INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
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CERTIFICATE

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

V.

REPUBLIC OF SERBIA

(ICSID CASE NO. ARB/20/12)

I hereby certify that the attached document is a true copy of the Tribunal's Award and the Dissenting opinion of Ms. Samaa Haridi dated January 30, 2023.

Meg Kinnear
Secretary-General

Washington, D.C., January 30, 2023

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

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

and

REPUBLIC OF SERBIA
Respondent

ICSID Case No. ARB/20/12

AWARD

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

Secretary of the Tribunal
Ms Aurélia Antonietti

Assistant to the President
Dr Ana Gerdau de Borja Mercereau

Date of dispatch to the Parties: 30 January 2023

REPRESENTATION OF THE PARTIES

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

Mr Christophe Maillard
CAS
1A Rue Christophe Plantin
L-2339 Luxembourg
Luxembourg

and

Mr Nenad Stankovic
Ms Sara Pendjer
Stankovic & Partners
19 Njegoseva Street
11000 Belgrade
Serbia

and

Mr Raëd Fathallah
Mr Jose Maria Perez
Ms Marina Weiss
Mr Shane Daly
Bredin Prat
53 Quai d'Orsay
75007 Paris
France

Representing the Republic of Serbia:

Mr John J. Buckley, Jr.
Mr Jonathan M. Landy
Mr Benjamin W. Graham
Mr Youlin Yuan
Williams & Connolly LLP
680 Maine Avenue, S.W.
Washington, D.C. 20024
United States of America

and

Mr Nebojša Anđelković
Law Office Anđelković
10 Nušićeva
11000 Belgrade
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TABLE OF ABBREVIATIONS/DEFINED TERMS

Ada Huja Project	The Ada Huja Project involved the development of a shopping centre on the banks of the Danube River in Belgrade
Adriatic or AIM	Adriatic Investment Management d.o.o. Belgrade
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Bankruptcy Administrator	Mr Dragan Perković, the Bankruptcy Administrator for BRIF-TC
Beauvallon	Beauvallon Europe S.A. SFP
Belgrade Court	Commercial Court in Belgrade
Beoland	Belgrade Land Development Agency
Bifurcation Hearing	Hearing on Bifurcation held on 24 November 2021
BIT	BLEU-Serbia BIT
BLEU-Serbia BIT	Agreement between the Belgo-Luxembourg Economic Union, on the one hand, and the Serbia and Montenegro, on the other hand, on the Reciprocal Promotion and Protection of Investments of 4 March 2004
BRIF SICAR	Balkan Reconstruction Investment Financing S.C.A. SICAR
BRIF-TC	BRIF-TC d.o.o. Beograd
BRIF TRES	BRIF TRES d.o.o. Beograd
C-[#]	Claimants' Exhibit
CL-[#]	Claimants' Legal Authority
Claimants	BRIF TRES d.o.o. Beograd and BRIF-TC d.o.o. Beograd

Claimants' Counter-Memorial	Claimant's Counter-Memorial on the Second Jurisdictional Objection of 20 May 2022
Claimants' First TRO Request	Claimants' request for a temporary restraining order of 25 January 2021
Claimants' Memorial on the Merits	Claimants' Memorial on the Merits of 15 July 2021
Claimants' Request for Provisional Measures	Claimants' request for provisional measures of 5 February 2021
Claimants' Second TRO Request	Claimants' request for a temporary restraining order of 5 February 2021
Consultancy Agreement	Consultancy Agreement of 29 August 2018, concluded between Wekare and Adriatic and its adjusted version of 8 November 2018
Engagement Agreement	Engagement Agreement of 30 September 2017 concluded between Mr Jean-Pierre Ribes and Mr Vuko Dragašević
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Jurisdiction Hearing	Hearing on Jurisdiction held on 2 September 2022
Lease Agreement	Lease Agreement of 2 September 2004 concluded between BRIF-TC (previously designated Montmontaža) and Beoland
Liquidator	BRIF SICAR's Luxembourg Liquidator
Luxembourg Liquidator	BRIF SICAR's Luxembourg Liquidator
Montmontaža	Montmontaža d.o.o. Beograd ("Montmontaža"), wholly owned by the Croatian company Montmontaža d.d. Zagreb
Mr Dragašević	Mr Vuko Dragašević

Mr Perković	Mr Dragan Perković, the Bankruptcy Administrator for BRIF-TC
Mr Ribes	Mr Jean-Pierre Ribes
Provisional Measures Hearing	Provisional Measures Hearing of 10 March 2021
R-[#]	Respondent's Exhibit
RL-[#]	Respondent's Legal Authority
Request	Request for Arbitration from BRIF TRES and BRIF-TC against Serbia of 17 April 2020
Request for Bifurcation	Respondent's request for bifurcation of 16 September 2021
Respondent	The Republic of Serbia
Project	Ada Huja Project
Respondent's Memorial	Respondent's Memorial on the Second Jurisdictional Objection of 25 March 2022
Respondent's Observations on the Request for Provisional Measures	Respondent's Observations on the Request for Provisional Measures of 5 February 2021
Respondent's Observations to the First TRO Request	Respondent's Observations to the First TRO Request of 26 January 2021
Respondent's Observations on the Second TRO Request	Respondent's Observations on the Second TRO Request of 8 February 2021
Serbia	The Republic of Serbia
Share Purchase Agreement	Share Purchase Agreement of 15 January 2019 concluded between Adriatic and Beauvallon for acquisition of BRIF TRES
Share Transfer Deed	Share Transfer Deed of 30 October 2018 concluded between Adriatic and BRIF SICAR
Site Analysis	Site Analysis of April 2018 prepared by a market leader of Serbia's construction industry in the field of design development, consulting and project management

Tribunal	Arbitral tribunal constituted on 26 October 2020
Wekare	Wekare S.A.

I. INTRODUCTION AND PARTIES

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

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

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

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

5. This dispute relates to a series of purported actions and inactions by Serbia that allegedly violated its obligations under the BLEU-Serbia BIT to provide (i) fair and equitable treatment and (ii) continuous legal protection and security to Claimants, and that allegedly led to (iii) unlawful expropriation of Claimants' investment in Serbia and to violation of Serbia's obligations vis-à-vis Claimants' investments protected under the umbrella clause of the Agreement between Serbia and Montenegro and the State of Kuwait on Mutual Promotion and Investment Protection concluded on 19 January 2004, imported *via* the most-favourable-nation clause of the BLEU-Serbia BIT, in the context of a 50-year Lease Agreement for the construction and operation of a modern shopping centre on plots of land bordering the Danube River in Ada Huja, Belgrade ("**Lease Agreement**").

II. PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

36. The Bankruptcy Administrator did not submit any observations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On behalf of the Tribunal

Mr Yves Derains (President)

Ms Samaa Haridi (Co-arbitrator)

Prof. Brigitte Stern (Co-arbitrator)

Assistant to the President

Dr Ana Gerdau de Borja Mercereau

On behalf of ICSID

Mr Francisco Abriani (Acting Secretary of the Tribunal)

On behalf of the Claimants

Mr Raed Fathallah (Bredin Prat)

Mr José Maria Perez (Bredin Prat)

Ms Marina Weiss (Bredin Prat)

Mr Shane Daly (Bredin Prat)

Ms Jelena Todić (Bredin Prat)

Ms Jude Dabbas (Bredin Prat)

Ms Lucy Smith (Bredin Prat)

Ms Natalia Da Silva Goncalves (Bredin Prat)

Mr Christophe Maillard (CAM)

Mr Nenad Stankovic (Stankovic & Partners)

Ms Sara Pendjer (Stankovic & Partners)

Mr Luka Marosiuk (Stankovic & Partners)

On behalf of the Respondent

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

Mr Jonathan M. Landy (Williams & Connolly)

Mr Benjamin W. Graham (Williams & Connolly)

Mr Nebojša Anđelković (Law Office Anđelaković)

Ms Olivera Stanimirović (Serbia)

Mr Marinko Čobanin (Serbia)

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

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

61. The proceeding was closed on 30 January 2023.

III. FACTUAL BACKGROUND

62. Montmontaža d.o.o. Beograd ("**Montmontaža**") (subsequently BRIF-TC) was incorporated[1] in Serbia on 18 September 2003 as a wholly owned subsidiary of the Croatian company Montmontaža d.o.o. Zagreb, with the purpose to participate in a public tender by the City of Belgrade for the Ada Huja Project ("**Ada Huja Project**" or "**Project**").[2]

63. The Ada Huja Project was established in the context of the "General [Urbanisation] Plan for Belgrade 2021" seeking, among other things, to revitalise Danube waterfront property[3] for the development of a shopping centre on the banks of the Danube River in Belgrade, in the Ada Huja neighbourhood in the Municipality of Palilula of Belgrade.[4] The Ada Huja Project concerned four parcels of land along the Danube, *i.e.*, parcels Nos. 7/1, 7/2, 5112/5 and 5111/1.

64. On 6 March 1975, the two largest parcels Nos. 7/1 and 5112/5 in the Ada Huja Project area had been subject to an agreement[5] for the transfer of rights of use over the same ("**1975 Agreement**"), concluded between the City of Belgrade and Luka Beograd a.d. Beograd ("**Luka Beograd**"). Despite the 1975 Agreement, in December 1997 the Municipality of Palilula registered the rights of use over parcels Nos. 7/1 and 5112/5 in favour of the State-owned enterprise Eko Zona Ada Huja d.o.o. Beograd.[6] The rights of use over the same parcels in favour of Eko Zona Ada Huja d.o.o. Beograd were

[1] Business Registers Agency Search for BRIF-TC, Basic Information of 19 May 2022 (Exhibit C-316).

[2] Claimants' Counter-Memorial on Respondent's Second Jurisdictional Objection ("**Claimants' Counter-Memorial**"), ¶¶ 17-18.

[3] Claimants' Counter-Memorial, ¶¶ 17-18; Claimants' Memorial on the Merits, ¶¶ 6-7.

[4] Respondent's Memorial on the Second Jurisdictional Objection ("**Respondent's Memorial**"), ¶ 29.

[5] Agreement between Luka Beograd and the City of Belgrade of 6 March 1975 (Exhibit C-52).

[6] Decisions of 19 December 1997 and of 24 December 1997 by the Municipality of Palilula (Exhibits C-56 and C-57).

terminated in favour of the City of Belgrade and for the use of the Belgrade Land Development Agency ("**Beoland**") by Decisions of 25 March 2004 and 10 April 2007 by the Municipality of Palilula, in the context of preparations for the Ada Huja Project's public tender.[7]

65. In April 2004, Montmontaža (subsequently BRIF-TC) participated in the 1 April 2004 public tender[8] for the Ada Huja Project. Two and a half months later, on 15 June 2004, the City of Belgrade authorised[9] Beoland to conclude the Lease Agreement with the winner of the public tender Montmontaža, executed on 2 September 2004.[10]

66. On 12 July 2006, BRIF TRES was incorporated[11] in Serbia as a wholly owned subsidiary of the Luxembourgish company BRIF SICAR.[12]

67. In January 2007, the ownership of Montmontaža, originally controlled by the Croatian parent company Montmontaža d.o.o. Zagreb, changed hands to the Serbian company BRIF TRES, which was, in turn, wholly owned by BRIF SICAR, a Luxembourg company.[13] The company designation of Montmontaža changed to BRIF-TC only in March 2009.[14]

68. In May 2007, Luka Beograd commenced administrative proceedings seeking to assert its rights over parcels Nos. 7/1 and 5112/5 in the Ada Huja Project area, on the ground that registration in favour of Eko Zona Ada Huja d.o.o. Beograd was illegal.[15] On 7 June 2007, the Municipality of Palilula issued two decisions confirming Luka

[7] Decisions of 25 March 2004 and of 10 April 2007 by the Municipality of Palilula (Exhibits C-71 and C-94).
[8] Beoland, Public Tender of 1 April 2004 (Exhibit C-3).
[9] Executive Committee of the Belgrade City Assembly, Decision No. 463-2072/04 IO of 15 June 2004 (Exhibit C-4).
[10] Lease Agreement of 2 September 2004 concluded between Beoland and Montmontaža (Exhibit C-5).
[11] BRIF TRES' Articles of Association of 12 July 2006 (Exhibit C-9).
[12] Claimants' Counter-Memorial, ¶ 21; Claimants' Memorial on the Merits, ¶ 80.
[13] Respondent's Memorial, ¶ 33; Claimants' Counter-Memorial, ¶ 24; Claimants' Memorial on the Merits, ¶ 80.
[14] Business Registers Agency, Decision of 10 March 2009 (Exhibit C-184).
[15] Respondent's Memorial, ¶ 36; Claimants' Memorial on the Merits, ¶ 114.

Beograd's rights of use over these two parcels on the ground of illegality of registration of rights of use in favour of Eko Zona Ada Huja d.o.o. Beograd in 1997.[16]

69. On 15 June 2007, Luka Beograd applied to the Second Municipal Court of Belgrade for registration of its rights based on the 7 June 2007 Decisions, which was granted on 29 October 2007.[17]

70. On 12 August 2007, the BLEU-Serbia BIT came into effect.

71. On 24 October 2007, BRIF SICAR sent letters to Serbia's Ministry of Economy and Regional Development and to Serbia's Ministry of Infrastructure requesting protection of its foreign direct investment and mentioning a possible compensation claim for the investment to be borne by Serbia's taxpayers.[18] These letters are virtually identical. To illustrate, one of them provides as follows:

> "[Dear] Minister,
>
> I am kindly asking you to approve an immediate reception, for the protection of a direct foreign investment from Luxembourg investment fund Brif, the final sum totalling EUR 160 million, which is presently in danger.
>
> The subject of our investment is the construction of the biggest shopping mall so far in Serbia, located at Ada Huja in Belgrade, […]
>
> […] Luka Beograd JSC (presently under direct or indirect control of Milan Beko and Milorad Mišković), former rights-holder over the majority of the location Ada Huja, those rights having expired by the legal acts made in 1975, is currently taking legal and court action against the City of Belgrade, in order to inhibit the registration of the City and therefore Montmontaža LLC into the Real-Estate Register, and to void the Construction Approval, and finally prevent the construction of the shopping mall and overtaking the entire location. The Belgrade Land Development Public Agency, the city authorities, and Montmontaža LLC have taken the necessary legal steps. Despite that, any holdup or an undesirable outcome of the investment could lead to a compensation claim against the lessor, in the amount that can equal the total investment amount. Tax payers of the Republic would have to bear the compensation cost, which would damage its highest interests and the

[16] Municipality of Palilula, Decision No. 463-259/2007-I-3 of 7 June 2007 (Exhibit C-96); Municipality of Palilula, Decision No. 463-260/2007-I-3 of 7 June 2007 (Exhibit C-97).

[17] Second Municipal Court, Decision No. Dn. 12900/07 of 29 October 2007 (Exhibit C-117).

[18] Letter from BRIF SICAR to the Minister of Economy and Regional Development of 24 October 2007 (Exhibit C-115); Letter from BRIF SICAR to the Minister of Infrastructure of 24 October 2007 (Exhibit C-116).

interest of our founders. Therefore, I kindly ask you to approve the urgent reception and take all the necessary and appropriate measures.

[…]

Laurent Nagy Revesz, signed

CEO of Brif"[19] (Emphasis added)

72. Two months later, on 28 December 2007, BRIF SICAR sent a letter to Serbia's President seeking urgent action from Serbia's authorities to protect its foreign direct investment, threatening "*all necessary action*" to obtain damages, if the unacceptable treatment continued, enclosing its legal analysis.[20]

73. In February 2008, the City of Belgrade filed an administrative petition to establish its rights of use over the relevant parcels, relying on the 1975 Agreement, subsequently dismissed by the Higher Court of Belgrade on 21 July 2010.[21]

74. In January 2009, Luka Beograd filed a judicial application challenging the City of Belgrade's 15 June 2004 decision to authorise Beoland to conclude with Montmontaža the Lease Agreement and the respective validity of the Lease Agreement.[22]

75. On 2 February 2009, Montmontaža sent a letter to Serbia's Ministry of Foreign Affairs, seeking action to protect its investment, enclosing memoranda describing purported illegalities by Serbia's authorities.[23]

76. Disagreements between BRIF SICAR's majority shareholders and its management in relation to the company's decision to acquire Montmontaža led to the shareholders' refusal to approve the annual accounts in June 2009 and March 2010 and to the

[19] *See* Letter from BRIF SICAR to the Minister of Economy and Regional Development of 24 October 2007 (Exhibit C-115), pp. 1-2.
[20] BRIF-SICAR's Letter to Serbia's President of 28 December 2007 (Exhibit C-124).
[21] Higher Court in Belgrade, Decision No. Gž 4009/10 of 21 July 2010 (Exhibit C-221).
[22] Luka Beograd's Claim for nullification of the Lease Agreement of 27 January 2009 (Exhibit C-28).
[23] Letter from Montmontaža to the Minister of Foreign Affairs of 9 February 2009 (Exhibit C-180).

revocation of BRIF SICAR's operating authorisation in July 2010.[24] The Luxembourg courts confirmed this revocation, and BRIF SICAR was placed in liquidation in October 2012.[25]

77. On 1 December 2016, Belgrade courts declared the Lease Agreement null and void, in the context of Luka Beograd's application of January 2009.[26]

78. On 30 September 2017, French national Mr Jean-Pierre Ribes ("**Mr Ribes**"), as "Client", entered into an "**Engagement Agreement**"[27] with Serbian national Mr Vuko Dragašević ("**Mr Dragašević**"), as "Consultant." Mr Ribes became the ultimate beneficial owner of Beauvallon Europe S.A. SFP ("**Beauvallon**"), a Luxembourgish company, only on 30 March 2019,[28] while Mr Dragašević was the sole owner, director and controller of Adriatic Investment Management d.o.o. Belgrade ("**Adriatic**").[29] The Engagement Agreement provided in its relevant parts as follows:

> "2.1 The Consultant shall provide to the Client Services in relation to Project Danube, pursuant to specific instructions of the Client ('Services').
>
> The scope of Services shall be as follows:
>
> (i) Ongoing assistance in relation to Project Danube, including:
>
> - Consulting services in relation to the acquisition of assets of BALKAN RECONSTRUCTION INVESTMENT FINANCING S.C.A. SICAR in Liquidation from Luxembourg ('BRIF SICAR') namely: BRIF UNUS d.o.o. from Belgrade, BRIF DUOS d.o.o. from Belgrade, BRIF TRES d.o.o. from Belgrade (owning BRIF TC from Belgrade and that has a contract with the city of Belgrade for the long term lease of approx. 141,000 sqm of land in Belgrade ('the Land')),

[24] Respondent's Memorial, ¶¶ 41-42; Claimants' Memorial on the Merits, ¶¶ 188-193. *See also* Commission de Surveillance du Secteur Financier, Decision revoking the inscription of BRIF SICAR on the official list of venture capital investment companies of 12 July 2010 (Exhibit C-220).

[25] District court of Luxembourg, Public Prosecutor's Office, Decision of 25 June 2012 (Exhibit C-226); District court of Luxembourg, Judgment of 4 October 2012 (Exhibit C-227).

[26] Respondent's Memorial, ¶ 40; Claimants' Memorial on the Merits, ¶ 215. *See also* First Basic Court in Belgrade, Decision No. 79203/10 of 1 December 2016 (Exhibit C-33).

[27] Engagement Agreement of 30 September 2017 concluded between Mr Jean-Pierre Ribes and Mr Vuko Dragašević (Exhibits R-18A and R-18B).

[28] Beauvallon Europe S.A., SPF, Shareholder Register (Exhibit C-287) and ELSTAN S.A., Shareholder Register (Exhibit C-299).

[29] *See* Claimants' Counter-Memorial, ¶ 39; Respondent's Memorial, ¶ 5.

BRIF QUATRUS d.o.o. from Belgrade (altogether hereinafter 'The Target') including but not limited to:

- Review of all documentation related to assets of BRIF SICAR and providing assistance related to the Target

- Approaching the Liquidator of BRIF S.I.C.A.R. ('Liquidator') on behalf of the Client

- Assistance during the negotiation with Liquidator and direct involvement in bidding process for takeover of assets of BRIF SICAR ('Target')

- Preparation of the Target for further functioning and development (data room, specialized firms consulting etc)

[…]

4.1 The Client acknowledges the retainer and success fee in the total potential amount of EUR 300,000 plus expenses payable to the Consultant for the following:

4.2 Preparation of the electronic data room and assistance in the review of the Target's financial and legal data: 50,000 EUR

Contracting a specialized firm to prepare a report on the architectural, legal and urbanistic possibilities on the Plot 25,000 EUR

Bid and negotiation with Mr. Yann Baden, a Luxembourg based liquidator appointed by the relevant court, for the purchase of the assets of BRIF S.I.C.A.R in liquidation: 100,000 EUR.

Closing of the transaction until the transfer of the ownership (signed SPAs) over the assets: 100,000 EUR.

Contracting a valuator from the 'big 4 firms' in order to prepare a valuation of the Target's assets: 25,000 EUR.

4.3 The Consultant will be entitled to the full amount from article 4.2 plus expenses as soon as the Target bought from the Liquidator and transferred to Adriatic Investment Management.

4.4 The Consultant will transfer in good faith the ownership over the asset(s) to any company determined by the Client following the receipt of payment of the fee from this agreement and the expenses.

4.5 Success fee is payable two business days after following the provision of the last service from article 4.2.

[…]

7.1 The Client acknowledges that the Consultant is required to comply with anti-money laundering regulations. The Client confirms to the Consultant that it is the ultimate beneficiary of this Engagement Agreement and all legal advice provided thereunder. In case the ultimate beneficiary changes in the course of the Consultant's engagement, the Client undertakes to notify the Consultant of such change and provide full details of the new beneficiary without delay. The Client acknowledges that, as a consequence of local regulations in Serbia, the Consultant may be required by law to request further evidence of the Client's identity in accordance with those applicable regulations and undertakes to provide such evidence without delay."[30]

79. On 29 August 2018, Wekare S.A. ("**Wekare**"), a Luxembourgish company, and Adriatic concluded a consultancy agreement for Wekare to appoint Adriatic as an external consultant for the acquisition of BRIF SICAR, to be sold to Beauvallon, which at the time had the same owner as Wekare, Mr Steeve Simonetti (until 30 March 2019)[31] ("**Consultancy Agreement**").[32] The Consultancy Agreement provided in the relevant parts as follows:

"Article 1.

The Company hereby appoints the Consultant as its external consultant and the Consultant hereby agrees to provide consulting services for submitting one of the offers for the acquisition of assets of BALKAN RECONSTRUCTION INVESTMENT FINANCING SCA SICAR LIQUIDATION ('BRIF') from Luxembourg (hereinafter referred as the 'Target') and to assist the Company in relation to other potential offers.

The Consultant shall carry out its services as specified in the Agreement.

Article 2.

The Consultant should provide the services specified in Article 1.

The Company agrees to pay to the Consultant fee in total amount of EUR 100,000 in two instalments.

[30] Engagement Agreement of 30 September 2017 concluded between Mr Jean-Pierre Ribes and Mr Vuko Dragašević (Exhibit R-18A signed by Mr Dragašević). The version of the Engagement Agreement of even date exhibited in R-18B signed by Mr Ribes is not virtually identical to version signed by Mr Dragašević; the version signed by Mr Ribes contains a different wording for Article 4.3, which reads as follows: "*4.3 The Consultant will be entitled to the full amount from article 4.2 plus expenses if the Client or company determined by the Client (i.e. BEAUVALLON EUROPE S.A., SPF) succeed to take over control over designated assets of BRIF SICAR*."

[31] Beauvallon Europe S.A., SPF, Shareholder Register (Exhibit C-287).

[32] Consultancy Agreement of 29 August 2018, concluded between Wekare and Adriatic (Exhibit C-291).

1. EUR 50,000 will be payable immediately.

2. EUR 50,000 will be payable 5 business days following the acceptance of the Liquidator, Attorney at law Yann Baden, of one of the offers (from the Consultant or from any other third party controlled or acting on behalf of the Company) for the acquisition of the Target.

3. The parties will agree on a possible success fee one the Liquidator has accepted a final price." [33]

80. Also, in the context of the Engagement Agreement, on 30 October 2018, Mr Dragašević approached BRIF SICAR's Luxembourg Liquidator ("**Luxembourg Liquidator**" or "**Liquidator**") to acquire BRIF TRES and its wholly-owned subsidiary BRIF-TC through his own Serbian company Adriatic, as "Buyer", and thus concluded with BRIF SICAR, as "Seller", the "**Share Transfer Deed**,"[34] which provided as follows:

"Article 2

2.1. The Seller agrees to sell and transfer to the Buyer, all (100%) of the issued and outstanding shares of the Company [BRIF TRES] representing 100% of the share capital of the Company ('Share') and the Buyer agrees to buy and accept the full ownership over the Share.

Article 3

3.1. The total consideration for the transfer of 3 Share is EUR 250,000.00 (two hundred and fifty thousand euros) ('Purchase Price').

3.2. The payment of the Purchase Price was made on the date of this Agreement by deposit of the Purchase Price from the Buyer's account to the Seller's account, as previously communicated by the Seller to the Buyer.

3.3. Subject to Article 4, the Buyer is authorized to be registered as the sole owner the Share.

Article 4

4.1. The Buyer acknowledges and agrees that the Share is transferred 'as is', without any guarantee or warranty from the Seller and more specifically, without any representation as to (i) the consistence of the transferred assets, and (ii) the Company's assets and liabilities, including regarding the Company's ownership of

[33] Consultancy Agreement of 29 August 2018, concluded between Wekare and Adriatic (Exhibit C-291).

[34] Share Transfer Deed of 30 October 2018 concluded between Adriatic and BRIF SICAR (Exhibit C-237).

the shares in BRIF-TC DOO BEOGRAD (STARI GRAD) – U PRINUDNOJ LIKVIDACIJI, a company with its registered seat at Dobraeina 38, Belgrade registered with the Commercial Register maintained by the Business Registers Agency of the Republic of Serbia under the registration number 17515942 ('BRIF TC').

The liquidator, acting as legal representative of the Seller, hereby states and confirms that:

1. He has not: transferred, executed any agreement, nor taken any action and/or undertaking, which would and/or could entail directly or indirectly, the transfer of, authorised any person to transfer, execute any agreement, take any action and/or undertaking, which would and/or could entail directly or indirectly, the transfer of, all or part of the shares of BRIF TC, and/or of any of BRIF TC's assets since its appointment, as liquidator of the Seller;

2. in his opinion, the Share has no value.

It is hereby agreed by the parties, that the statement under 4.1. 1. above, is an essential condition to this Agreement. […]" [35]

81. On 8 November 2018, Wekare and Adriatic concluded an adjustment to the Consultancy Agreement by concluding a further instrument, adjusting provisions on fees of the 29 August 2018 instrument:

"Article 1

The Company hereby appoints the Consultant as its external consultant and the Consultant hereby agrees to provide consulting services for submitting one of the offers for the acquisition of assets of BALKAN RECONSTRUCTION INVESTMENT FINANCING SCA SICAR LIQUIDATION ('BRIF') from Luxembourg (hereinafter referred as the 'Target') and to assist the Company in relation to other potential offers.

The Consultant will also purchase the assets, according to the signed SPAs, of BRIF the next business day following the payment by the Company.

The Consultant shall carry out its services as specified in the Agreement.

Article 2

The Consultant should provide the services specified in Article 1.

[35] Share Transfer Deed of 30 October 2018 concluded between Adriatic and BRIF SICAR (Exhibit C-237).

The Company agrees to pay to the Consultant fee in total -amount of EUR 50,000 and EUR 250,003 as purchase price for the acquisition of the Target.

EUR 300,003 will be payable on 14 November 2018 following the acceptance of the Liquidator, Attorney at law Yann Baden, of one of the offers (from the Consultant or from any other third party controlled or acting on behalf of the Company) for the acquisition of the Target." [36]

82. In December 2018,[37] the PowerPoint presentation titled "Project Danube" [38] was jointly prepared by Mr Vuko Dragašević and his brother, Mr Milan Dragašević,[39] scheduling the next steps in execution of the Engagement Agreement, as follows:[40]

#	TASKS	ACTION POINTS	COMMENTS	COMPLETION DATE	STATUS
	1. Companies takeover / Legal Status				
a.	Contract exchange with the liquidator		Took too much time due tu usual Liquidator's practice	14.11.18	DONE
b.	Payment of the purchase price		Additional costs from banks and potential penalty against AIM	20.11.18	DONE
c.	Tax Identification Number for BRIF Tres	Tax authority sent mail to lawyers	Tax Control initiated for BRIF TRES, this will delay change in ownership for few days	26.11.18	DONE
d.	Change of ownership of BRIF Tres	Waiting for Tax inspectors to finish control (all documents submitted by us)	End of the acquisition process for AIM	7.12.18	DONE
e.	Change of director of BRIF Tres			13.12.18	DONE
f.	Address change for BRIF Tres			20.12.18	IN PROGRESS
g.	Tax Identification Number for BRIF TC			10.12.18	DONE
h.	Change of director of BRIF TC	Requested from Liquidator's lawyers - completed	Important for visibility and control	27.11.18	DONE
i.	Address change for BRIF TC			20.12.18	IN PROGRESS
j.	Takeover of all documentation from 2012 up to now		Not much new documentation from what we had. From lawyer pantelic one file with photocopies received.	12.12.18	DONE
k.	Name change for BRIF Tres and BRIF TC			25.12.18	
l.	Sale of BRIF Tres to Lux			28.12.18	

[36] Revised Consultancy Agreement of 8 November 2018, concluded between Wekare and Adriatic (Exhibit C-295).

[37] The Project Danube PowerPoint presentation was last modified on 18 December 2018. *See* Respondent's Opening Presentation, Slide 95 (Showing the document's metadata).

[38] Project Danube PowerPoint with Metadata of 18 December 2018 (Exhibit R-19).

[39] Claimants' Counter-Memorial, ¶ 48.

[40] Project Danube PowerPoint with Metadata of 18 December 2018 (Exhibit R-19), Slides 2, 3 and 4.

#	TASKS	ACTION POINTS	COMMENTS	COMPLETION DATE	STATUS
	2. LAND				
a.	Legal Due Diligence on the status, changes and claims (two ongoing court proceedings related to land)	Provide to BDK all documentation	BDK confident that if paperwork in order and status of claims favorable there is no problem	27.12.18	IN PROGRESS
b.	Inscription of the lease right on 3 parcels	Lobbying?		25.12.18	IN PROGRESS
c.	Discussions & Agreement with the City of Belgrade: debt vs. potential claim of BRIF TC	Define strategy		15.01.19	
d.	Detailed Urban Plan contracting		Need in order to get 500k GBA	15.02.19	
	3. COMPANY ACCOUNTS				
a.	Appoint accounting firm	Unija Accounting	www.unija.com	26.11.18	DONE
b.	Reestablishment of companies' financial data from 2013 up to now			25.12.18	IN PROGRESS
c.	Preparation of Financial statements for period 2012-2017	idem		25.12.18	IN PROGRESS
d.	Submitting Financial statements for 2017 to APR		There will be penalties and tasks	20.12.18	
e.	Identification of companies Tax liabilities			28.12.18	IN PROGRESS
f.	Investigation on the status of claims regarding the blockage of the accounts		Around 3M EUR	25.12.18	
g.	Submitting of Tax returns and annual Tax balances for past 5 years		Partically completed for VAT	25.12.18	
h.	Unblocking of companies' bank accounts (negotiation and/or payment)			1.02.19	

#	TASKS	ACTION POINTS	COMMENTS	COMPLETION DATE	STATUS
	4. BRIDGE LOAN				
a.	Valuation	E&Y prepared draft valuation report	Draft report completed on 28.11.18	30.11.18	IN PROGRESS
b.	Identifying potential lenders	Provide potential lenders to Vuko	Depending on the inscription in cadaster	14.12.18	IN PROGRESS
c.	Contracting a bridge loan		Very difficult at that day but possible	31.01.19	
	5. SALE OF THE PROJECT				
a.	Feasibility study contracting		Could be useful after bridge	15.02.18	
b.	Identifying potential buyers			1.03.18	
c.	Sale of the project at full price		After detailed urbanistic plan	31.12.19	

83. On 15 January 2019, Beauvallon concluded with Adriatic the "**Share Purchase Agreement**"[41] for the acquisition of BRIF TRES for EUR 250,003. The Share Purchase Agreement provided as follows, in its relevant parts:

> "RECITALS:
>
> A. Seller owns 100 % of share capital in BRIF TRES DOO BEOGRAD, a company from the Republic of Serbia having its seat at Bulevar kralja Aleksandra 28, Belgrade, which is registered under the corporate identification number 20179252 with Business Registry Agency ('Company').

[41] Share Purchase Agreement of 15 January 2019 concluded between Adriatic and Beauvallon for acquisition of BRIF TRES (Exhibit C-239).

B. The registered share capital of the Company on the Signing Date amounts to RSD 1.367.489.062,67 and is paid-up. The registered capital consists of a sole share fully owned by the Seller.

C. The Company is sole shareholder of the company BRIF-TC D.O.O. Beograd, a company from the Republic of Serbia having its seat at Bulevar kralja Aleksandra 28, Belgrade, which is registered under the corporate identification number 17515942 with Business Registry Agency ('BRIFTC').

D. The Seller has agreed to sell, and the Buyer has agreed to purchase the 100 % of the Company's share capital ('Share'), in each case, on the terms and subject to the conditions of the Agreement.

THE PARTIES HAVE THEREFORE AGREED AS FOLLOWS

1 TRANSFER OF SHARE

1.1 The Seller hereby transfers the Share to the Buyer, together with all entitlements due under the applicable law and free of any encumbrances, so that the Buyer becomes the owner of 100% share in the Company.

2 PURCHASE PRICE

2.1 The purchase price for transfer of the Share amounts to EUR 250,003 (two hundred fifty thousand and three euros) and shall be paid to the Seller by the Buyer in accordance with the terms that shall be separately agreed.

3 FURTHER ASSURANCES

3.1 Buyer undertakes to pay a success fee in the amount of EUR 340,000 ('Consideration') before 15 February 2019 to BDK ATTORNEYS AT LAW, having its seat at Bulevar kralja Aleksandra 28, Belgrade, registered before BRA, registration number 20708344 ('BDK').

[…]

4 CONTRACTUAL RELATIONS

4.1 Buyer undertakes not to change or dismiss the director of the Company and/or of the BRIF-TC, not to appoint new director or proxy or other representative of the Company and/or of the BRIF-TC, not to limit authorities of the director of the Company and/or of the BRIF-TC or to interfere with the director of the Company and/or of the BRIF-TC in any other way, until payments of the Purchase Price and Consideration are made.

4.2 Buyer also undertakes, until payment of the Purchase Price and Consideration, not to make any material decision in relation to the Share, the Company and its material assets (e.g. pledge of the Share, sale of the Share, disposal of BRIF-TC,

settlement with creditors, entering into dispute, etc) without prior written approval of the Seller.

4.3 If Buyer violets obligation from Articles 3.1. 4.1. and 4.3., he undertakes to pay a contractual penalty to the Seller in the amount of EUR 340,000 for the breach of Article 3.1, EUR 30,000 per breach of Article 4.2 and EUR 1.000,000 for the breach of Article 4.3.

[…]

6.5 Coming into effect: Agreement shall have legal effect as of the date of notarization by the Public Notary."

84. On 6 February 2019, Mr Vuko Dragašević sent an email titled "Investment treaty" to Mr Christophe Maillard, counsel of record for Claimants, among others, enclosing a copy of the BLEU-Serbia BIT.[42]

85. On 21 February 2019, the Belgrade Court of Appeal confirmed the Belgrade court decision of 1 December 2016 declaring the Lease Agreement null and void.[43]

86. On 22 April 2019, Beauvallon became a registered shareholder of BRIF TRES pursuant to the Serbian Business Registry Agency.[44]

87. On 7 May 2019, Beauvallon retained White & Case to advise it and represent it against Serbia.[45]

88. On 19 July 2019, Beauvallon finalized the retention of Pardo Sichel & Associés. Claimants then sent a Notice of Dispute to Serbia on 31 July 2019.[46]

89. On 17 April 2020, ICSID received a request for arbitration from BRIF TRES and BRIF-TC against Serbia.

[42] Email from Mr Dragašević to Mr Maillard of 6 February 2019 (Exhibit R-26).

[43] *See* Court of Appeal in Belgrade, Decision No. 6118/18 of 21 February 2019 (Exhibit C-34).

[44] Serbian Business Register, Decision on BRIF TRES of 22 April 2019 (Exhibit R-13).

[45] Engagement Letter between White & Case and Beauvallon of 7 May 2019 (Exhibit R-20).

[46] Email Thread of 19-24 July 2019 (Exhibit R-21). *See also* Notice of Dispute of 31 July 2019 (Exhibit C-16).

90. On 31 December 2020, the City of Belgrade requested initiation of bankruptcy proceedings against BRIF-TC,[47] founded on the National Bank of Serbia's blocking of BRIF-TC's accounts as of 29 December 2015[48] by virtue of non-payment of tax obligations related to the Lease Agreement.

91. On 15 January 2021, the Commercial Court in Belgrade decided to initiate bankruptcy proceedings against BRIF-TC, appointing as its bankruptcy administrator Mr Dragan Perković.[49]

92. In September 2021, the Municipality of Palilula reversed its own decisions of 7 June 2007 recognising Luka Beograd's rights over the two parcels.[50]

93. On 21 April 2022, Beoland filed a request to reopen the proceedings leading to the final judicial annulment of the Lease Agreement and of the 15 June 2004 decision by the City of Belgrade awarding the tender to BRIF-TC.[51]

IV. PARTIES' CLAIMS AND REQUESTS FOR RELIEF

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

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

[47] City of Belgrade, Proposal for initiation of the bankruptcy procedure of 31 December 2020 (Exhibit C-35). Beoland also requested initiation of bankruptcy proceedings, *see* Beoland, Proposal for initiation of the bankruptcy procedure of 19 January 2021 (Exhibit C-37).

[48] Claimants' Memorial on the Merits, ¶ 238. *See also* Claimants' Letter dated 25 January 2021, Annexes 2 and 3.

[49] Commercial Court in Belgrade, Decision on initiating previous bankruptcy proceedings No. 3. St-221/2020 of 15 January 2021 (Exhibit C-36).

[50] Municipality of Palilula, Decision No. 463-260/2007-I-3 of 20 September 2021 (Exhibit R-27); Municipality of Palilula, Decision No. 463-259/2007-I-3 of 21 September 2021 (Exhibit R-31).

[51] Claimants' Counter-Memorial, ¶¶ 135-145. *See* Beoland, Request for Retrial, Case No.7 P 79203/2010 of 21 April 2022 (Exhibit C-313).

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

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

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

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

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

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

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

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

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

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

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

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

a. REJECT Serbia's Second Jurisdictional Objection;

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

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

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

V. RESPONDENT'S SECOND JURISDICTIONAL OBJECTION

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

A. RESPONDENT'S POSITION

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

(1) Factual Background

99. Respondent submits that, on 30 September 2017, French national Mr Ribes, as "Client", entered into an Engagement Agreement[53] with Serbian national Mr Dragašević, as "Consultant."[54] Mr Ribes is the ultimate beneficial owner of Beauvallon, while Mr Dragašević is the sole owner, director and controller of Adriatic.[55]

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

[53] Engagement Agreement of 30 September 2017 concluded between Mr Jean-Pierre Ribes and Mr Vuko Dragašević (Exhibits R-18A and R-18B).

[54] Respondent's Memorial, ¶ 5.

[55] Respondent's Memorial, ¶ 5.

100. Pursuant to Clause 7.1 of the Engagement Agreement, Mr Ribes was designated as the ultimate beneficiary of the same agreement, calling for Mr Dragašević to provide consulting services for the acquisition of the assets of BRIF SICAR, in liquidation at the time.[56] BRIF SICAR's assets included the Serbian companies BRIF TRES and BRIF-TC, Claimants in the arbitration.[57] BRIF TRES and BRIF-TC had been inactive since 2010 and, the Respondent says that, since 2012, they have been controlled by the Luxembourg court-appointed Liquidator.[58]

101. Clause 2.1 of the Engagement Agreement stipulated that Mr Dragašević would assist Mr Ribes during the negotiation with the Luxembourg Liquidator aimed at the acquisition of BRIF SICAR, in exchange for a retainer and success fee in the total potential amount of EUR 300,000 plus expenses, pursuant to Clause 4.1 of the same agreement.[59] While Mr Dragašević never signed the version of the Engagement Agreement edited and signed by Mr Ribes, having only signed a different version of this agreement, both versions establish that Mr Ribes would retain the right to control the ultimate destination of BRIF SICAR's assets and that these assets would be owned by Mr Ribes directly or indirectly through Beauvallon or another company of his choosing.[60]

102. Upon execution of the Engagement Agreement, Mr Dragašević approached the Luxembourg Liquidator to acquire BRIF TRES and its wholly-owned subsidiary BRIF-TC through his own Serbian company Adriatic and thus concluded with BRIF SICAR the Share Transfer Deed[61] on 30 October 2018.[62] Following the Share Transfer Deed, Mr Dragašević became the registered Director of BRIF-TC and the registered shareholder of BRIF TRES on 27 November 2018 and 7 December 2018,

[56] Respondent's Memorial, ¶¶ 5-6.
[57] Respondent's Memorial, ¶ 6.
[58] Respondent's Memorial, ¶ 6.
[59] Respondent's Memorial, ¶ 6.
[60] Respondent's Memorial, ¶ 7.
[61] Share Transfer Deed of 30 October 2018 concluded between Adriatic and BRIF SICAR (Exhibit C-237).
[62] Respondent's Memorial, ¶¶ 9-10.

respectively,[63] while Mr Milan Dragašević, a relative of Mr Vuko Dragašević, became BRIF-TRES' Director on 13 December 2018.[64]

103. By 18 December 2018, Respondent points out that Mr Milan Dragašević and Mr Vuko Dragašević finalised the PowerPoint presentation titled "Project Danube" plan setting forth a schedule for putting BRIF TRES' books and records in good order, preparing financial statements, filing tax returns and commissioning a feasibility study, including an attempt to solve debts with and asserting claims against the City of Belgrade, and a proposal to resell BRIF TRES to a third-party buyer by the end of 2019.[65]

104. According to Respondent, the "Project Danube" PowerPoint did not include a plan to complete the Ada Huja Project, let alone to build a shopping centre or to pursue a development project.[66] Neither does it transpire from the same project or from Claimants' responses to Respondent's document production requests that Claimants performed any due diligence, prepared a business plan, set up financing or arranged for contractors; rather, Respondent argues that the "Project Danube" PowerPoint shows that Claimants' strategy was "*taking a company that was mired in debt, entwined in litigation, and owned and controlled by a company in liquidation, and tidying up its books and records with the aim of quickly flipping the company and reselling its shares to someone else.*" [67]

105. Respondent further argues that, by 18 December 2018, BRIF TRES was owned by Adriatic, consistently with the reference to the "*sale of BRIF Tres to Lux*" in the same "Project Danube" PowerPoint.[68] Pursuant to the terms of the Engagement Agreement, Mr Ribes, seeking to become the ultimate beneficiary of BRIF SICAR's assets, now owned by Adriatic, in early 2019, initiated a corporate restructuring whereby

[63] Respondent's Memorial, ¶ 11. *See* Serbian Business Register, Decision on BRIF-TC of 27 November 2018 (Exhibit R-10) and Serbian Business Register, Decision on BRIF TRES of 7 December 2018 (Exhibit R-25).

[64] Respondent's Memorial, ¶ 11. *See* Serbian Business Register, Decision on BRIF TRES of 13 December 2018 (Exhibit R-7).

[65] Respondent's Memorial, ¶¶ 12-15, referring to Project Danube PowerPoint with Metadata of 18 December 2018 (Exhibit R-19).

[66] Respondent's Memorial, ¶ 16.

[67] Respondent's Memorial, ¶ 16.

[68] Respondent's Memorial, ¶ 18.

Beauvallon, whose Director at the time was Mr Vuko Dragašević, acquired BRIF TRES from Adriatic for EUR 250,003, *via* the conclusion of the Share Purchase Agreement[69] of 15 January 2019.[70]

106. According to Respondent, the "Project Danube" was abandoned by Mr Ribes upon transfer of BRIF TRES to Beauvallon, a Luxembourgish company.[71] The e-mail dated 6 February 2019 titled "Investment treaty", enclosing a copy of the BLEU-Serbia BIT, sent from Mr Vuko Dragašević to Mr Christophe Maillard, counsel of record for Claimants, to Mr Milan Dragašević and to two attorneys of the law firm BDK Attorneys at Law, which was paid EUR 340,000, the success fee set forth in Clause 3.1 of the Share Purchase Agreement, confirms this, Respondent argues.[72] Respondent further relies on Clauses 4.1 and 4.2 of the same agreement, arguing that they sought to ensure Beauvallon would not dispose of the Ada Huja Project's assets or initiate arbitration without Mr Vuko Dragašević's consent.[73]

107. Respondent further contends that Beauvallon took control of BRIF TRES on 22 April 2019,[74] the date it became a registered shareholder in the Serbian Business Registry Agency and – two weeks later, on 7 May 2019 – retained[75] White & Case to advise it and represent it against Respondent.[76] On 19 July 2019, Beauvallon finalized the retention of Pardo Sichel & Associés,[77] which had already prepared a draft trigger letter, sent to Respondent on 31 July 2019.[78]

108. Respondent further underscores that the claims asserted in the draft trigger letter concern the Ada Huja Project, which sought the development of a shopping centre on

[69] Share Purchase Agreement of 15 January 2019 concluded between Adriatic and Beauvallon for acquisition of BRIF TRES (Exhibit C-239).
[70] Respondent's Memorial, ¶ 19.
[71] Respondent's Memorial, ¶ 20.
[72] Respondent's Memorial, ¶ 21.
[73] Respondent's Memorial, ¶ 22.
[74] Serbian Business Register, Decision on BRIF TRES of 22 April 2019 (Exhibit R-13).
[75] Engagement Letter between White & Case and Beauvallon of 7 May 2019 (Exhibit R-20).
[76] Respondent's Memorial, ¶¶ 24-26.
[77] Email Thread of 19-24 July 2019 (Exhibit R-21).
[78] Respondent's Memorial, ¶¶ 26-27, citing Notice of dispute (Exhibit C-16).

the banks of the Danube River in Belgrade, in the Ada Huja neighbourhood in the Municipality of Palilula of Belgrade.[79]

(2) Beauvallon's Acquisition of BRIF TRES Is an Abuse of Process

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

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

110. Respondent submits that the first step of the test is satisfied, since the dispute "was not only foreseeable but was foreseen and had crystallized at least 12 years before the restructuring date of 22 April 2019 when Beauvallon became the registered owner of the BRIF TRES share."[82] In this respect, Claimants themselves admit that the 2019 change in control was an investment restructuring, which led to changing the nationality of the Claimants from Serbian to Luxembourgish; yet, Respondent argues that by their own logic Claimants as Serbian companies had no access to ICSID jurisdiction until they were deemed Luxembourgish following the restructuring, pursuant to Article 1(1)(c) of the BIT and Article 25(2)(b) of the ICSID Convention.[83]

[79] Respondent's Memorial, ¶ 29.

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

[81] Respondent's Memorial, ¶ 46.

[82] Respondent's Memorial, ¶ 47.

[83] Respondent's Memorial, ¶ 48.

111. Respondent relies on two BRIF SICAR letters dated 24 October 2007[84] to the Ministry of Finance and the Ministry of Infrastructure, respectively, focusing already at that time on an investment claim against Serbia and prompted by a series of events providing context to the dispute.[85] Respondent cites these events from Claimants' Memorial on the Merits of 15 July 2021:

> a. "In May 2007, Luka Beograd applied to the Legal Department of the Municipality of Palilula for the recognition of its alleged rights of use over the two biggest land parcels 7/1 and 5112/5 included in the Ada Huja Project Parcels."
>
> b. "On 7 June 2007, acting favorably upon Luka Beograd's petitions, the Legal Department of the Municipality of Palilula issued two decisions purporting to confirm Luka Beograd's rights of use over land parcels 7/1 and 5112/5."
>
> c. "On 15 June 2007, Luka Beograd applied to the Second Municipal Court of Belgrade for the registration of its alleged rights of use on the basis of the 7 June 2007 Decisions."
>
> d. "BRIF Management became aware of the challenges in August 2007 and immediately sought legal advice and support from the City of Belgrade, Beoland and the Ministry of Finance."
>
> e. "By letter dated 14 September 2007, Claimants also requested the Ministry of Finance to cancel the 7 June 2007 Decision" of the Municipality." [86]

112. Following BRIF SICAR's letters dated 24 October 2007, the dispute crystallised still further, Respondent argues, citing from Claimants' Memorial on the Merits of 15 July 2021:

> a. "[O]n 29 October 2007, [...] the Second Municipal Court of Belgrade registered Luka Beograd as the holder of the rights of use over parcels 5112/5 and 7/1 in the Land Registry records."
>
> b. In "November 2007 [...] the Municipality of Palilula [...] rejected the petitions filed by BRIF-TC and Beoland to re-open the proceedings related to Luka Beograd[.]"[87]

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[84] Letter from BRIF SICAR to the Minister of Economy and Regional Development (Exhibit C-115) and Letter from BRIF SICAR to the Minister of Infrastructure (Exhibit C-116).

[85] Respondent's Memorial, ¶¶ 49-51.

[86] Respondent's Memorial, ¶ 50, citing Claimants' Memorial on the Merits, ¶¶ 114, 115, 120, 117, 119.

[87] Respondent's Memorial, ¶ 52, citing Claimants' Memorial on the Merits, ¶¶ 121, 123.

113. On 28 December 2007, BRIF SICAR directly wrote to Serbia's President escalating BRIF SICAR's complaints.[88] Upon Luka Beograd's filing of a lawsuit against BRIF-TC and the City of Belgrade challenging the City of Belgrade's authorization given to Beoland to conclude the Lease Agreement and the validity of the Lease Agreement in January 2009, BRIF-TC wrote on 2 February 2009 to Serbia's Ministry of Foreign Affairs once again escalating the dispute.[89]

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

114. Respondent argues that Claimants failed to show that restructuring had a legitimate business purpose. According to Claimants, the Engagement Agreement was concluded between a French national Mr Ribes and a Serbian national Mr Vuko Dragašević, and the Luxembourgish entity Beauvallon was introduced into the equation to supply the element of foreign control under Article 1(1)(c) of the BIT and Article 25(2)(b) of the ICSID Convention, as set forth in the "Project Danube" PowerPoint ("*sale of BRIF Tres to Lux*").[90]

115. Moreover, Respondent further argues that Claimants failed to show that Beauvallon intended to develop the shopping centre Project, because BRIF TRES and BRIF-TC were, at the time of acquisition, dormant companies in the hands of the Luxembourg Liquidator, holding disputed land-right claims and featuring as parties to a Lease Agreement annulled in December 2016; Respondent adds that the Project was no longer attractive in light of the construction of a competing shopping centre Galerija Belgrade and that obtaining funding would be "*a fool's errand*" in these circumstances.[91] Respondent also refers to Article 4 of Beauvallon's Articles of Incorporation,[92] according to which Beauvallon may not "*involve itself in the*

[88] Respondent's Memorial, ¶ 53, citing BRIF-SICAR's Letter to Serbia's President of 28 December 2007 (Exhibit C-124).

[89] Respondent's Memorial, ¶ 55, citing BRIF-TC's Letter to Serbia's Ministry of Foreign Affairs of 2 February 2009 (Exhibit C-180), enclosing a memorandum on the "Violations of law committed by public authorities in Belgrade's river bank zone." *See also* Respondent's Memorial, ¶¶ 56-58.

[90] Respondent's Memorial, ¶¶ 60-65.

[91] Respondent's Memorial, ¶ 67.

[92] Beauvallon's Articles of Incorporation (Exhibit C-15).

management of its shareholdings," confirming it is a special-purpose vehicle created to hold financial assets, such as ICSID claims, with registered capital of only EUR 1 million.[93] In particular, Respondent emphasises that the sole document produced in response to its Document Production Request No. 1 in the document production phase on Beauvallon's plans in relation to the new shopping centre opening in Belgrade was a 20-page, preliminary and not detailed Site Analysis dated April 2018 commissioned by Adriatic and broadly discussing the development of a condominium for residential and office space with EUR 386 million estimated construction costs, not a shopping centre.[94]

116. Finally, Respondent objects to Claimants' argument at the Jurisdiction Hearing that Beauvallon would have "*stepped into the shoes of BRIF SICAR as the entity controlling the investments on the ground*," relying on the findings by the arbitral tribunal in the *Alapli v. Turkey* award. According to Respondent, this award is inapposite because the question before the *Alapli v. Turkey* tribunal was quite different: first, it did not consider abuse of process or investment restructuring for manufacturing jurisdiction but whether the claimant was an investor; second, it considered a hypothetical "inheritance analogy" to illustrate how a normal intra-family transfer upon death of a rightsholder could suggest a different analysis.[95] Rather, Respondent relies on the findings in the *Westmoreland v. Canada* award in which Westmoreland was found to have purchased certain assets, in an arm's-length transaction, with no successor liability in relation to the previous owner of such assets.[96] Thus, in Respondent's view, Beauvallon had no successor liability for BRIF SICAR, having simply acquired share capital from the Luxembourg Liquidator in an arm's-length transaction, *i.e.*, "*Beauvallon is not BRIF SICAR's legal successor; it did not emerge from BRIF SICAR's ashes like a mythical phoenix.*"[97]

[93] Respondent's Memorial, ¶¶ 66-67, 69.
[94] Respondent's Memorial, ¶¶ 70-75.
[95] Respondent's Memorial, ¶¶ 76-81, citing *Alapli v. Turkey*, ¶¶ 349, 350–51.
[96] Respondent's Memorial, ¶¶ 82-83, citing *Westmoreland Coal Co. v. Canada*, ICSID Case No. UNCT/20/3, Final Award of 31 January 2022 (Exhibit RL-48), ¶¶ 89, 217, 230.
[97] Respondent's Memorial, ¶ 83.

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

117. Respondent also submits that Mr Ribes, through Beauvallon, abused the foreign-control provisions in Article 1(1)(c) of the BIT and Article 25(2)(b) of the ICSID Convention.[98]

118. Respondent refers to Claimants' statement at the 24 November 2021 Hearing that "[a]*ny investment* [in Serbia] *was made by BRIF SICAR*," stressing, however, that BRIF SICAR's shareholders, the real investors in the Ada Huja Project, will not reap any benefit from the claims Claimants pursue in the arbitration, and that Mr Ribes had no role in BRIF SICAR's investment, did not work on the Project, let alone assumed any related risk.[99] Thus, Respondent concludes that:

> "Allowing a claim to proceed in this fashion under Article 1(1) of the BIT and Article 25(2)(b) of the ICSID Convention would undermine the system of investment-dispute settlement, as it would only encourage foreign vulture funds to acquire defunct domestic companies to lodge treaty claims over decade-old events without having invested a cent."[100]

119. Respondent relies on the *Phoenix v. Czech Republic* award to argue that Mr Ribes' and Beauvallon's acquisition of ownership and control was not *bona fide*, as its sole purpose was getting involved in "international legal activity" rather than economic activity in Serbia.[101] It also relies on the decision on jurisdiction in *Laos Holdings v. Lao* and on the award in *Mihaly v. Sri Lanka*, asserting that to allow a party to acquire distressed assets from a previous investor's project and bring a treaty claim would not advance the purpose of the BIT, objecting to Claimants' attempt to manufacture jurisdiction by claiming to be "*entitled to 'no less than EUR 143.6 Million' for the hard work of buying a distressed company out of liquidation for EUR 250,003*."[102]

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[98] Respondent's Memorial, ¶ 85.

[99] Respondent's Memorial, ¶¶ 86-89.

[100] Respondent's Memorial, ¶ 89.

[101] Respondent's Memorial, ¶ 90, citing *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No ARB/06/5, Award of 15 April 2009 (Exhibit RL-18) ("*Phoenix v. Czech Republic")*, ¶ 142.

[102] Respondent's Memorial, ¶¶ 91-95, citing *Lao Holdings v. Lao*, ¶ 79; *Mihaly International Corp. v. Sri Lanka*, ICSID Case No. ARB/00/2, Award of 15 March 2002 (Exhibit RL-27), ¶¶ 24-25.

B. CLAIMANTS' POSITION

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

(1) Factual Background

121. Claimants submit that they were foreign-controlled since their inception enjoying protection under the BLEU-Serbia BIT (1), that the sale of Claimants to Beauvallon by BRIF SICAR's management sought to preserve Claimants' investment in Serbia (2), and that Beauvallon intended to take control of and revive Claimants' investments in the Ada Huja Project (3).

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

122. Claimants argue that BRIF-TC (previously Montmontaža) was incorporated[104] in Serbia on 18 September 2003 as a wholly owned subsidiary of Montmontaža d.o.o. Zagreb, with the purpose to participate in a public bidding for the Ada Huja Project by the City of Belgrade, established in the context of the "General [Urbanisation] Plan for Belgrade 2021" seeking, among other things, to revitalise Danube waterfront property.[105] Following the 15 June 2004 decision awarding Montmontaža the lease of the Ada Huja Project, this was formalised on 2 September 2004 *via* the Lease Agreement. According to Claimants, Luka Beograd (which stands in Serbian for "Port of Belgrade") expressly consented to this decision.[106]

123. In turn, Claimants argue that BRIF TRES was incorporated[107] in Serbia about three years later on 12 July 2006 as a wholly owned subsidiary of the Luxembourgish company BRIF SICAR and that BRIF TRES acquired BRIF-TC (previously Montmontaža) on 18 January 2007.[108] According to Claimants, BRIF Management S.A., which involved Mr Laurent Nagy-Revesz and Mr Boris Pavlović, acted as the

[103] Claimants' Counter-Memorial, ¶¶ 1-11. On the standard of proof, *see* Jurisdiction Hearing Transcript, 124:1-2.
[104] Business Registers Agency Search for BRIF-TC, Basic Information of 19 May 2022 (Exhibit C-316).
[105] Claimants' Counter-Memorial, ¶¶ 17-18.
[106] Claimants' Counter-Memorial, ¶ 19, and footnote 19.
[107] BRIF TRES' Articles of Association of 12 July 2006 (Exhibit C-9).
[108] Claimants' Counter-Memorial, ¶¶ 21, 24.

general partner of BRIF SICAR identifying investment projects, including exploring ways "*to salvage the Ada Huja Project*" following the Serbian hostilities leading to BRIF SICAR's liquidation.[109]

124. Claimants allege that upon the entry into force of the BIT on 12 August 2007, they, together with their assets, enjoyed BIT protection from this moment onwards, as they argue that it is undisputed that BRIF-TC and BRIF TRES were under the control of the Luxembourgish company BRIF SICAR since 13 July 2006.[110]

b. <u>The sale of Claimants to Beauvallon by BRIF SICAR's management sought to preserve Claimants' investment</u>

125. Moreover, Claimants argue that from 2008 onwards three of the 22 limited shareholders in BRIF SICAR led by The Value Catalyst Fund Limited, LP Value Ltd. and Leaf Limited and Emergency Markets Special Opportunities Ltd. started a dispute against BRIF SICAR's management related to its assets BRIF TRES and BRIF-TC, culminating in the latter two shareholders (i) refusing to approve BRIF SICAR's annual accounts leading to withdrawal of BRIF SICAR's authorisation and to judicial liquidation; and (ii) forming a company presenting two hostile offers to acquire BRIF TRES (for EUR 1 and EUR 21,819.52, respectively).[111] These offers were rejected by BRIF SICAR's management, while BRIF SICAR's management own offer to salvage the investments in the Ada Huja Project was also rejected by the court-appointed Luxembourg Liquidator.[112]

126. In the late 2000s, Mr Boris Pavlović reached out to Mr Ribes and the owner of the Luxembourgish company Wekare, Mr Steeve Simonetti, to elicit their interest in purchasing BRIF TRES, Adriatic featuring as a transitory vehicle to secure the sale.[113] In this context, and seeking to preserve BRIF SICAR's assets, on 30 September 2017, Mr Ribes entered into the Engagement Agreement with Mr Dragašević. Not long

[109] Claimants' Counter-Memorial, ¶¶ 22-25.
[110] Claimants' Counter-Memorial, ¶¶ 26-29.
[111] Claimants' Counter-Memorial, ¶¶ 31-33.
[112] Claimants' Counter-Memorial, ¶¶ 33-34.
[113] Claimants' Counter-Memorial, ¶¶ 35-45.

thereafter, on 29 August 2018, Wekare and Adriatic concluded the Consultancy Agreement for Wekare to appoint Adriatic as an external consultant for the acquisition of BRIF SICAR, to be sold to Beauvallon, which, in turn, was a Wekare affiliate at the time (and continued as such until 30 March 2019[114]).[115] According to Claimants, Article 2 of the Consultancy Agreement (revised version) provided for a EUR 300,003 payment including Adriatic's services fee (EUR 50,000) and the purchase price for BRIF TRES' share (EUR 250,003), corroborating that Beauvallon and its affiliate Wekare, together with Mr Ribes and Mr Simonetti intended to acquire BRIF TRES from 2017/2018 onwards.[116]

c. Beauvallon intended to take control of and revive Claimants' investments in the Ada Huja Project

127. Claimants argue that they spent over EUR 24.5 million in the acquisition and development of the Ada Huja Project between 2006 and 2010, investment which they sought to preserve *via* the "preservation-restructuring" executed through the sale of BRIF SICAR *via* Adriatic to Beauvallon, Mr Ribes being introduced in the venture to act as financier.[117]

128. According to Claimants, the "investment preservation-restructuring" set forth in the 2018 Project Danube PowerPoint adopted a defined timeline in five steps, as follows:

> "a. Step 1: 'Companies takeover / Legal Status.' Following the finalization of the purchase of BRIF TRES from BRIF SICAR (tasks 1(a)-(b)), AIM was to accomplish certain corporate formalities regarding the Claimants (tasks 1(c)-(i)), take over all documentation from 2012 (task 1(j)) and ultimately, by 28 December 2018, organize the sale of BRIF TRES to a Luxembourg company (task 1(l)). In light of the version of the Engagement Agreement signed by Mr. Ribes, it is rather clear that this reference to "Lux" was an abbreviation meant to refer to Beauvallon.
>
> b. Step 2: 'Land.' This second step comprised four tasks, namely:

[114] Beauvallon Europe S.A., SPF, Shareholder Register (Exhibit C-287).

[115] Claimants' Counter-Memorial, ¶¶ 41-43. *See also* Consultancy Agreement of 29 August 2018, concluded between Wekare and Adriatic (Exhibits C-291 and C-295).

[116] Claimants' Counter-Memorial, ¶¶ 43-45.

[117] Claimants' Counter-Memorial, ¶ 47.

- a legal due diligence on the 'status, changes and claims' relating to the Ada Huja Project Parcels;

- the '[i]nscription of the lease right on 3 parcels' through '[l]obbying';

- the definition of a strategy regarding discussions and an '[a]greement with the City of Belgrade, notably regarding "debt vs. potential claim of BRIF TC;' and

- contracting for a 'Detailed Urban Plan' which was considered '[n]eed[ed] in order to get 500k GBA.'

c. Step 3: 'Company Accounts.' This third item consisted in a more detailed breakdown of certain tasks already listed under Step 1 and relating notably to the organization of Claimants' financial information.

d. Step 4: 'Bridge Loan.' This item foresaw:

- the preparation of a valuation by Ernst & Young;

- the identification of "potential lenders" based on information to be provided to Mr. Vuko Dragašević; and

- the contracting of a bridge loan.

e. Step 5: 'Sale of the Project.' Once bridge financing in place, the 2018 Project Danube Presentation contemplated contracting for a feasibility study, the identification of potential buyers and the '[s]ale of the project at full price' by 31 December 2019."[118]

129. Claimants say that it transpires from the Project Danube PowerPoint that the sale to the Luxembourgish company Beauvallon was to be made swiftly after acquisition by Adriatic and that the development of the Ada Huja Project sought to pave the way for a future sale to a third party.[119]

130. Further to the Project Danube PowerPoint, Claimants rely on the April 2018 Site Analysis,[120] prepared by a market leader of Serbia's construction industry in the field of design development, consulting and project management ("**Site Analysis**").[121]

[118] Claimants' Counter-Memorial, ¶ 48.

[119] Claimants' Counter-Memorial, ¶ 49; Project Danube PowerPoint with Metadata of 18 December 2018 (Exhibit R- 19).

[120] Site Analysis of April 2018 (Exhibit R-23).

[121] Claimants' Counter-Memorial, ¶¶ 50-52.

According to Claimants, the Site Analysis reviewed the urban construction law requirements of the Ada Huja Project and the urbanism specifications of the City of Belgrade, having thus estimated 427.870 m^2 as a "*gross above grade area*" including 84,974 m^2 for commercial spaces and 339,896 m^2 for residential spaces, setting forth timelines and EUR 386,880,000 as estimated construction costs.[122]

131. Finally, Claimants assert that between 30 October 2018 and 22 April 2019 Beauvallon controlled BRIF TRES because Adriatic during this time did not take any autonomous management decisions about BRIF TRES, let alone BRIF-TC.[123] According to Claimants, the Share Purchase Agreement of 15 January 2019 concluded between Adriatic and Beauvallon for the acquisition of BRIF TRES came into effect on the same date pursuant to its Article 6.5, date of its notarisation, providing for immediate transfer of title over BRIF TRES shares pursuant to its Article 1.1.[124] Claimants object to Respondent's argument that control was acquired only by Beauvallon over BRIF TRES on 22 April 2019, date on which Beauvallon was entered into the Serbian Business Register, as this was a mere formality and irrelevant in light of Adriatic's and Beauvallon's intent.[125] Claimants add that control is also shown by the fact that Beauvallon's affiliate Wekare at the time bore the entirety of BRIF TRES's acquisition cost and that Wekare, Beauvallon and Mr Ribes through Beauvallon paid Adriatic's and Mr Dragašević's fees and initial costs to resume activity of the Ada Huja Project such as settling claims for a former employee and contractor GEMAX d.o.o. and invoices of the law firm BDK Attorneys at Law.[126] Claimants further object to Respondent's argument related to statutory requirements applying to Beauvallon and to Beauvallon's Articles of Association, arguing that the fact of being organised as a *société de gestion de patrimoine famillial* does not prevent it from exercising direct

[122] Claimants' Counter-Memorial, ¶¶ 52-56.
[123] Claimants' Counter-Memorial, ¶¶ 57-58.
[124] Claimants' Counter-Memorial, ¶¶ 57-63.
[125] Claimants' Counter-Memorial, ¶ 63, footnote 129.
[126] Claimants' Counter-Memorial, ¶¶ 64-68.

management in the portfolio companies and that Respondent misrepresents Article 4 of the Articles of Association.[127]

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

132. Claimants object to Respondent's argument that BRIF SICAR and BRIF-TC contemplated ICSID arbitration back in October 2007, December 2007 and February 2009, on the basis of correspondence between BRIF SICAR, BRIF-TC and Serbian authorities, relying on Serbian law and mentioning only once the European Convention for the Protection of Human Rights and Fundamental Freedoms.[128] Rather, Claimants argue that this correspondence sought to unlock blockage by drawing the Serbian authorities' attention to the irregularities surrounding the Ada Huja Project, which was partially successful because:

- "On 8 August 2007, Beoland agreed for BRIF-TC to register its leasehold rights over the Ada Huja Project Parcels;
- On 26 October 2007, the Safety and Security Department of the Ministry of Internal Affairs approved the technical documentation relating to the construction of gas pipeline connections, measuring stations and fire protection measures;
- On 5 May 2008, the Secretariat for Urban Planning and Construction of the City of Belgrade issued a construction permit for a 300-person capacity, dual-purpose basic protection underground shelter, to be built on the Ada Huja Project Parcels;
- On 25 August 2009, the Secretariat for Environmental Protection of the City of Belgrade issued its consent to the environmental impact assessment study relating to the Ada Huja Project and ordered BRIF-TC to 'prepare the planned shopping mall and the accompanying land rehabilitation works and to implement the field arrangement in everything according to the terms and measures of environmental protection (of air, soil, water and accidents)';
- On 19 January 2010, the Secretariat for Urban Planning and Construction of the City of Belgrade issued a 'certificate of documentation receipt' in response to BRIF-TC's application for the beginning of construction, dated 2 August 2007. This document, which [sic] the equivalent of a construction permit, confirmed that BRIF-TC had properly filed all documentation for

[127] Claimants' Counter-Memorial, ¶¶ 69-70.
[128] Claimants' Counter-Memorial, ¶¶ 71-76.

> construction of the Ada Huja Project and that the proposed architectural and technical designs were approved [sic] the relevant authorities."[129]

133. Claimants and BRIF SICAR's management were convinced that their Serbian law position was well-founded, not to mention that the City of Belgrade and Beoland acted as co-claimants sustaining the validity of the Lease Agreement and that Mr Dragašević intended a negotiated outcome.[130] Claimants ignore how Mr Dragašević learnt about the existence of the BIT, attached to his 6 February 2019 email to Mr Christophe Maillard, but, in any case, this fact post-dated the "preservation-restructuring" on 15 January 2019, Claimants say.[131]

(3) The Tribunal Has Jurisdiction Over the Dispute

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

135. Claimants recapitulate that the Tribunal has personal jurisdiction over Claimants under Article 1(1), Article 1(2), Article 11 and Article 13 under the BLEU-Serbia BIT and under Article 25 of the ICSID Convention. The Serbian companies BRIF-TC (incorporated on 18 September 2003) and BRIF TRES (incorporated on 12 July 2006) were fully owned and controlled by the Luxembourgish company BRIF SICAR on 12 August 2007 (date of entry into force of the BIT), consistently with the foreign control provisions set forth in Article 1(1)(c) of the BIT and Article 25(2)(b) of the ICSID Convention.[133]

136. Claimants add that placing BRIF SICAR in judicial liquidation and replacing its own management by a court-appointed Luxembourg Liquidator did not change this. Neither did the sale to Beauvallon change the situation, as Beauvallon and its affiliate Wekare

[129] Claimants' Counter-Memorial, ¶ 74.
[130] Claimants' Counter-Memorial, ¶¶ 75-78.
[131] Claimants' Counter-Memorial, ¶¶ 79-81.
[132] Claimants' Counter-Memorial, ¶¶ 83-106.
[133] Claimants' Counter-Memorial, ¶¶ 85-97.

effectively controlled (directly) BRIF TRES and (indirectly) BRIF-TC.[134] Claimants add that Adriatic's role as the legal owner was transitional and limited in time, as its operations were subject to instructions by Beauvallon and Mr Ribes, not to mention that restructuring was funded by Beauvallon, its affiliate Wekare, and Mr Ribes, and that Beauvallon covered BRIF-TC's contractual debt toward GEMAX d.o.o..[135]

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

137. Claimants note that the Parties agree that "it is impermissible for an investor 'to restructure an investment on the backend, after a dispute has become foreseeable, to manufacture ICSID jurisdiction and claim treaty benefits'" and that "'[c]orporate restructurings have been found illegitimate when their main purpose was to obtain treaty protection and they were made in bad faith, to get access to international arbitration,'" citing ¶ 44 of Respondent's Memorial.[136]

138. Claimants refer to commentators qualifying abuse of process as "treaty fraud" instead, as the expression "abuse of process" presupposes a right – which does not exist – and would thus be technically inadequate.[137] According to Claimants, a finding of treaty fraud requires proof of an illicit motive, a fraudulent intent, that is "*maliciousness, unreasonableness and arbitrariness.*" Claimants add that the standard of proof for finding abuse of process is high, "*proportionate to the gravity of the charge and its legal consequences,*" relying, among others, on the interim award in *Chevron v. Ecuador*.[138] In turn, the standard of proof for finding fraud, Claimants say, was equally a high one, requiring proof beyond reasonable doubt of fraud attributable to a claimant-

[134] Claimants' Counter-Memorial, ¶¶ 97-98.
[135] Claimants' Counter-Memorial, ¶¶ 99-100.
[136] Claimants' Counter-Memorial, ¶ 108.
[137] Claimants' Counter-Memorial, ¶¶ 109-111.
[138] Claimants' Counter-Memorial, ¶ 112, citing, among others, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Interim Award of 1 December 2008 (Exhibit CL-161), ¶ 143.

investor, which did not presume lifting the corporate veil of the same.[139] In any event, the burden of proof falls on the asserting Party, *i.e.*, Respondent.[140]

139. Claimants submit that arbitral tribunals have examined abuse and fraud on a case-by-case basis, requiring direct or conclusive circumstantial (indirect) evidence that the "sole purpose" of restructuring was to manufacture ICISD jurisdiction for a finding of abuse.[141] To illustrate, Claimants rely on (i) the *Phoenix v. Czech Republic* award, accepting that purchasing a bankrupt or inactive company does not suffice for a finding of abuse; (ii) the *Renée Rose Levy de Levi v. Peru* award, stating that a share sale without charge cannot *per se* indicate fraud; (iii) the *ConocoPhillips v. Venezuela* decision on jurisdiction and merits, noting that continuing expenditure after restructuring was a major factor against abuse; (iv) *Vincent J Ryan and others v. Poland* award, noting that restructuring aimed at maintaining claims before national courts cannot lead to abuse; (v) *Cervin and others v. Costa Rica* decision on jurisdiction, refusing to find abuse where an investor-claimant benefitted from treaty protection before restructuring, among others.[142]

(5) Beauvallon's Acquisition of BRIF TRES Does Not Constitute an Abuse of Process

140. Claimants submit that Respondent has not met its burden of proof relating to the legal standard of fraudulent intent (1) and that the state of facts in 2018 differed from the state of facts in the Spring 2019 and the developments ensued when they commenced the arbitration (2).

[139] Claimants' Counter-Memorial, ¶¶ 112-114.

[140] Claimants' Counter-Memorial, ¶¶ 115-116.

[141] Claimants' Counter-Memorial, ¶¶ 117-127.

[142] Claimants' Counter-Memorial, ¶¶ 119-125, citing, among others, *Phoenix v. Czech Republic*, ¶ 140; *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award of 26 February 2014 (Exhibit CL-182), ¶ 154; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V. and ConocoPhillips Company v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits of 3 September 2013 (Exhibit CL-184), ¶ 280; *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award of 24 November 2015 (Exhibit CL-185), ¶¶ 199-204; *Cervin Investissements S.A. and Rhone Investissements S.A. v Republic of Costa Rica*, ICSID Case No. ARB/13/2, Decision on Jurisdiction of 15 December 2014 (Exhibit CL-186), ¶¶ 295-296.

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

141. Claimants object to Respondent's argument that restructuring was done to initiate ICSID arbitration, relying on the following facts:

- "For one, Serbia acknowledges that the investment preservation-restructuring has been planned since 2017/2018, that is, before AIM even became the holder of the BRIF TRES share. As such, this recognition suffices to dismiss Serbia's abuse claim as unfounded.

- Moreover, at the time the investment preservation-restructuring was planned, Claimants qualified as investors under the BLEU-Serbia BIT and enjoyed treaty protection. The preservation-restructuring merely constituted the transfer of control from one Luxembourg company, BRIF SICAR, to another, Beauvallon. Indeed, the record shows that Beauvallon and its affiliate Wekare controlled BRIF TRES (within the meaning of the BLEU-Luxembourg BIT) at all times, including before the conclusion of the 15 January 2019 SPA under which AIM transferred the BRIF TRES share to Beauvallon. Thus enjoying treaty protection, there was no reason to engage in any manipulation of nationality.

- As regards the motive behind the preservation-restructuring, the record shows that the investment preservation-restructuring was a long-haul effort to salvage the EUR 25 Million of investments Claimants had previously made in the Ada Huja Project Parcels, with the support of the Management Team of BRIF SICAR, assisted by Mr. Pavlović.

- The preservation-restructuring was to follow a pre-defined timeline, which started in the Spring of 2018.

    - The initial focus was on securing the BRIF TRES share under the control of Beauvallon and Wekare whilst the preparation of preliminary studies such as the April 2018 Site Analysis was ongoing.

    - Once control over BRIF TRES secured, Beauvallon intended to pursue contracting for a 'Detailed Urban Plan' required to obtain additional institutional bridge financing.

    - The acquisition of BRIF TRES from BRIF SICAR was a necessary intermediary step in order to accomplish the plan to secure the previously made financial investments before developing the Ada Huja Project Parcels. This justified the nominal price paid by Beauvallon for the acquisition of BRIF TRES.

- In any event, the record also shows that Beauvallon made substantial contributions to BRIF-TC after BRIF TRES's acquisition.

- The record also clearly evidences the business purpose of the preservation-restructuring, namely, the salvation of the Ada Huja Project Parcels in view of obtaining further institutional financing to pursue their development and explore their potential resale.

  - In this regard, the fact that the Ada Huja Project as envisaged in 2018 was different than the originally contemplated form, notably because Serbian construction law allowed for the building of financially more attractive mixed use buildings, is irrelevant.

  - To the contrary, the favourable evolution of the applicable urban construction laws further underscored the attractiveness of the Ada Huja Project Parcels.

- The other relevant facts in the case independently refute any allegation of fraud on behalf of Claimants:

  - The record shows that Beauvallon (as well as Mr. Dragašević) had a hope of reaching a negotiated solution with the Serbian authorities over the registration status of the Ada Huja Project Parcels until at least 21 February 2019, the date when the judicial annulment of the 2004 Lease Agreement was thought to have become final.

  - The record shows that the BLEU-Serbia BIT was never even mentioned before 6 February 2019, by Mr. Dragašević. This means that Serbia cannot sustain its allegation that Beauvallon acquired BRIF TRES with the intention of bringing an ICSID claim.

  - The record consequently refutes any allegation that the preservation-restructuring was made with the sole aim of establishing ICSID jurisdiction. To the contrary, Claimants have shown that Claimants at all times remained Luxembourg-controlled and that the preservation-restructuring followed a predefined process and business purpose.

- Moreover, and in any event, Serbia has failed to explain how any such abuse can be attributed to Claimants."[143]

[143] Claimants' Counter-Memorial, ¶ 130.

b. The Dispute Notified in July 2019 Has Substantially Evolved After Claimants Commenced the Arbitration

142. Further, Claimants submit that the dispute has substantially evolved and differs significantly from the state of facts in 2018 and 2019.[144] According to Claimants, BRIF-TC has become target of "*abrupt, unforeseeable and highly-intrusive bankruptcy proceedings in 2021*," leading to factual control of BRIF-TC's bankruptcy administrator, who seeks in parallel proceedings compensation from Beoland following judicial annulment of the Lease Agreement.[145] An additional development is that the decisions by the Municipality of Palilula of 7 June 2007 recognising Luka Beograd's rights over the two parcels – despite previous decisions of 1997 attributing the rights over the Ada Huja parcels to the City of Belgrade – were reversed in September 2021, which prompted a request by Beoland on 21 April 2022 for reopening the proceedings leading to the final judicial annulment of the Lease Agreement and of the 15 June 2004 decision by the City of Belgrade awarding the tender to BRIF-TC (BRIF-TC's bankruptcy administrator has decided not to pursue similar proceedings, Claimants say).[146]

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

143. Claimants also object to Respondent's accusation that Beauvallon committed a separate abuse of process, arguing this is disingenuous.[147] According to Claimants:

(i) Beauvallon does not assert claims in the arbitration, disagreeing with any reference to substitution or assignment and distinguishing the present case from the *Mihaly. v Sri Lanka* award;[148]

[144] Claimants' Counter-Memorial, ¶¶ 132, 146-147.
[145] Claimants' Counter-Memorial, ¶¶ 133-134.
[146] Claimants' Counter-Memorial, ¶¶ 135-145.
[147] Claimants' Counter-Memorial, ¶¶ 148-154.
[148] Claimants' Counter-Memorial, ¶ 149.

(ii) Beauvallon does not need to separately qualify as an investor and in any case the related jurisdictional objection has not been bifurcated;[149]

(iii) Changing Luxembourgish parent company is not illegal, not to mention that no requirement of continuous nationality exists under the BIT or the ICSID Convention;[150]

(iv) The investment preservation-restructuring was long-planned and pursued a business purpose; "*Serbia's accusation that Beauvallon attempted 'to acquire an ICSID claim' is unfounded.*"[151]

C. TRIBUNAL'S ANALYSIS[152]

144. Respondent's second jurisdictional objection on abuse of process involves the following basic facts. BRIF SICAR, a Luxembourgish company in liquidation, was the controlling shareholder of Claimants BRIF TRES and BRIF-TC, two Serbian companies. BRIF TRES and its subsidiary BRIF-TC were acquired from BRIF SICAR by the Serbian company Adriatic at the instigation of Mr Ribes, a French national, as contemplated by a client services contract – the Engagement Agreement of 30 September 2017[153] – for "Ongoing assistance in relation to Project Danube." The acquisition of BRIF TRES by Adriatic was implemented in execution of (i) the Consultancy Agreement of 29 August 2018, later adjusted *via* the Consultancy Agreement of 8 November 2018,[154] concluded between Adriatic and Wekare, a Luxembourgish company owned by the same owner as Beauvallon's at the time (*i.e.*, Mr Steeve Simonetti), before Beauvallon was acquired by Mr Ribes on 30 March 2019,[155] and of (ii) the Share Transfer Deed of 30 October 2018 concluded

[149] Claimants' Counter-Memorial, ¶ 150.

[150] Claimants' Counter-Memorial, ¶¶ 151-152.

[151] Claimants' Counter-Memorial, ¶ 153.

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

[153] Engagement Agreement of 30 September 2017 concluded between Mr Jean-Pierre Ribes and Mr Vuko Dragašević (Exhibits R-18A and R-18B).

[154] Consultancy Agreement of 29 August 2018, concluded between Wekare and Adriatic (Exhibit C-291).

[155] Beauvallon Europe S.A., SPF, Shareholder Register (Exhibit C-287) and ELSTAN S.A., Shareholder Register (Exhibit C-299).

between Adriatic and BRIF SICAR.[156] On 15 January 2019, BRIF TRES was sold by Adriatic to Beauvallon, a Luxembourgish company, *via* the Share Purchase Agreement.[157]

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

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

147. Several features of the factual matrix allow a distinction from the classical restructurings relied on by the Parties as the basis for their discussion of the existence of the abuse of process alleged by the Respondent in the light of the international investment arbitration case law. One is that the original owner, BRIF SICAR is neither the initiator nor the beneficiary of the restructuring. Another one is that the investment, BRIF TRES and BRIF-TC, enjoyed the protection of the BLEU-Serbia BIT at the

[156] Share Transfer Deed of 30 October 2018, concluded between Adriatic and BRIF SICAR (Exhibit C-237).

[157] Share Purchase Agreement of 15 January 2019 concluded between Adriatic and Beauvallon for acquisition of BRIF TRES (Exhibit C-239).

[158] Respondent refers to the term "acquisition" in its Memorial, not only to "restructuring". *See* Respondent's Memorial, p. 2, Item I of "Argument", and ¶¶ 6, 12, 23, 61, 63, 73.

origin, lost it when acquired by Adriatic, as alleged by Respondent and denied by Claimants,[159] and obtained such protection at the end, when acquired by Beauvallon.

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

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

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

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

[159] Respondent's Memorial, ¶ 3; Claimants' Counter-Memorial, ¶ 58.

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

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

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

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

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

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

153. It is Respondent's case that between 30 October 2018, when BRIF TRES's shares were acquired by Adriatic, and 22 April 2019, when Beauvallon was registered as the shareholder, BRIF TRES and BRIF-TC did not enjoy the BLEU-Serbia BIT protection as they were controlled by a Serbian company.[164]

154. Conversely, Claimants' case is that BRIF TRES and BRIF-TC were – at all relevant times – under Luxembourgish control, including between 30 October 2018 to 15 January 2019, when BRIF TRES' shares were sold by Adriatic to Beauvallon.[165] According to Claimants:

> "[…] the fact that Serbian company AIM [Adriatic] held the BRIF TRES' share between 30 October 2018 and 15 January 2019 is immaterial for the purpose of

[162] *See Pac Rim v. El Salvador*, ¶ 2.99; *Renée Rose Levy at al. v. Peru,* ICSID Case No. 11/17, Award of 9 January 2015 (Exhibit RL-19) ("*Renée Rose Levy v. Peru*"*)*, ¶ 185; *Lao Holdings v. Lao*, ¶ 76.
[163] *Alapli v. Turkey*, ¶ 390.
[164] Respondent's Memorial, ¶ 3.
[165] Claimants' Counter-Memorial, ¶¶ 85-97.

establishing control. AIM was free to abdicate control over BRIF TRES (before it sold BRIF TRES to Beauvallon as planned). And AIM did so agree. These facts evidence that the preservation-restructuring was a means to transfer an asset controlled by one Luxembourg company (BRIF SICAR) to another (Beauvallon)."[166]

155. Claimants highlight that their Serbian owner during this period, Adriatic, only "*intervened as a transitory vehicle in order to secure the sale by the Luxembourg liquidator*."[167] They explain that faced with the manifest hostility of the Liquidator to sell the BRIF TRES's assets, members of the BRIF SICAR management reached out to Mr Ribes and Mr Steeve Simonetti in order to, directly or indirectly, including through a third-party buyer (*i.e.*, Adriatic), purchase the shares of BRIF TRES out of the liquidation and then transfer them back to a Luxembourgish company.[168]

156. To establish control of BRIF TRES by Luxembourgish entities while it was owned by Adriatic, the Claimants mainly rely on two documents:

(i) The 30 September 2017 Engagement Agreement[169] between Mr Ribes (French national and current owner of Beauvallon, a Luxembourg entity) and Mr Dragašević—a Serbian national who owned and controlled Adriatic.

(ii) The 29 August 2018 Consultancy Agreement[170] and its revised version[171] of 8 November 2018 between Wekare[172] and Adriatic.

157. Claimants stress that the Engagement Agreement evidences Mr Ribes's and Mr Dragašević's plan for Adriatic to negotiate with the Luxembourg Liquidator to acquire the Claimants and transfer them to Beauvallon.[173] They emphasise that the Engagement Agreement contemplated other steps, such as the Site Analysis of the Ada

[166] Claimants' Counter-Memorial, ¶ 101.

[167] Claimants' Counter-Memorial, ¶ 36.

[168] Claimants' Counter-Memorial, ¶ 36; Claimants' Memorial on the Merits, ¶ 207.

[169] Engagement Agreement of 30 September 2017 concluded between Mr Jean-Pierre Ribes and Mr Vuko Dragašević (Exhibits R-18A and R-18B).

[170] Consultancy Agreement of 29 August 2018, concluded between Wekare and Adriatic (Exhibit C-291).

[171] Revised Consultancy Agreement of 8 November 2018, concluded between Wekare and Adriatic (Exhibit C-295).

[172] Wekare is a Luxembourg company fully owned by Mr Steeve Simonetti. At the time of the Consultancy Agreement until 30 March 2019, Mr Simonetti was the sole owner and director of Beauvallon. *See* Beauvallon Europe S.A., SPF, Shareholder Register (Exhibit C-287). *See also* Claimants' Counter-Memorial, ¶ 41, footnote 65.

[173] Claimants' Counter-Memorial, ¶ 44.

Huja Project, which was submitted in April 2018[174] by a Serbian engineering company and discusses potential site uses.[175]

158. According to Claimants, the Consultancy Agreement and its revised version prove that Wekare (Luxembourg) similarly hired Adriatic to submit an offer to acquire the Claimants in order to sale them to Beauvallon.[176] Claimants highlight that Wekare was an affiliate[177] of Beauvallon (because they shared at the time the same sole owner). They point out that the Consultancy Agreement was revised on 8 November 2018 – just after Adriatic entered into a Share Transfer Deed to acquire BRIF TRES on 30 October 2018 – to specify the price Adriatic paid to acquire BRIF TRES.[178]

159. Claimants argue that these Consultancy Agreements were fully implemented on or about 16 November 2018, when Wekare wired funds for the purchase of BRIF TRES to Adriatic. Adriatic then wired the purchase price to the Luxembourg Liquidator on 19 November 2018.[179] With this accomplished, Adriatic and Beauvallon entered into the 15 January 2019 Share Purchase Agreement for the sale of 100% of BRIF TRES to Beauvallon. On 22 April 2019, Beauvallon became the registered shareholder of BRIF TRES,[180] thus reverting Claimants to undisputed ownership (and formal control) by a Luxembourg entity. According to Claimants, Beauvallon "*stepped into the shoes of BRIF SICAR*"[181] *via* these transactions.

160. In sum, Claimants contend that "the record shows that Beauvallon and its affiliate Wekare, together with Mr. Ribes and Mr. Simonetti, intended for Beauvallon to acquire

[174] Site Analysis of April 2018 (Exhibit R-23).

[175] Claimants' Counter-Memorial, ¶ 51.

[176] Claimants' Counter-Memorial, ¶ 43.

[177] Jurisdiction Hearing Transcript, 218:7-13: "[Claimants' counsel] […] *under our position, what is relevant is that they were under common control and both of these companies were used as part of the same transaction to effect an overall economic operation, and it's in that sense that they have to be considered affiliate. And this was also documented in the contracts, and as confirmed by the court*."

[178] Claimants' Counter-Memorial, ¶ 41, footnote 66.

[179] Claimants' Counter-Memorial, ¶¶ 43-44, footnotes 71 and 72. *See* Atlas Banka AD Podgorica, Bank Statements, AIM of 16 and 19 November 2018 (Exhibit C-296); Invoice from Mr Vuko Dragašević to Mr Jean-Pierre Ribes of 3 January 2019 (Exhibit C-297).

[180] Serbian Business Register, Decision on BRIF TRES of 22 April 2019 (Exhibit R-13).

[181] Bifurcation Hearing Transcript, 49:4-7.

BRIF TRES from 2017/2018 onwards, at the suggestion of Mr. Boris Pavlović" a former member of the BRIF SICAR management and that "the role of AIM and Mr. Dragašević was intended to be a merely transient one, in order to facilitate the acquisition of BRIF TRES from BRIF SICAR."[182] They argue that even though Adriatic held the shares of BRIF TRES between 30 October 2018 and 15 January 2019, the record evidences that Beauvallon (and Wekare) were actually controlling BRIF TRES.[183]

161. At the Jurisdiction Hearing, Claimants added a nuance to their argument by saying that even assuming that there was Serbian control for three months (*quod non*), this could not lead to abuse as only a three-month time window might fall outside of the Tribunal's jurisdiction:

> "The facts under our position show that the intent was for there to be continuous Luxembourg control. So even if this were found not to have been implemented, not to have been established, the intent was there. The intent was not some ulterior other motive. And in the worst case, what this would signify, according to Claimants, is that if any impugned conduct occurred during that three-month time window, then that might arguably fall outside of the Tribunal's jurisdiction ratione temporis. But that would be the only legal consequence of this." [184]

162. The Tribunal has no doubt that Mr Ribes and/or Mr Simonetti had the intent to acquire BRIF TRES from BRIF SICAR and that Adriatic and/or Mr Dragašević "*intervened as a transitory vehicle in order to secure the sale by the Luxembourg liquidator*."[185] That Mr Ribes wanted to acquire BRIF TRES results from the 30 September 2017 Engagement Agreement and its acquisition by Mr Simonetti, the owner of Wekare, was the purpose of the 29 August 2018 Consultancy Agreement and its revised version of 8 November 2018. Yet, the proceedings have not allowed any clarification about the relations between both gentlemen, on the one hand, and Beauvallon, on the other.

[182] Claimants' Counter-Memorial, ¶ 45.
[183] Claimants' Counter-Memorial, ¶ 45.
[184] Jurisdiction Hearing Transcript, 199:14-24.
[185] Claimants' Counter-Memorial, ¶ 36.

163. While Beauvallon is mentioned in Article 4.3 of the version of the 30 September 2017 Engagement Agreement signed by Mr Ribes, it is not in the version signed by Mr Dragašević. This omission does not astonish the Tribunal since in September 2017 Beauvallon was not owned by Mr Ribes, who did not purchase it through his company ESLTAN SA from Mr Simonetti before 30 March 2019.[186] But Beauvallon was not owned by Mr Simonetti either when he signed the 29 August 2018 Consultancy Agreement since he purchased its shares from a Mr Euvrard on 24 October 2018,[187] two weeks before he signed the 8 November 2018 Consultancy Agreement. In this regard, it is regrettable that Claimants did not find it appropriate to provide any witnesses testimony from any of these gentlemen or from any participant into the transactions which led to the acquisition of BRIF TRES by Beauvallon, which remains rather opaque. The alleged hostility of the Liquidator to sell the BRIF TRES assets to BRIF SICAR management does not explain why Mr Simonetti or Beauvallon did not deal directly with the Liquidator.

164. In any case, the Tribunal finds that whatever was Mr Ribes' and /or Mr Simonetti's or even Beauvallon's intent when implementing the transaction leading to the acquisition of BRIF TRES by Beauvallon, such intent cannot support Claimants' contention that Beauvallon "*stepped into the shoes of BRIF SICAR*"[188] because of the very nature of the transaction. Beauvallon acquired BRIF TRES from the Serbian company Adriatic and the question is whether BRIF TRES was under Beauvallon's or more generally under Luxemburgish control when owned by Adriatic. The Tribunal's conclusion is that it was not so.

165. In reaching this decision, the Arbitral Tribunal had considered the relevant provisions on foreign control under the ICSID Convention and the BIT (1), the burden of proof for a showing of foreign control (2) and the evidence adduced (3).

[186] Beauvallon Europe S.A., SPF, Shareholder Register (Exhibit C-287) and Consultancy Agreement of 29 August 2018, concluded between Wekare and Adriatic (Exhibit C-291).
[187] Beauvallon Europe S.A., SPF, Shareholder Register (Exhibit C-287).
[188] Bifurcation Hearing Transcript, 49:4-7.

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

166. The Parties disagree on whether in spite of Adriatic's legal ownership of BRIF TRES between 30 October 2018 to 15 January 2019, the Claimants were under the protection of the BLEU-Serbia BIT, pursuant to Article 25(2)(b) of the ICSID Convention and Article 1(1)(c) of the BLEU-Serbia BIT, in the light of the provisions of the services agreements involving Mr Ribes and Wekare (Luxembourg). Respondent argues that "[i]*t is uncontested that Claimants were controlled in 2018 by a Serbian company*,"[189] while Claimants object by asserting that "*even though AIM was the title holder of BRIF TRES for little more than two months, it was clear from the outset that AIM was not intended to exercise control over BRIF TRES*."[190]

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

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

[189] Respondent's Memorial, ¶ 3.
[190] Claimants' Counter-Memorial, ¶ 58.

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

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

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

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

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

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

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

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

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

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

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

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

174. "*Control*" is generally ascertained through legal control founded on the percentage of ownership title of shares (direct or indirect), including an analysis of voting rights and shareholders' agreements, or through actual control, which requires establishing the capacity to control and direct a company's day-to-day management and activities. Claimants accept that legal title of BRIF TRES pertained to Adriatic in the period

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

between 30 October 2018 to 15 January 2019 but rely on actual control by Beauvallon over Claimants.[194] Although Respondent mainly relies on control through legal ownership, with the consequence that the period to be considered is, according to it, 30 October 2018 to 22 April 2019, the date when Beauvallon became registered shareholder of BRIF TRES, it does not seem to disagree that the definition of "*control*" under the relevant treaties encompasses actual control. However, Respondent's position is that actual control by Beauvallon did not exist between 30 October 2018 to 22 April 2019.[195]

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

176. It is not disputed that as from 22 April 2019, when Beauvallon became a registered shareholder of BRIF TRES, it had control over Claimants. It is not disputed either that Claimants were under Luxembourgish control before 30 October 2018, when they were acquired by Adriatic. The Tribunal also considers there are no reasons or evidence supporting that actual control did not exist following the Share Purchase Agreement of 15 January 2019 through 22 April 2019, the date when legal ownership was registered on behalf of Beauvallon. Accordingly, in order to decide that Claimants were always under Luxembourgish actual control, the Tribunal must be convinced that so was the case between 30 October 2018 and 15 January 2019.

[194] Jurisdiction Hearing Transcript, 122:5; 206:18.
[195] Respondent's Memorial, ¶ 47; Jurisdiction Hearing Transcript, 147:9-13. 185:15-25.
[196] *Aguas del Tunari v. Bolivia*, ¶ 264.

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

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

178. The Tribunal is satisfied that the burden of proof lies on the Party that makes a particular allegation. The Parties accept that there is no ownership control, and it is Claimants which allege, in response to Respondent's argument on the absence of ownership control, that "*even though AIM was the title holder of BRIF TRES for little more than two months, it was clear from the outset that AIM was not intended to exercise control over BRIF TRES.*"[198] Therefore, the burden for a showing of actual control lies on Claimants who are the Party alleging it.

c. Discussion of the evidence adduced by the Parties

179. Claimants must prove existing indirect Luxembourgish control by Beauvallon over BRIF TRES, through Adriatic, which, in turn, owned BRIF TRES' shares, between 30 October 2018 to 15 January 2019, distinguishing in that respect between Beauvallon and Wekare. The Tribunal has accepted that, for purposes of the relevant treaties, actual control falls under the definition of "*control.*" Therefore, the Tribunal will assess whether there was actual control by a Luxembourgish company, Beauvallon and/or Wekare during the period of Adriatic's legal ownership of BRIF TRES between 30 October 2018 to 15 January 2019, based on the facts and evidence adduced by the Parties.

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

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

180. Under the 30 September 2017 Engagement Agreement between Mr Ribes and Mr Dragašević, the latter was in charge as a "Consultant" to provide services for "[o]*n going assistance in relation to Project Danube*," as follows:

> "2.1 The Consultant shall provide to the Client Services in relation to Project Danube, pursuant to specific instructions of the Client ('Services').
>
> The scope of Services shall be as follows:
>
> (i) Ongoing assistance in relation to Project Danube, including:
>
> - Consulting services in relation to the acquisition of assets of BALKAN RECONSTRUCTION INVESTMENT FINANCING S.C.A. SICAR in Liquidation from Luxembourg ('BRIF SICAR') namely: BRIF UNUS d.o.o. from Belgrade, BRIF DUOS d.o.o. from Belgrade, BRIF TRES d.o.o. from Belgrade (owning BRIF TC from Belgrade and that has a contract with the city of Belgrade for the long term lease of approx. 141,000 sqm of land in Belgrade ('the Land')), BRIF QUATRUS d.o.o. from Belgrade (altogether hereinafter 'The Target') including but not limited to:
>
> - Review of all documentation related to assets of BRIF SICAR and providing assistance related to the Target
>
> - Approaching the Liquidator of BRIF S.I.C.A.R. ('Liquidator') on behalf of the Client
>
> - Assistance during the negotiation with Liquidator and direct involvement in bidding process for takeover of assets of BRIF SICAR ('Target')
>
> - Preparation of the Target for further functioning and development (data room, specialized firms consulting etc)." [199]

181. Clearly, the scope of the "Services" under the Engagement Agreement was limited to Project Danube assistance, that is (i) consulting for acquisition of assets of BRIF SICAR, among which BRIF TRES, (ii) reviewing BRIF SICAR's documents, (iii) approaching BRIF SICAR's Liquidator, (iv) negotiating with BRIF SICAR's Liquidator and (v) preparing BRIF SICAR's operations and development. The acquisition of BRIF SICAR's assets was the main service required but this was rendered to Mr Ribes personally, a French national, who was described as the "ultimate

[199] Engagement Agreement of 30 September 2017 concluded between Mr Jean-Pierre Ribes and Mr Vuko Dragašević (Exhibits R-18A and R-18B).

beneficiary" of the Engagement Agreement in its Article 7.1 and who did not own Beauvallon at the time. Article 7.1 provided as follows in the relevant part:

> "[…] The Client [Mr Ribes] confirms to the Consultant [Mr Dragašević] that it is the ultimate beneficiary of this Engagement Agreement and all legal advice provided thereunder […]."[200]

182. The fact that Mr Ribes features as the "ultimate beneficiary" of a services contract for assistance in relation to Project Danube cannot indicate actual control by Beauvallon over prospective assets of BRIF SICAR.

183. Even if the version of the Engagement Agreement signed by Mr Ribes,[201] contrary to that signed by Mr Dragašević,[202] contemplated the transfer of BRIF SICAR's assets to Beauvallon when acquired by Adriatic, it did not give any control to Beauvallon over Adriatic and even less over BRIF SICAR's assets, in particular since Mr Ribes did not acquire Beauvallon before 30 March 2019.[203] Articles 4.1 to 4.5 of the Engagement Agreement (version signed by Mr Ribes) stipulate that:

> "4.1 The Client acknowledges the retainer and success fee in the total potential amount of EUR 300,000 plus expenses payable to the Consultant for the following:
>
> 4.2 Preparation of the electronic data room and assistance in the review of the Target's financial and legal data: 50,000 EUR
>
> Contracting a specialized firm to prepare a report on the architectural, legal and urbanistic possibilities on the Plot 25,000 EUR
>
> Bid and negotiation with Mr. Yann Baden, a Luxembourg based liquidator appointed by the relevant court, for the purchase of the assets of BRIF S.I.C.A.R in liquidation: 100,000 EUR.

[200] Engagement Agreement of 30 September 2017 concluded between Mr Jean-Pierre Ribes and Mr Vuko Dragašević (Exhibits R-18A and R-18B).

[201] Engagement Agreement of 30 September 2017 concluded between Mr Jean-Pierre Ribes and Mr Vuko Dragašević (Exhibits R-18B).

[202] Engagement Agreement of 30 September 2017 concluded between Mr Jean-Pierre Ribes and Mr Vuko Dragašević (Exhibits R-18A).

[203] Beauvallon Europe S.A., SPF, Shareholder Register (Exhibit C-287) and ELSTAN S.A., Shareholder Register (Exhibit C-299).

Closing of the transaction until the transfer of the ownership (signed SPAs) over the assets: 100,000 EUR.

Contracting a valuator from the 'big 4 firms' in order to prepare a valuation of the Target's assets: 25,000 EUR.

4.3 The Consultant will be entitled to the full amount from article 4.2 plus expenses if the Client or company determined by the Client (i.e. BEAUVALLON EUROPE S.A., SPF) succeed to take over control over designated assets of BRIF SICAR.

4.4 Success fee is payable two business days after following the provision of the last service from article 4.2."[204] (Emphases added)

184. Clearly, the Engagement Agreement sets forth above Mr Dragašević's overarching services mission to assist Beauvallon to "*succeed to take over control over designated assets of BRIF SICAR*," subject to payment of a success fee. The wording of Article 4.3 above indicates clearly that there was no control of Beauvallon over BRIF TRES before it acquired it from Adriatic.

185. It is with an express reference to the Engagement Agreement that on 3 January 2019, Mr Dragašević and not Adriatic invoiced Mr Ribes and not Beauvallon for his services, including services for EUR 25,000 relating to contracting a specialised firm to prepare a report on the architectural, legal and urbanistic possibilities on the Plot[205], an activity which was part of his duties under Article 4.2 of the Engagement Agreement.

186. Likewise, pursuant to the 29 August 2018 Consultancy Agreement[206] between Wekare, an affiliate of Beauvallon between 20 October 2018 and 30 March 2019,[207] and Adriatic and its revised version of 8 November 2018,[208] Wekare granted Adriatic the mandate to purchase BRIF SICAR's assets, which took place *via* the Share Transfer Deed[209] concluded on 30 October 2018 between BRIF SICAR (in liquidation) and Adriatic. There was no actual control by Wekare and even less by Beauvallon over

[204] Engagement Agreement of 30 September 2017 concluded between Mr Jean-Pierre Ribes and Mr Vuko Dragašević (Exhibit R-18B signed by Mr Ribes).
[205] Invoice from Mr Vuko Dragašević to Mr Jean-Pierre Ribes of 3 January 2019 (Exhibit C-297).
[206] Consultancy Agreement of 29 August 2018, concluded between Wekare and Adriatic (Exhibit C-291).
[207] Beauvallon Europe S.A., SPF, Shareholder Register (Exhibit C-287).
[208] Revised Consultancy Agreement of 8 November 2018, concluded between Wekare and Adriatic (Exhibit C-295).
[209] Share Transfer Deed of 30 October 2018, concluded between Adriatic and BRIF SICAR (Exhibit C-237).

Adriatic or over BRIF SICAR's assets but the contractual rights and obligations resulting from a mandate contract. It is what transpires form the wording of the Consultancy Agreement:

> "Article 1.
>
> The Company hereby appoints the Consultant as its external consultant and the Consultant hereby agrees to provide consulting services for submitting one of the offers for the acquisition of assets of BALKAN RECONSTRUCTION INVESTMENT FINANCING SCA SICAR LIQUIDATION ('BRIF') from Luxembourg (hereinafter referred as the 'Target') and to assist the Company in relation to other potential offers.
>
> The Consultant shall carry out its services as specified in the Agreement.
>
> Article 2.
>
> The Consultant should provide the services specified in Article 1.
>
> The Company agrees to pay to the Consultant fee in total amount of EUR 100,000 in two instalments.
>
> 1. EUR 50,000 will be payable immediately.
>
> 2. EUR 50,000 will be payable 5 business days following the acceptance of the Liquidator, Attorney at law Yann Baden, of one of the offers (from the Consultant or from any other third party controlled or acting on behalf of the Company) for the acquisition of the Target.
>
> 3. The parties will agree on a possible success fee one the Liquidator has accepted a final price." [210]

187. Engaging the Serbian company Adriatic as a "Consultant" "*to provide consulting services for submitting one of the offers for the acquisition of assets of* [BRIF SICAR]" cannot serve as proof of actual control of Adriatic and even less of BRIF TRES by Wekare or Beauvallon. The fact that the acquisition costs were fully settled by

[210] Consultancy Agreement of 29 August 2018, concluded between Wekare and Adriatic (Exhibit C-291).

Wekare[211] does not change that conclusion either, as it was just the implementation of the Consultancy Agreement.[212]

188. Following the 30 October 2018 Share Transfer Deed whereby Adriatic acquired BRIF TRES from BRIF SICAR, the 15 January 2019 Share Purchase Agreement,[213] concluded, in turn, between Adriatic and Beauvallon, gave ownership control to Beauvallon over BRIF TRES. Thus, between 30 October 2018 and 15 January 2019, Claimants were Serbian companies under the ownership control of Adriatic, a Serbian company. The fact that Adriatic may have or may not have exercised actual control over the Claimants and/or even abdicated such control as alleged by the Claimants[214] did not confer actual control upon Wekare or Beauvallon which had not the legal capacity to exercise such a control. But the Tribunal is not convinced that Adriatic had abdicated such control.

189. It is noteworthy in this regard that Article 4.1 of the Share Purchase Agreement between Adriatic and Beauvallon reads that:

> "Buyer undertakes not to change or dismiss the director of the Company and/or of the BRIF-TC, not to appoint new director or proxy or other representative of the Company and/or of the BRIF-TC, not to limit authorities of the director of the Company and/or of the BRIF-TC or to interfere with the director of the Company and/or of the BRIF-TC in any other way, until payments of the Purchase Price and Consideration are made."

190. Likewise, Article 4.2 of the Share Purchase Agreement reads:

> "Buyer also undertakes, until payment of the Purchase Price and Consideration, not to make any material decision in relation to the Share, the Company and its material assets (e.g. pledge of the Share, sale of the Share, disposal of BRIF-TC, settlement with creditors, entering into dispute, etc) without prior written approval of the Seller." (Emphasis added)

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[211] Invoice from AIM to Wekare of 30 October 2018 (Exhibit C-294); Atlas Banka AD Podgorica, Bank Statements, AIM of 16 and 19 November 2018 (Exhibit C-296).

[212] The various invoices sent to Beauvallon after 15 January 2019 are irrelevant.

[213] Share Purchase Agreement of 15 January 2019 concluded between Adriatic and Beauvallon for acquisition of BRIF TRES (Exhibit C-239).

[214] Claimants' Counter-Memorial, ¶ 101.

191. These two provisions of the Share Purchase Agreement confirm that before the conclusion of this agreement between Adriatic and Beauvallon, there was no doubt in the parties' mind that the former controlled Claimants and that, although the ownership of BRIF TRES was transferred to Beauvallon with the transfer of the shares, the latter accepted to postpone actual control until payment of the purchase price.

192. More specifically, Article 4.2 of the Share Purchase Agreement confirms, as pointed out by Respondent, that between 30 November 2018 and the date of payment of BRIF TRES shares, neither Beauvallon nor any other Luxembourgish entity had the legal capacity to direct BRIF TRES to file a claim,[215] relying on Article 1(c) of the BLEU-Serbia BIT.

193. In light of the foregoing, the Tribunal finds that Beauvallon and/or Wekare did not exercise actual control over Claimants in the period between 30 October 2018 to 15 January 2019. In other words, there was an interruption in Luxemburgish control, and Beauvallon stepped into Adriatic's shoes, a Serbian company which was not entitled to rely on the BLEU-Serbia BIT, let alone the ICSID Convention, to act against Serbia as Respondent.

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

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

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

[215] Jurisdiction Hearing Transcript, 207:12-19.
[216] *See* supra ¶ 161.
[217] Jurisdiction Hearing Transcript, 199:14-24.

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

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

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

> "It's not a contention of illegality or fraud or bad faith; that is not the standard, that is not our burden, that is not what we're alleging. So Claimants have mentioned that a half-dozen or more times today. We are not seeking to prove, nor do we have to, that what the restructuring did was illegal under any jurisdictional law. It was an abuse of the international investment treaty arbitration process."[218]

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

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

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

[218] Jurisdiction Hearing Transcript, 207:4-11. Respondent does, however, refers to bad faith in its Memorial, although this is done only via cross-referencing to Claimant's Answer to the Request for Bifurcation. *See* Respondent's Memorial, ¶ 44. Respondent also refers to the *Phoenix v. Czech Republic* award when stating that "the abuse-of-process analysis is rooted in the principle of good faith that applies to all treaty rights" in its Request for Bifurcation (at ¶ 56).

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

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

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

a. Whether the Claimants' investment claims were already foreseeable at the time of Beauvallon's acquisition of BRIF SICAR's investment

201. The Parties disagree on whether the investment claims were already foreseeable at the time Beauvallon's acquisition took place on 15 January 2019. It is Respondent's case that the dispute was foreseeable at least 12 years before 22 April 2019, the date when Beauvallon became the registered owner of BRIF TRES,[221] relying, for example, on BRIF SICAR's letters of 24 October 2007 to two different Serbian Ministries,[222] on BRIF SICAR's letter of 28 December 2007 to Serbia's President,[223] and on BRIF-TC's letter of 2 February 2009 to Serbia's Ministry of Foreign Affairs.[224]

202. The Claimants object to Respondent's position, arguing that the above correspondence sought to unlock blockage by drawing Serbian authorities' attention to the irregularities surrounding the Ada Huja Project,[225] and highlighting that Claimants and BRIF SICAR's management were convinced that their Serbian law position was well-founded, adding that the City of Belgrade and Beoland acted with them as co-claimants, sustaining the validity of the Lease Agreement.[226] The Claimants also stress that the

[220] *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015 (Exhibit CL-163), ¶ 539.

[221] Respondent's Memorial, ¶ 47.

[222] Letter from BRIF SICAR to the Minister of Economy and Regional Development of 24 October 2007 (Exhibit C- 115); Letter from BRIF SICAR to the Minister of Infrastructure of 24 October 2007 (Exhibit C-116).

[223] Respondent's Memorial, ¶ 53, citing BRIF-SICAR's Letter to Serbia's President of 28 December 2007 (Exhibit C- 124).

[224] Respondent's Memorial, ¶ 55, citing BRIF-TC's Letter to Serbia's Ministry of Foreign Affairs of 2 February 2009 (Exhibit C-180), enclosing a memorandum on the "Violations of law committed by public authorities in Belgrade's river bank zone." *See also* Respondent's Memorial, ¶¶ 56-58.

[225] Claimants' Counter-Memorial, ¶¶ 71-76.

[226] Claimants' Counter-Memorial, ¶¶ 75-78.

dispute had a "domestic" character which would show that there was no treaty-based dispute.[227]

203. As a preliminary matter, the Tribunal will consider 15 January 2019 as the relevant date for its ruling on the foreseeability of the dispute, as the date of the Share Purchase Agreement and thus of the acquisition of BRIF TRES by Beauvallon, as it understands that from that moment in time Beauvallon exercised at the very least actual control over BRIF SICAR's assets including BRIF TRES, despite the fact that Beauvallon became a registered owner exercising legal control of BRIF TRES only on 22 April 2019.[228]

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

205. First, at the Jurisdiction Hearing, the Arbitral Tribunal asked the Parties to elaborate on who were the abusers or the actors of the abuse. Respondent replied by stating that the actors of the abuse of the transfer of BRIF TRES to Beauvallon to manufacture treaty jurisdiction were "*Beauvallon*, *because it's buying the shares in the context where the claim is contemplated* [and] *Adriatic which is aiding and abetting, participating, facilitating, partnering,*"[229] together with Claimants, who gained access to treaty jurisdiction through this process.[230] Claimants objected to any finding of abuse and did not answer the question.[231]

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[227] Claimants' Counter-Memorial, ¶¶ 75-76.

[228] Serbian Business Register, Decision on BRIF TRES of 22 April 2019 (Exhibit R-13).

[229] Jurisdiction Hearing Transcript, 194:16-19.

[230] Jurisdiction Hearing Transcript, 207: 21-25; 208:2-16: "[Respondent's counsel] *So as a result of the restructuring, the movement of those entities from Serbian control to Luxembourg control, they gained access to attempting to vindicate that right or that claim. They were participants in, parties to that abuse.* […] *the signatories to the share purchase agreement, the manner in which the share of BRIF TRES was going to be moved from Adriatic to Beauvallon. Who were the signatories to that agreement? The Dragasevic brothers, who were the directors of the Claimants in this case. They were participants in, parties to the abuse, the mechanism by which -- or the implementation of the restructuring, the movement of their entities, of which they were the directors, from Serbian ownership and control to Luxembourg ownership and control. They picked Luxembourg for that very reason: in order to try and establish or gain jurisdiction. So it is the Claimants who were participants in this, parties to this abuse, along with, as Mr Buckley outlined, Beauvallon and Adriatic*."

[231] Jurisdiction Hearing Transcript, 198:6-22.

206. The Tribunal considers that foreseeability of the dispute concerns the alleged abuser of the international investment arbitration system *i.e.*, the entity which restructures an investment or acquires an investment in order to be able to file or have filed by an entity under its control a claim relating to a foreseeable or crystalized dispute and not to invest in the host State. In this case, it would be Mr Ribes, Mr Simonetti and eventually Beauvallon. They are entities to whom the dispute was foreseeable or which knew that it had crystalized.

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

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

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

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

209. The Tribunal agrees with Respondent[234] that the dispute was foreseeable or highly probable to Claimants at least 12 years before Beauvallon took control of BRIF TRES. The evidence on the case record shows that the dispute was highly foreseeable if not crystallized, in May/June 2007, even before the entry into force of the BLEU-Serbia BIT on 12 August 2007:

(i) In May 2007, Luka Beograd commenced administrative proceedings seeking to assert its rights over parcels Nos. 7/1 and 5112/5 in the Ada Huja Project area.[235]

(ii) On 7 June 2007, the Municipality of Palilula issued two decisions confirming Luka Beograd's rights of use over these two parcels on the ground of illegality of registration of rights of use in favour of Eko Zona Ada Huja d.o.o. Beograd in 1997.[236]

(iii) On 15 June 2007, Luka Beograd applied to the Second Municipal Court of Belgrade for registration of its rights based on the 7 June 2007 Decision granted on 29 October 2007.[237]

210. Although the dispute has evolved since those events, as pointed out by Claimants,[238] it persists nevertheless rooted in deteriorating circumstances which affected Claimants' investment before the entry into force of the BIT, almost 12 years before the acquisition of BRIF TRES by Beauvallon *via* the Share Purchase Agreement of 15 January 2019.

211. BRIF SICAR's letters of 24 October 2007 to two different Serbian Ministries,[239] BRIF SICAR's letter of 28 December 2007 to Serbia's President[240] provide clear evidence that the dispute was foreseeable at the time and rooted in May/June 2007. Claimants' attempt to rely on a purported "domestic" character of the dispute before BRIF TRES' acquisition by Beauvallon is to no avail as mentioned above.[241] Moreover, the Tribunal is not convinced that BRIF SICAR was seeing the dispute as a domestic dispute. BRIF

[234] Respondent's Memorial, ¶ 47.

[235] Respondent's Memorial, ¶ 36; Claimants' Memorial on the Merits, ¶ 114.

[236] Municipality of Palilula, Decision No. 463-259/2007-I-3 of 7 June 2007 (Exhibit C-96); Municipality of Palilula, Decision No. 463-260/2007-I-3 of 7 June 2007 (Exhibit C-97).

[237] Second Municipal Court, Decision No. Dn. 12900/07 of 29 October 2007 (Exhibit C-117).

[238] Claimants' Counter-Memorial, ¶¶ 132, 146-147.

[239] Letter from BRIF SICAR to the Minister of Economy and Regional Development of 24 October 2007 (Exhibit C-115); Letter from BRIF SICAR to the Minister of Infrastructure of 24 October 2007 (Exhibit C-116).

[240] BRIF-SICAR's Letter to Serbia's President of 28 December 2007 (Exhibit C-124).

[241] *See* supra ¶ 208.

SICAR's choice not to bring an investment claim pertains to its own legal strategy at the time but cannot serve as a shield against a finding of foreseeability of the dispute at those times. Its letters of 24 October 2007 requested the protection of a foreign investment. Of particular significance is BRIF-TC's letter of 2 February 2009[242] to Serbia's Ministry of Foreign Affairs,[243] which confirms that the dispute at those times was not "domestic." Indeed, the letter refers to violations of the European Convention on Human Rights. Moreover, an interview of Mr Goran Pavlović, a member of the management of BRIF SICAR, of 20 April 2009 shows that the possibility of filing an international claim was among the discussed hypotheses.[244]

212. In light of the foregoing, the Tribunal finds that the dispute was already foreseeable, if not crystallized, when Beauvallon, on 15 January 2019, acquired BRIF TRES from Adriatic.

b. Whether Beauvallon's acquisition of BRIF TRES sought an economic purpose to develop normal business activities

213. The Parties diverge on whether Beauvallon's acquisition of BRIF TRES sought an economic purpose to develop normal business activity, or had an economic rationale. According to Respondent, BRIF TRES and BRIF-TC were at the time of acquisition dormant companies in the hands of the Luxembourg Liquidator, holding dispute land-right claims and featuring as parties to a Lease Agreement, annulled in December 2016, not to mention that the Project was no longer attractive.[245]

214. In turn, Claimants allege to have spent over EUR 24.5 million in the acquisition and development of the Ada Huja Project between 2006 and 2010, investment which they sought to revive and preserve *via* the "preservation-restructuring" through the sale of BRIF SICAR *via* Adriatic to Beauvallon.[246] They add that the development of the Ada Huja Project Parcels was going to require substantial additional funding and that Mr

[242] The letter is dated of 2 February 2008 but it is obviously a clerical mistake as it refers to fact after that date.
[243] BRIF-TC's Letter to Serbia's Ministry of Foreign Affairs of 2 February 2009 (Exhibit C-180), enclosing a memorandum on the "Violations of law committed by public authorities in Belgrade's riverbank zone."
[244] Insajder Investigative Journalism Docuseries "Abuse of Office" of 20 April 2019 (Exhibit C-189).
[245] Respondent's Memorial, ¶ 67.
[246] Claimants' Counter-Memorial, ¶ 47.

Ribes would act as a financier.[247] They present the Project Danube Power Point as evidence of Beauvallon's objective to prepare the Ada Huja Project Parcels for a potential resale in the future and rely on the Site analysis as an initiative to that effect.[248]

215. Claimants point out that no mention of the BLEU-Serbia BIT, let alone the ICSID Convention, was ever made before the acquisition of BRIF TRES by Beauvallon on 15 January 2019[249] and they further argue that they ignore how Mr Dragašević learnt about the existence of the BIT, attached to his 6 February 2019 email to Mr Christophe Maillard, but they stress that this fact post-dated 15 January 2019.[250]

216. The Tribunal wants first to indicate that the amount of the investment made by Claimants between 2006 and 2010 does not suggest that when Mr Ribes and Beauvallon acquired BRIF TRES, they had the intention to develop normal business activities because this investment had been lost, which is in great part the reason why an ICSID claim has been filed. On the contrary, it may suggest an interest to recuperate such investment made by BRIF SICAR in the past and assessed of having no value by BRIF SICAR's Luxembourg Liquidator when BRIF TRES's shares were purchased by Adriatic.[251]

217. What imports is Mr Ribes' and Beauvallon's intent and there is little evidence on the record showing that they intended to pursue the investment made by BRIF SICAR, much less to develop an economic activity in the host State. To the contrary, there is evidence that the possibility of filing an ICSID claim was the main reason for BRIF TRES' acquisition by Beauvallon.

218. That Mr Dragašević sent the BLEU-Serbia BIT to Mr Christophe Maillard, Claimants' counsel of record in this arbitration, on 6 February 2019,[252] *i.e.*, three weeks after the

[247] Claimants' Counter-Memorial, ¶ 47
[248] Claimants' Counter-Memorial, ¶¶ 50-51.
[249] Claimants' Counter-Memorial, ¶ 81.
[250] Claimants' Counter-Memorial, ¶¶ 79-81.
[251] Share Transfer Deed of 30 October 2018, concluded between Adriatic and BRIF SICAR (Exhibit C-237), Article 4.1.2.
[252] Email from Mr Dragašević to Mr Maillard of 6 February 2019 (Exhibit R-26).

acquisition of BRIF TRES by Beauvallon, proves that investment protection under such BIT was, to say the least, within the purchaser's immediate concern and the Claimants' allegations that they ignore why Mr Dragašević did it[253] is unconvincing. The Tribunal notes in this respect that Claimants decided not to adduce evidence from Mr Dragašević himself to clarify this.

219. The Tribunal does not believe that Beauvallon was interested in the BLEU-Serbia BIT to assess the protection that future business in Serbia would enjoy. Its interest was evidently directed to the past. On 7 May 2019, just two weeks after Beauvallon became a registered owner of BRIF TRES on 22 April 2019, Beauvallon formally retained White & Case LLP "*to advise and represent Beauvallon*[…] *and any relevant affiliates, including Serbian affiliates BRIF-TRES* [sic] *and BRIF-TC* […] *in connection with a dispute and possible arbitration against the Republic of Serbia concerning the rights of BRIF-TC (formerly Montmontaza) under a Lease Agreement dated 2 September 2004 for the construction of a shopping centre in Serbia.*"[254] The Engagement Letter between White & Case LLP and Beauvallon of 7 May 2019[255] is followed by the Notice of Dispute of 31 July 2019,[256] *i.e.*, the decision to start an ICSID arbitration was made in a very short period after the acquisition date 15 January 2019. No evidence was produced which would show that, after such acquisition, anything was done to invest in the Ada Huja Project, let alone that Claimants and/or Beauvallon had the intention to do it before having succeeded in their ICSID claim.

220. Even if one considers that Respondent had the burden to prove such absence of investment and of intent to invest, it has satisfied such burden by requesting Claimants to produce all documents they had in their possession in this respect. Claimants did not produce many documents in response to Respondent's Document Production Request No. 1[257] in relation to Beauvallon's intention to invest in the Ada Huja Project. The

[253] Claimants' Counter-Memorial, ¶¶ 79-81.
[254] Engagement Letter Between White & Case LLP and Beauvallon of 7 May 2019 (Exhibit R-20), at 1.
[255] Engagement Letter Between White & Case LLP and Beauvallon of 7 May 2019 (Exhibit R-20).
[256] Notice of Dispute of 31 July 2019 (Exhibit C-16).
[257] Respondent's Document Production Request No. 1 reads as follows: "*Documents reflecting that Beauvallon had a plan to develop the Ada Huja Project at the time it entered into the Share Purchase Agreement to acquire the BRIF*

sole documents produced by Claimants in response to Respondent's Document Production Request No. 1 do not provide sufficient support for Claimants' counter-argument refuting Respondent's argument that Claimants did not intend to pursue the investment:

(i) The Site Analysis of April 2018[258] was made for Adriatic before the acquisition by Beauvallon indicating the need for USD 386,880,000 (p. 22) to finance the project. Claimants did not show how they would obtain such an amount and the only known step made by Claimants in order to secure such an amount at their disposal seems to be the filing the arbitration claim;

(ii) The Project Danube PowerPoint with Metadata[259] of 18 December 2018 was also made for Adriatic, before the acquisition by Beauvallon and expressly states the objective to "[i]dentif[y] potential buyers" (p. 4) and contemplates a potential claim "Discussion & Agreement with the City of Belgrade: debt v. potential claim of BRIF TC" (p. 3), apparently an investment treaty claim since there is a reference to "Sale of BRIF Tres to Lux" (p. 2);

(iii) The Ernst & Young, Ada Huja Land Plots Valuation Report[260] of 21 January 2019 was also requested by Adriatic on 9 November 2018, before the acquisition by Beauvallon.

221. As a matter of fact, obtaining the above information at the request of Mr Ribes was probably done in performance of the Engagement Agreement. But it does not evidence an intention to invest in the Ada Huja Project independently of the ICSID claim which, on the contrary, appears to be the condition *sine qua non* for the "investment." The only "investment" of "Beauvallon" with respect of the Ada Huja Project after the acquisition of Claimants is to finance the ICSID arbitration.

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

TRES share on 15 January 2019 or afterward, including business plans, construction budgets, financing plans, timelines, communications with potential contractors and financing providers, and memoranda evaluating the business prospects of a new shopping mall opening in Belgrade."

[258] Site Analysis of April 2018 (Exhibit R-23).

[259] Project Danube PowerPoint with Metadata of 18 December 2018 (Exhibit R-19).

[260] Ernst & Young, Ada Huja Land Plots Valuation Report of 21 January 2019 (Exhibit C-298).

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

(3) Conclusion

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

VI. COSTS

A. CLAIMANTS' COST SUBMISSIONS

224. In its submissions on costs, Claimants submit that Serbia should bear all the costs of the arbitration, as well as Claimants' costs.[261] Specifically, Claimants specifically request the following:

> "40. For the reasons set out above, Claimants respectfully request that:
>
> a. in the event that Claimants prevail on the Second Jurisdictional Objection, Respondent be ordered to reimburse all of Claimants' costs regarding (i) Respondent's Request for Bifurcation, (ii) Respondent's Second Jurisdictional Objection, and (iii) Claimants' requests for temporary restraining orders and provisional measures and their defense against Mr. Perković's intervention, i.e., a total of EUR 2,539,098.46 and reimburse Claimants their share in the advance on the Tribunal's and the Centre's costs, i.e., USD 300,000.00, to the extent that this amount has been used in its entirety, with the determination on costs regarding the merits and quantum of Claimants' claims being reserved until a later stage;
>
> b. in the event that Claimants do not to prevail on the Second Jurisdictional Objection, Respondent be ordered to reimburse Claimants' costs regarding (i) Claimants' requests for temporary restraining orders and provisional measures and their defense against Mr. Perković's intervention, (ii) Claimants' Memorial, and (iii) four fifths of Claimants' cost spent to defend Respondent's Request for Bifurcation, i.e., EUR 2,824,080.23 and GBP 202,925, and reimburse Claimants their share in the advance on the Tribunal's and the Centre's costs, i.e., USD 300,000.00, to the extent that this amount has been used in its entirety."[262]

[261] Claimants' Cost Submission, ¶ 2.

[262] Claimants' Cost Submission, ¶ 40.

225. According to Claimants, the Tribunal has discretion with respect to costs under Article 61(2) of the ICSID Convention and Rule 28 of the ICSID Arbitration Rules.[263] Claimants add that ICSID tribunals typically adopt a variant of the two following approaches to cost allocation: (i) the costs-follow-the-event principle; or (ii) the solution that each party be ordered to bear its own costs, in light of factors such as the parties' relative success, their procedural conduct in the arbitration and the reasonableness of the costs claimed.[264] In this respect, Claimants emphasise to have prevailed in obtaining two non-aggravation orders and in defeating Mr Perković's attempt to intervene as counsel of record for BRIF-TC and to suspend the arbitration and in opposing the bifurcation of four out of five jurisdictional objections.[265]

226. Moreover, Claimants assert that Respondent caused delay and additional costs by not raising its Second Jurisdictional Objection from the outset of the arbitration, rather than requiring first Claimants to file their memorial on the merits.[266] Claimants add that their costs are reasonable,[267] having presented the following breakdown of their costs: [268]

Phase/Category	Legal Fees [EUR]	Expert Costs [EUR]	Expert Costs [GBP]	Expenses [EUR]	Share in Advance on Costs [USD]
Payment of Claimants' first and second share in the advance on Tribunal's/ ICSID's costs	-	-	-	-	**USD 300,000.00**
Review of the file, Preparation of Request for Arbitration, initiation of Arbitration, constitution of the Tribunal, First Session and PO1					
CAS	EUR 195,331.50			EUR 9,766.58	
NST	EUR 44,831.85				
BREDIN PRAT	EUR 480,000.00				
Phase sub-total	**EUR 720,163.35**			**EUR 9,766.58**	
Preparation of Defense against Respondent's Request for Bifurcation					
CAS	EUR 147,946.50			EUR 7,397.33	
NST	EUR 29,887.90				
BREDIN PRAT	EUR 431,565.85			EUR 339,09	
Phase sub-total	**EUR 609,400.25**			**EUR 7,736.42**	
Preparation of Defense against Second Jurisdictional Objection					
CAS	EUR 70,287.75			EUR 3,916.27	
NST	EUR 68,742.17			EUR 23,136.61	
BREDIN PRAT	EUR 1,182,259.61			EUR 205,34	
Phase sub-total	**EUR 1,321,289.53**			**EUR 27,258.22**	
CATEGORY SUB-TOTAL	**EUR 4,916,121.40**	**EUR 56,400.00**	**GBP 202,925.00**	**EUR 53,463.84**	**USD 300,000.00**
TOTAL	**EUR 5,025,985.24, GBP 202,925.00 and USD 300,000.00**				

[263] Claimants' Cost Submission, ¶¶ 4-7.

[264] Claimants' Cost Submission, ¶¶ 8-14.

[265] Claimants' Cost Submission, ¶¶ 16-30.

[266] Claimants' Cost Submission, ¶¶ 31-36.

[267] Claimants' Cost Submission, ¶¶ 37-38.

[268] Claimants' Cost Submission, ¶ 39.

227. In their Reply on Costs, Claimants noted not to have included pre-arbitration costs in their total costs, as opposed to Respondent, highlighting they could not comment on the reasonableness of Respondent's costs for lack of detailed breakdown.[269] Claimants add that Respondent does not consider different decision scenarios and that Claimants have prevailed in at least two key issues in the arbitration.[270]

B. RESPONDENT'S COST SUBMISSIONS

228. Respondent requests that it should be awarded its full costs, submitted in the form of an affidavit by Mr John Buckley, and that Claimants be ordered to bear their own, consistently with the principle costs-follow-the-event, as it has demonstrated Claimants' abuse of process in attempting to manufacture ICSID jurisdiction, adding that the Tribunal has discretion to award costs and citing ICISID Convention Article 61(2) and ICSID Arbitration Rule 47(1)(j).[271]

229. Respondent asserts to have incurred $3,012,149 in costs in connection with this arbitration, "fall[ing] into three categories: (1) counsel's fees of $2,525,241; (2) counsel's expenses of $136,908; (3) the advances to ICSID for the costs of the proceedings in the amount of $350,000."[272]

[269] Claimants' Reply on Costs, ¶¶ 4-5.

[270] Claimants' Reply on Costs, ¶¶ 6-7.

[271] Respondent's Submission on Costs, ¶ 7 and its footnote 2. *See also* Respondent's Reply on Costs, ¶ 12.

[272] Respondent's Submission on Costs, ¶ 2.

230. Respondent presents the following percentages in relation to counsel's billing records per task or undertaking: [273]

Time Period	Events	Percentage
Q4 2019 – Q1 2020	Review of the threatened claim, and negotiations pursuant to Article 11 of the BIT	15%
Q2 2020 – Q4 2020	Review of the Request for Arbitration, factual development, and constitution of the Tribunal	15%
Q1 2021 – Q2 2021	Response to and hearing concerning Claimants' Request for Provisional Measures	15%
Q3 2021	Review of the Memorial, preparation of the Request for Bifurcation, and beginning work on the Counter-Memorial	20%
Q4 2021	Hearing on the Request for Bifurcation and Requests for the Production of Documents	10%
Q1 2022	Memorial on Bifurcation	10%
Q2 2022 – Q3 2022	Hearing on Request for Bifurcation	15%

231. In its Reply on Costs, Respondent objects to Claimants' request to have the costs of preparing their memorial on the merits reimbursed, underlying, among other points, that the date for submission of Respondent's Bifurcation Request was in line with the schedule adopted with the Parties' agreement in Procedural Order No. 1.[274] Likewise, Respondent objects to Claimants' demand to be compensated for costs incurred in preliminary applications, as these were a complete waste of time, not to mention the decision on representation could hardly be something that Claimants won, it says.[275] Respondent also disagrees that Claimants be awarded costs for succeeding in objecting against Serbia's other four jurisdictional objection.[276] Finally, Respondent highlights that its own costs are even more reasonable than Claimants' costs.[277]

[273] Respondent's Submission on Costs, ¶ 5.
[274] Respondent's Reply on Costs, ¶¶ 2-5.
[275] Respondent's Reply on Costs, ¶¶ 6-9.
[276] Respondent's Reply on Costs, ¶ 10.
[277] Respondent's Reply on Costs, ¶ 11.

C. TRIBUNAL'S DECISION ON COSTS[278]

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

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

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

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

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

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

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

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

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

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

238. On the basis of the above, the Tribunal decides to award Respondent 90% its legal fees and expenses of USD 2,662,149.00, *i.e.*, USD 2,395,934.10, which the Tribunal finds reasonable. Thus, the Tribunal will order Claimants to reimburse to Respondent USD 2,395,934.10 and to bear their own legal costs and expenses.

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

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

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

VII. AWARD

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

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

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

(3) ORDERS Claimants (i) to reimburse to Respondent USD 2,395,934.10 (90% of Respondent's legal fees and expenses) and USD 238,894.52 (90% of Respondent's incurred costs with ICSID administrative fees and expenses and the arbitrators' fees and expenses) and (ii) to bear their own arbitration costs.

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

Samaa Haridi, dissenting
Arbitrator

(*See attached Statement of Dissent*)

Date: 30 January 2023

Brigitte Stern
Arbitrator

Date: 30 January 2023

Yves Derains
President of the Tribunal

Date: 30 January 2023