

**ICC INTERNATIONAL COURT OF ARBITRATION**

**CASE No. 24443/MHM/HH**

Mr. Bedri Selmani

(Croatia)

**vs/**

REPUBLIC OF KOSOVO

(Republic of Kosovo)

This document is an original of the Final Award rendered in conformity with the Rules of Arbitration of the ICC International Court of Arbitration.

**IN THE MATTER OF AN ARBITRATION UNDER THE  
2017 RULES OF ARBITRATION OF  
THE INTERNATIONAL CHAMBER OF COMMERCE (“ICC”)  
INTERNATIONAL COURT OF ARBITRATION**

ICC ARBITRATION NO. 24443/MHM/HBH

BETWEEN

**Mr. Bedri Selmani**

(“Claimant”)

v.

**Republic of Kosovo**

(“Respondent”)

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**FINAL AWARD**

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*Tribunal*

Mr. R. Doak Bishop

Prof. Zachary Douglas QC

Ms. Jean E. Kalicki (President)

*Administrative Secretary to the Tribunal*

Dr. Joel Dahlquist

1 August 2022

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## I. PARTIES

1. The Claimant is Mr. Bedri Selmani (“**Mr. Selmani**” or “**Claimant**”), a dual national of Croatia and Kosovo.
2. The Claimant is represented in these proceedings by:

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Mr. Mohamed Shelbaya  
Mr. Vincenzo Speciale  
Ms. Teresa Vega

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3. The Respondent is the Republic of Kosovo (“**Kosovo**” or “**Respondent**”). The Respondent’s contact details, for the purposes of this arbitration, are as follows

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General State Advocate Ndërtesa e Qeverisë  
Luan Haradinaj, pn. Ndërtesa e ish Rilindjes  
10000 Pristina  
Republic of Kosovo

4. The Respondent is represented in these proceedings by the following in-house counsel:

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Ms. Albulena Haxhiu  
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MINISTRY OF JUSTICE  
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5. The Respondent is further represented in these proceedings by:

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Mr. Stephen Anway  
Mr. Rostislav Pekar  
Mr. Stephen Adell  
Mr. Mark Stadnyk  
Mr. Matej Pustay  
Ms. Fellenza Limani  
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6. The Claimant and the Respondent collectively are referred to as the “**Parties**”.

## **II. ARBITRAL TRIBUNAL**

7. The Tribunal was constituted as follows:

- a. On 29 July 2019, Mr. R. Doak Bishop was confirmed as co-arbitrator by the Secretary General upon the nomination of Mr. Selmani, pursuant to Article 13(1) of the 2017 Rules of Arbitration of the International Chamber of Commerce (the “**ICC Rules**”).
- b. On 29 July 2019, Mr. Zachary Douglas QC was confirmed as co-arbitrator by the Secretary General upon the nomination of Kosovo, pursuant to Article 13(1) of the ICC Rules.



- c. On 16 December 2019, Ms. Jean E. Kalicki was confirmed as president of the Tribunal by the Secretary General, upon the joint nomination by the Parties, in consultation with the co-arbitrators, pursuant to Article 13(1) of the ICC Rules.

8. The Tribunal's contact details are as follows:

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### III. ARBITRATION AGREEMENT AND GOVERNING LAW

9. The arbitration agreement in this case is reflected in Article 16 of the Republic of Kosovo's Law No. 04/L-220 on Foreign Investment (the "**2014 LFI**"). According to an English version of the 2014 LFI which was published in Kosovo's Official Gazette,<sup>1</sup> Article 16 provides as follows:

#### **Article 16 Mechanisms for the Resolution of Investment Disputes**

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<sup>1</sup> CL-3, Law No. 04/L-220 on Foreign Investment, adopted by the Assembly of Kosovo on 30 December 2013, entered into force on 24 January 2014. As discussed herein, the authentic versions of the 2014 LFI are in Albanian and Serbian. The Tribunal refers to the English version to the extent the Parties have not identified any disputes about translations, but where necessary to address such disputes, the Tribunal also refers to the authentic versions.

1. A foreign investor shall have the right to require that an investment dispute be resolved in accordance with any applicable requirements or procedures that have been agreed upon in writing between the foreign investor and the Republic of Kosovo.

2. In the absence of such an agreed procedure, a foreign investor shall have the right to require that the investment dispute be settled either through litigation before a court of competent jurisdiction in the Republic of Kosovo or through local and international arbitration. The foreign investor may choose any of the following procedural rules to govern the arbitration of the investment dispute:

2.1. the ICSID Convention, if the foreign investor is a citizen of a foreign country and that country and the Republic of Kosovo are both parties to that convention at the time of the submission of the request for arbitration;

2.2. the ICSID Additional Facility Rules, if the jurisdictional requirements “ratione personae” of Article 25 of the ICSID Convention are not fulfilled at the time of the submission of the request for arbitration;

2.3. the UNCITRAL Rules, in such case the appointing authority referred to therein shall be the Secretary General of ICSID; or

2.4. the ICC Rules.

3. The consent of the Republic of Kosovo to the submission of an Investment Dispute for arbitration under this Article is hereby given under the authority of the present law. The consent of the foreign investor may be given at any time either by filing a request for arbitration or by providing to the Agency a written statement expressing such consent.

4. The consents referenced above shall be deemed to satisfy the requirements for the forms of consent under Chapter II of the ICSID Convention, the ICSID Additional Facility Rules, the UNCITRAL Rules, the ICC Rules, as well as the New York Convention. In particular, if an arbitral award is issued by a foreign or international arbitration body under a procedure authorized by this Article, such award shall be enforceable in accordance with law applicable to arbitration and the enforcement of foreign arbitral awards.

5. Unless the concerned foreign investor and the Republic of Kosovo agree otherwise in writing, any arbitration under the present law shall be held in an EU member country that is also a party to the New York Convention.

10. The governing law of this arbitration is reflected in Article 17 of the 2014 LFI, which provides as follows:

**Article 17 – Law Applicable to Investment Disputes**

1. The court or arbitral tribunal considering an Investment Dispute shall determine the issues in dispute in accordance with the substantive rules or laws agreed upon by the parties in writing.

2. In the absence of such an agreement, the court or arbitral tribunal shall apply the substantive law applicable in the Republic of Kosovo - excluding the private international law rules thereof - and such rules of public international law as may be applicable to the issues in dispute.

**IV. DEFINITIONS**

11. The following terms and abbreviations are used in this Award:

1978 LOR	1978 Yugoslav Law on Obligational Relationships
2001 Constitutional Framework	UNMIK Regulation No. 2001/9 on A Constitutional Framework for Provisional Self-Government in Kosovo
2001 UNMIK Investment Regulation	UNMIK Regulation No. 2001/3 on Foreign Investment
2005 Petroleum Law	The Petroleum Law, which entered into force on 7 May 2005
2006 LFI	Law No. 02/L-33 on Foreign Investment
2008 PAK Law	Law No. 03/L-67 on the Privatization Agency of Kosovo

2009 Amendment of the Petroleum Law	Law No. 03/L-138 on Amendment and Supplementation of Law No. 2004/5 on Trade of Petroleum and Petroleum Products in Kosovo
2010 MTI Administrative Instruction	MTI Administrative Instruction No. 07/2010 on Defining the Petroleum and Petroleum Products, the Licensing Procedures and Licensing Types of the Entities that Exercise the Activity in the Fuel Sector, 28 April 2010.
2011 PAK Law	Law No. 04/L-034 on the Privatization Agency of Kosovo
2012 LOR	Law No. 04/L-077 on Obligations adopted by the Assembly of Kosovo on 30 May 2012
2014 LFI	Law No. 04/L-220 on Foreign Investment, adopted by the Assembly of Kosovo on 30 December 2013, entered into force on 24 January 2014
2014 PAK Guidelines	PAK Guideline for Releasing of the Assets of Socially Owned Enterprises from Usurpers (Illegal Users), adopted on 15 December 2014
Ahtisaari Plan or Comprehensive Proposal	The Comprehensive Proposal for the Kosovo Status Settlement
Beopetrol	A company which had taken over a number of petrol stations in Kosovo previously operated by the Croatian national oil company INA
Bifurcation Decision	The Tribunal's Decision on Kosovo's Request for Bifurcation, reflected in Procedural Order No. 2 dated 12 August 2020
Bifurcation Observations	Mr. Selmani's Observations on Respondent's Bifurcation Request, dated 31 July 2020
Claimant	Mr. Bedri Selmani
Closing Arguments	The closing arguments, which took place on 16-17 March 2022

Cl. Rejoinder	Mr. Selmani's Rejoinder on Jurisdiction, dated 1 October 2021
Cl. Reply	Mr. Selmani's Reply and Statement of Defence on Jurisdiction, 4 April 2021
December 2014 Tender	PAK tender for 13 petrol stations, announced on 15 December 2014
Declaration of Independence	The Kosovo Declaration of Independence, adopted by the Assembly of Kosovo on 17 February 2008
Draft Termination Letter	The draft letter to Mr. Selmani prepared by UNMIK's Deputy SRSG and approved with edits by UNMIK's Legal Adviser on 14 December 2001
DTI	UNMIK's Department of Trade and Industry
February 2014 Tender	PAK tender for the Peja II petrol station in late February 2014
FET	Fair and equitable treatment
FPS	Full protection and security
Hearing	The main hearing, which took place on 25-30 October 2021
ICC Rules	The 2017 Rules of Arbitration of the International Chamber of Commerce
INA	The Croatian national oil company, previously operating petrol stations in Kosovo
Jugopetrol	The Federal Republic of Yugoslavia's national oil company, previously operating petrol stations in Kosovo
KFOR	Kosovo Peacekeeping Force (NATO)
KLA	Kosovo Liberation Army
KTA	Kosovo Trust Agency

May 2014 Tender	PAK tender for 10 petrol stations, announced on 28 May 2014
MFN	Most favored nation
MTI	Ministry of Trade and Industry
NATO	North Atlantic Treaty Organization
PAK	Privatization Agency of Kosovo
PISG	2001 Provisional Institutions of Self-Government
PO1	Procedural Order No. 1, dated 16 March 2020
Request for Bifurcation	Kosovo's Statement of Preliminary Objections and Request for Bifurcation, dated 19 June 2020
Respondent or Kosovo	The Republic of Kosovo
Resp. Rejoinder	Kosovo's Rejoinder, dated 6 August 2021
RfA	Mr. Selmani's Request for Arbitration, dated 29 April 2019
SoC	Mr. Selmani's Statement of Claim, dated 29 May 2020
SoD	Kosovo's Statement of Defence, dated 16 October 2020
SOE	Socially owned enterprise
Special Chamber or SCSC	The Special Chamber of the Supreme Court of Kosovo on PAK-Related Matters
SRSG	Special Representative of the Secretary-General for Kosovo (Head of UNMIK)
TAK	Tax Administration of Kosovo
ToR	The Terms of Reference, dated 23 January 2020 and approved by the ICC Court on 3 February 2020

Tr. Closing Day [#] [Speaker(s)] [page:line]	Transcript of the Closing Arguments
Tr. Hearing Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
UNMIK	United Nations Mission in Kosovo
UNMIK Permission	The UNMIK Permission, dated 25 January 2000
UNSC Resolution 1244	United Nations Security Council Resolution 1244, 10 June 1999

## V. PROCEDURAL HISTORY

12. On 29 April 2019, Mr. Selmani submitted his Request for Arbitration (“**RfA**”) to the ICC Secretariat. Mr. Selmani proposed that the “place and seat of arbitration” be Paris and English be the language of the arbitration.<sup>2</sup> Mr. Selmani proposed to have three arbitrators.
13. Kosovo submitted its **Answer to the Request for Arbitration** on 13 June 2019, in which it accepted that Paris be the “legal place of arbitration” and that English be the language of the arbitration.<sup>3</sup> Kosovo agreed to Mr. Selmani’s proposal to have three arbitrators.
14. On 29 July 2019, pursuant to Article 13(1) of the ICC Rules, Mr. R. Doak Bishop was confirmed as co-arbitrator by the Secretary General upon the nomination of Mr. Selmani, and Prof. Zachary Douglas QC was confirmed as co-arbitrator by the Secretary General upon the nomination of Kosovo.
15. On 16 December 2019, Ms. Jean E. Kalicki was confirmed as Tribunal President by the ICC Secretary General, upon the joint nomination by the Parties, in consultation with the co-arbitrators. On 17 December 2019, the ICC Secretariat transmitted the file to the Tribunal pursuant to Article 16 of the ICC Rules.
16. The Terms of Reference (“**ToR**”) were agreed by the Parties and the Tribunal on 3 February 2020 and subsequently transmitted to the ICC Court on 6 February 2020. Among other things, in the ToR the Parties agreed to the appointment of Dr. Joel Dahlquist as Administrative Secretary to the Tribunal (the “**Tribunal Secretary**”), in

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<sup>2</sup> RfA ¶¶ 62-63.

<sup>3</sup> Answer to Request for Arbitration ¶¶ 91-92.

conformity with the Note to Parties and the Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration.

17. The Parties also agreed as follows in the ToR, with respect to the mechanics of executing and transmitting the eventual award in this case:

The Parties likewise agree, again subject to any mandatory rules of law, (1) that any award may be signed by the members of the Tribunal in counterparts, and (2) that all such counterparts may be assembled in a single electronic file and notified to the parties by the Secretariat by email or any other means of telecommunication that provides a record of the sending thereof, pursuant to Article 34 of the Rules.

18. The Parties and the Tribunal conducted the first case management conference on 6 March 2020. On 16 March 2020, the Tribunal issued its Procedural Order No. 1 (“**PO1**”), including a first procedural timetable.
19. On 17 April 2020, the ICC Court fixed 29 October 2021 as the time limit for the final award, subject to extension on its own initiative or pursuant to a request by the Tribunal, pursuant to Article 31(2) of the ICC Rules.
20. On 29 May 2020, Mr. Selmani submitted his Statement of Claim (the “**SoC**”).
21. On 19 June 2020, Kosovo submitted its Statement of Preliminary Objections and Request for Bifurcation (the “**Request for Bifurcation**”). Mr. Selmani submitted his Observations on Kosovo’s Bifurcation Request (the “**Bifurcation Observations**”) on 31 July 2020.
22. In the time between Kosovo’s Request for Bifurcation and Mr. Selmani’s Bifurcation Observations, White & Case withdrew as counsel for Mr. Selmani effective immediately on 10 July 2020. On 20 July 2020, Mr. Selmani’s new counsel, from Shearman & Sterling LLP, informed the Tribunal and Kosovo of their instruction to act on his behalf.<sup>4</sup>
23. The Tribunal issued its Decision on the Kosovo’s Request for Bifurcation (the “**Bifurcation Decision**”) in Procedural Order No. 2 on 12 August 2020. In its Bifurcation Decision, the Tribunal rejected Kosovo’s Request to resolve jurisdictional issues in advance of liability issues, but proposed to “accelerate the hearing on jurisdiction and liability in order to efficiently address those issues, which appear largely intertwined, while deferring issues of quantum for the time being.”

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<sup>4</sup> Subsequently, on 18 February 2021, counsel communicated that they had departed from Shearman & Sterling to Gaillard Banifatemi Shelbaya Disputes.



The Tribunal also encouraged the Parties to discuss possible adjustments to the procedural calendar as a consequence of the Bifurcation Decision.

24. Following party correspondence on the revised calendar, the Tribunal adjusted the procedural calendar by its Procedural Order No. 3, on 26 August 2020.
25. Kosovo submitted its Statement of Defence (the “**SoD**”) on 16 October 2020.
26. Pursuant to the procedural calendar set forth by Procedural Order No. 3, the Parties exchanged document production requests, followed by responses and replies, through the Tribunal Secretary. On 24 November 2020, the Parties’ completed schedules related to their respective document requests were submitted to the Tribunal, which issued its Procedural Order No. 4 on the Parties’ Requests for Documents on 2 December 2020.
27. On 9 March 2021, Mr. Selmani requested a three-week extension to submit his Reply and Statement of Defence on Jurisdiction (“**Cl. Reply**”). Kosovo opposed the request, in comments invited by the Tribunal, on the next day. Having considered the Parties’ arguments, the Tribunal granted Mr. Selmani’s request, while also adding commensurate time for Kosovo’s Rejoinder. As a consequence of these extensions, the Tribunal also modified the procedural calendar. The Tribunal’s decision and the updated calendar were incorporated in its Procedural Order No. 5 on 15 March 2021.
28. On 8 April 2021, the Parties informed the Tribunal that they had agreed to postpone the deadline for submission of Mr. Selmani’s Reply to 11 April 2021. The same day, the Tribunal approved the extension submitted on the basis of consent.
29. Pursuant to the updated procedural calendar, Mr. Selmani submitted his Reply on 11 April 2021.
30. In an email to the Parties on 21 April 2021, the Tribunal indicated that while it was too early to determine the modalities of the scheduled October 2021 hearing (the “**Hearing**”), it intended to solicit the Parties’ views on the appropriate hearing format towards the end of the summer. The Tribunal also instructed the Parties to confer regarding making provisional bookings at an experienced hearing venue and to report back by 5 May 2021. On 5 May 2021, the Parties responded, agreeing with the Tribunal’s assessment that it was too early to determine the modality of the Hearing, and informing the Tribunal that provisional bookings were underway with the ICC in Paris.
31. On 1 June 2021, the Tribunal requested an update with respect to the provisional bookings of the ICC venue, which the Parties provided on the following day.

32. In a further email on 30 July 2021, the Tribunal expressed doubt, “[i]n light of continuing uncertainties regarding the course of the pandemic,” that the scheduled October 2021 Hearing could be safely achievable in person. The Tribunal invited the Parties to confer about the modality of the Hearing and revert back to the Tribunal by 6 August 2021.
33. On 5 August 2021, the Parties reported back to the Tribunal that they had “agreed to defer the decision in relation to the modality of the hearing until mid-September,” and that they had approached the ICC Hearing Centre about a preliminary booking. The Tribunal responded to the Parties on the same day, acknowledging the Parties’ preference for deferring, while also expressing concern that mid-September would be too late to “first begin the process of planning the required technical and logistical arrangements” for a remote hearing. The Tribunal therefore directed the Parties to (i) take all necessary steps to retain an experienced remote hearing manager, at least on a contingency basis, and to start investigating the necessary preparatory steps necessary for a potential remote hearing, and (ii) to make suitable court reporter bookings. The Tribunal instructed the Parties to report back within two weeks, i.e. by 19 August 2021.
34. On 6 August 2021, Kosovo submitted its Rejoinder (“**Resp. Rejoinder**”).
35. On 18 August 2021, Kosovo requested that the Tribunal order that Mr. Selmani’s forthcoming Rejoinder on Jurisdiction be limited to 30 pages. Upon the Tribunal’s invitation, Mr. Selmani responded on 25 August 2021, opposing the page-limit request. On 26 August 2021, the Tribunal issued its direction that Mr. Selmani’s Rejoinder be limited to 60 pages.
36. In a letter on 25 August 2021, Mr. Selmani applied for the exclusion of certain sections of the Resp. Rejoinder, on the ground that the sections introduced evidence on the merits that Mr. Selmani contended should have been introduced in the SoD. On the Tribunal’s invitation, Kosovo responded to Mr. Selmani’s application on 31 August 2021. After having been granted leave by the Tribunal to respond to the 31 August 2021 letter, Mr. Selmani submitted a response on 1 September 2021, which was followed by a similar request and grant of leave for Kosovo to submit a final response, which Kosovo submitted the same day. On 2 September 2021, the Tribunal denied Mr. Selmani’s application to exclude certain sections of the Resp. Rejoinder, while noting that it would “take under consideration any proposals the Claimant may wish to make regarding opportunities to address the new evidence before or at the hearing, as well as any observations the Respondent may offer with respect to any such proposal.”
37. On 27 August 2021, the Parties provided notice of the witnesses they intended to examine at the Hearing.

38. Having received no status update from the Parties on their hearing arrangements by 19 August 2021, the Tribunal sent a reminder on 30 August 2021, requesting an update as soon as possible but no later than within a week. On 8 September 2021, Mr. Selmani responded with a status update with respect to the steps taken by the Parties to retain the ICC as manager for a remote hearing, as well as court reporters and interpreters. On the Tribunal's invitation, Kosovo confirmed that it agreed with the content of Mr. Selmani's status update, and that the Parties would work together to finalize bookings. On 13 September 2021, the Parties confirmed the booking of the ICC as well as transcription services from Juriscript.
39. On 8 September 2021, the Tribunal circulated a draft procedural order containing a draft protocol for the Hearing, requesting the Parties' joint or separate comments by 4 October 2021.
40. Mr. Selmani submitted his Rejoinder on Jurisdiction ("**Cl. Rejoinder**") on 1 October 2021.
41. On 5 October 2021, the Parties submitted an updated version of the Tribunal's draft procedural order containing the hearing protocol, including the Parties' respective positions on the remaining disputed issues.
42. On 6 October 2021, the Tribunal and the Parties conducted the Pre-Hearing Conference.
43. On 17 October 2021, Mr. Selmani sought leave to submit a number of documents to the record, arguing that exceptional circumstances warranted their admittance. On the Tribunal's invitation, Kosovo replied on 19 October 2021, consenting to the admittance of most documents, with one exception. On the same day, the Tribunal admitted the undisputed documents on consent, and also granted Mr. Selmani's application to admit the remaining disputed document.
44. The Tribunal issued its Procedural Order No. 6, containing the Hearing protocol, on 18 October 2021. On that same day, the Tribunal and the Parties conducted a technical test session with the ICC and the other hearing participants.
45. On 20 October 2021, Kosovo applied for leave to submit an alleged corrected version of Exhibit R-57, including updated annexes. On the Tribunal's invitation to comment, Mr. Selmani opposed the application on the following day. On that same day, 21 October 2021, Kosovo submitted further comments in response to Mr. Selmani's objection. The Tribunal admitted the R-57 annexes to the record on 21 October 2021, on the basis that (i) Kosovo provide as soon as possible a full translation of any annexes not already in the record, and (ii) the Tribunal would "consider any

reasonable measures to prevent prejudice, including if necessary deferring argument or examination with respect to the new annexes.”

46. The Hearing was held remotely by video conference on 25-30 October 2021. The following individuals attended the Hearing:

*Tribunal*

Ms. Jean E. Kalicki	President of the Tribunal
Mr. Doak Bishop	Arbitrator
Prof. Zachary Douglas QC	Arbitrator

*Administrative Secretary to the Tribunal*

Dr. Joel Dahlquist

*For the Claimant*

Dr. Yas Banifatemi	GBS Disputes
Mr. Mohamed Shelbaya	GBS Disputes
Mr. Vincenzo Speciale	GBS Disputes
Ms. Teresa Vega	GBS Disputes
Ms. Krystyna Ponomarenko	GBS Disputes
Mr. Filip Nordling	GBS Disputes
Ms. Patricija Rukštelytė	GBS Disputes

Mr. Bedri Selmani	Party Representative
Ms. Leonora Selmani	Party Representative
Ms. Mimoza Selmani	Party Representative

*For the Respondent*

Mr. Luka Misetić	Squire Patton Boggs
Mr. Rostislav Pekař	Squire Patton Boggs
Mr. Mark Stadnyk	Squire Patton Boggs
Mr. Matej Pustay	Squire Patton Boggs
Ms. Fellenza Limani	Squire Patton Boggs

Mr. Jakub Kamenický	Squire Patton Boggs
Ms. Helena Čech	Squire Patton Boggs

Mr. Sami Istrefi	Party Representative
Ms. Ilire Aydogan	Party Representative
Mr. Arsim Zuka	Party Representative

*Court Reporter*

Elizabeth Wigglesworth	Juriscript
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*Interpreters*

Ms. Diana Jovani  
Mr. Paulin Kola

*ICC Hearing Centre*

Mr. Yassine Taj

47. During the Hearing, the following individuals were examined:

*On behalf of the Claimant:*

Mr. Bedri Selmani	Witness
Ms. Leonora Selmani <sup>5</sup>	Witness

Prof. Marc Weller	Expert
Prof. Iliriana Islami	Expert
Mr. William Klawonn	Expert

*On behalf of the Respondent:*

Mrs. Mimoza Kusari-Lila	Witness
Mr. Hajredin Ramajli	Witness

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<sup>5</sup> To distinguish Ms. Leonora Selmani's witness statements from those of her father Mr. Bedri Selmani, hers are referred to as the First and Second "L. Selmani" Statements. References to the First and Second "Selmani" Statements, without the use of a first initial, are to those of the Claimant, Mr. Selmani.

Mr. Avni Jashari	Witness
Prof. Bernhard Knoll-Tudor	Expert
Prof. Qerim Qerimi	Expert
Mr. Gentian Gurra	Expert

48. During the Hearing, on 26 October 2021, Mr. Selmani submitted a purported “corrected” version of certain 2009 amendments to the 2005 Petroleum Law (Exhibit C-61). Kosovo objected to the updated translation being admitted on 27 October 2021. On that same date, the Tribunal indicated that it did not see a need to rule in advance on the accuracy of the submitted translation, preferring to resolve any substantive differences between the two versions of C-61 as and when that might prove necessary. The Tribunal has now concluded that the differences in the two translations are not material to the outcome of the case.
49. On 28 October 2021, the ICC Court extended the time limit for rendering the Final Award until 31 March 2022, pursuant to Article 31(2) of the ICC Rules.
50. At the end of the Hearing on 30 October 2021, the Parties expressed a joint preference for separate oral closing arguments rather than written post-hearing briefs. Failing at the Hearing to find common dates for the closing arguments, the Parties and the Tribunal corresponded in October and November 2021 to this end. On 22 November 2021, the Tribunal confirmed that the closing arguments would take place on 16-17 March 2022 (the “**Closing Arguments**”).
51. On 13 December 2021, the Tribunal sent a detailed list of questions for the Parties’ consideration while preparing for the Closing Arguments.
52. Following correspondence between the Tribunal and the Parties, on 23 February 2022 the Tribunal decided on the notional agenda for the Closing Arguments.
53. On 4 March 2022, the Parties jointly submitted an agreed chronology of main exhibits.
54. The Closing Arguments were held remotely via videoconference on 16 and 17 March 2022. During the Closing Arguments, Kosovo objected that Mr. Selmani had offered certain alleged “new arguments” that had not previously featured in its written and oral submissions. The Tribunal took these objections under advisement and stated that it would resolve them only if and when it considered it necessary to reach any of

these points in order to render its decisions.<sup>6</sup> In the end, the Tribunal has not found any of these issues to be material to the outcome of the case.

55. At the conclusion of the Closing Arguments, the Parties agreed to submit simple schedules of their respective costs in connection with the proceedings, on a timetable to be agreed between the Parties within one week of the Closing Arguments.
56. On 24 March 2022, the ICC Court extended the time limit for rendering the Final Award until 30 November 2022.
57. On 25 March 2022, the Parties informed the Tribunal that they had agreed to send their respective schedules of costs by 29 April 2022.
58. On 7 April 2022, the Parties submitted the finalized transcripts of the Closing Arguments, which contained the Parties' agreement on all necessary changes to prior versions of the transcripts.
59. On 28 April 2022, the Parties informed the Tribunal that they had agreed to a two-week extension for filing their respective schedules of costs, which would now be submitted by 13 May 2022.
60. On 13 May 2022, the Parties submitted their respective schedules of costs.
61. On 21 June 2020, the Tribunal declared the proceedings closed pursuant to Article 27 of the ICC Rules.

## **VI. Factual Background and Findings**

62. The following is a summary of the background facts as pleaded by the Parties or established by the evidence, without prejudice to any legal conclusions by the Tribunal, which will be addressed in later sections. This summary is not intended as an exhaustive statement of the facts, and the absence of reference to particular facts or assertions, or to the evidence supporting any particular fact or assertion, should not be taken as an indication that the Tribunal did not consider those matters. The Tribunal has carefully considered *all* evidence and arguments submitted to it in the course of this Arbitration.

### **A. The Establishment of UNMIK**

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<sup>6</sup> Tr. Closing Day 2, Kalicki 148:15-149:1.

63. Some ten years before its Declaration of Independence on 17 February 2008 (the “**Declaration of Independence**”), Kosovo was the subject of violent armed conflict between forces of the Federal Republic of Yugoslavia, which originally controlled Kosovo’s territory, and the Kosovo Albanian rebel group known as the Kosovo Liberation Army (“**KLA**”), which was formed in the early 1990s to fight against Serbian persecution of Kosovo Albanians. Following an increasingly bloody conflict in 1998 and 1999, which involved massive loss of civilian life at the hands of Yugoslav armed forces and Serbian paramilitaries, the North Atlantic Treaty Organization (“**NATO**”) launched airstrikes on 25 March 1999 against Federal Republic of Yugoslavia armed forces in Kosovo.<sup>7</sup>
64. Following the NATO intervention and the withdrawal of the Yugoslavia army, on 10 June 1999 the United Nations Security Council established a United Nations Interim Administration Mission in Kosovo (“**UNMIK**”), through United Nations Security Council Resolution 1244 (“**UNSC Resolution 1244**”).<sup>8</sup>
65. UNSC Resolution 1244 provided that the United Nations Secretary-General would appoint “a Special Representative to control the implementation of the international civil presence” in Kosovo (the “**SRSG**”).<sup>9</sup> The interim administration was intended to “provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions,”<sup>10</sup> but the development of these institutions – and the performance by UNMIK of “basic civilian administrative functions,” including “[s]upporting the reconstruction of key infrastructure and other economic reconstruction” – were expressly to be performed “pending a political settlement.”<sup>11</sup> In other words, UNMIK was to be “status neutral” about the future of Kosovo, including whether the interim administration would be followed by the reversion of territory to Yugoslavia, by the declaration of an independent State, or some other status.
66. As the Secretary-General explained to the United Nations in a 12 July 1999 report, the administrative powers and responsibilities of the UNMIK SRSG were distributed among four components, known as “pillars,” each chaired by a Deputy SRSG.<sup>12</sup> Pillar I initially was responsible for humanitarian assistance and was led by the United Nations High Commissioner for Refugees;<sup>13</sup> Pillar II was responsible for civil administration, and was led by the United Nations; Pillar III was responsible for democratization and institution building, and was led by the Organization for Security

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<sup>7</sup> C-143, Transcript of NATO Press Conference, 25 March 1999.

<sup>8</sup> C-144, United Nations Security Council Resolution 1244, 10 June 1999.

<sup>9</sup> C-144, United Nations Security Council Resolution 1244, 10 June 1999, ¶ 6.

<sup>10</sup> C-144, United Nations Security Council Resolution 1244, 10 June 1999, ¶ 7.

<sup>11</sup> C-144, United Nations Security Council Resolution 1244, 10 June 1999, ¶¶ 11(b), (c), (g).

<sup>12</sup> C-146, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 July 1999, ¶ 45.

<sup>13</sup> After the emergency humanitarian phase was considered completed in June 2000, the justice and police functions, which previously were housed under civil administration, became a new, separate Pillar 1.



and Cooperation in Europe; and Pillar IV was responsible for reconstruction and economic development, and was led by the European Union.<sup>14</sup>

67. On 25 July 1999, one month after the establishment of UNMIK, the SRSG issued UNMIK Regulation No. 1999/1, which declared that “[a]ll legislative and executive authority with respect to in Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the [SRSG].”<sup>15</sup> The Regulation also provided that UNMIK would “issue legislative acts in the form of regulations,” which would remain in force until repealed by UNMIK “or superseded by such rules as are subsequently issued by the institutions established under a political settlement.”<sup>16</sup> In the meantime, in accordance with Section 6 of UNMIK Regulation No. 1999/1, UNMIK would administer all “movable or immovable property” of the Federal Republic of Yugoslavia or the Republic of Serbia or any of their organs, which was in the territory of Kosovo.<sup>17</sup> UNMIK Regulation No. 1999/1 was “deemed” to have entered into force as of 10 June 1999, the date of UNSC Resolution 1244.<sup>18</sup>
68. On 27 September 2000, UNMIK issued a further regulation – UNMIK Regulation No. 2000/54 – which amended UNMIK Regulation 1999/1 in a number of respects. Among the amendments was Section 6, which now provided that UNMIK would administer all “movable or immovable property” in the territory of Kosovo, “where UNMIK has reasonable and objective grounds to conclude that such property” either (a) belonged to the Federal Republic of Yugoslavia or the Republic of Serbia or any of their organs, or (b) was “[s]ocially owned property.”<sup>19</sup> The term “socially owned property,” and the related term, “socially owned enterprises” (“**SOE**”), are important ones for the present dispute; they are notions derived from Yugoslavia’s communist history, and referred to property and enterprises that were owned by society as a whole as opposed to by either private or public entities.<sup>20</sup> The Regulation provided that UNMIK’s administration of property which it reasonably believed to be either public or socially owned was without prejudice to the right of third parties to assert “ownership or other rights” through the competent courts.<sup>21</sup> As with UNMIK

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<sup>14</sup> C-146, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 July 1999, ¶ 43.

<sup>15</sup> C-145, UNMIK Regulation No. 1999/1, 25 July 1999, Section 1.1.

<sup>16</sup> C-145, UNMIK Regulation No. 1999/1, 25 July 1999, Section 4. UNMIK regulations were to bear a specified symbol and numbering system and to be included in an official register. *Id.*, Section 5.3.

<sup>17</sup> C-145, UNMIK Regulation No. 1999/1, 25 July 1999, Section 6.

<sup>18</sup> C-145, UNMIK Regulation No. 1999/1, 25 July 1999, Section 7.

<sup>19</sup> C-147, UNMIK Regulation No. 2000/54 (amending UNMIK Regulation No. 1999/1), 27 September 2000, Section 6.1.

<sup>20</sup> C-148, “The United Nations Mission in Kosovo and the Privatization of Socially Owned Property: A critical outline of the present privatization process in Kosovo”, KIPRED, June 2005, pp. 4-5.

<sup>21</sup> C-147, UNMIK Regulation No. 2000/54 (amending UNMIK Regulation No. 1999/1), 27 September 2000, Section 6.2.

Regulation No. 1999/1, the new UNMIK Regulation No. 2000/54 was expressly retroactive to 10 June 1999.<sup>22</sup>

69. The establishment of UNMIK, and its declaration of such broad powers, was a reaction to the significant issues confronting Kosovo after years of instability, which the international community at the time recognized had left Kosovo facing serious challenges with law and order, security and economic development.<sup>23</sup>
70. Among the many areas of concern, particularly relevant for the present dispute, was the lack of access to fuel following a breakdown of the local infrastructure after the NATO airstrikes, leading to concerns about the access to electricity in the region. In a report in the summer of 1999, UNMIK identified essential services, including power, as requiring immediate attention.<sup>24</sup> Similarly relevant for present purposes was the presence of criminal gangs, including ones involved in illegal smuggling of critical products including fuel, which combined with a lack of established formal law and order structures, was recognized by UNMIK as a challenge for attracting much needed investment.<sup>25</sup>
71. On 31 August 1999, UNMIK issued Administrative Direction No. 1999/1, which was intended to implement a customs regime to begin to address rampant smuggling. Among other things, this required all importers and exporters to register with UNMIK.<sup>26</sup> With respect to petroleum products in particular, Administrative Direction No. 1999/1 provided that “[t]he importation, transport, distribution and sale of petroleum products ... for and in Kosovo shall be subject to a license issued by UNMIK.”<sup>27</sup>
72. On 24 September 1999, UNMIK issued Regulation No. 1999/9, “[f]or the purpose of regulating the importation, transport, distribution and sale of petroleum products for and in Kosovo.” This Regulation confirmed that an SRSG license would be needed for any person or enterprise engaging in such activities. Such a license would be conditional, *inter alia*, on an “undertaking by the licensee to administer and render operational, assets of ‘Jugopetrol’ and/or ‘Beopetrol’ in Kosovo, in addition to any privately owned assets in Kosovo of which the licensee may lawfully make use.”<sup>28</sup>

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<sup>22</sup> C-147, UNMIK Regulation No. 2000/54 (amending UNMIK Regulation No. 1999/1), 27 September 2000, Section 7.

<sup>23</sup> See *inter alia* C-146, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 July 1999; C-149, “The Kosovo Report: Conflict, International Response, Lessons Learned”, IICK, 2000.

<sup>24</sup> C-146, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 July 1999.

<sup>25</sup> *Ibid.*, p.2.

<sup>26</sup> C-169, UNMIK Administrative Direction No. 1999/1, 31 August 1999, Section 7.1.

<sup>27</sup> C-169, UNMIK Administrative Direction No. 1999/1, 31 August 1999, Section 17.2.

<sup>28</sup> C-7, UNMIK Regulation No. 1999/9 on the Importation, Transport, Distribution and Sale of Petroleum Products (Petroleum, Oil and Lubricants) for and in Kosovo, 24 September 1999, Section 1 and Annex, ¶ 2.

The reference to “**Jugopetrol**” was to the Federal Republic of Yugoslavia’s national oil company, and the reference to “**Beopetrol**” was to a company that had taken over a number of stations previously operated by the Croatian national oil company “**INA**.” Prior to the war, both the Jugopetrol and INA stations had been operated as socially owned properties, and Jugopetrol and INA were registered in the commercial courts as SOEs as of 1989.<sup>29</sup>

73. UNMIK Regulation No. 1999/9 also required that any license issued in connection with the former Jugopetrol and Beopetrol stations would be conditional on the licensee’s payment of all applicable customs and excise duties and sales tax; that the Regulation itself would form an integral part of any such license; and that the SRSG could revoke a license with immediate effect if the licensee was in breach of any of these conditions, “or for any other reason which, in the opinion of the [SRSG], interferes with the successful discharge of the mandate of UNMIK.”<sup>30</sup>

#### **B. Mr. Selmani’s Early Ventures in Kosovo and the UNMIK Permission**

74. In the summer of 1999, around the same time as UNMIK was established, Mr. Bedri Selmani returned, like many others in the Kosovar diaspora, to his native Kosovo, having previously lived in Croatia since the late 1980s and having acquired Croatian nationality in 1994.<sup>31</sup> Mr. Selmani, who was a successful businessman in Croatia but by his own admission had no previous experience in the petrol industry, contends that he returned to Kosovo at the request of UNMIK, and with the intent to “rehabilitate and operate a nationwide network of petrol stations.”<sup>32</sup>
75. Kosovo questions this version of events, expressing doubt that UNMIK would reach out to Mr. Selmani given his admitted lack of experience in the petroleum sector. In Kosovo’s telling, Mr. Selmani came to occupy certain petrol stations in a different manner: Mr. Selmani was an “insider” with the KLA, which had established a self-proclaimed provisional Government of Kosovo in the summer of 1999 and created Kosova Petrol, appointing Mr. Selmani as its manager. This version of Kosova Petrol’s origin is supported, Kosovo says, by several contemporaneous documents.<sup>33</sup> First, Kosovo cites Mr. Selmani’s own statements in September 1999, as reported in an interview with a Dutch newspaper: he referred to Kosova Petrol (reportedly then operating 58 petrol stations) as “belonging to the ‘state of Kosovo’,” and claimed that he had been appointed director of Kosova Petrol by Mr. Hashim Thaci, the KLA leader who had declared himself the head of a new Kosovo government. The article

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<sup>29</sup> C-257, Status Determination Request 1366 (Jugopetrol), 2 October 2012, p. 2; C-258, Status Determination Request 0921U (INA), 2 October 2012, p. 3.

<sup>30</sup> C-7, UNMIK Regulation No. 1999/9, 24 September 1999, Annex, ¶¶ 5, 6, 8.

<sup>31</sup> First Selmani Statement, ¶¶ 14-17; C-3, Excerpt of Bedri Selmani’s Croatian Passport, 25 January 1994; C-4, Excerpt of Bedri Selmani’s Croatian Passport, 16 June 2011.

<sup>32</sup> First Selmani Statement, ¶ 8.

<sup>33</sup> Resp. Opening Slides 10-13.

reports that on 16 July 1999, the self-appointed KLA “government” had issued a decree declaring that petrol stations, along with other important properties, now belonged to it. This claim was disputed, however, by Mr. Gerard Fischer, described in the article as UNMIK’s “acting head of Public Administration” (but in actuality, the director of Pillar II’s Department of Economic Affairs and Natural Resources). Mr. Fischer is quoted as rejecting the legitimacy of the “so-called government” and claiming that the petrol stations fell under UNMIK’s authority, describing this as an “operational decision” because “[w]e have to get the area up and running and provide some form of administration.”<sup>34</sup>

76. Kosovo also cites letters in 2003 by former employees of petrol stations previously operated by Jugopetrol and Beopetrol, which refer to Mr. Selmani as “manager” of Kosova Petrol, which is alternately described as a “state owned enterprise” and as “controlled by the former Provisional Government of Kosova.” The employees claimed that Mr. Selmani had “misused” his appointment as manager to register Kosova Petrol as a private enterprise and take possession of petrol stations for himself.<sup>35</sup>
77. The Tribunal considers Kosovo’s version of these early events to be more persuasive, at least insofar as it relates to Mr. Selmani’s reasons for returning to Kosovo. There is no documentary evidence suggesting that UNMIK induced Mr. Selmani to return to Kosovo for the purpose of operating petrol stations. It appears more consistent with the evidence that Mr. Selmani returned for his own reasons; that he subsequently presented himself to UNMIK as already effectively in possession of many petrol stations, on account of his close ties to the KLA leadership then claiming to form a provisional government; and that UNMIK sought to agree on some arrangements with Mr. Selmani that would establish UNMIK authority over the stations, while at the same time ensuring the stations continued in operation during a critical transitional period.
78. In any event, Mr. Selmani says his first meetings with UNMIK took place in July 1999. Informed beforehand of UNMIK’s interest in rehabilitating the network of Kosovo’s petrol stations, Mr. Selmani says that at these meetings UNMIK presented a concrete proposal covering “over 50 petrol stations” previously operated by Jugopetrol and Beopetrol (and before Beopetrol, by INA).<sup>36</sup> Mr. Selmani says that at the meetings, UNMIK informed him of the challenging status of the stations, including the fact that some of them were still occupied by third parties.<sup>37</sup>

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<sup>34</sup> C-302, English translation of “Partijen verdelen de buit in Kosovo”, NRC Handelsblad, 10 September 1999.

<sup>35</sup> R-142, Letter from former SOE employees to the Ombudsperson, 15 April 2003.

<sup>36</sup> First Selmani Statement, ¶¶ 15-17.

<sup>37</sup> First Selmani Statement, ¶¶ 15-17.

79. No UNMIK representatives participated as witnesses in this case, so their recollection of the initial meetings with Mr. Selmani cannot be established.
80. What is clear is that following the meetings, on 25 January 2000, Mr. Gerard Fischer of UNMIK's Department of Economic Affairs and Natural Resources (in Pillar II, Civil Administration) issued a document entitled "Permission to Operate Previously State (Public)-Owned Fuel Outlets and Establishments (Known as Beopetrol & Jugopetrol) Pending the Registration of Businesses in Kosovo" ("**the UNMIK Permission**").<sup>38</sup> This document appears to be *sui generis*, at least insofar as the record of this case concerns: it does not bear any resemblance, for example, to the formal concession agreements that UNMIK's Pillar IV (Economic Reconstruction) apparently began using for later transactions, beginning as early as June 2000.<sup>39</sup>
81. Be that as it may, the Tribunal accepts that the UNMIK Permission was issued on 25 January 2000. While addressed in letter form to Mr. Selmani as the "President" of Kosova Petrol, the UNMIK Permission also identified him as "designated manager ... of the entity known as 'Kosova Petrol' ... pending the registration of businesses in Kosovo."<sup>40</sup> Mr. Selmani explains that Kosova Petrol was not yet registered as a business in Kosovo, because there was no such registration service available at the time.<sup>41</sup> The UNMIK Permission emphasized that Mr. Selmani's continual personal involvement with "the business responsibilities" of Kosova Petrol was a critical assumption, and in the event he "withdraws, or is asked to withdraw his involvement, this permit may and will be revoked."<sup>42</sup>
82. The UNMIK Permission stated that having "evaluate[d] the activities and current situation with regard to the operation of these facilities," permission was granted "to operate the 61 fuel and fuel establishments, as listed on the attachment ..."<sup>43</sup> The attachment listed 52 petrol stations and seven storage facilities which belonged to Beopetrol and Jugopetrol.<sup>44</sup>
83. The UNMIK Permission expressly cross-referenced UNMIK Regulation No. 1999/9, stating that it "extends to all factors as provided for in REGULATION NO. 1999/9, that being for the Importation, Transport, Distribution and Sale of Petroleum Products ... for and in Kosovo." It confirmed that "KP will be allowed to operate [the listed establishments] for commercial gain ... subject to compliance with" that Regulation.

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<sup>38</sup> C-8, UNMIK Permission, 25 January 2000.

<sup>39</sup> Resp. Rejoinder, ¶ 368 and Table 2 (citing R-206, European Stability Initiative, *The Ottoman Dilemma: Power and Property Relations under the United Nations Mission in Kosovo*, 8 August 2002, p. 19); see, e.g., R-170, Concession Contract for Mirusha facilities (redacted), 1 January 2001.

<sup>40</sup> C-8, UNMIK Permission, 25 January 2000, introductory paragraph.

<sup>41</sup> First Selmani Statement, ¶ 23.

<sup>42</sup> C-8, UNMIK Permission, 25 January 2000, introductory paragraph and ¶ 7.

<sup>43</sup> C-8, UNMIK Permission, 25 January 2000, p. 1.

<sup>44</sup> C-8, UNMIK Permission, 25 January 2000, Attachment.

It added that “the terms and conditions for compliance and conduct and quite explicit and must be adhered to.”<sup>45</sup>

84. The UNMIK Permission acknowledged that investments already had been made in many of the petrol stations, and described these investments variously as having been made by “KP” (Kosova Petrol) and by “Mr. Bedri Selmani.” Thus, it stated that “KP, acting in good faith, has already rendered operational the assets of both Jugopetrol and Beopetrol and other assets in Kosovo,” and stated that Kosova Petrol’s “monthly rental payments for the use of these fuel outlets and facilities” had been calculated bearing in mind that “KP has made considerable improvements and repairs to the outlets and establishments in order to render them operational,” that “many of the sites require further capital expenditure in order to render them operational,” and “[t]hat the expenditure that has been incurred to date, namely of a capital nature, needs to be ascertained and given a monetary value representing the business investment made by Mr. Bedri Selmani.”<sup>46</sup> As discussed further below, one of the disputes in this case is whether Mr. Selmani has proven that he made any personal investment in the petrol stations prior to the UNMIK Permission, or whether such investment was made using KLA funds, sourced for example from diaspora donations.
85. In any event, Kosova Petrol was to make monthly rental payments of DM 70,000 for continued use of the facilities, which would be paid directly to UNMIK and applied towards the “Kosovo Budget” that UNMIK administered. Kosova Petrol was also to obtain adequate insurance cover.<sup>47</sup>
86. The UNMIK Permission contained no express provision about its term of validity. However, it did state that “the permission extended in this letter is issued as a measure to ensure that the supply of Petroleum Products ... is ensured during this vital winter period,”<sup>48</sup> a reference that Kosovo says implies an intended short-term duration.<sup>49</sup> In the next sentence, the UNMIK Permission also suggested that in due course it would give way to a more regularized licensing process: “[i]t may be necessary for KP to obtain the appropriate licenses and permits once these have been finalized.” The UNMIK Permission continued, “[i]t is understood that this will be a crucial formality that KP will need to apply for and having fulfilled the requirements KP will be issued with these appropriate permits/licenses.”<sup>50</sup>
87. Finally, the UNMIK Permission stated that it was granted “subject to” both the UNMIK Regulations “that are in force currently and any that may be promulgated in

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<sup>45</sup> C-8, UNMIK Permission, 25 January 2000, p. 1.

<sup>46</sup> C-8, UNMIK Permission, 25 January 2000, p. 1 and ¶¶ 3, 5, 6.

<sup>47</sup> C-8, UNMIK Permission, 25 January 2000, pp. 1, 2.

<sup>48</sup> C-8, UNMIK Permission, 25 January 2000, p. 2.

<sup>49</sup> Resp. Rejoinder ¶¶ 333-338.

<sup>50</sup> C-8, UNMIK Permission, 25 January 2000, p. 2.

the future.” UNMIK also reserved the right to revoke the UNMIK Permission at any time if Kosovo Petrol did not meet its obligations or acted in any improper or unlawful manner.<sup>51</sup>

88. As is developed further below, the Parties dispute the exact purpose, scope and length of the UNMIK Permission. However, the Parties agree that it purported to grant Kosovo Petrol, for so long as it remained in force, two different types of authorizations. Because these are analytically distinct, and covered functions that ultimately devolved to different authorities following Kosovo’s independence, it is useful to identify the separate concepts here.
89. First, the UNMIK Permission authorized Mr. Selmani to *occupy* 52 petrol stations and seven storage facilities which belonged to Beopetrol and Jugopetrol.<sup>52</sup> It is not disputed that this did not convey *ownership rights* over the land or the facilities; the UNMIK Permission rather describes the arrangement as involving rental payments “*for the use*” of these fuel outlets and facilities.<sup>53</sup> The Parties at times have analogized this to a lease arrangement, albeit conveyed through an administrative act rather than a bilateral contract. However, Mr. Selmani asserts that Kosovo Petrol actually was provided with access only to 38 fuel facilities, including 34 petrol stations, by the end of 2000, and contends that he invested at least EUR 700,000 in the initial rehabilitation of them.<sup>54</sup> As discussed further below, Mr. Selmani complains that the other 18 petrol stations covered by the UNMIK Permission were occupied by third parties, and that UNMIK did not take any effective action to wrest control from them and hand over the stations to Kosovo Petrol for its use.
90. In addition to permitting Kosovo Petrol to occupy the petrol stations, the UNMIK Permission authorized Kosovo Petrol to perform all the petroleum trading functions associated with their operation, namely importation, transport, distribution and sale, as referenced in the expressly cross-referenced UNMIK Regulation No. 1999/9. As discussed above, that Regulation had specifically envisioned the issuance of an SRSG license for these activities, which would be conditional on the licensee’s “undertaking ... to administer and render operational” the Jugopetrol and Beopetrol “assets” in Kosovo.”<sup>55</sup> Given the cross-reference in the UNMIK Permission, it is reasonable to view the UNMIK Permission as a form of license for petroleum trading activities, albeit issued in a *sui generis* manner given the need for urgent action over the winter, but still expressly subject to eventual replacement by another form of licensing once such a system was developed. It is also clear that Kosovo Petrol was not guaranteed the issuance of later licenses, but would “need to apply” for them as a “crucial formality”; issuance of later licenses was subject to its doing so and to its

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<sup>51</sup> C-8, UNMIK Permission, 25 January 2000, p. 2.

<sup>52</sup> SoC ¶ 35, First Selmani Statement ¶ 25; SoD ¶ 47.

<sup>53</sup> C-8, UNMIK Permission, 25 January 2000, p. 1 (emphasis added).

<sup>54</sup> SoC ¶ 41; First Selmani Statement ¶ 32; C-10, Kosovo Petrol Financial Statement for 2000, p. 4.

<sup>55</sup> C-7, UNMIK Regulation No. 1999/9, 24 September 1999, Section 1 and Annex, ¶ 2.

“having fulfilled the requirements” that would be set forth in the future licensing regime. Nonetheless, the UNMIK Permission did suggest that Kosova Petrol could expect UNMIK to issue it continuing licenses to operate, assuming that it properly applied for them and fulfilled the requirements.<sup>56</sup>

91. Pending introduction of new legal regimes, the UNMIK Permission thus constituted (for at least some time) both authorization to occupy premises that were owned by others, and authorization to trade in petroleum products from those premises. These two authorizations were however expressly premised on Kosova Petrol’s reciprocal obligation to make monthly rental payments.
92. Kosova Petrol made some rent payments in 2000 and 2001. However, from the outset (the initial payments for February and March 2000), Kosova Petrol paid a reduced amount in rent, pro-rated based on its use of only 34 gas stations rather than the full number envisioned in the UNMIK Permission.<sup>57</sup> Mr. Selmani argues that this reduction was agreed between Kosova Petrol and UNMIK as a response to the fact that certain petrol stations continued to be occupied by third parties.<sup>58</sup> The record is unclear whether the rent reduction in fact was agreed in advance, but it does appear that UNMIK accepted its logic, because on 30 August 2001 its Department of Trade and Industry (“**DTI**”), through Mr. Richard Oaten, issued an invoice to Kosova Petrol that referred to a “Pro-rata charge” to Kosova Petrol for “38 Sites,” based on a “Formula 70,000 DM for 61 sites.”<sup>59</sup> As discussed below, Mr. Selmani also referred to this rent reduction agreement in his first meeting with the Kosovo Trust Agency (the “**KTA**”) in June 2003.<sup>60</sup>
93. However, it is undisputed that after August 2001, Kosova Petrol did not pay any further rent under the UNMIK Permission.<sup>61</sup> The Parties have different explanations for this fact. Mr. Selmani says that UNMIK (again through Mr. Oaten) agreed orally to a “suspension” of rental payments, essentially as an offset of debts owed to Kosova Petrol by other public institutions to which it had supplied petrol during the critical early period.<sup>62</sup> Kosovo disputes Mr. Selmani’s account of why Kosova Petrol did not pay any rent, and argues that he has failed to furnish evidence to support his contentions.<sup>63</sup>
94. The Tribunal agrees with Kosovo that Mr. Selmani has not presented convincing evidence to support his assertion of a mutual agreement that Kosova Petrol could

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<sup>56</sup> C-8, UNMIK Permission, 25 January 2000, p. 2.

<sup>57</sup> R-73, Report on Kosova Petrol payments, 23 September 2003.

<sup>58</sup> First Selmani Statement ¶¶ 69-70.

<sup>59</sup> C-39, Invoice issued by the Department of Trade and Industry, 20 August 2001.

<sup>60</sup> R-67, KTA File Note, 17 June 2003.

<sup>61</sup> SoD ¶ 55; SoC ¶ 146, First Selmani Statement ¶¶ 67-68.

<sup>62</sup> Cl. Reply ¶¶ 24-26; First Selmani Statement ¶¶ 70-72.

<sup>63</sup> SoD ¶¶ 94-97.



suspend all payment of rent. The contention is inconsistent with Mr. Oaten's issuance of an invoice for rental payments in a reduced (rather than suspended) amount. It is also inconsistent with internal UNMIK documents, discussed further below, which refer to an intention in late 2001 to terminate the UNMIK Permission, and reference among other things Kosova Petrol's non-payment of rent.

95. Kosovo argues that in addition to not meeting its rent payment obligations, Kosova Petrol also failed to arrange insurance cover as required by the UNMIK Permission, and also failed to comply with obligations to pay taxes and social contributions starting in the fall of 2001.<sup>64</sup> The failure to pay tax is supported by a 28 November 2001 memorandum from UNMIK's Legal Adviser, Mr. Alexander Borg-Olivier, who confirms "[t]he understanding of this Office ... that Kosova Petrol/Mr. Selmani have failed and/or refused to pay taxes due to the UNMIK authorities which arise/arose from fuel related operations in Kosovo." The memorandum does not, however, identify the source of that "understanding," instead stating that "[i]f this were correct then ... it would be a valid legal ground to refuse to approve [Kosova Petrol's] application to operate a customs bonded warehouse."<sup>65</sup> It is unclear what if anything happened with respect to that particular application.

### C. The 2001 UNMIK Investment Regulation

96. Meanwhile, on 12 January 2001 – roughly a year after the UNMIK Permission was issued but while it undisputedly remained in effect – an important new UNMIK regulation entered into force. UNMIK Regulation 2001/3 on Foreign Investment in Kosovo (the "**2001 UNMIK Investment Regulation**") provided a first framework for foreign investments in Kosovo, "[f]or the purpose of reconstructing and enhancing the economy of Kosovo and creating a viable market-based economy by attracting foreign investment."<sup>66</sup>
97. The relevance of the 2001 UNMIK Investment Regulation is discussed further herein. For present purposes, the Tribunal simply identifies certain provisions that have been discussed in this Arbitration.
98. Section 1 of the 2001 UNMIK Investment Regulation described its purpose as "to create certain legal guarantees necessary to make Kosovo more attractive to foreign investment."<sup>67</sup> The term "foreign investment" was defined to mean a business organization that was owned at least 25% by a "foreign investor," which was defined to include any natural person who is "a resident or citizen of a foreign State," as well

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<sup>64</sup> SoD ¶¶ 56, 63; Resp. Rejoinder ¶¶ 35-36, 47-49.

<sup>65</sup> R-19, pp. 6-7, Memo from UNMIK Legal Adviser to UNMIK Customs Service, 28 November 2001 (emphasis added).

<sup>66</sup> CL-1, 2001 UNMIK Investment Regulation, entered into force on 12 January 2001, Preamble.

<sup>67</sup> CL-1, 2001 UNMIK Investment Regulation, entered into force on 12 January 2001, Section 1.

as any legal entity that was registered or had its principal place of business abroad, or “is a foreign investment.”<sup>68</sup>

99. The 2001 UNMIK Investment Regulation contained various protections for qualifying foreign investments. These included a “National Treatment” provision (Section 3) and a provision extending “Protection against Takings” (Section 7). Both provisions applied to conduct of the “the authorities,” a term that was defined as meaning “the Interim Administration of Kosovo and its successors.”<sup>69</sup> For purposes of Section 7 on “Takings,” a taking was defined to cover expropriation, nationalization, or “regulatory measures which have a confiscatory effect ... of a foreign investment by the authorities,” but to specifically exclude “UNMIK’s administration of property pursuant to UNMIK Regulation No. 1999/1, as amended.”<sup>70</sup> The 2001 UNMIK Investment Regulation did not have a “fair and equitable treatment” provision, as such provisions are generally understood in the investment treaty context.
100. Of potential relevance to the Parties’ arguments regarding the 2006 LFI and 2014 LFIs (discussed further below), Section 12 of the 2001 UNMIK Investment Regulation provided “Protection Against the Retroactive Application of Adverse Laws,” stating that “[n]o law, regulation, instruction or other act having the force of law that imposes less favorable conditions on any foreign investment than those existing when the foreign investment was made may be applied retroactively.”
101. Notably, the 2001 UNMIK Investment Regulation did not contain an arbitration clause. Rather, absent direct agreement to arbitration by the parties to a foreign investment dispute, the Regulation provided that “[t]he courts of Kosovo shall have jurisdiction over the resolution of business disputes.”<sup>71</sup>

#### **D. The Debate about UNMIK’s Termination of the UNMIK Permission**

102. The Parties are in disagreement as to whether and when UNMIK terminated the UNMIK Permission. Kosovo says the termination took place in late 2001, as contemporaneous documents indicate UNMIK intended to do.<sup>72</sup> Mr. Selmani contends that UNMIK never acted on whatever steps it may have contemplated internally. The record is ambiguous on this question.
103. On 28 November 2001, UNMIK’s Legal Adviser (Mr. Borg-Olivier) advised the UNMIK Customs Service that “Kosovo Petrol/Mr. Selmani have failed and/or

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<sup>68</sup> CL-1, 2001 UNMIK Investment Regulation, entered into force on 12 January 2001, Section 2.1.

<sup>69</sup> CL-1, 2001 UNMIK Investment Regulation, entered into force on 12 January 2001, Section 2.1.

<sup>70</sup> CL-1, 2001 UNMIK Investment Regulation, entered into force on 12 January 2001, Section 2.1.

<sup>71</sup> CL-1, 2001 UNMIK Investment Regulation, entered into force on 12 January 2001, Section 17.

<sup>72</sup> SoD ¶¶ 60, 84-92; Rejoinder ¶¶ 52-57.

refused to pay taxes due to the UNMIK tax authorities,” and also that “UNMIK is in the process of terminating the current ‘arrangement’ between UNMIK and Kosovo Petrol and will be regularizing the situation in accordance with the applicable law.”<sup>73</sup> On 13 December 2001, the Deputy SRSG of UNMIK’s Pillar IV (Mr. Juergen Voss) apparently sent a memorandum to the Legal Adviser, attaching a draft termination letter “to be sent to Kosovo Petrol/Mr. Bedri Selmani”; the Legal Adviser responded with certain edits on 14 December 2001, clearing the letter to be sent out by the Deputy SRSG.<sup>74</sup>

104. As edited, the draft letter (hereafter the “**Draft Termination Letter**”) explained the reasons for termination as follows:

[The UNMIK Permission] was granted during a period of emergency to ensure that Kosovo was able to receive fuel for road and heating use during the vital winter period of 1999/2000 and was subject to a number of conditions, some of which have not been complied with.

UNMIK has decided that it will be necessary to regularize the operation of the state owned properties of Beopetrol and Jugopetrol and that these operations must under the applicable law and UNMIK financial rules and procedures be offered out on an open public tender and be subject to license. A more comprehensive regulatory framework for the importation, storage and distribution of petroleum products is currently in the process of being formulated by UNMIK, and it is necessary to bring all current arrangements into line with these developments.<sup>75</sup>

105. The Draft Termination Letter then stated, “[t]herefore, you are advised that the permission granted to you to operate the sixty-one (61) fuel establishments [...] is hereby terminated, effective 31 December 2001.” However, it continued:

At the same time you are further advised that you are required to continue to operate these establishments until such time as they are ready to be handed over to the successful tender bidders and recipients of licenses. This must be done in a manner that will protect and as far as possible enhance the assets currently used by you. UNMIK would wish to enter into discussions with you to ensure that this hand over is made in an orderly manner.

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<sup>73</sup> R-19, pp. 6-7, Memo from UNMIK Legal Adviser to UNMIK Customs Service, 28 November 2001.

<sup>74</sup> R-19, p. 4, Memo from UNMIK Legal Adviser to UNMIK Deputy SRSG, 14 December 2001. The underlying memorandum from Mr. Voss, to which Mr. Borg-Olivier responded, is not in the record.

<sup>75</sup> R-19, p. 5, Draft letter from UNMIK Deputy SRSG to Mr. Selmani, 11 December 2001, as edited by the UNMIK Legal Adviser and returned to the UNMIK Deputy SRSG on 14 December 2001.

The discussions referred to above should also address modalities for the settlement of all outstanding debts for customs, taxes, rental payments and all other payments due to UNMIK.<sup>76</sup>

106. Finally, the Draft Termination Letter referred again to the anticipated forthcoming tender for use of petrol stations and the forthcoming new regulations for trading in petroleum products. It stated as follows:

[Y]ou will be invited to bid in the forthcoming tender process on the condition that you have fulfilled all your obligations under the present arrangement and in accordance with the applicable law. Furthermore, in conformity with the comprehensive regulatory framework soon to be promulgated by UNMIK, all businesses engaged in the fuel sector will be required to comply with the applicable law in respect of all operations conducted in Kosovo involving the importation, storage and distribution of petroleum products.<sup>77</sup>

107. It is disputed whether the Draft Termination Letter was ultimately sent to Mr. Selmani. It is undisputed, however, that he continued operating the petrol stations without interruption, while continuing to pay no rent to UNMIK after August 2001.
108. Several years later, on 24 April 2006, a group claiming to be “Workers of ‘Jugopetrol-Kosova’ Company Pristina,” wrote to UNMIK’s SRSG and the head of Pillar IV, requesting a review of the status of the premises. The workers alleged that Mr. Selmani had “abused ... socially owned property” which he was renting, including pulling out and selling fuel storage tanks for his own account. The workers also asked whether Mr. Selmani had been regularly paying the monthly rent due under the UNMIK Permission, arguing that any funds generated from rent of SOE assets should be distributed to SOE workers. The workers also requested that any Jugopetrol assets occupied by Mr. Selmani or other persons “which are not currently under the KTA administration” should be put under such administration. (The Tribunal addresses the KTA issue separately in Section VI(E) below.)<sup>78</sup>
109. Soon thereafter, on 19 May 2006, UNMIK advised Mr. Borg-Olivier, its Legal Adviser, that it had “received some questions on a difficult issue: Kosova Petrol,” and asked for advice on a response. The specific questions put to the UNMIK Legal Adviser were whether Mr. Selmani had been paying rent under the UNMIK Permission for use of former Jugopetrol and Beopetrol premises; if not, why was he

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<sup>76</sup> R-19, p. 5, Draft letter from UNMIK Deputy SRSG to Mr. Selmani, 11 December 2001, as edited by the UNMIK Legal Adviser and returned to the UNMIK Deputy SRSG on 14 December 2001.

<sup>77</sup> R-19, p. 5, Draft letter from UNMIK Deputy SRSG to Mr. Selmani, 11 December 2001, as edited by the UNMIK Legal Adviser and returned to the UNMIK Deputy SRSG on 14 December 2001.

<sup>78</sup> R-57 (updated), pp. 45-47, Letter from former Jugopetrol workers to UNMIK and KTA, 24 April 2006.

still using the premises; and whether the former workers have been paid from the rent that was gathered.<sup>79</sup>

110. A hand-written note the same day by Mr. Borg-Olivier suggests that UNMIK should have terminated the UNMIK Permission in December 2001, but never did so:

The 70,000 [DM monthly rent] should have been collected by Pillar IV [of UNMIK] and then KTA had this responsibility.

The agreement should have been terminated in 2001 but Pillar IV did not do this and move to a tender as had been officially agreed and decided at the highest levels of the Mission (SRSG). Pending the regularization of the situation and the tender Kosovo Petrol was left in place mainly to act as custodians of the premises – but of course it continued to have the obligation to pay the monthly rent.<sup>80</sup>

111. Following this exchange, the then-Deputy SRSG for Pillar IV wrote a 15 June 2006 “Action Memorandum,” on behalf of Pillar IV and the KTA, on the subject of the “UNMIK-Kosova Petrol Lease.” The Action Memorandum was drafted by the KTA Legal Department and sent for review by Mr. Borg-Olivier, who continued to serve as the UNMIK Legal Adviser.<sup>81</sup> Certain aspects of this Action Memorandum relate to the separate issue, addressed in Section VI(E) below, of whether responsibility for “administration of certain socially owned assets” (namely the petrol stations) passed from UNMIK to KTA in 2002 or 2005. For present purposes, however, what is relevant is the Action Memorandum’s statement that “Pillar IV/KTA has no actual knowledge as to whether UNMIK has ever sought to terminate the UNMIK-KP Lease,” and its inquiry to UNMIK’s Legal Adviser as to “whether the lease is still in force and effect,” and specifically, if it had been terminated, when this occurred.<sup>82</sup>
112. Upon receipt of this inquiry, Mr. Borg-Olivier evidently looked into the matter, and then noted in response, “Please see my Note to [the Acting SRSG] of 14/8/06.”<sup>83</sup> That 14 August 2006 Note contained the UNMIK Legal Adviser’s more definitive response on the subject. Specifically, Mr. Borg-Olivier began his Note as follows: “At the outset it should be stated that the agreement with Kosova Petrol was

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<sup>79</sup> R-57 (updated), p. 44, Email from M. Henneke to A. Borg-Olivier, 19 May 2006.

<sup>80</sup> R-57 (updated), p. 44, Handwritten note by Mr. A. Borg-Olivier on email from M. Henneke to A. Borg-Olivier, 19 May 2006 (emphasis in original).

<sup>81</sup> R-52, Action Memorandum, 15 June 2006, pp. 1, 4.

<sup>82</sup> R-52, Action Memorandum, 15 June 2006, p. 2, p. 3 (Question 7).

<sup>83</sup> R-52, Action Memorandum, 15 June 2006, p. 4; R-19, p. 1 (Routing Slip for clearance of Action Memorandum, note of A. Borg-Olivier, 14 August 2006).

terminated in December 2001 and except as explained thereunder it no longer has validity.”<sup>84</sup>

113. Mr. Borg-Olivier provided the following context regarding the decision to terminate the UNMIK Permission:

In January and February 2001 it was agreed between Pillar II, Pillar IV and DTI, the predecessor of KTA, that the arrangement with Kosova Petrol should be terminated and that DTI will tender all 61 fuelling sites that were by then still operated and used by Kosova Petrol, for commercial use by any interested party within a period of three months. It was further determined that until such time as the tendering procedure could commence Kosova Petrol should provisionally be allowed to continue using and operating the fuel sites against payment of the agreed rent.<sup>85</sup>

114. However, Mr. Borg-Olivier conceded, “DTI never commenced the tender procedure. The matter was not vigorously pursued probably also because of the fact that attention became focused on the establishment of the KTA”<sup>86</sup> (a transition discussed in Section VI(E) below). Nonetheless, Mr. Borg-Olivier was clear that “UNMIK terminated the license arrangement with Kosova Petrol in December 2001, by a letter sent from Pillar IV to Kosova Petrol.” He acknowledged that “[t]his Office has been unable to locate signed copies of the original letter of termination signed by the DSRSG Pillar IV, but we do have evidence of [the UNMIK Office of Legal Affairs] having on 14 December 2001 reviewed and given legal clearance for the final draft text of this termination letter.”<sup>87</sup>
115. According to Kosovo, this evidence suffices to conclude that the UNMIK Permission was terminated in December 2001, because the UNMIK Legal Adviser – the most knowledgeable authority on which obligations continued to bind UNMIK – was confident the Draft Termination Letter had been sent to Mr. Selmani and the UNMIK Permission therefore was terminated and no longer had any validity. In support of this position, Kosovo’s expert Professor Knoll-Tudor opines, based on his own experience with UNMIK procedures at the time, that after the Draft Termination Letter “had been revised and cleared by the Office of Legal Affairs” and “[f]ollowing this exhaustive clearing process, there remained no reason for [the Deputy SRSG] to not send the letter. In fact, in my experience, a clearing process completed by the SRSG’ OLA would have indicated a concrete expectation that the cleared document would be sent.”<sup>88</sup> As to the absence of the final letter in UNMIK files, Prof. Knoll-

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<sup>84</sup> R-19, pp. 2-3, Note from the UNMIK Legal Adviser to the Acting SRSG, 14 August 2006, at p. 2.

<sup>85</sup> R-19, pp. 2-3, Note from the UNMIK Legal Adviser to the Acting SRSG, 14 August 2006, at p. 2.

<sup>86</sup> R-19, pp. 2-3, Note from the UNMIK Legal Adviser to the Acting SRSG, 14 August 2006, at p. 2.

<sup>87</sup> R-19, pp. 2-3, Note from the UNMIK Legal Adviser to the Acting SRSG, 14 August 2006.

<sup>88</sup> Knoll-Tudor Report ¶ 17.

Tudor referred to the “imperfect practices around filing and archiving in the first two years of UNMIK’s administration,” in which documents were archived in physical filing cabinets rather than electronically filed.<sup>89</sup>

116. Mr. Selmani, by contrast, says he never received any termination letter from UNMIK, and argues that the UNMIK Permission therefore continued in force. He notes that for many years thereafter, various authorities continued to act on the understanding that the UNMIK Permission remained in effect.<sup>90</sup>
117. The Tribunal acknowledges that the evidence on this issue is somewhat murky, chiefly because of the discrepancy between UNMIK’s clear intention to terminate the UNMIK Permission and the absence of a final termination letter in UNMIK’s files, as of 2006 when its Legal Adviser conducted an official inquiry. Nonetheless, the Tribunal considers that Mr. Selmani’s complete cessation of any rent payments beginning in late 2001, after a record of his having made periodic (if partial) rent payments from February 2000 through August 2001,<sup>91</sup> is powerful circumstantial evidence that he understood the legal situation to have changed. As noted above, the Tribunal does not accept that this was because of an alleged oral agreement with UNMIK’s Mr. Oaten that Mr. Selmani could suspend making all rent payments in offset against certain debts owed him by other public institutions.
118. By contrast, it is far more believable that Mr. Selmani halted rent payments upon learning of UNMIK’s intent to terminate the UNMIK Permission. As discussed above, the Draft Termination Letter (a) affirmatively requested Kosova Petrol to continue operating the petrol stations until a tender for new rental arrangements could be organized, and (b) promised that there would be comprehensive discussions at that time about “the settlement of all outstanding debts for customs, taxes, rental payments and all other payments due to UNMIK.”<sup>92</sup> In these circumstances, it seems logical that Mr. Selmani initially may have deferred further payments pending the promised comprehensive discussions. As time passed, however, and UNMIK neither reverted to Mr. Selmani with information about new tender arrangements nor issued any demand for resumption of rent payments, Mr. Selmani evidently found it convenient to continue operating as he had before, without acknowledging that anything had changed regarding his right to occupy the various stations or his authorization to trade petroleum products from the premises. On balance, and considering all of the evidence before it, the Tribunal concludes on the balance of probabilities that this was the most likely course of events. The Tribunal therefore hereafter refers to the “Draft

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<sup>89</sup> Knoll-Tudor Report ¶ 18.

<sup>90</sup> SoC ¶¶ 48-54, 143-145; Cl. Reply ¶¶ 27-32, 41.

<sup>91</sup> R-73, Report on Kosova Petrol payments, 23 September 2003.

<sup>92</sup> R-19, p. 5, Draft letter from UNMIK Deputy SRSG to Mr. Selmani, 11 December 2001, as edited by the UNMIK Legal Adviser and returned to the UNMIK Deputy SRSG on 14 December 2001.

Termination Letter” as the “**Termination Letter**,” on the finding that it was sent to Mr. Selmani in or around December 2001.

119. With this factual predicate, the question then becomes whether Mr. Selmani nonetheless enjoyed any continuing legal rights in a post-Termination Letter environment, given that (a) the Termination Letter expressly “advised that you are required to continue to operate these establishments until such time as they are ready to be handed over to the successful tender bidders and recipients of licenses,”<sup>93</sup> but (b) Mr. Selmani paid no rent whatsoever in exchange for this *de facto* authorization to remain in place. This question is inexplicably intertwined with the impact of new legal regimes that were introduced over time in the territory of Kosovo, first in the pre-independence period (through the KTA and the 2005 Petroleum Law) and later upon Kosovo’s independence. The Tribunal turns to these next chapters of the story below.

#### **E. The Establishment of KTA to Administer Socially Owned Property**

120. On 15 May 2001, UNMIK issued Regulation No. 2001/9, on “A Constitutional Framework for Provisional Self-Government in Kosovo” (the “**2001 Constitutional Framework**”), for the purposes of developing “provisional institutions of self-government” in Kosovo “pending a final settlement.”<sup>94</sup> The 2001 Constitutional Framework envisioned a “gradual transfer of responsibilities to Provisional Institutions of Self-Government,” within the limits defined by UNSC Resolution 1244, but without diminishing the “ultimate authority of the SRSG.”<sup>95</sup> Section 11 of the 2001 Constitutional Framework envisioned the establishment of certain “bodies and offices” to be established by subsequent laws, and which would “carry out their functions independently of the Provisional Institutions of Self-Government.”<sup>96</sup>
121. On 13 June 2002, UNMIK issued Regulation No. 2002/12, pursuant to Section 11.2 of the 2001 Constitutional Framework, establishing the KTA as an “independent body” with the remit to “administer Publicly-owned and Socially-owned Enterprises and related assets” as a “trustee for their Owners.”<sup>97</sup> The term “Owner” was defined to mean “a person or entity with a claim to ownership with respect to an Enterprise,” and “Enterprise” was defined to mean any enterprise or assets that the KTA had authority to administer, which encompassed all “Socially-owned Enterprises that are

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<sup>93</sup> R-19, p. 5, Draft letter from UNMIK Deputy SRSG to Mr. Selmani, 11 December 2001, as edited by the UNMIK Legal Adviser and returned to the UNMIK Deputy SRSG on 14 December 2001.

<sup>94</sup> C-236, UNMIK Regulation No. 2001/9, on A Constitutional Framework for Provisional Self-Government in Kosovo, 15 May 2001.

<sup>95</sup> C-236, UNMIK Regulation No. 2001/9, on A Constitutional Framework for Provisional Self-Government in Kosovo, 15 May 2001, Preamble.

<sup>96</sup> C-236, UNMIK Regulation No. 2001/9, on A Constitutional Framework for Provisional Self-Government in Kosovo, 15 May 2001, Section 11.

<sup>97</sup> RL-22, UNMIK Regulation No. 2002/12 on the Establishment of the Kosovo Trust Agency, 13 June 2002, Sections 1, 2.1, 2.2(a).



registered or operating in the territory of Kosovo,” and their assets.<sup>98</sup> KTA’s administrative authority with respect to such Enterprises included all actions it “considers appropriate to preserve or enhance the[ir] value, viability, or governance,” including liquidation of SOEs as appropriate.<sup>99</sup> KTA’s actions with respect to any Enterprises could be challenged only through a new Special Chamber of the Supreme Court on Kosovo Trust Agency Related Matters, and its liability was limited to actions that were *ultra vires*, represented a gross misuse of powers, or breached contractual obligations incurred on KTA’s own account.<sup>100</sup>

122. The KTA operated under the control of a Board of Directors, chaired by the Deputy SRSG for Economic Reconstruction and consisting of half “international” directors (UNMIK appointed) and half Kosovo residents, three of them ministers of the Provisional Institutions of Self-Government and the fourth the President of the Federation of Independent Trade Unions of Kosovo.<sup>101</sup>
123. From the record in this Arbitration, it appears that in KTA’s initial year of operation, it was not aware of the UNMIK Permission, presumably because UNMIK itself did not raise the issue in transitioning certain administrative functions to KTA. This may be because UNMIK regarded the UNMIK Permission as having already been terminated in late 2001, before KTA was established in June 2002, or it may be a function of broader disorganization in the UNMIK to KTA transition, as referenced further below.
124. Be that as it may, on 17 June 2003, Mr. Selmani met with certain KTA officials, “gave a written presentation” on Kosova Petrol, and “answered questions” from KTA. According to internal KTA notes of this meeting, Mr. Selmani showed the KTA the UNMIK Permission, and explained that Kosova Petrol had been operating 34 of the 62 petrol outlets referenced in that document, and that it had “gone to court” over certain other outlets that were illegally occupied by third parties. Mr. Selmani also referenced a signed rent reduction agreement with Mr. Richard Oaten of UNMIK, which “allowed the rent to fall to DEM 45,000 per month” on account of the fact that only 34 outlets were usable.<sup>102</sup> There is no indication he claimed any broader agreement on rent suspension, nor that he told KTA that Kosova Petrol had not actually paid any rent since late 2001 for use of the 34 facilities.

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<sup>98</sup> RL-22, UNMIK Regulation No. 2002/12 on the Establishment of the Kosovo Trust Agency, 13 June 2002, Sections 3, 5.1.

<sup>99</sup> RL-22, UNMIK Regulation No. 2002/12 on the Establishment of the Kosovo Trust Agency, 13 June 2002, Section 6.1, 6.2(c).

<sup>100</sup> RL-22, UNMIK Regulation No. 2002/12 on the Establishment of the Kosovo Trust Agency, 13 June 2002, Section 18.4.

<sup>101</sup> RL-22, UNMIK Regulation No. 2002/12 on the Establishment of the Kosovo Trust Agency, 13 June 2002, Section 12.

<sup>102</sup> R-67, KTA File Note, 17 June 2003, p. 1.

125. Importantly, Mr. Selmani apparently acknowledged that all of the land underlying the petrol stations was owned by two SOEs, and that they did not themselves receive any rent, although Kosova Petrol did employ many of their employees. The KTA in turn informed him that the SOE land in due course would be put up for tender (it “would fall within the privatization process in the normal way”), and that “he could bid for it in the normal way” but would have no special priority over other bidders. To the contrary, he was told simply that “if he did bid at a sensible price, he stood a good chance of winning, as the land might be more valuable to him than to anyone else.”<sup>103</sup>
126. Following this meeting, the KTA officials participating in the meeting asked the KTA Legal Department to comment on the validity of the UNMIK Permission, noting “in particular, there appears to be no time limit but there is a break clause for default.” The KTA also acknowledged a need to identify the “asset[s] belong to the original petrol station operators (SOEs),” as opposed to Kosova Petrol, and to “[c]onfirm with the bank monies received” from Kosova Petrol’s past payment of rent.<sup>104</sup> This inquiry was logical given the KTA’s statutory obligation to administer and hold SOE assets in trust for their ultimate owners.
127. Within two months, it appears that KTA had come to the conclusion that the petrol stations (and not just the land) belonged to the SOEs, and that “their administration must be returned to KTA.” This conclusion is reflected in a letter from KTA’s Managing Director dated 22 August 2003 to the KTA Ombudsperson, in response to complaints from Kosova Petrol workers about alleged “abuse of authority from Mr. Selmani.”<sup>105</sup>
128. The record does not reflect any subsequent developments on this issue until 7 March 2005, when the Head of KTA’s Legal Department sent a memo to several KTA Board members (including the Deputy SRSG of UNMIK Pillar IV) regarding the status of INA assets in Kosovo. The memo was prompted by a meeting with INA representatives, who repeated prior claims to possession of approximately 35-40 petrol stations that had been operated and allegedly owned by INA prior to March 1989.<sup>106</sup>
129. Regarding these assets, the KTA Legal Department noted that these were currently “in the possession of, and operated by” Kosova Petrol pursuant to what it called “a lease agreement” with UNMIK, which had designated INA’s claimed petrol stations as sites “[p]reviously [k]nown as Beopetrol [s]ites.”<sup>107</sup> The Legal Department

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<sup>103</sup> R-67, KTA File Note, 17 June 2003, p. 1.

<sup>104</sup> R-67, KTA File Note, 17 June 2003, pp. 1-2 (“Action”).

<sup>105</sup> R-79, Letter from KTA Managing Director to Ombudsman, 22 August 2003. The letter added that Kosova Petrol itself was not a SOE and “as a result KTA does not administer the internal relations between that enterprise and its workers.”

<sup>106</sup> C-240, Memorandum from the Head of KTA’s Legal Department, 7 March 2005, p. 1.

<sup>107</sup> C-240, Memorandum from the Head of KTA’s Legal Department, 7 March 2005, p. 2.

explained that under this “lease,” rent was to be made directly to “the designated UNMIK office” and to be applied towards the Kosovo Budget, but KTA had not been provided any documents, and “thus has no knowledge,” as to how UNMIK actually “administers the UNMIK-KP Lease” and whether and to what account payments had been made. KTA expressed the belief that “there are many other contracts of this nature that have not been tracked after their inception by UNMIK and DTI (which is said to be the KTA’s predecessor), and have not been turned over to an appropriate KTA unit to monitor.”<sup>108</sup> The KTA Legal Department added that the “UNMIK-KP Lease” was expressly revocable and “KTA has no knowledge as to whether UNMIK ever sought to terminate” it or “the degree of compliance by Kosova Petrol” with obligations imposed on it. It explained that it had made an “informal inquiry” to the Office of UNMIK’s Legal Advisor, which replied that “the UNMIK-KP Lease might have terminated by UNMIK sometime in July 2002, but the notice of termination or some other document to that effect was not located ....”<sup>109</sup> From all external appearances, however, the arrangement was “currently operational because the subject petrol stations are visibly operating in Kosovo under the trade name Kosova Petrol.”<sup>110</sup>

130. In any event, the KTA Legal Department concluded that UNMIK must have determined the petrol stations to be socially-owned property, as UNMIK’s authority was “to administer state, socially-owned and publicly-owned properties in Kosovo, but not private property.”<sup>111</sup> If so, then by virtue of the KTA’s statutory authority, it should assume administrative jurisdiction over the asset “*once* the UNMIK-KP Lease is terminated.”<sup>112</sup>
131. The following month, on 22 April 2005, UNMIK issued Regulation No. 2005/18, amending Regulation No. 2002/12 on Establishment of the KTA. The amendment reaffirmed the notion of socially owned property and the KTA’s responsibility for its administration.<sup>113</sup>
132. The record does not reflect that KTA took any further action regarding the petrol stations for more than a year, until June 2006. It appears based on its March 2005 memorandum that KTA simply assumed that the UNMIK Permission had *not* been terminated, from the combination of Kosova Petrol’s continuance in operation and UNMIK’s failure to provide any definitive confirmation of termination in response to KTA’s admittedly “informal inquiry.” Meanwhile, UNMIK apparently operated on the assumption that the UNMIK Permission *had* been terminated, and that it need do nothing further regarding administration of the petrol stations. It is worth recalling

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<sup>108</sup> C-240, Memorandum from the Head of KTA’s Legal Department, 7 March 2005, p. 2.

<sup>109</sup> C-240, Memorandum from the Head of KTA’s Legal Department, 7 March 2005, p. 2.

<sup>110</sup> C-240, Memorandum from the Head of KTA’s Legal Department, 7 March 2005, pp. 2-3.

<sup>111</sup> C-240, Memorandum from the Head of KTA’s Legal Department, 7 March 2005, p. 3.

<sup>112</sup> C-240, Memorandum from the Head of KTA’s Legal Department, 7 March 2005, p. 9 (emphasis added).

<sup>113</sup> RE-5, UNMIK Regulation No. 2005/18, 22 April 2005.

that UNMIK's late 2001 Termination Letter had already indicated a belief that the next step would be organization of a tender for new authorizations to operate the petrol stations, and since KTA's establishment in June 2002, the organization of tenders for all socially owned property fell under KTA's authority, not UNMIK's residual authority.

133. In other words, it appears that while KTA assumed UNMIK was still in charge of Kosova Petrol issues (because UNMIK had provided no concrete evidence of terminating the UNMIK Permission, in response to KTA's informal inquiry), UNMIK assumed KTA was responsible for any next steps (because the UNMIK Permission had been terminated and KTA, rather than UNMIK, was in charge of further administration of SOEs and their assets). In this confused environment, the matter apparently fell through the bureaucratic cracks. The upshot was that Kosova Petrol continued in *de facto* possession and operation of the petrol stations, in the meantime paying no rent to anyone at all.
134. The record reflects that KTA made no further inquiry until its Action Memorandum of 15 June 2006, when it formally requested clarification of the status of the UNMIK Permission. In addition to asking UNMIK whether it had ever terminated the UNMIK Permission (as discussed in Section VI(D) above), KTA asked about "Jurisdiction – UNMIK v KTA." Specifically, it stated that based on the 2002 and 2005 KTA Regulations, "it would appear that these assets, *prima facie*, would fall within the jurisdiction of the KTA" and "KTA could be considered as having an obligation to fulfil its mandate" in respect of them.<sup>114</sup> KTA stated that "[t]his action has now become more sensitive as KTA/Pillar IV is on notice of certain allegations by the workers of Jugopetrol Kosova against Kosova Petrol and Mr. Bedri Selmani as to adherence to the terms of the UNMIK-KP Lease." It noted "increased media speculation as to the administration of the lease and the status of the rental income from these fuel sites."<sup>115</sup>
135. As discussed above, UNMIK legal advisor Mr. Borg-Olivier responded to the KTA on 15 August 2006, in a memo which stated that UNMIK had terminated the UNMIK Permission in December 2001. While Mr. Borg-Olivier said that his office had been unable to locate signed copies of the final Termination Letter, he attached the Draft Termination Letter which had been cleared by his office in December 2001.<sup>116</sup> The UNMIK Legal Adviser also confirmed that while DTI, KTA's predecessor, had not commenced the tender procedure as originally planned – probably because "attention became focused on the establishment of the KTA and the development of all the related legal and organizational framework" – it was "evident that KTA as the successor of DTI has the administrative control over the assets in question and is obliged to administer these assets in accordance with its obligations under the KTA

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<sup>114</sup> R-52, Action Memorandum, 15 June 2006, pp. 2, 3.

<sup>115</sup> R-52, Action Memorandum, 15 June 2006, p. 3.

<sup>116</sup> R-19, pp. 2-3, Note from the UNMIK Legal Adviser to the Acting SRSB, 14 August 2006).

Regulation.”<sup>117</sup> Finally, the UNMIK Legal Adviser suggested that KTA, “as part of its fiduciary responsibilities for SOE assets, ... establish the precise status of amounts outstanding and owed by Kosova Petrol and ... establish a strategy for collecting same.”<sup>118</sup>

136. During the Closing Arguments in this matter, Kosovo argued that if UNMIK did not affirmatively terminate the UNMIK Permission in late 2001, that document still would have terminated as a matter of law in 2002, when responsibility for socially owned property shifted to KTA.<sup>119</sup> While the Tribunal has found it more likely than not that UNMIK *did* send a final version of the Termination Letter to Mr. Selmani in late 2001 – albeit with a significant direction that he should continue to operate the petrol stations until “they are ready to be handed over to the successful tender bidders and recipients of licenses”<sup>120</sup> – it is unable to accept Kosovo’s further proposition that the 2002 establishment of KTA *automatically* terminated the UNMIK Permission in any event. As the exchanges above make clear, there was substantial confusion between UNMIK and KTA during these years regarding which body was supposed to be dealing with Kosovo Petrol matters. Indeed, KTA initially seemed to entertain the possibility that UNMIK might have retained responsibility for these matters unless and until it affirmatively terminated the UNMIK Permission. Only in 2006 did it become clear, as between UNMIK and KTA, both that UNMIK considered it *had* effectively terminated the UNMIK Permission in late 2001, and that UNMIK considered the petrol stations to fall under KTA’s administrative authority as socially owned assets. Meanwhile, neither UNMIK nor KTA took any steps in this period to organize a new tender, either for privatization of the underlying SOE land (which KTA had told Mr. Selmani in 2003 would be forthcoming) or for new rental arrangements for the petrol stations, with rent being payable to some form of trust established for the SOE owners.
137. In these circumstances, where there was considerable lack of clarity even as between UNMIK and KTA regarding the status of affairs, it is difficult to accept that Mr. Selmani himself should have known that the establishment of KTA somehow automatically voided the lease-like elements of the UNMIK Permission, and thereby rendered Kosova Petrol in violation of the law simply by remaining in occupation of the various petrol stations. At the same time, there is no justification in the Tribunal’s view for his assuming he could continue in occupation of the stations without paying rent at all to any authority.

## **F. The 2005 Petroleum Law and the New Licensing Regime**

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<sup>117</sup> R-19, p. 2, Note from the UNMIK Legal Adviser to the Acting SRSG, 14 August 2006).

<sup>118</sup> R-19, p. 3, Note from the UNMIK Legal Adviser to the Acting SRSG, 14 August 2006).

<sup>119</sup> Resp. Closing Slides 73-75.

<sup>120</sup> R-19, p. 5, Draft letter from UNMIK Deputy SRSG to Mr. Selmani, 11 December 2001, as edited by the UNMIK Legal Adviser and returned to the UNMIK Deputy SRSG on 14 December 2001.

138. The story is somewhat different with respect to the petroleum trading aspects of the UNMIK Permission. As discussed in Section VI(B) above, the UNMIK Permission had a dual character, with elements both of a lease (an authorization to occupy and use premises owned by others) and of a license (an authorization to trade in petroleum products). The establishment of KTA, discussed in Section VI(E) above, effected a transfer of authority in Kosovo over administration of socially owned property. But the KTA did not have any remit over petroleum-related activities, and therefore could not, in its dealings with Mr. Selmani or otherwise, have any particular insight into whether the separate petroleum licensing aspects of the UNMIK Permission had been obviated by developments in the law.
139. As to that issue, on 7 May 2005, UNMIK Issued Regulation No. 2005/22, which promulgated a new Law on Petroleum and Petroleum Products that the Assembly of Kosovo had adopted (Law No. 2004/5) shortly before (the “**2005 Petroleum Law**”).<sup>121</sup> The 2005 Petroleum Law expressly applied to “all persons engaged in the wholesale, retail, transport, storage or sale of Petroleum and/or Petroleum Products in Kosovo.”<sup>122</sup>
140. Importantly, the 2005 Petroleum Law forbade any engagement in the transport, storage or sale of petroleum products (either wholesale or retail) for commercial purposes, “without a currently valid License” issued by an entity called the Council, a body to be established within the Ministry of Trade and Industry (“**MTI**”).<sup>123</sup> According to Article 61 of the 2005 Petroleum Law, all licenses that had been issued prior to the 2005 Petroleum Law’s entry into force would remain valid for a period of four months; all “Licensed Persons” were required to apply for renewal of licenses in 60 days, complying with the provisions of the new law.<sup>124</sup>
141. Under the 2005 Petroleum Law, the term of all licenses would be two years from the date of issuance and were to be signed by the MTI Minister.<sup>125</sup> Applications would be reviewed by the Council, which were to make a decision to approve or disapprove an application within 30 days of receipt of the application.<sup>126</sup> Under the initial version of the 2005 Petroleum Law, if these 30 days elapsed without approval of an application that otherwise was compliant with a list of required documentation, then the applicant would be considered “presumptively Licensed,” and entitled to receive the license “without delay” upon further application to the Council.<sup>127</sup> This reference

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<sup>121</sup> C-29, 2005 Petroleum Law, 7 May 2005.

<sup>122</sup> C-29, 2005 Petroleum Law, Article 1.2.

<sup>123</sup> C-29, 2005 Petroleum Law, Articles 2 (definition of “Council”), 4.1. As discussed below, the Council was replaced in 2009 by a Licensing Office established within the MTI. C-61 (corrected), Law No. 03/L-138 on Amendment and Supplementation of Law No. 2004/5 on Trade of Petroleum and Petroleum Products in Kosovo, 25 August 2009 (the “**2009 Amendment of the Petroleum Law**”).

<sup>124</sup> C-29, 2005 Petroleum Law, Articles 6.1, 6.2.

<sup>125</sup> C-29, 2005 Petroleum Law, Articles 4.5, 4.7.

<sup>126</sup> C-29, 2005 Petroleum Law, Article 5.5.

<sup>127</sup> C-29, 2005 Petroleum Law, Articles 5.6, 5.7.

to a “presumptive License[]” based on administrative inaction was later deleted in an August 2009 Amendment of the Petroleum Law,<sup>128</sup> which also changed the name “Council” to “Licensing Office.”<sup>129</sup>

142. The 2005 Petroleum Law also originally provided, in Article 7.1, that sixty days prior to the expiration term of a license issued under that Law, the Council would send a licensee written notification of that expiration, and “[a]ny Licensee that intends to continue providing a licenses service beyond the term of the original License may renew its License” by submitting required documentation and a fee.<sup>130</sup> The 2009 amendments to the 2005 Petroleum Law replaced this with a provision stating that “[a]t least sixty (60) [days] before the existing license lapse, the entity is obligated to submit the request for license renew,” adding however that “[i]f the Licensing Office does not make a decision within sixty (60) days from the day the license was submitted for renewal, the entity shall continue to exercise the activity until it receives a response.”<sup>131</sup> Under both the original 2005 Petroleum Law and the 2009 amendments, the Law provided that “[t]o be eligible for renewal of a License, the Licensee must be in substantial compliance with Council’s licensing requirement.”<sup>132</sup>
143. There is no evidence in the record that Kosova Petrol applied for, or was issued, any licenses between 2005 and late January 2008, pursuant to the terms of the 2005 Petroleum Law.<sup>133</sup> The first reference in the record to any license request by Kosova Petrol is in a 29 January 2008 memo from MTI to the UNMIK Customs Service, which discusses the licensing situation going forward, but makes no reference to Kosova Petrol’s status during the preceding several years.<sup>134</sup>
144. Kosovo argues that even if, *arguendo*, the UNMIK Permission was not terminated by UNMIK in December 2001, it automatically terminated shortly after entry into force of the 2005 Petroleum Law, once all prior licenses expired according to Article 6.1 of the new law.<sup>135</sup>

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<sup>128</sup> C-61, Amendment of the Petroleum Law, 25 August 2009, Article 6.6 (deleting paragraph 5.7 of the Petroleum Law as enacted in 2005).

<sup>129</sup> C-61, Amendment of the Petroleum Law, 25 August 2009, Article 3 (amending definitions in Article 2 of the 2005 Petroleum Law).

<sup>130</sup> C-29, 2005 Petroleum Law, Article 7.1.

<sup>131</sup> C-61, Amendment of the Petroleum Law, 25 August 2009, Article 8.1 (replacing language of prior Article 7.1 and adding additional language).

<sup>132</sup> C-29, 2005 Petroleum Law, Article 7.2; C-61, Amendment of the Petroleum Law, 25 August 2009, Article 8 (maintaining the text of prior Article 7.2).

<sup>133</sup> See Cl. Opening Slide 52; Cl. Rebuttal Slides 10-11; Resp. Closing Slides 79, 159-166.

<sup>134</sup> C-51, Letter from the MTI Council to the UNMIK Customs Service, 29 January 2008 (stating that on 29 January 2008, MTI “reviewed the request of [Kosova Petrol], and we have licensed the same for import, storage and wholesale and retail of oil and petroleum products in Kosovo”).

<sup>135</sup> Resp. Rejoinder ¶¶ 33, 54; Resp. Rebuttal Slide 19; Knoll-Tudor Report ¶ 21.

145. Mr. Selmani rejects this contention, arguing that Kosova Petrol had a continuing right to operate under the UNMIK Permission even after the 2005 Petroleum Law, a right which was “reiterated” beginning in 2008 “in the form of licenses.”<sup>136</sup> Mr. Selmani points out that MTI offered no objection in the 2005 to early 2008 period to Kosova Petrol’s continuing operation of the 34 petrol stations that it had run since the UNMIK Permission. In his view, the fact that following Kosovo’s independence in 2008, the MTI issued a number of licenses to Kosova Petrol further confirms that the MTI must have considered the UNMIK Permission still formed a valid and continuing basis for his entitlement to petroleum trading licenses, even under the licensing regime reflected in the 2005 Petroleum Law.<sup>137</sup>
146. In the Tribunal’s view, however, the 2005 Petroleum Law constituted precisely the kind of changed circumstance that the UNMIK Permission itself contemplated would result in a new framework for any Kosova Petrol rights and obligations. It must be recalled that under the UNMIK Permission itself, the authorization granted to trade in petroleum activities was expressly subject to eventual replacement by another form of licensing once such a system was developed. As discussed in Section VI(B) above, the UNMIK Permission made clear that Kosova Petrol was not guaranteed the issuance of later licenses, but would “need to apply” for them as a “crucial formality,” and that issuance of later licenses would be subject to its doing so and to its “having fulfilled the requirements” that would be set forth in the future licensing regime.<sup>138</sup>
147. The Tribunal thus considers that even had the UNMIK Permission not been expressly terminated in late 2001 (which the Tribunal considers most likely did occur), the license aspects of the UNMIK Permission ceased to be operative four months after entry into force of the 2005 Petroleum Law, when by that Law’s own Article 6, all prior licenses lost their validity. The fact that the MTI did not enforce Article 6 against Kosova Petrol, which in effect allowed it to continue operating without any legally valid licenses for the next several years, did not constitute a binding acceptance by MTI that the UNMIK Permission itself sufficed as an alternate form of license. The Tribunal addresses separately, in Section VI(J) below, the period beginning in late January 2008.
148. In any event, it is undisputed that Kosova Petrol continued *de facto* to operate the petrol stations in the interim. According to Mr. Selmani, by 2008 Kosova Petrol had “cemented its position as a leading retailer of petroleum products in Kosovo.”<sup>139</sup>

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<sup>136</sup> Tr. Hearing Day 1 Shelbaya 31:1-5.

<sup>137</sup> Cl. Closing, Slide 119; Tr. Closing Day 1 Shelbaya 47:3-7 (“after ten years of granting this permission and at least five years since independence, suddenly the same document that used to be fine as evidence of title to obtain a retail license is suddenly no longer fine”).

<sup>138</sup> C-8, UNMIK Permission, 25 January 2000, p. 2.

<sup>139</sup> First Selmani Statement, ¶ 53.



### G. The 2006 LFI

149. On 28 April 2006, UNMIK issued Regulation No. 2006/28 on the Promulgation of the Law of Foreign Investment Adopted by the Assembly of Kosovo, confirming the entry into force of Law No. 02/L-33 on Foreign Investment, subject to certain SRSG amendments of the version adopted by the Assembly of Kosovo on 21 November 2005 (the “**2006 LFI**”).<sup>140</sup>
150. One of the provisions changed by the SRSG was the definition of “Foreign Person,” which was relevant to the 2006 LFI’s definition of “Foreign Investor.” In the version adopted by the Assembly of Kosovo – at least according to the English version which the SRSG amended<sup>141</sup> – “Foreign Person” was defined *inter alia* as “a physical person who is a citizen of, or who has legal permanent resident status in, a foreign state or geographic territory outside Kosovo.”<sup>142</sup> The SRSG determined that for purposes of conformity with UNSC Resolution 1244, the definition “shall be revised to read” as follows: “a physical person who is not a habitual resident of Kosovo, or who has citizenship or legal permanent resident status outside of Kosovo.”<sup>143</sup>
151. Other provisions of the 2006 LFI are discussed herein as relevant to the dispute. Of note, however, is that unlike the 2001 UNMIK Investment Regulation described in Section VI(C) above – which was expressly repealed upon entry into force of the 2006 LFI<sup>144</sup> – the 2006 LFI provided foreign investors with a right to require that “an investment dispute” be resolved through international arbitration, including under the ICC Rules.<sup>145</sup>
152. Kosovo says that Mr. Selmani himself was a “sponsor” of a 2004 draft of the 2006 LFI.<sup>146</sup>
153. The 2006 LFI remained in effect until Kosovo declared independence in 2008, and as discussed in Section VI(H) below, the new Republic of Kosovo then accepted to continue in effect legislation from the pre-independence period.

### H. Kosovo’s Independence and Agreement to Adopt Certain Obligations

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<sup>140</sup> CL-2, UNMIK Regulation No. 2006/28 on the Promulgation of the Law of Foreign Investment Adopted by the Assembly of Kosovo, as entered into force on 28 April 2006.

<sup>141</sup> Claimant’s expert Mr. Klawonn has testified that the 2006 LFI was drafted in English, Tr. Hearing Day 6, Kalicki/Klawonn, 89:18-89:2.

<sup>142</sup> CL-2, Law No. 02/L-33, prior to SRSG amendment.

<sup>143</sup> CL-2, UNMIK Regulation No. 2006/28, paragraph B(b)(a) (amending the definition of “Foreign Person”

<sup>144</sup> CL-2, 2006 LFI, Article 25.

<sup>145</sup> CL-2, 2006 LFI, Article 16.2.

<sup>146</sup> Resp. Rejoinder ¶¶ 453-455; Resp. Closing, Slide 116.

154. On 26 March 2007, United Nations Special Envoy Mr. Martti Ahtisaari submitted to the United Nations the Comprehensive Proposal for the Kosovo Status Settlement (the “**Comprehensive Proposal**,” also known as the “**Ahtisaari Plan**”), proposing a solution for the final status of Kosovo.<sup>147</sup>
155. The Comprehensive Proposal provided that during a 120 day transition period after its entry into force, UNMIK would continue to exercise its mandate.<sup>148</sup> Thereafter, “UNMIK’s mandate shall expire and all legislative and executive authority vested in UNMIK shall be transferred *en bloc* to the governing authorities of Kosovo ....”<sup>149</sup> In order to “ensure an orderly transition of the legal framework currently in force,” however, “UNMIK Regulations promulgated by the SRSC ..., including Administrative Directions and Executive Decisions issued by the SRSG, and promulgated laws adopted by the Assembly of Kosovo shall continue to apply ... until they are revoked or replaced by legislation regulating the same subject matter.”<sup>150</sup> Kosovo would also “continue to be bound ... by all international agreements and other arrangements in the area of international cooperation that were concluded by UNMIK for and on behalf of Kosovo,” and “[f]inancial obligations undertaken by UNMIK for and on behalf of KOSOVO under these agreements or arrangements shall be respected by Kosovo.”<sup>151</sup>
156. As relevant to this dispute, the Comprehensive Proposal stated that “socially owned enterprises (SOEs) and their assets, currently under the jurisdiction of the Kosovo Trust Agency (KTA),” would be regulated as set for in Annex VII.<sup>152</sup> Annex VII provided that KTA should continue to exercise “trusteeship” for such assets, which would include a “privatization process of SOEs ... to be carried out with transparency.”<sup>153</sup> Final determinations of ownership of SOEs and adjudication of claims “shall continue to be handled” by the Special Chamber within the Supreme Court established for this purpose by UNMIK Regulation 2002/13.<sup>154</sup>
157. The Comprehensive Proposal was never formally adopted by the UN Security Council, due to opposition by Russia. Nonetheless, when the Kosovo Assembly adopted the Kosovo Declaration of Independence on 17 February 2008, that Declaration stated, “[w]e accept fully the obligations for Kosovo contained in the Ahtisaari Plan, and welcome the framework it proposes to guide Kosovo in the years ahead. We shall implement in full those obligations ....”<sup>155</sup> The Declaration of

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<sup>147</sup> C-290, Letter from the Secretary-General addressed to the President of the Security Council, Addendum, Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1, 26 March 2007.

<sup>148</sup> C-290, Comprehensive Proposal, Article 15.1(a).

<sup>149</sup> C-290, Comprehensive Proposal, Article 15.1(g).

<sup>150</sup> C-290, Comprehensive Proposal, Article 15.2.1.

<sup>151</sup> C-290, Comprehensive Proposal, Article 15.2.2.

<sup>152</sup> C-290, Comprehensive Proposal, Article 8.4.

<sup>153</sup> C-290, Comprehensive Proposal, Annex VII, Article 2.1 and note 10.

<sup>154</sup> C-290, Comprehensive Proposal, Annex VII, Article 3.1

<sup>155</sup> C-238, Kosovo Declaration of Independence, 17 February 2008, ¶ 3.

Independence further stated that “[w]e hereby undertake the international obligations of Kosovo, including those concluded on our behalf by [UNMIK]...”<sup>156</sup>

158. The Constitution of the Republic of Kosovo was enacted on 15 June 2008.<sup>157</sup> Article 145 of the Constitution confirmed as follows with regards to continuity of international agreements and domestic legislation:

1. International agreements and other acts relating to international cooperation that are in effect on the day this Constitution enters into force will continue to be respected until such agreements or acts are renegotiated or withdrawn from in accordance with their terms or until they are superseded by new international agreements or acts covering the same subject areas and adopted pursuant to this Constitution.
2. Legislation applicable on the date of the entry into force of this Constitution shall continue to apply to the extent it is in conformity with this Constitution until repealed, superseded or amended in accordance with this Constitution.<sup>158</sup>

159. It appears undisputed that, in consequence of Article 145(2) of the Constitution, the 2006 LFI remained in effect in the new Republic of Kosovo, until it was expressly terminated and replaced on 24 January 2014 by Law No. 04/L-220 on Foreign Investment (as previously defined, the “**2014 LFI**”).<sup>159</sup>

## **I. The Establishment of PAK**

160. Following independence, the Privatization Agency of Kosovo (“**PAK**”) was established in May 2008, by virtue of Law No. 03/L-067 (the “**2008 PAK Law**”).<sup>160</sup> The Assembly of Kosovo stated in the preamble to the 2008 PAK Law that it intended such legislation to comply with the Comprehensive Proposal; that it understood there could be substantial complexities sorting out “potentially conflicting ownership claims” over enterprises and assets that were in social ownership on or after 31 December 1988; and that “persistent legal uncertainty as to the ownership of such enterprises and assets is greatly impairing investment in, and the operation of, those ownership and assets.”<sup>161</sup> In order to address these concerns, the Assembly stated that the PAK was being established and provided “with broad administrative

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<sup>156</sup> C-238, Kosovo Declaration of Independence, 17 February 2008, ¶ 9.

<sup>157</sup> RE-7, Constitution of the Republic of Kosovo, 15 June 2008.

<sup>158</sup> RE-7, Constitution of the Republic of Kosovo, 15 June 2008, Article 145.

<sup>159</sup> CL-3, Law No. 04/L-220 on Foreign Investment, adopted by the Assembly of Kosovo on 30 December 2013, entered into force on 24 January 2014.

<sup>160</sup> RL-23, Law No. 03/L-067 on the Privatization Agency of Kosovo, 15 June 2008.

<sup>161</sup> RL-23, Law No. 03/L-067 on the Privatization Agency of Kosovo, 15 June 2008, p. 1.

authority over such enterprises and such assets, including, but not limited to, the mandate and authority to sell or otherwise transfer [them] to private investors, or liquidate them, in an open, transparent and competitive process and without delay.”<sup>162</sup>

161. Under Article 1 of the 2008 PAK Law, the PAK was established as an “independent public body” to serve as “the successor” of the KTA, and “all assets and liabilities of the latter shall be assets and liabilities of the [PAK].”<sup>163</sup> Accordingly, PAK was provided with authority to administer “Socially-owned Enterprises” and socially-owned property, “in trust for the benefit of the relevant Owners and Creditors.”<sup>164</sup> The Special Chamber of the Supreme Court (the “**Special Chamber**” or “**SCSC**”) was provided with exclusive jurisdiction for all suits against the PAK.<sup>165</sup>
162. The 2008 PAK Law provided that “UNMIK Regulation 2002/12, as amended, will cease to have legal effect on the date the present law enters into force,” but PAK “takes over all liabilities that it or its predecessor may have incurred” under the prior regulation.<sup>166</sup>
163. Notably, UNMIK did not initially recognize PAK as the successor of the KTA. The issue remained in contention between UNMIK and Kosovo until PAK’s status as the successor of KTA was confirmed by the Constitutional Court of Kosovo in a judgment on 31 March 2011.<sup>167</sup> The Constitutional Court found that any rulings to the contrary, for example by the Appellate Panel of the Special Chamber of the Supreme Court, “simply continue[] to ignore the existence of Kosovo as an independent State and the legislation emanating from its Assembly.”<sup>168</sup> This included Article 145 of the Constitution, which provided that prior legislation (such as that establishing and empowering KTA) would continue to apply only “until repealed, superseded or amended in accordance with this Constitution.” The Constitutional Court stated, “[a]s the final interpreter of the Constitution,” that UNMIK Regulation 2002/12, which was repealed by Article 31 of the PAK Law, was therefore “no longer applicable.”<sup>169</sup>
164. Roughly six months later, on 21 September 2011, the Parliament enacted a new PAK Law (the “**2011 PAK Law**”).<sup>170</sup> While Article 5 of the 2011 PAK Law, as Kosovo points out, retained PAK’s “exclusive administrative authority over ... socially-

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<sup>162</sup> RL-23, Law No. 03/L-067 on the Privatization Agency of Kosovo, 15 June 2008, p. 1.

<sup>163</sup> RL-23, Law No. 03/L-067 on the Privatization Agency of Kosovo, 15 June 2008, Article 1.

<sup>164</sup> RL-23, Law No. 03/L-067 on the Privatization Agency of Kosovo, 15 June 2008, Articles 2.2, 5.1.

<sup>165</sup> RL-23, Law No. 03/L-067 on the Privatization Agency of Kosovo, 15 June 2008, Article 30.1.

<sup>166</sup> RL-23, Law No. 03/L-067 on the Privatization Agency of Kosovo, 15 June 2008, Article 31.2, 31.3.

<sup>167</sup> CE3-19, Case No. KI 25/10 dated 31 March 2011 by the Constitutional Court of the Republic of Kosovo.

<sup>168</sup> CE3-19, Case No. KI 25/10 dated 31 March 2011 by the Constitutional Court of the Republic of Kosovo, ¶ 53.

<sup>169</sup> CE3-19, Case No. KI 25/10 dated 31 March 2011 by the Constitutional Court of the Republic of Kosovo, ¶¶ 58, 59.

<sup>170</sup> C-201, Law No. 04/L-034 on the Privatization Agency of Kosovo.

owned Enterprises,” Mr. Selmani contends that “the analysis cannot stop there,” and suggests that the preamble to the Law recognizes that the status of SOE property may be uncertain and therefore subject to PAK investigations. Mr. Selmani also says that Article 5 should be read together with Article 15.2.17, which provides that a qualified majority of the PAK Board of Directors may decide whether “an individual Enterprise or defined group of Enterprises shall be considered by the Agency as satisfying the requirements of Article 5.” As discussed further herein, Mr. Selmani’s position, based on the opinion of his expert Mr. Klawonn, is that “no authority can be exercised by the PAK over any enterprise or asset, prior to the completion of the investigations as to the legal status of such enterprise or asset” under Article 15.2.17.<sup>171</sup> Kosovo disagrees, contending that PAK’s authority to administer assets it reasonably believed to be socially owned, in trust for the ultimate owners, was independent of a final determination of their status.<sup>172</sup> The Tribunal returns to this issue in Section VI(K) below.

#### **J. The MTI’s Issuance of Petroleum Licenses to Kosova Petrol, 2008-2011**

165. While Kosovo’s independence led to a change in the legal authority governing administration of socially-owned property (from KTA to PAK), it did not change the legal regime governing issuance of petroleum licenses, which continued to be regulated by the 2005 Petroleum Law. As previously discussed, the 2005 Petroleum Law required all participants in the petroleum sector to apply for and obtain two-years licenses issued by the MTI.
166. The extent to which Kosova Petrol appropriately applied and held these licenses is disputed by the Parties.
167. The first evidence of any MTI license to Kosova Petrol predates Kosovo’s Declaration of Independence by a few weeks, and therefore falls under the “Provisional Institutions of Self Government” rather than as an act of the newly independent Republic of Kosovo. On 29 January 2008, the Head of MTI’s Council sent a memorandum to the UNMIK Customs Service, entitled “Notification regarding the licensing of the company ‘Kosova Petrol’ from Pristina for general import.” The memorandum states that at a meeting that day, the MTI Council had reviewed Kosova Petrol’s request and had “licensed the same for import, storage and wholesale and retail of oil and petroleum products in Kosovo.” The memorandum acknowledged that “the license for technical reasons has not yet been handed to the company in question,” but asked the UNMIK Customs Service to treat Kosova Petrol as duly

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<sup>171</sup> Cl. Reply ¶¶ 53-57; Klawonn Report ¶ 60. *See also* SoD ¶¶ 144-147.

<sup>172</sup> SoD ¶¶ 162-163.

licensed, *i.e.*, “to make it possible for the business entity to import until we hand out the licenses.”<sup>173</sup>

168. Kosovo disputes that this letter constitutes a license.<sup>174</sup> Nonetheless, the Head of the MTI Council clearly sought to convey that Kosova Petrol was operating with permission, until such time as MTI could issue it with formal licenses.
169. Beginning in early 2009 and through early 2011, the MTI did issue Kosova Petrol with a number of licenses, relating to various petrol stations. Mr. Selmani has furnished evidence of the following licenses signed by MTI’s then-Minister Lutfi Zharku: (a) a 10 February 2009 license for retail sales at the Pristina II station, and expiring on 10 February 2011;<sup>175</sup> (b) three 3 March 2009 licenses for import, wholesale and storage activities, respectively, each expiring on 3 March 2011;<sup>176</sup> (c) 4 August and 25 August 2009 licenses for retail sales at two other Pristina stations, expiring on 4 August 2011 and 25 August 2011, respectively;<sup>177</sup> and (d) four 25 June 2010 licenses for retail sales at various stations, each expiring on 25 June 2012.<sup>178</sup> Mr. Selmani argues that he was issued additional similar licenses for other petrol stations, but no longer has access to the documentation.<sup>179</sup>
170. In February 2011, Ms. Mimoza Kusari-Lila assumed the position of MTI Minister, after a period of several months in which the position had been vacant due to the fall of the prior Government in November 2010.<sup>180</sup> Ms. Kusari-Lila has testified that in the first few months of her tenure, she worked through “piles” of accumulated documents waiting for her signature, without reviewing the underlying documentation, due to the need to process the backlog quickly and on an assumption that the previous administration had properly reviewed the requests.<sup>181</sup>
171. The record reflects a number of Kosova Petrol licenses bearing Ms. Kusari-Lila’s signature. These include: (a) seven retail licenses with an issuance date of 1 October 2010 and an expiry date of 1 October 2012, which Ms. Kusari-Lila says were prepared before the fall of the prior Government, and which she actually signed in February

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<sup>173</sup> C-51, Letter from the MTI Council to the UNMIK Customs Service, 29 January 2008.

<sup>174</sup> Resp. Closing Slide 168.

<sup>175</sup> C-316, Retail License No. 926 (Pristina II), 10 February 2009. The English translation inaccurately states that this 2009 license was signed by Minister Mimoza Kusari-Lila, but this evidently is an error, as the original language document clearly bears the name of the prior Minister, and Ms. Kusari-Lila did not assume the Minister position until February 2011.

<sup>176</sup> C-52, Import License No. 932, 3 March 2009; C-53, Wholesale License No. 934, 3 March 2009; C-54, Storage License No. 933, 3 March 2009.

<sup>177</sup> C-57, Kosova Petrol Retail Licenses, pp. 1-4.

<sup>178</sup> C-57, Kosova Petrol Retail Licenses, pp. 5-14.

<sup>179</sup> Tr. Hearing Day 1 Shelbaya 109:5-17.

<sup>180</sup> First Kusari-Lila Statement ¶¶ 6, 12.

<sup>181</sup> First Kusari-Lila Statement ¶¶ 22-23, 31; Tr. Hearing Day 3 Kusari-Lila/Shelbaya 43:1-45:9.

2011;<sup>182</sup> (b) a 1 February 2011 retail license, expiring on 1 February 2013, with an attached 1 February 2011 Decision of the Licensing Office;<sup>183</sup> (c) several 7 February 2011 retail licenses, expiring on 7 February 2013, each accompanied by a 7 February 2011 Decision of the Licensing Office;<sup>184</sup> and (d) 8 March 2011 licenses for import and wholesale activities, each expiring on 8 March 2013.<sup>185</sup> The Licensing Office Decisions that accompany the February 2011 retail licenses each state that the Office found Kosova Petrol had attached the documentation necessary for obtaining a license, and accordingly that after it submits proof of payment of the required license fee, “as well as the signing of the license by the minister, the company in question can withdraw the same.”<sup>186</sup>

172. Ms. Kusari-Lila signed no further licenses for Kosova Petrol after March 2011. Mr. Selmani relies, however, on the fact that the MTI Licensing Office issued a series of Decisions issued in April and May 2011,<sup>187</sup> and again in October 2011,<sup>188</sup> each with the same standard language above – *i.e.*, that the Office had approved Kosova Petrol’s application for license renewal, and that Kosova Petrol could obtain the associated licenses after payment of the relevant fee and signature by the Minister. In Mr. Selmani’s view, these Decisions operated effectively as a grant of his license applications, particularly in the absence of any official rejection of those applications by the Minister.<sup>189</sup> Kosovo contests this interpretation, arguing that the Decisions were simply an internal step in the MTI approval process, which was a predicate for issuance of a Minister-approved license but which carried no official imprimatur on their own.<sup>190</sup>

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<sup>182</sup> C-57, Kosova Petrol Retail Licenses, pp. 15-28; First Kusari-Lila Statement ¶ 22.

<sup>183</sup> C-317, Retail License No. 1643 (Vushtrri I), 1 February 2011, with Decision of the Licensing Office, 1 February 2011.

<sup>184</sup> C-318, Retail License No. 1644 (Prizren I), 7 February 2011, with Decision of the Licensing Office, 7 February 2011; C-319, Retail License No. 1645 (Dragash I), 7 February 2011, with Decision of the Licensing Office, 7 February 2011; C-320, Retail License No. 1646 (Prizren II), 7 February 2011, with Decision of the Licensing Office, 7 February 2011; *see also* C-57, Kosova Petrol Retail Licenses, pp. 29-30.

<sup>185</sup> C-55, Import License No. 932-V1, 8 March 2011; C-56, Wholesale License No. 934-V1, 8 March 2011.

<sup>186</sup> C-318, Decision of the Licensing Office, 7 February 2011; C-319, Decision of the Licensing Office, 7 February 2011; C-320, Decision of the Licensing Office, 7 February 2011.

<sup>187</sup> R-166, Decisions of the MTI Licensing Office, undated; C-321, Decision of the MTI Licensing Office No. 215, accompanied by draft license (Ferizaj III), 22 April 2011; C-322, Decision of the MTI Licensing Office No. 216, accompanied by draft license (Ferizaj II), 22 April 2011; C-323, Decision of the MTI Licensing Office No. 217, accompanied by draft license (Ferizaj I), 22 April 2011; C-324, Decision of the MTI Licensing Office No. 218, accompanied by draft license (Lipjan), 22 April 2011; C-325, Decision of the MTI Licensing Office No. 227, accompanied by draft license (Pristina I), 3 May 2011; C-326, Decision of the MTI Licensing Office No. 228, accompanied by draft license (Pristina III), 3 May 2011; C-327, Decision of the MTI Licensing Office No. 252, accompanied by draft license (Gjilan 2), 10 May 2011; C-328, Decision of the MTI Licensing Office No. 250, accompanied by draft license (Viti), 10 May 2011; C-329, Decision of the MTI Licensing Office No. 262, accompanied by draft license (Kacanik), 11 May 2011; C-330, Decision of the MTI Licensing Office No. 286, accompanied by draft license (Rahovec), 27 May 2011.

<sup>188</sup> R-166, Decisions of the MTI Licensing Office, undated.

<sup>189</sup> Cl. Closing Slides 35-37; Tr. Closing Day 1 Shelbaya 36:22-43:19.

<sup>190</sup> SoD ¶ 171; Resp. Closing Slides 172-173; Tr. Closing Day 1 Pekar 222:20-224:13.

173. The Tribunal observes that the requirement of a ministerial signature was reflected not only in the original 2005 Petroleum Law, but also in the 2009 amendments to that Law. Article 3 of Law No. 03/L-138, on “Amendment and Supplementation” of the 2005 Petroleum Law, provided in Article 3 that the “Licensing Office is established within the MTI with civil servants, responding to the Minister”; that the “[m]ain activity of the Licensing Office is to issue, extend, dismiss, to amend or revoke licenses in compliance with this law”; but that “[l]icenses shall be signed by Minister.”<sup>191</sup>
174. The same division of authority was reflected in an April 2010 Administrative Instruction issued by the MTI (the “**2010 MTI Administrative Instruction**”),<sup>192</sup> which provided that:
- a. applicants for licenses would submit to the Licensing Office all required documentation – including, *inter alia*, “[a]n evidence sheet or a contract on property usage according to the license term”;<sup>193</sup> and
  - b. the MTI, “through the Licensing Office shall issue the License after the conditions are fulfilled,” “in a standard form that will [be] prescribed” by the MTI, and this standard-form “License shall be signed by the Minister of Trade and Industry.”<sup>194</sup>

The 2010 Administrative Instruction further provided that after an application for a license was submitted (which was supposed to be at “at least 60 days” before expiry of any prior license),<sup>195</sup> a “body that is authorized by the Minister” was to conduct a verification of the evidence presented by the applicant to determine its compliance with applicable requirements.<sup>196</sup> Upon reviewing the report of this verification process, “[t]he Minister, within 60 days from the application by the interested entity, shall take decision on authorization.”<sup>197</sup>

175. On the basis of this structure, the Tribunal concludes that the final decision on licensing was entrusted to the MTI Minister, and not to the Licensing Office. This is further confirmed by the text of the various Licensing Office Decisions themselves, which – as noted above – each stated that Kosova Petrol could obtain the license to which the Decision referred, after “the signing of the license by the minister.” Nothing

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<sup>191</sup> C-61, Amendment of the Petroleum Law, 25 August 2009, Articles 3.1, 3.2 and 3.3.

<sup>192</sup> MTI Administrative Instruction No. 07/2010 on Defining the Petroleum and Petroleum Products, the Licensing Procedures and Licensing Types of the Entities that Exercise the Activity in the Fuel Sector, 28 April 2010.

<sup>193</sup> 2010 MTI Administrative Instruction, Art. 4.1.

<sup>194</sup> 2010 MTI Administrative Instruction, Arts. 7.1, 7.2 and 7.3.

<sup>195</sup> 2010 MTI Administrative Instruction, Art. 13.

<sup>196</sup> 2010 MTI Administrative Instruction, Arts. 14, 15.

<sup>197</sup> 2010 MTI Administrative Instruction, Art. 17.



in the Petroleum Law, the 2010 Administrative Instructions, or the relevant Decisions suggests that the MTI Minister was *required* to sign a license prepared for her signature by the Licensing Office, much less that without her signature, the Licensing Office's Decisions standing alone would be treated as having the same legal effect, whether or not the Minister subsequently signed the license. To the contrary, the Tribunal considers that such an interpretation would render otiose the several references to licenses being signed by the Minister. In these circumstances, the Tribunal concludes that the April-May and October 2011 Licensing Office Decisions on which Mr. Selmani relies were not sufficient on their own to constitute valid licenses (or the functional equivalent of such licenses) under the law of Kosovo.

176. At the same time, there is no evidence that the Ministry ever communicated to Kosova Petrol any decision by Minister Kusari-Lila to *reject* Kosova Petrol's 2011 license applications. In these circumstances, while the Licensing Office's recommendations that Kosova Petrol's applications be granted did not themselves equate to a *grant* of new two-year licenses, the Minister's silence following those recommendations arguably did allow Kosova Petrol some latitude under the 2009 Amendment of the Petroleum Law to "continue to exercise the activity" until it received a further response, just as that Amendment provided with respect to decisions of the Licensing Office itself.<sup>198</sup> In other words, having been previously in possession of licenses that were valid until various dates in 2011; having received notice of Decisions indicating that the Licensing Office had approved its applications for renewal; and not having received any notice thereafter that the Minister thereafter had rejected its applications, Kosova Petrol cannot be said to have acted *in violation* of the Petroleum Law in continuing to trade in petroleum products for some time after the expiry of its prior licenses. It remains unclear why Kosova Petrol did not chase the MTI in this period for issuance of formal licenses in addition to the Decisions, but the Tribunal accepts that in the absence of notification of a rejection, Mr. Selmani could have understood the Petroleum Law to have granted him tacit permission to continue to operate in these circumstances.
177. With that said, it is undisputed that the *last* of the license applications on which Kosova Petrol did not receive any ministerial decision was filed in 2011, so Mr. Selmani could not have legitimately believed that the Minister's silence on the applications provided rights beyond a further two-year period. This is confirmed by the fact that in 2013, Kosova Petrol filed a *new* set of license applications with MTI, seeking the right to conduct petroleum trading activities for new two year terms beginning in that year.

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<sup>198</sup> C-61, Amendment of the Petroleum Law, 25 August 2009, Article 8.1 (providing that "[i]f the *Licensing Office* does not make a decision within sixty (60) days from the day the license was submitted for renewal, the entity shall continue to exercise the activity until it receives a response") (emphasis added).

178. As discussed in Section VI(M) below, Kosova Petrol’s applications in 2013 for new petroleum trading licenses were ultimately rejected, albeit for reasons that the Parties in this case dispute.

**K. The PAK “Usurpers” List and Efforts to “Release” Property**

179. Before turning to the 2013 MTI license applications, however, it is necessary to discuss several unrelated events that transpired beginning in 2012. On Mr. Selmani’s case, it was in that year that PAK embarked on a campaign to deprive Mr. Selmani of his investments. In Kosovo’s version of events, PAK – which, as discussed above, was responsible for administering SOEs and their property in trust for the benefit of owners and creditors<sup>199</sup> – began working to regain control of numerous socially owned properties that in its view had been occupied illegally. This included, but did not single out, the petrol stations which Kosova Petrol occupied.
180. The first disputed action by PAK arises out of its apparent development of a list, beginning in late 2011, of so-called “usurpers” of socially owned property, against whom action eventually would have to be taken. In early 2012, several press articles reported the existence of such a “usurpers” list (without publishing the list itself),<sup>200</sup> and quoted certain unnamed PAK officials as including Kosova Petrol on the list, referring to its occupation of the various INA and Jugopetrol petrol stations.<sup>201</sup>
181. As discussed in Section IX(A)2(b) below, Kosovo argues that it cannot be held responsible for articles in the independent media, purporting to quote anonymous sources which cannot be proven to have originated from PAK. In any event, Kosovo argues that it was appropriate to include Kosova Petrol on a “usurpers” list, because Mr. Selmani continued to operate the petrol stations without seeking any lease arrangement with PAK, which had administrative authority over the stations, and without having offered or paid any rent for the petrol stations for many years.<sup>202</sup> Mr. Selmani, by contrast, argues that he should not have been listed as a usurper of socially owned property, as the UNMIK Permission precluded such qualification.<sup>203</sup>
182. The Parties also disagree on whether PAK needed to complete an internal determination process regarding INA and Jugopetrol assets before it could conclude that the stations in question were socially owned and as such within PAK’s authority

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<sup>199</sup> RL-23, Law No. 03/L-067 on the Privatization Agency of Kosovo, 15 June 2008, Articles 2.2, 5.1.

<sup>200</sup> In February 2016, PAK released on its website a list of “Current and Previous usurpers of the social-owned enterprise assets,” including various petrol stations at issue in this case. C-87; First Ramajli Statement ¶¶ 15-17.

<sup>201</sup> C-35, Parim Olluri, 'Kosova Petrol 'Occupying' Croatian Property Balkan Insight, 21 February 2012; C-36, 'Kosova Petrol 'Occupying' Croatian Property' Pristina Insight, 16 February-2 March 2012; C-37, Parim Olluri, 'Bedri Selmani Owes Millions of Euros to the State' JNK, 9 April 2012; SoD ¶¶ 156-158; Cl. Reply ¶¶ 45-51.

<sup>202</sup> SoD ¶¶ 158-161.

<sup>203</sup> SoC ¶¶ 97-101.

to administer. In Mr. Selmani's submission, the status of the stations had long been unclear by the time PAK assumed authority over them.<sup>204</sup> In Kosovo's submission, PAK's authority to administer the assets was independent of a final determination of their status, and instead follows directly from the 2011 PAK Law. Kosovo describes the status determination process as an internal PAK review process, not a prerequisite for the exercise of authority.<sup>205</sup> Status determination requests were made on 2 October 2012,<sup>206</sup> and internal PAK documentation shows that "it ... expected their final conclusion" to verify that the assets of both entities were considered to be socially owned property.<sup>207</sup>

183. It is not clear whether prior to this arbitration, Kosova Petrol ever argued that PAK lacked authority to administer the petrol stations because it had not yet completed a status determination process to confirm whether the stations historically were socially owned property. At least as of June 2014, following PAK's initiation of open tenders to lease various petrol stations (discussed in Section VI(O) below), Kosova Petrol's main argument to the PAK and the Kosovar courts was different, namely that the stations did not fall within PAK's jurisdiction because Kosova Petrol had a continued right to operate them pursuant to the UNMIK Permission.<sup>208</sup>
184. In any event, the Tribunal considers that PAK *did* have authority to administer property for which it had an objectively reasonable belief that the property had been socially owned prior to December 1998. It must be recalled that UNMIK Regulation No. 2000/54 – which was issued on 27 September 2000 but was expressly retrospective to 10 June 1999,<sup>209</sup> before the UNMIK Permission was issued – had authorized UNMIK to administer all property for which it "has reasonable and objective grounds to conclude that such property" was socially owned.<sup>210</sup> This administration was in the nature of a trust on behalf of the ultimate owners, and was without prejudice to the right of third parties to assert "ownership or other rights" through the competent courts.<sup>211</sup> Nothing in the subsequent UNMIK Regulation No. 2002/12, which on 13 June 2002 established KTA to administer such property

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<sup>204</sup> SoC ¶ 98.

<sup>205</sup> SoD ¶¶ 162-163.

<sup>206</sup> C-257, Status Determination Request 1366 (Jugopetrol), 2 October 2012; C-258, Status Determination Request 0921U (INA), 2 October 2012.

<sup>207</sup> C-267, PAK Internal Report, 10 July 2014.

<sup>208</sup> See for example C-72, Kosova Petrol Statement of Claim to the Special Chamber of the Supreme Court of Kosovo on PAK-related Matters in Case No. C-I-14-0019, 3 June 2014, p. 4; C-73, Letter from Mr. Selmani to the PAK, 3 June 2014.

<sup>209</sup> C-147, UNMIK Regulation No. 2000/54 (amending UNMIK Regulation No. 1999/1), 27 September 2000, Section 7.

<sup>210</sup> C-147, UNMIK Regulation No. 2000/54 (amending UNMIK Regulation No. 1999/1), 27 September 2000, Section 6.1.

<sup>211</sup> C-147, UNMIK Regulation No. 2000/54 (amending UNMIK Regulation No. 1999/1), 27 September 2000, Section 6.2.

“as a “trustee for their Owners,”<sup>212</sup> suggested the imposition of a higher threshold of proof before KTA could act as trustee than had applied to UNMIK. Nor did anything in that subsequent Regulation condition KTA’s administration of particular property on its prior completion of a formal status determination assessment. The same is true for PAK, which was established following Kosovo’s independence to serve as “the successor” of KTA.<sup>213</sup> PAK was given “broad administrative authority” to act “in trust for the benefit of the relevant Owners and Creditors,”<sup>214</sup> even in recognition that there could be substantial complexities in sorting out “potentially conflicting ownership claims” over enterprises and assets that were in social ownership on or after 31 December 1988.<sup>215</sup> This clearly implies that *while* the precise status of particular property was being closely examined, either internally or through challenges in court, PAK could exercise its trustee authority over that property, precisely to preserve the property’s value, to the ultimate benefit of whomever finally was determined to be the legitimate owners and creditors.

185. As relevant to the PAK conduct challenged in this case, it is also worth observing that PAK’s efforts to regularize the use of socially owned property was not specifically targeted at Kosova Petrol. As reflected in a September 2013 memorandum to the PAK Board of Directors, PAK sought generally to develop a list of all SOE assets that could be leased through an open bidding process, “[i]n order to implement PAK Law respectively [to] preserve and enhance SOE value.”<sup>216</sup> On 21 November 2014, PAK issued a decision declaring that all assets of SOEs that fell within PAK jurisdiction “will be released from illegal possession/use/usurpations,” with PAK’s regional offices thereafter obliged to execute the decision with respect to usurped assets listed in the PAK database, including with the assistance of the Kosovo Police to the extent needed.<sup>217</sup>
186. On 15 December 2014, PAK adopted its Guideline for Releasing of the Assets of Socially Owned Enterprises from Usurpers (Illegal Users) (the “**2014 PAK Guidelines**”). This was an internal guideline intended to “determine the steps and procedures for releasing of the assets of [SOEs] which are subject of usurpation ... and/or continue to be used without any legal basis” or authorization by the SOE or by PAK.<sup>218</sup> The 2014 PAK Guidelines defined as “[u]surpers/illegal users” anyone “who without legal basis uses any asset which is property of [SOEs] and who refuses to pay

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<sup>212</sup> RL-22, UNMIK Regulation No. 2002/12 on the Establishment of the Kosovo Trust Agency, 13 June 2002, Sections 1, 2.1, 2.2(a).

<sup>213</sup> RL-23, Law No. 03/L-067 on the Privatization Agency of Kosovo, 15 June 2008, Article 1.

<sup>214</sup> RL-23, Law No. 03/L-067 on the Privatization Agency of Kosovo, 15 June 2008, Articles 2.2, 5.1.

<sup>215</sup> RL-23, Law No. 03/L-067 on the Privatization Agency of Kosovo, 15 June 2008, p. 1.

<sup>216</sup> C-265, Memorandum to the Board of Directors of the PAK, September 2013.

<sup>217</sup> R-68, PAK Decision No. 270/2014, 21 November 2014.

<sup>218</sup> R-69, Guidelines for releasing of the assets of socially owned enterprises from usurpers (illegal users), 10 December 2014, p. 1.

the lease for using the asset.”<sup>219</sup> They envisioned a process by which PAK would inform a “usurper/illegal user” that an asset was under PAK jurisdiction and a process of “releasing the property is ongoing, but extend to illegal users a pathway to cure their illegal use, if they recognized PAK authority and agreed within 15 days to enter into a new lease contract with PAK.”<sup>220</sup>

187. Fourteen months later, on 15 February 2016, PAK released on its website an official list of “Current and Previous usurpers of the social-owned enterprise assets,” including various petrol stations at issue in this case.<sup>221</sup> On 22 February 2016, the Chief State Prosecutor ordered the opening of criminal investigations into all listed entities, for the suspected crime of usurpation of public properties.<sup>222</sup>
188. The same day, 22 February 2016, PAK officially notified Mr. Selmani of its mandate under the 2011 PAK Law to “undertake reasonable actions for the maintenance or increase of the value of the [SOEs] and their assets,” and that according to PAK’s records, various petrol stations that Kosova Petrol was operating were property of the SOE Jugopetrol, with the result that Kosova Petrol’s usage of them without a PAK lease constituted “illegal possession (usurpation)”. PAK demanded that Kosova Petrol either (a) enter into a new lease contract with PAK providing for market-based rent, and pay compensation for past use without any rental payments, or alternatively (b) release the assets and face court proceedings by PAK for past rent. PAK warned that if Kosova Petrol did not select either alternative within 15 days, PAK would seek eviction of Kosova Petrol from the premises with the support of the Kosovo Police.<sup>223</sup> PAK sent a similar letter the next day relating to certain oil pumps that it understood to be owned by the SOE INA.<sup>224</sup>
189. On 23 February 2016, Mr. Selmani complained to PAK in writing about Kosova Petrol being included in the 15 February 2016 published PAK list of usurpers. He contended that the UNMIK Permission had “earned [him] the right of management and administration of former enterprises Jugopetrol and Beopetrol properties in Kosovo,” and alleged that his inclusion on the published usurpers’ list constituted a criminal production of “false and forged documents.”<sup>225</sup>

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<sup>219</sup> R-69, Guidelines for releasing of the assets of socially owned enterprises from usurpers (illegal users), 10 December 2014, p. 2.

<sup>220</sup> R-69, Guidelines for releasing of the assets of socially owned enterprises from usurpers (illegal users), 10 December 2014, p. 3.

<sup>221</sup> C-87, ‘Press Release: PAK publishes the list of current and former usurpers of socially-owned properties’, 15 February 2016; First Ramajli Statement ¶¶ 15-17.

<sup>222</sup> C-89, Criminal charges against Mr. Selmani, 5 May 2016.

<sup>223</sup> C-85, Letter from PAK to Kosova Petrol, 22 February 2016.

<sup>224</sup> C-86, Letter from PAK to Kosova Petrol, 23 February 2016.

<sup>225</sup> C-88, Letter from Mr. Selmani to the PAK, 23 February 2016.

190. On 28 April 2016, PAK published an updated version of the 2014 PAK Guidelines.<sup>226</sup> These defined a usurper as a person or entity that “does not have the administrative authority” of PAK for the use of a property, and distinguished situations where a user accepted PAK’s authority through conclusion of a lease but had let the lease contract expire or failed to fulfill its conditions. The latter situation (of breach of a lease contract) might result in a lack of legal basis for continuing use, but would not qualify the user as a “usurper,” a term which was restricted to those who did not accept PAK’s authority to administer the property in the first place.<sup>227</sup>
191. On 26 May 2016 and 12 July 2018 respectively, PAK issued final reports on the legal status of the assets previously owned by INA and Jugopetrol. Both reports confirmed the socially owned status of the stations in question, and thereby also confirmed PAK’s authority to administer them pursuant to the PAK Law.<sup>228</sup> As discussed previously in this Section, the Parties in this case debate whether PAK was permitted to provisionally administer the properties prior to its completion of the detailed status determination process. The Tribunal considers that it was.
192. In any event, Mr. Selmani says that later in 2018, he learned that criminal charges had been lodged against him following the publication of the PAK usurper’s list.<sup>229</sup> The charges accused him of usurping the socially owned property of Jugopetrol for years, without ever paying rent or acknowledging obligations to PAK.<sup>230</sup> In reaction, on 7 June 2018 Mr. Selmani addressed a letter to the prosecutor’s office, requesting that all charges be dropped.<sup>231</sup> A similar letter was sent on Mr. Selmani’s behalf by his attorney Mr. Muhamet Shala in November 2018.<sup>232</sup> The record of this Arbitration contains no response to either of these letters.

#### **L. The Expropriation of the Pristina I Station**

193. Meanwhile, another dispute that began germinating in 2012 concerned the fate of the Pristina I petrol station. Mr. Selmani says he operated this station under the UNMIK Permission and renovated it in 2009.<sup>233</sup> It is undisputed that the land under this station eventually was expropriated by Kosovo for construction of a national road, but the

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<sup>226</sup> C-207, PAK Guidelines on Release of Property from Illegal Occupiers, 28 April 2016.

<sup>227</sup> C-207, PAK Guidelines on Release of Property from Illegal Occupiers, 28 April 2016, note 2.

<sup>228</sup> R-54, Summary report from Review of the Request for Determination of the Legal Status of the Enterprise OBPB “Derivateve të naftës” in Prishtina, within the enterprise “Ina Trgovina” based in Zagreb, 26 May 2016; R-53, Summary report on the review of the Request for Determination of the Legal Status of the Assets of Entity “Jugopetrol” Belgrade, RO Prishtina, 12 July 2018.

<sup>229</sup> First Selmani Statement, ¶ 114.

<sup>230</sup> C-89, Criminal charges against Mr. Selmani, 5 May 2016.

<sup>231</sup> C-90, Letter from Mr. Selmani to the Prosecutor's Office, 7 June 2018.

<sup>232</sup> C-91, Letter from Muhamet Shala to the Prosecutor's Office, 15 November 2018.

<sup>233</sup> C-139, Overview of the Petrol Stations mentioned in the UNMIK Permission, undated.

Parties dispute the factual circumstances of this expropriation, and the extent to which any of Mr. Selmani's legal rights were violated by it.

194. On Mr. Selmani's version of the timeline, he learned in early October 2012 that the Ministry of Infrastructure had retained a company to do road works in an area close to the Pristina I station.<sup>234</sup> During a meeting with Ministry of Infrastructure officials on 15 October 2012, Mr. Selmani says he learned that the road works might entail demolition of the Pristina I station, and that a further tripartite meeting would be scheduled between Mr. Selmani, the Ministry of Infrastructure, and the Municipality of Pristina. Mr. Selmani says that Ministry of Infrastructure officials also encouraged Mr. Selmani to submit his views on the matter in writing, which he did the following day, requesting that the plans be reconsidered.<sup>235</sup>
195. On 12 December 2012, the Municipality of Pristina responded to Mr. Selmani's letter. The municipality informed Mr. Selmani that the Ministry of Infrastructure:
- [h]as taken the obligation to make the expropriation and compensation for the petrol station "Kosova Petroll" [*sic*], taking into consideration that this project includes a road of regional character, for which the Ministry of Infrastructure is developing and implementing the project.<sup>236</sup>
196. While Mr. Selmani says he was comforted by the letter's reference to an undertaking to provide compensation,<sup>237</sup> the work on the road adjacent to the station proceeded, in a manner which by mid-2013 blocked the station and significantly impacted its revenue.<sup>238</sup> Mr. Selmani says he then did not hear from the authorities until news about the final decision on the expropriation of the Pristina I station was reported in the media around the time of its issuance in February 2014.<sup>239</sup>
197. Kosovo's timeline differs in some respects. It points out that the Ministry of Infrastructure filed a request with the Ministry of Environment in September 2013 for expropriation of the land adjacent to and including the plot on which the Pristina I station was located.<sup>240</sup> The Ministry of Environment approved the request, while also

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<sup>234</sup> First Selmani Statement ¶ 74.

<sup>235</sup> C-42, Letter from Mr. Selmani to the Ministry of Infrastructure and the Municipality of Pristina, 16 October 2012. *See also* First Selmani Statement ¶ 75.

<sup>236</sup> C-43, Letter from the Municipality of Pristina to Mr. Selmani, 12 December 2012.

<sup>237</sup> First Selmani Statement ¶ 77.

<sup>238</sup> SoC ¶ 124; C-120, Monthly Income Statement for Pristina I, September 2012; C-121, Monthly Income Statement for Pristina I, November 2012; C-122, Pristina I Income Statement, 2011; C-123, Pristina I Income Statement, 2012; C-124, Pristina I Income Statement, 2013; First L. Selmani Statement ¶ 42.

<sup>239</sup> SoC ¶ 125.

<sup>240</sup> R-108, Application for expropriation, September 2013; C-48, Letter from Ministry of Environment and Spatial Planning to Kosova Petrol, 24 February 2014.

proposing that the Government adopt a decision to examine the rights of parties affected by the intended expropriation.<sup>241</sup> The Government approved the “further processing of the application for expropriation in the public interest” on 2 October 2013, in a decision which provided that there would be compensation to “real property owners and interest holders” affected by the construction;<sup>242</sup> the decision was published on 11 October 2013 in the Tribuna newspaper and on 18 October 2013 in the Official Gazette of the Republic of Kosovo.<sup>243</sup> Both published notices contained a list of entities with registered interests in the affected properties, which did not include Kosova Petrol, because (Kosovo says) the list was drawn up by the Ministry of Infrastructure based on cadastral directories of property interests, in which Kosova Petrol’s name did not appear.<sup>244</sup>

198. However, the notices also invited “[a]ny person who is not named in the notice and that claims to hold an ownership interest or other legitimate interest in any parcel of real property described in the notice” to promptly submit information on “the legal basis of that claim.” The notices announced a public meeting on 28 October 2013, and invited “[a]ny person who wishes to participate or express his/her opinion in the public hearing [to] bring reasonable evidence (documents) which demonstrate that he/she is in fact ... the owner or interest holder.”<sup>245</sup> Kosovo emphasizes that Kosova Petrol did not attend this meeting, even though it was aware of the proposed expropriation, and indeed had attended meetings with the Ministry of Infrastructure.<sup>246</sup> On 29 November 2013, the Government took a “Preliminary Decision” to approve the expropriation, providing for notice to “the owners and claimants of land that will be expropriated” and for a right of appeal within 30 days by “any person who owns or holds any interest in immovable property affected by this decision.”<sup>247</sup> Kosova Petrol apparently did not file any appeal within this time.
199. Despite the Parties’ different versions of the events leading to the Government’s final expropriation decision, it is undisputed that 30 days later, on 27 December 2013, the Government took a final decision on the expropriation and compensation of “the owners and holders of interest and property rights” in affected immovable properties, a list that did not include Kosova Petrol.<sup>248</sup> The final decision was published in the Official Gazette on 23 January 2014 and became effective that day.<sup>249</sup>

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<sup>241</sup> C-48, Letter from Ministry of Environment and Spatial Planning to Kosova Petrol, 24 February 2014.

<sup>242</sup> R-109, Decision of the Government of Kosovo No. 11/150, 2 October 2013.

<sup>243</sup> R-110, Excerpt from the Tribuna newspaper, 11 October 2013; R-111, Excerpt from the Official Gazette of Kosovo, 18 October 2013.

<sup>244</sup> C-48, Letter from Ministry of Environment and Spatial Planning to Kosova Petrol, 24 February 2014.

<sup>245</sup> R-110, Excerpt from the Tribuna newspaper, 11 October 2013; R-111, Excerpt from the Official Gazette of Kosovo, 18 October 2013.

<sup>246</sup> C-48, Letter from Ministry of Environment and Spatial Planning to Kosova Petrol, 24 February 2014.

<sup>247</sup> R-112, Preliminary Decision of the Government No. 14/158, 29 November 2013.

<sup>248</sup> C-46, Final Decision No. 23/162 of the Government of the Republic of Kosovo, 23 January 2014.

<sup>249</sup> R-116, Excerpt from the Official Gazette of Kosovo, 23 January 2014.



200. In a letter on 19 February 2014, Kosova Petrol wrote to Prime Minister Thaqi protesting the expropriation decision with reference, among other things, to its asserted rights under the UNMIK Permission.<sup>250</sup> The Ministry of Environment responded on 24 February 2014, rejecting the request and noting that Kosova Petrol had failed to participate in the October 2013 meeting or to file any documentation of a legal property interest within the time specified.<sup>251</sup> This rejection prompted Kosova Petrol to initiate proceedings against the Government in the Basic Court of Pristina, described below at para. 261.

### **M. The MTI's Denial of Petroleum Licenses from 2013**

201. While these events were underway involving other Kosovo authorities, in early 2013, Kosova Petrol applied to the MTI for new petroleum trading licenses, specifically for wholesale and import licenses (on 15 February 2013) and for retail licenses (on 25 April 2013).<sup>252</sup>
202. In Kosovo's telling, the MTI found these requests to be defective, being both belated and lacking necessary supportive documents.<sup>253</sup> In particular, Kosovo explains that under the applicable law, retail licenses only could be issued upon proof of a right to occupy the premises from which petroleum products could be sold (*i.e.*, either ownership or a valid lease agreement), and import and wholesale licenses required proof of a valid retail license.<sup>254</sup> However, the MTI concluded after review that Kosova Petrol did not satisfy these requirements. In particular, the UNMIK Permission was found not effective to grant Kosova Petrol rights of possession to the petrol stations. Kosovo acknowledges that this was a change in course from earlier periods in which retail licenses were granted, but Minister Kusari-Lila explains that this was the result of an improved scrutiny process at the MTI that was gradually implemented on her watch, combined with a greater awareness of the UNMIK Permission brought about by press reports describing the PAK's position that the

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<sup>250</sup> C-47, Letter from Kosova Petrol to the Prime Minister and other Government officials, 19 February 2014.

<sup>251</sup> C-48, Letter from Ministry of Environment and Spatial Planning to Kosova Petrol, 24 February 2014.

<sup>252</sup> C-58, Kosova Petrol Application No. 74 to the Licensing Office for the Renewal of Wholesale License, 15 February 2013; C-59, Kosova Petrol Application No. 75 to the Licensing Office for the Renewal of Import License, 15 February 2013; C-60, Kosova Petrol's Applications to the Licensing Office for the Renewal of Retail Licenses, 25 April 2013; R-94, Full version of Kosova Petrol's application No. 74 for the renewal of import license, 15 February 2013; R-95, Full version of Kosova Petrol's application No. 75 for the renewal of wholesale license, 15 February 2013; R-96, Full version of Kosova Petrol's applications for issuance of retail licenses, 25 April 2013.

<sup>253</sup> SoD ¶¶ 170, 174.

<sup>254</sup> Resp. Closing Slides 180-186; C-125, Administrative Instruction No. 7/2010 on Defining the Petroleum and Petroleum Products, the Licensing Procedures and Licenses Types of the Entities that Exercise the Activity in the Fuel Sector, 28 April 2010, Art. 4(1)(1.8).

petrol stations were SOE property which Kosova Petrol was occupying without legal right.<sup>255</sup>

203. Kosovo also disputes that the retail license applications are properly characterized as requesting *renewals*, arguing that there were no previously valid retail licenses in place for Kosova Petrol. As discussed in Section VI(J) above, Mr. Selmani disputes this assertion, pointing to decisions of the MTI Licensing Office which he says had the force of licenses even if not ultimately signed by the MTI Minister.<sup>256</sup>
204. The record confirms that as early as 21 February 2013, MTI officials were trying to sort out the licensing status of the various petrol stations. An internal MTI email that day, from Mr. Visar Bajraktari who was a witness in this case, reported that of the “34 points of sale of which we have been informed by” Kosova Petrol, “there are 11 sale points for which he has a decision (but not a license),” and “23 other sale points whose license has either expired (17 sale points) or has not applied (6 sale points).”<sup>257</sup>
205. On 27 May 2013, Mr Selmani met with MTI Minister Kusari-Lila and her MTI colleague Mr. Bajraktari. Prior to this meeting, Mr. Selmani says he had been informed that the license requests had been approved and were only awaiting Ms. Kusari-Lila’s signature,<sup>258</sup> a contention which Kosovo disputes.<sup>259</sup> The Parties’ versions of what transpired at the 27 May 2013 meeting also differ: Mr. Selmani says the minister informed him that the Office of the Prime Minister had “raised concerns about Kosova Petrol’s right to operate the petrol stations and the ownership of the underlying assets” and that she had therefore been instructed to refer “all matters relating to Kosova Petrol’s operations” to the office of the Prime Minister.<sup>260</sup> Kosovo’s witnesses deny such statements, saying that they simply informed Mr. Selmani that Kosova Petrol had failed to provide the necessary documents, but the meeting got tense, with Mr. Selmani threatening “that I will regret rejecting Kosova Petrol licenses and that he will ‘seek justice.’”<sup>261</sup> Kosovo’s witnesses add that they nonetheless tried to assist, by contacting PAK about potential solutions that would allow MTI to issue licenses to Kosova Petrol “so that it could operate lawfully.”<sup>262</sup>
206. Following the meeting with Ms. Kusari-Lila, Mr. Selmani says he also met with the then Prime Minister Mr. Thaçi and then Deputy Prime Minister Mr. Behgjet Pacolli

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<sup>255</sup> First Kusari-Lila Statement ¶¶ 28, 31-32; Second Kusari-Lila Statement ¶¶ 19-25.

<sup>256</sup> Rejoinder, ¶ 62; SoD ¶ 171; Cl. Reply ¶¶ 104-109; Second L. Selmani Statement ¶¶ 4-9.

<sup>257</sup> R-32, Email from V. Bajraktari to B. Nikaj, 21 February 2013.

<sup>258</sup> SoC ¶ 109; First Selmani Statement ¶ 84.

<sup>259</sup> SoD ¶ 185; First Kusari-Lila Statement ¶¶ 29-30; First Bajraktari Statement ¶¶ 33-35.

<sup>260</sup> SoC ¶ 110; First Selmani Statement ¶ 85.

<sup>261</sup> SoD ¶¶ 186-187; First Kusari-Lila Statement ¶¶ 34-35; First Bajraktari Statement ¶¶ 37-39.

<sup>262</sup> First Kusari-Lila Statement, ¶ 42.

in further attempts to resolve the issues of Kosova Petrol's licenses.<sup>263</sup> Kosovo disputes that any such meetings took place.<sup>264</sup>

207. What is clear from the documentary record is that on 28 May 2013, the day after Mr. Selmani's meeting, Mr. Bajraktari prepared a draft letter for Minister Kusari-Lila to send to PAK and the Office of the Prime Minister, in the hope that PAK could "provide us with a solution to the problem."<sup>265</sup> The next day, the MTI wrote to PAK, asking for "information on the use of socially owned properties by some petroleum selling entities which are located in socially owned properties," especially Kosova Petrol's use of properties of Jugopetrol and Beopetrol (INA). The MTI noted that under the 2010 MTI Administrative Instruction, petroleum license applicants were required to submit "the possession list or the contract on use of property" covering the licensing period, and that Kosova Petrol had previously obtained licenses on the basis of the UNMIK Permission, "[b]ut now UNMIK contracts/decisions are not valid and we cannot accept them for licensing Kosova Petrol." MTI stated that for other entities operating on socially owned property "[w]e have always directed entities to your institution, so they can obtain a document on the right of use of property from you," but according to Kosova Petrol, "PAK cannot provide them with such a document." MTI added that it "is interested in finding a way of licensing," rather than having to shut down operations as otherwise would be required under the 2009 Amendment to the Petroleum Law.<sup>266</sup>
208. On the same day, 29 May 2013, MTI also wrote a letter to Prime Minister Thaqi requesting assistance in finding a solution for the licensing of the Jugopetrol and Beopetrol assets. MTI reiterated that it "is interested in finding a way of licensing" these operating sale points, but Kosova Petrol reports that "PAK cannot provide them" with documentation confirming their right to occupy the properties, and "it is not in MTI's area of responsibility to decide on the right of use/non-use of said properties." MTI "ask[ed] help from your side to solve this problem."<sup>267</sup>
209. Roughly two weeks later, in mid-June 2013, the MTI rejected Kosova Petrol's applications for import and storage licenses. The rejections noted *inter alia* that Kosova Petrol had not attached any currently valid retail licenses.<sup>268</sup>
210. According to Mr. Selmani, these decisions were not communicated to Kosova Petrol until several months after the passing of the 30-day notice period provided for by

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<sup>263</sup> First Selmani Statement ¶¶ 88-89; First L. Selmani Statement ¶ 48; Cl. Reply ¶ 132.

<sup>264</sup> Rejoinder ¶ 187. *See also* First Kusari-Lila Statement ¶ 40; First Bajraktari Statement ¶ 43.

<sup>265</sup> R-33, Email from V. Bajraktari to M. Kusari-Lila, 28 May 2013.

<sup>266</sup> R-97, Letter from MTI to PAK, 29 May 2013.

<sup>267</sup> R-98, Letter from MTI to Prime Minister, 29 May 2013.

<sup>268</sup> R-34, MTI's Decision No. 284, 12 June 2013; R-35, MTI's Decision No. 285, 12 June 2013.

the Petroleum Law.<sup>269</sup> Kosovo, however, says it communicated the decisions via phone to Mr. Avni Pllana, a Kosova Petrol representative, on 17 June 2013.<sup>270</sup>

211. On 1 July 2013 PAK communicated to Minister Kusari-Lila, in a response to the MTI's 29 May 2013 letter, that "[PAK] is not under a cooperative or contractual relationship on the lease or use of these petrol stations with Kosova Petrol or any other entity."<sup>271</sup> As discussed in Section VI(N) below, PAK's expressed view to MTI was consistent in this respect with the opinions it had conveyed in both November 2011 and February 2012 to the Municipal Court of Peja, which was sorting out private lawsuits by Kosova Petrol against third party occupiers of petrol stations listed in the UNMIK Permission but to which Kosova Petrol had never in fact gained possession.<sup>272</sup>
212. Following receipt of this PAK confirmation, the MTI rejected Kosova Petrol's outstanding retail license requests on 3 July 2013, noting Kosova Petrol's failure to demonstrate its right to use the petrol stations for which the licenses were sought, in particular because it "is not in lease contractual relationship with the possessor[s] of the immovable property," *e.g.*, Jugopetrol or INA.<sup>273</sup> This time, Kosovo says, Mr. Pllana personally came to MTI and reviewed the decisions but decided not to pick them up.<sup>274</sup> On 21 August 2013, the MTI also sent Mr. Selmani an email referencing the prior rejections, and the notices provided to Mr. Pllana in person and by phone.<sup>275</sup>
213. Roughly fourteen months later, in an October 2014 letter to MTI, Mr. Selmani acknowledged receipt of the August 2013 notice.<sup>276</sup> This letter, written more than a year after the license decisions, appears to be Mr. Selmani's first reaction to the license rejections placed on the record of this Arbitration.

## **N. Kosova Petrol's Court Proceedings Against Third Party Occupiers**

214. In this Arbitration, Mr. Selmani contends that the position PAK expressed to MTI in 2013, and its actions in placing him on the PAK "usurpers' list," were inconsistent

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<sup>269</sup> SoC ¶ 113; First Selmani Statement ¶ 90.

<sup>270</sup> Rejoinder ¶¶ 194; R-103, Recommendation of the Commission on Kosova Petrol's requests for import license, 12 June 2013; R-104, Recommendation of the Commission on Kosova Petrol's requests for wholesale license, 12 June 2013; Second Bajraktari Statement ¶¶ 33, 48-49, 52.

<sup>271</sup> R-37, Letter from S. Lluka to M. Kusari-Lila, 1 July 2013.

<sup>272</sup> C-142, Letter from the PAK to the Municipal Court of Peja, 10 November 2011; C-68/R-163, Letter from the PAK to the Municipal Court of Peja, 13 February 2012.

<sup>273</sup> R-38, MTI's Decision No. 311, 3 July 2013; R-39, MTI's Decision No. 312, 3 July 2013; R-40, MTI's Decision No. 313, 3 July 2013; R-41, MTI's Decision No. 314, 3 July 2013. *See also* First Bajraktari Statement ¶ 58.

<sup>274</sup> Rejoinder ¶¶ 200-201, First Bajraktari Statement ¶ 60.

<sup>275</sup> R-50, Email from S. Halimi to B. Selmani, 21 August 2013.

<sup>276</sup> C-64, Letter from Mr. Selmani to Avni Kastrati, 14 October 2014.

with the position PAK took when its opinion on Kosova Petrol's rights was requested by a Kosovar court, which was hearing private claims Kosova Petrol had brought against third party occupiers of petrol stations listed in the UNMIK Permission but to which it had never obtained access. In order to understand this issue – and to set the stage for discussion of one of Mr. Selmani's expropriation claims in this case – it is necessary to revert back in the chronology, to discuss Mr. Selmani's various attempts over the years to obtain access to these additional petrol stations.

215. One significant disagreement between the Parties concerns whether and to what extent Kosovo is responsible for not facilitating Mr. Selmani's access to 18 petrol stations covered by the UNMIK Permission but which were occupied at that time by third parties. As discussed in Section VI(B) above, there is evidence that the DTI, UNMIK's Department of Trade and Industry, agreed in 2001 to pro-rate Kosova Petrol's rental obligations under the UNMIK Permission in reflection of its lack of access to certain facilities.<sup>277</sup> One question is whether this consequentially removed the 18 petrol stations from the scope of the UNMIK Permission, or whether alternatively Kosova Petrol retained legal rights to occupy and operate the 18 stations, with rental obligations simply suspended until he could obtain access. In asserting the latter, Mr. Selmani relies in part on the decisions of certain Kosovo courts in proceedings he initiated against third party occupiers.
216. Mr Selmani claims that, starting in the spring of 2001, Kosova Petrol was forced to take action on its own to try to remove the alleged occupiers. Initially, Mr. Selmani wrote to local authorities,<sup>278</sup> as well as to some of the alleged occupying entities directly,<sup>279</sup> invoking his right of possession of the petrol stations under the UNMIK Permission. In at least one of these letters – a 10 September 2002 letter to the Mayor of Peja – Kosova Petrol represented that it was “charged with rental obligations ... for the same facilities,”<sup>280</sup> without acknowledging that UNMIK actually had agreed *not* to collect rent for stations Kosova Petrol did not occupy (or for that matter, that Kosova Petrol had stopped paying rent a year earlier even on the many stations it *did* occupy).
217. Subsequently, Kosova Petrol proceeded, beginning in November 2005, to pursue court cases against various third parties occupying at least eight of the 18 stations. Kosovo points out that each of these lawsuits was initiated prior to the Republic of Kosovo's independence in February 2008,<sup>281</sup> but many of them continued and were resolved after independence. Equally important, Kosovo argues, these cases were

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<sup>277</sup> C-39, Invoice issued by the Department of Trade and Industry, 20 August 2001.

<sup>278</sup> C-13, Letter from Kosova Petrol to the Administrator of the municipality in Peja, undated; C-14, Letter from Kosova Petrol to the Regional Police Station in Peja, 28 March 2001; C-15, Letter from Kosova Petrol to the Mayor of Peja, 10 September 2002.

<sup>279</sup> C-16, Letter from Kosova Petrol to Enterprise Dukagjini, 28 March 2001; First Selmani Statement ¶ 38.

<sup>280</sup> C-15, Letter from Kosova Petrol to the Mayor of Peja, 10 September 2002.

<sup>281</sup> SoD ¶ 292.

brought against other private parties, not against relevant authorities, and involved repeated misrepresentations by Kosova Petrol regarding its compliance with its own obligations, including payment of rent.<sup>282</sup>

218. For purposes of a comprehensive summary, the Tribunal sets forth its understanding below of the various court cases, based on the record available to it. However, in general, the Tribunal does not consider the findings of these courts to be particularly helpful, much less probative of the issues in this case, essentially for the reasons identified by Kosovo. First, the courts were hearing private claims as between disputing stakeholders to various stations, to which Kosovo was not a party. Second, the courts' rulings as between those private stakeholders may well have been influenced by their belief – improperly induced by Kosova Petrol – that it had continued to pay rent to UNMIK, which in turn implied that UNMIK (by accepting such rent payments) implicitly continued to recognize Kosova Petrol's legal rights. In the case of one court (the Basic Court of Peja), this misunderstanding may have been further reinforced by certain ambiguities in PAK's response to the court's inquiry, which – as discussed below – denied any PAK arrangements with Kosova Petrol, but alluded to the possibility that UNMIK's arrangement with it might still be in effect. These points will become more apparent in the summary below.
219. The Gjakova Court Cases against Niki-S. Kosova Petrol initiated the first of these court proceedings in November 2005, concerning two petrol stations in Gjakova occupied by the Niki-S company. Kosova Petrol represented to the Municipal Court of Gjakova not only that the UNMIK Permission entitled it to possession, but also that “[a]s per the [UNMIK Permission], the claimant has constantly until today paid the obligations to the lessor (UNMIK and now KTA) and other obligations for this facility as for all other petrol stations ....”<sup>283</sup> This representation was false in both respects, *i.e.*, Kosova Petrol neither paid rent “for this facility” (pursuant to UNMIK's agreement to pro-rate rental obligations), nor “constantly until today paid ... for all other petrol stations” (as it had stopped paying rent for any stations in late 2001). In any event, Kosova Petrol was ultimately considered to have withdrawn its claims before the Municipal Court by failing to make a required filing.<sup>284</sup> Kosova Petrol sought to revive the claim, claiming an “administrative omission,”<sup>285</sup> but the dismissal was upheld by the District Court of Peja.<sup>286</sup>
220. Kosova Petrol later initiated a new proceeding in Gjakova against the occupant of these petrol stations, seeking a release of fuel pumps that the latter had “illegally taken in possession”; again, it represented to the court not only that it had had the right to use the facilities by virtue of the UNMIK Permission, but also that it “has settled by

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<sup>282</sup> SoD ¶ 476; Resp. Rejoinder ¶ 56; Resp. Closing Slide 241; Resp. Rebuttal Presentation Slide 41.

<sup>283</sup> C-245/R-132, Kosova Petrol Statement of Claim to the Municipal Court of Gjakova, 11 November 2005.

<sup>284</sup> C-246, Judgment of the Municipal Court of Gjakova, 19 March 2008.

<sup>285</sup> C-247, Kosova Petrol Submission to the District Court of Peja, 18 May 2008.

<sup>286</sup> C-248, Judgment of the District Court of Peja, 11 August 2008.

payment all due obligations to the Lessor.” On 1 November 2010, the Municipal Court of Gjakova found in Kosova Petrol’s favor and ordered the occupant to vacate and release the fuel pumps to Kosova Petrol’s use.<sup>287</sup>

221. The Pristina Court Case against Besarti. Also in November 2005, Kosova Petrol initiated proceedings against the Besarti company concerning a station in Pristina, representing that it “has constantly until today paid the obligations to the lessor (UNMIK and now KTA) and other obligations for this facility as for all other petrol stations, whereas the beneficiary from the exploitation of this facility” was Besarti.<sup>288</sup> Kosova Petrol made a further submission in November 2008, following Kosovo’s Declaration of Independence, and in a reply filed in early 2009, Besarti (the occupier of the station) argued that subsequent authorities – first the KTA and thereafter the PAK – had not renewed the UNMIK Permission. The Municipal Court in Pristina however accepted Kosova Petrol’s statement that it had notified KTA of the UNMIK Permission in 2007, but neither KTA nor PAK took action thereafter to terminate its rights or acquire management or use of “such socially owned properties.” Based on these findings, and reciting Kosova Petrol’s representation about its ongoing rent payments, the Municipal Court in Pristina found in Kosova Petrol’s favor on 11 March 2009.<sup>289</sup>
222. The judgment was overturned on appeal in 2011, with the District Court of Pristina finding that the Municipal Court failed to cite any legal basis for Kosova Petrol’s alleged right of possession. The District Court criticized the Municipal Court for not notifying PAK, which after 2008 managed all SOEs, to determine its views regarding Kosova Petrol’s alleged rights.<sup>290</sup>
223. In February 2014, Kosova Petrol’s claims against Besarti were deemed withdrawn after it did not attend a scheduled hearing.<sup>291</sup> In 2017 that ruling was affirmed on appeal.<sup>292</sup>
224. The Skenderaj Court Case against Klina Petrol. Kosova Petrol also initiated proceedings in November 2005 against the Klina Petrol company. As in its other court claims, Kosova Petrol represented to the court that it had “regularly paid its dues” for this station under the UNMIK Permission, initially to UNMIK and later to KTA, as well as “other dues for these facilities similar to all other facilities, while the Respondent has continued to reap the benefits of use of such facilities.”<sup>293</sup> Mr. Selmani says that while Kosova Petrol received an order in its favor in April

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<sup>287</sup> C-296, Judgment of the Municipal Court of Gjakova, 1 November 2010.

<sup>288</sup> R-133, Kosova Petrol Statement of Claim to the Municipal Court of Pristina, 11 November 2005.

<sup>289</sup> C-249, Judgment of the Municipal Court of Pristina, 11 March 2009.

<sup>290</sup> C-250, Judgment of the District Court of Pristina, 22 November 2011.

<sup>291</sup> C-251, Judgment of the Basic Court of Pristina, 6 February 2014.

<sup>292</sup> C-252, Judgment of the Court of Appeal of Kosovo, 9 February 2017.

<sup>293</sup> C-298/R-134, Kosova Petrol Statement of Claim to the Municipal Court of Skenderaj, 11 November 2005.

2006, it could never obtain use of the station “due to the failure by police authorities to enforce the court’s judgment.”<sup>294</sup>

225. The Pristina Court Case against Gallaku Petrol/Jupiteri. Another claim filed by Kosova Petrol in November 2005 concerned a petrol station in Pristina, Pristina VIII, occupied by Gallaku Petrol, later amended to cover the Jupiteri company. Kosova Petrol’s claim made the same representation, that pursuant to the UNMIK Permission, it “has constantly until today paid the obligations” first to UNMIK and then to KTA.<sup>295</sup> On 19 September 2007, the Municipal Court found in Kosova Petrol’s favor, accepting that the petrol station was the property of a SOE and that under UNMIK Regulation No. 1999/1, UNMIK was entitled to administer such property, including by leasing it. The court found that authority to administer socially-owned property was transferred to KTA in 2002, but “being that KTA hasn’t changed the permit issued by UNMIK for the use of the petrol station in dispute, . . . the Claimant has the right to legally use it.”<sup>296</sup> There is no evidence that before reaching this conclusion, the Municipal Court sought KTA’s views on the status of the UNMIK Permission. As noted above, in August 2006, the UNMIK Legal Advisor had advised the KTA that UNMIK had terminated the UNMIK Permission in December 2001.<sup>297</sup>
226. The decision in Kosova Petrol’s favor was upheld on appeal in 2011,<sup>298</sup> but ultimately was remanded back to the first instance by the Supreme Court in August 2013.<sup>299</sup> The Supreme Court noted that the first instance court “did not establish as fact whether the rent had been paid since 2000 to UNMIK,” nor did it notify KTA, which had authority to administer the use of socially-owned property since 2002, several years before the case was initiated in 2005. The Supreme Court also noted that by the time the case was heard on appeal, the competences of the KTA had been subsequently transferred to PAK, but the court of second instance had failed to take this into account or to eliminate the errors of the first instance court. The Supreme Court instructed that on remand, the first instance court should investigate the facts and authorities more closely, “since both judgments rely on the sole evidence” of the UNMIK Permission.<sup>300</sup>
227. By the time that the Basic Court<sup>301</sup> scheduled a hearing in the remanded case, in November 2016, Kosova Petrol had ceased its operation in Kosovo, making service of notice impossible except through posting of a hearing notice on the court notice

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<sup>294</sup> Cl. Reply ¶ 39; C-253, Judgment of the Municipal Court of Skenderaj, 28 April 2006.

<sup>295</sup> C-17, Kosova Petrol Statement of Claim to the Municipal Court of Pristina in Case No. 2247/2005, 15 November 2005.

<sup>296</sup> C-20, Judgment of the Municipal Court of Pristina in Case No. 2247/2005, 19 September 2007.

<sup>297</sup> R-19, pp. 2-3, Note from the UNMIK Legal Adviser to the Acting SRSG, 14 August 2006.

<sup>298</sup> C-21, Judgment of the District Court of Pristina in Case No. AC 508/2008, 28 October 2011.

<sup>299</sup> C-25, Judgment of the Supreme Court of Kosovo in Case No. 376/2011, 12 August 2013.

<sup>300</sup> C-25, Judgment of the Supreme Court of Kosovo in Case No. 376/2011, 12 August 2013.

<sup>301</sup> The Kosovar first-instance courts were re-named Basic Courts as of January 2013, *see* C-162, Law No. 03/L-199 on Courts, 1 January 2011 and 1 January 2013.



board. Kosova Petrol did not appear for the scheduled hearing and the case was deemed withdrawn.<sup>302</sup>

228. The Peja Court Cases. Finally, Kosova Petrol also initiated court proceedings in 2006 against the occupiers of the Peja I, Peja II and Peja III petrol stations. As before, Kosova Petrol claimed in each case that it had “continuously paid the rent” on the properties, first to UNMIK and then to KTA,<sup>303</sup> and that he was “suffering great material damages because he pays the rent to the Lessor according to the agreement and does not use the facility.”<sup>304</sup> The Peja I and Peja III court claims were seemingly consolidated into a single proceeding,<sup>305</sup> while the Peja II case proceeded separately against the Dukagjini enterprise which occupied that station.
229. Notably, on 1 November 2011, the Basic Court of Peja requested from PAK “a report stating if the petrol station Peja II is given for use or leased to the claimant ‘Kosova Petrol’ Pristina, and whether there is a cooperation relationship between the claimant and the Privatisation Agency of Kosovo (is there a lease contract between Kosova Petrol from Pristina, managed by Bedri Selmani and the Privatisation Agency of Kosovo, if yes, please send a copy of this contract).”<sup>306</sup>
230. On 10 November 2011, the PAK responded with two points. *First*, it stated that it “has not entered into any lease contract with the enterprise ‘Kosova Petrol’ for the use of [the Peja 1, 2 and 3] petrol stations and does not have any type of cooperation with the enterprise in question.” *Second*, referring to Article 5 of the 2011 PAK Law (which had been enacted in September 2011), PAK emphasize that it had “exclusive administrative authority” over SOEs and socially-owned property.<sup>307</sup>
231. It appears that PAK sent a second letter to the same court on 13 February 2012, apparently in response to a second inquiry. The inquiry itself is not in the record of this Arbitration, but the response suggests that the court requested information about (a) the status of the Peja 1, 2 and 3 stations, and (b) the validity of the UNMIK Permission. PAK responded as follows:

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<sup>302</sup> C-163, Judgment of the Basic Court of Pristina in Case No. 2180/2013, 8 September 2017; SoC ¶¶ 48-52.

<sup>303</sup> C-18, Kosova Petrol Statement of Claim to the Municipal Court of Peja in Case No. 17/2006, 13 January 2006 (Peja III station); C-19, Kosova Petrol Statement of Claim to the Municipal Court of Peja in Case No. 18/2006, 13 January 2006 (Peja II station).

<sup>304</sup> C-127, Kosova Petrol Statement of Claim to the Municipal Court of Peja, 1 December 2006 (Peja I station).

<sup>305</sup> SoC, footnote 94; SoD ¶ 122.

<sup>306</sup> C-67, Letter from the Municipal Court of Peja to the PAK, 1 November 2011.

<sup>307</sup> C-142, Letter from the PAK to the Municipal Court of Peja, 10 November 2011; C-68/R-163, Letter from the PAK to the Municipal Court of Peja, 13 February 2012.

As you have been informed, in accordance with the authorizations issued under [the 2011 PAK Law], PAK administers social enterprises and assets ... which were in social ownership on or after 22 March 1989.

Regarding the requested responses, we inform you that PAK is not in cooperation or contractual relations on the lease or exploitation of these petrol stations with the company Kosovo Petrol or any other subject.

As a consequence, we cannot issue any statement concerning the validity of the permit issued to this company by UNMIK, whose validity and continuity depends on the preconditions mentioned in its closing paragraph, for the fulfillment of which PAK has no knowledge.<sup>308</sup>

232. Kosovo emphasizes the first two paragraphs above, asserting PAK authority and disclaiming any PAK arrangement with Kosova Petrol.<sup>309</sup> Mr. Selmani emphasizes the last paragraph of this letter, arguing that it confirmed PAK's view as of early 2012 that the UNMIK Permission might have survived in effect, notwithstanding Kosovo's independence and the establishment of PAK's authority.<sup>310</sup>
233. In any event, in July 2013, the Basic Court of Peja found in Kosova Petrol's favor with respect to the Peja I and Peja III stations. The court accepted that as between Kosova Petrol and the occupier, the former had the better claim to use the stations, because the former's claim stemmed from the UNMIK Permission and UNMIK was "the legitimate authority at that time," but the occupier admitted he had no legal basis whatsoever for holding the disputed property. The court also noted PAK's statement that it was not currently managing the properties of the Jugopetrol and Beopetrol SOEs.<sup>311</sup>
234. This decision was ultimately reversed by the Court of Appeal in September 2016. The Court of Appeal noted PAK's clarification that it was not in any contractual relationship with Kosova Petrol or any other entity for the lease or use of these stations, but found that the lower court had not established "exactly who has the right of ownership" in the properties on which the petrol stations were built, which was a predicate for determining who had a present right of use. Since the lower court "has not properly and fully verified the factual situation, it has erroneously applied the material law." The Court of Appeal remanded the matter to the court of first instance, explaining that "[i]t must be established ... who is the owner of the parcels ...."<sup>312</sup>

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<sup>308</sup> C-68/R-163, Letter from the PAK to the Municipal Court of Peja, 13 February 2012.

<sup>309</sup> Resp. Rejoinder ¶¶ 104-106.

<sup>310</sup> Cl. Reply ¶¶ 72, 149, 173, 192; Cl. Closing Slide 24.

<sup>311</sup> C-22, Judgment of the Basic Court of Peja in Case No. 295/2009, 9 July 2013.

<sup>312</sup> C-26, Judgment of the Court of Appeal of Kosovo in Case No. AC 3079/2013, 19 September 2016.

235. With respect to the separate court case over the Peja II station, Kosova Petrol's claim against the occupier likewise was upheld by the Basic Court in 2013. The Basic Court reasoned, similarly to the Peja I and Peja III cases, that (a) Kosova Petrol's claim stemmed from the UNMIK Permission and UNMIK was "the legitimate authority of that time"; (b) PAK had stated that it had no lease contract for these stations with Kosova Petrol or anyone else, and (c) this therefore must mean that the UNMIK Permission "had not been terminated or discontinued."<sup>313</sup>
236. In March 2018, the Court of Appeal upheld the decision regarding the Peja II station. The Court of Appeal considered that the court of first instance had properly evaluated the evidence put before it, and noted that at no point had the respondent (the present occupier) submitted "any evidence to prove that the disputed immovable property is possessed and used [by it] under a legal ground stronger than the legal basis according to which the claimant had the right of use of this property."<sup>314</sup>

#### **O. The PAK Tenders for Lease of Petrol Stations**

237. As discussed in Section VI(K) above, in September 2013 a plan was presented to the PAK Board of Directors to commence an open bidding process for a list of SOE assets, "[i]n order to implement PAK Law respectively [to] preserve and enhance SOE value."<sup>315</sup> One of the disputed issues in this Arbitration is PAK's tendering of leases for a number of petrol stations pursuant to this plan. Kosovo says this was part of PAK's mandate to reform the previously unruly ownership of socially owned assets in Kosovo. Mr. Selmani argues that the PAK tenders to rent out these petrol stations deprived him of the rights to operate stations which Kosova Petrol lawfully operated under the UNMIK Permission.
238. In October 2013 the PAK Board of Directors approved the tender for the rental of 132 socially owned assets.<sup>316</sup> The tenders were then announced publicly, starting in late February 2014, in a tender for the right to rent one petrol station – Peja II – originally covered by the UNMIK Permission (the "**February 2014 Tender**").<sup>317</sup> Kosova Petrol did not operate this station, but there was pending litigation over its status between it and the current occupier, which had resulted in a July 2013 Basic Court decision in Kosova Petrol's favor that was still before a Court of Appeal at the time of the tender.<sup>318</sup>

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<sup>313</sup> C-23, Judgment of the Basic Court of Peja in Case No. 296/2009, 25 July 2013.

<sup>314</sup> C-24, Judgment of the Court of Appeal in Case No. 3182/2013, 22 March 2018.

<sup>315</sup> C-265, Memorandum to the Board of Directors of the PAK, September 2013.

<sup>316</sup> C-213, PAK Board of Director's Decision; R-22, PAK's BoD Decision to put SOE assets for rent and the assets list in the Annex, 31 October 2013.

<sup>317</sup> C-65, PAK Tender Announcement, 2014 (undated); R-55, PAK Internal Report, 6 March 2014.

<sup>318</sup> C-23, Judgment of the Basic Court of Peja in Case No. 296/2009, 25 July 2013; SoC ¶ 155.

239. In reaction to the February 2014 Tender, Mr. Selmani asked PAK (by letter of 6 March 2014) to cancel the tender for the Peja II station. Mr. Selmani claimed that Kosova Petrol remained a “legitimate exploiter of these assets” pursuant to the UNMIK Permission, and invoked both the Basic Court’s decision and PAK’s letter to that Court (discussed in Section VI(N) above). Mr. Selmani argued that “[t]he court decision is decisive and as such has proved the legitimate right of Kosova Petrol for the exploitation and the validity of the exploitation permit.”<sup>319</sup> There appears to be no answer to this letter on the record of this Arbitration.
240. The February 2014 Tender for the Peja II station was ultimately awarded to the company Dukagjini, also known as D-Petrol, as reflected by a 2014 Annual Report which does not provide the date of the decision.<sup>320</sup> In 2018, the Court of Appeal ultimately upheld the Basic Court decision from July 2013 – which Kosovo says was based on an incorrect assessment of Kosova Petrol’s rights, in part due to its misrepresentations about uninterrupted payment of rent<sup>321</sup> – and ordered Dukagjini to hand the station over to Kosova Petrol.<sup>322</sup> Mr. Selmani says that by this time, however, Kosova Petrol already had ceased operations in Kosovo.<sup>323</sup>
241. On 28 May 2014, a further tender was announced by PAK, this time for the lease of ten petrol stations which Mr. Selmani says Kosova Petrol had managed and operated continuously under the UNMIK Permission (the “**May 2014 Tender**”).<sup>324</sup> PAK ultimately received 117 bids for the stations covered by this tender.<sup>325</sup>
242. Mr. Selmani and his daughter Ms. Leonora Selmani, a witness in this Arbitration and the manager of Kosova Petrol at the time, met with PAK on 29 May 2014, the day after PAK published the May 2014 Tender. Mr. Jashari, PAK’s Acting Deputy Managing Director of Liquidation at the time and also a witness in this Arbitration, led the meeting on behalf of PAK and was accompanied by two other officials.
243. The meeting participants’ recollections of the discussions largely correspond: Mr. Selmani expressed that the recently published tenders violated Kosova Petrol’s rights under the UNMIK Permission, and asked that the tenders be cancelled. Mr. Jashari responded that the tenders were a result of the October 2013 PAK Board decision and that Mr. Selmani could file a complaint if he wished to the Special Chamber of the Supreme Court that the PAK Law had established to hear all claims

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<sup>319</sup> C-69, Letter from Kosova Petrol to the PAK Legal Office, 6 March 2014.

<sup>320</sup> C-204, 2014 PAK Annual Report, 2014, p. 62.

<sup>321</sup> SoD ¶¶ 130-137.

<sup>322</sup> C-24, Judgment of the Court of Appeal in Case No. 3182/2013, 22 March 2018.

<sup>323</sup> SoC ¶ 159.

<sup>324</sup> C-70, PAK Tender Announcement, 28 May 2014.

<sup>325</sup> R-57, PAK Internal Report, 10 July 2014.

against PAK.<sup>326</sup> These accounts are consistent with a contemporaneous summary of the meeting circulated within PAK on 30 May 2014.<sup>327</sup>

244. On 2 June 2014 Kosova Petrol issued a press release, in which it “inform[ed] the public opinion” of a “serious breach of law by [PAK]” in issuing the May 2014 Tender, and appealed to “all business entities not to waste time to bid for the lease of assets of Kosova Petrol.” Kosova Petrol claimed that the petrol stations were “neither under the administration nor under the management of PAK,” and accused PAK officials of organizing “illegal bids” for political purposes.<sup>328</sup>
245. The next day, on 3 June 2014, PAK published one of its own, “react[ing] against the ungrounded statements submitted yesterday” by Kosova Petrol, which PAK described as “the usurper” of property of SOEs. PAK asserted its authority under the 2011 PAK Law to administer socially owned enterprises, and stated while Kosova Petrol had signed an agreement with UNMIK before establishment of the former KTA, it never concluded an agreement with the KTA or PAK, nor had it ever presented evidence of any lease payments for use of the stations which it operated.<sup>329</sup>
246. The same day, 3 June 2014, PAK also wrote a letter to Mr. Selmani, echoing the press release in stating that the UNMIK Permission was never renewed by KTA or PAK, “the competent authorities for the administration of the assets of the Socially-Owned Enterprises,” nor had Kosova Petrol paid any rent obligations. The letter informed Mr. Selmani that PAK had announced the May 2014 Tender and in the near future would announce other tenders for lease of the remaining Ina and Jugopetrol stations, and called on Mr. Selmani to release all petrol stations “which you use without any legal base” and to pay all obligations owed from the use of petrol stations since 2002.<sup>330</sup>
247. Kosova Petrol responded first by issuing another press release on 5 June 2014. It insisted that “for more than 14 years it has had a license for the administration and management of the petrol stations of the former companies Jugopetrol and Beopetrol and its right to invest in them has been recognized.” Kosova Petrol also stated that PAK had never notified it of any alleged debt for rental obligations. Finally, it announced that it had filed a lawsuit against PAK before the Special Chamber,

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<sup>326</sup> Second Selmani Statement ¶¶ 49-50; Second L. Selmani Statement ¶¶ 13-16; First Jashari Statement ¶¶ 35-40.

<sup>327</sup> R-65, Email from D. Morina to S. Komoni et al., 30 May 2014.

<sup>328</sup> C-71, 'Press Release' Kosova Petrol, 2 June 2014.

<sup>329</sup> C-75, 'Press Release: PAK reaction against INA's Usurper' PAK, 3 June 2014; First Jashari Statement ¶¶ 48-51.

<sup>330</sup> C-74, Letter from the PAK to Kosova Petrol, 3 June 2014.

requesting an injunction against any tenders for petrol stations under Kosova Petrol's control.<sup>331</sup>

248. On 18 June 2014, Mr. Selmani responded directly to PAK's letter of 3 June 2014. Kosova Petrol questioned PAK's requests, saying that PAK had included "no evidence" for its claim of PAK authority to manage and tender the petrol stations or that Kosova Petrol owed any financial obligations for past use. Kosova Petrol also referenced the lawsuit against PAK it had lodged with the Special Chamber on 3 June 2014, and requested that PAK henceforth "communicate with us only through the Special Chamber until this Chamber provides a final verdict regarding our lawsuit."<sup>332</sup>
249. The Special Chamber application referenced in Kosova Petrol's 5 June 2014 press release and 18 June 2014 letter challenged PAK's authority to issue the May 2014 Tender, and requested that the Special Chamber enjoin PAK from proceeding with it.<sup>333</sup> On 11 August 2014, the Special Chamber rejected Kosova Petrol's request for an injunction against PAK,<sup>334</sup> a decision which Mr. Selmani appealed on 8 September 2014.<sup>335</sup> On 23 October 2014, the Appellate Panel rejected the appeal and confirmed the decision of the Special Chamber.<sup>336</sup>
250. On 26 August 2014, an internal PAK meeting took place, at which Mr. Jashari informed the PAK Board that Kosova Petrol "did not bid" for tenders because "they did not have a license to operate."<sup>337</sup>
251. The May 2014 Tender was ultimately won by a company called IP-KOS, which signed an agreement with PAK on 17 October 2014.<sup>338</sup> The physical possession of the stations covered by the tender was then transferred from Kosova Petrol to IP-KOS, although the Parties dispute the exact circumstances: Mr. Selmani says it happened suddenly and forcefully with the aid of PAK officials and police,<sup>339</sup> while Kosovo's witness, PAK official Mr. Hajredin Ramajli, does not recall any "significant issues" in the hand-over.<sup>340</sup>

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<sup>331</sup> C-217, "Kosova Petrol: We Have a Permit" Energija (5 June 2014), 5 June 2014.

<sup>332</sup> C-76, Letter from Mr. Selmani to the PAK, 18 June 2014.

<sup>333</sup> C-72, Kosova Petrol Statement of Claim to the Special Chamber of the Supreme Court of Kosovo on PAK-related Matters in Case No. C-I-14-0019, 3 June 2014.

<sup>334</sup> R-24, Decision of the Specialized Panel of SCSC C-III-14-0157, 11 August 2014.

<sup>335</sup> C-77, Kosova Petrol's Appeal against the Decision of the Special Chamber of the Supreme Court of Kosovo in Case No. C-III-14-0157, 8 September 2014.

<sup>336</sup> R-25, Decision of the Appellate Panel of SCSC AC-I-14-0268, 23 October 2014.

<sup>337</sup> C-266, Minutes of the 69th Meeting of PAK, 26 August 2014, p. 3.

<sup>338</sup> R-57, PAK Internal Report, 10 July 2014; R-59, Agreement between PAK and IP-KOS, 17 October 2014.

<sup>339</sup> SoC ¶ 170; First Selmani Statement ¶ 105. *See also* First L. Selmani Statement, ¶ 57.

<sup>340</sup> First Ramajli Statement ¶ 60. *See also* SoD ¶ 261; Rejoinder ¶ 281.

252. On 13 November 2014, PAK wrote to Mr. Selmani and requested, with reference to its 3 June 2014 letter, that Kosova Petrol pay the “outstanding liabilities for the use of the petrol stations of Kosova Petrol from February 2000 until today.”<sup>341</sup> There is no record in this Arbitration of a response to this letter, but shortly thereafter Mr. Selmani filed a criminal complaint with a prosecutor against PAK officials.<sup>342</sup>
253. A further tender, this time for 13 petrol stations, was announced by PAK on 15 December 2014 (the “**December 2014 Tender**”).<sup>343</sup> PAK received 81 bids, and the ultimate winner was the second highest one, Al-Petrol, after the highest bidder withdrew.<sup>344</sup> PAK and Al-Petrol concluded an agreement for the 13 stations on 30 January 2015.<sup>345</sup>
254. In June 2015, a further company, Illyrian Power, also concluded an agreement with PAK to operate a petrol station – Pristina III – after having reached out to PAK requesting to lease this and another station (the latter request was rejected by PAK). The agreement to operate Pristina III was undisputedly *not* the result of a tender, but rather of direct negotiations between PAK and Illyrian Power.
255. Illyrian Power represented to the authorities that it already operated the petrol station pursuant to a lease with Kosova Petrol. According to Kosovo, the agreement complied with the 2014 PAK Guidelines, as Illyrian Power – previously another “usurper” according to Kosovo – voluntarily entered into the agreement following the procedure required by the 2014 PAK Guidelines.<sup>346</sup>
256. Mr. Selmani, by contrast, says that the Pristina III station was not operated by Illyrian Power but was rather Kosova Petrol’s most profitable station. He also disputes Kosovo’s version of how the Illyrian Power agreement came about. Mr. Selmani argues that Illyrian Power was not a “usurper” previously operating stations in Kosovo, nor, he says, did it claim to be so in its communications with PAK. In fact, Mr. Selmani claims – with reference to a certificate of registration furnished with Illyrian Power’s first letter to PAK – that Illyrian Power was only created, by the brother of the then-First Deputy Prime Minister, on 6 May 2015.<sup>347</sup> As a consequence, Mr. Selmani argues, the lease agreement for the Pristina III station submitted to PAK by Illyrian Power, which Mr. Selmani says was dated 1 March 2015,<sup>348</sup> was fake, which PAK must have known at the time.<sup>349</sup> Kosovo’s witness Mr. Jashari testified

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<sup>341</sup> C-216, Letter from the PAK to Kosova Petrol, 13 November 2014.

<sup>342</sup> C-79, Letter from Mr. Selmani to the Chief Prosecutor SPRK, 4 December 2014.

<sup>343</sup> C-84, PAK Tender Announcement, December 2014; C-140, 'Press Release: Explanation with Regards to Lease of Petrol Stations' PAK, 13 March 2015; R-60, PAK Internal Memorandum, 14 January 2015.

<sup>344</sup> R-62, Letter from Petrol Company to PAK, 13 January 2015.

<sup>345</sup> R-63, Agreement between PAK and Al Petrol, 30 January 2015.

<sup>346</sup> SoD ¶¶ 271-275; R-72; R-83, PAK Internal Memorandum, 25 June 2015; Jashari Statement ¶ 110.

<sup>347</sup> R-70, Letter from Illyrian Power to PAK, 1 June 2015.

<sup>348</sup> R-71, Agreement between Illyrian Power and Kosova Petrol, exhibit seemingly undated.

<sup>349</sup> Cl. Reply, ¶¶ 229-236.

at the Hearing that Illyrian Power sent a letter to PAK confirming that it had been renting stations from Kosova Petrol,<sup>350</sup> but no such letter appears to be on the record of this arbitration.<sup>351</sup>

257. Instead, Mr. Selmani says, it was Kosova Petrol, and not Ilyrian Power, that operated the Pristina III station until July 2015, as evidenced by a receipt dated 15 July 2015,<sup>352</sup> the provenance of which is disputed by Kosovo.<sup>353</sup> According to Kosovo, Pristina III had been empty since at least 1 December 2014.<sup>354</sup>
258. By June 2015, Kosova Petrol had ceased operating all petrol stations.<sup>355</sup>

#### **P. Litigation between Kosova Petrol and PAK or the Government of Kosovo**

259. In addition to the Special Chamber claim launched by Kosova Petrol on 3 June 2014 and already described above, several legal proceedings were initiated directly between Kosova Petrol and Kosovar authorities during the second half of 2014.
260. From June 2014, PAK initiated a number of court proceedings against Kosova Petrol, seeking compensation for lost revenue to it attributable to Kosova Petrol's alleged unlawful use of the petrol stations, as well as the release of stations which Kosova Petrol still controlled.<sup>356</sup> Kosovo claims to have initiated 34 cases in total, some of which were successful,<sup>357</sup> some of which were unsuccessful,<sup>358</sup> and some of which were still pending at the time of Kosovo's Rejoinder.<sup>359</sup>
261. On 5 June 2014, Kosova Petrol initiated proceedings against the Government of Kosovo before the Pristina Basic Court, seeking compensation for the expropriation of the Pristina I station in the amount EUR 5,667,445.00.<sup>360</sup> The filing apparently did not designate which division of the Basic Court allegedly had jurisdiction. Pursuant

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<sup>350</sup> Tr. Hearing Day 4 Jashari 154:21-24.

<sup>351</sup> Cl. Closing Slides 145-146.

<sup>352</sup> Cl. Closing Slide 142; C-271, Receipt from the Pristina III station, 15 July 2015.

<sup>353</sup> Resp. Rejoinder ¶¶ 303-304.

<sup>354</sup> Resp. Rejoinder ¶¶ 301-302; R-184, Photographs of Pristina III petrol station.

<sup>355</sup> First Selmani Statement, ¶¶ 40, 110.

<sup>356</sup> C-81, Privatization Agency of Kosovo Statement of Claim to the Basic Court of Prizren-branch Dragash, 23 October 2014; C-82, Privatization Agency of Kosovo Statement of Claim to the Basic Court of Gjilan-branch Kamenica, 23 June 2014; C-83, Privatization Agency of Kosovo Statement of Claim to the Basic Court of Gjilan, 7 November 2014.

<sup>357</sup> R-78, Decision of the Basic Court in Peja Case No. 294/14, 17 December 2019; R-80, Decision of the Basic Court of Prizren No, 94/14, 7 June 2018.

<sup>358</sup> R-81, Decision of the Basic Court in Pristina No. 535/2014 17 July 2018; R-82, Decision of the Basic Court in Peja No. 31/16, 3 February 2020.

<sup>359</sup> Resp. Rejoinder ¶¶ 252-256.

<sup>360</sup> C-49, Kosova Petrol Statement of Claim to the Basic Court of Pristina in Case No. 348/2014, 5 June 2014.



to domestic law,<sup>361</sup> the Basic Court transferred the claim to the Department of Economic Affairs, which has jurisdiction generally to decide business disputes between local and foreign legal persons. The Government's response was filed on 30 December 2015, and on 2 May 2016, the Department of Economic Affairs rendered its judgment, finding it lacked substantive jurisdiction to decide on real estate rights. It determined that the claim instead should proceed before the Civil Division of the Basic Court in Pristina, which had exclusive competence for disputes about property rights for immovable property located in its territory.<sup>362</sup> The case appears still to be pending before the Civil Division; neither Party to this Arbitration has alluded to any developments since the 2016 transfer of the file.<sup>363</sup>

262. In a separate proceeding, on 27 October 2014, Mr. Selmani also filed a complaint with Albanian prosecutors for alleged "economic organized crime" at PAK, naming several specific officials including Mr. Jashari.<sup>364</sup> It is not clear what the status is of this complaint.

#### **Q. The 2014 LFI**

263. Finally, while a number of the events above were proceeding, the Parliament of Kosovo was at work on a new Law on Foreign Investment. Following a number of drafts in 2012 and 2013,<sup>365</sup> the Parliament on 30 December 2013 adopted Law No. 04/L-220 on Foreign Investment (as previously defined, the "**2014 LFI**").<sup>366</sup> The 2014 LFI entered into force on 24 January 2014. Pursuant to Article 25 of the 2014 LFI, the 2006 LFI was expressly repealed upon entry into force of the 2014 LFI.<sup>367</sup>
264. A number of provisions of the 2014 LFI are directly relevant to this dispute. The Tribunal discusses these provisions in the Sections that follow, as relevant to the Parties' specific arguments.

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<sup>361</sup> C-162, Law No. 03/L-199 on Courts, 1 January 2011 and 1 January 2013.

<sup>362</sup> C-50/R-176, Judgment of the Basic Court of Pristina Department of Economic Affairs in Case No. 348/2014, 2 May 2016; First Selmani Statement ¶ 81 First L. Selmani Statement ¶ 45.

<sup>363</sup> Tr. Closing Day 1 Kalicki/Pekar 249:4-250:13; Tr. Closing Day 1 Bishop/Shelbaya/Kalicki 64:16-65:9; Tr. Closing Day 2 Shelbaya/Bishop/Douglas 43:3-44:18.

<sup>364</sup> C-78, Report for Economic Organized Crime filed by Mr. Selmani to the Chief Prosecutor SPRK, 27 October 2014.

<sup>365</sup> C-232, Draft Law on Foreign Investment of 28 December 2012; C-277, Draft Law on Foreign Investment of 31 March 2013; C-233, Draft Law on Foreign Investment of 19 August 2013

<sup>366</sup> CL-3, Law No. 04/L-220 on Foreign Investment, adopted by the Assembly of Kosovo on 30 December 2013, entered into force on 24 January 2014.

<sup>367</sup> CL-3, 2014 LFI, Article 25.

## VII. SUMMARY OF CLAIMS, OBJECTIONS AND REQUESTS FOR RELIEF

265. On the basis of the complex factual history discussed above, Mr. Selmani alleges numerous breaches of the substantive obligations set forth in one or more of the 2001 UNMIK Investment Regulation, the 2006 LFI and the 2014 LFI. Specifically, Mr. Selmani alleges the following:
- a. A breach of fair and equitable treatment (“**FET**”) obligations, in connection with (i) an alleged PAK “smear campaign” against Kosova Petrol in 2012 and in 2014; (ii) the MTI’s decision in 2013 not to renew Kosova Petrol’s licenses; (iii) the “dispossession” of Kosova Petrol’s network of petrol stations, through PAK’s tendering of those stations for new leases and Kosova Petrol’s subsequent eviction to make way for the winners of those tenders; and (iv) an alleged denial of justice by Kosovo’s courts, in connection with proceedings Kosovo Petrol initiated in 2014 relating to the expropriation of the Pristina I station;
  - b. A breach of obligations not to impair investments by unreasonable or discriminatory means (“**Non-Impairment**”), in connection with the same acts challenged under the FET standard;
  - c. A breach of full protection and security (“**FPS**”) obligations, in connection with (i) the illegal occupation of 18 petrol stations, (ii) illegal competition from black market operators; and (iii) unlawful and arbitrary measures by public authorities, specifically the ones recounted in connection with the FET claim;
  - d. A breach of protections against expropriation, in connection with (i) the failure to hand over certain petrol stations, and (ii) the “dispossession” of other petrol stations; and
  - e. A breach of obligations to respect the rights of foreign investors and to comply with obligations towards such investors, with specific reference to obligations undertaken in the UNMIK Permission.
266. In addition to denying these claims on their merits, Kosovo raises eight objections against the Tribunal’s jurisdiction (all of which Mr. Selmani opposes). Specifically, Kosovo objects as follows:
- a. There is no jurisdiction *ratione personae*, because Mr. Selmani is not a qualified “foreign person” under the 2014 LFI’

- b. There is no jurisdiction *ratione materiae*, because Mr. Selmani had no lawful property rights qualifying as investments that are entitled to protection under the 2006 LFI or the 2014 LFI;
  - c. No alleged conduct, obligations or liability of UNMIK or PAK could be attributable to Kosovo;
  - d. There is no “retroactive” jurisdiction over alleged breaches of instruments predating the 2014 LFI;
  - e. The majority of claims are time-barred;
  - f. The claims are barred by the “fork-in-the-road” provision of the 2014 LFI;
  - g. The claims about PAK conduct are not arbitrable; and
  - h. There are “no substantive obligations” that could give rise to claims with respect to (i) alleged expropriation by UNMIK, or (ii) FET claims under the 2014 LFI.
267. On the basis of these claims and objections, the Parties have framed their respective requests for relief.
268. In his Statement of Claim, Mr. Selmani requested that the Tribunal:
- a) Declare that it has jurisdiction over Mr. Selmani’s claims;
  - b) Declare that Mr. Selmani’s claims are admissible;
  - c) Declare that Kosovo has breached its obligations under the Regulation on Foreign Investment, the 2006 LFI and the 2014 LFI;
  - d) Award Mr. Selmani compensation in the total amount of EUR 44.2 million;
  - e) Award Mr. Selmani pre- and post-award interest at the simple rate of 8% with respect to all claims except the claim relating to Pristina I;
  - f) Award Mr. Selmani pre- and post-award interest at the rate of 7% compounded annually as of date of the expropriation of the Pristina I station;

g) Award Mr. Selmani compensation on such other basis as the Tribunal may deem to be warranted;

h) Award Mr. Selmani the amounts of the legal fees and costs incurred in these proceedings, plus interest at an appropriate rate;

i) Grant Mr. Selmani such other and further relief as the Tribunal deems appropriate under the circumstances; and

j) Declare that any award rendered will be provisionally enforceable.<sup>368</sup>

269. In his Reply, Mr. Selmani updated his requests for relief as follows, requesting that the Tribunal:

(i) Declare that it has jurisdiction over Mr. Selmani's claims;

(ii) Declare that Mr. Selmani's claims are admissible;

(iii) Declare that Kosovo has breached its obligations under the Regulation on Foreign Investment, the 2006 LFI and the 2014 LFI;

(iv) Reserve for a subsequent award the determination of the amount of damages owed to the Claimant for the breaches of the Regulation on Foreign Investment, the 2006 LFI and the 2014 LFI;

(v) Award Mr. Selmani the amounts of all legal fees and costs incurred in these proceedings (including representation costs), plus interest at an appropriate rate;

(vi) Award Mr. Selmani the amounts of the legal fees and costs incurred in these proceedings, plus interest at an appropriate rate;

(vii) Grant Mr. Selmani such other and further relief as the Tribunal deems appropriate;

(viii) Declare that any award rendered will be provisionally enforceable.<sup>369</sup>

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<sup>368</sup> SoC ¶ 376.

<sup>369</sup> Cl. Reply ¶ 662.

270. For its part, Kosovo's request for relief remained the same in its Statement of Defense and Rejoinder. In both documents, Kosovo requested that the Tribunal issue an award:
- a. declaring that the Tribunal does not have jurisdiction;
  - b. in the alternative to request a. above dismissing Mr. Selmani's claims in their entirety;
  - c. ordering Mr. Selmani to pay, pursuant to Article 38 of the ICC Rules, all costs incurred in connection with these arbitration proceedings, including the costs of the arbitrators and of the ICC, as well as legal and other expenses incurred by Kosovo, including but not limited to the fees of its legal counsel, experts and consultants and those of Kosovo's own employees on a full indemnity basis, plus interest thereon at a reasonable rate from the date of which such costs are incurred to the date of payment;
  - d. ordering such other relief as the Tribunal may deem appropriate in the circumstances.<sup>370</sup>

## VIII. JURISDICTION

271. Kosovo has raised eight objections against the Tribunal's jurisdiction. The Parties' positions on each jurisdictional objection are summarized below,<sup>371</sup> followed by the Tribunal's analysis. As with the factual background provided above, this summary is not intended to be all-inclusive, but rather to provide some high-level background for the purposes of the Tribunal's analysis. The fact that a particular argument does not feature in the below summary should not be taken as an indication that it was not considered by the Tribunal. The Tribunal has carefully reviewed and considered *all* aspects of the Parties' written and oral submissions and considered all contentions presented in the course of the proceedings.

### A. *Ratione Personae*

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<sup>370</sup> SoD ¶ 513; Resp. Rejoinder ¶ 527.

<sup>371</sup> The Parties have addressed the jurisdictional objections in different sequences in their respective submissions. The Tribunal addresses them below in a sequence that appears most logical to it, irrespective of the sequence adopted by either Party.

**(1) Kosovo's Position**

272. In Kosovo's submission, any dispute between Mr. Selmani and Kosovo is domestic, and as such not within the ambit of the 2014 LFI.
273. Mr. Selmani was a resident of Kosovo "at all material times in dispute" and is therefore excluded from the protection of the 2014 LFI, Kosovo says. Mr. Selmani registered his business using his Kosovo identification, as opposed to his Croatian passport. Furthermore, even on Mr. Selmani's own case, he was a Kosovo resident from the time around his investment until 2016, when he claims to have left the country (which is not reflected by the records of Kosovo authorities, Kosovo points out).<sup>372</sup>
274. The fact that Mr. Selmani continuously has been a Kosovo resident is decisive, according to Kosovo. Mr. Selmani relies for his standing in this Arbitration on Article 2.1.3.1 of the 2014 LFI, which in the English and Albanian versions define a foreign person as "any natural person who is a citizen of a foreign country." Kosovo argues that this "does not cover natural persons holding Kosovar citizenship that also reside in Kosovo, irrespective of whether they also hold citizenship of a foreign country." Kosovo argues that this conclusion is supported by the Serbian language version of the relevant provision, which it translates as "any natural person who is not a citizen of the Republic of Kosovo."<sup>373</sup>
275. According to Kosovo, Article 2.1.3.1 only addresses foreign nationals who are not simultaneously Kosovo nationals. Kosovo nationals are addressed instead in the subsequent sub-provision, Article 2.1.3.2, which defines as foreign persons only Kosovo nationals with residence abroad, in keeping with the legal definition of residency-based "diaspora" under Kosovo law. In other words, Mr. Selmani cannot rely on the invoked sub-provision 2.1.3.1 because he is a Kosovo national, nor can he rely on sub-provision 2.1.3.2 because he was at all relevant times a resident of Kosovo (and thereby not part of the diaspora).<sup>374</sup>
276. Kosovo disagrees with Mr. Selmani's contention that the different language versions of the 2014 LFI provision on foreign investors are the result of drafting mistakes. In particular, Kosovo argues that the Kosovar legal concept of "diaspora" is significant and should influence the reading of the 2014 LFI, leading to the conclusion

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<sup>372</sup> SoD ¶¶ 325-329; Resp. Rejoinder ¶ 400.

<sup>373</sup> RL-007, 2014 LFI (Serbian version), Art. 2.1.3. The Serbian version defines a foreign person as: "1.3.1. fizičko lice koje nije državljanin Republike Kosova; 1.3.2. fizičko lice koje je državljanin Republike Kosova, ali živi u inostranstvo." which in the Respondent's English translation reads "1.3.1. any natural person who is not a citizen of the Republic of Kosovo; 1.3.2. any natural person who is a citizen of the Republic of Kosovo, but has residence abroad."

<sup>374</sup> SoD ¶¶ 330-336.

that Mr. Selmani as a dual national residing in Kosovo is excluded from the protection of the 2014 LFI.<sup>375</sup>

277. In any event, a dual national's standing "may be precluded under customary international law," Kosovo says. If the Tribunal does not agree with Kosovo's submission that Mr. Selmani's standing is addressed by the 2014 LFI, the Tribunal must instead turn to international law, which leads to the same conclusion as Kosovo's textual analysis of the law itself: Mr. Selmani's dominant nationality is Kosovar, as demonstrated by the fact that he has consistently relied on this nationality, and never (before this Arbitration) relied on his Croatian nationality in making and performing his alleged investment.<sup>376</sup> In this respect, Kosovo disputes Mr. Selmani's contention that customary international law has no role to play, an argument which Kosovo says ignores both the LFI's choice of law clause in Article 17.2, as well as the well-established prohibition on the internationalizing of domestic disputes.<sup>377</sup>

## (2) Mr. Selmani's Position

278. Mr. Selmani says that he is a "foreign person" for the purposes of 2.1.3 of the 2014 LFI, as well as a "foreign investor" under Article 2.1.2 of the same law.
279. Mr. Selmani qualifies as a citizen of Croatia since 25 January 1994.<sup>378</sup> Mr. Selmani submits that the fact that he has also held Kosovar citizenship since Kosovo's independence in 2008, based on his prior habitual residency in Kosovo,<sup>379</sup> does not deprive him of protection under the 2014 LFI, as the LFI neither denies protection to dual nationals, nor requires Kosovar citizens to be domiciled outside of Kosovo.<sup>380</sup>
280. Mr. Selmani says that the Serbian-language version of the 2014 LFI, which Kosovo relies on for its argument that Kosovar citizens are protected only if they have residence abroad, is the result of a "drafting mistake."<sup>381</sup> Earlier drafts of the 2014 LFI – in all three language versions – contained more restrictive definitions of "foreign person," which either explicitly excluded Kosovar citizens entirely,<sup>382</sup> or required that they have residence abroad.<sup>383</sup> The final language does not contain these restrictions, except in the Serbian version, which Mr. Selmani argues was evidently an inadvertent holdover from the prior draft, after the other versions were

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<sup>375</sup> Resp. Rejoinder ¶ 398.

<sup>376</sup> SoD ¶¶ 337-339.

<sup>377</sup> Resp. Rejoinder ¶¶ 398-399; SoD ¶¶ 340-341.

<sup>378</sup> C-3, Excerpt of Bedri Selmani's Croatian Passport issued on 25 January 1994; C-4, Excerpt of Bedri Selmani's Croatian Passport issued on 16 June 2011.

<sup>379</sup> C-6, Bedri Selmani's Kosovo Identification Card issued on 9 November 2010.

<sup>380</sup> SoC ¶¶ 193-194; Cl. Reply ¶¶ 289-291.

<sup>381</sup> Cl. Opening Slide 111; Cl. Reply ¶ 284.

<sup>382</sup> C-232, Draft Law on Foreign Investment of 28 December 2012, p. 3, Article 1.3.1.

<sup>383</sup> C-233, Draft Law on Foreign Investment of 19 August 2013, p. 3, Article 1.3.2.

amended to expand the “foreign person” definition. This history confirms that the 2014 LFI was intended to protect Kosovar citizens who are also citizens or residents abroad, Mr. Selmani says. He contends that Kosovar legislation is typically drafted first in Albanian, and then translated into Serbian, which further bolsters his argument that the Serbian-language version is a mistake.<sup>384</sup>

281. In any event, Mr. Selmani submits, he is also a protected foreign person under the 2001 UNMIK Investment Regulation and the 2006 LFI, both of which expressly define “Foreign Person” to cover any natural person who is a citizen or permanent resident of another state, irrespective of whether that person also holds Kosovar citizenship. Given that Article 12 of the 2014 LFI requires that Kosovo authorities “recognize and respect all rights” of foreign investors, Mr. Selmani’s protection under the two earlier instruments must be recognized also under the 2014 LFI.<sup>385</sup>
282. Mr. Selmani also says that Kosovo cannot rely on customary international law in support of its argument that Mr. Selmani does not qualify as a foreign investor. The wording of the 2014 LFI takes precedence over any default rules of international law, a fact which Kosovo itself recognizes. In Mr. Selmani’s submission, the fact that the Parties are advancing differing views on the interpretation of the 2014 LFI is not the same as the LFI not addressing the issue of dual nationals resident in Kosovo. The 2014 LFI *does* address this issue, and it protects such individuals, which means that customary international law does not have a role to play. Furthermore, Mr. Selmani questions both Kosovo’s reliance on the LFI’s choice of law clause in Article 17, which he says cannot inform the Tribunal’s jurisdiction, and other doctrines of international law, which he says cannot override what is provided by the 2014 LFI.<sup>386</sup>

### (3) The Tribunal’s Analysis

283. The core facts relevant to the *ratione personae* analysis are not in dispute. These are that (a) Mr. Selmani was a citizen of Croatia since 1994;<sup>387</sup> (b) Mr. Selmani returned to Kosovo in 1999 and, in 2001, was registered in UNMIK’s Central Civil Registry as a habitual resident of Kosovo; he went on to serve for three years as an elected member in the Kosovo Assembly, which at the time operated under UNMIK’s supervision;<sup>388</sup> (c) Mr. Selmani was issued Kosovar citizenship after Kosovo’s Declaration of Independence in 2008, based on his prior habitual residency in

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<sup>384</sup> SoC ¶ 197; Cl. Reply ¶¶ 280-285; Cl. Opening Slide 111.

<sup>385</sup> SoC ¶¶ 195-196; Cl. Reply ¶¶ 286, 292-295, 377-381; Cl. Opening Slide 112; CL-1, 2001 UNMIK Investment Regulation, Article 2.1; CL-2, 2006 LFI, Article 2.1(a).

<sup>386</sup> Cl. Rejoinder ¶¶ 21-24; Cl. Reply ¶¶ 296-297, referencing SoD ¶ 337; Statement of Preliminary Objections and Request for Bifurcation ¶ 67.

<sup>387</sup> First Selmani Statement ¶ 7; C-3, Excerpt of Bedri Selmani’s Croatian Passport issued on 25 January 1994; C-4, Excerpt of Bedri Selmani’s Croatian Passport issued on 16 June 2011.

<sup>388</sup> First Selmani Statement ¶¶ 8-10; R-1, Bedri Selmani’s UNMIK ID issued on 24 July 2001.



Kosovo;<sup>389</sup> and (d) Mr. Selmani remained a resident of Kosovo for many years, at least through 2015.

284. Mr. Selmani claims he left Kosovo in 2016, after the events he challenges in this case.<sup>390</sup> Kosovo argues that Mr. Selmani did not notify his departure, and therefore that according to official records, he is still considered to be a Kosovo resident.<sup>391</sup>
285. The real dispute between the Parties is about the implication of these facts for purposes of the 2014 LFI, upon which this Tribunal’s jurisdiction is founded. Article 16.2 of the 2014 LFI states that a “foreign investor” shall have the right to require an investment dispute be settled through international arbitration, and Article 2.1.2 defines a “foreign investor” as a “foreign person that has made an investment in the Republic of Kosovo.” The term “foreign person” is defined in Article 2.1.3, in two sub-clauses (2.1.3.1 and 2.1.3.2) which apply to natural persons, and one sub-clause (2.1.3.3) which applies to legal persons.<sup>392</sup> Since this case is brought by Mr. Selmani in his personal capacity, jurisdiction must be established – if at all – under Articles 2.1.3.1 or 2.1.3.2.
286. As a threshold matter, the Tribunal notes – with respect to Article 2.1.3.2 – that Mr. Selmani sought to rely on this as an alternative basis for jurisdiction *ratione personae* only late in this case. Article 2.1.3.2 applies to overseas Kosovars, *i.e.*, “any natural person who is a citizen of the Republic of Kosovo but has residence abroad.”<sup>393</sup> As noted above, Mr. Selmani became a citizen of Kosovo after its independence, and was a resident of Kosovo from 1999 until at least 2015, but he contends he left Kosovo before he commenced this arbitration.<sup>394</sup> Nonetheless, in both his Request for Arbitration and his Statement of Claim, Mr. Selmani invoked jurisdiction only under Article 2.1.3.1, on the basis of his Croatian nationality, *not* Article 2.1.3.2, on the basis of his Kosovar nationality and alleged residence abroad.<sup>395</sup> Only after Kosovo challenged the applicability of Article 2.1.3.1 to dual Kosovar-Croatian citizens did Mr. Selmani contend, in a single paragraph of his Reply, that jurisdiction might be grounded in the alternative on Article 2.1.3.2 of the 2014 LFI, based on his alleged foreign residence after 2015.<sup>396</sup> Kosovo engaged briefly with this argument in its Rejoinder, but did not challenge it as having been being raised too late.<sup>397</sup> Mr. Selmani did not develop this argument further.

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<sup>389</sup> First Selmani Statement ¶ 9; C-6, Bedri Selmani’s Kosovo Identification Card issued on 9 November 2010.

<sup>390</sup> First Selmani Statement ¶ 12.

<sup>391</sup> SoD ¶ 329.

<sup>392</sup> CL-3, 2014 LFI, Articles 2.1.2, 2.1.3, and 16.2.

<sup>393</sup> CL-3, 2014 LFI, Article 2.1.3.2.

<sup>394</sup> Cl. Reply ¶ 294.

<sup>395</sup> RfA ¶¶ 54-55; SoC ¶ 193.

<sup>396</sup> Cl. Reply ¶ 294.

<sup>397</sup> Resp. Rejoinder ¶ 400.

287. The Tribunal has serious doubts about this alternative argument, given Mr. Selmani's uninterrupted residence in Kosovo from before his alleged investment begun (*i.e.*, the UNMIK Permission), until the various disputes at issue crystallized. Nothing in the 2014 LFI suggests that Article 2.1.3.2, addressing *overseas Kosovar citizens*, was intended to enable citizens who resided in Kosovo when disputes with their Government arose to be treated nonetheless as "foreign persons" (qualifying as "foreign investors"), simply because they *subsequently* – post-dispute – may have relocated to another country before commencing suit. Such a reading would encourage and reward the post-dispute internationalization of what were simply domestic claims as of the date they actually arose.
288. For this reason, the Tribunal focuses on Mr. Selmani's primary case for jurisdiction *ratione personae*, which has always been based on his Croatian nationality and on Article 2.1.3.1 of the 2014 LFI. As noted, that was the sole theory of jurisdiction he invoked in commencing these proceedings.
289. The controversy in this case arises from the fact that Article 2.1.3.1 is framed differently in the two equally authentic versions of the 2014 LFI, *i.e.*, the Albanian and Serbian versions. The Albanian version – like the English version officially released by the Republic of Kosovo – frames Article 2.1.3.1 in positive language, describing a "foreign person" as those who have a particular characteristic: a "natural person who *is a citizen of a foreign country*."<sup>398</sup> The Serbian version by contrast frames Article 2.1.3.1 in negative language, describing a "foreign person" as all those who do *not* have a particular characteristic: a "natural person who *is not a citizen of Kosovo*."<sup>399</sup> As a matter of plain language, the former approach would seem to *include* those with dual Kosovar and foreign nationality, because of its focus on their foreign nationality, while the latter approach would seem to *exclude* dual nationals, because of its focus on their Kosovar nationality.
290. The co-existence of two different provisions in equally authentic versions of Article 2.1.3.1, with differing implications for the rights of dual nationals under the 2014 LFI, makes it impossible for the Tribunal to resolve the debate simply on a "plain language" analysis. The Parties have not presented any briefing regarding rules of interpretation that Kosovo law would apply to legislation with two different but equally interpretative texts. They have, however, presented various arguments based on extrinsic evidence. Given the Parties' approach to the issue, the Tribunal considers it appropriate likewise to examine the materials submitted, to determine if they may shed light on the applicable legislative intent.
291. The Tribunal begins this exercise by recalling that the prior legislation, the 2006 LFI, was framed in a way that emphasized foreign citizenship in its definition of "foreign

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<sup>398</sup> RL-8, 2014 LFI, Article 2.1.3.1 (Albanian version); CL-3, 2014 LFI, Article 2.1.3.1 (English version).

<sup>399</sup> SoD ¶ 332.

person.” This was true both in the version adopted by the Assembly of Kosovo on 21 November 2005, which defined a “foreign person” *inter alia* as “a physical person who is a citizen of, or who has legal permanent resident status in, a foreign state or geographic territory outside Kosovo,”<sup>400</sup> and in the version promulgated by UNMIK on 28 April 2006 with certain SRSB amendments, which revised the definition to read “a physical person who is not a habitual resident of Kosovo, *or* who has citizenship or legal permanent resident status outside of Kosovo.”<sup>401</sup> The use of the connector “or” in the SRSB amendments suggests that foreign citizenship was sufficient qualification under the 2006 LFI, even for foreign citizens who resided in Kosovo.

292. The 2006 LFI remained in effect following Kosovo’s Declaration of Independence, which made possible the establishment of a class of citizens in the new Republic of Kosovo. There appears to have been no effort to amend the definition of “foreign person” in the 2006 LFI to exclude coverage for those foreign citizens who obtained dual nationality by also becoming Kosovar citizens following the Declaration of Independence. As a result, so long as the 2006 LFI remained in effect, dual citizens such as Mr. Selmani remained qualified to invoke its benefits.
293. By contrast, the record reflects that the drafting process for the subsequent LFI started with a version which – in all language versions – contained exclusionary language along the lines of that reflected in the final Serbian version, *i.e.*, language disqualifying those who were citizens of Kosovo.<sup>402</sup> This language was maintained for several subsequent drafts.<sup>403</sup> However, this language was subsequently *revised* in the final Albanian version (adopted in December 2013) to substitute inclusionary language, *i.e.*, language qualifying those who were citizens of foreign countries, rather than disqualifying those who were citizens of Kosovo. The revisions to the Albanian version were likewise reflected in the final English translation. For reasons that are unclear, the Serbian version was left unrevised.
294. The Tribunal considers this drafting history relevant to the determination of which of the competing “authentic” language formulations was intended to be the final text. The history suggests a process of deliberation, resulting in an intent to revise the prior formulation. Taking into account the Claimant’s assertion (uncontradicted by the Respondent) that legislation in Kosovo is commonly drafted in Albanian and then translated into Serbian rather than the reverse,<sup>404</sup> the Tribunal considers it most likely that there was an inadvertent failure to update the Serbian version to match the updated Albanian version. The Albanian version being the last revised version in a

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<sup>400</sup> CL-2, Law No. 02/L-33, prior to SRSB amendment.

<sup>401</sup> CL-2, UNMIK Regulation No. 2006/28, paragraph B(b)(a) (emphasis added).

<sup>402</sup> C-232, Draft Law of Foreign Investment of 28 December 2012, p. 2.

<sup>403</sup> C-277, Draft Law on Foreign Investment of 31 March 2013, p. 2; C-233, Draft Law on Foreign Investment of 19 August 2013.

<sup>404</sup> Cl. Reply ¶ 285.

succession of drafts, the Tribunal considers it to be the more accurate formulation of legislative intent.

295. Given this conclusion based on the drafting history, the Tribunal need not attempt to resolve the Parties' rival notions of the concept of *diaspora* as significant to Kosovo's development. The Tribunal accepts that one goal of both the 2006 and 2014 LFIs was to attract investment into Kosovo from abroad, including by those of Kosovar origin who had previously left the territory and may have taken foreign citizenship in addition to residing abroad. But the evidence is less clear whether the Assembly of Kosovo intended to strip foreign citizens investing in Kosovo of their qualifying status on the basis that, having returned to reside in Kosovo, they subsequently obtained Kosovar citizenship in addition to their foreign citizenship. The record is inconclusive on this point, and therefore cannot serve as sufficient counterweight to the inferences the Tribunal has drawn based on the 2014 LFI's drafting history.
296. Finally, the Tribunal rejects the Respondent's invitation to interject a "dominant and effective nationality" analysis drawn from customary international law, in order to determine which of Mr. Selmani's dual nationalities should prevail, if only one of these nationalities might apply for determining jurisdiction *ratione personae* under the 2014 LFI.<sup>405</sup> The 2014 LFI is an instrument of domestic legislation, not an instrument of international law, and there is no reason that its definition of "foreign person" should be interpreted by reference to customary international law. While Article 17.2 of the 2014 LFI provides generally that a tribunal "shall apply the *substantive law* applicable in the Republic of Kosovo ... and such rules of public international law as *may* be applicable to the *issues in dispute*,"<sup>406</sup> nothing in this formulation – which on its face addresses the *substantive law* of the dispute – mandates that public international law govern a Tribunal's threshold determination of its *jurisdiction*. Certainly, nothing in the 2014 LFI suggests an intent by the Assembly of Kosovo that public international law rules would apply to interpreting the *definitions section* of the legislation, as those definitions pertain to issues of jurisdiction, or specifically to interpreting the Assembly's chosen definition of "foreign person," reflected in the wording of Article 2.1.3.1.
297. For these reasons, the Tribunal accepts that Mr. Selmani's status as a citizen of Croatia qualifies him as a "foreign person" under the 2014 LFI, regardless of the fact that he also held Kosovar nationality after 2008. The Respondent's objection *ratione personae* is therefore denied.

## **B. *Ratione Materiae***

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<sup>405</sup> SoD ¶ 337.

<sup>406</sup> CL-3, 2014 LFI, Article 17.2 (emphasis added).

**(1) Kosovo's Position**

298. Kosovo argues that Mr. Selmani has failed to establish the existence of lawful property rights protected under either the 2006 LFI or the 2014 LFI.<sup>407</sup>

**a. Rights under the UNMIK Permission**

299. The UNMIK Permission only gave Mr. Selmani a limited, temporary and freely revocable right to occupy the petrol stations; indeed, it is undisputed that Mr. Selmani never owned the stations in question, Kosovo says. Under these circumstances, Mr. Selmani was not in possession of either a property right or an “investment” as defined by the LFIs.<sup>408</sup> Kosovo further argues that the Tribunal lacks authority to decide on the nature of the property rights over the petrol stations, as this would entail (i) deciding on (non-arbitrable) competing claims to immovable property, and (ii) adjudicating the rights of third parties such as INA, who claim to have greater rights to the property in question. Under the principle established by the ICJ in the *Monetary Gold* case, which was accepted by the *Chevron v. Ecuador* tribunal to be applicable in investor-state arbitration, the Tribunal may not adjudicate these rights, because the implicated third parties have not consented to the Tribunal’s jurisdiction.<sup>409</sup>

300. In its Rejoinder, Kosovo argues at length that the nature of the UNMIK Permission, and the events after its issuance, make it clear that it was a “stop-gap measure” intended as a “short-term authorization that fell far short of granting any proprietary rights.” Even if the UNMIK Permission was an investment – which Kosovo disputes – it therefore was so only for a short time, and came to an end well before the entry into force of the 2006 LFI.<sup>410</sup>

301. In this respect, Kosovo explains that the UNMIK Permission was issued as an emergency response to a short-term crisis during the winter of 1999-2000, in order to ensure that petroleum products would be available during that time. This is clear not only from the contemporary context, with a number of other interim measures being taken by UNMIK to guarantee energy supplies during that winter, but also from the express language of the UNMIK Permission itself, which provides that “[t]he permission extended in this letter is issued as a measure to ensure that the supply of Petroleum Products (POL) is ensured during this vital winter period.”<sup>411</sup>

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<sup>407</sup> SoD ¶ 305.

<sup>408</sup> SoD ¶¶ 306-312; Resp. Rejoinder ¶ 330.

<sup>409</sup> SoD ¶¶ 313-315 (citing RL-26, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador II*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, ¶ 4.61.

<sup>410</sup> Resp. Rejoinder ¶¶ 331-332.

<sup>411</sup> Resp. Rejoinder ¶¶ 333-338; C-8, The UNMIK Permission, p. 2.

302. In explaining the context of the UNMIK Permission, Kosovo also highlights the fact that UNMIK did not possess (nor did it claim to possess) the authority to administer SOE assets in January 2000. At that time, UNMIK Regulation 1999/1 was in force, and the authority given to UNMIK under its Article 6 did not encompass the petrol stations, which were assets of the SOEs Beopetrol and JugoPetrol.<sup>412</sup>
303. Kosovo also points out that UNMIK’s authority to administer SOE assets was established only in September 2000, through Regulation 2000/54, and that it took further time for UNMIK to develop a program to exercise this authority *vis-à-vis* specific SOEs. Furthermore, Kosovo submits that the petrol stations were part of a complex web of competing claims by Serbia and Croatia. In recognition of this complexity, documentation from December 1999 shows that UNMIK was reluctant to make any long-term modifications to the petrol stations, focusing instead on maintaining the *status quo*.<sup>413</sup> Once UNMIK embarked on a strategy for the SOE assets, it did so through a “commercialization program” involving tenders and the formal granting of contracts with arbitration clauses as per United Nations practice, but the UNMIK Permission – and the assets covered by it – appear not to have been part of this program. Kosovo argues that this further shows that the UNMIK Permission was a temporary emergency measure.<sup>414</sup>
304. Kosovo also says that Mr. Selmani did not himself rely on the UNMIK Permission as granting definitive rights. In fact, documentation shows that Mr. Selmani negotiated with other competing entities over the very same petrol stations.<sup>415</sup>

#### **b. Capital expenditures**

305. According to Kosovo, Mr. Selmani cannot rely on his alleged “substantial capital expenditures” in improving the petrol stations for the purposes of establishing an investment. This argument, Kosovo says, was introduced too late in the proceedings and as such is inadmissible. In any event, the alleged expenditures are not sufficiently documented, and do not qualify as an “investment” under the 2014 LFI, as they are not “assets” under the LFI. Furthermore, expenditure of money for SOEs does not qualify as investments under Kosovan law, as Mr. Selmani does not have *in rem* rights over any equipment installed as a result of such expenditures.<sup>416</sup>

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<sup>412</sup> Resp. Rejoinder ¶¶ 339-344; C-145, UNMIK Regulation No. 1999/1, ¶ 6.

<sup>413</sup> Resp. Rejoinder ¶¶ 345-361; C-173, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/1999/1250 dated 23 December 1999, ¶ 45.

<sup>414</sup> Resp. Rejoinder ¶¶ 362-383.

<sup>415</sup> Resp. Rejoinder ¶¶ 384-386; R-142, Letter from former SOE employees to the Ombudsperson, 15 April 2003, p. 1.

<sup>416</sup> Resp. Rejoinder ¶¶ 383-390.

**c. The legality of Mr. Selmani's investments**

306. Finally, Mr. Selmani's alleged investment is "tainted with illegality," Kosovo argues. Mr. Selmani did not comply with the terms of the UNMIK Permission, as he failed to pay rent after 2001. Nor did Mr. Selmani comply with Kosovo law, as required by the express language of Articles 1.4 and 13 of the 2014 LFI; the express requirements of the 2014 LFI make inapposite arbitral jurisprudence with respect to legality requirements under investment treaties. In Kosovo's submission, Mr. Selmani did not obtain the required permits and permissions, nor did he pay necessary taxes. More broadly, Kosovo says that Mr. Selmani was either "part of" or "knowingly invested in an economic sector" which was plagued by well-known security problems tied to organized criminal activity, a fact which Kosovo argues constitutes "an independent basis on which to deny jurisdiction."<sup>417</sup>

**(2) Mr. Selmani's Position**

**a. Rights under the UNMIK Permission**

307. The term "investment" is defined broadly in Article 2.1.4 of the 2014 LFI, Mr. Selmani argues. Pursuant to that provision, "any asset owned or otherwise lawfully held by a Foreign Person in the Republic of Kosovo for the purpose of conducting lawful commercial activities" is a protected investment. Article 2.1.4 then sets out a non-exhaustive list of examples of investments, which includes "movable and immovable property, including rights in and to such property such as a mortgage, lien, pledge, lease or servitude," "claims or rights to money, goods, services, and performance under contract," and "concessions or licenses conferred by law, administrative act, or contract." Mr. Selmani also refers to Article 20 of the 2014 LFI, which provides that the law – and the "rights, guarantees, privileges and protections established" by it – applies "equally to foreign investors that invested in the Republic of Kosovo prior to the effective date of this law." Mr. Selmani contends that his investments, including the rights conferred to him and Kosova Petrol under the UNMIK Permission to possess and operate the petrol stations, are clearly protected under this language. Those rights also constitute protected (i) rights in and to immovable property, (ii) rights to perform under contract, and (iii) concession or license conferred by contract.<sup>418</sup> Mr. Selmani's rights also were protected under the corresponding language of the 2006 LFI, he submits.<sup>419</sup>

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<sup>417</sup> SoD ¶¶ 316-321; Resp. Rejoinder ¶¶ 391-396.

<sup>418</sup> SoC ¶¶ 198-200; Cl. Reply ¶¶ 300-304; Cl. Rejoinder ¶¶ 29-36.

<sup>419</sup> Cl. Reply ¶¶ 305-306

308. More specifically, Mr. Selmani says, the UNMIK Permission qualifies under both LFIs as (i) a lease, and (ii) a license to import, transport distribute and sell petroleum products.
309. The UNMIK Permission is a lease because it allowed Mr. Selmani to “operate for commercial gain the fuel outlets and establishments” and “lawfully enjoy [their] occupancy” in exchange for monthly rental payments and the making of “further capital expenditure in order to render them operational.” Mr. Selmani argues that this constitutes a lease under Kosovar law, which at the time of the UNMIK Permission was enshrined in the Yugoslav Law on Obligational Relationships (“**1978 LOR**”).<sup>420</sup> Article 567 of that law provided:

**Article 567. Notion**

(1) By a contract of lease (or hire agreement) a lessor (or owner) shall assume the obligation to deliver a specific object to a lease-holder (or hirer) for use, while the latter shall assume the obligation to pay him in return a specified rent.

(2) The use shall also include enjoying objects (collecting yields), unless otherwise provided by contract or by trade usage.”

310. Mr. Selmani argues that the UNMIK Permission is covered by this definition, and furthermore that the 1978 LOR allowed for an undetermined duration, and also provided that such a lease could not be terminated unless a notice was sent to the lease-holder.<sup>421</sup> The law also allowed for the implicit renewal of a lease, if the lease-holder continued to use the leased object without the lessor’s objection.<sup>422</sup> Applying these provisions to the present situation, Mr. Selmani argues that his continuing operation of the fuel stations without UNMIK’s objection transformed the lease into one concluded for an indefinite period.<sup>423</sup>
311. The UNMIK Permission also was a license to import, transport, distribute and sell petroleum products. It follows from the wording of the UNMIK Permission itself that it constituted a petroleum license, as does the “entitlement to obtain” further petroleum licenses in the future, subject to compliance with regulations.<sup>424</sup>
312. Both leases and licenses are expressly listed as “investments” in the 2014 LFI – even if, *arguendo*, they are temporary in nature – Mr Selmani says. Furthermore, the

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<sup>420</sup> RL-13/RE-21, 1978 LOR.

<sup>421</sup> RL-13/RE-21, 1978 LOR, Article 597.

<sup>422</sup> RL-13/RE-21, 1978 LOR, Article 596.

<sup>423</sup> Cl. Rejoinder ¶¶ 70-75.

<sup>424</sup> C-8, Permission, p. 1,



UNMIK Permission itself recognizes that Mr. Selmani made an investment, by stating that Kosova Petrol “has made considerable improvements and repairs to the outlets and establishments in order to render them operational,” and “[t]hat the expenditure that has been incurred to date, namely of a capital nature, needs to be ascertained and given a monetary value representing the business investment made by Mr. Bedri Selmani.”<sup>425</sup>

313. UNMIK represented to Mr. Selmani that it had the authority to grant the UNMIK Permission, on which Mr. Selmani says he was entitled to rely.<sup>426</sup> In this respect, Mr. Selmani says that he entered into the UNMIK Permission with UNMIK, the authority in Kosovo in 2000, legitimately relying on UNMIK’s representation that it had the power to issue the UNMIK Permission.<sup>427</sup> Furthermore, the validity of the UNMIK Permission was repeatedly recognized as valid, including by the KTA,<sup>428</sup> which Mr. Selmani argues “would have cured any defect the Permission may have had.”<sup>429</sup>
314. Regardless of the representations about UNMIK’s authority, Mr. Selmani submits that UNMIK *de facto* did have the power to grant the UNMIK Permission. UNMIK had the power to administer socially-owned property, Mr. Selmani says. In its Answer, Kosovo conceded as much, by stating that “[t]he administration of enterprises (including SOEs) was a reserved competency of the Special Representative of the Secretary General of the UN.”<sup>430</sup>
315. Mr. Selmani also advances a number of arguments to support his contention with respect to UNMIK’s authority. *First*, UNMIK’s authority covered “*ab initio* property located in the territory of Kosovo” derived directly from the broad interim mandate contained in paragraph 10 of UNSC Resolution 1244.<sup>431</sup> That broad authority to administer property was further specified in UNMIK Regulation 1999/1, which provides that UNMIK “shall administer moveable or immovable property [...] of, or registered in the name of, the Federal Republic of Yugoslavia or the Republic of Serbia or any of its organs, which is in the territory of Kosovo.”<sup>432</sup> Mr. Selmani says that Kosovo agrees that UNMIK was vested with authority to administer socially-owned property from its inception, pointing again to Kosovo’s Answer.<sup>433</sup>

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<sup>425</sup> Cl. Rejoinder ¶¶ 79-83; C-8, Permission, pp. 1-2.

<sup>426</sup> Cl. Rejoinder ¶ 26.

<sup>427</sup> Second Weller Report ¶¶ 35-37.

<sup>428</sup> R-67, KTA File Note, 17 June 2003; R-79, Letter from KTA to A. Novicki, 22 August 2003; C-240. Report on Kosova Petrol payments, 23 September 2003, Exhibit R-0073; C-240, Internal Note of the Kosovo Trust Agency, 7 March 2005, p. 2.

<sup>429</sup> Cl. Rejoinder ¶ 39.

<sup>430</sup> Answer ¶ 18.

<sup>431</sup> C-144, UNSC Resolution 1244, ¶ 10

<sup>432</sup> C-145, UNMIK Regulation No. 1999/, 25 July 1999, Section 6.

<sup>433</sup> Cl. Rejoinder ¶¶ 42-47.

316. *Second*, this power was subsequently confirmed – with retroactive effect as of 10 June 1999 – by Section 7 of UNMIK Regulation No. 2000/54.<sup>434</sup>
317. *Third*, UNMIK expressly recognized its authority to administer socially-owned property as early as in the second half of 1999, leading Mr. Selmani’s expert Mr. Klawonn to conclude that UNMIK possessed such authority “from the beginning of its mission.”<sup>435</sup>
318. *Fourth*, Mr. Selmani points to UNMIK Regulation No. 1999/9, which established the regime for obtaining petroleum licenses from the SRSG, four months prior to the granting of the UNMIK Permission. In an Annex to that Regulation, it was envisaged that UNMIK would lease the petrol stations subsequently covered by the UNMIK Permission.<sup>436</sup>
319. *Fifth*, while conceding that it was “unclear” in early 2000 whether the petrol stations were socially-owned property, Mr. Selmani says that their administration still fell under UNMIK’s powers and UNMIK expressly recognized that power.<sup>437</sup>
320. For these reasons, Mr. Selmani submits that UNMIK did have the authority to administer socially owned properties. Mr. Selmani also says that it is “hard to understand” why Kosovo alleges that he did not rely on the UNMIK Permission, since contemporaneous evidence that Kosovo produced supports the opposite conclusion.<sup>438</sup>
321. Mr. Selmani also says that, contrary to Kosovo’s assertions, the UNMIK Permission was granted for an unlimited period. The language of the UNMIK Permission itself makes numerous references to the prospect that the UNMIK Permission may be continued in the future. This includes the language about the “vital winter period” relied upon by Kosovo; read in its entirety that provision refers to envisioned events “well beyond that period,” in the form of future licenses which UNMIK at the time knew or ought to have known it would not be able to produce during the short span of those winter months in 1999/2000.<sup>439</sup>

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<sup>434</sup> Cl. Rejoinder ¶ 48; C-147, UNMIK Regulation No. 2000/54 (amending UNMIK Regulation No. 1999/1), entered into force on 27 September 2000, p. 3, Section 7.

<sup>435</sup> Cl. Rejoinder ¶ 49; Second Klawonn Report, ¶¶ 15-17.

<sup>436</sup> Cl. Rejoinder ¶¶ 51-53; C-7, UNMIK Regulation No. 1999/9 on the Importation, Transport, Distribution and Sale of Petroleum Products (Petroleum, Oil and Lubricants) for and in Kosovo, 24 September 1999.

<sup>437</sup> Cl. Rejoinder ¶ 55.

<sup>438</sup> Cl. Rejoinder ¶¶ 57-58.

<sup>439</sup> Cl. Rejoinder ¶¶ 61-65.

322. Furthermore, Kosovar authorities, including both the KTA and local courts, repeatedly recognized the validity of the UNMIK Permission past the initial period, all the way up through 2012.<sup>440</sup>
323. Finally, Mr. Selmani says that the UNMIK Permission “does not present any term or duration,” which read against the applicable 1978 LOR – which envisioned obligations being entered into for an unlimited time – contributes to the overall inference that no time limit was envisioned for the UNMIK Permission. Mr. Selmani also finds further support in a 2005 internal KTA document which recognizes that the “lease contained no express expiration date.”<sup>441</sup>

### **b. Capital expenditures**

324. Further to his rights under the UNMIK Permission, Mr. Selmani claims that he has made “substantial capital expenditures” in his efforts to renovate, operate and modernize petrol stations, and that these expenditures constitute protected “investments.” Among other things, and in addition to expenditures made in the early years of the UNMIK Permission, Mr. Selmani observes that in August 2008, his daughter Leonora Selmani joined the company, and father and daughter together initiated a plan of renovation and digitalization of many of the petrol stations. They contend that this led them to make investments of almost EUR 2 million by the end of 2010 and over EUR 3 million by the end of 2012.<sup>442</sup>
325. Mr. Selmani initially disputes that this further jurisdictional basis was introduced too late. In addition to his rights under the UNMIK Permission, Mr. Selmani advanced already in his Request for Arbitration that his protected investments include “capital contributions associated with the operation of petrol facilities pursuant to the UNMIK Permission.”<sup>443</sup> He did not develop this ground further in his SoC because Kosovo did not object to it in its Answer, but Kosovo had the opportunity to address it (as it did) in its SoD. Mr. Selmani therefore argues that he has not “dramatically redefined his case on jurisdiction,” nor has Kosovo been deprived of an opportunity to reply.<sup>444</sup>
326. Mr. Selmani initially invested “over EUR 700,000” to rehabilitate and make the petrol stations functioning.<sup>445</sup> Furthermore, Kosova Petrol made significant investments to

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<sup>440</sup> SoC ¶ 145; Cl. Rejoinder ¶¶ 66; R-67, See KTA File Note, 17 June 2003; R-73, Report on Kosova Petrol payments, 23 September 2003; R-79, Letter from KTA to A. Novicki, 22 August 2003; C-240, Internal Note of the Kosovo Trust Agency, 7 March 2005, p. 2, C-24, Judgment of the Court of Appeal in Case No. 3182/2013, 22 March 2018, p. 3; C-22, Judgment of the Basic Court of Peja in Case No. 295/2009, 9 July 2013, p. 2.

<sup>441</sup> Cl. Rejoinder ¶¶ 68-69; C-240, Internal Note of the Kosovo Trust Agency, 7 March 2005, p. 2.

<sup>442</sup> First Selmani Statement, ¶¶ 53-60; First L. Selmani Statement ¶¶ 18-20.

<sup>443</sup> Request for Arbitration ¶ 57.

<sup>444</sup> Cl. Reply ¶¶ 322-326; Cl. Rejoinder ¶¶ 86-87.

<sup>445</sup> Second Selmani Statement ¶ 10.

renovate and modernize the petrol stations starting in 2009.<sup>446</sup> These further investments were “more than EUR 3 million” in order to renovate and digitalize twelve stations, and fit nine of them with convenience stores – over EUR 1.8 million to renovate the stations and over EUR 1.2 million to purchase equipment such as pumps and trucks.<sup>447</sup> Mr. Selmani also says that Kosova Petrol retained a Turkish company, Gama Reklam, to carry out design and construction work, and a Greek company, Spyrides Group, to digitalize the petrol stations. There were also further plans to acquire existing petrol stations and create new ones,<sup>448</sup> but these plans were thwarted by Kosovo’s conduct, Mr. Selmani argues.<sup>449</sup>

327. The initial investments made by Mr. Selmani are protected by the 2006 LFI, which Mr. Selmani says that Kosovo does not dispute.<sup>450</sup> Mr. Selmani further disputes that the post-2006 expenditures do not qualify as investments under the 2014 LFI, saying that Kosovo has failed to explain why he would not have *in rem* rights: at the time these expenditures were made, the equipment and additions were owned by Mr. Selmani and not socially-owned.<sup>451</sup>
328. Finally, Mr. Selmani argues that his right to use and operate the stations, as well as his right to claim compensation for the contributions made for their renovation, constitute “assets” under Article 2.1.4 of the 2014 LFI.<sup>452</sup>

### c. The legality of Mr. Selmani’s investments

329. The legality requirement in the 2014 LFI is limited to the time when the investment was made, Mr. Selmani submits. In supporting this contention, Mr. Selmani refers to investment treaty tribunals which have interpreted language similar to that of Article 1.4 of the 2014 LFI; he says these cases show that it is “unanimously admitted that the legality requirements contained in investment treaties are limited in scope to illegalities committed at the making of the investment,” and Kosovo has not alleged that Mr. Selmani’s investments were not lawfully made.<sup>453</sup>

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<sup>446</sup> First Selmani Statement ¶¶ 53-60; First L Statement ¶¶ 13-20.

<sup>447</sup> C-136, Cash Flow from Investing Activities’ in the Statement of Cash Flow in Kosova Petrol Financial Statement, 2008; C-104, Kosova Petrol Financial Statement, 2009; C-105, Kosova Petrol Financial Statement, 2010; C-111, Kosova Petrol Financial Statement, 2011; C-112, Kosova Petrol Financial Statement, 2012; CER-001, ‘Cash Flow from Investment Activities’ in Table D33 of the WorkPaper D; C-303, Invoices for the renovation and modernization of the petrol stations (new sample).

<sup>448</sup> First L Statement ¶¶ 21-25.

<sup>449</sup> Cl. Opening Slides 35-36; Cl. Reply ¶¶ 328-333.

<sup>450</sup> Cl. Rejoinder ¶¶ 90-92.

<sup>451</sup> Cl. Rejoinder ¶¶ 93-95.

<sup>452</sup> Cl. Rejoinder ¶¶ 96-97.

<sup>453</sup> Cl. Reply ¶¶ 334-343, referencing CL-132, *Alasdair Ross Anderson et al v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/07/3), Award, 19 May 2010, ¶ 57; CL-133, *Copper Mesa Mining Corporation v. Republic of Ecuador* (PCA No. 2012-2), Award, 15 March 2016, ¶¶ 5.54-5.55; CL-134, *Vannessa Ventures Ltd. v.*

330. In the event that the Tribunal, contrary to Mr. Selmani’s argument, considers that the 2014 LFI’s legality requirement extends to the entire operation of the investment, Mr. Selmani says that Kosovo has failed to demonstrate any illegality. In this respect, Mr. Selmani argues that UNMIK agreed to his suspending rent payments in light of other debts owed to him at the time, and in any event the alleged non-fulfillment of contractual obligations would not equate to a failure to carry out the investment in accordance with Kosovo law. Furthermore, Kosovo has not established that Mr. Selmani failed to pay any taxes beyond the alleged failure to pay pension contributions of 1,800 (in an unspecified currency).<sup>454</sup> Finally, Mr. Selmani’s failure to obtain the required licenses was due to MTI’s conduct and constitutes part of Mr. Selmani’s claims in this arbitration; Kosovo cannot rely on these facts to request the Tribunal to deny jurisdiction over Mr. Selmani’s claims.<sup>455</sup>
331. Mr. Selmani also disputes as wholly unsubstantiated and “defamatory” Kosovo’s allegation that Mr. Selmani may have participated in organized crime. Kosovo refers to a German intelligence report which is not verified, contains serious factual errors and does not mention Mr. Selmani by name. The other document relied upon by Kosovo, a list of “unclean candidates” for an upcoming election, is an unsourced list of names with no explanations given for the reasons to include the listed individuals.<sup>456</sup>

### (3) The Tribunal’s Analysis

332. As a threshold matter, the Tribunal sees no basis for application of the *Monetary Gold* principle, which Kosovo argues would prevent the Tribunal from deciding the nature of any rights Mr. Selmani may have over the petrol stations. The concerns that the ICJ stated in *Monetary Gold* relate to a situation in which the very subject matter of the dispute involves a determination of a third State’s international legal responsibility, such as where that determination is a necessary prerequisite for decision on the claimant’s claims. No such concerns arise in this case.
333. This Tribunal is constituted under the 2014 LFI, and is thus empowered to determine if *Mr. Selmani* has standing under the 2014 LFI to bring the claims that *he* has asserted. This necessarily requires determining the extent of any qualifying investment he may have. The fact that the Tribunal makes such determinations, and in so doing makes certain rulings about the nature of the UNMIK Permission and other alleged sources of Mr. Selmani’s own alleged rights relating to the petrol

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*Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)04/6), Award, 16 January 2013, ¶ 167; CL-31, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia* (UNCITRAL), Decision on Jurisdiction, 25 July 2012, ¶ 383.

<sup>454</sup> R-76, List of Past Debts of Kosova Petrol, Tax Administration of Kosovo, 11 June 2020; R-77, List of Current Debts of Kosova Petrol, Tax Administration of Kosovo, 11 June 2020.

<sup>455</sup> Cl. Reply ¶¶ 345-349.

<sup>456</sup> Cl. Rejoinder ¶¶ 99-109.

stations, does not constitute a ruling on any competing claims that third parties may have over those stations or any other property. Nothing the Tribunal decides herein adjudicates the property rights of any other putative stakeholder to the petrol stations.

**a. The 2014 LFI's Definition of Investment**

334. The Tribunal starts with the definition of investment under the 2014 LFI, since that is the instrument which the Claimant itself invokes as reflecting Kosovo's offer to arbitrate the issues in dispute.<sup>457</sup>
335. Article 2.1.4 of the 2014 LFI defines investment as "any asset owned or otherwise lawfully held by a Foreign Person in the Republic of Kosovo for the purpose of conducting lawful commercial activities"; it then provides an illustrative but non-exhaustive set of examples ("including but not limited to ..."). Before applying this definition to the facts of the case, a few threshold comments are in order.
336. First, *ownership* of an asset is not required; the definition expressly encompasses also assets that are "*otherwise lawfully held*" (emphasis added). In general, assets can be lawfully held through a number of mechanisms short of having title to own them; that includes, as relevant to this dispute, through a valid "lease" (included in the illustrative list at Article 2.1.4.1) or through a valid "concession[] or license[]" conferred by law, administrative act, or contract" (included in the illustrative list at Article 2.1.4.5). Accordingly, to the extent a foreign person "lawfully held" a lease, concession or license to occupy or use certain premises, this would qualify *substantively* as an investment according to the definition, regardless of the fact that the foreign person was not the legal owner of the premises themselves.
337. However, the definition of investment also contains an implicit *temporal* requirement, reflected in Article 2.1.4's requirement that the asset be "lawfully held ... *in the Republic of Kosovo*" (emphasis added). The Republic of Kosovo came into existence with the Declaration of Independence in February 2008. Accordingly, by the plain language of this provision, the 2014 LFI's protections extend only to investments that, even if originally "made" in the territory of Kosovo prior to the birth of the Republic, continued after Kosovo's independence to be "lawfully held" under its laws. This interpretation implicitly excludes from coverage pre-independence investments that were no longer recognized as valid after independence.
338. This interpretation of Article 2.1.4 is in no way inconsistent with Article 20 of the 2014 LFI, which confirms that the Law was intended to "apply equally to foreign investors that invested *in the Republic* of Kosovo prior to the effective date of this law" (emphasis added). This provision refers to investments made between February

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<sup>457</sup> RfA, ¶¶ 1, 15; ToR, ¶ 27. The Tribunal turns later, in Section VII(B)(3)(c), to the separate question of whether the 2014 LFI itself preserves any right to bring claims for breach of prior investment instruments.

2008 (when the Republic came into existence) and January 2014 (when the 2014 LFI entered into force). It does not extend the 2014 LFI's protections to older investments which predated the birth of the Republic but which had no continuing validity under its laws.

339. The two Articles can easily be read together. Article 20 ensures that all investments which continued to be “lawfully held ... in the Republic of Kosovo” *after* February 2008 (thus qualifying under Article 2.1.4), but which were first invested “in the Republic of Kosovo” *prior to* January 2014, when the 2014 LFI entered into force, would be covered by its terms. Stated otherwise, Article 20 grandfathers into the 2014 LFI's protections any investments that were made between 2008-2014. Under Article 2.1.4, such pre-2008 investments would be covered by the 2014 LFI only to the extent that they continued to be “lawfully held” in the Republic from 2008 onwards, under its laws.
340. Finally, the reference to assets being “*lawfully held*” (emphasis added) refers to the validity of the “holding,” whether that occurs by lease, concession, license, contract or other mechanism. It does not require that the foreign person be in perfect compliance with all conditions of the operative instrument or with applicable provisions of Kosovar law. Non-compliance with the terms of a lease, concession, license, or contract – such as a failure to pay required rent – might be relevant to merits issues in any eventual dispute over State treatment of the investment, but it would not strip the investment of its status as such, for purposes of arbitral jurisdiction. The status of being an “investment” is granted by Article 2.1.4 so long as the mechanism authorizing the holding (*e.g.*, the lease, concession, license or contract) remains validly in effect, in the sense that it has not been revoked, terminated, or otherwise invalidated as a matter of law.

**b. The Extent of Any Qualifying “Investment” by Mr. Selmani**

341. The UNMIK Permission: Applying these principles to the case at hand, the first observation is that as long as it remained in effect, the UNMIK Permission did convey certain rights of possession and operation with respect to the petrol stations. As discussed in Section VI(B) above, those rights had aspects similar to both a lease of the premises (in the sense that the UNMIK Permission conveyed the right to occupy the stations, in exchange for payment of rent) and a license (in the sense that the UNMIK Permission conveyed the right to trade petroleum products). As noted, leases and licenses were two forms of assets that Article 2.1.4 explicitly identified as qualifying for the status of an “investment” under the 2014 LFI.
342. The Tribunal does not accept Kosovo's argument that the UNMIK Permission was *ultra vires*, because (as discussed in Section VI(B) above), whatever initial confusion there may have been about the extent of UNMIK's authority under UNMIK Regulation No. 1999/1 to administer socially owned property as distinct from

property previously owned by Yugoslavia or Serbia, this authority was confirmed on 27 September 2000 by UNMIK Regulation No. 2000/54, which authorized UNMIK to administer all property for which it had “reasonable and objective grounds” to believe was socially owned property.<sup>458</sup> UNMIK Regulation No. 2000/54 was expressly stated to be retrospective to June 1999, the date of UNSC Resolution 1244.<sup>459</sup> This Regulation effectively resolved any doubts that might previously have existed about UNMIK’s authority to issue the UNMIK Permission on 25 January 2000.

343. Nor does the Tribunal accept Kosovo’s argument that Mr. Selmani’s failure to continue rent payments, or to meet other conditions of the UNMIK Permission, stripped that Permission of its status as being “lawfully held,” for so long as the Permission remained in effect. The UNMIK Permission may have been *terminable* by UNMIK on these grounds, among others, but until it was actually *terminated*, the Permission remained a valid legal instrument conveying significant rights to Mr. Selmani.
344. However, while the rights of possession and operation conveyed by the UNMIK Permission may have been sufficiently akin to a lease and a license as to meet the *substantive* definition of an investment under Article 2.1.4, the *temporal* requirements of that Article were not equally met. These would be satisfied only if the UNMIK Permission had continued to be “lawfully held” (*i.e.*, valid and in effect) following Kosovo’s Declaration of Independence. For the reasons set forth in prior Sections of this Award, the Tribunal considers that not to have been the case. In particular, as explained in Section VI(D) above, *the UNMIK Permission was most likely terminated directly by UNMIK in December 2001*, as UNMIK’s Legal Adviser ultimately concluded following his analysis in 2006, and as corroborated at least circumstantially by Kosova Petrol’s cessation of rent payments around the same time.
345. The Termination Letter’s “Requirement” to Continue Operating. However, because the Termination Letter nonetheless instructed (or to be precise, “required”) Kosova Petrol to continue operating the petrol stations “until such time as they are ready to be handed over to the successful tender bidders and recipients of licenses,”<sup>460</sup> Kosova Petrol may be considered to still have “lawfully held” the stations for so long as this *ad hoc* instruction reasonably could be considered to remain in effect.
346. The Tribunal acknowledges Kosovo’s point that six months after the Termination Letter, UNMIK established the KTA in June 2002 for the purpose of independently

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<sup>458</sup> C-147, UNMIK Regulation No. 2000/54 (amending UNMIK Regulation No. 1999/1), 27 September 2000, Section 6.1.

<sup>459</sup> C-147, UNMIK Regulation No. 2000/54 (amending UNMIK Regulation No. 1999/1), 27 September 2000, Section 7.

<sup>460</sup> R-19, p. 5, Draft letter from UNMIK Deputy SRSG to Mr. Selmani, 11 December 2001, as edited by the UNMIK Legal Adviser and returned to the UNMIK Deputy SRSG on 14 December 2001.



administering SOEs and their assets. However, as explained in Section VI(E) above, the KTA itself was unclear for several years thereafter about the status of the UNMIK Permission, and for a time apparently assumed it was still valid, based both on Mr. Selmani's representations to that effect and the absence of any clarification from UNMIK about any termination. Indeed, as of 7 March 2005, the view of KTA's Legal Department was that by virtue of the KTA's statutory authority, it should assume administrative jurisdiction over the petrol stations "once the UNMIK-KP Lease is terminated"<sup>461</sup> – which implicitly means *not until that time*. This willingness by the KTA to defer to UNMIK regarding the status of the UNMIK Permission suggests, if nothing else, that the KTA did not believe that its own establishment had *automatically terminated* all prior permissions UNMIK had granted. The Tribunal accordingly accepts that, during this confused transition period from 2001 until Kosovo's independence in early 2008, Kosova Petrol arguably still had some basis for continuing to lawfully occupy the petrol stations, having first been asked to do so by UNMIK (in the Termination Letter) and thereafter not having been told at any point to cease doing so, either by UNMIK or by the KTA.

347. Nonetheless, there is no question that Kosova Petrol's *separate right to trade in petroleum products* – which is distinct from any *right to occupy socially owned property* – ceased to be "lawfully held" four months after the May 2005 promulgation of the 2005 Petroleum Law. The UNMIK Permission by its terms had cautioned that Kosova Petrol would need to obtain official licenses once a new licensing regime entered into effect.<sup>462</sup> As discussed in Section VI(F), that new regime was established by the 2005 Petroleum Law, which expressly stated that all prior licenses for petroleum trading activities would become invalid four months after the Law's entry into effect, and from that point on new licenses from the MTI would be required.<sup>463</sup> As a result, once those four months had passed, the rights of operation conveyed originally by the UNMIK Permission, and informally allowed to continue by virtue of the language of the Termination Letter, were rendered without legal effect. Yet there is no evidence that Kosova Petrol applied for any licenses pursuant to the 2005 Petroleum Law, at any time between its entry into force and early 2008.
348. Accordingly, well before the Declaration of Independence in February 2008, Mr. Selmani ceased to "lawfully hold" any rights in the nature of a license to operate the petrol stations for petroleum trading. For a period of years from at least 2005 through early 2008, the best that can be said is that Mr. Selmani continued *de facto* operation of the petrol stations, without protest by the relevant authorities. This status of undisturbed operation – or "use without objection" – is insufficient to meet the 2014 LFI's requirement that assets be "lawfully held" in the Republic of Kosovo. The phrase "lawfully held" connotes the requirement of a *positive legal right* to the relevant assets. Mr. Selmani had no such right under the applicable legal regime,

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<sup>461</sup> C-240, Memorandum from the Head of KTA's Legal Department, 7 March 2005, p. 9 (emphasis added).

<sup>462</sup> C-8, UNMIK Permission, 25 January 2000, p. 2.

<sup>463</sup> C-29, 2005 Petroleum Law, Articles 6.1, 6.2.

which was the 2005 Petroleum Law. The fact that he nonetheless continued to operate, without affirmative efforts by authorities to stop him, does not convert his status into that of a lawful holder of rights within the meaning of the 2014 LFI.

349. For these reasons, the Tribunal concludes that *as of the establishment of the Republic of Kosovo* in February 2008, which is a critical legal marker for purposes of the 2014 LFI's definition of investment, neither the UNMIK Permission nor the UNMIK "requirement" to continue operating stated in the Termination Letter created rights that Mr. Selmani continued to "lawfully hold."
350. The MTI's 2008-2011 Licenses and Decisions. This is not the end of the analysis, however, because circumstances changed again in 2008. As discussed in Section VI(J), it is undisputed that beginning in early 2008 (*after* Kosovo's Declaration of Independence) and continuing through March 2011, the MTI issued Kosova Petrol a series of legally valid two-year licenses for petroleum trading activities. Those licenses may have been issued on a *presumption* by the Ministry that Kosova Petrol continued to enjoy occupancy rights over the stations, but the licenses themselves *did not convey* (and could not have conveyed) any such occupancy rights; occupancy of socially owned property, including the right to grant leases, was not within the MTI's authority to determine. By May 2008, that authority had been firmly vested in the PAK, by virtue of the 2008 PAK Law. It is undisputed that Kosova Petrol had no lease arrangement with PAK for occupation of the petrol stations, a fact that PAK twice confirmed to the Basic Court of Kosovo (in November 2011 and February 2012)<sup>464</sup> and also confirmed directly to MTI on 1 July 2013.<sup>465</sup>
351. Nonetheless, the various petroleum trading licenses the MTI issued to Kosova Petrol were valid on their terms, namely as authorizations to import, store and sell petroleum products. The rights conveyed by these licenses qualify under Article 2.1.4 of the 2014 LFI as assets "lawfully held ... in the Republic of Kosovo for the purpose of conducting lawful commercial activities," and specifically as "licenses conferred by law, administrative act, or contract" under Article 2.1.4.5. Accordingly, so long as Kosova Petrol continued to hold valid licenses of this sort, it did *to that extent* have a qualifying investment in Kosovo under the 2014 LFI, which would be sufficient as a basis for jurisdiction *ratione materiae*<sup>466</sup> to claim improper State interference with any of the rights conveyed to Kosova Petrol by such licenses.

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<sup>464</sup> C-142, Letter from the PAK to the Municipal Court of Peja, 10 November 2011; C-68/R-163, Letter from the PAK to the Municipal Court of Peja, 13 February 2012.

<sup>465</sup> R-37, Letter from S. Lluka to M. Kusari-Lila, 1 July 2013.

<sup>466</sup> The *ratione materiae* question is separate from the temporal (retroactivity) issue addressed in Section VII(D) below. As explained therein, the Tribunal finds that the 2014 LFI does not create jurisdiction for this Tribunal to consider alleged breaches of prior investment instruments (such as the 2006 LFI) that predated the 2014's entry into force.

352. For avoidance of doubt, jurisdiction *ratione materiae* also would lie under the 2014 LFI with respect to any alleged interference with Kosova Petrol’s petroleum trading activities, during the period of time between 2011 and 2013 that certain petrol stations were operating only under Decisions issued by the MTI’s Licensing Office, in the absence of any express rejection of Kosova Petrol’s license applications by the MTI Minister. This is not because the Decisions as such qualified as licenses; the Tribunal accepts, as explained in Section VI(M) above, that licenses required a ministerial signature in order to be legally valid. However, as also explained above, it is reasonable to read the 2009 Amendment of the Petroleum Law as allowing Kosova Petrol to continue to exercise the activities for which it had requested a license based on the Licensing Office decisions, until it received a response from MTI actually rejecting its applications. This conclusion is also supported by Article 10.2 of the 2014 LFI, which provides that the principle of “[s]ilence is consent – shall be applied in case if the foreign investor undertakes business activity of a certain type, without obtaining approval from the competent body, if an approval or rejection of the application is not given within the timeframe contemplated in the legislation in force.”<sup>467</sup> The “silence is consent” principle was incorporated similarly in the Definitions section of the 2014 LFI, as “guarantying the right to each person to undertake business activity of a certain type, without obtaining approval from the competent body, if an approval or rejection of the application is not given within the timeframe contemplated in the legislation in force.”<sup>468</sup>
353. Taking these two pronouncements together, the Tribunal is prepared to accept that the MTI’s failure in 2011 to convey to Kosovo Petrol any *actual rejection* of its April, May and October 2011 license applications constituted implicit authorization for it to continue to operate at those locations, during the ensuing two-year licensing period for which Kosova Petrol had applied. While such authorization might not qualify as a “*license conferred by ... administrative act,*” within the terms of Article 2.1.4.5 of the 2014 LFI, it arguably could qualify as a form of provisional permission to operate that was “conferred by law,” by virtue of the legislative provisions governing the effect of administrative silence after duly filed license applications. The Tribunal therefore accepts that Mr. Selmani *had a qualifying investment under the 2014 LFI* to the extent that, between early 2008 and 2013, Kosova Petrol held for various petrol stations either MTI licenses or MTI Licensing Office decisions without receiving any ministerial rejection of those decisions.
354. Capital Expenditures. By contrast, the Tribunal considers that Mr. Selmani’s alternate theory of his qualifying “investment”<sup>469</sup> – resulting from monetary contributions he

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<sup>467</sup> CL-3, 2014 LFI, Article 10.2.

<sup>468</sup> CL-3, 2014 LFI, Article 2.1.2.

<sup>469</sup> The Tribunal does not accept Kosovo’s argument that Mr. Selmani waived this argument by not presenting it in his SoC, since his Request for Arbitration already had advanced the theory that his protected investments include “capital contributions associated with the operation of petrol facilities pursuant to the UNMIK Permission,” Request for Arbitration ¶ 57, and because in any event, after Mr. Selmani expanded on the point in his Reply, Kosovo had ample opportunity to address the issue, in its Rejoinder and during the Hearing.

allegedly made to renovate and improve various petrol stations – does not assist his case.

355. As a *matter of fact*, the Tribunal is prepared to accept that Mr. Selmani did make such contributions over a period of time. First, with respect to the pre-UNMIK Permission period, the Respondent suggests that the funds invested were not Mr. Selmani's, but rather originated with the KLA or groups supporting it; this suggestion is based largely on press articles about Mr. Selmani's ties to such groups, not on any concrete evidence regarding the source of funds. By contrast, the only contemporaneous document that bears on the issue – the UNMIK Permission itself – refers not only to the fact that “considerable improvements and repairs” had been made to the petrol stations in order to render them operational, but also expressly to “the business investment made *by Mr. Bedri Selmani*,” stating that “the expenditure that has been incurred to date, namely of a capital nature, needs to be ascertained and given a monetary value representing [Mr. Selmani's] business investment . . . .”<sup>470</sup> While it is possible that UNMIK itself was misled as to the source of funds, the Tribunal does not have sufficient evidence before it to reach that conclusion. It is therefore prepared to accept UNMIK's own statement as sufficient evidence of an initial contribution of funds.
356. Second, with respect to the subsequent period of more than a decade during which Mr. Selmani operated the various petrol stations, the Tribunal likewise is prepared to accept that he contributed funds for certain renovation and improvement, including digitalization of certain services. Among other things, the Tribunal credits the testimony of Ms. Leonora Selmani in that regard.<sup>471</sup>
357. But *as a matter of law*, the expenditure of money does not itself equate to an “*asset* owned or otherwise lawfully held . . . in the Republic of Kosovo,” which is the definition of investment under the 2014 LFI. A connection between the expenditure and a qualifying asset still must be shown. In particular, if the money was spent to renovate or improve an asset to which Mr. Selmani had no legal rights, it cannot transform the underlying status of *that asset* into one “owned or otherwise lawfully held” for purposes of the 2014 LFI. By contrast, if the money was spent to purchase *separate assets* and place them on the premises – such as new equipment used to operate the stations or new goods offered for sale in the convenience stores established at the stations – then Mr. Selmani might well have legal title to *those assets*, so long as they remained severable from the premises as a whole. The fact that he placed these assets on premises to which he had no legal rights does not obviate his ownership of the underlying goods or equipment, purchased and installed with his own funds.

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<sup>470</sup> C-8, UNMIK Permission, 25 January 2000, p. 1 and ¶¶ 3, 5, 6.

<sup>471</sup> First L. Selmani Statement ¶¶ 13-20.

**c. The Connection between Qualifying Investments and Legal Claims**

358. The difficulty for Mr. Selmani is that he has *not brought any legal claims* for State interference with the limited assets that he has demonstrated he lawfully held in the Republic of Kosovo, and therefore which were entitled to protection under the 2014 LFI.
359. For the most part, Mr. Selmani's claims relate to rights he says derive from the continued validity of the UNMIK Permission (*e.g.*, rights to continue occupying and using the petrol stations, and rights to obtain access to petrol stations he never received from UNMIK in the first place). The Tribunal has found that the UNMIK Permission was not a qualifying investment under Article 2.1.4 of the 2014 LFI, because the *temporal* requirements of that Article were not met: none of the rights of possession and operation that originally were reflected in the UNMIK Permission continued to be "lawfully held" (*i.e.*, valid and in effect) following Kosovo's Declaration of Independence. The UNMIK Permission therefore cannot be the basis for any legal claims under the 2014 LFI.
360. By contrast, while the various two-year petroleum trading licenses issued to Kosova Petrol between 2008 and 2011 do qualify as cognizable investments under the 2014 LFI, Mr. Selmani has not claimed any disruption to his ability to trade in petroleum products during the terms of any of these licenses, which expired (with the last such license) in March 2013.<sup>472</sup> Nor has he claimed any State interference with his trading activities during the further period running through October 2013, when Mr. Selmani says he relied on decisions of the MTI Licensing Office, which were not accompanied by licenses bearing the signature of the MTI Minister, but which were also never expressly rejected by the Minister. In general, the evidence is that Mr. Selmani's operation of the relevant petrol stations continued undisturbed through the whole period between 2008 and 2013. His claims relate instead to the *subsequent rejection* of new license applications filed in 2013. As discussed in Section IX(B)(2) below, Mr. Selmani has not demonstrated that the holding of licenses for one two-year term creates any vested right to be given new licenses for a subsequent two-year term, especially when he has no legal right to occupy the relevant properties.
361. Similarly, with respect to Mr. Selmani's alternate theory of an investment founded on his capital expenditures, he has not attempted to pursue any discrete claim for loss of particular assets that were "lawfully held" by virtue of those contributions, such as equipment or goods purchased for use at the petrol stations, but capable of being segregated and used elsewhere following his loss of rights to the premises. Absent such a claim for segregable assets, the Tribunal must assume that the majority of

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<sup>472</sup> The Tribunal discussed in Section IX(B)(1) below the one 2012 act Mr. Selmani challenges, which is PAK's alleged 2012 leak to the press of its internal "usurper's list," identifying unauthorized occupants of socially owned property.

funds contributed were used to improve (*e.g.*, renovate or digitalize) the underlying equipment that was a fixture to the premises (*e.g.*, underground fuel tanks). In such circumstances, in which Mr. Selmani had no valid legal right to remain indefinitely in occupancy and use of the petrol stations, Mr. Selmani contributed these funds at his own risk. They did not qualify as separate “lawfully held” investments capable of protection under the 2014 LFI.

362. Summarizing the point, while Mr. Selmani may have held certain qualified investments for certain periods of time, the *liability claims* he has presented concern alleged interference with a variety of purported rights that *do not actually align with any such validly recognized investments*. Specifically:
- a. the UNMIK Permission cannot be the basis for jurisdiction *ratione materiae* under the 2014 LFI, because it ceased to be in effect prior to Kosovo’s independence and therefore could not be the basis for any rights “lawfully held” in the Republic of Kosovo.
  - b. The fact that Kosova Petrol was issued various two-year petroleum trading licenses between 2008 and 2011 might have been the basis for jurisdiction *ratione materiae* if State interference was alleged during the terms of such licenses, but Mr. Selmani has not so alleged, and the 2008-2011 licenses did not create any vested legal right that Kosova Petrol would be granted additional licenses for subsequent terms.
  - c. Finally, funds contributed to improve non-segregable assets to which Mr. Selmani had no underlying legal right cannot transform those assets into ones that he “lawfully held”; this therefore cannot be the basis of jurisdiction *ratione materiae* in connection with alleged interference with such assets.
363. In short, there are fundamental *ratione materiae* limitations on the claims Mr. Selmani has asserted for breach of the 2014 LFI. The Tribunal returns to these issues further in its discussion of Mr. Selmani’s various liability claims in Section IX.
364. For completeness of the analysis, however, the Tribunal acknowledges that Mr. Selmani has presented an alternate theory of temporal jurisdiction, which potentially impacts the *ratione materiae* analysis. Under this theory, the 2014 LFI authorizes the bringing of claims not only for *subsequent* State conduct impacting investments that are recognized under its terms, but also for pre-2014 LFI violations of *earlier investment instruments* – namely the 2001 UNMIK Investment Regulation and the 2006 LFI – with respect to *investments that those instruments recognized* while they remained in force. According to this alternate theory, the 2014 LFI essentially grandfathered a continuing right to bring claims that had accrued under prior instruments, including (for example) on account of UNMIK’s actions or

inactions while the UNMIK Permission remained in effect (such as its alleged failure to hand over certain petrol stations identified in the UNMIK Permission). The Tribunal returns to this temporal issue in Section VIII.D.3 below, on “Retroactivity.”

365. First, however, the Tribunal addresses two predicate attribution issues that are implicated by many of Mr. Selmani’s claims related to pre-2014 LFI conduct. These are whether (a) Kosovo assumed any responsibilities following independence for the prior conduct, obligations or liabilities of UNMIK, and (b) whether PAK’s conduct after its establishment in 2008 is attributable to Kosovo. These attribution issues form the basis for further jurisdictional objections that Kosovo asserted in this case.

### C. Attribution

#### (1) Kosovo’s Position

##### a. Attribution of UNMIK conduct, obligations and liability

366. Kosovo’s first attribution objection is based on the premise that a State cannot breach obligations that are incumbent on other entities prior to that State’s independence. In this respect, Kosovo argues that a number of Mr. Selmani’s claims are properly against legal entities other than Kosovo, which did not even exist at the time the UNMIK Permission was concluded, or at the time when a significant number of the alleged breaches occurred. UNMIK still exists today and any claims concerning its conduct in the territory of Kosovo should be brought against it, Kosovo says.<sup>473</sup>
367. Kosovo furthermore says it “cannot be said to have assumed UNMIK’s liabilities.” Moreover, even if, *arguendo*, the Tribunal were to find that Kosovo did assume UNMIK liabilities, these could not be any greater than that of UNMIK. This matters because UNMIK is immune from suit and, furthermore, any claims against UNMIK are subject to a carveout for expropriation in the 2001 UNMIK Investment Regulation. Kosovo also points out that in cases when Kosovo has wished to take over obligations from entities whose activities predate independence, Kosovo has done so explicitly in written agreements directly with the relevant counterparties. Such an undertaking is absent with respect to the present case.<sup>474</sup>
368. In response to Mr. Selmani’s arguments on attribution, Kosovo disputes that it has waived UNMIK’s immunity by way of the 2006 LFI and the 2014 LFI. Those laws are not binding on UNMIK, Kosovo says, but in any event they do not provide for the “express waiver” required by the 1946 Convention on the Privileges and Immunities of the United Nations. Kosovo further argues that, contrary to Mr. Selmani’s assertions, UNMIK has not waived its immunity through UNMIK

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<sup>473</sup> SoD ¶¶ 290-293; Resp. Rejoinder ¶ 321.

<sup>474</sup> SoD ¶¶ 295-300; First Qerimi Report ¶ 42.

Regulation No. 2000/47. That regulation expressly preserves UNMIK’s immunity and, furthermore, the specific provision on which Mr. Selmani relies addresses a “limited dispute resolution process that may be set up in the future, but was not guaranteed,” Kosovo says.<sup>475</sup>

369. Kosovo also disagrees with Mr. Selmani’s alternative contentions that UNMIK’s obligations could be transferred to Kosovo through theories of agency or unilateral assumption. All of Kosovo’s unilateral undertakings of pre-independence obligations are restricted to international obligations such as treaties, which the UNMIK Permission is not. Absent such an express undertaking, no automatic succession or transfer occurs, Kosovo argues, citing a press report about a 2019 award in *Oleg Deripaska v. Montenegro*, an UNCITRAL case in which two members of this Tribunal served as arbitrators.<sup>476</sup> Separately, Kosovo argues that in entering into treaties pre-independence, it was UNMIK practice to state that it was acting “on behalf of” Kosovo, something which UNMIK did not do when it entered into the UNMIK Permission. Furthermore, UNMIK could not have been acting as an agent for Kosovo in entering into the UNMIK Permission, as acting in that capacity would have meant prejudging the question of Kosovo’s independence, Kosovo says. In fact, there was no entity for which to act as agent at the time, because the Republic of Kosovo was yet to be established.<sup>477</sup>
370. Kosovo explains that UNMIK’s principal was the United Nations, and not Kosovo (which did not exist at the time). Furthermore, Kosovo qualifies for the so-called *tabula rasa* doctrine under international law. Even if the Tribunal were to accept Mr. Selmani’s agency theory despite these facts, Kosovo argues that Mr. Selmani must also establish that UNMIK had authority to bind Kosovo “in perpetuity” when it issued the UNMIK Permission, which Mr. Selmani has failed to do.<sup>478</sup>

#### **b. Attribution of PAK conduct, obligations and liability**

371. As for Mr. Selmani’s claims under the 2014 LFI arising out of the conduct of PAK, Kosovo says that Article 4 of the 2011 PAK Law contains a carve-out providing that claims against PAK are subject to the exclusive jurisdiction of the Special Chamber.<sup>479</sup>

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<sup>475</sup> SoD ¶ 302; Resp. Rejoinder, ¶ 323.

<sup>476</sup> R-194, V. Djanic, “Revealed: Reasons surface for tribunal’s decision that Montenegro was not bound by the Russia-Yugoslavia BIT,” *IAREporter*, 3 July 2020.

<sup>477</sup> Resp. Rejoinder ¶¶ 324-328, with further references therein; Second Qerimi Report ¶¶ 6, 55; Knoll-Tudor Report ¶ 33.

<sup>478</sup> Resp. Rejoinder, ¶ 329.

<sup>479</sup> SoD ¶ 303; Resp. Rejoinder ¶ 322; RL-25, Law No. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters, 22 September 2011.



372. Finally, Kosovo argues that claims brought under Article 3 of the 2014 LFI are based on obligations incumbent on the “Republic of Kosovo,” and as such cannot be derived from the conduct of PAK, which is an independent body that can “sue and be sued in its own name.” Claims based on PAK’s acts or omissions in connection with the privatization processes that PAK oversaw instead should be brought directly against PAK in the forum established specifically for that purpose (the Special Chamber), and not against Kosovo in an international arbitration.<sup>480</sup>

## **(2) Mr. Selmani’s Position**

373. Mr. Selmani contends that Kosovo is responsible for the conduct of both UNMIK and PAK.

### **a. Attribution of UNMIK Conduct, Obligations and Liability**

374. With respect to UNMIK, Mr. Selmani responds to Kosovo’s immunity argument by pointing out that both the 2006 LFI and the 2014 LFI provide that “[n]o type of legal immunity shall serve as bar to the liability created by” failures to comply with those laws. Furthermore, Mr. Selmani says, when third parties claim for loss of property and damage, UNMIK’s immunity is limited only to situations in which it acted based on “operational necessity,” which is not the case here.<sup>481</sup>
375. Kosovo’s argument that it can avail itself of UNMIK’s immunity is unpersuasive, Mr. Selmani says, for three further reasons. First, Kosovo has failed to support its proposition that the immunities of an international organization could be available to a sovereign State. If anything, the silence on the immunity issue in the relevant documents should be contrasted with Kosovo’s accepting commitments and obligations on behalf of UNMIK in those documents (discussed below in para. 380). Second, UNMIK’s alleged failure to provide a claims settlement procedure cannot affect UNMIK’s supposed immunities. Third, UNMIK established the KTA in order to incur liabilities while administering socially owned property during UNMIK’s tenure, which Mr. Selmani says demonstrates that such administration was not subject to immunity.<sup>482</sup>
376. Mr. Selmani argues that Kosovo has *de facto* continued UNMIK’s legal personality through “gradual and effective transfers of power.” As an initial matter, Mr. Selmani disputes that UNMIK acted as an agent of the United Nations: the mandate of UNMIK was rather “for and on behalf of” Kosovo, which Mr. Selmani says Kosovo’s own legal experts concede. Mr. Selmani further contends that UNMIK’s transitional

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<sup>480</sup> SoD ¶¶ 304, 391-393.

<sup>481</sup> Cl. Reply ¶ 385; Cl. Rejoinder ¶ 144; Bifurcation Observations ¶ 49; CL-2, 2006 LFI, Article 3.3; CL-3, 2014 LFI, Article 3.5; RL-1, UNMIK Regulation No. 2000/47, Section 7.

<sup>482</sup> Cl. Rejoinder ¶¶ 146-151.

nature “was justified by the need to transfer UNMIK’s authority to the institutions that would replace it.” Such transfer from UNMIK to Kosovo took place in several steps, with the 2001 Provisional Institutions of Self-Government (“**PISG**”) as the primary example of UNMIK and local authorities working together towards a gradual transfer of power from the former to the latter.<sup>483</sup>

377. Mr. Selmani’s position that UNMIK acted as an agent for Kosovo is further supported by what Mr. Selmani says is a “continuity of obligations due to territorial agency.” While it is true that UNMIK’s mission was “status neutral” with respect to Kosovo, UNMIK acted on behalf of the territory irrespective of the ultimate legal status of that territory, and therefore “the unresolved state of Kosovo’s status in UN Resolution 1244 does not undermine the theory of agency” which Mr. Selmani advances.<sup>484</sup>
378. Mr. Selmani also says that Kosovo’s argument that there was no “Kosovo” for which UNMIK could have acted as agent is “devoid of any merit.” The territory of Kosovo, with a defined population, was well-identified enough, at least from 1999, to constitute a legal subject even pre-independence. Mr. Selmani says that Kosovo’s expert Prof. Knoll-Tudor recognizes as much.<sup>485</sup>
379. Mr. Selmani also disagrees with Kosovo’s argument that the State cannot be held liable for UNMIK’s acts and omissions because UNMIK still exists. In response, Mr. Selmani says that UNMIK “effectively transferred authority” to Kosovo in 2008. UNMIK’s role following independence is very different from its role before independence, Mr. Selmani says.<sup>486</sup>
380. Furthermore, Kosovo has accepted liability for UNMIK’s conduct and obligations through three different instruments, Mr. Selmani says: (i) in the Ahtisaari Plan,<sup>487</sup> by which Kosovo undertook to respect all UNMIK Regulations; (ii) Kosovo’s Declaration of Independence, which provides in paragraph 9 that Kosovo undertakes “the international obligations of Kosovo, including those concluded on our behalf by [UNMIK]”;<sup>488</sup> and (iii) the 2008 Constitution of Kosovo, which records Kosovo’s consent to continue to apply “[l]egislation applicable on the date of the entry into force of this Constitution” until “repealed, superseded or amended [...]”<sup>489</sup> Together, Mr. Selmani says, these instruments demonstrate that Kosovo has undertaken to

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<sup>483</sup> Cl. Reply ¶¶ 386-394; SoC ¶ 248; Cl. Rejoinder ¶ 122; First Weller Report ¶¶ 2, 115; First Islami Report ¶¶ 15-17; RE-16, International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, 22 July 2010, ¶¶ 99-100.

<sup>484</sup> Cl. Rejoinder ¶¶ 124-128.

<sup>485</sup> Cl. Rejoinder ¶¶ 129-133; Knoll-Tudor Report ¶ 140; Second Weller Report ¶ 75.

<sup>486</sup> Cl. Reply ¶¶ 395-298; First Islami Report ¶¶ 18-21; C-287, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/629, 1 October 2008, ¶¶ 21-25; 48-50.

<sup>487</sup> C-290, Letter from the Secretary-General addressed to the President of the Security Council, Addendum, Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1, 26 March 2007.

<sup>488</sup> C-238, Kosovo Declaration of Independence, 17 February 2008, ¶ 9.

<sup>489</sup> RE-7, Constitution of the Republic of Kosovo, Article 145.2.

respect UNMIK's obligations, a commitment which continued through the 2001 UNMIK Investment Regulation and both LFIs.<sup>490</sup>

381. Mr. Selmani does not accept Kosovo's contention that it cannot be subject to obligations prior to its statehood. There is no "clean slate" (or *tabula rasa*) upon independence, he contends, because even if Kosovo was not an independent State before 2008, it existed as a territory with a population governed by provisional entities. Furthermore, Kosovo rejected the "clean slate" notion by expressly undertaking UNMIK obligations, and the doctrine in any event is not applicable, as it is intended for situations of a State's succession from prior States, and not for *sui generis* situations like the present, when a territory is first governed by a temporary international entity. Even assuming *arguendo* that Kosovo's "clean slate" approach is accepted, Mr. Selmani says the doctrine still does not support Kosovo's case, because (i) international law practice is to recognize the continuity of private rights except when the succeeding entity is a newly independent former colony, (ii) Kosovo's institutions are the same as those under the PISG, and (iii) the breaches in this case extend from the time prior to independence into post-independence times.<sup>491</sup>
382. Further to the above arguments on continuity of obligations, Mr. Selmani adds that UNMIK was a *sui generis* international territorial administration, with a mandate deriving directly from UNSC Resolution 1244. This resolution, and its mandates, are "binding upon the international community of States," including Kosovo, he contends.<sup>492</sup>

#### **b. Attribution of PAK Conduct, Obligations and Liability**

383. Mr. Selmani says that Kosovo is also responsible for the conduct of PAK. In this respect, Mr. Selmani first notes that any objection to the contrary is not a matter of jurisdiction or admissibility, but rather of the merits of the claim, and should therefore be dismissed accordingly.<sup>493</sup>
384. In any event, the objection is destined to fail, Mr. Selmani says. First, Mr. Selmani argues that the 2014 LFI's references to "public authorities" covers all organs of the State, as well as independent agencies such as PAK. Any other reading would lead to almost no conduct being attributable to Kosovo, he says. Second, while the "Republic of Kosovo" is not defined in the 2014 LFI, the prior 2006 LFI provides that "Kosovo"

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<sup>490</sup> Cl. Reply ¶¶ 399-405; Cl. Rejoinder ¶¶ 135-140.

<sup>491</sup> Cl. Reply ¶¶ 406-410; First Weller Report ¶¶ 128-158.

<sup>492</sup> Cl. Rejoinder ¶¶ 141-143.

<sup>493</sup> Cl. Reply ¶ 412.

means Kosovo as defined under UNSCR 1244 (1999) and includes all public authorities in Kosovo.”<sup>494</sup>

385. Furthermore, the fact that PAK is an independent agency which can sue and be sued in its own name does not mean that PAK’s conduct cannot be attributable to Kosovo for purposes of international liability, as confirmed by Article 5 of International Law Commission’s Articles on State Responsibility (the “**ILC Articles**”) and jurisprudence applying that rule. It is evident, according to Mr. Selmani, that PAK was established to exercise elements of governmental authority.<sup>495</sup>

### **(3) The Tribunal’s Analysis**

#### **a. Attribution of UNMIK Conduct, Obligations and Liability**

386. The Tribunal acknowledges the detailed arguments about doctrines of State succession and agency theory that the Parties presented, based on the expert reports rendered by Profs. Weller and Islami (for Mr. Selmani) and Profs. Knoll-Tudor and Qerimi (for Kosovo). While these arguments are of course interesting from the perspective of academic debate, the Tribunal nonetheless considers them of no direct application to this case. That is because this case is *sui generis* in at least two respects.
387. First, this case does not involve the question of whether, and to what extent, a new State succeeds to obligations of a prior State established in the same territory. No arguments have been presented, for example, regarding alleged succession to (or continuity of) undertakings of the former Federal Republic of Yugoslavia. The issue in this case concerns obligations undertaken by UNMIK, an international organization exercising temporary administrative authority within the territory, while the longer-term status of the territory was being determined. UNMIK was expressly “status neutral” regarding the outcome of that question. The steps it took to administer the territory in the meantime – including through *ad hoc* arrangements such as the UNMIK Permission and through the promulgation of UNMIK Regulations such as the 2001 UNMIK Investment Regulation and the UNMIK Regulation promulgating the 2006 LFI – cannot be equated to the acts of a sovereign State, for purposes of triggering the potential applicability of State succession doctrines. There is, moreover, no settled doctrine applicable to the issue of a new State’s succession to prior undertakings (much less its succession to the alleged prior liabilities) of an interim UN administration.
388. Second, as mentioned in the paragraph above, this case does not involve treaty obligations at all. The obligations at issue are based on the domestic law of Kosovo. While UNMIK did purport to enter into certain international treaties for the territory

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<sup>494</sup> Cl. Reply ¶¶ 414-417; CL-3, 2014 LFI, Article 2.1.20; CL-2, 2006 LFI, Article 2.1.

<sup>495</sup> Cl. Reply ¶¶ 418-422.

of Kosovo during the term of its administration,<sup>496</sup> none of those are at issue in this case. The question here is about the alleged continuation of UNMIK undertakings in – or liability for breach of – the UNMIK Permission (essentially an administrative act with aspects of a domestic law lease and license) and of UNMIK Regulations (which had the effect of domestic legislation). None of these documents implicate obligations to *other States* in the way that a treaty would do. The Tribunal considers this case therefore to present *sui generis* issues on which general doctrines of State succession have little to offer.<sup>497</sup>

389. The Tribunal considers general doctrines such as “agency theory” to be of similarly limited utility. UNMIK was not acting as an agent for whatever eventual new regime would emerge as sovereign of the territory. This was not only because it was deliberately “status neutral” as to the nature of that new regime, but also because UNMIK expressly disclaimed any intent to bind that new regime. It should be recalled that from the moment in July 1999 when the SRSG declared that “[a]ll legislative and executive authority with respect to Kosovo ... is vested in UNMIK and is exercised by the [SRSG],”<sup>498</sup> it also stated that while UNMIK would “issue legislative acts in the form of regulations,” those would remain in force until repealed by UNMIK “or superseded by such rules as are subsequently issued by the institutions established under a political settlement.”<sup>499</sup> In other words, UNMIK itself anticipated that its regulations would be superseded by the rules established by the eventual new regime; UNMIK never expected its regulations to remain binding under that new regime, unless (and to the extent that) such continuity might be provided for under the new regime’s own rules.
390. In these circumstances, the Tribunal concludes that following its independence, the Republic of Kosovo would be bound by obligations undertaken by UNMIK, or by liabilities incurred by UNMIK, only to the extent it expressly agreed to be so bound. This is particularly the case given that *both* the United Nations and Kosovo turned their attention to issues of legal continuity in the context of the Ahtisaari Plan, and Kosovo later expressly addressed the subject in its Declaration of Independence and Constitution. Since the issue of legal continuity was addressed specifically in such

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<sup>496</sup> See Resp. Rejoinder ¶ 326, referencing R-192, Free Trade Agreement between UNMIK on behalf of the Provisional Institutions of Self-Government in Kosovo and The Council of Ministers of the Republic of Albania, 4 July 2003, and R-193, Interim Free Trade Agreement between UNMIK and the Government of FYROM, 31 August 2005.

<sup>497</sup> Even in the context of State-to-State succession and bilateral investment treaties (which the UNMIK Permission, 2001 UNMIK Investment Regulation and 2006 LFI decidedly were not), the *Oleg Deripaska v. Montenegro* tribunal concluded that there was no support for a “novel finding of a customary international law doctrine of automatic succession to BITs.” Among other things, it found, there is “simply no state practice or *opinio juris* in existence to support a principle of automatic succession,” and no international tribunal had yet accepted the principle of automatic succession to BITs as a matter of customary international law. R-194, V. Djanic, “Revealed: Reasons surface for tribunal’s decision that Montenegro was not bound by the Russia-Yugoslavia BIT,” *IAReporter*, 3 July 2020.

<sup>498</sup> C-145, UNMIK Regulation No. 1999/1, 25 July 1999, Section 1.1.

<sup>499</sup> C-145, UNMIK Regulation No. 1999/1, 25 July 1999, Section 4 (emphasis added).

documents, there is little point in invoking analogies and inferences from general doctrines. Rather, the specific instruments to which Kosovo agreed are the proper place to begin.

391. First, as discussed in Section VI(H) above, Kosovo’s Declaration of Independence expressly stated that “[w]e hereby undertake the international obligations of Kosovo, including those concluded on our behalf by [UNMIK]...”<sup>500</sup> The Declaration of Independence also stated that “[w]e accept fully the obligations for Kosovo contained in the Ahtisaari Plan, and welcome the framework it proposes to guide Kosovo in the years ahead. We shall implement in full those obligations ....”<sup>501</sup> The Ahtisaari Plan, also known as the Comprehensive Proposal, had provided that “UNMIK Regulations promulgated by the SRSC ..., including Administrative Directions and Executive Decisions issued by the SRSG, and promulgated laws adopted by the Assembly of Kosovo shall continue to apply ... until they are revoked or replaced by legislation regulating the same subject matter.”<sup>502</sup> It also provided that Kosovo would “continue to be bound ... by all international agreements and other arrangements in the area of international cooperation that were concluded by UNMIK for and on behalf of Kosovo,” and that Kosovo would respect “[f]inancial obligations undertaken by UNMIK for and on behalf of Kosovo under these agreements or arrangements.”<sup>503</sup> By reaffirming the obligations contained in the Ahtisaari Plan, the Declaration of Independence undertook to abide by the instruments referenced above.
392. Second, as also discussed in Section VI(H), Article 145 of the Constitution of Kosovo confirmed as follows with regards to continuity of international agreements and domestic legislation:
1. International agreements and other acts relating to international cooperation that are in effect on the day this Constitution enters into force will continue to be respected until such agreements or acts are renegotiated or withdrawn from in accordance with their terms or until they are superseded by new international agreements or acts covering the same subject areas and adopted pursuant to this Constitution.
  2. Legislation applicable on the date of the entry into force of this Constitution shall continue to apply to the extent it is in conformity

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<sup>500</sup> C-238, Kosovo Declaration of Independence, 17 February 2008, ¶ 9.

<sup>501</sup> C-238, Kosovo Declaration of Independence, 17 February 2008, ¶ 3.

<sup>502</sup> C-290, Comprehensive Proposal, Article 15.2.1.

<sup>503</sup> C-290, Comprehensive Proposal, Article 15.2.2.

with this Constitution until repealed, superseded or amended in accordance with this Constitution.<sup>504</sup>

393. Accordingly, taking these documents together, Kosovo agreed to assume obligations under the following instruments from the period of UNMIK administration, unless and until revoked or superseded by subsequent acts: (a) international agreements and other acts in the area of “international cooperation”; (b) UNMIK Regulations, Administrative Directions and Executive Decisions, promulgated by the SRSG; and (c) promulgated laws adopted by the Assembly of Kosovo.
394. Notably, the UNMIK Permission did not qualify as any of these (even if, *quod non*, UNMIK had not acted to terminate it in late 2001). It certainly was not an “international agreement” or similar act of “international cooperation” *vis-à-vis* a foreign State. Nor was it a “law” adopted by the Assembly of Kosovo and thereafter promulgated by the SRSG. Finally, the UNMIK Permission did not qualify as an “UNMIK Regulation[], Administrative Direction[] or Executive Decision[],” all of which were normative acts published in the Official Gazette.<sup>505</sup> With respect to UNMIK Regulations, these expressly were to bear a specified symbol and numbering system and to be included in an official register.<sup>506</sup> The SRSG’s Executive Decisions similarly had a distinct form and numbering system, as confirmed by those in the record of this case.<sup>507</sup> Finally, although the UNMIK Permission could be said to be a type of *sui generis* administrative act, it was addressed to a single recipient, and clearly was not of the nature of an SRSG “Administrative Direction,” which, as already noted, had a distinct form and numbering system and generally were of broad applicability.<sup>508</sup>
395. The Tribunal thus concludes that, even if the UNMIK Permission was not effectively terminated by UNMIK (contrary to the Tribunal’s findings), it still would not have survived the establishment of the new Republic of Kosovo, to bind Kosovo going forward after its independence. Kosovo did not agree to assume obligations under this type of instrument. It certainly did not agree to assume any liability that UNMIK might have had for a pre-independence breach.

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<sup>504</sup> RE-7, Constitution of the Republic of Kosovo. 15 June 2008, Article 145.

<sup>505</sup> Tr. Hearng Day 5 Qerimi 118:4-23 (Qerimi).

<sup>506</sup> C-145, UNMIK Regulation No. 1999/1, 25 July 1999, Section 5.3.

<sup>507</sup> See R-230, UNMIK Executive Decision No. 2000/1, 16 March 2000; R-225, UNMIK Executive Decision No. 2000/2, 2 June 2000; R-231, UNMIK Executive Decision No. 2000/3, 11 August 2000; R-232, UNMIK Executive Decision No. 2000/4, 11 August 2000; R-226, UNMIK Executive Decision No. 2002/6, 17 July 2002; R-227, UNMIK Executive Decision No. 2002/10, 11 September 2002; R-228, UNMIK Executive Decision No. 2002/16, 18 December 2002.

<sup>508</sup> See C-169, Administrative Direction No. 1999/1, 1 September 1999 (on the establishment of the customs and other related services in Kosovo); RKT-12, Administrative Direction No. 1/2020, 19 January 2010 (on organization and functioning of Licensing Office of the Oil Sector); C-235, Administrative Direction No. 1/2015, 3 March 2015 (on the form and context of foreign investment register).

396. As for the 2006 LFI, this qualifies as domestic legislation of the sort that Kosovo did undertake to apply in the new Republic, by virtue of Article 145(2) of the Constitution. The 2006 LFI therefore remained in effect in Kosovo from 2008 until it was expressly terminated and replaced on 24 January 2014 by the 2014 LFI. In principle, this means that Kosovo could have been liable to Mr. Selmani for any *State conduct* by Kosovo between 2008 and early 2014 that violated the terms of the 2006 LFI with respect to an investment qualifying under its terms. It does not mean, however, that Kosovo agreed to assume responsibility for conduct *by UNMIK* towards Mr. Selmani (including with respect to the UNMIK Permission). Nothing in the Declaration of Independence or the Constitution, or any Kosovar law, even hints at such an assumption of responsibility for UNMIK conduct. Nor, for the reasons discussed above, do any of the abstract doctrines of State succession and agency that the Parties have briefed in this case compel a different view.
397. For these reasons, the Tribunal concludes that UNMIK's conduct prior to Kosovo's independence was not attributable to the Republic of Kosovo following its independence, nor did Kosovo agree to assume any liabilities that UNMIK might have had for any pre-independence breach. The Tribunal therefore grants Kosovo's jurisdictional objection to any claims that are predicated on such attribution.
398. Because Kosovo did not agree to assume responsibility following its independence for prior undertakings by UNMIK towards Mr. Selmani or prior UNMIK acts or omissions with respect to those undertakings, it is not necessary to render any decision on the contested issues of (a) the extent of UNMIK's potential immunity for breach of the 2001 UNMIK Investment Regulation and the 2006 LFI, and (b) the extent to which Kosovo, had it assumed responsibility generally for UNMIK conduct prior to independence, might also benefit from UNMIK's immunity.

#### **b. Attribution of PAK Conduct, Obligations and Liability**

399. With respect to PAK, the Tribunal agrees with Mr. Selmani that its conduct may form the basis for an "investment dispute" to be asserted against the Republic of Kosovo under Article 16 of the 2014 LFI.
400. Article 3 of the 2014 LFI provides in numerous articles that the standards of treatment undertaken towards foreign investors by Kosovo apply to the conduct of "*any public authority*." For example, Article 3 of the 2014 LFI – which includes *inter alia* obligations of "full and constant protection and security" and non-impairment by "unreasonable or discriminatory action or inaction"<sup>509</sup> – states that "[a]ny public authority that violates or otherwise fails to respect the rights and guarantees provided by the present law to foreign investors and their investments shall be liable to pay

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<sup>509</sup> The Tribunal defers for later, in Section IX(A)(3), a discussion of whether Article 3 of the 2014 LFI incorporates a "fair and equitable treatment" obligation.



compensation.” Article 5 of the 2014 LFI – which includes the obligation to “comply in good faith with all obligations” standard – states that “[i]f any public authority issues an act or assumes an obligation with respect to a particular foreign investor,” which is “beyond the authorization of such public authority,” the investor shall have a right of compensation for losses incurred as a result of its good faith reliance on the validity of such act. Article 9, which includes the right of free transfer, refers to the liability of a “public authority” for breach.<sup>510</sup>

401. Importantly, the definition of “public authority” for the purposes of these provisions is broad. As set forth in Article 2.1.10 of the 2014 LFI, the term includes “any body, governmental executive authority, ministry, public body, department, agency, or other such authorities that exercises public executive, legislative, regulatory, administrative or judicial powers within the territory of the Republic of Kosovo.”<sup>511</sup> This definition would seem to encompass PAK, which was established in the 2008 PAK Law as an “independent public body” and was vested with “broad administrative authority.”<sup>512</sup> Notably, while the PAK Law provided that all suits *against the PAK* brought within Kosovo’s domestic legal system were subject to the exclusive jurisdiction of the SCSC,<sup>513</sup> the 2014 LFI’s authorization of international arbitration as the mechanism for resolving foreign investment disputes *against Kosovo* does not contain any such carve-out.
402. The Tribunal acknowledges that the attribution issue under the 2014 LFI is somewhat different than the State responsibility analysis often undertaken under BITs, because the 2014 LFI is an instrument of domestic legislation that is governed principally by Kosovar law. Nonetheless, Article 17.2 of the 2014 LFI, which addresses the applicable *substantive* law, provides that this shall also include “such rules of public international law as may be applicable to the issues in dispute.”<sup>514</sup> The Tribunal has little doubt that under international law principles, the conduct of PAK would be attributable to Kosovo to determine whether Kosovo potential liability for breach of substantive obligations. The Tribunal considers that the same result should apply under the 2014 LFI, given the broad definition of “public authority” contained therein, and the absence of any carve-out for PAK either in that definition or in the arbitration clause. Stated otherwise, nothing in the 2014 LFI, either expressly or by implication, suggests that Kosovo intended to insulate itself from investment disputes in arbitration arising out of PAK conduct in alleged breach of the substantive standards of conduct reflected therein, or to subjugate the 2014 LFI’s consent to arbitration to the exclusive remedies provision in the PAK Law.

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<sup>510</sup> CL-2, 2014 LFI, Articles 3, 5, 9.

<sup>511</sup> CL-2, 2015 LFI, Article 2.1.10.

<sup>512</sup> RL-23, Law No. 03/L-067 on the Privatization Agency of Kosovo, 15 June 2008, p. 1 and Article 1.

<sup>513</sup> RL-23, Law No. 03/L-067 on the Privatization Agency of Kosovo, 15 June 2008, Article 30.1.

<sup>514</sup> CL-2, 2014 LFI, Article 27.2.

403. For these reasons, the Tribunal declines to accept Kosovo’s jurisdictional objection that the Tribunal cannot consider any claims against Kosovo under the 2014 LFI, arising out of PAK’s conduct.

**D. “Retroactivity” (Jurisdiction over Breaches of Pre-2014 Instruments)**

**(1) Kosovo’s Position**

404. Kosovo’s retroactivity objection is based on what it says is Mr. Selmani’s attempt to rely on the 2014 LFI to authorize the bringing of claims based on “pre-existing liabilities incurred by other parties (*e.g.*, UNMIK and KFOR).”<sup>515</sup>

405. Kosovo says that Mr. Selmani’s reliance on Article 20 of the 2014 LFI is misplaced. Article 20 provides:

The present law - and the rights, guarantees, privileges and protections established by the present law - shall apply equally to foreign investors that invested in the Republic of Kosovo prior to the effective date of this law.

406. According to Kosovo, the Article 20 reference to “the Republic of Kosovo” means that only investments made since Kosovo’s independence – before which there was no Republic of Kosovo – are covered. However, even as to such post-independence investments, it says that the law’s “substantive obligations [...] only apply prospectively (from the law’s entry into force in January 2014).”<sup>516</sup>

407. Any intent to give retroactive effect to statutory provisions must be explicit, Kosovo says, and no such intent is reflected by the language of 2014 LFI. In this respect, Kosovo relies on *Generation Ukraine v. Ukraine*, in which the tribunal found that it “could only have jurisdiction over causes of actions arising after the relevant bilateral investment treaty entered into force, notwithstanding that the treaty applied expressly to investments made before the treaty entered into force.” As all disputes in the present case involve conduct that predates entry into force of 2014 LFI, a law which does not explicitly provide for retroactive effect of its statutory provisions, the disputes are outside the scope of that law, Kosovo says.<sup>517</sup>

408. Furthermore, Kosovo says that the offer to arbitrate contained in the 2006 LFI expired by the entry into force of the 2014 LFI and cannot be relied upon by Mr. Selmani to bring claims in this Arbitration, which was initiated in April 2019. Nor can

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<sup>515</sup> Resp. Rejoinder ¶ 401.

<sup>516</sup> SoD ¶¶ 344-348; Resp. Rejoinder ¶ 405.

<sup>517</sup> SoD ¶¶ 346-348; CL-90, *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Final Award, 16 September 2003, (“*Generation Ukraine*”) ¶ 11.2.

Mr. Selmani rely on the 2001 UNMIK Investment Regulation, which lacks an arbitration provision.<sup>518</sup>

409. Kosovo rejects as unpersuasive Mr. Selmani’s references to academic writing and tribunal *dicta* on the general possibility of retroactive application of treaties. In the abstract, Kosovo does not dispute that such application is possible, but it says that express language to that effect is necessary, and that there is no such language in the 2014 LFI.<sup>519</sup>

## (2) Mr. Selmani’s Position

410. In Mr. Selmani’s view, the Tribunal has jurisdiction over breaches of pre-2014 LFI instruments that pre-date the entry into force of the 2014 LFI. In his submission, Article 16 extends Kosovo’s consent to any investment dispute with a foreign investor, without temporal limitation, because Article 2.1.19 defines a “Foreign Investment Dispute” as “any dispute or claim arising from a foreign investment or that is related to it.”<sup>520</sup>
411. According to Mr. Selmani, this broad language is similar to that of many investment treaties, and investment tribunals have consistently understood the phrase “any dispute,” in the absence of restricting language, to “extend [the tribunal’s adjudicative powers] to disputes that may have arisen prior to the entry into force of the relevant investment protection instrument.”
412. Furthermore, Mr. Selmani points out that unlike many investment treaties concluded by Kosovo,<sup>521</sup> Article 16 “does not restrict Kosovo’s consent to the arbitration of disputes involving the application of the substantive obligations in the 2014 LFI.” This means, Mr. Selmani says, that Kosovo’s consent covers disputes that may have arisen prior to entry into force of the 2014 LFI, and which are based on other types of obligations, including those contained in the 2006 LFI. This fact also distinguishes the present dispute from the situation in *Generation Ukraine* on which Kosovo relies,

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<sup>518</sup> SoD ¶ 348.

<sup>519</sup> Resp. Rejoinder ¶¶ 404-405.

<sup>520</sup> SoC ¶¶ 203-207; Cl. Rejoinder ¶ 113.

<sup>521</sup> See CL-4, Agreement between the Republic of Kosovo and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, dated 27 October 2011, Article 11.1; CL-5, Agreement between the Government of Canada and the Government of the Republic of Kosovo for the Promotion and Protection of Investments, Article 21; CL-6, Agreement between the Government of the Republic of Kosovo and the Government of the Republic of Austria on the Promotion and Protection of Investments, dated 22 January 2010, Article 13; CL-22, Agreement between the Government of the Republic of Kosovo and the Council of Ministers of the Republic of Albania for the Promotion and Protection of Investments, dated 3 May 2016, Article 11.1.

where the applicable BIT expressly limited jurisdiction to alleged breaches of that treaty.<sup>522</sup>

413. Mr. Selmani says that Kosovo’s arguments proceed from the “flawed assumption” that as a default, the Tribunal’s jurisdiction does not extend to disputes which existed prior to entry into force of the 2014 LFI. On the contrary, Mr. Selmani argues, with reference to the International Court of Justice’s *Mavrommatis* judgment, that “rather than a rebuttable non-retroactivity presumption, the burden of proof is inverted so that the Court has jurisdiction over all disputes referred to it under such a clause whether the dispute occurred before, or after, entry into force of the treaty.”<sup>523</sup> Mr. Selmani urges the Tribunal to apply this principle – which he says has been confirmed more recently by both the International Court of Justice<sup>524</sup> and investment treaty tribunals<sup>525</sup> – in the present case.<sup>526</sup>
414. The temporal determination of substantive provisions is different from that of jurisdictional provisions, Mr. Selmani says: the former must be determined with reference to the law applicable at the time of the breach, while the same considerations do not apply to jurisdictional provisions.<sup>527</sup>
415. Mr. Selmani also offers an interpretation of the 2014 LFI’s Article 20 which differs from Kosovo’s. To recall, that provision provides that “[t]he present law – and the rights, guarantees, privileges and protections established by the present law – shall apply equally to foreign investors that invested in the Republic of Kosovo prior to the effective date of this law.” Kosovo argues that the reference to the “Republic of Kosovo” should be understood to mean the legal entity established in 2008, which Mr. Selmani says is incorrect. The preparatory works to the law clarify that the phrase “Republic of Kosovo” is used instead of “Kosovo” in recognition of an “adaptation of the name to the constitutional name for Kosovo.”<sup>528</sup> Mr. Selmani also says that Kosovo’s interpretation would force investors to “artificially split their claims relating to the same investment under multiple jurisdictional clauses.”<sup>529</sup>

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<sup>522</sup> SoC ¶ 207; Cl. Reply ¶¶ 372-373.

<sup>523</sup> CL-139, *Mavrommatis Palestine Concessions (Greece v. UK)*, PCIJ, Judgment of 30 August 1924, PCIJ Rep Series A No 2, p. 35.

<sup>524</sup> CL-140, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)* Judgment of 11 July 1996 on Preliminary Objections, ICJ Rep 595, p. 617, ¶ 34.

<sup>525</sup> CL-21, *Tradex*, p. 194; RL-15, *Nordzucker AG v. The Republic of Poland (UNCITRAL)*, Partial Award, 10 December 2008, (“*Nordzucker*”), ¶ 110. See also academic literature referred to in Cl. Reply, footnote 461.

<sup>526</sup> Cl. Reply ¶¶ 366-368.

<sup>527</sup> SoC ¶¶ 203, 206; Cl. Reply ¶¶ 369-370, referencing CL-143, Sadie Blanchard, “State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis into International Investment Arbitration” (2011) 10(3) Washington University Global Studies Law Review 419, p. 429.

<sup>528</sup> R-85, Report with Recommendations on the Draft Law 04/L-220 on Foreign Investments, 3 December 2013, p. 33 (Amendment 2).

<sup>529</sup> Cl. Reply ¶ 374.

416. Mr. Selmani also says that the 2001 UNMIK Investment Regulation and the 2006 LFI constitute relevant “context and purpose” for interpreting the 2014 LFI, and demonstrate the legislator’s intent to ensure “continued protection” to foreign investors.<sup>530</sup>
417. Mr. Selmani also contends that if Kosovo’s contention is that it did not consent in the 2014 LFI to jurisdiction over breaches of prior instruments that occurred while they were still in force, that would mean that Kosovo is in breach of Article 12 of the 2014 LFI. That Article provides that “[p]ublic authorities shall recognize and respect all rights of a foreign investor relating to a foreign investment.” Mr. Selmani had such a right – as Mr. Selmani says Kosovo has admitted<sup>531</sup> – under Article 16 of the 2006 LFI, which gave him “the right to require that the investment dispute be settled through arbitration.” On Kosovo’s case with respect to the temporal applicability of the 2014 LFI, Kosovo has foreclosed Mr. Selmani’s right to pursue arbitration under the 2006 LFI, which in itself would be a breach of Article 12 of the 2014 LFI – a breach over which the Tribunal does have jurisdiction.<sup>532</sup>
418. Finally, Mr. Selmani argues that Kosovo has misrepresented his position on the retroactivity objection, and has failed to engage with his authorities on several points. *First*, Mr. Selmani is not asking the Tribunal to apply the 2014 LFI retroactively, but rather to exercise jurisdiction over breaches of prior instruments that pre-dated its entry into force. *Second*, Mr. Selmani says his many authorities advanced to support the retroactive applicability of investment treaties remain substantively unchallenged. *Third*, Kosovo does not offer any authorities to refute Mr. Selmani’s contention that the broad language of the 2014 LFI’s Article 16 encompasses pre-existing breaches. *Fourth*, Kosovo’s argument that the 2014 LFI aims to attract future investments ignores Article 20 of the law. *Fifth*, Kosovo’s retroactivity objection is conflated with its attribution objection. Finally, Kosovo has not engaged with Mr. Selmani’s argument concerning the context and purpose of the 2014 LFI, or his pre-existing right to arbitrate under the 2006 LFI.<sup>533</sup>

### (3) The Tribunal’s Analysis

419. It is useful to begin by recapping key elements of the Tribunal’s determinations in Sections VIII(B)(3) and VIII(C)(3) above. In Section VIII(B)(3), addressing *ratione materiae* issues, the Tribunal determined that the 2014 LFI extends protection to (a) pre-independence investments in the territory of Kosovo, *but only* if these continued to be lawfully held in the Republic of Kosovo after its independence in 2008 (Article 2.1.4), and (b) post-independence investments that were lawfully held in the Republic of Kosovo, even if these predated the 2014 LFI’s entry into force

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<sup>530</sup> Cl. Reply ¶¶ 375.

<sup>531</sup> SoD ¶ 139.

<sup>532</sup> Cl. Reply ¶¶ 377-381.

<sup>533</sup> Cl. Rejoinder ¶¶ 111-118.

(Article 20). In Section VIII(C)(3), addressing attribution issues, the Tribunal determined that the Republic of Kosovo did not agree to assume responsibility following its independence for prior conduct by UNMIK, and accordingly that both the 2006 LFI (which the Republic of Kosovo maintained in force from 2008 to early 2014) and the 2014 LFI (which terminated and replaced the 2006 LFI) address only State conduct *by the Republic of Kosovo*, including the conduct of all of its “public authorities.”

420. The clear implication of the above is that *so long as the 2006 LFI remained in force*, alleged breaches of its substantive obligations – on account of State conduct occurring after independence, with respect to investments that continued to be lawfully held after independence – were actionable as investment disputes under the 2006 LFI. However, this case was filed *after the 2006 LFI ceased to be in force*. The temporal issue that remains, therefore, is whether investment disputes that crystallized between 2008 and early 2014, and that could have been brought to arbitration under the 2006 LFI, *continued to be actionable under the 2014 LFI*, notwithstanding the termination of the 2006 LFI. Stated otherwise: does the arbitration clause of the 2014 LFI grant this Tribunal jurisdiction over investment disputes concerning allegations that State conduct *prior to 2014* breached the substantive provisions of *the 2006 LFI*? Or does the Tribunal have jurisdiction only over disputes over State conduct after the 2014 LFI entered into effect?
421. As a threshold matter, the Tribunal rejects Mr. Selmani’s suggestion that the 2001 UNMIK Investment Regulation has any bearing on the question.<sup>534</sup> Mr. Selmani invokes Section 12 of the 2001 UNMIK Investment Regulation, which provided that “[n]o law, regulation, instruction or other act having the force of law that imposes less favorable conditions on any foreign investment than those existing when the foreign investment was made may be applied retroactively.” But even apart from the question whether the 2001 UNMIK Investment Regulation could bind a future sovereign State, that Regulation did not contain an arbitration clause at all, so it is difficult to see how the 2014 LFI could possibly be viewed as imposing “less favorable conditions” with respect to arbitral jurisdiction than the 2001 UNMIK Investment Regulation. In any event, the 2001 UNMIK Investment Regulation was expressly repealed by the 2006 LFI.<sup>535</sup> Accordingly, it no longer remained applicable in the territory of Kosovo in 2008, when the new Republic of Kosovo agreed to continue to apply “UNMIK Regulations promulgated by the SRSC ... until they are revoked or replaced by legislation regulating the same subject matter.”<sup>536</sup>

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<sup>534</sup> Cl. Reply ¶ 375.

<sup>535</sup> CL-2, 2006 LFI, Article 25.

<sup>536</sup> C-290, Comprehensive Proposal, Article 15.2.1 (whose obligations Kosovo accepted in its Declaration of Independence; *see* C-238, Kosovo Declaration of Independence, 17 February 2008, ¶ 3).

422. Mr. Selmani also invokes Article 6.1 of the 2006 LFI, as reinforcing its position that “breaches of the ... 2006 LFI can be heard by this Tribunal.”<sup>537</sup> Article 6.1 provided that “[n]o law, regulation or other normative act shall have retroactive force or be applied retroactively to the detriment of a foreign investor or the investment of a foreign investor.”<sup>538</sup> This provision was one of the *substantive protections* afforded by the 2006 LFI, but it cannot be read as applying to *arbitral jurisdiction*, which was governed by a separate provision of the 2006 LFI. Equally important, Article 6.1 is not freestanding, independent of the 2006 LFI in which it appears. It thus cannot, simply by virtue of its own terms, survive the express repeal of the whole 2006 LFI pursuant to Article 25 of the 2014 LFI.<sup>539</sup>
423. Rather, the scope of this Tribunal’s jurisdiction must be determined solely by reference to the terms of the 2014 LFI itself, not the terms of prior instruments.<sup>540</sup>
424. As a starting point, the arbitration clause of the 2014 LFI, Article 16, authorizes submission to arbitration of “an investment dispute,” without further description or qualification.<sup>541</sup> Article 2.1.19 in turn defines a “Foreign Investment Dispute” as “any dispute or claim arising from a foreign investment or that is related to it.”<sup>542</sup> Mr. Selmani is correct to note that this broad definition does not, by its terms, restrict the applicable disputes to those alleging a breach of the 2014 LFI’s substantive obligations. Taken on its own, such language could be read as allowing a tribunal empaneled under the 2014 LFI to hear claims alleging breach of *other instruments* regulating State treatment of a covered investment, provided that State conduct is measured only against obligations incumbent on State actors *at the time they acted* in accordance with generally accepted rules against retroactivity of substantive obligations. An example of this might be a claim for breach of an investment agreement, which could be seen as falling within the scope of Article 2.1.19’s definition of “Foreign Investment Dispute,” and thus within the scope of Article 16’s grant of jurisdiction over “an investment dispute,” even if no violation of the 2014 LFI’s substantive obligations actually is alleged.
425. But a different issue arises in the context of *successive* instruments, in which the prior instrument was *expressly repealed* by the later instrument that regulates arbitral jurisdiction. In the context of successive instruments, the key question is whether the

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<sup>537</sup> Bifurcation Observations ¶¶ 69-70 (cross-referenced in Cl. Reply ¶ 375).

<sup>538</sup> CL-2, 2006 LFI, Article 6.1.

<sup>539</sup> CL-3, 2014 LFI, Article 25.

<sup>540</sup> The Tribunal declines Mr. Selmani’s invitation to ground its analysis on alleged presumptions for or against retroactivity of international treaties, such as discussed in the *Mavrommatis* judgment. As the Tribunal emphasizes at several points in this Award, this is not an investment treaty case, but rather a case proceeding under Kosovo’s 2014 LFI. Whether that instrument of domestic legislation was intended to permit the continued assertion of claims for breach of prior legislation that it expressly repealed must be answered by reference to the legislation itself, not to ICJ discussions about international treaties.

<sup>541</sup> CL-3, 2014 LFI, Article 16.

<sup>542</sup> CL-3, 2014 LFI, Article 2.1.19.

intent was to “grandfather” into the later instrument a continuing right for investors to file (and tribunals to hear) new claims for past breach of the prior instrument.

426. The implications of the two approaches to this question can be seen by the juxtaposition of two hypotheticals, deliberately unconnected to the chronology of Kosovo’s recent independence and designed to demonstrate fairly extreme consequences. On the one hand, an approach that interprets the general phrase “investment dispute” to have *no implicit temporal restriction* to State conduct occurring after a particular investment law or treaty entered into force could allow an investor to submit a dispute to international arbitration that relates to historic events such as expropriations following the Russian Revolution or confiscations of property during the Nazi regime (perhaps relying on extant obligations under customary international law). On the other hand, the opposite approach that interprets the phrase “investment dispute” as *implicitly limited* to disputes concerning liabilities under the most recent investment law or treaty could shut the door entirely on disputes relating to very recent State conduct – occurring just weeks or months before a new investment law or treaty entered into force – simply because the dispute had not yet been submitted to international arbitration under the prior instrument, in the very short window before it was replaced by the new one.
427. The Tribunal is not empowered to decide which approach is best as a policy issue. It is limited to closely examining the record for evidence of the intent that applied in this case, when the 2014 LFI was enacted to replace the 2006 LFI.
428. The most obvious place to look for legislative intent is in any provisions of the 2014 LFI itself that expressly address the issue of rights and claims under successive instruments. When there is evidence that legislators actually turned their attention to continuity or extinguishment of rights and claims, tribunals should give substantial weight to the provisions as enacted and restrain themselves from assuming other unstated intentions.
429. Mr. Selmani suggests that Article 6.1 of the 2014 LFI is one such provision.<sup>543</sup> Article 6.1 provides that “[n]o law, regulation or other legal act shall have retroactive force or be applied retroactively to the detriment of a foreign investor of the investment of a foreign investor.”<sup>544</sup> But the verb “shall have” suggests that this provision was intended to refer to future events, such as the enactment or application of future laws and regulations. It is far from clear that the provision was intended to refer to the 2014 LFI itself, and particularly its own application to past events, such as those alleged to have been contrary to the 2006 LFI.

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<sup>543</sup> Bifurcation Observations ¶ 69 (cross-referenced in Cl. Reply ¶ 375).

<sup>544</sup> CL-3, 2014 LFI, Article 6.1.



430. By contrast, the immediately following provision, Article 6.2 of the 2014 LFI, expressly addresses the possibility of future changes *to the 2014 LFI*, and grants investors certain protections in that event. Article 6.2 provides in relevant part as follows:

If, a foreign investor has invested in the Republic of Kosovo, and within a five years period, immediately after the investment, any provision of this Law will be amended or revoked, and this will have a negative impact to a foreign investor or his/her investment, then the foreign investor is entitled to compensation by the Government of the Republic of Kosovo under Article 8 paragraph 2 of this law [addressing compensation for expropriation and nationalization], for all damages and expenses incurred as a result of change, revoke or issuance of such act. This privilege shall be given to the foreign investor and will be applied immediately after his/her investment in the Republic of Kosovo.<sup>545</sup>

431. This provision on its face envisions a scenario in which the 2014 LFI (or certain of its provisions) may be amended or revoked, and extends certain protections to a class of investors who would be negatively impacted by that change, subject to limitations on the composition of that class (*i.e.*, only those who invested in the Republic of Kosovo in the five years immediately preceding the adverse change). The Tribunal must assume that the selection of this particular class of protected investors and claims, and the exclusion of others – such as those who invested more than five years prior to the legal change – was deliberate. The Tribunal also must assume that having turned their mind explicitly to the possibility of investors being harmed by the future revocation of the 2014 LFI, the Assembly of Kosovo was not blind to the fact that the 2014 LFI was completely revoking the 2006 LFI. Yet no provision was made in the 2014 LFI for continuing protection of investors who might be negatively impacted by the revocation of the 2006 LFI.
432. Even more notable is the fact that the 2006 LFI itself contained a similar provision. Article 6.2 of the 2006 LFI likewise provided that if a foreign investor made an investment in Kosovo, and “any provision of the present law is changed or repealed” within five years after such investment, resulting in a “detrimental impact” to the investor or investment, then the foreign investor “shall have a right to compensation from the Government of Kosovo ... for losses and expenses incurred as a consequence” of such change or repeal.<sup>546</sup> The 2006 LFI stated that this right, essentially to five years of the law’s protection after the initial making of an

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<sup>545</sup> CL-3, 2014 LFI, Article 6.2.

<sup>546</sup> CL-2, 2006 LFI, Article 6.2.

investment, “shall be vested in and irrevocably acquired by a foreign investor at the moment the foreign investor makes an investment in Kosovo.”<sup>547</sup>

433. The specific provision in the 2006 LFI for five years of protection of an investment against the possible repeal of that law – and *a contrario*, to no further protection after the first five years of an investment – is devastating to Mr. Selmani’s position. By its terms, the five year period in Article 6.2 of the 2006 LFI begins to run “immediately after the investment” is made. The Parties do not dispute this point. As discussed in Section VIII(B)(2) above, Mr. Selmani’s own principal theory of his investment is that it arose in early 2000, with the issuance of the UNMIK Permission. By that theory, the 2006 LFI *did not even come into force* until six years after Mr. Selmani made his investment. The repeal of the 2006 LFI in early 2014 was 14 years after Mr. Selmani made his purported investment, so Mr. Selmani could have no rights emanating from Article 6.2 of the 2006 LFI, resulting from the loss of an avenue to bring claims against Kosovo under the arbitration clause of the 2006 LFI. Nothing in the subsequent 2014 LFI provided otherwise.
434. In particular, the Tribunal is unpersuaded by Mr. Selmani’s argument that Article 12 of the 2014 LFI, which provides generally that “[p]ublic authorities shall recognize and respect all rights of a foreign investor relating to a foreign investment in the Republic of Kosovo,” acts as a gateway to his asserting claims for breach of the 2006 LFI, after the 2006 law was repealed and with respect to challenged conduct that took place long after expiration of the five years of protection against repeal that Article 6.2 of the 2006 LFI provided. It would be a similar overreach to assume that, simply because Article 16 of the 2014 LFI used the general phrase “investment dispute” to describe the contours of arbitral jurisdiction, the Assembly of Kosovo intended to preserve – for an indefinite period – an ability for investors who had never filed complaints for breach of the 2006 LFI while it remained in force, to file new claims for such breaches after its repeal. That would extend broader continuity of rights to investors under the 2006 LFI, *sub silentio*, than the 2006 LFI *expressly* extended to investors in the event of its own future revocation. Reviewing the terms of the 2014 LFI as a whole, the Tribunal is unable to conclude that this was intended.
435. For these reasons, the Tribunal concludes that it has temporal jurisdiction only over investment disputes that challenge conduct, attributable to the Republic of Kosovo, that occurred after entry into force of the 2014 LFI on 24 January 2014. The implications of this finding are discussed further in Section IX, addressing Mr. Selmani’s various merits claims.

## E. Time Bar

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<sup>547</sup> CL-2, 2006 LFI, Article 6.2.

**(1) Kosovo's Position**

436. Kosovo says that the present dispute raises “precisely the concerns that time bars, statutes of limitation, extinctive prescription, and other related doctrines were all intended to address.” Claims based on the 2001 UNMIK Permission are time-barred and as such are inadmissible, Kosovo says.<sup>548</sup>
437. First, Kosovo argues that domestic law bars the vast majority of Mr. Selmani’s claims (with the “possible exception” of the denial of justice claims). The 2014 LFI must be supplemented with surrounding Kosovar legislation, which includes Law No. 04/L-077 on Obligations adopted by the Assembly of Kosovo on 30 May 2012 (the “**2012 LOR**”), a fact which Kosovo says the Mr. Selmani has implicitly conceded by relying on the 2012 LOR for his interest claims. That same law also contains provisions on time bars. Article 341 contains a general rule for the application of “statute-barring”; Article 352 provides that “[c]laims shall become statute-barred after five (5) years, unless a different period is stipulated by the statute of limitations”; and Article 357 provides that “compensation claims” are time-barred “three years after the injured party learnt of the damage and of the person that inflicted it.”<sup>549</sup>
438. Articles 341 and 357 are very similar to corresponding provisions in the 1978 LOR.<sup>550</sup> This law contained the statute of limitations under Kosovo law before it was replaced by the 2012 LOR, Kosovo says, and thus was the relevant “law in force in Kosovo on 22 March 1989,” referred to by Article 1.1(b) of the 2001 UNMIK Investment Regulation.<sup>551</sup>
439. Referring to expert evidence from Professor Qerimi, Kosovo says that both the 1978 LOR and the 2012 LOR are part of Kosovar substantive law, and that claims under both LFIs are subject to the statute of limitations set forth therein: claims under the 2006 LFI are governed by the 1978 LOR and claims under the 2014 LFI are governed by the 2012 LOR, respectively.<sup>552</sup>
440. Mr. Selmani’s Request for Arbitration is dated 29 April 2019. Applying the time bar provided for by Kosovar law, Kosovo argues that Mr. Selmani’s claims are only timely if (i) the loss occurred no more than five years earlier, and (ii) Mr. Selmani acquired knowledge of the alleged loss and the identity of the party inflicting it no more than three years earlier. Neither of these tests is met for any of Mr. Selmani’s

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<sup>548</sup> SoD ¶¶ 349.

<sup>549</sup> SoD ¶¶ 350-353; RL-14, 2012 LOR, Articles 341, 352, 357.

<sup>550</sup> RL-13/RE-21, 1978 LOR, Articles 360 and 376. In its SoD, Kosovo referred to this law as the “1978 LCT,” but Professor Qerimi’s expert reports, as well as both Parties at the Hearing and the Closing Arguments, referred to it as the “1978 LOR.” Both terms appear to refer to the very same law, which the Tribunal will refer to as the 1978 LOR in the interest of consistency.

<sup>551</sup> SoD ¶¶ 351-352.

<sup>552</sup> SoD ¶¶ 354-355; First Qerimi Report ¶¶ 52-56.

claims, Kosovo argues, again with the possible exception of his denial of justice claims.<sup>553</sup>

441. Mr. Selmani is also prevented by international law from bringing his claims, Kosovo submits. While there is no general time bar rule in international law, the customary international law doctrine of extinctive prescription prevents Mr. Selmani from bringing his claims.<sup>554</sup>

## (2) Mr. Selmani's Position

442. Mr. Selmani says that his claims are not time-barred. With respect to the law applicable to this issue, Mr. Selmani says it is “well settled that investment claims submitted to international arbitral tribunals are subject to international law standards in relation to prescription, and not to domestic law’s statutes of limitation.” This position has been confirmed by arbitral tribunals constituted under both investment treaties<sup>555</sup> and laws on foreign investment,<sup>556</sup> Mr. Selmani submits.<sup>557</sup>
443. Mr. Selmani suggests that it would be inapposite to “import domestic statutes of limitations” through Article 17.2 of the 2014 LFI, for the following reasons.
444. First, the statutes of limitation under Kosovar law to which Kosovo refers are not relevant to Mr. Selmani’s international law claims. The time bar in the Law on Contracts and Torts apply only to obligations governed by that law, and not to claims under the LFIs. Even if the opposite were true, and domestic rules were found applicable by the Tribunal, municipal statutes of limitation do not bind claims before international tribunals, although they may consider them.<sup>558</sup>
445. Furthermore, Article 17.2 of the 2014 LFI provides only for the application of Kosovar “substantive law.” Time bars are procedural in nature, Mr. Selmani argues,

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<sup>553</sup> SoD ¶¶ 360-367.

<sup>554</sup> SoD ¶¶ 368-370; RL-15, *Nordzucker*, ¶ 221; RL-16, *Salini Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, 23 February 2018, ¶¶ 89-90.

<sup>555</sup> CL-95, *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Award, 8 December 2000, (“*Wena Hotels*”) ¶ 106; CL-171, *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Award, 13 November 2000, ¶ 93; CL-156, *Luigiterzo Bosca v. Republic of Lithuania* (PCA Case No. 2011-04), Award, 17 May 2013, ¶ 120; CL-172, *Marco Gavazzi and Stefano Gavazzi v. Romania* (ICSID Case No. ARB/12/25), Decision on Jurisdiction, Admissibility and Liability, 21 April 2015, ¶ 147; CL-173, *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Award, 14 October 2016, ¶ 5.72; CL-174, *Caratube International Oil Company LLP and Devinci Salah Hourani v. Republic of Kazakhstan* (ICSID Case No. ARB/13/13), Award, 27 September 2017, (“*Caratube*”), ¶ 421.

<sup>556</sup> CL-124, *Interocean Oil Development Company and Interoccean Oil Exploration Company v. Federal Republic of Nigeria* (ICSID Case No. ARB/13/20), Decision on Preliminary Objections, 29 October 2014 (“*Interocean*”), ¶¶ 122-124.

<sup>557</sup> Cl. Reply ¶¶ 462-467.

<sup>558</sup> Cl. Reply ¶¶ 468-469, 471, referencing CL-95, *Wena Hotels*, ¶ 107; CL-174, *Caratube*, ¶¶ 417-418.

because under the 2012 LOR time bars only affect the right to “demand performance of an obligation,” and not the existence of an obligation itself.<sup>559</sup>

446. Rather than domestic law, Mr. Selmani submits that international law governs the timeliness of his claims. Pursuant to international law, and as recognized by Kosovo, three conditions must all be met for international claims to be considered untimely: “(i) an unreasonable delay (ii) attributable to the claimant, and (iii) causing prejudice to the respondent.”<sup>560</sup>
447. None of these conditions is met, Mr. Selmani says. First, Mr. Selmani took proactive steps to protect his rights as soon as he realized that UNMIK would not hand over all of the petrol stations, including by initiating several court proceedings against the occupiers of the stations. The record of this case is also “replete with evidence” showing Mr. Selmani’s various interactions with Kosovar authorities, he says. Therefore, no unreasonable delay can be attributed to Mr. Selmani; on the contrary, any delay is due to Kosovo’s failures to properly address Mr. Selmani’s concerns.<sup>561</sup>
448. Furthermore, even if an unreasonable delay were attributable to Mr. Selmani – which he denies – that delay has not “clearly disadvantaged” Kosovo, as required by the international law test. The only prejudice Kosovo allegedly suffered relates to its supposed problems in collecting evidence from the early 2000s, which does not “clearly disadvantage” Kosovo; in any event, Mr. Selmani faces the same issue.<sup>562</sup>

### **(3) The Tribunal’s Analysis**

449. The Tribunal considers the statutes of limitation in the 1978 LOR and 2012 LOR to be inapplicable to the claims Mr. Selmani asserts. None of the claims in this case allege a breach of the substantive obligations of either LOR. Rather, Mr. Selmani presents claims for breach of the substantive obligations of the 2014 LFI, which contains its own dispute resolution mechanism. That mechanism authorizes the filing of claims, and makes no reference to any statute of limitation – either self-contained or incorporated from any LOR – as a condition to such filings. The same is true of the 2006 LFI, to the extent Mr. Selmani seeks to present claims for breach of its substantive obligations, although the Tribunal has found it has no jurisdiction in any event to entertain such claims following the revocation of the 2006 LFI (*see* Section VIII(D)(3) above).
450. In other words, Mr. Selmani invokes instruments that contain stand-alone dispute resolution mechanisms. In these circumstances, there is no basis for a “mix and

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<sup>559</sup> Cl. Reply ¶ 470.

<sup>560</sup> Bifurcation Observations ¶ 84; Cl. Reply ¶ 473.

<sup>561</sup> Cl. Reply ¶¶ 476-479.

<sup>562</sup> Cl. Reply ¶ 480.

match” approach, by which the Tribunal would import into the LFIs the limitations periods applicable to contract or tort claims filed in the domestic courts, pursuant to completely different dispute resolution mechanisms.<sup>563</sup> Nothing in the LFIs, nor in any extrinsic evidence to which the Tribunal has been directed, suggests an intent by the Kosovo Assembly that the limitations periods applicable to those different claims and fora should be applied also to investment disputes in arbitrations explicitly authorized by the LFIs.

451. This includes Article 17.2 of the 2014 LFI, which directs a tribunal to apply the “substantive law applicable in the Republic of Kosovo, excluding the private international law rules thereof” to decide “the issues in dispute” in an investment dispute presented to arbitration. In the Tribunal’s view, this does not refer to the threshold admissibility of a claim under the arbitration clause in Article 16 of the 2014 LFI, nor permit the importation into an international arbitration proceeding of prescription rules applicable to different types of substantive obligations altogether.
452. Kosovo’s alternative argument is that Mr. Selmani’s claims are time-barred under customary international law, which is said to include a general principle of extinctive prescription. The Tribunal sees no need to delve into whether international law indeed contains some outer limit beyond which claims are deemed too stale to assert. First, as the Tribunal has repeatedly emphasized, this case is not brought under customary international law, but rather under an instrument of domestic legislation. Moreover, even if customary international law were somehow applicable to the time-bar issue, and even if such law was presumed to impose some outer limit for the presentation of claims, Kosovo has not shown that this case involves delays of the extent as to trigger such outer limit. Putting aside Mr. Selmani’s complaints about *UNMIK*’s failure to make additional petrol stations available to him soon after the *UNMIK* Permission (which the Tribunal has found would not be attributable to Kosovo in any event), the bulk of Mr. Selmani’s complaints about *Kosovo*’s conduct concern acts said to have occurred more recently. The Request for Arbitration complains of measures “beginning in 2011,”<sup>564</sup> and most of the specific acts identified took place in 2013 or 2014 (*e.g.*, MTI denial of petroleum trading licenses, PAK tenders for other petrol stations). Kosovo has not demonstrated that international law imposes any time bar that would preclude the commencement of an arbitration in 2019 to challenge acts taken in 2013 or 2014.

## **F. Fork-in-the-road**

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<sup>563</sup> See similarly CL-124, *Interocean*, ¶¶ 122-124 (declining to apply limitations periods applicable to contract claims in Nigeria to claims against Nigeria for violation of its investment protection law).

<sup>564</sup> RFA p. 8 (Section D caption).

### (1) Kosovo's Position

453. Mr. Selmani already has pursued a multitude of claims before Kosovar courts, a fact which Kosovo argues bars him from now bringing the same claims before this Tribunal. In this respect, Article 16.2 of the 2014 LFI provides that:

[...] a foreign investor shall have the right to require that the investment dispute be settled either through litigation before a court of competent jurisdiction in the Republic of Kosovo or through local and international arbitration. [*Kosovo's emphasis*]

454. Kosovo submits that the “either/or” language of this provision was intentional and must be given effect. Furthermore, an “investment dispute” is broadly defined by Article 1.19 of the 2014 LFI as “any dispute or claim arising from a foreign investment or that is related to it,” and under this broad definition the “disputes” brought before Kosovar courts and before this Tribunal are one and the same. Furthermore, Kosovo points out, Kosova Petrol lacks independent legal personality from Mr. Selmani, so a distinction cannot rest on that basis as between the claims in local courts and those in this arbitration.<sup>565</sup>

### (2) Mr. Selmani's Position

455. Mr. Selmani rejects Kosovo's fork-in-the-road objection as “groundless.”<sup>566</sup>
456. Contrary to Kosovo's assertions, Article 16.2 of the 2014 LFI is not a fork-in-the-road provision, Mr. Selmani says. The Article's use of “either/or” does not mean that a choice of venue is exclusive, because “or” can also have an inclusive effect, as found by the ICC tribunal in *Olin v. Libya*.<sup>567</sup> This is confirmed by Kosovo's treaty practice, which contains plenty of examples of fork-in-the-road clauses which explicitly make an investor's choice of venue exclusive of others.<sup>568</sup>

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<sup>565</sup> SoD ¶¶ 387-390.

<sup>566</sup> Cl. Reply ¶ 483.

<sup>567</sup> CL-26, *Olin Holdings Ltd. v. Libya*, ICC Case no. 20355/MCP, Partial Award on Jurisdiction, dated 28 June 2016, reported in Damien Charlotin, ‘Analysis: At jurisdiction phase, Libyan civil unrest justifies waiver of BIT's cooling off period, but does not excuse state's failure to post a share of costs; treaty provision should not be read as “fork-in-the-road” clause that would bar later bit claim’ (4 June 2018) IA Reporter, p. 3.

<sup>568</sup> SoC ¶¶ 225-229; Cl. Reply ¶¶ 484-493; CL-27, Agreement between the Government of the Republic of Kosovo and the Government of the Republic of Turkey on the Reciprocal Promotion and Protection of Investments, dated 30 May 2012, Article 10.3; CL-28, Agreement between the Government of the Republic of Kosovo and the Government of the Republic of Macedonia concerning the Encouragement and Reciprocal Protection of Investments, dated 22 January 2015, Article 7.3; CL-4, Agreement between the Republic of Kosovo and the Swiss Confederation on the Promotion and

457. Assuming *arguendo* that the Tribunal understands Article 16.2 to be a mutually exclusive fork-in-the-road clause, it still is not applicable in the present case, Mr. Selmani says. Applying the triple identity test, none of the criteria has been satisfied. No domestic court case involves either the 2001 UNMIK Investment Regulation, the 2006 LFI or the 2014 LFI. Similarly, with the sole exception of the expropriation case relating to Pristina I, there is no identity of the parties or of object, because “none of the court proceedings were initiated against the Republic of Kosovo and sought compensation for harm caused to Mr. Selmani’s investment in Kosova Petrol,” Mr. Selmani says.<sup>569</sup>
458. Furthermore, a fork-in-the-road clause cannot prevent a claim for denial of justice, a position which Mr. Selmani says Kosovo does not dispute.<sup>570</sup>

### (3) The Tribunal’s Analysis

459. Article 16.2 of the 2014 LFI provides that a foreign investor has a choice among various dispute resolution mechanisms for the resolution of a given investment dispute: he may submit that dispute to the domestic courts, or he may submit it to local or international arbitration. Kosovo consents in advance to the foreign investor’s election of any of these mechanisms.
460. The threshold question presented by Kosovo’s objection is whether an investor who elects to pursue one of these mechanisms for a given investment dispute is thereby precluded from ever pursuing another – regardless of the outcome of the first remedy, or even if the initial proceedings remain pending without resolution. In other words, is the election of remedies exclusive and forever binding, as in a traditional fork-in-the-road clause? In the view of the Tribunal, the language of Article 16.2 does not so provide. The “either/or” formulation simply identifies the existence of a choice, not the consequences of that choice. More explicit text would be required to imbue that choice with binding preclusive effect.<sup>571</sup>

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Reciprocal Protection of Investments, dated 27 October 2011, Article 11.4; CL-22, Agreement between the Government of the Republic of Kosovo and the Council of Ministers of the Republic of Albania for the Promotion and Protection of Investments, dated 3 May 2016, Article 11.4; CL-6, Agreement between the Government of the Republic of Kosovo and the Government of the Republic of Austria on the Promotion and Protection of Investments, dated 22 January 2010, Article 15.1.

<sup>569</sup> SoC ¶¶ 230-233; Cl. Reply ¶¶ 495-499.

<sup>570</sup> SoC ¶¶ 234-235; Cl. Reply ¶ 500.

<sup>571</sup> To this extent the Tribunal agrees with the *Mabco* tribunal, which declined to find a “fork in the road” (election of remedies) provision in the 2014 LFI. See CL-125, *Mabco*, ¶¶ 431-437 (explaining that a “statutory provision enabling a claimant to submit a dispute *either* to the courts (or administrative tribunals) of the host State *or* international arbitration” could reasonably be read as “simply giving it two avenues of recourse”; “[i]t does not follow from the fact that a claimant has two options that a choice once made is necessarily an irreversible one, so that availing oneself of one remedy precludes it from thereafter resorting to the other”) (emphasis in original).



461. Moreover, even if (*arguendo*) Article 16.2 were to be read as mandating an exclusive choice among fora, that choice would only be triggered for “the” particular investment dispute submitted to the first forum. The fact that an investor may submit “an” investment dispute to one forum would not preclude him from submitting another investment dispute to a different forum, if the two proceedings do not involve the same dispute. At the very minimum – and without entering into unnecessary debate about whether all aspects of the so-called triple-identity test need be satisfied – the second claim would need to challenge the *same government act* that is at issue in the first claim, before any argument about preclusion could even arise.
462. Here, Kosovo has not demonstrated that Mr. Selmani challenged the same government act in different fora. At most, it alleges in a brief passage in its Statement of Defense, without any specificity, that “many of the *disputed issues* in this arbitration” have been raised in the Kosovo courts.<sup>572</sup> Of course, to the extent Kosovo refers to Mr. Selmani’s many private court cases against competing stakeholders interested in the petrol stations, these cases did not challenge *any* government act, even if they referenced the UNMIK Permission as the asserted basis for Mr. Selmani’s rights. To the extent Kosovo intends to refer to some other domestic court proceedings in which Mr. Selmani did challenge government acts, it has not provided sufficient detail to substantiate any objection that such proceedings involved the same “investment dispute” presented here. Certainly, Kosovo does not assert that Mr. Selmani ever previously alleged, in any other forum, a violation of the 2001 UNMIK Investment Regulation, the 2006 LFI or the 2014 LFI.
463. Kosovo’s fork-in-the-road objection is therefore denied.

## **G. Arbitrability**

### **(1) Kosovo’s Position**

464. Kosovo presents a further jurisdictional objection that is premised on its contention that the subject matter of this dispute is not “arbitrable” because the Special Chamber has exclusive jurisdiction over all claims against PAK. Article 30 of the 2011 PAK Law provides that “[t]he Special Chamber shall have exclusive jurisdiction for all suits against [PAK].” Furthermore, Article 31.1 of the same law contains a rule of precedence stating expressly that “[t]he present Law shall prevail over any provisions of the Law of Kosovo that are inconsistent herewith.” The 2014 LFI is such a “Law of Kosovo,” and a consistent joint reading of the two instruments must give precedence to the jurisdictional provision of Law No. 04/L-34 on the PAK, Kosovo says.<sup>573</sup>

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<sup>572</sup> SoD, ¶ 387 (emphasis added).

<sup>573</sup> Answer ¶ IV.A; SoD ¶¶ 391-393; C-201, 2011 PAK Law, Articles 30 and 31.

## (2) Mr. Selmani's Position

465. Mr. Selmani argues that the Special Chamber's exclusive jurisdiction is expressly limited to suits against PAK, whereas he has brought the present dispute against the Republic of Kosovo, for conduct attributable to the Republic (conduct which includes, but is not limited to, conduct of PAK).<sup>574</sup>
466. Furthermore, there is no limitation on Kosovo's broad consent to arbitration in Article 16 of the 2014 LFI; on the contrary, Article 19.2 provides that the LFI shall prevail in the event of any conflict with other domestic laws.<sup>575</sup>
467. Mr. Selmani also says that it is well established that a State "cannot invoke its own laws to escape a valid arbitration agreement, or to argue subjective non-arbitrability," which he says follows from arbitral jurisprudence.<sup>576</sup>
468. Finally, Mr. Selmani says that Kosovo's arbitrability objection is undermined by its own conduct in other arbitrations centered on claims based on PAK measures, where Kosovo has not made any similar objection. PAK itself has also entered into agreements with arbitration clauses, which further undermines Kosovo's position, Mr. Selmani says.<sup>577</sup>

## (3) The Tribunal's Analysis

469. The Tribunal denies Kosovo's arbitrability objection for much the same reason as it denied Kosovo's attribution objection regarding PAK, in Section VIII(C)(3)(b) above. This proceeding is not brought against PAK, but rather against the Republic of Kosovo. It is based on the 2014 LFI, which broadly authorizes the submission of investment disputes to international arbitration, without any carve-out for disputes based on the underlying conduct of PAK. The 2014 LFI's definition of "public authority" – the phrase the Law repeatedly uses in the context of substantive obligations of treatment – is broad, and would seem to encompass PAK. Finally, as Mr. Selmani points out, Article 19.2 of the 2014 LFI – which post-dates entry into

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<sup>574</sup> SoC ¶ 211; Cl. Reply ¶¶ 502-505.

<sup>575</sup> SoC ¶¶ 212-215; Cl. Reply ¶¶ 506-510.

<sup>576</sup> Cl. Reply ¶¶ 511-513; CL-186, *Millicom International Operations B.V. and Sentel GSM SA v. Republic of Senegal* (ICSID Case No. ARB/08/20), Decision on Jurisdiction of the Arbitral Tribunal, 16 July 2010, ¶ 103; CL-173, *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Award, 14 October 2016, ¶ 5.68; CL-188, *Cayman Power Barge I, LTD vs. Dominican Republic and Corporacion Dominicana de Electricidad* (ICC Case No. 11772/KGA/CCO), Preliminary Arbitration Decision on the Jurisdiction of the Arbitral Tribunal, 19 September 2003, ¶ 46.

<sup>577</sup> Cl. Reply ¶ 514; CL-125, *Mabco*; C-294, Permanent Court of Arbitration, Case information, *Sharr Beteiligungs GmbH (Germany) v. Privatization Agency of Kosovo*, (available at <https://pca-cpa.org/en/cases/237/>), "The PCA provides administrative support in this arbitration, which has been brought pursuant to a Share Purchase Agreement between the Parties dated 9 December 2010 and the UNCITRAL Arbitration Rules 2010".

force of both the 2008 PAK Law and the 2011 PAK Law – provides that the provisions of the 2014 LFI prevail in the event of any conflict between its provisions and those of any other Kosovar law, unless the other law “contains a clearly expressed intention to avoid the application of a provision of this law.”<sup>578</sup> Nothing in the prior PAK Laws so provide, nor did they express such an intention with respect to the provisions of the 2006 LFI, which was in force in Kosovo upon enactment of the PAK Laws.

470. Accordingly, the Tribunal considers Mr. Selmani’s claims against Kosovo to be arbitrable, notwithstanding that some of those claims refer to the conduct of PAK.

## **H. No Substantive Obligation**

### **(1) Kosovo’s Position**

471. In Kosovo’s submission, the vast majority of Mr. Selmani’s claims are predicated on obligations that simply do not exist in the instruments relied upon.<sup>579</sup>

#### **a. No expropriation claims for UNMIK conduct**

472. First, the 2001 UNMIK Investment Regulation does not protect against takings in this instance, contrary to Mr. Selmani’s assertions. While Section 7 of the 2001 UNMIK Investment Regulation contains “protections regarding takings,” Kosovo points out that Section 2.1 expressly provides that UNMIK’s administration of property under UNMIK Regulation 1999/1 “as amended” does not amount to a taking. It is undisputed that Regulation 1999/1 was amended on 27 September 2000 to include administration of socially owned property. As a consequence, the claims based on an alleged failure to hand over petrol stations are carved out by Section 2.1 of the 2011 UNMIK Investment Regulation, Kosovo says.<sup>580</sup>

#### **b. No FET claims under the 2014 LFI**

473. Second, Kosovo contends that the 2014 LFI does not contain a “BIT-style” FET provision. Mr. Selmani’s assumption to the contrary is based on a flawed reliance on the (unofficial) English version of the law. According to Kosovo, neither of the two official Albanian and Serbian versions contains an FET provision: an accurate English translation of Article 3.1 in those versions clearly provides that Kosovo shall accord foreign investors and investments “the same and equal treatment as to local investors and local investments.” This language, rather than providing for an FET

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<sup>578</sup> CL-3, 2014 LFI, Article 19.2.

<sup>579</sup> SoD ¶¶ 372.

<sup>580</sup> SoD ¶¶ 373-377.

standard, is deliberately aimed at procedural rights of non-discrimination, as made clear by the December 2013 Assembly report.<sup>581</sup>

474. Mr. Selmani's attempts to incorporate an FET obligation into the 2014 LFI with reference to such an obligation being a generally accepted norm of international law should fail, Kosovo says. FET is not customary international law, nor is it even "unanimously accepted in modern investment treaty practice." In any event, the language of the 2014 LFI objectively provides for a different standard.<sup>582</sup>

## **(2) Mr. Selmani's Position**

475. In Mr. Selmani's submission, Kosovo's "no substantive obligation" objection is groundless, for two main reasons.

### **a. Expropriation claims for UNMIK conduct**

476. First, Mr. Selmani says that Kosovo's reading of Section 2.1 of the 2001 UNMIK Investment Regulation is "artificial." The carve-out contained in that provision must be read in context with Article 6.2 of UNMIK Regulation 1999/1, as amended by UNMIK Regulation 2000/54. Under that regime, UNMIK had the authority to administer property that it had reasonable grounds to believe was socially owned, without prejudice to the right of third parties to assert ownership over that property, either because the property in fact was privately owned or because it had been acquired prior to UNMIK's administration. This is the context for the carve-out in Section 2.1, Mr. Selmani says: since UNMIK's decision to administer an asset was without prejudice to third party rights, that decision alone cannot be deemed to be a "taking." However, Mr. Selmani's expropriation claim is not that Kosovo Petrol's rights predate UNMIK's administration of the petrol stations, nor that UNMIK improperly considered it had the authority to undertake that administration. Rather, Mr. Selmani's expropriation claim is based on *how* UNMIK exercised its administration authority. His claim therefore falls outside of the scope of Section 2.1, as interpreted in good faith and in harmony with UNMIK Regulation 1999/1 as amended.<sup>583</sup>
477. Even if Section 2.1 excludes UNMIK's conduct from the definition of a "taking," Kosovo's objection fails, Mr. Selmani says. First, his claims based on the failure to hand over the petrol stations are not limited to expropriation, but also are based on the full protection and security standard. Second, the failure to hand over the stations continued in time past the 2001 UNMIK Investment Regulation period, into the

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<sup>581</sup> SoD ¶¶ 378-382; R-85, Report with Recommendations on the Draft Law 04 / L-220 on Foreign Investments, 3 December 2013, p. 9 (Amendment 11).

<sup>582</sup> SoD ¶¶ 383-386.

<sup>583</sup> Cl. Reply ¶¶ 429-435; Cl. Rejoinder ¶¶ 188-189.

periods during which foreign investments were protected by the 2006 and 2014 LFIs, and neither of those instruments contain a similar carve-out. Third, custom provides that a State must provide compensation for an expropriatory measure that is “confiscatory or that ‘unreasonably interferes with, or unduly delays, effective enjoyment’ of the property.”<sup>584</sup> Finally, Mr. Selmani says that even if the objection were successful, Kosovo has failed to show how that would affect either jurisdiction or admissibility.<sup>585</sup>

#### **b. FET claims under the 2014 LFI**

478. Mr. Selmani’s second main argument in response to the “no substantive obligation” objection is that the objection ignores Kosovo’s fair and equitable treatment undertaking.
479. In Mr. Selmani’s submission, the 2014 LFI contains an FET undertaking. Mr. Selmani says this follows from the language of Article 3.1, read in conjunction with Article 1.1, which provides that the purpose of the law is to provide foreign investors with “a set of fundamental rights and guarantees that will ensure foreign investors that their investments will be protected and treated with fairness [...]” Mr. Selmani also contends that the *Mabco* tribunal found the 2014 LFI to contain an FET guarantee. In any event, the 2014 LFI expressly incorporates “generally accepted norms of international law,” which include protections similar to the FET standard.<sup>586</sup>
480. Independent from the above, Mr. Selmani also says that Article 4.1 of the 2014 LFI contains an undertaking by Kosovo to “grant all foreign investments equally advantageous treatment, irrespective of their nationalities”; in his view, this means that the FET protection expressly extended to other investors in Kosovo’s BITs is incorporated by reference into the 2014 LFI. Furthermore, the 2006 LFI contains an express FET standard, and Kosovo is prevented by Article 6 of the 2014 LFI from lowering protections to foreign investors through the later law. Finally, the 2014 LFI also contains a non-impairment clause in Article 3.4, which Mr. Selmani says provides for protections similar to that of an FET clause.<sup>587</sup>

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<sup>584</sup> CL-158, *Glamis Gold, Ltd. v. United States of America* (UNCITRAL), Award, 8 June 2009, ¶ 354; CL-90, *Generation Ukraine*, ¶ 11.3.

<sup>585</sup> Cl. Rejoinder ¶¶ 190-195; Cl. Reply ¶ 436.

<sup>586</sup> Cl. Reply ¶¶ 437-450; Cl. Rejoinder ¶¶ 197-202; CL-125, *Mabco Constructions SA v. Republic of Kosovo* (ICSID Case No. ARB/17/25), Decision on Jurisdiction, 30 October 2020 (“*Mabco*”), ¶ 478.

<sup>587</sup> Cl. Reply ¶¶ 452-459; Cl. Rejoinder ¶¶ 203-204.

### **(3) The Tribunal's Analysis**

#### **a. Expropriation claims for UNMIK conduct**

481. The Tribunal considers it unnecessary to address the extent of immunity that UNMIK may have had against expropriation claims under the 2001 UNMIK Investment Regulation, with respect to its administration of socially owned property, in consequence of Section 2.1 of that Regulation. There is equally no need to delve into the question of any UNMIK immunity against similar claims under the 2006 LFI. That is because, for the reasons explained in Section VIII(C)(3)(a) above, the Tribunal has found that UNMIK's conduct prior to Kosovo's independence was not attributable to the new Republic of Kosovo following its independence, nor did Kosovo agree to assume any liabilities that UNMIK might have had for any pre-independence breach. This necessarily includes any putative UNMIK failure to make additional petrol stations available to Kosova Petrol to occupy and operate following issuance of the UNMIK Permission.
482. Of course, the lack of attribution of *UNMIK* conduct to Kosovo still leaves Kosovo responsible for its *own* fulfillment (or non-fulfillment) of any obligations that it assumed upon independence. But the Tribunal also has found that Kosovo did not assume *any* obligations under the UNMIK Permission. This is both because (a) even before independence, UNMIK itself had most likely terminated the UNMIK Permission, and even if not, the UNMIK Permission was supplanted by new licensing regimes as they were introduced (see Sections VI(D) and VI(F) above), and (b) in any event, upon Kosovo's independence, the UNMIK Permission fell outside the scope of the type of instruments that Kosovo agreed to accept as binding upon it (see Section VI(H) above).

#### **b. FET claims under the 2014 LFI**

483. The Parties have briefed the existence (or non-existence) of an FET obligation in the 2014 LFI both in the context of Kosovo's jurisdictional objections, and separately (somewhat more extensively) in the context of their respective arguments on liability. To avoid duplication, and to address the arguments in the context of their fullest explication by the Parties, the Tribunal addresses the issue in Section IX, which follows immediately below. For the reasons therein stated, the Tribunal finds that the 2014 LFI does not contain an FET obligation. Accordingly, the Tribunal does not have jurisdiction to consider any FET claims. However, since the 2014 LFI does contain a Non-Impairment obligation, and because Mr. Selmani contends that the same conduct he invokes as a violation of FET also violates the Non-Impairment obligation, the Tribunal evaluates Mr. Selmani's substantive claims on that basis.

### **I. Summary of the Tribunal's Findings on Jurisdiction**

484. For the reasons stated above, the Tribunal finds as follows with respect to Kosovo's eight jurisdictional objections:
- a. Kosovo's objection *ratione personae* is denied;
  - b. Kosovo's objection *ratione materiae* is granted in significant part. In particular, the UNMIK Permission cannot be the basis for jurisdiction *ratione materiae* under the 2014 LFI, because it ceased to be in effect prior to Kosovo's independence and therefore gave rise to no rights "lawfully held" in the Republic of Kosovo. All claims predicated on an alleged violation of the 2014 LFI due to non-recognition of the UNMIK Permission by Kosovar authorities fail for lack of jurisdiction. In the liability section that follows, the Tribunal explains with more specificity which substantive claims fail on this basis;
  - c. Kosovo's "attribution" objection with respect to the conduct, obligations or liability of UNMIK is granted, but its "attribution" objection with respect to the conduct, obligations or liability of PAK is denied;
  - d. Kosovo's "retroactivity" objection to jurisdiction over claims alleging breaches of instruments predating the 2014 LFI is granted; the Tribunal has temporal jurisdiction only over investment disputes that challenge conduct, attributable to the Republic of Kosovo, that occurred after entry into force of the 2014 LFI. The implications of this finding for Mr. Selmani's various merits claims are discussed further in the liability section that follows;
  - e. Kosovo's "time bar" objection is denied;
  - f. Kosovo's "fork-in-the-road" objection is denied;
  - g. Kosovo's "arbitrability" objection regarding claims referring to the conduct of PAK is denied; and
  - h. Kosovo's "no substantive obligations" objection with respect to alleged expropriation by UNMIK is rendered moot by the Tribunal's finding that UNMIK's conduct prior to Kosovo's independence is not attributable in any event to the Republic of Kosovo; Kosovo's "no substantive obligations" objection with respect to FET claims under the 2014 LFI is granted, for the reasons stated in Section IX.A.3 below.

## **IX. LIABILITY**

485. The Tribunal’s decisions regarding various jurisdictional objections dispose of many of Mr. Selmani’s substantive claims at the threshold. Nonetheless, this case involves many moving parts – a large number of challenged acts occurring over many years, alleged to violate many different legal standards – and the Parties have devoted substantial attention to each of the substantive claims. The Tribunal therefore considers it appropriate to discuss the liability claims in sequence, clarifying for each (after a description of the claim) the extent to which it was impacted by one or more of the Tribunal’s jurisdictional rulings. For the sake of completeness, the Tribunal also sets forth below its views on the substance of the claims, sometimes on an *arguendo* (or *quod non*) basis where its jurisdictional rulings in any event dispose of the claim.
486. As with prior sections, the summary of the Parties’ arguments is not intended to be all-inclusive, and the Tribunal affirms that it has considered all contentions presented in the course of the proceedings.

## **A. Fair and Equitable Treatment**

### **(1) Mr. Selmani’s Position**

#### **a. Existence of an FET obligation**

487. The 2006 LFI explicitly includes an FET clause in Article 6, Mr. Selmani says.<sup>588</sup> While it is undisputed that the English version of Article 3.1 of the 2014 LFI also provides for an FET standard, Kosovo has argued that the Albanian and Serbian versions of the 2014 LFI do not. In Mr. Selmani’s submission, the Tribunal should take into account the drafting history of the 2014 LFI, which shows that the initial draft of Article 3.1 contained an FET provision in all three language versions, which was then explicitly combined with the national treatment provision into one and the same provision in the final version of the law, as reflected by the English version.<sup>589</sup> In his view, this history demonstrates an intent to preserve FET protection rather than eliminate it.
488. Furthermore, Article 1.1 of the 2014 LFI confirms this interpretation, Mr. Selmani argues, as it states that the law’s purpose is to “provide foreign investors with a set of fundamental rights and guarantees that will ensure foreign investors *that their investments will be protected and treated with fairness* in strict accordance with the accepted international standards and practices.”<sup>590</sup>

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<sup>588</sup> Cl. Reply ¶ 453.

<sup>589</sup> Cl. Reply ¶¶ 437-443; Cl. Opening Slide 144; R-85, Report with Recommendations on the Draft Law 04/L-220 on Foreign Investments, 3 December 2013; C-232, Draft Law on Foreign Investment of 28 December 2012, pp 9-11.

<sup>590</sup> CL-3, 2014 LFI, Article 1.1 (Claimant’s emphasis).



489. Mr. Selmani also refers to the tribunal’s finding in *Mabco v. Kosovo* that the 2014 LFI provides for fair and equitable treatment.<sup>591</sup>
490. In any event, Mr. Selmani submits, Article 3.3 and Article 10.1 of the 2014 LFI both refer to “generally accepted norms of international law.” Article 3.3 provides:

In no case shall the treatment, protection or security required by this paragraph be less favorable than that required by generally accepted norms of international law or any provision of the present law.

Article 10.1 provides:

Without prejudice to any other rights or remedies that a foreign investor may have, a foreign investor shall have a right to refer to the court or arbitration for compensation for losses and expenses incurred as a consequence of any action or inaction that is directed against the foreign investor and that is a violation of the applicable law in the Republic of Kosovo or generally accepted norms of international law; and is attributable to the Republic of Kosovo.

491. FET is part of such generally accepted international law, Mr. Selmani says, with reference to numerous authorities.<sup>592</sup>
492. Mr. Selmani also relies on Article 4.1, under which Kosovo has undertaken to “provide the foreign investments the same treatment, regardless of their citizenship, origin, residency, place of establishment of business or control.” This clause, which counsel for Mr. Selmani referred to at the Hearing as a most-favored nation (“MFN”) clause,<sup>593</sup> prevents Kosovo from providing less protection in the 2014 LFI than is

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<sup>591</sup> Cl. Reply ¶ 446; Cl. Opening Slide 155; CL-125, *Mabco*, ¶ 478.

<sup>592</sup> Cl. Reply ¶¶ 448-451; CL-43, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award, 11 October 2002, ¶ 117; CL-57, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008, ¶ 592; CL-50, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award, 29 July 2008, ¶ 611; CL-161, *Rusoro Mining Limited v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5), Award, 22 August 2016, ¶ 520; CL-162, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008, ¶ 337; CL-163, *Occidental Exploration and Production Company v. Republic of Ecuador* (LCIA Case No. UN3467), Final Award, 1 July 2004, ¶ 190; CL-164, *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Award, 31 October 2011, ¶ 336; CL-85, *SAUR International S.A. v. Argentine Republic* (ICSID Case No. ARB/04/4), Decision on Jurisdiction and Liability, 6 June 2012, ¶ 494; CL-29, *Ronald S. Lauder v. Czech Republic* (UNCITRAL), Final Award, 3 September 2001, ¶ 292.

<sup>593</sup> Cl. Opening Slide 156.

offered under pre-existing investment treaties, Mr. Selmani says. Kosovo has concluded at least one investment treaty which explicitly includes FET protection.<sup>594</sup>

493. The FET standard encompasses a number of concrete principles, Mr. Selmani submits. These include an obligation to act in good faith, transparently, proportionally, in a consistent manner, with procedural propriety, not arbitrarily and not to frustrate legitimate expectations. The standard also encompasses the notion of denial of justice.<sup>595</sup>
494. Any determination of a potential FET breach involves a fact-specific inquiry of the breach in question, Mr. Selmani says. However, he points out that a breach can result from a series of actions and omissions, as opposed to individually isolated acts, and there is no need to show bad faith on behalf of the State.<sup>596</sup>
495. As discussed further in Section IX(B) below, Mr. Selmani also says that the same conduct that violated Kosovo's FET obligations also violated its Non-Impairment obligation, which is reflected in Article 3.2 of the 2006 LFI and Article 3.4 of the 2014 LFI. In these Articles, Kosovo undertook not to impair "by any unreasonable or discriminatory action or inaction, the operation, management, maintenance, use, enjoyment or disposal of a foreign investment organization or other investment by a foreign investor in the Republic of Kosovo."
496. The separate specific breaches of which Mr. Selmani accuses Kosovo are briefly summarized below.<sup>597</sup>

#### **b. The "Smear Campaign"**

497. Mr. Selmani says that Kosovo breached its FET obligations by disseminating baseless information about Kosova Petrol, in the form of the list of usurpers which was published by a number of news outlets in February 2012. While Kosovo says that it cannot be held responsible for what was published by independent media, Mr. Selmani argues that the source of the information, in all cases, was PAK. PAK representatives are quoted in the articles, albeit not by name, and Mr. Selmani argues that these quotes could not have been provided without the approval of PAK management; Mr. Selmani also considers it telling that PAK never issued any denial of the information that the articles attributed to the agency. Furthermore, Kosovar authorities themselves considered that PAK was the source for the 2012 leaks.<sup>598</sup>

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<sup>594</sup> Cl. Reply ¶¶ 452; CL-166, BIT between Kosovo and the United Arab Emirates, Article 2.2.

<sup>595</sup> SoC ¶ 542; Cl. Reply ¶ 517; Cl. Opening Slides 159-161.

<sup>596</sup> SoC ¶ 246; Cl. Reply ¶ 516.

<sup>597</sup> Cl. Reply ¶¶ 519-520.

<sup>598</sup> Cl. Reply ¶¶ 120, 521-532.

498. Separate from the 2012 leaks, Mr. Selmani also directly challenges PAK's own public accusation in its 3 June 2014 press statements that Mr. Selmani was a usurper of socially owned property, as well as the agency's ultimate publication of the usurper list.<sup>599</sup>
499. The accusations were "baseless in law and in fact," Mr. Selmani submits, and they were made without Kosova Petrol or Mr. Selmani being given the opportunity to address any concerns PAK may have had about the legal basis for Kosova Petrol's operations under the UNMIK Permission. The accusations also undermined the status of Kosova Petrol in the public eye, leading to a drop in revenues, Mr. Selmani says.<sup>600</sup>

**c. The failure to renew licenses**

500. Mr. Selmani says that the MTI's sudden decision in 2013 not to renew Kosova Petrol's licenses was inconsistent and arbitrary. The Ministry had previously granted various licenses as matter of course, and its refusal to do so again was despite the fact that no circumstances, or supporting documentation submitted by Kosova Petrol, had changed.<sup>601</sup>
501. The refusal to renew the licenses was also "riddled with procedural flaws," Mr. Selmani argues. The Ministry let deadlines lapse, and made public declarations about the non-renewals, without informing Kosova Petrol.<sup>602</sup> Mr. Selmani also alleges that Kosova Petrol was the victim of politically motivated considerations, as the company was referred back and forth between Minister Kusari-Lila, Prime Minister Thaçi and First Deputy Prime Minister Pacolli, each of whom referred to mutually contradictory requirements for the renewal of Kosova Petrol's licenses.<sup>603</sup>
502. Kosovo's reference to Kosova Petrol lacking a valid title to operate the petrol stations is unconvincing, as Kosova Petrol did have such a title: the UNMIK Permission. Even assuming *arguendo* that the UNMIK Permission was not a valid title, Mr. Selmani says that nothing had changed from the earlier times when Kosova Petrol was given renewed licenses. MTI's refusal to renew the licenses it previously had renewed, with no objective change of circumstances, is inconsistent in a manner that breaches the FET standard, Mr. Selmani says. This is particularly the case because the inconsistency stems from the very same governmental branch, as opposed to separate arms of the State.<sup>604</sup>

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<sup>599</sup> Cl. Reply ¶¶ 533-534.

<sup>600</sup> Cl. Reply ¶¶ 535-542; First L. Selmani Statement ¶ 30.

<sup>601</sup> Cl. Reply ¶¶ 545-546.

<sup>602</sup> Cl. Reply ¶¶ 124-126, 547.

<sup>603</sup> Cl. Reply ¶¶ 549-551; SoC ¶ 272.

<sup>604</sup> Cl. Reply ¶¶ 552-559.

503. Mr. Selmani also takes issue with Kosovo's assertion that Mr. Selmani cannot now complain about the MTI's decisions because Kosova Petrol never challenged them at the time. There is no such requirement under international law, Mr. Selmani submits, and even if there were, Kosova Petrol was never properly notified of any decisions to deny its license applications, so there was no decision it could take to court.<sup>605</sup>

**d. Dispossession of the stations**

504. Kosovo violated its FET obligation by dispossessing Kosova Petrol of the network of stations it had been operating for nearly 15 years under the UNMIK Permission, Mr. Selmani says. This process played out over several steps, which included first the successive tendering of the stations covered by the UNMIK Permission, and then Kosova Petrol's eviction from the same (as recounted in para 600 below). It continued finally with "harassing" letters to Kosova Petrol and with criminal charges brought against Mr. Selmani, even after Kosova Petrol had been dispossessed of the stations.<sup>606</sup>
505. Mr. Selmani disagrees with Kosovo's response that PAK's conduct in the tendering processes was lawful and in legitimate exercise of its authority, and points out that PAK's authority to administer INA assets had not yet been determined as of the time of the tenders. The tenders also were carried out in disregard of Kosova Petrol's rights under the UNMIK Permission, Mr. Selmani says.<sup>607</sup>
506. Mr. Selmani presents a different version than Kosovo does of Mr. Selmani's meeting with KTA in June 2003. According to Mr. Selmani, the privatization discussions focused on the land on which the stations were located, but not on his rights under the UNMIK Permission to operate the same stations.<sup>608</sup>
507. The tender for the Peja II station, part of the February 2014 Tender, was awarded to D-Petrol, the entity which the Basic Court of Peja had found to illegally occupy Peja II. This inconsistency between PAK's tender and the Peja court's decision constitutes a breach of the FET standard, Mr. Selmani says.<sup>609</sup>
508. The May 2014 Tender (of ten further stations, which had been recently renovated by Kosova Petrol) and the December 2014 Tender (which covered twelve further

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<sup>605</sup> Cl. Reply ¶¶ 560-563.

<sup>606</sup> SoC ¶ 273; Reply ¶¶ 565, 584-585; C-85, Letter from the PAK to Kosova Petrol, dated 22 February 2016; C-86, Letter from the PAK to Kosova Petrol, dated 23 February 2016.

<sup>607</sup> Cl. Reply ¶ 568.

<sup>608</sup> Cl. Reply ¶¶ 570-571 ; R-67, KTA File Note, 17 June 2003; Selmani Second Statement ¶ 14.

<sup>609</sup> Cl. Reply ¶¶ 166-176, 574-577.

stations operated by Kosova Petrol) also constitute FET breaches, Mr. Selmani says.<sup>610</sup>

**e. Denial of justice – the Pristina I station**

509. The FET standard also includes an obligation not to deny justice,<sup>611</sup> which Mr. Selmani says Kosovo violated through its courts' treatment of proceedings Kosova Petrol initiated in June 2014 relating to the expropriation of the Pristina I station.
510. The first two years of the proceedings were “wasted” because of the court’s failure to assign the case to the proper court. Mr. Selmani argues that this process, which was then followed by six more years without a decision on the merits, qualifies as denial of justice. By the time of the Closing Arguments in this Arbitration in March 2022,<sup>612</sup> no decision had been rendered for almost eight years, a time-span which Mr. Selmani contends is extraordinary by Kosovar standards and constitutes a denial of justice under international law.<sup>613</sup>

**(2) Kosovo’s Position**

**a. Non-existence of an FET obligation**

511. The 2014 LFI does not contain an FET clause, Kosovo says. According to Kosovo, the Tribunal should not rely on the inauthentic English version of the LFI, but rather refer to the (authentic) Albanian<sup>614</sup> and Serbian<sup>615</sup> language versions, both of which refer to affording foreign investors and their investments “same and equal treatment” as to local investors and their investments – a very different standard. Under this standard, Kosovo submits, Mr. Selmani must demonstrate that he, or Kosova Petrol, was treated less favorably than Kosovar investors and investments, which he has failed to do.<sup>616</sup>

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<sup>610</sup> Cl. Reply ¶¶ 578-580.

<sup>611</sup> SoC ¶¶ 254; Cl. Reply ¶ 596.

<sup>612</sup> When asked by members of the Tribunal during the Closing Arguments, counsel for both Parties confirmed that the case has not proceeded since it was transferred to the proper court division, Tr. Closing Day 1 Kalicki/Pekar 249:4-250:13; Tr. Closing Day 1 Bishop/Shelbaya/Kalicki 64:16-65:9; Tr. Closing Day 2 Shelbaya/Bishop/Douglas 43:3-44:18.

<sup>613</sup> SoC 278-289; Cl. Reply ¶¶ 597-602; CL-40, *Victor Pey Casado and the “Presidente Allende” Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Arbitral Award, 8 May 2008, ¶ 659.

<sup>614</sup> RL-008, 2014 LFI (Albanian version), Art. 3(1): “Republika e Kosovës do t’ju jep investitorëve të huaj dhe investimeve të tyre trajtim të njëjtë dhe të barabartë me ndonjë investitor vendor dhe investimeve vendore.”

<sup>615</sup> RL-007, 2014 LFI (Serbian version), Art 3(1): “Republika Kosovo treba da stranim investitorima i njihovim investicijama dati isto i jednaki tretman kao domaćim investitorima ili domaćim investicijama.”

<sup>616</sup> SoD ¶¶ 380-381, 396-398; Resp. Rejoinder ¶ 416; Resp. Opening Slide 166; Resp. Closing Slide 148.

512. Kosovo rejects Mr. Selmani's reference to the *Mabco* tribunal having found that the 2014 LFI contains a guarantee of fair and equitable treatment. Read in context, it is clear (Kosovo says) that the Tribunal simply assumed this was the case, without engaging in any analysis or indeed deciding or defining the scope of protection under the 2014 LFI.<sup>617</sup>
513. Even if the Tribunal finds that the 2014 LFI contains an FET obligation, PAK did not exercise any sovereign powers and its actions thus cannot engage Kosovo's responsibility, Kosovo says.<sup>618</sup> Furthermore, the LFI's protections cannot act as an "insurance policy" for the risks assumed by Mr. Selmani's alleged investment, which was purportedly made at what Kosovo characterizes as a "chaotic legal and economic" time, when Kosovo suffered from a lack of rule of law, and did not even have a foreign investment regime.<sup>619</sup>
514. Kosovo's position on the separate specific breaches Mr. Selmani alleges is briefly summarized below.

**b. The "Smear Campaign"**

515. With respect to Mr. Selmani's claim based on the alleged "smear campaign" in February 2012, Kosovo disputes this contention. The list of usurpers was not published by Kosovo or its authorities, but rather by independent media which Kosovo does not control. The cited articles, which Mr. Selmani says refer to information obtained by PAK, were not official statements or releases by PAK and therefore cannot be attributable to Kosovo.<sup>620</sup>
516. Kosovo adds that the press articles did not purport to make any legal assessment, and could not be deemed to affect any rights which Mr. Selmani claims to have under the UNMIK Permission. Furthermore, even if Mr. Selmani's allegations that PAK instigated these articles were true – which Kosovo denies – that could not constitute a "measure" or "treatment" of Mr. Selmani's investments, and is consequently not susceptible of breaching any FET standard. Kosovo also points out that the information disclosed in the media, and two years later (in June 2014) by PAK itself, all turned out to be correct.<sup>621</sup>

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<sup>617</sup> Resp. Closing Slide 150.

<sup>618</sup> Resp. Closing Slide 168.

<sup>619</sup> Resp. Rejoinder ¶¶ 417-547.

<sup>620</sup> SoD ¶¶ 400-406.

<sup>621</sup> SoD ¶¶ 408-412; Resp. Rejoinder ¶¶ 458-467; Resp. Closing Slide 156.

**c. The failure to renew licenses**

517. Kosovo says that the MTI rejected Kosova Petrol's license requests because Kosova Petrol failed to produce the necessary documents. The MTI informed Mr. Selmani that he could no longer rely on the UNMIK Permission, which Kosovo argues was (i) issued for a limited amount of time, (ii) terminated in 2001, (iii) not succeeded to or renewed by either KTA or PAK, and (iv) not respected by Kosova Petrol. The MTI also gave Mr. Selmani several opportunities to be heard and to supplement his applications, both of which he failed to exercise. This is not a chain of events that constitute a breach of Article 3 of the 2014 LFI, Kosovo says.<sup>622</sup>
518. Even if, *arguendo*, the MTI acted contrary to Kosovo law, the actions do not breach the FET standard (or the "same and equal" standard that Kosovo contends is applicable under the proper reading of the 2014 LFI) because MTI's actions were neither arbitrary nor discriminatory.<sup>623</sup>
519. Kosovo also situates the 2013 non-renewals in the context of what it says was the State's effort to improve its regulatory regime after independence. It concedes that the license process previously had not been managed in a satisfactory manner, but says that the MTI under Minister Kusari-Lila made good faith efforts to address these shortcomings, and that the Ministry's new, more rigorous approach applied to many other users of SOE property, not just to Kosova Petrol. In these circumstances, the FET standard does not require a State to "repeat its past mistakes," such as prior incorrect decisions granting licenses, Kosovo says.<sup>624</sup>
520. Furthermore, Kosovo argues that Mr. Selmani never attempted contemporaneously to challenge MTI's decisions denying new licenses, which prevents him from now complaining about them before this Tribunal.<sup>625</sup>

**d. Dispossession of the stations**

521. Kosovo also says that it did not unlawfully dispossess Kosova Petrol of the petrol stations it was using. As a preliminary point, Kosovo points out that almost all of the measures complained of under this heading post-date the entry into force of the 2014 LFI,<sup>626</sup> and the valuation date for Mr. Selmani's claimed damages starts with the PAK

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<sup>622</sup> SoD ¶¶ 413-417; Resp. Rejoinder ¶¶ 469-470.

<sup>623</sup> Resp. Rejoinder ¶¶ 471-473; Resp. Opening Slide 169.

<sup>624</sup> Resp. Rejoinder ¶¶ 474-478; Resp. Opening, Slide 169; Resp. Closing Slide 231, referencing C-204, PAK Annual Report for 2014, 31 March 2015, p. 9.31 o

<sup>625</sup> SoD ¶¶ 421-424; RL-30, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008, ¶ 148.

<sup>626</sup> The sole exception being, Kosovo says, the PAK Board of Director's decision on 31 October 2013, which it says neither affected any rights under the UNMIK Permission, nor compelled Mr. Selmani to stop operating the petrol stations, see R-22, Decision of PAK's Board of Directors, 31 October 2013,

Board of Director's decision on 21 October 2014, which also falls in the 2014 LFI period. Yet the 2014 LFI contains no FET clause, Kosovo says. Consequently, Mr. Selmani's claims fail if they are brought under the FET clause of the 2006 LFI (because he claims no damages from the period when this law was applicable) and also under the 2014 LFI (because there was no FET obligation applicable in that period).<sup>627</sup>

522. Kosovo contends that it did not breach Kosova Petrol's rights under the UNMIK Permission because, as argued above, Kosova Petrol had no such rights.<sup>628</sup> Mr. Selmani furthermore had been put on notice more than a decade earlier, during a June 2003 meeting with the KTA, that the stations he operated under the UNMIK Permission eventually would be privatized. Kosovo claims that PAK offered Mr. Selmani the opportunity to pay the outstanding rent and to enter into new rent agreements with PAK, which Mr. Selmani did not accept.<sup>629</sup>
523. Kosovo also argues that the UNMIK Permission could have been freely terminated starting in 2001 on the grounds of Kosova Petrol's continuous breaches, such as the non-payment of rent, the failure to acquire insurance cover for the stations, and the failure to pay taxes due.<sup>630</sup>
524. Furthermore, PAK did not exercise any sovereign powers, which is required for a breach of the FET standard, Kosovo says. While PAK had the exclusive authority to administer SOE assets, it acted as an administrator of certain private law aspects of the assets on behalf of other entities but was not vested with any public "administrative" powers. Furthermore, and in any event, as discussed above, PAK's conduct is not attributable to Kosovo.<sup>631</sup>
525. Kosovo also argues that the claims relating to the Peja II station are unfounded. The Basic Court of Peja's finding that the station was illegally occupied by another entity is "inapposite," because (i) it was based on a misrepresentation from Kosova Petrol that it had consistently paid rent for the station under the UNMIK Permission, and (ii) PAK was not a party to those proceedings, which have no bearing on PAK's authority to administer the petrol station.<sup>632</sup>
526. Furthermore, the PAK tenders of the petrol stations proceeded in a transparent manner which was consistent with applicable regulations, Kosovo says. Kosova Petrol could

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<sup>627</sup> Resp. Rejoinder ¶¶ 479-481.

<sup>628</sup> Resp. Rejoinder ¶ 481; Resp. Opening Slide 168.

<sup>629</sup> SoD ¶¶ 101-103, 262-263, 440(e).

<sup>630</sup> Resp. Rejoinder ¶¶ 486-488; SoD ¶¶ 60-64; Resp. Closing Slide 216.

<sup>631</sup> SoD ¶ 434-437; Resp. Rejoinder ¶¶ 482, 490-491; Resp. Opening Slide 168; Resp. Closing Slide 230; C-201, 2011 PAK Law, Art. 2.

<sup>632</sup> Resp. Rejoinder ¶ 489; Resp. Closing Slide 214; R-131, Kosova Petrol Statement of Claim to the Municipal Court of Peja in Case No. 18/2006, 13 January 2006, p. 1.



have participated but chose not to do so. The tenders also did not violate the UNMIK Permission, as Mr. Selmani contends, but rather the other way around: PAK proceeded with the tenders because it understood the UNMIK Permission no longer to be in effect. Kosovo submits that the relevant inquiry is whether it was “unreasonable” for PAK to consider the UNMIK Permission invalid, which it clearly was not.<sup>633</sup>

#### e. Denial of Justice – the Pristina I station

527. In Kosovo’s submission, the “same and equal treatment” required by both authentic language versions of the 2014 LFI’s Article 3.1 does not equate to a protection against denial of justice. In any event, Mr. Selmani has failed to demonstrate that such a denial has taken place. The delay in the court proceedings is largely attributable to Kosova Petrol, which submitted its claim to the wrong department within the Basic Court of Pristina. Kosova Petrol had ample opportunity to amend its claim and resubmit it to a competent court, but did not do so.<sup>634</sup> While conceding that there have been “no developments” in the case since it was transferred to the proper department within the Basic Court, Kosovo says that any comparison to the average length of a Kosovar court case is irrelevant for the purposes of denial of justice in this case because Kosova Petrol clearly does not have standing to bring the case in the first place due to its lack of rights in the underlying property.<sup>635</sup>

#### (3) The Tribunal’s Analysis

528. In Section VIII(A)(3) above, in the context of Kosovo’s *ratione personae* objections, the Tribunal addressed a different instance of mismatch among the Serbian, Albanian and English versions of the 2014 LFI. However, unlike the issue with Article 2.1.3.1, which involved different versions of the provision in the equally authentic Albanian and Serbian texts, there is no discrepancy between the Serbian and Albanian texts with respect to Article 3.1. *Neither* of these authentic texts contains the phrase “fair and equitable treatment” in Article 3.1. Both instead require that foreign investors and their investments be provided with “the same and equal treatment” as Kosovo affords local investors and their investors.<sup>636</sup> This is a classic national treatment clause, which protects foreigners against discrimination. Mr. Selmani has not alleged any breach of Kosovo’s national treatment obligations under the 2014 LFI.

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<sup>633</sup> Resp. Rejoinder ¶¶ 483-485; Resp. Closing Slides 238, 244, 260.

<sup>634</sup> SoD ¶¶ 447-449; Cl. Rejoinder ¶¶ 492-494; Resp. Opening Slides 170-171.

<sup>635</sup> Tr. Closing Day 1 Kalicki/Pekar 249:4-251:11.

<sup>636</sup> SoD ¶ 380 (translating the Serbian and Albanian texts; Mr. Selmani does not take issue with the translation).

529. The Tribunal acknowledges Mr. Selmani’s argument that an earlier draft of the 2014 LFI had two separate provisions, both an Article 3.1 referring to “fair and equitable treatment” and an Article 4.1 referring to “treatment no less favorable” than that afforded to nationals.<sup>637</sup> Mr. Selmani invokes certain preparatory materials to suggest that the final version of Article 3.1 was intended to combine the two,<sup>638</sup> which he says is apparent from the final English version published by Kosovo in its Official Gazette, which requires Kosovo to “accord fair and equitable treatment to foreign investors and their investments in Kosovo with any local investors and local investments.”<sup>639</sup> In essence, Mr. Selmani suggests, an error was made in finalizing the Albanian and Serbian versions, which were not adapted to reflect the language shown in the final English version.
530. The Tribunal cannot rule out that this may be historically correct. But it is essentially a hypothesis, and an opposite hypothesis is that, for whatever reason, a decision was made to eliminate the draft FET language and maintain only the national treatment language. Whatever occurred in finalizing the 2014 LFI, the Tribunal is required to interpret and apply the authentic versions of that law. Where there is no discrepancy between the two authentic versions, and the consistent text used in both authentic versions contains no ambiguity, the Tribunal has no authority to read back into those versions a provision that does not appear in either of them. The Tribunal cannot elevate into law either language from an earlier draft that was not adopted by the Assembly of Kosovo, or language from an English version that is not legally authentic under Kosovar law. The Tribunal must instead consider the authentic Albanian and Serbian versions to be the accurate formulation of legislative intent.
531. The *Mabco* decision does not dictate a different result. This was a decision on jurisdiction which referenced only the English version of the 2014 LFI, with no indication that any discrepancies between that and the authentic Albanian and Serbian versions were ever brought to the tribunal’s attention. In the passage on which Mr. Selmani relies, the *Mabco* tribunal was addressing a *ratione temporis* objection to certain denial of justice claims that had been asserted under both a BIT and Kosovo’s foreign investment laws. The tribunal found that since the relevant acts arose after entry into force of the 2014 LFI, they were subject to that law rather than the prior LFI. It observed that “[t]hough the 2014 Law does not specifically identify denial of justice as a cognizable claim, Article 8, paras. 1 and 3, guarantee due process of law.” It then added, in a single sentence, that “[a]lso, as under the BIT, protection against denial of justice *may conceivably be read into* and pursued under the rubric of the 2014 Law’s guarantee of fair and equitable treatment.”<sup>640</sup> On this basis, the tribunal permitted the denial of justice claims to proceed to the merits under both the BIT and the 2014 LFI. There was no actual engagement with the substance of Article

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<sup>637</sup> Cl. Reply ¶¶ 440-441.

<sup>638</sup> Cl. Reply ¶ 442.

<sup>639</sup> Cl. Reply ¶ 439; CL-3, 2014 LFI (English version), Art. 3.1.

<sup>640</sup> CL-125, *Mabco*, ¶ 478 (emphasis added).

3.1 of the 2014 LFI, and the issue of whether it contained an FET obligation in the first place – given the absence of FET language in the two authentic versions of the law – appears not to have been placed before the tribunal. In these circumstances, *Mabco*'s one-sentence reference to a FET obligation, based solely on the non-authentic English text of the 2014 LFI, is hardly a compelling authority.

532. Nor is the Tribunal persuaded by Mr. Selmani's invocation of the word "fairness," as it is used in Article 1 of the 2014 LFI. That Article provides as follows:

The purpose of this law is to protect, promote and encourage foreign investment in the Republic of Kosovo, to provide foreign investors with a set of fundamental rights and guarantees that will ensure foreign investors that their investments will be protected and *treated with fairness in strict accordance with the accepted international standards and practices*.<sup>641</sup>

533. As a threshold matter, Article 1 is a preamble or "purpose" clause, not a "shall" clause that imposes specific substantive obligations. In any event, the reference to "fairness ... in accordance with the accepted international standards and practices" does not unambiguously refer to FET, as that concept has developed in investment treaty jurisprudence.<sup>642</sup>
534. For the same reason, neither Article 3.3 nor Article 10.1 of the 2014 LFI provide a foothold for recognizing an FET obligation in the absence of any express reference to one in the authentic Albanian and Serbian versions of the law. Article 3.3 provides that the norms of treatment elaborated in the rest of Article 3 shall "[i]n no case ... be less favorable than that required by generally accepted norms [of] international law."<sup>643</sup> Nothing in this phrase suggests a separate consent to FET claims. The same is true for Article 10.1, which provides that a foreign investor may bring a compensation claim for harm incurred as a result of action, attributable to the Republic of Kosovo, that is "directed against" it and that violates Kosovar law "or generally accepted norms of international law."<sup>644</sup>
535. Finally, the Tribunal does not accept Mr. Selmani's invitation to treat Article 4.1 of the 2014 LFI as a "borrowing" clause, which would permit the importation of an FET

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<sup>641</sup> CL-3, 2014 LFI, Article 1 (emphasis added). The Parties have not identified any discrepancies between the English, Albanian and Serbian versions in relation to Article 1.

<sup>642</sup> In this respect, the Tribunal notes that the International Court of Justice has expressed doubt that investment arbitration jurisprudence referring to "legitimate expectations" in the context of fair and equitable treatment clauses means that such principles are part of "general international law." *See* *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, I.C.J. Reports 2018, p. 507 ¶ 162.

<sup>643</sup> CL-3, 2014 LFI, Article 3.3.

<sup>644</sup> CL-3, 2014 LFI, Article 10.1.

clause from one or more of Kosovo's BITs. Article 4.1 is a *substantive non-discrimination clause*, by which Kosovo pledges to provide the "same treatment" to foreign investors "regardless of their citizenship, origin, residency, place of establishment of business or control."<sup>645</sup> This clause is contained in an act of domestic legislation, not in an investment treaty; the distinction is important. There is no indication that this clause was intended to collapse these distinctions, such that Kosovo's domestic legislation must be read as importing any and all provisions of any investment treaties that Kosovo had negotiated with any States. That would be particularly curious in circumstances where a particular investor's home State had no BIT with Kosovo at all. Nothing in the 2014 LFI suggests that this legislation was expected to take the place of prior or future BITs, leveling all distinctions between them and making all their clauses available (as a matter of Kosovo's domestic law) to any foreign investor operating in Kosovo. In the Tribunal's view, such an intention would have to be clearly expressed.

536. For these reasons, the Tribunal concludes that the 2014 LFI, in its authentic and thus binding versions, contains no FET clause which Mr. Selmani can invoke for purposes of this case.

## **B. Non-Impairment – The Tribunal's Analysis**

537. The Tribunal acknowledges, however, Mr. Selmani's alternative argument that "Kosovo's breaches of the FET standard ... also amount to breaches of Kosovo's obligation not to unreasonably impair the operation of Mr. Selmani's investments."<sup>646</sup> Although Mr. Selmani did not include this claim in his Statement of Claim, his Request for Arbitration did briefly allude to it,<sup>647</sup> and he expanded on it in his Reply as an alternative to the FET claim.<sup>648</sup> Kosovo did not object to its admissibility. In these circumstances, the Tribunal accepts as admissible this alternative pleading by Mr. Selmani, and assesses his specific claims on this basis below.
538. In Article 3.4 of the 2014 LFI, Kosovo pledges that it "shall not impair by any unreasonable or discriminatory action or inaction, the operation, management, maintenance, use, enjoyment or disposal" of an investment by a foreign investor in the Republic of Kosovo. According to Mr. Selmani, the standard of "reasonableness" in non-impairment clauses is essentially equivalent to the standard of treatment contained in traditional FET clauses.<sup>649</sup> That posited equivalence is not necessarily established; some might argue that unreasonableness is akin to arbitrariness, in the sense that unreasonable measures are "those which are not founded in reason or fact

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<sup>645</sup> CL-3, 2014 LFI, Article 4.1.

<sup>646</sup> Cl. Reply ¶ 455.

<sup>647</sup> RFA ¶ 50.

<sup>648</sup> Cl. Reply ¶¶ 455-459; Cl. Rej. ¶ 203.

<sup>649</sup> Cl. Reply ¶¶ 457-458.

but on caprice, prejudice or personal preference.”<sup>650</sup> For present purposes, however, it is not necessary to delve deeply into the precise contours of the reasonableness standard. As demonstrated below, Mr. Selmani has not established a breach in any event.

### **(1) The Alleged “Smear Campaign”**

539. The first claim that Mr. Selmani asserted as an FET violation, and alternatively as a violation of Kosovo’s Non-Impairment obligation, revolves around several separate incidents that occurred in different time periods.
540. First, with respect to events in February 2012, Mr. Selmani complains that PAK was responsible for disseminating to the press its internal list of usurpers of socially owned property, which a number of news outlets then published; Kosovo says it cannot be held responsible for what was published by independent media, and in any event, there was nothing inaccurate about Mr. Selmani’s inclusion on the list. However, the threshold point with respect to the February 2012 allegations is that the challenged conduct predates the entry into force of the 2014 LFI, and therefore the Tribunal’s jurisdiction under that law. As the Tribunal explained in Section VIII(D)(3) above, the 2014 LFI does not give it jurisdiction to hear claims of alleged violation of earlier instruments, such as the 2006 LFI. For the avoidance of doubt, however, even if the Tribunal had jurisdiction over this claim (*quod non*), it would not be persuaded by it. Mr. Selmani has not proven the hand of the State in the publication of the February 2012 articles; the information in those articles could have been obtained by unauthorized means. Equally important, Mr. Selmani has not demonstrated that Kosova Petrol’s inclusion on the usurper’s list was inaccurate, for the same reason as explained in the next paragraph with respect to later events.
541. Separate from the 2012 press articles, Mr. Selmani directly challenges PAK’s own public accusation, in its 3 June 2014 press statement, that Mr. Selmani was a usurper of socially owned property, as well as PAK’s ultimate publication of the usurper list in February 2016. Unlike the February 2012 incident, the claims about these events involve conduct that both post-dates the 2014 LFI and is attributable to Kosovo, on account of the statements being made directly by PAK, which qualifies as a “public authority” within the definition of that law (see Section VIII(C)(3)(b) above, on attribution of PAK acts).
542. However, Mr. Selmani has not demonstrated any investment that he “lawfully held” in Kosovo as of this time (see Section VIII(B)(3) above, on *ratione materiae*). That is a predicate both for the Tribunal’s exercise of jurisdiction, and also to application on the merits of Article 3.4 of the 2014 LFI, which proscribes

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<sup>650</sup> RL-42, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 184.

unreasonable impairment of such an “investment” in the Republic of Kosovo. To recall, the Tribunal has found that as and from the establishment of the Republic of Kosovo, which is a critical legal marker for purposes of the 2014 LFI’s definition of investment, neither the UNMIK Permission nor the Termination Letter’s request that Kosova Petrol temporarily continue operating created ongoing legal rights that Mr. Selmani “lawfully held” in the Republic of Kosovo.

543. For these reasons, the PAK’s statements were also accurate, and therefore – even if the Tribunal had jurisdiction (*quod non*) – they were not “unreasonable” on the merits. Mr. Selmani’s only basis for claiming a legal right to occupy the petrol stations was the UNMIK Permission, but even if UNMIK had not acted to terminate the Permission, Kosovo assumed no obligations under that document following its independence. Mr. Selmani could not reasonably have understood otherwise. The UNMIK Permission itself had cautioned that it was subject to the roll-out of future regulations and licensing regimes. Following Kosovo’s independence, and the establishment of PAK to administer all socially owned properties, Mr. Selmani should have realized the importance of dealing with PAK, in order to regularize Kosova Petrol’s continued occupation of the petrol stations under new lease arrangements. He did not even attempt to do so, perhaps understanding that any new leases would require the payment of rent, which Kosova Petrol had not paid to anyone since late 2001.
544. To the contrary, Mr. Selmani consistently refused to recognize PAK’s authority even to administer the properties. Indeed, that was the essence of the very first sentence of Kosova Petrol’s own press release of 2 June 2014, which accused PAK of a “serious breach of law” by purporting to organize tenders for stations that “are neither under the administration nor the management of PAK.”<sup>651</sup> Given this public accusation, it was hardly unreasonable for PAK to respond the next day with its own press release, referencing its exclusive authority under the PAK Law over socially owned property and asserting (accurately) that Kosova Petrol had not concluded any agreement with PAK or its predecessor KTA.<sup>652</sup> PAK’s conclusion in the same press release that Kosova Petrol instead “possesses usurped socially-owned properties only” was accurate as of the time this statement was made.<sup>653</sup>
545. The same is true for Kosova Petrol’s inclusion in the “usurper’s list” that PAK ultimately published in June 2016 – a list which in no way was specifically targeted at Kosova Petrol, but rather contained many other entities who continued to occupy socially owned properties without recognizing PAK’s authority to administer them and entering into any lease arrangements with PAK. As discussed in Section VI(K)

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<sup>651</sup> C-71, ‘Press Release’ Kosova Petrol, 2 June 2014.

<sup>652</sup> C-75, ‘Press Release: PAK reaction against INA’s Usurper’ PAK, 3 June 2014; First Jashari Statement ¶¶ 48-51.

<sup>653</sup> C-75, ‘Press Release: PAK reaction against INA’s Usurper’ PAK, 3 June 2014; First Jashari Statement ¶¶ 48-51.

this was the culmination of a broader process that had been underway at PAK for several years, first to identify SOE assets that were being used without a valid PAK lease, and then to obtain their release from illegal possession in order to lease them instead to rent-paying tenants through an open bidding process.<sup>654</sup>

## (2) The MTI's 2013 Denial of Licenses

546. Mr. Selmani's second "unreasonable impairment" claim arises in connection with the MTI's decision in 2013 not to grant Kosova Petrol new petroleum trading licenses, after the expiration of the prior licenses that it was issued up to and during the first months of 2011. This claim also fails as a threshold matter because the Tribunal has found it has temporal jurisdiction only over challenges to State conduct that occurred after entry into force of the 2014 LFI on 24 January 2014.
547. The Tribunal also has found, as a jurisdictional matter, that Mr. Selmani had no qualifying investment following Kosovo's independence that would carry with it a right to be issued with new petroleum trading licenses. The UNMIK Permission was no longer in effect, and as a matter of law, the fact that Kosova Petrol was issued various two-year licenses between 2008 and 2011 did not create any vested right that it be given new licenses for subsequent two-year terms.
548. The Tribunal could stop there. However, it considers it worth clarifying that with respect to the application process for new licenses, Mr. Selmani and Kosova Petrol were subject (like anyone else) to the MTI licensing regime that was first established under the 2005 Petroleum Law, and thereafter was reinforced by the 2009 Amendment to the Petroleum Law and the 2010 MTI Administrative Instruction. That regime expressly required all applicants for petroleum trading licenses to "submit to the Licensing Office" documentation that included *proof of a legal right to occupy the property in question*, i.e., "[a]n evidence sheet or a contract on property usage according to the license term."<sup>655</sup> The legal regime also mandated that the Licensing Office only issue licenses after it had found that "the conditions are fulfilled,"<sup>656</sup> through an internal process in which a verification was to be conducted of the evidence presented by the applicant, in order to determine its compliance with applicable requirements.<sup>657</sup>
549. It is undisputed that MTI was not the authority ultimately responsible for determining rights to use particular properties. In October 2011, MTI had reminded Kosova Petrol of that fact, explaining that MTI "only licenses the exercise of petroleum and

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<sup>654</sup> C-265, Memorandum to the Board of Directors of the PAK, September 2013; R-68, PAK Decision No. 270/2014, 21 November 2014.

<sup>655</sup> 2010 MTI Administrative Instruction, Art. 4.1.

<sup>656</sup> 2010 MTI Administrative Instruction, Arts. 7.1, 7.2 and 7.3.

<sup>657</sup> 2010 MTI Administrative Instruction, Arts. 14, 15.

petroleum products trade activity. It is not responsible for the determination of the rights to use the facilities.”<sup>658</sup> Mr. Selmani argues that as a result, MTI was acting beyond its competence in 2013 when it embarked on an inquiry about Kosova Petrol’s rights to use various petrol stations.<sup>659</sup> But to the contrary, this was precisely what the 2010 MTI Administrative Instruction required MTI to verify, by checking that a license applicant had submitted *appropriate proof* of its right to occupy the property in question. The fact that in prior licensing cycles, MTI may have simply *assumed* that Kosova Petrol’s alleged proof (the UNMIK Permission) was sufficient, rather than inquiring about its status from the competent authority (PAK), did not create any entitlement for Mr. Selmani that a more rigorous investigation would not be conducted in future. The Tribunal agrees with Kosovo that the LFI “does not require a state to repeat its past mistakes,”<sup>660</sup> such as prior incorrect decisions granting licenses on the basis of documentation that no longer was validly in effect.

550. Accordingly, the Tribunal finds nothing unreasonable in the new MTI Minister’s decision, soon after assuming her position, to direct a more systematic review of the underlying qualifications of each applicant. The Tribunal accepts that this was based on a good faith desire to approach the process with more rigor, and not on any targeting of Kosova Petrol for political reasons or otherwise. To the contrary, it appears that Minister Kusari-Lila bent over backwards in Kosova Petrol’s case to try to see if there might be a path for *approving* its license applications, in light of its longstanding history with the petrol stations. This included her 29 May 2013 letter to PAK, which noted Mr. Selmani’s continuing reliance on the old UNMIK Permission as well as his statement to her that PAK would not provide alternative documentation confirming a right to use the properties. The Minister told PAK that it “is interested in finding a way of licensing,” rather than having to shut down operations, as otherwise would be required under the 2009 Amendment to the Petroleum Law.<sup>661</sup> MTI expressed the same “interest[] in finding a way of licensing” in a letter to the Prime Minister, which again reported Kosova Petrol’s statement that “PAK cannot provide” it with documentation confirming a right to occupy the properties, and asked for help to “solve this problem,” given that “it is not in MTI’s area of responsibility to decide on the right of use/non-use of said properties.”<sup>662</sup> MTI rejected Kosova Petrol’s request for new retail licenses only after receiving PAK’s written response that it “is not under a cooperative or contractual relationship on the lease or use of these petrol stations with Kosova Petrol or any other entity.”<sup>663</sup>

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<sup>658</sup> C-262, Letter from MTI to Leonara Selmani, 25 October 2011.

<sup>659</sup> Reply ¶ 117.

<sup>660</sup> Resp. Opening Slide 169.

<sup>661</sup> R-97, Letter from MTI to PAK, 29 May 2013.

<sup>662</sup> R-98, Letter from MTI to Prime Minister, 29 May 2013.

<sup>663</sup> R-37, Letter from S. Lluka to M. Kusari-Lila, 1 July 2013; R-38, MTI’s Decision No. 311, 3 July 2013; R-39, MTI’s Decision No. 312, 3 July 2013; R-40, MTI’s Decision No. 313, 3 July 2013; R-41, MTI’s Decision No. 314, 3 July 2013. *See also* First Bajraktari Statement ¶ 58.



551. In these circumstances, even if the Tribunal (*arguendo*) had jurisdiction under the 2014 LFI to reach the merits of this particular Non-Impairment claim, it would find nothing unreasonable in the MTI's decision to deny Kosova Petrol's 2013 applications for new licenses. The retail license applications were dependent on an applicant presenting valid proof of property usage rights, which Kosova Petrol could not provide, and the import and storage license applications were dependent on an applicant's having valid retail licenses for the same period, which Kosova Petrol did not. The MTI investigated the applications for compliance with these requirements, as the applicable legal regime required it to do. It did not violate any of Mr. Selmani's rights in the process.

### **(3) The 2014 Tenders and Dispossession of Petrol Stations**

552. Unlike the claims addressed above, Mr. Selmani's Non-Impairment claims with respect to the 2014 Tenders and Kosova Petrol's ultimate eviction from the petrol stations involve conduct that almost entirely post-dates the 2014 LFI's entry into force, and thus are within the Tribunal's temporal jurisdiction to resolve.<sup>664</sup> However, as the Tribunal has explained above in Section VIII(B)(3), Mr. Selmani had no legal right to continue in occupation of the stations, and therefore the organization of public tenders for the award of new leases over those stations could not have impaired any qualifying "investment" on his part in the Republic of Kosovo.

553. It must be recalled that the Termination Letter, which the Tribunal has found UNMIK most likely sent to Mr. Selmani in late 2001, specifically advised that a tender eventually would be issued for the petrol stations. It also instructed Mr. Selmani that while he could continue to operate the stations until that time, this was to "protect and as far as possible enhance the assets" prior to an orderly "hand over" to the successful tender bidder.<sup>665</sup> Later, during Mr. Selmani's June 2003 meeting with KTA, he was specifically reminded that the land underlying the petrol stations eventually would be put up for a tender, and while he "could bid for it in the normal way," he would have no special priority over other bidders.<sup>666</sup> While the June 2003 statement was in the context of privatization of land rather than of leases, it should have put Mr. Selmani also on notice that once tenders were organized in connection with socially owned assets under KTA administration, his historic operation of the facilities under the UNMIK Permission would provide him with no special status – much less a right to

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<sup>664</sup> There is one act challenged under the "dispossession" rubric that pre-dates the 2014 LFI: a 31 October 2013 PAK decision (C-213) approving a tender for the rental of 132 socially owned assets, including the Peja II petrol station which Kosova Petrol did not operate but which was the subject of pending litigation between it and the current occupier. This act is outside the Tribunal's temporal jurisdiction to adjudicate. In any event, given the Tribunal's findings about termination of the UNMIK Permission and that Permission in any event not binding the Republic of Kosovo after independence, this 2013 PAK decision did not "dispossess" Kosova Petrol of any station that it had a right to occupy and use.

<sup>665</sup> R-19, p. 5, Draft letter from UNMIK Deputy SRSG to Mr. Selmani, 11 December 2001, as edited by the UNMIK Legal Adviser and returned to the UNMIK Deputy SRSG on 14 December 2001.

<sup>666</sup> R-67, KTA File Note, 17 June 2003, p. 1.

forgo participation entirely, but still somehow block the winning bidder from taking over possession. The Republic of Kosovo's subsequent Declaration of Independence, and the establishment of PAK as the recognized authority to administer socially owned assets, should have made it even more clear to Mr. Selmani that he could not continue to rely on the UNMIK Permission as some kind of perpetual pass to continue indefinitely in possession of the petrol stations, without paying rent to anyone and without regularizing his occupation of the premises through a lease or other contractual arrangement with PAK. And having not concluded any prior agreement with PAK, Mr. Selmani had no basis for expecting that PAK would not organize tenders for the award of new lease agreements to others.

554. In short, Kosova Petrol should have participated in the tenders. Having not done so, and having no other lawfully held "investment" in the Republic of Kosovo that provided a right to occupy the petrol stations in defiance of a tender, Mr. Selmani has no legal basis under the 2014 LFI to protest the manner in which the tenders were conducted, or the entities to whom leases ultimately were awarded.
555. Mr. Selmani also has no valid basis to challenge PAK's decision to award a lease for one station (Pristina III) to a recipient, Illyrian Power, without first going through a tender process. The 2014 PAK Guidelines specifically authorized PAK to do so, if a previously unauthorized occupant agreed to recognize PAK's authority over a property and to pay rent under a new lease.<sup>667</sup> Whether Illyrian Power properly qualified under these Guidelines is not within the Tribunal's remit to determine, in circumstances in which Kosova Petrol itself had no legal right to the premises. Of course, before the PAK awarded leases to any new operators, and just a few months before issuance of the 2014 PAK Guidelines, Kosova Petrol had made it abundantly clear that it had no interest in recognizing PAK's authority to administer the stations,<sup>668</sup> or for that matter dealing with PAK at all.<sup>669</sup>
556. Once the tenders were concluded and leases were awarded to other entities, Kosova Petrol naturally was required to vacate the premises, and has no legal right to claim "dispossession" in breach of the Non-Impairment clause (or any other clause) of the 2014 LFI. The only assets that Mr. Selmani at that point might have had a legal right to preserve would be movable property (such as equipment or goods) that he purchased and placed on the premises during Kosova Petrol's past period of occupation. But as discussed in Section VIII(B)(3)(b) above, Mr. Selmani has not

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<sup>667</sup> R-69, Guidelines for releasing of the assets of socially owned enterprises from usurpers (illegal users), 10 December 2014, p. 3.

<sup>668</sup> See C-71, 'Press Release' Kosova Petrol, 2 June 2014 (accusing PAK of a "serious breach of law" by purporting to organize tenders for stations that "are neither under the administration nor the management of PAK").

<sup>669</sup> See C-76, Letter from Mr. Selmani to the PAK, 18 June 2014 (asking PAK to "communicate with us only through the Special Chamber").

attempted to pursue any discrete claim for loss of such movable property following his loss of rights to occupy the premises.

#### (4) The Alleged Denial of Justice

557. The Tribunal has found that Article 3 of the 2014 LFI does not contain an FET obligation, and the Parties have not addressed in their submissions whether a denial of justice claim can be pursued alternatively as a breach of the Non-Impairment obligation, which Mr. Selmani invokes generally as an alternative to his various FET claims. The Tribunal nonetheless examines the claim, on the basis that a denial of justice that is shown to have impacted a qualified investment would seem to constitute an unreasonable impairment of the “operation, management, maintenance, use, enjoyment or disposal” of that investment.
558. The difficulty for Mr. Selmani is with the predicate, *i.e.*, the establishment of the underlying qualified investment. Mr. Selmani alleges denial of justice by virtue of delays in a Kosovo court proceeding. That particular court proceeding challenged the refusal of Kosovo authorities to compensate Kosova Petrol after the land under the Pristina I petrol station was expropriated (and the petrol station subsequently destroyed) in order to build a roundabout for a national road. Mr. Selmani admits that he never owned the land in question. He claims, however, that the UNMIK Permission gave him a legal right to occupy and use the petrol station, and that this right was itself expropriated when the station was taken and then destroyed for the roadwork project. However, the Tribunal has found to the contrary, namely that the UNMIK Permission was likely terminated by UNMIK, and in any event did not provide Mr. Selmani with any legal rights *vis-à-vis* the Republic of Kosovo, after it declared independence. In consequence, while Mr. Selmani remained physically in possession of certain petrol stations, he had no legal right to occupy such stations, including the Pristina I station as of the date when the land was expropriated. In these circumstances, the expropriation of the land and the destruction of the petrol did not interfere with any cognizable “investment” that was lawfully held in the Republic of the Kosovo.<sup>670</sup>
559. This is not to say that lengthy delays in resolving domestic court proceedings are somehow justified simply because a particular litigant may have little basis for the claim he asserts. Litigants are entitled to their proverbial day in court, and to an eventual ruling on their claims, however strong or weak those claims may be. But in order to sustain any claim *in international arbitration* for a denial of justice

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<sup>670</sup> For avoidance of doubt, the Tribunal does not consider that the letter Mr. Selmani received from the Municipality of Pristina in December 2012 constituted an assurance of compensation to Kosova Petrol. The Tribunal reads that letter – although inartfully worded – essentially as saying that the Ministry of Infrastructure (rather than the Municipality of Pristina) is in charge of the issue of compensation for expropriation. C-43, Letter from the Municipality of Pristina to Mr. Selmani, 12 December 2012. Mr. Selmani does not contend that he ever received any assurances from the Ministry of Infrastructure.

under the 2014 LFI, a claimant must demonstrate that the alleged denial of justice it invokes concerned a foreign investment that is protected by that LFI. If no qualified investment has been established in the first place, then an international tribunal has no basis under the 2014 LFI to rule, in the abstract, on the excusability or inexcusability of particular delays in domestic court proceedings.

560. For this reason, the Tribunal declines to offer pure *dicta* on whether the particular court delays about which Mr. Selmani complains might qualify as a denial of justice, had those delays impacted a qualified investment under the 2014 LFI. Such an analysis might well require more evidence than the Parties have submitted thus far, including (a) information about what (if anything) has progressed in proof of a case or the review of the file since the case was transferred in 2016 to the Civil Division of the Basic Court in Pristina, and (b) what (if anything) Mr. Selmani has done in Kosovo to address the perceived delays, including for example the filing of any applications or writs that might be available under domestic law to directly challenge judicial delays. There is no point conducting an inquiry into such matters in circumstances in which Mr. Selmani has not shown the case in question to concern any investment that is qualified for protection under the 2014 LFI.

## **C. Full Protection and Security**

### **(1) Mr. Selmani's Position**

561. Mr. Selmani relies for his FPS claims on Article 3.1 of the 2006 LFI and Article 3.2 of the 2014 LFI.
562. The relevant part of Article 3.1 of the 2006 LFI provides that “Kosovo shall [...] provide foreign investors and their investments with full and constant protection and security.” The corresponding language in Article 3.2 of the 2014 LFI provides that “[the] Republic of Kosovo shall [...] provide foreign investors and their investments with full and constant protection and security in accordance with the applicable legislation.”
563. Mr. Selmani rejects Kosovo’s argument that only breaches of domestic law can constitute FPS breaches under the 2014 LFI. Furthermore, Mr. Selmani argues that both FPS clauses provide for protection beyond physical security, as recognized by numerous arbitral tribunals. Mr. Selmani also rejects Kosovo’s contention that the FPS standard is one of “due diligence proportional to [its] present circumstances,” as irrelevant in the present circumstances where the State’s failure was “obvious and lasted or over a decade.”<sup>671</sup>
564. Mr. Selmani identifies three main ways, discussed below, in which he says Kosovo has failed to provide him full protection and security.<sup>672</sup>

#### **a. Illegal occupation of certain petrol stations**

565. Despite active efforts from 1999 until it ended operations in 2015, a period lasting more than 15 years, Kosova Petrol never recovered possession of 18 petrol stations covered by the UNMIK Permission. Kosovar authorities failed to take any measures to protect Mr. Selmani’s investments, he says, forcing him instead to turn to the courts in futile attempts to recover possession of the stations.<sup>673</sup>

#### **b. Illegal competition from black market operators**

566. Kosovo was unwilling to address a persistent problem with fuel smuggling, which undercut Kosova Petrol’s market share and prices, Mr. Selmani says. Mr. Selmani contends that in the face of his extensively documented allegations about rampant

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<sup>671</sup> Cl. Reply ¶¶ 606-609; SoC ¶¶ 283-286 with references to jurisprudence contained therein.

<sup>672</sup> Cl. Reply ¶¶ 604, 606.

<sup>673</sup> SoC ¶¶ 288-293; Cl. Reply ¶ 610; Cl. Opening Slide 170.

fuel smuggling, Kosovo's references to gradual efforts to improve the legislative framework are insufficient to demonstrate compliance with its obligations.<sup>674</sup>

**c. Unlawful and arbitrary measures by public authorities**

567. The same unlawful and arbitrary measures advanced by Mr. Selmani (and recounted above at paras. 497-510) for his FET claim also constitute a breach of FPS, Mr. Selmani submits.<sup>675</sup>

**(2) Kosovo's Position**

568. As a preliminary point, Kosovo says that the reference in Article 3.2 of the 2014 LFI to "in accordance with the applicable legislation" means that Kosovo can only be liable for FPS breaches that violate provisions of Kosovar law.<sup>676</sup>
569. Kosovo also submits that the full protection and security standard contained in both the 2006 LFI and the 2014 LFI protects only the physical integrity of an investment. Mr. Selmani has not alleged that Kosovo has failed to protect either himself or Kosova Petrol from interference with their physical security.<sup>677</sup>
570. Furthermore, according to Kosovo, the FPS standard requires only that a State exercise "reasonable due diligence" proportional to its present circumstances. That is different from what Mr. Selmani is claiming, which Kosovo says amounts to a requirement that no illegal activity takes place on its territory.<sup>678</sup>
571. Kosovo's responses to Mr. Selmani's three main theories of FPS breaches are summarized below.

**a. Illegal occupation of certain petrol stations**

572. First, Kosovo says it did not have any obligation under the UNMIK Permission to evict the third parties that Mr. Selmani claims illegally occupied certain stations; if anyone had such an obligation, it would have been UNMIK. In any event, Kosovo submits that Kosova Petrol did not do anything itself to gain control over the petrol

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<sup>674</sup> SoC ¶¶ 54-75; 294-298; Cl. Reply ¶ 610; Cl. Opening Slide 170.

<sup>675</sup> SoC ¶¶ 54-75; 299-301; Cl. Reply ¶ 610; Cl. Opening Slide 170.

<sup>676</sup> SoD ¶¶ 451-452.

<sup>677</sup> SoD ¶¶ 454-456; Resp. Opening Slide 173; CL-42, *Saluka Investments BV v. Czech Republic*, PCA Case No. 2001 04, Partial Award, 17 March 2006, ¶ 484.

<sup>678</sup> SoD ¶¶ 457-460; Resp. Opening Slide 177.

stations, and that Mr. Selmani has failed sufficiently to identify the alleged occupants.<sup>679</sup>

573. The UNMIK Permission only granted Mr. Selmani the right to use the stations in exchange for monthly rent. Consequently, the only detrimental effect a hypothetical occupation of the stations could have on Mr. Selmani is that he could not operate stations for which he was paying rent. However, on the facts, it is undisputed that Mr. Selmani had not been paying rent for the relevant petrol stations for years by the time he first complained of the alleged occupation.<sup>680</sup>

**b. Illegal competition from black-market operators**

574. Both UNMIK and later Kosovo met the FPS requirements with respect to black-market competition, Kosovo says. Not only did UNMIK and later Kosovo enact both general and specific regulatory frameworks to address problems of illegal fuel smuggling,<sup>681</sup> UNMIK trained and employed more than 500 customs officers to address the general problem through anti-smuggling teams. Later, when the Customs Services were under Kosovo's control, it uncovered numerous attempts to smuggle fuel to Kosovo and carried out actions against the perpetrators. These efforts included the only black-market competitors actually identified by Mr. Selmani – Al-Petrol, Petrol Company and Hib-Petrol – which were investigated, had their premises raided, and 17 people associated with the companies were arrested.<sup>682</sup>

**c. Unlawful and arbitrary measures by public authorities.**

575. Kosovo submits that the State “made its judicial and administrative apparatus available” to Mr. Selmani. Beyond this, Kosovo notes that Mr. Selmani relies on the same arguments for this part of this FPS claim as for his claims under the alleged FET standard. The claims therefore fail for the same reasons as Mr. Selmani's FET claims, Kosovo says.<sup>683</sup>

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<sup>679</sup> SoD ¶¶ 461-475; Resp. Rejoinder ¶¶ 502-503.

<sup>680</sup> SoD ¶¶ 476-480; Resp. Rejoinder ¶ 501.

<sup>681</sup> R-146, UNMIK Regulation No. 1999/3, 31 August 1999; C-169, Administrative Direction No. 1999/1 (implementing UNMIK Regulation No. 1999/3 of 31 August 1999 on the Establishment of the Customs and Other Related Services in Kosovo), 1 September 1999; C-7, UNMIK Regulation No. 1999/9 on the Importation, Transport, Distribution and Sale of Petroleum Products (Petroleum, Oil and Lubricants) for and in Kosovo, 24 September 1999;

<sup>682</sup> SoD ¶¶ 481-487; Cl. Rejoinder ¶¶ 58-78; 504-507; C-189, “HIB Petrol”, “Al Petrol”, “Petrol Company” oil smuggling, Friends of Kosovo, 11 December 2014; R-160, BalkanWeb, Kosovo, police with wide action against oil smuggling, 7 arrested, 10 December 2014, <http://www.balkanweb.com/site/kosove-policia-aksion-te-gjere-kunder-kontrabandes-se-naftes-7-ne-pranga/>.

<sup>683</sup> SoD ¶¶ 488-489; Resp. Rejoinder ¶¶ 508-509; Resp. Opening Slide 174.

### (3) The Tribunal's Analysis

576. This case is not the occasion for the Tribunal to render a lengthy interpretation of full protection and security clauses in investment treaty jurisprudence. It is sufficient to say that there are several strands in the jurisprudence.<sup>684</sup> As the Respondent notes, many tribunals and commentators consider the starting point to be that FPS clauses oblige States to exercise reasonable due diligence to protect an investment against foreseeable harm.<sup>685</sup> The traditional understanding in customary international law was that this obligation involved protection against foreseeable *physical harm by third parties*.<sup>686</sup> Some tribunals have recognized also an obligation to provide investors with *access to a functioning judicial system*, as part and parcel of protecting and securing the legal rights associated with an investment against foreseeable harm by third parties.<sup>687</sup> Beyond this, as Claimant notes, certain other tribunals have offered a more expansive interpretation of FPS clauses, pursuant to which they protect against a wide range of *State conduct*, including conduct said to undermine the stability of the legal regime under which an investment was made.<sup>688</sup> The latter expansion has proven far more controversial.
577. This is not an investment treaty case, but rather a case proceeding under Kosovo's 2014 LFI. Article 3.2 of the 2014 LFI<sup>689</sup> obligates the "Republic of Kosovo" to "provide foreign investors and their investments with full and constant protection and security in accordance with the applicable legislation." The Tribunal has been shown no legislative history or other authority to suggest the Assembly of Kosovo intended this standard to be broader than the traditional understanding of such clauses, as extending to physical protection (and perhaps also access to the courts) with respect to third parties. The phrase "in accordance with the applicable legislation" seems expressly to anchor the clause to the domestic legal framework, by promising investors that their investments will be provided the full protections and securities available under Kosovo law.
578. Taking this as the applicable standard, the Tribunal turns below to Mr. Selmani's claims under this clause of the 2014 LFI.

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<sup>684</sup> See generally *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020, ¶¶ 478-482 (noting different approaches to interpretation of FPS clauses).

<sup>685</sup> See, e.g., SoD ¶¶ 457-460.

<sup>686</sup> See, e.g., SoD ¶¶ 454-455; Resp. Rejoinder ¶ 498.

<sup>687</sup> See, e.g., Resp. Opening Slide 174 (citing jurisprudence to the effect that a State has a FPS duty "to keep its judicial systems available [to investors to bring claims against third parties], and for such claims to be properly examined and decided in accordance with domestic and international law").

<sup>688</sup> See, e.g., SoC ¶¶ 283-285; Cl. Reply ¶ 608.

<sup>689</sup> Given the Tribunal's ruling in Section VIII.D.3 that it has no jurisdiction to consider alleged breaches of the 2006 LFI that were committed prior to the repeal of that legislation by the 2014 LFI, there is no need to analyze separately Article 3.1 of the 2006 LFI.



**a. Illegal occupation of certain petrol stations**

579. It is undisputed that Kosova Petrol never was able to take possession of 18 petrol stations that were listed on 25 January 2000 in the annex of the UNMIK Permission. Whether or not known to UNMIK during the chaotic initial months of its work in Kosovo, such stations were in the possession of third parties, and therefore were not available for Kosova Petrol to assume management and operation. This reality was recognized almost immediately after the UNMIK Permission, however, since beginning with Kosova Petrol's initial rent payments for February and March 2000, it paid a reduced rent based on its use of only 34 petrol stations.<sup>690</sup> As discussed in Section VI(B) above, this rent reduction appears to have been agreed (at least eventually) between Kosova Petrol and UNMIK on the basis that the other 18 stations remained occupied by third parties. In August 2001, UNMIK issued invoices that were expressly pro-rated on this basis.<sup>691</sup>
580. The Tribunal has considerable doubt that the UNMIK Permission *ever* included an obligation, on the part of UNMIK, to wrest control of the other stations from third parties and hand them over to Kosova Petrol. That would involve a considerable undertaking, likely requiring the commitment of police forces, during a period in which UNMIK was overwhelmed with trying to establish basic order in Kosovo and to establish initial structures for civilian administration. Nothing in the terms of the document commits UNMIK to such acts. Rather, the annex likely was compiled simply to list the stations understood to previously have been operated by Jugopetrol and Beopetrol (and before Beopetrol, by INA), and to reflect UNMIK's understanding that Mr. Selmani was already in possession of many of those stations, on account of his close ties to the KLA leadership then claiming to form a provisional government.
581. By the time UNMIK realized that Mr. Selmani did not have effective access to the other stations, the obvious solution was to carve those out of the scope of the UNMIK Permission. The Tribunal views the agreement to reduce Kosova Petrol's rent obligations as effectively amending the UNMIK Permission, to cover only the stations to which Mr. Selmani had access. It is notable that in Mr. Selmani's detailed rendering of the steps he took to try to obtain access to the other stations (summarized in Section VI(N) above), he does not allude to any exhortations to UNMIK itself, objecting to its failure to honor some ostensible commitment to hand over the stations. Rather, his efforts consisted entirely of characterizing to third parties (not to UNMIK itself) the rights supposedly granted under the UNMIK Permission. Mr. Selmani's apparent reluctance ever to approach UNMIK itself for assistance speaks volumes about his ostensible belief that UNMIK had a clear obligation to hand over additional

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<sup>690</sup> R-73, Report on Kosova Petrol payments, 23 September 2003.

<sup>691</sup> C-39, Invoice issued by the Department of Trade and Industry, 20 August 2001.

stations. It also may reflect his understanding that by late 2001, UNMIK was seeking to terminate the UNMIK Permission altogether.

582. In any event, the Tribunal has found that in 2008, the Republic of Kosovo did not inherit responsibility for any of UNMIK's prior liabilities (if any) under the UNMIK Permission. Nor did it assume any ongoing obligations to implement the UNMIK Permission (*see* Section VIII(C)(3) above). This necessarily includes any obligation to rectify UNMIK's putative failure to make additional petrol stations available to Kosova Petrol.
583. Finally, the Tribunal has found that that the 2014 LFI provides jurisdiction only for claims challenging State conduct after its entry into force, not for claims challenging prior State conduct alleged to breach prior investment instruments such as the 2001 UNMIK Investment Regulation and the 2006 LFI (*see* Section VIII(D)(3) above). The Tribunal has also found that during this post-2014 LFI period, Mr. Selmani had no cognizable investments in Kosovo with respect to any of the petrol stations listed in the UNMIK Permission (*see* Section VIII(B)(3)(c) above). This conclusion covers both the stations he previously operated and those he did not.
584. Taking all of the above into account, the only ongoing obligation that Kosovo could have to Mr. Selmani under the full protection and security clause (Article 3.2) of the 2014 LFI is to make its courts available to him for claims against third parties, to protect his rights "in accordance with the applicable legislation." Mr. Selmani does not assert that either he or Kosova Petrol has been deprived of access to the Kosovo judicial system. To the contrary, as detailed in Section VI(N), Kosova Petrol made ample use of the Kosovar courts over many years, in an effort to challenge various third-party occupiers of petrol stations.

**b. Failure to curb illegal competition**

585. With respect to Mr. Selmani's FPS claim regarding an alleged failure to crack down on illegal fuel smuggling and other black market competition, the Tribunal notes that its jurisdictional rulings again confine this claim to acts or omissions of the Republic of Kosovo during the post-2014 LFI period. The Republic of Kosovo is not responsible for any acts or omissions of UNMIK in the years preceding its independence (*see* Section Section VIII(C)(3)(a) above). As for the post-independence period, while the Republic of Kosovo did agree in 2008 to adhere to the 2006 LFI (which contained its own FPS clause), any claims for alleged breach of that LFI would have to have been brought either prior to its termination, or within five years from an investment in the Republic of Kosovo under the limited sunset/grandfathering clause in Article 6.2 of the 2006 LFI. Having not pursued a FPS claim under the 2006 LFI, Mr. Selmani cannot now invoke the 2014 LFI as a jurisdictional basis to reach back in time to the pre-2014 LFI period (*see* Section VIII(D)(3) above).

586. Even with respect to the period after the 2014 LFI came into effect, the FPS clause applies to “foreign investors and their investments.” Mr. Selmani has not shown that he had any qualifying investment in the Republic of Kosovo in this period, since the UNMIK Permission had long ceased to be in effect, Mr. Selmani had no agreement with PAK that would permit him to continue to occupy the petrol stations, and the various petroleum trading licenses Kosova Petrol was issued between 2008 and 2011 had all expired by their own terms (*see* Section VI(J) above). In the absence of a protected investment authorizing Kosova Petrol to occupy petrol stations or trade in petroleum products, Mr. Selmani has no standing to complain about alleged harm to his investment from the authorities’ alleged failure to control black market competition in the post-2014 LFI period.
587. Finally, even if these jurisdictional impediments did not exist (*quod non*), Mr. Selmani has not proven a lack of reasonable due diligence by Kosovar authorities in the post-2014 LFI period, with respect to actions to control fuel smuggling and other illegal competition. The Tribunal has no doubt that fuel smuggling was a major issue in the territory in the chaotic early years when Kosova Petrol was establishing its operations; that is confirmed by various UNMIK reports and other documents in the record. It took considerable time for UNMIK, and subsequently the new Republic of Kosovo, both to establish a relevant regulatory framework and to organize customs and enforcement activities. But by 2014, it appears that significant efforts had been made in these areas,<sup>692</sup> and in any event, Mr. Selmani has not presented significant evidence of persisting problems.<sup>693</sup> The Tribunal is not persuaded that such problems with fuel smuggling as still may have existed from 2014 were of a scale to conclude that the State violated duties of reasonable due diligence to protect investments against foreseeable harm.

**c. Unlawful and arbitrary measures by public authorities**

588. Finally, Mr. Selmani argues generally that the same measures by public authorities that he challenged in his FET claims (and incorporated by reference in his claims for breach of the Non-Impairment obligation) also constitute a breach of FPS.<sup>694</sup>
589. The Tribunal does not view the FPS standard as a catch-all provision for challenging State conduct on the grounds of alleged unlawfulness or arbitrariness. In any event, the complaints about these various measures would fail on the same grounds as under the Non-Impairment standard, addressed in Section IX(B) above.

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<sup>692</sup> SoD ¶¶ 483-486; Resp. Rejoinder, ¶¶ 58-78, 504-506.

<sup>693</sup> Mr. Selmani’s focus is almost entirely on the pre-2014 period. *See, e.g.*, Cl. Opening Slides 29-30 (“Fuel smuggling has consistently been a serious problem in Kosovo *between 1999 and 2014*”) (emphasis added); SoC ¶ 296. *See also* Resp. Closing Slide 107 (noting that Claimant presented a single exhibit to support claims for 2014 omission, “which actually describes police crackdown on smuggling”).

<sup>694</sup> SoC ¶¶ 54-75; 299-301; Cl. Reply ¶ 610; Cl. Opening Slide 170.

## **D. Expropriation**

### **(1) Mr. Selmani's Position**

590. Mr. Selmani argues that he is protected against expropriation by both the 2001 UNMIK Investment Regulation and the 2014 LFI, and that Kosovo has unlawfully expropriated his investments.<sup>695</sup>

591. Section 7.1 of the 2001 UNMIK Investment Regulation provides:

#### **Section 7 – Protection Regarding Takings**

Foreign investments shall not be subject to a taking by the authorities except as provided in the subsections below. The authorities may effect a taking of a foreign investment only if such a taking:

- (a) Is for an overriding public purpose;
- (b) Is the least burdensome available means to satisfy that overriding public purpose;
- (c) Is made on a non-discriminatory basis, in accordance with due process of law; and
- (d) Is accompanied by prompt, adequate and effective compensation to the foreign investor.

592. Article 7 of the 2014 LFI provides:

#### **Article 7 Expropriation and Nationalization**

The foreign investment shall not be subject to any form of expropriation or nationalization directly or indirectly or any other equivalent measure with it, except in cases of special public interest established by law, without discrimination, immediate, adequate and effective compensation in accordance with legal procedures.

593. Furthermore, Article 2.1.7 of the 2014 LFI contains a definition of an “act of expropriation” which Mr. Selmani says is relevant:

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<sup>695</sup> SoC ¶ 303; Cl. Reply ¶ 612.

1.7. Act of expropriation - any act or measure, any series of acts or measures, any failure to act or series of failures to act, if the direct or indirect effect thereof is to deprive the concerned foreign investor of the ownership or control of, or a significant benefit or use of, an asset; provided, however, that the term “act of expropriation” shall not apply to the imposition by the Republic of Kosovo of generally applicable taxes and duties.

594. According to Mr. Selmani, the references to expropriation in these documents reflect the international law understanding that an expropriation can be not only “direct” but also “indirect” or “creeping.” In other words, “any State action or omission or series thereof may constitute an expropriation, so long as the interference with the investor’s rights is such as to substantially deprive the investor of the economic value, use or enjoyment of its investment.”<sup>696</sup>
595. Under the 2014 LFI, rights to use tangible assets are susceptible of being expropriated, Mr. Selmani submits, even if those assets are not owned by the investor in question. Mr. Selmani argues that contractual rights can be expropriated – the term “asset” in Article 2.7.1 is wider than the *in rem* rights Kosovo argues are necessary for protection – and that Kosovar law<sup>697</sup> provides for the same protection.<sup>698</sup>
596. In any event, Mr. Selmani’s rights under the UNMIK Permission constitute protected property rights.<sup>699</sup>
597. Mr. Selmani argues that the following measures constituted an unlawful expropriation of his investments.<sup>700</sup>

**a. The failure to hand over certain petrol stations**

598. Mr. Selmani argues that Kosovo’s actions and omissions in relation to the illegal occupation of certain petrol stations amount to an indirect expropriation of Mr. Selmani’s rights, as it effectively deprived him of the value, use and enjoyment of those stations.<sup>701</sup> For purposes of his *quantum* claims, Mr. Selmani dates this effective expropriation as of 14 November 2005, instructing his valuation expert that he was “dispossessed of the 18 Occupied Stations as of 14 November 2005, being the

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<sup>696</sup> SoC ¶¶ 303-308.

<sup>697</sup> C-208, Law No. 03/L-205 on Amending and Supplementing Law No. 03/L-139 on Expropriation of Immovable Property, 10 December 2010. Article 18.1.

<sup>698</sup> SoC ¶ 311; Cl. Reply ¶¶ 620-622.

<sup>699</sup> Cl. Reply ¶ 624.

<sup>700</sup> Cl. Opening Slide 174.

<sup>701</sup> SoC ¶ 316; Cl. Reply ¶ 629.

date on which KP started initiating court proceedings against illegal occupiers of the petrol stations to recover possession.”<sup>702</sup>

**b. The “dispossession” of other petrol stations**

599. From 2001 to 2012, when PAK first publicly accused Kosova Petrol of usurping the stations, Mr. Selmani says that “Kosova Petrol operated the network of petrol stations with the full knowledge of the Kosovar authorities, which recognized on repeated occasions that Mr. Selmani’s right to operate the petrol stations was governed by the UNMIK Permission.”<sup>703</sup>
600. Following this, Mr. Selmani says that Kosovo implemented a series of measures which deprived him of the stations:<sup>704</sup>
- In 2013, the MTI deprived Kosova Petrol of its petroleum licenses, which Mr. Selmani says happened without Kosova Petrol having the opportunity to address the MTI’s concerns and without a written communication of the rejection. The public declaration of the non-renewals of the licenses caused a “dramatic drop” in Kosova Petrol’s revenues;<sup>705</sup>
  - PAK then leased a number of petrol stations covered by the UNMIK Permission to other entities in October 2013;
  - PAK then proceeded to tender further stations in 2014, and to evict Kosova Petrol from the stations which it was operating. As discussed above, the most profitable station, Pristina III, was leased by PAK to a company founded by the brother of First Deputy Prime Minister Pacolli, without a tender having been issued.
601. In response to Kosovo’s contention that Mr. Selmani supposedly failed to obtain the necessary licenses, Mr. Selmani says that MTI’s “unlawful” refusal to renew Kosova Petrol’s licenses cannot justify a subsequent unlawful measure by PAK, which in any event never referred to the failure to obtain licenses as a justification for its own measures.<sup>706</sup>
602. Mr. Selmani also says that Kosovo’s argument that he failed to pay rent does not justify the expropriatory measures. First, he contends that the suspension of rent payments was agreed with UNMIK and never questioned. But in any event, had

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<sup>702</sup> Harris Report ¶ 27.

<sup>703</sup> Cl. Reply ¶ 628.

<sup>704</sup> SoC ¶ 317.

<sup>705</sup> C-126, Kosova Petrol Financial Statement for 2013, shows revenues of EUR 8.5 million, compared with C-112, Kosova Petrol Financial Statement for 2012, which shows revenues EUR 22.8 million.

<sup>706</sup> Cl. Reply ¶ 637.

Mr. Selmani actually failed to paid rent that was due, that would have justified only PAK's invocation of contractual remedies under the UNMIK Permission and not its tender of the assets covered by it.<sup>707</sup>

## (2) Kosovo's Position

603. Kosovo submits that Mr. Selmani did not have any proprietary rights susceptible of protection against expropriation. The UNMIK Permission – which, to repeat Kosovo's earlier arguments, in any event (i) was not granted to Mr. Selmani but to Kosova Petrol, (ii) was temporary in nature, and (iii) was revoked in 2001 – never granted any ownership rights, but rather only a right to operate the stations. Even if, *arguendo*, the expropriation of such a right were compensable, it would not be compensable in the same way as an expropriation of ownership rights, Kosovo submits.<sup>708</sup>
604. As for the capital expenditures Mr. Selmani alleges to have incurred in renovating the stations, Kosovo says that under Kosovar law they would “become part of the socially owned property, without entitling Mr. Selmani to claim restitution of such funds.”<sup>709</sup>

### a. The failure to hand over certain petrol stations

605. Turning to the alleged expropriatory measures, Kosovo argues that it was under no obligation to expel the occupants of the petrol stations; no such duty can be derived from the UNMIK Permission, as it does not impose any duties on Kosovo. As for UNMIK itself, its administration of the stations is excluded from the 2001 UNMIK Investment Regulation's definition of a “taking.”<sup>710</sup> Nor could UNMIK's administration of the stations violate the 2006 LFI, because Mr. Selmani's own valuation date for the alleged expropriation is November 2005, before the 2006 LFI entered into effect.<sup>711</sup>

### b. The “dispossession” of other petrol stations

606. With respect to PAK's alleged taking of petrol stations that Kosova Petrol previously operated, Kosovo reiterates that PAK (i) had the authority to administer these assets and acted lawfully based on its finding that the UNMIK Permission no longer was valid, and (ii) in any event did not exercise sovereign power. Accordingly, PAK's conduct could not amount to an expropriation. Furthermore, Kosovo gave

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<sup>707</sup> Cl. Reply ¶¶ 638-641.

<sup>708</sup> SoD ¶¶ 491-498 ; Resp. Rejoinder ¶¶ 511-515; Resp. Opening Slide 179.

<sup>709</sup> Resp. Rejoinder ¶ 516; First Qerimi Report, ¶ 3.

<sup>710</sup> CL-1, 2001 UNMIK Investment Regulation, Article 2.2.1.

<sup>711</sup> Resp. Rejoinder ¶¶ 517-519; SoD ¶ 502.

Mr. Selmani numerous opportunities to seek redress within the domestic order, of which it says Mr. Selmani did not avail himself.<sup>712</sup>

607. Kosovo also observes that Kosova Petrol failed both to pay rent under the UNMIK Permission, and to obtain necessary licenses which the UNMIK Permission itself indicated would be required. Under these circumstances, any actions taken by Kosovo's authorities were lawful under the UNMIK Permission itself, and accordingly Mr. Selmani's expropriation claims must fail.<sup>713</sup>

### **(3) The Tribunal's Analysis**

#### **a. Failure to hand over certain petrol stations**

608. The Tribunal already has found, in Section IX(D)(3)(b) above, that the Republic of Kosovo had no obligation to "hand over" other petrol stations to Kosova Petrol. It is doubtful whether the UNMIK Permission ever imposed such an obligation on UNMIK to take active measures to wrest control of stations from third party occupiers, but even if it did, the Republic of Kosovo did not inherit such an obligation from UNMIK (or any other obligation under the UNMIK Permission) upon its Declaration of Independence. Nor did the Republic of Kosovo inherit any liabilities that UNMIK might have had for its actions predating independence.
609. In these circumstances, Mr. Selmani can have no valid expropriation claim against the Republic of Kosovo for an alleged failure to hand over petrol stations to which Mr. Selmani had no legal entitlement. The claim would therefore fail on its merits, even apart from the various jurisdictional infirmities the Tribunal already has identified (*i.e.*, that the 2014 LFI provides jurisdiction only for claims challenging State conduct after its entry into force, not for prior State conduct or any UNMIK conduct; and that during this post-2014 LFI period, Mr. Selmani had no cognizable investments in Kosovo with respect to any of the petrol stations listed in the UNMIK Permission).

#### **b. Dispossession of other petrol stations.**

610. The Tribunal has found, in preceding sections, that while Mr. Selmani remained physically in possession of certain stations after the establishment of the Republic of Kosovo, he had no legal right to occupy such petrol stations, in the absence of any arrangement with PAK. The UNMIK Permission provided no such continuing rights to Kosova Petrol, and while MTI issued petroleum trading licenses to it between 2008 and 2011 in an apparent assumption to the contrary, these licenses conveyed neither

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<sup>712</sup> Resp. Rejoinder ¶ 520; SoD ¶¶ 503-504.

<sup>713</sup> SoD ¶¶ 505-506; CL-46, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 458.



legal occupancy rights (which were not within MTI's domain to assign), nor any vested right to new petroleum licenses in 2013, when the term of the prior licenses expired. MTI acted consistently with Kosovo law in investigating the circumstances further, and in denying licenses once it learned from PAK that there were no extant arrangements giving Kosova Petrol a legal right to use the premises.

611. Accordingly, as also explained above, PAK's eventual organization of public tenders for the award of new leases over those stations, and the subsequent eviction of Kosova Petrol from the premises, did not interfere with any cognizable "investment" in the petrol stations that Mr. Selmani or Kosova Petrol lawfully held in the Republic of the Kosovo, within the meaning of the 2014 LFI. These acts certainly did not "expropriate" any such investment in violation of that LFI.
612. Finally, as previously discussed, the only assets that Mr. Selmani might have had a legal right to preserve would be movable property (such as equipment or goods) that he purchased and placed on the premises during Kosova Petrol's past period of occupation. But as discussed in prior sections, Mr. Selmani has not attempted to pursue any discrete claim for loss of such movable property following his loss of rights to occupy the premises.

## **E. Articles 5 and 12 of the LFIs**

### **(1) Mr. Selmani's Position**

613. Finally, Mr. Selmani argues that pursuant to the 2006 LFI and the 2014 LFI, Kosovo has undertaken "to comply in good faith with all obligations that it had towards foreign investors, and to recognize and respect all rights of foreign investors in relation to their investments."<sup>714</sup> In Mr. Selmani's submission, Kosovo's actions constitute an independent breach of these undertakings.

614. Article 12 of the 2006 LFI provides:

Kosovo, as well as every public authority, public official and civil servant shall fully, routinely and uneventfully recognize and respect all rights of a foreign investor relating to a foreign investment in Kosovo, especially where such rights relate to immovable and movable property, intellectual property and other assets, contract rights, and the rights established by the present law.

615. Article 12 of the 2014 LFI reads as follows:

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<sup>714</sup> Claimant Opening, Slide 167.

Public authorities shall recognize and respect all rights of a foreign investor relating to a foreign investment in the Republic of Kosovo, especially when such rights relate to immovable and movable property, intellectual property and other assets, contract rights, and the rights established by this Law.

616. Contrary to Kosovo's contention, these provisions are *sui generis* and broader in scope than a typical "umbrella clause," Mr. Selmani says. In his submission, "all the measures described above as constituting a breach of the fair and equitable treatment standard, of the full protection and security standard as well as an unlawful expropriation of Mr. Selmani's investments," also violate Article 12 of both LFIs.<sup>715</sup>

617. Furthermore, both LFIs contain separate umbrella clauses, which Mr. Selmani argues that Kosovo also has breached. Article 5.1 of the 2006 LFI provides as follows:

Kosovo shall promptly, routinely, and uneventfully comply in good faith with all obligations that it has to a foreign investor. This Article shall apply to any type of obligation, whether created by law, agreement, administrative act, or otherwise.

618. The corresponding Article 5.1 of the 2014 LFI provides:

Republic of Kosovo shall comply in good faith with all obligations that it has to the foreign investors. This provision shall apply to any type of obligation, whether created by law, agreement, or other legal act.

619. Pursuant to these provisions, Kosovo has undertaken to comply in good faith with all its obligations towards Mr. Selmani, most notably those contained in the UNMIK Permission, Mr. Selmani argues. He rejects Kosovo's objection that the required privity between Kosovo and the investor is lacking because Mr. Selmani would be the foreign investor whereas the UNMIK Permission was issued to Kosova Petrol, pointing to the fact that Kosova Petrol does not have separate legal personality.<sup>716</sup>

620. According to Mr. Selmani, umbrella clauses such as these apply to any situation where Kosovo is acting as a State, and not just when the State itself has directly undertaken obligations to an investor. Furthermore, even if some exercise of sovereign power were necessary to trigger the umbrella clause – which Mr. Selmani says is not supported by the text of Articles 5 – PAK clearly exercised its

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<sup>715</sup> SoC ¶¶ 318-319; Cl. Reply ¶¶ 647-652.

<sup>716</sup> Cl. Reply ¶ 656.

administrative authority in dispossessing Mr. Selmani of the petrol stations, and by tendering them to third parties.<sup>717</sup>

## (2) Kosovo's Position

621. Kosovo argues that it did not violate either Articles 5 or Articles 12 of the LFIs.
622. Any obligations undertaken in the UNMIK Permission were undertaken by UNMIK in relation to Kosova Petrol, and cannot be relied upon against Kosovo. Furthermore, Article 12 is limited to rights of a “foreign investor,” which Kosova Petrol is not. This “lack of privity” means that any claims under Article 12 of both LFIs are destined to fail, Kosovo submits.<sup>718</sup>
623. In any event, assuming that PAK was the successor to UNMIK’s obligation, Kosovo submits that PAK did not exercise the “public executive, legislative, regulatory, administrative, or judicial powers” required by Article 12.<sup>719</sup>
624. With respect to Article 5 of the LFIs, Kosovo disputes that they constitute umbrella clauses. Regardless, the obligations referred to in Articles 5 are contingent upon the obligations undertaken in the UNMIK Permission, which could not be incumbent on either PAK or Kosovo as neither existed at the time of the UNMIK Permission. Even if they were, the UNMIK Permission is not enforceable against Kosovo under Article 5, Kosovo says, because “the potential attribution of PAK’s alleged wrongful conduct to Kosovo would not make Kosovo the obligor under the UNMIK Permission.”<sup>720</sup>
625. Kosovo also states that all of its defenses against Mr. Selmani’s claims under other provisions “apply with equal force” to the claims made under Article 5 and Article 12 of the LFIs.<sup>721</sup>

## (3) The Tribunal's Analysis

626. The Tribunal sees no need to engage in a detailed analysis of the jurisprudential reach of Articles 5 and 12 of the 2014 LFI.<sup>722</sup> That is because, in light of the Tribunal’s

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<sup>717</sup> Cl. Reply ¶¶ 657-661.

<sup>718</sup> SoD ¶¶ 509-510.

<sup>719</sup> Resp. Rejoinder ¶ 525.

<sup>720</sup> Resp. Rejoinder ¶¶ 523-524.

<sup>721</sup> Resp. Rejoinder ¶ 526.

<sup>722</sup> Given the Tribunal’s ruling in Section VIII.D.3 that it has no jurisdiction to consider alleged breaches of the 2006 LFI that were committed prior to the repeal of that legislation by the 2014 LFI, there is no need to analyze separately Articles 5 and 12 of the 2006 LFI.

findings regarding the measures at issue in this case, Mr. Selmani cannot demonstrate a breach.

627. To recall, Article 5.1 of the 2014 LFI obligates the Republic of Kosovo to “comply in good faith with all obligations that it has to the foreign investors.” Article 12 of the 2014 LFI obligates “public authorities” to “recognize and respect all rights of a foreign investor relating to a foreign investment in the Republic of Kosovo.” Neither of these provisions negate the findings the Tribunal has made regarding the temporal and *ratione materiae* limitations on Mr. Selmani’s case. In consequence of those limitations, Mr. Selmani would need to prove that, following entry into force of the 2014 LFI, Kosovo had (a) failed to comply in good faith with an obligation that it had to Mr. Selmani, or (b) failed to recognize and respect rights Mr. Selmani had relating to a qualified “investment” that he lawfully held in the Republic of Kosovo. But the Tribunal has found no such cognizable investment in this period with respect to the petrol stations, and no such breach of State obligations. For reasons explained above, the UNMIK Permission did not qualify as a source of any continuing State obligations, nor did Mr. Selmani have any other cognizable lease or license rights that persisted in 2014. Accordingly, there has been no breach of Kosovo’s obligations under Article 5.1 or Article 12 with respect to such obligations or rights.

## **X. CONCLUDING REMARKS**

628. For the reasons discussed above, the Tribunal denies each of the claims Mr. Selmani has presented in this arbitration.
629. The Tribunal recognizes that this conclusion will be frustrating to Mr. Selmani, who devoted substantial effort to operating petrol stations in Kosovo over many years, and who more recently has devoted substantial effort to these proceedings. But the legal case Mr. Selmani presented was challenging from the outset. It rested largely on the proposition that the UNMIK Permission, an *ad hoc* document issued by an interim UN administrative authority during an initially chaotic transitional period, remained in force more than a decade after its issuance, and continued to bind the independent State that later emerged in the same territory, without Mr. Selmani ever paying rent to any Kosovar authority and without any subsequent agreement to regularize his occupancy of the premises. Mr. Selmani has not been able to sustain this proposition. Nor has he been able to prove that the 2014 LFI, which is the only source of this Tribunal’s jurisdiction, authorizes it to assess claims about UNMIK’s purported breach of previous investment instruments (the 2001 UNMIK Investment Regulation and the 2006 LFI), much less to assign liability to Kosovo for any hypothetical UNMIK violation.
630. The Tribunal accepts that each of these propositions has been pursued in good faith, and presented ably by counsel advocating their client’s case with professionalism and

courtesy. Counsel for Kosovo equally has defended their client's interests with skill, professionalism and courtesy. The Tribunal is grateful to all counsel for the constructive manner in which they proceeded with the presentation of an exceedingly complex and interesting case. As the length of this Award reflects, the Tribunal has taken great care to work through the issues comprehensively and methodically, to ensure that the Parties have a clear understanding of the basis for the Tribunal's rulings.

## **XI. COSTS AND LEGAL FEES**

### **A. The Costs Claimed by the Parties**

631. Each Party submitted its costs and attorney's fees for the Tribunal's consideration on 13 May 2022.
632. Mr. Selmani submitted a schedule showing incurred costs and fees in the total amounts of EUR 3,313,891.19, USD 2,420,597.92 and GBP 85,185.00, as per the following breakdown:

Attorney fees <sup>1</sup>	EUR 2,755,144.27
	USD 2,045,687.32
Counsel's expenses <sup>2</sup>	EUR 21,711.07
	USD 9,400.60
Party expenses <sup>3</sup>	EUR 53,661.13
Expert Fees and Expenses – The Brattle Group	EUR 412,459.72
Expert Fees and Expenses – Marc Weller	GBP 77,025.00
Expert Fees and Expenses – Iliriana Islami	EUR 58,000.00
Expert Fees and Expenses – William Klawonn	USD 15,510.00
Arbitration costs (ICC, Tribunal and Secretary) <sup>4</sup>	USD 350,000.00
Hearing Expenses – ICC (Hearing administrator) <sup>5</sup>	EUR 4,200.00
Hearing Expenses – Transcription <sup>6</sup>	EUR 8,715.00
Hearing Expenses – Interpretation	GBP 8,160.00
<b>Total (EUR amounts only)</b>	<b>EUR 3,313,891.19</b>
<b>Total (USD amounts only)</b>	<b>USD 2,420,597.92</b>
<b>Total (GBP amounts only)</b>	<b>GBP 85,185.00</b>

<sup>1</sup> Hourly rates: Shearman & Sterling and Gaillard Banifatemi Shelbaya Disputes: Partners (both Senior and non-Senior) (average): EUR 920, Associates (average): EUR 595; White & Case: Senior Partners (average): USD 855, Partners (average): USD 665, Associates (average): USD 445.

<sup>2</sup> Travel and business expenses, research, document (including Document Management) and telephone expenses, translation expenses (including Interpretation) covered by Counsel, etc.

<sup>3</sup> Travel and accommodation of Party representatives, translation costs covered directly by a Party, etc.

<sup>4</sup> This amount includes USD 5,000 paid for the ICC filing fee.

<sup>5</sup> Part of the amount invoiced by the ICC for its services as Hearing Administrator (EUR 1,200.00) was included in an invoice issued by counsel and is therefore included among "Counsel's expenses".

<sup>6</sup> Part of the amount invoiced by Juriscript for their reporting services (EUR 3,000) was included in invoices issued by counsel and is therefore included among "Counsel's expenses".

633. Kosovo submitted a schedule showing incurred costs and fees in the total amounts of USD 1,736,220.51 and EUR 390,111.14, as per the following breakdown:

Attorney fees <sup>1</sup>	USD 1,721,405.50
Counsel's expenses <sup>2</sup>	USD 14,815.01
Party expenses <sup>3</sup>	EUR 5,663.95
Expert Fees and Expenses – [Prof. Qerim Qerimi]	EUR 29,171.45
Expert Fees and Expenses – [Prof. Bernhard Knoll-Tudor]	EUR 30,180.96
Expert Fees and Expenses – [Mr. Gentian Gurra]	EUR 5,362.49
Arbitration costs (ICC, Tribunal and Secretary)	EUR 294,573.40
Hearing Expenses – ICC (Hearing administrator)	EUR 5,400.00
Hearing Expenses – Transcription	EUR 11,715.00
Hearing Expenses – Interpretation	EUR 8,043.89

<sup>1</sup> Hourly rates: Partners (average): [USD 533.00], Associates (average): [USD 266.00]  
<sup>2</sup> Travel and business expenses, research, document (including Document Management) and telephone expenses, translation expenses (including Interpretation) covered by Counsel, etc.  
<sup>3</sup> Travel and accommodation of Party representatives, translation costs covered directly by a Party, etc.

## B. The Costs Fixed by the ICC Court

634. At its session on 13 July 2022, the ICC Court fixed the fees and expenses of the Arbitral Tribunal at USD 602,191, and the ICC administrative fees at USD 97,809, for total costs of USD 700,000. The Parties have previously paid in equal shares the advance on costs fixed by the ICC Court in the amount of USD 350,000 each, or a total of USD 700,000.

## C. The Tribunal's Allocation of Costs

635. Pursuant to ¶ 54(f) of the Terms of Reference, the Tribunal may determine “[w]hether either Party is entitled to an award of costs in connection with these proceedings, and if so, for which categories of costs and in what amounts.”

636. Article 38(4) of the ICC Rules on Arbitration states, in relevant part, that “the final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.” In selecting the ICC Rules to govern resolution of any dispute, the Parties in this case explicitly accepted the Tribunal’s discretion under such Rules to allocate attorneys’ fees as well as other costs.
637. Article 38(5) states that “[i]n making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.” In the ICC Secretariat’s Guide to ICC Arbitration, a number of other factors to take into account are listed, including of particular importance the outcome of the case. The Secretariat states in this regard that “the arbitral tribunal is likely to allow [an entirely successful party] to recover some or all of its reasonable costs from the losing party.”<sup>723</sup>
638. In this case, the Parties have both conducted the arbitration in a professional and courteous manner, as noted in Section X above. While the change in Claimant’s counsel in 2020 no doubt occasioned some additional expense and delay, this was not out of the range of what may be expected upon such occurrences. The Tribunal concludes that taking all the complexities of the case into account, both Parties conducted the arbitration in a reasonably expeditious and cost-effective manner, within the meaning of Article 38(5) of the ICC Rules.
639. Kosovo is the clear prevailing party; it has defeated all of Mr. Selmani’s claims. That said, Mr. Selmani has defeated some (but not all) of Kosovo’s jurisdictional objections.
640. Taking all these factors into account in a holistic manner, the Tribunal determines that Mr. Selmani shall bear 75% of the costs claimed by Kosovo, excluding its share of the arbitration costs fixed by the ICC court. Kosovo’s other total costs were USD 1,736,220.51 and EUR 95,537.74; these figures are reasonable in amount, and significantly less than Mr. Selmani’s own costs. Accordingly, Mr. Selmani shall pay Kosovo USD 1,302,165.38 and EUR 71,653.305, constituting 75% of these costs.
641. Further, Mr. Selmani shall bear 75% of the USD 700,000 costs fixed by the ICC Court, or USD 525,000, with Kosovo bearing the remaining USD 175,000. The result

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<sup>723</sup> J. Fry, S. Greenberg and F. Mazza, *The Secretariat’s Guide to ICC Arbitration*, ¶ 3-1488.



is that Mr. Selmani should reimburse Kosovo for USD 175,000 of the total USD 350,000<sup>724</sup> that it paid towards the advance on costs.

642. Accordingly, Mr. Selmani shall pay a total of USD 1,477,165.38 and EUR 71,653.305 to Kosovo.
643. The Tribunal declines to order payment of pre-Award interest on these costs. Kosovo has not demonstrated the dates on which its various costs were incurred, nor has either Party submitted any briefing on an appropriate interest rate. Nor does the Tribunal consider such an Award appropriate in the circumstances of this case.

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<sup>724</sup> Kosovo's cost submission referenced the Euro equivalent of its payment of the advance on costs (EUR 294,537.50). The Tribunal instead uses the U.S. dollar figure referenced by the ICC both in requesting payments of the advance and in fixing the final costs of arbitration.

## **XII. DISPOSITIF**

644. In accordance with the above findings, the Tribunal unanimously:
- a. DETERMINES that Mr. Selmani is a qualified foreign investor for purposes of the 2014 LFI;
  - b. DETERMINES that it has jurisdiction over Mr. Selmani's claims only to the extent that those claims (i) relate to rights that he continued to lawfully hold in the Republic of Kosovo following its independence in 2008, and (ii) challenge conduct attributable to the Republic of Kosovo that occurred after the 2014 LFI came into force;
  - c. ACCORDINGLY, DETERMINES that it does not have jurisdiction in relation to claims (i) arising out of any rights that had ceased to exist prior to the Republic of Kosovo's independence, or (ii) alleging breach of the 2001 UNMIK Investment Regulation or the 2006 LFI; or (iii) arising out of the conduct of UNMIK rather than the Republic of Kosovo;
  - d. DETERMINES that Mr. Selmani's claims are not inadmissible on the basis of any time-bar or fork-in-the road clause;
  - e. DISMISSES on their merits all of Mr. Selmani's claims that Kosovo has breached its obligations under the 2014 LFI;
  - f. ORDERS Mr. Selmani to pay 75% of Kosovo's costs, without pre-Award interest; and accordingly,
  - g. AWARDS Kosovo a total of USD 1,477,165.38 and EUR 71,653.305 from Mr. Selmani, comprised of USD 1,302,165.38 and EUR 71,653.305 for Kosovo's costs and fees (excluding arbitration costs) and USD 175,000 for Kosovo's share of the costs of arbitration fixed by the ICC Court.
645. This Final Award, which is executed and will be transmitted to the Parties in the form agreed in the ToR, renders a final decision on all claims submitted in this arbitration. All claims not expressly granted in this Final Award are denied.

Place of Arbitration: Paris, France

Date: 1 August 2022

Signatures:



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R. Doak Bishop  
Co-Arbitrator

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Zachary Douglas QC  
Co-Arbitrator

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Jean E. Kalicki  
Presiding Arbitrator


Place of Arbitration: Paris, France

Date: 1 August 2022

Signatures:

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R. Doak Bishop  
Co-Arbitrator

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Zachary Douglas QC  
Co-Arbitrator

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Jean E. Kalicki  
Presiding Arbitrator

Place of Arbitration: Paris, France

Date: 1 August 2022

Signatures:

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R. Doak Bishop  
Co-Arbitrator

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*Jean E. Kalicki*

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Jean E. Kalicki  
Presiding Arbitrator