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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)

-vs-

The Republic of Serbia

ICSID Case No. ARB/22/14

RESPONDENT'S REJOINDER

14 June 2024

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

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A. Introduction

1. For and on behalf of the Republic of Serbia ("**Serbia**" or "**Respondent**"), we hereby submit this Rejoinder in accordance with Rules of the International Centre for Settlement of Investment Disputes and the Procedural Timetable contained in Procedural Order No. 1 dated 31 March 2023 (the "**Rejoinder**"). This Rejoinder responds to the Reply submitted by Claimants[1] dated 23 February 2024 (the "**Reply**"). To the extent any allegation raised in the Reply is not specifically addressed in this Rejoinder, such allegation is denied.

2. Claimants' case is that Respondent has violated its obligations under the Cyprus-Serbia BIT and the Canada-Serbia BIT (the "**Treaties**") by adopting a planning decision which re-zoned their land for a public transportation terminal and refusing to pay compensation.

3. Respondent requests that the Tribunal dismiss Claimants' claims in their entirety.

4. Despite Respondent's dismantling of Claimants' position by way of the Counter-Memorial, Claimants' entire case still rests on their insistence (i) that Obnova had certain property rights (allegedly, the right *of* use of the Dunavska Plots convertible to ownership, as well as the ownership or the right of use of the Objects placed on them), and (ii) that the 2013 DRP placing the public transportation terminal on the Dunavska Plots allegedly took those rights away. Yet, beyond certain contrived conclusions, Claimants have failed to offer any credible evidence that the alleged property rights in fact existed. This is simply not enough to meet Claimants' burden of proof, which requires Claimants to prove every element of any claim they assert.[2] Claimants have furnished no proof of property rights such as any corresponding Cadastre inscription or confirmatory court judgment. Obnova's various lacklustre and misguided efforts over the years to seek to establish its alleged property rights over the Objects and the Dunavska Plots have all been in vain, for the simple reason that Obnova had no valid basis under Serbian law to claim ownership over the Objects or any right of use over the Dunavska Plots.

5. It is not possible for Obnova to have owned the Objects, as they were either (i) built illegally (without a construction permit), or (ii) temporary such that they had to be

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[1] All capitalised terms used in this submission have the meaning as indicated in the Counter-Memorial, unless stated otherwise.

[2] G.B. Born, "Chapter 4: On Burden and Standard of Proof", in Meg Kinnear, Geraldine R. Fischer, et al. (eds), *Building International Investment Law: The First 50 Years of ICSID*, (Kluwer Law International, 2015), **R-266**, pp 43-54.

demolished upon request, in accordance with the construction permits. And since Obnova did not have any right of use over the Objects, no such right existed that could be transformed into ownership at the time of Obnova's privatization in 2003. Obnova also never had the right *of* use over the Dunavska Plots and thus once more was not entitled to conversion of that right into ownership. Instead, the Lease Agreements confirm that Obnova was merely a lessee (with the right *to* use the Dunavska Plots, for which it had paid rent). All of the above is confirmed by Respondents' two separate expert reports and Serbian law analysis.

6. Accordingly, this case clearly represents nothing more than an opportunistic and inappropriate attempt by Claimants to relitigate their unsupported property law claims that they should have pursued before the Serbian courts. This Tribunal, constituted under international law, is clearly not the correct forum to Claimants to bring claims regarding Obnova's property rights: there are no substantive rules of property law and acquisition of rights *in rem* under international law or the Treaties. Hence, this dispute is a matter of domestic law.[3] As Claimants have failed to prove their property rights under the Serbian law and in Serbian courts or seek compensation for the alleged *de facto* expropriation in the Serbian courts, their case must fail for this reason alone.

7. In any event, Claimants' case (i) does not engage the jurisdiction of this Tribunal, and (ii) lacks any merit. None of the evidence presented or submissions made by the Claimants in the Reply alters this position.

I. Claimants have not established the jurisdiction of this Tribunal

8. **First, this Tribunal lacks jurisdiction to hear the Cypriot Claimants' claims under the Cyprus-Serbia BIT**, as follows:

9. This Tribunal lacks **jurisdiction *ratione personae*** under the Cyprus-Serbia BIT because the Cypriot Claimants have not met the "seat" requirement in the Cyprus-Serbia BIT, which requires proving effective management in Cyprus as a separate requirement from "registered office". In this context, Claimants and Mr Rand have admitted that Obnova is managed from Canada, and not Cyprus (**Section C.I.1**).

10. This Tribunal lacks **jurisdiction *ratione temporis*** under the Cyprus-Serbia BIT because the claims concern the matters and the dispute pre-dating the entry into force of the Cyprus-Serbia BIT in 2005, and the Cypriot Claimants' alleged investments in Obnova, including the alleged grounds of Obnova's property rights dating decades back. In

[3] Z. Douglas, The International Law of Investment Claims (Cambridge, 2009), **RL-037(a).**

particular, the 2013 DRP and the 2021 Letter are consequences of the 2003 Registration of the City as the holder of the right of use of the Dunavska Plots and the Objects, that had taken place before Claimants' alleged investment and the BIT's entry into force in 2005. The Tribunal simply cannot adjudicate Claimants' claims related to the 2013 DRP and the 2021 Letter without deciding whether Obnova had acquired the right of use or ownership over the Dunavska Plots or the Objects (**Section C.I.2**).

11. This Tribunal also lacks **jurisdiction *ratione materiae*** under the Cyprus-Serbia BIT and the ICSID Convention because the Cypriot Claimants have failed to demonstrate that they hold a protected investment within the meaning of the Cyprus-Serbia BIT and the ICSID Convention. Much of this stems from the dubious circumstances in which they are alleged to have invested in Obnova through a loosely connected network of Cypriot entities and offshore trusts. It is surprising how little evidence there is on the record (aside from self-serving witness testimony from Mr Rand) as to the financing of this (alleged) investment and of Mr Rand's arrangement with Mr Obradović, leaving it unclear exactly who invested in Serbia. What is clear, however, is that neither Kalemegdan nor Coropi made an "investment" within the meaning of either the Cyprus-Serbia BIT or the ICSID Convention. Kalemegdan acquired the Obnova shares from its sole shareholder with no evidence of how the acquisition of those shares was funded, if at all. Moreover, the circumstances in which Coropi's beneficial ownership of Kalemegdan was allegedly established are unsupported and do not establish that Coropi paid for or acquired any interest in Obnova. Finally, the Cypriot Claimants did not make an investment "in accordance with" Serbian law, having breached the 2012 Serbian Law on Takeover by failing to make a takeover bid when Kalemegdan acquired the Obnova shares. This breach unequivocally deprives this Tribunal of jurisdiction given the clear language adopted in the Cyprus-Serbia BIT, which ties compliance with host State law to the definition of a protected investment (**Section C.I.3**).

12. **Second, this Tribunal lacks jurisdiction to hear Mr Broshko's claims under the Canada-Serbia BIT**, as follows:

13. This Tribunal lacks **jurisdiction *ratione temporis*** under the Canada-Serbia BIT because the 2021 Letter concerns, and is a consequence of, events pre-dating the entry into force of the Canada-Serbia BIT in 2014 and Mr Broshko's alleged investment. As a long-time associate of Mr Rand, Mr Broshko had been closely involved in Mr Rand's companies in Serbia since 2012 and was well-aware of both Obnova's unsuccessful attempts to claim rights over the Objects and the Dunavska Plots and the adoption of the 2013 DRP. Despite these setbacks, Mr Broshko still acquired a stake in Obnova in 2017. Additionally, Mr Broshko's claims fall outside the BIT's three-year limitation period, which requires an investor to initiate arbitration within three years of gaining knowledge of the existence

of a dispute and the related harm. Clearly, Mr Broshko was aware of this dispute from as early as 2012 (**Section C.II.1**).

14. This Tribunal lacks **jurisdiction *ratione voluntatis*** under the Canada-Serbia BIT because Mr Broshko has failed to bring his claims within the three-year limitation period and has failed to provide the Obnova Waiver of local claims, despite the clear requirement to this effect under the Canada-Serbia BIT, aimed at avoiding double recovery (**Section C.II.2**).

15. This Tribunal also lacks **jurisdiction *ratione materiae*** as Mr Broshko did not make an investment in compliance with Serbian law. As was the case with the Cypriot Claimants, Mr Broshko breached the 2016 Law on Takeover when he acquired his shares in Obnova, having acted in concert with the Cypriot Claimants and Mr Rand. Such breach should not be taken lightly, given that law that was violated was of paramount importance for the protection of minority shareholders and the implications would be substantial, i.e., Mr Broshko would have been deprived of any say in the management of the company (**Section C.II.3**).

II. <u>The case is inadmissible for abuse of process</u>

16. Claimants' case should, further, be found admissible for abuse of process. This concerns both the Cypriot Claimants and Mr Broshko.

17. When Kalemegdan acquired the Obnova shares in 2012 as part of a restructuring of Mr Obradovic's Serbian assets, which were purportedly controlled and beneficially owned by Mr Rand, it was plainly foreseeable that a dispute would arise with Respondent regarding Obnova's alleged property entitlements and the potential rezoning of the Dunavska Plots, which had come to Obnova's attention already in 2008.[4] This raises questions as to the reasons for the 2012 restructuring of the Obnova shares. According to Claimants, tax reasons were behind the restructuring. For this, Claimants offer only self-serving testimonies of Mr Rand, who is evidently behind the Cypriot Claimants, and Mr Broshko, who is a Claimant himself, although Claimants have access to abundant contemporaneous documentary evidence detailing minutes of their business. This clearly signals that the real reason must have been gaining treaty protection for Mr Rand, as an experienced professional investor and lawyer (**Section D.I**).

18. Similarly, given Mr Broshko's close professional relationship with Mr Rand and his role in overseeing Mr Rand's investments in Serbia (including Obnova), as well as the fact

[4] Memorial, para 78. Letter from Obnova to the City of Belgrade from 27 March 2008, **C-314**.

that a dispute with Respondent was clearly foreseeable in 2017, Mr Broshko's investment in Obova was not made in good faith (**Section D.II**).

III. Claimants' case on the merits has also failed

19. **First, Claimants' expropriation case is wrong from the outset**. Since Obnova had no property rights, it simply could not have been subjected to any expropriation by way of the 2013 DRP. In accordance with a long-standing rule of international law, the Tribunal should defer to the decisions of the Serbian courts, denying Obnova's property claims and thereby confirming the City's ownership of the Objects (of which Claimants do not complain in this Arbitration), and the fact that under the Serbian law, Obnova's alleged right to convert the right of use over the Dunavska Plots into ownership was never recognized. In any event, contrary to Claimants' allegations, the 2013 DRP was a legitimate exercise of Respondent's regulatory powers, *bona fide* in the public interest, reasoned and non-discriminatory, and aligned with the previous planning documents. The City had made this choice of location for the public transportation terminal after an eight year long process involving a careful analysis, internal discussions between the various City departments and public companies, and, finally, the public inspection of the draft 2013 DRP in which Obnova had simply failed to participate (**Section E.I**).

20. **Second, Claimant's FET claim is similarly futile**. Claimants have still failed to provide any evidence of their alleged legitimate expectations that the Dunavska Plots would be developed or that the 2013 DRP envisaging the use of these plots for the public transportation terminal would not be issued. Rather, Claimants' witness statements confirm that in fact, Claimants' due diligence in this regard failed entirely. Claimant's arbitrariness argument is also defective, as Claimants have not made out their case that the location of the public transportation terminal at the Dunavska Plots was not justified. It was indeed justified (considering the City's ownership and lower development costs) and came after careful studies and a widely publicized public inspection process. Despite knowing of the possibility that the Dunavska Plots may be used for the public transportation terminal already back in 2008, Obnova failed to take part in the 2013 DRP. Obnova had also failed to seek compensation for the alleged *de facto* expropriation in the Serbian courts, although this venue was available to it. Only years later did Obnova decide to ask the Land Directorate for compensation, even though the Land Directorate has no relevant governmental authority in this regard (**Section E.II**).

21. **Third, Claimants' attempt to access the non-impairment standard by improperly relying on the MFN clause in both Treaties must be dismissed**. Claimants have failed to establish that the adoption of the 2013 DRP and the subsequent denial of compensation were unreasonable and caused them undue harm. To the contrary, the City's decision to

locate the public transportation terminal on the Dunavska Plots was reasonably justified, adopted in a fair and transparent manner, and did not result in any detriment to Obnova or to Claimants. Claimants' argument that Respondent "failed", without justification, to initiate expropriation proceedings and to compensate Obnova in relation to the 2013 DRP must fail, since there were no grounds for compensation and Obnova did not seek proper legal recourse through the Serbian courts (**Section E.III**).

22. **Fourth, with regard to Claimants' umbrella clause argument, apart from the fact that the Cypriot Claimants again rely improperly on the MFN clause in the Cyprus-Serbia BIT to access an entirely new standard of protection, this claim is in any case wholly without merit**. This is because the Cypriot Claimants seek to base their claim on laws of general application, which however do not constitute obligations specifically entered into with respect to an investment. In any case, Respondent has not violated such laws since Obnova was never entitled to compensation under the Serbian Law of Expropriation or the Serbian Constitution (**Section E.IV**).

23. Accordingly, there can be no doubt that Respondent has complied with its obligations under the Treaties.

24. Together with this Rejoinder, Respondent submits:

- Second Legal Opinion-**Prof Radenko Jotanović**-Rejoinder-SRB dated 14 June 2024 on the Serbian property rights laws, **(RLO-004)**;
- Second Legal Opinion-**Prof Jelena Lepetić**-Rejoinder-ENG dated 14 June 2024 on the Serbian laws applicable to the takeover of joint stock companies and beneficial ownership of shares, **(RLO-005)**;
- Second Legal Opinion-**Mr Kypros Ioannides**-Rejoinder-ENG dated 14 June 2024 on the Cyprus company law and the meaning of the term "seat", **(RLO-006)**;
- Legal Opinion-**Prof Jelena Perović Vujacic**-Rejoinder-SRB dated 14 June 2024 on the Serbian obligations law and the Lease Agreements, **(RLO-007);**
- Expert Opinion-**Prof Nenad Ivanišević**-Rejoinder-ENG dated 14 June 2024 on the civil engineering issues concerning the Objects and the construction permits, **(REO-001)**;
- Exhibits **R-141** to **R-212**; and
- Legal authorities **RL-037(a)**, **RL-133(a)** and RL-**208** to **RL-268**.

25. This Rejoinder is structured as follows:

- In **Section B.**, Respondent addresses the facts of the case, providing a proper account of matters misstated by the Claimants.
- In **Section C.**, Respondent maintains its objections on jurisdiction and admissibility.
- In **Section D.**, Respondent demonstrates that Claimants' allegations lacks any merit.
- In **Section E.**, Respondent specifies the relief sought.

B. Facts

26. Same as in the Memorial, in the Reply Claimants misrepresented or omitted to mention key facts of the case, while their interpretation of Serbian law is incorrect. As will be explained in this Section:

- Obnova was never granted the right of use over the Dunavska Plots but merely had the right to use the land pursuant to (at least) 13 lease agreements Obnova concluded between 1949 (at the latest) and 2006, with the City of Belgrade and Luka Beograd, as the respective lessors (**Section B.I. below**);
- Obnova's construction permits, as well as the documents concerning the issuance of these permits undisputably show that Obnova was allowed to construct only the objects for temporary use, which was in line with the then-applicable regulations and widespread practice in Serbia (**Section B.II. below**);
- Materials from which the Objects were constructed and their duration are irrelevant for their characterization as temporary, both from the legal and civil engineering perspective. What matters is what was stated in the construction permits, and Obnova's construction permits explicitly allowed construction of objects "FOR TEMPORARY USE" (**Section B.II. below**);
- Obnova was careful to register the property rights it had, while its requests for inscription of its alleged rights over the Dunavska Plots from 2003 and 2015 lack any legal basis (**Section B.III. below**).
- The inscription of the rights of the City of Belgrade in 2003 did not interfere with Obnova's alleged property rights over the Dunavska Plots and the Objects, since Obnova had no such rights (**Section B.III. below**);
- The fact that Obnova does not have any property rights over the Objects and the Dunavska was confirmed in the court proceedings that Obnova initiated for determination of its ownership (**Section B.IV. below**);
- Obnova does not fulfil the conditions for legalization of the Objects because it did not successfully resolve property rights over the Dunavska Plots and the Objects (**Section B.V. 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 the right of use of the Dunavska Plots or the Objects, nor was it inscribed as its holder (**Section B.VI. below**);

- The 2013 DRP, which envisaged construction of the public transportation terminal on part of the Dunavska Plots, was in line with the law and did not have an expropriatory effect on Obnova's rights (**Section B.VII. below**).

I. Obnova only had contractual right to use the Dunavska Plots as the lessee

27. The Parties are in an agreement that Serbian law distinguishes between the property (*in rem*) right *of* use 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.[5] What the Parties disagree about is whether Obnova had the right *to* use the Dunavska Plots based on lease agreements it had concluded for decades with the City of Belgrade and Luka Beograd ("**Lease Agreements**"), or Obnova had the right *of* use over the land "*as a result of constructing its buildings at Dunavska 17-19,*"[6] and its "*undisturbed possession of the land at Dunavska 23."*[7]

28. In the Counter Memorial Respondent demonstrated that for almost 60 years Obnova had been concluding lease agreements for the Dunavska Plots in the capacity of a lessee and that this was the only legal ground allowing Obnova to use these premises.[8] Respondent submitted into evidence eleven Lease Agreements which Claimants failed to mention in the Memorial when claiming Obnova had the right of use of the Dunavska Plots. In the Reply, Claimants allege that the Lease Agreements do not relate to the Dunavska Plots.[9] This is evidently wrong, because: the Lease Agreements contain clear references to Dunavska 17-19 and 23, or to the parcels no. 47 and 39/1 (encompassed by the Dunavska Plots), or both (**Section 1.**); Claimants fail to explain to which other premises the Lease Agreements could possibly relate to (**Section 2.**); Obnova and Claimants themselves referred to Lease Agreements when addressing what they call "Obnova's premises" (**Section 3.**); Claimants' assertion that certain references in the Lease Agreements indicate that they do not relate to the Dunavska Plots, is baseless (**Section 4.**); Claimants' assertion that Obnova never paid any rent and yet was not evicted from the Dunavska Plots, is both untrue and irrelevant (**Section 5.**); and Luka Beograd had the right to lease the premises in question (**Section 6.**).

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5 Counter-Memorial, para. 24-25; **Živković Milošević ER-2**, para. 19.

6 Reply, para. 35.

7 Reply, para. 181.

8 Counter-Memorial, paras. 28-38.

9 Reply, Section II.A.4.f.i. and para. 198; **Živković Milošević ER-2**, Sections III.A.2.a.ii. and III.B.1.a.ii.

1. The Lease Agreements contain references to the Dunavska Plots

29. In the Counter-Memorial, Respondent showed that in the period from 1953 to 2006, Obnova, as the lessee, concluded at least 13 Lease Agreements for the Dunavska Plots – two were exhibited by Claimants[10] and eleven by Respondent.[11] The agreements were concluded either with the City of Belgrade or with Luka Beograd (and its legal predecessor, the Directorate for Construction and Development of the Danube river bank), as the lessors.[12] Eleven of these Lease Agreements have explicit references to Dunavska 17-19 and 23, or to the parcels no. 47 and 39/1 (encompassed by the Dunavska Plots), or both:

- The lease agreement from **April 1953** expressly refers to "*cadastral parcel number 47 CM Belgrade"* and to *"Dunavska St. 17-19*";[13]
- The lease agreement from **September 1959** expressly refers to "*Dunavska Street 17-19"* and *to "Dunavska Street no. 23*";[14]
- The lease agreement from **January 1962** expressly refers to "cadastral lots 47, 49, and 50, cadastral municipality Belgrade -1";[15]

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[10] Lease Agreement between Obnova and Serbia dated 10 April 1953, **C-007**; Lease Agreement between Obnova and Preduzeće pristaništa, Beograd dated 18 January 1962, **C-160**.

[11] Lease agreement between Obnova and the Directorate dated 29 September 1959, **R-007**; Lease agreement between Obnova and the Directorate dated 7 April 1960, **R-008**; Lease agreement between Luka Beograd and Obnova dated 10 March 1965, **R-009**; 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**; Agreement on Provision and Use of Transhipment, Warehousing and Other Services between Luka Beograd and Obnova of 1 April 1985 dated 6 May 1985, **R-012**; Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova dated 25 January 2000, **R-013**; Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova dated 3 February 2000, **R-014**; Agreement on Provision and Use of Port and Warehousing Services from 2003, **RJ-011**; Agreement for Providing and Using Port and Warehouse Services between Luka Beograd and Obnova for parcel no. 47 dated 7 November 2003, **R-015**; 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**; 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.**

[12] Counter-Memorial, para. 28.

[13] Lease Agreement between Obnova and Serbia dated 10 April 1953, **C-007**, para. 2.

[14] Lease agreement between Obnova and the Directorate dated 29 September 1959, **R-007**, Article 1.

[15] Lease Agreement between Obnova and Preduzeće pristaništa, Beograd dated 18 January 1962, **C-160**, Article 1.

- The lease agreement from **March 1965** expressly refers to "*the cadastre plots nos. 47, 49, and 50*";[16]
- The lease agreement from **July 1983** expressly refers to "*17 Dunavska Street*.";[17]
- The lease agreement from **January 2000** expressly refers to "*17-19 Dunavska Str*.";[18]
- The lease agreement from **February 2000** expressly refers to "*23 Dunavska Str."* and *"cadastral parcel 39/1*";[19]
- Two lease agreements from **November 2003** expressly refer to either "*23 Dunavska Str."* And *"the cadastral parcel 39/1* ",[20] or to "*17-19 Dunavska Str*.";[21] and
- Two lease agreements from **March 2006** expressly refer to either "17-19 Dunavska Str." and "the cadastral parcel 47"[22] or to "23 Dunavska Str." and "the cadastral parcel 39/1."[23].

30. The remaining two Lease Agreements on the record, although not expressly, also clearly relate to the Dunavska Plots:

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16 Lease agreement between Luka Beograd and Obnova dated 10 March 1965, **R-009**, Article 1.

17 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 2.

18 Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova dated 25 January 2000, **R-013**, Article 1.

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

20 Agreement on Provision and Use of Port and Warehousing Services from 7 November 2003, **RJ-011**, Article 1.

21 Agreement for Providing and Using Port and Warehouse Services between Luka Beograd and Obnova for parcel no. 47 dated 7 November 2003, **R-015**, Article 1.

22 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. The surface area, i.e, 8,772.00 m^2 again matches the surface area Obnova leased based on January 2000 and November 2003 agreements dealing with the land at Dunavska 17-19. Thus, it can confidently be concluded that all agreements relate to parcel no. 47. See Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova dated 25 January 2000, **R-013**, Article 1; Agreement for Providing and Using Port and Warehouse Services between Luka Beograd and Obnova for parcel no. 47 dated 7 November 2003, **R-015**, Article 1.

23 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.

- The lease agreement from **April 1960**[24] relates to the same land as the lease agreement concluded in September 1959, i.e. the land at Dunavska 17-19 and 23, as the total surface area of the land leased under both agreements was exactly the same (7630 m^2).[25] Respondent has already demonstrated this in the Counter-Memorial,[26] but Claimants failed to address this.[27]
- The lease agreement from **April 1985**[28] explicitly refers to Dunavska Street and relates to exactly the same land as the lease agreement from March 1965 which it had substituted.[29] Claimants do not dispute this.

31. Although Respondent is not in possession of any other lease agreements that Obnova concluded for the Dunavska Plots, it is evident from the record that Obnova had concluded at least two more lease agreements:

- Before obtaining its first construction permit in 1949 for a temporary object at cadastral parcel no. 47,[30] Obnova had obtained approval from the City to erect a canopy on the land leased to it, i.e. Dunavska 17-19.[31]
- The agreement concluded in January 2000[32] refers to the lease agreement from **15 March 1994** that ceased to be valid by conclusion of the former agreement, so it is evident that between 1985 and 2000, Obnova and Luka Beograd concluded at least one more lease agreement.[33]

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24 Lease agreement between Obnova and the Directorate dated 7 April 1960, **R-008**.

25 Lease agreement between Obnova and the Directorate dated 7 April 1960, **R-008**, Article 1.

26 Counter-Memorial, fn. 23.

27 Claimants only objection to the specificity of the lease agreement from 1960 is that it refers to the port area and that Obnova's land is not in the port area. See Reply, para. 153.

28 Agreement on Provision and Use of Transhipment, Warehousing and Other Services between Luka Beograd and Obnova of 1 April 1985 dated 6 May 1985, **R-012**.

29 See Counter-Memorial, para. 35. Agreement on Provision and Use of Transhipment, Warehousing and Other Services between Luka Beograd and Obnova of 1 April 1985 dated 6 May 1985, **R-012**, Article 25.

30 Construction permit No. 5034 dated 31 October 1949, **C-150**.

31 Approval for Obnova's construction permit dated 31 October 1949, **R-141**.

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

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).

32. As explained by Prof Perovic, the above-mentioned references to Dunavska 17-19 and 23, and to the parcels no. 47 and 39/1,[34] are more than sufficient to properly designate the premises that are the subject of the lease:

> *the subject matter of contractual obligations in the Agreements is indicated so that it is clear that it is related to the real estate in Dunavska 17-19 and Dunavska 23 which are the subject matter of this Arbitration. If in some of the individual Agreements the formulation related to the subject matter of the contractual obligation might not have been done with precision, the consensual will of the parties that the subject of the contractual obligation is related to the real estate in Dunavska 17-19 and Dunavska 23 unequivocally stems from: a) other elements of the agreement and the agreement as a whole; b) the fact that the agreements were fulfilled according to the subject matter formulated in such manner; c) the fact that between the parties there was an established ongoing business relationship since at latest 1953, based on the agreements with the subject matter of the contractual obligations defined in such way.*[35]

33. Therefore, contrary to Claimants' allegations, the Lease Agreements did refer to the Dunavska Plots and did encompass them.

2. Claimants fail to explain to which other premises the Lease Agreements could have possibly related to

34. Claimants fail to explain which other premises could have been allegedly covered by the Lease Agreements. This further evidences that the Lease Agreements covered the Dunavska Plots.[36]

35. Claimants simply state that "*the agreements may relate to other warehouse land that Obnova may have been renting, at the time*".[37] But Claimants have failed to provide any evidence of that. Notably, Obnova had concluded Lease Agreements for the Dunavska Plots still in 2006,[38] after Mr. Rand had allegedly acquired Obnova.[39] It is therefore quite

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[34] Counter-Memorial, paras. 28-38.

[35] Legal Opinion-Prof Jelena Perović Vujačić-Rejoinder-SRB dated 14 June 2024, **RLO-007**, para. 44.

[36] Legal Opinion-Prof Jelena Perović Vujačić-Rejoinder-SRB dated 14 June 2024, **RLO-007**, para. 43.

[37] Reply, para. 148.

[38] 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**; 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**.

[39] Reply, para. 260-264; Witness statement of Mr. William Archibald Rand dated 23 February 2024, para. 23.

unconvincing that Claimants profess they are unaware if in 2006 "*Obnova may have been renting"* some other premises in Dunavska Street. If Obnova was leasing some other premises, they would be able to provide certain documentation or witnesses who would confirm that, but they did not.

36. In fact, neither Claimants nor Obnova ever mentioned that Obnova was leasing some other land at Dunavska Street, apart from Dunavska 17-19 and 23. On the contrary, Claimants and their Serbian law experts demonstrate that the 1953 and 1962 lease agreements (the two agreements submitted by Claimants) did relate to the Dunavska Plots, even though they contain similar wording as the Lease Agreements provided by Respondent.[40]

37. In particular, the 1953 lease agreement states that Obnova leased from the City "*part of cadastral parcel number 47 CM Belgrade, surface 6,600 m2, in Dunavska St. 17-19*"[41], while the 1962 lease agreement refers to "*open warehouse space located on cadastral lot 47, 49, and 50, cadastral municipality Belgrade -1, with a surface area of 9,565 m^2*."[42] Tellingly, Claimants do not argue that because some additional plots are mentioned (plots no. 49 and 50), this means that the agreement does not concern the Dunavska Plots. However, they are using this as the argument that the lease agreement from 1965 does not relate to "Obnova's premises" at Dunavska 17-19. In addition, Claimants challenge the surface area covered by the 1965 lease agreement as pertaining to the Dunavska Plots although an identical surface area is mentioned in the agreement from 1962.[43]

3. Before these proceedings, Obnova and Claimants acknowledged that the Lease Agreements concern the Dunavska Plots

38. Contemporaneous documents show that Claimants' allegation that the Lease Agreements do not concern the Dunavska Plots is coined for the purpose of this arbitration. On 27 March 2008, when Obnova requested the City of Belgrade to relocate the bus loop which was planned at the Dunavska Plots in the preparations of the detailed regulation plan (the "**Initiative**"),[44] Obnova noted that they are:

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[40] **Živković Milošević ER-1**, paras. 136 and 138. Memorial, para. 136.

[41] Lease Agreement between Obnova and Serbia dated 10 April 1953, **C-007**, para. 2.

[42] Lease Agreement between Obnova and Preduzeće pristaništa, Beograd dated 18 January 1962, **C-160**, Article 1.

[43] Reply, p. 60 (of PDF).

[44] Reply, paras. 268 and 687.

> *users of the cadastral lot no. 47, covering the total surface of 8,722m^2 and lot no: 39/1, covering the total surface of 1,163.58 m^2 on the basis of the lease agreement comprising the complex for the regular performance of activities.*[45]

39. Obnova further stated that it submits the Initiative:

> *for the purpose of relocation of the envisaged tram turnaround from the lot which poses an integral part of our land complex, that we exploit for regular operation and where we have been located ever since 1954, with constructed business facilities covering the surface of 2,464.08 m2 on lot no. 47 and surface of 446.85 m2 on lot 39/1.*[46]

40. As can be seen, Obnova requested the relocation of the bus loop from cadastral parcels no. 47 and 39/1, which it used based on the lease agreements. Obnova attached two Lease Agreements from 2006 to the Initiative.[47] This shows that Obnova was well aware that parcel no. 47 was leased, not owned by Obnova.[48]

41. Claimants argue that Obnova did not admit to being a lessee in the Initiative, since it used the word "*korisnici*" (which, is plural of word "*korisnik*" and according to Claimants means a person having the right *of* use) and not "*zakupac*" (the lessee).[49] They, however, conveniently "omitted" to note that after stated that it is the *user*, Obnova also explained the legal ground for being the user: "*on the basis of the lease agreement*", and specifically

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45 As Respondent explains below, the quotation in Claimants' exhibit C-314 is incorrect, therefore Respondent provides the Letter from Obnova to the City of Belgrade with the attachments dated 27 March 2008, as **R-174**.

46 Letter from Obnova to City of Belgrade with the attachments dated 27 March 2008, **R-174** (emphasis added). Obnova referred to lease agreement from 2006, which mention the same addresses, the same parcel numbers and the same surface areas. 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** and 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**. Lease Agreements from 2000 and 2003 also mention the same addresses and the surface areas. See Agreement for Providing and Using Port and Warehouse Services between Luka Beograd and Obnova for parcel no. 47 dated 7 November 2003, **R-015**, Article 1; Agreement on Provision and Use of Port and Warehousing Services from 2003, **RJ-011**, Article 1; Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova dated 25 January 2000, **R-013**, Article 1; Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova of 3 February 2000 dated 3 February 2000, **R-014**, Article 1

47 Letter from Obnova to City of Belgrade with the attachments dated 27 March 2008, **R-174.**

48 Legal Opinion-Prof Jelena Perović Vujačić-Rejoinder-SRB dated 14 June 2024, **RLO-007**, para. 141.

49 Reply, para. 269.

referred to the lease agreement as the basis for its use of the Dunavska Plots.[50] Here, it is worth noting that Claimants are trying to mislead the Tribunal when implying that Serbian word "*korisnik*" should be translated as a person having the right *of* use. The word "*korisnik*" is described as "*the one who utilises something, who uses something: the one who has a right to use something*".[51] Therefore, this term pertains to a person who uses something, and not to one who owns it. The users can equally be the owners, but also lessees and borrowers or any other person who for whatever ground uses something.

42. In addition to that, it should be noted that Claimants' translation of the Initiative (filed as exhibit C-314) is misleading. Claimants' translation incorrectly states that Obnova forwarded its initiative "*as beneficiaries of the cadastral lot no. 47, covering the total surface of 8,722m2 and lot no: 39/1, covering the total surface of 1,163.58 m2, and on the basis of the lease agreement comprising the complex for the regular performance of activities*".[52] However, the Serbian text does not contain the word "and", but rather states that Obnova submits its initiative as the *user* of the parcels no. 47 and 39/1 *on the basis of the lease agreements*.[53] Moreover, Claimants' translation wrongly suggests that Obnova stated in the Initiative that it had constructed facilities on the land in question ("…*whereby having constructed business facilities*"). In fact, the original wording shows that Obnova merely said that the buildings were constructed on that land ("…*with constructed business facilities*").

43. Further, court documents also confirm that the Lease Agreements from 2006 encompassed the Dunavska Plots.[54] In the court proceedings initiated by Luka Beograd to collect the outstanding rent from Obnova, Obnova pointed out: that it had used the leased land for more than 70 years; that Serbia was inscribed as the owner of the land; that Obnova had the objects on that land which it sought to legalize.[55]

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50 Letter from Obnova to City of Belgrade with the attachments dated 27 March 2008, **R-174.**

51 Dictionary of the Serbian language, Matica Srpska, Novi Sad, 2007, **R-183**, p. 571.

52 Letter from Obnova to City of Belgrade, 27 March 2008, **C-314** (emphasis added).

53 Letter from Obnova to City of Belgrade with the attachments dated 27 March 2008, **R-174.**

54 Prof. Perović noted that „*In the court proceedings previously conducted according to the claim of Luka Beograd against Obnova in order to collect the rent under the agreements concluded in 2006 and the counterclaim of Obnova to determine invalidity of those agreements, the courts determined in final judgements that the agreements were valid*", Legal Opinion-Prof Jelena Perović Vujačić-Rejoinder-SRB dated 14 June 2024, **RLO-007**, para. 14

55 Counter-Memorial, para. 40; For instance, Obnova expressly stated that: "*The land recorded on cadastral parcel no. 39/1 – cadastral municipality Stari Grad, and no. 47 – cadastral municipality Stari Grad, is urban construction land owned by the Republic of Serbia, over which the City of Belgrade has the right of use, so*

44. It is therefore striking that Claimants now argue that the Lease Agreements do not relate to what they call "Obnova's premises."

4. Claimants' assertion that certain references in the Lease Agreements indicate that they do not relate to Dunavska Plots is baseless

45. Claimants further make misplaced allegations as to the scope of the Lease Agreements, namely that (a) the Lease Agreements refer to the port area;[56] (b) the surface area designated in the Lease Agreements does not match the total surface area of "Obnova's premises";[57] (c) the Lease Agreements refer to cadastral parcels which were not part of "Obnova's premises";[58] (d) Serbia failed to provide drawings attached to agreements depicting the land which Obnova leased;[59] (e) some Lease Agreements refer to a railway, while no railways are present at Obnova's premises;[60] and (f) Luka Beograd never provided the services stipulated in the Lease Agreements.[61] As will be seen, all these statements are either untrue, misplaced or irrelevant, and do not support Claimants' case that Obnova was not the lessee of the Dunavska Plots.

a) Reference to the port area is given in accordance with Luka Beograd's price lists

46. Claimants' allegation that because some of the Lease Agreements refer to the port area the Lease Agreements relate to some other land is incorrect.[62]

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the claimants in this case groundlessly demands payment of rent from the defendant in this case.", and "*Furthermore, legal predecessor of the defendant, socially-owned company Obnova Beograd, has been situated on the location in question ever since liberation of Belgrade in 1945, and it has been using this space in such way for almost 70 years without any problems. How and with what kind of motives the rental agreement has been concluded is not known to the defendant, but it regards that there were no legal grounds for that. Besides, the defendant stresses that it is currently in the procedure for legalization of its facilities on the parcel in question and expects to record property right of the facilities with the Real Estate Cadastral Office-Belgrade in near future*." 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**.

56 Reply, paras. 153, 158 and pp. 60, 62, 63, 67 and 68 (of PDF).

57 Reply, paras. 154, 156, 198 and pp. 62, 63 and 65 (of PDF).

58 Reply, p. 60 (of PDF).

59 Reply, paras. 159 and pp. 60, 62, 63, 65, 67 and 68 (of PDF).

60 Reply, paras. 157 and p. 63 (of PDF).

61 Reply, pp. 65 and 67 (of PDF).

62 Reply, paras. 148, 153-154, 158 and pp. 60, 62-63, 68 (of PDF).

47. During the court proceedings for unpaid rent between Luka Beograd and Obnova, Luka Beograd expressly noted that the Dunavska Plots were located in the port area. This is because Luka Beograd itself designated the Dunavska Plots as being placed in the "wider port area" in its price lists. Obnova never disputed that. [63]

b) <u>Designated surface area does not indicate that Obnova was leasing some other land</u>

48. Claimants' allegation that the surface area indicated in certain Lease Agreements shows that Obnova leased "some other land" from Luka Beograd and not the Dunavska Plots is equally incorrect.[64]

49. Claimants failed to submit any evidence whatsoever to support their statements as to the lack of alignment between the surface agreed and actually used by Obnova. In any event, even if there is some discrepancy between the agreed and used area, this does not mean that the Lease Agreements did not encompass "Obnova's premises", especially as the areas designated in these agreements are larger than the Dunavska Plots. Designated surface area cannot possibly indicate that the subject of the lease was different; it merely shows that Obnova concluded a lease agreement for as much land as it needed at the given time. Tellingly, although the Lease Agreements were discussed in several court proceedings for unpaid rent,[65] Obnova never argued that the surface area designated in the Lease Agreements is somehow questionable. On the contrary, Obnova had expressly

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[63] The price lists were produced by Luka Beograd in the court proceedings related to Obnova's unpaid rent in order to prove the amount Obnova owes to Luka Beograd. See Luka Beograd's submission in the court proceedings, P 4677/13 dated 27 September 2013, **R-151**. Luka Beograd's Price List 906/1 dated 14 February 2009, **R-148;** Luka Beograd's Price List 8948/1 dated 1 December 2006; **R-147**. See Legal Opinion-Prof Jelena Perović Vujačić-Rejoinder-SRB dated 14 June 2024, **RLO-007**, para. 98.

[64] In short, they state (1) that the surface areas designated in the Lease Agreements are larger than the area of Obnova's premises at Dunavska 17-19 and 23 (Reply, paras. 154, 156 and pp. 62, 63 and 65 (of PDF)), (2) that the surface area designated in lease agreement is larger than the total area of Obnova's premises Dunavska 17-19 or Dunavska 23, (Reply, p. 61 (of PDF)), (3) that the parcel no. 47 used to be larger in the past and covered an area outside Obnova's premises (Reply, p. 60 (of PDF)), (4) that the parcel no. 39/1 used to be larger in the past than Obnova's premises and that Obnova might have leased some other part of the parcels from Luka Beograd, and not the part where Obnova's premises are (Reply, para. 198).

[65] 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**.

confirmed that the surface area mentioned in the 2006 lease agreements represents an integral part of the land complex it had been using at the parcels 47 and 39/1.[66]

c) <u>Reference to other cadastral parcels alongside the Dunavska Plots is irrelevant</u>

50. Claimants' allegation that some of the Lease Agreements referred to other parcels alongside the Dunavska Plots is irrelevant. What is important is that they refer to parcel no. 47, which was used by Obnova without a doubt.[67] In particular:

- Claimants argue that parcels nos. 49 and 50 mentioned alongside with the parcel no. 47 in the lease agreement from March 1965,[68] were never part of Obnova's premises.[69] This is incorrect. The earlier lease agreement from 1962 submitted by Claimants mentions these two parcels in addition to parcel no. 47, as well.[70] In any case, it is important that these Lease Agreements indeed referred to the parcel no. 47.
- Claimants also purport that the lease agreement from January 2000 does not refer to Obnova's premises since it refers to cadastral parcel no. 12/6 – CM Stari Grad.[71] However, this agreement also refers to Dunavska 17-19, so the reference to parcel no. 12/6 was just an obvious error.[72]
- Claimants also raise that the lease agreement No. 3981 concluded in November 2003 refers to parcel no. 39/1 but incorrectly places this parcel at Dunavska 17-19.[73] A brief look at the lease agreement concluded in January 2000,[74] lease agreement No.

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66 Letter from Obnova to City of Belgrade with the attachments dated 27 March 2008, **R-174**.

67 Subject matter of 1963 agreement is "open warehouse space located on cadastral lot 47, 49, and 50, cadastral municipality Belgrade -1, with a surface area of 9,565 m^2 " and of 1965 agreement is "the open warehousing area on the cadastre plots no. 47, 49 and 50 CM-1 amounting to surface area of 9,565 m^2". Lease Agreement between Obnova and Preduzeće pristaništa, Beograd dated 18 January 1962, **C-160**, Article 1, and Lease agreement between Luka Beograd and Obnova dated 10 March 1965, **R-009**, Article 1.

68 Lease agreement between Luka Beograd and Obnova dated 10 March 1965, **R-009**, Article 1.

69 Reply, p. 60 (of PDF).

70 Lease Agreement between Obnova and Preduzeće pristaništa, Beograd dated 18 January 1962, **C-160**, Article 1. See Legal Opinion-Prof Jelena Perović Vujačić-Rejoinder-SRB dated 14 June 2024, **RLO-007**, paras. 109-110.

71 Reply, para. 155.

72 Legal Opinion-Prof Jelena Perović Vujačić-Rejoinder-SRB dated 14 June 2024, **RLO-007**, para. 123.

73 Reply, p. 63 (of PDF).

74 Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova of 25 January 2000 dated 25 January 2020, **R-013**.

3981 from 2003,[75] and the lease agreement No. 1816 from 2006,[76] indicates that parcel no. 47 located at Dunavska 17-19 is the subject matter of all three agreements. Amongst other reasons, they all refer to 8,722m^2 of warehouse space at Dunavska 17-19,[77] while in its letter to the City from 27 March 2008 Obnova confirmed that it leased the total surface of 8,722m^2 at parcel no. 47.[78]

d) <u>References to railway, drawings and various services do not mean that the Dunavska Plots were not subjects of the Lease Agreements</u>

51. Claimants state that there are no railways on the land Obnova purportedly owns.[79] It is unclear how Claimants reached this conclusion, since the historical images for the Dunavska Plots submitted by Claimants confirm the opposite - that the railway was right next to this land.[80]

52. Claimants further purport that Luka Beograd and its security department never operated at Obnova's premises,[81] that Obnova never used Luka Beograd's weighbridge since it has its own weighbridge,[82] that Luka Beograd never provided transshipment and warehousing services at Obnova's premises,[83] and that Luka Beograd never maintained Obnova's facilities.[84] Claimants, however, fail to provide evidence for any of these statements, such as witness statements from Obnova's employees at the time. Nevertheless, even if

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75 Agreement for Providing and Using Port and Warehouse Services between Luka Beograd and Obnova for parcel no. 47 dated 7 November 2003, **R-015**.

76 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**.

77 Legal Opinion-Prof Jelena Perović Vujačić-Rejoinder-SRB dated 14 June 2024, **RLO-007**, paras. 130-131; Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova dated 25 January 2000, **R-013**, Article 1; Agreement for Providing and Using Port and Warehouse Services between Luka Beograd and Obnova for parcel no. 47 dated 7 November 2003, **R-015**, Article 1; 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.

78 Letter from Obnova to City of Belgrade with the attachments dated 27 March 2008, **R-174**.

79 Reply, paras. 148, 157 and 63 (of PDF).

80 Compilation of historical images from Dunavska 17-19 and Dunavska 23, **C-613**.

81 Reply, pp. 65 and 67 (of PDF).

82 Reply, pp. 65 and 67 (of PDF).

83 Reply, p. 61 (of PDF).

84 Reply, p. 65 (of PDF).

Obnova had not used these services, this does not in any way affect the conclusion that the Dunavska Plots were the subjects of the lease. As explained by Prof Perovic:

> *Claimants lose sight of the fact that non-performance of contractual obligations does not affect the validity of an agreement, nor does it indicate that the subject of the lease was not the real estate which is the subject matter of this Arbitration.*[85]

53. Similarly, the lack of sketches mentioned in the Lease Agreements[86] does not affect determination of their subject matter, as the agreements contain other indicators confirming that their pertained to the Dunavska Plots (see paras 29-33 above). This is also confirmed by Prof Perovic who agrees that the Lease Agreements refer to the Dunavska Plots and explains that:

> *in general, by a scheme, drawing, graph or a similar attachment referenced by the agreement, the consent of the contracting parties expressed by the agreement can only be made more precise, and not excluded or amended.*[87]

5. Obnova had been paying rent

54. Claimants argue that Obnova has been using premises at the Dunavska Plots for 70 years without payment of any rent,[88] and that the landlords would have tried to evict Obnova if indeed it was leasing the land.[89] According to Claimants, the alleged lack of rent payments confirms that Obnova was leasing some other land from Luka Beograd.[90] This is again misleading.

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85 Legal Opinion-Prof Jelena Perović Vujačić-Rejoinder-SRB dated 14 June 2024, **RLO-007**, para. 116.

86 Reply, para. 159, and pp. 60, 62, 63, 65, 67 and 68 (of PDF).

87 Legal Opinion-Prof Jelena Perović Vujačić-Rejoinder-SRB dated 14 June 2024, **RLO-007**, para. 97.

88 Reply, paras. 166 and 447-448.

89 Reply. para. 167.

90 Reply, para. 167.

55. Putting aside the fact that the lack of direct evidence for the rent payments made decades ago is no surprise, there is a number of documents proving that Obnova had paid rent and when it failed to do so, Luka Beograd did not refrain from taking Obnova to court:

- In 1964, Luka Beograd initiated enforcement proceeding against Obnova for non-payment of rent and obtained a decision ordering Obnova to clear the premises. However, the parties eventually reached an out-of-court settlement.[91]
- On 12 December 2002, Obnova concluded an agreement on business-technical co-operation with the privately-owned company Petko which, inter alia, provided that Petko would pay the outstanding rent Obnova owed to Luka Beograd in accordance with the 2000 Lease Agreements for the Dunavska Plots. In 2004, Petko initiated court proceedings against Obnova related to the fulfilment of the said agreement. The financial expertise conducted for the purpose of that case noted that there were rent payments of both Obnova and Petko to Luka Beograd. In addition, Obnova's director testified that Petko had paid rent to Luka Beograd on behalf of Obnova.[92]
- In 2003 and 2006, Obnova concluded four Lease Agreements with Luka Beograd, and after it again failed to pay the rent, Luka Beograd initiated several court proceedings to collect the rent owed by Obnova.[93] In all these proceedings, the Serbian courts ordered Obnova to pay the rent due.[94]

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91 Lease agreement between Luka Beograd and Obnova dated 10 March 1965, **R-009**.

92 Judgment of the Commercial Court in Belgrade, P 3210/04 dated 12 April 2007, **R-146**, p. 1, 4, 6-8 (of PDF); Court Expert Report No. P 3210/04 dated 11 July 2006, **R-161**, p. 2 and 5 (of PDF); Hearing minutes No. P 3210/04 dated 8 November 2005, **R-142**, p. 2 (of PDF).

93 Motion for enforcement filed by Luka Beograd dated 23 February 2009, **R-016**; Motion for enforcement filed by Luka Beograd dated 16 December 2009, Motion for enforcement from 16 December 2009, **R-017**; Motion for enforcement filed by Luka Beograd dated 23 April 2012, **R-018**; Motion for enforcement filed by Luka Beograd dated 31 May 2012, **R-019**; Motion for enforcement filed by Luka Beograd dated 29 January 2013, **R-020**; Motion for enforcement filed by Luka Beograd dated 9 April 2013, **R-021**; Motion for enforcement filed by Luka Beograd dated 1 April 2014, **R-022**; Motion for enforcement filed by Luka Beograd dated 24 February 2015, **R-023**.

94 Judgement of the Commercial Court of Appeal, Pz 1186/11 dated 9 February 2012**, R-024**; Judgement of the Commercial Court in Belgrade, P 3861/12 dated 4 October 2012, **R-025**; Judgement of the Commercial Court of Appeal, Pz 6411/14 dated 16 March 2016, **R-026**; Judgement of the Commercial Court of Appeal, Pz dated 28 August 2014, **R-027**. Obnova's minority shareholders, i.e. its employees were also aware that Obnova has to pay the rent to Luka Beograd or otherwise its accounts will be blocked. Letter from small shareholders to Obnova dated 25 January 2005, **R-166**.

56. Therefore, there is no doubt that Obnova had paid rent, voluntarily or by way of a court order, for its use of the Dunavska Plots.[95]

6. Luka Beograd as the lessor of the premises at Dunavska Street

57. Despite the Lease Agreements that Obnova concluded with Luka Beograd (even after its privatisation in 2003, and after Mr Djura Obradović acquired the privatised shares in Obnova in 2005, allegedly pursuant to directions from Mr Rand[96]), Claimants argue that Luka Beograd did not have any right to lease out the Dunavska Plots after the City was inscribed as the user of the Dunavska Plots in 2003.[97] Claimants allege that Luka Beograd was aware that it had no rights to the premises and for this reason, allegedly did not include the Dunavska Plots in its privatisation documents during its privatisation in 2005.[98]

58. Claimants are again wrong: **(a)** Luka was privatised in 2002 and not in 2005, and more importantly, it did include Dunavska Plots and Objects in its privatisation documents, and **(b)** Luka Beograd had the right to lease out the Dunavska Plots.

a) Luka Beograd included the Dunavska Plots and Objects in its privatisation documents

59. At the outset, it should be noted that Luka Beograd was privatised at the very beginning of 2002, when it was registered as a joint-stock company instead as a socially-owned enterprise and not in 2005, as Claimants wrongly contend.[99] Luka Beograd's privatisation was conducted in 2002 in accordance with the Law on Ownership Transformation dated 1997 (which governed the privatisation before enaction of the 2001 Law on Privatisation).[100] After that, 60% of Luka Beograd's shares were owned by the minority

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95 See Legal Opinion-Prof Jelena Perović Vujačić-Rejoinder-SRB dated 14 June 2024, **RLO-007**, paras. 58-64.

96 Memorial, paras. 73-75.

97 Reply, para. 163.

98 Reply, para. 164.

99 The privatisation of Luka Beograd ended by the Decision of the Commercial Court in Belgrade no. I-Fi-9058/01 dated 21 February 2002 by which Luka Beograd was formally transformed from the socially-owned enterprise ("**SOE**") into the joint stock company. See Independent Auditor's Report of Luka Beograd's financial statements for 2022, **R-178**.

100 Decision on issuance and sale of the shares rendered by the General Meeting of the SOA "Luka Beograd", dated 27 November 2000, **R-162** and Public Invitation for inscription of shares prepared by the General Meeting of the SOA "Luka Beograd", dated 27 November 2000, **R-163**.

shareholders (mostly Luka Beograd's employees), while the remainder was in State's ownership.[101] In 2005, Luka Beograd's shares were taken over by Worldfin S.A. (Luxemburg), in accordance with the Law on Securities Market and other Financial Instruments from 2002.[102]

60. Prior to its privatisation, in September 1999, Luka Beograd prepared a report on appraisal of the capital as at 31 December 1998 ("**Luka Report**"). Contrary to Claimants' allegations, both cadastral parcels nos. 47 and 39/1 were included in the Luka Report as part of Luka Beograd's real estate property. This can be seen from the list of the land and the objects that Luka Beograd would continue to use until the land is brought to its intended urban purpose.[103] Similarly, the list of disputed objects contained in the Luka Report listed ten objects with the surface area of 2,365 m^2, with an indication of a dispute between Luka Beograd and Obnova related to these objects.[104]

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[101] The Letter from Luka Beograd to the Ministry of Economy and Privatisation dated 17 June 2005, **R-187**.

[102] In 2005, a company Worldfin S.A. (Luxemburg) launched a takeover bid (in September and October respectively), and successfully acquired approximately 90.3% of Luka Beograd's shares. Through the takeover bid(s), Worldfin S.A. acquired approximately 50.3% of shares owned by the minority shareholders and 40% of shares held by the State. The acquisition of Luka Beograd's shares in 2005 was not initiated by or conducted under the auspices of the Privatisation Agency. In that sense, the acquisition of Luka Beograd's shares by Worldfin S.A. in 2005 could not have been qualified as the privatisation, given that: (i) the privatisation of Luka Beograd ended in 2002 pursuant to the 1997 Law on Ownership Transformation; (ii) the State did not sell its shares pursuant to the 2001 Law on Privatisation, but in accordance with the 2002 Law on Securities by selling the shares together with the minority shareholders; and (iii) the 2002 Law on Securities did not govern privatisation, but merely the acquisition of shares through a takeover bid. See 2002 Law on Securities Market and other Financial Instruments, **R-184,** Articles 67-83; Worldfin's shortened takeover bid from 5 September 2005, **R-172**; Worldfin's extended takeover bid from 6 October 2005, **R-173**; Decision of the SEC on the approval of the shortened takeover bid from 9 September 2005, **R-171;** Decision of the SEC on the approval of the extended takeover bid from 30 September 2005, **R-170**; Notification on acquisition of Luka Beograd's shares sent to the SEC by Luka Beograd's corporate agent M&V Investments, dated 24 October 2005, **R-177**.

[103] Report on appraisal of the capital of Luka Beograd, dated September 1999, **R-164**, pp. 269, 281, 391 and 538. By the 1975 Agreement, Luka Beograd transferred its rights over the Dunavska Plots to the City, however, Annex 3 to this Agreement provided that Luka Beograd will continue to temporarily use the parcel no. 47 and parcel no. 39/1, until the land is brought to its intended urban purpose. See Counter-Memorial, para. 77; the 1975 Agreement concluded between the City of Belgrade and Luka Beograd on 6 March 1975, **R-060**; Annex 3 to the 1975 Agreement, **R-064**, p. 2 (of PDF).

[104] See Report on appraisal of the capital of Luka Beograd, dated September 1999, **R-164**, p. 270. Last, but not the least, Luka Beograd was inscribed as the holder of the right of use over parcels no. 47 and 39/1 in 1966 and 1968, respectively. Claimants do not dispute that. As Respondent explained in the Counter-Memorial, Luka Beograd's inscription over parcel no. 47 was left out during the restoration of the land books in 1972/3, while for parcel no. 39/1, Luka Beograd remained inscribed as the holder of the right of use until 2003 (when

61. On the other hand, Obnova's financial statements reveal that Obnova has never considered cadastral parcels no. 47 and 39/1 as its real estate property. In Obnova's balance sheet as at 31 December 2002, Obnova indicated the value of land as 0.[105] In other words, Obnova did not consider that it had any land in its ownership. Importantly, this balance sheet was attached to Obnova's Privatisation Program,[106] as its integral part, which means that all prospective buyers were informed about this fact. Obnova maintained this in later years and has never included the Dunavska Plots in its financial statements. This, for example, can be seen from the balance sheet as at 31 December 2020, where the value of the land again amounted to 0.[107]

62. When it comes to the Objects, the facts do not speak in Claimants' favour either. In the balance sheets for 2020, 2021 and 2022, in the item "Buildings, plants and equipment", Obnova stated that it owned the Objects, i.e. it inserted the value of the buildings. However, during the audit of the financial statements, independent auditors engaged by Obnova gave the *disclaimer of opinion* because they had not been presented with appropriate documentation on the basis of which they would have been able to verify the ownership over the Objects.[108]

63. Considering all of the above, Luka Beograd undoubtedly had property rights over the Dunavska Plots and these rights were not contentious between Luka Beograd and Obnova. When it comes to the Objects located at the Dunavska Plots, both Luka Beograd and Obnova claimed their right of use, but Obnova obviously, even according to its auditors, was unable to prove its right of use (or ownership).

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the City was inscribed). Counter-Memorial, pp. 30-31 and fn. 113; Land Book insertion no. 5, **R-052** p. 4 (of PDF); Land Book insertion no 2461, **R-056**; Copy of a plan for parcel no. 47 dated 20 May 1997, **R-165**; Cadaster decision No. 952-02-9-31/03 relating to Dunavska 23, 22 November 2003, **C-184**.

105 Obnova's financial statements as at 31 December 2002, **R-149**, item "Lands, forests and plantations".

106 Privatisation Program, **R-046**, p. 49 of PDF.

107 Obnova's financial statements as at 31 December 2020, **R-150,** item "Land".

108 Independent Auditor's Report of Obnova's financial statements for 2020, **R-143**; Independent Auditor's Report of Obnova's financial statements for 2021, **R-144**; Independent Auditor's Report of Obnova's financial statements for 2022, **R-145**. In 2021 and 2022 the balance sheet's items did not differentiate between land and buildings, which were designated under the common term "real estate". Therefore, the Auditor's Reports for 2021 and 2022 have expressed the *disclaimer of opinion* with respect to the ownership over any real estate, not only the buildings.

b) Luka Beograd had the right to lease out the premises

64. Claimants also argue that Luka Beograd did not have the right to lease out the Dunavska Plots since the City was inscribed in 2003 as the holder of property rights over the Dunavska Plots and the Objects.[109] They are wrong.

65. On 6 March 1975 City of Belgrade and Luka Beograd concluded an agreement by which Luka Beograd transferred its rights over certain land, including the parcels no. 47 and 39/1 to the City ("**the 1975 Agreement**").[110] This agreement was the basis for the inscription of the City as holding the right of use over the Dunavska Plots in the Cadastre in 2003. However, Annex 3 of the 1975 Agreement provided that Luka Beograd would continue to temporarily use these parcels until the land was brought to its intended urban purpose.[111] That is why Luka Beograd continued to lease the Dunavska Plots even after the above-mentioned inscription of the City in 2003. Luka Beograd's right to lease these parcels was confirmed by the Serbian courts in the proceedings for the collection of the rent that Obnova owed to Luka Beograd.[112]

66. Obnova was not the only entity to which Luka Beograd leased out the Dunavska Plots. In the period January – November 2003, Luka Beograd concluded two lease agreements with Petko, one for Dunavska 17-19 and the other one for Dunavska 23 (Obnova renewed the lease by concluding two Lease Agreements with Luka Beograd in November 2003). The lease agreements that Luka Beograd concluded with Petko had the same designation of the leased property as the Lease Agreements Obnova had concluded with Luka Beograd in 2000, 2003 and 2006.[113]

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109 Reply, para. 163.

110 Counter-Memorial, para. 77 and fn. 145 Contract between Preduzeće luka i skladišta Beograd and City of Belgrade (1975), **C-167**, p. 9 (of PDF); 1975 Agreement concluded between the City of Belgrade and Luka Beograd on 6 March 1975, **R-060**.

111 Counter-Memorial, fn. 145; Annex 3 to the 1975 Agreement, **R-064**, p. 2 (of PDF).

112 Judgement of the Commercial Court of Appeal, Pz 1186/11 dated 9 February 2012, **R-026**, p. 3 (of PDF); 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**.

113 Agreement no. 71 referred to Dunavska 17-19 and the surface area of 8.772 m2, same as Obnova's Lease Agreements for parcels no. 47 from 2000, 2003 and 2006. It even contained the same typo incorrectly referring to parcel no 12/6 instead to parcel no. 47 just like Obnova's January 2000 lease agreement. Petko's lease agreement no. 72 referred to Dunavska 23, parcel no 39/1 and surface area of 1.163 m2, just like Obnova's Lease Agreements for the same parcel from 2000, 2003 and 2006. See Agreement no. 71 concluded between Luka Beograd and Petko 13 January 2003, **C-609**, Article 1; Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova of 25 January 2000 dated 25 January

67. Claimants further dispute that the Lease Agreements related to buildings[114] and state that the 1985 lease agreement and the 2006 lease agreement refer to buildings, but note that these are "*only general provisions that do not relate to any specific building*".[115] This is however irrelevant, since it is clear that the lease encompasses all the objects present at the area designated in the Lease Agreements.[116] The fact that Obnova was leasing out the Objects in the capacity of a lessor to the third parties and that it was referred to as the owner of the Objects in these lease agreements, could not give Obnova more rights than it actually had over the Objects. In any event, it should be emphasized that, in these agreements, Obnova did not designate itself as the owner of the land at parcels no. 47 and 39/1, nor was it leasing out that land.[117]

2020, **R-013**, Article 1; Agreement for Providing and Using Port and Warehouse Services between Luka Beograd and Obnova for parcel no. 47 dated 7 November 2003, **R-015**, Article 1; 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 no. 72 concluded between Luka Beograd and Petko dated 13 January 2003, **C-610**; Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova dated 3 February 2000, **R-014**, Article 1; Agreement on Provision and Use of Port and Warehousing Services from 2003, **RJ-011**, 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.

114 Reply, para. 137.

115 Reply, para. 137.

116 As explained in para. 41 of Respondent's Counter-Memorial, the lease agreement concluded in 1985 stipulated that the maintenance of the Objects shall be entrusted to Luka Beograd. The parties also agreed that any changes to the Objects, such as additional construction, could be performed only with the consent and supervision of Luka Beograd. Furthermore, it was agreed that Luka Beograd had the right to control the manner in which Obnova uses the Objects. 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. *See*, Agreement on Provision and Use of Transhipment, Warehousing and Other Services between Luka Beograd and Obnova of 1 April 1985, **R-012**, Articles 10, 11 and 12; 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).

117 **Živković Milošević ER-2**, para. 143; Lease Agreement concluded between Obnova and Agrofos dated 11 April 2006, **C-411**; Lease Agreement concluded between Obnova and Industrokommerce-Incom dated 21 September 2007, **C-412**; Lease Agreement concluded between Obnova and Struktura 9 dated 1 November 2007, **C-413**; Lease Agreement concluded between Obnova and Hemtex dated 4 November 2009, **C-414**; Lease Agreement concluded between Obnova and Lemit dated 1 May 2012, **C-415**; Real Estate Lease Agreement concluded between Obnova and Lemit dated15 June 2022, **C-416**.

68. All of the above proves that Obnova was merely a lessee of the Dunavska Plots and Objects and had no right of use over them.

II. Objects constructed at Dunavska 17-19 based on the construction permits are temporary

69. In the Counter-Memorial, Respondent demonstrated that Obnova had obtained construction permits that authorised construction only of temporary objects on parcel no. 47, as well as that these permits were issued in accordance with the then-applicable regulations.[118] Respondent further showed that the materials from which the objects are constructed, their duration, and the inscription of the objects in the public records, are utterly immaterial for determination of the objects as permanent under Serbian law.[119] Therefore, Obnova's construction of the Objects pursuant to construction permits that allowed construction of the temporary objects cannot result in the right of use of the land at parcel no. 47.[120]

70. Claimants argue that "*Obnova's permits were not and could not have been temporary",*[121] because the then-applicable law "*did not allow for the issuance of temporary permits*".[122] Claimants also emphasize that the references in the permits to the *temporary use* and to the demolition obligation were adopted from the 1953 lease agreement.[123] They also claim that the materials and other technical criteria are relevant for the qualification of the object as permanent or temporary under Serbian law and refer to their civil engineering expert, Prof. Arizanovic, who has concluded that the objects "*are permanent from the viewpoint of the engineering practice*".[124]

71. Claimants are wrong. Respondent will demonstrate that: the construction permits issued to Obnova, as well as the documents concerning the issuance of these permits, permitted the construction of *temporary* objects (**Section 1**); under the then-applicable regulations it was possible to issue construction permits for temporary objects and it was a widespread practice in Serbia at the time (**Section 2**); the materials from which the Objects

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118 Counter-Memorial, paras 45- 53.

119 Counter-Memorial, paras 54-60.

120 Counter-Memorial, Section IV.

121 Reply, para 126.

122 Reply, paras 19, 55 and 93.

123 Reply, para 109, 121, 206 and 344.

124 Reply, paras 55 and 93-95.

were constructed and their duration are irrelevant for their characterization as temporary (**Section 3**); the Objects are temporary even from the perspective of civil engineering practice, as Respondent's civil engineering expert confirms (**Section 4**).

1. Construction permits issued to Obnova, as well as the documents concerning the issuance of the permits expressly refer to the construction of temporary objects

72. As Respondent already explained in the Counter-Memorial, six out of seven construction permits issued to Obnova explicitly permitted the construction of the objects "*FOR TEMPORARY USE*".[125] Claimants, however, argue that this wording (in capital letters) is irrelevant and should be ignored. Respondent notes that the same wording is featured in the documents prepared prior the issuance of the permits. For example:

- Before the issuance of the construction permit dated 31 October 1949, the City issued a report dated 4 October 1949, which allowed Obnova to construct a *"temporary, wooden warehouse, for storing baled paper."*[126] The Report explicitly stated that it concerned a "*[t]emporary warehouse in Dunavska Street…",* and that the *"[b]arrack-warehouse is temporary and if necessary, and upon request of the Executive Council of P.C. of the City of Belgrade, it shall be demolished."*[127]
- Similarly, on 31 March 1953, the City issued a report for the purposes of obtaining the construction permit in April 1953, the subject of which was the "*Location for erecting a temporary canopy in Dunavska Street*". According to the report, the City granted "*the location for constructing a temporary canopy warehouse*", the "*object*

[125] As already explained by Respondent in Counter-Memorial, only one of Obnova's construction permits did not contain such reference. Specifically, the permit for the construction of plumbing installations and sewerage dated 29 July 1954 does not state that it was issued for the construction of a temporary object, but the fact that the installations were intended for a temporary object implies that the installations themselves were temporary. See Counter-Memorial, para 47; 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. 9358 dated 29 July 1954, **C-154**; Construction permit No. 18578 dated 2 November 1954, **C-155;** Construction permit No. 21817 dated 24 December 1954, **C-156.**

[126] Report to the investor on general approval or rejection dated 4 October 1949, **R-154;** Construction permit No. 5034 dated 31 October 1949, **C-150.**

[127] See upper left side, as well as the second paragraph of the Report to the investor on general approval or rejection dated 4 October 1949, **R-154.**

is temporary", and the investor had to remove it upon the request of the competent authority.[128]

- For the purpose of obtaining the construction permit dated 22 March 1954, Obnova provided the City with a document entitled "*Technical description of the main design for temporary office building of "Obnova" in Belgrade*".[129] This document contains the following statement: *"The Urban Planning Institute of People's Committee of the City of Belgrade has decided that the building can be only temporary, either prefabricated or made of brick in mud."*[130]
- The decision on the approval of the location issued by the City in relation to the construction permit dated 24 December 1954, also explicitly stated that it permitted construction of a "*temporary warehouse for packing iron in bundles*". It also noted that the "*the Locations Department, in cooperation with the Urban Institute, proposed that the location of the subject building be approved as a temporary solution*".[131]

73. In view of the above and the explicit wording of the construction permits, Claimants cannot seriously argue that the references to the temporary nature of the objects are irrelevant for the determination of their nature.

74. Respondent's expert, Professor Ivanisevic, who is both a construction engineer and a lawyer, analysed Obnova's construction permits and had no doubts that objects constructed based on such permits are temporary.[132]

75. To prove that the objects are not temporary, Claimants and their Serbian law experts note that Obnova's construction permit for a plumbing installation and sewerage from July

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[128] Report to the investor on general approval or rejection dated 31 March 1953, **R-152**; Construction permit No. 1846 dated 21 April 1953, **C-151.**

[129] Technical description of the main design for Obnova's temporary office building dated 29 December 1953, **R-153;** Construction permit No. 730 dated 22 March 1954, **C-152.**

[130] Technical description of the main design for Obnova's temporary office building dated 29 December 1953, **R-153**.

[131] Decision on location approval for construction permit dated 24 December 1954, **C-473;** Construction permit No. 21817 dated 24 December 1954, **C-156**.

[132] Expert Opinion-Prof Nenad Ivanišević-Rejoinder-ENG dated 14 June 2024, **REO-001,** para 41.

1954 and its occupancy permit from 30 May 1956, do not mention that the objects are for temporary use.[133] This is misleading.

76. As already explained in the Counter-Memorial, the construction permit for plumbing installations and sewerage was issued for an office building which, according to the construction permit from March 1954, was constructed for temporary use.[134] As a result, the plumbing installations and sewerage installed in this building are only temporary as well. Prof Ivanisevic agrees with this conclusion.[135]

77. Similarly, the occupancy permit dated 30 May 1956 was issued for two objects that are temporary, which stems from their construction permits.[136] The legal status of the objects determined by their construction permits cannot be changed by an occupancy permit. The fact that the occupancy permit confirmed that the objects were constructed in accordance with the construction permits meant that they could be used only temporarily, as envisaged in the construction permits:[137]

> *Urban Regulatory Plan of the People's Committee of Belgrade District hereby issues to the TRADE COMPANY "OBNOVA" from Belgrade, the following PERMIT to use its newly constructed buildings, specifically: 1) the building of Headquarters located at Dunavska Street no. 17 in Belgrade, and 2) hydraulic press 17. These buildings have been constructed based on the construction permits no. 730 and 21817/1954.*[138]

78. Prof Ivanisevic also confirmed that the temporary status of objects was already determined in the construction permits, therefore there was no need to repeat this fact again in the occupancy permit.[139]

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133 Occupancy permit No. 11169/56 dated 30 May 1956, **C-157**; Construction permit No. 9358 dated 29 July 1954, **C-154**; **Živković Milošević ER-2**, para 66.

134 Counter-Memorial, para 47; Construction permit No. 9358 dated 29 July 1954, **C-154**; Construction permit No. 730 dated 22 March 1954, **C-152**.

135 Expert Opinion-Prof Nenad Ivanišević-Rejoinder-ENG dated 14 June 2024, **REO-001,** para 44.

136 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**.

137 Construction permit No. 730 dated 22 March 1954, **C-152** and Construction permit No. 21817 dated 24 December 1954, **C-156**.

138 Occupancy permit No. 11169/56 dated 30 May 1956, **C-157** (emphasis added).

139 Expert Opinion-Prof Nenad Ivanišević-Rejoinder-ENG dated 14 June 2024, **REO-001,** paras 45-47**;** 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**.

79. Finally, it should be highlighted that Prof Ivanisevic has noted that, after inspecting the Objects, he can only conclude that only one existing building at Dunavska 17-19 was constructed in accordance with the construction permit (the object no. 1, "new office building").[140] For some reason, Claimants engineering expert, Prof Arizanovic, who also inspected the Objects, failed to mention whether the currently existing objects correspond to the objects from the construction permits.[141]

2. Issuance of construction permits for temporary objects was allowed by the then-applicable regulations and was a widespread practice in Serbia

80. Facing the lack of effective arguments, Claimants and their Serbian law experts argue that, at the time of the issuance of the construction permits to Obnova, the applicable law "*did not allow for the issuance of temporary permits.*"[142] On this basis, Claimants conclude that the permits envisaged construction of permanent buildings. This is incorrect.

81. As is evident from the construction permits issued to Obnova, none of them was entitled "temporary (construction) permit", but "construction permit".[143] The then-applicable regulations that governed the issuance of construction permits, Basic Regulation on Construction from 1948 and the Regulation on Construction from 1952, mandated the following:

> *Construction cannot be initiated without a construction permit.*[144]
>
> *and*
>
> *Construction works on an object must not be started without a construction permit.*[145]

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[140] Expert Opinion-Prof Nenad Ivanišević-Rejoinder-ENG dated 14 June 2024, **REO-001,** para 63; Construction permit No.730 dated 22 March 1954, **C-152**.

[141] **Arizanović ER**, paras 13-14.

[142] Reply, paras 19, 55 and 93. **Živković-Milošević ER-2**, paras 56-61.

[143] *Temporary construction permit* is the expression that is regularly used for the construction permits issued for the construction of the temporary objects. See Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, footnote 33.

[144] Basic Regulation on Construction, Official Gazette of the Federal People's Republic of Yugoslavia, No. 46/48, **R-074**, Article 16 (1).

[145] Regulation on Construction, Official Gazette of the Federal People's Republic of Yugoslavia, No. 14/52, **R-075,** Article 23.

82. Respondent's Serbian law expert, Prof Jotanovic, confirms that at the time, all objects, including temporary objects, required a construction permit:

> *During that period, as well as today, legal regulations were unambiguous – construction without construction permit was not permitted, thus it is clear that erection of a temporary object also required construction permit.*[146]

83. Claimants' argument that the authorities were able to issue construction permits for temporary objects only "*if they were specifically allowed to do so by the law*"[147] is absurd. Under this logic, Serbian authorities would not have been allowed to issue construction permits for permanent objects as well, as the regulation did not refer to permanent objects either.

84. Claimants and their Serbian law experts claim that the Regulation on Construction Design from 1952 does not prove that the construction of temporary objects was allowed and regulated.[148] However, they fail to explain why the said Regulation contained an explicit reference to temporary objects[149] and why it required preparation of different documents for the construction of temporary objects than in case of permanent objects. Specifically, for the permanent objects, the Regulation required both main and preliminary designs, while only main designs were required for temporary objects.[150] Evidence shows that Obnova prepared only main designs.[151] The lack of preliminary designs is yet another confirmation of the temporary nature of the objects in question.

85. The fact that the then-applicable legislation permitted issuance of construction permits for the erection of temporary objects is also evidenced by the fact that such permits were being issued to other entities. Just like Obnova's construction permits, these other permits, which were issued in 1950s, 1960s and 1970s, allowed for the construction of

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146 Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004,** para 24.

147 Reply, paras 115-116; **Živković-Milošević ER-2**, para 56.

148 Counter-Memorial, paras 51-52 and 57; Reply, para 117; **Živković-Milošević ER-2**, para 60.

149 Article 10 (1) of the Regulation on Construction Design states that "*preliminary design does not have to be prepared for: business and residential buildings of private investors; temporary construction objects for needs of business enterprises, state bodies, institutions, cooperative and social organizations*." (emphasis added). See Regulation on Construction Design of 1952, **R-036**, Article 10(1).

150 Regulation on Construction Design of 1952, **R-036**, Article 10.

151 Counter-Memorial, paras 51-52; 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**.

objects for temporary use and required that these objects are demolished upon the request of the competent authority.[152] Serbian courts have also frequently addressed construction permits for the erection of temporary objects.[153]

86. Obnova itself obtained one more permit for the construction of a temporary object but on another location, in Herceg Stepana Street, in Belgrade.[154] This construction permit also authorised the construction of an object for temporary use and provided that Obnova had to remove the object upon the request of the People's Committee of the City of Belgrade.[155] Similarly, as with the Dunavska Plots, Obnova leased the land at Herceg Stepana Street.[156]

87. Professor Jotanovic explains in his Second Report that it was very common for entities in socialist Yugoslavia to construct temporary objects on the land they leased.[157] This was also noted by scholars at the time:

> *On the other hand, there is a need to utilize someone else's land, among other reasons, for the erection of temporary objects.*
>
> *(...)*
>
> *The legal relationship that enables such use of someone else's land is typically established between the owner of the land and the owner of temporary objects, most commonly through a lease agreement...*
>
> *(...)*
>
> *The owner of the temporary building uses someone else's land on the basis of the lease agreement...*[158]

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[152] Construction permit issued to Technical store Kopaonik dated 2 October 1953, **R-156**. Construction permit issued to Bravarsko-limarsko preduzece Beograd dated 23 September 1960, **R-158.** Construction permit issued to Slovenijapromet dated 19 May 1969, **R-157.** Construction permit issued to Slovenijapromet dated 12 July 1973, **R-159.**

[153] Judgement of the Supreme Court of Serbia, No. Rev 990/2006, 14 December 2006, p. 1, **RJ-058** and Judgement of the Appellate Court in Belgrade, No. Gz 1471/2013, 13 November 2014, **RJ-059**.

[154] Obnova's construction permit for Herceg Stepana Street dated 25 October 1954, **R-155.**

[155] Compare, for example, the text of the construction permit dated 2 November 1954 issued to Obnova for Dunavska 17-19, **C-155**, and the text of Obnova's construction permit for Herceg Stepana Street dated 25 October 1954, **R-155**.

[156] Lease agreement between Obnova and the City of Belgrade dated 28 August 1969, **R-169**.

[157] Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para 50.

[158] Simonetti Petar, Construction on Someone Else's Land, Sarajevo, 1982, **R-167,** pp. 52 and 60**.**

88. Therefore, there was nothing illegal or unusual in the issuance of construction permits for construction of temporary objects at the land that was leased to Obnova in Dunavska Street. On the contrary, that was in line with the then applicable regulation and widespread practice in Serbia.[159]

89. Considering the above, Claimants' allegation that the references to temporary use of the objects and the obligation to demolish them were copied the 1953 lease agreement is absurd.[160] It is even more striking that the Claimants' Serbian law experts share this preposterous view despite that there was a practice of issuing such permits. Claimants' experts have also failed to note the following:

- Obnova's construction permit from 1949 and the City's report from 4 October 1949 which was issued in relation to this permit, also state that only object for temporary use can be constructed, as well as that the object has to be removed at the request of the competent authority. Both documents obviously predate the lease agreement from 1953.[161]
- The Report to the investor on general approval or rejection, issued on 31 March 1953 by the City in relation to the construction permit from April 1953, also contained clear indications that the objects were temporary and that, as such, should be demolished. This Report also predates the lease agreement from 1953.[162]
- Obnova's construction permit relating to Herceg Stepana Street also allowed construction of the object for temporary use and contained a demolition obligation, although that location was not the subject of the lease agreement from 1953.[163]

90. All of the above undoubtedly refutes Claimants' argument that the construction permits simply copy the contents of the 1953 lease agreement and that therefore, the objects were not temporary.

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159 Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para 21-26.

160 Lease Agreement between Obnova and Serbia dated 10 April 1953, **C-007;** Reply, paras 109,121,206 and 344; **Živković-Milošević ER-2**, paras 62-65; See Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, paras 37-39.

161 Construction permit No. 5034 dated 31 October 1949, **C-150;** Report to the investor on general approval or rejection dated 4 October 1949, **R-154.**

162 Report to the investor on general approval or rejection dated 31 March 1953, **R-152;** Construction permit No. 1846 dated 21 April 1953, **C-151.**

163 Obnova's construction permit for Herceg Stepana Street dated 25 October 1954, **R-155.**

91. For the sake of completeness, Respondent also notes that, even if Claimants were right, and the demolition obligation indeed originated from the 1953 lease agreement, Obnova would still have been obliged to demolish the objects, regardless of the termination of that agreement, which according to Claimants would have caused this obligation to expire.[164] First, the termination of the 1953 lease agreement cannot impact Obnova's public law obligation stemming from the administrative act, i.e. the construction permit.[165] Second, by concluding the 1953 lease agreement, Obnova, *inter alia*, undertook the obligation to demolish the objects it constructed, "*upon expiry of the lease"*.[166] Accordingly, the demolition obligation could not have ceased to exist at the moment the lease was terminated.[167]

3. The materials from which the objects are constructed and their duration are irrelevant

92. As explained in the Counter-Memorial, the status of the object as temporary or permanent does not depend on the material it was built from, but on the content of the construction permit, i.e. whether it allowed construction of a permanent or temporary object.[168] This stance, completely disregarded by Claimants and their experts, was unanimously adopted in Serbian court practice, including by the Supreme Court of Serbia:

> *The indication in the revision that the disputable object is erected on a concrete foundation, partially built of solid material, and partly of wood, with the firm incorporation into the ground, to the extent that this object cannot be relocated from one place to another without damaging its essence, is unfounded, considering the competent administrative authority permitted its construction as a temporary object, while the material it is constructed from or its suitability for relocation to another location is of no importance.*[169]

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[164] **Živković-Milošević ER-2,** paras 64-65 and 85; Reply, paras 93, 108-109, 121, 206 and 344.

[165] Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para 39.

[166] Lease Agreement between Obnova and Serbia dated 10 April 1953, **C-007,** Article 5.

[167] Lease Agreement between Obnova and Serbia dated 10 April 1953, **C-005**, Article 5.

[168] Counter-Memorial, para 58; Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 28-29.

[169] Judgement of the Supreme Court of Serbia, No. 2903/2005 dated 15 December 2005, **RJ-018**; Judgment of the District Court in Šabac, No. Gž 2029/00 from 22 January, 2001, **RJ-019** ("In order to determine the character of the object, the type of material it was built of is irrelevant, what is relevant is its legal status…") (emphasis added); Judgement of the Appellate Court in Belgrade, No. Gz 1471/2013 from 13 November 2014, **RJ-059** ("*it stems that the claimant's legal predecessor got approval for the object in question – garage with*

93. In his first report, Prof Jotanovic drew attention to the above-quoted decision of the Supreme Court of Serbia from 2005, as well as to the District Court's decision from 2001 which confirmed that the legal status of objects depends on their construction permits and not on the materials used for their construction (RJ-018 and RJ-019). Claimants' Serbian law experts state that these decisions are *inapposite*,[170] yet they provide no supporting arguments in that regard whatsoever.[171] Claimants' experts were also unable to provide a single court decision stating the opposite from the practice that Prof Jotanovic has pointed to.

94. Respondent's expert, Prof Ivanisevic agrees that the status of an object is permanent or temporary is determined by its construction permits, while the physical characteristics of the object are irrelevant for this assessment.[172]

95. As already explained in the Counter-Memorial, Claimants' statement that according to one decision of the Constitutional Court "*only smaller prefabricated buildings that are placed in public areas (kiosks, summer gardens, mobile stalls, etc.) ha[ve] [a] temporary character*", is irrelevant.[173] As previously explained, the Constitutional Court did not provide a definition of temporary objects, but simply referred to Article 98 of the 2003 Law on Planning and Construction, enacted decades after the issuance of Obnova's construction permits.[174] The pronouncement of the Constitutional Court is therefore immaterial to the dispute at hand. Claimants themselves noted that laws adopted 70 years after the

workshop as temporary object so that it may use the same until such approval is revoked, i.e. until being ordered by the relevant body to remove the object at its own expense") (emphasis added).

170 **Živković Milošević ER-2**, para 80; See, for example, Judgement of the Supreme Court of Serbia, No. 2903/2005 dated 15 December 2005, **RJ-018**; Judgment of the District Court in Šabac, No. Gž 2029/00 from 22 January, 2001, **RJ-019** and Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 28 and 29.

171 **Živković Milošević ER-2**, para 80.

172 Expert Opinion-Prof Nenad Ivanišević-Rejoinder-ENG dated 14 June 2024, **REO-001,** paras 18 and 28-32**.**

173 Counter-Memorial, paras 55-58; Reply, paras 96-99.

174 Decision of the Constitutional Court, Case No. IUI 156/2009, Official Gazette of the Republic of Serbia, No. 55/10, 22 June 2010, p. 6 (of PDF), **C-056**. Claimants omitted to mention that the relevant text was taken from the Article 98 of the Law on Planning and Construction from 2003 and not "*created*" by the court itself. Compare the text of the Article 98 of the Law on Planning and Construction from 2003, **R-040,** with the cited text from the decision No. IUI 156/2009, p. 6 (of PDF), **C-056.**

construction of the Objects cannot be retroactively applied to the issues related to their construction.[175]

96. Finally, the allegedly permanent nature of the Objects in Dunavska 17-19 is, according to Claimants and their legal experts, evidenced by the fact that these Objects were registered in the public registers.[176] As Respondent already explained, the Cadastre is not a competent authority to determine the legal status of objects, given that the legal status is determined by the relevant construction permit.[177] Therefore, the fact that the ownership rights over the Objects were inscribed in the Cadastre does not alter the fact that these Objects are temporary.

4. <u>Serbian court practice supports Respondent's case</u>

97. Claimants' Serbian law experts state that "*permanent permits were issued for objects that were* de facto *temporary because of their physical characteristics or because of the existence of an obligation to demolish them at a certain time or at the request of a third party. This was also the case of the objects discussed in the decisions relied upon by Prof. Jotanović*".[178] Then they continue to rely on the Supreme Court's decision from 2006 (RJ-058), the decision of the Appellate Court of Belgrade from 2014 (RJ-059), and the decision of the Supreme Court of Serbia, from 1999 (C-497).

98. First, Claimants fail to provide a single piece of evidence that *permanent construction permits* were ever issued in Serbia. The above-mentioned court decisions to which Claimants' experts refer also do not mention *permanent permit*s. This is of no surprise since, as already explained above (see Section B.II.2.), the construction permits issued for both temporary and permanent objects were simply named *construction permits*, while the status of the objects whose construction was the subject matter of the permits was designated within the executive part of the permit.

99. **Supreme Court's decision from 2006 (RJ-058).** Claimants' experts argue that in this decision the court concluded that the materials from which the object is constructed are decisive for assessing the status of the objects.[179] This is wrong. The court found that the

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175 Reply, para 118.

176 Reply, para 105-106; **Živković Milošević ER-2**, para 83 and 86.

177 Counter-Memorial, para 60; See paras 92-94 above. See also Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para 32.

178 Živković-Milošević ER-2, para 81.

179 Živković Milošević ER-2, paras 82-83.

object at issue in this case was temporary as was stated in the construction permit, while the building materials were only mentioned in passing:

> *... it was indisputably established in the proceedings that now deceased PP was not the owner of the premises which he transferred to the plaintiff by the sale and purchase agreement, but he had acquired, as a lessee of the premises, the right to build premises based on temporary building permit, from iron portals in glass, which had to be disassembled without compensation at request of the competent body.* [180]

100. As can be seen from the quoted sentence, the claimant was the lessee of the land and was allowed to build the temporary object based on the construction permit, which he had to remove without compensation at request of the competent authority. This situation was literally identical to the case before this Tribunal.

101. **Decision of the Appellate Court of Belgrade from 2014**. This decision states that

> *the claimant's legal predecessor got approval for the object in question – garage with workshop as temporary object so that it may use the same until such approval is revoked, i.e. until being ordered by the relevant body to remove the object at its own expense.* [181]

102. Claimants' experts argue that "*this object, thus, falls into the second category mentioned above—i.e. objects considered temporary because of the existence of an obligation to demolish upon request of a third party*". [182] They do not explain why this decision is contradictory to Respondent's position. Obnova also got the approval for temporary objects and was obliged to have them demolished ordered by the competent authority.

103. **Decision of the Supreme Court of Serbia from 1999.** Claimants contend that in this decision the court "*held that buildings existing for more than 50 years were clearly intended to be permanent and cannot be considered temporary"*.[183] Unlike the above-described cases, the situation considered in this court proceeding was not comparable with the present case because it related to an object constructed without a construction

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[180] Judgement of the Supreme Court of Serbia, No. Rev 990/2006, 14 December 2006, p. 1, **RJ-058**; Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para 34.

[181] Judgement of the Appellate Court in Belgrade, No. Gz 1471/2013 from 13 November 2014, **RJ-059**; Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para 34.

[182] Živković Milošević ER-2, para 84.

[183] Živković Milošević ER-2, para 87.

permit,"*in 1938, when no building permit was required for such facilities"*[184] This decision therefore, relates to an object constructed without a construction permit at the time when no construction permit was required, so in order to determine the status of that object, the court had to rely on other factors, such as its duration.[185] The situation is totally different for objects constructed after 1938, when construction permits were necessary. As showed hereunder, the court practice is on unanimous stance that in such cases the legal status is determined by the relevant construction permit and not by its duration, or material, or any other factors.

5. The Objects are not permanent even from the perspective of civil engineering practice

104. Claimants contend that the construction material is a decisive factor in determining whether an object is permanent or temporary.[186] Claimants therefore engaged a civil engineer expert, Prof Arizanovic, who concluded that the Objects are permanent "*from the viewpoint of engineering practice*".[187] As will elaborated hereunder, this conclusion does not hold.

105. As explained by Prof Ivanisevic, "permanent buildings" are buildings that have a *legal permit* to exist and are to be used indefinitely in the future (permanently).[188] On the other hand, "durable buildings" are buildings that are constructed in such a way and are made of materials which do not lose their load bearing and other key characteristics in a short period of time (long lasting buildings). Durable (long lasting) buildings are not necessarily permanent. This is because not all durable buildings are *permitted* to remain for as long as the material from which they are constructed exists. In fact, as Prof Ivanisevic explains, from the engineering point of view, there is no permanent structure or building

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184 Decision of the Supreme Court of Serbia, Case No. Rev. 453/97, 29 November 1999, **C-497** ("*In the files, there is an opinion of the Expert Service of the Municipal Committee for Tourism, stating that in the case of the disputed Plot No. 234/2, it is a developed plot of land, because there is a building facility erected on it in 1938, when no building permit was required for such facilities, so it cannot be considered illegally erected, and that the expropriation of property cannot be carried out*.")

185 Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO**-004, para 35.

186 Reply, paras 55 and 94-96.

187 Reply, para 95; **Arizanović ER**, paras 42 and 50.

188 Expert Opinion-Prof Nenad Ivanišević-Rejoinder-ENG dated 14 June 2024, **REO-001,** paras 9,10,13 and 28.

(where permanent means lasting forever), as all materials are subject to deterioration through time.[189]

106. Prof Ivanisevic further explains the difference between *permanent* buildings and *temporary* buildings and notes that permanent buildings are buildings that have a legal permit to exist and to be used indefinitely in the future (permanently), while temporary buildings do not have the legal right to exist for an indefinite period of time, but instead they can be used for a certain period of time and then they have to be removed.[190]

107. When defining temporary objects, Prof Arizanovic relies on the regulations that are applicable today.[191] He does not explain how these regulations are relevant for Objects constructed decades ago.[192] On the basis of these regulations, Prof Arizanovic mentions several examples of what he claims are temporary objects (pop-up structures, tents, pavilions and others).[193] However, he actually refers to smaller prefabricated structures and not to temporary objects. Prefabricated objects have a completely different legal status than temporary objects - for example, installation and demolition of smaller prefabricated objects are governed by the local authorities, while temporary objects are built in accordance with temporary construction permits. This has also been elaborated in detail by Prof Ivanisevic.[194]

108. Therefore, even from engineers' perspective the Objects are not permanent. They could only be durable. But that does not change the fact that they are *temporary*, because they have been constructed either based on the permits allowing only construction of the objects for temporary use or without any permits.

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189 Expert Opinion-Prof Nenad Ivanišević-Rejoinder-ENG dated 14 June 2024, **REO-001,** Section IV.

190 Expert Opinion-Prof Nenad Ivanišević-Rejoinder-ENG dated 14 June 2024, **REO-001,** Section V.

191 **Arizanović ER**, paras 20-2

192 See Counter-Memorial, para 57.

193 **Arizanović ER**, paras 20-21; See Expert Opinion-Prof Nenad Ivanišević-Rejoinder-ENG dated 14 June 2024, **REO-001**, Section V.

194 2009 Law on Planning and Construction as amended in 2023, Article 147 (1), (2), (**R-201**); Expert Opinion-Prof Nenad Ivanišević-Rejoinder-ENG dated 14 June 2024, **REO-001,** paras 35-38**.** In the footnote 11 Prof. Arizanović also refered to the Decision on the installation of temporary facilities in the territory of the City of Belgrade from 2015 which governs only the prefabricated objects for which installation the City of Belgrade issues an approval. Arizanovic's report, para 20. See Decision on the installation of temporary facilities in the territory of the City of Belgrade, **C-467**.

III. Obnova was never registered as the holder of property rights over the Dunavska Plots and the Objects

109. In its Counter-Memorial Respondent presented a detailed historical overview of the inscriptions for the Dunavska Plots and the Objects starting from the socialist era.[195] The Parties are in agreement that Obnova was never registered as the holder of any rights over the Dunavska Plots and the Objects.[196] It is also undisputed that Luka Beograd was registered as the holder of the right of use over the Dunavska Plots,[197] while the City of Belgrade has been inscribed since 2003 as the holder of the right of use over both the Dunavska Plots and the Objects.[198]

110. To overcome the fact that Obnova was never inscribed in the Cadastre, Claimants and their Serbian law experts argue that the obligation to register property rights was largely ignored in communist Yugoslavia,[199] and that Respondent should not therefore be entitled to rely on historical inscriptions.[200] Respondent will address the legal significance of inscriptions in the public registers and show that Obnova was careful to register the property rights it actually had in other properties (**Section 1**). Respondent will also demonstrate that Obnova's requests for inscription of its alleged rights over the Dunavska Plots from 2003 and 2015 lack any legal basis (**Section 2**), and that the 2003 Registration of the City of Belgrade did not interfere with Obnova's alleged property rights over the Dunavska Plots and the Objects, namely because Obnova had no such rights (**Section 3**). Finally, Respondent will address Claimants baseless allegations that annotations on the maps can serve as a proof of property rights (**Section 4**), and as well as allegations that Information from the Cadastre dated 31 July 2023 is erroneous (**Section 4**).

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195 Counter-Memorial, Section B.III.2.a) and B.III.2.b).

196 Counter-Memorial, Section B.III.2.a) and B.III.2.b).

197 As explained on pages 25-26 of the Counter-Memorial, in 1966 Luka Beograd was inscribed as the holder of the right of use for the parcel no. 47 (Dunavska 17-19), Land Book insertion no. 5, **R-052**, p. 4 (of PDF). In 1968 it was inscribed as the holder of the right of use over the part of the parcel no. 39/1 (Dunavska 23). Land Book insertion no 2461, **R-056**.

198 Counter-Memorial, para. 77; Cadaster decision No. 952-02-9-31/03 relating to Dunavska 23 dated 22 November 2003, **C-184**; Cadaster decision No. 952-02-9-31/03 relating to Dunavska 17-19 dated 22 November 2003, **C-165**.

199 Reply, paras 215 and 216, Memorial, para. 64, **Živković Milošević ER-2**, para 26; **Živković Milošević ER-1**, paras 100-102.

200 Reply, para 223.

1. Obnova acknowledged the legal significance of the inscriptions in the public registers

111. According to Serbian law, "*there is a legal presumption that everything inscribed in the land book is true and accurate*".[201] As Claimants rightfully note, this presumption is rebuttable.[202] However, unless it is rebutted, this legal presumption triggers certain consequences.

112. For example, a Land Book or Cadastre registration serves to notify third parties about existence of the inscribed rights and makes these rights opposable to third party claims.[203] Registration secures the position of the registered person in the event of a dispute, since a Land Book or Cadastre excerpt is a public document whose contents are presumed to be correct.[204] Additionally, only registered holders of property rights may enjoy the full scope of these rights. As stated by one of Claimants' experts, Prof Živković, "*only the person inscribed as the holder of a certain right in the cadastre is entitled to dispose of this right in a legal transaction*".[205] Unregistered holders of such rights cannot transfer their rights or encumber them, unless and until such rights are inscribed in the Cadastre.[206]

113. The legal authorities referred to by Claimants' Serbian law experts confirm that socially-owned companies (such as Obnova) were responsible for the protection of their own rights and social ownership over the assets they held.[207] Respondent has already demonstrated that Obnova was careful to register the rights it had over certain land in Valjevo in 1982,[208] whereas it made no attempt to register its purported rights over the Dunavska Plots at the time. Claimants are unable to provide any reasonable explanation for this, and instead they falsely state that the inscription of the rights over the land in Valjevo

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201 Counter-Memorial, para. 70; Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 31.

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

203 Živković, Miloš, *Law of Land Registers*, Belgrade, 2022, **R-168**, para 134.

204 Živković, Miloš, *Law of Land Registers*, Belgrade, 2022, **R-168**, para 134.

205 Živković, Miloš, *Law of Land Registers*, Belgrade, 2022, **R-168**, para 140.

206 Živković, Miloš, *Law of Land Registers*, Belgrade, 2022, **R-168**, para 140.

207 **Živković Milošević ER-1**, para 101; S. Georgijevski, *Real Property Records*, Anali PFB 1-6/2000, **C-130**, p 4 (of PDF).

208 Counter-Memorial, para 82.

was done by another legal entity, OOUR Dunav, and not Obnova.[209] Yet, the Land Book excerpt reveals that the holder of the right of use over the Valjevo land was "*Work organization 'Obnova' Basic organization of joint work 'Dunav' Belgrade*". The "Basic organization Dunav" operated within Obnova until 1986, as Claimants are well-aware.[210]

114. Claimants' contention that Obnova's failure to register its rights was "*consistent with the then prevailing practice*"[211] and that it "*started to take first steps to put its records in order*" only in March 2003,[212] is therefore untrue. Obnova kept its records in order and registered its property rights even *before 2003*, but it obviously (and rightfully) did not consider having any property rights over the Dunavska Plots and the Objects that are suitable for registration.

2. Obnova's requests for inscription in the Cadastre in 2003 and 2015 were rightfully rejected

115. Obnova's attempts to inscribe its alleged rights in 2003 were rightfully rejected by the Cadastre, which Obnova did not contest at the time. This shows that Obnova did not credibly consider it was entitled to any property rights over the Dunavska Plots and the Objects.

116. Obnova filed its first request for inscription of the right of use over the objects on parcel no. 47 and one object on parcel no 39/1 on 18 March 2003.[213] As the supporting documentation it provided was insufficient,[214] the Cadastre contacted Obnova's manager, who informed it that Obnova did not possess any other appropriate documentation in support of its request. On 20 May 2003 the Cadastre prepared a report about this correspondence,[215] In its Privatisation Program, Obnova referred to the Cadastre's report without contesting what was stated therein. On the contrary, the Privatization Program

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209 Reply, para. 227.

210 Land Book Excerpt for Valjevo land, **R-066**. List of Obnova's deleted corporate divisions of labor, **C-583**; Obnova's registration of a corporate division of labor, **C-584**; Separation of "Dunav" from Obnova**, C-585**.

211 Reply, para 224.

212 Memorial, para 67.

213 Counter-Memorial, para 84; Request for registration of immovables to the Cadaster dated 18 March 2003, **C-013**.

214 Counter-Memorial, paras 86-87.

215 Counter-Memorial, para. 86. See Report of the Cadastre from 20 May 2003, **R-130** and Report of the Cadastre of 9 April 2003, **R-067**.

contains a lengthy summary of the Cadastre's report, which indicates that Obnova considered this to be important information for potential buyers.[216]

117. Notably, Obnova did not object to the Cadastre's conclusions, request the Cadastre to render any decision or submit any further information to the Cadastre. Instead, Obnova remained silent for the next 12 years, even after the City was inscribed as the holder of the right of use over the Dunavska Plots and the Objects in November 2003, shortly after the Cadastre's report was issued.[217] Claimants' assertion that Obnova was ignored by the Cadastre[218] is therefore untrue. Obnova was informed by the Cadastre that it had no proper documentation to support its request for inscription of its claimed property rights and, at the time, Obnova did not dispute this conclusion.[219]

118. Obnova submitted a second request for inscription of its property rights over the Objects at Dunavska 17-19 on 24 September 2015. Obnova's request was dismissed due to the expiry of the ten-year deadline for the submission of requests to rectify the allegedly erroneous inscriptions of the City in 2003. With the passing of this deadline, the legal presumption of the accuracy of the information inscribed in the Cadastre was established

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[216] The Privatisation Program contains the following 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 the State Geodetic Authority, 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 State Geodetic Authority, 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*". Privatisation Program, **R-046**, pp 7-9 (of PDF).

[217] Counter-Memorial, para 77; Cadaster decision No. 952-02-9-31/03 relating to Dunavska 23 dated 22 November 2003, **C-184**; Cadaster decision No. 952-02-9-31/03 relating to Dunavska 17-19 dated 22 November 2003, **C-165**.

[218] Reply, para 231.

[219] Counter-Memorial, paras 84-87.

such that the inscription could be challenged only in court proceedings.[220] To miss a decade-long deadline speaks for itself as evidence of Obnova's and Claimants' attitude towards the rights they now claim to have.

3. The inscription of the City of Belgrade in 2003 did not interfere with Obnova's purported property rights

119. As elaborated in Counter-Memorial,[221] on the basis of the 1975 Agreement, Luka Beograd transferred to the City its rights over, *inter alia*, parcels no. 47 and 39/1. On this basis, the City was registered in the Cadastre in 2003, in a procedure in which Luka Beograd also participated.[222] However, Luka Beograd continued to use the Dunavska Plots (and to lease them to Obnova) in accordance with Annex 3 of the 1975 Agreement, which permitted Luka Beograd to continue to use parcels nos. 47 and 39/1 "*until the land is brought to its intended urban purpose*".[223]

120. Claimants incorrectly assert that the "*alleged rights of the City had to be determined by the court*" before the inscription in the Cadastre.[224] The City did not have to go before the court as it had the appropriate documentation which provided a sufficient legal basis for registration of its rights, i.e. the 1975 Agreement. This was explicitly confirmed by the Cadastre during the inscription procedure following Luka Beograd's appeal against the City's inscription.[225]

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220 Counter-Memorial, para 88; Obnova's request for ownership registration in the Cadaster dated 18 September 2015, **C-035**; Decision of the Cadaster Office No. 952-02-6-1732/2015 22 March 2016, **C-036**; Decision of the Republic Geodetic Authority from 9 May 2016, **R-070**.

221 Counter-Memorial, para 77 and fn. 145.

222 Counter-Memorial, para 77; Request for suspension of changes in the Cadastre submitted by Luka Beograd on 12 October 2001, **R-061;** Cadaster decision No. 952-02-9-31/03 relating to Dunavska 23 dated 22 November 2003, **C-184**; Cadaster decision No. 952-02-9-31/03 relating to Dunavska 17-19 dated 22 November 2003**, C-165**; Appeal against the Decision from 22 November 2003 submitted by Luka Beograd on 6 January 2004, **R-062**; Decision of the Republic Geodetic Authority of 31 May 2004, **R-063**.

223 Counter-Memorial, para 77; 1975 Agreement concluded between the City of Belgrade and Luka Beograd on 6 March 1975, **R-060**; Annex 3 to the 1975 Agreement, **R-064**, p 2 (of PDF). With adoption of the 2013 DRP, the land was brought to its intended urban purpose and Luka Beograd lost its interest/right to lease the Dunavska Plots.

224 Reply, para. 233.

225 Counter-Memorial, para. 77; Counter-Memorial, para 77; Cadaster decision No. 952-02-9-31/03 relating to Dunavska 23 dated 22 November 2003, **C-184**, p. 3 (of PDF); Cadaster decision No. 952-02-9-31/03 relating to Dunavska 17-19 dated 22 November 2003, **C-165**, pp. 2-3; Decision of the Republic Geodetic Authority of 31 May 2004, **R-063**.

121. Obnova did not contest the City's inscription at the time, arguably because the City's inscription did not in any way interfere with Obnova's property rights over the Dunavska Plots and the Objects, namely because Obnova had no such rights.[226] As already elaborated[227] and will be addressed in the next section:

- Since the Objects that were constructed on the basis of temporary construction permits are temporary, they cannot be the subject of property rights and have to be demolished, without giving rise to any compensation to Obnova.[228]
- Since the Objects that were constructed without construction permits are illegal, they cannot be the subject of the property rights and have to be demolished, without giving rise to any compensation to Obnova.[229]
- There is no documentation proving that the right of use over the Dunavska Plots had ever been granted to Obnova. Obnova has always used the Dunavska Plots as a lessee based on the lease agreements spanning several decades. Obnova was allowed to construct only temporary objects; all other objects built without a permit were constructed illegally. Obnova therefore could not have possibly obtained the right of use

[226] If Obnova had any property rights over the Dunavska Land and Objects in 2003 (*quod non*), then the 2003 Registration would have constituted an expropriation of these property rights. This would, however, be outside the jurisdiction *ratione temporis* of the Tribunal. See below Section C.I.2.b)aa).

[227] Counter-Memorial, Sections B.IV. and B.V.

[228] See Section II.1.a) below.

[229] See Section II.1.b) below.

over the land through acquisitive prescription[230] or by constructing the Objects on the land.[231]

122. Therefore, even if City's inscription over the Objects were erroneous for whatever reason (e.g. because it lacked ground for such inscription or because temporary and illegal objects were not supposed to be registered in the Cadastre), Obnova would still have no rights over the Objects. In fact, whoever built the Objects, would be required to remove them from the Dunavska Plots.[232] Claimants fails to address this point in their Reply.

4. Maps cannot serve to prove property rights

123. On multiple occasions in their Reply, Claimants argue that the annotations of Obnova as a *"user"* in the cadastre maps meant that Obnova was recognized as the holder of the right of use over the Dunavska Plots.[233] This is blatantly wrong.

124. The sketches prepared during the initial survey from 1929-1932, the additional survey from 1946-1947, and the revision survey from 1966-1967 were prepared at a time when the competences concerning real estate records were divided between the Land Books (Serbian: „*zemljišne knjige* ") and the Land Cadastre (Serbian: „*katastar zemljišta* "). The Land Books were public records held by the courts and were meant for inscription of immovables and the property rights over them.[234] As explained by Prof. Jotanović, *"the land book rights could be acquired, transferred, restricted, or revoked only through entry*

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230 Acquisitive prescription represents a type of acquisition of ownership right (i.e. right of use) in cases where (1) an acquirer has possession of certain quality, and (2) possession of that quality lasts for a certain statutory-defined period. Ordinary acquisitive prescription takes place following 10 years of good faith and lawful possession of real estate owned by someone else. Extraordinary acquisitive prescription takes place in case of an unlawful, but good faith possession of real estate lasting for more than 20 years. As it can be seen, good faith possession is a constitutive requirement in case of acquisition of rights, through both ordinary and extraordinary acquisitive prescription. Good faith possession exists only if the possessor is not or cannot 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 in his possession. When it comes to extraordinary acquisitive prescription, a good faith possessor also reasonably believes that he is a lawful possessor – he is unaware and cannot be aware of the fact that his possession is not based on a legal basis necessary for the acquisition of ownership. i.e., right of use. See Counter-Memorial, paras. 145-147; Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para. 54-59; 1980 Law on Basic Ownership Relations, **R-065**, Articles 28(2)(4) and 72.

231 See Section II.2. below.

232 Counter-Memorial, para 79.

233 Reply, paras 37-43.

234 Orlić, Miodrag and Stanković, Obren, Real Estate Law, Belgrade, 1999, **R-191**, p 318.

in the main book…".[235] On the other hand, the Land Cadastre was the public record for data on the position, shape, surface area of land parcels, types of land use, etc. All data on the land recorded in the Land Cadastre was collected through a geodetic survey process (or by an inventory process).[236] In other words,

> *The cadaster has the purpose of factual records of real estate, the land book has the purpose of legal records…Therefore, inscription in the cadastre does not lead to the acquisition of property rights over the real estate.*[237]

125. Therefore, the main difference between the Land Books and the Land Cadastre is that the Land Books represented the public records on rights over the real estates, whereas the Land Cadastre represented public records on factual data. As stated in the decision of the Supreme Court of Serbia:

> *In Article 2 of the Basic Law on Survey and Cadastre, the Land Cadastre serves for commercial, administrative and statistical purposes, for preparation of the land books, as the basis for determining of the cadastral income as well as for other purposes of state bodies, organizations and citizens. Therefore, state in the cadastre taken for itself, does not represent a proof of ownership over the land. That can be only the inscription in the land books…*[238]

126. In other words, the maps, sketches and drawings to which Claimants referred in their Memorial and Reply[239] were prepared by the Land Cadastre, i.e. by a geodetic technician, who performed geodetic survey. Any annotations on these documents of "Obnova" being the "user", on the basis of which Claimants argue that Obnova had property rights,[240] have no legal significance and cannot possibly represent the proof of any property rights, let alone ownership. Therefore, the word "user", which was recorded by a geodetic technician on the map, means only that Obnova *de facto* used the Dunavska Plots at the time the map in question, i.e., sketches, was prepared.

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235 Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 30.

236 Miladinović, Manojlo, Real Estate Cadastre, Belgrade, 2004, **R-192**, p 264.

237 Orlić, Miodrag and Stanković, Obren, Real Estate Law, Belgrade, 1999, **R-191**, p 321.

238 Judgement of the Supreme Court of Serbia, no. Gzz. 203/66, as cited in the footnote no. 1095 by Orlić, Miodrag and Stanković, Obren, Real Estate Law, Belgrade, 1999, **R-191**, p 321. See also Judgement of the Supreme Court of Serbia, no. U. 1907/2007 dated 24 September 2009, **R-194**.

239 Memorial, para 145; Reply, paras 37 and 40.

240 Reply, paras 37, 38 and 43.

127. Claimants allege that sketch no. 4/22 of the review survey for the period 1966-1967 of cadastral parcel no. 47 was *"purposefully cropped"* by Serbia so that the word "user" cannot be shown on the sketch,[241] and that *"Serbia omitted the key word "user" in exhibit R-043 to purposely mislead the Tribunal"*.[242] This is evidently misleading. The same sketch was already on the record (submitted by Claimants as exhibit C-329) and Respondent explained in the Counter-Memorial that the annotations on the sketches have no legal significance.[243] Only inscription in the Land Books has legal significance, but Obnova was never successful in proving it had the right eligible for inscription.

128. On the other hand, sketch 49/2005 which marks Obnova as the *owner* of the objects at parcel no. 39/1,[244] was prepared by the privately-owned geodetic agency Beta, which was engaged by Obnova itself.[245] The annotation that Obnova is the owner of the objects is therefore based on false information provided to Beta by Obnova. Since the establishment of the Cadastre as the centralized record for data on real estate properties and rights over them, sketches are prepared by the privately held geodetic organizations. These organizations are engaged to record the changes concerning factual state of the objects at the cadastre parcel (construction of new objects, extensions and upgrades of the objects, removal of objects, etc).[246] For this reason, sketch no. 49/2005, prepared by Beta, has no legal significance as it was only meant to present the change of the factual state at the parcel no. 39/1.

5. Cadastre's Information is accurate

129. With its Counter-Memorial, Respondent has provided the Information from the Cadastre dated 31 July 2023 ("**Cadastre's Information**"), in which Cadastre has analysed certain cadastre sketches and concluded that some objects at Dunavska 17-19 existed before December 1948 (i.e. before Obnova was established).[247] Respondent referred to the

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241 Reply, para 40.

242 Reply, para 41.

243 Counter-Memorial, para 90.

244 Reply, para 189; Information from the Cadastre dated 31 July 2023, **R-043**, p 7 (of PDF).

245 Report on the Inspection conducted by Beta on 18 February 2004, 18 February 2004, **R-193**.

246 Changes include construction, construction extension and upgrades, removal of buildings and other construction object. See The 1992 Law on State Survey and Cadastre as amended in 2002, **R-195,** Article 97(4) in relation to Article 97 (1) and (2). Only exceptionally, sketches may be prepared by the Cadastre itself. The 1992 Law on State Survey and Cadastre as amended in 2002, **R-195**, Article 97(5).

247 Information from the Cadastre dated 31 July 2023, **R-043**.

Cadastre's Information once in its Counter Memorial.[248] In the Reply Claimants have extensively elaborated on this Information stating that (i) certain "maps" included in the Cadastre's Information are not contemporaneous as they post-date the 1946-1947 supplemental survey, and (ii) the Cadastre's clerk who interpreted the sketches ignored *"several key details"* which indicates that the Cadastre's Information was prepared and interpreted solely for the purpose of this Arbitration.[249] Both these allegations are incorrect.

a) <u>Sketches do not post-date the 1946-1947 supplemental survey</u>

130. Claimants state that the sketches nos. 68/22 and 56/22 of the supplemental survey for cadastral parcel no. 47 clearly post-date the 1946-1947 supplemental survey since they do not include the information from Article 10 of the 1930 Rulebook on cadastral surveying.[250] Claimants' conclusion is wrong, as it is the result of a misrepresentation of the Rulebook.

131. The Cadastre's Information included and referred to <u>sketches</u> (Serbian: „*skica* ") from the initial survey (1929-1932), supplemental survey (1946-1947) and revision survey (1966-1967). Cadastre's Information did not include or refer to any <u>sheets</u> (Serbian: *„list "*). Article 10 of the 1930 Rulebook specifies which information *sheets* must have, *not* sketches.[251] Therefore, the fact that the *sketches* nos. 68/22 and 56/22 do not include the information from Article 10 of the 1930 Rulebook does not support Claimants' allegation that the sketches post-date the 1946-1947 supplemental survey.

132. In addition, it is not true that the Cadastre confirmed to Claimants that it did not have in its archives any historic map or plan that would show changes recorded during the supplemental survey in 1946 -1947.[252] This is blatant misrepresentation of the Cadastre's letter from 12 January 2024. As can be seen from the letter, the Cadastre did not state that it has no maps recording supplemental survey in 1946-1947 as Claimants suggest, but stated that it did "*not hold the <u>archive original</u> map"* and that it had "*<u>the working</u>*

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248 Counter-Memorial, footnote 85.

249 Reply, paras 67, 69 and 72.

250 Reply, para 69.

251 Article 10 of the 1930 Rulebook on cadastral surveying expressly states that *"each sheet"* must have , *inter alia*, the information that Claimants mention in their Reply, namely (a) date on which the sheet was prepared; (b) name of the person who prepared the sheet; (c) name of the persons who performed control of the sheet; and (d) a signature, in red ink, of the cadastral inspector and the chief of local section. On the other hand, the 1930 Rulebook did not mandate that it was necessary to record this information in the sketches. The 1930 Rulebook on cadastral surveying, **C-457**.

252 Reply, para 66.

original of the map".[253] Claimants omit to provide the complete correspondence with the Cadastre from January 2024, including documents the Cadastre produced to them on 5 January 2024. In other words, they failed to prove that what was delivered to them did not contain the information from supplemental survey in 1946-1947.[254]

b) The sketches were correctly interpreted

133. Claimants further argue that the sketches referred to in Cadastre's Information were wrongly interpreted by the Cadastre's clerk (*i.e.* Ms. Partenijević) as she *"ignored several key details on the sketches, which provides conclusive evidence that the excerpts were in fact prepared after 1946-1947."*[255] This is incorrect, for reasons detailed below.

134. **Name of the Dunavska Street**. Claimants state that the inscription "Dunavska Street" in sketches 68/22 and 56/22 shows that the sketches post-date supplemental survey 1946-1947 because the street was named "Dunavska" only in 1947, while until 1947 it was called Bulevar Dunavski (Danube Boulevard).[256] This is misleading.

135. The book "Belgrade's Streets and Squares" provides an overview of changes of the names of streets and squares in Belgrade. It also contains a legend of symbols for its interpretation.[257] The legend shows that the street Dunavska was called Podunavska until 1896 (which is indicated by the sign "←1896"), while after 1896 it was called Dunavska (which is indicated by the sign "1896→"). During the period 1938-1947, Dunavska street was also called Bulevar Dunavski (Danube Boulevard).[258]

> ***"DUNAVSKA***
>
> ***Zemun**. Gornji grad (Upper Town); from 94 Cara Dušana Street, next to Nade Dimić Street, it intersects with Pregrevica Street in the Danube direction.*

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253 Correspondence with the Cadastre from January 2024, **R-202.** Letter from Cadaster, 12 January 2024, **C-472**. The appropriate translation of „katastraski plan" is "cadastre map" and not "cadastre plan".

254 Letter from Cadastre, 12 January 2024, **C-472**.

255 Reply, para 72.

256 Reply, paras 73-74.

257 Belgrade's Streets and Squares, Belgrade, 2004, **R-200**, p. 8.

258 Belgrade's Streets and Squares, Belgrade, 2004, **R-200**, p. 242. The book "Belgrade's Streets and Squares" states (in Serbian) that *"1938-1947 se navodi **i** kao Bulevar Dunavski"*, and should be translated as follows: *"in 1938-1947 it is also referred to as Danube Boulevard"*. The conjunction *"i"* (*and*) in the Serbian text indicates that alongside Dunavska Street, the name Danube Boulevard was simultaneously in usage from 1938-1947.

1897 →

***Stari Grad**, Dorćol; from the end of Tadeuša Košćuška Street, next to the railway track, to Francuska Street*

1896 →
Podunavska (the last one next to the Danube River), ← 1896. Note: 1938-1947 it was also called Bulevar dunavski."

136. Thus, Claimants are wrong that the sketches could not have included the name "Dunavska Street" if they were prepared during the supplemental survey in 1946-1947. Already at that time the name of the street was "Dunavska Street", while in the period 1938-1947 it was simultaneously called "Bulevar Dunavski".[259]

137. **Object labelled with number 17**. Claimants further argue that another example that the sketches were allegedly not interpreted with due care is the black pencil drawing of the main office building, marked with number 17 on the sketch no. 68/22. They contend that this building was built in the 1950s on the basis of a permit issued on 22 March 1954 and that the provided sketch from 1946 -1947 could not have depicted that building.[260] While Claimants might be right that a new object was built on that place in the 1950s, they are wrong that the Cadastre mistakenly concluded that already in 1946 -1947 there was an object at that same place.

138. As an individual sketch called "manual" from December 1947 shows, object no. 17 was identified already *in 1947 during the supplemental survey*.[261] Object no. 17 was also mapped on the cadastral map sheet no. 27 that shows the state recorded by the supplemental survey in 1946-1947 as well as changes occurred up until 1967. Object no. 17 is recorded in black ink[262] and Claimants themselves confirm that the information marked in

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259 The Secretariat for Culture wrongly stated that in the period from 1896 the Dunavska Street was bearing the name Podunavska. The Secretariat has also made an error in its Response from 20 October 2023 to which Claimants refer to. Took "Belgrade's Streets and Squares" states the following: *"1938-1947 se navodi **i** kao Bulevar Dunavski"* and should be translated as follows: *"in 1938-1947 it is also referred to as Danube Boulevard"* (emphasis added). The conjunction *"i"* in the Serbian text indicates that alongside Dunavska Street, the name Danube Boulevard was simultaneously in usage from 1938-1947. The Secretariat for Culture simply left out the conjunction *"i"* in its interpretation. Response of the Secretariat for Culture dated 20 October 2023, **C-661**, p. 2.

260 Reply, para 75.

261 Manual sketch from December 1947, **R-199**.

262 Cadastre map sheet no. 27, **R-198**. Notably, this document contains all the data required by Article 10 of the 1930 Rulebook on cadastral surveying, **C-457**.

black represents information available before the preparation of a sketch.[263] Therefore, contrary to Claimants' allegations, object no. 17 existed before the 1950s.

139. **The "map" submitted by Obnova in 1949 was not prepared in 1949 nor was it provided by the Land Cadastre**. Claimants allege that a "map" submitted by Obnova in 1949 with its request for issuance of a construction permit, confirms that only two buildings existed at Dunavska 17-19 at that time.[264]

140. The "map" to which Claimants refer cannot serve as a proof of the state of the Cadastre. As it was not issued by the Land Cadastre, it does not show the contemporaneous state of the Cadastre. In fact, it was not *prepared* in 1949, as Claimants suggest, but rather was only *provided* to Obnova in 1949. Therefore, the "map" in question depicts the state of the parcel at certain time, perhaps years before 1949.[265]

141. **Railway track**. Claimants state that a railway track running alongside the left border of the land plot no. 47 was shown on the above-mentioned map that was provided to Obnova in 1949, while on sketch no. 56/22, which was referred to in the Cadastre's Information, this railway track was marked with black crosses, indicating that it was removed before preparation of that sketch. On this basis, Claimants conclude that sketch no. 56/22 was prepared after 1949.[266] This is again wrong.

142. A railway track running alongside the left border of land plot no. 47 existed at the time of the supplemental survey in 1946-1947. In this regard, it is important to note that a railway track on sketch no. 56/22 was crossed with a graphite pencil but not with black ink, as Claimants suggest.[267] This means that the intervention was made after 1947. Even more importantly, the railway was not crossed with *red ink*, which proves that the railway was existing during the supplemental survey in 1946-1947. As Claimants confirm, "*information marked in black represents information available before preparation of a sketch and that subsequent information is marked in red*".[268] The railway track was crossed with red ink in the working original cadastral map sheet no. 22, which shows the

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263 Reply, para 72.

264 Reply, paras 75, 76, and 77.

265 Annex to the construction permit No. 5034 dated 31 October 1949, **C-576**.

266 Reply, para 80.

267 Reply, para 80.

268 Reply, para 72.

changes of the state of the parcel that occurred between the supplemental survey in 1946-1947 and the revision survey in 1966-1967.[269]

143. **Objects no. 1, 2 and 3**. Claimants state that an additional indication that sketch no. 68/22 was not prepared when the supplemental survey was conducted in 1946-1947, is the more extensive excerpt of this sketch that Respondent provided in the document production. They state that the "*extended excerpt shows: (i) certain buildings on land plot No. 45 (near the border between land plots Nos. 45 and 47); (ii) a building at the bottom of Tara's land plot; and (iii) a building in the middle of Tara's land plot*".[270] Claimants further refer to the document called *"Plan Copy for cadastre parcel no. 45 CM Beograd 1"* from November 1948 which allegedly proves that none of the above-mentioned three objects existed in 1948, i.e. objects no. 1 and 3 are not shown on the plan from 1948 at all, whereas object no. 2 is marked as planned, but not built – which again allegedly demonstrates that sketch no. 68/22 post-dates supplemental survey in 1946-1947.[271] Claimants are again wrong.

144. First, there is no "*cadastre parcel no. 45*" near the border between parcels nos. 45 and 47, as Claimants allege. Instead, cadastral parcel no. 43 is placed there.[272] Second, two out of three objects (object no. 1 and no. 3) on cadastral parcel no. 43 are drawn with a graphite pencil and without a ruler at the extended sketch from supplemental survey 1946/1947.[273] This suggests that they were recorded after the supplemental survey in 1946-1947 and not during the survey, otherwise they would have been drawn in either black or red ink, since "*information marked in black represents information available before preparation of a sketch and that subsequent information is marked in red*".[274]

145. Object no. 2 was drawn in red ink at the extended sketch from supplemental survey 1946/1947,[275] which means that it was recorded for the first time in 1946-1947 when the supplemental survey was conducted. This is because "*information marked in black*

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269 Cadastre map sheet no. 22, **R-197**.

270 Reply, paras 82 and 83. Compilation of sketches produced by Serbia in Document Production as document no. 6_01, p. 11, **C-577**.

271 Reply, 84. Copy of the plan for parcel no. 42/20, 2 November 1948, **C-608**.

272 Excerpt from the website application GeoSrbija for cadastral parcel no. 43, **R-196**.

273 See Reply, para 83, objects no. 1 and 3 as marked by Claimants on the sketch on page 34 (of PDF). Compilation of sketches produced by Serbia in Document Production as document no. 6_01, **C-577**, p 11.

274 Reply, para 72. See Reply, para 83, object no. 2 as marked by Claimants on the sketch on page 34 (of PDF).

275 Reply, para 83, object no. 2 as marked by Claimants on the sketch on page 34 (of PDF). Compilation of sketches produced by Serbia in Document Production as document no. 6_01, p. 11, **C-577**.

represents information available before preparation of a sketch and that subsequent information is marked in red". [276]

146. Finally, Claimants' reference to the document "Plan Copy for cadastre parcel no. 45 CM Beograd 1" from November 1948, which allegedly proves that none of the above-mentioned three objects existed in 1948,[277] is inapposite.

147. "Plan Copy for cadastre parcel no. 45 CM Beograd 1" does not show objects nos. 1 and 3, whereas object no. 2 is marked as planned, but not built.[278] This document was prepared in disregard of the actual state of the Cadastre, which is proven by the following: it was not issued by the Cadastre, it mentions parcel no. 45 as the parcel where object no. 2 had to be constructed, although parcel no. 43, and not parcel no. 45, is located next to parcel no. 47. Also, the boundary between parcels no. 47 and 45 was incorrectly drawn. All this indicates that this document does not present the real state of the Cadastre. In any event, this document surely cannot be of greater relevance than the Cadastre's official extended sketch from the supplemental survey 1946/1947,[279] from which it is visible that object no. 2 was recorded in red ink, meaning that it was detected for the first time in 1946/1947, i.e. that it existed before 1948.

148. In view of the above, Claimants' malicious allegations concerning accuracy of the Cadastre's Information and its good faith are erroneous. Respondent thus maintains its arguments based on this Information, which it made only *one* reference to in its Counter Memorial.[280]

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[276] Reply, para 72. See Reply, para 83, object no. 2 as marked by Claimants on the sketch on page 34 (of PDF).

[277] Reply, 84. Copy of the plan for parcel no. 42/20, 2 November 1948, **C-608**.

[278] Copy of the plan for parcel no. 42/20, 2 November 1948, **C-608**.

[279] Reply, para 83, object no. 2 as marked by Claimants on the sketch on page 34 (of PDF). Compilation of sketches produced by Serbia in Document Production as document no. 6_01, p 11, **C-577**.

[280] Counter-Memorial, footnote 85.

IV. Obnova is not an unregistered holder of property rights over the Dunavska Plots and the Objects

149. Since it is undisputed that Obnova never had registered property rights over the Dunavska Plots and the Objects, Claimants argue that Obnova is an unregistered holder of these rights.[281] This is wrong.

150. As noted by Claimants' expert, Prof Živković, in order to prove its unregistered rights:

> *The unregistered holder must do so in court proceedings, by filing a claim against the registered owner as the defendant, and the judgement from that proceedings will serve as a document for registering his right in the register.*[282]

151. Obnova initiated three court proceedings to determine ownership of the Objects and the Dunavska Plots. As elaborated in the sections below, Obnova was unsuccessful in proving its rights in all of them:

- The first court proceeding related to the land and objects at Dunavska 17-19 for which Obnova had permits for the construction of temporary objects.[283] Obnova's claim of ownership over the objects and land needed for their use was denied by the Higher Court in Belgrade, and this judgement became final after the Appellate Court in Belgrade rejected Obnova's appeal on 7 December 2023.[284]
- The second court proceeding related to ownership of the land and objects at Dunavska 17-19 for which Obnova had no construction permits.[285] The court held that the lawsuit was deemed withdrawn due to Obnova's failure to appear at the scheduled hearing.[286]

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281 Reply, paras. 286, 927 and 929; **Živković-Milošević, ER-2**, para 201.

282 Živković, Miloš, Law of Land Registers, Belgrade, 2022, **R-168**, para 136. See also Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, paras 14-15.

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

284 Judgment of the Appellate Court in Belgrade, No. Gž 6171/22 dated 7 December 2023, **C-503**.

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

286 Minutes from the hearing before the Higher Court in Belgrade, No. 5844/2019 from 26 December 2019, **R-088**; Decision of the Higher Court in Belgrade, No. 5844/2019 from 21 July 2021, **R-089**.

- The third court proceeding related to the objects at Dunavska 23 for which there were also no construction permits.[287] Obnova's request for determination of ownership over the objects was denied by a first-instance decision of the Higher Court in Belgrade on 5 March 2024 and is pending on appeal.[288]

152. The Serbian courts thus concluded that Obnova had no (unregistered) property rights in the Objects (and associated land) as a matter of Serbian property law. Having this in mind, Prof Jotanovic concludes that:

> *Obnova cannot claim to have unregistered rights to the parcels 47 and 39/1 or the objects at the Dunavska Street since it failed to obtain a court decision which establishes (declares) that all legally required conditions for acquisition of ownership rights were met.*[289]

153. As Claimants make no allegations that their due process rights were not respected in these court proceedings or that the decisions were arbitrary, the Tribunal should accept the decisions of the Serbian courts.

154. For the sake of good order, Respondent will demonstrate that Obnova never acquired any ownership over the Objects (**Section 1.**) or any right of use over the Dunavska Plots (**Section 2.**). Respondent will also demonstrate that Obnova's privatization in 2005 did not establish or confirm any alleged rights over the Objects and the Dunavska Plots (**Section 3.**).

1. Obnova never acquired property rights over the Objects

155. Claimants maintain that Obnova acquired the right of use over the Objects by virtue of having built them[290] "*in accordance with the contemporaneous socialist legislation and Obnova's then status of a state economic enterprise*."[291] Yet neither Claimants nor their

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287 Obnova's submission to the Higher Court in Belgrade dated 16 July 2019, **C-050**. Obnova first requested determination of ownership both over the Objects at Dunavska 23 and over the land necessary for their use, but at a later stage of the proceedings it has changed its claim and left out request for determination of ownership over the land at Dunavska 23. Judgement of the Higher Court in Belgrade, P 5457/19 dated 5 March 2024, **R-160**, pp 1-4.

288 Judgement of the Higher Court in Belgrade, No. P 5457/19 dated 5 March 2024, **R-160**.

289 Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para 17.

290 Reply, para. 143.

291 Reply, para. 33.

Serbian law experts point to socialist legislation to support their position.[292] Respondent maintains that Obnova merely acquired right to temporarily use the Objects,[293] which will eventually have to be removed from Dunavska Plots.[294]

a) <u>Obnova does not have ownership of the Objects at Dunavska 17-19 based on construction permits</u>

156. As explained above,[295] the Serbian courts determined, by a final court decision, that Obnova did not have ownership of the temporary objects at Dunavska 17-19 constructed in accordance with construction permits.

157. The Higher Court rejected Obnova's claim that it had acquired ownership over the Objects and the land.[296] It found that Obnova did not satisfy the requirements for acquisitive prescription because it was not a good faith possessor of the Objects, as it was aware that it had obtained permits for the construction of temporary objects that had to be demolished upon the request of the competent authority. Since ownership is permanent right, Obnova could not have believed that it had acquired ownership over temporary objects.[297] Obnova's appeal against this decision was rejected by the Appellate Court, which upheld the first-instance decision.[298]

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292 Respondent has already drawn the attention to the lack of such a reference, but neither Claimants nor their Serbian law experts addressed this issue. *See* Counter-Memorial, paras 94 and 97.

293 Counter-Memorial, para 98.

294 Decision of the Higher Court in Belgrade No. 23. P. no. 1724/16 dated 22 September 2022, **C-168**; Decision of the Court of Appeal in Belgrade no. Gž 6171/22 7 dated December 2023, **C-503**.

295 See also Second Legal opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para 16.

296 Obnova's submission to the Higher Court in Belgrade dated 15 November 2016, **C-038**, p 1 (of PDF); Obnova's submission from 17 February 2022, **R-086**, pp 4-6 (of PDF); Decision of the Higher Court in Belgrade No. 23. P. no. 1724/16 dated 22 September 2022, **C-168**, pp 15-16 (of PDF).

297 Counter-Memorial, para 130; Decision of the Higher Court in Belgrade No. 23. P. no. 1724/16 dated 22 September 2022, **C-168**, p 16 (of PDF). As explained by Respondent's legal expert, good faith possession exists where that the possessor is unaware or unable to recognize that the subject in their possession is not their own. *See* Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para 57.

298 Decision of the Court of Appeal in Belgrade no. Gž 6171/22 7 dated December 2023, **C-503**, pp 5-6 (of PDF); Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, paras 40 and 41.

158. The Supreme Court of Serbia confirmed that rights over temporary objects are not property rights, stating that "*the use of such object does not belong to the corpus of ownership-related powers*".[299] Accordingly, the Supreme Court concluded that builders of temporary objects "*could only have ownership over the building material used to build the object, and not over the object itself*".[300]

159. Respondent's expert, Prof Jotanovic, agrees that Obnova could not have acquired ownership over the temporary Objects,[301] and also points to the position taken by the Supreme Court of Serbia that, in fact, temporary objects are not immovable thing:

> *a temporary object is only seemingly an immovable thing. It in fact is a movable thing by its purpose because its temporary nature indicates that, after some time, it shall certainly be removed from the then location in order for it to be brought back to its legal nature.*[302]

160. Since Obnova's construction permits expressly stipulated that Obnova was not entitled to any compensation for the value of the temporary objects upon their demolition,[303] Obnova also does not have the right to be compensated, even for the building materials, after the Objects are demolished.

161. In addition to the above, it should be noted that, after inspecting the objects at Dunavska 17-19, Prof Ivanisevic concluded that only for one existing object at Dunavska 17-19 it can be plausibly said that it was constructed in accordance with the construction permits

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299 Judgement of the Appellate Court in Belgrade, No. Gz 1471/2013 from 13 November 2014, **RJ-059** Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para 43.

300 Judgement of the Supreme Court of Serbia, No. Rev 990/2006 from 14 December 2006, **RJ-058**, p 2; Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para 44.

301 Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, paras 40 and 41.

302 Judgement of the Appellate Court in Belgrade, No. Gž 1471/2013 from 13 November 2014, p 1 (of PDF) (**RJ-059**). See also Judgement of the Supreme Court of Serbia, No. 2903/2005 dated 15 December 2005, **RJ-018**; Judgement of the Supreme Court of Serbia, No. Rev 990/2006 from 14 December 2006, **RJ-058**. In Prof Simonetti's opinion, to who, Claimants' experts refer, "*the construction object built without the permission of a competent authority until legalization (commonly: rehabilitation) has a legal status of a temporary construction object – a movable thing*." In other words, Prof Simonetti considers illegally constructed objects as temporary objects and thus as movable things. See Petar Simonetti, Petar, Construction without legal basis on construction land in social ownership, *Our Legality*, 10-11/1984, p 1154 (**R-175**).

303 Counter-Memorial, para. 98; Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 27, 46-50.

(the object constructed based on the construction permit from 22 March 1954).[304] As already mentioned, Prof Arizanovic's failed to identify which currently existing objects tally with the objects in the construction permits. Therefore, Obnova did not prove that the objects constructed based on permits for construction of temporary objects exist and thus cannot claim to have any rights over any, but one, of the existing Objects.

b) <u>Obnova does not have ownership of the illegally constructed Objects at Dunavska 17-19 and Dunavska 23</u>

162. It is undisputed that there is a number of illegally constructed Objects on the Dunavska Plots.[305] According to Claimants, "*the entity that built a building acquired the right of use automatically upon its construction—regardless of whether the building had all necessary permits or not*."[306] On this basis, Claimants argue Obnova has rights over these illegally constructed Objects. This is incorrect, as confirmed by the Serbian courts. As explained above and detailed further below, Obnova was unsuccessful in establishing that it has ownership of the Objects constructed without any permits at Dunavska 17-19 and Dunavska 23.

<u>aa)</u> <u>The illegally constructed Objects at Dunavska 17-19</u>

163. In the proceedings for determination of ownership over the illegally constructed Objects at Dunavska 17-19 and the land necessary for their regular use, the court held that Obnova's claim should be deemed withdrawn after Obnova failed to appear at the hearing in December 2019.[307] Claimants now contend that this proceeding should not be treated as concluded since the court failed to react to Obnova's appeal from January 2020.[308] As evident from the court files, this allegation is erroneous:

- After the decision that its claim is withdrawn due to failure to appear at the hearing, in **January 2020**, Obnova submitted a request for *restitutio in integrum*, arguing that it had not been properly summoned to the hearing or served with documents from

304 Expert Opinion-Prof Nenad Ivanišević-Rejoinder-ENG dated 14 June 2024, **REO-001**, paras 63-64.

305 Reply, paras 209 and 317.

306 Reply, para 209.

307 Counter-Memorial, paras 136 and 137; Minutes from the hearing before the Higher Court in Belgrade, No. 5844/2019 from 26 December 2019, **R-088**.

308 Reply, paras 331-332.

the proceedings. Obnova proposed that if the court did not uphold the request for *restitutio in integrum*, it should instead treat its submission as an appeal.[309]

- On **15 July 2020**, the Higher Court upheld Obnova's request for *restitutio in integrum* and quashed the decision on withdrawal of Obnova's claim.[310]
- The City and the Republic of Serbia (as respondents in the that case) both filed appeals against the Higher Court's decision, claiming that Obnova's request was untimely.[311]
- On **10 June 2021**, the Appellate Court in Belgrade upheld the respondents' appeals, finding that the Higher Court had failed to assess the timeliness of Obnova's request and returned the case to the Higher Court for a rehearing.[312]
- On **21 July 2021**, the Higher Court dismissed Obnova's request for *restitutio in integrum* from January 2020, finding it untimely, and instructed Obnova to file an appeal to the Appellate Court in Belgrade within 15 days as of receiving the decision on dismissal.[313]
- Obnova, however, failed to submit an appeal against the decision of the Higher Court from 21 July 2021.

164. Therefore, Claimants' allegation that Obnova's request for *restitutio in integrum* from January 2020 should have been treated as the appeal and that it never received any response to its appeal is unfounded. The Higher Court specifically instructed Obnova to file an appeal after it received its decision from July 2021.[314] Obnova did not do so and thus the decision dismissing Obnova's request for *restitutio in integrum* became final.

bb) The illegally constructed Objects at Dunavska 23

165. In the court proceedings for determination of ownership over the Objects at Dunavska 23, Obnova claimed that it had constructed the Objects and had been a lawful and good faith possessor of these Objects for more than 20 years. The Higher Court rejected

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309 Obnova's submission to the Higher Court in Belgrade, No. 5844/19 dated 23 January 2020, **C-450**.

310 Decision of the Higher Court in Belgrade, 13 P 5844/19 dated 15 July 2020, **C-462**.

311 Decision of the Appellate Court in Belgrade, Gž 5597/20 dated 10 June 2021, **C-460**, pp 1-2 (of PDF).

312 Decision of the Appellate Court in Belgrade, Gž 5597/20 dated 10 June 2021, **C-460**, pp 1-2 (of PDF).

313 Decision of the Higher Court in Belgrade no. 13 P 5844/19 dated 21 July 2021, **C-451,** p 2 (of PDF).

314 In addition, the Law on Civil Law Procedure which regulates *restitutio in integrum* does not provide that unsuccessful request for *restitutio in integrum* can be considered as appeal. See Law on Civil Procedure**, R-090**, Articles 109-114.

Obnova's claim in March 2024, stating that Obnova did not prove it had constructed the Objects. It also stated that because these Objects were temporary, Obnova in any event did not acquire ownership whether based on acquisitive prescription or by virtue of constructing them.[315]

166. As explained in the Counter-Memorial, construction without the appropriate permit from the competent authorities has been forbidden since 1948.[316] Prof Jotanovic confirms that objects constructed without a permit have the legal status of temporary objects and cannot be the subject of property rights:

> *The right of use of an object constructed without the permit cannot be acquired, since the right of use is related only to the permanent objects, while the objects constructed without a construction permit do not have the status of permanent construction objects, but only of temporary objects.*[317]

167. Prof Simonetti, a leading authority on property law upon whom Claimants' Serbian law experts also rely, agrees that objects built without the necessary approvals have the status of a temporary object:

> *a construction object built without a construction permit is in all respects equal to a temporary construction object, except that there is a possibility to subsequently approve the construction, but before the construction is approved, such an object is not an integral part of the land, although it is not separated by a permanent right of use, but is treated as a movable property like any other temporary object. The permanent right of use, if the building is built on socially owned land, is acquired only with a subsequent construction approval (legalisation).*[318]

[315] Judgement of the Higher Court in Belgrade, P 5457/19 dated 5 March 2024, **R-160**, pp. 1 and 16-18 (of PDF).

[316] Counter-Memorial, para. 100; Basic Regulation on Construction, Official Gazette of the Federal 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; 2003 Law on Planning and Construction, **R-040**, Articles 88(1) and 141; Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras. 51-53.

[317] Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para. 74.

[318] Simonetti, Petar, Constructing on Someone Else's Land, Sarajevo, 1982, **R-167**, pp. 61-62 (emphasis added).

168. The same position was adopted by the Higher Court, which rejected Obnova's claim related to the objects constructed without any permits because these objects were to be considered as objects of temporary character, subject to demolition.[319]

2. Obnova did not acquire any property rights over the Dunavska Plots

169. As elaborated in the Counter Memorial and this Rejoinder, Obnova always used the Dunavska Plots as the lessee based on the lease agreements. In addition, since Obnova constructed either temporary objects (in accordance with the construction permits) or illegal objects (without any permits) on the Dunvaska Plots, it never met the conditions for acquiring property rights over the Objects and the Dunavska Plots.[320] Claimants' arguments to the contrary are to no avail, as demonstrated below.

a) Obnova does not have any property rights over the land at Dunavska 17-19

170. Claimants argue that Obnova obtained a permanent right of use over the land at Dunavska 17-19 *ex lege* because Obnova constructed the Objects on this land.[321] They further state that any subsequent conclusion of the lease agreements did not affect rights Obnova already acquired upon construction of the Objects.[322] This is erroneous.

171. Obnova initiated two court proceedings for determination of its ownership over the land at Dunavska 17-19 and was unsuccessful in both. As elaborated above, in the proceeding concerning the illegally constructed Objects and the land necessary for regular use of the Objects, Obnova's claim was considered to have been withdrawn. And in the court proceeding for determination of ownership of the Objects built in accordance with the construction permits, the first and the second instance courts found that Obnova did not have any rights over the land because it did not have ownership of the temporary Objects.[323]

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[319] Judgement of the Higher Court in Belgrade, P 5457/19 dated 5 March 2024, **R-160**, pp. 16-18 (of PDF). As Prof Jotanovic explains, since 1958, the sanction for the illegal construction of objects has been the demolition and removal of those objects. Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para. 73.

[320] Counter-Memorial, Sections B.I, B.II. and B.V.

[321] Reply, paras. 35, 145 and 147.

[322] Reply, para. 165; **Živković Milošević ER-2**, paras. 144-145.

[323] Decision of the Higher Court in Belgrade No. 23. P. no. 1724/16 dated 22 September 2022, **C-168**, p. 1 (of PDF). Decision of the Court of Appeal in Belgrade no. Gž 6171/22 7 dated December 2023, **C-503**, p. 6 (of PDF).

172. The lease agreements that Obnova concluded with the City and Luka Beograd further confirm that Obnova could not have acquired any property rights over the land on Dunavska 17-19. As explained by Prof Jotanovic, a builder must have a legal basis for the construction of an object in order to obtain a construction permit. The lease agreements Obnova concluded in relation to Dunavska 17-19 represent the only available evidence of such legal basis.[324] It is proved that Obnova had been leasing the Dunavska Plots before it obtained its first construction permit in 1949.[325] Prior to obtaining the remaining six construction permits, Obnova had concluded another lease agreement, in 1953.[326] In subsequent years, until 2006, it concluded at least nine more lease agreements over the same land at parcel 47.[327]

173. As explained by Prof Jotanovic, the construction of temporary objects on leased land does not result in the acquisition of property rights over that land:

> *This was common practice at the time of socialist Yugoslavia – enterprises were concluding lease agreements for land and then built temporary objects on that land. Based on those agreements the builders of temporary objects acquired only the contractual right to use another's land and they could not acquire any rights to land by virtue of construction.*[328]

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[324] Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para. 49.

[325] In 1949, before getting its first construction permit, Obnova obtained an approval from the City to erect a canopy on the land *leased to it*. See Approval for Obnova's construction permit dated 31 October 1949, **R-141**; Construction permit No. 5034 31 dated October 1949, **C-150**.

[326] Construction permit No. 1846 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. 9358 dated 29 July 1954, **C-154**; Construction permit No. 18578 dated 2 November 1954, **C-155**; Construction permit No. 21817 dated 24 December 1954, **C-156**; Lease Agreement between Obnova and Serbia dated 10 April 1953, **C-007**.

[327] Lease agreement between Obnova and the Directorate dated 29 September 1959, **R-007**, Article 1; Lease agreement between Obnova and the Directorate dated 7 April 1960, **R-008**, Article 1; Lease Agreement between Obnova and Preduzeće pristaništa, Beograd dated 18 January 1962, **C-160**, Article 1; Lease agreement between Luka Beograd and Obnova dated 10 March 1965, **R-009**, Article 1; 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 2; Agreement on Provision and Use of Transhipment, Warehousing and Other Services between Luka Beograd and Obnova of 1 April 1985 dated 6 May 1985, **R-012**, Articles 1 and 25; Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova dated 25 January 2000, **R-013**, Article 1; Agreement for Providing and Using Port and Warehouse Services between Luka Beograd and Obnova for parcel no. 47 dated 7 November 2003, **R-015**, Article 1; 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.

[328] Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para. 50.

174. Serbian court practice also confirms that the builders of temporary objects do not acquire rights over the land:

> *the respondent obtained for temporary use a part of a plot in order to install a temporary object, [therefore] the first instance Court has concluded correctly that construction of such object cannot lead to acquisition of the land.*[329]

175. Claimants' argument that Obnova acquired rights of use over the leased land on which it had constructed the temporary Objects is therefore incorrect.

176. For the same reason, Claimants' argument that Obnova also constructed some Objects without any permits and thereby obtained the right of use over the land necessary for use of these Objects, has no merit.[330] This is because these illegally constructed Objects share the destiny of the temporary Objects, so all the above-described position of Serbian courts applies *mutatis mutandis* here as well. By constructing both temporary and illegal Objects on the leased land at Dunavska 17-19, Obnova could not have acquired any rights over the land. The existence of lease agreements in which Obnova appears as a lessee, both before and after the construction of these Objects, clearly supports the conclusion that the State never granted Obnova the right of permanent use of the land at Dunavska 17-19, nor did Obnova acquire it by virtue of constructing the Objects.[331]

b) <u>Obnova did not acquire any property rights over the land at Dunavska 23</u>

177. Claimants assert that Obnova has had undisturbed and good faith possession of the land at Dunavska 23 since at least 1968, and that Obnova acquired the right of use through acquisitive prescription (*usucapio*) 20 years later.[332] They also state that Obnova acquired the right of use regardless of the lease agreements that Obnova had concluded with Luka Beograd.[333] This is incorrect.

178. In the court proceedings that Obnova had initiated regarding its alleged rights over the property at Dunavska 23, it first requested determination of ownership over both illegally constructed Objects and the land needed for their regular use. Obnova later amended its claim and left out its request for determination of ownership over the land. By

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329 Judgment of the District Court in Šabac, No. Gž 2029/00 from 22 January 2001, **RJ-019**.

330 Reply, paras. 134, 145 and 317.

331 Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para. 51.

332 Reply, paras. 181 and 196.

333 Reply, para. 199.

abandoning its claim related to the land, Obnova deprived itself of the only legal possibility to confirm its alleged unregistered property rights over the land – a court decision.

179. Despite this, Claimants maintain that Obnova has property rights over the land at Dunavska 23. But they are wrong. Obnova did not acquire any rights by means of acquisitive prescription. Under this doctrine, a good faith possessor is one who rightfully believes that he has a legal basis for acquiring property rights, even when such basis does not exist.[334] Claimants fail to explain on what basis Obnova started using the land at Dunavska 23. In fact, all evidence in this arbitration demonstrates that Obnova has been using the land at Dunavska 23 based on the lease agreements.[335] Accordingly, Obnova only had a contractual right to use the land. This not only precluded Obnova from meeting the good faith requirement, it also deprived it of another element of prescriptive acquisition – a legal basis. This is because a lease agreement cannot be an appropriate legal basis for prescriptive acquisition,[336] as explained by Prof Jotanovic:

> *A lessee holds in possession a lessor's property to use it for a certain time, so on his side there is a will to use someone else's property and not his own. Thus, the lessee has (direct) possession, but this is not sufficient for acquiring ownership rights through acquisitive prescription because his possession is in bad faith – he knows that he is using the lessor's rather than his own property.*[337]

180. Claimants allege that the lease agreement from 1959 was automatically terminated in 1961 by force of law[338] and that between 1961 and 2000, there was no lease agreement in

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334 Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para. 65.

335 Lease agreement between Obnova and the Directorate dated 29 September 1959, **R-007**, Article 1; Lease agreement between Obnova and the Directorate dated 7 April 1960, **R-008**, Article 1; Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova dated 3 February 2000, **R-014**, Article 1; Agreement on Provision and Use of Port and Warehousing Services from 2003, **RJ-011**, 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.

336 Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para. 60; Legal Opinion-Prof Jelena Perović Vujacic-Rejoinder-SRB dated 14 June 2024, **RLO-007**, para. 127.

337 Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para. 61.

338 Reply, para. 200; **Živković Milošević ER-2**, paras. 166-168. According to Claimants' experts, this occurred in accordance with the Serbian Civil Code from 1844, after the real estate that was the subject of the lease agreement from 1959 was transferred from the Directorate for Construction and Development of the Danube to Luka Beograd. Claimants, however, misinterpret the lease agreement from 1959. According to Article 5 of the lease agreement from 1959, the agreement ceased to exist on 31 December 1959 and, as Respondent already explained, was subsequently replaced by the lease agreement from 1960, which was concluded for an indefinite period of time. Respondent understands that Claimants would have relied on the same rule about

place for Dunavska 23. However, this is irrelevant for assessing good faith on Obnova's part. No passage of time can cure the fact that when it started using the land at Dunavska 23, and even afterwards, Obnova did not have the right of use over the land and as noted by Prof Jotanovic, "*the alleged termination of the lease agreement is not the reason for the alleged acquirer to start believing that he acquired the permanent right of use.*"[339]

181. Obnova, for sure, never believed that it had acquired the right of use over the land at Dunavska 23 as it continued to conclude lease agreements for Dunavska 23 from 2000 onwards.[340] Therefore, its claim based on acquisitive prescription is baseless.

3. The privatization of Obnova did not confirm Obnova's alleged property rights

182. In one of the court proceedings against Luka Beograd for collection of rent, which took place in 2012, long after Obnova's privatisation, Obnova admitted that it has "*no proof of ownership rights to neither the buildings nor the land*" at Dunavska 17-19 and 23.[341] Claimants nevertheless argue that Obnova had acquired ownership over the Objects *ex lege* upon its privatisation in 2003,[342] that the privatisation program confirms its alleged ownership,[343] and that because the Privatisation Agency had to act in good faith when reviewing the privatisation program, it was obliged not to approve anything it knew to be false.[344] In substance, Claimants do not say anything that was not already stated in their Memorial. Respondent will therefore summarize its position from the Counter-Memorial.

183. **The Privatisation Program is not valid evidence of ownership rights**:[345] This was confirmed by the Appellate Court in Belgrade, which noted:

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automatic termination with respect to the lease agreement from 1960 if they had not mistakenly referred to the wrong agreement, and they would nevertheless maintain their position that the lease agreement from 1960 ceased to apply in 1961 after the transfer of land from the Directorate to Luka Beograd. In any case, this does not affect Respondent's position elaborated above. See Lease agreement between Obnova and the Directorate dated 29 September 1959, **R-007**, Articles 1 and 5; Lease agreement between Obnova and the Directorate dated 7 April 1960, **R-008**, Articles 1 and 3.

339 Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para. 64.

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

341 Obnova's submission in the court proceeding, I 2376/12 dated 25 July 2012, **R-182**.

342 Reply, paras. 34, 256 and 727.

343 Reply, paras. 141 and 252.

344 Reply, para. 253; **Živković Milošević ER-2**, para. 25.

345 Counter-Memorial, 103-126.

> *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.*[346]

184. This is further confirmed by Prof Jotanovic, who explains that:

> *what is enclosed in the privatization program regarding possible rights of the privatization subject, is legally not relevant, because a privatization program does not represent proof of ownership or the permanent right of use over the real estate. Such right must be proved either by an excerpt from the public records on rights over the real estate or other property documentation.*[347]

185. **The Privatisation Agency is not responsible for accuracy of the information contained in Privatisation Program:**[348] The Commercial Appellate Court has confirmed that Privatisation Agency is not liable for the validity of information contained in a privatisation program:

> *... the first-instance court correctly and by way of application of the provisions of the Law on Privatization and the Regulation on the Sale of Capital and Property by Public Auction finds that the Agency verifies whether the privatization program has the content prescribed by the applicable regulation, and that the responsible person of the privatization subject is held liable for accuracy of the information, which excludes the liability of the Agency in this specific case. Moreover, Obnova's Privatisation Program even contained*

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346 Decision of the Appellate Court in Belgrade, No. Gz 15525/2010 from 19 July 2012, **R-045** (emphasis added). Similarly, the Commercial Appellate Court opined that "*…the first-instance court correctly concludes, in contrast to the appellant's claims, that the mere fact that the subject property was included in the Privatization Program and the Prospectus does not, by itself, constitute proof that the privatization entity had ownership rights or rights of use of the socially-owned real estate*". Judgement of the Commercial Court of Appeal, No. Pz 58/16 from 25 May 2016, **R-085**.

347 Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para. 76 (emphasis added).

348 Counter-Memorial, paras. 104-107; Judgement of the Commercial Appellate Court no. Pz. 10609/2010 from 27 January 2011, **R-083**; Judgement of the Supreme Court of Serbia No. Prev 197/2007 from 27 December 2007, **R-084**. 2003 Law on Privatisation, **R-080**, Article 22 (3)(4); Law on Privatisation Agency, **R-081**, Article 10 para 1 item 2) p. 2; Regulation on the Sale of Capital and Property by Public Auction, **R-082**, Article 53. Privatisation Program, **R-046**, p 10 (of PDF).

> *the "Notification on Limitation of Liability of the Privatisation Agency" which, inter alia, stated the following:*
>
> *Having in mind, that the Privatization Program was submitted by the company and that it was not independently verified by the Privatization Agency, the Agency does not assume the liability for:*
>
> *1. accuracy and comprehensiveness of the data, information, statements and opinions contained in the Privatization Program;*
>
> *2. any direct or indirect damages, loss of profit, i.e. costs incurred due to inaccuracy and incompleteness of the data, information, statements and opinions contained in the Privatization Program, […]*[349]

186. Given the above, Claimants' argument that the Privatisation Agency had an obligation to act in good faith when reviewing the Privatisation Program and to not approve anything false contained therein, is wrong.[350] On the contrary, the Privatisation Agency was not required to review and confirm the accuracy of the information provided in Obnova's privatisation program concerning its alleged rights in relation to the Dunavska Plots and Objects. As explained by Prof Jotanovic, a person cannot be deemed acting in bad faith if it does not undertake something it was not obligated to do in the first place.[351]

187. In any event, the **Privatisation Program expressly confirms that Obnova does not own any land or the right of use over the construction land**:[352]

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[349] Judgement of the Commercial Appellate Court no. Pž. 10609/2010 from 27 January 2011, **R-083** (emphasis added)**.** Respondent's legal expert explains that the Agency cannot be held liable for damages arising out of the incorrect and/or incomplete information contained in the privatisation program by relying on the court practice noting that the buyer could have reviewed the privatization documents and that he is the one who is able to fully review and examine the subject, its assets and financial and business activities and that he completely relies on performed examinations and check-ups when buying the sales capital. See Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, paras. 77-78 and Judgement of the Supreme Court of Serbia No. Prev 197/2007 from 27 December 2007, **R-084**.

[350] Reply, para. 253.

[351] Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para. 81.

[352] Counter-Memorial, para. 110 and fn. 194; Privatisation Program, **R-046**, pp. 6-7 (of PDF).

2.4. Land owned by the enterprise

Parcel	Location	Type of land	Book value as of 31/12/2002 (RSD 000)	Purpose	Area		
					ha	a	m²
		Building land:					
N/A							
		TOTAL BUILDING LAND	0		0	0	0
		Agricultural land:					
		TOTAL AGRICULTURAL LAND	0		0	0	0
		TOTAL LAND	0		0	0	0

...

2.5. Land over which the enterprise has the right of use

Parcel	Location	Type of land	Land owner	Use requirements	Purpose	Area		
						ha	a	m²
		Building land:						
		TOTAL BUILDING LAND				0	0	0
		Agricultural land:						
		TOTAL AGRICULTURAL LAND				0	0	0
		TOTAL LAND				0	0	0

Note: Republic Geodetic Authority's Report no. 952-297/03 dated 09/04/2003 and supplemental Report dated 20/05/2003 were submitted.

188. Finally, the privatisation of shares of the subject of the privatization (in this case, Obnova) cannot *per se* create any property rights on the part of the subject of privatization. Privatisation can only transform *an already existing* property right (a permanent right of use) of the subject of privatization into the ownership right. Accordingly, since Obnova never had a permanent right of use over the Dunavska Plots and the Objects, it has no property rights that can be converted to ownership.

V. Obnova's legalization requests were unsubstantiated

189. Serbia has passed several laws enabling the legalization of illegally built objects. Each of these laws establishes the conditions that must be met in order for legalization to take place.[353] All of them require the applicant to submit evidence of its ownership or right of

[353] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para. 98. 102 Law on Special Conditions for Issuing Construction and Use Permits for Certain Objects ("Official Gazette of RS", No. 16/97), **C-117**; Law on Planning and Construction ("Official Gazette of RS", no. 47/03), **C-018**; Law on Planning and Construction ("Official Gazette of RS", no. 72/09), **C-021**; Law on

use over the object that is the subject of the legalization request or over the land on which the object was built.[354]

190. Obnova never met these conditions since it never had ownership and/or the right of use over the Objects and the Dunavska Plots.[355] That is why Obnova was unsuccessful in the five legalization proceedings it initiated in the period between 2003 and 2014.[356]

191. In this section, Respondent will show that, contrary to Claimants' assertions from the Reply, Obnova's requests for legalization from November 2003 were not ignored by the Serbian authorities (**Section 1.**); Obnova's request for legalization from January 2010 was also unsubstantiated (**Section 2.**); and Obnova's requests from January 2010 and January 2014 would have been rejected even if the 2013 DRP had not been adopted (**Section 3.**).

1. Obnova's legalization requests from 2003 were not ignored

192. Claimants restate their argument that Obnova did not receive any response from the City regarding the two legalization requests that it filed in November 2003.[357] This is incorrect.

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special conditions for registration of ownership rights on objects built without a construction permit ("Official Gazette of RS", no. 25/13), **C-118**; Law on Legalization of Objects ("Official Gazette of RS", no. 95/13), **C-026**; and the Law on Legalization of Objects ("Official Gazette of RS", no. 96/15), **C-119**.

354 Art. 160 of the Law on Planning and Construction ("Official Gazette of RS", no. 47/03), **RJ-038**; Art. 2 Law on special conditions for registration of ownership rights on objects built without a construction permit ("Official Gazette of RS", no. 25/13), **RJ-062**; Art. 12 and Art. 21 Law on Legalization of Objects ("Official Gazette of RS", no. 95/13), **RJ-063** and Art. 10 of the Law on Legalization of Objects from 2015 (Official Gazette of RS", no. 96/15) **RJ-064**.

355 Sections B.I, B.IV.

356 Counter-Memorial, paras 219-235; Reply, paras 239-244, 277-281, 349-353.

357 Reply, para 240. As explained in para. 219 of the Counter-Memorial, in November 2003, Obnova filed one request to legalize the object on parcel no. 47 and another request to legalize the object on parcel no. 39/1. See Obnova's Legalization Request related to Dunavska 17-19 dated November 2003, **R-179**; Obnova's Legalization Request related to Dunavska 23 dated November 2003, **R-180**. Both documents are produced as Claimants' exhibits C-019 and C-020, but Respondent resubmits them due to Claimants' incorrect translation. When it comes to Obnova's request related to the object at Dunavska 17-19, Claimants' translation incorrectly states that Obnova stated that it had built the object based on a "**valid** construction permit" but the Serbian original expressly provides that Obnova instead said that it had constructed the object based on a "**temporary** construction permit". When it comes to Obnova's request related to the object at Dunavska 23, Claimants' translation incorrectly provides that Obnova stated that it had built the object based on a "valid construction permit", but Obnova never said any of that in the Serbian original.

193. As Respondent explained in the Counter-Memorial, the minutes from a meeting held by the Committee for Legalization in November 2004 demonstrate that: (i) the Committee assessed 49 different legalization requests, and (ii) the Committee decided that 25 requests, including Obnova's, could not be the subject of further legalization procedure.[358] In other words, the Committee examined all 49 requests but concluded that not all of them were eligible for further consideration in the legalization procedure. As this happened 20 years ago, there is no available documentation of the reasons for such decision.[359] Nevertheless, the available documents show that Obnova's legalization requests were not ignored.

194. This can be seen from the response that Obnova received from the Construction Department of the City of Belgrade upon its request to reopen one of the legalizations proceedings initiated in 2003.[360] In its response dated 27 November 2009, the Construction Department explained that: (i) the Committee's decision not to proceed with Obnova's legalization requests initiated in November 2003 had been sent to Obnova on 27 December 2004, as evidenced by the Department's post records, and (ii) Obnova had been allowed to take part in the proceeding, as evidenced by the fact that it had been requested to supplement its incomplete legalization requests, which Obnova did.[361] Claimants does not address these facts in the Reply.

195. Instead, Claimants incorrectly state that Obnova's request to reopen the legalization proceeding filed in 2009 was also ignored,[362] while, in fact, the Construction Department informed Obnova that (i) the original legalization procedure had been concluded and that Obnova was invited to file a new request for legalization by 11 March 2010 pursuant to then applicable Law on Planning and Construction.[363] Obnova did precisely as the

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358 Counter-Memorial, para 220; Minutes from the session of the Committee for legalization dated 26 November 2004, **R-110**, pp 1-2 (of PDF).

359 Counter-Memorial, para 220. Construction Department explained in its letter that since this was a non-administrative proceeding which did not approve continuation of the legalization proceeding, the case was archived on 17 January 2005, with one-year period for preservation. Letter from the Construction Department to Obnova from 27 November 2009, **C-317**, p. 2 (of PDF).

360 Reply, para 227; Obnova's request for reopening of the legalization proceedings dated 15 December 2008, **C-316**, p. 1 (of PDF).

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

362 Counter-Memorial, para. 220.

363 Letter from the Construction Department to Obnova from 27 November 2009, **C-317**, p. 2 (of PDF).

Construction Department instructed it.[364] Therefore, not only did the Construction Department respond to Obnova's request, but Obnova also responded to the instruction of the Construction Department.[365]

2. Obnova's legalization request from January 2010 was also unsubstantiated

196. As set out in the Counter-Memorial, in January 2010 Obnova filed a request for legalization of the Object located at Dunavska 23. Yet it failed to provide documents proving Obnova's rights, despite the Secretariat for Legalization's instruction that Obnova supplement its request on two occasions.[366] Claimants argue that Respondent has misinterpreted this legalization requests because in paragraph 231 of the Counter-Memorial, Respondent discusses the legalization request related to the Object at Dunavska 23 but refers only to the legalization request for the Object at Dunavska 17-19 (R-111).[367] Respondent's failure to exhibit the legalization request for the object at Dunavska 23, filed in January 2010, was an unintentional error. This does not change the fact that paragraphs 231-232 of the Counter-Memorial are in fact correct.

197. Claimants also deny that Obnova, acting upon Secretariat for Legalization's requests, submitted only the certificate of existence of the court proceedings related to the Objects and the land at Dunavska 17-19 (which is completely unrelated to the Object at Dunavska 23). They state that Obnova also submitted "*a number of additional documents*" listed in its supplemented application.[368] However, they fail to explain how these other documents substantiate that Obnova had rights over the land and/or the Object at Dunavska 23.[369]

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364 Reply, para. 278; Request for legalization of objects at Dunavska 23 dated 26 January 2010, **R-176**; Request for legalization of objects at Dunavska 17-19 dated 26 January 2010, **R-111.**

365 Reply, para. 278.

366 Counter-Memorial, para. 231-232; Request for legalization of object at Dunavska 23 dated 26 January 2010, **R-176**; Order for supplementation of the request for object at Dunavska 23 dated 13 December 2011, **R-118**; Order for supplementation of the request for object at Dunavska 23 dated 17 April 2018, **R-119.**

367 Reply, para. 279.

368 Reply, para. 280.

369 The Secretariat for Legalization requested proof of the right of ownership, right of use or right of lease on the construction land, or, right of ownership on the object. It also stated that the following items are, *inter alia*, regarded as an appropriate documents: (i) for an object built on land owned by another person - a legally binding court judgment establishing the right of ownership to the land, which shall be acquired by owner in accordance with the regulations governing property relations; (ii) for an object built on construction land - agreement for transfer of the right of use, or purchase of land, certified by the competent court between the then user and applicant, as well as other agreements by which the land was at disposal (agreement for transfer or exchange of real estate concluded between the then land users, in appropriate form that was prescribed for conclusion of such type of agreement at the time of its conclusion). Order for supplementation of the request

This is of no surprise, as none of these documents could possibly serve as proof of the claimed property rights (a land survey, a copy of the plan, a description of the fixed assets within the Obnova's Objects at Dunavska 23, and the letter from the Secretariat for Urbanism from April 2008 related to Obnova's Initiative (C-315)).[370]

3. Obnova's legalization requests from January 2010 and January 2014 would have been rejected regardless of the adoption of the 2013 DRP

198. It is undisputed that Obnova's requests from January 2010 and January 2014 were rejected because the Objects in question were located on cadastral parcels covered by the 2013 DRP.[371] However, the Parties disagree about whether these requests would have been rejected even without the adoption of the 2013 DRP.[372]

199. Claimants assert that Obnova had provided sufficient evidence of its rights over the Objects, (construction and occupancy permits) and that the adoption of the 2013 DRP was the only reason for the rejection of its legalization requests.[373]

200. This is incorrect. Respondent has already explained that under Serbian law, Obnova, as an alleged unregistered holder of the property rights over the real estate at Dunavska Street, was required to establish its rights in court proceedings, before it applied for legalization. This was explicitly provided in the relevant legislation applicable at the relevant time, namely the Law on Legalization of Objects, which stipulated that:[374]

> *The object of legalization can be an object for which the owner submits proof of the corresponding right over the construction land or object....*[375]

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for object at Dunavska 23 dated 17 April 2018, **R-119**, p. 1 (of PDF). See also Order for supplementation of the request for object at Dunavska 23 dated 13 December 2011, **R-118.**

370 Obnova's supplement submission from 24 May 2018, **R-120**.

371 Reply, para. 349; Counter-Memorial, paras. 223 and 233. Decision of the Secretariat for Legalization No. 351.21-19758/2010 dated 25 April 2018, **C-041**; Decision of the City Council of the City of Belgrade No. 351 – 515/18-GV dated 19 June 2018, **R-046**; Judgement of the Administrative Court dated 12 October 2022, **R-112**; Decision of the Secretariat for Legalization No. 351.21 –16194/2014 dated 25 April 2018, **C-042**; Decision of the City Council of the City of Belgrade No. 351-512/18 – GV 19 June 2018, **C-045**; Decision of Administrative Court No. 11 U 14419/8 dated 11 January 2021, **C-049**.

372 Reply, para. 351.

373 Reply, para. 353.

374 See Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para. 99 and fn. 105.

375 2015 Law on Legalization of Objects, **R-116**, Article 10(1).

201. The Law on Legalization of Objects considered the following as an appropriate proof of the right over the land, i.e., the object:

> *For an object built on land owned by another person - a final court decision determining the right of ownership on the land...;*[376]

202. Moreover, the court practice unequivocally confirms that the applicant is required to resolve ownership over the object and land before commencing legalization procedure.[377]

203. Therefore, without a court decision, all Obnova's legalization requests were unsubstantiated, regardless of the adoption of the 2013 DRP.[378] This is confirmed by Prof Jotanovic, who explains that:

> *…all legal property relations regarding the land or the object must be resolved before initiating the legalization procedure itself. Obnova did not resolve the legal property relations regarding the land or the objects for which it filed a request for legalization.*[379]

VI. Obnova never met the requirements for conversion

204. The 2006 Constitution of the Republic of Serbia ended the State's monopoly on ownership over construction land. After this, the 2009 Law on Planning and Construction introduced the possibility to convert the right of use over the previously State-owned construction land into private ownership.[380] Claimants argue that the only reason Obnova was prevented from converting its right of use over the Dunavska Plots was the adoption of the 2013 DRP which designated this land for public purposes and thereby excluded it from conversion.[381] This is incorrect, since Obnova never met the conditions required for conversion regardless of the adoption of the 2013 DRP.

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376 2015 Law on Legalization of Objects, **R-116**, Article 10(3) items 1), 2) and 3).

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

378 See Section B.IV; Counter-Memorial, paras 218, 224-230, 234; Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 103-105.

379 Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 105.

380 **Živković Milošević ER-1**, para 48.

381 Reply, paras 47-48, 177, 192 and 385.

205. All regulations governing conversion since 2009 until now provide that conversion is possible only for registered holders of property rights over the land and/or the objects constructed on that land. This was confirmed by the Supreme Court of Serbia in a decision on which Claimants refrain from commenting:

> *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.*[382]

206. Given the above, Respondent will again demonstrate that unregistered right of use is not suitable for conversion (**Section 1.**). For the sake of completeness, Respondent will also reiterate its arguments that, in any case, conversion was not possible between 2013 and 2015 (**Section 2.**).

1. Unregistered holders of the property rights cannot apply for conversion

207. Claimants maintain their position that Obnova acquired the right to convert its alleged *unregistered* right of use over the land at Dunavska 17-19 and 23 into ownership based on the 2009 Law on Planning and Construction.[383] This is incorrect. Obnova could have converted its alleged property rights only if it had inscribed them in the Cadastre, which it undisputedly did not.

208. When the conversion process was first introduced, privatized entities such as Obnova could apply for conversion for a fee,[384] but only if their right of use was registered in the public real estate records. 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 must 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.[385]

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382 Counter-Memorial, para. 242; Judgement of the Supreme Court, No. Rev 3644/2021 dated 25 November 2021, **R-125**, pp 3-4 (of PDF).

383 Reply, paras. 47, 177, 192-193 and 276.

384 **Živković Milošević ER-1**, para 49.

385 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 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 2(1) item 1) and Article 20(3).

209. The same was required by the 2015 Law on Conversion, which provided that:

> *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.*[386]

210. The 2015 Law on Conversion was amended in 2020, but it nevertheless provided that an unregistered right of use over the land can be converted the ownership only if the holder of such right is registered in the Cadastre as the owner of the object on the land.[387]

211. Nothing changed with the newest amendments introduced in 2023 to the Law on Planning and Construction. While the privatised entities do not have to pay a conversion fee any longer and conversion now takes place *ex lege*, they still must be inscribed as the holders of the right of use over the land or inscribed as the owners of objects on the land, to be eligible for conversion. This is clearly stated in the 2023 Law on Planning and Construction:

> *The ownership right on the cadastral parcel shall be registered in favor of the entity who is registered as the owner of the building, i.e., the buildings located on that parcel, or the entity who is registered as the holder of the right of use on the cadastral parcel on an undeveloped building land.*[388]

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386 Article 1(2) to which this provision refers to provides that the persons in question are, *inter alia*, privatised entities. 2015 Law on Conversion, **R-123**, Articles 1(2) item 2) and 4(1),(2).

387 Article 4(1) of the amended 2015 Law on Conversion stipulated 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. This provision, on the other hand, allowed owners of the objects to apply for conversion with a fee, even if they are not registered in the Cadastre as the holders of the right of use over the land 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(2) of the amended 2015 Law on Conversion prescribes that a person who applies for conversion must prove its standing by the excerpt from the Cadastre. 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 Cadastre. See, the 2015 Law on Conversion as amended on 12 February 2020, **R-124**, as amended on 12 February 2020, Article 4(1)(2); 2009 Law on Planning and Construction, **R-097**, as amended on 6 June 2019, Article 105(5).

388 Law on Amendments of the Law on Planning and Construction ("Official gazette of the RS", No. 62/2023), **C-488**, Article 102(3).

212. Claimants are thus blatantly wrong when stating that registration is "*merely a procedural point*".[389] As explained by Prof Jotanovic:

> *considering that the registration of rights in the cadastre is a legal requirement for conversion, there can be no words of "formalities", "procedural requirement", and "one procedural step", but rather of a required condition (conditio sine qua non) for completing the conversion procedure.*[390]

213. Even Claimants' experts agree that in order to convert its rights Obnova was required to:

> *first, register its ownership over the buildings and the right of use over the land, and then, second, complete the conversion procedure by registering its ownership right over the land.*[391]

214. Therefore, without having registered its alleged rights of use over the land at Dunavska Plots, Obnova simply could not have converted its rights over the land into ownership according to Serbian legislation.

2. Conversion was not possible between 2013 and 2015

215. Claimants disagree that conversion was not possible from 2013 until 2015, after the Constitutional Court struck down part of Article 103 of the 2009 Law on Planning and Construction, which regulated conversion against a fee and which applied to privatised entities such as Obnova.[392] They claim that the Constitutional Court only abolished the part of this article which concerned the calculation of the conversion fee but they deny that this prevented the conversion process.[393] This is incorrect.

216. Claimants fail to explain how it would be possible to complete the conversion with a fee if that fee was impossible to calculate. They also do not address the fact that the Administrative Court found that conversion was not possible in the given period.[394]

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389 Reply, para. 179.

390 Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para. 88.

391 **Živković Milošević ER-2**, para. 149.

392 Counter-Memorial, para. 237.

393 Reply, paras. 180.

394 Counter-Memorial, para. 247 and fn. 400; Judgement of the Administrative Court, No. U 7501/14 from 15 March 2016, **R-126**, p. 2-3 (of PDF).

217. Conversion was enabled once again upon the adoption of the 2015 Law on Conversion.[395] Notably, the draft of that law, which was submitted by Claimants, was accompanied with the following explanation:

> *This law resolves the issue of acquiring ownership right over building land for a certain category of legal entities, which are listed in Article 1 of this law that did not have a legal opportunity to convert the right of use into a right of ownership over [construction] land since the adoption of the Decision of the Constitutional Court in 2013.*[396]

218. Hence, it is evidently wrong to state that the conversion was possible in the period between 2013 and 2015.

VII. The 2013 DRP was in line with the law and did not have an expropriatory effect on Obnova's rights

219. In the Counter-Memorial, Respondent demonstrated that:

- the 2013 DRP was and still is in line with higher planning documents; [397]
- the adoption of the 2013 DRP was preceded by a careful review and study of available options for the location of public transportation terminal; [398]
- Obnova's rights could not have been expropriated due to the adoption of the 2013 DRP because Obnova did not hold any property rights;[399] and
- the Land Directorate did not acknowledge Obnova's right to compensation.[400]

220. As Claimants dispute these conclusions,[401] Respondent will address Claimants' arguments and explain in the following sections that: the 2013 DRP complied with the higher planning documents and in particular, the public transportation terminal (as the non-predominant purpose of the relevant block) did not occupy more than 50% of that block, i.e.

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395 Counter-Memorial, para. 247; 2015 Law on Conversion, **R-123**.

396 Draft of the Law on Conversion of Right of Use into Right of Ownership Over Building Land Against Fee Payment from 2015, **C-651**, pp 2-3 (of PDF).

397 Counter-Memorial, paras. 158-170.

398 Counter-Memorial, paras. 171-181.

399 Counter-Memorial, paras. 182-192.

400 Counter-Memorial, paras. 193-198.

401 Counter-Memorial, paras. 158-198.

zone (**Section 2**.); the location of the public transportation terminal was selected after a careful analysis of the available options (**Section 3**.); the public inspection process of the adoption of the 2013 DRP was conducted in accordance with the law and Obnova simply failed to participate in this process (**Section 4**.); the 2013 DRP did not expropriate Obnova's rights (**Section 5**.); and, thus Obnova was not entitled to compensation (**Section 6**.). Before addressing these issues, Respondent will present a chronology of the events relevant for the discussion about the 2013 DRP (**Section 1**.).

1. Events leading up to the adoption of the 2013 DRP

221. The key events related to the adoption of the 2013 DRP can be summarised as follows:

- In **September 2003**, the City adopted the 2003 General Plan, which designated the predominant purpose of the area where the Dunavska Plots were located as "*commercial zones*" and "*city centres*" and indicated that the purpose of the "*traffic area and terminus*" was compatible with this (predominant) purpose;[402]
- In **January 2006**, the Urbel (Urban Planning Bureau) prepared an analysis of the suitability of potential locations for the trolleybus terminus in Dorćol, which identified the location in Dunavska 17-19 as one of the most favourable locations for construction of the trolleybus terminus.[403]
- In **March 2006**, the City of Belgrade adopted the Decision to draft the 2013 DRP;[404]
- In **November 2007**, the public enterprise "Public City Transport" prepared another study in which Dunavska 17-19 was identified as the most favourable option for placing the public transportation terminal (bus and trolleybus) having in mind the City's ownership over the land and costs;[405]

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[402] Counter-Memorial, paras 160-162; General Plan of Belgrade 2021, **C-025**, p. 16-17 and 24 (of PDF). Respondent notes that in its Counter-Memorial it mistitled the exhibit **C-025** as "General Plan of Belgrade 2013".

[403] Counter-Memorial, para 173; Analysis of suitability of the locations for organizing trolleybus terminus in Dorćol dated January 2006, **R-101**, p. 19 (of PDF).

[404] Counter-Memorial, para 177; 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**.

[405] Counter-Memorial, para 173; 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)

- In **March 2008**, Obnova sent the Initiative to the City (Secretariat for Urban Planning and Construction) asking that it relocate the public transportation terminal from parcel no. 47, because Obnova's business operated at the leased premises on that parcel;[406]
- In **2010**, the Urbel prepared the concept of the 2013 DRP, which designated part of the parcel no. 47 for the construction of the public transportation terminal;[407]
- From **5 September until 5 October 2012** the City conducted the public inspection of the draft of the 2013 DRP (the "**Draft 2013 DRP**"), during which it was possible to review the text of the draft and submit objections to the planned solutions;[408]
- In **December 2013,** the City adopted the 2013 DRP, which, in accordance with its concept from 2010, designated part of parcel no. 47 for the construction of the public transportation terminal;[409]
- In **December 2015**, the 2015 DRP was adopted, which rezoned the land across from the Dunavska Plots, where the bus depot was located, for residential development;[410]
- In **March 2016**, the 2016 General Plan was adopted, replacing the 2003 General Plan. It also envisaged that the predominant purpose of the area where the Dunavska Plots were located ("*commercial facilities*") was compatible with the traffic and infrastructure purposes (i.e. public transportation terminal);[411]
- Also in **March 2016,** simultaneously with the 2016 General Plan, the 2016 General Regulation Plan (the "**2016 GRP**") was adopted.[412] The 2016 GRP, which specified the purposes of the narrower parts of the areas covered with the 2016 General Plan,

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406 Counter-Memorial, para 177; Letter from Obnova to City of Belgrade with the attachments dated 27 March 2008, **R-174**.

407 Reply, para 452; Concept of the 2013 DRP from 2010, **R-203**, pp. 1 (of PDF).

408 Counter-Memorial, para 181; Report on Public Review for the 2013 DRP dated 8 November 2012, **R-105**.

409 Counter-Memorial, para 152-159, 171-175; Detailed Regulation Plan for Roadways: Dunavska, Tadeuša Košćuška, Dubrovačka, Trolleybus and Bus Terminal in Dorćol, Municipality of Stari Grad, **C-024**, p. 12 (of PDF)

410 Counter-Memorial, para 176; Minutes from the 74th session of the Commission for Plans dated 18 June 2015, **R-103**, pp 2-3 (of PDF), 2015 DRP, **C-326**.

411 Counter-Memorial 166-168; 2016 General Plan, **R-096**, pp 4-5 (of PDF); General Urban Plan of Belgrade dated 7 March 2016, C-177, p 8 (of PDF);

412 Counter-Memorial, para 157 and 165-170; 2016 General Plan, **R-096**, pp 4-5 (of PDF).

designated the area where the Dunavska Plots are located as the "*traffic area*" (just like the 2013 DRP).[413]

2. The 2013 DRP is in line with the higher planning documents

222. Claimants contend that the 2013 DRP does not comply with any of the above-mentioned planning documents (the 2003 General Plan, the 2016 General Plan and the 2016 GRP), because the public transportation terminal occupies more than 50% of the relevant block designated for commercial zones and city centres as the predominant purpose.[414] They are wrong.

223. As explained in the Counter-Memorial, the "*commercial zones*" and "*city centres*" purpose of the area where the Dunavska Plots are located, as designated by the 2003 General Plan, was the predominant purpose of that area, not the exclusive purpose. In accordance with the 2003 General Plan, the predominant purpose must occupy at least 50% of a block, i.e. zone[415], while the purpose of the remaining land must be compatible with the predominant purpose.[416] According to the compatibility chart included in the 2003 General Plan, the purpose of "*traffic area and terminus*" is compatible with the (predominant) purposes of "*commercial zones*" and "*city centres*".[417] The placement of the public transportation terminal on part of the Dunavska Plots was therefore fully aligned with the 2003 General Plan.[418]

224. Claimants do not seem to dispute that the "*traffic area and terminus*" are compatible with the (predominant) purposes of "*commercial zones*" and "*city centres*". Rather, they argue that the public transportation terminal was not aligned with the 2003 General Plan, because it occupies more than 50% of a *certain area*, which the 2003 General Plan calls *a block.* They further argue that "*blocks*" are defined in the 2013 DRP and in the 2015 DRP.[419] These arguments are incorrect for a number of reasons.

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413 Counter-Memorial, para 157 and 167-170; 2016 General Regulation Plan, **R-099**, p. 644 (of PDF).

414 Reply, paras 297-303 and 707.

415 General Plan of Belgrade 2021, **C-025**, p. 16 (of PDF).

416 Counter-Memorial, paras 160-161; General Plan of Belgrade 2021**, C-025**, p. 16 (of PDF).

417 General Plan of Belgrade 2021**, C-025**, pp. 16-17 (of PDF).

418 Counter- Memorial, paras 160-163.

419 Reply, para 299.

225. **First**, the 2013 DRP and the 2015 DRP do not define the term "*block*".[420] In any event, these plans were adopted years after the adoption of the 2003 General Plan and thus they cannot be the relevant source of the definitions of the terms used therein.

226. **Second**, the 2003 General Plan envisaged that the "[*p*]*urposes 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.*"[421] The "*Land Use Plan 2021*" encompasses several zones, which are marked in different colours. The zone named "*commercial zones and city centres*" is marked in red. The Dunavska Plots are within this zone.[422]

227. In 2008, the City's Secretariat for Urban Planning and Construction raised the issue of the predominant purpose and the planned public transportation terminal. It concluded that the proposed solution of placing the bus loop at the Dunavska Plots was in accordance with the 2003 General Plan:

> *An inspection of the General Plan for Belgrade 2021 ("Official Gazette of the City of Belgrade", No. 27/03 and 25/05) established that the area in question is mostly located in the regions intended for public traffic areas, and in smaller part (the location planned by the DRP for the construction of the Public City Transport terminus: bus and trolleybus terminus) in the areas intended for commercial zones and city centers.*
>
> *At the same time, it was established that the purposes: " utility and infrastructure areas" and " traffic areas and terminals" are compatible with the purpose of "commercial zones and city centers" (chapter 11.1.1. "Dominant use of space", table no. 89 "Compatibility of uses").*[423]

228. In addition, the 2003 General Plan envisaged that the block area, i.e. the zone, could comprise at least several cadastral parcels, and that the compatible (non-predominant) purpose could occupy the entirety of certain parcels in that block/zone: "*at the level of individual parcels within a block, the purpose defined as compatible can be a predominant or a sole purpose*." The fact that the public transportation terminal (as a compatible

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420 Reply, para 299

421 General Plan of Belgrade 2021, **C-025**, p. 16 (of PDF); Counter- Memorial, para 160.

422 General Plan of Belgrade 2021, **C-025**, p. 24 (of PDF).

423 Letter from Secretariat for Planning and Construction no. 350.1-35/2007, 22 April 2008, **C-590**, p. 2 (of PDF).

purpose) occupies a large part of cadastral parcels nos. 49/1, 47 and 43 is therefore irrelevant.[424]

229. **Third**, the fact that public transportation terminal does not occupy more than 50% of the area that is planned for "*commercial zones and city centres*" is further confirmed by the 2016 General Plan. According to it, predominant purposes, as set out in Schedule no. 3, are designated for an area that occupies a minimum of 5 hectares:

> *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.*[425]

230. Therefore, the minimum surface area where the Dunavska Plots are located is also 5 hectares. The predominant purposes of these 5 hectares is *"commercial facilities" (*i.e. *"commercial content).*[426] *Traffic and infrastructure areas* are compatible[427] with this predominant purpose and can occupy maximum 50% of that area. As the public transportation terminal occupies the surface of 1,96 hectares,[428] the 2013 DRP complies with the 2016 General Plan.

231. Claimants argue that the 2016 General Regulation Plan "*shows that more than 60% of the block with Obnova's premises is taken up by the bus loop*" and pointed on the map enclosed with this plan.[429] However, this map does not contain any division into block area/zones[430] and it is unclear how Claimants calculated the percentage covered by the public transportation terminal.[431] As explained above, the 1.96 hectare surface of the

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424 General Plan of Belgrade 2021, **C-025**, p. 16 (of PDF) and Detailed Regulation Plan for Roadways: Dunavska, Tadeuša Košćuška, Dubrovačka, Trolleybus and Bus Terminal in Dorćol, Municipality of Stari Grad, **C-024**, p. 5 (of PDF).

425 2016 General Plan, **R-096**, p. 2 (of PDF) (emphasis added).

426 See General Urban Plan of Belgrade dated 7 March 2016, **C-177**, p. 7-8 (of PDF). The purpose "commercial zones and city centres" from 2003 General Plan is renamed to "commercial facilities"(i.e. "commercial content") in 2016 General Plan.

427 See 2016 General Plan, **R-096**, p. 4-5 (of PDF). The purpose "*traffic area and terminus*" from 2003 General Plan is renamed in „*traffic and infrastucture areas*" in 2016 General Plan.

428 2013 DRP, **R-098**, p. 6 (of PDF) ("*At the location covering approximately 19,600 m2 in Dunavska Street, it is necessary to build a trolleybus and -bus terminal with the necessary accompanying facilities*").

429 Reply, para 303; 2016 GRP, **R-099,** p. 644 (of PDF)

430 2016 GRP, **R-099**, p. 644 (of PDF)

431 2016 GRP, **R-099,** p. 644 (of PDF)

public transportation terminal of certainly does not exceeds 50% of the *"commercial facilities" (*i.e. *"commercial content")* that cover an area of 5 hectares.

3. The City chose the location of the public transportation terminal after a careful analysis of the available options

232. As already demonstrated, the location for the construction of the public transportation terminal was selected only after other available options were analysed in 2006 and 2007.[432] Claimants allege that, according to the analysis from 2006 (the "**2006 Analysis**"), parcel no. 47 was not the best option for placing the public transportation terminal,[433] while the study from 2007 (the "**2007 Study**") failed to compare different options and does not contain the reasons for placing the public transportation terminal at the parcel no. 47.[434] Tellingly, Claimants do not explain why parcel no. 47 was allegedly not a good location for the public transportation terminal. In any event, as will be shown below, the relevant considerations led the City to the conclusion that it was the best choice.

a) The 2006 Analysis

233. The 2006 Analysis considered several locations as options for placing the trolleybus terminus, including Dunavska 17-19 (parcel no. 47), which was named "*location 3*".[435] It concluded that parcel no. 47 was one of the "*favourable locations*" for the trolleybus terminus:

> *Based on the conducted analysis and evaluation of the locations from the aspects of various criteria, it follows that the favorable locations for the construction of the trolleybus terminus are location 2 and location 3.*
>
> *Location 2 could be singled out as the most favorable…*[436]

234. Therefore, the analysis confirmed that the location covering parcel no. 47 was a favourable location for the trolleybus terminus. The existence of another location ("*Location*

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[432] Counter-Memorial, paras 172-176. See Analysis of suitability of the locations for organizing trolleybus terminus in Dorćol dated January 2006, **R- 101**, p 8 (of PDF) and 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).

[433] Reply, para 307.

[434] Reply, paras 308 and 774.

[435] Analysis of suitability of the locations for organizing trolleybus terminus in Dorćol dated January 2006, **R-101**, p 8. (of PDF).

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

2"), that could be, but not necessarily was, the most favourable location certainly does not prove that the decision about the location of the public transportation terminal was reached arbitrarily. The fact that the analysis explained the advantages of the location covering parcel no. 47 also proves that the decision was not arbitrary.[437] It should be noted that what was considered as the advantage of the parcel no. 47 – the ownership of the City and the costs, was in fact considered a disadvantage of "Location 2", as the holder of rights over the part of that location was not determined.[438] The fact that the City opted for the location that did not require expropriation is more than reasonable.

b) The 2007 Study

235. The 2007 Study confirmed the results of the 2006 Analysis, determining 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*."[439] Contrary to Claimants' allegations, the study explained how that conclusion was reached,[440] which is further proof that the decision to

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[437] *For the plots included in the proposed location 3, the user is the City of Belgrade, and from that point of view, the realization of the terminus at this location is easily feasible;*

- By planning the trolleybus terminus at this location, a good connection with the existing GSP depot is achieved;

-The existing purpose of the space as a production and business complex is inadequate and its relocation is necessary;

-The planned purpose of the block as a whole as a larger business and commercial center will contribute to the concentration of a larger number of users in this zone;

-The location occupies such a position that it does not disturb the functioning of other activities in the area and it is well integrated into the area. Analysis of suitability of the locations for organizing trolleybus terminus in Dorćol dated January 2006, **R-101**, p 18 (of PDF).

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

[439] 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).

[440] *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;

place the public transportation terminal at Dunavska 17-19 was not arbitrary. The fact that this particular report did not contain an analysis of other options is irrelevant, as these other options had already been analysed in 2006.[441]

236. In conclusion, the City conducted two analyses before deciding to place the public transportation terminal on parcel no. 47.[442] The studies in question provide a comprehensive analysis and reasons for the selection of this location. Claimants' disagreement with the City's conclusions is irrelevant because the question here is not whether the City reached the most objectively favourable traffic solution, but whether it conducted a rational decision-making process and provided reasons for its decision. It clearly did. It is also crucial to recall that at the time, the City held the property rights over the Dunavska Plots and was informed about Obnova's claims to the land only much later, in 2016 when Obnova initiated the first court proceedings against the City.[443]

c) The 2015 DRP

237. Two years after the adoption of the 2013 DRP, the City adopted the 2015 DRP which rezoned the land across the street from the Dunavska Plots, where the bus depot was

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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". 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). The same explanation is included in the 2013 DRP. See 2013 DRP, **R-098**, p 5 (of PDF).

441 Analysis of suitability of the locations for organizing trolleybus terminus in Dorćol dated January 2006, **R-101**, p 8 (of PDF).

442 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**, and Analysis of suitability of the locations for organizing trolleybus terminus in Dorćol dated January 2006, **R-101**.

443 Land book insertion no. 1689 for parcel no. 47, **R-011**, pp 1 and 2 (of PDF) and Decision of the Higher Court in Belgrade No. 23. P. no. 1724/16 dated 22 September 2022, **C-168**, p 2 (of PDF). See also Counter-Memorial, para 75.

located, for residential development.[444] Claimants argue that this shows that the decision on the location of the public transportation terminal was arbitrary, because "*instead of putting the bus loop on the land owned by the City, which was already designated and used for traffic purposes, the City decided to put a bus loop on Obnova's premises.*"[445]

238. However, as Claimants note, when the 2013 DRP was adopted, the bus depot was still located across from the Dunavska Plots and its relocation was not even considered, so it is of no surprise that that the 2013 DRP did not place the public transportation terminal there. Furthermore, both the land where the bus depot was located and the Dunavska Plots were already owned by the City at the time of the adoption of the 2013 DRP.[446] Therefore, the City did not have to decide whether to place public transportation terminal on its or "Obnova's land", since it owned both locations. Claimants' argument that "*the City has benefited from rezoning of its own land for residential purpose*s" by placing the bus loop on Obnova's premises thus fails.[447]

4. The public inspection process was transparent and conducted in accordance with law

239. After the Draft 2013 DRP was prepared, the City proceeded with its public inspection between 5 September and 5 October 2012. Obnova did not participate in this process,[448] allegedly because the public inspection was announced "*only in two tabloids*" of ill repute, while the Draft 2013 DRP was "*only made available in hard copy at a Government building.*"[449] Claimants' arguments are without merit because the public inspection process was transparent and conducted in accordance with law, allowing Obnova to participate and raise objections. Clearly at the time, Obnova did not consider it important and decided not to participate.

240. The 2009 Law on Planning and Construction provides that the presentation of the planning documents for public inspection shall last for 30 days and that it shall be announced in a daily newspaper.[450] Furthermore, the Regulation on the Content, Method, and

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444 Counter-Memorial, para 176.

445 Reply, para 337.

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

447 Reply, paras 337-338.

448 Counter-Memorial, para 180-181; Report on Public Review for the 2013 DRP dated 8 November 2012, **R-105**, p 3 (of PDF).

449 Reply, para 320.

450 2009 Law on Planning and Construction as amended in 2011, **R-181**, Article 50(1).

Procedure of Preparation of the Planning Documents stated that the planning document shall be presented at the local authority's building.[451]

241. The public inspection of the Draft 2013 DRP was announced in two daily newspapers, and it lasted from 5 September 2012 until 5 October 2012 (i.e. 30 days).[452] It is also not disputed that the Draft 2013 DRP was presented in the Belgrade City Assembly.[453]

242. The "Kurir" and the "Informer", the newspapers where the public inspection was announced, were among the most read and highest-circulation newspapers in Serbia.[454] Whether these newspapers are "trashy tabloids"[455] is irrelevant and ultimately a question of taste. The applicable legislation did not specify whether the announcement should be made in "quality" or "tabloid" newspapers. Rather, the purpose of the publication was to *inform* the public about the Draft 2013 DRP. Obviously, this purpose was fulfilled by publication of the announcement in two widely circulated newspapers.[456]

243. Crucially, as explained before, Obnova already in 2008 knew that the public transportation terminal was planned to be placed on Dunavska Plots, but remained completely passive over the years, apart from one communication (the Initiative) to the City in 2008.[457] This passive behaviour also resulted in their failure to provide any objections during the public inspection procedure whatsoever. For 13 years, between 2008 and 2021 Obnova had not raised any objections to the location of the bus loop on the Dunavska Plots.

244. Claimants argue that "*only one private person submitted objections to the plan",* whereas Belgrade citizens subsequently protested the changes in bus routes introduced by the

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451 Regulation on the Content, Manner, and Procedure of Preparation of the Planning Documents, **R-104**, Article 65.

452 Claimants stated that the draft of the 2013 "*was made publicly available for the first time between 9 September and 5 October"*, but they provide no proof for that. On the other hand, all relevant documents state that the public inspection took place from 5 September to 5 October. See Report on Public Review for the 2013 DRP dated 8 November 2012, **R-105**, p. 2-3 (of PDF).

453 Report on Public Review for the 2013 DRP dated 8 November 2012, **R-105**, p. 2-3 (of PDF);

454 "Kurir is the winner despite the foul play", 10 November 2012, **R-185; "**In Serbia we have no competition! Informer is convincingly first – both the best-selling and most-read", 20 July 2016, **R-186**.

455 Reply, paras 778, 786 and 904.

456 The announcements of public inspection of the planning documents was regularly published in tabloid newspapers. See Kurir, BELGRADE: draft of the detailed regulation plan for the block in Zvezdara, 11 February 2013, **R-190**, and Kurir, PUBLIC INSPECTION OF THE REGULATION PLAN OF THE LINEAR PARK: Green Belt from Beton Hala to Pančevački Bridge, 16 May 2021, **R-189**.

457 Letter from Obnova to City of Belgrade with the attachments dated 27 March 2008, **R-174**.

2013 DRP, having had no previous knowledge of these planned changes.[458] This is a pure speculation. The fact that only one person submitted an objection does not mean that other citizens were not aware of the Draft 2013 DRP during the public inspection procedure. This also applies to the demonstrations that took place several years later against one of the solutions in the 2013 DRP. In addition, Obnova and its owners, who are professional investors, should not be equated with an average citizen who might or might not have an interest in reviewing or commenting on the Draft 2013 DRP. As Obnova is a legal entity with a claimed financial interest in the Dunavska Plots, it would have been expected to monitor the process of the adoption of the 2013 DRP more closely, especially as Obnova had known since 2008 that the location for the public transportation terminal was envisaged on the land it leased.

245. Finally, not only did Obnova decline to participate in the public inspection of the 2013 DRP and to object to the solutions provided therein, it also did not exercise its right to challenge the 2013 DRP after it was adopted.[459]

246. In fact, the only time that Obnova addressed the City's decision to locate the public transportation terminal at parcel no. 47 was in 2008 when it sent the Initiative to the City's Secretariat for Urban Planning and Construction, requesting relocation of the bus loop.[460] As already noted, in the Initiative, Obnova stated that it was a lessee of the Dunavska Plots and appended the lease agreements from 2006.[461] The Secretariat forwarded the Initiative to the Urbel, the authority responsible for the preparation of the 2013 DRP, explaining that:

> *Upon insight into available documentation, the Secretariat for Urban Planning and Construction notes the following:*
>
> *• According to the Master Plan for Belgrade 2021 ("Gazette of the City of Belgrade", No.: 27/03, 25/05, 34/07), the subject cadastral parcels are located in areas intended for activities and city centers.*
>
> *• In accordance with the Decision on the drafting of a detailed regulation plan for the area between the streets: Francuska, Cara Dušana, Tadeuša Koškuška and the existing railway in Dorćol ("Off. Gazette of the City of*

458 Reply, paras 321 and 780.

459 It was possible for Obnova to request amendments of the 2013 DRP. This is evidenced by, *inter alia*, the court decision that Claimants relied on. See Decision of the Supreme Court of Cassation Rev 17881/2022 dated 29 March 2023, p. 2, **C-507** ("*On December 16, 2016, the plaintiff submitted a request to amend part of the general urban plan related to the area where the disputed plot is located"*).

460 Letter from Obnova to City of Belgrade with the attachments dated 27 March 2008, **R-174**.

461 Letter from Obnova to City of Belgrade with the attachments dated 27 March 2008, **R-174,** p. 1-17 (of PDF).

> *Belgrade, no. 03/06) ("Off. Gazette of the Belgrade", Planning Institute in Belgrade, preparation of the Draft of the plan is currently in motion, in whose reach are the cadastral parcels in question.*
>
> *Considering the above, attached with the letter, we submit the subject initiative for the purpose of evidencing and considering its justifiability in the course of forming aforementioned Draft of the plan.*[462]

247. As is evident, the Secretariat sent the Initiative to Urbel for the purpose of (i) evidencing, and (ii) considering its justifiability.[463] Claimants, however, completely misrepresent this letter and state that the Secretariat informed Obnova that part of the Dunavska Plots was intended for commercial activities and city centres and that this fact should be taken into consideration when preparing the plan.[464] Moreover, Claimants allege that the City instructed the Urbel to *"consider Obnova's objections in preparation of a detailed regulation plan*".[465] These allegations are obviously incorrect. The quotation from the Secretariat's letter speaks for itself: "*we submit the subject initiative for the purpose of evidencing and considering its justifiability*".[466]

248. Therefore, Claimants cannot credibly claim that the Secretariat's letter to the Urbel served as the assurance that the public transportation terminal would not be placed on Dunavska Plots.

5. The 2013 DRP did not expropriate Obnova's rights

249. Claimants argue that Obnova's property rights over the Dunavska Plots and Objects were *de facto* expropriated by the adoption of the 2013 DRP.[467]

250. As explained in Counter-Memorial, (a) under Serbian law only the courts are competent to decide whether a *de facto* expropriation has occurred, yet in this case, no such decision

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462 Letter from the Secretariat for Urban Planning and Construction to the Urban Planning Institute from 23 April 2008**, C-315** (emphasis added)**.**

463 Letter from the Secretariat for Urban Planning and Construction to the Urban Planning Institute from 23 April 2008**, C-315.**

464 Reply, para. 290.

465 Reply, para. 273.

466 Letter from the Secretariat for Urban Planning and Construction to the Urban Planning Institute from 23 April 2008**, C-315.**

467 Memorial, paras 126-128; Reply, paras 311-317, 323 and 834.

exists,[468] (b) Obnova had no property rights that could be expropriated,[469] and (c) the adoption of the 2013 DRP does not, in any event, constitute an expropriation.[470] Claimants disagree and provide arguments to the contrary in their Reply,[471] which will all be refuted in the following paragraphs.

a) A *de facto* expropriation under Serbian law must be determined by the Serbian courts

251. The Parties agree that *de facto* expropriation exists in cases where the competent authorities fail to conduct a formal expropriation but undertake measures that amount to it.[472] In its Counter-Memorial, Respondent pointed out that only the courts are competent to decide whether a *de facto* expropriation has occurred under Serbian law:

> *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 ...*[473]

252. It is settled law that only the domestic courts are competent to decide whether a *de facto* expropriation under Serbian law has occurred through the adoption of a planning document, as well as to determine the appropriate compensation. Claimants do not dispute this and did not provide any conflicting court decision in that regard.

253. Claimants' statement that Serbian courts have "*repeatedly confirmed that an adoption of a planning document can represent a de facto expropriation"*[474] also does not help their case. It is not disputed that the adoption of a planning document can constitute a *de facto* expropriation. It is, however, disputed between the Parties, who is competent to determine so. But Claimants' statement cited above clearly supports Respondent's position that only the courts are authorised to "*confirm"* whether "*an adoption of a planning document can represent a de facto expropriation"* in a particular case.

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468 Counter-Memorial, paras 184-185.

469 Counter-Memorial, paras 186-189.

470 Counter-Memorial, paras 190-192.

471 Reply, paras 312-317 and 323.

472 Memorial, para 113; **Živković Milošević ER-1**, para 240.

473 Counter-Memorial, paras 184-185; Decision of the Higher Court in Belgrade, No. Gz 5266/2016 dated 14 June 2016, **R-106**.

474 Reply, para 313.

254. Obnova never brought this matter to the relevant courts of Serbia for decision. Nor is there any court decision confirming that the 2013 DRP constitutes a *de facto* expropriation. It is telling that the measures at the heart of Claimants' case, which are alleged to have been an expropriation of Obnova's property rights, were never brought before the competent courts of Serbia.

b) <u>There was no *de facto* expropriation since Obnova had no property rights that could have been expropriated</u>

255. Respondent explained in the Counter-Memorial that （i） a *de facto* expropriation can exist only if a person has a valid legal basis for inscription of its rights in the Cadastre,[475] and (ii) objects can be the subject of expropriation only if they are constructed in accordance with law.[476] Respondent also proved that (iii) Obnova did not have any property rights over the Dunavska Plots which could have been the subject of expropriation.[477]

256. In their Reply, Claimants continue to argue that Obnova has property rights over the Dunavska Plots and the Objects which are capable of being expropriated.[478] Respondent already refuted the existence of such rights as discussed above, as discussed in Section B.IV above.

257. Claimants also disagree that illegally constructed objects cannot be the subject of expropriation. They argue that the Supreme Court of Serbia confirmed that even buildings constructed without all necessary permits can be the subject of expropriation because "*rights of the builder of such buildings enjoy full court protection*".[479] However, the

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[475] Counter-Memorial, paras 187-188; See 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, <u>it is enough that they have a valid legal basis for registration</u>, which the claimant did have and subsequently made the registration in the real estate folio*.").

[476] Counter-Memorial, para 187; Judgement of the Administrative Court, No. U 1886/2014 dated 20 March 2015, **R-107**, pp. 6-7 (of PDF); Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, paras 92-93.

[477] Counter-Memorial, para 186 and Sections B.I and B.III; Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para 91.

[478] Reply, para 317.

[479] Reply, para 317; Decision of the Supreme Court of Serbia No, Rev 463/06, 17 October 2006, **C-141**, p. 2 (of PDF).

decision that Claimants rely on does not pertain or even refer to expropriation,[480] and as such has no relevance to the present case. On the other hand, the judgement of the Administrative Court from 2015 specifically dealt with the question whether the illegally constructed objects can be the subject of expropriation, and concluded that they cannot:

> *the objects are expropriated only if they are in the ownership, i.e. if they are built in accordance with the law.*[481]

258. However, even if it is considered that the expropriation of the Objects did occur (*quod non*), Claimants could claim only compensation for the Objects and not for the *inability to commercially develop the land*. As explained above and in the Counter-Memorial,[482] since the Objects are either temporary or illegal, and since they are built on the leased land, Obnova never fulfilled the conditions for obtaining any rights over the Dunavska Plots based on its alleged construction of the Objects.

259. In sum, there is no legal basis under Serbian law for Claimants' position that the 2013 DRP amounted to an expropriation of Obnova's alleged rights in the Dunavska Plots and Objects.

c) <u>The adoption of the 2013 DRP was not sufficient to cause *de facto* expropriation</u>

260. In its Counter-Memorial, Respondent highlighted that in addition to the adoption of the planning document, two more conditions had to be (cumulatively) met for a *de facto* expropriation to take place: (i) the land envisaged for public purposes must actually be brought to its intended public purpose; and (ii) the person who claims its immovable assets have been expropriated must truly be dispossessed of those assets.[483] This is the position adopted by Serbian courts.[484]

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480 Decision of the Supreme Court of Serbia No, Rev 463/06, 17 October 2006, **C-141**; Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, paras 92-93.

481 Judgement of the Administrative Court, No. U 1886/2014 dated 20 March 2015, **R-107**, pp. 6-7 (of PDF). See also Counter-Memorial, para 187; Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, paras 92.

482 See Counter-Memorial, Sections B. I, B.II and B.V.

483 Counter-Memorial, paras 190.

484 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*.").

261. Claimants oppose this and argue that a recent court decision showed that "*expropriation can take place upon adoption of a planning document—even if the construction envisaged in the planning document does not commence*".[485] This decision is, however, inapposite for the present case, as the factual background of that case is significantly different from Obnova's case.[486] Unlike Obnova, which did not have a valid legal basis for inscription of its rights, the claimant in the case invoked by Claimants was the *registered owner* of the relevant cadastral parcel.[487] This was a crucial fact. The court noted that claimant's ownership right had lost its essence with the adoption of the planning document, because, among other reasons, the cadastral parcel in question became non-competitive in the market due to its re-zoning for public purposes.[488] This is not so with Obnova, as Obnova has no property rights over the Dunavska Plots and therefore is not able to sell[489] or develop them, regardless of the adoption of the 2013 DRP.

6. <u>The Land Directorate is not competent to decide on matters of compensation and it did not make any decision in that regard</u>

262. On 19 April 2021, Obnova addressed several Serbian authorities, including the Land Directorate, requesting compensation for the alleged losses caused by the adoption of the 2013 DRP.[490] On 13 August 2021, the Land Directorate responded to Obnova explaining that its request is not justified.[491] Claimants argue that Respondent was obliged to compensate Obnova for the 2013 DRP's impact on Obnova's alleged rights over the Dunavska Plots and the Objects, and that its right to compensation was allegedly recognized

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485 Reply, para 323.

486 Decision of the Supreme Court of Cassation Rev 17881/2022 dated 29 March 2023, **C-507**.

487 Decision of the Supreme Court of Cassation Rev 17881/2022 dated 29 March 2023, **C-507** ("The plaintiff has the ownership right of the subject plot, but she cannot sell it under market conditions because no one is interested in buying a plot designated for a special purpose. In this way, the plaintiff bears an excessive burden.")

488 Decision of the Supreme Court of Cassation Rev 17881/2022 dated 29 March 2023, **C-507.**

489 Notably, the court found that by "*creating uncertainty regarding the possibility of disposing of the property – the disputed plot, there is a certain limitation of the plaintiff's right to the peaceful enjoyment of property*…". Such limitation does not exist in Obnova's case, given that Obnova could not dispose of Dunavska Plots as it was never their owner. See Decision of the Supreme Court of Cassation Rev 17881/2022 dated 29 March 2023, **C-507**.

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

491 Letter from the Letter from the Land Directorate of the City of Belgrade from 13 August 2021, **C-053.**

in the Land Directorate's letter of 24 February 2016.[492] Claimants are wrong on both accounts.

263. First, as Respondent already explained in its Counter-Memorial[493] and in Section B.IV above, Obnova never had any rights over the Dunavska Plots or the Objects suitable for expropriation and thus it cannot be entitled to compensation. Second, as also explained in the Counter-Memorial[494] and as will be reiterated in this Section: the Land Directorate was not competent to decide the issue of compensation (**Section a)**); in fact, it did not decide this issue (**Section b)**), but instead, provided a reasonable explanation as to why it considered that Obnova should not be compensated (**Section c)**).

a) <u>The Land Directorate was not competent to determine whether Obnova was entitled to compensation</u>

264. Claimants deny that only the Serbian courts are competent to determine a request for compensation and argue that the Land Directorate was authorised to decide on Obnova's request for compensation for *de facto* expropriation allegedly caused by adoption of the 2013 DRP.[495] However, Claimants' Serbian law experts themselves state that "*Serbian courts only have the authority to decide upon disputes resulting from factual expropriations, and only when such disputes arise*".[496] Obnova's rights over the Objects and the Dunavska Plots were indeed disputed by Respondent and the City (all three court proceedings between Obnova, as claimant, and the City and the Republic of Serbia, as respondents, were pending at the time Obnova addressed the Land Directorate with the request for compensation on 19 April 2021[497]).[498] It is therefore clear that only the courts were competent to decide on Obnova's right to compensation and that this issue could not be the subject of discussions with the Land Directorate.

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492 Reply, paras. 324 and 342.

493 Counter-Memorial, Section B.IV, B.V. and paras. 186-189.

494 Counter-Memorial, paras. 202-2016.

495 Reply, paras. 360-361. Counter-Memorial, paras. 199-206.

496 **Živković Milošević ER-2**, para. 224.

497 See Obnova's request for compensation dated 19 April 2021, **C-052.**

498 Obnova's submission to the Higher Court in Belgrade dated 15 November 2016, **C-038**; Obnova's submission to the Higher Court in Belgrade dated 16 July 2019, **C-050**; Obnova's submission to the Higher Court in Belgrade dated 13 August 2019, **C-051**.

265. Prof Jotanovic agrees that the Land Directorate was not authorised to negotiate or decide on Obnova's request for compensation as that would also require its decision on ownership of the properties, which only the courts can do:

> *the fact that Obnova is not registered as the owner of the real estate in Dunavska Street represents an insurmountable obstacle due to which, the Land Directorate could not, even if it wanted to, agree on payment of damages for alleged expropriation because the decision on the compensation would assume that the Land Directorate determines the existence of ownership rights, and as it was explained, unregistered rights over the real estate can be determined only by the court.*[499]

266. Therefore, as Prof. Jotanovic concludes, the Land Directorate "*cannot make decisions neither on its existence nor on the amount of compensation because it is not competent to do so*".[500] Claimants, however, have never explained why Obnova refrained from addressing Serbian courts with a compensation claim.

b) The Land Directorate never confirmed that Obnova would be compensated for the Dunavska Plots and the Objects

267. Claimants argue that the letters from the Land Directorate from 24 February 2016 and 19 February 2018 indicate that Obnova would be compensated for the Objects which were to be removed from the Dunavska Plots.[501] Claimants' position is that the Land Directorate would not have brought up the issue of compensation if it thought that Obnova had no rights over the Objects.[502] Claimants offer no new arguments for this statement. Respondent maintains as follows:

- The Land Directorate *never acknowledged Obnova's alleged rights over the Dunavska Plots*. On the contrary, in its first letter from 24 February 2016, the Land

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499 Second Legal opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para. 94 (emphasis added).

500 Second Legal opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para. 95. The court practice to which Claimants' experts refer only confirms that it is the court which may determine the amount of compensation when the Land Directorate does not reach an agreement, not only in cases when it is disputed whether the expropriation had occurred but also in cases when there is no dispute about that question. See Decision of the Supreme Court of Cassation, No. Rev 1154/2015 dated 26 May 2016, **C-521**; Decision of the Supreme Court of Cassation, No. Rev 1316/2015 dated 4 February 2016, **C-522**; Decision of the Supreme Court of Cassation, No. Rev 4831/2020 dated 20 January 2022, **C-523**; Decision of the Higher Court in Belgrade No. Gž 564/2017 dated 13 July 2017, **C-524**.

501 Reply, paras. 342 and 346-347; Memorial, para. 123.

502 Reply para. 347.

Directorate noted that the City of Belgrade was inscribed as the holder of the right of use over the Objects at Dunavska 17-19.[503]

- In its letter from 19 February 2018, the Land Directorate explained that if Obnova considered it had the right to be compensated, *it could resolve that issue at a later stage*. To enable this, the Land Directorate obtained a description and inventory of the Objects, as well as their valuation,[504] as this would have been impossible after demolition of the Objects, which was the next step to be taken. Crucially, however, the Land Directorate did not take any decision as to Obnova's entitlement to compensation.
- Therefore, the Land Directorate *never stated in its letters that it considered that Obnova should be compensated, nor did it offer any compensation to Obnova*, but instead, in both letters insisted that the Objects are handed over and demolished, so that the construction of the public transportation terminal could start. [505]

c) <u>In any event, the Land Directorate provided reasonable explanations as to why it considered Obnova's request was unjustified</u>

268. Claimants argue that Obnova's request for compensation was rejected by the Land Directorate on 13 August 2021 based on incorrect and arbitrary reasons.[506] Respondent has already explained that the Land Directorate did not decide on the request for compensation as it was not competent to do so,[507] and that it only provided its views as to why it considered Obnova's request to be unjustified. In particular:

- The Land Directorate correctly concluded that the Objects were temporary and that Obnova was obliged to demolish them at the City's request without the right to compensation.[508]

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503 Counter-Memorial, para. 195; Letter from the Land Directorate to Obnova from 24 February 2016, **C-327**, p. 2 (of PDF).

504 Counter-Memorial, para. 198; Letter from the Land Directorate to Obnova from 19 February 2018, **C-328**, p 1 (of PDF).

505 Counter-Memorial, paras. 196-198; Letter from the Land Directorate to Obnova from 24 February 2016, **C-327**, p 2 (of PDF); Letter from the Land Directorate to Obnova from 19 February 2018, **C-328**, p 1 (of PDF).

506 Reply, para. 325 and paras. 363-374; Obnova's request for compensation dated 19 April 2021, **C-052**; Letter from the Land Directorate of the City of Belgrade from 13 August 2021, **C-053**.

507 Counter-Memorial, paras. 202-203, 208.

508 Counter-Memorial, Sections B.II.2 and B.IV; para 267.

- The Land Directorate noted that it could not identify the Objects built in accordance with the construction permits issued to Obnova, which was of no surprise, since a majority of these Objects no longer existed or were in very poor condition.[509] Claimants criticize the Land Directorate for its alleged lack of efforts in reconciling Obnova's permits with the existing buildings,[510] but they disregard the fact that it was up to Obnova to properly identify the Objects for which it sought the compensation.
- The Land Directorate correctly explained that the Objects could not be regarded as the subject of privatisation, as Obnova never acquired rights that could be converted into ownership upon its privatisation.[511]
- The Land Directorate correctly noted that Obnova's rights could not have been expropriated because the City was the registered owner of the Objects, while Obnova's claims for correcting these registrations were pending before the Serbian courts at the time. As discussed above, Obnova was ultimately unsuccessful in refuting the City's inscription, since it failed to prove its rights over the Objects and the Dunavska Plots in the court proceedings.[512]
- The Land Directorate did make a clerical error that the 2013 DRP did not cover Obnova's building at Dunavska 23 on parcel no. 40/5. Notably, the 2013 DRP did not mention Dunavska 23 or parcel no. 40/5, but it did mention parcel no. 40/4, on which, at the time of preparation of the 2013 DRP, the object in question was located.[513] By the time the Land Directorate addressed this issue, that object was located at parcel no. 40/5[514] (which was not mentioned in the 2013 DRP). For this reason, it stated that this particular object (located at Dunavska 23) was not part of the 2013 DRP. This error, however, had no legal consequences because, as elaborated above, the Land Directorate was not competent to decide on the compensation in any event.

269. In any event, regardless of the Land Directorate's explanations, Obnova had meaningful and appropriate legal means to protect its alleged right to compensation - the court proceedings - but it failed to initiate them. Tellingly, Claimants have never explained why

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509 Expert Opinion-Prof Nenad Ivanišević-Rejoinder-ENG dated 14 June 2024, **REO-001**, Section VII and VIII.

510 Reply, para. 365.

511 Counter-Memorial, para. 207; Section B.II.2.

512 Counter-Memorial, para. 215 and Sections B.III. and B.IV; para 119.

513 Detailed Regulation Plan for Roadways: Dunavska, Tadeuša Košćuška, Dubrovačka, Trolleybus and Bus Terminal in Dorćol, Municipality of Stari Grad, **C-024**, p. 3 (of PDF).

514 Memorial, para. 150.

Obnova refrained from addressing Serbian courts and decided to initiate this Arbitration first, despite this being clearly a matter of Serbian law which should be resolved under the domestic law of Serbia.

C. Jurisdiction

I. The Tribunal has no jurisdiction under the Cyprus-Serbia BIT

270. The Cyprus-Serbia BIT establishes clear criteria for bringing a dispute to international arbitration. This requires, inter alia, that the Cypriot Claimants are incorporated and have their seat in Cyprus, as required under Article 1(3)(b) of the BIT (jurisdiction *ratione personae*), that the claims relate to matters and disputes which arose after the Treaty came into force on 23 December 2005[515] (jurisdiction *ratione temporis*); and that the claims relate to an investment as defined in Article 1(1) of the BIT (jurisdiction *ratione materiae*). The Cypriot Claimants must also satisfy the jurisdictional criteria set out in Article 25 of the ICSID Convention, which requires that the dispute arises directly out of an investment between Serbia and a national of another contracting State, i.e. Cyprus.

271. For reasons which will be fully detailed below, the Cypriot Claimants' claims under the Cyprus-Serbia BIT are defective and should be dismissed for lack of jurisdiction. First, the Cypriot Claimants are not seated in Cyprus, as they have failed to show that they are effectively managed in Cyprus as required under the BIT (**Section 1.**). Second, the Cypriot Claimants' claims are out of the temporal scope of jurisdiction, as they are based on matters which took place, and disputes that emerged, before the BIT entered into force in 2005 (**Section 2.**). Third and finally, the Cypriot Claimants did not make any contribution in Serbia and thus do not have an "investment" under either Article 1(1) of the Cyprus-Serbia BIT or Article 25(1) of the ICSID Convention (**Section 3.**).

1. The Tribunal has no jurisdiction *ratione personae* as the Cypriot Claimants are not seated in Cyprus

272. This Tribunal lacks jurisdiction *ratione personae* over the Cypriot Claimants. To establish a "seat" in Cyprus, the Cyprus-Serbia BIT requires effective management in Cyprus, rather than merely the presence of the registered office (**Section a)**). However, Claimants

[515] Extract from the website of the Law Commissioner of the Republic of Cyprus evidencing the entry into force of the Serbia-Cyprus BIT on 23 December 2005, 6 February 2018, **C-072**.

have failed to prove such effective management in Cyprus and themselves concede that they are instead managed from Canada, by Mr Rand (**Section b)**).

a) <u>The term "seat" in Article 1(3)(b) of the Cyprus-Serbia BIT requires the Cypriot Claimants to prove effective management in Cyprus</u>

273. Article 1(3)(b) Cyprus-Serbia BIT defines an investor as:[516]

> *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.*

274. As Respondent explained previously,[517] in order to qualify as a foreign investor in Serbia, the Cyprus-Serbia BIT requires both (i) incorporation (or registered office) of the relevant legal entity in accordance with the laws of Cyprus, and (ii) a "seat" in Cyprus, with the latter term to be interpreted in accordance with the rules of treaty interpretation.[518]

275. Claimants wrongly allege – by misplaced reference to a single arbitral award (*Mera v. Serbia*) – that under Article 1(3)(b) of the Cyprus-Serbia BIT, incorporation (registered office) in Cyprus in accordance with its laws is enough to fulfil the "seat" requirement. It is not. Had Serbia and Cyprus intended this to be the case, they would not have addressed the two terms "*incorporation*" and "*seat*" separately in Article 1(3)(b) (**Section aa)**). In any event, a finding of effective management <u>in addition to</u> a registered office in Cyprus is required as a matter of both international law as relevant to the BIT (**Section bb)**) and Cypriot law (**Section cc)**).

<u>aa)</u> <u>"Seat" is an autonomous term that should be interpreted in accordance with international law</u>

276. Claimants argue that the term "*seat*" in Article 1(3)(b) of the Cyprus-Serbia BIT should be interpreted only in accordance with Cypriot law, as international law allegedly does not provide for a definition of the term "*seat*".[519] To support this argument, Claimants rely on the VCLT, the separate opinion of Professor William Park in *CEAC v.*

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

[517] Counter-Memorial, para 251.

[518] Counter-Memorial, paras 253-258.

[519] Reply, para 390.

Montenegro and a single arbitral award in *Mera v. Serbia* that followed Professor Park's interpretation of the term "seat" under Cypriot law.[520]

277. Article 31 of the VCLT requires a good faith interpretation of a treaty in accordance with the ordinary meaning to be given to the treaty terms in their context, and in light of the treaty's object and purpose.[521] It is well-established that the context of the treaty comprises its text (which includes "*the remaining terms of the sentence and of the paragraph; the entire article at issue; and remainder of the treaty*"[522]), its preamble and annexes.[523] In determining the object and purpose of a treaty, tribunals rely on principle of effectiveness or *effet utile*, which means that the treaty terms must be interpreted so as to not become devoid of effect.[524] The object and purpose may also be discerned from the treaty's preamble and text.[525]

278. Claimants' proposition that the term "*seat*" is to be interpreted only by reference to Cypriot law, following from a single award issued in *Mera v. Serbia*, and a separate opinion in *CEAC v. Montenegro*, simply fails to properly consider the above-mentioned rules of treaty interpretation. It does not properly consider the ordinary meaning given to the

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520 *Mera Investment Fund Limited v. Republic of Serbia* (ICSID Case No. ARB/17/2), Decision on Jurisdiction, 30 November 2018, **RL-020**, para 89; *CEAC Holdings Limited v. Montenegro* (ICSID Case No. ARB/14/8), Separate Opinion of William W. Park, **RL-11**, paras 3-9, 13-14, 18-22.

521 Counter-Memorial, para 253.

522 *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/26), Award dated 29 January 2016**, CL-019**, para 145.

523 Vienna Convention on the Law of Treaties, **RL-008**, Article 31(2). See also A. Kulick and M. Waibel, *General International Law in International Investment Law: A Commentary*, (Oxford Public International Law, 2024), **RL-209**, paras 17-20; R. Gardiner, *Treaty Interpretation*, (Oxford Public International Law, 2015), **RL-210**, pp 197-209; *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award dated 29 January 2016**, CL-019**, para 145.

524 See R. Gardiner, *Treaty Interpretation*, (Oxford Public International Law, 2015), **RL-210**, pp 221-222; *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/26), Award dated 29 January 2016**, CL-019**, paras 151-153.

525 See R. Gardiner, *Treaty Interpretation*, (Oxford Public International Law, 2015), **RL-210**, pp 213-214, 217-218; E. Sheargold in Esme Shirlow and Kiran N. Gore (eds), *The Vienna Convention on the Law of Treaties in Investor State Disputes: History, Evolution and Future* (2022), **RL-210**, p 158; A. Kulick and M. Waibel, *General International Law in International Investment Law: A Commentary*, (Oxford Public International Law, 2024), **RL-209**, paras 23-25; *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/26), Award dated 29 January 2016**, CL-019**, paras 146, 153, referring to M.E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (2009), pp 427-428.

terms of Article 1(3)(b) of the Cyprus-Serbia BIT in its context, or the object and purpose of the BIT.

279. Tellingly, the *Mera v. Serbia* tribunal (and Professor Park's opinion in *CEAC v. Montenegro*) referred to Cypriot law solely because, in their view, international law provides "*no uniformly accepted meaning of the corporate seat*".[526] The interpretation suggest by the *Mera v Serbia* tribunal (and Professor Park) is wrong for several reasons.

280. First, Article 1(3)(b) of the Cyprus-Serbia BIT lists two separate requirements for an investor: (i) "*incorporation*" in Cyprus, in accordance with Cypriot law, and (ii) "*seat*" in Cyprus. While "incorporation" mandates a *renvoi* to the national law of a Contracting Party, the same is not the case for "*seat*". Had Serbia and Cyprus intended Cypriot law to be relevant for the "*seat*", they would have specified this in the BIT. They did not.

281. Claimants do not contest Respondent's textual analysis of Article 1(3)(b) of the Cyprus-Serbia BIT. Instead, Claimants state that the *Orascom v. Algeria* allegedly proves their position that the tribunals interpret seat as merely registered office where effective management is not specifically required.[527] This is misleading. In analysing the term "*siège social*" (i.e., seat) in that case under Article 1(1)(b) of the Algeria-Belgium-Luxembourg Economic Union BIT – which is similarly worded to Article 1(3)(b) of the Cyprus-Serbia BIT – the *Orascom* tribunal held that while "*Article 1(1)(b) ... operates a ... renvoi to national law for the constitution of a corporation, no reference to national law applies to siege social"*.[528] Thus, given the express wording of the treaty, the tribunal interpreted "*siege social*" in accordance with international law. This confirms Serbia's position that Article 1(3)(b) of the Cyprus-Serbia BIT (having no reference to national law) requires to interpret the term seat in accordance with international law.

282. Second, investment tribunals tasked with the interpretation of terms in treaties that are similarly worded to the Cyprus-Serbia BIT have consistently held that in the absence of

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526 *Mera Investment Fund Limited v. Republic of Serbia* (ICSID Case No. ARB/17/2), Decision on Jurisdiction, 30 November 2018, **RL-020**, para 89; *CEAC Holdings Limited v. Montenegro* (ICSID Case No. ARB/14/8), Separate Opinion of William W. Park, **RL-11**, para 18.

527 Reply, paras 400-402.

528 *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 278.

express wording in the relevant BIT, no reference should be made to national law.[529] For example, the tribunal in *Alverley v. Romania* stated:

> *216. To qualify as an investor of Cyprus, a company must therefore meet two requirements: it must be incorporated in compliance with the laws of Cyprus (the "incorporation requirement") and it must have its "seat" in unoccupied Cyprus (the "proviso").*
>
> *217. The Tribunal notes that, on a textual analysis, the reference to the law of Cyprus applies only in respect of the first of these two conditions. Had the parties to the BIT intended that Cyprus law should govern both conditions, it would have been easy for them to have chosen a form of words which said so. That they did not do so is telling. Moreover, the fact that in 1991 there was no clear meaning of the term "seat" in Cyprus law,14 in contrast to the position in some civil law jurisdictions, provides further confirmation that the parties intended the reference to Cyprus law to apply only to the first condition.*
>
> *218. The Tribunal cannot, therefore, accept the Claimants' contention that it should look to the law of Cyprus for the meaning of "seat". That meaning must be sought elsewhere.*[530]

283. As further explained by *A.M.F. v. Czech Republic*:

> *[W]hen the Contracting Parties wished their municipal laws to govern a certain issue, they expressly provided for it in the text of the provision. On the contrary, if they did not include an express renvoi to municipal law, it is reasonable to conclude that they intended international law to apply to the interpretation of the term at issue.*[531]

284. The international law interpretation of the term "*seat*" has also been confirmed by many arbitral tribunals other than the *Mera v. Serbia* tribunal.[532]

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[529] See *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela (II)* (ICSID Case No. ARB/12/23), Award dated 29 January 2016, **CL-019**, para 186; *Alps Finance and Trade AG v. The Slovak Republic* (UNCITRAL), Award (redacted version) dated 5 March 2011, **RL-019**, para 216; *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 217.

[530] See *Alverley Investments Limited and Germen Properties Ltd v. Romania* (ICSID Case No. ARB/18/30), Excerpts of Award dated 16 March 2022, **RL-022**, paras 216-219.

[531] *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**, paras 439-440.

[532] See for example *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/26), Award dated 29 January 2016, **CL-019,** para 145; *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic* (PCA Case No. 2017-15), Final Award

285. Furthermore, the above interpretation is also in line with the Cyprus-Serbia BIT's object and purpose. The Cyprus-Serbia BIT preamble provides:

> *Desiring to create favourable conditions for greater economic cooperation between the Contracting Parties,*
>
> *Intending to create and maintain favourable conditions for mutual investments,*
>
> *Convinced that the promotion and protection of investments will contribute to strengthening of entrepreneurial initiatives and thus considerably contribute to development of economic relations between the Contracting Parties.*

286. The object and purpose of the Cyprus-Serbia BIT, as stated above, is to facilitate the "*development of economic relations between*" Cyprus and Serbia. Contrary to Claimants' assertions, there is nothing in the wording of the BIT suggesting that Cyprus intended to maintain, as Claimants submit, the "*status of* […] *a leading offshore jurisdiction*" when concluding the Cyprus-Serbia BIT. Nor is there anything to suggest that Cyprus envisaged that Cyprus-registered investors might be seated in other countries – which would include Serbia itself – but have a registered office in Cyprus only.[533] As the tribunal in *Tenaris v. Venezuela* confirmed in relation to a similarly worded preamble:

> *Nothing in the evident objects and purposes of either Treaty suggests that a purely formal test of "registered office" or "statutory office" is required.*[534]

287. Accordingly, the interpretation of the term "*seat*" in accordance with international law is aligned with the object and purpose of the Cyprus-Serbia BIT.

bb) Under international law, "seat" means the place of effective management

288. Claimants' argument that Serbia is wrongly "*importing*" an effective management requirement into Article 1(3)(b) of Cyprus-Serbia BIT must be rejected.[535] Claimants attempt to distinguish the case law that overwhelmingly supports Serbia's interpretation by

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dated 11 May 2020, **RL-021**, para 441; *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; *WA Investments-Europa Nova Limited v. Czech Republic* (PCA Case No. 2014-19), Award dated 15 May 2019, **RL-024**, para 239.

533 Reply, para 405.

534 *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/26), Award dated 29 January 2016, **CL-019,** para 153.

535 Reply, para 400.

alleging that it concerns "*interpretation of differently worded investment treaties*" has failed.[536]

289. Respondent's interpretation that the term "seat" encompasses not only the "*registered office*" but also "*effective management*" is indeed consistent with numerous arbitral awards which held – under similarly worded treaties – that due to the *effet utile* principle, the term "*seat*" means the "*place of effective management*".[537] Claimants' arguments that the cases on which Respondent relies are inapposite are misplaced. For example, in Claimants' view, the tribunal in *ATF v. Slovakia* on the basis that, that tribunal concluded that "seat" requires "effective management" because the Switzerland-Slovakia BIT stipulated that investors must have "*their seat, together with real economic activities, in the territory of [their home State]*".[538] This is disingenuous. In fact, that tribunal analysed the term "seat" separately from the wording "real economic activity" and concluded:

> *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.*
>
> *Proof of a "business seat", in the meaning of an effective centre of administration of the business operations, requires additional elements, such as the proof that: the place where the company board of directors regularly meets or the shareholders' meetings are held is in Swiss territory; there is a management at the top of the company sitting in Switzerland; the company has a certain number of employees working at the seat; an address with phone and fax numbers are offered to third parties entering in contact with the company; certain general expenses or overhead costs are incurred for the maintenance of the physical location of the seat and related services, which would be a clear indication that a business entity is effectively organized at a given Swiss place.*[539]

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536 Reply, para 408.

537 *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/26), Award, 29 January 2016, **CL-019,** para 145; *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; *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; *WA Investments-Europa Nova Limited v. Czech Republic* (PCA Case No. 2014-19), Award, 15 May 2019, **RL-024**, para 239.

538 Reply, para 409.

539 *Alps Finance and Trade AG v. The Slovak Republic* (UNCITRAL), Award (redacted version) dated 5 March 2011, **RL-019**, paras 215-217 (emphasis added).

290. Contrary to Claimants' allegations, it is evident that the *ATF v. Slovakia* tribunal's finding of an "*effective management*" requirement was separate from any consideration of the term "*real economic activities*" used in the Switzerland-Slovakia BIT. Specifically, the tribunal did not refer to the requirement of "*real economic activities*" at all when determining that "seat" meant more than a registered office or incorporation.[540]

291. Claimants similarly attempt to turn the *Tenaris v. Venezuela* award to their favour, arguing that the tribunal in that case "*rejected Venezuela's assertion that Tenaris was in fact not seated in Luxembourg, but rather in Argentina, because Tenaris had thousands of employees in Argentina and its directors and CEO resided there as well*."[541] Indeed, the *Tenaris* tribunal stated that the CEO's and employees' residence were not relevant criteria to determine the seat. However, the tribunal applied Luxembourg and Portuguese law to make this determination, and not international law.[542] Therefore, the tribunal's findings are irrelevant for this case, while Claimants' interpretation of this award is misleading.

292. Finally, Claimants' attempt to dismiss the significance of the *Alverley v. Romania* award also fails. Claimants wrongly state that the tribunal concluded that the term "seat" under the Cyprus-Romania BIT required more than a "*registered office*" due to the wording of the BIT, which provided that the "seat" must be "*in the area of the Republic of Cyprus which is under the jurisdiction and the control of the Republic's Government*".[543] This is incorrect. In fact, in analysing the term "seat", the *Alverley* tribunal first undertook a textual interpretation of the relevant provision and held that in order to qualify as an investor from Cyprus, a company must be incorporated in compliance with the laws of Cyprus and have its seat in unoccupied Cyprus.[544] The tribunal pointed out that:

> [O]*n a textual analysis, the reference to the law of Cyprus applies only in respect of the first of these two conditions (i.e. incorporation)" and " [h]ad the parties to the BIT intended that Cyprus law should govern both conditions*

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[540] *Alps Finance and Trade AG v. The Slovak Republic* (UNCITRAL), Award (redacted version) dated 5 March 2011, **RL-019**, paras 215-217.

[541] Reply, para 411.

[542] *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/26), Award dated 29 January 2016, **CL-019**, para 219.

[543] Reply, para 412.

[544] *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 216.

> *(i.e. incorporation and seat), it would have been easy for them to have chosen a form of words which said so. That they did not do so is telling.* [545]

293. That tribunal rejected the claimants' argument that the term "seat" should be interpreted in accordance with Cypriot law and instead interpreted "seat" in accordance with international law.[546] Then, applying the VCLT, the tribunal relied on the *effet utile* principle and held that the term seat "*must have been intended to add something to the requirement of incorporation"* otherwise, the term "seat" would have "*merely repeate[d] what was already provided for in the requirement of incorporation (and) would deprive the proviso of any effet utile*."[547] Additionally, the tribunal emphasised that had the claimants' interpretation, it "*would mean, in effect, that the proviso added nothing to the incorporation requirement*".[548]

294. In addition, Claimants assert that *Alverley v. Romania* should be distinguished on its facts, as the tribunal allegedly only scrutinised the issue of control, because of the allegation that the investor's ultimate beneficial owner was from the host State.[549] This is irrelevant to the current case and in any event, did not impact the tribunal's interpretation of the term "*seat*" in any way.

295. Finally, the autonomous interpretation that the term "*seat*" encompasses "*effective management*" is confirmed by scholarly works which – Claimants have failed to address.[550]

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545 *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 217.

546 *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 219.

547 *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 221.

548 *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 222.

549 Reply, para 414.

550 P. Sauve, 'Trade and Investment Rules: Latin American Perspectives', *UN Economic Commission for Latin America and the Caribbean* (2006), **RL-009**, p 22 ("*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. The "seat of a company" often refers to the place of effective management decision-making, and as such, while more difficult to determine, reflects a more significant economic relationship between the corporation and the country granting nationality*"); E. Schlemmer, 'Investment, Investor, Nationality, and Shareholders', in Muchlinsky/Ortino/Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008), **RL-010**, p 79 ("*It has become more and more pertinent to look at the aspect of the control of a corporation when one wants to determine its nationality especially for purposes of international investment arbitration.*

cc) In any case, "effective management" is also required under Cypriot law

296. Even if this Tribunal does consider that the meaning of the term "*seat*" should be determined in accordance with Cypriot law only, Claimants are wrong that Cypriot law does not require "*effective management*".

297. In their Reply, Claimants argue that the term "seat" under Cypriot law means "*registered office*".[551] In support of such argument, Claimants refer to the award in *Mera* and the separate opinion by Professor Park in the *CEAC* arbitration, as well as the expert report prepared by Claimants' Cypriot law expert, Mr Agis Georgiades.[552] These sources wrongly interpret Cypriot law for the following reasons.

298. First, contrary to the position of Mr Georgiades, and as explained by Mr Ioannides, the terms "*registered office*" and "*seat*" have different meanings under Cypriot law.

299. The legal term "*registered office*" is consistently used throughout the Cyprus Companies Law to denote the place (i) where documents may be served upon the company, and (ii) where the company's books and statutory registers are maintained.[553] Without a designation of a registered office in Cyprus, there can be no valid company incorporation under Cypriot law.[554]

300. By contrast, the term "seat" does not have a settled meaning and it largely depends on the context in which it is used. The most common interpretation of the term "*seat*" is the place of a corporation's central management and control, as explained by Mr Ioannides.[555] Given the difference in the interpretation of "*seat*" and "*registered office*", it is impossible to conclude that the two terms could be used interchangeably, as Mr Georgiades suggests.[556] Equally, Mr Georgiades' explanation that the only reason that the word "seat"

[...] The test of the seat of the corporation requires something more, whether some activities are taking place and whether the corporation is managed from that particular state").

551 Reply, para 416.

552 Reply, paras 388, 390-391, 397. See also Expert report of Mr. Agis Georgiades dated 23 February 2024.

553 Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, para 8.10.

554 T. Papadopoulos, "The Different Legal Concepts of 'Seat' and 'Registered Office' in Cyprus Company Law", 19 *European Company Law*, (Kluwer, 2022), **R-212**, pp 133, 134.

555 Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, paras 8.17, 8.22-8.23, 8.27-8.31. See also *OMAS (Cyprus) Ltd v. Republic of Cyprus* (2008) 3 A.A.D. 253, **Exhibit KI-020.**

556 Reply, para 417.

was retained in several amendments to the Cyprus Companies Law were due to "*translation issues*" is wholly unconvincing.[557] Investment treaty tribunals considering the Cyprus law incorporation issues have also recognized that "*registered office*" and "*seat*" are separate and independent terms under Cyprus law.[558]

301. Accordingly, the appropriate interpretation of the term "*seat*" under Cypriot law is the place where the corporation's central management and control are exercised.[559] This conclusion is reached, as Mr Ioannides explains, by relying on the conflict of law principle of "*residence*", which in respect of corporations under Cypriot law is the place where central management and control are exercised.[560]

302. Second, Claimants' assertion that the registered office does not determine the place of incorporation as "*the registered office may subsequently be transferred to another state*" after incorporation[561] is flawed and based on a wrong interpretation of the Cyprus Companies Law.[562] As explained by Mr Ioannides, the relevant provisions of the Cyprus Companies Law provide for "*reincorporation*" of a company, a process whereby a company is de-registered from Cyprus and re-incorporated as a continuing legal entity in the destination State.[563] The questions of whether in the new state the company will have a registered office, or a seat, is to be determined by the legal regime of that destination State; it is not a matter of Cypriot law.[564]

303. Accordingly, under Cypriot law the term "*seat*" means the place of "*effective management*". Both the *Mera* tribunal and Prof Park's separate opinion in *CEAC* fail to differentiate between the terms "*seat*" and "*registered office*" under Cypriot law and further fail

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557 Reply, para 417; Georgiades ER, para 4.5.5.

558 *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 222.

559 Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, paras 8.19-8.31.

560 Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, paras 8.22-8.23.

561 Reply, para 419.

562 Second Legal Opinion-Mr Kypros Ioannides-Rejoinder-ENG dated 14 June 2024, **RLO-006**, paras 9.6-9.11.

563 Second Legal Opinion-Mr Kypros Ioannides-Rejoinder-ENG dated 14 June 2024, **RLO-006**, para 9.10.

564 Second Legal Opinion-Mr Kypros Ioannides-Rejoinder-ENG dated 14 June 2024, **RLO-006**, para 9.11.

to recognise that incorporation under Cypriot law includes, among other things, the designation and maintenance of a "*registered office*" in Cyprus.[565]

b) Claimants' effective management is in Canada, not Cyprus

304. With the Reply, Claimants submitted additional evidence showing that both Coropi and Kalemegdan have registered offices in Cyprus.[566] At the same time, Claimants do not contest that all material decisions concerning Coropi and Kalemegdan are made in Canada, i.e. that Canada is the place of Coropi's and Kalemegdan's effective management.[567] Nor do they provide evidence to the contrary.

305. In fact, Claimants concede that all material decisions regarding Coropi and Kalemegdan are made by Mr Rand (a Canadian national residing in Canada). This is because Mr Rand "*fully controll[s]*" and "*own[s]*" both Coropi and Kalemegdan.[568] Even Mr Rand himself states:

> *My approach to Obova was consistent with all my Serbian companies: I provided oversight of my investment and made all material decisions* [...][569]

306. Accordingly, Mr Rand, a Canadian national residing in Canada, was the sole person exercising "*effective management*" over Coropi and Kalemegdan.[570]

307. Since Mr Rand was making all material decisions from Canada, Coropi and Kalemegdan's place of effective management is in Canada, not in Cyprus.

308. In light of the requirements contained in Article 1(3)(b) of the Cyprus-Serbia BIT, it is clear that neither Coropi's nor Kalemegdan's "seat" is in Cyprus. Accordingly, the Cypriot Claimants do not qualify as investors under Cyprus-Serbia BIT.

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565 Second Legal Opinion-Mr Kypros Ioannides-Rejoinder-ENG dated 14 June 2024, **RLO-006**, paras 8.8-8.14.

566 Reply, para 427.

567 See Reply, paras 261, 284, 294, 531; Memorial, paras 22, 74, 91, 92; Witness statement of Mr. William Archibald Rand dated 23 February 2024, para 24.

568 Memorial, paras 22, 74, 91, 92.

569 Witness statement of Mr. William Archibald Rand dated 23 February 2024, para 24.

570 See Counter-Memorial, paras 258-259. See also Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, paras 8.22-8.28.

2. The Tribunal has no jurisdiction *ratione temporis*

309. Claimants' response to Serbia's *ratione temporis* objection is deliberately conflating different aspects of this objection and misrepresenting Serbia's arguments.

310. Serbia's *ratione temporis* objection under the Cyprus-Serbia BIT has three prongs:

- The *dispute resolution clause* in the BIT applies only to *disputes and matters* which took place after its entry into force. The Tribunal cannot adjudicate Claimants' claims (as pled i.e. related to the 2013 DRP and the 2021 Letter) because this would include adjudication of existence of Obnova's alleged property rights, which is a matter and a dispute that predate the BIT's entry into force (**Section a)**).[571]
- The *substantive treaty provisions* cannot apply retroactively to events which predate entry into force of the BIT (December 2005) and this rule also extends to the consequences of such events (even if they occur after the entry into force). In turn, the alleged breaches of the BIT (i.e. the 2013 DRP and the 2021 Letter) are consequences of the 2003 Registration which confirmed the Dunavska Plots were public property (**Section b)**).[572]
- The measures invoked by Claimants (i.e. the 2013 DRP and the 2021 Letter) are consequences of an event (2003 Registration) which took place before Claimants made their investment in 2012 (**Section c)**).[573]

311. Claimants' Reply avoids presenting a direct response to these three aspects of Respondent's objection *ratione temporis*, and instead conflates them, all the while misrepresenting Serbia's arguments. According to Claimants:

- Serbia's "*entire case is based on the allegation that Claimants are bringing their claims based on the 2003-2004 events*".[574]
- Serbia is wrong in stating that the measures (the 2013 DRP and the 2021 Letter) are direct consequences of the 2003-2004 events.[575]

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571 Counter-Memorial, paras 293-304.

572 Counter-Memorial, paras 306-330.

573 Counter-Memorial, paras 331-338.

574 Reply, para 438.

575 Reply, paras 444-456.

- Even if the measures were consequences of the 2003-2004 events, the 2003 Registration was merely a first step in a series of events that culminated only in the adoption of the 2013 DRP, which is sufficient to trigger Serbia's responsibility under the Cyprus-Serbia BIT.[576]
- Events predating the Cyprus-Serbia BIT's entry into force constitute relevant background, not a dispute, which the Tribunal may consider.[577]
- The "dispute" arose only when Obnova submitted its request for compensation, which was after the Cyprus-Serbia BIT entered into force.[578]

312. As will be demonstrated below, Claimants' arguments are without merit. But, before proceeding further, one should first consider Claimants' overarching argument that Respondent's entire *ratione temporis* objection is based on the allegation that Claimants are bringing their claims based on 2003-2004 events,[579] which allegedly is "*a gross misinterpretation of Cypriot Claimants claims*".[580]

313. This is a strawman argument and a deliberate distortion of Respondent's case. The truth of the matter is that Respondent's *ratione temporis* objection is built on a simple proposition – the Tribunal cannot make a decision on whether Claimants' alleged entitlements to the Dunavska Plots were expropriated by Respondent's measures in 2013 and 2021 without first determining whether these property entitlements were created, or taken, in the period up to the entry into force of the Cyprus-Serbia BIT in 2005. This is not saying that Cypriot Claimants' claims are based on the events that pre-date the treaty. Nor that Cypriot Claimants' claims should be phrased differently, as Claimants also impute.[581] Rather, the point here is that the Tribunal cannot make a decision about the Cypriot Claimants' claims without first making a decision about the matters (and disputes) that took place before the treaty entered into force. As will be discussed below, this proposition is at the heart of all aspects of Respondent's *ratione temporis* objection.

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576 Reply, paras 457-462.

577 Reply, paras 463-477.

578 Reply, paras 486-492.

579 Reply, paras 434 & 438-443.

580 Reply, para 438.

581 Reply, para 440.

a) <u>Adjudication of the present dispute would require retroactive application of the dispute resolution clause contained in Article 9 of the Cyprus-Serbia BIT</u>

314. Article 28 of the VCLT, which codifies a general rule of international law, provides that treaty provisions – including dispute resolution clauses - do not have retroactive effect, unless a different interpretation appears from a treaty or is otherwise established.[582] The effect of this rule on dispute resolution clauses is that, in principle, they apply only to <u>disputes</u> that have arisen *after* the entry into force of a treaty.[583] In case of the Cyprus-Serbia BIT, this rule of general international law is supplemented by Article 12 which provides that the treaty "*shall only apply to <u>matters</u> occurring after the entry into force of the present Agreement*".[584] Accordingly, the dispute resolution clause in Article 9 of the Cyprus-Serbia BIT is qualified by both Article 12 of the same treaty and Article 28 of the VCLT, with the result that a tribunal constituted under the Cyprus-Serbia BIT does not have temporal jurisdiction to entertain a *dispute* which has arisen, or a *matter* which has occurred, before the entry into force of the treaty (in 2005).[585]

315. The *dispute* between Obnova and Serbia concerning property rights over the Dunavska Plots and Objects, which is at the heart of Claimants' claims and the alleged breaches, had arisen already in 2003 and 2004, i.e., before the entry into force of the Cyprus-Serbia BIT in 2005.[586] Likewise, the crucial *matters* which concern the creation and existence of Obnova's alleged property entitlements – or lack thereof – occurred before 2005, including what Claimants consider are crucial events that led to their current property entitlement such as Obnova's acquisition of the right to use the Dunavska Plots and Objects allegedly since 1960s, and the privatization of Obnova's rights and their conversion into private property in 2003.[587]

316. Claimants disagree with Respondent's interpretation of Article 12 of the Cyprus-Serbia BIT, on the basis that (i) Article 12 does not apply to the dispute resolution clause in the treaty and that Serbia's interpretation of Article 12 would lead to absurd results, and (ii) no dispute has arisen between the Parties before the BIT's entry into force. As will be discussed below, Claimants are wrong on all counts.

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582 Vienna Convention on the Law of Treaties, **RL-008**, Article 28; see also Counter-Memorial, paras 275-276.

583 Counter-Memorial, para 276 and the cases referred to therein.

584 Cyprus-Serbia BIT, **CL-007(a)**, Article 12 (emphasis added).

585 Counter-Memorial, paras 277-280.

586 Counter-Memorial, para 294.

587 Counter-Memorial, paras 285-292.

aa) Article 12 of the Cyprus-Serbia BIT concerns the dispute resolution clause as well

317. Contrary to what Claimants argue,[588] there is nothing in the Cyprus-Serbia BIT that would limit application of Article 12 only to substantive provisions of the treaty.[589] In that regard, the text of Article 12 is unequivocal: "*... it [the Agreement] shall apply only to matters occurring after the entry into force of the present Agreement*". Obviously, Article 12 does not differentiate between the substantive provisions of the treaty and the dispute resolution clause in Article 9 but refers to the BIT as a whole, which includes its dispute resolution clause.

318. Claimants further argue that Respondent is allegedly suggesting that "*the Tribunal may not look at any relevant facts that predate the entry into force of the Treaty*".[590] On this basis, Claimants conclude that under Respondent's interpretation of Article 12 "*a tribunal would not be able to confirm the existence of the investment, because it would not be able to make any determination based on facts pre-dating the treaty*", which would be contrary to another part of Article 12, stipulating that the BIT also applies to the investments made before the entry into force of the treaty.[591]

319. Claimants' argument is easily refuted by consulting the wording of Article 12, which expressly stipulates that the Cyprus-Serbia BIT applies to investments pre-dating the treaty, "*but it shall only apply to matters occurring after the entry into force*". Obviously, a general rule that the treaty shall apply to investments pre-dating it, is qualified by the provision that the treaty shall only apply to matters occurring after its entry into force. Thus, there is nothing that would prevent a tribunal from determining existence of an investment which pre-dates the treaty, contrary to what Claimants argue.

bb) "Matters" are different from "facts"

320. Claimants also state that, under Respondent's interpretation of Article 12, tribunal "*may not look at any relevant facts that predate the entry into force of the Treaty*".[592] This is a clear distortion of Respondent's argument in the Counter-Memorial, which has focused

588 Reply, para 468.

589 Counter-Memorial, paras 279-284.

590 Reply, para. 467.

591 Reply, paras 469-471.

592 Reply, para 467.

on the term "matter" in Article 12, not on "fact(s)". The former term is clearly different from the latter, both in its ordinary meaning and as used in international legal texts.

321. As already discussed in the Counter-Memorial, the ordinary meaning of the term "matter" has been understood as "*a subject or situation that you must consider or deal with*".[593] This clearly indicates that a "matter" has a different meaning, and is more complex, than a "fact".

322. The difference between "matter" and "fact" can also be noted in international legal texts. It suffices to recall the use of the term "matter" in the UN Charter and the Statute of the International Court of Justice, which aligns with the dictionary meaning of the term and describes a subject or a situation that needs to be dealt with, not individual fact(s).[594]

323. Obviously, Respondent's position that the Tribunal does not have jurisdiction to deal with a *matter* (subject or situation) pre-dating the Cyprus-Serbia BIT is very different from saying that it may not "look" into "any relevant facts" pre-dating the treaty, as Claimants' impute. While the Tribunal may take into account facts that pre-date the treaty, Article 12 enjoins it from determining, resolving or adjudicating "matters" (subjects, situations) which occurred before the entry into force of the treaty.

324. This conclusion is not at all affected by the cases invoked by Claimants. The Tribunal in *MCI v. Ecuador* considered that events subsequent to the entry into force of the BIT may *only* be considered "*for purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force*".[595] However, in the present

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593 See Oxford Dictionary's definition of "matter", **R-128**. For other, similar definitions, see Counter-Memorial, para 281.

594 For example, The Charter of the United Nations uses the term "matter" in this sense, see, e.g., Article 2(7) (*"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter"*), Article 10 ("*The General Assembly may discuss any questions or any matters within the scope of the present Charter…*") Article 12(1) ("*The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council…*") or Article 99 (*"The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security."*), **RL-212**. See also The Statute of the International Court of Justice, Article 36(1) ("*The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force*."), **RL-213**.

595 See Reply, para. 464, quoting *M.C.I Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/03/6), Award, 31 July 2007, **CL-081**, para 93.

case prior events would not be considered for the purpose of better understanding the case or its causes, but as a necessary and indispensable factor for determination of whether there was a violation of Claimants' treaty rights. In order to make a finding about the claims, the Tribunal would have to establish whether Obnova and, by extension, Claimants have property entitlements to the Dunavska Plots and Objects. In order to do that, the Tribunal must decide whether Claimants had acquired these property entitlements in the first place, and, if so, whether they lost them due to the 2003 Registration. These are the *matters* which took place before the entry into force of the Cyprus-Serbia BIT.

325. Claimants further quote *Kardassopoulos v. Georgia*, where the tribunal affirmed its jurisdiction *ratione temporis* over the claimant's FET claim. The claim in question related to a compensation process that took place after the treaty entered into force, although the expropriation that served as the basis for the compensation process took place before entry into force. According to Claimants, this is similar to the present case where their claims relate solely to Serbia's conduct that post-dates the entry into force of the Cyprus-Serbia BIT.[596] However, Claimants fail to mention that the respondent in *Kardassopoulos* expressly conceded jurisdiction over claimant's claims under the Georgia-Israel BIT to the extent they pertained to the compensation process, which post-dated the BIT, while the expropriation itself, which preceded it, was not a contentious issue in that context. The tribunal in *Kardassopoulos* had temporal jurisdiction to deal with the question of expropriation under the ECT.[597] The situation in the present case is different, since the matters which occurred before the entry into force of the Cyprus-Serbia BIT are contentious between the Parties, while the Tribunal has no temporal jurisdiction to consider them.

326. Claimants state that Respondent's differentiation between "*taking relevant facts into account" and "making determinations*" is a distinction without difference.[598] However, by calling it "assessment", Claimants inadvertently admit that "making determinations" is much more than taking into account certain facts.[599]

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596 Reply, paras 465-466.

597 The tribunal ruled that there had been expropriation under the ECT, see *Ioannis Kardassopoulos v. The Republic of Georgia* (ICSID Case No. ARB/05/18), Award, 3 March 2010, **CL-083**, para 408.

598 Reply, para 472 referring to Counter-Memorial, para 300.

599 Reply, para 477 ("*Serbia's assertion that the similarity with* Phosphates in Morocco *stems from the fact that the Tribunal will have to assess whether Obnova acquired right to it premises or not, is a red herring. Such assessment needs to be made under Serbian law, not under the Cyprus-Serbia BIT.*").

cc) The matter of Obnova's property rights arose before the entry into force of the Cyprus-Serbia BIT

327. If the Tribunal makes a determination whether Obnova had acquired or lost certain property entitlement, this is not simply "*taking certain facts into account*" but assessing the relevant facts and legal rules in the process of making a judicial determination about the existence of a property entitlement and ultimately about the claims. This is a "matter" that needs to be resolved or adjudicated by the Tribunal. For the Tribunal cannot adjudicate Claimants' claims that Obnova's rights were expropriated in 2013 or that compensation was due and denied in 2021 without deciding whether Obnova had acquired the rights of use or ownership over the Dunavska Plots or Objects, or had been stripped of these rights in 2003-2004. If this "matter" pre-dates entry into force of the Cyprus-Serbia BIT, then the Tribunal cannot entertain it, as is expressly provided in Article 12. It is irrelevant whether the matter needs to be resolved on the basis of international law or Serbian law,[600] what is relevant is that this will be done by the Tribunal itself with respect to a matter that pre-dates the treaty.

328. The property rights are therefore preliminary questions indispensable for adjudication of Claimants' claims.[601] Similarly as in the *Phosphates in Morocco* case, the Tribunal "*could not regard [the 2013 expropriation] established unless it had first satisfied itself as to the existence of the rights*" of Obnova, but the Tribunal "*could not reach such a conclusion without calling in question the decision"* of the Cadastre from 2003 and

> *It follows that 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.*[602]

329. Claimants try to distinguish *Phosphates in Morocco* by stating that, unlike in that case, their claims are based solely on events post-dating the Cyprus-Serbia BIT.[603] This is misplaced. As explained above, the point here is that a claim (or part thereof), although based on the facts post-dating the basis for jurisdiction, cannot be resolved without looking into, and adjudicating, the matters that are outside the temporal scope of jurisdiction. As Professor Zachary Douglas noted when writing about jurisdiction *ratione temporis*:

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600 See Reply, para 477.

601 Counter-Memorial, para 299.

602 *Phosphates in Morrocco, Italy v France*, Preliminary Objections, PCIJ Series A/B No 74, ICJ, **RL-034**, p 23.

603 Reply, para 475.

> *If there is no breach of the obligation without reliance upon the facts occurring prior to the commencement of the tribunal's jurisdiction ratione temporis over the claim, then it must follow that those facts are being relied upon to establish the constituent elements of the breach. Such reliance would be impermissible.*[604]

330. In *Phosphates in Morocco*, Italy's denial of justice claim could not be resolved without first assessing the decision of the Department of Mines which pre-dated French declaration on compulsory jurisdiction. In the present case, Claimants' claims cannot be resolved without first assessing the matters pre-dating the Cyprus-Serbia BIT, most notably the 2003 Registration and its effects, as well as the acquisition of property entitlements by Obnova which is alleged to have been completed by 2003. In turn, the existence of Obnova's property entitlements is a crucial element for establishing breaches of treaty obligations by Respondent, since there is no expropriation and no obligation to pay compensation, if Obnova, and by extension Claimants, did not have property entitlements over the Dunavska Plots and Objects at the time of the alleged measures.

331. Finally, one should mention Claimants' argument that the 2003-2004 events, including 2003 Registration, "*did not have any effect on Obnova's rights*".[605] This argument has already been refuted above, as a matter of Serbian law.[606] More importantly in the present context, which concerns jurisdiction *ratione temporis*, the real question is not what *was* the effect of the 2003 Registration on Obnova's rights, but *whether* the Tribunal can entertain this issue *at all* without overstepping its jurisdiction *ratione personae.* The same applies to the question whether the Tribunal can entertain the issue of alleged acquisition of property entitlements by Obnova, which Claimants allege had acquired by 2003 at the latest.

dd) The dispute existed before the entry into force of the Cyprus-Serbia BIT

332. Not only does the Tribunal lack jurisdiction to adjudicate *matters* which occurred before the Cyprus-Serbia BIT entered into force, it also lacks jurisdiction to adjudicate *disputes* that arose before that date.

333. As discussed in the Counter-Memorial, the dispute over Obnova's property entitlements arose already in 2003-2004. Obnova asked the Cadastre to inscribe its right of use over

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604 Z. Douglas, *The International Law of Investment Claims* (Cambridge, 2009), **RL-037(a)**, p 342, para 639.

605 Reply, para 476.

606 See above para 122.

the Objects on parcel no. 47 in early 2003.[607] However, the Cadastre inscribed the City of Belgrade as the holder of the right over the Objects on the Dunavska Plots in November 2003.[608] Further, the Cadastre's communications to Obnova during the privatization, which also occurred in 2003, clearly indicated the Cadastre's view that there was insufficient evidence of Obnova's right of use over the Objects and the Dunavska Plots.[609] Finally, in November 2004, the authorities denied Obnova's legalization requests concerning certain objects at parcels no. 47 and 39/1.[610] Obnova and Respondent's authorities held and communicated opposing views concerning Obnova's property entitlements over the Objects and the Dunavska Plots already in 2003 and 2004,[611] which shows that the dispute between Obnova and Serbia over the rights to the Dunavska Plots arose already at that time.

334. It is undisputed that Article 9 of the Cyprus-Serbia BIT does not apply retroactively to disputes which had arisen before this treaty entered into force in 2005.[612] As will be shown below, the dispute between Obnova and Serbia over the right of use of the Dunavska Plots forms part of the current dispute.

335. Claimants argue that (i) as a matter of fact, there was no dispute in 2003 and 2004, and (ii) even if there was a dispute, this was not the same dispute as the current one. Claimants are wrong on both counts.

336. *First*, Claimants argue that there was no dispute in 2003 and 2004 as the City never approached Obnova to dispute its right to use the premises, never required Obnova to pay the rent, and never asked it to vacate the premises.[613] However, the reason why the City did not ask Obnova to pay the rent or vacate the premises was that Luka Beograd used the premises in question on the basis of the 1975 Agreement with the City of Belgrade.[614] In this context, Claimants disregard other evidence, described above, which clearly indicates that Respondent's authorities and Obnova had different and opposing views about

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607 Counter-Memorial, paras 84-87; Request for registration of immovables to the Cadaster dated 18 March 2003, **C-013**.

608 Counter-Memorial, para 77.

609 Counter-Memorial, para 111, referring to Privatisation Program, **R-046**, pp 3-5 (of PDF).

610 Counter-Memorial, paras 219-220.

611 Counter-Memorial, paras 294 and 81-87.

612 Reply, para 487.

613 Reply, para 490.

614 See above paras 64-68.

Obnova's property rights over the Dunavska Plots and Objects, i.e., that the dispute had existed already at that time.

337. Claimants do not – and cannot – show that the 2003-2004 dispute failed to meet the criteria for a dispute stemming from international cases, in particular that Obnova and Respondents' authorities had "*a disagreement on a point of law*"[615] concerning Obnova's property rights. On the contrary, the above facts show that Obnova unsuccessfully sought to have the right of use recognized by the authorities in 2003, while in turn the Cadastre registered the City of Belgrade as the holder of the right of use in 2003 and made clear its position about the lack of proof of Obnova's rights during the process of privatization.

338. There was also a sufficient degree of communication so each party knew the position of the other[616] and it was clear that Obnova's claim was opposed by the authorities.[617] It should be noted that the opposition of one party to the position of another may be expressed directly or indirectly:

> *It has also been rightly commented that the existence of the dispute presupposes a minimum of communications between the parties, one party taking up the matter with the other, with the latter opposing the Claimant's position directly or indirectly.*[618]

339. In the present case, Obnova received a direct communication from the Cadastre during privatization, stating that there was insufficient evidence of Obnova's right of use over the Objects and the Dunavska Plots,[619] which indicated the authorities' opposition to its claim. The same goes for the rejection of Obnova's legalization requests in 2004.[620] In addition, the 2003 Registration of the City of Belgrade was publicly available since the Cadastre records are a matter of public record, which clearly signalled the authorities'

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615 *Mavrommatis Palestine Concessions (Greece v. UK)*, Objection to the Jurisdiction of the Court, Judgment, PCIJ Series A no 2, ICJ, 30 August 1924, p 13 (of PDF), **RL-030**, quoted in Reply, para 478.

616 Compare *Railroad Development Corporation v Guatemala* (ICSID Case No. ARB/07/23), Second Decision on Objections on Jurisdiction, 18 May 2010, **CL-087**, para 129 (quoting *Maffezini* that existence of a dispute presupposes a minimum of communication between the parties) (also quoted in Reply, para 479).

617 Compare *Lao Holdings N.V. v Lao People's Democratic Republic (I)* (ICSID Case No. ARB(AF)/12/6), Decision on Jurisdiction 21 February 2014, paras 143 and 146, **CL-086** (claimant learnt that members of the government opposed its proposal, which was sufficient for a finding that the dispute arose).

618 *Emilio Agustin Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, **CL-088**, p 35 para 96 (emphasis added, footnote omitted).

619 Counter-Memorial, para 111, referring to Privatisation Program, **R-046**, pp 3-5 (of PDF).

620 Counter-Memorial, paras 219-220.

opposition to Obnova's claim for the right of use over the Dunavska Plots and Objects. All this is clear evidence that there was "*a stated disagreement*"[621] between the parties.

340. Claimants also argue, with reference to the ICJ judgment on preliminary objections in *Georgia v. Russia*, that "*for a disagreement between parties to be considered a 'dispute' within the context of the relevant treaty, it must pertain to the state's obligation under public international law*".[622] However, Claimants fail to mention that the ICJ also stated that it was not necessary to *refer* to a specific treaty or treaty obligation in this context. Rather, there must be a reference to the *subject-matter* of the treaty, so the other side can identify that there is a dispute with regard to that subject-matter. As the ICJ emphasized, *"[t]he Court's determination must turn on an examination of the facts"*.[623] As demonstrated above, the evidence clearly indicates the existence of the present dispute already in 2003-2004. Its subject-matter was property rights – Obnova's claim for recognition of the rights of use and the State's refusal to grant it. The same issue of Obnova's property rights is at the heart of the present dispute, since the existence of property rights is the main precondition for a finding of expropriation and consequently for acceptance of Claimants' compensation claim.

341. *Second*, Claimants argue that even if there were a dispute, this was not the same dispute as the one presently before the Tribunal. For this conclusion, Claimants rely on the so-called "triple identity test", used in the context of *lis pendens* and *res judicata* to show that there is no identity between the 2003-2004 dispute and the present one, as there is no identity of the parties, no identity of the subject-matter, and no identity of the cause of action.[624]

342. The "triple identity test" is not warranted in the present context, which concerns a different jurisdictional issue: when did a dispute arise and whether it is identical with the dispute before the Tribunal. Claimants have been able to identify only one case, *Railroad Development Corporation v. Guatemala*, in which the tribunal applied the "triple identity" test in the present context, while all other cases cited by Claimants concern its application in the context of *lis pendens* and *res judicata*.[625] Even the tribunal in *Railroad*

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621 *Iona Micula, Viorel Micula and others v. Romania (I)*, (ICSID Case No. ARB/05/20), Decision on Jurisdiction and Admissibility, 24 September 2008, **CL-089**, para 155, quoted in Reply, para 481.

622 Reply, para 483.

623 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011(I), **CL-091**, para 30.

624 Reply, paras 489-492.

625 See Reply, para 484 and footnotes 586-587.

Corporation v. Guatemala cautiously stated that it "*finds guidance in arbitral practice related to lis pendens*" and then proceeded with analysis which was not a strict and formalistic application of the "triple identity test".[626] It should also be noted that one of the elements in its analysis was whether the issues in the local proceedings overlapped with the issues in the investment arbitration and the tribunal found that they did not.[627] The situation is markedly different in the present case, where the Tribunal must resolve the underlying issue of whether Obnova's property entitlements exist in the first place, which is identical to the issue that was the subject-matter of the dispute in 2003-2004.

343. The focus on the substance of disputes, rather than on formal requirements, was emphasized by the tribunal in *Luccheti v. Peru*:

> *... the Tribunal must examine the facts that gave rise to the 2001 dispute and those that culminated in the 1998 dispute, seeking to determine in each instance whether and to what extent the subject matter or facts that were the real cause of the disputes differ from or are identical to the other. According to a recent ICSID case [CMS Gas Transmission v Argentina], the critical element in determining the existence of one or two separate disputes is whether or not they concern the same subject matter. The Tribunal considers that, whether the focus is on the 'real causes' of the dispute or on its 'subject matter', it will in each instance have to determine whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute*.[628]

344. This approach has been followed in arbitral practice.[629]

345. If, following *Luccheti*, one examines "*whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the latter dispute*" in the present case, the inevitable conclusion is that both the 2003-2004 dispute and the present one raise the central issue of the existence of Obnova's property entitlements over the Objects

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626 *Railroad Development Corporation v Guatemala* (ICSID Case No. ARB/07/23), Second Decision on Objections on Jurisdiction, 18 May 2010, **CL-087**, paras 131-134.

627 *Railroad Development Corporation v Guatemala* (ICSID Case No. ARB/07/23), Second Decision on Objections on Jurisdiction, 18 May 2010, **CL-087**, paras 133.

628 *Empresas Lucchetti S.A. and Lucchetti Peru S.A. v The Republic of Peru* (ICSID Case No. ARB/03/4), Award dated 7 February 2005, **RL-214**, para 50 (footnotes omitted, emphasis added).

629 *EuroGas Inc. and Belmont Resources Inc v. Slovak Republic* (ICSID Case No. ARB/14/14), Award dated 18 August 2017, **RL-215**, paras 451-455; *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan* (ICSID Case No. ARB/08/02), Award dated 18 May 2010, **RL-216,** para 102; *Astrida Benita Carrizosa v. Republic of Columbia* (ICSID Case No. ARB/18/5), Award dated 19 April 2021, **RL-217,** paras 219-220.

and the Dunavska Plots. In the 2003-2004 dispute, Obnova and Respondent's authorities held opposing views about the existence of Obnova's right of use, which lead to the denial of Obnova's respective requests for inscription and legalization and also to the inscription of the City of Belgrade as the holder of the right of use over the Objects and Dunavska Plots. In the dispute before the Tribunal, Claimants and, by extension, Obnova, on one side, and Respondent, on the other, hold opposing views concerning the measures alleged as breaches of the BIT (i.e. the 2013 DRP and the 2021 Letter), which are based, and fundamentally depend, on the Parties' respective positions about Obnova's property entitlements. To use the words of the *Luccheti* tribunal, both disputes "*have the same origin and source*", which is the opposing views of the parties concerning Obnova's property rights over the Dunavska Plots and Objects.

b) <u>Claimants seek to apply the substantive provisions of the Cyprus-Serbia BIT retroactively</u>

346. It is a common ground between the Parties that substantive provisions of the Cyprus-Serbia BIT do not apply retroactively. As a consequence, pursuant to Article 13 of Articles on State Responsibility, Respondent cannot be responsible for acts which occurred before its obligations under the Cyprus-Serbia BIT came into effect in 2005. Moreover, according to Article 14 of Articles on State Responsibility, the breach of an international obligation by non-continuing acts occurs at the moment when the act is performed "*even if its effects continue*". Thus, although effects of a non-continuing act, which occurred before a treaty enters into force, continue after its entry into force, the relevant moment is the time the act was performed, not the time when the consequences take place. In this context, expropriation is mentioned as a typical example of a non-continuing act.[630]

347. On the basis of these legal rules, which Claimants do not question, Respondent submits that in the present case (i) the 2003 Registration extinguished any rights Obnova might have had over the Dunavska Plots and Objects and (ii) that both measures invoked by Respondent (the 2013 DRP and the 2021 Letter) are consequences of the 2003 Registration, which is also a non-continuing act.[631] As a consequence, application of the Cyprus-Serbia BIT to these measures would constitute its retroactive application.

348. Claimants' arguments that (i) the 2003 Registration did not affect Obnova's rights over the Dunavska Plots and Objects (**Section aa)**); (ii) the impugned measures were not a

630 Counter-Memorial, paras 308-320.

631 Counter-Memorial, paras 324-330.

consequence of the 2003 Registration (**Section bb)**); or, alternatively, (iii) the impugned measures are part of a composite breach (**Section cc)**), are all without merit.

aa) Whether the 2003 Registration extinguished Obnova's rights over the Dunavska Plots and Objects

349. Claimants argue that the 2003 Registration did not change Obnova's rights either *de jure* or *de facto*.[632] This conclusion beggars belief since it denies any effect whatsoever to the inscription of property rights in the Cadastre, contrary both to law and logic. Here, Claimants deliberately disregard that 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, which could be changed only by court decision in favour of an unregistered owner.[633] Conversely, without a court decision establishing otherwise, the registered owner is deemed to be the owner of the property. Significantly, Obnova tried, but failed, to have its property rights recognized in court proceedings. It initiated three court proceedings concerning the cadastral parcels 47 and 39/1 to establish its ownership over the Dunavska Plots and Objects, but its requests were denied.[634] This shows that Obnova itself considered that the 2003 Registration impacted its rights.

350. The fact that Obnova has been using the Dunavska Plots and Objects after the 2003 Registration up to the present day does not change this conclusion and, given Obnova's bad faith, could not give rise to any property rights by way of acquisitive prescription.[635] Here, it should be recalled that Obnova had lease agreements with Luka Beograd also after the 2003 Registration (because Luka had the right to continue to use these premises until they are brought to their intended purpose).[636] It should also be recalled that the City was

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632 Reply, para 447.

633 Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 45.

634 First, Obnova's request for determination of ownership over the Objects in Dunavska 17-19 that it allegedly constructed on the basis of temporary construction permits was denied by a final court decision after appeal, see Decision of the Court of Appeal in Belgrade no. Gž 6171/22, 7 December 2023, **C-503**; Second, Obnova's request for determination of ownership over 11 objects in Dunavska 17-19 that it allegedly constructed without construction permits was considered withdrawn because Obnova failed to appear at the hearing, Decision of the Higher Court in Belgrade, P. no. P 5844/2019 from 21 July 2021, **R-089**. Third, Obnova's request for determination of ownership over eight objects at Dunavska 23 was denied by the first instance court, see Decision of the Higher Court in Belgrade, P. no. 5457/19 from 5 March 2024, **R-160**.

635 See Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, paras 40 (on Dunavska 17-19) & 54-57 (on Dunavska 23).

636 See above para 65.

enjoined from disposing of the objects and land at Dunavska 17-19 by a court injunction issued by the Higher Court in Belgrade in the proceedings for determination of ownership initiated by Obnova.[637]

351. In this context, Claimants invoke the explanation of the tribunal in *Azurix v. Argentina* that a treaty violation is deemed to occur when "*the interference has ripened into a more or less irreversible deprivation of the property*", and argue that the 2003 Registration clearly did not have such effect.[638] However, the *Azurix* pronouncement concerned indirect or creeping expropriation. In contrast to that, and *assuming* that Obnova had property rights over the Dunavska Plots and Objects (*quod non*), these rights were taken by the 2003 Registration, which, as an act of direct expropriation, changed the title over the properties in an instant. Therefore, Claimants' reliance on *Azurix* is inapposite.

bb) Whether the 2013 DRP and 2021 refusal to compensate are consequences of the 2003 Registration

352. Claimants state that Respondent has provided no evidence that the 2013 DRP and the 2021 Letter were the consequences of the 2003 Registration and that the evidence confirms the opposite.[639] This is incorrect. Respondent did provide evidence that the 2013 DRP and the 2021 Letter were inevitably tied with the 2003 Registration, while the evidence adduced by Claimants does not rebut Respondent's argument.

353. *First*, as far as the 2013 DRP is concerned, the study identifying suitable locations for the trolleybus loop conducted in 2006 took into account ownership of the land as one of the selection factors. This is where the Dunavska Plots stood better than another top location, where the City of Belgrade was inscribed as the user only of one part of the plot.[640] Since one of the criteria for selection of the location was the cost of investment, a location that would avoid expropriation costs was to be preferred.[641] Further, locating the public transportation terminus on the land owned by the City was a simple, cheap and logical choice for the drafters of the 2013 DRP, in light of the fact that one of the criteria for

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637 Decision of the Higher Court in Belgrade, No. 4 P No. 1724/16 dated 21 February 2019, **C-039**.

638 Reply, para 448.

639 Reply, paras 449-450.

640 Analysis for suitability of the locations for organizing trolleybus terminus in Dorcol dated January 2006, **R-101**, p 15 (of PDF).

641 2013 DRP, **R-098**, p 5 (of PDF). The criterion in question was formulated as "*justification of investment from the aspect of available funds for the formation of a new trolley-bus terminal with accompanying facilities*".

selection was to maintain the exploitation costs "*at the current level*".[642] So there is evidence that the choice of the location for the public transportation terminus was made, *inter alia*, on the basis of the ownership and cost criteria, including expropriation costs, which would be significantly lower if the terminus was located on the land owned by the City. In this respect, the 2003 Registration confirming the State's title over the Dunavska Plots made it possible to select the Dunavska Plots as the future location of the public transportation terminal in the 2013 DRP.

354. According to Claimants, the so-called concept of the plan envisaged that the cost of construction of the bus loop would include payments for expropriated land and buildings, so if Serbia believed that the City owned the Dunavska Plots and Objects, there would have been no need to include these additional payments for their expropriation.[643] However, Claimants' argument is inapposite since the break-down of costs to which Claimants refer in fact presents costs for the implementation of all activities envisaged by the 2013 DRP not only the cost for the construction of the bus loop.[644]

355. To support their position, Claimants also refer to the same arguments that Serbia has already rebutted in the Counter-Memorial. In particular, Claimants again refer to the letter from the City Secretariat for Urbanism dated 23 April 2008, which mentioned that the Dunavska Plots were located in the areas "*intended for commercial activities and urban centres*", to argue that this indicated that the City did not consider itself to be the owner of the land in question.[645] However, this is a pure speculation. The fact that the City's letter repeated what was the intended use of the land in question according to the then valid planning documents and passed Obnova's Initiative to the Urban Planning Institute for further consideration of its justifiability, does not in any way indicate the City's position on the question of ownership over the land. It merely testifies that the City passed Obnova's Initiative to a different authority. In any case, the City did not have any competence to recognize property rights.

356. Claimants also refer to the letter from the City Land Directorate to Obnova dated 19 February 2018 to argue that the Land Directorate recognized that Obnova was entitled to

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642 2013 DRP, **R-098**, p 5 (of PDF) and Counter-Memorial, para 328.

643 Reply, para. 452, referring to Concept of the 2013 DRP, 2010, **C-330**, pp 2-3 (of PDF).

644 See Concept of the 2013 DRP, 2010, **C-330**, pp 2-3. The same table, with slightly amended numbers, is also reproduced in 2013 DRP, **R-098**, B.8.

645 Reply, para 451; Letter from City of Belgrade to Secretariat for Urban Planning and Construction, 23 April 2008, **C-315**.

compensation for the demolition of the Objects.[646] However, as already discussed in the Counter-Memorial, the Land Directorate merely explained that if Obnova considered it had the right to be compensated, then it would be later on able to resolve this issue, once the inventory of the Objects and their valuation had been carried out. In any case, the Land Directorate was not competent to recognize Obnova's ownership over the Objects, so its letter cannot possibly be regarded as "*recognition*" of Obnova's rights, as Claimants aver.

357. *Second*, as far as the 2021 Letter is concerned, the Land Directorate expressly justified its view that Obnova had no right to compensation with the fact that the City of Belgrade was the owner of the Dunavska Plots and the Objects.[647] This is direct evidence that the 2021 Letter came as a consequence of the 2003 Registration.

358. In the Reply, Claimants maintain that the Land Directorate could have addressed Obnova's ownership as a preliminary issue and agree on compensation.[648] However, the Land Directorate did not have the competence to decide the question of ownership, or even to grant compensation.[649] Even more importantly, Claimants' argument is inapposite, since the question here is not what the Land Directorate could or should have done, but rather whether its letter came as a consequence of the 2003 Registration.

359. In conclusion, both the 2013 DRP and the 2021 Letter came as a consequence of the 2003 Registration of the City of Belgrade as the holder of the right of use over the Dunavska Plots and Objects. As such, these alleged measures are outside the jurisdiction of the Tribunal, because their consideration would necessarily entail consideration of the 2003 Registration and the facts related to the issue of whether Obnova had acquired the right of use over the Dunavska Plots and the Objects, all of which pre-date the Cyprus-Serbia BIT.

cc) The impugned measures are not a part of a composite act either

360. As an alternative argument, Claimants aver that even if the alleged measures were a consequence of the 2003 Registration, this would not affect the Tribunal's jurisdiction *ratione temporis*, because the 2003 Registration was just the first step in a series of events

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646 Reply, para. 453; Letter from the Land Directorate to Obnova, 19 February 2018, **C-328**.

647 Counter-Memorial, para 329; Letter from the Land Directorate of the City of Belgrade from 13 August 2021, **C-053**, pp 2-3.

648 Reply, para 455.

649 Counter-Memorial, paras 202-206.

that culminated with the adoption of the 2013 DRP, which in itself had not given rise to any dispute before that date.[650]

361. In the Counter-Memorial, Respondent demonstrated that the 2003 Registration is a non-continuing act, because it created a permanent legal situation, which was completed at the time of the entry of the registration in the Cadastre.[651] The designation of the land for the transportation terminal in the 2013 DRP and the 2021 Letter were consequences of this situation. They were neither the continuation of the 2003 Registration (which had been completed), nor were they last in a series of acts which commenced with it, as Claimants aver.

362. In support of their alternative argument, Claimants refer to general pronouncements about legal rules regulating responsibility for composite acts,[652] but provide no meaningful legal analysis that would apply these rules to the present case.[653] Claimants merely state that "*the 2003 Registration would be, at best, the first step in a series of events that culminated only in 2013*".[654]

363. Here, it should be noted that composite wrongful acts fall into category of continuing breaches. As the ILC noted, "*[c]omposite acts give rise to continuing breaches*".[655] In the Counter-Memorial, Respondent demonstrated that the 2003 Registration did not give rise to a continuing breach, but was a completed act.[656] Claimants failed to address Respondent's analysis.

364. Tellingly, since the definition of a composite act requires that it consists of a "*series of actions or omissions defined in aggregate as wrongful*",[657] it seems that Claimants' argument presupposes that the 2003 Registration was not wrongful itself, but that gave rise

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650 Reply, para 457.

651 Counter-Memorial, paras 326-327. The 2003 Registration became final in law on 31 May 2004, see Decision of the Republic Geodetic Authority of 31 May 2004, **R-063**.

652 Reply, paras 460-461. Claimants provide a quote from the *Tecmed* case which does not address composite breaches at all. Reply, para 461.

653 Reply, paras 457-462.

654 Reply, para 457.

655 *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, **CL-036**, p 62, para 1.

656 Counter-Memorial, paras 324-326.

657 ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), **RL-035**, Art. 15.

to a breach together with the adoption of the 2013 DRP. This is in contradiction to Claimants' position taken so far.

c) The Tribunal cannot consider the 2003 Registration or the measures which are its consequences, because the 2003 Registration took place before the investment was made

365. Finally, Respondent objects to the Tribunal's jurisdiction on the basis of a well-accepted rule that a tribunal's jurisdiction "*is limited* ratione temporis *to judging only those acts and omissions occurring after the date of the investor's purported investment*".[658] This is due to the fact that in order to adjudicate the claims, the Tribunal would have to assess the 2003 Registration.[659]

366. The main issues in the present context are the same as in the context of retroactive application of the substantive provisions of the Cyprus-Serbia BIT: whether the alleged measures are consequences of the 2003 Registration, and whether the Tribunal can adjudicate the present claims without adjudicating the legality of the 2003 Registration and Obnova's purported acquisition of property entitlements before 2003. In order to avoid repetition, Respondent respectfully directs the Tribunal to the discussion of these issues in the Section C.I.2a) above.

3. The Tribunal has no jurisdiction *ratione materiae* as the Cypriot Claimants did not make an investment

367. The Cypriot Claimants have yet again failed to establish that they have made an "investment" under both Article 3(1) of the Cyprus-Serbia BIT (**Section a)**) and Article 25(1) of the ICSID Convention (**Section b)**). Accordingly, the Tribunal should decline to exercise jurisdiction over the claims brought by the Cypriot Claimants in this Arbitration.

a) The Cypriot Claimants do not have an investment under Article 1(1) of the Cyprus-Serbia BIT

368. Article 1(1) of the Cyprus-Serbia BIT requires that the investor cause an investment to be made, which entails some sort of positive act in connection with the investment (**Section aa)**). Kalemegdan fails to satisfy this requirement, not having made any contribution or other act of investing in relation to its acquisition of the shares in Obnova in 2012

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658 *Phoenix Action, Ltd. v The Czech Republic* (ICSID Case No. ARB/06/5), Award dated 15 April 2009, **RL-043**, para 68; see also Counter-Memorial, paras 331-333 and the cases referred to therein.

659 Counter-Memorial, paras 335-338.

(**Section bb)**). Coropi equally fails to satisfy this requirement, as it alleged beneficial ownership of Kalemegdan is unsubstantiated and in any case an insufficient basis for seeking protection under the BIT (**Section cc)**).

aa) Article 1(1) of the Cyprus-Serbia BIT requires a positive act of investment by the investor

369. Article 1(1) of the Cyprus-Canada BIT defines an investment as "*every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter* […]".[660] As explained in the Counter-Memorial, it is clear that the BIT requirement that any protected investment must be "*invested by an investor*" entails some positive act of investment in connection with the host State.[661]

370. In cases involving similarly worded treaty definitions of "investment", tribunals have repeatedly endorsed Respondent's position, requiring a claimant to prove it made an active investment.[662] The tribunal in *Tokios Tokelés*, in considering an identically worded

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

661 Counter-Memorial, paras 344-345.

662 *Komaksavia Airport Invest Ltd. v. Republic of Moldova* (SCC Case No. 2020-074), Final Award dated 3 August 2022, **RL-084**, para 151; *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award dated 17 October 2013, **RL-060**, paras 165-166 (in which the tribunal found that the word 'investment' has an inherent ordinary meaning which "*presuppose[s] … a commitment of resources*"). See also *Standard Chartered Bank v. United Republic of Tanzania* (ICSID Case No. ARB/10/12), Award dated 2 November 2012, **RL-090**, paras 208, 219-222, 232 (finding that the requirement in the UK-Tanzania BIT for "an investment of" the investor could be used interchangeably with other phrases in the BIT, such as "investments by investors" and "investment made by", which connoted "*a more active relationship between investor and investment*". Accordingly, "*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*"); *Alapli Elektrik B.V. v. Republic of Turkey* (ICSID Case No. ARB/08/13), Excerpts of Award dated 16 July 2012, **RL-124**, paras 360, 362, 389 (in which the majority of the tribunal declined jurisdiction over the claimant's shares in the host state project company, which had been assigned rights under a concession contract concluded between another Turkish project company and a Turkish Ministry. Prof Park considered that "investment of an investor" – as used in the two operative treaties – meant that an investment must involve an active contribution by that investor. In his view, the claimant's status as the owner of the Turkish project company did not meet the test of contributing "*something of value (money, know-how, contacts, or expertise)*" to the host State, and thus it did not qualify as an investor under either of the two treaties. Instead, it was a US-based project company and its Turkish founders which had made an active investment, having provided the statutory capital and technological know-how as well as concluding the concession contract with the State (which the claimant was neither party nor a signatory of,

definition of "investment" under the Lithuania-Ukraine BIT, explained that "*the Claimant must show that it caused an investment to be made in the territory of the Respondent*".[663] Noting that the claimant had provided "substantial evidence" that it had invested sums of money (totalling USD 6.5 million) toward its investment in a local enterprise and related properties, the *Tokios* tribunal was satisfied that the claimant had a protected investment under the BIT,[664] explaining that "[t]*he Claimant made an investment for the purposes of the Convention when it decided to deploy capital under its control in the territory of Ukraine instead of investing it elsewhere*".[665]

371. In *Komaksavia*, the relevant treaty defined an investment as "*every kind of asset invested by investors*", followed by a non-exhaustive list of assets, much like the definition of an investment under Article 1(1). That tribunal considered that "*unless the term 'investment' is given some inherent meaning, the non-exclusive nature of the list would provide no benchmark by which a tribunal could evaluate the qualification of other forms of assets outside the illustrative list*".[666] On this basis, the tribunal found that the treaty's definition required "*interpretation by reference to the ordinary meaning of the concepts of "investment" and "investing"*".[667] In its view, the term "investment" entailed "*some contribution which is made in an attempt to earn a return over a period of time, a process that necessarily involves the possibility or risk of not earning a return*".[668] The treaty's inclusion of the phrase "*invested by investors*" reinforced the tribunal's view that the investor must

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nor had it negotiated its terms). The other majority arbitrator also declined jurisdiction but on different grounds).

663 *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18), Decision on Jurisdiction dated 29 April 2004, **RL-054**, paras 754 (emphasis added). See also para 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*").

664 *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18), Decision on Jurisdiction dated 29 April 2004, **RL-054**, para 76.

665 *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18), Decision on Jurisdiction dated 29 April 2004, **RL-054**, para 80.

666 *Komaksavia Airport Invest Ltd. v. Republic of Moldova* (SCC Case No. 2020-074), Final Award dated 3 August 2022, **RL-084**, para 148.

667 *Komaksavia Airport Invest Ltd. v. Republic of Moldova* (SCC Case No. 2020-074), Final Award dated 3 August 2022, **RL-084**, para 149.

668 *Komaksavia Airport Invest Ltd. v. Republic of Moldova* (SCC Case No. 2020-074), Final Award dated 3 August 2022, **RL-084**, para 151.

make an actual contribution, explaining that "[t]*his flows from the ordinary meaning of the term 'invested', which is a past tense verb, referring to a prior act of investing*".[669] It elaborated that:[670]

> *'investing' an asset connotes something different from merely 'owning' or 'holding' an asset; the latter terms connote legal title or possession, while the former refers to a form of conduct, the taking of an act. The Tribunal is unable to accept Komaksavia's argument that the terms necessarily can be conflated, so that a qualifying national who comes to own an asset in the host State, without having made any contribution in respect of that ownership, can be considered to have 'invested' that asset. The term 'invested', like the term 'investment', has a particular meaning, one that is not akin to mere ownership alone.*

372. It follows that the ordinary meaning of the words "*invested by an investor of one Contracting Party in the territory of the other Contracting Party*", within their context, indicates that a positive act by the investor is required in order for there to be an investment under Article 1(1). As explained by the tribunal in *Komaksavia*, this requires that the investor make "*an actual contribution of some sort, in connection with its putative investment*", such as the commitment of money in order to earn a financial return, or the expenditure of time, effort or resources to make a profit or gain an advantage.[671]

373. It also requires some nexus to the territory of the host State. As explained in the Counter-Memorial, the inclusion of the words "*in the territory of the other Contracting Party*" implies the existence of investment activities of an investor in the host State. Thus, an investor must prove that its act of investment has a connection to Serbia.[672]

374. Claimants' muddled response to Respondent's analysis of the BIT's definition of an investment is to deny that it requires an investor to fulfil "*any requirements related to contribution provided and/or risk undertaken*".[673] This is unconvincing. Had the parties to the Cyprus-Serbia BIT intended that the treaty definition of an "investment" should be broad enough to encompass passive ownership of an investment, they would have

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669 *Komaksavia Airport Invest Ltd. v. Republic of Moldova* (SCC Case No. 2020-074), Final Award dated 3 August 2022, **RL-084**, para 153.

670 *Komaksavia Airport Invest Ltd. v. Republic of Moldova* (SCC Case No. 2020-074), Final Award dated 3 August 2022, **RL-084**, para 154.

671 *Komaksavia Airport Invest Ltd. v. Republic of Moldova* (SCC Case No. 2020-074), Final Award dated 3 August 2022, **RL-084**, paras 153-154.

672 Counter-Memorial, paras 345, 390-391.

673 Reply, para 500.

adopted language to that effect (such as "every kind of asset *owned* directly or indirectly by an investor"). Their choice to adopt the active language of "invested" rather than "owned" ("*every kind of asset invested by an investor*") signals that a positive act of investing by an investor is required. That such language is then linked to the host State's territory further signals that the act of investing must have some connection to the host State. This is supported by the fact that Article 1(3) of the Cyprus-Serbia BIT similarly ties the definition of an "investor" to the act of "*making investments in the territory of another Contracting Party*". To dispense with the requirement of a positive act of investing would override the explicit choice of the parties to the BIT as to how to define the scope of a covered investment.

bb) Kalemegdan did not make an investment within the meaning of Article 1(1) of the Cyprus-Canada BIT

375. Contrary to Claimants' assertions, Kalemegdan's shares in Obnova do not constitute a protected investment as defined under Article 1(1) of the Cyprus-Serbia BIT. Kalemegdan's passive acquisition of the Obnova shares through Mr Obradović's in-kind contribution does not satisfy the BIT's requirement for a positive act of investment in Serbia in exchange for the Obnova shares (**Section (i)**). Nor does it amount to any contribution of assets in connection with the Obnova shares (**Section (ii)**).

(i) Mr Obradović's restructuring of his Obnova shares is not an "investment" made by Kalemegdan

376. As explained in the Counter-Memorial,[674] there is no evidence that Kalemegdan undertook any positive act, e.g. by making any injection of capital or transferring anything of value to Serbia, in return for acquiring the Obnova shares in April 2012 from its (then)[675] sole shareholder Mr Obradović.[676]

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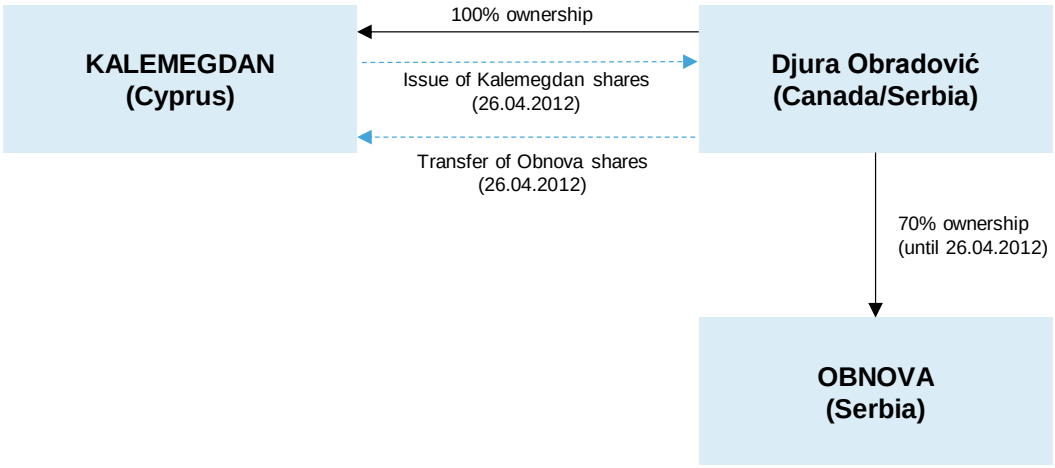
674 Counter-Memorial, paras 359-360.

675 On or about 27 December 2023, after Respondent had filed its Counter-Memorial, Mr Obradović's shares in Kalemegdan were transferred to Coropi. Certificate of Kalemegdan's shareholders, 27 December 2023, **C-401**. Witness statement of Mr. Willian Archibald Rand dated 23 February 2024, para 66; Witness statement of Mr. Erinn Bernard Broshko dated 23 February 2024, para 54.

676 For the avoidance of doubt, Respondent does not contend that the assumption of risk is a condition for a covered investment under Article 1(1) of the Cyprus-Serbia BIT. Respondent addresses the risk requirement in connection with Kalemegdan's shareholding in Obnova, including Claimants' arguments in that regard, further below, in regard to the requirements for an investment under Article 25(1) of the ICSID Convention. See Sections C.I.3.b)aa)(ii) and C.I.3.b)bb)(ii) below.

377. Claimants (sidestepping the interpretation of "invested") incorrectly assert that Kalemegdan's issue of share capital to Mr Obradović in exchange for his shares in Obnova in April 2012 amounts to a contribution. But Kalemegdan's issue of share capital did not entail any transfer of economic value from Cyprus to Serbia, since Mr Obradović merely exchanged his shares in Obnova for additional shares in Kalemegdan (which he wholly owned). This was merely a restructuring of Mr Obradović's own assets, in effect a share-to-share swap, as shown in Figure 1 below. Claimants indicate that this restructuring was initiated at the instruction of Mr Rand, based on advice from his Canadian tax lawyers.[677] Mr Obradović's restructuring of his Obnova shares cannot possibly satisfy the BIT's definition of an investment, such that it can be said the shares were "*invested by an investor*" in Cyprus.

Figure 1: Kalemegdan's alleged investment in Obnova in April 2012



378. Claimants argue that Respondent's reliance on *Komaksavia* is "inapposite" because in that case, the investor had not made any contribution for its shares in the Moldovan enterprise Avia Invest through a corporate restructuring, whereas here Kalemegdan issued shares to Mr Obradović in exchange for the Obnova shares. This is to no avail. According to the share purchase agreement in *Komaksavia*, the Avia Invest shares had been acquired by the claimant for an agreed price, but the evidence indicated that the sale price was never paid.[678] As the evidence on the record showed that the claimant received shares in

[677] Reply, paras 282-283; Witness statement of Mr. William Archibald Rand dated 23 February 2024, paras 34-37.

[678] *Komaksavia Airport Invest Ltd. v. Republic of Moldova* (SCC Case No. 2020-074), Final Award dated 3 August 2022, **RL-084**, para 167.

Avia Invest without any consideration, it was found not to have a protected investment.[679] In the present case, as explained above, Kalemegdan's 2012 acquisition of the Obnova shares similarly did not result in any injection of capital or other form of contribution amounting to an investment in Serbia. While it is not disputed that Kalemegdan issued shares to Mr Obradović and acquired his shares in Obnova, there is no evidence of Mr Obradović's alleged contribution (such that it can be attributed or linked to Kalemegdan). As neither Kalemegdan nor its then (sole) shareholder had any active role in investing in Serbia, Claimants have failed to demonstrate that Kalemegdan made an investment within the meaning of Article 1(1) of the Cyprus-Serbia BIT.

(ii) Any consideration paid for the Obnova shares cannot be linked to Kalemegdan

379. Claimants argue that Kalemegdan's share issue in exchange for Mr Obradović's in-kind contribution does constitute an act of investment within the meaning of the Cyprus-Serbia BIT. They allege that "*Serbia's erroneous interpretation of the Serbia-Cyprus BIT would exclude from investment protection all Cypriot investors which are corporate entities and which acquired assets in Serbia as an in-kind contribution to their capital against the issuance of their shares.*"[680] This argument is misleading and incorrect.

380. Claimants misrepresent Respondent's analysis and application of Article 1(1) of the Cyprus-Serbia BIT. Respondent does not argue that an in-kind contribution of assets can never amount to an investment capable of BIT protection. Rather, it is Respondent's position, as supported by previous investment treaty awards, that an internal restructuring or transfer of assets among corporate entities still requires a showing by the investor that some positive act of investment or contribution was made to acquire those assets. In the present case, Claimants have failed to show that either Kalemegdan or Mr Obradović made any contribution in connection with the acquisition of the Obnova shares.

381. Case law confirms that the reality of a contribution is to be assessed based on the totality of the circumstances and the elements of the economic goal pursued. Where the contribution is made not through the injection of new capital but rather through the restructuring of assets among a group of companies functioning as a single economic entity, tribunals will look carefully at the surrounding circumstances in assessing whether the contribution requirement has been fulfilled.[681] Specifically, tribunals will assess whether

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679 *Komaksavia Airport Invest Ltd. v. Republic of Moldova* (SCC Case No. 2020-074), Final Award dated 3 August 2022, **RL-084**, para 176.

680 Reply, para 504.

681 *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius* (PCA Case No. 2018-37), Award on Jurisdiction dated 23 August 2019, **RL-093**, para 126; *Rand Investments Ltd. and others v.*

there is an economic link between the contribution made and the putative investor, such that the investor can be said to have made an investment.[682]

382. Even though the origin of the investor's funds is in principle irrelevant, "*there still needs to be some economic link between that capital and the purported investor that enables the Tribunal to find that a given investment is an investment of that particular investor*".[683] Accordingly, the transfer of assets among related companies or similar non arms-length transactions warrant scrutiny as to the origin of any contribution and how it is linked to the claimant investor. As explained by the tribunal in *Rand v. Serbia*, [w]*hat matters is the economic reality of the contribution in consideration of all the relevant circumstances, not the formal arrangements used. … What matters is that the investor is the one ultimately bearing the financial burden of the contribution*."[684]

383. In the present case, there is no evidence linking the capital used to acquire the Obnova shares to Kalemegdan. This is because the circumstances in which (i) Kalemegdan acquired the Obnova shares, and (ii) Mr Rand set up his disparate holding companies, do not indicate any economic link between Kalemegdan, as the investor, and the funds used to acquire the Obnova shares in December 2005. Mr Obradović acquired these shares from Obnova's previous owner by means of an assignment of the original sale agreement for Obnova, which had been concluded between the previous owner and Serbia's Privatization Agency.[685] Any funds used by Mr Obradović to acquire the shares and to invest in Obnova were clearly not provided by Kalemegdan, which did not yet exist at the time. Thus, insofar as it may be presumed that Mr Obradović did purchase the shares or otherwise contribute to the capital of Obnova (which is not substantiated), such contribution cannot be linked or attributed to Kalemegdan.

Republic of Serbia (ICSID Case No. ARB/18/8), Award dated 29 June 2023, Dissenting Opinion of Professor Marcelo G. Kohen, **RL-076,** para 18 ("*The promotion of foreign investment to favour economic development requires clarity and normality of transactions. Investment arbitration cannot be the last area in economic relations in which the origin of the funds invested are of no relevance*").

682 *Rand Investments Ltd. and others v. Republic of Serbia* (ICSID Case No. ARB/18/8), Award dated 29 June 2023, **RL-076**, para 237 ("*There must thus be an economic link between the funds and the investor which is such that the contribution made with the funds is that of the investor.*").

683 *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)* (ICSID Case No. ARB/08/12), Award dated 5 June 2012, **RL-082**, para 355 and see para 456 ("*the capital must still be linked to the person purporting to have made an investment*").

684 *Rand Investments Ltd. and others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award dated 29 June 2023, **RL-076**, para 237.

685 Annex to Obnova's privatization agreement, 22 December 2005, **C-312**.

384. In fact, there is no evidence that Mr Obradović made any contribution when he acquired the Obnova shares. The assignment agreement he concluded with Obnova's previous owner makes no reference to any consideration paid for the assignment of the shares. While it provides that Mr Obradović will "*fulfil all obligations toward the Privatization Agency, in particular those that concern payment of the purchase price for the capital*", Claimants provide no further details as to the payment of any purchase price.[686] Additionally, the purchase price for Obnova's shares was paid already in 2003, upon Obnova's privatization. In short, there is no evidence that Mr Obradović or Kalemegdan made any contribution in relation to the acquisition of the Obnova shares, either in 2012 (when Kalemegdan acquired the shares) or in 2005 (when Mr Obradović acquired the shares).

385. By Claimants' account, Mr Rand would have funded the investment in Obnova. According to Claimants, Mr Obradović acted at the instruction of Mr Rand when he acquired the Obnova shares in 2005.[687] In effect, Mr Rand and Mr Obradović had a "gentlemen's agreement" whereby Mr Obradović would act in accordance with Mr Rand's instruction, while being the nominal owner of the Obnova shares.

386. Claimants assert that Kalemegdan was incorporated in Cyprus to hold Mr Obradović's shares in Obnova and other Serbian entities, allegedly for the benefit of Mr Rand. While Mr Rand's alleged beneficial ownership and control over Kalemegdan and Obnova, and his business relationship with Mr Obradović, seem to indicate that the investment in Obnova was in fact funded by Mr Rand, there is no evidence of this. Furthermore, Mr Rand is not a claimant in this proceeding and his contribution cannot be linked or attributed to Kalemegdan, which is a legally separate personality that is not part of any corporate group or consolidated economic entity owned by Mr Rand.

387. This case calls to mind the tribunal's reasoning in *KT Asia v. Kazakhstan*, which found that the claimant KT Asia had not established an economic link with the financial contribution made by a third party. KT Asia had unsuccessfully sought to rely on the contribution made by its ultimate beneficial owner Mr Ablyazov, through nominees, for shares in a local company which were subsequently acquired by KT Asia on credit at a nominal price through other companies owned and controlled by Mr Ablyazov. The tribunal rejected this argument, noting that there was no paper trail of the original acquisition by Mr Ablyasov. Additionally, due to the manner in which Mr Ablyazov had structured and run those entities, it could not be said that they were part of a corporate group nor that

686 Annex to Obnova's privatization agreement, 22 December 2005, **C-312**, Article 2.

687 Memorial, para 74; Reply, para 261; Witness statement of Mr. William Archibald Rand dated 23 February 2024, paras 11,12, 14, 23.

they represented a single economic unity. Accordingly, the tribunal concluded that KT Asia could not rely on Mr Ablyazov's original contribution to show that it had made an investment:[688]

> *In the present case, Mr. Ablyazov beneficially owned and controlled many companies through nominees and individuals whom he trusted and who (directly or indirectly) owned or controlled the shares. These nominees and other individuals acted on Mr. Ablyazov's instructions and were required not to disclose that they held or controlled the shares for his benefit. Mr. Ablyazov was never himself a shareholder in any of the companies. Indeed, it is the Tribunal's understanding that there was no single person (whether corporate or individual) who had legal title to the shares in the companies held for the ultimate benefit of Mr. Ablyazov.*

388. Much like in *KT Asia*, Mr Rand's putative and unsubstantiated beneficial ownership of Kalemegdan and Obnova is not a sufficient connecting factor for purposes of attributing to Kalemegdan any contribution made by or on behalf of Mr Rand for the Obnova shares. Accordingly, there is no contribution of economic value or risk related to the transfer of the Obnova shares to Kalemegdan, even if Mr Rand, who is not a claimant in these proceedings, bore the financial burden of the contribution and corresponding risk. For this reason, Kalemegdan should not be permitted to rely on or benefit from any contributions made by Mr Obradović on Mr Rand's behalf in order to claim investment protection.

389. Indeed, in *Rand v. Serbia*, which also involved investments purportedly made and/or managed by Mr Rand and Mr Obradović, the tribunal found that although Mr Obradović had formally paid the purchase price for shares in a Serbian company, he did so with money that had been arranged and secured by Mr Rand, who ultimately exercised control over the company's operation and management.[689] Here again, Claimants' assertions indicate that if anyone financed the investment in Obnova (which is in any event not proven), it would have been Mr Rand. As neither Kalemegdan nor its then sole shareholder made any contribution in connection with the Obnova shares, Kalemegdan has not made an investment within the meaning of Article 1(1) of the Cyprus-Serbia BIT.

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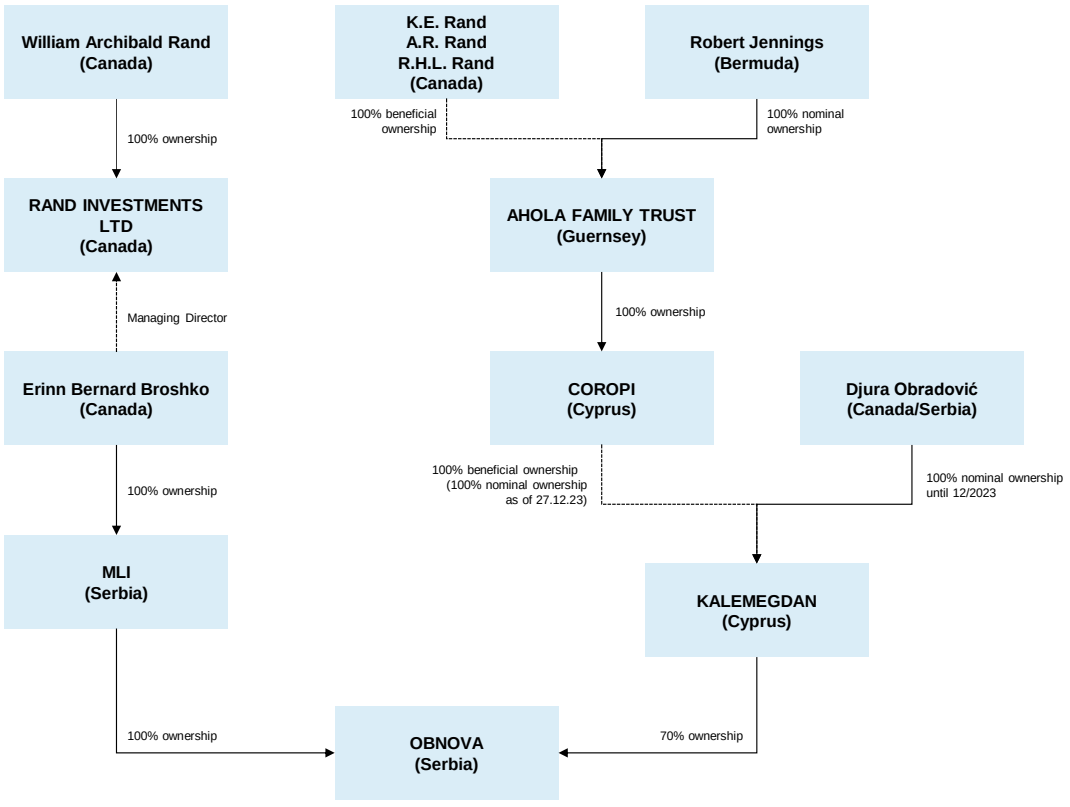
[688] *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award dated 17 October 2013, **RL-060**, paras 192, 19.

[689] *Rand Investments Ltd. and others v. Republic of Serbia* (ICSID Case No. ARB/18/8), Award dated 29 June 2023, **RL-076**, paras 240-241.

cc) Coropi did not make an investment within the meaning of Article 1(1) of the Cyprus-Serbia BIT

390. Claimants allege that as part of the 2012 restructuring of Mr Rand's Serbian investments, Coropi acquired a beneficial interest in Kalemegdan, and by extension, its Obnova shares. In particular, Claimants allege that upon Kalemegdan's incorporation, a trust was established over Mr Obradović's shares in Kalemegdan, with Coropi acting as the beneficiary and Mr Obradović as the trustee.[690] According to Claimants, Coropi is controlled by Mr Rand, and beneficially owned by his three children via the Ahola Family Trust, which is domiciled in Guernsey.[691]

Figure 2: Overview of Claimants' investment structure



391. As explained in the Counter-Memorial[692] and detailed further below, the circumstances in which Coropi's beneficial ownership of Kalemegdan (and indirect beneficial

690 Request for Arbitration, paras 16, 64.

691 Memorial, para 22; Reply, para 283; Witness statement of Mr. William Archibald Rand dated 23 February 2024, para 38. The Ahola Family Trust is solely owned by Mr Robert Jennings, the trustee.

692 Counter-Memorial, para 366-377.

ownership of Obnova) was allegedly established are poorly documented and raise serious doubts about the veracity of this claim. As a consequence, Claimants have failed to demonstrate that Coropi has made an investment within the meaning of Article 1(1) of the Cyprus-Serbia BIT. First, Coropi did not acquire a beneficial interest in Obnova via the alleged trust arrangement with Mr Obradović over his shares in Kalemegdan (**Section (i)**). Second, Claimants have failed to establish that Coropi acquired an interest in Obnova as a matter of Serbian law (**Section (ii)**). Third, Coropi has not made any form of active contribution in relation to its alleged acquisition of a beneficial interest in Obnova via the trust (**Section (iii)**).

(i) Coropi did not acquire a beneficial interest in Obnova

392. Claimants have not established that Coropi acquired a beneficial interest in Kalemegdan and by extension, an indirect beneficial interest in Kalemegdan's shares in Obnova. Claimants allege that Coropi's beneficial ownership of the Obnova shares arose from the trust established over Mr Obradović's shares in Kalemegdan for the benefit of Coropi. They point to the letter of instructions dated 26 March 2012[693] (the "**Letter of Instructions**") as well as the two trust deeds settled by Coropi on 26 April 2012 and 16 August 2012 (the "**Trust Deeds**"),[694] alleging that "[b]*ased on the trust deeds, Coropi therefore became the 100% beneficial owner of Kalemegdan*" and "*the indirect beneficial owner of the Cypriot Obnova Shares*".[695] Respondent explained in its Counter-Memorial that the Letter of Instructions and the Trust Deeds did not produce any effect on the ownership of Obnova's shares. The Trust Deeds presuppose that Coropi had already acquired a beneficial interest in Kalemegdan "*for consideration given*", yet no evidence was offered to indicate how and when that beneficial interest was acquired.[696]

393. Claimants have changed their story regarding Coropi's acquisition of a beneficial interest in Kalemegdan. Whereas in their Memorial, Claimants alleged that Coropi acquired its beneficial interest in Kalemegdan by concluding the Trust Deeds with Mr Obradović,[697] they now assert that Coropi had acquired its interest upon the incorporation of Kalemegdan in March 2012 by means of an oral trust, which the Trust Deeds simply confirm.[698]

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693 Letter of Instructions, 26 March 2012, **C-319**.

694 Trust Deed, 26 April 2012, **C-066**; Trust Deed, 16 August 2012, **C-067**.

695 Memorial, para 95.

696 Counter-Memorial, paras 366-367, 375-376.

697 Memorial, para 95.

698 Reply, paras 511, 517. Claimants incorrectly assert that "[i]*t is undisputed that Coropi obtained beneficial ownership of Kalemegdan before the conclusion of the trust deeds. Indeed, the trust deeds prove the existence*

Claimants' shape-shifting account of how Coropi acquired a beneficial interest in Kalemegdan belies the spurious nature of this claim.

394. Claimants have still failed to establish that Coropi acquired a beneficial interest in Kalemegdan. Mr Georgiades and Mr Ioannides, Claimants' and Respondent's respective experts on Cypriot law, agree that the existence of a trust under Cypriot law requires certainty as to (i) an intention to create a trust, (ii) the subject matter of the trust, and (iii) the intended objects/beneficiaries of the trust.[699] In the present case, there is a clear lack of certainty regarding the intention to declare a trust. As the sole legal owner and presumptive beneficial owner of the Kalemegdan shares, only Mr Obradović could declare a trust over those shares.[700] None of the evidence presented by Claimants is sufficient to support their assertion that a trust was established by Mr Obradović in March 2012, as Claimants allege. On the contrary, the evidence on the record is ambiguous as to the circumstances in which the alleged trust was established and curiously silent as to Mr Obradović's intentions. Claimants' expert Mr Georgiades does not deny these deficiencies, acknowledging that "[i]*f each piece of evidence is viewed in isolation, it is unlikely to rebut the presumption [of Mr Obradovic's beneficial ownership]*".[701] He then argues that when the evidence is viewed together, it establishes the existence of Coropi's beneficial interest, but this is unsupported, for the reasons elaborated below.

- **The Letter of Instructions:** In his first report, Mr Ioannides explained why the Letter of Instructions did not establish that Coropi was beneficially interested in Kalemegdan or any shares in Kalemegdan, as it (i) lacked the necessary certainty as to the subject matter of the alleged trust that the Letter of Instructions purportedly confirmed and (ii) was not acknowledged by Kalemegdan's actual owner, Mr Obradović.[702] Mr Ioannides also pointed out that Kalemegdan's articles of association do

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of this pre-existing ownership" (Reply, para 517). Respondent has from the outset disputed Coropi's alleged beneficial ownership of Mr Obradović's Kalemegdan shares. Counter-Memorial, Section C.I.3.d).

699 Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, para 7.5; Expert Report of Mr. Agis Georgiades dated 23 February 2024, para 5.1.1; Second Legal Opinion-Mr Kypros Ioannides-Rejoinder-ENG dated 14 June 2024, **RLO-006**, paras 10.1 and 10.3.

700 Second Legal Opinion-Mr Kypros Ioannides-Rejoinder-ENG dated 14 June 2024, **RLO-006**, para 12.8. See also Expert Report of Agis Georgiades dated 23 February 2024, para 5.3.3 ("*Given the presumption in favour of beneficial ownership by Mr Obradovic, a person asserting that a trust existed on those shares must furnish credible evidence that there was an express or inferred (or implied) agreement, arrangement or understanding about the beneficial ownership in the said shares.*").

701 Expert Report of Agis Georgiades dated 23 February 2024, para 5.3.4.

702 Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, paras 7.19-7.23.

not permit the company's directors to recognise the authority of any other person beside the registered owner of its shares, i.e. Mr Obradović.[703] This is consistent with the position taken by the Cyprus courts, which only recognise the authority of the company's registered shareholder, i.e. the company is only bound by the authority of the registered shareholder. Accordingly, Kalemegdan is not bound by the Letter of Instructions, which was neither authorised nor acknowledged by its only registered shareholder, Mr Obradović.[704]

Mr Georgiades agrees with Mr Ioannides that the letter, taken on its own, was not intended to create a trust, nor does it establish the existence of a trust over Mr Obradović's shares in Kalemegdan.[705] While he disputes Mr Ioannides' reading of Kalemegdan's articles of association and claims that they apply to preference rights of shareholders, he offers no support or authority for his own more restricted reading.

Mr Georgiades also incorrectly claims that the letter "*is circumstantial evidence of the existence of the trust since the incorporation of Kalemegdan*" when read together with the Trust Deeds and witness statements of Mr Broshko and Mr Rand.[706] On the contrary, as explained by Mr Ioannides, the Trust Deeds and the witness evidence are not capable of rehabilitating the defects of the Letter of Instructions.[707]

- **The Trust Deeds**: As stated above, the Trust Deeds do not create or confirm a beneficial interest or trust over the Kalemegdan shares in favour of Coropi.[708] Mr Georgiades concedes that there is "*some ambiguity as to where the beneficial interest in the initial issued share capital (1.000) vested before the date of the first trust deed*" and agrees that the Trust Deeds do not, in themselves, establish Coropi's beneficial interest.[709]

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703 Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, para 7.23.

704 Second Legal Opinion-Mr Kypros Ioannides-Rejoinder-ENG dated 14 June 2024, **RLO-006**, para 11.3-11.9.

705 Expert Report of Agis Georgiades dated 23 February 2024, para 5.2.2.

706 Expert Report of Agis Georgiades dated 23 February 2024, para 5.2.3.

707 Second Legal Opinion-Mr Kypros Ioannides-Rejoinder-ENG dated 14 June 2024, **RLO-006**, paras 12.9-12.10.

708 Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, para 7.28.

709 Expert Report of Agis Georgiades dated 23 February 2024, para 5.3.3.

- **The witness evidence of Mr Rand and Mr Broshko**: Mr Rand and Mr Broshko claim that the trust over Mr Obradović's shares in Kalemegdan was created at the date of Kalemegdan's incorporation on 23 March 2012. They further assert that Mr Obradović was the registered owner of shares in several Serbian companies of which Mr Rand was the beneficial owner but does not offer any contemporaneous evidence of this alleged arrangement. And as Mr Ioannides points out, an express trust or beneficial interest in the Kalemegdan shares could only be created by declaration of the subscriber to Kalemegdan's memorandum of association and its original shareholder, i.e. Mr Obradović.[710] Claimants have not put forward any evidence proving that Mr Obradović did in fact declare a trust or beneficial interest in his Kalemegdan shares. The lack of any clear, unambiguous declaration by Mr Obradović cannot be remedied by Mr Rand's and Mr Broshko's evidence.[711]

395. Additional inconsistencies and incongruities in Claimants' evidence call into question Coropi's alleged beneficial ownership of Kalemegdan. According to Mr Rand, "*Mr Obradović agreed to always follow my instructions with respect to any matters related to Kalemegdan*".[712] He also states that "[i]*n furtherance of Coropi's beneficial ownership, I later instructed Mr Obradović to conclude the two trust deeds with Coropi*".[713] If Coropi had already been the beneficial owner of Kalemegdan since Kalemegdan's incorporation in March 2012, it begs the question why and under what capacity Mr Rand instructed Mr Obradović on the affairs of Kalemegdan.[714]

396. Moreover, had Coropi been the beneficial owner of Kalemegdan since Kalemegdan's incorporation in March 2012, then Coropi's beneficial interest should be reflected in its financial statements. Yet, Coropi's financial statements for the financial years 2012 and 2013 contain no such record, while the company's directors state for both financial years that "[t]*he principal activity of the Company is to act as a holding company, however during the year the Company remained dormant*".[715] Accordingly, Mr Ioannides

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710 Second Legal Opinion-Mr Kypros Ioannides-Rejoinder-ENG dated 14 June 2024, **RLO-006**, para 12.8.

711 Second Legal Opinion-Mr Kypros Ioannides-Rejoinder-ENG dated 14 June 2024, **RLO-006**, para 12.9.

712 Witness statement of Mr. William Archibald Rand dated 23 February 2024, para 37.

713 Witness statement of Mr. William Archibald Rand dated 23 February 2024, para 40.

714 Second Legal Opinion-Mr Kypros Ioannides-Rejoinder-ENG dated 14 June 2024, **RLO-006**, para 13.7.

715 Coropi Holdings Ltd, Report and Financial Statements, 31 December 2012, **R-210**, p 9 (p 13 of PDF) (emphasis added); Coropi Holdings Ltd, Report and Financial Statements, 31 December 2013, **R-211**, p 9 (p 15 of PDF) (emphasis added).

concludes that "*there is no clear evidence that an express or even a constructive trust of the Kalemegdan Shares has been established in favour of Coropi*".[716]

397. Claimants' efforts to distinguish the *Anglo-Adriatic* and *Alverley* cases, which also concerned defective trust deeds,[717] are without merit. In both cases, the claimant investor had relied on a trust deed (or, in *Anglo-Adriatic*, four trust deeds) to establish the existence of a beneficial interest in the alleged investment (shares). And in both cases, the tribunal found that the trust deeds neither conferred nor confirmed the claimant investor's beneficial interest in the shares. In *Alverley*, the trust deed was the only contemporaneous evidence of the alleged trust, which was, much like the present case, declared by the claimant investor for its own benefit. The tribunal found that the trust deed did not constitute sufficient evidence of the creation of an oral trust, noting that while the trust deed assumed the claimant had acquired a pre-existing beneficial interest "for consideration", no evidence was presented as to how that interest was acquired:

> *there is no evidence of how, when and from whom Alverley acquired the beneficial ownership of the shares. Contrary to the arguments of Alverley's counsel, the trust deeds themselves cannot confer the beneficial interest which Alverley claims to have possessed. Their terms make clear that they are written on the basis that Alverley had already acquired that beneficial interest "for consideration". Yet there is no explanation in the evidence of how it did so or from whom.*[718]

398. In the present case, there is also no clear evidence of how and when Coropi acquired its alleged beneficial interest, as elaborated above.

399. Parallels to the reasoning and conclusion of the tribunal in *Anglo-Adriatic* may also be drawn. Much like the Trust Deeds settled by Coropi, the claimant investor was both the settlor and named beneficiary under the four trust deeds at issue in *Anglo-Adriatic*. And much like in the present case, there was no evidence that the settlor had any interest in the subject matter of the trust, such that it was entitled to declare a trust. The only persons entitled to act as settlors were the legal shareholders, who were instead the named trustees (much like Mr Obradović, being the nominal and presumptive beneficial owner of the Kalemegdan shares). The tribunal thus concluded that the trust deeds did not support the

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716 Second Legal Opinion-Mr Kypros Ioannides-Rejoinder-ENG dated 14 June 2024, **RLO-006**, para 13.9.

717 Reply, paras 520-525.

718 *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 428.

claimant's case that the shareholders had transferred beneficial ownership over the shares to the claimant.[719]

400. The *Anglo-Adriatic* tribunal went on to consider if the outcome would be any different if it were to accept that the actual settlors and trustees of the trust deeds were the shareholders and the beneficiary was the claimant. The tribunal answered this hypothetical question in the negative, as there would still be no evidence proving that the claimant had paid the appropriate consideration to the shareholders in exchange for the transfer of the shares.[720] For that tribunal, this omission was "especially striking", as it should have been easy for the claimant, being a corporation, to prove the existence of any payment of consideration through the company accounts.[721] On this basis as well, the tribunal found that the claimant's case had come up short, i.e. in addition to failing to establish that it had an interest in the shares, the claimant had failed to prove it had paid any consideration for those shares. So too in the present case, there is no evidence that Coropi paid any consideration for a beneficial interest in the Kalemegdan shares.

401. Finally, and in any case, Coropi's putative beneficial ownership of Kalemegdan does not entail or confer an indirect beneficial interest in Obnova, as the Trust Deeds cannot create indirect beneficial ownership over the property of Kalemegdan.[722] Thus, even if Claimants had established that Coropi acquired a beneficial interest in Kalemegdan via the trust, it does not follow from this that it had an indirect beneficial interest in the Obnova shares owned by Kalemegdan.

(ii) Coropi's purported beneficial interest is not a recognised investment under Serbian law

402. In its Counter-Memorial, Respondent explained that Coropi's alleged indirect beneficial ownership of the Obnova shares does not constitute a property right under Serbian law, which does not recognise beneficial ownership of shares arising under a trust. As Coropi did not acquire an interest in the Obnova shares under Serbian law, the question of

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719 *Anglo-Adriatic Group Limited v. Republic of Albania* (ICSID Case No. ARB/17/6), Award dated 7 February 2019, **RL-051**, paras 233-234.

720 *Anglo-Adriatic Group Limited v. Republic of Albania* (ICSID Case No. ARB/17/6), Award dated 7 February 2019, **RL-051**, para 242.

721 *Anglo-Adriatic Group Limited v. Republic of Albania* (ICSID Case No. ARB/17/6), Award dated 7 February 2019, **RL-051**, para 245.

722 Legal Opinion-Mr Kypros Ioannides-Counter-Memorial-ENG dated 29 September 2023, **RLO-002**, para 7.31.

whether its interest is recognised and protected as an investment under the Cyprus-Serbia BIT does not arise.[723]

403. Claimants argue that Serbian law does not apply and has no relevance for Coropi's indirect beneficial ownership over Kalemegdan's shares, but do not explain why this is the case, nor do they respond to Respondent's argument to the contrary.[724] Claimants ignore that for a right to qualify for protection (as an investment) under international law, it must first exist under national law. As the annulment committee in *Venezuela Holdings* put it, "*an investment consists of rights created under national law*".[725] The applicable investment treaty then determines whether those rights are recognised and protected as an "investment" under international law, and if so, what are the consequences flowing from an interference with the investment.[726] Accordingly, if – and only if – the claimed rights constituting Coropi's alleged investment are created or recognised under Serbian law, does the question arise of whether those rights are protected by international law under the Cyprus-Serbia BIT.

404. The Cyprus-Serbia BIT defines an investment as "*every kind of asset invested by an investor*" followed by a list of examples, among them "*movable and immovable property and any other rights in rem*" as well as "*shares, bonds and other kinds of securities*". Coropi claims to have an indirect, beneficial interest in Obnova's shares via the "oral trust" which was allegedly created upon Kalemegdan's incorporation in March 2012.[727] While Respondent does not dispute that share ownership falls within the protective scope of Article 1(1) of the BIT, it does not follow from this that Coropi has an investment within the meaning of that provision. As explained by Prof Lepetić in her first expert report, trusts do not exist under Serbian law and cannot create a beneficial interest in shares in a joint stock company.[728] As Serbian law does not recognise or confer beneficial ownership rights over shares, only the legal owner of shares, i.e. the shareholder, enjoys the rights associated with those shares. Any other qualification or designation of an

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723 Counter-Memorial, paras 381-386.

724 Reply, para 535.

725 *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**, para 169 (also noting that "*the character of the rights at issue (whether they be called 'property rights' or by some other description) is inherent in the very nature of an 'investment*').

726 *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**, para 169.

727 Reply, para 524.

728 Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-3**, paras 82, 84.

interest in shares is irrelevant according to the rights of owners of shares under Serbian law. In the present case, Kalemegdan has been a shareholder in Obnova since April 2012. Coropi is not an owner of shares in Obnova and is not entitled to any rights deriving from those shares.[729]

405. Claimants argue that Serbian law does recognise beneficial ownership, referring to specific provisions of the Law on Capital Markets, the 2018 Law on Centralized Records of Beneficial Owners, and the Law on the Prevention of Money Laundering and the Financing of Terrorism which contain definitions of a beneficial owner and, in the case of the Law on the Prevention of Money Laundering and the Financing of Terrorism, a definition of a trust.[730] These provisions are addressed by Prof Lepetić in her first report, wherein she explains that the references to beneficial ownership relate to the obligations but not the rights of shareholders (and none refer to indirect beneficial owners of shares).[731] None of these provisions recognise or confer indirect beneficial ownership of shares.[732] The reference to trusts in the Law on the Prevention of Money Laundering and the Financing of Terrorism is irrelevant, as this law does not confer or recognise any rights associated with a trust. Rather, as noted by Prof Lepetić, this statute confirms that "*trusts are an institution which does not exist in Serbian law*".[733]

(iii) Coropi did not make an investment in Serbia

406. Even if it was possible under Serbian law for Coropi to acquire an indirect beneficial interest in Obnova's shares via the alleged trust over the Kalemegdan shares (which it was not), such interest would in any case not satisfy the requirements for an investment under Article 1(1) of the Cyprus-Serbia BIT.[734] This is because there is no evidence on the record that Coropi has made a positive act of investing in the territory of Serbia. On the contrary, to the extent Coropi can be said to have acquired any indirect, beneficial

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729 Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-3**, paras 99-100.

730 Reply, paras 536-539.

731 Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-3**, para 96.

732 Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-3**, paras 91-99.

733 Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-3**, para 82, referring to Law on the Prevention of Money Laundering and the Financing of Terrorism, Official Gazette of Republic of Serbia, No. 113/2017, 91/2019 and 153/2020, **JL-011**, Article 3, item 4 ("*Foreign legal entity is a legal form of organization established for the purposes of management and disposal of property that does not exist in domestic legislation (e.g., trust, foundation, fiduciary, fiduciary mandate, etc.)*").

734 For the requirements for an "investment" under Article 1(1) of the Cyprus-Serbia BIT, see above Section C.I.3.a)aa) and Counter-Memorial, paras 387-388.

interest in Obnova (which is denied), it did so passively and without any consideration or transfer of value.

407. Coropi's alleged payment of consideration for its (alleged) beneficial interest in Kalemegdan remains unsubstantiated. Apart from the reference to "consideration given" in the Trust Deeds, Claimants have put forward no evidence to show that Coropi has contributed anything of economic value in the territory of Serbia in connection with its alleged indirect, beneficial ownership of the Obnova shares.

408. Due to the defects with the Trust Deeds and the Letter of Instructions, it cannot be said that Coropi in fact owns or controls Kalemegdan, such that they should be treated as being the same person or having the same corporate identity. Therefore, any contribution ostensibly made by Kalemegdan or its sole shareholder Mr Obradović with respect to Obnova (which Claimants have not proven[735]) cannot be attributed to Coropi.[736] As with Kalemegdan, there is no economic link tying Coropi to the capital used to acquire the Obnova shares. Nor have Claimants shown that Coropi otherwise engaged in a positive act of investing, such that it can said that Coropi "*caused an investment to be made in the territory of the Respondent*".[737]

409. Claimants argue that Coropi met the criteria for an investment under the BIT because two of its directors, Mr Rand and Mr Igor Markićević, participated in Obnova's management.[738] This argument is both factually and legally incorrect.

410. First, Claimants offer no legal footing for their assertion that mere (indirect) participation in the management of the investment vehicle, without any corresponding economic contribution, qualifies an investor's putative investment for protection under the Cyprus-Serbia BIT. It is commonly accepted by investment tribunals and commentators that the meaning of the term "investment" requires a contribution of resources of economic value in the host State.[739] Claimants have not shown that Coropi contributed anything of economic value in relation to Obnova. And they do not identify or attach any economic value to Mr Rand's and Mr Markićević's alleged services.

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735 See above paras 383-384.

736 See above paras 382.

737 See above para 369-370.

738 Reply, paras 531 and 532, referring to Witness statement of Mr. William Archibald Rand dated 23 February 2024, paras 45-49; Witness statement of Mr Igor Markićević dated 23 February 2024, paras 18-19.

739 See above paras 371-372. See also Counter-Memorial, paras 352, 398.

411. Second, Claimants' assertion that Coropi was involved in Obnova's management is doubtful. According to Claimants, Mr Rand and Mr Markićević assumed various roles and responsibilities aside from their duties as directors of Coropi. Mr Markićević was also Obnova's director and General Manager as well as a director of Kalemegdan and other companies owned by Mr Rand.[740] Mr Rand is the owner of the private equity firm Rand Investments Ltd and, according to Claimants, he is the ultimate beneficial owner of Kalemegdan and Obnova.[741] To the extent either participated in the management of Obnova, it appears that they did not do so in their capacity as directors of Coropi, but rather in independent roles.

412. According to Claimants, Obnova was managed not by Kalemegdan or Coropi, but rather by Mr Rand in his capacity as owner of Rand Investments Ltd. According to Claimants, Kalemegdan was required to obtain instructions and consent from Coropi in carrying out decisions, as per the Letter of Instructions dated 26 March 2012.[742] Mr Markićević refers to another "letter of instruction", which was sent on behalf of Mr Robert Jennings, as the trustee of the Ahola Family Trust, and Rand Investments to HLB Afxentiou Limited on 11 March 2010 – two years before Kalemegdan was incorporated and received the Obnova shares from Mr Obradović.[743] According to Mr Markićević, this letter required Coropi to "*only accept instructions from [Mr Jennings] or from Rand Investments Ltd. (a company wholly-owned by Mr. Rand)*".[744] If these documents are to be taken at face value, Rand Investments Ltd. and Mr Jennings controlled Coropi and Kalemegdan and by extension, Kalemegdan's Serbian investments.

413. Mr Markićević also states that "*Mr. Rand controlled both Kalemegdan and Coropi*" and that when carrying out decision-making and management activities with respect to Obnova, he was simply implementing Mr Rand's instructions.[745] Mr Markićević notes that "*[t]here was usually no need to formally convene meetings of all Coropi and Kalemegdan's directors*" and that he usually discussed issues concerning Obnova directly with Mr Rand and Mr Broshko, without necessarily including the other directors of Coropi. Again, given that Mr Markićević was also Obnova's General Manager and a director, and

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740 Witness statement of Mr. Igor Markićević dated 23 February 2024, para 11; Witness statement of Mr. William Archibald Rand dated 23 February 2024, para 45.

741 Memorial, paras 74, 91, 124.

742 Letter of Instructions, 26 March 2012, **C-319**, referred to in Memorial, para 93 and Reply, para 514.

743 Instructions letter, 11 March 2010, **C-408**.

744 Witness statement of Mr. Igor Markićević dated 23 February 2024, para 16.

745 Witness statement of Mr. Igor Markićević dated 23 February 2024, para 19.

that Mr Broskho has since 2012 been the Managing Director of Rand Investments, which is owned by Mr Rand,[746] this does not establish Coropi's participation in Obnova's management, as alleged.[747] Again, according to the letter of instruction from 11 March 2010, Obnova's management was ultimately controlled by Mr Rand, as owner of Rand Investments, and Mr Jennings, as trustee of Coropi on behalf of the Ahola Family Trust.

414. It also bears noting that Mr Markićević, as "*the general manager of the Rand family's companies in Serbia*",[748] is a paid employee. Employee services of this nature, which are remunerated rather than provided by the investor, are inherently different from the types of in-kind contributions that investment tribunals and commentators have in mind in relation to the requirement of a contribution. Such contributions have an identifiable economic value that flows from the investor to the investment. As stated by the tribunal in *Deutsche Telekom*, "*providing services for compensation does not constitute in-kind equity contributions*".[749]

415. In sum, Claimants have not discharged their burden of proving that Coropi's alleged acquisition of a beneficial interest in Obnova via the trust resulted in any injection of capital or other transfer of economic value amounting to an investment in Serbia, as required under Article 1(1) of the Cyprus-Serbia BIT.

b) <u>The Cypriot Claimants did not make an "investment" under Article 25(1) ICSID Convention</u>

416. It is common ground that in addition to fulfilling the criteria for an investment under the applicable BIT, a claimant investor must prove that its alleged investment constitutes an "investment" within the meaning of Article 25(1) of the ICSID Convention. However. with misplaced reliance on the fact that the ICSID Convention does not define an investment, Claimants incorrectly assert that the treaty definition of an investment is determinative of existence of an investment under Article 25(1) of the ICSID Convention.[750] On the contrary, as the tribunal in *Orascom* explained, "*the absence of a definition of 'investment' under the ICSID Convention implies that the Contracting States intended to give to the term its ordinary meaning under Article 31(1) of the VCLT as opposed to a special*

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746 Witness statement of Mr. Erinn Bernard Broshko dated 23 February 2024, para 3.

747 Reply, para 532.

748 Witness statement of Mr. Igor Markićević dated 23 February 2024, para 3.

749 *Deutsche Telekom AG v. The Republic of India* (PCA Case No. 2014-10), Final Award dated 27 May 2020, **RL-218**, para 243.

750 Reply, paras 575-576.

meaning under Article 31(4) of the same treaty".[751] Therefore, it is not sufficient for the Cypriot Claimants to show that they have satisfied the definition of an investment under the Cyprus-Serbia BIT (which they have in any case failed to do); they must also satisfy the independent, objective requirements for an "investment" under Article 25(1) of the ICSID Convention.[752]

417. As explicitly endorsed by a number of ICSID tribunals, an investment under Article 25(1) of the ICSID Convention comprises the elements of (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.[753] It is settled law that the claimant bears the burden of proving its investment exhibits the elements of contribution, risk, and duration. Neither Kalemegdan (**Section aa)**) nor Coropi (**Section bb)**) fulfils all these requirements with respect to their alleged investment in Obnova.

aa) Kalemegdan did not satisfy the criteria of contribution and assumption of risk

418. As set out in Respondent's Counter-Memorial, Kalemegdan's mere ownership of the Obnova shares does not prove that it made any contribution of money or assets with respect to Obnova, or that it assumed any risk in relation to Obnova.[754]

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751 *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, **CL-077**, para 370, citing *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award dated 17 October 2013, **RL-060**, para 165; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisdiction dated 27 September 2012, **RL-073**, paras 61, 211-212; *Aguas del Tunari, S.A. v Republic of Bolivia* (ICSID Case No. ARB/02/3), Decision on Respondent's Objections to Jurisdiction dated 21 October 2005, **RL-219**, para 278.

752 Counter-Memorial, paras 349-350. See also *Saba Fakes v Republic of Turkey* (ICSID Case No. ARB/07/20), Award dated 14 July 2010, **RL-072**, paras 108-109; *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 50 ("[t]*he parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention*"); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisdiction dated 27 September 2012, **RL-073**, paras 211-217.

753 Counter-Memorial, para 351; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisdiction dated 27 September 2012, **RL-073**, paras 219, 227; *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award dated 17 October 2013, **RL-060**, para 173; *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5), Award dated 15 April 2009, **RL-043**, paras 83-85.

754 Counter-Memorial, paras 355-360.

(i) No contribution

419. In view of the fact that Mr Obradović was the sole shareholder of Kalemegdan in 2012, his alleged in-kind contribution of these shares to Kalemegdan against the allotment of shares in Kalemegdan did not involve any transfer or payment of consideration in the territory of Serbia, as required under Article 25(1) of the ICSID Convention.

420. Respondent does not dispute that a contribution in the sense of Article 25(1) can be in-kind. This does not change the fact that in the present case, there is no evidence that either Mr Obradović or Kalemegdan paid anything for the Obnova shares or otherwise made an economic contribution in relation to Obnova.[755]

421. Additionally, Claimants do not allege, and the record does not disclose, that Kalemegdan subsequently contributed any capital or other resources to Obnova beyond its acquisition of the Obnova shares in April 2012.

(ii) No risk

422. Claimants allege that Kalemegdan's shareholding in Obnova satisfies the criterion of risk, as it necessarily carried the risk of a decline in the value of those shares due to the "*unpredictable legal and business environment in Serbia*".[756] Yet, Claimants provide no evidence whatsoever that the legal and business environment in Serbia is "unpredictable". And while it may be true that the value of Kalemegdan's shares in Obnova could decline, this risk is inherent in the ownership of shares. Without a corresponding economic contribution by Kalemegdan, the risk of a decline in the value of the Obnova shares is not sufficient to satisfy the element of an assumption of risk under Article 25(1) of the ICSID Convention.[757] As stated by the tribunal in *Komaksavia*, "[i]*n the absence of any consideration, a lack of returns is not a loss"*.[758]

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[755] See above Section C.I.3.a)bb).

[756] Reply, paras 582-584.

[757] *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic* (ICSID Case No. ARB/13/8), Award dated 9 April 2015, **RL-096**, para 367.

[758] *Komaksavia Airport Invest Ltd. v. Republic of Moldova* (SCC Case No. 2020-074), Final Award dated 3 August 2022, **RL-084**, para 177. See also *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 ("*KT Asia has made no contribution and, having made no contribution, incurred no risk of losing such (inexistent) contribution. … Therefore, in the absence of any contribution of some economic value, it is difficult to identify an investment risk*"); *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic* (ICSID Case No. ARB/13/8), Award dated 9 April 2015, **RL-096,** para 361 ("*in the absence of a contribution to an economic venture, there could be no*

423. Furthermore, Claimants' reliance on *Orascom v. Algeria* is misplaced.[759] In that case, the claimant investor's indirect stake in the investment vehicle OTA via ownership of shares was accompanied by contributions exceeding EUR 1.5 billion that the claimant had made towards its acquisition of those shares.[760] Here, because Kalemegdan made no contribution of its own to acquire the Obnova shares, it undertook no risk. Therefore, *Orascom* is inapposite.

bb) Coropi did not satisfy the criteria of contribution and assumption of risk

424. Claimants have equally failed to prove that Coropi's putative investment in Obnova satisfies the elements of contribution and risk.

(i) No contribution

425. As set out above and in Respondent's Counter-Memorial, there is no factual basis for Claimants' assertion that Coropi acquired an indirect beneficial interest in Obnova through its alleged beneficial ownership of Kalemegdan.[761] In their Memorial, Claimants relied on the Letter of Instructions issued by Coropi and the Trust Deeds to substantiate Coropi's beneficial ownership of Kalemegdan, but none of these documents prove that Coropi ever contributed money or other assets in connection with its alleged acquisition of an indirect beneficial interest in Obnova. While the Trust Deeds indicate that Coropi's beneficial interest in Kalemegdan was acquired "for consideration given", the record does not shed any light on that consideration.[762]

426. Claimants take issue with Respondent's reliance on the jurisdictional findings in *Anglo-Adriatic v. Albania*, alleging that the facts in this case are distinguishable. Specifically, they assert that in *Anglo-Adriatic*, "*there was no proof whatsoever of any consideration provided under the trust deeds that were supposed to establish AAG's beneficial ownership*", whereas "*[i]n the present case, the trust deeds between Coropi and Mr. Obradović*

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investment"); *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5), Award dated 15 April 2009, **RL-043**, paras 120, 127 (where a claimant did contribute funds for the purchase of shares, there is a risk "*that the investor loses the amount he has paid*"); *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius* (PCA Case No. 2018-37), Award on Jurisdiction dated 23 August 2019, **RL-093**, para 145 ("[t]*he risks must be inherent in the contribution*").

759 Reply, para 505.

760 *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35), Final Award, **CL-077,** para 379.

761 See above Section C.I.3.a)cc)(i). See also Counter-Memorial, Section C.I.3(d).

762 See Counter-Memorial, paras 401, 403.

expressly refer to consideration given" in connection with Coropi's acquisition of a beneficial interest in Kalemegdan.[763] However, a mere reference to "consideration given" is insufficient to demonstrate Coropi's alleged contribution in exchange for its beneficial interest, especially in view of Claimants' silence as to the particulars of that consideration, i.e. when it was given, in what form, and of what value. This was confirmed by the tribunals in *Alverley* and *Anglo-Adriatic*, as discussed in Respondent's Counter-Memorial.[764] Despite Respondent having raised the matter of Coropi's unsubstantiated consideration in its Counter-Memorial, it is not addressed in any of the witness statements submitted with Claimants' Reply.

427. In view of the deficiencies in their arguments regarding the Trust Deeds, Claimants now argue that "*Coropi made its contribution through its participation in Obnova's management through Messrs. Rand and Markićević*".[765] Presumably, Claimants have in mind Mr Rand's role as director of Coropi and Mr Markićević's role in overseeing Mr Rand's investments in Serbia, including Obnova,[766] and as a director of Obnova, Coropi, and Kalemegdan. Yet, as explained above, there is nothing to show that Mr Rand and Mr Markićević, insofar as they exercised control over and participated in the management of Obnova, acted in their capacity as directors of Coropi, given that they occupied other roles.[767]

428. Moreover, management activities, absent any commitment of economic resources, do not satisfy the requirement of a contribution. This is particularly true, as is the case with Mr Markićević, where his alleged involvement in managing Mr Rand's investment in Obnova is a paid-for service as opposed to a contribution of economic value to Serbia.[768]

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763 Reply, para 580.

764 Counter-Memorial, paras 399-400. See also *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisdiction dated 27 September 2012, **RL-073,** para 232, in which the tribunal declined jurisdiction over one of the claimant investors, Mr Allan Fosk on the ground that there was "*no evidence that Allan Fost made a contribution of money or assets*", elaborating that he "*did not pay for his one share but rather 'received' it … There is thus no evidence of an original contribution*").

765 Reply, para 579.

766 Witness statement of Mr. Igor Markićević dated 23 February 2024, para 9.

767 See above Section C.I.3.a)cc)(iii).

768 See above para 414

(ii) No risk

429. As above, with respect to Kalemegdan, Coropi's alleged investment in Obnova did not involve any risk in the sense of Article 25(1) of the ICSID Convention. Not having made any contribution, financial or otherwise, and furthermore, not having substantiated that it even has an interest in the Obnova shares, Coropi cannot be said to have assumed any risk in relation to Obnova.

c) The Cypriot Claimants did not comply with Serbian law when Kalemegdan acquired the Obnova shares

430. Respondent has already demonstrated in its Counter-Memorial that the Cypriot Claimants did not make their investment in accordance with the laws and regulations of Serbia, as required under the Cyprus-Serbia BIT. Their failure to launch a takeover bid when Kalemegdan acquired the Obnova shares in 2012 violated the 2012 Law on Takeover of Joint Stock Companies ("**2012 Law on Takeover**").[769]

431. Claimants deny that they have run afoul of the express legality requirement of the Cyprus-Serbia BIT and argue (i) that the Cypriot Claimants acted in good faith and complied with their obligations under the 2012 Law on Takeover, and (ii) that in any event, only serious violations of domestic law can displace the Tribunal's jurisdiction, whereas a failure to issue a takeover bid is not a serious violation of Serbian law.[770] As explained in more detail below, Claimants' arguments are misplaced.

432. As set out in Respondent's Counter-Memorial,[771] the provisions of the Cyprus-Serbia BIT make it clear that compliance with the laws and regulations of the host State is an inherent part of the Treaty's definition of an investment. Therefore, the Tribunal only has jurisdiction over those disputes relating to investments that are made in accordance with Serbian law (**Section aa)**). As explained below, the Cypriot Claimants breached the 2012 Law on Takeover when Kalemegdan acquired the shares in Obnova in 2012 (**Section bb)**). Their failure to launch a takeover bid meets the "seriousness threshold" that is argued by Claimants (**Section cc)**). In any event, even if the breach did not meet the seriousness threshold, weighing the totality of the circumstances of the breach, the Tribunal's jurisdiction is unwarranted (**Section dd)**). Finally, Claimants' reliance on *Rand Investments* award is misplaced and misleading (**Section ee)**).

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769 Counter-Memorial, paras 406-417.

770 Reply, para 546.

771 Counter-Memorial, paras 407-409.

aa) The express legality requirement under the Cyprus-Serbia BIT makes legality a condition of investment

433. The express wording of the Cyprus-Serbia BIT makes it clear that investments made by an investor from one Contracting Party must comply with the laws and regulations of the other Contracting Party at the time of investment.[772] Indeed, Article 1(1) of the Cyprus-Serbia BIT makes this a prerequisite for there to exist a protected investment.[773] 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*".

434. Article 2(1) of the Cyprus-Serbia BIT similarly provides that only those investments that are made in accordance with the laws and regulations of the host State should be admitted.[774] As the treaty contains no other qualifications, requirements, or restrictions as to the type of laws and regulations with which an investment must comply, or the extent to which compliance is required, it follows that a failure to acquire an investment in accordance with Serbian law is sufficient to disqualify the investment from protection under the Cyprus-Serbia BIT.[775]

435. Where a BIT contains an express legality requirement, it is accepted that disputes arising out of an investment acquired or established in violation of the host State's substantive laws or procedural rules will generally fall outside the scope of the treaty's protection and thus beyond the jurisdiction of the tribunal.[776] An express legality requirement in a BIT

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772 Counter-Memorial, para 407.

773 Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **CL-007(a), Article 1(1)** ("*The term "investment" shall mean any kind of assets invested by investor of one Contracting Party in the territory of the other Contracting Party in accordance with its laws and regulations and in particular, though not exclusively…*").

774 Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **CL-007(a), Article 2(1)** ("*Each Contracting Party shall encourage and create stable, equal, favourable and transparent conditions for investors of the other Contracting Party to invest capital in its territory and shall admit such investments in accordance with its laws and regulations*.") (emphasis added.)

775 Counter-Memorial, para 407.

776 U. Kriebaum, Investment Arbitration – Illegal Investments, in G. Zeiler, I. Welser, et al. (eds.), *Austrian Arbitration Yearbook* (2010), **RL-220**, pp 307, 309; *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; *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award dated 2 August 2006, **RL-100**, paras 184-185, 187, 240; *Anglo-Adriatic Group Limited v. Republic of Albania* (ICSID Case No. ARB/17/6), Award dated 7 February 2019, **RL-051**, paras 281-296; Counter-Memorial, para 408.

is a clear indication of the importance that the parties to the BIT attached to compliance with domestic law by investors of the other party in the making of an investment and their intention that their laws with respect to investments be strictly followed.[777] The fact that a legality requirement appears in two different provisions of the BIT is highly indicative of the legal consequences that the Contracting Parties attached to non-compliance with host State law and their intention that compliance with the host State's law is a strict requirement for there to be a protected investment. In other words, a breach of host State law in the making of an investment means that there is no investment for the purposes of the BIT and consequently no consent to arbitrate.[778]

436. The clear, unambiguous wording of Article 1(1) establishes that compliance with Serbian law is a condition for Respondent's consent to arbitration. As was confirmed by the tribunal in *Khan Resources v. Government of Mongolia and Monatom*, it would be wrong to grant treaty protection to investments made in contravention of host State law as this would allow the investor to benefit from its unlawful act:

> *An investor who has obtained its investment in the host state only by acting in bad faith or in violation of the laws of the host state, has brought him or herself within the scope of application of the ECT only as a result of his wrongful acts. Such an investor should not be allowed to benefit as a result, in accordance with the maxim nemo auditor propriam turpitudinem allegans.*[779]

437. The Cypriot Claimants have attempted to bring themselves within the scope of the Cyprus-Serbia BIT on the basis of an investment made in breach of Serbian law. It would be unfair to allow the Cypriot Claimants to benefit from their breach of Serbian law by now claiming protection under the Cyprus-Serbia BIT.

bb) The Cypriot Claimants failed to make a takeover bid, contrary to the 2012 Law on Takeover

438. As explained in the Counter-Memorial and the accompanying report by Serbian company law expert Professor Jelena Lepetić, the 2012 Law on Takeover obliges an acquirer of shares to comply with certain formal requirements when the shares to be acquired exceed

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[777] *Alasdair Ross Anderson & Ors. v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/07/3), Award dated 19 May 2010, **RL-168**, para 53.

[778] R. Dolzer, U. Kriebaum and C. Schreuer, *Principles of International Investment Law* 108 (OUP 2022), **RL-221**.

[779] *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia and Monatom Co., Ltd*. (PCA Case No. 2011-09), Decision on Jurisdiction, 25 July 2012, **CL-092**, para 383.

a certain threshold of control. Pursuant to Article 6 of the 2012 Law on Takeover, acquisitions trigger the obligation to launch a takeover bid where (i) the "control" threshold of 25% of the voting shares is exceeded, and/or (ii) the "final" threshold of 75% of the voting shares is exceeded.[780]

439. The obligation to launch a takeover bid applies where the acquirer acquires the shares either itself or with persons acting in concert with it.[781] Each of the persons acting in concert has an obligation to launch a takeover bid to enable the minority shareholders to sell their shares to the acquirer.[782] Persons are deemed to be acting in concert if "*one of them, indirectly or directly exercises control*" over the other, being a legal entity. 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 that or the period in which the shares were acquired, the method of acquisition, and other circumstances indicating coordination in the acquisition or the common intention of the persons.[783]

440. As Kalemegdan's acquisition of the Obnova shares exceeded the initial threshold of 25% as specified in the 2012 Law on Takeover,[784] Kalemegdan was obliged to launch a takeover bid under the 2012 Law on Takeover. Coropi and Mr Rand were also obliged to launch a takeover bid as they qualified as persons acting in concert with Kalemegdan under the 2012 Law on Takeover.[785] As explained in the Counter-Memorial, Coropi was acting in concert with Kalemegdan because it purported to exercise a prevailing influence over the conduct of Kalemegdan's business and its decision-making process by its Letter of Instructions dated 26 March 2012.[786]

441. Ms Tomić Brkušanin, Claimants' expert on Serbian company law, concedes that under the 2012 Law on Takeover, Kalemegdan's acquisition would have triggered Kalemegdan's obligation to launch a takeover bid.[787] She also concedes that Coropi and Mr Rand

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780 Counter-Memorial, paras 411-417.

781 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, para 5.

782 Counter-Memorial, para 411.

783 Counter-Memorial, para 412.

784 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, para 29.

785 Counter-Memorial, paras 412-414.

786 Counter-Memorial, para 414.

787 Expert Report of Ms. Bojana Tomić Brkušanin dated 23 February 2024, para 24.

constituted persons "acting in concert" with Kalemegdan within the meaning of the 2012 Law on Takeover.[788]

442. However, Ms Tomić Brkušanin goes on to argue that Kalemegdan, Mr Rand and Coropi were exempted from the obligation to launch a takeover bid and thus did not breach the law when they failed to launch such a bid in 2012. This is not the case. Ms Tomić Brkušanin incorrectly bases her analysis of Kalemegdan's acquisition on the 2006 version of the Law on Takeover (the "**2006 Law on Takeover**") and the accompanying opinion published by the Serbian Securities Exchange Commission ("**SEC**") in 2007 (the "**2007 SEC Opinion**"), which exempted parties from launching a takeover bid if the transfer of shares occurred between related parties and the total number of shares transferred remained unchanged. In performing this analysis, Ms Tomić Brkušanin fails to consider that when the 2006 Law on Takeover was amended in January 2012, the 2007 Opinion ceased to apply. The 2012 Law on Takeover narrowed the exception for share transfers among related parties, with the new narrowed exception applicable only to transfers of shares among persons acting in concert if one of the persons had previously acquired the shares through a takeover bid. In other words, if a takeover bid had not been previously launched by the persons acting in concert, the transfer among the persons acting in concert may be done only through a takeover bid.[789]

443. Ms Tomić Brkušanin argues that as the SEC opinion of 28 September 2012 (the "**2012 SEC Opinion**"), which interpreted the exemption introduced in the 2012 Law on Takeover, was not issued until after Kalemegdan's acquisition of Obnova shares in 2012, the narrow exemption provided by the 2012 Law on Takeover did not apply to the Cypriot Claimants.[790] However, as explained by Prof Lepetić, the fact that the 2012 SEC Opinion was issued only in October 2012 does not change the fact that the Cypriot Claimants could no longer avail themselves of the earlier exemption as interpreted in the 2007 SEC Opinion.[791] As Kalemegdan acquired the Obnova shares in April 2012, the law that applied to the transaction was the version as amended in 2012, i.e., the 2012 Law on Takeover and not the law as it existed in 2007 or as interpreted in the 2007 SEC Opinion. Therefore, Kalemegdan, Mr Rand and Coropi were obliged to launch a takeover bid. Since no takeover bid was launched, Kalemegdan as well as Mr Rand and Coropi breached the 2012 Law on Takeover when the Obnova shares were acquired in 2012.

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788 Expert Report of Ms. Bojana Tomić Brkušanin dated 23 February 2024, para 28, 34.

789 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, para 35.

790 Expert Report of Ms. Bojana Tomić Brkušanin dated 23 February 2024, paras 22-25.

791 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, para 36.

444. While the Cypriot Claimants claim to have relied in good faith on the 2007 SEC Opinion, this does not change the fact that they were legally bound by the provisions of the 2012 Law on Takeover. Ignorance of the law cannot excuse the Cypriot Claimants from their obligations under the 2012 Law on Takeover.[792]

445. First, the Cypriot Claimants bore exclusive responsibility for complying with the applicable legal requirements to launch a takeover bid and for coordinating with the correct authorities, which they failed to do. That the investor bears responsibility for compliance with domestic law was recognised by the *Mamidoil* tribunal, which held:

> *[T]he Claimant's non-respect of the content and the form of the applications for [permits] are exclusively its own responsibility. It also bore responsibility for complying with the legal requirement and for coordinating with 'the right authorities' [and that] the burden of initiating compliance with national legal requirements cannot be shifted to Respondent.*[793]

446. Had the Cypriot Claimants been uncertain as to how they should interpret the exception to the obligation to launch a takeover bid, they had the option to submit a request for interpretation to the SEC. However, neither Kalemegdan nor any of the persons with whom it was acting in concert availed themselves of this option.[794]

447. It is generally accepted that claimants that fail to adhere to a host State's laws and regulations in the presence of an express legality requirement should be held strictly liable, as confirmed by the tribunal in *Anderson v. Costa Rica*. That tribunal declined jurisdiction in the presence of an express legality requirement because the claimants' transaction to acquire their investments was not in accordance with Costa Rican law,[795] holding "*the BIT states [the legality] requirement in objective and categorical terms*"[796] and each

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792 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, para 36.

793 *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania* (ICSID Case No. ARB/11/24), Award dated 30 March 2015, **RL-061**, para 394.

794 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, para 37.

795 C. Mouawad & J. Beess und Chrostin, "The Illegality Objection in Investor-State Arbitration", 37 *Arbitration International* (2021), **RL-222**, p 9; *Alasdair Ross Anderson & Ors. v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/07/3), Award, 19 May 2010, **RL-168**, para 57.

796 *Alasdair Ross Anderson & Ors. v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/07/3), Award, 19 May 2010, **RL-168**, paras 52 and 57; C. Mouawad & J. Beess und Chrostin, "The Illegality Objection in Investor-State Arbitration", 37 *Arbitration International* (2021), **RL-222**, p 9.

claimant has to meet the legality requirement "*regardless of his or her knowledge of the law or his or her intention to follow the law*."[797]

448. Claimants have attempted to shift the burden of their failure by alleging that the SEC did not direct the Cypriot Claimants to issue a takeover bid even after they had duly notified the SEC of Kalemegdan's acquisition. However, this argument is misleading.[798] It does nothing to change the fact that the Cypriot Claimants did not comply with their legal obligations. The Cypriot Claimants were obliged under Article 6 of the 2012 Law on Takeover to publish a notice of intent and file it with (i) the regulated market or the Multilateral Trading Facility (the "**MTF**"), (ii) the Central Securities Depository and Clearing House (the "**CSD**"), (iii) the SEC, and (iv) the offeree company.[799] The conjunctive wording of Article 6 indicates that the Cypriot Claimants were required to publish and file their intent of takeover with three different authorities as well as the target company. However, the Cypriot Claimants have failed to show that they notified any other authority other than the SEC.[800] This already demonstrates that they did not comply with their legal obligations.

449. And in any case, the notification to the SEC was defective as it was made under the wrong legal provision: the notification made to SEC was made under Article 57 of the 2011 Law on Capital Markets, which simply requires the acquirer of shares to give details of the number of shares that were acquired. This is far less onerous than the (actually applicable) detailed notification requirement under the 2012 Law on Takeover, which instead requires the acquirer to also provide details of the target and offeror company and their issued shares with voting rights, including details of the persons acting in concert with the offeror. This information would have served to enable the SEC or other authorities mentioned under Article 6 to determine whether to initiate supervisory proceedings against the acquirer.[801] Having failed from the outset to fulfil the applicable detailed

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797 *Alasdair Ross Anderson & Ors. v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/07/3), Award, 19 May 2010, **RL-168**, para 52.

798 Reply, paras 559 and 560.

799 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 ("*When the obligation to publish a Takeover Bid arises, the persons referred to in Paragraph 1 of this Article shall, within two business days, publish a notice announcing its intention to take over the Shares and deliver it to the regulated market, i.e. the MTP where the Shares of the Target Company are traded, the Central Registry, the Commission and the Target Company, under the conditions and in the manner determined by this Law*.")

800 Reply, para 555.

801 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, fn 39.

notification requirements under the 2012 Law on Takeover, Claimants cannot now reasonably shift the burden onto Respondent for this failure by arguing that "*the SEC did not express any reservations in respect of the 2012 Acquisition […], did not initiate any supervisory proceedings and did not require Kalemegdan to issue a takeover bid* […]".[802]

450. Even if the SEC had been properly notified under the 2012 Law on Takeover, it is illogical for Claimants to assert that the SEC would have directed Kalemegdan to issue a takeover bid had it considered that no exemption applied. As Prof Lepetić explains, it would have been difficult or even impossible for the SEC to determine which parties are acting in concert under the circumstances of the present case, which purportedly involves beneficial ownership acquired through a trust structure.[803]

451. In summary, the Cypriot Claimants plainly breached the 2012 Law on Takeover by failing to launch a takeover bid when Kalemegdan acquired a 70% stake in Obnova in 2012. Claimants' efforts to rely on the 2007 SEC Opinion are to no avail, as the exemption contained therein no longer applied after the Law on Takeover was amended in early 2012. Claimants' efforts to shift the burden of their failures onto Respondent must, moreover, be rejected.

cc) The Cypriot Claimants' failure to launch a takeover bid meets the "seriousness" threshold pleaded by Claimants

452. Contrary to the Claimants' contention, the failure to launch a takeover bid is a breach of a fundamental rule of Serbian takeover law.[804] The objective behind launching a takeover bid is to protect minority shareholders from unfair practices during a takeover and foster a level playing field for share deals.[805] This is reflected in the 2012 Law on Takeover, which states that all shareholders of an offeree company shall be "*afforded equivalent treatment in the takeover procedure*" such that they are able "*to reach a properly informed decision on the bid, define their interests and decide whether to accept or refuse the takeover bid*".[806] As the 2012 Law on Takeover (and in particular, the obligation contained therein to launch a takeover bid) is of paramount importance for the protection of

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802 Expert Report of Ms. Bojana Tomić Brkušanin dated 23 February 2024, para 26.

803 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, para 39.

804 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, paras 6(b), 43.

805 J. Mukwiri, "Takeovers and Incidental Protection of Minority Shareholders", 10 European Comp. & Fin. L. Rev. 432, 441, 460 (2013), **RL-223**, pp 7-10.

806 The Law on Takeover of Joint Stock Companies, *Official Gazette of Republic of Serbia*, No. 46/2006, 107/2009, 99/2011 and 108/2016, **C-560**, Article 3.

minority shareholders , it would be erroneous to classify such an important provision as somehow "non-fundamental" or "not serious".

453. The effects of the Cypriot Claimants' violation of the 2012 Law on Takeover are indeed very serious and must not be understated. The potential consequences of violating the law could lead to the acquirer losing its rights to vote the acquired shares or the issuance of fine.[807] Losing the right to vote on the acquired shares would essentially have stripped the Cypriot Claimants of any say in the management and functioning of Obnova, rendering their investment in Obnova potentially worthless. The fact that the minority shareholders in Obnova did not object to or challenge Kalemegdan's exercise of its voting shares in Obnova[808] is nothing more than a red herring, for as Prof Lepetić notes, the minority shareholders would in any case not have been in a position to object since they could hardly have known of the Cypriot Claimants' breach of the 2012 Law on Takeover or the implications of that for the exercise of Kalemegdan's voting shares.[809]

454. Claimants have sought to downplay the consequences of their breach of Serbian law by contending that a failure to launch a takeover bid would merely render the transaction voidable (rather than void), and therefore without any jurisdictional consequences.[810] While the failure to launch a takeover bid would indeed merely render the transaction voidable, this does not absolve Claimants of their breach of Serbian law. The express legality requirement of the Cyprus-Serbia BIT requires the Tribunal to decline jurisdiction (i) due to the fundamental significance of the 2012 Law on Takeover, and (ii) on a holistic assessment, having regard to *inter alia* the interests of all market participants and the regular functioning of the capital market.[811] Therefore, the fact that a breach of the 2012 Law on Takeover did not render the relevant transaction "void" *per se* does not negate or ameliorate the Cypriot Claimants' breach of Serbian law or cure the illegality of their investment.

dd) In determining whether to accept or deny jurisdiction, tribunals consider the totality of the circumstances, not just the seriousness of the breach

455. Claimants argue that even if the Cypriot Claimants had failed to comply with the 2012 Law on Takeover, their non-compliance does not displace the Tribunal's jurisdiction over

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807 Expert Report of Ms. Bojana Tomić Brkušanin dated 23 February 2024, paras 42, 44.

808 Expert Report of Ms. Bojana Tomić Brkušanin dated 23 February 2024, para 47.

809 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, para 44.

810 Reply, para 565.

811 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, para 41.

their putative investment in Obnova because in their view, only serious violations of fundamental principles of host State law can remove an investment tribunal's jurisdiction.[812] This is wrong. First, there is no applicable threshold of "seriousness", as the Claimants have attempted to invoke. Second, even if this Tribunal were to conclude that Claimants' failure to launch a takeover bid was not a "fundamental" breach of Serbian law, Claimants' non-compliance should still lead this Tribunal to decline jurisdiction because as both case law and commentary shows, tribunals generally analyse the totality of the circumstances and do not limit their inquiry to the seriousness of the relevant breach.

456. Claimants have sought to rely on the *Rand Investments* award to argue that only "violations of fundamental rules" deprive a tribunal of its jurisdiction under the Cyprus-Serbia. Respondent respectfully disagrees with the *Rand* tribunal's statement. As an initial matter, as shown above,[813] the obligation to launch a takeover bid is indeed a "fundamental rule" of Serbian law due to its important purpose of protecting minority shareholders. In any event, tribunals have not limited their analysis to the seriousness or consequences of the relevant breach. Instead, tribunals weigh, *inter alia*, the totality of the circumstances such as any express legality requirement under the BIT, the clarity and unambiguity of the provisions in the relevant legislation, and the conduct of the parties to determine if jurisdiction may be established.[814] Commentators have similarly confirmed that a denial of protection based on a legality requirement depends on a number of factors, including the importance of the violated regulation, the effects of the violation, the conduct of the investor after the breach occurred, the language and location of the BIT, the intention of the parties to the BIT, and the object and purpose of the BIT.[815] Therefore, tribunals should weigh the totality of circumstances rather than being fixated on any particular individual factor such as the consequence of the non-compliance. In this particular instance, the totality of the circumstances is such that (i) the legislation that was violated was of paramount importance for the protection of minority shareholders, (ii) the effect of the violation on the acquiror was substantial, i.e., it would have lost its right to vote and consequently, to have any say in the management of the company and finally (iii)

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812 Reply, para 561.

813 See paras 452-453

814 See e.g. *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania* (ICSID Case No. ARB/11/24), Award dated 30 March 2015, **RL-061**, para 359 et seq. (in which the tribunal implied that the tribunal's jurisdiction (or a lack thereof), depends on several factors such as an express legality requirement in the BIT, the clarity of the legislation in question, the investor's conduct and so on).

815 G. Bottini, "Legality of Investments under ICSID Jurisprudence", in M. Waibel, A. Kaushal, et al. (eds.), *The Backlash Against Investment Arbitration* (2010), **RL-224**, pp 299-300.

the language of the BIT itself makes legality a condition for the existence of a protected investment. To assume jurisdiction in such circumstances would clearly be unwarranted.

457. Indeed, investments may be deemed illegal where the investor violates something as simple as failing to follow a form and content requirement. In *Mamidoil v. Albania*, for example, the tribunal denied jurisdiction over the claimant's investment on the basis that the claimant had failed to follow the form and content requirement of construction site permits as required by Albanian law.[816] That tribunal confirmed that there is no limitation of illegality to serious contraventions of the law such as fraud or corruption.[817] Thus, Claimants' violation of Serbian law deprives this Tribunal of jurisdiction, from whichever angle it is viewed.

ee) Claimants' reliance on the *Rand Investments* award is misplaced and misleading

458. Claimants rely on the award in *Rand Investments*, in which the tribunal held that the claimant investors' violations of Serbian law did not remove the tribunal's jurisdiction under the Cyprus-Serbia and Canada-Serbia BIT.[818] While it may be correct that Serbia's illegality objections were dismissed by the *Rand* tribunal, Claimants' reasoning and their reliance on the *Rand* award are misleading and misplaced.

459. The *Rand* tribunal only considered the illegality objections that were raised under the Canada-Serbia BIT, as it had already declined to exercise jurisdiction over the claims brought under the Cyprus-Serbia BIT due to a lack of an "investment" under the ICSID Convention. Whereas the Canada-Serbia BIT does not contain any express legality requirement as a condition for Serbia's consent to arbitration under this treaty, the Cyprus-Serbia BIT establishes a clear link between having a protected investment and complying with Serbian law. This limits the relevance of the *Rand* tribunal's conclusion that "*only violations of fundamental rules would deprive a tribunal of its jurisdiction*", which was clearly applied only to the illegality objections brought under the Canada-Serbia BIT.[819]

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816 *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania* (ICSID Case No. ARB/11/24), Award dated 30 March 2015, **RL-061**, para 378.

817 *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania* (ICSID Case No. ARB/11/24), Award dated 30 March 2015, **RL-061**, para 378.

818 Reply, paras 543-544.

819 *Rand Investment Ltd and other v: Republic of Serbia* (ICSID Case No. ARB/18/8), Award dated 29 June 2023, **CL-112**, para 393.

Claimants' assertion that the *Rand* tribunal's conclusion "*is particularly instructive here because (i) it was based on the very same Treaties*" is thus misleading.[820]

460. In conclusion, the Cypriot Claimants' breach of the 2012 Law of Takeover should be treated as a significant one and should lead this Tribunal to decline jurisdiction.

II. The Tribunal has no jurisdiction under the Canada-Serbia BIT

461. The Tribunal lacks jurisdiction over Mr Broshko's claims under the Canada-Serbia BIT. First, it lacks jurisdiction *ratione temporis*, because Mr Broshko's claims concerned events that pre-date the entry into force of the BIT and his investment (**Section 1.**). Second, the Tribunals lacks jurisdiction *ratione voluntatis*, as Mr Broshko failed to provide the required waiver of Obnova's local claims and further failed to submit his claims to Arbitration within the Treaty's three-year limitation period (**Section 2**.). Finally, Mr Broshko's acquisition of shares in Obnova breached the 2016 Law on Takeover and thus is not entitled to treaty protection (**Section 3.**).

1. The Tribunal has no jurisdiction *ratione temporis*

462. Respondent has objected to the Tribunal's jurisdiction *ratione temporis* under the Canada-Serbia BIT on the basis that its exercise is prevented by the rule prohibiting retroactive application of treaties (**Section a)**) and Mr Broshko's claims fall outside the three-year limitation period provided in the Canada-Serbia BIT (**Section b)**).

a) The Tribunal lacks jurisdiction due to the prohibition of retroactive application of the Canada-Serbia BIT

463. Respondent's objection to the jurisdiction *ratione temporis* over Mr Broshko's claims has three prongs:

- The *dispute resolution* clause in the Canada-Serbia BIT does not have retroactive effect, while the violation alleged by Mr Broshko (the 2021 Letter) is merely a consequence of actions (2003 Registration and 2013 DRP) which occurred before the Canada-Serbia BIT entered into force;[821]
- The *substantive treaty provisions* cannot apply retroactively to events which pre-date entry into force of the Canada-Serbia BIT, and this rule also extends to consequences of such events even though they occur after the treaty's entry into force. At

[820] Reply, para 544.

[821] Counter-Memorial, paras 451-458.

the same time, Mr Broshko's alleged measure (the 2021 Letter) is a consequence of the 2003 Registration and the 2013 DRP.[822]

- Mr Broshko's alleged measure (the 2021 Letter) is a consequence of events (2003 Registration and 2013 DRP) which had taken place before Mr Broshko made his investment in Obnova in 2017.[823]

464. In response, Claimants repeat their overarching argument that Respondent is re-defining their claims by connecting them to the 2003 Registration and 2013 DRP.[824] As has already been discussed above in the context of the Cyprus-Serbia BIT, this is a distortion of Respondent's case. Respondent is not attempting to redefine Claimants' claims but is putting forward a simple point crucial in the context of the jurisdiction *ratione temporis* – that the Tribunal cannot decide about Mr Broshko's claims without first adjudicating the issue of whether Obnova had acquired property entitlements over the Dunavska Plots and Objects, as well as the 2003 Registration and the 2013 DRP, all of which occurred before the Canada-Serbia BIT entered into force.

465. In defending the *ratione temporis* jurisdiction, Claimants refer to the *Rand* case, where Serbia raised a similar objection trying to tie the breaches claimed to earlier events.[825] This is inapposite. Namely, the aspect of the *Rand* case that Claimants refer to concerned the three-year limitation under the Canada-Serbia BIT and the issue of characterization of factual basis of the claims, which was relevant for determining when the claimants had acquired knowledge of the breach, as this was the moment from which the limitation period started to run.[826] The issue in the present context is different and concerns neither characterization of claims nor Claimants' knowledge of the breach, but whether the alleged measures are consequences of events pre-dating the treaty and whether the adjudication of these events is necessary in order to adjudicate Mr Broshko's claims.

466. Claimants also argue that Serbia's 2021 Letter was not a consequence of the 2003 Registration. However, as explained above in paragraph 268, according to the text of the 2021

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822 Counter-Memorial, paras 459-461.

823 Counter-Memorial, paras 462-465.

824 Reply, paras 605-606.

825 Reply, paras 606-608.

826 *Rand Investment Ltd and other v. Republic of Serbia* (ICSID Case No. ARB/18/8), Award dated 29 June 2023, **CL-112**, para 441.

Letter, its view that Obnova had no right to compensation was specifically justified by the fact that the City of Belgrade was the owner of the Dunavska Plots and the Objects.[827]

467. Finally, Claimants argue that even if the 2021 Letter came as a consequence of the 2003 Registration, this would not affect Tribunal's jurisdiction because the 2003 Registration was only the initial step of a composite act, which culminated in the 2021 refusal to compensate.[828] Notably, Claimants here apparently had forgotten that in the context of the Cyprus-Serbia BIT they argue that the adoption of the DRP in 2013 was the culmination of a composite act, which started with the 2003 Registration.[829] If so, then the breach must have been completed by 2013, not by 2021, which would exclude the 2021 letter from the scope of the temporal jurisdiction under the Canada-Serbia BIT in any event.

468. In addition to this contradiction, one should also note that although composite wrongful acts fall into category of continuing breaches,[830] Claimants fail to show that there is a continuing breach in the present case. In the Counter-Memorial, Respondent demonstrated that the 2003 Registration did not give rise to a continuing breach but is a completed act.[831] The same goes for the 2013 DRP. However, Claimants completely failed to address Respondent's analysis.

b) <u>Mr Broshko's claims are brought outside the three-year limitation period</u>

469. As explained previously,[832] Article 22(2)(e)(i) and (f)(i) of the Canada-Serbia BIT requires that:

> *(i) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby,*
>
> …

827 Counter-Memorial, para 329.

828 Reply, para 611.

829 Reply, para 457 ("*…the 2003 Registration would be, at best, the first step in a series of events that culminated only in 2013.*").

830 As the ILC noted, "*[c]omposite acts give rise to continuing breaches*", *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, International Law Commission, UN GA Doc A/56/10, **CL-036**, p 62.

831 Counter-Memorial, paras 326-327.

832 Counter-Memorial, paras 429-431.

> *(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 [...]*

470. Claimants argue that Mr Broshko met this requirement as he submitted his claim on 27 April 2022, which was within the three years since he had acquired knowledge of the alleged breach, i.e. the 2021 Land Directorate Letter and losses allegedly stemming from that breach. Claimants argue that since the 2021 Letter was issued on 13 August 2021, Mr Broshko "*did not – and could not – have knowledge about the alleged breach before 27 April 2019*".[833] This is misplaced.

471. As already explained above, Serbia's 2021 Letter is intrinsically linked to the 2003 Registration and the 2013 DRP.[834] As also explained previously,[835] both of these events occurred prior to the three-year limitation period, and Mr Broshko, by his own admission, was well-informed of the consequences for Obnova as early as 2017, if not even earlier.[836] According to his own witness statement, Mr Broshko had been managing Mr Rand's investment in Serbia, including in Obnova since 2012.[837] Mr Broshko also confirmed that his decision to invest in Obnova in 2017 was driven by his familiarity with Obnova's state of affairs following the 2003 Registration and 2013 DRP.[838]

472. Claimants do not dispute Mr Broshko's ties to Obnova since 2012, but rather maintain the stance that Serbia's refusal to compensate Obnova is an autonomous breach. As explained above, according to the text of the 2021 Letter, the Land Directorate's view that Obnova had no right to compensation was specifically justified by the fact that the City of Belgrade was the owner of the Dunavska Plots and the Objects.[839] Furthermore, as Mr Broshko was aware of Obnova's situation in 2013 (and the 2003 Registration of the City as the holder of the Dunavska Plots), it was at least plausible to expect that the 2021 Letter refusing compensation to Obnova would be issued. Claimants' attempt to

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833 Reply, para 616.

834 Counter-Memorial, paras 433-435.

835 See above para 361. See also Counter Memorial, paras 437-438.

836 See Witness Statement of Mr Erinn Bernard Broshko dated 23 February 2024, paras 32-36, 39-40. See also Memorial, para 125.

837 Witness Statement of Mr. Erinn Bernard Broshko dated 23 February 2024, paras 32-36, 39-40.

838 Witness Statement of Mr. Erinn Bernard Broshko dated 23 February 2024, paras 39-40.

839 Counter-Memorial, para 329.

artificially divorce the 2021 Letter from the circumstances leading up to its issuance is misleading.

473. Furthermore, Claimants wrongly allege that Serbia's reliance on *Corona Materials v Dominican Republic* is misplaced because, in the Claimants' view, the tribunal there only dealt with a continuous breach, whereas the 2021 Letter was not a continuous breach (or composite breach).[840] That tribunal indeed held that claimant's claim was part of a continuous breach and that in such cases the starting point for the calculation of the three-year limitation period starts from the initiation of the breach.[841] However, the tribunal also noted that even if the claimant's claim had not been part of a continuous breach, it would still not have satisfied the three-year limitation period and holding otherwise would allow the claimant to "*evade the limitations period by basing its claim on 'the most recent transgression in that series*"[842] – which is precisely what Claimants are trying to do in the present case.[843] The *Corona* tribunal finally noted that *"[t]o allow an investor to do so* (avoid the limitation period by relying on the most recent transgression in a series) *would, … render the limitations provisions ineffective*."[844] Therefore, *Corona Materials v Dominican Republic* remains relevant for this Tribunal's interpretation of the three-year limitation period contained in Article 22(2)(e)(i) and Article 22(2)(f)(i) of the Canada-Serbia BIT.

474. Finally, Claimants allege that Serbia failed to discuss the requirement of Mr Broshko's knowledge of loss. This is simply incorrect. In the Counter-Memorial, Serbia stated clearly that "*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*".[845] Mr Broshko also admits in his witness statement that he already knew of Obnova's loss in 2017:

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840 Reply, paras 612-620.

841 *Corona Materials LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3), Award dated 31 May 2016, **RL-110**, paras 210, 216.

842 *Corona Materials LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3), Award dated 31 May 2016, **RL-110**, para 215, citing *Grand River v. USA*, para 81 (interpreting the claims limitation language in NAFTA Chapter Eleven which is identical to DR-CAFTA Article 10.18.1. for all relevant purposes).

843 Counter-Memorial, para 505-520.

844 *Corona Materials LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3), Award dated 31 May 2016, **RL-110**, para 215.

845 Counter-Memorial, para 466.

> *Obnova would be provided with compensation due under Serbian law – which I understood would be calculated based on the value of Obnova's premises affected by the 2013 DRP before the adoption of the 2013 DRP. As such, I thought that Obnova represented an interesting investment opportunity.*[846]

475. Tellingly, Mr Broshko fails to explain why he considered that Obnova would receive compensation, despite the 2003 Registration. As Serbia has submitted above, the 2021 Letter cannot be assessed in isolation.

476. Accordingly, Mr Broshko surely first acquired knowledge of the alleged breach and losses stemming from that alleged breach before 27 April 2019, which deprives this Tribunal of jurisdiction *ratione temporis*.

2. The Tribunal has no jurisdiction *ratione voluntatis*

477. Serbia's consent to arbitrate disputes with Canadian nationals is included in Article 24(1)(a) of the Canada-Serbia BIT, which states that:

> *An investor that meets the conditions precedent in Article 22 may submit a claim to arbitration (…).*

478. Claimants do not dispute that Serbia's consent to arbitration requires Mr Brosko to comply with the conditions precedent set out in Article 22.[847] Instead, Claimants wrongly argue that the conditions were fulfilled for the submission of claims within the three-year limitation period (**Section a)**) and Obnova's waiver (**Section b)**). As will be shown below, they were to the contrary in fact not fulfilled, which excludes this Tribunal's jurisdiction *ratione voluntatis*.

a) Mr Broshko failed to bring claims within the three-year limitation period

479. As explained in detail in Section C.II.1.b) above, Mr Broshko's claims fall outside the three-year limitation period set out in Articles 22(e)(i) and 22(2)(f)(i) of the Canada-Serbia BIT. As Mr Broshko must have known of the claims and losses culminating in the 2021 Letter long before 27 April 2019, Serbia's consent to arbitrate Mr Broshko's claims is excluded.

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[846] Witness Statement of Mr Erinn Bernard Broshko dated 23 February 2024, paras 39-40.

[847] Reply, para 622.

b) Mr Broshko failed to submit the required waiver on behalf of Obnova

480. Article 22(2) of the Canada-Serbia BIT provides that:

> *2. An investor may submit a claim to arbitration under Article 21 only if:*
>
> *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;*
>
> *(….)*
>
> *(e) in the case of a claim submitted under Article 21(1):*
>
> *(…)*
>
> *(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) 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, the enterprise waives the right referred to under subparagraph (ii);*
>
> *(….)*
>
> *(f) in the case of a claim submitted under Article 21(2):*
>
> *(…)*
>
> *(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.*

481. In light of this provision, where a claim is brought under the Canada-Serbia BIT by an investor on its own behalf but concerns loss to the local enterprise (Article 21(1) of the Canada-Serbia BIT) or is brought by the investor on behalf of the local enterprise (Article 21(2) of the Canada-Serbia BIT), a waiver by that local enterprise is required. Accordingly, as explained previously[848], the giving of such a waiver is one of the mandatory conditions precedent to arbitration under the Canada-Serbia BIT.[849]

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[848] Counter-Memorial, paras 425-426.

[849] 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.

482. Obnova was required to give such a waiver, encompassing Obnova's right to initiate or continue proceedings before the local administrative tribunal or court, or other dispute settlement procedures with respect to the measures raised in the BIT proceedings (the "**Obnova Waiver**"). The object, purpose or *effet utile* of this requirement is to ensure that there will be no multiplicity of claims in the domestic and international fora concerning losses to the local enterprise.[850] Serbia's consent to arbitration with Mr Broshko is therefore dependent on Mr Broshko providing the Obnova Waiver.

483. In their Reply, Claimants do not dispute the above interpretation of the Canada-Serbia BIT. Rather, Claimants focus on the fact that Mr Broshko was not able to provide the Obnova Waiver because he is not Obnova's majority shareholder, while Mr Rand (who controls the majority) refused to issue the waiver.[851] At the same time, Claimants argue that Serbia's objection is raised in bad faith because "*Obnova has not engaged in any parallel proceedings*".[852] This is misplaced and unconvincing.

484. First, the Obnova Waiver is required because Claimants seek recovery for losses to Obnova. Neither Mr Broshko's nor MLI's waivers prevent Obnova from seeking these losses locally in parallel proceedings. In absence of the Obnova Waiver, Serbia did not consent to arbitration with Mr Broshko (**Section aa)**).

485. Second, contrary to Claimants' allegations, Serbia has not raised the objection to its consent in bad faith, but rather in a timely manner and in good faith (**Section bb)**).

aa) The lack of the Obnova Waiver deprives this Tribunal of jurisdiction over Mr Broshko's claims

486. States' consent to investment arbitration cannot be presumed.[853] As explained by the tribunal in *ST-AD GmbH v. Republic of Bulgaria*:

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850 *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 13.

851 Witness Statement of Mr William Archibald Rand dated 23 February 2024, para 53.

852 Reply, para 644.

853 *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*

> *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.*[854]

487. The Canada-Serbia BIT specifies that Serbia's consent to arbitration with Mr Broshko is dependent on Mr Broshko submitting the Obnova Waiver.[855] Claimants seek to downplay this requirement and argue that lack of such waiver does not deprive the Tribunal of jurisdiction, being allegedly a "*merely procedural*" requirement.[856] This is incorrect.

488. First, Claimants wrongly argue that Article 22(2) does not constitute a jurisdictional requirement.[857] As explained previously,[858] a failure to adhere to the condition precedent contained in Article 22(2) would nullify Serbia's consent to arbitrate disputes with Canadian nationals.[859] As observed by the *ICS v Argentina* tribunal:

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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); *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic* (ICSID Case No. ARB/07/26), Decision on Jurisdiction, 19 December 2012, **RL-225**, para 125 ("*If the applicable provision on dispute resolution qualifies such condition as a requirement to be complied with before the tribunal can affirm its jurisdiction, the provision then must also pertain to jurisdiction*. ").

854 *ST-AD GmbH v. Republic of Bulgaria* (PCA Case No. 2011-06), Award on Jurisdiction dated 18 July 2013, **RL-101**, para 336.

855 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CL-001**, Article 22(4).

856 Reply, para 631.

857 Reply, para 631.

858 Counter-Memorial, paras 421-425.

859 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CL-001**, Article 25. See also *The Renco Group Inc. v. Republic of Peru I* (ICSID Case No. UNCT/13/1), Partial Award on Jurisdiction dated 15 July 2016, para 142 ("*The Tribunal is constrained to conclude, therefore, that the submission of a formally compliant waiver (and the material obligation to abstain from initiating or*

> [T]*he failure to respect the precondition to the Respondent's consent to arbitrate cannot but lead to the conclusion that the Tribunal lacks jurisdiction over the present dispute.*[860]

489. Thus, the Obnova Waiver is a jurisdictional requirement, whose submission is a condition precedent to Serbia's consent to arbitration under Canada-Serbia BIT.

490. Second, Claimants wrongly argue that the Obnova Waiver would only be required if the claim was brought by Mr Broshko "*on behalf of Obnova*".[861] For this proposition, Claimants rely solely on the award issued by the majority in the case of *Kappes v. Guatemala,* in which it was stated that "*a waiver on behalf of the local company is required only if an investor brings a claim on behalf of a local company*".[862] However, Claimants' reliance on *Kappes* is misplaced. The underlying DR-CAFTA does not include any provision with comparable wording to Article 22(2)(e)(iii) of the Canada-Serbia BIT. Specifically, Article 22(2)(e)(iii) of the Canada-Serbia BIT requires that:

> *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>*

491. The ordinary meaning of Article 22(2)(e)(iii) of the Canada-Serbia BIT is clear. Article 22(2)(e)(iii) contains the specific obligation on an enterprise to submit a waiver where BIT proceedings are brought by a claimant on its own behalf but concerns the loss of the local enterprise directly or indirectly owned by claimant. Indeed, it is difficult to imagine what else the Parties could possibly have meant when including the requirement in this provision that: "*(…) the enterprise waives the right (...)*".

492. Third, Claimants wrongly argue that Mr Broshko is not required to submit a waiver on behalf of Obnova because "*he has no control over Obnova*" and is "*unable to provide a*

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continuing proceedings in a domestic court) is a precondition to the State's "consent" to arbitrate and to the Tribunal's jurisdiction"); *Bacilio Amorrortu v. Republic of Peru* (PCA Case No. 2020-11), Partial Award on Jurisdiction dated 5 August 2022, **RL-114**, para 233 ("*The Tribunal by majority finds, similarly to the Renco I tribunal, 312 that the submission of a compliant waiver is not a condition for the admissibility of claims, but a precondition for the very existence of the State's consent to arbitrate, and, by way of necessary implication, to this Tribunal's jurisdiction.*").

860 *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina* (PCA Case No. 2010-9), Award on Jurisdiction dated 10 February 2012, **RL-226**, para 262.

861 Reply, paras 624-626.

862 Reply, paras 624.

waiver on behalf of Obnova",[863] or because "*Obnova is not pursuing any proceedings that would have been subject to the waiver*".[864] Claimants fail to acknowledge the explicit wording of the Article 22(4) of the Canada-Serbia BIT, which envisages the sole circumstance whereby the waiver does not have to be provided, i.e. "*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*".[865] This is clearly not the case here.

493. As explained previously, Mr Rand is the ultimate beneficial owner of a 70% stake in Obnova,[866] which was originally acquired by Mr Rand's former associate, Mr Obradović in December 2005.[867] Mr Obradović acquired these shares at the behest of and for the benefit of Mr Rand, who is alleged to have at all material times owned and controlled this investment.[868] Mr Broshko invested in Obnova in 2017 by acquiring a 10% ownership stake through MLI, a Serbian entity owned by Mr Broshko.[869] Since making their investments, both Mr Rand and Mr Broshko have been unhindered in their control over their respective investments. For example, in 2012, Mr Rand directed Mr Obradović to contribute Obnova shares to Kalemegdan, in a process which Claimants describe as a "*restructuring of Serbian companies beneficially owned by the Rand family*" for tax purposes.[870] More recently, in 2023, Mr Rand executed another transfer of Obnova's shares from Kalemegdan to Coropi.[871] With regards to Mr Broshko, in 2018, MLI purchased receivables from two of Obnova's creditors for EUR 20,000.[872] Thus, it is evident that Serbia did not hinder Mr Broshko's, nor Mr Rand's, control over their investments at all relevant times.

494. Therefore, Claimants' assertion that Mr Broshko is unable to obtain the Obnova Waiver is irrelevant. Again, it is abundantly clear from Article 22(2) of the Canada-Serbia BIT

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863 Reply, paras 624, 626. See also Memorial, para 194.

864 Reply, para 630.

865 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CL-001**, Article 22(4).

866 Memorial, paras 74, 91; Witness statement of Mr. William Archibald Rand dated 23 February 2024, paras 5, 23.

867 Reply, para 260; Witness statement of Mr. William Archibald Rand dated 23 February 2024, para 23.

868 Reply, para 261.

869 Witness statement of Erinn Bernard Broshko dated 23 February 2023, para 40.

870 Reply, paras 282-283.

871 Witness statement of Mr. William Archibald Rand dated 23 February 2024, para 66.

872 Witness statement of Erinn Bernard Broshko dated 23 February 2023, para 41.

and in line with VCLT treaty interpretation rules that the Obnova Waiver is required in order for the Tribunal to assume jurisdiction. Indeed, had the Parties intended otherwise, they would have indicated that such waiver would not be required when the investor brings its own claims concerning the local enterprise under the BIT, being a minority shareholder. And they did not.

495. Further, the object and purpose of Articles 22(2)(e)(iii) and (f)(ii) of the Canada-Serbia BIT would not have been achieved in the absence of the Obnova Waiver.[873] The objective of waiver provisions is to prevent multiple or parallel claims in domestic and international fora, and double recovery.[874] Claimants assert that since both Mr Broshko and MLI provided waivers, there are no concerns of parallel proceedings.[875] However, this is not correct. Mr Broshko's claim in this arbitration is for his reflective loss as Obnova's (indirect) shareholder. Mr Broshko claims losses stemming from the alleged losses of Obnova due to the adoption of the 2013 DRP, multiplied by his 10% shareholding,[876] with the Cypriot Claimants claiming losses corresponding to their shareholding. These are, for all intents and purposes, the same losses that Obnova would be able to claim in the local proceedings (and, as will be pointed out below, Obnova has claims for compensation regarding the alleged *de facto* expropriation).

496. At the same time, Obnova is not bound by the waivers by Mr Broshko or MLI.[877] Obnova could potentially initiate new proceedings in Serbia and obtain a remedy for the same violations and losses as those raised by Mr Broshko in this arbitration.[878] Claimants completely disregard that the purpose of Article 22(2) of the Canada-Serbia BIT would not be fulfilled in such a situation. Tellingly, Mr Rand refused to provide the Obnova Waiver, such that it cannot be excluded that Obnova may plan to initiate local proceedings.[879] In this context, it is to be noted that Article 22(2) refers not only to pending local proceedings, but also to the initiation of new proceedings. Hence, Claimants' argument that no proceedings are currently pending is not convincing. Serbia did not consent to arbitration

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873 Memorial, para 194.

874 Memorial, para 441. See also M. Kinnear et al., "Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11", 24 Arbitration International (2008), **RL-227**, pp. 1121-11.

875 Memorial, para 194.

876 Expert Report-Dr. Richard Hern-Memorial on Quantum-ENG dated 31 March 2023, Hern ER-1, paras 31-34; Memorial, para 404.

877 Mr Broshko's waiver, **C-071**; MLI's waiver, **C-064**.

878 See Memorial, paras 189, 192, 386; Reply, paras 608, 614,

879 Witness statement of Mr. William Archibald Rand dated 23 February 2024, para 53.

under the Canada-Serbia BIT in a scenario where there is a risk of parallel local proceedings.

497. Claimants' attempt to trivialise the lack of the Obnova Waiver by reference to the award in *Thunderbird v. Mexico*. Claimants further allege that it is key whether the parallel proceedings are actually pending (and say that Obnova did not initiate any proceedings). However, in *Thunderbird*, the waiver confirming that the relevant entities would not initiate or continue proceedings in Mexico was provided, albeit with delay.[880] In any event, the waiver requirement under Article 22(2) refers to waiving the "*right to initiate or continue*", which means that Obnova would in any case still have to waive its right to initiate such proceedings in the future as well.[881]

498. Similarly, Claimants attempt to disregard the award issued in *Bacilio Amorrortu v. Peru* by arguing that it's not applicable to Obnova since it "*does not provide any guidance with respect to waivers by third parties*".[882] This is again wrong. As explained above, the Obnova Waiver is specifically required because Mr Broshko claims losses stemming from losses of Obnova (the local enterprise).[883] In accordance with Article 22(2)(e)(iii), Obnova is therefore not a "third party" and its own waiver is required.

bb) Serbia's objection is not made in bad faith and is not belated

499. Finally, Claimants' allegations that Serbia has raised its waiver objection in bad faith and belatedly are both wrong.

500. First, in response to the bad faith allegation, Serbia maintains that neither Mr Broshko nor the Cypriot Claimants (or Mr Rand) have been able to guarantee that Obnova will not (in the future) initiate parallel proceedings seeking Obnova's losses due to the 2013 DRP.[884] Thus, Serbia is within its right to raise the jurisdictional objection based on the lack of waiver and protect itself from becoming mired in multiple proceedings concerning the same alleged losses – which clearly was not Serbia's intention when concluding

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880 *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award dated 26 January 2006, **CL-117**, para 186.

881 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CL-001**.

882 Reply, para 629.

883 Expert Report-Dr. Richard Hern-Memorial on Quantum-ENG dated 31 March 2023, Hern ER-1, paras 31-34; Memorial, paras 390-391, 404.

884 Reply, paras 624-626, 628. See also Memorial, paras 26, 194; Witness statement of Mr. William Archibald Rand dated 23 February 2024, paras 64-65; Mr Broshko's waiver, **C-071**; MLI's waiver, **C-064**.

the Canada-Serbia BIT, including its Article 22(2). Claimants' reference to *Renco v. Peru* for its allegation that Serbia is raising its waiver objection "*for an improper motive*" is misplaced.[885] In *Renco*, the tribunal considered whether Peru's belated objection to the claimant's invalid waiver (submitted with the notice of arbitration but containing a reservation of rights) represented an abuse of rights. The tribunal rejected the claimant's argument and instead held that Peru was within its right to demand a waiver that fully complies with formal requirements and fulfils the object and purpose of the waiver requirement under the relevant treaty.[886] Therefore, the *Renco v. Peru* award in fact supports Serbia's right to require the Obnova Waiver.

501. Second, Claimants' assertion that Serbia's waiver objection was not raised in a timely manner is equally wrong. In the absence of any effort by Claimants to provide the Obnova Waiver since the initiation of these proceedings or with their Memorial, Serbia raised its objection *as early as possible* in accordance with Rule 41(1) of the ICSID Arbitration Rules, i.e. in its Counter-Memorial.

502. In any event, Rule 41 of the ICSID Arbitration Rules requires tribunals "*to determine every objection to jurisdiction*",[887] including belated objections. For example, in analysing Rule 41, the tribunal in *AIG v. Kazakhstan* opined that:

> *Objections to the jurisdiction of an adjudicatory body cannot be ignored, if raised during the arbitral proceedings - delay notwithstanding. Mere tardiness in raising a point of jurisdiction cannot preclude it being considered by the Tribunal at a later stage: so long as the same is raised during the course of the arbitral proceedings.*

503. This is also confirmed by other awards, such as *Pac Rim v. El Salvador*[888] to which Claimants refer in support of their bad faith allegations.[889]

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885 Reply, para 643.

886 *The Renco Group, Inc. v. Republic of Peru [I]* (ICSID Case No. UNCT/13/1), Partial Award on Jurisdiction dated 15 July 2016, **CL-122,** para 186.

887 *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan* (ICSID Case No. ARB/01/6), Award dated 7 October 2003, **CL-129,** para 9.2.

888 *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Award, 14 October 2016, **CL-118**, para 5.34. See also *Bacilio Amorrortu v. Republic of Peru*, PCA Case No. 2020-11, Partial Award on Jurisdiction, 5 August 2022, **RL-114**, paras 236-237.

889 Reply, paras 636-637.

504. Accordingly, Serbia submits that the Tribunal should consider its jurisdictional objection related to the absent Obnova Waiver.

3. Mr Broshko's investment was not made in accordance with Serbian law

505. Investment tribunals have implied a requirement to comply with host State law as a condition for accessing treaty protection even where the relevant treaty does not contain an express legality provision (**Section a)**). In turn, because Mr Broshko breached the 2016 Law on Takeover when he indirectly acquired shares in Obnova through MLI without launching a takeover bid, his investment falls outside the protective scope of the Canada-Serbia BIT (**Section b)**).

a) The Tribunal should not assume jurisdiction over an unlawfully made investment

506. Respondent acknowledges that the Canada-Serbia BIT does not contain an express provision requiring investors to comply with the host State's laws and regulations in making an investment. This does not, however, mean that Serbia has consented to arbitrate disputes arising out of investments that were made in breach of its laws. Even in the absence of an express legality requirement, tribunals have held that compliance with domestic law is an implied condition for granting international protection to investments.[890]

507. In *Cortec Mining*, for instance, the tribunal considered that it is "accepted jurisprudence" that "*to be protected, an investment has to be in accordance with the law of the host State and made in good faith*".[891] Similarly, in *Oxus Gold*, the tribunal ruled that "*an investment*

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[890] Yotova, "Compliance with Domestic Law: An Implied Condition in Treaties Conferring Rights And Protections on Foreign Nationals And Their Property?" in J. Klingler, Y. Parkhomenko, et al. (eds.), *Between The Lines of The Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* 307 (2018), **RL-228**, pp 308-309; U. Kriebaum, Investment Arbitration – Illegal Investments, in G. Zeiler, I. Welser, et al. (eds.), *Austrian Arbitration Yearbook* (2010), **RL-220**, pp 309-310; C. Mouawad & J. Beess und Chrostin, "The Illegality Objection in Investor-State Arbitration", 37 *Arbitration International* (2021), **RL-222**, p 3. See also *Plama Consortium Ltd. v Bulgaria* (ICSID Case No. ARB/03/24) Award, 27 August 2008, **RL-119**, para 138 ("*the ECT does not contain a provision requiring the conformity of the Investment with a particular law… This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law.*"); *Phoenix Action v the Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009, **RL-043**, para 101 ("*States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws … it is the Tribunal's view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT.*"). See also Counter-Memorial, para 469.

[891] *Cortec Mining Kenya Ltd., Cortec (Pty) Ltd. & Stirling Capital Ltd. v Republic of Kenya* (ICSID Case No ARB/15/29), Award, 22 October 2018, **RL-229**, para 260.

may not qualify for protection under a BIT, where such investment was made in breach of relevant laws and regulations, including international treaties but also national law of the host State."[892] Other tribunals have invoked international legal principles such as international public policy, good faith or some version of unclean hands in order to imply a legality requirement.[893] For these tribunals, whether the relevant BIT contains an express legality requirement was "not a relevant factor".[894]

b) <u>Mr Broshko breached Serbian law when he acquired his shares in Obnova without launching a takeover bid</u>

508. In its Counter-Memorial, Respondent already demonstrated that Mr Broshko's indirect acquisition of 10% of Obnova's shares (the "**2017 Acquisition**") is not eligible for protection under the Canada-Serbia BIT because it was not accompanied by the issuance of a takeover bid by Mr Broshko and MLI, in violation of the 2016 Law on Takeover.[895] As a result, Mr Broshko acted in concert with Kalemegdan, Coropi and Mr Rand when he acquired his shares through MLI, and such share acquisition, when taken together with Kalemegdan's 70% stake in Obnova, exceeded the so-called "final threshold" of 75%.[896] Article 6, paragraph 3 of the 2016 Law on Takeover provides that those that acquire and/or <u>*persons acting in concert*</u> acquiring the voting shares of a target company, *directly or indirectly*, are required to make a takeover bid when such acquisition exceeds the threshold of <u>75% of voting rights</u> (the "final threshold").[897] As Mr Broshko's and

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892 *Oxus Gold v The Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, **RL-204**, para 706.

893 C. Mouawad & J. Beess und Chrostin, "The Illegality Objection in Investor-State Arbitration", 37 *Arbitration International* (2021), **RL-222**, p 3.

894 C. Mouawad & J. Beess und Chrostin, "The Illegality Objection in Investor-State Arbitration", 37 *Arbitration International* (2021), **RL-222**, p 3; *SAUR International SA v. Republic of Argentina* (ICSID Case No. ARB/04/4), Decision on Jurisdiction and Liability dated 6 June 2012, para 308 ("*Whether the BIT between France and Argentina mentions or not the requirement that an investor act in accordance with domestic laws is not a relevant factor*"); *hoenix Action v the Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009, **RL-043**, para 101 ("*it is the Tribunal's view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT*"); *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award dated 18 June 2010, **RL-098**, paras 123-124 ("*An investment will not be protected if it has been created in violation of national or international principles of good faith, by way of corruption, fraud, or deceitful conduct … It will also not be protected if it is made in violation of host State's law. These are general principles that exist independently of specific language to this effect in the Treaty*.").

895 Counter-Memorial, paras 470-473.

896 Counter-Memorial, paras 470-473.

897 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, paras 5(f), 51.

Kalemegdan's combined shareholding was roughly 80%, this obviously exceeded the 75% threshold, such that Mr Broshko as well as Kalemegdan, Coropi, and Mr Rand each had an obligation to launch a takeover bid.[898]

509. Claimants' Serbian law expert Ms Tomić Brkušanin disagrees that Mr Broshko and MLI[899] were required to launch a takeover bid. In particular, she denies that they acted in concert with Kalemegdan, Coropi and Mr Rand.[900] However, she concedes that if Mr Broshko had acted in concert with Kalemegdan, Coropi or Mr Rand, he would have been obliged to launch a takeover bid under the 2016 Law on Takeover.[901] The ownership and management structure of Kalemegdan, Coropi and Rand Investments when interpreted through the application of the Law on Companies and the 2016 Law on Takeover qualifies Mr Broshko as a "person acting in concert" and requires him to launch a takeover bid (**Section aa)**). Furthermore, Tomić Brkušanin's misleading interpretation of Article 4 of the 2016 Law on Takeover should be rejected as the SEC could have considered other circumstantial evidence to determine if Mr Broshko was a "person acting in concert" and therefore required to launch a takeover bid (**Section bb)**).

aa) The provisions of the Law on Companies read with the 2016 Law on Takeover establishes that Mr Broshko acted in concert with Coropi and Kalemegdan

510. Mr Broshko did act in concert with Kalemegdan and Coropi. If the ownership and management structures of Kalemegdan, Coropi and Rand Investments are assessed in line with the provisions of the 2016 Law on Takeover and the Law on Companies, it is clear Mr Broshko acted in concert with Coropi and Kalemegdan and Mr Rand, as follows:

- Article 62, paragraph 2, item 3 of the Law on Companies defines "related persons"[902] as legal persons that are controlled by the same person.[903] Mr Rand controls Coropi,

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898 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, para 53; Expert report of Ms. Bojana Tomić Brkušanin dated 23 February 2024, para 53; Counter-Memorial, para 473.

899 MLI is wholly owned and controlled by Mr Broshko; Counter-Memorial, para 506.

900 Expert report of Ms. Bojana Tomić Brkušanin dated 23 February 2024, paras 53-70.

901 Expert report of Ms. Bojana Tomić Brkušanin dated 23 February 2024, para 53.

902 Under Serbian language the term "*povezana lica*" as used under Article 62 of the Law on Companies, 2019 when translated to English can be used to describe "related persons/ entities" or "affiliated persons/ entities" or "interconnected persons/ entities".

903 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, para 56 "*Article 62 – A related person in terms of this Act in relation to a specific legal person is considered to be […] a legal person that is, together with that legal person, under the control of a third person*."

Kalemegdan and Rand Investments.[904] Therefore, Coropi and Kalemegdan and Rand Investments are "related persons" for the purposes of the Law on Companies.[905]

- Article 4, paragraph 6 of the 2016 Law on Takeover provides that "Companies act in concert if they are [related][906] in the context of [the 2016 Law on Takeover] and in terms of the law regulating companies".[907] As explained in the preceding paragraph, Coropi, Kalemaegdan and Rand Investments are controlled by Mr Rand and are therefore, related persons. Under the provisions of the 2016 Law on Takeover, "acting in concert" is an automatic consequence of being "related". Therefore, these two provisions read together establish that Coropi, Kalemegdan and Rand Investments are related companies and therefore persons acting in concert.
- Article 4, paragraph 2, item 1 of the 2016 Law on Takeover provides that persons are deemed to be acting in concert if such persons are members of the management body of companies acting in concert.[908] In the preceding paragraph, we have established that Rand Investments and Coropi are related companies and hence acting in concert. Mr Broshko is the managing director of Rand Investments and Mr Rand is the director of Coropi. Since Mr Broshko and Mr Rand are members of the management of the companies acting in concert, then, pursuant to Article 4, paragraph 1, item 1, it follows that both Mr Broshko and Mr Rand were acting in concert with each other, requiring Mr Broshko to launch a takeover bid.
- Furthermore, Article 4, paragraph 2, item 2 of the 2016 Law on Takeover provides that members of management bodies and companies in which they are members are also deemed to be acting in concert.[909] This means that members of management bodies, by virtue of them being in the management, would automatically be acting

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904 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, para 58.

905 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, para 56.

906 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, fn 68 ("*For clarification, the terms "related" and "interconnected" can be used interchangeably.*").

907 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, para 57.

908 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, paragraph 2, item 1 ("*The following persons are considered to be acting in concert: members of the company corporate management bodies [sic] acting in concert."*).

909 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, paragraph 2, item 2 " *The following persons are considered to be acting in concert: […] members of corporate management bodies with companies wherein they are also members of such bodies.*"

in concert with the company of which they are members. Pursuant to Article 4, paragraph 2, item 2, Mr Broshko as the managing director of Rand Investments was acting in concert with Rand Investments. Similarly, Mr Rand as the director of Coropi, was acting in concert with Coropi. Since both Mr Rand and Mr Broshko are "*members of corporate management bodies*" of related companies, it follows that they are necessarily acting in concert with each other and therefore, Mr Broshko was required to launch a takeover bid.

511. Curiously, Ms Tomić Brkušanin totally omits Rand Investments from her analysis.[910] The effect of this is to conveniently avoid the application of the abovementioned laws to Mr Broshko and consequently avoids Mr Broshko falling within the definition of a "person acting in concert" with Mr Rand, Coropi and Rand Investments.

bb) Ms Tomić Brkušanin's interpretation of Article 4 of the Law on Takeover is misplaced and incomplete

512. In addition to the preceding contention regarding, the analysis of the provisions of the 2016 Law on Takeover alone would have been enough to establish that Mr Broshko was a person acting in concert and therefore was required to launch a takeover bid.

513. According to Ms Tomić Brkušanin, Mr Broshko's supervision of Mr Rand's investments in Serbia does not indicate that he was acting in concert with Mr Rand since his dealings did not trigger any of the presumptions under Article 4, paragraphs 2-7 of the 2016 Law on Takeover.[911] This analysis is misplaced. As explained in the previous section, Mr Broshko's acquisition of Obnova's shares did engage Article 4, paragraph 2 as it qualified him as a "person acting in concert" and therefore, triggered his obligation to launch a takeover bid.[912]

514. In any case, even if none of the irrebuttable presumptions listed under Article 4, paragraphs 2-7 of the 2016 Law on Takeover were to apply (which is denied),[913] persons may still be deemed to be acting in concert under the provisions of Article 4, paragraph 8 – a provision that Ms Brkusanin again conveniently completely omits to mention. Article 4 paragraph 8 permits the SEC, when determining if persons are acting in concert, *to take into special account* other circumstances such as (1) time or period in which the shares

910 Expert report of Ms. Bojana Tomić Brkušanin dated 23 February 2024, para 59.

911 Expert report of Ms. Bojana Tomić Brkušanin dated 23 February 2024, paras 58-64.

912 See paras 510-511 above.

913 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, para 60.

were acquired; (2) the place of acquisition; (3) the methods of acquisition; (4) the provisions of the acquisition contract; (5) the value of the acquired shares; (6) transactions financing the acquisition of shares; (7) proposals for appointment or dismissal of members from corporate management bodies. The language of paragraph 8, i.e., "take into special account" and the omission of the word "and" before the last circumstance is indicative of the fact that the circumstances provided in paragraph 8 is not a closed list. [914] In line with this, Prof Lepetić identifies factors from paragraph 8 itself as well as other additional considerations that further support the conclusion that Mr Broshko acted in concert with Coropi and Kalemegdan:

- First, the time or period in which the shares were acquired is telling. In 2017, Mr Broshko acquired shares (through MLI) in another Serbian company, Crveni Signal. The ownership and management structure of Crveni Signal is such that MLI is the legal owner of 10% of the shares and Kalemegdan is the majority shareholder while Mr Rand is the ultimate beneficial owner; the company has been managed by Mr Broshko since 2012 under Mr Rand's direction.[915]
- Second, the fact that Mr Broshko, under the direction of Mr Rand, supervised Mr Rand's investments in Serbia, including Obnova, is according to Prof Lepetić, another strong indicator that Mr Broshko and Mr Rand were acting in concert.[916]

515. In sum, Respondent has shown above that as Mr Broshko's and Kalemegdan's combined shareholding exceeded the 75% threshold, consequently requiring each of them to launch a takeover bid. In addition, Mr Broshko Kalemegdan, Coropi, and Mr Rand were persons acting in concert within the meaning of the Law on Companies and the Law on Takeover and therefore each had an obligation to launch a takeover bid.[917] Furthermore, circumstantial transactions at the time of Mr Broshko's acquisition of the Obnova shares coupled with Mr Rand's supervision of Mr Broshko's investment in Serbia is highly indicative of the fact that Mr Broshko was a person acting in concert with Mr Rand and was consequently, required to launch a takeover bid. Since no bid was launched, Mr Broshko's acquisition of shares in Obnova was not in accordance with Serbian law. Accordingly,

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914 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, para 60.

915 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, paras 5(e), 62.

916 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, para 61.

917 Second Legal Opinion-Prof Jelena Lepetić-Rejoinder-ENG dated 14 June 2024, **RLO-005**, para 53; Expert report of Ms. Bojana Tomić Brkušanin dated 23 February 2024, para 53; Counter-Memorial, para 473.

Mr Broshko's violation of Serbian law places his investment outside the protective scope of the Canada-Serbia BIT.

D. Claimants' claims are inadmissible as the investments were not *bona fide*

516. When Mr Obradović transferred his shares to Kalemegdan in 2012, a dispute was already on the horizon with regard to Obnova's alleged property entitlements and the potential rezoning of the Dunavska Plots for the public transportation terminal, which had come to Obnova's attention already in 2008. This raises questions as to Mr Rand's and the Cypriot Claimants' true motives for the 2012 restructuring (**Section I.**). Similarly, given Mr Broshko's involvement in Mr Rand's investments in Serbia, including in Obnova, since 2012, he was clearly aware of the dispute with Respondent when he invested in Obnova in 2017 (**Section II.**). Accordingly, the investments of both the Cypriot Claimants and Mr Broshko were not made in good faith, thereby entitling the Tribunal to decline to decide the claims in this Arbitration.

I. The Cypriot Claimants' investment was an abuse of process

517. Respondent's Counter-Memorial pointed to a well-established rule that restructuring of an investment by an investor in order to gain international treaty protection when a dispute is foreseeable constitutes abuse of process which precludes the Tribunal from exercising its jurisdiction. The Cypriot Claimants' investment in Obnova, which Claimants state was a restructuring of Mr Rand's investments, occurred in 2012, when a dispute with Respondent over Obnova's property entitlements was already foreseeable. As evidence that the dispute was foreseeable, Respondent pointed to facts indicating conflicting views about Obnova's property rights over Dunavska 17-19, as well as Obnova's awareness in 2008 that a detailed regulation plan designating land at Dunavska 17-19 for a public transportation terminal was in the process of preparation. This admissibility objection has been raised in alternative to Respondent's objection concerning the Tribunal's jurisdiction *ratione temporis*, which is based on the proposition that the dispute had already arisen before the Cyprus-Serbia BIT entered into force and for that reason is outside the scope of temporal jurisdiction under the treaty.[918]

518. In the Reply, Claimants do not challenge that claims may be inadmissible due to abuse of process, but insist on further requirements: (i) that the *sole* purpose of the restructuring was to obtain treaty protection, and (ii) that the *specific dispute brought to arbitration*

[918] Counter-Memorial, paras 474-475 and 491-503.

was foreseeable with a high probability at the time of the restructuring. On this basis, Claimants argue that the sole purpose of the restructuring in 2012 was tax efficiency and that the present arbitration dispute was not foreseeable at the time.[919]

519. As will be discussed below, Claimants' additional criteria for inadmissibility are not in line with international arbitral practice (**Section 1.**). Further, Claimants' factual allegations are without merit, because the factual record indicates that appropriate requirements for inadmissibility of the Cypriot Claimants claims have been fulfilled, making the claims inadmissible (**Section 2.**).

1. Claimants' additional criteria are not supported by international arbitral practice

a) Treaty protection need not be the sole purpose of the restructuring

520. Claimants argue that corporate restructuring does not represent abuse unless its *sole* purpose is to gain treaty protection. In support, they refer to *Phoenix v. Czech Republic* and *Gremcitel v. Peru*, which mentioned that the "sole" (*Phoenix*) or "only" (*Gremcitel*) purpose of the restructuring must be to gain international treaty protection.[920] However, as noted by the tribunal in *Alverey* these pronouncements were not meant to state a necessary legal requirement for abuse, but rather were factual statements, describing what actually occurred in these cases:

> *The Tribunal does not accept that securing BIT protection must be the sole purpose of the restructuring, so that if there were any other purpose, however secondary, it would preclude a finding of abuse of process. The jurisprudence does not support such a strict test. The fact that a tribunal found that securing the protection of a BIT was the sole purpose of the restructuring, does not imply that it had to be the sole purpose. Thus, in the Levy v Peru case [Gremcitel], to which the Claimants refer, the tribunal set the test in the following terms […]*
>
> *There is no suggestion there that the intention to invoke the treaty must be the sole intention. The same is true of Phoenix v. Czech Republic, where the tribunal found that gaining access to the protections of the treaty was the sole purpose of the restructuring but did not suggest that this was a requirement.*[921]

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919 Reply, paras 645-646.

920 Reply, paras 651-656.

921 *Alverley Investments Limited and Germen Properties Ltd v. Romania* (ICSID Case No. ARB/18/30), Award dated 16 March 2002, **RL-007**, para 376.

521. Claimants recognize that other tribunals did not adopt their strict requirement of "sole" purpose,[922] and submit, with reference to *Alverley* and *Philip Morris*, that gaining treaty protection must be at least determinative or principal purpose of the restructuring.[923] However, this does not reflect any consensus or accepted view in investment law; other investment tribunals did not insist that gaining treaty protection must be determinative or principal purpose of the restructuring, but just that it was one of them. For example, the tribunal in *Tidewater* considered that

> *…it suffices for the Tribunal to accept for present purposes that one of the two reasons for the reorganization was a desire to protect Tidewater from the risk of expropriation by incorporation of an investment vehicle in a state having investment treaty arrangements with Venezuela.*[924]

522. It should also be noted that it is not often that the question about the purpose of restructuring can be answered with reference to clear and unambiguous evidence, as in *Philip Morris*, where the trail of correspondence was abundant. Rather, as the tribunal in *Alverley* remarked:

> *In the end, therefore, the Tribunal must look at all of the evidence which has been put before it – by both Parties – and at the gaps in that evidence and decide whether, on the balance of probabilities, the evidence is sufficiently persuasive for it to conclude that there has been an abuse of process.*[925]

523. As will be discussed in the next section, evidence put forward by Respondent points to the conclusion that it was made as part of preparations for a dispute over property entitlements related to the Dunavska Plots and Objects.

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922 Reply, para 657.

923 Reply, para 657 referring to *Alverley Investments Limited and Germen Properties Ltd v. Romania* (ICSID Case No. ARB/18/30), Award dated 16 March 2002, **RL-007**, para 376, and *Philip Morris Asia Limited v. The Commonwealth of Australia* (PCA Case No. 2012-12), Award on Jurisdiction and Admissibility dated 17 December 2015, **RL-122**, para 584.

924 *Tidewater Investment SRL and Tidewater Caribe v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Decision on Jurisdiction dated 8 February 2013, **RL-127**, para 183. See also *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on Jurisdiction and Admissibility dated 1 June 2012, **RL-046**, para 2.41 (mentioning more than one principal purposes of the restructuring).

925 *Alverley Investments Limited and Germen Properties Ltd v. Romania* (ICSID Case No. ARB/18/30), Award dated 16 March 2022, **RL-007**, para 368. See also *ConocoPhillips Petrozuata B.V. et al v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on Jurisdiction and Merits dated 3 September 2013, **CL-047,** para 275.

b) <u>What needs to be foreseeable and how?</u>

524. As demonstrated in the Counter-Memorial, it has been widely accepted that foreseeability of a dispute for an investor is a matter of an objective assessment of all circumstances. What matters is whether a future dispute or a claim was reasonably foreseeable to the investor at the time of the restructuring.[926] The test also implies that a certain degree of due diligence needs to be applied by the investor.[927]

525. However, Claimants propose a different and much more stringent test requiring that "*the specific dispute brought to arbitration was foreseeable with a high probability*".[928] This is not in line with international arbitral practice, as will be demonstrated, first, with regard to the question of the level of foreseeability and, second, with regard to the question of what needs to be foreseen.

526. In support of their position that a dispute must be foreseeable "*with a high probability*", Claimants refer to the *Pac Rim* case[929], which made one of the initial pronouncements about abuse of process objections but ignore subsequent international arbitral practice. The only other case referred to by Claimants in this context is *MNSS v. Montenegro*,[930] which merely quoted *Pac Rim* and did not offer any discussion about foreseeability of the dispute, because the tribunal ruled that there was no dispute at the time of the investment.[931]

527. As far as the *Pac Rim* case is concerned, it has been discussed, but not strictly followed, in the subsequent caselaw dealing with abuse of process. According to the *Philip Morris* tribunal,

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926 Counter-Memorial, paras 483-490, referring to *Tidewater Investment SRL and Tidewater Caribe v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Decision on Jurisdiction dated 8 February 2013, **RL-127**, para 150; *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No. 2012-12), Award on Jurisdiction and Admissibility dated 17 December 2015, **RL-122**, para 554; *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award dated 20 September 2021, **RL-123**, paras 342-343.

927 Counter-Memorial, para 490, referring *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award dated 20 September 2021, **RL-123**, para 345.

928 Reply, para 645.

929 Reply, paras 661-662.

930 Reply, paras 663-664.

931 *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro* (ICSID Case No. ARB(AF)/12/8), Award of 4 May 2016, **CL-123,** para 182.

> *... foreseeability rests between the two extremes posited by the tribunal in Pac Rim v El Salvador – 'a very high probability and not merely a possible controversy' (...) 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 materialize.*[932]

528. This, according to the *Alverley* tribunal, was the most accurate formulation of international practice.[933] It is precisely this level of foreseeability that Respondent considers should be applied in the present case.

529. The second part of Claimants' stringent test of foreseeability requires that "*the specific dispute brought to arbitration*" must be foreseeable to the investor.[934] However, Claimants offer no support whatsoever for this proposition. In their discussion, they only refer to "*the specific future dispute*" – this is the term from the *Pac Rim* tribunal used in the context of foreseeability – which is a different thing.[935] However, Claimants do not elaborate on the meaning of any of these terms.

530. The issue of what needs to be foreseeable was in detail discussed by the *Cascade Investments* tribunal, which concluded that:

> *... what must be reasonably foreseeable is that the State will take some adverse action against the investment, on account of a disagreement or conflict of interest with the investor, which – when it transpires – will impact the investor's rights and therefore be 'susceptible of being stated in terms of a concrete claim'. This understanding is consistent with the Philip Morris tribunal's conclusion that 'a dispute is foreseeable when there is a reasonable prospect… that a measure which may give rise to a treaty claim will materialize' That formulation does not require foreseeability of the precise measure that the State eventually adopts, just 'a measure' (emphasis added) that is*

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[932] *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No. 2012-12), Award on Jurisdiction and Admissibility dated 17 December 2015, **RL-122**, para 554. A similar approach was adopted by the tribunal in *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award dated 20 September 2021, **RL-123**, para 343 ("*The concept in essence is thus focus on whether a development in its nature was capable (reasonably) of being foreseen. It does not require a proof that a particular investor actually foresaw that which was objectively foreseeable*") and para 351.

[933] *Alverley Investments Limited and Germen Properties Ltd v. Romania* (ICSID Case No. ARB/18/30), Award dated 16 March 2022, **RL-007**, para 384 ("*The Tribunal considers that the Philip Morris formulation… most accurately captures both the prevailing view in the case law and the principle which the abuse teste is designed to serve…*").

[934] Reply, para 645.

[935] Reply, para 661.

capable of harming the investment to the degree that a treaty claim could be asserted.[936]

531. Therefore, following *Philip Morris* and *Cascade* approach, there is no requirement that a specific dispute be reasonably foreseeable by the investor. Rather, it is sufficient that some adverse state measure against the investment, which might give rise to a treaty claim, is reasonably foreseeable by the investor.

532. In conclusion, neither element of the stringent test of foreseeability proposed by Claimants holds in light of arbitral practice. Rather, the prevailing view is that the test is objective and concerns the question whether some adverse state action against the investment was reasonably foreseeable by the investor at the time of the restructuring.

2. The restructuring of Obnova's ownership satisfies the criteria for finding of abuse of process

533. As Respondent's Counter-Memorial demonstrated, an investment dispute over the Dunavska Land and Objects was objectively foreseeable at the time of the 2012 restructuring of Mr Rand's putative investment in Obnova because facts which must have been known to Mr Rand and Cypriot Claimants indicated that the adoption of the 2013 DRP was imminent.[937]

534. In Reply, Claimants argue that (i) Mr Rand restructured his ownership based on tax advice he received and not for the purpose of gaining international treaty protection and (ii) the dispute before the Tribunal was not foreseeable in April 2012 at all.[938]

535. Respondent will deal with purpose(s) of the restructuring (**Section a)**) and with foreseeability of dispute (**Section b)**) in order to demonstrate that the appropriate requirements for finding of abuse of process in this case have been met.

a) The purpose of the restructuring in 2012

536. At the outset, it should be noted that the only evidence Claimants offer in support of their allegation that the restructuring was conducted for tax purposes are the witness

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936 *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award dated 20 September 2021, **RL-123**, para 351.

937 Counter-Memorial, paras 491-503.

938 Reply, para 667 *et seq*.

statements of Mr Rand and Mr Broshko.[939] By his own admission, Mr Rand controls the Cypriot Claimants,[940] while Mr Broshko is a Claimant himself and an employee of Mr Rand.[941]

537. Since both Mr Rand and Mr Broshko are directly interested in the outcome of the present proceedings, their statements about the purpose of the restructuring are not reliable and should be disregard. The rule was succinctly put in the Latin legal maxim: *Testis nemo in sua causa esse potest* (No one can be a witness in his own cause). This rule is also reflected in international practice. In the *Nicaragua* case, the ICJ treated testimony from government officials with interest in the outcome of the proceedings "*with great reserve*", and accepted such testimony only if it could be regarded as contrary to the interests or contentions of the party to which the official in question belonged.[942]

538. In addition, it has been noted that allegations of abuse of process give rise to specific evidentiary problems, since much of the relevant evidence is possessed by claimants. Thus,

> *Where a respondent produces evidence which points to an abuse of process, the claimant may bear the burden of adducing evidence to explain its actions – evidence to which it alone has access – if it wishes to refute the respondent case.*[943]

539. However, instead of providing relevant documentary evidence of the purported tax motive for the restructuring of Mr Rand ownership in Obnova (e.g. internal memos or notes), Claimants present as "evidence" what is effectively their own statement, since Mr Rand and Mr Broshko are indistinguishable from Claimants. Mr Rand's witness statement alleges that the restructuring was done for tax reasons on the basis of advice of "Thorsteinssons", which Claimants state were Mr Rand's tax attorneys.[944] However, Claimants have failed to provide any documentary evidence about this, although such evidence is very likely in their and Mr Rand's possession. For example, in the present case Claimants have filed a number of exhibits containing internal email correspondence from the same time

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939 Reply, para 669.

940 Witness statement of Mr. William Archibald Rand dated 23 February 2024, para 38.

941 Witness statement of Mr. Erin Bernard Broshko dated 23 February 2024, para 3.

942 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, **RL-231**, para 70.

943 *Alverley Investments Limited and Germen Properties Ltd v. Romania* (ICSID Case No. ARB/18/30), Award dated 16 March 2002, **RL-007**, para 364 (emphasis added).

944 Reply, para 669; Witness statement of Mr. William Archibald Rand dated 23 February 2024, paras 33-34.

period as the restructuring (2012), but none that would indicate the so-called tax motive behind it.[945] Further, Mr Rand keeps a diary. In the *Rand* case, claimants introduced excerpts from Mr Rand's diary into the record. As he testified at the hearing in that case: "*I keep a diary of my main events every day usually*".[946]

540. The Tribunal should therefore disregard Claimants' allegation about the purported tax motive for the restructuring as unsubstantiated, considering Claimants' failure to produce any documentary evidence in support of this allegation, while the testimony of Mr. Rand and Mr Broshko on this point should not be accepted.

541. What remains to be considered is Respondent's submission that the motive for the restructuring was to gain investment treaty protection under the Cyprus-Serbia BIT. While Respondent could hardly get hold of direct evidence of such motive, it nevertheless appears clear after consideration of all the circumstances of the case.

542. As discussed in the Counter-Memorial, several facts make it clear that Obnova was entering into a dispute with Serbia concerning property rights over the Dunavska Land and Objects. First, different state authorities had denied Obnova's property rights claims and the 2003 Registration inscribed the City of Belgrade as the holder of the right of use over the properties. It was also becoming clear that the City was in the process of adopting a detailed regulation plan that would place a public transportation terminal at Dunavska 17-19.[947] These facts are part of the factual matrix that indicates that Mr Rand was looking for investment treaty protection, particularly when considered alongside the following conspicuous details:

- Mr Rand, as a Canadian national, did not have investment treaty protection at the time of the restructuring in 2012, since the Canada-Serbia BIT came into force only on 25 April 2017; however, investment treaty protection under the Cyprus-Serbia BIT had been available since 2005, which made Cyprus an attractive destination for the restructuring.

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945 See e.g. Email communication between Mr Broshko and Mr Rand dated 2 October 2012, **C-336;** Email to Mr Rand dated 27 November 2023**, C-339**; Email communication from Igor Markicevic dated 6 Avgust 2012, **C-365**; Email communication between Igor Markicevic and Mr Rand dated 13 August 2012, **C-366**; Email communication between Mr Rand and Igor Markicevic dated 13 Avgust 2012, **C-367**.

946 *Rand Investments et al v. Republic of Serbia* (ICSID Case No. ARB/18/8), Hearing Transcripts, Day 2, 13 July 2021, **R-188**, p 20 line 21 (Mr Rand).

947 Counter-Memorial, para 494.

- This is even more so since Mr Obradović, the nominal owner of Obnova, is a Serbian national, therefore without investment treaty protection on Serbia's territory.
- Mr Rand is an experienced and highly sophisticated investor and experienced lawyer;[948] it is likely that he, with the benefit of external advice he receives, was aware of the advantages and benefits of investment treaty protection.
- Mr Rand testifies that, in 2008, he received advice from a leading Canadian tax law firm to channel his beneficial ownership in BD Agro, also a Serbian company, to Cyprus. At the time, he allegedly also had beneficial ownership in Obnova, but apparently the same tax motive did not apply to it, since his beneficial ownership of Obnova was channelled through Cyprus only in 2012, again allegedly for tax purposes.[949] Since Mr Rand also testifies that he structured all his investments in Serbia in the same way via beneficial ownership,[950] it is suspicious to see that tax reasons applied to the transfer of ownership over BD Agro to Cyprus in 2008, but only in 2012 for Obnova. This indicates that something other than taxes must have been the motive behind the 2012 restructuring. The approaching dispute with Serbia over Obnova's alleged property rights, and considering that Mr Rand was highly sophisticated investor, suggests that the real motive for the restructuring was to gain investment protection.
- 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 restructuring.[951] One important consideration in the abuse of process context is whether there was "*any fresh economic investment arising out of the restructuring that would advance the purposes of the Treaty*".[952] In the present case, there was none.

543. Claimants point out that the restructuring in 2012 also involved other Serbian companies controlled by Mr Rand,[953] but this does not provide any additional details about the motive for the restructuring. It may well be that Mr Rand wished to gain treaty protection

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948 Witness statement of Mr. William Archibald Rand dated 23 February 2024, paras 2-4.

949 Witness statement of Mr. William Archibald Rand dated 23 February 2024, paras 33-34.

950 Witness statement of Mr. William Archibald Rand dated 23 February 2024, para 11.

951 Counter-Memorial, para 376.

952 *Lao Holdings N.V. v. The Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6), Decision on Jurisdiction dated 21 February 2014, **CL-086**, para 79 (quoting *Phoenix Action Ltd v The Czech Republic)*

953 Reply, para 673.

for his investments in all these companies, although only with respect to Obnova there was a dispute looming.

544. In conclusion, Claimants have provided no convincing evidence of the motive for the restructuring, since they have provided no documentary evidence in this regard, while the testimonies of Mr Rand and Mr Broshko should not be accepted. Claimants have failed to rebut Respondent's submission that the restructuring of Mr Rand's beneficial ownership in Obnova was for the purpose of gaining treaty protection.

545. Respondent's submission that the principal purpose of the restructuring was gaining treaty protection is based on cogent facts. Mr Rand was a very sophisticated investor, who was likely to be aware of the benefits of investment treaty protection. In the *Alverley* case, this was the main consideration that led the tribunal to conclude that Alverley conducted restructuring in order to obtain BIT protection.[954] Likewise, Mr. Rand must also have been aware that his investment in Obnova did not enjoy such protection until the restructuring. At the same time, there were documented differences about property entitlements over the Dunavska Land and Objects between Obnova and Respondent's authorities. The process of adoption of the 2013 DRP was under way and, as will be further discussed below, early in that process Dunavska Land was identified as a location for the public transportation terminal. Although Obnova formally approached the City in 2008 with its "Initiative" to remove the location elsewhere, this was to no avail.[955] In such circumstances, a reasonable, let alone highly-sophisticated, investor would consider all options to protect his investment, and this is what Mr Rand did. Therefore, the restructuring was conducted for the purpose of gaining protection under the Cyprus-Serbia BIT.

b) <u>Foreseeability of the dispute</u>

546. As already mentioned, Respondent's Counter-Memorial outlined a series of facts which by themselves, and taken together, pointed to an emerging dispute with Serbia concerning Obnova's alleged property rights over the Dunavska Land and Objects.[956] These facts deserve to be repeated:

- In March 2003, Obnova unsuccessfully sought to be inscribed in the Cadastre Books as the holder of the right of use over the Objects.

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954 *Alverley Investments Limited and Germen Properties Ltd v. Romania* (ICSID Case No. ARB/18/30), Award dated 16 March 2002, **RL-007**, paras 439-441 and 451.

955 Letter from Obnova to City of Belgrade from 27 March 2008, **C-314**. For more, see next subsection.

956 Counter-Memorial, paras 494-495.

- Obnova's Privatisation Program from July 2003 stated that Obnova had no land in its ownership nor the right of use over any construction land,[957] had only temporary construction permits for some objects in Dunavska 17-19, and did not have any documents proving its right of use over other objects.[958]
- 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.[959]
- Obnova's request for legalization of the Objects was denied in 2004.
- On 6 March 2006, the City of Belgrade adopted the Decision on the drafting a Detailed Regulation Plan for the area where the Dunavska Plots were located,[960] which was published in the Official Gazette of the City of Belgrade and in the media.[961]
- After it learned that the City of Belgrade envisaged a public transportation 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.*"[962]
- Obnova filed new requests for legalization in 2010, which were still pending when the restructuring took place in 2012.
- In 2011, the City of Belgrade was inscribed as the owner of the land at Dunavska 17-19.[963]

547. This evidence shows that, at the time of the restructuring in 2012, it must have been clear to Mr Rand and the Cypriot Claimants that the process of adoption of the DRP designating the bus loop in Dunavska 17-19 was under way. At the same time, Respondent's authorities had consistently and repeatedly refused to recognize Obnova's (unsupported)

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957 Privatisation Program, **R-046**, pp 7-8 (of PDF).

958 Privatisation Program, **R-046**, pp 7-9 (of PDF).

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

960 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**.

961 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** and Article 13 thereof.

962 Memorial, para 78. Letter from Obnova to City of Belgrade from 27 March 2008**, C-314**.

963 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**.

property claims over the Dunavska Plots and the Objects, but instead reconfirmed the City of Belgrade's property rights over these properties.

548. Incredibly, Claimants submit that none of this matters at all. They alleged that the 2003 Registration of the City's right of use and the 2011 registration of the ownership "did not herald a future dispute".[964] Obviously, Claimants try to underplay the accuracy and importance of the Cadastre inscriptions, but no reasonable owner would sit tight if someone else were inscribed as the owner on their property (or holder of some property entitlement). In other words, a reasonable investor, let alone a sophisticated one, would have had concerns and would have reacted.

549. Claimants further submit that the pages in Obnova's Privatization Program to which Respondent referred did not state that Obnova had no land in its ownership nor the right of use over any construction land.[965] However, Claimants could easily establish that this is only a citing error, because this information is stated several pages earlier in the Privatization Program.[966]

550. In this context, Claimants also argue that Obnova's request for legalization in 2004 was not rejected but ignored. This is inaccurate, because other evidence shows that the rejection decision was transmitted to Obnova in 2004.[967] In any case, Obnova could not have succeeded with any of its requests for legalization because it did not supply any evidence of its ownership over the Objects, as required. Significantly, Obnova did not even initiate court proceedings to establish its alleged ownership before it submitted its new request for legalization in 2010.[968] Without a final court decision establishing its alleged ownership rights, Obnova could not obtain legalization of the Objects.

551. Finally, Claimants provide their own interpretation of events leading to the adoption of the 2013 DRP, but this interpretation is at odds with contemporaneous documents. Claimants accept that Obnova learnt in 2008 that a new bus loop would be placed in Dunavska 17-19.[969] Claimants describe this as "rumours", but the information was apparently sufficiently credible for Obnova to approach the City on 28 March 2008 with a formal

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964 Reply, para 681.

965 Reply, para 682.

966 Privatisation Program, **R-046**, pp 6-7 (of PDF).

967 Counter-Memorial, paras 219-222.

968 Counter-Memorial, paras 223-230.

969 Reply, para 687.

submission called "Initiative for the amendment of the Belgrade general urban plan". Obnova's request was formulated as follows:

> *You are hereby kindly requested to relocate the tram turnaround and to adapt the land to the development land in order for the business facilities to be built.*[970]

552. This text reveals that public transportation terminal had already been envisaged at what Obnova calls "our land complex" at cadastre parcels nos. 47 and 39/1 and this was the reason why Obnova approached the City. It is also noteworthy that Obnova stated that it used the land parcels in question on the basis of a *lease* (which Claimants now dispute).[971]

553. According to Claimants, the City issued a binding "instruction" to the Urban Planning Institute in response to this communication "*to consider Obnova's rights"*.[972] However, the substance of the Belgrade's Secretariat for Urban Planning and Construction communication to the Urban Planning Institute was not an instruction to "consider Obnova's rights", as Claimants aver. As can be seen from the text of its communication, which Claimants omit in the Reply,[973] the Secretariat simply forwarded Obnova's "initiative" to the Urban Planning Institute and asked the latter to *consider* its merits.[974] The Secretariat did not take *any* position concerning Obnova's property rights.

554. As far as the Urban Planning Institute is concerned, it apparently did not consider that Obnova's "Initiative" had any merit and proceeded with locating the bus loop in Dunavska. This was to be expected since Obnova did not provide any evidence of its alleged property entitlements, but instead enclosed its lease agreements.[975] It is also significant that subsequently Obnova remained completely passive and expressed no interest

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

971 Letter from Obnova to City of Belgrade from 27 March 2008, **C-314**. For more on this, see above paras 38-44.

972 Reply, para 688.

973 Reply, paras 271-274 and 687-689.

974 Letter from City of Belgrade to Secretariat for Urban Planning and Construction from 23 April 2008, **C-315** (resubmitted) ("*In view of the above, attached with the letter, we submit the subject initiative for the purpose of evidencing and considering its justifiability in the course of forming a solution within the aforementioned Draft of the plan*.").

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

whatsoever in what happened with its "Initiative". It did not even participate in the public inspection of the draft DRP.[976]

555. Obviously, Claimants interpretation of the City's communication as an instruction to take into consideration Obnova's "rights" is a blatant manipulation of its text. Accordingly, there is no basis whatsoever for Claimants' conclusion that "*no reasonable investor would objectively foresee that the City would subsequently disregard those very rights when it adopted the 2013 DRP*".[977] The truth of the matter is that the City did not take any position on Obnova's "Initiative".

c) <u>Claimants' argument about the passage of time between the restructuring and treaty claims does not hold</u>

556. Finally, Claimants argue that, even if the dispute were foreseeable in April 2012, the Tribunal must take into account that ten years have passed between the restructuring and Claimants' initiation of this arbitration.[978] Claimants invoke *Levi de Levi v. Peru* to argue that the passage of time indicates that the restructuring was not abuse of process. In that case, the tribunal concluded that it was impossible to determine that the assignment of shares was an attempt to "manufacture" ICSID jurisdiction, taking into account that five years had passed between the assignment and the resort to ICSID arbitration.[979]

557. However, the passage of time was just one of the factors that the tribunal took into account in *Levi de Levi v. Peru*. In that case, Mr Levy Pesso assigned his shares to his daughter without charge, but the tribunal did not regard this as sufficient evidence to prove abuse, first, because the transfer occurred between close family members and, second, because five years had passed between the transfer and arbitration.[980]

558. As noted by the *Averley* tribunal, the passage of time is not decisive because "*each case has to be considered on its own facts*". Accordingly, the tribunal did not consider that the passage of time between the restructuring in 2011 and the commencement of arbitration

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976 Counter-Memorial, para 181.

977 Reply, para 688.

978 Reply, paras 691-696.

979 Reply, para 693.

980 *Renee Rose Levy de Levi v. Republic of Peru* (ICSID Case No. ARB/10/17), Award of 26 February 2014, **CL-124**, para 154.

proceedings in 2018 was an obstacle to finding that Averley's claim was an abuse of process.[981]

559. In the present case, the transfer of shares between Mr Obradović and Kalemegdan was effected without any consideration being paid or additional investment being made, while Claimants have not submitted any documentary evidence of any ostensible purpose of the restructuring. Given that there was a clear difference in views about Obnova's property entitlements or such difference was emerging, all this points to the conclusion that Mr Rand, as an experienced investor and lawyer, had in mind the objective of gaining treaty protection, of which he could avail himself as and when necessary. The passage of time between the restructuring and initiation of the present arbitration does not change this conclusion.

II. Mr Broshko's investment was an abuse of process

560. In the Counter-Memorial, Respondent demonstrated that requirement of good faith and the doctrine of abuse of process are not limited to the restructuring context and may apply in comparable contexts such as third-party acquisitions of an investment, as was recognized by the tribunal in the *Cascade Investments* case.[982] In view of Mr Broshko's connection with Mr Rand and his role in overseeing Mr Rand's investments in Serbia, as well as the fact that a dispute with Respondent was clearly foreseeable in 2017, Mr Broshko's investment in Obnova was an abuse of process.[983]

561. Claimants dispute both the value and applicability of the *Cascade Investments* award to the present case, and also argue that Mr Broshko's acquisition of shares in Obnova does not raise any special circumstances that could point to an abuse of process.[984]

562. The *Cascade Investments* award, which contains a comprehensive and valuable discussion of international arbitral practice concerning abuse of process, is clearly relevant to the present case. This award, although redacted, clearly states that because Cascade's investments were not *bona fide* transactions, the claimant's attempt to seek protection

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981 *Alverley Investments Limited and Germen Properties Ltd v. Romania* (ICSID Case No. ARB/18/30), Award dated 16 March 2002, **RL-007**, para 443.

982 Counter-Memorial, para 506.

983 Counter-Memorial, Section D.II.2.

984 Reply, paras 697-709.

under the BIT and ICSID Convention "*constitute[d] an abuse of process*".[985] Accordingly, Claimants' contention that it is impossible to see what were the grounds for dismissal does not hold.[986]

563. Claimants also argue that the *Cascade Investments* tribunal specifically confirmed that arm's length transactions do not give rise to an abuse of process. This is inaccurate, as can be seen if one considers the pronouncement of the tribunal in full. Regrettably, Claimants quote only the beginning:

> *Of course, in a true arm's-length sale of an existing investment for fair value, there generally will be no reason to suspect that the acquiror is not acquiring the investment for normal business purposes…*[987]

564. However, Claimants disregard the rest of this passage:

> *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 suspicious circumstances.*[988]

565. This part, which directly contradicts Claimants' contention, accepts the possibility that the good faith of an acquirer may be doubted even in an arm's length transaction if the evidence is "sufficiently unusual".

566. Claimants also attempt to distinguish *Cascade Investments* on the ground that this case concerned a transaction which was part of a broader scheme aimed at gaining international treaty protection for the assets owned by the Gülenist movement in Turkey, arguing that these were the "suspicious circumstances" that the tribunal in that case had in mind.[989] This may very well be, but it is inapposite in the present case. Here, Respondent relies on a general approach and general pronouncements of the *Cascade Investments*

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985 *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award dated 20 September 2021, **RL-123**, para 444.

986 Reply, para 698.

987 *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award dated 20 September 2021, **RL-123**, para 354 (emphasis added), quoted in Reply, para 699.

988 *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award dated 20 September 2021, **RL-123**, para 354 (emphasis added), not quoted in the Reply.

989 Reply, paras 703-708.

tribunal quoted above about "sufficiently unusual" evidence as to raise concerns about the *bona fides* of a transaction, in which case "*it remains appropriate for a tribunal to consider the suspicious circumstances*".[990]

567. Claimants then point out that the *Cascade Investments* tribunal did not consider that making an investment in risky circumstances means that the investment was made in bad faith.[991] However, while one should consider that foreseeability of an imminent dispute at the time of investment also constitutes a risk, there are other suspicious circumstances surrounding Mr Broshko's investment which indicate an abuse of process, as well.

568. Claimants dispute this and state that Mr Broshko made his investment independently from Mr Rand, as they both confirmed.[992] However, as already discussed, testimony of persons with interest in the proceedings should be taken with great reserve and accepted only exceptionally, if it goes against their interests or contentions in the proceedings.[993]

569. It is undisputed that Mr Broshko, who is Mr Rand's employee, was managing Mr Rand's investments in Serbia, including Obnova, at the same time when he acquired his shares. This raises the suspicion that Mr Broshko made his investment in pursuance of Mr Rand's interests and/or in concert with him. Indeed, Prof Lepetić concluded that Mr Broshko acted in concert with Mr Rand as a matter of the Serbian Law on Takeover.[994] The fact that Mr Broshko acted on behalf of, or in concert with, Mr Rand shows that Mr Broshko's investment was "*simply a rearrangement of assets within a family*".[995]

570. Further, as already discussed in the Counter-Memorial, another suspicious circumstance was that he was clearly aware of the dispute with Respondent when he invested in Obnova in 2017.[996]

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990 *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4), Award dated 20 September 2021, **RL-123**, para 354, quoted in the Reply, para 703.

991 Reply, paras 700-701.

992 Reply, para 714.

993 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, **RL-231**, para 70.

994 Legal Opinion-Prof Jelena Lepetić-Counter-Memorial-ENG dated 29 September 2023, **RLO-3**, para 74.

995 *Phoenix Action, Ltd v. The Czech Republic* (ICSID Case No. ARB/06/05), Award dated 15 April 2009, **RL-043**, para 140.

996 Counter-Memorial, paras 509-513.

571. Finally, through Mr Broshko's investment in Obnova, Mr Rand, as a Canadian national and purported beneficial owner, obtained treaty protection under the Canada-Serbia BIT for his investment in Obnova, which is something that Mr Rand could not have attained at the time of the 2012 restructuring since this treaty came into force only on 27 April 2015.[997] This indicates that the motive for Mr Broshko's investment was to gain (additional) investment treaty protection under the Canada-Serbia BIT for Mr Rand's purported beneficial ownership, without Mr Rand having to prove his beneficial ownership and its eligibility for treaty protection, or to even appear as the investor.

572. Claimants argue that investment tribunals have concluded that no evidence of abuse exists when there was a material passage of time between investment and arbitration.[998] As discussed above,[999] Claimants invoke only one case to support this contention, *Levi de Levi v. Peru*, but even in that case the tribunal considered the passage of time only as a supplemental element in the analysis of other factors (family relations, no payment of consideration). At the same time, in *Alverley v. Romania*, the passage of five years between the investment and initiation of arbitration – similar to the case of Mr Broshko – was not considered an obstacle to finding an abuse of process.

573. Moreover, as in *Alverley*, investment of Mr Broshko was preceded by a number of legal and court proceedings concerning the property in question, thus "*[a]dvance planning therefore made every sense*".[1000]

574. Finally, Claimants argue that the dispute was not foreseeable at the time Mr Broshko acquired his investment.[1001] In this regard, Claimants repeat their mantra that Mr Broshko's claim is based solely on the 2021 refusal of the Land Directorate to compensate Obnova, which they allege was not foreseeable at the time of the investment.[1002] They further allege that his claim is not connected to any of the legal and court proceedings concerning the Dunavska Plots and Objects initiated by Obnova, which were pending at the time of Mr Broshko's investment.[1003]

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997 UNTS, vol 3313, No. 55911 (2019), **RL-115**.

998 Reply, para 721.

999 See above paras 556-559.

1000 *Alverley Investments Limited and Germen Properties Ltd v. Romania* (ICSID Case No. ARB/18/30), Award dated 16 March 2002, **RL-007**, para 444.

1001 Reply, para 716.

1002 Reply, para 718.

1003 Reply, para 720.

575. All this, of course, is completely unconvincing. As the person who managed Mr Rand's investments, including Obnova, Mr Broshko was intimately familiar with disagreements over property rights, as well as about legal proceedings, between Obnova and Respondent's authorities concerning Dunavska Plots and Objects,[1004] and he informed Mr Rand about this matter.[1005]

576. Respondent has already in detail discussed what needs to be foreseeable in the context of abuse of process.[1006] In short, there is no requirement that a specific treaty dispute be foreseeable by the investor. Rather, it is sufficient that *some* adverse state measure against the investment, which might give rise to a treaty claim, is reasonably foreseeable by the investor. It is clear that Mr Broshko was aware that Obnova might not receive compensation if its property claims concerning the Dunavska Plots and Objects failed, primarily because Obnova's property claims at that point in time depended on administrative (legalization) and court (determination of property rights) proceedings where a losing party does not receive any compensation.

577. In conclusion, Mr Broshko's investment involved a number of suspicious circumstances and was acquired when a dispute with Serbia over Obnova's entitlement to compensation over the 2013 DRP was clearly foreseeable. Accordingly, his claims in the present proceedings should be declared inadmissible due to of abuse of process.

[1004] Mr Broshko testifies: "*I did not need to conduct any due diligence because I had been overseeing Obnova for Mr. Rand for five years before the purchase. As noted above, Mr. Markicevic had continuously kept me informed about all relevantdevelopments in Serbia—including developments related to Obnova.*" Witness statement of Mr. Erinn Bernard Broshko dated 23 February 2024, para 43.

[1005] See e.g., Email communication between Mr Broshko and Mr Rand dated 8 September 2014, **C-338**, p 3 (of PDF), in which Mr Broshko provides a detailed report to Mr Rand on the status of Obnova's property. See also Witness statement of Mr. Erinn Bernard Broshko dated 23 February 2024, paras 32-38.

[1006] See above paras 517-518.

E. Merits

I. Serbia did not unlawfully expropriate Claimants' investment

578. Respondent's Counter-Memorial demonstrated that Serbia has not expropriated the Cypriot Claimants' investment because:

- Obnova never held property rights allegedly interfered with, so the question of expropriation does not even arise;
- The adoption of the 2013 DRP was a legitimate regulatory measure, not expropriation;
- In any event, the high threshold for indirect expropriation has not been met;

579. In the Reply, Claimants argue that the Obnova acquired ownership over the Objects as well as the rights of use and conversion over the Dunavska Plots, in accordance with Serbian law; that the 2013 DRP precluded Obnova from reasonable exploitation of its alleged property, thereby amounting to an indirect expropriation of the Cypriot Claimants' investment; and that Serbia's expropriation of the Cypriot Claimants' investment was unlawful.

580. In the following, Respondent will demonstrate that:

- Obnova did not have any property rights over the Dunavska Plots and Objects (**Section 1.**)
- Even if Obnova acquired the property rights in question (*quod non*), the 2013 DRP did not amount to indirect expropriation (**Section 2.**)
- In any case, the adoption of the 2013 DRP was a lawful regulatory measure (**Section 3.**)

1. Obnova did not have any property rights that were allegedly interfered with

581. Claimants do not dispute that expropriation presupposes the existence of property rights under national law at the time it occurs.[1007] However, Claimants have changed their formulations as to which specific property rights allegedly held by Obnova were expropriated.

[1007] Counter-Memorial, paras 525-530.

582. In the Memorial, they state that "*Serbia indirectly expropriated Obnova's property and rights*…",[1008] specifying that

> *The fact that Obnova did not own the land at Dunavska 17-19 at the time of the adoption of the 2013 DRP, <u>but only had the right of use convertible into ownership</u> does not change anything. Investment arbitration tribunals have repeatedly held that expropriation included not only forced transfers of title, but also other types of interference with property or rights of investors.*[1009]

583. For this reason, Respondent's Counter-Memorial refuted Claimants' contention that

> *Obnova had "the right of use [of the land] convertible into ownership", which was frustrated by the adopting of 2013 DRP that prevented the conversion and, consequently, the use of the premises for commercial and residential development.*[1010]

584. In the Reply, Claimants have changed the formulation of their expropriation claim, alleging that in addition to the right of use of the land, Obnova's ownership of the Objects was expropriated:

> *[…], at the time when Serbia adopted the 2013 DRP, Obnova: (i) was the owner of its buildings at Dunavska 17-19 and 23; and (ii) had the right of use over the land at Dunavska 17-19 and 23, which could be converted into ownership. It is undisputed that the ownership right, as well as the right of use over the land, qualify as property rights under Serbian law.*[1011]

585. The Parties are in dispute as to whether Obnova acquired ownership over the Objects and the right of use convertible over the Dunavska Plots. Respondent has demonstrated in the Counter-Memorial and above that Obnova did not acquire the property rights in question.[1012] In the present section, Respondent will summarize its position with regard to each of the property rights purported by Claimants and will also respond to their comments concerning these rights in the context of expropriation.

[1008] Memorial, para 197 ("*Serbia indirectly expropriated Obnova's property and rights when it adopted the 2013 DRP and, thus, prevented Obnova from using and/or selling its premises for commercial and residential development"*)

[1009] Memorial, para 209 (emphasis added).

[1010] Counter-Memorial, para 522.

[1011] Reply, para 728.

[1012] See above paras 169-176.

a) <u>Obnova does not have ownership over the Objects</u>

586. In the Counter-Memorial, Respondent demonstrated that Obnova never had ownership or the right of use over the Objects, either before or after its privatization in 2003:

- *Objects at Dunavska 17-19 for which construction permits had been issued:* Obnova only had the right of temporary use of these Objects, which ceases to exist once the owner of the land requests removal of the objects. Further, this right could not be converted into the permanent right of use, because there was no legislation allowing for such conversion.[1013]
- *Objects at Dunavska 17-19 and 23 which were built without construction permits*: Obnova could not have acquired any rights over such Objects, which must be demolished.[1014]
- Since Obnova did not have any right of use over the Objects, no such right could be converted into ownership at the time of Obnova's privatization in 2003.[1015]
- Obnova's requests for legalization of some Objects were initially denied in 2004, many years before the 2013 DRP, while Obnova's subsequent requests for legalization submitted in 2010 and 2014 did not provide evidence of the main requirement for legalization – proof of ownership.[1016]

587. Obnova initiated court proceedings in order to establish its ownership over the Objects at Dunavska 17-19 and 23 but failed.[1017] Two proceedings concerning Dunavska 17-19 were completed. In the first proceeding, Obnova's request for determination of ownership over the Objects allegedly constructed on the basis of construction permits for construction of temporary objects was denied by a final court decision after appeal.[1018] In the second proceeding, Obnova's request for determination of ownership over 11 Objects allegedly constructed without construction permits was considered withdrawn because

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[1013] Counter-Memorial, para 98.

[1014] Counter-Memorial, para 100.

[1015] Counter-Memorial, para 101.

[1016] Counter-Memorial, paras 224-230, 234.

[1017] Counter-Memorial, paras 127-139.

[1018] Decision of the Court of Appeal in Belgrade no. Gž 6171/22, 7 December 2023, **C-503**. Obnova filed revision petition against this decision with the Supreme Court of Serbia, which is an extraordinary remedy, but the decision of the Court of Appeal remains final in law pending decision of the Supreme Court in the revision proceedings.

Obnova failed to appear at the hearing.[1019] The one court case concerning the Objects at Dunavska 23 is still pending on appeal, after the first instance court denied Obnova's request.[1020]

588. In this Arbitration, Claimants do not raise any objections about the conduct of these court proceedings, nor do they allege any violations of their treaty rights in this regard. In fact, Claimants do not even mention the Court of Appeal's decision concerning Dunavska 17-19; only their experts deal with it.[1021]

589. The final court decision in the case concerning determination of Obnova's ownership over Objects at Dunavska 17-19 built on the basis of construction permits for construction of temporary objects is of particular significance in the present case. Obnova's purported ownership over these Objects forms the backbone of Claimants' claim that they can convert their right of use over the land at Dunavska 17-19 into ownership.[1022] If Obnova does not own the Objects, then conversion is not possible.

590. One consequence of the court's denial of Obnova's claim for a declaration of ownership over these Objects was that the *registered* ownership of the City of Belgrade was confirmed by a final court decision. This also means that Obnova can no longer claim to have unregistered ownership over these Objects.[1023] Since Obnova's request for a declaration of its alleged ownership over the Objects built with construction permits for construction of temporary objects at Dunavska 17-19 was filed against the City of Belgrade and the Republic of Serbia,[1024] the final court decision denying Obnova's request constitutes *res judicata* among these parties.[1025]

[1019] Decision of the Higher Court in Belgrade, P. no. P 5844/2019 from 21 July 2021, **R-089**

[1020] Decision of the Higher Court in Belgrade, P. no. 5457/19 from 5 March 2024, **R-160**.

[1021] Zivkovic Milosevic Second ER, paras 117-125. However, Prof Jotanovic disagrees with Claimants' experts and considers that the reasoning of the Court of Appeal was correct, Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, paras. 40-41.

[1022] Memorial, para 83 ("*The conversion process was introduced exactly to address this situation and allow privatized companies, such as Obnova, to acquire ownership over the land on which buildings owned by these companies were built.*); **Zivkovic-Milosevic** First ER, paras 50 ("*privatized companies could apply for conversion of all the land necessary for the regular use of the buildings*").

[1023] Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para 17.

[1024] Decision of the Court of Appeal in Belgrade no. Gž 6171/22, 7 December 2023, **C-503**.

[1025] Articles 359-360 of the Law on Civil Procedure, **R-207**.

591. The Tribunal should defer to the decisions of Serbian courts concerning Obnova's property rights over the Dunavska Objects, particularly to the final decision of the Court of Appeal in Belgrade, for the following reasons:

- There is long-standing international practice holding that international courts and tribunals should interpret and apply national law in accordance with domestic jurisprudence.
- Claimants have not raised any complaint about the conduct of these proceedings or that the outcome was manifestly unjust, nor do they raise any concern about denial of justice.

592. International courts and tribunals have consistently held that they should interpret and apply national law in accordance with the decisions of domestic courts. As explained by the PCIJ:

> *Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.*
>
> *It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case. If the Court were obliged to disregard the decisions of municipal courts, the result would be that it might in certain circumstances apply rules other than those actually applied; this would seem to be contrary to the whole theory on which the application of municipal law is based.*[1026]

593. This approach has been widely adopted by international investment tribunals.[1027] As stated by the tribunal in *Helnan v. Egypt*:

> *When, as in the present case, a domestic tribunal has ruled on an issue of domestic law which subsequently has to be considered by an ICSID Tribunal,*

[1026] *Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France (France v. Brazil)*, Judgment, 1929 P.C.I.J. (ser. A) No. 21, 12 July 1929, **RL-232**, p 124 (emphasis added); also, see, *Case Concerning the Payment of Various Serbian Loans Issued in France (France v. Kingdom of the Serbs, Croats and Slovenes)*, Judgment, 1929 P.C.I.J. (ser. A) No. 20, 12 July 1929, **RL-233**, pp 46-47.

[1027] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* (ICSID Case No. ARB (AF)/97/2), Award dated 1 November 1999, **RL-234**, para 97; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan* (ICSID Case No. ARB/07/14), Excerpts of the Award dated 22 June 2010, **RL-235**, paras 430-431; *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad*

> *the ICSID Tribunal will have to take into account that the task of applying and interpreting domestic law lies primarily with the courts of the host country.*[1028]

594. The *Helnan* tribunal then pointed out that investment tribunals are not courts of appeal on issues of domestic law:

> *Instead, the Tribunal will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice."*[1029]

595. The tribunal in *Arif v. Moldova* took a similar approach:

> *This Tribunal cannot and should not act as a court of appeal of last resort. Under these circumstances, it does not consider appropriate to decide on Claimant's "specific undertakings" claim to the extent it implies analysing ex novo the validity of these instruments under Moldovan law. This issue has already been decided by the Moldovan courts.*[1030]

596. The position that domestic court decisions on issues of domestic law should not be re-examined unless they are manifestly unjust or deficient is particularly justified in the context of expropriation. This is because expropriation presupposes the existence of property rights under domestic law, which must be established with reference to the domestic law.[1031] In this context, decisions of national courts are an indispensable tool for establishing content of domestic property law.

Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan (ICSID Case No. ARB/13/38), Award dated 14 December 2017, **RL-236**, paras 361-363.

[1028] *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19), Award dated 3 July 2008, **RL-237**, para 105. See also *Marion Unglaube v. Republic of Costa Rica*, Award (ICSID Case No. ARB/08/1), Award dated 16 May 2012, **CL-009**, para 253; *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23), Award dated 8 April 2013, **CL-031**, para 398; *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/13/38), Award dated 14 December 2017, **RL-236**, para 354.

[1029] *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19), Award dated 3 July 2008, **RL-237**, paras 105-106.

[1030] *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23), Award dated 8 April 2013, **CL-031**, para 398.

[1031] Z. Douglas, *The International Law of Investment Claims* (Cambridge, 2009), **RL-037(a)**, p 52; Counter-Memorial paras 525-530.

597. In the present case, there are two Serbian court decisions denying Obnova's requests for recognition of ownership of the Objects. Claimants have not raised any treaty claims concerning these court proceedings, nor do they allege any substantial deficiencies that could give rise to concerns about denial of justice. Accordingly, the Tribunal should accept and follow these decisions, which confirm that Obnova (i) does not have property rights with regard to the Objects built with permits for construction of temporary objects in Dunavska 17-19, and (ii) does not have property rights with regard to the six Objects in Dunavska 23. In addition, Respondent has demonstrated that Obnova also does not have any property rights over the other Objects at Dunavska Plots, because these Objects were built without any permits.[1032]

b) <u>Obnova does not have a right of use over the Dunavska Plots which is convertible into ownership</u>

598. In the Counter-Memorial, Respondent demonstrated that:

- Obnova never had the right of use over the Dunavska Plots;[1033]
- Obnova's right to conversion was never recognized by the Serbian authorities;[1034]
- Obnova failed to fulfil the main precondition for conversion, which is to have the right of use over the Dunavska Plots inscribed in the Cadastre;[1035]
- In any case, as the public interest exception to conversion also applies in the case of the Dunavska Plots, conversion is not possible for this reason as well; and
- At the time of the alleged expropriation, conversion was not in fact possible in Serbia.[1036]

599. Claimants deny that conversion into ownership was conditional upon recognition by the relevant state authority.[1037] They further argue that Obnova acquired the right of use over the Dunavska Plots land "*decades before*" the adoption of the 2013 DRP, which they claim is the only reason preventing Obnova from converting its right of use over the

[1032] See above pp 27-41.

[1033] Counter-Memorial, Section B.V.

[1034] Counter-Memorial, Section B.VIII.1.

[1035] Counter-Memorial, Section B.VIII.2.

[1036] Counter-Memorial, Section B.VIII.3.

[1037] Reply, para 733.

Dunavska Plots into ownership,[1038] and challenge the cases relied on by Respondent which support its position that a right that has never been acquired or a claim that is conditional cannot be expropriated. As Respondent will explain below, neither of these arguments is correct.

aa) Conversion was conditional upon fulfilment of legal requirements and did not occur *ex lege*

600. Claimants argue that Obnova acquired the right to convert its right of use over the land into ownership *ex lege* in 2009, without any need for a decision by the Serbian authorities.[1039]

601. This is inaccurate. Article 103 of the 2009 Law on Planning and Construction expressly provides that conversion was a possibility ("*right of use **may** be converted into right of ownership*"),[1040] which was effected through a decision of the authorities upon the request of a legal entity.[1041] The law also established a right of appeal against a conversion decision, which implies that the decision could be negative.[1042] All this shows that Obnova never "*acquired the right to convert its right of use over the land into ownership* ex lege"[1043] but rather that a holder of the right of use (which Obnova was not) had the right to seek conversion and to have its right of use over construction land converted into ownership by a decision of the authorities, if it satisfied the appropriate legal requirements.

602. One such requirement was that the privatized entity in question must be inscribed as the holder of the right of use over the land.[1044] According to Claimants' experts Messrs. Zivkovic and Milosevic, this was only a "*formality*", "*a procedural requirement in the conversion procedure*" and not a condition for acquiring the right of conversion as

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[1038] Reply, paras 734-737.

[1039] Reply, paras 733-744.

[1040] 2009 Law on Planning and Construction, Official Gazette of the Republic of Serbia, Nos. 72/09 & 81/09, **C-021-SRB**, Article 103(1).

[1041] 2009 Law on Planning and Construction, Official Gazette of the Republic of Serbia, Nos. 72/09 & 81/09, **C-021-SRB**, Article 103(3).

[1042] 2009 Law on Planning and Construction, Official Gazette of the Republic of Serbia, Nos. 72/09 & 81/09, **C-021-SRB**, Article 103(4).

[1043] Reply, para 733.

[1044] Counter-Memorial, paras 240-241; Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023**, RLO-001**, para 111.

such.[1045] However, as Prof Jotanovic explains, inscription in the Cadastre is a *conditio sine qua non* for conversion and cannot be regarded as a mere formality.[1046]

603. In this context, it should be recalled that the inscription as the holder of the right of use of land depends on the recognition of the right of ownership, or the right of use, of the objects on the land in question, which must be attained through either a court decision or an administrative decision "legalizing" the objects. This means that a company, such as Obnova, which is not inscribed as the holder of the right of use of land must first attain a positive decision on the merits of its request to be recognized as the owner, or the holder of the right of use, of the objects on the land in question. Only then may it request to be registered as the holder of the right of use of the land and thereafter seek conversion.[1047] This multi-step process can hardly be regarded as a formality. Claimants are well-aware of this, since Obnova unsuccessfully tried and failed to obtain recognition of its ownership of the Objects both in court and administrative proceedings.[1048]

604. There is yet another legal requirement which was relevant for conversion and applied at the time the 2013 DRP was adopted. The right of use over land could not be converted into ownership if the land in question was designated for the construction of objects in the public interest and surfaces for public use (the so-called public interest exception).[1049] As Prof Jotanovic notes, the public interest exception applied not only to land that was declared for public use at the time this exception was introduced in 2011, but also to the land designated for public use by *subsequent* planning documents.[1050] Messrs. Zivkovic and Milosevic do not take issue with his conclusion.

605. It should also be noted that the effect of the "public interest exception" was not to expropriate the right of use of land, which its holder continued to exercise, but only to exclude the possibility of its conversion into ownership.

[1045] Zivkovic-Milosevic Second ER, paras 149 and 152.

[1046] Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para 88.

[1047] Counter-Memorial, paras 545-547.

[1048] Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, paras 16-17 & 82; Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 98-99, 103-105.

[1049] Law on Planning and Construction (Official Gazette of the RS, Nos. 72/2009, 81/2009, 64/2010, 24/2011), **C-102**, Article 103(7); Zivkovic Milosevic ER-1, para 56.

[1050] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 117.

606. As this inherent limitation to the right to conversion was introduced in 2011, before the Cypriot Claimants made their investment,[1051] they should have been aware of its implications, especially given that Obnova had known since March 2008 that the City was considering placing a public transportation terminal on the Dunavska Plots.[1052] Claimants fail to address this important limitation of the right of conversion and its effect in the context of expropriation.

607. Further, Claimants and their experts take issue with Prof Jotanovic's opinion that the right of conversion did not effectively apply between 2013 and 2015 due to the rulings of the Constitutional Court and the 2014 amendments to Law on Planning and Construction.[1053] While they argue that the right to conversion was not abolished as such, they fail to explain how could it be possible for anyone to convert the right of use into ownership with a fee, if it was not possible to calculate the fee in the first place.[1054]

608. In any case, Claimants' argument is refuted by a decision of the Administrative Court of Serbia, which confirms that conversion was not possible in 2013.[1055]

609. On the basis of the above, it is evident that Obnova never acquired any property rights over the Dunavska Plots and Objects that Claimants now invoke in the context of expropriation. Obnova also never satisfied the basic requirements for conversion (inscription of its right of use over the Dunavska Plots in the Cadastre and that the land in question was not designated for public use). Equally important is the fact that Obnova's alleged right of conversion has never been recognized by the authorities. In fact, Obnova has never even applied for conversion, despite Claimants' contention that Obnova had the right to apply for conversion since 2009 (until the 2013 DRP was adopted).[1056]

[1051] The provision in question was introduced in 2011 and was in force until 2023, see Counter-Memorial, para 548, note 746, para 555.

[1052] Letter of Obnova to City of Belgrade dated 27 March 2008, **C-314**.

[1053] Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, paras 118-121; Counter-Memorial, para 552.

[1054] Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para 90.

[1055] Decision of the Administrative Court in Belgrade no U 7501/14, 15 March 2016, **R-126**, pp 1, 3 (of PDF).

[1056] Reply, para 47.

bb) Claimants fail to distinguish *Gosling* and *Kopecky* which remain relevant for the present case

610. Claimants take issue with Respondent's reference to the decisions in *Gosling and others v Mauritius* and *Kopecky v Slovakia* in support of the position that a right that has never been acquired (*Gosling*) or a claim that is conditional (*Kopecky*) cannot be expropriated.

611. Claimants argue that unlike the claimant in *Gosling*, Obnova had already acquired and exercised property rights with respect to the premises in Dunavska 17-19 and 23 when the expropriatory measure was adopted.[1057] First, as has been extensively discussed throughout this submission, Obnova has never acquired property rights over the Dunavska Plots and the Objects. Second, even assuming that Obnova had ownership over the Objects and the right of use of the Dunavska Plots (*quod non*), its claim to conversion would remain subject to legally prescribed requirements and a favourable decision of the authorities. In that sense, the position of Obnova and, by extension Claimants, is similar to that of the claimants in *Gosling*, where the issuance of an investment certificate was required for further development of claimants' development project in Mauritius, and was conditional upon submission of further documentation and decision of the Board of Investment. In the end, no investment certificate was issued, and claimants did not acquire development rights, so the tribunal dismissed their claim for indirect expropriation. [1058]

612. In *Kopecky*, the applicant's "*restitution claim was a conditional one from the outset"* and his compliance with the statutory requirements was to be determined in court proceedings.[1059] In the same way, Obnova's claim to conversion depends on fulfilment of certain conditions, which would be determined in legal proceedings. Had the competent municipal authority determined that Obnova satisfied the requisite legal conditions for conversion of the right of use into ownership over certain land, it would have issued a decision to that effect and calculated the conversion fee.[1060] As can be seen, both Mr Kopecky's restitution claim and Obnova's conversion claim have not been recognized as property rights under the applicable national law. The only difference is that Mr Kopecky met most (but not all) requirements for his restitution claim and filed his request, while

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[1057] Reply, para 742.

[1058] *Thomas Goslieng and others v Republic of Mauritius* (ICSID Case No. ARB/16/32), Award dated 14 February 2020, **RL-136**, paras 229-230 & 242.

[1059] *Kopecky v Slovakia [GC]*, no 44912/98, ECHR 2004-IX dated 28 September 2009, **RL-137**, para 58.

[1060] Judgment of the Administrative Court no. 9U7501/2014 dated 15 March 2016, **R-126**, p 1 (of pdf), para 1 of the reasoning.

Obnova does not fulfil any of the legal requirements for conversion and has not filed any request.

613. Of course, it does not take much to realize that the approach of the European Court of Human Rights, as embodied in *Kopecky*, is similar to the approach taken in international investment law, where the initial step in an expropriation context is to determine whether a property entitlement exists under national law, as in *Gosling*.

614. Fully aware that *Kopecky* is the case in point, Claimants argue that jurisprudence of the European Court of Human Rights ("**ECHR**") is irrelevant because it deals with human rights, and that investment tribunals have cautioned against its use in interpretation of investment treaties.[1061] Only one of the investment decisions referred to by Claimants may be relevant for this contention, but is clearly distinguishable.

615. In *Firemen's Fund Insurance Company v Mexico*, the tribunal outlined elements of definition of expropriation, among which it mentioned proportionality between means employed and the aims sought to be realized. In a footnote, the tribunal mentioned that this factor was relied upon by *Tecmed* and was used by the ECHR, but that "*it may be questioned whether it is a viable source of interpreting Article 1110 of the NAFTA*".[1062] Clearly, the tribunal did not exclude but only questioned the relevance of the ECHR jurisprudence in the expropriation context and did so with respect to a confined issue of proportionality. In the present context, the issue is different and concerns establishing property entitlements as a prerequisite for expropriation. In that context, the ECHR approach is relevant and should be taken into account, since the ECHR has followed a similar approach towards establishing existence of property entitlements as investment tribunals. Finally, in the present case both States parties to the Cyprus-Serbia BIT are also parties to the European Convention on Human Rights and for this reason the Tribunal constituted under the Cyprus-Serbia BIT should not ignore the ECHR jurisprudence.

616. As far as other cases invoked by Claimants are concerned, they do not support their contention that the ECHR jurisprudence is irrelevant in the investment treaty context. In *St-AD GmbH v Bulgaria*, the tribunal did not address impact of the ECHR jurisprudence on interpretation of investment treaty rights at all, but commented that it could not see the relevance of claimant's complaints under the European Convention on Human Rights

[1061] Reply, paras 743-744.

[1062] *Fireman's Fund Insurance Company v United Mexican States* (ICSID Case No. ARB(AF)/0201), Award dated 17 July 2006, **CL-126**, para 176(j).

because they all had been found inadmissible.[1063] In *Spyridon Roussalis v Romania*, the tribunal also did not address the question of impact of the ECHR jurisprudence on interpretation of investment treaty rights. Rather, it refused to consider obligations under the European Convention on Human Rights invoked by claimants, because it considered that the BIT offered higher and more specific level of protection.[1064]

617. In contrast to what Claimants argue, references to the European Convention on Human Rights and the ECHR jurisprudence in the context of expropriation have been common in international investment law. For example, in the context of the salient point that existence and scope of property rights is to be determined with reference to municipal law, a leading commentary, with reference to *Kopecky*, mentions that the same approach has been adopted in the ECHR jurisprudence.[1065]

2. The 2013 DRP did not amount to indirect expropriation

618. In the Counter-Memorial, Respondent argued that, even assuming that Obnova had some property entitlements over the Dunavska Plots and Objects, the applicable standard for an indirect expropriation was not met, since Claimants failed to show any substantial deprivation of their investment. In particular, Obnova still uses the properties in question, while the economic value of Obnova's purported rights has not been destroyed.[1066] In other words, Obnova continues to use the Dunavska Plots and Objects in the same way it used them before the alleged measure.

619. In this context, Claimants argue that arbitral decisions Respondent referred to [1067] are inapposite in the present case, because in those cases, unlike in the present one, "*the claimants were not deprived of the control, use or future development of their investment*."[1068] Claimants' attempts to dispute the relevance of these decisions must fail, since they were

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[1063] *ST-AD GmbH v Bulgaria* (PCA Case no. 2011-06 (ST-BG), Award on Jurisdiction dated 18 July 2013, **RL-101**, para 264.

[1064] *Spyridon Roussalis v Romania* (ICSID Case No. ARB/06/1), Award of 1 December 2011, **CL-127**, para 312. Here, the Reply wrongly refers to para 322 of the award, Reply, para 744, note 848.

[1065] Z. Douglas, *The International Law of Investment Claims* (Cambridge, 2009), **RL-037(a)**, p. 52. See also *Continental Casualty Company v The Argentine Republic* (ICSID Case no. ARB/03/09), Award of 27 August 2008, **RL-238,** para 181, note 270, and para 277; *Burlington Resources Inc v Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Reconsideration and Award dated 7 February 2017, **RL-239**, para 330.

[1066] Counter-Memorial, paras 595-602.

[1067] Counter-Memorial, paras 590-594.

[1068] Reply, para 758.

not relied upon because of their factual similarity with the present case, but for their pronouncements discussing elements of the international standard of indirect expropriation. On the basis of this caselaw, Respondent's Counter-Memorial identified certain factors that tribunals have seen as prerequisites for finding indirect expropriation and discussed whether they obtain in the present case:

- **A total or at least substantial interference with investor's property rights**.[1069] This was not the case here, since Obnova continues to use the Dunavska Plots and Objects as it did before, which amounts to its factual control over these premises (since Obnova has no property rights over them).[1070]
- **An interference with the control or use of the investment**.[1071] Obnova remains in control of, and uses, the Dunavska Land and Objects.[1072]
- **Almost complete deprivation or destruction of the value of the investment**.[1073] The value of Obnova's real estate in the period from 2012 to 2021 has not substantially decreased nor has it been "annihilated".[1074]

620. In the Reply, Claimants take issue with Respondent's conclusions that there was no deprivation of Obnova's property rights over the Dunavska Plots and Objects or loss of use or control. In particular, Claimants argue that Obnova cannot develop its premises and

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[1069] *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability dated 3 October 2006, **CL-006**, para 200 ("*severe deprivation of [investor's] rights with regard to its investment*"); *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15), Award dated 31 October 2011, **RL-144**, para 245 ("*at least one of the essential components of the property rights must have disappeared for an expropriation to have occurred"*)

[1070] Counter-Memorial, 595-597.

[1071] *Venezuela Holdings B.V et al v The Bolivarian Republic of Venezuela* (ICSID case No. ARB/07/27), Award of 9 October 2014, **RL-153**, para 286. *Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina Sociedad Anonima v. The Argentine Republic* (ICSID Case No. ARB/04/16), Award dated 10 April 2013, **RL-145**, para 828. Control and use of the investment may also be viewed as being part of what is regarded as investor's rights with regard to its investment, whose deprivation is necessary for indirect expropriation, see *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15), Award dated 31 October 2011, **RL-144**, para 245.

[1072] Counter-Memorial, para 595 and note 803.

[1073] *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc v. Argentine Republic* (ICSID Case No. ARB/02/1 *) Decision on Liability dated 3 October 2006* , **CL-006**, para 200 ("*almost complete deprivation of the value of [the] investment*"); *Sempra Energy International v Argentine Republic* (ICSID Case No. ARB/02/16) Award, **CL-044**, para 285.

[1074] Counter-Memorial, paras 599-600.

was deprived of its ability to reasonably exploit the economic potential of the property. They also argue that Obnova's use of its premises is limited to having access to them.[1075] As will be discussed immediately below, Claimants are wrong. And quite tellingly, Claimants fail to show any evidence according to which the value of Obnova's rights has allegedly suffered a substantial reduction in value between 2021 and 2021.

a) <u>Ability to reasonably exploit the economic potential of a property arises from the property rights held by the investor</u>

621. In the Reply, Claimants reiterate their reliance on *Santa Elena v Costa Rica*, *Unglaube v Costa Rica* and *Metalclad v Mexico* to argue that the adoption of the 2013 DRP "*effectively freezes of blights Obnova's ability to reasonably exploit the economic potential of the property and, thus, represents an indirect expropriation*".[1076]

622. At the outset, it should be recalled that these cases are clearly distinguishable from the present set of facts, because the claimants in them, unlike Obnova, had the property rights they claimed were expropriated.[1077]

623. Moreover, when relying on these cases, Claimants omit that the economic potential of a property for an investor is based, and depends, on the rights that the investor has with respect to this property. As the tribunal in *Pope & Talbot* remarked, an expropriation usually implies a "*removal of the ability of an owner to make use of its economic rights*".[1078] It is for this reason that the ability of the owners in *Santa Elena* and *Unglaube* to use and exploit the economic potential of their properties in the period after expropriatory measures and pending payment of compensation was deemed to be "frozen". Formally, they were still the owners but, due to the expropriatory measures, they were not able to develop the properties as owners would. Similarly, the investor's Mexican

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[1075] Reply, para 753. Claimants seem to be contradictory on this issue, as elsewhere they imply that Obnova is using the land ("*Claimants have never claimed that Obnova cannot longer use its premises*", Reply, para 751) but also that Obnova is not using it ("*In those cases, unlike in the present case, the claimants were not deprived of the control, **use** or future development of their investment*." Reply, para 758). However, Obnova not only has access to the premises, it also leases the premises at Dunavska 17-19, which is not disputed between the Parties. For avoidance of doubt, this lease is unauthorized, since Obnova is not the owner of the property or the holder of the right of use.

[1076] Reply, para 753.

[1077] Counter-Memorial, para 537.

[1078] S. *D. Myers Inc. v. Government of Canada*, Partial Award dated 13 November 2000, **RL-267**, para 283, also favourably cited by *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15), Award dated 31 October 2011, **RL-144**, para 245.

company in *Metalclad* would have been able to exploit the economic potential of its right to operate a hazardous waste landfill, on the basis of the rights it *had* on the land and the licences that *were* granted to it, but for the municipal government's illegal refusal to issue the construction permit.[1079] Importantly, this analysis also applies to conditional property claims, such as the claim to conversion. As discussed above, they also do not qualify as property rights capable of being expropriated.

624. As discussed above, Obnova *does not have* the property rights over the Dunavska Plots and Objects. Even had Obnova had conditional property claims, they also would not have had the economic potential that can be "reasonably exploited" or "frozen" by an expropriatory measure.

625. This is confirmed by *Eskosol v Italy*, which concerned the removal of certain state price incentives available to producers of solar energy, but not yet granted to the claimant:

> *At best, Eskosol might argue that it was well positioned to eventually secure legal rights, but nothing in the Italian legislation transformed positioning to secure a future legal right into a legal right as such. And absent any established right that was abrogated by Government interference, the fact that Government conduct may have impacted a company business plan does not itself amount to expropriation, even if the end result ultimately is that the company was unable to survive financially.*[1080]

626. As will be in more detail discussed in the next subsection, Obnova would not have been able to develop any economic potential of the Dunavska Plots and Objects on the basis of non-existing rights or the claims that have never been recognized.

b) The 2013 DRP did not "freeze" the economic potential of the Dunavska Plots and Objects

627. Claimants' case is that Obnova has been prevented from "*reasonably exploiting the economic potential*" of the Dunavska Plots and Objects, because:

> *The 2013 DRP expressly precluded any kind of development on Obnova's premises, stripped Obnova of its right to convert its rights of use over the land at Dunavska 17-19 and 23 to ownership and prevented Obnova from*

[1079] *Metalclad Corporation v United Mexican States*, (ICSID Case No. ARB(AF)/97/1), Award dated 30 August 2000, **CL-011**, paras 106-107.

[1080] *Eskosol S.p.A. v Italian Republic* (ICSID Case No. ARB/15/50), Award dated 4 September 2021, **RL-241**, para 472 (emphasis added).

legalizing certain buildings at Dunavska 17-19 and most of the buildings at Dunavska 23.[1081]

628. Each of these claims about effect of the 2013 DRP on Obnova's purported rights will be refuted separately because: the 2013 DRP did not strip Obnova of its right to conversion which it did not have (**Section aa))**; did not preclude development on Obnova's premises because Obnova could not develop them in any case (**Section bb)**); and Obnova's buildings could not be legalized in any case (**Section cc)**).

aa) 2013 DRP did not preclude conversion of Obnova's right of use

629. While it is true that the existence of the 2013 DRP would have precluded the conversion of a right of use over the Dunavska Plots, Obnova did not fulfil the main requirements for the conversion anyway. As has been already discussed above,[1082] Obnova did not have the right to convert Dunavska Plots into private ownership because (i) it never acquired the right of use over the land; (ii) it was not inscribed as the holder of the right of use in the Cadastre which is one of the requirements for conversion; (iii) its right to conversion was never recognized by the authorities; (iii) conversion was not possible due to public interest exception (adoption of the 2013 DRP); (iv) conversion was not in fact possible in Serbia in 2013.[1083] Therefore, the 2013 DRP did not preclude the conversion and it is inaccurate that the 2013 DRP "*stripped Obnova of its right to convert its right of use over the land*" into ownership.[1084]

630. Tellingly, Obnova in fact never even filed a request for conversion, either before or after the adoption of the 2013 DRP, although the Law on Planning and Construction provided that a privatized company may apply for conversion.[1085]

[1081] Reply, paras 749-750. It should be noted that Claimants have reformulated what constitutes expropriation in the present case. In the Memorial, Claimants stated that, by the adoption of the 2013 DRP, Respondent "*prevented Obnova from using and/or selling its premises for commercial and residential development*", Memorial, para 197.

[1082] See above paras 201-206.

[1083] See above paras 201-206.

[1084] Reply, para 749.

[1085] 2009 Law on Planning and Construction, Official Gazette of the Republic of Serbia, Nos. 72/09 & 81/09, **C-021-SRB**, Article 103(1).

bb) The 2013 DRP did not preclude Obnova's development of the Dunavska Plots and Objects because Obnova did not have the right to develop them

631. Claimant's main claim is that Obnova cannot develop the Dunavska Plots and Objects due to the adoption of the 2013 DRP.[1086] However, the development of the Dunavska Plots and Objects was not possible both before and after the adoption of the 2013 DRP. As discussed in the Counter-Memorial, a privatised company which was the holder of the right of use over construction land could not develop the land unless it first converted its right of use into private ownership.[1087] This was because no construction was possible without a construction permit. In turn, submission of proof of ownership (or lease) over the land was necessary for the issuance of the permit.[1088] Claimants do not contest this.

632. Without conversion, the land remained in public (state) ownership; while a privatised company could use the land, it could not develop it. The adoption of a planning document, such as the 2013 DRP, did not change anything in this regard. The scope and modality of the privatised company's right over the land (to use it) remain the same until the planning document is implemented.

633. Therefore, Obnova's development of the Dunavska land depended on whether this land was converted into Obnova's ownership. To put it differently, the only source of Obnova's purported entitlement to develop the land could be its private ownership over it, acquired through conversion.

634. As discussed above, Obnova never applied for conversion, never obtained a decision on conversion by the relevant authority and, indeed, never fulfilled the requirements for conversion, regardless of the 2013 DRP. Due to all this, the 2013 DRP could not have an expropriatory effect on the investment. Finally, and in any case, the public interest exception, i.e, unavailability of conversion due to the designation of the land for public use in a planning document was an inherent limitation to the right to conversion, so for this reason, as well, the 2013 DRP could not have an expropriatory effect.

[1086] Reply, para 700.

[1087] There is a limited exception to this rule, which is not applicable in the present case, see 2009 Law on Planning and Construction, Official Gazette of the Republic of Serbia, Nos. 72/09 & 81/09, **C-021-SRB**, Article 103(5); Counter-Memorial, para 596.

[1088] See 2009 Law on Planning and Construction, Official Gazette of the Republic of Serbia, Nos. 72/09 & 81/09, **C-021-SRB**, Article 135(1)(3) & Counter-Memorial, para 596.

cc) Obnova would not be able to legalize its Objects regardless of the 2013 DRP

635. Claimants also argue that the 2013 DRP prevented Obnova from legalizing certain Objects at the Dunavska Plots. However, Claimants omit that Obnova's requests for legalization of some Objects were initially denied in 2004, many years before the 2013 DRP. While Obnova's subsequent requests for legalization submitted in 2010 and 2014 were denied with reference to the 2013 DRP, the requests would have been rejected in any event because Obnova did not provide evidence of its ownership, which is the main condition for legalization.[1089]

636. In conclusion, considering all the above, the 2013 DRP, as the expropriatory measure alleged by Claimants, could not have and did not have expropriatory effect in the circumstances of the present case.

3. The measures complained of are legitimate and non-expropriatory

637. Claimants' case is that Serbia breached Article 5(1) of the Cyprus-Serbia BIT, having unlawfully expropriated its alleged property rights over the Dunavska Plots and Objects. As demonstrated in the Counter-Memorial and previously in this chapter, Article 5(1) does not even come into play in the present case because (i) Obnova, and by extension Claimants, do not have the property rights capable of being expropriated by the 2013 DRP; (ii) in any event, the 2013 DRP does not have an expropriatory effect, so there was no indirect expropriation.

638. In this Section, Respondent will address the question of whether the 2013 DRP was a legitimate regulatory action and will discuss the applicable international legal standard (**Section a)**) and its application in the present case (**Section b)**)

a) The applicable international standard for legitimate exercise of regulatory powers

639. As Respondent discussed in the Counter-Memorial, it has been widely accepted that a measure which is (i) taken *bona fide* in public interest and (ii) non-discriminatory does not constitute an expropriation.[1090] This rule of international law applies in the present case for two reasons: (i) the Tribunal is bound to decide the case in accordance with the Cyprus-Serbia BIT and "the applicable rules of international law", as provided in Article 9(4) of the BIT, and (ii) the BIT, as an international treaty, must be interpreted in light

[1089] Counter-Memorial, paras 224-230 & 234.

[1090] Counter-Memorial, paras 557-561.

of "*any relevant rules of international law applicable in relations between the parties*", as provided in Article 31(3)(c) of the VCLT.[1091]

640. Claimants do not directly take issue with these two conclusions. In the Reply, they focus solely on the question of whether the 2013 DRP was adopted in public interest, which is just one element of the standard, and to this they add the requirement of proportionality.[1092] However, unlike the above identified requirements, proportionality is not universally accepted as a requirement for characterization of a measure as a legitimate non-expropriatory exercise of regulatory powers.[1093] In fact, the cases invoked by Claimants in this context are largely inapposite, because only two cases Claimants refer to considered proportionality as a requirement in the context of non-expropriatory regulatory measures.[1094] In any case, in the context of its discussion of the 2013 DRP as a *bona fide* measure in public interest (**Section b)aa)(iii)**), Respondent will demonstrate that the 2013 DRP was also a proportionate measure.

641. Moreover, Claimants argue that even if the 2013 DRP was adopted in public interest, it "*would not change the fact that Serbia has failed to satisfy the remaining conditions*" from Article 5 of the Cyprus-Serbia BIT.[1095] This shows that Claimants' approach is oblivious to the fact that if the 2013 DRP meets the accepted requirements for a non-expropriatory measure, then the requirements for expropriation from Article 5 do not even come into play.

[1091] Counter-Memorial, para 562-563.

[1092] Reply, para 767 note 878.

[1093] *Saluka Investments B.V. v The Czech Republic* (UNCITRAL), Partial Award dated 17 March 2006, **CL-063**, para 255; *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); *Chemtura Corporation v Government of Canada* (UNCITRAL), Award dated 2 August 2010, **RL-139**, para 266.

[1094] *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic* (ICSID Case No. ArB/14/32), Award dated 5 November 2021, **RL-174**, para 351. In *PL Holdings*, it was not in dispute whether proportionality applies as part of applicable and EU law, *PL Holdings S.A.R.L v Republic of Poland*, SCC Case No V2014/163, Partial Award, 28 June 2017, **CL-128**, paras 20, 248-250; Reply, paras 767-768, notes 878-879. The *Tecmed* tribunal considered regulatory actions and measures as being expropriatory acts, see *Técnicas Medioambientales Tecmed, S.A. v United Mexican States* (ICSID Case No. ARB (AF)/002/2), Award, 29 May 2003, **CL-017**, para 122.

[1095] Reply, 766.

b) The 2013 DRP is a legitimate, non-expropriatory measure

642. Contrary to Claimants' allegations, the 2013 DRP satisfied the requirements for a legitimate non-expropriatory measures, because it was adopted *bona fide* in public interest (**Section aa)**) and was not discriminatory (**Section bb)**).

aa) The 2013 DRP was adopted *bona fide* in public interest

643. Claimants do no dispute that adoption of a zoning regulation such as the 2013 DRP is a matter of public interest. What they dispute is the designation of the Dunavska Plots as the location of the public transportation terminal.[1096]

644. In the Counter-Memorial, Respondent demonstrated that the placing of the public transportation terminal at the cadastre parcel no. 47 was a *bona fide* measure taken in public interest, which was fully justified by the relevant authorities.[1097] The City had made this choice of location after an eight year long process involving a careful analysis, internal discussions between the various City departments and public companies, including the City's public transportation company, and, finally, the public inspection of the draft 2013 DRP. The Dunavska Plots were identified as one of two best locations for placing the trolleybus loop as early as 2006,[1098] and then as the best location for what became the planned public transportation terminal (both bus and trolleybus) in 2007.[1099] Ownership of the land and costs involved were among the factors taken into account by the City, and on both counts the Dunavska Plots were the front-runner.[1100]

645. Tellingly, during the whole process of drafting and adoption of the 2013 DRP (2005-2013), Obnova never raised the issue of its purported ownership or the right of use over the Dunavska Plots with the relevant planning authorities. Only once, in 2008, it had approached the City's Secretariat for Urban Planning, with the "Initiative" to change the designated location from the Dunavska Plots, but even on that occasion identified itself

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1096 Memorial, para 216; Counter-Memorial, para 566.

1097 Counter-Memorial, paras 172-181 & 569-574

1098 Analysis for suitability of the locations for organizing trolleybus terminus in Dorcol dated January 2006, **R-101**, pp 18-19 (pdf).

1099 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 (pdf).

1100 Analysis for suitability of the locations for organizing trolleybus terminus in Dorcol dated January 2006, **R-101**, pp 18-19 (pdf).

as the lessor and provided its lease agreements as proof of interest in the matter.[1101] Apart from this one instance, Obnova had remained completely passive for years and even failed to raise any objections to the draft 2013 DRP in the public inspection procedure

646. In response, Claimants (again) argue that the 2013 DRP was allegedly adopted in breach of Serbia's own laws because it was non-compliant with a higher-level plan; that Serbia failed to show the necessity of choosing Dunavska Plots as the location; that the public inspection procedure was non-transparent; and, finally, that Obnova could not challenge the 2013 DRP once it was adopted. These arguments do not withstand scrutiny. As demonstrated below, the 2013 DRP was compliant with the 2003 General Plan and other relevant planning documents (**Section (i)**), the placing of the public transportation terminal at Dunavska Land had sufficient justification (**Section (ii)**), and was a proportional decision (**Section (iii)**), while Obnova and Claimants had a meaningful opportunity to challenge the 2013 DRP but never used it (**Section (iv)**).

(i) The 2013 DRP was compliant with 2003 General Plan and other relevant planning documents

647. As Respondent has demonstrated, there was no contradiction between the 2013 DRP and the "higher" zoning plans, such as 2003 General Plan.[1102] In particular, the "planned land use" (commercial zone in case of cadastre parcels 47 and 39/1) did not mean that the land in question had to be exclusively used for that purpose. Rather, the planned use had to occupy at least 50% of the land (i.e. be predominant). Claimants accept this approach but argue that the drawings from the planning documents show that the public transportation terminal is planned "on more than 60%" of the block on which it is located.[1103] This is incorrect, as demonstrated above.[1104]

648. In any case, evidence reveals that the planning authorities acted with due diligence in the choice of location, because the issue of the predominant use of the land was raised – and resolved – during preparation of the 2013 DRP. In 2008, the City Secretariat for Urbanism issued its "findings" related to the draft of what would become the 2013 DRP. In this document, the Secretariat raised the issue of the predominant purpose and its compatibility with the planned public transportation terminal and concluded that the proposed

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[1101] Letter from Obnova to Secretariat for Urban Planning from 27 March 2008 with attachments, **R-174.**

[1102] Counter-Memorial, paras 160-170; above paras 222 and following.

[1103] Reply, para 299.

[1104] See above para 231.

solution was in accordance with the 2005 General Plan.[1105] The issue of compatibility was also mentioned in the 2006 study concerning location of the trolleybus loop.[1106] Notably, Obnova never raised the issue of alleged incompatibility until this Arbitration.

649. Claimants are also wrong to argue that the alleged incompatibility between zoning plans is a "*breach of Serbia's own laws*".[1107] This is inaccurate. As Claimants are well aware, the Constitutional Court of Serbia concluded that the question of (in)compatibility between zoning plans is a technical question resolved by the experts[1108]

(ii) The placing of the public transportation terminal on Dunavska Plots had sufficient justification

650. Claimants also attempt to challenge the studies prepared in the process of selecting the location for the public transportation terminal and allege that they do not show that it was necessary to place the public transportation terminal on the Dunavska Plots because there was a more suitable location in the selection.[1109] Further, Claimants argue that Serbia failed to show why it was necessary to place the public transportation terminal on the Dunavska Plots rather than other locations considered, or on the City premises (bus depot) across the street.[1110] This is baseless.

651. As explained above, Claimants misinterpret the studies prepared in the process of selection of locations for public transportation terminal. The conclusion of the 2006 Analysis was clear:

> *Based on the conducted analyzes and evaluation of the locations from the aspects of various criteria, it follows that the favorable locations for the construction of the trolleybus terminus are location 2 and location 3 [Dunavska Plots].*
>
> *Location 2 could be singled out as the most favorable, because there are no spatial restrictions for the construction of the terminus, a good spatial*

[1105] Letter from Secretariat for Planning and Construction no. 350.1-35/2007 dated 22 April 2008, **C-590**.

[1106] Analysis for suitability of the locations for organizing trolleybus terminus in Dorcol dated January 2006, **R-101**, pp 11,14 (of PDF).

[1107] Reply, para 770.

[1108] Decision of the Constitutional Court IUO 875/2010 dated 24 February 2011, **C-645**, p 5 (of PDF); Reply, para 781 ("*The Constitutional Court would not assess the contents of the plan or its compatibility with higher plans.*").

[1109] Reply, para 773.

[1110] Reply, para 771.

integration is achieved and there is the possibility of expansion deeper in the block.[1111]

652. As can be seen, the study considered Dunavska Plots as equally favourable as another location, and only in the second step it ventured to carefully state that another location "could be" singled out ("*bi se mogla izdvojiti"*) due to its possibility of expansion. However, it should also be noted that the Dunavska Plots had better rankings than another location in terms of ownership (the other location was in part privately owned) and the cost of development.[1112]

653. One year later, a study prepared by the public transportation company of Belgrade focused on the Dunavska Plots only, which shows that the stakeholder directly concerned with the location, and with most expert knowledge about its selection, opted for Dunavska Plots.[1113] Claimants argue that this document does not seem to be a study at all, because it did not compare different locations.[1114] However, this is inapposite, because the point is that this document *studied* the location in question, explained why it was selected, and provided specifics about the planned public transportation terminal.[1115] This also shows that the decision to place the terminal on the Dunavska Plots was reasonable and supported by valid arguments.

654. In this context, it should be recalled that the standard for legitimate non-expropriatory measures is that they are taken in good faith (which is undisputed) and "*can be justified as permissible regulatory actions*".[1116] The studies conducted in 2006 and 2007 provide sufficient justification for placing the public transportation terminal on the Dunavska Plots and this is more than sufficient to considered the 2013 DRP as permissible regulatory action.

[1111] Analysis for suitability of the locations for organizing trolleybus terminus in Dorcol dated January 2006, **R-101**, p 19 (of PDF).

[1112] Analysis for suitability of the locations for organizing trolleybus terminus in Dorcol dated January 2006, **R-101**, pp 15-16 (of PDF).

[1113] 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**.

[1114] Reply, para 774.

[1115] 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). The same explanation is included in the 2013 DRP. See 2013 DRP, **R-098**, p 5 (of PDF).

[1116] *Saluka Investments B.V. v The Czech Republic* (UNCITRAL), Partial Award dated 17 March 2006, **CL-063**, para 265.

655. Similarly, as regards Claimants' argument about the bus depot across the street from the Dunavska Plots, the documents show that the existing bus depot was never considered as a location for a public transportation terminal.[1117] Moreover, as both the Dunavska Plots and the bus depot were – and are – owned by the City, the planning authorities would be, in any case, free to choose which location best satisfied the need for a public transportation terminal.

656. Finally, Claimants' argument about the rezoning of the bus depot for residential and commercial purposes in 2015 is misplaced. This rezoning occurred after the treaty breach invoked by Claimants (i.e. the 2013 DRP).[1118]

(iii) Proportionality

657. Claimants have failed to demonstrate that proportionality is part of the international standard for legitimate non-expropriatory measures. In any case, the 2013 DRP's designation of the Dunavska Plots as the location for the public transportation terminal was a proportionate measure. As noted by the tribunal in *Casinos Austria*, quoted by Claimants, the measure must be "*proportionate* stricto sensu, *that is, that the benefit for the public of the measure in question stand in an adequate and acceptable relationship to the negative impact of the measure on the investment."* [1119]

658. In the present case, the benefit of the public transportation terminal is undisputed and well-documented, while the adoption of the 2013 DRP has not affected Obnova's use of the property; indeed they continue to use it. Claimants instead complain about the purported loss of the economic potential of the Dunavska Plots as well as their inability to convert Obnova's right to use into ownership and to legalize certain Objects, all allegedly due to the 2013 DRP.[1120] But as has been demonstrated above, the 2013 DRP could not have, and did not have, expropriatory effect alleged by Claimants.[1121] Therefore, the extent of deprivation caused by the 2013 DRP is non-existent.

[1117] Analysis for suitability of the locations for organizing trolleybus terminus in Dorcol dated January 2006, **R-101**, pp 17-19 (of PDF).

[1118] Counter-Memorial, para 572.

[1119] *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic* (ICSID Case No. ARB/14/32), Award dated 5 November 2021, **RL-174**, para 351.

[1120] Reply, para 750.

[1121] See above Section B.VI.

659. Notably, Obnova had ample opportunities to challenge the designation of the Dunavska Plots for the public transportation terminal, but chose to remain passive. Indeed, the authorities preparing and adopting the 2013 DRP were not aware, nor were they alerted by Obnova, that Obnova had claimed property entitlements over the land, but relied on the information from the Cadastre as accurate.[1122] Finally, the authorities conducted proper studies and provided sufficient justification for selecting the Dunavska Plots as the location of the public transportation terminal.

660. All this shows that Respondent's authorities acted in a proportionate manner when they adopted the 2013 DRP and designed Dunavska Plots, owned by the City, as the location of the planned public transportation terminal.

(iv) Claimants had a meaningful opportunity to challenge the 2013 DRP but failed to use it

661. Further, Claimants challenge the transparency and usefulness of the public inspection procedure, in which they failed to participate.[1123] This is unconvincing. Claimants argue that public inspection process of the draft 2013 DRP was advertised only in two "trashy tabloids".[1124] As explained above, these "tabloids" were among the most read and highest circulation newspapers at the time,[1125] and so the information about the public inspection process was published on a very wide scale.[1126] This clearly satisfied the purpose of the publication requirement – to inform the public about the draft DRP. But Obnova, its management and owners, either did not pay attention (as was the case with their due diligence) or deliberately refrained from getting involved.

[1122] Analysis for suitability of the locations for organizing trolleybus terminus in Dorcol dated January 2006, **R-101**, p 15 (of PDF).

[1123] Reply, paras 776-781.

[1124] Reply, para 786.

[1125] Kurir is the winner despite the foul play, 10 November 2012, **R-185**; In Serbia we have no competition! Informer is convincingly first - both the best-selling and most-read, 20 July 2016, **R-186**.

[1126] Claimants argue that "*no one actually learned about the public inspection process*" and provide a number of press articles in support, arguing that the residents protested later on, Reply, para 779, note 892. However, the press coverage in question concerns another matter – protests organized by people living in an area through which the trolleybus traffic would be directed if the trolleybus terminal is moved to Dunavska street, not the location of the public transportation terminal, see above paras 244-248.

662. Claimants also wrongly argue that once the 2013 DRP was adopted, Obnova had no effective means to dispute it.[1127] This is false. Obnova could have challenged the 2013 DRP after it was adopted, but simply did not bother to do so.[1128]

663. In this context, Claimants invoke a pronouncement of the Constitutional Court refusing to assess the compatibility of a planning document with higher level plans. This is misleading. The position of the Constitutional Court was that this was a technical question that had to be left to expert bodies. Moreover, the case in question concerned so-called initiative for assessment of constitutionality and legality of general legal acts, where natural and legal persons do not have the right to start procedure of assessment, but only submit an initiative to the court.[1129] However, Obnova would certainly be able to challenge individual measures adopted on the basis of the 2013 DRP and ultimately initiate the so-called constitutional complaint procedure.[1130] But it failed to do so as well.

bb) The 2013 DRP was not discriminatory

664. The Parties agree about international standard for discrimination, according to which discrimination exists when similar cases are treated differently without justification.[1131] Absence of discrimination is part of international standard for non-expropriatory measures, but is also a requirement under Article 5(1) of the Cyprus-Serbia BIT.

665. Claimants argue that Respondent acted in a discriminatory manner because "*it treated Obnova differently than other land owners in the area, whose land plots are not being converted into a bus loop*".[1132] First, as already explained, Obnova is not the owner of the Dunavska Plots and Objects, so its position cannot be compared to "*other land owners in the area*".

666. And even if Obnova had the rights that Claimants purport it has, it would still be necessary to *identify similar cases* - other persons in a similar situation who were put in a better

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[1127] Reply, para 781.

[1128] It was possible for Obnova to request amendments of the 2013 DRP. This is, *inter alia*, evidenced by the court decision Claimants rely on, see Decision of the Supreme Court of Cassation Rev 17881/2022 dated 29 March 2023, p. 2, **C-507** ("*On December 16, 2016, the plaintiff submitted a request to amend part of the general urban plan related to the area where the disputed plot is located*").

[1129] Decision of the Constitution Court IUO 875/2010 dated 24 February 2011, **C-645**, p 1 (of PDF).

[1130] Constitution of the Republic of Serbia, **C-031**, Article 170.

[1131] Memorial, para 246, & Counter-Memorial, para 582, both referring to *Saluka Investments B.V. v The Czech Republic* (UNCITRAL), Partial Award dated 17 March 2006, **CL-063**, para 313.

[1132] Reply, para 793.

position than Obnova, without justification. Claimants argue that the requirement of identification does not exist and that discrimination exists when an aggrieved investor shows "*that similar situations are objectively treated differently to the investor's detriment*".[1133] However, Claimants forget that one must first identify a "similar situation" in order to compare it with investor's situation. This is precisely what Respondent pointed out in the Counter-Memorial.[1134]

667. As noted by the tribunal in *Pavlowski AG v Czech Republic*,

> *"[f]irst, an appropriate comparator must be identified, i.e., an investor which is in a situation similar to that of Claimants (or an investment which is in a situation similar to Claimants' investment in the Czech Republic)".*[1135]

668. In other words, Claimants would need to identify another investor or another investment in a similar situation, which includes showing that the investor or investments are in the same industry or sector as Claimants and have the same rights as they do, but have been treated more favourably.[1136]

669. In the present case, identification of a *similar case* at least requires identifying a person having similar purported property entitlements to what Claimants argue is Obnova's situation – having unregistered right of use over the land and unlegalized and unregistered ownership or the right of use over the objects on the land. Then Claimants must show that this person was treated *differently* than Obnova, for example, that a planning document took their rights into account when choosing location for a transportation terminal and did not locate the terminal on the land where that person purports to have property rights. In the third step, Claimants would have to show that this differentiation in the treatment between Obnova and another person was not justified.

670. Claimants only argue that they pointed to other owners of the land plots in the neighbourhood of Dunavska 17-19 and 23.[1137] In fact, Claimants have not pointed to any actual land owners in the area. In any case, even if they did so, this would be not sufficient to prove similarity of Obnova's situation with the situation of the "land owners in the area",

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[1133] Memorial, para 246, & Counter-Memorial, para 582, both referring to Saluka Investments B.V. v The Czech Republic (UNCITRAL), Partial Award dated 17 March 2006, **CL-063**, para 313.

[1134] Counter-Memorial, para 585.

[1135] *Pawlowski AG and Project Sever s.r.o. v Czech Republic* (ICSID Case No. ARB17/11), Award dated 1 November 2021, **RL-240**, para 534.

[1136] *Ibid.* para 536.

[1137] Reply, para 795.

because the latter are registered owners, whose property title is uncontested. In contrast, Obnova merely has, according to Claimants' own case, an unregistered right of use over the Dunavska Plots and unregistered ownership over the Objects. Therefore, a proper comparator would be a person holding the same set of rights.

671. Finally, Claimants allege that the justification for placing the public transportation terminal on the Dunavska Plots is inapposite, because it allegedly fails to explain why Respondent placed the public transportation terminal on Obnova's premises rather than on a different location that also satisfied the criteria, and point to the City's land across the street.[1138] Here, it should first be noted that it is difficult to discuss justification for differential treatment, without identifying a person in a similar situation. It has been seen that other owners in the neighbourhood are not in a similar situation to Obnova and this also applies to the state as the owner of the property "across the street".

672. Moreover, the State itself cannot be the comparator, because the alleged difference in treatment must concern investors and their investments. As well-regarded scholar of international law Prof Ursula Kriebaum notes:

> *… the case law of investment tribunals… considers different treatment of similar investments without reasonable justification as prohibited discrimination.*[1139]

673. This is confirmed by the text of the Cyprus-Serbia BIT, where the provisions dealing with differential treatment in the context of national and MFN treatment invariably indicate that these guarantees accord to investments "*treatment no less favourable than that accorded to investments of its own investors or investors of any third State*".[1140] There is no reason whatsoever why the prohibition of discrimination in Article 5 should be interpreted differently, to encompass the State party itself, which is clearly not an investor with an investment according to the terms of the Cyprus-Serbia BIT.

674. Therefore, Claimants' attempt to invoke the fact that the land "across the street" from Dunavska Plots is in state ownership is inapposite in the context of discrimination analysis.

[1138] Reply, para 797.

[1139] U. Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in M. Bungenberg et al, *International Investment Law*, C.H.Beck-Hart-Nomos, 2015, **RL-242**, pp 790, 802.

[1140] Cyprus-Serbia BIT, **CL-007a**, Articles 3(1) and 3(2).

4. The question of due process: Claimants had available remedies but failed to use them

675. In this section Respondent will refute Claimants' argument that Serbia has breached the due process requirement for expropriation set out in Article 5 of the Cyprus-Serbia BIT, while in the next **Section 5** it will address the treaty requirement for compensation (as it also did in the Counter-Memorial[1141]), although Respondent's denies that Article 5 is even applicable in the present case.

a) Due process standard under Article 5 of the Cyprus-Serbia BIT and international law

676. Claimants allege that Respondent failed to provide the Cypriot Claimants with due process in violation of Article 5 of the Cyprus-Serbia BIT because it never initiated expropriation proceedings.[1142]

677. It should first be recalled that Respondent's position is that Article 5 of the Cyprus-Serbia BIT does not apply, as Claimants have no property rights capable of being confiscated and/or the 2013 DRP was a legitimate non-expropriatory measure. However, even if Article 5 were applicable, Claimants would be wrong, because they misinterpret the treaty's due process standard. In any case, Obnova had ample opportunities to object to the 2013 DRP and initiate court proceedings in which, if successful (*quod non*), it would have been granted compensation.

678. The due process requirement provided in Article 5, paragraphs 1 and 2, of the Cyprus-Serbia BIT is set out as follows:

> *The expropriation shall be carried out under due process of law, on a non-discriminatory basis and against adequate compensation…*
>
> *The investor shall have the right, under the laws and regulations of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of the Contract Party, of his or its case and to the valuation of his or its investment in accordance with the principles set out in this paragraph.*

[1141] Hence, Claimants' remark that "*Serbia's only response [to their Article 5(1) of the Serbia-Cyprus BIT allegations] is that the 2013 DRP was adopted in public interest*", Reply, para 765, is not accurate.

[1142] Reply, para 782.

679. It is clear that the Cyprus-Serbia BIT contains a general requirement of due process in Article 5(1), which is then further specified in Article 5(2) as an additional guarantee of access to a court or an independent authority in case of expropriation.

680. The requirements in Article 5(1) and 5(2) do not indicate some specific or additional due process obligations but rather encompass what was regarded as a general requirement that:

> *…the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard.*[1143]

681. However, in this context Claimants propose a sweeping interpretation of the treaty requirement of due process which, in most part, is not supported either by the text of Article 5 or by international practice.

682. First, Claimants argue that Respondent was required to provide them with an opportunity to question the legality of expropriation,[1144] relying on the award in *SLSL v Bolivia*. However, Claimants fail to note that, unlike Article 5 of the Cyprus-Serbia BIT, the UK-Bolivia BIT invoked in *SLSL v Bolivia* expressly required the host state to provide investors with an opportunity to challenge the legality of expropriation.[1145]

683. Second, Claimants argue that any failure to comply with national expropriation procedures amounts to violation of the due process requirement.[1146] However, there is nothing in the Cyprus-Serbia BIT that supports this interpretation. Moreover, in *Tenaris v Venezuela*, quoted by Claimants, the tribunal based its decision on the fact that:

> *In this case, Venezuela had put in place a "tailor made" process, which Venezuela itself then chose not to follow.*[1147]

[1143] *ADC Affiliate Limited et al v Republic of Hungary* (ICSID Case No. ARB/05/22), Award dated 2 October 2006, **CL-03**, para 435.

[1144] Reply, para 782.

[1145] *South American Silver Limited v Bolivia* (PCA Case No. 2013-15), Award dated 22 November 2018, **CL-018**, para 581 ("*shall have the right to establish promptly by due process of law in the territory of the Contracting Party making the expropriation, the legality of the expropriation and the amount of the compensation…"*).

[1146] Reply, para 782.

[1147] *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal Lda v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/26), Award dated 29 January 2016, **CL-019**, para 492.

684. This clearly does not lend support to Claimants' sweeping proposition that *any* failure to comply with national expropriation procedure amounts to violation of international law or the Cyprus-Serbia BIT, because the violation in *Tenaris* was something else – a violation of the procedure put in place especially for the investor in question. In the present case, no "tailor-made process" was in place that Respondent's authorities failed to follow.

685. Claimants also rely on *Olin Holdings v Libya*, but this case also does not lend support for their sweeping proposition, because it concerned a grave violation of national law and "usurpation" of judicial powers by the local executive authority who decreed formal expropriation of investor's property.[1148] This is clearly different from the present case, which does not involve formal expropriation and where Claimants do not allege any grave violations of national law.

686. Claimants' reliance on *AIG Capital Partners v Kazakhstan* in this context[1149] is also inapposite, since in that case the tribunal linked the due process requirement with the lack of arbitrariness, quoting the ICJ's famous adage about "*an act which shocks or at least surprises a sense of juridical propriety*".[1150] Obviously, what is required for a violation of due process is a grave violation of national law, not just *any* violation as Claimants argue.

b) <u>Obnova failed to initiate court proceedings</u>

687. As Parties' experts agree,[1151] Serbian law provides two legal tracks for resolving compensation issues, both of which ultimately provide for a court review of claims related to expropriation and fully comply with Article 5 of the Cyprus-Serbia BIT. One is the procedure under the Law on Expropriation, another is the procedure in case of *de facto* expropriation.

688. Claimants insist that the procedure under the Law on Expropriation has not been initiated by Respondent's authorities and, on that basis, claim violation of due process requirements.[1152] However, Claimants deliberately neglect the opinion of their experts that there

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[1148] *Olin Holdings Ltd v Libya* (ICC Case No. 20355/MCP), Award dated 25 May 2018, **CL-020**, paras 171-172.

[1149] Reply, para 788.

[1150] *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v Republic of Kazakhstan* (ICSID Case No. ARB/01/6), Award of 7 October 2003, **CL-129**, para. 10.5.1, quoting ICJ, *Ellectronica Sicula (USA v Italy)*.

[1151] According to Claimants' experts, "*[a]ny expropriation conducted by Serbian authorities, both formal and* de facto, *is subject to several safeguard provided for in Serbian legislation*", Zivkovic-Milosevic First EO, para 237. Respondent's expert Prof. Jotanovic agrees, Legal Opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 128.

[1152] Reply, para 791.

are two legal tracks in the context of expropriation, and that there was another court procedure available to them. The latter procedure applies precisely in cases of *de facto* expropriation through adoption of an urban planning document that Claimants allege in the present case.

689. Obviously, Obnova could, but never did, initiate court proceedings claiming *de facto* expropriation. In other words, a judicial procedure envisaged by Article 5(2) of the Cyprus-Serbia BIT was available to Obnova, but it failed to use it.

690. Moreover, it would be absurd to expect Respondent's authorities to initiate a formal expropriation procedure in the situation where the allegedly expropriated property was inscribed as state ownership of the City of Belgrade.

c) <u>Obnova failed to object to the 2013 DRP</u>

691. In addition to Obnova's failure to initiate court proceedings in which it could claim *de facto* expropriation and seek compensation, Obnova failed to object to the 2013 DRP although it had ample opportunity to do so. As already discussed, Obnova had approached the authorities already in 2008 with the Initiative for the removal of the future location for public transportation terminal from Dunavska Plots.[1153] Obnova was clearly aware that the terminal was planned on the Dunavska Plots. But following its Initiative, Obnova fell silent and did not inquire about it. It also did not show any further interest in the procedure of adoption of the 2013 DRP which was obviously ongoing. In particular, it failed to submit any objections to the draft 2013 DRP.

692. Since Obnova was obviously aware of the projected location of the public transportation terminal already in 2008, its subsequent silence cannot be interpreted as anything else but deliberately passive approach instructed by its majority shareholder Mr Obradovic. The reason for this is unclear but it may well be that Mr Obradovic considered Obnova to be a mere lessee of the Dunavska Plots.[1154] Also, on Claimants' case, Mr Obradovic held the shares in Obnova for Mr Rand, as the beneficial owner. Therefore, in accordance with Claimants' case, Obnova's silence between 2008 and 2013 should be interpreted as having been instructed by Mr Rand and, from 2012 onwards, by the Cypriot Claimants.

693. Claimants make only two arguments in this regard. One is that public inspection process of the draft 2013 DRP was advertised only in two "trashy tabloids",[1155] but as discussed

[1153] Letter from Obnova to City of Belgrade from 27 March 2008, **C-314**.

[1154] Letter from Obnova to City of Belgrade from 27 March 2008, **C-314**.

[1155] Reply, para 786.

above this is inaccurate because the newspapers in question are among most-read newspapers in Serbia.[1156]

694. Claimants' second argument is that Obnova in any case would not be able to challenge the legality of expropriation and the amount of compensation which are the due process requirements under Cyprus-Serbia BIT.[1157] However, as discussed above, challenge to legality of expropriation is not a requirement under the Cyprus-Serbia BIT. Further, Obnova could seek compensation in court proceedings for *de facto* expropriation.

695. Claimants also argue that Respondent did not give any advance notice and a fair hearing before expropriation, in breach of due process.[1158] This is inaccurate. Obnova was well-acquainted with the procedure of adoption of the 2013 DRP, as can be seen from the fact that in 2008 it submitted Initiative asking for a change of location.[1159] Had it filed an objection to the draft 2013 DRP, such objection would have received a fair hearing, and the Commission for Plan would be obliged to provide reasoning for its decision on the objection.[1160] In addition, the public inspection process of the draft 2013 DRP was sufficiently advertised but Obnova failed to participate and provide its objections. Obnova could have initiated court proceedings for *de facto* expropriation. Instead, Obnova and the Cypriot Claimants did nothing. Serbia cannot be blamed for this in the present Arbitration.

5. <u>There were no grounds for compensation</u>

696. Finally, Claimants argue that they were not granted compensation for expropriation.[1161] However, as explained in the previous section, their argument manifestly fails because Claimants had (and still have) the possibility to initiate court proceedings and claim compensation for *de facto expropriation.*

697. In conclusion, it is submitted that Obnova and Cypriot Claimants, by their failure to object to the 2013 DRP and their failure to initiate court proceedings for *de facto* expropriation, acted similarly as investor in *Generation Ukraine* who did not make any effort to

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[1156] Kurir is the winner despite the foul play, 10 November 2012, **R-185**; In Serbia we have no competition! Informer is convincingly first - both the best-selling and most-read, 20 July 2016, **R-186**.

[1157] Reply, para 787.

[1158] Reply, para 788.

[1159] Letter from Obnova to City of Belgrade from 27 March 2008, **C-314.**

[1160] Counter-Memorial, para 180.

[1161] Reply, paras 799-800.

challenge the failure of the Kiev City State Administration to issue amended lease agreements.[1162]

698. On the basis of all the above, it is submitted that the 2013 DRP was a legitimate non-expropriatory measure taken in good faith and in public interest, which did not entail any discrimination of Obnova and was not expropriatory.

II. Serbia did not violate the FET standard

699. Serbia denies that it has breached the FET standards contained in the Cyprus-Serbia BIT and the Canada-Serbia BIT. As Serbia has previously outlined, Claimants' interpretation of the FET standard is self-serving and overly broad (**Section 1.**). In any event, regardless of how the FET standards in the Cyprus-Serbia BIT or the Canada-Serbia BIT are interpreted, there are no grounds to argue that either the 2013 DRP or the 2021 Letter violated the FET standard; indeed, the Reply brought nothing new in this respect (**Section 2.**).

1. Claimants' interpretation of the FET standard is highly expansive

700. It is particularly striking that despite the very clear and specific reference to the customary international law minimum standard of treatment (the "**MST**") in Article 6 of the Canada-Serbia BIT, Claimants continue to maintain their stance that the FET standard contained therein is allegedly "essentially the same" as the FET standard contained in the Cyprus-Serbia BIT. This is obviously wrong (**Section a)** below). In any case, Claimants have sought to maintain an outdated and overly broad interpretation of the FET standard and their attempt to make the FET standard an insurance policy against a business risk must fail (**Section b)** below).

a) Claimants are wrong that the FET standard in both Treaties is "essentially the same"

701. Claimants' argument that the content of the FET standard in the Cyprus-Serbia BIT is the same as that of the FET standard in the Canada-Serbia BIT is incorrect.[1163]

702. The FET provision in Article 6 of the Canada-Serbia BIT contains a specific reference to the MST:

[1162] *Generation Ukraine v Ukraine (ICSID Case No. ARB/00/9), Award dated 16 September 2003*, **RL-039**, para. 20.30; also, *Marvin Feldman v Mexico* (ICSID case No. ARB(AF)/99/1), Award dated 16 December 2002, para. 114.

[1163] Reply, para 804.

> 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.*[1164]

703. By comparison, the FET provision in Article 2(2) of the Cyprus-Serbia BIT reads as follows, i.e. without any specific reference to the MST:

> *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.*[1165]

704. Claimants' proposed interpretation that the two above formulations of the FET standard carry the same meaning clearly contravenes the rules of treaty interpretation. Had the Parties to the Canada-Serbia BIT intended to apply an FET standard that is broader than the MST, they would not have included the reference to the MST in the FET clause. This is confirmed by an interpretation in line with the customary international law provisions of Article 31 of the VCLT.[1166] Indeed, it has been confirmed that arbitral tribunals must pay close attention to the wording of the applicable FET clause.[1167]

705. Claimants also wrongly argue that the concept of the MST is "*outdated*" and "*not supported in recent jurisprudence of investment tribunals*".[1168] Claimants' only argument to support this position is an attempt to question Serbia's reference to two cases supporting

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[1164] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CL-001**, Article 6.

[1165] Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **CL-007(a)**, Article 2(2).

[1166] C. Brower et al., "Competing Theories of Treaty Interpretation and the Divided Application by Investor-State Tribunals of Articles 31 and 32 of the VCLT" in E. Shirlow and K. N. Gore (eds), *The Vienna Convention on the Law of Treaties in Investor State Disputes: History, Evolution and Future* (2022), **RL-243**, p 117.

[1167] A. Diehl, The Core Standard of International Investment Protection, International Arbitration Law Library, Volume 26 (© Kluwer Law International; Kluwer Law International 2012), **RL-268**, p 313. See also *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia* (ICSID Case No. ARB/99/2), Award dated 25 June 2001, **RL-157**, para 367.

[1168] Reply, para 806.

view that the MST imposes a high bar for the breach of the FET standard: *Al Tamimi v. Oman* and *Alex Genin v. Estonia*.[1169]

706. In response to Serbia's reliance on *Al Tamimi v. Oman*, Claimants allege that the high threshold for a breach of the FET standard found there stemmed from the fact that the investor had complained of the application of Oman's environmental laws, whereas the underlying US-Oman FTA contains an express caveat with respect to the adoption of laws aimed at protecting the environment.[1170] Claimants argue that the Canada-Serbia BIT does not contain similar qualifying provisions and therefore, the award does not support Serbia's standpoint that a high bar was set for a violation of the FET standard. This is misleading. The *Al Tamimi* tribunal – referring to a clause very similar to Article 6 of the Canada-Serbia BIT[1171] – specifically stated that the MST imposes a high threshold for breach, and the caveat about the environmental concerns in the FTA[1172] did not impact this conclusion:

> *In the Tribunal's view, therefore, to 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.*[1173]

707. In relation to Serbia's reliance on *Alex Genin v. Estonia*, Claimants allege that as the award was issued in 2001, since then the jurisprudence concerning the content of the FET standard has significantly evolved.[1174] This is misleading. Notably, to support this

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[1169] Reply, paras 805-806.

[1170] Reply, para 806.

[1171] Article 10.5 of the US-Oman FTA provided that: "*1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investors. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.*" (see *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33), Award dated 3 November 2015, **RL-156**, para 377).

[1172] *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33), Award dated 3 November 2015, **RL-156**, paras 380-381.

[1173] *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33), Award dated 3 November 2015, **RL-156**, paras 386 and 390.

[1174] Reply, footnote 919.

statement, Claimants rely on case law on the FET standard dating back to early 2000s.[1175] And tellingly, Claimants have failed to rebut Serbia's reference[1176] to recent case law, including *Berkowitz v. Costa Rica* (Award from 2016[1177]) or *Lone Pine Resources v. Canada* (Award from 2022[1178]), both of which support the view that – notwithstanding the evolution from the so-called *Neer* standard requiring a high threshold – a breach of the MST still requires a high threshold to be met, i.e. an act that is sufficiently egregious or shocking, or manifest arbitrariness and blatant unfairness.[1179]

708. As a result, Claimants' proposition that the FET standard in both Treaties is the same is flawed from the start.

b) <u>In any event, Claimants' reading of the FET standard is overly broad</u>

709. Regardless of the above, Claimants' general stance that the FET standard permits the Tribunal to protect investors' unproven expectations from business risks where their due diligence has failed, must be rejected.

710. To prove a violation of the FET standard, Claimants would have to prove (i) that their due diligence allowed them to legitimately expect that there will be no taking of property, or (ii) that the State's actions in taking property were arbitrary.[1180] Tellingly, Claimants do not dispute this in the Reply.

711. Instead, Claimants focus on the following arguments: (i) that the FET standard was violated because of a *de facto* expropriation of the Dunavska Plots,[1181] (ii) that the case law cited by Serbia in support of the content of the FET standard is inapposite,[1182] and (iii) that an exhaustion of local remedies is not required in order to claim a violation of the

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[1175] Reply, para 804 and footnotes 916 and 917.

[1176] Counter-Memorial, footnote 828.

[1177] *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**.

[1178] *Lone Pine Resources Inc. v. Government of Canada* (ICSID Case No. UNCT/15/2), Final Award dated 21 November 2022, **RL-158**.

[1179] Counter-Memorial, para 615.

[1180] Counter-Memorial, paras 616-627.

[1181] Reply, para 817 and following.

[1182] Reply, paras 812-813.

FET standard.[1183] As will be shown below, Claimants are wrong on all accounts and none of these arguments aid Claimants' case that the FET standard has been violated.

aa) A *de facto* expropriation does not necessarily mean a violation of the FET standard

712. Putting aside the fact that there was no expropriation or taking in this case (as explained in Section E.I. above), Claimants are wrong that an expropriation necessarily entails a violation of the FET standard. As investment tribunals have emphasised, expropriation and FET claims are of a separate nature.[1184] Claimants point to *Unglaube v. Costa Rica* to support their position that a *de facto* expropriation can be classified as breach of the FET standard.[1185] Claimants however fail to explain that in that case, the tribunal concluded rather that a breach of FET can lead to an expropriation, and not the other way around:

> *(…) expropriation may result from a variety of potential causes. Among these are included situations where violations of the fair and equitable treatment standard and their consequences are so severe that they result in a taking of an investor's property.*[1186]

713. Notably, in *Unglaube*, despite finding a *de facto* expropriation,[1187] the tribunal did not find a violation of the FET standard because it did not find convincing evidence of such, and underlined that:

[1183] Reply, paras 814-815.

[1184] R. Dolzer, U. Kriebaum and C. Schreuer, *Principles of International Investment Law* (OUP, 2022), **RL-221**, p 195; A. Reinisch and C. Schreuer, *International Protection of Investments: The Substantive Standards* (Cambridge, 2020), **RL-133(a)**, para 492, p 351; *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Award dated 13 March 2015, **RL-244**, para 150 ("*The claim of failure of fair and equitable treatment is, in the Tribunal's view, simply inapposite in the present case in which the real focus of the claim is not on the procedural fairness of Respondent's treatment of Claimants, but on its taking of their property*").

[1185] Reply, para 817.

[1186] *Marion Unglaube v. Republic of Costa Rica* (ICSID Case No. ARB/08/1) and *Reinhard Hans Unglaube v. Republic of Costa Rica* (ICSID Case No. ARB/09/20), Award dated 16 May 2012, **CL-009**, para 257.

[1187] *Marion Unglaube v. Republic of Costa Rica* (ICSID Case No. ARB/08/1) and *Reinhard Hans Unglaube v. Republic of Costa Rica* (ICSID Case No. ARB/09/20), Award dated 16 May 2012, **CL-009**, para 257.

714. *As intelligent and experienced investors, Claimants were, of course, required, as part of their due diligence, to become familiar with Costa Rican law and procedure.*[1188]

715. Furthermore, if Claimants' argument was to be taken at face value, it leads to the conclusion that a *de facto* expropriation equates to a breach of an FET standard. This is wrong. Tribunals have been wary of blurring the distinction between the two concepts, as they serve separate and distinct functions within an investment treaty. As noted by the tribunal in *Emmis International Holding, B.V. v. Republic of Hungary:*[1189]

> *[fair and equitable treatment] protection is designed to ensure that investments receive due process from the host State's administrative authorities and courts. That provision would not serve a useful and distinct function if procedural rights were treated as assets of the investor protected by the expropriation clause.*[1190]

bb) The FET standard cannot be read as highly expansive

716. It is widely accepted that the FET standard is not an insurance policy against business risk, and that an investor's expectations cannot be based on misplaced optimism or hope but require proper due diligence of the applicable framework.[1191] For example, one investment treaty tribunal dealing with an acquisition of property confirmed that the investor should conduct an "*extensive investigation into the precise properties and plots*" and

[1188] *Marion Unglaube v. Republic of Costa Rica* (ICSID Case No. ARB/08/1) and *Reinhard Hans Unglaube v. Republic of Costa Rica* (ICSID Case No. ARB/09/20), Award dated 16 May 2012, **CL-009**, para 258.

[1189] *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Republic of Hungary* (ICSID Case No. ARB/12/2), Award dated 16 April 2014, **RL-130**.

[1190] *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft v. Republic of Hungary* (ICSID Case No. ARB/12/2), Award dated 16 April 2014, **RL-130**, para 167. See also *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 563 ("*The term 'expropriation' is specific and not a synonym for damages that can be sought for the breach of other standards such as 'fair and equitable treatment', which require distinct conditions for a breach to be established.*")

[1191] *Joseph Charles Lemire v. Ukraine (II)* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability dated 14 January 2010, **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 dated 19 February 2019, **RL-169**, para 393; *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic* (PCA Case No. 2014-01), Award dated 2 May 2018, **RL-170**, para 435.

denied protection when no evidence of such investigation was adduced.[1192] Claimants have failed to adduce any such evidence.

717. Referring to a single arbitral award, *Rumeli v. Kazakhstan*, Claimants maintain that the FET standard encompasses "*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 an investor's reasonable and legitimate expectations*".[1193]

718. As previously explained, this is an overly broad reading of the FET standard. As many investment treaty tribunals have confirmed, the FET standard is not precisely defined and assessing whether it has been breached is necessarily a highly fact-specific exercise.[1194] Serbia has already set out its position on the applicable framework as follows:

- As regards legitimate expectations, [1195] Serbia maintains that to be considered as legitimate, the investor's expectations must be based on the State's promises or individual assurances that are precise and unambiguous,[1196] and supported by the investor's due diligence.[1197]
- As regards arbitrariness,[1198] Serbia maintains that the threshold is very high and requires proving bad faith or ulterior motive, or wilful disregard of due process and

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[1192] Counter-Memorial, para 619; *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia* (ICSID Case No. ARB/12/39), Award dated 26 July 2018, **RL-132**, para 1012.

[1193] Reply, para 810.

[1194] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award dated 17 March 2006, **CL-063**, para 309; *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability dated 14 January 2010, **RL-159**, para 284; *Valeri Belokon v. Kyrgyz Republic* (UNCITRAL), Award dated 24 October 2014, **RL-160**, para 227; *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award dated 11 October 2002, **RL-161**, para 118.

[1195] Memorial, para 264 and following.

[1196] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award dated 19 January 2007, **RL-164**, para 241; *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 dated 27 December 2010, **RL-165**, para 119; *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.

[1197] 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 dated 9 May 2010, **RL-168**, para 58.

[1198] Memorial, paras 272-274.

proper procedure.[1199] Claimants seem to agree that they would have to prove that Serbia's conduct was based on preference or prejudice.[1200]

719. Claimants have not even attempted to dispute the above. Instead, Claimants allege that two cases cited by Serbia allegedly do not support Serbia's position as to the content of the FET standard.[1201] This is misplaced.

720. First, contrary to Claimants' allegations, the *Vanessa Ventures v. Venezuela* tribunal did in fact specifically address the content of the FET standard, not to mention that it did so in a manner that supports Serbia's position that the FET standard is not an insurance policy against business risks:

> *The Tribunal recognizes that there are different formulations of the precise content of the FET standard, but observes that they all have in common the requirement that the standard does not guarantee the success or profitability of an investment but requires that the treatment of investments not fall below a minimum standard of fairness and equitableness that all investors have a right to expect.*[1202]

721. Second, contrary to Claimants' allegations, the tribunal in *EDF v. Romania* did not "*merely confirm that legitimate and reasonable expectations are components of the FET standard*",[1203] but also clarified that legitimate expectations can only be created when host States make specific promises or representations. Once again, this supports Serbia's position as to the scope of the FET standard:

> *Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal*

[1199] *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia* (ICSID Case No. ARB/12/39), Award dated 26 July 2018, **RL-132**, paras 878-879; *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; *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability dated 14 January 2010, **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 dated 1 November 2021, **RL-173**, paras 365-366.

[1200] Reply, para 824.

[1201] Reply, para 811.

[1202] *Vannessa Ventures Ltd. V. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/04/6), Award dated 16 January 2013, **RL-163**, para 222.

[1203] Reply, para 813.

and economic framework. Such expectation would be neither legitimate nor reasonable.[1204]

cc) An effort to attempt at local remedies is required

722. Finally, Claimants' position that the local remedies do not need to be exhausted or attempted at in order to establish a violation of the FET standard on the basis of the 2013 DRP and the 2021 Letter[1205] is incorrect.

723. Serbia has argued that violations of international law by way of acts of administrative authorities requires the exhaustion of local remedies, referring to *Generation Ukraine v. Ukraine*.[1206] Claimants misleadingly state that the tribunal in that case concluded that there is no formal obligation to exhaust local remedies.[1207] However, Claimants' account of that decision is misleading. What the tribunal in *Generation Ukraine v. Ukraine* confirmed is the need to resort to local remedies in the context that an international tribunal is not there to exercise the function of an administrative review body:

> *it is not enough for an investor to seize upon an act of maladministration, no matter how low the level of the relevant governmental authority; to abandon his investment without any effort at overturning the administrative fault; and thus to claim an international delict on the theory that there had been an uncompensated virtual expropriation. In such instances an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable –not necessarily exhaustive –effort by the investor to obtain correction.*[1208]

724. Claimants allege that this case is inapposite because it "*did not address the FET standard*".[1209] For this purpose, Serbia points to other investment tribunals that considered – in the context of the FET standard – that whether the investor acted diligently to resort to

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[1204] *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, **CL-032**, para 217.

[1205] Reply, paras 814-815.

[1206] Counter-Memorial, para 626.

[1207] Reply, para 816.

[1208] *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award dated 16 September 2003, **RL-039**, para 20.30 (emphasis added), see also para 20.33.

[1209] Reply, para 815.

local remedies to protect its rights is a relevant factor in determining State responsibility.[1210]

2. Neither the 2013 DRP, nor the 2021 Letter give rise to violation of the FET standard

725. First of all, Claimants have failed to even attempt to use the local remedies and resolve the matter in the local courts which is sufficient to dismiss their case for violation of the FET standard (**Section 2a)** below). Regardless of the above, Claimants' case on the FET standard remains unproven. Clearly aware of the weakness of their case on legitimate expectations and arbitrariness, in the Reply Claimants focus on their argument that the 2013 DRP allegedly violated the FET standard because it was a *de facto* expropriation.[1211] As explained above, expropriation does not necessarily entail a violation of the FET standard and in any event, no expropriation has taken place (**Section 2b)** below). Claimants have still failed (i) to provide any evidence of their alleged legitimate expectations that they would develop the Dunavska Plots, or that the 2013 DRP would not be issued, let alone that Claimants would receive compensation for the designation of the Dunavska Plots for the public transportation terminal (**Section 2c)** below), or (ii) to prove that either the 2013 DRP or the 2021 Letter were arbitrary (**Section 2d)** below).

a) Claimants failed to resolve the case in the local courts

726. As explained in paras 251-254 above, the issue of Obnova's property rights and related compensation lies within the competence of the Serbian courts. It is undisputed that Obnova has failed with its claims in the local courts. This alone is sufficient to dismiss Claimants' claim for violation of the FET standard.

727. In any event, as will be shown below, Claimants failed to prove any violation of the FET standard.

b) There was no expropriation

728. Claimants wrongly argue that if the 2013 DRP was expropriatory, this also violates the FET standard.[1212]

[1210] *Cervin Investissements SA and Rhone Investissements SA v Republic of Costa Rica* (ICSID Case No. ARB/13/2), Award dated 7 March 2017, **RL-245**, para 472.

[1211] Reply, para 817 and following.

[1212] Reply, para 817.

729. As explained in detail in section B.VII.5 above, the 2013 DRP was not (and could not have been) expropriatory as (i) Obnova held no property rights to the Dunavska Plots and the Objects, and (ii) the Dunavska Plots were owned by the City and therefore, planning a public transportation terminal on them could not have deprived Claimants of any rights.

730. In any event, to prove a violation of the FET standard, Claimants would have to show a breach of legitimate expectations or arbitrariness, rather than a *de facto* expropriation. As will be shown below, Claimants failed to do so.

c) The 2013 DRP did not violate the FET standard

731. Claimants' case on the FET standard revolves around the alleged violation of their legitimate expectations[1213] as well as the alleged arbitrariness[1214] of the 2013 DRP. Claimants are wrong on both counts.

aa) No violation of legitimate expectations

732. Claimants wrongly allege that the 2013 DRP caused Obnova's premises at Dunavska 17-19 and 23 to become "*essentially worthless*" which is said to be "*in stark contrast to the expectations that Cypriot Claimants had at the time of their investment*".[1215] These expectations are alleged to have arisen from (i) the ownership of the Objects and the right of use over the Dunavska Plots, and (ii) the 2003 General Plan according to which the prevailing use of a block including Obnova's premises should have been residential and commercial development.[1216]

733. Tellingly, proof of these expectations is nowhere to be found. There is no due diligence report or analysis, or any representation from Serbia on the record. None of the witnesses put forward by Claimant points to any credible basis for these expectations.

734. Mr Rand testifies that the basis for his expectations was (i) Obnova's privatization program which referred to the Objects,[1217] and (ii) the 2003 General Plan.[1218] However:

[1213] Reply, para 817.

[1214] Reply, para 824.

[1215] Reply, para 817.

[1216] Reply, paras 820-821.

[1217] Witness statement of Mr. William Archibald Rand dated 24 February 2024, paras 17-18.

[1218] Witness statement of Mr. William Archibald Rand dated 24 February 2024, para 20.

- As explained in detail in the Counter-Memorial, the privatization program was prepared by Obnova, not Serbia, and did not indicate ownership rights, and even mentioned that there are no documents proving the right of use.[1219] Rather, as Serbia has explained throughout these proceedings, Obnova simply did not have the property rights subject to conversion that Claimants rely on to make their case on legitimate expectations.[1220] In light of this, the argument that Obnova expected the potential development of the Dunavska Plots is entirely misplaced.
- As regards the 2003 General Plan, the 2013 DRP was fully in line with it, as the 2003 General Plan had marked the commercial and residential purpose of the area only as predominant (or prevailing), and the placement of the public transportation terminal did not violate this rule.[1221] In particular, contrary to Claimants' allegations,[1222] as explained in para 230, the public transportation terminal did not take over 60% of the zone in which it is located. Proper due diligence of the applicable legal framework would have revealed that the 2003 General Plan envisaged that up to 50% of the zone could have been used for public infrastructure purposes.

735. Mr Rand also admits that he was informed that the Dunavska Plots "*could only be in state ownership*" but at the same time he "*anticipated that Serbia's economic transformation would eventually require a legislative change allowing privatized companies, such as Obnova, to acquire ownership over the then state-owned land which they had a right to use*".[1223] Quite tellingly, he does not refer to the basis of this information or anticipation.

736. As regards Mr Broshko, it is even more clear that he was aware of the lack of Obnova's property rights. As Mr Broshko explains in his witness statement, since early 2012 his work entailed "*getting to understand the management and operations of the Serbian companies (…) including Obnova*".[1224] In this capacity, he must have been aware of the legal status of Obnova's property rights, including that it is merely the lessee of the Dunavska Plots. Notably, contemporaneous documents show that Mr Broshko was aware already in 2014, long before his investment in Obnova, that (i) the Dunavska Plots are owned by the City and the conversion of Obnova's (alleged) right of use was uncertain, and (ii) the

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[1219] Counter-Memorial, para 115 and following.

[1220] Sections B.I – B.VI.

[1221] Section B.VII.

[1222] Reply, para 821.

[1223] Witness statement of Mr. William Archibald Rand dated 23 February 2024, para 21.

[1224] Witness statement of Mr. Erinn Bernard Broshko dated 23 February 2024, para 10.

Objects do not have permits.[1225] As he admits, he was advised by a Serbian law firm on the ownership structure of Coropi and Kalemegdan,[1226] but nothing is said about any legal advice as regards the status of the property rights.

737. Therefore, it is clear that Claimants' due diligence as regards both Obnova's property rights and the planning documents simply failed, and Serbia cannot be held liable for this.

738. Finally, Claimants misleadingly use the City's response to the 2008 Initiative (in which Obnova asked for a reconsideration of the placement of the public transportation terminal and admitted to being a lessee of the Dunavska Plots[1227]) to argue that it had allegedly "*reassured*" Obnova that it could rely on the 2003 General Plan.[1228] This response merely forwarded the Initiative to the Secretariat for Urban Planning and Construction and asked it to consider it in the decision-making process for the planning document.[1229] Had Obnova wished to submit objections about the alleged non-compliance with the 2003 General Plan, the public inspection of the 2013 DRP would have been the proper forum for this. However, Obnova did not submit any objections and as aptly put by one of Claimants' witnesses, Mr Markićević, "[a]*doption of the 2013 DRP came as an unpleasant surprise to me because I had not been aware of its preparation*."[1230]

739. This statement is particularly surprising considering that (i) already in the 2008 Initiative Obnova was aware of the possibility of locating the public transportation terminal on the Dunavska Plots, (ii) it did not follow up with the Secretariat for Urban Planning and Construction afterwards, and (iii) as explained in detail above, the public inspection of the 2013 DRP was a widely publicized process. Tellingly, Mr Rand says that "*if*" he had been asked about the 2008 Initiative then, he "*would have thought the matter was dead*".[1231] This speaks volumes of the Claimants' lack of due diligence.

740. In light of the above, Claimants' case on legitimate expectations must fail.

[1225] Email from Mr. Markićević to Mr. Broshko, **C-383**.

[1226] Witness statement of Mr. Erinn Bernard Broshko dated 23 February 2024, para 25.

[1227] Letter from Obnova to City of Belgrade, **C-314**.

[1228] Reply, para 823.

[1229] Counter-Memorial, para 179.

[1230] Witness statement of Mr. Igor Markićević dated 23 February 2024, para 24.

[1231] Witness statement of Mr. William Archibald Rand dated 23 February 2024, para 53.

bb) No arbitrariness or discrimination

741. Claimants wrongly state that Serbia's conduct leading to the adoption of the 2013 DRP was arbitrary. Claimants allege that Serbia adopted the 2013 DRP without an explanation as to why the public transportation terminal would need to be located specifically on the Dunavska Plots.[1232] This is misleading (and notably, Claimants do not make any allegations that the choice of the Dunavska Plots was based on preference or prejudice, required under the attribution standard they put forward[1233]).

742. Contrary to Claimants' allegations, and as explained in detail in Section B.VII above:

- Serbia did not ignore the 2003 General Plan, but adopted the 2013 DRP and designated the location of the public transportation terminal in full compliance with the 2003 General Plan and other relevant planning regulations and after assessing such compliance.[1234]
- As is clear from the 2013 DRP process, the Secretariat for Urban Planning and Construction did consider alternative locations as well as the Initiative, and eventually deemed the Dunavska Plots to be the best locations due to the City's ownership and related development costs.[1235]
- The plots across the street with the bus depot were never even considered as possible locations for the public transportation terminal.[1236]
- The public inspection of the 2013 DRP was fully aligned with the applicable law, including that it lasted for a month and was publicized in major newspapers. Obnova simply did not follow the process or decided not to participate.[1237]

743. The above comes nowhere close to the demanding threshold for arbitrariness (and even more so, the "manifest" arbitrariness required under the Canada-Cyprus BIT) or discrimination. In light of this, Claimants' case on arbitrariness must fail.

[1232] Reply, para 825.

[1233] Memorial, para 260.

[1234] See paras 222-231.

[1235] See paras 232-237.

[1236] See para 238.

[1237] See paras 239-248.

d) The 2021 Letter did not violate the FET standard

aa) No legitimate expectations

744. Claimants wrongly argue that the 2021 Letter breached the FET standard. Here, Claimants' case focuses on legitimate expectations.[1238] Similarly as with the 2013 DRP, Claimants fail to put forward any evidence showing that their expectation that the Land Directorate would provide compensation was legitimate.

745. As explained in detail in Sections B.VII.5 - B.VII.6 above, not only was Obnova not entitled to compensation for the 2013 DRP (because it held no property rights), but also the Land Directorate was not competent or authorized to decide on the compensation. If Claimants had indeed held expectations that this would take place, clearly Claimants' due diligence of the applicable legal framework failed. Claimants point to witness statements seeking to prove that Claimants expected that Obnova would receive compensation. However, none of these refers to a basis for such expectation:

- Mr Markićević states "*Serbia refused to provide to Obnova compensation that I understand is due under Serbian law*".[1239] He does not explain the basis of this statement. The only document he refers to in his witness statement is the letter from the Land Directorate of 19 February 2018, which allegedly affirmed Obnova's right to compensation.[1240] However, as explained in para 267 above, this letter did not acknowledge Obnova's right to compensation (nor did any other letter) - it merely stated that if Obnova considered it had such right, it could be resolved after the demolition of the Objects.
- The defect of lack of due diligence applies also to Mr Broshko's statement that he invested in Obnova after the 2013 DRP because he "*expected that these issues would either be resolved so that Obnova could develop its land, or that Obnova would be provided with compensation due under Serbian law*".[1241]
- Contrary to Claimants' allegations, Mr Rand in fact fails to mention that he expected compensation, he rather merely refers to the fact that he instructed filing of the

[1238] Reply, para 833.

[1239] Witness statement of Mr. Igor Markićević dated 23 February 2024, para 32.

[1240] Letter from the Land Directorate to Obnova, **C-328**.

[1241] Witness statement of Mr. Erinn Bernard Broshko dated 23 February 2024, para 39.

request for compensation and that the Land Directorate's decision made it clear to him that Serbia was not willing to compensate Obnova for its losses.[1242]

746. The fact that the Land Directorate was not even authorized to compensate Obnova further supports Serbia's position as to the lack of Claimants' legitimate expectations.[1243] Claimants have failed to properly rebut this point. To support their case, Claimants argue that Obnova has sent two other letters to the City and the public attorney and that "*it is clear that these authorities also could have responded*".[1244] This is a red herring (and in any event, Claimants are not alleging the lack of response from the other authorities as breach of the Treaties). As explained in paragraphs 251-254 above, Obnova had meaningful and appropriate legal means to protect its alleged right to compensation in the local court proceedings, but failed to make use of them.

747. In any event, even the Claimants' legal experts admit that only the Serbian courts have the authority to decide on disputes resulting from *de facto* expropriations, including compensation.[1245] The Land Directorate had no such authority.[1246]

bb) No attribution

748. Serbia maintains that it is not responsible for the Land Directorate's 2021 Letter. Claimants have sought to argue the contrary, relying on Articles 4, 5 and 8 of the ILC Articles. These arguments all fail and the legal standard for attribution set out by Claimants is misleading.

749. First, under Article 4 of the ILC Articles, Claimants argue that State-owned companies can be considered *de facto* State organs. Claimants refer to *Deutsche Bank v Sri Lanka*.[1247]This is misplaced. Majority of investment tribunals consider that separate legal personality excludes attribution under Article 4 of the ILC Articles. For example, in

[1242] Witness statement of Mr. William Archibald Rand dated 24 February 2024, para 61.

[1243] Counter-Memorial, para 202 et seq.

[1244] Reply, paras 850-851.

[1245] Second Expert Report of Prof. Dr Miloš Živković and Mr. Miloš Milošević dated 23 February 2024, para. 224.

[1246] Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para 94.

[1247] Reply, para 856.

Bayindir v Pakistan or *EDF v. Romania*, the tribunal refused to attribute actions of the relevant authorities to the State under Article 4, due to their distinct legal personality.[1248]

750. In any event, the tribunal in *Deutsche Bank* stated that the assessment as to whether a State-owned company can be considered a *de facto* State organ under Article 4 of the ILC Articles is "*entirely fact-specific*",[1249] and having examined in detail the circumstances of the underlying contract and its termination, concluded that there was considerable evidence as to the level of control, governmental authority and direction from the Government in relation to this contract.[1250]

751. Applying the standard set out by *Deutsche Bank*, Claimants would need to show, considerable evidence that the City had full control over the Land Directorate's personnel or finances and decision-making, that the Land Directorate was established to correspond with the entities seeking compensation, and that the Land Directorate acted under the City's specific instructions when sending the 2021 Letter.

752. Further, by reference to Article 5 of the ILC Articles, Claimants acknowledge that "[w]*hether the entity is empowered to exercise governmental authority is determined by the national law*".[1251] Respondent also notes that Article 5 allows for attribution only "*provided the person or entity is acting in that capacity in the particular instance*".[1252] Under Article 5, Claimants would thus have to prove that the Serbian law grants the Land Directorate governmental authority and that in the specific action complained of, i.e. the 2021 Letter, the Land Directorate exercised this authority.

753. Finally, as regards Article 8 of the ILC Articles, Claimants raise that effective control "*encompasses both general control of the State over the entity as well as specific control*

[1248] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award dated 27 August 2009, **RL-147**, para 119; *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13), Award, 8 October 2009, **CL-032**, para 190; see also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, 24 May 2007, I.C.J. Reports 2007, **RL-264**, p 605, para 61.

[1249] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award dated 31 October 2012, **CL-099**, para 405e) and f).

[1250] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award dated 31 October 2012, **CL-099**, para 405b) and c).

[1251] Reply, para 865.

[1252] *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, International Law Commission, UN GA Doc A/56/10, **CL-036**, p 42.

over the act attribution of which is at stake".[1253] This is incorrect. Effective control requires proving that it was exercised in respect of the specific action complained of, not generally in respect of the overall actions.[1254]

754. Claimants case on attribution under each of the above provisions of the ILC Articles fails, as the 2021 Letter issued by the Land Directorate does not come close to meeting the demanding tests under each of them.

755. Claimants make a blunt statement that the Land Directorate was "*empowered to act on behalf of the City in the determination of compensation and in all expropriation proceedings related to the land expropriated for the benefit of the city*",[1255] but there is no evidence whatsoever that the City or Serbia empowered the Land Directorate to represent it in relation to compensation proceedings. Quite to the contrary, as mentioned above, even Claimants' experts agree that these issues are in the courts' competence only.

756. Although the Land Directorate is a public company, it performs a communal activity and certain "*professional, scientific and technical activities*" related to the arrangement, use, improvement and protection of construction land. [1256] It is obvious that it does not engage in sovereign activity and Claimants have failed to prove otherwise. Claimants case also falls short of showing any instruction or direction to issue the 2021 Letter.

757. In light of the above, Serbia cannot be deemed responsible for the 2021 Letter.

III. Serbia did not treat Claimants' investment unreasonably or in a discriminatory manner

758. Claimants improperly rely on the MFN provisions in the Cyprus-Serbia BIT and the Canada-Serbia BIT in an attempt to access the non-impairment standard contained in other BITs concluded by Respondent. As neither the Cyprus-Serbia BIT nor the Canada-Serbia BIT contains any comparable obligation, Claimants effectively seek to create a new obligation – and a new cause of action – beyond the scope of these BITs (**Section 1.**). In

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[1253] Reply, para 872.

[1254] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007, **RL-265**, paras 399-406.

[1255] Reply, para 865.

[1256] Decision on Amendments to the Decision on the establishment of the Public Enterprise for Construction Land and Construction of Belgrade (Official Gazette of Belgrade 57/2016, 73/2016, 4/2017, 36/2017, 96/2017, 57/2018, 93/2018 and 32/2019, **C-519**, Article 4.

any case, Respondent did not impair Claimants' investment through unreasonable or discriminatory measures (**Section 2.**).

1. Claimants may not use the MFN clause to access new standards of protection

759. Claimants rely on the MFN provisions contained in the Cyprus-Serbia BIT and the Canada-Serbia BIT to attempt to import the non-impairment obligation from other BITs concluded by Serbia, namely Article 2(3) of the Morocco-Serbia BIT and Article 3(4) of the Qatar-Serbia BIT. As neither the Cyprus-Serbia BIT nor the Canada-Serbia BIT contains a non-impairment clause, Claimants are seeking to introduce new substantive protections for their investments into these proceedings. Claimants should not be permitted to "cherry pick" protection standards from other BITs, in disregard of the specific wording and purpose of the base BITs (**Section a)**). In any case, the MFN clause in neither the Cyprus-Serbia BIT (**Section b)**) nor the Canada-Serbia BIT (**Section c)**) supports Claimants' attempt to import a new treaty standard from a third-party treaty.

a) The MFN clause does not grant automatic access to new standards of treatment

760. In the Counter-Memorial, Respondent explained why Claimants should not be permitted to use the MFN clause in the respective BITs to import entirely new substantive protections.[1257] Investment tribunals do not, as Claimants assert, "*unanimously recognize that MFN clauses allow investors to attract more favourable standards of treatment contained in any investment treaty concluded between the host State and a third State or States*", at least not where the more favourable standards of treatment are entirely new.[1258] In support of this erroneous statement, Claimants cite the same four cases they relied on in their Memorial and which Respondent subsequently addressed in its Counter-Memorial.[1259] But these cases do not confirm that the MFN standard gives claimants an unqualified right to access the protection standards granted to investors under treaties concluded with a third State. On the contrary, in these cases the tribunals refrained from taking a firm position on the general question whether MFN clauses could be used to access new rights and remedies available to investors under a different treaty.[1260]

[1257] Counter-Memorial, paras 667-670.

[1258] Reply, para 881.

[1259] Counter-Memorial, para 667.

[1260] *RosInvestCo UK Ltd. v. The Russian Federation* (SCC Case No. V079/2005), Award on Jurisdiction dated 5 October 2007, **CL-030**, para 129; *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, **CL-032**, para 935 (noting the "*divergence of opinion exists with respect to application of MFN clauses*"). As noted in

761. At most, the four cases cited by Claimants show that in certain situations, a claimant may be entitled to secure more favourable treatment by relying on the MFN clause insofar as this is supported by the specific wording, context, and purpose of the base treaty.[1261] In any event, this small sample of cases does not represent any consensus among investment tribunals as to potential applications of the MFN standard.

762. Respondent does not dispute that some investment tribunals – including those in *EDF v. Argentina* and *Arif v. Moldova* – have permitted investors to access more favourable standards of treatment via an MFN provision. This does not, however, translate into an unfettered or automatic right to access or impose on the State an entirely new obligation which exists under a third-party treaty.[1262] Such approach has been criticised by tribunals and commentators alike,[1263] as it allows investors to "cherry-pick" from numerous other

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Respondent's Counter-Memorial, the tribunal in *Rumeli* did not analyse the MFN clause at issue as the parties had agreed that the respondent's international obligations assumed in other BITs could be claimed through the base BIT's MFN clause. *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award dated 29 July 2008, **CL-002**, para 575 (with the respondent noting, in para 574, that "*each of the obligations asserted by Claimants must be interpreted by reference to the specific terms, context and aims of each individual BIT*"). Similarly, in *Mr. Franck Charles Arif v. Republic of Moldova*, the parties agreed that the MFN clause at issue could be used to access substantive obligations in other treaties. *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23), Award dated 8 April 2013, **CL-031**, para 396.

[1261] *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23), Award dated 8 April 2013, **CL-031**, para 396.

[1262] Counter-Memorial, para 668.

[1263] See e.g. F. Perez-Aznar, "The Use of MFN Clauses to Import Substantive Treaty Provisions", *Journal of International Economic Law* (2018), **RL-247**, p 781 ("*The use of MFN provisions to import new treaty standards broadens the jurisdiction of a tribunal in a more radical way than in those cases where MFN clauses are used to broaden limited ISDS provisions (the Maffezini v Argentina approach). … in cases dealing with MFN treatment and the importation of substantive standards the effect is twofold: the tribunal 'imports' the standard into the base treaty and it gives to itself the 'jurisdiction' to decide whether there is compliance or not with the imported provision*"); A. Faya Rodriguez, "The Most-Favored-Nation Clause in International Investment Agreements: A Tool for Treaty Shopping' 25 *Journal of International Arbitration* 89 (2008), **RL-248**, p 99 ("*The tribunal's role is to examine a breach and, if found, award damages, not to grant or guarantee ex ante a right to the investor, when the tribunal is importing a provisions related to legal standards or procedure from third treaties, what it is actually doing is making the state fulfil an obligation (that does not really exist) before it is allegedly breached*"); Z. Douglas, "The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails" 2 *Journal of International Dispute Settlement* 1 (2011), **RL-249**, p 105 ("*The MFN clause does not, in truth, operate automatically to 'incorporate' provisions of a third treaty so that all that remains for a tribunal to do is to interpret the amended text of the basic treaty.*"); S. Menon, "The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions", 108 *Proceedings of the ASIL Annual Meeting* 219 (2015), pp 232–33; A. Wang, *The Interpretation and Application of the Most-Favored-Nation Clause in Investment Arbitration* (2022), **RL-190**, p 147 ("*the general assumption that MFN*

investment treaties while ignoring various trade-offs and compromises that contracting States make when negotiating such treaties, which risks distorting the overall, agreed-upon level of protection.[1264] Accordingly, tribunals and commentators increasingly advocate for a case-by-case approach that turns on the specific language of the relevant MFN clause, its interaction with other treaty provisions, and the overall purpose of the base treaty, in keeping with the *ejusdem generis* principle.[1265]

763. Under the *ejusdem generis* principle, a claim to MFN can only be applied in respect of the same subject matter and in respect of those in the same relationship with the

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clauses are supposed to multilateralize investment protection is unfounded in international law and may lead to abusive treaty-shopping"); *İçkale İnşaat Limited Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/24), Award dated 8 March 2016, **RL-186**, para 332; *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; *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; UNCTAD Series on Issues in International Investment Agreements II (2010), **RL-189,** pp 105–06.

[1264] J. Kudrna, "Bermann calls on states to eliminate MFN clauses", *Global Arbitration Review*, 19 December 2023, available at <https://globalarbitrationreview.com/article/bermann-calls-states-eliminate-mfn-clauses>, last accessed 4 June 2024, **RL-250**; S. Menon, "The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions", 108 *Proceedings of the ASIL Annual Meeting* 219 (2015), pp 232–33, **RL-251**; C. McLachlan, QC, L. Shore and M. Weiniger, *International Investment Arbitration* (Oxford UP, 2017), **RL-252**, para 7.313 ("[*i*]*t is essential to ensure that the provisions relied upon as constituting the more favourable treatment are properly applicable and will not have the effect of fundamentally subverting the carefully negotiated balance of the investment treaty being applied* ", quoted in *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); S. Batifort, J. Benton Heath, "The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization", *American Journal of International Law* Vol. 111, Issue 4 (2017), **RL-188**, p 3.

[1265] C. Greenwood, "Reflections on 'Most Favored Nation Clauses in Bilateral Investment Treaties", *Practising Virtue: Inside International Arbitration* (D.D. Caron, S.W. Schill, A. Cohen Smutny and E.E. Triantafilou eds., 2015), **RL-253**, p 559 ("*The essential question for a tribunal is not what effect 'the MFN clause' – in a generalized and abstract sense – might have, but what this MFN clause in this particular BIT means and, thus, what effect it has*"); F. Perez-Aznar, "The Fictions and Realities of MFN Clauses in International Investment Agreements", *20 Journal of International Economic Law* (2018), **RL-254** p 58 (noting that of the 14 cases in which investment tribunals have allowed the importation of substantive treaty provisions through the MFN clause, per the author's analysis, there was no analysis of the text of the MFN clause in nine of those cases; *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; 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*").

comparator. This requires "substantial identity" between the subject matter of the two clauses at issue (the MFN clause and the clause to be imported from a third-party treaty).[1266] This approach offers a reasonable middle ground and an opportunity for investment tribunals to reconsider the "*automatic importation*" approach to MFN clauses, particularly in light of recent treaty practice, which is to curtail the broad application of MFN clauses and exclude the importation of substantive protections through the MFN clause.[1267]

764. Claimants accept the application of the *ejusdem generis* principle but argue that it supports their position that the MFN clauses in the Cyprus-Serbia and Canada-Serbia BITs entitle them to access new substantive protections in other BITs. This is incorrect. As explained in more detail below, Claimants misapply the *ejusdem generis* principle, relying instead on facile comparisons to the MFN clauses at issue in *EDF* and *Arif*, and thereby expand unduly the scope of the MFN clause in the Canada-Serbia and Cyprus-Serbia BITs. This is because there is no "*substantial identity*" between these MFN clauses on the one hand and the non-impairment clauses to which Claimants seek access in the Qatar-Serbia and Serbia-Morocco BITs on the other.

765. According to Claimants, the Cyprus-Serbia and Canada-Serbia BITs do contain standards of investment protection comparable to the non-impairment standard. Accordingly, they argue that it would not amount to importing an entirely new standard of treatment into these treaties if Claimants were permitted to access the non-impairment standard from another BIT by means of the MFN clause.[1268] In their view, the non-impairment standard in the Morocco-Serbia and Qatar-Serbia BITs represents a "*more detailed version of the FET standard*" in the Morocco-Serbia and Qatar-Serbia BITs as well as the Cyprus-Serbia and Canada-Serbia BITs.[1269] This argument lacks credibility, as it invites the question of how the non-impairment standard, as a "*specification*" of the more general FET

[1266] 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, para 11, p 30 (footnote omitted) (the "*process is strictly confined to cases where there is a substantial identity between the subject matter of the two sets of clauses concerned*"), **RL-195**. See also OECD, "Most-Favoured-Nation Treatment in International Investment Law", OECD Working Papers on International Investment, 2004/02, OECD Publishing, **RL-255**.

[1267] S. Batifort and J. Benton Heath, "The New Debate on the Interpretation of MFN Clauses in Investment Treaties" 111 *American Journal of International Law* 873 (2017), **RL-256**, p 897; F. Perez-Aznar, "The Use of MFN Clauses to Import Substantive Treaty Provisions", *20 Journal of International Economic Law* (2018), **RL-247**, pp 6, 23.

[1268] Reply, para 897.

[1269] Reply, para 898.

standard – can constitute "*more favourable*" treatment. Insofar as investment tribunals have associated the non-impairment standard with the FET standard, they have viewed it as a more detailed and demanding iteration of the FET standard.[1270] For instance, the tribunal in *Muszynianka v. Slovakia* observed that the non-impairment standard entails a slightly higher threshold for a violation, requiring "*the existence of an impairment, i.e., of harm*", whereas an "*FET breach exists irrespective of the harm it may have caused*".[1271] It is absurd and illogical for Claimants to argue that the non-impairment standard is subsumed by or closely associated with the FET standard while also asserting that its omission from the Treaties constitutes less favourable treatment compared to the treatment accorded under the Morocco-Serbia and Qatar-Serbia BITs. If anything, the non-impairment obligation imposes a higher threshold for a breach, as it requires – in addition to arbitrary or discriminatory conduct vis-à-vis the investor and its investment – proof of substantial impairment.

b) Application to the Cyprus-Serbia BIT

766. Article 3 of the Cyprus-Serbia BIT contains the contracting parties' obligations to accord both national treatment and most-favoured nation treatment to investors and their investments.[1272] Claimants rely in particular on Article 3(1), which provides that a contracting party "*shall accord to such investment made by investors of the other Contracting Party treatment no less favourable than that accorded to investments of its own investors or of investments of any third State whichever is more favourable than to the investor concerned*". In its Counter-Memorial, Respondent explained that this provision does not permit the incorporation of new substantive rights. This is due to the language and placement of the MFN clause in the treaty and the absence of a non-impairment obligation to serve as a basis of comparison to the treatment accorded to investments under Article 2(3) of the Morocco-Serbia BIT.[1273] Claimants, on the other hand, allege that this provision is

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[1270] *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Award dated 21 June 2011, **RL-257**, para 333; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award dated 29 July 2008, **CL-002**, para 654; *Saluka Investments v. Czech Republic*, UNCITRAL, Partial Award dated 17 March 2006, **CL-063**, para 461 (noting that "*insofar as the standard of conduct is concerned*", a violation of the non-impairment standard does not "differ substantially" from a violation of the FET standard); *Spoldzielnia Pracy Muszynianka v. Slovak Republic*, UNCITRAL, (PCA Case No. 2017-08), Award dated 7 October 2020, **CL-025**, para 645.

[1271] *Spoldzielnia Pracy Muszynianka v. Slovak Republic*, UNCITRAL, (PCA Case No. 2017-08), Award, 7 October 2020, **CL-025**, para 646.

[1272] Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **CL-007(a)**, Article 3.

[1273] Counter-Memorial, para 674.

sufficiently and similarly broad in scope as the MFN clauses in *EDF* and *Arif* such as to permit access to additional standards of treatment not included in the BIT, having in mind the BIT's object and purpose to create and maintain "*favourable conditions for reciprocal investments*" and economic cooperation.[1274]

767. It is telling that Claimants continue to cling to the decisions in *EDF* and *Arif* – decisions which were issued over ten years ago pursuant to different treaties – to support their position that an MFN clause permits access to wholly new rights and benefits, while downplaying more recent cases and commentary that emphasise a more rigorous, text-based approach to MFN clauses. The *EDF* and *Arif* tribunals' conclusion that the MFN clause could be used to access the umbrella clause in a third-party BIT should not be mechanically adopted or applied to the present case, especially given that these tribunals did not conduct a thorough analysis of all elements of the MFN clause within the context of the treaty as a whole, nor did they ensure compliance with the *ejusdem generis* principle.[1275] There is danger in adopting interpretations of one BIT as applicable automatically to other BITs, especially when the wording of each BIT is not identical.[1276]

768. Here, the specific wording and placement of the MFN standard, which is paired with the national treatment standard in Article 3 of the Cyprus-Serbia BIT, speaks to a more narrowly drawn application aimed at preventing discriminatory treatment between domestic and foreign investors and their investments. In both Article 3(1) and 3(2), the contracting parties' obligations to accord national treatment and MFN treatment to investments and investors, respectively, are paired together. Article 3's "*twinning*" of the national treatment and MFN treatment standards indicates the common nature of these standards, which are both relative and require a comparative analysis. Accordingly, an investment tribunal, when applying the MFN standard in the Cyprus-Serbia BIT, should undertake a similar analysis to what is required in respect of the national treatment standard, i.e. to consider whether the claimant has established "*treatment*", "*in like circumstances*", which is "*less favourable*" than that accorded to investors of third countries.[1277] As explained above, Claimants have failed to show that the omission of a non-impairment

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[1274] Reply, paras 889-890.

[1275] T. Gazzini and A. Tanzi, "Handle with Care: Umbrella Clauses and MFN Treatment in Investment Arbitration", 14 *Journal of World Investment and Trade* (2013) 978, **RL-258**, pp 990-991.

[1276] International Law Commission, "Most-Favoured-Nation Clause: Final Report of the Study Group on the Most-Favoured-Nation Clause" (2015), **RL-259**, para 73.

[1277] F. Perez-Aznar, "The Use of MFN Clauses to Import Substantive Treaty Provisions", *20 Journal of International Economic Law* (2018), **RL-247**, pp 22, 24 ("*the 'like circumstances' requirement, even if not expressly provided, is implicit in any non-discrimination provision, including MFN clauses*").

clause in the Cyprus-Serbia BIT constitutes less favourable treatment than that accorded to investors protected under the Morocco-Serbia BIT.

769. Claimants also fail to explain how the Cyprus-Serbia BIT's reference to "*favourable conditions*" should support their expansive interpretation of Article 3(1). Recourse to the general object and purpose of the BIT, without any detailed textual analysis of the MFN clause, offers little guidance as to whether the contracting parties actually intended the MFN clause to be extended to include or grant access to new substantive rights.

c) Application to the Canada-Serbia BIT

770. The MFN clause contained in Article 5 of the Canada-Serbia BIT is drafted with even more specificity, consistent with this provision's narrow scope of application, which is targeted at discriminatory treatment.

771. First, as Respondent explained in its Counter-Memorial, Article 5 expressly limits the MFN standard's application to investors and/or their investments in "*like circumstances*". Recent tribunals have concluded that the words "like circumstances" serve to confine the MFN's scope to cases of discrimination, similar to the national treatment standard.[1278] The same view has been endorsed by the International Law Commission, which observed that "*The words [in like circumstances] seem to place some limitation upon which investors or investments can claim the benefit of an MFN provision – suggesting perhaps that only those investors or investments that are in 'like circumstances' with those of the comparator treaty can do so*".[1279]

772. Claimants' arguments to the contrary are without merit. They take issue with the approach as applied in *İçkale v. Turkmenistan* and *Muhammet Çap v. Turkmenistan*, in which the words "*in similar situations*" were found to limit the scope of the MFN clause's application, such that it excluded standards of investment protection included in other BITs.[1280] Claimants allege that this interpretation "*contradicts well-established interpretation of MFN clauses under international investment law*", referring to *Guris v. Syria*, wherein

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[1278] Counter-Memorial, para 672, referring to *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, and *İçkale İnşaat Limited Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/24), Award dated 8 March 2016, **RL-186**, para 329.

[1279] International Law Commission, Most-Favoured-Nation clause: Final Report of the Study Group on the Most-Favoured-Nation Clause (2015), **RL-259**, para 71.

[1280] *İçkale İnşaat Limited Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/24), Award dated 8 March 2016, **RL-186**, para 329; *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 rejected the *İçkale* tribunal's conclusion that "*in similar situations*" restricts the scope of the MFN clause to *de facto* discrimination.[1281] As explained above, Claimants' contention that their interpretation of the MFN standard, which allows for access to new standards of treatment from other BITs, does not emanate from any consensus among investment tribunals let alone any principle of international investment law.[1282]

773. Moreover, Claimants' reliance on *Guris v. Syria* is selective and does not advance its position in the present case. The claimants in *Guris* did not seek to use the MFN provision to access a wholly new standard of protection, as Claimants seek to do here, but instead sought to access a more broadly worded war losses provision in the Italy-Syria BIT, which allowed for compensation for war losses, irrespective of any discrimination (whereas the corresponding provision in the base treaty was limited to a non-discrimination obligation). Applying the *ejusdem* principle, the tribunal majority allowed the claimants to rely on the general MFN provision in order to claim the benefit of the more broadly worded war losses provision. In reaching this conclusion, the tribunal observed that the MFN clause was "cast in broad terms", as it was "*not confined to certain categories of treatment, such as in respect of the acquisition, expansion, or management of investments*" (unlike Article 5 of the Canada-Serbia BIT and Article 3(2) of the Cyprus-Serbia BIT).[1283] It further observed that both treaties (the Turkey-Syria BIT and the Italy-Syria BIT) contained provisions allowing for compensation for war losses:[1284]

> *The two provisions evidently cover the same subject-matter, both being war-losses clauses. And while they are not word-for-word identical, both provisions include the generic "similar events" catch-all which expands their respective scope of application. The Tribunal has no difficulty concluding that these provisions are in pari materiæ, covering disturbances of various intensities and scale, whether inter-State ("war") or internal*

774. Having found that there was substantial similarity between the two war losses provisions, the tribunal went on to conclude that the broader war losses provision in the Italy-Syria BIT amounted to more favourable treatment.[1285]

[1281] Reply, para 896.

[1282] See above para 761.

[1283] *Guris Construction and Engineering Inc. and others v. Arab Republic of Syria* (ICC Case No. 21845/ZF/AYZ), Final Award dated 31 August 2020, **CL-072**, para 278.

[1284] *Guris Construction and Engineering Inc. and others v. Arab Republic of Syria* (ICC Case No. 21845/ZF/AYZ), Final Award dated 31 August 2020, **CL-072**, para 279.

[1285] *Guris Construction and Engineering Inc. and others v. Arab Republic of Syria* (ICC Case No. 21845/ZF/AYZ), Final Award dated 31 August 2020, **CL-072**, paras 280-281. The dissenting arbitrator,

775. In addition to *Guris*, Claimants cite the NAFTA case *Clayton v. Canada* to support their position that "*the qualifier 'in like circumstances' does not require Claimants to identify a specific investor from a third country that was treated more favorably in the particular context of Claimants' investment*".[1286] Instead, it is in Claimants' view sufficient to show that a Qatari investor would benefit from more favourable treatment under the Qatar-Serbia BIT than an investor under the Canada-Serbia BIT, due to the inclusion of a non-impairment obligation in the former but not the latter.[1287] Quoting from *Bayindir v. Pakistan*, Claimants conclude that this approach "*is in line with the general purpose of MFN clauses, which is to 'provide a level playing field […] between foreign investors from different countries*'".[1288] What Claimants fail to mention is that the *Bayindir* tribunal had in mind both the MFN and the national treatment standards, on the basis of which it proceeded to consider whether the claimant investor was in "like circumstances" with other investors, before assessing whether the claimant investor had been granted less favourable treatment.[1289]

776. Claimant's reliance on *Clayton* is misplaced and misleading. When quoted in full and read in the proper context, it becomes clear that the *Clayton* tribunal's reasoning does not support Claimants' position. At issue in *Clayton* was whether the Canadian authorities had treated the claimant investors less favourably in the context of carrying out an environment assessment for a planned quarry mine, with the claimant investors arguing that the projects of domestic investors had been evaluated by the authorities on a more favourable basis in terms of both the mode of review and the evaluative standard that had been applied during the environmental assessment regulatory process. With respect to the appropriator comparators, the parties disputed whether the words "in like circumstances" required identical or "most like" circumstances, i.e. whether the other projects, in order to be considered an appropriator comparator, had to concern the same mode or industry as the claimant investor's project and/or be the subject of a comparable level of public controversy. The tribunal concluded that the other projects identified by the

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meanwhile, considered that the expression "in similar situations" should be read as limiting the clause to *de facto* discrimination, in line with the views of the tribunals in *İçkale* and *Muhammet Çap* as well as the parties to NAFTA (discussed below). Thus, the BIT's MFN clause did not allow the claimants to import any standards of protection from the Italy-Serbia BIT. See *ibid*, Partial Dissenting Opinion of Nassib G. Ziadé dated 31 August 2020, paras 20-24.

1286 Reply, para 893.

1287 Reply, para 894.

1288 Reply, para 894.

1289 *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan (I)* (ICSID Case No. ARB/03/29), Award dated 27 August 2009, **RL-147**, paras 387-390.

claimants were sufficiently similar to be deemed "in like circumstances" with the claimant's quarry project, noting that a number of them were also quarry and marine terminal export projects. Having determined that the comparators were "in like circumstances" with the claimants' investment, the tribunal proceeded to apply the standard three-pronged test for discrimination under the national treatment standard.

777. Apart from their misplaced reliance on *Clayton*, Claimants fail to consider that the State parties to NAFTA (Canada, Mexico, and the United States) have all consistently objected to the use of the MFN standard to import standards of treatment from other treaties concluded by a NAFTA party.[1290]

778. Aside from the restrictive effect of "in like circumstances", the inclusion of the phrase "in its territory" in Article 5(2) of the Canada-Serbia BIT indicates that the scope of this provision is aimed at internal measures of the State which concern the local treatment of the investment. In *Berschader v. Russia*, the tribunal considered that the use of the expressions "treatment" and "in its territory" "*appears to indicate that what the Contracting Parties had in view was the material rights accorded to investors within the territory of the Contracting States*".[1291] According to one arbitration scholar, "*substantive obligations included in other IIAs do not constitute in themselves 'treatment in the territory' for purposes of the MFN clause*".[1292]

779. Finally, Respondent notes that the dispute resolution clause in Article 20 of the Canada-Serbia BIT provides that an investor may commence arbitration proceedings under the treaty where "the respondent Party has breached an obligation under Section B". The jurisdiction of the Tribunal is thus limited to assessing whether or not there has been a breach of the obligations under Section B of the Canada-Serbia BIT. Claimants do not bring a claim that Respondent has breached the Treaty's MFN clause in Article 5. Rather, they rely on the MFN clause to bring a claim that Respondent has breached an obligation

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[1290] In *Pope & Talbot v. Canada*, *Methanex v. United States*, *Chemtura v. Canada*, *Bilcon v. Canada*, *Apotex v. United States*, and *Mesa Power v. Canada*, the claimants sought to rely on Article 1103 to borrow substantive standards of treatment in treaties between a NAFTA party and a third country. Their efforts were met with resistance from the three states parties to the NAFTA, either in their role as respondent or as non-disputing parties in arbitration proceedings, and the claimants' attempts have never proven successful.

[1291] *Vladimir Berschader and Moïse Berschader v. The Russian Federation* (SCC Case No. 080/2004), Award dated 21 April 2006, **RL-260**, para 185 (emphasis added); see also *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (ICSID Case No. ARB/14/30), Decision on Jurisdiction dated 31 May 2017, **RL-261**, para 120.

[1292] F. Perez-Aznar, "The Use of MFN Clauses to Import Substantive Treaty Provisions", *20 Journal of International Economic Law* (2018), **RL-247**, p 23.

under a different investment agreement, which goes beyond the scope of Serbia's consent to arbitrate under Article 20. Given that "*MFN clauses are not and should not be interpreted or applied to create new causes of action beyond those to which consent to arbitrate has been given by the Parties*",[1293] it cannot be that the parties to the Canada-Serbia BIT intended for the MFN clause to be used to extend the Tribunal's jurisdiction to permit a determination as to whether or not there has been a breach of an obligation not included in the base treaty.[1294]

2. Respondent did not impair Claimants' investment though unreasonable or discriminatory measures

780. Insofar as the Tribunal permits Claimants to invoke the MFN clause in the Cyprus-Serbia and Canada-Serbia BITs for the purpose of accessing the non-impairment standard, this does not get Claimants very far. Respondent's adoption of the 2013 DRP and the Land Directorate's related refusal to compensate Obnova do not amount to a violation of the non-impairment standard. In particular, the adoption of the 2013 DRP did not unreasonably impair the Cypriot Claimants' putative investment in Obnova, as Claimants allege. On the contrary, the decision to locate the public transportation terminal on the Dunavska Plots was reasonably justified, was not discriminatory, and did not result in any detriment to Obnova (**Section a)**). Additionally, Claimants' argument that Respondent unreasonably "failed" to initiate expropriation proceedings and to compensate Obnova in relation to the 2013 DRP must fail, as there were no grounds for compensation (**Section b))**.

a) The 2013 DRP was neither unreasonable nor discriminatory

781. As explained above[1295] and in Respondent's Counter-Memorial,[1296] the 2013 DRP was a reasonable and legitimate measure that was adopted following a transparent process in which Obnova was entitled to – but did not – comment on the proposal to locate the public transportation terminal on the Dunavska Plots. At the same time, Claimants have not shown that the adoption of the 2013 DRP impaired their investment in Obnova in any way. This is because (i) Obnova never had any rights in the Dunavska Plots or related

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[1293] *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), 16 January 2013, **RL-262**, para 73.

[1294] F. Perez-Aznar, "The Use of MFN Clauses to Import Substantive Treaty Provisions", *AJIL Unbound* (2018), **RL-247**, p 21.

[1295] See above Sections B.VIII and E.II.2.

[1296] Counter-Memorial, para 680.

Objects that had been harmed or taken away, and (ii) Obnova remains in possession and use of the Dunavska Plots and Objects.[1297]

782. While Claimants maintain their position that the 2013 DRP was unreasonable, their arguments are not convincing and thus their claims under the non-impairment standard must fail.

783. First, Claimants assert that the 2013 DRP lacked a "*legitimate purpose*" because the City "*did not explain why it eventually chose Obnova's location"* for the public transportation terminal instead of the City's premises across the street on which the bus depot was sited.[1298] This is incorrect. As explained above, the City analysed various options for the public transportation terminal. The location at the Dunavska Plots was one of two preferred locations. Following the 2006 Analysis and 2007 Study, the location at the Dunavska Plots was chosen over alternative locations, evidently for reasons of administrative ease and cost efficiency – which both flow from the fact that the City was already inscribed as the owner of the Dunavska Plots.[1299] Claimants fail to explain why this decision is unreasonable, improper, or had an undue impact on Obnova, especially given the fact that Obnova merely occupied (and continues to occupy) the premises as a lessee, with no property rights over the land or the Objects.

784. Claimants' second assertion – that Obnova did not have a meaningful opportunity to comment on 2013 DRP before it was adopted[1300] – is simply untrue. It is not disputed that as early as 2008, Obnova wrote to the City's Secretariat for Urban Planning to request that the proposed new public transportation termination not be located on the Dunavska Plots. This letter was provided to the Urbel for consideration.[1301] The fact that the Urbel did not change its decision to locate the public transportation terminal on the Dunavska Plots, notwithstanding the letter, does not support Claimants' position that this decision was unjustified. This is because, as pointed out in its letter, Obnova was occupying the land as a lessee and did not have any property rights which would have been expropriated by the decision to locate the terminal on that land.[1302]

1297 Counter-Memorial, para 681.

1298 Reply paras 900, 902-903.

1299 See above Section B.VII.

1300 Reply, para 904.

1301 See above para 243.

1302 Letter from Obnova to the City of Belgrade with the attachments dated 27 March 2008, as **R-174**.

785. Notably, Obnova never followed up on the letter or commented on the draft 2013 DRP through the public inspection procedure. Claimants allege that this was because they were unaware of the procedure, as the notice had been printed in "two trashy tabloids".[1303] This argument lacks any merit. As noted above, these "tabloids" were among the most circulated and read newspapers in the country; that Obnova and Claimants had no particular interest in those publications should not be held against Respondent, which had fully and transparently complied with its legal obligations in carrying out the public inspection procedure.

786. Finally, Claimants still have not shown that the 2013 DRP has unreasonably impaired the Cypriot Claimants' alleged investment in Obnova. Claimants' position is that Obnova is prevented from converting its right of use to ownership and thereby developing the premises as long as the 2013 DRP remains in place. As Claimants acknowledge, Obnova's ability to develop the premises is tied to its ability to convert its purported unregistered right of use over the land (which is based on the existence of the temporary and/or illegal Objects and the lease agreements) into ownership. But as explained above, Obnova has no right of use over the Dunavska Plots which can be converted into ownership.[1304]

b) <u>The Land Directorate did not act unreasonably in denying Obnova's request for compensation</u>

787. Claimants are equally misguided with their claim that Respondent acted unreasonably, in breach of the non-impairment standard, because it did not compensate Obnova for the alleged expropriatory impact of the 2013 DRP.

788. This claim must be dismissed from the outset for the reasons already provided above and in Respondent's Counter-Memorial,[1305] namely that Obnova, and by extension Claimants, were not entitled to any compensation for the 2013 DRP (because Obnova held no rights in the property that was impacted by the 2013 DRP) and thus there is no impairment of Claimants' investment in Obnova.

789. In an apparent effort to evade this fundamental flaw in its case, Claimants refocus their arguments in their Reply on Respondent's alleged failure to initiate expropriation proceedings. According to Claimants, had Respondent done so, this would have led to a

[1303] Reply, paras 786, 904.

[1304] See above Section B.VI.

[1305] Counter-Memorial, para 683.

determination that Obnova was entitled to compensation.[1306] This is misguided. Claimants ignore that as the registered holder of rights over the Dunavska Plots, it would have been senseless for Respondent to initiate expropriation proceedings and order that Obnova be compensated for the impact of the 2013 DRP on the City's land. Claimants also fail to consider that in cases of *de facto* expropriation, the proper route for legal redress is for the alleged owner or user of the land to initiate court proceedings.[1307] While Obnova could have initiated court proceedings seeking compensation, it did not do so, instead opting to pursue costly and premature claims before an international investment tribunal.

790. Claimants next take aim at the Land Directorate's refusal to compensate Obnova, arguing that this "decision" was irrational and in violation of Serbian law while insisting that the Land Directorate was "authorised to respond".[1308] None of these arguments hold up to scrutiny. For reasons set out above, the Land Directorate was not competent or authorized to decide on Obnova's compensation.[1309] Only the Serbian courts have the authority to determine disputes resulting from *de facto* expropriations, including compensation.[1310] It follows from this that the Land Directorate did not, as Claimants allege, issue a decision denying Obnova compensation. Instead, it provided a reasonable explanation as to why it considered that Obnova should not be compensated, above all because Obnova had not established that it had rights over the Objects, while noting that Obnova's challenge to the City's inscription in the Cadastre as the registered holder of rights over the Dunavska Plots was the subject of pending court proceedings.[1311] Even if the Land Directorate's preliminary view that Obnova was not entitled to compensation was incorrect (*quad non*), this would not give rise to a violation of the non-impairment standard. As explained in Respondent's Counter-Memorial, the threshold for arbitrariness in international law is high; only a manifestly unjust or wilful disregard of the law will breach this standard.[1312] Claimants offer no support for their allegation that the Land Directorate's response fell below this standard.

[1306] Reply, para 908.

[1307] Legal opinion-Prof Dr Radenko Jotanović-Counter-Memorial-SRB dated 29 September 2023, **RLO-001**, para 128.

[1308] Reply, paras 909, 911-912.

[1309] Second Legal Opinion-Prof Radenko Jotanović-Rejoinder-SRB dated 14 June 2024, **RLO-004**, para. 94.

[1310] Second Expert report of Prof. Miloš Živković and Mr. Miloš Milošević, para. 224.

[1311] See above Section B.VII.6.c).

[1312] Counter-Memorial, para 620.

791. Finally, as regards Claimants' argument that Respondent's failure to compensate Claimants for the adoption 2013 DRP has impaired their investment, Respondent directs the Tribunal to its arguments presented in connection with the 2013 DRP. As the lessee of the Dunavska Plots and user of unauthorised and/or temporary Objects, Obnova had no claim to compensation and has suffered no discernible loss in relation to the 2013 DRP, not having any rights capable of being expropriated. This is because Claimants have failed to establish that Obnova had any entitlement to the land and Objects and thus was never in a position to develop the land. The loss of which Claimants now complain is speculative and unsubstantiated.

IV. Serbia did not breach its obligations under the umbrella clause

792. The Cypriot Claimants further rely on the MFN clause in Article 3(1) of the Cyprus-Serbia BIT to import the umbrella clause contained in Article 2(2) of the UK-Serbia BIT. Their attempt to access a wholly new treaty obligation which has no counterpart in the Cyprus-Serbia should not be permitted (**Section 1.**). But even if the Cypriot Claimants are permitted to access the umbrella clause in another treaty, this would not assist their cause, because Respondent has not assumed any specific obligations toward the Cypriot Claimants or their alleged investment (Obnova). Instead, they rely on general provisions of law, which are not sufficiently specific to engage Respondent's obligations as a matter of public international law (**Section 2.**). The Cypriot Claimants contend that Respondent's failure to initiate expropriation proceedings and compensate Obnova amount to a breach of both Serbian law and the umbrella clause, but they are wrong on both counts (**Section 3**.)

1. Claimants may not claim the benefit of the umbrella clause in Article 2(2) of the UK-Serbia BIT through the MFN clause in Article 3(1) of the Cyprus-Serbia BIT

793. For the same reasons that Respondent objects to Claimants' invocation of the MFN clause contained in the Cyprus-Serbia BIT to access the non-impairment obligation in the Morocco-Serbia BIT, Respondent objects to Claimants' attempt to access the umbrella clause in Article 2(2) of the UK-Serbia BIT. Article 3(1) of the Cyprus-Serbia BIT does not permit the Cypriot Claimants to claim entirely new standards of protection contained in other treaties entered into by 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 the UK-Serbia BIT.

2. The umbrella clause does not cover laws of general application

794. Article 2(2) of the UK-Serbia BIT 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*".[1313] In its Counter-Memorial, Respondent explained that Article 2(2) of the UK-Serbia BIT is not engaged in the present case, as Respondent did not assume or enter into any obligation with respect to the Cypriot Claimants' investment in Obnova. Respondent further explained that umbrella clauses such as the one contained in Article 2(2) of the UK-Serbia BIT do not cover general legal obligations such as those arising under statutory law. The alleged breach of Article 2(2) UK-Serbia BIT is based on Respondent's alleged failure to comply with general obligations under Serbian law to pay compensation for expropriating property, specifically the Law on Expropriation and the Serbian Constitution. Being based on alleged violations of general law that were not adopted with respect to Obnova, the Cypriot Claimants' claim under Article 2(2) must fail.[1314]

795. Claimants erroneously argue that the term "any obligation" in Article 2(2) of the UK-Serbia BIT extends to obligations arising under legislative and administrative acts.[1315] They ignore that umbrella clauses do not apply to legislative acts of general application.[1316] This is particularly the case where the umbrella clause refers to any obligations "*entered into*" with regard to investments of nationals of the other contracting State, as is the case with Article 2(2) of the UK-Serbia BIT.[1317] The ordinary meaning of this

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[1313] Agreement between UK and Yugoslavia on Reciprocal Promotion and Protection of Investments, **CL-010**, Article 2(2).

[1314] Counter-Memorial, paras 691-695.

[1315] Reply, para 916, referring to Memorial, paras 289-290.

[1316] 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.

[1317] *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,

expression indicates that the commitment must be unequivocal and specific with respect to a particular investment. Provisions of a host State's legislation or case law, which are of general application and not addressed specifically to foreign investors in relation to their investments, do not fall within this category.[1318]

796. Insofar as investment tribunals have recognised obligations arising from host State laws and regulations, this was because those laws and regulations were directed specifically at the investor and its investment. This was acknowledged by the tribunal in *Continental Casualty v. Argentina*, which confirmed that "*the umbrella clause does not come into play when the breach complained of concerns general obligations arising from the law of the host State*":[1319]

> *The obligation that a State must observe under an umbrella clause 'will often be a bilateral obligation,' such as a contractual obligation, 'or will be intrinsically linked to obligations of the investment company.' This can include the unilateral commitments arising from provisions of the law of the host State regulating a particular business sector and addressed specifically to the foreign investors in relation to their investments therein. For example, according to the award of the LG&E tribunal, this was the case of the obligations that were made by Argentina to foreign investors under the Gas Law and its implementing regulations because they were the basis on which the original investors relied to make investments in the gas sector.*

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**, paras 368, 379 (noting that the phrasing "entered into" with respect to an investment "*implies a counterpart and not a general undertaking of an obligation*" and "*[i]f the violation of any legal obligation contained in the national legal order would be transformed by an umbrella clause into a violation of the Treaty, whatever the internal source of the obligation or the seriousness of the breach, it would be sufficient to include an umbrella clause in the Treaty and no other standard of protection. This would result in the fact that the whole national legal order would be automatically internationalized through an umbrella clause, which cannot be*").

[1318] See e.g. *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-096**, para 51; *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-097**, 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-098**, paras 691; *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 121.

[1319] *Continental Casualty Company v. The Argentine Republic* (ICSID Case No. ARB/03/9), Award dated 5 September 2008, **RL-206**, paras 301.

797. Claimants' reliance on *ESPF v. Italy* does not advance their position that Serbian laws amount to an "obligation" within the meaning of Article 2(2) of the UK-Serbia BIT.[1320] As Claimants acknowledge, the *ESPF* tribunal was careful to qualify its statement that non-contractual obligations may give rise to treaty protection, elaborating that there "*must be a specific obligation given by the host state to either the investor or its investment*".[1321] In that case, the measures at issue – which comprised a series of decrees setting out the specific tariff rates for photovoltaic plants, letters to qualifying investors confirming their entitlement to the tariffs, and a corresponding agreement concluded by each individual PV plant – amounted to an "obligation" to guarantee specific incentive tariff rates for 20 years for PV plants. As explained by the tribunal, this regime, which was designed to attract investors to the PV sector, created "*specific obligations to each investment*" by having confirmed them by way of the letter and the subsequent agreement.[1322] While the legislation itself was not specific enough on its own to qualify as an obligation, as it set out rules for all investments, the tribunal found that it crystallised into an obligation under international law once the individual PV plants met the technical requirements for the fixed tariffs, as formalised by the agreements concluded by those qualifying plants. This is wholly different from the present case, where Claimants rely on general provisions of Serbian law which do not amount to any specific commitment or obligation entered into with respect to either Claimants or Obnova.

798. While the *ESPF* tribunal found that the FIT regime, as implemented through a framework of regulatory decrees and other actions made with respect to specific investments, could give rise to a treaty-protected obligation, it also found that the Italian State had assumed no obligations to the claimant investor in relation to a related "minimum guaranteed price" (or MGP) scheme for small PV plants, which was set out in the legislation and regulations. This was because the State "*did not take on an analogous obligation to*

[1320] Reply, para 920.

[1321] *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic* (ICSID Case No. ARB/16/5), Award dated 14 September 2020, **CL-055**, para 787. See also para 792.

[1322] *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic* (ICSID Case No. ARB/16/5), Award dated 14 September 2020, **CL-055**, para 792 ("*The Respondent created a regime designed to attract investment by offering incentive tariffs and then committing to pay those tariffs* for *20 years. The system was designed to create specific obligations to each investment by having them confirmed by letter and then followed up with a GSE Agreement*.").

maintain the MGPs at a certain level or for a specific period of time" and "*did not enter into any obligations with the Claimants or their Investments not to alter the MGP regime*".[1323]

799. Claimants' reliance on the reasoning in *Enron v. Argentina*, *OIEG v. Venezuela*, and *Gardabani v. Georgia* is similarly unavailing. None of these cases serve as authority for the view that an umbrella clause covers general acts of legislation. While the *Enron* tribunal considered that "*obligations assumed through law or regulation*" could in principle fall within the scope of an umbrella clause, it clarified that "'[o]*bligations covered by the 'umbrella clause' are nevertheless limited by their object: 'with regard to investments'*".[1324] Since the gas law at issue in that case and its implementing legislation were adopted to establish a tariff regime that provided for a certain rate of return for newly privatised companies and to ensure the value of the claimant's investment, the tribunal considered them "obligations with regard to investments" in the sense of the umbrella clause.[1325]

800. As in *Enron*, the fact that the tribunal in *OIEG v. Venezuela* accepted that certain legislative acts could amount to an "obligation" within the meaning of the applicable treaty's umbrella clause has no bearing on the present case. The obligation that Venezuela had failed to honour in *OIEG* was a domestic investment protection statute, the purpose of which was "*to provide a stable, predictable legal framework for national and foreign investments*", i.e. was entered into specifically with respect to investments.[1326] On this basis, the tribunal accepted the claimant's argument that a violation of the domestic investment protection statute also amounted to a violation of the BIT, but noted that since the investment protection undertakings in the investment law were analogous to those contained in the BIT, the practical consequences of this decision were limited.[1327]

[1323] *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic* (ICSID Case No. ARB/16/5), Award dated 14 September 2020, **CL-055**, para 794.

[1324] *Enron Corporation and Ponderosa Assets LP v. Argentine Republic* (ICSID Case No. ARB/01/3), Award dated 22 May 2007, **CL-033**, para 274.

[1325] *Enron Corporation and Ponderosa Assets LP v. Argentine Republic* (ICSID Case No. ARB/01/3), Award dated 22 May 2007, **CL-033**, para 275.

[1326] *OI European Group B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25), Award dated 10 March 2015, **CL-034**, para 590.

[1327] *OI European Group B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25), Award dated 10 March 2015, **CL-034**, paras 594-595.

801. Finally, Claimants fail to mention the *Gardabani* tribunal's qualification when it stated that "*legislation or regulation are capable of creating obligations that are protected by an umbrella clause*". The *Gardabani* tribunal was careful to add that laws of general application do not qualify for such protection:

> *However, 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 commitment or obligation. In this case, the relevant regulations are NERC Resolution No. 3 of 3 April 2013 and NERC Resolution No. 5 of 11 April 2011.*[1328]

802. In the present case, Respondent's purported obligations under the Law on Expropriation and the Serbian Constitution to award compensation were not assumed specifically with respect to Obnova or with a view toward encouraging investments in Serbia. On the contrary, the State's duty to compensate in the event of an expropriation is a general obligation under Serbian law which is applicable to everyone, natural and legal persons alike. Further, to state the obvious, this obligation of general application exists independently of the Cypriot Claimants' purported investment in Obnova. Accordingly, there is no valid basis for Claimants' allegation that Respondent has breached an obligation entered into with respect to Obnova.

3. Serbia did not breach its obligations under Serbian law

803. Claimants allege that Respondent's denial of compensation to Obnova for the alleged expropriation of its putative property amounts to a violation of the umbrella clause obligation contained in Article 2(2) of the UK-Serbia BIT. They allege in particular that the Land Directorate's refusal to grant Obnova's request for compensation in relation to the 2013 DRP contravened the Serbian Law on Expropriation and the Serbian Constitution. This is incorrect for several reasons.

804. First, Respondent did not assume or owe any "*specific obligations […] to Cypriot Claimants*", as alleged.[1329] As explained above, the State's obligation to initiate expropriation proceedings and to compensate property owners in the event of an expropriation does not amount to an obligation specifically owed or entered into with respect to the Cypriot Claimants and their putative investment in Obnova. Moreover, Respondent had no

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[1328] *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.

[1329] See above para 789.

obligation under Serbian law to initiate expropriation proceedings in relation to an alleged *de facto* expropriation. As already mentioned, this would have been absurd considering that the City is inscribed as the owner of the Dunavska Plots and Objects. On the other hand, Obnova was entitled to initiate civil proceedings in order to claim compensation but opted not to.

805. Second, even if it could be said that Respondent had assumed a specific obligation to compensate the Cypriot Claimants (which is denied), no such obligation arose or was breached in relation to the 2013 DRP. This is because Obnova had no recognised property rights in the Dunavska Plots and the Objects that were the subject of the 2013 DRP.[1330]

F. Prayers for relief

806. For all the above reasons, Respondent respectfully requests the Tribunal to:

(1) DISMISS the present claims in their entirety for lack of jurisdiction and/or inadmissibility;

(2) In the event that the Tribunal rejects Respondent's objections to jurisdiction and admissibility, DISMISS Claimants' claims in their entirety; and

(3) ORDER 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.

[1330] See above Section B.VII.5.

Submitted on behalf of Respondent

[signed]

Prof. Dr. Moritz Keller
Partner, Clifford Chance

[signed]

Senka Mihaj, attorney at law

[signed]

Dr. Vladimir Djeric, attorney at law