Excerpts

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

BRIF TRES D.O.O. BEOGRAD AND BRIF-TC D.O.O. BEOGRAD
Claimants

and

REPUBLIC OF SERBIA
Respondent

ICSID Case No. ARB/20/12

AWARD

Members of the Tribunal
Mr Yves Derains, President
Ms Samaa Haridi, Arbitrator
Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal
Ms Aurélia Antonietti

Assistant to the President
Dr Ana Gerdau de Borja Mercereau

Date of dispatch to the Parties: 30 January 2023

REPRESENTATION OF THE PARTIES

Representing BRIF TRES d.o.o. Beograd and BRIF-TC d.o.o. Beograd:

Mr Christophe Maillard
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and

Mr Nenad Stankovic
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and

Mr Raëd Fathallah
Mr Jose Maria Perez
Ms Marina Weiss
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France

Representing the Republic of Serbia:

Mr John J. Buckley, Jr.
Mr Jonathan M. Landy
Mr Benjamin W. Graham
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and

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TABLE OF ABBREVIATIONS/DEFINED TERMS

[redacted]	[redacted]
[redacted]	[redacted]
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Bankruptcy Administrator	[redacted]
[redacted]	[redacted]
Belgrade Court	Commercial Court in Belgrade
Beoland	Belgrade Land Development Agency
Bifurcation Hearing	Hearing on Bifurcation held on 24 November 2021
BIT	BLEU-Serbia BIT
BLEU-Serbia BIT	Agreement between the Belgo-Luxembourg Economic Union, on the one hand, and the Serbia and Montenegro, on the other hand, on the Reciprocal Promotion and Protection of Investments of 4 March 2004
[redacted]	[redacted]
BRIF-TC	BRIF-TC d.o.o. Beograd
BRIF TRES	BRIF TRES d.o.o. Beograd
C-[#]	Claimants' Exhibit
CL-[#]	Claimants' Legal Authority
Claimants	BRIF TRES d.o.o. Beograd and BRIF-TC d.o.o. Beograd

Claimants' Counter-Memorial	Claimant's Counter-Memorial on the Second Jurisdictional Objection of 20 May 2022
Claimants' First TRO Request	Claimants' request for a temporary restraining order of 25 January 2021
Claimants' Memorial on the Merits	Claimants' Memorial on the Merits of 15 July 2021
Claimants' Request for Provisional Measures	Claimants' request for provisional measures of 5 February 2021
Claimants' Second TRO Request	Claimants' request for a temporary restraining order of 5 February 2021
[redacted]	[redacted]
[redacted]	[redacted]
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Jurisdiction Hearing	Hearing on Jurisdiction held on 2 September 2022
[redacted]	[redacted]
Liquidator	[redacted] Luxembourg Liquidator
Luxembourg Liquidator	[redacted] Luxembourg Liquidator
[redacted]	[redacted]
[redacted]	[redacted]

[redacted]	[redacted]
[redacted]	[redacted]
Provisional Measures Hearing	Provisional Measures Hearing of 10 March 2021
R-[#]	Respondent's Exhibit
RL-[#]	Respondent's Legal Authority
Request	Request for Arbitration from BRIF TRES and BRIF-TC against Serbia of 17 April 2020
Request for Bifurcation	Respondent's request for bifurcation of 16 September 2021
Respondent	The Republic of Serbia
Project	[redacted] Project
Respondent's Memorial	Respondent's Memorial on the Second Jurisdictional Objection of 25 March 2022
Respondent's Observations on the Request for Provisional Measures	Respondent's Observations on the Request for Provisional Measures of 5 February 2021
Respondent's Observations to the First TRO Request	Respondent's Observations to the First TRO Request of 26 January 2021
Respondent's Observations on the Second TRO Request	Respondent's Observations on the Second TRO Request of 8 February 2021
Serbia	The Republic of Serbia
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

Tribunal	Arbitral tribunal constituted on 26 October 2020
[redacted]	[redacted]

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or "**Centre**") on the basis of the Agreement between the Belgo-Luxemburg Economic Union and Serbia and Montenegro on the Reciprocal Promotion and Protection of Investments which entered into force on 12 August 2007 ("**BLEU-Serbia BIT**" or "**BIT**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 ("**ICSID Convention**").

2. Claimants are BRIF TRES d.o.o. Beograd ("**BRIF TRES**"), a company incorporated under the laws of the Republic of Serbia and BRIF-TC d.o.o. Beograd ("**BRIF-TC**"), a company incorporated under the laws of the Republic of Serbia (together, "**Claimants**").

3. Respondent is the Republic of Serbia ("**Serbia**" or "**Respondent**").

4. Claimants and Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i).

5. This dispute relates to a series of purported actions and inactions by Serbia that allegedly violated its obligations under the BLEU-Serbia BIT to provide (i) fair and equitable treatment and (ii) continuous legal protection and security to Claimants, and that allegedly led to (iii) unlawful expropriation of Claimants' investment in Serbia and to violation of Serbia's obligations vis-à-vis Claimants' investments protected under the umbrella clause of the Agreement between Serbia and Montenegro and the State of Kuwait on Mutual Promotion and Investment Protection concluded on 19 January 2004, imported *via* the most-favourable-nation clause of the BLEU-Serbia BIT, in the context of a [redacted] Agreement for the construction and operation of a modern shopping centre on plots of land bordering the Danube River [redacted].

II. PROCEDURAL HISTORY

6. On 17 April 2020, ICSID received a request for arbitration from BRIF TRES and BRIF-TC against Serbia ("**Request**").

7. On 27 April 2020, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

8. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follow: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator, to be appointed by agreement of the two co-arbitrators.

9. The Tribunal is composed of Mr Yves Derains, a national of France, President, appointed by agreement of the co-arbitrators, through a rank and strike mechanism agreed by the Parties and by the co-arbitrators; Ms Samaa Haridi, a national of Egypt and the United States of America, appointed by Claimants; and Prof. Brigitte Stern, a national of France, appointed by Respondent.

10. On 26 October 2020, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings ("**Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms Aurélia Antonietti, ICSID Senior Legal Adviser, was designated to serve as Secretary of the Tribunal.

11. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 21 December 2020 by videoconference.

12. Following the first session, on 22 December 2020, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the

decision of the Tribunal on disputed issues. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Washington, D.C.

13. On 25 January 2021, Claimants submitted a request for a temporary restraining order (the "**Claimants' First TRO Request**"), anticipating a request for provisional measures, in relation to a notification dated 20 January 2021 from the Commercial Court in Belgrade ("**Belgrade Court**") summoning BRIF-TC to a hearing to examine a possible declaration of bankruptcy of BRIF-TC, pursuant to motions submitted by the City of Belgrade and the Belgrade Land Development Public Agency ("**Beoland**").

14. On 26 January 2021, Respondent submitted its observations ("**Respondent's Observations to the First TRO Request**").

15. On 26 January 2021, the Tribunal issued Procedural Order No. 2, whereby it:

> "[g]rant[ed] the urgent relief requested in Item (c) of Claimants' Request, and thus issue[d] the following recommendation pursuant to ICSID Convention Article 47 and ICSID Arbitration Rule 39:
>
> [and ordered] that the Republic of Serbia, the Respondent in the present proceedings (ICSID Case No. ARB/20/12), cause the City of Belgrade and the [redacted] and/or any of its instrumentalities to refrain from adopting any measures, whether with respect to BRIF-TC or BRIF TRES, that would otherwise aggravate the present dispute, noting that objecting to a request for a reasonable adjournment of the Belgrade Court Hearing scheduled for 27 January 2021 at 11:00 am (Belgrade time) would contribute to aggravate the dispute."

16. Procedural Order No. 2 also determined that it would remain in force until the Tribunal ruled on the request for provisional measures anticipated by Claimants and would be automatically withdrawn if such request was not filed by 5 February 2021.

17. On 5 February 2021, Claimants filed a request for provisional measures, together with a second request for a temporary restraining order ("**Claimants' Second TRO Request**" and "**Claimants' Request for Provisional Measures**").

18. On 8 February 2021, Respondent submitted its observations on Claimants' Second TRO Request ("**Respondent's Observations on the Second TRO Request**").

19. By email dated 9 February 2021, Claimants informed the Tribunal that bankruptcy proceedings had been opened against BRIF-TC.

20. On the same day, the Tribunal issued Procedural Order No. 3, as follows:

> "1. While the Tribunal was preparing its decision relating to the Claimants' Request for a Temporary Restraining Order ("TRO") filed on 5 February 2021, it was informed by the Claimants on 9 February 2021 that bankruptcy proceedings have been opened against BRIF-TC, although neither BRIF-TC nor its legal representatives have received any individual notification in this regard.
>
> 2. In view of this last development, the Claimants are invited to inform the Arbitral Tribunal as soon as possible whether they intend to amend their request for TRO and/ or their Request for provisional measures.
>
> 3. In the meantime, the Tribunal orders the Republic of Serbia, the Respondent in the present proceedings (ICSID Case No. ARB/20/12), to cause the City of Belgrade and the Belgrade Land Development Public Agency and/or any of its instrumentalities to refrain from adopting any measures, whether with respect to BRIF-TC or BRIF TRES, that would otherwise further aggravate the present dispute.
>
> 4. This order will remain in place until the Arbitral Tribunal has ruled on the Claimants' Request for provisional measures filed on 5 February 2021."

21. By letter dated 9 February 2021, Claimants informed the Tribunal that Claimants' Second TRO Request and part of their prayer for relief in relation to the Request for Provisional Measures had become moot, by virtue of bankruptcy proceedings being opened against BRIF-TC, while maintaining the remainder of their prayer for relief.

22. On 15 February 2021, Respondent filed its observations on Claimants' Request for Provisional Measures ("**Respondent's Observations on the Request for Provisional Measures**").

23. By emails of even date, Claimants requested leave to submit a reply on Respondent's Observations on the Request for Provisional Measures, and Respondent communicated its reservations about the arbitration continuing without clarity concerning the identity

of BRIF-TC's authorized legal representative in light of the opening of bankruptcy proceedings.

24. By email dated 16 February 2021, the Tribunal granted Claimants until 22 February 2021 to reply and deal with the legal representation issue and Respondent until 27 February 2021 to file a rejoinder and comment on the legal representation issue (if willing).

25. By letter dated 22 February 2021, Claimants commented on the legal representation issue.

26. On the same day, Claimants filed their Reply with an amended prayer for relief.

27. By letter dated 23 February 2021, Respondent commented on Claimants' letter dated 22 February 2021.

28. By a written submission dated 24 February 2021, [redacted], Bankruptcy Administrator for BRIF-TC ("**Bankruptcy Administrator**" or [redacted] requested the suspension of the proceedings and access to the case file.

29. On the same day, the Tribunal invited Claimants (including BRIF-TC's counsel of record) and the Respondent to simultaneously comment on the issue of BRIF-TC's representation and on the Bankruptcy Administrator's request for suspension by 1 March 2021.

30. By letter dated 1 March 2021, Claimants submitted their comments on the Bankruptcy Administrator's request for suspension and on Respondent's letter dated 23 February 2021.

31. On 1 March 2021, Respondent submitted its Rejoinder commenting on the Bankruptcy Administrator's request for suspension and on BRIF-TC's representation.

32. On the same date, the Tribunal issued Procedural Order No. 4 on the provisional measures hearing's ("**Provisional Measures Hearing**") organisation.

33. By communication dated 2 March 2021, the Tribunal invited (i) Claimants to clarify by 4 March 2021 whether they argued that their counsel still represented BRIF-TC and, if so, on which legal basis; (ii) Respondent and the Bankruptcy Administrator to submit by 8 March 2021 observations (if willing) on these issues; and confirmed that (iii) the Provisional Measures Hearing was maintained, although the agenda could be amended to extend to the issue of BRIF-TC's representation.

34. On 4 March 2021, Claimants submitted their clarifications pursuant to the Tribunal's request dated 2 March 2021.

35. On 8 March 2021, Respondent filed its observations on Claimants' clarifications dated 4 March 2021.

36. The Bankruptcy Administrator did not submit any observations.

37. By correspondence dated 9 March 2021, the Tribunal informed the Parties that it had decided to maintain the Provisional Measures Hearing, at which the Parties would be entitled to address the issue of the representation of BRIF-TC in addition to Claimants' Application for Provisional Measures. By the same correspondence, the Tribunal informed the Parties that the Bankruptcy Administrator would be allowed to attend the Provisional Measures Hearing (if willing), reserving any decision on representation for a later stage. By separate correspondence of even date, the Tribunal invited the Bankruptcy Administrator to attend the Provisional Measures Hearing and to address on this occasion the issue of representation.

38. On 10 March 2021, the Tribunal held a Provisional Measures Hearing *via* videoconference. The Bankruptcy Administrator did not participate in the Provisional Measures Hearing.

39. At the Provisional Measures Hearing, Claimants further amended their prayer for relief.

40. By email dated 12 March 2021, Claimants informed the Tribunal that they had "just learned from the online docket system of the Serbian courts that the Belgrade Commercial Court of Appeal has revoked the decision of the Belgrade Commercial

Court dated 2 February 2021 on the opening of the bankruptcy proceedings against BRIF-TC."

41. By email dated 18 March 2021, Claimants further informed the Tribunal that the City of Belgrade and Beoland had filed submissions in the bankruptcy case.

42. On the same day, the Tribunal (i) invited the Parties to keep it informed of any development in relation to the bankruptcy proceedings; and (ii) communicated that until the issue of the revocation of the opening of bankruptcy was clarified, a decision on Claimants' Request on Provisional Measures would be premature, although the Tribunal would decide the issue of BRIF-TC's representation as soon as possible.

43. On 23 March 2021, the Tribunal issued its Decision on Representation. The Tribunal decided that:

> "the Arbitral Tribunal finds that the power of attorney of CAS, Stankovic & Partners and Bredin Prat is still valid and that a change of control and its consequences under the *lex societatis* after consent to arbitrate on 17 April 2020 are irrelevant for purposes of examining the validity of the power of attorney of BRIF-TC's counsel.
>
> In light of the foregoing, the Arbitral Tribunal decides that CAS, Stankovic & Partners and Bredin Prat are the authorised legal representatives of BRIF-TC in these arbitration proceedings."

44. On 15 July 2021, Claimants filed their Memorial on the Merits ("**Claimants' Memorial on the Merits**").

45. On 16 September 2021, Serbia filed its Request for Bifurcation ("**Request for Bifurcation**").

46. On 1 November 2021, Claimants filed their Answer to the Respondent's Bifurcation Request.

47. On 16 November 2021, the Tribunal issued Procedural Order No. 5 concerning the organization of the Hearing on Bifurcation ("**Bifurcation Hearing**"), which was held on 24 November 2021.

48. On 1 December 2021, the Tribunal issued Procedural Order No. 6 addressing Respondent's Request for Bifurcation. The Tribunal granted the "*Respondent's Request for Bifurcation with respect to its second jurisdictional objection according to which it should decline to exercise jurisdiction because* [redacted] *acquisition of the BRIF TRES share was an abuse of process*" and dismissed the Request for Bifurcation regarding all remaining jurisdictional objections.

49. On 13 December 2021, the Tribunal issued Procedural Order No. 7 setting the timetable for the pleadings on the second jurisdictional objection.

50. On 24 January 2022, the Tribunal issued a decision on the Parties' requests for document production.

51. On 17 February 2022, the Parties sent simultaneous communications to the Tribunal regarding their outstanding disagreements on each other's document production.

52. On 21 February 2022, the Parties communicated to the Tribunal their replies.

53. On 25 February 2022, the Tribunal issued Procedural Order No. 8 on the Parties' disagreements on each other's document production request.

54. On 25 March 2022, Respondent filed its memorial on jurisdiction ("**Respondent's Memorial**").

55. On 20 May 2022, Claimants filed their counter-memorial on jurisdiction ("**Claimants' Counter-Memorial**").

56. On 16 August 2022, the President held a pre-hearing organizational meeting with the Parties by videoconference.

57. On 17 August 2022, the Tribunal issued Procedural Order No. 9 concerning the organization of the hearing on jurisdiction ("**Hearing on Jurisdiction**").

58. The Hearing on Jurisdiction was held in Paris on 2 September 2022. The following persons were present:

On behalf of the Tribunal

Mr Yves Derains (President)

Ms Samaa Haridi (Co-arbitrator)

Prof. Brigitte Stern (Co-arbitrator)

Assistant to the President

Dr Ana Gerdau de Borja Mercereau

On behalf of ICSID

Mr Francisco Abriani (Acting Secretary of the Tribunal)

On behalf of the Claimants

Mr Raed Fathallah (Bredin Prat)

Mr José Maria Perez (Bredin Prat)

Ms Marina Weiss (Bredin Prat)

Mr Shane Daly (Bredin Prat)

Ms Jelena Todić (Bredin Prat)

Ms Jude Dabbas (Bredin Prat)

Ms Lucy Smith (Bredin Prat)

Ms Natalia Da Silva Goncalves (Bredin Prat)

Mr Christophe Maillard (CAM)

Mr Nenad Stankovic (Stankovic & Partners)

Ms Sara Pendjer (Stankovic & Partners)

Mr Luka Marosiuk (Stankovic & Partners)

On behalf of the Respondent

Mr John J. Buckley, Jr. (Williams & Connolly)

Mr Jonathan M. Landy (Williams & Connolly)

Mr Benjamin W. Graham (Williams & Connolly)

Mr Nebojša Anđelković (Law Office Anđelaković)

Ms Olivera Stanimirović (Serbia)

Mr Marinko Čobanin (Serbia)

59. On 7 December 2022, the Parties filed their cost submissions.

60. On 14 December 2022, the Parties filed their replies to the other side's cost submission.

61. The proceeding was closed on 30 January 2023.

III. FACTUAL BACKGROUND

62. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted] [redacted]

[redacted] [redacted] [redacted]

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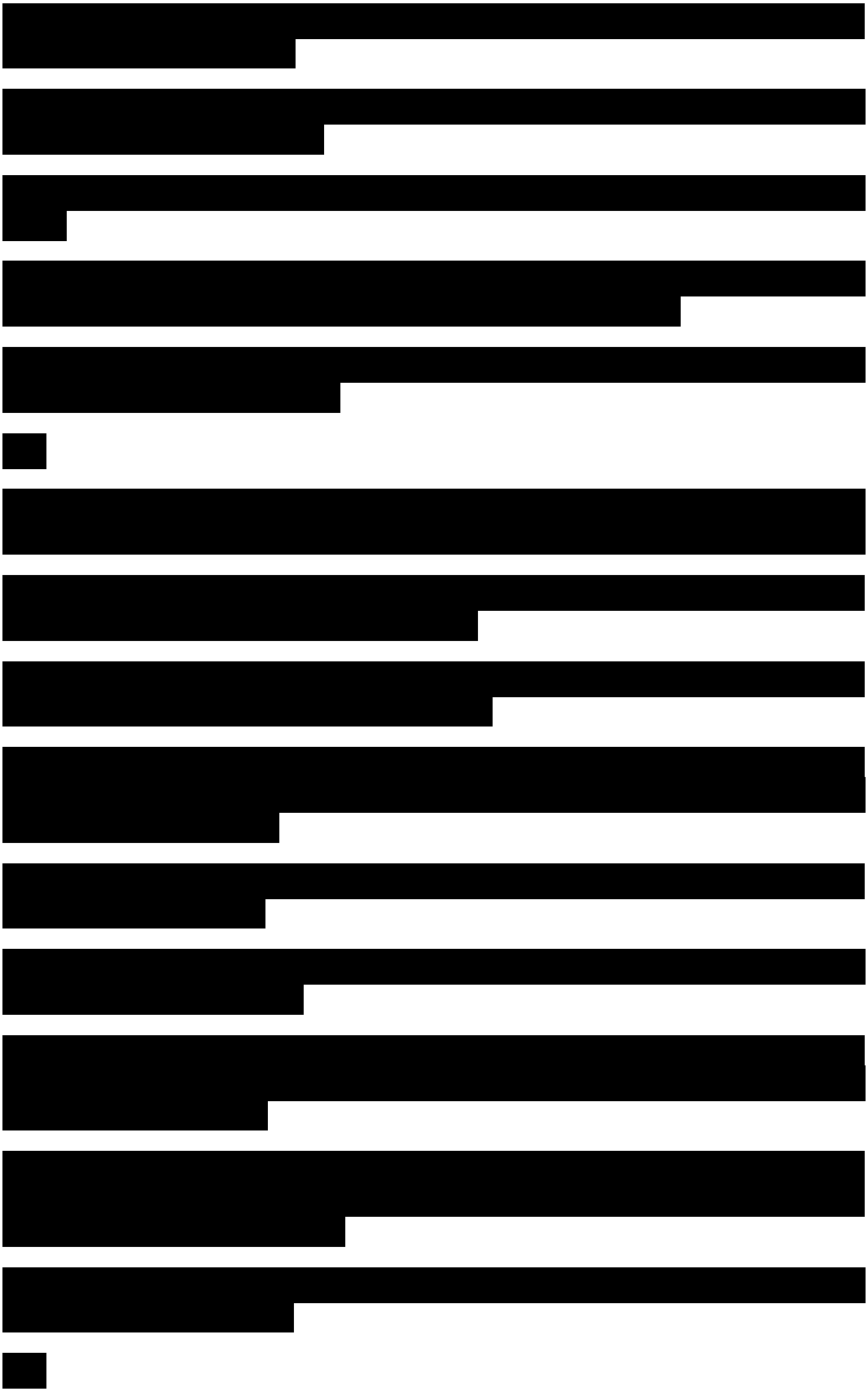

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IV. PARTIES' CLAIMS AND REQUESTS FOR RELIEF

94. At ¶¶ 479-480 of Claimants' Memorial on the Merits of 15 July 2021, Claimants made the following prayer for relief:

> "479. For all the reasons set forth above, Claimants respectfully request that the Tribunal:
>
> a. DECLARE that it has jurisdiction over Claimants' claims;
>
> b. DECLARE that Serbia has breached its obligations under Article 3(1) of the BLEU-Serbia BIT;

[redacted]

c. DECLARE that Serbia has breached its obligations under Article 3(2) of the BLEU-Serbia BIT;

d. DECLARE that Serbia has breached its obligations under Article 7 of the BLEU-Serbia BIT;

e. DECLARE that Serbia has breached its obligations under Article 4(1) of the BLEU-Serbia BIT;

f. AWARD Claimants compensation in the total amount of no less than EUR 143.6 Million;

g. AWARD Claimants' per-award interest on the above amount until the date of the award at the rate of EURIBOR + 2, compounded annually;

h. AWARD Claimants post-award interest on all of the above amounts from the date of the award until the date of full payment at a rate of EURIBOR +2, compounded annually;

i. ORDER Serbia to pay all costs incurred in connection with these arbitration proceedings, including the fees and expenses of the arbitrators and of ICSID, as well as all legal and other expenses incurred by the Claimants in this regard, including but not limited to the fees and expenses of its legal counsel, experts, and consultants, plus interest thereon from the date on which such costs are incurred to the date of payment;

j. AWARD such further relief or other relief as may be deemed appropriate.

480. Claimants reserve their rights to amend these submissions in light of the further pleadings in this case and of other such considerations of fact and law and may be necessary or appropriate to enforce of defend its rights."

95. Following the Tribunal's decision on bifurcation enshrined in Procedural Order No. 6, bifurcating Respondent's second jurisdictional objection on abuse of process, Respondent requested that "*the Tribunal* […] *dismiss Claimants' claims because they are tainted by an abuse of process*," as set forth at ¶ 96 of its Memorial on the Second Jurisdictional Objection.

96. Claimants, in turn, made the following request at ¶ 155 of their Counter-Memorial on the Second Jurisdictional Objection:

"155. Based on the foregoing, Claimants respectfully request the Tribunal to

a. REJECT Serbia's Second Jurisdictional Objection;

b. ADOPT a timetable for the conduct of the proceedings;

c. ORDER Serbia to pay in full Claimants' legal and other costs relating to its Bifurcation Request and to the briefing of Serbia's Second Jurisdictional Objection;

d. ORDER such other relief as the Tribunal deems appropriate."

V. RESPONDENT'S SECOND JURISDICTIONAL OBJECTION

97. The following summary of the Parties' positions in relation to Respondent's second jurisdictional objection on abuse of process is an overview of the Parties' most relevant positions in this respect. The fact that a particular submission is not expressly referenced below should not be taken as any indication that the Tribunal has not considered it.

A. RESPONDENT'S POSITION

98. Respondent submits that the Arbitral Tribunal should decline to exercise jurisdiction and dismiss Claimants' claims as constituting an abuse of Article 25(2)(b) of the ICSID Convention, which permits domestic companies to qualify as a deemed foreign investor for purposes of ICSID jurisdiction, because (i) [redacted] acquisition of the BRIF TRES share was an abuse of process; and (ii) [redacted] committed a separate abuse of process in asserting claims for an investment it did not make.[52]

(1) Factual Background

99. [redacted]

[52] Respondent's Memorial, ¶¶ 1-4; 44-95.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(2) [redacted] Acquisition of BRIF TRES Is an Abuse of Process

109. Respondent argues that an investor cannot restructure an investment after a dispute has become foreseeable to manufacture ICSID jurisdiction and claim treaty benefits, relying in particular on the arbitral decisions in *Alapli v. Turkey*, *Pac Rim v. El Salvador* and *Lao Holdings v. Laos*.[80] According to Respondent, the Arbitral Tribunal should apply a two-step analysis when dealing with an abuse of process objection: (i) to determine whether the restructuring took place after the dispute became foreseeable or had arisen; and (ii) to determine whether the restructuring was undertaken for legitimate business reasons based on an economic rationale, not to gain access to ICSID jurisdiction.[81]

a. Restructuring took place after the dispute became foreseeable or had arisen

110. [redacted]

[redacted]

[80] Respondent's Memorial, ¶¶ 44-45, citing, for example, *Alapli Eletrik B.V. v. Turkey*, ICSID Case No. ARB/08/13, Award of 16 July 2012 (Exhibit CL-157) ("*Alapli v. Turkey*"), ¶ 390 (opinion of Arbitrator Stern); *Pac Rim Cayman LLC v. El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections of 1 June 2012 (Exhibit RL-22) ("*Pac Rim v. El Salvador*"), ¶ 2.99; *Lao Holdings N.V. v. Lao*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction of 21 February 2014 (Exhibit RL-46) ("*Lao Holdings v. Lao*"), ¶¶ 70, 76.

[81] Respondent's Memorial, ¶ 46.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

b. *Restructuring was not undertaken for legitimate business reasons based on an economic rationale, but to gain access to ICSID jurisdiction*

[redacted]

[redacted]

[redacted]

[redacted]

(3) [redacted] Committed Abuse of Process in Asserting Claims for an Investment it Did Not Make

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

B. CLAIMANTS' POSITION

120. Claimants argue that Respondent has not met the standard of proof for a showing of abuse of process: mere restructuring does not suffice for a showing of abuse.[103]

(1) Factual Background

121. [redacted]

a. Claimants submit that they were foreign-controlled since their inception

[redacted]

[redacted]

[103] Claimants' Counter-Memorial, ¶¶ 1-11. On the standard of proof, *see* Jurisdiction Hearing Transcript, 124:1-2.

[redacted]

[redacted]

[redacted]

b. <u>The sale of Claimants to [redacted] by [redacted]s management sought to preserve Claimants' investment</u>

[redacted]

[redacted]

[redacted]

[redacted]

c. [redacted] *intended to take control of and revive Claimants' investments in the* [redacted] *Project*

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(2) Resort to ICSID Arbitration Was Not Contemplated Before Spring 2019

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

construction of the Ada Huja Project and that the proposed architectural and [redacted]

[redacted]

(3) The Tribunal Has Jurisdiction Over the Dispute

134. Claimants argue they have already shown that the Tribunal has jurisdiction *ratione personae, ratione materiae, ratione temporis* and *ratione voluntatis* under the BIT and the ICSID Convention.[132]

[redacted]

[redacted]

[redacted]

[redacted]

(4) Respondent's Abuse of Process Allegations Are Unfounded

[redacted]

[redacted]

[redacted]

[redacted]

(5) [redacted] Acquisition of BRIF TRES Does Not Constitute an Abuse of Process

140. [redacted]

[redacted]

a. <u>BRIF TRES was sold with a legitimate purpose</u>

[redacted]

[redacted]

[redacted]

(6) [redacted] Did Not Commit Any Abuse Because It Does Not Assert Any Claims In Its Own Name

[redacted]

[redacted]

C. TRIBUNAL'S ANALYSIS[152]

[redacted]

[redacted]

[152] Arbitrator Samaa Haridi does not share this analysis as expressed in her Statement of Dissent.

[redacted]

[redacted]

145. The above basic facts do not concern, on their face, the restructuring of an investment where the original owner of the investment which does not enjoy the protection of a treaty giving access to international arbitration against the host state transfers control over such investment to another company of its group organised under the laws of a country entitling it to qualify as an "investor" enjoying treaty protection. Whatever the modalities and the purpose of the restructuring, the original owner always remains connected to the investment through some corporate or other ownership affiliation. Otherwise, the transaction would present no interest for the original owner other than the sale of the investment.

146. The situation in the present case is completely different. It concerns the sale by its owner, a Luxembourgish company, of an investment in Serbia protected by the BLEU-Serbia BIT to an unaffiliated Serbian company and the ultimate acquisition of the investment,[158] some months after, by another unaffiliated company in Luxembourg, which places again the acquired investment in Serbia under the protection of the BLEU-Serbia BIT, in so far as it is assumed that it lost such protection during the period when it was owned by the Serbian company.

147. Several features of the factual matrix allow a distinction from the classical restructurings relied on by the Parties as the basis for their discussion of the existence of the abuse of process alleged by the Respondent in the light of the international investment arbitration case law. [redacted]

[redacted]

[redacted]

148. Yet, the Tribunal does not consider that these differences with the classical cases of restructuring would justify ignoring the fundamental principle recalled by the *Phoenix* Tribunal:

> "The ICSID Convention/BIT system is not deemed to protect economic transactions undertaken and performed with *the sole purpose* of taking advantage of the rights contained in such instruments, without any significant economic activity, which is the fundamental prerequisite of any investor's protection. Such transactions must be considered as an abuse of the system. The Tribunal is of the view that if the sole purpose of an economic transaction is to pursue an ICSID claim, without any intent to perform any economic activity in the host country, such transaction cannot be considered as a protected investment."[160]

149. The Parties agree with the implementation of such principle when they state that "it is impermissible for an investor 'to restructure an investment on the backend, after a dispute has become foreseeable, to manufacture ICSID jurisdiction and claim treaty benefits'" and that "'[c]orporate restructurings have been found illegitimate when their main purpose was to obtain treaty protection and they were made in bad faith, to get access to international arbitration."[161]

150. Therefore, whatever the specific circumstances of the transaction, it is undisputed that the acquisition of an investment not protected by an investment protection treaty by a company enjoying such protection, in an arm's-length relationship for fair value, is not as such a suspicious transaction and does not *per se* lead to abuse, just because the unprotected investment becomes protected as a result. Otherwise, every case of investment restructuring and acquisition would be found to be abusive, which does not

[redacted]

[160] *Phoenix v. Czech Republic*, ¶ 93.

[161] Respondent's Memorial, ¶ 44 and ¶ 45, adopted by Claimants in their Answer to the Request for Bifurcation, ¶ 43 with a reference to *Alapli v. Turkey*, ¶¶ 393, 401, as well as in Claimants' Counter-Memorial, ¶ 108. See also *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, (Exhibit RL-20) ¶ 190: "It thus appears to the Tribunal that **the main**, if not the sole purpose of the restructuring was to protect Mobil investments from adverse Venezuelan measures in getting access to ICSID arbitration through the Dutch-Venezuela BIT." (Emphasis added)

count for the myriad of cases where investment restructuring and acquisition were found to be legitimate.

151. A finding on whether there was abuse – be it in a restructuring case or in an acquisition case – hinges upon (i) whether the investment claims brought before the tribunal were already crystallized or foreseeable at the time of the restructuring or, in this case, at the time the acquisition took place;[162] and (ii) whether the restructuring or acquisition was made for normal business purposes and had an economic rationale, with the intention of engaging in economic activity in the host State.[163]

152. However, before examining these two issues and applying the above principles to this case, the Tribunal must decide whether BRIF TRES and BRIF-TC were or were not still enjoying protection under the BLEU-Serbia BIT when they came under the control of the Luxembourgish company [redacted] since the answer to this question may have an impact when dealing with the second issue above.

(1) Whether BRIF TRES and BRIF-TC were or were not always under Luxembourgish control

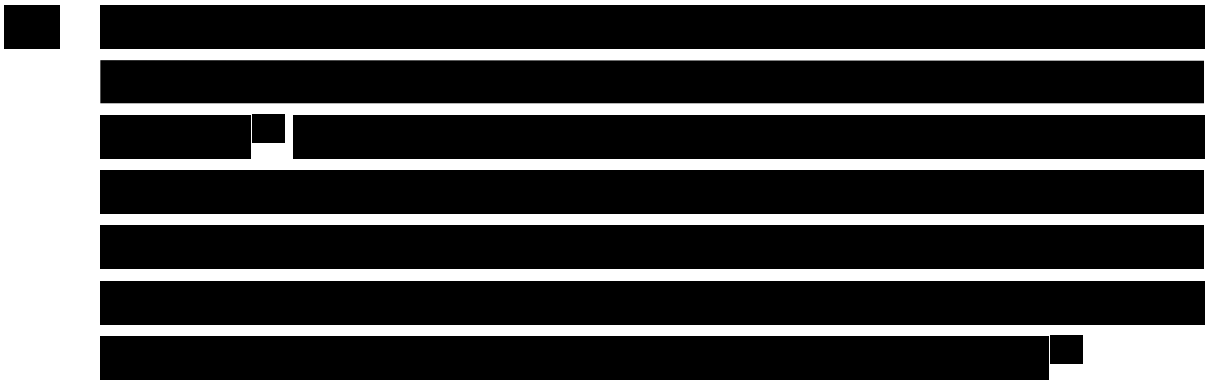
153. [redacted]

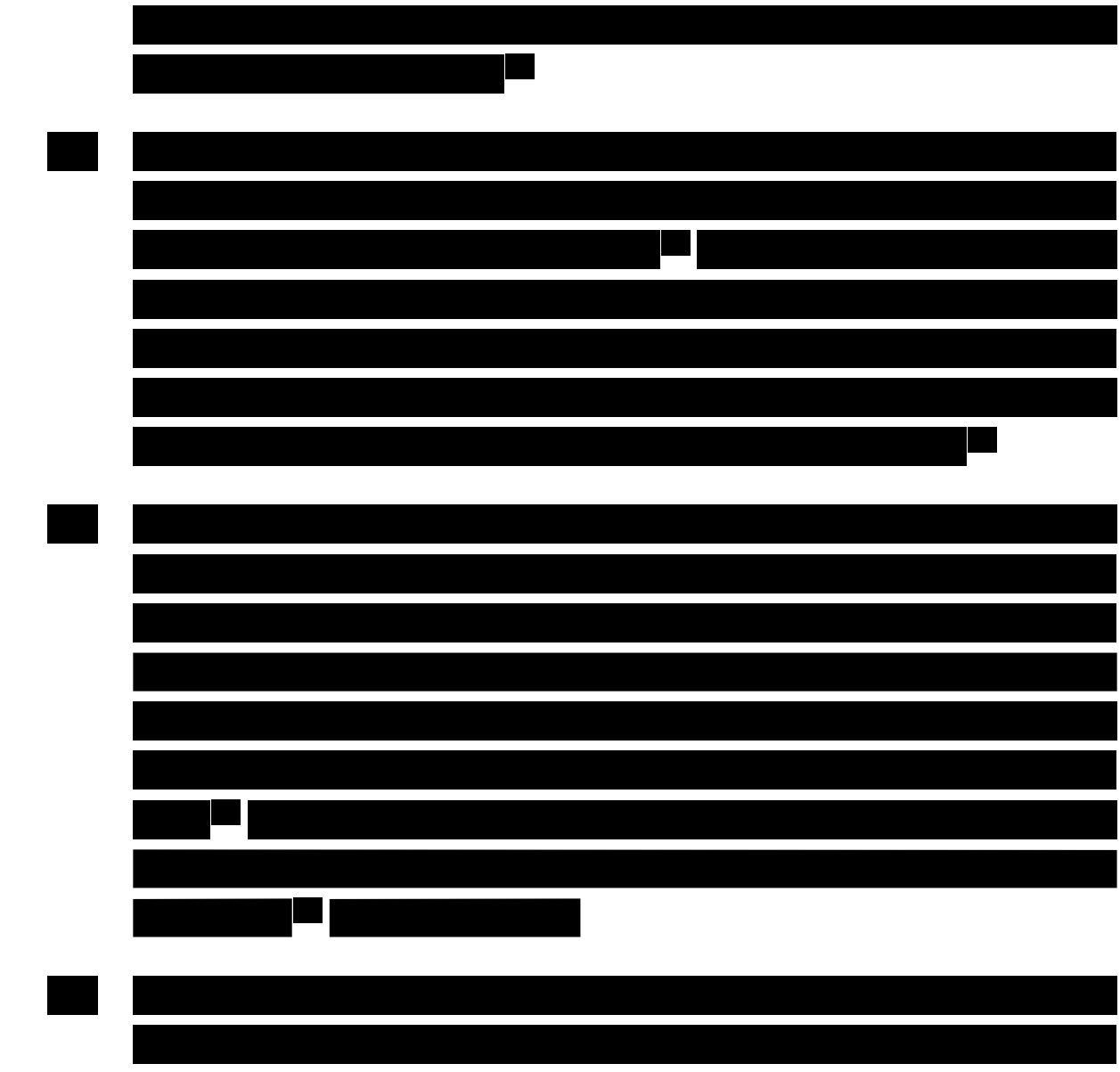
[162] *See Pac Rim v. El Salvador*, ¶ 2.99; *Renée Rose Levy at al. v. Peru,* ICSID Case No. 11/17, Award of 9 January 2015 (Exhibit RL-19) ("*Renée Rose Levy v. Peru*"), ¶ 185; *Lao Holdings v. Lao*, ¶ 76.

[163] *Alapli v. Turkey*, ¶ 390.

[164] Respondent's Memorial, ¶ 3.

[165] Claimants' Counter-Memorial, ¶¶ 85-97.





[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

a. The relevant provisions on "control" under the ICSID Convention and the BLEU-Serbia BIT

[redacted]

167. Article 25 of the ICSID Convention reads as follows:

> "Article 25
>
> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) 'National of another Contracting State' means:
>
> (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
>
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national

[redacted]

of another Contracting State for the purposes of this Convention. […]" (Emphases added)

168. In turn, Article 1 of the BLEU-Serbia BIT provides that:

> "ARTICLE 1
>
> Definitions
>
> 1. The term 'investor' shall mean:
>
> a) the 'national', i.e. any natural person having the nationality of one Contracting Party in accordance with its laws and regulations and making investments in the territory of the other Contracting Party;
>
> b) the 'company', i.e. a legal entity incorporated, constituted or otherwise duly organized in accordance with the laws and regulations of one Contracting Party, having its registered office in the territory of that Contracting Party and making investments in the territory of the other Contracting Party;
>
> c) the '1ega1 person' not constituted for the purpose of this Agreement, under the 1aw of that Contracting Party, but controlled, directly or indirectly, by natural person as defined in a) or by legal person as defined in b). […]" (Emphasis added)

169. Neither the ICSID Convention nor the BLEU-Serbia BIT define "control." Thus, the Tribunal will interpret the term "control" under the ICSID Convention and under the BIT in light of the international law principles of treaty interpretation enshrined in Article 31(1) of the Vienna Convention on the Law of Treaties,[191] according to which a treaty "*shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*."

170. Pursuant to the Cambridge Dictionary,[192] the definition of "control" used as a noun is "the act of controlling something or someone, or the power to do this," "the power to give orders, make decisions, and take responsibility for something" and can result from "a large number of shares owned by one person or group, which gives them power to

[191] Vienna Convention on the Law of Treaties, entered into force on 27 January 1980.

[192] Cambridge Dictionary, Definition of "control" (noun), available at https://dictionary.cambridge.org/dictionary/english/control (accessed 20 January 2023).

control its management." The Tribunal will consider the ordinary meaning of the term "control" in its context in the light of the relevant treaties' object and purpose.

171. The object and purpose of the BLEU-Serbia BIT are defined in its Preamble as "creating favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party". The object and purpose of the ICSID Convention can be as well found in its Preamble, which reads:

> "Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;
>
> Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development […]"

172. As to the context in which the phrase "*controlled, directly or indirectly*" in Article 1(c) of the BLEU-Serbia BIT is found, the Tribunal notes, as did the *Aguas del Tunari* tribunal when interpreting a similar provision of another BIT that the concept of "*company*" in Article 1 (b) "*not only defines the scope of persons and entities that are to be regarded as the beneficiaries of the substantive rights of the BIT but also defines those persons and entities to whom the offer of arbitration is directed and who thus are potential claimants*." [193]

173. The consequence is that to be under the protection of the BLEU-Serbia BIT, a Serbian company must be under the direct or indirect control of a Belgian or a Luxembourgish company which makes an investment in Serbia and to whom the offer of arbitration is directed.

174. "*Control*" is generally ascertained through legal control founded on the percentage of ownership title of shares (direct or indirect), including an analysis of voting rights and shareholders' agreements, or through actual control, which requires establishing the capacity to control and direct a company's day-to-day management and activities. [redacted]

[193] *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction of 21 October 2005 (Exhibit RL-24) ("*Aguas del Tunari v. Bolivia")*, ¶ 242.

[redacted]

175. However, either through legal ownership or actual control, the Tribunal finds, as the *Aguas del Tunari* tribunal, that "the phrase – controlled directly or indirectly – means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity."[196] It means that failing ownership of the controlled company, the controlling company must dispose of contractual or other legal means to exercise the rights of the controlled company for that company to be protected under the BLEU-Serbia BIT.

[redacted]

[redacted]

[196] *Aguas del Tunari v. Bolivia*, ¶ 264.

b. The burden of proof for a showing of actual control

177. The Parties seem to disagree on the burden of proof in general in relation to Respondent's jurisdictional objection at stake but did not discuss this in the specific context of Claimants' allegation of actual control.[197]

178. The Tribunal is satisfied that the burden of proof lies on the Party that makes a particular allegation. [redacted][8] Therefore, the burden for a showing of actual control lies on Claimants who are the Party alleging it.

c. Discussion of the evidence adduced by the Parties

[redacted]

[197] Respondent's Memorial, ¶ 75 ("*As explained above, once Respondent demonstrated that the change in the nationality of the foreign controlling entity occurred after the dispute had become foreseeable or had crystallized, the burden was on Claimants to establish that the purpose of the corporate restructuring was instead for legitimate business reasons and not for the purpose of creating ICSID jurisdiction* […]"); Claimants' Counter-Memorial, ¶¶ 115-116 ("*115. The burden of establishing abuse is on the asserting party. A claimant investor is not required to prove that its claim is asserted in a non-abusive manner. Rather, it is the defending State that must prove its allegation of fraud. This leaves no room for any presumption of abuse which the claimant-investor would have to rebut. 116. In sum, a party alleging abusive investment restructuring bears a high evidentiary burden in order to establish the civil delict of treaty fraud which, once found, will have the radical effect of depriving the claimant-investor of access to jurisdiction or rendering its claims inadmissible*.").

[198] Claimants' Counter-Memorial, ¶ 58.

[redacted] [redacted]

[redacted]

[redacted]

[redacted]

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[redacted]

[redacted]

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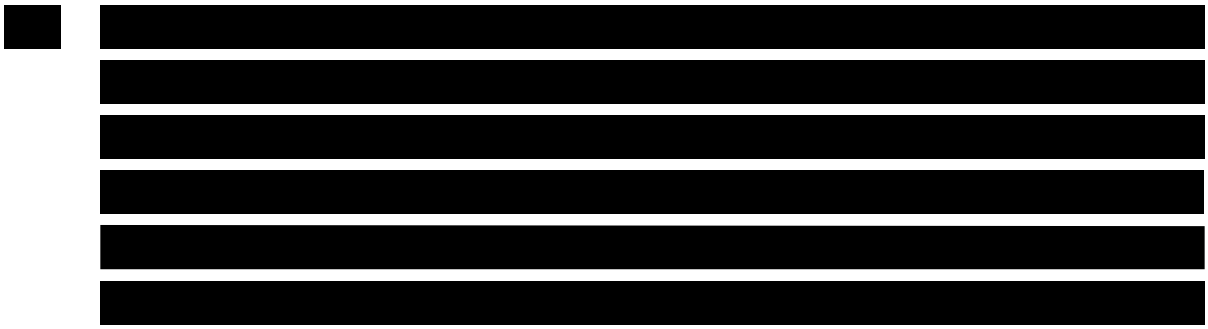


[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

194. In sum, the Claimants were not protected by the BLEU-Serbia BIT Article I(1)(c) and could not rely on ICSID arbitration pursuant to Article 25(2) of the ICSID Convention between 30 November 2018 and at least 15 January 2019.

195. As noted above,[216] Claimants contend that the only legal consequence of that finding is that if any impugned conduct of Serbia occurred during that three-month time window, then that might arguably fall outside of the Tribunal's jurisdiction *ratione temporis*.[217]

196. The Tribunal is not convinced by this argument since when [redacted] purchased BRIF TRES' shares [redacted], BRIF TRES did not enjoy by BLEU-Serbia BIT

[redacted]

Article I(1)(c) and could not rely on ICSID arbitration pursuant to Article 25(2) of the ICSID Convention. The issue at stake before the Tribunal is whether by passing under the control of [redacted] Claimants did recover that protection and this would be the case only if Respondent does not convince the Tribunal that the purchase of BRIF TRES's shares was an abuse of process, an issue that the Tribunal will now examine.

(2) Whether Claimants Have Abused the Foreign Control Provisions under the Relevant Treaties

197. As a preliminary manner, the Tribunal notes that at the Jurisdiction Hearing Respondent clarified that its argument on abuse did not include a contention of illegality, fraud or bad faith, as follows:

[redacted]

198. In turn, Claimants argue that a finding of abuse "requires a showing of bad faith by the party asserting it." [219]

199. This Tribunal understands that a finding of abuse does not require a showing of bad faith, being subject to an objective test. As the *Philip Morris v. Australia* tribunal put it:

> "As a preliminary matter, it is clear, and recognised by all earlier decisions that the threshold for finding an abusive initiation of an investment claim is high. It is equally accepted that the notion of abuse does not imply a showing of bad faith. Under the case law, the abuse is subject to an objective test and is seen in the fact that an investor who is not protected by an investment treaty restructures its

[redacted]

[219] Jurisdiction Hearing Transcript, 112:15-16. *See also* Jurisdiction Hearing Transcript, 106:7-9.

investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute. […]" (Emphasis added)[220]

200. The Tribunal will therefore discuss (i) whether the investment claims brought before this Tribunal were already foreseeable at the time of the acquisition of BRIF TRES and its subsidiary BRIF-TC by [redacted]; and (ii) whether such acquisition sought an economic purpose to develop normal business activities, in turn.

a. Whether the Claimants' investment claims were already foreseeable at the time of [redacted] acquisition of [redacted] investment

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

204. Moreover, before assessing the foreseeability issue, this Tribunal will address three questions about the contours of the applicable foreseeability analysis: (i) to whom the dispute should be foreseeable; (ii) what should be the applicable degree of foreseeability and (iii) what needs to be foreseeable.

[redacted]

[redacted]

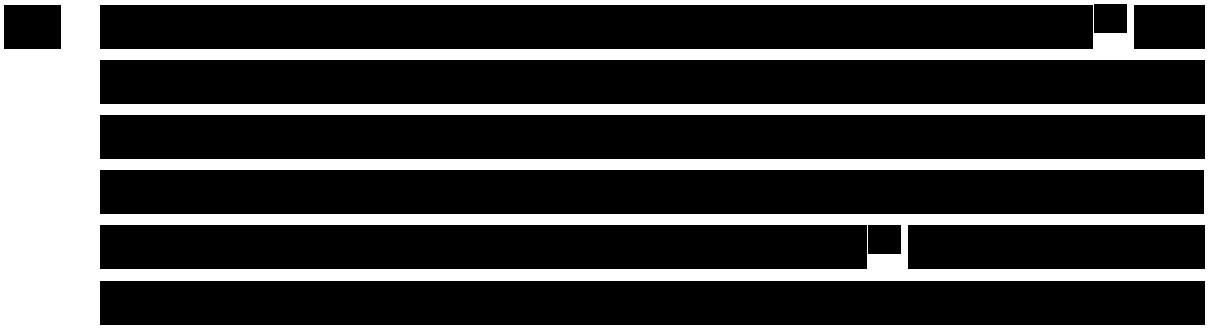
206. The Tribunal considers that foreseeability of the dispute concerns the alleged abuser of the international investment arbitration system *i.e.*, the entity which restructures an investment or acquires an investment in order to be able to file or have filed by an entity under its control a claim relating to a foreseeable or crystalized dispute and not to invest in the host State. [redacted]

207. Second, recalling that a finding of abuse of process lies on an objective assessment, the Tribunal considers that the level of foreseeability is "*when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy*," as put forward by the *Pac Rim v. El Salvador* tribunal:

> "[…] In the Tribunal's view, the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy. In the Tribunal's view, before that dividing-line is reached, there will be ordinarily no abuse of process; but after that dividing-line is passed, there ordinarily will be. The answer in each case will, however, depend upon its particular facts and circumstances, as in this case. As already indicated above, the Tribunal is here more concerned with substance than semantics; and it recognises that, as a matter of practical reality, this dividing-line will rarely be a thin red line, but will include a significant grey area."[232] (Emphases added)

208. Third, this Tribunal also finds that what needs to be foreseeable is a dispute originating from deteriorated circumstances affecting an investment in the host State. The abuse is in manipulating the system, being aware that facts at the root of a dispute have already taken place negatively affecting the investment and could lead to investment treaty arbitration,[233] irrespective of how a claimant labels the same facts as leading to a "domestic" or an "international" dispute.

[232] *Pac Rim v. El Salvador*, ¶ 2.99. *See also Renée Rose Levy v. Peru,* ¶ 185; *Lao Holdings v. Lao*, ¶ 76.
[233] *Pac Rim v. El Salvador*, ¶¶ 2.96, 2.100.



[redacted]

212. In light of the foregoing, the Tribunal finds that the dispute was already foreseeable, if not crystallized, when [redacted], [redacted], acquired BRIF TRES from [redacted].

b. Whether [redacted] acquisition of BRIF TRES sought an economic purpose to develop normal business activities

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

222. In light of the foregoing, the Tribunal concludes that the acquisition by [redacted] of [redacted] dormant investment enshrined in BRIF TRES aimed at acquiring a previously crystalised ICSID claim without an independent economic purpose amounts to an abusive manipulation of the investment treaty system. The Luxembourgish

[redacted]

control of Claimants at the time of the filing of the ICSID claim is the result of such manipulation and thus constitutes an abuse of process.

(3) Conclusion

223. It follows from these findings that the Tribunal lacks jurisdiction over Claimants' request, as the Tribunal concludes that Claimants' claims are made in abuse of process.

VI. COSTS

A. CLAIMANTS' COST SUBMISSIONS

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

B. RESPONDENT'S COST SUBMISSIONS

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

C. TRIBUNAL'S DECISION ON COSTS[278]

232. Article 61(2) of the ICSID Convention provides:

> "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."

233. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

234. The Tribunal generally considers that the principle "costs follow the event," subject to possible adaptations to the specificities of the case, provides an appropriate framework for allocating costs in this case. The Tribunal notes in this regard the new ICSID Arbitration Rule 52 effective as of 1 July 2022, which, although it only applies to requests for arbitration for which consent was given after that date, enshrines this principle in its paragraph (1)(a):

> "Rule 52
>
> Decisions on Costs
>
> (1) In allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances, including:
>
> (a) the outcome of the proceeding or any part of it;
>
> (b) the conduct of the parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner and complied with these Rules and the orders and decisions of the Tribunal;
>
> (c) the complexity of the issues; and
>
> (d) the reasonableness of the costs claimed."

235. The Parties do not disagree that the costs-follow-the-event principle constitutes a possible approach to fixing the arbitration costs. Although Claimants equally rely on another approach according to which parties may be ordered to bear their own costs,

[278] Arbitrator Samaa Haridi does not share this analysis as expressed in her Statement of Dissent.

the Tribunal does not see any reason to depart from the costs-follow-the-event principle as a starting point.

236. The Tribunal notes that while Respondent prevailed in its Jurisdictional Objection on abuse of process, it was unable to convince the Tribunal that a number of its procedural requests were justified. Out of its five jurisdictional objections, the Tribunal accepted to bifurcate only one, contrary to Respondent's request. Likewise, the Tribunal upheld Claimants' objection to accept that [redacted] be admitted as counsel of record for BRIF-TC instead of Claimants' present counsel, contrary to Respondent's position.

237. Consequently, the Tribunal decides that, although Respondent prevailed in its Jurisdictional Objection on abuse of process, it should bear 10% of its own costs incurred in this arbitration and that Claimants should reimburse only 90% of Respondent's arbitration costs.

238. [redacted]

239. Moreover, the costs of the arbitration, including the fees and expenses of the Tribunal and ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Mr. Yves Derains	USD 141,246.51
Ms. Samaa Haridi	USD 112,629.27
Prof. Brigitte Stern	USD 109,147.00
ICSID's administrative fees	USD 126,000.00
Direct expenses (estimated)	USD 41,853.94
Total	**USD 530,876.72**

240. The above costs have been paid out of the advances made by the Parties in equal parts of USD 350,000[279]. As a result of the Tribunal decision under ¶ 237 above, the Tribunal will also order Claimants to reimburse 90% of Respondent's costs incurred in respect of fees and expenses of the Tribunal and ICSID's administrative fees and direct expenses, *i.e.*, USD 238,894.52, and to bear their own arbitration costs.

VII. AWARD

241. For the reasons set forth above, the Tribunal, by majority:

(1) DECLARES that the dispute brought by Claimants before the Centre is not within the jurisdiction of the Centre, let alone the competence of the Tribunal;

(2) DECIDES to award Respondent 90% of its arbitration costs;

(3) ORDERS Claimants (i) to reimburse to Respondent [redacted] (90% of Respondent's legal fees and expenses) and USD 238,894.52 (90% of Respondent's incurred costs with ICSID administrative fees and expenses and the arbitrators' fees and expenses) and (ii) to bear their own arbitration costs.

[279] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

[signed]

Samaa Haridi, dissenting
Arbitrator

(*See attached Statement of Dissent*)

Date: 30 January 2023

[signed]

Brigitte Stern
Arbitrator

Date: 30 January 2023

[signed]

Yves Derains
President

Date: 30 January 2023

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

BRIF TRES D.O.O. BEOGRAD AND BRIF-TC D.O.O. BEOGRAD
Claimants

and

REPUBLIC OF SERBIA
Respondent

ICSID Case No. ARB/20/12

STATEMENT OF DISSENT OF ARBITRATOR SAMAA A. HARIDI

Members of the Tribunal
Mr. Yves Derains, President
Ms. Samaa A. Haridi, Arbitrator
Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal
Ms. Aurélia Antonietti

Assistant to the President
Dr. Ana Gerdau de Borja Mercereau

Date of dispatch to the Parties: 30 January 2023

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1. I regret that I do not share some views and conclusions that my esteemed colleagues in the Majority have reached in the Award. With my respect and admiration for the work performed by this Tribunal through the drafting of the Award, I express below my differing views on the questions of law and fact that I consider significant. **First**, I am not persuaded based on the evidence currently before the Tribunal that Claimants and their owners "manufactured" treaty claims or "abused" the ICSID system. In concluding otherwise, the Majority does not identify prior jurisprudence finding an abuse of process where the claimant merely sought to regain, if not maintain, rights to a treaty claim it had enjoyed in years prior. The Claimants here enjoyed BLEU-Serbia BIT rights for most of that treaty's existence, including at the time the land dispute at the heart of this case evolved. The "abuse of process" line of authority as is currently known under international investment law is therefore inapplicable—or at a minimum, should apply with only the greatest caution and after concluding the alleged abuse is undeniable. Respondent did not clear those hurdles in this case at this juncture.

2. **Second**, I hold reservations about the Majority's analysis of "control" under the treaty. The Majority places the burden on Claimants to establish continuous control by Luxembourgish entities. (Maj. ¶¶ 177-78). Yet we are deciding Respondent's jurisdictional objection, and it is therefore for Respondent to establish a break in control, which is the necessary predicate to its theory that Claimants abusively fabricated ICSID jurisdiction. I therefore disagree with the Majority on the manner in which it allocated the burden of proof.

3. When analysing the question of indirect control, the Majority focuses on "the legal capacity to control," citing the *Aguas del Tunari* tribunal's writings on this topic. (Maj. ¶ 175.) Yet, Respondent provided us with no analysis of indirect control as defined internationally, domestically, or in relevant legal instruments. From Claimants' unchallenged exposition on the subject,[1] I gather that tribunals construing the meaning of

[1] Claimants' Counter-Memorial ¶ 96 n.191 (20 May 2022); Claimants' Opening Presentation, slide 68; Hearing Tr. 121:17 -125:4 (2 Sept. 2022); s*ee also* Hearing Tr. 25:4-7 (2 Sept. 2022); Resp't's Opening Presentation, slide 25.

"indirect" control have scrutinized indicia of control *in fact*. That is the approach called for here.

[redacted]

5. This Statement of Dissent expresses my doubts as of the date of this writing concerning the evidentiary record and whether this record is sufficiently established at this stage of the proceedings to warrant a dismissal on jurisdictional grounds. A unanimous Tribunal may have reached this decision at a later stage of these proceedings based on an examination of the totality of the jurisdictional objections presented by Respondent and a more established evidentiary record, but I am not satisfied that Respondent has met its burden of proof at this time.

6. For these reasons, I also disagree with the Majority's order that Claimants shall pay 90% of Respondent's legal fees and expenses.

[redacted]

I. ABUSE OF PROCESS

A. STANDARD AND BURDEN OF PROOF

7. The Abuse of Process Objection. First, it bears noting that the Tribunal bifurcated these proceedings only with respect to one of five preliminary objections to the Tribunal's jurisdiction, namely the second objection.[3] The "Second objection," as formulated by Respondent, is that:

8. Standard. Ordinarily, abuse of process objectors must pass an exacting legal test. The Majority acknowledges the "threshold for finding an abusive initiation of an investment claim is high." (Maj.¶ 199.)[5] And it also notes the allegedly abusive transaction must be "undertaken and performed with the *sole* purpose of taking advantage of the rights contained in such instruments, without *any* significant economic activity [in the host country]." (Maj. ¶ 144 (citing *Phoenix Action*)) (emphasis added). As the *Alapli Eletrik B.V. v. Turkey* tribunal cautioned, not every "structuring of a national investment through a foreign corporation is an abuse," instead it depends on "the circumstances in which it

[3] Resp't's Request for Bifurcation and Summary of Objs. ¶¶ 3-5 (16 Sept. 2021).

[5] I agree, because "[i]t is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim" and "the graver the charge the more confidence must there be in the evidence relied on." Exhibit **CL-161**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Interim Award ¶ 143 (1 Dec. 2008) ("*Chevron v. Ecuador*") (citation omitted).

happened."[6] Relevant factors may include the timing of the investment, the timing of the request to ICSID, the substance of the transaction, and the "true nature of the operation."[7]

9. I agree with the Majority's use of a two stepped analysis of abuse of process: (i) whether the investment claims brought before this Tribunal were already foreseeable at the time of the acquisition of BRIF TRES and its subsidiary BRIF-TC by [redacted] and (ii) whether such acquisition sought an economic purpose to develop normal business activities. (Maj. ¶ 200.)

10. Burden. It is well-established that the party alleging an abuse of process—here, Respondent—bears the burden of proof.[8] The Majority shifts the burden onto Claimants. (Maj. ¶¶ 177-78, 220 ("Even if one considers that the Respondent had the burden to prove such absence of investment and of intent to invest . . . .")

B. APPLICATION

11. I have doubts that the abuse of process legal authorities squarely apply in this case. First, I am not aware of any prior abuse of process cases involving a claimant who enjoyed treaty rights when the dispute arose. It seems inapposite to examine whether Claimants "manufactured" treaty rights, when they had already enjoyed those rights for many years prior. Moreover, prior abuse of process cases do not clearly apply the foreseeability analysis to non-parties [redacted]

[6] Exhibit **CL-157**, *Alapli Eletrik B.V. v. Turkey*, ICSID Case No. ARB/08/13, Award ¶ 390-91 (16 July 2012).

[7] Exhibit **RL-18**, *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award ¶¶ 136-40 (15 Apr. 2009) ("*Phoenix v. Czech Republic*").

[8] *See* Claimants' Opening Presentation, slides 44-46; Claimants' Counter-Memorial ¶ 115 (20 May 2022) (collecting authorities including: *Chevron v. Ecuador* ¶¶ 136-141; Exhibit **RL-22**, *Pac Rim Cayman v. El Salvador*, ICSID Case No. ARB/09/12, Decision on Resp't's Jurisdictional Objs. ¶ 2.14 (1 June 2012) ("*Pac Rim v. El Salvador*") (following *Chevron I* tribunal's approach)).

[redacted] Legal successorship is not a requirement for this investment to be protected under the relevant treaties.

(1) Foreseeability

12. It should matter when looking at foreseeability and the (alleged) three-month break in Luxembourgish control, that the Claimants had access to BLEU-Serbia BIT claims for about 10 years prior, including when the land dispute crystallised.[9] Indeed, as the Majority acknowledges, "Several features of the factual matrix allow a distinction from the classical restructurings relied on by the Parties as the basis for their discussion of the existence of the abuse of process alleged by Respondent in the light of the international investment arbitration case law." (Maj. ¶ 147.) Those significant distinctions lie at the heart of my disagreement with the Majority that Respondent has established that an abuse of process has been committed in this matter. Unlike Claimants here, the claimants in *Phoenix Action, Pac Rim Cayman, Alapli, ST-AD,* and *Levy/Gremcitel* had never enjoyed BIT protection before their suspicious restructurings—or at least, those decisions included no discussion of the claimants' previous access to BIT claims.[10]

[redacted]

14. Another discrepancy between this case and the abuse of process line of cases is *who* allegedly abused legal process. Until today, to credit an abuse of process defense, tribunals

[redacted]

[10] Claimants' Opening Presentation, slides 50-55.

[11] *Id.* slides 57-64.

focused on the claimant's alleged legal machinations—not the misdeeds of third parties [redacted]. In the Parties' most cited case, *Phoenix Action*, the tribunal found strong indicia that the *claimant* had never intended to engage in economic activity in the host state, which supported a finding of abuse of process.[12] In *Lao Holdings*, similarly, the *claimant* did not become an investor until a "critical date" when it took over ownership of another company that had been a longstanding Laos investor.[13] The tribunal in *Lao Holdings* noted the abuse of process defense precludes "unacceptable manipulations by a *claimant* acting in bad faith."[14] And in *Saluka v. Czech Republic*, the tribunal refused to attribute to the *claimant* Saluka the alleged procedural ruses deployed by a third-party and previous owner, Nomura.[15] The Majority goes a step further and punishes Claimants for the alleged abusive intentions of third parties to the dispute. (Maj. ¶¶ 206, 217) [redacted]

(2) Economic Purpose to Develop Business Activities

[redacted]

[12] *Phoenix v. Czech Republic* ¶ 140.

[13] Exhibit **CL-173**, *Lao Holdings N.V. v. Lao*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction ¶ 2 (21 Feb. 2014).

[14] *Id.* ¶ 70 (emphasis added).

[15] Exhibit **CL-56**, *Saluka v. Czech Republic*, UNCITRAL, Partial Award ¶¶ 218, 237 (17 March 2006) ("To be relevant to the present proceedings, Nomura's failings (if any) at the time of purchasing the IPB shares in March 1998 need also to be in some way attributable to Saluka in relation to its acquisition and subsequent holding of the shares after October 1998.").

[redacted]

[17] Exhibit **CL-14**, Serbia-BLEU BIT.

[redacted]

[redacted]

[redacted]

[redacted]

18. While there is some evidence of intent to bring ICSID claims, like the timing of the Notice of Dispute,[26] this does not without more prove the "sole" purpose[27] of the acquisition was to commence litigation.

19. The remaining evidence is ambivalent. [redacted]

21. Finally, it is essential to recall the applicable legal standard requiring that the *sole purpose* of the acquisition must be to bring a treaty claim. (Maj. ¶ 148.) Respondent's assertion that "even if creating ICSID jurisdiction were just one of two purposes [of restructuring] . . . it still would not excuse the abuse of process"[29] is made with no supporting authority, and prior tribunals have demanded much stronger indications of procedural abuse. For instance, the *Phoenix Action* tribunal was confronted with a claimant that manipulated legal formalities "for the *sole* purpose of bringing international litigation" (emphasis added).[30] *Venezuela Holdings* later opted to "take the words" of the *Phoenix Action* tribunal, then held that abuse requires "restructur[ing] investments *only in order to gain jurisdiction*," all the while emphasizing that it "depends on the circumstances" in which the restructuring

[redacted]

[27] *Phoenix v. Czech Republic* ¶ 142.

[redacted]

[29] Resp't's Memorial on 2d Jurisdictional Obj. ¶ 65 (25 Mar. 2022).

[30] *Phoenix v. Czech Republic* ¶ 142.

happens (emphasis added).[31] The Late Professor Gaillard's statements on the subject are equally clear that an abuse of process occurs only if the claimant manipulates legal formalities with the "sole purpose" ("*le seul but*") of obtaining jurisdiction.[32] Commentator Delphine Burriez uses identical language,[33] as do Dominique Bureau and Horatia Muir-Watt.[34]

22. In sum, the Majority ventures where no tribunal has before, to hold a claimant responsible for a third party's purported abuse of process. The Majority reaches this conclusion even though Claimants enjoyed treaty rights at the time the relevant dispute arose, and where at best, Claimants had mixed motives when they undertook a restructuring. I respectfully disagree with the Majority's approach.

(3) Successorship and New Investors

23. Respondent referred to a different line of cases, on successorship, to avoid the apparent inconsistency between its assertion that this is a "textbook case" of abuse of process[35] and the facts here, which do not resemble previous abuse of process decisions. [redacted] But Respondent did not adequately explain why legal successorship is needed or how it relates to the question of abuse of process.[37]

[redacted]

[35] Resp't's Memorial on 2d Jurisdictional Obj. ¶ 3 (25 Mar. 2022).

[36] *Id.* ¶ 83.

[37] *Westmoreland*, quoted by Respondent, is inapposite; it rejected the attempt by an unprotected investor to assign rights to another investor that could bring a treaty claim. Exhibit **RL-48**, *Westmoreland Coal Co. v. Canada*, ICSID Case No. UNCT/20/3, Final Award ¶ 25 (31 Jan. 2022).

24. From the standpoint of the BLEU-Serbia BIT and the ICSID Convention, it appears permissible for a Luxembourgish entity to acquire an investment from either a Luxembourgish *or* non-Luxembourgish entity.[38] Indeed, the Majority acknowledges it is permissible for an entity enjoying treaty protection to acquire a *non-protected* company in an arm's length transaction and later bring a treaty claim.[39] Presumably, it would be even less problematic for a Luxembourgish entity to purchase, or inherit, a project directly from another Luxembourgish entity, then bring a claim. Nothing in Article 1(1)(c) of the BIT or Article 25(2)(b) of the ICSID Convention prohibits it.

25. I am thus unconvinced that a Luxembourgish entity (abused legal process by accomplishing *indirectly* that which would have been permissible to accomplish directly: purchase Claimants directly from . The end result should be the same.

[redacted]

II. CONTROL BY LUXEMBOURGISH ENTITIES

27. I similarly diverge from the Majority on a key threshold factual issue—whether there was in fact a clear break in Luxembourgish "control" of Claimants during the Critical Period.

A. STANDARD AND BURDEN OF PROOF

28. Respondent's Second Objection assumes as a necessary predicate that Luxembourgish entities lost control of Claimants during the Critical Period. If there was no break in control

[38] *See* Exhibit **CL-14**, Serbia-BLEU BIT Art. 1.

[39] Maj. ¶ 150 ("whatever be the specific circumstances of the transaction, it is undisputed that the acquisition of an investment not protected by an investment protection treaty by a company enjoying such protection, in an arm's-length relationship for fair value, is not as such a suspicious transaction and does not *per se* lead to abuse, just because the unprotected investment becomes protected as a result. Otherwise, every case of investment restructuring and acquisition would be found to be abusive, which does not count for the myriad of cases where investment restructuring and acquisition were found to be legitimate.").

[redacted]

of Claimants by Luxembourgish entities then Respondent's defense—that Claimants and their owners manufactured an ICSID claim to which they were not entitled—would fail.

29. As I state above, I believe that the party alleging an abuse of process bears the burden of establishing that an abuse has occurred.[41] Because Respondent's abuse of process objection is premised on a loss in Luxembourgish control, Respondent also bore the burden of proving Luxembourg entities lost "control" of Claimants, as that term is defined in the relevant legal instruments. The Majority takes a different view. (Maj. ¶ 178).

30. The BLEU-Serbia BIT permits claims by legal persons controlled "directly or indirectly" by a Luxembourgish entity.[42] I agree with the Majority that the ordinary meaning of "control" generally includes the power to "give orders, make decisions, and take responsibility for something." (Maj. ¶¶ 169-70). But I also find it significant that the treaty explicitly permits claims based on foreign control, "direct … or indirect…."[43] The ordinary meaning of "indirect" includes "deviating from a direct line or course"; "not going straight to the point"; "not straightforward and open"; and also "not directly aimed at or achieved."[44]

31. Indeed, as the Tribunal observes, the *Aguas del Tunari* tribunal held that "directly or indirectly" in modifying "control" means the "legal capacity to control." (*See* Maj. ¶ 175.) But that tribunal also acknowledged its definition "does not limit the scope of eligible claimants to only the 'ultimate controller'" and that legal capacity is to be ascertained after a wholistic accounting of "shares held, legal rights conveyed in instruments or agreements . . . , or a combination of these."[45] The tribunal in *Aguas del Tunari* also noted the import of its opinion was limited, as it was "not charged with determining all forms which control might take."[46] Indeed, the *Guardianship Fiduciary* tribunal noted a decade later that the

[41] *See* Claimants' Opening Presentation, slides 44-46; Claimants' Counter-Memorial ¶ 115 (20 May 2022); *see also Chevron v. Ecuador* ¶¶ 136-141; *Pac Rim v. El Salvador* ¶ 2.14 (following *Chevron I* tribunal's approach).

[42] Exhibit **CL-14**, Serbia-BLEU BIT Art. 1(1)(c).

[43] Exhibit **CL-14**, Serbia-BLEU BIT, Article 1.

[44] MERIAM WEBSTER (2022), https://www.merriam-webster.com/dictionary/indirect (last accessed 19 Jan. 2022).

[45] Exhibit **RL-24,** *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Resp't's Objs. to Jurisdiction ¶¶ 237, 246, 264 (21 Oct. 2005) ("*Aguas del Tunari v. Bolivia*").

[46] *Id.* ¶ 264 (finding the existence of foreign control "directly or indirectly" where an entity has both majority shareholdings and ownership of majority of voting rights).

issue of control can be "complicated" by the facts of a given case and is "ultimately a matter of evidence."[47] The many ways in which indirect control could be exercised makes this a fact-intensive inquiry, which the Tribunal here might have more appropriately decided at a later stage.

B. APPLICATION

[redacted]

[47] Exhibit **CL-201**, *Guardian Fiduciary Trust Ltd. f/k/a Capital Conservator Savings & Loan Ltd. v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/12/31, Award ¶¶ 131, 134 (22 Sept. 2015).

[redacted]

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[redacted]

III. CONCLUSION

42. In sum, at this stage of the proceedings, and on the basis of the limited evidentiary record before the Tribunal, I am not satisfied that Claimants committed an abuse of process by initiating this ICSID arbitration. I am also not convinced that Respondent satisfied its burden to prove a break in indirect control by Luxembourgish entities of Claimants.

IV. COSTS

43. After sustaining the Second Objection, the Majority awards Respondent 90% of its arbitration legal fees and expenses. (Maj. ¶ 238.) In light of my views on the Second Objection, I also respectfully disagree with this award of costs. I believe that a more suitable approach would be to rule that each party shall bear its own costs, in light of the novel aspects of the Majority's legal analysis of abuse of process, and the ambivalent record supporting the Second Objection.

[redacted]

Samaa A. Haridi
Arbitrator

Date: 30 January 2023