

Alverley Investments Limited and Germen Properties Ltd v. Romania
(ICSID Case No. ARB/18/30)

Excerpts of Award dated March 16, 2022 made pursuant to Rule 48(4) of the
ICSID Arbitration Rules of 2006

Claimant

Alverley Investments Limited and Germen Properties Ltd (two companies incorporated under the laws of the Republic of Cyprus)

Respondent

Romania

Tribunal

Christopher Greenwood (President; British), appointed by the co-arbitrators in consultation with the Parties

Bernard Hanotiau (Belgian), appointed by the Claimants

Pierre Mayer (French), appointed by the Respondent

Award

Award of March 16, 2022 in English (unpublished)

Instrument relied on for consent to ICSID arbitration

Agreement between the Government of the Republic of Cyprus and the Government of Romania on the Mutual Promotion and Protection of Investments, which entered into force on July 10, 1993

Procedure

Applicable Arbitration Rules: ICSID Arbitration Rules of 2006

Place of Proceedings: Washington, D.C.

Procedural Language: English

Full procedural details: Available at <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/18/30>

Factual Background

The case concerns the Claimants' alleged indirect investment in a commercial and real estate development project in Romania channelled through their various shareholdings in Romanian and Cypriot subsidiaries. The dispute arose after Romania investigated the transaction of land from a Romanian university to the real estate developers for the latter's development of the project and challenged the real estate developers' right to use the land in a series of criminal and civil proceedings.

EXCERPTS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

ALVERLEY INVESTMENTS LIMITED AND GERMEN PROPERTIES LTD

Claimants

and

ROMANIA

Respondent

ICSID Case No. ARB/18/30

AWARD

Members of the Tribunal

Sir Christopher Greenwood, GBE, CMG, QC, President of the Tribunal
Prof Bernard Hanotiau, Arbitrator
Prof Pierre Mayer, Arbitrator

Secretary of the Tribunal

Ms Jara Mínguez Almeida

Assistant to the President of the Tribunal

Ms Rosalind Elphick

Date of dispatch to the Parties: 16 March 2022

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I. INTRODUCTION AND PARTIES

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 between the Government of the Republic of Cyprus and the Government of Romania on the Mutual Promotion and Protection of Investments, which entered into force on 10 July 1993 (the “**BIT**” or “**Treaty**”) 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 claimants are Alverley Investments Limited (“**Alverley**”), formerly known as Bladon Enterprises Ltd. (“**Bladon**”)¹ and Germen Properties Ltd. (“**Germen**”), two companies incorporated under the laws of the Republic of Cyprus (together, the “**Claimants**”).
3. The respondent is Romania (the “**Respondent**”).
4. The Claimants and the Respondent are collectively referred to as the “**Parties**”. The Parties’ representatives and their addresses are listed above on page (i).
5. The dispute relates to the Claimants’ alleged investment in a commercial and real estate development project in Romania (the “[...] **Project**”).

II. PROCEDURAL BACKGROUND

6. On 13 August 2018, ICSID received a Request for Arbitration, dated 10 August 2018, from Bladon Enterprises Ltd.² and Germen Properties Ltd. by which they sought to institute proceedings against Romania (the “**Request**”). The Request was accompanied by Exhibits C-001 to C-090 and Legal Authority CL-001.
7. On 23 August 2018, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute

¹ By letter of 24 January 2019, the Claimants informed ICSID that Bladon had changed its name to Alverley Investments Limited. It will be referred to throughout the present Award as “Alverley”.

² See note 1, above.

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an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

8. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator, to be appointed by agreement of the two co-arbitrators, in consultation with the Parties.
9. The Tribunal is composed of Sir Christopher Greenwood, a national of the United Kingdom, President, appointed by the co-arbitrators in consultation with the Parties; Professor Bernard Hanotiau, a national of Belgium, appointed by the Claimants; and Professor Pierre Mayer, a national of France, appointed by the Respondent.
10. On 31 January 2019, the Claimants filed a Request for Provisional Measures pursuant to Article 47 of the ICSID Convention and ICSID Arbitration Rule 39(1) (the "**Request for Provisional Measures**"), together with Exhibits C-091 to C-236; Legal Authorities CL-002 to CL-034; a Witness Statement of [...] ("**[WS of ...]**"); and a Witness Statement of [...]. The submission was also accompanied by a request that the ICSID Secretary-General set an expedited deadline for the Respondent to file a response. Following correspondence between the Parties and the Secretariat, the Claimants, by letter of 4 March 2019 withdrew their request for an expedited schedule.
11. On 25 March 2019, the ICSID Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "ICSID Arbitration Rules"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms Jara Mínguez Almeida, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
12. On 1 April 2019, the Tribunal Secretary wrote to the Parties requesting an advance payment of USD 200,000 from each Party pursuant to ICSID Administrative and Financial Regulation 14(3).
13. Following correspondence between the Tribunal Secretary and the Parties, it was agreed to hold the first session by conference call on 8 May 2019.

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14. The advance payment requested from the Claimants was received on 12 April 2019.
15. On 17 April 2019, the European Commission (the “**EC**”) applied for leave to intervene in the proceedings as a non-disputing party, pursuant to ICSID Arbitration Rule 37(2) (the “**EC Application**”).
16. On 23 April 2019, the Respondent filed an Application for Summary Dismissal pursuant to ICSID Arbitration Rule 41(5) (the “**Rule 41(5) Application**”), together with Exhibits R-001 to R-007 and Legal Authorities RL-001 to RL-049. The Respondent submitted that the Tribunal manifestly lacked jurisdiction because the BIT had been without legal effect since, at the latest, 1 December 2009, as it was inconsistent with European Union (“**EU**”) law. The Tribunal determined that it would not be possible, consistent with its duty under ICSID Arbitration Rule 41(5) to give the Parties a proper opportunity to present their observations on this request, to deal with the EU law issue at the first session. It therefore informed the Parties that it would fix a schedule for their observations during the first session and hold a hearing as soon as possible thereafter.
17. Pursuant to directions given by the Tribunal, on 3 May 2019 each Party filed observations on the EC Application. On the same day, the Respondent filed its response to the Request for Provisional Measures, together with Exhibits R-008 to R-055; Legal Authorities RL-050 to RL-075; an Expert Report of [...] (“**[ER1 of ...]**”) dated 3 May 2019, with Exhibits RW-001 to RW-024; and an Expert Report of [...] dated 3 May 2019 with Exhibits ER-0001 to ER-0012.
18. Also on 3 May 2019, the Respondent filed three further applications:
 - (1) an Application for Bifurcation of the Proceedings into Jurisdiction and Merits Phases (the “**Bifurcation Application**”);
 - (2) an Application for Identification of Controlling Interests, Identification of Third-Party Funder and Security for Costs (the “**Interests Application**”), together with Exhibits R-056 to R-070 and Legal Authorities RL-076 to RL-094; and

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- (3) a Request to Strike Claimants' Exhibit C-144, Authenticate Exhibits C-015 and C-016, Identify Translators, Require Certification of Translations and Require Translations of Material Portions of Documents (the "**Exhibits Request**"), together with Exhibit R-071 and Legal Authority RL-095.
19. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 8 May 2019 by teleconference. The session lasted two hours and eight minutes. A list of those participating is set out in Procedural Order No. 1, which was issued on 10 May 2019. The Parties confirmed that the Tribunal was properly constituted and that neither Party had any objection to any Member of the Tribunal based upon the disclosures provided as of that date. The Respondent reserved its right to object to any Member of the Tribunal in the light of any future disclosure arising out of the Interests Application and the response thereto.
20. Following the first session, on 10 May 2019, the Tribunal issued Procedural Order No. 1 recording the agreements of the Parties on procedural matters and the decision of the Tribunal on disputed issues. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Washington, D.C., United States of America. Annex B of Procedural Order No. 1 also sets forth the agreed schedule concerning: (1) the Request for Provisional Measures; (2) the EC Application; (3) the Rule 41(5) Application; (4) the Bifurcation Application; (5) the Interests Application; and (6) the Exhibits Request. A Hearing on Provisional Measures and the Rule 41(5) Application was scheduled for 18–19 July 2019.
21. The Tribunal decided to hold a hearing in Paris on 18 and 19 July 2019 (the earliest date on which both Parties' counsel and all Members of the Tribunal were available, and which was commensurate with a reasonable schedule for written observations) to hear argument on the Claimants' Request for Provisional Measures and the Respondent's Rule 41(5) Application. Procedural Order No 1 fixed a schedule for each Party to make written observations on these matters. The Tribunal decided that it was not necessary to recommend any provisional measures prior to the hearing.

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22. The Tribunal determined that it would rule on the Bifurcation Application, the Interests Application and the Exhibits Request, made by the Respondent on 3 May 2019, to the extent that a ruling would be necessary, on the basis of the written submissions alone. A schedule for these submissions was also laid down in Procedural Order No 1.
23. Also on 10 May 2019, the Tribunal issued Procedural Order No. 2, granting the EC leave to submit a written intervention on the issue raised by the Respondent's Rule 41(5) Application. Since ICSID Arbitration Rule 32(2) permits non-parties to participate in hearings only in the event that neither party objects, and since the Claimants objected to the EC participating in the hearing on 18–19 July 2019, the EC's intervention was confined to a written statement the conditions for which were set out in Procedural Order No 2.
24. At the first session, counsel for the Respondent stated that the Respondent would not make an advance payment, because it considered that the Tribunal lacked jurisdiction. The Tribunal explained that the obligation to make such payments as were requested by the Tribunal Secretary was derived not from the BIT but from the ICSID Convention and the Administrative and Financial Regulations, and was therefore entirely independent of the question whether or not the Tribunal possessed jurisdiction.³ The Respondent having maintained its refusal to pay, on 10 May 2019, the Tribunal declared the Respondent to be in default and invited the Claimants to advance the Respondent's share. The Claimants informed the Secretary that they were prepared to do so, and the additional share of the advance payment was received on 12 June 2019.
25. The EC filed its written submission on 23 May 2019 (the "**EC's Submission**"), together with Exhibits EC-001 to EC-017 and Legal Authorities ECA-001 to ECA-027.
26. Between 30 May and 12 July 2019, the Parties filed written pleadings on the pending applications and requests pursuant to Annex B of Procedural Order No. 1.
27. On 12 July 2019, the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference.

³ Tr. First Session, 12:14–17:10; Second Letter from the Tribunal Secretary to the Parties, 10 May 2019.

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28. On 13 July 2019, the Tribunal issued Procedural Order No. 3 concerning the organization of the upcoming hearing.
29. A hearing on Provisional Measures and the Rule 41(5) Application was held on 18 and 19 July 2019 at the World Bank Offices located at 66 avenue d'Iéna, 75116 Paris, France (the "**July 2019 Hearing**").
30. On 30 July 2019, each Party filed a Submission on Costs.
31. On 1 August 2019, the Tribunal issued a Decision on (1) the Respondent's Rule 41(5) Application; (2) the Respondent's Bifurcation Application; (3) the Respondent's Interests Application; (4) the Respondent's Exhibits Request; and (5) the Claimants' Request for Provisional Measures (the "**August 2019 Decision**"). Therein, the Tribunal decided the following:
 - (1) the Respondent's Rule 41(5) Application was denied without prejudice to the right of the Respondent to raise the same jurisdictional objection in the next phase of the proceeding;
 - (2) the Respondent's Bifurcation Application was granted; as a result, the proceeding on the merits was suspended;
 - (3) the Respondent's Interests Application was granted in part (as set out in paras. 78 and 82 of the Decision). The Respondent's application for security for costs, which was part of the Respondent's Interests Application, was denied;
 - (4) the Respondent's Exhibits Request was denied in the terms set out in paras. 90-94 of the Decision;
 - (5) the Claimants' Request for Provisional Measures was granted in part (as set out in para. 148(6) of the Decision); and
 - (6) the question of costs was reserved to a later decision or award.

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32. Following exchanges between the Parties, on 23 August 2019, the Tribunal issued Procedural Order No. 4 setting forth the pleading schedule for the jurisdictional phase of the proceeding. Following agreement between the Parties, the procedural calendar was modified by the Tribunal on 4 September 2019.
33. On 1 October 2019, the Tribunal issued Procedural Order No. 5 concerning document production.
34. Further to a letter from the Claimants dated 8 October 2019, the Tribunal communicated further directions to the Parties concerning document production by letter dated 10 October 2019.
35. Pursuant to the procedural calendar, on 25 October 2019, the Respondent filed its Memorial on Jurisdiction (the “**Respondent’s Memorial**”), together with Exhibits R-083 to R-135; Legal Authorities RL-141 to RL-167; and a Second Expert Report of [...] dated 25 October 2019 (“**[ER2 of ...]**”), with Annexes 1 to 5 and Exhibits RW-025 to RW-052.
36. On 5 November 2019, by letter transmitted by the Tribunal Secretary, the President of the Tribunal inquired whether the Parties would be agreeable to the appointment of Ms Rosalind Elphick as Assistant to the President of the Tribunal. By separate emails of 6 November 2019, each Party accepted Ms Elphick’s appointment.
37. On 7 December 2019, the Claimants filed their Counter-Memorial on Jurisdiction, dated 6 December 2019 (the “**Claimants’ Counter-Memorial**”), together with Exhibits C-380 to C-538; Legal Authorities CL-110 to CL-177; a Witness Statement of [...] dated 6 December 2019 (“**[WS of ...]**”); and an Expert Report of [...] dated 6 December 2019 (“**[ER1 of ...]**”).
38. On 11 December 2019, the Tribunal Secretary wrote to the Parties requesting that each Party make a further advance payment of USD 200,000.
39. On 13 December 2019, in accordance with the procedural calendar, the Parties exchanged their requests for document disclosure. The exchange was facilitated by the Tribunal Secretary.

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40. By letter of 20 December 2019, the Claimants wrote to the Tribunal to request that the Tribunal strike from the record a submission filed by the Respondent with its Redfern Schedule during the document production phase.
41. By a second letter of 20 December 2019, the Claimants informed the Tribunal that they had mistakenly submitted unredacted exhibits together with their Counter-Memorial and requested that the unredacted exhibits be struck from the record and replaced by the redacted ones.
42. By letter of 21 December 2019, transmitted to the Parties by the Tribunal Secretary, the Tribunal: (1) invited the Respondent to reply, by 30 December 2019, to the Claimants' request contained in their first letter of 20 December; and (2) granted the Claimants' request contained in their second letter of 20 December.
43. On 28 December 2019, the Claimants re-filed the redacted exhibits referenced in their second letter of 20 December.
44. By letter of 30 December 2019, the Respondent replied to the Claimants' first letter of 20 December, wherein it objected to the Claimants' request.
45. By a second letter of 30 December 2019, the Respondent wrote to the Tribunal to request that it revise its directions of 21 December with regard to the redacted exhibits filed by the Claimants on 28 December 2019.
46. On 31 December 2019, the Tribunal issued Procedural Order No. 6 concerning the Parties' aforementioned requests regarding document production and the Claimants' redacted exhibits.
47. Pursuant to the procedural calendar, on 3 January 2020, the Parties exchanged simultaneous observations on each other's requests for document production; each Party filed reply observations on 10 January 2020. The last submission, which included the Parties' requests for production, the Parties' objections, and the Parties' responses to the objections, was transmitted to the Tribunal, which was called to decide this matter by 17 January 2020.

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48. Pursuant to the Tribunal's instructions in Procedural Order No. 6, on 7 January 2020, the Claimants filed observations regarding their redacted exhibits filed on 28 December 2019. Following the Tribunal's invitation, the Respondent responded by letter of 21 January 2020, accompanied by Annexes 1 to 4. A further round of comments was received from the Claimants on 27 January 2020 and the Respondent on 29 January 2020.
49. On 17 January 2020, the Tribunal issued Procedural Order No. 7 concerning the production of documents.
50. By letter of 17 January 2020, the Respondent wrote to the Tribunal seeking clarification on how to comply with certain aspects of Procedural Order No. 6 concerning the destruction of the electronic copies of the unredacted documents. The Claimants, by letter of 19 January 2020, objected to the Respondent's application and requested that the Tribunal order the Respondent to destroy the electronic exhibits.
51. On 22 January 2020, the Tribunal Secretary informed the Parties that the Tribunal would decide the Respondent's request of 17 January when it decided upon the issues raised by the redaction log.
52. On 29 January 2020, the Respondent informed the Tribunal that it would not pay the outstanding second advance payment requested from the Parties. Since neither Party had made the advance payment requested, on 30 January 2020, a default letter was sent to the Parties.
53. Following various exchanges between the Parties regarding the redaction log matter and missing pages of the Management Agreement, on 11 February 2020, the Tribunal issued Procedural Order No. 8 concerning Redaction, Disclosure and Due Process.
54. On 13 February 2020, the Respondent requested a clarification concerning Procedural Order No. 8. On the same date, the Claimants asked the Tribunal to order the Respondent to destroy all electronic and hard copies of the exhibits referred to in paragraphs 19(3) and 19(4) of Procedural Order No. 8, and also asked the Tribunal to grant the Claimants' request to produce, for counsel's eyes only, documents which identified the Claimants' ultimate beneficiary owner ("**UBO**").

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55. On 14 February 2020, the Tribunal decided with respect to the production of the unredacted documents ruling that the Claimants should comply with paragraphs 19(3) and 19(4) of Procedural Order No. 8. In response to the Respondent’s inquiry requesting a clarification of Procedural Order No. 8 with regard to Exhibits C-462 and C-463, the Tribunal directed that the original documents be reinstated on the record noting that the Claimants were no longer seeking redactions of these documents.
56. Also on 14 February 2020, the Respondent filed a motion to compel Claimants to comply with Procedural Order No. 7, together with Annexes 1 to 17. The Respondent asked the Tribunal to order the Claimants to produce without further delay all of the documents encompassed by its rulings on fourteen of the Respondent’s document production requests, including a complete, unaltered copy of the Management Agreement between the Claimants’ UBO and [...]. The Tribunal invited the Claimants’ comments on this motion.
57. Pursuant to paragraph 24 of Procedural Order No. 8 and after a reminder sent by the Tribunal Secretary on behalf of the Tribunal, on 18 February 2020, the Claimants confirmed “*there is no other power of attorney or other authorization empowering any other person to act on behalf of [...] in respect of the Claimants.*”
58. On 19 February 2020, the Tribunal sent a letter to the Parties concerning the deadlines of the next steps in the proceeding that needed to be fixed in advance of the upcoming hearing of 6–8 April 2020.
59. On 20 February 2020, the Claimants replied to the Respondent’s motion of 14 February, requesting that the Tribunal issue a decision dismissing the Respondent’s motion.
60. On 20 February 2020, the Tribunal issued Procedural Order No. 9 concerning disclosure and due process and directing the Claimants to comply with Procedural Order No. 7 as set out in paragraphs 8-13.
61. On 21 February 2020, the Respondent filed its Reply on Jurisdiction (the “**Respondent’s Reply**”), together with Exhibits R-136 to R-221; Legal Authorities RL-168 to RL-196; a Third Expert Report of [...] dated 21 February 2020 (“**[ER3 of ...]**”), with Exhibits RW-

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- 053 and RW-054; and an Expert Report of [...] dated 21 February 2020 (“[ER of ...]”), with Exhibits KI-001 to KI-030.
62. On 24 February 2020, the Claimants submitted a letter to the Tribunal, pursuant to the Tribunal’s directions set forth in Procedural Order No. 9, together with Annexes 1 to 5. The Respondent’s comments in response were received on 26 February 2020.
63. By email of 28 February 2020, the Claimants maintained that the Respondent’s letter of 26 February raised “*a number of new issues*” and sought leave to respond to them in the Claimants’ next scheduled submission due on 20 March 2020. On the same date, the Respondent submitted an email disputing that it had raised any “*new issues*” and maintaining that resolution of the remaining issues on document disclosure could not wait until 20 March 2020.
64. On 29 February 2020, the Tribunal issued Procedural Order No. 10 concerning disclosure of documents and due process, and requiring the Claimants to comply with the directions given in relation to certain of the Respondent’s document production requests contained in Procedural Order No. 9. The Tribunal further directed that once the Claimants’ responses to the Tribunal’s directions were received, it would invite the Respondent to reply and after that it would treat the matter as closed until the hearing when it would consider any inferences to be drawn from failures in disclosure and the effect of the Parties’ behaviour during the disclosure process on the question of costs.
65. On 4 March 2020, pursuant to the Tribunal’s directions in Procedural Order No. 10, the Claimants submitted a letter together with Annexes 1 to 4. A second letter was submitted on 6 March 2020 informing the Tribunal that documents responsive to several of the requests had not been located.
66. On the same day, 4 March 2020, the Respondent made a request to the Tribunal concerning the deadlines related to the Rejoinder on Jurisdiction to allow enough time to prepare for the hearing. A response letter from the Claimants was submitted on 5 March 2020.
67. On 10 March 2020, the Tribunal reminded the Parties that if proof of the advance payment was not received by 12 March 2020, the upcoming hearing would be cancelled and the

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ICSID Secretary-General might move the Tribunal to stay the proceeding for non-payment pursuant to ICSID Administrative and Financial Regulation 14(3)(d). The Claimants' share of the advance request was received on 12 March 2020.

68. On 13 March 2020, the Parties were invited to confirm their availability for a conference call with the President of the Tribunal to discuss the logistics of the upcoming hearing to be held on April 6–8 in light of the latest developments related to the Covid-19 pandemic.
69. On 17 March 2020, the Claimants requested that the Tribunal grant an extension for the submission of their Rejoinder on Jurisdiction claiming that their Counsel had been seriously impacted in the preparation by the Covid-19 pandemic. Furthermore, by email of 18 March 2020, the Claimants requested a seven-day extension that was disputed by the Respondent on the same date.
70. On 19 March 2020, a conference call was held to discuss the logistics of the April hearing in light of ongoing pandemic. After the call, the Tribunal Secretary recorded in an email, on behalf of the Tribunal, the agreements that were reached during the meeting including: (1) a briefing schedule to discuss the format of the hearing; (2) the extension for the submission of the Claimants' Rejoinder on Jurisdiction; (3) a request to identify by 27 March 2020 the witnesses and experts the Parties wished to cross-examine; and (4) that a pre-hearing organizational meeting would take place on 30 March 2020.
71. On 20 March 2020, following exchanges between the Parties concerning the format of the hearing, the Tribunal Secretary communicated the Tribunal's decision to conduct the hearing remotely, in view of the pandemic and the consequent travel restrictions. In the same letter, the Tribunal provided logistic and administrative directions to assist with the organization of the remote hearing.
72. On 25 March 2020, the Claimants filed their Rejoinder on Jurisdiction (the "**Claimants' Rejoinder**"), together with Exhibits C-539 to C-548; Legal Authorities CL-188 to CL-210 to CL-222; and a Second Expert Report of [...] dated 24 March 2020 ("**ER2 of ...**"). The Rejoinder was supplemented on 26 March 2020 with Legal Authority CL-0223 and on 29 March 2020 with Exhibit GG-001.

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73. On 27 March 2020, the Claimants informed the Tribunal that they intended to cross-examine [...] (“[...]”) at the hearing. On the same date, the Respondent filed a motion to strike portions of the [ER2 of ...] and the Claimants’ Exhibits C-541 to C-548. The Respondent informed the Tribunal that it intended to cross-examine [Witness C] and that it reserved the right to cross-examine [...] depending on the outcome of the Tribunal’s ruling on its motion to strike.
74. On 28 March 2020, the Tribunal decided the motion filed by the Respondent on 27 March. The Tribunal concluded that the relevant portions of the [ER2 of ...] should remain in the record, along with Exhibits C-541 to C-548. On the same date, the Claimants noted that Exhibit C-547 had been provided to the Tribunal and to the Respondent as Annex 2 of the Claimants’ letter of 27 January and therefore had not been identified as a “new” document.
75. On 29 March 2020, the Respondent submitted a motion requesting (1) leave to introduce two new exhibits into the record (Exhibits R-0222 and R-0223), referred as Annexes 1 and 4 to the Claimants’ letter of 4 March, and (2) that the Tribunal allow [...] to respond to the new sections of the [ER2 of ...] during the hearing.
76. A pre-hearing organizational meeting between the Parties and the Tribunal was held on 30 March 2020 by teleconference. Following the meeting, the Tribunal issued Procedural Order No. 11 concerning the organization of the upcoming hearing on jurisdiction.
77. On 30 March 2020, pursuant to paragraph 19 of Procedural Order No. 11, the Tribunal granted the Respondent’s request for leave to introduce Exhibits R-222 and R-223 into the record.
78. By letter dated 30 March 2020, the Respondent argued there were no grounds to “*to block filing of legal authorities or factual documents [...] believes are relevant to respond to [ER2 of ...] related to, for example, the alleged ‘Trust’ documents*”. In this regard, the Respondent noted that the “*Claimants have provided no testimony as to the authority or validity of those documents*”. On 31 March 2020, the Claimants alleged that the Respondent had waited until this point to challenge the validity of Exhibits C-510 [C-513, as corrected by the Tribunal] and C-538, which had been on the record for more than three months, and

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Exhibit C-547, which had already been filed with the Claimants' Rejoinder on 25 March. On the same date, the Tribunal Secretary sent an email inviting the Respondent's comments; the Respondent submitted its response later that day.

79. On 1 April 2020, after considering the Parties' positions, the Tribunal decided (1) that Exhibits C-513 and C-538 might be filed for the examination of the experts during the hearing, and (2) that the Cyprus legal materials (i.e., Legal Authorities RL-197 and RL-198) relevant to the [ER2 of ...] might also be added to the record.
80. On 2 April 2020, pursuant to paragraph 13 of Procedural Order No. 11 and the Tribunal's decision of 1 April, the Respondent filed Exhibits KI-029 to KI-032, and Legal Authorities RL-197 and RL-198.
81. On 2 April 2020, the Respondent submitted an application (1) concerning the documents that could be put to [...] during cross-examination, (2) requesting to supplement Exhibits R-092 and R-096, and (3) requesting to add Exhibit R-224 to the record. Following the Tribunal's approval, the Respondent filed Exhibits R-092a, R-096a, and R-0224. The Tribunal also informed the Parties that the addition of the exhibits was without prejudice to any later decision of the Tribunal on whether the Respondent's cross-examination of [...] was within the limits it had set and what was proper in all the circumstances.
82. A videoconference test call with [...] and [...] was conducted by the Secretary on 2 April 2020. Counsel for both Parties also participated in the videoconference. On 2 April 2020, the Parties submitted their skeleton arguments for the upcoming hearing; corrected versions were submitted by the Parties on 4 April 2020 (the "**Claimants' Skeleton**" and the "**Respondent's Skeleton**", respectively).
83. On 3 April 2020, in accordance with paragraph 12 of Procedural Order No 11, both Parties provided cross-examination bundles. The Claimants' bundle for the cross-examination of [...] contained documents CL-0212, GG-000 and KI-0001 to KI-0032. The Respondent's bundle for the cross-examination of [...] contained [...]s' expert reports along with exhibits C-0015 and C-0513, supplemented on 4 April 2020 by legal authority KI-0033.

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84. On 4 April 2020, pursuant to the Parties' exchange of cross-examination bundles, the Claimants sent a supplemental bundle of background documents for the cross-examination of [...] (exhibits C-0549 to C-0552). On the same date both Parties sent a corrected version of the skeleton of arguments.
85. A hearing on jurisdiction was held by video conference from 6–8 April 2020 (the “**April 2020 Hearing**”). Participating in the April 2020 Hearing were:

Tribunal:

Sir Christopher Greenwood, President (video)
Prof Bernard Hanotiau (video)
Prof Pierre Mayer (video)

ICSID Secretariat:

Ms Jara Mínguez Almeida, Tribunal Secretary (video)

Assistant to the President:

Ms Rosalind Elphick (video)

On behalf of the Claimants:

Counsel

Mr Roderick Cordara, QC (video), of Essex Court Chambers
Ms Emilie Gonin (video), of Doughty Street Chambers

Mr Mark McNeill (video)
Ms Ashley Hammett (audio)
Mr Marjun Parcasio (audio)
Mr Ionut Rus (audio), of Quinn Emanuel Urquhart & Sullivan LLP

Ms Andreia Pîslaru (audio)

Prof Ion Dragne (audio)
Mr Stelian Garofil (audio)
Ms Ana-Maria Filip (audio)
Ms Mădălina Sandu (audio), of Dragne and Asociatii

Witness

[...]

Experts

[...]

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On behalf of the Respondent:

Counsel

Mr John Jay Range (video)

Mr William E Potts Jr (video)

Ms Julie M Peters (audio)

Mr Sevren R Gourley (audio), of Hunton Andrews Kurth LLP

Ms Emilia Toader (audio)

Ms Ramona Voinea (audio)

Ms Anca Iablonschi (audio)

Ms Iris Petrescu (audio), of SCP Toader si Asociatii

Dr Alina Cobuz (audio)

Mr Silviu Ioan Constantin (audio)

Mr Daniel F. Visoiu (video), of SCP Cobuz si Asociatii

Experts

[...]

Court Reporter

Mr Trevor McGowan

86. By letter dated 11 May 2020, the Claimants sought leave to introduce, together with their post-hearing submission, “*a small number of publicly available documents that are directly relevant to questions raised by the Tribunal during the hearing*”. The Respondent objected to the Claimants’ request on 14 May 2020. The Claimants’ request was rejected by the Tribunal on 15 May 2020, but the Tribunal clarified that no leave was necessary to file new legal authorities with the post-hearing submissions.
87. On 19 May 2020, the Parties filed their respective Post-Hearing Briefs (“**CPHB1**” and “**RPHB1**”, respectively). The Claimants’ submission was accompanied by Legal Authorities CL-224 to CL-233.
88. On 10 June 2020, the Parties filed their respective Reply Post-Hearing Briefs (“**CPHB2**” and “**RPHB2**”, respectively”). The Claimants’ submission was accompanied by Legal Authorities CL-234 to CL-245 and the Respondent’s submission was accompanied by Legal Authorities RL-199 and RL-200.

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89. On 26 June 2020, each Party filed a Submission on Costs (“CSOC” and “RSOC”, respectively). The Claimants also filed Legal Authorities CL-246 to CL-254 and the Respondent filed Legal Authorities RL-201 to RL-204.
90. On 30 June 2020, further to an application from the Claimants and an exchange of comments from the Parties, the Tribunal granted the Claimants’ request to add to the record Exhibit C-161a.
91. On 3 August 2020, the Respondent updated its Submission on Costs.
92. On 16 March 2022, the Tribunal declared the proceeding closed.

III. FACTUAL BACKGROUND

[...]

A. THE [...] DEVELOPMENT

[...]

B. THE CLAIMANTS’ ALLEGED INVESTMENT

(1) The Claimants’ Interests in the Romanian and Cypriot Subsidiaries

[...]

(2) The Subsidiaries’ Links to the [...] Project

[...]

(3) The Claimants’ Shareholdings in the Romanian Subsidiaries

[...]

(4) Alverley’s Shareholdings in the Cypriot Subsidiaries

[...]

C. PUBLIC CONTROVERSY AND LEGAL PROCEEDINGS IN ROMANIA

[...]

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D. THE CLAIMANTS' ULTIMATE BENEFICIAL OWNER AND MANAGEMENT

[...]

IV. APPLICABLE LAW

155. It is not in dispute that the Tribunal's jurisdiction is governed by the ICSID Convention and the BIT.

156. Jurisdiction under the ICSID Convention is governed by Article 25(1), which reads as follows:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

157. Article 41(1) of the ICSID Convention provides that “[t]he Tribunal shall be the judge of its own competence”.

158. Article 42(1) of the ICSID Convention provides:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

The Parties are, however, in agreement, and rightly so, that Article 42(1) of the ICSID Convention only applies to the merits of the dispute and does not apply to the determination of the question whether or not the Tribunal has jurisdiction. It is common ground that the Tribunal must decide whether or not it has jurisdiction by applying the provisions of the ICSID Convention and the BIT.

159. Both of these instruments are treaties governed by international law and it is common ground that they should be interpreted in accordance with the principles enshrined in

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Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the “VCLT”),⁴ which provide that:

Article 31. General rule of interpretation

1. *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.*

2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

(a) *Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;*

(b) *Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

3. *There shall be taken into account, together with the context:*

(a) *Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*

(b) *Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*

(c) *Any relevant rules of international law applicable in the relations between the parties.*

4. *A special meaning shall be given to a term if it is established that the parties so intended.*

Article 32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

⁴ VCLT, **CL-077**, Arts. 31-32; Memorial, para. 91; Counter-Memorial, para. 95; Reply, para. 103; Tr. Day 1, 42:19-20 (Range); Tr. Day 1, 143:13-16 (McNeill).

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- (a) *Leaves the meaning ambiguous or obscure; or*
- (b) *Leads to a result which is manifestly absurd or unreasonable.*

160. The Claimants invoke Article 8 of the BIT, the relevant part of which provides that:

ARTICLE 8

Settlement of Investment Disputes

1. Any dispute between one Contracting Party and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party shall be settled between the interested parties.

2. In the event that such a dispute cannot be settled amicably within three months of the date of a written application, the investor in question may submit the dispute, at his choice, for settlement to:

[...]

(b) the “International Centre for the Settlement of Investment Disputes” for the application of the conciliation and arbitration procedures provided by the Washington Convention of 18 March 1965 on the “Settlement of Investment Disputes as between States and Nationals of other States”.

3. The Contracting Party which is a party to the dispute shall at no time whatever during the procedures involving any investment dispute assert as a defence its immunity as well as the fact that the investor has received compensation under an insurance contract covering the whole or part of the incurred damage or loss.⁵

161. The Tribunal will therefore determine whether or not it possesses jurisdiction by considering the provisions of the ICSID Convention and the BIT, together with relevant rules of international law.

V. SUMMARY OF THE RESPONDENT’S JURISDICTIONAL OBJECTIONS

162. The Respondent raises five jurisdictional objections:

⁵ BIT, CL-001, Art. 8.

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- (1) that neither Claimant has satisfied the burden of proving that it has its “*seat*” in Cyprus within the meaning of Article 1(2)(b) of the BIT and neither Claimant is therefore an “*investor*” under the BIT (the “**Investor Objection**”);
 - (2) that neither Claimant has proved that it has made “*investments*” within the meaning of Article 1(1) of the BIT (the “**Investment Objection**”);
 - (3) that the Claimants are engaged in an abuse of the ICSID system in that they are a front for a Romanian national or nationals who transferred assets to them in contemplation of a foreseeable dispute (the “**Abuse of Rights Objection**”);
 - (4) that the alleged investments were not made in good faith (the “**Good Faith Objection**”); and
 - (5) that a BIT between two European Union Member States cannot create jurisdiction (the “**Intra-EU Objection**”).
163. There is a degree of overlap between the objections (particularly between the second and third objections). The Tribunal will, however, consider each in turn to the extent that it is necessary to do so.

VI. OBJECTION 1: THE INVESTOR OBJECTION

A. INTRODUCTION

164. An “*investor*” is defined in Article 1(2) of the Cyprus–Romania BIT as:

(a) In respect of Romania: any natural person holding Romanian citizenship, in accordance with the laws in force as well as any legal person constituted under the Romanian laws and having the head office in Romania;

(b) in respect of the Republic of Cyprus: any natural person having the citizenship of the Republic of Cyprus in accordance with its Law as well as any legal entity incorporated in compliance with its Law and having its seat in the area of the Republic of Cyprus

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*which is under the jurisdiction and the control of the Republic's Government.*⁶

165. Romania asserts that neither Claimant has raised sufficient proof to establish that it meets the requirements of Article 1(2)(b) of the BIT. Subject to one qualification (regarding the question whether they meet the requirements of Cyprus law for the maintenance of a registered office), the Respondent takes no issue with the Claimants' position that they are incorporated in accordance with Cyprus law. Romania asserts, however, that they are unable to meet the requirements of the proviso that a qualifying investor must have "*its seat in the area of the Republic of Cyprus which is under the jurisdiction and the control of the Republic's Government*". The Claimants disagree as a matter of both fact and law.
166. The Parties and their respective experts are agreed that the phrase "*in the area of the Republic of Cyprus which is under the jurisdiction and the control of the Republic's Government*" as it appears in Article 1(2)(b) of the BIT refers to the unoccupied territory in the south of Cyprus,⁷ and excludes the area in the north of the island which came under Turkish control in 1974.⁸ The inclusion of the proviso was, they agree, intended to exclude companies incorporated in the Republic of Cyprus, but having their "*seat*" in the northern part of the island.⁹ Equally, there is no dispute between the Parties that the address at which the Claimant companies have registered their businesses is located in a part of the City of Nicosia which lies in the unoccupied part of Cyprus.¹⁰
167. The Parties' differences are therefore centred on the proper interpretation of the term "*seat*" as it appears in the particular context of Article 1(2)(b) of the BIT. Both accept that the term has no settled, ordinary meaning in international law, in terms of which the word could mean either "*real seat*", meaning the place where the effective management and control of the company occurs, or the "*statutory seat*" of the company, defined as the place

⁶ BIT, **CL-001**, Art. 1(2).

⁷ Counter-Memorial, paras. 121-128; [ER2 of ...], para. 23; [ER of ...], para. 10.13; Reply, para. 91; Rejoinder, para. 32; Tr. Day 1, 73:19-74:12 (McNeill).

⁸ Reply, para. 91; Tr. Day 1, 74:3-4 (McNeill).

⁹ Counter-Memorial, para. 131; Reply, para. 91.

¹⁰ Rejoinder, para. 51.

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where the company is duly incorporated.¹¹ They agree further that the term has no settled meaning under Cypriot domestic law.¹² They differ, however, when it comes to the matter of which law applies and which of the possible interpretations available under either domestic or international law should be given to the term “*seat*” in the context of Article 1(2)(b) of the BIT. Furthermore, whichever interpretation is adopted, the Parties disagree as to whether or not the Claimants are able to satisfy the test as a matter of fact.

B. THE POSITIONS OF THE PARTIES

(1) The Respondent

[...]

a. The meaning of the term “seat”

[...]

(b) Whether either Claimant has established a “real seat” in Cyprus

[...]

(c) Whether either Claimant has established a “statutory seat” in Cyprus

[...]

(2) The Claimants

[...]

a. The meaning of the term “seat”

[...]

(b) Whether the Claimants both have a “real seat” in Cyprus

[...]

¹¹ Memorial, para. 93; Tr. Day 1, 42:16-18 (Range); Tr. Day 1, 74:13-16 (McNeill); RPHB1, paras. 6-7.

¹² Tr. Day 1, 74:16-22 (McNeill); [ER of ...], para. 9.1; Tr. Day 2, 6:11-15 ([...]); Tr. Day 2, 48:19-22 ([...]); [ER2 of ...], para. 27.

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(c) Whether each Claimant has a “statutory seat” in Cyprus

[...]

C. THE ANALYSIS OF THE TRIBUNAL

(1) The Meaning of the Term “Seat” in Article 1(2)(b) of the BIT

215. The Tribunal begins by considering the meaning to be given to the term “*seat*” in Article 1(2)(b) of the BIT. It is important to recall the precise terms of that provision, the relevant part of which defines an investor as:

*[I]n respect of the Republic of Cyprus: [...] any legal entity incorporated in compliance with its Law and having its seat in the area of the Republic of Cyprus which is under the jurisdiction and the control of the Republic’s Government.*¹³

216. To qualify as an investor of Cyprus, a company must therefore meet two requirements: it must be incorporated in compliance with the laws of Cyprus (the “**incorporation requirement**”) and it must have its “*seat*” in unoccupied Cyprus (the “**proviso**”).

217. The Tribunal notes that, on a textual analysis, the reference to the law of Cyprus applies only in respect of the first of these two conditions. Had the parties to the BIT intended that Cyprus law should govern both conditions, it would have been easy for them to have chosen a form of words which said so. That they did not do so is telling. Moreover, the fact that in 1991 there was no clear meaning of the term “*seat*” in Cyprus law,¹⁴ in contrast to the position in some civil law jurisdictions, provides further confirmation that the parties intended the reference to Cyprus law to apply only to the first condition.

218. The Tribunal cannot, therefore, accept the Claimants’ contention that it should look to the law of Cyprus for the meaning of “*seat*”. That meaning must be sought elsewhere.

¹³ BIT, **CL-001**, Art. 1(2)(b).

¹⁴ [ER of ...], paras. 9.1-9.9; [ER2 of ...], paras. 25, 43(i). Tr. Day 1, 81:16-23 (McNeill); Tr. Day 2, 6:11-15 and 48:19-22 (Range).

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219. In the absence of a *renvoi* to domestic law, the Parties agree that the Treaty is to be interpreted by reference to international law.¹⁵ They agree further that there is no generally accepted meaning of the term “*seat*” in international law.¹⁶ The Tribunal considers, therefore, that the meaning has to be identified by a careful analysis of the BIT in accordance with the principles of interpretation contained in the VCLT, so as to ascertain what it is most likely that the parties to the BIT intended when they adopted this clause.
220. The Tribunal considers that two factors militate in favour of the Respondent’s argument that “*seat*” means “*real seat*”.
221. First, the proviso to Article 1(2)(b) must have been intended to add something to the requirement of incorporation. Such a conclusion follows from the general maxim that each provision in a treaty should be given an effect (“*effet utile*”).¹⁷ It also follows from the fact that the proviso was clearly included to meet the particular needs of Cyprus, given that, at the time that the BIT was concluded, the island was divided between an area in the south which was “*under the jurisdiction and control of the Republic’s Government*” and an area in the north which fell outside that control, a circumstance which still persists. To hold that the proviso merely repeated what was already provided for in the requirement of incorporation would deprive the proviso of any *effet utile*. It would also be impossible to reconcile with the obvious desire of the Republic of Cyprus to exclude certain companies incorporated under the laws of Cyprus.
222. The Claimants have argued that “*seat*” should be interpreted to mean “*registered office*” but an entity is not incorporated in compliance with the laws of Cyprus unless it has a registered office in Cyprus.¹⁸ To adopt the Claimants’ preferred interpretation would mean, in effect, that the proviso added nothing to the incorporation requirement.

¹⁵ Memorial, para. 91, note 293; Reply, para. 103; Counter-Memorial, paras. 94, 99; Tr. Day 1, 143:13-16 (McNeill); Tr. Day 1, 146:20-23 (Range).

¹⁶ Memorial, para. 93; Tr. Day 1, 74:13-16 (McNeill); RPHB1, paras. 6-7.

¹⁷ See *Tenaris v. Venezuela*, **RL-147**, paras. 148-151.

¹⁸ Memorial, para. 119, referring to *CEAC v. Montenegro*, **RL-088**, paras. 169-200.

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223. Secondly, closer examination of the concerns which led to the inclusion of the proviso points to the “*real seat*” interpretation. With part of the territory of the Republic of Cyprus occupied and outside the control of the Government of the Republic, Cyprus clearly wanted to exclude from the protection of the BIT certain companies even though those companies were incorporated in Cyprus, namely companies in some way linked to the occupied part of the country. The question is what form that link had to take. Was the decisive consideration the location of the company’s registered office or the location of the “*real seat*” in the sense of the place from which the company’s activities were controlled? The Tribunal considers that the latter approach makes more sense.
224. A company might have its registered office in the unoccupied territory but be controlled from the occupied area. Or, it might have its registered office in the occupied area but be controlled from the unoccupied part of the island. That both possibilities exist is made all the more likely by even a cursory examination of the circumstances of the division of the island. The invasion of 1974 led to large numbers of people leaving their homes in one part of the country to settle in the other.¹⁹ It is therefore highly likely that there were many cases in which the management of a company became physically separated from what had been its registered office. Moreover, the capital city and business centre of Cyprus, Nicosia, was itself divided as a result of the events of 1974.²⁰ Since many businesses presumably had their registered offices in various parts of the capital prior to 1974, separation of the registered office from the place of control was even more likely to have occurred.
225. If “*seat*” in the BIT is taken to mean “*registered office*”, it would mean that a company with its registered office in the unoccupied territory but controlled from the occupied area would be included within the protection of the BIT. By contrast, a company controlled from the unoccupied territory but with a registered office in the occupied area would be

¹⁹ It is not for the Tribunal to comment on whether these movements were forced or voluntary and nothing said here should be taken as such a comment.

²⁰ See Tr. Day 2, 104:16–105:5 ([...]).

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excluded. It is difficult to see why the Government of Cyprus would have desired such a result, something which the Claimants' expert [...] acknowledged.²¹

226. The Tribunal is not persuaded that the Claimants' reliance on the object and purpose of the BIT as a whole leads to a different conclusion. The Claimants are correct in saying that one of the objectives of the BIT is to ensure protection for investors of one State in the territory of the other. That general objective cannot however be relied upon to override the terms by which the two States agreed to define who was to be regarded as an investor. On the contrary, the object of the BIT is to ensure protection for those who meet that definition.
227. Nor does the Tribunal find convincing the argument that the "*real seat*" interpretation introduces an undesirable degree of uncertainty. It is true that it is easier to ascertain where a company has its registered office than to determine where its "*real seat*" of management is located. Nevertheless, the latter test is frequently applied in relation to corporate and tax matters in many jurisdictions, including Cyprus itself.²² The Tribunal considers that it is just as workable as the alternative approach proposed by the Claimants, especially in the unique circumstances of Cyprus.
228. Accordingly, the Tribunal concludes that the term "*seat*" in the proviso of Article 1(2)(b) of the BIT means "*real seat*".

(2) The Requirements of a "*Real Seat*"

229. Since "*seat*" in the proviso of Article 1(2)(b) must be taken to mean "*real seat*", the Tribunal must next decide what requirements must be satisfied if a company is to be held to have its "*real seat*" in the unoccupied part of Cyprus.
230. The Tribunal considers that the requirement that a company have its "*real seat*" in the unoccupied part of Cyprus means that the management and control of the company and its

²¹ Tr. Day 1, 80:25–81:8 and 84:12–85:22 (Mr McNeill); Tr. Day 2, 65:11–67:2 and 71:3–72:4 ([...]); Tr. Day 2, 156:23–157:25 ([...]).

²² [ER of ...], paras. 11.20-11.22; Tr. Day 2, 85:10-13 ([...]).

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activities must in some sense be located in that part of Cyprus. The question is what that means in practice, especially in the case of a holding company.

231. The Respondent argues that neither Claimant meets these requirements because they are merely “*shell*” companies with no real existence and all decisions are taken by their ultimate beneficial owners, which the Respondent asserts means [...], neither of whom resides in, or operates from, Cyprus.²³
232. The Tribunal does not find the attempt to distinguish between a “*shell*” company and a genuine holding company helpful. It notes the testimony of [...] and [...] reference to “*red flags*”.²⁴ These considerations are of great importance in relation to money laundering (under the Cypriot rules on which the Respondent relies extensively) and tax evasion but they do not go to the heart of the issue when determining whether or not a company meets the requirements of investor status under the BIT. To the extent that they are part and parcel of the Respondent’s distinct objection that the Claimants are abusing the ICSID system, they will be considered in relation to Objection No. 3 below. But the Tribunal considers that, for the purposes of the present objection, applying the label “*shell company*” does not assist in the interpretation or application of the test in Article 1(2)(b) of the BIT.
233. Nor is the Tribunal persuaded by the argument that the “*real seat*” of a claimant is located in the place where the ultimate power to control the company resides. Ultimately, every company is controlled by its shareholders, whether they be many or few. In a corporate group, the result is that ultimate control over a subsidiary company resides with its parent. While the shareholders may exercise greater or lesser degrees of control over ordinary decision-making, the fact remains that they have the final say. This is particularly important to note in relation to a holding company set up to hold the shares in an operational entity on behalf of the holding company’s ultimate beneficial owners. Yet it is unlikely that Cyprus, which is home to large numbers of holding companies to whom it offers a

²³ Memorial, paras. 103-105; Reply, paras. 124-127; RPHB1, para. 23.

²⁴ Tr. Day 1, 45:9-11 (Range); RPHB1, para. 22; Respondent’s Skeleton, para. 4(m).

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beneficial taxation and legal regime and which it has worked hard to attract,²⁵ intended to exclude all holding companies based in its territory from protection under the BIT.

234. Taking proper account of the separate personality of each company in any corporate group, the Tribunal considers that the requirements for a “*real seat*” are that the direct management of a company, with responsibility for that company’s compliance with company and taxation laws, as well as laws relating to such matters as bribery, must be located at the seat.
235. The Respondent has drawn the Tribunal’s attention to the passage in *Alps Finance v. Slovakia* in which that tribunal said of a company incorporated in Switzerland:

*Proof of a “business seat”, in the meaning of an effective center of administration of the business operations, requires additional elements, such as the proof that: the place where the company board of directors regularly meets or the shareholders’ meetings are held is in Swiss territory; there is a management at the top of the company sitting in Switzerland; the company has a certain number of employees working at the seat; an address with phone and fax numbers are offered to third parties entering in contact with the company; certain general expenses or overhead costs are incurred for the maintenance of the physical location of the seat and related services, which would be a clear indication that a business entity is effectively organized at a given Swiss place.*²⁶

236. There are, however, a number of problems with the application of this passage to the present case. First, the BIT which was in issue in *Alps Finance* required that to qualify as a Swiss investor the company must not only have its “*seat*” in Switzerland but also have “*real economic activities*” in Switzerland. There is no comparable requirement in the Cyprus–Romania BIT. Secondly, in the passage quoted the tribunal stated that a company must meet certain requirements “*such as*” those listed. It did not say that such a company must meet all of those requirements. Moreover, since the tribunal went on to hold that “*none of these requirements were satisfied by the Claimant*”,²⁷ it is impossible to tell precisely what activity or activities it would have regarded as sufficient. Lastly, although

²⁵ Tr. Day 2, 41:3–42:17 ([...]); Tr. Day 1, 157:5-24 (McNeill); [ER2 of ...], paras. 60-69.

²⁶ *Alps Finance v. Slovakia*, **RL-148**, para. 217.

²⁷ *Alps Finance v. Slovakia*, **RL-148**, para. 218.

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the *Alps Finance* award dates from 2011, a number of the criteria which it lists have a distinctly dated ring. Few businesses today regularly use fax anymore and the increased use of email and other forms of communication have reduced (though not removed) the importance of a physical office, especially for a company that has no direct operational activities.

237. The Tribunal finds more helpful the analysis of the tribunal in the *Tenaris v. Venezuela* case.²⁸ The tribunal in that case concluded that the terms “*siège social*” and “*sede*” (which it held was the Portuguese word for “*seat*”) meant “‘*effective management*’ or *some sort of actual or genuine corporate activity*”.²⁹ The tribunal went on, however, to hold that:

199. *In so far as either entity is no more than a holding company, or a company with little or no day-to-day operational activities, its day-to-day “management” will necessarily be very limited, and so will its physical links with its corporate seat. Put another way, it would be entirely unreasonable to expect a mere holding company, or a company with little or no operational responsibility, to maintain extensive offices or workforce, or to be able to provide evidence of extensive activities, at its corporate location. And yet holding companies, and companies with little or no operational responsibility, have “management”, and are certainly not excluded from the Treaties in this case. Indeed, countries such as Luxembourg and Portugal clearly consider it to their respective benefit to attract such companies, and to maintain a corporate regulatory regime that allows for them.*

200. *To this end, the Tribunal considers that the test of actual or effective management must be a flexible one, which takes into account the precise nature of the company in question and its actual activities. And it is with this in mind that the Tribunal has assessed the record in this case.*³⁰

238. The Tribunal respectfully agrees with this analysis.³¹ Nevertheless, it considers that neither *Tenaris* nor the other cases lay down a rigid test which can be applied by ticking boxes

²⁸ *Tenaris v. Venezuela*, **RL-147**, paras. 150-153.

²⁹ *Tenaris v. Venezuela*, **RL-147**, para. 150.

³⁰ *Tenaris v. Venezuela*, **RL-147**, paras. 199-200.

³¹ The Tribunal also notes the Respondent’s references to *Capital Finacial v. Cameroon*, **RL-149** (see note [...], above). It considers that the test set out in paras. 237-242 of that award essentially follows the same approach as that in *Tenaris v. Venezuela*, **RL-147**, which the Court of Arbitration quotes with approval. In particular, the Tribunal notes the Court’s insistence that “*the examination of the place of efficient administration must result from a flexible*

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reflecting the different links to the State of incorporation; on the contrary, each case must be assessed by reference to its own facts. Moreover, in doing so, the emphasis must be on substance, rather than form. When considering whether a holding company has its “*effective management*” in its State of incorporation, it is necessary to examine whether there is in fact some element of independent decision-making taking place there, even if subject to the ultimate control of the UBO. It appears to the Tribunal that this element is more important than the formalities of records kept by a corporate service provider for whom the Claimants were just two among the many companies for which it provided services.³² For the reasons which will be set out in the next section, the Tribunal considers this element particularly important where (as it turns out is the case with the Claimants) the UBO and the investments held by the holding company are all based in the respondent State.

(3) Do Alverley and Germen Meet the Requirement of Having a “*Real Seat*” in the Area of the Republic of Cyprus Which is Under the Jurisdiction and the Control of the Republic’s Government?

a. Points common to both Claimants

239. The two Claimants are separate companies, even though it transpires that they have the same UBO. In deciding whether they meet the requirements for having a “*real seat*” in the area of the Republic of Cyprus which is under the jurisdiction and the control of the Republic’s Government, each company must therefore be considered separately. The activities of one Claimant cannot strengthen, or weaken, the case of the other.
240. There are, however, certain factors which are common to both companies and which it is appropriate to consider before turning to the individual circumstances of Alverley and Germen.

examination that takes into account the concrete nature of the company concerned and its concrete activities” (para. 242, translation from French).

³² Tr. Day 3, 29:6-19 ([...]); Management Agreement, **R-143 / R-222**.

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241. First, it is now accepted that the UBO of both companies is [...].³³ The Claimants now accept that 100% of the shares in both Alverley and Germen are held by [...].
242. Moreover, [...]. [...] The agreement indemnified [...] and its employees to the extent that they were acting under instruction from [...] as UBO.
243. In 2017, [...] instructed [...] to accept instructions from [...] or [...] who would act on [...] behalf.³⁴
244. [...], who is [...] of [...], testified that [...] was the UBO and that [...] and [...] colleagues took directions from [...] or [...].³⁵
245. It is unclear precisely what role [...], might have had in relation to giving these directions. [...] The Tribunal accordingly considers it reasonable to infer that [...] may have been acting on [...] behalf on occasion, particularly given [...] significant ties to [...] family's business operations in Romania and Cyprus. [...] Germen's financial statements contain no similar statements. However, since both Alverley and Germen are owned by the same company ([...])³⁶ which is in turn owned by [...],³⁷ the Tribunal considers it reasonable to infer that [...] is a person with significant influence or joint control over Germen also. The Tribunal also notes that the Claimants assert that [...] "*was instrumental in the establishment of the investments*".³⁸ As noted above, the Claimants have also referred to both companies being ultimately owned by "[...]."³⁹
246. Both Claimants were therefore alike in having as their UBO [...] and [...] as a person with significant influence or control, and in having [...] who took instructions from the UBO through, since 2017, [...] or [...].

³³ Rejoinder, para. 280; Tr. Day 3, 126:4-13 (Cordara).

³⁴ Letter from [...] to [...], 1 July 2017, **R-158** (Alverley/Bladon); Letter from [...] to [...], 1 July 2017, **R-161** (Germen).

³⁵ Tr. Day 3, 17:6–18:18 ([...]).

³⁶ Germen Financial Statements, 31 December 2017, **C-508**, note 15; Bladon Annual Report and Financial Statements, 31 December 2016, **C-428**, note 26.

³⁷ Management Agreement, Appendix B (20 February 2020 production version), **R-155**, p. AG00001865.

³⁸ Letter from the Claimants to the Tribunal, 20 September 2019. *See also* [WS of ...], para. 52.

³⁹ *See* para. [...] **Error! Reference source not found.**, above, citing Rejoinder, para. 280.

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247. The Respondent has not argued that the fact that the UBO is a Romanian national is, in itself, sufficient to ensure that the Claimants lacked “*real seats*” in Cyprus.⁴⁰ It contends that what matters is whether “*they have a physical presence in, and genuine connection to, Cyprus, including that they are effectively managed and controlled from within Cyprus, which necessarily means that the actual decision-making and decision-makers for Alverley and Germen must be physically present in Cyprus*”.⁴¹
248. The Tribunal has already explained that a holding company will necessarily be subject to the ultimate control of its UBO. The fact that the UBO is located in another country cannot, therefore, preclude the holding company being held to have a “*real seat*” in its State of incorporation. To hold otherwise would be to exclude most, if not all, holding companies incorporated in Cyprus from the protection of the BIT. The Tribunal does not consider that this was the intention of the parties to the BIT. In the view of the Tribunal, however, the holding company must demonstrate that there is a degree of “*effective management*” from the unoccupied area of Cyprus.
249. That is particularly important where, as here, the UBO is based in the respondent State and the assets which are the subject of the case are also located there. The purpose of most BITs is to encourage investment flows into the host State. The preamble to the Cyprus–Romania BIT makes clear that this is the principal objective. The two Governments declare that they have agreed on the provisions of the BIT:

Desiring to develop further the relations of economic co-operation existing between their two States and to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party,

[...]

Recognising that the encouragement and reciprocal protection of investments, according to the present Agreement will be conducive

⁴⁰ “As this issue was raised repeatedly during the Hearing, Romania wishes to make it clear that it takes no position for purposes of this arbitration on whether the Tokios Tokelés case was rightly or wrongly decided. Romania has not and does not base its case on a suggestion that Alverley and Germen do not have ‘real seats’ in Cyprus only because their UBOs are Romanian nationals [...]” (RPHB1, para. 30).

⁴¹ RPHB1, para. 30.

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*to the stimulation of initiatives in this field and will increase prosperity of both States [...].*⁴²

250. If, however, all that is happening is that a Romanian investor is recycling funds into an existing Romanian investment through a holding company in Cyprus which really is no more than a paper façade, it is difficult to see such an operation as something within the contemplation of the parties to the BIT. That makes it particularly important to scrutinise the evidence to see whether the Cyprus holding company is exercising some form of effective management and not simply discharging formalities.
251. Secondly, since each company must satisfy the Tribunal that it has a “*real seat*” in Cyprus in order to meet one of the criteria for jurisdiction, the date at which each of the Claimants must show that it had such a “*real seat*” is the date on which the proceedings were commenced, namely 13 August 2018 (the date on which the Request for Arbitration was received by ICSID). That does not preclude the Tribunal from looking at evidence of the Claimants’ conduct before that date – indeed, doing so is unavoidable – but it is relevant only insofar as it gives an insight into the position at the date of commencement.
252. Thirdly, at the date the proceedings were commenced, each of the Claimants had arrangements with [...] whereby one of the [...] acted as sole director of the company while another [...] represented the sole shareholder and a third ([...]) acted as company secretary.⁴³
253. In these circumstances, the Tribunal considers that there is a degree of formalism in speaking of “*meetings*” of the shareholders or the directors. It accepts that a resolution of the sole director or a shareholder resolution is sufficient to establish that an action was taken.
254. Lastly, the Respondent has made numerous criticisms of the financial statements of the two Claimants, arguing that they do not meet international accounting standards and contain

⁴² BIT, **CL-001**, Preamble.

⁴³ Germen Shareholders’ Report as of 14 March 2019, **R-015**; Alverley Shareholders’ Report as of 14 March 2019, **R-017**; Bladon, Directors’ Resolution, 30 September 2015, **C-516**; Germen, Sole Director’s Resolution, 5 July 2016, **C-519**.

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obvious errors.⁴⁴ The question for the Tribunal, however, is not whether the directors of the Claimants were failing in their duties under the laws of Cyprus but whether they were managing the Claimants from Cyprus. Mistakes in the financial statements may be relevant to the question whether or not the management in Cyprus was “*effective*” and they have an importance in determining the weight to be accorded to those statements as evidence of any given matter, but they are not in themselves definitive answers to the question before the Tribunal.

(b) The Claimant Alverley

255. Alverley was incorporated on 4 May 1999.⁴⁵ According to the Certificate of Registered Office issued by the Cyprus Registrar of Companies and Official Receiver on 17 August 2017, its registered office is at “[...]”⁴⁶ – the premises of [...].⁴⁷ The Respondent has argued that the certificate issued in August 2017 is insufficient to prove that this was the registered office at the time the Request for Arbitration was served (13 August 2018).⁴⁸ It has not persisted with this point and the Tribunal considers that the certificate is sufficient evidence that this is the office which is currently registered with the Registrar of Companies.
256. As the *CEAC v. Montenegro* case shows, the Registrar does not check whether the company actually maintains an office at this address and certificates of registered office as such do not suffice as conclusive evidence that a registered office exists.⁴⁹ In the circumstances of this case, however, it appears to be common ground that Alverley does indeed have an office at the address listed on its Certificate of Registered Office, although its nameplate is not displayed outside as required by Cyprus law.⁵⁰ While that may entail a

⁴⁴ See, in particular, [ER2 of ...], para. 8; [ER3 of ...], paras. 15-18, 38-50.

⁴⁵ Bladon Certificate of Incorporation, 4 May 1999, **C-001**; Bladon Memorandum and Articles of Incorporation, **C-387**.

⁴⁶ Bladon Certificate of Domiciliation, 17 August 2017, **C-002**.

⁴⁷ [WS of ...], para. 15; Cyprus Securities and Exchange Commission listing for [...] as of 25 April 2019, **R-016**.

⁴⁸ Memorial, para. 109.

⁴⁹ *CEAC v. Montenegro*, **RL-088**, paras. 160-168. The deficiencies identified by the tribunal in the *CEAC* case went far beyond the omission of a nameplate.

⁵⁰ Counter-Memorial, para. 175; Rejoinder, paras. 111-113; Tr. Day 1, 93:12–94:14 (McNeill); Photographs of [...] from October 2019, **R-130**.

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penalty under the laws of Cyprus, the Tribunal accepts the evidence of the Claimants' expert that this omission does not affect Alverley's status as a company incorporated under the law of Cyprus.⁵¹

257. The record establishes that, as at 13 August 2018, Alverley:

- (1) had the right under the Management Agreement to use the office space of [...],⁵² in January 2018 it began leasing separate office space,⁵³ and it had no other office outside Cyprus;
- (2) had a sole director based in Cyprus;⁵⁴
- (3) kept its books and records in Cyprus;⁵⁵
- (4) filed tax and VAT returns in Cyprus;⁵⁶
- (5) held bank accounts in Cyprus;⁵⁷
- (6) obtained, and paid for, legal advice in Cyprus;⁵⁸

⁵¹ [ER1 of ...], paras. 53-59. *See also* [ER of ...], para. 12.8.

⁵² Management Agreement, **R-143 / R-222**, Art. 2.

⁵³ Office Space Agreement – Terms of Business between [...] and Bladon, 1 January 2018, **C-461**.

⁵⁴ Bladon, Directors' Resolution, 30 September 2015, **C-516** (appointing [...] as sole director).

⁵⁵ [WS of ...], para. 19; Tr. Day 3, 68:14-17. However, the fact that the Claimants' counsel informed the Tribunal in 2019 and 2020 (*see* Procedural Order No. 7, p. 116; and Letter from the Claimants to the Tribunal, 24 February 2020, p. 3) that it was having difficulties obtaining records which had been retained by the previous directors raises questions about whether all of these books and records were maintained at the registered office.

⁵⁶ The most recent statements in the record are: Bladon HE 32(I), 31 December 2017, **C-432**; income tax for the tax year 2016 (**C-460**; Bladon VAT Returns, 1 December 2018 to 28 February 2019, **C-441**. Details of earlier returns are set out in CPHB1, para. 33, note 66.

⁵⁷ The record includes the bank statements from [...], for the years 2018 ([...], Statement of Account for Alverley, 1 January 2018 to 31 December 2018, **C-400a**), 2017 ([...], Statement of Account for Bladon, 1 January 2017 to 31 December 2017, **C-401a**) and 2016 ([...], Statement of Account for Bladon, 1 January 2016 to 31 December 2016, **C-402a**). There is also a statement from [...] for 16 September 2014 to 15 September 2016 ([...], Statement of Account for Bladon, 15 September 2016, **C-403a**).

⁵⁸ The record includes invoices from the law firm [...] dated 22 November 2016 (Bladon, Invoice from [...], 22 November 2016, **C-408**) and 26 April 2018 (Bladon, Invoice from [...], 26 April 2018, **C-410**), as well as one dated 18 October 2018 (Bladon, Invoice from [...], 18 October 2018, **C-409a**) which of course comes after the commencement of the arbitration but may relate to legal services provided before that date.

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- (7) submitted financial statements, audited by [...]’s Cyprus office;⁵⁹
- (8) took board decisions, apparently in Cyprus, regarding the purchase of shares in different companies;⁶⁰
- (9) took board decisions, apparently in Cyprus, regarding participation in shareholders’ meetings of companies in which Alverley held shares;⁶¹ and
- (10) in 2018 had appointed [...], a Romanian national, as a part-time employee, to report to BoD meetings in Cyprus on a quarterly basis regarding the [...] Project and other

⁵⁹ The most recent statement is for 2016 (Bladon Annual Report and Financial Statements, 31 December 2016, **C-428**). Cf. Alverley’s financial statements for the years 1999 through 2003, signed on 14 April 2005 (Bladon Report and Financial Statements, 31 December 1999, **C-411**; Bladon Report and Financial Statements, 31 December 2000, **C-412**; Bladon Report and Financial Statements, 31 December 2001, **C-413**; Bladon Report and Financial Statements, 31 December 2002, **C-414**; Bladon Report and Financial Statements, 31 December 2003, **C-415**); the financial statements for the years 2004 and 2005 years, signed on 22 December 2006 (Bladon Report and Financial Statements, 31 December 2004, **C-416**; Bladon Report and Financial Statements, 31 December 2005, **C-417**); the financial statements for the years 2006 and 2007 financial, signed on 30 April 2010 (Bladon Report and Financial Statements, 31 December 2006, **C-418**; Bladon Report and Financial Statements, 31 December 2007, **C-419**); the 2008 financial statement, signed on 22 November 2010 (Bladon Report and Financial Statements, 31 December 2008, **C-420**); the financial statements for the years 2009 and 2010, signed on 9 June 2011 (Bladon Report and Financial Statements, 31 December 2009, **C-421**; Bladon Report and Financial Statements, 31 December 2010, **C-422**); the 2011 financial statement, signed on 9 July 2013 (Bladon Report and Financial Statements, 31 December 2011, **C-423**); the 2012 financial statement, signed on 10 January 2014 (Bladon Report and Financial Statements, 31 December 2012, **C-424**); the 2013 financial statement, signed on 17 August 2015 (Bladon Report and Financial Statements, 31 December 2013, **C-425**); the 2014 financial statement, signed on 27 June 2016 (Bladon Report and Financial Statements, 31 December 2014, **C-426**); and the 2015 financial statement, signed on 13 February 2018 (Bladon Report and Financial Statements, 31 December 2015, **C-427**).

⁶⁰ There are two examples in the record: the minutes of a meeting held on 14 July 2011 (Bladon, Minutes of BoD Meeting, 14 July 2011, **R-168**) at which it was decided to purchase [...] of the shares in each of [...] and [...], and the record of a resolution of the sole director on 29 December 2017 deciding to purchase shares in [...], a Cyprus company (Bladon, Sole Director’s Resolution, 29 December 2017, **C-393**).

⁶¹ Bladon, Minutes of BoD Meeting, 16 April 2008, **R-185** (regarding an extraordinary general meeting of [...]); Bladon, Minutes of BoD Meeting, 26 November 2015, **C-392** (regarding participation in a shareholders’ meeting of [...], a Romanian company, and deciding on the view which Alverley would support at that meeting).

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real estate matters in Romania.⁶² Prior to that date, it appears that [...] visited Romania periodically to obtain updates there.⁶³

258. These facts appear to be accepted by the Respondent. The Respondent has however challenged the assertion that there were BoD meetings in Cyprus, arguing that the documents on the record were resolutions of the sole director, not references to actual meetings.⁶⁴ For the reason already given, the Tribunal considers this excessively formalistic given that at the times in question there was a sole director. In any event, several of the documents on record are the minutes of meetings with dates and location.⁶⁵ The Tribunal concludes that the evidence shows that the sole director operated in Cyprus and took decisions there.
259. It is also clear from the financial statements (although there are questions which the Tribunal will discuss in the next part of the Award about the reliability of some of the information in those statements) that by the end of 2016 (the last date for which there is a financial statement in the record), Alverley held shares in seven Cypriot companies (all of them described as holding companies) including [...] and [...], and one Romanian company.⁶⁶ Moreover, although it held very few investments until 2006, between then and the end of 2016, Alverley's financial statements show holdings in the following companies, described as "associates":⁶⁷

⁶² The precise date of this appointment is unclear. The contract was dated 1 January 2018 (*see* Contract of Employment between Bladon and [...], 1 January 2018, **R-221**) but [...] admitted that it was actually signed at a later date (*see* Tr. Day 3, 36:13-21 ([...])). The minutes of a BoD meeting of 21 August 2018, shortly after the commencement of the arbitration, ratified the appointment and agreed that reports would be made quarterly (*see* Alverley, Minutes of BoD Meeting, 21 August 2018, **R-089**). There is only one such report in the record (*see* Alverley, Minutes of BoD Meeting, 5 March 2019, **R-178**). The company's decision, after the filing of the Request, to employ another part-time member of staff cannot affect the question whether it had a "real seat" in Cyprus at the critical date, since that employment only occurred after the critical date.

⁶³ Tr. Day 3, 49:9-16 ([...]).

⁶⁴ RPHB1, para. 28, notes 62, 64.

⁶⁵ *See, e.g.*, Bladon, Minutes of BoD Meeting, 14 July 2011, **R-168**; Bladon, Minutes of BoD Meeting, 26 November 2015, **C-392**; Alverley, Minutes of BoD Meeting, 5 March 2019, **R-178**.

⁶⁶ Bladon Annual Report and Financial Statements, 31 December 2016, **C-428**, p. 20.

⁶⁷ This information is taken from [...], Annex 5, with additional information from the statements themselves. The term "associate" is defined as "an entity over which the Company has significant influence but not control or joint control. Significant influence is the power to participate in the financial and operating policy decisions of the investee, usually when the Company has a shareholding of between 20% and 50% of the voting rights." (Bladon Annual Report and Financial Statements, 31 December 2016, **C-428**, p. 15).

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Name of Company	State of Incorporation	Description of Activities ⁶⁸	Dates Held ⁶⁹
[...]	Cyprus	Holding company	2010 ⁷⁰ –
[...]	Cyprus	Holding company	2010 ⁷¹ –
[...]	Romania	Real estate	2000–2010 ⁷²
[...]	Romania	Real estate	2006–2011
[...]	Romania	Hotels	2006–2011 ⁷³
[...]	Romania	Food and beverage	2006–2015
[...]	Romania	Food and beverage	2006–2015
[...]	Romania	Real estate	2006–2008
[...]	Romania	Holding company	2007–2011
[...]	Romania	Hotel services	2007–2014
[...]	Romania	Holding company	2007–2011
[...]	Romania	Holding company	2007–2011
[...]	Romania	Consulting	2007–2012
[...]	Romania	Real estate	2007–2012
[...]	Romania	Holding company	2007–2015
[...]	Cyprus	Holding company	2009–
[...]	Romania	Food and beverage	2009–2015
[...]	Romania	Holding company	2010–2015
[...]	Cyprus	Holding company	2011–
[...]	Romania	Real estate	2011–2016
[...]	Romania	Restaurant	2011–2016
[...]	Romania	Telecoms	2011–2016
[...]	Cyprus	Franchising	2011–2014
[...]	Cyprus	Holding company	2014–
[...]	Cyprus	Holding company	2011 and 2015–
[...]	Romania	Holding company	2011–2015
[...]	Romania	Holding company	2010–2013
[...]	Cyprus	Holding company	2012–
[...]	Romania	Holding company	2007–

260. In addition, in 2015 Alverley invested just over [...] to buy a controlling interest in another Romanian company, [...], which appears in the 2015 financial statement as a subsidiary.

Some of the companies are shown as subsidiaries in the early financial statements.

⁶⁸ The descriptions are those given in the relevant financial statements.

⁶⁹ These dates are taken from the financial statements. There are doubts, discussed elsewhere, about the dates on which some of these shares were acquired and alienated.

⁷⁰ See Sec. VIII.C(5)a, below.

⁷¹ *Ibid.*

⁷² There is some doubt about the date of acquisition and it is common ground that these shares were sold to Germen on 30 June 2008.

⁷³ There was a very small holding (1% of the company's shares) shown in the financial statements from 2000 to 2006.

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Its share was increased to 100% in 2016. [...] is described as a company specialising in residential and commercial building development.⁷⁴

261. Alverley made small losses or profits in the years up to and including 2006. From 2007, its profits became substantial. It received significant sums in dividends from the companies in which it held investments and paid large amounts in dividends to its UBO and preference shareholders from 2010.⁷⁵ Its financial statements report (all sums in Euros):

Year	Revenue	Profit After Tax	Tax	Dividends Paid
2007	[...]	[...]	[...]	[...]
2008	[...]	[...]	[...]	[...]
2009	[...]	[...]	[...]	[...]
2010	[...]	[...]	[...]	[...]
2011	[...]	[...]	[...]	[...]
2012	[...]	[...]	[...]	[...]
2013	[...]	[...]	[...]	[...]
2014	[...]	[...]	[...]	[...]
2015	[...]	[...]	[...]	[...]
2016	[...]	[...]	[...]	[...]

262. There is thus no denying that Alverley was extremely profitable and that it was active. The Respondent and its expert, [...], raise a number of what they describe as “*red flags*”, including in particular the failure to abide by certain international accounting standards, the number of transactions with related parties, and the very large loans made to [...] (the outstanding amount of which is shown at the end of 2016 as [...]).⁷⁶ Nevertheless, the question for the Tribunal at this stage is confined to whether or not Alverley had a “*real seat*” in Cyprus in 2018, in the sense that it was effectively managed from there. In that context, the Tribunal does not consider that it can draw from those “*red flags*” an adverse inference that there was no effective management in Cyprus.

⁷⁴ Bladon Report and Financial Statements, 31 December 2015, C-427, p. 20; Bladon Annual Report and Financial Statements, 31 December 2016, C-428, p. 20.

⁷⁵ A small number of non-voting preference shares were created from 2016. The preference shareholders were entitled to substantial dividends. One preference shareholder was [...], who received over [...] in dividends in 2018 ([...], para. 30); another was [...], a representative of [...] (*see* para. 243, above), who appears to have received no dividend, though [...] did receive some [...] in respect of invoices ([...], para. 33). Another preference shareholder, [...], received [...] ([...], para. 28).

⁷⁶ Bladon Annual Report and Financial Statements, 31 December 2016, C-428, p. 32. *Cf.* [...], paras. 38-50; Reply, para. 133.

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263. The Tribunal notes the indicia of presence in Cyprus set out in para. 257, above. It also notes that Alverley had interests in a number of companies, both Cypriot and Romanian, and that there was considerable activity through its bank accounts in Cyprus.⁷⁷ The Tribunal considers that there is sufficient evidence before it to justify a finding that there was the degree of “*effective management*” to be expected of a holding company taking place in Cyprus. Of particular importance is the fact that the companies in which Alverley held shares included companies with no proven link either to [...] or the [...] development. It is possible that such links exist but the Tribunal cannot base its finding on speculation. Accordingly, the Tribunal cannot conclude that Alverley was just a case of Romanian nationals recycling their money through a paper façade.
264. Taking into account all of the evidence put before it, the Tribunal concludes, on the balance of probabilities, that Alverley has met the test of having a “*real seat*” in Cyprus at the critical date. The Respondent’s objection to jurisdiction on this basis is thus dismissed so far as Alverley is concerned.

(c) The Claimant Germen

265. Germen was incorporated on 26 October 2007.⁷⁸ According to the Certificate of Registered Office issued by the Cyprus Registrar of Companies and Official Receiver on 27 October 2016, its registered office is also listed as “[...]” the premises of [...].⁷⁹ The Respondent has argued that the certificate issued in August 2017 is insufficient to prove that this was the registered office at the time the Request for Arbitration was served (13 August 2018).⁸⁰ It has not persisted with this point and the Tribunal considers that the certificate is sufficient evidence that this is the office which is currently registered with the Registrar of Companies. As with Alverley, it is accepted that there has been a failure to display the

⁷⁷ The Tribunal notes that [...] emphasizes that a large number of the transactions between 2015 and 2018 involved money moved between Alverley’s bank accounts or with persons and entities associated with the UBO ([...], Annex 3) but considers that there is nevertheless sufficient banking activity in Cyprus to afford support for its conclusion – which is based on all of the factors set out above – that Alverley engaged in Cyprus in the level of activity which would be expected of a holding company under the *Tenaris* test (see para. 237, above).

⁷⁸ Certificate of Incorporation, **C-003**; Germen Certificate of Domiciliation, 27 October 2016, **C-004**. The Memorandum and Articles of Association are at **C-464**.

⁷⁹ Germen Certificate of Domiciliation, 27 October 2016, **C-004**; [...], para. 15; Cyprus Securities and Exchange Commission listing for [...] as of 25 April 2019, **R-016**.

⁸⁰ Memorial, para. 109; Photographs of [...] from October 2019, **R-130**.

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company's name outside the registered office.⁸¹ For the reasons already given (*see* para. 256, above), the Tribunal considers that this has no effect on the present proceedings.

266. Many of the facts regarding Germen are similar to those set out in the previous section regarding Alverley. In particular, Germen:

- (1) had the right under the Management Agreement to use the office space of [...] ⁸² and it had no other office outside Cyprus;
- (2) had a sole director based in Cyprus; ⁸³
- (3) kept its books and records in Cyprus; ⁸⁴
- (4) filed tax and VAT returns in Cyprus; ⁸⁵
- (5) held bank accounts in Cyprus; ⁸⁶
- (6) submitted financial statements, audited by [...] until 2015 and thereafter by [...], in Cyprus; ⁸⁷

⁸¹ Memorial, para. 117; Reply, para. 147.

⁸² Management Agreement, **R-143 / R-222**, Art. 2.

⁸³ Germen, Sole Director's Resolution, 5 July 2016, **C-519**.

⁸⁴ [...], para. 19; Tr. Day 3, 68:13-17 ([...]). However, the fact that the Claimants' counsel informed the Tribunal in 2019 and 2020 (*see* Procedural Order No. 7, p. 116; and Letter from the Claimants to the Tribunal, 24 February 2020, p. 3) that it was having difficulties obtaining records which had been retained by the previous directors raises questions about whether all of these books and records were maintained at the registered office.

⁸⁵ For annual tax returns, *see*: Germen HE 32(I), 31 December 2016, **C-476**; Germen HE 32(I), 31 December 2017, **C-477**; Germen HE 32(I), 31 December 2015, **C-478**; Germen HE 32(I), 31 December 2008, **C-479**; Germen HE 32(I), 31 December 2009, **C-480**; Germen HE 32(I), 31 December 2010, **C-481**; Germen HE 32(I), 31 December 2011, **C-482**; Germen HE 32(I), 31 December 2012, **C-483**; Germen HE 32(I), 31 December 2013, **C-484**; Germen HE 32(I), 31 December 2014, **C-485**. For income tax returns, *see*: Germen Tax Returns for 2007, **C-486**; Germen Tax Returns for 2008, **C-487**; Germen Tax Returns for 2009, **C-488**; Germen Tax Returns for 2010, **C-489**; Germen Tax Returns for 2011, **C-490**; Germen Tax Returns for 2012, **C-491**; Germen Tax Returns for 2013, **C-492**; Germen Tax Returns for 2014, **C-493**; Germen Tax Returns for 2015, **C-494**; Germen Tax Returns for 2016, **C-495**; Germen Tax Returns for 2017, **C-496**. For VAT returns, *see*: Germen VAT Returns, 1 March 2018 to 31 May 2018, **C-497**; Germen VAT Returns, 1 June 2018 to 31 August 2018, **C-498**.

⁸⁶ The record includes the bank statements from [...], for the years 2018 ([...], Statement of Account for Germen, 1 January 2018 to 31 December 2018, **C-523a**), 2017 ([...], Statement of Account for Germen, 1 January 2017 to 31 December 2017, **C-524a**) and 2016 ([...], Statement of Account for Germen, 1 January 2016 to 31 December 2016, **C-525a**).

⁸⁷ The most recent statement is for 2017, signed on 5 June 2019 (Germen Financial Statements, 31 December 2017, **C-508**). *Cf.* Germen's financial statements for the financial years 2008 through 2013, signed on 16 and 17 September

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- (7) took BoD decisions, apparently in Cyprus, regarding participation in shareholders' meetings of companies in which Germen held shares;⁸⁸ and
- (8) although it had no employees, the evidence of [...] was that [...], after [...] retention by Alverley, also reported to the Germen BoD regarding the [...] Project and other real estate matters in Romania. Prior to that date, it appears that [...] visited Romania periodically to obtain updates there.⁸⁹
267. There are, however, several important differences between Germen and Alverley. While Alverley held shares in a wide range of companies, Germen's only investments have been in [...]. [...]
268. Germen's 49.25% interest in [...] was acquired:
- by purchasing from [...] 24.9% of the shares on [...],⁹⁰ Alverley, like Germen, was a company owned and controlled by [...] through [...];
 - by purchasing from [...] 24.319% of the shares on [...];⁹¹ and
 - by two small purchases from [...] ⁹² on [...],⁹³ and [...] on [...].⁹⁴
269. Germen's 42.09% share in [...] was acquired as follows:

(Germen Report and Financial Statements, 31 December 2008, **C-499**; Germen Report and Financial Statements, 31 December 2009, **C-500**; Germen Report and Financial Statements, 31 December 2010, **C-501**; Germen Report and Financial Statements, 31 December 2011, **C-502**; Germen Report and Financial Statements, 31 December 2012, **C-503**; Germen Report and Financial Statements, 31 December 2013, **C-504a**); the 2014 and 2015 financial statements, signed on 21 June 2016 (Germen Report and Financial Statements, 31 December 2014, **C-505a**; Germen Report and Financial Statements, 31 December 2015, **C-506**); and the 2016 financial statement, signed on 5 June 2019 (Germen Report and Financial Statements, 31 December 2016, **C-507a**).

⁸⁸ CPHB1, para. 34, referring to a vote by correspondence for the ordinary general meetings of shareholders in [...] ([...], Form of Vote by Correspondence, 25–26 April, 2017, **C-470**) and in [...] ([...], Form of Vote by Correspondence, [...], **C-471**).

⁸⁹ Tr. Day 3, 49:9-16 ([...]).

⁹⁰ Shares Sale-Purchase Agreement in [...] between Bladon and Germen, [...], **C-014**.

⁹¹ Shares Sale-Purchase Agreement in [...] between [...] and Germen, [...], **C-036**.

⁹² [...] was a director of [...].

⁹³ Shares Sale-Purchase Agreement in [...] between [...] and Germen, [...], **C-037**.

⁹⁴ Shares Sale-Purchase Agreement in [...] between [...] and Germen, [...], **C-038**.

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- by purchasing 3.196% from [...] on [...];
 - by purchasing 10.017% from [...] on [...];
 - by purchasing 0.069% from [...] on [...]; and
 - by purchasing 28.81% from [...] on [...].
270. Germen's 37.64% share in [...] was acquired as follows:
- by purchasing 5.3077% from [...] on [...];⁹⁵ and
 - by purchasing 32.3323% from [...] on [...].⁹⁶
271. [...] is a Romanian company [...].⁹⁷ It was described by [...] as being 50% owned by [...],⁹⁸ an assertion repeated on several occasions during the present proceedings by the Respondent and not denied by the Claimants.
272. It follows that all but a very small part of Germen's investment in [...] was acquired from [...] and a company (Alverley) of which [...] is the UBO. The principal part of its investment in [...] was acquired from Alverley (of which [...] is the UBO) and [...] (of which [...] owns 50%). The principal part of Germen's investment in [...] was also acquired from [...].
273. These shareholdings were valued at [...] in the Germen financial statement for 2008.⁹⁹ The same valuation appears in every financial statement from Germen thereafter.¹⁰⁰

⁹⁵ Shares Sale-Purchase Agreement in [...] between [...] and Germen, [...], **C-007**.

⁹⁶ Shares Sale-Purchase Agreement in [...] between [...] and Germen, [...], **C-045**.

⁹⁷ Supporting Memorandum for Establishment of [...], 5 December 1990, **R-146**.

⁹⁸ 2017 Judgment, **C-049**, p. 90.

⁹⁹ Germen Report and Financial Statements, 31 December 2008, **C-499**, p. 8.

¹⁰⁰ See, most recently, Germen Financial Statements, 31 December 2017, **C-508**, p. 12. Strangely, the valuation is given as [...] in the auditor's reports up to 2016 after which, with a different auditor, it is shown in Euros. Since the acquisitions all occurred in 2008, after Cyprus had adopted the Euro, the Tribunal assumes that the auditor's statements from 2008–2015 were an error and it has adopted the figure shown in the body of the financial statements.

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274. In sharp contrast to Alverley, Germen was never profitable. It made a loss in every year with accumulated losses to 31 December 2017 of [...].¹⁰¹ This led the auditors to question whether it was a going concern,¹⁰² and the BoD to include in the 2016 financial statement a note to the effect that the UBO had indicated that they would provide sufficient financial support to enable the company to meet its obligations as they fell due and continue as a going concern.¹⁰³

275. The financial statements from 2008 to 2015 all contain the following statement in the Directors' Report:

[...].¹⁰⁴

This statement did not appear in the 2016 financial statement which follows a different model with no separate Directors' Report.

276. The record does not, however, contain any minutes of BoD meetings at which this issue was discussed. Although the Tribunal has before it fifteen minutes or records of decisions of the sole director regarding Germen's participation in the shareholders' meetings of [...], [...] and [...] between 2009 and 2016,¹⁰⁵ these are largely formal, recording the routine matters which always come before shareholders' meetings and appointing a proxy to cast Germen's votes (usually [...], although [...] is appointed proxy in relation to forthcoming meetings of [...]¹⁰⁶ and [...]¹⁰⁷). Even where there is a matter of real substance to be

¹⁰¹ Germen Financial Statements, 31 December 2017, **C-508**, p. 5.

¹⁰² Germen Report and Financial Statements, 31 December 2014, **C-505a**, pp. 5, 12.

¹⁰³ Germen Report and Financial Statements, 31 December 2016, **C-507a**, p. 9.

¹⁰⁴ Germen Report and Financial Statements, 31 December 2008, **C-499**, p. 2.

¹⁰⁵ For [...] see: Germen, Minutes of Meeting of Sole Director, 2 November 2009, **R-189**; Germen, Minutes of Meeting of Sole Director, 23 April 2010, **R-183**; Germen, Minutes of Meeting of Sole Director, 19 April 2013, **R-190**; Germen, Minutes of Meeting of Sole Director, 20 March 2014, **R-191**; Germen, Decision of Sole Director, 31 March 2016, **C-469**. For [...] see: Germen, Minutes of Meeting of Sole Director, 20 May 2009, **R-188**; Germen, Minutes of Meeting of Sole Director, 26 April 2010, **R-194**; Germen, Minutes of Meeting of Sole Director, 28 March 2011, **R-184**; Germen, Minutes of Meeting of Sole Director, 20 March 2014, **R-186 / R-192**. For [...] see: Germen, Minutes of Meeting of Sole Director, 14 May 2009, **R-182**; Germen, Minutes of Meeting of Sole Director, 26 May 2009, **R-195**; Germen, Minutes of Meeting of Sole Director, 22 March 2010, **R-193**; Germen, Minutes of Meeting of Sole Director, 3 May 2012, **R-181**; Germen, Minutes of Meeting of Sole Director, 20 March 2014, **R-187**; Germen, Decision of Sole Director, 13 October 2015, **C-468**.

¹⁰⁶ Germen, Decision of Sole Director, 13 October 2015, **C-468**.

¹⁰⁷ Germen, Decision of Sole Director, 31 March 2016, **C-469**.

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discussed at the forthcoming meeting,¹⁰⁸ there is no decision on whether or not to support the proposed decision; the matter is apparently left to the judgement of the proxy.

277. Germen's bank accounts show almost no activity throughout the period 2008–2017.¹⁰⁹ After the initial purchase of the shares in 2008, the largest transaction is in 2017 when a loan from [...] of just over [...] million is immediately followed by the loan by Germen to [...] of [...] million.¹¹⁰ Other transactions appear to be routine payments for administrative services and matters such as audit fees and loans from [...] and Alverley to keep the company afloat.
278. The Claimants make the point that the parlous state of Germen's finances has been brought about by the actions of Romania in freezing the assets of the [...] and thus depriving Germen of its only source of income. However, as indicated above, the financial statements filed by the company expressed concern about the company's finances from the start and were repeated every year from 2008 to 2015. That makes it all the more surprising that there is nothing at all in the record to suggest that the effect of what was happening in the [...] Project was even discussed by Germen in Cyprus and that the mandates given to [...] and later to [...] to cast Germen's votes at the shareholders' meetings of the three Romanian companies in which it held shares contain no instruction to raise concerns about what was happening.
279. Germen certainly carried out some activity in Cyprus: its registered office and only right to use office space (albeit in someone else's office) were located there. Its sole director was based and worked there. Its accounts were audited there and it filed its VAT and tax returns there (though there was never any income tax to pay). But the Tribunal is left with a sense that these were mere formalities. The mandates to the persons voting at the Romanian companies' meetings show no engagement with the substantive issues concerned. The note

¹⁰⁸ See, e.g., Germen, Decision of Sole Director, 13 October 2015, **C-468** (proposal for purchase of a building by [...] from [...] and the lease of some land to [...]); Germen, Minutes of Meeting of Sole Director, 26 May 2009, **R-195** (proposal for a demerger).

¹⁰⁹ See [ER3 of ...], paras. 13-20. Although the Claimants dispute the relevance of some of [...]’s conclusions (e.g., on the relevance of non-compliance with certain accounting standards), they have not sought to rebut his factual analysis.

¹¹³ Memorial, para. 133; Respondent's Skeleton, para. 5(f).

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of concern in the financial statements regarding the financial situation of the company and the promise of efforts to reduce losses are repeated in identical language each year until 2016 but with no sign that this was more than a ritual based on cutting and pasting from the previous year's statement. The fact that, until 2016, the value of the company's only significant assets were given as [...] in the accounts but [...] in the covering report of the auditor also suggests that no real attention was paid to these documents.

280. In short, Germen purchased – almost entirely from members of the [...] family or companies ultimately controlled by them – shares in the three Romanian companies in 2008 after which it seems to have done nothing of any substance except to act as a conduit for loans from the UBO, [...], to companies purchased from [...] and [...] companies in the first place. [...], through [...], loaned [...] ¹¹¹ to Germen, which Germen promptly loaned to [...], a company whose shares it had bought (with the exception of two small batches amounting to less than 0.05%) from [...] and a company owned and controlled entirely by [...]. ¹¹²
281. Taking all of these factors together, the Tribunal has concluded that there is insufficient evidence of any “*effective management*” located in Cyprus to establish that Germen had a “*real seat*” there. The Respondent's first objection to jurisdiction in respect of Germen is therefore upheld.

VII. OBJECTION 2: FAILURE TO ESTABLISH AN “INVESTMENT” WITHIN THE MEANING OF THE CYPRUS–ROMANIA BIT

A. INTRODUCTION

282. The Claimants' Request for Arbitration is founded on the allegation that they have indirect shareholdings in the [...], which are Romanian legal entities, and that those indirect shareholdings constitute protected investments under the terms of the BIT.

¹¹³ Memorial, para. 133; Respondent's Skeleton, para. 5(f).

¹¹³ Memorial, para. 133; Respondent's Skeleton, para. 5(f).

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283. Romania refutes this claim. It argues that the Claimants' Request for Arbitration must be dismissed for lack of jurisdiction *ratione materiae* because the dispute it describes does not concern any investment that the Claimants have made in Romania.¹¹³
284. The Parties' dispute in this regard turns on their disparate interpretation of the Preamble and three further provisions of the BIT, namely Articles 1(1), 3(3) and 8(1). The terms of these provisions are set out here below.
285. Article 1(1) states that

[t]he term 'investment' shall comprise every kind of asset connected with the participation in companies and joint ventures, more particularly, though not exclusively:

(a) movable and immovable property as well as any other real rights in respect of every kind of asset;

(b) rights derived from shares, bonds and other kinds of interests in companies;

(c) claims to money, goodwill and other assets and to any performance having an economic or financial value;

(d) rights in the field of intellectual and industrial property, technical processes and know-how;

(e) reinvested returns.

These investments shall be made in compliance with the laws and regulations and any written permits that may be required thereunder of the Contracting Party in the territory of which the investment has been made.

*A possible change in the form in which the investments have been made does not affect their substance as investments, provided that such a change does not contradict the laws and regulations and written permits of the Contracting Parties.*¹¹⁴

¹¹³ Memorial, para. 133; Respondent's Skeleton, para. 5(f).

¹¹⁴ BIT, CL-001, Art. 1(1)

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286. Article 3 of the BIT provides:

1. Each Contracting Party shall accord to the investments made in its territory by investors of the other Contracting Party a treatment not less favourable than that which it accords in like situations to investments of investors of any third State.

[...]

3. The provisions of this Agreement relating in the granting of the most favoured nation treatment, shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the advantage resulting from:

[...]

(c) any investment agreement which [...] defines indirect shareholdings as investments.¹¹⁵

287. Article 8(1) of the BIT states that

[a]ny dispute between one Contracting Party and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party shall be settled between the interested parties.¹¹⁶

B. THE POSITIONS OF THE PARTIES

(1) The Respondent

[...]

(2) The Claimants

[...]

¹¹⁵ BIT, CL-001, Art. 3.

¹¹⁶ BIT, CL-001, Art. 8(1).

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C. THE ANALYSIS OF THE TRIBUNAL

318. Although the Parties have devoted considerable attention to this issue and their arguments have been summarized at some length, the Tribunal considers that this issue is a comparatively simple one which it can address quite briefly.
319. It is necessary to begin by analysing the definition of “*investment*” in Article 1(1) of the BIT to determine whether, taken by itself, it encompasses indirect investments. The language of Article 1(1) is broad. The opening words “*the term ‘investment’ shall comprise every kind of asset connected with the participation in companies or joint ventures*” appear apposite to cover not only direct participation in companies but also participation through the intermediary of a holding company. Such corporate structures are not at all unusual and the Tribunal considers that a phrase such as “*every kind of asset connected with the participation in companies*” includes such indirect shareholding.
320. The Tribunal is not persuaded by the Respondent’s argument regarding the relationship between the opening words of Article 1(1) and the following sub-paragraphs (*see* para. [...])**Error! Reference source not found.**, above). Article 1(1) follows a pattern, familiar in many BITs, in which general opening words describing investments are followed by a non-exhaustive list of examples. Attributing to the opening words of Article 1(1) the broad meaning (set out in para. 319, above) does not in any way render meaningless the examples which follow.
321. Nor is the Tribunal persuaded that the provision in Article 3(3)(c) of the BIT requires a different interpretation of Article 1(1). Article 3, as its title states, is the Most-Favoured Nation clause of the BIT. The scope of Article 3(3)(c) is clear from the text:

The provisions of this Agreement relating in the granting of the most favoured nation treatment, shall not be construed so as to oblige one Contracting party to extend to the investors of the other Contracting Party the advantage resulting from:

[...]

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*(c) any investment agreement which provides for retroactive validity or defines indirect shareholdings as investments.*¹¹⁷

In short, Article 3(3)(c) applies only to limit the scope of the Most-Favoured-Nation provisions in Article 3(1) and (2). The Claimants in the present case are not seeking to rely upon Article 3(1) or 3(2), so it follows that Article 3(3)(c) is not applicable as such. For that reason, the Tribunal sees no need to enter into the debate between the Parties over whether a Most-Favoured-Nation clause can apply to the scope of the jurisdiction of a tribunal; in the present case, the Most-Favoured-Nation clause does not apply at all.

322. That leaves the question whether Article 3(3)(c), even if not applicable, nevertheless suggests an interpretation of Article 1(1) more limited than that suggested in paras. 319-320, above. The Tribunal understands the Respondent's argument that there is a lack of logic in providing that indirect shareholdings are investments covered by the BIT but precluding the application of the MFN clause to other BITs which define indirect shareholdings as investments. However, it takes the view that the language of Article 1(1) is clear and that there is no justification for reading into that provision a limitation which is not suggested by its text merely because the contracting parties have chosen to place such a limitation in another provision of the treaty.
323. So far as the Respondent's argument – based on the reasoning in *Standard Chartered v. Tanzania*¹¹⁸ – is concerned, the Tribunal does not accept that the definition of investment requires a degree of active management. The Tribunal sees nothing in the provisions of Article 1, read in the light of the Preamble and the object and purpose of the BIT, that restricts the definition of “*investment*” or that of “*investor*” so as to exclude a holding company which “*passively*” owns shares and does not involve itself in active management of the project. To the extent that this argument is relevant to Objection No. 3, it will be considered in Part VIII of the Award but insofar as it is advanced as part of Objection No. 2, it is rejected.
324. The Tribunal therefore dismisses the Respondent's second jurisdictional objection.

¹¹⁷ BIT, CL-001, Art. 3(3)(c).

¹¹⁸ See para. [...], above.

VIII. OBJECTION 3: ABUSE OF RIGHTS

A. THE POSITIONS OF THE PARTIES ON ABUSE OF RIGHTS

(1) The Respondent

[...]

(2) The Claimants

[...]

B. THE POSITIONS OF THE PARTIES AS TO ALVERLEY'S ACQUISITION OF SHARES IN [...] AND [...]

As explained at paras [...], above, as the proceedings unfolded an important difference arose between the Parties regarding the date on which Alverley first acquired its interest in [...] and [...]. Since that difference arose from a change in the position of the Claimant Alverley in the Counter-Memorial, to which Romania then responded, the Tribunal considers it better to set out the positions of the Parties on this issue in a separate section, beginning with the position of the Claimant Alverley.

(1) The Claimants

[...]

(2) The Respondent

[...]

C. THE ANALYSIS OF THE TRIBUNAL

(1) Introduction

359. The Tribunal considers that it is important to begin by analysing the precise nature of the Respondent's third objection. The Respondent is not contending that the Tribunal lacks jurisdiction simply because the UBO of the two Claimants is Romanian. It does not maintain that a tribunal has no jurisdiction over a claim against a respondent State merely because the claimant is owned and controlled by nationals of that respondent State.¹¹⁹ That

¹¹⁹ Tr. Day 1, 169:16–170:12 (Range); RPHB1, para. 30.

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proposition was famously rejected by a majority of the tribunal in *Tokios v. Ukraine*¹²⁰ (over a strong dissenting opinion from the president of that tribunal) and Romania is not challenging that decision.

360. Romania’s third objection is, rather, that the circumstances of the transfer of assets in the Romanian subsidiary companies and the [...] amounts to an abuse of process. It argues that the Claimants are mere “*paper façades*” for [...],¹²¹ and that the transactions by which shares in the Romanian subsidiaries and in the [...] ended up with the Claimants was no more than the shuffling of funds and assets between companies which were all controlled, or substantially influenced, by [...]. Crucially, Romania maintains that the shuffling occurred after the dispute with Romania became foreseeable.
361. This analysis prompts four observations. First, the objection is one of inadmissibility, rather than a lack of jurisdiction. The distinction between the two is frequently unclear in international jurisprudence and particularly where the objection is one of abuse of process. Some tribunals have considered that this is “*a distinction without a difference*” and have accordingly left the characterisation of the abuse of process objection open.¹²² Other arbitral decisions have treated an objection similar to the one raised in this proceeding as a challenge to jurisdiction.¹²³ The Tribunal, however, considers that this approach, which tends not to be explained, is difficult to reconcile with the acceptance in most of those decisions of the principle enunciated by the majority in *Tokios v. Ukraine* and the language of the definition of “*investor*” in most BITs (including Article 1 of the Cyprus–Romania BIT).
362. The Tribunal prefers the analysis of the *Philip Morris v. Australia* tribunal, which upheld an objection similar to that here in the following terms:

¹²⁰ *Tokios v. Ukraine*, **CL-107**, para. 40.

¹²¹ Memorial, para. 11.

¹²² *Levy v. Peru*, **RL-091**, para. 181; *Pac Rim v. El Salvador*, **CL-123**, para. 2.10.

¹²³ *Phoenix v. Czech Republic*, **RL-090**, para. 144; *Tidewater Inc and others v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Decision on Jurisdiction, 8 February 2013 (“*Tidewater v. Venezuela*”), **CL-167**, para. 197; *ConocoPhillips Petrozuata B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013, **CL-231**, para. 279

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[...] *the Tribunal cannot but conclude that the initiation of this arbitration constitutes an abuse of rights, as the corporate restructuring by which the Claimant acquired the Australian subsidiaries occurred at a time when there was a reasonable prospect that the dispute would materialise and as it was carried out for the principal, if not the sole, purpose of gaining Treaty protection. Accordingly, the claims raised in this arbitration are inadmissible and the Tribunal is precluded from exercising jurisdiction over this dispute.*¹²⁴

It is not that a successful objection means that the Tribunal lacks jurisdiction, but rather that it may not exercise a jurisdiction which it possesses.

363. Secondly, in order to determine whether there has been an abuse of process, it is necessary for the Tribunal to make certain findings of fact. The question of how a tribunal should approach matters of fact in a jurisdictional phase has been much debated but two principles seem now to have been clearly established. The first is that, so far as facts pertaining to the merits are concerned, a tribunal must proceed, at the jurisdictional stage, on the basis of an assumption that the facts alleged by a claimant are true and ask only whether those alleged facts (if subsequently proved) would sustain a claim which would fall within the jurisdiction of the tribunal and would be admissible. The second, however, is that the Tribunal must inquire into, and make findings in respect of, those facts which pertain to its jurisdiction.¹²⁵ Similarly, it must make findings of fact with regard to allegations of fact which are said to render the claim inadmissible. It follows, in the present case, that the Tribunal must determine whether or not the facts which the Respondent alleges indicate that there has been an abuse of process have been proved.
364. That makes it important to be clear about the burden of proof. While the burden is on a claimant to prove the facts on which it relies to establish the tribunal's jurisdiction, when a respondent argues that a claim is inadmissible, it is for the respondent to prove the facts on which it relies to support that claim. Nevertheless, where the issue is one of abuse of

¹²⁴ *Philip Morris v. Australia*, **RL-159**, para. 588. Cf. *Transglobal v. Panama*, **RL-158**, para. 100 (“*the existence of abuse of process is a threshold issue that would bar the exercise of the Tribunal’s jurisdiction even if jurisdiction existed*”).

¹²⁵ As the tribunal in *Phoenix* put it, if “*the alleged facts are facts on which the jurisdiction of the tribunal rests, it seems evident that the tribunal has to decide on those facts, if contested between the parties, and cannot accept the facts as alleged by the claimant*” (*Phoenix v. Czech Republic*, **RL-090**, para. 63).

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process, particularly in the form raised here, a claimant may not simply shield itself behind the fact that the burden is on the respondent. Much of the evidence which is relevant to such issues as whether or not a dispute was foreseen or foreseeable at a given time, the relationship between a UBO and the companies which it controls, the motive for a transfer of assets and the nature of the corporate structure are possessed by the claimant. In international arbitration, the parties have a duty to cooperate in good faith with one another and with the tribunal in disclosing documents properly requested, and whose disclosure is ordered by the tribunal. Where a respondent produces evidence which points to an abuse of process, the claimant may bear the burden of adducing evidence to explain its actions – evidence to which it alone has access – if it wishes to refute the respondent’s case.

365. Thirdly, the standard of proof also needs to be considered. The Tribunal agrees with the Claimants when they maintain that it is only in an exceptional case that a tribunal may not exercise a jurisdiction which it otherwise possesses.¹²⁶ As the tribunal in *Levy v. Peru* put it, “*the threshold for a finding of abuse of process is high, as a court or tribunal will obviously not presume an abuse, and will affirm the evidence of an abuse only ‘in very exceptional circumstances’*”.¹²⁷
366. There can certainly be no presumption of an abuse of process and the threshold is indeed a high one, but that does not mean that a different standard of proof applies. As the *Libananco v. Turkey* tribunal put it:

In relation to the Claimant’s contention that there should be a heightened standard of proof for allegations of “fraud or other serious wrongdoing”, the Tribunal accepts that fraud is a serious allegation, but it does not consider that this (without more) requires it to apply a heightened standard of proof. While agreeing with the general proposition that “the graver the charge, the more confidence there must be in the evidence relied on” [...], this does not necessarily entail a higher standard of proof. It may simply require more persuasive evidence, in the case of a fact that is

¹²⁶ Counter-Memorial, paras. 231-232, citing *Levy v. Peru*, **RL-091**, para. 186; *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador*, PCA Case No. AA 277, Interim Award, 1 December 2008, **CL-213**, para. 143.

¹²⁷ *Levy v. Peru*, **RL-091**, para. 186.

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*inherently improbable, in order for the Tribunal to be satisfied that the burden of proof has been discharged.*¹²⁸

367. It is also important to bear in mind that, in the words of the *Philip Morris v. Australia* tribunal, “*the notion of abuse does not imply a showing of bad faith*”; rather, “*the abuse is subject to an objective test and is seen in the fact that an investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute.*”¹²⁹ Accordingly, it is not necessary for the Respondent to prove that the Claimants or their UBO have acted in bad faith.
368. In the end, therefore, the Tribunal must look at all of the evidence which has been put before it – by both Parties – and at the gaps in that evidence and decide whether, on the balance of probabilities, the evidence is sufficiently persuasive for it to conclude that there has been an abuse of process. Moreover, what constitutes sufficiently “*persuasive evidence*” must depend upon the facts of the case.
369. Lastly, while the Respondent is not seeking to argue that the fact that the Claimants’ UBO is Romanian is in itself sufficient to preclude the Tribunal from exercising jurisdiction (*see* para. 359, above), it does argue that the relationship between [...] and [...], on the one hand, and both the Claimants and the other companies involved, on the other hand, is material to the claim of abuse of process. The Tribunal shares that view and will enlarge on the point later.

(2) The Legal Test for Abuse of Rights

370. It is a well-established principle, which is not in dispute between the Parties, that, while it is “*uncontroversial that the mere fact of restructuring an investment to obtain BIT benefits*

¹²⁸ *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2022 (“*Libananco v. Turkey*”), CL-161, para. 125.

¹²⁹ *Philip Morris v. Australia*, RL-159, para. 539.

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is not per se illegitimate”,¹³⁰ it becomes an abuse where this restructuring is undertaken to ensure BIT protection with regard to a specific dispute which has emerged or is emerging.

371. In this context, it is necessary to note that the term “*restructuring*” is used as a convenient shorthand term which can cover a variety of different actions. Thus, there may be cases in which the nationality of a company or an individual is changed so as to give them the nationality of a State party to a relevant BIT. But the term can also cover cases in which ownership of an investment (whether direct or indirect) is transferred from a person or company not covered by the BIT to a person or company which is so covered. The present case is an instance of the latter type of restructuring. The issue is not, as the Claimants at one point appear to suggest,¹³¹ the intention of anyone at the time that the Claimants were incorporated.¹³² Rather, the issue is whether, at the time that the shares in the Romanian and Cypriot subsidiaries were transferred to the Claimants, the dispute was foreseeable to those responsible for those transfers.
372. Three features of the test laid down in *Philip Morris v. Australia* and the numerous other cases to which our attention has helpfully been drawn require further consideration in the context of the present case:
- (a) whether obtaining the benefits of the BIT must be the sole purpose of the restructuring;
 - (b) whether a dispute must already exist at the date of the restructuring and, if not, what degree of probability and foresight as regards a future dispute must exist; and
 - (c) how specific must be the dispute which is foreseen or foreseeable.

¹³⁰ *Philip Morris v. Australia*, **RL-159**, para. 540. Cf. *Tidewater v. Venezuela*, **CL-167**, para. 184; *Mobil Corporation, Venezuela Holdings, B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 (“*Mobil v. Venezuela*”), **CL-141**, para. 204; *Levy v. Peru*, **RL-091**, para. 184.

¹³¹ CPHB1, paras. 100-104.

¹³² 1999 in the case of Alverley and 2007 in the case of Germen.

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373. On the first of these points, the Claimants argue that securing the protection of the BIT must be the sole purpose of the restructuring.¹³³ They rely upon the following passages from the *Phoenix v. Czech Republic* decision:

[T]he Claimant made an “investment” not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic. This alleged investment was not made in order to engage in national economic activity, it was made solely for the purpose of getting involved with international legal activity.¹³⁴

374. The Claimants also cite *Levy v. Peru*:

[...] the only reason for the sudden transfer of the majority of the shares in Gremcitel to Ms. Levy was her nationality. The Claimants were unable to furnish any reasonable explanation why Ms. Levy became a shareholder and why that happened by then. [...] [T]he only purpose of the transfer was to obtain access to ICSID/BIT arbitration, which was otherwise precluded.¹³⁵

375. The Respondent does not directly take issue with these arguments, concentrating instead on arguing that there is no evidence that the transfer of assets to the Claimants had any other purpose. It does not, however, expressly accept the assertion that the sole purpose of the restructuring must be to obtain the benefits of the BIT.

376. The Tribunal does not accept that securing BIT protection must be the *sole* purpose of the restructuring, so that if there were any other purpose, however secondary, it would preclude a finding of abuse of process. The jurisprudence does not support such a strict test. The fact that a tribunal found that securing the protection of a BIT *was* the sole purpose of a restructuring, does not imply that it *had* to be the sole purpose. Thus, in the *Levy v. Peru* case, to which the Claimants refer, the tribunal set out the test in the following terms:

¹³³ See, in particular, Counter-Memorial, paras. 247-250; Rejoinder, para. 203; CPHB1, paras. 112 *et seq.*; CPHB2 paras. 36-37; Tr. Day 3, 98:6-18 (Cordara).

¹³⁴ Counter-Memorial, citing *Phoenix v. Czech Republic*, **RL-090**, para. 142.

¹³⁵ Counter-Memorial, para. 249, citing *Levy v. Peru*, **RL-091**, para. 190. See also Counter-Memorial, paras. 247-248, notes 309-310, where the Claimants refer to *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Decision on Jurisdiction, 15 December 2014, **CL-169**, paras. 292-294; and the mentions of “essential purpose” and “sole purpose” in *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (“*ST-AD v. Bulgaria*”), **RL-141**, paras. 421, 423.

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[...] *a restructuring carried out with the intention to invoke the treaty's protections at a time when the dispute is foreseeable may constitute an abuse of process depending on the circumstances.*¹³⁶

There is no suggestion there that the intention to invoke the treaty must be the sole intention. The same is true of *Phoenix v. Czech Republic*, where the tribunal found that gaining access to the protections of the treaty was the sole purpose of the restructuring but did not suggest that this was a requirement. In *Philip Morris v. Australia*, the tribunal held that there was an abuse because “*the principal, if not the sole, purpose*” of the restructuring had been to gain the protection of the treaty; that it did not require that this be the sole purpose is evident in its finding that “*the Claimant has not been able to prove that tax or other business reasons were determinative for the restructuring*”.¹³⁷ The Tribunal agrees that the correct test is whether a determinative or principal purpose was to gain the protection of the treaty.

377. With regard to the question of what must be known or foreseen about the dispute before the restructuring occurs, the Tribunal notes that some tribunals have referred to a dispute which is already in existence.¹³⁸ However, the Tribunal agrees with the observation of the *Philip Morris* tribunal:

*Although it is sometimes said that an abuse of right might also exist in the case of restructuring in respect of an existing dispute, if the dispute already exists, then a tribunal would normally lack jurisdiction ratione temporis.*¹³⁹

378. Nor is the Tribunal persuaded that the dispute must actually have been foreseen by those responsible for carrying out the restructuring. The Claimants are right when they point out that some tribunals “*have based findings of abuse on actual foresight of the dispute*”¹⁴⁰ but

¹³⁶ *Levy v. Peru*, **RL-091**, para. 185. The references to “*essential purpose*” and “*sole purpose*” in *ST-AD v. Bulgaria* (see note 135, above) do not assist the Claimants as the two terms have different meanings; a purpose may be “*essential*” without being the “*sole*” purpose.

¹³⁷ *Philip Morris v. Australia*, **RL-159**, para. 584.

¹³⁸ See, e.g., *Tidewater v. Venezuela*, **CL-167**, para. 184; *Mobil v. Venezuela*, **CL-141**, para. 205.

¹³⁹ *Philip Morris v. Australia*, **RL-159**, para. 539. See also *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014 (“*Lao Holdings v. Laos*”), **CL-164**, para. 76.

¹⁴⁰ Counter-Memorial, para. 240.

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those tribunals have not required actual foresight, merely treated it as even more persuasive than evidence of foreseeability. For example, although the tribunal in *Philip Morris v. Australia* was convinced that the dispute had actually been foreseen,¹⁴¹ its formulation of the test to be applied is the objective one of foreseeability.¹⁴² The *Levy v. Peru* tribunal found that the relevant people in that case were presumed to have foreseen the dispute¹⁴³ but the test which that tribunal formulated was objective, namely whether the dispute was foreseeable.¹⁴⁴

379. The question is with what degree of probability must the dispute be foreseen. Here the various awards and decisions to which we have been directed use different language.

- The *Pac Rim v. El Salvador* tribunal put it in these terms:

*[...] the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy.*¹⁴⁵

- The *Alapli v. Turkey* tribunal said:

*The dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a high probability and not merely a general future controversy.*¹⁴⁶

- The tribunal in *Levy v. Peru* endorsed the formula in *Pac Rim*, adding that:

*[...] this test strikes a fair balance between the need to safeguard an investor's right to invoke a BIT's protection in the context of a legitimate corporate restructuring and the need to deny protection to abusive conduct.*¹⁴⁷

- The tribunal in *Lao Holdings v. Laos* stated that:

¹⁴¹ *Philip Morris v. Australia*, **RL-159**, para. 587.

¹⁴² *See, e.g., Philip Morris v. Australia*, **RL-159**, para. 539.

¹⁴³ *Levy v. Peru*, **RL-091**, para. 190.

¹⁴⁴ *Levy v. Peru*, **RL-091**, para. 185.

¹⁴⁵ *Pac Rim v. El Salvador*, **CL-123**, para. 2.99.

¹⁴⁶ *Alapli v. Turkey*, **CL-163**, para. 403.

¹⁴⁷ *Levy v. Peru*, **RL-091**, para. 185.

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[...] *it is clearly an abuse for an investor to manipulate the nationality of a company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration.*¹⁴⁸

380. After a detailed review of the case law, the *Philip Morris v. Australia* tribunal held:

*Despite the variations in the formulations used in the decisions just quoted, this Tribunal considers that case law has articulated legal tests on abuse of right that are broadly analogous, revolving around the concept of foreseeability. In the Tribunal's view, foreseeability rests between the two extremes posited by the tribunal in *PacRim v. El Salvador*—"a very high probability and not merely a possible controversy". On this basis, the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable. The Tribunal is of the opinion that a dispute is foreseeable when there is a reasonable prospect, as stated by the *Tidewater* tribunal, that a measure which may give rise to a treaty claim will materialise.*¹⁴⁹

381. In addition, numerous tribunals have made clear that each case has to be considered on its own facts and that there is no strict line between what is and what is not sufficiently foreseeable.

382. Thus, the *Pac Rim* tribunal, just after the passage quoted above, added:

*The answer in each case will, however, depend upon its particular facts and circumstances [...] the Tribunal here is more concerned with substance than semantics and it recognizes that, as a matter of practical reality, this dividing-line will rarely be a thin red line, but will include a significant grey area.*¹⁵⁰

383. The passage just quoted from *Alapli* is similarly followed by the statement:

¹⁴⁸ *Lao Holdings v. Laos*, **CL-164**, para. 70. It should be noted though that the tribunal went on to speak of a "moment when things have started to deteriorate so that a dispute is highly probable" (para. 76).

¹⁴⁹ *Philip Morris v. Australia*, **RL-159**, para. 554.

¹⁵⁰ *Pac Rim v. El Salvador*, **CL-123**, para. 2.99.

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*It appears that it would be unfair to allow Claimant to change its nationality in the grey period of the Parties' relationship between good relations and a full-fledged dispute, when disagreement and acrimony have already arisen. It is indeed an abuse for an investor to manipulate the nationality of a shell company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration. [...] The answer in each case will, however, depend upon its particular facts and circumstances [...]*¹⁵¹

384. The Tribunal considers that the *Philip Morris* formulation (quoted in para. 380, above) most accurately captures both the prevailing view in the case law and the principle which the abuse test is designed to serve, as expounded in the passage from *Levy v. Peru* (cited in para. 379, above). It will therefore approach the third objection by examining when, in light of all the facts and circumstances of the case, there was a reasonable prospect that a measure which might give rise to a treaty claim had materialised.
385. Lastly, the Tribunal turns to the question of precisely what must be foreseeable. The Tribunal agrees with the view which is prevalent in the jurisprudence, namely that a specific dispute must be foreseeable and not a vague general controversy. Nevertheless, this test must be applied in the light of the facts and circumstances of the case. There is a considerable difference between a case such as *Philip Morris*, in which the dispute was clearly defined by the nature of the announcement of pending legislation to require clear packaging of cigarettes with the attendant denial of the right to use a trademarked brand name, and a case such as the present, in which the dispute evolves over time. The Tribunal considers that, while what must be foreseeable is a specific dispute, it is not necessary that every contour of the dispute as it is eventually laid before an arbitral tribunal has to be foreseeable. It is the dispute, not the detailed claim, which has to be foreseeable.

¹⁵¹ *Alapli v. Turkey*, **CL-163**, para. 403.

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(3) Identification of the Dispute in the Present Case

386. In the present case, the Claimants maintain that the specific dispute is whether the actions of [...] amounted to the expropriation of the [...] land contrary to the BIT. The Respondent argues that the specific dispute is less precisely defined as one over the title to the [...].
387. The right of [...] to the land, described by [...] as the Companies' "*main asset*",¹⁵² was central to the success of the entire [...] Project and thus to the investments of those who held shares in the Romanian and Cypriot subsidiaries.
388. The Tribunal considers that the dispute which has to be foreseeable is one over whether [...] were properly granted the land and whether the State was entitled to deprive them of that land. That is what underlies the entire case. The focus must be on [...]’ rights with regard to the land, rather than on the rights of the Claimants as such, since the issue before the Tribunal is whether the dispute existed before the Claimants acquired the assets which gave them an indirect investment in the [...]Project.
389. It is true that the proceedings in the Romanian courts involved two different questions regarding the land, namely whether the land was the property of the [...] or the [...] and whether [...] had granted the land to [...] for too small a consideration and in a manner which might be characterised as corrupt. The two questions are, however, closely related.
390. If, as [...] was to hold, the land had not belonged to [...] at the time of the grant to [...], then the agreement by which [...] granted the land to [...] for [...] to use would be fatally undermined since it would have rested on a grant by [...] of rights in respect of property which [...] lacked the right to grant.
391. But a finding by the courts that [...] had not acted properly in granting the land to [...] would also have risked undermining the project, since such a finding would again have risked depriving the [...] of their right to use the land. Although this aspect of the case concentrated on whether certain individuals such as [...] had acted corruptly, the effect of a finding that they had done so would have been likely to cast into question the continued

¹⁵⁵ [...]’s 2014 Statement, C-288, p. 12.

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validity of the grant, especially since [...] and others who had acted on the other side of the transaction were also being charged. [...]

392. Moreover, the record suggests that the two questions were interwoven from the start. [...] various denunciations seem to have raised both the issue of whether [...] had title to the land and whether the grant to [...] had been improper. That is reflected both in the contemporary press coverage (to which the Tribunal will turn shortly) and the comments by [...] and [...] to the press.
393. The Tribunal does not, therefore, accept the Claimants' submission that the two matters have to be treated as separate disputes. It sees them as two facets of the same dispute, since they involve two different but related threats from Romania to the right to use the land which was central to the viability of the entire [...] Project.
394. It follows that the "*critical date*" for the purposes of determining whether there has been an abuse of right is the date when it became foreseeable that there was a reasonable prospect of a measure being adopted by an organ of the Romanian State which would severely impair the right and ability of [...] to use the land for the purposes of the project.

(4) The Date at Which the Dispute Became Foreseeable

395. The Tribunal will now consider the date at which the dispute, as defined above (*see* para. 394) became foreseeable. On this question, the Parties hold markedly different views (as demonstrated in paras. [...], above). The Respondent maintains that the dispute was foreseeable by June 2006, while the Claimants argue that the "*critical date*" is the date on which the taking of the land was upheld by [...], namely 2017, or, at the very least, the date on which proceedings for recovery of the land were instituted by the State and the sequestration of the assets of three of the [...] was ordered, that is 2012.
396. The Tribunal cannot accept the Claimants' reasoning on this point. By the time that [...] affirmed the decision of [...] in 2017, the dispute already existed. For the reasons already given, the Tribunal considers that the critical date is the point at which there became a reasonable prospect that the Romanian State would take a measure which might give rise to a treaty claim.

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397. Nor does the Tribunal accept the date of sequestration (August 2012), or even the date at which [...] applied for sequestration (July 2012) as the critical date. That suggested date is based upon the theory that a dispute regarding title became foreseeable only once the State took steps to challenge [...] title to the land and thus relies upon the distinction between a dispute regarding title to the land and a dispute regarding the propriety of [...] actions – a distinction which the Tribunal has rejected.
398. The Tribunal considers that the critical date is the moment at which there was a serious prospect of a legal challenge by the State (whether in criminal proceedings or in civil proceedings brought by the State) to the right of [...] to use the land, and that prospect was known, or could have been known, to those directing the [...] Project.
399. That was certainly the case by early 2009. In March 2009, [...] were formally charged regarding the alleged impropriety of the grant to [...] and in April 2009, [...] was informed that he was prohibited from leaving Romania.¹⁵³ Moreover, [...] testified to the Romanian courts in 2014 that [...] had become aware that [...] was investigating the [...] before he met [...] (one of [...]) on 29 January 2009. In [...] testimony in 2014 in the Romanian courts, [...] stated:
400. Earlier in that statement, [...] gives 27 January 2009 as the date of [...] meeting with [...].¹⁵⁴ The Tribunal considers that, at that point, it was reasonably foreseeable to [...] that, at the very least, there was a prospect that the outcome of the proceedings could include a finding that the land had been granted to [...] at less than full value and that the decision of [...] to make that grant would be called in question, with serious consequences for the right of the Companies to continue using the land. Moreover, in [...] 2014 statement, [...],¹⁵⁵ which [...] knew involved a challenge to title to the land.¹⁵⁶
401. But the record shows that the dispute was foreseeable at an earlier date.

¹⁵³ [...]’s 2014 Statement, C-288, p. 12.

¹⁵⁴ [...]’s 2014 Statement, C-288, p. 12.

¹⁵⁵ [...]’s 2014 Statement, C-288, p. 12.

¹⁵⁶ [WS of ...], para. 68.

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402. There had been challenges to the land grant by various tenants claiming that they had a right to parts of the land from the start of the Project. These appear to have been civil proceedings and, despite a rather sweeping statement by the Respondent's counsel at the Hearing,¹⁵⁷ it does not appear to be suggested that [...] could have foreseen a dispute that early. Nevertheless, the tenants appear to have been complaining that whereas in the late 1990s [...] refused to sell them their homes on the ground that this was State land, from 2001 onwards the University was asserting title to the land. The University had, of course, by then obtained court confirmation of its title but it could be said that the fact of these disputes put everyone on notice that there were those willing to challenge that title.
403. Matters changed in 2005. In February 2005, [...] made a criminal complaint to [...].¹⁵⁸ Over the next 16 months he also complained to [...], [...] and [...].¹⁵⁹ These complaints are picked up in the press in four reports which are part of the record:
404. While these articles, by themselves, are not sufficient to meet the foreseeability test, they must have put [...] and the other members of the management of [...] on notice that Romanian State agencies had been notified of both aspects of the challenge to the Companies' right to use the land. The fact that [...] shows that those responsible for running the project must have been aware of the articles and suggests that they had considered the issues underlying the complaints.
405. There were also several sets of criminal proceedings during 2006–2008.
- [...]

¹⁵⁷ Tr. Day 1, 57:14-16 (Range).

¹⁶⁴ The Parties differ on the significance of this latter date. The Respondent maintains that if the critical date was held to fall somewhere between 10 August 2011 and 2 July 2013, then the Tribunal would lack jurisdiction – or be precluded from the exercise of jurisdiction – with regard to Alverley's claims based on the 45% shareholding. The Claimants argue that a critical date in this range would mean that the Tribunal had and could exercise jurisdiction with regard to the whole of Alverley's claim and that the acquisition of 45% of the shares after the critical date would go to quantum not jurisdiction or admissibility. *See* Tr. Day 3, 102:5-14 and 121:16-17 (Cordara).

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406. Cases 206/P/2006 and 5098/P/2006: At some point, the DNA also became involved. On 12 June 2006, Mr Bundoiu and Mr Becali made a complaint to the DNA160 in terms very similar to that in Case 1517/P/2006, with the same four persons as suspects but fewer complainants. There was also a DNA investigation which led the DNA to arrange for the decision to cease proceedings in Case 1481/P/2006 to be reversed.

407. In [...] Witness Statement, [...] states that

408. Also relevant is [...] witness statement of 2014 in the Romanian court proceedings instituted in 2009. In this statement, [...] says:

409. In the same statement, [...] says:

[...] was later replaced as prosecutor. The reference in [...] statement must be to [...], because he goes on to refer to the prosecution being discontinued.

410. The Respondent makes much of that paragraph, repeating the references to [...] being [...] and arguing that this showed [...] state of mind in 2006. However, the passage quoted from [...] statement does not make clear when [...] had this conversation with [...] and thus learned of the involvement of [...]. The answer may, however, lie in the passage quoted in para. 408, above. That earlier passage refers to a conversation with [...] which occurred while [...] was still a director of [...], which [...] ceased to be on 22 April 2006.

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415. Taking this evidence as a whole, the Tribunal considers that it is more likely than not that by April 2006 [...] can be presumed to have been aware of criminal investigations in which both title to the land and the question of undervaluation would be in issue.
416. What is in the statements is confirmed by:
-
417. On this basis, the Tribunal considers that a dispute with Romania over the right of [...] and [...] to the land and possible interference by the Romanian criminal authorities through the courts was foreseeable in April or May 2006.
416. The 2008 decision not to proceed with a prosecution in [...] and the discrediting of [...] (who seems to have withdrawn [...] allegations and then reinstated them) cannot retrospectively alter whether or not a dispute was foreseeable and foreseen in 2006.

(5) The Claimant Alverley

a. The date on which Alverley acquired shares in [...] and [...]

417. It is necessary to begin by considering the date at which Alverley first acquired an interest in the [...] Project. Since Alverley's interest in that project exists only as a result of its shareholding in [...] and [...], it follows that the Tribunal must first determine the date (or dates) on which that shareholding was acquired.
418. As originally pleaded, Alverley's case on this point was simple and uncontroversial. As evidenced by the share registers of [...] ¹⁶¹ and [...], ¹⁶² Alverley purchased 50 shares (5%

¹⁶⁴ The Parties differ on the significance of this latter date. The Respondent maintains that if the critical date was held to fall somewhere between 10 August 2011 and 2 July 2013, then the Tribunal would lack jurisdiction – or be precluded from the exercise of jurisdiction – with regard to Alverley's claims based on the 45% shareholding. The Claimants argue that a critical date in this range would mean that the Tribunal had and could exercise jurisdiction with regard to the whole of Alverley's claim and that the acquisition of 45% of the shares after the critical date would go to quantum not jurisdiction or admissibility. *See* Tr. Day 3, 102:5-14 and 121:16-17 (Cordara).

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of the equity) in each company from [...] on 10 August 2011.¹⁶³ A further 450 shares (45% of the equity) in each company was transferred by [...] on 2 July 2013. If Alverley's case had remained as first pleaded, the issue before the Tribunal would have been whether the dispute had become foreseeable by 10 August 2011 and, if not, by 2 July 2013.¹⁶⁴

419. However, as outlined in paras. [...], above, and elaborated in paras. [...], above, Alverley later changed its case with regard to the 45% shareholding and now contends that it acquired a beneficial interest in those shares on 9 May 2006, after which [...] held them on trust for Alverley as beneficial owner. In support of that argument, Alverley relies principally on two 2006 Trust Deeds.¹⁶⁵

420. These deeds are so significant that it is appropriate to quote from one of them¹⁶⁶ at some length. Each is expressed to be between Alverley (then called Bladon), described as "*the Grantor*" and [...], described as "*the Trustee*". The deed in respect of [...] then provides:

[...]

421. The two 2006 Trust Deeds were signed on behalf of Alverley by [...].¹⁶⁷

422. There is a further trust deed, dated 9 August 2011, in respect of the same [...] shares. The terms are in most respects the same as those of the 2006 Trust Deeds save for the addition of a further clause (1(h)) providing that "[...]", the fact that the value of the shares is

¹⁶⁴ The Parties differ on the significance of this latter date. The Respondent maintains that if the critical date was held to fall somewhere between 10 August 2011 and 2 July 2013, then the Tribunal would lack jurisdiction – or be precluded from the exercise of jurisdiction – with regard to Alverley's claims based on the 45% shareholding. The Claimants argue that a critical date in this range would mean that the Tribunal had and could exercise jurisdiction with regard to the whole of Alverley's claim and that the acquisition of 45% of the shares after the critical date would go to quantum not jurisdiction or admissibility. *See* Tr. Day 3, 102:5-14 and 121:16-17 (Cordara).

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¹⁶⁵ Bladon and [...] Trust Deed ([...]), **C-538**; and Bladon and [...] Trust Deed ([...]), **C-510**.

¹⁶⁶ The two are in the same terms other than as regards the name of the company with whose shares the deed is concerned.

¹⁶⁷ Bladon and [...] Trust Deed ([...]), **C-510**; Bladon and [...] Trust Deed ([...]), **C-538**; Tr. Day 2, 19:7–20:15 ([...]); CPHB1, para. 96.

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expressed in Euros not Cyprus Pounds and [...].¹⁶⁸ The 2011 [...] Trust Deed is not signed on behalf of Alverley. There is no 2011 deed in respect of [...] in the record.

423. [...] was incorporated on 8 May 1997, apparently as a “*shelf*” company which had no assets at incorporation but could be taken off the shelf if a customer wanted to acquire a Cyprus company. [...] Alverley does not appear in the share register until it acquired shares [...] on 10 August 2011. On 2 July 2013, the register shows that Alverley acquired shares [...] from [...]. Counsel for the Claimants explains that entry as reflecting the result of a termination of the trust ([...]), which converted Alverley’s beneficial ownership of the shares into legal ownership.
424. [...] was incorporated on [...] apparently on the same basis as [...]. [...] Counsel for the Claimants gives the same explanation for the entry on 2 July 2013 and there are on the record a deed of termination of trust dated 2 July 2013¹⁶⁹ and an instrument of transfer of the same date¹⁷⁰.
425. There are serious problems with this new argument of the Claimant Alverley.
426. First, the 2006 Trust Deeds have certain defects, although it is important to note that the Respondent does not allege that they are not genuine documents. The fact that they do not bear the Alverley seal or a Government stamp may perhaps be overlooked as formalities which could easily be rectified. In any event, the evidence of the two experts on Cyprus law is that a bare trust can be created orally under Cyprus law.¹⁷¹ The Tribunal is also inclined to attach little weight to the fact that the share numbers in the [...] Trust Deed do not tally with the share numbers in the company’s share register; there are other mistakes in that register and the Tribunal considers that this discrepancy is most likely to be the result of a clerical error.

¹⁶⁸ Trust Deed between Bladon and [...], 9 August 2011, **C-513**.

¹⁶⁹ Deed of Termination of Trust between Bladon and [...] ([...]), 2 July 2013, **R-167**.

¹⁷⁰ Instrument of Transfer of [...], 2 July 2013, **C-512**.

¹⁷¹ Tr. Day 2, 18:22-23 ([...]) and 164:18–165:3 ([...]).

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427. However, a trust – whether oral or written – can be created by a corporation only through a duly authorized person. At the time that [...] signed the 2006 Trust Deeds, [...] was not yet a director of Alverley, nor is there anything in the record to suggest that [...] had been authorised to act for the company before [...] became a director. Since the trust documents are the only evidence of the creation of a trust at that date, the absence of a signature by someone duly authorized not only means that those documents could not create a trust, it also means that they cannot constitute sufficient evidence of the creation of an oral trust.
428. A further problem is that there is no evidence of how, when and from whom Alverley acquired the beneficial ownership of the shares. Contrary to the arguments of Alverley’s counsel, the trust deeds themselves cannot confer the beneficial interest which Alverley claims to have possessed.¹⁷² Their terms make clear that they are written on the basis that Alverley had already acquired that beneficial interest “*for consideration*”. Yet there is no explanation in the evidence of how it did so or from whom. Counsel attempted to explain this by reference to the nature of [...] and [...] as “*shelf*” companies but counsel’s explanations are not the same as evidence and, in any event, still leave unanswered the question of who assigned the beneficial interest to Alverley and what was the consideration to which the deeds refer.
429. There is also, in the case of [...] though not of [...], the existence of the 2011 [...] Trust Deed relating to the same shares as that of 2006. The 2011 [...] Trust Deed, which is unsigned by anyone on behalf of Alverley, makes no reference to the 2006 trust and its existence serves only to cast further doubt on the argument that there was a trust at the earlier date. In its Post-Hearing Briefs, the Claimants attempt to refute the suggestion that the 2011 document would have been unnecessary if the 2006 document were valid and effective:

This argument is without merit, indeed it points the other way. Following Cyprus’ accession to the European Union, in 2011, the parties to the 2006 [...] Trust Deed re-executed an identical version

¹⁷² Alverley’s pleadings themselves reflect this confusion. In CPHB1, para. 70, there appears the statement that “[t]he 2006 Trust Deeds [...] **created an equitable interest and transferred that interest to Alverley**” [emphasis added]. However, in para. 88 of the same document it is stated that “*the bare trust arrangement reflected in the 2006 Trust Deeds are [sic] expressed in the present tense as an arrangement **that has already consummated***” [emphasis added].

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*of the document, redenominating the value of the shares from Cypriot Pounds to Euros.*¹⁷³

With respect, that cannot be right. Cyprus joined the European Union in 2004 and adopted the Euro on 1 January 2008. Alterations were made in the share registers and other documents shortly after 1 January 2008 to show the nominal value of the shares in euros instead of Cyprus pounds. It cannot be the case that Alverley suddenly decided, three and a half years later, that it needed a new deed to take account of the switch to the Euro, and if it had so decided, then why did it not take the same steps with regard to the [...] deed?

430. Alverley has also argued that “*all parties concerned [...] began conducting their affairs on the basis of the trust being in place*”.¹⁷⁴ Yet the evidence does not bear that out. Alverley relies on:

(a) documents showing payments by [...] and [...] to [...] for the latter’s services as trustee (for which the 2006 Trust Deeds stated that it would be paid an agreed remuneration).¹⁷⁵

But if there was a trust, those services would have been performed for the benefit of Alverley, not of [...] and [...], and payment should have been made by Alverley (not least because it was not, even on its own case, the owner, at that time, of more than [...] of the shares in either company, so that the owners of the other shares would have been paying for services which had nothing to do with them);

(b) the fact that [...] in June 2006 and [...] in October 2006 invested in [...] and [...], in furtherance – so it is claimed – of a plan by Alverley to invest in those companies. But there is no evidence of such a plan and Alverley was not, even on its own case, the majority shareholder in either [...] or [...]. The decision to invest in [...] and [...] could easily have been explained by other factors and is in no way dependent upon the existence of a trust;

(c) the fact that Alverley made loans to [...] and [...] between 2006 and 2011. Again, however, there is no basis for saying that it would not have done so if it had not been

¹⁷³ CPHB1, para. 97.

¹⁷⁴ CPHB1, para. 92.

¹⁷⁵ CPHB2, para. 21, note 44.

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- beneficially interested in them. Alverley made loans to [...] and other entities during this period; there is no suggestion that it had an ownership interest in them; and
- (d) the termination deeds from 2013, on the basis that these would not have been necessary if there had not been trusts to terminate. However, the [...] deed of termination makes reference only to the 2011 trust document and is dated 22 July 2013, twenty days after the transfer of the shares was entered in the share register. The [...] termination deed does not suffer from the same defects but the Tribunal considers that it is not enough to establish the existence of a trust dating from 2006 when all of the evidence is taken into account. The two instruments of transfer do not assist Alverley as these could just as readily be explained as transfers of beneficial and legal ownership as had happened in 2011 with the acquisition of the 5% of shares from [...].
431. There is no mention of an interest in [...] or [...] in the financial statements for Alverley until 2010. Yet those statements define an “*associate*” as “*an entity over which the Company has significant influence but not control*” and refer to a shareholding of between 20 and 50%.¹⁷⁶ Since, under the 2006 Trust Deeds, [...] was obliged to comply with the instructions of Alverley with regard to exercise of voting and other shareholder rights, there can be little doubt that, if there had been a trust on the terms set out in the 2006 documents, then both [...] and [...] should have been listed as associates. It is also worth noting that the 2010 financial statement is misleading because it shows Alverley as having a 50% interest in both companies (making no distinction between legal and beneficial interests), whereas, even on its own case, it only held a beneficial interest in 45%. The Tribunal notes that the 2010 financial statement was not prepared until June 2011, which is still two months before the purchase of the 5% interest from [...]. The Tribunal considers that the statement is some evidence that Alverley had acquired an interest in the shares in 2010 but it is no evidence of ownership prior to 2010 and, in any case, the errors over the amount and character of the interest mean that this evidence cannot prevail over the other evidence pointing to the first acquisition being in 2011.

¹⁷⁶ See note 67, above.

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432. The Tribunal thus concludes, on the balance of the evidence, that it has not been established that Alverley acquired any interest in [...] or [...] until it acquired [...] of the shares in each in August 2011. For the avoidance of doubt, the Tribunal wishes to make clear that in reaching that conclusion, it has not drawn any adverse inference from the fact that the trust documents were not disclosed at an earlier date in these proceedings. Although the Respondent argued that drawing such inferences was appropriate, the Tribunal did not consider it necessary in view of its findings on the evidence before it.

(b) The purpose of the restructuring

433. Since the Tribunal has concluded that the transfer of the investment to Alverley took place only in 2011, it is clear that it falls after the dispute had become foreseeable. By August 2011, when Alverley first acquired shares in [...] and [...], the dispute had been foreseeable for some time and the onward march of the proceedings in the Romanian courts can only have increased the likelihood of the dispute actually coming into existence.

434. However, for the Respondent's argument on abuse of process to succeed, it is not enough that the transfer took place after the dispute had become foreseeable; it is necessary that a principal purpose (though not necessarily the sole purpose) of the transfer should have been to obtain the protection of the BIT.

435. The Claimants raise four arguments to refute the allegation that the transfer of assets to Alverley was undertaken in order to gain the protection of the BIT.

436. First, they argue that – unlike the companies in the *Philip Morris* group – [...] lacked the knowledge of the BIT and the sophistication to make such a decision. In the words of counsel for the Claimants:

[...] there's been no suggestion or evidence as to the state of knowledge of the investors as to the existence of the ICSID jurisdiction. It's meat and drink to all of us [...] but whether or not it's equally well known to the man in the street – whether that's a Cypriot or a Romanian street, particularly in 2006 to 2008 – is not a matter on which you have received any evidence.¹⁷⁷

¹⁷⁷ Tr. Day 3, 101:10-17 (Cordara).

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437. To similar effect, the Claimants' first Post-Hearing Brief argues:

*[...] it cannot be assumed that the average businessperson in the years 2005-2013, in either Cyprus or Romania would even be aware of the ICSID system, or even the treaty. The further one goes back in time, the stronger this point is.*¹⁷⁸

438. The lack of direct evidence is, of course, due to the decision of the Claimants not to submit a second witness statement from [...] (whom they describe as having been “*instrumental*” in the key decisions)¹⁷⁹ or to submit evidence from anyone else involved in the decisions regarding the transfer of the assets. The Respondent cannot be expected to produce direct evidence as to the state of mind of those who made the decision to transfer the assets to Alverley. The Claimants have also informed the Tribunal that they have no documents relating to those decisions.¹⁸⁰ The absence of such evidence is unsatisfactory, but it compels the Tribunal to proceed on the basis of what conclusions can reasonably be drawn from the evidence which is before it. It may be the case that direct evidence might have caused the Tribunal to reconsider those conclusions but, in the absence of such evidence, then they must stand.

439. The Tribunal begins with the fact that [...] was far from being “*the man in the street*” or even “*the average businessperson*”. The evidence shows that [...] was a highly sophisticated investor who had established a complex corporate structure involving companies in a number of jurisdictions with holding companies having shares in other holding companies, which in turn held shares in another level of holding companies before one gets to the operating companies. [...] was evidently well informed about the benefits of such structures and of the jurisdictions in which it was beneficial to incorporate [...] companies.

¹⁷⁸ CPHB1, para. 123.

¹⁷⁹ Letter from the Claimants to the Tribunal Secretary, 20 September 2019, **R-085**.

¹⁸⁰ Letter from the Claimants to the Tribunal, 24 February 2020, p. 3; Letter from the Claimants to the Tribunal, 19 February 2020, para. 10.

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440. The Tribunal also notes that [...] has stated that [...] had concerns about the Romanian courts and prosecutors. In these circumstances, it is probable that [...] looked for other means by which to protect the investments in the [...] Project.
441. The Tribunal concludes that it is more likely than not that [...] was aware (at least in outline if not in every detail) of the advantages in terms of legal protection which could flow from using a Cyprus company to hold the assets.
442. Secondly, the Claimants cite their expert, [...], as showing that there were many reasons why foreign investors would incorporate in Cyprus including tax benefits, common law, and the use of English.¹⁸¹ There is however no evidence that these factors ever entered [...]’s mind and no analysis in the evidence of the actual tax implications of restructuring the investment through Cypriot companies. [...] and [...] colleagues may well have been aware of these advantages – the factors considered in the previous paragraphs suggest that they would have been – but that has to be seen in the light of the circumstances at the time the decision was taken. By 2011, what [...] describes in [...] Witness Statement as “[...]”¹⁸² seems, in [...] opinion, to have been well under way and the Tribunal concludes that securing legal protection was likely to have been a decisive consideration.
443. Thirdly, the Claimants point to the length of time between the restructuring of the investment mostly in 2008 or 2011 depending on the analysis of the Alverley trust deeds (which the Tribunal has considered above) and the date on which arbitration proceedings were commenced (2018). They emphasise that in other abuse of process cases the gap has been no more than a few months and often far less. They suggest that it makes no sense to restructure the investment to enable a case to be brought many years later.
444. However, as *Philip Morris v. Australia* and the other awards and decisions referred to above stress, each case has to be considered on its own facts. The present case is unusual in that it does not concern a single act of taking (as with the legislation in *Philip Morris*) but a drawn-out series of steps involving the courts and the prosecutors, [...] ([...]). In

¹⁸¹ [ER2 of ...], paras. 60-69. Cf. Tr. Day 2, 41:3-42:17 ([...]).

¹⁸² [WS of ...], Sec. III.

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those circumstances, it would have been impossible to predict how long the Romanian courts would take or whether an adverse decision might be overturned on appeal. Advance planning therefore made every sense.

445. Lastly, the Claimants argue that there was already a long history of the [...] family channelling investments in Romania through Cyprus. They point, in particular, to the fact that by 2011 Alverley already held shares in a range of Romanian projects (*see* para. 259, above). They also contend that, even if the 2006 Trust Deeds are not accepted as establishing that Alverley already owned the beneficial interest in 45% of the shares by May 2006, the documents nevertheless evidence an intention to invest at that date, which suggests that the actual investment in 2011 cannot have been made for the purpose of gaining the protection of the BIT.
446. The Tribunal accepts that by 2011 Alverley had already held interests in a number of Romanian companies for some years but it does not accept – at least without further explanation which has not been provided – that this fact is sufficient to displace its conclusion based on the other evidence before it. Moreover, with the sole possible exception of the shareholding in [...] (on which more is said in the next section), none of these investments were made before April/May 2006, by which time (as the Tribunal has held in paras. 398-416, above) a dispute was already foreseeable even though its contours were not as clearly defined and the risk to [...] not as acute as it had become by 2011.
447. The same considerations apply to the argument about the trust documents evidencing an intention to invest. In addition, the defects in those documents, in particular, the lack of an authorized signatory, mean that little weight can be attached to them even in relation to this alternative argument of the Claimants.

(c) Conclusion

448. The Tribunal thus concludes that Alverley did not acquire any part of its interests in [...] and [...] until August 2011. At that time, a dispute with Romania over interference with the [...]’ right to use the [...] land was already foreseeable. It also concludes that obtaining the protection of the BIT was a principal reason for the decision to restructure the investment.

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449. The Tribunal has considered whether the fact that [...] and [...] first acquired shares in [...] and [...] in 2006,¹⁸³ at which date both were Cyprus companies and thus covered by the protection of the BIT, precludes the later acquisition of shares in [...] and [...] constituting an abuse. The Tribunal has concluded that it does not have that effect.
450. First, for the reasons given in paras. 401-416, above, the Tribunal considers that the dispute would have been sufficiently foreseeable, albeit with less clarity, before 6 June 2006. Secondly, what happened here was not a transfer of the assets of [...] and [...] but a transfer of the shares in those two companies. The Tribunal has been given very little information about the acquisition of the shares in [...] and [...] in 2006 or how those acquisitions were financed. [...] acquired its shares in [...] from [...] and [...] acquired its shares in [...] from [...], [...]. As to how those acquisitions were financed, it is sufficient to say that there is no evidence of loans or transfers from Alverley to [...] or [...] in 2006. In these circumstances, the Tribunal concludes that the 2006 acquisition of shares in [...] and [...] by [...] and [...] does not affect its findings regarding the acquisition of the shares in [...] and [...] by Alverley in 2011–2013.
451. The Tribunal concludes that the decision to restructure the investment in this way was therefore an abuse of process. In reaching that conclusion, it is not suggesting bad faith on the part of the Claimants but applying the objective test as explained in *Philip Morris v. Australia*.
452. The Tribunal therefore accepts the third objection of the Respondent with regard to Alverley and concludes that its claims are inadmissible.

(6) The Claimant Germen

453. The Tribunal has already decided that it lacks jurisdiction with regard to Germen's claims. Nevertheless, as there was extensive discussion in the pleadings and at the Hearing of the abuse of process argument with regard to Germen, it briefly sets out the view which it would have taken had it been necessary to decide on this ground.

¹⁸³ [...] acquired [...] of the shares in [...] on [...]: see [...], Sole Shareholder's Resolution, [...], **C-047**; [...] acquired [...] of the shares in [...] on [...]: see Share Sale Agreement between [...] and [...], [...], **C-509**.

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454. There is no dispute regarding the dates of acquisition by Germen of the shares in the Romanian subsidiaries. All were acquired between 4 June and 21 July 2008.¹⁸⁴
455. The transfers of the shares to Germen were almost entirely a transfer from the [...] or [...] controlled companies in Romania to Germen, a [...] controlled company in Cyprus.¹⁸⁵
456. Taking account of the considerations set out in paras. 438-444, above, the Tribunal finds that (subject to one matter which is considered in the next paragraphs) the transfer of these investments was carried out with a view to obtaining the protection of the BIT and was thus an abuse of process, rendering the claim inadmissible.
457. Special consideration needs, however, to be given to the shares in [...] and [...] purchased by Germen from Alverley on 30 June 2008. The Tribunal cannot see this transfer, from one Cyprus company to another, as an abuse of process in itself. The purpose of that transfer cannot have been to secure the protection of the BIT since both Alverley and Germen were potentially covered by the BIT.
458. There could only be an abuse of process here if the original acquisition by Alverley was itself undertaken in order to gain the protection of the BIT. That requires an examination of the dates on which Alverley acquired the shares. In the case of [...], it is agreed that Alverley acquired the shares on 20 December 2006 from [...].¹⁸⁶ By that date, the Tribunal considers that the dispute was already foreseeable. The transfer was from a Romanian company (in which the [...] family had an interest) to a Cypriot company. The Tribunal considers that this was a transfer carried out with a view to acquiring the protection of the BIT and was thus an abuse of process. That being the case, the subsequent transfer in 2008 from one Cypriot company to another (especially given that [...] is the UBO of both) cannot alter the situation.
459. The position regarding the [...] shares is more difficult. There is no contract of sale on the record. Counsel for the Claimants freely admitted that there was a gap in the evidence and

¹⁸⁴ See paras. [...] above.

¹⁸⁵ See paras. [...], above.

¹⁸⁶ Contract for Purchase/Sale of Shares in [...] between [...] and Bladon, 20 December 2006, **C-012**.

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that he did not know when Alverley had acquired these shares.¹⁸⁷ However, there is an entry regarding the ownership of these shares in the financial statements for Alverley from 2000 onwards. Mystifyingly, the percentage of the shares in [...] shown in the statements increases from 24.3% in 2000¹⁸⁸ to 24.9% in 2004¹⁸⁹ although the number of shares appears to be the same and in both the 2004 and 2005 statements, the entry showing ownership of 24.9% is followed by the sentence “[...]”. Further mystery is caused by the fact that the [...] shares continue to appear in the financial statements for 2008, 2009 and 2010¹⁹⁰ despite them having been sold to Germen in 2008. There is no explanation in the financial statements.

460. If Alverley did indeed acquire its shareholding in [...] in 2000, then it did so before there could be any question of the dispute with Romania being foreseeable. However, the Tribunal has concluded that it cannot rely upon the entries in the Alverley financial statements as sufficient proof of ownership at that date given that those statements contain a number of material inaccuracies (including the fact that the shares are still shown as being owned by Alverley for two years after it is agreed that they were sold to Germen). The Tribunal is also concerned that the Claimants’ counsel has not relied upon the financial statements as evidence of the date of acquisition of the shares in [...].
461. Accordingly, had it not already held that it lacked jurisdiction over the claims of Germen, the Tribunal would have concluded that those claims were inadmissible.

IX. OBJECTIONS 4 AND 5

462. In view of the Tribunal’s findings on Objections 1 and 3, it has concluded that it is unnecessary for it to examine Objections 4 and 5.

¹⁸⁷ Tr. Day 3, 100:10-24 (Cordara).

¹⁹⁰ Bladon Report and Financial Statements, 31 December 2010, C-422, p. 21.

¹⁹⁰ Bladon Report and Financial Statements, 31 December 2010, C-422, p. 21.

¹⁹⁰ Bladon Report and Financial Statements, 31 December 2010, C-422, p. 21.

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X. COSTS

A. THE POSITIONS OF THE PARTIES

(1) The Respondent

[...]

(2) The Claimants

[...]

B. THE ANALYSIS OF THE TRIBUNAL

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

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

472. This provision gives the Tribunal a broad discretion with regard to the costs of the arbitration. That discretion is not limited by any presumption in favour of a “loser pays” approach such as is found in the UNCITRAL Rules.¹⁹¹

473. Those costs fall into two categories. First, there are the costs of the Tribunal and the Centre, including the fees and expenses of the Members of the Tribunal, ICSID’s administrative fees and direct expenses. These amount to:

Fees and Expenses of the Members of the Tribunal

Sir Christopher Greenwood	USD 193,865.12
Professor Bernard Hanotiau	USD 161,830.97
Professor Pierre Mayer	USD 91,125.00

Fees and Expenses of the Assistant to the President

Ms Rosalind Elphick	USD 25,875.00
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ICSID Fees and Expenses

¹⁹¹ See 1976 UNCITRAL Rules, Art. 40(1); 2010 UNCITRAL Rules, Art. 42(1).

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ICSID Administrative Fees	USD 168,000.00
Direct Expenses	USD 30,942.56
Total	USD 671,638.65

474. In accordance with normal ICSID practice and the provisions of Regulation 14(3) of the Administrative and Financial Regulations and Rule 28 of the ICSID Arbitration Rules, the Tribunal decided that each Party should make advance payments totalling USD 400,000.00 to cover these costs. The Respondent, however, has refused to make the payments required and its share of the advance payments was met by the Claimants, as follows:

- on 1 April 2019, the Tribunal requested an advance payment of USD 200,000.00 from each Party;
- on 12 April 2019, the Claimants made their payment of USD 200,000.00;
- on 10 May 2019, the Tribunal declared the Respondent to be in default and invited the Claimants to pay the Respondent's share of the advance;
- on 12 June 2019, the Claimants paid a further USD 200,000.00 to cover the Respondent's share of the first advance;
- on 11 December 2019, the Tribunal requested a further USD 200,000.00 from each Party;
- on 29 January 2020, the Tribunal declared both Parties to be in default;
- on 12 March 2020, the Claimants made their payment of USD 200,000.00; and
- on 1 July 2020, the Claimants paid a further USD 200,000.00 to cover the Respondent's share of the second advance.

475. In view of the outcome of the proceedings, the Tribunal considers that the arbitration costs, totalling USD 671,638.65 should be borne in their entirety by the Claimants. In accordance with standard ICSID practice and the provisions referred to above, any amount remaining in the account after all payments have been made will be refunded to the Claimants since

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they covered not only their share of the advance payments required but also that of the Respondent. The Tribunal will consider whether the Respondent's default regarding the advance payments should have implications for costs below (*see* paras. 483 to 485, below).

476. The second category of costs with respect to which the Tribunal has a discretion in accordance with Article 61(2) of the ICSID Convention comprises the costs of legal representation incurred by each Party, including counsel's fees and any expenses incurred in respect of experts, travel, document preparation and the like. The total amount of these costs of representation incurred by each Party are summarized at paras. [...] and [...], above. In relation to these costs, the Tribunal considers that it is appropriate to distinguish between two phases of the proceedings: the July 2019 Hearing and the steps leading up to it ("**the first phase**") and the proceedings following the August 2019 Decision and continuing to the April 2020 Hearing and Post-Hearing Briefs ("**the second phase**").
477. The Tribunal begins by noting that both Parties' costs of legal representation are exceptionally high, given that the proceedings never reached the merits stage. In part that is due, no doubt, to the complexity of the case and the number of legal and factual issues raised. The Tribunal considers, however, that certain aspects of the conduct of the litigation have also contributed to the unusually high costs.
478. In this respect, the persistent refusal of the Claimants to identify their UBO,¹⁹² in spite of repeated directions from the Tribunal that they were required to do so,¹⁹³ is a matter of particular concern as regards the second phase of the proceedings. That refusal made the process of document disclosure far more complex and acrimonious than it should have been, for it led to disputes not only about the name of the UBO but about the disclosure of numerous documents which were relevant to the proceedings and which contained information which might have identified the UBO.
479. The Claimants maintain that this refusal was justifiable because of the risk that reprisals would be taken against the UBO. However, that argument was raised at the time of the

¹⁹² *See* paras. [...], above.

¹⁹³ August 2019 Decision, para. 78(a); Procedural Order No. 5.

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July 2019 Hearing and was duly considered by the Tribunal which nevertheless determined – and repeated¹⁹⁴ – that the Claimants must identify the UBO. The refusal to do so was a breach of the Tribunal’s procedural directions and cannot be justified by reference to an argument already considered, and rejected, by the Tribunal.

480. Nor is the Tribunal persuaded by the Claimants’ argument that no harm was done because the Respondent already had the information contained in the 2017 letter from [...] to the Stock Exchange in which [...] identified [...] as the UBO of Alverley. It is true that this letter was in the public domain to the extent that the Respondent could – and eventually did – obtain it. However, it was a document which must also have been in the possession of the Claimant Alverley and to which that Claimant had ready access. In these circumstances, it is no excuse to say that the Respondent could have obtained it by a far more laborious process. Moreover, the fact that the Claimants knew that the document was capable of being located by the Respondent undermines the Claimants’ excuse that it could not identify the UBO for fear of reprisals by Romania against that UBO.
481. The Tribunal considers that the breach of its directions to identify the UBO was the principal cause of the lengthy exchanges between the Parties, which necessitated several procedural orders and directions from the Tribunal. While the various motions submitted by the Respondent during this phase made these proceedings more protracted and costly, it does not accept the Claimants’ contention that those motions were “*frivolous*”. On balance, it concludes that they were a reasonable consequence of the Claimants’ refusal to comply with the Tribunal’s directions regarding disclosure.
482. The good faith conduct of arbitration requires that the parties comply fully with procedural directions from the tribunal. If a party fails to do so, for whatever reason, it must bear the costs brought about as a result of that failure. Accordingly, the Tribunal concludes that the costs of both Parties for the disclosure phase would have had to be met by the Claimants whatever the outcome of the proceedings.

¹⁹⁴ August 2019 Decision, para. 78; Procedural Order No. 5. The point was also made in correspondence on 10 October 2019.

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483. The Claimants have not, however, been alone in refusing to comply with the Tribunal's directions. From the outset of the case, the Respondent has made clear that it would not make any advance payment towards the Tribunal's costs. It has sought to justify that stance by maintaining that European Union law precluded the arbitration and prohibited Romania from acknowledging the jurisdiction of the Tribunal or from making payment on any award which might be made against it.
484. It has never, however, been suggested – nor could it have been – that European Union law prohibited the Respondent from participating in the proceedings and advancing several arguments, only one of which concerned European Union law. Nor has Romania suggested that European Union law precluded it from making the advance payments required. The duty to make those payments stems not from the jurisdiction of the Tribunal but from the duties of Romania as a party to the ICSID Convention and its consequent duty to comply with directions under the Administrative and Financial Regulations. If a State which challenged the jurisdiction of an ICSID arbitration tribunal was able to avoid making any advance payment towards the costs of the tribunal in addressing that jurisdictional challenge, the result would be to impose a wholly unfair and unreasonable burden on the other party and to impair the ability of the tribunal to exercise its *compétence de la compétence*.
485. Just as the Claimants cannot expect the Respondent to bear the costs arising as a result of their failure to comply, until a very late date, with the Tribunal's directions regarding disclosure, the Respondent cannot expect the Claimants to bear the additional cost of making the advance payments which should have been made by the Respondent.
486. A further element which the Tribunal must take into account in the exercise of its discretion is the outcome of different parts of the proceedings. The Tribunal considers that the outcome of the first phase of the proceedings, i.e., of everything up to and including the July 2019 Hearing and the ensuing Decision, is that neither Party can be regarded as the winner. The Respondent was successful in resisting many of the requests for provisional measures, in obtaining an order for disclosure of controlling interests and in securing bifurcation of the proceedings. On the other hand, it failed in its Application for Summary

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Dismissal under Rule 41(5) of the ICSID Arbitration Rules, for security for costs and to strike certain documents. Moreover, the Claimants' breach of the Tribunal's directions regarding disclosure of the identity of their UBO took place after this phase had been concluded.

487. In these circumstances, the Tribunal considers it appropriate that each Party should bear its own costs of representation in respect of the first phase.
488. With regard to the second phase, after the August 2019 Decision, the Tribunal considers that, subject to one qualification, the Claimants should pay the Respondent's costs of legal representation. In coming to that conclusion, the Tribunal has taken account of the fact that the Respondent has succeeded in its objection that the Tribunal has no jurisdiction with regard to Claimant Germen and that Claimant Alverley's claims are inadmissible. Although the Respondent was unsuccessful as regards Objection 2 and, so far as Alverley is concerned, as regards its Objection 1, the Tribunal does not consider that these factors would justify requiring it to bear part of the costs of this phase of the proceedings.
489. The Tribunal has also taken into account, as explained above, the fact that the significant expenses incurred by both Parties during the document disclosure process between September 2019 and shortly before the April 2020 Hearing were exacerbated by the refusal, until a very late stage, of the Claimants to disclose the identity of their UBO and the protracted disputes regarding redactions and non-disclosure of documents which resulted from that refusal.
490. The Tribunal has considered whether the costs incurred by the Respondent were reasonable but it notes that the Claimants' costs were comparable and, in fact, somewhat higher than those of the Respondent.¹⁹⁵ In these circumstances, the Tribunal has concluded that it has no basis on which to question the reasonableness of the Respondent's costs.

¹⁹⁵ A larger part of the Claimants' costs were incurred in 2019 but that is to be expected given that much of the initial work (described by the Claimants in Annex 1 to their Submission on Costs was concerned with the preparation of the Request and initial pleadings) were not directly attributable to the July 2019 Hearing.

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491. The qualification, to which the Tribunal has referred in para. 488, above, concerns the effects of the refusal by the Respondent to meet its share of the advance payments to the Tribunal. For the reasons already given, the Tribunal considers that this refusal was a clear breach of the Respondent's obligations and had the effect of forcing the Claimants to pay the Respondent's share if the case were to continue. The Respondent has argued that the Claimants incurred no borrowing costs as a result, because they were able to borrow at will and without cost from their UBO. It is impossible to be certain whether that was the case or not but even if a claimant is able to finance that part of the tribunal's costs which should have been met by the respondent, it can do so only at the price of foregoing other opportunities to put the money concerned to use. The Tribunal has therefore concluded that the amount which the Claimants are to pay to the Respondent in respect of the latter's costs of representation should be reduced by USD 54,000. It has arrived at that figure by applying a commercial rate of interest of 6% for a period of 33 months in respect of the first advance and 21 months in respect of the second advance.
492. Accordingly, the Tribunal directs that the Claimants are to pay to the Respondent the sum of USD 4,194,779.24 (being the Respondent's fees and expenses for the period after the August 2019 Decision, as set out in para. [...], above), less USD 54,000. The total to be paid by the Claimants to the Respondent is, therefore, USD 4,140,779.24.
493. That sum is to be paid by the Claimants to the Respondent not less than sixty days after the date of this Award, after which it will bear interest at the rate of 6% per annum, compounded twice yearly, until full payment has been made.

XI. DISPOSITIF

494. For the reasons given above, the Tribunal DECIDES that:
- (1) the Tribunal lacks jurisdiction over the Claimant Germen;
 - (2) the claims advanced by the Claimant Alverley are inadmissible;
 - (3) the case is therefore dismissed;
 - (4) the Claimants shall bear the costs of the Tribunal and the Centre;

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- (5) the Claimants shall pay to the Respondent within sixty days of the date of this Award the sum of USD 4,140,779.24 in respect of the Respondent's costs of legal representation;
- (6) in the event that the Claimants do not pay the sum stipulated in the preceding subparagraph within sixty days of the date of this Award, they shall additionally pay interest at the rate of 6% per annum, compounded twice yearly, until full payment is made; and
- (7) All other claims and requests are dismissed.

ANNEX A

[...]