INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

GUARDIAN FIDUCIARY TRUST LTD
f/k/a CAPITAL CONSERVATOR SAVINGS & LOAN LTD

Claimant

and

FORMER YUGOSLAV REPUBLIC OF MACEDONIA

Respondent

(ICSID Case No. ARB/12/31)

AWARD

Members of the Tribunal

Dr Veijo Heiskanen, President of the Tribunal
Prof. Andreas Bucher, Arbitrator
Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal
Ms Milanka Kostadinova

Date of dispatch to the Parties: 22 September 2015

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TABLE OF CONTENTS

I. INTRODUCTION 1
II. PROCEDURAL HISTORY 3
III. THE PARTIES' POSITIONS REGARDING JURISDICTION *RATIONE PERSONAE* 9
A. The Interpretation of Article 1(b)(III) of the Treaty 10
1. The Respondent's position 10
2. The Claimant's position 12
B. Burden of Proof and Relevant Evidence 14
1. The Respondent's position 14
2. The Claimant's position 17
C. The Claimant's Corporate Structure 20
1. The Respondent's position 20
2. The Claimant's position 24
D. Exercise of Control over the Claimant 25
1. The Respondent's position 25
2. The Claimant's position 30
E. Relevant Arbitral Jurisprudence 33
1. The Respondent's position 33
2. The Claimant's position 35
IV. THE PARTIES' REQUESTS FOR RELIEF 35
A. The Respondent's request for relief 35
B. The Claimant's request for relief 36
V. THE TRIBUNAL'S ANALYSIS 36
VI. COSTS 44
A. The Respondent's position 44
B. The Claimant's position 45
C. The Tribunal's analysis 47
VII. AWARD 48

FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT	Agreement on Encouragement and Reciprocal Protection of Investments between the Macedonian Government and the Government of the Kingdom of the Netherlands, signed on 7 July 1998 and entered into force on 1 June 1999
CCG	Capital Conservator Group LLC
CCSL	Capital Conservator Savings & Loan Limited, the former name of the Claimant
CCT	Capital Conservator Trustees Limited
Claimant	Guardian Fiduciary Trust Limited, or GFT, formerly known as Capital Conservator Savings & Loan Limited
Deed	Deed of Trust dated 1 October 2008 (Exhibit R-0003)
FYROM	The Former Yugoslav Republic of Macedonia, or the Respondent
GFT	Guardian Fiduciary Trust Limited, or the Claimant, formerly known as Capital Conservator Savings & Loan Limited
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
IN Asset Management	IN Asset Management Limited
Memorial on Jurisdiction	Respondent's Memorial on Jurisdiction dated 19 September 2014
Memorial on the Merits	Claimant's Memorial on the Merits dated 30 December 2013
Counter-Memorial on Jurisdiction	Claimant's Counter-Memorial on Jurisdiction dated 18 November 2014
Reply on Jurisdiction	Respondent's Reply on Jurisdiction dated 19 January 2015

Rejoinder on Jurisdiction	Claimant's Rejoinder on Jurisdiction dated 19 March 2015
Request for Arbitration	Request for Arbitration dated 2 August 2012
Respondent	The Former Yugoslav Republic of Macedonia
Treaty	Agreement on Encouragement and Reciprocal Protection of Investments between the Macedonian Government and the Government of the Kingdom of the Netherlands, signed on 7 July 1998 and entered into force on 1 June 1999
Vienna Convention	Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969

I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement on Encouragement and Reciprocal Protection of Investments between the Macedonian Government and the Government of the Kingdom of the Netherlands (the "**BIT**" or the "**Treaty**"), signed on 7 July 1998, and which entered into force on 1 June 1999, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

2. The Claimant is Guardian Fiduciary Trust Limited ("**GFT**" or the "**Claimant**"). The Claimant is a company incorporated on 17 September 2007 under the laws of New Zealand, with headquarters at Level 2, The Public Trust Building, 442 Moray Place, PO Box 3058, Dunedin, New Zealand 9016, and with an administrative office in Uruguay and a European representative office in Serbia. The Claimant was formerly known as Capital Conservator Savings & Loan Limited ("**CCSL**").

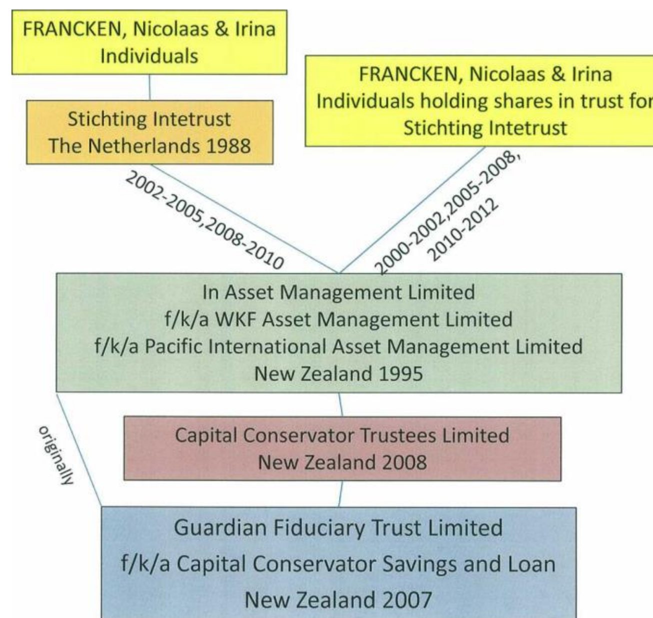
3. The Respondent is the Former Yugoslav Republic of Macedonia ("**FYROM**" or the "**Respondent**").

4. The Claimant is a trustee company and financial services provider that has operated in the territory of the Respondent since 2007, through Stopanska Banka, a local bank. According to the Claimant, Stopanska Banka operated all of its business. The Claimant contends that in June 2009, following money-laundering investigations initiated in the United States, Stopanska Banka informed the Claimant that its accounts would be closed. In late August 2009, the Respondent's authorities arrested one of the Claimant's directors for money laundering and issued a press release disclosing the name of the Claimant and the director. According to the Claimant, the Respondent knew or should have known that the money laundering allegations were false. The Claimant contends that the measures taken by the Respondent, in particular the allegedly false statements, forced the Claimant to change the location of its operations and its name, which caused substantial damage to its business. The Claimant alleges that the Respondent's conduct constitutes a breach of the Treaty and claims compensation for the alleged losses sustained by the Claimant. The claim was initially

quantified at over US$ 600 million, but subsequently reduced to approximately US$ 20 million.

5. The Claimant is wholly owned by Capital Conservator Trustees Limited ("**CCT**") a trustee company incorporated on 17 September 2008 under the laws of New Zealand. CCT in turn is a wholly-owned subsidiary of IN Asset Management Limited ("**IN Asset Management**") a company incorporated under the laws of New Zealand. IN Asset Management is wholly owned by Stichting Intetrust, a Dutch foundation having its registered office in Velp, the Netherlands. The founder and director of Stichting Intetrust is Nicolaas Jan Carel Francken, a national of New Zealand. Stichting Intetrust is the owner and holder of the family interests of Mr Francken. The Claimant argues that it qualifies as a national of the Netherlands under the BIT as it is ultimately controlled by Stichting Intetrust.

6. The Claimant illustrates its organizational structure with the following chart:[1]



7. The Respondent denies that the Claimant is controlled by Stichting Intetrust. According to the Respondent, the beneficial owner of CCT, the immediate holding company of the Claimant, is not IN Asset Management but Capital Conservator Group LLC ("**CCG**"), a

[1] Exhibit C-3 submitted in support of the Request for Arbitration.

company incorporated in the Marshall Islands. CCG's shares in CCT were transferred to IN Asset Management based on a trust deed executed on 1 October 2008, which provides that CCG's shares in CCT are held by IN Asset Management for and on behalf of CCG. Contrary to the Claimant's allegations, the Claimant was therefore not indirectly controlled by IN Asset Management or Stichting Intetrust but by CCG, a Marshall Islands company, and accordingly it does not qualify as a national of the Netherlands.

8. As set out in detail below, the proceedings in this arbitration were bifurcated to deal with the nationality of the Claimant and the Respondent's preliminary objection to the Tribunal's jurisdiction *ratione personae* over the Claimant as a preliminary matter.

II. PROCEDURAL HISTORY

9. On 2 August 2012, Guardian Fiduciary Trust Limited filed a "Request for Arbitration Proceedings" ("**Request for Arbitration**") with the Centre. On 6 August 2012, the Centre confirmed receipt of the Request for Arbitration and the supporting documentation.

10. On 28 August 2012, the Secretary-General of ICSID ("**Secretary-General**") requested additional information from the Claimant prior to registering the Request for Arbitration.

11. On 22 September 2012, the Claimant submitted its answers to the Secretary-General's queries.

12. On 5 October 2012, the Secretary-General registered the Request for Arbitration pursuant to Article 36(3) of the ICSID Convention and Rules 6 and 7 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

13. By letter of 9 October 2012, the Claimant made a proposal for the selection of arbitrators and the constitution of the Arbitral Tribunal, and proposed to appoint Professor Andreas Bucher, a national of Switzerland, as arbitrator.

14. On the same day, the Centre invited the Respondent to accept the Claimant's proposals or to make other proposals regarding the number of arbitrators and the method of their appointment.

15. On 29 October 2012, the Respondent informed the Centre that it agreed to the constitution of an arbitral tribunal composed of three arbitrators. However, the Respondent did not agree to any of the other proposals made by the Claimant.

16. By letter dated 2 November 2012, the Claimant accepted the Respondent's proposal for the method of constitution of the Arbitral Tribunal, but maintained its position that the majority of the arbitrators be nationals of States other than the State party to the dispute and the State whose national is a party to the dispute. The Claimant also confirmed its intention to appoint Professor Andreas Bucher as arbitrator.

17. On 26 November 2012, the Respondent notified the Centre that it had appointed Professor Brigitte Stern, a national of France, as arbitrator.

18. On the same day, the Centre wrote to the Parties, indicating that it would proceed to approach the party-appointed arbitrators to seek their acceptance as soon as the Parties had reached an agreement on the method of constitution of the Tribunal.

19. On 20 December 2012, the Respondent informed the Centre, on behalf of both Parties, that the Parties had agreed on the method of constitution of the Arbitral Tribunal. According to the agreement, the Tribunal would consist of three arbitrators, each Party nominating one arbitrator and the Parties then endeavoring to agree on a president of the Tribunal by 21 January 2013, or such later date as the Parties may agree.

20. On 18 January 2013, the Centre informed the Parties that Professor Stern and Professor Bucher had accepted their appointments to the Arbitral Tribunal.

21. On 11 April 2013, the Claimant informed the Centre that the Parties had been unable to agree on the presiding arbitrator and requested that the president be appointed by the Chairman of the ICSID Administrative Council pursuant to Article 38 of the ICSID Convention and Rule 4 of the Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"). On the same day, the Respondent confirmed that it had no objection to the Claimant's request, although it did "not join the Claimant in making it."

22. On 24 April 2013, the Secretary-General transmitted a list of potential candidates for a presiding arbitrator to the Parties and invited the Parties to consider them and provide their views by 6 May 2013 by way of a ballot form.

23. On 7 May 2013, the Secretary-General informed the Parties that the consultation process had not resulted in the selection of a mutually agreeable candidate. The Secretary-General informed the Parties that she intended to propose to the Chairman of the ICSID Administrative Council that Dr Veijo Heiskanen, a national of Finland, be appointed as the presiding arbitrator pursuant to Articles 38 and 40(1) of the ICSID Convention. The Parties were invited to submit their observations on the proposal, including Dr Heiskanen's disclosure statement, by 14 May 2013.

24. On 16 May 2013, the Secretary-General transmitted to the Parties the additional information provided by Dr Heiskanen in response to the Claimant's request of 14 May 2013.

25. On 22 May 2013, the Claimant confirmed that it had no further observations to make on the Centre's proposal.

26. On 24 May 2013, the Secretary-General informed the Parties that Dr Heiskanen had accepted his appointment as the presiding arbitrator, and that the Arbitral Tribunal was deemed to be constituted, and the proceedings to have begun, as of that day pursuant to Rule 6 of the Arbitration Rules. The Parties were informed that Ms Milanka Kostadinova had been designated to serve as the Secretary of the Tribunal.

27. The first session of the Tribunal was held on 23 July 2013 in Paris.

28. On 2 August 2013, the Tribunal issued Procedural Order No. 1, setting out the rules governing the proceedings as agreed by the Parties or, insofar as the Parties had been unable to agree, as decided by the Tribunal, as well as a detailed procedural calendar.

29. On 29 August 2013, the Tribunal issued a Revised Procedural Order No. 1, amending paragraph 19.4.5 of the Order, as agreed by the Parties.

30. On 30 December 2013, the Claimant filed its Memorial on the Merits, together with the supporting documentary evidence and legal authorities.

31. On 30 January 2014, pursuant to paragraph 14.1.2 of Procedural Order No. 1, the Respondent filed a request for bifurcation of the proceedings (the "**Request for Bifurcation**"), requesting that the Respondent's objections to jurisdiction, as outlined in the Request for Bifurcation, be heard as preliminary questions, and that the Tribunal suspend the proceedings on the merits. The Respondent raised the following three jurisdictional objections:

    (1) The Tribunal lacks jurisdiction *ratione materiae* because the Claimant has failed to demonstrate that it has made any "investment" in FYROM (the "**Respondent's First Objection**");[2]

    (2) The Tribunal lacks jurisdiction *ratione personae* because the Claimant does not qualify as a national of the Netherlands within the meaning of Article 1(b)(III) of the BIT (the "**Respondent's Second Objection**");[3] and

    (3) The Tribunal lacks jurisdiction over the dispute insofar as it relates to the conduct of the Respondent towards third parties (the "**Respondent's Third Objection**").[4]

32. On 20 February 2014, pursuant to paragraph 14.1.3 of Procedural Order No. 1, the Claimant filed its observations and objections to the Respondent's Request for Bifurcation, requesting that the Tribunal deny the Request for Bifurcation for the reasons set out in the Claimant's Observations.

33. On 11 March 2014, the Tribunal issued its Decision on Bifurcation in the form of Procedural Order No. 2, pursuant to paragraph 14.1.4 of Procedural Order No. 1. The Tribunal rejected the Respondent's request to bifurcate the proceedings to hear the Respondent's First Objection and Third Objection as preliminary questions, noting that "[t]he determination of the former issue would require that the Tribunal engage in a detailed analysis of evidence relating to the manner in which the Claimant operated the relevant bank account and the nature of the accounts, whereas the latter would require a similar analysis of evidence

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[2] Request for Bifurcation, para. 13.

[3] Request for Bifurcation, para. 20.

[4] Request for Bifurcation, para. 23.

relating to the Respondent's conduct insofar as it concerns its alleged breach of its obligations under the BIT."[5] The Tribunal concluded that, in these circumstances, "a preliminary determination of these issues would not reduce significantly the scope and complexity of the dispute and thus would not serve procedural economy."[6]

34. The Tribunal found, however, that the Respondent's Second Objection was capable of being dealt with as a preliminary question, and that the bifurcation of the proceedings on this basis was appropriate:

> *"The Tribunal does agree however that the Respondent's Second Objection, i.e., as to whether the Claimant qualifies as a national of the Netherlands within the meaning of Article 1(b)(III) of the BIT, is not inextricably linked to the merits and is therefore capable of preliminary determination. The Tribunal considers that this would also serve procedural economy since, if successful, the Second Objection would be capable of disposing of the entire case, without the Tribunal having to engage in a detailed review of the evidence relating to the merits, and if unsuccessful, would reduce the scope of the subsequent phase."*[7]

35. Accordingly, the Tribunal ordered that the Respondent's Second Objection be heard as a preliminary question and suspended the proceedings on the merits.[8] The Tribunal further directed the Parties to follow the procedural calendar set out in paragraph 14.1.5 of Procedural Order No. 1.[9]

36. On 20 May 2014, the Respondent submitted its request for production of documents, in the form of a Redfern Schedule, requesting that the Tribunal rule on the Claimant's objections to the Respondent's requests pursuant to paragraph 15.2.4 of Procedural Order No. 1.

37. On 28 May 2014, the Tribunal issued Procedural Order No. 3, setting out its Decision on the Respondent's Document Production Request. The Tribunal's decisions were recorded in the Respondent's Redfern Schedule, which was annexed to and formed part of the Order.

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[5] Procedural Order No. 2, para. 15.

[6] Procedural Order No. 2, para. 15.

[7] Procedural Order No. 2, para. 16.

[8] Procedural Order No. 2, para. 18 (a) - (c).

[9] Procedural Order No. 2, para. 18(d).

The Claimant was ordered to produce the requested documents, as directed by the Tribunal, within three weeks of the date of the Order.

38. On 19 September 2014, pursuant to paragraph 14.1.5.1 of Procedural Order No. 1, the Respondent filed its Memorial on Jurisdiction, together with the supporting documentary evidence and the legal authorities.

39. On 18 November 2014, pursuant to paragraph 14.1.5.2 of Procedural Order No. 1, the Claimant filed its Counter-Memorial on Jurisdiction, together with supporting evidence.

40. On 17 December 2014, the Tribunal confirmed, after consultation with the Parties, that the Hearing on Jurisdiction would be held on 6-7 May 2015 in Paris.

41. On 19 January 2015, pursuant to paragraph 14.1.5.3 of Procedural Order No. 1, the Respondent filed its Reply on Jurisdiction, accompanied by the Opinion of Francis Barlow, QC, and the supporting legal authorities.

42. On 19 March 2015, pursuant to paragraph 14.1.5.4 of Procedural Order No. 1, the Claimant filed its Rejoinder on Jurisdiction.

43. The pre-hearing organizational meeting was held by telephone conference on 21 April 2015. In advance of the call, the Tribunal invited the Parties to confer and agree on the schedule for the upcoming hearing. The Parties subsequently agreed that the hearing could be completed in one day and be held on 6 May 2015.

44. The Hearing on Jurisdiction was held on 6 May 2015 at the World Bank Office in Paris.

45. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the Hearing on Jurisdiction were:

For the Claimant:

Mr Petro Janura	Advocate Petro Janura
Mr Juan F. Torres III (by telephone)	Juan F. Torres III, P.A.

For the Respondent:

Mr Charles Claypoole	Latham & Watkins LLP
Mr Sebastian Seelmann-Eggebert	Latham & Watkins LLP
Mr Robert Price	Latham & Watkins LLP
Ms Angela Angelovska-Wilson	Reed Smith LLP
Ms Emilija Radojkova	State Attorney's Office of the Former Yugoslav Republic of Macedonia
Mr Zlato Uzunoski	State Attorney's Office of the Former Yugoslav Republic of Macedonia State
Mr Arlinda Zimeri	State Attorney's Office of the Former Yugoslav Republic of Macedonia

46. Mr Francis Barlow, QC, the Respondent's legal expert, was examined by the Respondent and cross-examined by the Claimant.

47. Mr Juan F. Torres III, one of the two Claimant's counsel on record, participated in the hearing by way of a telephone conference, due to health issues which precluded him from traveling to Paris.

48. On 17 June 2015, the Claimant and the Respondent filed their Submissions on Costs, as agreed at the Hearing on Jurisdiction.[10]

III. THE PARTIES' POSITIONS REGARDING JURISDICTION *RATIONE PERSONAE*

49. The Respondent objects to the Tribunal's jurisdiction *ratione personae*. The Respondent argues that the Claimant does not qualify as a national of the Netherlands under Article 1(b)(III) of the BIT as it is incorporated under the laws of New Zealand and, contrary to what the Claimant alleges, is not controlled by a legal person constituted under the laws of the Netherlands. According to the Respondent, the Claimant is controlled by CCG, a Marshall Island company.[11]

50. The Claimant's position is that the Tribunal has jurisdiction *ratione personae* to hear its claim since it is controlled indirectly by Stichting Intetrust, a legal person constituted under

[10] Hearing on Jurisdiction, Transcript, I/175/22-I/177/15.

[11] Memorial on Jurisdiction, para. 16.

the laws of the Netherlands. The fact that the Claimant is owned by CCT, a New Zealand company, and that the latter company is in turn owned by IN Asset Management, another New Zealand company, is irrelevant since Stichting Intetrust is the sole owner of IN Asset Management, just as the latter is the sole owner of CCT, which in turn is the owner of the Claimant.

A. The Interpretation of Article 1(b)(III) of the Treaty

1. The Respondent's position

51. The Respondent argues that the Claimant, a company incorporated in New Zealand, does not qualify as a "national" of the Netherlands within the meaning of Article 1(b)(III) of the BIT. The Tribunal therefore lacks jurisdiction *ratione personae* over the Claimant under Article 9 of the BIT, which limits the scope of the Respondent's consent to arbitrate to legal disputes "arising between [a] Contracting State and a national of the other Contracting State."[12]

52. According to the Respondent, Article 1(b)(III) of the BIT, which defines the term "national," must be interpreted in accordance with the customary international law rules of treaty interpretation as set out in the Vienna Convention on the Law of Treaties (the "**Vienna Convention**"), in particular the general rule of treaty interpretation in Article 31(1) of the Vienna Convention, which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[13]

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[12] Memorial on Jurisdiction, para. 19. Article 9 of the BIT, Exhibit C-0005, provides:

> *"Each Contracting State hereby consents to submit any legal dispute arising between that Contracting State and a national of the other Contracting State concerning an investment of that national in the territory of the former Contracting State to the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965. A legal person which is a national of one Contracting State and which before such a dispute arises is controlled by nationals of the other Contracting State shall, in accordance with Article 25(2)(b) of the Convention, for the purpose of the Convention be treated as a national of the other Contracting State*."

[13] Memorial on Jurisdiction, paras. 23-24; Hearing on Jurisdiction, Transcript, I/11/9-14; Article 31(1) of the Vienna Convention, Exhibit RLA-0022.

53. The Respondent argues that the object and purpose of the BIT, as set out in its Preamble, is "to extend and intensify the economic relations between [the Contracting States], particularly with respect to investments by the nationals of one Contracting State in the territory of the other Contracting State," and to "stimulate the flow of capital and technology and the economic development of the Contracting States."[14] The Respondent argues that the link between Stichting Intetrust, a Dutch foundation, and the Claimant is not such that it can be considered to stimulate or facilitate the flow of capital or technology from the Netherlands to FYROM, or the economic development of either country.[15]

54. The Respondent asserts that the term "controlled" in Article 1(b)(III) of the BIT, when interpreted pursuant to its ordinary meaning, requires not only evidence of ownership over the Claimant, but also of exercise of active control over the Claimant's activities.[16] Relying on *Aucoven v. Venezuela*,[17] and on the guidance issued in the Final Act of the European Energy Charter Conference regarding Article I(6) of the Energy Charter Treaty, which both the Respondent and the Netherlands have ratified,[18] the Respondent submits that the Claimant "must demonstrate with evidence" that it is controlled by Stichting Intetrust.[19] This requires that the Tribunal must look at "all factual circumstances, including evidence of who controls the management and operation of the company, and who selects the board members or management of the entity in question."[20] As noted by the tribunal in *Plama v. Bulgaria*, "control includes control in fact,"[21] and accordingly the purpose of the exercise is "to ascertain which entity or person is giving 'instructions' to the Claimant entity and

[14] BIT, Preamble, Exhibit C-0005.

[15] Memorial on Jurisdiction, paras. 25-26; Hearing on Jurisdiction, Transcript, I/11/15-I/12/7.

[16] Memorial on Jurisdiction, paras. 27-35 and 44; Hearing on Jurisdiction, Transcript, I/7/25-I/11/8.

[17] *Autopista Concesionada de Venezuela, C.A. (Aucoven) v. Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 Sept. 2001, paras. 79-119, Exhibit RLA-0003; Memorial on Jurisdiction, paras. 36-40.

[18] Final Act of the European Charter Conference, Understanding IV(3), Exhibit RLA-0010; Memorial on Jurisdiction, paras. 41-42.

[19] Memorial on Jurisdiction, para. 43.

[20] Memorial on Jurisdiction, para. 43.

[21] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 Feb. 2005, para. 170, Exhibit RLA-0018.

thereby exercising control."[22] This implies that "the mere legal ownership of shares is not sufficient to establish control."[23]

2. The Claimant's position

55. The Claimant argues, in response, that it is sufficient, for the purposes of meeting the requirements of Article 1(b)(III) of the BIT, that Stichting Intetrust as a legal person constituted under the laws of the Netherlands is in the end of the chain of ownership in the structure" of the relevant companies, *i.e.,* the Claimant, CCT and IN Asset Management.[24] Moreover, since a foundation under Dutch law has no owners, and cannot be controlled by any other entity or natural person, "it is sufficient for the interpretation of the BIT, that the Stichting is the controlling entity, since it controls and it could not be controlled by other [sic] legal entity and it is the main vehicle in the structure."[25]

56. The Claimant explains that Stichting Intetrust is "the main vehicle in the structure that sometimes changes its position from the end legal owner to the end beneficial owner."[26] For reasons related to "the area of company law (auditing) and asset protection,"[27] the shares of IN Asset Management were on 4 May 2010 transferred from Stichting Intetrust to Mr Francken and subsequently, on the same day, from Mr Francken to his spouse Irina Michajlovna Francken and Mr Francken. On 5 September 2012, that is, after the filing of the Request for Arbitration on 2 August 2012 but before its registration by ICSID on 5 October 2012, Mr and Mrs Francken transferred the shares to Stichting Intetrust.[28] Mr and Mrs Francken are members of the board of directors of Stichting Intetrust as well as directors of IN Asset Management, and Mr Francken is also director of CCT.[29] Stichting Intetrust

[22] Memorial on Jurisdiction, para. 43.

[23] Memorial on Jurisdiction, para. 44.

[24] Counter-Memorial on Jurisdiction, para. 19; Hearing on Jurisdiction, Transcript, I/57/21-I/58/2.

[25] Counter-Memorial on Jurisdiction, para. 22.

[26] Counter-Memorial on Jurisdiction, para. 24.

[27] Counter-Memorial on Jurisdiction, para. 24.

[28] Counter-Memorial on Jurisdiction, paras. 24-25.

[29] Counter-Memorial on Jurisdiction, para. 28.

remained the beneficial owner of IN Asset Management throughout the period when the shares were held by Mr and Mrs Francken.

57. According to the Claimant, companies "control the subsidiary companies that they own."[30] The terms "controlled, directly or indirectly" in Article I(b)(III) of the BIT include ownership, but are not limited to ownership. The term "indirectly" in Article 1(b)(III) of the BIT implies that this term is being used in a much broader sense than ownership, however, this does not mean that ownership does not amount to "control."[31] The Claimant refers, in support of its position, to *Aguas del Tunari SA v. Bolivia*, in which the tribunal held that the phrase "controlled directly or indirectly" referred to the legal capacity rather than fact.[32]

58. The Claimant denies that the deed of 1 October 2008, pursuant to which IN Asset Management holds the shares of CCG in CCT as a trustee, is relevant to the Tribunal's jurisdiction. According to the Claimant, IN Asset Management as the legal owner of the shares for and on behalf of CCG, the beneficial owner, "is controlling the shares for the Beneficial Owner."[33] As the legal owner, IN Asset Management holds all the voting rights in CCT, "which means that it controls its own subsidiary within the meaning of the BIT."[34] The role of CCG in this structure is "passive" as the deed only addresses any transactions on the shares and the income earned, derived or received from the shares and the associated benefits.[35] According to the Claimant, beneficial ownership could be relied upon to prove control, but it cannot be "applied against nationality."[36]

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[30] Counter-Memorial on Jurisdiction, para. 30.

[31] Counter-Memorial on Jurisdiction, para. 30; Hearing on Jurisdiction, Transcript, I/144/11-21.

[32] Memorial on the Merits, para. 47. *See Aguas del Tunari SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objection to Jurisdiction, 21 Oct. 2005, Exhibit RLA-0002.

[33] Counter-Memorial on Jurisdiction, para. 32.

[34] Counter-Memorial on Jurisdiction, para. 32.

[35] Counter-Memorial on Jurisdiction, para. 33.

[36] Counter-Memorial on Jurisdiction, para. 36.

B. Burden of Proof and Relevant Evidence

1. The Respondent's position

59. The Respondent argues, relying on arbitral jurisprudence, that the Claimant bears the burden of proving, by preponderance of the evidence, that it was controlled at all relevant times by Stichting Intetrust and thus qualifies as a "national" of the Netherlands within the meaning of Article 1(b)(III) of the BIT and Article 25(1) of the ICSID Convention.[37] This it has failed to do.[38]

60. The Respondent argues that the Claimant has not produced any documentary evidence to show that it was in fact controlled by Stichting Intetrust at the relevant time. The Claimant merely relies on evidence showing that at certain periods of time, *i.e.*, from around 2002/2003 to 24 June 2005, from 29 October 2008 to 4 May 2010 and from 5 September 2012 onwards, Stichting Intetrust has indirectly, through IN Asset Management and CCT, held shares in the Claimant. The Respondent submits that the evidence shows that in September/October 2008 CCG transferred, against nominal consideration, legal ownership in the Claimant to CCT, while retaining beneficial ownership and control over the Claimant. CCT had been created shortly beforehand by IN Asset Management for the very purpose of this trustee arrangement.[39]

61. According to the Respondent, the Claimant is a company that specializes in providing asset protection structures and services to conceal the ownership of funds and assets. Similarly, based on the information available on its website, IN Asset Management "appears to specialize in establishing corporate structures that permit its clients to exercise control over their assets without retaining legal ownership."[40] The relevant mechanisms to achieve this

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[37] Memorial on Jurisdiction, paras. 47-50; Reply on Jurisdiction, paras. 17-22, referring to *Waguih Elie George Siag and Clorinda Vecchi v. Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, paras. 315-316, Exhibit RLA-0023; *Philip Morris Brands SARL, Philip Morris Products SA and Abal Hermanos SA v. Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, para. 29, Exhibit RLA-0016; *National Gas S.A.E v. Egypt*, ICSID Case No. ARB/11/7, Award, 3 Apr. 2014, para. 118, Exhibit RLA-0026; and *Abaclat and Others v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 Aug. 2011, para. 678, Exhibit RLA-0001. *See also* Hearing on Jurisdiction, Transcript, I/13/21-I/14/16.

[38] Reply on Jurisdiction, para. 23.

[39] Memorial on Jurisdiction, para. 71.

[40] Memorial on Jurisdiction, para. 80.

include "private trustee services" and "foundations," one of the main purposes of these mechanisms being "to hide assets from third parties and governments to obscure 'management and control.'"[41]

62. The Respondent also contends that the Claimant has failed to comply with "several aspects" of Procedural Order No. 3, in which the Tribunal ordered the Claimant to produce certain documents relating to its ownership requested by the Respondent, including the document that describes the arrangement pursuant to which Stichting Intetrust allegedly holds the shares in IN Asset Management, the documents related to the various transfers of shares between Stichting Intetrust and Mr and Ms Francken, and documents which would prove the extent to which Stichting Intetrust may have exercised voting rights in respect of the Claimant.[42] The Respondent does not accept the Claimant's statement that these documents do not exist, citing corporate regulatory requirements under New Zealand law.[43]

63. The Respondent notes that the Claimant's refusal is based on Mr Francken's statement that the requested documents concern "a private arrangement which has nothing to do with the Claimant."[44] According to the Respondent, the Claimant's refusal to produce the requested documents is inadequate since the jurisdictional basis of the Claimant's case hinges on its allegation that it is controlled by Stichting Intetrust.[45]

64. The Respondent submits that the Tribunal should draw an adverse inference from the Claimant's refusal to produce the documents, arguing that "if Stichting Intetrust were to own the shares in IN Asset Management (and, indirectly, the Claimant) under some form of 'private arrangement' details of which have not been disclosed, the Tribunal should infer from the Claimant's refusal to disclose the terms of this arrangement that the Claimant is not in fact controlled by Stichting Intetrust."[46]

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[41] Memorial on Jurisdiction, para. 80.

[42] Memorial on Jurisdiction, paras. 61-62; Reply on Jurisdiction, paras. 24-27.

[43] Memorial on Jurisdiction, paras. 64-66; Reply on Jurisdiction, paras. 28-31.

[44] Counter-Memorial on Jurisdiction, para. 46; Email correspondence with Mr Francken, Exhibit C-0052.

[45] Reply on Jurisdiction, paras. 25-26.

[46] Memorial on Jurisdiction, para. 90.

65. The Respondent also submits that the Tribunal should draw an adverse inference from the Claimant's failure to produce documents related to the various transfers of the shares in IN Asset Management between Stichting Intetrust and Mr and Mrs Francken, despite the Tribunal's order.[47] The Respondent submits that the Tribunal should conclude that "the fact that ownership of the shares in IN Asset Management Limited was only intermittently held by Stichting Intetrust further confirms the fact that the Claimant was not in fact controlled by Stichting Intetrust as the Claimant alleges."[48]

66. The Respondent also refers to Item 2 of the Redfern Schedule, under which the Claimant was ordered to produce "[m]anagement agreement, minutes of board or shareholders meetings, board or shareholder resolutions or other corporate documents that identify the persons or entities that hold voting rights or reflect any restrictions on the exercise of voting rights in respect of (a) IN Asset Management, (b) Capital Conservator Trustees Limited and (c) the Claimant, and in particular the extent to which Stichting Intetrust holds any such voting rights (if at all)."[49] Noting Mr Francken's statement that "[t]he documents as requested do not exist as there is / was no need,"[50] the Respondent does not accept that such standard corporate documents would not exist,[51] on the basis that under the New Zealand law, companies incorporated in New Zealand are required to keep minutes of board or shareholders meetings for a period of seven years.[52]

67. The Respondent further argues that the Claimant's explanation that the decisions of Stichting Intetrust could be enforced immediately as a result of Mr Francken's role as director of Stichting Intetrust, IN Asset Management and CCT does not provide a legitimate reason for not holding corporate records for those entities.[53]

[47] Memorial on Jurisdiction, paras. 127-129; Hearing on Jurisdiction, Transcript, I/32/4-18; Procedural Order No. 3, Item 5 of the Redfern Schedule.

[48] Memorial on Jurisdiction, para. 129.

[49] Procedural Order No. 3, Item 2 of the Redfern Schedule.

[50] Email correspondence with Mr Francken, Exhibit C-0052, p. 4.

[51] Memorial on Jurisdiction, paras. 61-63; Reply on Jurisdiction, paras. 27-28 and 31.

[52] Memorial on Jurisdiction, paras. 64-66; Reply on Jurisdiction, paras. 29-30.

[53] Reply on Jurisdiction, para. 31.

68. The Respondent submits that, as a result of the Claimant's failure to comply with the Tribunal's Order under Item 2 of the Redfern Schedule and to produce standard corporate documents required to be kept under the New Zealand law, the Claimant cannot be considered to have discharged its burden to establish that the Claimant was at all relevant times controlled by Stichting Intetrust.[54]

69. The Respondent concludes that the Claimant's failure to produce any evidence showing that Stichting Intetrust controls the Claimant demonstrates that it is unable to establish this fact, and that the Tribunal should, as a result, decline jurisdiction.[55]

2. The Claimant's position

70. The Claimant argues that the issue of who bears the burden of proving the nationality of the investor is "vague and questionable in international arbitration legal practice."[56] The Claimant submits that, in any event, it has submitted sufficient evidence to prove its Netherlands nationality under the BIT. On the other hand, the Respondent has failed to establish that the Claimant is not a national of the Netherlands.[57]

71. The Claimant submits that the documents of the New Zealand Company Register regarding the change of legal ownership in IN Asset Management establish the control of Stichting Intetrust over the Claimant,[58] and the fact that Stichting Intetrust owns the shares of IN Asset Management demonstrates that it controls the other companies in the structure.[59] Furthermore, the extracts of registration of CCT in themselves establish that CCT was actually exercising control over the Claimant.[60]

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[54] Reply on Jurisdiction, para. 32.

[55] Memorial on Jurisdiction, paras. 59 and 67-68.

[56] Counter-Memorial on Jurisdiction, para. 40.

[57] Counter-Memorial on Jurisdiction, para. 40.

[58] Counter-Memorial on Jurisdiction, para. 40; Hearing on Jurisdiction, Transcript, I/61/3-24.

[59] Counter-Memorial on Jurisdiction, para. 40.

[60] Hearing on Jurisdiction, Transcript, I/172/6-I/175/21; Commercial register extracts of Stichting Intetrust, IN Asset Management Limited, Capital Conservator Trustees Limited and Guardian Fiduciary Trust Limited, Exhibit C-0049.

72. The Claimant argues that there is no basis for any adverse inference as it has fully complied with the Tribunal's orders to produce documents by addressing these requests to Mr Francken.[61]

73. As to Item 1 of the Redfern Schedule, under which the Claimant was ordered to produce the "[d]eed of trust or equivalent document that establishes, or otherwise describes, the terms of the arrangement pursuant to which Stichting Intetrust holds (a) the family interests of Mr Nicolaas Francken, (b) IN Asset Management, (c) Capital Conservator Trustees Limited and (d) the Claimant,"[62] the Claimant explains that Mr Francken "does not agree to provide any information in respect with the Stichting Intetrust and his family, since it is a private arrangement which has nothing to do with the Claimant."[63] According to the Claimant, this information is irrelevant to the case and does not have any connection with the Claimant.[64]

74. As to Item 2 of the Redfern Schedule, under which the Claimant was ordered to produce "[m]anagement agreements, minutes of board or shareholders meetings, board or shareholder resolutions or other corporate documents that identify the persons or entities that hold voting rights or reflect any restrictions on the exercise of voting rights in respect of (a) IN Asset Management, (b) Capital Conservator Trustees Limited and (c) the Claimant, and in particular the extent to which Stichting Intetrust holds any such voting rights (if at all),"[65] the Claimant states that the requested documents do not exist.[66] The Respondent's argument that Section 189 of the New Zealand Companies Act of 1993 requires that such documents be held for seven years does not apply because such documents were not needed in the first place for a number of reasons, including Mr and Mrs Francken being members of the board of directors of Stichting Intetrust and directors of IN Asset Management, and

[61] Counter-Memorial on Jurisdiction, para. 42.

[62] Procedural Order No. 3, Item 1 of the Redfern Schedule.

[63] Counter-Memorial on Jurisdiction, para. 46.

[64] Counter-Memorial on Jurisdiction, paras. 46-49.

[65] Procedural Order No. 3, Item 2 of the Redfern Schedule.

[66] Counter-Memorial on Jurisdiction, paras. 50-51.

Mr Francken being the director of CCT,[67] and because the Claimant was not operating in New Zealand.[68]

75. As to Item 5 of the Redfern Schedule, under which the Claimant was ordered to produce "the share sale agreements regarding the various transfers of shares in IN Asset Management between Stichting Intetrust and Mr Nicolaas Francken and/or Ms Irina Francken that took place in the period between 2002 and 2012, including the share sale agreement relating to the (most recent) transfer of shares from Mr Nicolaas Francken and Ms Irina Francken to Stichting Intetrust on 5 September 2012,"[69] the Claimant asserts that, as explained by Mr Francken, the share transfers were registered as they took place and Stichting Intetrust was always the beneficial owner of IN Asset Management and the shares were therefore never sold.[70] Also, since Mr and Mrs Francken are members of the board of directors of Stichting Intetrust and directors of IN Asset Management, no formal agreements were necessary.[71]

76. As to Item 8 of the Redfern Schedule, under which the Claimant was ordered to produce "services contracts evidencing the nature of the services performed by IN Asset Management for the Capital Conservator group in respect of the creation of Capital Conservator Trustees Limited and the corporate structure establishing ownership and/or control over the Claimant,"[72] the Claimant submits that the engagement letter dated 16 September 2008 is the only relevant document.[73]

77. As to Item 9 of the Redfern Schedule, under which the Claimant was ordered to produce "[a]ll deeds of trust or other documents related to the private trust or similar structure through which the shares in Capital Conservator Trustees Limited and/or the Claimant are

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[67] Counter-Memorial on Jurisdiction, para. 52.

[68] Hearing on Jurisdiction, Transcript, I/154/7-20.

[69] Procedural Order No. 3, Item 5 of the Redfern Schedule.

[70] Counter-Memorial on Jurisdiction, paras. 54-55.

[71] Counter-Memorial on Jurisdiction, para. 56.

[72] Procedural Order No. 3, Item 8 of the Redfern Schedule.

[73] Counter-Memorial on Jurisdiction, para. 43; Engagement letter between IN Asset Management Limited and Capital Conservator Group dated 16 Sept. 2008, Exhibit R-0025.

or, since 2008 have been, held"[74] the Claimant explains that the deed dated 1 October 2008 concerning the shares of CCT,[75] produced pursuant to the Tribunal's Procedural Order No. 3, and the share transfer agreement concerning the shares of CCSL dated 17 September 2008,[76] produced in response to the Respondent's document production request, are the only two documents responsive to this request.[77] This is in addition to the deed of trust dated 4 May 2010 which the Claimant filed in September 2012 in response to queries from the ICSID Secretariat.[78]

78. Finally, the Claimant contends that being at the bottom of the corporate chain, it is not in a position to direct Stichting Intetrust, or the other subsidiary companies in the chain, or any other person, to produce documents. The Claimant would therefore not be in possession or custody of the requested documents even when such documents exist.[79] The Claimant argues that therefore the Respondent's request that the Tribunal draw adverse inferences is unfounded.[80]

C. The Claimant's Corporate Structure

1. The Respondent's position

79. The Respondent argues that the Claimant's representation of its corporate structure, as set out in Exhibit 3 to the Request for Arbitration,[81] is misleading and wrong.[82]

80. First, the Respondent argues that, contrary to what is shown by the chart, the Claimant was owned prior to 17 September 2008 by CCG, a Marshall Islands company, and not by IN

[74] Procedural Order No. 3, Item 9 of the Redfern Schedule.

[75] Deed created by IN Asset Management Limited dated 1 Oct. 2008, Exhibit R-0003.

[76] Transfer of Shares dated 17 Sept. 2008, Exhibit R-0001.

[77] Counter-Memorial on Jurisdiction, para. 44.

[78] Documents for Summary of Share Parcels Changes, Exhibit C-0004; Counter-Memorial on Jurisdiction, para. 45.

[79] Counter-Memorial on Jurisdiction, para. 57.

[80] Counter-Memorial on Jurisdiction, para. 57; Hearing on Jurisdiction, Transcript, I/143/2-24.

[81] Chart reflecting the organizational structure of GFT, Exhibit C-3 submitted in support of the Request for Arbitration.

[82] Hearing on Jurisdiction, Transcript, I/22/9-15; Memorial on Jurisdiction, para. 85.

Asset Management.[83] On 17 September 2008, CCG transferred its shareholding in the Claimant to CCT for a nominal price of USD 1.00.[84] According to the Respondent, only the legal title, but not the beneficial ownership, was transferred to IN Asset Management.[85]

81. Second, the Respondent contends that the information provided by the Claimant regarding the periods of time when IN Asset Management was owned by Stichting Intetrust is incomplete.[86] The chart does not mention that the shares in IN Asset Management were transferred back to Stichting Intetrust only on 5 September 2012, *i.e.,* after the filing by the Claimant of the Request for Arbitration.[87]

82. Third, the chart suggests that Mr and Mrs Francken are owners of Stichting Intetrust, while arguing elsewhere that a Dutch foundation has no owners; Mr and Mrs Francken are merely board members of Stichting Intetrust.[88] Moreover, while the Claimant alleges that Stichting Intetrust is "the owner and holder of all the family interests of Nicolas Jan Carol Francken [sic],"[89] the Respondent notes that the Claimant has failed to provide any evidence in support of its allegation, despite the Tribunal's order that the Claimant produce the relevant documentation. The Tribunal should draw adverse inference and conclude that the Claimant is in fact not controlled by Stichting Intetrust.[90]

83. Fourth, the Respondent notes that the Claimant has produced a deed dated 4 May 2010 (but no deeds for the earlier periods) to show that Mr and Mrs Francken held the shares in IN Asset Management as trustees for and on behalf of Stichting Intetrust, which is defined in the deed as the beneficial owner of IN Asset Management.[91] As according to the Claimant

[83] Memorial on Jurisdiction, paras. 84-87; Hearing on Jurisdiction, Transcript, I/22/22-I/23/4.

[84] Memorial on Jurisdiction, para. 94 (c); Transfer of Shares of Capital Conservator Savings & Loans dated 17 Sept. 2008, Exhibit R-0001; Hearing on Jurisdiction, Transcript, I/24/12-I/24/15.

[85] Hearing on Jurisdiction, Transcript, I/130/18-24.

[86] Memorial on Jurisdiction, para. 88.

[87] Memorial on Jurisdiction, para. 88.

[88] Memorial on Jurisdiction, para. 89.

[89] Claimant's Memorial on the Merits, para. 20.

[90] Memorial on Jurisdiction, para. 90.

[91] Memorial on Jurisdiction, para. 91; Deed dated 4 May 2010, Exhibit C-0004; Hearing on Jurisdiction, Transcript, I/132/23-I/133/2.

Mr and Mrs Francken held the shares in IN Asset Management for and on behalf of Stichting Intetrust, while being board members of Stichting Intetrust, which in turn held the family interest of the Francken family, the Respondent submits that this "opaque circular arrangement" is artificial and undermines the Claimant's submission that Stichting Intetrust actually exercised any control over IN Asset Management.[92]

84. Finally, the Respondent notes that the Claimant's chart does not reflect the deed dated 1 October 2008,[93] based on which IN Asset Management holds the shares in CCT (which owns the Claimant) as a trustee for and on behalf of CCG, the beneficial owner of CCT. The deed shows that IN Asset Management held the shares merely as a nominee, and that CCG, a Marshall Islands company, "held not only beneficial ownership of, but also continued to control, Capital Conservator Trustees Limited (and the Claimant)."[94] The ownership structure of the Claimant should therefore be represented by the following chart:[95]

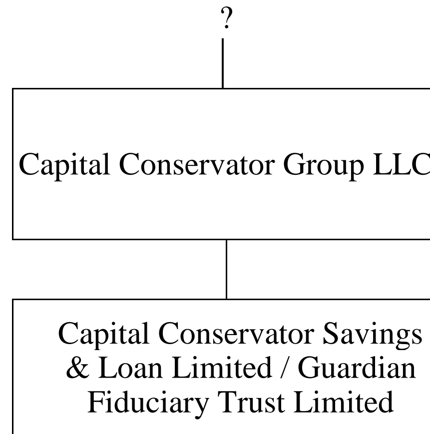
[92] Memorial on Jurisdiction, para. 92; Hearing on Jurisdiction, Transcript, I/133/8-18.

[93] Deed created by IN Asset Management Limited dated 1 Oct. 2008, Exhibit R-0003.

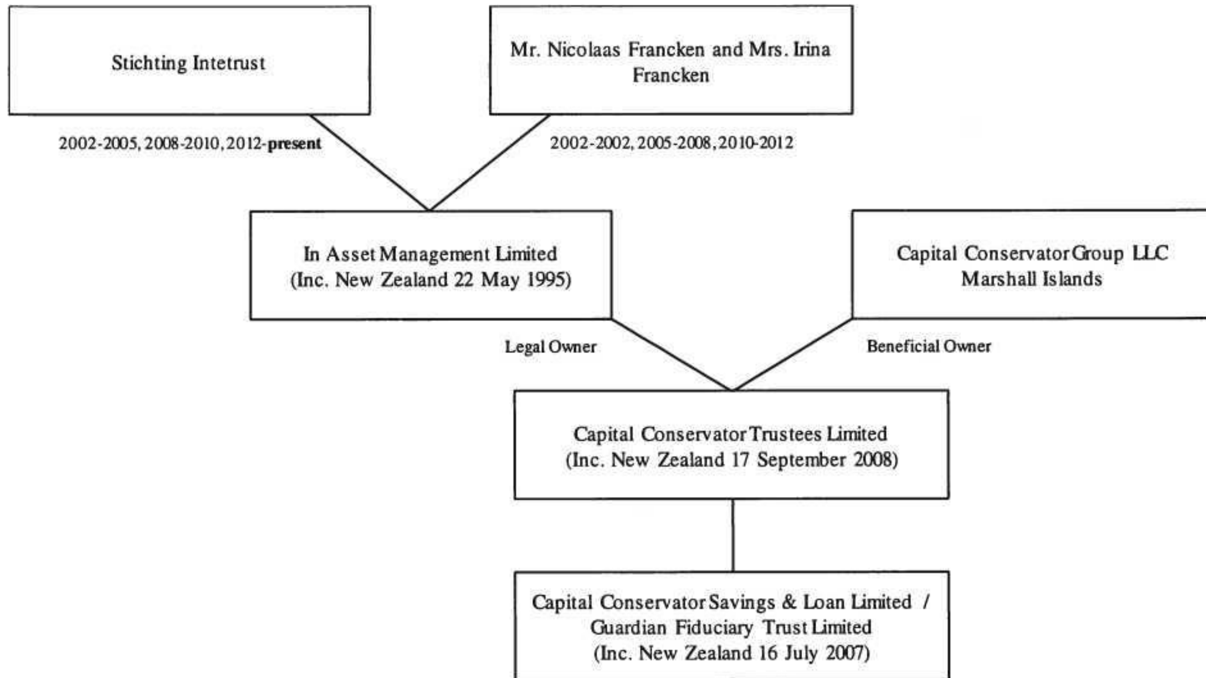
[94] Memorial on Jurisdiction, para. 93; Hearing on Jurisdiction, Transcript, I/134/1-15.

[95] Memorial on Jurisdiction, para. 95.

For the period prior to 1 October 2008:



For the period subsequent to 1 October 2008:



85. The Respondent argues that the engagement letter between IN Asset Management and CCG, which was signed on 16 September 2008, and thus "only days before" the creation of CCT, shows that IN Asset Management was engaged by CCG, and its director, Mr David Finzer, to devise and implement a structure whereby CCG would retain beneficial ownership of the

Claimant, while transferring its legal ownership to CCT, the latter being held by IN Asset Management as a nominee trustee acting in a professional capacity.[96]

86. The Respondent infers from the evidence that until 17 September 2008, CCG was the legal and beneficial owner of the Claimant. However, on 17 September 2008, CCT was incorporated, with IN Asset Management as its sole owner, and Mr Francken as a director, and CCG transferred its shares in the Claimant to CCT, for a nominal payment of US$ 1 on the same day. On 1 October 2008, IN Asset Management executed the deed of trust pursuant to which IN Asset Management would hold CCT, and the Claimant, on trust for CCG.[97]

2. The Claimant's position

87. The Claimant argues that the fact that Stichting Intetrust is at the end of the chain of ownership of the Claimant is sufficient to establish its Dutch nationality. Relying on the summary of the share parcel changes of IN Asset Management registered with the New Zealand Companies Register, the Claimant asserts that in 2009, when the claim arose, Stichting Intetrust had 100% ownership of the shares in IN Asset Management, and that the latter had 100% legal ownership of CCT, which in turn owned the Claimant.[98]

88. The Claimant explains that CCT acquired all of the Claimant's issued share capital on 17 September 2008, and that accordingly, as of this day, Stichting Intetrust, through its wholly owned subsidiaries IN Asset Management and CCT, held all the shares and voting rights in the Claimant.[99] Under Dutch law, foundations such as Stichting Intetrust have no owner and cannot therefore be controlled by another entity. This is sufficient for the purposes of establishing the Claimant's nationality under the BIT.[100]

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[96] Memorial on Jurisdiction, paras. 97-101; Hearing on Jurisdiction, Transcript, I/25/3-I/26/5.

[97] Memorial on Jurisdiction, paras. 94 and 95; Hearing on Jurisdiction, Transcript, I/26/6-I/27/2.

[98] Counter-Memorial on Jurisdiction, paras. 19-20 and 67 A; Rejoinder on Jurisdiction, para. 19; Documents for Summary of Share Parcels Changes of Stichting Intetrust, Exhibit C-0004; Hearing on Jurisdiction, Transcript, I/62/7-19.

[99] Counter-Memorial on Jurisdiction, paras. 20 and 26.

[100] Counter-Memorial on Jurisdiction, paras. 21-22.

D. Exercise of Control over the Claimant

1. The Respondent's position

89. The Respondent argues that the Claimant has failed to prove that Stichting Intetrust controlled the Claimant at all relevant times. On the contrary, the evidence shows that the Claimant was at all relevant times controlled by CCG, a company incorporated in the Marshall Islands.[101]

90. The Respondent reiterates its position that the Claimant has failed to comply with the Tribunal's order to produce documents evidencing that Stichting Intetrust is the owner and holder of the family interests of Mr Francken.[102] The Tribunal should draw an adverse inference from the Claimant's refusal to disclose such documents and conclude that Stichting Intetrust never controlled the Claimant.[103]

91. The Respondent submits that while the Claimant has failed to establish the ownership of CCG, publicly available information suggests that it was owned by Mr Finzer, until his death in November 2012, and that Mr Finzer was the sole owner and CEO of CCG until then.[104] The Respondent concludes that the Claimant must have been controlled by CCG, and ultimately by its beneficial owner Mr Finzer, from October 2008 until November 2012, and not by IN Asset Management.[105]

92. Relying on the information available on the websites of IN Asset Management and CCG,[106] the Respondent notes that both companies are experienced in devising asset protection structures.[107] Similarly, the purpose of the arrangement between IN Asset Management and CCG concluded on 16 September 2008 was to provide professional trustee services, and

[101] Hearing on Jurisdiction, Transcript, I/29/9-I/31/5; Memorial on Jurisdiction, paras. 101-111.

[102] Procedural Order No. 3, Item 1 of the Redfern Schedule.

[103] Memorial on Jurisdiction, para. 90.

[104] Communiqué from Capital Conservator Group LLC reported on an internet blog "Expatbob" on 24 Nov. 2012, Exhibit R-0002; Screenshot of Capital Conservator webpage, 28 Mar. 2013, Exhibit R-0026.

[105] Memorial on Jurisdiction, paras. 103-111.

[106] Extracts from Capital Conservator website, Exhibit R-0009; Extracts from IN Asset Management website, Exhibit R-0010.

[107] Memorial on Jurisdiction, paras. 73-75; Hearing on Jurisdiction, Transcript, I/17/25-I/22/1 and I/27/3-12.

accordingly IN Asset Management only acted in a nominee capacity in its dealing with the Claimant under this arrangement, as it did for some 123 companies.[108] The Respondent submits that this is consistent with IN Asset Management being a private trustee company, which, on the face of its website, appears to specialize in establishing corporate structures that permit its clients to exercise control over their assets without retaining legal ownership.[109]

93. The Respondent argues that Mr Francken was acting only in a nominee capacity in its dealings with CCT and exercised no actual control over the Claimant.[110] In support of its assertion the Respondent relies on a statement of Mr Francken made in a newspaper where it was reported that he was "acting only as nominee and had no involvement in the Guardian Fiduciary business,"[111] as well as on the fact that Mr Francken was a director of some 174 companies, including numerous trustee companies.[112]

94. The deed of 1 October 2008 demonstrates that the Claimant remained beneficially owned and controlled by CCG since this date.[113] The deed ensured that IN Asset Management, a professional trustee, held the shares in CCT in a nominee capacity and that CCG remained the beneficial owner of CCT.[114] Under the terms of the arrangement, IN Asset Management could not have exercised effective control over the Claimant; beneficial ownership, and accordingly control, was retained by CCG.[115]

95. In support of its position, the Respondent relies on the Opinion of Mr Francis Barlow QC. Mr Barlow opines that the deed was a "bare trust;" a trust arrangement under which the trustee has no beneficial interest in the trust property, but holds the bare legal title to the

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[108] Memorial on Jurisdiction, paras. 113-117.

[109] Memorial on Jurisdiction, paras. 77-83 and 118; Extracts from IN Asset Management website, Exhibit R-0010.

[110] Memorial on Jurisdiction, paras. 115-118; Hearing on Jurisdiction, Transcript, I/27/13-I/28/15.

[111] Tim Hunter, "Dunedin firm goes legal in the Balkans", 3 Feb. 2013, Exhibit R-0039.

[112] List of shareholdings of IN Asset Management Limited from website of New Zealand Companies Office, accessed 19 Aug. 2014, Exhibit R-0041.

[113] Memorial on Jurisdiction, para. 120.

[114] Memorial on Jurisdiction, paras. 121-123; Deed created by IN Asset Management dated 1 Oct. 2008, Exhibit R-0003; Hearing on Jurisdiction, Transcript, I/16/14-I/17/10.

[115] Memorial on Jurisdiction, para. 124.

property as trustee for the beneficial owner who retains ownership and control over the trust property.[116] Mr Barlow concludes that under the terms of the deed, the Claimant cannot be controlled by CCT, as a result of Stichting Intetrust not being entitled to control CCG.[117]

96. In response to the Claimant's assertion that under the deed, the holding of the shares for and on behalf of the beneficial owner (*i.e*. CCG) meant that the legal owner (*i.e*. IN Asset Management) controlled the shares for the beneficial owner, the Respondent submits that if it were to be considered that IN Asset Management controlled the Claimant, it did so on behalf of CCG, not Stichting Intetrust.[118]

97. The Respondent disputes the Claimant's argument in support of its assertion that the deed "does not have an impact on the functionality of the structure that is under the supervision and control of the Stichting Intetrust."[119] First, the Respondent argues that if CCG never appointed a new or additional trustee, it is because CCG never needed to replace IN Asset Management as a trustee since IN Asset Management acted on the directions of CCG;[120] and second, while Mr and Mrs Francken are members of the board of Stichting Intetrust and directors of IN Asset Management, and since Mr Francken is a director of CCT, the Claimant ignores the fact that Mr Finzer was the sole director of the Claimant until his death in November 2012.[121]

98. As for the various transfers of shares of IN Asset Management that occurred between Stichting Intetrust and Mr and Mrs Francken, the Respondent argues that they support the conclusion that the Claimant was never controlled by Stichting Intetrust. According to the Respondent, Stichting Intetrust, a foundation established for the purpose of holding the

[116] Opinion of Mr Barlow, para. 15.

[117] Opinion of Mr Barlow, para. 24.

[118] Reply on Jurisdiction, para. 35.

[119] Counter-Memorial on Jurisdiction, paras. 33 and 34.

[120] Reply on Jurisdiction, para. 36.

[121] Reply on Jurisdiction, para. 37.

family interests of the Francken family, and whose board members are Mr and Mrs Francken, could not have directed these changes of ownership.[122]

99. According to the Respondent, the transfer of ownership of shares in IN Asset Management that took place on 5 September 2012, from Mr and Mrs Francken to Stichting Intetrust, must have been made for the sole purpose of establishing ICSID jurisdiction. The Respondent argues that the relevant date to determine the Claimant's nationality and therefore the Tribunal's jurisdiction is the date of the filing of the Request for Arbitration.[123] The Respondent notes that this transfer of shares took place after the Request for Arbitration was filed with ICSID (on 2 August 2012) and before ICSID registered the Request for Arbitration (on 5 October 2012), and that the timing of the transfer of shares gives rise to a presumption that it was made in order to attempt to confer Dutch nationality on the Claimant for the purpose of conferring jurisdiction over the Claimant's claim.[124]

100. The Respondent notes that despite having been ordered to produce the documents explaining these changes of ownership of the shares of IN Asset Management, the Claimant has failed to provide the documents on the basis that such documents would not exist.[125] The Respondent does not accept this allegation and invites the Tribunal to draw an adverse inference that the Claimant was in fact never controlled by Stichting Intetrust.[126]

101. The Respondent further submits that the Claimant's failure to produce these documents should compel the Tribunal to draw adverse inference regarding the motive for the transfer of shares on 5 September 2012.[127] The Respondent notes that there is *jurisprudence constante* to the effect that transfer of ownership in an investment for the purpose of

[122] Memorial on Jurisdiction, paras. 125-126.

[123] Hearing on Jurisdiction, Transcript, I/134/23-I/138/11.

[124] Memorial on Jurisdiction, paras. 130-132; Reply on Jurisdiction, paras. 48-49; Hearing on Jurisdiction, Transcript, I/32/21-I/35/8.

[125] Memorial on Jurisdiction, paras. 127-129; Procedural Order No. 3, Item 5 of the Redfern Schedule.

[126] Memorial on Jurisdiction, para. 129; Hearing on Jurisdiction, Transcript, I/32/4-18.

[127] Procedural Order No. 3, Item 5 of the Redfern Schedule; Reply on Jurisdiction, paras. 45-46; Hearing on Jurisdiction, Transcript, I/32/4-18.

obtaining ICSID jurisdiction over a claim is an abuse of process, and that the Tribunal should therefore decline jurisdiction.[128]

102. The Respondent disputes the Claimant's allegation that only Stichting Intetrust was aware of the change of ownership of IN Asset Management, and that in any event, whether or not it had such knowledge is irrelevant.[129] If, as asserted by the Claimant, the Claimant's officers were unaware of the transfer of shares in IN Asset Management to Stichting Intetrust, this means that the Claimant was unaware of the identity and nationality of its ultimate legal owner, and it would be wrong to invoke the nationality of this ultimate legal owner for purposes of legal protection.[130]

103. Citing *Banro American Resources, Inc. v Democratic Republic of the Congo*,[131] the Respondent argues that the Claimant must have met the relevant nationality requirement on both the date it consented to ICSID arbitration (6 August 2012, the date ICSID received the Request for Arbitration, "if note before") and the date of the registration of the claim (5 October 2012). However, on the earlier of these dates legal ownership of the Claimant was held indirectly by Mr and Mrs Francken, and not Stichting Intetrust.[132]

104. Finally, relying on Mr Barlow's interpretation of the deeds of 4 May 2010 and 1 October 2008,[133] the Respondent argues that if as expressed by the Claimant, the 4 May 2010 deed operates to confer control to Stichting Intetrust (the beneficiary of the trust) over the shares in IN Asset Management, then the October 2008 deed must be interpreted as conferring control to CCG over CCT and the Claimant, not Stichting Intetrust.[134]

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[128] Memorial on Jurisdiction, para. 132; Reply on Jurisdiction, paras. 46 and 52, referring *inter alia* to *Banro American Resources, Inc. v. Democratic Republic of the Congo*, ICSID Case No. ARB/98/7, Award, 1 Sept. 2000, para. 1, Exhibit RLA-0025; and *Achmea B.V. v. The Slovak Republic*, UNCITRAL arbitration, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 Oct. 2010, para. 223, Exhibit RLA-0024.

[129] Reply on Jurisdiction, paras. 45-48. *See also* Counter-Memorial on Jurisdiction, para. 61.

[130] Reply on Jurisdiction, para. 48.

[131] *Banro American Resources, Inc. v. Democratic Republic of the Congo,* ICSID Case No. ARB/98/7, Award, 1 Sept. 2000, para. 1, Exhibit RLA-0025.

[132] Reply on Jurisdiction, paras. 50-51.

[133] Hearing on Jurisdiction, Transcript, I/94/2-I/96/21.

[134] Hearing on Jurisdiction, Transcript, I/132/2-I/134/15.

2. The Claimant's position

105. The Claimant argues that Stichting Intetrust controls the Claimant, through its wholly owned subsidiaries IN Asset Management and CCT, since 17 September 2008. This is also reflected in the fact that Mr Francken and Mrs Francken are members of the board of directors of Stichting Intetrust and directors of IN Asset Management, and Mr Francken is also director of CCT.[135]

106. The Claimant argues that the deed of 1 October 2008 does not affect the control exercised by IN Asset Management over the Claimant and has no impact on the function of the structure that is under supervision and control of Stichting Intetrust.[136] According to the Claimant, under the deed, IN Asset Management (the trustee) holds the shares in CCT for and on behalf of CCG (the beneficial owner) and as a result, IN Asset Management controls the shares for CCG.[137] Since IN Asset Management is the legal owner of CCT, it holds all the voting rights in the company and therefore controls it as its subsidiary within the meaning of the BIT.[138]

107. The Claimant argues that the Opinion of Mr Francis Barlow, filed by the Respondent in support of its Reply on Jurisdiction, in fact shows that the Claimant has Dutch nationality under the BIT.[139] According to the Claimant's reading of the Opinion, Mr Barlow in fact confirms that Stichting Intetrust has control over CCT and the Claimant, in that it has the power to change the directors of IN Asset Management, CCT and the Claimant, and that this is "sufficient for proving that Claimant is a national of the Kingdom of Netherlands."[140]

108. The Claimant disputes Mr Barlow's conclusion that CCT is not controlled by Stichting Intetrust since Stichting Intetrust has the power to change the directors of all of the

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[135] Counter-Memorial on Jurisdiction, paras. 67 B and C; Rejoinder on Jurisdiction, paras. 17-19.

[136] Counter-Memorial on Jurisdiction, para. 33; Rejoinder on Jurisdiction, paras. 18-20; Hearing on Jurisdiction, Transcript, I/64/1-I/65/24, I/145/16-I/149/11, I/151/1-11, I/159/17-I/160/1 and I/168/20-I/169/9.

[137] Counter-Memorial on Jurisdiction, paras. 31-32.

[138] Counter-Memorial on Jurisdiction, paras. 32 and 67 D; Rejoinder on Jurisdiction, para. 20.

[139] Rejoinder on Jurisdiction, para. 6.

[140] Rejoinder on Jurisdiction, paras. 8-10 and 16, referring to the Opinion of Mr Barlow, paras. 21 and 22.

subsidiaries in the structure.[141] The Claimant also argues that Mr Barlow is not an expert on ICSID or investment treaty law, and that his conclusions on the meaning of the term "control" under New Zealand law are not relevant for the interpretation of the BIT.[142]

109. The Claimant also points out that, even if the shares of IN Asset Management were transferred to Mr and Mrs Francken for the period 4 May 2010 to 5 September 2012, Stichting Intetrust remained the beneficial owner of the shares throughout this period. This means that the Claimant continued to be controlled, indirectly, by Stichting Intetrust, a national of the Netherlands, throughout this period.[143] The Claimant adds that the deed only imposed restrictions on transactions on the shares of CCT, having no impact on the voting rights, and therefore on the control exercised by IN Asset Management on CCT.[144]

110. The Claimant further argues that the fact that Mr and Mrs Francken were always members of the board of directors of Stichting Intetrust and directors of IN Asset Management, and that Mr Francken was the sole director of CCT, clearly shows that the fact that Stichting Intetrust was the beneficial owner of IN Asset Management at certain times had no effect on the control it exercised over IN Asset Management.[145]

111. According to the Claimant, as a result of the broad definition of nationality provided for in the BIT, beneficial ownership does not amount to absence of control of the legal owner over its subsidiaries in the structure. The Claimant therefore concludes that the deed of 1 October 2008 is irrelevant in the present case.[146]

112. In response to the Respondent's argument that the letter of engagement from IN Asset Management to CCG dated 16 September 2008 establishes that IN Asset Management was engaged to divide the beneficial and legal ownership of the Claimant, the Claimant submits

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[141] Rejoinder on Jurisdiction, para. 11.

[142] Rejoinder on Jurisdiction, para. 11.

[143] Rejoinder on Jurisdiction, para. 15.

[144] Rejoinder on Jurisdiction, para. 18.

[145] Counter-Memorial on Jurisdiction, paras. 28 and 35; Rejoinder on Jurisdiction, para. 17; Deed created by IN Asset Management Limited dated 1 Oct. 2008, Exhibit R-0003; Hearing on Jurisdiction, Transcript, I/58/3-9.

[146] Counter-Memorial on Jurisdiction, para. 36; Hearing on Jurisdiction, Transcript, I/152/1-9.

that the fact that IN Asset Management provides asset protection services is irrelevant for the purpose of the nationality of the Claimant, and that the relevant information is that IN Asset Management has the power, supervision and control over its subsidiaries and their subsidiaries and is under the power, supervision and control of Stichting Intetrust, a Dutch foundation.[147]

113. The Claimant asserts that Stichting Intetrust is the owner of 100% of the shares of IN Asset Management since 22 May 1995. According to the Claimant, the fact that the registration of the shares in IN Asset Management has been transferred a number of times to Mr and Mrs Francken does not affect the fact that Stichting Intetrust remained the beneficial owner of the shares and retained control of IN Asset Management.[148]

114. The Claimant explains that it is for internal reasons "in the area of company law (auditing) and asset protection,"[149] that Stichting Intetrust sometimes changed its position from the end legal owner to the end beneficial owner of the structure, but that Stichting Intetrust has always been the beneficial owner of IN Asset Management. The Claimant explains that this requires the registration of ownership of the shares in IN Asset Management passing to Mr and Mrs Francken (the director of Stichting Intetrust) and back to Stichting Intetrust.[150] The Claimant explains that this is how the shares in IN Asset Management were transferred from Stichting Intetrust to Mr Francken on 4 May 2010 before being transferred on the same day from Mr Francken to Mr and Mrs Francken. The shares were then transferred from Mr and Mrs Francken back to Stichting Intetrust on 5 September 2012.[151]

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[147] Counter-Memorial on Jurisdiction, para. 37.

[148] Rejoinder on Jurisdiction, para. 15; Sworn Statement of Nicolaas Jan Carel Francken, para. 2, Exhibit C-0003; Hearing on Jurisdiction, Transcript, I/58/10-19.

[149] Counter-Memorial on Jurisdiction, para. 24.

[150] Counter-Memorial on Jurisdiction, paras. 24-25.

[151] Counter-Memorial on Jurisdiction, para. 25; Documents for Summary of Share Parcels Changes of Stichting Intetrust, Exhibit C-0004; Email correspondence with Mr Francken, Exhibit R-0052.

115. The Claimant explains that the change of legal ownership of IN Asset Management did not depend on the Claimant, but exclusively on Stichting Intetrust, and was done, as explained by Mr Francken, for reasons related to auditing and asset protection.[152]

116. The Claimant denies the Respondent's allegation that the transfer by Mr and Mrs Francken of their shareholding in IN Asset Management to Stichting Intetrust, which occurred on 5 September 2012, was done for the sole purpose of obtaining ICSID jurisdiction. Indeed, in 2009, which is when the Respondent breached the BIT, the shares of IN Asset Management were held by Stichting Intetrust. It was only on 4 May 2010 that the shareholding was transferred first to Mr Francken and then, on the same day, to Mr and Mrs Francken. Stichting Intetrust was therefore the entity that ultimately controlled the Claimant at the time the claim arose. The Claimant expressed its consent to arbitrate in several instruments, including in its letter dated 22 September 2012, and thus after the transfer of the shareholding in IN Asset Management to Stichting Intetrust and well before the Request for Arbitration was registered by ICSID on 5 October 2012.[153]

E. Relevant Arbitral Jurisprudence

1. The Respondent's position

117. The Respondent disputes the Claimant's argument that the Tribunal should rely on the majority decision in *Aguas del Tunari v. Bolivia*.[154] There is no doctrine of precedent in investor-State arbitration, and in any event *Aguas del Tunari* is distinguishable on the facts from the present case.[155]

118. According to the Respondent, the main difference between *Aguas del Tunari* and the present case is that in *Aguas del Tunari* the issue was whether a company that was not at the end of the corporate chain could be said to "control" the claimant. There was nothing to suggest

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[152] Counter-Memorial on Jurisdiction, paras. 60-61 and 67 G; Sworn Statement of Nicolaas Jan Carel Francken, para. 3, Exhibit C-0003; Hearing on Jurisdiction, Transcript, I/140/25-I/142/4.

[153] Counter-Memorial on Jurisdiction, paras. 60-61; Hearing on Jurisdiction, Transcript, I/139/20-I/140/24.

[154] *Aguas del Tunari SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 Oct. 2005, Exhibit RLA-0002.

[155] Memorial on Jurisdiction, paras. 138-139.

that the ownership of shares and the associated rights would not be synonymous with control.[156] However, in the present case legal and beneficial ownership do not coincide but vest in two different entities, as IN Asset Management "merely holds legal ownership of the shares in Capital Conservator Trustees Limited as a trustee."[157] There are therefore "two corporate chains in issue, one which traces an ownership structure predicated on an indirect legal (nominee) interest in the Claimant, and one which traces the beneficial ownership in the Claimant back to Capital Conservator Group LLC, a Marshall Islands Company which retained control over the Claimant."[158]

119. The Respondent also argues that the operations of Stichting Intetrust are not transparent, and "[i]t is unclear how the foundation could have directed or controlled the corporate entities below it."[159] The Tribunal should look for evidence of control rather than rely on a formal legal ownership, as ownership "is not synonymous with control, nor is it alone determinative of control."[160] In support of its position, the Respondent argues that investment arbitral tribunals look increasingly at actual evidence of control rather than relying on formal legal ownership, in particular for purposes of Article 25(2)(b) of the ICSID Convention.[161]

120. The Respondent concludes that, when determining whether it has jurisdiction, the Tribunal should bear in mind that legal ownership is not determinative of control and look into the specific circumstances of the case, including the nature and the line of business of IN Asset Management and CCG (asset protection and professional trustee services), the terms of

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[156] Memorial on Jurisdiction, paras. 140-146.

[157] Memorial on Jurisdiction, para. 147.

[158] Memorial on Jurisdiction, para. 148.

[159] Memorial on Jurisdiction, para. 149.

[160] Reply on Jurisdiction, para. 75.

[161] Memorial on Jurisdiction, paras. 152-165 and Reply on Jurisdiction, paras. 60-73, citing *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 5 June 2012, paras. 382-407, Exhibit RLA-0006; *Vacuum Salt Products Limited v. Government of the Republic of Ghana*, ICSID Case No. ARB/92/1, Award, 16 Feb. 1994, para. 43, Exhibit RLA-0021; *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, 19 Dec. 2008, paras. 147-161, Exhibit RLA-0020; *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, 3 Apr. 2014, para. 135, Exhibit RLA-0026; *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, 12 Sept. 2014, paras. 216-223 and 522-529, Exhibit RLA-0027; and *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, paras. 66-67, Exhibit RLA-0013.

engagement of IN Asset Management by CCG and Mr Finzer for provision of asset protection and trustee services (following which IN Asset Management established CCT), the terms of the deed concluded between IN Asset Management and CCG on 1 October 2008, the fact that Mr Finzer was a director of the Claimant from its incorporation, and its sole director from 2010 until his reported death in November 2012, and the failure of the Claimant to demonstrate that Stichting Intetrust ever exercised any control over the Claimant, whether directly or indirectly.[162]

2. The Claimant's position

121. The Claimant argues that the Tribunal should follow the reasoning of the *Aguas del Tunari* tribunal, which found that "the ordinary meaning of 'control' would seemingly encompass both actual exercise of powers or direction and the rights arising from the ownership of shares.*"*[163] "Control" thus covers both the actual exercise of control and the capacity to control, that is, the possession of authority over an object.

122. The Claimant argues that the "[p]osition of the Stichting Intetrust in the chain of ownership totally matches with the findings of the Tribunal in [*Aguas del Tunari*]."[164] According to the Claimant, the fact that Stichting Intetrust is the end owner of the corporate structure establishes that it in fact controls all the subsidiaries in the corporate chain, including the Claimant.[165]

IV. THE PARTIES' REQUESTS FOR RELIEF

A. <u>The Respondent's request for relief</u>

123. In its Reply on Jurisdiction, the Respondent requests the Tribunal to:

> *"(i) dismiss all the Claimant's claims for lack of jurisdiction; and*

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[162] Memorial on Jurisdiction, paras. 166-169; Reply on Jurisdiction, paras. 75-78.

[163] *Aguas del Tunari SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 Oct. 2005, para. 227, Exhibit RLA-0002. *See also* Memorial on the Merits, para. 47.

[164] Counter-Memorial on Jurisdiction, para. 64.

[165] Counter-Memorial on Jurisdiction, paras. 64-65.

(ii) order the Claimant to bear the costs of this arbitration, including all fees and expenses of ICSID and the Tribunal as well as the Respondent's costs (including but not limited to its legal fees and expenses), with interest calculated on a compound basis, payable forthwith."[166]

B. The Claimant's request for relief

124. In its Rejoinder on Jurisdiction, the Claimant requested the Tribunal to:

"(i) Declare that Arbitral Tribunal [sic] has jurisdiction over the present dispute;

(ii) Deny Respondent's objection to the jurisdiction of the Tribunal;

(ii) Order the Respondent to bear the costs of this arbitration, including all fees and expenses of ICSID and the Tribunal as well as the Claimant's costs (including but not limited to its legal fees and expenses), with interest calculated on a compound basis, payable forthwith."[167]

V. THE TRIBUNAL'S ANALYSIS

125. The sole issue before the Tribunal at this stage of the proceedings is whether the Claimant qualifies as a national of the Netherlands within the meaning of Article 1(b)(III) of the BIT and Article 25(1) and (2)(b) of the ICSID Convention, and accordingly whether the Tribunal has jurisdiction *ratione personae* over the Claimant. The nationality of the Claimant is a jurisdictional issue since under Article 9 of the BIT the consent of the Contracting States to arbitrate is limited to "any legal dispute between the Contracting State and *a national of the other Contracting State*.[168] The claim having been brought against the Former Yugoslav Republic of Macedonia, the Claimant must qualify as a national of the Netherlands, in order to fall within the Tribunal's jurisdiction *ratione personae*.

126. Article 1 of the BIT provides, in relevant part:

"*For the purposes of this Agreement:*

(b) the term 'nationals' comprises with regard to either Contracting State:

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[166] Reply on Jurisdiction, Section VI.

[167] Rejoinder on Jurisdiction, para. 22.

[168] Article 9 of the BIT, Exhibit C-0005. (Emphasis added.)

> ...
>
> *(II) legal persons constituted under the law of that Contracting State;*
>
> *(III) legal persons not constituted under the law of that Contracting State but controlled, directly or indirectly, by natural persons as defined in (I) or by legal persons as defined in (II)."*[169]

127. Article 25(1) and (2)(b) of the ICSID Convention provide, in relevant part:

> "*(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. ...*
>
> *(2) 'National of another Contracting State' means:*
>
> *...*
>
> *(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration ... ."*

128. The Tribunal will first consider whether the Claimant meets the applicable nationality requirements under the BIT, as this is the issue on which the Parties have focused almost exclusively in their written submissions and at the Hearing. The Tribunal is nonetheless mindful that, in order for it to possess jurisdiction *ratione personae* over the Claimant, jurisdiction must be established under both the BIT and the ICSID Convention.

129. The Tribunal notes that there is no dispute between the Parties that the Claimant is organized under the law of New Zealand and therefore does not qualify as a national of the Netherlands under Article 1(b)(II) of the BIT. The Claimant argues however that it is controlled, indirectly, by Stichting Intetrust, a foundation organized under the law of the Netherlands, and thus qualifies as a national of the Netherlands under Article 1(b)(III) of the BIT. This is disputed by the Respondent.

130. The Tribunal notes that the Parties disagree on the interpretation of the term "controlled" in Article 1(b)(III) of BIT. The Respondent, which is the moving party in this phase of the

[169] Article 1 of the BIT, Exhibit C-0005.

proceedings, argues that the term "controlled," when interpreted in accordance with its ordinary meaning, implies that mere ownership, or capacity to control, is not sufficient, but that evidence of actual exercise of control is required. The Claimant on the other hand takes the view that the term "controlled" includes ownership, but is not limited to ownership. According to the Claimant, ownership is sufficient to establish control, although it could also be established by other means, in particular in case of indirect control. Citing *Aguas del Tunari*, the Claimant argues that, in case of ownership, the phrase "controlled, directly or indirectly" refers to the legal capacity of control rather than the fact of control. As an indirect owner of the Claimant, Stichting Intetrust has, in the Claimant's submission, the legal capacity to control the Claimant, and this is sufficient to establish jurisdiction.

131. The Tribunal notes that, while ownership generally implies the legal right or the capacity to exercise control, the issue is complicated in the present case by the fact that different aspects of the ownership of CCT, the Claimant's immediate holding company, are divided between IN Asset Management and CCG, a Marshall Islands company that falls outside the corporate chain of which Stichting Intetrust forms part. Pursuant to the deed of 1 October 2008 between IN Asset Management and CCG, the former became the legal owner of CCT, the immediate holding company of the Claimant, whereas the latter retained beneficial ownership over CCT. The deed provides, in relevant part:

> "*By [IN Asset Management] (herein called the Trust Company) being the holder of the number and class of shares stated in Part 3 of the Schedule hereto (herein called the Shares) in [Capital Conservator Trustees Limited] (herein called the Company) declares and covenants that:*
>
> *1. The Shares in the Company are held by it as Trustee for and on behalf of [Capital Conservator Group LLC, Marshall Islands] (herein called the Beneficial Owner).*
>
> *2. The Shares will not be encumbered, transferred, assigned or dealt with in any way by the Trustee without the consent in writing of the Beneficial Owner being first held and obtained.*
>
> *3. The Trustee will account to the Beneficial Owner in respect of all income earned, derived or received from the said Shares and all other benefits in respect thereof in such manner as the Beneficial Owner may from time to time direct.*

> *4. The Trustee acknowledges that the Beneficial Owner may from time to time appoint a new or additional Trustee and remove any Trustee so appointed subject to the special provisions and conditions as contained in the letter of engagement as accepted by the beneficial owner."*

132. The question therefore arises whether CCT can be said to be "controlled, directly or indirectly," by IN Asset Management, given that the beneficial ownership of CCT has been retained by CCG. The Parties disagree on this point, the Respondent arguing that a legal owner can never be said to "control" its subsidiary as it is the beneficial owner that retains the power or the capacity of control, whereas the legal owner merely possesses formal ownership and operates under the direction and control of the beneficial owner. The Claimant argues, in turn, that legal ownership is sufficient as the legal owner acts for and on behalf of the beneficial owner; in the Claimant's submission, beneficial ownership can be relied upon to prove ownership, but not "applied against" it. The Respondent further argues that, in any event, there is no evidence on record that Stichting Intetrust ever exercised any kind of control, direct or indirect, over the Claimant. The Claimant does not deny that CCT is beneficially owned by CCG, but argues that this is irrelevant for purposes of the Tribunal's jurisdiction over the Claimant.

133. The Respondent's argument that the Claimant is not controlled by Stichting Intetrust is based, in part, on New Zealand law. The Respondent relies on the expert opinion of Mr Barlow, who takes the view that the deed of 1 October 2008 between IN Asset Management and CCG "creates what is known in English law and in New Zealand law as a 'bare' trust", the defining features of such bare trust being that "the trustee holds property in trust for a single beneficiary absolutely and indefeasibly."[170] Such a bare trustee "has no beneficial interest in the trust property whatsoever but merely holds the bare legal title to the property as trustee for the beneficial owner and control over the trust property is vested in the beneficiary."[171] While Mr Barlow recognizes that a holding company "may well have the power to exercise control over its subsidiary and its assets," either directly or indirectly, such power "cannot be exercised in relation to assets which do not belong beneficially to the

[170] Opinion of Mr Barlow, paras. 13-14.

[171] Opinion of Mr Barlow, para. 15.

subsidiary or the subsidiary's own subsidiary."[172] Mr Barlow concludes that "under the terms of the Deed [of 1 October 2008], Capital Conservator Trustees is not 'controlled' by Stichting Intetrust in any sense of the word."[173]

134. The Tribunal notes that pursuant to the terms of the deed of 1 October 2008, the trustee or the legal owner (*i.e.*, IN Asset Management) is not entitled to "encumber[], transfer[], assign[] or deal[]" with the shares of CCT in any way without the written consent of the beneficial owner (*i.e.,* CCG), and that the beneficial owner may appoint a new trustee and remove IN Asset Management as a trustee of CCT; IN Asset Management must also account to CCG in respect of all income earned or otherwise derived or received from the shares of CCT.[174] However, the deed makes no mention of the direction and control of the business activities of CCT, or the exercise of voting rights.[175] The terms of the deed thus appear to leave open the possibility that IN Asset Management and/or, indirectly, Stichting Intetrust could have exercised such control over CCT's activities, by way of exercise of voting rights or otherwise. When questioned on this issue at the hearing, Mr Barlow testified that the deed entitled the beneficial owner to exercise voting rights by directing the trustee to vote as directed by the beneficial owner, even if such right was not specifically mentioned in the deed.[176] However, while the Tribunal accepts Mr Barlow's testimony on this point, the right of the beneficial owner to control the exercise of voting rights by the trustee does not exclude the possibility that the beneficial owner (*i.e.*, CCG) may have refrained from exercising this right, and that the legal owner (*i.e.*, IN Asset Management) may have exercised corporate control over CCT, and thus indirectly over the Claimant. The issue of control is therefore ultimately a matter of evidence and cannot be determined solely on the basis of an analysis

[172] Opinion of Mr Barlow, paras. 21-22.

[173] Opinion of Mr Barlow, para. 24.

[174] Deed created by IN Asset Management Limited dated 1 Oct.2008, Exhibit R-0003.

[175] *Cf.* the deed of 4 May 2010 between Mr and Mrs Francken and Stichting Intetrust, which does not contain any limitations regarding the exercise of voting rights, Exhibit C-0004.

[176] Hearing on Jurisdiction, Transcript, I/82-86, I/105-06.

of the applicable New Zealand law, as also accepted by Mr Barlow.[177] The Tribunal will next turn to the issue of whether there is any such evidence.

135. The Tribunal notes that the sole piece of evidence that might qualify as evidence that the Claimant was controlled, indirectly, by Stichting Intetrust is the "Sworn Statement" of Mr Francken, submitted by the Claimant in support of the Request for Arbitration.[178] However, in his Sworn Statement, Mr Francken merely states that "[t]he ultimate shareholder control of [CCT] was and is with its parent Stichting Intetrust of Velp (Gld) the Netherlands," and that "[f]rom 17 September 2008, Stichting Intetrust, through its wholly owned subsidiary IN Asset Management Limited and through its wholly owned subsidiary Capital Conservator Trustees Limited held all the shares and voting rights in Capital Conservator Savings & Loans Limited (now renamed as Guardian Fiduciary Trust Limited)."[179] No further detail or explanation is provided as to how such shareholder control, including voting rights, were in fact exercised, if at all. Nor is there any other evidence on record regarding the actual exercise of control, direct or indirect, by Stichting Intetrust, IN Asset Management or CCT over the Claimant. Indeed, the engagement letter of 16 September 2008 between CCG and IN Asset Management provides that IN Asset Management merely provided "trust- and trustee services" to CCG, and that such services were to be provided "on the basis of full indemnity to [IN Asset Management]."[180]

136. At the pre-hearing organizational meeting, the Tribunal noted that the Respondent had not called Mr Francken for cross-examination at the Hearing, and indicated that it was contemplating calling Mr Francken for questioning by the Tribunal. The Respondent explained that it had not called Mr Francken as the Claimant had stated during the Parties' discussions that Mr Francken's Sworn Statement was not a witness statement. After further

[177] As recognized by Mr Barlow at the Hearing; Hearing on Jurisdiction, Transcript, I/102-103, I/108 and I/114-117.

[178] Exhibit C-4 submitted in support of the Request for Arbitration, also filed as Exhibit C-0003. At the Hearing, Counsel for the Claimant stated that he had no information of any other activities of CCT, apart from holding the shares of the Claimant. According to the Claimant, what mattered was legal ownership, and that "it is not important what the companies were doing." Hearing on Jurisdiction, Transcript, I/172/22-I/173/24.

[179] Sworn Statement of Nicolaas Jan Carel Francken, paras. 4 and 5, Exhibit C-4 submitted in support of the Request for Arbitration.

[180] Engagement letter between IN Asset Management Limited and Capital Conservator Group dated 16 Sept. 2008, Exhibit R-0025.

discussion during the pre-hearing organizational meeting, the Claimant eventually confirmed that Mr Francken's Sworn Statement was "just an exhibit" and not a witness statement, and that Mr Francken had not been presented as a witness.[181] In these circumstances, and in the absence of any detail or explanation in Mr Francken's Sworn Statement regarding the way in which, if any, Stichting Intetrust, IN Asset Management or indeed CCT might have exercised corporate control over the Claimant, the Tribunal is unable to conclude that Mr Francken's statement constitutes evidence of actual exercise of control. In the absence of any other or further evidence of any exercise of actual control by IN Asset Management over CCT, or by CCT over the Claimant during the relevant period, that is, immediately prior to and during the summer of 2009, when the claim allegedly arose, or at any relevant time thereafter, the Tribunal must conclude that the Claimant was not controlled, directly or indirectly, by Stichting Intetrust at any time during this period.

137. Indeed, the limited evidence before the Tribunal suggests that CCT, and therefore indirectly the Claimant, was in fact controlled by CCG, a Marshall Islands company, and its director and beneficial owner Mr Finzer, until his reported death in November 2012. This evidence includes a newspaper report recording Mr Francken's statement to the press in February 2013 that he "was acting only as nominee and had no involvement in the Guardian Fiduciary business," referring to CCG as his "client."[182] This statement, the accuracy of which has not been challenged by the Claimant, is consistent with the terms of the deed of 1 October 2008, according to which IN Asset Management merely held the shares of CCT in trust for and on behalf of CCG, as well as the fact that Mr Finzer apparently was the sole director and president of the Claimant from the date of its incorporation until his reported death in November 2012.[183] It was also Mr Finzer who authorized the commencement of the

[181] Audio recording of the pre-hearing organizational meeting.

[182] Exhibit R-0039.

[183] Exhibit C-3 submitted in support of the Request for Arbitration, and Annual Return for the Claimant dated 25 Nov. 2010, Exhibit R-0033; Guardian Fiduciary Trust Limited Consent and Certificate of Director dated Dec. 2012, Exhibit R-0035.

arbitration on behalf of the Claimant and signed the powers of attorney of the Claimant's counsel.[184]

138. In light of the above, the Tribunal concludes that the Claimant has failed to prove that it is controlled by Stichting Intetrust, and that it therefore qualifies as a national of the Netherlands within the meaning of Article 1(b)(III) of the BIT.

139. In the circumstances, the Tribunal need not consider whether Stichting Intetrust controlled IN Asset Management at any of the potentially relevant dates, including when the claim allegedly arose, or when the dispute was submitted to ICSID arbitration or, if different from this latter date, when the Parties consented to submit the dispute to arbitration. In the absence of any evidence that the Claimant was ever controlled by Stichting Intetrust, IN Asset Management or indeed CCT, the relationships between these other companies in the corporate chain are irrelevant for the purposes of determining the Claimant's nationality. For the same reason, the Tribunal need not consider whether the fact that the shares of IN Asset Management, which had been held by Mr and Mrs Francken as trustees for and on behalf of Stichting Intetrust from 4 May 2010, were transferred to Stichting Intetrust on 5 September 2012, after the filing of the Request for Arbitration, constitutes an abuse of process on the grounds that its sole purpose was, as argued by the Respondent, to obtain ICSID jurisdiction.

140. The Tribunal recalls that, in order for the Tribunal to find jurisdiction *ratione personae*, the Claimant would have to qualify as a national of the Netherlands under both the BIT and the ICSID Convention. As the Claimant has failed to establish that it meets the nationality requirements of the BIT, the Tribunal need not consider whether the Claimant would meet the nationality requirements of the ICSID Convention.

[184] Attachment to the Request for Arbitration; Attachment to the letter of the Claimant's counsel to ICSID dated 22 Sept. 2012.

VI. COSTS

A. The Respondent's position

141. The Respondent argues that in the event the Tribunal dismisses the Claimant's claims for lack of jurisdiction, the Claimant should pay the Respondent's costs, including its legal fees and expenses, with interest.[185] The Respondent submitted the following table summarizing its costs:[186]

Legal Fees and Expenses (Latham & Watkins LLP)	1,153,508.51 USD
Legal Fees and Expenses (Reed Smith LLP)	182,493.89 USD
Fees and expenses of Mr Francis Barlow QC	£40,999.50
ICSID and Tribunal Fees and Expenses	175,000 USD
Costs of the representatives of the Republic of Macedonia for (i) hotel fees for meetings in Skopje with Latham & Watkins in March 2013; and (ii) travel and subsistence costs attending the first session of the tribunal (23 July 2013) and the hearing (6 May 2015), both in Paris.	4,882.60 USD (travel and subsistence)
Total	**1,515,885 USD** **and** **£40,999.50**

142. The Respondent argues that the traditional practice whereby the Parties were required to bear their own costs has changed, and that ICSID tribunals increasingly order the losing

[185] Respondent's Submissions on Costs, paras. 9-11.

[186] Respondent's Submissions on Costs, para. 9.

party to pay some or all of the costs of the prevailing party. This is the case in particular in circumstances where the unsuccessful party "has engaged in some form of misconduct which has caused the prevailing party to incur unnecessary costs."[187]

143. According to the Respondent, this applies in the present case, for several reasons. First, the Claimant has presented its claim in a confused and disorganized manner, having submitted irrelevant and unsolicited submissions during the proceedings and having failed to comply with the Tribunal's Procedural Order No. 3 regarding document production.[188] Second, the Respondent submits that it incurred unnecessary costs also because the Claimant initially presented the jurisdictional basis of its claim and its ownership structure in a misleading manner, failing to disclose the deed of 1 October 2008 at an early stage of the proceedings, and failing to produce any evidence that it was in fact controlled by Stichting Intetrust, thus forcing the Respondent to undertake extensive investigations.[189] Finally, the Respondent argues that it should not bear the cost of defending a claim that constitutes an abuse of process; according to the Respondent, the transfer of legal title to the shares in IN Asset Management from Mr and Mrs Francken to Stichting Intetrust on 5 September 2012 was abusive as it was made for the sole purpose of establishing ICSID jurisdiction.[190]

144. In the event that the Tribunal accepts jurisdiction, the Respondent submits that the Tribunal should reserve the issue of costs until a later stage of the proceedings.[191]

B. The Claimant's position

145. The Claimant requests that the Tribunal deny the Respondent's claim for costs of arbitration and submits that, in the event the Tribunal were to accept jurisdiction, the Respondent should

[187] Respondent's Submissions on Costs, paras. 12-18.

[188] Respondent's Submissions on Costs, paras. 20, 24-27.

[189] Respondent's Submissions on Costs, paras. 21, 28-34.

[190] Respondent's Submissions on Costs, paras. 22, 35-41.

[191] Respondent's Submissions on Costs, para. 42.

bear the costs associated with the jurisdictional phase of the proceedings.[192] The Claimant summarizes its costs as follows:[193]

> "*4. The legal fees of Mr. Torres are specified as follows:*
>
> ***JUAN F. TORRES III, ESQUIRE LEGAL FEES AND COSTS FOR JURISDICTION***
>
> *From 30 January 2014 until the present:*
>
> *Fees Out of Court/Arbitration/Hearings: $100,305.00 USD*
>
> *Fees In Court/Arbitration/Hearings: $1,260.00 USD*
>
> *Total Fees: $101,565.00*
>
> *5. The legal fees of Mr. Petro Janura – Attorney at law are specified as follows:*
>
> ***PETRO JANURA – ATTORNEY AT LAW LEGAL FEES AND COSTS FOR JURISDICTION***
>
> *From 30 January 2014 until the present:*
>
> *Fees Out of Hearings: 76,500,oo EUR*
>
> *Fees In Hearings: 3.000,oo EUR*
>
> *Total Fees: 79.500,oo EUR*"

146. In support of its position, the Claimant argues that the Respondent filed its objections to jurisdiction late in the proceedings, refusing to do so before the Claimant had submitted its Memorial on the Merits, therefore unnecessarily prolonging the proceedings and not complying with Article 41(1) of the ICSID Arbitration Rules, which requires that preliminary objections be made "as early as possible." The Respondent's conduct therefore created "unnecessary and considerable financial burden for the Claimant." [194]

147. The Claimant argues that it would be "fair and proper" for the Respondent, if it were to lose, to bear the costs associated with the jurisdictional phase, in particular because the present

[192] Claimant's Submissions on Costs, para. 1.

[193] Claimant's Submissions on Costs, paras. 4-5.

[194] Claimant's Submissions on Costs, paras. 6-8.

dispute is between a sovereign State, with greater financial resources, and a small company.[195]

C. The Tribunal's analysis

148. The relevant rules covering the award of costs of the proceedings can be found in Chapter VI of the ICSID Convention, and in particular in Article 61(2) of the Convention, which provides:

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

149. The Tribunal notes, as recognized by the Respondent which addressed the issue in its cost submissions, that the practice of ICSID tribunals in awarding costs is not entirely consistent, some tribunals ordering the parties to bear their own costs and others applying the "costs follow the event" approach. The divergent practice reflects the considerable degree of discretion that ICSID tribunals enjoy under Article 61(2) of the Convention, which does not prescribe any particular approach, in making costs awards.

150. The Tribunal considers that in the circumstances of the present case, it is appropriate to apply the "costs follow the event" approach and award the costs of the prevailing party. However, the Tribunal does not consider that the conduct of either Party in the course of the proceedings should form an additional basis for awarding costs.

151. The Respondent is the prevailing party as its objection to the Tribunal's jurisdiction *ratione personae* has been upheld, resulting in dismissal of all of the Claimant's claims. In view of the outcome of the case, and taking into account the substantially disparate amounts spent by the Parties in the proceedings, the Tribunal considers it appropriate that the Claimant reimburse 80 per cent of the Respondent's costs of arbitration. The Tribunal additionally

[195] Claimant's Submissions on Costs, para. 12.

considers it appropriate that each Party bear and equally share the fees and expenses of the Tribunal and the costs of the ICSID facilities.

VII. AWARD

152. For the reasons set out above, the Tribunal decides as follows:

a. The Claimant's claims are dismissed for lack of jurisdiction *ratione personae*;

b. The Claimant shall pay the Respondent the amount of US$ 1,072,708 and £ 32,800 as reimbursement of the Respondent's legal fees and expenses;

c. The Parties shall bear and equally share the fees and expenses of the Tribunal and the costs of the ICSID facilities; and

d. All other claims and requests for relief by either Party are dismissed.

Prof. Andreas Bucher
Arbitrator
Date: 17/9/2015

Prof. Brigitte Stern
Arbitrator
Date: 17/9/2015

Dr Veijo Heiskanen
President of the Tribunal
Date: 17/9/2015