Obnova was not made in accordance with Serbian law.

471. In particular, Mr Broshko, as indirect owner of 10% of the voting shares of Obnova, failed to launch a takeover bid in accordance with the Law on Takeover when he acquired these shares in 2017. This follows from that fact that Mr Broshko may be deemed to have acted in concert with Kalemegdan, Coropi and Mr Rand when he acquired his shares. As explained above, the Law on Takeover presumes that persons are acting in concert when they are connected by certain circumstances in relation to the share acquisition.[641] In such cases, the voting shares of the acquiring person are added to voting shares of its

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[639] *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5), Award dated 15 April 2009, **RL-043**, para 101.

[640] *Ampal-American Israel Corporation and others v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11), Decision on Jurisdiction dated 1 February 2016, **RL-116**, para 301; *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5), Award dated 15 April 2009, **RL-043**, para 104; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II)* (ICSID Case No. ARB/11/12), Award dated 10 December 2014, **RL-117**, para 332; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania* (ICSID Case No. ARB/11/24), Award dated 30 March 2015, **RL-061**, para 359; *Achmea B.V. v. The Slovak Republic (formerly Eureko B.V. v. The Slovak Republic) (PCA Case No. 2008-13),* Final Award dated 7 December 2012, **RL-118**, para 170; *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Award dated 27 August 2008, **RL-119**, paras 133, 140-146; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3), Final Award dated 27 December 2016, **RL-120**, para 264; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award dated 18 June 2010, **RL-099**, paras 123-124.

[641] See above para 411.

concerting parties,[642] thereby triggering the obligation to launch a takeover in the event one of the statutory thresholds is met.[643]

472. As the managing director of Rand Investments Ltd., Mr Broshko is necessarily connected with its owner, Mr Rand, who – according to Claimants – exercises control over Coropi and Kalemegdan as well. There are at least two circumstances which indicate conclusion that there was an agreement between Mr Broshko and Mr Rand together with Coropi and Kalemegdan, whose aim was the acquisition of shares in Obnova in 2017. First, in 2012, Mr Broshko supervised Mr Rand's investments in Serbia, including Obnova and another Serbian company, Crveni Signal, ostensibly at the direction of Mr Rand.[644] Second, in 2017 Mr Broshko indirectly acquired 10% of shares in Obnova as well as 10% of shares in Crveni Signal, at a time when Kalemegdan was a majority shareholder of Crveni Signal.[645] These circumstances are strong indications that Mr Broshko acted in concert with Mr Rand, Coropi, and Kalemegdan.[646]

473. Because Kalemegdan had already acquired approximately 70% of voting shares in Obnova, their combined shareholding of roughly 80% exceeded the so-called final threshold of 75%, giving rise to an obligation to launch a takeover bid. In that case, each of the persons acting in concert would have an obligation to launch a takeover bid. Since the bid was not launched, the acquisition of shares in Obnova by Mr Broshko was not in accordance with Serbian law.[647]

[642] Law on Takeover of Joint Stock Companies, *Official Gazette of Republic of Serbia*, No. 46/2006, 107/2009, 99/2011 and 108/2016 (as amended), **R-133**, Articles 5(1) and 5(2).

[643] See above para 411-416. See also Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-003**, para 65.

[644] *Rand Investments Ltd. and others v. Republic of Serbia* (ICSID Case No. ARB/18/8), Award dated 29 June 2023, **RL-076**, para 28.

[645] Notification on major holdings dated 19 October 2017, **R-135**; Confirmation from Ilirika Investments dated 30 March 2022, **C-006**.

[646] Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-003**, paras 71 and 72.

[647] Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-003**, paras 65-68, 75-76.

D. CLAIMANTS' CLAIMS ARE INADMISSIBLE AS THE INVESTMENTS WERE NOT *BONA FIDE*

I. The Cypriot Claimants' investment was an abuse of process

474. It is a well-established principle that investment protection is available only to *bona fide* investments. There is a broad consensus that the acquisition of an investment, or restructuring of ownership of an investment, at a time when an investment dispute is foreseeable, constitutes an abuse of process, thereby entitling the tribunal to decline to decide the claims (**Section 1**. below).

475. If, for any reason, the Tribunal considers that the dispute between the Parties had not arisen before the entry into force of the Cyprus-Serbia BIT in 2005, or before the time when the Cypriot Claimants made their purported investment in 2012, then the dispute was at the very least foreseeable at the time of their purported investment. The Cypriot Claimants are therefore not entitled to protection under the Cyprus-Serbia BIT as their purported investment in Obnova was not made in good faith (**Section 2**. below).

1. Investments acquired or restructured when a dispute is foreseeable are not entitled to treaty protection

476. Investments deserve protection only when made in good faith, the latter being a general principle of international law.[648] This principle also requires that *"[n]obody shall abuse the rights granted by treaties"*,[649] to use the words of the tribunal in *Phoenix Action, Ltd v. The Czech Republic*. This tribunal considered that its duty was

> *to prevent an abuse of the system of international investment protection under the ICSID convention, in ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected.*[650]

[648] *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5), Award dated 15 April 2009, **RL-043**, paras 106 and 113.

[649] *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5), Award dated 15 April 2009, **RL-043**, para 107.

[650] *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5), Award dated 15 April 2009, **RL-043**, para 113.

477. The tribunal in *Gremcitel* remarked that "*arbitral tribunals have indeed applied the doctrine of abuse of process (or abuse of rights) in cases involving disputed corporate restructurings*"[651] and concluded that:

> *… a restructuring carried out with the intention to invoke the treaty's protections at a time when the dispute is foreseeable may constitute an abuse of process depending on the circumstances.*[652]

478. There is a broad consensus that while restructuring an investment in order to secure benefits of a certain investment protection treaty is permissible, doing so when an investment dispute is foreseeable, constitutes an abuse of process.[653] According to the tribunal in *Philip Morris v. Australia*, which in detail examined international arbitral practice on abuse of process,

> *… the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable.*[654]

479. To determine whether an investor's restructuring of investment was an abuse of rights, the primary criterion is foreseeability of the dispute at the time of the restructuring.[655]

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[651] *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award**, RL-121**, para 183.

[652] *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award**, RL-121**, para 185 (footnote omitted).

[653] *Philip Morris Asia Limited v. The Commonwealth of Australia* (PCA Case No. 2012-12), Award on Jurisdiction and Admissibility dated 17 December 2005, **RL-122**, paras 540 and 545. See also *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award**, RL-123**, para 335, also *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award**, RL-121**, paras 183-185.

[654] *Philip Morris Asia Limited v. The Commonwealth of Australia* (PCA Case No. 2012-12), Award on Jurisdiction and Admissibility dated 17 December 2005**, RL-122**, para 554, see also paras 538-553.

[655] *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award**, RL-121**, para 185; *Philip Morris Asia Limited v. The Commonwealth of Australia* (PCA Case No. 2012-12), Award on Jurisdiction and Admissibility dated 17 December 2005**, RL-122**, para 554; *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award**, RL-123**, paras 339-340 ("*a foreseeability analysis is a critical element in an abuse of process inquiry*."); *Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12*, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012**, RL-046**, para 2.96; *Alapli Elektrik B.V. v. Republic of Turkey* (ICSID Case No. ARB/08/13), Excerpts of Award dated 16 July 2012**, RL-124**, para 403; *Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Republic of Poland* (ICSID Case No. ADHOC/15/1), Partial Award on Jurisdiction dated 4 March 2020**, RL-125**, para 7.25; *Alverley*

480. It is worth noting that not only restructuring of an investment by an investor when a dispute is foreseeable may raise the question of abuse of process, but that this may also be the case with investments of third persons.[656] In the present case, this angle may be perhaps more relevant with respect to Mr Broshko, the Canadian Claimant, than with respect to the Cypriot Claimants, so it will be addressed in the section dealing with the admissibility objections under the Canada-Serbia BIT

481. The time frame for an abuse of process objection can be distinguished from the one applicable to *ratione temporis* objections.[657] In drawing a distinction between the two, the *Gremcitel* tribunal explained that:

> *If a claimant acquires an investment after the date on which the challenged act occurred, the tribunal will normally lack jurisdiction ratione temporis and there will be no room for an abuse of process. Here, the Tribunal has established that Ms. Levy acquired her investment prior to the challenged measure, even if it was just slightly before. In such a situation, a tribunal has jurisdiction ratione temporis but may be precluded from exercising its jurisdiction if the acquisition is abusive.*[658]

482. Therefore, if a dispute had already existed when an investor restructured its investment and thereby gained treaty protection, the issue is one of retroactivity, which may give rise to a *ratione temporis* objection. But if the dispute had not yet crystallized but was foreseeable at the time of the restructuring, then the issue is the one of abuse of process. Following this distinction, Respondent has cast its present objection as an alternative to its primary objection to the Tribunal's jurisdiction *ratione temporis*, the latter being based on the fact that the present dispute already arose in 2003.[659]

Investments Limited and Germen Properties Ltd v. Romania (ICSID Case No. ARB/18/30), Excerpts of Award dated 16 March 2022, **RL-022**, para 385; *Ipek Investment Limited v. Republic of Turkey* (ICSID Case No. ARB/18/18), Award dated 8 December 2022, **RL-126**, para 320.

[656] See e.g. *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award**, RL-123**, paras 352-354.

[657] See e.g. *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award**, RL-121**, para 182; *Philip Morris Asia Limited v. The Commonwealth of Australia* (PCA Case No. 2012-12), Award on Jurisdiction and Admissibility dated 17 December 2005**, RL-122**, para 539; *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award**, RL-123**, paras 338-339.

[658] *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award**, RL-121**, para 182.

[659] See above C.I.2

483. To determine whether an investor's restructuring of investment was an abuse of rights, the primary criterion is foreseeability of the dispute at the time of the restructuring.[660] According to the *Tidewater* tribunal, a dispute was foreseeable if its existence "*was within the reasonable contemplation of Tidewater at that time*"[661] and, more specifically,

> *whether 'the objective purpose of restructuring was to facilitate access to an investment treaty tribunal with respect to a claim that was within the reasonable contemplation of the investor'.*[662]

484. The *Philip Morris v. Australia* tribunal formulated the foreseeability test as follows:

> *The Tribunal is of the opinion that a dispute is foreseeable when there is a reasonable prospect, as stated by the Tidewater tribunal, that a measure which may give rise to a treaty claim will materialise.*[663]

485. In *Cascade Investments*, the tribunal framed the foreseeability test in terms of three questions: (i) to whom must the answer be foreseeable, (ii) what is the applicable degree of foreseeability, and (iii) what exactly is it that must be foreseeable.[664]

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[660] *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award**, RL-121,** para 185; *Philip Morris Asia Limited v. The Commonwealth of Australia* (PCA Case No. 2012-12), Award on Jurisdiction and Admissibility dated 17 December 2005**, RL-122**, para 554; *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award**, RL-123**, paras 339-340 ("*a foreseeability analysis is a critical element in an abuse of process inquiry*."); *Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12*, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012**, RL-046**, para 2.96; *Alapli Elektrik B.V. v. Republic of Turkey* (ICSID Case No. ARB/08/13), Excerpts of Award dated 16 July 2012**, RL-124**, para 403; *Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Republic of Poland* (ICSID Case No. ADHOC/15/1), Partial Award on Jurisdiction dated 4 March 2020**, RL-125**, para 7.25; *Alverley Investments Limited and Germen Properties Ltd v. Romania* (ICSID Case No. ARB/18/30), Excerpts of Award dated 16 March 2022, **RL-022**, para 385; *Ipek Investment Limited v. Republic of Turkey* (ICSID Case No. ARB/18/18), Award dated 8 December 2022, **RL-126**, para 320.

[661] *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction dated 8 February 2013**, RL-127**, para 148.

[662] *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction dated 8 February 2013**, RL-127**, para 150 (quoting Z. Douglas, *The International Law of Investment Claims* (Cambridge, 2009), **RL-037**, p 465; footnote omitted).

[663] *Philip Morris Asia Limited v. The Commonwealth of Australia* (PCA Case No. 2012-12), Award on Jurisdiction and Admissibility dated 17 December 2005**, RL-122**, para 554.

[664] *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award**, RL-123,** para 341. The tribunal also asked the question of whether the notion of abuse is limited to restructuring cases, or can it apply to an acquisition by a nominally new owner who is not connected to the prior owner? This question will be relevant in the case of the Canadian Claimant, Mr. Broshko, but does not appear to be relevant in the case of the Cypriot

486. In answering the first question (to whom the answer must be foreseeable), the *Cascade Investments* tribunal adopted an objective test of foreseeability, requiring that a dispute would have been foreseeable to a reasonable investor.[665] Proof of the investor's actual state of mind is not required:

> *The concept in essence is thus focused on whether a development by its nature was capable (reasonably) of being foreseen. It does not require proof that a particular investor actually foresaw that which was objectively foreseeable.*[666]

487. In particular, the test does not require showing of bad faith on the side of the investor.[667]

488. Further, according to the *Cascade Investments* tribunal, a dispute must be "*reasonably foreseeable, but not necessarily 'highly probable'*" in the sense that:

> *It can attach if the evidence shows that a reasonable investor, conducting an appropriate inquiry, should have understood that the investment it was acquiring already faced a significant risk of government action that would adversely affect its rights, but nonetheless chose to proceed in the absence of any real commercial rationale for doing so. The degree of apparent risk may factor into a holistic evaluation of all the circumstances… but it is not a rigid requirement in and of itself.*[668]

489. Finally, the *Cascade Investments* tribunal stated that what must be foreseeable are not the precise state measures, but that a State will take some adverse action against the investment.[669]

490. In sum, the foreseeability of a dispute for an investor is a matter of an objective assessment of all the circumstances; it does not require proof of the investor's state of

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Claimants, considering Claimants' submission that Mr. Rand, as beneficial owner, controlled Obnova through Mr. Obradovic, as nominal owner, even before the latter transferred the shares to Kalemegdan in 2012. Memorial, para 74. In any case, however, the *Cascade Investments* tribunal considered that an abuse of process objection as a matter of principle also may apply to arm's-length sales, see *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award**, RL-123**, para 354.

[665] *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award**, RL-123**, paras 342-343.

[666] *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award**, RL-123**, para 343.

[667] *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award**, RL-123**, para 344, quoting *Philip Morris*.

[668] *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award**, RL-123**, para 345 (emphasis in the original).

[669] *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award**, RL-123**, para 351.

mind or bad faith. What matters is whether a future dispute or claim was reasonably foreseeable to the investor at the time of the restructuring,[670] which implies that a certain degree of due diligence needs to be conducted by the investor. This was expressly stated by the *Cascade Investments* tribunal ("*a reasonable investor, conducting an appropriate inquiry, should have understood… [there was] a significant risk of government action*").[671]

2. The Cypriot Claimants' purported investment in Obnova was an abuse of rights

491. In April 2012, Mr Obradović contributed his shares in Obnova to the capital of Kalemegdan, which he wholly owned. These shares represented approximately 70% of Obnova's total share capital. In this way, Kalemegdan became the nominal and direct beneficial owner of these shares. At approximately the same time, Coropi allegedly became the 100% beneficial owner of Kalemegdan, thereby also becoming an indirect beneficial owner of Obnova.[672] According to Claimants, Mr Obradović held Obnova's shares on behalf of Mr William Rand, who was and still is the beneficial owner of Kalemegdan[673] and who also, according to Claimants, controls Coropi.[674]

492. Claimants do not mention, nor does the evidence show, that any consideration was paid to Mr Obradović for his transfer of Obnova's shares to the capital of Kalemegdan or for the acceptance of Coropi's beneficial ownership in the trust deeds.[675]

493. As a result of this restructuring, from April 2012 onwards, approximately 70% of Obnova's shares ostensibly constituted an investment of Kalemegdan, a Cypriot company (as well as, according to Claimants, an investment of Coropi, also a Cypriot company), which would entitle the shares to protection under the Cyprus-Serbia BIT.[676] Before this

[670] *Philip Morris Asia Limited v. The Commonwealth of Australia* (PCA Case No. 2012-12), Award on Jurisdiction and Admissibility dated 17 December 2005**, RL-122**, para 554 ("*a reasonable prospect… that a measure which may give rise to a treaty claim will materialize*").

[671] *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award**, RL-123**, para 345.

[672] Memorial, paras 90-96.

[673] Memorial, para 91.

[674] Memorial, para 92.

[675] See Memorial, paras 90-96; Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, paras 7.28-29.

[676] This is without prejudice to Respondent's argument that neither Coropi nor Kalemegdan has a covered investment under the Cyprus-Serbia BIT. See above Section C.I.3.d).

change, the Obnova shares were not protected by the treaty, since the owner was Mr Obradović, a Serbian national.

494. At the time of this restructuring, in April 2012, the new owner(s) of the Obnova shares were aware or must have been aware, through their nominal and/or alleged beneficial owners, Mr Obradović and Mr Rand respectively, of the following facts:

- In March 2003, Obnova unsuccessfully sought to be inscribed in the Cadastre Books as the holder of the right of use over the Objects.[677]
- Obnova's Privatisation Program from July 2003 expressly stated that Obnova had no land in its ownership nor the right of use over any construction land.[678] Although it stated that Obnova was the user of certain objects, the Privatisation Program emphasized that for Dunavska 17-19, Obnova had only temporary construction permits for the objects or did not have any documents proving its right of use over the objects. It also noted that while an object at Dunavska 23 was prefabricated and Obnova did not specify the grounds for use of office space at that address.[679]
- In November 2003, the City of Belgrade was inscribed in the Cadastre as the holder of the right of use over the Objects and Dunavska Plots.[680] In 2011, the City of Belgrade was inscribed as the owner of the land at Dunavska 17-19.[681]
- Obnova's request for legalization of the Objects was denied in 2004. Subsequently, Obnova had filed new requests in 2010, which were still pending when the restructuring took place in 2012.[682]
- On 6 March 2006, the City of Belgrade adopted the Decision on the drafting a Detailed Regulation Plan for the area where the Land Parcels were located.[683] This

[677] See above B.III.2.d).

[678] Privatisation Program, **R-046**, pp 6-7 (of PDF).

[679] Privatisation Program, **R-046**, pp 3-5 (of PDF). For more, see above Section B.IV.2

[680] Cadaster decision No. 952-02-9-31/03 relating to Dunavska 17-19 dated 22 November 2003, **C-165**.

[681] Cadaster decision No. 952-02-9-31/03 relating to Dunavska 17-19 dated 22 November 2003, **C-165** and Decision of the Cadastre from 12 September 2011, **R-054**.

[682] See above Section B.VII.3

[683] Decision on the drafting of a Detailed Regulation Plan for the area between: Francuska, Cara Dušana and Tadeuša Košćuška streets and the existing railway at Dorcól, municipality of Stari Grad. dated 6 March 2006, **C-313**.

Decision was published in the Official Gazette of the City of Belgrade and in the media.[684]

- By Claimants' own admission, Obnova "heard" that the City of Belgrade was considering to place a bus loop on its premises at Dunavska 17-19. Obnova wrote to the City of Belgrade on 27 March 2008, asking for "*relocat[ion of] the tram turnaround and to adapt the land to the development land in order for the business facilities to be built.*"[685]

495. The above overview of facts shows that it was quite evident, at the time of the 2012 restructuring, that Obnova's claim for the right of use or ownership over the parcels and objects (as the case may be) in Dunavska 17-19 and 23 was rebuffed by the inscription of the City of Belgrade as the holder of the right of use. Further, Obnova's legalization requests pertaining to the objects at these premises had been denied and new ones were pending with uncertain prospect of success. Most importantly, Obnova and its owner(s) were aware that the City of Belgrade commenced preparation of a new detailed regulation plan and that the premises in Dunavska would be designated as the land for the public transportation terminus. Having known all that, the Cypriot Claimants and Mr Rand effected the restructuring of Obnova's ownership with Mr Obradović in 2012, bringing it under the protection of the Cyprus-Serbia BIT. Soon thereafter, in 2013, the City of Belgrade adopted the 2013 DRP, the state measure that allegedly infringed Claimants' treaty rights.

496. At the time of the 2012 restructuring, an investment dispute over the Land Parcels and Objects was hence objectively foreseeable to the Cypriot Claimants, as well as to Mr Rand and Mr Obradović. The relevant facts easily meet the criteria for foreseeability of a dispute articulated in international arbitral practice. To use the words of the *Philip Morris* tribunal, there was a "*reasonable prospect… that a measure which may give rise to a treaty claim will materialize*".[686] In the present case, the "measure" was, of course, the 2013 DRP. Its adoption was initiated in 2006 and still pending as of April 2012, so there was a "*reasonable prospect*" that the "*measure*" would "*materialize*", which indeed occurred in 2013.

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[684]See Decision on the drafting of a Detailed Regulation Plan for the area between: Francuska, Cara Dušana and Tadeuša Košćuška streets and the existing railway at Dorcól, municipality of Stari Grad. dated 6 March 2006, **C-313** & Article 13 thereof.

[685] Memorial, para 78. Letter from Obnova to City of Belgrade from 27 March 2008**, C-314**.

[686] *Philip Morris Asia Limited v. The Commonwealth of Australia* (PCA Case No. 2012-12), Award on Jurisdiction and Admissibility dated 17 December 2005**, RL-122**, para 554.

497. Further, since Obnova "heard" already in 2008 that the plan would designate the premises in Dunavska 17-19 for the public transportation terminus, and since its "objection" in that regard went unanswered, it was clear that the new DRP could "*give rise to a treaty claim*" (provided that the nationality issue could be resolved) and that this claim "*was within the reasonable contemplation of the investor*",[687] as required by the *Tidewater* tribunal.

498. Similarly, the dispute was reasonably foreseeable since "*a reasonable investor, conducting an appropriate inquiry, should have understood that the investment… faced a significant risk of government action*"[688], but chose to proceed with the transaction.

499. Accordingly, a reasonable investor, applying minimal due diligence, would have easily established that there was a potential dispute with the respect to the Objects and Land Parcels in 2012. It was clear that adoption of the DRP was imminent, which would designate the Land Parcels for the public transportation terminus and that Obnova would not be compensated for the alleged expropriation, since the City of Belgrade was inscribed as the user of the land. In addition, it was also likely that Obnova's legalization requests would be denied.

500. Considering that the Cypriot Claimants argue that Obnova was owned and controlled by Mr Obradović and Mr Rand since 2005,[689] and that the 2012 restructuring was purportedly conceived by Mr Rand and executed by Mr Obradović,[690] the dispute must have been foreseeable to them and the Cypriot Claimants at the time of the restructuring in 2012.

501. With full view of the above facts, the Cypriot Claimants and Mr Rand effected the restructuring of Obnova's ownership with Mr Obradović in 2012, ostensibly to bring the Obnova shares under the protection of the Cyprus-Serbia BIT. Soon thereafter, in 2013, the City of Belgrade adopted the 2013 DRP, the state measure that allegedly infringed the Cypriot Claimants' treaty rights.

502. Last but not the least, there is no evidence that the Cypriot Claimants paid any consideration to Mr Obradović, nor did Kalemegdan itself contribute any funds or assets to Obnova during the "acquisition" of this investment.[691]

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[687] *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction dated 8 February 2013**, RL-127**, para 150.

[688] *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award**, RL-123**, para 345

[689] Memorial, paras 73-74.

[690] Memorial, para 90.

[691] See above paras 374-377.

503. In conclusion, in case the Tribunal decide not to grant Respondent's *ratione temporis* objection to its jurisdiction, Respondent submits that the Cypriot Claimants' claims are an abuse of process and as such not entitled to investment protection.

II. Mr Broshko's investment in Obnova was an abuse of rights

504. The doctrine of abuse of process is not limited to the restructuring context and instead may apply in comparable scenarios in which an investor seeks to bring a dispute under a particular treaty (**Section 1.** below). As with the Cypriot Claimants, Mr Broshko's investment was not bona fide, as it was acquired at a time when a treaty dispute was reasonably foreseeable (**Section 2.** below). This objection is made in the alternative to Respondent's *ratione temporis* objection with respect to Mr Broshko's claims in this arbitration.

1. Investments acquired by an investor when a dispute is foreseeable are also not *bona fide*

505. The Tribunal is respectfully directed to Respondent's discussion of the applicable international legal standard for an abuse of process objection, which is hereby incorporated by reference.[692] The main focus of that discussion was restructuring of a domestic investment into an international investment, in order to gain international treaty protection for a future foreseeable dispute.

506. In the case of Mr Broshko, the situation is somewhat different because his investment, at least on the face of it, was not a corporate restructuring. Instead, Mr Broshko bought 10% of Obnova's shares through his Serbian company MLI in November 2017.[693] Nevertheless, the requirements of good faith and prohibition of abuse of process apply with equal force to his investment. The *Cascade Investments* tribunal recognised that the concerns about an abuse of process that arise in the restructuring context "*could arise in a different context, which might justify application of the same core principles*".[694] The *Cascade Investments* tribunal continued

> *The Tribunal therefore expects that abuse of process concerns would arise only rarely in the acquisition context. However, if the evidence in a particular case is sufficiently unusual as to raise concerns about the bona fides of a transaction which was made in the face of a reasonably foreseeable dispute with the host State, it remains appropriate for a tribunal to consider the*

[692] See above Section D.I.1

[693] Memorial, para. 125.

[694] *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award**, RL-123**, para 353.

> *suspicious circumstances. Certainly, the nature of any relationship between the seller and the acquiror will be an important element to probe, but that relationship need not be limited, analytically, to a corporate affiliation or shared beneficial ownership; a tribunal should examine the potential existence of other common interests between seller and buyer which might shed light on the real objectives of the transaction.*[695]

507. Therefore, the same requirement of a reasonably foreseeable dispute should be applied to third party acquisitions as it is applied to a restructuring of an investment. In addition, "*it remains appropriate for a tribunal to consider the suspicious circumstances*."

2. Mr Broshko was aware of the investment dispute when he invested in Obnova in 2017

508. It should be recalled that, already in 2012, a reasonable investor, applying minimal due diligence, would have easily established that a dispute was foreseeable with the respect to the status of the Dunavska Plots and Objects.[696] It was at this same time that Mr Broshko became involved in Mr Rand's investments in Serbia. In January 2012, Mr Broshko relocated to Serbia with his family to

> *act as a liaison for Mr. Rand in Serbia and to represent Mr. Rand as the controlling beneficial owner of BD Agro and several other companies in Serbia in which the Rand family had a significant ownership interest.*[697]

509. As Mr Rand's representative in Serbia, and Managing Director of Rand Investments Ltd., a private equity firm owned by Mr Rand,[698] Mr Broshko must have been intimately familiar with the situation with Obnova in which, according to Claimants, Mr Rand had a majority beneficial ownership.[699] Therefore, he must have been aware that in 2003, the City of Belgrade was inscribed as the holder of the right of use over the Dunavska Plots in the Cadastre, which meant that Obnova's purported rights, if any, were not recognized. This crucially affected the outcomes of subsequent legal procedures initiated by Obnova

[695] *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award**, RL-123**, para 354 (emphasis added).

[696] See above paras 496-500.

[697] Rand et al. v The Republic of Serbia, Witness Statement of Mr. Erinn Bernard Broshko, 5 February 2018, **R-136**, para 8.

[698] Memorial, para 23.

[699] Memorial, para 74.

with respect to the Objects and Dunavska Plots, including its legalization requests, which were pending at the time of Mr Broshko's investment.[700]

510. Mr Broshko must have also been aware of the adoption of the 2013 DRP as it significantly affected Mr Rand's interests in Obnova, according to Claimants.

511. Further, in November 2016, one year before Mr Broshko's investment, Obnova initiated court proceedings, requesting determination of its ownership over the objects that Obnova allegedly constructed at Dunavska 17-19 and of its ownership over the land beneath the objects.[701] This was a significant step that could not be taken without Mr Broshko's knowledge.

512. In addition, on 24 February 2017, again before Mr Broshko's investment, the Land Directorate of the City of Belgrade announced upcoming demolition of the Objects and asked Obnova to vacate the premises.[702]

513. Finally Obnova's legalization requests were pending at the time of Mr Broshko's investment in 2017, but were denied soon thereafter, in 2018.[703] Obnova's administrative appeals[704] and judicial review applications were also subsequently denied.[705] When he invested, Mr Broshko must have been aware that shortly before, on 23 June 2017, the Secretariat for Legalization had ordered Obnova to supplement its request for legalization and to provide "*the proof of ownership right, right of use or the right of lease over the*

[700] Decision of the Secretariat for Legalization No. 351.21-19758/2010 dated 25 April 2018**, C-041**; Decision of the Secretariat for Legalization No. 351.21 –16194/2014 dated 25 April 2018, **C-042**, p. 1 (of PDF). There is one additional legalization request still pending concerning one object in Dunavska 23, see above Section B.VII.4.

[701] Memorial, para 147, footnote 175.

[702] See Letter from the Land Directorate to Obnova from 24 February 2016, **C-327** and Letter from the Land Directorate to Obnova from 19 February 2018**, C-328**.

[703] Decision of the Secretariat for Legalization No. 351.21-19758/2010 dated 25 April 2018**, C-041**, p 1 (of PDF); Decision of the Secretariat for Legalization No. 351.21 –16194/2014 dated 25 April 2018, **C-042**, p 1 (of PDF). There is one additional legalization request still pending concerning one object in Dunavska 23, see above Section B.VII.4.

[704] Decision of the City Council of the City of Belgrade No. 351 –515/18-GV dated 19 June 2018, **C-046**, p 1 (of PDF). Decision of the City Council of the City of Belgrade No. 351-512/18 – GV dated 19 June 2018, **C-045**, p 1 (of PDF). Decision of Administrative Court No. 11 U 14419/8 dated 11 January 2021, **C-049**, p 1 (of PDF).

[705] Judgement of the Administrative Court dated 12 October 2022, **R-112**, p 1 (of PDF). Decision of Administrative Court No. 11 U 14419/8 dated 11 January 2021, **C-049**, p 1 (of PDF).

construction land, i.e. the proof of ownership over the objects",[706] which Obnova had failed to provide during the first instance proceeding.

514. By Claimants' own admission,

> *Mr. Broshko decided to invest in Obnova's shares because he believed that the company would either be able to resolve the issue with the 2013 DRP or would be awarded compensation due under Serbian law.*[707]

515. It is hard to imagine that Mr Broshko, who is a lawyer and experienced businessman, did not consider that a dispute with the Serbian State was quite possible, in addition to the two possibilities mentioned by Claimants, since Obnova itself initiated court proceedings in 2016 against the City of Belgrade. A dispute was likely considering not only Obnova's weak claim to ownership or right of use of the Objects, but also the repeatedly stated position of the Serbian authorities that Obnova did not have property rights over the Dunavska Plots, which also implied that compensation would not be granted in relation to the 2013 DRP.

516. As mentioned above, in addition to foreseeability of a dispute, there must also be "*sufficiently unusual*" evidence so as to raise concerns about the *bona fides* of the investment, in which case the tribunal should consider the "*suspicious circumstances*".[708] The circumstances of Mr Broshko's position *vis-à-vis* Mr Rand raise concerns about the *bona fides* of his investment.

517. According to Claimants, Mr Broshko managed Mr Rand's investments as the Managing Director of Investments Ltd. and learned about Obnova's case through his work.[709] The fact that Mr Broshko invested alongside his boss meant that both Mr Rand's investment (through Rand Corporation, Coropi and Kalemegdan) and Mr Broshko's private investment (through MLI) were managed by Mr Broshko. As mentioned above, Mr Broshko was Mr Rand's personal representative in Serbia.[710]

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[706] Order for supplementation of the legalization request for objects at Dunavska 17-19 dated 23 June 2017, **R-115**.

[707] Memorial, para 125.

[708] *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award**, RL-123**, para 354 (emphasis added).

[709] Memorial, para 125.

[710] Rand et al. v The Republic of Serbia, Witness Statement of Mr. Erinn Bernard Broshko, 5 February 2018, **R-136**, para 8.

518. The fact that Mr Broshko works for Mr Rand raises of the question of whether, and to what extent, Mr Broshko as an investor in Obnova is independent from Mr Rand, or whether Mr Rand exercises control over Mr Broshko's investment, such that Mr Broshko's investment was "*simply a rearrangement of assets within a family*".[711]

519. Additionally, Mr Broshko's motivation for investing in Obnova must have been, at least in part, to monetarize Obnova's claim, instead of pursuing a business activity, because a full-fledged dispute was clearly foreseeable at the time of the investment.

520. In conclusion, there are clearly "special circumstances" connected with Mr Broshko's investment in Obnova, which, together with the foreseeability of a dispute with Respondent, indicate that this investment was not made in good faith, but is rather an abuse of process.

[711] *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5), Award dated 15 April 2009**, RL-043**, para 140.

E. RESPONDENT DID NOT BREACH THE CANADA-SERBIA BIT OR THE CYPRUS-SERBIA BIT

521. Respondent did not expropriate the Cypriot Claimants' investment in Obnova (**Section I.** below), did not violate the FET standard (**Section II.** below) and finally, Claimants cannot rely on the MFN to claim breaches of new substantive rights not envisaged directly in the BITs and in any event, neither the 2013 DRP nor the subsequent 2021 Land Directorate Letter breached the non-impairment standard (**Section III**. below).

I. Respondent did not unlawfully expropriate the Cypriot Claimants' investment

522. Claimants allege expropriation only with respect to the Cypriot Claimants under the Cyprus-Serbia BIT and in that regard allege only one measure of indirect expropriation: the adoption of the 2013 DRP.[712] According to Claimants, Obnova had "*the right of use [of the land] convertible into ownership*", which was frustrated by the adoption of the 2013 DRP that prevented the conversion and, consequently, the use of the premises for commercial and residential development.[713]

523. Contrary to Claimants' allegation, Respondent did not expropriate the Cypriot Claimants' investments. In this regard, Respondent will demonstrate that: Obnova never held the rights allegedly interfered with so the question of expropriation does not even arise (**Section 1.** below); the adoption of the 2013 DRP was a legitimate regulatory measure, not an expropriation (**Section 2.** below); and in any event, the high threshold for indirect expropriation has not been reached (**Section 3.** below). Finally, since Obnova had no property rights, the question of lawfulness of the alleged expropriation does not even arise (**Section 4.** below).

1. Obnova does not hold the property rights that were allegedly interfered with

524. Respondent did not expropriate the Cypriot Claimants' investments when it adopted the 2013 DRP.[714] There was no deprivation of the use or economic benefits of the properties, as Claimants held no ownership rights over the Dunavska Plots or the Objects; nor did they hold the right of use convertible into ownership.[715]

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[712] Memorial, paras 196-197.

[713] Memorial, paras 197 & 209.

[714] Memorial, paras 197-249.

[715] See above Section B.VIII.

a) **Expropriation presupposes existence of property rights under national law**

525. It is settled that recourse to municipal law is necessary to ascertain the existence, nature and scope of rights that are alleged to have been expropriated: "[t]*he law applicable to an issue relating to the existence or scope of property rights comprising the investment is the municipal law of the host state, including its rules of private international law*."[716] In other words, "[w]*henever there is a dispute about the scope of the property rights comprising the investment, or to whom such rights belong, there must be a reference to a municipal law of property*."[717]

526. As the tribunal in *Quiborax v. Bolivia* stated:

> *The Tribunal agrees with the Respondent that, in order for a right to be expropriated, it must first exist under the relevant domestic law (in this case, Bolivian law).*[718]

527. It also goes without saying that expropriation presupposes that an investor must have a property right in the first place. As noted by the tribunal in *Emmis v. Hungary*:

> *It also follows from the basic notion that an expropriation clause seeks to protect an investor from deprivation of his property that the property right or asset must have vested (directly or indirectly) in the claimant for him to seek redress.*[719]

[716] Z. Douglas, *The International Law of Investment Claims* (Cambridge, 2009), **RL-037**, p. 52 (emphasis added).

[717] Z. Douglas, *The International Law of Investment Claims* (Cambridge, 2009), **RL-037**, p. 52 (emphasis added).

[718] Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia (ICSID Case No. ARB/06/2), Award dated 16 September 2015, **RL-128**, para. 135; See, also, *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award dated 3 February 2006, **RL-129**, para. 184; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Award dated 16 April 2014, **RL-130**, para. 162; *Vestey Group Ltd v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/06/4), Award dated 15 April 2016, **RL-131**, para. 257; *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia* (ICSID Case No. ARB/12/39), Award**, RL-132**, para. 432.

[719] *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Award dated 16 April 2014, **RL-130**, para. 168; see, also *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/13/1), Award dated 22 August 2017**, RL-063**, para. 646.

528. In *Generation Ukraine v Ukraine*, the tribunal dealt with the question of "*whether the Claimant acquired a right to use the neighbouring property as a construction staging area as part of the bundle of rights pertaining to the Parkview Project*".[720] It found that:

> *expropriation concerns interference with rights in property, it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when the alleged expropriation occurred." The Tribunal went on to hold that in respect of a claimed right to use land, there "cannot be an expropriation of something to which the Claimant never had a legitimate claim."*[721]

529. The Tribunal went on to hold that in respect of a claimed right to use land, there:

> *cannot be an expropriation of something to which the Claimant never had a legitimate claim.*[722]

530. Accordingly, an investor must have some tangible or intangible property right or interest that is capable of being expropriated, i.e., a property that is recognized, acquired or vested under local law.[723] Indeed, this is the first step in the inquiry:

> *The rule or principle that a tribunal must first determine as a matter of national law what the claimant's rights are (or were until the matters complained of) is itself an applicable rule or principle of international law.*[724]

531. In the present case, Claimants argue that Obnova's "right of use [of land] convertible into ownership"[725] was expropriated, but they fail to explain how Respondent could expropriate a right that had not yet been acquired and was allegedly hoped to be acquired if (and only if) certain requirements defined under national law were fulfilled.

532. This issue has been addressed in international practice and the conclusion reached was that rights that have not been acquired or recognized cannot be expropriated. In *Gosling*

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[720]Generation Ukraine, Inc. v. Ukraine (ICSID Case No. ARB/00/9), Award, **RL-039**, para. 18.59.

[721]Generation Ukraine, Inc. v. Ukraine (ICSID Case No. ARB/00/9), Award, **RL-039**, para. 6.2.

[722]Generation Ukraine, Inc. v. Ukraine (ICSID Case No. ARB/00/9), Award, **RL-039**, para. 22.1.

[723]A. Reinisch and C. Schreuer, *International Protection of Investments: The Substantive Standards* (Cambridge, 2020), **RL-133**, paras 126 and 129; Z. Douglas, '*Chapter 24: Property Rights as the Object of an Expropriation*', in Meg Kinnear , Geraldine R. Fischer , et al. (eds), Building International Investment Law: The First 50 Years of ICSID, (Kluwer Law International; Kluwer Law International 2015), **RL-134**, pp 336 – 338.

[724]T. Roe and M. Happold, Settlement of Investment Disputes under the Energy Charter Treaty, Cambridge University Press, 2011, as cited in: Hege Elisabeth Kjos, Applicable Law in Investor-State Arbitration (Interplay Between National and International Law), Oxford University Press, 2013, **RL-135**, p. 242.

[725]Memorial, paras 200 & 209.

v Mauritius, the tribunal dismissed the expropriation claim as the claimants had never acquired the allegedly expropriated right to build a luxury real estate development on their land, nor had the government's actions created reasonable expectations that such a right would be granted.[726]

533. A similar approach has been taken by the European Court of Human Rights ("**ECHR**"). In *Kopecky v. Slovakia*, the applicant's late father had been convicted in 1959 of the illegal possession of coins of numismatic value, which were confiscated. The father was judicially rehabilitated in 1992 and the applicant claimed restitution of the coins from the state, as he was entitled under law. However, the applicant failed to produce sufficient evidence as to where the coins were located, which was a legal requirement for restitution, and his request was ultimately denied on appeal.

534. The Grand Chamber of the European Court of Human Rights first outlined the relevant principles, including that:

> *"Possessions" can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a "possession" within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition…*[727]

535. The court found that the applicant did not have a "possession" because:

> *[in] particular, the Court notes that the applicant's restitution claim was a conditional one from the outset and that the question whether or not he complied with the statutory requirements was to be determined in the ensuing judicial proceedings.*[728]

536. As can be seen, the ECHR held that a right which was not yet acquired but depends on a decision by the authorities on whether the requisite conditions for its acquisition have been fulfilled – does not qualify as an asset.

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[726] *Thomas Gosling and others v. Republic of Mauritius,* ICSID Case No. ARB/16/32, Award dated 14 February 2020**, RL-136**, para. 242.

[727] *Kopecký v Slovakia* [GC], no 44912/98, ECHR 2004-IX dated 28 September 2009, **RL-137**, para 35 (emphasis added).

[728] *Kopecký v Slovakia* [GC], no 44912/98, ECHR 2004-IX dated 28 September 2009, **RL-137**, para 58 (emphasis added).

537. In the context of the question whether unrecognized property rights may be expropriated, Claimants' reliance on *Santa Elena v Costa Rica*, *Unglaube v Costa Rica*, and *Metalclad v Mexico* is misplaced.[729] This is because Obnova – unlike the local enterprise in *Santa Elena* and the claimants in *Unglaube* and *Metalclad*– never had any property right on the Dunavska Plots and the Objects. In *Santa Elena*, the respondent State did not contest that there had been an expropriation – the dispute turned on the amount of compensation. In *Unglaube*, the claimants' ownership was also not in issue, as it was not in issue in *Metalclad*, which concerned the denial of existing operating permits for a landfill that was indirectly owned by the claimant.

538. Claimants also state that expropriation may concern not only rights *in rem*, but also other rights.[730] It is hard to see how this is relevant in the present case, since Claimants argue precisely that expropriation concerned their "right of use convertible into ownership", which would obviously be a right *in rem*. Again, Claimants fail to provide support for the proposition that an unrecognized property right, such as the right of use that they claim Obnova has, is capable of being expropriated.

539. In this regard, Claimants' reliance on *Immaris v Ukraine and Eco Oro v Colombia* does not support their argument.[731] *Immaris* concerned interference, by way of a travel ban, with the claimant's contractual right to use a ship, but the right itself was recognized and uncontroversial, unlike in the present case. The fact that the title to the ship was not vested in the claimant, highlighted by Claimants, was immaterial, because the object of expropriation was the economic value of claimant's (undisputed) *existing* contractual right to use the ship.[732] In *Eco Oro*, the tribunal found that the claimant had certain rights that were capable of being expropriated, but the relevant point was that these rights had been acquired by the claimant and recognized by the State on the basis of a concession agreement,[733] unlike in the case of Obnova.

b) <u>Obnova never held the right that was allegedly interfered with</u>

540. Claimants allege that Obnova had "the right of use convertible into ownership". The conversion would enable the use of the premises for commercial and residential

[729]Memorial, para.197-207.

[730]Memorial, para 210.

[731]Memorial, paras. 210-213.

[732]*Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine,* ICSID Case No. ARB/08/8, Excerpts of Award dated 1 March 2012, **CL-061**, para. 301.

[733]*Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum dated 9 September 2021, **CL-062**, para 634.

development, but the adoption of the 2013 DRP prevented the conversion and the planned development.[734]

541. As Respondent will demonstrate, Obnova was not the holder of the right of use over the land in the Dunavska Plots (**Section aa)** below); Obnova's right to conversion has never been recognized by the Serbian authorities (**Section bb)** below); Obnova never had a registered right of use which is the main condition for conversion (**Section cc)** below); there was a public interest exception to conversion (**Section dd)** below); and in any case, conversion was not effectively applied in 2013 (**Section ee)** below).

aa) Obnova never had the right of use over the Dunavska Plots

542. As already discussed,[735] Obnova was not and is not the holder of the right of use (registered or unregistered) over the Dunavska Plots, so it could not possibly seek the conversion of the right of use over the land into ownership.[736] Accordingly, the right that Claimants argue was expropriated was not, and is not, vested in them, which is a necessary requirement for expropriation.[737] In fact, as discussed extensively above,[738] Obnova leased the land in question from the City of Belgrade and Luka Beograd, another privatised entity.

bb) Obnova's right of conversion has never been recognized by the authorities

543. It is also beyond dispute that the right to conversion in the case of the Dunavska Plots has not been recognized by any decision of Respondent's authorities. Accordingly, the Cypriot Claimants and Obnova have never held a right that is capable of being expropriated, since their right of conversion was never recognized, acquired or vested under local law.[739]

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[734]Memorial, paras 200 & 209.

[735]See above Section B.IV.

[736]See above Section B.VIII.

[737]*Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Award dated 16 April 2014, **RL-130**, para 168.

[738]See above Section B.I.1.

[739] See A. Reinisch and C. Schreuer, *International Protection of Investments: The Substantive Standards* (Cambridge, 2020), **RL-133**, paras 68 and 71; Z. Douglas, '*Chapter 24: Property Rights as the Object of an Expropriation*', in Meg Kinnear , Geraldine R. Fischer , et al. (eds), Building International Investment Law: The First 50 Years of ICSID, (Kluwer Law International; Kluwer Law International 2015), **RL-134**, pp 336 – 338.

cc) Obnova never fulfilled the main precondition for conversion

544. Having a *registered* right of use is the precondition for conversion.[740] It is undisputable that Obnova was never inscribed as the holder of the right of use over the Dunavska Plots and the Objects.

545. Since Obnova was not inscribed as the holder of the right of use over the land, it would have had to first initiate the civil procedure before the competent court for determination of the right of use over the land. If successful, Obnova could use these decisions to inscribe itself as the holder of the right of use over the land in the Cadastre, and only then ask for the conversion of this right into ownership.[741] At the time of the alleged expropriation in 2013, Obnova had not taken even this initial step towards the conversion of the land.

546. Alternatively, if Obnova legalized the Objects, and were inscribed in the Cadastre as their registered owner, it could then seek the conversion of the land necessary for their use.[742] In 2013, Obnova had pending requests for legalization of certain objects at Dunavska Plots[743] but their prospects of success were far from certain.[744]

547. As can be seen, in 2013, and both before and thereafter, Obnova could not expect, with any certainty, that its possible claim for the recognition of the right of use over the land or the claim for legalization of objects would be accepted by the relevant authorities.

dd) The public interest exception to conversion applies

548. According to Article 103(7) of the Law on Planning and Construction which applied when the 2013 DRP was adopted, conversion of the right of use into ownership was not possible in the case of the land designated for construction of objects in the public interest and surfaces for public use.[745] The provision in question was introduced in 2011 and was

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[740] See above Section B.VIII.1. See also Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 106-114.

[741] See above Section B.VIII.1.

[742] 2009 Law on Planning and Construction, Official Gazette of the Republic of Serbia, Nos. 72/09 and 81/09, **C-021-SRB**, Article 70. The existence of this possibility has been confirmed. **Živković Milošević ER-1**, para 196.

[743] See above Section B.VII.

[744] Particularly in view of the fact that Obnova's previous request for legalization and its request for inscription in the Cadastre were denied in 2003 and 2004, see above Section B.VII.1.

[745] Law on Planning and Construction (Official Gazette of the RS No. 72/2009, 81/2009, 64/2010, 24/2011)**, C-102**, Article 103(7). **Živković Milošević ER-1**, para 56.

in force until 2023.[746] Since the possibility of conversion was granted by the State as the owner of the construction land, the State was free to legislate conditions for its application. The introduction of this inherent limitation to conversion was a legitimate exercise of legislative powers under the Constitution of the Republic of Serbia.[747]

549. The freedom of the host State to determine the scope of property rights has also been recognized in the context of international investment law. As Shore and Weiniger state:

> *The property rights that are the subject of protection under the international law of expropriation are created by the host State law. Thus, it is for the host State law to define the nature and extent of property rights that a foreign investor can acquire."*[748]

550. According to the public interest exception to conversion, even if all requirements for conversion were in place (such as the registered right of use), land designated for the construction of objects in the public interest and surfaces for public use was excluded, and could be excluded, from conversion. Importantly, the result of the operation of this provision was not to expropriate the right of use, but rather to exclude the possibility of its conversion into ownership. The question of expropriation would arise only if the land in question was in fact used for the public purpose. In such case, the holder of the right of use would have the right to receive compensation for the labour and money invested in the land in question.[749]

551. The 2013 DRP designated the Dunavska Plots for the construction of the public transportation terminus, which is obviously an object in the public interest on the land for public use. Therefore, the exception in Article 103(7) applied and the Cypriot Claimants could not possibly gain "the right of use convertible into ownership" (even if they had taken the necessary steps to have their "right of use" recognized, which they did

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[746] From 2011 to 2014 this provision was contained in Article 103 (paragraphs (6) or (7), as the provision changed places due to amendments) of the Law on Planning and Construction (Official Gazette of the RS No. 72/2009, 81/2009, 64/2010, 24/2011)**, C-102**, while from 2015, it was contained in the Law on Conversion of the Right of Use into the Right of Ownership on Construction Land for a Fee, Official Gazette of the Republic of Serbia, Nos. 64/15, 9/20, **C-027**, Article, 6(1).

[747] The Constitutional Court of Serbia dismissed an initiative for examination of constitutionality of Article 103(6), **C-104**, para. 2 of dispositif and pp 5-6 (pdf).

[748] C. McLachlan, L. Shore, M. Weiniger, *International Investment Arbitration: Substantive Principles* (2017), **RL-138**, para. 8.64.

[749] See Article 99a of the Law on Planning and Construction valid between 2011 and 2014**, R-137**, and Articles 70 and 71 of the Law on Expropriation, **R-138**.

not). This exception to conversion was something that the Cypriot Claimants had to reckon with, as it was the law before their purported investment in 2012.

ee) <u>In any case, conversion was not effectively possible at the time of the alleged expropriation</u>

552. Finally, and in any case, the possibility of conversion was not effectively applied at the time of the alleged expropriation measure or thereafter. The requirements for conversion for a fee in the case of privatised companies were the subject of constitutional review before the Constitutional Court in 2013 which suspended certain provisions of the 2009 Law on Planning and Construction pending its decision.[750] Then, the 2014 amendments to Law on Planning and Construction postponed conversion for a fee until the adoption of a new law.[751] Accordingly, there was no legal basis for conversion with a fee until the new law was adopted in 2015.[752] Assuming that Obnova was a registered holder of the right of use (which it was not), all that it could have held in 2013 was an expectation that conversion might be possible if the authorities had established that it fulfilled all applicable legal requirements, once these legal requirements were settled by law (as they were in 2015).

ff) <u>Conclusion</u>

553. Obnova and by extension Claimants have never acquired the rights they claim were expropriated.

554. In 2013, and even today, Obnova is very far from obtaining any recognition of its rights of use or conversion by the relevant authorities. It is in a similar position to the applicant in the *Kopecky* case, whose "*restitution claim was a conditional one from the outset*" while "*the question whether or not he complied with the statutory requirements was to be determined*" in the ensuing legal proceedings.[753] In addition, considering that conversion was not effectively applied between 2013 and 2015,[754] Obnova and Claimants at maximum had "*the hope of recognition of a property right which it has been impossible*

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[750] **Živković Milošević ER-1**, paras 59-62.

[751]See above B.VIII.3

[752] **Živković Milošević ER-1** para 64. Applications for conversion were also not processed until the adoption of the new law in 2015, see *ibid*, Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 121.

[753] *Kopecký v Slovakia* [GC], no 44912/98, ECHR 2004-IX dated 28 September 2009, **RL-137**, para 58.

[754] **Živković Milošević ER-1**, dated 31 March 2023, **ER-2**, para 64. See also Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 121.

to exercise effectively", because the law was not settled.[755] Obviously, their hope was far from being an asset.

555. Finally, the possibility of conversion was expressly limited if the land in question was designed for the construction of objects in the public interest and surfaces for public use. Obviously, the possibility of the adoption of a planning document which would exclude certain land from conversion, such as the 2013 DRP, was something that the Cypriot Claimants had to reckon with. For all of these reasons, there was no expropriation.

2. The measures complained of are legitimate and non-expropriatory

556. The measure Claimants allege constituted expropriation of their investment, i.e., adoption of the 2013 DRP, was a legitimate exercise of Respondent's regulatory powers, and not an expropriation. In the following, Respondent will set out the applicable international legal standard (**Section a)** below) and then apply this standard to the measure in question to show that it was a legitimate exercise of its regulatory powers (**Section b)** below).

a) The applicable international standard for the legitimate exercise of regulatory powers

557. According to a leading commentary:

> *It is generally accepted that legitimate regulatory action in the public interest does not constitute indirect expropriation and thus does not give rise to claims of compensation.*[756]

558. As noted in 2006 by the arbitral tribunal in *Saluka v. Czech Republic*:

> *It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.*[757]
>
> *In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are "commonly accepted as within the police power of States" forms part of customary*

[755] *Kopecký v Slovakia* [GC], no 44912/98, ECHR 2004-IX dated 28 September 2009, **RL-137**, paras 35 and 54.

[756] A. Reinisch and C. Schreuer, *International Protection of Investments: The Substantive Standards* (Cambridge, 2020), **RL-133**, para 389.

[757] *Saluka Investments B.V. v. The Czech Republic,* UNCITRAL, PartialAward dated 17 March 2006**, CL-063**, para. 255.

> *international law today. There is ample case law in support of this proposition.*[758]

559. Similarly, the tribunal in *Chemtura v. Canada* considered:

> *that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation.*[759]

560. Accordingly, if a measure is taken (i) *bona fide* in the public interest and (ii) non-discriminatory, it does not constitute an expropriation.

561. Many tribunals have followed the principle that legitimate regulatory action in the public interest does not constitute indirect expropriation[760] and its status as part of general international law has been confirmed.[761]

562. This rule of international law applies in the present case on the basis of Article 9, paragraph 4, of the Cyprus-Serbia BIT, which provides that:

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[758] *Saluka Investments B.V. v. The Czech Republic,* UNCITRAL, PartialAward dated 17 March 2006**, CL-063**, para. 262.

[759] *Chemtura Corporation v. Government of Canada* (UNCITRAL), Award dated 2 August 2010**, RL-139**, para. 266.

[760] See, e.g., *Methanex Corporation v. United States of America* (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits dated 3 August 2005, part IV, Ch. D, **RL-140**, p 278 (of PDF); *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic* (ICSID Case No. ARB/03/19), Decision on Liability, **RL-141**, para. 139; *Les Laboratoires Servier, S.A.A., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland* (UNCITRAL), Final Award (redacted) dated 14 February 2012, **RL-142**, paras. 569-570; *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award**, RL-121**, paras. 475-476; *Chemtura Corporation v. Government of Canada* (UNCITRAL), Award dated 2 August 2010**, RL-139**, para. 266; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award dated 8 July 2016**, RL-143**, paras. 291-301; *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15), Award dated 31 October 2011**, RL-144**, para. 240; *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic* (ICSID Case No. ARB/04/16), Decision on Jurisdiction and Liability dated 10 April 2013**, RL-145**, paras. 816-818.

[761] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award dated 8 July 2016**, RL-143**, para. 301.

*The arbitral tribunal shall decide the dispute in accordance with the provisions of this agreement and **the applicable rules of international law**.*

563. Further, the provisions of the Cyprus-Serbia BIT must be interpreted in accordance with Article 31(3)(c) of the VCLT, in light of "*any relevant rules of international law applicable in relations between the parties*", which includes customary international law.[762]

564. Finally, it seems that Claimants also accept that rules of international law envisage that legitimate exercise of police powers does not constitute expropriation, as they discuss what would be necessary to make the alleged expropriatory measure lawful under international law.[763]

b) The adoption of the 2013 DRP was a legitimate exercise of Respondent's regulatory powers

565. It is submitted that the interference alleged in the present case, i.e. the adoption of the 2013 DRP, fully complies with the above-mentioned conditions under which a measure should be considered non-expropriatory – the measure was taken *bona fide* in the public interest (**Section aa)** below) and is non-discriminatory (**Section bb)** below).

aa) The 2013 DRP was adopted bona fide in the public interest

566. It is undisputed between the Parties that, in principle, construction of a bus loop is in the public interest.[764] Claimants also make no allegations of bad faith on the part of Respondent.

567. However, Claimants complain about the lack of explanation as to why Respondent rezoned the Dunavska Plots differently to the higher-in-the-hierarchy general plans of 2003 and 2015, while it had available State-owned land for the same purpose in the vicinity.[765] Claimants also argue that Respondent did not grant Obnova due process rights

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[762] *Marfin Investment Group v. The Republic of Cyprus* (ICSID Case No. ARB/13/27), Award (redacted) dated 26 July 2018**, RL-146**, para. 827.

[763] Memorial, para. 223

[764] Memorial, para. 216.

[765] Memorial, paras 217-226.

both before designating its premises for the construction of the bus loop[766] and later, as Obnova could not challenge this purported expropriation.[767]

568. All of this is inaccurate. The 2013 DRP is in line with the 2003 and 2013 General Plans while the designation of the Dunavska Plots for the public transportation terminus was the result of detailed studies (**Section (i)** below); and the due process rights of Obnova and the Cyprus Claimants have not been violated, while Obnova in fact failed to participate in the procedure in which the 2013 DRP was adopted (**Section (ii)** below)

(i) The designation of the Dunavska Plots for the public transportation terminal was the result of detailed studies

569. As already discussed in detail, Respondent's designation of the Dunavska Plots for the location of the public transportation terminal in the 2013 DRP was in line with the 2003 and 2016 General Plans. The areas designated by the 2003 and 2016 General Plans as commercial zones and city centres could also be used for "traffic area and terminus", for as long as the predominant purpose of the whole area remained unchanged.[768] Therefore, the 2013 DRP's designation of the Dunavska Plots as the traffic area does not conflict with higher-level spatial plans, as Claimants contend.[769]

570. Claimants' allegation that Respondent has never explained *why* it designated the Dunavska Plots for traffic purposes, while it re-zoned its own traffic infrastructure as residential,[770] is inaccurate. The 2013 DRP itself outlined the criteria for the establishment of a terminus for public transportation and then identified the Dunavska Plots location as fully satisfying these criteria.[771] It is also significant that this location was inscribed in the Cadastre as being in public ownership, i.e., in the ownership of the City of Belgrade, since 2011, while previously the City was inscribed as the holder of the right of use since 2003.[772] It was thus quite reasonable that the 2013 DRP designated the land in question for the terminus for public transportation, as it meet all the necessary criteria and was owned by the City.

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766 Memorial, para. 227.

767 Memorial, para. 230.

768 See above Section B.VI.1.b).

769 Memorial, para. 220.

770 Memorial, para. 221.

771 2013 DRP**, R-098**, B.5.23., pp 11-12 (of PDF).

772 See above Section B.III.2.c)

571. As has been already explained in detail, the designation of the Dunavska Plots in the 2013 DRP was preceded by careful and detailed analyses of all available options. The Dunavska Plots were identified as one of the two best options for a trolleybus loop in a 2006 study, and as the best option for public transportation terminus in a 2007 study.[773] The studies were detailed with, for example, the 2006 study considering various factors related to traffic (e.g., number of users in the neighbourhood, available surface of the location, access), urbanism (e.g., compatibility with planned purposes, possibilities of expanding of the terminus, ownership) and costs.[774]

572. As far as the land across the street from the Dunavska Plots is concerned, it was re-zoned for residential purposes only in 2015, that is, after the 2013 DRP and years after the studies for the location of the public transportation terminal had been prepared. Thus, Claimants' remark that Serbia had a similar plot across the street is baseless.

573. Moreover, the draft of the 2013 DRP was available for public inspection and Obnova could have objected to the designation of the Dunavska Plots, but failed to do so.[775] Had Obnova voiced any objections, the Commission for Plans would have been under the obligation to consider them and provide reasons for its decision on them.[776]

574. Therefore, Respondent conducted thorough studies, which provided more than sufficient reasons for the designation of the Dunavska Plots in the 2013 DRP, while Obnova had the opportunity to provide its views on the matter and raise additional issues, but failed to do so.

(ii) Alleged lack of due process

575. While lack of due process is not strictly speaking part of the international law requirements for legitimate non-expropriatory measures, Respondent finds it convenient to address Claimants' pertinent allegations here.

576. Claimants argue that "*Serbia did not grant Obnova* any *due process rights in the procedure leading to the designation of Obnova's premises for the construction of a bus loop*"[777] and that the Cypriot Claimant never had the opportunity to question the legality

[773] See above Section B.VI.2.a)

[774] Analysis of suitability of the locations for organizing trolleybus terminus in Dorćol dated January 2006, **R-101**.

[775] Report on Public Review for the 2013 DRP dated 8 November 2012, **R-105**, p 2 (of the PDF).

[776] 2009 Law on Planning and Construction**, R-097**, Article 50 (3).

[777] Memorial, para. 227.

of the expropriation and the amount of compensation.[778] Claimants' allegations concerning the lack of due process are inaccurate for several reasons.

577. First, as already mentioned, Obnova had the opportunity to raise objections to the 2013 DRP in accordance with Serbian law, but failed to do so.

578. Second, even if one assumes for the sake of argument that Obnova had property rights over the Dunavska Plots, under Serbian law, its *de facto* expropriation and compensation due must be established by a court at the initiative of the dispossessed party.[779] So obviously there is a legal remedy, but Obnova has failed to pursue it.

579. Instead of addressing the proper entity, in 2021 Obnova approached the Land Directorate, to resolve the compensation issue. Claimants complain that the "City of Belgrade" dismissed its request "*in a simple letter and for clearly arbitrary reasons*".[780] However, the Land Directorate is a public company, separate from the City of Belgrade. It does not have competence to decide on expropriation and compensation.[781] It merely stated its views in the form of a letter to Obnova. Claimants' contention that these views are wrong and arbitrary is not only inaccurate, but also beside the point, since Obnova should have gone to the courts to seek compensation.[782]

580. In any case, Respondent cannot be held liable for the conduct of the Land Directorate in this instance, since the latter is not its organ, but an entity ("public company") with a separate legal personality.[783] The Land Directorate also did not exercise delegated governmental powers in this instance.[784] Accordingly, Land Directorate Letter[785] cannot

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[778] Memorial, para. 230.

[779] See above B.VI.3.a)

[780] Memorial, para. 232.

[781] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 122.

[782] See above B.VI.5

[783] See Article 4 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), **RL-035**; see, e.g., Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009, **RL-147**, para. 119.

[784] See Article 5 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), **RL-035**; see, e.g., Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, 6 November 2008, **RL-148**, para 163.

[785] Letter from the Land Directorate of the City of Belgrade from 13 August 2021, **C-053**.

be attributed to Respondent, nor does it constitute an exercise of sovereign powers, which is also a requirement for liability.[786]

581. Claimants also allege that Respondent violated its own Constitution and the Law on Expropriation when it failed to initiate an expropriation procedure and provide compensation.[787] However, as Claimants well-know, a *de facto* expropriation is different from a formal expropriation and is called "de facto" precisely because it does not occur in the procedure envisaged by the Law on Expropriation. This, however, does not mean that no legal remedy and compensation are available, because, as mentioned above, they clearly are, since an aggrieved party may initiate court proceedings. The question of a constitutional violation also does not arise in such case, since the aggrieved party could obtain compensation for the taking in the court proceedings. Perhaps just for this reason, Claimants also mention, but do not further explain, that the required legal proceedings should have been initiated by Respondent.[788] However, there is no such legal requirement in international law. What is required is that an investor has "*timely access to a legal proceeding*".[789]

bb) No discrimination

582. The Parties agree that the applicable standard for discrimination is whether (i) similar cases are (ii) treated differently, (iii) without reasonable justification.[790]

583. In addition, as the tribunal in *Sempra v. Argentina* noted, a mere differentiation that was not "capricious, irrational or absurd" is not sufficient to amount to breach of international

[786] *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction, **RL-026**, para. 260 ("*Only the State in the exercise of its sovereign authority ('puissance publique'), and not as a contracting party, may breach the obligations assumed under the BIT*").

[787]Memorial, para 231.

[788]Memorial, para 230 ("*Serbia did not initiate any formal proceedings*") and, also, para 231.

[789]*South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award dated 22 November 2018**, CL-018**, para. 582, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16,Award dated 2 October 2006**, CL-037**, para. 435, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela I*, ICSID Case No. ARB/11/26, Award dated 29 January 2016**, CL-019**, para. 496.

[790]See *Saluka Investments B.V. v. The Czech Republic,* UNCITRAL, PartialAward dated 17 March 2006**, CL-063**, para. 313, referred to in Memorial, para. 246.

law.[791] Even Claimants don not argue that the designation of the Dunavska Plots fulfilled these criteria.

584. The burden to prove discrimination lies with Claimants.[792]

585. Claimants' argument has two limbs. First, they argue that Obnova was treated differently from other land owners in the area without justification, as their land is not converted into a bus loop.[793] However, Obnova is not the owner of the land in question and cannot be compared to other owners in the area, which are not in a similar situation as they have ownership which Obnova does not. This is sufficient to dispose of this part of Claimants' discrimination argument. Further, even assuming Obnova was the owner of the land, it would still be necessary to identify other owners who were put in a better position. Claimants identify none, so their discrimination argument fails for this reason as well.

586. Even assuming that Respondent treated Obnova and other "landowners" differently, this differential treatment would be justified. As already mentioned, the justification is contained in the 2013 DRP, which set out the criteria for the new bus loop and concluded that the Dunavska Plots fulfilled them all.[794]

587. Another limb of Claimants' discrimination argument is that Respondent failed to provide any reasonable justification as to why it put the bus loop on Obnova's premises rather than on its own nearby land.[795] However, even if true, this fact would not be an indication of discrimination because it is unclear what distinction has been made by such measures and who was exactly put in a better position in comparison to Obnova, other than the state itself? In any case, as discussed above, there was ample justification to put the traffic terminus on the Dunavska Plots, while the decision to relocate the trolley bus depot from across the street and rezone this land for residential purposes had not even been made in 2013, when the DRP was adopted, but only in 2015. For all of these reasons, Claimants' discrimination argument clearly fails.

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[791] *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award dated 28 September 2007**, CL-044**, para 319.

[792] *Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya* (ICC Case No. 21537/ZF/AYZ) Award, **RL-149**, para 84.

[793] Memorial, para 247.

[794] 2013 DRP**, R-098**, B.5.23., pp 11 and 12 (of PDF).

[795] Memorial, para 247.

cc) Conclusion

588. As has been demonstrated above, the adoption of the 2013 DRP, and its designation of the Dunavska Plots for the location of the public transportation terminus, was a legitimate non-expropriatory measure which satisfied all conditions set by international law, as it was enacted *bona fide* in the public interest and was non-discriminatory. In addition, Obnova had effective due process rights at its disposal to challenge this measure but failed to do so.

3. In any case, the high standard for indirect expropriation has not been met

589. The Cypriot Claimants' expropriation claim is formulated as for *de facto* or indirect expropriation.[796] What they completely fail to present and consider is the applicable international standard against which to assess the facts of the present case. No wonder, as international law sets a high, and for Claimants clearly unattainable, standard for a *de facto* expropriation.

a) The international standard for indirect expropriation

590. The international standard for indirect expropriation has been described as the substantial deprivation of property on a permanent or long-term basis.[797]

591. This standard is amply supported by international arbitral practice. According to Professor Schreuer, arbitral tribunals have "*consistently looked at the degree and duration of deprivations to determine whether an expropriation has occurred*".[798]

592. According to the *Sempra Energy* tribunal, the value of the business has to be "*virtually annihilated*",[799] while the *LG&E* tribunal required "*a permanent severe deprivation of*

[796] Memorial, para. 197.

[797] C Schreuer, '*The Concept of Expropriation under the ECT and other Investment Protection Treaties*', in Transnational Dispute Management Vol. 2, Issue 5 (2005), **RL-150**, para 81.

[798] Christoph H. Schreuer, "The Concept of Expropriation under the ECT and other Investment Protection Treaties", *Investment Arbitration and the Energy Charter Treaty* (JurisNet, LLC, 2006) dated 7 September 2023, **RL-151**, p 146.

[799] *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award dated 28 September 2007, **CL-044**, para 285. See also *ECE Projektmanagement v. The Czech Republic*, (PCA Case No. 2010-5), Award dated 19 September 2013, **RL-152**, para. 366, in which a drop in value of land plots and the commercial value of the claimant's project was deemed insufficient to constitute an expropriation.

LG&E's rights with regard to its investment, or almost complete deprivation of the value of LG&E investment".[800]

593. Further, indirect expropriation also presupposes that the investor has suffered a substantial deprivation of the *use* of the investment, and not merely of its economic benefits. As noted by the *Mobil* tribunal

> *In conclusion, consistently with mainstream case law, the Tribunal finds that for an expropriation to exist, the investor should be substantially deprived not only of the benefits, but also of the use of the investment. A mere frustration of investor's expectations, even when legitimate, which is not a result of an interference with the control or use or the investment, is not an indirect expropriation.*[801]

594. Similarly, in *Venezuela Holdings*, the tribunal noted that mere economic loss is not sufficient for indirect expropriation, as there must also be an interference with the control or use of the investment:

> *"[f]or an expropriation to exist, the investor should be substantially deprived not only of the benefits, but also of the use of his investment. A mere loss of value, which is not the result of an interference with the control or use of the investment, is not an indirect expropriation.*[802]

b) **Obnova's purported rights were not substantially interfered with or destroyed**

595. Facts show that the requisite standard for indirect expropriation has not been met. It is undisputed that Claimants, i.e. Obnova, still use the premises in Dunavska Street.[803] As already mentioned, indirect expropriation presupposes substantial deprivation or interference with the use of the investment, not simply deprivation of its benefits. As mentioned by the *Mobil* tribunal, "[a] *mere frustration of investor's expectation*" is not

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[800] *LG&E Energy Corp., LG&E Capital Corp., and LG&EInternational, Inc .v. Argentine Republic,* ICSID Case No. ARB/02/1,Award dated 25 July 2007**, CL-067**, para 200.

[801] *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic* (ICSID Case No. ARB/04/16), Decision on Jurisdiction and Liability dated 10 April 2013**, RL-145**, para 828.

[802] *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Award dated 9 October 2014**, RL-153**, para 286 (emphasis added).

[803] On 21 February 2019, the Higher Court in Belgrade approved Obnova's request for provisional measures and prohibited the City of Belgrade and the Republic of Serbia from disposing of the some of the objects and the land located on the parcel 47. Decision of the Higher Court in Belgrade No. 4 P No. 1724/16 dated 21 February 2019, **R-139**.

sufficient for indirect expropriation unless it came as the result of interference with the control or use of the investment."[804]

596. It should also be clarified here that a privatised company which is a holder of the right of use over the construction land is not entitled to develop the land unless it has first obtained conversion of the land into private ownership. Without conversion, the privatised company cannot obtain a construction permit to build any objects on the land.[805] Only when the privatised company converts the land and gains ownership, can it manage and dispose of it as it sees fit. Until conversion, the land is in public (state) ownership, and the privatised company can only use it. Accordingly, before conversion, the mere adoption of a planning document, such as the 2013 DRP, does not change the scope and the modality of the privatised company's right over the land (as it continues to use the land). They are changed only once the holder is evicted from the land.

597. Therefore, even if Obnova had the right of use over the Dunavska Plots (*quod non*), it would not have been able to develop the land without firstly obtaining conversion, but instead it would have just had the right to continue to use the land. Indeed, Obnova is still using the Dunavska Plots.

598. In addition, the economic value of Obnova's purported rights has not been "*destroyed*", "*neutralized*" or "*annihilated*", to use the terminology used by various international tribunals when describing the threshold for indirect expropriation. This is clear from Obnova's financial statements, adopted by the management appointed by Claimants.

599. The following is the table of aggregate values of Obnova's immovable properties in the period 2012 to 2021:[806]

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[804] *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic* (ICSID Case No. ARB/04/16), Decision on Jurisdiction and Liability dated 10 April 2013**, RL-145**, para. 828.

[805] In order not to hinder the day-to-day operations of a privatised company in case it needed additional buildings for its operations, the Law on Planning and Construction also prescribed a transitional period of 18 months in which the company could, in fact, obtain a construction permit and build or reconstruct an existing object, without converting its right of use to ownership and paying the applicable fee. This possibility was applicable only to the objects needed for the performance of the usual activity of the company. The initial deadline was extended by the until July of 2016 by subsequent amendments. Article 103(5) of the 2009 Law on Planning and Construction**, R-097**. See also M. Živković, *Analysis of the legislation and practise: Conversion of the right of use on construction land into the ownership right with a fee*, NALED, 2011**, C-094**, p. 14 ("*Upon expiry of this deadline, the implementation of the conversion is foreseen as a condition for obtaining a building permit*").

[806] Obnova's Balance Sheets 2012-2021, **R-140**. Respondent used official data from the balance sheets as registered with the Serbian Business Registry Agency. Respondent uses here the total declared value of Obnova's properties since there is no data for Dunavska properties alone. It is also assumed, for the sake of argument only,

2012	€ 134.939,76
2013	€ 126.919,05
2014	€ 114.386,11
2015	€ 108.584,11
2016	€ 101.862,80
2017	€ 100.894,74
2018	€ 95.845,67
2019	€ 77.242,96
2020	€ 69.059,36
2021	€ 60.869,20

600. If one considers that the alleged interference took place at the very end of 2013[807] when the value of the company's real estate was EUR 126,919, it can be seen that the total value of Obnova's properties was still valued at EUR 60,869 in 2021. Obviously, the value of Obnova's real estate was not "annihilated" or "completely deprived of value". Accordingly, the demanding standard for indirect expropriation has not been even remotely reached in the present case.

601. In any event, Claimants failed to prove their "*reasonably to be expected economic benefit*"[808] of Obnova's properties pertaining to a commercial or residential development of which they were allegedly deprived. Not only did Obnova have no ownership or right to convert its rights into ownership, but it also failed to evidence the actual plans. Dr Hern based his calculations on Exhibits C-217 and C-218,[809] which post-date the request for amicable settlement of the dispute by the Cypriot Claimants in the present proceedings, filed on 16 June 2021[810] and for this reason cannot be taken seriously as

that the decrease in the value of the company's real estate was caused by the 2013 DRP. The fact that Obnova's management included the value of the Dunavska Plots into the value of the company's real estate in the financial statements is confirmed by Mr. Hern's calculation of Claimants' losses, which uses the same data and excludes the value of the Dunavska Plots when calculating Obnova's net liabilities, *Expert Report-Dr. Richard Hern-Memorial on Quantum-ENG* dated 31 March 2023, **Hern ER-1**, para. 33.

[807] DRP was adopted on 20 December 2013, see 2013 DRP**, R-098.**

[808] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award dated 30 August 2000**, CL-011**, para 103.

[809] See *Expert Report-Dr. Richard Hern-Memorial on Quantum-ENG* dated 31 March 2023, **Hern ER-1**, paras 79-80.

[810] Both architectural analyses are dated October 2021, see Arhinaut M d.o.o, Architectural Analysis for the location in Dunavska Street, Belgrade**, C-217** & Arhinaut M d.o.o, Architectural Analysis for the location in 23 Dunavska Street, Belgrade**, C-218**.

evidence of investor's expected economic benefit prior to the interference or even before the present arbitration. There is no evidence that any other steps towards the development had been taken.

602. In conclusion, Claimants have failed to show any substantial deprivation in their investment as a result of Respondent's actions.

4. Without an object of expropriation, the issue of its lawfulness is moot

603. Claimants argue that there was an expropriation of the Cypriot Claimant's investment in violation of the requirements for expropriation under Article 5(1) of the Serbia-Cyprus BIT.[811] However, since Claimants' investment Obnova had no property rights that could be expropriated, the question of lawfulness of expropriation does not even arise.

604. In addition, the Claimant Coropi could not, in any case, have acquired any property in Serbia through beneficial ownership, so Respondent could not expropriate Coropi's indirect "investment" and the issue of lawfulness of expropriation also does not arise. Namely, Coropi claims that it is the 100% beneficial owner of Kalemegdan and the indirect beneficial owner of Obnova, which is its investment in the present case.[812] However, as Respondent's expert Professor Lepetic concludes, "*Coropi is not the owner of shares in Obnova and is not entitled to any rights deriving from these shares*".[813] Serbian law does not recognise beneficial ownership as ownership over the shares, but only recognises their nominal owner, i.e. the shareholder, as the owner of the shares.[814] Accordingly, Coropi has never acquired ownership over Obnova's shares and thus has never had rights recognized by Serbian law that could be expropriated in the present case.

II. Serbia did not violate the FET standard

605. Serbia denies that it has breached the FET standard. Claimants' claim that Serbia violated the FET standard contained in the BITs due to: (i) the adoption of the 2013 DRP,[815] and (ii) Serbia's refusal to compensate Obnova for the alleged expropriation.[816]

[811] Memorial, paras 214-250.

[812] Memorial, paras 95 and 96.

[813] Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-003**, para 100.

[814] Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-003**, paras 88 and 100.

[815] Memorial, para 256.

[816] Memorial, paras 256 and 264.

606. As regards the Cypriot Claimants and the Cyprus-Serbia BIT, Claimants argue that both these events breached the FET standard.

607. Claimants allege that the adoption of the 2013 DRP breached the FET standard contained in the Cyprus-Serbia BIT, because it allegedly: (i) violated Cypriot Claimants' legitimate expectations that the Dunavska Plots would be able to be developed for residential and commercial purposes;[817] (ii) was arbitrary and (iii) discriminatory, because Serbia decided to place the bus loop on the Dunavska Plots and not other plots.[818]

608. Claimants further argue that the refusal to compensate Obnova (separately) breached the FET standard contained in the Cyprus-Serbia BIT, because it allegedly (i) violated Cypriot Claimants' expectation that Obnova would be compensated in line with Serbian law;[819] (ii) was arbitrary, unfair and unjust.[820]

609. As regards Mr Broshko and the Canada-Serbia BIT, Claimants refer only to the refusal of compensation (clearly because the adoption of the 2013 DRP took place long before Mr Broshko's acquisition of Obnova's shares or entrance of the Canada-Serbia BIT into force). Here, Claimants allege that the refusal of compensation itself (i) violated Mr Broshko's legitimate expectations that Serbia would provide Obnova with compensation for the expropriation in accordance with its own law;[821] and (ii) was arbitrary, unfair and unjust.[822]

610. Serbia denies these allegations. Claimants rely on a highly expansive notion of the FET standard, which, as Serbia will demonstrate is an incorrect interpretation of the treaty standard under both BITs (**Section 1. below**). Furthermore, contrary to Claimants' allegations neither the 2013 DRP (**Section 2. below**) nor the refusal to compensate Obnova for the alleged expropriation (**Section 3. below**) violated the FET standard contained in the BITs.

1. FET standard

611. Article 2(2) of the Cyprus-Serbia BIT requires that:

[817] Memorial, para 258.

[818] Memorial, para 262 and 263.

[819] Memorial, para 264.

[820] Memorial, paras 272-274.

[821] Memorial, para 266.

[822] Memorial, para 275.

> *Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.*[823]

612. Article 6 of the Canada-Serbia BIT reads:

> *1. Each Party shall accord to a covered investment treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.*
>
> *2. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.*[824]

613. Claimants argue that both BITs "*in reality provide for the same level of protection*".[825] This is incorrect.

614. The reference to the minimum standard in the FET clause in the Canada-Serbia BIT means that the FET standard is identical to the minimum standard required by international law.[826] In particular:

> *[a] reference in an FET clause to the minimum standard of treatment of aliens conveys a clear message that only the very serious acts of maladministration can be seen as violating the treaty.*[827]

615. It is widely accepted by investment tribunals that reference to the minimum standard of treatment imposes a high bar for the breach:

> [a breach of minimum standard of treatment] *requires an act that is sufficiently egregious and shocking so as to fall below accepted international standards. The Tribunal agrees, as well, that such conduct includes, inter*

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[823] Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **CL-007(a)**, Article 2(2).

[824] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CL-001**, Article 6.

[825] Memorial, para 253.

[826] C. Schreuer, "*Fair and equitable treatment in arbitral practice*" in Journal of World Investment and Trade, Vol. 6, Issue 3 (2005), **RL-154**, p 364; see also A. Reinisch and C. Schreuer, *International Protection of Investments: The Substantive Standards* (Cambridge, 2020), **RL-133**, p 319, paras 338-339.

[827] Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II UNITED NATIONS New York and Geneva, 2012, **RL-155**, p 13.

> *alia, insofar as may be relevant for present purposes, manifest arbitrariness and blatant unfairness*[828]
>
> [T]*o establish a breach of the minimum standard of treatment under Article 10.5, the Claimant must show that Oman has acted with a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law. Such a standard requires more than that the Claimant point to some inconsistency or inadequacy in Oman's regulation of its internal affairs: a breach of the minimum standard requires a failure, wilful or otherwise egregious, to protect a foreign investor's basic rights and expectations. It will certainly not be the case that every minor misapplication of a State's laws or regulations will meet that high standard.*[829]

616. In the investment treaty context, an assessment of whether the FET standard has been breached is a highly fact-specific exercise, taking into consideration all relevant circumstances.[830] As regards the Cyprus-Serbia BIT, Claimants rely on a self-serving, overly broad, and outdated description of what the FET standard allegedly means.[831] However, contrary to this proposition, the threshold for breach of the FET standard is high and the question is not whether the host State legal system is performing as efficiently as it ideally could, but rather whether it is performing so badly as to violate

[828] *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica* (ICSID Case No. UNCT/13/2), Interim Award of the Tribunal on Jurisdiction dated 25 October 2016, **RL-111**, para 282 *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, **RL-156**, paras 382, 386 and 390; see also *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia* (ICSID Case No. ARB/99/2), Award, **RL-157**, para 367; *Lone Pine Resources Inc. v. Government of Canada* (ICSID Case No. UNCT/15/2), Final Award , **RL-158**, para 611.

[829] *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, **RL-156**, paras 382-386. See also *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia* (ICSID Case No. ARB/99/2), Award, **RL-157**, para. 367.

[830] *Saluka Investments B.V. v. The Czech Republic,* UNCITRAL, PartialAward dated 17 March 2006, **CL-063**, para 309; *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability, **RL-159**, para 284; *Valeri Belokon v. Kyrgyz Republic* (UNCITRAL), Award, **RL-160**, para 227; *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award, **RL-161**, para 118.

[831] Memorial, para 254, Claimants argue that: "*The FET standard has been interpreted by investment tribunals to encompass, in particular, the state's duty to act in a transparent manner and in good faith, to refrain from conduct that would be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory or lacking in due process, to respect procedural propriety and due process and not to frustrate the investor's reasonable and legitimate expectations"*. For example, the ad hoc Committee in MTD v. Chile stated that Tecmed's tribunal apparent reliance on the foreign investors unqualified expectations as the source of the host State's obligations was questionable, see MTD v. Chile, Decision on Annulment, 21 March 2007, **RL-162**, para 67.

the treaty obligations.[832] In particular, investment treaty tribunals underline that the FET standard is not an insurance policy against business risk.[833]

a) Legitimate expectations

617. The investor's (legitimate) expectations must rest on conditions existing at the time of making the investment,[834] and an investor should prove that the given expectation was the determining factor in its decision to invest.[835] In *Mamidoil v. Albania*, the tribunal underlined that "[i]*nvestors base their plans on circumstances and conditions as they find them, and they can only rely on conditions as they exist at that period*".[836] Tribunals typically inquire what would have been the legitimate and reasonable expectations of a reasonable investor in the position of the claimants, at the time they made the investment.[837]

618. Notably, a general reference to domestic legal framework as a basis for a legitimate expectation is not enough. Tribunals have underlined the importance of the State's promise,[838] assurances individually addressed to the investor,[839] that are precise and unambiguous.[840] Particular importance should be attached to the due diligence conducted

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[832] *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/04/6), Award, **RL-163**, para 227. See also *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No.ARB/05/20, Award dated 11 December 2013, **CL-060**, para 533.

[833] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award dated 8 October 2008, **CL-032**, para 217.

[834] *Siemens A.G. v. Argentine Republic*, ICSID Case No.ARB/02/8, Award dated 6 February 2007, **CL-043**, para 299*; Duke Energy Electroquil Partners and Electroquil S.A. v.Republic of Ecuador*, ICSID Case No. ARB/04/19, Award dated 18 August 2008, **CL-027**, paras 340, 347, 365, 366.

[835] *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No.ARB/05/20, Award dated 11 December 2013, **CL-060**, para 672.

[836] *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania* (ICSID Case No. ARB/11/24), Award dated 30 March 2015, **RL-061**, paras 695-698.

[837] *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic* (ICSID Case No. ARB/03/19), Decision on Liability, **RL-141**, para 228.

[838] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award, **RL-164**, para 241.

[839] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award dated 8 October 2008, **CL-032**, para 217; *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/01), Decision on Liability, **RL-165**, para 119.

[840] *Glamis Gold, Ltd. v. United States of America* (UNCITRAL), Award, **RL-166**, paras 766-802; *White Industries Australia Limited v. The Republic of India* (UNCITRAL), Final Award, **RL-167**, para 10.3.7.

by the investor,[841] including verifying whether a thorough legal analysis of the relevant provisions was made prior to an investment decision.[842] In practice, tribunals assessed whether the alleged expectation was based on an objective basis confirmed in the course of the investor's due diligence, rather than a misplaced optimism.[843] In cases where the expectations were not based on due diligence, but rather on speculative hope, tribunals dismissed claims for breach of the FET standard.[844]

619. For example, in *Unglaube v. Costa Rica* (on which Claimants also rely), the tribunal dismissed the claimants' FET claim by holding that they failed to conduct a proper due diligence before making their investment, including to become familiar with the law of the host State.[845] Likewise, in *Gavrilovic v. Croatia*, which concerned the investor's acquisition of properties, the tribunal found:

> *The reasonableness of Mr Gavrilovic's expectation is additionally complicated by the absence of any evidence of due diligence being performed before the execution of the Purchase Agreement. In the circumstances, the Tribunal considers that a reasonable and legitimate expectation that an investor would be able to register ownership over the claimed properties would be grounded in extensive investigation into the precise properties and plots owned by each of the Five Companies, taking into account the corporate changes that had occurred and, in particular, the transitioning corporate and ownership systems under Croatian law. No evidence of any such investigation being performed has been adduced by the Claimants.*[846]

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[841] A. Reinisch and C. Schreuer, *International Protection of Investments: The Substantive Standards* (Cambridge, 2020), **RL-133**, para 1175; *Alasdair Ross Anderson et al v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/07/3), Award, **RL-168**, para 58.

[842] *Cube Infrastructure Fund SICAV and others v Kingdom of Spain* (ICSID Case No. ARB/15/20), Decision on Jurisdiction, Liability and Partial Decision on Quantum dated 19 February 2019, **RL-169**, para 393.

[843] *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability, **RL-159**, paras 342-57; *Mr. Franck Charles Arif v. Republic of Moldova,* ICSID Case No. ARB/11/23, Award dated 8 December 2013, **CL-031**, para 532; *Cube Infrastructure Fund SICAV and others v Kingdom of Spain* (ICSID Case No. ARB/15/20), Decision on Jurisdiction, Liability and Partial Decision on Quantum, **RL-169**, 19 February 2019, para 393.

[844] *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic* (PCA Case No. 2014-01), Award, **RL-170**, para 435.

[845] *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award and *Reinhard Hans Unglaube v. Republic ofCosta Rica*, ICSID Case No. ARB/09/20, Award dated 16 May 2021, **CL-009**, para 258.

[846] *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia* (ICSID Case No. ARB/12/39), Award, **RL-132**, para 1012.

b) Arbitrariness and discrimination

620. Similarly, the threshold to establish arbitrary measures within the realm of the FET standard is very high.[847] It is generally accepted that non-compliance with domestic law does not necessarily entail a treaty violation,[848] and that clear and malicious misapplication of the law must be proven.[849] The cases on which Claimants rely do notably involve breaches of the FET standard due to wilful disregard of the local law or *ex ante* repudiation of the legal framework for the investment.[850]

621. Whether a measure is arbitrary is to be assessed on the basis of whether in the underlying decision preference or bias substituted for the rule of law or whether an impugned act is based on prejudice rather than fact, discretionary, unconnected to a reasonable State policy or legitimate purpose or taken in wilful disregard of due process and proper procedure.[851]

622. In the application of domestic law, any alleged bad faith or ulterior motive of the State must be proven.[852] Discrimination occurs for treating similar situations differently for no reasonable justification which essentially means in a non-arbitrary manner.[853] A measure is discriminatory if it treats similar investments operating in similar circumstances

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[847] A. Newcombe, L. P. Trius, *A Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009), **RL-171**, p 302.

[848] *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia* (ICSID Case No. ARB/12/39), Award, **RL-132**, para 876; ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001)ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), **RL-035**, Article 3; *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Award, **RL-172**, paras 174, 177.

[849] *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia* (ICSID Case No. ARB/12/39), Award, **RL-132**, paras 878-879.

[850] *Spoldzielnia Pracy Muszynianka v. Slovak Republic*, UNCITRAL, PCA Case No. 2017-08, Award dated 7 October 2020, **CL-025**, para 616; *B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia*, ICSID Case No. ARB/15/5, Excerpts of Award dated 5 April 2019, **CL-003**, para 845.

[851] *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability, **RL-159**, para 263; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award dated 8 October 2008, **CL-032**, para 303; *Pawlowski AG and Project Sever s.r.o. v. Czech Republic* (ICSID Case No. ARB/17/11), Award , **RL-173**, paras 365-366.

[852] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia* (ICSID Case No. ARB/99/2), Award, **RL-157**, para 371; *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic* (ICSID Case No. ARB/14/32), Award, **RL-174** para 348; *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award , **RL-175**, para 293.

[853] *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8), Award, **RL-176**, para 368; *Lidercón, S.L. v. Republic of Peru* (ICSID Case No. ARB/17/9), Award, **RL-177**, paras 167-169.

invidiously without justification.[854] The applicable test to assess discrimination is whether (i) similar cases are (ii) treated differently, (iii) without reasonable justification.[855] The burden of proof thereby lies with Claimant.[856]

623. A "*similar case*" means another investor or project in a comparable situation.[857] To establish this, tribunals have considered broader circumstances[858] than merely the industry in which a comparator operates, including whether it is subject to the same laws and regulations.[859] It is also important to consider whether the investor and comparator are private or State-owned, and how they trade.[860] Discrimination requires in particular a "*comparative analysis between the measures applied to the protected investment and other investments in similar situations*".[861]

624. Even where a comparator can be identified, discrimination requires differential treatment without any reasonable justification. This prong of the test for discrimination is

[854] *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Award dated 27 August 2008, **RL-119**, para 184; *Ulysseas, Inc. v The Republic of Ecuador* (UNCITRAL), Final Award, **RL-178**, UNCITRAL, Final Award, 12 June 2012, para 293 ("*As stated by the ICSID tribunal in Goetz v Burundi, 'discrimination supposes a differential treatment applied to people who are in similar situations. As such, discrimination may well disregard nationality and relate to a foreign investor being treated differently from another investor whether national or foreign in a similar situations*'"); *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award and *Reinhard Hans Unglaube v. Republic ofCosta Rica*, ICSID Case No. ARB/09/20, Award dated 16 May 2021, **CL-009**, para 262.

[855] See *Saluka Investments B.V. v. The Czech Republic,* UNCITRAL, PartialAward dated 17 March 2006, **CL-063**, para 313; *ECE Projektmanagement v. The Czech Republic*, (PCA Case No. 2010-5), Award dated 19 September 2013, **RL-152**, para 4.825; *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/12), Award , **RL-179**, para 616; *Addiko Bank AG v. Montenegro* (ICSID Case No. ARB/17/35), Award [Redacted], **RL-180**, para 671; *Pawlowski AG and Project Sever s.r.o. v. Czech Republic* (ICSID Case No. ARB/17/11), Award , **RL-173**, para 534. See also N. Blackaby, C. Partasides , et al., Redfern and Hunter on International Arbitration (Kluwer Law International, 2023), **RL-181**, para 8.125.

[856] *Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya* (ICC Case No. 21537/ZF/AYZ) Award, **RL-149**, para 526.

[857] *Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya* (ICC Case No. 21537/ZF/AYZ) Award, **RL-149**, para 525; *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8), Award, **RL-176**, para 288.

[858] *Invesmart v. Czech Republic* (UNCITRAL), Award, **RL-182**, para 415.

[859] *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia* (SCC Case No. 118/2001), Award , **RL-183**, p. 34.

[860] *Champion Trading v. Egypt* (ICSID Case No. ARB/02/9), Award, **RL-184**, para 154.

[861] *Pawlowski AG and Project Sever s.r.o. v. Czech Republic* (ICSID Case No. ARB/17/11), Award , **RL-173**, para 531.

inherently tied to reasonableness or the prohibition of arbitrariness. As outlined by the tribunal in *Parkerings v. Lithuania*:

> [t]*o violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases.*[862]

625. It follows that the treatment of Claimants' investment in Serbia may only be compared with the treatment of similar users of construction land possessing the same features and that were subject to the same regulations. Claimants must also prove that there were no reasonable grounds for the alleged differential treatment.

626. Finally, to establish a violation of international law by way of acts of administrative authorities, the investor must demonstrate that it has exhausted local remedies or that such remedies were futile.[863]

627. As will be shown below, neither the 2013 DRP, nor the refusal to compensate Obnova gave rise to breach of the FET standard in any of the BITs.

2. The adoption of the 2013 DRP did not breach the FET standard

628. Claimants argue that Serbia violated the FET standard contained in the Cyprus-Serbia BIT because it adopted the 2013 DRP (a) against their legitimate expectations, and (b) in an arbitrary and discriminatory manner.[864] This is denied. Respondent also notes that absence of the Cyprus-Serbia BIT's breach excludes any breach of the Canada-Serbia BIT as the latter refers to the minimum standard of treatment.

a) Claimants could not have legitimately expected to develop the Dunavska Plots

629. Claimants' case boils down to the allegation that they expected to use the Dunavska Plots for residential and commercial developments and that the 2013 DRP allegedly made such development impossible, rendering the Dunavska Plots useless. [865] This is misplaced.

630. **Firstly**, Claimants provide no documentary or witness evidence whatsoever of their alleged expectations.

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[862] *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8), Award, **RL-176**, para 368.

[863] Generation Ukraine, Inc. v. Ukraine (ICSID Case No. ARB/00/9), Award, **RL-039**, para 20.33.

[864] See para 607 and following above.

[865] Memorial, para 257.

631. **Secondly**, Claimants could not have had legitimate expectations when they (purportedly) invested that they will freely develop the Dunavska Plots, because Obnova did not have any property rights over them, neither the right of use or ownership.

632. As explained in detail in Section B.I.1.b) above, Obnova merely used the Dunavska Plots as the lessee, and did not have the right of use over them that was capable of being converted into ownership. The rightful owner of the Dunavska Plots is the City of Belgrade, as properly indicated in the Cadastre as of 2011. The City of Belgrade had been inscribed as the holder of the right of use over the Dunavska Plots since 2003. Even assuming that Obnova did construct some Objects on the Dunavska Plots (which remains unproven), this did not lead to Obnova acquiring any property rights over the Dunavska Plots. This is all in accordance with the Serbian law, as evidenced by the expert report of Professor Jotanovic.[866]

633. Further, as already discussed in Section B.VII.5 above, Obnova did not have the right to conversion into ownership, because it did not have the registered right of use over the Dunavska Plots, which is the main precondition for conversion, and because the right to conversion does not exist unless recognized by the authorities. But even if Obnova had the right of use and recognized right to conversion, the possibility of conversion was since 2011 legally excluded in case the land was designated for construction of objects in public interest and surfaces for public use.[867] In turn, without conversion of the Dunavska Plots into its private ownership, Obnova could not construct anything on the land. Since the Cypriot Claimants (allegedly) invested in 2012, i.e. after this exception for conversion was introduced by law, they could not possibly have expected that they would develop construction on the Dunavska Plots despite the said requirements of the applicable law and the possibility that this land be designated for public use. What is more, at the time of their investment in 2013, conversion was not even applicable.[868]

634. In light of this, the Cypriot Claimants simply failed to conduct proper due diligence of Obnova's property rights and application of the relevant laws when acquiring Obnova's shares in 2012.

635. Claimants hide behind the shield of the Cadastre's refusal to register their rights to the Objects or Dunavska Plots,[869] claiming that the proceedings for legalization "*were*

[866] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**.

[867] See para 543 and following.

[868] See para 552 and following.

[869] Memorial, para 67.

supposed to be a formality".[870] It is notable however, that Claimants do not point to any provision that would warrant registration of Obnova's rights in the Cadastre given Obnova's circumstances. As explained in Section B.VII, Obnova had no such rights. Even though Obnova's attempts failed as early as in 2003-2006, Claimants still decided to acquire shares in Obnova much later. It is clear that Claimants decided to take on such business risk, based on a mere "supposition" that legalization will (a) be possible or (b) be a formality. In any event, even if some rights were registered with an error, this was not an egregious misapplication of the Serbian law and did not impact Obnova's rights that could level to arbitrariness.

636. **Thirdly**, Claimants could not have expected that the Dunavska Plots will be designated for residential and commercial developments. Claimants state that when the Cypriot Claimants invested in Obnova in April 2012, they relied on the then-applicable 2003 RP "*which designated Obnova's premises for commercial and residential use*".[871] This is yet another example of Claimants' poor due diligence of the local framework and Obnova's assets.

637. As outlined in Section B.VI.1 above, the 2003 General Plan, as well as all the other plans adopted after that, did not in any way exclude the designation of a bus loop at the Dunavska Plots. These plans rather envisaged minimum space to be designated for residential and commercial use in the area. Therefore, the 2013 DRP's designation of the bus loop at the Dunavska Plots was in line with the 2003 General Plan that Claimants have relied on.

638. Tellingly, the possibility that the Dunavska Plots (at the time, State-owned) will be used for the bus loop was considered as early as in 2005 and this is clear from the planning documents (see para 172 above). Claimants admit that in 2008 Obnova specifically asked the City not to designate the bus loop at the Dunavska Plots i.e. Obnova was well aware of this plan.[872] This was long before Claimants' alleged investment and thus, the 2013 DRP did not come as a surprise. It is also notable that Claimants admit in the Memorial when they argue that they expected "*a potential change in planning regulation*".[873]

639. Therefore, the Cypriot Claimants' allegations that the adoption of the 2013 DRP violated their legitimate expectations are unfounded.

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[870] Memorial, para 69.

[871] Memorial, para 258.

[872] Memorial, para 78; Letter from Obnova to City of Belgrade from 27 March 2008, **C-314**.

[873] Memorial, para 264.

b) 2013 DRP was not arbitrary or discriminatory

640. Claimants' allegations that the 2013 DRP was arbitrary or discriminatory in choosing the bus loop location at the Dunavska Plots are equally groundless.

641. It is obvious that the designation of the Dunavska Plots for the bus loop was not arbitrary. As explained above:

- The City of Belgrade conducted the required analysis of available locations, before deciding where to place the bus loop (see Section B.VI.2.a) above); notably, the Dunavska Plots were owned by the City of Belgrade (and previously, by the State) and so it was only natural to look at these properties when looking for a place for public construction;
- 2013 DRP clearly explained the reasons for this decision, including their close location to the central pedestrian zone and the possibility to satisfy the transportation requirements (see Section B.VI.2.a) above); this decision was thus made based on reason or fact;
- Other locations were not suitable for the bus loop, and the City of Belgrade also analysed this in detail in the course of preparing the 2013 DRP (see para 172 and following above);
- Obnova did not even object to the possible use of the Dunavska Plots for the bus loop in course of the 2013 DRP draft inspection (see Section B.VI.2.b) above), which shows that even Obnova understood that it has no grounds for such an objection.

642. Further, as explained above with respect to the allegation of expropriation, Claimants' discrimination argument is based on the premise that "Obnova's land" was treated differently from the land owned by other entities in Serbia.[874] However, Obnova was not the owner and so, cannot possible be in "like situation" to these other owners.[875]

643. Therefore, the choice of the Dunavska Plots for the bus loop was reasonably justified and the Cypriot Claimant's allegations that the adoption of the 2013 DRP violated the FET standard contained in the Cyprus-Serbia BIT must fail.

[874] Memorial, para 263.

[875] See Section E.I.2.b)bb) above.

3. The 2021 Land Directorate Letter did not violate the FET standard

644. The second prong of Claimants' case on the FET standard is the allegation that the Land Directorate refused to compensate Obnova for the alleged expropriation resulting from the 2013 DRP. Claimants raise this under both BITs. Serbia denies Claimants' allegations. Respondent also notes that dismissal of the claim under the Cyprus-Serbia BIT would require dismissal of the claim under the Canada-Serbia BIT, referring to the minimum standard of treatment.

a) Claimants could not have expected compensation for the 2013 DRP

645. Claimants argue that they legitimately expected that if the development of the Dunavska Plots would be impossible "*because of Serbia's conduct, including a potential change in planning regulation*", Obnova would be compensated.[876]

646. This is misplaced. Firstly, Claimants provide no documentary or witness evidence of the expectations. Secondly, even in absence of the 2013 DRP Obnova would not have been able to develop the Dunavska Plots, because it had no property rights over them. Hence, Claimants could not have legitimately expected any compensation for the property. As already explained above, it is clear that Claimants' due diligence in this regard failed.

647. It stands out that Claimants raise legitimate expectations of Mr Broshko, who allegedly, making an investment in Obnova in 2017 (i.e., knowing about the 2013 DRP), expected compensation. Yet, Claimants point to no analyses or specific assurances obtained by Mr Broshko that Obnova would be entitled to such compensation nor provided a witness statement of Mr Broshko. It was clearly Mr Broshko's business risk and not a legitimate expectation.

b) The 2021 Land Directorate Letter was justified and reasoned

648. Claimants further argue that the 2021 Land Directorate Letter stating that Obnova is not entitled to compensation was arbitrary and unjust and as such, violated the FET standard.[877] This is groundless.

649. First of all, Obnova failed to initiate appropriate court proceedings for the payment of compensation, as the Land Directorate is not competent to decide on compensation for alleged expropriation (see para 180 above). (Serbia is also not responsible for the actions of the Land Directorate, as a separate legal person from the City of Belgrade, see 580

[876] Memorial, para 264.

[877] See para 607 above.

above). Therefore, the Land Directorate's letter is not binding in any way, and is rather a courtesy letter stating Land Directorate's views on the matter. Obnova should have initiated court proceedings. As it failed to do so, this alone makes the Claimants' treaty claim for arbitrariness moot.

650. In any event, the Land Directorate's reasoning in refusing compensation was reasonable and justified. In its response, the Land Directorate noted several reasons for which Obnova is not entitled to compensation:

- Obnova's Objects were temporary, illegal and required to be demolished;
- Obnova failed to legalize the Objects or inscribe the ownership over them;
- The Objects in any event could not be regarded as subjects of Obnova's privatisation and therefore, privatisation does not prove Obnova's property rights over the Objects;
- Obnova's alleged rights of use and conversion could not have been expropriated, because the City of Belgrade was registered as the owner of the Objects.

651. As explained in detail in Section B.VI.5.b) above, all those reasons were valid under Serbian law and correct as a matter of fact.

652. First, Claimants take issue with the Land Directorate's finding that certain Objects had not been affected by the 2013 DRP, whereas the Secretariat refused to legalise these Objects because they were located on land affected by the 2013 DRP.[878] As explained above, this was an inadvertent error related to a single parcel on Dunavska 23. The parcel in question was created from another parcel, which the Land Directorate acknowledged had been covered by the 2013 DRP.[879]

653. Second, Claimants reject the Land Directorate's finding that the Objects were temporary and that Obnova was obliged to be demolish them without the right to compensation.[880] As explained above, there is no legal basis for Claimants' insistence that Obnova's building were not temporary. The temporary construction permits which were issued with respect to these Objects (insofar as any permit was issued) are determinative in this respect.[881]

[878] Memorial, para 286(a).

[879] See Section E.II.3.b) above.

[880] Memorial, para 286(b).

[881] See above Section B.II above.

654. Claimants allege that the fact that the Objects could not be the subject of privatisation was "*wholly irrelevant for Obnova's ownership of the buildings and its right to compensation*".[882] They claim that after privatisation, Obnova *ex lege* acquired ownership of the Objects for which it had the right of use, even though the object of the privatisation was Obnova's shares, not its assets. As Respondent explained above, there is simply no basis for Obnova's purported *ex le*ge acquisition of ownership. Obnova has never proven the existence of its ownership right or the right of use over the Objects. The Privatisation Program is not proof of any property rights of Obnova.[883]

655. Claimants also object to the Land Directorate's finding that that Obnova's rights could not have been expropriated because the City of Belgrade was registered as the owner of the Objects, based on the 1975 Agreement with Luka Beograd. Claimants argue that the City of Belgrade was registered in error as the 1975 Agreement did not transfer any rights to the Objects, which were allegedly built by Obnova.[884] As explained above, this has no bearing on Obnova's entitlement to these Objects. This is because temporary objects cannot be the subject of the ownership right inscribed in the Cadastre. Moreover, for the Objects which were constructed without permits, inscription of the ownership right could be done only after legalization, for which Obnova did not fulfil the conditions.[885]

656. Finally, according to Claimants, the Land Directorate incorrectly relied on court proceedings in which Obnova sought recognition of its rights to the Object. Claimants allege that Obnova had to initiate these proceedings solely because Serbia had registered in error the City of Belgrade as the owner of the Objects.[886] They ignore that the Land Directorate was effectively bound by the inscription of the City of Belgrade as owner, which could change only after Obnova proved otherwise in the court proceedings (which it failed to do).[887]

657. Hence, contrary to Claimants' allegations, the Land Directorate's comments were reasonable and justified as a matter of Serbian law, based on reason and fact.

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[882] Memorial, para 286(c).

[883] See above Section

[884] Memorial, para 286(d).

[885] See Section B.III.2.c) above.

[886] Memorial, para 286(e).

[887] See above para 122 and following.

658. As no expropriation within the meaning of Serbian law took place, Obnova was not entitled to any compensation. The 2021 Land Directorate Letter was surely not "egregious" or "shocking", as already explained in Section B.VI.5.b) above.

659. As a result, Claimants' allegation of the violation of the FET standard must fail.

III. Serbia did not impair the investments by adopting unreasonable and discriminatory measures

660. Relying on the respective most-favoured-nation ("**MFN**") clauses in the Cyprus-Serbia BIT and the Canada-Serbia BIT, Claimants allege that Respondent has violated its obligation under other investment treaties to refrain from unreasonable and discriminatory measures (the so-called non-impairment standard) in the same two distinct ways they refer to for the purpose of the FET standard violation, i.e.: (i) by adopting of the 2013 DRP; and (ii) by refusing to compensate Obnova for the ensuing alleged expropriation.

661. In particular, Claimants argue that the adoption of the 2013 DRP breached the impairment standard in Article 2(3) of the Morocco-Serbia BIT vis-à-vis the Cypriot Claimants because: (i) the decision to place the bus loop on the Dunavska Plots was not based on reason or fact;[888] and (ii) it prevented Obnova from converting its alleged right of use over the Dunavska Plots into ownership, imposed an undue burden on Claimants' investment.[889]

662. Claimants also argue that the refusal to compensate Obnova for the alleged expropriation of its property (stemming from the 2013 DRP) separately breached the impairment standard vis-à-vis all Claimants because: (i) Respondent's failure to initiate any expropriation proceedings was allegedly improper and without due process;[890] and (ii) Respondent's reasons for refusing compensation were arbitrary.[891]

663. Claimants' allegations are wholly without merit. As a starting point, their reliance on the MFN clause to access the impairment obligation under other treaties concluded by Serbia is unwarranted (**Section 1**. below). In particularising their claims, they fail to clearly specify the parameters of the legal standard (**Section 2.** below) and explain how Serbia's actions have fallen below that standard. In fact, neither the 2013 DRP (**Section 3.** below)

888 Memorial, para 283.

889 Memorial, paras 283-284.

890 Memorial, para 285.

891 Memorial, para 286.

nor Respondent's subsequent decision to deny compensation breached the impairment standard (**Section 4.** below).

1. <u>Claimants cannot rely on the MFN clause to claim new substantive rights</u>

664. The Cypriot Claimants invoke the MFN Clause in Article 3(1) of the Serbia-Cyprus BIT to import the non-impairment standard in Article 2(3) of the Morocco-Serbia BIT. Article 3(1) of the Serbia-Cyprus BIT provides:

> *Once a Contracting Party has admitted an investment in its territory in accordance with its laws and regulations, it shall accord to such investment made by investors of the other Contracting Party treatment no less favorable than that accorded to investments of its own investors or of investors of any third State whichever is more favorable to the investor concerned.*[892]

665. Similarly, Mr Broshko invokes the MFN clause in Article 5 of the Canada-Serbia BIT to import the non-impairment standard from Article 3(4) of the Qatar-Serbia BIT. Article 5 of the Canada-Serbia BIT provides:

> *Each Party shall accord to an investor of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory.*[893]

666. Neither the Cyprus-Serbia nor the Canada-Serbia BIT contains an impairment clause. Claimants' arguments to the contrary, the MFN clause does not automatically create rights and obligation where none exist under the relevant treaty, especially when – as here – the clause has a narrow scope of application (**Section a)** below). The MFN clause in the Canada-Serbia BIT is particularly narrow in scope and is aimed at affording equal treatment of investors in "like circumstances". The MFN clause in the Cyprus-Serbia BIT, when interpreted in the context and in the light of the object and purpose of the treaty, also does not permit an investor to import new rights and obligations which are outside the scope of the subject matter of the MFN clause (**Section b)** below).

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[892] Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **CL-007(a)**.

[893] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CL-001**.

a) The Tribunal must consider the specific wording and subject matter of the MFN clause

667. Claimants assert that "*Investment tribunals unanimously recognize that MFN clauses allow the investor to attract the more favorable standards of treatment contained in an investment treaty concluded between the host State and a third state*", citing a handful of investment treaty awards of limited relevance.[894] The cases cited by Claimants do not support their position that MFN clauses permit the blanket importation of more favourable standards of protection from third party treaties. For instance:

- In *RosInvestCo UK Ltd. v. The Russian Federation*, the investor successfully invoked the MFN clause in the UK-Soviet BIT to import a more favourable dispute resolution provision contained in the Denmark-Russia BIT. This outcome has no bearing on the interpretation or application of the MFN clause in the present case, as it concerns a dispute resolution clause (a procedural right) rather than a standard of treatment (a substantive right). Moreover, the investor applied to the MFN clause to access a more favourable dispute resolution clause from another BIT, whereas here Claimants seek to import a new provision altogether.[895]
- In *Rumeli Telekom v Kazakhstan*, the tribunal allowed the claimant to rely on an MFN to access a substantive obligation for another treaty, but it did not consider the scope or general application of MFN clauses as the respondent did not object to the claimant's use of the MFN clause in this instance.[896]
- In both *Arif v. Republic of Moldova* and *EDF v Argentina,* an MFN clause was used to access the umbrella clause from a third-party treaty. In permitting the use of the MFN clause in this manner, the *Arif* and *EDF* tribunals acknowledged the broad and unqualified language used in the MFN clauses at issue, which entitled investors to "*treatment no less favourable than that accorded to [...] investors of the most favoured Nation*"[897] (in *EDF*) or "*treatment not less favourable than that granted to*

[894] Memorial, para 277.

[895] *RosInvestCo UK Ltd. v. The Russian Federation,* SCC Case No. V079/2005, Award on Jurisdiction dated 5 October 2007, **CL-030**, para 131.

[896] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v, Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 29 July 2008, **CL-003**, para 575.

[897] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Award dated 11 June 2012, **RL-185**, paras 921, 933-934.

[...] nationals and companies of the most favoured nation" (in *Arif*).[898] These MFN clauses[899] can be contrasted with the MFN clauses in the Canada-Serbia BIT and Cyprus-Serbia BIT, which – as explained further below – do not lend themselves to such broad interpretation.[900]

668. Claimants' bold assertion regarding the unanimity of tribunals in the application of MFN clauses is unsupported. Tribunals and commentators have cautioned against over-expansive interpretations of MFN provisions, maintaining that such clauses should not be used to automatically import new rights and obligations from other treaties unless there are clear indications that this was the intention of the State parties.[901] Thus, while tribunals have permitted claimants to invoke the MFN clause to displace a treaty provision deemed less favourable in favour of a more favourable provision in another

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[898] *Mr. Franck Charles Arif v. Republic of Moldova,* ICSID Case No. ARB/11/23, Award dated 8 December 2013, **CL-030**, paras 394, 396.

[899] *See* Article 4 of France-Argentine BIT (1991) and Article 4 of France-Moldova BIT (1997)

[900] See below para 671 and following.

[901] *İçkale İnşaat Limited Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/24), Award dated 8 March 2016, **RL-186**, para 328; *State Development Corporation "VEB.RF" v. Ukraine* (SCC Case No. 2019/113 and V2019/088), Partial Award on Preliminary Objections dated 31 January 2021*,* **RL-187**, para 253 ("*MFN clauses are not boilerplate provisions. They are often specifically negotiated and, as a result, they take many different forms. In the words of a leading commentary on The Law of Treaties, 'although it is customary to speak of the most favored-nation clause, there are many forms of the clause, so that any attempt to generalise upon the meaning and effect of such clauses must be made, and accepted, with caution'*; S. Batifort, J. Benton Heath, "The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization" in American Journal of International Law Vol. 111, Issue 4 (2017), **RL-188**, p 3 (stating that the use of the MFN clause to import new rights undermines "*the understanding of BITs as an expression of quid pro quo bargains*," and transforms them into "*instruments of multilateralism in international investment relations*".); UNCTAD Series on Issues in International Investment Agreements II (2010), **RL-189**, pp 105–06; A. Wang, *The Interpretation and Application of the Most-Favored-Nation Clause in Investment Arbitration* (2022), **RL-190**, p 129 ("*tribunals should defer to the treaty text and interpret MFN clauses in accordance with the interpretive methods [...]* ***For incorporation of higher treaty standards, it requires the inclusion of such standard in the basic treaty***") (emphasis added) and p. 147 ("*the general assumption that MFN clauses are supposed to multilateralize investment protection is unfounded in international law and may lead to abusive treaty-shopping*.").

treaty,[902] they are more circumspect about using the MFN clause to import new rights and obligations, as this could lead to undue expansion of the substantive scope of the treaty.[903]

669. The starting point should be the subject matter of the MFN clause, as this determines the scope of the beneficiary's rights.[904] This reflects the *ejusdem generis* principle, which effectively bars claimants from invoking substantive protections of a kind not explicitly contained in the treaty itself. The principle is also reflected in the ILC's Draft MFN Articles, which provide that:

> *Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause.*[905]

670. The question is therefore whether there is "*substantial identity between the subject-matter of the two sets of clauses concerned*".[906] Tribunals will consider the wording of the MFN clause in the context of the treaty as a whole to assess its scope and application.[907] Absent clear language permitting otherwise, these rights may not be supplemented with entirely

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[902] See e.g. *Garanti Koza LLP v. Turkmenistan* (ICSID Case No. ARB/11/20), Decision on the Objection to Jurisdiction for Lack of Consent dated 3 July 2013, **RL-104**, para 54; *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction from 3 August 2006, **RL-191**, para 57; National Grid plc v. The Argentine Republic, UNCITRAL, Decision on jurisdiction from 20 June 2006, **RL-192**, paras 92-93.

[903] *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary* (ICSID Case No. ARB/12/3), Decision on Respondent's Objection under Arbitration Rule 41(5) dated 16 January 2013, **RL-193**, paras 73-74; *Hochtief v Argentina* (ICSID Case No. ARB/07/31), Decision on Jurisdiction, **RL-194**, paras 81, 84, 85, paras 81, 84, 85; *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius* (PCA Case No. 2018-37), Award on Jurisdiction dated 23 August 2019, **RL-093**, paras 223-229.

[904] A. Newcombe, L. P. Trius, *A Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009), **RL-171**, p. 204

[905] Draft Articles on Most-Favoured-Nation Clauses, with Commentaries, text adopted by the International Law Commission at its thirtieth session, Yearbook of the International Law Commission, 1978, vol. II, Part Two, **RL-195**.

[906] *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius* (PCA Case No. 2018-37), Award on Jurisdiction dated 23 August 2019, **RL-093**, para 217.

[907] G. S. Tawil, '*Most Favoured Nation Clauses and Jurisdictional Clauses in investment Treaty Arbitration*' in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009), **RL-196**, p. 13; C. McLachlan, L. Shore, M. Weiniger, *International Investment Arbitration: Substantive Principles* (2017), **RL-138**, para 7.346; B. Sabahi, N. Rubins, et al., *Investor-State Arbitration* (2019), **RL-197**, paras 17.39-40.

new rights which are not contained in the original treaty, such as protection against impairment of the investment through arbitrary or discriminatory conduct.[908]

b) <u>The MFN clauses in the Cyprus-Serbia and Canada-Serbia BITs do not allow for importation of new substantive treaty obligations</u>

671. Neither the Cyprus-Serbia BIT nor the Canada-Serbia BIT contains a non-impairment clause. Claimants should not be permitted to introduce this standard of treatment from another treaty concluded by Serbia. To allow the incorporation of new substantive rights related to investment protection is to ignore the specific text and location of the MFN clauses in these treaties.

672. This is especially true in respect of the MFN clause contained in Article 5 of the Canada-Serbia BIT, which limits the requirement of comparable treatment to investors and/or investments in "*like circumstances*". Recent tribunals have given a restrictive effect to phrases such as "*like circumstances*", which narrows the scope of treatment.[909] In *İçkale v. Turkmenistan*, the tribunal considered that an MFN clause which refers to "*treatment accorded in similar situations*" is concerned not with other standards of investment protection but is rather targeted at cases of *de facto* discrimination. In reaching this conclusion, it explained that:[910]

> *The standards of protection included in other investment treaties create legal rights for the investors concerned, which may be more favourable in the sense of being additional to the standards included in the basic treaty, but such differences between applicable legal standards cannot be said to*

[908] *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary* (ICSID Case No. ARB/12/3), Decision on Respondent's Objection under Arbitration Rule 41(5) dated 16 January 2013, **RL-193**, para 74.

[909] *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan,* ICSID Case No. ARB/12/6, Award dated 4 May 2021, **RL-197**, paras 789-790 ("*The tribunal in İçkale v Turkmenistan concluded on the facts in that case that 'given the limitation of the scope of application of the MFN clause to 'similar situations', it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State party and a third State.' The Tribunal concurs with this rationale and decision which is equally applicable to this case.*".)

[910] *İçkale İnşaat Limited Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/24), Award dated 8 March 2016, **RL-186**, para 329 ("*given the limitation of the scope of application of the MFN clause to "similar situations," it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State party and a third State*."). The MFN clause at issue provided "*Each Party shall accord to these investments, once established, treatment no less favorable than that accorded in similar situations to investments of its investors or to investors of any third country, whichever is the most favorable*".

> *amount to "treatment accorded in similar situations," without effectively denying any meaning to the terms "similar situations."*[911]

673. The MFN clause in the Canada-Serbia BIT, which is limited to treatment "*in like circumstances*", should not be read as granting access to better standards of treatment under other treaties. Rather, it calls for a comparative, fact-based analysis which considers whether the investors were similarly situated and "*whether the treatment accorded to the host State's national or third State's national was in fact more favourable than that of the claimant*".[912]

674. Article 3(1) of the Cyprus-Serbia BIT should also not be regarded as a vehicle for importation of new standards of protection. Article 3(1) is situated apart from the provisions concerning the promotion and protection of investments, contained in Article 2, which do not contain a non-impairment clause. Instead, Article 3(1) is grouped with other provisions addressing the comparative treatment of investors and investments of both the host State and any third States. Read in this context, the clause's subject-matter – and thus, its application – is restricted to a particular kind of treatment that does not encompass standards of treatment existing under other parts of the BIT. Had the contracting parties intended for Article 3(1) to allow for access to new or more favourable standards of protection not available under the Cyprus-Serbia BIT, they would have placed this clause alongside other provisions concerning the promotion and protection of investments and limited the comparator to investments of investors from a third state.

2. <u>The standards of reasonableness and non-discriminatory treatment</u>

675. Article 2(3) of the Morocco-Serbia BIT, which the Cypriot Claimants invoke, provides that "*neither Contracting Party shall in any way impair by <u>unreasonable or discriminatory</u> measures the management, maintenance, use, enjoyment, or disposal of investments of investors in the territory of the other Contracting Party*".[913]

676. Article 3(4) of the Qatar-Serbia BIT, on which Mr Broshko relies, similarly provides that "[n]*either Contracting Party shall in any way impair by unreasonable or discriminatory*

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[911] *İçkale İnşaat Limited Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/24), Award dated 8 March 2016, **RL-186**, para 329.

[912] *İçkale İnşaat Limited Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/24), Award dated 8 March 2016, **RL-186**, para 329.

[913] Agreement between Serbia and Morocco on Reciprocal Promotion and Protection of Investments, **CL-012**.

measures the operation, management, maintenance, use, enjoyment or disposal of investment in its territory by investors of the other Contracting Party".[914]

677. As outlined in Section II.1 on the FET standard above, the threshold to establish unreasonable or discriminatory measures is very high.

678. In addition to establishing unreasonable or discriminatory treatment, Claimants must also demonstrate that such treatment has impaired their investment in Obnova.[915] This requires that State's measures have had a detrimental impact on the investment.

3. The 2013 DRP did not unreasonably impair the Cypriot Claimants' investment

679. Respondent did not act unreasonably or in a discriminatory manner, to Obnova's detriment, when it adopted the 2013 DRP.[916] Claimants' claim in this regard rest on two unsubstantiated and misguided allegations. The first allege that the decision to place the bus loop on the Dunavska Plots was adopted without any justification or explanation. They further allege that this decision prevented Obnova from converting its right of use of the land into ownership and thus from developing the premises", without any consideration of the ensuing harm.[917]

680. As to the first allegation, Respondent has shown that the 2013 DRP was adopted in a well-reasoned, transparent, and lawful manner. The Secretariat for Planning and Construction considered other siting options and explained the reasons for its decision to locate the bus loop at the Dunavska Plot.[918] Obnova had an opportunity to comment on the decision before the 2013 DRP was adopted but did not do so.[919] The decision was therefore reasonably justified and not discriminatory.

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[914] Agreement between the Government of the Republic of Serbia and the Government of the State of Qatar for the Reciprocal Promotion and Protection of Investments, **CL-004**.

[915] A. Newcombe, L. P. Trius, *A Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009), **RL-171**, p. 300; *Sun Reserve Luxco Holdings SRL v. The Italian Republic* (SCC Case No. 132/2016), Final Award dated 25 March 2020, **RL-199**, paras 936-937; *ESPF and others v. Italy,* ICSID, Award dated 14 September 2020, **CL-055**, para 698; *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award dated 23 September 2010, **RL-200**, paras 10.3.1-10.3.3; *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award dated 1 July 2004, **RL-201**, para 161 and 165.

[916] Memorial, para 283.

[917] Memorial, paras 283-284.

[918] See above Section E.II.2.b). See above paras B.VI.2.a).

[919] See above para. 641.

681. In any event, Claimants' claim here must fail as they have not demonstrated that the 2013 DRP impaired their investment in Obnova. First, Obnova had no rights to the Objects or the Dunavska Plots that could have been taken away, as it was not entitled to conversion or legalization.[920] In any event, the City never acted upon the construction of the bus loop and therefore, the 2013 DRP has not resulted in any expropriation under Serbian law.[921] Obnova remains in possession and use of the Objects and the Dunavska Plots until today. Finally, Claimants have failed to provide any evidence that the economic value of Obnova has been annihilated because of the 2013 DRP, or that its plans to develop the land – of which it has also offered no proof – have been thwarted.[922]

4. <u>Respondent's denial of compensation did not unreasonably impair Claimants' investment</u>

682. Also groundless is Claimants' allegation that Respondent unreasonably impaired their investment in Obnova by first failing to initiate expropriation proceedings, contrary to Serbian law, and then dismissing Obnova's request for compensation in connection with the 2013 DRP.[923] Claimants raise this claim in connection with both the Cypriot Claimants and Mr Broshko.

683. As stated above, Obnova did not have any rights in the Objects or the Dunavska Plots which were capable of being expropriated.[924] Accordingly, there was no legal basis or mandate for Respondent to initiate formal expropriation proceedings following the adoption of the 2013 DRP. Respondent's failure to do so can hardly, in these circumstances, be described as unjust or "*in willful disregard of due process and proper procedure*".[925] Even if Respondent was required by law to initiate expropriation proceedings – which Claimants merely imply, without providing any legal support for this position – Claimants have not explained how this rises to the level of a treaty violation (which, if true, would not).

684. Claimants' allegation that the Land Directorate's decision to deny compensation to Obnova was unjustified, irrational, and based on Respondent's own mistakes, is also

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[920] See Section E.I.1.b) above.

[921] See Section E.I.1.b) above.

[922] See Section E.I.3.b) above.

[923] Memorial, paras 280, 285, 286.

[924] See Section E.I.1.b) above.

[925] Memorial, para 285, citing Christoph Schreuer, " Protection against Arbitrary or Discriminatory Measures", in C. A. Rogers, R. P. Alford (eds.), *The Future of Investment Arbitration*, **CL-005**, p 188.

groundless. Respondent has already explained why the Land Directorate's refusal of compensation was justified[926] and that the reasons given were valid under Serbian law and correct as a matter of fact. In addition, as shown above, the Land Directorate was neither competent nor obliged to determine whether there had been an expropriation and whether Obnova was entitled to any compensation, and its response was not a formal decision.[927]

685. In any event, as outlined above, Claimants have not shown that their investment suffered any detriment as a result of the Land Directorate's decision, since no expropriation took place. Had there been a *de facto* expropriation of Obnova's rights, Obnova was free to initiate proper court proceedings for compensation, which it has not done.

IV. Serbia did not violate the umbrella clause

686. The Cypriot Claimants further invoke the MFN clause in Article 3(1) of the Cyprus-Serbia BIT to access the umbrella clause contained in Article 2(2) of the UK-Serbia BIT. As with their claims related the non-impairment obligation, the Cypriot Claimants' reliance on the MFN clause to import an entirely new substantive obligation is another example of unwarranted treaty-shopping (**Section 1**. below). Even if the umbrella clause in the UK-Serbia BIT were to be found available to the Cypriot Claimants, Respondent's conduct falls far outside the material scope of this clause (**Section 2.** below). Finally, Respondent did not breach any obligations under Serbia law to compensate Obnova in relation to the 2013 DRP. The simple reason is that Respondent was not entitled to compensation, not having initiated the proper procedure and not having any rights capable of being expropriated (**Section 3.** below).

1. The Cypriot Claimants cannot rely on the MFN clause to import an umbrella obligation into the Cyprus-Serbia BIT

687. The Cypriot Claimants once again impermissibly invoke Article 3(1) of the Cyprus-Serbia BIT to access additional substantive protections contained in another treaty. Here, they seek access to Article 2(2) of the UK-Serbia BIT, which provides that "[e]*ach Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party*" (the so-called umbrella clause).[928]

[926] See Section E.II.3.b) above.

[927] See above paras 180, 202-206.

[928] Agreement between UK and Yugoslavia on Reciprocal Promotion and Protection of Investments, **CL-010**.

They do so without citing any treaty practice or legal commentary which supports its reliance on the MFN clause in this way.

688. As Respondent has explained above, the MFN clause does not grant an investor automatic access to new rights and obligations under another treaty. Consideration must be given to the subject matter and wording of the MFN clause, in the context of the treaty, to ascertain its scope. Investors may only avail themselves of the same category of rights they were afforded under the basic treaty, whose substance may be expanded by operation of the MFN clause.[929]

689. As regards Article 3(1) of the Cyprus-Serbia BIT, the scope does not permit an investor to import a substantive standard of treatment contained in another treaty with Serbia. Since the Cyprus-Serbia BIT does not contain an umbrella clause or any other rights pertaining to the same subject-matter of an umbrella clause, the Cypriot Claimants cannot rely on the MFN clause in Article 3(1) to import this obligation from another treaty.

2. Respondent's conduct is not engaged by Article 2(2) of the UK-Serbia BIT

690. Article 2(2) of the UK-Serbia BIT, which provides that "[e]*ach Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party*,"[930] has no application in the present case.

691. Claimants incorrectly insist that this clause should be interpreted to cover any obligation, including general obligations under Serbian law. Claimants' arguments to the contrary, the phrase "*any obligation*" in the umbrella clause does not encompass commitments of general application, which are not related to the investment of a qualifying investor, particularly when – as here – it is limited to obligations "*entered into with regard to investments*".[931] The ordinary meaning of such wording indicates that the commitment must be unequivocal and specific with respect to a particular investment. Absent express words specifying otherwise, umbrella clauses only cover breaches of contracts, specific undertakings, and other kinds of unilateral acts (e.g. concession or license between the

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[929] See above Section III.1

[930] Agreement between UK and Yugoslavia on Reciprocal Promotion and Protection of Investments, **CL-010**.

[931] *WNC Factoring Limited v. The Czech Republic* (PCA Case No. 2014-34), Award dated 22 February 2017, **RL-202**, para 346 ("*it is uncontroversial that umbrella clauses do not elevate states' domestic laws to the level of the BIT or convert them into promises"*); *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award dated 12 October 2005, **RL-203**, para 51 (the phrase "'*entered into' indicates that specific commitments are referred to and not general commitments, for example by way of legislative acts.*"); *Oxus Gold v. The Republic of Uzbekistan* (UNCITRAL), Final Award dated 17 December 2015, **RL-204**, para 379 (noting that the words "*entered into with regard to investments*" "*implies a counterpart and not a general undertaking of an obligation*").

state and the investor). General provisions of a host State's legislation or case law do not fall within this category.[932]

692. Legislation or regulations are thus only capable of creating obligations that are protected by an umbrella clause insofar as they were undertaken by the host State "*with regard to*" the investor's investment. This was explained by the tribunal in *Gardabani and Silk Road v. Georgia*, which stated that:

> *[...] as in the case of contractual obligations, an obligation contained in a law or regulation must have been entered into or undertaken by the state 'with regard to investments' of a claimant. The obligation must be made with respect to an identifiable investment of a qualifying investor. A general regulatory statute will not normally contain a sufficiently specific.*[933]

693. Not even the two cases cited by Claimants support their position. In *Enron v Argentina*, Argentina had entered into specific license agreement with the investors' local company which the tribunal considered to have formed part of the implementing legislation governing gas transportation and distribution. The tribunal found that certain measures by the State had violated the provisions of the license agreement as well as the guarantees contained in the legislative framework, which amounted to "obligations with regard to investments", pursuant to the plain meaning of the language of the BIT. In this regard, the tribunal noted that the relevant legislative framework was targeted toward newly privatised companies and protecting such investments:

> *Through the Gas Law and its implementing legislation, the Respondent assumed 'obligations with regard to investments': tariffs calculated in US dollars converted to pesos for billing purposes, linked to the US PPI and sufficient to provide a reasonable rate of return were intended to establish a tariff regime that assured the influx of capital into the newly privatized companies such as TGS and ensured the value of such investment. The*

[932] A. Reinisch and C. Schreuer, *International Protection of Investments: The Substantive Standards* (Cambridge, 2020), **RL-133**, p 869, paras 47-48; A. Sinclair and H. Zayyan, "Observance of Obligations" in *The Investment Treaty Arbitration Review,* ed Barton Legum, 4th edn (2019), **RL-205**, p. 215; *Continental Casualty Company v. The Argentine Republic* (ICSID Case No. ARB/03/9), Award dated 5 September 2008*,* **RL-206**, paras 299-300 ("*the umbrella clause does not come into play when the breach complained of concerns general obligations arising from the law of the host State*"); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award dated 8 July 2016, **RL-143**, para 478; *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No. ARB/01/8), Decision of the Ad hoc Committee on Argentina's Application for Annulment dated 25 September 2007, **RL-207**, para 95; *Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia* (ICSID Case No. ARB/17/29), Award dated 27 October 2022*,* **RL-208**, para 691.

[933] *Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia* (ICSID Case No. ARB/17/29), Award dated 27 October 2022*,* **RL-208**, paras 691.

> *dismantling of these guarantees would suffice to establish a violation of the obligations entered into by the Respondent with regard to the Claimants' investment.*[934]

694. The same is true for *OIEG v. Venezuela*, the only other case relied on by Claimants.[935] The obligations at issue arose under Venezuelan Investment Law. However, because this law formed part of the host State's regulatory framework for foreign investors, it was taken by the tribunal as a unilateral obligation assumed by the State with specific regard to foreign investments and as such fell within the scope of the relevant umbrella clause.

695. In the present case, there were no specific regulatory or other governmental commitments or obligations entered into by Respondent with respect to the Cypriot Claimants or their investment in Obnova. Claimants are relying on laws of general application regarding legalisation of property rights and compensation for expropriation.

3. Serbia did not breach any obligations owed to Obnova or Claimants

696. In any case, Respondent did not breach its obligations under the umbrella clause contained in the UK-Serbia BIT by refusing to pay compensation to Obnova under the Serbian law.[936] As Obnova did not have a right of use or entitlement to ownership of the Objects and Land Parcels, it was not entitled to compensation in relation to 2013 DRP.[937] Additionally, Obnova failed to bring its request for compensation before the correct forum. Accordingly, Respondent did not owe, and did not breach "*any obligation it may have entered into with regard to"* Obnova.

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[934] *Enron Corporation and Ponderosa Assets LP v. Argentine Republic*, ICSID Case No. ARB/01/3, Award dated 22 May 2017, **CL-033**, para 275. See also *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability dated 3 October 2006, **CL-006**, para 175, in which the tribunal found that rights targeted to investors under the Gas Law and implementing regulations contained "obligations" in the sense of the umbrella clause. "*These laws and regulations became obligations within the meaning of Article II(2)(c), by virtue of targeting foreign investors and applying specifically to their investments, that gave rise to liability under the umbrella clause*".

[935] Memorial, para 291; *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award dated 10 March 2015, **CL-034**.

[936] Memorial, para. 292.

[937] See Section E.II.3.a) above.

F. PRAYERS FOR RELIEF

697. For all the above reasons, Respondent respectfully requests the Tribunal to:

(1) DISMISS the Claimants' claims in their entirety for lack of jurisdiction and/or inadmissibility;

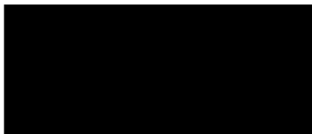
(2) In the event that the Tribunal rejects the Respondent's objections to jurisdiction or inadmissibility, DISMISS the Claimants' claims in their entirety;

(3) ORDER the Claimants to pay all costs borne by Respondent in relation to the present proceedings, the arbitrators' fees and expenses, ICSID administrative costs, the costs of Respondent's external counsel and advisors as well as the costs incurred by Respondent in connection with the present dispute, with interest from the date of the award until the date of payment.

Submitted on behalf of Respondent

Dr Moritz Keller
Audley Sheppard KC
Sarah Lemoine
Monika Diehl

Clifford Chance



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