

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

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

and

**REPUBLIC OF SERBIA**  
Respondent

**ICSID Case No. ARB/20/12**

---

**STATEMENT OF DISSENT OF ARBITRATOR SAMAA A. HARIDI**

---

*Members of the Tribunal*

Mr. Yves Derains, President  
Ms. Samaa A. Haridi, Arbitrator  
Prof. Brigitte Stern, Arbitrator

*Secretary of the Tribunal*

Ms. Aurélie Antonietti

*Assistant to the President*

Dr. Ana Gerdau de Borja Mercereau

*Date of dispatch to the Parties: 30 January 2023*

## TABLE OF CONTENTS

I.	ABUSE OF PROCESS .....	4
A.	Standard and Burden of Proof .....	4
B.	Application .....	5
(1)	Foreseeability .....	6
(2)	Economic Purpose to Develop Business Activities .....	7
(3)	Successorship and New Investors .....	10
II.	CONTROL BY LUXEMBOURGISH ENTITIES .....	11
A.	Standard and Burden of Proof .....	11
B.	Application .....	13
III.	CONCLUSION .....	17
IV.	COSTS .....	17

1. I regret that I do not share some views and conclusions that my esteemed colleagues in the Majority have reached in the Award. With my respect and admiration for the work performed by this Tribunal through the drafting of the Award, I express below my differing views on the questions of law and fact that I consider significant. **First**, I am not persuaded based on the evidence currently before the Tribunal that Claimants and their owners “manufactured” treaty claims or “abused” the ICSID system. In concluding otherwise, the Majority does not identify prior jurisprudence finding an abuse of process where the claimant merely sought to regain, if not maintain, rights to a treaty claim it had enjoyed in years prior. The Claimants here enjoyed BLEU-Serbia BIT rights for most of that treaty’s existence, including at the time the land dispute at the heart of this case evolved. The “abuse of process” line of authority as is currently known under international investment law is therefore inapplicable—or at a minimum, should apply with only the greatest caution and after concluding the alleged abuse is undeniable. Respondent did not clear those hurdles in this case at this juncture.
2. **Second**, I hold reservations about the Majority’s analysis of “control” under the treaty. The Majority places the burden on Claimants to establish continuous control by Luxembourgish entities. (Maj. ¶¶ 177-78). Yet we are deciding Respondent’s jurisdictional objection, and it is therefore for Respondent to establish a break in control, which is the necessary predicate to its theory that Claimants abusively fabricated ICSID jurisdiction. I therefore disagree with the Majority on the manner in which it allocated the burden of proof.
3. When analysing the question of indirect control, the Majority focuses on “the legal capacity to control,” citing the *Aguas del Tunari* tribunal’s writings on this topic. (Maj. ¶ 175.) Yet, Respondent provided us with no analysis of indirect control as defined internationally, domestically, or in relevant legal instruments. From Claimants’ unchallenged exposition on the subject,<sup>1</sup> I gather that tribunals construing the meaning of

---

<sup>1</sup> Claimants’ Counter-Memorial ¶ 96 n.191 (20 May 2022); Claimants’ Opening Presentation, slide 68; Hearing Tr. 121:17 -125:4 (2 Sept. 2022); *see also* Hearing Tr. 25:4-7 (2 Sept. 2022); Resp’t’s Opening Presentation, slide 25.

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

4. The limited record at this stage of the proceedings casts doubt, at the very least, on the question of indirect Luxembourgish control of Claimants during a period of under three months from 30 October 2018 to 15 January 2019 (the “Critical Period”). The record shows that a Luxembourgish entity (Wekare) directed Adriatic to acquire Claimants. The same Luxembourgish entity funded Adriatic’s purchase of Claimants. And a second Luxembourgish entity’s (Beauvallon) director/manager—Vuko Dragašević—was also the sole owner/director of Adriatic at the time it purchased Claimants. The record includes an Engagement Agreement in which Vuko Dragašević agreed to acquire Claimants for the benefit of a Luxembourgish entity (Beauvallon).<sup>2</sup> Accordingly, and as I further discuss below, the record does not conclusively support the Majority’s view that there was a break in actual Luxembourgish control of Claimants, and thus the predicate to Respondent’s jurisdictional objection is unfounded.
5. This Statement of Dissent expresses my doubts as of the date of this writing concerning the evidentiary record and whether this record is sufficiently established at this stage of the proceedings to warrant a dismissal on jurisdictional grounds. A unanimous Tribunal may have reached this decision at a later stage of these proceedings based on an examination of the totality of the jurisdictional objections presented by Respondent and a more established evidentiary record, but I am not satisfied that Respondent has met its burden of proof at this time.
6. For these reasons, I also disagree with the Majority’s order that Claimants shall pay 90% of Respondent’s legal fees and expenses.

---

<sup>2</sup> Exhibit **R-18B**, Engagement Agreement concluded between Mr. Jean-Pierre Ribes and Mr. Vuko Dragašević (30 Sept. 2017).

## I. ABUSE OF PROCESS

### A. STANDARD AND BURDEN OF PROOF

7. The Abuse of Process Objection. First, it bears noting that the Tribunal bifurcated these proceedings only with respect to one of five preliminary objections to the Tribunal’s jurisdiction, namely the second objection.<sup>3</sup> The “Second objection,” as formulated by Respondent, is that:

*Claimants’ claims are tainted by an abuse of process: Beauvallon engaged in strategic restructuring in an attempt to manufacture ICSID jurisdiction . . . Beauvallon attempted to purchase the shares of BRIF TRES in 2019 with the intent to create ICSID jurisdiction and file a claim against the Republic of Serbia. Moreover, Beauvallon is attempting to abuse the provisions of Article 25(2)(b) of the ICSID Convention to recycle the putative claims of a former investor (BRIF SICAR) through domestic entities.*<sup>4</sup>

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

---

<sup>3</sup> Procedural Order No. 6 (1 Dec. 2021) (granting 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.”).

<sup>4</sup> Resp’t’s Request for Bifurcation and Summary of Objs. ¶¶ 3-5 (16 Sept. 2021).

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

happened.”<sup>6</sup> Relevant factors may include the timing of the investment, the timing of the request to ICSID, the substance of the transaction, and the “true nature of the operation.”<sup>7</sup>

9. I agree with the Majority’s use of a two stepped analysis of abuse of process: (i) whether the investment claims brought before this Tribunal were already foreseeable at the time of the acquisition of BRIF TRES and its subsidiary BRIF-TC by Beauvallon; and (ii) whether such acquisition sought an economic purpose to develop normal business activities. (Maj. ¶ 200.)
10. Burden. It is well-established that the party alleging an abuse of process—here, Respondent—bears the burden of proof.<sup>8</sup> The Majority shifts the burden onto Claimants. (Maj. ¶¶ 177-78, 220 (“Even if one considers that the Respondent had the burden to prove such absence of investment and of intent to invest . . . .”))

## **B. APPLICATION**

11. I have doubts that the abuse of process legal authorities squarely apply in this case. First, I am not aware of any prior abuse of process cases involving a claimant who enjoyed treaty rights when the dispute arose. It seems inapposite to examine whether Claimants “manufactured” treaty rights, when they had already enjoyed those rights for many years prior. Moreover, prior abuse of process cases do not clearly apply the foreseeability analysis to non-parties like Beauvallon and Mr. Ribes. Second, the facts of this case supporting Respondent’s allegation that Beauvallon lacked an economic purpose are ambivalent, which leads me to conclude that Respondent failed at this time to satisfy its burden of proof under the heightened legal standard. Third, Respondent’s argument that Beauvallon and Ribes are not legal successors of the previous Luxembourgish owner, BRIF

---

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

<sup>7</sup> Exhibit **RL-18**, *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award ¶¶ 136-40 (15 Apr. 2009) (“*Phoenix v. Czech Republic*”).

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

SICAR, misses the mark. Legal successorship is not a requirement for this investment to be protected under the relevant treaties.

**(1) Foreseeability**

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

13. The question of whether the land dispute here was “already foreseeable at the time” Beauvallon acquired Claimants, one of the possible indicators of abuse, (Maj. ¶ 200), must necessarily be answered positively. But that should not automatically raise suspicion.<sup>11</sup> The land parcel dispute crystallised, as the Majority acknowledges, *at a time when Claimants were Luxembourg controlled and enjoyed treaty protection*, and long before Mr. Ribes or Beauvallon entered the picture. (Maj. ¶ 209.) That fact distinguishes this case from any other abuse of process decision cited by the Parties or discussed by the Majority.

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

---

<sup>9</sup> The BLEU-Serbia BIT had come into effect on 12 August 2007, prior to BRIF SICAR’s letters to different Serbian Ministries, Serbia’s President, and Serbia’s Ministry of Foreign Affairs.

<sup>10</sup> Claimants’ Opening Presentation, slides 50-55.

<sup>11</sup> *Id.* slides 57-64.

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

## (2) Economic Purpose to Develop Business Activities

15. Next, I take a different view of the facts relating to the economic purpose prong. Claimants allege that they made substantial investments in Serbia, which, they claim, they intended to salvage through the restructuring.<sup>16</sup> I find that there is enough evidence of Mr. Ribes/Beauvallon’s legitimate economic purpose in “investing” in Claimants, as that term is defined in the treaty,<sup>17</sup> to deny or defer the Second Objection. Article 1(2) of the Serbia-BLEU BIT defines “investment” quite broadly to mean “any kind of assets invested

---

<sup>12</sup> *Phoenix v. Czech Republic* ¶ 140.

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

<sup>14</sup> *Id.* ¶ 70 (emphasis added).

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

<sup>16</sup> Hearing Tr. 7:20-24; 92:25 – 96:14 (2 Sept. 2022); Claimants’ Memorial n.38 (citing Resp’t’s Request for Bifurcation ¶¶ 65-66 (16 Sept. 2021) (“Any ‘investment’ was made by BRIF SICAR”; “Beginning in 2007, BRIF SICAR invested time, money, and know-how in Serbia.”)); Resp’t’s Memorial on the 2d Jurisdictional Obj. ¶ 67 (25 March 2022).

<sup>17</sup> Exhibit **CL-14**, Serbia-BLEU BIT.



in any sector of economic activity” including “claims . . . to any performance under contract having an economic value.”<sup>18</sup>

16. Once Claimants were sold, there is some evidence of an intent to pursue normal business activity. The much-debated Project Danube PowerPoint<sup>19</sup> at a minimum shows permissible intent to maintain legal claims to the land parcels, to revive the project, and ultimately to make more traditional economic investments. The April 2018 Site Analysis of applicable zoning regulations relevant to the Ada Huja Project parcels is also suggestive of economic intent,<sup>20</sup> as is a January 2019 Ernst & Young Land Valuation Report,<sup>21</sup> and evidence that Beauvallon paid in 2019 half a million dollars of BRIF-TC debt and legal fees.<sup>22</sup> The Site analysis in particular even shows some thought of changing the project from a shopping center to the development of a condominium for residential and office space with an estimated EUR 386 million in construction costs, as Respondent notes.<sup>23</sup>
17. The Majority acknowledges these reports and studies were “probably” undertaken “in performance of the Engagement Agreement” between Mr. Ribes and Mr. Vuko Dragašević. (Maj. ¶ 221.) I discuss the Engagement Agreement in greater detail in the next Part,<sup>24</sup> but at this juncture it suffices to note the Engagement Agreement suggests an intent to develop Claimants and their underlying Ada Huja Project parcels. Indeed, Mr. Ribes directed Mr. Dragašević to prepare Claimants “for further *functioning and development*” including but not limited to “specialized firms consulting etc.”<sup>25</sup>

---

<sup>18</sup> *Id.* Art. 1(2)(c).

<sup>19</sup> Exhibit **R-19**, Project Danube PowerPoint with Metadata (18 Dec. 2018).

<sup>20</sup> Exhibit **R-23**, Mašinoprojekt Koprivica JSC, Study – Site Analysis (Apr. 2018).

<sup>21</sup> Exhibit **C-298**, Ernst & Young, Ada Huja Land Plots Valuation Report (21 January 2019).

<sup>22</sup> Claimants’ Counter-Memorial ¶¶ 65-67 (20 May 2022).

<sup>23</sup> Resp’t’s Memorial on the 2d Jurisdictional Obj. ¶¶ 70-75 (25 March 2022).

<sup>24</sup> *Infra* Part II.B, at ¶¶ 33-35.

<sup>25</sup> Exhibit **R-18B** Art. 2.1.

18. While there is some evidence of intent to bring ICSID claims, like the timing of the Notice of Dispute,<sup>26</sup> this does not without more prove the “sole” purpose<sup>27</sup> of the acquisition was to commence litigation.
19. The remaining evidence is ambivalent. The blank Vuko Dragašević email attaching the Serbia-BLEU BIT<sup>28</sup> was sent nearly a month *after* the Beauvallon-Adriatic SPA, copying only lawyers. The Majority does not state how this proves bad faith by Claimants, let alone non-claimants *Beauvallon or Ribes*, who were not copied. At most, it suggests Vuko Dragašević learned of the treaty protections only after Beauvallon/Ribes had already acquired Claimants.
20. While the record is less than clear in relation to the intent behind the transactions, this should inure to the benefit of Claimants. Again, it is Respondent who bears the burden of proof of abuse of process under the applicable heightened standard. If the burden were switched, tribunals can expect to face routine, expensive, and frivolous pre-merits “abuse of process” objections.
21. Finally, it is essential to recall the applicable legal standard requiring that the *sole purpose* of the acquisition must be to bring a treaty claim. (Maj. ¶ 148.) Respondent’s assertion that “even if creating ICSID jurisdiction were just one of two purposes [of restructuring] . . . it still would not excuse the abuse of process”<sup>29</sup> is made with no supporting authority, and prior tribunals have demanded much stronger indications of procedural abuse. For instance, the *Phoenix Action* tribunal was confronted with a claimant that manipulated legal formalities “for the *sole purpose* of bringing international litigation” (emphasis added).<sup>30</sup> *Venezuela Holdings* later opted to “take the words” of the *Phoenix Action* tribunal, then held that abuse requires “restructur[ing] investments *only in order to gain jurisdiction*,” all the while emphasizing that it “depends on the circumstances” in which the restructuring

---

<sup>26</sup> Exhibit **R-16**, Decision re BRIF TRES Registration Application, Registry of Business Entities (6 Apr. 2021).

<sup>27</sup> *Phoenix v. Czech Republic* ¶ 142.

<sup>28</sup> Exhibit **R-26**, Email from V. Dragašević (6 Feb. 2019).

<sup>29</sup> Resp’t’s Memorial on 2d Jurisdictional Obj. ¶ 65 (25 Mar. 2022).

<sup>30</sup> *Phoenix v. Czech Republic* ¶ 142.

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

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

### (3) Successorship and New Investors

23. Respondent referred to a different line of cases, on successorship, to avoid the apparent inconsistency between its assertion that this is a “textbook case” of abuse of process<sup>35</sup> and the facts here, which do not resemble previous abuse of process decisions. Respondent argued that “Beauvallon is not BRIF SICAR’s legal successor” and has not “stepped into the shoes” of that entity, the previous Luxembourgish owner.<sup>36</sup> But Respondent did not adequately explain why legal successorship is needed or how it relates to the question of abuse of process.<sup>37</sup>

---

<sup>31</sup> Exhibit **RL-20**, *Mobil Corporation, Venezuela Holdings, B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction ¶¶ 191, 205 (10 June 2010) (“the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the *Phoenix* Tribunal, ‘an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs’.”)

<sup>32</sup> Exhibit **CL-170**, Emmanuel Gaillard, *Chronique des sentences arbitrales*, 2 JOURNAL DU DROIT INTERNATIONAL 536, 538 (Clunet 2010) (commenting on *Phoenix v. Czech Republic*).

<sup>33</sup> Exhibit **CL-174**, Delphine Burriez, *Le treaty shopping procédural d’incorporation dans le contentieux arbitral transnational*, 25 ICSID REV. 408 (Fall 2010) (“dans *le seul but de nuire à l’Etat défendeur*”) (emphasis added).

<sup>34</sup> Exhibit **CL-176**, Dominique Bureau and Horatia Muir-Watt, DROIT INTERNATIONAL PRIVE 530 ¶ 431 (5th ed., Presses Universitaires de France) (“il faut donc que la démarche entreprise soit inspirée par un dessein frauduleux, dans *le seul but d’échapper à la loi normalement applicable*”) (emphasis added).

<sup>35</sup> Resp’t’s Memorial on 2d Jurisdictional Obj. ¶ 3 (25 Mar. 2022).

<sup>36</sup> *Id.* ¶ 83.

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

24. From the standpoint of the BLEU-Serbia BIT and the ICSID Convention, it appears permissible for a Luxembourgish entity to acquire an investment from either a Luxembourgish *or* non-Luxembourgish entity.<sup>38</sup> Indeed, the Majority acknowledges it is permissible for an entity enjoying treaty protection to acquire a *non-protected* company in an arm’s length transaction and later bring a treaty claim.<sup>39</sup> Presumably, it would be even less problematic for a Luxembourgish entity to purchase, or inherit, a project directly from another Luxembourgish entity, then bring a claim. Nothing in Article 1(1)(c) of the BIT or Article 25(2)(b) of the ICSID Convention prohibits it.
25. I am thus unconvinced that a Luxembourgish entity (Beauvallon) abused legal process by accomplishing *indirectly* that which would have been permissible to accomplish directly: purchase Claimants directly from BRIF-SICAR. The end result should be the same.
26. Moreover, the details of BRIF SICAR’s bankruptcy and subsequent sale appear intertwined with the merits. Claimants contend BRIF SICAR’s forced judicial liquidation was the result of collusion between certain hostile limited shareholders and Serbian authorities.<sup>40</sup>

## **II. CONTROL BY LUXEMBOURGISH ENTITIES**

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

### **A. STANDARD AND BURDEN OF PROOF**

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

---

<sup>38</sup> See Exhibit **CL-14**, Serbia-BLEU BIT Art. 1.

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

<sup>40</sup> Claimants’ Memorial ¶¶ 188-193 (15 July 2021); Claimants’ Counter-Memorial ¶ 32 (20 May 2022).

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

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

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

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

---

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

<sup>42</sup> Exhibit **CL-14**, Serbia-BLEU BIT Art. 1(1)(c).

<sup>43</sup> Exhibit **CL-14**, Serbia-BLEU BIT, Article 1.

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

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

<sup>46</sup> *Id.* ¶ 264 (finding the existence of foreign control “directly or indirectly” where an entity has both majority shareholdings and ownership of majority of voting rights).

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

## **B. APPLICATION**

32. The record includes many indicia of indirect Luxembourgish control during the Critical Period. Accordingly, I find that Respondent failed to carry its burden of proof under the heightened standard for abuse of process. The Majority does not consider these indicia of indirect control convincing, and relies on SPA provisions regarding control, (Maj. ¶¶ 189-192), which I do not find dispositive of the question.
33. Engagement Agreement. The 30 September 2017 Engagement Agreement<sup>48</sup> and revised Engagement Agreement<sup>49</sup> between Mr. Ribes (French national and later owner of Beauvallon, a Luxembourg entity) and Mr. Vuko Dragašević is the first of several exhibits suggesting possible continuous indirect Luxembourgish control over Claimants during the Critical Period. Article 2.1 specifies that Mr. Vuko Dragašević is to acquire Claimants for Mr. Ribes, and Article 4.3 specifies that Claimants if acquired are to be transferred to Beauvallon.<sup>50</sup> In sum, the Engagement Agreement contemplates that Mr. Vuko Dragašević would acquire Claimants (using Adriatic as a vehicle for instance), then transfer Claimants to Beauvallon.
34. Contrary to the Majority’s suggestion, (Maj. ¶ 182), Article 7.1 designating Mr. Ribes the “ultimate beneficiary” of the Agreement is of little importance in my view. The *Aguas del Tunari* decision, upon which the Majority relies, clarified that the term “indirect” control “does not limit the scope of eligible claimants to only the ‘ultimate controller’.”<sup>51</sup> And the

---

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

<sup>48</sup> Exhibit **R-18A**, Engagement Agreement concluded between Mr. Jean-Pierre Ribes and Mr. Vuko Dragašević (30 Sept. 2017).

<sup>49</sup> Exhibit **R-18B**, Engagement Agreement concluded between Mr. Jean-Pierre Ribes and Mr. Vuko Dragašević (30 Sept. 2017).

<sup>50</sup> *Id.*

<sup>51</sup> *Aguas del Tunari v. Bolivia* ¶ 237.

Majority points to no authority equating “indirect” control with ultimate control or, for that matter, with exclusive control. Whether or not Mr. Ribes owned Beauvallon at the time of the Engagement Agreement, similarly, is immaterial. What matters is that Beauvallon is apparently a beneficiary of the Engagement Agreement and that Beauvallon is a Luxembourgish entity.

35. Nor do I agree that the Engagement Agreement “indicates clearly that there was no control of Beauvallon over BRIF TRES *before* [Beauvallon] acquired it from Adriatic.” (Maj. ¶ 184) (emphasis added). The Majority is referencing the Engagement Agreement, Article 4.3, which states that Dragašević’s overarching services mission was to assist Beauvallon to “succeed to take over control over [sic] designated assets of BRIF SICAR.”<sup>52</sup> I read “take over control” in Article 4.3 as a reference to direct ownership control as would be understood in a business transaction, which is different than the technical analysis of the term “control” as it is understood under international law.

36. Mixed Management. During the Critical Period, the Parties agree, Adriatic formally owned Claimants. But at the time, Adriatic—and the directors of Claimants themselves—were difficult to distinguish from Beauvallon. This fact complicates the Majority’s conclusion that Beauvallon exercised no “actual” control over Claimants. (Maj. ¶ 193.) We saw that Mr. Vuko Dragašević was a party to an Engagement Agreement requiring him to transfer Claimants to Luxembourg entity Beauvallon. In addition, when Adriatic purchased Claimants, Mr. Vuko Dragašević was simultaneously a director/manager of Beauvallon<sup>53</sup> and the sole shareholder and managing director of Adriatic.<sup>54</sup> In sum, the owner of Claimants was a director/manager of Beauvallon during the Critical Period.

37. Once Adriatic acquired Claimants, the mixing of management between Beauvallon and Claimants only deepened. On 18 November 2018, Mr. Vuko Dragašević—again, a

---

<sup>52</sup> Exhibit **RL-18B**, Engagement Agreement concluded between Mr. Jean-Pierre Ribes and Mr. Vuko Dragašević (30 Sept. 2017).

<sup>53</sup> Exhibit **R-28**, Luxembourg Business Register, Beauvallon 2 (8 Jan. 2019). Mr. Vuko Dragašević was appointed as a director/manager of Beauvallon just five days before the 30 October 2018 purchase of Claimants by Adriatic.

<sup>54</sup> Resp’t’s Memorial on 2d Jurisdictional Obj. ¶ 5 (25 Mar. 2022); *accord* Claimants’ Counter-Memorial ¶ 39 (20 May 2022).

director/manager of Beauvallon—became director of Claimant BRIF-TC<sup>55</sup> and then caused his relative Mr. Milan Dragašević to become the director of Claimant BRIF TRES on 13 December 2018.<sup>56</sup> Mr. Milan Dragašević would later act as an authorized representative of Beauvallon, pursuant to the power of attorney of January 2019.<sup>57</sup> The Tribunal thus heard evidence the directors of Claimants (Vuko and Milan), and the sole owner and shareholder Adriatic (Vuko), were affiliated with Beauvallon during the Critical Period.

38. Consultancy Agreements. The next exhibits suggesting indirect Luxembourgish control are the August and November 2018 Consultancy Agreements, concluded between Wekare S.A. (Luxembourg, fully owned by Mr. Steeve Simonetti) and Adriatic.<sup>58</sup> The Consultancy Agreements—like the Engagement Agreements—establish a plan for a third party (in this case Adriatic) to acquire Claimants, apparently for the benefit of Luxembourg entities.<sup>59</sup>
39. When Adriatic completed the share transfer deed to purchase Claimants on 30 October 2018,<sup>60</sup> Adriatic’s sole owner and director, Vuko Dragašević, was a director of Beauvallon.<sup>61</sup> At that time, Mr. Simonetti was simultaneously a director of Beauvallon,<sup>62</sup> the sole owner of Beauvallon,<sup>63</sup> and the sole owner of Wekare.<sup>64</sup> This raises doubts in my mind whether Adriatic was capable of asserting—or ever actually asserted control—over Claimants independently of Luxembourgish entities Wekare and Beauvallon. Indeed, pursuant to the Consultancy Agreement, Adriatic owed contractual duties and obligations to Wekare, a Luxembourgish entity. And as the Majority states in the Award, “the proceedings have not allowed any clarification about the relations between both gentlemen

---

<sup>55</sup> Exhibit **R-10**, Serbian Business Register, Decision on BRIF-TC (27 Nov. 2018).

<sup>56</sup> Exhibit **R-25**, Serbian Business Register, Decision on BRIF TRES (7 Dec. 2018).

<sup>57</sup> Hearing Tr. 21:8-19 (2 Sept. 2022).

<sup>58</sup> Exhibit **C-291**, Consultancy Agreement No. 0208/18 between Wekare S.A. and Adriatic Investment Management d.o.o. (29 Aug. 2018); Exhibit **C-295**, Revised Consultancy Agreement No. 0208/18 between Wekare and AIM with Addendum (8 Nov. 2018).

<sup>59</sup> *See, e.g.*, Exhibit **C-297**, Invoice from Vuko Dragašević to Jean-Pierre Ribes (3 Jan. 2019); Exhibit **C-296**, Atlas Banka AD Podgorica, Bank Statements, AIM (16, 19 Nov. 2018).

<sup>60</sup> Exhibit **C-237**, Share Transfer Deed concluded between Adriatic and BRIF SICAR (30 Oct. 2018).

<sup>61</sup> Exhibit **R-28**, Beauvallon Europe S.A., RCS Extract.

<sup>62</sup> *Id.*

<sup>63</sup> Exhibit **C-287**, Beauvallon Europe S.A., SPF, Shareholder Register.

<sup>64</sup> Exhibit **C-318**, Wekare S.A., Shareholder Register.



[Ribes and Simonetti], on the one hand, and Beauvallon, on the other.” (Maj. ¶ 162.) I also join the Majority’s view that the circumstance “which led to the acquisition of BRIF TRES by Beauvallon, [which] remains rather opaque.” (Maj. ¶ 163.) However, this, in my view, contributes to the reasons the record is not sufficiently clear at this time to lead the Tribunal to sustain the Second Objection.

40. A Luxembourgish Entity Paid for Adriatic’s Acquisition of Claimants. Once Adriatic concluded the 30 October 2018 share transfer deed to acquire Claimants, the Parties continued to implement the Consultancy Agreements. On 16 November, 2018, Wekare wired funds for the purchase of Claimants to Adriatic, and a few days later, Adriatic wired the purchase price to the Luxembourg Liquidator.<sup>65</sup> The payment is one indicator of the possibility that Wekare, not Adriatic, “controlled” Claimants according to the ordinary meaning of that term, which includes “taking responsibility for something.” (Maj. ¶ 170.)
41. SPA Articles 4.1, 4.2. The Majority notes that Articles 4.1 and 4.2 of the SPA between Adriatic and Beauvallon limit the ability of Beauvallon to make certain decisions with regard to Claimants, for example changing the Claimants’ directors or entering into a dispute. (Maj. ¶¶ 189- 92.) But as noted above, the directors of Adriatic and of Claimants were intermixed with those of Beauvallon. Provisions 4.1 and 4.2 therefore may not have prevented Beauvallon from continuing indirectly to exercise control over Claimants. For the same reason, it is unclear that “prior written approval” of the Seller (Adriatic) would pose an obstacle to actual Luxembourgish control: the Seller was owned/directed by a director of Beauvallon. Articles 4.1 and 4.2 do not refer to other substantial rights (such as voting rights) Beauvallon acquired as the owner with the SPA, only decisions such as the pledge for sale or disposal of Claimants. The terms of the SPA therefore seem to leave open the possibility that Beauvallon could continue to exercise indirect control over Claimants and their activities.

---

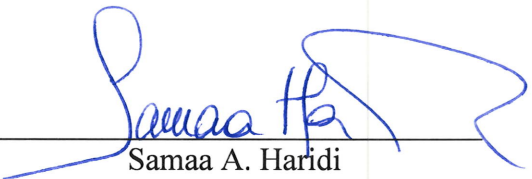
<sup>65</sup> Exhibit C-297, Invoice from Vuko Dragašević to Jean-Pierre Ribes (3 Jan. 2019); Exhibit C-296, Atlas Banka AD Podgorica, Bank Statements, AIM (16, 19 Nov. 2018).

### III. CONCLUSION

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

### IV. COSTS

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



\_\_\_\_\_  
Samaa A. Haridi  
Arbitrator

Date: 30 January 2023