IN THE MATTER OF INVESTMENT DISPUTE UNDER THE AGREEMENT BETWEEN SERBIA AND MONTENEGRO AND THE REPUBLIC OF CYPRUS ON RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS AND UNDER THE AGREEMENT BETWEEN CANADA AND THE REPUBLIC OF SERBIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

COROPI HOLDINGS LIMITED AND KALEMEGDAN INVESTMENTS LIMITED (CYPRUS)

AND

MR. ERINN BERNARD BROSHKO (CANADA)

CLAIMANTS

– v –

THE REPUBLIC OF SERBIA

RESPONDENT

REPLY

23 February 2024

SQUIRE PATTON BOGGS

nstlaw/Stankovic & Partners

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I. INTRODUCTION

A. Preliminary statement

1. Claimants' case is straightforward, and its core can be easily summarized in a few simple points.

2. Claimants' Serbian company Obnova[1] is the owner of certain buildings and has the right of use over the adjacent land located in central Belgrade near the Danube river at Dunavska street Nos. 17-19 and 23.

3. Under the "*Master Plan for the City of Belgrade 2021*" that the City of Belgrade ("**City**") adopted in 2003 ("**2003 RP**"), Obnova's land was zoned for commercial and residential development.[2]

4. In December 2013, the City adopted a detailed regulation plan for certain roadways, which designated Obnova's premises for the construction of a bus loop.[3]

5. The adoption of the 2013 DRP had an expropriatory effect. The 2013 DRP severely restricted Obnova's use of its premises by prohibiting their development for any purposes other than the construction of the bus loop by the City. The 2013 DPR also cancelled Obnova's right to convert its right of use over the land into ownership. If Obnova's had not requested conversion earlier, Obnova's right of use would have converted into ownership, *ex lege* and automatically, on 4 August 2023—but for the designation of Obnova's premises for the construction of the bus loop.

6. The expropriatory effect is compounded by the fact that the 2013 DRP allows the City to seize the land and start the construction of the bus loop when it sees fit. Serbia already attempted to seize the premises on 18 April 2019, when it sent heavy machinery to raze Obnova's buildings. In such circumstances, there is no buyer for the premises.

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1 Preduzeće za prikupljanje, preradu i promet sekundarnih sirovina Obnova AD Beograd (Stari grad) ("**Obnova**").

2 2003 RP, **C-025**.

3 "Detailed Regulation Plan for Roadways: Dunavska, Tadeuša Košćuška, Dubrovačka, Trolleybus and Bus Terminus in Dorćol, Municiplaity of Stari Grad"("**2013 DRP**").

7. The City adopted the 2013 DRP in a complete disregard for its own laws and for Obnova's substantive and procedural rights. To begin with, under applicable Serbian regulations, a detailed regulation plan, such as the 2013 DRP, must be in line with a higher-level planning document, such as the 2003 RP.[4] Thus, the 2013 DRP is unlawful because it designated Obnova's land for the construction of a bus loop while the 2003 RP had zoned it for residential and commercial development. The unlawfulness persists to this day because the City's General Urban Plan from 2016 ("**2016 RP**")[5] also designated Obnova's land for commercial and residential use.

8. Serbia was also required to make a draft of the 2013 DRP publicly available during the so-called public inspection process.[6] During the public inspection, it was—in theory—possible to review the text of the draft and submit objections.

9. However, the beginning of the public inspection period was announced only in two tabloid journals[7] and the draft was only made available in hard copy at a Government building.[8] As a result, almost no one actually learned about the public inspection process and the draft of the 2013 DRP.[9]

10. Worse yet, when deciding on the location of the bus loop, the City did not even consider placing it on its own land, located literally across the street from Obnova's premises, even though that land was zoned for traffic infrastructure under the 2003 RP and its bigger size (5.4 hectares compared to less than 1 hectare of Obnova's land) and rectangular shape made it a much more favorable location for the bus loop than Obnova's land. The reason for the City's conduct became apparent in December 2015, when the City conveniently re-zoned its own land for residential purposes in the second

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4 2009 Law on Planning and Construction, Art. 33, **C-021.**

5 2016 RP, **C-177**.

6 Report on the public inspection procedure, 12 November 2012, pp. 9-10 (pdf), **C-425**.

7 Report on the public inspection procedure, 12 November 2012, p. 9 (pdf), **C-425**; Report on Public Review for the 2013 DRP dated 8 November 2012 and Amendments to the Report on Public Review for the 2013 DRP dated 16 May 2013, p. 2 (pdf), **R-105**.

8 Report on the public inspection procedure, 12 November 2012, p. 9 (pdf), **C-425**.

9 Low transparency of the urban planning processes is an issue in the whole Serbia. *E.g.* Handbook – How to achieve a quality urban plan tailored to local self-government, **C-420**; Guide to Participation in Urban Development Planning, **C-419**.

phase of the 2013 DRP ("**2015 DRP**").[10] Therefore, the City misused its regulatory powers for its own financial benefit—on the one hand, it rezoned Obnova's premises from commercial and residential to that of a bus loop for the City, thus destroying all development value; and on the other hand, it rezoned its own land from a bus depot to residential, thus substantially increasing its value.

11. Even without these violations of Obnova's procedural and substantive rights, the adoption of the 2013 DRP represents a compensable expropriation both under Serbian law and under public international law.

12. Serbia, however, expressly refused to provide any compensation when it rejected Obnova's request for compensation ("**Request for Compensation**") on 13 August 2021,[11] and then entirely ignored Claimants' Notice of Dispute.[12]

13. Thus, Serbia violated: (*i*) the Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, which entered into force on 23 December 2005 and was published in the Official Gazette of Serbia and Montenegro No.14/05 "**Cyprus-Serbia BIT**"); and (*ii*) the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, which entered into force on 27 April 2015 ("**Canada-Serbia BIT**"; the Canada-Serbia BIT and the Serbia-Cyprus BIT being, together, "**Treaties**")[13] that protect Claimants' investments in Obnova.

14. Serbia's Counter-Memorial shows that most of the key facts that form the basis for Claimants' claims are undisputed: (*i*) Serbia does not dispute the existence and content of the 2003 RP;[14] (*ii*) Serbia does not dispute the existence, content and legal effect of the 2013 DRP;[15] (*iii*) Serbia admits that the City did not consider its own land for the

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10 2015 DRP, **C-326**.

11 Memorial, ¶ 126.

12 Memorial, ¶ 16.

13 Extract from the website of the Government of Canada evidencing the entry into force of the Canada-Serbia BIT on 27 April 2015, 6 February 2018, **C-073**.

14 Counter-Memorial, § B.VI.

15 Counter-Memorial, § B.VI.

location of the bus loop[16] and that the City re-zoned its own land for residential purposes in 2015;[17] and (*iv*) Serbia also does not dispute that no compensation was provided.

15. Unable to deny the City's decisions and their effects on Obnova's premises, Serbia's defense seems to be that Obnova has had no rights to its buildings and land—even though Obnova had built them starting in the 1950s and has been using them now, without interruption, for almost 75 years.

16. Serbia contests the existence of Obnova's rights for a multitude of purported reasons, which Claimants painstakingly refute one by one in this Reply.

17. Serbia starts its defense with the silly argument that Claimants have not proved the existence of Obnova's buildings and what they are made of—even though the buildings are clearly visible on the aerial maps reproduced in the Memorial and most of them have been recorded in the Land Books and then the Cadaster going back decades. To put these non-issues to rest, Claimants have engaged an independent expert, Prof. Dragan Arizanović. Prof. Arizanović is a civil engineering expert who, in his report, confirms that he has inspected Obnova's buildings and confirmed that they exist and are brick-and-mortar buildings.

18. Serbia then continues with the inconsistent but equally silly argument that Obnova's buildings were not built by Obnova because they pre-date Obnova's establishment in 1948. Serbia relies on an erroneous and purposely misleading interpretation of historic cadastral maps, attached to the Counter-Memorial as exhibit R-043.[18] Claimants show below that Serbia falsely relies on one particular map, which in fact depicts the status of Obnova's buildings recorded in the 1966-1967 cadastral survey, long after Obnova was established and built its buildings.[19] A cadastral map from 1949 conclusively shows that none of Obnova's current buildings existed at that time.[20]

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16 Counter-Memorial, ¶ 176.

17 Counter-Memorial, ¶ 176.

18 Notice of the Cadaster dated 31 July 2023, **R-043**.

19 *Infra* § II.A.4.

20 Annex to construction permit No. 5034 dated 31 October 1949, p. 2, **C-576**.

19. In the same vein, Serbia argues that Obnova does not have any rights to its premises because its buildings are temporary in a legal sense and that Obnova is subject to an obligation to demolish them upon a request of the City. This argument is refuted by Claimants' Serbian law experts, Professor Živković and Dr. Milošević.[21] Suffice it to say here that Obnova's buildings do not meet any definition of temporary buildings that ever existed under Yugoslav and/or Serbian law, that Obnova's private law obligation to demolish the buildings ceased to exist in 1961, at the latest, and that Serbian law did not allow for the issuance of temporary building permits at the time when Obnova's buildings were permitted.

20. Serbia also raises a novel—and equally absurd—argument that Obnova has been using its premises solely based on alleged historic lease agreements with the City and/or another Serbian company, Luka Beograd. Even a cursory review of the alleged agreements relied upon by Serbia shows that they do *not* relate to Obnova's current premises, for which Claimants seek compensation. This is consistent with the fact that Obnova has not paid any rent to the City or to Luka Beograd, or to any other entity for that matter, for the use of its current premises—and Serbia does not show otherwise.

21. Serbia's objections to the Tribunal's jurisdiction are clearly without merit and based solely on misinterpretations of both the text of the Treaties and the claims brought forward by Claimants.

22. The Tribunal has jurisdiction over Cypriot Claimants and their claims. Cypriot Claimants meet the definition of an "investor" because they have their seat in Cyprus, as confirmed by Agis Georgiades, Claimants' Cyprus law expert.[22] Serbia's theory that Mr. Rand's control over Cypriot Claimants somehow precludes them from having their seat in Cyprus finds no support under public international law and/or Cyprus law.

23. Cypriot Claimants have a protected investment under the Cyprus-Serbia BIT—and also under the ICSID Convention. Mr. Georgiades confirms that Coropi[23] acquired

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21 Miloš Živković and Miloš Milošević Expert Report dated 23 Februry 2024.

22 Agis Georgiades Expert Report dated 23 February 2024.

23 Coropi Holdings Limited ("**Coropi**").

beneficial ownership of Kalemegdan[24] in March 2012.[25] Kalemegdan was registered as the owner of Obnova's shares on 17 May 2012.[26] Kalemegdan's acquisition of Obnova's shares was lawful regardless of whether or not it triggered Kalemegdan's obligation to publish a takeover bid. In any event, Claimants' Serbian securities law expert, Ms. Bojana Tomić-Brkušanin, explains that Kalemegdan and Coropi acted in good faith when they did not launch a takeover bid because they relied on a previously published opinion of the Securities Commission of the Republic of Serbia (the "**SEC**"), which exempted such transactions.[27] Kalemegdan contemporaneously notified the SEC of its acquisition—and the SEC did not require a takeover bid.[28]

24. The Tribunal also has jurisdiction *ratione temporis* under the Cyprus-Serbia BIT because Cypriot Claimants invoke breaches—*i.e.* the adoption of the 2013 DRP in December 2013 and Serbia's rejection of the Request for Compensation in August 2021—that clearly occurred long after the treaty's entry into force in December 2005 and the making of their investment in April 2012. The events pre-dating the entry into force of the treaty, invoked by Serbia, did not give rise to any dispute at the time. Therefore, they are irrelevant for the Tribunal's jurisdiction. This, however, does not preclude the Tribunal from evaluating them as part of the relevant factual background of the dispute.

25. The Tribunal also has jurisdiction over Mr. Broshko's claims.[29] Mr. Broshko[30] claims, on his own behalf as well as on behalf of his Serbian company, Maple Leaf Investments d.o.o. Beograd – Stari Grad ("**MLI**"), violations of the Canada-Serbia BIT with respect to Serbia's refusal to provide compensation on 13 August 2021. These claims were filed timely because the three-year time period for their filing under Articles 22(2)(e)(i)

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24 Kalemegdan Investments Limited ("**Kalemegdan**"; together with Coropi, "**Cypriot Claimants**"), a Cypriot company that has been, since April 2012, the owner of 14,142 shares in Obnova, which represent approximately 70% of Obnova's total share capital (the "**Cypriot Obnova Shares**").

25 Georgiades ER, ¶¶ 5.2.1 - 5.2.3.

26 Excerpt from the Central Securities Depository and Clearing House, 17 May 2012, **C-005**; Excerpt from the webpage of the Central Securities Depository and Clearing House, 29 March 2022, **C-004**; Minutes of a meeting of the board of directors of Kalemegdan, 26 April 2012, p. 2, **C-318**.

27 Tomić Brkušanin Expert Report dated 23 February 2024.

28 Erinn Broshko Witness Statement dated 23 February 2024, ¶ 25.

29 Based on approximately 10% of Obnova's shares purchased in 2017 ("**Canadian Obnova Shares**").

30 Together with Cypriot Claimants ("**Claimants**").

and 22(2)(f)(i) of the Canada-Serbia BIT will lapse only in the future. Mr. Broshko's claims are not barred by the fact that he does not control Obnova and cannot procure Obnova's waiver of certain claims. Obnova, in any event, is not pursuing any claims that it would need to waive if it were controlled by Mr. Broshko.

26. Claimants' claims are admissible. Cypriot Claimants acquired the Cypriot Obnova Shares for tax planning purposes, not to obtain protection under the Cyprus-Serbia BIT, and the present dispute was not foreseeable, let alone with a high probability, at the time of the acquisition. The same holds true for Mr. Broshko, who only claims in connection with Serbia's refusal to pay compensation, which occurred years after his purchase of a minority stake of Obnova's shares on the Belgrade Stock Exchange ("**BSE**").

27. Thus, the Tribunal has jurisdiction over all claims brought by Claimants and the claims are admissible. Claimants respectfully request that the Tribunal exercise its jurisdiction and find that Serbia violated the Treaties as set forth below.

B. Organization of the Reply

28. This Reply is structured as follows:

a. Section I is this Introduction;

b. Section II describes the Factual Background;

c. Section III explains that the claims fall within the jurisdictional ambit of the Treaties and the ICSID Convention;

d. Section IV sets out Serbia's violation of the Treaties; and

e. Section V sets out the Claimants' Request for Relief.

29. This submission is accompanied by the following witness statements:

a. witness statement of Mr. William Archibald Rand dated 23 February 2024;

b. witness statement of Mr. Erinn Bernard Broshko dated 23 February 2024; and

c. witness statement of Mr. Igor Markićević dated 23 February 2024.

30. This submission is also accompanied by the following expert reports:

a. second joint expert report of Prof. Miloš Živković and Mr. Miloš Milošević, Serbian law experts addressing various Serbian real estate law issues;

b. expert report of Mr. Agis Georgiades, a Cyprus law expert addressing the definition and determination of a company's "seat" and the creation of trusts under Cyprus law;

c. expert report of Ms. Bojana Tomić Brkušanin, a Serbian law expert addressing Serbian regulation of takeover bids; and

d. expert report of Prof. Dragan Arizanović, a civil engineer addressing the status of Obnova's buildings from the viewpoint of engineering practice.

31. This Reply annexes a number of exhibits (*e.g.*, **C-[x]**) and legal authorities (*e.g.*, **CL-[x]**) numbered consecutively following those submitted with the Claimants' Request for Arbitration dated 27 April 2022 ("**Request for Arbitration**") and the Claimants' Memorial dated 31 March 2023 ("**Memorial**").

II. OBNOVA'S RIGHTS TO THE LAND AND BUILDINGS

A. Obnova's rights to the buildings and land at Dunavska 17-19

1. Obnova's ownership of the buildings at Dunavska 17-19

32. Since its privatization in 2003, Obnova has been the owner of 15 buildings at Dunavska 17-19, shown on a current photomap:[31]

33. Obnova owns the buildings because it constructed them in the 1950s. During that time, in accordance with the contemporaneous socialist legislation and Obnova's then status of a state economic enterprise, Obnova acquired the right of use—and not ownership—over the buildings.[32] For all practical purposes, the right of use was "*regarded as a surrogate for the ownership right*" in then communist Yugoslavia.[33]

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31 The current status of buildings and land plots constituting Obnova's premises at Dunavska 17-19 is set out in detail in **Annex A** below.

32 Memorial, ¶¶ 36, 38. *See also* Živković Milošević First ER, ¶¶ 75, 128; Živković Milošević Second ER, ¶¶ 53-75, 97-106, 126-127.

33 Jotanović ER, ¶ 13.

34. After the fall of communism and upon Obnova's privatization in September 2003, Obnova's right of use over the buildings, which were all listed in Obnova's privatization documents, *ex lege* transformed into ownership.[34]

2. Obnova's right of use over the land at Dunavska 17-19

35. As a result of constructing its buildings at Dunavska 17-19, Obnova *ex lege* acquired a permanent right of use over the construction land on which these buildings were built.[35]

36. Unlike Obnova's buildings, the construction land at Dunavska 17-19 used by Obnova remained in state ownership after Obnova's privatization. This is because, at the time of Obnova's privatization in 2003, private ownership of construction land was still not possible in Serbia.[36] Obnova, therefore, continued to have the right of use of the land.[37]

37. Contemporaneous documents confirm that Serbia was aware of Obnova's right of use over the land at Dunavska 17-19. With their Memorial, Claimants produced the following map from the 1960s that expressly states that Obnova was the "*user*" of the land at Dunavska 17-19:[38]

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34 Memorial, ¶ 50. *See also* Živković Milošević First ER, ¶¶ 78, 139-145; Živković Milošević Second ER, ¶¶ 114-116, 126-127.

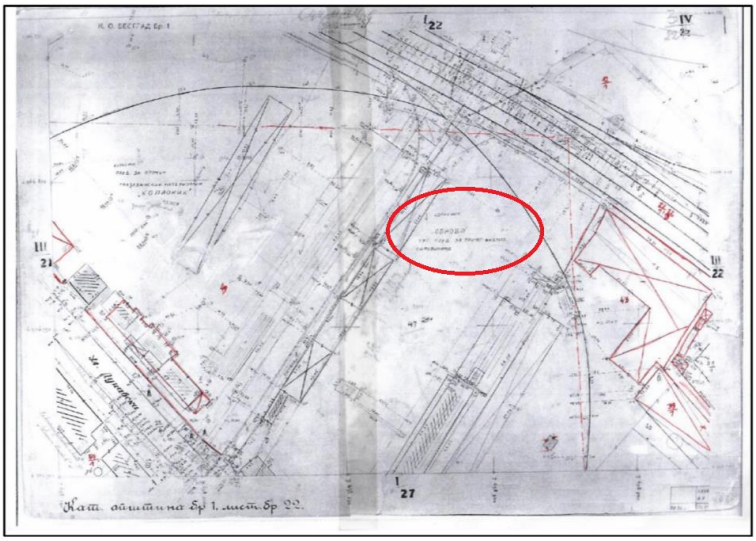
35 Memorial, ¶ 39. *See also* Živković Milošević First ER, ¶¶ 40, 176-177; Živković Milošević Second ER, ¶ 144.

36 Memorial, ¶ 51.

37 *Ibid*.

38 Letter from Geodetic Authority of Serbia to Obnova, 18 February 2021, p. 3 (pdf), **C-329**.

Translation: "*User: 'OBNOVA' Trading Company for Trade of Industrial Raw Materials*"



38. Importantly, the original Serbian text uses the word "*korisnik*", which means a "*user*" having the right of use, not a lessee ("*zakupac*").

39. As Claimants explained in their Memorial, Obnova received this map directly from the Cadaster after it requested information about historical changes of land plot No. 47, *i.e.* the land on which Obnova's premises at Dunavska 17-19 are located.[39] At the request of Serbia, the Cadaster now reproduced the same map—without any comments on the annotation included therein—in exhibit R-043.

40. Specifically, the corresponding map is included on page 3 of exhibit R-043 and, according to Serbia, it represents "*Sketch 4/22 review survey for the period 1966-1967 cadastral parcel 47.*"[40] The only difference between the map in R-043 and the map submitted by Claimants as C-329 is that the excerpt provided by Serbia is purposefully cropped to not show the word "*user*". As can be seen on the comparison below, when preparing the excerpt for R-043, the Cadaster simply cut off the upper part of the map to exclude the key word "*korisnik*":

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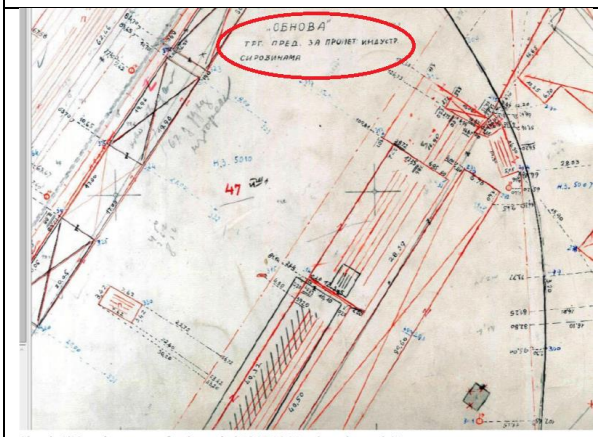
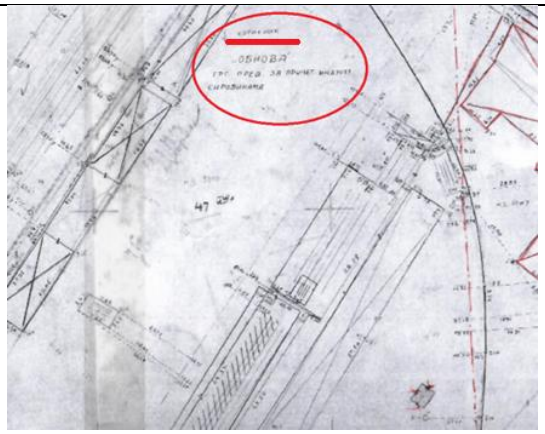
[39] Memorial, ¶ 145. Land plot No. 47 was later divided into three smaller land plots Nos. 47/1, 47/2 and 47/3. *Infra* Annex A.

[40] Notice of the Cadaster dated 31 July 2023, p. 3 (pdf), **R-043**.

R-043 (submitted with Serbia's Counter-Memorial)	C-329 (submitted with Claimants' Memorial)
 Sketch 4/22 review survey for the period 1966-1967 cadastral parcel 47	

41. The Cadaster's approach speaks volumes about both the reliability of exhibit R-043 and Serbia's approach to this arbitration. Serbia omitted the key word "*user*" in exhibit R-043 to purposely mislead the Tribunal.

42. Worse yet, despite the fact that Serbia now produced the same map twice—once directly to Claimants[41] and once as a part of R-043—and without any objections to the annotation included therein, Serbia now tries to dispute the relevance of this annotation. Specifically, Serbia argues that "*maps or handwritings do not constitute any proof that Obnova ever acquired the right of use or the ownership right.*" Serbia also claims that "*any annotations on maps have no legal significance with respect to property rights, which can be acquired solely by inscription in the Land Books or the Cadastre.*"[42] Serbia's arguments are both incorrect and misleading.

43. The annotation in the map is clear evidence of the contemporaneous understanding of the person who prepared the map. According to Serbia, the map was prepared in the 1960s by the Cadaster itself. Thus, the annotation included therein clearly reflects the contemporaneous understanding of the Cadaster that Obnova was the holder of the right of use ("*korisnik*")—and not the lessee ("*zakupac*"), *i.e.* the holder of the right to use—of the land at Dunavska 17-19. That understanding was entirely correct. It is no wonder why Serbia would now wish to conceal such information from the Tribunal.

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41 Registration No. 952-02-6-74, 1 March 2004, **C-605**; Statement No. 952-02-6-74, 1 March 2004, **C-606**.

42 Counter-Memorial, ¶ 90.

3. Obnova's right to convert its right of use over the land into ownership

44. In 2009, Obnova acquired the right to convert its right of use over the land at Dunavska 17-19 into ownership (upon the payment of a conversion fee). Obnova acquired this right based on a new Law on Planning and Construction adopted by Serbia ("**2009 Law on Planning and Construction**").[43]

45. According to the 2009 Law on Planning and Construction, privatized companies could apply for conversion of all the land necessary for ordinary use of their buildings.[44] The land necessary for ordinary use of buildings was defined as the "*land under the building and the land around the building in the area that is determined as the minimum for the allotment of new parcels for that zone, according to the valid planning document, for that building*."[45]

46. Obnova's premises at Dunavska 17-19 are essentially a rectangular yard with Obnova's buildings at the entrance to the yard and along both wings. Obnova has been the only user of the entire area, as one business complex, for over 70 years. Therefore, the land necessary for regular use of Obnova's buildings is the entire land to which Obnova has the right of use at Dunavska 17-19.[46]

47. Therefore, the 2009 Law on Planning and Construction gave Obnova the legal right to acquire ownership over all the land at Dunavska 17-19, subject to the payment of a conversion fee. Obnova had had this right until December 2013, when the adoption of the 2013 DRP made the conversion of the land at Dunavska 17-19 impossible.[47] The 2013 DRP designated the land at Dunavska 17-19 for public purposes—*i.e.* the construction of a bus loop. Under Serbian law, land designated for public purposes is excluded from the conversion process.[48] Thus, upon the adoption of the 2013 DRP, Obnova lost its right to acquire ownership over the land at Dunavska 17-19.

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43 Memorial, ¶ 81.

44 Živković Milošević First ER, ¶¶ 50, 189.

45 2009 Law on Planning and Construction (Official Gazette RS, No. 72/2009, 81/2009), Art. 70(1), **C-021**.

46 Memorial, ¶ 84.

47 *Id.*, ¶¶ 86, 100, 109.

48 Živković Milošević First ER, ¶ 56.

48. In July 2023, Serbia introduced a new regulation governing the conversion process. According to this new regulation, as of the entry into force of the new law on 4 August 2023, the right of use converted into ownership *ex lege*, but now without the need to pay a conversion fee.[49] Obnova, however, cannot benefit from these changes because the new law did not alter the provision precluding conversion of the right of use over land designated for construction of objects serving a public purpose. As explained above, this provision applies to Obnova's land because the bus loop that is contemplated to be placed on Obnova's land based on the 2013 DRP represents an object serving a public purpose.[50]

4. Serbia's erroneous denials of the existence of Obnova's rights

49. Since 2018, Serbia has repeatedly denied the existence of Obnova's rights to its premises at Dunavska 17-19 on an ever-growing number of changing and mutually exclusive pretexts.

50. In April 2018, Serbia refused Obnova's request for legalization of certain buildings at Dunavska 17-19. The only reason for the rejection of Obnova's requests was that Obnova's buildings were located on land plots designated by the 2013 DRP for "public use." Such land can be legalized only with the consent of the Land Directorate of the City of Belgrade ("**City**"). The Land Directorate, however, refused to provide the necessary consent.[51]

51. In addition, Serbian courts incorrectly rejected Obnova's claim for determination of ownership over buildings at Dunavska 17-19 for which Obnova has building and occupancy permits. Serbian courts rejected Obnova's claim based on an incorrect conclusion that the buildings are temporary and were built based on temporary building permits. As Claimants explain in detail in **Sections II.A.4.b** and **II.A.4.c** below, Obnova's buildings are permanent and were not built based on temporary permits—

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49 Živković Milošević Second ER, ¶¶ 31-32.

50 *Id.*, ¶ 34.

51 Markićević WS, ¶ 42; Decision of the Secretariat for Legalization No. 351.21-19758/2010, 25 April 2018, pp. 2-3 (pdf), **C-041**; Decision of the Secretariat for Legalization No. 351.21-16194/2014, 25 April 2018, p. 2 (pdf), **C-042**; Conclusion of the Executive Board 06-55-03, 6 November 2003, **C-607**.

because Serbian law applicable at the time did not contemplate at all the issuance of temporary permits.

52. Serbia also disregarded Obnova's rights when it rejected Obnova's Request for Compensation. Once again, Serbia did so for reasons that have no merit. As Claimants explained in their Memorial, with respect to buildings at Dunavska 17-19, Serbia argued that:

a. Obnova's buildings are temporary and that Obnova was allegedly obliged to demolish its buildings "*at the request of the People's Committee of the City of Belgrade, without the right to compensation*";

b. it is "*not possible to positively identify Objects built under temporary approvals compared to the current situation on the ground*" and that Obnova's requests for legalization of the existing objects had been rejected;

c. Obnova's buildings allegedly "*could not be regarded as the subject of privatization*"; and

d. Obnova's rights allegedly could not be expropriated because the Cadaster had registered the City as the owner and Obnova's claim for correction of the registration was pending before Serbian courts.[52]

53. None of these arguments withstand scrutiny. This is because:

a. Obnova's buildings are not temporary and Obnova does not have an obligation to demolish them;

b. the Land Directorate did not even attempt to identify the relevant buildings;

c. it is utterly irrelevant that the buildings located at Dunavska 17-19 were not "*subject of privatization*";

d. the City is not the owner of Obnova's buildings; and

[52] Memorial, ¶ 130.

e. the erroneous registration of the City's purported ownership is irrelevant.[53]

54. Finally, Serbia advanced these—and many other, made-for-arbitration—pretexts in its Counter Memorial and the expert report of its Serbian law expert, Professor Jotanović. Claimants show below that all but one of these purported justifications violate Serbian law. The only justification that stands under Serbian law is that Obnova cannot exercise its rights to the premises at Dunavska 17-19 because of the adoption of the 2013 DRP.

55. In the following subsections, Claimants will explain that:

a. both the building and occupancy permits issued to Obnova, as well as historical cadastral maps *submitted by Serbia itself*, confirm that Obnova's buildings were constructed only after Obnova's establishment in 1948 (paragraphs 56 to 90 below);

b. Prof. Arizanović, Claimants' civil engineering expert, has inspected Obnova's buildings and confirmed that they are brick-and-mortar buildings and that, given the function of these buildings, the material they were constructed from and the technological procedures used in their construction, the buildings are clearly permanent (paragraphs 93 to 98 below);

c. the permanent nature of Obnova's buildings is confirmed by their inscription into the Cadaster—as confirmed by Serbia's own legal expert (paragraphs 105 to 106 below);

d. Obnova's permits were not, and if fact could not have been, temporary because the legislation applicable at the time of their issuance did not allow issuance of temporary permits (paragraphs 110 to 116 below);

e. Obnova's permits would not be considered temporary even under the current regulations, which were passed only in the 1990s and which allow for the issuance of temporary permits (paragraphs 118 to 119 below);

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53 Memorial, ¶¶ 132-148.

f. the agreements, based on which Serbia purports to argue that Obnova allegedly used the buildings at Dunavska 17-19 as a mere lessee, do not relate to Obnova's buildings at all (paragraphs 135 to 138 below);

g. Serbia has offered no evidence that the agreements, based on which Serbia purports to argue that Obnova allegedly used its land at Dunavska 17-19 as a mere lessee, actually relate to that land (paragraphs 152 to 164 below); and

h. even if the agreements relied upon by Serbia as noted in (h) above related to the land at Obnova's premises at Dunavska 17-19, they would not affect the permanent right of use that Obnova acquired to this land when it constructed its buildings at Dunavska 17-19 (paragraphs 165 below).

a. Starting in the 1950s, Obnova constructed 15 buildings at Dunavska 17-19

56. In their Memorial,[54] Claimants explained that Obnova gradually built a number of buildings at Dunavska 17-19. Claimants also provided a photomap showing the layout of the buildings.[55]

57. Serbia claims in the Counter-Memorial that Claimants have not proved the existence and status of the buildings.[56] Therefore, Claimants instructed Prof. Dragan Arizanović, a civil engineering expert, to visit Obnova's premises at Dunavska 17-19, document all of Obnova's buildings and opine on their nature. Based on his inspection of Obnova's premises, Prof. Arizanović confirmed that there are 15 brick-and-mortar buildings located at Dunavska 17-19.

58. He has also confirmed, as discussed in more detail below, that all of Obnova's buildings were built as permanent buildings.[57] This puts an end to Serbia's absurd argument that "*Claimants failed to prove that Obnova constructed any objects on the parcel no. 47*."[58]

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54 Memorial, ¶ 35.

55 *Id.*, ¶¶ 35, 408.

56 *E.g.* Counter-Memorial, ¶¶ 44 *et seq*.

57 Arizanović ER, ¶ 42.

58 Counter-Memorial, ¶ 64.

59. Serbia's absurd arguments do not stop there, though. Serbia claims in the Counter-Memorial that the buildings were allegedly "*built before Obnova was established in December 1948.*"[59] This is a nonsense. Obnova's buildings were all built by Obnova after Obnova was established, as Claimants showed in their Memorial and will show again below.

60. Serbia's only support for this bold proposition is a single document—exhibit R-043[60]—which Serbia's own authority, the Republic Geodetic Authority, prepared for the purposes of this arbitration on 31 July 2023, less than two months before the filing of Serbia's Counter-Memorial. As Claimants demonstrate below, exhibit R-043 is *purposely misleading*[61]—and Serbia relies on it in bad faith.

61. Exhibit R-043 was prepared by Ms. Zorica Partenijević from the Republic Geodetic Authority, as her interpretation of certain historical maps available to the Cadaster.[62] As such, exhibit R-043 is essentially an expert report (or, perhaps, a witness statement) prepared by a current employee of Serbia. Needless to say, such a document cannot be considered objective and independent, even more so because Serbia did not submit this document as an expert report (or a witness statement for that matter) and thus is precluding Claimants from cross-examining its author. To be clear: Claimants would be very eager for the opportunity to cross examine Ms. Partenijević.

62. Furthermore, exhibit R-043 was prepared under highly suspicious circumstances. According to Serbia, exhibit R-043 was prepared in response to a letter from the State Attorney to the Republic Geodetic Authority dated 26 June 2023—which, however, requested only sketches and surveys, without requesting *any* comments or interpretations:[63]

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59 *Id.*, ¶ 63.

60 Notice of the Cadaster dated 31 July 2023, p. 1 (pdf), **R-043**.

61 The fact that exhibit R-043 was prepared more than a year after the commencement of this arbitration and by Serbia's own authority, on its own casts a very serious doubt on its evidentiary value. *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, ¶ 259, **CL-074**.

62 Counter Memorial, ¶ 63.

63 Letter from the State Attorney to the Republic Geodetic Authority, 26 June 2023, **C-540**.

(Coat of arms of the Republic of Serbia)
Republic of Serbia
STATE ATTORNEY'S OFFICE
No.: Is pov – 3/21
June 26th 2023
Belgrade
31 Kosovska Street

Registration stamp: EXPEDITED
IN THE STATE ATTORNEY'S OFFICE
JUNE 26TH 2023
BY COURIER / REGISTERED /
REGULAR MAIL / POSTAGE IN RSD /

CONFIDENTIAL

REPUBLIC GEODETIC AUTHORITY
THE REAL ESTATE CADASTER OFFICE OF STARI GRAD
Attn. Mrs. Ljiljana Parezanović, responsible official
Belgrade 11158
1 Cara Dušana Street

Subject: Request for the submission of documentation

Dear Mrs. Parezanović,

We are addressing you regarding the investment arbitration proceedings initiated against the Republic of Serbia before the International Centre for Settlement of Investment Disputes, after the claim of the companies Kalemegdan Investments Limited and Coropi Holdings Limited, as well as the Canadian citizen Erinn Bernard Broshko.

In order to prepare the defense of the Republic of Serbia in the aforementioned arbitration proceedings, we require the documentation relating to immovable property located at 17-19 Dunavska Street in Belgrade. Specifically, please provide us with the following:

- Sketches of the main survey from 1932, sketches of the revised (supplementary) survey from 1946-1947, sketches of the revised (supplementary) survey from 1966-1967, as well as sketches of all subsequent surveys that recorded the buildings on the cadastral parcel no. 47 (current cadastral parcels nos. 47/1; 47/2 and 47/3), that is, the buildings on the cadastral parcel no. 39/1 (current cadastral parcels nos. 39/1; 39/12 and 39/15), and on the cadastral parcel no. 40/15 (which until 2016 was part of the cadastral parcel no. 40/4).

Thank you in advance for your cooperation.

DEPUTY
STATE ATTORNEY
Marinko Čobanin (*signed*)

63. The inclusion of Ms. Partenijević's interpretations must obviously come from a subsequent exchange between the State Attorney and the Cadaster, which has not been disclosed by Serbia. Serbia requested from the Cadastre only sketches and surveys; they received back from the Cadastre a detailed made-for-arbitration treatise, albeit one riddled with misrepresentations, errors and omissions. Thus, it remains unclear what instructions the State Attorney provided to the Cadaster and specifically to Ms. Partenijević, and how these instructions affected the contents of R-043.

64. In any event, the interpretations offered in exhibit R-043 are demonstrably wrong and Ms. Partenijević clearly misinterprets the content of several maps that she purports to describe and interpret in exhibit R-043.

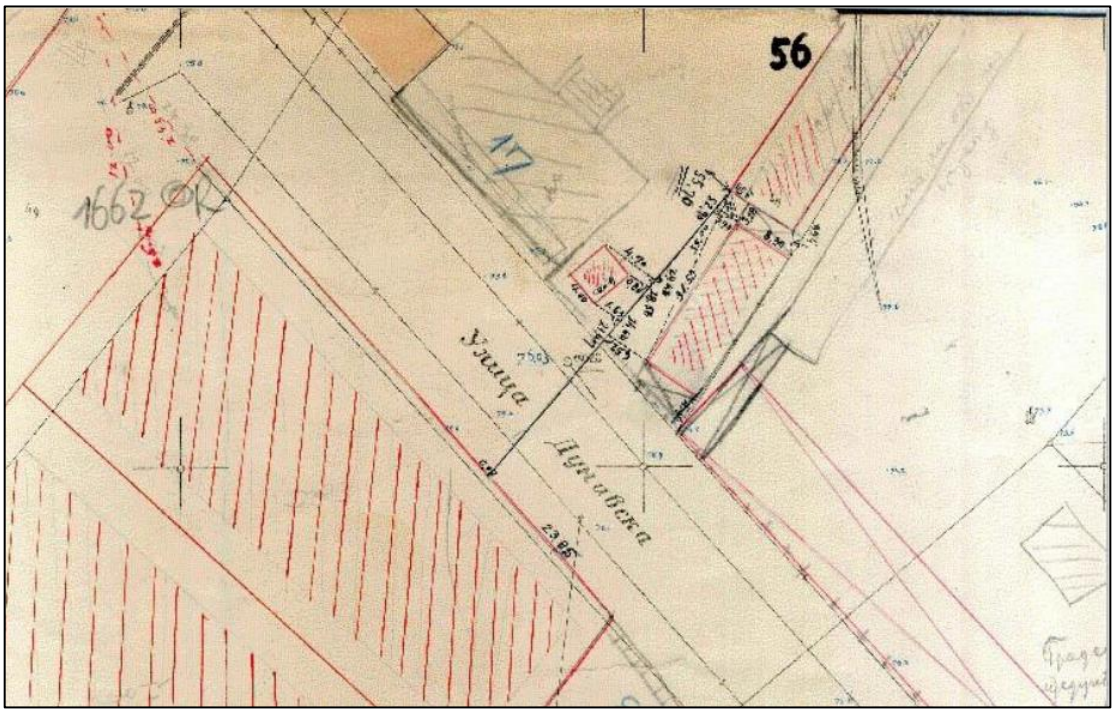
65. Most importantly, Ms. Partenijević claims—and Serbia repeats this claim in its Counter-Memorial—that two sketches included in R-043 purportedly show that 11 buildings at Dunavska 17-19 were built before Obnova was established in December 1948 because they were allegedly "*detected by a survey performed in 1946-1947.*"[64]

64 Counter-Memorial, ¶ 63.

66. Serbia's argument is absurd because the Cadaster has confirmed to Claimants that it does *not* have in its archives any historic map or plan that would show changes recorded during the 1946-1947 survey:

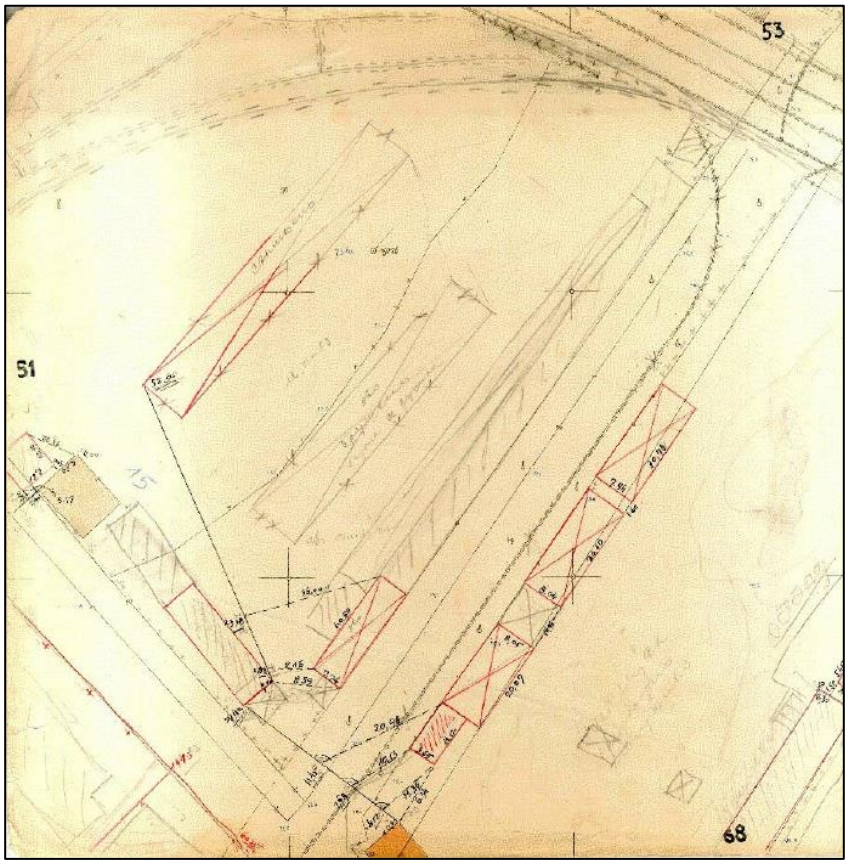
> Acting upon your filing from 09 January 2024 and the relevant request for access to information of public importance, in line with Article 16 paragraph 1 of the Law on Free Access to Information of Public Importance ("Official Gazette of the Republic of Serbia" number 120/04, 54/07, 104/09, 36/10 and 105/21), *we are hereby notifying you that Republic Geodetic Authority, Archive Department does not hold the archive original of the plan for cadaster lot number 47 Cadaster Municipality Stari grad, with sub-numbers of the stated lot, after putting the additional survey 1946-1947 to official use, since the changes based on the division of the lot are not implemented on the archived original of the plan, but on the working (actual) original of the plan*.[65]

67. The sketches that Ms. Partenijević and Serbia rely on clearly post-date the 1946-1947 supplemental survey. The first sketch that Serbia relies on is, according to Serbia, "*Sketch 68/22 supplemental survey 1946-1947, cadastral parcel 47*". Claimants reproduce the sketch in the same form as in R-043:



[65] Letter from Cadaster, 12 January 2024, **C-472**.

68. The second sketch that Serbia relies on is allegedly "*Sketch 56/22 supplemental survey 1946-1947 cadastral parcel 47.*" Claimants hereby reproduce the sketch in the same form it is presented in R-043:



69. As the above pictures show, Serbia provided only *excerpts* from what it claims to be "*Sketch 68/22 supplemental survey 1946-1947, cadastral parcel 47*" and "*Sketch 56/22 supplemental survey 1946-1947 cadastral parcel 47*". Both excerpts are undated and do not provide information necessary to verify whether the excerpts actually come from the alleged sketches and, if so, when exactly the sketches were prepared.

70. According to the 1930 Rulebook on cadastral surveying, which was applicable during the 1946-1947 survey, any sketches were required to include the following information:

a. date on which was the sketch prepared;

b. name of the person who prepared the sketch;

c. name of the persons who performed control of the sketch; and

d. a signature, in red ink, of the person who controlled the inscription in the cadastral plan made on the basis of the sketch, to confirm that such a person reviewed the sketch and found it to be correct.[66]

71. The excerpts relied on by Serbia do not contain *any* of the above. Serbia was ordered to provide the full version of these sketches in document production, but failed to do so.[67] And that is for a good reason—as Claimants demonstrate below, the sketches relied upon by Serbia were not prepared in 1946-1947, but *years later*.

72. According to comments provided by Ms. Partenijević, the excerpts relied upon by Serbia allegedly show that several buildings at Dunavska 17-19 "*existed before the survey of 1946-1947*" because they are "*shown in black which marks the old state in the cadastre.*"[68] Ms. Partenijević relies on the right surveying rule—that information marked in black represents information available before preparation of a sketch and any subsequent information is marked in red[69]—but she reaches the wrong conclusion because she ignores—either through a lack of attention or purposefully— several key details on the sketches, which provides conclusive evidence that the excerpts were in fact prepared after 1946-1947.

73. For example, the name of Dunavska street is marked in black on both sketches:

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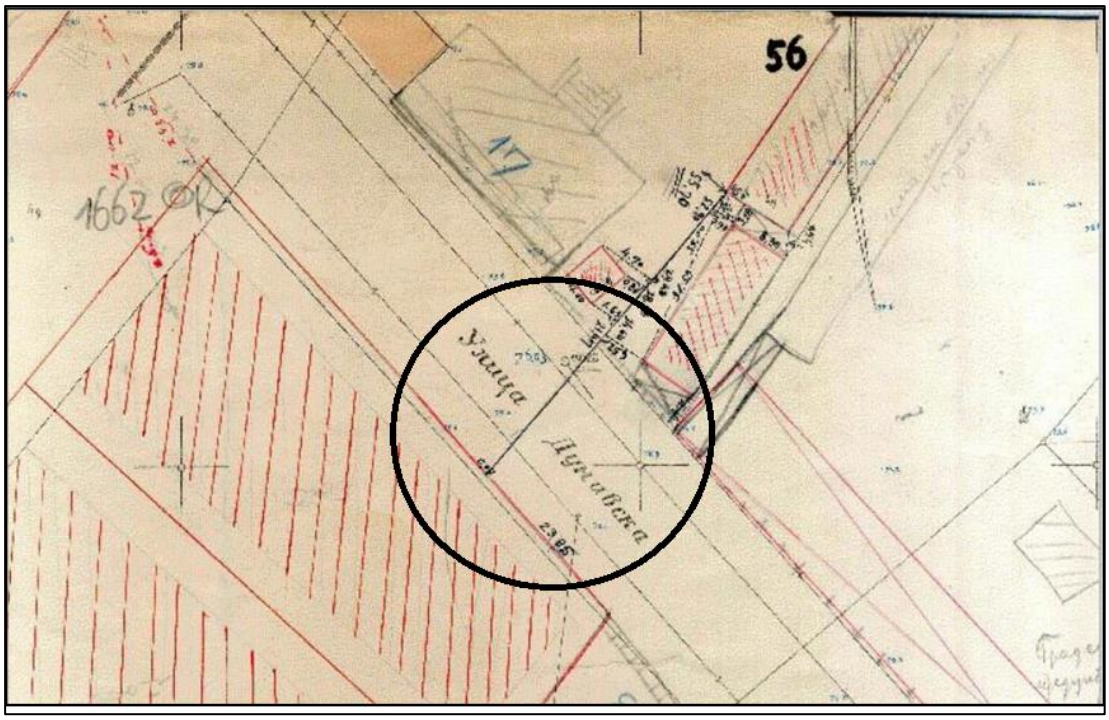
66 1930 Rulebook on cadastral surveying, Article 10, **C-457**.

67 Claimants understand that, according to Serbia, the documents produced by Serbia do not represent excerpts, but full sketches that, *together with other sketches*, would create the complete plan. Regardless of whether this is true or not, the fact remains that documents produced by Serbia clearly represent excerpts from a bigger document and, at the same time, do not contain information about when, how and by whom was this bigger document prepared. *See* Letter from Cadaster to State Attorney's Office, 18 January 2024, **C-575**.

68 Notice of the Cadaster dated 31 July 2023, pp. 1, 3 (pdf), **R-043**.

69 2000 Instructions on land cadaster maintenance, January 2000, Art. 28 and Art. 44, **C-659**; 2016 Rulebook on cadaster survey and real estate cadaster ("Official Gazette of the Republic of Serbia" no. 7/2016), Art. 77, **C-660**.



74. The name "Dunavska street", used in the above picture, was adopted only *in 1947*. Before 1947, the street was called "*Dunavski Boulevard*".[70] As a result, the excerpts submitted by Serbia could not have been prepared in 1946, and if they had been prepared in 1947, the name of Dunavska street would not appear in black because it would not represent "*the old state in the cadaster.*" Instead, the name of the street would be marked in red—thus indicating, in Ms. Partenijević's words, "*objects shown for the first time in the supplemental survey of 1946-1947.*"[71]

75. Another example is the black pencil drawing of the main office building, marked with the number 17. That building was built in 1950s on the basis of a building permit issued on 22 March 1954.[72] A map from 1946-1947 could not, obviously, have depicted that building.

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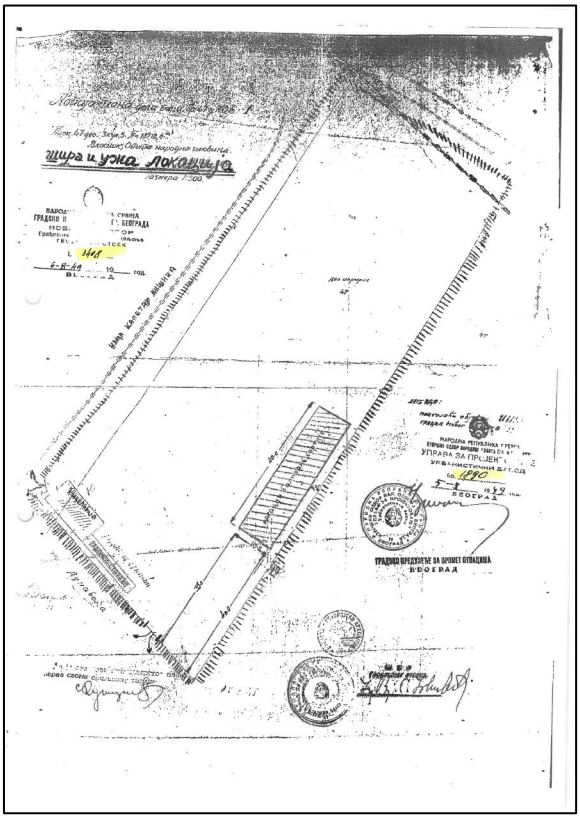
70 Response of the Secretariat for Culture dated 20 October 2023, pp. 2, 5 (pdf), **C-661**.

71 Notice of the Cadaster dated 31 July 2023, p. 1 (pdf), **R-043**.

72 Construction permit No. 730, 22 March 1954, **C-152**.

76. Furthermore, a map submitted by Obnova in 1949[73] with its request for a building permit confirms that only two buildings existed at Dunavska 17-19 at that time:[74]



77. If Ms. Partenijević were right that the sketches shown in exhibit R-043 are from 1946-1947, they would show the same two existing buildings as the map from 1949. However, the opposite is true. The sketches relied upon by Serbia show a significantly higher number of buildings:[75]

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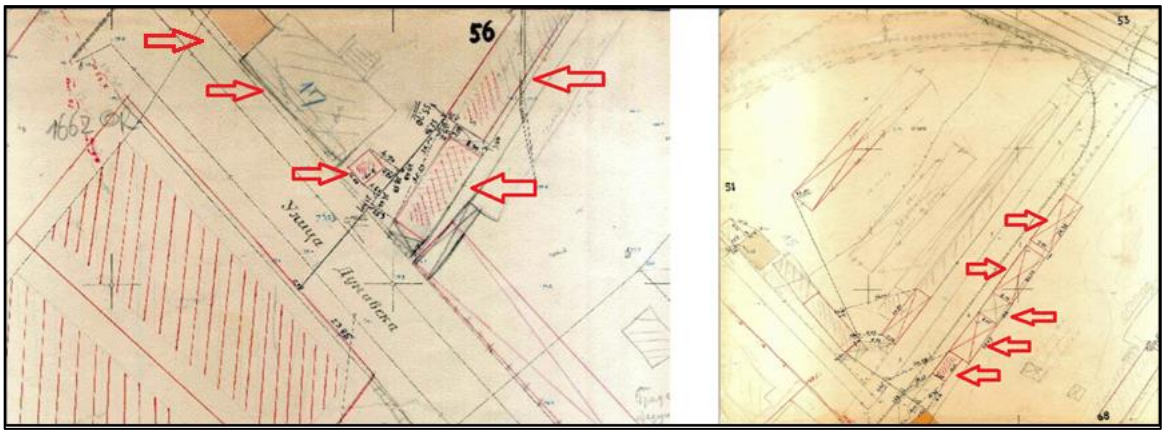
73 The map was prepared based on the so-called "*kopija plana*", *i.e.* an official map issued by Serbian authorities showing the actual situation on the land plot at the time.

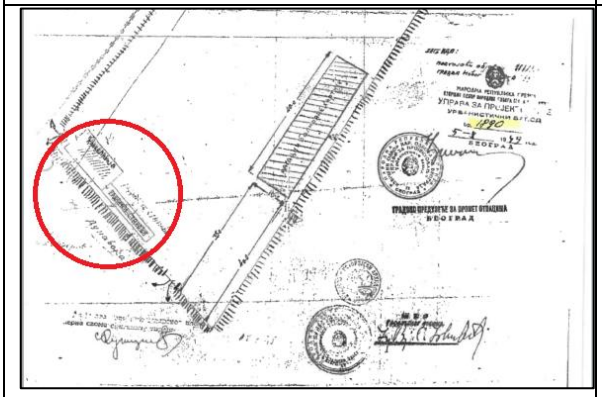
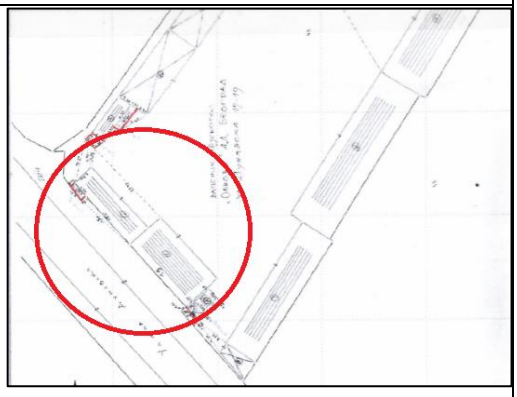
74 Annex to the construction permit No. 5034 dated 31 October 1949, p. 2, **C-576**. The third building, on the right-hand side, is a planned building for which the permit was sought. This is confirmed by the measurements showed for the building (which are not included for the existing buildings).

75 Notice of the Cadaster dated 31 July 2023, pp. 1-2 (pdf), **R-043**.



78. The higher number of buildings shows that the sketches relied on by Serbia post-date (rather than pre-date) the 1949 map.

79. For the sake of completeness, both of the buildings shown in the lower left part of the 1949 map were later replaced with new buildings with a somewhat different emplacement and layout:

Situation in 1949[76]	**Situation in 2005**[77]
	

80. Another proof that the alleged "*Sketch 56/22 supplemental survey 1946-1947 cadastral parcel 47*" post-dates 1949 is that the 1949 map shows a railway track running alongside the left border of land plot No. 47. The alleged "*Sketch 56/22 supplemental survey 1946-1947 cadastral parcel 47*" also shows the same railway track, but it is marked with

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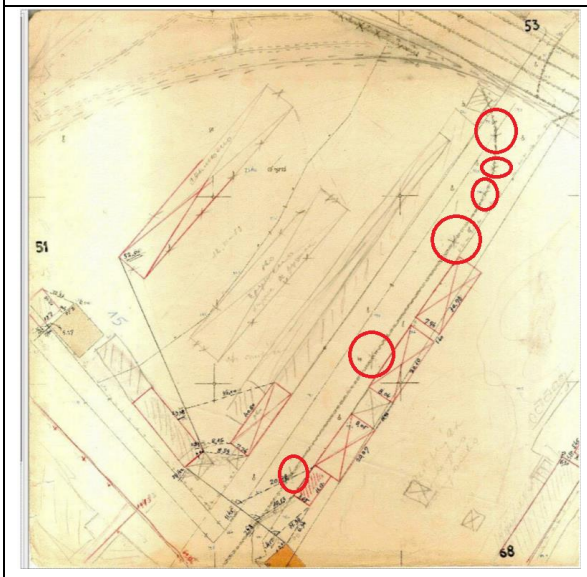
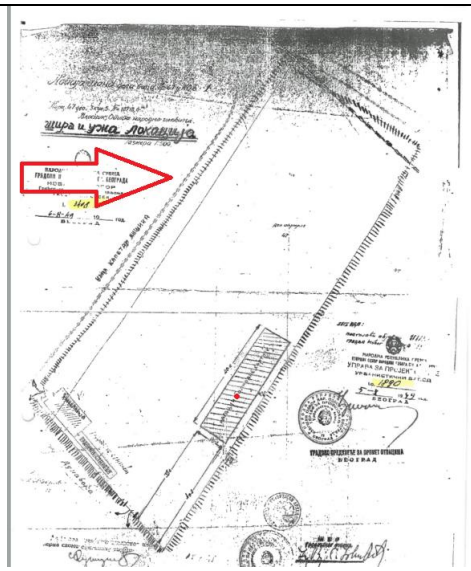
76 Annex to the construction permit No. 5034, 31 October 1949, p. 2, **C-576**.

77 Letter from Geodetic Authority of Serbia to Obnova, 18 February 2021, p. 4 (pdf), **C-329**.

black crosses—which indicate that the railway track had been removed sometime before the preparation of the sketch:[78]

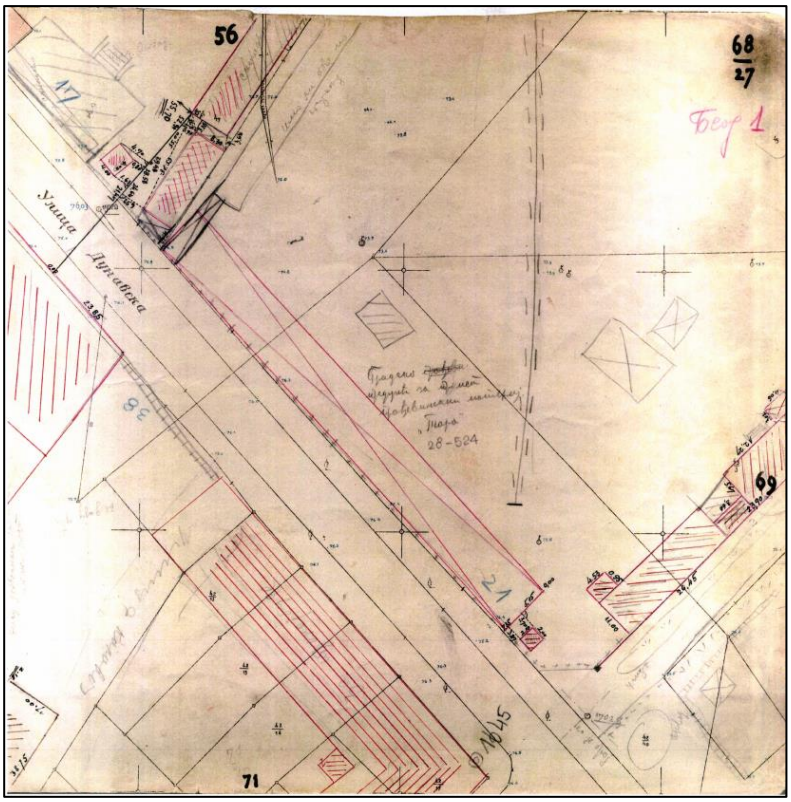
R-043	C-576
	

81. This is further proof that the alleged "*Sketch 56/22 supplemental survey 1946-1947 cadastral parcel 47*" was prepared *after* the 1949 map, which shows that the railway track still existed in 1949. The sketch submitted by Serbia was prepared at a later date, after the removal of the railway track.

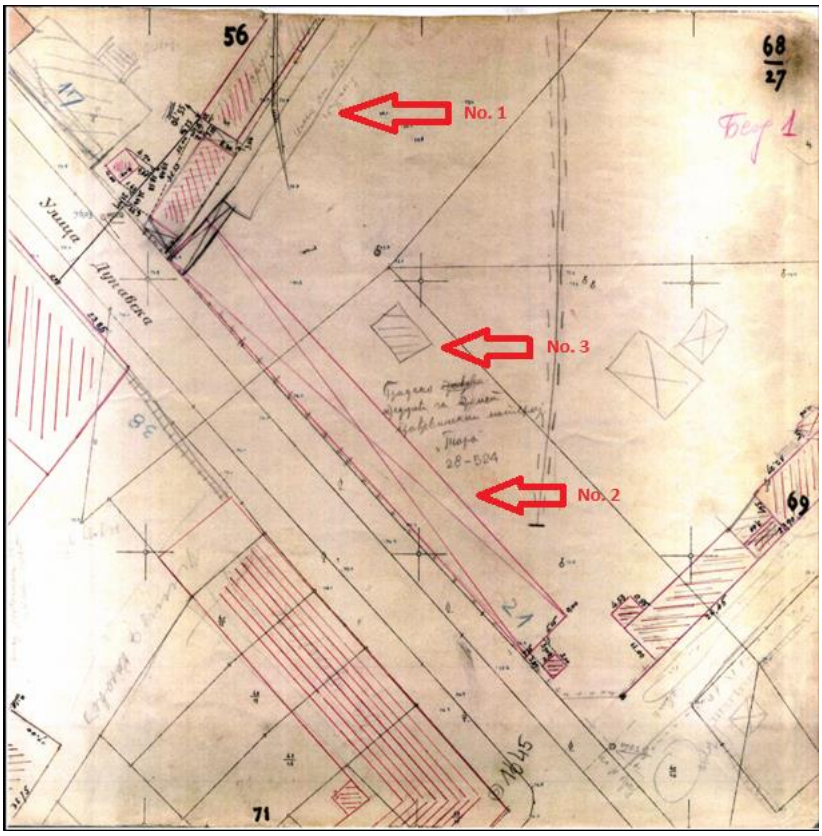
82. Furthermore, in the document production, Serbia produced a more extensive excerpt of what is allegedly "*Sketch 68/22 supplemental survey 1946-1947, cadastral parcel 47*". Besides showing a small part of Dunavska 17-19 (bottom right corner of the land plot), it also shows land plot No. 45, adjacent to land plot No. 47, which belonged to "*Company for the Trade of Construction Materials 'Tara'*":[79]

[78] Notice of the Cadaster dated 31 July 2023, p. 2 (pdf), **R-043**; Building permit No. 5034 dated 31 October 1949, document produced on 22 December 2023, p. 2, **C-576**.

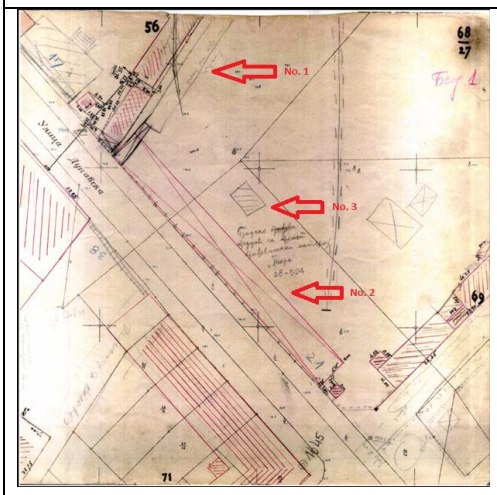
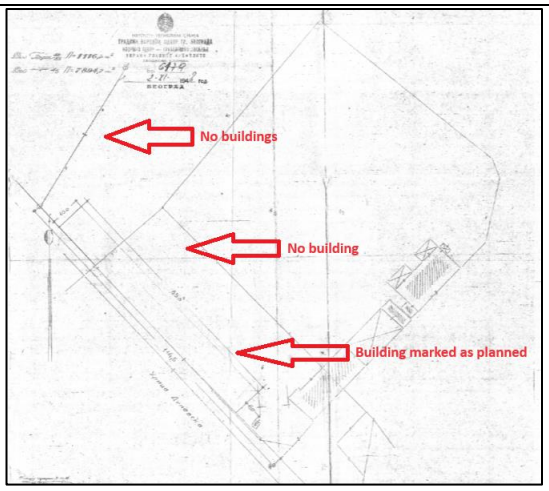
[79] Compilation of sketches produced by Serbia in Document Production as document no. 6_01, p. 11, **C-577**.



83. The depiction of land plot No. 47 on this excerpt, once again, shows that the sketch was not prepared in 1947, but at a later date. As shown below, the extended excerpt shows: (*i*) certain buildings on land plot No. 45 (near the border between land plots Nos. 45 and 47) (No. 1 below); (*ii*) a building at the bottom of Tara's land plot (No. 2 below); and (*iii*) a building in the middle of Tara's land plot (No. 3 below):



84. The document called "*Plan Copy for cadastre parcel no. 45 CM Beograd 1*", dated 2 November 1948, proves that *none* of the objects marked on the alleged "*Sketch 68/22 supplemental survey 1946-1947, cadastral parcel 47*" existed in 1948. Objects Nos. 1 and 3 are not showed on the 1948 map at all and object No. 2 is marked as planned, but not built yet:

Map allegedly prepared in 1947[80]	Map from 1948[81]
	

85. Importantly, in an embarrassing about-face the Cadaster now admits that the sketches that Serbia presents as sketches from the supplemental survey in 1946-1947, were actually prepared two decades later—during a "*revision survey in the 1966-1967*".

86. During document production, the Tribunal ordered Serbia to produce the full versions of all sketches included in R-043.[82] In response, Serbia produced a compilation of various additional sketches.[83] Claimants reached out to Sebia and asked for an explanation of the compilation. In response, Serbia provided to Claimants a letter from the Cadaster dated 18 January 2024 that expressly states that the sketches presented by Serbia as sketches prepared during the 1946-1947 in fact "*show the entire cadastral parcel 47 and the* ***changes that have occurred on it during the Revision survey in the 1966-1967***."[84]

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80 Compilation of sketches produced by Serbia in Document Production as document no. 6_01, p. 11, **C-577**.

81 Copy of the plan for parcel no. 42/20, 2 November 1948, **C-608**. Unlike the alleged excerpts of the 1946-1947 plan relied upon by Serbia, which are unsigned and undated, this document was prepared based on the so-called "*kopija plana*", *i.e.* an official document issued by Serbian authorities showing the recorded situation at a certain moment in time (with the planned buildings then added by a geometer).

82 Procedural Order No. 5, 8 December 2023.

83 Compilation of sketches produced by Serbia in Document Production as document no. 6_01, **C-577**.

84 Letter from Cadaster to State Attorney's Office, 18 January 2024, p. 3, **C-575**.

87. Thus, the Cadaster itself explained that the sketches falsely presented by Serbia as sketches from 1946-1947,[85] were actually recorded during or after the survey in 1966-1967.

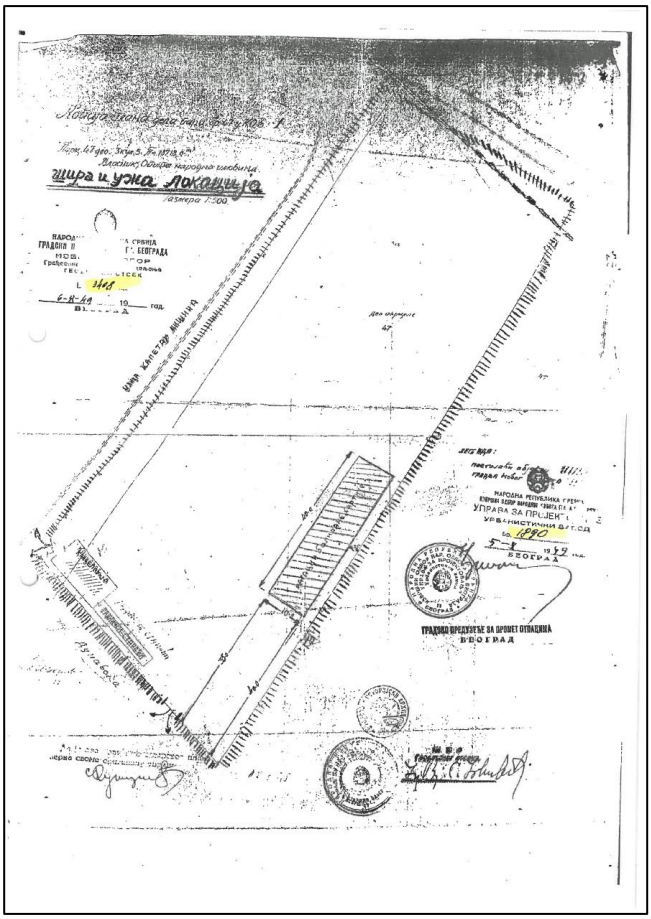
88. The recording of the sketches during or after the 1966-1967 survey is consistent with the fact that the building and occupancy permits that Obnova obtained for its buildings at Dunavska 17-19 were all issued between 1949 and 1956. Claimants' Serbian law experts, Messrs. Živković and Milošević, confirm that these permits were issued for construction of *new* buildings—not reconstruction or an extension of existing buildings.[86] As a result, it is clear that the buildings built based on these permits were built only *after* 1949 and thus also after Obnova's establishment in 1948.

89. The situation at Dunavska 17-19 upon Obnova's arrival to the site in 1948 is depicted on the map that Obnova submitted in 1949 together with one of its requests for a building permit:[87]

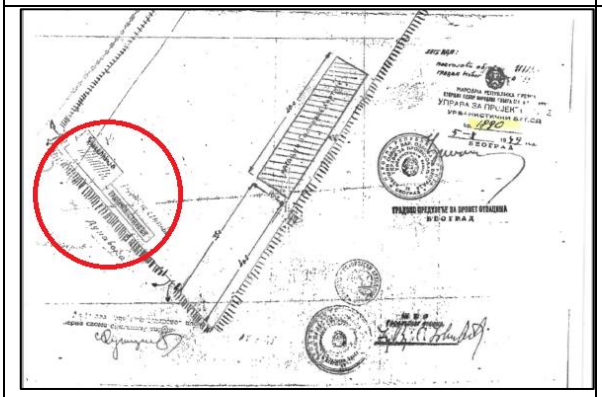
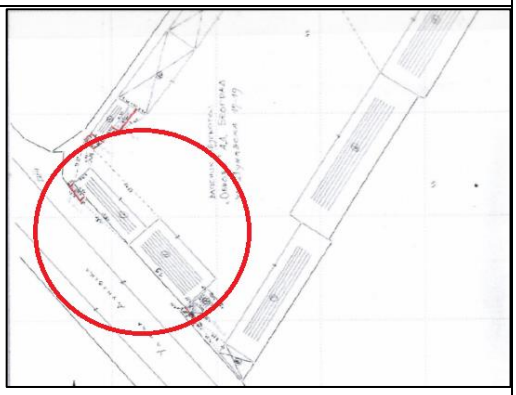
85 Counter-Memorial, ¶ 63.

86 Živković Milošević Second ER, ¶ 46.

87 Annex to the construction permit No. 5034, 31 October 1949, p. 2, **C-576**.



90. To repeat, this document shows that in 1949, after Obnova was established and allocated land at Dunavska 17-19, there were only two buildings at Dunavska 17-19 (showed in the lower left corner). Both of these buildings were later replaced with new buildings:

Situation in 1949[88]	**Situation in 2005**[89]
	

88 Annex to the construction permit No. 5034, 31 October 1949, p. 2, **C-576**.

89 Letter from Geodetic Authority of Serbia to Obnova, 18 February 2021, p. 4 (pdf), **C-329**.

* * *

91. The above analysis makes it clear that Serbia relies on exhibit R-043 in bad faith. Exhibit R-043 was prepared for the purpose of this arbitration and grossly misinterprets the excerpts of the sketches included therein to purposely mislead the Tribunal. The sketches that, according to Serbia, were prepared in 1947, were actually prepared only the 1960s. As such, these sketches do not—and cannot—show that Obnova's buildings were allegedly built before its establishment in 1948—as Serbia falsely claims in its Counter-Memorial.[90]

92. On the contrary, as explained above, Serbia's own documents clearly show that all the buildings that today exist at Obnova's premises were built *after* 1949 and thus also after Obnova's establishment and its arrival to Dunavska 17-19 in 1948.

b. Obnova's buildings are permanent

93. Another pretext used by Serbia to deny the existence of Obnova's rights to its premises at Dunavska 17-19 is the allegation that Obnova's buildings are only "temporary." Claimants refuted this allegation in their Memorial, where they demonstrated that:

a. Obnova's buildings are not "*temporary*" in their duration—they have existed since the 1950s, *i.e.* for approximately 70 years;

b. Obnova's buildings are not temporary in nature—they consist of brick-and-mortar offices, warehouses and other buildings for commercial use, permanently attached to the ground;

c. Obnova's permits are not temporary. When Obnova's permits were issued, Serbian law did not allow for the issuance of temporary permits. Furthermore, the permits would not qualify as temporary even under subsequent Serbian laws that allowed for issuance of temporary construction permits starting in 1990s; and

[90] Counter-Memorial, ¶¶ 63-64.

d. Obnova is not obliged to demolish its buildings at the request of the People's Committee of the City—as this obligation was included in a lease agreement terminated in 1961 and the Committee no longer exists.[91]

94. Prof. Arizanović inspected all of Obnova's buildings at Dunavska 17-19 and confirms that all these buildings are indeed brick-and-mortar buildings.[92] Prof. Arizanović also explains that, given the function of these buildings, the material they were constructed from and the technological procedures used in their construction, the buildings are clearly permanent.[93] Specifically, he confirms that *all* buildings at Dunavska 17-19 (as well as buildings at Dunavska 23):

a. were built from durable materials (such as bricks and reinforced concrete);

b. were built using construction methods that guarantee their stability, safety, reliability and, as a result, durability for a long time period;

c. are permanently connected to ground and built on proper foundations; and

d. were designated for a purpose confirming their permanent nature.[94]

95. As a result, Prof. Arizanović concludes that "*the Buildings located at Dunavska 17-19 […] are, from the viewpoint of engineering practice, permanent*."[95]

96. Given the permanent nature of Obnova's buildings, they clearly qualify as permanent under Serbian law. Indeed, as Claimants explained already in their Memorial, the Serbian Constitutional Court concluded in 2010 that "*only smaller prefabricated buildings that are placed in public areas (kiosks, summer gardens, mobile stalls, etc.) ha[ve] [a] temporary character*".[96] Obnova's buildings, which include warehouses, offices and other buildings for commercial use, which are constructed of brick and

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91 Memorial, ¶¶ 132-137.

92 Arizanović ER, ¶ 35.

93 *Id.*, ¶ 42.

94 *Id.*, ¶¶ 42, 50.

95 *Id.*, ¶ 42.

96 Memorial, ¶ 133; Decision of the Constitutional Court, Case No. IUI 156/2009, Official Gazette of the Republic of Serbia, No. 55/10, 22 June 2010, p. 6 (pdf), **C-056**.

mortar and which have existed for more than 70 years, clearly do not fit the Constitutional Court's definition of temporary buildings.[97]

97. Serbia's only response is that the definition of temporary buildings introduced by the Constitutional Court is irrelevant in the present case. According to Serbia, this is because the Constitutional Court's decision refers to the 2003 Law on Planning and Construction, which is irrelevant for buildings built several decades earlier.[98] Serbia's argument misses the point.

98. Before the Constitutional Court's decision, there had not been *any* definition of temporary buildings under Serbian law.[99] The definition created by the Constitutional Court was, therefore, the first definition of temporary buildings under Serbian law. Obnova's buildings clearly do not fall within this definition.[100]

99. Serbia observed that the 1952 Regulation on Construction Design used the term "*temporary construction objects*", but without offering any definition and without establishing any different rules for such temporary objects—with the only exception that under the Regulation, construction of permanent buildings required approval of both preliminary and main designs, while construction of temporary objects only needed approval of main designs.[101] Thus, the 1952 Regulation on Construction Design, changes nothing to the fact that there was no definition of temporary buildings in the 1950s and when the Constitutional Court finally introduced one decades later, Obnova's buildings clearly did *not* fall within that definition.

100. Serbia, however, ignores this simple fact and purports to rely on three decisions approving main designs for some of Obnova's buildings to argue that "*Obnova prepared only the main designs*" for these buildings and, as a result, these buildings were temporary.[102] This was simply not the case.

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97 Memorial, ¶ 133; Živković Milošević First ER, ¶¶ 170-171.

98 Counter-Memorial, ¶ 57.

99 Živković Milošević Second ER, ¶ 89.

100 *Ibid*.

101 Counter-Memorial, ¶¶ 51, 57.

102 *Id.*, ¶ 52.

101. The main designs were needed for *both* temporary *and* permanent objects. Thus, the fact that Obnova obtained approval of main designs for several of its buildings says strictly nothing about whether those buildings were to be considered permanent or temporary within the meaning of the 1952 Regulation on Construction Design.

102. In any event, Serbia's argument fails on the law—because Serbia does not explain why the alleged temporary status of the buildings for the purposes of the 1952 Regulation on Construction Design would trump the definition provided by the Serbian Constitutional Court in 2010 and change the permanent status of Obnova's buildings within the meaning of Serbian civil law.

103. Serbia also claims that the fact that the buildings at Dunavska 17-19 have existed for more than 70 years is irrelevant because Claimants "*are unable to point to any legislation supporting their argument that after some time a temporary object loses its temporary character and transforms into a permanent object […]*."[103]

104. To begin with, Claimants have not argued that "*after some time a temporary object loses its temporary character and transforms into a permanent object.*" Claimants' position has always been that Obnova's buildings are *not* temporary. Claimants pointed to the fact that they have existed for more than 70 years as a confirmation of that argument. Indeed, Serbia cannot seriously claim that buildings that have existed for many decades—*without a single objection from any Serbian authority*—are only temporary.

105. In any event, the permanent nature of Obnova's buildings is also confirmed by the fact that Obnova's buildings at Dunavska 17-19 were registered in the public registers, first as socially owned in the land books[104] and then, in 2003, in the Cadaster—first as state owned and later as owned by the City.[105]

106. Serbia's only response—being the allegation that "*the Cadastre's inscription of the ownership rights over the objects could not have changed their temporary*

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103 *Id.*, ¶ 54.

104 Land book insertion No. 1689 for parcel No. 47, pp. 1-2 (pdf), **R-011**.

105 Cadaster decision No. 952-02-9-31/03 relating to Dunavska 17-19 dated 22 November 2003, **C-165**; Decision of the Cadaster dated 12 September 2011, **R-054.**

character"[106]—is disproved by its own expert, who correctly points out that ownership over temporary buildings cannot be registered in the Cadaster.[107] The registration of ownership over the buildings in the Cadaster, thus, conclusively confirms that they are considered as permanent under Serbian law.

107. Serbia's argument that "*as Obnova's buildings are temporary, Obnova had an obligation to demolish them*" is equally incorrect.[108] To begin with, Serbia does not provide any support for this allegation. Indeed, there is none. Serbia cannot seriously claim that buildings that have existed for over 70 years are temporary and that Obnova should suddenly demolish them—just because it would benefit Serbia in this case. On the contrary, as Claimants explained above, Obnova's buildings are permanent and Obnova does *not* have an obligation to demolish them.

108. Furthermore, while Serbia recognizes that the 1953 Agreement ceased to apply, at latest, in 1961,[109] it argues that "*after 1961, Obnova continued to conclude lease agreements with Luka Beograd, while the construction permits expressly oblige Obnova to demolish the objects at the request of the City of Belgrade.*"[110] The agreements submitted by Serbia, however, do not relate to Obnova's buildings at Dunavska 17-19 and 23. In any event, these agreements do not require Obnova to demolish anything.

109. The fact that certain building permits from the 1950s referenced Obnova's obligation stemming from the 1953 Lease Agreement to demolish the respective buildings does not change the analysis.[111] This is because the reference did not elevate the *private law* obligation under the 1953 Lease Agreement into a new, *public law* obligation under the building permits. As explained by Messrs. Živković and Milošević, reference in the permits could not change the nature of this obligation because Serbian law did not allow for creation of such an obligation through building permits.[112] As the obligation to

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106 Counter-Memorial, ¶ 60.

107 Jotanović ER, ¶ 94.

108 Counter-Memorial, ¶ 210.

109 *Id.*, ¶ 32.

110 *Id.*, ¶ 212.

111 *Id.*, ¶¶ 44, 45, 79, 97.

112 Živković Milošević Second ER, ¶ 63.

demolish buildings was always a civil law obligation under the 1953 Lease Agreement, it ceased to apply upon termination of this agreement in 1961 (or earlier).

c. Obnova's building and occupancy permits are permanent

110. In their Memorial, Claimants explained that Obnova has had the following building and occupancy permits for its buildings at Dunavska 17-19:[113]

Permit	Number	Date	Object	Notes
Building permit	5034	31 October 1949	Canopy warehouse for storing the paper baling machine	The permit states that the building is for "*TEMPORARY USE, being understood that the owner shall not be entitled to any damages from the Executive Council of the People's Committee of the City of Belgrade for the value of such building that the owner shall undertake to demolished as soon as requested so by the Executive Council of the People's Committee of the City of Belgrade."*
Building permit	1846	21 April 1953	A canopy	The permit states that the building is for "*TEMPORARY USE, being understood that the owner of the structure shall undertake to immediately demolish it at the request of the People's Committee of the City of Belgrade, without receiving any damages for the value of the subject-matter structure."*

113 Construction permit No. 5034 dated 31 October 1949, **C-150**; Construction permit No. 1846 dated 21 April 1953, **C-151**; Construction permit No. 730 dated 22 March 1954, **C-152**; Construction permit No. 4542 dated 31 May 1954, **C-153**; Construction permit No. 9358 dated 29 July 1954, **C-154**; Construction permit No. 18578 dated 2 November 1954, **C-155**; Construction permit No. 21817 dated 24 December 1954, **C-156**; Occupancy permit No. 11169/55 dated 30 May 1956, **C-157**.

Permit	Number	Date	Object	Notes
Building permit	730	22 March 1954	An office building	The permit states that the building is for "*TEMPORARY USE, being understood that the building owner shall undertake to immediately remove the subject-matter building, at the request of the People's Committee of the City of Belgrade."*
Building permit	4542	31 May 1954	A warehouse	The permit states that the building is for "*TEMPORARY USE, without the building owner being entitled to any damages from the People's Committee of the City of Belgrade for the value of the building at the time when the building will be demolished at the request of the People's Committee."*
Building permit	9358	29 July 1954	A water supply and sewerage system for the office building	No notes about temporary use.
Building permit	18578	2 November 1954	A canopy	The permit states that the building is for "*TEMPORARY USE, being understood that the owner of the structure shall undertake to immediately remove it from the above-mentioned land at the request of the People's Committee of the City of Belgrade, and shall not be entitled to any damages for the value of the subject-matter structure."*

Permit	Number	Date	Object	Notes
Building permit	21817	24 December 1954	A building and a press platform	The permit states that the building is for "*TEMPORARY USE, being understood that the owner of the building shall undertake to immediately remove it at the request of the People's Committee of the City of Belgrade from the above-mentioned land, and shall not be entitled to any damages for the value of the subject-matter building."*
Occupancy permit	11169/55	30 May 1956	Headquarters building and hydraulic press	

111. Serbia does not dispute that Obnova has had these permits. However, it claims that these permits are, for various reasons, irrelevant. To begin with, Serbia argues that some of the permits are irrelevant because they were issued for canopies and "*canopies clearly cannot be equated with buildings.*"[114] This argument is not serious.

112. If a canopy indeed could not be equated with a building, it is hard to see why Obnova would need a "*building*" permit to construct the canopies in the first place. Unsurprisingly, Serbia does not refer to *any* authority to support this allegation. Furthermore, as explained above, Prof. Arizanović confirms that all the buildings at Dunavska 17-19, including any canopies, are, in fact, permanent, brick and mortar buildings.[115]

113. Serbia's argument that the permits issued to Obnova are only temporary is equally incorrect.[116] In their Memorial, Claimants explained that the permits are permanent—and in fact could not have been temporary. Specifically, Claimants explained that the permits were issued under the Basic Regulation on Construction from 1948 and the

114 Counter-Memorial, ¶ 48.

115 Arizanović ER, ¶¶ 35, 42.

116 *E.g.* Counter-Memorial, ¶¶ 7, 43 *et seq.*

Regulation on Construction from 1952—neither of which allowed for issuance of temporary construction permits.[117]

114. While Serbia admits that the regulations applicable in 1948 and 1952 "*did not expressly mention or regulate the issuance of construction permits for temporary objects […]*" it claims that neither of the regulations "*prohibit[ed] the issuance of such permits.*"[118] This argument is based on a clear misinterpretation of Serbian law.

115. As explained by Messrs. Živković and Milošević, the principle that one can do anything that is not precluded by the law is a *private law principle* and, as such, does not apply in administrative law matters—such as the issuance of buildings permits. Administrative law, and public law in general, is based on the principle that Serbian authorities can only do what they are expressly allowed to do by applicable legislation.[119]

116. As a result, Serbian authorities could only issue a temporary permit if they were specifically allowed to do so by the law. It is undisputed that they were not.

117. Serbia's reliance on the fact that the 1952 Regulation on Construction Design does refer to "*temporary construction objects*" is inapposite.[120] Contrary to Serbia's incorrect allegations,[121] this regulation did *not* govern the issuance of building permits at all. As such, this regulation is simply irrelevant for the assessment of whether Obnova's building permits could be issued as temporary or not.

118. Indeed, as Claimants explained in their Memorial, the notion of temporary construction permits was introduced into the Serbian legal system only decades later, in the Law on Special Conditions for the Issuing of Construction and Occupancy Permits for Certain Objects from 1997 and the Law on Planning and Construction from 2009 ("**2009 Law**

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117 Memorial, ¶ 134.

118 Counter-Memorial, ¶ 51.

119 Živković Milošević Second ER, ¶ 57.

120 Counter-Memorial, ¶ 51.

121 *Id.*, ¶ 211.

on Planning and Construction"). Neither of these two laws applies retroactively and, thus, simply cannot apply to permits issued more than 70 years ago.

119. Serbia seems to agree and argues that Claimants' reference to these laws is irrelevant for the assessment of "*construction permits issued 40-50 years earlier*."[122] While Claimants agree, they note that Serbia misinterprets their position presented in the Memorial. As explained above, Claimants indeed did not argue that these laws are applicable to Obnova's permits. Claimants merely referred to these laws to show that: (*i*) once Serbia decided to allow issuance of temporary building permits, it adopted laws that *expressly* allowed it; and (*ii*) even under those laws, the permits obtained by Obnova would not qualify as temporary.[123]

120. Aware that its temporary permit theory is not supported by *any* regulations applicable in Serbia at *any* time, Serbia seems to base its argument that Obnova's building permits were temporary only on the fact that six of the building permits state that the permitted buildings are for "*TEMPORARY USE, being understood that the owner shall not be entitled to any damages from the Executive Council of the People's Committee of the City of Belgrade for the value of such building that the owner shall undertake to demolished as soon as requested so by the Executive Council of the People's Committee of the City of Belgrade.*"[124] Serbia's argument is wrong for a number of reasons.

121. *First*, as Claimants explained above, the reference to temporary use in the six building permits is based on the 1953 Lease Agreement. However, it is undisputed that the 1953 Lease Agreement was terminated in November 1961 (if not earlier)[125] and it was not replaced by any other agreement that would require Obnova to demolish its buildings.

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122 *Id.*, ¶ 53.

123 Memorial, ¶¶ 135, 235.

124 Construction permit No. 5034 dated 31 October 1949, p. 1 (pdf), **C-150**. *Similarly* Construction permit No. 1846 dated 21 April 1953, p. 1 (pdf), **C-151**; Construction permit No. 730 dated 22 March 1954, p. 1 (pdf), **C-152**; Construction permit No. 4542 dated 31 May 1954, p. 1 (pdf), **C-153**; Construction permit No. 18578 dated 2 November 1954, p. 1 (pdf), **C-155**; Construction permit No. 21817 dated 24 December 1954, p. 1 (pdf), **C-156**.

125 Memorial, ¶¶ 136-137. Claimants also explained that this agreement was only *pro forma* and was not complied with by the Parties. *See* Živković Milošević First ER, ¶¶ 132, 134. While Serbia disputes the *pro forma* nature of this agreements, it does not seem to refer to any evidence to the contrary. *See* Counter-Memorial, ¶ 30.

As a result, the *contractual* obligation reflected in the building permits ceased to exist in 1961 (if not earlier).

122. Furthermore, Serbia itself admits that one of the permits, for construction of a water supply and sewerage system for the office building, does not state that the permitted building was for a temporary use.[126] Thus, even if Serbia was correct that the reference to temporary use made the building permits temporary (*quod non*), this would not change the fact that at least one of Obnova's objects clearly is not temporary.

123. This is a crucial admission because the right of use, and later ownership, of a single building at Dunavska 17-19 was sufficient for Obnova to acquire the right of use over the entirety of the land at Dunavska 17-19. Claimants' legal experts, Messrs. Živković and Milošević, explained this was the case in their first report—and Serbia does not seem to dispute this conclusion.[127]

124. Serbia's attempts to downplay the importance of this fact by arguing that "*the installations were for a building which was of temporary character, according to the construction permit dated 22 March 1954, it follows that the installations were also of a temporary character.*"[128] Serbia, however, fails to provide any explanation, much less authority, for its inference that the installations were of a temporary character.

125. In addition, two of Obnova's buildings have an occupancy permit[129] and that occupancy permit does not state anything about the buildings being built for temporary use.[130] According to Serbia, Claimants' reliance on the occupancy permit is "*evidently misleading*" because even though "*this occupancy permit does not mention that the objects are temporary, it was issued for the objects that were constructed in accordance with the construction permits issued for temporary objects.*"[131] This argument is, once again, without any merit.

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126 Counter-Memorial, ¶ 47.

127 Živković Milošević First ER, ¶¶ 190-192.

128 Counter-Memorial, ¶ 47.

129 Occupancy permit No. 11169/55 dated 30 May 1956, p. 1 (pdf), **C-157**.

130 *Ibid*.

131 Counter-Memorial, fn. 60.

126. To begin with, Serbia does not explain what allegedly makes Claimants' reliance on the occupancy permit "*evidently misleading*". Serbia does not dispute the existence of the permit, nor the fact that the permit does *not* state that the buildings to which it relates would be for temporary use. Furthermore, as explained above, Obnova's permits were not—and could not have been—temporary, as temporary permits did not exist then.

127. Claimants consider it undisputed that occupancy permits are issued *after* building permits and in fact only after a building is constructed. Occupancy permits therefore reflect more up to date information than corresponding building permits, which are issued before the construction of a building commences. As a result, if Obnova's buildings were supposed to be for a temporary use only, it would be specifically stated in the occupancy permit. However, as explained above, Obnova's occupancy permit does not state so.[132]

d. Obnova acquired the right of use over its buildings upon their construction

128. At the time when Obnova constructed its buildings, it was a state economic enterprise.[133] As such, it could not have ownership rights over the buildings it built—only the right of use.[134] Obnova acquired the right of use over its buildings automatically upon their construction.[135]

129. Serbia does not seem to dispute the fact that public enterprises acquired the right of use over the buildings they built. However, Serbia appears to argue that Claimants failed to prove that this was Obnova's case.

130. Serbia bases its argument on the absurd allegation that there is no evidence that Obnova actually built the buildings for which the construction and occupancy permits were issued to Obnova.[136]

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132 Živković Milošević Second ER, ¶ 66.

133 Memorial, ¶ 31.

134 *Id.*, ¶¶ 36, 38.

135 *Id.*, ¶¶ 31-38.

136 Counter-Memorial, ¶ 96.

131. Given that Serbia does not seem to dispute that Obnova has been using the land at Dunavska 17-19 since the late 1940s, it is difficult to follow Serbia's argument. Indeed, Serbia does not explain who else, besides Obnova, would be constructing buildings on the basis of building permits issued to Obnova and on land used exclusively by Obnova. All of the building permits identify Obnova as the contemplated builder of the permitted buildings.[137]

132. Furthermore, as explained above, it is undisputed that Obnova has been issued occupancy permits for several of its buildings at Dunavska 17-19. Needless to say, the occupancy permit could only be issued for buildings that were actually built.[138]

133. Serbia also repeats its argument that Obnova's permits were only temporary. According to Serbia, this means that Obnova only acquired "*a right to temporarily use*" its buildings.[139] As explained above, this argument is based on an incorrect premise that Obnova's permits were temporary.

134. However, even if Serbia was right (*quod non*) and Obnova's permits were indeed temporary, this would not change the fact that Obnova acquired the right of use, and later ownership, over these buildings. As explained by Messrs. Živković and Milošević, the nature or even existence of building permits, on the one hand, and acquisition of ownership, on the other hand, are two unrelated issues. A person or entity that constructed a building automatically becomes its owner—regardless of whether the building has any permits or not.[140]

135. Serbia's allegation that Obnova did not have the right of use over its buildings and was, instead, using them based on agreements concluded with the City and Luka Beograd is nothing short of absurd.[141]

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137 Construction permit No. 5034, 31 October 1949, p. 1, **C-150**; Construction permit No. 1846, 21 April 1953, p. 1, **C-151**; Construction permit No. 730, 22 March 1954, p. 1, **C-152**; Construction permit No. 4542, 31 May 1954, p.1, **C-153**; Construction permit No. 9358, 29 July 1954, p. 1, **C-154**; Construction permit No. 18578, p. 1, **C-155**; Construction permit No. 21817, 24 December 1954, p. 1, **C-156**.

138 Rulebook on Issuing of Building Permit (Official gazette of the FPRY, No. 24/1952), Art. 3, **C-490**.

139 Counter-Memorial, ¶ 98.

140 Živković Milošević Second ER, ¶ 73.

141 Counter-Memorial, ¶ 41.

136. To begin with, the agreements from 1985 and 2006 on which Serbia relies when it argues that Obnova allegedly leased its buildings are not for a lease of any buildings:[142]

R-012

AGREEMENT ON PROVISION AND USE OF
PORT, WAREHOUSING AND OTHER SERVICES

Article 1

Subject of the Agreement is provision and usage of port-warehousing services (use of open warehouse space and port rails) in port area in Dunavska Street according to attached outline.

R-016

AGREEMENT SUBJECT MATTER

Article 1

By this Agreement LUKA "BEOGRAD" AD and SERVICE BENEFICIARY govern mutual rights and obligations related to use of commercial and warehousing space for storage of SERVICE BENEFICIARY'S secondary raw materials, provided that the SERVICE BENEFICIARY is registered to do business with such type of goods, as well as conditions for providing and using transloading and other port-related services in warehousing premises of LUKA "Beograd" AD, at the address: 17-19 Dunavska Str., on a part of the cadastral parcel 47 – cadastral municipality Stari grad.

Structure of commercial and warehousing space set forth in the previous paragraph is as follows:

a) open warehousing space, IV category 8,772.00 m2

Outline of the above space no. 321/90, dated 7 November 2003, is attached hereto as integral part of this Agreement.

142 Agreement on Provision and Use of Transshipment, Warehousing and Other Services between Luka Beograd and Obnova dated 1 April 1985 (*date indicated by Serbia*), Art. 1, **R-012**; Agreement on Provision and Use of Transshipment and Warehousing Services between Luka Beograd and Obnova for parcel no. 47 dated 16 March 2006 (*date indicated by Serbia*), Art. 1, **R-016**. Agreement on Provision and Use of Port and Warehousing Services between Luka Beograd and Obnova for parcel No. 39/1 dated 16 March 2006 (*date indicated by Serbia*), Art. 1, **R-017**.

R-017

AGREEMENT SUBJECT MATTER

Article 1

By this Agreement LUKA "BEOGRAD" AD and SERVICE BENEFICIARY govern mutual rights and obligations related to use of commercial and warehousing space for storage of the SERVICE BENEFICIARY'S secondary raw materials, provided that the SERVICE BENEFICIARY is registered to do business with such type of goods, as well as conditions for providing and using transloading and other port-related services in warehousing premises of LUKA "Beograd" AD, at the address: 23 Dunavska Str., on a part of the cadastral parcel 39/1 – cadastral municipality Stari Grad.

Structure of commercial and warehousing space set forth in the previous paragraph is as follows:

- open warehousing space, IV category 1,163.00 m2

Outline of the above space no. 321/89, dated 7 November 2003, is attached hereto as integral part of this Agreement.

137. These agreements, the subject matter of which is only the land, set out certain provisions that, by their content, refer to buildings. However, these provisions are only *general* provisions that do *not* relate to any *specific* building.[143] And this does not come as a surprise, Messrs. Živković and Milošević confirm that they reviewed *all* agreements that, according to Serbia, relate to Obnova's premises at Dunavska 17-19 and 23 and confirm that "*[n]one of the agreements […] relate to any […] buildings.*"[144] In fact, as explained in detail below, these agreements do not relate to Obnova's premises at all.

138. However, even if any of the agreements relied upon by Serbia did apply to Obnova's buildings, and they do not, it would not change the fact that Obnova is the owner of these buildings. Also, even if Obnova had indeed concluded a lease agreement for its own buildings, which would be strange indeed, it would not change the fact that Obnova had the right of use over those buildings since their construction and that its right of use transformed into ownership upon Obnova's privatization.[145]

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143 Counter-Memorial, ¶ 41. Agreement on Provision and Use of Transshipment, Warehousing and Other Services between Luka Beograd and Obnova dated 1 April 1985 (*date indicated by Serbia*), Art. 10-12, **R-012**; Agreement on Provision and Use of Transshipment and Warehousing Services between Luka Beograd and Obnova for parcel no. 47 dated 16 March 2006 (*date indicated by Serbia*), Art. 1, **R-016**. Agreement on Provision and Use of Port and Warehousing Services between Luka Beograd and Obnova for parcel No. 39/1 dated 16 March 2006 (*date indicated by Serbia*), Art. 5(1), 6(1), **R-017**.

144 Živković Milošević Second ER, ¶ 103.

145 *Id.*, ¶ 105.

e. Upon its privatization, Obnova's right of use over its buildings *ex lege* transformed into ownership

139. As explained above, upon its privatization, Obnova became the owner of its buildings at Dunavska 17-19. Serbia does not seem to dispute that, as a matter of Serbian law, any right of use that privatized companies had over their assets, with the exception of construction land, automatically transformed into ownership upon privatization. Serbia also does not appear to dispute that the right of use could be proved by submission of construction permits.[146]

140. However, Serbia argues that Obnova did not acquire ownership over its buildings because there is not sufficient proof that Obnova had the right of use over the buildings at the time of its privatization.[147] According to Serbia, this is because Obnova's permits were issued for construction of "*temporary objects*" and did not cover all buildings.[148]

141. Serbia's objections, again, do not withstand scrutiny. The alleged "*temporary*" nature of Obnova's objects was already addressed and refuted above. The fact that Obnova did not have all necessary permits for all its buildings is irrelevant because the existence of a permit is sufficient but not necessary evidence of the right of use. The fact that the buildings were built by Obnova, and Obnova therefore had the right of use over these buildings, is confirmed by the privatization program, as well as the fact that Obnova had been using them—without any objections—for decades. These facts are amply sufficient to establish the existence of Obnova's right of use even in the absence of building permits for certain buildings.

142. Furthermore, when the City conducted an inspection of Obnova's buildings in July 2019, it repeatedly referred to Obnova as "*the investor*" of the buildings at both Dunavska 17-19 and 23.[149] According to the 2009 Law on Planning and Construction,

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146 Živković Milošević First ER, ¶ 141.

147 Counter-Memorial, ¶¶ 122-124.

148 *Id.*, ¶ 123.

149 Report from inspection at Dunayska 23, 15 July 2019, **C-454**; Decision No. 356-442/2019, 11 September 2019, pp. 1-2, **C-453**.

"the investor" is "*a person for whose needs the object is constructed and in whose name the construction permit is issued.*"[150]

143. Finally, Serbia's argument that property rights can be acquired solely "*by inscription in the Land Books or the Cadastre*" is simply incorrect. As Claimants' experts explain, in a case of a non-contractual mode of acquisition, such as through construction, the registration of ownership rights in real estate registers has only a declarative effect. The registration in the Cadaster has a constitutive effect only in case of the acquisition of real estate based on a contract.[151] Obnova acquired its rights through a non-contractual mode of acquisition—*i.e.* by its construction of the buildings—and not on the basis of a contract—and Serbia does not allege otherwise. Therefore, Obnova's property rights existed and exist regardless of whether or not they have been inscribed in the Land Books or the Cadaster.

144. Serbia's argument that the City is the owner of the buildings at Dunavska 17-19 is incorrect for at least the following reasons:

a. the argument is based on an incorrect assumption that at the moment of its privatization, Obnova did not have the right of use over the buildings it built starting in the 1950s. Claimants have demonstrated the opposite above;

b. the argument contradicts the Land Directorate's position in 2018, when it recognized that Obnova was entitled to compensation for potential demolition of its buildings;

c. several contemporaneous maps produced by the Geodetic Authority of Serbia (the "**Geodetic Authority**") had previously shown that the buildings were not publicly-owned;[152]

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150 Law on Planning and Construction, ("Official Gazette of RS", number: 72/09, 81/09-corr., 64/10 – decision of the CC, 24:72/09, 81/09 – corr., 64/10 – decision of the CC, 121/2012, 42/2013 – decision of the CC, 50/13 – decision of the CC, and 98/13 – decision of the cc, 132/14, 145/14, 83/18, 31/19, 37/19), **C-578**.

151 Živković Milošević First ER, ¶¶ 111-112.

152 Memorial, ¶¶ 144 *et seq*.

d. the concept of the 2013 DRP specifically envisaged that costs of construction of the bus loop would include, among other things, payments for expropriated land and buildings—there would be no such costs if the land and buildings were owned by Serbia; and

e. Serbia has never submitted any relevant documents that could establish the City's alleged rights to the buildings—the City was registered in the Cadaster based on the City's agreement with Luka Beograd from 1975, which, however, does not mention Obnova's buildings.[153]

f. Upon construction of its buildings, Obnova acquired the permanent right of use over the land at Dunavska 17-19

145. As explained above, upon construction of its buildings at Dunavska 17-19, Obnova acquired the so-called "*permanent right of use*" over the land where these buildings were built. Serbia does not dispute the existence of the "*right of use*". On the contrary, Serbia expressly confirms that the right of use "*was introduced during the communist era in former Yugoslavia, as the surrogate right for ownership right.*" In addition, Serbia also confirms that the right of use "*is a property right in its nature*" in "*the same way as an ownership right.*"[154] That much, thus, seems to be undisputed between the Parties.

146. Claimants also explained that contemporaneous documents confirm that Serbia was aware of Obnova's right of use over the land at Dunavska 17-19. Serbia simply ignores this fact and argues that Obnova allegedly used the land at Dunavska 17-19 only based on certain lease and other agreements with the City and Luka Beograd.[155] According to Serbia, as a result, Obnova only had a right *to* use this land (*i.e.* a contractual right)—rather than the right *of* use over this land (which, as Serbia confirms, was akin to the ownership right).[156] Serbia's arguments are wrong for several different reasons.

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153 *Id.*, ¶¶ 140-146.

154 Counter-Memorial, ¶ 24.

155 During the document production Serbia also produced certain agreements concluded between Luka Beograd and a Serbian company called Petko. *See* Agreement no. 71 concluded between Luka Beograd and Petko, 13 January 2003, **C-609**; Agreement no. 72 concluded between Luka Beograd and Petko, 13 January 2003, **C-610**.

156 *E.g.* Counter-Memorial, ¶¶ 2 *et seq*.

147. To begin with, Serbia's position directly contradicts the Cadaster's contemporaneous understanding, in the 1960s, that Obnova was the user (*in Serbian: korisnik*) of the land—*i.e.* that it had the right *of* use over this land.[157] As Claimants explained in their Memorial, and again above in this Reply, Obnova acquired the permanent right of use over the land at Dunavska 17-19 by constructing its buildings on this land.[158]

148. Furthermore, the agreements relied upon by Serbia in any case do not relate to Obnova's land at Dunavska 17-19. In fact, these agreements, which were not even included in Obnova's archive handed over upon privatization, often refer to land "*in the port area*" and to land with a railway track. Obnova's current land is not in the port area and it does not include a railway track. Thus, the agreements may relate to other warehouse land that Obnova may have been renting, at the time, in the port area or in the area between Obnova's current premises and the port, which includes a railway track.

149. In any event, even if the agreements relied upon by Serbia related to Obnova's current land at Dunavska 17-19, this would not affect Obnova's right of use in any way. This is because Obnova acquired the right of use *ex lege* upon construction of its buildings at Dunavska 17-19 in the 1950s. Any subsequent lease agreements for the same land would have had to have been done in error—but such an error, if made, would not change the fact that Obnova had already acquired the right of use to the land and has held that right for over 70 years now.

150. Finally, it is important to stress that neither Luka Beograd nor the City, being the alleged landlords under the agreements, ever tried to evict Obnova from its land at Dunavska 17-19 for failure to pay any rent—and as far as Claimants are aware, Obnova never paid any rent for its current premises.

151. Each of these points is explained in greater detail below.

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157 Letter from Geodetic Authority of Serbia to Obnova, 18 February 2021, p. 3 (pdf), **C-329;** Letter from Obnova to City of Belgrade, 27 March 2008, p. 2 (pdf), **C-314**.

158 Živković Milošević First ER, ¶¶ 14-45, 176. *See also* Memorial, ¶ 39. To be clear, Claimants have not argued that Obnova was *granted* the right of use over the land at Dunavska 17-19 as Serbia incorrectly asserts in its Counter-Memorial. *See* Counter-Memorial, ¶ 26.

i. Agreements relied upon by Serbia do not relate to Obnova's land at Dunavska 17-19

152. The agreements on which Serbia relies to argue that Obnova leased the land at Dunavska 17-19 do not relate to Obnova's land at Dunavska 17-19 at all. Specifically, Serbia relies on 11 different agreements that allegedly relate to Obnova's premises. Serbia, however, does not specify to which of the two locations (Dunavska 17-19 and 23) these agreements allegedly relate, nor how it concluded that they relate to any of these premises to begin with. And indeed, they do not.

153. Two of the agreements submitted by Serbia (and resubmitted by its legal expert, Prof. Jotanović) (RJ-004/R-008 and RJ-007/R-012) state that the land subject to these agreements is land located in "*the port zone on the Danube in Belgrade*"[159] respectively "*port area in Dunavska street*".[160] However, Obnova's premises at Dunavska 17-19 and Dunavska 23[161] are not located in the port area.[162] As a result, it is clear that these agreements do not relate to Obnova's premises at Dunavska 17-19 and 23, which are the subject matter of this arbitration.[163]

154. The agreement submitted by Serbia as RJ-007/R-012 also suffers from the following additional flaws:

a. Article 2 states that the agreement purports to cover land with the total size of 9,132 m^2,[164] even though this area exceeds by approximately 30% the total open space area of land plot No. 47, *i.e.* the land plot at which Obnova's premises at

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159 Lease Agreement between Obnova and the Directorate for Construction and Development of the Danube river bank dated 7 April 1960 (*date indicated by Serbia*), Art. 1, **R-008**; Lease agreement between Obnova and the Directorate dated 7 April 1960 (*date indicated by Serbia*), Art. 1, **RJ-004**.

160 Agreement on Provision and Use of Transhipment, Warehousing and Other Services between Luka Beograd and Obnova of 1 April 1985 (*date indicated by Serbia*), Art. 1, **R-012**; Agreement on Provision and Use of Transhipment, Warehousing and Other Services between Luka Beograd and Obnova of 1 April 1985 dated 6 May 1985(*date indicated by Serbia*), Art. 1, **RJ-007**.

161 For the avoidance of doubt, Claimants mean Obnova's premises as defined in Annex A of the Memorial and Annex A to this Reply.

162 This is evident from the fact that the land plots required by Luka Beograd for its operations according to the 1975 Agreement did not include Obnova's premises. *See* Contract between Preduzeće luka i skladišta Beograd and City of Belgrade dated 1975, **C-167**; Contract between Preduzeće luka i skladišta Beograd and City of Belgrade dated 1975 including attachments, **C-611**.

163 *See also* Živković Milošević Second ER, ¶¶ 134-136.

164 Agreement on Provision and Use of Transshipment, Warehousing and Other Services between Luka Beograd and Obnova dated 1 April 1985 (*date indicated by Serbia*), Art. 2, **R-012**.

Dunavska 17-19 were located, at the time when the agreement was concluded;[165] and

b. Article 15 refers to use of "*port commercial area*", and Articles 17 and 18, which refer to "*port area*", even though, as explained above, the port area never covered Obnova's premises.[166]

155. Another agreement submitted by Serbia that clearly does not relate to Obnova's premises is the agreement submitted as RJ-008/R-013. This agreement expressly states that it relates to "*cadastral parcel 12/6 – CM Stari Grad*",[167] which is not part of Obnova's premises.[168]

156. Furthermore, according to Article 1 of that agreement, the agreement relates to open warehousing space with a total size of 8,772 m^2.[169] This area is significantly larger than the actual open warehousing space existing on Obnova's premises at Dunavska 17-19 or Dunavska 23.[170]

157. In addition, according to Article 1, the agreement purportedly related to "*use of railway*".[171] However, at the time this agreement was concluded, there were no railways at Obnova's premises.[172]

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165 For the total area of land used by Obnova see Hern analysis.xlsx, sheet called "Development Parameters", **C-190**. For total area of buildings see Arizanović ER, Attachment B.

166 This is evident from the fact that the land plots required by Luka Beograd for its operations according to the agreement from 1975 ("**1975 Agreement**") did not include Obnova's premises. *See* Contract between Preduzeće luka i skladišta Beograd and City of Belgrade dated 1975, **C-167**.

Furthermore, it is also clear from the list of land plots designated for Luka Beograd's main activity from 1967–Obnova's land plots were not included. Report of the City of Belgrade and Luka Beograd, 5 December 1974, p. 19 (pdf), **C-579**.

167 Agreement on Provision and Use of Transhipment and Warehousing Services between Luka Beograd and Obnova of 25 January 2000 (*date indicated by Serbia*), Art. 1, **R-013**.

168 *Infra*, Annex A; Memorial, Annex A; Screenshot from the Real Estate Cadaster showing location of parcel 12/6, 2000, **C-612**.

169 Agreement on Provision and Use of Transshipment and Warehousing Services between Luka Beograd and Obnova dated 25 January 2000 (*date indicated by Serbia*), Art. 1, **R-013**.

170 For the total area of land see Hern analysis.xlsx, sheet called "Development Parameters", **C-190**. For total area of buildings see Arizanović ER, Attachment B.

171 Agreement on Provision and Use of Transshipment and Warehousing Services between Luka Beograd and Obnova dated 25 January 2000 (*date indicated by Serbia*), Art. 1, **R-013**.

172 Compilation of historical images from Dunavska 17-19 and Dunavska 23, **C-613**.

158. Finally, according to Article 15, Luka Beograd could terminate the agreement in case of "*[p]roviding services from reloading and warehousing activity of LUKA for other parties in the port area.*"[173] However, Obnova's premises are not (and never have been) located in the port area.[174]

159. Notably, Serbia failed to submit a drawing (*in Serbian: skica*) that was an "*integral part*" of the agreement and that would show the specific land to which the agreement related.[175] When Claimants asked for this document in the document production, Serbia claimed the document was not in Serbia's possession or control.

160. As for the remaining eight agreements, while they include certain references to Obnova's premises (such as an address or a number of land plot), the remaining provisions of these agreements again demonstrate that the subject of the leases is not Obnova's premises:

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173 Agreement on Provision and Use of Transshipment and Warehousing Services between Luka Beograd and Obnova dated 25 January 2000 (*date indicated by Serbia*), Art. 15, **R-013**.

174 This is evident from the fact that the land plots required by Luka Beograd for its operations according to the 1975 Agreement did not include Obnova's premises. *See* Contract between Preduzeće luka i skladišta Beograd and City of Belgrade dated 1975, **C-167**.

175 Agreement on Provision and Use of Transshipment and Warehousing Services between Luka Beograd and Obnova dated 25 January 2000 (*date indicated by Serbia*), Art. 1, **R-013**.

Agreement	Date (according to Serbia)	Exhibit No.	Issue
Lease agreement concluded between Obnova and the Directorate for Construction and Development of the Danube riverbank[176]	29 September 1959	R-007/RJ-003	• The agreement stated that the leased land was "*in the cargo port area on the Danube river bank*."[177] However, Obnova's premises were not and are not on Danube's river bank nor have ever served for any port services.[178] • The land to which the agreement applied was supposed to be marked in "*the scheme*[179] *which is an integral part of this agreement.*"[180] Version of the agreement submitted by Serbia, however, does not include this scheme.
Agreement concluded between Luka Beograd and Obnova[181]	March 1965	R-009/RJ-005	• The agreement stated that the leased land was located on land plots No. 47, 49 and 50.[182] However, land plots. No. 49 and 50 have never been part of Obnova's premises. • Furthermore, land plot No. 47 used to be significantly larger in the past and also covered an area outside of Obnova's premises.[183]

176 Lease Agreement between Obnova and the Directorate for Construction and Development of the Danube river bank dated 29 September 1959, **R-007**.

177 *Id.*, Art 1.

178 This is evident from the fact that the land plots required by Luka Beograd for its operations according to the 1975 Agreement did not include Obnova's premises. *See* Contract between Preduzeće luka i skladišta Beograd and City of Belgrade dated 1975, **C-167**.

179 Correct translation would actually be "*drawing*" (*in Serbian: skica*).

180 Lease Agreement between Obnova and the Directorate for Construction and Development of the Danube river bank dated 29 September 1959, Art 1, **R-007**.

181 Agreement between Luka Beograd and Obnova dated March of 1965 (*date indicated by Serbia*), **R-009**.

182 *Id.*, Art. 1.

183 Land Book insertion no. 5, p. 8 (pdf), **R-052**. These facts also clearly contradict Serbia's allegation that this agreement allegedly obliged Obnova to pay the rent agreed under an agreement concluded in 1962. *See* Živković Milošević First ER, ¶¶ 138, 168. Indeed, the agreement submitted as R-009 does not make any reference to the agreement concluded in 1962.

Agreement	Date (according to Serbia)	Exhibit No.	Issue
Agreement on use of warehouse space and performance of the transshipment and warehousing services concluded between Luka Beograd and Obnova[184]	21 July 1983	R-010/RJ-006	• The agreement did not state to which land plot it related. Article 2 merely stated that the agreement purported to cover land with the total size of 10,581 m^2.[185] However, this area is larger than the total area on which Obnova's premises at either Dunavska 17-19 or Dunavska 23 were located.[186] • Article 5 of this agreement referred to provision of transshipment and warehousing services by Luka Beograd.[187] However, Luka Beograd has never provided any such services at Obnova's premises.

184 Agreement on Use of Warehouse Space and Performance of the Transshipment and Warehousing Services between Luka Beograd and Obnova dated 21 July 1983 (*date indicated by Serbia*), **R-010**.

185 *Id.*, Art. 2.

186 For the total area of land see Hern analysis.xlsx, sheet called "Development Parameters", **C-190**. For total area of buildings see Arizanović ER, Attachment B.

187 Agreement on Use of Warehouse Space and Performance of the Transshipment and Warehousing Services between Luka Beograd and Obnova dated 21 July 1983 (*date indicated by Serbia*), Art. 5, **R-010**.

Agreement	Date (according to Serbia)	Exhibit No.	Issue
Agreement on provision and use of port and warehousing services concluded between Obnova and Luka Beograd[188]	3 February 2000	R-014/RJ-009	• According to Article 1, the agreement purported to relate to open warehousing space "*at the address: 23 Dunavska Str., on a part of the cadastral parcel 39/1*" with the total size of 1,163m^2.[189] However, the open space used by Obnova at Dunavska 23 is smaller. • Several articles of the agreement referred to various "*port-related services*" and Article 15 stated that one of the reasons for termination is Obnova providing "*services from reloading and warehousing activity of LUKA for other parties in the port area*".[190] However, as already explained above, Obnova's premises have never been part of the port area.[191] • According to Article 1 of this agreement, a drawing of the area subject to this agreement was supposed to be included as its attachment.[192] However, the drawing is not included in the copy of the agreement submitted by Serbia.

188 Agreement on Provision and Use of Port and Warehousing Services between Obnova and Luka Beograd dated 3 February 2000 (*date indicated by Serbia*), **R-014**.

189 *Id.*, Art. 1.

190 *Id.*, Arts. 8, 10-11, 15.

191 This is evident from the fact that the land plots required by Luka Beograd for its operations according to the 1975 Agreement did not include Obnova's premises. *See* Contract between Preduzeće luka i skladišta Beograd and City of Belgrade dated 1975, **C-167**.

192 Agreement on Provision and Use of Port and Warehousing Services from 3 February 2000 (*date indicated by Serbia*), Art. 1, **R-014**.

Agreement	Date (according to Serbia)	Exhibit No.	Issue
Agreement for providing and using port and warehouse services concluded between Luka Beograd and Obnova[193]	November 2003	R-015/RJ-010	• The agreement stated that it referred to land plot No. 39/1, but placed this land plot at Dunavska 17-19, even though it is located at Dunavska 23. • The subject matter of this agreement was the same as it was in the agreement submitted by Serbia as R-013/RJ-008 and, as explained above, related to land plot No. 12/6, which is outside of Obnova's premises.[194] • The agreement envisaged the use of railways at the land subject to the agreement. However, at the time when this agreement was concluded, there were no railways at Obnova's premises at either Dunavska 17-19 or Dunavska 23.[195] • According to Article 1, the agreement purported to relate to an open warehousing space with the total size of 8,772 m^2.[196] This area is larger than the actual open warehousing space existing at either Dunavska 17-19 or 23.[197] • According to Article 1, a drawing of the land covered by this agreement should be included as its attachment.[198] However, the copy of this agreement submitted by Serbia does not include such drawing. • Finally, the agreement again referred to the port area.[199] The port area has never included Obnova's premises.[200]

193 Agreement for Providing and Using Port and Warehouse Services between Luka Beograd and Obnova dated November of 2003 (*date indicated by Serbia*), **R-015**.

194 *Supra*, ¶¶ 155-156.

195 Compilation of historical images from Dunavska 17-19 and Dunavska 23, **C-613**.

196 Agreement for Providing and Using Port and Warehouse Services between Luka Beograd and Obnova dated November of 2003 (*date indicated by Serbia*), Art. 1, **R-015**.

197 For the total area of land see Hern analysis.xlsx, sheet called "Development Parameters", **C-190**. For total area of buildings see Arizanović ER, Attachment B.

198 Agreement for Providing and Using Port and Warehouse Services between Luka Beograd and Obnova dated November of 2003 (*date indicated by Serbia*), Art. 1, **R-015**.

199 *Ibid*.

200 This is evident from the fact that the land plots required by Luka Beograd for its operations according to the 1975 Agreement did not include Obnova's premises. *See* Contract between Preduzeće luka i skladišta Beograd and City of Belgrade dated 1975, **C-167**.

Agreement	Date (according to Serbia)	Exhibit No.	Issue
Agreement on provision and use of transshipment and warehousing services concluded between Luka Beograd and Obnova[201]	16 March 2006	R-016/RJ-012	• According to Article 1, the agreement purported to relate to an open warehousing space with the total size of 8,772 m^2. However, this is more than the actual size of the open warehousing space located at Obnova's premises at Dunavska 17-19 or 23.[202] • The agreement envisaged provisions of certain services by Luka Beograd (such as maintenance of the facilities).[203] However, Luka Beograd never provided such services with respect to any building at Obnova's premises. • According to Article 10, working hours "*in the commercial and warehousing premises referred to in Article 1 hereof shall be from 07:00 to 21:00*" and Obnova should notify Luka's security department about any work done outside these hours.[204] However, neither Luka, nor its security department, ever operated at Obnova's premises. • According to Article 11, Obnova was permitted to use Luka's weighbridge in case it needed to weigh its goods.[205] However, Obnova had its own weighbridge at Dunavska 17-19.[206] • The land to which the agreement applied was supposed to be marked in a drawing that was "*integral part*" of the agreement.[207] However, the version of the agreement submitted by Serbia does not include such outline.

201 Agreement on Provision and Use of Transshipment and Warehousing Services between Luka Beograd and Obnova for parcel no. 47 dated 16 March 2006 (*date indicated by Serbia*), **R-016**.

202 For the total area of land see Hern analysis.xlsx, sheet called "Development Parameters", **C-190**. For total area of buildings see Arizanović ER, Attachment B.

[203] Agreement on Provision and Use of Transshipment and Warehousing Services between Luka Beograd and Obnova for parcel no. 47 dated 16 March 2006 (*date indicated by Serbia*), Arts. 5, 6, 7, 8, 9, **R-016**.

[204] *Id.*, Art. 10.

[205] *Id.*, Art. 11.

[206] Arizanović ER, Attachment B, pp. 36-37, Attachment F, p. 99.

[207] Agreement on Provision and Use of Transshipment and Warehousing Services between Luka Beograd and Obnova for parcel no. 47 dated 16 March 2006 (*date indicated by Serbia*), Art. 1, **R-016**.

Agreement	Date (according to Serbia)	Exhibit No.	Issue
Agreement on Provision and Use of Port and Warehousing Services[208]	16 March 2006	R-017/RJ-013	• Several articles of the agreement refer to various "*port-related services*".[209] However, as already explained above, Obnova's premises have never been part of the port area.[210] • According to Article 10, "*[w]orking hours in the commercial and warehousing premises referred to in Article 1 hereof shall be from 07:00 to 21:00*" and Obnova should notify Luka Beograd's security department about any work conducted outside these hours.[211] However, neither Luka, nor its security department, ever operated at Obnova's premises. • According to Article 11, Obnova was permitted to use Luka's weighbridge in case it needed to weigh its goods.[212] However, Obnova had its own weighbridge at Dunavska 17-19.[213] • According to Article 1 of this agreement, a drawing depicting the land subject to the agreement was supposed to be including as an attachment.[214] However, the copy of the agreement submitted by Serbia does not include any such drawing.

208 Agreement on Provision and Use of Port and Warehousing Services from 16 March 2006 (*date indicated by Serbia*), **R-017**.

209 *Id.*, Arts. 1, 17, 18.

210 This is evident from the fact that the land plots required by Luka Beograd for its operations according to the 1975 Agreement did not include Obnova's premises. *See* Contract between Preduzeće luka i skladišta Beograd and City of Belgrade dated 1975, **C-167**.

211 Agreement on Provision and Use of Port and Warehousing Services from 16 March 2006 (*date indicated by Serbia*), Art. 10, **R-017**.

212 *Id.*, Art. 1.

Agreement	Date (according to Serbia)	Exhibit No.	Issue
Agreement on provision and use of port and warehousing services concluded between Obnova and Luka Beograd[215]	7 November 2003	RJ-011	• Several articles of the agreement referred to various "*port-related services*".[216] However, as already explained above, Obnova's premises have never been part of the port area.[217] • According to Article 1 of this agreement, a drawing depicting the land subject to the agreement was supposed to be including as an attachment.[218] However, the copy of the agreement submitted by Serbia does not include any such drawing.

213 Arizanović ER, Attachment B, pp. 36-37, Attachment F, p. 99.

214 Agreement on Provision and Use of Port and Warehousing Services from 16 March 2006 (*date indicated by Serbia*), Art. 1, **R-017**.

215 Agreement on Provision and Use of Port and Warehousing Services between Luka Beograd and Obnova dated 7 November 2003, **RJ-011**.

216 *Id.*, Arts. 7, 8, 9, 12.

217 *Id.*, Art. 7-9.

218 *Id.*, Art. 1.

161. The above makes it clear that the agreements submitted by Serbia do not relate to Obnova's land at either Dunavska 17-19 or Dunavska 23. Given this fact, it comes as no surprise that Obnova's privatization program, prepared in 2003, expressly confirmed that Obnova did not lease any real estate property at Dunavska 17-19.[219]

162. Furthermore, as Claimants explained during document production,[220] none of the agreements submitted by Serbia was in Obnova's archives that were made available to Claimants.

163. In addition, Serbia argues in this arbitration that, since 2003, Serbia has been registered as the owner and the City as the user of buildings and land at Dunavska 17-19 and 23.[221] Based on this fact, and Serbia's own submissions in this arbitration, Luka Beograd would not have had any right to lease out the premises at Dunavska 17-19 and 23.

164. Luka Beograd does not seem to dispute this fact. On the contrary, during Luka's privatization in 2005, Luka did not include Obnova's premises at Dunavska 17-19 and 23 in its privatization documentation. If Luka believed it had any rights to these premises, it would have stated so in its privatization documents.

ii. Even if the agreements relied upon by Serbia related to Obnova's land, this would not affect Obnova's right of use over this land

165. Importantly, even if the agreements relied upon by Serbia indeed related to the land at Obnova's premises at Dunavska 17-19, and they do not, this would not change anything with respect to Obnova's rights to this land. Messrs. Živković and Milošević confirm in their report that: (*i*) Obnova acquired the permanent right of use over the land upon the construction of its buildings; and (*ii*) this right would *not* be affected in any way by Obnova's subsequent conclusion of a lease agreement to the same land:

> However, even if Prof. Jotanović was correct and the above agreements had applied to Obnova's premises at Dunavska 17-19 (as defined in Annex A to our First Report), it would still not change our conclusion that Obnova acquired the right of use over its land. As explained above, Obnova acquired the right of use over land at Dunavska 17-19 *ex lege*

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219 Counter-memorial, ¶ 110.

220 Claimants' Reply to Serbia's Objections to Claimants' Document Production Requests, ¶¶ 34, 46.

221 Counter-Memorial, ¶ 75.

> upon the construction of its buildings on that land in the 1950s. As a result, even if Obnova had later concluded lease agreements for the same land, it would not have impacted the existence of its already established right of use.[222]

iii. Neither Serbia nor Luka Beograd tried to evict Obnova from its premises at Dunavska 17-19

166. Finally, as the table above makes clear, the last agreement relied upon by Serbia is purportedly from 2006. However, it is undisputed that Obnova has been using its premises at Dunavska 17-19 for 70 years without payment of any rent to either the City or Luka Beograd.

167. If Obnova indeed had been using the land at Dunavska 17-19 based on the agreements with the City or Luka Beograd, common sense tells us that these alleged landlords would have certainly tried to evict Obnova for non-payment of rent. However, this has not been the case—neither Serbia nor Luka Beograd has ever questioned Obnova's rights or tried to evict it from the premises at Dunavska 17-19.

168. Serbia's assertion that "*Luka Beograd was inscribed as the holder of the right of use over the Dunavska Plots, and therefore had the right of use over the land*" in 1966-1972, is inapposite.[223] To begin with, as Claimants demonstrated in their Memorial, the permanent right of use, held by Obnova based on its construction of its buildings, took precedence over the "*right of use as an emanation of social ownership*", allegedly held by Luka Beograd.[224]

169. Serbia does not seem to dispute this relationship between these two types of the right of use. As a result, it is irrelevant whether or not Luka Beograd was registered in the land books. In addition, according to Serbia itself, Luka Beograd was registered as a user of the land at Dunavska 17-19 only between 1966 and 1972[225]—and even that registration seems to have been done in error, given that the Cadaster refused to register Luka Beograd again when it requested so in 2001.[226]

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222 Živković Milošević Second ER, ¶ 144.

223 Counter-Memorial, ¶ 143.

224 Živković Milošević First ER, ¶ 178.

225 Counter-Memorial, ¶ 75.

226 Counter-Memorial, ¶ 77.

170. Serbia's argument that Obnova knew that its right did not have priority over that of Luka Beograd because there is allegedly "*no logical explanation why Obnova would have leased the land*" is again irrelevant.[227]

171. As explained above, Obnova did not lease the land it currently uses at Dunavska 17-19 from Luka Beograd. More importantly, even if Serbia was right (*quod non*) and Obnova concluded agreements with Luka Beograd because it wrongly believed that Luka Beograd's right had priority, this would be irrelevant. What matters is whether Obnova's right had the priority under Serbian law—not what Obnova's understanding was.

172. Finally, Serbia's assertion that Obnova confirmed in court proceedings that it was leasing the land at Dunavska 17-19 from Luka Beograd is simply untrue.[228] None of the documents referred to by Serbia shows this purported confirmation. On the contrary, according to one of the decisions cited by Serbia, Obnova expressly argued that "*it was not in a commercial relationship with the plaintiff*", *i.e.* with Luka Beograd.[229]

173. Serbia's allegation that Obnova argued in these proceedings that "*[Serbia] owned the Dunavska Plots and that the City of Belgrade (and not Luka Beograd, the plaintiff) was the holder of the right of use*" is misleading.[230] It is undisputed that it was the state that was—incorrectly—registered in the Cadaster. Obnova only referred to the registration status in the Cadaster.

174. For the sake of completeness, Claimants note that, in the part of the Counter-Memorial addressing Obnova's rights to the land at Dunavska 17-19, Serbia also repeats its argument about the temporary nature of Obnova's buildings. Specifically, Serbia argues that because the buildings at Dunavska 17-19 were temporary, or in some cases, built without buildings permits, the land at Dunavska 17-19 was not developed construction

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227 Counter-Memorial, ¶ 143.

228 Counter-Memorial, ¶ 40.

229 Decision of the Commercial Court in Belgrade No. 14 P – 3861/2012 dated 4 October 2012, p. 2, **R-027**.

230 Counter-Memorial, ¶ 40.

land and, as a result, Obnova could not acquire the permanent right of use over this land.[231]

175. As explained above, it is undisputed that at least some of Obnova's buildings had all necessary permits. The fact that some buildings did not is, thus, irrelevant. Claimants also already demonstrated that neither Obnova's permits, nor its buildings were temporary.

176. Thus, Serbia simply cannot in good faith deny that Obnova has had the right of use to the land at Dunavska 17-19 since the 1950s.

g. In 2009, Obnova acquired the right to convert its right of use into ownership

177. As explained above, in 2009, Obnova acquired the right to convert its right of use over the land at Dunavska 17-19 into ownership. However, Obnova lost this right in December 2013 when Serbia adopted the 2013 DRP.

178. Serbia disagrees and claims that Obnova did not have a right to convert its right of use because it did not have any right of use to begin with—only a right to use based on various agreements.[232] Claimants have already demonstrated that this argument does not have any merit.[233]

179. Serbia also claims that even if Obnova had the right of use, it would need to register it in the Cadaster before it could request conversion.[234] While this might be the case, this is merely a procedural point. As such, it does not change the fact that, under Serbian law, Obnova did have the right to convert its right of use into ownership.

180. Finally, Serbia's argument that from 2013 to 2015, the conversion of the right of use into ownership was not possible because the "*Constitutional Court also struck down part of Article 103, which regulated the fee for conversion*" is both incorrect and

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231 Counter-Memorial, ¶ 142.

232 Counter-Memorial, ¶ 239.

233 *Supra* ¶¶ 44-47.

234 Counter-Memorial, ¶ 240.

misleading.[235] The Constitutional Court only abolished *a part* of the relevant Article 103 of the 2009 Law on Planning and Construction—*not the entire provision*, as Serbia seems to suggest. As the below redline makes clear, the part of Article 103 remaining in force was sufficient to allow for the conduct of conversion proceedings:

> **Article 103**
>
> The right of use over construction land in state or public ownership, on which the holders of the right of use were or are companies and other legal entities to whom applied the provisions of the law governing privatization, bankruptcy and enforcement proceedings, as well as their legal successors, can be converted into a proof of title, with compensation of the market value of that construction land at the moment of conversion of the right, reduced by the costs of obtaining the right of use to that construction land. ~~The costs of acquiring the right of use of building land shall include, within the meaning of this Law, the total revalued price of the capital or the property paid in the privatization process i.e., the total revalued price paid for the property or part of the property of a company or other legal entity in the bankruptcy or enforcement proceedings, as well as other actual costs.~~[236]

B. Obnova's rights to the buildings and land at Dunavska 23

1. Obnova's right of use over the land at Dunavska 23

181. In their Memorial, Claimants explained that because Obnova had been in undisturbed possession of the land at Dunavska 23 for many decades—at least since 1968—it acquired the right of use over the land through acquisitive prescription (*usucapio*).[237]

182. The land at Dunavska 23 used by Obnova was not included in the privatization and remained in state ownership because, at that time, private ownership of construction land was still not possible in Serbia.[238] Obnova, however, continued to have the right of use over this land.[239]

183. Same as with respect to Dunavska 17-19, contemporaneous documents demonstrate that Serbia also understood that Obnova had the right of use over the land at Dunavska 23. Specifically, on page 6 of exhibit R-043, Serbia produced an excerpt of what allegedly

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235 Counter-Memorial, ¶ 247.

236 Živković Milošević Second ER, ¶ 28.

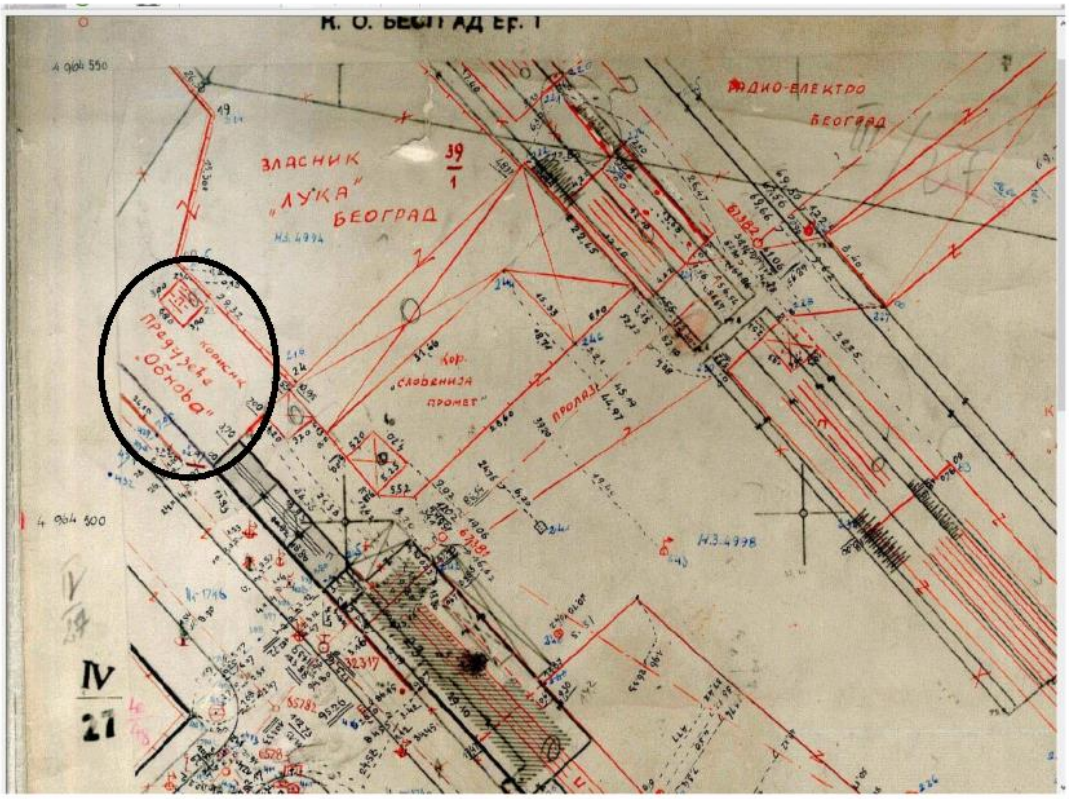
237 Memorial, ¶¶ 43, 45, 51, 85. *See also* Živković Milošević First ER, ¶¶ 201-207, 222-223; Živković Milošević Second ER, ¶¶ 155, 162-171.

238 Memorial, ¶ 51.

239 Memorial, ¶ 51.

is the "*Sketch of the survey no. 3/27 in the survey review process in the period 1966-1967.*"[240] This sketch relates to Dunavska 23 and, according to Serbia, was prepared by Serbian authorities.

184. Importantly, the sketch has the following note with respect to Obnova's premises: "*User Company 'Obnova'*". The word used in Serbian is again "*korisnik*", *i.e.* the word used for the holder of the right of use, not a lessee:[241]



Sketch of the survey no. 3/27 in the survey review process in the period 1966-1967

2. Obnova's ownership of the buildings at Dunavska 23

185. In their Memorial, Claimants explained that Obnova constructed several buildings at Dunavska 23 between 1988 and 1992.[242] Obnova's buildings are depicted on the following photomap:

240 Notice of the Cadaster dated 31 July 2023, p. 6 (pdf), **R-043**.

241 Notice of the Cadaster dated 31 July 2023, p. 6 (pdf), **R-043**.

242 Memorial ¶ 44.

186. In this Reply, Claimants rely on an expert report of Prof. Arizanović, who confirms that there are 9 buildings at Dunavska 23.[243] He also explains that these buildings are brick-and-mortar[244] and that, given their function and the technological procedures employed in their construction, they represent permanent buildings.[245]

187. As Claimants explained in their Memorial, since Obnova was still a socially-owned enterprise at that time when it constructed these buildings, same as with respect to the buildings at Dunavska 17-19, the buildings at Dunavska 23 were in social ownership and Obnova automatically acquired the right of use over these buildings.[246]

188. Claimants also explained in their Memorial that, upon Obnova's privatization, Obnova's right of use over the buildings at Dunavska 23, which were all listed in the privatization

243 Arizanović ER, ¶ 50.

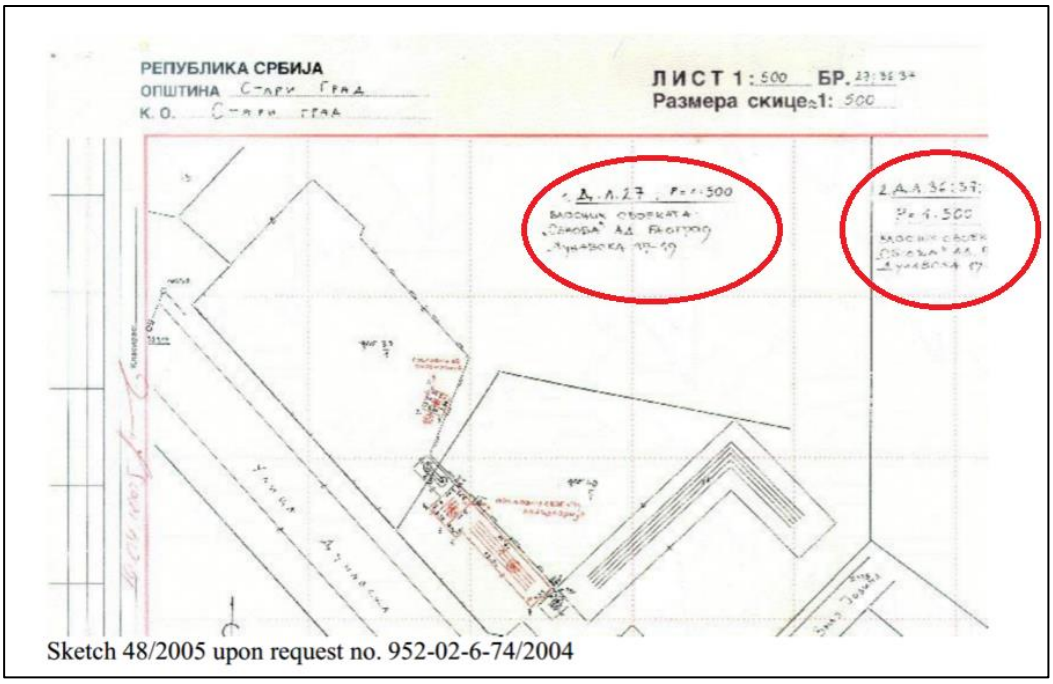
244 The only exception is building E that was built streel construction and corrugated aluminum sheet.

245 Arizanović ER, ¶¶ 46, 50.

246 Memorial, ¶ 44.

documents, automatically converted into Obnova's full private ownership of the buildings.[247]

189. The existence of Obnova's rights is, once again, confirmed by contemporaneous documents. Specifically, Serbia produced as its exhibit an excerpt from "*Sketch 48/2005 upon request no. 952-02-6-74/2004.*" This sketch includes the following notes—again untranslated by Serbia—related to Obnova's buildings at Dunavska 23: (*i*) "*D. 1. 27, P = 1:500, the owner of the objects: „Obnova" AD Belgrade, Dunavska Street no. 17-19*"; and (*ii*) "*2.D.1. 36:37, P=1:500, The owner of the objec (sic), „Obnova" AD (...) Dunavska 17 (...)*:"[248]



Sketch 48/2005 upon request no. 952-02-6-74/2004

190. To the best of Claimants' knowledge, the Cadaster never disputed these annotations. On the contrary, as explained above, it included the map—together with these annotations—in exhibit R-043 that it prepared based on Serbia's direction. This document therefore confirms that in 2005, the Cadaster did not dispute Obnova's ownership over the buildings.

247 Memorial, ¶ 50.

248 Notice of the Cadaster dated 31 July 2023, p. 7 (pdf), **R-043**. As explained above, descriptions of certain sketches provided in R-043 are clearly incorrect. However, there does not seem to be any issue with the excerpt from "*Sketch 48/2005 upon request no. 952-02-6-74/2004.*"

191. The fact that Obnova was recognized as the owner of the buildings also confirms that it built them. Indeed, even Serbia does not suggest that Obnova would purchase these buildings or acquire them in any other way. And this makes sense. As explained above, it is undisputed that Obnova has been using the premises at Dunavska 23 at least since 1968. According to Obnova's privatization program, none of the buildings used by Obnova had been built before this date.[249] Given this fact, it does not seem logical that some other entity would construct buildings on this land.

3. Obnova's right to convert its right of use into ownership

192. Same as with respect to Dunavska 17-19, in 2009, Obnova acquired the right to convert its right of use over the land at Dunavska 23 into ownership (upon the payment of a fee). Also same as with respect to Dunavska 17-19, after Serbia adopted the 2013 DRP, Obnova lost the right to convert the right of use over the part of land at Dunavska 23 that the 2013 DRP designated for public purposes.

193. For the same reason, Obnova cannot rely on the new regulation of the conversion process introduced in July 2023, based on which Obnova would have been—but for the adoption of the 2013 DRP—able to convert its right of use over the land at Dunavska 23 into ownership without payment of any conversion fee.

4. Serbia's incorrect arguments to the contrary

194. Same as with respect to Dunavska 17-19, Serbia has repeatedly failed to recognize Obnova's rights to its premises at Dunavska 23. Serbia did so based on a variety of pretexts that violate Serbian law and that are contradicted by contemporaneous documents. In the following sections, Claimants will show that:

a. Obnova acquired the right of use over the land at Dunavska 23 in the 1980s (at latest) (paragraphs 195 to 196 below);

b. Obnova was using the land at Dunavska 23 based on its right of use—Serbia has offered no evidence that the agreements it relies on relate to Obnova's land at Dunavska 23 (paragraphs 197 to 206 below); and

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249 Obnova Privatization Program dated July 2003, pp. 4-5 (pdf), Items 16-23, **C-015**.

c. Obnova had the right of use, and later ownership, over the buildings at Dunavska 23 (paragraphs 207 to 211 below).

a. Obnova acquired the right of use over the land at Dunavska 23 in the 1980s

195. In their Memorial,[250] Claimants explained that besides the land at Dunavska 17-19, Obnova has also been using buildings and land located at Dunavska 23, approximately 50 meters down the street from Dunavska 17-19.[251] Obnova started to use the land at Dunavska 23 in the 1960s, at the latest in 1968 when it constructed a metal gate at this location.[252]

196. Since Obnova had been in undisturbed possession of the land for several decades—at least since 1968—it acquired the right of use over the land at Dunavska 23 through acquisitive prescription (*usucapio*). Obnova satisfied the conditions for acquisition of land through *usucapio* because it had over 20 years of undisturbed, good faith possession.[253]

b. Obnova was using the land at Dunavska 23 based on its right of use

197. As explained above, contemporaneous documents confirm that Obnova has had the right of use over the land at Dunavska 23 and that Serbia recognized this right. Once again, Serbia ignores the contemporaneous understanding of its own authorities and argues that Obnova allegedly knew it did not have the right of use over the land because it was using it "*based on the lease agreements concluded in the period from 1953 to 2006.*"[254] Serbia claims that, as a result, Obnova did not acquire the right of use over the land at Dunavska 23 through acquisitive prescription because it allegedly did not satisfy the good faith requirement.[255]

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250 Memorial, ¶ 41.

251 Google Earth images (with annotation), **C-308**. The current status of buildings and land plots constituting Obnova's premises at Dunavska 23 is set out in detail in **Annex A** below.

252 Memorial, ¶ 43.

253 Memorial, ¶¶ 43, 45, 51, 85. *See also* Živković Milošević First ER, ¶¶ 201-207, 222-223; Živković Milošević Second ER, ¶¶ 155, 162.

254 Counter-Memorial, ¶ 147.

255 Counter-Memorial, ¶ 146.

198. As explained above, the agreements relied upon by Serbia do *not* relate to Obnova's premises at all. According to Serbia itself, Luka Beograd only had a right of use over 13,900m^2 of land plot 39/1.[256] However, the total area of land plot No. 39/1 was almost three times larger—over 4 hectares.[257] Together with the wording of the agreements relied upon by Serbia (as discussed above), this fact further confirms that Obnova was leasing from Luka another part of land plot No. 39/1—not the one for which it had the right of use and which is the subject matter of this arbitration.

199. Even more importantly, as explained by Messrs. Živković and Milošević, even if the agreements submitted by Serbia did relate to Obnova's land at Dunavska 23, this would not change the fact that, under Serbian law, Obnova acquired the right of use over its land through acquisitive prescription.[258]

200. The agreements submitted by Serbia that refer to Dunavska 23 were allegedly concluded in 1959, 2000, 2003 and 2006.[259] Given that the 1959 agreement ceased to apply, at latest, in 1961, there is a 39-year window between that agreement and the next agreement making any reference to Dunavska 23.[260] Obnova was using the land at Dunavska 23 during this time period without any lease agreement and without any objections from either Serbia or anyone else.

201. Specifically, as Claimants explained in their Memorial, Obnova had been continuously using the land at Dunavska 23 at least from 1968.[261] Given that, at that time, there was no lease agreement related to Obnova's land at Dunavska 23 and Obnova continued to use the land without any objections, Obnova in good faith believed it had a right of use

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256 Counter-Memorial, ¶ 75.

257 Report of the City of Belgrade and Luka Beograd, 5 December 1974, pp. 4, 18, 21, 38 (pdf), **C-579**.

258 Živković Milošević Second ER, ¶ 163.

259 Agreement for Providing and Using Port and Warehouse Services between Luka Beograd and Obnova dated November of 2003 (*date indicated by Serbia*), **R-015**; Lease Agreement between Obnova and the Directorate for Construction and Development of the Danube river bank dated 29 September 1959 (*date indicated by Serbia*), **R-007**; Agreement on Provision and Use of Port and Warehousing Services from 3 February 2000 (*date indicated by Serbia*), **R-014**; Agreement on Provision and Use of Port and Warehousing Services from 2003 (*date indicated by Serbia*), **RJ-011**; Agreement on Provision and Use of Port and Warehousing Services from 16 March 2006 (*date indicated by Serbia*), **R-017**; Živković Milošević Second ER, ¶ 160.

260 Živković Milošević Second ER, ¶ 160.

261 Memorial, ¶ 43.

over the land.[262] As explained above, Serbian authorities also understood that Obnova had the right of use over this land.

202. The existence of good faith is presumed under Serbian law.[263] Given that no circumstances existed that would cast into question Obnova's good faith, this presumption stands.

203. Obnova also satisfied the second condition for acquisition of the right of use through acquisitive prescription—*i.e.* it had been using the land for more than 20 years. As a result, Obnova acquired the right of use at latest in 1988.[264]

204. To be clear, this conclusion would not change even if the Tribunal concluded that the agreements submitted by Serbia concluded between 2000 and 2006 related to Obnova's land. This is because potential subsequent knowledge of Obnova that it did not have the right of use is irrelevant. As explained by Messrs. Živković and Milošević, this is a consequence of the fact that good faith possession during the period of acquisitive prescription leads to acquisition *ex lege* and the acquirer's subsequent knowledge that it was not the right-bearer during the prescription period, does not change the fact that it acquired the right.[265]

205. Serbia's argument that the "*fact that the lease agreements envisaged that Obnova was actually prohibited from constructing the Objects without the lessor's consent and obliged Obnova to demolish them makes the Claimants' argument on acquisitive prescription even more misplaced*"[266] is equally incorrect. To support this argument, Serbia relies on the same agreements through which Obnova allegedly leased the land at Dunavska 17-19 and 23 and, in addition, on the 1953 Lease Agreement. As explained above, the agreements submitted by Serbia do not apply to Obnova's premises at all. As such, they are wholly irrelevant for assessment of Obnova's right to the land at Dunavska 23.

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262 Živković Milošević Second ER, ¶ 162.

263 Živković Milošević First ER, ¶ 206.

264 Živković Milošević Second ER, ¶ 164.

265 Živković Milošević Second ER, ¶ 164.

266 Counter-Memorial, ¶ 149.

206. As for the 1953 Agreement, it is undisputed that an obligation to demolish the buildings—*at the request of the People's Committee of the City of Belgrade*—indeed existed. However, as explained above, this agreement was terminated in November 1961 (at the latest) and the obligation to potentially demolish the buildings ceased to apply at that time.

c. Obnova had the right of use, and later ownership, over the buildings at Dunavska 23

207. While Serbia does not seem to dispute the existence of buildings at Dunavska 23, as described in Claimants' Memorial, it argues that Claimants did not sufficiently prove that Obnova constructed the buildings.[267] Serbia's argument, once again, ignores contemporaneous evidence.

208. Serbia's argument that Obnova "*had not established its right of use*" over its buildings at Dunavska 23 because it did not refer to any documents related to these buildings in the privatization program, has no merit.[268] It is undisputed that Obnova's buildings at Dunavska 23 did not have building permits. This was common in Yugoslavia at the time and, to this day, there are millions of buildings without building permits in Serbia.[269]

209. However, the fact that Obnova did not have building permits for its buildings does not mean that it did not have the right of use over them. The entity that built a building acquired the right of use automatically upon its construction—regardless of whether the building had all necessary permits or not.[270]

210. Furthermore, as explained above, Serbia itself recognized that Obnova had rights to buildings at Dunavska 23. As explained above, exhibit R-043 contains a sketch that expressly states that Obnova is the owner of buildings at Dunavska 23.[271]

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267 Counter-Memorial, ¶ 66-68.

268 Counter-Memorial, ¶ 124.

269 Ministry of Construction, Transport and Infrastructure, *Database of illegally constructed buildings*, https://www.mgsi.gov.rs/cir/dokumenti/baza-nezakonito-izgradjenih-objekata, **C-586**.

270 Živković Milošević Second ER, ¶ 73.

271 To be clear, R-043 also confirms that Obnova owned the buildings at Dunavska 17-19. Specifically, the map on page 5 of exhibit R-043, which according to Serbia represents "*Sketch 49/2005, upon request 952-02-6-74/2004*", expressly states that Obnova was the owner of buildings at Dunavska 17-19. *See*

211. Finally, Serbia's argument that with respect to the buildings that are not inscribed in the Cadaster, Claimants "*do not provide any information that would facilitate their precise identification, such as their surface area, construction year or designated purpose*" is simply untrue.[272] Claimants identified these buildings in their Memorial.[273] Prof. Arizanović further expands on these buildings in his Expert Report, attached to this Reply.

Notice of the Cadaster dated 31 July 2023, p. 5 (pdf), **R-043**; Letter from Geodetic Authority of Serbia to Obnova, 18 February 2021, p. 4 (pdf), **C-329**.

272 Counter-Memorial, ¶ 68.

273 Annex A to the Memorial, ¶¶ 408-411.

III. SERBIA'S CONDUCT LEADING TO THE EXPROPRIATION OF OBNOVA'S RIGHTS

A. In 1948, Obnova was founded and allocated land at Dunavska 17-19

212. In their Memorial, Claimants explained that Obnova was founded in 1948, as a so-called state economic enterprise with the tasks to collect and process scrap metals in Belgrade, the capital city of the then Yugoslavia.[274] To carry out this activity, Obnova was allocated a large land plot located at Dunavska street, numbers 17-19, in the city center of Belgrade, near the Danube river. The central location of the land plot is shown on the following photomap:[275]

213. As explained above, after Obnova was allocated the land at Dunavska 17-19, it constructed 15 buildings at Dunavska 17-19. Upon the construction of these buildings, Obnova acquired the right of use (as an emanation of social ownership) over them. At the same time, Obnova acquired the right of use over the land at Dunavska 17-19.

B. In the 1960s, Serbia allocated to Obnova land at Dunavska 23

214. Obnova has also been using buildings and land located at Dunavska 23, approximately 50 meters down the street from Dunavska 17-19. As explained above, Obnova acquired

274 Memorial, ¶ 31.

275 Google Earth images (with annotation), **C-308**.

the right of use (as an emanation of social ownership) over this land in the 1980s and subsequently constructed nine buildings on this land.

C. Issues with incorrect registration of rights to real estate and missing building and occupancy permits are common in Serbia

1. Unreliability of public registers

a. Public entities have largely ignored registration of rights in the public registers

215. As Claimants explained in their Memorial, the requirements for the registration of rights to real estate were largely ignored in communist Yugoslavia after the Second World War.[276] Owners often did not register their rights even when registration was supposed to be constitutive of their ownership. In fact, buyers were discouraged from registering their rights by exorbitant taxes that the state imposed on sale of real estate (which could reach as much as 80% of the value of the purchased real estate).[277] As a result, public registers of real estate quickly became unreliable and outdated.[278]

216. The widespread issues with the unreliability of public registers and the resulting confusion with respect to information registered therein can be demonstrated also in several examples related to this arbitration.

217. For example, as Claimants explained in their Memorial, on 7 December 2003, the Cadaster prepared a decision based on which the City was to be registered as the owner of most of Obnova's buildings at Dunavska 17-19 and certain of Obnova's buildings at Dunavska 23.[279] Serbia does not dispute that this document exists, nor does it dispute its contents. However, it argues that the decision "*was only a draft*" and "*should be simply disregarded*".[280] Yet, Serbia does not explain why and on what basis this draft was prepared.

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276 Živković Milošević First ER, ¶¶ 100-105; B. Blagojević, *Preface,* in Đ. Krstić, *Property Right Records,* Institute of Comparative Law, Belgrade 1972, IV-V, **C-132**.

277 Živković Milošević First ER, ¶ 113.

278 Živković Milošević First ER, ¶¶ 101-102.

279 Memorial, ¶ 70.

280 Counter-Memorial, ¶ 80.

218. This "draft"—as Serbia calls it—clearly evidences the confusion existing at the Cadaster. Indeed, it seems that the Cadaster was preparing decisions without any legal basis whatsoever.

219. In addition, this "draft" was produced to Claimants by the City based on their request for information about the basis for the inscription in 2003 of the City as the user of Obnova's premises.[281] If the document indeed was only a draft—as Serbia claims in this arbitration—it is difficult to see how this draft of a Cadaster decision came into the possession of the City and why the City produced it to Obnova in response to its request.

220. Another example of the unreliability of the public registers is again highlighted by Serbia itself in its Memorial. Serbia claims that in 1966, Luka Beograd "*was inscribed as the holder of the right of use*" over land plot No. 47 at Dunavska 17-19.[282] However, Serbia then states that "*the inscription of Luka Beograd was left out*" when the land book were restored in 1972-1973 and "*no entity was inscribed as the holder of the right of use over the land*" until 2003.[283] Importantly, according to Serbia, this happened even though "*no one disputed Luka Beograd's right of use over the land on the cadastral parcel no. 47 […]*."[284]

221. However, in 2003, the Cadaster refused to register Luka Beograd and, instead, registered the City as the user of the same land.[285] Serbia does not explain why the Cadaster registered the City if, as noted above, it is Serbia's position in this arbitration that "*no one disputed Luka Beograd's right of use over the land on the cadastral parcel no. 47 […]*."[286]

222. More importantly, the fact that the Cadaster refused to register Luka Beograd shows that the Cadaster believed that Luka Beograd did not have the right of use over land plot No. 47. At the same time, the Cadaster registered the City based on the City's own request—

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281 Request for access to information of public importance, 17 August 2022, **C-580**; Response of the Secretariat of Property and Legal Affairs of the City of Belgrade, 2 September 2022, **C-581**.

282 Counter-Memorial, ¶ 75.

283 Counter-Memorial, ¶ 75.

284 Counter-Memorial, fn. 113.

285 Counter-Memorial, ¶ 75; Minutes from the oral discussion between Republic Geodetic Authority and Luka Beograd, 25 June 2003, **C-614**.

286 Counter-Memorial, fn. 113.

thus, showing, that the City also did not believe that Luka Beograd had the right of use over land plot No. 47. These facts further confirm that the agreements between Luka Beograd and Obnova submitted by Serbia do *not* relate to Obnova's land at Dunavska 17-19, because neither the City, nor Serbia's own Cadaster, believed that Luka Beograd had the right of use over that land.[287]

223. Given the above, Serbia's repeated reliance on historical inscriptions in various public registers misses the point.[288] Serbia is—without any doubt—aware that the reliability of any such inscriptions is very questionable, to put it mildly.

b. Serbia ignored Obnova's attempt to register its rights in 2003

224. In their Memorial, Claimants explained that, consistent with the then prevailing practice in communist Yugoslavia, Obnova's right of use over its premises was never registered in public registers.[289] While Serbia does not dispute that the lack of registration in public registers was widespread during socialist times, it argues that Claimants allegedly failed "*to provide any proof*" that this was the reason for which Obnova did not register its rights.[290] This argument is a red herring.

225. Obnova failed to register its rights in the 1950s, during which time it was a publicly-owned company controlled by Serbia. It is not for Claimants to explain why, in that period, Serbia failed to take the steps necessary to properly register Obnova's rights.

226. Serbia also claims that when Obnova wanted to, it did register its rights. To support this allegation, Serbia refers to a land book excerpt that—according to Serbia—shows that Obnova registered a right of use over certain land in Valjevo.[291] Serbia's assertion is, at best, misleading.

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287 Cadaster decision No. 952-02-11501/11 dated 12 September 2011, **R-054**; Cadaster decision No. 952-02-5-233-18443/2019 dated 10 January 2020, **R-055**.

288 Counter-Memorial, Sections B. II. 1), B. III., B. IV. 2) c).

289 Memorial, ¶¶ 64-65.

290 Counter-Memorial, ¶ 81.

291 Counter-Memorial, ¶ 82.

227. To begin with, the registration in Valjevo was done by the basic organization of associated labor "Dunav" – Belgrade, Dunavska St. 17-19 ("**OOUR Dunav**").[292] Serbia does not explain how a registration of completely unrelated land, in a different city, done by OOUR Dunav, is relevant for the assessment of Obnova's conduct in this case.

228. Serbia's argument that Obnova "*refrained from taking part in the public inspection procedure during the establishment of the Cadastre for the municipality of Stari Grad where the Dunavska Plots are located*" is equally misplaced. According to Serbia, the fact that Obnova allegedly "*refrained from taking part*" in these proceedings shows that "*Obnova was probably aware at the time that it did not have any rights whose registration it could seek.*"[293]

229. Serbia's argument is not serious. As Claimants explained already in their Memorial, Obnova started to take steps to put its records in order in March 2003—*i.e.* months before the registration of Serbia and the City in the Cadaster. Specifically:

a. in March 2003, Obnova, still a socially-owned enterprise at that time, filed with the Land Cadaster to formally register its right of use over the buildings at Dunavska 17-19 and Dunavska 23. However, the Cadaster failed to act and simply ignored the request; and[294]

b. in November 2003, only a few months after its privatization, Obnova filed with the City a request to commence the so-called legalization proceedings under Article 160 of the then applicable Law on Planning and Construction, which would have led to the issuance of all missing permits. Obnova, however, again did not receive any response from the City.[295]

230. If Obnova believed that it did not have any rights to its premises—as Serbia seems to suggest now—it is hard to see why Obnova was making these requests.

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292 Land Book Excerpt for Valjevo land, **R-066**; List of Obnova's corporate divisions of labor, 10 January 2024, **C-582**; List of Obnova's deleted corporate divisions of labor, 10 January 2024, **C-583**; Obnova's registration of a corporate division of labor, 10 January 2024, **C-584**; Separation of "Dunav" from Obnova, 10 January 2024, **C-585**.

293 Counter-Memorial, ¶ 82.

294 Memorial, ¶ 67.

295 Memorial, ¶¶ 68-69.

231. Serbia seems to be arguing that Obnova's requests were unsuccessful because Obnova did not submit all documents required to prove the existence of its rights.[296] This is clearly a made-for-arbitration argument. Serbia is unable to point to a single decision reaching such conclusion. In fact, Serbia has not submitted *any* decision on these requests at all.[297]

232. Serbia not only failed to register Obnova as the user of its premises—as it was supposed to—it registered itself instead. As Claimants explained in their Memorial, on 22 November 2003, the Cadaster registered—in error—the City as the user of most of Obnova's buildings at Dunavska 17-19 and certain of Obnova's buildings at Dunavska 23.[298] The City had not been using Obnova's land since at least the 1940s and it had never had anything to do with Obnova's buildings.[299]

233. Tellingly, while Serbia expressly states in its Counter-Memorial that "*[i]nscriptions of the property rights over the real estate are conducted based on a private or public document, which has to be substantially and formally suitable for inscription*", it does not explain what documents the City provided to be registered in the Cadaster.[300] In Serbia's own words, in such a case, alleged rights of the City "*ha[d] to be determined by the court*."[301] That, however, never happened.

234. Serbia does not dispute any of these facts. Serbia's only response is that Obnova "*failed to address the Cadastre during its formation, i.e. in the public inspection procedure, and to dispute the inscription of the City of Belgrade.*" According to Serbia, this means that the erroneous registration of Serbia as the owner and the City as a user of Obnova's buildings "*did not infringe upon any rights of Obnova.*"[302]

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296 Counter-Memorial, ¶ 86.

297 Report of the Cadaster dated 9 April 2003, **R-067**; Report of the Cadaster dated 28 March 2003, **R-068**.

298 Memorial, ¶ 70.

299 Memorial, ¶ 71.

300 It merely refers to the 1975 Agreement that, as explained above, did not relate to Obnova's buildings. *See* Counter-Memorial, ¶ 74.

301 Counter-Memorial, ¶ 74.

302 Counter-Memorial, ¶ 78.

235. Claimants agree with this conclusion, albeit for a different reason. As Claimants explained in their Memorial,[303] the erroneous registration of the City did not lead to the City's acquisition of any rights to Obnova's buildings. Claimants also explained that the City did not claim otherwise at the time.[304]

236. Serbia certainly cannot rely on the incorrect inscription of the City to oppose Claimants' rights in this arbitration.

2. Millions of buildings in Serbia have been built without required permits

a. Millions of buildings in Serbia, built mainly during the socialist times, lack required permits

237. According to the Serbian Ministry of Construction, Transport and Infrastructure, as of 8 January 2024, there were still 2,050,614 buildings lacking required permits across Serbia. This includes 266,655 such buildings in the City alone.[305]

238. To put these numbers into a perspective—Serbia has approximately 7 million citizens, with approximately 1.2 million citizens living in the City.[306] This shows how widespread buildings without necessary permits are in Serbia.

b. Serbia ignored Obnova's efforts to legalize its buildings built without all necessary permits

239. As Claimants explained in their Memorial, the issue of buildings without necessary permits relates to Obnova as well—with several of Obnova's buildings at Dunavska 17-19 and 23 lacking at least some required permits.[307]

240. Claimants also explained that Obnova tried to remedy this issue. Specifically, in November 2003, Obnova filed with the City a request to commence so-called legalization proceedings under Article 160 of the then applicable Law on Planning and

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303 Memorial, ¶ 71. Claimants' legal experts, Messrs. Živković and Milošević also confirmed this fact. Živković Milošević First ER, ¶ 154; Živković Milošević Second ER, ¶ 41.

304 Memorial, ¶ 71.

305 Živković Milošević First ER, ¶ 79. Ministry of Construction, Transport and Infrastructure, *List of illegally built facilities,* https://www.mgsi.gov.rs/cir/dokumenti/baza-nezakonito-izgradjenih-objekata (last accessed 8 January 2024), **C-586**.

306 Worldometer, *Serbia Population (2024)*, https://www.worldometers.info/world-population/serbia-population (last accessed on 21 February 2024), **C-587**.

307 Memorial, ¶ 66.

Construction, which would have led to the issuance of all missing permits. Obnova, however, again did not receive any response from the City.[308]

241. Serbia disputes this and claims that Obnova's requests were, in fact, rejected.[309] Serbia, however, does not submit an actual decision on Obnova's request, much less show that such a decision was delivered to Obnova.

242. Instead, Serbia relies on minutes from a meeting of the Committee for Legalization held on 26 November 2004.[310] However, these minutes do not state anything besides the fact that Obnova's request was "not included" in "*building legalization procedure*":[311]

Ser. no.	CASE NO.	INVESTOR	ADDRESS	DECISION
1678.	351-2104/03	Dragašević Jelena	Dobračina 10	Included
1679.	351-1743/03	Grujić Silvana	Kralja Petra 74	Included
1680	351-1045/03	Novaković MArinka	Carigradska 22	Included
1681	351-1561/03	Jovanović Milorad	Majke Jecrosime 18	Included
1682	351-1336/03	Pejić Dušanka	Kolarčeva 3	Not included
1683	351-1297/03	Milinković Radojko	T. Košćuška 18	Included
1684	351-2511/03	Elektroistok	Jelene Ćetković 2	Not included
1685	351-2736/03	Beobanka ad in bankrupzcy and Elektroprivreda Srbije	Carice Milice 2	Not included
1686	351-1889/03	Obnova DP	Dunavska 23	Not included
1687	351-253/03	Damjanović Gordana	Nušićeva 4	Not included
1688	351-1193/03	Ilić Ivana, Aleksandra, Slađana	S. Miletića 7	Not included
1689	351-1891/03	Obnova DP	Dunavska 23	Not included

[…]

308 Memorial, ¶¶ 68-69.

309 Counter-Memorial, ¶ 220.

310 Counter-Memorial, ¶ 220.

311 Minutes of the meeting of the Legalization Committee dated 26 November 2004, p. 1, **R-110**.

Having reviewed forty nine applications, the Committee acknowledged that twenty four applications may be included in the building legalization procedure, while twenty five may not be included.

1. MILOŠ DAMJANOVIĆ
(*Signature illegible*)

2. LJILJANA BELOŠ
(*Signature illegible*)

3. MIRA LUKIĆ
(*Signature illegible*)

4. ZORAN ĐORĐEVIĆ
(*Signature illegible*)

5. PREDRAG RAJČEVIĆ
(*Signature illegible*)

6. ALEKSANDAR NOVAKOVIĆ
(*Signature illegible*)

7. VERICA BULAJIĆ ČVOROVIĆ
(*Signature illegible*)

RECORDER
Tanja Vasiljević
(*Signature illegible*)

243. The minutes, however, do not explain exactly what procedure they reference nor *why* some of the requests—including those submitted by Obnova—were not included. Indeed, Serbia confirms that there are no documents to show "*what was the exact reasoning of the Committee for Legalization in denying the request.*"[312]

244. Furthermore, these minutes do not change the fact that Obnova did not receive any decision addressing its request.

D. On 12 September 2003, Serbia privatized Obnova

1. Obnova's privatization

245. In their Memorial, Claimants explained that, in the early 2000s, Serbia launched a large program of privatization of socially and state-owned enterprises. The purpose of the privatization program was to sell socially-owned and state-owned capital and to convert

312 Counter-Memorial, ¶ 220.

socially-owned and state-owned property used by the privatized enterprises into property in their private ownership.[313] Serbia does not appear to dispute these facts.

246. Claimants further explained that, at the beginning of 2003, Serbia decided to privatize Obnova and that it did so through a public auction.[314] Claimants further explained that the basic document in any privatization through a public auction was the so-called "privatization program". This document contained information about the subject of privatization and its assets and liabilities.[315]

247. As also explained by Claimants in their Memorial, part of this privatization program was a listing of Obnova's buildings located in the Belgrade city center, including Dunavska 17-19 and Dunavska 23 street.[316] These buildings included an administrative building, storehouses, warehouses, offices and other buildings for commercial use.[317] Furthermore, Obnova was identified as the user of all buildings listed in the privatization program–*i.e.* the privatization program recognized Obnova's right of use over these buildings.[318]

248. Furthermore, the privatization program confirmed that the buildings at Dunavska 17-19 were constructed starting in the 1950s[319] and, thus, some buildings had existed for more than 70 years. It also confirmed that Obnova started to use the land at Dunavska 23 in the 1960s, at the latest in 1968, when it constructed a metal gate at the location[320] and then subsequently constructed certain buildings at the premises between 1988-1992.[321]

249. Overall, the privatization program reflected the understanding of the status of Obnova's assets that both Obnova and Serbia clearly had during the time period preceding

313 Memorial, ¶ 47.

314 Memorial, ¶ 48.

315 Memorial, ¶ 48.

316 Memorial, ¶ 50.

317 Obnova Privatization Program, July 2003, pp. 4-5 (pdf), **C-015**.

318 Obnova Privatization Program, July 2003, p. 4 (pdf), **C-015**.

319 Obnova Privatization Program, July 2003, p. 4 (pdf), **C-015**.

320 Memorial, ¶ 43.

321 Memorial, ¶ 44.

Obnova's privatization—*i.e.* that Obnova built the buildings at Dunavska 17-19 and 23 and that it had the right of use over the land at Dunavska 17-19 and 23.

250. In its Counter-Memorial, Serbia cherry-picks certain parts of the privatization program and misinterprets their contents. For example, Serbia argues that the privatization program "*expressly stated that Obnova did not own any land or have the right of use over any construction land.*"[322] However, pages 11-12 of the privatization program, to which Serbia refers to in support of this allegation, simply do not state any such thing. On the contrary, page 11 is a list of appendices and page 12 is a report from the Cadaster from April 2003, which does not conclude anything about Obnova's rights.

251. Furthermore, Obnova was legally precluded from owning any construction land under the then legislation. What mattered was Obnova's right of use over the buildings, which was clearly stated in the privatization program.

252. Finally, Serbia's allegations that the documents submitted with the privatization program showed that Obnova "*did not have appropriate documentation for inscription of its alleged right of use in the Cadastre*" or that the privatization program is "*not an appropriate or suitable document for proving the construction of the objects*" are simply untrue.[323] Serbian law does not limit the types of evidence that can be used to demonstrate ownership.[324] The documents submitted with the privatization program, such as building or occupancy permits, as well as the privatization program itself constitute valid and compelling evidence.

253. Indeed, the privatization program is a document that was prepared by Obnova itself—*at the time when it was still a socially-owned enterprise controlled by Serbia*—and it was reviewed and approved by the Privatization Agency, a Serbian authority. As confirmed by Messrs. Živković and Milošević, the Privatization Agency had an

322 Counter-Memorial, ¶ 110.

323 Counter-Memorial, ¶¶ 66, 120.

324 N. Bodiroga, *Hearing of the parties in the civil procedure*, The Gazette of the Bar Association of Vojvodina, 2007, volume 79, No. 6, pages. 180-193, **C-615**; Law on general administrative proceedings ("Official Gazette of the SRY", no. 33/1997 and 31/2001), Art. 10, **C-616**.

obligation to act in good faith when reviewing the privatization program and to not approve anything that it knew to be false.[325]

* * *

254. Serbia's formalistic and irrelevant distinction between various types of evidence is simply an attempt to distract the Tribunal's attention from the fact that—at the time of its privatization—Obnova had been using its premises without interruption for over 50 years. Importantly, it had been doing so without any objections from any Serbian authorities or any other entities. This fact, on its own, clearly demonstrates that Obnova had the relevant rights to its premises.

255. As Claimants demonstrate in the subsequent sections, this *status quo* continued also after Obnova's privatization. In fact, it is undisputed that Obnova is using the premises at Dunavska 17-19 and 23 *right now*—even though the extent of how these premises can be used was drastically limited after the adoption of the 2013 DRP.

2. Impact of Obnova's privatization on its rights to buildings and land at Dunavska 17-19 and 23

256. Upon Obnova's privatization:

a. it became a joint stock company and 70% of its shares were transferred to the buyer selected through the public auction; and[326]

b. the socially-owned property over which Obnova had the right of use was transferred, *ex lege*, to Obnova's private ownership. As a result, Obnova's right of use over the buildings at Dunavska 17-19 and Dunavska 23, which were all listed in the privatization documents, automatically converted into Obnova's full private ownership of the buildings.[327]

257. Furthermore, as explained above, Obnova continued to have the right of use over the land at Dunavska 17-19 and 23.

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325 Živković Milošević Second ER, ¶¶ 25, 183.

326 Memorial, ¶ 49.

327 Memorial, ¶ 50.

E. On 22 September 2003, the City adopted the 2003 RP—which designated Obnova's premises for commercial and residential development

258. In their Memorial, Claimants provided a detailed description of the "*Master Plan for the City of Belgrade 2021"* that the City adopted on 22 September 2003 ("**2003 RP**").[328] Specifically, Claimants explained that:

a. the 2003 RP designated all of the land at Obnova's premises at Dunavska Street as "*commercial zones and city centers*";[329]

b. the 2003 RP made it clear that "*commercial zones and city centers*" should contain commercial and residential buildings, accompanied by various public services and public areas (such as squares and parks);[330]

c. the 2003 RP made it clear that premises generating "*air pollution or noise*" and "*a large volume of traffic*" were being moved away from the city center;[331]

d. within the category of "*commercial zones and city centers*", Obnova's premises were further defined as "*special commercial complexes*". The 2003 RP defined special commercial complexes as *"multifunctional complexes […] with a predominantly commercial purpose.*" The 2003 RP mentioned, among others, business parks and shopping centers as examples of special commercial complexes;[332]

e. the 2003 RP confirmed that it was necessary to respect "*the need of small investors to build practically in every point of the City fabric*" and stressed the need for flexibility when allowing new investments; and[333]

f. the 2003 RP designated a big publicly-owned land plot across Obnova's premises at Dunavska 17-19 for "*traffic and roads*". This land was and still is used by JKP Gradsko saobraćajno preduzeće "Beograd" ("**JKP**"), the City's

328 Memorial, ¶¶ 53-61.

329 Memorial, ¶¶ 53-57.

330 Memorial, ¶ 56.

331 Memorial, ¶ 56.

332 Memorial, ¶ 57.

333 Memorial, ¶ 61.

transportation company providing public transportation services in Belgrade, as a bus depot.[334]

259. Serbia does not dispute the above description of the 2003 RP. As a result, Claimants simply refer to the Memorial for more details.[335]

F. In December 2005, Mr. Obradović acquired 70% shareholding in Obnova

260. It is undisputed that on 22 December 2005, Mr. Djura Obradović, a Canadian-Serbian businessman, acquired the privatized shares in Obnova through assignment of the privatization agreement. Mr. Obradović thus became a 70% nominal shareholder in Obnova.[336]

261. Claimants also explained that Mr. Obradović acted according to directions from Mr. William A. Rand, a Canadian businessman, who had had a business relationship with Mr. Obradović in Serbia going back to the late 1990s. Claimants explained that, as a part of this relationship, Messrs. Rand and Obradović agreed that Mr. Obradović would acquire certain Serbian assets—including Obnova's shares—as a nominal owner. The beneficial owner of these assets was Mr. Rand—usually through various corporate entities he owned and/or controlled.[337]

262. Furthermore, Claimants explained that Mr. Rand directed Mr. Obradović to acquire Obnova's shares primarily because of Obnova's ownership of the buildings and the right of use over the land at Dunavska 17-19 and 23. Due to their central location and the recently adopted 2003 RP, Obnova's premises represented a very interesting real estate investment with a potential for a significant increase in value.[338]

263. Obnova would be able to maximize that value if it became the owner of the land. Mr. Rand anticipated that Serbia's economic transformation would unavoidably require a legislative change allowing the privatized companies to acquire ownership over the

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334 Memorial, ¶¶ 58-59.

335 Memorial, ¶¶ 53-61.

336 Memorial, ¶ 73.

337 Memorial, ¶ 74; Rand WS, ¶ 30.

338 Memorial, ¶ 75; Rand WS, ¶ 19.

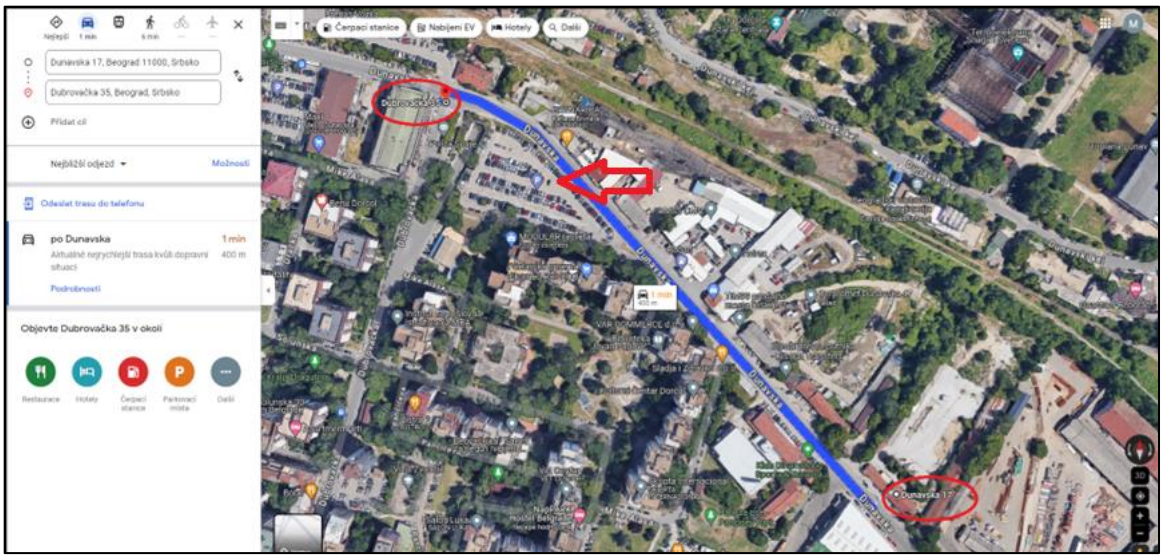
then state-owned land to which they had the right of use. He decided to wait until such a change was implemented.[339]

264. Once again, none of the above facts seem to be disputed by Serbia.

G. In March 2008, the City assured Obnova its rights would be taken into consideration during the preparation of the 2013 DRP

265. In their Memorial, Claimants explained that on 6 March 2006, the City adopted the Decision on the drafting of a Detailed Regulation Plan for the area between Francuska, Cara Dušana and Tadeuša Košćuška streets and the existing railway in Dorćol, Municipality of Stari Grad ("**2006 Decision**").[340] Claimants also explained that, as a lower level plan, the detailed regulation was supposed to be in line with the existing 2003 RP, which, as explained above, envisaged residential and commercial development at Obnova's premises.[341]

266. Despite these facts, Obnova heard that the City may have been considering placing a bus loop on Obnova's premises. However, according to news reports from 2005, the bus loop should have been located at the corner of Dubrovačka and Dunavska street, *i.e.* approximately 300 meters from Obnova's premises at Dunavska 17-19:[342]



339 Memorial, ¶ 75; Rand WS, ¶ 21.

340 Memorial, ¶ 76.

341 Memorial, ¶¶ 53-57, 77.

342 eKapija, New trolleybus loop in Dunavska Street, 3 March 2005, **C-588**.

267. In January 2008, Serbian media reported that the bus loop should be moved to the intersection of Dušanova and Dunavska streets (which does not cover Obnova's premises), with the exact place not yet being specified.[343]

268. As Claimants explained in their Memorial,[344] despite the inconsistency of the information about the potential location of the bus loop, Obnova immediately reached out to the City and asked it to "*relocate the tram turnaround and to adapt the land to the development land in order for the business facilities to be built.*"[345]

269. While Serbia does not dispute that the letter was sent and that it included the above sentence, it claims that Obnova also "*admitted to being a lessee*" in this letter.[346] That is not the case. Obnova used the word "*korisnici*", which, as explained above, means users in the sense of having the right of use.[347] The Serbian word for a lessee would be "*zakupac*". Obnova therefore clearly stated it had the right of use over the land at Dunavska 17-19 and 23.

270. In addition, Obnova also expressly stated that it "*constructed business facilities*" on land plots Nos. 47 and 39/1, *i.e.* both at Dunavska 17-19 and 23.[348] As explained above, the fact that Obnova constructed its buildings means that it owned the buildings and also had the right of use over the land.

271. In response, the City (specifically its Secretariat for Urban Planning and Construction) confirmed that Obnova's premises were "*located in areas intended for commercial activities and urban centers.*"[349] The City also instructed the Urban Planning Institute to consider this fact, as well as Obnova's letter, when preparing the detailed regulation plan.[350]

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343 Politics, Loop from the Studetski trg is moving to Dorcol, 22 January 2008, **C-589**.

344 Memorial, ¶ 78.

345 Letter from Obnova to City of Belgrade, 27 March 2008, **C-314**.

346 Counter-Memorial, ¶ 178.

347 Letter from Obnova to City of Belgrade, 27 March 2008, p. 2 (pdf), **C-314**.

348 Letter from Obnova to City of Belgrade, 27 March 2008, **C-314**.

349 Letter from City of Belgrade to Secretariat for Urban Planning and Construction, 23 April 2008, **C-315**.

350 Memorial, ¶ 79.

272. Serbia does not dispute that the letter was sent or its contents. However, it claims that Claimants misrepresent the contents of the letter when they state that it included instructions from the City to the Urban Planning Institute.[351] Enough to say, this is not true.

273. The text of the letter speaks for itself and clearly shows that the City instructed the Urban Planning Institute to consider Obnova's objections in preparation of a detailed regulation plan.[352] Importantly, the Urban Planning Institute was *obliged to follow* the City's instructions.

274. The City, specifically the above-mentioned Secretariat for Urban Planning and Construction, is the competent authority for spatial and urban planning.[353] In this case, the Secretariat delegated the actual drafting of the detailed regulation plan to the Urban Planning Institute.[354] In turn, the Urban Planning Institute was obliged to follow any instructions from the Secretariat related to the draft. The Secretariat was routinely sending other instructions related to the preparation of the regulation plan to the Urban Planning Institute.[355]

H. In 2009, Serbia adopted the 2009 Law on Planning and Construction—which introduced the possibility to convert the right of use into ownership

275. As Claimants explained in their Memorial, Serbia's decision to keep construction land used by privatized companies in state ownership created significant issues. This was because privatized companies often found themselves in a situation where they owned certain buildings, but they did not own the land on which those buildings were built. This situation was economically unsustainable in the long-term. Thus, Serbia subsequently enacted a mechanism, called the conversion process, which allowed

351 Counter-Memorial, ¶ 179.

352 Letter from City of Belgrade to Secretariat for Urban Planning and Construction, 23 April 2008, **C-315**.

353 Decision on the City Administration of the City of Belgrade ("Official gazette of Belgrade", No. 8/2013 – refined text, 9/2013 – correction and 61/2013), Art. 58, **C-617**.

354 Decision on the drafting of a Detailed Regulation Plan for the area between: Francuska, Cara Dušana and Tadeuša Košćuška streets and the existing railway at Dorcól, municipality of Stari Grad, 6 March 2006, **C-313**.

355 Letter from Secretariat for Planning and Construction no. 350.1-35/2007, 22 April 2008, **C-590**.

privatized companies to convert their right of use over construction land into ownership.[356]

276. Specifically, on 11 September 2009, Serbia adopted a new Law on Planning and Construction ("**2009 Law on Planning and Construction**"). As Claimants explained in their Memorial, the 2009 Law on Planning and Construction introduced, among other things, the ability to convert the right of use over state-owned construction land—which right Obnova had for the land at Dunavska 17-19 and Dunavska 23—into ownership.[357]

I. Between 2008 and 2010, Obnova continued its efforts to obtain the missing permits for its buildings—but was again ignored by Serbia

277. In their Memorial, Claimants explained that Obnova continued its efforts to obtain the missing permits for its buildings also after its privatization. For example, on 15 December 2008, Obnova submitted a request for reopening of the legalization proceedings, which it started in 2003.[358]

278. However, this request was ignored by Serbia and Obnova was told to initiate new proceedings instead, as the ones initiated in 2003 were allegedly discontinued—even though Obnova has never received any decision confirming such discontinuance. Obnova followed the instructions and submitted a new request for the legalization of its buildings. However, it had to wait for another eight years for a decision.[359]

279. In addition, Serbia misinterprets Obnova's requests in its Counter-Memorial. For example, in paragraph 231 of the Counter-Memorial, Serbia makes certain allegations regarding legalization of objects at Dunavska 23 but refers solely to the request for legalization related to Dunavska 17-19.[360]

280. Serbia also incorrectly claims that when the Secretariat for Legalization invited Obnova to provide proof of its rights over the land and buildings, Obnova only provided "*the certificate on existence of the court proceeding related to the objects and land at*

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356 Memorial, ¶ 52.

357 Memorial, ¶¶ 82-86.

358 Memorial, ¶ 87.

359 Memorial, ¶¶ 88-89.

360 Counter-Memorial, ¶ 231; Request for legalization of objects at Dunavska 17-19 dated 26 January 2010, **R-111**.

Dunavska 17-19."[361] This is simply untrue. The document cited by Serbia actually shows that Obnova submitted a number of additional documents as well:

> In accordance with your request for submission of additional documentation, within the legal timeframe, in the case XXXI-11, No: 351.21-19756/2010, we are hereby submitting the following documentation:
>
> 1. land survey
> 2. copy of the plan
> 3. description of the fixed assets within the OBNOVA objects at Dunavska 23, which are the subject of this pre privatization request.
> 4. At the time of privatization, including on 23 April, 2008, the location in question was designated for commercial activities and city centers which is why OBNOVA was of interest for privatization, and in order to continue working on the location in question – evidence note from the Secretariat for Urbanism, IX -03, No: 350.10-101/08.
> 5. Certificate of the ongoing legal dispute before the Higher Court in Belgrade case number P-1724/16, concerning the determination of ownership rights over the real estate in question, which in this case, should be considered a preliminary question for the resolution of property-legal relations.

281. Finally, Serbia mentions objections allegedly filed against Obnova's legalization request by the company Kompresor, which claimed to be a "*user*" of the land on which the buildings subject to the legalization request are built. However, Serbia refers to an incomplete document which does not make it clear what right, if any, Kompresor allegedly had.[362]

J. In April 2012, Cypriot Claimants acquired the Cypriot Obnova Shares

1. Cypriot Claimants' acquisition of Obnova's shares

282. In their Memorial, Claimants explained that in April 2012, acting upon Mr. Rand's instruction, Mr. Obradović contributed the Cypriot Obnova Shares (*i.e.* 14,142 shares in Obnova, representing approximately 70% of Obnova's total share capital) to the capital of Kalemegdan. Claimants also explained that this was a part of a broader restructuring of Serbian companies beneficially owned by the Rand family—the shares

361 Counter-Memorial, ¶ 232.

362 Counter-Memorial, ¶ 232; Objection to Obnova's request for legalization submitted by Kompresor on 20 July 2010, **R-117**.

of Crveni signal a.d., PIK Pešter a.d., Beotrans a.d. and Inex a.d. were also contributed to the capital of Kalemegdan.[363] Serbia does not seem to dispute these facts.

283. The only reason for this restructuring was tax advice provided to Mr. Rand by Thorsteinssons LLP, a leading Canadian tax law firm.[364] Mr. Rand had previously implemented a similar holding structure for another of his Serbian companies—the agricultural company called BD Agro. BD Agro had been, since 2008, beneficially owned by the Cypriot company, Sembi Investment Limited.[365] Sembi was owned by Rand Investments Ltd., a company wholly-owned by Mr. Rand, and The Ahola Family Trust. The beneficiaries of this trust are, and always were, Mr. Rand's three children. The trust was established on 6 March 1995 by the late Mr. Axel Ahola as the settlor, the grandfather of Mr. Rand's wife, Tracey Rand. Mrs. Rand was the only grandchild of Mr. Axel Ahola.[366]

284. In 2012, Mr. Rand involved Coropi in the ownership structure of his Serbian companies to involve his children, who are ultimate beneficial owners of Coropi, so that his Serbian companies would be a legacy investment for them.[367] Mr. Rand is a director of Coropi and controls the company.[368]

285. Both Mr. Obradović and Kalemegdan notified SEC and other Serbian authorities of the transfers of shares in the Serbian companies to Kalemegdan.[369] Neither the SEC, nor

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363 Memorial, ¶ 90.

364 Rand WS, ¶¶ 38, 40, 43; Broshko WS, ¶¶ 13-15, 17.

365 Rand WS, ¶ 41; Broshko WS, ¶ 14.

366 Rand WS, ¶ 33.

367 Rand WS, ¶ 38.

368 Memorial, ¶ 92. *See also* Rand WS, ¶ 38; Broshko WS, ¶ 20.

369 Letter from Mr. Obradovic to the SEC regarding the transfer of shares of Beotrans a.d., 29 May 2012, **C-355**; Letter from Mr. Obradovic to the SEC regarding the transfer of shares of Crveni Signal a.d., 29 May 2012, **C-356**; Letter from Mr. Obradovic to the SEC regarding the transfer of shares of Inex a.d., 29 May 2012, **C-357**; Letter from Mr. Obradovic to the SEC regarding the transfer of shares of Obnova, 29 May 2012, **C-358**; Letter from Mr. Obradovic to the SEC regarding the transfer of shares of PIK Pešter a.d., 29 May 2012, **C-359**; Letter from Kalemegdan to the SEC regarding the transfer of shares of Beotrans a.d,, 23 May 2012, **C-360**; Letter from Kalemegdan to the SEC regarding the transfer of shares of Crveni Signal a.d,, 23 May 2012, **C-361**; Letter from Kalemegdan to the SEC regarding the transfer of shares of Inex a.d,, 23 May 2012, **C-362**; Letter from Kalemegdan to the SEC regarding the transfer of shares of Obnova, 23 May 2012, **C-363**; Letter from Kalemegdan to the SEC regarding the transfer of shares of PIK Pešter a.d., 23 May 2012, **C-364**.

any other Serbian authority, has made any objections or raised any additional requirements related to these transactions.[370]

2. Obnova's rights at the time of Cypriot Claimants' investment

286. In their Memorial, Claimants demonstrated that at the time when Kalemegdan and Coropi became owners of Obnova:

a. Obnova's premises at Dunavska 17-19 and 23 were zoned for residential and commercial development;[371]

b. Obnova was the unregistered owner of its buildings at Dunavska 17-19 and Dunavska 23 and had a right of use over the land it was using at these locations;

c. Obnova had the right to convert its right of use over the land at Dunavska 17-19 and Dunavska 23 into ownership; and

d. Obnova had a right to obtain all permits for its buildings and it had also initiated the respective legalization proceedings.[372]

287. While Serbia does not dispute the fact that the 2003 RP zoned Obnova's premises for residential and commercial development, it claims that "*[o]ne cannot rely on the highest-level plan when choosing the location for possible construction, as the rules for development and rules for construction are set out by the detailed regulation plan.*"[373]

288. What Serbia omits to note is that when Cypriot Claimants invested in Obnova, there was no other plan in place. Cypriot Claimants thus had a full right to rely on the 2003 GRP.

289. The placement of the bus loop was not a known issue at the time. As explained above, various news reports in 2005 were reporting either that the bus loop would be placed on a different location or that the location for the bus loop had not been decided yet.

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370 Broshko WS, ¶ 25.

371 Memorial, ¶ 98.

372 Memorial, ¶ 97.

373 Counter-Memorial, ¶ 164.

Cypriot Claimants had no reason to suspect that Serbia would violate its own 2003 RP and place the bus loop on Obnova's premises.

290. When Obnova approached the City in 2008 with respect to rumors that the bus loop might be placed on its land, the City responded that Obnova's land was intended for "*commercial activities and urban centers*" and that this fact should be taken into consideration when preparing the plan:[374]

PUE "Urban Planning Institute in Belgrade, Serbia

Belgrade 11000
30 Palmotićeva St.

On March 28th 2008, the Secretariat for Urban Planning and Construction was approached by the company "Obnova" JSC from Belgrade, 17-19 Dunavska St., with an initiative for the change of the urban design for cadastral parcels no. 47 and 39/1 in the Cadastral Municipality Stari grad, for the creation of planning possibilities for the construction of commercial objects on the stated parcels.

Upon insight into available documentation, the Secretariat for Urban Planning and Construction notes the following:

- According to the Master Plan for Belgrade 2021 ("Off. Gazette of the City of Belgrade", No.: 27/03, 25/05, 34/07), the subject cadastral parcels are located in areas intended for commercial activities and city centers.
- In accordance with the **Decision on the drafting of a detailed regulation plan for the area between the streets: Francuska, Cara Dušana, Tadeuša Košćuška and the existing railway in Dorćol ("Off. Gazette of the City of Belgrade, no. 03/06)** ("Off. Gazette of the City of Belgrade", no.: 22/01), in the Urban Planning Institute in Belgrade, preparation of the Draft of the plan is currently in motion, in whose reach are the cadastral parcels in question.

Considering the above, attached with the letter, we submit the subject initiative for the purpose of evidencing and considering its justifiability in the course of forming a solution within the aforementioned Draft of the plan.

Respectfully,

DEPUTY SECRETARY
Marjana Strugar B.Arch., signed, sealed

To be delivered to:
- The addressee
- Petitioner of the motion
- Archive

291. As a result, Claimants legitimately expected that the future use of Obnova's premises will be in line with the only existing plan—being the 2003 RP. The 2003 RP zoned Obnova's premises for residential and commercial purposes.

374 Letter from City of Belgrade to Secretariat for Urban Planning and Construction from 24 April 2008, **C-315**.

292. Serbia also argues that Claimants allegedly "*did not perform the required legal due diligence*" before they invested in Obnova.[375] However, Serbia's argument completely ignores the history of Claimants' investment.

293. As explained above, Cypriot Claimants acquired the Cypriot Obnova Shares in 2012—when Mr. Obradović contributed these shares to Kalemegdan's capital. However, Mr. Obradović had been the nominal owner, and the Rand family the beneficial owner, of these shares since 2005. During all that time, Mr. Rand had been regularly informed about the relevant developments related to Obnova.[376]

294. As a result, there was no need for Kalemegdan and Coropi—both being controlled by Mr. Rand and beneficially owned by the Rand family—to conduct any due diligence. Kalemegdan and Coropi shared Mr. Rand's historical knowledge of Obnova and could rely on it.[377]

295. In addition, Serbia does not explain what due diligence Cypriot Claimants supposedly should have undertaken to acquire more information. After the City confirmed, in 2008, that Obnova's land was intended for "*commercial activities and urban centers*" and that this fact should be taken into consideration when preparing the plan, there was no reason for Claimants to inquire into the matter any further. Indeed, Mr. Rand specifically confirms in his witness statement that after the 2008 communication with the City, he "*thought the matter was dead.*"[378]

K. On 20 December 2013, the City adopted the 2013 DRP

1. Contents of the 2013 DRP

296. The contents of the 2013 DRP are undisputed. As Claimants explained in their Memorial, the 2013 DRP designated the majority of Obnova's premises at Dunavska

375 Counter-Memorial, ¶ 164.

376 Rand WS, ¶ 24.

377 Rand WS, ¶¶ 17, 24, 27 and 31.

378 Rand WS, ¶ 53.

17-19 and Dunavska 23 for construction of a bus terminal (bus loop) and its access roads.[379]

297. Claimants also explained that the 2013 DRP was contradictory to the 2003 RP, which, as explained above, envisaged commercial and residential development at Obnova's premises. As a result, the 2013 DRP was adopted in breach of the applicable planning regulation.[380]

298. Serbia disagrees and claims that the 2003 RP stated that commercial and residential development "*was not meant to be the exclusive purpose for that area, but only the predominant purpose.*"[381] Based on this argument, Serbia claims that the 2013 DRP "*was fully in line with the 2003 General Plan*" because the "*traffic area and terminus*" represents one of other—*i.e.* not predominant—uses for the area where Obnova's land is located. Serbia's description is misleading.

299. As Serbia itself admits, the predominant purpose must occupy "*at least 50% of a certain area.*"[382] The 2003 RP calls that "*certain area*" a block.[383] The blocks are defined in both the 2013 DRP and 2015 DRP—and the description provided in the text of the 2013 DRP, as well as the graphical annex to the 2015 DRP, show that the bus loop clearly

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379 Memorial, ¶ 101. To update the record, Claimants submit additional documents related to the 2013 DRP produced by Serbia during the document production. *See* Letter no. 350-834/08, 11 March 2008, **C-618**; Letter no. 350.1-35/2007, 22 April 2008, **C-619**; Letter no. 350.1-35/2007, 22 June 2010, **C-620**; Letter no. 350-1242/10, 29 March 2007, **C-621**; Letter no. 350.1-36/2007, 19 April 2012, **C-622**; Letter no. 350-214/2011, 8 August 2012, **C-623**; Letter no. 350.1-35/2007, 22 August 2012, **C-624**; Letter no. 350.1-35/2007, 4 October 2012, **C-625**; Letter no. 350.1-35/2007, 11 October 2012, **C-626**; Letter no. 350.1-35/2007, 16 October 2012, **C-627**; Letter no. 350-802/2012, 4 December 2012, **C-628**; Letter no. 350.1-35/2007, 21 December 2012, **C-629**; Letter no. 350-802/12, 28 January 2013, **C-630**; Letter no. 350-244/13, 20 August 2013, **C-631**; Letter no. 350-244/13, 21 October 2013, **C-632**; Letter from Beoland, 13 April 2010, **C-633**; Letter from Zelenilo Beograd, 17 April 2008, **C-634**; Letter from the Secretariat for Environmental Protection, 24 April 2008, **C-635**; Letter from the Ministry of Environment, 14 April 2010, **C-636**; Letter from the Institute for the Protection of Nature, 14 April 2008, **C-637**; Conclusion IX-03 no. 350.1-35-2007, 28 August 2012, **C-638**; Minutes from the 153rd session of the Planning Commission, 20 May 2008, **C-639**; Minutes from the 104th session of the Planning Commission, 30 November 2010, **C-640**; Minutes from the 251st session of the Planning Commission, 7 February 2013, **C-641**; Minutes from the 9th session of the Planning Commission, 14 May 2013, **C-642**; Minutes from the Assembly Meeting, 3 March 2006, **C-643**.

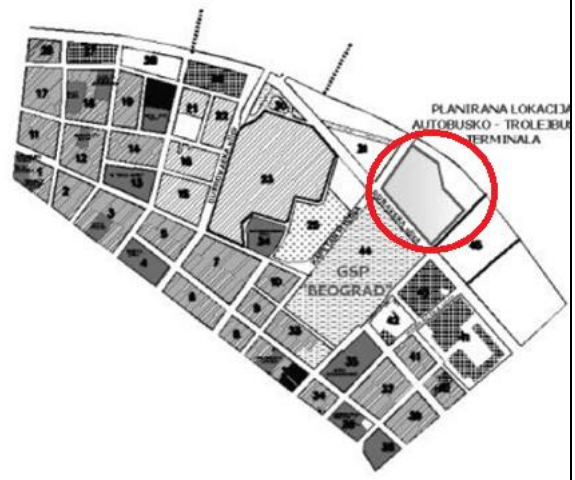
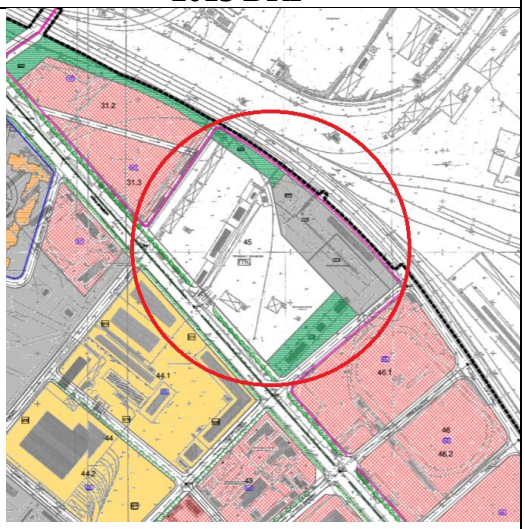
380 Memorial, ¶¶ 103-104.

381 Counter-Memorial, ¶ 161.

382 Counter-Memorial, ¶ 161.

383 2003 RP, p. 16 (pdf), **C-025**.

exceeds the 50% threshold, and in fact takes up *more than 60%* of the block on which it is located:

2013 DRP[384]	2015 DRP[385]
 Figure 3: Location of the new terminal at Dunavska Street	

300. Claimants also explained that the non-compliance between the 2013 DRP and higher planning documents continues to this day. This is because the 2016 RP, which replaced the 2003 RP, again zoned Obnova's premises as commercial facilities. However, the 2013 DRP remains valid as well and development of Obnova's premises for residential and commercial purposes remains impossible.[386]

301. Serbia again argues that there is no contradiction because the 2016 RP only defined the "*predominant purpose*" of individual areas. However, as explained above, the bus loop clearly takes up well in excess of 50% of the block on which Obnova's land is located. Therefore, the "*predominant purpose*" requirement is not respected.

302. Finally, Serbia's argument that the General Regulation Plan adopted by the City in 2016 ("**2016 GRP**") shows that part of Obnova's land is supposed to be used for traffic purposes, is simply irrelevant.[387] Serbia admits that the 2016 GRP is "*a lower lever*

384 2013 DRP, p. 12 (pdf), **C-024**.

385 2015 DRP, p. 272 (pdf), **C-326**.

386 Memorial, ¶ 105.

387 Counter-Memorial, ¶¶ 167-170.

planning document in comparison" to the 2016 RP.[388] As such, it should be in line with the 2016 RP, which states that the predominant use of Obnova's premises should be for commercial facilities.[389]

303. However, the 2016 GRP once again shows that more than 60% of the block with Obnova's premises is taken up by the bus loop:[390]

304. Importantly, even if the Tribunal concluded that the 2013 DRP was in line with the higher applicable planning document (*quod non*), this would not change the fact that the 2013 DRP had an expropriatory effect on Obnova and that Obnova should have received compensation.[391]

388 Counter-Memorial, fn. 289.

389 Memorial, ¶¶ 4, 105, 197, 220-221.

390 2016 GRP, p. 644, **R-099**.

391 *Infra* § VI.A.

305. Finally, Claimants explained that the City failed to explain why it decided to put the bus loop on Obnova premises—rather than on several other potential locations, including locations actually owned by the City.[392]

306. Serbia disagrees and claims that "*the City of Belgrade adopted the 2013 DRP after proper analysis of all available options and conducting studies showing that the Dunavska Plots are the most suitable area for placing the bus loop.*"[393] This statement is, at best, misleading.

307. First, Serbia itself admits that when the Urban Planning Institute prepared an analysis of suitability of the locations for organizing of the trolleybus terminus, Obnova's premises were considered and determined to *not* be the best option.[394]

308. Second, Serbia's reliance on "*another study*" from 2007, which allegedly confirmed that "*[t]he space that fully satisfies all the mentioned criteria is located at Dunavska Street across the street from the complex of GSP Beograd*" is incorrect.[395] The document cited by Serbia is not a study at all because it does not compare different potential locations. It only discusses the location at Obnova's premises.

309. Furthermore, while the document indeed contains the text cited by Serbia, it does not explain how that conclusion was made, nor whether there are any other locations that would potentially also satisfy the "*mentioned criteria*."

310. Finally, even if Obnova's premises indeed satisfied the criteria for construction of a bus loop, it still remains unclear whether Serbia considered other localities which seem to satisfy these criteria as well and if so, why it rejected them. Indeed, as explained in Claimants' Memorial, there are several such locations in the close vicinity of Obnova's

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392 Memorial, ¶¶ 106-108.

393 Counter-Memorial, ¶ 171.

394 Counter-Memorial, ¶ 173. The document cited by Serbia also mentioned a proximity to the bus depo across the street as one of the advantages of Obnova's premises. *See* Analysis of suitability of the locations for organizing trolleybus terminus in Dorćol dated January 2006, **R- 101**. However, as explained below, the City rezoned the land plot on which the depo is located for residential development.

395 Counter-Memorial, ¶ 173.

premises—including the land across the street from Obnova's premises at Dunavska 17-19, which is owned by the City and already being used for traffic purposes.[396]

2. Expropriatory effect of the 2013 DRP on Obnova's rights

311. In their Memorial, Claimants demonstrated that the adoption of the 2013 DRP affected Obnova's rights in several key respects:

a. the 2013 DRP stripped Obnova of its right to convert the right of use over all the land at Dunavska 17-19 and Dunavska 23 into ownership;

b. the 2013 DRP expressly prohibits any development on the land affected by the plan;

c. after the adoption of the 2013 DRP, Obnova was no longer able to legalize its buildings at Dunavska 17-19 and most of the buildings at Dunavska 23 because the 2009 Law on Planning and Construction made legalization contingent on the consent of the Land Directorate of the City of Belgrade ("**Land Directorate**"), which the Land Directorate refused to provide; and

d. given the above, the adoption of the 2013 DRP represents a *de facto* expropriation of Obnova's rights under Serbian law.[397]

312. Serbia does not dispute that the adoption of the 2013 DRP had the above effect. However, it argues that this is irrelevant because "*only the courts are competent to decide whether de facto expropriation occurred.*"[398] This argument is absurd. *De facto* expropriation occurs when an owner's right is restricted—regardless of whether this was confirmed by a court or not.

313. While the courts can confirm that a *de facto* expropriation took place, this does not mean that the State's conduct cannot amount to *de facto* expropriation unless a court so

396 Memorial, ¶¶ 106-108.

397 Memorial, ¶¶ 109-111.

398 Counter-Memorial, ¶ 184.

confirms. Furthermore, Serbian courts have in fact repeatedly confirmed that an adoption of a planning document can represent a *de facto* expropriation.[399]

314. Serbia's reliance on the decision of the Higher Court in Belgrade is inapposite. As a very part of the decision cited by Serbia shows, the Higher Court merely noted that, before awarding compensation, the court will decide on whether a *de facto* expropriation occurred:

> As the case at hand concerns *de facto* expropriation, then the civil court is competent for determining compensation, having in mind that within the litigation proceeding it is determined whether the de facto expropriation has occurred, through which the owner or the user of the land is protected against the municipality and other state authorities which themselves or through third parties organize the construction of public and other goods on the land which is not formally expropriated.[400]

315. That, however, does not mean that a *de facto* expropriation cannot exist unless a court so concludes. Indeed, it is the very nature of a *de facto* expropriation that it occurs *without* any formal proceedings.

316. Serbia also claims that Obnova did not have any rights susceptible of expropriation because: (*i*) it did not have a valid legal title for inscription of its rights in the Cadaster; (*ii*) only buildings built in accordance with law can be subject to expropriation; and (*iii*) Obnova did not have ownership or the right of use over land plots at Dunavska 17-19.[401] Serbia's arguments are, once again, simply incorrect.

317. As already explained above, Obnova had the right of use over the land at Dunavska 17-19 and owned the buildings at Dunavska 17-19—several of which had all necessary permits and thus were built in accordance with law. However, the question of whether the buildings had all permits or not is, in fact, irrelevant. The Supreme Court of Serbia has confirmed that even buildings built without all necessary permits can be subject to expropriation and their expropriation must be compensated because the rights of the

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399 *E.g.* Constitutional Court Decision No. UŽ.472/14, 25 February 2016, p. 5, **C-029**; Decision of the Appellate Court in Novi Sad, Gž3180/16, 25 October 2016, pp. 1-2, **C-186**; Decision of the Supreme Court of Cassation Rev 493/17, 9 June 2017, **C-030**.

400 Decision of the Higher Court in Belgrade, No. Gz 5266/2016, 14 June 2016, **R-106**.

401 Counter-Memorial, ¶ 187.

builder of such buildings enjoy full court protection.[402] Given that, as explained above, there are more than two million illegal buildings in Serbia, this hardly comes as a surprise.

318. Serbia's argument that Obnova "*did not participate in the public inspection and did not submit any objections to the solutions proposed in the draft 2013 DRP*" also does not help Serbia's case.[403] To begin with, whether Obnova submitted objections or not does not change the impact of the plan, and Serbia's obligation to compensate, Obnova.

319. Furthermore, Serbia's reliance on Obnova's ability to participate in the process for adoption of the 2013 DRP is, at best, disingenuous. A draft of the 2013 DRP was made publicly available for the first time between 9 September and 5 October 2012—during the so-called public inspection process.[404] During the public inspection, it was—in theory—possible to review the text of the draft and submit objections.

320. However, the beginning of the public inspection period was announced only in two tabloid journals[405] and the draft was only made available in hard copy at a Government building.[406] As a result, almost no one actually learned about the public inspection process and the draft of the 2013 DRP.[407]

321. The best evidence of this fact is that only *one* private person submitted objections to the plan[408]—even though the construction of the bus loop and the related change in the bus routes would affect thousands of citizens.[409] In addition, when actual construction

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402 Decision of the Supreme Court of Serbia No, Rev 463/06, 17 October 2006, p. 2 (emphasis added), **C-141**. *See also* Milošević Živković Second ER, ¶¶ 194-197.

403 Counter-Memorial, ¶ 181.

404 Report on the public inspection procedure, 12 November 2012, pp. 9-10 (pdf), **C-425**.

405 Report on the public inspection procedure, 12 November 2012, p. 9 (pdf), **C-425**; Report on Public Review for the 2013 DRP dated 8 November 2012 and Amendments to the Report on Public Review for the 2013 DRP dated 16 May 2013, p. 2 (pdf), **R-105**.

406 Report on the public inspection procedure, 12 November 2012, p. 9 (pdf), **C-425**.

407 Low transparency of the urban planning processes is an issue in the whole Serbia. *E.g.* Handbook – How to achieve a quality urban plan tailored to local self-government, **C-420**; Guide to Participation in Urban Development Planning, **C-419**.

408 Minutes from the 219th session of the Commission for Plans, p. 6 (pdf), 23 October 2012, **C-442**; Report on the public inspection procedure, 12 November 2012, p. 11, **C-425**; Letter from the Urban Institute No. 350-802/2012, 18 October 2012, p. 5, **C-443**.

409 Markićević WS, ¶ 30.

works based on the 2013 DRP started, they caused repeated protest by Belgrade citizens—who objected to the changes in bus routes and claimed they had not had previous knowledge of planned changes.[410]

322. Once the plan was adopted, Obnova had no effective means to dispute it. The only remedy available to Obnova was the initiation of proceedings before the Constitutional Court.[411] However, such proceedings would have taken years and, in any case, been limited to the assessment of procedural aspects of the process leading to the adoption of the 2013 DRP.[412] The Constitutional Court would not assess the contents of the plan nor its compatibility with higher level plans.[413]

323. Finally, Serbia's argument that it is not sufficient for *de facto* expropriation that a planning document is adopted, but "*the land envisaged for public purposes*" must be "*actually brought to its intended purpose*" is in fact contradicted by Serbian courts.[414] In its recent decision, the Supreme Court of Cassation expressly confirmed that *de facto*

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410 YouTube, *Finished protest on Dorcol –We feel neglected*, 11 February 2021 (accessed 12 February 2024), **C-427**; Transcript of YouTube video titled "Finished protest on Dorcol –We feel neglected", 11 February 2021 (accessed 12 February 2024), **C-428**; Danas, *The Protest "Stop secret works in Lower Dorćol on November 26th"*, 25 November 2019 (accessed 15 January 2024), **C-429**; Mondo, *Protest about the trolleybus: Dorćol residents took to the streets*, 25 November 2019 (accessed 15 January 2024), **C-430**; Direktno, *Another protest of Dorćol residents against the trolleybus line*, 27 November 2019 (accessed 15 January 2024), **C-431**; Danas, *Residents of Lower Dorćol refute the city authorities*, 5 December 2019 (accessed 15 January 2024), **C-432**; Danas, NDM BGD: *The city authorities deceive citizens again*, 27 November 2019 (accessed 15 January 2024), **C-433**; Danas, *A new protest to be held tonight in Dorćol due to the relocation of trolleybus routes*, 27 November 2019 (accessed 15 January 2024), **C-434**; Radio Slobodna Evropa, *Belgrade: New protest of residents of Donji Dorćol due to the relocation of trolleybus route*, 4 December 2019 (accessed 15 January 2024), **C-435**; Nedeljnik, *(VIDEO) Protest against the trolleybus network construction organized at Dorćol during the curfew: "The police detained no one, but they are filming…"*, 28 April 2020 (accessed 15 January 2024), **C-436**; Beograduživo, *Protest of the citizens at Dorćol (video)*, 12 February 2021 (accessed 15 January 2024), **C-437**; Istinomer, *The Citizens'Association "Komšije sa Dorćola": A New Protest on Thursday*, 10 February 2021 (accessed 15 January 2024), **C-438**; Danas, *The citizens'association is asking the city authorities to disclose their plans for Dorćol*, 7 December 2020 (accessed 15 January 2024), **C-439**; Danas, *The association: The competent authorities are tendentiously presenting false information about the construction of the trolleybus network at Dorćol*, 5 May 2020 (accessed 15 January 2024), **C-440**; Blic, *No one wants trolleybuses on their streets*, 6 December 2019 (accessed 15 January 2024), **C-441**.

411 Constitution of RS, ("Official Gazette of the RS", No. 98/2006 and 115/2021) Art. 168(2) and Art. 194(3); Statute of the City of Belgrade ("Official gazette of the City of Belgrade", No. 39/2008, 6/2010 and 23/2013), Art. 31, **C-644**.

412 Decision of the Constitutional Court IUO 875/2010, 24 February 2011, **C-645**; Decision of the Constitutional Court IV-241-2001, 11 September 2003, **C-646**.

413 Decision of the Constitutional Court IUO 875/2010 dated 24 February 2011, **C-645**.

414 Counter-Memorial, ¶ 190.

expropriation can take place upon adoption of a planning document—even if the construction envisaged in the planning document does not commence:

> When, by the general act of the defendant as a unit of local self-government, the land owned by individual is planned for the area of public use for construction of a school, but it has not been excluded from that person`s ownership for many years, the owner's right is restricted. Therefore, the claim of the owner to determine the defendant's property rights on the disputed land and to oblige the defendant to pay compensation for that land is founded.[415]

3. Obnova's right to compensation under Serbian law

324. In their Memorial, Claimants explained that despite the profound negative impact that the adoption of the 2013 DRP had on Obnova's rights, Serbia provided no compensation whatsoever to Obnova—even though it was obliged to do so under Serbian law.[416] Serbia does not dispute this fact.

325. Worse yet, when Obnova approached Serbia and requested the compensation due, it was flatly rejected based on clearly incorrect and arbitrary reasons. Claimants address this issue in detail in **Section III.R** below.

L. In 2015, Obnova continued its efforts to register its rights to buildings and land at Dunavska 17-19 and 23

326. On 18 September 2015, Obnova submitted a new request to the Cadaster for the registration of its ownership rights to buildings located at Dunavska 17-19. The Cadaster denied the request for the reason that more than ten years had passed since the registration of Serbia as the owner of the buildings.[417] Obnova filed an appeal against this decision on 1 April 2016, but has not received any response.

327. Since the Cadaster rejected Obnova's request for the registration of its rights to buildings at Dunavska 17-19, Obnova had no other choice but to initiate court proceedings for

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415 Decision of the Supreme Court of Cassation Rev 17881/2022 dated 29 March 2023, **C-507**. *See also* Živković Milošević Second ER, ¶ 196.

416 Memorial, ¶¶ 112-117.

417 Decision of the Cadaster Office No. 952-02-6-1732/2015, 22 March 2016, **C-036**.

determination of its ownership. Obnova initiated these proceedings on 15 November 2016.[418]

328. In order to protect its rights during the proceedings to determine its ownership, Obnova also requested a preliminary injunction to prevent Serbia and the City from disposing of the land and buildings that were subject to the claim.[419]

329. Obnova later initiated two additional court proceedings with respect to: (*i*) buildings at Dunavska 17-19 that did not have all required permits; and (*ii*) buildings at Dunavska 23. Obnova has not received any decision in the case related to Dunavska 23.

330. As for the claim related to Dunavska 17-19, Serbia's allegation that Obnova withdrew the claim is incorrect.[420] The claim was considered withdrawn by the court after Obnova failed to appear at the hearing. However, Obnova did not attend the hearing because it was not properly summoned nor served with documents from the proceedings.[421]

331. Obnova filed a request to quash the decision on a withdrawal of the claim and a continuance of the proceedings. At the same time, Obnova stated that if the request is rejected, Obnova's submission should be treated as an appeal against the decision on withdrawal of the case. The first instance court upheld Obnova's request, but it was eventually rejected on higher instance.[422]

332. As a result, Obnova's request should have been treated as an appeal. However, Obnova has not received, to this day, any response to its appeal.

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418 Obnova's submission to the Higher Court in Belgrade, 15 November 2016, **C-038**.

419 Markicević WS, ¶ 41; Obnova's submission to the Higher Court in Belgrade, 15 November 2016, p. 7 (pdf), **C-038**.

420 Counter-Memorial, ¶ 137.

421 Obnova's submission to the Higher Court in Belgrade, 13 August 2019, **C-051**; Decision of the Higher Court in Belgrade, 13 P 5844/19, 26 December 2019, **C-459**; Court's Return Receipt, 13 January 2020, **C-458**.

422 Obnova's submission to the Higher Court in Belgrade, No. 5844/19, 23 January 2020, **C-450**; Decision of the Higher Court in Belgrade, 13 P no. 5844/19, 15 July 2020, **C-462**; Decision of the Appellate Court in Belgrade, Gž5597/20, 10 June 2021, **C-460**; Decision of the Higher Court in Belgrade no. 13 P 5844/19, 21 July 2021, **C-451**.

M. On 28 December 2015, the City adopted the 2015 DRP

333. As Claimants explained in their Memorial, on 28 December 2015, the City adopted the 2015 DRP.[423] To add an insult to injury, according to the 2015 DRP, the land plot directly across the street from Obnova's premises (owned by the City) is no longer supposed to be used for development of traffic infrastructure. Instead, it is now dedicated to residential development (blocks of apartment buildings) with a note that the existing depo should "*be […] relocated to another adequate location.*"[424]

334. By adoption of the 2015 DRP, the City therefore significantly increased the value of its own land plot located across the street from Obnova's premises, as the land for residential development is obviously much more valuable than the land for traffic infrastructure. At the same time, the City has shown by their own actions that one of the alleged reasons for placing the bus loop on Obnova's premises—*i.e.* their proximity to the existing bus depot across the street—was not serious at all.

335. This fact explains why the City did not place the bus loop on this land, even though it was, as explained above, specifically dedicated for development of traffic infrastructure. The City did not do so simply because it had more lucrative plans for its own land.

336. Serbia does not dispute that the City decided to rezone the land across the street for residential development. Serbia's only response is that "*this is irrelevant in the context of the 2013 DRP*" because "*[a]t the time of preparation of the 2013 DRP (or before), the bus depot was not even considered as a possible location for a bus loop, and the relocation of the bus depot was considered only in June 2015, i.e. after the adoption of the 2013 DRP.*"[425] Serbia's assertions only confirm Claimants' claim.

337. Specifically, it confirms that instead of putting the bus loop on the land owned by the City, which was already designated and used for traffic purposes, the City decided to put a bus loop on Obnova's premises. In fact, if Serbia's allegation that the bus depot—*located across the street from Obnova's premises*—was not even considered as a

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423 2015 DRP, **C-326**.

424 Memorial, ¶ 118.

425 Counter-Memorial, ¶ 176.

location for the bus loop in 2013 is correct, it only further demonstrates that the decision on location of the bus loop was clearly arbitrary.

338. Furthermore, Serbia's explanation does not change the fact that the City has benefited from rezoning of its own land for residential purposes while, at the same time, it has caused significant loss to Obnova by designating its premises for the construction of the bus loop.

N. In November 2017, Mr. Broshko acquired 10% of Obnova's shares

339. It is undisputed that in November 2017, MLI—a Serbian limited liability company solely-owned and controlled by Mr. Broshko—acquired the Canadian Obnova Shares (*i.e.* 2,028 shares in Obnova, representing approximately 10% of Obnova's total share capital). In addition, in March 2018, MLI also acquired Obnova's debts for approximately EUR 20,000.[426]

340. At the time of his investment, Mr. Broshko had all necessary information about Obnova because he had been assisting Mr. Rand with the management of the Rand family's Serbian companies since 2012.[427] In addition, Mr. Broshko had been receiving regular reports about all relevant developments in Serbia from Mr. Markićević—a Serbian manager that Mr. Rand engaged to manage the Rand family companies in Serbia.[428]

341. Based on the information available to Mr. Broshko in 2017, he believed that, despite the adoption of the 2013 DRP, Obnova still represented an interesting investment opportunity.[429] Specifically, Mr. Broshko believed that Obnova would be able to resolve the situation resulting from the adoption of the 2013 DRP or, at least, would be awarded compensation due under Serbian law.[430]

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426 Broshko WS, ¶ 40.

427 Mr. Broshko's involvement has been limited to overseeing the Rand family's Serbian companies on behalf of Mr. Rand, and according to Mr. Rand's instructions. Mr. Broshko has never managed the Rand family's Serbian companies in his own name nor on his own behalf. *See* Broshko WS, ¶¶ 8-9; Rand WS, ¶¶ 29-30.

428 Broshko WS, ¶ 30; Rand WS, ¶¶ 46-47, Markićević WS, ¶ 19.

429 Broshko WS, ¶ 37.

430 Broshko WS, ¶ 36.

O. In February 2018, Serbia informed Obnova that implementation of the 2013 DRP would include discussion of compensation due to Obnova

342. In their Memorial, Claimants explained that on 24 February 2016, Obnova received a letter from the Land Directorate informing Obnova that the Land Directorate initiated proceedings related to planned construction of the bus loop.[431] However, as Claimants stressed in their Memorial, the Land Directorate did not assert that the buildings at Dunavska 17-19 and 23 did not belong to Obnova. On the contrary, in it is letter from February 2018, the Land Directorate expressly envisaged that Obnova would be provided with compensation "*for facilities that need to be demolished, that is, removed from the location.*"[432]

343. The Land Directorate's position was fully in line with Claimants' expectations at that time. Indeed, as explained above, Mr. Broshko made his investment exactly because he expected that Obnova would either resolve the issues with the 2013 DRP or would be appropriately compensated.

344. At the same time, the Land Directorate's position clearly contradicts Serbia's argument that "*Objects at Dunavska 17-19 and 23 had to be demolished upon the request of the City since that was envisaged in the construction permits and since that is prescribed for the objects constructed on someone else's land.*"[433] And this is for a good reason. As explained above, Obnova's obligation to demolish the buildings was based on the 1953 Lease Agreement. However, this agreement terminated in 1961 at the latest. With the termination of this agreement, the obligation to demolish the buildings ceased to apply.[434]

345. The fact that the obligation to demolish the buildings ceased to apply is best demonstrated by the fact that Serbia has *never* relied on this alleged obligation during its discussions with Obnova relating to the implementation of the 2013 DRP.

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431 Memorial, ¶ 121.

432 Memorial, ¶¶ 122-123.

433 Counter-Memorial, ¶ 79.

434 Živković Miloševič First ER, ¶ 262.

346. Serbia also tries to misinterpret the text of the Land Directorate's letters to argue that the Directorate did not recognize Obnova's rights to its buildings.[435] The Directorate's letters speak for themselves.

347. In its letter from February 2018, the Directorate expressly stated that Obnova should hand over its buildings "*before regulating the question of compensation for facilities that need to be demolished, that is, removed from the location.*"[436] If the Directorate had believed that Obnova did not have any rights to its buildings, or that the buildings could have been demolished at any time—as Serbia claims in this arbitration—the Directorate would have had no reason at all to bring up the compensation issue.

348. It comes as a bitter irony that the same Land Directorate, in a remarkable about-face, rejected Obnova's request for compensation just three years later.

P. In April 2018, Serbia rejected Obnova's legalization requests

349. On 25 April 2018, the Secretariat for Legalization rejected Obnova's legalization requests from 2010 and 2014. As explained above, the Secretariat based its decision on the fact that Obnova's buildings were located on land plots designated by the 2013 DRP for "public use." Such land can be legalized only with the consent of the Land Directorate. The Land Directorate, however, refused to provide the necessary consent.[437] Obnova's appeal against this decision was rejected.[438] Obnova challenged this rejection in front of Serbian courts but was again unsuccessful.[439]

350. Serbia does not dispute the fact that it needed several years to respond to Obnova's requests and that the requests were rejected because of the adoption of the 2013 DRP.[440]

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435 Counter-Memorial, ¶¶ 195-198.

436 Letter from the Land Directorate to Obnova, 19 February 2018, p. 1, **C-328**.

437 Markicević WS, ¶ 42; Decision of the Secretariat for Legalization No. 351.21-19758/2010, 25 April 2018, pp. 2-3 (pdf), **C-041**; Decision of the Secretariat for Legalization No. 351.21-16194/2014, 25 April 2018, p. 2 (pdf), **C-042**.

438 Obnova's appeal related to Dunavska 17-19, 30 May 2018, **C-043**; Obnova's appeal related to Dunavska 23, 30 May 2018, **C-044**; Decision of the City Council of the City of Belgrade No. 351-512/18-GV, 19 June 2018, **C-045**; Decision of the City Council of the City of Belgrade No. 351-515/18-GV, 19 June 2018, **C-046**.

439 Obnova's claim related to Dunavska 23, 10 August 2018, C-047; Obnova's claim related to Dunavska 17-19, 10 August 2018, **C-048**; Decision of Administrative Court No. 11 U 14419/8, 11 January 2021, **C-049**.

440 Counter-Memorial, ¶ 223.

However, Serbia claims that Obnova's request would not have been successful regardless of the adoption of the 2013 DRP because Obnova had not resolved ownership of the buildings—as the court proceedings initiated by Obnova remained pending at the time of Serbia's Counter-Memorial.[441]

351. Serbia's argument is both misleading and disingenuous. To begin with, Obnova did submit evidence of its rights—*i.e.* the building and occupancy permits it had for certain buildings.[442] Furthermore, Obnova had to initiate the court proceedings in respect of recognition of its ownership only because Serbia ignored its request for registration of its rights in the Cadaster submitted in 2003 and incorrectly registered itself instead. If Serbia had not done so, Obnova would have been able to easily demonstrate its rights by submitting an excerpt from the Cadaster.

352. Finally, Serbia's argument that the 2015 Law on Legalization did not apply to Obnova because it was given land at Dunavska 17-19 and 23 only for temporary use, is clearly incorrect.[443] As explained above, Obnova had the permanent right of use over land at Dunavska 17-19 and the right of use as an emanation of social ownership over the land at Dunavska 23. Neither of these rights were temporary.

353. In sum, the only reason for rejection of Obnova's legalization requests was the designation of Obnova's premises for public use in the 2013 DRP, as was explicitly stated in the City's respective decisions.

Q. In April 2019, Serbia attempted—in total disregard of a preliminary injunction—to demolish Obnova's buildings at Dunavska 17-19

354. On 21 February 2019, the Higher Court in Belgrade granted a temporary injunction requested by Obnova back in 2016, when it initiated the first court proceedings related to the declaration of ownership over its buildings at Dunavska 17-19. The Higher Court confirmed that Obnova "*proved the probability of existence of [its] non-pecuniary claim and provided evidence in regard to disputable real estate […].*"[444] The court also

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441 Counter-Memorial, ¶¶ 224 *et seq*.

442 Obnova's appeal related to Dunavska 17-19, 30 May 2018, pp. 3-4 (pdf), **C-043**; Obnova's appeal related to Dunavska 23, 30 May 2018, p. 3 (pdf), **C-044**.

443 Counter-Memorial, ¶ 236.

444 Decision of the Higher Court in Belgrade No. 4 P No. 1724/16, 21 February 2019, p. 5 (pdf), **C-039**.

ordered the Real Estate Cadaster to make an annotation of the prohibition within 24 hours following the receipt of the decision.[445]

355. Serbia ignored this decision and, just two months later, tried to destroy Obnova's buildings at Dunavska 17-19.

356. On 18 April 2019, without notice, the Director of the Land Directorate and the head of the Directorate's legal department, together with the public utility company "JPK Beograd put", which is founded and controlled by the City, and one of their subcontractors arrived at Dunavska 17-19. They brought with them heavy machinery and planned to demolish Obnova's buildings located on the plot.[446]

357. Obnova's representatives immediately arrived and relied on the injunction issued by the Higher Court, but to no avail. Only after they informed the Land Directorate's representatives that the media had been alerted about the situation and were on their way, did the Land Directorate's representatives leave.[447]

R. In August 2021, Serbia refused to compensate Obnova for the loss caused by the adoption of the 2013 DRP

1. The Land Directorate's decision

358. It is undisputed that on 19 April 2021, Obnova filed with several Serbian authorities, including the City and the State Attorney's Office, the Request for Compensation for the losses caused to Obnova by the adoption of the 2013 DRP and Serbia's failure to register and protect Obnova's rights.[448] As Claimants explained in their Memorial, Obnova listed all relevant facts in the Request for Compensation and requested compensation of at least EUR 42.5 million.[449]

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445 Decision of the Higher Court in Belgrade No. 4 P No. 1724/16, 21 February 2019, p. 1 (pdf), **C-039**. Serbia and the City of Belgrade appealed the decision, but the Court of Appeal in Belgrade upheld the temporary injunction on 14 July 2021. *See* Decision of the Court of Appeal No. Gž8810/19, 14 July 2021, **C-040**.

446 Markićević WS, ¶¶ 49-53.

447 Markićević WS, ¶ 54.

448 Memorial, ¶ 126.

449 Memorial, ¶¶ 126-128.

359. It is equally undisputed that on 13 August 2021, the Land Directorate rejected the Request for Compensation. As Claimants explained in their Memorial, the Land Directorate did so based on entirely incorrect, unreasonable and arbitrary grounds and in complete disregard of the position it had taken just three years earlier, in February 2018.[450]

2. The Land Directorate's authority to respond to Obnova's request

360. Serbia does not dispute that the Land Directorate responded to Obnova's request and rejected it. However, Serbia seems to dismiss these facts based on the argument that "*a request for compensation could be resolved only before courts, and not before the Land Directorate.*"[451] In essence, Serbia therefore seems to argue that the Land Directorate's actions are irrelevant because it was not authorized to act in the first place. Serbia is wrong.

361. As explained by Messrs. Živković and Milošević, the Land Directorate was fully authorized to respond to Obnova's request. Indeed, the Land Directorate negotiates compensation in case of expropriations conducted by the City and also represents the City in court proceedings in cases where the compensation is not agreed.[452]

362. In addition, as explained above, it is undisputed that the Request for Compensation was not addressed only to the Land Directorate. It was also sent to the City and the City's public attorney.[453] It is clear that these authorities also could have responded—but chose not to.[454]

3. The Land Directorate's response regarding premises at Dunavska 17-19

363. As Claimants explained in their Memorial, with respect to buildings at Dunavska 17-19, the Land Directorate argued that:

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450 Memorial, ¶ 129.

451 Counter-Memorial, ¶ 203.

452 Živković Milošević Second ER, ¶¶ 224-228.

453 Obnova's request for compensation, 19 April 2021, **C-052**.

454 Živković Milošević Second ER, ¶¶ 232-234.

a. Obnova's buildings are temporary and that Obnova was allegedly obliged to demolish its buildings "*at the request of the People's Committee of the City of Belgrade, without the right to compensation*";

b. it is "*not possible to positively identify Objects built under temporary approvals compared to the current situation on the ground*" and that Obnova's requests for legalization of the existing objects had been rejected;

c. Obnova's buildings allegedly "*could not be regarded as the subject of privatization*"; and

d. Obnova's rights allegedly could not be expropriated because the Cadaster had registered the City as the owner and Obnova's claim for correction of the registration was pending before Serbian courts.[455]

364. As Claimants demonstrated above, none of these arguments withstand scrutiny. This is because:

a. Obnova's buildings are not temporary and Obnova does not have an obligation to demolish them;

b. the Land Directorate did not even attempt to identify the relevant buildings;

c. it is utterly irrelevant that the buildings located at Dunavska 17-19 were not "*subject of privatization*";

d. the City is not the owner of Obnova's buildings; and

e. the erroneous registration of the City's purported ownership is irrelevant.[456]

365. Serbia only addresses some of these points in its Counter-Memorial. As a result, Claimants provide a brief summary of the undisputed points below and address in more details only those issues that Serbia addresses in its Counter-Memorial.

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455 Memorial, ¶ 130.

456 Memorial, ¶¶ 132-148.

a. Obnova's buildings are permanent and Obnova does not have an obligation to demolish them

366. As explained above, Obnova's buildings are permanent and Obnova does not have an obligation to demolish them. This is confirmed by both contemporaneous documents on the record[457] and Serbia's contemporaneous conduct.[458]

b. The Land Directorate did not attempt to identify the relevant buildings

367. As Claimants explained in their Memorial, the Land Directorate arbitrarily argued that it is allegedly "*not possible to positively identify Objects built under temporary approvals compared to the current situation on the ground*." This argument is arbitrary because the Land Directorate did not explain what efforts it undertook to reconcile Obnova's permits with its existing buildings. Most importantly, the Land Directorate did not even approach Obnova to resolve this alleged issue.[459]

368. Serbia does not dispute that the Land Directorate did not do anything to identify the buildings. Serbia's only response is that Claimants themselves allegedly failed to identify "*the objects that are subject of this case.*"[460] This is simply not true. Claimants clearly identified the relevant objects in the Request for Compensation,[461] as well as in their Memorial and again in this Reply.[462]

c. It is irrelevant that the buildings located at Dunavska 17-19 were not "*subject of privatization*"

369. As Claimants explained in their Memorial, the Land Directorate's argument that the buildings located at Dunavska 17-19 could not be the subject of privatization is entirely irrelevant. It is technically correct that the "*subject of privatization*" within the meaning of Article 3 of the 2001 Law on Privatization was Obnova's shares and not its assets. However, in accordance with consistent case law of Serbian courts, "*[u]pon privatization, Obnova ex lege acquired ownership of the buildings it had the right to*

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457 *Supra* ¶¶ 93-96.

458 *Supra* ¶¶ 105-109.

459 Memorial, ¶ 138.

460 Counter-Memorial, ¶ 213.

461 Obnova's request for compensation, 19 April 2021, Attachment 1, pp. 8-10 (pdf), **C-052**.

462 *Infra* Annex A.

use, even though the object of the privatization was Obnova's shares, not Obnova's assets."[463]

370. In response, Serbia only repeats its arguments about the evidentiary value of the privatization program and its contents.[464] Claimants have already addressed these arguments above.[465]

371. Fundamentally, the only thing that matters under Serbian law is that Obnova had the right of use over the buildings at the time of its privatization. Since it did, it became the owner of the buildings.

d. The City is not the owner of Obnova's buildings

372. As explained above, the Land Directorate's argument that the City is the owner of the buildings at Dunavska 17-19 is equally erroneous and, once again, contradicted by contemporaneous evidence.[466] The same applies to Serbia's argument that the Land Directorate "*was effectively bound*" by the "*inscription in the Cadastre, according to which the City of Belgrade was the user of the objects as of November 2003 and their owner as of January 2020.*"[467] As explained by Messrs. Živković and Milošević, the Cadaster inscription in no way precluded the Land Directorate from negotiating with Obnova.[468]

e. Erroneous registration of the City's purported ownership is irrelevant

373. In their Memorial, Claimants showed that the Land Directorate incorrectly argued that Obnova's right to compensation allegedly depends on the outcome of the court proceedings that Obnova initiated in order to correct the erroneous registration in the Cadaster of the City as the owner of Obnova's buildings. Claimants showed that the Land Directorate's position was incorrect because registration in the Cadaster is not determinative to establish ownership (or any other rights and facts registered in the

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463 Memorial, ¶ 139; Živković Milošević First ER, ¶ 263.

464 Counter-Memorial, ¶ 214.

465 *Supra* ¶ 252.

466 *Supra* ¶ 372.

467 Counter-Memorial, ¶ 215.

468 Živković Milošević Second ER, ¶¶ 225-228.

Cadaster). The pending proceedings, therefore, did not represent an obstacle for providing compensation to Obnova.[469]

374. In addition, Claimants explained that Obnova was forced to initiate these court proceedings because the Cadaster had: (*i*) incorrectly, and without any apparent reason, registered the City as the owner of Obnova's buildings; and (*ii*) refused Obnova's request for correction of the Cadaster records. The Land Directorate cannot rely on Serbia's own mistakes and omissions to escape its obligation to compensate Obnova for the expropriation of its premises.[470]

4. The Land Directorate's response regarding Obnova's premises at Dunavska 23

375. As Claimants explained in their Memorial, with respect to Obnova's premises at Dunavska 23, the Land Directorate merely stated that the 2013 DRP does not cover Obnova's building located on land plot No. 40/5 CM Stari grad. This is simply incorrect.

376. As Claimants showed in their Memorial, the fact that this land plot is affected by the 2013 DRP is confirmed by data from the Land Directorate's own website. Furthermore, the Secretariat for Legalization previously refused to legalize Obnova's building on this land plot exactly because the 2013 DRP covers this building.[471]

377. Serbia does not dispute this fact. However, it claims that the Land Directorate's response "*was an inadvertent error*" because "*the cadastral parcel no. 40/4 that was mentioned in the 2013 DRP, was subsequently divided for the purpose of implementation of the 2013 DRP, and after the division of two new parcels were formed –the cadastral parcels nos. 40/4 and 40/5.*"[472] Serbia, thus, expressly confirms that the Land Directorate's position was incorrect.

378. Finally, the Land Directorate entirely ignored the fact that Obnova has five other buildings on land plots Nos. 39/12, 22/4 and 10678 CM Stari grad, which are also

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469 Memorial, ¶ 147.

470 Memorial, ¶ 148.

471 Memorial, ¶¶ 149-151.

472 Counter-Memorial, ¶ 216 (emphasis added).

located at Dunavska 23 and which were expressly mentioned in the Request for Compensation. The response from the Land Directorate is, thus, not only incorrect, but also arbitrary as it simply ignores an important part of the Request for Compensation.[473]

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379. The response from the Land Directorate makes it absolutely clear that Serbia is not willing to provide to Obnova any compensation for the expropriation of its premises at Dunavska 17-19 and Dunavska 23. Instead, Serbia invents incorrect, unreasonable and arbitrary arguments to avoid the payment of compensation.

380. Serbia's assertion that "*the answer of the Land Directorate was just a gesture of good will and a statement of its disagreement with Obnova's allegations*" but not "*a formal decision on Obnova's request for compensation*" is not serious—nothing in the Land Directorate's response suggests this was the case.[474].

381. In addition, even if Serbia was right and the Land Directorate's response was a mere "*gesture of good will*", it would only mean that after Obnova addressed a request for compensation to several Serbian authorities, the request was simply ignored.

S. In December 2023, Kalemegdan's shares registered in Mr. Obradović's name were transferred to Coropi

382. In 2023, Mr. Rand decided to replace Mr. Obradović as the nominal owner of Kalemegdan.[475] Therefore, Mr. Rand directed Coropi to exercise the right it had pursuant to the trust deeds and to effect the transfer of shares in Kalemegdan. As a result, all of the shares of Kalemegdan registered in the name of Mr. Obradović were transferred to Coropi in December 2023.[476]

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473 Memorial, ¶ 152.

474 Counter-Memorial, ¶ 208.

475 Rand WS, ¶ 66; Broshko WS, ¶ 54; Markićević WS, ¶ 68.

476 Certificate of Kalemegdan's shareholders, 27 December 2023, **C-401**. *See also* Rand WS, ¶ 66; Broshko WS, ¶ 54; Markićević WS, ¶ 69.

T. In 2023, Serbia abolished the requirement to pay a conversion fee for the conversion of right of use into ownership

383. In July 2023, Serbia adopted several major changes to the conversion process.[477] To begin with, privatized companies, such as Obnova, no longer needed to pay a conversion fee in order to convert their right of use over the land into ownership.[478]

384. Furthermore, as of the entry into force of the new law on 4 August 2023, the right of use over the land converted into ownership *ex lege* for all eligible land that satisfied substantive and procedural conditions for the conversion.[479] Finally, the registration of the newly acquired ownership shall be made by the Cadaster *ex officio*, *i.e.* without the need for the new owner to file a request.[480]

385. However, as already explained above, Obnova cannot benefit from any of these major changes because the new law did not alter the provision precluding conversion of the right of use over land designated for construction of objects serving a public purpose.[481] This provision applies to Obnova's land because the bus loop that is contemplated to be placed on Obnova's land based on the 2013 DRP represents an object serving public purpose.[482]

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477 Živković Milošević Second ER, ¶ 31.

478 Živković Milošević Second ER, ¶ 32. For discussion of conversion fees before the adoption of this change see, for example, Politika, *Interview: 20.09.2013. Free building permits for a month*, 20 September 2013 (last accessed 2 February 2024), **C-647**; Comments on Draft Law on Amendments to the Law on Planning and Construction by AmCham Serbia, 20 August 2014, **C-648**; RST, *Public debate on the Draft Law on Land Conversion*, 20 May 2015 (last accessed 2 February 2024), **C-649**; Opinion of the Ministry of Construction, Transport and Infrastructure, 27 May 2015, **C-650**; Draft of the Law on Conversion of Right of Use into Right of Ownership over Building Land against Fee Payment, 10 July 2015, **C-651**; Blic, *Mihajlović: Lan Conversion to Start in One Month*, 13 July 2015 (last accessed 2 February 2024), **C-652**; Blic, *Petrović: Law on Conversion Will Encourage New Investments*, 13 July 2015 (last accessed 2 February 2024), **C-653**; eKapija, *Mihajlović: Law on Conversion Will Unblock Investments*, 13 July 2015 (last accessed 2 February 2024), **C-654**; Propisi.net, *New Law on Building Land Conversion Brings Legal Security to Investors*, 20 May 2016 (last accessed 2 February 2024), **C-655**; Draft of the Law on Conversion of Right of Use into Right of Ownership over Building Land against Fee Payment, 5 December 2019, **C-656**; Naled, *Incentives for Legalisation and Free Registration in the Cadastre to Be Introduced*, 6 October 2020 (last accessed 2 February 2024), **C-657**; Naled, *Law on Planning and Construction from 2009 was supposed to resolve property rights relations over land owned by commercial entities, which resulted in us facing even bigger problem in 2020 meaning that 5,000 hectares of building land was "trapped"*, 1 December 2020, **C-658**.

479 Živković Milošević Second ER, ¶ 31.

480 Živković Milošević Second ER, ¶ 33.

481 Živković Milošević Second ER, ¶ 34.

482 Živković Milošević Second ER, ¶ 34.

IV. THE TRIBUNAL HAS JURISDICTION OVER THE ENTIRETY OF CLAIMANT'S CLAIMS

A. The Tribunal has jurisdiction over Cypriot Claimants' claims

1. The Tribunal has jurisdiction *ratione personae* under the Serbia-Cyprus BIT

386. Serbia argues that the Tribunal lacks jurisdiction *ratione personae* over Cypriot Claimants because they purportedly do not have "seat" in Cyprus within the meaning of Article 1(3)(b) of the Serbia-Cyprus BIT. This is allegedly because: (*i*) under international law, the term "seat" purportedly imports a requirement of "*effective management*"; and (*ii*) Cypriot Claimants are allegedly "effectively managed" from—and thus presumably have their seat in—Canada, as the country of residence of Mr. Rand who controls both Cypriot Claimants.[483]

387. Serbia's objection fails for a number of reasons set out below.

388. As explained by the tribunal in *Mera v. Serbia*, the term "seat" in Article 1(3)(b) of the Serbia-Cyprus BIT has the same meaning as "*registered office*".[484] Serbia itself concedes, "*the Company Register records show that the Cypriot Claimants are both registered and have registered offices in Cyprus.*"[485] Both Cypriot Claimants also have a certificate of "registered office" issued by the Cyprus Registrar of Companies.[486] Thus, both Cypriot Claimants have their "seat" in Cyprus.

389. Claimants will explain below that Serbia's attempt to read a requirement of "effective management" into Article 1(3)(b) of the Serbia-Cyprus BIT finds no support under: (*i*) the arbitral awards rendered under that treaty; (*ii*) good faith interpretation of Article 1(3)(b) of the Serbia-Cyprus BIT; (*iii*) the inapposite authorities opining on the notion of "seat" under different treaties; and (*iv*) Cyprus law (which equates "seat" with "registered office").

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483 Counter-Memorial, ¶¶ 267-271.

484 *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶ 91, **RL-020**.

485 Counter-Memorial, ¶ 268.

486 Certificate of registered office for Coropi, 21 February 2024, **C-591**; Certificate of registered office for Kalemegdan, **C-592**.

a. Arbitral awards rendered under the Serbia-Cyprus BIT demonstrate that the term "seat" does not import any requirement of "effective management"

390. Contrary to Serbia's arguments, the term "seat" in Article 1(3)(b) of the Serbia-Cyprus BIT cannot be interpreted by reference to public international law because public international law includes no definition of this term.[487] The *Mera* tribunal—which addressed the meaning of "seat" under the very same investment treaty—confirmed that there was no definition of "seat" in relevant sources of international law and thus concluded that the term "seat" falls to be interpreted by reference to Cyprus law:

> Since there is no definition of "seat" in the ICSID Convention, nor in the BIT, and no uniform definition under international law, *the Arbitral Tribunal considers that the term in question must be interpreted by way of renvoi to municipal law*.[488]

391. The *Mera* tribunal relied on the definition of "seat" within the meaning of Cyprus law and concluded that the correct meaning of "seat" under Cyprus law—and hence under the Serbia-Cyprus BIT—is the place of the company's registered office.[489] Serbia does not raise any circumstances that would cast any doubt over the fact that Cypriot Claimants have their "registered office" in Cyprus.

392. The only other case that considered the term "seat" under the Serbia-Cyprus BIT is *CAEC v. Montenegro,* which had been published more than two years before the *Mera* award and was discussed extensively in the *Mera* arbitration.[490]

393. The *CAEC* tribunal was split on the issue of whether or not the claimant's registration of an address with the Cypriot authorities was conclusive evidence of the claimant having a "registered office", and thus a "seat", in Cyprus. The majority answered this question in the negative, without "*consideri[ng] it necessary to determine the precise meaning of the term "seat" as employed in Article 1(3)(b) of the [Serbia-Cyprus]*

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487 Counter-Memorial, ¶ 254.

488 *Mera Investment Fund Limited v. Republic of Serbia,* ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶ 89 (emphasis added), **RL-020**.

489 *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶¶ 90-91, 93, **RL-020**.

490 The *CAEC v. Montenegro* case was governed by the same investment treaty because the Cyprus-Serbia BIT was entered into before the split of Serbia and Montenegro. The same BIT, thus, continues to apply both between Serbia and Cyprus and between Montenegro and Cyprus.

BIT".[491] While the majority noted that in the "*vast majority of cases, a company's registered office will be at the address indicated in the certificate of registered office*",[492] it concluded that the "*special circumstances of [that] case*" compelled the finding that the claimant's stated registered office did not exist. [493]

394. These special circumstances included that the address of the alleged registered office: (*i*) was in a vacant private house, which only appeared to host objects such as "*an old couch (with some pillows and a walking stick lying on it)*" and a "*folded rug*"[494]; (*ii*) had no sign or brass plate of CEAC appended to the building;[495] (*iii*) was not accessible to public[496]; (*iii*) showed no signs of any, much less business, activity; (*iv*) was not amenable to service by mail or courier[497]; and (*v*) did not host the company's books and registerers.[498]

395. No such circumstances exist in the present case. The registered offices of both Cypriot Claimants are located at a modern office building, are easily identifiable by the companies' names appended to the building,[499] are reachable by both the public and couriers during business hours[500] and host the companies' books and registers.[501]

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491 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶ 147, **RL-011**.

492 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶ 166, **RL-011**.

493 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶ 200, **RL-011**.

494 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶ 186, **RL-011**.

495 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶ 198, **RL-011**.

496 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶ 193, **RL-011**.

497 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶ 196, **RL-011**.

498 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶ 197, **RL-011**.

499 Georgiades ER, ¶ 4.6.3.

500 Georgiades ER, ¶¶ 4.6.3-4.6.4.

501 Georgiades ER, ¶ 4.6.5.

396. Thus, both Cypriot Claimants have their "seat" in Cyprus also within the meaning ascribed to this term by the *CAEC* majority. Serbia does not even argue otherwise.

397. The dissenting opinion in *CAEC v. Montenegro* was issued by Professor Park who emphasized that "*the plain meaning of registered office best matches the meaning of 'seat' in Cyprus as used in this particular [Serbia-Cyprus] Treaty*"[502] and concluded that "*registered office*" simply means "*an office that is registered*".[503] His dissenting opinion was later expressly endorsed by the *Mera* tribunal.[504]

398. Claimants invite the Tribunal to interpret the term "seat" like the *Mera* tribunal and Professor Park did—as "registered office", which both Cypriot Claimants clearly have in Cyprus. However, both Cypriot Claimants' premises in Cyprus also meet the more demanding, and incorrect, requirements on "seat" proposed by the *CAEC* majority. Thus, there can be no doubt that both Cypriot Claimants have their "seat" in Cyprus.

b. Interpretation of Article 1(3)(b) of the Serbia-Cyprus BIT in accordance with Article 31 of the VCLT shows that the term "seat" does not import any requirement of "effective management"

399. Article 31(1) of the Vienna Convention on the Law of Treaties ("**VCLT**") mandates that Article 1(3)(b) of the Serbia-Cyprus BIT be interpreted in *good faith*, in accordance with the ordinary meaning of its terms and in light of the Serbia-Cyprus BIT's object and purpose.[505]

400. The terms of Article 1(3)(b) of the Serbia-Cyprus BIT include no requirement of "effective management". The other interpretative methods mandated by Article 31 of the VCLT clearly do not allow the importation of such a requirement into the wording of that provision.

401. The case *Orascom v. Algeria*—where the tribunal adopted an "autonomous meaning" approach to interpret the term "siège social"—proves the point. In that case, Algeria—

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502 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Separate Opinion of William W. Park, 26 July 2016, ¶ 22, **CL-073**.

503 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Separate Opinion of William W. Park, 26 July 2016, ¶ 19, **CL-073**.

504 *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶ 90, **RL-020**.

505 Counter-Memorial, ¶¶ 251-252.

just like Serbia here—purported to strip the tribunal of its jurisdiction *ratione personae* by seeking to import the "place of effective management" into the definition of investor under Article 1(1)(b) of the applicable Algeria-Belgium-Luxembourg Economic Union BIT.[506] As here, that treaty defined an investor by reference to both the place of incorporation and the "siège social" in the host State,[507] but made no reference to "effective management" or "real seat". The *Orascom* tribunal categorically rejected Algeria's attempts. It did so on the basis of Article 31(1) of the VCLT. "*[A] good faith interpretation of the ordinary meaning*" of "siège social", the tribunal held, leaves no doubt that the term means "*registered office*"[508]—not "effective management".

402. Serbia's lip service to Article 31(1) of the VCLT, thus, cannot support its attempt to fabricate the purported requirement of "effective management". The ordinary meaning of "seat" is the same as is ascribed to it under Cyprus domestic law: "seat" equals "registered office".

403. The *Orascom* tribunal also refuted another contention put forward by Algeria—also raised by Serbia here—that interpreting the term "siège social" as "registered office" would run counter to the principle of effectiveness because the first limb of Article 1(1)(b) of the Algeria-Belgium-Luxembourg Economic Union BIT—the requirement that a company be constituted in accordance with domestic law—would have already prescribed an incorporation test. In the *Orascom* tribunal's view, the principle of

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506 Article 1(1)(b) reads:

"For the purposes of this Agreement,

1. The term "investors" shall mean:

(…)

(b) "Companies", i.e. any legal person constituted in accordance with Belgian, Luxembourg or Algerian legislation and having its registered office in the territory of Belgium, Luxembourg or Algeria." Agreement between the Belgo-Luxembourg Economic Union and the People's Democratic Republic of Algeria on the Reciprocal Promotion and Protection of Investments, signed 24 April 1991, **CL-076**.

507 The exact wording of the definition of investor with respect to juridical persons read as follows: "Les «sociétés», c'est-à-dire, toute personne morale constituée conformément à la législation belge, luxembourgeoise ou algérienne, et ayant son siège social sur le territoire de la Belgique, du Luxembourg ou de l'Algérie." *See* Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/12/35, Final Award, ¶ 269, **CL-077**.

508 Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/12/35, Final Award, ¶ 298, **CL-077**.

effectiveness was left intact because "registered office" and "constitution" were two components of the same incorporation test:

> While it acknowledges that in most instances the constitution of a company in a Contracting State implies the presence of the registered office in that *State, the Tribunal does not consider that interpreting siège social as "registered office" renders such term meaningless*. In its opinion, the *Contracting Parties chose in Article 1(1)(b) to define corporate nationality for the purposes of the BIT by reference to the place of incorporation*. They did so *by naming the two elements normally part of the incorporation test, i.e. "constitution" and "registered office*". In other words, constitution in accordance with local law (i.e. the creation of a company as a legal person within a given system of municipal law) and registered office or *siège statutaire* in the respective State (i.e. the seat appearing in the corporation's constitutive documents) are two elements of one single test (place of incorporation) and not two different tests.[509]

404. Therefore, the reference in Article 1(3)(b) of the Serbia-Cyprus BIT to the investor being "incorporated" in its home State does not mean that the term "seat" should be interpreted as requiring effective management in the home State.

405. In addition, Article 31(1) of the VCLT requires treaties to be interpreted "*in their context and* ***in the light of its object and purpose***."[510] Serbia's interpretation of Article 1(3)(b) of the Serbia-Cyprus BIT, however, clearly runs counter to the intention of the Contracting Parties to the treaty. Under Serbia's flawed theory, all foreign-controlled companies would be excluded from the protection of Cypriot investment treaties, which use the same—or similar—definition of "investor". Such an outcome would be absurd and at odds with the long-standing status of Cyprus as a leading offshore jurisdiction. It would also run counter to the very intention of the Contracting Parties. As the *Mera* tribunal aptly put it:

> *According to the Respondent it is "usual practice in Cyprus as it has been known for years as a popular offshore jurisdiction,* and one need only google 'Cyprus offshore' to find a plethora of links to various law and consultancy firms offering services of incorporating and maintaining companies on Cyprus." *If the Respondent is of this viewpoint, then when it negotiated the BIT in question it could have required that in order for a legal entity to qualify as an investor under the BIT, it would need to be managed and controlled in the place of*

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509 Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/12/35, Final Award, ¶ 289 (emphasis added), **CL-077**.

510 Vienna Convention on the Law of Treaties, Article 31(1), **RL-008**.

> *incorporation. It is not for the Arbitral Tribunal to insert additional requirements into the BIT which could have easily been inserted by the negotiators at the time of drafting, but were not*.[511]

406. In addition, Serbia shows strictly no evidence that the intention of the Contracting Parties was to include the requirement of "*effective management*" within the term "seat". Conversely, the *Mera* tribunal's conclusion that "seat" is equivalent to "registered office" was based, among other things, on a testimony of Cyprus's former Minister of Foreign Affairs and a signatory of the *Cyprus—Serbia* BIT—who confirmed in no uncertain terms that "seat" was meant to mean, plainly and simply, the registered office:

> The Arbitral Tribunal finds the statements made by the Claimant's witness, Mr. Georgios Iacovou, to be relevant. *The former Minister of Foreign Affairs, and signatory of the BIT for Cyprus, stated that "[i]n this sense, 'seat' means the seat of the legal person, the registered office, the physical location of a company where it can be visited, where service can be made".* The Arbitral Tribunal therefore accepts that the meaning of the term "seat" must be understood to have been a reference to an actual location, place or address. Thus, in the Arbitral Tribunal's view the equivalent of this condition under Cypriot law is the registered office of an entity.[512]

407. As a result, Serbia plainly distorts the rules of interpretation of international treaties in its attempts to import the requirement of "*effective management*" (or "*some form of genuine corporate activity*") into the notion of "seat" under the Serbia-Cyprus BIT. On the contrary, a good faith analysis of the purpose of the Serbia-Cyprus BIT allows no other conclusion than that "seat" means quite simply "registered office".

c. Authorities cited by Serbia are inapposite

408. Unable to make its case under the terms of the Serbia-Cyprus BIT, Serbia seeks to rely on a handful of investment cases which did require "something more" than the registered office to qualify as a "seat". However, Serbia's reliance on these cases is misguided because they related to interpretation of *differently worded* investment treaties.

409. In particular, Serbia seeks to source the purported requirement of "*effective management*" from *ATF v. Slovakia*, where the tribunal required the investor

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511 *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶ 88 (emphasis added), **RL-020**.

512 *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶ 91 (emphasis added), **RL-020**.

demonstrate the location of "*effective centre of administration of the business operations*".[513] However, that requirement was mandated by the applicable Swiss-Slovakia BIT which only applied to investors who had *"their seat, **together with real economic activities**, in the territory of [their home State]*."[514] Such a wording is not included in the Serbia-Cyprus BIT. Thus, the decision in *ATF v. Slovakia* provides no guidance to the Tribunal.

410. In fact, in *Tenaris v. Venezuela*—on which Serbia also relies—the tribunal expressly cautioned against reliance on the findings of tribunals constituted under different investment treaties. In that very case, Venezuela—just like Serbia here—strongly emphasized the decision in *ATF v Slovak Republic*.[515] The *Tenaris* tribunal rejected Venezuela's argument, and cautioned against reliance on cases under different investment treaties:

> But on a closer analysis, *the Alps case provides no support at all for Venezuela's case. On the contrary, it appears to cut exactly the other way, and demonstrate that the terms in question are susceptible of different meanings in different contexts.* Article 1(1)(b) of the Switzerland-Slovak Republic BIT (in issue in that case) provides as follows: […]
>
> *It is immediately apparent that this is a differently worded provision* to that in both the Luxembourg and Portuguese Treaties, and that – unlike here – the tribunal in the Alps case had to apply a "real economic activities" test, as specifically provided for in the treaty.
>
> But more than this, *the juxtaposition in Article 1(1)(b) of the Switzerland-Slovak Republic BIT of the two requirements of "seat" and "real economic activities", which are clearly expressed as separate and cumulative criteria, demonstrates that "seat" in this particular context must mean something other, and presumably less, than "real economic activities*.[516]

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513 *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award (redacted version), 5 March 2011, ¶ 217, **RL-019**.

514 Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the promotion and reciprocal protection of investments, 1990, Art. 1(1)(C) (emphasis added), **CL-078**.

515 Counter-Memorial, ¶¶ 257-258; *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶ 139, **CL-019**.

516 *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶¶ 141-143 (emphasis added), **CL-019**.

411. The *Tenaris* tribunal also rejected Venezuela's assertion that Tenaris was in fact not seated in Luxembourg, but rather in Argentina because Tenaris had thousands of employees in Argentina and its directors and CEO resided there as well. The *Tenaris* tribunal considered that these facts were irrelevant for determining Tenaris's seat,[517] and ultimately upheld its jurisdiction *ratione personae*.[518] The *Tenaris* case, therefore, not only does not help Serbia, it expressly contradicts its theory that Mr. Rand's control over Cypriot Claimants somehow transforms them into Vancouver-seated companies.

412. In *Alverley v. Romania*, another case cited by Serbia, the tribunal held that the term "seat" under the Cyprus-Romania BIT required more than "registered office". That conclusion, was, however driven by the provision in the Cyprus-Romania BIT that the "seat" must be "*in the area of the Republic of Cyprus* ***which is under the jurisdiction and the control of the Republic's Government***."[519] The tribunal explained that because of this provison, the term "seat" under the Cyprus-Romania BIT cannot be equated to "registered office". This is because 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*" and, conversely that "*a company controlled from the unoccupied territory but with a registered office in the occupied area would be excluded.*"[520]

413. The Serbia-Cyprus BIT does not include the above-referenced provison. Thus, *Alverley* is inapposite because it interpreted and applied a differently-worded bilateral investment treaty.

414. In addition, *Alverley* is also distinguishable on facts. This is because the reason why the *Alverley* tribunal "*scrutinize[d] the evidence to see whether the Cyprus holding company is exercising some form of effective management*" was the fact that the ultimate beneficial owner of the Cypriot claimant was a Romanian national, and thus a national

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517 *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶ 219, **CL-019**.

518 *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶ 226, **CL-019**.

519 *Alverley Investments Limited and Germen Properties Ltd v. Romania*, ICSID Case No. ARB/18/30, Excerpts of Award, 16 March 2022, ¶ 215, **RL-007**.

520 *Alverley Investments Limited and Germen Properties Ltd v. Romania* (ICSID Case No. ARB/18/30). Excerpts of Award, 16 March 2022, ¶ 225, **RL-007**.

of the host State.[521] No such considerations arise here because the (correct) factual premise of Serbia's objection is that Cypriot Claimants are controlled by Mr. Rand—a Canadian national.

415. Serbia also cannot rely on a remark in an UNCTAD treatise that "*generally speaking, "seat of a company" connotes the place where effective management takes place*".[522] As explained by Professor Park, this very statement "*does not purport to confirm any rule of international law, but simply mentions that generally speaking a seat connotes place of effective management*."[523] Indeed, such a cursory and unsupported comment provides no guidance to the Tribunal.

d. Under Cyprus law, the term "seat" denotes "registered office" and does not import a requirement of "effective management"

416. As explained above, the meaning of the term "seat" under Article 1(3)(b) of the Serbia-Cyprus BIT is governed by the host State's law, here Cyprus law. Claimants' Cyprus law expert, Mr. Agis Georgiades, conclusively shows that Cyprus law equates "seat" with "registered office" and that both terms are used interchangeably in both Cypriot statutes and case-law.[524] Serbia's arguments to the contrary—made in reliance on Serbia's expert, Mr. Ioannides—are unavailing.

417. *First*, Mr. Georgiades explains that the "*term 'seat' is used in Cyprus company law interchangeably with, and having the same meaning as, 'registered office.'*"[525] As Mr. Georgiades further explains, the fact that several amendments to the Cyprus Companies Law refer to the term "seat" instead of referring to the term "registered office" does not change the conclusion that both terms are interchangeable. To the contrary, the use of two terms with an identical meaning in the amending laws was merely a result of translation issues in connection with Cyprus's accession to the EU.

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521 *Alverley Investments Limited and Germen Properties Ltd v. Romania* (ICSID Case No. ARB/18/30). Excerpts of Award, 16 March 2022, ¶ 250, **RL-007**.

522 Scope and Definition - UNCTAD Series on Issues in International Investment Agreements II UNITED NATIONS New York and Geneva, 2011, p. 83, **RL-012**.

523 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Separate Opinion of William W. Park, 26 July 2016, p. 2, footnote 7 (emphasis added), **CL-073**.

524 Georgiades ER, ¶ 4.5.1.

525 Georgiades ER, ¶ 4.5.1.

418. As Mr. Georgiades explains, "*in the process of Cyprus's accession but also later, in the process of transposition of EU law into the Cypriot legal order*," terms and phrases, which derive from the Greek legal terminology, and do not reflect the specific Cypriot legal terminology, made their way into statutes which purport to translate EU law.[526] Conversely, concepts derived from EU law, such as the transfer of a company's seat, introduced the term "seat"—commonly used in EU legal instruments and literature—into the Cyprus Companies Law as an *alternative* to the term "registered office".[527] As a result, not only the Cypriot legislature, but also Cypriot case-law currently uses the two terms interchangeably.[528]

419. *Second*, Mr. Georgiades makes clear that the registered office of a company does not necessarily determine that company's place of incorporation. While the place of incorporation and registered office are normally the same address at the time of incorporation, the registered office "*may subsequently be transferred to another state.*"[529] There is, thus, no merit in Serbia's assertion that the term "place of incorporation" and "registered office" are interchangeable. They are not.

420. Serbia's objection is predicated on the argument that, because the definition of a Cypriot *investor* under the Serbia-Cyprus BIT requires both "incorporation" and a "seat" in Cyprus, then these terms must necessarily mean something different.[530] Building up on this premise, Serbia goes on to claim that because "incorporation" equals "registered office" under Cyprus law, then "seat" must mean something more.[531] As Mr. Georgiades made clear, that logic must fail because "incorporation" does *not* equal "registered office" under Cyprus law.[532]

421. *Third*, Serbia argues that the notion of the term "seat" under Cyprus law should be guided by the practice of English courts in corporate tax matters, according to which

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526 Georgiades ER, ¶ 4.5.6.

527 Georgiades ER, ¶ 4.5.2.

528 Georgiades ER, ¶ 4.5.15.

529 Georgiades ER, ¶ 4.1.1.

530 Counter-Memorial, ¶ 256.

531 Counter-Memorial, ¶¶ 256, 259.

532 Georgiades ER, ¶ 4.1.1.

"seat" of a tax resident falls to be determined based on the place of its central management.[533] However, as the *CEAC* tribunal confirmed, tax residence in Cyprus is wholly irrelevant to the question of whether an investor has its "seat" in Cyprus.[534] Mr. Georgiades confirms as well.[535]

422. *Finally*, the conclusion that Cyprus law equates "seat" to "registered office" is further confirmed by the 2016 final report published by the European Commission, titled "Study on the Law Applicable to Companies" ("**EC Final Report**"). The EC Final Report clearly found that that Cyprus had "no" requirements for "residence/real seat", other than having a registered office.[536]

e. Claimants have their "seat" in Cyprus

423. In sum, the question of whether or not Claimants have their "seat" in Cyprus within the meaning of both Cyprus law and Article 1(3)(b) of the Serbia-Cyprus BIT solely depends on whether they have their "registered office" there.

424. As Mr. Georgiades explains, a registered office is an address registered as such by the Registrar of Companies, which can be easily ascertained from its website. An excerpt from the Company Register clearly shows that both Cypriot Claimants have, from the date of their incorporation until today, their registered office on Corner of Prodromos Str & Zinonos Kitieos, Palaceview House, 2064, Nicosia, Cyprus.[537] Indeed, Serbia also admits "*the Company Register records show that the Cypriot Claimants are both registered and have registered offices in Cyprus*."[538] As Mr. Georgiades confirms, this is conclusive evidence that both companies have their registered offices—and thus their "seat"—in Cyprus.

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533 Counter-Memorial, ¶ 263.

534 *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶ 201, **RL-011**.

535 Georgiades ER, ¶ 4.5.19.

536 EC Final Report, p. 109, **C-535**.

537 Corporate Register of Kalemegdan dated 31 March 2022, **C-063**; Excerpt from the Cypriot Company Registry for Kalemegadan, **C-591**; Corporate Register of Coropi dated 31 March 2022, **C-065**. Excerpt from the Cypriot Company Registry for Coropi, **C-592**.

538 Counter-Memorial, ¶ 268.

425. Serbia, nevertheless, argues that Cypriot Claimants failed to prove that they have a registered office "*in accordance with applicable requirements*."[539] These alleged requirements include: (*i*) the existence of physical premises ("a vacant plot will not do"); (*ii*) accessibility of the premises to public, (*iii*) maintaining the company's books and registers at the place of registered office, (*iv*) accepting delivery by post at the registered office; and (*v*) affixation of the company's name outside the office, "in letters easily legible".[540]

426. Mr. Georgiades explains that Cyprus Company Law provides for such obligations, but that they are not pre-conditions for a place to be designated as a registered office and failure to meet them cannot *invalidate* the designation of a particular place as the registered office of the company. Thus, Serbia's argument fails on the law.

427. Moreover, Serbia's argument also fails on the facts. Serbia was very careful not to allege that either of Cypriot Claimants would fail to meet any of these alleged requirements. This is because both Cypriot Claimants meet these alleged requirements. Mr. Georgiades performed an unannounced personal inspection of Cypriot Claimants' registered offices, and he was able to verify that all of these obligations under the Cyprus Company Law were met.[541]

428. Accordingly, Cypriot Claimants conclusively demonstrated—and Serbia failed to rebut—that they have a registered office and, thus, also their seat, in Cyprus.

2. The Tribunal has jurisdiction *ratione temporis* under the Cyprus-Serbia BIT

429. The scope of the Tribunal's temporal jurisdiction under the Cyprus-Serbia BIT is defined in Article 12 of the Cyprus-Serbia BIT. Accordingly, "*provisions of this Agreement shall apply to investments made by investors of one Contracting Party prior to as well as after the date of entry into force of this Agreement, but it shall only apply to matters occurring after the entry into force of the present Agreement.*"[542] This means

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539 Counter-Memorial, ¶ 252.

540 Ioannides ER, ¶ 8.33.

541 Georgiades ER, ¶ 4.6.6.

542 Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Art. 12, **CL-007(a)**.

that the Tribunal has jurisdiction over Serbia's measures adopted after the Cyprus-Serbia BIT entered into force on 23 December 2005.[543]

430. In their Memorial, Claimants explained that Cypriot Claimants' claims satisfy this requirement because:

a. the City adopted the 2013 DRP on 20 December 2013, *i.e.* almost eight years after the Cyprus-Serbia BIT's entry into force; and

b. Serbia rejected Obnova's Request for Compensation on 13 August 2021, *i.e.* almost 16 years after the Cyprus-Serbia BIT's entry into force.[544]

431. Serbia disagrees and claims that "*the Tribunal cannot make a decision about the alleged breaches without considering a dispute which arose, and the matters which occurred, in 2003 and 2004, for which it lacks ratione temporis jurisdiction under the dispute resolution clause contained in the Cyprus-Serbia BIT*."[545] According to Serbia, the "*matters which occurred, in 2003 and 2004*" are:

a. the registration of the City as the user of Obnova's premises on 22 November 2003 ("**2003 Registration**"); and

b. rejection of Obnova's requests for legalization in 2004 ("**2004 Rejection**" and with 2003 Registration also as "**2003-2004 events**").[546]

432. In addition, Serbia argues that: (*i*) the substantive obligations contained in the Cyprus-Serbia BIT cannot be applied retroactively and, as a result, they did not bind Serbia at the time of the 2003-2004 events; and (*ii*) the Tribunal lacks *ratione temporis* jurisdiction because the crucial events predate Cypriot Claimants' investments.[547]

433. Serbia's arguments are both incorrect and irrelevant.

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543 Extract from the website of the Law Commissioner of the Republic of Cyprus evidencing the entry into force of the Cyprus-Serbia BIT on 23 December 2005, 6 February 2018, **C-072**.

544 Memorial, ¶¶ 171-172.

545 Counter-Memorial, ¶ 273.

546 Counter-Memorial, ¶ 294.

547 Counter-Memorial, ¶ 273.

434. To begin with, as explained above, Cypriot Claimants do *not* bring any of their claims based on the 2003-2004 events. On the contrary, they only bring claims based on the adoption of the 2013 DRP and the rejection of Obnova's Request for Compensation. It is undisputed that these two measures took place *years after* the Cyprus-Serbia BIT's entry into force and Cypriot Claimants' investment. Claimants address this fact in detail in **Section IV.A.2.a** below.

435. However, the fact that Cypriot Claimants do not rely on the 2003-2004 events as a basis for their claims does not mean that these events should be ignored by the Tribunal. On the contrary, as Claimants explain in **Section IV.A.2.b** below, the 2003-2004 events constitute a part of the relevant factual background and should be assessed by the Tribunal as such.

436. This, however, does not mean that these events have any bearing on the Tribunal's jurisdiction. As Claimants explain in detail in **Section IV.A.2.c** below, the 2003-2004 events did not give rise to any dispute, whether before or after the entry into force of the Cyprus-Serbia BIT. They neither stripped Obnova of its property rights, nor dictated Serbia's post-treaty actions.

437. Finally, as for Serbia's assertion that the substantive obligations contained in the Cyprus-Serbia BIT cannot be applied retroactively, this is undisputed. However, as Claimants explain in detail in **Section IV.A.2.d** below, this is not what Claimants ask the Tribunal to do. Claimants ask the Tribunal to apply the substantive provisions of the Cyprus-Serbia BIT to the adoption of the 2013 DRP and Serbia's rejection of the Request for Compensation. Both these measures were adopted years after the Cyprus-Serbia BIT entered into force.

a. All breaches of the Cyprus-Serbia BIT invoked by Claimants took place after the Cyprus-Serbia BIT's entry into force

i. All breaches of the Cyprus-Serbia BIT invoked by Cypriot Claimants took place after the Cyprus-Serbia BIT entered into force and Claimants made their investment

438. Serbia's objections to the Tribunal's jurisdiction *ratione temporis* are essentially based on a gross misinterpretation of Cypriot Claimants' claims. As explained above, Serbia's entire case is based on the allegation that Claimants are bringing their claims based on the 2003-2004 events.

439. This is simply not the case. Cypriot Claimants' claims are based *solely* on:

a. the adoption of the 2013 DRP on 20 December 2013—*i.e.* almost eight years after the Cyprus-Serbia BIT's entry into force; and

b. rejection of Obnova's Request for Compensation on 13 August 2021—*i.e.* almost 16 years after the Cyprus-Serbia BIT's entry into force.[548]

440. The fact that Serbia believes that Cypriot Claimants' claims should be phrased differently is irrelevant. It is for Claimants—*not for Serbia*—to formulate their claims and to identify Serbia's measures that, according to Claimants, constitute breaches of the Cyprus-Serbia BIT. As confirmed by the tribunal in *Infinito v. Costa Rica*: "*it is the Claimant's prerogative to formulate its claims as it sees fit*."[549]

441. In the same vein, investment tribunals have consistently found that, at the jurisdictional stage, they must consider presumed or supposed violations of international law *as invoked by the investors*. For example, the tribunal in *ECE v. Czech Republic* expressly stated that:

> [I]t is for the investor to allege and formulate its claims of breach of relevant treaty standards as it sees fit. It is not the place of the respondent State to recast those claims in a different manner of its own choosing and the Claimants' claims accordingly fall to be assessed on the basis on which they are pleaded.[550]

442. A similar position was taken in a recent award in *Rand v. Serbia*:

> The Respondent argues that the Tribunal should adopt its own characterization of the alleged breaches, whereas the Claimants submit that it must accept the claims as pled. The Tribunal tends to agree with the Claimants.[551]

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548 Memorial, ¶¶ 171-172.

549 *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017, ¶ 186 (emphasis added), **CL-079**.

550 *ECE Projektmanagement v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.743 (emphasis added), **RL-152**.

551 *Rand Investments Ltd. and others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award 9 June 2023, ¶¶ 440-441, **CL-112**.

443. Given the above, Serbia's attempt to recast Cypriot Claimants' claims, and thus manufacture a *ratione temporis* objection, must be rejected.

ii. Breaches of the Cyprus-Serbia BIT invoked by Cypriot Claimants are *not* the consequence of events predating the Cyprus-Serbia BIT's entry into force

444. Serbia's argument that the adoption of the 2013 DRP and rejection of the Request for Compensation are direct consequences of the 2003-2004 events is equally incorrect.[552]

445. Claimants understand that, according to Serbia, the adoption of the 2013 DRP and the rejection of Obnova's Request for Compensation are consequences of the 2003-2004 events because:

a. "*the 2003 Registration definitively extinguished any property entitlements that other persons, including Obnova, might have had over*" the buildings and land at Dunavska 17-19 and 23; and

b. the "*2003 Registration determined the outcome of the subsequent actions of Respondent's authorities that would have impact on the Dunavska Plots, including the adoption of the 2013 DRP and the 2021 refusal to compensate Obnova for the alleged expropriation.*"[553]

446. Neither of these assertions has any merit. To begin with, the 2003 Registration did *not* extinguish Obnova's rights to the premises. On the contrary, as confirmed by Messrs. Živković and Milošević, the registration did not affect Obnova's rights at all:

> As we explain in detail below, Obnova indeed acquired rights to its premises based on the application of Serbian law. As a result, the above principle affirmed by Prof. Jotanović substantiates that Obnova acquired its rights notwithstanding whether or not such rights were inscribed in public registers.[554]
>
> […]
>
> As noted above, it is undisputed that the City of Belgrade is registered as the owner of certain buildings at Dunavska 17-19. However, this does not mean that Obnova's rights to these buildings were somehow

552 Counter-Memorial, ¶ 295.

553 Counter-Memorial, ¶¶ 326-327.

554 Živković Milošević Second ER, ¶ 22.

> affected. Despite the incorrect registration of the City, Obnova remains the owner of the buildings. Indeed, as we explained both in the First Report and above, Serbia recognizes and protects unregistered ownership.[555]
>
> […]
>
> Obnova acquired the right to conversion *ex lege* upon the adoption of the 2009 Law on Construction and Planning. Registration of the right of use in the Cadastre was only a procedural step in the conversion process—it did not represent a condition for acquiring the conversion right as a matter of substantive law.
>
> As a result, the fact that Obnova's right of use was not registered in the Cadastre did not preclude the existence of Obnova's right to convert its right of use into ownership.[556]

447. Contrary to Serbia's claims, the 2003 Registration did not create "*a permanent situation.*"[557] The 2003 Registration did not change Obnova's rights—neither *de jure* nor *de facto.* There was no *de jure* change because the incorrect registration did not affect Obnova's rights in any way. As explained by Messrs. Živković and Milošević, despite the 2003 Registration, Obnova remained the owner of the buildings at Dunavska 17-19 and 23, and continued to have the right of use over the land at Dunavska 17-19 and 23.[558] Furthermore, there was no *de facto* change because Obnova continued to use its premises without payment of any rent to the City, which was the incorrectly registered as the owner and user. The City did not object at any point before the adoption of the Cyprus-Serbia BIT.

448. In *Azurix v. Argentina*, the tribunal explained that a treaty violation is deemed to occur "*the day when the interference has ripened into a more or less* ***irreversible deprivation of the property***."[559] The 2003 Registration clearly did not have any such effect as Obnova remained the owner of the buildings and retained the right of use over the land. Obnova also continued to use its premises without payment of any rent and without any

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555 Živković Milošević Second ER, ¶ 93.

556 Živković Milošević Second ER, ¶¶ 149-150.

557 Counter-Memorial, ¶ 326.

558 Živković Milošević Second ER, ¶¶ 41, 93, 186.

559 *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 417 (citing Reza Said Malek v. The Government of the Islamic Republic of Iran, IUSCT Case No. 193, Final Award dated 11 August 1992, ¶ 114 (1992) and Int'l Technical Prods. Corp. v. Iran, Partial Award No. 190-302-3 dated 28 October 1985, ¶ 120 (emphasis added)), **CL-029**.

objections from Serbia predating the Cyprus-Serbia BIT. Given these facts, it is clear that the 2003 Registration did *not* represent an "*irreversible deprivation of the property*."

449. As for Serbia's assertion that the 2003 Registration was determinative for the adoption of the 2013 DRP and rejection of Obnova's Request for Compensation, Serbia does not refer to *any* evidence to support it.

450. In fact, available evidence confirms the opposite. Despite the incorrect registration of the City, Serbian authorities were clearly aware of and recognized Obnova's rights to its premises at Dunavska 17-19 and 23.

451. In March 2008, when Obnova inquired about a rumor that a bus loop might be placed on its premises, the City confirmed that Obnova's premises were "*located in areas intended for commercial activities and urban centers*"[560] and instructed the Urban Planning Institute to consider this fact when preparing the detailed regulation plan.[561] If the City was in fact the owner of the buildings and user of the land at Obnova's premises, it would have surely responded to Obnova by stating as much and informing Obnova that it would do as it saw fit without taking Obnova's interests into account. Of course, the City did not do this. The City also did not object to Obnova's use of its (*i.e.* Obnova's) premises in any other way.

452. In fact, before Serbia adopted the 2013 DRP, it prepared the so-called concept of this plan.[562] The concept specifically envisaged that the costs of construction of the bus loop would include, among other things, payments for expropriated land and buildings.[563] If Serbia had believed that the City owned the land and buildings at Dunavska 17-19 and Dunavska 23 (or had the right of use over them), there would have been no need to consider additional payments for their expropriation.

453. Serbia continued to recognize Obnova's rights even after the adoption of the 2013 DRP. In 2018, the Land Directorate recognized that Obnova was entitled to compensation for

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560 Letter from City of Belgrade to Secretariat for Urban Planning and Construction, 23 April 2008, **C-315**.

561 Memorial, ¶ 79.

562 Concept of the 2013 DRP, 2010, **C-330**.

563 2013 DRP, Section B.8, **C-024**; Concept of the 2013 DRP, 2010, pp. 2-3 (pdf), **C-330**.

potential demolition of its buildings as a result of the construction of the bus loop pursuant to the 2013 DRP.[564]

454. The above makes it clear that the adoption of the 2013 DRP was *not* a consequence of the 2003 Registration. The 2003 Registration did *not* lead the City to believe that Obnova had no property rights to its premises. On the contrary, the City—and thus Serbia—was well aware of Obnova's rights to its premises *despite* the 2003 Registration.

455. Finally, the rejection of Obnova's Request for Compensation was not a consequence of the 2003 Registration either. The Land Directorate could have provided the compensation requested by Obnova despite the incorrect registration. Messrs. Živković and Milošević explain that the Land Directorate "*could have addressed Obnova's ownership as a preliminary issue and, consequently, agreed on the compensation due.*"[565]

456. If anything, the incorrect 2003 Registration suddenly became a convenient pretext for the Land Directorate's *volte face* and sudden refusal to provide any compensation despite its previous willingness to do so in 2018. The fact that a State may choose to rely on a past event as a convenient pretext for its violations of public international law does not establish a cause-and-effect relationship between the event and the violations.

iii. Even if the breaches invoked by Cypriot Claimants were a consequence of events predating the Cyprus-Serbia BIT's entry into force, the Tribunal's jurisdiction would not be affected

457. Even if the Tribunal concluded that the adoption of the 2013 DRP and Serbia's rejection of the Request for Compensation were consequences of the 2003 Registration, such a conclusion would not affect the Tribunal's jurisdiction *ratione temporis.* This is because the 2003 Registration would be, at best, the first step in a series of events that culminated only in 2013, *i.e.* after the Cyprus-Serbia BIT's entry into force, and that had not given rise to any dispute before that date.

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564 Letter from the Land Directorate to Obnova, 19 February 2018, **C-328.**

565 Živković Milošević Second ER, ¶ 229; Živković Milošević First ER, ¶ 266.

458. The fact that Serbia's conduct culminated only in 2013, after the entry into force of the Cyprus-Serbia BIT, is sufficient to trigger Serbia's responsibility under that treaty. In its authoritative Commentary to the Articles on State Responsibility, the International Law Commission states that in accordance with the principle of the inter-temporality of law:

> […] the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. *In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the "first" of the actions or omissions of the series for the purposes of State Responsibility will be the first occurring after the obligation came into existence*.[566]

459. This exact conclusion should be reached in the present case. Even if the 2003 Registration was considered to be the first step towards the violation of the Cyprus-Serbia BIT (*quod non*), this would not remove the Tribunal's jurisdiction *ratione temporis*.

460. For example, the tribunal in *Société Générale v. Dominican Republic* explained that even in case of a creeping violation of a treaty through a series of events that constitute a violation only when considered as a whole, it is sufficient for the applicability of the treaty that the last in the series of events take place after the entry into force of the treaty:

> While normally acts will take place at a given point in time independently of their continuing effects, and they might at that point be wrongful or not, it is conceivable also that there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation, when the treaty obligation will have come into force. This is what normally will happen in situations in which creeping or indirect expropriation is found.
>
> In such a situation, the obligations of the treaty will not be applied retroactively but only to acts that will be the final result of that convergence and which take place when the treaty has come into force.[567]

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566 *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, ¶¶ 89-90, **CL-081**.

567 *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶¶ 91-92, **CL-080**.

461. The *Tecmed* tribunal also concluded that events predating the entry into force of a treaty "*may be considered a constituting part, concurrent factor or aggravating or mitigating element of*" breaches that fully crystalize after a treaty's entry into force:

> On the other hand, conduct, acts or omissions of the Respondent which, though they happened before the entry into force, may be considered a constituting part, concurrent factor or aggravating or mitigating element of conduct or acts or omissions of the Respondent which took place after such date do fall within the scope of this Arbitral Tribunal's jurisdiction. This is so, provided such conduct or acts, upon consummation or completion of their consummation after the entry into force of the Agreement constitute a breach of the Agreement, and particularly if the conduct, acts or omissions prior to December 18, 1996, could not reasonably have been fully assessed by the Claimant in their significance and effects when they took place, either because as the Agreement was not in force they could not be considered within the framework of a possible claim under its provisions or because it was not possible to assess them within the general context of conduct attributable to the Respondent in connection with the investment, the key point of which led to violations of the Agreement following its entry into force.[568]

462. Given the above, even if the Tribunal found that the breaches claimed by Cypriot Claimants were a consequence of the 2003-2004 events (*quod non*), the Tribunal should still uphold its jurisdiction *ratione temporis.*

b. Events predating the Cyprus-Serbia BIT's entry into force constitute relevant factual background, but not a dispute

463. Serbia's assertion that in order to decide on Cypriot Claimants' claims, the Tribunal would need to consider certain facts predating the Cyprus-Serbia BIT's entry into force is not disputed.[569] However, this fact does not affect the Tribunal's jurisdiction.

464. On the contrary, the principle of non-retroactivity of treaties does not preclude tribunals from examining the events predating a treaty's entry into force as a part of the factual background of a given case. As the tribunal in *MCI v. Ecuador* put it:

> The Tribunal holds that it has Competence over events subsequent to the entry into force of the BIT when those acts are alleged to be violations of the BIT. *Prior events may only be considered by the*

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568 *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 68, **CL-017**.

569 Counter-Memorial, ¶ 285.

> *Tribunal for purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force*.[570]

465. Other tribunals followed a similar reasoning. For example, in *Kardassopoulos v. Georgia*, the tribunal affirmed its jurisdiction *ratione temporis* over the claimant's FET claim, even though the claim was based on the conduct of a compensation process that followed an expropriation that had occurred before the treaty's entry into force:

> On the basis of the Claimants' written and oral submissions, the Tribunal understands Mr Fuchs' fair and equitable treatment claim to relate solely to the compensation process and not to the expropriation of his investment per se. The first compensation commission was established by Order No. 84 on 23 April 1997. The Georgia / Israel BIT entered into force approximately two months earlier, on 18 February 1997. Accordingly, the Tribunal is satisfied that it has jurisdiction ratione temporis over Mr Fuchs' fair and equitable treatment claim.[571]

466. Same as in *Kardassopoulos v. Georgia*, Cypriot Claimants' claims in this case relate solely to Serbia's conduct postdating the Cyprus-Serbia's BIT entry into force. As Claimants explained above, their claims are based on the adoption of the 2013 DRP in December 2013 and the rejection of the Request for Compensation in August 2021.

467. The 2003-2004 events relied upon by Serbia represent a relevant part of the factual background and must be assessed as such. Serbia's suggestion that the Tribunal may not look at any relevant facts that predate the entry into force of the Treaty at all is simply absurd.

468. Serbia draws this absurd conclusion from the wording of Article 12 of the Cyprus-Serbia BIT, according to which "*provisions of this Agreement shall relate to investments made by investors of one Contracting Party prior to as well as after the entry into force of this Agreement, but it shall only apply to matters occurring after the entry into force of the present Agreement.*"[572] However, this provision merely reiterates a point that Claimants

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570 *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, ¶ 93, **CL-081**. *Similarly also Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award of the Tribunal (Corrected), 30 May 2017, ¶ 217, **CL-084**.

571 *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, ¶¶ 248-249, **CL-083**. *See also Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Interim Award, 1 December 2008, ¶ 270, **CL-085**.

572 Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Art. 12, **CL-007(a)**.

do not dispute—the substantive provisions of the Treaty are not retroactively applicable to events that occurred before its enactment. This article clearly does not preclude the Tribunal from relying on events predating the treaty's entry into force.

469. Accepting Serbia's interpretation would, in fact, lead to absurd results. Article 12 expressly states that the Cyprus-Serbia BIT applies to "*investments made by investors of one Contracting Party* ***prior*** *to as well as after the entry into force of this Agreement.*" However, in order to assess whether an investor made an investment predating the Cyprus-Serbia BIT's entry into force, a tribunal must necessarily analyze acts predating the treaty (such as the conditions under which the investment was acquired, etc.).

470. Accepting Serbia's interpretation would mean that Serbia could dispose of any dispute related to an investment pre-dating the treaty's entry into force by simply disputing the existence of the underlying investment. Under Serbia's interpretation of the treaty, a tribunal would not be able to confirm the existence of the investment because it would not be able to make any determinations based on facts pre-dating the treaty, such as the making of the investment.

471. Serbia cannot seriously claim that the Tribunal should interpret Article 12 of the BIT in a way that would make moot a part of that very provision.

472. By trying to distinguish between "*taking relevant facts into account*" and "*making determinations,*" Serbia is making a distinction without a difference.[573] If one takes relevant facts "*into account*", one necessarily makes "*determinations*" based on such facts.

473. Serbia's reliance on the decision of the Permanent Court of International Justice ("**PCIJ**") in *Phosphates in Morocco* is also inapposite because the facts of the present case are markedly different. The case concerned Italy's complaint against the "*monopolization of the Moroccan phosphates*" deposits by a 1925 decision of the Department of Mines ("**1925 Decision**"). Importantly, however, the PCIJ's jurisdiction was limited to "*disputes which may arise after [September 1931] with regard to*

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573 Counter-Memorial, ¶ 300.

situations or facts subsequent to this ratification" that have arisen after September 1931."[574]

474. Italy sought to escape this jurisdiction limitation by arguing that the alleged "*permanent illegal situation"*, while indeed "*brought about by the [1925 Decision]*", was "*maintained in existence at a period subsequent to the crucial date by the denial of justice to the claimants*."[575] The PCIJ rejected that argument and dismissed its temporal jurisdiction, holding that the 1925 Decision "*is always found, in this matter of the dispossession of the Italian nationals, to be the fact with regard to which the dispute arose.*"[576]

475. Unlike in *Phosphates in Morocco*, Cypriot Claimants' claims are based solely on events post-dating the Cyprus-Serbia BIT. Claimats do not ask the Tribunal to find a violation of the BIT with respect to any acts or omissions pre-dating the Cyprus-Serbia BIT. Claimants are only asking the Tribunal to consider such facts when applying the BIT to matters that took place after the BIT's entry into force.

476. Another major difference is that the 1925 Decision in *Phosphates in Morocco* had legal effect on Italian nationals immediately in 1925, six years before the start date for the PCIJ's jurisdiction. The 2003-2004 events did not have any effect on Obnova's rights.[577] Obnova lost its rights as a result of the adoption of the 2013 DRP in December 2013 and its right to compensation under Serbian law was rebuffed only in August 2021. Both December 2013 and August 2021 are well after the entry into force of the Cyprus-Serbia BIT in December 2005.

477. Serbia's assertion that the similarity with *Phosphates in Morocco* stems from the fact that the Tribunal will have to assess whether Obnova acquired rights to its premises or

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574 *Phosphates in Morocco, Italy v France,* Preliminary objections, PCIJ Series A/B No 74, ICJ, p. 22, **RL-034**.

575 *Phosphates in Morocco, Italy v France,* Preliminary objections, PCIJ Series A/B No 74, ICJ, p. 28, **RL-034.**

576 *Phosphates in Morocco, Italy v France,* Preliminary objections, PCIJ Series A/B No 74, ICJ, p. 29, **RL-034,**

577 *Supra* ¶¶ 431-436.

not, is a red herring. Such assessment needs to be made under Serbian law, not under the Cyprus-Serbia BIT.

c. The dispute arose only after the Cyprus-Serbia BIT entered into force

i. Definition of a dispute under international law

478. It is common ground that, as famously held by the PCIJ in the *Mavrommatis* case, a "dispute" is defined as "*…a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.*"[578] As recognized in *Lao Holdings N.V. v Lao*, in order to establish the existence of a dispute in the sense of the *Mavrommatis* definition, "'*it must be shown that the claim of one of the Parties meets obvious opposition from the other*.' *[...] It is only with the expression and the confrontation of the points of view of the Parties that the dispute is crystallized*".[579]

479. As further explained by the tribunal in *Railroad Development Corporation v. Guatemala*, a dispute may only arise if there is a sufficient degree of communication between the parties for each to know the other party's views and oppose them:

> For its part, the Tribunal retains the concept of dispute as a conflict of views on points of law or fact which requires sufficient communication between the parties for each to know the other's views and oppose them. Furthermore and for purposes of determining the date when a dispute starts, it is necessary to distinguish it from the facts leading to the dispute, which naturally will have occurred earlier.[580]

480. Importantly, every dispute is preceded by a certain sequence of events which lead to the emergence of a dispute but, on their own, do not yet represent a dispute. In the words of the tribunal in *Maffezini v. Spain*:

> […] there tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time these events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict

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578 *Mavrommatis Palestine Concessions (Greece v. U.K.)*, Objection to the Jurisdiction of the Court, Judgment, PCIJ Series A no 2, ICJ dated 30 August 1924, p. 13 (pdf), **RL-030**.

579 *Lao Holdings N.V. v. Lao People's Democratic Republic (I)*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014, ¶ 121, **CL-086**.

580 *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, ¶ 129, **CL-087**.

> of legal views and interests will only be present in the latter stage, even though the underlying facts predate them.[581]

481. As a result, it is necessary to distinguish between events that led to a dispute and the dispute itself. As noted by the *Micula* tribunal: "*the critical date is the date when the dispute arose rather than the date when events and actions that may have given rise to the dispute took place*."[582] According to the *Micula* tribunal, a dispute arises only when there is a "*stated disagreement between Claimants and Respondent*."[583]

482. Similarly, in *Toto v. Lebanon*, the tribunal distinguished between the terms "breach", "problem" and "dispute", and noted the fact that Toto had sent a letter requesting compensation that went unanswered, and concluded that the treaty dispute only "*crystallized*" when "*Toto invited [Lebanon] on June 30, 2004, to have recourse to Article 7 of the [Italy-Lebanon BIT] ("Settlement of Disputes").*"[584]

483. Finally, as explained by the ICJ in *Georgia v. Russia* for a disagreement between parties to be considered a "dispute" within the context of the relevant treaty, it must pertain to the state's obligations under public international law.

> [T]he exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter.[585]

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581 *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, ¶ 96, **CL-088**.

582 *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, ¶ 156, **CL-089**.

583 *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, ¶ 155, **CL-089**.

584 *Toto Costruzioni Generali S.p A. v. Lebanese Republic*, ICSID Case No. ARB/07/12, Award, 7 June 2012, ¶ 63, **CL-090**.

585 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I), ¶ 30, **CL-091.**

484. In investment arbitration practice, the corresponding rules have been expressed in the so-called: "*triple identity test*".[586] Under this test, the disputes are the same if they involve (*i*) the same parties; (*ii*) the same object; and (*iii*) the same cause of action.[587]

485. As explained in detail in next section, in the present case, no dispute—much less an investment dispute—arose before the Cyprus-Serbia BIT's entry into force and Cypriot Claimants' investment.

ii. The dispute between Cypriot Claimants and Serbia arose *after* the Cyprus-Serbia BIT entered into force

486. Pursuant to Article 9(1) of the Cyprus-Serbia BIT it is for the investor to specify the dispute, which is brought to arbitration: "***Disputes*** *that may arise between one of the Contracting Parties and an investor […] with regard to an investment […]* ***shall be notified*** *in writing, including detailed information,* ***by the investor*** *to the former Contracting Party.*" [588]

487. Throughout this arbitration, Cypriot Claimants have made it abundantly clear that they challenge only two measures—the adoption of the 2013 DRP and the rejection of the Request for Compensation—both of which post-date Cyprus-Serbia BIT's entry into force.

488. In the Counter-Memorial, Serbia claims that the Tribunal lacks jurisdiction *ratione temporis* because the dispute before the Tribunal is the same as the "*dispute between Obnova and Respondent concerning the former's right of use over the Objects arose already in 2003-2004.*"[589] This is obviously incorrect.

489. As a preliminary matter, if even Serbia's allegations were factually correct—and they are not—Serbia's argument would *prima facie* fail the so-called "triple identity test".

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586 *Railroad Development Corp. (RDC) v. Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction dated 18 May 2010), ¶ 131, **CL-087**.

587 *Khan Resources Inc., Khan Resources B.V. and Cauc Holding Company Ltd. v. the Government of Mongolia and Monatom Co., Ltd.*, PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012, ¶¶ 392-396, **CL-092**; *Iberdrola Energía, S.A. v. Republic of Guatemala (II)*, PCA Case No. 2017-41, Final Award, 24 August 2020, ¶ 272, **CL-093**; *Benvenuti & Bonfant SRL v. the Government of the People's Republic of Congo*, ICSID Case No. ARB/77/2, Award dated 8 August 1980, ¶ 1.14, **CL-094**; *GPF GP S.à.r.l v. Poland*, SCC Case No. 2014/168, Final award, 29 April 2020, ¶ 284, **CL-095.**

588 Cyprus-Serbia BIT, Art. 9(1) (emphasis added), **CL-007(a)**.

589 Counter-Memorial, ¶ 295.

All three elements that must be the same under the test are in fact different in the case at hand:

a. the parties are different because the 2003-2004 events concerned only Obnova—which, in addition, did not bring any dispute at the time—while the current dispute is brought by Claimants;

b. the object is different because the 2003-2004 events concerned registration—but not the existence—of Obnova's property rights, while the current dispute centers around the expropriation of Obnova's premises under the 2013 DRP, Serbia's refusal to provide compensation and their impact on the value of Claimants' shareholding in Obnova; and

c. there is no identity of the cause of action because the current dispute is based on violations of the Cyprus-Serbia BIT. while there was no dispute, and thus no cause of action with respect to the 2003-2004 events. Had there been a dispute at the time, its cause of action would have been an improper registration in the Cadaster.

490. More fundamentally, there was no dispute in 2003 and 2004—not even as between Obnova and the City. The City did not approach Obnova to dispute Obnova's rights to its premises. The City did not require Obnova to pay any rent for the use of its premises, nor did it ask Obnova to vacate them. Simply put, there was no dispute with respect to the use of Obnova's premises and with respect to Obnova's rights in 2003-2004.

491. Conversely, the dispute put before this Tribunal is a dispute on whether Serbia breached its obligations under the Treaties when it adopted the 2013 DRP and, subsequently, rejected to provide Obnova with the compensation due (under both Serbian and international law). The causes of this dispute—*i.e.* the adoption of the 2013 DRP and the rejection of the Request for Compensation—both occurred after the Cyprus-Serbia BIT's entry into force.

492. Neither Claimants nor Obnova have raised the issue of expropriation of Obnova's rights at any point before the adoption of the 2013 DRP. On the contrary, the first time that Obnova demanded compensation for the expropriation of its rights was when it submitted the Request for Compensation. Thus, the dispute before the Tribunal arose

only after Serbia rejected the Request for Compensation—well after the entry into force of the Treaties and Claimants' investment.

3. The Tribunal has jurisdiction *ratione materiae* under the Cyprus-Serbia BIT

493. In the Memorial, Claimants explained that pursuant to Article 1(1)(b) of the Cyprus-Serbia BIT, the term "*investment*" shall "*mean every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter and in particular, though not exclusively, shall include […] shares, bonds and other kinds of securities*."[590]

494. Claimant further explained that since April 2012, Kalemegdan has been the direct nominal owner of the Cypriot Obnova Shares, which represent 14,142 shares in Obnova (approximately 70% of Obnova's total share capital).[591] Finally, Claimants explain that Kalemegdan's shares in Obnova represent an "*investment*" under Art. 1(1)(b) of the Serbia-Cyprus BIT, which specifically lists "*shares*" as a type of investment.

495. Kalemegdan brought its claims together with Coropi.[592] Coropi had been the 100% beneficial owner of Kalemegdan. In December 2023, Coropi became also the 100% nominal owner of Kalemegdan. Thus, Coropi has always been an indirect beneficial owner of the Cypriot Obnova Shares. As such, Coropi is an indirect beneficial owner of "*shares*" and consequently possesses an "*investment*" within the meaning of Article 1(1) of the Cyprus-Serbia BIT.

496. In the Counter-Memorial Serbia alleges that Kalemegdan's acquisition of the Cypriot Obnova Shares does not constitute a protected investment because there is no proof of contribution attributable to Kalemegdan or risk incurred by Kalemegdan.[593] Serbia also argues that Coropi's beneficial ownership of the Cypriot Obnova Shares does not constitute a protected investment because Coropi did not acquire an interest in Obnova.

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590 Cyprus-Serbia BIT, Art. 1(1)(b), **CL-007(a)**.

591 Excerpt from the Central securities depository and clearing house, 17 May 2012, **C-005**; Excerpt from the webpage of the Central Securities Depository and Clearing House, 29 March 2022, **C-004**.

592 Trust Deed, 26 April 2012, **C-066;** Trust Deed, 16 August 2012, **C-067**.

593 Counter-Memorial, ¶ 340.

497. Serbia's objections are without merit. Claimants will demonstrate that:

a. the definition of "*investment*" under Cyprus-Serbia BIT does not contain the requirements of contribution and risk, but even if did, Kalemegdan's investment satisfies those conditions (**Section IV.A.3.a** below); and

b. Coropi's beneficial ownership has been a protected investment under the Cyprus-Serbia BIT because Coropi has been the beneficial owner of Kalemegdan and, in turn, an indirect beneficial owner of the Cypriot Obnova Shares (**Section IV.A.3.b** below).

a. Kalemegdan's ownership of shares in Obnova is a protected investment under Cyprus-Serbia BIT

498. In an attempt to prove that Kalemegdan's ownership of shares in Obnova is not a protected investment under Cyprus-Serbia BIT, Serbia argues that "*Claimants have failed to show that Kalemegdan "caused" an investment to be made in Serbia, whether through the expenditure of money or some other effort in exchange for the Obnova shares.*" [594] Serbia further alleges that "*Claimants have equally failed to show that Kalemegdan made a contribution in Serbia [since] the transfer of the shares to Kalemegdan was made without payment of any consideration and there was no new injection of capital into the company.*"[595]

499. Serbia's assertions are without merit. To begin with, Serbia misinterprets the Cyprus-Serbia BIT. As explained above, according to Article 1(1)(b) of the Serbia-Cyprus BIT, "investment" encompasses "*every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter and in particular, though not exclusively, shall include […] shares, bonds and other kinds of securities*."[596] Kalemegdan's shareholding in Obnova clearly satisfies this definition.

500. Importantly, the Cyprus-Serbia BIT does *not* contain any further requirements concerning the existence of a protected investment. In particular, it does not contain

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594 Counter-Memorial, ¶ 358.

595 Counter-Memorial, ¶ 359.

596 Cyprus-Serbia BIT, Art. 1(1)(b), **CL-007(a)**.

any requirements related to contribution provided and/or risk undertaken by an investor. Numerous investment tribunals interpreting similarly worded provisions confirmed that where a treaty does not provide for such additional requirements, it would be improper to read them into the text of the treaty.[597]

501. However, even if Serbia were right, and the Cyprus-Serbia BIT did require existence of contribution and risk (*quod non*), Kalemegdan's investment easily satisfies both these criteria. To begin with, Kalemegdan acquired the Cypriot Obnova Shares for consideration. Specifically, it is undisputed that Mr. Obradović contributed the Cypriot Obnova Shares to Kalemegdan's capital against his acquisition of shares issued by Kalemegdan.[598] Serbia's assertion that "*the transfer of the shares to Kalemegdan was made without payment of any consideration*" is simply false.[599]

502. The tribunal in *Quiborax v. Bolivia* confirmed that when the investor "*did issue 26,680 shares*" to acquire the investment, this constitutes "*a contribution of assets.*"[600]

503. Serbia's reliance on *Komaksavia v Moldova* is inapposite. In that case, the tribunal was "*unable to find any contribution of Komaksavia in connection with its shareholding of Avia Invest. Rather, by virtue of a transaction that appears murky at best, Komaksavia became the holder of a legal title to 95% of Avia Invest's shares, **which were transferred to it without payment of any consideration, and without Komaksavia undertaking any obligation to fund Avia Invest in the future***."[601] The facts in the *Komaksavia* case were therefore markedly different than those in the present case.

504. In any event, Serbia's erroneous interpretation of the Serbia-Cyprus BIT would exclude from investment protection all Cypriot investors which are corporate entities and which

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597 *E.g. RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, June 6, 2016, ¶ 158, **CL-096**; *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, ¶ 316, **CL-097**.

598 Counter-Memorial, ¶ 357; Minutes of a meeting of the board of directors of Kalemegdan, 26 April 2012, p. 3, **C-318**.

599 Counter-Memorial, ¶ 359.

600 *Quiborax S.A., Non Metalic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶ 229, **RL-073**.

601 *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020-074, Final Award, 3 August 2022, ¶ 175 (emphasis added), **RL-084**.

acquired assets in Serbia as an in-kind contribution to their capital against the issuance of their shares. There is no justification for such an exclusion in the text of the BIT. In fact, Serbia's erroneous interpretation would, if adopted, lead to an outright discrimination of such investors compared to those who acquired their Serbian assets in a different manner.

505. Kalemegdan's investment also included a significant element of risk associated with an unpredictable legal and business environment in Serbia. As highlighted in *Orascom v. Algeria*, "*with regard to the element of risk, the Tribunal is equally satisfied that by acquiring and holding an indirect stake in OTA the Claimant bore the risk inherent in holding shares, namely the risk that the value of the shares may decline.*"[602] The same applies in the present case—by acquiring the Cypriot Obnova Shares, Kalemegdan bore the risk inherent in holding shares.

506. Furthermore, investment tribunals have confirmed that "*[t]he very existence of a dispute*" proves the existence of a risk.[603] It is obvious that a dispute exists in the present case.

b. Coropi's beneficial ownership is a protected investment under the Cyprus-Serbia BIT

507. Coropi has been the beneficial owner of Kalemegdan since its establishment in March 2012.[604] Through its ownership of Kalemegdan, Coropi has been also an indirect beneficial owner of the Cypriot Obnova Shares. As a result, Coropi has an "*investment*" within the meaning of Article 1(1)(a) of the Cyprus-Serbia BIT.

508. It is a well-established principle of public international law that where ownership title is split between a nominal owner and a beneficial owner, the latter is also entitled to pursue its claims before an international tribunal.[605] Serbia does not dispute that

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602 *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017, ¶ 379, **CL-077**.

603 *FEDAX N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, ¶ 40. *See also Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 301, **CL-099**.

604 Georgiades ER, ¶ 5.2.2; Rand WS, ¶ 38; Broshko WS, ¶ 19; Markićević WS, ¶ 14.

605 *See Trust Co. v. Hungary* (U.S. For. Cl. Settlement Comm'n 1957), **C-574**, where the trustee presenting the claim before a commission for settlement of U.S. citizens'claims against Hungary was a U.S. citizen, but its beneficiaries were not, the commission rejected the claim, noting that "*[p]recedents for the*

beneficial ownership is protected under public international law in general, or the Cyprus-Serbia BIT in particular.

509. However, Serbia contests Coropi's beneficial ownership, claiming that: (*i*) there is no evidence that Coropi ever acquired an interest in Kalemegdan; (*ii*) the trust deeds signed by Coropi and Mr. Obradović have no effect under Serbian law; and (*iii*) Coropi has not made an investment in the territory of Serbia.

510. Serbia's allegations have no merit. As Claimants show below:

a. contemporaneous evidence clearly proves that Coropi has always been the beneficial owner of Kalemegdan (**Section IV.A.3.b.i** below);

b. Coropi has made an investment in Serbia (**Section IV.A.3.b.ii** below); and

c. Serbian law is irrelevant for the Tribunal's assessment of Coropi's rights (**Section IV.A.3.b.iii** below).

i. Coropi has been the beneficial owner of the Cypriot Obnova Shares since April 2012

511. As explained above, Coropi has been the beneficial owner of Kalemegdan since Kalemegdan's establishment in March 2012.[606] While the beneficial ownership was not created through a written document, the creation of a trust between Mr. Obradović and Coropi is confirmed by both Messrs. Rand and Broshko.[607]

512. Importantly, it is undisputed that an oral declaration of a trust is sufficient under Cyprus law, as Cyprus law does not set forth any formal requirements to create a trust.[608] Claimants' Cyprus law expert, Mr. Georgiades, expressly confirms this fact:

> The Ioannides Opinion correctly states that, save from the three certainties (intention, subject matter, and objects/beneficiaries), Cyprus

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foregoing well-settled proposition are so numerous that it is not deemed necessary to document it with a long list of authorities." See also David J. Bederman, "*Beneficial Ownership of international Claims*", International and Comparative Law. Quarterly, Vol. 38, 1989, p. 936 (emphasis added), **C-593**. *See also* Robert Jennings and Arthur Watts eds., *Oppenheim's International Law –Volume 1*, 9th ed., Oxford University Press 2008, p. 514, **C-594**.

606 Georgiades ER, ¶ 5.5.2; Rand WS, ¶ 38; Broshko WS, ¶ 19; Markićević WS, ¶ 14.

607 Rand WS, ¶¶ 40-41; Broshko WS, ¶¶ 22-23.

608 Counter-Memorial, ¶ 351.

law does not require that a trust is evidenced in writing, or that any other formalities are met.[609]

513. Coropi's beneficial ownership is also proved by:

a. a letter of instructions issued by Coropi to the directors of Kalemegdan on 26 March 2012, *i.e.* three days after Kalemegdan's incorporation;[610] and

b. trust deeds concluded by Mr. Obradović and Coropi on 26 April 2012 and 16 August 2018.[611]

514. The letter of instructions requires the directors to always obtain "*instructions, directions and written consent*" from Coropi for the implementation of any administration and fiduciary services. The letter also states that no "*decisions and resolutions shall be taken regarding*" Kalemegdan without obtaining permission from Coropi.[612] Kalemegdan's directors accepted the terms of the letter of instructions and have always acted accordingly and followed all instructions provided by or on behalf of Coropi.[613]

515. According to the trust deeds, Mr. Obradović was obliged to transfer to Coropi, upon Coropi's request, all the shares in Kalemegdan registered in his name.[614] Mr. Obradović was also obliged to transfer to Coropi any dividends or other payments received based on his nominal shareholding in Kalemegdan.[615] Mr. Obradović committed to exercise rights and to vote at Kalemegdan's general meetings as instructed by Coropi.[616]

516. Mr. Georgiades confirms that witness statements provided by Messrs. Rand and Broshko, together with the letter of instructions and the trust deeds, sufficiently establish that Coropi is the beneficial owner of Kalemegdan:

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609 Georgiades ER, ¶ 5.1.1.

610 Letter of Instructions from 26 March 2012, **C-319;** Georgiades ER, ¶ 5.2.3; Rand WS, ¶ 39; Broshko WS, ¶ 21; Markićević WS, ¶ 14.

611 Trust Deed, 26 April 2012, **C-066**; Trust Deed, 16 August 2012, **C-067**; Georgiades ER, ¶ 5.3.4; Rand WS, ¶ 40; Broshko WS, ¶ 122; Markićević WS, ¶ 17.

612 Letter of Instructions from 26 March 2012, **C-319.**

613 Rand WS, ¶ 39; Broshko WS, ¶ 21; Markićević WS, ¶ 14.

614 Trust Deed, 26 April 2012, Art. 1(a), **C-066**; Trust Deed, 16 August 2012, Art. 1(a), **C-067**.

615 Trust Deed, 26 April 2012, Art. 1(c), **C-066**; Trust Deed, 16 August 2012, Art. 1(c), **C-067**.

616 Trust Deed, 26 April 2012, Art. 1(e), **C-066**; Trust Deed, 16 August 2012, Art. 1(e), **C-067**.

> In the present case, the evidence of Mr Erinn Bernard Broshko and Mr William Archibald Rand appear to satisfy the evidentiary burden that the Kalemegdan shares (initially 1.000) were held by Mr Obradović on trust for Coropi, from the date of incorporation of Kalemegdan.[617]
>
> [T]he LI is circumstantial evidence of the existence of the trust since the incorporation of Kalemegdan. It confirms the testimony of Mr Erinn Bernard Broshko and Mr William Archibald Rand, and is also in conformity and confirmed by the Trust Deeds which, importantly, were signed by Mr Obradović. All these pieces of evidence, when viewed together, clearly lead to the conclusion that the trust was created before the date of LI, from the date of incorporation of Kalemegdan.[618]

517. Given the above, Serbia's argument that "*there is no evidence on the record of a transfer of beneficial ownership of shares in Kalemegdan to Coropi*" is clearly incorrect.[619] Serbia's argument that the trust deeds could not create the beneficial interest, as the "*beneficial interest was pre-existing*" is equally misplaced.[620] It is undisputed that Coropi obtained beneficial ownership of Kalemegdan before the conclusion of the trust deeds. Indeed, the trust deeds prove the existence of this pre-existing ownership.[621]

518. Serbia's reference to Article 12 of Kalemegdan's Articles of Association is also inapposite. According to this provision, "*no person may be recognized by the Company as holding any shares on the basis of any trust.*"[622] As explained by Mr. Georgiades, this provision "*does not preclude the creation of trust over shares.*"[623]

519. On the contrary, Article 12 merely provides that the company does not have to recognize a trust and is, therefore, not liable to a beneficial owner for breach of preference rights in relation to shares that such beneficial owner is entitled to receive in the event of a capital increase. As such, this provision does not affect the creation of a trust over

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617 Georgiades ER, ¶ 5.2.1.

618 Georgiades ER, ¶ 5.2.3.

619 Counter-Memorial, ¶ 376.

620 Counter-Memorial, ¶ 375.

621 Georgiades ER, ¶ 5.2.3.

622 Memorandum and Articles of Association of Kalemegdan Investments Limited dated 19 March 2012, **R-132**.

623 Georgiades ER, ¶ 5.4.1.

Kalemegdan's shares and, therefore, is irrelevant for existence of Coropi's beneficial ownership over the Cypriot Obnova Shares.[624]

520. Investment case law cited by Serbia does not help its case either. The first case relied upon by Serbia, *Anglo-Adriatic Group Limited v. Republic of Albania*, is irrelevant because the facts of that case and the facts of the case at hand are completely different.

521. In the *Anglo-Adriatic* case, Anglo-Adriatic Group ("**AAG**") relied on four trust deeds that, according to AAG, were supposed to transfer to AAG the beneficial ownership of shares in an Albanian company, Anglo Adriatika Investment Fund ("**AAIF**"). However, it was undisputed that the text of trust deeds contemplated—contrary to AAG's alleged intentions—that AAG would transfer the shares, rather than receive them.[625]

522. AAG was aware of this fact and blamed it on "a *mistake when preparing the Trust Deeds*" as the alleged intention of the parties had been to transfer the beneficial ownership of AAIF *from* the "*foreign shareholders*" *to* AAG, rather than the other way round.[626] The tribunal was not persuaded by this explanation and noted that it did not correspond to "*the reality which the Trust Deeds represent[ed]*."[627] Consequently, the tribunal found that "*the Trust Deeds [did] not support Claimant's case that the Foreign Shareholders transferred beneficial ownership over the Foreign Shares to AAG.*"[628]

523. In the present case, it is undisputed that Mr. Obradović is the settlor (and trustee), and Coropi is the beneficiary. The issue with unclear wording of the trust deeds that arose in the AAG case simply does not exist in the present case.

524. The second case cited by Serbia, *Alverley v. Romania*, actually supports Claimants' case. In that case, the trust deed was "*written on the basis that Alverley had already*

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624 Georgiades ER, ¶ 5.4.1.

625 *Anglo-Adriatic Group Limited v. Republic of Albania,* ICSID Case No. ARB/17/6, Award, 7 February 2019, ¶ 233, **RL-051**.

626 *Anglo-Adriatic Group Limited v. Republic of Albania,* ICSID Case No. ARB/17/6, Award, 7 February 2019, ¶ 235, **RL-051**.

627 *Anglo-Adriatic Group Limited v. Republic of Albania,* ICSID Case No. ARB/17/6, Award, 7 February 2019, ¶ 232, **RL-051**.

628 *Anglo-Adriatic Group Limited v. Republic of Albania,* ICSID Case No. ARB/17/6, Award, 7 February 2019, ¶ 234, **RL-051**.

acquired that beneficial interest."[629] The *Alverley* tribunal accepted this fact and concluded that a trust deed can "*constitute sufficient evidence of the creation of an oral trust*".[630] This is exactly what happened in the present case. The oral trust was created upon Kalemegdan's incorporation in March 2012, and the subsequent trust deeds "*constitute sufficient evidence of the creation of [that] oral trust.*"

525. While the *Alverley* tribunal eventually rejected its jurisdiction, it was because of two issues that do not exist in the present case. Specifically:

a. the trust deed in *Alverley* was signed by unauthorized persons;[631] and

b. there was also another, subsequent trust deed, which related to the same shares, as the previous trust deed, but made no reference to the previous one. This subsequent trust deed, in view of the tribunal, casted "*further doubt on the argument that there was a trust at the earlier date*."[632]

526. Neither of these issues exists in the present case. It is undisputed that the persons who signed the trust deeds were authorized to do so. Furthermore, while Mr. Obradović and Coropi also signed two trust deeds, the trust deeds relate to different shares. The first trust deed relates to all of Kalemegdan's shares that had been issued by April 2012.[633] The second trust deed relates only to additional shares that were issued between April and August 2012.[634] Thus, there are no competing trust deeds for the same shares in Kalemegdan.

ii. Coropi did invest in the territory of Serbia

527. Serbia alleges that because Article 1(1) of the Cyprus-Serbia BIT defines investment as "*every kind of asset **invested** by an investor*", it requires existence of investment

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629 *Alverley Investments Limited and Germen Properties Ltd v.* Romania, ICSID Case No. ARB/18/30, Excerpts of Award, 16 March 2022, ¶ 428, **RL-007**.

630 *Alverley Investments Limited and Germen Properties Ltd v.* Romania, ICSID Case No. ARB/18/30, Excerpts of Award, 16 March 2022, ¶ 427, **RL-007**.

631 *Alverley Investments Limited and Germen Properties Ltd v.* Romania, ICSID Case No. ARB/18/30, Excerpts of Award, 16 March 2022, ¶ 427. **RL-007**.

632 *Alverley Investments Limited and Germen Properties Ltd v. Romania*, ICSID Case No. ARB/18/30, Excerpts of Award, 16 March 2022, ¶ 429, **RL-007**.

633 Trust Deed, 26 April 2012, **C-066**.

634 Trust Deed, 16 August 2012, **C-067**.

activities by the investor in the territory of Serbia.[635] Such activities, according to Serbia, include "*economic activity*" or "*investment activity*" subsequent to the original investment.[636]

528. Serbia misinterprets text of the Serbia-Cyprus BIT. The term "*invested*" does not impose any additional requirement—such as active involvement of the investor in the target's business—that is not already included in the definition of investment under the Treaty. This was expressly confirmed by the tribunal in *Saluka v. Czech Republic:*

> Although the chapeau of Article 2 refers to "every kind of asset invested", the use of that term in that place does not require, in addition to the very broad terms in which "investments" are defined in the Article, the satisfaction of a requirement based on the meaning of "investing" as an economic process: the chapeau needs to contain a verb which is apt for the various specific kinds of investments which are listed, and since all of them are being defined as various kinds of investment it is in the context appropriate to use the verb "invested" without thereby adding further substantive conditions.[637]

529. This conclusion was later endorsed by the tribunal in *Mytilineos v. Serbia*:

> In this respect, the Tribunal shares the view of the ad hoc tribunal in the Saluka case,128 which also operated under the UNCITRAL Rules. It found that the verb "invested" did not add any further substantive conditions to an investment definition contained in the Netherlands-Czech Republic BIT which is almost identical to the one in the case at hand.[638]

530. Accordingly, the term "*invested*" does not require any active involvement of an investor subsequent to the original investment. However, even if this was a valid test under Cyprus-Serbia BIT—and it is not—Coropi would satisfy these criteria.

531. Coropi participated in Obnova's management through Messrs. Rand and Markićević, who are both directors of Coropi. Mr. Markićević is also a director and the General Manager of Obnova. Mr. Rand controls Coropi, Kalemegdan and, as a result, Obnova. Messrs. Rand and Markićević both confirm that they have regularly discussed Obnova's

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635 Counter-Memorial, ¶ 387.

636 Counter-Memorial, ¶¶ 391-392.

637 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 211, **CL-063**.

638 *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia I,* UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, ¶ 130, **CL-100**.

management and made decisions regarding steps to be taken with respect to Obnova in Serbia.[639] Through Messrs. Rand and Markićević, Coropi participated in these decisions.

532. As a result, Obnova participated in the "*management of investments*"—as suggested under the test formulated by the *Mera* tribunal.[640] Consequently, there can be no doubt that Coropi fulfilled all the requirements under Article 1(1) of the Cyprus-Serbia BIT.

iii. Serbian law is irrelevant for the assessment of Coropi's beneficial ownership

533. Serbia argues that Coropi's beneficial ownership of Obnova is not protected under the Cyprus-Serbia BIT because Serbian law allegedly does not recognize trusts.[641] Serbia's argument is both incorrect and irrelevant.

534. To begin with, Serbia's argument is irrelevant because Coropi does not claim to have any direct rights related to Obnova's shares. From the beginning of this case, Claimants consistently claimed that Coropi is only an *indirect* beneficial owner of Obnova—through its direct beneficial (and now nominal) ownership of Kalemegdan.

535. Serbian law has no relevance whatsoever for Coropi's acquisition of beneficial ownership over Kalemegdan's shares. Given that Coropi does not claim to have any direct rights to the Cypriot Obnova Shares and because, at the same time, Serbia does not dispute Kalemegdan's ownership of the Cypriot Obnova Shares, it is entirely irrelevant whether Serbian law recognizes beneficial ownership or not.

536. That being said, Serbian law *does* recognize the beneficial ownership. The term "*beneficial owner*" was introduced into Serbian law in 2011, with Article 2(34) of the Law on Capital Markets, which expressly defines beneficial owner as:

> [A] person who has the benefits of ownership of a financial instrument either entirely or partially, including the power to direct the voting or disposition of the financial instrument or to receive the economic

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639 Rand WS, ¶¶ 45-49; Markićević WS, ¶¶ 18-19.

640 *Mera Investment Fund Limited v. Republic of Serbia,* ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, ¶ 107, **RL-020**.

641 Counter-Memorial, ¶¶ 381-386.

> benefits of ownership of that financial instrument, and yet does not nominally own the financial instrument itself.[642]

537. Similarly, Article 3 of the 2018 Law on Centralized Records of Beneficial Owners defines beneficial owners as:

> (1) Individual which directly or indirectly holds 25% or more shares, stake voting rights or other rights, based on which he/she participates in managing of the Registered subject, and/or participates in the capital of the Registered subject with 25% or more shares;
>
> (2) Individual who directly or indirectly holds prevailing interest on business activities and decision making process;
>
> (3) Individual who indirectly secured or secures the means for the Registered subject and based on that has significant impact on decision making by the management bodies of the Registered subject when deciding on financing and business;
>
> (4) Individual who is the owner, trustee, protector, beneficiary if appointed, as well as individual with dominant position in trust management, and/or in another entity of foreign law;
>
> (5) Individual registered for representation of cooperatives, associations, foundations, endowments and institutions if the person authorized for representation has not registered other individual as real owner.[643]

538. Finally, Article 3.10 of the Law on the Prevention of Money Laundering and the Financing of Terrorism provides that:

> Beneficial owner of a party is a natural person who indirectly or directly owns or controls the party; a party from this point includes a natural person.[644]

539. The Law on the Prevention of Money Laundering and the Financing of Terrorism also includes a definition of a trust:

> Trust is a foreign legal entity established during the lifetime or after the death of one person, the founder (settlor, trustor), who entrusts the property to a trustee (trustee) for the benefit of beneficiaries (beneficiaries) or for a specifically designated purpose, in such a way that: the property is not part of the founder's trust; the right of ownership of the trust property belongs to the [trustee] who holds, uses, and

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642 2011 Law on Capital Markets, Arts. 2(33) and (34), **C-595**.

643 Law on Centralized Records of Beneficial Owners, Art. 3, **C-596**. This law also makes it mandatory for limited liability companies to register their beneficial owner.

644 Law on the Prevention of Money Laundering and the Financing of Terrorism, Official Gazette of Republic of Serbia, No. 113/2017, 91/2019 and 153/2020, Art. 3.10, **JL-011**.

> disposes of the property for the benefit of the beneficiaries or the founder, in accordance with the trust conditions; by a trust agreement, the performance of certain tasks can also be entrusted to a protector (trust protector), whose main role is to ensure that the trust property is managed and disposed of in such a way that the objectives of establishing the trust are fully achieved; the beneficiary is a natural person or a group of individuals for whose benefit the foreign legal entity was established or operates, regardless of whether that individual or group of individuals is specified or specifiable.[645]

540. As explained above, Coropi has always had indirect ownership and control over Obnova—through its beneficial (and now nominal) ownership of Kalemegdan's shares. Coropi's rights were clearly reflected in the:

a. letter of instructions issued by Coropi to the directors of Kalemegdan on 26 March 2012, *i.e.* three days after Kalemegdan's incorporation;[646] and

b. trust deeds concluded by Mr. Obradović and Coropi on 26 April 2012 and 16 August 2018.[647]

541. As a result, Coropi clearly satisfied the above definitions of beneficial owner existing under Serbian law.

c. Cypriot Claimants' investment was acquired in accordance with Serbian law

542. Serbia alleges that the Cypriot Obnova Shares were acquired by Cypriot Claimants in violation of their obligation to issue a takeover bid arising under the Serbian Law on Takeover on Joint Stock Companies ("**Takeover Law**") and, as a result, fall outside the Tribunal's jurisdiction *ratione materiae*.[648]

543. Serbia raised an identical objection in the *Rand Investments* arbitration, arguing that the failure of Messrs. Rand and Obradović to issue a takeover bid in acquiring the shares of

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645 Law on the Prevention of Money Laundering and the Financing of Terrorism, Official Gazette of Republic of Serbia, No. 113/2017, 91/2019 and 153/2020, Article 3.6, **JL-011**.

646 Letter of Instructions from 26 March 2012, **C-319;** Georgiades ER, ¶ 5.2.3; Rand WS, ¶ 39; Broshko WS, ¶ 21; Markićević WS, ¶ 14.

647 Trust Deed, 26 April 2012, **C-066**; Trust Deed, 16 August 2012, **C-067**; Georgiades ER, ¶ 5.2.3; Rand WS, ¶ 40; Broshko WS, ¶ 22; Markićević WS, ¶ 17.

648 Counter-Memorial, ¶ 406.

the Serbian company BD Agro removed the tribunal's jurisdiction. The *Rand Investments* tribunal flatly rejected that objection, holding that:

> *Only violations of fundamental rules would deprive a tribunal of its jurisdiction and Serbia has not established that the failure to issue a takeover bid would affect a fundamental principle of Serbian law*. The contrary rather emerges from the fact that a failure to issue a takeover bid does not affect the validity of the transfer of shares, nor the ownership of the newly acquired shares. As a result, the Tribunal dismisses this Objection.[649]

544. The conclusion of the *Rand Investments* tribunal is particularly instructive here because: (*i*) it was based on the very same Treaties (*i.e.* the Serbia-Cyprus BIT, the Canada-Serbia BIT and the ICSID Convention); and (*ii*) involved the very same obligation to issue a takeover bid under the Takeover Law.

545. Serbia cannot—and does not—dispute the key, and correct, premise underlying the conclusion of the *Rand Investments* tribunal, which was that, as a matter of Serbian law, "*failure to issue a takeover bid does not affect the validity of the transfer of shares, nor the ownership of the newly acquired shares*." Serbia's objection, thus, fails for the same reason for which it failed in the *Rand Investments* arbitration.

546. For the sake of completeness, Claimants will explain *seriatim* below that: (*i*) both Cypriot Claimants acted in good faith with respect to their obligations under the Takeover Law; and, in any event (*ii*) only a particularly serious violation of domestic law can remove the Tribunal's jurisdiction—and failure to issue a takeover bid does not qualify as such.

i. Cypriot Claimants acted in good faith with respect to their obligations under the Takeover Law

547. As explained above, on 26 April 2012, Mr. Obradović contributed to Kalemegdan—which was, and remains, beneficially owned by Mr. Rand's children—an in-kind contribution consisting of all of the shares in Obnova registered in his name (approximately 70% of Obnova's total share capital). On 17 May 2012, Kalemegdan was registered in Serbia as the owner of the Cypriot Obnova Shares within the Central

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649 *Rand Investments Ltd. and others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award, 29 June 2023, ¶¶ 393-394, **RL-076**.

Securities Depository (the "**2012 Acquisition**").[650] As a result of the 2012 Acquisition, Kalemegdan became the nominal shareholder of the Cypriot Obnova Shares. As noted above, at the time of the 2012 Acquisition, Coropi was the beneficial owner of Kalemegdan. Thus, Coropi became an indirect beneficial owner of the Cypriot Obnova Shares.[651]

548. As explained by Ms. Tomić Brkušanin—a former official at SEC and Claimants' legal expert—both Cypriot Claimants acted in good faith with respect to their obligation under the Takeover Law.[652] Ms. Tomić Brkušanin also explains that in any event, a failure to issue a required takeover bid has no effect on the validity of the transfer of shares.[653]

549. Cypriot Claimants acted in good faith because they relied on the SEC's interpretation of the Takeover Law, which exempted transactions like the 2012 Acquisition from the obligation to issue a takeover bid. The SEC changed that interpretation and ceased the exemption for such transactions only in September 2012, four months after the 2012 Acquisition.

550. In fact, the SEC itself did not consider at the time that the 2012 Acquisition triggered the obligation to publish a takeover bid. Kalemegdan duly notified the SEC of the 2012 Acquisition in May 2012—and the SEC did not require Kalemegdan to issue a takeover bid.

551. The Takeover Law—adopted to implement the EU Directive 2004/25/EC on Takeover Bids ("**Takeover Directive**")[654]—entered into force on 10 June 2006 ("**2006 Takeover Law**"),[655] and its amendments entered into force subsequently on 24 December 2009

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650 Excerpt from the Central Securities Depository and Clearing House, 17 May 2012, **C-005**; Excerpt from the webpage of the Central Securities Depository and Clearing House, 29 March 2022, **C-004**; Minutes of a meeting of the board of directors of Kalemegdan, 26 April 2012, p. 2, **C-318**.

651 Trust Deed, 26 April 2012, C-066; Trust Deed, 16 August 2012, C-067. *See also* Memorial, ¶¶ 90-96

652 Tomić Brkušanin ER, ¶¶ 25, 36.

653 Tomić Brkušanin ER, ¶¶ 38-40, 51.

654 Lepetić ER, ¶ 43.

655 Law on Takeover of Joint Stock Companies (Official Gazette of the RS No. 46/2006), **C-557**.

("**2009 Takeover Law"**),[656] 4 January 2012 ("**2012 Takeover Law**"),[657] and 6 January 2017 (for the ease of reference, "**2016 Takeover Law**").[658]

552. The purpose of both the Takeover Law[659] and the Takeover Directive[660] was to protect minority shareholders in cases of a change of control. In its Opinion No. 2/0-03-387/3-07 dated 19 July 2007 ("**2007 SEC Opinion**"), the SEC expressly stated that "*related parties can acquire and dispose of shares of the target company on the organized market amongst themselves, without the obligation to make a takeover offer, provided that the total number of those shares remains unchanged.*"[661] In other words, the 2007 SEC Opinion stated that a transfer of shares between persons acting in concert did not trigger any obligation to publish a takeover bid.

553. It is undisputed that Messrs. Rand and Obradović were acting in concert within the meaning of the 2012 Takeover Law.[662] Coropi was also acting in concert with them at the time of the 2012 Acquisition because, since 11 March 2010 until today, it has been owned by the Ahola Family Trust,[663] whose beneficial owners are, and always have been, Mr. Rand's three children.[664] Article 4(6) of the 2012 Takeover Law provides that "*natural persons are considered to act in concert if they are […] parents and descendants.*"[665] Mr. Rand's children—and thus also Coropi—have, as a result, been

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656 Law on Takeover of Joint Stock Companies (Official Gazette of the RS No. 46/2006 and 107/2009), **C-558**.

657 Law on Takeover of Joint Stock Companies (Official Gazette of the RS No. 46/2006 and 107/2009 and 99/2011), **C-559**.

658 Law on Takeover of Joint Stock Companies (Official Gazette of the RS No. 46/2006. 107/2009 and 99/2011 and 108/2016), **C-560**.

659 Law on Takeover of Joint Stock Companies (Official Gazette of the RS No. 46/2006 and 107/2009), , Art. 3, **C-558**.

660 DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 April 2004 on takeover bids, Art. 5. **C-561**.

661 SEC, Opinion No. 2/0-03-387/3-07, 19 July 2007, **C-562**.

662 Counter-Memorial, ¶ 413.

663 Corporate Register of Coropi, 31 March 2022, **C-065**.

664 The Ahola Family Trust Indenture, 6 March 1995, Schedule B, **C-074**.

665 Law on Takeover of Joint Stock Companies (Official Gazette of the RS No. 46/2006), Art. 4(6), **C-557**; Law on Takeover of Joint Stock Companies (Official Gazette of the RS No. 46/2006 and 107/2009), Art. 4(6), **C-558**; Law on Takeover of Joint Stock Companies (Official Gazette of the RS No. 46/2006, 107/2009 and 99/2011), Art. 4(6), **C-559**.

acting in concert with Mr. Rand and all those acting in concert with him, including Mr. Obradović.

554. Thus, as explained by Ms. Tomić Brkušanin, under the SEC's interpretation of the Takeover Law set out in the 2007 SEC Opinion, the 2012 Acquisition was not subject to a takeover bid obligation because it did not result in a change of control over Obnova.

555. Indeed, as explained above, after Mr. Obradović and Kalemegdan—represented by their legal counsel, Karanović and Nikolić, a leading Serbian law firm—notified the SEC of the 2012 Acquisition the SEC did not express any reservation and did not require Kalemegdan to issue a takeover bid. Therefore, as Ms. Tomić Brkušanin concludes, Mr. Obradović and Kalemegdan acted in good faith with respect to their obligations under the Takeover Law.[666]

556. This conclusion is not disturbed by the fact that after the 2012 Acquisition occurred and the SEC was notified of the same, the SEC published an opinion in an unrelated matter in which it departed from the 2007 Opinion. In its opinion issued on 28 September 2012 and published on 17 October 2012 ("**2012 SEC Opinion**"), the SEC adopted a more restrictive interpretation of the Takeover Law, according to which transactions not resulting in the change of control over the target company were exempted from a takeover-bid obligation only if the parties acting in concert had issued a takeover bid in the past.[667]

557. The SEC explained its new interpretation of the Takeover Law by the introduction of an additional *exemption* from the obligation to publish a takeover bid. This exemption, set forth in Article 8(11) of the 2012 Takeover Law, provided that "*the acquirer is not obliged to publish a takeover bid if: […] after the takeover bid has been carried out, he acquires shares of the target company by transfer between persons who acted in concert in the takeover bid*."[668]

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666 Tomić Brkušanin ER, ¶¶ 25-26.

667 SEC Opinion No.:2/0-03-512/2-12, 28 September 2012, **CE-563**.

668 Law on Takeover of Joint Stock Companies (Official Gazette of the RS No. 46/2006, 107/2009 and 99/2011), Art. 8(11), **CE-559**.

558. The SEC explained in its 2012 Opinion that Article 8(11) of the 2012 Takeover Law "*implie[d] that other persons, who act in concert but have not published a takeover bid, and who mutually acquire shares, shall have the obligation to launch a takeover bid, according to this exemption*."[669] In other words, the SEC interpreted the introduction of an additional exemption from an obligation to issue a takeover-bid as restricting—rather than expanding—the universe of exempted transactions. Such interpretation could not have been foreseen by Cypriot Claimants.

559. Under the interpretation of the Takeover Law as espoused in the 2012 SEC Opinion, the 2012 Acquisition would have triggered Kalemegdan's obligation to publish a takeover bid since no takeover bid was published in the past by Kalemegdan or parties acting in concert with it with respect to the acquisition of shares in Obnova. However, as Ms. Tomić Brkušanin concludes, Kalemegdan acted in good faith with respect to its obligations under the Takeover Law because it legitimately relied on the 2007 SEC Opinion under which it had no obligation to issue a takeover bid.[670] This conclusion is further reinforced by the fact that SEC did not express any reservations in respect of the 2012 Acquisition despite being duly notified of the same and did not require Kalemegdan—or any other entity—to issue a takeover bid even after the SEC adopted the 2012 SEC Opinion.

560. The same conclusion applies to Coropi, which also relied on the 2007 SEC Opinion and—as an entity acting in concert with them—also on Mr. Obradović and Kalemegdan's notification of the 2012 Acquisition to the SEC.[671]

ii. Even if Cypriot Claimants were required under Serbian law to issue a takeover bid and failed to do so, this would still not remove the Tribunal's jurisdiction *ratione materiae*

561. Even if Cypriot Claimants were required under the Takeover Law to issue a takeover bid, their failure to do so would not remove the Tribunal's jurisdiction over the Cypriot Obnova Shares. Article 1(1) of the Serbia-Cyprus BIT provides that "*investment*" shall mean every kind of asset invested by investor "*in accordance with the laws and*

669 SEC Opinion No. No.:2/0-03-512/2-12, 28 September 2012, **CE-563**.

670 Tomić Brkušanin ER, ¶ 25.

671 Tomić Brkušanin ER, ¶¶ 27, 36.

regulations of the [host State]."[672] However, as unanimously recognized by investment tribunals, regardless of whether the applicable BIT contains a legality clause, only a particular serious violation of a fundamental principle of the host State's law can remove jurisdiction of an investment tribunal.

562. For example, in *Hocthief v. Argentina*, the tribunal held that only conduct violating fundamental principles of the host State's law—such as fraud or corruption—can remove the tribunal's jurisdiction over an otherwise qualifying investment:

> The Tribunal notes that in previous cases, tribunals have focused upon compliance with "fundamental principles of the host State's law". This Tribunal considers that to be the correct focus when the question is addressed in the context of questions of jurisdiction and admissibility. Investments that are forbidden, or dependent upon government approvals that were not in fact obtained, or which were effected by fraud or corruption can be caught by a provision such as Article 2(2) of the Argentina-Germany BIT. But not every technical infraction of a State's regulations associated with an investment will operate so as to deprive that investment of the protection of a Treaty that contains such a provision.[673]

563. In *Allard v. Barbados*, the tribunal concluded that the investor's non-compliance with exchange control laws could not remove its jurisdiction because it only represented a technical breach of local law not involving violation of fundamental legal principles of the host State.[674]

564. In *Lee-Chin v. Dominican Republic*, the respondent argued that claimant's shareholding in a local company is not a protected investment because the investor failed to pay taxes for such acquisition (for the payment of which the claimant was allegedly jointly liable with the seller). The tribunal rejected the objection, holding that even if established, "*the violations adduced by Respondent are not severe enough so as to reach, even if established, the highest threshold*" required to remove the tribunal's jurisdiction.[675]

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672 Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Art. 1(1), **CL-007**.

673 *HOCHTIEF Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014, ¶ 199, **CL-101**.

674 *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award on Jurisdiction, 13 June 2014, ¶ 94, **CL-102**.

675 *Michael Anthony Lee-Chin v. Dominican Republic*, ICSID Case No. UNCT/18/3, Final Award, 6 October 2023, ¶ 187, **CL-103**.

565. In determining whether a particular provision of municipal law relates to a fundamental legal principle, investment tribunals often focus on the sanction for non-compliance under domestic law. This is exactly the approach taken by the *Rand Investments* tribunal.[676] Similarly, the tribunal in *Liman Caspian v. Kazakhstan* explained that while violations of domestic law rendering the underlying transaction null and void may remove the tribunal's jurisdiction, violations that only make it voidable do not have any jurisdictional consequences:

> [T]he scope of Respondent's consent to jurisdiction must be understood to extend also to those investments in respect of which the underlying transaction was made in breach of Kazakh law and was therefore voidable. Since the transfer of the Licence was not invalid, but only voidable, Claimants' investment does not fall outside the scope of Respondent's consent to jurisdiction.[677]

566. Even if the Cypriot Claimants were required under the Takeover Law to issue a takeover bid, their failure to do so does not involve a breach of any fundamental principle of Serbian law and, thus, cannot remove the Tribunal's jurisdiction. This is also evident from the fact that such purported failure could not render the 2012 Acquisition void or voidable. As explained by Ms. Tomić Brkušanin, Kalemegdan became a lawful shareholder in Obnova on 17 May 2012 when it was registered as such by the Central Securities Depository, regardless whether or not Kalemegdan published a takeover bid.[678]

567. As put by Ms. Tomić Brkušanin, "*the acquiror's obligation to issue a takeover bid may, in certain circumstances, be the consequence of a valid acquisition of shares but is never a condition thereof*."[679] In other words, an obligation to issue a takeover bid can only arise where the transfer of shares is valid—because an invalid transfer of shares cannot cause any obligation to issue a takeover bid.

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676 Tomić Brkušanin ER, ¶¶ 37-52, 71-79.

677 *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of the Award, 22 June 2010, ¶ 187, **CL-104**.

678 Tomić Brkušanin ER, ¶ 37.

679 Tomić Brkušanin ER, ¶ 38.

568. In fact, Dr. Lepetić, Serbia's own expert, recognizes that the consequences stemming from a buyer's failure to launch a take-over bid are limited to the following three.[680]

569. *First,* Article 37 of the 2012 Takeover Law provided that the acquirer and persons acting in concert with it could not vote the acquired shares from the day the obligation to publish a takeover bid arises until the day this obligation is fulfilled.[681] As the Commercial Court of Appeal made clear, where the acquiror loses its voting rights as result of its failure to publish a takeover bid, "*it is up to the shareholders themselves*" to "***challenge decisions made by the assembly through prohibited or unauthorized voting***"[682], within a deadline of three months.[683] None of the Obnova minority shareholders ever sought to challenge the validity of any of resolutions of Obnova's shareholder assemblies. The first potential consequence of Cypriot Claimants' non-issuance of a takeover bid, thus, never materialized.

570. *Second*, Article 41b of the 2012 Takeover Law empowered all other shareholders to request a competent commercial court to order the purchase of their shares by any persons who failed to launch a mandatory takeover bid under the same conditions as if the takeover bid had been made.[684] Again, none of Obnova's shareholders ever filed such a request before Serbian courts. In any event, such a hypothetical claim would be subject to the general 10-year limitation period set forth in Article 371 of the Law on Obligations[685] and would, thus, have already been time-barred. The second potential consequence of the Cypriot Claimants' non-issuance of a takeover bid, thus, never materialized and cannot materialize in future either.

571. *Third,* pursuant to Article 47 of the 2012 Law Takeover Law, the SEC could issue a fine ranging from RSD 1,000,000 (approx. EUR 8 thousand) to RSD 3,000,000 (approx.

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680 Lepetić ER, ¶ 33.

681 Law on Takeover of Joint Stock Companies (Official Gazette of the RS No. 46/2006, 107/2009 and 99/2011), Art. 37, **C-559**.

682 Judgment 510/2017, Commercial Court of Appeal, 17 November 2017, **C-570**.

683 Companies Law (Official Gazette RS, No. 36/2011, 99/2011, 83/2014 – other law, 5/2015, 44/2018, 95/2018, 91/2019 and 109/2021), Art. 376, **C-568**.

684 Law on Takeover of Joint Stock Companies (Official Gazette of the RS No. 46/2006, 107/2009 and 99/2011), Art. 41(b), **C-559**.

685 Law on Obligations (Official gazette of SFRY, No. 29/78, 39/85, 45/89 – decision of the Constitutional Court of Yugoslavia and 57/89, Official gazette of SRY, No. 31/93, Official gazette SCG, No. 1/2003 - constitutional charter), Art. 371, **C-571**.

EUR 25 thousand).[686] However, the SEC never fined any of Cypriot Claimants even though it was duly notified of the 2012 Acquisition. Moreover, any potential fine was subject to a three-year limitation period under Article 37 of the Law on Economic Offences,[687] and is now time-barred. Accordingly, the third potential consequence of Cypriot Claimants' non-issuance of a takeover bid, thus, also never materialized and cannot materialize in the future.

572. In sum, the transfer of shares under the 2012 Acquisition was valid under Serbian law—irrespective of whether or not Cypriot Claimants were required to issue a takeover bid—and the Cypriot Obnova Shares are, thus, an investment protected under the Serbia-Cyprus BIT.

4. Cypriot Claimants' claims meet the jurisdictional requirements under the ICSID Convention

573. In their Memorial, Claimants explained that Cypriot Claimants' claims satisfy all the jurisdictional requirements under the ICSID Convention, as there is: (*i*) a *legal dispute;* (*ii*) arising directly out of an *investment;* (*iii*) between a *national* of a Contracting State and another Contracting State; and (*iv*) both Parties to the dispute have consented in writing to submit the dispute to ICSID.[688]

574. Serbia does not dispute that these requirements have been satisfied, with the sole exception—Serbia claims that Cypriot Claimants do not have an "*investment*" under Article 25(1) of the ICSID Convention.[689] Specifically, Serbia claims that an "*investment*" under Article 25(1) of the ICSID Convention requires: "*(i) a contribution of resources of economic value in the territory of the host State, (ii) that extends over a*

686 Law on Takeover of Joint Stock Companies (Official Gazette of the RS No. 46/2006, 107/2009 and 99/2011), Arts. 5(3) and 6, **JL-006**.

687 Law on Economic Offenses ("Official gazette of the SFRY", No. 4/77, 36/77 correction, 14/85, 10/86 (refined text), 74/87, 57/89 and 3/90 and "Official Gazette of the SRY", No. 27/92, 16/93, 31/93, 41/93, 50/93, 24/94, 28/96 and 64/2001 and "Official gazette of the RS", No. 101/2005 –other law), Art. 37, **C-569**.

688 Memorial, ¶¶ 173 *et seq.*

689 Counter-Memorial, ¶ 355.

certain period of time, and (iii) involves some risk."[690] Serbia's argument fails for a number of reasons.

575. To begin with, the ICSID Convention does *not* include *any* definition of *investment* and does not contain any provision that would condition the existence of an investment upon the three requirements invoked by Serbia. As a result, commentators confirm that "*tribunals should treat the definition of 'investment' under the [ICSID] Convention as encompassing any plausibly economic activity or asset.*"[691]

576. Investment tribunals have also repeatedly confirmed that it is the definition under the relevant investment treaty—here the Cyprus-Serbia BIT—which is determinative for the existence of an *investment* under the ICSID Convention.[692] As explained above, Kalemegdan and Coropi's investment satisfies the requirements under Cyprus-Serbia BIT.

577. However, even if Serbia were right and Claimants were required to show the existence of contribution, duration and risk (*quod non*), Kalemegdan and Coropi's investment satisfies these requirements. Claimants demonstrate this below separately for Kalemegdan and Coropi.

578. Kalemegdan has made contribution because, as explained above, it is undisputed that Mr. Obradović contributed the Cypriot Obnova Shares to Kalemegdan's capital against his acquisition of the shares issued by Kalemegdan.[693]

579. Contrary to Serbia's allegation, Coropi also made a contribution. Investment tribunals have repeatedly confirmed that contribution is not limited to monetary contribution. On

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690 Counter-Memorial, ¶ 351.

691 J. Mortenson, *The Meaning of Investment: ICSID Travaux and the Domain of International Investment Law,* Harvard International Law Journal, Vol. 51, 2010, p. 261, **C-597**.

692 *Philippe Gruslin v. Malaysia,* ICSID Case No. ARB/99/3, Award, 27 November 2000, ¶ 13.6, **CL-105**; *Lanco Int'l, Inc. v. Argentine Republic,* ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, 8 December 1998, ¶ 11, **CL-106**; *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/03/6, Award, 31 July 2007, ¶¶ 159-60, **CL-081**; *Ambiente Ufficio SPA and others v. The Argentine Republic,* ICSID Case No. ARB/08/09, Decision on Jurisdiction and Admissibility, 8 February 2013, ¶ 453, **CL-108**.

693 Counter-Memorial, ¶ 357; Minutes of a meeting of the board of directors of Kalemegdan, 26 April 2012, p. 3, **C-318.**

the contrary, contribution can be provided in other forms as well.[694] In the present case, Coropi made its contribution through its participation in Obnova's management through Messrs. Rand and Markićević.

580. Serbia's reliance on the *AAG* case is inapposite. In that case, there was no proof whatsoever of any consideration provided under the trust deeds that were supposed to establish AAG's beneficial ownership.[695] In the present case, the trust deeds between Coropi and Mr. Obradović expressly refer to consideration given.[696]

581. Furthermore, Kalemegdan acquired direct ownership over the Cypriot Obnova Shares, and Coropi their indirect beneficial ownership, in April 2012. Thus, at the time when this arbitration was commenced, Cypriot Claimants had held the Cypriot Obnova Shares for almost a decade. This period is clearly sufficient to satisfy the duration requirement for both Kalemegdan and Coropi.

582. Finally, Cypriot Claimants' investment clearly involved risk—connected with the unpredictable legal and business environment in Serbia. This risk ultimately materialized when Serbia committed the breaches of the Cyprus-Serbia BIT. In the words of the *Fedax v. Venezuela* tribunal, "*the very existence of a dispute*"[697] proves the existence of a risk incurred by both Kalemegdan and Coropi.

583. Similarly, in *Rand Investments v. Serbia*, the tribunal found that the risk requirement under Article 25(1) of the Convention is satisfied by the existence of an "*inherent risk*" of a decline in the value of an investment:

> Mr. Rand's investment faced the usual business risks involved in investing in a foreign country. The Tribunal is satisfied that by acquiring an interest in BD Agro through the Beneficially Owned

694 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 297, **CL-099**; *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Decision on Jurisdiction, 16 July 2001, ¶ 61, **CL-109**; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶ 131, **CL-110**; *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Decision on Jurisdiction dated 12 July 2006, ¶ 73, **CL-111**.

695 *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019, ¶ 197, **RL-051**.

696 Trust Deed, 26 April 2012, Preamble, **C-066**; Trust Deed, 16 August 2012, Preamble, **C-067**.

697 *FEDAX N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, ¶ 40, **CL-098**. *See also Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 301, **CL-099**.

> Shares, Mr. Rand bore the risk inherent in such an investment, namely the risk that the value of BD Agro might decline. This suffices to fulfil the risk requirement included in the objective definition of investment under Article 25(1) of the Convention.[698]

584. Needless to say, Cypriot Claimants clearly bore the "*inherent risk*" of a decline in the value of its investment. This risk, in fact, realized when Serbia breached the Cyprus-Serbia BIT.

585. Serbia relies on the award in *Romak v. Uzbekistan* to argue that "*the ordinary commercial or business risk assumed by all those who enter into a contractual relationship*" does not satisfy the test proposed by Serbia under Article 25(1) of the Convention.[699] However, the *Romak* case is irrelevant because it dealt with a commercial contract on supply of wheat. The risk in that case was therefore limited to "*the value of the wheat to be delivered*." Furthermore, Romak tried to avoid even that risk by providing, in the supply agreement, that the payment will be made by means of a "*letter of guarantee*" or a "*letter of credit*".[700] The risk in *Romak* was a simple risk of the buyer's non-payment for goods delivered by the seller.

586. The business and regulatory risk assumed by Kalemegdan and Coropi obviously went far beyond the risk of a buyer's failure to make payment for goods delivered, let alone a guaranteed one. There can be no doubt that Kalemegdan and Coropi's investment satisfies the risk requirement under the *Salini* test.

B. The Tribunal has jurisdiction over Mr. Broshko' claims

1. The Tribunal has jurisdiction *ratione personae* under the Canada-Serbia BIT

587. In the Memorial, Claimants explained that Article 1 of the Canada-Serbia BIT defines "*investor*" as: "*a national or an enterprise of a Party, that seeks to make, is making or*

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698 *Rand Investments Ltd. and others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award 27 October 2023, ¶ 268, **CL-112**.

699 *Romak S.A. v. The Republic of Uzbekistan* (PCA Case No. AA280), Award, 26 November 2009, ¶ 231, **RL-086**.

700 *Romak S.A. v. The Republic of Uzbekistan* (PCA Case No. AA280), Award, 26 November 2009, ¶ 231, **RL-086**.

has made an investment."[701] The term "*national*" means "*for Canada, a natural person who is a citizen or permanent resident of Canada.*"[702]

588. Mr. Broshko is a natural person who is a citizen and permanent resident of Canada. He has made an investment in Serbia. Thus, Mr. Broshko qualifies as a protected investor under Article 1 of the Canada-Serbia BIT.[703]

589. According to Article 21(2) of the Canada-Serbia BIT, an investor can submit a claim to arbitration also "*on behalf of an enterprise of the respondent Party that is a juridical person that the investor owns or controls directly or indirectly.*"[704] The term "*enterprise*" means "*an entity constituted or organized under applicable law, whether or not for profit, whether privately owned or governmentally owned, including a corporation, trust, partnership, sole proprietorship, joint venture or other association and a branch of any such entity.*"[705]

590. MLI is an "*enterprise of the respondent Party*" because it is a corporation constituted in accordance with the laws of Serbia. MLI is controlled by Mr. Broshko,[706] its sole shareholder.[707]

591. Given the above, Mr. Broshko can submit claims both on his own behalf, under Article 21(1) of the Canada-Serbia BIT, and on behalf of MLI, under Article 21(2) of the Canada-Serbia BIT in conjunction with Article 1 of the Canada-Serbia BIT.

592. In the Counter-Memorial, Serbia did not raise any objections concerning jurisdiction *ratione personae* with respect to Mr. Broshko. Claimants therefore understand it is undisputed that the Tribunal has jurisdiction *ratione personae* over Mr. Broshko's claims (both claims on his own behalf and claims on behalf of MLI).

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701 Canada-Serbia BIT, Art. 1, definition of "investor of a Party", **CL-001**. *See also* Memorial ¶¶ 158-162.

702 Canada-Serbia BIT, Art. 1, definition of "national," **CL-001**.

703 Passport of Mr. Erinn Broshko, 23 August 2016, **C-001**.

704 Canada-Serbia BIT, Art. 21(2), **CL-001**.

705 Canada-Serbia BIT, Art. 1, definition of "enterprise", **CL-001**.

706 Passport of Mr. Erinn Broshko, 23 August 2016, **C-001**

707 Excerpt from the webpage of Serbian Business Register Agency for MLI, 29 March 2022, **C-002**.

2. The Tribunal has jurisdiction *ratione materiae* under the Canada-Serbia BIT

593. Article 1 of the Canada-Serbia BIT defines "*covered investment*" as "*an investment in [the host state's] territory that is owned or controlled, directly or indirectly, by an investor of the other Party existing on the date of entry into force of this Agreement, as well as an investment made or acquired thereafter*."[708] The same provision also confirms that the term "*investment*" includes, among others, "*a share, stock or other form of equity participation in an enterprise.*"[709]

594. Mr. Broshko's investment is represented by the 10% shareholding in Obnova, held by Mr. Broshko indirectly through MLI. Mr. Broshko's shareholding in Obnova squarely meets the definition of "*investment*" set forth in Article 1 of the Canada-Serbia BIT.

595. Serbia does not dispute that Mr. Broshko's investment satisfies the definition under the Canada-Serbia BIT. However, Serbia argues that Mr. Broshko's acquisition of Obnova's shares ("**2017 Acquisition**") is not an investment protected under the Canada-Serbia BIT because it was not accompanied by the issuance of a takeover bid my Mr. Broshko and MLI.[710]

596. Again, Serbia's objection fails for a number of reasons.

597. *First,* neither Mr. Brosko nor MLI were required to issue a takeover bid in connection with the 2017 Acquisition. The premise of Serbia's argument is that Mr. Broshko and/or MLI acted in concert with Mr. Rand with respect to the 2017 Acquisition. This conclusion purportedly follows from the fact that: (*i*) "*in 2012, Mr Broshko supervised Mr Rand's investments in Serbia*";[711] and (*ii*) in 2017, Mr. Broshko also acquired a 10% shareholding in Crveni Signal,[712] another Serbian company whose majority beneficial owner was Mr. Rand. Serbia, however, does not explain why these facts should establish concerted conduct between Messrs. Rand and Broshko.

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708 Canada-Serbia BIT, Art. 1, definition of "covered investment", **CL-001**.

709 Canada-Serbia BIT, Art. 1, definition of "investment", **CL-001**.

710 Counter-Memorial, ¶¶ 470-473.

711 Counter-Memorial, ¶ 472.

712 Counter-Memorial, ¶ 472.

598. The fact that Mr. Broshko decided to invest in companies he oversaw for Mr. Rand, and had intimate knowledge of, in no way indicates that the 2017 Acquisition was a result of any concerted conduct. In fact, Mr. Broshko testifies that he "*did not coordinate [the 2017 Acquisition] with Mr. Rand*"[713] and that he financed the 2017 Acquisition from his own funds.[714] Moreover, as explained by Ms. Tomić Brkušanin, none of the circumstances establishing concerted action under the 2016 Takeover Law is present in the 2017 Acquisition.[715]

599. *Second*, even Mr. Broshko and MLI were required to publish a takeover bid, the only potential consequences for them not doing so would be the three consequences discussed above in connection with the legality of the 2012 Acquisition:

a. pursuant to Art. 37(2) of the 2016 Takeover Law, MLI could be deprived of the right to vote the acquired shares at Obnova shareholders' assembly.[716] However, in any event, MLI never voted its shares in Obnova;

b. in accordance with Article 47 of the 2016 Takeover Law, the SEC could fine MLI from 1,000,000 to 3,000,000 dinars (approximately EUR 8,500 to 25,500) to and Mr. Broshko from 20,000 to 40,000 dinars (approximately EUR 170 to 340).[717] However, no such fines were ever imposed. Moreover, since the SEC's power to fine Mr. Broshko and/or MLI is subject to a three-year limitation period set forth under Article 37 of the Law on Economic Offenses,[718] no such a fine could have been imposed as of 15 November 2020; and

c. pursuant to Article 41b of the Takeover Law, Obnova's minority shareholders could request a competent court to order a purchase of their shares under the

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713 Broshko WS, ¶ 44.

714 Counter-Memorial, ¶ 470.

715 Tomić Brkušanin ER, ¶¶ 53-70.

716 Law on Takeover of Joint Stock Companies (Official Gazette of the RS No. 46/2006, 107/2009, 99/2011 and 108/2016), Art. 37(2), **C-560**.

717 Law on Takeover of Joint Stock Companies (Official Gazette of the RS No. 46/2006, 107/2009, 99/2011 and 108/2016), Art. 47, **C-560**.

718 Law on Economic Offenses ("Official gazette of the SFRY", No. 4/77, 36/77 correction, 14/85, 10/86 (refined text), 74/87, 57/89 and 3/90 and "Official Gazette of the SRY", No. 27/92, 16/93, 31/93, 41/93, 50/93, 24/94, 28/96 and 64/2001 and "Official gazette of the RS", No. 101/2005 –other law), Art. 37, **C-569**.

same terms that would have applied under the takeover bid.[719] However, no such request was ever filed by any shareholder.

600. Accordingly, even if the 2016 Takeover Law had required Mr. Broshko and/or MLI to launch a takeover bid, and it did not, their failure to do so would—in the words of the *Rand Investments* tribunal—"***not*** *affect the validity of the transfer of shares, nor the ownership of the newly acquired shares*."[720] Indeed, as explained above, an obligation to issue a takeover bid can only arise if the transfer of shares is valid. Moreover, Ms. Tomić Brkušanin confirms[721]—and Serbia does not argue otherwise—that even where such an obligation arises, non-compliance therewith has no effect on the validity of the transfer of shares or the ownership to the acquired shares.

601. *Third,* for the reasons explained above with respect to Cypriot Claimants and the 2012 Acquisition, even if Mr. Broshko and MLI were required under the 2016 Takeover Law to launch a takeover bid, and they were not, their failure to do so would not remove the Tribunal's jurisdiction over Mr. Broshko's investment. This is because only a particularly serious violation of domestic law—such as bribery or fraud[722]—are susceptible of removing jurisdiction of an investment tribunal. A failure to launch a required takeover bid plainly does not qualify as such a serious illegality, as the *Rand Investments* tribunal expressly confirmed.[723] Accordingly, even if the Mr. Broshko and/or MLI were required under the Takeover Law to issue a takeover bid (quod non), their failure to do so does not involve a breach of any fundamental principle of Serbian law and, thus, cannot remove the Tribunal's jurisdiction.

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719 Law on Takeover of Joint Stock Companies (Official Gazette of the RS No. 46/2006, 107/2009, 99/2011 and 108/2016), Art. 41(b), **C-560**.

720 *Rand Investments Ltd. and others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award, 29 June 2023, ¶¶ 393-394, **RL-076**.

721 Tomić Brkušanin ER, ¶¶ 38-40, 51.

722 *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, ¶ 3.169, **RL-152**.

723 *Rand Investments Ltd. and others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award, 29 June 2023, ¶¶ 393-394, **RL-076**.

3. The Tribunal has jurisdiction *ratione temporis* under the Canada-Serbia BIT

602. In the Memorial, Claimants explained that the Canada-Serbia BIT entered into force on 27 April 2015 and applies to all investments "*existing on the date of entry into force of this Agreement, as well as an investment made or acquired thereafter.*"[724] Furthermore, Claimants clarified that the only breach relied upon by Mr. Broshko is Serbia's express refusal of the Request for Compensation in August 2021, *i.e.* after the entry into force of the Canada-Serbia BIT.[725] Consequently, the Tribunal has jurisdiction *ratione temporis* over the claims submitted by Mr. Broshko.

603. Serbia disagrees and claims that Mr. Broshko's claims are "*are intrinsically linked to events which pre-date the entry into force of the Canada-Serbia BIT*", in particular the 2003 Registration and the 2013 DRP.[726] As a result, Serbia argues that the Tribunal does not have jurisdiction *ratione temporis*, as it would have to look at events that predate the treaty, as well as because the three-year time limit set forth in Article 22(2)(e)(i) has passed.[727]

604. As Claimants explain in detail below, none of Serbia's objections has any merit.

a. Mr. Broshko's claims are based solely on events post-dating the Canada-Serbia BIT

605. As explained above, it is for Claimants—and not for Serbia—to define the breach of the treaty they claim. In fact, Article 22(2)(e)(i) of the Canada-Serbia BIT explicitly states that the Tribunal must examine only those claims, which have been raised by the investor:

> An investor may submit a claim to arbitration […] only if […] not more than three years have elapsed from the date on which the investor first

724 Canada-Serbia BIT, Art. 1, definition of "covered investment", **CL-001**.

725 Memorial, ¶ 172.

726 Counter-Memorial, ¶ 458.

727 According to this provision, eligible investors bring their investment claim no later than three years from the date on which the investor/ enterprise "*first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor [/enterprise] has incurred loss or damage thereby*." Canada-Serbia BIT, Art. 22(2)(e)(i), **CL-001**.

> acquired, or should have first acquired, knowledge of the *alleged breach* […].[728]

606. The ordinary meaning of the term "*alleged*", in this context, is "*pleaded*" or "*claimed*". There is, thus, no doubt that the Tribunal must make its jurisdictional assessment on the basis of Mr. Broshko's characterization of his claims.

607. The above conclusion was explicitly confirmed in the *Rand v. Serbia* award, where Serbia raised a similar objection *ratione temporis* trying to tie the breaches claimed by claimants to some other events, which pre-dated the Canada-Serbia BIT. The tribunal rejected this attempt and expressly stated that "*the Tribunal must assess its jurisdiction on the basis of the claims as pled*":

> The Tribunal tends to agree with the Claimants. Article 22(2)(e)(i) of the Canada-Serbia BIT reproduced above provides that an investor may submit a claim to arbitration if not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach. *The use of the word "alleged" to qualify the breach suggests that the Tribunal must assess its jurisdiction on the basis of the claims as pled*. Other tribunals, interpreting similarly worded investment agreements, have reached the same conclusion.[729]

608. Mr. Broshko does not bring any claims based on either the 2003 Registration or 2013 DRP. His claims are based solely on the rejection of Obnova's Request for Compensation, which took place on 13 August 2021.

609. Serbia's allegation that the rejection of Obnova's Request for Compensation is "*intrinsically linked to events which pre-date the entry into force of the Canada-Serbia BIT*", is both incorrect and irrelevant.

610. Serbia's rejection of the Request for Compensation is *not* a consequence of the 2003 Registration. The Land Directorate could have provided the compensation requested by Obnova despite the incorrect registration. Messrs. Živković and Milošević explain that

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728 Canada-Serbia BIT, Art. 22(2)(e)(i), **CL-001**. Article 22(2)(f)(i) of the Canada-Serbia BIT contains similar wording referring to an enterprise.

729 *Rand Investments Ltd. and others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award 29 June 2023, ¶ 441 (emphasis added), **CL-112**.

the Land Directorate "*could have addressed Obnova's ownership as a preliminary issue and, consequently, agreed on the compensation due.*"[730]

611. Even if the Tribunal concluded that the rejection of Obnova's Request for Compensation was a consequence of the 2003 Registration (*quad non*), it would not affect the Tribunal's jurisdiction. This is because the 2003 Registration would only represent an initial step in the process that culminated with Serbia's rejection of the Request for Compensation only in 2021, *i.e.* after the Canada-Serbia BIT's entry into force.[731]

b. The three-year time limit under Articles 22(2)(e)(i) and 22(2)(f)(i) of the Canada-Serbia BIT has not lapsed before commencement of the arbitration

612. Serbia's second objection *ratione temporis*[732] is based on the allegation that Mr. Broshko's claims fall outside of the three-year time limit for initiating arbitration proceedings set forth in Articles 22(2)(e)(i) and 22(2)(f)(i) of the Canada-Serbia BIT. These provisions require Mr. Broshko to bring an investment claim no later than three years "*from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby.*"[733]

613. Mr. Broshko submitted his claims to arbitration on 27 April 2022.[734] Thus, Articles 22(2)(e)(i) and 22(2)(f)(i) of the Canada-Serbia BIT would operate to exclude Mr. Broshko's claims only if Mr. Broshko first acquired (or should have first acquired) knowledge of Serbia's breaches and knowledge of the loss he suffered as a result of those breaches before 27 April 2019.

614. As already explained above, Mr. Broshko's claims are based on Serbia's refusal to provide compensation, which occurred on 13 August 2021. Consequently, Mr. Broshko

730 Živković Milošević First ER, ¶ 266; Živković Milošević Second ER, ¶ 229.

731 *Supra* ¶¶ 358-359.

732 This objection is raised both under *ratione termporis* and *ratione voluntatis* part of Serbia's Counter-Memorial

733 Canada-Serbia BIT, Art. 22(2)(e)(i) and 22(2)(f)(i), **CL-001**.

734 Request for Arbitration.

did not acquire knowledge of Serbia's breach and the resulting loss before 27 April 2019. Claimants address this point in detail in **Section IV.B.3.b.i** below.

615. However, even if the Tribunal were to conclude that Mr. Broshko became aware of Serbia's violations before the cut-off date—and he did not—Serbia has still not demonstrated that Mr. Broshko was aware of the damages resulting from those violations. Claimants address this point in detail in **Section IV.B.3.b.i** below.

i. Mr. Broshko did not—and could not—have knowledge about the alleged breach before 27 April 2019

616. As explained above, the only violation of Canada-Serbia BIT claimed by Mr. Broshko is Serbia's rejection of Obnova's Request for Compensation which occurred on 13 August 2021.[735] Since Mr. Broshko solely relies on the rejection of Obnova's Request for Compensation as the basis for his claims, there is no doubt that the three-year deadline set forth in Articles 22(2)(e)(i) and 22(2)(f)(i) of the Canada-Serbia BIT has been met. Three years from 13 August 2021 will lapse only in the future, on 13 August 2024.

617. Serbia's reliance on *Corona Materials v. Dominican Republic* is misplaced. In that case, the claimant relied on a breach that started before the cut-off date and continued thereafter.[736] This is not the situation in the present case. The rejection of Obnova's Request for Compensation was not a continuous breach.

ii. Mr. Broshko did not—and could not—acquire knowledge of the loss caused by the rejection of the Request for Compensation before 27 April 2019

618. As explained above, both the knowledge of a *breach* and the knowledge of a *loss* are necessary to trigger the three-year period under Articles 22(2)(e)(i) and 22(2)(f)(i) of

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735 Request for Arbitration, ¶ 126; Memorial, ¶ 386.

736 *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, ¶ 205 (emphasis added), **RL-110**.

the Canada-Serbia BIT.[737] In case knowledge of these two issues is not acquired on the same date, the three-year period starts to run on the *later* of these two dates.[738]

619. Mr. Broshko undisputedly acquired knowledge of both Serbia's breach of the Canada-Serbia BIT and the knowledge of the resulting loss after the cut-off date of 27 April 2019, namely when the Land Directorate issued the letter, where it expressly refused to compensate Obnova for the unlawful expropriation of its premises.[739]

620. Tellingly, Serbia completely failed to discuss the requirement of Mr. Broshko's knowledge of *loss*. Without explaining when Mr. Broshko allegedly acquired knowledge of the *loss*, Serbia cannot credibly argue that Mr. Broshko filed his claim after the expiry of the three-year period under Articles 22(2)(e)(i) and 22(2)(f)(i) of the Canada-Serbia BIT.

4. Mr. Broshko's claims meet the jurisdiction requirements under the ICSID Convention

621. In their Memorial, Claimants explained that Mr. Broshko' claims satisfy all the jurisdictional requirements under the ICSID Convention because the dispute brought by Mr. Broshko is: (*i*) a *legal dispute;* (*ii*) arising directly out of an *investment;* (*iii*) between a *national* of a Contracting State and another Contracting State; and (*iv*) both Parties to the dispute have consented in writing to submit the dispute to ICSID.[740]

622. Serbia does not dispute that the above requirements are satisfied—with the exception of Serbia's consent to the dispute. Specifically, Serbia argues that its consent to arbitration

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737 *E.g. Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award of the Tribunal (Corrected), 30 May 2017, ¶ 211, **CL-084**; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decisions on Objections to Jurisdiction, 20 July 2006, ¶ 38, **RL-107**; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 52, **CL-113**; *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, ¶ 194, **RL-110**; *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award in Relation to Preliminary Motion by the Government of Canada ("The Harmac Motion"), 24 February 2000, ¶ 12 (emphasis added), **CL-114**; *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018 (emphasis added), ¶ 155, **CL-115**.

738 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 347, **RL-166**.

739 Letter from the Land Directorate of the City of Belgrade, 13 August 2021 (pdf), **C-053**.

740 Memorial, ¶¶ 173-182, 186-195.

under the Canada-Serbia BIT is conditioned upon the provision of a waiver of local claims on behalf of Obnova.[741]

623. As Claimants explain in the following sections, Serbia's objection is fundamentally misplaced.

a. Mr. Broshko cannot be required to submit a waiver on behalf of Obnova because he does not control Obnova

624. Mr. Broshko is a minority (10%) shareholder in Obnova. As such, he has no control over Obnova. This fact, on its own, is sufficient to reject Serbia's objection. As confirmed by the tribunal in *Kappes v. Guatemala*, a waiver on behalf of the local company is required only if an investor brings a claim on behalf of a local company:

> Respondent's third related ground for dismissal is that the Tribunal does not have jurisdiction to determine claims for "Exmingua's losses," because Claimants did not submit a waiver by Exmingua pursuant to DR-CAFTA Article 10.18.2. *In the Tribunal's view, recasting the issue as about whether proper waivers were submitted does not advance the debate beyond the core jurisdictional question presented. That is because, on its face, Article 10.18.2 does not require an enterprise waiver for claims submitted to arbitration under Article 10.16.1(a), but only for those submitted on behalf of an enterprise under Article 10.16.1(b),119i.e., the alternative avenue that Claimants concededly have not pursued.120* In consequence, the issue of waivers will become moot upon determination of the core jurisdictional issue the Tribunal has identified. Stated flatly: if there is jurisdiction for Claimants to proceed as they have done under Article 10.16.1(a), then they have submitted sufficient waivers to do so - and if there is no jurisdiction to proceed under Article 10.16.1(a), then it would not matter what waivers they submitted, as an additional waiver would not cure the fundamental problem of lack of consent.[742]

625. Furthermore, because Mr. Broshko does not control Obnova, he would only be able to obtain a waiver from Obnova in case Kalemegdan, being the controlling shareholder of Obnova, would approve the issuance of such a waiver.

626. Mr. Broshko explains in his witness statement that after he decided to pursue the claim against Serbia, he approached Mr. Rand—who controls Kalemegdan—and inquired

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741 Counter-Memorial, ¶¶ 441-449.

742 *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections,13 March 2020, ¶ 121 (emphasis added), **CL-116**.

whether he would be willing to make Obnova issue the waiver. Mr. Rand, however, declined.[743] As a result, Mr. Broshko has been unable to provide a waiver on behalf of Obnova.

627. In *Kappes v. Guatemala* case, decided on the basis of similar waiver requirements included in the DR-CAFTA, the tribunal found that if there were a requirement to always submit a waiver on behalf of a "*local enterprise*", "*the 49% shareholder would be dependent on the 51% shareholder to protect its interest.*"[744] Consequently, the tribunal disagreed with such interpretation of the waiver requirements and dismissed the state's objection.

628. Serbia's argument that "*majority shareholders of Obnova (the Cypriot Claimants) are also Claimants in this Arbitration*" is inapposite.[745] The fact that Kalemegdan and Coropi are also claimants in this arbitration does not change the fact that Mr. Broshko is not able to obtain a waiver from Obnova.

629. Serbia's reliance on *Bacilio Amorrortu v. Peru* is irrelevant. This case was based on the United States-Peru Trade Promotion Agreement, which expressly required that "*the notice of arbitration is accompanied … by the claimant's written waiver.*"[746] In the present case, Mr. Broshko submitted the waivers required by the Canada-Serbia BIT. The issue raised by Serbia is a waiver of a third party—Obnova. *Bacilio Amorrortu v. Peru* case does not provide any guidance with respect to waivers by third parties.

b. Even if Mr. Broshko were required to submit a waiver on behalf of Obnova, the absence of the waiver would not affect the Tribunal's jurisdiction

630. Even if Mr. Broshko were required to submit a waiver on behalf of Obnova (*quod non*), the absence of such a waiver would not affect the Tribunal's jurisdiction. This is because, even though Obnova did not submit a formal waiver, Obnova is not pursuing any proceedings that would have been subject to the waiver. Specifically, Obnova is

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743 Rand WS, ¶¶ 64-65; Broshko WS, ¶ 53.

744 *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶ 151, **CL-116**.

745 Counter-Memorial, ¶ 446.

746 *Bacilio Amorrortu v. Republic of Peru*, PCA Case No. 2020-11, Partial Award on Jurisdiction, 5 August 2022, ¶ 234, **RL-114**.

not engaged in any proceedings in which it could obtain compensation for damages for the losses that it sustained as a result of Serbia's expropriation of its premises.

631. Investment tribunals have held that the requirement of a waiver is merely procedural, and its absence does not deprive the investment tribunal of jurisdiction. In *Thunderbird v. Mexico*, for example, a NAFTA tribunal expressly emphasized that the local enterprises which failed to submit the waiver did not engage in any parallel proceedings and, thus, effectively complied with the purpose of the waiver as required under Article 1121 NAFTA—*i.e.* the equivalent of Article 22 of the Canada-Serbia BIT:

> In construing Article 1121 of the NAFTA, one must also take into account the rationale and purpose of that article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure. *In the present proceedings, the Tribunal notes that the EDM entities did not initiate or continue any remedies in Mexico while taking part in the present arbitral proceedings. Therefore, the Tribunal considers that Thunderbird has effectively complied with the requirements of Article 1121 of the NAFTA.*[747]

632. Investment tribunals which denied jurisdiction based on issues related to alleged defects in waivers only did so in situations where the purpose of the waiver was gravely compromised, most commonly because of the actual existence of parallel proceedings.[748] However, this is plainly not the case here. Obnova is not engaged in any parallel proceedings seeking the payment of damages by Serbia—and Serbia did not point to any such proceedings in its Counter-Memorial.

c. Serbia's objection is belated and made in bad faith

633. Serbia's objection based on the absence of Obnova's waiver must be dismissed because it was raised belatedly and in bad faith.

634. *First*, Serbia's objection is belated because it is raised more than a year after Claimants submitted the Request for Arbitration even though Serbia had ample opportunity to do

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747 *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006 ¶ 118, **CL-117**.

748 *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006 ¶ 118 (emphasis added), **CL-117**.

so during the pre-arbitration communications between the Parties. In raising the waiver objection only in its Counter-Memorial, Serbia directly contravenes the ICSID Arbitration Rule 41(1), which prescribes that jurisdictional objections must be raised as early as possible:

> *Any objection* that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal *shall be made as early as possible*. A party shall file the objection with the Secretary-General *no later than* the expiration of the time limit fixed for *the filing of the counter-memorial*, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.[749]

635. The language of the provision is unambiguous: any preliminary objection to the Tribunal's jurisdiction "*shall be made as early as possible.*" This means that the host state is required to raise any jurisdictional objection as soon as it becomes apparent—and this requirement is notwithstanding the additional time limit provided for in ICSID Arbitration Rule 41(1) that is, "*no later than […] the filing of the Counter Memorial,*" which operates as a secondary rule.

636. Numerous ICSID tribunals have confirmed the mandatory nature of the requirement to raise jurisdictional objections as early as possible. In *Pac Rim v. El Salvador*, El Salvador raised additional objections to jurisdiction within its Counter-Memorial on the Merits. El Salvador argued that, in so doing, it had complied with the deadline set forth in ICSID Arbitration Rule 41(1), and its objections were admissible. The tribunal disagreed. It explained that the governing condition under ICSID Arbitration Rule 41(1) was that the objections were to be raised at the earliest possibility:

> The Tribunal considers that the ordinary meaning of this provision establishes as the primary rule that jurisdictional objections must be made as early as possible. This rule is subject to the further condition that any such objection may not exceed the time limit for the counter-memorial. The imposition of this time limit is an additional condition, not an alternative requirement. In other words, the indicated deadline does not negate the primary obligation to raise jurisdictional objections as early as possible. The exception to the time limit for objections based on facts that were unknown at that time further confirms that the

749 ICSID Arbitration Rules, Rule 41(1) (emphasis added), **CL-013**.

> governing condition remains that they should be raised "as early as possible.[750]

637. Because some of El Salvador's objections were solely based on facts it knew or ought to have known before submitting its Counter-Memorial, the tribunal concluded that those objections were raised too late:

> The Tribunal therefore concludes that the Respondent has failed to fulfil the "as early as possible" requirement of ICSID Arbitration Rule 41(1)'because 'These objections have not been raised at the earliest possibility, even if they were raised before the expiration of the time limit for the Respondent's Counter-Memorial (on the merits).[751]

638. The *Desert Line* tribunal interpreted Article 41(1) in the same manner and observed that the respondent state is bound to raise its objections before filing the Counter-Memorial if they were or ought to have been manifest at an earlier time:

> The fact that objections shall be filed with ICSID 'no later' than the deadline for the Counter-Memorial does not mean that the Respondent was not bound to raise them before that date, if such objections were or ought to have been already manifest, in view of the 'as early as possible' requirement in the first sentence of Article 41.[752]

639. ICSID Arbitration Rule 41(1) is an expression of a broader duty of procedural good faith which is widely recognized in international investment arbitration.[753] For example, the tribunal in *Amto v. Ukraine* held that Ukraine's failure to raise its jurisdictional objections immediately amounted to a breach of the principle of procedural good faith, with the consequence that Ukraine was barred from raising such objections in the arbitration:

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750 *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, 14 October 2016, ¶ 5.42 (emphasis added), **CL-118**.

751 *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, 14 October 2016, ¶ 5.49 (emphasis added), **CL-118**.

752 *Desert Line Projects LLC v Republic of Yemen,* ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶ 97 (emphasis added), **CL-119.**

753 The tribunals in *Methanex, Quiborax*, and *Libananco* have pointed out that States, as much as investors, owe a general duty to arbitrate in good faith, and, in the words of the *Metal Tech* tribunal, "*have a good faith obligation to cooperate in procedural matters.*" *See Methanex Corporation v. United States of America*, UNCITRAL Tribunal under NAFTA Chapter XXI, Final Award, 3 August 2005, Part II – Chapter I, ¶ 54, **RL-140**; *Quiborax S.A. and Non Metalic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶¶ 590-593, **RL-128**; *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues of 23 June 2008, ¶ 78, **CL-120**; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶ 244, **CL-075**.

> Additionally, a State party that considers the amicable settlement requirements of Article 26(2) have not been complied with by an Investor has an obligation, as a matter of procedural good faith, to raise its objections immediately. This ensures the Investor can, if necessary, remedy the defect so that both parties are in a position to engage in the amicable settlement discussions envisaged by the ECT, and thereby help to preserve their long term cooperation in the energy sector. Accordingly, the Tribunal finds that by failing to raise any immediate objection to the Claim Letters, the Respondent recognized the existence of the dispute and the validity of the Claim Letters.[754]

640. In short, since Serbia waited with its jurisdictional objection based on the alleged lack of a waiver from Obnova until submitting its Counter-Memorial, the objection was obviously not raised "*as early as possible*".

641. *Second*, Serbia seeks to rely on a purely formalistic requirement to evade the jurisdiction of this Tribunal. Serbia does not complain of Obnova pursuing any claims that would need to be waived under the Serbia-Canada BIT. Serbia, thus, clearly does not insist on Obnova's waiver to truly vindicate its right to be protected from double recovery. Instead, Serbia merely disingenuously fabricates formalistic reasons to attempt to escape justiciability of Mr. Broshko' claims.

642. This is a textbook example of *abus de droit*. The prohibition of abuse of rights was formulated for example in *Phoenix v. the Czech Republic*. The Phoenix tribunal resolutely stated that "*[n]obody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused*."[755] The *Saipem* tribunal similarly held that "*[i]t is generally acknowledged in international law that a State exercising a right for a purpose that is different from that for which that right was created commits an abuse of rights.*"[756]

643. Even more to the point, the NAFTA tribunal in the *Renco v. Peru* case recognized that a State's objection to the form of a waiver required by the underlying treaty would be abusive, and therefore ineffective, where such objection would be "*raise[d] […] for an*

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754 *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, ¶ 53 (emphasis added), **CL-121**.

755 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 107, **RL-073**.

756 *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, ¶ 160, **RL-079**.

improper motive."[757] According to the *Renco* tribunal, that would be the case where the host state "*is seeking to evade its duty to arbitrate [the investor's] claims under the Treaty rather than ensure that its waiver rights are respected or that the waiver provision's objectives are served.*"[758]

644. This is precisely what Serbia seeks with its waiver objection. As explained above, Serbia is by no means at risk of parallel proceedings initiated by Obnova in order to obtain compensation for losses due to the expropriation of its premises, simply because Obnova has not engaged in any such proceedings. Serbia's waiver objection, therefore, constitutes nothing more than a mere attempt to "*evade its duty to arbitrate*." Serbia's objection is abusive and must fail for this additional reason.

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757 *The Renco Group, Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, ¶ 185, **CL-122.**

758 *The Renco Group, Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, ¶ 185, **CL-122.**

V. CLAIMANTS' CLAIMS ARE ADMISSIBLE

645. Both Cypriot Claimants' claims and Mr. Broshko's claims are admissible. Under settled investment arbitration case law, investment claims brought following a corporate restructuring do not represent an abuse of process unless: (*i*) the sole purpose of the restructuring was to acquire treaty protection; and (*ii*) the restructuring occurred at a time when the specific dispute brought to arbitration was foreseeable with a high probability. Claimants discuss the relevant standard in **Section V.A** below.

646. Neither condition is met in the present case. When Mr. Rand decided, in 2012, to change the ownership structure of the Serbian companies beneficially owned by the Rand family—including Obnova ("**Serbian companies**")[759]—he did *not* do so to acquire treaty protection. On the contrary, the sole purpose of the restructuring was tax efficiency. Claimants address this point in more detail in **Section V.B.1** below. Furthermore, the restructuring occurred at a time where the present dispute was not foreseeable, as Claimants demonstrate in **Section V.B.2** below.

647. The same holds true of Mr. Broshko's claim. Mr. Broshko's claim is based solely on Serbia's rejection of Obnova's Request for Compensation—which Obnova submitted almost *four years after Mr. Broshko* acquired his investment. Mr. Broshko clearly could not have expected Serbia's rejection at the time when he made his investment in 2017. Furthermore, Mr. Broshko did not acquire his shares in Obnova as a result of any corporate restructuring. On the contrary, he purchased his shares on the BSE. As Claimants demonstrate in **Section C** below, investment tribunals have confirmed—including in cases cited by Serbia itself—that there is no reason to suspect an abuse of process in arm's length transactions.

A. The legal standard for a finding of an abuse of process is very demanding

1. Finding of an abuse of process is subject to a high threshold

648. Investment tribunals have repeatedly confirmed that an abuse of process may occur only in *very exceptional circumstances* and the finding of an abuse of process is subject to a *high threshold*. The burden to prove that such exceptional circumstances exist lies with

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759 The other five companies were Crveni signal a.d., PIK Pešter a.d., Beotrans a.d., Inex a.d. Nova Varoš and Kalemegdan Investments d.o.o. *See* Rand WS, ¶ 10; Broshko WS, ¶ 17.

the respondent. Thus, the tribunal in *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru* noted:

> As for any abuse of right, 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".[760]

649. The same conclusion was reached by the tribunal in *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*:

> In this context, it has further to be noted that in all legal systems, the doctrines of abuse of rights, estoppel and waiver are subject to a high threshold. Any right leads normally and automatically to a claim for its holder. It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim.[761]

650. The high threshold for finding an abuse of process was also stressed by the tribunals in *Mercuria Energy Group Limited v. Republic of Poland*[762] and *Ipek Investment Limited v. Republic of Turkey*.[763]

2. An abuse of process may occur only if the sole purpose of a corporate restructuring was to acquire treaty protection

651. Corporate restructuring does not represent an abuse of process unless: (*i*) its *sole purpose* is acquiring treaty protection; and (*ii*) it occurs at a time when a specific dispute is *foreseeable with a high probability*.

652. The first condition, that an abuse of process may occur in connection with a corporate restructuring only if the sole purpose of the restructuring was to acquire treaty protection, was formulated in the seminal decision in *Phoenix v. Czech Republic*:

> The Tribunal has to ensure that the ICSID mechanism does not protect investments that it was not designed for to protect, because they are in

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760 *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award dated 9 January 2015, ¶ 186, **RL-121**.

761 Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, ¶ 143, **CL-085**.

762 *Mercuria Energy Group Limited v. Republic of Poland (II)*, SCC Case No. 2019/126, Final Award, 29 December 2022, ¶ 626, **RL-095**.

763 *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Award dated 8 December 2022, ¶ 324, **RL-126**.

> essence domestic investments disguised as international investments for the *sole* purpose of access to this mechanism.[764]

653. In *Phoenix*, the State's interference occurred well before Mr. Beňo, a Czech national, incorporated an Israeli company, Phoenix Action, for the *sole* purpose of allowing Mr. Beňo to commence an ICSID arbitration under Czech Republic-Israel BIT and, thus, internationalize his pre-existing dispute with the Czech Republic. Mr. Beňo did so by transferring to Phoenix the shares in his Czech companies which had initiated domestic law recourses against the Czech Republic's seizure of their assets and freezing of their accounts. Phoenix then claimed that the Czech Republic's failure to resolve the recourses in favor of the Czech companies violated the Czech Republic-Israel BIT. Under those circumstances, the tribunal concluded that "*the Claimant's initiation and pursuit of this arbitration is an abuse of the system of international ICSID investment arbitration*."[765]

654. The conclusion reached by the *Phoenix* tribunal was subsequently adopted also by certain other investments tribunals. For example, in *Gremcitel v. Peru*, the claimant was a Peruvian company, Gremcitel, belonging to the Levy Group of companies, which acquired a deemed French nationality due to the transfer of a majority of its shares to Mrs. Renée Rose Levy, a national of France.[766] The transfer occurred *one day* before the Peruvian National Institute of Culture ("**NIC**") issued, on 10 October 2007, a decision delimitating the boundaries of the Morro Solar historical heritage site in a manner that confirmed the protected status of certain land owned by Gremcitel that Gremcitel intended for a tourism and real estate project.[767]

655. The tribunal concluded that the NIC's decision was clearly foreseeable at the time of the transfer to Mrs. Renée Rose Levy. As early as in 2001, the Levy Group proposed that the NIC change the protected status of its land through a new delimitation of the

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764764 *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009, ¶ 144 (emphasis added), **RL-043**.

765 *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009, ¶ 144, **RL-043**.

766 *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, ¶ 171, **RL-121**.

767 *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, ¶¶ 18, 37, **RL-121**.

boundaries of the Morro Solar site.[768] In 2003, the NIC decided that there were no grounds to lift the site's protected status and required the Levy Group to submit a project for prospecting and excavation of its land, stressing that any urban development plans would depend on the NIC's approval.[769] The 2007 decision confirming the protected status of Gremcitel's land was issued on a basis of a report published by a special commission on delimitation of the boundaries of the Morro Solar site in 2005.[770]

656. In these circumstances, the Gremcitel tribunal rejected jurisdiction because it found that "*the **only** purpose of the transfer [to Mrs. Renée Rose Levy] was to obtain access to ICSID/BIT arbitration, which was otherwise precluded*."[771]

657. Some tribunals formulated a lower threshold and were satisfied that an abuse of process may exist also if the restructuring served several purposes, but the aim to acquire treaty protection was its determinative or principal purpose.[772]

658. For example, the *Philip Morris v. Australia* case related to Australia's adoption of the Tobacco Plain Packaging Act, a tobacco control legislation that removed brands from cigarette packs. During the legislative process that ultimately led to the adoption of the Act, the Philip Morris group restructured to make a company registered in Hong Kong, the parent company of the group's Australian subsidiaries. The Hong Kong company acquired Philip Morris Australia on 23 February 2011. On the same day, Philip Morris Australia wrote to Australia's Minister of Health that it "*strongly opposes*" the plain packaging legislation. A week later, Philip Morris Australia informed the Minister of

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768 *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, ¶ 26, **RL-121**.

769 *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, ¶¶ 27-28, **RL-121**.

770 *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, ¶ 35, **RL-121**.

771 *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, ¶ 191 (emphasis added), **RL-121**.

772 *E.g. Alverley Investments Limited and Germen Properties Ltd v. Romania*, ICSID Case No. ARB/18/30, Award (Excerpts), 16 March 2022, ¶ 376, **RL-007**; *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 584, **RL-122**.

Health that it was "*continuing its preparations for [an] arbitration [and had] made inquiries for the purposes of instructing additional counsel*."[773]

659. The tribunal found that the dispute arising from the Australian legislation was foreseeable at the time of the restructuring and, thus, the claimant's attempt to obtain the BIT's protection through a change of its nationality status was an abuse of rights.[774]

660. All discussed cases show that finding of an abuse of process occurs in very exceptional and aggravated circumstances. No such circumstances are present in this case.

3. An abuse of process may occur only if the dispute was foreseeable with "*a very high probability*" at the time of the restructuring

661. Furthermore, a corporate restructuring may lead to an abuse of process only if it was done at a time when the *specific future dispute* was foreseeable with "*a very high probability*." A mere "*possibility*" that the dispute will arise is not enough. This conclusion was expressly confirmed by the tribunal in *Pac Rim v. El Salvador*:

> In the Tribunal's view, the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy. In the Tribunal's view, before that dividing-line is reached, there will be ordinarily no abuse of process; but after that dividing-line is passed, there ordinarily will be. The answer in each case will, however, depend upon its particular facts and circumstances.[775]

662. In that case, Pacific Rim Mining Corp., a Canadian company, had unsuccessfully applied for various permits and concessions in 2004. At the time, Canada was neither a party to the Central America Free Trade Agreement ("**CAFTA**") nor to the ICSID Convention. Few years later, in December 2007, Pacific Rim Mining Corp. changed the nationality of one of its subsidiaries from the Cayman Islands to the United States, which was a party to CAFTA and to the ICSID Convention. Shortly after this change, in March 2008 the President of El Salvador announced that he was opposed to the granting of the permits. This refusal became the subject of an ICSID arbitration

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773 *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 123, **RL-122**.

774 *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 585, **RL-122**.

775 *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.99, **RL-046**.

instituted by the subsidiary registered in the United States under the CAFTA. El Salvador claimed that this change of nationality constituted an abuse of process. While Pac Rim argued that the change of nationality was not an abuse of process because it "*was part of an overall plan to restructure the Pac Rim group of companies*,"[776] one of its witnesses confirmed that "*the availability of international arbitration (under CAFTA and ICSID) was one of the elements of its decision to change the Claimant's nationality*."[777] More importantly, throughout its submissions, Pac Rim repeatedly referred to events pre-dating the March 2008 refusal and the tribunal even found that Pac Rim "*was aware of difficulties in obtaining the permit and concession*" before its change of nationality in December 2007.[778] Despite all these facts, the tribunal declined to find an abuse of process and dismissed Pac Rim's claims on these grounds.

663. Similarly, the tribunal in *MNSS v Montenegro* found that for an abuse of process to occur, the investor must see "*an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy*":

> As held by other tribunals, to structure an investment with the aim to seek protection of a BIT is not per se in breach of the good faith expected of an investor. Tribunals have found that an investor would not qualify for the protection of the BIT concerned only if the nationality is changed after the dispute has arisen or "*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*.[779]

664. This case related to a privatization of a Montenegrin company originally bought by English company MN Specialty Steel Ltd. in 2006.[780] On 8 February 2008, a Dutch company, MNSS, a claimant in the arbitration, acquired all of MN Specialty Steel's shares and on 28 February 2008, MN Specialty Steel assigned all its rights under the privatization agreement to MNSS. Montenegro argued that at the time of its acquisition

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776 *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.21, **RL-046**.

777 *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.22, **RL-046**.

778 *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.85, **RL-046**.

779 *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, ¶ 182, **CL-123**.

780 *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, ¶ 46, **CL-123**.

of MNSS, the controversy with Montenegro "*had already arisen (or was at least foreseeable)*."[781] This is because already in February 2008, MN Specialty Steel and Montenegro had "*opposing views on whether the investor had performed its obligations under the Privatization Agreement*."[782] And since there was no BIT between Montenegro and United Kingdom, the acquisition by the Dutch company was an abuse of process. The tribunal ultimately dismissed this objection, finding that despite some past opposing views, the dispute arose only after the assignment on 28 February 2008.[783]

665. Claimants will show below that the legal standard for finding an abuse of process is not met with respect to any of their claims.

B. The change in the ownership structure of the Serbian companies does not satisfy the conditions necessary for a potential existence of an abuse of process

666. The case law discussed in the previous section confirms that a potential finding of an abuse of process is subject to a very high threshold and requires a showing of exceptional circumstances. In cases of corporate restructurings, such exceptional circumstances include, at the very least, the following:

a. the sole, or at least the determinative or principal purpose of the restructuring is to acquire treaty protection; and

b. the restructuring is implemented at a time when a specific future dispute is foreseeable with a very high probability.

667. Serbia failed to show that either of these exceptional circumstances exists in the present case. On the contrary, evidence on the record shows that:

a. Mr. Rand decided to change the ownership structure of the Serbian companies—including Obnova—based on a tax advice that he received; and

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781 *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, ¶ 90, **CL-123**.

782 *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, ¶ 92, **CL-123**.

783 *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, ¶ 182, **CL-123**.

b. the change in the ownership structure was implemented at a time when the dispute presently pending before the Tribunal was not foreseeable, much less with a very high probability.

668. Claimants address both these points *seriatim* below.

1. The change in the ownership structure of the Serbian companies was implemented for tax reasons—not to acquire investment protection

669. Mr. Rand decided to change the ownership structure of *six* Serbian companies—including Obnova—for tax reasons. He obtained tax advice from Thorsteinssons LLP, a leading Canadian tax law firm.[784] Based on this advice, he amended the ownership structure of the Serbian companies to include a Cypriot holding company, Kalemegdan.

670. Mr. Rand had implemented a similar ownership structure for another Serbian company beneficially owned by the Rand family, BD Agro, four years earlier, in 2008. Following that earlier restructuring, BD Agro was beneficially owned by a Cypriot company, Sembi Investment Limited, which was, in turn, owned by Mr. Rand and his children.[785]

671. The change in the ownership structure of the Serbian companies beneficially owned by the Rand family, therefore, was *not* motivated by the effort to acquire investment protection. On the contrary, Mr. Rand expressly confirms that the "*possibility of investment treaty protection did not even cross [his] mind.*"[786]

672. Mr. Broshko—who was responsible for preparing all relevant documents necessary for the change in the ownership structure, as well as for the implementation of the new structure—confirms that he was not even aware of the existence of investment treaties at the time when the change in the ownership structure was implemented.[787]

673. The change of the ownership structure was implemented for *all* Serbian companies beneficially owned by the Rand family (with the sole exception of BD Agro, for which a similar structure had already been in place for four years). If the *sole* reason for the

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784 Rand WS, ¶ 33-34; Broshko WS, ¶ 12.

785 Rand WS, ¶¶ 33-34; Broshko WS, ¶ 13.

786 Rand WS, ¶ 42.

787 Broshko WS, ¶ 14.

change in Obnova's ownership structure had been to acquire investment protection for a dispute related to Obnova's rights—as Serbia seems to suggest in the Counter-Memorial—Mr. Rand would not have changed the ownership structure of all of his Serbian companies.

674. This should be the end of Serbia's objection of inadmissibility. As explained above, investment tribunals have confirmed that one of the conditions necessary for finding an abuse of process is that the sole, or at least the determinative or principal, purpose of a corporate restructuring is to acquire treaty protection.[788] This was not the reason why Cypriot Claimants acquired Obnova and the other Serbian companies; in fact, acquiring treaty protection was not even considered.

2. The dispute before the Tribunal was not foreseeable in April 2012, much less with a high probability

675. The April 2012 change in the ownership structure of the Serbian companies does not satisfy the second condition necessary for potential existence of an abuse of process either. This is because at the time of this ownership change, no specific future dispute was foreseeable at all, let alone with a very high probability.[789]

676. The dispute before this Tribunal relates to two measures adopted by Serbia in 2013 and 2021:

a. the adoption of the 2013 DRP on 20 December 2013; and

b. the refusal of Obnova's Request for Compensation on 13 August 2021.

677. Serbia attempts to argue that the dispute was foreseeable in April 2012 because of certain events that took place at isolated points in time between 2003 and 2011 in connection with the registration of Obnova's real estate in the Cadaster and with the preparation of the 2013 DRP. Serbia shows below that none of these events was

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788 *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5), Award dated 15 April 2009, ¶ 144 (emphasis added), **RL-043**; *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award dated 9 January 2015, ¶ 191 (emphasis added), **RL-121**.

789 *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012, ¶ 2.99, **RL-046**; *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, ¶ 182, **CL-123**.

susceptible of making the present dispute foreseeable to Cypriot Claimants at the time they acquired Obnova in April 2012.

678. *First*, as Claimants explained in their Memorial and Serbia did not dispute in its Counter-Memorial, the Cadaster system was being created *de novo* in Serbia in 2003.[790] This naturally led to numerous inaccuracies in property registrations, such as that "*Obnova unsuccessfully sought to be inscribed in the Cadastre Books as the holder of the right of use over the Objects*" in March 2003 or that the City of Belgrade was inscribed in the Cadaster as the holder of the right of use and later the owner of the buildings and land at Dunavska 17-19 and the land at Dunavska 23, as well as the holder of the right of use over the buildings at Dunavska 23, in November 2003 and in September 2011, respectively.[791]

679. The incorrect registrations also had no impact in real life. Obnova was using its premises without any lease or other agreement with the City of Belgrade and without paying any rental fees to the City of Belgrade. The City of Belgrade never requested any payment of rent. Simply put, the City of Belgrade did not act as the holder of the right of use over, let alone as the owner of, Obnova's buildings.

680. In fact, it is undisputed even in this arbitration that the incorrect registrations also did not extinguish Obnova's rights to its premises.

681. Thus, the incorrect registrations did not herald a future dispute. Obnova had every reason to believe that they stemmed from simple administrative oversight due to the huge volume of information that the Cadaster had to register *de novo*. The City of Belgrade did not claim any rights to Obnova's buildings. The incorrect registrations cannot be considered as an indication of an upcoming expropriation when nothing changed both *de jure* and *de facto*.

682. *Second*, Serbia argues that the dispute was foreseeable because "*Obnova's Privatisation Program from July 2003 expressly stated that Obnova had no land in its ownership nor the right of use over any construction land*". Pages 11-12 of the privatization program, to which Serbia refers in support of this allegation, simply do not state any such thing.

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790 Memorial, ¶ 72.

791 Counter-Memorial, ¶ 75.

Rather, page 11 is a list of appendices and page 12 is a report from the Cadaster from April 2003, which does not conclude anything about Obnova's rights.[792]

683. To recall, under the then legislation, Obnova was legally precluded from owning any construction land. Therefore, the privatization documents simply could not have stated that Obnova owned the land. That the privatization documents were silent on Obnova's right of use over the land was immaterial. What mattered was that the privatization program clearly stated, on page 55, that Obnova had the right of use over its buildings.[793] Under Serbian law, Obnova's right of use over the buildings also entailed the right of use over the construction land on which the buildings were built.[794]

684. *Third,* the fact that Obnova did not receive any decision on its legalization request from 2003 and its 2008 request was pending in 2012 likewise does not indicate that the present dispute was foreseeable, let alone with "*a very high probability*." Obnova's legalization request from 2003, filed before Obnova's privatization, was not rejected, but ignored. Serbia was not able to produce a decision rejecting the request even in this arbitration. That the Serbian state simply ignored a legalization request filed by a Serbian socially-owned enterprise is a sign of the notorious deficiencies of the Serbian registration of real estate rights, and certainly did not foretell a dispute regarding the adoption of the 2013 DRP and Serbia's failure to pay any compensation therefor.

685. The same holds true for the pendency of Obnova's legalization requests filed in 2008. Serbia cannot seriously argue that the City's failure to decide on Obnova's request made it foreseeable, let alone with a high level of probability, that Serbia would adopt the 2013 DRP and refuse to pay compensation.

686. *Fourth*, the fact that the City of Belgrade adopted the decision on drafting of a detailed regulation plan for the broader Dorćol area on 6 March 2006 cannot serve as an indicator of specific dispute about the 2013 DRP and subsequent refusal of Obnova's Request for Compensation. As Claimants explained in their Memorial, detailed regulation plans, which provide detailed regulation for smaller areas, must be in line with higher level

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792 Privatisation Program, pp 11-12 (pdf), **R-046**.

793 Obnova Privatization Program dated July 2003, p. 55 (pdf), **C-015.**

794 Živković Milošević First ER, ¶¶ 40, 176-177; Živković Milošević Second ER, ¶ 144.

regulations—such as the 2003 RP.[795] Obnova had no reason to fear that the 2013 DRP would violate the 2003 RP.

687. When Obnova heard rumors that the City might be planning on putting a bus loop on Obnova's premises in violation of the 2003 RP, it reached out to the City on 27 March 2008.[796] On 23 April 2008, the City (specifically its Secretariat for Urban Planning and Construction) confirmed that Obnova's premises were "*located in areas intended for commercial activities and urban centers*"[797] and instructed the Urban Planning Institute, which was bound by the City's instructions, to consider this fact, as well as Obnova's letter, when preparing the 2013 DRP.[798]

688. Given that the Urban Planning Institute was bound by the City's instruction to consider Obnova's rights, no reasonable investor would objectively foresee that the City would subsequently disregard those very rights when it adopted the 2013 DRP. The 2008 exchange between the City and Obnova thus was the exact opposite of an indication of a future dispute about unlawful and uncompensated expropriation of Obnova's premises, let alone that such a dispute would later occur with "*a very high probability*".

689. Thus, Serbia's allegation that Obnova and its owners were aware, before the adoption of the 2013 DRP, that "*the premises in Dunavska would be designated as the land for the public transportation terminus*" is simply false.[799] If anything, the exchange between the City and Urban Planning Institute suggested the exact opposite.

690. To conclude, the adoption of the 2013 DRP was *not* a consequence of the events relied upon by Serbia. On the contrary, the adoption of the 2013 DRP is unrelated to these events—most of which took place a decade before the adoption of the 2013 DRP. As a result, even if the 2012 change in Obnova's ownership had been implemented with these events in mind (*quod non*), it would not have precluded Cypriot Claimants from

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795 Memorial, ¶ 77.

796 Letter from Obnova to City of Belgrade, 27 March 2008, **C-314**.

797 Letter from City of Belgrade to Secretariat for Urban Planning and Construction, 23 April 2008, **C-315**.

798 Memorial, ¶ 79.

799 Counter-Memorial, ¶ 495.

bringing a dispute based on the adoption of the 2013 DRP—which was unrelated to those events.

3. Even if the dispute had been foreseeable in April 2012, there would still be no abuse of process

691. Even if the dispute before the Tribunal had been foreseeable in 2012 (*quod non*), it would still be insufficient to automatically find an abuse of process. Investment tribunals have repeatedly confirmed that, even if a corporate restructuring takes place when a dispute is foreseeable, other relevant circumstances must be taken into consideration.[800]

692. Such other circumstances include, among other things, the timing of the actual investment claim brought after the restructuring. An abuse of process is more probable when an investment claim is brought shortly after the restructuring. On the other hand, if the actual claim is brought only several years after the restructuring, it is an indication that the restructuring did not represent an abuse of process.

693. For example, in *Levi de Levi v. Peru*, the restructuring "*occurred in July 2005*" but "*it was not until five years later that the Claimant decided to resort to ICSID arbitration*".[801] Based on these facts, the *Levi* tribunal concluded that it was "*impossible to determine […] that the assignment of shares in 2005 was an attempt to 'manufacture' ICSID jurisdiction*."[802]

694. In the present case, Claimants initiated their ICSID arbitration *ten years after* the acquisition of Cypriot Obnova Shares by Cypriot Claimants, *i.e.* five years later than in *Levi de Levi v. Peru.*

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800 *E.g. Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, ¶ 185, **RL-121**; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 135-144, **RL-043**; *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction dated 8 February 2013, ¶ 147, **RL-127**.

801 *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, ¶ 154, **CL-124**.

802 *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, ¶ 154, **CL-124**.

695. Furthermore, this arbitration was initiated *almost nine years after* the adoption of the 2013 DRP. If Cypriot Claimants acquired ownership in Obnova for the sole purpose of bringing an investment dispute—as Serbia argues—they would not have waited for an additional nine years to bring the claim.

696. Given the above, same as in *Levi de Levi v. Peru*, it is "*impossible to determine from the precise circumstances of this case*" that the change of ownership structure in 2012 "*was an attempt to 'manufacture' ICSID jurisdiction*."

C. Mr. Broshko's acquisition of the Canadian Obnova Shares does not satisfy the conditions necessary for a potential existence of an abuse of process

1. Mr. Broshko's acquisition of shares on the BSE cannot be the basis for a claim of abuse of process

697. It is undisputed that Mr. Broshko acquired his shares in Obnova on the BSE—not through any restructuring. Serbia claims that the "*doctrine of abuse of process is not limited to the restructuring context and instead may apply in comparable scenarios in which an investor seeks to bring a dispute under a particular treaty.*"[803] However, Serbia has not been able to identify a *single* relevant authority that would confirm that an arm's length acquisition of shares on a stock exchange can represent an abuse of process.

698. The only authority relied upon by Serbia, a heavily redacted decision in *Cascade Investments v. Turkey*, does not support Serbia's proposition. The *Cascade* tribunal dismissed the investor's claims for lack of jurisdiction, but the redactions are so extensive that they make it impossible to see on what grounds.

699. Mr. Broshko acquired Obnova's shares on the BSE. The *Cascade* tribunal specifically confirmed that arm's length market transactions do not give rise to an abuse of process:

> Of course, in a true arm's-length sale of an existing investment for fair value, there generally will be no reason to suspect that the acquiror is not acquiring the investment for normal business purposes, with the intention of engaging on an ongoing basis in some real economic activity in the host State.[804]

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803 Counter-Memorial, ¶ 504.

804 *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award, 20 September 2021, ¶ 354, **RL-123**.

700. Furthermore, the *Cascade* tribunal also held that "*the fact that an investment is taken in risky circumstances does not necessarily prove that the investment was not genuine […].*"[805] Thus, the fact that Mr. Broshko acquired his shares in Obnova only after the adoption of the 2013 DRP is not sufficient to find an abuse of process.

701. Indeed, when Mr. Broshko made his investment, he expected that Serbia would either allow Obnova to develop its premises or, at the very least, provide compensation to Obnova due under Serbian law.[806] This expectation included certain risk, but the existence of such a risk in no way suggests that the investment was made in bad faith.

702. As explained above, Mr. Broshko's investment could constitute an abuse of process only if a specific dispute about Serbia's refusal to compensate Obnova had been foreseeable with a very high probability at the time of Mr. Broshko's investment. Mr. Broshko, however, expected the exact opposite—*i.e.* that Serbia would either allow Obnova to develop its premises or provide compensation to Obnova due under Serbian law.

703. The *Cascade* tribunal also concluded that if the circumstances of a transaction are unusual, "*it remains appropriate for a tribunal to consider the suspicious circumstances*."[807] This concern, however, does not apply here because the *Cascade* tribunal was concerned that the transaction in that case was part of a broader scheme aimed at gaining international protection for the assets owned by the Gülenist movement in Turkey:[808]

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805 *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award, 20 September 2021, ¶ 426, **RL-123**.

806 Broshko WS, ¶ 42.

807 *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award, 20 September 2021, ¶ 354, **RL-123**.

808 *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award, 20 September 2021, ¶ 444 (emphasis added), **RL-123**.

(4) Conclusions and Consequences

444. For all of these reasons, the Tribunal concludes that Cascade's investments in [redacted], were not *bona fide* transactions by a foreign investor made with the intention of engaging on an ongoing basis in real economic activity in the host State. Rather, the Tribunal is persuaded that they were part of a broader scheme, implemented by [redacted]. While these steps may be understandable from the perspective of those seeking to permit [redacted]'s operations to continue in another form, the fact remains that they were designed to repackage under a foreign flag an investment actually made by domestic investors in their home State, at a time and in an atmosphere when adverse actions by the [redacted] were reasonably foreseeable. In the Tribunal's view, a transaction taken for these purposes does not result in an investment entitled to protection under the BIT and the ICSID Convention. As a consequence, Claimant's attempt to seek such protection through the BIT constitutes an abuse of process.

704. Publicly available information appears to support this conclusion. According to various news articles, the *Cascade* dispute related to steps taken by the Turkish Government against the so called "*Gülen movement*".[809]

705. Specifically, on 14 December 2014, Turkish police arrested more than two dozen senior journalists and media executives allegedly connected to this movement.[810] In response to this crackdown, the "*Gülen movement*" started to transfer its Turkish assets to foreign companies—including the claimant in the *Cascade* case. In fact, the publicly available sources confirm that Cascade Investments NV "*may have been established by members of the Gülen movement, with assets from Gülenist businesses in Turkey having been transferred to the company*."[811] These transfers allegedly took place in 2015,[812] only few months after the December 2014 crackdown.

706. Publicly available news articles also reveal that "*[b]y transferring assets to the ownership of companies based outside Turkey, the Gülen movement, which Turkish*

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809 Wikipedia, *Gülen movement,* https://en.wikipedia.org/wiki/G%C3%BClen_movement (last accessed on 22 February 2024), **C-598**.

810 Wikipedia, *Zaman newspaper*, https://en.wikipedia.org/wiki/Zaman_(newspaper) (last accessed on 16 January 2024), **C-599**.

811 AHVALnews, *Belgium firm to sue Turkey over Gülen-linked assets*, 12 March 2018, **C-600**.

812 Kerim ÜLKER, *Game "Time" in arbitration: They filed a lawsuit for 80 million dollars* , dunya.com, 12 March 2018, **C-601**.

authorities hold responsible for the coup attempt of 2016, may be able to use international mechanisms in order to reclaim some of the more than YTL 80 billion worth of assets confiscated by the Turkish government in the wake of the coup."[813] This conclusion seems to be confirmed by the fact that the price for the transferred assets was ostensibly low.[814]

707. It thus seems that the "*suspicious circumstances*" found by the *Cascade* tribunal referred to transfers of Gülen movement's assets in Turkey to related foreign entities amid threatening state intervention and for a fraction of their real value. Indeed, another unredacted part of the *Cascade* award suggests that one of the issues that the *Cascade* tribunal focused on was the relationship between the claimant and companies from which it acquired the alleged investment:

> Certainly, the nature of any relationship between the seller and the acquiror will be an important element to probe, but that relationship need not be limited, analytically, to a corporate affiliation or shared beneficial ownership; a tribunal should examine the potential existence of other common interests between seller and buyer which might shed light on the real objectives of the transaction.[815]

708. The above makes it clear that the circumstances in the *Cascade* case were completely different than those in the present arbitration. In essence, same as in other cases finding the abuse of process, the claimant in *Cascade* also acquired the investment through corporate restructuring done in order to obtain treaty protection. The only difference was that the claimant tried to hide its affiliation with previous owners of the investment.

709. Mr. Broshko, on the other hand, acquired his shares on the BSE. In addition, Mr. Broshko's purchase of Obnova's shares clearly was not done to acquire investment protection for Obnova—because that already existed due to its Cypriot majority ownership. This is in stark contrast with the *Cascade* case, where the transfer of assets to a Belgian company allowed the Gülen movement to pursue the ICSID claim against Turkey, to which it would otherwise not have been entitled.

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813 AHVALnews, Belgium firm to sue Turkey over Gülen-linked assets, 12 March 2018, **C-600**.

814 Mehmet SOLMAZ, *FETÖ media's Belgium-based front company exposed*, dailysabah.com, 14 March 2018, **C-602**.

815 *Cascade Investments NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award, 20 September 2021, ¶ 354, **RL-123**.

2. The circumstances under which Mr. Broshko acquired his investment in any case do *not* suggest an abuse of process

710. Even if the Tribunal concluded that acquisition of shares on a stock exchange can represent the abuse of process, it would not be sufficient to find an abuse of process in the present case. As explained above, a finding of abuse of process requires the existence of certain *exceptional circumstances*—related to the purpose and timing of the investment or timing of the investment claim. No such circumstances exist in the present case.

a. Mr. Broshko acquired his investment in Obnova because he believed it represented an interesting investment opportunity

711. Mr. Broshko acquired his investment in Obnova because he believed that, despite the adoption of the 2013 DRP, Obnova represented an interesting investment opportunity. Specifically, he believed that Obnova would either resolve the issue with the 2013 DRP or, at least, would be provided with the compensation equal to the market value of Obnova's premises.[816]

712. Serbia does not seem to dispute this. However, it claims there were certain "*suspicious circumstances*" that, according to Serbia "*raise concerns about the bona fides of his investment.*"[817]

713. To begin with, Serbia claims that one of these "*suspicious circumstances*" is "*Mr Broshko's position vis-à-vis Mr Rand.*"[818] However, the only actual fact to which Serbia points is that Mr. Broshko has been working for Mr. Rand since 2012. Serbia does not explain how this fact could make Mr. Broshko's investment an abuse of process.

714. Serbia's assertion that the relationship between Messrs. Broshko and Mr. Rand raises "*the question of whether, and to what extent, Mr Broshko as an investor in Obnova is independent from Mr Rand*" is equally misplaced.[819] To begin with, Mr. Broshko indeed

816 Broshko WS, ¶ 42.

817 Counter-Memorial, ¶ 516.

818 Counter-Memorial, ¶ 516.

819 Counter-Memorial, ¶ 518.

made his investment independently from Mr. Rand. This is expressly confirmed by both Messrs. Broshko and Rand.[820]

715. Furthermore, even if Serbia was correct, and it is not, and Mr. Broshko's investment was not independent from Mr. Rand, Serbia again fails to explain why such a fact should indicate an abuse of process.

b. The dispute before the Tribunal was not foreseeable at the time when Mr. Broshko acquired his investment

716. Serbia's argument related to alleged inadmissibility of Mr. Broshko's claims primarily focuses on the allegation that, at the time when Mr. Broshko made his investment, he could have foreseen a dispute with Sebia. Specifically, Serbia claims that Mr. Broshko's acquisition of Obnova's shares in 2017 was not *bona fide* because "*[i]nvestments acquired by an investor when a dispute is foreseeable are also not bona fide*".[821]

717. To begin with, as explained above, the foreseeability of a dispute is—on its own—insufficient to find the abuse of process. Even Serbia itself seems to recognize that much.[822] However, as demonstrated above, other circumstances related to Mr. Broshko's investment do *not* suggest the abuse of process. Thus, even if the dispute before the Tribunal was foreseeable at the time of Mr. Broshko's investment, such fact would not be sufficient for finding the abuse of process.

718. In any case, the dispute related to Mr. Broshko's investment that is before the Tribunal was *not* foreseeable at the time of Mr. Broshko's investment. Mr. Broshko's claim is based solely on Serbia's rejection of Obnova's Request for Compensation—which took place five years *after* Mr. Broshko's investment. This rejection was not foreseeable at the time of Mr. Broshko's investment. On the contrary, Mr. Broshko expected Obnova

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820 Broshko WS, ¶ 44; Rand WS, ¶¶ 59-60.

821 Counter-Memorial, ¶¶ 511-513, 515.

822 Counter-Memorial, ¶ 516 ("*As mentioned above, in addition to foreseeability of a dispute, there must also be 'sufficiently unusual' evidence so as to raise concerns about the bona fides of the investment, in which case the tribunal should consider the 'suspicious circumstances'*.")

would either resolve the issue with the 2013 DRP or, if not, that Obnova would be properly compensated, as required under Serbian law.[823]

719. Indeed, as explained in detail above, Mr. Broshko acquired not only the Canadian Obnova Shares, but also certain receivable *vis-à-vis* Obnova. Mr. Broshko thus clearly expected that Obnova would have been able to generate funds to repay these receivables.

720. Serbia's assertion that, at the time of Mr. Broshko's investment, there were several pending administrative and court proceedings in Serbia related to Obnova's rights is inapposite.[824] Mr. Broshko does not base his claim on Serbia's conduct in any of those proceedings. On the contrary, his claim is based on a separate measure—*i.e.* the rejection of Obnova's Request for Compensation—which took place *several years after* his investment.

3. Timing of Mr. Broshko's claim also shows that there was no abuse of process

721. As explained above, investment tribunals have confirmed that one of the issues that should be taken into consideration when assessing potential abuse of process is the timing of the investment claim. Claimants also showed that investment tribunals have concluded that no evidence of the abuse of process exists where there was a material passage of time from the making of an investment to the filing of a claim in arbitration. In the present case, Mr. Broshko initiated his ICSID arbitration *five years after* his acquisition (through MLI) of the Canadian Obnova Shares, *i.e.* the same time period as in *Levi de Levi v. Peru*, where the tribunal found no abuse of process.[825]

722. Obviously, if Mr. Broshko made his investment solely to initiate investment arbitration, he would not have waited for five years to do so. Also, there would be no reason for him to purchase the receivables *vis-à-vis* Obnova.

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823 Broshko WS, ¶ 42.

824 Counter-Memorial, ¶¶ 509-515.

825 *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, ¶ 154, **CL-124**.

VI. SERBIA VIOLATED ITS OBLIGATIONS UNDER THE TREATIES

723. Serbia violated the Treaties by: (*i*) unlawfully expropriating Cypriot Claimants' investment; (*ii*) violating the standard of fair and equitable treatment; (*iii*) subjecting Claimants' investment to unreasonable and arbitrary treatment; and (*iv*) violating the umbrella clause relied upon by Cypriot Claimants. Claimants address all these breaches *seriatim* below.

A. Serbia unlawfully expropriated Cypriot Claimants' investment

724. In their Memorial, Claimants explained that Serbia indirectly expropriated Cypriot Claimants' investment when it adopted the 2013 DRP and, thus, prevented Obnova from developing its premises for commercial and residential use.[826]

725. Serbia disagrees and argues that:

a. Serbia did not expropriate Cypriot Claimants' investment because Obnova never had ownership or the right of use over Obnova's premises at Dunavska 17-19 and Dunavska 23;[827]

b. the 2013 DRP was a "*legitimate regulatory measure*" adopted in a public interest and, therefore, cannot represent an expropriation of Cypriot Claimants' investment;[828] and

c. Cypriot Claimants failed to meet the threshold for indirect expropriation.[829]

726. Serbia's arguments have no merit. Claimants will show that:

a. Cypriot Claimants acquired an ownership right over the buildings as well as the right of use and the conversion right over the land at Dunavska 17-19 and

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826 Memorial, ¶¶ 197-250. At the same time, large development project is planned on the neighboring land. *See* eKapija, *Selfnest in Belgrade plans to build a residential and commercial building with 490 apartments (PHOTO)*, 7 September 2023, https://www.ekapija.com/real-estate/4365612/KZIN-PR/selfnest-u-beogradu-planira-gradnju-stambeno-poslovnog-objekta-sa-490-stanova-foto (last accessed on 23 February 2023), **C-603**.

827 Counter-Memorial, ¶¶ 524-555.

828 Counter-Memorial, ¶¶ 556-588.

829 Counter-Memorial, ¶¶ 589-602.

Dunavska 23 in accordance with Serbian law and that these rights are susceptible to expropriation under the Serbia-Cyprus BIT (**Section VI.A.1.a** below);

b. investment tribunals have repeatedly confirmed that measures precluding a reasonable exploitation of an investor's property amount to indirect expropriation (**Section VI.A.1.b** below);

c. by adopting the 2013 DRP, Serbia precluded Cypriot Claimants from a reasonable exploitation of their investment (**Section VI.A.1.b** below); and

d. Serbia's expropriation of Cypriot Claimants' investment was unlawful (**Section VI.A.2** below).

1. Serbia expropriated Cypriot Claimant's investment

a. Obnova had rights susceptible to expropriation

727. As Claimants demonstrated above, by the time Serbia adopted the 2013 DRP, Obnova's rights to its building and land has undergone the following development:

a. Obnova acquired, *ex lege*, the right of use over its buildings at Dunavska 17-19 and 23 upon their construction;[830]

b. upon Obnova's privatization in 2003, Obnova's right of use over its buildings at Dunavska 17-19 and 23 transformed, *ex lege*, into ownership;[831]

c. Obnova acquired the permanent right of use over the land at Dunavska 17-19 upon the construction of its buildings at Dunavska 17-19; [832]

d. Obnova acquired the right of use (as emanation of social ownership) over the land at Dunavska 23 based on acquisitive prescription in 1968 (at latest);[833] and

830 *Supra*, §§ II.A.4.d, II.B.2.

831 *Supra*, § III.D.2.

832 *Supra*, § II.A.4.f.

833 *Supra*, § II.B.1.

e. in 2009, Obnova acquired the right to convert the right of use it had over the land at Dunavska 17-19 and 23 into ownership.[834]

728. As a result, at the time when Serbia adopted the 2013 DRP, Obnova: (*i*) was the owner of its buildings at Dunavska 17-19 and 23; and (*ii*) had the right of use over the land at Dunavska 17-19 and 23, which could be converted into ownership. It is undisputed that the ownership right, as well as the right of use over the land, qualify as property rights under Serbian law.[835] As such, these rights clearly qualify as rights susceptible to expropriation.

729. Serbia disagrees and argues that Obnova—and by extension Cypriot Claimants—never had any "*recognized, acquired or vested rights under the local law*."[836] Serbia's argument is incorrect for several reasons.

i. Obnova's ownership over the buildings at Dunavska 17-19 and 23

730. To begin with, Serbia completely ignores Obnova's ownership over the buildings and focuses solely on Obnova's rights over the land. However, Obnova's ownership of the buildings was affected by the adoption of the 2013 DRP as well. As explained above, the 2013 DRP expressly states:

> Until all existing facilities planned for removal that are located within the borders of the plan on planned public development parcels have been conformed to designated use, they shall be kept in the existing condition. No new construction or extension is permitted on them.[837]

731. As a result, Obnova cannot do anything with its buildings besides maintaining them in their current condition. Obnova also cannot sell the buildings—because there is, obviously, no buyer for buildings that are supposed to be demolished and replaced with a bus loop.

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834 *Supra*, §§ II.A.4.g, II.B.3.

835 Counter-Memorial, ¶ 538.

836 Counter-Memorial, ¶ 543.

837 2013 DRP, p. 6 (pdf), **C-024**.

ii. Obnova's right of use over the land at Dunavska 17-19 and 23

732. As for Obnova's right of use over the land and its conversion into ownership, Serbia's assertion that Obnova never acquired the right of use over the land at Dunavska 17-19 and Dunavska 23 is simply false. Claimants already showed that Obnova acquired the right of use over the land and has been exercising it for decades.

733. Claimants also demonstrated that, in 2009, Obnova acquired the right to convert its right of use over the land into ownership. Serbia's argument that "*the right to conversion in the case of the Dunavska Plots has not been recognized by any decision of Respondent's authorities*" is a red herring.[838] Obnova acquired the right to convert its right of use over the land into ownership *ex lege*—it did not need any decision from Serbian authorities.[839] Tellingly, Serbia does not refer to *any* authority to the contrary.

734. Serbia's argument that Obnova "*could not possibly gain 'the right of use convertible into ownership'*" because the 2013 DRP designated Obnova's premises for public use is absurd because Obnova acquired that right several years before the adoption of the 2013 DRP.

735. As explained above, Obnova acquired the right of use over the land (*i*) at Dunavska 17-19 upon the construction of its buildings in the 1950s; and (*ii*) at Dunavska 23 at latest in 1968 through acquisitive prescription. Furthermore, Obnova acquired the right to convert the right of use over the land into ownership in 2009—when Serbia adopted the 2009 Law on Planning and Construction which introduced the conversion process.

736. Obnova therefore acquired its right of use over its land *decades before* the adoption of the 2013 DRP. The 2013 DRP, thus, did not preclude Obnova from obtaining its rights. To the contrary, Obnova had its rights at the time of the adoption of the 2013 DRP—and the 2013 DRP stripped Obnova of them.[840]

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838 Counter-Memorial, ¶ 543.

839 Memorial, § III.B; See *supra,* §§ II.A.4.g, II.B.3

840 *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, ¶ 356, **CL-125**; *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, ¶¶ 663-670, **RL-132**.

737. As explained above, the adoption of the 2013 DRP precluded Obnova from converting its right of use over the land at Dunavska 17-19 and 23 into ownership because—as confirmed by Serbia—it designated Obnova's land for public use and such land cannot be subject to conversion.[841]

738. Serbia's argument that "*the possibility of conversion was not effectively applied at the time of the alleged expropriation measure or thereafter*" is equally wrong.[842] At the time of adoption of the 2013 DRP, the 2009 Law on Planning and Conversion was still in force—including the provision allowing for conversion of the right of use.[843]

739. Furthermore, Serbia subsequently adopted new regulations regarding the conversion process, which is even more beneficial for privatized companies having the right of use over construction land. As explained above, the main benefit of this new regulation is that the conversion of the right of use occurs *ex lege* and no longer requires payment of the conversion fee.

740. Serbia, however, precluded Obnova—and thus also Cypriot Claimants—from relying on this new regulation. This is because, same as with the 2009 Law on Planning and Construction, the new regulation does not allow for conversion of the land designed for public use.

741. Finally, Serbia's reliance on *Gosling v. Mauritius* and the European Court of Human rights ("**ECHR**") case *Kopecky v. Slovakia* does not help its case either. In fact, neither of these decisions supports Serbia's theory.

742. In *Gosling v. Mauritius*, the investor sought to obtain contractual development rights to pursue a development project in Mauritius.[844] However, the claimant never got to the phase of concluding a contract, nor did it hold any property rights.[845] The claimant was only provided with a letter of intent indicating that Mauritius would be generally

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841 See *supra*, § III.K.2.

842 Counter-Memorial, ¶ 552.

843 Memorial, ¶ 83; Živković Milošević First ER, ¶¶ 51-72.

844 *Thomas Gosling v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, 14 February 2020, ¶ 226, **RL-136**.

845 *Thomas Gosling v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, 14 February 2020, ¶ 229, **RL-136**.

interested in the project.[846] The claimant's position in *Gosling v. Mauritius* is strikingly different from Obnova's position. Obnova already had and exercised property rights with respect to its premises at Dunavska 17-19 and Dunavska 23 when the expropriatory measure was adopted.

743. Serbia's reliance on the ECHR case in *Kopecky v. Slovakia* is equally misplaced.[847] To begin with, the *Kopecky* decision is inapposite because it interprets the Convention for the Protection of Human Rights and Fundamental Freedoms ("**Convention**"), which deals with human rights—*i.e.* a completely different subject-matter than that of the Cyprus-Serbia BIT (or any other BIT for that matter).

744. While the ECHR's decisions might be relevant for the interpretation of other treaties on human rights, they are not relevant for the interpretation of international investment treaties. Indeed, investment tribunals have repeatedly cautioned against the use of the ECHR's case law for the interpretation of bilateral or multilateral investment treaties.[848]

745. Furthermore, the *Kopecky* case again relates to a situation completely different from the one in the present case. In the *Kopecky* case, Mr. Kopecký inherited a claim for restitution of coins under a special law on restitution and rehabilitation. In order to succeed with his claim, Mr. Kopecký had to prove when the coins were taken, who seized them and who was in the possession of the seized coins at the time the restitution claim was brought before a court. Slovak courts concluded that Mr. Kopecký failed to establish with the last condition—*i.e.* he failed to identify the person who was in the possession of the seized coins.[849]

746. The ECHR concluded in this decision that a legal claim can constitute an "*asset*", and thus attract the guarantees of Article 1 Protocol No. 1 to the Convention. However, it also noted that this is only if the claim has sufficient basis in national law: "*the Court*

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846 *Thomas Gosling v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, 14 February 2020, ¶ 229, **RL-136**.

847 Counter-Memorial, ¶¶ 533-536.

848 *E.g. Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, 17 July 2006, ¶ 176(j), **CL-126**; *ST-AD GmbH. v. Bulgaria*, PCA Case no. 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013, ¶ 264, **RL-101**; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 1 December 2011, ¶ 322, **CL-127**.

849 *Kopecký v. Slovakia* [GC], no 44912/98, ECHR 2004-IX, 28 September 2009, ¶ 54, **RL-137**.

takes the view that where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it."[850] The ECHR concluded that Mr. Kopecký was unable to satisfy the condition of showing who had *possession* of the seized coins, and thus did not have the alleged claim to their restitution because the restitution claim was conditional and depended upon fulfilment of that condition.

747. The situation in the present case is completely different. Obnova's right to convert its right of use into ownership was *not* conditional upon satisfaction of any additional conditions. As long as Obnova had the right of use over the land, it could have converted it to ownership. As a result, Obnova's right would actually satisfy the test for existence of an asset formulated by the *Kopecky* decision even if that test were applicable in under the Cyprus-Serbia BIT—and it is not.

b. Serbia expropriated Obnova's rights through the adoption of the 2013 DRP

748. Before the adoption of the 2013 DRP, Obnova's premises were zoned for commercial and residential development.[851] Specifically, Obnova's premises were defined as "*multifunctional complexes […] with a predominantly commercial purpose.*"[852]

749. It is undisputed that the 2013 DRP changed the designation of Obnova's premises and placed a bus loop and its infrastructure on Obnova's premises.[853] The 2013 DRP expressly precluded any kind of development on Obnova's premises, stripped Obnova of its right to convert its right of use over the land at Dunavska 17-19 and 23 to ownership and prevented Obnova from legalizing certain buildings at Dunavska 17-19 and most of the buildings at Dunavska 23.[854]

750. As a result, the 2013 DRP clearly prevented Obnova from reasonably exploiting the economic potential of its premises. As Claimants demonstrated already in their

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850 *Kopecký v. Slovakia* [GC], no 44912/98, ECHR 2004-IX, 28 September 2009, ¶ 52, **RL-137**.

851 2003 RP, pp. 24, 214 (pdf), **C-025**.

852 2003 RP, ¶ 4.5.10, **C-025**.

853 Memorial, ¶ 101.

854 See *supra*, §§ III.K.2; Memorial, ¶¶ 109-111; Živković Milošević First ER, ¶¶ 56, 94.

Memorial, investment tribunals have repeatedly confirmed that a change in spatial regulation that effectively freezes or blights an owner's ability to reasonably exploit the economic potential of the property represents an indirect expropriation.[855]

751. Serbia does not dispute that a change in spatial regulation preventing the property owners from exercising their rights amounts to indirect expropriation.[856] However, it claims that Cypriot Claimants' investment was not indirectly expropriated because they were not "*completely deprived*" of the value of their investment.[857] According to Serbia, this is because Obnova "*still uses the premises in Dunavska Street.*"[858]

752. Serbia's argument is a red herring. Claimants have never claimed that Obnova can no longer use its premises. The issue is that, as explained above, Obnova cannot develop its premises in any way. On the contrary, the 2013 DRP expressly states that no "*new construction or extension is permitted*" on Obnova's premises.

753. Obnova's use of its premises is, thus, essentially limited to Obnova's access to these premises. Obnova, however, cannot develop the premises nor sell them. As a result, it is clear that the adoption of the 2013 DRP effectively freezes or blights Obnova's ability to reasonably exploit the economic potential of the property and, thus, represents an indirect expropriation.

754. The decisions cited by Serbia are inapposite. To begin with, in *Sempra Energy*, the claimant complained of changes in Argentina's regulatory framework for gas trade. Specifically, in 2000, Argentina decided to revise its favorable tariffs policy in response to a rapidly worsening economic situation of the State.[859] While these measures decreased the claimant's revenue in that case, they did not deprive the claimant of its

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855 Memorial, ¶ 197; *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, ¶¶ 76-81, **CL-008**; *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012, ¶¶ 209-223, **CL-009**; *Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, ¶¶ 209-223, **CL-009**; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶¶ 109-112, **CL-011**.

856 Counter-Memorial, ¶ 537.

857 Counter-Memorial, ¶¶ 589-595.

858 Counter-Memorial, ¶ 595.

859 *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 101, **CL-044**.

business.[860] It was against this background that the Tribunal concluded that a mere decrease in the value of an investment is not sufficient to establish indirect expropriation.[861]

755. The present case is markedly different. The adoption of the 2013 DRP did much more than decrease Obnova's revenues. It precluded Obnova from developing or selling its premises—which are the only valuable assets that Obnova has.

756. Furthermore, while the current effect of the 2013 DRP is that Obnova cannot reasonably exploit its premises, the ultimate effect of the 2013 DRP is that Obnova's premises are to be replaced by a bus loop. Serbia cannot seriously claim that Obnova's rights have not been expropriated simply because Serbia has not yet taken this final step.

757. Indeed, Serbia's own courts have confirmed that expropriation takes place upon the adoption of a planning document—not only upon its actual realization:

> When, by the general act of the defendant as a unit of local self-government, the land owned by individual is planned for the area of public use for construction of a school, but it has not been excluded from that person`s ownership for many years, the owner's right is restricted. Therefore, the claim of the owner to determine the defendant's property rights on the disputed land and to oblige the defendant to pay compensation for that land is founded.[862]

758. The awards in *ECE v. Czech Republic, LG&E v. Argentina* and *Mobil v. Argentina* are irrelevant for the same reason. In those cases, unlike in the present case, the claimants were not deprived of the control, use or future development of their investment.[863]

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860 *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 3 August 2009, ¶ 285, **CL-044**.

861 *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 285, **CL-044**.

862 Supreme Court of Cassation judgment Rev 17881/2022 dated 29 March 2023, **C-507**. *Similarly* Appellate Court in Kragujevac, Gž 1867/2011, 23 September 2011, **C-508**. *See also* Živković Milošević Second ER, ¶¶ 195-197.

863 *ECE Projektmanagement v. The Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, ¶¶ 4.814-4.815, **RL-152**. Claimants note that Serbia refers to an award dated 25 July 2007 issued in the case *LG&E v. Argentine*. However, said award does not deal with issues of liability and does not contain the quote referenced in Serbia's submission. Claimants assume Serbia intended to refer to the Decision on liability dated 3 October 2006 (**CL-006**); *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, ¶ 828, **RL-145**; *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award 9 October 2014, ¶ 286, **RL-153**.

759. The claimant in *ECE v. Czech Republic* purchased certain land plots with the intention to build a shopping mall and applied for the necessary permits.[864] However, the permitting process was significantly delayed by several revocations and remands in the administrative procedure.[865] In the meantime, a competitor was able to complete a competing shopping mall project across the street. The claimant thus abandoned its project and claimed the revocations, reversals and delays constituted an indirect expropriation of its project.[866] The tribunal rejected the claim because the claimant remained in possession of the land in question and was not prevented from selling or developing the land.[867] The present case is substantially different because Obnova cannot develop its premises for *any* purpose.

760. In *LG&E v. Argentina*, the claimant argued that Argentina expropriated its investment following the amendment of Argentina's legislation on a gas distribution tariff system.[868] The Claimants—just like in *ECE*—admitted that they were still in possession of their assets and were entitled to operate them.[869] The tribunal opined that to establish an indirect expropriation, the tribunal must consider the economic impact of Argentina's measures and its interference with the investor's expectations.[870] With this in mind, it concluded that "*interference with the investment's ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished*.[871] As explained above, the adoption of the 2013 DRP did not merely diminish Obnova's profits. It completely precluded Obnova from developing or selling its premises (as no

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864 *ECE Projektmanagement v. The Czech Republic*, (PCA Case No. 2010-5), Award, 19 September 2013, ¶¶ 1.10-1.12, **RL-152**.

865 *ECE Projektmanagement v. The Czech Republic*, (PCA Case No. 2010-5), Award, 19 September 2013, ¶¶ 1.13, 4.780-4.781, **RL-152**.

866 *ECE Projektmanagement v. The Czech Republic*, (PCA Case No. 2010-5), Award, 19 September 2013, ¶ 1.13, **RL-152**.

867 *ECE Projektmanagement v. The Czech Republic*, (PCA Case No. 2010-5), Award, 19 September 2013, ¶¶ 4.814-4.815, **RL-152**.

868 *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 177, **CL-006**.

869 *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 180, **CL-006**.

870 *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 189, **CL-006**.

871 *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 192, **CL-006**.

buyer would buy a premises designated for construction of a bus loop). As such, the adoption of the 2013 DRP clearly represents "*interference with the investment's ability to carry on its business.*"

761. Serbia also relied on the award in *Mobile Exploration v. Argentina* to argue that Cypriot Claimants failed to satisfy the threshold for an indirect expropriation. This decision concerns Mobile's claim for an indirect expropriation of its "*legal and contractual rights and specific associated revenues*."[872] Upon assessing various measures taken by Argentina, which negatively affected the claimant's expected revenues from its contracts, the tribunal held that Argentina's measures did not deprive the claimants of control of their investments.[873] In contrast, the adoption of the 2013 DRP effectively deprived Obnova of any possibility to develop its premises and convert its right of use over the land to ownership. This is an entirely different situation than a mere decrease of revenues under a contract.

762. Finally, Serbia refers to paragraph 286 of the decision in *Venezuela Holdings v. Venezuela* and claims that the tribunal in that case concluded that: "*[f]or an expropriation to exist, the investor should be substantially deprived not only of the benefits, but also of the use of his investment. A mere loss of value, which is not the result of an interference with the control or use of the investment, is not an indirect expropriation.*"[874]

763. However, the text cited by Serbia simply does not exist in paragraph 286 of the *Venezuela Holdings* award—nor anywhere else in the award. In any case, the 2013 DRP made it impossible for Obnova to use its premises for any development or to sell them. As such, the adoption of the 2013 DRP clearly deprived Obnova, and thus also Claimants, of "*the use of their investment*"—and, in any event, would qualify as an indirect expropriation under the test proposed by Serbia.

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872 *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, ¶ 829, **RL-145**.

873 *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, ¶ 843, **RL-145**.

874 Counter-Memorial, ¶ 594.

2. The expropriation of Cypriot Claimant's investment was unlawful

764. Pursuant to Article 5(1) of the Serbia-Cyprus BIT, Serbia can expropriate foreign investments only if it does so: (*i*) in the public interest; (*ii*) under due process of law; (*iii*) on a non-discriminatory basis; and (*iv*) against adequate compensation paid without undue delay.[875] As Cypriot Claimants explained in the Memorial, Serbia expropriated their investment in breach of Article 5(1) of the Serbia-Cyprus BIT because it did not satisfy *any* of these conditions.[876]

765. Serbia's only response is that the 2013 DRP was adopted in public interest.[877] As Claimants demonstrate in **Section a** below, this is simply not the case.

766. However, even if the Tribunal reached the opposite conclusion, it would not change the fact that Serbia failed to satisfy the remaining conditions. Claimants demonstrate this in **Sections b** to **d** below.

a. Serbia failed to show the expropriation of Obnova's premises was done in public interest

767. An expropriation can be lawful only if it is done in the public interest and if it is proportionate to the public interest it is supposed to serve.[878] The tribunal in *Casinos Austria* duly pointed out:

> [Principle of proportionality] is a recognized limitation on the exercise of the host State's regulatory and police powers so that host State measures that are disproportionate from the perspective of international law cannot qualify as legitimate exercises of the host State's police powers that fall outside the concept of indirect expropriations. […] Proportionality requires that a host State's measures *i) pursues a legitimate goal (public purpose); ii) is suitable to achieve that goal; iii) is necessary to achieve that goal in the sense that less intrusive, but equally feasible and effective measures do not exist;* and iv) is proportionate stricto sensu, that is, that the benefit for the public of the

875 Cyprus-Serbia BIT, Art. 5, **CL-007(a)**.

876 Memorial, ¶¶ 214-250.

877 Counter-Memorial, ¶¶ 557-588.

878 *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 122, **CL-017**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 7.5.21, **CL-042**; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2017, ¶¶ 391-392, **RL-080**; *PL Holdings S.A.R.L. v. Republic of Poland*, SCC Case No V2014/163, Partial Award, 28 June 2017, ¶ 355, **CL-128.**

> measure in question stands in an adequate and acceptable relationship to the negative impact of the measure on the investment.[879]

768. As Cypriot Claimants explained already in their Memorial, the adoption of the 2013 DRP does not satisfy any of these criteria. On the contrary, Serbia failed to show that the adoption of the 2013 DRP was done in public interest or that the adoption of the 2013 DRP represents a proportional measure.[880] Specifically, Claimants explained that the bus loop could have been placed on a land plot across the street from Obnova's premises—which is owned by the City and that had already been designated for traffic and roads infrastructure.[881]

769. Serbia claims that the re-zoning of Obnova's premises does not represent expropriation because it was compliant with Serbian law and done in the public interest. Serbia also claims that Obnova's premises at Dunavska 17-19 and Dunavska 23 were allegedly selected as the most suitable based on "*detailed analyses*".[882] Neither of these arguments withstands scrutiny.

770. To begin with, as explained above, the adoption of the 2013 DRP was not in line with Serbian law because the 2013 DRP is contradictory to higher regulation plans, namely the 2003 RP and then the 2016 RP. Thus, the 2013 DRP was adopted in breach of Serbia's own laws.

771. Furthermore, even if the 2013 DRP were not in conflict with the 2003 RP and 2016 RP, and it is, Serbia failed to show why it was necessary to place the bus loop on Obnova's premises, rather than the premises owned by the City across the street—which were already zoned for traffic and road infrastructure.

772. Serbia's failure to address this fact is especially relevant given that Serbia subsequently—*i.e.* after the adoption of the 2013 DRP—rezoned the City's land across the street from Obnova for residential purposes. Serbia cannot seriously claim that it was proportionate to place the bus loop on Obnova's premises and, at the same time,

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879 *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, 05 November 2021, ¶ 351 (emphasis added), **RL-174**.

880 Memorial, ¶¶ 216-226.

881 Memorial, ¶ 271; 2003 RP, pp. 24, 29, 214, 229 (pdf), **C-025**.

882 Counter-Memorial, ¶¶ 570-572.

rezone Serbia's premises across the street to replace the existing bus depot with residential development.

773. Furthermore, while it is true that the City conducted certain studies related to the location for the bus loop, these do not prove that it was necessary to place the bus loop on Obnova's premises. On the contrary, one of the studies relied upon by Serbia expressly states that there was a more suitable location.[883]

774. Serbia's reliance on "another study" from 2007, which allegedly confirmed that *"[t]he space that fully satisfies all the mentioned criteria is located at Dunavska Street across the street from the complex of GSP Beograd*" is also misplaced.[884] The document cited by Serbia does not seem to be a study at all because it does not compare different potential locations. It only discusses the location at Obnova's premises.

775. Furthermore, while the document indeed contains the text cited by Serbia, it does not explain how that conclusion was made, nor whether there are any other locations that would potentially also satisfy the "*mentioned criteria*."

776. Finally, Obnova's participation in the process leading to the adoption of the 2013 DRP is irrelevant for the assessment of whether the adoption of the 2013 DRP was done in public interest and whether it was proportional.[885] Regardless, Serbia's reliance on the fact that Obnova did not participate in process leading to the adoption of the 2013 DRP is, at best, disingenuous.[886]

777. As explained above, a draft of the 2013 DRP was made publicly available for the first time between 9 September and 5 October 2012—during the so-called public inspection process. During the public inspection, it was—in theory—possible to review the text of the draft and submit objections.

778. However, the beginning of the public inspection period was announced only in two trashy tabloid journals, whose readership would, for obvious reasons, not likely include

883 Counter-Memorial, ¶ 173.

884 Counter-Memorial, ¶ 173.

885 Counter-Memorial, ¶ 573.

886 Counter-Memorial, ¶ 574.

many respected members of the Belgrade business community.[887] Claimants will not repeat here the obscenities that have appeared on the front pages of these journals. Serbia cannot seriously claim that Obnova was supposed to follow, on daily basis, such newspapers to learn of the public inspection process.

779. Further, the draft DRP was only made available in hard copy at a Government building.[888] As a result, almost no one actually learned about the public inspection process and the draft of the 2013 DRP.[889]

780. The best evidence of this fact is that only *one* private person submitted objections to the plan[890]—even though the construction of the bus loop and the related change in the bus routes would affect thousands of citizens.[891] In addition, when actual construction works based on the 2013 DRP started, they caused repeated protest by Belgrade citizens—who objected to the changes in bus routes and claimed they had not had previous knowledge of the changes.[892]

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887 Report on the public inspection procedure, 12 November 2012, p. 9 (pdf), **C-425**; Report on Public Review for the 2013 DRP dated 8 November 2012 and Amendments to the Report on Public Review for the 2013 DRP dated 16 May 2013, p. 2 (pdf), **R-105**.

888 Report on the public inspection procedure, 12 November 2012, p. 9 (pdf), **C-425**.

889 Low transparency of the urban planning processes is an issue in the whole Serbia. *E.g.* Handbook – How to achieve a quality urban plan tailored to local self-government, **C-420**; Guide to Participation in Urban Development Planning, **C-419**.

890 Minutes from the 219th session of the Commission for Plans, p. 6 (pdf), 23 October 2012, **C-442;** Report on the public inspection procedure, 12 November 2012, p. 11, **C-425**; Letter from the Urban Institute No. 350-802/2012, 18 October 2012, p. 5, **C-443**.

891 Markićević WS, ¶ 30.

892 YouTube, *Finished protest on Dorcol –We feel neglected*, 11 February 2021 (accessed 12 February 2024), **C-427**; Transcript of YouTube video titled "Finished protest on Dorcol –We feel neglected", 11 February 2021 (accessed 12 February 2024), **C-428**; Danas, *The Protest "Stop secret works in Lower Dorćol on November 26th"*, 25 November 2019 (accessed 15 January 2024), **C-429**; Mondo, *Protest about the trolleybus: Dorćol residents took to the streets*, 25 November 2019 (accessed 15 January 2024), **C-430**; Direktno, *Another protest of Dorćol residents against the trolleybus line*, 27 November 2019 (accessed 15 January 2024), **C-431**; Danas, *Residents of Lower Dorćol refute the city authorities*, 5 December 2019 (accessed 15 January 2024), **C-432**; Danas, NDM BGD: *The city authorities deceive citizens again*, 27 November 2019 (accessed 15 January 2024), **C-433**; Danas, *A new protest to be held tonight in Dorćol due to the relocation of trolleybus routes*, 27 November 2019 (accessed 15 January 2024), **C-434**; Radio Slobodna Evropa, *Belgrade: New protest of residents of Donji Dorćol due to the relocation of trolleybus route*, 4 December 2019 (accessed 15 January 2024), **C-435**; Nedeljnik, *(VIDEO) Protest against the trolleybus network construction organized at Dorćol during the curfew: "The police detained no one, but they are filming…"*, 28 April 2020 (accessed 15 January 2024), **C-436**; Beogradуživo, *Protest of the citizens at Dorćol (video)*, 12 February 2021 (accessed 15 January 2024), **C-437**; Istinomer, *The Citizens'Association "Komšije sa Dorćola": A New Protest on Thursday*, 10 February 2021 (accessed 15 January 2024), **C-438**; Danas, *The citizens'association is asking the city authorities to disclose their plans for Dorćol*, 7 December 2020 (accessed 15 January 2024), **C-439**; Danas, *The association: The competent*

781. Once the plan was adopted, Obnova had no effective means to dispute it. The only remedy available to Obnova was initiation of proceedings before the Constitutional Court. However, such proceedings would take years and would, in any case, be limited to assessment of certain procedural aspects of the process leading to the adoption of the 2013 DRP. The Constitutional Court would not assess the contents of the plan or its compatibility with higher level plans.[893]

b. Serbia failed to grant Cypriot Claimants' due process

782. As explained in the Memorial, the requirement of due process is satisfied when a foreign investor can question the legality of expropriation and the amount of compensation.[894] In addition, the host state must comply with its internal rules regulating the expropriation process.[895] Since Serbia never initiated any proceedings that could lead to a lawful expropriation and calculation of compensation due to Obnova, it did not comply with the requirement of due process under Article 5(1) of the BIT.[896]

783. Serbia does not dispute the legal standard as defined by Cypriot Claimants.[897] However, Serbia alleges that "*Claimants' allegations concerning the lack of due process are inaccurate for several reasons*",[898] namely that:

a. Obnova failed to object to the 2013 DRP in the process of its adoption; and

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authorities are tendentiously presenting false information about the construction of the trolleybus network at Dorćol, 5 May 2020 (accessed 15 January 2024), **C-440**; Blic, *No one wants trolleybuses on their streets*, 6 December 2019 (accessed 15 January 2024), **C-441**.

893 *Supra* ¶ 322.

894 *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, ¶ 582, **CL-018**.

895 *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela I*, ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶¶ 493, 496 (references omitted), **CL-019**. The tribunal in *Olin v. Libya* similarly confirmed that the breach of national laws regulating expropriation can represent a breach of due process. See *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Award, 25 May 2018, ¶ 172 ("*The Tribunal concludes that by failing to comply with the provisions of its Investment Law with regard to the procedural requirements in Article 23 of the Libyan Investment Law, Libya did not comply with its obligation to ensure that the 2006 Expropriation Order was issued in accordance with due process of law*."), **CL-020**.

896 Memorial, ¶ 230.

897 Counter-Memorial, ¶¶ 575-581.

898 Counter-Memorial, ¶ 576.

b. Obnova failed to initiate court proceedings to be compensated for expropriation.

784. Claimants address Serbia's allegations *seriatim* below—and demonstrate they have no merit.

i. Obnova's alleged failure to object to adoption of the 2013 DRP

785. As explained above, Serbia's reliance on the fact that Obnova did not participate in the process for adoption of the 2013 DRP is, at best, disingenuous. Obnova did not participate in the process simply because Obnova—same as with thousands of other Belgrade citizens—did not have sufficient opportunity to learn about the process in the first place.

786. Indeed, as explained above, Obnova could learn about the initiation of the public inspection process only from two trashy tabloids.[899] No one approached Obnova or informed it about the proceedings.

787. More importantly, Serbia does not explain how Obnova's participation in the proceedings would satisfy the due process requirement under Serbia-Cyprus BIT. As explained above, due process is satisfied when a foreign investor can question the legality of expropriation and the amount of compensation. However, it is undisputed that Serbia has never initiated separate expropriation proceedings that would lead to formal expropriation and compensation of Obnova—even though it was required to do so under Serbian law.[900]

788. Investment tribunals confirm that an expropriation is unlawful when the host State: (*i*) fails to apply its duly adopted laws when expropriating the property;[901] or (*ii*) fails to provide the investor advance notice and a fair hearing before the expropriation takes place.[902] Given that Serbia did not initiate any expropriation proceedings at all, it is

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899 Markićević WS, ¶ 27.

900 Živković Milošević First ER, ¶ 248; Živković Milošević Second ER, ¶¶ 190-191.

901 *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, ¶ 10.5.1, **CL-129**; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 306, **RL-131**.

902 *JSC Tashkent Mechanical Plant and others v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/16/4, Award, 17 May 2023, ¶ 567, **CL-130**.

clear that the expropriation was unlawful and in breach of Claimants' due process rights under the Serbia-Cyprus BIT.

ii. Obnova's alleged failure to initiate court proceedings

789. Serbia argues that Obnova was required to initiate court proceedings to obtain compensation because, under Serbian law, "*de facto expropriation and compensation due must be established by a court at the initiative of the dispossessed party.*"[903] This argument is both incorrect and irrelevant.

790. To begin with, Serbia's argument is incorrect because a *de facto* expropriation can clearly exist without a court decision. As explained above, a *de facto* expropriation occurs when the owner's rights are restricted. A court can confirm that a *de facto* expropriation took place, but this certainly does not mean that the State's conduct does not amount to expropriation unless a court so confirms.

791. More importantly, the question of whether or not Obnova initiated court proceedings in Serbia is irrelevant for the assessment of whether Serbia provided Cypriot Claimants with due process required under the Cyprus-Serbia BIT. This is because Serbia did not initiate the proper expropriation procedure—as it was supposed to do under Serbian law.[904]

792. As explained above, the State's failure to apply its laws when expropriating an investor's property is in breach of the due process requirement and results in an unlawful expropriation.[905] In that respect, it is irrelevant whether Obnova took initiative and commenced court proceedings. It was Serbia that was supposed to commence a proper expropriation procedure but failed to do so.

c. Serbia acted in a discriminatory manner

793. The expropriation of Obnova's premises was unlawful because it was done in a discriminatory manner. As Claimants explained already in their Memorial, a

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903 Counter-Memorial, ¶ 578.

904 Živković Milošević First ER, ¶ 248; Živković Milošević Second ER, ¶¶ 190-191.

905 *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, ¶ 10.5.1, **CL-129**; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 306, **RL-131**.

discrimination exists where a State treats similar parties differently without any reasonable justification.[906] Serbia acted in a discriminatory manner because it treated Obnova differently than other landowners in the area, whose land plots are not being converted into a bus loop.[907]

794. Serbia disagrees and claims that "*Obnova is not the owner of the land in question and cannot be compared to other owners in the area, which are not in a similar situation as they have ownership which Obnova does not.*"[908] As explained above, this is simply not the case. Obnova *owns* the buildings at Dunavska 17-19 and 23 and has the right of use over the land at these locations that, in the word of Serbia's own expert, is "*regarded as a surrogate for the ownership right.*"[909]

795. Serbia's argument that "*even assuming Obnova was the owner of the land, it would still be necessary to identify other owners who were put in a better position*" is equally incorrect.[910] Enough to say, Serbia does not refer to any authorities that would support this assertion. And this does not come as a surprise. Investment tribunals have confirmed that a State is in breach of the non-discrimination requirement if the aggrieved investor shows that two similar situations are *objectively* treated differently to the investor's detriment.[911] Claimants have satisfied that requirement by pointing out to the owners of the land plots in the neighborhood of Dunavska 17-19 and 23. Claimants are not required to identify such owners by their name.

796. Serbia's argument that the discriminatory treatment is justified and "*the justification is contained in the 2013 DRP, which set out the criteria for the new bus loop and concluded that the Dunavska Plots fulfilled them all*" misses the point.[912]

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906 Memorial, ¶ 246.

907 Memorial, ¶ 247.

908 Counter-Memorial, ¶ 585.

909 Jotanović ER, ¶ 13.

910 Counter-Memorial, ¶ 585.

911 *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, ¶ 886, **RL-145**.

912 Counter-Memorial, ¶ 586.

797. The 2013 DRP clearly does not state that Obnova's premises are the only land plots that satisfy the criteria for building a bus loop. Therefore, the relevant question is not whether Obnova's premises satisfied the conditions for placement of the bus loop. Instead, the question is why Sebia placed the bus loop on Obnova's premises, rather than a different location that would also satisfy the criteria—such as the City's own land plot right across the street.

798. Serbia's argument that the failure to consider the location across the street cannot represent discrimination because the only entity put into a better position than Obnova would be "*the state itself*" almost does not warrant a response. Serbia cannot seriously claim that a decision cannot be discriminatory simply because it benefits Serbia, as a landowner, rather than some other landowner.

d. Serbia did not compensate Obnova for expropriation of its premises

799. Serbia breached its obligations under the Serbia-Cyprus BIT when it expropriated Cyprus Claimants investment without adequate compensation. As Claimants demonstrated already in their Memorial, failure to adequately compensate an investor is, on its own, sufficient to find a breach of the Cyprus-Serbia BIT.[913]

800. Serbia does not dispute this conclusion. It also does not dispute that no compensation has been provided to Cypriot Claimants. As a result, if the Tribunal finds—as it should—that the adoption of the 2013 DRP represents an expropriation of Cypriot Claimants' rights, it should find such expropriation to be unlawful—even if only for the reason of missing compensation.

B. Serbia failed to provide fair and equitable treatment to Claimants' investment

801. Serbia's actions amounted to a breach of the fair and equitable treatment ("**FET**") standard under both Serbia-Cyprus BIT and Canada-Serbia BIT. Claimants will show that:

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913 *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Award, 28 July 2015, ¶¶ 496-498 (emphasis added), **CL-021**. Similarly also *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014, ¶ 441, **CL-068**.

a. the FET standard under both Treaties has similar contents (**Section VI.B.1** below);

b. by adopting the 2013 DRP, Serbia *de facto* breached the FET standard under Serbia-Cyprus BIT (**Section VI.B.2** below); and

c. Serbia's rejection of Obnova's Request for Compensation breached the FET standard under both Treaties (**Section VI.B.3** below).

1. The FET standard under the Treaties

a. The level of protection contained in the FET clauses of the Treaties is essentially the same

802. According to Article 2(2) of the Serbia-Cyprus BIT, foreign investments "*shall at all times be accorded* ***fair and equitable treatment and shall enjoy full protection and security*** *in the territory of the other Contracting Party*."[914]

803. The Article 6(1) of the Canada-Serbia BIT provides equal level of protection to foreign investments: "*Each Party shall accord to a covered investment treatment in accordance with the customary international law minimum standard of treatment of aliens,* ***including fair and equitable treatment and full protection and security***."[915]

804. In their Memorial, Claimants explained that the level of protection contained in the FET clause of the Treaties is "*essentially the same*" despite the Canada-Serbia BIT's reference to the customary international law standard of minimum treatment. Indeed, numerous tribunals have confirmed that a stand-alone FET clause has essentially the same contents as the FET standard connected to the customary international law standard.[916] This is in line with the evolving nature of standards for treatment of investors in international law.[917]

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914 Cyprus-Serbia BIT, Art. 2(2) (emphasis added), **CL-007(a)**.

915 Canada-Serbia BIT, Art. 6(1) (emphasis added), **CL-001**.

916 *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 337, **CL-027**; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 284, **CL-028**; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 361, **CL-029**.

917 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 537, **CL-131**. *See also ADF Affiliate Group v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶ 181, **CL-132**; *Waste Management, Inc. v. United*

805. Serbia asserts that the FET standard under the Cyprus-Serbia BIT and the Canada-Serbia BIT differs. Specifically, Serbia argues that the FET standard under the Canada-Serbia BIT has supposedly a higher threshold as it is linked to the minimum standard of treatment under international law.[918] Serbia is wrong. This is because the distinction that Serbia attempts to make is based on an outdated concept of the minimum standard of treatment in international law that is not supported in recent jurisprudence of investment tribunals.[919]

806. Serbia's reliance on *Al Tamimi v. Sultanate of Oman* is inapposite. While the *Al Tamimi* tribunal indeed adopted a higher threshold for a breach of the minimum treatment, it did so based on the specific provisions of the US-Oman FTA. Specifically, the US-Oman FTA contains an express caveat with respect to the adoption and implementation of laws aimed at protection of the environment:

> In the present case, Article 10.10 expressly qualifies the construction of the other provisions of Chapter 10, including Article 10.5. The wording of Article 10.10 provides a forceful protection of the right of either State Party to adopt, maintain or enforce any measure to ensure that investment is "*undertaken in a manner sensitive to environmental concerns*", provided it is not otherwise inconsistent with the express provisions of Chapter 10. […] It is clear that the State Parties intended to reserve a significant margin of discretion to themselves in the application and enforcement of their respective environmental laws.[920]

807. The claimant in *Al Tamimi* indeed complained of—among other things—the application of Oman's environmental protection laws.[921] It was in that context that the *Al Tamini* tribunal reached its decision.

Mexican States, ICSID Case No ARB/AF/00/3, Award, 30 April 2004, ¶ 93, **CL-133**; *GAMI Investments Inc. v. United Mexican States*, (NAFTA) UNCITRAL, Award, 15 November 2004, ¶ 95, **CL-134**.

[918] Counter-Memorial, ¶¶ 614-616.

[919] The basis for Serbia's argument is the case *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia* from 2001 (**RL-157**). Clearly, jurisprudence concerning the contents of the FET standard has significantly evolved since then and subsequent case law—as cited by Claimants—shows that the FET standard connected to the minimum treatment standard is considered to be essentially equal with the stand-alone standard of treatment.

[920] *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, ¶¶ 387, 389, **RL-156**

[921] *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, ¶ 397, **RL-156**.

808. However, no such context exists in the present case. The Canada-Serbia BIT does not include any qualifying provisions that would justify application of a more lenient minimum standard of treatment as opposed to the minimum standard of treatment as it evolved in investment arbitration jurisprudence over time.

809. Most importantly, Serbia's distinction between FET standards under the Cyprus-Serbia BIT and the Canada-Serbia BIT is purely academic. Serbia does not make any distinction between the two standards when applying them to Cypriot Claimants' claims and Mr. Broshko's claims.

b. Requirements for Serbia's conduct stemming from the FET standard

810. The FET standard encompasses—in particular—the state's duty to act in a transparent manner and in good faith, to refrain from conduct that would be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory or lacking in due process, to respect procedural propriety and due process and not to frustrate an investor's reasonable and legitimate expectations.[922]

811. Serbia, in general, disagrees with Claimants' description and claims that it is "*self-serving, overly broad, and outdated.*" Serbia, however, does not explain why this is supposedly the case.[923] Also, the few investment cases to which Serbia does refer to do not support its assertion.

812. To begin with, the tribunal in *Vanessa Ventures Ltd. v. Venezuela* did not address the contents of the FET standard at all. The tribunal merely analyzed whether delays in proceedings can represent a breach of the obligation to accord due process to investors.[924]

813. The decision in *EDF v. Romania* does not disprove Claimants' description of the FET standard. In that case, the tribunal merely confirmed that legitimate and reasonable

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922 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 609, **CL-002**.

923 Counter-Memorial, ¶ 616.

924 *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, ¶ 227, **RL-163**.

expectations are components of the FET standard.[925] Claimants have never claimed that this is not the case.

814. Finally, Serbia asserts—in a single paragraph (out of the total of 697 paragraphs of the Counter-Memorial)—that "*to establish a violation of international law by way of acts of administrative authorities, the investor must demonstrate that it has exhausted local remedies or that such remedies were futile.*"[926] Serbia is, once again, wrong. Investment tribunals have repeatedly confirmed that exhaustion of local remedies does *not* represent a requirement for bringing an investment claim.[927]

815. Serbia's reliance on the award in *Generation Ukraine v. Ukraine* is inapposite. To begin with, the tribunal in that case assessed whether a series of acts adopted by various State entities amounted to an indirect expropriation.[928] The tribunal did *not* address the FET standard.

816. More importantly, the tribunal in that case did *not* rule that claims for breaches of international law are conditional on exhaustion of local remedies. On the contrary, the tribunal expressly concluded that there is "*no formal obligation upon the Claimant to exhaust local remedies before resorting to ICSID arbitration pursuant to the BIT*."[929]

2. Serbia breached the FET standard when it *de facto* expropriated Cypriot Claimants' investment through adoption of the 2013 DRP

817. By indirectly and unlawfully expropriating Obnova's property rights, Serbia also breached the FET standard under the Cyprus-Serbia BIT.[930] As Claimants explained in their Memorial, investment tribunals have confirmed that conduct leading to a *de facto*

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925 *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2008, ¶¶ 216-217, **CL-135**.

926 Counter-Memorial, ¶ 626.

927 *E.g. Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, 1 March 2012, ¶ 302, **CL-061**; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶¶ 334-335, **CL-031**; *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, ¶ 889, **RL-132**.

928 *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶ 20.32, **RL-039**.

929 *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶ 20.32, **RL-039**.

930 Memorial, ¶¶ 256-263.

expropriation can be classified as a breach of the FET standard.[931] The *Unglaube* tribunal explained that this is particularly the case "*where violations of the fair and equitable treatment are so severe that they result in a taking of an investor's property*."[932] As explained above, the adoption of the 2013 DRP made any development at Obnova's premises impossible. As a result, Obnova's premises at Dunavska 17-19 and 23 became essentially worthless. This is in stark contrast to the expectations that Cypriot Claimants had at the time of their investment.

818. As Claimants explained already in their Memorial, when Cypriot Claimants made their investment, they expected that they would be able to develop Obnova's premises for residential and commercial purposes. Cypriot Claimants' expectation was based on the then-applicable 2003 RP, which designated Obnova's premises for commercial and residential use.[933] In addition, the 2003 RP expressly stated that it was necessary to respect "*the need of small investors to build practically in every point of the City fabric*"[934] and to be "*open to any investment, especially for the important ones which both drive the economic life and contribute to the well-being of citizens*."[935]

819. Serbia disagrees and claims that Claimants "*could not have legitimately expected*" to develop Obnova's premises. According to Serbia, this is because:

a. Obnova did not have either the right of use or ownership of its premises at Dunavska 17-19 and 23; and

b. the 2003 RP, as well as all the other plans adopted after that, did not in any way exclude the designation of a bus loop at Obnova's premises.[936]

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931 *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012, ¶ 25 (emphasis added), **CL-009**; *Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, ¶ 257 (emphasis added), **CL-009**.

932 *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012, ¶ 25 (emphasis added), **CL-009**; *Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, ¶ 257 (emphasis added), **CL-009**.

933 Memorial, ¶ 258.

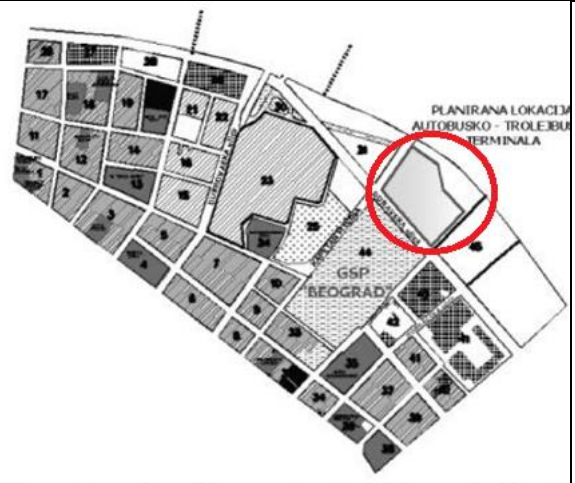
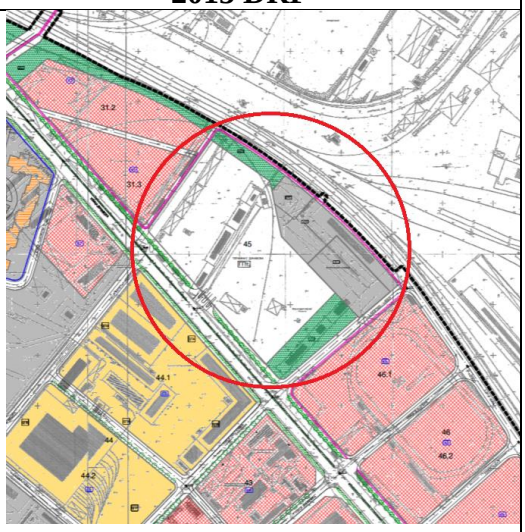
934 2003 RP, p. 1 (pdf), **C-025**.

935 2003 RP, p. 2 (pdf), **C-025**.

936 Counter-Memorial, ¶¶ 631-639.

820. Both these arguments have already been addressed above. Specifically, Claimants have demonstrated that Obnova is the owner of buildings at Dunavska 17-19 and 23 and has the right of use over the land at Dunavska 17-19 and 23. Claimants also showed that this fact is confirmed by contemporaneous documents—including documents prepared by Serbia itself.[937]

821. Serbia's argument that "*the 2003 General Plan, as well as all the other plans adopted after that, did not in any way exclude the designation of a bus loop at the Dunavska Plots*" is incorrect.[938] As explained above, according to the 2003 RP, the prevailing use of a block including Obnova's premises should have been residential and commercial development.[939] Both the 2013 DRP and the 2015 DRP clearly show that the bus loop takes over 60% of the block on which it is located:

2013 DRP[940]	**2015 DRP**[941]
 Figure 3: Location of the new terminal at Dunavska Street	

822. As a result, it is clear that, under the 2013 DRP, the prevailing use of the block including Obnova's premises is not residential and commercial development. The 2013 DRP is inconsistent with both the 2003 RP (as well as the later-adopted 2016 RP which replaced

937 *Supra* §§ II.A.4; II.B.1;II.B.2.

938 Counter-Memorial, ¶ 637.

939 *Supra* ¶¶ 265, 286(a), 287, 291.

940 2013 DRP, p. 12 (pdf), **C-024**.

941 2015 DRP, p. 272 (pdf), **C-326**.

the 2003 RP and again zoned Obnova's premises as commercial facilities).[942] As such, the 2013 DRP clearly violated legitimate expectations that Cypriot Claimants had based on the 2003 RP.

823. Serbia's argument that Obnova learned, in 2008, that the bus loop might be placed on Obnova's premises, is inapposite. After Obnova heard rumors about such a possibility, it raised this issue with the City and was assured that its premises were "*located in areas intended for commercial activities and urban centers*" and that this fact will be taken into consideration when preparing the detailed regulation plan.[943] Thus, the 2008 correspondence reassured Obnova that it could rely on the 2003 RP.

824. Claimants also explained that when Serbia adopted the 2013 DRP, it acted arbitrarily. Investment tribunals concluded that State's conduct is arbitrary if it depends "*on individual discretion*" or is "*founded on prejudice or preference rather than on reason or fact.*"[944] Serbia's conduct leading to the adoption of the 2013 DRP clearly fulfills this definition.[945]

825. As explained above, Serbia adopted the 2013 DRP without any explanation of why the bus loop would need to be located specifically on Obnova's premises. In doing so, Serbia ignored two important facts:

a. the 2003 RP designated Obnova's premises for residential and commercial use; and

942 *Supra* ¶¶ 297-300.

943 *Supra* ¶¶ 451, 687.

944 *Ronald S. Lauder v. The Czech Republic*, Final Award, 3 September 2001, ¶ 221 (citing Black's Law Dictionary 100 (7th ed. 1999), **CL-064**.

945 Memorial, ¶ 261.

b. the land plot across the street from Obnova's premises at Dunavska 17-19, which was owned by the City[946] and used as a bus depo for many years,[947] was already designated for traffic development in the 2003 RP.[948]

826. It is to be inferred that Serbia did not decide to place the bus terminal on Obnova's premises—rather than Serbia's own land located just across the street—based on "*reason or fact*". On the contrary, it was "*founded on [Serbia's] preference*" to put the bus loop on Obnova's land and rezone Serbia's land for residential use.

827. In response, Serbia mainly repeats the same arguments that were already disproved above. Specifically, Serbia claims that:

a. the City conducted the required analysis of available locations, before deciding where to place the bus loop;

b. the City was registered as the user of Obnova's premises;

c. the 2013 DRP explained why it was reasonable to place the bus loop on Obnova's premises;

d. other locations were not suitable for the bus loop, and the City also analyzed this in detail in the course of preparing the 2013 DRP; and

e. Obnova did not object to placing the bus loop on its premises during the public inspection of the 2013 DRP.[949]

828. As already explained above, none of these arguments has any merit. To begin with, the analysis conducted by the City confirmed that other locations were better suited for construction of the bus loop than Obnova's premises.[950] Furthermore, the analysis

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946 Excerpt from the cadaster for the land plot, 4 August 2022, p. 1, **C-321**; Excerpts from the cadaster for buildings, 4 August 2022, p. 1 (of all individual excerpts), **C-322**. Given that the excerpts are all identical, with the exception of description of individual buildings, Claimants only submit English translation of one of these excerpts. The remaining excerpts are only submitted in Serbian. *See also* Cadaster decision No. 952-02-040-376/13, 21 January 2014, p. 3 (pdf), **C-309**.

947 Letter from JKP, 31 August 2022, p. 1, **C-310**.

948 *Supra* ¶ 10.

949 Counter-Memorial, ¶ 641.

950 *Supra* ¶¶ 307-310, 773-775.

conducted by the City did not even assess the land just across the street from Dunavska 17-19 that was already owned by the City. This land was designated for traffic infrastructure in the 2003 RP and the City conveniently rezoned it for residential use in 2015.[951]

829. The fact that the City was registered as the user of Obnova's premises is equally irrelevant. As explained above, the City was aware that this registration was incorrect and that Obnova was the owner of buildings and had the right of use over the land.[952]

830. Serbia's assertion that the 2013 DRP explained why it was reasonable to put the bus loop on Obnova's premises is a red herring. The issue in question is why the City placed the bus loop on Obnova's premises, rather than other premises that also satisfied the same criteria.[953]

831. In addition, as explained above, Obnova did not submit any objections against the 2013 DRP during the public inspection period simply because it was not aware—same as thousands of other Belgrade citizens—that the public inspection was underway and that the 2013 DRP intended to place a bus loop on Obnova's premises.[954]

832. Finally, the adoption of the 2013 DRP represents a breach of the FET standard also because it was discriminatory. As explained above,[955] the adoption of the 2013 DRP was discriminatory because Serbia offered no reasonable justification for its different treatment of Obnova's premises as opposed to its own land or the land owned by other owners in the vicinity of Obnova's premises.

3. Serbia breached the FET standard by refusing to compensate Obnova for the expropriation of its property

833. Claimants' legitimate expectations are protected by the FET standard contained in both Treaties. As Claimants explained already in their Memorial, legitimate expectations created under the legal framework applicable at the time the investment was made fall

951 *Supra* ¶¶ 10, 333-336.

952 *Supra* ¶ 450.

953 *Supra* ¶¶ 307-310, 773-775.

954 *Supra* ¶¶ 318-320, 777-779.

955 *Supra* ¶¶ 793-798.

within the scope of the FET standard under both Treaties.[956] A deliberate non-observance of the State's own regulatory framework represents a breach of the FET standard.[957]

834. In **Section III.R** above, Claimants showed that Obnova has the right to compensation for expropriation of its premises caused by the adoption of the 2013 DRP. This is because Obnova had the right of use over the land and ownership of the buildings at Dunavska 17-19 and Dunavska 23. The adoption of the 2013 DRP prevented Obnova from exercising its rights and therefore represents a *de facto* expropriation under Serbian law, which necessitates compensation.[958]

835. Accordingly, Claimants expected that, following the adoption of the 2013 DRP, Obnova would be compensated for Serbia's expropriatory acts in line with Serbian law.[959] Serbia not only failed to promptly initiate proceedings to determine appropriate compensation, but it outright rejected to compensate Obnova in August 2021.

836. As explained above, it is undisputed that on 19 April 2021, Obnova filed with several Serbian authorities, including the City and the State Attorney's Office, a request for compensation for the losses caused to Obnova by the adoption of the 2013 DRP.[960]

837. It is equally undisputed that on 13 August 2021, the Land Directorate of the City rejected the Request for Compensation. The Land Directorate did so based on entirely incorrect, unreasonable and arbitrary grounds and in complete disregard of the position it had

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956 Memorial, ¶ 259.

957 *E.g. B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia*, ICSID Case No. ARB/15/5, Excerpts of Award, 5 April 2019, ¶ 840 ("*Further, the Tribunal agrees with Claimant that the FET standard is infringed not only when a State engages in a positive act, but also when it fails to discharge its duties and to comply with its statutory obligations […].*"), **CL-003**; *Spoldzielnia Pracy Muszynianka v. Slovak Republic*, UNCITRAL, PCA Case No. 2017-08, Award, 7 October 2020, ¶ 616 ("*It is therefore evident that the Exploitation Permit proceedings were conducted in willful disregard of Slovak administrative law and the transparency expected from State authorities. […] In the Tribunal's view, such treatment was in breach of the FET standard*."), **CL-025**.

958 *Supra*, § III.K.2. *See also* Živković Milošević First ER, ¶¶ 237-246; Živković Milošević Second ER, ¶¶ 194-197.

959 *Supra*, § III.K.3.

960 *Supra*, § III.R.

taken just three years earlier, in February 2018, when it envisaged that Obnova would be provided with compensation.[961]

838. In August 2021, the Land Directorate expressly refused to provide any compensation, arguing with respect to the buildings at Dunavska 17-19 that:

a. Obnova's buildings are temporary and that Obnova was allegedly obliged to demolish its buildings "*at the request of the People's Committee of the City of Belgrade, without the right to compensation*";

b. it is "*not possible to positively identify Objects built under temporary approvals compared to the current situation on the ground*" and that Obnova's requests for legalization of the existing objects had been rejected;

c. Obnova's buildings allegedly "*could not be regarded as the subject of privatization*"; and

d. Obnova's rights allegedly could not be expropriated because the Cadaster had registered the City as the owner and Obnova's claim for determination of its ownership was pending before Serbian courts.[962]

839. As Claimants demonstrated above, none of these arguments withstand scrutiny. This is because:

a. Obnova's buildings are not temporary and Obnova does not have an obligation to demolish them;

b. the Land Directorate did not even attempt to identify the relevant buildings;

c. it is utterly irrelevant that the buildings located at Dunavska 17-19 were not the "*subject of privatization*";

d. the City is not the owner of Obnova's buildings; and

961 *Supra*, § III.R.3.

962 Memorial, ¶ 130.

e. the erroneous registration of the City's purported ownership is irrelevant.[963]

840. With respect to Obnova's premises at Dunavska 23, the Land Directorate merely stated that the 2013 DRP does not cover Obnova's building located on land plot No. 40/5 CM Stari grad. This is simply incorrect.

841. As Claimants showed in their Memorial, land plot No. 40/5 CM Stari grad is affected by the 2013 DRP according to data from the Land Directorate's own website. Furthermore, the Secretariat for Legalization previously refused to legalize Obnova's building on this land plot exactly because the 2013 DRP covers this land plot.[964]

842. Serbia does not dispute this fact. It only explains that the Land Directorate's response "*was an inadvertent error*" because "*the cadastral parcel no. 40/4 that was mentioned in the 2013 DRP, was subsequently divided for the purpose of implementation of the 2013 DRP, and after the division of two new parcels were formed –the cadastral parcels nos. 40/4 and 40/5.*"[965] Thus, Serbia expressly confirms that the Land Directorate's argument was incorrect. It does not matter whether the Land Directorate's error was inadvertent or intentional.

843. Finally, the Land Directorate entirely ignored the fact that Obnova has four other buildings on land plots Nos. 39/12 and 39/1 CM Stari grad, which are also located at Dunavska 23 and which were expressly mentioned in the Request for Compensation. The response from the Land Directorate is, thus, not only incorrect, but also arbitrary as it simply ignores an important part of the Request for Compensation.[966]

844. Serbia does not dispute that the Land Directorate rejected the Request for Compensation for the reasons set out above. Serbia, however, argues that:

a. Claimants could not have expected compensation for the 2013 DRP;[967]

963 Memorial, ¶¶ 132-148.

964 Memorial, ¶¶ 149-151.

965 Counter-Memorial, ¶ 216.

966 Memorial, ¶ 152.

967 Counter-Memorial, ¶¶ 645-647.

b. the Land Directorate is not competent to decide on compensation for alleged expropriation;

c. Serbia is not responsible for the actions of the Land Directorate; and

d. the Land Directorate's reasoning in refusing compensation was reasonable and justified.

845. Claimants address Serbia's arguments *seriatim* below—and demonstrate that its arguments, once again, have no merit.

a. Claimants legitimately expected that Obnova would be compensated under Serbian law

846. As explained above, the adoption of the 2013 DRP represents a *de facto* expropriation under Serbian law, for which Obnova should have been compensated by Serbia.[968] Serbia disagrees and claims that Claimants could not have legitimately expected that Obnova would be compensated. According to Serbia, this is because even in absence of the 2013 DRP, Obnova would not have been able to develop its premises, because it had no property rights over them.[969]

847. As Claimants already demonstrated above, Serbia is wrong. Obnova is the owner of the buildings, and has the right of use over the land, at Dunavska 17-19 and 23. But for the adoption of the 2013 DRP, Obnova's right of use could have been converted into ownership. Obnova would, therefore, clearly have been able to develop its premises but for the adoption of the 2013 DRP.

848. Serbia's argument that Claimants did not provide sufficient evidence of their expectation is equally misplaced. Claimants submit witness statements from Messrs. Rand, Broshko and Markićević, each of whom confirm that Claimants indeed expected that Obnova would receive compensation due under Serbian law.[970]

968 *Supra* §§ III.K.2, III.K.3.

969 Counter-Memorial, ¶ 646.

970 Markićević WS, ¶¶ 66-67; Broshko WS, ¶¶ 39-42; Rand WS, ¶¶ 61-62.

b. The Land Directorate was authorized to respond to the Request for Compensation

849. As explained by Messrs. Živković and Milošević, the Land Directorate was fully authorized to respond to Obnova's request. Indeed, the Land Directorate acts on behalf of the City during negotiations of compensation in cases of expropriations conducted by the City and in court proceedings in cases where the compensation is not agreed upon.[971]

850. In addition, it is undisputed that the Request for Compensation was addressed not only to the Land Directorate. It was also sent to the City and the City's public attorney.[972] It is clear that these authorities also could have responded, instead, chose not to, and their silence was equivalent to a rejection of Obnova's request.[973]

851. As explained above, Serbia's argument that "*Obnova failed to initiate appropriate court proceedings for the payment of compensation*" is a red herring.[974] Serbian courts have authority to adjudicate disputes related to compensation for a *de facto* expropriation, but such a dispute arises only after the expropriating entity, here the City, refuses to provide compensation voluntarily. Obnova tried to reach such an agreement, but its efforts were expressly rejected by the Land Directorate and the other addressees of its Request for Compensation.

852. Following such rejection, Claimants were entitled to claim their rights under the Treaties and, later, commence the present arbitration proceedings without the need to exhaust local remedies by having Obnova sue before Serbian courts.

c. The Land Directorate's conduct is attributable to Serbia

853. Serbia argues that "*Serbia is also not responsible for the actions of the Land Directorate*".[975] According to Serbia, this is because the Land Directorate is not a state organ and it did not exercise governmental powers when it was rejecting Obnova's request for expropriation.[976] Serbia is wrong. As Claimants explain below, the Land

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971 Živković Milošević Second ER, ¶¶ 224-235.

972 Obnova's request for compensation, 19 April 2021, **C-052**.

973 Živković Milošević Second ER, ¶¶ 193, 203.

974 Counter-Memorial, ¶ 649.

975 Counter-Memorial, ¶ 649.

976 Counter-Memorial, ¶ 580.

Directorate's actions are clearly attributable to Serbia under the ILC Articles on Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**").[977]

854. Article 4 of the ILC Articles stipulates:

> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.[978]

855. The term "*state organ*" is to be interpreted broadly—including organs of the government and officials at all levels, be it central or local.[979] Whether an entity has the status of an organ of the State under Article 4 of the ILC Articles is determined primarily—but not exclusively—in accordance with the law of the State.[980] The fact that an entity has a separate legal personality under domestic law does not necessarily imply that the entity is not a state organ:

> However, internal status does not necessarily imply that an entity is not a State organ if other factors, such as the performance of core governmental functions, direct day-to-day subordination to central government, or lack of all operational autonomy, point the other way.[981]

856. It is settled investment law that an entity qualifies as the so-called *de facto* state organ under Article 4 of the ILC Articles where the State exercises control over the entity and the entity itself lacks genuine operational independence.[982] For example, in *Deutsche Bank v. Sri Lanka*, the tribunal found that a State-owned petroleum company was a *de*

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977 ILC Articles, Art. 4, **RL-035**.

978 ILC Articles, Art. 4, **RL-035**.

979 *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021, ¶ 743, **RL-198**.

980 ILC Articles, Art. 4(2), **RL-035**.

981 *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13, ¶ 207, **CL-136**.

982 *Flemingo DutyFree Shop Private Limited v. Republic of Poland*, PCA Case No. 2014-11, Award, 12 August 2016, ¶ 433, **CL-137**; *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶ 137, **CL-138**; *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, ¶ 9.94, **CL-139**.

facto state organ because the relevant minister exercised significant control over the company's personnel, finances and decision making.[983]

857. The Land Directorate qualifies as a *de facto* state organ pursuant to Article 4 of the ILC Articles because it is controlled by the City (which is a state organ itself) and because it exercises governmental powers.

858. As Messrs. Živković and Milošević explain, the Land Directorate is a public enterprise founded by the City.[984] The director of the Land Directorate as well as the president and members of the supervisory board are appointed by the Belgrade's City Assembly.[985] The Belgrade City Assembly also approves the Land Directorate's bylaws, tariffs and prices for its services.[986] In turn, the Land Directorate is obliged to report progress in implementation of the Land Directorate's business program to the City Assembly.[987]

859. The City also has the right to change the internal organization of the Land Directorate, to dismiss existing bodies and appoint temporary bodies, to limit the rights of disposal of certain assets and to undertake measures that regulate the conditions and the manner in which the Land Directorate performs its activities of general interest.[988] The City also approves distribution of the Land Directorate's profits and their split between Belgrade's budget and Serbia's budget.[989]

860. Finally, pursuant to its 2016 Founding Act, the principal activities of Land Directorate are: (*i*) ensuring the conditions for arrangement, use, improvement and protection of construction land are satisfied; (*ii*) preparation and implementation of medium-termed and annual programs of arrangement of construction land in the territory of the City;

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983 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, ¶ 405(b), **CL-099**.

984 Živković Milošević Second ER, ¶ 207.

985 Živković Milošević Second ER, ¶ 207.

986 Živković Milošević Second ER, ¶ 214.

987 Živković Milošević Second ER, ¶ 211.

988 Živković Milošević Second ER, ¶ 214.

989 Živković Milošević Second ER, ¶ 219.

and (*iii*) building public facilities of special importance for the City.[990] All of these activities are clearly sovereign in nature.

861. Given the above, it is clear that:

a. the Land Directorate is subject to a detailed supervision and direction of the City;

b. the Land Directorate's activities are sovereign and regulatory in nature; and

c. the Land Directorate lacks financial independence and independence in its decision-making.

862. Based on all these reasons, the Land Directorate qualifies as a *de facto* state organ pursuant to Article 4 of the ILC Articles and its actions are attributable to Serbia.

863. In addition, the conduct of the Land Directorate would be attributable to Serbia also under Article 5 of the ILC Articles, pursuant to which:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[991]

864. The term "*elements of governmental authority*" is intentionally undefined and broad to cover all possible acts of entities acting in the State's capacity. As the tribunal in *F-W Oil v. Trinidad & Tobago* accurately noted:

> There is in other words a whole gamut of possibilities, whose application to particular situations depends upon an amalgam of questions of law and questions of fact which will vary from case to case according to the circumstances. The internal law of the State will be the starting point, but not the end point.[992]

865. It is broadly accepted that the conduct of an entity is attributable to the State under Article 5 of the ILC Articles if: (*i*) the entity is empowered by law to exercise governmental authority; and (*ii*) the entity acted in the State's capacity in the matter at

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990 Živković Milošević Second ER, ¶ 216.

991 ILC Articles, Art. 5, **RL-035**.

992 *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award, 3 March 2006, ¶ 203, **CL-140**.

issue.[993] Whether the entity is empowered to exercise governmental authority is determined by the national law.[994] The Land Directorate was empowered by Serbian law to exercise governmental authority and its acts at issue concerned the Land Directorate's governmental powers.

866. If the City had initiated proper expropriation proceedings to provide compensation for Obnova's rights affected by the adoption of the 2013 DRP, it would have been the Land Directorate that would have negotiated with Obnova regarding the amount of compensation.[995]

867. If the Land Directorate and Obnova did not reach an agreement on the amount of compensation, the matter would have been decided in court proceedings. In such proceedings, the Land Directorate would have acted on behalf of the City, as it routinely does in numerous other court proceedings regarding compensation for expropriated land.[996]

868. An expropriation of land for public use undoubtedly constitutes an exercise of sovereign powers. This also includes determination of the amount of compensation, whether in negotiations with the expropriated owner or through any other mechanism. For expropriations such as the one operated under the 2013 DRP, these tasks fell primarily on the City, which delegated them to the Land Directorate.

869. Given the above, it is clear the Land Directorate is "*empowered by the law of that State to exercise elements of the governmental authority.*" Specifically, the Land Directorate is empowered to act on behalf of the City in the determination of compensation and in all expropriation proceedings related to land expropriated for the benefit of the City.

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993 *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020, ¶ 338, **CL-141**; *Stabil LLC and others v. Russia*, PCA Case No. 2015-35, Final Award, 12 April 2019, ¶ 176, **CL-142**; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, ¶ 736, **CL-143**.

994 *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award, 3 March 2006, ¶ 203, **CL-140**.

995 Živković Milošević ER, ¶¶ 224, 226-227.

996 Živković Milošević Second ER, ¶¶ 224-228.

870. The Land Directorate clearly acted in that capacity when it rejected Obnova's Request for Compensation because the Request for Compensation sought compensation for land expropriated for public use under the 2013 DRP.

871. Finally, the Land Directorate's conduct is also attributable to Serbia under Article 8 of the ILC Articles, pursuant to which:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[997]

872. In determining whether a person acts on instructions or under the direction or control of a State, the standard of "*effective control*" applies.[998] The effective control encompasses both general control of the State over the entity as well as specific control over the act attribution of which is at stake.[999]

873. As explained above, all activities of the Land Directorate are carried out under the control of the City. Furthermore, it is clear that the Land Directorate acted under the control of the City also in the present case. As explained above, the Request for Compensation was addressed not only to the Land Directorate, but also to the City, the Public Attorney's Office of Belgrade and the State Attorney's Office. However, the only authority that responded was the Land Directorate. It is reasonable to assume that the remaining authorities coordinated with the Land Directorate and that the Land Directorate had been instructed either by the City or by Serbia to respond to Obnova's Request for Compensation.

874. If the Land Directorate responded without such coordination, then its conduct was attributable to Serbia under Article 4 or Article 5 of the ILC Articles.

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997 ILC Articles, Art. 8, **RL-035**.

998 *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, ¶ 828, **RL-132**.

999 *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, ¶ 828, **RL-132**.

d. The reasons provided by the Land Directorate for refusal of the Request for Compensation were neither reasonable nor justified

875. The reasons that the Land Directorate provided for the rejection of the Request for Compensation were neither reasonable nor justified. In fact, Serbia now admits as much with respect to the Land Directorate's reasoning related to Dunavska 23.[1000] Claimants will show below that the same holds true for the Land Directorate's reasoning related to Dunavska 17-19.

876. Serbia disagrees and claims that the Land Directorate correctly concluded that:

a. Obnova's buildings were temporary, illegal and required to be demolished;

b. Obnova failed to legalize its buildings or inscribe the ownership over them;

c. Obnova's buildings could not be regarded as subjects of Obnova's privatization and, therefore, privatization does not evidence Obnova's property rights over the buildings; and

d. Obnova's alleged rights of use and conversion could not have been expropriated, because the City was registered as the owner of the buildings.[1001]

877. None of these arguments has any merits. Claimants already addressed all these arguments in detail above, they will, therefore, limit their response to the following summary:

a. Obnova's buildings were permanent—this is confirmed, among other things, by Serbia's own legal expert who confirms that only permanent buildings can be registered in the Cadaster (and Obnova's buildings are registered in the Cadaster);[1002]

b. several of Obnova's buildings have all required permits and, therefore, clearly are not "*illegal*";[1003]

1000 *Supra* § III.R.3.

1001 Counter-Memorial, ¶ 650.

1002 *Supra* ¶ 105.

1003 *Supra* ¶ 317.

c. Obnova repeatedly tried to legalize buildings that do not have all required permits, but was unable to do so based on Serbia's ignoring of its requests;[1004]

d. the fact that Obnova's buildings as such were not the subject of privatization is irrelevant for the assessment of Obnova's ownership over the buildings;[1005] and

e. the registration in error of the City as the owner of Obnova's premises does not affect Obnova's rights and did not preclude the Land Directorate from providing compensation due to Obnova.[1006]

C. Serbia impaired Claimants' investment by unreasonable and discriminatory measures

878. In their Memorial, Claimants explained that they rely on the most favored nation ("**MFN"**) clauses in the Treaties in order to invoke substantive provisions of the Morrocco-Serbia BIT and Qatar-Serbia BIT. Specifically:

a. Cypriot Claimants rely on the MFN clause in Article 3(1) of the Serbia-Cyprus BIT,[1007] to invoke the more favorable treatment provided to investors under Article 2(3) of the Morrocco-Serbia BIT, which stipulates that: "*neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment disposal of investments of investors in the territory of the other Contracting Party*";[1008] and

b. Mr. Broshko, in turn, relies on the MFN clause contained in Article 5 of the Canada-Serbia BIT, to invoke—on his own accord and on behalf of MLI—the non-impairment standard contained in Article 3(4) of the Qatar-Serbia BIT, which provides that "*[n]either Contracting Party shall in any way impair by unreasonable or discriminatory measures the operation, management,*

1004 *Supra* ¶ 328-332.

1005 *Supra* ¶¶ 369-371.

1006 *Supra* ¶ 372.

1007 Cyprus-Serbia BIT, Art. 3(1), **CL-007(a)**.

1008 Agreement between Serbia and Morocco on Reciprocal Promotion and Protection of Investments, Art. 2(3), **CL-012**.

maintenance, use, enjoyment or disposal of investment in its territory by investors of the other Contracting Party."[1009]

879. Claimants further demonstrated in their Memorial that Serbia impaired: (*i*) Cypriot Claimants' investments by unreasonable and discriminatory measures when it expropriated Obnova's premises; and (*ii*) Claimants' investments by unreasonable and discriminatory measures when it refused to provide compensation to Obnova.

880. Serbia counter-argues that: (*i*) Claimants cannot rely on the MFN clauses in the Treaties to invoke substantive provisions from other clauses; and (*ii*) Serbia's measures in any case were not unreasonable or discriminatory. Claimants will show that neither of Serbia's counter-arguments has any merit.

1. The MFN clauses in the Treaties allow Claimants to invoke substantive provision contained in Serbia's other treaties

881. In their Memorial, Claimants demonstrated that investment tribunals unanimously recognize that MFN clauses allow investors to attract more favorable standards of treatment contained in any investment treaty concluded between the host State and a third State or States.[1010]

882. This interpretation of the MFN clauses is also in line with the *ejusdem generis* principle[1011] referred to by Serbia.[1012] According to this principle, MFN clauses attract matters belonging to the same category of subject as that to which the clause itself relates.[1013] It is undisputable that the Treaties, as well as the Morrocco-Serbia BIT and

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1009 Agreement between the Government of the Republic of Serbia and the Government of the State of Qatar for the Reciprocal Promotion and Protection of Investments, Art. 3(4), **CL-004**.

1010 *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, 5 October 2007, ¶ 131, **CL-030**; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 575, **CL-002**; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 396, **CL-031**; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, ¶¶ 932-934, **CL-032**.

1011 *Ejusdem generis* is translated into English as "*of the same kind*". *See* Black's Law Dictionary, p. 556, **C-604**.

1012 Counter-Memorial, ¶ 669.

1013 Philip Morris Brand SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, ¶ 85, **CL-144**; Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, ¶ 56, **CL-088**.

the Qatar-Serbia BIT, which Claimants invoke under the MFN clauses in the respective Treaties, all concern protection of foreign investments and promotion of trade. Therefore, the subject-matter of all four treaties is the same and the importation of standards of treatment from the Morrocco-Serbia BIT and the Qatar-Serbia BIT is within the limits of the *ejusdem generis* principle.

883. In their Memorial, Claimants also cited several investment cases confirming that this conclusion relates to both substantive and procedural provisions in investment treaties concluded between Serbia and third States.[1014] Serbia, on the other hand, does not cite to a single case that would reach an opposite conclusion—*i.e.* that would state that the MFN clauses cannot be used to invoke substantive provisions in other treaties. Serbia merely questions the relevance of the awards cited by Claimants. Serbia's criticism, however, has no merit.

884. To begin with, Serbia admits that in *Rumeli Telekom v Kazakhstan*, one of the cases cited by Claimants, the tribunal "*allowed the claimant to rely on an MFN to access a substantive obligation from another treaty.*"[1015] As such, this case is clearly relevant and supports Claimants' position.

885. Serbia's allegation that the *Rumeli* tribunal "*did not consider the scope or general application of MFN clauses as the respondent did not object to the claimant's use of the MFN clause in this instance*" is inapposite.[1016] Regardless of whether or not the *Rumeli* tribunal provided a detailed explanation for its decision to allow access to substantive protections from another investment treaty, that decision stands—and Serbia does not provide any arguments for why that decision would be incorrect or inapplicable in the present case.

1014 Memorial, ¶ 277.

1015 Counter-Memorial, ¶ 667.

1016 Counter-Memorial, ¶ 667.

886. Serbia's effort to distinguish the awards in *Arif v. Moldova* and *EDF v. Argentina* is also to no avail. The tribunals in those cases expressly noted that claimants were permitted to import additional standards of treatment from other BITs.[1017]

887. Serbia does dispute the conclusions reached in these cases, but argues that they are inapplicable in the present case because the MFN clause in those case was broader than the MFN clauses contained in the Treaties. That argument is wrong because there are no substantive differences between the MFN clause assessed by the *Arif* tribunal and the MFN clauses relied upon by Claimants:

***Arif v. Moldova* compared to Cypriot Claimants' case**

Article 4 of France-Moldova BIT (as cited in *Arif v. Moldova*)[1018]	**Article 3 of Serbia-Cyprus BIT**[1019]
Each Contracting Party shall extend, in its territory and in its maritime area, to nationals and companies of the other Contracting Party, regarding their investments and activities connected with these investments, treatment not less favourable than that granted to its nationals or companies, or treatment granted to the nationals and companies of the most favoured nation, if the latter is more favourable […]	Once a Contracting Party has admitted an investment in its territory, it shall accord to such investment made by investors of the other Contracting Party treatment no less favourable than that accorded to investments of its own investors or of investors of any third State whichever is more favourable to the investor concerned […]

1017 *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 397, **CL-031**.

1018 *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 394, **CL-031**.

1019 Cyprus-Serbia BIT, Art. 3, **CL-007(a)**.

***Arif v. Moldova* compared to Mr. Broshko's case**

Article 4 of France-Moldova BIT (as cited in *Arif v. Moldova*)[1020]	**Article 5 of Canada-Serbia BIT**[1021]
Each Contracting Party shall extend, in its territory and in its maritime area, to nationals and companies of the other Contracting Party, regarding their investments and activities connected with these investments, treatment not less favourable than that granted to its nationals or companies, or treatment granted to the nationals and companies of the most favoured nation, if the latter is more favourable […]	1. Each Party shall accord to an investor of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory. 2. Each Party shall accord to a covered investment treatment no less favourable than that it accords, in like circumstances, to investments of investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory. […]

888. As is apparent from the text in the tables above, the wording of the MFN clause in the France-Moldova BIT, as cited in *Arif*, is virtually identical to—and thus equally broad as—the MFN clause in the Serbia-Cyprus BIT. The same holds true for the *EDF v. Argentina* case, which applied the MFN clause set out in Article 4 of the France-Argentina BIT. That MFN clause compares to the two MFN clauses applicable in the present case as follows:

1020 *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 394, **CL-031**.

1021 Canada-Serbia BIT, Art. 5, **CL-001**.

***EDF v. Argentina* compared to Cypriot Claimants' case**

Article 4 of France-Argentina BIT (as cited in *EDF v. Argentina*)[1022]	**Article 3 of Serbia-Cyprus BIT**[1023]
Within its territory and in its maritime zone, each Contracting Party shall provide to the investors of the other Party, with respect to their investments and activities associated with such investments, a treatment no less favorable than that accorded to its own investors or the treatment accorded to investors of the most favored Nation if the latter is more advantageous. […]	Once a Contracting Party has admitted an investment in its territory, it shall accord to such investment made by investors of the other Contracting Party treatment no less favourable than that accorded to investments of its own investors or of investors of any third State whichever is more favourable to the investor concerned […]

***EDF v. Argentina* compared to Mr. Broshko's case**

Article 4 of France-Argentina BIT (as cited in *EDF v. Argentina*)[1024]	**Article 5 of Canada-Serbia BIT**[1025]
Within its territory and in its maritime zone, each Contracting Party shall provide to the investors of the other Party, with respect to their investments and activities associated with such investments, a treatment no less favorable than that accorded to its own investors or the treatment accorded to investors of the most favored Nation if the latter is more advantageous. […]	1. Each Party shall accord to an investor of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory. 2. Each Party shall accord to a covered investment treatment no less favourable than that it accords, in like circumstances, to investments of investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory. […]

889. Serbia itself agrees that in case of broad MFN clauses, the investor is allowed to access more favorable standards of treatment that are not included in the otherwise applicable

1022 *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, ¶ 207, **RL-185**.

1023 Cyprus-Serbia BIT, Art. 3, **CL-007(a)**.

1024 *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, ¶ 207, **RL-185**.

1025 Canada-Serbia BIT, Art. 5, **CL-001**.

BIT.[1026] Serbia's argument that the MFN clause in the Cyprus-Serbia BIT cannot be used to invoke substantive provisions of other treaties because it is "*grouped with other provisions addressing the comparative treatment of investors and investments of both the host State and any third States*" simply does not make sense. Suffice to say, Serbia does not cite to *any* authority that could support this argument.

890. And that is not surprising. International treaties are to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.[1027] The object and purpose of the Serbia-Cyprus BIT is to "*create favourable conditions for greater economic cooperation*", "*create and maintain favourable conditions for reciprocal investments*", and "*to enhance entrepreneurial initiative*".[1028] It is certainly in line with the objective of creating and maintaining favorable economic conditions and economic cooperation to accord investors the most favored nation treatment, even if it means incorporating additional standards of treatment from other treaties. Claimants' interpretation of the MFN clause is also in line with the ordinary meaning of this term as apparent from the numerous cases interpreting similarly broad MFN clauses in the manner proposed by Claimants.[1029]

891. In the same vein, the wording of Article 5 of the Canada-Serbia BIT does not prevent Claimants from importing additional standards of treatment from other treaties. As apparent from the table above, the only difference between the MFN clauses in *Arif v. Moldova* and *EDF v. Argentina* and the MFN clause in Canada-Serbia BIT is that the MFN clause in Canada-Serbia BIT expressly states it aims to provide the same level of protection to investors and investments "*in like circumstances*".[1030]

1026 Counter-Memorial, ¶ 667 (third bullet point).

1027 VCLT, Art. 31, **RL-008**.

1028 Cyprus-Serbia BIT, Preamble, **CL-007(a)**.

1029 *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, 5 October 2007, ¶ 131, **CL-030**; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 575, **CL-002**; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 396, **CL-031**; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, ¶¶ 932-934, **CL-032**.

1030 Canada-Serbia BIT, Art. 5, **CL-001**.

892. The reference to "like circumstances" does not limit the application of the MFN clause. To the contrary, invoking more favorable treatment of investors by reference to treaties between the host State and the third State ("comparator treaties") is a common and accepted practice.[1031]

893. Furthermore, the qualifier "in like circumstances" does not require Claimants to identify a specific investor from a third country that was treated more favorably in the particular context of Claimants' investment. In NAFTA case *William Ralph Clayton and others v. Canada*, the tribunal applied Article 1102 of NAFTA (national treatment), which also includes the term "*in like circumstances*" and noted that:

> Article 1102 refers to the way in which either the investor or investment is treated, rather than confining concerns over discrimination to comparisons between similar articles of trade […] In addition to *giving the reasonably broad language of Article 1102 its due*, a Tribunal *must also take into account the objects of NAFTA*, which include according to Article 102(1)(c) "*to increase substantially investment opportunities in the territories of the Parties*".[1032]

894. The tribunal emphasized that the alleged denial of national treatment must be decided in its own factual and regulatory context. The core question was, however, whether the investor was treated less favorably.[1033] In this case, Claimants submit that Mr. Broshko is treated less favorably than Qatari investors would be in his place since the Qatar-Serbia BIT contains a more precise and specific commitment not to impair Qatari investors' investments by unreasonable or discriminatory measures. This is in line with the general purpose of MFN clauses, which is to "*provide a level playing field […] between foreign investors from different countries*."[1034]

895. Serbia's reliance on the award in *İçkale v. Turkmenistan* is inapposite. Serbia relies on this award to argue that an MFN clause with the qualifier "*in like circumstances*" or

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1031 S.W. Shill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses,* Berkeley Journal of International Law, 2009, p. 496, **CL-080**.

1032 *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶ 692 (emphasis added), **CL-107**.

1033 *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶ 696, **CL-14**07

1034 *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 387, **RL-147**.

"*similar situations*" only covers cases of *de facto* discrimination and thus, prohibits claimants to import additional standards of treatment from other treaties.[1035]

896. However, the *İçkale* tribunal's understanding of the MFN clause with the qualifier "*in like circumstances*" contradicts well-established interpretation of MFN clauses under international investment law. Indeed, its conclusions have been firmly rejected by at least one other investment tribunal as "*antithetical to the core idea of MFN treatment*".[1036]

897. Finally, unlike as incorrectly claimed by Serbia,[1037] Claimants do not seek to import an entirely new standard of treatment from the Morrocco-Serbia BIT and the Qatar-Serbia BIT. Instead, Claimants seek to import the non-impairment standard that is associated with the fair and equitable treatment. As the *Saluka v. The Czech Republic* tribunal put it:

> Insofar as the standard of conduct is concerned, a violation of the non-impairment requirement does not therefore differ substantially from a violation of the "fair and equitable treatment" standard. The non-impairment requirement merely identifies more specific effects of any such violation, namely with regard to the operation, management, maintenance, use, enjoyment or disposal of the investment by the investor.[1038]

898. Apparently, Serbia shares the views of the Saluka tribunal because Serbia describes the concept of the non-impairment standard within its discussion of unreasonable and discriminatory measures under the FET standard.[1039] Undisputedly, the Canada-Serbia BIT and Serbia-Cyprus BIT include the FET standard. Claimants simply seek to rely on the more detailed version of the FET standard contained in the Morrocco-Serbia BIT and the Qatar-Serbia BIT.

1035 Counter-Memorial, ¶ 672.

1036 *Guris Construction and Engineering Inc. and others v. Arab Republic of Syria*, ICC Case No. 21845/ZF/AYZ, Final Award, 31 August 2020, ¶ 255, **CL-072**.

1037 Counter-Memorial, ¶ 668.

1038 *Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶ 461, **CL-063**. *See also Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 1 December 2011, ¶ 324, **CL-127**.

1039 Counter-Memorial, ¶¶ 677-678.

2. Serbia impaired Cypriot Claimants' by unreasonable and discriminatory measures when it expropriated Obnova's premises

899. As explained above, in the 2013 DRP, Serbia decided to put the bus loop on Obnova's premises without an explanation of why the bus loop could not be placed on land already owned by Serbia literally across the street from Obnova and designated for traffic infrastructure. The adoption of the 2013 DRP caused harm to Obnova and, in turn, Cypriot Claimants, because it prevented Obnova from converting its right of use of the land at Dunavska 17-19 and Dunavska 23 into ownership and from developing the premises.[1040]

900. As Claimants explained in their Memorial, the 2013 DRP qualifies as arbitrary because it represents "*a measure that inflicts damage on the investor without serving any apparent legitimate purpose*".[1041] In addition, the adoption of the 2013 DRP clearly did *not* involve "*a consideration of the effect of a measure on foreign investments and a balance of the interests of the State with any burden imposed on such investments.*" As such, it was arbitrary also under the standard proposed by the *LG&E Energy* tribunal.[1042]

901. Serbia disagrees and claims that the decision to place the bus loop on Obnova's premises was "*justified and not discriminatory*" because the City considered other potential locations for bus loop and because Obnova allegedly "*had an opportunity to comment on the decision before the 2013 DRP was adopted but did not do so.*"[1043] As already explained above, neither of these arguments has any merit.

902. To begin with, as explained above, while the City did analyze other locations as well, it did not explain why it eventually chose Obnova's location. On the contrary, one of the analysis relied upon by Serbia itself confirms that another location would be more suitable for construction of the bus loop.[1044]

903. In addition, the City did not explain why it placed the bus loop at Obnova's premises, rather than on its own premises located across the street. On the contrary, Serbia itself

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1040 *Supra,* § III.K.2

1041 Memorial, ¶ 284.

1042 Memorial, ¶ 284.

1043 Counter-Memorial, ¶ 680.

1044 *Supra* ¶¶ 771-778, 828.

confirms that the premises across the street have not been even considered by the City[1045]—probably because the City wanted to benefit from the change of their designation from traffic infrastructure to residential development.[1046]

904. Serbia's argument that Obnova allegedly "*had an opportunity to comment on the decision before the 2013 DRP was adopted but did not do so*" is, at best, misleading. As explained above, Obnova did not participate in the proceedings simply because it was not aware that they were happening—as their commencement was announced solely in two trashy tabloids.[1047]

905. Serbia's argument that the adoption of the 2013 DRP did not impair Cypriot Claimants' investment because Obnova "*remains in possession and use*" of its premises is equally misplaced.[1048] As explained above, while Serbia formally remains in possession of its premises, it cannot do anything with them because the 2013 DRP precludes any development of the premises (besides construction of the bus loop) and prevents Obnova from converting its right of use over the land into ownership.[1049]

906. Indeed, as explained above, Serbian courts have confirmed that adoption of planning documents, such as the 2013 DRP, can constitute expropriation *regardless* of whether the construction of the intended development, in this case the bus loop, has already commenced.[1050]

3. Serbia impaired Claimants investments by unreasonable and discriminatory measures when it refused to provide compensation to Obnova

907. As explained above, Serbia failed to initiate any expropriation proceedings that could lead to awarding rightful compensation to Obnova. Accordingly, Serbia acted in willful

1045 *Supra* ¶ 337.

1046 *Supra* ¶ 338.

1047 *Supra* ¶¶ 9, 320, 778, 786.

1048 Counter-Memorial, ¶ 681.

1049 *Supra* § III.K.2.

1050 *Supra* ¶¶ 817-832.

disregard of due process and proper procedure, thereby impairing Claimants investment.[1051]

908. Serbia was required under Serbian law to initiate expropriation proceedings, in which case respective Serbian authorities would issue an expropriation decision followed by the determination of appropriate compensation for the expropriation.[1052] No such proceeding was ever commenced, and Serbia similarly failed to compensate Obnova for the expropriation.

909. Worse yet, as again explained above, when Obnova approached Serbia and requested compensation, the Land Directorate rejected Obnova's request based on arguments that lack any proper explanation, contradict Serbian law as applied in a number of decisions of Serbia's courts and administrative authorities and essentially rely on Serbia's own mistakes and omissions. Serbia's refusal to provide due compensation to Obnova, therefore, clearly does not represent an outcome of a "*rational decision-making process*", as required for a measure to be reasonable.[1053]

910. In response, Serbia merely repeats the same arguments that have been already rebutted above. To begin with, Serbia claims that Obnova did not have any rights to its premises. As explained above, this is simply false.[1054] Obnova owned buildings, and had the right of use over the land, at Dunavska 17-19 and 23.[1055]

911. Serbia also claims that "*the Land Directorate's refusal of compensation was justified and that the reasons given were valid under Serbian law and correct as a matter of fact.*"[1056] Once again, this assertion is simply false. The rejection of Obnova's Request for Compensation was *not* in line with Serbian law and was based on clearly incorrect factual assumptions—as Serbia itself admits with respect to Dunavska 23.[1057]

1051 Memorial, ¶¶ 285-287.

1052 Milošević Živković First ER, ¶¶ 247-251.

1053 Memorial, ¶ 287.

1054 Counter-Memorial, ¶ 683.

1055 *Supra* § II.A.

1056 Counter-Memorial, ¶ 684.

1057 *Supra* § III.R.3.

912. Serbia's argument that the Land Directorate was "*neither competent nor obliged*" to respond to the Request for Compensation is equally misplaced. As explained above, the Land Directorate clearly was authorized to respond.[1058] Indeed, neither the Land Directorate itself, nor any other Serbian authority for that matter, has ever disputed the Land Directorate's authority. This argument is, therefore, clearly made-for-the-arbitration.

913. Finally, Serbia's argument that "*Claimants have not shown that their investment suffered any detriment as a result of the Land Directorate's decision, since no expropriation took place*" is not serious.[1059] As explained above, both investment tribunals and Serbia's own courts have confirmed that *de facto* expropriation takes place at the moment when the planning document is adopted—regardless of whether the actual construction of the envisaged development has commenced.[1060]

D. Serbia breached its obligations under the umbrella clause

1. The legal standard

914. In their Memorial, Cypriot Claimants explained that they invoke the MFN clause contained in the Serbia-Cyprus BIT to rely on the umbrella clause contained in Article 2(2) of the UK-Serbia BIT.[1061]

915. Serbia's argument that the MFN clause in the Cyprus-Serbia BIT "*does not permit an investor to import a substantive standard of treatment contained in another treaty with Serbia*" is incorrect.[1062] As explained above, the MFN clause in Article 3(1) of the Serbia-Cyprus BIT clearly allows Claimants to import substantive standards of protection included in other investment treaties concluded by Serbia. This conclusion is confirmed both by the text of Article 3(1), as well as by case law of investment tribunals that have interpreted similarly worded provisions.[1063]

1058 *Supra* § III.R.2.

1059 Counter-Memorial, ¶ 685.

1060 *Supra* §§ VI.A.2, VI.B.2.

1061 Agreement between UK and Yugoslavia on Reciprocal Promotion and Protection of Investments, Art. 2(2), **CL-010**.

1062 Counter-Memorial, ¶ 689.

1063 *Supra* § VI.C.2.

916. Article 2(2) of the UK-Serbia BIT provides that "*[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party*."[1064] As Claimants explained in their Memorial, the term "*any obligation*" means that this provision covers *any* obligations, be it contractual or statutory.[1065]

917. Serbia argues that the cases cited by Claimants do not support this proposition. According to Serbia, the conclusions of the tribunal in *Enron v. Argentina* are not applicable in the present case because the *Enron* tribunal focused on a violation of a specific license agreement, which also breached specific commitments with respect to foreign investors in Argentinian legislation.[1066]

918. Serbia's attempt to distinguish the *Enron* decision fails because it ignores the specific wording of that decision. The *Enron* tribunal specifically confirmed that "*[t]hrough the Gas Law and its implementing legislation, the Respondent assumed 'obligations with regard to investments'*."[1067]

919. The Tribunal in *OIEG v. Venezuela* made virtually the same conclusion without any qualification that these obligations must be assumed with respect to foreign investments:

> The term "any obligation" includes obligations entered into by law. Consequently, Venezuela has accepted the commitment to fulfil all of the legal obligations established in the Venezuelan legal system.[1068]

920. With respect to obligations arising out of laws or regulations, the decisive question is whether the obligation was owed to the investor, as noted by the *ESPF v. Italian Republic* tribunal:

> The Tribunal has found that the Umbrella Clause may, in certain circumstances, protect obligations created by instruments other than contracts. However, in order for a non-contractual "obligation entered

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1064 Agreement between UK and Yugoslavia on Reciprocal Promotion and Protection of Investments, Art. 2(2), **CL-010**.

1065 Memorial, ¶¶ 289-290.

1066 Counter-Memorial, ¶ 693.

1067 *Enron Corporation and Ponderosa Assets LP v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 273, **CL-033**.

1068 *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶ 589 (emphasis added, references omitted), **CL-034**.

> into" to give rise to treaty protection, it must *be a specific obligation given by the host state to either the investor or its investment.* With respect to timing, a successful claim of breach of the Umbrella Clause requires *that there be an obligation owed to the Investor or the Investment of the Investor at the time that the Respondent failed to observe that obligation*.[1069]

921. Serbia's reliance on *Gardabani and Silk Road v. Georgia* is misplaced.[1070] Suffice to say, the *Gardabani and Silk Road* tribunal expressly confirmed that "*legislation or regulations are capable of creating obligations that are protected by an umbrella clause*."[1071]

2. Serbia breached its obligations under the umbrella clause

922. As explained above, Serbia failed to comply with its obligations under Serbian law to compensate Obnova—and thereby Claimants—for expropriation of Obnova's property. Serbia failed to initiate proper expropriation proceedings and expressly refused to compensate Obnova in complete disregard of Serbia's Law on Expropriation as well as its Constitution. By breaching its specific obligations owed to Cypriot Claimants, Serbia also breached the umbrella clause.[1072]

923. For the reasons explained in detail above, Serbia's arguments that Obnova did not have any rights to its premises at Dunavska 17-19[1073] and 23 and that Obnova "*failed to bring its request for compensation before the correct forum*"[1074] have no merit.[1075]

1069 *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award, 14 September 2020, ¶ 787 (emphasis added), **CL-055**.

1070 Counter-Memorial, ¶ 692.

1071 *Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia*, ICSID Case No. ARB/17/29, Award, 27 October 2022, ¶ 691, **RL-208**.

1072 Cypriot Claimants incorporate their discussion on Serbia's breaches of Serbian law by reference. *Supra* §§ III.K, III.L, III.P, III.Q, III.R.

1073 Counter-Memorial, ¶ 696.

1074 Counter-Memorial, ¶ 696.

1075 *Supra* §§ II.A, II.B.

VII. REQUEST FOR RELIEF

924. Claimants request that the Tribunal issues an award:

a. declaring that Serbia has breached the Cyprus-Serbia BIT with respect to Kalemegdan and Coropi;

b. declaring that Serbia has breached the Canada-Serbia BIT with respect to Mr. Broshko and MLI;

c. ordering Serbia to pay compensation to Claimants in the amount to be determined in next part of these proceedings;

d. ordering Serbia to pay the costs of this proceeding, including costs of legal representation; and

e. ordering such other relief as the Tribunal may deem appropriate in the circumstances.

925. Claimants reserve the right to supplement or otherwise amend their claims and the relief sought.

Submitted on behalf of Kalemegdan, Coropi and Mr. Broshko

[signed]

Rostislav Pekař
Stephen Anway
Luka Misetic
Matej Pustay
SQUIRE PATTON BOGGS

Nenad Stanković
STANKOVIC & PARTNERS

ANNEX A

The current status of buildings and land plots constituting Obnova's premises[1076]

[1076] Claimants have updated Annex A submitted with their Memorial to reflect: (*i*) changes in the Cadaster that have taken place since submission of the Memorial; and (*ii*) new information provided by Prof. Arizanović.

A. Dunavska 17-19, Belgrade

926. The current status of Obnova's premises at Dunavska 17-19 can be seen on the following map:[1077]

927. Obnova is the unregistered owner and holder/possessor of all real estate objects located at Dunavska 17-19. Their current legal status is as follows:

Land plot No.	Object Identification	Note
47/1 CM Stari grad	3	Entered into the records of the Geodetic Authority of the Republic of Serbia – Service for Real Estate Cadaster
	5	
	6	
	7	
	14	
	15	
	16	
	A	Not entered into the records of the Real Estate Cadaster
	D	
	E	
47/2 CM Stari grad	1	

1077 Drawings on the map are provided for illustration purposes only and are not intended to be a definitive representation of the configuration of the referenced objects or the size of land subject to Obnova's unregistered right of use.

Land plot No.	Object Identification	Note
	2	Entered into the records of the Real Estate Cadaster[1078]
	3	
	4	
	5	
	B	Not entered into the records of the Real Estate Cadaster
	C	
22/4 CM Stari grad	F	Not entered into the records of the Real Estate Cadaster

B. Dunavska 23, Belgrade

928. Obnova's premises at Dunavska 23 can be seen on the following map:[1079]

1078 Object 3 on cadastral parcel 47/2 CM Stari grad is in fact a part of object 7 on cadastral parcel 47/1 CM Stari grad, extending partly to cadastral parcel 47/2 CM Stari grad, as registered in the records of the Cadaster.

1079 Drawings on the map are provided for illustration purposes only and are not intended to be a definitive representation of the configuration of the referenced objects or the size of land subject to Obnova's unregistered right of use.

929. Obnova is the unregistered owner and holder/possessor of the following real estate objects located at Dunavska 23. Their current legal status is as follows:

Land plot No.	**Objects**	**Note**
10678 CM Stari grad	16	Entered into the records of the Real Estate Cadaster
	E[1080]	Not entered into the records of the Real Estate Cadaster
39/12 CM Stari grad	1	Entered into the records of the Real Estate Cadaster
	A[1081]	Not entered into the records of the Real Estate Cadaster
	E[1082]	
	F[1083]	
40/5 CM Stari grad	3	Entered into the records of the Real Estate Cadaster[1084]
	8	
	9	
	A[1085]	Not entered into the records of the Real Estate Cadaster
	B[1086]	
22/4 CM Stari grad	A[1087]	Not entered into the records of the Real Estate Cadaster
	B[1088]	

1080 Building E extends to land plots 10678 and 39/12.

1081 Building A extends to land plots 39/12, 40/5 and 22/4.

1082 Building E extends to land plots 10678 and 39/12.

1083 Building F extends to land plots 39/12 and 22/4.

1084 Building 9 on cadastral parcel 40/5 CM Stari grad is in fact a part of object 1 on cadastral parcel 39/12 CM Stari grad, extending partly to cadastral parcel 40/5 CM Stari grad, as entered into the records of the Cadaster.

1085 Building A extends to land plots 39/12, 40/5 and 22/4.

1086 Building B extends to land plots 40/5 and 22/4.

1087 Building A extends to land plots 39/12, 40/5 and 22/4.

1088 Building B extends to land plots 40/5 and 22/4.

Land plot No.	Objects	Note
	F[1089]	
39/15 CM Stari grad	-	Part of this land plot represents land necessary for regular use of Obnova's buildings listed above.

[1089] Building F extends to land plots 39/12 and 22/4.