

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**MABCO CONSTRUCTIONS SA**

Claimant

and

**REPUBLIC OF KOSOVO**

Respondent

**ICSID Case No. ARB/17/25**

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**DECISION ON JURISDICTION**

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***Members of the Tribunal***

Professor George A. Bermann, President

Mr. Gianrocco Ferraro, Arbitrator

Professor Dr. August Reinisch, Arbitrator

***Secretary of the Tribunal***

Mr. Francisco Abriani

*Date of dispatch to the Parties: 30 October 2020*

## REPRESENTATION OF THE PARTIES

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AGU	Agreement of Good Understanding
Annex Agreement	Annex Agreement to the AGU dated 28 March 2012
Application	Kosovo's Preliminary Objections under Rule 41(5) dated 18 December 2017
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
BIT	Agreement between the Swiss Confederation and the Republic of Kosovo on the Promotion and Reciprocal Protection of Investments, which entered into force on 13 June 2012
C-[#]	Claimant's Exhibit
CL-[#]	Claimant's Legal Authority
Cl. post-hearing br.	Claimant's Post Hearing Brief dated 17 February 2020
Cl. Supp. to RfA	Claimant's letter supplementing the Request dated 16 June 2017
Commitment Agreement	Commitment agreement among Mr. Berisha on behalf of UTC, KTA on behalf of SOE Sloga and the Grand Hotel LLC attached to the Purchase Agreement
Counter-Memorial or Cl. Counter-Mem. on Jurisd.	Claimant's Counter-Memorial on Jurisdiction and Admissibility dated 14 May 2019
Grand Hotel	Grand Hotel L.L.C.
Hearing	Hearing on Jurisdiction and Admissibility held on 23 January 2020
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
KTA	Kosovo Trust Agency
Mabetex	Mabetex Group Switzerland
Memorial or Resp. Mem. on Jurisd.	Respondent's Memorial on Jurisdiction and Admissibility dated 5 April 2019
NewCo	New company
NewCos	New companies
NTSH	NTSH Eurokoha-Reisen
PAK	Kosovo Privatization Agency
Performance Guarantee	Performance guarantee dated 21 March 2012 issued by the National Commercial Bank Kosovo in the amount of EUR 20.2m in favor of Mabetex
Purchase Agreement	Agreement for the "Sale of Ordinary Shares in Grand Hotel" concluded on 10 August 2006
R-[#]	Respondent's Exhibit
Rejoinder or Cl. Rejoinder on Jurisd.	Claimant's Rejoinder on Jurisdiction and Admissibility dated 20 September 2019
Reply or Resp. Reply on Jurisd.	Respondent's Reply on Jurisdiction and Admissibility dated 23 August 2019
Request or RfA	Claimant's Request for Arbitration dated 15 May 217
Resp. post-hearing br.	Respondent's Post-Hearing Brief dated 17 February 2020
RL-[#]	Respondent's Legal Authority
SCSC	Supreme Court of Kosovo's Special Chamber for Matters relating to the Privatization Agency
SOE	Socially-owned property

Tr. [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 20 November 2017
UNMIK	United Nations Interim Administration Mission in Kosovo
UTC	N.T.P. Unio-Commerce
2005 Foreign Investment Law	Foreign Investment Law No. 02/L-33, enacted on 21 November 2005 and entering into force upon promulgation by the Special Representative of the United Nations Secretary-General in April 2006
2014 Foreign Investment Law	Foreign Investment Law No. 04/L-220, which entered into force on 24 January 2014



## **I. PROCEDURAL HISTORY**

1. On 15 May 2017, ICSID received a request for arbitration of the same date from Mabco against Kosovo, along with exhibits C-1 through C-17 (the “**Request**”).
2. On 2 June 2017, the Centre sent a first set of questions to Claimant.
3. On 16 June 2017, Claimant responded by submitting a letter supplementing the Request, along with additional exhibits C-17<sup>1</sup> through C-21.
4. On 26 June 2017, ICSID sent a second round of questions to Claimant.
5. On 30 June 2017, the General State Attorney of Kosovo requested that the ICSID Secretary-General refuse the registration of the Request as being manifestly outside the jurisdiction of the Centre.
6. On 4 July 2017, the Centre acknowledged receipt of Kosovo’s letter of 30 June 2017 and reminded Kosovo that:

*Pursuant to Article 36(3) of the ICSID Convention, the Secretary-General shall register the Request unless she finds, on the basis of the information contained in the Request, that the dispute is manifestly outside the jurisdiction of ICSID. Therefore, the Secretary-General’s power to consider any objections to a request for arbitration is limited.*
7. On 12 July 2017, Claimant responded to the Centre’s second set of questions and provided comments on Respondent’s letter of 30 June 2017.
8. On 21 July 2017, 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

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<sup>1</sup> The Claimant submitted a second part of Exhibit C-17 containing the original text in Albanian.

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.

9. On 31 July 2017, Claimant made a proposal as to the method of constitution of the Tribunal, which Respondent accepted on 11 August 2017.
10. By letter dated 15 August 2018, the Centre noted that the Parties had agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention, and that the Tribunal would consist of three arbitrators, to be appointed as follows:

*1. Each party shall appoint one arbitrator;*

*2. The two party-appointed arbitrators shall, each in consultation with the party that nominated him/her, appoint the Chairperson of the Arbitral Tribunal within 90 days of the registration of the case;*

*3. None of the members of the Arbitral Tribunal shall be a national of Switzerland or the Republic of Kosovo;*

*4. In case the party-appointed arbitrators and the parties cannot agree on a Chairperson within the above-mentioned time limit, the Chairperson shall be appointed by the Chairman of the Administrative Council of ICSID.*

11. On 24 August 2017, Claimant appointed Mr. Gianrocco Ferraro, a national of Italy, as arbitrator in this case. Mr. Ferraro accepted his appointment on September 5, 2017.
12. On 20 September 2017, Respondent appointed Professor Dr. August Reinisch, a national of Austria, as arbitrator in this case. Professor Dr. Reinisch accepted his appointment on 26 September 2017.
13. On 23 October 2017, the co-arbitrators informed the Parties that they had been unable to reach an agreement on the presiding arbitrator within the 90-day period set forth in the Parties' agreement; and inquired whether the Parties would agree to a 2-week extension for the appointment of the presiding arbitrator.
14. On 25 October 2017, Claimant agreed to the extension of the deadline for the appointment of the presiding arbitrator until 2 November 2017.

15. On 2 November 2017, the co-arbitrators inquired whether the Parties would agree to a further 2-week extension.
16. By correspondence dated 3 and 6 November 2017, the Parties agreed to extend the deadline for the appointment of the presiding arbitrator. The Centre took note of such agreement on 6 November 2017.
17. On 15 November 2017, the Centre informed the Parties that the co-arbitrators had appointed Professor George Bermann, a national of the United States, as the presiding arbitrator.
18. On 20 September 2017, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “**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. Mr. Francisco Abriani, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
19. On 29 November 2017, the Centre requested the Parties to make an initial advance payment by 29 December 2017 in order to cover the cost of the proceeding, in accordance with ICSID Administrative and Financial Regulation 14(3).
20. On 6 December 2017, the Tribunal informed the Parties that it would be available to hold the first session with the Parties by telephone conference on 17 January 2018 and invited them to confirm their availability on this date. A draft Procedural Order No. 1 was also circulated, and the Parties were invited to review its content, to agree on as many of the issues addressed in the draft order as possible, and to submit their comments on the proposed draft one week before the first session.
21. On 14 December 2017, the Tribunal reiterated its request regarding the Parties’ availability.
22. On 18 December 2017, Claimant informed the Tribunal that it had initiated settlement negotiations with Respondent and requested the stay of the proceeding and the extension of the deadline for the payment of the advance on costs until 31 January 2018.

23. On 18 December 2017, Respondent informed the Tribunal of its intention to submit an objection pursuant to Rule 41(5) of the ICSID Arbitration Rules for “manifest lack of legal merits within the deadlines set forth in the aforementioned rule.”
24. On 19 December 2017, the Tribunal invited Respondent to state, whether it agreed to Claimant’s request that the proceeding be stayed until 31 January 2018. The Tribunal also took note of Respondent’s intention to submit an objection pursuant to ICSID Arbitration Rule 41(5), and reminded the Parties that the deadline to submit an objection pursuant to Rule 41(5) was “30 days after the constitution of the Tribunal”, i.e. 20 December 2017.
25. On 22 December 2017, Respondent informed the Tribunal that there had been no official settlement negotiations initiated to that date and therefore it could not comment on Claimant’s request to stay the proceeding. Respondent also informed the Tribunal that it had already filed on 18 December 2017, its objections under Rule 41(5) in hard copy via express mail delivery.
26. On 27 December 2017, the Centre acknowledged receipt on 22 December 2017, of one original hard copy of Kosovo’s Preliminary Objections under Rule 41(5) dated 18 December 2017, (the “**Application**”), along with exhibits R-1 through R-10. The Centre noted that the package did not contain the six additional copies mentioned in Kosovo’s cover letter. The Centre also attached: (i) a copy of the shipment label which the Centre received with Kosovo’s package; and (ii) the shipping information provided on the FedEx website based on the package tracking number. According to these documents, Respondent’s Application was dispatched on 20 December 2017, and was delivered at the seat of the Centre on 22 December 2017.
27. By letter dated 29 December 2017, the Tribunal noted that, absent confirmation by both Parties that settlement negotiations were underway, the stay of the proceeding as requested by Claimant could not be granted at that stage. The Tribunal also noted that it appeared that Respondent’s Application was not “delivered at the seat of the Centre [...] before the close of business on the indicated date,” as required by ICSID Administrative and Financial Regulation 29(2). The Tribunal however invited (i) Claimant to provide comments on the timeliness of Respondent’s Application by 3 January 2018, and (ii) Respondent to respond

to Claimant's comments, if any, by 5 January 2018. The Tribunal noted that it would then decide whether it would entertain Respondent's objections under Rule 41(5). Finally, the Tribunal confirmed that the deadline to make the initial advance payment requested by the Centre, was extended until 10 January 2018.

28. On 3 January 2018, Claimant submitted its comments on Respondent's Application, to which the Respondent replied on 4 January 2018. Respondent also requested a deferral of the first session at least until 1 February 2018.
29. On 5 January 2018, the Tribunal informed the Parties that it would not rule on the timeliness of the Application until the advance on costs was paid and both the Tribunal and Claimant had received copies of Respondent's Application along with any attachments. The Tribunal further invited Claimant to confirm its agreement to the extension of the 60-day period set forth in ICSID Arbitration Rule 13(1) as proposed by Respondent, and invited both Parties to confirm their availability for a first session on any date during the week of 5 to 9 February 2018.
30. By correspondence dated 7 and 9 January 2018, the Parties agreed to the extension of the 60-day period set forth in ICSID Arbitration Rule 13(1) and to hold the first session by telephone conference on 8 February 2018.
31. On 10 January 2018, the Centre acknowledged receipt of Claimant's payment of its share of the initial advance on costs and confirmed that the first session would be held on the agreed date.
32. On 16 January 2018, the Centre informed the Parties of the default in the payment of Respondent's share of the advance requested, and invited either Party to pay the outstanding amount by 31 January 2018.
33. On 17 January 2018, Respondent submitted an electronic copy of the Application via email, along with exhibits R-1 and R-3 through R-10. Hard copies of the submission were subsequently delivered to Professor Bermann and Mr. Ferraro.
34. On 30 January 2018, a draft agenda was circulated to the Parties for the first session.

35. On 1 and 2 February 2018, Claimant and Respondent, respectively, submitted their proposed changes to the draft Procedural Order No. 1, indicating the items on which they agreed as well as their respective positions regarding the items on which they did not agree.
36. On 7 February 2018, the Tribunal rendered its Decision on Respondent's Preliminary Objections under Rule 41(5) of the Arbitration Rules. The Tribunal decided "that Respondent's Application is untimely and declines to entertain the Application on the merits."<sup>2</sup>
37. On 8 February 2018, the Tribunal held a first session with the Parties by telephone conference.
38. On 15 February 2018, the Centre informed the Parties that ICSID's Secretary-General would move the Tribunal to stay the proceeding if the outstanding portion of the first advance had not been received from either Party by 8 March 2018.
39. On 21 February 2018, Claimant submitted a draft provisional procedural timetable to the Tribunal.
40. On the same date, the Tribunal invited Respondent to comment on Claimant's proposal by 23 February 2018.
41. On 27 February 2018, Respondent submitted its draft provisional timetable.
42. On the same date, the Tribunal acknowledged receipt of Respondent's proposed procedural timetable and reminded the Parties, *inter alia*, that the proceedings could only go forward if the balance of the advance payment was paid by either Party.
43. On 6 March 2018, Claimant provided its comments on Respondent's draft procedural timetable.

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<sup>2</sup> Decision on Respondent's Preliminary Objections under Rule 41(5) of the Arbitration Rules, ¶ 37.

44. On 12 March 2018, the Centre informed the Parties that the Tribunal, pursuant to ICSID Administrative and Financial Regulation 14(3)(d) and the Centre's motion, had decided to suspend the proceeding for non-payment of the required advances.
45. On 14 August 2018, the Secretariat informed the Parties that they had not taken any steps during five consecutive months, and that, therefore, pursuant to ICSID Arbitration Rule 45, if no steps were taken by them before 12 September, 2018, the Secretary-General, after notice to the Parties, would move to discontinue the proceeding.
46. On 19 September 2018, the proceeding was resumed following Claimant's payment of the outstanding balance of the initial advance.
47. On 5 October 2018, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. 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 the proceeding would be Paris, France. The Tribunal also invited the Parties to submit a proposed timetable.
48. On 15 October 2018, Respondent requested an extension until the second week of November to submit the proposed timetable.
49. On 16 October 2018, Claimant agreed to the extension of the deadline for the submission of the proposed timetable until 5 November 2018.
50. On 17 October 2018, the Tribunal took note of the Parties' agreement to extend until 5 November 2018, the deadline for the submission of the proposed timetable by the Parties and therefore granted the extension upon consent.
51. On 5 November 2018, both Parties submitted their respective proposed procedural timetable, informing the Tribunal that they had not been able to agree on a joint procedural timetable.
52. On 12 November 2018, the Tribunal transmitted the procedural timetable to the Parties.

53. On 14 November 2018, Claimant objected to the procedural timetable set out by the Tribunal and requested the Tribunal to adjust it in accordance with the revised timetable then submitted by Claimant.
54. On 15 November 2018, the Tribunal invited the Parties to submit an agreed timetable by 22 November 2018, or their respective positions for the Tribunal to issue a new timetable taking into account their respective views, absent an agreement between the Parties.
55. On 22 November 2019, the Parties informed the Tribunal that they could not reach an agreement with regard to the procedural timetable and submitted their respective proposed timetable.
56. On 28 November 2019, the Tribunal took note of the Parties' failure to reach an agreement on the procedural timetable and transmitted to them the timetable it had therefore established.
57. On 18 December 2018, Respondent requested an extension of the deadline for the submission of its Memorial on Objections to Jurisdiction and Admissibility until 29 March 2019.
58. On 19 December 2018, the Tribunal invited Claimant to comment on Respondent's request.
59. On 21 December 2018, Claimant agreed to Respondent's request and requested the Tribunal to set a deadline for the submission of the procedural timetable taking into account 29 March 2019 as the starting date.
60. On 28 December 2018, the Tribunal granted Respondent's extension request and invited the Parties to submit an agreed timetable using 29 March 2019 as the starting point, by 14 January 2019.
61. On 14 January 2019, Claimant submitted the Parties' agreed timetable to the Tribunal, which Respondent confirmed on 15 January 2019.



62. On 30 January 2019, following exchanges with the Parties, the Tribunal transmitted the final procedural timetable to the Parties.
63. On 25 March 2019, Dr. Florian Dupuy of Wagner Arbitration, informed the Centre that its law firm had been retained by Kosovo as legal counsel in these arbitration proceedings, and requested an extension until 5 April 2019 to file Respondent's Memorial on Objections on Jurisdiction and Admissibility.
64. On the same date, the Secretary of the Tribunal invited Wagner Arbitration to provide a new power of attorney, which was provided by Respondent on 26 March 2019.
65. On 26 March 2019, the Tribunal invited Claimant to comment on Respondent's request.
66. On 27 March 2019, Claimant agreed to an extension of the deadline until 5 April 2019.
67. On 28 March 2019, the Tribunal informed the Parties that the extension request was approved upon consent.
68. On 28 March 2019, the Centre requested the Parties to make a second advance payment in order to cover the cost of the proceeding, in accordance with ICSID Administrative and Financial Regulation 14(3).
69. On 5 April 2019, Respondent filed its Memorial on Objections to Jurisdiction and Admissibility along with exhibits R-001 through R-019 and legal authorities RL-001 through RL-015 (the "**Memorial**").
70. On 25 April 2019, Respondent informed the Tribunal that "it [was] not in a position to honor the payment of its share of the advance."
71. On 1 May 2019, the Centre informed the Parties of their default in the payment of the second advance, and invited either Party to pay the outstanding amount by 16 May 2019.
72. On 2 May 2019, the Centre acknowledged receipt of Claimant's payment of its share of the second advance requested by the Centre.

73. On 9 May 2019, Claimant requested an extension of the deadline to file its Counter-Memorial on Jurisdiction and Admissibility until 14 May 2019, to which the Respondent agreed on 10 May 2019. On the same date, the Tribunal informed the Parties that the requested extension was granted upon agreement of the Parties.
74. On 14 May 2019, Claimant filed its Counter-Memorial on Jurisdiction and Admissibility, along with the witness statement of Mr. Behgjet Pacolli dated 14 May 2019, the witness statement of Mr. Selim Pacolli dated 14 May 2019, exhibits C-026 through C-044, and legal authorities CL-001 through CL-018 (the “**Counter-Memorial**”).
75. On 21 May 2019, the Centre acknowledged receipt of Claimant’s payment of Respondent’s share of the second advance.
76. On 12 June 2019, the Parties submitted their respective Redfern Schedules to the Tribunal.
77. On 21 June 2019, the Tribunal issued Procedural Order No. 2 concerning the production of documents.
78. On 12 July 2019, Respondent produced the documents ordered by the Tribunal in Procedural Order No. 2 and provided observations regarding certain requests, while Claimant produced some documents as per Procedural Order No. 2 and confirmed that no documents pertaining to requests nos. 2 and 3 were in its possession.
79. On 22 July 2019, the Tribunal invited the Parties to confirm their availability to hold a pre-hearing organizational meeting by telephone conference on 18 September 2019.
80. On 25 July 2019, Claimant’s confirmed its availability and requested an extension until 13 September 2019 for the submission of its Rejoinder on Jurisdiction and Admissibility. Claimant further noted that, in light of such request, the deadlines set out in paragraphs 18.2 and 18.3 of Procedural Order No. 1 should be conducted within a deadline of 7 days instead of 14 and that the Parties would also have to agree to amend paragraph 20.3 of Procedural Order No. 1. Finally, Claimant provided further comments on Respondent’s letter of 12 July 2019.

81. On 29 July 2019, Respondent confirmed its availability on the proposed date for the pre-hearing telephone conference and confirmed its agreement to an extension of the deadline for the submission of Claimant's Rejoinder on Jurisdiction and Admissibility until 13 September 2019 as well as to the amendment of paragraphs 18.2, 18.3 and 20.3 of Procedural Order No. 1.
82. On 30 July 2019, the Tribunal: (i) granted the extension of the deadline for the filing of Claimant's Rejoinder on Jurisdiction and Admissibility upon consent; (ii) approved the Parties' agreement to reduce the time periods foreseen at paragraphs 18.2, 18.3 and 20.3 of Procedural Order No. 1; (iii) noted that, accordingly, the deadline for each party to notify each other and the Tribunal which witnesses and experts of the opposing party it intends to cross-examine at the hearing is 20 September 2019; and (iv) proposed that the conference call scheduled for 18 September 2019, be cancelled and that it take place instead on 23 September 2019.
83. On 31 July 2019, Claimant confirmed its availability for a pre-hearing organizational meeting on the proposed date while Respondent confirmed its availability on 5 August 2019.
84. On 15 August 2019, the Tribunal confirmed that the pre-hearing organizational meeting would take place on 23 September 2019. The Tribunal also circulated a draft agenda and invited the Parties to confer and submit their comments, indicating their points of agreement and their respective positions on the points of disagreement.
85. On 23 August 2019, Respondent filed its Reply on Jurisdiction and Admissibility, along with the witness statement of Mr. Shkelzen Lluka dated 23 August 2019, the witness statement of Mr. Ahmet Shala dated 20 August 2019,<sup>3</sup> exhibits R-020 through R-046, R-048 through R-080, R-082 and R-083, and legal authorities RL-016 through RL-065 (the **"Reply"**).

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<sup>3</sup> Respondent submitted a signed version of Mr. Shala's Witness Statement on 25 August 2019.

86. On 2 September 2019, Claimant requested an extension of the deadline for its Rejoinder on Jurisdiction and Admissibility until 19 September 2019, to which the Respondent objected on 5 September 2019.
87. On 11 September 2019, the Tribunal informed the Parties that Claimant's request for an extension of 2 September 2019 was granted.
88. On 12 September 2019, Respondent provided comments concerning the Tribunal's decision to grant extension requested by Claimant and informed the Tribunal that it intended to request the postponement of the hearing on jurisdiction and admissibility. Claimant provided its comments on Respondent's request on the same date.
89. On 13 September 2019, the Tribunal informed the Parties that in order to assess the Respondent's request, it would be relevant to know whether Claimant intended to submit new witnesses or experts with its Rejoinder on Jurisdiction and Admissibility, and therefore invited Claimant to disclose this information by 16 September 2019.
90. On 16 September 2019, Claimant agreed to a postponement of the hearing on jurisdiction and admissibility. Claimant indicated, however, that its next available dates for a hearing were 30 October to 1 November 2019, and therefore requested an extension of the deadline to submit its Rejoinder on Jurisdiction and Admissibility until 27 September 2019. Respondent provided its comments on Claimant's request on the same date.
91. On 16 September 2019, the Tribunal confirmed that the deadline for the filing of the Rejoinder on Jurisdiction and Admissibility was 19 September 2019, and that the hearing on jurisdiction and admissibility would take place on 2-4 October 2019. The Tribunal further invited Claimant to answer its question regarding new witnesses. Finally, the Tribunal advised the Parties that, should it become necessary to postpone the hearing, and subject to finding a hearing room available in Paris, the Tribunal would be available to reschedule it for 6-8 November 2019, with 9 November in reserve.
92. On 17 September 2019, Claimant responded the Tribunal's inquiry of 16 September 2019. Claimant made further comments on Respondent's request and requested, *inter alia*, that:

*In any case, if the Tribunal decides to keep the hearing dates, the Claimant in its preparation of the Rejoinder having severely been jeopardized by the Respondent's procedural conduct submitting an unfair and ambiguous procedural request to which the Respondent has to respond on a daily basis losing a significant amount of time, the Claimant requests to submit its Rejoinder on Friday 20, 2019. The Claimant, however, offers to submit its Witness Statements before that date, if the Tribunal so requires.*

93. On the same date, Respondent proposed that, in light of the extension until 19 September granted to Claimant, the date for the Parties' comments on the draft agenda be set to 25 September 2019 and that the pre-hearing organizational meeting take place on 25 September 2019. The Respondent also proposed that the new date for the Parties' notification of witnesses to be heard be set for 24 September 2019.
94. On 18 September 2019, the Tribunal informed the Parties that the one-day extension for the filing of Claimant's Rejoinder was granted, that the hearing dates were maintained, and that if the hearing were to be postponed, the only practicable dates were the early November dates provided by the Tribunal.
95. On 20 September 2019, the Claimant filed its Rejoinder on Jurisdiction and Admissibility, along with the second witness statement of Mr. Pacolli dated 20 September 2019, the witness statement of Mr. Remzi Ejupi dated 20 September 2019 and the witness statement of Ms. Lucina Maesani-Gaiatto dated 18 September 2019, exhibits C-045 to C-075, and legal authorities CL-019 to CL-049 (the "**Rejoinder**").
96. On 21 September 2019, Claimant informed the Tribunal of its agreement with Respondent's suggested extensions of the various deadlines.
97. On 22 September 2019, the Tribunal informed the Parties that the pre-hearing organizational meeting was postponed until 25 September 2019 upon agreement of the Parties.
98. On 24 September 2019, Respondent requested, *inter alia*, that the hearing be postponed, while Claimant suggested to discuss this during the pre-hearing organizational meeting.

99. On the same date, the Parties also submitted their comments on the draft agenda for the pre-hearing organizational meeting as well as their respective lists of participants for the pre-hearing organizational meeting, and notified the witnesses that they wish to cross-examine at the hearing. In its notification, Respondent noted, *inter alia*, that it “[did] not request the presence of any of the Claimant’s witnesses at the oral hearing, because the written witness testimony does not contain statements of sufficient precision to be tested by oral interrogation.”
100. On 25 September 2019, the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference.
101. On 27 September 2019, Respondent, on behalf of the Parties, asked the Tribunal to formally confirm the postponement of the hearing, which the Tribunal did on the same date. The Tribunal also indicated to the Parties that it would revert to them regarding the available dates to hold the hearing in late November 2019.
102. On the same date, Respondent informed the Tribunal that “as discussed during the pre-hearing organizational meeting, the Parties [had] conferred and reached an agreement on items 1.2., 1.5., 2.3., 3.3. and 4 of the Agenda” and submitted their proposed wordings for those items. Claimant confirmed its agreement on the same date.
103. On 30 September 2019, the Tribunal proposed that the hearing on jurisdiction and admissibility be rescheduled for 25-26 November 2019, in Paris, and invited the Parties to confirm their availability on the proposed dates.
104. On 1 October 2019, Respondent informed the Tribunal that it was not available on the proposed dates due to other engagements, and that its earliest period of availability would be 16-20 December 2019. On the same date, Claimant confirmed its availability during the week of 16-20 December 2019, but proposed that the hearing be rescheduled for 17-18 December 2019 due to travel arrangements.
105. On 1 October 2019, Respondent requested that the Tribunal confirm that the Parties were requested to observe the 14-day deadline after the last submission (i.e. 4 October 2019) for the notification of the witnesses to be cross-examined at the hearing.

106. On 4 October 2019, the Tribunal proposed that the rescheduled hearing be held on 12-13 November 2019.
107. On 7 October 2019, the Tribunal informed the Parties that it preferred to hold the hearing on 11-12 November 2019.
108. On the same date, Claimant indicated that it would not be available to hold the hearing on the proposed dates but proposed to hold the hearing in Zurich on 12-13 November 2019.
109. On 8 October 2019, the Tribunal issued Procedural Order No. 3 concerning the organization of the hearing on jurisdiction and admissibility, and reiterated its invitation to Respondent to confirm its availability to hold the hearing on 12-13 November 2019 and to indicate whether it would be agreeable to hold the hearing in Zurich.
110. On 9 October 2019, Respondent informed the Tribunal that it was not available on the proposed dates and reiterated that both Parties, and their witnesses, were available during the week from 16 to 20 December 2019.
111. On the same date, Claimant confirmed that it did not intend to cross-examine Mr. Lluca and made some comments regarding Procedural Order No. 3.
112. On 10 October 2019, the Tribunal circulated an amended version of Procedural Order No. 3.
113. On 22 October 2019, the Tribunal invited the Parties to confirm their availability to hold the hearing on jurisdiction and admissibility on 23-24 January 2020 at the World Bank in Paris.
114. On 30 October 2019, following the Parties' confirmations of 23 and 25 October 2019, the Tribunal confirmed that the hearing on jurisdiction and admissibility would be held on 23-24 January 2020 at the World Bank in Paris.
115. On 14 November 2019, the Claimants requested the Tribunal to:

*(i) set the Claimant a deadline to comment on the Respondent's email of September 24, 2019 as to whether "Claimant's written*

*witness testimony does not contain statements of sufficient precision to be tested by oral interrogation” before the Tribunal makes a decision on whether the Claimant’s witness statements contain statements of sufficient precision and*

*(ii) to inform the Parties whether the Tribunal wishes to question Mr. Lluka not called upon by the Claimant for cross-examination.*

116. On 21 November 2019, the Tribunal invited Claimant to confirm that it: (i) intended to cross-examine M. Shala; (ii) did not intend to cross-examine Mr. Lluka; and (iii) anticipated no further cross-examination. The Tribunal also informed the Parties that it did not require that Mr. Lluka appear at the hearing for examination. The Tribunal further invited Claimant to comment on Respondent’s 24 September 2019 contention that the witness statements of Claimant’s witnesses Mr. Pacolli, Mr. Ejupi and Ms. Maesani-Gaiatto were of insufficient precision to allow cross-examination. Finally, the Tribunal asked Respondent to confirm that: (i) in the event that the Tribunal find those statements to be sufficient, it intended to cross-examine all those witnesses; and (ii) it anticipated no further cross-examination.
117. On 28 November 2019, Claimant responded to the questions that the Tribunal asked on 21 November 2019.
118. On 29 November 2019, the Tribunal gave Respondent the opportunity to reply to the Tribunal’s questions by 2 December 2019.
119. On 2 December 2020, Respondent: (i) confirmed its intent to cross-examine Messrs. Pacolli and Ejupi, and Ms. Maesani-Gaiatto; and (ii) informed the Tribunal that it was coordinating with Mr. Shala whether he was able to appear in person at the hearing.
120. By letter dated 2 December 2020, the Tribunal noted that it found the witness statements of Mr. Pacolli, Mr. Ejupi and Ms. Maesani-Gaiatto of sufficient precision to allow for cross-examination and that Respondent anticipated no further cross-examination at the hearing. The Tribunal further urged Respondent to do everything possible to enable Mr. Shala to appear in person at the hearing.



121. On 8 January 2020, Respondent informed the Tribunal that Mr. Shala would not be able to appear in person at the hearing and requested that the Tribunal allow him to be examined at the hearing by video-conference.
122. On 14 January 2020, Claimant presented its comments on Respondent's request of 8 January 2020.
123. On 16 January 2020, Respondent provided its comments on Claimant's email of 14 January 2020.
124. On 17 January 2020, the Tribunal urged Respondent to exert all possible influence to persuade Mr. Shala to attend the hearing in person.
125. On 21 January 2020, Respondent informed the Tribunal that Mr. Shala had made the arrangements to attend the hearing in person, and that Ms. Drita Kozmaqi of the Ministry of Justice of the Republic of Kosovo would not attend the hearing.
126. A hearing on jurisdiction was held at the World Bank offices in Paris on 23 January 2020 (the "**Hearing**"). The following persons were present at the Hearing:

*Tribunal:*

Professor George Bermann	President
Mr. Gianrocco Ferraro	Arbitrator
Professor August Reinisch	Arbitrator

*ICSID Secretariat:*

Mr. Francisco Abriani	Secretary of the Tribunal
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*For the Claimant:*

***Counsel:***

Dr. Christian Schmid	Counsel for Claimant, Bratschi Ltd.
Ms. Sandra De Vito Bieri	Counsel for Claimant, Bratschi Ltd.
Ms. Liv Bahner	Counsel for Claimant, Bratschi Ltd.

***Parties:***

Ms. Susanne Betz	Assistant of the board of Mabco Constructions SA
Mr. Valon Lluka	CEO of Mabetex Holding

***Witnesses:***

Mr. Behgjet Pacolli	Owner of the Mabetex Group
Mr. Remzi Ejupi	Owner of Eurokoha Reisen NTSH
Ms. Lucina Maesani-Gaiatto	CFO of Mabco Constructions SA

*For the Respondent:*

***Counsel:***

Dr. Philipp K. Wagner, LL.M.	WAGNER Arbitration
Dr. Florian Dupuy, LL.M.	WAGNER Arbitration
Mr. Petrit Elshani, LL.M.	WAGNER Arbitration

***Parties:***

Mr. Sami Istrefi	General State Advocate, Ministry of Justice of the Republic of Kosovo
Mr. Qemajl Marmullakaj	General Secretary, Ministry of Justice of the Republic of Kosovo
Ms. Fellenza Limani	Legal Officer, Ministry of Justice of the Republic of Kosovo

***Witness:***

Mr. Ahmet Shala	Visiting Professor, James Madison University (Virginia, USA)
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***Court Reporter:***

Mr. Trevor McGowan

***Interpreters:***

Ms. Francisca Geddes-Mondino	English/Italian
Ms. Monica Robiglio	English/Italian
Mr. Genc Lamani	English/Albanian
Mr. Ragip Luta	English/Albanian

127. During the Hearing, the following persons were examined:

***On behalf of the Claimant:***

Mr. Behgjet Pacolli	Owner of the Mabetex Group
Mr. Remzi Ejupi	Owner of Eurokoha Reisen NTSH
Ms. Lucina Maesani-Gaiatto	CFO of Mabco Constructions SA

***On behalf of the Respondent:***

Mr. Ahmet Shala	Visiting Professor, James Madison University (Virginia, USA)
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128. On 23 January 2020, the Tribunal invited the Parties to address the following issues in the post-hearing briefs:

1. *The Tribunal asks what form did the investment take specifically, and when and how specifically was it made? The Tribunal wants*

*references to particular documents that support the answer to that question.*

*2. The Tribunal welcomes an assessment of the significance of the violation of Kosovo law, if any, and any reason why any such violation, if it occurred, should be considered as having been overlooked. This includes the question of whether a violation of the tender rules, if any, constitutes a violation of Kosovo law within the meaning of the BIT and the Kosovo foreign investment law.*

*3. The Tribunal would welcome any observations on the temporal applicability of the BIT and the Kosovo foreign investment law to the present dispute.*

129. By letter dated 24 January 2020, the Tribunal indicated the Parties that the deadline for the submission of the Parties' agreed corrections to the transcript, and for their indication of any points of disagreement, was 31 January 2020 and invited them to file their costs submissions one week after the filing of their post-hearing submissions, i.e. by 24 February 2020.
130. On 27 January 2020, Claimant submitted a notarized and apostilled copy of the minutes of the extraordinary shareholders meeting of Mabco with regard to investments in Kosovo dated 22 January 2006 as exhibit C-76. The Claimant indicated that "contrary to the indication during the hearing, the attached document [did] not qualify as board resolution but show[ed] the minutes of an extraordinary shareholders meeting."
131. On 31 January 2020, the Parties transmitted their agreed corrections to the transcript with an indication of the passages on which they disagreed.
132. On 3 February 2020, the Tribunal: (i) acknowledged receipt of the Parties' correspondence dated 31 January 2020; (ii) informed the Parties that it would resolve the Parties' disagreements arising from the translation with the assistance of one of the Albanian/English interpreters that attended the Hearing; and (iii) indicated that once it had decided on the issue, it would communicate its decision to the Parties and request the court reporter to implement all the changes to the transcript.

133. On 17 February 2020, the Parties filed simultaneous post-hearing briefs. Claimant's Post-Hearing Brief was accompanied by exhibit C-076 and legal authorities CL-050 through CL-062. Respondent's Post-Hearing Brief was accompanied by exhibits R-084 through R-088 and legal authorities RL-066 through RL-080.
134. On 19 February 2020, the Tribunal informed the Parties of its decision on the passages of the transcript on which the Parties disagreed and transmitted the final version of the transcript.
135. On 24 February 2020, the Parties filed their submissions on costs.

## II. FACTUAL BACKGROUND

136. In this Section, the Tribunal provides an account of the history of the dispute. The Parties are in agreement on the majority of facts and circumstances reported here. Where a pertinent fact is alleged by one party and disputed by the other, that will be briefly indicated.
137. Claimant, Mabco, initiated the present proceedings against Kosovo over a dispute arising out of the privatization and ownership of the Grand Hotel, a major hotel in Pristina, Kosovo. Claimant brought its proceedings under both the Agreement between the Swiss Confederation and the Republic of Kosovo on the Promotion and Reciprocal Protection of Investments, which entered into force on 13 June 2012 ("**the BIT**")<sup>4</sup> and Kosovo's Law on Foreign Investment. Due to the fact that claims asserted in this proceeding do not all have the same dates of accrual, certain of them are subject to the Foreign Investment Law No. 02/L-33, enacted on 21 November 2005 and entering into force upon promulgation by the Special Representative of the United Nations Secretary-General in April 2006 (hereinafter "**2005 Foreign Investment Law**"), and others are subject to the Foreign Investment Law No. 04/L-220, which entered into force on 24 January 2014 (hereinafter "**2014 Foreign**

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<sup>4</sup> Exh. C-1: BIT.

**Investment Law**”).<sup>5</sup> As appropriate, all references to the Foreign Investment Law will indicate the applicable version. Claimant selected ICSID as the administering institution.

138. Claimant asserts that Respondent violated its obligations under both the BIT and the Foreign Investment Law, primarily by unlawful expropriation of Claimant’s property, denial of fair and equitable treatment and denial of justice.<sup>6</sup>
139. By way of relief, Claimant requests compensation in the amount of EUR 4m, while reserving the right to adjust that amount going forward.<sup>7</sup> During the course of the proceedings Claimant stated that it not only lost its EUR 4m investment in the Grand Hotel, but also lost benefits of ownership of the shares it claims to have acquired, without however quantifying that loss.

**A. CENTRAL ENTITIES AND INDIVIDUALS INVOLVED IN THE DISPUTE**

140. The following entities and individuals figure importantly in the present dispute:

**(1) *GRAND HOTEL***

141. The NewCo Grand Hotel L.L.C., a limited liability company incorporated under the laws of Kosovo, was the owner of the Grand Hotel Pristina located in Pristina.
142. Until the end of the war in Kosovo in June 1999, Grand Hotel was a “socially-owned property” (hereinafter “**SOE**”) known by the name of “SOE Sloga” and held by the Socialist Federal Republic of Yugoslavia until its dissolution in 1992. In 2002, the United Nations Interim Administration Mission in Kosovo (hereinafter “**UNMIK**”), which had been established in Kosovo in 1999 pursuant to UN Security Council Resolution 1244 to help launch the rebuilding of Kosovo following the Kosovo War, entrusted management of the Grand Hotel and other SOEs to an entity by the name of the Kosovo Trust Agency

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<sup>5</sup> Exh. C-2: 2005 Foreign Investment Law; Exhs. C-18/R-19: 2014 Foreign Investment Law.

<sup>6</sup> Claimant initially also invoked the principle of national treatment, but did not develop its position on that issue.

<sup>7</sup> RfA, paras. 59-60.

(hereinafter “**the KTA**”). The KTA managed and dealt with the privatization of some 500 SOEs.

**(2) THE PRIVATIZATION AGENCY OF KOSOVO**

143. Shortly after Kosovo’s declaration of independence on 17 February 2008, the KTA was transformed into the Kosovo Privatization Agency (hereinafter “**the PAK**”).<sup>8</sup>
144. Just as the KTA, the PAK was charged with administering the SOEs and disposing of their assets by creating new companies (“**NewCos**”) and offering them for sale in a tender process.
145. The initial chairman of the PAK’s board of directors was Mr. Dino Asanaj. He was succeeded in 2012 by Mr. Naser Osmani.

**(3) MABCO CONSTRUCTIONS, S.A.**

146. Mabco is a Swiss legal entity engaged in the construction and engineering business, founded and owned by Mr. Behgjet Pacolli. Mabco is a subsidiary of the Mabetex Group, a consortium of companies operating in different sectors.
147. Mabco alleges in this proceeding to have made an investment in the Grand Hotel in Pristina, Kosovo at the time that the hotel underwent privatization.

**(4) MABETEX GROUP SWITZERLAND**

148. Mabetex Group Switzerland (hereinafter “**Mabetex**”) is a Swiss company comprised of a large number of companies in addition to Claimant. It is specialized in civil and industrial planning, carried out through a large number of subsidiaries, including Claimant. It was founded and is owned by Mr. Behgjet Pacolli.

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<sup>8</sup> Exh. C-11: Law No. 04/L-034 on The Privatization Agency of Kosovo of 2011; Exh. C-12: Law No. 05/L-080 on amending and supplementing Law No. 04/L-034 on The Privatization Agency of Kosovo, dated 14 December 2015.

**(5) MR. BEHGJET PACOLLI**

149. Mr. Behgjet Pacolli, a Kosovo and Swiss national, is the founder and president of Mabetex.<sup>9</sup> He regularly represents Mabetex and its affiliates including Mabco.<sup>10</sup> He was, until 2010, Head of Claimant's Managing Board, a position to which his brother Mr. Afrim Pacolli succeeded in 2010.
150. At the time of filing of the present claim, Mr. Pacolli was also First Deputy Prime Minister and Minister of Foreign Affairs of the Republic of Kosovo. For a short period in 2011, Mr. Pacolli was President of the Republic of Kosovo. Between 2011 and 2014 he served as First Deputy Prime Minister of the Republic of Kosovo. Before 2011, he occupied no official government post in Kosovo.

**(6) MR. SELIM PACOLLI**

151. Mr. Selim Pacolli (hereinafter "**Selim Pacolli**," to distinguish him from Mr. Behgjet Pacolli), a brother of Mr. Behgjet Pacolli, is a businessman, serving at the time of filing of the present claim as Deputy Mayor of Pristina. Prior to his appointment as Deputy Mayor, he on occasion represented Mabetex in Kosovo.
152. From 2011 to 2018, Selim Pacolli was General Director of the Swiss Diamond Hotel Pristina, a Mabetex property.

**(7) UNIO COMMERCE - UTC**

153. N.T.P. Unio-Commerce (hereinafter "**UTC**") is a company owned by Mr. Zelqif Berisha, a national of Kosovo. At the time of the filing of the present claim, UTC became a limited liability company, Unio-Commerce Sh.p.k., incorporated under the laws of the Republic of Kosovo and registered with the Business Registration Agency. Mr. Berisha is its owner and director.

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<sup>9</sup> Exh. R-12: Excerpt from website of Mabetex Group – Landing Page, <http://www.mabetexgroup.com>.

<sup>10</sup> Cl. Counter-Mem. on Jurisd., para. 15.

**(8) MR. ZELQIF BERISHA**

154. As noted (para. 153 *supra*), Mr. Zelqif Berisha is owner and director of UTC.

**(9) NTSH EUROKOHA-REISEN**

155. NTSH Eurokoha-Reisen (hereinafter “NTSH”) is a business owned by Mr. Remzi Ejupi and registered under the laws of the Republic of Kosovo, with branches in Switzerland and Germany. NTSH operates in the aviation and tourism market.

**(10) MR. REMZI EJUPI**

156. As noted (para. 155, *supra*), Mr. Remzi Ejupi, born in Kosovo but living in Germany, is the founder of NTSH.

**(11) MR. AHMET SHALA**

157. Mr. Ahmet Shala was the KTA’s Deputy Managing Director until 2008.

**(12) MR. SHKELZEN LLUKA**

158. Mr. Shkelzen Lluka was deputy managing director of the KTA and thereafter managing director of the PAK.

**(13) MR. NASER OSMANI**

159. Mr. Naser Osmani became chairman of the PAK’s board of directors in 2012.

**B. PRIVATIZATION AND THE TENDER OF SHARES IN THE GRAND HOTEL**

160. The KTA, and thereafter the PAK, conducted the privatization of Kosovo’s SOEs through a Special Spin-Off Privatization Procedure<sup>11</sup> that entailed the creation of a new company (hereinafter “NewCo”), to which an SOE’s assets were transferred, followed by a public tender for bids for purchase of the NewCo’s assets. The formal name of the NewCo holding the Grand Hotel as an asset was the NewCo Grand Hotel L.L.C.

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<sup>11</sup> Exh. R-14: Rules of Tender for the Privatization of the Grand Hotel, 20 December 2005 (“Tender Rules”).



161. Under the Special Spin-Off Rules adopted on 20 December 2005, the buyer of an asset was obligated to maintain operation of the enterprise, while at the same time investing in it a prescribed level of capital and retaining a minimum number of employees for a minimum period of time following conclusion of the purchase agreement. These obligations were spelled out in a commitment agreement annexed to the purchase agreement. Under a commitment agreement, the KTA had a share call option, i.e., a right of withdrawal of shares, in the event of non-compliance with the Special Spin-Off Privatization Procedure obligations.
162. On 1 September 2005, the PAK issued a tender for bids, due in February 2006, for purchase of the Grand Hotel. Among the bidders, and the eventual awardee, was UTC, which had submitted a bid of EUR 8,160,000.00.<sup>12</sup> The award was announced in early April 2006.

### **C. AGREEMENT AMONG CO-OWNERS**

163. Under the Tender Rules, UTC, as successful bidder, was required to deposit the purchase price in the KTA's designated escrow account within 20 days of notification of the award.<sup>13</sup> According to Claimant,<sup>14</sup> UTC did not have sufficient funds to purchase the shares of the Grand Hotel for the bid price.
164. According to Mr. Remzi Ejupi, in or around January 2006, Mr. Ahmet Shala contacted him asking that he and Mr. Pacolli participate as bidders in the tender process. Mr. Pacolli declined to do so, but Mr. Ejupi did make a bid, though he did not win.<sup>15</sup> Mr. Ejupi further testified that Mr. Shala later contacted him again, informing him that the final winner of the bid, Mr. Zelqif Berisha, did not have sufficient funds to pay the purchase price for the Grand Hotel or to fulfill the commitments associated with the privatization, and asking him to convince Mr. Pacolli to join him in investing in the hotel.<sup>16</sup> Mr. Pacolli testified that Mr. Shala's reason for doing so was the need to avoid annulment of the procedure, which would

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<sup>12</sup> Cl. Counter-Mem. on Jurisd., para. 36.

<sup>13</sup> Exh. R-14: Tender Rules, Sec. 11.1.

<sup>14</sup> Cl. Counter-Mem. on Jurisd., para. 34.

<sup>15</sup> Ejupi witness stmt, Exh. CWS-4, para. 10.

<sup>16</sup> Behgjet Pacolli witness stmt, Exh. CWS-1, para. 8; Ejupi witness stmt, Exh. CWS-4, para. 11.

necessitate a retendering.<sup>17</sup> Also, according to Mr. Ejupi, Mr. Shala was concerned that having to launch a retendering process would reflect badly on the KTA, which already had a poor reputation.<sup>18</sup> Further, according to Mr. Ejupi, Mr. Shala assured him that he would take care of everything and see to it that the shares were distributed in accordance with the investors' participation in the purchase price.<sup>19</sup>

165. According to Mr. Pacolli, he then received a call from Mr. Ejupi informing him that Mr. Shala had indeed sought to convince him to participate in lending UTC financial support, and to enlist Mr. Pacolli in that enterprise.<sup>20</sup> Mr. Ejupi recalls telling Mr. Pacolli on that call that Mr. Berisha, whom Mr. Pacolli did not know, was a good businessperson,<sup>21</sup> and that Mr. Shala assured him that the purchase would be formalized and the shares registered.<sup>22</sup> Although Mr. Pacolli did not know Mr. Berisha, the prospect of investing in, and renovating, a hotel as prestigious as the Grand Hotel, and thereby boosting tourism in Kosovo, was attractive to him.<sup>23</sup>
166. Mr. Pacolli testified that there followed a meeting in Vienna with Messrs. Berisha and Ejupi at which Mr. Berisha told him that he had already paid EUR 500,000 as a deposit for being admitted to the tender but could not afford to pay the balance of the total price of about EUR 8m. At that meeting, Messrs. Berisha, Ejupi and Pacolli decided by oral agreement, allegedly as representatives of their respective companies, that they would purchase the Grand Hotel shares, with Claimant and NTSH contributing EUR 4m and EUR 1m, respectively, to the purchase of the Grand Hotel. They did so on the understanding that Mr. Berisha would manage the project for a period of two years and that he, Mr. Pacolli,

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<sup>17</sup> Exh. C-30: Official Memorandum of the Republic of Kosovo, Ministry of Internal Affairs, Police General Directorate, Crimes Investigation Directorate, 22 August 2012, p. 1, para. 5. Exhibit C-30 is a police report dated 22 August 2012.

<sup>18</sup> Ejupi witness stmt, Exh. CWS-4, para. 13.

<sup>19</sup> Ejupi witness stmt, Exh. CWS-4, para. 13.

<sup>20</sup> Exh. C-30: Official Memorandum of the Republic of Kosovo, Ministry of Internal Affairs, Police General Directorate, Crimes Investigation Directorate, 22 August 2012, p. 1; Behgjet Pacolli witness stmt, Exh. CWS-1, para. 8; Behgjet Pacolli 2d witness stmt, Exh. CWS-3, para. 8.

<sup>21</sup> Ejupi witness stmt, Exh. CWS-4, para. 14.

<sup>22</sup> Ejupi witness stmt, Exh. CWS-4, para. 8.

<sup>23</sup> Ejupi witness Stmt, Exh. CWS-4, para. 8.

would make the investments to fulfill the owners' commitments.<sup>24</sup> Mr. Ejupi supports this account.<sup>25</sup>

167. At any extraordinary meeting, the Claimant's shareholders then approved the deal.<sup>26</sup> It was understood that, while Mr. Pacolli owned Mabetex, it was Mabetex's affiliate Mabco, in whose specialization, construction, the project fell.<sup>27</sup>
168. Mr. Pacolli testified that the arrangement was known to the KTA and to Mr. Shala in particular.<sup>28</sup> Mr. Ejupi testified that, during the year 2006, he had three meetings with Mr. Shala, all on the subject of his and Mr. Pacolli's participation.<sup>29</sup>
169. However, Mr. Shala testified that any suggestion that he invited or encouraged Messrs. Pacolli or Ejupi to invest in the Grand Hotel is untrue.<sup>30</sup> He denied inviting or encouraging any potential investor to do so.<sup>31</sup> He added that no one could qualify as a buyer of a privatized NewCo without participating in the tender process.

#### **D. TRANSFER OF CAPITAL**

170. Pursuant to the agreement among Messrs. Pacolli, Ejupi and Berisha, Claimant transferred EUR 4m to NTSH,<sup>32</sup> which forwarded the sum of EUR 4,000,600.00 that sum to UTC,<sup>33</sup> which in turn paid the bid amount of EUR 8,160,000.00, including 4,011,000 EUR as Claimant's share, into the escrow account designated by the KTA. According to Claimant,

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<sup>24</sup> Behgjet Pacolli witness stmt, Exh. CWS-1, para. 9; Behgjet Pacolli 2d witness stmt, Exh. CWS-3, para. 9. See Cl. oral argum., tr. 30:11 – 30:15.

<sup>25</sup> Ejupi witness stmt, Exh. CWS-4, para. 15.

<sup>26</sup> Behgjet Pacolli witness stmt, Exh. CWS-1, para. 9.

<sup>27</sup> Behgjet Pacolli witness stmt, Exh. CWS-1, para. 8.

<sup>28</sup> Behgjet Pacolli 2d witness stmt, Exh. CWS-3, para. 10.

<sup>29</sup> Ejupi witness stmt, Exh. CWS-4, para. 16.

<sup>30</sup> Shala witness stmt, p. 1; Resp. oral argum., tr. 12:12 – 13:7.

<sup>31</sup> Shala witness stmt, p. 2.

<sup>32</sup> Exh. C-14: Wire transfer receipt of EUR 4'000'000, 29 April 2006; Cl. Supp. to RfA, para. 17.

<sup>33</sup> Exh. C-21: Wire transfer confirmation, 29 April 2006; Behgjet Pacolli witness stmt, Exh. CWS-1, para. 9.

all of these transfers occurred on a single day, 28 April 2006.<sup>34</sup> (As explained below, paras. 353-355, *infra*, the payment did not proceed smoothly, but was ultimately received.) According to Claimant, these arrangements enabled UTC, as winner of the tender, to enter into an Agreement for the “Sale of Ordinary Shares in Grand Hotel” (hereinafter “**Purchase Agreement**”) on 10 August 2006, whereby the SOE Sloga formally undertook to sell the shares of Grand Hotel to UTC.<sup>35</sup>

171. Much controversy surrounds the EUR 4m payment. Claimant affirms that the EUR 4m payment incontrovertibly represents Claimant’s contribution to the purchase of the Grand Hotel shares. Respondent disagrees, arguing that the record contains no proper documentation of the circumstances of, or reasons for, the transfer,<sup>36</sup> though the wire transfers mentioned, respectively, “Agreement”<sup>37</sup> and “Payment under the Contract.”<sup>38</sup> The details of the Parties’ competing understandings of the EUR 4m transfer are examined below (paras. 362-370, *infra*).
172. On 3 August 2006, shortly before the Purchase Agreement was signed on 10 August 2006, Mr. Pacolli committed to providing to UTC’s bank a guarantee as required under the Commitment Agreement attached to the Purchase Agreement.<sup>39</sup> The guarantee, in the amount of EUR 20.2m was actually given on 21 March 2012.<sup>40</sup>

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<sup>34</sup> Behgjet Pacolli witness stmt, Exh. CWS-1, para. 9.

<sup>35</sup> Exh. C-15: Purchase Agreement; Exh. R-1: Commitment Agreement; Resp. Mem. on Jurisd., para. 36.

<sup>36</sup> Resp. Mem. on Jurisd., para. 44; Resp. oral argum., tr. 9:19-22.

<sup>37</sup> Exh. C-14: Wire transfer receipt of EUR 4'000'000, 29 April 2006.

<sup>38</sup> Exh. C-21: Wire transfer confirmation, 29 April 2006.

<sup>39</sup> Exh. C-66: Letter from Behgjet Pacolli to Raiffeisen Bank, 3 August 2006. The letter of guarantee provided:

*[O]perating costs concerning Grand Hotel New Co located in Pristina will be provided by me personally and the group of companies as mentioned as listed ... All financing of Grand Hotel New Co. ... will be covered by me personally and the group of my companies without any need of mortgage loan.*

<sup>40</sup> Exh. C-39: Performance Guarantee.

## E. PURCHASE AGREEMENT

173. On 10 August 2006, the KTA on behalf of SOE Sloga and the Grand Hotel then issued a Declaration of Transfer, providing for the transfer of the real property and other rights of the Grand Hotel to Grand Hotel L.L.C., (hereinafter “**Grand Hotel**”)<sup>41</sup> shares of which became the object of the present dispute.
174. On the same day, a purchase agreement for the shares in the Grand Hotel was signed by the KTA on behalf of the SOE Sloga and Mr. Berisha on behalf of UTC.<sup>42</sup>
175. Article 5.1.3 of the Purchase Agreement provided:

*The Buyer is purchasing the Shares for its own use and not as an agent for a third party and, during the tender for this company, the Buyer has not formed any informal or formal undisclosed agreements or consortiums between two or more bidders or with any undisclosed third party.*

176. Attached to the Purchase Agreement was a Commitment Agreement (hereinafter “**Commitment Agreement**”) among Mr. Berisha on behalf of UTC, KTA on behalf of SOE Sloga and the Grand Hotel LLC. It contained the following stipulations:
- a. UTC committed, pursuant to para. 2 of the Commitment Agreement, to invest a minimum of EUR 20,200,000.00 as capital by the end of the commitment period, i.e. two years after the entry into force of the Commitment Agreement (“Commitment Period”).
  - b. UTC committed, pursuant to para. 3.1.1 of the Commitment Agreement, to employ a minimum of 270 full-time employees six months after entry into force of the Commitment Agreement.
  - c. UTC committed, pursuant to para. 3.1.2 of the Commitment Agreement, to maintain the number of 270 employees for a period of twelve months after the entry into force of the Commitment Agreement.
  - d. UTC committed, pursuant to para. 3.2.1 of the Commitment Agreement, to employ minimum 540 full-time employees twelve months after the entry into force of the Commitment Agreement.

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<sup>41</sup> Exh. C-16: Transfer Declaration, 10 August 2006.

<sup>42</sup> Exh. C-15: Purchase Agreement; Cl. post-hearing br., para. 16.

- e. UTC committed, pursuant to para. 3.2.2 of the Commitment Agreement, to maintain the number of 540 employees to the end of the Commitment Period.
177. Paragraph 6.2 of the Commitment Agreement gave the KTA an option to purchase the entire issued share capital of Grand Hotel LLC in the event of UTC's failure to honor its commitments under the Commitment Agreement.
178. On 13 October 2006, the shares in the Grand Hotel were transferred to UTC, which thereupon became the owner of the Grand Hotel, together with all the assets and rights pertaining to it.

**F. AGREEMENT OF GOOD UNDERSTANDING**

179. Claimant maintains that in January 2007,<sup>43</sup> in order to formalize the prior arrangements among UTC, NTSH and Claimant, Messrs. Pacolli, Ejupi and Berisha signed an "Agreement of Good Understanding" (hereinafter "**AGU**").<sup>44</sup> Under the AGU, UTC would become the formal owner of the shares of Grand Hotel for a period of two years. Thus, according to paragraph 2 of the AGU, UTC was initially the "legal purchaser," while Messrs. Ejupi and Pacolli were the "actual purchaser[s]."<sup>45</sup> When the two years passed, Claimant, NTSH and UTC were to officially become joint owners of the shares, with the shares distributed among the three owners as follows: UTC 40%, NTSH 20% and Claimant 40%.<sup>46</sup> Under the AGU, Mr. Pacolli's brother, Selim Pacolli was appointed as Mr. Behgjet's representative on the board of the Grand Hotel L.L.C.
180. Claimant maintains that when Messrs. Pacolli, Ejupi, and Berisha signed the AGU, they did so on behalf of Claimant, NTSH and UTC, respectively. More specifically, Claimant maintains that in all the discussions pertaining to the privatization, Mr. Pacolli, as President of the Board of Claimant, acted as representative of Claimant.<sup>47</sup> According to Claimant,

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<sup>43</sup> In some papers, the date of execution of the AGU is given as 22/28 Dec. 2006.

<sup>44</sup> Exh. C-17: AGU; Behgjet Pacolli witness stmt, Exh. CWS-1, para. 10.

<sup>45</sup> Cl. Supp. to RfA, para. 21.

<sup>46</sup> RfA, para. 45.

<sup>47</sup> Cl. Counter-Mem. on Jurisd., paras. 39-40. According to Claimant:

the three individuals were to be understood, and were understood, as acting on behalf of the companies that they respectively owned, and Mr. Ejupi affirmed that this was their understanding.<sup>48</sup> UTC, having paid the purchase price, and Mr. Berisha, having signed the AGU, the latter thereafter was acting vis-à-vis the KTA on behalf of all three companies. Mr. Selim Pacolli testified that his brother informed him of all the foregoing events and understandings.<sup>49</sup>

181. According to Behgjet Pacolli, the KTA knew about and approved of the agreement and the source of funds.<sup>50</sup> However, according to Mr. Lluka, the PAK was never made aware of the AGU or any other agreement between Mr. Berisha, on the one hand, and Messrs. Pacolli and Ejupi, on the other.<sup>51</sup>
182. Respondent maintains that Messrs. Pacolli and Ejupi signed the AGU in their personal capacities only.<sup>52</sup> Respondent cites in support of this proposition the fact that the title page of the AGU, the Recitals, Article III, Article XIII lit. b, and the signature page refer to the Contracting Parties as “Co-owners” in their capacity as natural persons. In sum, Claimant as such was not involved in any of the steps relating to the privatization of the Grand Hotel.<sup>53</sup> Claimant reads the record entirely differently, identifying numerous ways in which Claimant manifested its involvement in the various transactions.<sup>54</sup>

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*The facts as established clearly suggest that the AGU was concluded by the Co-Owners with respect to the joint purchase of the shares of Grand Hotel. As undisputed by Respondent, Mr. Behgjet Pacolli was at the time of the conclusion of the AGU the president of the board of Claimant. In all the discussions regarding the privatization of Grand Hotel, he always acted within its capacity as representative, so did he, when he concluded the AGU...*

<sup>48</sup> Ejupi witness stmt, Exh. CWS-4, para. 17.

<sup>49</sup> Selim Pacolli witness stmt, Exh. CWS-2, para. 8.

<sup>50</sup> Behgjet Pacolli witness stmt, Exh. CWS-1, paras. 10, 15. See Cl. oral argum., tr. 30:11–30:15, 41:10–41:18.

<sup>51</sup> Lluka witness stmt, para. 17.

<sup>52</sup> Resp. Mem. on Jurisd., para. 42.

<sup>53</sup> Resp. Mem. on Jurisd., para. 103.

<sup>54</sup> Cl. Counter-Mem. on Jurisd., para. 43.

183. Respondent also claims that uncertainty surrounds the question of what exactly the term “Hotel Grand Pristina” signified in the context of the AGU.<sup>55</sup> Respondent further notes that the name of the Claimant is not mentioned in the AGU. Claimant strongly disagrees, quoting at length from the AGU, to establish that the AGU’s import was entirely clear. In fact, the Grand Hotel shares were not registered with the Kosovo Business Registration Agency, and, when the two-year period elapsed, UTC failed to transfer the shares to Claimant and NTSH, or to Messrs. Pacolli or Ejupi.

## **G. WITHDRAWAL OF THE SHARES**

184. At this point, Claimant’s and Respondent’s narratives diverge even more markedly.

185. Claimant asserts that starting in 2008, UTC ignored Claimant’s and NTSH’s ownership in the Grand Hotel, refused to accept Claimant’s offer of the funds needed to maintain the investment and meet the owners’ commitments under the Purchase Agreement. Claimant testified that UTC went so far as to deny Claimant access to the Grand Hotel,<sup>56</sup> thereby preventing Claimant from making the required investments. According to Claimant, had its proposal been accepted, the obligations under the Commitment Agreement would have been performed.<sup>57</sup> Claimant further asserts that it later learned that UTC had deliberately taken these acts and omissions in collaboration with the PAK, for the purpose of either extorting Claimant and NTSH or excluding them from the project.<sup>58</sup>

186. Having determined that UTC had failed to comply with its obligations under the Commitment Agreement, the PAK, pursuant to the Agreement, engaged an independent auditor to conduct an inquiry into the matter. A first audit report,<sup>59</sup> issued on 16 November 2009, and covering the period from 13 August 2006 to 13 August 2009, found that only EUR 1,244,373.33 out of the required EUR 20,200,000.00 had been invested. As for

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<sup>55</sup> Resp. Mem. on Jurisd., paras. 43-44.

<sup>56</sup> Cl. Counter-Mem. on Jurisd., paras. 45-46; Behgjet Pacolli witness stmt, Exh. CWS-1, para. 11; Selim Pacolli witness stmt, Exh. CWS-2, para. 9.

<sup>57</sup> Behgjet Pacolli witness stmt, Exh. CWS-1, para. 11.

<sup>58</sup> Cl. Counter-Mem. on Jurisd., para. 46, citing Exh. C-31: Official Memorandum of the Republic of Kosovo, Ministry of Internal Affairs, Police General Directorate, Crimes Investigation Directorate, 30 November 2012, p. 5.

<sup>59</sup> Exh. R-15: First Audit Report, 16 November 2009.



employment commitments, the report found that in the first year, UTC employed on average 84.11 more employees than required; in the second year, on average 121.58 fewer employees than required; and in the third year 1 more employee than required. The PAK made it known that it was, as a consequence, contemplating withdrawal of the shares in the Grand Hotel.<sup>60</sup>

187. On 21 October 2011, Selim Pacolli, having learned of this possibility, sent a letter to the PAK in his capacity as Claimant's representative on the board of Grand Hotel L.L.C., urging that the shares not be withdrawn.<sup>61</sup> Both Selim Pacolli<sup>62</sup> and Behgjet Pacolli<sup>63</sup> affirm that the letter was written on behalf of Claimant. The letter reminded the PAK that Mr. Pacolli had contributed EUR 4m for purchase of the Grand Hotel shares and, by virtue of the AGU, formally acquired co-ownership of the Grand Hotel. It also informed the PAK that UTC had undertaken works, without consultation of Messrs Ejupi and Pacolli, that did not benefit the restoration of the hotel. Finally, it assured the PAK that it was prepared itself to fulfill all the commitments made under the Purchase Agreement, provided it was given access to the hotel, and it asked the PAK to allow it to do so.<sup>64</sup>
188. The PAK replied to Behgjet Pacolli, rather than Selim Pacolli, asserting that "the sale contract of the [Grand Hotel] was signed only with Mr. Zelqif Berisha, as the purchaser of this new company."<sup>65</sup> In the letter, the PAK reported that the necessary decisions, including a potential withdrawal of shares, would be taken at an upcoming PAK Board of Directors meeting.<sup>66</sup>
189. Respondent further asserts that, by 2011, UTC had still not fully complied with its commitment to invest at least EUR 20.2m or to employ and maintain at least 540

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<sup>60</sup> Cl. Counter-Mem. on Jurisd., para. 47.

<sup>61</sup> Exh. C-22: Letter of Mabco to PAK, 21 October 2011; Cl. Counter-Mem. on Jurisd., para. 48, Behgjet Pacolli witness stmt, Exh. CWS-1, para. 12.

<sup>62</sup> Selim Pacolli witness stmt, Exh. CWS-2, para. 10.

<sup>63</sup> Behgjet Pacolli witness stmt, Exh. CWS-1, para. 12.

<sup>64</sup> Behgjet Pacolli witness stmt, Exh. CWS-1; Selim Pacolli witness stmt, Exh. CWS-2.

<sup>65</sup> Exh. C-23: Letter of PAK to Mabco, 5 March 2012.

<sup>66</sup> RfA, para. 46.

employees. Accordingly, the PAK continued to contemplate exercising its right under the Purchase Agreement to withdraw the shares.<sup>67</sup>

190. On 14 December 2011, Selim Pacolli wrote to the PAK once again, reiterating his view that the PAK's withdrawal of the shares would violate Claimant's ownership rights. Claimant asserts that, once again, Selim Pacolli was writing on behalf of Claimant.<sup>68</sup>
191. Having received Claimant's letters of 21 October and 14 December 2011, the PAK Board of Directors met on 16 December 2011 to discuss the Grand Hotel matter. It decided that the share call option should be exercised, but that UTC should be given a final chance to find new investors who would commit to making the required investments.<sup>69</sup>
192. According to Mr. Lluka, there followed a concerted effort to find external investors who would make the investments in the Grand Hotel that were required. He testified that, in this connection, the PAK held talks with a number of interested investors.<sup>70</sup>
193. Mr. Lluka testified that, in early January, the Board received a notice of claim by Mr. Pacolli, in his individual capacity, and Mrs. Ejupi, as representative of NTSH, demanding recognition of their rights as shareholders and reversal by the PAK of its 16 December 2011 decision.<sup>71</sup> According to Claimant, the PAK then invited Messrs. Pacolli, Berisha and Ejupi to a January 2012 meeting at which they were informed that Mr. Naser Osmani, a member of the Board of the PAK, had been appointed "commission chairman on the Grand Hotel issue."<sup>72</sup> According to Claimant, they were also advised that if they provided certain documentation, the PAK would not withdraw the shares and would register UTC, NTSH and Claimant as co-owners of the Grand Hotel in the Kosovo Business Registry. Such documentation, according to Claimant was to include a bank guarantee for investments to

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<sup>67</sup> Resp. Mem. on Jurisd., para. 52.

<sup>68</sup> Cl. Counter-Mem. on Jurisd., para. 51; Behgjet Pacolli witness stmt, Exh. CWS-1, para. 12.

<sup>69</sup> Lluka witness stmt, para. 10.

<sup>70</sup> Lluka witness stmt, para. 12.

<sup>71</sup> Lluka witness stmt, para. 11.

<sup>72</sup> Cl. Counter-Mem. on Jurisd., para. 56.

be made in the amount of EUR 20.2m, as well as a business plan.<sup>73</sup> According to Selim Pacolli, Claimant provided all the documentation that was requested.<sup>74</sup>

194. Mr. Lluka testified that the PAK thereafter received several letters from Selim Pacolli recounting the difficulties that they were having with Mr. Berisha.<sup>75</sup> He stated that those letters were sent in Mr. Pacolli's personal capacity.<sup>76</sup> Eventually, Selim Pacolli, again in his personal capacity, requested a meeting with the PAK to discuss the matter.<sup>77</sup> According to Mr. Lluka, in agreeing to such a meeting, the PAK considered Selim Pacolli, as well as Behgjet Pacolli and Mr. Ejupi, to be new interested investors having no preexisting interest in the Grand Hotel.<sup>78</sup>
195. Mr. Lluka does not testify as to what occurred at that meeting which was held on 12 February 2012. However, he testifies that he thereafter received a letter, for the first time, from Behgjet Pacolli, reiterating the concerns that his brother had previously raised.<sup>79</sup> According to Mr. Lluka, he responded to that letter on 5 March 2012 by insisting that the Purchase Agreement had been entered into with UTC alone and that UTC alone was the purchaser of shares in the Grand Hotel.<sup>80</sup> Mr. Lluka also informed Mr. Pacolli that the Board would meet once again on 12 March 2012 before making a final decision on the Grand Hotel on 15 March 2012.<sup>81</sup> According to Claimant, the letter said the following:

*[T]he Agency ... further encourages the Parties to find an adequate solution of cooperation and to reach a concrete agreement [by] 15*

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<sup>73</sup> Exh. C-30: Official Memorandum of the Republic of Kosovo, Ministry of Internal Affairs, Police General Directorate, Crimes Investigation Directorate, 22 August 2012, pp. 2, 7; Cl. Counter-Mem. on Jurisd., para. 56. Claimant maintains that it had already provided the guarantee on 3 August 2006 (para. 172, *supra*).

<sup>74</sup> Selim Pacolli witness stmt, Exh. CWS-2, para. 11.

<sup>75</sup> Exh. R-21: Letter from Mr. Selim Pacolli to Mr. Naser Osmani, 16 February 2012; Exh. R-22: Letter from Mr. Selim Pacolli to Board of Directors of the PAK, 24 February 2012.

<sup>76</sup> Lluka Witness Stmt, para. 13.

<sup>77</sup> Exh. R-56: Letter by Mr. Selim Pacolli to the Working Commission of the PAK Board of Directors, 24 February 2012.

<sup>78</sup> Lluka witness stmt, para. 13.

<sup>79</sup> Exh. R-57: Letter from Mr. Pacolli to the PAK Board of Directors, 29 February 2012; Lluka witness stmt, para. 14.

<sup>80</sup> Resp. Mem. on Jurisd., para. 54.

<sup>81</sup> Exh. C-23: Letter of PAK to Mabco, 5 March 2012; Lluka witness stmt, para. 14.

*March 2012, when the Agency Board of Directors will make a decision regarding shares of the [Grand Hotel].*

...

*[T]he Agency Board of Directors will meet on 12 March 2012 to evaluate the actions and concrete achievements of parties involved in the process and to draft relevant conclusions for decision making of 15 March 2012.<sup>82</sup>*

196. Meanwhile, the PAK had commissioned a second audit, the report of which was issued on 8 March 2012 covering the period between 15 August 2009 and 8 March 2012.<sup>83</sup> That report concluded that by then only EUR 1,680,435.26 out of the required EUR 20.2m had been invested, i.e., 8.32%, and that the employment commitments had been implemented at a level of 79.52%.<sup>84</sup>
197. According to Mr. Lluka, upon receiving a further letter from Selim Pacolli in his personal capacity,<sup>85</sup> he reiterated that the PAK had no relationship with Behgjet Pacolli and was not prepared to honor any change in ownership structure upon which Messrs. Berisha, Pacolli and Ejupi may have agreed.<sup>86</sup> Mr. Lluka testified that the PAK never accepted Mr. Pacolli's claim that he was already an investor in the Grand Hotel based on an alleged agreement with Mr. Berisha.
198. Mr. Lluka testified that at the 15 March 2012 meeting, the Board of the PAK decided to suspend any withdrawal of the shares, due to the interest shown by potential investors, all of whom, including Mr. Pacolli, the PAK viewed as new investors.<sup>87</sup> According to Mr. Lluka, the PAK never acknowledged any pre-existing ownership by Behgjet or Selim Pacolli, but merely asked them to supply various documents, including bank guarantees

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<sup>82</sup> Cl. Counter-Mem. on Jurisd., paras. 60-61, citing Exh. C-23: Letter of PAK to Mabco, 5 March 2012.

<sup>83</sup> Exh. R-16: Second Audit Report.

<sup>84</sup> Resp. Mem. on Jurisd., para. 56.

<sup>85</sup> Exh. R-58: Letter from Mr. Selim Pacolli to Mr. Lluka, 14 March 2012.

<sup>86</sup> Exh. R-17: Letter from PAK to Mr. Selim Pacolli, 14 March 2012; Lluka witness stmt, para. 15.

<sup>87</sup> Lluka witness stmt, para. 16.

and a business plan, a request that the PAK made to all potential investors. The purpose of such documents was strictly to assess the applicants' reliability as investors.<sup>88</sup>

199. On 14 March 2012, the PAK wrote to Selim Pacolli reiterating its view that, while the PAK was a party to the Purchase Agreement, the Agreement identified only one buyer, namely UTC, so that Messrs. Pacolli and Ejupi were third parties only.<sup>89</sup> According to Claimant, the PAK nevertheless postponed its decision on withdrawal of the shares that was initially scheduled for 15 March 2012.<sup>90</sup>
200. According to Claimant, there followed a series of attempts at extortion on the PAK's part. First, certain persons with close links to the PAK and its then director, Mr. Dino Asanaj, allegedly asked Messrs. Pacolli and Ejupi to pay an additional EUR 4m in order for the shares of the Grand Hotel to be registered, or else the shares would not be registered, and would actually be withdrawn.<sup>91</sup> Mr. Ejupi confirms that these extortion attempts were made, and were arranged specifically by Mr. Asanaj.<sup>92</sup> The so-called "intermediaries of PAK" included Astrit Haraqija, former minister of finance; Uke Rugova, the son of the former President and deputy in the National Assembly; and Gazmend Abrashi, a businessman and former bidder for the Grand Hotel.<sup>93</sup> Mr. Pacolli says that he refused to make the payment.
201. Claimant asserts that on 16 March 2012 a further meeting took place among Behgjet Pacolli, Remzi Ejupi and Gazmend Abrashi, at which Mr. Abrashi asked for payment of EUR 3.6m in order for the shares to be registered.<sup>94</sup> Selim Pacolli affirms that this is what

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<sup>88</sup> Lluca witness stmt, para. 16.

<sup>89</sup> Exh. R-17: Letter from PAK to Mr. Selim Pacolli, 14 March 2012.

<sup>90</sup> Exh. C-30: Official Memorandum of the Republic of Kosovo, Ministry of Internal Affairs, Police General Directorate, Crimes Investigation Directorate, 22 August 2012, p. 7; Cl. Counter-Mem. on Jurisd., para. 64.

<sup>91</sup> Exh. C-30: Official Memorandum of the Republic of Kosovo, Ministry of Internal Affairs, Police General Directorate, Crimes Investigation Directorate, 22 August 2012, p. 7; RfA, para. 48; Cl. Counter-Mem. on Jurisd., para. 59; Behgjet Pacolli 2d witness stmt, Exh. CWS-3, para. 17.

<sup>92</sup> Ejupi witness stmt, Exh. CWS-4, para. 19.

<sup>93</sup> Exh. C-30: Official Memorandum of the Republic of Kosovo, Ministry of Internal Affairs, Police General Directorate, Crimes Investigation Directorate, 22 August 2012.

<sup>94</sup> Behgjet Pacolli testimony, tr. 172:21 – 172:23; Cl. Counter-Mem. on Jurisd., para. 65.

occurred.<sup>95</sup> Claimant affirms that, at this point, Messrs. Pacolli and Ejupi went to the media with information about the PAK's alleged extortion attempts.<sup>96</sup>

202. According to Claimant,<sup>97</sup> the PAK, under pressure from public opinion, wrote again to Selim Pacolli and Mr. Ejupi on 19 March 2012,<sup>98</sup> officially requesting further information as follows:

*[By] 21 March we should accept the agreement with Grand Hotel Prishtina purchaser, along with a proposal how the new shareholders will meet the conditions provided for in the Commitment Agreement, which proposal should be supported by a Bank Guarantee.*

*[T]herefore [by] 21 March you are kindly asked to submit:*

- Agreement with Grand Hotel purchaser;*
- Official request on change of structure of ownership/shareholders;*
- Unconditional bank guarantee to be issued by a credible first class financial institution; and an action plan or business plan on the way of fulfilment of contractual obligations.*<sup>99</sup>

203. In addition to characterizing the extortion charge as a merits rather than jurisdictional issue, Respondent denies that any extortion attempts took place, observing that the only documentary evidence consists of statements by Behgjet Pacolli to the police and a witness statement in this proceeding. Respondent points out that, upon investigation, the prosecution found insufficient evidence to take the allegations any further, with no indictment, much less trial.<sup>100</sup>

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<sup>95</sup> Selim Pacolli witness stmt, Exh. CWS-2, para. 11.

<sup>96</sup> Exh. C-30: Official Memorandum of the Republic of Kosovo, Ministry of Internal Affairs, Police General Directorate, Crimes Investigation Directorate, 22 August 2012, p. 2.

<sup>97</sup> Cl. Counter-Mem. on Jurisd., para. 66.

<sup>98</sup> Cl. post-hearing br., para. 26, citing Exhs. C-24/C-38: Letter from the PAK to Selim Pacolli representing Mabco, 19 March 2012. Claimant characterizes the request as an offer to approve the change of ownership structure.

<sup>99</sup> Exhs. C-24/C-38: Letter from the PAK to Selim Pacolli representing Mabco, 19 March 2012.

<sup>100</sup> Resp. Reply on Jurisd., paras. 110, 121-124.

204. However, Claimant maintains that UTC's earlier failures of performance under the Purchase Agreement and its refusal of Claimant's financial contribution were in fact part of a plan by which UTC collaborated with the chair and deputy chair of the PAK to extort both Claimant and NTSH through threats that their shares in the Grand Hotel would be withdrawn if they did not make further payments.<sup>101</sup>
205. On 28 March 2012, Mr. Berisha, Mrs. Ejupi (representing Mr. Ejupi), and Mr. Selim Pacolli entered into an Annex Agreement to the AGU (hereinafter "**Annex Agreement**").<sup>102</sup> Once again, Claimant insists that they entered into the Agreement on behalf of their companies. However, according to Respondent, while Mr. Berisha represented UTC and Mrs. Ejupi represented NTSH, Mr. Selim Pacolli represented only Mr. Behgjet Pacolli and Mabetex, but not Claimant.<sup>103</sup>
206. The Annex Agreement was submitted to the PAK on 29 March 2012, along with a business plan setting out the planned capital investments and increase in the number of employees over the following two years,<sup>104</sup> as well as a performance guarantee dated 21 March 2012 issued by the National Commercial Bank Kosovo in the amount of EUR 20.2m in favor of Mabetex (hereinafter "**Performance Guarantee**").<sup>105</sup> According to Claimant, this submission complied fully with the PAK's 19 March request for documentation.<sup>106</sup> However, Respondent points out that, according to Article V of the Annex Agreement, the Agreement was only to enter into force after approval by the PAK, and that the PAK never gave its approval.<sup>107</sup>

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<sup>101</sup> Exh., C-31: Official Memorandum of the Republic of Kosovo, Ministry of Internal Affairs, Police General Directorate, Crimes Investigation Directorate, 30 November 2012, p. 5; Exh. R-17: Letter from PAK to Mr. Selim Pacolli, 14 March 2012.

<sup>102</sup> Exh. C-20: Annex Agreement, 28 March 2012; Cl. Counter-Mem. on Jurisd., para. 67.

<sup>103</sup> Resp. Mem. on Jurisd., para. 59.

<sup>104</sup> Exh. C-39: Performance Guarantee; Exh. R-32: Letter from UTC, Mabetex Project Engineering and NTSH to PAK, 28 March 2012, Annex.

<sup>105</sup> Exh. C-39: Performance Guarantee, 21 March 2012.

<sup>106</sup> Cl. Counter-Mem. on Jurisd., para. 68. Elsewhere, Claimant characterizes the PAK's 19 March 2012 letter not as a request, but as an "offer" to register Claimant's shares, provided the required documents were produced. Cl. post-hearing br., para. 116.

<sup>107</sup> Resp. Mem. on Jurisd., para. 59.

207. According to Claimant, there followed a meeting between Mr. Ejupi and Mr. Naser Osmani of the PAK, in which Mr. Osmani assured Mr. Ejupi that all the papers were in order, but that a payment of EUR 1m still needed to be paid in order for the shares to be registered and not withdrawn.<sup>108</sup> Messrs. Pacolli and Ejupi declined. Claimant maintains that still another attempt at extortion was made on 25 April 2012, but likewise was unsuccessful.<sup>109</sup>
208. On 31 May 2012, the PAK finally announced its decision to withdraw the shares of the Grand Hotel.<sup>110</sup> According to Claimant, that announcement was made shortly after Claimant and NTSH had refused to pay the above-mentioned bribes.<sup>111</sup>
209. Claimant reports then sending a letter of 14 June 2012 to the PAK requesting that it review and cancel its decision to withdraw the shares.<sup>112</sup> Receiving no reply, Claimant sent a further letter on 20 June 2012, claiming that the PAK had accepted Claimant's ownership of the shares, and warning the PAK that, unless the change in ownership structure was registered, Claimant would initiate arbitration under the BIT.<sup>113</sup>
210. On 22 June 2012, the PAK replied.<sup>114</sup> According to Claimant, in its reply the PAK acknowledged receiving the required documents, but stated that it would not register the shares because it had been informed by UTC that Claimant and NTSH were not serious in their intentions.<sup>115</sup>

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<sup>108</sup> Exh. C-30: Official Memorandum of the Republic of Kosovo, Ministry of Internal Affairs, Police General Directorate, Crimes Investigation Directorate, 22 August 2012, p. 2; Cl. Counter-Mem. on Jurisd., paras. 63, 69.

<sup>109</sup> Exh. C-30: Official Memorandum of the Republic of Kosovo, Ministry of Internal Affairs, Police General Directorate, Crimes Investigation Directorate, 22 August 2012, p. 5; Cl. Counter-Mem. on Jurisd., para. 69.

<sup>110</sup> Exh. R-3: PAK Final Decision, 31 May 2012; RfA, para. 49; Cl. Counter-Mem. on Jurisd., para. 72; Lluka witness stmt, para. 17.

<sup>111</sup> RfA, para. 49.

<sup>112</sup> Cl. Counter-Mem. on Jurisd., para. 73. This letter is referred to elsewhere as bearing the date of 11 June 2012 (Exh. R-42). See Cl. post-hearing br., para. 27.

<sup>113</sup> Exh. C-40: Letter from Mabco to PAK, 20 June 2012; Cl. Counter-Mem. on Jurisd., para. 73.

<sup>114</sup> Exh. R-39: Letter from PAK to Mr. Bajram Morina, 22 June 2012.

<sup>115</sup> Exh. C-41: Letter from PAK to Mabco, 17 July 2012.



211. Finally, Claimant and NTSB wrote to the PAK on 28 June 2012, reiterating their intention to initiate arbitration if their request for registration of their shares was not granted.<sup>116</sup>
212. Claimant reports that in August 2012, the European Rule of Law Mission in Kosovo, together with local authorities, initiated an investigation into the privatization of the Grand Hotel.<sup>117</sup> Mr. Pacolli testified that all of the 2011 and 2012 events surrounding ownership and withdrawal of the shares are recorded in the resulting Police Reports of 22 August 2012 and 30 November 2012.<sup>118</sup> According to the 22 August Report:

*Based on analyzes of witness statements regarding this case, it is suspected that Zylqif Berisha has been in close connection with persons having access to NPA [PAK] decisions, and the breach of contract by those claiming to have undergone damages in this case was intentional and well-planned.*

*This case also involves second degree judge Sylajman Nuredini, suspected of making a decision for retrial as a favour to Zylqif Berisha, who managed to corrupt this judge.*

*Intermediators who continued to demand four million euros, or three and a half million euros of the aggrieved party Behxjet Pacolli [] in order to have the Hotel Grand privatization disengaged. Intermediators of this case who are allegedly connected in a group are Naser Osmani (ex-deputy of NPA [PAK]), Dino Asanaj, Astrit Haraqija, Ukë Rugova, Adelina Reçica (Dino's ex-wife) and Burim Gashi and Gazmend Abrashi.*

*All NPA [PAK] meetings that were postponed, and all decisions, put off on the matter were allegedly part of the plan to extort the injured parties in this case.*

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<sup>116</sup> Exh. C-37: Letter from Mabco and NTSB to PAK, 28 June 2012.

<sup>117</sup> Cl. Counter-Mem. on Jurisd., para. 70.

<sup>118</sup> Exh. C-30: Official Memorandum of the Republic of Kosovo, Ministry of Internal Affairs, Police General Directorate, Crimes Investigation Directorate, 22 August 2012; Exh. C-31: Official Memorandum of the Republic of Kosovo, Ministry of Internal Affairs, Police General Directorate, Crimes Investigation Directorate, 30 November 2012; Behgjet Pacolli witness stmt, Exh. CWS-1, para. 14.

*Regarding this situation, the above-mentioned group is suspected of high-level, decision-making organized crime, assisted by their intermediators and the businessman who privatized Hotel Grand.*<sup>119</sup>

Mr. Ejupi also affirms the truth of the statements made to the police and recorded in the Police Reports.<sup>120</sup>

213. On 17 July 2012, the PAK informed Claimant as follows:

*[PAK has] undertaken the necessary legal actions to return the ownership of the Grand Hotel and the same is now returned on the name of the Agency. Therefore, all displeased parties may contact competent bodies.*<sup>121</sup>

214. According to its annual report for 2013, the PAK resumed direct administration of the Grand Hotel on 20 July 2012.<sup>122</sup>

215. Although Respondent alleges that Claimant committed various breaches of the Tender Rules (see paras. 339-345, *infra*), Claimant maintains that none of the PAK's communications to it over this entire period made reference to any breach of those Rules, the Purchase Agreement or the Commitment Agreement on Claimant's part.<sup>123</sup>

216. Claimant states that, while declining to register the shares in Claimant's name and in fact withdrawing them, the PAK kept the paid purchase price for those shares, including the EUR 4m that Claimant had contributed.<sup>124</sup> Claimant maintains that it received no compensation from the PAK for the loss of its investment.

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<sup>119</sup> Exh. C-30: Official Memorandum of the Republic of Kosovo, Ministry of Internal Affairs, Police General Directorate, Crimes Investigation Directorate, 22 August 2012, p. 7.

<sup>120</sup> Ejupi witness stmt, Exh. CWS-4, para. 19.

<sup>121</sup> Exh. C-41: Letter from PAK to Mabco, 17 July 2012.

<sup>122</sup> Exh. C-42: PAK Yearly Report 2013, 2014.

<sup>123</sup> Cl. Counter-Mem. on Jurisd., para. 80.

<sup>124</sup> Cl. Counter-Mem. on Jurisd., para. 81.

## **H. LEGAL PROCEEDINGS IN KOSOVO**

217. In this case, there are two relevant sets of legal proceedings in the courts of Kosovo.
218. First, in 2007, Messrs. Pacolli, as president and CEO Mabetex Group, and NTSB brought suit against Mr. Berisha in Municipal Court in Pristina,<sup>125</sup> seeking recognition that the plaintiffs were owners of 40% and 20% of the shares, respectively. The Municipal Court ruled in favor of the plaintiffs, affirming their share ownership. However, the District Court of Pristina then reversed that judgment. Claimant's view is that the District Court made no ruling on the merits, but merely remanded the case to the Municipal Court for clarification of the question whether the suit was brought in the plaintiffs' personal capacity or on behalf of their respective companies.<sup>126</sup> According to Claimant, on remand, the Municipal Court never decided the ownership question because by that time the shares had already been withdrawn.<sup>127</sup> Respondent takes a different view of the District Court judgment. According to it, the Court found that Mr. Pacolli did not obtain any shares or other interest in the Grand Hotel,<sup>128</sup> so holding on the ground that there was no written contract for the transfer of ownership,<sup>129</sup> that the AGU lacked the required elements to constitute a company statute,<sup>130</sup> and that the alleged shareholding was never registered.<sup>131</sup>
219. On 8 June 2012, UTC filed an action against the PAK in the Supreme Court of Kosovo, and more particularly in the Court's Special Chamber for Matters relating to the Privatization Agency (hereinafter "SCSC"),<sup>132</sup> challenging the PAK's decision to

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<sup>125</sup> Exh. R-30: Lawsuit by Mr. Pacolli and NTSB against Berisha/UTC, 5 June 2007.

<sup>126</sup> Exh. R-31: Judgment of the District Court of Pristina in proceeding between Pacolli and NTSB v. Berisha/UTC, 13 April 2010; Cl. post-hearing br., para. 23.

<sup>127</sup> Cl. Rejoinder on Jurisd., para. 126-127; Cl. post-hearing br., para. 23.

<sup>128</sup> Exh. R-31: Judgment of the District Court of Pristina in proceeding between Pacolli and NTSB v. Berisha/UTC, 13 April 2010, pp. 8-9.

<sup>129</sup> Exh. R-31: Judgment of the District Court of Pristina in proceeding between Pacolli and NTSB v. Berisha/UTC, 13 April 2010, pp. 8-9.

<sup>130</sup> Exh. R-31: Judgment of the District Court of Pristina in proceeding between Pacolli and NTSB v. Berisha/UTC, 13 April 2010, p. 9.

<sup>131</sup> Exh. R-31: Judgment of the District Court of Pristina in proceeding between Pacolli and NTSB v. Berisha/UTC, 13 April 2010, pp. 9-10.

<sup>132</sup> Exh. R-18: Law No. 04/L033 on the Specialized Chamber of the Supreme Court of Kosovo for Matters relating to the Privatization Agency of Kosovo (SCSC) ("SCSC Law"), Art. 4.

withdraw the shares in the Grand Hotel and seeking an interim injunction restraining the PAK from doing so. On 25 June 2012, a first instance panel of the Special Chamber denied UTC's request for interim relief, but the Appellate Panel reversed that decision, and granted the requested relief in part. On 20 March 2013, the Special Chamber rejected UTC's claim on the merits.<sup>133</sup>

220. Meanwhile, on 19 November 2012, Claimant and NTSH likewise initiated proceedings in the SCSC for annulment of the decision by the PAK to withdraw the shares of Grand Hotel. The court found that the action had not been brought within the 120-day limitations period established by law,<sup>134</sup> and ruled it inadmissible.<sup>135</sup>
221. On 15 April 2013, UTC appealed the decision rendered against it to the Special Chamber's Appellate Panel. On 20 January 2014, both Claimant and NTSH sought to intervene in UTC's appeal.<sup>136</sup> Both UTC and the PAK objected to the request, the PAK arguing that the applicants had "no legal-material relation with [PAK]." On 26 June 2014, the Appellate Panel rejected the petition to intervene.<sup>137</sup> According to Claimant, the Appellate Panel did not address Claimant's arguments, but rather based its decision on the mere fact that the PAK and UTC objected to the requested intervention.<sup>138</sup> On the merits, the Appellate Panel affirmed the lower court's ruling, characterizing UTC's non-compliance with the investment commitments as an "egregious breach of contractual obligations."<sup>139</sup>
222. On 14 November 2014, UTC filed a complaint with the Constitutional Court of Kosovo, but lost on the merits.<sup>140</sup> On 17 November 2014, Claimant and NTSH likewise filed a complaint with the Constitutional Court, claiming a violation not only of the Constitution

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<sup>133</sup> Exh. R-5: SCSC Decision (C-1-12-0042), 20 March 2013; RfA, para. 51.

<sup>134</sup> Exh. R-18: SCSC Law, Art. 6(2).

<sup>135</sup> Exh. R-8: SCSC Decision (C-1-12-0056), 15 May 2003, pp. 2-3.

<sup>136</sup> Cl. Counter-Mem. on Jurisd., para. 85.

<sup>137</sup> File reference AC-I-13-0045-A0001.

<sup>138</sup> Cl. Counter-Mem. on Jurisd., para. 88.

<sup>139</sup> Exh. R-6: SCSC Appellate Panel Decision (AC-1-13-0045-A0001), 26 June 2014.

<sup>140</sup> Exh. R-7: Constitutional Court of Kosovo, Resolution of Inadmissibility, 28 August 2015, Case No. K1167/14, p. 15.

but also the BIT. According to Claimant, the Court found the claims to be inadmissible on the ground that it lacked competence to examine the compatibility of national law with international agreements.<sup>141</sup>

223. It is on this basis that Claimant also charges Kosovo with denial of justice.

### III. STATEMENT OF CLAIM

224. Claimant alleges that Respondent expropriated its investment and denied it fair and equitable treatment, while also committing a denial of justice – all in violation of its obligations under the BIT and the Foreign Investment Law.<sup>142</sup>

225. With respect to expropriation, Claimant invokes Articles 5(1) and 5(2) of the BIT:

#### Article 5

*(1) Neither of the Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments of investors of the other Contracting Party...*

*(2) [D]ue process of law includes the right of an investor of a Contracting Party, which claims to be affected by expropriation by the other Contracting Party, to prompt review of its case, including the valuation of its investment and the payment of compensation in accordance with the provisions of this Article, by a judicial authority or another competent and independent authority of the latter Contracting Party.*

226. With respect to fair and equitable treatment, Claimant invokes Article 4(1) of the BIT:

#### Article 4

*(1) Each Contracting Party shall in its territory accord to investments and returns of investors of the other Contracting Party at all times fair and equitable treatment as well as full protection*

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<sup>141</sup> Exh. R-9: Constitutional Court of Kosovo, Resolution of Inadmissibility, 28 August 2015, Case No. K1168/14, p. 9; Cl. Counter-Mem. on Jurisd., para. 92.

<sup>142</sup> Claimant invokes the principle of national treatment as well, but does not develop that argument.

*and security. Neither Contracting Party shall impair, by unreasonable or discriminatory measures, maintenance, use, enjoyment, extensions or disposal of such investments.*

227. The provision applicable to the expropriation claim under the 2005 Foreign Investment Law is the following:<sup>143</sup>

*Article 8*

*8.1. [An investment in Kosovo made by a foreign investor] shall ... not be subject to any act of expropriation by or attributable to Kosovo.*

*8.2. Notwithstanding the prohibition contained in Article 8.1, Kosovo may take an act of expropriation affecting an asset of a foreign investor, foreign investment organization or foreign person, if the act of expropriation:*

- a. is for a clearly defined and legitimate public purpose;*
- b. is not inspired by any discriminatory objective;*
- c. is carried out in a non-discriminatory manner;*
- d. is carried out in accordance with due process of law; and*
- e. is accompanied by the prompt payment of adequate and effective compensation.*

228. Insofar as Claimant's fair and equitable treatment claim relates to its claimed ownership of the Grand Hotel shares, the 2005 Foreign Investment Law is applicable.<sup>144</sup> The relevant provisions follow:

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<sup>143</sup> For reasons explained below in connection with Respondent's objections *ratio temporis* objections (paras. 464-469, *infra*), Claimant's expropriation claim is subject to the 2005 rather than the 2014 Foreign Investment Law.

<sup>144</sup> For reasons explained below in connection with Respondent's objections *ratio temporis* objections (paras. 470-473, *infra*), Claimant's fair and equitable treatment expropriation claim in connection with its alleged ownership of the Grand Hotel is subject to the 2005 rather than the 2014 Foreign Investment Law.

### Article 3

*3.1. Kosovo shall accord fair and equitable treatment to foreign investors and their investments in Kosovo. Kosovo shall also provide foreign investors and their investments with full and constant protection and security. In no case shall the treatment, protection or security required by this Article 3.1 be less favorable than that required by international law or any provision of the present law.*

*3.2. Kosovo shall not impair by any unreasonable or discriminatory action or inaction, the operation, management, maintenance, use enjoyment or disposal of a foreign investment organization or other investment by a foreign investor in Kosovo. Kosovo shall in particular not interfere with the lawful activities, rights and legally recognized interests of a foreign investor.*

*3.3. Any public authority that violates or otherwise fails to respect the rights and guarantees provided by the present law to foreign investors and their investments shall be liable to pay compensation ... for losses and expenses incurred as a consequence of such violation or failure....*

229. Insofar as Claimant's fair and equitable treatment claim encompasses its claim of denial of justice, the 2014 Foreign Investment Law is applicable.<sup>145</sup> The relevant provisions follow:

### Article 3

*1. Republic of Kosovo shall accord fair and equitable treatment to foreign investors and their investments in Kosovo with any local investors and local investments.*

*2. Republic of Kosovo shall also provide foreign investors and their investments with full and constant protection and security in accordance with the applicable legislation.*

*3. In no case shall the treatment, protection or security required by this paragraph be less favorable than that required by generally*

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<sup>145</sup> For reasons explained below in connection with Respondent's objections *ratio temporis* objections (paras. 474-479, *infra*), Claimant's denial of justice claim is subject to the 2014 rather than the 2005 Foreign Investment Law.

*accepted norms of international law or any provision of the present law.*

*4. Republic of Kosovo shall not impair by any unreasonable or discriminatory action or inaction, the operation, management, maintenance, use, enjoyment or disposal of a foreign investment organization or other investment by a foreign investor in the Republic of Kosovo. Republic of Kosovo shall not interfere with the lawful activities, rights and legally recognized interests of a foreign investor.*

*5. Any public authority that violates or otherwise fails to respect the rights and guarantees provided by the present law to foreign investors and their investments shall be liable to pay compensation, in accordance with Article 8 paragraph 2 of this law, for losses and expenses incurred as a consequence of such violation or failure. No type of legal immunity shall serve as bar to the liability created by this Article.*

**A. CLAIMANT’S INVESTMENT UNDER THE BIT AND THE FOREIGN INVESTMENT LAW**

230. In this proceeding, Claimant maintains that it has made a qualifying investment within the meaning of the BIT, the Foreign Investment Law and the ICSID Convention. The definitions of “investment” under the BIT, the Foreign Investment Laws and the ICSID Conventions are different. For that reason, whether Claimant has made an investment must be examined separately for each of these three instruments.

**(1) “INVESTMENT” WITHIN THE MEANING OF THE BIT**

231. According to Article 2 of the BIT, its provisions apply to investments in the territory of one Contracting Party established in accordance with its laws and regulations by investors of the other Contracting Party, “whether [made] prior to or after the entry into force of [the BIT].” However, the BIT does not apply “to claims and disputes arising out of events which occurred prior to its entry into force.”

232. Article 1(1) of the BIT defines an investment as “every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party that has such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.” Such an asset may take the form of:



*(a) movable and immovable property as well as any related rights, such as servitudes, mortgages, liens and pledges;*

*(b) a company, or shares, parts or any other kind of participation in a company;*

*(c) claims to money or to any performance having an economic value, except claims to money arising solely out of commercial contracts for the sale of goods and services; ... [and]*

*(e) rights conferred pursuant to law, contract or decision of an authority such as concessions, licences, authorizations and permits.*

233. Article 1(2) defines “investor” to include “(b) a legal entity, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organized under the law of that Contracting party and have their seat, together with real economic activities, in the territory of the same Contracting Party.”
234. Article 11 of the BIT contemplates the arbitration of disputes “between an investor of a Contracting Party and the other Contracting Party regarding an investment of the former made in the territory of the latter ... based on an alleged breach of obligations under [the BIT].”
235. Claimant maintains that it has established all the requirements under the foregoing provisions of the BIT that must be met in order to qualify as a foreign investor that has made an investment in Kosovo. It maintains that both its shares in the Grand Hotel and its claims to performance of Kosovo’s undertaking to transfer ownership of those shares are assets that constitute investments within the meaning of Article 1(1) of the BIT.<sup>146</sup> Claimant specifically argues that legal title to shares is not required to constitute an investment and that beneficial ownership suffices. Its ownership interest consisted of the right to registration of the Grand Hotel shares, thereby formally acquiring ownership of

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<sup>146</sup> Cl. Rejoinder on Jurisd., paras. 155-156.

those shares. Thus, the fact that Claimant's share ownership was not yet registered in Kosovo does not prevent it from constituting an investment.<sup>147</sup>

**(2) “INVESTMENT” WITHIN THE MEANING OF THE KOSOVO FOREIGN INVESTMENT LAW**

236. As explained above,<sup>148</sup> with respect to the Foreign Investment Law, the Tribunal must take into account both the 2005 and 2014 Foreign Investment Laws, which are worded somewhat differently:

**(a) The 2005 Foreign Investment Law**

237. Article 2(1) of the 2005 Foreign Investment Law defines “investment dispute” as “any dispute between a foreign investor and a public authority relating (i) to an investment in Kosovo made by such foreign investor ...” The provision continues:

*An “investment dispute” includes, but is not limited to, such a dispute that relates to:*

*a. any alleged inconsistency of an action or inaction of a public authority with any international agreement that is binding on Kosovo, the present law or any other law, regulation or normative or sub normative act of Kosovo;*

*... or*

*c. the making or attempt to make an investment in Kosovo.*

238. A “foreign investor” is defined under the 2005 Foreign Investment Law as “a foreign person that has made an investment in Kosovo,” and a “foreign person” in turn includes, among others, “b. a business or other organization, entity or association - with or without legal personality - that has been established under the law of a foreign state or geographic territory outside Kosovo.”

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<sup>147</sup> Cl. post-hearing br., paras. 66-68. citing Exh. CL-29: *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB 07/20, Award, 14 July 2010, para. 134 (“The separation of legal title and beneficial ownership rights does not deprive such ownership of the characteristics of the investment within the meaning of the ICSID Convention or ... the BIT.”)

<sup>148</sup> *supra*, para. 137.

239. An “investment” is defined under the 2005 Foreign Investment Law in part as:

*[A]ny asset that has (i) been contributed to a Kosovo business organization in return for an ownership interest in that business organization; ...*

The term “asset” is in turn defined in part as:

*[A]ny item of value, whether tangible or intangible, and includes, but is not limited to, the following and similar items:*

*a. movable and immovable property, including rights in and to such property such as a mortgage, lien, pledge, lease or servitude; ...*  
*[and]*

*d. claims or rights to money, goods, services, and performance under contract; ...*

(b) The 2014 Foreign Investment Law

240. Under Article 2.1.4 of the 2014 Foreign Investment Law, an investment is “any asset owned or otherwise lawfully held by a Foreign Person in the Republic of Kosovo for the purpose of conducting lawful commercial activities, including but not limited to”:

...

*1.4.3. cash, securities, commercial paper, guarantees, shares of stock or other types of ownership interests in the Republic of Kosovo or foreign business organization; bonds, debentures, other debt instruments*

*1.4.4. claims or rights to money, goods, services, and performance under contract...*

241. Article 16(1) of the 2014 Foreign Investment Law requires that the claimant be a “foreign investor,” defined as a “foreign person that has made an investment in the Republic of Kosovo.”

242. In Claimant’s view, its claim to performance by Kosovo of its obligation to register those shares and refrain from withdrawing them are assets qualifying as an investment under

both the 2005 and 2014 Foreign Investment Laws. Moreover, as a Swiss entity, it is a foreign investor.

## **B. CLAIMANT’S INVESTMENT UNDER THE ICSID CONVENTION**

243. Article 25(1) defines the jurisdiction of ICSID as follows:

*The jurisdiction of the Centre shall extend to any dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.*

244. Claimant maintains that it satisfies the jurisdictional requirements set out in Article 25(1) since:

- a. the dispute is a legal one arising directly out of an investment (condition *ratione materiae*);
- b. the dispute is between a Contracting State and a national of the other Contracting State (condition *ratione personae*); and
- c. the parties consented to settlement of the dispute through ICSID arbitration (condition *ratione voluntatis*).<sup>149</sup>

According to Claimant, Respondent gave its consent to arbitration under both the BIT and the Foreign Investment Law.<sup>150</sup>

245. Claimant also asserts that its purchase of shares in the Grand Hotel meets all the criteria of an investment under the ICSID Convention established by arbitral jurisprudence.<sup>151</sup> These are a substantial capital contribution, entailing a certain risk, promising a regular profit and return, and having a certain duration.<sup>152</sup> If an additional requirement – contribution to the host State’s economic development – is imposed, Claimant meets that requirement as well,

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<sup>149</sup> Cl. Counter-Mem. on Jurisd., paras. 96-97; Cl. oral argum., tr. 32:19–33:7.

<sup>150</sup> Cl. oral argum., tr. 32:19–33:7.

<sup>151</sup> Cl. Supp. to RfA, para. 35; Cl. Rejoinder on Jurisd., paras. 159, 173.

<sup>152</sup> Exh. CL-28: *Salini Costruttori S.p.A & Italstrade S.p.A v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001. See also Exh. RL-43: Christoph Schreuer et al., *The ICSID Convention: A Commentary* (2ded. 2009) 128-135, 668-671, p. 129.

due to the importance of the Grand Hotel, including its renovation and operation, to the economy of Kosovo.

246. Accordingly, Claimant contends that its ownership interest in the Grand Hotel constitutes an investment for purposes of Article 25(1) of the ICSID Convention.

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247. Claimant concludes from the above that it made a qualifying investment in Kosovo, within the meaning of the BIT, the Kosovo Foreign Investment Law and the ICSID Convention. It further claims that the present dispute arises directly out of that investment.<sup>153</sup>

#### IV. STATEMENT OF DEFENSE

248. Respondent contests the jurisdiction of this Tribunal under Article 25(1) of the ICSID Convention on numerous grounds,<sup>154</sup> including notably that it did not consent to arbitration of the claims asserted by Claimant under either the BIT or the Foreign Investment Law.<sup>155</sup>
249. First, Claimant cannot avail itself of either the BIT or the Foreign Investment Law because it owns no qualifying asset, which is necessary, *ratione materiae*, in order for either of those instruments to apply. It never acquired ownership of, or a right or interest in, the asset at issue in this case.<sup>156</sup> Moreover, while the ICSID Convention does not itself define an investment, arbitral jurisprudence has done so. According to the prevailing view, an investment must exhibit the following characteristics: a substantial capital contribution, a certain risk and a certain duration.<sup>157</sup> In addition, it may be required to make a substantial contribution to the host State's economic development.<sup>158</sup> According to Respondent,

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<sup>153</sup> Cl. Counter-Mem. on Jurisd., paras. 163-165.

<sup>154</sup> Resp. Mem. on Jurisd., para. 73.

<sup>155</sup> Resp. Mem. on Jurisd., paras. 129-133; Resp. Reply on Jurisd., paras. 163-172.

<sup>156</sup> Resp. oral argum., tr. 17:8–17:23, 19:15–19:20; Resp. post-hearing br., paras. 28-32.

<sup>157</sup> See Exh. RL-43: Christoph Schreuer et al., *The ICSID Convention: A Commentary* (2d ed. 2009) 128-135, 668-671, p. 129.

<sup>158</sup> The leading case is Exh. CL-28: *Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001.

Claimant fails to satisfy any of these requirements. It made no capital contribution, much less a substantial one and, because of that, it assumed no risk, made no investment of the requisite duration, and did not contribute substantially to the host State's economic development.<sup>159</sup>

250. Second, Claimant does not qualify as a foreign investor. Since Claimant made no investment, it is not an investor, much less a foreign investor. If any investment was made, it would have been made by Mr. Pacolli in his personal capacity. Being a national of Kosovo, he does not qualify as a foreign investor. Nor can Claimant itself be considered a foreign national, in this case a national of Switzerland, due to the absence of any real economic activity on its part in Switzerland. The Tribunal accordingly lacks jurisdiction *ratione personae*.
251. Third, the alleged investment is not a protected one under either the BIT or the Foreign Investment Law because, if made, it was made unlawfully under Kosovo law.
252. Fourth, because Respondent did not consent to arbitrate the present dispute, the Tribunal also lacks jurisdiction *ratione voluntatis*. Respondent's consent to arbitrate was subject under Article 11(2) of the BIT and Article 16(2) of both the 2005 and 2014 Foreign Investment Laws to an "election of remedies" requirement.<sup>160</sup> Under those provisions, because Claimant first brought litigation over its claims in the courts of Kosovo, it could no longer resort to arbitration over them. Also, under Article 11(1) of the BIT (although not under the Foreign Investment Law), Respondent's consent to arbitrate was conditional upon Claimant's engaging with the Respondent in an effort to settle their dispute "amicably through consultations," which Claimant failed to do.
253. Fifth, Respondent argues that, even if all of the BIT conditions were otherwise met, the tribunal lacks jurisdiction *ratione temporis*. According to Article 2, while the BIT applies

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<sup>159</sup> Resp. Mem. on Jurisd., paras. 106, 118-122; Resp. Reply on Jurisd., paras. 282-293.

<sup>160</sup> Article 11(2) of the BIT: "[T]he investor may submit the dispute either to the courts or the administrative tribunals of the Contracting Party concerned or to international arbitration." (Exh. C-1); Article 16(2) of the 2014 Foreign Investment Law: "... a foreign investor shall have the right to require that the investment dispute be settled either through litigation before a court of competent jurisdiction in the Republic of Kosovo or through local and international arbitration." (Exhs. C-18/R-19).

to investments made prior to the BIT's entry into force, it does not apply "to claims and disputes arising out of events which occurred prior to its entry into force." (Neither the 2005 nor the 2014 Foreign Investment Law contains such a limitation. On the contrary, the 2014 Law specifically states that "[t]he present law – and the rights, guarantees, privileges and protections established by the present law – shall apply equally to foreign investors that invested in the Republic of Kosovo prior to the effective date of this law."<sup>161</sup>) According to Respondent, the events giving rise to the dispute occurred on 16 December 2011, which is when the PAK decided to withdraw the shares of Grand Hotel or, at the latest 31 May 2012, which is when the PAK made the decision to execute the withdrawal of shares. Both dates precede the BIT's entry into force on 13 June 2012.<sup>162</sup>

- 254. Sixth, the claim advanced in this proceeding is at variance with the scope and purpose of the ICSID Convention.
- 255. Seventh, Claimant failed to establish a *prima facie* case on the merits.
- 256. Respondent accordingly challenges the jurisdiction of this Tribunal *ratione personae*, *ratione materiae* and *ratione voluntatis* under the ICSID Convention, the BIT and the Foreign Investment Law, as well as *ratione temporis* under the BIT. The Respondent's jurisdictional objections and Claimant's responses thereto are dealt with in the following sequence:
  - A. The claim does not arise out of or relate to an investment in Kosovo.
  - B. Claimant is not a foreign investor.
  - C. Claimant's alleged ownership interest in shares of Grand Hotel LLC is not a "protected investment".
  - D. Respondent did not give its consent to arbitrate the present dispute.
  - E. The Tribunal lacks jurisdiction *ratione temporis*.
  - F. Claim falls outside the scope and purpose of the ICSID Convention.

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<sup>161</sup> Exhs. C-18/R-19: 2014 Foreign Investment Law, Art. 20.

<sup>162</sup> Resp. Reply on Jurisd., paras. 111-115, 156-157.

G. Claimant has failed to establish a *prima facie* cause of action.

Each of these challenges is taken up in turn below.

**A. THE CLAIM DOES NOT ARISE OUT OF OR RELATE TO AN INVESTMENT IN KOSOVO**

257. Respondent maintains that Claimant did not make an investment in Kosovo, within the meaning of the relevant instruments. It bases this contention on the following propositions:

- (1) Claimant never held any assets relating to the Grand Hotel.
- (2) Claimant's payment of EUR 4m does not constitute evidence of an investment on Claimant's part.
- (3) Claimant did not become an owner of shares by virtue of the AGU.
- (4) Claimant did not become an owner of shares by virtue of the Annex Agreement.

The Tribunal examines each of these propositions in turn.

**(1) CLAIMANT NEVER HELD ANY ASSETS RELATING TO THE GRAND HOTEL**

**(a) Respondent's Position**

258. Respondent asserts that Claimant was involved in none of the steps of the tender process. The successful bid was made by UTC, not Claimant.<sup>163</sup> Claimant accordingly was a third party and acquired no rights of ownership in the Grand Hotel. Respondent cites Article 5.1.3 of the Purchase Agreement by which UTC itself confirmed that:

*[T]he Buyer is purchasing the Shares for its own use and not as an agent for a third party and during the tender for this Company, the Buyer has not formed any informal or formal undisclosed agreements or consortiums between two or more bidders or with any undisclosed third party.*

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<sup>163</sup> Resp. Mem. on Jurisd., paras. 73-79.



According to Respondent, whether the alleged investor was Mr. Pacolli or Claimant, it would have been a secret investor in violation of the Tender Rules and the above-quoted provision of the Purchase Agreement.<sup>164</sup>

259. Respondent also contests that Mr. Ahmet Shala invited Claimant to participate in the privatization of the Grand Hotel. It finds that in previous accounts of the transactions given by Mr. Pacolli, including in his witness statement, no mention of Mr. Shala is made.<sup>165</sup> Nor is there any documentation to support Claimant's contention.<sup>166</sup> Respondent also raises a temporal doubt about Claimant's contention because, while Mr. Pacolli represents that Mr. Shala approached him and Mr. Ejupi about their possible interest in investing in the Grand Hotel in early March 2006,<sup>167</sup> UTC was not declared the winning bidder until 27 March 2006. At that time, the KTA had no reason to doubt UTC's ability to pay the purchase price. Above all, in his witness statement, Mr. Shala denies Mr. Pacolli's account, testifying that no such contacts were ever made.<sup>168</sup>
260. Mr. Shala testified that he met Mr. Pacolli for the first time in September or October 1999 at a conference in Switzerland on the future of Kosovo, where Mr. Pacolli proposed that Kosovo transfer all public assets to a foundation of which he would be chair, a proposal that Mr. Shala did not favor.<sup>169</sup> Mr. Shala further testified that he could not possibly have allowed Claimant to become owner of the shares without following the Tender Rules. Given the public scrutiny of the privatization process, if he deviated from the Tender Rules he would be killed; he testified in fact to having received death threats.<sup>170</sup>
261. According to Mr. Shala, he and Mr. Pacolli met during a short conversation in Mr. Pacolli's office in Pristina in January 2019 and afterwards flew together to Rwanda on Mr. Pacolli's

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<sup>164</sup> Resp. oral argum., tr. 11:23 – 12:11.

<sup>165</sup> Resp. Reply on Jurisd., paras. 31-39.

<sup>166</sup> Behgjet Pacolli testimony, tr. 162:12 – 162:16; Resp. Reply on Jurisd., para. 217; Resp. oral argum., tr. 9:19 – 9:22, 11:9 – 11:19 (the sole documentation of ownership is UTC's).

<sup>167</sup> Behgjet Pacolli witness stmt, Exh. CWS-1, p. 2.

<sup>168</sup> Shala testimony, tr. 66:11 – 66:18.

<sup>169</sup> Shala testimony, tr. 85:11 – 85:14, 86:1 – 86:5.

<sup>170</sup> Shala testimony, tr. 101:1 – 102:10.

airplane, followed at a later time by a dinner at Mr. Pacolli's home and eventually a breakfast together in Berlin.<sup>171</sup> The first time the subject of privatization of the Grand Hotel arose was afterwards, when Mr. Pacolli asked him to issue an invitation to him to invest in Kosovo, which Mr. Shala said he could not do.<sup>172</sup>

262. Mr. Shala testified that, some days before the hearing in this arbitration, he learned that Mr. Ejupi had approached Mr. Shala's son-in-law, who is also a cousin of Mr. Ejupi, asking him to set up a meeting with him. That individual made the request, which Mr. Shala then refused, deeming it inappropriate.<sup>173</sup> Counsel for Respondent questioned Mr. Pacolli about a statement made by Mr. Shala, according to which Mr. Pacolli met with him in June 2019 and asked him to confirm in this proceeding that he invited Mr. Pacolli to co-invest in the Grand Hotel,<sup>174</sup> an allegation that Mr. Pacolli flatly denied.<sup>175</sup>
263. Respondent further contends that, even if an investment was made, it was made by Behgjet Pacolli in his personal capacity and not as Claimant's representative. It claims that the funds were transferred to Mr. Berisha from Mr. Pacolli's personal account.<sup>176</sup> Moreover, over a six-year period, between 2006 and 2012, there was no mention of Claimant in any of the relevant correspondence. Then, when suit was brought against Mr. Berisha in 2007 in Municipal Court in Pristina,<sup>177</sup> seeking recognition that Claimant was owner of 40% of the shares, and NTSH owner of 20% of the shares, it was not brought in Claimant's name, but in Mr. Pacolli's.<sup>178</sup> The relief sought in that suit was that Mr. Pacolli (not Claimant) and NTSH (not Mr. Ejupi) be recognized as shareholders,<sup>179</sup> a fact that Mr. Pacolli

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<sup>171</sup> Shala testimony, tr. 66:23 – 66:25, 68:2 – 68:21.

<sup>172</sup> Shala testimony, tr. 68:22 – 69:8. Mr. Shala testified that he did not know at the time that Mr. Berisha was unable to pay the purchase price for the shares of the Grand Hotel. Shala testimony, tr. 95:22 – 96:16.

<sup>173</sup> Shala testimony, tr. 70:1 – 70:14, 71:24 – 72:2

<sup>174</sup> Behgjet Pacolli testimony, tr. 164:20 – 164:24.

<sup>175</sup> Behgjet Pacolli testimony, tr. 164:25, 165:17 – 165:20, 166:6 – 166:10.

<sup>176</sup> Resp. Reply on Jurisd., para. 274.

<sup>177</sup> Exh. R-29: Judgment of the Municipal Court of Prishtina in proceeding between Pacolli and NTSH v. Berisha/UTC, 28 May 2009; Exh. R-30: Lawsuit by Mr. Pacolli and NTSH against Berisha/UTC, 5 June 2007.

<sup>178</sup> Resp. oral argum., tr. 20:20 – 20:23.

<sup>179</sup> Resp. post-hearing br., para. 16.

attributed to a mistake.<sup>180</sup> The first reference to Claimant was allegedly made only after the BIT came into force.<sup>181</sup>

264. Respondent cites two letters, dated 29 May 2010<sup>182</sup> and 3 January 2012,<sup>183</sup> in the first of which Behgjet Pacolli's lawyer, and in the second of which Selim Pacolli, state that Behgjet Pacolli is owner of the shares. Counsel for Respondent observes that in the first of these letters, Mr. Pacolli's lawyer refers to the alleged shareholders as Behgjet Pacolli, on the one hand, and NTSH, on the other, suggesting that, while Mr. Ejupi was acting as representative of NTSH, Mr. Pacolli was acting in a personal capacity,<sup>184</sup> a suggestion that Mr. Pacolli denies.<sup>185</sup> Similarly, counsel for Respondent points out that in the 3 January 2012 letter, Selim Pacolli refers to Behgjet Pacolli as "the owner of 40% of [the] shares."<sup>186</sup> Further, in a letter of 29 February 2012, Behgjet Pacolli expressly stated that "my companies have not been involved in the purchase of assets of Grand Hotel."<sup>187</sup> Mr. Pacolli testified that Respondent has distorted the import of that language because all that was meant by that statement was the obvious fact that his companies never participated in the tendering process and that only UTC entered into the Purchase Agreement. According to him the statement meant only that, "[n]othing more, nothing less."<sup>188</sup>

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<sup>180</sup> Behgjet Pacolli 2d witness stmt, Exh. CWS-3, para. 15.

<sup>181</sup> Respondent observes that, in all his correspondence with the PAK between 2010 and June 2012, Mr. Pacolli referred to himself, but never Mabco. See Exh. R-44: Letter from Mr. Makolli, on behalf of Mr. Pacolli, to the PAK, 29 May 2010; Exh. R-52: Letter from Mr. Selim Pacolli and Ms. Nerimane Ejupi to PAK Board of Directors, 3 January 2012; Exh. R-57: Letter from Mr. Pacolli to the PAK Board of Directors, 29 February 2012; Exh. R-4: Written Request from Mr. Pacolli and NTSH to PAK, 14 June 2012.

<sup>182</sup> Exh. R-44: Letter from Mr. Makolli, on behalf of Mr. Pacolli, to the PAK, 29 May 2010.

<sup>183</sup> Exh. R-52: Letter from Mr. Selim Pacolli and Ms. Nerimane Ejupi to PAK Board of Directors, 3 January 2012.

<sup>184</sup> Behgjet Pacolli testimony, tr. 147:11 – 147:18.

<sup>185</sup> Behgjet Pacolli testimony, tr. 147:20 – 148:10.

<sup>186</sup> Behgjet Pacolli testimony, tr. 149:12 – 149:18.

<sup>187</sup> Exh. R-57: Letter from Mr. Pacolli to the PAK Board of Directors, 29 February 2012; Resp. Reply on Jurisd., para. 51.

<sup>188</sup> Behgjet Pacolli 2d witness stmt, Exh. CWS-3, para. 16.

265. Respondent adds that, even if Mr. Pacolli acted in a representative capacity, he could have been representing any one of the 35 companies comprising the Mabetex Group, not necessarily Claimant.<sup>189</sup>
266. Then, in a letter dated 13 March 2012, Selim Pacolli identified Mabetex as shareholder alongside NTSH,<sup>190</sup> and in a 15 March 2012 declaration, signed by Mr. Berisha (for UTC) and Ms. Ejupi (for NTSH), Selim Pacolli signed not for Claimant, but for Behgjet Pacolli and Mabetex.<sup>191</sup>
267. Respondent further observes that in a letter of 28 March 2012 to the PAK, sent jointly with Ms. Ejupi and Mr. Berisha, Selim Pacolli identified himself as a representative of a company by the name of “NPN Mabetex Project Engineering – Pristina” and asked that that company be listed as shareholder of the Grand Hotel.<sup>192</sup> Further, on 21 May 2012, Selim Pacolli wrote to the PAK stating that Mabetex Project Engineering was in contact with a company called “HMG Hotel management Group” regarding a potential joint management of the Grand Hotel.<sup>193</sup> Neither of these letters indicated that Selim Pacolli was acting as Claimant’s representative. (According to Claimant, Mabetex Project Engineering had been established in Pristina strictly as a purpose vehicle for holding investments made by Mabetex companies, including Claimant in Switzerland.<sup>194</sup>)
268. According to Respondent, the letter of 20 June 2012,<sup>195</sup> para. 209, *supra*, is the first correspondence specifically referring to Claimant, and not simply Mr. Pacolli, as involved in the privatization project.<sup>196</sup> It was in response to that letter that the PAK, on 22 June 2012, wrote back, stating that the only funds it had received were those paid by UTC and

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<sup>189</sup> Exh. R-11: Excerpt from website of Mabetex Group - List of subsidiaries of Mabetex, 3 April 2019; Resp. Reply on Jurisd., paras. 239-240.

<sup>190</sup> Exh. R-43: Letter from Mr. Selim Pacolli and Mrs. Nerimane Ejupi to Mr. Shkelzen Lluka, 13 March 2012.

<sup>191</sup> Exh. R-49: Declaration by Messrs. Berisha, Ejupi, and Selim Pacolli on behalf of UTC, NTSH and Mabetex respectively dated 15 March 2012; Resp. Reply on Jurisd., para. 48.

<sup>192</sup> Resp. Reply on Jurisd., paras. 46-47; Resp. post-hearing br., paras. 22-23.

<sup>193</sup> Exh. R-50: Letter from Mr. Selim Pacolli to Mr. Lluka, 21 May 2012.

<sup>194</sup> Cl. post-hearing br., para. 24.

<sup>195</sup> Exh. C-40: Letter from Mabco to PAK, 20 June 2012.

<sup>196</sup> Resp. Reply on Jurisd., para. 129.

that it had never accepted Claimant as shareholder. The PAK reiterated that position in a letter of 17 July 2012.<sup>197</sup>

269. Respondent observes that the evidence adduced by Claimant in support of its ownership of shares in the Grand Hotel consists nearly exclusively of the witness statements of Behgjet and Selim Pacolli, both of whom have a material financial interest in the outcome of the proceedings and whose testimony should therefore be discounted.<sup>198</sup> Respondent further argues that neither witness statement is supported by documentation in the record.<sup>199</sup> For example, Respondent finds no documentary evidence that Mr. Shala invited Mr. Pacolli to invest in the project; that the KTA endorsed the investment; that Messrs. Pacolli, Berisha and Ejupi concluded an agreement prior to the 28 April 2006 transfer of funds; or that that transfer was made pursuant to that agreement.<sup>200</sup>
270. According to Respondent, Claimant misrepresents the discussions that took place between Messrs. Pacolli and the PAK in the first half of 2012. Respondent describes those discussions as pertaining, not to any pre-existing interest in the Grand Hotel such as Claimant asserts, but only to the possibility that it, along with NTSH, might become involved as new investors so as to avoid a withdrawal of shares and a retendering.<sup>201</sup> Respondent cites the witness statement of Mr. Shkelzen Lluka in support of this proposition, as well as the fact that the PAK was in touch in that period with several prospective investors.<sup>202</sup>

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<sup>197</sup> Exh. C-41: Letter from PAK to Mabco, 17 July 2012.

<sup>198</sup> Resp. Reply on Jurisd., paras. 59-64.

<sup>199</sup> Resp. Reply on Jurisd., paras. 65-68.

<sup>200</sup> The documents whose probative value Respondent challenges are Exh. C-4 (commercial register excerpt), Exh. C-30 (statements made in police interviews), CWS-1 (statement by Mr. Pacolli), CWS-2 (statement by Selim Pacolli), Exh. C-14 (wire transfer) and Exh. C-21 (term, “payment under contract”). According to Respondent (a) Exhibit C-4 does not establish that Behgjet Pacolli was ever acting in a representative capacity; (b) Exhibit C-30 only reports that statements were made to the police, not that they are true; (c) Exhibit CWS-1 refers only to Messrs. Berisha and Ejupi, not Behgjet Pacolli; does not establish that Mr. Shala issued the invitation to invest that Claimant asserts; and fails to indicate the purpose of the 28 April 2006 transfer (d) Exhibit CWS-2 does not establish that either Behgjet or Selim Pacolli was acting in a representative capacity for Claimant; (e) Exhibit C-14 does not establish purpose of the transfer; and (f) Exhibit C-21 does not identify the “contract” to which reference is made.

<sup>201</sup> Resp. Reply on Jurisd., para. 125.

<sup>202</sup> Lluka witness stmt, paras. 10 *et seq.*; Resp. Reply on Jurisd., paras. 125-127.

271. Respondent maintains that, under the BIT, Kosovo law determines whether a legal right has been created and in whom, while Article 17 of both the 2005 and 2014 Foreign Investment Laws designates as applicable the law of in Kosovo and such rules of public international law as may be applicable to the issues in dispute. Accordingly, the questions whether Mr. Pacolli acted in a representative capacity and to the extent to which he and his company enjoy distinct legal personalities are strictly governed by the law of Kosovo. Under that law, Mr. Pacolli did not act in a representative capacity and has a legal personality distinct from Claimant.<sup>203</sup> Kosovo law also determines whether an investment was made and when ownership comes into being.<sup>204</sup>
272. As summarized in Respondent's post-hearing brief, the difficulties with Claimant's case are that (a) the actions taken by Mr. Pacolli may not be attributed to Claimant, (b)

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<sup>203</sup> In its Reply on Jurisdiction, paras. 228-231, Respondent cites the following legal provisions:

- (a) Article 26 of the Law of Contracts and Torts No. 29/1978 of the Social Federal Republic of Yugoslavia (Exh. R-60):
 

*A contract shall be concluded after the contracting parties have come to an agreement as to the essential constitutive elements (terms) of the contract.*
- (b) Article 54(1) of the Law of Contracts and Torts No. 29/1978 of the Social Federal Republic of Yugoslavia (Exh. R-60):
 

*A legal person may enter into contracts in the sphere of legal transactions within the framework of his legal capacity.*
- (c) Article 148(1) of the Law of Contracts and Torts No. 29/1978 of the Social Federal Republic of Yugoslavia (Exh. R-60):
 

*A contract shall create rights and obligations for the contracting parties.*
- (d) UNMIK Regulation 2001/6, Secs. 23.2, 23.3 (Exh. R-61), stating that corporations are legal persons and own property in their own name, and providing that:
 

*The property of a corporation is separate from the property of the founders and shareholders of the corporation.*
- (e) New Law on Business Organizations No. 02/L-123, Arts. 78.1, 82, 126.1, 130 (Exh. R-10), stating that limited liability companies are legal persons that are "legally separate and distinct" from their owners and shareholders, and providing that:
 

[Limited liability companies have the power to] "(i) to sue and be sued; (ii) to make contracts, borrow money, and incur other debts and liabilities; (iii) to acquire, own, lease, pledge or mortgage, or otherwise dispose of or deal with property; (iv) to acquire, own, pledge, vote, sell, or otherwise dispose of shares or other interests in another business organization, but not a personal business enterprise...

<sup>204</sup> Resp. post-hearing br., paras. 38-40, citing, among other awards, Exh. RL-19: *Vestey Group Ltd. v. Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 194; Exh. RL-39: *Libananco Holdings Co. v. Republic of Turkey*, ICSID Case No. ARB/06/08, Award, 2 September 2011, para. 112.

Claimant's alleged asset cannot properly be defined, (c) neither Mr. Pacolli nor Claimant ever became shareholders of the Grand Hotel L.L.C., and (d) even the contribution alleged to have been made cannot be established.<sup>205</sup>

(b) Claimant's Position

273. Claimant seeks to refute Respondent's representations on various levels. It maintains that, despite the appearance of his name alone on much of the correspondence and other documents, all actions that Mr. Pacolli took in connection with the purchase of the shares of the Grand Hotel and the PAK's withdrawal of them were taken in his capacity as representative of Mabco as part of the Mabetex Group.<sup>206</sup> Mr. Pacolli testified that, because of his individual prominence in Kosovo, he typically uses his name when acting in the interest and on behalf of his companies, so that every transaction in which he engages within Claimant's business sector, even if bearing his name, is made on behalf of Claimant.<sup>207</sup> He asserts that everyone knows that he does not carry on construction business as a natural person in his own name.<sup>208</sup> Accordingly, Claimant maintains that the PAK knew perfectly well that it was Mr. Behgjet Pacolli's company that contributed the capital and that it was on the company's behalf that Mr. Behgjet Pacolli acted.<sup>209</sup>
274. Mr. Ejupi fully concurs, testifying that, whenever reference is made in Kosovo to a person – not only Mr. Pacolli – making an investment or even owning a particular asset, it is understood that it is that person's company, if he or she has one, that made the investment or owned the asset. Thus, when any one asks him – Mr. Ejupi – to invest, they are asking NTSH to invest.<sup>210</sup> Indeed, according to Mr. Ejupi, the KTA itself contemplated that it would be companies, not individuals, that invested in privatized assets.<sup>211</sup> Claimant's chief financial officer, witness Ms. Maesani-Gaiatto, also testified that when Mr. Pacolli uses

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<sup>205</sup> Resp. post-hearing br., para. 7.

<sup>206</sup> Behgjet Pacolli witness stmt, Exh. CWS-1, para. 13; Behgjet Pacolli 2d witness stmt, Exh. CWS-3, paras. 14-15.

<sup>207</sup> Behgjet Pacolli testimony, tr. 149:19–150:12; Behgjet Pacolli witness stmt, Exh. CWS-1, para. 13.

<sup>208</sup> Behgjet Pacolli witness stmt, Exh. CWS-1, para. 13; Selim Pacolli witness stmt, Exh. CWS-2, para. 7.

<sup>209</sup> Behgjet Pacolli witness stmt, Exh. CWS-1, paras. 10, 13; Selim Pacolli witness stmt, Exh. CWS-2, para. 14.

<sup>210</sup> Ejupi witness stmt, Exh. CWS-4, para. 12.

<sup>211</sup> Ejupi testimony, tr. 124:18-125:1.

the terms “me” or “I” in connection with his business dealings, including construction projects, he invariably has the relevant company in mind, and that it is not at all unusual for the sole owner of a company to identify himself or herself with his or her company.<sup>212</sup> When Mr. Pacolli decides to make an investment, he selects the specific Mabetex company to make and conduct that investment.<sup>213</sup> Starting in 2000, Claimant was the company that performed all the Group’s important construction projects.<sup>214</sup> In fact, Claimant was the most active company within the Mabetex Group of companies.<sup>215</sup> According to Ms. Maesani-Gaiatto, since the term “Mabetex” has always been the Group name, and since it has become a useful “brand,” its name is commonly used in connection with the transactions in which its individual companies engage.<sup>216</sup>

275. Claimant concedes that it did not participate in the tender process, was not a party to the Purchase Agreement, and has never been registered as shareholder. However, it points out that its non-participation in the tender process by no means disqualifies its eventual ownership of shares as a protected asset under the BIT or Foreign Investment Law.<sup>217</sup> It became a holder of shares in the Grand Hotel because it was specifically invited by the KTA to purchase part of the shares, paid close to half of the total purchase price of the shares in the Grand Hotel (as KTA knew), and entered into the AGU with UTC and NTSH to formalize the investment.<sup>218</sup> (Claimant’s reliance on the EUR 4m payment and the AGU are dealt with more fully in the sections that follow.) The reason that only UTC signed the Purchase Agreement is that UTC was officially the successful bidder.
276. Claimant insists that Mr. Shala initiated discussion with Mr. Pacolli, along with Mr. Gazmend Abrashi, owner of a large company called Makos Ltd., of a possible investment in the Grand Hotel. According to Claimant, the privatization effort, launched

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<sup>212</sup> Maesani-Gaiatto witness stmt, Exh. CWS-5, para. 10.

<sup>213</sup> Maesani-Gaiatto testimony, tr. 195:18 – 195:24.

<sup>214</sup> Maesani-Gaiatto witness stmt, Exh. CWS-5, para. 8.

<sup>215</sup> Maesani-Gaiatto testimony, tr. 196:2 – 196:4.

<sup>216</sup> Maesani-Gaiatto witness stmt, Exh. CWS-5, para. 8.

<sup>217</sup> Cl. oral argum., tr. 34:17 -34:24.

<sup>218</sup> Cl. Counter-Mem. on Jurisd., paras. 114-115.



toward the end of 2005, ran into difficulties due to the paucity of potential investors, even though the Grand Hotel was one of Kosovo's "crown jewels."<sup>219</sup> Faced with this problem, Mr. Shala invited Messrs. Pacolli and Abrashi to a meeting in Tirana, Albania, to discuss the privatization, urging them to submit bids.<sup>220</sup> According to Mr. Ejupi, Mr. Shala asked him to seek to persuade Mr. Pacolli to co-invest and, in that context, assured Mr. Ejupi that, upon closure of the privatization procedure, the share ownership would be registered.<sup>221</sup> Mr. Pacolli declined to participate.

277. Claimant states that the bidding phase, slated for 18 January 2006, then had to be postponed to the following month due to only one prospective bidder having shown interest.<sup>222</sup> In the postponed procedure, there were several interested parties, including Makos Ltd, as well as NTSH and UTC. Makos won the bid, with UTC placing second. However in March 2006, Makos withdrew from the tendering process and UTC became the winning bidder.
278. However, UTC did not have sufficient funds to make the payment due on 24 April 2006. Mr. Ejupi testified that during the period in which Mr. Berisha had been required to pay the purchase price, Mr. Shala visited Mr. Ejupi in his office.<sup>223</sup> At that meeting, Mr. Shala asked him to join the tender process, make the needed payment and assume the obligations set out in the Commitment Agreement but, knowing the difficulty of meeting a EUR 8m purchase price, again urged him to persuade Mr. Pacolli to participate as well. According to Mr. Ejupi, in that conversation, he received assurances from Mr. Shala that he would assist them in completing the required documentation.<sup>224</sup> Mr. Pacolli ultimately agreed to participate. It is at that point, in early April 2006, that Messrs. Ejupi, Pacolli and Berisha had the meeting in Vienna described earlier (para. 166, *supra*) and an agreement to co-

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<sup>219</sup> Cl. Rejoinder on Jurisd., para. 59, citing Exh. C-34: Press Release KTA of September 1, 2015.

<sup>220</sup> Behgjet Pacolli testimony, tr. 136:1 – 136:15, 178:16 – 179:1; Cl. oral argum., tr. 29:6 – 29:11; Rejoinder, para. 59.

<sup>221</sup> Ejupi witness stmt, Exh. CWS-4, paras. 10-11; Cl. Rejoinder on Jurisd., para. 60, 61, 66, citing Behgjet Pacolli 2d witness stmt, Exh. CWS-3, para. 8.

<sup>222</sup> Cl. Rejoinder on Jurisd., para. 61, citing Exh. C-47: ECIKS News Kosovo: Few Bids for Grand Hotel, 17 January 2006.

<sup>223</sup> Ejupi testimony, tr. 108:19 – 108:21.

<sup>224</sup> Ejupi testimony, tr. 109:1 – 109:16.

invest was reached.<sup>225</sup> Claimant maintains that it is not at all unusual that no written report of that meeting was produced.

279. Mr. Ejupi further testified that Mr. Shala meanwhile invited Messrs. Pacolli and Ejupi to accompany him to Croatia in an effort to attract other businesspeople to take part in the overall Kosovo privatization project. But while in Croatia, they learned that there had been a bomb threat at the Grand Hotel in Pristina, where Mr. Ejupi had established an office.<sup>226</sup> According to Mr. Ejupi, Mr. Shala assured him that he need not worry about it.<sup>227</sup> Mr. Ejupi referred in his testimony to there being a lot of pressure at that time from powerful parties in connection with the privatization, stating that upon their return from Croatia he learned that there was pressure for the Grand Hotel shares in particular to be acquired by persons whom Mr. Shala favored.<sup>228</sup> Mr. Ejupi reports that he and Mr. Pacolli then began facing pressure to abandon ownership in the hotel, and that the KTA took action to impede efforts by Messrs. Pacolli and Ejupi to satisfy the KTA's documentation requirements.<sup>229</sup> Mr. Ejupi eventually requested that the funds that had been transferred be returned and that the KTA allow whoever it wanted to become owner.<sup>230</sup>
280. Claimant rejects Respondent's contention that these representations by Claimant contradict earlier statements on his part, notably statements made in connection with Mr. Pacolli's lawsuit in the Municipal Court of Pristina. Claimant argues that Mr. Pacolli omitted mention of Mr. Shala in that proceeding because he did not want to publicly accuse Mr. Shala of wrongdoing, which also explains why Mr. Shala was not mentioned in Mr. Pacolli's 29 February 2012 letter to the PAK. Even so, Claimant states that Mr. Ejupi had already by that time declared publicly that Mr. Shala was the person urging Mr. Ejupi to invest,<sup>231</sup> so that it was no secret. Claimant observes that, Mr. Shala, who had taken the

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<sup>225</sup> Behgjet Pacolli 2d witness stmt, Exh. CWS-3, para. 9; Ejupi witness stmt, Exh. CWS-4, para. 15.

<sup>226</sup> Ejupi testimony, tr. 109:17 – 110:1.

<sup>227</sup> Ejupi testimony, tr. 110:1 – 110:4.

<sup>228</sup> Ejupi testimony, tr. 110:6 – 110:9. Mr. Ejupi added that he did invest in the Grand Hotel in 2006 and continues, up to the present time, to pay interest on it. *Id.* tr. 110:10 – 110:12.

<sup>229</sup> Ejupi testimony, tr. 111:6 – 110:10.

<sup>230</sup> Ejupi testimony, tr. 111:2 – 111:6.

<sup>231</sup> Exh. C-50: UNMIK Media Monitoring Headlines, 14 September 2012, p. 2.

lead in the privatization effort during difficult times in Kosovo, would have had no choice but to approach them for help.<sup>232</sup> Claimant also rejects as inconsequential the fact that Mr. Pacolli's witness statement says that Mr. Shala first contacted Mr. Ejupi who then contacted Mr. Pacolli, while Claimant's Counter-Memorial says that Mr. Shala contacted both Mr. Ejupi and Mr. Pacolli.

281. According to Claimant, Respondent more generally misrepresents the litigation in the courts of Kosovo. Although the District Court reversed the Municipal Court's ruling that confirmed the co-ownership of the Grand Hotel shares, it did so not on the merits, but only for clarification, in light of an apparent inconsistency, of whether the litigant was Mr. Pacolli or the Mabetex Group. In its ruling, the court specifically acknowledged the existence of a power of attorney,<sup>233</sup> but sought confirmation as to the issuer of the power of attorney and the party in favor of whom it was issued. According to Mr. Pacolli, he gave the power of attorney to counsel in the case as CEO of the Mabetex Group.<sup>234</sup> As previously noted,<sup>235</sup> on remand, the Municipal Court never decided the ownership question because by then the shares had been withdrawn.<sup>236</sup> Claimant also observes that, notwithstanding the testimony of Mr. Lluka to the contrary,<sup>237</sup> the KTA was necessarily aware of the litigation from the very beginning in mid-2007 and did not first learn of it, as testified to by Mr. Lluka, in March 2012. Asked why he and Mr. Pacolli brought suit in 2007 against UTC, and not the KTA, Mr. Ejupi explained that it was because the KTA refused to recognize them as investors.<sup>238</sup> Mr. Pacolli explained that the reason why he, as CEO of Mabetex, rather than Claimant, initiated the proceedings was that Claimant was not registered in Kosovo.<sup>239</sup>

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<sup>232</sup> Cl. Rejoinder on Jurisd., paras. 47-49, 57.

<sup>233</sup> Cl. Rejoinder on Jurisd., para. 126.

<sup>234</sup> Behgjet Pacolli 2d witness stmt, Exh. CWS-3, para. 15.

<sup>235</sup> See para. 236, *supra*.

<sup>236</sup> Cl. Rejoinder on Jurisd., paras. 126-127.

<sup>237</sup> Lluka witness stmt, paras. 13-16. Claimant also cites Exh. C-22, a letter from Selim Pacolli to PAK informing PAK of the pending lawsuit in regard to ownership of the Grand Hotel shares.

<sup>238</sup> Ejupi testimony, tr. 122:2–122:15.

<sup>239</sup> Behgjet Pacolli testimony, tr. 149:20-25, 150:3-8.

282. Claimant maintains that the PAK's decision of 16 December 2011 to withdraw the shares was illegal.<sup>240</sup> It maintains, based on the agenda of the 16 December meeting and the absence of documents concerning the buyer's alleged delinquencies or the possibility of a share call option, that the purpose of the 16 December meeting was not in fact to make a decision about the withdrawal of the shares. Claimant suggests that the meeting was in fact held to consider whether to demand additional payments from Mr. Pacolli as bribes.<sup>241</sup> In its view, the PAK withdrew the shares, not due to non-fulfillment of the investment commitments, but due to Mr. Pacolli's unwillingness to be bribed.
283. In this regard, Claimant calls into question the PAK's eventual justification for the withdrawal of shares. It observes that between 2005 and 2016, the PKA exercised its share call option in only four cases, including the Grand Hotel, even though only 39% of privatized special spin-offs actually met their investment commitments.<sup>242</sup>
284. On cross-examination, Mr. Pacolli disputed Mr. Shala's account of their travel to Rwanda. According to Mr. Pacolli, at Mr. Shala's request, he hosted a dinner at his home for a prayer group coming from Washington, D.C., to which Mr. Shala belonged. At that dinner, Mr. Shala mentioned that the prayer group was going next to Rwanda, and asked whether Mr. Pacolli would like to join them.<sup>243</sup>
285. Mr. Ejupi was questioned about his efforts to communicate with Mr. Shala in the weeks preceding the hearing. Mr. Ejupi testified that the reason for that contact had nothing to do with the Grand Hotel. Rather, as president of a football club, he was trying to acquire land for that club, and knew that Mr. Shala had landholdings that might be available.<sup>244</sup>

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<sup>240</sup> Resp. Reply on Jurisd., paras. 110 *et seq.* Respondent contends that the legality or illegality of the decision to withdraw the share is purely a merits, rather than jurisdictional, issue. However, it maintains that that decision was fully justified by UTC's failure to meet its investment commitments. Resp. Reply on Jurisd., paras. 111-115.

<sup>241</sup> Cl. Rejoinder on Jurisd., paras. 136 *et seq.*, citing Exh. R-34: Invitation to the PAK board of directors meeting of 16 December 2011, 8 December 2011, Exh. R-36: Agenda for the PAK Board of Directors Meeting of 16 December 2011, 16 December 2011, Exh. R-37: Report of the PAK Board of Directors regarding the Grand Hotel LLC, 16 December 2011.

<sup>242</sup> Cl. Rejoinder on Jurisd., paras. 143-144.

<sup>243</sup> Behgjet Pacolli testimony, tr. 163:19–164:17, 166:25–167:4.

<sup>244</sup> Ejupi testimony, tr. 106:25–107:14.

286. When asked why there was so little documentation of the communications among the KTA, Mr. Shala, on the one hand, and Messrs. Berisha, Pacolli and himself, on the other, Mr. Ejupi explained that there was very little communication by email in Kosovo at that time, and that parties communicated predominantly by telephone, as well as by meetings in person since distances in the city are minimal, relying fundamentally on trust and the word of honor in dealings among themselves.<sup>245</sup> He reported disappointment in Mr. Shala in that regard.
287. More generally, Claimant urges that the witness statements of Behgjet and Selim Pacolli not be discounted on account of their supposed self-interest. In Claimant's view, what matters is the tribunal's assessment of the relevance and credibility of their testimony.<sup>246</sup> Claimant further questions Respondent's assertion that their witness testimony is unsupported by documentary evidence. Without conceding a lack of documentation, Claimant rejects the notion that witness testimony must be corroborated by documentary evidence.<sup>247</sup>
288. As a matter of law, Claimant rejects Respondent's contention that Kosovo law determines whether an investment was made and when ownership came into being.<sup>248</sup> More specifically, it is irrelevant whether, under Kosovo law, Mr. Pacolli's actions were or were not attributable to Claimant.<sup>249</sup> According to Claimant, Mr. Pacolli's authority to represent Claimant is governed by Swiss law, and under that law he is authorized to do so.<sup>250</sup> Claimant also disputes Respondent's interpretation of the Kosovo legislation governing the registration of shares and corporate charters.<sup>251</sup>

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<sup>245</sup> Ejupi testimony, tr. 111:16 – 112:6, 112:17 – 112:21.

<sup>246</sup> Cl. Rejoinder on Jurisd., para. 28.

<sup>247</sup> Cl. Rejoinder on Jurisd., paras. 39-43.

<sup>248</sup> Resp. post-hearing br., paras. 38-40, citing, among other awards, Exh. RL-19: *Vestey Group Ltd. v. Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 194; Exh. RL-39: *Libananco Holdings Co. v. Republic of Turkey*, ICSID Case No. ARB/06/08, 2 September 2011, para. 112.

<sup>249</sup> Cl. post-hearing br., paras. 85-88.

<sup>250</sup> Cl. oral argum., tr. 40:8 – 40:14.

<sup>251</sup> Cl. post-hearing br., paras. 89-91.

289. At the hearing, the Tribunal, in view of the contradictions between their testimony, conducted witness conferencing between Messrs. Pacolli and Shala.
290. During that conferencing, Mr. Pacolli recalled Mr. Shala stating the following at their meeting in Tirana:

*You have a luxury hotel. The hotels are in privatization now, Grand Hotel and Iliria Hotel. You have all the opportunity, because you have money, you have the hotel management, you have the experience, and I – we need investments, and I would ask you to invest in this sector.*<sup>252</sup>

In reply to this assertion, Mr. Shala stated that, while he met with Mr. Pacolli in 1999, he did not recall meeting with him at all in 2005, and that, in any event, he never requested that Mr. Pacolli invest in the Grand Hotel.<sup>253</sup> If he were ever to make such a request, it would only be before the bidding process had begun.<sup>254</sup> Mr. Shala stated that it is significant that Mr. Pacolli never followed up on the alleged meeting with any correspondence, and did not participate in the tender process.<sup>255</sup> He described the tender process as “100% bulletproof [from] manipulation.”<sup>256</sup>

291. At the witness conferencing, Mr. Pacolli asserted that present at the meeting in Tirana was also Gazmend Abrashi. According to Mr. Pacolli, Mr. Abrashi was the winner in the first round of bidding, but lacked both money and management experience, which is why Mr. Shala invited him to co-invest with Mr. Abrashi.<sup>257</sup> Ultimately, Mr. Abrashi withdrew his bid though he proceeded with the other bid he had won, viz. the bid for another hotel, the Hotel Iliria. But to do so he needed a contribution by Mr. Pacolli of EUR 3.6m, which Mr.

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<sup>252</sup> Behgjet Pacolli testimony, tr. 178:16–178:22.

<sup>253</sup> Shala testimony, tr. 179:3–179:9.

<sup>254</sup> Shala testimony, tr. 180:13–180:18.

<sup>255</sup> Shala testimony, tr. 180:19–181:6.

<sup>256</sup> Shala testimony, tr. 183:10.

<sup>257</sup> Behgjet Pacolli testimony, tr. 186:22–187:9.

Pacolli made.<sup>258</sup> Mr. Pacolli thereafter purchased Mr. Abrashi's share of the Hotel Iliria and became its sole owner.<sup>259</sup>

(c) The Tribunal's Findings and Analysis

292. As noted, Respondent makes the following contentions with respect to Claimant's alleged investment:

- a. Claimant never held any assets relating to the Grand Hotel.
- b. Claimant's payment of EUR 4m does not constitute evidence of an investment on Claimant's part.
- c. Claimant did not become an owner of shares by virtue of the AGU.
- d. Claimant did not become an owner of shares by virtue of the Annex Agreement.

Respondent's basic position is that Claimant made no investment within the meaning of the ICSID Convention, the BIT or the Foreign Investment Law, and that if any investment was made, it was made only by Mr. Behgjet Pacolli in his individual capacity and not on behalf of Claimant. In addressing the question whether Claimant made an investment, within the meaning of the BIT, Foreign Investment Law and the ICSID Convention, each of these instruments, due to their distinctive language, must be considered on its own terms.

- a. Does a claim of entitlement to ownership of shares require proof of actual ownership?

293. Claimant is not entirely clear or consistent as to the exact nature of the investment it claims to have acquired in respect of the Grand Hotel shares. On numerous occasions, it claims that it acquired ownership of the shares.<sup>260</sup> Elsewhere, it suggests that it has a "beneficial" interest in the shares,<sup>261</sup> though it does not elaborate on that assertion. Still elsewhere, it leaves its interest somewhat indeterminate. In sum, Claimant's characterization of its investment lacks the clarity or consistency one might expect.

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<sup>258</sup> Behgjet Pacolli testimony, tr. 187:21 – 188:13.

<sup>259</sup> Behgjet Pacolli testimony, tr. 190:6 – 190:16.

<sup>260</sup> See, e.g., RfA, para. 55; Counter-Memorial on Jurisdiction paras. 112, 132; Rejoinder, para. 171.

<sup>261</sup> Cl. post-hearing br., para. 16.

294. In this case, it is therefore less easy to identify the nature of the alleged investment than is usually the case in investor-State arbitration. However, it is uncontested that, while Claimant allegedly paid for the shares, it never received them and its ownership of them was never registered.<sup>262</sup> Reading the record as a whole, and reconciling as best it can the not entirely consistent ways in which Claimant characterizes its putative investment, the Tribunal considers that Claimant is best understood as asserting that it acquired pursuant to its arrangements with UTC and NTSB and over the extended period of dealings with the KTA and thereafter the PAK, *a claim of entitlement to ownership of the shares*, and therefore a right to their registration in its name and protection from their withdrawal. An initial question before the Tribunal at this stage of the analysis is therefore whether that claim qualifies as an investment within the meaning of Article 25.1 of the ICSID Convention, Article 1(1) of the BIT and the relevant articles of the 2005 and 2014 Foreign Investment Laws. The Tribunal examines the status of the alleged investment under each of these instruments in turn.

(i) The ICSID Convention

295. Jurisdiction over a dispute under Article 25.1 of the ICSID Convention requires that the dispute “aris[es] directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.” The Convention does not however define the term “investment.” It does not therefore offer in itself a solid basis for determining whether or not a claim of entitlement to ownership of shares requires proof of actual ownership. To make that determination, one must look at arbitral jurisprudence on the definition of investment under the Convention.

296. Under one well-established line of arbitral case law, an asset does not qualify as an investment under the ICSID Convention unless, cumulatively, it represents a substantial capital contribution, entails a certain risk, and presents a certain duration. The award most closely associated with these criteria is *Salini Costruttori S.p.A & Italstrade S.p.A v.*

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<sup>262</sup> Cl. oral argum., tr. 27:10-11.



*Kingdom of Morocco*.<sup>263</sup> The *Salini* tribunal also posited a fourth criterion, viz., contribution to the economic development of the host State,<sup>264</sup> but this criterion has, for various reasons, since fallen significantly out of favor.<sup>265</sup> A common view is that contribution to the host State's economy is not part of the ordinary meaning of "investment" and is best viewed not as definitional of an investment, but as, at best, its desired consequence.<sup>266</sup> The Tribunal is of that view.

297. The *Salini* test has been criticized as unduly rigid, and has by no means been followed by all tribunals.<sup>267</sup> However, since the *Salini* test is on the whole more demanding than the alternative approaches that have been followed, and the Tribunal, as will be seen (para. 300), considers that test to have been met, the Tribunal need not examine the case through the lens of those alternatives.
298. Respondent predicates its position on two basic assertions. First, having not acquired ownership of the shares and having no direct contract with either the KTA or the PAK, Claimant cannot maintain that it made an investment. Second, even if an investment was made, it would have been made by Mr. Pacolli in his personal capacity rather than on behalf of the Claimant – in other words, Claimant was not the investor. If Claimant was not the investor, then by definition it cannot satisfy the *Salini* test. It contributed no capital, incurred no risk, invested for no duration and made no contribution to Kosovo's economic

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<sup>263</sup> Exh. CL-28: *Salini Costruttori S.p.A & Italstrade S.p.A v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001. See also Exh. RL-43: Christoph Schreuer et al., *The ICSID Convention: A Commentary* (2d ed. 2009) 128-135, 668-671, p. 129. Among many awards applying the *Salini* criteria is Exh. CL-9: *LESI SpA et Astaldi SpA v. Algeria*, ICSID Case No. ARB/05/03, Decision of 12 July 2006, para. 72.

<sup>264</sup> Other tribunals have imposed a further additional requirement that an investment hold a promise of regular profit and return. The Tribunal sees little warrant for imposing this additional requirement. A contribution of capital to a business enterprise invariably implies an expectation of a regular profit and return. Dolzer & Schreuer describe regularity of profit as "seldom considered relevant." Exh. RL-50: Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2d ed. 2012), p. 66.

<sup>265</sup> See, e.g., Exh. CL-49: *Société Générale v. Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008; Exh. CL-29: *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010.

<sup>266</sup> Dolzer & Schreuer, *supra* note 264, at 66-74, citing *Fakes v. Turkey*, *supra* note 265, para. 110.

<sup>267</sup> See, e.g., Exh. CL-46: *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, paras. 323 *et seq.*; Exh. CL-25: *Malaysian Historical Salvors Sdn Bhd v. Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, 16 April 2009.

development. The Tribunal must therefore decide whether an investment within the meaning of the ICSID Convention was made and, if so, whether it was Claimant that made it.

299. Taking the second issue first, the Tribunal finds, for reasons explained in detail below (paras. 339-345, *infra*), that Mr. Pacolli took his actions on behalf of Mabco. For that reason, in the discussion that follows, the Tribunal will impute the investment, if one was made, to Claimant rather than Mr. Pacolli. It now turns to the *Salini* criteria, namely, whether there was a contribution of capital, whether that contribution entailed a risk, whether the putative investment had the requisite duration and, if required, whether it would contribute to the economic development of Kosovo.
300. The Tribunal leaves aside at this point the specific question of whether, as Respondent suggests (paras. 362-370, *infra*), any payment that was made was for the purchase of the shares in the Grand Hotel. That said, the Tribunal has no difficulty finding that, based on the Eur 4m payment, a contribution of capital was made. Turning to the question of risk, the Tribunal notes that, at the relevant time, Kosovo had virtually no tourism industry and development of a successful tourism industry could not be assumed. The purchase of shares in the Grand Hotel therefore necessarily entailed a risk. Nor is there any reason to suppose that Claimant's investment, if made, would not have sufficient duration. If Kosovo's tourism industry were to develop successfully, there is every reason to believe, based on the prominence of the Grand Hotel, that the investment would continue, entailing ongoing maintenance and management of the hotel.<sup>268</sup> In sum, the Tribunal finds that all three criteria for which the Dissent (para. 21) cites the cases of *Clorox v. Venezuela* and *Saba Fakes v. Turkey* – contribution of capital, risk and duration – are met in this case.
301. As for contribution to the economic development of the host State, the Tribunal, as noted, joins those that have rejected it as a requirement. However, even were contribution to the economic development of a host State to be required, that requirement would appear to be

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<sup>268</sup> While considerable emphasis was placed in the proceedings on reconstruction and rehabilitation of the Grand Hotel, the arrangement among the co-owners also entailed management of the hotel going forward. Mr. Pacolli described his contribution as consisting of "funds and ... management." Behgjet Pacolli testimony, tr. 169:13 – 169:14. See also tr. 187:4: "I had money, I had management."

met in the present case. Claimant and Respondent alike have subscribed to the view that promotion of tourism represents a prime component of Kosovo's economic development policy and that no single facility stood to contribute more importantly to that policy than the Grand Hotel in Kosovo's capital, Pristina.<sup>269</sup> Accordingly, though in the Tribunal's view the ICSID Convention does not make protection of investment contingent on that investment making a contribution to the host State's economic development, any such requirement, were it to be imposed, would be satisfied.

(ii) The BIT

302. Article 1(1) of the BIT defines an investment as “every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party that has such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.” Among others, such an asset may take the form of:

*(a) movable and immovable property as well as any related rights, such as servitudes, mortgages, liens and pledges;*

*(b) a company, or shares, parts or any other kind of participation in a company;*

*(c) claims to money or to any performance having an economic value, except claims to money arising solely out of commercial contracts for the sale of goods and services; ... [and]*

*(e) rights conferred pursuant to law, contract or decision of an authority such as concessions, licences, authorizations and permits.*

303. Article 1(2) defines “investor” to include “(b) a legal entity, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of the same Contracting Party.”

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<sup>269</sup> Claimant describes the Grand Hotel as a “crown jewel.” Cl. Rejoinder on Jurisd., para. 51.

304. Article 11 of the BIT contemplates the arbitration of disputes “between an investor of a Contracting Party and the other Contracting Party regarding an investment of the former made in the territory of the latter ... based on an alleged breach of obligations under [the BIT].”
305. It is well-established that an asset, within the meaning of a BIT, may consist of an intangible right, and that intangible rights are capable of being expropriated.<sup>270</sup> The BIT in this case identifies several different intangibles as assets: “a company, or shares, parts or any other kind of participation in a company;” “copyrights, industrial property rights ... know-how and goodwill;” and “rights conferred pursuant to law, contract or decision of an authority such as concessions, licences, authorizations and permits.”
306. Admittedly, intangibles as covered investments typically take the form of contracts and the rights they confer.<sup>271</sup> But, a claim need not be rooted in contract in order to be cognizable as an investment. As the language of BIT Article 1(1) itself shows, intangibles qualifying as assets take numerous forms. Nor are the intangibles identified in Article 1(1) themselves to be viewed as the only qualifying intangibles.<sup>272</sup> There is no reason why, in logic or practice, intangibles taking other forms cannot be covered investments. The intangibles listed in the BIT do not constitute a “closed set.” In sum, the Tribunal is not prepared to exclude the possibility that a claim of entitlement cognizable in investor-State arbitration can arise other than by contract or other than in the form of the specific intangibles enumerated in Article 1(1).
307. The question therefore is whether the particular intangible that Claimant asserts – namely, a claim of entitlement to ownership of shares – may constitute a covered investment.
308. Although the case law is sparse, the notion that non-contractual claims of entitlement may constitute investments is clearly supported in the literature. Rudolf Dolzer & Christoph

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<sup>270</sup> See, e.g., *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2.

<sup>271</sup> See, e.g., Exh. RL-14: *Pantechniki, S.A. Contractors & Engineers v. the Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009. For a collection of awards treating claims, mostly under contract, as investments, see M. Somarajah, *The International Law on Foreign Investment*, 308-313 (3d ed. 2012).

<sup>272</sup> Article 1(1) identified covered assets as “including” those enumerated.

Schreuer identify as common forms of investment, not only “rights conferred by contracts,” but also “rights granted by the general laws,”<sup>273</sup> and in the present case Mabco precisely bases its claim on its right to registration of shares under the law of Kosovo. According to Zachary Douglas, a claim to money can qualify as an investment provided that it “entail[s] a ‘transfer of resources into the economy of the host state by the claimant entailing the assumption of risk in expectation of a commercial return.’”<sup>274</sup> As already found, the investment claimed by Mabco satisfies these criteria: it entails a transfer of resources into the economy of Kosovo with the attendant risk to which Douglas refers. The Tribunal is accordingly not prepared to exclude fully the possibility that a claim of entitlement to ownership of shares under certain circumstances is cognizable as a qualifying investment.<sup>275</sup>

309. In fact, Article 1(1)(c) of the BIT identifies a specific category of intangibles into which the asset Claimant invokes in this case comfortably falls. Claimant is literally asserting a “claim[] to [a] performance having an economic value.” within the meaning of BIT Article 1(1)(c). It not only claims an entitlement to ownership; it claims a *performance*, viz. registration in its name of the shares it allegedly purchased. The Tribunal finds that this constitutes a *claim to a performance having an economic value*, under Article 1(1)(c). Significantly, the category of claims that Article 1(1)(c) specifically excludes from coverage is “claims to money arising solely out of *commercial contracts for the sale of goods and services*” (emphasis added). Mabco’s claim in this case is by no means reducible to a claim based solely on a mere “sale of goods and services.”
310. It is useful, in assessing Mabco’s claim of having made a qualifying investment, to compare the present case with a variation on it. Imagine that Claimant, under otherwise identical circumstances, *had* participated in the tender process, *had* made the winning bid and, let

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<sup>273</sup> Dolzer & Schreuer, *supra* note 264, p. 64.

<sup>274</sup> Zachary Douglas, *The International Law of Investment Claims* (CUP, 2009), p. 185, para. 388, quoting *PSEG v. Turkey*, Decision on Jurisdiction, 11 ICSID Reports 434 (4 June 2004) (Exh. CL-5). Douglas cites the Germany Model BIT which treats as a form of investment “claims to money which has been used to create an economic value or claims to any performance having an economic value.”

<sup>275</sup> It is also somewhat troubling that a claim alleging a failure to register purchased shares can be defeated on the ground that, precisely because the shares were unregistered, a claim of entitlement to their ownership cannot constitute an investment.

us say, *had* made payment in full for the shares. Imagine further that the KTA or PAK nevertheless refused to register the shares in Claimant's name. Under that hypothesis, just as in the present case, Claimant would not receive the shares and would not be officially recorded as their owner. If Claimant then initiated arbitration, it would best describe its asset precisely as *a claim of entitlement to ownership of the shares*, and this Tribunal would have little hesitation in treating that claim as a qualifying investment. The Tribunal does not see any warrant in treating the present case any differently.

311. In sum, the Tribunal concludes that, depending on the circumstances, a claim of entitlement to an asset is itself capable of constituting an investment under the BIT, provided that, as the Dissent rightly says (para. 18), it was "established or acquired." In the Tribunal's view, Mabco's claim of entitlement was both established and acquired.
312. At the same time, *a claim of entitlement*, such as that advanced by Claimant, does not of course in itself amount to *an entitlement*, any more than that an assertion of contractual rights amounts to actual contractual rights. Whether Claimant actually has that entitlement remains to be seen.

(iii) The Foreign Investment Law

313. Given the fact that both the 2005 and 2014 Foreign Investment Law have application in part to this case, the Tribunal examines them both.
314. Under Article 2(1) of the 2005 Foreign Investment Law, an "investment dispute" is "any dispute between a foreign investor and a public authority relating (i) to an investment in Kosovo made by such foreign investor." Article 2(1) specifies that an "investment dispute" includes, among other things, disputes relating to:

*c. the making or attempt to make an investment in Kosovo.*

315. An "investment" is defined in part under Article 2(1) the 2005 Foreign Investment Law as any asset that has "been contributed to a Kosovo business organization in return for an ownership interest in that business organization." Assets in turn are defined in part as:

*a. movable and immovable property, including rights in and to such property such as a mortgage, lien, pledge, lease or servitude;*

*b. intangible and intellectual property, including rights in and to such property, as well as goodwill, technical processes and know how;*

*c. cash, securities, commercial paper, guarantees, shares of stock or other types of ownership interests in a Kosovo or foreign business organization; bonds, debentures, other debt instruments;*

*d. claims or rights to money, goods, services, and performance under contract; [and]*

*e. concessions or licenses conferred by law, administrative action, or contract; ...*

316. In the Tribunal's view, Mabco's claim of entitlement in the case falls comfortably within Article 2(1) of the 2005 Foreign Investment Law. This enumeration establishes that, like the BIT, the Foreign Investment Law specifically contemplates intangibles as assets amenable to treatment as investments. Moreover, Article 2(1) specifically identifies, "claims ... to ... performance" as among the assets capable of constituting an investment. While Article 2(1) specifically refers to "claims ... to ... performance under contract," the Tribunal, for reasons set out above in connection with the BIT, is not prepared to exclude from coverage claims to performance on legal grounds other than contract *stricto sensu*.
317. The Tribunal refers back to its discussion, in connection with the BIT, of the support in the literature for the proposition that investments may take the form, not only of contract rights, but more generally of rights granted under national law,<sup>276</sup> and may entail "a 'transfer of resources into the economy of the host state by the claimant entailing the assumption of risk in expectation of a commercial return.'"<sup>277</sup> As earlier observed, the investment claimed by Mabco may fairly be characterized as a claim of right under law as well as a transfer of resources into the economy of Kosovo with the attendant risk to which Douglas refers. As

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<sup>276</sup> *Supra*, para. 308.

<sup>277</sup> *Supra*, para. 308.

noted, Article 2(1) also defines an “investment dispute” to include a dispute relating to “c. the making or *attempt* to make an investment in Kosovo” (emphasis added).

318. The Tribunal accordingly considers a claim of entitlement to ownership of shares to be cognizable as a qualifying investment, although once again that entitlement must eventually be established as a merits matter.

319. Much the same analysis applies to the definition of an investment under Article 2.1.4 of the 2014 Foreign Investment Law, which defines an “investment” to include, among other things:

*1.4.3. cash, securities, commercial paper, guarantees, shares of stock or other types of ownership interests in ... the Republic of Kosovo or foreign business organization; bonds, debentures, other debt instruments;*

*1.4.4. claims or rights to money, goods, services, and performance under contract...*

320. Article 2.1.4.4 repeats verbatim Article 2(1)(d) of the 2005 Law (“*claims or rights to money, goods, services, and performance under contract*”), which the Tribunal found to be capable of encompassing Mabco’s claim of entitlement to shares in this case.<sup>278</sup>

321. The Tribunal thus finds that, depending of course on the circumstances, a claim of entitlement to an asset is itself capable of constituting an investment. To borrow Zachary Douglas’ phrase, it “entail[s] a ‘transfer of resources into the economy of the host state by the claimant entailing the assumption of risk in expectation of a commercial return.’”

b. Has Claimant adduced sufficient evidence of its entitlement to ownership of the Grand Hotel shares for it to constitute a claim of entitlement worthy of protection under the BIT and/or Foreign Investment Law?

322. Assuming an asset in the form of a claim of entitlement can under some circumstances constitute an investment, as the Tribunal has found, the question then arises whether Claimant, under the circumstances of this case, has established such a *claim*. It bears

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<sup>278</sup> *Supra*, para. 317.



repeating that it is not necessary that Claimant at this stage establish that it actually has an *entitlement* to the Grand Hotel shares. That remains an open question. At the same time, it certainly cannot suffice at the jurisdictional stage, for purposes of demonstrating a claim of entitlement, merely to articulate such a claim. In the Tribunal's view, any such claim must be a colourable one, i.e., must be at the very least arguable. In the Tribunal's view, what may be demanded at this stage is what may be called a *prima facie* showing, by which is meant a showing sufficient to find the asserted claim sufficiently plausible. That apparently is Respondent's view as well.<sup>279</sup>

323. The Tribunal finds that, by this standard, Claimant has made the necessary showing. Claimant's argumentation is admittedly less than linear. Neither the KTA nor the PAK entered into any formal agreement with Claimant for its acquisition of the shares, and so Claimant's entitlement cannot be predicated on any agreement with Respondent or its agencies. Rather, in order to make a *prima facie* judgment on this score, the Tribunal in this case must piece together words and conduct – in a word, circumstances – taking place over a significant period of time, running between 2005/2006 and 2012 so as to produce a reasonable claim of entitlement.
324. Claimant relies heavily on the proposition that Mr. Shala, upon finding that UTC, the winning bidder, could not pay the required price, expressly invited Claimant to participate in UTC's acquisition of ownership of the shares.<sup>280</sup> Mr. Ejupi testified that Mr. Shala approached him twice in 2006 (once at the outset of the bidding process and later upon Mr. Berisha's failure to pay the share purchase price), specifically urging him to recruit Mr. Pacolli as co-purchaser of Grand Hotel shares.<sup>281</sup> Even so, the Tribunal has difficulty lending substantial credence to this assertion. Not only is there no documentary evidence in the record of any such agreement, which one would normally expect, but Mr. Pacolli's

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<sup>279</sup> Resp. oral argum., tr. 24:18-21:

*Setting out a prima facie case on the merits is one of the conditions to establishing the jurisdiction of an ICSID tribunal. In other words, the Claimant must formulate its claims in a plausible manner.*

<sup>280</sup> Ejupi testimony, tr. 108:19 – 108:21; Ejupi testimony, tr. 109:1 – 109:16; Ejupi witness stmt, para. 11.

<sup>281</sup> Ejupi witness stmt, Exh. CWS-4, paras. 10-11.

forceful assertion to this effect was met by Mr. Shala's equally forceful denial.<sup>282</sup> In an effort to arrive at a finding on this point, the Tribunal conducted a witness conferencing in which Messrs. Pacolli and Shala were jointly examined and directly confronted one another.<sup>283</sup> The Tribunal found that exercise to be inconclusive.<sup>284</sup> In any event, even if the issuance of such an invitation could be established, it alone would not suffice to create a colourable claim to entitlement to the Grand Hotel shares. A mere invitation to bid, whether via a tender offer or otherwise, signifies little more than the inviting party's willingness to contemplate the possibility of an acquisition by the invitee.

325. Moreover, the Purchase Agreement for privatization of the Grand Hotel was concluded between UTC and the KTA, not between Claimant and the KTA. Additionally, the Purchase Agreement required UTC to declare that it was "purchasing the Shares for its own use and not as an agent for a third party and [that], during the tender for this Company, the Buyer has not formed any informal or formal undisclosed agreements or consortiums between two or more bidders or with any undisclosed third party."<sup>285</sup>
326. These circumstances weaken Claimant's assertion of a claim of entitlement to registration of the shares. However, other circumstances of the case, viewed in their totality, point in an opposite direction.
327. Most basic is the fact of Claimant's transfer via NTSH and UTC to the KTA of the sum of Eur 4m for the hotel shares. UTC, which had won the bid for the Grand Hotel but lacked the resources necessary to pay the contract price, engaged Messrs. Pacolli and Ejupi of NTSH in discussions with a view to their participation in the acquisition of the shares. The parties reached an agreement at a meeting in Vienna in early April 2006 devoted to the

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<sup>282</sup> Shala testimony, tr. 66:11 – 66:18.

<sup>283</sup> Tr. 176-194.

<sup>284</sup> At the witness conferencing (tr. 177:6 – 117:12), the Tribunal heard the following:

*MR. FERRARO: My first question is: have you two ever met to discuss the opportunity of investment in the Grand Hotel in Pristina?*

...

*A. (Mr. Shala) No. No, sir.*

*A. (Mr. Pacolli) Yes, sir.*

<sup>285</sup> Exh. C-15: Purchase Agreement, Art. 5.1.3.

purchase of the Grand Hotel shares, specifically on the understanding that Claimant and NTSH would contribute Eur 4m and Eur 1m, respectively, for that purpose, that Mr. Berisha would manage the project for a period of two years, at which point Claimant and NTSH would become legal owners of the shares, and that Mr. Pacolli, would make all investments required to meet the owners' commitments under the Purchase Agreement.<sup>286</sup> Claimant gave KTA a guarantee of payment of the Eur 20.2m that the KTA required prior to signing the Purchase Agreement with UTC in August 2006,<sup>287</sup> and in January 2007 the AGU formalized that undertaking.<sup>288</sup>

328. Clearly, the KTA was not a party to the AGU and is not bound by it. However, the existence and terms of the AGU do adequately establish the purposes of the transfer of Eur 4m to the KTA (via UTC). Respondent calls attention to the fact, as discussed more fully below (para. 348, *infra*), that the Eur 4m transfer was made prior to the meeting in Vienna and conclusion of the AGU. But it is not unreasonable to suppose that that transfer was made in anticipation of a formal agreement among UTC, NTSH and Mabco to be made thereafter.
329. The question whether and to what extent this transfer in particular supports Mabco's claim of entitlement to share ownership in the Grand Hotel is discussed in greater detail in the following section. As will be seen there (paras. 362-370, *infra*), the Tribunal finds that the transfer was made by Mabco for purposes of acquiring the Grand Hotel shares.
330. There is no documentary evidence specifically establishing that, as Claimant maintains, the KTA or PAK was aware at an early point in time of the transfer of moneys by Claimant and the reasons for it,<sup>289</sup> and there are inconsistent assertions as to when the KTA or PAK learned of the AGU in particular.<sup>290</sup> Respondent maintains that the KTA and PAK were

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<sup>286</sup> Cl. Rejoinder on Jurisd., paras. 60, 67.

<sup>287</sup> Exh. C-66: Letter from Behgjet Pacolli to Raiffeisen Bank, 3 August 2006. See Cl. Rejoinder on Jurisd., paras. 45, 119-120, 199; Cl. oral argum., tr. 32:10-12.

<sup>288</sup> Exh. C-17: AGU; Behgjet Pacolli witness stmt, Exh. CWS-1, para. 10.

<sup>289</sup> Cl. oral argum., tr. 36:9–37:4, 42:4–42:12.

<sup>290</sup> Mr. Pacolli testified that the KTA had early knowledge of the AGU (Behgjet Pacolli witness stmt, Exh. CWS-1, para. 10; Behgjet Pacolli 2d witness stmt, Exh. CWS-3, para. 10).

unaware that Claimant had invested Eur 4m in the Grand Hotel prior to 2012,<sup>291</sup> and Mr. Lluka testified in support of that contention.<sup>292</sup> However, there are circumstances suggesting otherwise. First, when Claimant's first attempt to pay the EUR 4m failed, and NTSH was required to return the funds to Mabco, the letter from the Kosovo Central Bank (BPK) to Mabco reporting that its initial transfer of funds was unsuccessful was copied to the KTA.<sup>293</sup> As far as the Tribunal can tell, the KTA did not express any question or concern about the fact that the funds were being paid by a party other than the winning bidder, much less give any other indication that it thought the payment was irregular or ineffective.

331. Additionally, Claimant brought suit against UTC in the Municipal Court of Pristina in June 2007 and that court's judgment in Claimant's favour was the subject of appeal by UTC and ultimately reversed on 28 May 2010. (Notably, the appeals court did not make a ruling on the merits of Mabco's claim. Rather, it remanded the case to the Municipal Court for a determination of whether the Claimant or Mr. Pacolli had standing to sue. The Municipal Court never made that determination because the case had been overtaken by events.) It is improbable that the KTA was ignorant of that litigation or the identity of the parties to it.
332. It is not possible on the record to determine exactly when Claimant's purchase of the shares became known to the KTA or PAK. But the circumstances, taken together, suggest that the KTA and PAK likely had knowledge of the transfer by 2007 or 2008. According to the record, only in October 2011, when Selim Pacolli, upon hearing that the PAK was considering withdrawing the shares, contacted the PAK urging it not to do so, did the PAK deny that Claimant had any ownership interest in the shares.<sup>294</sup>
333. Over a period of several months early in 2012, years after receiving Claimant's Eur 4m contribution, the PAK had communications and held meetings with Mr. Pacolli, in which it advised him that once he produced certain specific documents, the shares would be

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<sup>291</sup> Resp. oral argum., tr. 49:7–49:11.

<sup>292</sup> Lluka witness stmt, paras. 10-12.

<sup>293</sup> See para. 331, *supra*.

<sup>294</sup> Exh. C-22: Letter of Mabco to PAK, 21 October 2011.

officially registered under Claimant's name.<sup>295</sup> It is uncontested that Mr. Pacolli provided all the requested documentation.<sup>296</sup>

334. Claimant did of course have a contractual relationship with UTC and, on that basis, a cause of action against UTC. Indeed that was the basis for Mr. Pacolli's litigation against UTC in the Kosovo courts.<sup>297</sup> On the other hand, it had no contractual relationship with the KTA or PAK, and no basis for asserting a contract claim against them. When Claimant did bring suit against the PAK, in the SCSC and later in the Constitutional Court, it did not argue that PAK had a contractual obligation to register the shares, but rather effectively an obligation in law. However, neither the existence of a contract claim against UTC nor the absence of a contract claim against either the KTA or the PAK negates the existence of a non-contractual claim against the PAK. Nor can the present dispute fairly be described as purely "private" relationship to which the KTA and PAK were mere bystanders, and therefore not cognizable under a BIT or foreign investment law. Although the agreement among UTC, NTSH and Claimant is central to the present dispute, no less central is Claimant's relationship with the public authorities of Kosovo, if only because only the KTA and thereafter the PAK had the public authority to take the actions that lie at the heart of this dispute, namely, authority to register shares that had been purchased and authority to withdraw shares in a company to which, through privatization, the State had transferred public property.
335. It is not accurate to portray this case as one in which Claimant merely "sought" or "attempted" to make an investment.<sup>298</sup> In the Tribunal's view, this is not an apt way of characterizing Claimant's position in this case. As will be developed more fully below, Claimant actually purchased the shares in question, the KTA became aware of that fact and

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<sup>295</sup> Exhs. C-24/C-38: Letter from the PAK to Selim Pacolli representing Mabco, 19 March 2012; Cl. Rejoinder on Jurisd., para. 6.

<sup>296</sup> See Exh. C-39: Performance Guarantee and Exh. R-32: Letter from UTC, Mabetex Project Engineering and NTSH to PAK, 28 March 2012.

<sup>297</sup> Exh. R-29: Judgment of the Municipal Court of Prishtina in proceeding between Pacolli and NTSH v. Berisha/UTC, 28 May 2009, reversed, Exh. R-31: Judgment of the District Court of Prishtina in proceeding between Pacolli and NTSH v. Berisha/UTC, 13 April 2010.

<sup>298</sup> According to Counsel for Respondent, "Mr. Pacolli, as an individual, *tried to obtain shares* in the company Grand Hotel LLC. But this does not make the Claimant ... an investor in this company" (emphasis added). Tr. 19:22-25.

eventually stated on several occasions stated that only certain documents, which Claimant promptly supplied, were required in order for the shares to be registered in Claimant's name. (According to the allegations, the only thing that stood between that undertaking on the PAK's part and formal registration of the shares was Claimant's refusal, on several occasions, to pay a bribe.) Claimant did a great deal more than "attempt" to make an investment.

336. Nor does the Tribunal's finding of an investment in the present case by any means signify that every trans-border capital movement suffices to qualify as an investment. The Tribunal agrees with Counsel for Respondent in oral argument that "an investment is not just a transfer of money,"<sup>299</sup> but rather "an asset acquired by the investor as a result of [a] contribution."<sup>300</sup> However, this case cannot be reduced to a mere "transfer of money" or characterized as "any claim to obtain whatever has been contractually stipulated," as the Dissent suggests (paras. 20, 29). This was no "garden-variety" contract, much less the paradigmatic "one-off" sale transaction that all would agree cannot qualify as an investment.<sup>301</sup> The relationship between Claimant, on the one hand, and KTA and PAK, on the other, represented vastly more than that. What resulted from the relationships in this case was nothing less than a joint venture entailing all the characteristics of an investment: a contribution of capital in contemplation of gain or profit, an assumption of risk, a significant duration and even, if necessary, a contribution to the economic development of Kosovo. The Tribunal thus cannot agree with the Dissent's suggestion (para. 41) that finding as we do "render[s] the distinction between a contract obligation and an investment largely meaningless."

337. In sum, the Tribunal finds that, solely for the purpose of establishing jurisdiction on a *prima facie* basis, and without prejudice to any decision on the merits, there is a colourable basis for Mabco's contention that it had a claim of entitlement against Respondent for registration of the shares in its name and for reversal of the order of withdrawal of the

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<sup>299</sup> Resp. oral argum., 19:4.

<sup>300</sup> Resp. oral argum., 19:5-6.

<sup>301</sup> Resp. Mem. on Jurisd., para. 125.

shares, and that claim, under the circumstances of this case, may be regarded as an investment.

c. Assuming a claim of entitlement in this case is sufficiently established, is it a claim that can be asserted by Claimant?

338. In the preceding discussion, the Tribunal has, for simplicity, repeatedly referred to a claim of entitlement to shares on Claimant's part. But of course Respondent forcefully argues (paras. 293-338, *supra*) that it is not Claimant that engaged with the KTA and PAK, on the one hand, and with UTC and NTSH, on the other, with a view to ownership of the Grand Hotel shares, but rather Mr. Pacolli in his individual capacity – with the result that any investment that could possibly have been made would have been made by Mr. Pacolli personally and not by Claimant.<sup>302</sup>
339. The Tribunal of course agrees that in order to establish jurisdiction, it must find that, in taking his actions, Mr. Pacolli acted on behalf of Claimant. On this, the record is spotty. In the great majority of the documents and communications relative to Mr. Pacolli's engagement either with the KTA or PAK, on the one hand, and with Messrs. Berisha and Ejupi, on the other, Mr. Pacolli signed and otherwise referred to himself in his own name. That regularity has naturally created some doubt in the Tribunal's thinking that he was acting on these occasions in the name of Mabco.
340. That said, the Tribunal cannot ultimately conclude that, when Mr. Pacolli took the steps he did, he did so on his own account. First, it is not the case that Mr. Pacolli invariably, over the relevant period of time, wrote no correspondence and entered into no agreement in the name of Claimant. In the lawsuit brought against UTC in 5 June 2007,<sup>303</sup> the plaintiff was identified as "Behgjet Pacolli from Prishtina, president of c.e.o MABETEX GROUP." Another example is the letter of guarantee – dated 3 August 2008 – sent by Mr. Pacolli to UTC's bank (which expressly refers to the Grand Hotel acquisition and mentions Mabco,

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<sup>302</sup> Resp. Reply on Jurisd., para. 274; Resp. oral argum., tr. 20:20–20:23; Resp. post-hearing br., para. 16.

<sup>303</sup> Exh. R-30: Judgment of the Municipal Court of Prishtina in proceeding between Pacolli and NTSH v. Berisha/UTC.

among other companies of Mabetex group).<sup>304</sup> The 28 March 2012 letter to PAK<sup>305</sup> was signed by Mr. Selim Pacolli on behalf of Mabetex. Further, when Selim Pacolli signed the Annex Agreement, dated 28 March 2012,<sup>306</sup> he identified himself as “representing Mr. Behxhet Pacolli, acting on behalf of the company ‘MABETEX’ and in his personal name.” For reasons given below (paras. 382-383, *infra*), the Tribunal does not, as Respondent urges,<sup>307</sup> find the reference to Mabetex, rather than Mabco, disqualifying. Mabetex was nothing more than a group of separate companies, among them Mabco, and among those companies, Mabco was apparently the one that would have been charged with a project such as the project in the present case.<sup>308</sup> Thus, for all practical purposes, any reference to Mabetex in the context of the present dispute signified a reference to Mabco. Indeed, if, as Respondent suggests, Mr. Pacolli was at all times acting solely for himself, there would be no reason to reference Mabetex at all.<sup>309</sup>

341. The Tribunal agrees that only starting in June 2012, after the BIT had come into force, did the correspondence plainly come in Mabco’s name as such. Notably, in the 20 June 2012 letter to PAK,<sup>310</sup> Mr. Pacolli is referred to as “a legal representative of MABETEX GROUP — working unit MABCO CONSTRUCTION S.A. headquartered in Lugano, Switzerland.” Respondent suggests, and the Dissent agrees (para. 52), that this was done in order to make what was Mr. Pacolli’s investment appear to be Mabco’s investment so as to take advantage of the BIT which had only just entered into force. The Tribunal agrees that that is no

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<sup>304</sup> Exh. C-66 states that the cost of the project would be covered solely by Mr. Pacolli and his group of companies, and that “[t]here are no other shareholders and especially not [UTC] involved in the cost of this project.” (Letter from Behgjet Pacolli to Raiffeisen Bank, 3 August 2006)

<sup>305</sup> Exh. R-32: Letter from UTC, Mabetex Project Engineering and NTSH to PAK dated 28 March 2012, 28 March 2012.

<sup>306</sup> Exh. C-20: Annex Agreement, 28 March 2012.

<sup>307</sup> Resp. Mem. on Jurisd., para. 100.

<sup>308</sup> Mabco’s Chief Financial Officer, Lucina Maesani-Gaiatto, testified that “all the prestigious construction projects were conducted since 2000 by Mabco.” Maesani-Gaiatto witness stmt, para. 8.

<sup>309</sup> The Tribunal also notes that, with limited exceptions, Messrs. Berisha, Ejupi and Pacolli also used their own names. The Annex Agreement, dated 28 March 2012, was signed by Mr. Berisha as representative of UTC, Ms. Ejupi as representative of NTSH and Mr. Selim Pacolli as representative of Mr. Behgjet Pacolli and Mabetex. Also, the AGU refers to UTC as the “[l]egal purchaser of ‘Grand’..., with the seat in Hani I Elezit, with the sole owner Mr. Zekqif Berisha.” Exh. C-17: AGU, Sec. II. There is no suggestion that they too made their investments on their own account.

<sup>310</sup> Exh. C-40: Letter from Mabco to PAK, 20 June 2012.



coincidence. But it is not a suspicious one. The 20 June communication appears to be the very first correspondence with the KTA or PAK that came from counsel for Claimant, rather than Mr. Pacolli individually. According to Claimant, Mr. Pacolli engaged counsel at that point in time because the PAK had then just announced its decision to execute withdrawal of the shares.<sup>311</sup> It should come as no surprise that counsel appreciated, far better than Mr. Pacolli in the past had, that in order for the action to be maintained, the claim had to be presented in Claimant's name. Therefore, in the Tribunal's view, it does not follow from the appearance of a reference to Mabco on 20 June 2012 that the claim was not Mabco's claim before that date and that it became Mabco's claim only then. The Tribunal cannot conclude that, in that correspondence, Mr. Pacolli and counsel were suddenly "converting" a claim belonging at all times to Mr. Pacolli into a claim belonging to Mabco.

342. The only testimony presented on whether Mr. Pacolli was acting on his own or in a representative capacity, supports the Tribunal's conclusion. Mr. Ejupi testified more generally, but unequivocally, that the consistent practice in Kosovo was precisely for individuals to use their own names in representing their companies, particularly individuals, like Mr. Pacolli, of especially high prominence.<sup>312</sup> Mr. Ejupi was not cross-examined on this matter, nor did Respondent adduce any evidence challenging Mr. Ejupi's account of the practice in Kosovo. Similarly, Mabco's Chief Financial Officer, Lucina Maesani-Gaiatto, testified that, as an objective matter, business was conducted in that way in Kosovo, as a result of which, when Mr. Pacolli negotiated and signed agreements, he was understood as doing so on behalf of the relevant entity within the Mabetex group, which in the construction and engineering sector would have been Mabco.<sup>313</sup> Again, though it would have been possible, through witness testimony, to challenge Ms. Maesani-Gaiatto's account of business practices in Kosovo, no effort to challenge her testimony was made. While the Dissent disagrees (paras. 43, 47), the Tribunal finds that, if in fact the practice in Kosovo was for businesspersons to use their own name when speaking for the

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<sup>311</sup> Cl. Rejoinder on Jurisd., para. 7.

<sup>312</sup> Ejupi witness stmt, Exh. CWS-4, para. 12.

<sup>313</sup> Maesani-Gaiatto witness stmt, Exh. CWS-5, paras. 8-10.

business entities they own and control – and all the testimony in this case supports that understanding – that practice cannot and should not be ignored. This is not altered by the fact that Mr. Pacolli was “experienced.”

343. But there are more direct indications that, in the underlying transactions, Mr. Pacolli was representing Mabco and not himself as an individual. Of none of these is there any dispute. First, the Eur 4m transfer was made out of Mabco’s own bank account.<sup>314</sup> Second, it was reflected on Mabco’s balance sheets and confirmed by Mabco’s external auditor.<sup>315</sup> Third, the decision to invest in Kosovo a significant amount of monies was brought before and voted upon by Mabco’s shareholders, which adopted a resolution to that effect.<sup>316</sup>
344. The Tribunal concludes that, notwithstanding Mr. Pacolli’s having very often used his own name rather than Mabco’s, the investment was in fact Mabco’s.

**(2) CLAIMANT’S PAYMENT OF EUR 4M DOES NOT CONSTITUTE EVIDENCE OF AN INVESTMENT ON CLAIMANT’S PART**

**(a) Respondent’s Position**

345. Respondent contends that no link has been established between Claimant’s payment of EUR 4m and its alleged investment in the Grand Hotel. It finds no reference, in connection with the transfer, to the Grand Hotel privatization. Additionally, in the domestic court proceeding referred to earlier (para. 218, *supra*), Mr. Pacolli mentions that he made the payment but makes no mention of Claimant in that connection.<sup>317</sup>
346. In that proceeding, evidence was introduced of a transfer dated 27 April 2006 of EUR 4m from Kosovo Airlines, not Claimant, to NTSB in connection with the privatization process, for which no explanation was given. Respondent also asks why no evidence of a 28 April

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<sup>314</sup> Exh. C-14: Wire transfer receipt of EUR 4’000’000, 29 April 2006; Exh. C-61: Mabco’s account statements dated 31 December 2006.

<sup>315</sup> Exh. C-60: Confirmation by Consolidated dated 11 September 2019; Exh. C-61: Mabco’s account statements dated 31 December 2006.

<sup>316</sup> Behgjet Pacolli testimony, tr. 175:11-21.

<sup>317</sup> Resp. Mem. on Jurisd. paras. 49, 75-81, 98.

2006 transfer was introduced in the Kosovo court actions.<sup>318</sup> Respondent concludes that payments to the KTA for the shares were made only by UTC and NTSH, and not by Claimant. Respondent also speculates that the EUR 4m transfer may have been made in connection with a transaction having nothing to do with the Grand Hotel. It notes that, at the time of the Grand Hotel privatization, the KTA was conducting a tender process for privatization of Hotel Iliria, in which Behgjet and Selim Pacolli participated, as did Ms. Ejupi on behalf of NTSH.<sup>319</sup>

347. Respondent also raises a question of timing. The EUR 4m payment was made in April 2006, but the AGU was only concluded in January 2007, i.e. 8 months later. Indeed, the Purchase Agreement between UTC and the KTA, dated 10 August 2006, was not yet even concluded.<sup>320</sup> Thus, the payment could not have had investment in the Grand Hotel as its object. Moreover, the deadline set by the KTA for payment of the purchase price by UTC and the date when that payment was made was 24 April 2006, a date that had already passed by the time of the alleged 28 April 2006 transfer.<sup>321</sup> Furthermore, in a letter of 29 February 2012,<sup>322</sup> Mr. Pacolli stated that he met Mr. Berisha for the first time in Vienna in the summer of 2006. That means that investment in the Grand Hotel cannot have been the purpose of the 28 April 2006 transfer of funds on which Claimant relies as evidencing its investment.<sup>323</sup>
348. Respondent observes a number of other peculiarities surrounding the transfer.<sup>324</sup> Thus, although Mr. Pacolli purports to have transferred EUR 4m in contribution to the purchase price of the shares, the actual transfer was not in that amount, but rather in the amount of

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<sup>318</sup> Resp. Reply on Jurisd., paras. 25-28.

<sup>319</sup> Resp. Reply on Jurisd. paras. 270-272.

<sup>320</sup> Resp. Mem. on Jurisd., paras. 95-97. Respondent regards it as remarkable that Mr. Pacolli would allow so many months to elapse between payment and the agreement in connection with which it was made. Resp. Reply on Jurisd., para. 267.

<sup>321</sup> Resp. Reply on Jurisd., paras. 21-22.

<sup>322</sup> Exh. R-57: Letter from Mr. Pacolli to the PAK Board of Directors, 29 February 2012.

<sup>323</sup> Resp. Reply on Jurisd., para. 16.

<sup>324</sup> Resp. Reply on Jurisd., paras. 12 *et seq.*

EUR 5,014,876.00, in two instalments of EUR 4,011,676.00<sup>325</sup> and EUR 1,003,200.00.<sup>326</sup> The latter figures appear in various letters by Selim Pacolli,<sup>327</sup> which, Respondent points out, refer to the privatization of the Grand Hotel but not to a 28 April 2006 transfer. More particularly, the transfers of 4,011,676.00 and EUR 1,003,200.00 are shown as having been made to UTC by NTSH, not by Claimant. The alleged transfer of 28 April 2006 is unmentioned either in Behgjet Pacolli's 29 February 2012 letter or in the letters from Selim Pacolli.

349. In short, Respondent's position is that Claimant made no investment in the Grand Hotel, whether for purposes of the ICSID Convention, the BIT or the Foreign Investment Law. Fundamentally, Claimant made no capital contribution, as required to constitute an investment, under all three instruments. Having made no capital contribution, Claimant neither incurred any risk, nor made an investment of the requisite duration, nor generated a profit or return, nor contributed to Kosovo's economic development.<sup>328</sup> Thus, the requirements for an investment under the ICSID Convention were unmet.

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<sup>325</sup> Exh. R-23: Transfer of EUR 4,011,676.00 from NTSH to UTC, 21 April 2006.

<sup>326</sup> Exh. R-24: Transfer of EUR 1,003,200.00 from NTSH to UTC, 4 August 2006.

<sup>327</sup> Exh. C-22: Letter of Mabco to PAK, 21 October 2011; Exh. R-21: Letter from Mr. Selim Pacolli to Mr. Naser Osmani, 16 February 2012; Exh. R-22: Letter from Mr. Selim Pacolli to Board of Directors of the PAK, 24 February 2012; Exh. R-46: Letter from Mr. Selim Pacolli to Mr. Berisha/UTC copying PAK, 24 February 2012.

<sup>328</sup> Resp. Reply on Jurisd., paras. 281-293.

(b) Claimant's Position

350. Claimant disagrees. It maintains that the factual link between Claimant's payment of EUR 4m and its agreement to invest in the Grand Hotel is "evident."<sup>329</sup> At the same time, Respondent's various representations and doubts concerning the transfer of funds are baseless. It is untrue, according to Claimant, that UTC transferred the purchase price to the KTA on the due date of 24 April 2006 and that by then the KTA had received all amounts due. In truth, by 24 April, only part of the purchase price had been paid. The KTA received payment in full only on 2 May 2006,<sup>330</sup>
351. Claimant explains the chronology more specifically as follows.
352. The Tender Rules required UTC, as winning bidder, to pay the purchase price to the designated bank account within a very short period, i.e., 20 days after being notified that it had won the bid.<sup>331</sup> Having agreed with UTC and NTSH to co-invest, and knowing that payment in full was due on 24 April 2006, Claimant paid its agreed upon contribution of EUR 4m prior to that date, viz. on 20 April 2006. Claimant's CFO, Lucina Maesani-Gaiatto, testified that, in order to do so, Claimant asked its affiliate, Interfin, which owed payment to Claimant on a loan in the amount of EUR 6,997,500.00 on an unrelated matter, to make the EUR 4m payment to NTSH on its behalf.<sup>332</sup> This Interfin did the following day.<sup>333</sup> NTSH then transferred the sum of EUR 4,011,676.00 by wire to UTC. The wire contained the following notation: "PAY ACCORDING TO CONTR. DT. 18.04.06 FOR PRIVATIZATION ACCORDING TO REFERENCE P-78."<sup>334</sup> Claimant notes that "P-78" was a specific reference to the Grand Hotel share transactions. Again, on the same day, UTC then ordered payment of a total sum of EUR 7,661,250 to the KTA (that sum

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<sup>329</sup> Cl. Counter-Mem. on Jurisd., para. 117.

<sup>330</sup> Cl. Rejoinder, paras. 78-107.

<sup>331</sup> Exh. R-14: Tender Rules, Sec. 11.1.

<sup>332</sup> Maesani-Gaiatto witness stmt, Exh. CWS-5, paras. 14-15.

<sup>333</sup> Cl. Rejoinder on Jurisd., para. 81, citing Exh. C-52: Debit advice for transfer of EUR 6'997'500 from Mabco to Interfin dated 10 March 2006; Maesani-Gaiatto witness stmt, Exh. CWS-5, para. 14; Behgjet Pacolli 2d witness stmt, Exh. CWS-3, para. 13.

<sup>334</sup> Cl. Rejoinder on Jurisd., para. 82, citing Exh. R-23: Transfer of EUR 4,011,676.00 from NTSH to UTC, 21 April 2006.

reflecting an advance deposit of EUR 500,000 already made).<sup>335</sup> On 24 April, the KTA should have received payment in full. However, what the KTA received on 24 April was not actually a transfer of that sum of money, but only a notice of a transfer order,”<sup>336</sup> and the amount of money that the KTA actually received, as a result of the transfer, appears to have been the sums of EUR 3,661,000 and EUR 196,656, as shown by the KTA’s statement for the Grand Hotel account for the relevant period.<sup>337</sup>

353. Claimant explains why the KTA received on 24 April a notice of transfer order in an amount of EUR 7,661,250, but actually received only the sum of EUR 3,661,000.<sup>338</sup> What happened was that the Banking and Payment Authority had rejected the payment of EUR 4m that had been made by Interfin on behalf of Claimant. In a letter to Claimant of 25 April 2006, copied to the KTA, the Authority attributed the rejection to the fact that Interfin did not hold a license to perform financial activities in Kosovo.<sup>339</sup> As a result, the EUR 4,011,676.00 was returned by NTSH to Interfin on 26 April 2006, and on the same day by Interfin to Claimant.<sup>340</sup>
354. On 27 April 2006, Claimant then reordered the transfer, this time from its own account, but in this second attempt mistakenly had it sent to UTC not via NTSH, but via an NTSH affiliate, viz. Kosova Airlines.<sup>341</sup> Upon receiving the funds back on 28 April 2006, Claimant on the same day transferred them directly to NTSH,<sup>342</sup> as reflected in the Swiss

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<sup>335</sup> Cl. Rejoinder on Jurisd., para. 83. There are slight discrepancies in the Claimant’s pleadings as to the exact sum, shown in Claimant’s rejoinder variously as EUR 7,661,259 (para. 79), EUR 7,611,000 (para. 83) and EUR 7,166,000 (para. 84).

<sup>336</sup> Cl. Rejoinder on Jurisd., paras. 84-86, citing Exh. R-27: Transfer of EUR 7,661,000.00 from UTC to PAK, 24 April 2006.

<sup>337</sup> Exh. C-53: Statement of accounts for Grand Hotel of the BPK dated 13 July 2006. The account number 1000500199001154 refers to the Grand Hotel account.

<sup>338</sup> Mr. Pacolli provides a detailed account of the transfer in his Second Witness Statement, Exh. CWS-3, para. 13.

<sup>339</sup> Exh. C-54: Letter from the Banking Payments Authority to Mabco, cc: Selim Pacolli and the KTA, 25 April 2006; Behgjet Pacolli 2d witness stmt, Exh. CWS-3, para. 13.

<sup>340</sup> Exh. C-56: Payment order Mabco to Kosova Airlines in the amount of EUR 4’000’000 dated 27 April 2006; Maesani-Gaiatto witness stmt, Exh. CWS-5, para. 16.

<sup>341</sup> Exh. C-58: Payment order Mabco to Kosova Airlines in the amount of EUR 4’000’000 dated 27 April 2006; Maesani-Gaiatto witness stmt, Exh. CWS-5, para. 17.

<sup>342</sup> Exh. C-14: Wire transfer receipt of EUR 4’000’000, 29 April 2006; Maesani-Gaiatto witness stmt, Exh. CWS-5, paras. 17-18.

Interbank Clearing (SIC) payment system<sup>343</sup> and confirmed by Claimant's account statements,<sup>344</sup> as well as by Claimant's external auditor.<sup>345</sup> Then NTSH in turn forwarded the funds to UTC, a transaction confirmed by NTSH's account statement.<sup>346</sup> Finally, on 29 April 2006, UTC transferred the sum of EUR 4,011,000 to the KTA's Grand Hotel bank account.<sup>347</sup> Due to an intervening bank holiday and weekend, the credit only appeared in that account on 2 May 2006. Internal KTA communications confirm that the additional EUR 4,011,000 was indeed received and credited on 2 May 2006.<sup>348</sup> According to Claimant, Mr. Berisha confirmed this entire chain of events by letter dated 19 June 2006.<sup>349</sup>

355. According to Claimant, Respondent thus misrepresented this chronology, a chronology that clearly establishes Claimant's payment of EUR 4,011,000 as part of the Grand Hotel purchase price. More specifically, at the time Claimant's payment was made, the full purchase price had not been fully paid. It only became fully paid when Claimant's payment appeared in the KTA's Grand Hotel bank account on 2 May 2006.
356. The KTA could not have failed to know that Claimant was participating in the purchase of shares so as to enable UTC to fulfill its obligations as successful bidder under the Purchase Agreement. First, when the bank rejected the transfer of moneys made through Interfin, it so stated in a letter to Mr. Pacolli, copied to Selim Pacolli and the KTA.<sup>350</sup> Also the EUR 4m was thereafter, on 2 May 2006, credited to the KTA's own account.<sup>351</sup> The chronology is also fully consistent with the AGU, the agreement by which Claimant

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<sup>343</sup> Exh. C-59: SIC Payment dated 28 April 2006.

<sup>344</sup> Exh. C-61: Mabco's account statements dated 31 December 2006.

<sup>345</sup> Exh. C-60: Confirmation by Consolida dated 11 September 2019; Maesani-Gaiatto witness stmt, Exh. CWS-5, para. 19.

<sup>346</sup> Exh. C-62: NTSH Eurokoha's Account Statement dated 28 April 2006; Ejupi witness stmt, Exh. CWS-4, para. 18.

<sup>347</sup> Exh. C-53: Statement of accounts for Grand Hotel of the BPK dated 13 July 2006. The notation was "Payment details: KTA9TENDER-No.08B-Privatization".

<sup>348</sup> Exh. C-64: Email from Klara Boskhi to Arten Bajrush; Kirk Adams, 27 April 2006; Exh. C-65: Email from Klara Bokshi to Arten Bajrush; Kirk Adams, 2 May 2006.

<sup>349</sup> Exh. R-28: Letter from UTC to PAK, 19 June 2006.

<sup>350</sup> Exh. C-54: Letter from the Banking Payments Authority to Mabco, cc: Selim Pacolli and the KTA, 25 April 2006; Cl. oral argum., tr. 41:10–41:18.

<sup>351</sup> Cl. oral argum., tr. 31:3–32:4, 35:18–36:8.

formalized its undertaking to make the necessary investment and comply with the obligations under the Commitment Agreement.

357. As for the source of the EUR 4m, Mr. Pacolli testified that though he arranged the payment, the funds, as shown by Claimant's balance sheets and bank account, came from Claimant's account.<sup>352</sup> Further, the transaction had to be, and was, approved by resolution of the Claimant's Board of Directors.<sup>353</sup>
358. Also according to Claimant, in early August 2006 and days before the Purchase Agreement was signed, Mr. Pacolli, on behalf of his group of companies, committed by letter to UTC's bank to guarantee the investments in the Grand Hotel in the amount of EUR 20,2m that was required under the Commitment Agreement,<sup>354</sup> stating that "[t]he required investment and operating costs concerning Grand Hotel New Co located in Pristina will be provided by me personally and the group of my companies ... as listed."<sup>355</sup> The guarantee appears to have been actually provided on 21 March 2012.<sup>356</sup>
359. Claimant calls attention to the negotiations that took place between Claimant and the PAK in the period of January through March 2012.<sup>357</sup> The correspondence surrounding those discussions demonstrates that the PAK was quite aware that Claimant and NTSH had paid part of the purchase price.
360. In his testimony, Mr. Ejupi describes as "absurd" Respondent's suggestion that the payment made by Claimant to NTSH was for any purpose other than purchase of the Grand

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<sup>352</sup> Behgjet Pacolli testimony, tr. 129:10–129:16, 143:1–143:7, 156:8–156:11.

<sup>353</sup> Behgjet Pacolli testimony, tr. 129:20–129:24.

<sup>354</sup> Cl. oral argum., tr. 36:20–36:22; Cl. post-hearing br., para. 111, citing Exh. C-66: Letter from Behgjet Pacolli to Raiffeisen Bank, 3 August 2006. Elsewhere, Claimant asserts that the assurance was given to the KTA itself, rather than UTC's bank. Cl. post-hearing br., para. 111, citing Exh. C-66: Letter from Behgjet Pacolli to Raiffeisen Bank, 3 August 2006.

<sup>355</sup> Exh. C-66: Letter from Behgjet Pacolli to Raiffeisen Bank, 3 August 2006; Exh. R-1: Commitment Agreement; Cl. post-hearing br., para. 16. Claimant also cites Exhibit C-55 (Fax from BPK to Banka Ekonomika dated 26 April 2006) for the proposition that it agreed to make the investments required under the Commitment Agreement. Cl. post-hearing br., para. 71.

<sup>356</sup> Exh. C-39: Performance Guarantee.

<sup>357</sup> Cl. Counter-Mem. on Jurisdiction, paras. 55 *et seq.*



Hotel shares.<sup>358</sup> He affirms that the payment was unquestionably made for that purpose, and, in doing so, confirms Mr. Pacolli's account of the difficulties encountered in the process of making the payment, as recounted in paragraphs 353-355, *supra*.<sup>359</sup>

(c) The Tribunal's Analysis and Findings

361. In respect of the 2006 Eur 4m transfer, Respondent's position is three-fold. First, though there is no dispute that the Eur 4m payment was made by Mabco, there is insufficient evidence that it was made for purposes of acquiring the Grand Hotel shares. Second, the sequence of events casts serious doubt on the transfer of funds having the purpose that Claimant attributes to it. Third, the process of payment itself was irregular.

a. Is the Eur 4m payment attributable to the purchase of Grand Hotel shares?

362. Respondent casts doubt on the notion that the Eur 4m transfer was made for the purpose of acquiring the Grand Hotel shares. Although the evidence of that could certainly have been clearer, the Tribunal does not share Respondent's doubts. Ms. Maesani-Gaiatto testified without contradiction that when the BPK rejected Mabco's initial transfer of funds to NTSH, its explanatory letter to Mabco specified Mabco as the source of the funds, and that letter was copied to the KTA.<sup>360</sup> Moreover, the onward transfer from NTSH to UTC bore the notation "PAY ACCORDING TO CONTR. DT. 18.04.06 FOR PRIVATIZATION ACCORDING TO REFERENCE P-78."<sup>361</sup> It is uncontested that "P-78" was a specific reference to the Grand Hotel share transactions. (The record in the case does not appear to contain an exhibit of the onward transfer from UTC to KTA.) This evidence cannot be characterized, as the Dissent suggests (para. 41), as "circumstantial."

363. Nor is there evidence to suggest that those moneys were thereafter transferred elsewhere.

364. These are good indications of the purpose for which the transfer was made, and Respondent offers no serious alternative explanation for it. The closest it comes to doing so is to raise

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<sup>358</sup> Ejupi witness stmt, Exh. CWS-4, para. 18.

<sup>359</sup> Ejupi witness stmt, Exh. CWS-4, para. 18.

<sup>360</sup> Maesani-Gaiatto witness stmt, Exh. CWS-5, para. 16.

<sup>361</sup> Exh. R-23: Transfer of EUR 4,011,676.00 from NTSH to UTC, 21 April 2006; Cl. Rejoinder on Jurisd., para. 82.

the possibility that the funds were transferred for the purpose of acquiring shares in a different hotel, the Hotel Iliria. But this, by Respondent's own admission, is without any documentation, and represents sheer conjecture.

b. Is the chronology consistent with payment for purchase of the shares?

365. Second, Respondent regards the chronology of events as inconsistent with the notion that Mabco made its payment for the purported purposes. However, the Tribunal cannot infer from the fact that the Eur 4m payment preceded conclusion of the AGU by 8 months that the payment had nothing to do with acquisition of the Grand Hotel shares. It is not inconceivable that Mabco would make the payment before arrangements among UTC, NTSB and Mabco became formalized, as long as those arrangements were in fact in place. Nor is it problematic that the payment also preceded conclusion of the Purchase Agreement between UTC and the KTA. Once the Purchase Agreement was formally concluded, UTC was immediately required to pay the purchase price into the KTA's designated escrow account. It is not remarkable that Mabco would seek to ensure that UTC immediately had the requisite funds for the purchase.
366. Respondent observes that, in a letter dated 29 February 2012, Mr. Pacolli reported meeting Mr. Berisha for the first time in Vienna in the summer of 2006,<sup>362</sup> the suggestion being that the April 2006 transfer could therefore have had nothing to do with purchase of the Grand Hotel shares. The sequence of events is somewhat counter-intuitive. However, the Tribunal notes Mr. Ejupi's testimony that, prior to the meeting in Vienna, he (allegedly at Mr. Shala's request) engaged in conversations with Mr. Pacolli about the prospect, at the KTA's suggestion, of participating with Mr. Ejupi in UTC's purchase of the Grand Hotel. The possibility cannot be excluded that, on the strength of those conversations, Mr. Pacolli made his contribution prior to actually meeting Mr. Berisha. This would be consistent with the fact that, when Mabco made the Eur 4m transfer, it made that transfer in the first instance to Mr. Ejupi's company, NTSB, with which it was cooperating, rather than to UTC directly.<sup>363</sup>

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<sup>362</sup> Resp. Reply on Jurisd., para. 16.

<sup>363</sup> Exh. C-14: Wire transfer receipt of EUR 4'000'000, 29 April 2006.

367. Based on the positive evidence that Mabco made the transfer of funds in connection with the Grand Hotel acquisition, the Tribunal cannot conclude otherwise.

c. Is the payment process consistent with purchase of the shares?

368. The apparent irregularities in connection with the actual payment of the funds are considerable, but they were effectively explained by Claimant's witness, Ms. Maesani-Gaiatto.<sup>364</sup> The need for explanation was precipitated by Respondent's assertion that UTC's deadline for payment of the purchase price was 24 April 2006, but the transfer was actually made on 28 April 2006. Ms. Maesani-Gaiatto took the Tribunal through the precise chronology of the payment, explaining the reasons for the delay in receipt of the funds to the bank account that the KTA maintained at the BPK's letter to Mabco of 25 April 2006 rejecting the initial transfer of funds and requiring NTSH to return the funds to Mabco was copied to the KTA.<sup>365</sup> The transfer that was eventually successful was made on 28 April 2006 and through successive transfers eventually credited to the KTA on 2 May 2006, specifically referencing purchase of the Grand Hotel shares.<sup>366</sup> While the story, detailed above (paras. 353-355, *supra*), is indeed a convoluted one, and suggests a degree of ineptitude on Claimant's part, it adequately accounts for the delay in receipt of the monies.

369. In sum, the Tribunal concludes that the Eur 4m represented Mabco's participation, alongside UTC and NTSH, in acquisition of the Grand Hotel shares.

### **(3) CLAIMANT DID NOT BECOME AN OWNER OF SHARES BY VIRTUE OF THE AGU**

#### **(a) Respondent's Position**

370. According to Respondent, Claimant acquired no rights in the Grand Hotel as a result of the AGU because Claimant was neither a party to it nor its beneficiary. The AGU was entered into by Messrs. Pacolli, Berisha and Ejupi in their personal capacities.<sup>367</sup> Although Mr.

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<sup>364</sup> Maesni-Gaiatto witness stmt, Exh. CWS-5, paras. 13-18.

<sup>365</sup> Exh. C-54: Letter from the Banking Payments Authority to Mabco, cc: Selim Pacolli and the KTA, 25 April 2006.

<sup>366</sup> Exh. C-63: Payment Order in the amount of EUR 4'011'000 from UTC to the KTA dated April 29, 2006. The payment order issued to the KTA was captioned "Privatization NewCo Grand Hotel LLC." See also Exh. C-53: Statement of accounts for Grand Hotel of the BPK dated 13 July 2006.

<sup>367</sup> Resp. Mem. on Jurisd., para. 81.

Pacolli was not only owner, but also CEO and authorized representative of the Mabetex Group, he was not acting in connection with the AGU in the capacity of agent or representative of Claimant.<sup>368</sup> Respondent also cites laws and regulations in effect at that time for the proposition that if a party enters into a contract, its name must appear as either the contracting party or the beneficiary in order to claim performance under the contract.<sup>369</sup> Yet, Claimant's name is unmentioned in the AGU or surrounding documents. Thus, even if Mr. Pacolli entered into an agreement for co-ownership with Messrs. Berisha and Ejupi, and even if the payment was for shares in Grand Hotel, that would not, under the applicable investment law, constitute an investment by Claimant.<sup>370</sup>

371. Respondent argues that, even if Mr. Pacolli was acting as Claimant's agent in signing the AGU, the AGU was insufficient to transfer any share because (i) it is unclear, even with the presence of the word "Grand," to what shares the AGU refers, (ii) the AGU imposed no obligation on any party to transfer shares to another, and (iii) the shares were never in fact transferred.<sup>371</sup> On the last point, Respondent remarks that the Law on Business Organizations of Kosovo requires that all changes to the information contained in a registered charter of a limited liability company be publicly notified,<sup>372</sup> indicating the names and addresses of the owners and their respective ownership interests.<sup>373</sup> Any such amendments must then be registered with the Business Registration Agency.<sup>374</sup> However, neither Mr. Pacolli nor Mr. Ejupi was ever registered as an owner of the Grand Hotel.<sup>375</sup> Accordingly, neither Mr. Pacolli nor Mr. Ejupi had ownership of shares in the Grand Hotel, even in their personal capacities.<sup>376</sup> Moreover, in the Appellate Panel of the Special

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<sup>368</sup> Resp. Mem. on Jurisd., para. 82.

<sup>369</sup> Resp. Reply on Jurisd., paras. 228-232.

<sup>370</sup> Resp. oral argum., tr. 13:14 – 14:5.

<sup>371</sup> Resp. Mem. on Jurisd., paras. 84-87; Resp. Reply on Jurisd., paras. 254-256.

<sup>372</sup> Resp. Mem. on Jurisd., para. 88, citing Exh. R-10: Kosovo Law No. 02-L-123 on Business organizations, 27 September 2007, Art. 34.

<sup>373</sup> Exh. R-10: Kosovo Law No. 02-L-123 on Business organizations, 27 September 2007, Art. 33 (1) lit k.

<sup>374</sup> *Id.*, Art. 34(3). See Resp. post-hearing br., paras. 45-46.

<sup>375</sup> Resp. Mem. on Jurisd., para. 89; Resp. oral argum., tr. 21:16 – 21:19.

<sup>376</sup> Respondent emphasizes that, by its own terms, the AGU left legal ownership in the hands of Mr. Berisha for at least two years. Resp. Mem. on Jurisd., para. 90.

Chamber, UTC objected to the intervention of Claimant and NTSH on the ground that they had no legal interest in the Hotel.

372. In addition, the AGU does not in any event purport to constitute a sale of shares, but refers only to a “property purchased jointly.”<sup>377</sup> But that prior purchase is not identified. Respondent observes further that the AGU postdates payment of the EUR 4m, and that it in itself imposes no further payment obligations.<sup>378</sup> Respondent asserts, more generally, that the AGU was not a contract for the transfer of shares, but only an internal agreement establishing rules governing the relationship among the alleged stockholders. It therefore presupposed that a transfer of shares had actually occurred, but did not constitute such a transfer.<sup>379</sup>

(b) Claimant’s Position

373. Claimant concedes that the AGU mentions only the names of Messrs. Pacolli, Ejupi and Berisha, rather than Claimant, NTSH and UTC, respectively, but considers that “one cannot seriously come to the conclusion that the AGU had the purpose of conferring ownership rights on the mentioned individuals.”<sup>380</sup> According to Claimant, these men all knew, from their prior discussions, that each was representing the company that they owned. Claimant also remarks that it was the respective companies that provided the funds for purchase of the shares.<sup>381</sup> Moreover, when the AGU was concluded, Mr. Pacolli was registered in the Swiss Commercial Registry as director of Claimant with individual signatory authority.<sup>382</sup> Thus, Messrs. Pacolli, Berisha and Ejupi did not sign the AGU in their personal capacities and for their personal interests. Even Mr. Berisha could not,

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<sup>377</sup> Exh. C-17: AGU, Sec. 1; Cl. Supp. to RfA, para. 20.

<sup>378</sup> Resp. Mem. on Jurisd., paras. 92-95.

<sup>379</sup> Resp. oral argum., tr. 21:6–21:11; Resp. post-hearing br., para. 42.

<sup>380</sup> Cl. Rejoinder on Jurisd., para. 162.

<sup>381</sup> Cl. Rejoinder on Jurisd., paras. 163, 168.

<sup>382</sup> Cl. Rejoinder on Jurisd., para. 164, citing Exh. C-4: Certificate of Commercial Register of Canton Ticino, 20 April 2017. Claimant observes that Mr. Berisha did not sign the AGU in his personal capacity. The AGU stated that UTC was “a legal person with limited liability that is now registered as a company with limited liability.” Presumably, Claimant is arguing that if Mr. Berisha signed the AGU in a representative as opposed to a personal capacity, there is every reason to suppose that Messrs. Pacolli and Ejupi signed in their representative capacities as well.

through the AGU, agree to an allocation of shares in his personal capacity, since the shares were registered, not in his name, but in the name of UTC.<sup>383</sup> If he was not acting in a personal capacity there is no reason to assume that either Mr. Pacolli or Mr. Ejupi was doing so.

374. Claimant disputes that Law no. 02/L 123, requiring shareowners to be registered in the Kosovo Business Register has any relevance, as it was not in force when the investment was made or the AGU was concluded.<sup>384</sup> More generally, Claimant cites academic authority<sup>385</sup> and arbitral case law<sup>386</sup> for the proposition that host State law does not govern the definition of an investment or the question whether an investment was made, but only the investment's legality,<sup>387</sup> which is a separate issue. Moreover, the fact, pointed out by Respondent, that UTC objected to Claimant's intervention in its lawsuit in Kosovo has no bearing on whether Claimant did in fact acquire ownership of the shares.
375. In any event, Claimant's contention is not that it acquired ownership of the shares through the AGU. The AGU merely formalized Claimant's ownership of the shares.<sup>388</sup>

#### (c) The Tribunal's Analysis and Findings

376. Respondent calls into question Claimant's reliance on the AGU as the basis of its claimed entitlement. Although Respondent casts doubt on whether the AGU pertained to the Grand Hotel shares at all, the Tribunal finds sufficient evidence that, although the AGU itself imposed no obligations on the KTA, the subject of the AGU was acquisition of those shares.<sup>389</sup>

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<sup>383</sup> Cl. Counter-Mem. on Jurisd., para. 122.

<sup>384</sup> Exh. R-10: Kosovo Law No. 02-L-123 on Business organizations, 27 September 2017; Cl. Counter-Mem. on Jurisd., para. 125.

<sup>385</sup> Dolzer & Schreuer, *supra* note 264, p. 64.

<sup>386</sup> Exh. CL-28: *Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, para. 46.

<sup>387</sup> Cl. Rejoinder on Jurisd., para. 179.

<sup>388</sup> Cl. Counter-Mem. on Jurisd., para. 112.

<sup>389</sup> Exh. C-17: AGU.

377. Respondent is correct that the AGU did not itself effectuate a transfer of shares from UTC to Claimant.<sup>390</sup> The AGU notwithstanding, the shares in question were never in fact transferred to Claimant and Claimant's ownership of the shares is not publicly recorded, with the names and addresses of the owners and their respective ownership interests, as required by Kosovo's Law on Business Organizations.<sup>391</sup> Nor is it registered with the Business Registration Agency.<sup>392</sup> But, as the Tribunal has indicated,<sup>393</sup> it views as the fairest characterization of Claimant's contention in this proceeding that it has an *entitlement* to share ownership, not ownership as such.

**(4) CLAIMANT DID NOT BECOME AN OWNER OF SHARES BY VIRTUE OF THE ANNEX AGREEMENT**

**(a) Respondent's Position**

378. Respondent observes that the Annex Agreement was not signed by any party acting as representative of Claimant. Mr. Berisha signed the Agreement on behalf of UTC and Mrs. Ejupi signed on behalf of Mr. Ejupi and NTSH, but Selim Pacolli signed on behalf of Behgjet Pacolli and on behalf of Mabetex.<sup>394</sup> Claimant was neither party to nor beneficiary of the Annex Agreement. In fact, as in the case of the AGU, Claimant's name is unmentioned in the Annex Agreement. In short, Claimant derived no rights from that Agreement or any property interest that could possibly constitute an investment.<sup>395</sup> In any event, the Annex Agreement makes no reference to any payment of EUR 4m.

379. Finally, Respondent notes that under Article 5 of the Annex Agreement, the Agreement "shall enter into force following its approval by [the PAK]." Since the PAK never approved the Annex Agreement, it never entered into force.

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<sup>390</sup> Resp. Mem. on Jurisd., paras. 75, 80, 84; Resp. oral argum., tr. 21:9–21:11.

<sup>391</sup> Resp. Mem. on Jurisd., paras. 84-87; Resp. Reply on Jurisd., paras. 254-256.

<sup>392</sup> Exh. R-10: Kosovo Law No. 02-L-123 on Business organizations, 27 September 2007, Art. 34(3). See Resp. post-hearing br., paras. 45-46.

<sup>393</sup> See para. 319, *supra*.

<sup>394</sup> Behgjet Pacolli testimony, tr. 154:8–154:24; Resp. Mem. in Jurisd., para. 100.

<sup>395</sup> Resp. Mem. on Jurisd., paras. 99-100.

(b) Claimant's Position

380. Claimant replies that its assertion of ownership is not dependent on the Annex Agreement but was established prior to the time that the Agreement was concluded. Moreover, no significance should be given to the reference to Mabetex, since Mabetex is the group of companies to which Claimant belongs.<sup>396</sup> If anything, the fact that Selim Behgjet signed the Annex Agreement on behalf of Mabetex refutes the proposition that Behgjet Pacolli made the investment in his personal capacity.

(c) The Tribunal's Analysis and Findings

381. The Tribunal does not linger over the 28 March 2012 Annex Agreement as a basis of Mabco's claim of entitlement to ownership of the Grand Hotel shares because Claimant does not principally rely on that instrument. Also, by its terms, the Annex Agreement required the PAK's approval, which appears not to have been given.<sup>397</sup> Notably, however, appended to the Annex Agreement were (a) a business plan setting out the contemplated capital investments and increase in the number of employees over the following two years and (b) the required performance guarantee dated 21 March 2012 issued by the National Commercial Bank Kosovo in the amount of Eur 20.2m.<sup>398</sup> Both submissions substantially corresponded to the items in the PAK's 19 March 2012 request for documentation.<sup>399</sup> It appears that the PAK at no time suggested that the submissions were inadequate. Claimant states that in reply to a letter that it sent to the PAK in late June 2012, the PAK acknowledged that the submissions were satisfactory, but justified its refusal to register the shares on the ground that UTC had told it that its co-owners showed a "lack of seriousness."<sup>400</sup>

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<sup>396</sup> Cl. Counter-Mem. on Jurisd., para. 127.

<sup>397</sup> Exh. C-20: Annex Agreement, 28 March 2012.

<sup>398</sup> Exh. C-39: Performance Guarantee.

<sup>399</sup> Cl. Counter-Mem. on Jurisd., paras. 67, 68. Elsewhere, Claimant characterizes the PAK's 19 March 2012 letter not as a request, but as an "offer" to register Claimant's shares, provided the required documents were produced. Cl. post-hearing br., para. 116.

<sup>400</sup> Cl. Counter-Mem. on Jurisd., para. 74.



382. Respondent observes that, in the Annex Agreement, Mr. Berisha and Ms. Ejupi indicated expressly that they were acting on behalf of UTC and NTSH, respectively, while Selim Pacolli represented that he signed on behalf of Behgjet Pacolli and Mabetex.<sup>401</sup> The Tribunal does not attach great significance to this fact. Having concluded that Behgjet Pacolli acted throughout on behalf of Mabco, the fact that Selim Pacolli acted on behalf of Behgjet Pacolli changes nothing. Nor, for reasons earlier explained,<sup>402</sup> does the reference to Mabetex greatly assist Respondent's contention that Mr. Pacolli acted throughout on his own rather than Claimant's behalf. If he was acting entirely in a personal capacity, Mabetex would not warrant mention.

## **B. CLAIMANT IS NOT A FOREIGN INVESTOR**

383. Respondent argues that, for two reasons, Claimant is not a foreign investor:

(1) Claimant is not an investor.

(2) Even if Claimant were an investor, it was not a foreign investor.

384. Under the ICSID Convention, as under the BIT and the Foreign Investment Law, it is insufficient to establish jurisdiction that an investment was made. Claimant must, among other things, have made the investment, i.e. qualify as an investor. It must be also have the requisite foreign nationality. Under the BIT, Claimant must have Swiss nationality. Under both the ICSID Convention and the Foreign Investment Law, Claimant must have a nationality other than that of Kosovo.

### ***(1) CLAIMANT IS NOT AN INVESTOR***

#### ***(a) Respondent's Position***

385. Respondent's position on this point follows directly from all that has preceded. In its view, for all the reasons previously set out, the alleged investment in Kosovo was never made, and even if it was made, was made by Mr. Pacolli as an individual, not by Claimant. Also, according to Respondent, Mr. Pacolli lacked legal authority to represent it. As a

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<sup>401</sup> Exh. C-20: Annex Agreement, 28 March 2012.

<sup>402</sup> See paras. 341-345, *supra*.

consequence, Claimant is not an investor, within the meaning of ICSID Convention, the BIT or the Foreign Investment Law.

(b) Claimant's Position

386. Similarly, Claimant's position on whether Mabco is an investor, within the meaning of the relevant instruments, has been fully set out above. It maintains that it constitutes an investor, within the meaning of ICSID Convention and otherwise. In addition, it denies Respondent's suggestion that Mr. Pacolli lacked the requisite legal authority to represent Claimant in his dealings in this case, suggesting that, if the matter were to be further examined, it would need to be examined, not under the law of the host State, Kosovo, but under the law of the State of incorporation, i.e., Switzerland,<sup>403</sup> whose requirements Claimant satisfies.<sup>404</sup> It adds that, in any event, the question whether Mr. Pacolli validly represents Claimant is not a jurisdictional issue, but rather one that is substantive in nature and, if it is to be examined, is to be examined, not under the law of the host State, Kosovo, but rather under the law of the State of incorporation, i.e. Switzerland,<sup>405</sup> which Respondent has not adduced. It maintains that, under Swiss law, Mr. Pacolli was empowered to represent it.<sup>406</sup>

(c) The Tribunal's Findings and Analysis

387. The Tribunal notes at the outset its disagreement with Claimant's assertion that whether Mr. Pacolli validly represented the Claimant is a substantive rather than jurisdictional issue. Although Respondent claims that Mr. Pacolli lacked legal authority to represent Claimant, neither Party has adduced evidence of either Swiss or Kosovan law on the subject, and the matter was not pursued.
388. Otherwise, the arguments advanced by Respondent and Claimant under this heading are largely ones that the Tribunal has already dealt with in other sections of this Decision (see

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<sup>403</sup> Cl. Rejoinder on Jurisd., para. 229.

<sup>404</sup> Claimant maintains that Mr. Pacolli was registered in the Swiss Commercial Registry as director of Mabco with individual signatory powers in Mabco's name. Cl. Rejoinder on Jurisd., para. 164; Cl. oral argum., tr. 40:8–40:14.

<sup>405</sup> Cl. Rejoinder on Jurisd., para. 229.

<sup>406</sup> Cl. oral argum., tr. 40:8–40:14.

paras. 339-345, *supra*). The Tribunal reaffirms that, factually, Mr. Pacolli acted in his dealings with the KTA and the PAK, as well as with UTC and NTSH, in a representative capacity.

**(2) *EVEN IF CLAIMANT WERE AN INVESTOR, IT WAS NOT A FOREIGN INVESTOR***

**(a) Respondent's Position**

389. Respondent argues that not only the BIT and the Kosovo Foreign Investment Law, but also the ICSID Convention, under which this case is proceeding, imposes a nationality requirement on an alleged investor. Under the BIT, the alleged investor must be a national of the other Contracting State while; under the Kosovo Foreign Investment Law, it must be a foreign national; and under the ICSID Convention, it must be a national of another ICSID Contracting State. Claimant satisfies the requirements of none of these instruments.
390. According to Respondent, Claimant is indisputably a foreign entity. But Claimant's Swiss nationality is irrelevant because Claimant was not an investor in this case.<sup>407</sup> Even if Mr. Pacolli made the investment that is alleged, as a national of Kosovo, he lacks the requisite nationality under ICSID, the BIT or the Foreign Investment Law. He is not a national of another Contracting State (for purposes of the ICSID Convention), or a national of Kosovo's BIT partner (for purposes of the BIT) or any foreign nationality (for purposes of the Foreign Investment Law).<sup>408</sup>
391. Respondent further argues that even if Claimant, rather than Behgjet Pacolli acting in his personal capacity, made an investment in Kosovo, Claimant cannot be considered a Swiss national for purposes of the BIT. According to Respondent, Claimant performs no economic activity in Switzerland, as the BIT specifically requires.<sup>409</sup> It is not sufficient that Claimant manages several projects from an office in Switzerland, a proposition for which, according to Respondent, Claimant has in any event adduced no evidence.<sup>410</sup> Counsel for Respondent suggests that only the place where a construction company

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<sup>407</sup> Resp. Reply on Jurisd., paras. 125, 300-301.

<sup>408</sup> Resp. Mem. on Jurisd., para. 126; Resp. Reply on Jurisd., paras. 402-403.

<sup>409</sup> Exh. C-1: BIT, Art. 1(2).

<sup>410</sup> Resp. Mem. on Jurisd., paras. 127-128; Resp. Reply on Jurisd., para. 300.

engages in its real economic activities is the place where the construction projects are performed.<sup>411</sup>

(b) Claimant's Position

392. Claimant advances several arguments in response. First, it insists that Mr. Pacolli acted throughout the privatization process as Claimant's representative, and that this was well known to Respondent. Mr. Pacolli was known throughout Kosovo as having established Claimant as a business entity and as a component part of Mabetex, which he was also known to have founded.<sup>412</sup> Claimant observes more generally that, in any transaction, a juridical person is necessarily represented by a natural person.<sup>413</sup> The fact that the owner of a company is of a different nationality than the claimant company, and thus not a national of the other Contracting State, is irrelevant. That situation is in fact extremely common.<sup>414</sup> That is no less the case just because the owner is a national of the host State.
393. Claimant further disputes Respondent's contention that Claimant conducts no real economic activities in Switzerland.<sup>415</sup> Claimant, as part of the Mabetex Group, conducts project planning, development, and management in Switzerland for construction around the world.<sup>416</sup> Ms. Maesani-Gaiatto testified that since 1999 the number of Claimant's employees based in Switzerland has ranged from 13 to 60, the latter being the number of employees at this time.<sup>417</sup> As evidence of the increase in number of employees in Switzerland, Ms. Maesani-Gaiatto cites Claimant's balance sheets for 2006 and 2017.<sup>418</sup>

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<sup>411</sup> Resp. Answ. to Trib. Q, Tr. 51:24–52:11.

<sup>412</sup> Cl. Counter-Mem. on Jurisd., paras. 157-159.

<sup>413</sup> Cl. Counter-Mem. on Jurisd., para. 156.

<sup>414</sup> Cl. Counter-Mem. on Jurisd., para. 159.

<sup>415</sup> Cl. Supp. to RfA, para. 15; Cl. Rejoinder on Jurisd., para. 231.

<sup>416</sup> Cl. Counter-Mem. on Jurisd., para. 160.

<sup>417</sup> Maesani-Gaiatto testimony, tr. 196:19–196:25.

<sup>418</sup> Exh. C-69: Balance Sheet of Mabco for the business year 2006, 31 December 2006; Exh. C-70: Balance Sheet of Mabco for the business year 2017, 31 December 2017.

(c) The Tribunal's Findings and Analysis

394. Respondent is correct that, if Mr. Pacolli was acting in a personal capacity, neither the BIT, nor the Foreign Investment Law, nor the ICSID Convention<sup>419</sup> would be applicable to this case, since Mr. Pacolli is a national of Kosovo. However, the Tribunal, having concluded that Mr. Pacolli was acting on behalf of Mabco rather than himself, the relevant issue is the nationality of Mabco. Mabco indisputably has Swiss nationality<sup>420</sup> and is therefore presumably entitled, from a *ratione personae* point of view, to proceed under the ICSID Convention and seek protection under both the BIT and the Foreign Investment Law in connection with an investment in Kosovo.
395. However, Respondent questions Claimant's Swiss nationality and therefore its entitlement to proceed under the Convention and its eligibility to invoke the BIT. (As far as the Foreign Investment Law is concerned, Claimant need not of course be Swiss; any nationality other than that of Kosovo would suffice.) Respondent bases its challenge on the premise that, under the BIT, it is insufficient that Claimant is a Swiss national. It must also engage in economic activity in Switzerland.<sup>421</sup> Although Respondent does not contend that Claimant is a "shell company," it denies that Claimant engages in sufficient activity in Switzerland to satisfy the BIT requirement. The Tribunal is unconvinced. Ms. Maesani-Gaiatto testified that Claimant conducts all its project planning and management activity in Lugano and, for those purposes, has at all times employed at those headquarters a significant number of employees,<sup>422</sup> and her testimony was not refuted. Nor can the Tribunal accept Respondent's proposition that the economic activities performed by a construction company such as Mabco are to be considered by definition as conducted only in the locales where its construction projects are situated.

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<sup>419</sup> Article 25(2)(a) ICSID Convention. See also Exh. CL-12: *Champion Trading Company et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003.

<sup>420</sup> Exh. C-4: Certificate of Commercial Register of Canton Ticino, 20 April 2017.

<sup>421</sup> Resp. Mem. on Jurisd., para. 127; Resp. Reply on Jurisd., para. 300.

<sup>422</sup> Maesani-Gaiatto witness stmt, paras. 8-11.

**C. EVEN IF CLAIMANT HAD MADE AN INVESTMENT IN KOSOVO, IT DOES NOT CONSTITUTE A “PROTECTED INVESTMENT”**

396. Respondent contends that, even if Claimant made an investment, it was not lawfully made. It bases this contention on the following two arguments:

- (1) The alleged investment was not made in accordance with domestic law.
- (2) The alleged investment would not contribute to the economic development of Kosovo.

**(1) THE ALLEGED INVESTMENT WAS NOT MADE IN ACCORDANCE WITH DOMESTIC LAW**

**(a) Respondent’s Position**

397. Respondent argues that both the BIT and the Foreign Investment Law require that, in order to be protected, an investment must be lawful, i.e., must have been made in accordance with domestic law. According to Respondent, its consent to arbitrate under both the BIT and the Foreign Investment Law is expressly conditional on the lawfulness of a claimant’s investment.<sup>423</sup> Thus, an investment’s lawfulness is a jurisdictional requirement, whether stated in the definition of investment (as in the Foreign Investment Law) or in the clause on scope of application (as in the BIT).<sup>424</sup>

398. Claimant cannot have lawfully acquired an investment in Kosovo, in the form of shares in the Grand Hotel, because any arrangement that Mr. Berisha, acting on behalf of UTC, made with undisclosed third parties, such as Claimant, would have been in breach of the Purchase Agreement.<sup>425</sup> Article 5.1.3 of that Agreement forbade a buyer to “purchase[e] ... Shares ... as an agent for a third party [or]... form[] any informal or formal undisclosed agreements or consortiums ... with any undisclosed third party.”

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<sup>423</sup> Resp. post-hearing br., paras. 60-63.

<sup>424</sup> Resp. Reply on Jurisd., paras. 354-359, citing, among other authorities, Exhs. CL-7/RL-59: *Metal-tech Ltd. v. Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, paras. 272-273; Exh. RL-6: *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007; Exh. RL-9: *Gustav F.W. Hamester GmbH & Co. KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 127. See Resp. post-hearing br., paras. 60-63.

<sup>425</sup> Resp. Mem. on Jurisd., para. 114.

399. Finally, even if Claimant had purchased the shares, Claimant would have violated the Tender Rules governing the privatization process in numerous respects,<sup>426</sup> including the supply of required information and assurances. For example, Rule 4.4(ii)(dd) provides that, if a bidder is a consortium of individuals or legal entities, it must submit certified copies of the consortium's founding documents, identification cards, passports, and registration information, as well as identify all the beneficial owners and "Control Persons" – none of which was done.
400. In a reply to a Tribunal member's question, counsel for Respondent stated that whether a party complied with Tender Rules, which are part of Kosovo's legal framework for privatization, is a question of public law, not one of contract law.<sup>427</sup> Violation of the Tender Rules constitutes a violation of host State law, due to the special importance of transparency in the tender process.<sup>428</sup> Respondent asserts that, through its covert action, Claimant, even assuming it was the investor, circumvented the mandatory screening process, including essential background checks.<sup>429</sup> Respondent specifically rejects

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<sup>426</sup> Exh. R-14: Tender Rules. The Rules provide that those bidding as a consortium must provide certain documentation, including certified copies of founding documents, certified copies of identification cards and passports, as well as identification of any beneficial owners or controlling persons. *Id.*, Sec. 4.4 (ii)(dd); Resp. Reply on Jurisd., paras. 375-391; Resp. post-hearing br., paras. 68-71.

<sup>427</sup> Resp. Answ. to Trib. Q, tr. 53:20–54:1.

<sup>428</sup> Resp. Reply on Jurisd., paras. 375-385; Cl. oral argum., tr. 47:17–48:10. See also Resp. post-hearing br., para. 70, citing the KTA's Operational Policies (Exh. R-88), Addendum, paras. 2.3, 2.4:

Para. 2.3: "[T]he Share Sale/Purchase Agreement shall be voidable by the Agency if the purchaser (or any of its principals) is later determined by a court or other adjudicative tribunal to have made materially false or misleading representations or disclosures to the Agency or to have engaged in any act of collusion, fraud or bribery affecting the tender process."

Para. 2.4: "Bidders [must] disclose the source of all funds that will be used by the bidder in relation to paying the purchase of a NewCo [and] must represent and warrant that they have not formed and will not form any informal or formal undisclosed agreement or consortiums between two or more bidders or with any undisclosed party."

<sup>429</sup> Resp. post-hearing br., para. 76, citing Rules 1, 4.4 and 14.7 of the Tender Rules (Exh. R-14). Rule 1(f) automatically disqualifies any bidder that does not disclose its principals. Rule 4.4 requires bidders, if acting as an agent for another party or a consortium, to provide detailed information about all participants. Rule 14.7 renders an agreement concluded with the winning bidder voidable if it is determined that it colluded during the tender process or otherwise violated the Tender Rules.

Claimant's argument that Tender Rules are insufficiently fundamental to render an investment unlawful for purposes of the BIT and the Foreign Investment Law.<sup>430</sup>

401. Respondent also rejects any notion that it is estopped from contesting the lawfulness of Claimant's alleged investment due to Mr. Shala having actively solicited and approved Claimant's investment in the Grand Hotel. As noted (para. 259, *supra*), Respondent denies that Mr. Shala took any such actions. More generally, Respondent denies the existence of any evidence in the record to suggest that it endorsed or accepted Claimant's alleged investment.<sup>431</sup> Respondent made no representations about the validity of the alleged investment under local law, nor did it ever rely upon the alleged investment agreement.<sup>432</sup> It consistently rejected Claimant's assertions of ownership.<sup>433</sup>

(b) Claimant's Position

402. Claimant disputes these contentions on several grounds. First, Claimant contends that Respondent misinterprets the legality requirement set out in the BIT. In its view, an investment, for purposes of the BIT, is defined in Article 1 merely as a qualifying asset established or acquired by a claimant, without reference to its legality, and Article 11 does not make submission of a dispute to arbitration dependent on the legality of the underlying asset. The legality of an investment is, in Claimant's view a merits, not a jurisdictional, issue.<sup>434</sup> According to Claimant, the legality of an investment is a jurisdictional requirement only if the definition of investment in the BIT so provides, which, unlike in other BITs, is not the case here.<sup>435</sup> Accordingly, the lawfulness of an investment under the

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<sup>430</sup> Resp. post-hearing br., paras. 72, 75, 77, 86-87. Respondent suggests that only non-compliance with formal legal requirements can be overlooked in determining whether an investment is or is not lawful.

<sup>431</sup> Resp. oral argum., tr. 23:6–23:11, Resp. Answ. to Trib. Q, tr. 49:1–49:11.

<sup>432</sup> Resp. post-hearing br., para. 89.

<sup>433</sup> Resp. post-hearing br., paras. 93, 95.

<sup>434</sup> Cl. Counter-Mem. on Jurisd., paras. 137-139. Claimant also cites the award in Exhs. CL-7/RL-59: *Metal-tech Ltd. v. Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 127, for the proposition that a legality requirement is not a universal principle of international investment law.

<sup>435</sup> Cl. Counter-Mem. on Jurisd., paras. 135-139.



present BIT pertains to the scope of application of the BIT, rather than jurisdiction, and is a merits issue.<sup>436</sup>

403. But, even if the legality of an investment were a jurisdictional requirement, it is satisfied. According to Claimant, in order to be disqualifying, an illegality must consist of a breach of a fundamental principle of law,<sup>437</sup> which is not the case in a violation of a tendering rule. Moreover, an illegality, especially if not fundamental, may be excused where the claimant acted in good faith, as is Claimant's case.<sup>438</sup>
404. Moreover, the Tender Rules, and the possibility of a breach thereof, are irrelevant in this case because Claimant was specifically engaged by the KTA as a prospective purchaser well after the tendering procedure had ended. It was not a participant in that procedure and therefore could not have violated it.<sup>439</sup> According to Claimant, it is common practice that if a winning bidder cannot pay the purchase price, other investors may assist it.<sup>440</sup> Claimant refers to the fact that the KTA accepted and never questioned the investment made in Mabetex's name in the Hotel Iliria and the Pipeline Factory as co-owner even though Claimant had not participated in the bidding process for those entities.<sup>441</sup> If any violation of the Tender Rules was committed, it would in any event have been committed by the bidder which was UTC.<sup>442</sup>

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<sup>436</sup> Cl. post-hearing br., paras. 93-94, 97.

<sup>437</sup> Claimant cites in support of this proposition the awards in Exh. CL-9: *LESI SpA et Astaldi SpA v. Algeria*, ICSID Case No. ARB/05/03, Decision of 12 July 2006, para. 83; Exh. CL-10: *Inceysa Vallisoletana, S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006; Exh. RL-6: *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007. Tribunals have declined jurisdiction due to the illegality of an investment only in cases of serious violations of fundamental principles of host State law. Claimant cites as examples Exh. CL-32: *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/25, Award, 27 August 2008, paras. 133-135, 137, 143 (fraud); Exh. CL-34: *Saur international SA v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, para. 308 (misappropriation of millions of dollars of government funds).

<sup>438</sup> In support of this proposition, Claimant cites Exh. RL-6: *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 396.

<sup>439</sup> Cl. post-hearing br., para. 98.

<sup>440</sup> Cl. post-hearing br., para. 98, citing Exh. C-49.

<sup>441</sup> Cl. post-hearing br., para. 114.

<sup>442</sup> Cl. Rejoinder on Jurisd., para. 197; Cl. post-hearing br., paras. 98-99.

405. Further, Respondent is estopped from invoking illegality as a barrier to jurisdiction, inasmuch as it actively solicited Claimant's participation in the investment.<sup>443</sup> In any event, Respondent was well aware of the payment that Claimant made and the fact that it was made as part of the share purchase price, which the KTA tacitly approved.<sup>444</sup> Claimant observes that, between February 2008 and March 2012, the PAK received an entire series of communications from the co-investors informing it that they had co-invested in the Grand Hotel and were prepared to make the required investments.<sup>445</sup> Yet, no public authority of Kosovo, including the KTA and the PAK, ever questioned that the payment by Claimant was made or was legal, nor did it ever raise any breach of either the Tender Rules or the Purchase Agreement.<sup>446</sup> Finally, the PAK's involvement in an attempt to bribe Messrs. Pacolli and Ejupi in exchange for registration of their shares demonstrates that it was aware of their participation in the purchase of the shares.<sup>447</sup>

(c) The Tribunal's Analysis and Findings

406. Article 2 of the BIT states by its terms that, in order to be protected, an investment must be "established or acquired *in accordance with its laws and regulations* by investors of the other Contracting Party, whether prior to or after the entry into force of this Agreement" (emphasis added). Similarly, the 2005 Foreign Investment Law provides in Article 2(1) that an investment may take the form of an asset that has been "contributed to, or leased or otherwise temporarily provided under contract to, any other type of organization *lawfully* established in Kosovo for use in such organization's business or other activities in Kosovo"

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<sup>443</sup> Cl. Counter-Mem. on Jurisd., para. 144-145, again citing Exh. RL-6: *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 346.

*Principles of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment, which was not in compliance with its law.*

See Cl. oral argum., tr. 37:5–38:14.

<sup>444</sup> Cl. Rejoinder on Jurisd., para. 189. In this context, Claimant invokes the principle of estoppel. *Id.*, paras. 216-222.

<sup>445</sup> Cl. post-hearing br., para. 113, citing letters of February 2008 (Exh. C-37), 21 October 2011 (Exh. C-22), 14 December 2011 (Exh. C-37), 16 February 2012 (Exh. R-21), and 15 March 2012 (Exh. R-48). These communications are summarized in Claimant's letter to the PAK of 29 June 2012 (Exh. C-37).

<sup>446</sup> Cl. oral argum., tr. 36:9–36:22.

<sup>447</sup> Cl. post-hearing br., para. 117.

(emphasis added).<sup>448</sup> Article 2.1.4 of the Kosovo 2014 Foreign Investment Law extends protection only to “[i]nvestments,” defined as “any asset owned or otherwise *lawfully* held by a Foreign Person in the Republic of Kosovo for the purpose of conducting *lawful* commercial activities” (emphasis added).

407. Claimant maintains initially that the lawfulness of an investment is a merits issue and therefore not to be determined at this stage.<sup>449</sup> The Tribunal disagrees. According to well-established jurisprudence,<sup>450</sup> unless an investment is lawful, it cannot constitute an investment within the meaning of an investment protection instrument, particularly when the instrument specifically requires that an investment be lawful. The Tribunal’s jurisdiction under the BIT and Foreign Investment Law thus depends on the alleged investment being a lawful one.
408. Respondent’s assertion of unlawfulness turns on the fact that Claimant did not comply with the rules of tender under Kosovo law.<sup>451</sup> That Claimant did not comply with those rules is beyond doubt. Claimant makes two arguments in reply. First, it maintains that the tender rules of Kosovo are insufficiently fundamental in order for non-compliance with them to render its investment unlawful, within the meaning of the BIT or the Foreign Investment Law. Second, it claims that, even if the rules are sufficiently fundamental for that purpose, Respondent waived any objection based on the alleged investment’s unlawfulness.<sup>452</sup>
409. The Tribunal has no reason to rule on the question whether the tender rules are sufficiently fundamental within the meaning of the lawfulness requirement. This is because, in the Tribunal’s judgment, the PAK indeed waived any claim of unlawfulness. The record shows

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<sup>448</sup> However, under the 2005 Law, an investment can also take the form of an asset “contributed to a Kosovo business organization in return for an ownership interest in that business organization,” without expressly requiring that the business organization must have been established lawfully.

<sup>449</sup> Cl. Counter-mem. on Jurisd., paras. 136 *et seq.*; Cl. Rejoinder on Jurisd., para. 184.

<sup>450</sup> See, e.g., Exh. RL-6: *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 401; Exh. RL-72: *Ioannis Kardassopoulos v. The Republic of Georgia*, Decision on Jurisdiction, 6 July 2007, para. 184. See generally, Exh. CL-3: Kenneth J. Vandevelde, *Bilateral Investment Treaties* (2010), pp. 152-157.

<sup>451</sup> Resp. Reply on Jurisd., paras. 375-391; Resp. post-hearing brief, paras. 68-71.

<sup>452</sup> Cl. Rejoinder on Jurisd., paras. 6, 195.

that the PAK engaged in substantial negotiations with Claimant, in contemplation of Claimant's eventual acquisition of the Grand Hotel shares, well after the tender procedure had concluded and without the PAK having launched a new tender procedure. During those negotiations, which continued well into the early months of 2012, as late as April, the PAK voiced no concern over the legality of the manner in which Claimant was proceeding. As late as 2012, the PAK indicated that all that remained to register the shares was production by Claimant of certain documentation. Arbitral case law suggests that an illegality in an investment that might otherwise disqualify the investment from protection cannot be raised as a jurisdictional defense if the State was aware of the illegality and expressed no objection on that basis.<sup>453</sup>

410. Respondent accordingly cannot impugn Claimant's putative investment in Kosovo on the ground that it was unlawful.

**(2) THE ALLEGED INVESTMENT WOULD NOT CONTRIBUTE TO THE ECONOMIC DEVELOPMENT OF KOSOVO**

**(a) Respondent's Position**

411. Although Respondent did not pursue this argument, it initially maintained that contribution to economic development of a host State is a necessary element of an investment and in its absence an investment is illegal. In this case, the alleged investment, even if made, was not lawful because it failed to contribute to Kosovo's economic development.<sup>454</sup> The argument is essentially that the successful bidder, UTC, had failed to fulfill its obligations under the Commitment Agreement with regard, among other things, to levels of contribution of capital and employment,<sup>455</sup> and Claimant cannot therefore maintain that it substantially contributed to economic development of the home State.

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<sup>453</sup> See, e.g., Exh. CL-35: *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, para. 106.

<sup>454</sup> Resp. Mem. on Jurisd., paras. 118-119.

<sup>455</sup> Resp. Mem. on Jurisd., paras. 119-123.

(b) Claimant's Position

412. Claimant rejects this argument on the ground that Kosovo's withdrawal of the shares was not precipitated by UTC's alleged noncompliance with the Commitment Agreement, assuming that would in itself render the investment unlawful, but rather by Claimant's refusal to pay a bribe.<sup>456</sup> Mr. Ejupi testified that the only reason the shares were ultimately withdrawn was indeed his and Mr. Pacolli's refusal to pay any bribes.<sup>457</sup> Claimant also maintains that UTC and the PAK made Claimant's access to the hotel, and therefore Claimant's further contributions, impossible.<sup>458</sup>
413. More fundamentally, Claimant argues that, had its investment not been withdrawn by the PAK, it would have contributed to Kosovo's economic development, for the simple reason that the Grand Hotel's privatization was part of a project to privatize some 500 SOEs as a major boost to the country's economy and that the hotel was a particularly prestigious and valuable element of the economy.<sup>459</sup>

(c) The Tribunal's Analysis and Findings

414. In a line of argument that it has not pursued, Respondent has argued that in order to be protected an investment must contribute to the economic development of the host State. The Tribunal does not find language in any of the instruments at issue in this case suggesting that an investment is not lawful unless it makes a contribution of that kind. It is also aware of no award standing for, or literature supporting, that proposition. In an earlier portion of this Decision (see para. 296, *supra*), the Tribunal acknowledged that some tribunals have treated contribution to the economic development of the host State as part of the definition of an investment under the ICSID Convention but, for reasons explained there, it joins the large number of tribunals that decline to do so. It would make little sense, having dispensed with that requirement in connection with the definition of an investment, to then reintroduce it as an element of an investment's lawfulness.

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<sup>456</sup> Cl. Counter-Mem. on Jurisd., para. 148; Behgjet Pacolli 2d witness stmt, Exh. CWS-3, para. 17.

<sup>457</sup> Ejupi witness stmt, Exh. CWS-4, para. 19.

<sup>458</sup> Cl. Counter-Mem. on Jurisd., para. 148.

<sup>459</sup> Cl. Counter-Mem. on Jurisd., paras. 147-150.

415. Our consideration of this argument can stop there. But, in any event, the Tribunal finds, again as stated earlier (para. 301, *supra*), that renovation and management of the Grand Hotel represented a significant contribution to Kosovo's tourism industry and thus to Kosovo's economic development more generally.

**D. KOSOVO HAS NOT GIVEN ITS CONSENT TO ARBITRATE THE PRESENT DISPUTE**

416. Respondent maintains that, under both the BIT and the Foreign Investment Law, Claimant could not conclude an agreement to arbitrate with Kosovo without satisfying the conditions to which Kosovo subjected its offer to arbitrate. Because Claimant did not fulfill those conditions prior to initiating arbitration, no agreement to arbitrate came into existence.

417. There are three conditions required in order to accept an offer to arbitrate under the relevant instruments that, according to Respondent, Claimant failed to satisfy.<sup>460</sup>

(1) Claimant failed to present an "investment dispute," as required by both the BIT and the Foreign Investment Law.

(2) Claimant failed to comply with the BIT's and Foreign Investment Law's election of remedies clauses.

(3) Claimant failed to satisfy the BIT's requirement of prior consultation.

Each of these assertions is discussed in turn below.

**(1) CLAIMANT FAILED TO PRESENT AN "INVESTMENT DISPUTE," AS REQUIRED BY BOTH THE BIT AND THE FOREIGN INVESTMENT LAW**

418. Here Respondent reiterates that, having not acquired an ownership interest in shares of Grand Hotel, Claimant did not make an investment, and therefore has not presented to the Tribunal an "investment dispute." This argument and Claimant's defense thereto have been addressed earlier (see paras. 293-322, *supra*) and require no further elaboration here.

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<sup>460</sup> Resp. Mem. on Jurisd., para. 130.

**(2) CLAIMANT FAILED TO COMPLY WITH THE BIT'S AND FOREIGN INVESTMENT LAW'S ELECTION OF REMEDIES CLAUSE.**

**(a) Respondent's Position**

419. Respondent next argues that, having brought suit in the courts of Kosovo, Claimant is precluded by a “fork in the road” provision from thereafter initiating and maintaining this proceeding. Respondent maintains that both the BIT and the 2014 Foreign Investment Law require an election of remedies as between litigation and arbitration and that Claimant made its election by having recourse to the courts. Article 11(2) of the BIT provides:

*If ... consultations do not result in a solution within six months from the date of the written request for consultations, the investor may submit the dispute either to the courts or the administrative tribunals of the Contracting party concerned or to international arbitration.*  
(emphasis added)

Article 16(2) of the 2014 Foreign Investment Law is worded differently. It provides:

*In the absence of ... an agreed procedure, a foreign investor shall have the right to require that the investment dispute be settled either through litigation before a court of competent jurisdiction in the Republic of Kosovo or through local and international arbitration.*  
(emphasis added)

The Tribunal notes that 2005 Foreign Investment Law contains no such requirement.<sup>461</sup>

420. In Respondent's view, use of the phrase “either ... or” in both provisions demonstrates that Claimant could pursue either of the two mentioned avenues of relief, but not both. In other words, both Article 11(2) of the BIT and Article 16(2) of the 2014 Foreign Investment Law constitute “fork in the road” provisions.<sup>462</sup> Prior to initiating arbitration, Claimant both brought an action against the PAK for annulment of its exercise of the share call option

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<sup>461</sup> Article 16(2) of the 2005 Foreign Investment Law is silent on the availability of a remedy in the courts of Kosovo. It only addresses arbitration, providing that “[t]he foreign investor may choose any of the following procedural rules to govern the arbitration of the investment dispute,” specifying as available the ICSID Convention and ICSID Additional Facility Rules, provided their jurisdictional requirements are met, the UNCITRAL Rules and the ICC Rules (Exh. C-2).

<sup>462</sup> Resp. Reply on Jurisd., paras. 320-323.

and sought to intervene in the UTC's action for annulment of the same decision.<sup>463</sup> Because Claimant first brought litigation over the dispute in the courts of Kosovo, it is barred by the election of remedies provision from thereafter pursuing arbitration.<sup>464</sup> Claimant's choice to litigate its grievances was irreversible.

421. According to Respondent, it is of no consequence that Claimant based its litigation on Kosovo's alleged undue interference with Claimant's alleged shareholding in Grand Hotel, while basing this proceeding on unlawful expropriation and denial of fair and equitable treatment, since the actions have the same subject matter.<sup>465</sup> Both claims arise out of the same factual circumstances, make the same allegations, and seek the same relief, viz. protection from the withdrawal of shares. At the center of both the arbitration and litigation is the legality of the PAK's decision to withdraw the shares in the Grand Hotel.
422. Respondent argues that, under arbitral case law, application of a fork in the road provision does not require satisfaction of the so-called "triple identity test" (identities of parties, object and cause of action), but merely a demonstration that the two claims are substantially equivalent,<sup>466</sup> which they are in this case.

#### (b) Claimant's Position

423. Claimant advances several arguments in response.
424. First, Claimant disagrees with Respondent's reading of Article 11(2) of the BIT and Article 16(2) of the 2014 Foreign Investment Law. In Claimant's view, the "either"/"or" formulation simply gives an investor a choice of remedies, but does not by its terms forbid resort to both.<sup>467</sup>

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<sup>463</sup> Resp. Reply on Jurisd., para. 332.

<sup>464</sup> Resp. Reply on Jurisd., para. 320.

<sup>465</sup> Resp. Reply on Jurisd., paras. 325-331.

<sup>466</sup> Resp. Reply on Jurisd., paras. 324-328, citing Exh. RL-58: *Chevron Corporation and Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-12, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, paras. 4.76-4.77; Exh. RL-42: Campbell McLachlan et al., *International Investment Law: Substantive Principles* (Oxford U. Press, 2d ed. 2017), para. 4.108.

<sup>467</sup> Cl. Counter-Mem. on Jurisd., para. 171.



425. Claimant further points to Article 11(4) of the BIT. In its estimation, Article 11(4) is not a “fork in the road” provision either. It expressly provides that, once the investor has elected to arbitrate its dispute, that choice of forum is final and the investor cannot thereafter have recourse to a host State court on the same claim. However, it does not provide the converse, namely that once the investor has elected to litigate its dispute in host State court, that choice of jurisdiction is final and the investor cannot thereafter have recourse to arbitration on the same claim. In other words, the clause in the present case is asymmetric. Claimant points out that it is easy enough to draft a clause providing that whichever forum a claimant chooses – whether litigation or arbitration – that choice is irreversible. Illustrative of the several examples provided by Claimant, all of which are BITs concluded by Switzerland, is the Colombia-Switzerland:

*Once the investor has referred the dispute to either a national tribunal or an international arbitration mechanism ..., the choice of the procedure shall be final.*<sup>468</sup>

426. Claimant further takes the position that, even if the provisions of the BIT and the 2014 Foreign Investment Law were to be read as “fork in the road” clauses, they would not bar access to arbitration following litigation because the claims in the two fora are not the same. In the courts of Kosovo, Claimant invoked domestic law, which the Tribunal understands as the law governing the registration of shares, which is most likely part of administrative law, whereas in this proceeding, it asserts claims of expropriation and violation of fair and equitable treatment, as well as denial of justice, under the BIT and the Foreign Investment Law.<sup>469</sup> Accordingly, the triple identity test, widely adopted for “fork-in-the road” purposes, is not satisfied. While there is an identity of parties and arguably an identity of object, there is no identity of cause of action. So far as identity of cause of action is concerned, the prevailing view among investment tribunals is that contract and investment

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<sup>468</sup> Agreement between the Swiss Confederation and the Republic of Colombia on the Promotion and Reciprocal Protection of Investments (Exh. C-71), Art. 11(4). Also cited are Agreement between the Swiss Confederation and the Republic of Costa Rica on the Promotion and Reciprocal Protection of Investments (Exh. C-72), Art. 9; Agreement between the Swiss Confederation and the Arab Republic of Egypt on the Promotion and Reciprocal Protection of Investments (Exh. C-73), Art. 12(6); Agreement between the Swiss Confederation and the Kingdom of Saudi Arabia on the Promotion and Reciprocal Protection of Investments (Exh. C-74), Art. 10.

<sup>469</sup> Cl. Counter-Mem. on Jurisd., paras. 172-174. Although Claimant refers in these paragraphs to the BIT, its argument would be equally applicable to the 2014 Foreign Investment Law.

treaty claims are distinct.<sup>470</sup> Although a “fundamental basis” test has recently emerged,<sup>471</sup> it is not the prevailing view. A leading case emphasized that it is “necessary ... to determine whether claimed entitlements have the same normative source.”<sup>472</sup> That the litigation and arbitration in this case do not share the same normative source is, to Claimant’s mind, obvious.

427. Finally, according to Claimant, the fork in the road principle is in any event inapplicable to this case because the courts of Kosovo declined to entertain on the merits any of the claims advanced by Claimant.<sup>473</sup> Claimant cites precedent to this effect.<sup>474</sup>

#### (c) The Tribunal’s Analysis and Findings

428. Resolving this issue entails making potentially three determinations. First, do the BIT and/or the 2014 Foreign Investment Law impose an election of remedies requirement? Second, assuming that these instruments do contain a fork in the road requirement and that Claimant did pursue litigation prior to initiating arbitration, are the claims in the two fora substantially the same? Third, should the Tribunal so find, is it of consequence that, as Claimant contends, the courts of Kosovo did not address or decide its claims on the merits.
429. As noted, Article 11(2) BIT invites foreign investors to submit their claims either to litigation or arbitration:

*If ... consultations do not result in a solution within six months from the date of the written request for consultations, the investor may submit the dispute either to the courts or the administrative tribunals*

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<sup>470</sup> Cl. Rejoinder on Jurisd., paras. 262-266, citing, among other awards, Exh. CL-39: *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 24 January 2004, para. 97; Exh. CL-38: *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, para. 89; Exh. CL-14: *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, para. 80.

<sup>471</sup> Exh. RL-14: *Pantechniki, S.A. Contractors & Engineers v. the Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 62; Exh. RL-13: *H&H Enterprise Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, 6 May 2014.

<sup>472</sup> *Pantechniki*, *supra*.

<sup>473</sup> Cl. Supp. to RfA, para. 73.

<sup>474</sup> Exh. CL-41: *Mr. Hassan Awadi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, para. 203.

*of the Contracting party concerned or to international arbitration.*  
(emphasis added)

For arbitration, the options are ICSID, the ICSID Additional Facility and the UNCITRAL Rules.

430. BIT Article 11(4) goes on to provide that “[o]nce the investor has referred the investment dispute to international arbitration ... the choice of jurisdiction shall be final.” Arguably Article 11(4) modifies Article 11(2) by rendering it a “one-way” election of remedies clause, barring a claimant from bringing litigation of a claim or claims previously submitted to arbitration, but not, conversely, barring a claimant from initiating arbitration over a claim or claims previously brought to the courts. Under this view, the BIT would entitle an investor to pursue litigation over its claims without prejudice to its right to thereafter submit them to arbitration. However, it seems to the Tribunal more plausible, especially in view of its placement within Article 11, that Article 11(4) has a more limited import, namely that if and when a claimant opts for arbitration and institutes proceedings before one arbitral institution, it may not thereafter pursue its claim before a different arbitral institution. So viewed, Article 11(4) would leave Article 11(2), and any limitation that it imposes, fully intact.

431. The 2014 Foreign Investment Law similarly offers claimants both a litigation and arbitration option:

*In the absence of such an agreed procedure, a foreign investor shall have the right to require that the investment dispute be settled either through litigation before a court of competent jurisdiction in the Republic of Kosovo or through local and international arbitration. The foreign investor may choose any of the following procedural rules to govern the arbitration of the investment dispute: ...*

If a claimant opts for arbitration, its options are the ICSID Convention, the ICSID Additional Facility Rules, the UNCITRAL Rules and the ICC Rules.

432. The question then is whether a treaty or statutory provision enabling a claimant to submit a dispute *either* to the courts (or administrative tribunals) of the host State *or* international arbitration constitutes a “fork in the road” provision.

433. It seems to the Tribunal quite reasonable to read a provision enabling a claimant to proceed either in litigation or in arbitration as simply giving it two avenues of recourse against an alleged BIT violation. It does not follow from the fact that a claimant has two options that a choice once made is necessarily an irreversible one, so that availing oneself of one remedy precludes it from thereafter resorting to the other. As the above examples show, there exists standard language by which States, in drafting their BITs, can clearly require investors to make an irreversible election of remedies. The Tribunal cannot comfortably conclude that BIT Article 11(2), as written, operates to bar Claimant from proceeding in this forum.
434. In reaching its conclusion, the Tribunal is also influenced by comparing the language of BIT Article 11(2) and the analogous provisions in other BITs. An example of a classic “fork in the road” provision are Articles VII(2) and (3) of the Argentina-U.S. BIT, according to which:

*Provided that the [investor] has not submitted the dispute for resolution under paragraph 2 (a) [the courts or administrative tribunals of the host State] or (b) [any previously agreed dispute settlement procedure] ... , the [investor] may choose to consent in writing to the submission of the dispute for settlement by binding arbitration...*

435. By way of a further example, Article VI(3) of the Czech-U.S. BIT provides:

*[E]ither party to the dispute may institute [arbitration] provided:*

*(i) the dispute has not been submitted ... for resolution in accordance with any applicable previously agreed dispute-settlement procedures; and*

*the [investor] has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the [host State].*

These are the standard formulations. They demonstrate how an effective fork in the road provision can be, and is, drafted.

436. In sum, Respondent’s objection based on BIT Article 11(2) must be rejected. That having been decided, the Tribunal has no occasion to address Claimant’s two further arguments,

namely that the claims advanced by Claimant in the courts of Kosovo and the claims pursued here are not substantially the same, and that a “fork in the road” provision is not triggered if the forum first seized does not address and decide the claims before it on the merits.

437. Thus, under neither the BIT nor the 2014 Foreign Investment Law is an investor subject to an election of remedies requirement.

**(3) CLAIMANT FAILED TO SATISFY THE BIT’S AND THE FOREIGN INVESTMENT LAW’S REQUIREMENT OF PRIOR CONSULTATION**

**(a) Respondent’s Position**

438. Respondent observes that the BIT requires that, prior to initiating arbitration, an investor must engage in consultations with the host State with a view to achieving amicable settlement of the dispute. Articles 11(1) and (2) provide as follows:

*(1) [D]isputes between an investor of a Contracting Party and the other Contracting Party regarding an investment of the former made in the territory of the latter, which are based on an alleged breach of obligations under this Agreement, shall be, to the extent possible, settled amicably through consultations by request in writing of either of the parties to the dispute.*

*(2) If these consultations do not result in a solution within six months from the date of the written request for consultations, the investor may submit the dispute either to the courts or the administrative tribunals of the Contracting party concerned or to international arbitration.*

Respondent lays emphasis on the word “shall” in paragraph 1.

439. Respondent maintains that Claimant has not performed the above steps. It rejects Claimant’s suggestion that it complied with the consultation requirement through its letters to the PAK of 23 February 2016<sup>475</sup> and 30 March 2016.<sup>476</sup> The first letter does not express a request for consultations, but rather an intention to bring a legal action. While the second

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<sup>475</sup> Exh. C-8: Request for amicable settlement of dispute, 23 February 2016.

<sup>476</sup> Exh. C-9: Reminder, 30 March 2016.

letter does refer to amicable resolution of the dispute, it is insufficiently precise because it failed to specify that the dispute concerned a BIT-protected investment and an alleged breach of BIT obligations.<sup>477</sup> Because Respondent's consent to arbitrate was conditioned on a claimant's satisfaction of the prior consultation requirement, and because Claimant did not satisfy that requirement, Respondent's offer was not accepted and no agreement to arbitrate came into existence.<sup>478</sup>

440. Any assertion by Claimant that recourse to prior consultation should not be required because it would have been futile should be rejected. A claim of futility in regard to satisfaction of a condition precedent must be supported by clear evidence, and in this case no evidence of futility was proffered, apart from Behgjet Pacolli's own statement in his interview with police investigators.<sup>479</sup>

(b) Claimant's Position

441. Claimant disagrees. It maintains, first, that prior consultation is not a jurisdictional requirement, but simply a procedural or at most an admissibility one.<sup>480</sup> Thus, even if the requirement is not met, the Tribunal's jurisdiction is intact. Claimant also accuses Respondent of overlooking the phrase "to the extent possible" in Article 11(1).
442. More to the point, Claimant maintains that the letters of 23 February 2016 and 30 March 2016 do satisfy the BIT's prior consultation requirement because they served the purpose of that requirement, which is to enable the parties to enter into negotiation over the dispute. In Claimant's view, both letters served that purpose.<sup>481</sup> In its Rejoinder, Claimant adduced a third communication that, according to it, also satisfies the prior consultation

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<sup>477</sup> Resp. Mem. on Jurisd., paras. 146-148.

<sup>478</sup> Resp. Reply on Jurisd., para. 314.

<sup>479</sup> Resp. Reply on Jurisd., paras. 315-318.

<sup>480</sup> Cl. Rejoinder on Jurisd., paras. 288-294 citing Exh. CL-42: *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction, 25 May 1999 in: 41 I.L.M. (2002), p. 891; Exh. CL-44: *Ronald S. Lauder v. Czech Republic*, Final Award, 3 September 2001, paras. 187, 190; Exh. CL-43: *Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, para. 184; Exh. CL-45: *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 100; Exh. CL-46: *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 343.

<sup>481</sup> Cl. Rejoinder on Jurisd., paras. 300-302.

requirement. Claimant maintains that its letter of 27 August 2012<sup>482</sup> clearly represents a request for consultation, by stating the nature of the dispute, invoking BIT Article 11(1) and specifically referencing its grounds of complaint under the BIT.

443. Claimant also suggests that, as awards have previously held,<sup>483</sup> prior consultation is not required where resort to it would be futile. It would be futile, in Claimant's view, because the authorities of Respondent were engaged in "serious high-level decision-making organized crime."<sup>484</sup> Under these circumstances, further negotiations were pointless.

(c) The Tribunal's Analysis and Findings

444. Respondent observes that the BIT, though not the Foreign Investment Law, requires that, prior to initiating arbitration, an investor engage in consultations with the host State with a view to achieving amicable settlement of their dispute. Article 11(1) provides as follows:

*[D]isputes between an investor of a Contracting Party and the other Contracting Party regarding an investment of the former made in the territory of the latter, which are based on an alleged breach of obligations under this Agreement, shall be, to the extent possible, settled amicably through consultations by request in writing of either of the parties to the dispute.*

445. Respondent alleges that Claimant failed to comply with the precondition set out in BIT Article 11(1). Claimant replies in part that the condition set out in Article 11(1) constitutes an admissibility rather than a jurisdictional objection and that, in any event, it is inoperative since efforts at amicable resolution of the dispute would have been futile. Should those arguments fail, Claimant contends that it did in fact do what Article 11(1) requires. The Tribunal can accept neither of these assertions. In its reading of the BIT, Kosovo's offer to arbitrate could not be accepted by Mabco until the stated consultations were held, or at

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<sup>482</sup> Exh. C-75: Consultation Request, 27 August 2011.

<sup>483</sup> Claimant cites the awards in Exh CL-15: *Occidental Petroleum v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, 9 September 2008, para. 94; Exh. CL-16: *Teinver v. Argentina*, ICSID Case No. ARB 09/, Decision on Jurisdiction, 21 December 2012, para. 126.

<sup>484</sup> Exh. C-30: Official Memorandum of the Republic of Kosovo, Ministry of Internal Affairs, Police General Directorate, Crimes Investigation Directorate, 22 August 2012, p. 7; Cl. Counter-Mem. on Jurisd., para. 177; Cl. Rejoinder on Jurisd., para. 296, citing Exh. CL-47: *Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998, para. 84.

least requested, and failed. The condition is therefore jurisdictional in nature. Nor can the Tribunal conclude that consultations would be futile. They might or might not have been futile, but Respondent has adduced no evidence to that effect.

446. What remains then to be decided is whether Claimant did or did not satisfy the BIT's condition precedent. In maintaining that it did satisfy that requirement, Claimant relies on two communications from it to the PAK, those of 23 February 2016 and 30 March 2016.
447. Upon a fair reading, the former communication cannot be regarded as a request for consultations. In that short communication, Claimant's attorney Gazmend Nushi simply wrote: "I hereby notify [y]ou for the intention to file lawsuit against Privatization Agency of Kosovo in relation with the protection of infringed interests of 'Mabetex Group – Mabco Construction' in the process of privatization of NewCo 'Hoteli Grand' respectively on the occasion of withdrawal of shares of this enterprise by the Board of Directors of PAK."<sup>485</sup> This communication reflects no interest on Claimant's part in engaging in further discussions with the PAK in connection with their dispute. It announces Claimant's readiness to bring suit and nothing more.
448. Claimant's 30 March 2016 communication to the PAK reads as follows:

*Honorable President of Board of Directors,*

*On 23 February 2016, in the capacity of authorized representative of "Mabetex Group — Mabco Construction", I have submitted a Request for amicable resolution of the disputes, registered with PAK with protocol number 1600.*

*Through this submission, I would like to recall and reiterate that that "Mabetex Group — Mabco Construction" yet remains in the proposal filed by the Request of February 23rd 2016.*

*I hope that the Board of Directors will consider this request by sending an invitation to the delegation of "Mabetex Group — Mabco Construction" for discussions in finding an amicable*

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<sup>485</sup> Exh. C-8: Request for amicable settlement of dispute, 23 February 2016.



*resolution of the disputes and thus preventing the initiation of respective legal proceedings.*<sup>486</sup>

449. The Tribunal finds that, unlike the 23 February 2016 communication, the 30 March 2016 communication does satisfy the BIT's requirement of prior consultation. The language solicits an invitation from the PAK for "discussions in finding an amicable resolution of the disputes." The Tribunal finds that this expression of interest is sufficient to meet the BIT's requirement of prior consultation. Further, it cannot accept the suggestion that this communication bore no relation to the present dispute. That argument must fail, if for no other reason, because it refers back explicitly to the 23 February 2016 communication which in turn refers explicitly to the "infringed interests of 'Mabetex Group – Mabco Construction' in the process of privatization of NewCo 'Hoteli Grand' respectively on the occasion of withdrawal of shares of this enterprise by the Board of Directors of PAK." That sufficiently identifies the dispute referenced in the 30 March 2016 communication.
450. In sum, Claimant has satisfied the prior consultation requirement set out in BIT Article 11(1).

**E. THE TRIBUNAL LACKS JURISDICTION *RATIONE TEMPORIS***

451. Respondent also raises an objection *ratione temporis*, viz., that the BIT, by its terms applies to investments made prior to the BIT's entry into force, but that, according to Article 2, it does not apply "to claims and disputes arising out of events which occurred prior to its entry into force."<sup>487</sup>

**(1) RESPONDENT'S POSITION**

452. Respondent argues that, since Claimant challenges the validity of the decision to withdraw the shares,<sup>488</sup> the event out of which the present dispute arose is precisely the PAK's 16 December 2011 decision to withdraw the shares<sup>489</sup> or, at the very latest the 31 May 2012

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<sup>486</sup> Exh. C-9: Reminder, 30 March 2016.

<sup>487</sup> Exh. C-1: BIT, Art. 2.

<sup>488</sup> Resp. post-hearing br., para. 102.

<sup>489</sup> Resp. Reply on Jurisd., paras. 111-115; Resp. post-hearing br., para. 102.

decision to execute that decision.<sup>490</sup> Both dates predate the entry into force of the BIT on 13 June 2012. Respondent describes the 31 May decision as “final, binding and irreversible,” in a word, definitive, all subsequent steps amounting to nothing more than formalities.<sup>491</sup> Significantly, the measure that Mr. Pacolli challenged in the SCSC and in the Constitutional Court was the decision of 31 May 2012.<sup>492</sup>

453. Respondent also disputes the notion that its conduct was a continuing action, extending beyond the entry in force of the BIT.<sup>493</sup> Similarly, Claimant’s denial of justice claim does not constitute a new event within the meaning of BIT Article 2, because it relates back to the 31 May 2012 decision.<sup>494</sup> Both claims arise out of events that precede entry into force of the BIT on 13 June 2012. Respondent cites, among other things, Selim Pacolli’s 11 June 2012 letter to the PAK objecting to withdrawal of the shares.<sup>495</sup>

## **(2) CLAIMANT’S POSITION**

454. Claimant insists that the present dispute arises out of events that postdate the BIT’s entry into force.
455. Claimant notes that, as early as its correspondence with the ICSID Secretariat before registration of the case, it stated that it only became aware of the withdrawal of shares on 14 June 2012, i.e., one day after the BIT entered into force, and its claim was therefore timely.
456. Claimant disagrees that the dispute arose either on 16 December 2016 or 31 May 2012. In its view, the dispute did not arise either when the PAK decided to withdraw the shares or when it decided to execute the withdrawal. Neither of these decisions was a legally binding measure or was definitive. The measure challenged in this dispute is the actual withdrawal of the shares, not the prospect of it. The decisive event was the withdrawal itself, which

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<sup>490</sup> Resp. Reply on Jurisd., paras. 151 *et seq.* ; Resp. post-hearing br., para. 102.

<sup>491</sup> Resp. post-hearing br., paras. 103-105.

<sup>492</sup> Resp. post-hearing br., para. 107.

<sup>493</sup> Resp. post-hearing br., para. 108.

<sup>494</sup> Resp. post-hearing br., para. 112.

<sup>495</sup> Resp. Reply on Jurisd., paras. 156-162.

occurred on 20 July 2012,<sup>496</sup> after the BIT had gone into effect. Before that time, Claimant had suffered no losses.<sup>497</sup> Had the withdrawal not actually been carried out, there would have been no dispute.<sup>498</sup>

457. Claimant maintains that, in any event, Respondent's breach of its obligations was a continuing or composite one.<sup>499</sup> The chain of events by which Respondent pursued its wrongful purpose may have begun prior to the date of entry into force of the BIT, but it did not crystallize and culminate in the deprivation of Claimant's rights until after that date. Withdrawal of the shares on 20 July 2012 was the decisive moment.<sup>500</sup>
458. Claimant observes that the Foreign Investment Law, unlike the BIT, contains no exclusion for disputes arising out of events prior to its enactment. Article 20 simply provides that "the present law – and the rights, guarantees, privileges and protections established by the present law – shall apply equally to foreign investors that invested in the Republic of Kosovo prior to the effective date of this law."
459. At the very least, Claimant's denial of justice claim arose after the entry into force of the BIT.<sup>501</sup> Claimant submitted its claim to the SCSC on 19 November 2012, many months after the BIT's entry into force, and the court never ruled on it and neither did the SCSC's Appellate Panel or, for that matter, the Constitutional Court. Accordingly, the courts of Respondent never afforded Claimant an opportunity to be heard. In sum, Claimant suffered a denial of justice, and it did so after, not before, the BIT came into effect.

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<sup>496</sup> Cl. Rejoinder on Jurisd., paras. 305-311. Claimant also quotes from the PAK's letter of 17 July 2012 (Exh. C-41) stating that "[w]e as an Agency have undertaken necessary legal actions to return the ownership of Grand Hotel and the same is now returned on the name of the Agency." Cl. post-hearing br., para. 36.

<sup>497</sup> Cl. Rejoinder on Jurisd., paras. 309-310.

<sup>498</sup> Cl. Rejoinder on Jurisd., para. 311. Claimant also observes that even after 31 May 2012, Claimant and the PAK continued to correspond concerning Claimant's request to have the withdrawal decision reversed. Cl. post-hearing br., para. 41.

<sup>499</sup> Cl. post-hearing br., para. 44.

<sup>500</sup> Cl. Rejoinder on Jurisd., paras. 312-315, citing Exh. CL-49: *Société Générale v. Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, paras. 87-88. See Cl. post-hearing br., paras. 35-36.

<sup>501</sup> Cl. Rejoinder on Jurisd., paras. 316-319. Cl. post-hearing br., para. 37.

**(3) THE TRIBUNAL'S ANALYSIS AND FINDINGS**

460. The Tribunal notes at the outset that, unlike most BIT provisions to this general effect, Article 2 excludes claims arising out of “events” that occurred prior to the BIT’s entry into force, rather than “disputes” occurring prior to the BIT’s entry into force. This language suggests that the exclusion from coverage may start at an earlier point than the time at which the dispute as such emerged.
461. The 2005 Foreign Investment Law contains no such temporal limitation.<sup>502</sup> However, even if it did, it would pose no impediment to the claims in the present case. The Foreign Investment Law dates back to 21 November 2005, effective April 2006. While Claimant made its contribution in 2006, it cannot be said that any of its claims arose before the 2005 Law came into force.
462. Accordingly, we are concerned here solely with Mabco’s BIT claims.
463. In applying BIT Article 2, and thereby determining when the operative events occurred, it is necessary to distinguish clearly among Mabco’s various BIT claims. These are expropriation, denial of fair and equitable treatment and denial of justice.

**(a) Expropriation Claim**

464. Under Article 5(1) of the BIT:

*Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measures having the same nature or the same effect against investments of investors of the other Contracting Party (hereinafter referred to as “expropriation”) unless the measures are taken in the public interest, on a non-discriminatory basis and under due process of law, and provided that provisions be made for prompt, effective and adequate compensation. Such compensation shall be equivalent to the fair market value of the investment immediately before the expropriation occurred or became public knowledge,*

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<sup>502</sup> By contrast, the 2014 Foreign Investment law introduced a provision according to which “[t]he present law - and the rights, guarantees, privileges and protections established by the present law - shall apply equally to foreign investors that invested in the Republic of Kosovo prior to the effective date of this law.” (Exhs. C-18/R-19).

*whichever is earlier, as determined in accordance with recognised principles of valuation.*

465. Because the relevant events in connection with Mabco's expropriation claim unfolded in steps over a substantial period of time, identifying the events out of which that claim arose is not an entirely straightforward matter. Assuming, as the parties do, that the operative event, in terms of appropriation, is the withdrawal of the shares, a number of dates present themselves for consideration. At numerous points in time between October and December 2011, the PAK indicated that it was seriously contemplating withdrawal of the shares. However, an actual decision to do so was not taken until 16 December 2011.<sup>503</sup>
466. However, notwithstanding the 16 December 2011 decision, in the months that followed, Claimant and PAK engaged in a number of communications and meetings which gave the impression that that decision was not in fact definitive. The record indicates that the PAK invited Messrs. Pacolli, Berisha and Ejupi to a January 2012 meeting to discuss the matter and thereafter informed them that, subject to Claimant providing certain documentation and a bank guarantee, it would not withdraw the shares.<sup>504</sup> There ensued a further meeting on 12 February 2012, following which Mr. Lluka informed Mr. Pacolli that the PAK Board would meet again on 12 March 2012 before making a final decision on the Grand Hotel on 15 March 2012.<sup>505</sup> In the interim, the PAK received a second audit report on management of the Grand Hotel on 8 March 2012.<sup>506</sup> Mr. Lluka himself testified that at the 15 March 2012 meeting, the PAK Board decided to suspend any withdrawal of the shares, due to the interest shown by potential investors, all of whom, including the Pacollis, the PAK viewed as new investors.<sup>507</sup> PAK appears then to have postponed its decision on withdrawal of the shares that was initially scheduled for 15 March 2012.<sup>508</sup> On 19 March 2012, the PAK

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<sup>503</sup> Lluka witness stmt, para. 10.

<sup>504</sup> Cl. Counter-Mem. on Jurisd., paras. 55-56; Exh. C-30: Official Memorandum of the Republic of Kosovo, Ministry of Internal Affairs, Police General Directorate, Crimes Investigation Directorate, 22 August 2012, pp. 2, 7.

<sup>505</sup> Lluka witness stmt, para. 14; Cl. Counter-Mem. on Jurisd., paras. 60-61.

<sup>506</sup> Exh. R-16: Second Audit Report.

<sup>507</sup> Lluka witness stmt, para. 16.

<sup>508</sup> Exh. C-30: Official Memorandum of the Republic of Kosovo, Ministry of Internal Affairs, Police General Directorate, Crimes Investigation Directorate, 22 August 2012, p. 7; Cl. Counter-Mem. on Jurisd., para. 64.

contacted Selim Pacolli and Ms. Ejupi, requesting them to provide further information by 21 March 2012.<sup>509</sup> In response, on 28 March 2012, UTC, NTSH and Mabetex Project Engineering submitted to the PAK the Annex Agreement that has been agreed upon by them,<sup>510</sup> along with a Business Plan and Performance Guarantee.<sup>511</sup> The last exchanges between Claimant and the PAK occurred in April 2012, during which, in Claimant's contention, the PAK reiterated its prior requests for a bribe.<sup>512</sup> Under these circumstances, the Tribunal cannot conclude with confidence that the operative event was the decision of 16 December 2011.

467. However, moving forward in time, it is uncontested that on 31 May 2012 the PAK took the official decision to order execution of the withdrawal of shares. Without doubt, the dispute itself, and not merely events leading up to it, had arisen by that time, which was some two weeks prior to the BIT's entry into force on 13 June 2012. The Tribunal cannot accept Claimant's suggestion that the operative date was 20 July 2012 (a date obviously well after entry into force of the BIT) when the withdrawal of shares was actually executed.<sup>513</sup> The PAK's decision of 31 May 2012 was already sufficiently definitive.
468. The Tribunal accordingly finds that, by virtue of BIT Article 2, it lacks jurisdiction over Mabco's expropriation claim *ratione temporis*.
469. As noted, the 2005 Foreign Investment Law contains no provision comparable to Article 2 of the BIT. There is therefore no reason, from a *ratione temporis* point of view, why Claimant's expropriation claim under the Foreign Investment Law cannot proceed.<sup>514</sup>

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<sup>509</sup> Exhs. C-24/C-38: Letter from the PAK to Selim Pacolli representing Mabco, 19 March 2012.

<sup>510</sup> Exh. R-32: Letter from UTC, Mabetex Project Engineering and NTSH to PAK, 28 March 2012.

<sup>511</sup> Exh. C-39: Performance Guarantee.

<sup>512</sup> Pacolli 2d witness stmt, para. 17; Exh. C-30: Official Memorandum of the Republic of Kosovo, Ministry of Internal Affairs, Police General Directorate, Crimes Investigation Directorate, 22 August 2012, p. 5; Cl. Counter-Mem. on Jurisd., paras. 65, 69-70.

<sup>513</sup> Cl. Rejoinder on Jurisd., paras. 8, 310.

<sup>514</sup> The provisions of the 2005 Foreign Investment Law most relevant to expropriation are these:

(b) Denial of Fair and Equitable Treatment Claim

470. The BIT's fair and equitable treatment clause, Article 4(1), reads as follows:

*Each Contracting Party shall in its territory accord to investments and returns of investors of the other Contracting Party at all times fair and equitable treatment as well as full protection and security. Neither Contracting Party shall impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension or disposal of such investments.*

471. Claimant has not described in great detail what, apart from the alleged expropriation itself, might constitute a denial of fair and equitable treatment. However, under a fair reading of the pleadings, the purported unfairness and inequity appears to reside in the fact that, according to the Claimant, the PAK, directly or through intermediaries, required Claimant on more than one occasion to pay a bribe in order to have its ownership of the Grand Hotel shares registered, an allegation confirmed by Mr. Ejupi,<sup>515</sup> and that the PAK ultimately withdrew the shares as a result of Claimant's refusal to pay any such bribe.<sup>516</sup> Accordingly, the Tribunal understands Claimant's position to be that, even if the KTA's and PAK's actions and/or inactions are not found to constitute an expropriation, withdrawal of the shares due to Claimant's refusal to participate in the alleged bribes amounted to a denial of fair and equitable treatment.

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Article 8

8.1. *The items described in Article 7.1 shall also not be subject to any act of expropriation by or attributable to Kosovo.*

8.2. *Notwithstanding the prohibition contained in Article 8.1, Kosovo may take an act of expropriation affecting an asset of a foreign investor, foreign investment organization or foreign person, if the act of expropriation:*

- a. is for a clearly defined and legitimate public purpose;*
- b. is not inspired by any discriminatory objective;*
- c. is carried out in a non-discriminatory manner;*
- d. is carried out in accordance with due process of law; and*
- e. is accompanied by the prompt payment of adequate and effective compensation.*

<sup>515</sup> Ejupi witness stmt, Exh. CWS-4, para. 19. See also Ejupi testimony, tr. 172:21-24: "I had after, from the same agency, I had a visit in my home. They wanted that I pay €3.6 million a bribery if I want to have the shares. And I denied this, and I denounced the next day in EULEX."

<sup>516</sup> Cl. Counter-Mem. on Jurisd., paras. 3, 31, 78. Claimant specifically maintains that if it had paid the bribes solicited of it, the PAK would have honored its commitment to register the shares. *Id.*, para. 79.

472. Assuming that to be the essence of the asserted denial of fair and equitable treatment, the Tribunal's task in connection with Mabco's claim is, once again, to determine whether the events giving rise to that claim occurred before or after the date of the BIT's entry into force. According to Claimant, the PAK's attempts to bribe took place in the early months of 2012, well before the BIT came into effect. However, the Tribunal does not consider the alleged offers of a bribe to be the event that gave rise to Mabco's fair and equitable treatment claim. The event that gave rise to that claim would be PAK's alleged decision to withdraw the shares due to Claimant's refusal to be bribed. However, as already determined (paras. 464-468, *supra*), that event could have occurred as early as 16 December 2011 or as late as 31 May 2012. But, under either hypothesis, the event or events that gave rise to the dispute took place prior to the BIT's entry into force on 13 June 2012. Mabco's claim of denial of fair and equitable treatment under the BIT therefore also cannot proceed *ratione temporis*.

473. On the other hand, since the 2005 Foreign Investment Law, unlike the BIT, contains no limitation *ratione temporis*, Mabco's claim of unfair and inequitable treatment, absent any other jurisdictional barrier, may proceed.<sup>517</sup>

#### (c) Denial of Justice Claim

474. Finally, Claimant states a denial of justice claim arising out of its treatment by the courts of Kosovo.<sup>518</sup>

475. The BIT does not contain a freestanding denial of justice clause, but Article 5(2) does guarantee access to the courts of the host State in connection with an expropriation claim:

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<sup>517</sup> The most pertinent provision of the 2005 Foreign Investment Law on fair and equitable treatment is as follows:

#### *Article 3*

*3.1 Kosovo shall accord fair and equitable treatment to foreign investors and their investments in Kosovo. Kosovo shall also provide foreign investors and their investments with full and constant protection and security. In no case shall the treatment, protection or security required by this Article 3.1 be less favorable than that required by generally accepted norms international law or any provision of the present law.*

<sup>518</sup> Cl. Rejoinder on Jurisd., paras. 317, 324-327.



*[D]ue process of law includes the right of an investor of a Contracting Party which claims to be affected by expropriation by the other Contracting Party to prompt review of its case, including the valuation of its investment and the payment of compensation in accordance with the provisions of this Article, by a judicial authority or another competent and independent authority of the latter Contracting Party.*

Also, even if Claimant does not prevail on its expropriation claim, it remains possible for it to pursue a denial of justice claim in connection with its allegations of denial of fair and equitable treatment.

476. Claimant found itself in the courts of Kosovo at several intervals, some of them prior to the BIT's entry into forces, others subsequent to it. Because the event out of which a denial of justice arises is the action or inaction, as the case may be, of a court, the Tribunal looks presumptively at the date on which Mabco's claims were definitively resolved.
477. Claimant does not base its denial of justice claim on its 2007 litigation against UTC. The legal proceedings in the courts of Kosovo of which Claimant complains and that might potentially give rise to a denial of justice claim on Mabco's part include the following:
- a. the June 2012 action by UTC against the PAK in the Supreme Court of Kosovo,<sup>519</sup> in connection with which Claimant and NTSB sought to intervene, a request that the SCSC's Appellate Panel denied on 26 June 2014;
  - b. the action in the SCSC that Claimant and NTSB brought on 19 November 2012 for annulment of the PAK's decision,<sup>520</sup> which was dismissed by an undated judgment as time-barred;<sup>521</sup> and
  - c. the constitutional complaint filed by Claimant and NTSB on 17 November 2014 which the Constitution Court dismissed as inadmissible.<sup>522</sup> In either event, since the courts in

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<sup>519</sup> Exh. R-5: SCSC Decision (C-I-12-0042), 20 March 2013.

<sup>520</sup> File reference C-I-12-0056.

<sup>521</sup> Exh. R-8: SCSC Decision (C-I-12-0056), 15 May 2003.

<sup>522</sup> Exh. R-9: Constitutional Court of Kosovo, Resolution of Inadmissibility, 28 August 2015, Case No. K1168/14, p. 9; Cl. Counter-Mem. on Jurisd., para. 92.

these proceedings only disposed of Mabco's claims definitively after the entry into force of the BIT on 14 June 2012, they are subject to it.

478. As concerns Mabco's denial of justice claims under the Foreign Investment Law, since the acts upon which those claims are based arose after the entry into force of the 2014 Law on 24 January 2014, they are subject to that law rather than the 2005 law. Though the 2014 Law does not specifically identify denial of justice as a cognizable claim, Article 8, paras. 1 and 3, guarantee due process of law. Also, as under the BIT, protection against denial of justice may conceivably be read into and pursued under the rubric of the 2014 Law's guarantee of fair and equitable treatment.
479. Accordingly, the claims that Mabco attributes to the judgments in these proceedings fall within this Tribunal's jurisdiction *ratio temporis*, and are to be considered under both the BIT and the 2014 Foreign Investment Law.

**F. THE CLAIM FALLS OUTSIDE THE SCOPE AND PURPOSE OF THE ICSID CONVENTION**

480. Respondent's next argument pertains to the ICSID Convention only, and neither the BIT nor the Foreign investment Law. It maintains that the claim advanced here falls outside the scope and purpose of the ICSID Convention in two respects:

- (1) The claim is at variance with the purposes of the ICSID Convention.
- (2) Mr. Pacolli's involvement in this proceeding constitutes double-hatting and is procedurally unfair.

**(1) THE CLAIM IS AT VARIANCE WITH THE PURPOSES OF THE ICSID CONVENTION**

**(a) Respondent's Position**

481. Respondent points out that the very first letters sent to the PAK in which Mabco was identified as the alleged owner of the shares were dated June 2012, immediately after the BIT between Switzerland and Kosovo went into effect.<sup>523</sup> The suggestion is that Mr. Pacolli acted in bad faith by transforming a claim that he had all along advanced in his own

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<sup>523</sup> Resp. oral argum., tr. 23:17 – 23:25.

name into a claim purportedly belonging to Claimant purely to take advantage of the BIT.<sup>524</sup> This amounts to an abuse of process.<sup>525</sup>

482. Also, in Respondent's view, the claims being advanced in this arbitration are properly directed to UTC, not Respondent.<sup>526</sup>

(b) Claimant's Position

483. Claimant denies that it has in any way committed an abuse of process. Its submission of the present dispute is in every respect legitimate and conforms to the requirements and purposes of the BIT, the Foreign Investment Law and the ICSID Convention. Citing arbitral jurisprudence,<sup>527</sup> Claimant underscores the heavy burden that a party bears in establishing an abuse of process on the part of its opponent.<sup>528</sup> It contends that Respondent "has not even come close" to discharging that burden.<sup>529</sup>

(c) The Tribunal's Analysis and findings

484. Any argument that Mr. Pacolli acted in bad faith by transforming a personal claim of his into a claim purportedly belonging to Claimant, purely to take advantage of the BIT, naturally presupposes that, prior to the BIT's entry into force, the claim belonged only to Mr. Pacolli, and not to Claimant. The Tribunal has already determined (paras. 339-345, *supra*) that, despite the fact that he signed the great majority of documents and communications in his own name, Mr. Pacolli was at all times acting in a representative capacity on behalf of Claimant. To the extent that the basis for Respondent's assertion that the Tribunal's entertainment of the claims in this case does not comport with the ICSID

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<sup>524</sup> Resp. Reply on Jurisd., para. 406; Resp. oral argum., tr. 14:10–14:14.

<sup>525</sup> Resp. Mem. on Jurisd., paras. 151 *et seq.*; Resp. oral argum., tr. 14:24–15:1; 23:12–24:2; Resp. post-hearing br., paras. 135-137.

<sup>526</sup> Resp. oral argum., tr. 15:1–15:5.

<sup>527</sup> See, e.g., Exh. CL-18: *Chevron Corp. & Texaco Petroleum Corporation v. the Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Interim Award, 1 December 2008, para. 146.

<sup>528</sup> Cl. Rejoinder on Jurisd., para. 237.

<sup>529</sup> Cl. Counter-Mem. on Jurisd., para. 192.

Convention's purposes is that any investment that was made was made by Mr. Pacolli and not Claimant, Respondent's assertion must fail.

485. It seems to the Tribunal likely that Respondent also considers it contrary to the purposes of the ICSID Convention for a member of the government of a host State to assert claims, through a controlled foreign company, against his own government. That question is taken up more directly in the next section.

**(2) *MR. PACOLLI'S INVOLVEMENT IN THIS PROCEEDING CONSTITUTES DOUBLE-HATTING AND IS PROCEDURALLY UNFAIR***

**(a) Respondent's Position**

486. According to Respondent, the Tribunal must not entertain a claim by an individual against the very government of which he or she is a member, which is the situation in the present case. Admittedly, parties are generally free to structure their investments so as to avail themselves of a BIT from which they would otherwise not benefit. Nor is a minister generally barred from asserting an international claim against his or her own government through a foreign-incorporated company. However, since Claimant is not a "real foreign investor, its initiation of this arbitration represents an abuse of process."<sup>530</sup>
487. Also, Mr. Pacolli, as a member of the Government of Kosovo, would have access to documents and other information, including confidential information, that a party does not ordinarily enjoy vis-à-vis its opponent in an adversarial proceeding.<sup>531</sup> Mr. Pacolli, again as Government member, would also participate in decisions the Respondent will take in this proceeding, including even the decision to advance payment to ICSID of the costs of the arbitration that Mr. Pacolli has himself brought. The situation represents a form of double-hatting.<sup>532</sup>

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<sup>530</sup> Resp. Mem. on Jurisd., paras. 152-155.

<sup>531</sup> Resp. Mem. on Jurisd., para. 157; Resp. Reply on Jurisd., para. 409.

<sup>532</sup> Resp. Mem. on Jurisd., paras. 156-158.

(b) Claimant's Position

488. Claimant rejects the notion that Mr. Pacolli's involvement in this proceeding constitutes double-hatting. In its view, Respondent once again fails to distinguish between Claimant, a juridical person, and its owner, Mr. Pacolli, a natural person. A foreign corporate investor is not defined in terms of its owner, even a controlling owner. According to Claimant, there is neither in the text nor the purpose of the ICSID Convention any basis for denying protection to a foreign investor on account of the fact that its owner is a member of the host State's government.<sup>533</sup>
489. Claimant views the notion that Mr. Pacolli would be in a position to weaken or damage the Government's case before this Tribunal as implausible. Mr. Pacolli, being Foreign Minister would have no access to the files and records of the Ministry of Justice, which is handling this case.<sup>534</sup> Moreover, on any occasion in which the present dispute would be the subject of discussion or decision within the Government, Mr. Pacolli would be required to recuse himself.<sup>535</sup> More generally, Claimant posits that the very situation giving rise to the dispute demonstrates that Mr. Pacolli's position in the Government did not enable him to exert influence over the actions of the PAK.

(c) The Tribunal's Analysis and Findings

- a. May a member of the government of a host State maintain a claim against that State under a BIT or the Foreign Investment Law?
490. The question thus raised assumes, by definition, that the claim in question belongs to and is being asserted by a member of the host State's government. That cannot be said to be the case here. The Tribunal has already concluded that the putative investor is Mabco, not Mr. Pacolli. That Mr. Pacolli owns and controls Claimant is of no consequence, at least as long as the Claimant is not a "shell company" or otherwise purely fictional. Claimant, which is duly incorporated in Switzerland and conducts its business there (see paras. 395-396, *supra*), is entitled to be treated as a separate juridical entity. This would hardly be the

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<sup>533</sup> Cl. Counter-Mem. on Jurisd., para. 188.

<sup>534</sup> Behgjet Pacolli witness stmt, Exh. CWS-1, para. 16.

<sup>535</sup> Behgjet Pacolli witness stmt, Exh. CWS-1, para. 16.

first instance of an investor-State claim properly brought by a foreign company owned and controlled by a national of the host State.<sup>536</sup>

491. Is the situation altered in any way by the fact that the Claimant is not only a national of the host State, but also a member of its government? (It will be recalled, *supra* para. 150, that, at the time arbitration was initiated, Mr. Pacolli was First Deputy Prime Minister and Minister of Foreign Affairs of Kosovo.) Although this scenario is highly unusual, possibly unprecedented, the Tribunal sees no basis for treating a national of a host state any differently on account of the fact that he or she is a member of that State's government. Neither the BIT nor the Foreign Investment Law, nor any case law of which the Tribunal is aware, lends any support for a "carve-out" of this sort. The fact is that Mr. Pacolli was a businessman at the same time as he held public office. He was entitled, as a businessman legitimately operating through a foreign company, to the same protections as are available to any other businessman.

b. Would Mr. Pacolli's involvement in this proceeding constitute impermissible "double-hatting" or otherwise be procedurally unfair?

492. The Tribunal cannot subscribe to the notion that Mr. Pacolli's involvement in the present case constitutes "double-hatting." The term "double-hatting" is customarily used to denote the situation in which an individual sitting as arbitrator in one case is acting at the same time as advocate in another case and, more particularly, may be tempted to take positions in his or her capacity as arbitrator that are designed to advance his or her case as advocate. This is not an apt way of characterizing Mr. Pacolli's posture in the present case. Mr.

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<sup>536</sup> See, e.g., Exh. CL-11: *Tokios Tokeles v. Ukraine*, Decision on Jurisdiction, 29 April 2004, para. 56; *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007, para. 210.

Vandeveldt writes:

*Host-state investors potentially may ... obtain BIT protection for their investment in their own country. These investors may incorporate a company under the laws of the other BIT party and place ownership of their domestic investment in that company. In the event that their government wrongfully injures their investment, they can direct the company of the other BIT party that owns the investment to submit a claim to investor-state arbitration against their own government for a violation of the BIT.*

Vandeveldt, *supra* note 450, at pp. 162-163.

Pacolli is performing no adjudicatory function whatsoever. As Claimant's owner and chief executive, his sole interest is advancement of Claimant's case.

493. As for due process, the possibility cannot be excluded that Mr. Pacolli, and therefore Claimant, possesses government documents, or access to government documents, of assistance to Claimant that claimants in investor-State arbitration ordinarily do not have. In the Tribunal's judgment, however, this eventuality cannot bar the foreign company that he owns from availing itself either of a BIT between the two countries or of the host-State's foreign investment law. It is not at all uncommon, in private litigation, for an officer of a company to bring an action against that company and, in such capacity, similarly enjoy access to documents and other information that some other claimant against that company would not enjoy. To the Tribunal's knowledge, it has never been held or even maintained, that an officer of a company is on that basis disqualified from pursuing a claim against that company that he or she would otherwise be in a position to pursue.

494. Nor does the Tribunal see how Respondent could be unfairly disadvantaged in this proceeding by the fact that its opponent is or was owned by a member of Respondent's government. Respondent has ample means at its disposal, including removing Mr. Pacolli from any discussions of the dispute within the government, to arrange its defense so as to prevent Mr. Pacolli from interfering with or undermining it. Arguably, Claimant's felt need to institute these proceedings suggests that he does not have undue influence over the Government.

**G. CLAIMANT HAS FAILED TO ESTABLISH A *PRIMA FACIE* CAUSE OF ACTION**

**(1) *RESPONDENT'S POSITION***

495. Lastly, Respondent maintains that Claimant's Request for Arbitration, First Clarification Submission and Counter-Memorial, taken together, fail to present a *prima facie* case on the merits.<sup>537</sup> It is neither a precise nor a coherent exposition of the claim, including the basis for alleging breaches of the BIT's and the Foreign Investment Law's standards of

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<sup>537</sup> Resp. oral argum., tr. 24:16 – 25:3.

protection. The claim is also insufficiently documented. In Respondent's view, if Claimant has any cause of action at all, it is a purely private cause of action against UTC and/or Mr. Berisha.<sup>538</sup>

496. In this connection, Respondent denies that any acts of extortion occurred, invoking in support of that contention, the police investigation and decision not to prosecute. It even denies that the so-called intermediaries (paras. 200, 471, *supra*) were ever affiliated with or acted on behalf of the PAK.<sup>539</sup>

**(2) CLAIMANT'S POSITION**

497. Claimant asserts that, on the facts as presented, it has established a *prima facie* case. It has demonstrated that Respondent expropriated its property without compensation in violation of Article 5(1) of the BIT and denied Claimant fair and equitable treatment in violation of Articles 4(1) and 4(2) of the BIT. It also committed a denial of justice in violation of Article 5(2) of the BIT.
498. Further, Respondent has committed numerous breaches of its obligations under the Kosovo Foreign Investment Law, including violation of fair and equitable treatment and national treatment (Articles. 3 and 4); disappointment of investors' good faith reliance on the validity of host State law (Articles. 5(1) and 5(2)); and uncompensated expropriation (Article 7).
499. As for the suggestion that Claimant's action should be directed to UTC rather than the Respondent, Claimant's counsel disagrees, arguing that the violation essentially consisted of Respondent's refusal to register Claimant's shares of stock in the Grand Hotel and its withdrawal of the shares.<sup>540</sup>

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<sup>538</sup> Resp. Reply on Jurisd., paras. 392-397.

<sup>539</sup> Resp. Reply on Jurisd., paras. 398-400.

<sup>540</sup> Cl. Answ. to Trib. Q., tr. 55:24–56:1.



### (3) THE TRIBUNAL'S ANALYSIS AND FINDINGS

500. As noted (para. 36, *supra*), on 22 December 2018, Respondent filed a preliminary objection to the claim under Rule 41(5) of the ICSID Arbitration Rules on grounds of “manifest lack of legal merit,” an objection that the Tribunal rejected on 7 February 2019. The Tribunal now has the benefit of the Parties’ successive pleadings in this case as well as the documentary and testimonial evidence they have adduced. In assessing whether Claimant has established, with respect to its expropriation claim, a *prima facie* case – which of course is a measurably higher standard than “manifest lack of legal merit” – the Tribunal recalls that Claimant’s position in this proceeding is best understood as a claim of *entitlement* to the Grand Hotel shares. Thus, it is not necessary at this stage for Claimant to prove ownership. What Claimant must establish is that it has a colourable claim of entitlement to those shares.
501. For reasons set out earlier in this Decision (see paras. 293-338, *supra*), the Tribunal finds that Claimant has established a credible claim to the entitlement that it asserts in this proceeding. While Mabco could have presented its claim more coherently than it did, its showing is sufficient to defeat Respondent’s argument that Claimant has failed to establish a *prima facie* case of expropriation.
502. It remains to determine whether Claimant has also made a *prima facie* case in support of its claims of denial of fair and equitable treatment under the Foreign Investment Law and denial of justice under the BIT and/or the Foreign Investment Law. As noted earlier (para. 471, *supra*), putting its expropriation claim to one side, Mabco’s claim that Respondent denied it fair and equitable treatment rests essentially on the claim that the PAK withdrew the shares to which Mabco claims entitlement on account of the fact that Mabco refused to pay a bribe. An official police report of 22 August 2012 records an affirmation by Mr. Pacolli of PAK authorities asking for bribes in exchange for registration of the shares, and the truth of that affirmation is attested to both Selim Pacolli and Mr. Ejupi.<sup>541</sup> Respondent denies that any attempts at a bribe occurred, but given Mr. Pacolli’s affirmation to the

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<sup>541</sup> Exh. C-30: Official Memorandum of the Republic of Kosovo, Ministry of Internal Affairs, Police General Directorate, Crimes Investigation Directorate, 22 August 2012.

authorities that such attempts occurred and Mr. Selim Pacolli's and Mr. Ejupi's confirmation of that allegation, the Tribunal is reluctant to conclude that Claimant's assertion that Respondent violated its obligation of fair and equitable treatment has, for jurisdictional purposes, no reasonable basis.

503. Mabco's claim of denial of justice is considerably less well-developed. As best the Tribunal can tell, Claimant does not object to the SCSC's ruling that the claim brought before it by Claimant and NTSB was time-barred under the applicable limitations period. Claimant does, however, object to the SCSC Appellate Panel's rejection of Claimant's and NTSB's petition to intervene in UTC's action against the PAK, as impermissibly based on the rationale that UTC and the PAK objected to their intervention. Claimant also objects to the Constitutional Court's dismissal of its and NTSB's complaint alleging violation by the PAK of both the Constitution of Kosovo and the BIT on the basis of its claimed lack of competence to examine the compatibility of national law with international agreements.<sup>542</sup> The Tribunal is not in a particularly good position to gauge the strength of Mabco's claim of denial of justice on these bases. However, Claimant has stated its strong objections, in terms of principle, to the Appellate Panel's and the Constitutional Court's rulings, as well as their basis – objections that Respondent has not yet addressed. Largely, on that basis the Tribunal concludes that Mabco's claims of denial of justice cannot be dismissed at this stage.

## **V. CONCLUSION**

504. In this Decision, the Tribunal has examined each of the jurisdictional objections raised by Respondent. It has determined (a) that the claims advanced in this arbitration arise out of or relate to an investment in Kosovo, (b) that Claimant is a foreign investor, (c) that Claimant's alleged ownership interest in shares of Grand Hotel LLC is a protected investment, (d) that Respondent consented to arbitrate the present dispute, insofar as Claimant was not subject to an election of remedies requirement and satisfied the BIT's

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<sup>542</sup> Exh. R-9: Constitutional Court of Kosovo, Resolution of Inadmissibility, 28 August 2015, Case No. K1168/14, p. 9; Cl. Counter-Mem. on Jurisd., para. 92.

requirement of prior consultation, (e) that the Tribunal has jurisdiction *ratione temporis* over Mabco’s denial of justice claim under the BIT and over its claims of expropriation, denial of fair and equitable treatment and denial of justice under the applicable Foreign Investment Law, (f) that the claims are within the scope and purpose of the ICSID Convention, and (g) Claimant has established a *prima facie* case for its expropriation, denial of fair and equitable treatment and denial of justice claims in this case.

## VI. COSTS

### A. CLAIMANT’S COST SUBMISSIONS

505. In its submission on costs, Claimant argues that Respondent “shall be ordered to reimburse the Claimant for its payment of the advances in the amount of USD 137’500,” and that, “[i]n an award all costs incurred, CHF 509’907.15 and USD 300’000.00 and EUR 5’394.00, in relation to the jurisdictional phase of the proceedings shall be borne by the Respondent.” Claimant also maintained its prayers for relief as stated in its post-hearing brief.
506. Claimant’s legal fees and expenses totalling CHF 500,907.15, EUR 5,394 and USD 300,000, were broken down as follows:

Legal representation fee	CHF 495,347.15
Travel costs	CHF 5,660.00.
	EUR 5,394.00.
Hotel fees and advances paid	USD 300,000.
Total	CHF 500,907.15
	EUR 5,394.00.
	USD 300,000.

507. Claimant makes its claim on the basis that all costs of the jurisdictional phase are solely due to the Respondent's meritless objections. It also argues that the length of the jurisdictional proceedings and the costs thereby incurred are solely due to the Respondent's conduct. Claimant refers to Respondent's failure to pay its share of the advance on costs, which resulted in the proceedings being stayed for more than six months, and Respondent's requests for extension of time to file its submissions.<sup>543</sup>

**B. RESPONDENT'S COST SUBMISSIONS**

508. In its submission on costs, Respondent submits that the Tribunal should order Claimant to pay the Respondent's full costs and expenses associated with defending against Claimant's claims including, in addition to the costs of the arbitrators and ICSID, the costs and expenses for legal representation and of the Respondent's own officials and witnesses in an amount of EUR 505,433.36, together with interest thereon at a reasonable rate.

509. The Respondent's legal fees and expenses totalling EUR 505,433.36 were broken down as follows:

Legal representation fee	EUR 490,000.
Counsel expenses	EUR 7,390.73
Respondent's own expenses	EUR 4,388.24
Expenses of Mr. Shala	EUR 3,654.39
Total	EUR 505,433.36

510. Respondent argues that when a claimant's claims are rejected for lack of jurisdiction, numerous tribunals have followed the principle of "loser pays" or "costs follow the event". It also argues that Claimant's claims are frivolous and abusive, and that Claimant should

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<sup>543</sup> Claimant's Submission on Costs, 24 February 2020.

be ordered to pay the costs occasioned by its faulty conduct in the proceedings, including the postponement of the hearing and unnecessary procedural correspondence.<sup>544</sup>

### **C. THE TRIBUNAL'S DECISION ON COSTS**

511. 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.*

512. 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.

513. Because the Tribunal rejects Respondent's jurisdictional objections and this proceeding shall continue into a merits phase, it defers a decision on cost allocation to a future date.

### **VII. DECISION**

514. For the reasons set forth above,

- (1) the Tribunal decides that Respondent's jurisdictional objections *ratione temporis* to Claimant's expropriation and fair and equitable claims under the BIT are upheld, but its jurisdictional objections to Claimant's denial of justice claim under the BIT is rejected.
- (2) the Tribunal decides that Respondent's jurisdictional objections *ratione temporis* to Claimant's expropriation, fair and equitable claim and denial of justice claims under the Foreign Investment Law are rejected.

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<sup>544</sup> Respondent's Submission on Costs, 24 February 2020.

- (3) the Tribunal by majority rejects Respondent's jurisdictional objections *ratione materiae* and *ratione personae*.
- (4) the Tribunal rejects all of the Respondent's other jurisdictional objections.
- (5) defers decision on allocation of costs to a later date.

[Signed]

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Mr. Gianrocco Ferraro  
Arbitrator

Date:

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Professor Dr. August Reinisch  
Arbitrator  
*Subject to the attached dissenting opinion*

Date:

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Professor George A. Bermann  
President of the Tribunal

Date:

[Signed]

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Mr. Gianrocco Ferraro  
Arbitrator

Date:

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Professor Dr. August Reinisch  
Arbitrator  
*Subject to the attached dissenting opinion*

Date:

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Professor George A. Bermann  
President of the Tribunal

Date:



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Mr. Gianrocco Ferraro  
Arbitrator

Date:

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Professor Dr. August Reinisch  
Arbitrator  
*Subject to the attached dissenting opinion*

Date:

[Signed]

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Professor George A. Bermann  
President of the Tribunal

Date:

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT  
DISPUTES**

In the arbitration proceedings between

**MABCO CONSTRUCTIONS SA**

Claimant

and

**REPUBLIC OF KOSOVO**

Respondent

**ICSID Case No. ARB/17/25**

**DISSENT ON JURISDICTION**

Professor Dr. August Reinisch

## I. INTRODUCTION

1. I am afraid but I am unable to concur with my co-arbitrators' view that this Tribunal would have jurisdiction over the present dispute.
2. This is indeed a highly complex story of an attempt to make an investment in the tourism sector of the Kosovo through participating in the privatization of the Grand Hotel Prishtina. However, to consider that it actually amounted to an "investment" made by the Claimant in order to fall under the *ratione materiae* and *ratione personae* jurisdiction of an ICSID tribunal would just require too many leaps of faith.
3. While the story is indeed perplexingly strange and full of factual difficulties, as outlined in the majority's factual background,<sup>1</sup> it is also a relatively simple contractual dispute concerning a share purchase agreed upon between private parties.
4. Mr. Behgjet Pacolli, a highly successful businessman and prominent politician of Kosovo and Swiss nationality, together with Mr. Ejupi, the founder and owner of NTSH Eurokoha-Reisen, entered into an agreement with Mr. Zelqif Berisha. Mr. Berisha, the owner and director of UTC/Unio Commerce, had successfully bid for the privatization of Grand Hotel, but was unable to pay the entire purchase price. Mr. Pacolli and Mr. Ejupi agreed to participate in this privatization venture by providing part of the unpaid purchase price to UTC to be then paid to the privatization agency of the Kosovo (KTA/PAK). Under an agreement between the three businessmen, Mr. Pacolli, Mr. Ejupi and Mr. Berisha, apparently orally entered into sometime around April 2006 and put into writing in the so-called Agreement of Good Understanding,<sup>2</sup> Mr. Pacolli and Mr. Ejupi would participate with a 40% and a 20% share in the hotel project obliging the two to make cash infusions of 4 million and 1 million Euro, respectively, and Mr. Berisha to hand over to the former their shares after a period of two years.

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<sup>1</sup> *Mabco Constructions SA v. Republic of Kosovo*, Decision on Jurisdiction, ICSID Case No. ARB/17/25 (*Mabco v. Kosovo*, Decision on Jurisdiction), paras. 136 *et seq.*

<sup>2</sup> "Agreement of Good Understanding – Hotel Grand Prishtina", dated January 2007 (C-17).

5. On this obligation Mr. Berisha reneged, triggering a law-suit by Mr. Pacolli before the courts in the Kosovo. While Mr. Pacolli prevailed in these proceedings at first instance,<sup>3</sup> he lost on appeal.<sup>4</sup>
6. Mabco, the Claimant in this arbitration, a Swiss company founded and controlled by Mr. Behgjet Pacolli, appeared neither in the contractual arrangements, nor in the legal proceedings. It was always Mr. Behgjet Pacolli who acted in his own name when trying to obtain the shares contractually<sup>5</sup> and subsequently in litigation.<sup>6</sup>
7. Also in lengthy discussions with the PAK concerning the fulfilment of the privatization requirements of Grand Hotel and the eventual withdrawal of the shares, it was Mr. Behgjet Pacolli and/or his brother Mr. Selim Pacolli, representing him, who acted.<sup>7</sup>
8. The Claimant Mabco comes into play in a letter by a Kosovo lawyer writing to the PAK on 20 June 2012, a few days after the Kosovo-Switzerland Bilateral Investment Treaty (BIT)<sup>8</sup> entered into force. In this letter, Mabco is referred to as a “working unit” of MABETEX GROUP<sup>9</sup> and the PAK is informed that “MABETEX group has sustained

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<sup>3</sup> Judgment of the Municipal Court of Prishtina, dated 28 May 2009 (R-29).

<sup>4</sup> Judgment of the District Court of Prishtina, dated 13 April 2010 (R-31).

<sup>5</sup> The “Agreement of Good Understanding – Hotel Grand Prishtina”, January 2007 (C-17), refers to Mr. Zelqif Berisha, Mr. Behxhet Pacolli and Mr. Remzi Ejupi as “Co-Owners” without any mentioning of Mabco; The Annex agreement, dated 28 March 2012 (C-20), refers to Mabetex, not Mabco as the company involved next to Mr. Behxhet Pacolli (“Selim Pacolli, born on 21/09/1969 in Marec-Prishtina Commune, holder of personal ID number 2005867137, representing Mr. Behxhet Pacolli, acting on behalf of the company ‘MABETEX’ and in his personal name.”).

<sup>6</sup> The lawsuit filed by Mr. Pacolli and NTSH against UTC, dated 5 June 2007 (R-30), was brought by “Behgjet Pacolli from Prishtina, president of c.e.o MABETEX GROUP” and “NTSH Eurokoha-Reisen”, demanding confirmation “that the Claimants are co-owners of the hotel ‘Grand Hotel Prishtina’ Prishtina as follows: the first Claimant Behgjet Pacolli from Prishtina of the ideal part of 2/5 or 40%, and the second Claimant NTSH ‘Eurokoha - Reisen’ from Prishtina of the ideal part of 1/5 or 20% of this hotel.”; the Judgment of the Municipal Court of Prishtina, dated 28 May 2009, (R-29) lists as claimants Mr. “Behxhet Pacolli” and “NTSH Eurokoha-Reisen”, whereas “Unio Commerce” appears as respondent; the same is true for the Judgment of the District Court of Prishtina, dated 13 April 2010 (R-31).

<sup>7</sup> The so-called “October 21, 2011 Letter of Mabco to PAK” (C-22) was sent and signed by Mr. Selim Pacolli, not mentioning Mabco, but that he represented his brother, Mr. Behgjet Pacolli, as 40% owner according to the Agreement of Good Understanding; the so-called “March 5, 2012 Letter of PAK to Mabco” (C-23) was sent to Mr. Behxhet Pacolli not mentioning Mabco; the so-called “March 19, 2012 Letter of PAK to Mabco and NTSH” (C-24, C-38) was sent to Mr. Selim Pacolli not mentioning Mabco; the letter from UTC, Mabetex Project Engineering and NTSH to PAK, dated 28 March 2012 (R-32), signed by Mr. Selim Pacolli on behalf of Mabetex mentions Mabetex, not Mabco; the letter from Mr. Selim Pacolli to PAK dated 11 June 2012 (R-42) in re share withdrawal refers to Mr. Behgjet Pacolli as 40% owner, not to Mabco.

<sup>8</sup> Agreement between the Swiss Confederation and the Republic of Kosovo on the Promotion and Reciprocal Protection of Investments, 27 October 2011, entered into force on 13 June 2012 (Kosovo-Switzerland BIT) (C-1).

<sup>9</sup> In the “June 20, 2012 Letter from Mabco to PAK” (C-40) “Mr. Behgjet Pacolli” is referred to as “a legal representative of MABETEX GROUP — working unit MARCO CONSTRUCTION S.A. headquartered in Lugano, Switzerland.”

a serious moral and pecuniary damage and shall never agree with your decision on withdrawal of shares.”<sup>10</sup>

9. In the end, it appears that attempts were made to acquire shares in the privatization of the Grand Hotel Prishtina, but so far these attempts have been unsuccessful, not leading to an “investment” in Kosovo, but to a contractual claim against UTC/Unio Commerce.
10. I believe it is the assessment of these facts where I am unable to follow the majority’s views and not really the legal prerequisites. We seem to concur that in order to be protected under the BIT<sup>11</sup> and/or the Kosovo Foreign Investment Law (FIL)<sup>12</sup> an “investment” must have been made and, for an ICSID tribunal to exercise jurisdiction *ratione materiae*, the dispute must “directly aris[e] out of an investment.”<sup>13</sup> We also agree that in order to fall under the Tribunal’s jurisdiction *ratione personae*, the Claimant, a company incorporated in Switzerland must have made the investment and not Mr. Pacolli, a dual Swiss and Kosovo national, since his latter nationality would prevent him from bringing an ICSID claim pursuant to Article 25(2)(a) of the ICSID Convention.<sup>14</sup>
11. In my view, the present case fails on jurisdictional grounds for two main reasons, first because no investment has been made and second because any attempts to make an investment were made by a dual Swiss-Kosovo national and not by the Swiss claimant.

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<sup>10</sup> Ibid. See also the so-called “Letter from Mabco and NTSH to PAK”, dated 28 June 2012 (C-37), written by “Selim Pacolli” and “NTSH Eurokoha-Reisen” to the PAK, wherein the former referred to himself as “general representative of Mabatex Group - Mabco Construction’ headquartered in Lugano - Switzerland and of owners of this Swiss investor.”

<sup>11</sup> See *supra* note 8.

<sup>12</sup> See *infra* notes 19 *et seq.*

<sup>13</sup> Article 25(1) ICSID Convention (“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.”).

<sup>14</sup> Article 25(2)(a) ICSID Convention (“‘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;”); See also *Champion Trading Company v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003, p. 14 (CL-12) (“According to the ordinary meaning of the terms of the Convention (Article 25 (2)(a)) dual nationals are excluded from invoking the protection under the Convention against the host country of the investment of which they are also a national.”).

12. This result corresponds to the object and purpose of investment protection, i.e. to protect existing investments against interference by host states, not to support claimants in their contractual disputes with private parties about the fulfilment of their obligations. In essence, this is what the dispute presented by the Claimant is all about, a contractual dispute concerning a share purchase agreed upon between private parties, Mr. Pacolli and Mr. Ejupi, on the one side, and Mr. Berisha, on the other side.<sup>15</sup>
13. This dispute should be distinguished from the dispute regarding the withdrawal of the Grand Hotel shares from UTC by the PAK, which resulted from UTC's non-fulfilment of the privatization requirements and may be viewed as a dispute between UTC and the host state. It is undoubted that neither Mr. Pacolli nor Mabco ever acquired Grand Hotel shares. Thus, any dispute about the withdrawal exists between the privatization agency, PAK, and the party whose shares have been withdrawn, UTC.

## II. WAS THERE AN INVESTMENT?

14. Contrary to the majority's view, acknowledging that "Claimant is not entirely clear or consistent as to the exact nature of the investment it claims to have acquired in respect of the Grand Hotel shares,"<sup>16</sup> but still finding that "*a claim of entitlement to ownership of the shares*"<sup>17</sup> constitutes an "investment",<sup>18</sup> I have difficulties in concluding that a contractual entitlement to receive shares constitutes an "investment" within the meaning of Article 1 of the BIT or Article 2 of Kosovo's Foreign Investment Law 2005<sup>19</sup>/2014<sup>20, 21</sup> on the one hand, and in the sense of Article 25 of the ICSID Convention, on the other hand.

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<sup>15</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, para. 334 ("Claimant did of course have a contractual relationship with UTC and, on that basis, a cause of action against UTC.").

<sup>16</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, para. 293.

<sup>17</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, para. 294 [emphasis in original].

<sup>18</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, paras. 295 *et seq.* (in regard to the ICSID Convention); paras. 302 *et seq.* (in regard to the BIT); paras. 313 *et seq.* (in regard to the FIL).

<sup>19</sup> Assembly of Kosovo, Law No. 02/L-33 on Foreign Investment, 21 November 2005 (C-2).

<sup>20</sup> Republic of Kosovo, Law No. 04/L-220 on Foreign Investment, 12 December 2013 (C-18) (R-19).

<sup>21</sup> The Claimant has variously invoked both investment laws at different stages of these proceedings, making it difficult for the Tribunal to ascertain on which legislation its non-BIT claims are based. However, I concur with my colleagues finding that since most of the challenged measures took place before the entry into force of the 2014 act it must be largely the 2005 legislation which applies in the present case. *Mabco v. Kosovo*, Decision on Jurisdiction, paras. 460 *et seq.*

15. We agree that in ICSID arbitration the “investment” criterion, both under the ICSID Convention and the instrument conferring consent to ICSID arbitration, i.e. the BIT or the applicable host state legislation, must be fulfilled. This follows from the well-established, double-barrelled test, as expressed by the ICSID tribunal in *CSOB v. Slovak Republic*<sup>22</sup> and affirmed by many other tribunals.<sup>23</sup>
16. In the present case, this implies that Claimant must have made an “investment” in the sense of Article 25 of the ICSID Convention and either Article 1 of the Kosovo-Switzerland BIT 2011 or Article 2 of Kosovo’s Foreign Investment Law 2005/2014.

**A. THE KOSOVO-SWITZERLAND BIT**

17. Article 1(1) Kosovo-Switzerland BIT 2011 provides in relevant part:

“The term ‘investment’ means every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party that has such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk, including: [...] (b) a company, or shares, parts or any other kind of participation in a company; (c) claims to money or to any performance having an economic value, except claims to money arising solely out of commercial contracts for the sale of goods and services; [...]”<sup>24</sup>

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<sup>22</sup> *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, para. 68 (“A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties’ consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in [...] the BIT.”).

<sup>23</sup> *Malaysian Historical Salvors Sdn, Bhd v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award, 17 May 2007 (RL-45), para. 55 (“Under the double-barrelled test, a finding that the Contract satisfied the definition of ‘investment’ under the BIT would not be sufficient for this Tribunal to assume jurisdiction, if the Contract failed to satisfy the criterion of an ‘investment’ within the meaning of Article 25.”); *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 107 (“[...] in order for a proceeding based on breach of the treaty to be admissible, the investment to which the dispute relates must pass a double test (also known as the ‘double keyhole approach’ or ‘double-barrelled test;’.”); *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, Partial Award on Jurisdiction, 8 September 2006, para. 112 (“It is the established practice of ICSID tribunals to assess whether a specific transaction qualifies as an ‘investment’ under the ICSID Convention, independently of the definition of investment in a BIT or other applicable investment instrument, in order to fulfill the *ratione materiae* prerequisite of Article 25 of the Convention.”).

<sup>24</sup> Article 1(1) Kosovo-Switzerland BIT, *supra* note 8.

18. It thus defines as investment “every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party.”<sup>25</sup> It does require that an asset must have been “established” or “acquired”, it does not include the attempt to acquire an asset. The BIT’s definition is thus fairly clear in its aim to protect investments on the basis of “established or acquired” assets.
19. The text of the BIT is also explicit in not merely containing a broad, asset-based definition of investment. In addition, it incorporates some of the elements developed by ICSID tribunals in the so-called *Salini*-test,<sup>26</sup> such as “the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk.”<sup>27</sup> Thereby, it makes clear that not every asset listed should qualify as an investment.<sup>28</sup> Rather, assets qualify as investment if they are established or acquired as a result of (usually) a capital commitment, held and operated in order to receive returns, with all the uncertainties associated with entrepreneurial risk. In this regard, I agree with the majority that suggested as a test “[...] that a claim to money can qualify as an investment provided that it “entail[s] a ‘transfer of resources into the economy of the host state by the claimant entailing the assumption of risk in expectation of a commercial return.’”<sup>29</sup> However, I do not agree with the majority’s conclusion that “*a claim of entitlement to ownership of the shares*” could already constitute an “investment.”<sup>30</sup>
20. Once shares, constituting participation in a company, have been acquired they would constitute an investment under the definition of the BIT. However, to view attempts to acquire shares as claims to performance having an economic value and thus “investments” would extend the notion of investment to any claim to obtain whatever has been contractually stipulated, whether real property, intellectual property rights,

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<sup>25</sup> *Ibid.*

<sup>26</sup> See *infra* at note 40.

<sup>27</sup> Article 1(1) Kosovo-Switzerland BIT, *supra* note 8.

<sup>28</sup> See even for cases where such a clarification is missing in the text of a BIT, *Romak S.A. v. Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, para. 207 (“[...] the term ‘investments’ under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk. [...] By their nature, asset types enumerated in the BIT’s non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of investment the fact that it falls within one of the categories listed in Article 1 does not transform it into an ‘investment’.” [emphases omitted]).

<sup>29</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, para. 308.

<sup>30</sup> *Ibid.* (“The Tribunal is accordingly not prepared to exclude fully the possibility that a claim of entitlement to ownership of shares under certain circumstances is cognizable as a qualifying investment.”).



shares or other rights, without the characteristics required for an “investment”, i.e. acquiring assets used in order to produce gain or profit with the assumption of risk.

21. As the tribunal in *Clorox v. Venezuela*<sup>31</sup> found “under its common meaning, an investment consists of deploying money or other goods in the hope of receiving a benefit,” which in its view “basically corresponds to the Latin etymology of the words ‘investment’ and ‘invest,’ which imply an input (*in*) and a return (*versus, vertere*).”<sup>32</sup> Also the tribunal in *Saba Fakes v. Turkey*<sup>33</sup> correctly emphasized “that the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk [...] derive from the ordinary meaning of the word ‘investment’, [...], one is required to contribute a certain amount of funds or know-how, one cannot harvest the benefits of such contribution instantaneously, and one runs the risk that no benefits would be reaped at all, as a project might never be completed [...].”<sup>34</sup>

## **B. THE FOREIGN INVESTMENT LAW**

22. As noted by the majority,<sup>35</sup> Kosovo’s 2005 Foreign Investment Law defines “investment” as “any asset that has (i) been contributed to a Kosovo business organization in return for an ownership interest in that business organization;”<sup>36</sup> and continues to define the term “asset”, among others, as “any item of value, whether tangible or intangible, and includes, but is not limited to, the following and similar items: a. movable and immovable property, including rights in and to such property such as a mortgage, lien, pledge, lease or servitude; [...] d. claims or rights to money, goods, services, and performance under contract;”<sup>37</sup>
23. In a similar way, Kosovo’s 2014 Foreign Investment Law defines “investment” as an “asset owned or otherwise lawfully held [...] for the purpose of conducting lawful

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<sup>31</sup> *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019.

<sup>32</sup> *Ibid.*, para. 820 (translation from Spanish) (“[...] en su sentido corriente, una inversión consiste en el empleo de dinero u otros bienes con la esperanza de sacar un beneficio. Ello corresponde básicamente a la etimología latina de las palabras “inversión” e “invertir” que implican una entrada (*in*) y un retorno (*versus, vertere*).”).

<sup>33</sup> *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (RL-46).

<sup>34</sup> *Ibid.*, para. 110.

<sup>35</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, paras. 315 *et seq.*

<sup>36</sup> Article 2 of the Foreign Investment Law 2005, *supra* note 19.

<sup>37</sup> *Ibid.*

commercial activities”, it does not define “investment” as assets attempted to be acquired.

24. Specifically, the definition of “investment” in Article 2 of Kosovo’s Foreign Investment Law 2014 provides as follows:

“[...] any asset owned or otherwise lawfully held by a Foreign Person in the Republic of Kosovo for the purpose of conducting lawful commercial activities, including but not limited to: [...]

1.4.3. cash, securities, commercial paper, guarantees, shares of stock or other types of ownership interests in a (sic!) the Republic of Kosovo or foreign business organization; bonds, debentures, other debt instruments;

1.4.4. claims or rights to money, goods, services, and performance under contract;”<sup>38</sup>

25. Like the BIT, the Foreign Investment Law does not regard any “asset” as an “investment.” Rather, it defines as “investment” “[...] any asset owned or otherwise lawfully held [...] for the purpose of conducting lawful commercial activities.”
26. While I agree that claims to performance under contract sometimes may form assets held for the purpose of conducting lawful commercial activities, this is not the case here since the claim to receive shares could not yet be viewed as commercial activity by which one conducts business.<sup>39</sup>

### **C. THE ICSID CONVENTION**

27. Most importantly, the *ratione materiae* jurisdiction under the ICSID Convention is lacking since the attributes of even a scaled-down *Salini* test have not been met. Indeed, most ICSID tribunals have limited the original *Salini*-test, which mentioned next to “contributions, a certain duration of performance of the contract and a participation in the risks of the transaction” “the contribution to the economic development of the host

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<sup>38</sup> Law No. 04/L-220, 12 December 2013 (C-18) (R-19).

<sup>39</sup> Law No. 04/L-220, 12 December 2013 (C-18) (R-19) (“1.6. Business activity – any activity involving the offering, providing or producing of goods, services, property and/or works to anyone in return for or in expectation of any type of payment or compensation.”).

State of the investment as an additional condition.”<sup>40</sup> Today, most ICSID tribunals hold that in fact only “the three objective criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk are necessary elements of an investment.”<sup>41</sup>

28. I concur with the majority that contribution to the economic development of the host state has fallen out of favour<sup>42</sup> and that it should not be seen as a separate jurisdictional requirement.<sup>43</sup> However, I disagree with the majority’s application of the core requirements of the *Salini* test, which demands that a substantial commitment is made in order to acquire assets which are being used over a certain period of time for entrepreneurial purposes, i.e. aimed at producing profit and return. Whether one would like to emphasise the expectation of regular profit and return or the implicit risk of such use does not seem to be important, but what is important is that the notion of investment implies the acquisition of some assets for economic purposes.<sup>44</sup>
29. Where only a transfer of money is made, leading to a claim to acquire assets, this in itself does not yet constitute an investment. As long as the contractual claim to ownership to assets has not been fulfilled by the other party, the usual commercial,

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<sup>40</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (CL-28), para. 52 (“The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (cf. commentary by E. Gaillard, cited above, p. 292). In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.”).

<sup>41</sup> *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (RL-46), para. 110 (“[...] that the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention.”). See also *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 5.43; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, para. 295; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, para. 151; *Poštová banka, a.s. and Istrokapital SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, para. 360; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 (RL-19), para. 187.

<sup>42</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, para. 296.

<sup>43</sup> See also *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, para. 306 (“[...] the criterion of contribution to economic development has been discredited and has not been adopted recently by any tribunal. It is generally considered that this criterion is unworkable owing to its subjective nature. Indeed, whether or not a commitment of capital or resources ultimately proves to have contributed to the economic development of the host State can often be a matter of appreciation and can generate a wide spectrum of reasonable opinions. Moreover, some transactions may undoubtedly be qualified as investments, even though they do not result in a significant contribution to economic development in a post hoc evaluation of the claimant’s activities. This is for example the case of mergers and acquisitions or of failed construction projects.” [footnotes omitted]).

<sup>44</sup> See also *Mabco v. Kosovo*, Decision on Jurisdiction, para. 308.

counterparty risk materialized, but not yet an investment risk as a typical characteristic of an investment.<sup>45</sup>

30. What is needed for an investment to exist is both a contribution and something created by such contribution, i.e. ownership or control of (at least potentially) wealth-creating assets.<sup>46</sup>
31. In determining whether there is an “investment” in the sense of Article 25 of the ICSID Convention I agree with those ICSID tribunals that use “a fact-specific and holistic assessment”<sup>47</sup> and stress that the *Salini*-elements<sup>48</sup> should not be characterized “as jurisdictional requirements but merely as typical characteristics of investments under the Convention.”<sup>49</sup>
32. Applying these considerations to the present facts indicates that much remains mysterious about the various money transfers back and forth in April 2006. Still, I understand that one may possibly recognize a contribution in the form of a transfer of 4 million Euro from Mabco (via NTSH Eurokoha-Reisen) to UTC for the purpose of acquiring shares in the Grand Hotel Prishtina. However, even this assumption remains highly problematic.

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<sup>45</sup> See *Romak S.A. v. Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, paras. 229, 230 (“All economic activity entails a certain degree of risk. As such, all contracts – including contracts that do not constitute an investment – carry the risk of non-performance. However, this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial transaction. An ‘investment risk’ entails a different kind of *alea*, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is ‘risk’ of this sort, the investor simply cannot predict the outcome of the transaction.”).

<sup>46</sup> *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 110 (“Clearly Article 1(a) of the Agreement emphasises the fruits and assets resulting from the investment, which must be protected, whereas the definitions generally used in relation to Article 25 of the ICSID Convention lay stress on the contributions that have created such fruits and assets. It can be inferred from this that assets cannot be protected unless they result from contributions, and contributions will not be protected unless they have actually produced the assets of which the investor claims to have been deprived.”).

<sup>47</sup> *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007 (RL-45), para. 107; see also *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction, 6 August 2004 (RL-44), para. 54 (“The requirement mentioned above, that a given element of a complex operation should not be examined in isolation because what matters is to assess the operation globally or as a whole, is a perfectly reasonable one in the view of the Tribunal. Accordingly, it has undertaken an examination of the Contract as a whole in order to determine whether it could qualify as an investment under Article 25 of the Convention [...]”).

<sup>48</sup> See *supra* note 40.

<sup>49</sup> *Ambiente Ufficio S.p.A. and others v. Argentine Republic (formerly Giordano Alpi and others v. Argentine Republic)*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 480.

33. For the following reasons, I cannot concur with the majority's assessment of the facts constituting "positive evidence that Mabco made the transfer of funds in connection with the Grand Hotel acquisition."<sup>50</sup>
34. While the majority criticizes the Respondent offering a possible alternative explanation for the 4 million Euro transfer as "sheer conjecture,"<sup>51</sup> it seems to take at face value the statements of Claimant's witnesses without any documentary evidence that the payment was indeed made for the privatization of the Grand Hotel. In fact, the majority seems to apply a *prima facie* test to the question whether an investment existed.<sup>52</sup>
35. In my view, a *prima facie* test is appropriate only when it comes to assessing whether the claims raised are capable of constituting breaches of the applicable BIT or investment law.<sup>53</sup> However, when it comes to establishing whether the *ratione materiae* requirement of an "investment" is fulfilled, the claimant has to prove the facts which are critical for the jurisdiction of a tribunal.<sup>54</sup>

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<sup>50</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, para. 367.

<sup>51</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, para. 364.

<sup>52</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, para. 337, finding that "for the purpose of establishing jurisdiction on a *prima facie* basis, and without prejudice to any decision on the merits, there is a colourable basis for Mabco's contention that it had a claim of entitlement against Respondent for registration of the shares in its name [...] and that claim, under the circumstances of this case, may be regarded as an investment."

<sup>53</sup> *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 254 ("[...] whether the facts as alleged by the Claimant [...], if established, are capable of coming within those provisions of the BIT which have been invoked." [emphasis omitted]); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 (CL-45), para. 197 ("[...] the Tribunal will apply a *prima facie* standard, both to the determination of the meaning and scope of the BIT provisions and to the assessment whether the facts alleged may constitute breaches. If the result is affirmative, jurisdiction will be established, but the existence of breaches will remain to be litigated on the merits.").

<sup>54</sup> *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (CL-33), para. 64 ("In sum, the Tribunal considers that as a general approach, it is correct that factual matters should provisionally be accepted at face value, since the proper time to prove or disprove such facts is during the merits phase. But when a particular circumstance constitutes a critical element for the establishment of the jurisdiction itself, such fact must be proven, and the Tribunal must take a decision thereon when ruling on its jurisdiction. In our case, this means that the Tribunal must ascertain that the prerequisites for its jurisdiction are fulfilled, and that the facts on which its jurisdiction can be based are proven."); *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction, 1 June 2012 (CL-1), para. 2.8-2.9 ("[t]he application of that '*prima facie*' standard is limited to testing the merits of a claimant's case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal's jurisdiction directly depends [...] all relevant facts supporting such jurisdiction must be established by the Claimant at this jurisdictional stage and not merely assumed in the Claimant's favour"); *Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14, Decision on Jurisdiction, 24 February 2014, para. 96 ("At the jurisdictional stage, the Claimant must establish (i) that the jurisdictional requirements of Article 25 of the ICSID Convention and of the Treaty are met, which includes proving the facts necessary to meet these requirements, and (ii) that it has a *prima facie* cause of action under the Treaty, that is, that the facts it alleges are susceptible of constituting a breach of the Treaty if they are ultimately proven.").

36. What the record reveals is that on 28 April 2006 (after various unsuccessful attempts) a transfer of 4 million Euro was made from Mabco to NTSH Eurokoha-Reisen. What the record does not reveal is whether this transfer was made for purposes of acquiring the shares in Grand Hotel. For the majority there “are good indications of the purpose for which the transfer was made, and Respondent offers no serious alternative explanation for it.”<sup>55</sup> However, the payment order concerning the initial transfer made by Mabco to NTSH Eurokoha-Reisen did not expressly indicate that it represented Mabco’s share for the Grand Hotel. Rather, the order merely noted “Agreement” as payment motive.<sup>56</sup> Whether the 21 April 2006 payment of Euro 4,011,676.00 from NTSH Eurokoha-Reisen to UTC<sup>57</sup> can be viewed as “onward transfer”<sup>58</sup> may create some chronological difficulties. In addition, the absence of documentary evidence requires some conjecture to assume that the money was subsequently transferred from UTC to KTA.<sup>59</sup> In my view, the majority’s assessment that the 4 million Euro transfer from Mabco to NTSH Eurokoha-Reisen was made in “connection with the Grand Hotel acquisition”<sup>60</sup> is based on Claimant’s circumstantial evidence and as such insufficient to establish that a contribution has been made.
37. Even if one would be willing to view the 4 million Euro transfer from Mabco to UTC in April 2006 as the contribution for acquiring an investment in the Kosovo, the other typical elements of an investment are still missing. The party receiving this “contribution”, UTC, failed to comply with its contractual obligation to deliver the shares. Thus, all that occurred was a transfer of money for the purchase of shares. Since the seller of the shares failed to fulfil its part of the deal, the would-be investor, Mabco or Mr. Pacolli, failed to acquire any assets with which it would have been possible to engage in economic activities aimed at producing profit and return over a certain period of time. This sentiment is very well captured by Mr. Pacolli who testified during the hearing that he had received nothing for the 4 million Euro<sup>61</sup> and that on the basis of the

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<sup>55</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, para. 364.

<sup>56</sup> Wire transfer receipt of EUR 4'000'000, dated April 29, 2006 (C-14).

<sup>57</sup> Transfer of EUR 4,011,676.00 from NTSH to UTC, dated 21 April 2006 (R-23).

<sup>58</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, para. 362.

<sup>59</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, para. 362 (“The record in the case does not appear to contain an exhibit of the onward transfer from UTC to KTA.”).

<sup>60</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, para. 367.

<sup>61</sup> Transcript of the Hearing Day 1, 172:18-20, Mr. Pacolli (“We have received nothing. I [am] only the big loser. The energy, you know, and money we lost. And we -- still today we haven't received anything.”).

agreement with Mr. Berisha of UTC he had intended to start investing in the hotel project.<sup>62</sup>

38. Thus, the only typical characteristic of an “investment” that may be recognized in the present facts is a contribution made in order to acquire assets that could be used for the purpose of producing a profit. The other elements, such as a certain duration and an element of risk are missing as a result of the failure to actually acquire an asset in return for the money contribution. Tellingly, the majority’s finding of the element of duration is made conditionally “if” an investment had in fact been made. Similarly, its conclusion that there was risk is premised on the assumption that shares were in fact obtained.<sup>63</sup>
39. In my view, a “holistic assessment” of the facts leads to the conclusion that one cannot qualify the Claimant’s activities as an investment under Article 25 ICSID Convention.
40. The majority’s approach, regarding not only shares, embodying participation in a corporate entity, but also a claim to entitlement to ownership of such shares as “investments” in effect transforms a purchase agreement for the acquisition of assets into an investment.
41. This would render the distinction between a contractual obligation and an investment largely meaningless and, in my view, impermissibly expands the notion of “investment.”

### **III. WAS AN INVESTMENT MADE BY THE CLAIMANT?**

42. I also have to part ways with the Tribunal’s majority in regard to its conclusion “that, notwithstanding Mr. Pacolli’s having very often used his own name rather than Mabco’s, the investment was in fact Mabco’s.”<sup>64</sup>

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<sup>62</sup> Transcript of the Hearing Day 1, 174:5-10, Mr. Pacolli (“Because we had an agreement with Mr Zelqif Berisha, a signed agreement, confirmed by a lawyer in the time. [...] and on base of this agreement we had to start with the investment, we had to invest.”).

<sup>63</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, para. 300 (“Turning to the question of risk, the Tribunal notes that, at the relevant time, Kosovo had virtually no tourism industry and development of a successful tourism industry could not be assumed. The purchase of shares in the Grand Hotel therefore necessarily entailed a risk. Nor is there any reason to suppose that Claimant’s investment, if made, would not have sufficient duration.”).

<sup>64</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, para. 344.



43. Rather, the “doubt in the Tribunal’s thinking that he was acting on these occasions in the name of Mabco”<sup>65</sup> leads me to believe that it would be wrong to disregard all the documentary evidence we have before us and to rely on after-the-fact testimony of Claimant’s witnesses, stating that everyone knew that “when Mr. Pacolli negotiated and signed agreements, he did so on behalf of the relevant entity within the Mabetex group, which in the construction and engineering sector would have been Mabco”<sup>66</sup> and that such had been common practice in Kosovo.<sup>67</sup>
44. Therefore, I cannot follow the majority’s determination “that, factually, Mr. Pacolli acted in his dealings with the KTA and the PAK, as well as with UTC and NTSB, in a representative capacity.”<sup>68</sup>
45. In my view, looking at the documentary evidence on record there is not much that would support the assumption that “Mr. Pacolli acted in a representative capacity.”
46. As already outlined above,<sup>69</sup> in all contemporaneous documents it was Mr. Behgjet Pacolli and not Mabco, who acted in the attempt to participate in the Grand Hotel privatization. Had it really been Mabco that entered into the Agreement of Good Understanding<sup>70</sup> it seems curious that it was nowhere mentioned and when court proceedings were brought it is strange that Mabco did not appear as plaintiff. Equally, it is surprising that when engaged in protracted communications with the PAK, trying to avert the impending withdrawal of shares, it was always Mr. Behgjet Pacolli and not Mabco who acted.
47. Given that Mr. Behgjet Pacolli is an experienced businessman one would expect him to be clear in his dealings when he is acting in his own name and when in the name of one of his companies.
48. To rely on an alleged practice in the Kosovo according to which everyone knew that “when Mr. Pacolli negotiated and signed agreements, he was understood as doing so on

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<sup>65</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, para. 339.

<sup>66</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, para. 342, relying on testimony by Mabco’s Chief Financial Officer, Lucina Maesani-Gaiatto (CWS-5).

<sup>67</sup> *Ibid.*, relying on testimony by Mr. Ejupi (CWS-4).

<sup>68</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, para. 388.

<sup>69</sup> See *supra* at paras. 6 *et seq.*

<sup>70</sup> “Agreement of Good Understanding – Hotel Grand Prishtina”, dated January 2007 (C-17).



behalf of [one of his companies]”<sup>71</sup> cannot suffice to absolve the Claimant of its burden of proof to establish that Mr. Pacolli actually negotiated and acted on its behalf.

49. We can all speculate about different business practices. It may equally well be that Mr. Pacolli acted in his personal capacity because he was a well-known and successful businessman with whom an agreement was sought to invest in the Grand Hotel privatization, rather than with Mabco, S.A., a Swiss société anonyme with a share capital of 100.000,00 CHF.<sup>72</sup>
50. Such speculations cannot overcome Claimant’s failure to establish that Mr. Pacolli’s activities should in fact be attributed to Mabco.
51. That Mabco enters the scene in June 2012 is less surprising. The entry-into-force of the Kosovo-Switzerland BIT on 13 June 2012 certainly did not go unnoticed in legal circles.
52. It thus made strategic sense for Mr. Pacolli’s lawyer to refer to Mr. Pacolli as “a legal representative of MABETEX GROUP — working unit MABCO CONSTRUCTION S.A. headquartered in Lugano, Switzerland” and to threaten in regard to the PAK’s decision on the withdrawal of shares “legal steps for the implementation of rights under legal procedures, the latter as provided for in international law, agreement on protection of foreign investments signed by Government of the Republic of Kosovo and Swiss Government.”<sup>73</sup>
53. However, such re-interpretation of the factual record should be viewed as what it is: an impermissible attempt to overcome the jurisdictional obstacle for Mr. Pacolli, as a Swiss-Kosovo dual national, to have an ICSID tribunal hear his claims. Of course, also this is speculation.

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<sup>71</sup> *Mabco v. Kosovo*, Decision on Jurisdiction, para. 342.

<sup>72</sup> “Original excerpt of the Register of Commerce of Mabco Constructions SA and English translation” (C-4).

<sup>73</sup> “June 20, 2012 Letter from Mabco to PAK” (C-40).

#### IV. CONCLUSION

54. My point is that it is the task of ICSID tribunals to assess whether there is sufficient evidence that the core jurisdictional requirements are fulfilled.<sup>74</sup> In my view, this is not the case in regard to two crucial *ratione materiae* and *ratione personae* requirements.
55. I would thus have preferred this Tribunal to declare that it lacks jurisdiction over the present dispute.

[Signed]

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Professor Dr. August Reinisch

Date: 29 October 2020

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<sup>74</sup> See *supra* para. 35.