INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
1818 H STREET, NW | WASHINGTON, DC 20433 | USA
TELEPHONE +1 (202) 458 1534 | FACSIMILE +1 (202) 522 2615
WWW.WORLDBANK.ORG/ICSID

CERTIFICATE

KORNIKOM EOOD

v.

REPUBLIC OF SERBIA

(ICSID CASE NO. ARB/19/12)

I hereby certify that the attached document is a true copy of the Tribunal's Award dated September 20, 2023.

Meg Kinnear
Secretary-General

Washington, D.C., September 20, 2023

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

KORNIKOM EOOD

Claimant

and

THE REPUBLIC OF SERBIA

Respondent

ICSID Case No. ARB/19/12

AWARD

Members of the Tribunal
Prof. Bernard Hanotiau, President
Prof. Pierre Mayer, Arbitrator
Mr. J. William Rowley KC, Arbitrator

Secretary of the Tribunal
Mr. Benjamin Garel

Assistant to the Tribunal
Mr. Shyam Balakrishnan

Date of dispatch to the Parties: 20 September 2023

REPRESENTATION OF THE PARTIES

Representing Claimant

Robert Wheal
Andrea Menaker
Agnieszka Zarówna
Sushruta Chandraker

WHITE & CASE LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom

Representing Respondent

John J. Buckley, Jr.
Jonathan M. Landy
Benjamin W. Graham
Youlin Yuan
Haley Wasserman
William M. Schmidt
Natalie A. Komrovsky

WILLIAMS & CONNOLLY LLP
680 Maine Avenue, S.W.
Washington, D.C., 20024
USA

&

Nebojša Anđelković

LAW OFFICE ANĐELKOVIĆ 10
Nusiceva Street
11000 Belgrade
Serbia

TABLE OF ABBREVIATIONS/DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Bifurcation Request	Respondent's Request for Bifurcation dated 10 August 2020
BIT	Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Republic of Bulgaria on Reciprocal Promotion and Protection of Investments, concluded on 13 February 1996
Budimlić-I	Witness Statement of Mr. Goran Budimlić dated 27 January 2021
Budimlić-II	Second Witness Statement of Mr. Goran Budimlić dated 11 March 2022
Business Continuity Obligation, or Core Activity Obligation	Obligation to ensure business continuity assumed by Claimant vis-à-vis Rudnik Kovin in Article 5 of the Privatization Agreement
Cadastre Office	Kovin Office for Real Estate Cadastre
Commercial Court	Commercial Court of Belgrade
Commission	Contract Compliance Enforcement Commission
Controls	9 inspections of Rudnik Kovin carried out by the Privatization Agency between May 2008 and 2010
Control Centre	Privatization Agency's Centre for the Control of Compliance
Control Reports	Reports prepared by the Control Centre regarding the Claimant's compliance with the terms of the Privatization Agreement
Counter-Memorial	Respondent's Counter-Memorial on the Merits and Jurisdiction dated 27 January 2021
C-PHB	Claimant's Post Hearing Brief dated 13 September 2022
Cvetković-I	Witness Statement of Mr. Vladislav Cvetković dated 27 January 2021

Cvetković-II	Second Witness Statement of Mr. Vladislav Cvetković dated 11 March 2022
Decisions on Transfer	Decision on the Transfer of Capital, and Decision on the Transfer of the Treasury Shares enclosed with the Termination Notice
ECE	Energy Consulting and Engineering d.o.o.
EPS	Elektroprivreda Srbije
Exhibit C-[#]	Claimant's Exhibit
Exhibit CL-[#]	Claimant's Legal Authority
Exhibit R-[#]	Respondent's Exhibit
Exhibit RL-[#]	Respondent's Legal Authority
FIA	FIA Group, a group of five Serbian companies with operations in several sectors including construction and energy distribution
Framework Agreement	Framework Agreement dated 30 March 2010 between FIA as the buyer, and Claimant, Eco Analiz, and Prof. Milan Radunović as the sellers, regarding the sale of their respective interests in Rudnik Kovin and ECE to FIA.
Gravić-I	Witness Statement of Mr. Nada Gravić dated 27 January 2021
Goranov-I	Witness Statement of Mr. Asen Goranov dated 1 July 2020
Goranov-II	Second Witness Statement of Mr. Asen Goranov dated 13 October 2021
Head Inspector	Head Inspector of the Control Centre
Hearing	Hearing on the Merits and Jurisdiction held from 13 June 2022 to 17 June 2022
HSE	Holding Slovenske elektrarne D.O.O. Ljubljana, the Slovenian state-owned power company
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965

ICSID or the Centre	International Centre for Settlement of Investment Disputes
ILC Articles	ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts
Investment Obligation	Obligation to invest assumed by Claimant vis-à-vis Rudnik Kovin in Article 5 of the Privatization Agreement
Ivanov-I	Witness Statement of Mr. Ivaylo Ivanov dated 1 July 2020
Jovanović-I	Legal Opinion of Prof Marko Jovanović dated 27 January 2021
Jovanović-II	Second Legal Opinion of Prof Marko Jovanović dated 11 March 2022
Kacharov-I	Witness Statement of Mr. Vasil Kacharov dated 1 July 2020
Kacharov-II	Second Witness Statement of Mr. Vasil Kacharov dated 13 October 2021
Kornikom or Claimant	Kornikom EOOD
Kovin	Municipality of Kovin
Law on Privatization	Serbian Law on Privatization implementing Serbia's privatization framework, adopted in 2001
Law on the Privatization Agency	Separate legislation enacted to regulate the Privatization Agency, adopted in 2001
Lepetić-I	Legal Opinion of Prof Mirko Vasiljević and Prof Jelena Lepetić dated 27 January 2021
Lepetić-II	Second Legal Opinion of Prof Mirko Vasiljević and Prof Jelena Lepetić dated 11 March 2022
Memorial	Claimant's Memorial on the Merits and jurisdiction dated 1 July 2020
Mićić-I	Witness Statement of Jelenko Mićić dated 2 March 2022
Milošević-I	Expert Report of Mr. Miloš V. Milošević dated 30 June 2020

Milošević-II	Second Expert Report of Mr. Miloš V. Milošević dated 15 October 2021
Milošević-III	Third Expert Report of Mr. Miloš V. Milošević dated 4 May 2022
MoF Scheme	Serbian Ministry of Finance Scheme
Novi Kovin Project	Project set up by Claimant following the acquisition of Rudnik Kovin, contemplating a wider development strategy for the exploitation of the mineral resources in the Kovin basin and the design, construction, operation and connection of a thermal power plant
Petrović-I	Expert Report of Ms. Aleksandra Petrović dated 27 January 2021
Petrović-II	Second Expert Report of Ms. Aleksandra Petrović dated 11 March 2022
Pre-Hearing Conference	Pre-hearing conference held by videoconference on 12 May 2022
Privatization Agency	One of the three entities listed as responsible for the implementation of the privatization process in Article 4 of the Privatization Law (along with the Share Fund and the Central Securities Depository)
Privatization Agreement	Agreement for the Sale of State-Owned Capital by Public Auction, in accordance with the Law on Privatization signed by the Privatization Agency and Claimant on 23 April 2007
Privatization Program	Document prepared in June 2006 as a first step in the privatization of Rudnik Kovin, containing information about the Company's business operations, organizational structure, finances, and employee relations
Radović-I	Legal Opinion of Prof Mirjana Radović dated 27 January 2021
Radović-II	Second Legal Opinion of Prof Mirjana Radović dated 11 March 2022
Rejoinder	Respondent's Rejoinder on the Merits and Jurisdiction dated 11 March 2022
Rejoinder on Jurisdiction	Claimant's Rejoinder on Jurisdiction dated 4 May 2022

Reply	Claimant's Reply on the Merits and Jurisdiction dated 15 October 2021
R-PHB	Respondent's Post Hearing Brief dated 13 September 2022
Request for Arbitration or RfA	Request for Arbitration filed on 3 April 2019
Rudnik Kovin or the Company	Rudnik Kovin D.o.o.
TPP	Thermal Power Plant
Serbia or Respondent	Republic of Serbia
Serbian Supreme Court	The Serbian Supreme Court of Cassation
Sequeira-I	Expert Report of Mr. Kiran P. Sequeira dated 1 July 2020
Sequeira-II	Second Expert Report of Mr. Kiran P. Sequeira dated 13 October 2021
Share Fund	One of the three entities listed as responsible for the implementation of the privatization process in Article 4 of the Privatization Law (along with the Privatization Agency and the Central Securities Depository)
Social Program Obligation	Obligation to comply with the social program in Annex No. 1 to the Privatization Agreement assumed by Claimant vis-à-vis Rudnik Kovin in Article 5 of the Privatization Agreement
Termination Notice	Termination Notice issued by the Privatization Agency on 11 June 2010
Tr. Day [#] [page:line]	Transcript of the Hearing
Treasury Shares	174,589 shares issued to Rudnik Kovin in June and December 2009 in return for Claimant's satisfaction of the Investment Obligation under the Privatization Agreement
Tribunal	Arbitral tribunal constituted on 29 October 2019
Vojvodina	Autonomous Province of Vojvodina
Vučković-I	Witness Statement of Ms. Julijana Vučković dated 27 January 2021

Vučković-II	Second Witness Statement of Ms. Julijana Vučković dated 11 March 2022
2007 Amendment	Amended iteration of Article 41 of the Law on Privatization applied by the Privatization Agency
2007 Rulebook	Privatization Agency's 2007 Rulebook on Performance Control on Implementation of the Privatization Agreements
2010 Rulebook	Privatization Agency's 2010 Instructions for Monitoring Compliance with Contracts for the Sale of Capital or Assets

TABLE OF CONTENTS

I. INTRODUCTION AND PARTIES

1. The present dispute has been submitted to arbitration under the auspices of the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of (i) the Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Republic of Bulgaria on Reciprocal Promotion and Protection of Investments, which was concluded on 13 February 1996 and which entered into force on 13 September 1996 (the "**BIT**"),[1] and (ii) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

CLAIMANT

2. Kornikom EOOD ("**Claimant**" or "**Kornikom**") is a juridical person duly registered and constituted as a limited liability company with a sole shareholder under the laws of the Republic of Bulgaria, bearing registration no. UIC 131274281, and having its registered office at Sofia 1592, Druzhba Street 1, Republic of Bulgaria.[2]

3. Claimant is a company incorporated in 2004 and is engaged in the exploration and enrichment of coal.[3]

4. Claimant is represented in this arbitration by its duly authorized attorneys and counsel mentioned at page ii above.

RESPONDENT

5. Republic of Serbia ("**Respondent**" or "**Serbia**") is an ICSID Contracting State since 8 June 2007.

6. Respondent is represented in this arbitration by its duly authorized attorneys and counsel mentioned at page ii above.

7. Claimant and Respondent are jointly referred to as "Parties" and individually as a "Party".

[1] The Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Republic of Bulgaria on Reciprocal Promotion and Protection of Investments, 13 February 1996 (Exhibit CL-01) ("BIT" or "the Treaty").
[2] Request for Arbitration, at 4; Certificate from the Bulgarian Ministry of Justice re Kornikom, 21 December 2018 (Exhibit C-10 produced with the Request for Arbitration).
[3] Request for Arbitration, at 5; Decision of the Sofia City Court on Incorporation of Kornikom, 9 July 2004 (Exhibit C-09 produced with the Request for Arbitration).

II. THE ARBITRAL TRIBUNAL

8. In accordance with Article 37(2)(a) of the ICSID Convention, the Parties agreed that the Arbitral Tribunal ("**the Tribunal**") should consist of three arbitrators, one appointed by each Party, and the President of the Tribunal appointed by a multi-step procedure. Claimant appointed Mr. J. William Rowley KC as arbitrator, and Respondent appointed Professor Pierre Mayer as arbitrator. The two-party appointed arbitrators nominated Professor Bernard Hanotiau as President of the Tribunal. On 29 October 2019, the Secretary General informed the Parties that the proposed members of the Arbitral Tribunal had accepted their respective appointments.

9. The Arbitral Tribunal was thus constituted as below:

(i) Professor Bernard Hanotiau (Belgium)
(President)
HANOTIAU & VAN DEN BERG
IT Tower
480 Avenue Louise, Box 9
1050 Brussels
Belgium

(ii) Mr. J William Rowley KC (Canada / UK)
(Appointed by Claimant)
Twenty Essex Chambers
20 Essex Street
London WC2R 3AL
United Kingdom

AND

Suite 900, 333 Bay Street
Toronto, Ontario M5H 2R2

(iii) Professor Pierre Mayer (France)
(Appointed by Respondent)
20, rue des Pyramides
75001 Paris
France

III. THE PROCEDURAL HISTORY

10. On 3 April 2019, Claimant filed its Request for Arbitration against Serbia with the ICSID Secretariat ("**Request for Arbitration**" or "**RfA**").

11. This Request for Arbitration was registered under the ICSID Convention by the Secretary-General on 20 April 2019.

12. On 22 July 2019, the Parties agreed that the Tribunal should consist of three arbitrators, one appointed by each Party, and the President of the Tribunal appointed by the two co-arbitrators in consultation with the Parties. The appointment of the President of the Tribunal was to be done within 30 days of Respondent's nominee accepting their nomination. The Parties further agreed that in the event that one Party failed to appoint its arbitrator, or the two Party-appointed arbitrators were unable to reach an agreement on the identity of the President of the Tribunal within the time limits specified above, the Chairman of the ICSID Administrative Council would appoint the arbitrator or arbitrators not yet appointed and would designate the President of the Tribunal.

13. On 26 July 2019, Claimant appointed J. William Rowley KC as arbitrator.

14. On 30 August 2019, Respondent appointed Professor Pierre Mayer as arbitrator.

15. On 1 October 2019, the Parties consented to extend the time limit for the appointment of the President of the Tribunal by 20 days.

16. On 21 October 2019, the Parties agreed to further extend the time limit for the appointment of the President of the Tribunal until 4 November 2019.

17. On 28 October 2019, the Party-appointed arbitrators jointly nominated Professor Bernard Hanotiau as President of the Tribunal.

18. On 29 October 2019, the ICSID Secretariat informed the Parties that Professor Bernard Hanotiau, Professor Pierre Mayer and Mr. J. William Rowley KC had all accepted their appointments. The Tribunal was therefore deemed to have been constituted, and the proceedings deemed to have begun as at that date in accordance with Rule 6 of the Rules of Procedure for Arbitration Proceedings (the "**ICSID Rules**").

19. On 30 October 2019, the ICSID Secretariat informed the Parties that the initial advance to cover the costs of the arbitration had been fixed at USD 300,000 and requested the Parties to each make payment of one half of the advance fixed *i.e.*, USD 150,000 by 29 November 2019.

20. On the same day, the Tribunal requested the Parties to indicate by 4 November 2019 their preference, if any, as to the format of the preliminary meeting between the Parties

and the Tribunal (the "**First Session**"). The Tribunal also invited the Parties to confirm whether they would be agreeable to the appointment of Ms. Iris Raynaud as Assistant to the Tribunal.

21. On 4 November 2019, Claimant informed the Tribunal that its preference was for the First Session to be held by telephone conference. Claimant also indicated that it had no objection to the appointment of Ms. Iris Raynaud as Assistant to the Tribunal.

22. On the same day, Respondent indicated that it had no preference for the format of the First Session but requested that it be given an opportunity to be heard regarding the venue for the session if the First Session was to be held in person. Separately, Respondent also confirmed that it had no objection to Ms. Iris Raynaud's appointment as Assistant to the Tribunal.

23. On 5 November 2019, Respondent requested the Tribunal to hold the First Session after 16 December 2019.

24. On 6 November 2019, the Tribunal circulated Ms. Iris Raynaud's signed declaration to the Parties.

25. On the same day, the Tribunal, among other things, informed the Parties that the First Session would be held by telephone conference and notified them of the dates on which the Tribunal was available to hold the First Session. The Tribunal also circulated the draft agenda for the First Session and the draft Procedural Order ("**PO**") No. 1 for the Parties' comments.

26. By way of emails dated 6 November 2019 and 11 November 2019, the Parties informed the Tribunal of their respective availabilities for the First Session.

27. On 12 November 2019, the Tribunal informed the Parties that the First Session would be held by teleconference on 11 December 2019 and requested the Parties to furnish their respective lists of participants on or before 19 November 2021. The Tribunal also invited the Parties to provide their joint proposal on the draft PO No.1 by 4 December 2019 at the latest.

28. By way of separate emails dated 19 November 2019, the Parties furnished their respective lists of participants to the Tribunal. Claimant later supplemented this list on 26 November 2019.

29. On 4 December 2019, the Parties submitted their comments on the draft PO No.1, setting out their respective positions on points of disagreement.

30. On 9 December 2019, the ICSID Secretariat acknowledged receipt of USD 150,000 from each Party.

31. On 11 December 2019, the First Session was held by way of telephone conference and was attended by the following participants:

Tribunal
Prof. Bernard Hanotiau (President)
J. William Rowley KC
Prof. Pierre Mayer

ICSID Secretariat
Benjamin Garel

Assistant to the Tribunal
Iris Raynaud

Claimant
Robert Wheal (White & Case LLP)
Andrea J. Menaker (White & Case LLP)
Dipen Sabharwal QC (White & Case LLP)
Agnieszka Zarowna (White & Case LLP)

Tsvetelina Dimitrova (Georgiev, Todorov & Co)

Respondent
John J. Buckley Jr. (Williams & Connolly LLP)
Benjamin W. Graham (Williams & Connolly LLP)

Nebojša Andjelković (Law Office Andjelković)

32. On 12 December 2019, the ICSID Secretariat sent the audio recording of the First Session to the Parties.

33. On 13 December 2019, the Tribunal circulated PO No. 1 to the Parties. The Tribunal also set out its decision confirming Paris as the place of the arbitration.

34. On 20 March 2020, the Parties informed the Tribunal that they were discussing the effect of the Covid-19 pandemic on the procedural timetable. They further informed the Tribunal that they would, in due course, submit for the Tribunal's consideration a joint proposal or, in the absence of agreement, their respective positions.

35. On 25 March 2020, Claimant filed an application requesting, among other things, that it be permitted to file an amended Request for Arbitration with an additional claimant by 1 April 2020.

36. On 27 March 2020, the Tribunal invited Respondent to comment on Claimant's application by 1 April 2020. The Tribunal also requested Claimant to wait for further directions from the Tribunal before filing its Memorial, which was due to be filed on 1 April 2020.

37. On 1 April 2020, Respondent filed its response opposing Claimant's application.

38. On 2 April 2020, Claimant informed the Tribunal that there were several factual misstatements in Respondent's answer and requested an opportunity to file a reply.

39. On the same day, the Tribunal granted Claimant until 6 April 2020 to file its reply and granted Respondent until 8 April 2020 to submit its final comments.

40. On 6 April 2020, Claimant filed its reply in accordance with the Tribunal's directions.

41. On 8 April 2020, Respondent submitted its final comments on Claimant's application.

42. On 9 April 2020, the Tribunal informed the Parties that it wished to hold a telephone conference to discuss the issues raised by the Parties in their communications between 25 March 2020 and 8 April 2020. The Tribunal therefore proposed some dates for the Parties' consideration and invited them to indicate their respective availabilities at the earliest.

43. On 10 April 2020, both Parties, separately, indicated their availabilities for the telephone conference.

44. On 11 April 2020, the Tribunal informed the Parties that it had decided to hold the telephone conference on 14 April 2020.

45. On 14 April 2020, the telephone conference was held. This telephone conference was attended by the following participants:

Tribunal
Prof. Bernard Hanotiau (President)
J. William Rowley KC
Prof. Pierre Mayer

ICSID Secretariat
Benjamin Garel

Assistant to the Tribunal
Iris Raynaud

Claimant
Andrea J. Menaker (White & Case LLP)
Robert Wheal (White & Case LLP)
Dipen Sabharwal QC (White & Case LLP)
Agnieszka Zarowna (White & Case LLP)
Ally Doyle (White & Case LLP)

Respondent
John J. Buckley Jr. (Williams & Connolly LLP)
Jonathan M. Landy (Williams & Connolly LLP)
Benjamin W. Graham (Williams & Connolly LLP)
Youlin Yuan (Williams & Connolly LLP)

46. On 16 April 2020, the Tribunal issued PO No.2. In this PO, the Tribunal, among other things, (i) denied Claimant's request to amend its Request for Arbitration; (ii) granted Claimant until 1 July 2020 to file its Memorial and Respondent until 1 November 2020 to file its Counter-Memorial; and (iii) noted that it would reconsider the procedural calendar after Claimant filed its Memorial.

47. On 27 April 2020, the Tribunal vacated the hearing dates initially scheduled for 12-16 July 2021 in light of the adjustments to the procedural timetable.

48. On 1 July 2020, Claimant electronically filed its Memorial along with the following documents:

- Witness Statement of Mr. Asen Goranov dated 1 July 2020 ("**Goranov-I**");
- Witness Statement of Mr. Ivaylo Ivanov dated 1 July 2020 ("**Ivanov-I**");
- Witness Statement of Mr. Vasil Kacharov dated 1 July 2020 ("**Kacharov-I**");
- Expert Report of Mr. Kiran P. Sequeira dated 1 July 2020 (including Appendices A to E) ("**Sequeira-I**");
- Expert Report of Mr. Miloš V. Milošević dated 30 June 2020 ("**Milošević-I**");
- Factual Exhibits C-1 to C-249; and
- Legal Authorities CL-1 to CL-76.

49. On 2 July 2020, the Tribunal invited the Parties to confer with each other regarding a revised procedural calendar and to revert with their proposal within 10 days.

50. On 13 July 2020, the Parties informed the Tribunal that they were unable to agree upon a procedural timetable and set out their respective positions on the subject. The principal disagreements between the Parties related to whether the proceedings should be bifurcated and when Respondent should file its Counter-Memorial.

51. On 15 July 2020, the Tribunal issued PO No. 3. In this PO, the Tribunal granted Respondent until 2 December 2020 to file its Counter-Memorial, subject to the

Tribunal's decision on bifurcation. The Tribunal also established a briefing schedule for Respondent's bifurcation application and clarified that should it decide to bifurcate the proceedings, a new procedural calendar for the jurisdictional/admissibility phase, based on the proposals submitted by the Parties on 13 July 2020, would be established. On the other hand, if the proceedings were not bifurcated, the procedural calendar set out in Annex A to PO No. 3 would govern.

52. On 10 August 2020, Respondent filed its Request for Bifurcation (the "**Bifurcation Request**") along with supporting exhibits.

53. On 24 August 2020, Claimant filed its response to the Bifurcation Request.

54. On 1 September 2020, the Tribunal issued its decision rejecting Respondent's Bifurcation Request.

55. On 5 October 2020, after the exchange of several communications with the Parties, the Tribunal confirmed that the hearing would take place in the week starting 13 June 2022.

56. On 17 October 2020, the Parties circulated a revised procedural timetable and requested the Tribunal to issue a procedural order adopting it.

57. On 23 October 2020, the Tribunal issued PO No. 4 adopting the Parties' revised procedural timetable.

58. On 27 January 2021, Respondent filed its Counter-Memorial along with the following documents:

- Witness Statement of Mr. Goran Budimlić dated 27 January 2021 ("**Budimlić-I**").
- Witness Statement of Ms. Julijana Vučković dated 27 January 2021 ("**Vučković-I**");
- Witness Statement of Mr. Nada Gravić dated 27 January 2021 ("**Gravić-I**");
- Witness Statement of Mr. Vladislav Cvetković dated 27 January 2021 ("**Cvetković-I**");
- Legal Opinion of Prof Marko Jovanović dated 27 January 2021 ("**Jovanović-I**");
- Legal Opinion of Prof Mirjana Radović dated 27 January 2021 ("**Radović-I**");
- Legal Opinion of Prof Mirko Vasiljević and Prof Jelena Lepetić dated 27 January 2021 ("**Lepetić-I**");
- Expert Report of Ms. Aleksandra Petrović dated 27 January 2021 ("**Petrović-I**");
- Factual Exhibits R-1 to R-110; and
- Legal Authorities RL-1 to RL-182.

59. On 5 February 2021, Respondent filed a corrected version of Budimlić-I.

60. On 22 February 2021, Claimant requested the Tribunal to make a few minor adjustments to the procedural timetable. Claimant informed the Tribunal that Respondent had already consented to these extensions. Respondent confirmed its agreement separately.

61. On 24 February 2021, the Tribunal informed the Parties that it had taken note of and approved the proposed adjustments to the procedural timetable.

62. On 11 May 2021, the Parties transmitted their respective Redfern Schedules to the Tribunal. Respondent also transmitted Exhibit R-111.

63. On 24 May 2021, the Tribunal issued PO No. 5, deciding the Parties' document production requests.

64. On 30 August 2021, the Parties informed the Tribunal that they had agreed to a few more adjustments to the procedural timetable and requested the Tribunal to extend the time-limits as agreed between the Parties.

65. On 31 August 2021, the Tribunal informed the Parties that it had taken note of and approved the Parties' revisions to the procedural timetable.

66. On 14 September 2021, the Tribunal informed the Parties that it proposed to appoint Mr. Shyam Balakrishnan instead of Ms. Iris Raynaud as Assistant to the Tribunal and invited the Parties to confirm that they had no objection to the proposed appointment.

67. By 15 September 2021, the Parties separately confirmed that they had no objection to Mr. Balakrishnan's appointment.

68. On 17 September 2021, the Tribunal circulated Mr. Shyam Balakrishnan's declaration to the Parties.

69. On 12 October 2021, the Parties informed the Tribunal that they had once again agreed to a few modifications to the procedural timetable and requested the Tribunal to extend the time-limits as agreed between the Parties.

70. On 13 October 2021, the Tribunal informed the Parties that the requested extensions were granted.

71. On 15 October 2021, Claimant filed its Reply along with the following documents:

- Second Witness Statement of Mr. Asen Goranov dated 13 October 2021 ("**Goranov-II**");
- Second Witness Statement of Mr. Vasil Kacharov dated 13 October 2021 ("**Kacharov-II**");

- Second Expert Report of Mr. Kiran P. Sequeira dated 13 October 2021 ("**Sequeira-II**");
- Second Expert Report of Mr. Miloš V. Milošević dated 15 October 2021 ("**Milošević-II**");
- Factual Exhibits C-250 to C-342; and
- Legal Authorities CL-77 to CL-185.

72. On 25 January 2022, the ICSID Secretariat informed the Parties that the additional advance to cover the costs of the arbitration had been fixed at USD 400,000 and requested the Parties to each make payment of one half of the advance fixed, *i.e.*, USD 200,000 by 24 February 2022.

73. On 8 March 2022, the ICSID Secretariat confirmed that it had received two wire transfers of USD 200,000, one each from Claimant and Respondent.

74. On 11 March 2022, Respondent filed its Rejoinder along with the following documents:

- Witness Statement of Jelenko Mićić dated 2 March 2022 ("**Mićić-I**")
- Second Witness Statement of Mr. Goran Budimlić dated 11 March 2022 ("**Budimlić-II**");
- Second Witness Statement of Ms. Julijana Vučković dated 11 March 2022 ("**Vučković-II**");
- Second Witness Statement of Mr. Vladislav Cvetković dated 11 March 2022 ("**Cvetković-II**");
- Second Legal Opinion of Prof Marko Jovanović dated 11 March 2022 ("**Jovanović-II**");
- Second Legal Opinion of Prof Mirjana Radović dated 11 March 2022 ("**Radović-II**");
- Second Legal Opinion of Prof Mirko Vasiljević and Prof Jelena Lepetić dated 11 March 2022 ("**Lepetić-II**");
- Second Expert Report of Ms. Aleksandra Petrović dated 11 March 2022 ("**Petrović-II**");
- Factual Exhibits R-111 to R-121; and
- Legal Authorities RL-184 to RL-211.

75. On 30 March 2022, the Tribunal wrote to the Parties regarding the organization of the hearing, particularly with respect to the arrangement of interpreters. The Tribunal also proposed certain dates for a pre-hearing conference (which would be attended by the President alone) (the "**Pre-Hearing Conference**") and invited the Parties to revert with their availabilities.

76. On 5 April 2022, the Parties responded to the Tribunal's email indicating their availabilities for the Pre-Hearing Conference. Respondent also informed the Tribunal that it was withdrawing Professor Mirko Vasiljević as a witness and requested the

Tribunal to treat the legal opinions he authored with Professor Jelena Lepetić as submitted in her name alone.

77. On 8 April 2022, the Tribunal confirmed that the Pre-Hearing Conference would take place on 12 May 2022.

78. On 2 May 2022, the Tribunal wrote to the Parties regarding the Covid Protocol for the impending hearing.

79. On 4 May 2022, Claimant filed its Rejoinder on Jurisdiction, along with the following documents:

- Third Expert Report of Mr. Miloš V. Milošević dated 4 May 2022 ("**Milošević-III**");
- Factual Exhibits C-357 to C-361; and
- Legal Authorities CL-186 to CL-202.

80. On 5 May 2022, the Tribunal sent the Parties a draft PO regarding the hearing and invited them to comment on the draft by 10 May 2022. The Tribunal also reminded the Parties to comment on the Covid Protocol that was circulated so that these issues could be discussed at the Pre-Hearing Conference.

81. On 9 May 2022, the Parties notified the Tribunal of the list of witnesses and experts they intended to cross-examine at the hearing.

82. On 10 May 2022, the Parties reverted with their comments on the draft PO for the hearing as well as the Covid Protocol.

83. On 11 May 2022, the Tribunal circulated the agenda for the Pre-Hearing Conference and invited the Parties to revert with their respective lists of participants before the meeting. The Parties reverted with their respective lists of participants on 12 May 2022.

84. On 12 May 2022, the Pre-Hearing Conference was held by videoconference. The meeting was attended by the following individuals:

Tribunal
Prof. Bernard Hanotiau (President)

ICSID Secretariat
Benjamin Garel

Assistant to the Tribunal
Shyam Balakrishnan

Claimant
Andrea J. Menaker (White & Case LLP)
Robert Wheal (White & Case LLP)
Agnieszka Zarowna (White & Case LLP)
Sushruta Chandraker (White & Case LLP)
Ramsey Jouzy (White & Case LLP)

Respondent
John J. Buckley Jr. (Williams & Connolly LLP)
Jonathan M. Landy (Williams & Connolly LLP)
Benjamin W. Graham (Williams & Connolly LLP)
Youlin Yuan (Williams & Connolly LLP)
Haley L. Wasserman (Williams & Connolly LLP)
William M. Schmidt (Williams & Connolly LLP)

Nebojša Anđelković (Law Office Anđelković)

85. On the same day, Respondent wrote to the ICSID Secretariat indicating its preference for native Serbian speakers to be interpreters during the hearing in order to ensure the accuracy of the translation. The ICSID Secretariat responded to this correspondence on the same day informing Respondent that its preference was being considered and that inquiries were being made with the proposed interpreters and the language department of the World Bank.

86. On 13 May 2022, the ICSID Secretariat informed Respondent that all selected interpreters had native-speaker level in Serbian and that they had significant experience in ICSID hearings.

87. On 16 May 2022, pursuant to the discussions at the Pre-Hearing Conference, the Parties set out a proposed hearing schedule.

88. On 16 May 2022, Respondent separately requested that Ana Reyes be removed from the distribution list for the proceedings.

89. On 17 May 2022, Respondent requested the Tribunal's guidance on the dates on which it required the witnesses to attend the hearing so that travel arrangements could be made.

90. On 19 May 2022, the Tribunal set out its views on the proposed hearing schedule. The Tribunal also informed the Parties that it would shortly revert with details of how much time it would need for witness conferencing.

91. On 27 May 2022, the Tribunal informed the Parties that it would revert in the course of the following week with an estimate of the time needed for witness conferencing of the Parties' legal experts so as to allow the Parties to finalize the hearing agenda.

92. Between 27 May 2022 and 30 May 2022, the Parties and the Tribunal exchanged further communications regarding the testimony of the legal experts.

93. On 31 May 2022, the Parties submitted the Hearing Bundle.

94. On 1 June 2022, the Tribunal issued directions on the format and length for the examination of the Parties' legal experts. The Tribunal also invited the Parties to revert with the final hearing schedule by 6 June 2022.

95. On 6 June 2022, the Parties reverted with their separate proposals for the hearing schedule. Between 6 June 2022 and 8 June 2022, the Parties and the Tribunal further discussed and agreed on the hearing schedule. On 10 June 2022, the Parties circulated the final hearing schedule.

96. On 11 June 2022, the Tribunal circulated PO No. 6 on the organization and conduct of the hearing (including the Covid Protocol to be followed during the hearing). The Tribunal also set out a consolidated list of participants at the hearing.

97. Between 13 June 2022 and 17 June 2022, the hearing was held at the World Bank Hearing Centre in Paris, France (the "**Hearing**"). Arrangements were also made for remote participation. The hearing was attended by the following participants:

Tribunal
Prof. Bernard Hanotiau (President)
J. William Rowley KC
Prof. Pierre Mayer

ICSID Secretariat
Benjamin Garel

Assistant to the Tribunal
Shyam Balakrishnan

Claimant
Andrea J. Menaker (White & Case LLP)[4]
Robert Wheal (White & Case LLP)
Agnieszka Zarowna (White & Case LLP)
McCoy Pitt (White & Case LLP)
Sushruta Chandraker (White & Case LLP)
Brooke Wilson (White & Case LLP)
Ramsey Jouzy (White & Case LLP)

[4] On 13 June 2022, Claimant informed the Parties and the Tribunal that Claimant's counsel Andrea Menaker had tested positive for Covid and would, therefore, give her opening presentation and attend via Zoom.

Alexandria Davis (White & Case LLP)

Nenad Stanković (Stanković & Partners)
Sara Pendjer (Stanković & Partners)
Mitar Simonović (Stanković & Partners)
Tsvetelina Dimitrova (Georgiev, Todorov & Co)

Kiril Kirilov (Party Representative)
Vania Milcheva (Party Representative)

Respondent
John J. Buckley Jr. (Williams & Connolly LLP)
Jonathan M. Landy (Williams & Connolly LLP)
Benjamin W. Graham (Williams & Connolly LLP)
Youlin Yuan (Williams & Connolly LLP)
Haley L. Wasserman (Williams & Connolly LLP)
William M. Schmidt (Williams & Connolly LLP)

Nebojša Anđelković (Law Office Anđelković)

Olivera Stanimirović (Party Representative)
Ksenija Maksić (Party Representative)
Marinko Čobanin (Party Representative)

98. On 27 June 2022, the Parties requested the Tribunal for instructions on the length and due date for the post-hearing briefs ("**PHBs**").

99. On 28 June 2022, the Tribunal set a 50-page limit for the PHBs and invited the Parties to file their respective PHBs by 2 September 2022.

100. On 8 July 2022, the Parties invited the Tribunal's attention to certain disagreements between the Parties in the final transcript. Claimant requested that certain corrections be made based on the non-English audio. Respondent objected to this request.

101. On 11 July 2022, the Tribunal issued directions regarding the finalization of the transcript.

102. On 22 July 2022, the transcripts were finalized by the Parties.

103. On 25 August 2022, Claimant requested an extension of the deadline for the filing of (i) the PHBs until 13 September 2022; and (ii) the cost submissions which would be due two weeks after the PHBs. Respondent did not object to this request. On the same day, the Tribunal granted Claimant's request.

104. On 13 September 2022, the Parties filed their respective PHBs.

105. On 26 September 2022, the Parties informed the Tribunal that they had agreed to extend the deadline for the filing of their respective cost submissions until 30 September 2022. The Tribunal confirmed its agreement to the proposed extension on 27 September 2022.

106. On 29 September 2022, the Parties filed their respective cost submissions.

107. On 7 October 2022, Respondent informed the Tribunal that there was a miscommunication between the Parties regarding the contents of their respective cost submissions. To overcome this, Respondent submitted a letter stating its position and requested the Tribunal's leave for it to be considered.

108. On 11 October 2022, the Tribunal acknowledged receipt of Respondent's letter of 7 October 2022 and invited Claimant to submit its comments by 18 October 2022.

109. On the same day, Claimant confirmed that there had indeed been a miscommunication between the Parties and indicated that it did not object to Respondent's letter of 7 October 2022. Claimant also informed the Tribunal that it did not consider it necessary to respond to Respondent's letter.

110. On 18 August 2023, the ICSID Secretariat informed the Parties that the additional advance to cover the costs of the arbitration had been fixed at USD 300,000 and requested the Parties to each make payment of one half of the advance fixed, i.e., USD 150,000 by 18 September 2023.

111. On 7 September 2023, the ICSID Secretariat confirmed that it had received two wire transfers of USD 150,000, one each from Claimant and Respondent.

112. On xx September 2023, the Tribunal declared the proceeding closed.

IV. THE PARTIES' REQUEST FOR RELIEF

113. In its Memorial, Claimant requests the following relief:

> "[…] Claimant respectfully requests that the Tribunal:
>
> a) find that Serbia has expropriated Claimant's investments in violation of its obligation under the BIT;
>
> b) order Serbia to pay Kornikom: (i) damages for all losses incurred by Kornikom, in an amount of EUR 34.96 million, plus interest at a commercially reasonable rate from the time of the breach until the date of the award; (ii) all costs associated with this proceeding, including all professional fees and disbursements incurred in connection with this arbitration; and (iii) interest from the date of the award until the date of Serbia's full and final satisfaction of the award; and
>
> c) grant Kornikom such other relief as the Tribunal deems just and appropriate in the circumstances."[5]

114. In its Reply, its Rejoinder on Jurisdiction and PHB, Claimant requests the following relief:

> "[…] Claimant respectfully requests that the Tribunal:
>
> a) dismiss Serbia's objections to the Tribunal's jurisdiction;
>
> b) find that Claimant's expropriation claim is admissible;
>
> c) find that Serbia has expropriated Claimant's investments in violation of its obligation under the BIT;
>
> d) order Serbia to pay Kornikom: (i) damages for all losses incurred by Kornikom, in the amount of EUR 34.96 million or such other sum as the Tribunal may determine, plus interest at a commercially reasonable rate from the time of the breach until the date of the award; (ii) all costs associated with this proceeding, including all professional fees and disbursements incurred in connection with this arbitration; and (iii) interest from the date of the award until the date of Serbia's full and final satisfaction of the award; and
>
> e) grant Kornikom such other relief as the Tribunal deems just and appropriate in the circumstances."[6]

115. In its Counter-Memorial, Respondent requests the following relief:

---

[5] Memorial, at 259.
[6] Reply, at 409; Rejoinder on Jurisdiction, at 165; C-PHB, at 99.

"[…] Respondent respectfully requests that the Tribunal enter an award:

a. dismissing Claimant's claims as inadmissible under Article 9 of the Serbia-Bulgaria BIT;

b. dismissing Claimant's claims as time-barred pursuant to (a) Article 42(1) of the ICSID Convention and the Serbian Law of Contract and Torts or (b) the doctrine of extinctive prescription;

c. dismissing Claimant's claims for lack of jurisdiction *ratione personae* because the acts or omissions of the Privatization Agency are not attributable to the Republic of Serbia;

d. denying Claimant's claims on the merits because the Republic of Serbia did not unlawfully expropriate Claimant's investment;

e. awarding Respondent all costs of arbitration, including attorneys' fees, expert costs, vendor costs, and arbitrator fees and costs, along with pre- and post-award interest on the costs of arbitration; and

f. awarding Respondent all such further relief as the Tribunal deems just and proper."[7]

116. In its Rejoinder, Respondent restates the relief claimed in its Counter-Memorial.[8]

117. In its PHB, Respondent requests the following relief:

"[…] Respondent respectfully requests that the Tribunal enter an Award:

a. denying Claimant's claims on the merits because the Republic of Serbia did not unlawfully expropriate Claimant's investment;

b. awarding Respondent all costs of arbitration, including attorneys' fees, expert costs, vendor costs, and arbitrator fees and costs, along with pre- and post-award interest on the costs of arbitration; and

c. awarding Respondent all such further relief as the Tribunal deems just and proper."[9]

[7] Counter-Memorial, at 449.
[8] Rejoinder, at 320.
[9] R-PHB, at 124.

V. THE FACTUAL BACKGROUND TO THE DISPUTE

118. This arbitration relates to Claimant's investment in the company Rudnik Kovin D.o.o. ("**Rudnik Kovin**" or the "**Company**"). Claimant argues that Respondent expropriated its investment in the Company, in breach of the BIT, by wrongfully terminating the agreement pursuant to which Claimant acquired its shareholding in the Company and by transferring Claimant's shares in the Company without compensation. Respondent disputes these allegations. In the section below, the Tribunal sets out the factual background relevant to the dispute.

A. The Serbian Law on Privatization

119. After the dissolution of Yugoslavia, Serbia began to transition its economy away from models of social ownership and towards a system of private property, by adopting a large-scale privatization policy.[10]

120. To achieve its desired policy outcome, Serbia created a privatization framework and adopted the Serbian Law on Privatization (the "**Law on Privatization**") in 2001. The purpose of the Law on Privatization, as evidenced by Article 1 therein, was to govern the conditions and procedure for the privatization of state-owned capital.[11]

121. The Law on Privatization originally consisted of 79 articles, divided into 7 chapters and several sub-chapters.[12]

122. Chapter I titled "Basic Provisions" contained the introductory sections of the law, setting out, among other things, the principles upon which the privatization process was based, the entities responsible for the privatization process, and the roles and responsibilities of these entities. It also shed light on the entities that could be subject to the privatization process, the entities that could participate in the privatization process as buyers, and the models of privatization.

123. The overarching principles governing the privatization process were set out in Article 2. These included: (i) the creation of conditions for economic development and social stability; (ii) transparency; (iii) flexibility; and (iv) the establishment of a sale price in accordance with market conditions.[13]

124. Article 4 listed three entities as responsible for the implementation of the privatization process: (i) the Privatization Agency (the "**Privatization Agency**" or the "**Agency**");

[10] Memorial, at 13; Counter-Memorial, at 30.
[11] 2001 Serbian Law on Privatization (Official Gazette of the Republic of Serbia No. 38/2001, 18/2003, 45/2005) (Exhibit C-144) (the "Law on Privatization"). Article 1 of the Law on Privatization provides: "This law shall govern the conditions and the procedure for change of ownership of socially and/or state owned capital (hereinafter: privatization)".
[12] Law on Privatization (Exhibit C-144). The Law on Privatization was thereafter amended in 2003 and 2005.
[13] Law on Privatization, Article 2 (Exhibit C-144).

(ii) the Share Fund ("**the Share Fund**"); and (iii) the Central Securities Depository.[14] The functions of these entities were set out in Articles 5, 6 and 7 respectively.[15] The role of the Privatization Agency, in particular, is discussed in greater detail in Section B below.

125. Chapter II was titled "Preparation for Privatization" and included Articles 16 to 24. As the name suggests, this chapter contained articles that, among other things, prescribed rules regulating how the privatization procedure was to be initiated, what documents were necessary, and how the value of the capital and property was to be assessed.[16]

126. Chapter III, titled "Privatization of Capital", regulated how the capital was to be privatized. This chapter, spanning from Article 25 to 59 included, among other things, regulations on how the sale of capital was to be done and how a public tender or public auction was to be organized and conducted by the Privatization Agency.[17]

127. Materially, this chapter included provisions on what the agreement for sale was required to contain and the grounds upon which this sale agreement could be terminated. Given the central role these provisions occupy in the present dispute, the Tribunal considers it appropriate to reproduce these provisions in full below.

Article 41

> "Agreement on sale of capital, that is, of property shall contain the provisions indicating the following: contracting parties, subject of sale, agreed price, payment deadline, the usage of the land, the mode, forms and deadline for the investments by the buyer into the subject of privatization for the purpose of performing the registered business activity, the mode of solving the issues of the employees, and other provisions agreed upon by the contracting parties.
>
> The agreement referred to in paragraph 1 of this Article shall be considered concluded after being signed by the buyer and the Agency, and certified before a court.
>
> The agreement on sale of the capital, that is, of the property shall be submitted by the Agency to the ministry in charge of finances, for the purpose of records, and to the employees and the minority shareholders of the subject of privatization, at their request, for the purpose of information."[18]

[14] Law on Privatization, Article 4 (Exhibit C-144).
[15] Law on Privatization, Articles 5-7 (Exhibit C-144).
[16] Law on Privatization, Articles 16-24 (Exhibit C-144).
[17] Law on Privatization, Articles 25-59 (Exhibit C-144).
[18] Law on Privatization, Article 41 (Exhibit C-144).

Article 41a

> "The agreement on sale of the capital, and/or of the property shall be deemed terminated due to non-fulfilment, should the buyer even within an additionally granted term:
>
> 1) fail to pay the stipulated price, that is, any of the due installments;
>
> 2) fail to invest into the subject of privatization in the mode, the form and the deadline stipulated in the agreement;
>
> 3) dispose of the property of the subject of privatization contrary to provisions of the agreement;
>
> 4) fail to ensure the continuity in performing the registered business activity that was the reason for establishing the subject of privatization;
>
> 5) fail to deliver a guarantee for the investment in the mode stipulated by the agreement;
>
> 6) fail to provide means for resolving the issues of the employees;
>
> 7) in other cases provided for by the agreement.
>
> In the event of termination of the agreement referred to in paragraph 1 of this Article, the employees of the subject of privatization shall retain the ownership rights on the capital, acquired in accordance with the provisions of Articles 42 through 44 of this Law, and the capital that was the subject of sale shall be transferred to the Share Fund.
>
> In case of termination of the agreement on sale of the capital, and/or of the property due to failure of the buyer of capital to fulfil contractual obligations, the buyer of capital, as the dishonest party, shall have no right to the refund of the amount paid as the purchase price in order to protect the public interest."[19]

128. Chapter IV was titled "Allocation of Funds Received from the Privatization Procedure" and set out, as the name suggests, the purposes for which the funds obtained in the privatization process could be used.[20]

129. Chapter V set out the entities responsible for implementing the law. Article 62, *i.e.*, the relevant Article in the Chapter, provides in relevant part:

> "The supervision of the implementation of this law and regulations adopted based on it shall be carried out by the ministry in charge of privatization affairs.

[19] Law on Privatization, Article 41a (Exhibit C-144).
[20] Law on Privatization, Article 60 (Exhibit C-144).

> The control of the work of the Government of the Republic of Serbia and the ministry in charge of privatization affairs during carrying out of the privatization procedure shall be done by the competent committee of the National Assembly of the Republic of Serbia.
>
> Ministry in charge of privatization affairs shall submit regular monthly report to the competent committee of the National Assembly of the Republic of Serbia on the status of the privatization procedure, signed agreement on sale of the capital, and/or of the property, with attached agreements, initiated privatization procedures, work of institutions in charge of carrying out of privatization procedure as set forth in Article 4 of this law, as well as provide all necessary data and information upon request by the competent committee."[21]

130. Finally, Chapter VI set out certain penal provisions and Chapter VII captured the transitional and final provisions.[22]

B. The Privatization Agency

131. As mentioned above, the Law on Privatization vested the responsibility for its implementation with the Privatization Agency and two other entities. Article 5 of the Law on Privatization discussed the Privatization Agency's role in some detail. For ease of reference, it is set out in full below:

> **Article 5**
>
> "The Privatization Agency […] is a legal entity that sells capital, and/or property and promotes, initiates, implements and controls the privatization procedure, in accordance with the law.
>
> In addition to the activities referred to in paragraph 1 of this Article, the Privatization Agency […] shall also perform the activities of the bankruptcy trustee, if it is appointed by the bankruptcy panel to perform those activities in accordance with the law regulating bankruptcy procedure.
>
> During performance of the activities of control of the privatization procedure, in the context of the regulations on privatization, the Agency shall check: the assessed value of capital or property of the subject of privatization; compliance of the program of privatization or restructuring program with the regulations; compliance between the inflow of funds from the effected sale with the sale agreement, and performance of the sale agreement where the Agency is a contracting party, as well as the transfer of shares issued free of charge to the employees.
>
> A separate law shall govern the status, rights and duties of the Agency, as well as other issues of importance for its work."[23]

[21] Law on Privatization, Article 62 (Exhibit C-144).
[22] Law on Privatization, Articles 63a-79 (Exhibit C-144).
[23] Law on Privatization, Article 5 (Exhibit C-144).

132. The Privatization Agency was thus envisioned as a legal entity,[24] and was tasked with the dual responsibility of (i) selling the capital, and/or property; and (ii) promoting, initiating, implementing and controlling the privatization procedure, in accordance with the law.[25]

133. In addition to the Law on Privatization, separate legislation was also enacted to regulate the Privatization Agency (the "**Law on the Privatization Agency**").[26] The Law on the Privatization Agency, among other things, set out the legal status of the entity, the functions it was empowered to perform and the manner in which it would be funded and regulated.[27]

134. The Parties disagree as to the independence and autonomy enjoyed by the Privatization Agency and disagree on whether its conduct is attributable to Respondent.

C. The Kovin Mine, the Creation of Rudnik Kovin and its Privatization

135. The Kovin Mine is a lignite coal mine on the banks of the Danube River in the municipality of Kovin ("**Kovin**"), which is in the Autonomous Province of Vojvodina ("**Vojvodina**").[28] It is a unique, specialized coal mine in which coal is excavated underwater, from a lake connected to the Danube River by a small channel. The Kovin basin is an extension of the giant Kostolac coal basin, one of Serbia's largest coal fields.[29]

136. The Kovin Mine and the development of the Kovin basin is considered to have played a crucial role in Vojvodina's energy policy.[30] Exploration works in the Kovin basis began in 1976 and, in 1980, the Vojvodina Commission for Verification of Reserves confirmed substantial coal reserves in two separate fields (A and B) therein.[31]

137. In the 1980s, the Kovin mine was taken over by Elektroprivreda Srbije ("**EPS**"), which started laying plans for the wider development of the Kovin basin, including the construction of a 600 MW power plant.[32] Exploration and tests continued at the Kovin

[24] Law on Privatization, Article 5 (Exhibit C-144).
[25] Law on Privatization, Articles 4, 5 (Exhibit C-144).
[26] 2001 Serbian Law on the Privatisation Agency (Official Gazette of the Republic of Serbia No. 38/2001, 135/2004) (Exhibit C-167); ("2001 Law on the Privatization Agency"); Law on the Privatization Agency (Exhibit RL-148).
[27] 2001 Law on the Privatization Agency, (Exhibit C-167); Law on the Privatization Agency (Exhibit RL-148).
[28] Memorial, at 15; Counter-Memorial, at 52.
[29] Presentation on the Kovin Power Complex, 30 May 2011, slide 4 et seq. (Exhibit C-224); Euracoal Map of Serbian Coal Fields (2020) (Exhibit C-225).
[30] Radunovic, M., Kecman, O., Mihajlovic, T., Schlenstedt, J., Denke, P. and Djuric, D.,'The possibilities and chances of the project energy complex Kovin – new coal mine and power plant', Górnictwo i Geoinzynieria, Rok 35, Zeszyt 3, 2011, p.299. (Exhibit C-111).
[31] Verifications of Reserves, 1980 (Exhibit C-226); Letter from Vojvodina Energy Secretariat to ECE attaching an authorization to conduct geological research, 8 May 2008 (Exhibit C-227).
[32] EPS 2001 Study, March 2001, p.3 (Exhibit C-70).

basin throughout the 1980s, and the Vojvodina government and EPS subsequently decided to lead exploitation of the Kovin basin with the underwater development of the Kovin Mine.[33] An underwater excavator was purchased for that purpose in 1990. Commercial gravel production began in 1992 and underwater coal mining began in 1995.[34]

138. The coal in the Kovin basin is of a soft, brown, lignite type. The Kovin Mine produces three sizes or "fractions" of coal: large "pieces" suitable for household consumption; medium-sized "walnuts" suitable for factories; and small "peas" suitable for thermal power plants ("**TPPs**").[35] The by-products of the excavation, *i.e.*, sand and gravel, also have commercial value for various construction purposes, including the building of roads.[36]

139. In 2005, a decision was taken to privatize the mining operation in the Kovin basin. For this, EPS established Rudnik Kovin, a company engaged in the underwater exploitation of coal on 16 June 2005.[37] EPS, later, contributed approximately EUR 11 million worth of cash, machinery and real estate to Rudnik Kovin, before eventually transferring ownership of the entity to Respondent so that it could be privatized under the Law on Privatization.[38]

140. The Ministry of Economy thereafter submitted a formal proposal to initiate privatization, which the Serbian government approved on 29 December 2005.[39] In January 2006, EPS formally transferred the Kovin Mine to Rudnik Kovin.[40]

D. Kornikom's Acquisition of Rudnik Kovin

141. As a first step to the privatization of Rudnik Kovin, a document called the Privatization Program was prepared in June 2006 (the "**Privatization Program**"). This document contained information about the Company's business operations, organizational structure, finances, and employee relations. Among other things, it furnished details about the mine's coal production and sales, its financial performance over time, and an inventory of its current assets. The Parties disagree on who produced the Privatization

[33] EPS 2001 Study, March 2001, p.5-6 (Exhibit C-70).
[34] Privatization Program for Rudnik Kovin, June 2006, p.3-4 (Exhibit C-71) ("Privatization Program").
[35] Privatization Program, p.8-9 (Exhibit C-71).
[36] Privatization Program, p.9 (Exhibit C-71).
[37] Memorial, at 15; Counter-Memorial, at 53; Decision Granting Approval for the Establishment of Rudnik Kovin, adopted by the Serbian Government, 23 June 2005, p.2-4 (Exhibit C-221).
[38] Decision Granting Approval for the Establishment of Rudnik Kovin, adopted by the Serbian Government, 23 June 2005, p.2-4 (Exhibit C-221); Letter from EPS to Rudnik Kovin, 20 January 2006, p.1-2 (Exhibit C-114); Initiative for Initiation of Privatization Procedure of Rudnik Kovin submitted by the Serbian Ministry of Economy, 12 December 2005, p.1 (Exhibit C-113).
[39] Decision on Issuing Consent for the Initiative rendered by the Serbian Government, 29 December 2005, p.1 (Exhibit C-229).
[40] EPS notification of transfer of Kovin mine to Rudnik Kovin, 20 January 2006 (Exhibit C-114).

Program. The Parties also disagree on the role played by the Privatization Agency and Respondent at this time.[41]

142. Thereafter, on 16 March 2007, the Privatization Agency invited applications from prospective bidders for the auction of 70% of the capital in Rudnik Kovin at the minimum bidding price of RSD 228,363,000.[42] Under the terms of this invitation, applications were to be accompanied by a draft privatization agreement signed by the prospective bidder and a confirmation that the deposit of RSD 114,181,000 or EUR 1,407,735 had been paid. These applications were to be submitted by 11 April 2007.[43] Claimant submitted its application on 10 April 2007.[44]

143. The auction for Rudnik Kovin was held on 18 April 2007. Claimant participated in the bidding process along with six others.[45] As it turned out, Claimant prevailed in the auction and paid EUR 16,160,770.40 for 70% of the capital in Rudnik Kovin.[46]

E. The Privatization Agreement

144. On 23 April 2007, the Privatization Agency and Claimant entered into the Agreement for the Sale of State-Owned Capital by Public Auction (the "**Privatization Agreement**"), in accordance with the Law on Privatization.[47]

145. The Privatization Agreement recorded that the Privatization Agency sold 70% of the state-owned capital in Rudnik Kovin to Claimant in the auction held on 18 April 2007. It also recorded that the balance 30% of the state-owned capital would be transferred to Rudnik Kovin's employees without compensation.[48]

146. In addition to the above, the Privatization Agreement set out in Article 5 and elsewhere (particularly Annex No. 1) the various representations, warranties and obligations assumed by Claimant vis-à-vis Rudnik Kovin. These included the following obligations:

---

[41] Memorial, at 20-24; Counter-Memorial, at 54-56; Privatization Program, p.9 (Exhibit C-71).
[42] Rudnik Kovin decision adopting the Investment Program, 12 March 2007 (Exhibit C-230); Rudnik Kovin decision adopting the Privatisation Program, 12 March 2007 (Exhibit C-231); Rudnik Kovin decision adopting the Social Program, 12 March 2007 (Exhibit C-63); Rudnik Kovin Trade Union decision adopting the Social Program, 12 March 2007 (Exhibit C-232); Public invitation to participate in the auction for the privatization of Rudnik Kovin, 16 March 2007, p.2 (Exhibit C-116) ("Invitation to participate in the Rudnik Kovin auction").
[43] Invitation to participate in the Rudnik Kovin auction, p.1-2 (Exhibit C-116); Law on Privatization, Articles 16 and 17 (Exhibit C-144).
[44] Kornikom's application for participation in the auction for Rudnik Kovin, 10 April 2007 (Exhibit C-234).
[45] Minutes from the Public Auction for Rudnik Kovin, 18 April 2007 (Exhibit C-73) ("Minutes - Auction for Rudnik Kovin").
[46] It appears that Kornikom paid a higher figure but the Privatization Agency returned EUR 57,460.13 as overpaid. See Letter to National Bank regarding payment and refund on overpayment, 7 May 2007 (Exhibit C-119); Minutes - Auction for Rudnik Kovin (Exhibit C-73).
[47] Privatization Agreement for Rudnik Kovin, 23 April 2007, p.2 (Exhibit C-1) ("Privatization Agreement").
[48] Privatization Agreement, p.2, Recitals (Exhibit C-1).

a. To invest a sum of EUR 2,001,294 over a period of two years in fixed assets used "solely for the performance of the company's principal business activity registered on the date of the auction" (the "**Investment Obligation**");[49]

b. To pay dividends amounting to at least 10% of any profits earned by the Company for two years following the conclusion of the Privatization Agreement;[50]

c. To not sell, transfer or otherwise alienate its shareholding in the Company for two years following the conclusion of the Privatization Agreement, without prior approval from the Privatization Agency;[51]

d. To ensure that there is business continuity within the scope of the Company's core business activity registered on the date of the auction, for a period of three years from the date of the Privatization Agreement (the "**Business Continuity Obligation**" or the "**Core Activity Obligation**");[52]

e. To not sell, transfer or otherwise alienate more than 10% of Rudnik Kovin's assets for one year following the date of the Privatization Agreement, without prior approval from the Privatization Agency;[53]

f. To not use any of the Company's assets as collateral, save for securing receivables arising out of the Company's regular operation, without prior approval from the Privatization Agency;[54] and

g. To comply with the social program set out in Annex No. 1 to the Privatization Agreement, including its Employee Protection, Employment Policy, Trade Union Protection, Employee Salary and Employee Benefits provisions (the "**Social Program Obligation**").[55]

147. These obligations are of paramount importance to the present dispute. The Tribunal therefore considers it appropriate to reproduce these provisions of the Privatization Agreement in full below.

148. Article 5 of the Privatization Agreement sets out in relevant part:

> "5.1 Representations and Warranties
>
> The Buyer represents and warrants to the Agency that the following is true:

[49] Privatization Agreement, Clauses 5.2.1 and 5.2.3 (Exhibit C-1).
[50] Privatization Agreement, Clause 5.2.2 (Exhibit C-1).
[51] Privatization Agreement, Clause 5.3.1 (Exhibit C-1).
[52] Privatization Agreement, Clause 5.3.2 (Exhibit C-1).
[53] Privatization Agreement, Clause 5.3.3 (Exhibit C-1).
[54] Privatization Agreement, Clause 5.3.4 (Exhibit C-1).
[55] Privatization Agreement, Annex No. 1 (Exhibit C-1).

5.1.1 […]

5.1.2 […]

5.1.3 The Buyer has not had an agreement for the sale of capital or assets terminated due to non-performance of its contractual obligations;

5.1.4 […]

5.1.5 The Buyer confirms that it has been allowed to analyze and conduct a due diligence review of the Privatization Subject, its assets and financial operation, and that it fully relies on its own analyses and reviews conducted prior to purchasing the capital.

5.2 Obligations of the Buyer

The Buyer undertakes the following with respect to the Agency:

5.2.1 to invest in the Privatization Subject a total of EUR 2,001,294.00 […] within the time period beginning to run as of the date of execution of the agreement, as follows:

in the first year: 81,234,000.00 […] dinars, as the equivalent value of EUR 1,001,294.00 […], calculated at the official mid-market rate of the National Bank of Serbia valid on the date of publication of the sale by public auction of the Privatization Subject.

In the second year: EUR 1,000,000.00 […] in the dinar equivalent value calculated at the official mid-market rate of the National Bank of Serbia on investment date.

The investment shall be made into fixed assets used solely for the performance of the company's principal business activity registered on the date of auction.

5.2.2 if the Privatization Subject generates any profits, the Buyer shall determine a dividend for each of the two years after the date of conclusion of the agreement, in the amount of at least 10 percent of the profit generated, after the covering of losses and statutory reserves.

5.2.3 to provide to the Agency, within 13 months as of the execution hereof, a certificate issued by a licensed audit firm, proving that the Buyer complied with clause 5.2.1 and specifying the exact amount and type of investment. The Agency may review the books and records of the Privatization Subject in order to ascertain that the Buyer has complied with its obligations specified in clause 5.2.

Further, the Buyer undertakes to, within 25 months as of the date of conclusion of the agreement, deliver to the Agency a certificate issued by a licensed audit firm, proving that the Buyer complied with clause 5.2.1 and

fulfilled its investment obligation envisaged for the second year after the date of execution of the agreement.

The Agency may review the books and records of the Privatization Subject in order to ascertain that the Buyer has acted in accordance with its obligations specified in clause 5.2.

The Buyer undertakes to allow the Agency, upon request, at any time, access to the Privatization Subject's business books and records, provided that the Agency notifies its intention to conduct a check at least 3 (three) days in advance.

After fulfilment of the investment obligation in accordance with the time schedule determined in clause 5.2.1 in conjunction with clause 3.3, the bank guarantee for the investment shall be returned to the guarantor bank.

5.3. Additional obligations of the Buyer

The Buyer undertakes not to perform, or allow the performance of, the following actions without prior written approval of the Agency:

5.3.1. sell, transfer or otherwise dispose of its shareholding in the 2 years following the conclusion of this agreement;

5.3.2 it undertakes to ensure, during a period of three years as of the date of conclusion of the agreement, business continuity at the company with respect to its core business activity registered on the date of auction;

5.3.3 The Buyer shall not sell, transfer or otherwise dispose of any of the Privatization Subject's fixed assets, in either one or several transactions a year, in an amount exceeding 10% of the total value of the Privatization Subject's assets reported in its latest balance sheet, in a period of one year following the conclusion of the agreement;

5.3.4 The Buyer shall not encumber by a mortgage any fixed assets of the Privatization Subject throughout the term of the agreement, other than to secure the claims against the Privatization Subject arising out of its regular operation, and other than to acquire funds to be used by the Privatization Subject;

5.3.5 The Buyer undertakes to, immediately after the conclusion of this agreement, take all required legal action to suspend any court proceedings initiated by any creditor against the Privatization Subject for the purpose of collecting its claims arising out of an investment into the Privatization Program; this concerns particularly the creditors (states and others) who released the Privatization Subject from the debt fallen due on December 31, 2004, in order to satisfy their claims from the proceeds of sale of the Privatization Subject's state owned capital.

The Agency shall not be held liable for any unjustified satisfaction of the creditors referred to in para. 1 of this clause, with respect to debts from which the Privatization Subject was released."[56]

149. Similarly, Annex No. 1 of the Privatization Agreement, which sets out further obligations of Claimant provides:

"**ANNEX No. 1 TO SALE AND PURCHASE AGREEMENT**

Social program to be implemented at the Privatization Subject after conclusion of the agreement

EMPLOYEE PROTECTION

The Buyer undertakes to ensure, within the Privatization Subject, compliance with the employees' rights stipulated under the individual bargaining agreement and other Privatization Subject's bylaws valid at the time of conclusion of this agreement, for a period of two years as of the date of conclusion of this agreement.

The Buyer undertakes not to dismiss any redundant Privatization Subject employees for a period of two years following entry into this agreement.

The Privatization Subject may dismiss redundant employees in a period of two years following entry into this agreement provided that it pays each redundant employee, for each full year of service, a severance pay in the amount of that employee's average gross salary earned in the last three months preceding the month of dismissal. Any employee being terminated by the Privatization Subject on grounds of redundancy may request the Buyer to pay severance prescribed under the Labor Act, where this is more favorable.

In the event of dismissal under the preceding paragraph the Buyer shall ensure that the relevant corporate body of the Privatization Subject adopts the decision terminating the employee's employment agreement on grounds of redundancy.

The Buyer undertakes that, if the Privatization Subject has more than 50 definite-term employees and more than 10% of the total number of the employment agreements of all the employees must be terminated due to technological changes, the relevant corporate body of the Privatization Subject shall adopt a redundancy program, the draft of which shall be submitted to the representative trade union for an opinion.

If the Privatization Subject acts in contravention of paragraph 3 of this Annex and terminates employees contrary thereto, the Buyer undertakes to pay each employee terminated on this ground an amount equal to 36 times his salary, within one month of adoption of the termination decision.

[56] Privatization Agreement, Clause 5 (Exhibit C-1).

EMPLOYMENT POLICY

The Buyer undertakes that the corporate body of the Privatization Subject competent for employment matters shall cooperate with the representatives of the Privatization Subject's trade union, specifically in respect of:

1. employee retraining program;

2. creation of new jobs outside the Privatization Subject's regular business activity;

3. the resolving of issues of employment of persons with disabilities.

The Buyer undertakes to preserve its present business activity - production of coal and gravel - as its principal business activity for three years following the date of execution hereof.

PROTECTION OF TRADE UNION RIGHTS AND REPRESENTATIVES

The Buyer undertakes to allow, within the Privatization Subject, unobstructed trade union activities of the employees and to respect the rights of the trade unions under the collective bargaining agreement, the special industry bargaining agreement and the individual bargaining agreement in force as at the date of execution hereof.

EMPLOYEES' SALARIES

The Buyer warrants that the employees' salaries will not be lower than those established as at the date of signing of this agreement, and undertakes to ensure their growth in the event of improved performance by the company, in accordance with the individual bargaining agreement.

OTHER EMPLOYEE BENEFITS

The Buyer undertakes the following with respect to the employees:

1. The Buyer undertakes to, upon expiration of each financial year, propose and vote for the Privatization Subject to adopt a decision on the distribution of bonuses to employees in the amount of at least 5% of the net profit, after payment of any liabilities provided by law.

2. The Buyer undertakes to vote for the Privatization Subject to adopt and implement a training program for all employees, or if such program is already in place, for it to include all the employees, to the extent such program is necessary."[57] (Emphasis in original)

[57] Privatization Agreement, Annex No. 1 (Exhibit C-1).

150. The termination of the Privatization Agreement was governed by Article 7. It provides, in relevant part:

> "7.1 The agreement shall be deemed terminated by operation of law on grounds of non-performance if, within an additionally provided time period for performance, the Buyer:
>
> 7.1.1 fails to pay the purchase price in the amount, manner and within the time limits envisaged in clauses 1.2, 3.1 and 3.1.1 hereof;
>
> 7.1.2 fails to deliver to the Agency an investment guarantee in accordance with clause 3.3. hereof;
>
> 7.1.3 fails to invest in the Privatization Subject in the manner and within the term set forth in clause 5.2.1 hereof;
>
> 7.1.4 disposes of the property of the Privatization Subject contrary to clause 5.3.3 hereof;
>
> 7.1.5 fails to ensure business continuity at the Privatization Subject as per clause 5.3.2 hereof;
>
> 7.1.6 fails to comply with the provisions of ANNEX 1 to this agreement, that is, resolves employment matters contrary to the provisions of ANNEX 1 to the agreement;
>
> 7.1.7 fails to exercise the voting rights arising out of its shareholding to vote in favor of the resolutions to be adopted at the general meeting pursuant to clause 3.2. hereof.
>
> 7.2 The Agency shall notify the Buyer in writing in case of agreement termination. In the event of termination of the agreement on grounds of non-performance of the Buyer's contractual obligations, the Buyer as defaulting party shall forfeit its right to reimbursement of the amount of purchase price already paid and all its rights and claims arising out of this agreement."[58]

151. The Parties dispute the meaning and purport of the various terms of the Privatization Agreement quoted above.

F. The Operations of Rudnik Kovin post-acquisition and the Privatization Agency's supervision

152. After Claimant's acquisition of Rudnik Kovin, it claims to have made substantial investments and improvements in the operation of the Kovin Mine. Specifically, Claimant contends that (i) it acquired valuable equipment for the mining operations in satisfaction of the investment obligation under the Privatization Agreement; (ii) it

[58] Privatization Agreement, Clause 7 (Exhibit C-1).

increased the Kovin Mine's profitability; and (iii) it increased the number of employees at Rudnik Kovin and their average salaries.[59]

153. In return for Claimant's actions and in particular, its purported satisfaction of the Investment Obligation under the Privatization Agreement, 81,234 new shares were issued to Rudnik Kovin on 18 June 2009 and another 93,355 ordinary shares were issued to Rudnik Kovin on 24 December 2009 (together amounting to a total of 174,589 shares – the "**Treasury Shares**").[60]

154. Claimant, however, contends that Respondent thwarted its operation of the Kovin Mine in three ways. First, it shut Rudnik Kovin out of the TPP market, which was dominated by the state-owned electricity utility EPS. As a result, Rudnik Kovin was forced to sell its pea sized coal to a TPP in Romania, instead of being able to sell it in Serbia. Second, the Privatization Agency sold Rudnik Kovin to Claimant without vital permits, a fact which Claimant discovered in 2009. Third, instead of helping Claimant, the Privatization Agency repeatedly and groundlessly questioned Claimant's fulfilment of its obligations under the Privatization Agreement.[61]

155. Respondent disagrees with these assertions. According to Respondent, the Privatization Agency carried out 9 inspections ("**Controls**") of Rudnik Kovin between May 2008 and 2010. During each of these Controls, the Privatization Agency found Claimant to be in breach of one or more of its obligations under the Privatization Agreement. Specifically, Respondent contends that Claimant failed to comply with the Business Continuity Obligation and the Social Program Obligation.[62]

156. The Tribunal notes that there is material disagreement between the Parties as to whether Claimant complied with the abovementioned obligations under the Privatization Agreement. Both Parties, however, agree that Claimant's and Rudnik Kovin's activities were regularly supervised by the Privatization Agency.

157. The record shows that a total of 9 Controls were performed by the Privatization Agency's Centre for the Control of Compliance (the "**Control Centre**") in the period between May 2008 and May 2010.[63]

---

[59] Memorial, at 37-47.

[60] Memorial, at 41; Rudnik Kovin Minutes of Shareholders' Meeting, 17 April 2008, p.6 (Exhibit C-238); Privatization Agency decision confirming Rudnik Kovin's acquisition of its own shares, 18 June 2009 (Exhibit C-120); Rudnik Kovin decision to increase its share capital, 28 May 2009 (Exhibit C-8); Privatization Agency resolution permitting Rudnik Kovin's acquisition of its own shares, 24 December 2009, p.1 (Exhibit C-121).

[61] Memorial, at 65-88.

[62] Counter-Memorial, at 80-86.

[63] Privatization Agency, First Control Report (of control on 19 May 2008) (Exhibit R-21) ("First Control Report"); Privatization Agency, Second Control Report (of control on 21 November 2008) (Exhibit R-22) ("Second Control Report"); Privatization Agency, Third Control Report (of control on 6 March 2009) (Exhibit R-23) ("Third Control Report"); Privatization Agency, Fourth Control Report (of control on 8 June 2009) (Exhibit R-24) ("Fourth Control Report"); Privatization Agency, Fifth Control Report (of control on 26 August 2009) (Exhibit R-25) ("Fifth Control Report"); Privatization Agency, Sixth Control Report (of control on 20 October 2009)

158. In these Controls, the Control Centre, among other things, examined whether Claimant was in compliance with the terms of the Privatization Agreement and prepared reports ("**Control Reports**") documenting its findings.[64] In instances where the Control Centre found non-compliance, the Privatization Agency granted Claimant additional time to demonstrate compliance.[65]

159. The table below sets out the dates on which the Controls were held.

#	Control	Date
1.	1st Control (Control Report dated 2 July 2008)	19 May 2008
2.	2nd Control (Control Report dated 18 December 2008)	21 November 2008
3.	3rd Control (Control Report dated 16 March 2009)	6 March 2009
4.	4th Control (Control Report dated 12 June 2009)	8 June 2009
5.	5th Control (Control Report dated 3 September 2009)	26 August 2009
6.	6th Control (Control Report dated 6 November 2009)	20 October 2009
7.	7th Control (Control Report dated 24 November 2009)	23 December 2009
8.	8th Control (Control Report dated 12 March 2010)	18 February 2010
9.	9th Control (Control Report dated 27 May 2010)	24 May 2010

160. The chronology of events and the Control Centre's findings vis-à-vis the Business Continuity Obligation and the Social Program Obligation are briefly canvassed below.

Business Continuity Obligation

161. In the first 3 Controls held on 19 May 2008, 21 November 2008 and 6 March 2009 respectively, the Control Centre found Claimant to be compliant with the Business Continuity Obligation.[66]

162. During the 4th and 5th Controls held on 8 June 2009 and 26 August 2009 respectively, the Control Centre's conclusions had changed. It no longer found Claimant to be

(Exhibit R-26) ("Sixth Control Report"); Privatization Agency, Seventh Control Report (of control on 20 November 2009) (Exhibit R-27) ("Seventh Control Report"); Privatization Agency, Eighth Control Report (of control on 18 February 2010) (Exhibit R-28) ("Eighth Control Report") ; Privatization Agency, Ninth Control Report (of control on 24 May 2010) (Exhibit R-29) ("Ninth Control Report").

[64] First Control Report (Exhibit R-21); Second Control Report (Exhibit R-22); Third Control Report (Exhibit R-23); Fourth Control Report (Exhibit R-24); Fifth Control Report (Exhibit R-25); Sixth Control Report (Exhibit R-26); Seventh Control Report (Exhibit R-27); Eighth Control Report (Exhibit R-28); Ninth Control Report (Exhibit R-29).

[65] See for e.g., Letter from the Privatization Agency to Kornikom, 19 June 2009, p.1 (Exhibit R-37); Letter from the Privatization Agency to Kornikom, 15 September 2009, p.2 (Exhibit R-38); Letter from the Privatization Agency to Kornikom, 14 December 2009 (Exhibit R-39); Letter from the Privatization Agency to Kornikom, 18 March 2010, p.1 (Exhibit R-40).

[66] First Control Report, p.1, 4 (Exhibit R-21); Second Control Report, p.1, 6 (Exhibit R-22), Third Control Report, p.1, 6 (Exhibit R-23).

maintaining Rudnik Kovin's business continuity. Instead, it observed that the Business Continuity of Rudnik Kovin was "jeopardized".[67]

163. This is clear, for instance, from the following extract of the 4th Control Report:

> "Head inspector's opinion: […] Based on the documentation provided during the inspection, it can be said that business continuity is jeopardized. The basis for this statement is as follows:
>
> • The account has been continuously frozen since November 26, 2008 (it was overdrawn by RSD 54,806,047.60 on the day of inspection i.e. June 8, 2009). An account frozen for more than 45 days continuously may trigger bankruptcy proceedings;
>
> • The Entity's total liabilities have increased severalfold, and according to the gross balance sheet figures they amount to RSD 299,155,481.45 as of June 8, 2009 (they amounted to RSD 245,794,000.00 as of December 31, 2008). Prior to privatization in 2006, the Entity's total liabilities amounted to RSD 28,861,000.00.
>
> • Liabilities under the Banca Intesa loan are not being serviced and are one of the reasons why the Entity's account is frozen (according to the ledger, as of June 8, 2009 the liabilities amount to RSD 44,228,699.59, the loan repayment term was May 5, 2009).
>
> • The production process was discontinued in November 2008, and employees have been on strike since June 8, 2009. Liabilities to employees on the day of the inspection amount to RSD 30,109,273.58.
>
> • The Entity is faced with a major liability to PUC Elektrovojvodina, and according (sic.) gross balance sheet figures, as of June 8, 2009, it amounts to RSD 43,969,961.04, which is why the electricity is often cut off."[68]

164. In light of these observations and in a bid to allow Claimant to ensure compliance with the Business Continuity Obligation, the Head Inspector of the Control Centre (the "**Head Inspector**") observed in the 4th Control Report that Claimant should be given 60 additional days to demonstrate compliance with the Business Continuity Obligation.[69]

165. The record shows that this recommendation of the Head Inspector was, in fact, implemented and Claimant was sent a letter on 19 June 2009. In this letter, Claimant was directed to comply with the Business Continuity Obligation within 60 days and to submit proof of compliance to the Privatization Agency. The letter also informed

[67] Fourth Control Report, p.2, 9 (Exhibit R-24); Fifth Control Report, p.1, 9 (Exhibit R-25).
[68] Fourth Control Report, p.9-10 (Exhibit R-24).
[69] Fourth Control Report, p.18 (Exhibit R-24).

Claimant that if it failed to comply with the letter, the Privatization Agreement would be deemed terminated in accordance with Article 41a of the Law on Privatization.[70]

166. For ease of reference, the relevant extract of the 19 June 2009 letter is reproduced below:

> "Also, pursuant to Article 5 of the Law on Privatization and Art. 10 of the Law on the Privatization Agency, Inspection Center, Privatization Agency, during the procedure of inspection of the execution of contractual obligations in the Subject, on 08/06/2009, it was determined that the Buyer did not fulfill obligations related to ensuring continuity in the predominant activity for which the Subject was registered on the day of the auction […]
>
> Bearing in mind the aforementioned, you are hereby invited to execute the contractual obligations within 60 days from the day of receipt of this notice and submit to the Privatization Agency the proof thereof, according to the following:
>
> […]
>
> - proof relating to the maintenance of continuity in the predominant activity for which the Subject was registered on the day of the auction,
>
> […]
>
> If you do not comply with this notice, the Agreement on the Sale of State Capital by the Method of Public Auction of the Privatization Subject "Rudnik Kovin" Kovin (II/1 Cert.No. 425/07 of 23/04/2007) shall be considered terminated for failure to comply, in accordance with the provisions of Article 41a of the Law on Privatization ("Official Gazette of RS" No. 38/2001, 18/2003, 45/2005 and 123/2007)."[71]

167. Similar observations were made in the 5th Control Report as well and another letter was sent to Claimant on 15 September 2009 granting Claimant a further 60 days to comply with the Business Continuity Obligation.[72]

168. In the 6th Control held on 20 October 2009, the Control Centre found that Claimant had taken some steps to comply with the Business Continuity Obligation. It therefore concluded that the business continuity of Rudnik Kovin was "in the process of being restored."[73]

[70] Letter from the Privatization Agency to Kornikom, 19 June 2009, p.1-2 (Exhibit R-37).
[71] Letter from the Privatization Agency to Kornikom, 19 June 2009, p.1-2 (Exhibit R-37).
[72] Fifth Control Report, p.1, 9 (Exhibit R-25); Letter from the Privatization Agency to Kornikom, 15 September 2009, p.2-3 (Exhibit R-38).
[73] Sixth Control Report, p.1, 6, 19 (Exhibit R-26).

169. In the 7th Control held on 20 November 2009, although the Control Centre made similar remarks, it observed some elements of non-compliance. It therefore sent another letter to Claimant on 14 December 2009, inviting Claimant to demonstrate compliance with the Business Continuity Obligation.[74]

170. Claimant, however, does not appear to have demonstrated such compliance to the Control Centre's satisfaction. The record shows that during the 8th Control held on 18 February 2010, *i.e.*, the last inspection before the expiry of the Business Continuity Obligation, the Control Centre observed further non-compliances. The Control Centre therefore once again reverted to its observation that the business continuity of Rudnik Kovin was "jeopardized".[75]

171. In light of these observations, the Head Inspector recommended that Claimant be given 60 additional days to demonstrate compliance.[76] This is clear from the following extract of the 8th Control Report:

> "The documentation demonstrates that the continuity in respect of the Entity's primary activity remains jeopardized (in 2009 the business operated at a loss, the account has been permanently frozen since that year), and bearing in mind the negotiations with "Banca Intesa" AD Belgrade (one of the reasons the account is frozen are installment arrears under the Loan Agreement concluded with the bank), it is proposed that a Notice be sent to the Buyer leaving another additional 60-day deadline for furnishing the Privatization Agency with proof that the contractual obligation has been discharged."[77]

172. Based on the Head Inspector's recommendation, the Privatization Agency sent a letter to Claimant on 18 March 2010, inviting Claimant to demonstrate compliance. Just like the earlier letters, this letter too cautioned Claimant that if it failed to demonstrate compliance with the Business Continuity Obligation within 60 days, the Privatization Agreement would be terminated by operation of law.[78]

173. Eventually, the 9th Control was held on 24 May 2010.[79] In this Control, the Control Centre once again found the business continuity of Rudnik Kovin to be jeopardized. This is clear from the following extract:

> "Business continuity was to be maintained for three years (monitoring until April 23, 2010).

---

[74] Seventh Control Report, p.1, 7, 10 (Exhibit R-27); Letter from the Privatization Agency to Kornikom, 14 December 2009 (Exhibit R-39).
[75] Eighth Control Report, p.1, 9 (Exhibit R-28).
[76] Eighth Control Report, p.1, 9, 19 (Exhibit R-28).
[77] Eighth Control Report, p.19 (Exhibit R-28).
[78] Letter from the Privatization Agency to Kornikom, 18 March 2010 (Exhibit R-40). The English translation of the letter appears to be incorrectly dated 18 March 2008. However, the contents of the letter and the Serbian original demonstrate that it was in fact sent in 2010.
[79] Ninth Control Report, p.2, 12 (Exhibit R-29).

> Notice leaving an additional 60-day deadline for complying with Article 5.3.2 of the Agreement was sent to the Buyer on March 15, 2010 (at the 248th sitting of the Measures Commission).
>
> The Buyer failed to comply with the measure within the additional deadline.
>
> The documentation submitted during the inspection demonstrates that continuity of the primary business activity remains jeopardized owing to the Entity's business account being frozen."[80]

174. Although the 9th Control Report recommended the Claimant be given a further 60 days to demonstrate compliance, this was not done.[81] Instead, the Privatization Agency informed Claimant that the Privatization Agreement had been terminated in the manner discussed in greater detail in Section I below.

Social Program Obligation

175. With respect to the Social Program Obligation, the record shows that the Control Centre found Claimant to be in compliance during the 1st and 2nd Controls held on 19 May 2008 and 21 November 2008 respectively. This, however, changed during the 3rd Control.

176. In the 3rd Control on 6 March 2009, the Control Centre found that Rudnik Kovin had not paid taxes on salaries, or contributions on salaries, for the period November 2008 through January 2009.[82] Specifically, the 3rd Control Report noted:

> "Current salaries: net salaries for January 2008 (partly) paid on February 23, 2009; no taxes or contributions on salaries were paid October – December 2008; […]
>
> The last salary was paid on February 23, 2009 for January 2008 (partially), with the average net amount being RSD 24,112.66, excluding taxes and contributions paid. The average net salary for December amounted to RSD 53,471.75. No taxes and contributions were paid for November and December 2008 and January 2009 nor the remainder of the net salary for January".[83]

177. In light of these observations, the Head Inspector concluded:

> "Head Inspector's opinion: The Buyer is failing in its employment obligations where the payment of salaries is concerned, namely net salaries for the months of

[80] Ninth Control Report, p.12 (Exhibit R-29).
[81] Letter from the Privatization Agency to Kornikom: Notice of Termination, 11 June 2010, p.2 (Exhibit C-2) ("Termination Notice").
[82] Third Control Report (Exhibit R-23).
[83] Third Control Report, p.1, 11 (Exhibit R-23).

January and February of 2009, and taxes and contributions since November 2008."[84]

178. The Head Inspector also recommended that Claimant be given 60 additional days to demonstrate compliance.[85]

179. Pursuant to this Control, Respondent contends that a formal warning letter was sent by the Privatization Agency to Claimant on 3 April 2009 and relies on Exhibit R-36. Exhibit R-36, however, does not appear to be the letter which Respondent references. Instead, Exhibit R-36 appears to be a letter (incorrectly) dated 28 April 2008, which does not discuss Claimant's Social Program Obligation at all.[86] Claimant, however, does not dispute that such a notice was in fact sent.

180. Thereafter, it appears that in the next five inspections, *i.e.*, from the 4th Control held on 12 June 2009 to the 8th Control held on 12 March 2010, the Control Centre found that Claimant remained in breach of its Social Program Obligation for, among other things, paying only net salaries and for failing to pay taxes and contributions.[87]

181. All but one of these Controls were followed by a notice from the Privatization Agency granting Claimant an additional deadline to comply with the Social Program Obligation and reminding Claimant that failure to comply would result in the termination of the Privatization Agreement.[88]

182. Finally, the 9th Control was held on 24 May 2010.[89] In this Control, the Control Center once again found deficiencies in Claimant's compliance with the Social Program Obligation. The Control Center observed, among other things:

"The employer is in arrears on the following payroll liabilities:

1. taxes on salaries: the period from January 2010 to March 2010;
2. health insurance contributions: for half of the month of November and December 2009 and for the month of March 2010;
3. unemployment insurance contributions: the period from January 2010 to March 2010;

[84] Third Control Report, p.12 (Exhibit R-23).
[85] Third Control Report, p.13 (Exhibit R-23).
[86] Letter from the Privatization Agency to Kornikom, 3 April 2009, p.2 (Exhibit R-36). A perusal of the contents of the letter shows that the date is incorrect because it makes reference to events that transpired in 2009.
[87] Fourth Control Report, p.3, 15-16 (Exhibit R-24); Fifth Control Report, p.1-2, 17-19 (Exhibit R-25); Sixth Control Report, p.2, 16, 19 (Exhibit R-26); Seventh Control Report, p.2, 18-19, 21 (Exhibit R-27); Eighth Control Report, p.1, 16-17, 19 (Exhibit R-28).
[88] Letter from the Privatization Agency to Kornikom, 19 June 2009, p.1 (Exhibit R-37); Letter from the Privatization Agency to Kornikom, 15 September 2009, p.2 (Exhibit R-38); Letter from the Privatization Agency to Kornikom, 14 December 2009 (Exhibit R-39); Letter from the Privatization Agency to Kornikom, 18 March 2010, p.1 (Exhibit R-40).
[89] Ninth Control Report, p.1, 2 (Exhibit R-29).

4. Pension and disability insurance contributions: for the period January to December 2009 (subject of pensionable service bridging) and for the period January to March 2010."[90] (Emphasis omitted)

183. As noted earlier (see paragraph 174), although the 9th Control Report recommended that Claimant be given a further 60 days to demonstrate compliance, this was not done.[91]

184. As will be seen below, the Parties disagree on the meaning and purport of the Control Reports.

G. The Novi Kovin Project

185. Following the acquisition of Rudnik Kovin, Claimant also claims to have set up the "Novi Kovin Project" (the "**Novi Kovin Project**"). This project contemplated a wider development strategy for the exploitation of the mineral resources in the Kovin basin (the "A' and 'B' fields), and foresaw the design, construction, operation and connection of a thermal power plant with an installed capacity of 600 megawatts.[92] For this, Claimant, through Rudnik Kovin, co-founded and acquired a 30% interest in Energy Consulting and Engineering d.o.o. ("**ECE**"), a Serbian company, to further prospect for coal in the Kovin basin and to develop the Novi Kovin Project.[93]

186. Starting in 2007, ECE obtained licenses for and undertook new geological exploration in order to verify the quantity and quality of reserves at the Kovin coal deposit, and to provide a geological basis for the development of the Novi Kovin Project. It performed these activities with the participation and assistance of local authorities and using the data and rights that Rudnik Kovin had in its possession.

187. Between December 2007 and the autumn of 2008, ECE and several contractors conducted drilling works and laboratory analysis of the Kovin basin. They also conducted coal quality tests and analyzed samples taken from the newly drilled holes. The information obtained was collated in an extensive report, which confirmed the quality of Rudnik Kovin's coal, and, specifically, that it was ideal for use in thermal power plants. This report was published on 31 December 2009 and, based on that report, on 5 May 2010, the Vojvodina Energy Secretariat certified reserves of 182,645,623 tons for the A and B fields.[94]

188. To progress the Novi Kovin Project further, Claimant partnered with Holding Slovenske elektrarne D.O.O. Ljubljana ("**HSE**"), the Slovenian state-owned power company and

[90] Ninth Control Report, p.21 (Exhibit R-29).
[91] Termination Notice, p.2 (Exhibit C-2).
[92] Memorial, at 35.
[93] Rudnik Kovin decision to establish ECE, 9 July 2007 (Exhibit C-13).
[94] Memorial, at 54-55; ECE Study on coal reserves in the Kovin Coal Basin deposit fields A and B, 31 December 2009, p.59-60, 78-113 (Exhibit C-20); Vojvodina Energy Secretariat certificate of reserves of Kovinski coal basin fields A and B, 5 May 2010, p.1-3 (Exhibit C-22).

the largest company in Slovenia. HSE, Rudnik Kovin and ECE representatives met on several occasions in the course of the Novi Kovin Project, during which they formulated a plan that HSE would contribute to the fulfilment of the technical side of the Novi Kovin Project and act as an off-taker of the generated electricity.[95]

189. In addition to the above, HSE also introduced Claimant to the FIA Group ("**FIA**"), a group of five Serbian companies with operations in several sectors including construction and energy distribution. On 9 November 2009, FIA sent a letter of intent to ECE noting its intention to participate in the realization of the Novi Kovin Project. Discussions with FIA proceeded quickly and, shortly thereafter, on 4 December 2009, FIA, ECE, and Rudnik Kovin entered into a Memorandum of Understanding setting out their agreement to participate in the Novi Kovin Project. While FIA became a strategic partner, the Memorandum of Understanding envisaged entering into another memorandum of understanding with HSE as a potential partner as well. Accordingly, on 21 December 2009, FIA, ECE, Rudnik Kovin and HSE entered into a further Memorandum of Understanding for implementation of the Novi Kovin Project, designating HSE as a partner for the design, supervision, and commissioning of the thermal power plant and for the off-taking of electricity generated from the project.[96]

190. On 18 January 2010, the partners obtained the express support of the local authorities for the Novi Kovin Project at a meeting at the Vojvodina Energy Secretariat. The Vojvodina Energy Secretariat in fact noted:

> "The Government of the Autonomous Province of Vojvodina and the Provincial Secretariat for Energy and Mineral Resources support the implementation of the Novi Kovin Project and are determined to become partners in its implementation. They believe that the conditions have been created for the Project to be completed successfully […]"
>
> The interest is not only short-term—to commence the Project; it is also a long-term one of efficient and economically viable Project implementation in the interest of the state and of the financing partners.
>
> The position of the Provincial Secretariat for Energy and Mineral Resources is that the project should be implemented; that it was well conceived; that the experiences with previous exploitation solutions were positive; that the State has an interest in being a partner in the implementation; and that the Secretariat itself will do all within its power to expedite the implementation activities in compliance with the applicable regulations."[97]

[95] MoU between FIA, ECE and HSE, 21 December 2009, Recital P (Exhibit C-26); Memorandum on HSE and ECE's visit to the Kovin Mine, 6 August 2009, p.1, 3-4 (Exhibit C-27).
[96] Memorial, at 57-58; Kacharov-I, at 37; Ivanov-I, at 39-42; Letter from FIA to ECE, 9 November 2009 (Exhibit C-79); MoU between FIA and ECE, 4 December 2009 (Exhibit C-28); MoU between FIA, ECE and HSE, 21 December 2009 (Exhibit C-26).
[97] Memorial, at 59-62; Minutes of Meeting between the Vojvodina Energy Secretariat, HSE, FIA, Rudnik Kovin and ECE, 18 January 2010, p.4 (Exhibit C-29).

191. In addition, the Vojvodina Energy Secretariat committed to assisting Rudnik Kovin in overcoming any regulatory hurdles it faced in the execution of the Novi Kovin Project.[98]

192. However, these plans for the Novi Kovin Project never came to fruition. Claimant argues that this was because of Respondent's conduct referred to above (see paragraph 154). Respondent disagrees.

H. Negotiations with FIA for the sale of Rudnik Kovin

193. Claimant contends that as a result of Respondent's actions and the anti-Bulgarian sentiment it faced, it accepted an offer to sell its investments in Serbia. In early 2010, FIA expressed an interest in acquiring Rudnik Kovin and ECE and Claimant decided to take it forward.

194. On 12 March 2010, Claimant wrote to the Privatization Agency to inform the Privatization Agency that it was in negotiations with "another party" to transfer its shareholding in Rudnik Kovin.[99]

195. Claimant contends that in order to insulate ECE from the risk of any capricious acts the Privatization Agency might have taken vis-à-vis Rudnik Kovin, it decided to restructure its indirect interest in ECE, which in 2010 was still held through Rudnik Kovin. This restructuring was completed in late March 2010, at which point Rudnik Kovin transferred its 30% shareholding in ECE to Eco Analiz EOOD ("**Eco Analiz**"), a Bulgarian company associated with Claimant. As a result, Eco Analiz held 80% of the shares in ECE.[100]

196. On 30 March 2010, FIA as the buyer, and Claimant, Eco Analiz, and Prof. Milan Radunović as the sellers, signed a framework agreement on the sale of their respective interests in Rudnik Kovin and ECE to FIA (the "**Framework Agreement**"). Under the Framework Agreement, FIA was to acquire Claimant's shares in Rudnik Kovin for EUR 34,960,000, and 95% of the shares in ECE from Eco Analiz and Prof. Radunović (leaving Prof. Radunović with 5% of the shares in ECE). The total amount payable for both transactions was EUR 45,000,000.[101]

[98] Minutes of Meeting between the Vojvodina Energy Secretariat, HSE, FIA, Rudnik Kovin and ECE, 18 January 2010, p.4 (Exhibit C-29).
[99] Letter from Kornikom to the Privatization Agency, 12 March 2010 (Exhibit C-36).
[100] Framework Agreement between FIA, Kornikom, Eco Analiz and Milan Radunovic, 30 March 2010, p.1 (Exhibit C-82).
[101] Framework Agreement between FIA, Kornikom, Eco Analiz and Milan Radunovic, 30 March 2010, p.1-3 (Exhibit C-82).

197. On 9 April 2010, the Privatization Agency replied to Claimant's letter and gave details of the documentation that it would need to see from Claimant regarding the anticipated transfer.[102]

198. Following further negotiations with FIA, the transactions for ECE and Rudnik Kovin were split into two separate agreements and, on 10 May 2010, Claimant and FIA entered into a final agreement for the transfer of Rudnik Kovin, for the price of EUR 34,960,000. The only condition for transferring the funds to Claimant was that the Privatization Agency confirm that Claimant had fulfilled all of its obligations under the Privatization Agreement.[103]

199. The deal was, however, never consummated because the Privatization Agreement was terminated in the meantime.

I. The Termination of the Privatization Agreement

200. On 8 June 2010, Rudnik Kovin wrote to the Privatization Agency, setting out its fulfilment of its obligations, item by item.[104]

201. On 11 June 2010, Respondent, acting through its Privatization Agency, terminated the Privatization Agreement (the "**Termination Notice**").[105] For ease of reference, the relevant text of the Termination Notice is reproduced below:

> **"**RE: Notice of termination on grounds of non-performance of the Agreement for the sale of state-owned capital by public auction of the privatization subject RUDNIK KOVIN, Kovin.
>
> Based on the Agreement for the sale of state-owned capital by public auction of the privatization subject RUDNIK KOVIN […], you have become the Buyer of 70% of the state-owned capital of the Privatization Subject. The specified Agreement defines the Buyer's obligations whose non-performance may result in termination.
>
> In clause 5.3.2 of the Agreement the Buyer undertakes to ensure, within a period of three years as of the Agreement date, business continuity at the Privatization Subject with respect to its principal business activity registered on the date of auction.

[102] Letter from the Privatization Agency to Kornikom, 9 April 2010 (Exhibit C-37).
[103] Agreement between FIA and Kornikom for the transfer of Rudnik Kovin, 10 May 2010, Clause 5.1 (Exhibit C-85); FIA Statement confirming payment to escrow account on Kornikom's fulfilment of Privatization Agreement obligations, 2 June 2010 (Exhibit C-83); Letter from Rudnik Kovin to the Privatization Agency, 8 June 2010 (Exhibit C-40).
[104] Letter from Rudnik Kovin to the Privatization Agency, 8 June 2010 (Exhibit C-40).
[105] Termination Notice (Exhibit C-2).

> In Annex 1 of the Sale and Purchase Agreement - Social Program - the Buyer undertakes to ensure, within the Privatization Subject, observance of all the employees' rights under the individual collective agreement and other Privatization Subject's bylaws valid at the time of entry into the Agreement, until the amendment thereof in accordance with the Labor Act.
>
> The inspections of Buyer's compliance with the contractual provisions and the examination of the available documents revealed that the Buyer did not fulfil the specified contractual obligations. With this respect, the Privatization Agency sent to the addresses of the Buyer and of the Privatization Subject four notices granting an additional term for fulfillment of the contractual obligation to maintain business continuity at the Privatization Subject with respect to its principal registered business activity and to comply with the Social Program.
>
> The last notice, sent on March 18, 2010, grants the Buyer an additional term of 60 days to provide evidence of business continuity at the Privatization Subject with respect to its principal business activity and of full compliance with the Social Program.
>
> The notices warn the Buyer that, if it fails to comply with the instructions within the specified additional time period, the Privatization Agency will consider the State Owned Capital Sale Agreement terminated on grounds of non-performance, in accordance with the provision in Article 41a of the Privatization Act.
>
> Since the Buyer did not provide proof of compliance with the instructions in the notices in the additionally granted term, and since the last inspection, conducted at the registered office of the Privatization Subject on May 24, 2010, established that the Buyer did not comply with the Agency's notices in the additionally granted term, that is, failed to provide proof of business continuity and compliance with the Social Program, the Privatization Agency adopted a decision to terminate the Agreement for the sale of state-owned capital by public auction of the privatization subject RUDNIK KOVIN […] on grounds of non-performance on expiry of the additionally granted term, in accordance with Article 41a(1) points (4) and (6) of the Privatization Act […].
>
> We further inform you that the Decision on the transfer of capital sold as part of the privatization subject RUDNIK KOVIN, Kovin to the Privatization Agency will be adopted pursuant to Article 41a(2) of the Privatization Act."[106]

202. Along with the Termination Notice, the Privatization Agency enclosed decisions on the transfer of capital and on the Treasury Shares (the "**Decision on the Transfer of Capital**" and the "**Decision on the Transfer of the Treasury Shares**", respectively, and together the "**Decisions on Transfer**"), which had the effect of transferring Claimant's shares in Rudnik Kovin and Rudnik Kovin's own Treasury Shares to the

[106] Termination Notice (Exhibit C-2).

Privatization Agency.[107] For ease of reference, the relevant excerpts of the Decisions on Transfer are reproduced below.

203. The Decision on the Transfer of Capital provides:

> "**DECISION**
> **ON THE TRANSFER OF THE CAPITAL of […] RUDNIK KOVIN ad Kovin**
>
> 1. By this decision the capital of […] RUDNIK KOVIN ad Kovin, Cara Lazara 85, corporate ID number: 20053518, is transferred to the Privatization Agency.
>
> The Agreement for the sale of state-owned capital by public auction of the privatization subject […] RUDNIK KOVIN doo Kovin, concluded on April 23, 2007 […] is terminated.
>
> 2. The capital being transferred to the Privatization Agency is divided into 661,365 shares with a par value of 1,000.00 dinars as at the date of adoption of this decision.
>
> 3. The capital under point 2 of this decision is transferred to the Privatization Agency for the purpose of sale in the manner prescribed by law.
>
> 4. The notice of termination on grounds of non-performance of the Sale Agreement is enclosed with this decision and forms part hereof.
>
> 5. This decision is to be provided to the Business Registers Agency and the Central Securities Depository and Clearing House for further processing, and to […] RUDNIK KOVIN ad Kovin for review.
>
> 6. This decision enters into force as of the date following its adoption.
>
> **Rationale**
>
> Article 41a of the Privatization Act […] provides that an agreement for the sale of capital or assets shall be deemed terminated on grounds of non-performance and the capital sold shall be transferred to the Share Fund where the buyer fails to meet its contractual obligations within an additionally granted term.
>
> Article 12 of the Act amending the Privatization Agency Act […] provides that the Privatization Agency is the legal successor of the Share Fund and that the shares and stakesss (sic.) from the Share Fund's portfolio, transferred to the Fund under agreements terminated prior to the date of entry into force of the Act, shall be transferred to the Privatization Agency.

[107] Letter from the Privatization Agency to Rudnik Kovin enclosing decisions on the transfer of capital and the transfer of shares, 11 June 2010 (Exhibit C-141); Decision of the Privatization Agency on the transfer of Rudnik Kovin capital, 11 June 2010 (Exhibit C-128) ("Decision on the Transfer of Capital"); Decision of the Privatization Agency on the transfer of Rudnik Kovin shares, 11 June 2010 (Exhibit C-86) ("Decision on the Transfer of the Treasury Shares").

[…]

Since the Buyer did not provide proof of compliance with the instructions in the notices in the additionally granted term, and since the last inspection, conducted at the registered office of the Privatization Subject on May 24, 2010, established that the Buyer did not comply with the Agency's notices in the additionally granted term, that is, failed to provide proof of uninterrupted operation and compliance with the Social Program, the Privatization Agency adopted a decision to terminate the Agreement for the sale of state-owned capital by public auction of the privatization subject RUDNIK KOVIN, Kovin […] on grounds of non-performance on expiry of the additionally granted term, in accordance with Article 41a(1) points (4) and (6) of the Privatization Act.

As the Sale Agreement was terminated, a decision was adopted to transfer the capital sold in accordance with the provision of Article 41a(2) of the Privatization Act."[108]

204. The Decision on the Transfer of the Treasury Shares provides:

"**DECISION**
on the transfer of treasury shares of […] RUDNIK KOVIN AD Kovin to the Privatization Agency

1. 174,589 treasury shares […] with a par value of 1,000.00 dinars shall be transferred from the securities account of […] RUDNIK KOVIN […] to the securities account of the Privatization Agency.

2. The shares specified in point 1 of the operative part of this decision are transferred to the Privatization Agency for the purpose of sale in the manner prescribed by law.

3. This decision shall constitute the legal basis for the transfer of the shares specified under point 1 of the operative part of this decision from the securities account of […] RUDNIK KOVIN ad Kovin to the securities account of the Privatization Agency with the Central Securities Depository and Clearing House.

Rationale
Article 41(2) of the Privatization Act provides that, throughout the period of performance of contractual obligations, the shares acquired by a buyer from new issues within the capital increase of a privatization subject shall be considered fully paid-up treasury shares of the privatization subject. Paragraph 5 of this Article stipulates, inter alia, that, in the event of termination of the agreement for the sale of capital or assets, the treasury shares shall be transferred to the Share Fund, which shall sell them along with the shares of the privatization subject transferred to it in accordance with the Act.

[108] Decision on the Transfer of Capital (Exhibit C-128).

> However, as the Act amending the Privatization Agency Act (Official Gazette of the Republic of Serbia No. 30/10) provides for the dissolution of the Share Fund, and stipulates that the Privatization Agency shall be the legal successor of the Share Fund and shall sell shares or stakes following the termination of the agreement for the sale of capital or assets concluded between the Privatization Agency and the capital buyer, the shares referred to in point 1 of the operative part of this decision are being transferred to the Privatization Agency for the purpose of sale in the manner prescribed by law.
>
> […]
>
> Since, on June 11, 2010, the Privatization Agency terminated the Agreement for the sale of state-owned capital of the privatization subject […] RUDNIK KOVIN doo Kovin, concluded on April 23, 2007 with Kornikom doo, Sofia, Bulgaria as buyer […], it was decided as stated in the operative part of this decision."[109]

205. The Parties disagree as to the lawfulness, meaning and purport of the Termination Notice and the Decisions on Transfer.

J. The Proceedings Initiated by Claimant in the aftermath of the Termination of the Privatization Agreement

206. After the termination of the Privatization Agreement, Claimant wrote a letter to the Serbian Ministry of Economy and Regional Development on 25 June 2010.[110] In this letter, Claimant, among other things, alleged that there were some "obvious irregularities in the Privatization Agency's work, as the Agency terminated the Agreement contrary to law and the Agreement" and requested the relevant ministry to schedule a meeting in order to resolve "this highly disagreeable situation" and to help avoid "further difficulties that would be brought on by court proceedings".[111] While making this request, Claimant emphasized that "amicable resolution of disputes with Bulgarian investors is an obligation by which the Republic of Serbia is bound" under Article 9(1) of the Act ratifying the BIT.[112]

207. On 30 March 2011, Claimant filed a lawsuit in the Commercial Court of Belgrade ("**Commercial Court**") against the Privatization Agency.[113] In this lawsuit, Claimant, among other things, alleged that the Privatization Agency illegally terminated the Privatization Agreement and requested the Commercial Court to order the Privatization

[109] Decision on the Transfer of the Treasury Shares (Exhibit C-86).
[110] Letter from Kornikom to the Serbian Ministry of Economy, 25 June 2010 (Exhibit R-1) ("Letter from Kornikom to the Ministry of Economy").
[111] Letter from Kornikom to the Ministry of Economy (Exhibit R-1).
[112] Letter from Kornikom to the Ministry of Economy (Exhibit R-1).
[113] Kornikom's Complaint in the Commercial Court of Belgrade, 30 March 2011 (Exhibit R-2).

Agency to compensate it in the amount of EUR 34,960,000 (being EUR 18,219,524.53 in respect of actual damages and EUR 16,740,475.47 in lost profits).[114]

208. The Privatization Agency filed its response to the above lawsuit on 10 May 2011. Claimant and the Privatization Agency thereafter filed supplemental briefs on the merits on 4 July 2011 and 8 October 2011 respectively.[115]

209. On 19 October 2011, the Commercial Court held a hearing and notified counsel for Claimant and the Privatization Agency that a merits hearing would take place on 28 November 2011. On 22 November 2011, Claimant's counsel confirmed that he would attend the hearing. On 28 November 2011, however, Claimant failed to appear for the scheduled hearing. As a result, and consistent with Serbian legal procedure, the lawsuit was presumed to be withdrawn, and the Commercial Court dismissed the case on the same day.[116]

210. On 9 January 2012, the Commercial Court granted the Privatization Agency's post-dismissal motion for costs against Claimant.[117]

211. Thereafter, the record does not show any action on Claimant's part until 19 April 2019 when Claimant filed the Request for Arbitration in the present dispute.

[114] Kornikom's Complaint in the Commercial Court of Belgrade, 30 March 2011 (Exhibit R-2).
[115] Privatization Agency's Answer in the Commercial Court of Belgrade, 10 May 2011 (Exhibit R-3); Kornikom's Reply in the Commercial Court of Belgrade, 4 July 2011 (Exhibit R-83); Privatization Agency's Reply in the Commercial Court of Belgrade, 11 October 2011 (Exhibit R-84).
[116] Ruling of the Commercial Court of Belgrade, 28 November 2011 (Exhibit R-4).
[117] Ruling of the Commercial Court of Belgrade, 9 January 2012 (Exhibit R-5).

VI. APPLICABLE LEGAL FRAMEWORK

212. Article 1 of the BIT titled "Definitions" provides:

> "For the purposes of this Agreement:
>
> 1. The term "investments" shall mean any assets invested by the investors of one of the Contracting Parties in the territory of the other Contracting Party in accordance with the national legislation of the latter, and include in particular:
>
> - movable and immovable property rights and other rights in rem in accordance with the national legislation of the Contracting Party on the territory of which the investment has been made, as well as mortgages, pledges or other similar rights;
>
> - shares, stocks or other kinds of participation in companies;
>
> - claims to money, as well as any other rights related to the investment process, that have economic value;
>
> - intellectual property rights, such as copyrights and similar rights, patents, licences, industrial designs, trademarks, as well as technical processes, know-how, goodwill;
>
> - concessions under the national legislation of the Contracting Party on the territory of which the investment is to be made, including concessions to search for, extract and exploit natural resources, as well as other rights to cany out economic activities under its national legislation.
>
> A subsequent change in the form in which the investments have been made, shall not affect their substance as investments, provided that such a change does not contravene the legislation of the Contracting Party, in the territory of which the investment has been made.
>
> 2. The term "returns" shall mean lawful amounts yielded by an investment, and in particular, though not exclusively, shall include profits, dividends, interests, capital gains, royalties, licence fees, as well as other similar fees.
>
> 3. The term "investors" shall mean:
>
> - natural persons who are citizens of the Federal Republic of Yugoslavia or the Republic of Bulgaria in accordance with the applicable law of the respective Contracting Party;
>
> - juridical persons that are duly registered and constituted under the law of a Contracting Party and have their seat in the territory of the same Contracting Party.

> 4. The term "territory" means the territory under the sovereignty of the Federal Republic of Yugoslavia, on the one hand, and of the Republic of Bulgaria, on the other hand, including the territorial sea, as well as the continental shelf and the exclusive economic zone, over which the respective State exercises sovereign rights and jurisdiction in conformity with its national legislation and the international law."[118]

213. Article 5 of the BIT titled "Expropriation" provides:

> "1. Investments of investors of either Contracting Party, made in the territory of the other Contracting Party, shall not be expropriated or nationalized in the territory of the that other Contracting Party except only by virtue of law, in the public interest, on a non-discriminatory basis and against prompt and adequate compensation.
>
> 2. The compensation shall amount to the fair market value of the expropriated investments immediately before the expropriation or before the impending expropriation has become public knowledge, whichever is earlier. It shall be paid without delay, shall carry an annual rate of interest equal to 12 months LIBOR quoted for the currency the investment was made in, until the date of payment. The payment of such a compensation shall be freely transferable."[119]

214. Article 9 of the BIT titled "Settlement of Disputes between One Contracting Party and an Investor of the Other Contracting Party" provides:

> "1. Disputes between an investor of one of the Contracting Parties and the other Contracting Party concerning the obligations of the latter, arising from this Agreement, in relation to an investment made by an investor of the first Contracting Party, shall be settled, as far as possible, through negotiations.
>
> 2. If the dispute referred in paragraph 1 of this Article cannot be settled within six months of the date when either Contracting Party requested settlement through negotiations, the investor concerned may submit the dispute for settlement to the competent court of the Contracting Party which is party to the dispute.
>
> 3. Instead of resorting to the provisions of paragraph 2 of this Article, the investor concerned may choose, in case of disputes with regard to Articles 5 and 6 of the present Agreement, to submit the dispute for settlement through arbitration to:
>
> - an ad hoc arbitral tribunal according to the Arbitral Rules of the United Nation Commission on International Trade Law (UNCITRAL);
>
> - the International Centre for Settlement of Investment Disputes, in the event that both Contracting Parties are parties to the Convention on the Settlement of

[118] BIT, Article 1 (Exhibit CL-1).
[119] BIT, Article 5 (Exhibit CL-1).

Investment Disputes between States and National of other States, opened for signature at Washington, on 18 March 1965 (ICSID Convention).

4. The award shall be final and binding on both parties to the dispute and shall be enforced in accordance with the legislation of the Contracting Party in whose territory the investment has been made."[120]

[120] BIT, Article 9 (Exhibit CL-1).

VII. DISCUSSION

1. WHETHER CLAIMANT'S CLAIMS ARE ADMISSIBLE?

A. Respondent's Position

215. In its Counter-Memorial and Rejoinder, Respondent argued that Claimant's claims were inadmissible for two reasons - the fork-in-the-road provision in Article 9 of the BIT and time-bar.[121]

216. Respondent advanced four arguments to support its position that Claimant's claims were inadmissible under the fork-in-the-road clause in Article 9 of the BIT. Specifically, Respondent argued that (i) Article 9 of the BIT is a fork-in-the-road clause; (ii) the fork-in-the-road clause applies to disputes with the same fundamental basis; (iii) Claimant previously submitted substantively the same dispute for resolution to the Commercial Court; and (iv) Claimant cannot evade application of Article 9 of the BIT.[122]

217. As for its second argument, Respondent contended that Claimant's claims were inadmissible as time-barred because Claimant allowed nine years to pass between the date on which the claims arose and when it filed its claim. In particular, Respondent argued that Claimant's claims were time-barred both under Serbian law, which applies pursuant to Article 42(1) of the ICSID Convention, and the equitable doctrine of extinctive prescription.[123]

218. Respondent withdrew these allegations in the R-PHB.[124]

B. Claimant's Position

219. In its Reply and Rejoinder on Jurisdiction, Claimant maintained that its claims were admissible.[125]

220. With respect to Respondent's first preliminary objection, Claimant contended that Article 9 of the BIT did not render its claims inadmissible because Article 9 of the BIT is not a fork-in-the-road provision. Alternatively, Claimant argued that even if Article 9 is a fork-in-the-road provision, it would not preclude Claimant's claims.[126]

221. With respect to Respondent's objection relating to time-bar, Claimant advanced three arguments. First, Claimant argued that prescription periods under Serbian law are

[121] Counter-Memorial, at 227-282; Rejoinder, at 89-151.
[122] Counter-Memorial, at 227-276; Rejoinder, at 89-137.
[123] Counter-Memorial, at 277-282; Rejoinder, at 138-151.
[124] R-PHB, at 7.
[125] Reply, at 165-244; Rejoinder on Jurisdiction, at 4-93. Claimant also maintained the position it adopted in its earlier pleadings in its PHB (see C-PHB, at 2).
[126] Reply, at 165-215; Rejoinder on Jurisdiction, at 4-73.

inapplicable to the present proceedings. Second, the international law doctrine of extinctive prescription did not apply to the present proceedings. Third and finally, Claimant contended that even if the doctrine of extinctive prescription was to apply to the present proceedings, Claimant's claims would not be barred because (i) Claimant did not unreasonably delay the presentation of its claim; (ii) Respondent suffered no prejudice as a result of the alleged delay; and (iii) the purported delay was not attributable to Claimant.[127]

C. The Tribunal's Analysis

i. Jurisdiction of the Tribunal

222. Before proceeding to discuss the admissibility objections raised by Respondent in these proceedings, the Tribunal considers it appropriate to touch briefly upon its own jurisdiction.

223. The source of the Tribunal's jurisdiction over the present dispute is the BIT and the ICSID Convention.

224. A plain reading of Article 9 of the BIT (see paragraph 214 above) shows that the following conditions need to be satisfied for a tribunal to have jurisdiction over disputes under the BIT:

- There needs to be a protected "investment" as defined under the BIT;
- The dispute must be between "an investor of one of the Contracting Parties and the other Contracting Party";
- The dispute must concern the obligations of the Contracting Party arising from the BIT, particularly Articles 5 or 6 therein; and
- An attempt must have been made to resolve the dispute through negotiations for six months.[128]

225. Similarly, a perusal of Article 25(1) of the ICSID Convention titled "Jurisdiction of the Centre" shows that the following conditions need to be met for a tribunal to have jurisdiction over disputes under the ICSID Convention:

- There needs to be a "legal dispute" arising directly out of an "investment";
- The dispute must be between "a Contracting State […] and a national of another Contracting State"; and
- The parties to the dispute must "consent in writing" to resolve their dispute under the auspices of the ICSID Convention.[129]

[127] Reply, at 216-244; Rejoinder on Jurisdiction, at 74-93.
[128] BIT, Article 9 (Exhibit CL-1).
[129] ICSID Convention, Article 25 (Exhibit RL-172).

226. For ease of reference, Article 25(1) of the ICSID Convention is reproduced below:

> "(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."[130]

227. In its Request for Arbitration, Claimant argues that all of the above conditions under both the BIT and the ICSID Convention have been satisfied.[131] The Tribunal agrees.

228. First, Claimant has made a protected investment by acquiring a 70% shareholding in Rudnik Kovin and by making further investments pursuant to the Investment Obligation under the Privatization Agreement. These investments made by Claimant satisfy the definition of "investment" under both the BIT (see paragraph 212 above) and the ICSID Convention.

229. Second, Claimant meets the definition of an "investor" under the BIT. "Investor" is defined under the BIT to include "juridical persons that are duly registered and constituted under the law of a Contracting Party and have their seat in the territory of the same Contracting Party" (see paragraph 212 above).[132] Claimant satisfies this definition because it is a juridical person duly registered and constituted under the law of Bulgaria, a contracting party to the BIT, and having a registered office in Sofia, Bulgaria.[133]

230. Third, the present dispute concerns the purported breach of Serbia's, *i.e.*, the other contracting party's obligations under the BIT.

231. Fourth, attempts were made to resolve the dispute through negotiation, albeit unsuccessfully.[134]

232. Fifth, there is a "legal dispute" arising directly out of and in relation to Claimant's investment in Rudnik Kovin and Serbia's obligation under Article 5 of the BIT.

233. Sixth, the dispute is between a "Contracting State and a national of another Contracting State". Both Bulgaria and Serbia and Contracting States to the ICSID Convention.[135]

---

[130] ICSID Convention, Article 25 (Exhibit RL-172).
[131] Request for Arbitration, at 24-33.
[132] BIT, Article 9 (Exhibit CL-1).
[133] Certificate from the Bulgarian Ministry of Justice re Kornikom, 21 December 2018 (Exhibit C-10 produced with the Request for Arbitration).
[134] Letter from Kornikom to the Ministry of Economy and Regional Development, 25 June 2010 (Exhibit C-7 produced with the Request for Arbitration); Letter from Kornikom to the Republic of Serbia, 31 December 2018 (Exhibit C-8 produced with the Request for Arbitration).
[135] See ICSID, Database of ICSID Member States.

As noted above (see paragraph 229 above), Kornikom has Bulgarian nationality. This condition is therefore satisfied.

234. Finally, the Parties have consented in writing to arbitrate the present dispute through Serbia's standing offer to arbitrate under Article 9 of the BIT and Claimant's acceptance thereof in the Request for Arbitration.[136]

235. For all these reasons, the Tribunal is satisfied that it has jurisdiction over the present dispute.

ii. Respondent's objections as to the admissibility of Claimant's claims

236. Although the Tribunal would have ordinarily proceeded to decide this issue and set out its views on the admissibility of Claimant's claims, Respondent has withdrawn these objections in the R-PHB.

237. Specifically, Respondent states in paragraph 7 of the R-PHB:

> "Thus, to resolve this case the Tribunal need only adjudicate Claimant's direct expropriation claim. To aid that process, Respondent hereby withdraws its preliminary objections under the fork-in-the-road clause and the doctrine of extinctive prescription."[137] (Emphasis added)

238. Respondent has also specifically amended its request for relief in the R-PHB to exclude its admissibility objections.[138]

239. Subsequent to Respondent's withdrawal of these preliminary objections, neither Party has insisted that the Tribunal consider these issues any further. In fact, in Claimant's Cost Submissions, Claimant merely requests that the Tribunal take Respondent's withdrawal of these objections into account when allocating costs.[139]

240. In these circumstances, the above mentioned preliminary objections have been rendered moot. The Tribunal, therefore, does not consider it necessary to set out its views on these objections.

[136] Request for Arbitration, at 32.
[137] R-PHB, at 7.
[138] See paragraphs 112 to 114. Compare Respondent's Requests for Relief in its Counter-Memorial and Rejoinder on the one hand and the R-PHB on the other.
[139] Claimant's Cost Submissions, at 7-12.

2. WHETHER THE PRIVATIZATION AGENCY'S CONDUCT IS ATTRIBUTABLE TO SERBIA?

A. Respondent's Position

241. Respondent contends that Claimant's expropriation claim fails at the threshold because the Privatization Agency's conduct is not attributable to Serbia under the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**").[140]

i. The Privatization Agency is not a State organ

242. Respondent contends that the actions of the Privatization Agency are not attributable to Serbia under ILC Article 4 because the Privatization Agency is neither a *de jure* State organ nor a *de facto* State organ but rather an entity that possesses significant financial and management autonomy.[141]

243. According to Respondent, the Privatization Agency is not a *de jure* State organ because it possesses a separate and distinct legal personality under Serbian law.[142]

244. Similarly, the Privatization Agency is not a *de facto* State organ because Claimant cannot meet the standard set out by the ICJ in the Genocide Convention case. In the Genocide Convention case, the ICJ observed that where an entity is not a *de jure* State organ under "internal law", it can be held to be a *de facto* State organ only if the entity acts in 'complete dependence' on the State of which it is ultimately merely the instrument.[143] The ICJ also cautioned that these situations are exceptional because they require proof of a particularly great degree of State control.[144]

---

[140] Counter-Memorial, at 284; Rejoinder, at 153-154; ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 2 (Exhibit CL-18) ("ILC Articles").
[141] Counter-Memorial, at 286.
[142] Counter-Memorial, at 287-288; Rejoinder, at 156-157; Radović_I, at 21; Cvetković-I, at 15; Kornikom's Complaint in the Commercial Court of Belgrade, 30 March 2011 (Exhibit R-2); Law on the Privatization Agency, Article 2(2) (Exhibit RL-148); ILC Articles (Exhibit CL-18); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, at 160 (Exhibit RL-12) ("*Jan de Nul v. Egypt*"); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, at 119 (Exhibit CL-47) ("*Bayindir v. Pakistan*, Award"); *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, (ICSID Case No. ARB/07/24), Award, 18 June 2010, at 184 (Exhibit RL-175) ("*Hamester v. Ghana*"); *EDF (Services) Limited v. Romania*, (ICSID Case No. ARB/05/13), Award, 8 October 2009, at 189–90 (Exhibit RL-176) ("*EDF v. Romania*"); *Mr. Kristian Almås and Mr. Geir Almås v. Republic of Poland*, (PCA Case No 2015-13), Award, 27 June 2016, at 209 (Exhibit RL-177) ("*Almås v. Poland*").
[143] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), ICJ, Judgment, 26 February 2007, at 392-393 (Exhibit RL-173).
[144] Counter-Memorial, at 290-291; Rejoinder, at 158-160; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), ICJ, Judgment, 26 February 2007, at 392-393 (Exhibit RL-173); *Almås v. Poland*, at 207 (Exhibit RL-177); *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, at 9.96 (Exhibit RL-178) ("*Unión Fenosa v. Egypt*"); *Jan de Nul v. Egypt*, at 146, 158-162 (Exhibit RL-12).

245. In the present case, Claimant has not shown that the Privatization Agency was completely dependent on the State or that it was a mere instrument of the State. On the contrary, the evidence suggests that Privatization Agency possessed significant financial and management autonomy and "was structured in a manner designed to ensure its independence and prevent political interference".[145]

246. Looking at financial autonomy first, Respondent points out that numerous tribunals have concluded that financially autonomous entities are not *de facto* State organs. In the present case, the Privatization Agency (i) had its own bank account; (ii) held its funds separate from any government funds; (iii) was responsible for its own budget; (iv) independently disposed of its funds (through its Director) in accordance with the financial plan adopted by its Managing Board; and (v) had its own means of financing its day-to-day operations and was not reliant on any funds from the Serbian government. Referring to the testimony of Mr. Cvetković, the former Director of the Privatization Agency, Respondent submits that the independent source of funding "was critical to ensuring the professionalism and integrity of the Privatization Agency and its employees in conducting the privatization process and to safeguard against interference from any political arm of the government."[146]

247. Second, the Privatization Agency had significant managerial autonomy. It had "full managerial autonomy and discretion" in determining whether buyers had complied with their obligations under the privatization agreements and whether to terminate the agreements. Its employees were employees of the Privatization Agency alone and not employees of the government. Its key decision-makers were the Director, the Managing Board, and the Commission. The Director headed the Privatization Agency's day-to-day operations; the Managing Board had high-level supervisory power over the work of the Privatization Agency; and the Contract Compliance Enforcement Commission (the "**Commission**") was chiefly responsible for determining buyers' compliance with privatization agreements and, in instances of non-compliance, issuing warning notices and notices of termination.[147]

248. Third, Respondent submits that the Ministry of Economy had a limited supervisory role over the Privatization Agency, which did not extend to contract compliance and termination. Respondent refers to the testimony of Professor Radović and Mr. Cvetković in support of its position.[148]

---

[145] Counter-Memorial, at 293; Cvetković-I, at 14.
[146] Counter-Memorial, at 294-296; Cvetković-I, at 17-18; *Almås v. Poland*, at 207, 213 (Exhibit RL-177); Law on the Privatization Agency, Article 2(3) (Exhibit RL-148); *Jan de Nul v. Egypt*, at 161 (Exhibit RL-12); *Hamester v. Ghana*, at 185 (Exhibit RL-175); *Unión Fenosa v. Egypt*, at 9.101 (Exhibit RL-178).
[147] Counter-Memorial, at 297-298; Cvetković-I, at 15-24; Law on the Privatization Agency, Article 15(2) (Exhibit RL-148).
[148] Counter-Memorial, at 301; Cvetković-I, at 23-24; Radović-I, at 21.

249. All in all, Respondent submits that Claimant's submission falls short of satisfying the onerous burden of demonstrating that the Privatization Agency is a *de facto* State organ.[149]

250. Respondent, therefore, maintains that the challenged conduct of the Privatization Agency cannot be attributed to Serbia under ILC Article 4.

ii. The Privatization Agency did not exercise elements of governmental authority in terminating the Privatization Agreement

251. Respondent contends that the actions of the Privatization Agency are not attributable to Serbia under ILC Article 5 because the Privatization Agency did not exercise elements of governmental authority in terminating the Privatization Agreement.

252. According to Respondent, for an act to be attributable to a State under ILC Article 5, "the [challenged] act itself must be completed in the exercise of government authority."[150] In other words, the entity must be "acting in [the governmental] capacity in the particular instance.[151] ILC Article 5, thus, requires the specific challenged conduct be of governmental nature because acts that are "essentially commercial rather than governmental in nature" do not form a basis for attribution.[152]

253. The touchstone of whether the conduct involves an exercise of government authority is therefore whether a private commercial entity could have acted in a similar manner.[153]

254. In the present case, the Privatization Agency's Termination Notice was not an administrative act but rather one of a commercial character. Under Serbian law and court practice, the Privatization Agency's issuance of a notice of termination is an act pursuant to the general law on contracts, *i.e.*, the Law on Obligations, as *lex generalis* and the Law on Privatization as *lex specialis*. The termination mechanism for the Privatization Agreement is therefore the same as that for any type of commercial contract.[154]

---

[149] Counter-Memorial, at 306; *Almås v. Poland*, at 207 (Exhibit RL-177); *Ortiz Construcciones y Proyectos S.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/17/1, Award, 29 April 2020, at 178 (Exhibit RL-180) ("*Ortiz v. Algeria*"); *Unión Fenosa v. Egypt*, at 9.99, 9.107 (Exhibit RL-178); *Hamester v. Ghana*, at 187 (Exhibit RL-175); *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020, at 329 (Exhibit RL-179).
[150] Counter-Memorial, at 311; *Jan de Nul v. Egypt*, at 161 (Exhibit RL-12); *Almås v. Poland*, at 216 (Exhibit RL-177); *Hamester v. Ghana*, at 193 (Exhibit RL-175).
[151] ILC Articles, Article 5 (Exhibit CL-18).
[152] Counter-Memorial, at 312-314; *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, at 52 (Exhibit RL-181); *Hamester v. Ghana*, at 193 (Exhibit RL-175); *Almås v. Poland*, at 219 (Exhibit RL-177); *Jan de Nul v. Egypt*, at 170 (Exhibit RL-12).
[153] Counter-Memorial, at 315; *EDF v. Romania*, at 197 (Exhibit RL-176); *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award, 24 May 2007, at 77 (Exhibit RL-182); *Ortiz v. Algeria*, at 214 (Exhibit RL-180).
[154] Counter-Memorial, at 316-317; Radović-I, at 34, 58-59.

255. There is thus no basis in Serbian law for Claimant to argue that the Privatization Agency's termination of a privatization agreement is an administrative act. This is particularly when both Parties' experts agree that judicial practice has expressly rejected the qualification of notice of termination issued by the Privatization Agency as an administrative act.[155]

256. For all these reasons, Respondent maintains that the Privatization Agency did not exercise any governmental authority when issuing the Termination Notice and therefore, the Privatization Agency's conduct cannot be attributable to Respondent under ILC Article 5.

iii. The Privatization Agency's conduct was not controlled or directed by the State

257. Finally, Respondent argues that the Privatization Agency's conduct cannot be attributed to Serbia under ILC Article 8 because the Privatization Agency's actions were not controlled or directed by the State.[156]

258. Referring to the commentary to ILC Article 8, Respondent suggests that "conduct will be attributable to the State [under ILC Article 8] only if it directed and controlled the specific operation and the conduct complained of was an integral part of that operation".[157] Respondent also refers to *Jan de Nul v. Egypt* and emphasizes that, "[i]nternational jurisprudence is very demanding in order to attribute the act of a person or entity to a State, as it requires both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake."[158]

259. In the present case, Claimant alleges that the Privatization Agreement was terminated at the instance of State by relying on two instances of hearsay, devoid of any details, from Mr. Ivanov – First, Mr. Ivanov (who worked for Claimant) claims that Mr. Dragan Ćirić told him more than ten years ago that he (Mr. Ćirić) had been told by a relative of his that the Privatization Agreement had been terminated at the insistence of the then Serbian Minister of the Economy, Mlađan Dinkić for the benefit of a wealthy local businessman. Second, Mr. Ivanov claims that Mr. Nebojša Ćirić, successor to Mlađan Dinkić, "confirmed to [him] that the termination was directly instigated by Mr. Dinkić".[159]

---

[155] Counter-Memorial, at 318; Radović-I, at 62; Milošević-I, at 66.
[156] Counter-Memorial, at 325.
[157] ILC Articles, Article 8, comment 3 (Exhibit CL-18).
[158] Counter-Memorial, at 327; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America*), ICJ, Judgment, 27 June 1986, at 109, 115 (Exhibit RL-174); *Jan de Nul v. Egypt*, at 173 (Exhibit RL-12).
[159] Counter-Memorial, at 328; Ivanov-I, at 7, 63-64.

260. According to Respondent, the Tribunal should treat this evidence with some skepticism because it is (i) based on hearsay; (ii) is unsupported by any contemporaneous evidence; (iii) incongruent with the facts; and (iv) refuted by the evidence of Mr. Cvetković.[160]

261. Respondent highlights that Rudnik Kovin lingered in a state of extreme financial and operational difficulty for years after termination and has not been reprivatized for anyone's benefit. Moreover, Mr. Cvetković, the former Director of the Privatization Agency who participated in the meeting when the decision to terminate the Privatization Agreement was made, confirms that the Commission's decision was based on (i) Claimant's repeated breaches of the Privatization Agreement and its failure to remedy them; (ii) Rudnik Kovin's veering toward bankruptcy under Claimant's management; (iii) Claimant's failure to comply with the Social Program and pay gross salaries to employees; and (iv) Claimant's serious mismanagement of the business, all of which resulted in Rudnik Kovin's significant financial deterioration. Mr. Cvetković has, in fact, specifically averred that that "the Ministry of the Economy was not involved in and did not attempt to influence any of the Commission's decisions regarding Kornikom as the buyer of Rudnik Kovin."[161]

262. Thus, because the Privatization Agency's Termination Notice was not specifically directed or controlled by the Serbian government, this conduct cannot be attributed to Serbia under ILC Article 8.

B. Claimant's Position

263. Claimant submits that the conduct of the Privatization Agency is attributable to Serbia under the ILC Articles and advances the following three arguments.

i. The Privatization Agency was a State organ and its conduct is attributable to Respondent under ILC Article 4

264. Claimant argues that the conduct of the Privatization Agency is attributable to Serbia under ILC Article 4 because the Privatization Agency was a State organ.

265. According to Claimant, the Privatization Agency's structure and functions show that the Privatization Agency is a State organ. Moreover, all the factors that arbitral tribunals consider when making this assessment, namely, whether the entity exercises core governmental functions, lacks full managerial and financial autonomy, and whether its day-to-day decision-making is supervised by the State support the conclusion that the Privatization Agency was a State organ.[162]

[160] Counter-Memorial, at 329-330.
[161] Counter-Memorial, at 330-331; Cvetković-I, at 20, 37-48.
[162] Reply, at 248.

266. Claimant makes six points in support of attribution under ILC Article 4. They are as below.

267. First, the Privatization Agency "held itself out" as a holder of the State's public powers, and represented that it acted in the name of and on behalf of the State. This is clear from the Privatization Agency's website, its letters and control reports, as well as its submissions in various judicial proceedings including the present case.[163]

268. In Claimant's view, these repeated acknowledgements confirm that the Privatization Agency was a State organ and Respondent should be estopped from claiming otherwise.[164]

269. Second, the Privatization Agency performed a core governmental function, *i.e.*, implementing the privatization process in Serbia and entering into agreements relating to the sale of State property. Claimant refers to the decision in *Awdi v. Romania* and notes that privatization is generally considered to be "an inherently sovereign process".[165]

270. Claimant submits that the governmental nature of the Privatization Agency's actions is reinforced by the fact that (i) upon the dissolution of the Privatization Agency, its key tasks, including the monitoring of contractual obligations, were transferred back to the Ministry of Economy; and (ii) the Privatization Agency's status as a State "body" or organ has been confirmed by the European Court for Human Rights.[166]

271. Third, the "complete dependence" test proposed by Respondent should not be applied in the present case because this test was postulated in the context of paramilitary activity in the time of war. According to Claimant, a limited degree of managerial or financial

---

[163] Privatization Agency's historic web page, 4 February 2012 (Exhibit C-166); Second Control Report (Exhibit R-22); Letter from the Privatization Agency to Kornikom, 12 December 2008 (Exhibit R-33); Privatization Agency's Answer in the Commercial Court of Belgrade, 10 May 2011 (Exhibit R-3); *Uniworld v. Privatization Agency and Srbija-Turist A.D.*, ICC Case No. 14361/AVH/CCO/JRF/GZ, Award, 30 May 2011, at 295, n. 57 (Exhibit CL-4) ("*Uniworld v. Srbija-Turist*").

[164] Reply, at 249; Rejoinder on Jurisdiction, at 98-104; C-PHB, at 35-36; Request for Bifurcation, at 50; Cvetković-I, at 15, 20; Ian Brownlie, Principles Of Public International Law, p.221 (9th ed., 2019) (Exhibit CL-164); D.W. Bowett, *Estoppel before International Tribunals and its Relation to Acquiescence*, 33 BYIL, p.176 (1957) (Exhibit CL-165); A.Newcombe and L. Paradell, Law and Practice of Investment Treaties: Standards Of Treatment, p.526-527 (2009) (Exhibit CL-166); Case Concerning the Temple of Preah Vihear (*Cambodia v. Thailand*), ICJ Rep. 15 June 1962 at 6, 32 (Exhibit CL-167); *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, at 475 (Exhibit CL-41) ("*ADC v. Hungary*"); *Duke Energy Int'l Peru Investments No. 1, Ltd. v. Peru*, ICSID Case No. ARB/03/28, Award, 18 August 2008, at 231 (Exhibit RL-116).

[165] Reply, at 250-253; Rejoinder on Jurisdiction, at 105-112; C-PHB, at 37-38; *Jan de Nul v. Egypt*, at 161 (Exhibit RL-12); *Hamester v. Ghana*, at 184 (Exhibit RL-175); *Almås v. Poland*, at 212 (Exhibit RL-177).

[166] Reply, at 250-253; C-PHB, at 37-38; Milošević-I, at 36-37; C. Kovacs, Attribution In International Investment Law, p.70 (2018) (Exhibit CL-134); *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corp. v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, at 322-323 (Exhibit CL-72); 2015 Amendments to the 2001 Serbian Law on Privatization (Official Gazette of the Republic of Serbia No. 112/2015), Article 31 (Exhibit C-161); *R. Kačapor and others v. Serbia*, Nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, ECtHR, 2008, at 75, 97-98 (Exhibit CL-168); *Zastava It Turs v. Serbia*, No. 24922/12, ECtHR, 2013, at 21 (Exhibit CL-169).

independence should not preclude a finding that the entity is a State organ when there are "many restrictions and forms of governmental control and interference".[167]

272. Fourth, the following points show that the Privatization Agency did not operate with "full managerial autonomy and discretion":

- The Commission was created and chaired by the Director of the Privatization Agency who was appointed and dismissed by the State and over whom Respondent wielded significant control. All employees of the Privatization Agency were subordinated to the Director.[168]

- The managerial autonomy of the Privatization Agency purportedly "guaranteed by Article 4(2) of the 2005 Law on Public Agencies" does not expressly apply to the Privatization Agency because it was created by a bespoke statute.[169]

- Respondent has confirmed in its pleadings that employees of the Privatization Agency were indeed government employees.[170]

- The Ministry of Economy was able to issue instructions to the Privatization Agency and actually exercised this power.[171]

- The Privatization Agency was required by statute to send to the Ministry regular reports on its activities, including on deficiencies identified during the control procedure.[172]

273. Similarly, the following features show that the Privatization Agency lacked "significant financial autonomy":[173]

[167] Reply, at 254; Rejoinder on Jurisdiction, at 113-119; *Flemingo Duty Free Shop Private Ltd. v. Republic of Poland*, UNCITRAL, Award, 12 August 2016, at 50, 425-435 (Exhibit CL-31) ("*Flemingo v. Poland*").
[168] Reply, at 255-257; C-PHB, at 39; Vučković-I, at 9; Milošević-I, at 33; Milošević-II, at 37; 2001 Law on the Privatization Agency, Articles 12(2), 15(1) (Exhibit C-167); Decision on appointment of Mr. Galić as director of Privatization Agency, 7 December 2006 (Exhibit C-300); Decision on dismissal of Mr. Galić as director of Privatization Agency, 25 May 2007 (Exhibit C-301); Decision on appointment of Mrs. Džinić as director of Privatization Agency, 31 October 2007 (Exhibit C-302); Decision on appointment of Mr. Cvetković as director of Privatization Agency, 30 November 2009 (Exhibit C-303); Centre for Investigative Journalism of Serbia, "'At personal request' they left the Agency", 25 August 2010 (Exhibit C-304); Statute of the Privatization Agency, 1 August 2006 (Official Gazette of the RoS, No.: 38/2001) (Exhibit C-342); *Flemingo v. Poland*, at 430 (Exhibit CL-31); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, at 405 (Exhibit CL-170) ("*Deutsche Bank v. Sri Lanka*"); *InterTrade Holding GmbH v. The Czech Republic*, PCA Case No. 2009-12, Separate Opinion of Arbitrator Alvarez, 7 June 2012, at 4 (Exhibit CL-171).
[169] Reply, at 256; Milošević-II, at 32; 2001 Law on the Privatization Agency (Exhibit C-167); 2005 Serbian Law on Public Agencies (Official Gazette of the Republic of Serbia No. 18/2005, 81/2005), Article 57 (Exhibit C-165).
[170] Reply, at 258.
[171] Reply, at 259; Milošević-II, at 18-20.
[172] 2001 Law on the Privatization Agency, Articles 11, 18 (Exhibit C-167).
[173] Rejoinder on Jurisdiction, at 120-125; C-PHB, at 40.

- The initial funds for establishment of the Privatization Agency were provided from the State budget.[174]

- Following the dissolution of the Share Fund in 2010, the Privatization Agency derived income from "commissions from the sale of shares and/or stakes owned by the Agency, *i.e.* shares and/or stakes that constitute the assets of the institution dealing with activities of the Shareholder Fund." Claimant submits that the amount of such commission was prescribed by a Government Minister, and the balance of the sales proceeds (after deduction of costs and the commission prescribed by statute) went to the State budget.[175]

- Respondent was jointly and severally liable for damages in the event of the Privatization Agency's default.[176]

- The Privatization Agency's Managing Board was appointed by the State and its financial plan required the consent of the government.[177]

- After settling certain specified costs, all revenue acquired by the Privatization Agency pursuant to the sale of privatized assets had to be transferred to the State budget to finance programs for the development of the Serbian economy.[178]

274. Thus, Claimant submits that not only was the Privatization Agency dependent on Respondent's decision-making for its income, but its income was eventually transferred back to the State budget.[179]

275. Finally, Claimant submits that the Ministry of Economy played a "central role" in the privatization process, exercising broad supervisory powers over the Privatization Agency's conduct both directly and indirectly. By way of example, Claimant points out that in the case of the company BD AGRO, the Ministry of Economy supervised the tasks of the Privatization Agency (as a holder of public power) pursuant to Articles 46 and 47 of the Law on State Administration. It issued a report and instructed the Privatization Agency to send the buyer a warning notice advising it of the alleged non-compliance with its privatization agreement. It also advised the Privatization Agency to take steps if the buyer failed to provide proof of compliance. The Privatization Agency

[174] Reply, at 262; Milošević-I, at 32; 2001 Law on the Privatization Agency, Article 5(1) (Exhibit C-167).
[175] Reply, at 263; Milošević-I, at 32; Milošević-II, at 17, 34-35, 92; 2001 Serbian Law on the Privatization Agency (Official Gazette of the Republic of Serbia No. 38/2001, 135/2004, 30/2010), Article 5(2)(a) (Exhibit C-163); Law on Privatization, Article 41b(4) (Exhibit C-144).
[176] Reply, at 264; Milošević-II, at 31; 2009 Serbian Bankruptcy Law (Official Gazette of the Republic of Serbia, No. 104/09, 99/2011 – as amended, 71/2102 – Constitutional Court Ruling, 83/2014, 113, 2017, 44/2018 and 95/2018), Article 14 (Exhibit RL-40).
[177] Reply, at 265; 2001 Law on the Privatization Agency, Article 13(3) (Exhibit C-167).
[178] Reply, at 266; Milošević-I, at 32; Law on Privatization, Articles 41b(2), 60 and 61 (Exhibit C-144); 2002 Serbian Law on the Budget System (Official Gazette of the Republic of Serbia No. 9/202, 87/2002, 61/2005, 101/2005, 62/2006, 63/2006, 85/2006, 86/2006), Articles 2(1) and (37) (Exhibit C-168).
[179] Reply, at 266.

complied with those instructions and, in issuing a notice of termination, indicated that its actions were pursuant to the Ministry of Economy's report.[180]

276. For all these reasons, Claimant submits that the Privatization Agency's conduct is attributable to Respondent because it is a *de facto* State organ within the meaning of ILC Article 4.

ii. The Privatization Agency was exercising governmental authority and its conduct is attributable to Respondent under ILC Article 5.

277. Alternatively, Claimant submits that the Privatization Agency's conduct is attributable to Respondent because it was exercising governmental authority when it terminated the Privatization Agreement with Claimant.[181]

278. According to Claimant, the question of attribution under ILC Article 5 requires a two-step analysis. First, it requires an initial assessment of whether there is delegated governmental authority. Thereafter, a tribunal must consider whether the entity exercised that authority in the specific instance at issue,[182] with context being important.[183]

279. In the present case, Claimant maintains that both conditions are satisfied. As for the first question, *i.e.*, whether the Privatization exercised governmental authority generally, Claimant submits that this is borne out from the fact that the Privatization Agency was empowered by statute to privatize State-owned entities. Claimant argues that this is an inherently sovereign process and a core State function. Specifically, the Privatization Agency was required to implement the privatization process by, among other things, concluding privatization agreements, monitoring compliance and terminating them in the event of non-compliance.[184]

---

[180] Reply, at 267-268; Rejoinder on Jurisdiction, at 126-132; C-PHB, at 41; Milošević-I, at 35; Milošević-II, § II.B.1; 2001 Law on the Privatization Agency, Articles 10, 11, 18(2) (Exhibit C-167); Serbian Law on the State Administration (Official Gazette of the Republic of Serbia No. 79/2005, 101/2007), Article 19 (Exhibit C-159); Report on the supervision over the activities of the Privatization Agency in the privatization case of the company "BD AGRO", 7 April 2015, p.13 (Exhibit C-310); Termination Notice in the privatization case of the company "BD AGRO", 1 October 2015, p.2 (Exhibit C-311).

[181] Reply, at 270; Rejoinder on Jurisdiction, at 133-152; C-PHB, at 42.

[182] Reply, at 273; G. Petrochilos, *Attribution: State Organs and Entities Exercising Elements of Governmental Authority in* K. Yannaca-Small (Ed.), Arbitration Under International Investment Agreements: A Guide to The Key Issues, p.352 (2nd ed., 2018) (Exhibit CL-163).

[183] Reply, at 273; Rejoinder on Jurisdiction, at 133-139; C-PHB, at 43; *Flemingo v. Poland*, at 436 (Exhibit CL-31); *Bosh Int'l, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, at 173 (Exhibit CL-172); *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, at 335 (Exhibit CL-173).

[184] Reply, at 274; C. Kovacs, Attribution in International Investment Law, p.70 (2018) (Exhibit CL-134); G. Petrochilos, *Attribution: State Organs and Entities Exercising Elements of Governmental Authority in* K. Yannaca-Small (Ed.), Arbitration Under International Investment Agreements: A Guide to The Key Issues, p.351-352 (2nd ed., 2018) (Exhibit CL-163).

280. As for the second question, *i.e.*, whether the Privatization Agency was exercising governmental authority when it terminated the Privatization Agreement, Claimant submits that this is indeed the case for the following reasons:

- Only the Privatization Agency, acting under its delegated governmental authority to manage privatizations, could enter into – and terminate – privatization agreements.[185]

- Privatization agreements are *sui generis* and are distinct from ordinary commercial contracts in that they have a social / development component. This has been acknowledged by Respondent in its pleadings. It has also been recognised by Serbian courts.[186]

- Unlike in an ordinary commercial contract, the Privatization Agency had the statutory power to terminate the contract and to transfer an entity's capital and shares unilaterally back to itself, in a way that no private contract party could do.[187]

281. As a last point, Claimant submits that it is not necessary for the termination of a privatization agreement to be formally classified as an administrative act under Serbian law for it to be considered the exercise of delegated governmental authority under ILC Article 5.[188]

282. For all of these reasons, Claimant argues that the Privatization Agency's challenged conduct is attributable to Serbia under ILC Article 5 because the Privatization Agency exercised governmental authority when undertaking the actions challenged in this arbitration.

iii. The Privatization Agency's conduct was controlled or directed by Respondent and is therefore attributable to Respondent under ILC Article 8.

283. Alternatively, Claimant argues that the Privatization Agency's conduct is attributable to Respondent under ILC Article 8 because the Privatization Agency's impugned conduct was instructed, directed or controlled by the Ministry of Economy. Specifically, Claimant contends that the Ministry of Economy directed the Privatization Agency to terminate the Privatization Agreement for pretextual reasons, in line with its terminations of dozens of other privatization agreements.[189]

---

[185] Reply, at 277; C-PHB, at 43.
[186] Reply, at 278-279; Milošević-I, at 48-51; Milošević-II, at 42-52; *Uniworld v. Srbija-Turist*, at 295 (Exhibit CL-4); S. Spasic, *Practice of Commercial Courts in Disputes for Termination of Agreements on Sale of Socially Owned Capital* (2006), p.4 (Exhibit C-179); Decision of the Higher Commercial Court (Pž. 6463/2007), 8 December 2008 (Exhibit C-183).
[187] Reply, at 280-282; C-PHB, at 45; Milošević-I, at 126, 129-130; Milošević-II, at 131-139, § III.C.; Law on Privatization, Article 41a(3) (Exhibit C-144).
[188] Reply, at 283; C-PHB, at 44, 46.
[189] Reply, at 285; Rejoinder on Jurisdiction, at 153-163.

284. Claimant advances the following arguments in support of its position.

285. First, the "effective control" test applied by Respondent is incorrect. This is because the "effective control" test was developed in the *Nicaragua* case to determine whether conduct was attributable under ILC Article 8 in the context of foreign armed interventions or international criminal responsibility and not in the context of international economic law.[190]

286. According to Claimant, the Tribunal should adopt a flexible approach, where it considers all factual circumstances and surrounding context to determine whether the Privatization Agency's conduct in question was carried out under the instructions, direction or control of Respondent.[191]

287. Second, Claimant argues that the termination of the Privatization Agreement was pretextual and was at the instance of the Serbian Minister of the Economy, Mlađan Dinkić, following pressure from a wealthy local businessman, Mr. Miodrag Kostic. Claimant relies on the testimony of Mr. Ivanov in support of this position.[192]

288. Claimant submits that Mr. Ivanov's testimony should be accepted because (i) the Ministry of Economy's power to supervise the privatization process extended to issuing instructions to the Privatization Agency; (ii) the Ministry did, in fact, exercise this power to order termination of privatization agreements; and (iii) there was no justifiable reason for the termination of the Privatization Agreement.[193]

289. As for Respondent's contention that it did not benefit from the termination and, thus, that act could not have been directed by it, Claimant argues that this is not borne out by the facts. The record shows that Respondent sought to re-privatize Rudnik Kovin shortly after terminating the Privatization Agreement and has recently taken steps to that effect. The fact that Respondent's initial attempt to re-privatize Rudnik Kovin failed does not assist it. To the contrary, the fact that Respondent immediately sought to profit from the termination of the Privatization Agreement is further evidence that Respondent directed, instructed, or controlled the Privatization Agency's termination decision.[194]

290. As a last point, Claimant submits that the fact that Respondent's Mr. Cvetković attempts to justify the termination by providing reasons which were not set out in the contemporaneous Termination Notice illustrates the pretextual nature of the termination and further supports the finding that Respondent directed, instructed or controlled the termination.[195]

---

[190] Reply, at 286; C-PHB, at 47; *Bayindir v. Pakistan*, Award, at 130 (Exhibit CL-47).
[191] Reply, at 288; ILC Articles, Article 8, comment 5 (Exhibit CL-18).
[192] Memorial, at 163-164; Reply, at 289-291; C-PHB, at 47; Ivanov-I, at 62-64.
[193] Reply, at 291; C-PHB, at 47; Milošević-II, at 19-22.
[194] Reply, at 159, 292; C-PHB, at 48.
[195] Reply, at 293; Cvetković-I, at 20, 37-48.

291. For all these reasons, Claimant contends that the Privatization Agency was instructed, directed or controlled by the State in terminating Claimant's Privatization Agreement and its conduct is therefore attributable to Serbia within the meaning of ILC Article 8.[196]

C. The Tribunal's Analysis

292. The Parties' pleadings show that they disagree on whether the conduct of the Privatization Agency is attributable to Serbia.

293. In Respondent's PHB, it argues that the Tribunal need not enter into the question of attribution if the Tribunal finds that the Privatization Agency was acting as a contracting party. Specifically, Respondent notes:

> "Respondent […] submits that the Tribunal need not, as a threshold matter, determine whether the Privatization Agency's conduct as a whole is attributable to Serbia. That question is irrelevant if the Tribunal concludes – as the hearing demonstrated – that the Privatization Agency was acting as a contracting party."[197]

294. The Tribunal agrees with Respondent. As more particularly set out in the Tribunal's analysis of Claimant's expropriation allegations below, the Tribunal finds Claimant's expropriation claim to be lacking merit even if the conduct of the Privatization Agency as whole was attributable to Serbia.

295. The Tribunal, therefore, does not consider it necessary to analyze this question but will assume for the purpose of Claimant's expropriation claims that the actions of the Privatization Agency were indeed attributable to Serbia.

[196] Reply, at 294.
[197] R-PHB, at 7.

3. WHETHER SERBIA UNLAWFULLY EXPROPRIATED CLAIMANT'S INVESTMENT IN RUDNIK KOVIN?

A. Claimant's Position

296. Claimant argues that Serbia, acting principally through the Privatization Agency, "arbitrarily and unlawfully" obstructed Kornikom's operation of Rudnik Kovin, terminated the Privatization Agreement, and deprived Kornikom of its investments. According to Claimant, these "arbitrary and unlawful" actions violated Serbia's obligation under Article 5 of the BIT to refrain from unlawfully expropriating Kornikom's investments.[198]

i. Article 5 of the BIT prohibits Serbia from expropriating Claimant's investment

297. According to Claimant, Article 5 of the BIT prohibits Serbia from expropriating investments of Bulgarian investors except where the following four conditions are cumulatively met: the expropriation is carried out: (i) by virtue of law, (ii) in the public interest, (iii) on a non-discriminatory basis, and (iv) against prompt and adequate compensation.[199]

298. As for what this prohibition of expropriation or nationalization encompasses, Claimant submits that it includes the following situations:

- Direct expropriation, *i.e.*, when the investor's investment is taken through formal transfer of title or seizure.[200]

- Indirect expropriation, *i.e.*, when the State takes measures that interfere with an investor's operation or use of the investment to such an extent that it is rendered valueless. Claimant points out that this may take one step or several steps and may be effectuated by the State's actions or omissions. But like direct expropriation, it has the effect of depriving an investor of all or a substantial part of its investment.[201]

---

[198] Memorial, at 176.

[199] Memorial, at 177-178; BIT, Article 5 (Exhibit CL-1). *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, at 716 (Exhibit CL-6) ("*Crystallex Int. v. Venezuela*").

[200] Memorial, at 179; *Crystallex Int. v. Venezuela*, at 667 (Exhibit CL-6); *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, at 200 (Exhibit CL-10).

[201] Memorial, at 180; R. Dolzer and C. Schreuer, Principles of International Investment Law (2012) (Extract), p.101, 118 (Exhibit CL-13); ILC Articles, Article 2 (Exhibit CL-18); A. Newcombe and L. Paradell, Chapter 7 – Expropriation, in Law and Practice of Investment Treaties: Standards of Treatment (2009), p.337 (Exhibit CL-19); *National Grid plc v The Argentine Republic*, UNCITRAL, Award, 3 November 2008, at 144-153 (Exhibit CL-14); *Caratube Int'l Oil Co. LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, at 822 (Exhibit CL-15) ("*Caratube v. Kazakhstan*"); *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, at 103 (Exhibit CL-16) ("*Metalclad v. Mexico*"); *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, at 438 (Exhibit CL-17) ("*Parkerings v. Lithuania*"); *Pope & Talbot Inc. v. The Government of Canada*, NAFTA, UNCITRAL, Interim Award, 26 June 2000, at 102 (Exhibit CL-20) ("*Pope &*

- "Creeping" expropriation (a form of indirect expropriation), *i.e.*, where the State deprives an investor of his investment through an incremental process made up of a series of acts which may or may not constitute unlawful acts independently, but which, cumulatively, are expropriatory in their nature and effect.[202]

299. Claimant also makes three further observations regarding expropriation under Article 5, which it considers relevant to its case. First, it is possible for an indirect (or creeping) expropriation to take place before a direct expropriation.[203] Second, it is not necessary for the State to take possession of an investor's property or benefit from the taking for an expropriation to occur. Rather, it is the adverse effect on the investor that is relevant.[204] Finally, the termination of a contract can amount to expropriation.[205]

ii. Serbia expropriated Claimant's investments

300. Claimant submits that Serbia expropriated its investments through a series of actions and omissions including the termination of the Privatization Agreement and the transfer of Claimant's share capital in Rudnik Kovin and Rudnik Kovin's Treasury Shares to the Privatization Agency.[206] Specifically, Claimant highlights four expropriatory actions taken by Respondent as below.

a. Serbia privatized Rudnik Kovin in a manner that made Claimant's performance of the Privatization Agreement more burdensome than it otherwise would have been

---

Talbot v. Canada"); *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, 21 November 2007, at 240 (Exhibit CL-21) ("*Archer Daniels v. Mexico*"); *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, at 65 (Exhibit CL-22) ("*Telenor v. Hungary*").

[202] Memorial, at 181; R. Dolzer and C. Schreuer, Principles of International Investment Law (2012) (Extract), p.125-126 (Exhibit CL-13); *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, at 688, 708 (Exhibit CL-23) ("*Rumeli Telekom v. Kazakhstan*").

[203] Memorial, at 182; *GPF GP S.à.r.l v. Republic of Poland* [2018] EWHC 409 (Comm), Judgment of the High Court of Justice of England and Wales, 2 March 2018, at 113-117 (Exhibit CL-24); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017, at 951 (Exhibit CL-25) ("*Teinver v. Argentina*"); *Crystallex Int. v. Venezuela*, at 708-709 (Exhibit CL-6); *Abengoa S.A. y COFIDES S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013, at 578-610 (Exhibit CL-26) ("*Abengoa S.A. v. Mexico*"); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, at 271 (Exhibit CL-27) ("*Siemens v. Argentina*").

[204] Memorial, at 186; *Metalclad v. Mexico*, at 103 (Exhibit CL-16); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, at 113 (Exhibit CL-28) ("*Tecmed, S.A. v. Mexico*"); *Rumeli Telekom v. Kazakhstan*, at 707 (Exhibit CL-23); *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009, at 117-118 (Exhibit CL-29).

[205] *European Media Ventures SA v. Czech Republic*, UNCITRAL, Partial Award on Liability, 8 July 2009, at 84 (Exhibit CL-30) ("*European Media v. Czech Republic,* Partial Award on Liability"); *Caratube v. Kazakhstan*, at 938 (Exhibit CL-15); *Flemingo v. Poland*, at 593 (Exhibit CL-31); *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016, at 6.64-6.69 (Exhibit CL-32) ("*Copper Mesa v. Ecuador*"); *SAUR Int'l S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, at 391-392 (Exhibit CL-11) ("*SAUR Int'l S.A. v. Argentina*, Decision on Jurisdiction and Liability").

[206] Memorial, at 191.

301. First, Claimant contends that Serbia privatized Rudnik Kovin in a manner that made Claimant's performance of the Privatization Agreement more burdensome than it would have been.[207] Claimant refers to the following facts in support of its position:

- Serbia auctioned and sold Rudnik Kovin to Claimant without authorizations, permits, and rights to land necessary to operate the mine, *i.e.*, the Company's key asset.[208]

- Although these deficiencies should have been disclosed to Claimant prior to its acquisition of Rudnik Kovin, they were not. On the contrary, the Privatization Program set out Rudnik Kovin's production and sales for the years leading to the privatization and gave a clear impression that the Kovin Mine could continue its operations in the post-privatization period without any legal impediment.[209]

- The issue regarding the lack of authorizations came to the fore only when Rudnik Kovin sought to obtain a permit for a coal separation machine that Claimant had purchased, and Respondent advised Rudnik Kovin that it lacked authorization to operate the Kovin Mine. Claimant points out that this was nearly 20 years after Rudnik Kovin began operations and more than 4 years after Claimant acquired Rudnik Kovin.[210]

- As Claimant and Rudnik Kovin sought to fix these issues relating to the lack of authorizations, Claimant learnt that Serbia, acting through EPS, had failed to properly convey the right to use the land on which the Kovin Mine was situated. This was despite Respondent's affirmations prior to Rudnik Kovin's privatization that EPS contributed in-kind the right to use the land to Rudnik Kovin.[211]

302. According to Claimant, the absence of these permits and rights impeded Rudnik Kovin's operation of the Kovin Mine and hampered Claimant's performance of the Privatization Agreement. This is because significant time and resources had to be devoted to overcoming these shortcomings and Respondent did not provide any assistance. Claimant submits that these actions amount to a "covert or incidental interference with the use of property which has the effect of depriving the owner, in

[207] Memorial, at 192.
[208] Memorial, at 192, § II.D.2.
[209] Memorial, at 193; Privatization Program, p.8-10 (Exhibit C-71).
[210] Memorial, at 193, § II.D.2; Goranov-I, at § IV; Kacharov-I, at 25-26; Ivanov-I, at 30; Letter from Rudnik Kovin to the Privatization Agency, 4 May 2010 (Exhibit C-51); Letter from Kornikom to the Privatization Agency, 20 May 2010 (Exhibit C-11).
[211] Memorial, at 194; Reply, at 310; Real Estate Cadastre Office Kovin decision rejecting Rudnik Kovin's request, 4 September 2009, p.3 (Exhibit C-58); Letter from EPS to Rudnik Kovin, 30 November 2009 (Exhibit C-56); Privatization Program, Article 1.1 (Exhibit C-71); Serbian Land Registry Extract, 5 December 2006 (Exhibit C-246).

whole or in significant part, of the use or reasonably-to-be-expected economic benefit of its investment."[212]

b. Serbia made the process of curing the difficulties it had caused more cumbersome

303. Second, Serbia impeded Claimant's efforts to cure the various difficulties it had caused to Claimant.[213] Claimant refers to the following actions of Serbia in support of its position:

- Whereas, on the one hand, Serbia (acting through the Privatization Agency) repeatedly requested Claimant to furnish a permit for the coal separation machine, the Vojvodina Energy Secretariat, on the other hand, refused to issue the said permit on the grounds that the Privatization Agency had auctioned Rudnik Kovin to Claimant without the necessary authorizations and the right to use the land. As a result, Claimant was put in a position where the Vojvodina Energy Secretariat and the Kovin Office for Real Estate Cadastre (the "**Cadastre Office**") refused to issue the permit for the coal separation machine, while the Privatization Agency ignored Claimant's and Rudnik Kovin's explanations and pleas for assistance.[214] Claimant points out that the operating permit was only granted to Rudnik Kovin one day before Respondent terminated the Privatization Agreement, and the land registration problem remained unresolved as of the termination.[215]

- Second, immediately after Claimant's acquisition of Rudnik Kovin, all of Respondent's State-owned TPPs refused to continue buying coal from Rudnik Kovin. This was despite the TPPs' continued need for coal and despite it being far more logistically convenient and, thus, inexpensive, for them to purchase coal from Rudnik Kovin. This was also contrary to the projections of demand in the Privatization Program.[216]

304. According to Claimant, this conduct of the TPPs was "not only internally inconsistent, misleading, and contrary to its own prior conduct, but […] was biased, and resulted in

[212] Memorial, at 195-196; Reply, at 301; Goranov-I, at § IV; *Metalclad v. Mexico*, at 103 (Exhibit CL-16).
[213] Memorial, at 197-200.
[214] Memorial, at 197, § II.D.2; Reply, at 302, 310; Goranov-I, at 19-31; Letter from the Privatization Agency to Kornikom and Rudnik Kovin, 12 December 2008 (Exhibit C-247); Letter from the Privatization Agency to Kornikom and Rudnik Kovin, 28 April 2009 (Exhibit C-248); Letter from the Privatization Agency to Kornikom and Rudnik Kovin, 15 September 2009 (Exhibit C-249); Letter from the Privatization Agency to Kornikom, 18 March 2010 (Exhibit C-195); Letter from Rudnik Kovin to the Privatization Agency, 4 May 2010, p.1 (Exhibit C-51); Letter from Kornikom to the Privatization Agency, 20 May 2010, p.1 (Exhibit C-11); Minutes of Kornikom and Rudnik Kovin Working Meeting, 30 June 2009, at 1-2 (Exhibit C-5); Minutes of Kornikom and Rudnik Kovin Working Meeting, 20 January 2009 (Exhibit C-3); Letter from Kornikom to the Privatization Agency, 18 September 2009 (Exhibit C-49); Letter from EPS to Rudnik Kovin, 29 September 2009 (Exhibit C-54); Letter from EPS to Rudnik Kovin, 30 November 2009 (Exhibit C-56); Letter from Kornikom to the Privatization Agency, 12 February 2010 (Exhibit C-50).
[215] Reply, at 311.
[216] Memorial, at 198; Kacharov-I, § VI; Privatization Program, p.9 (Exhibit C-71).

a legal and business environment in which [Claimant], through Rudnik Kovin, faced mounting hostility and financial difficulties in operating the Kovin Mine."[217]

305. Claimant submits that tribunals have found similar behavior to be expropriatory in the past.[218] However, even assuming that this conduct did not, in and of itself, amount to an unlawful expropriation, Claimant argues that it is beside the point for the purposes of establishing creeping expropriation.[219]

306. In the present case, the lack of permits and land use rights required Claimant and Rudnik Kovin to operate on temporary permits, whilst expending significant time and effort to obtain the relevant documents. This caused Claimant difficulties in operations and delays to the works at the mine.[220]

307. Similarly, the refusal of the State-owned TPPs to purchase Rudnik Kovin's coal also caused Claimant difficulties. Claimant had envisaged that the TPPs would purchase coal from Rudnik Kovin, pursuant to representations made in the Privatization Program as well as by senior officials from EPS and Rudnik Kovin. Claimant therefore implemented changes to Rudnik Kovin's production program in order to increase the volume and quality of Rudnik Kovin's pea-sized coal so that the TPPs could be supplied coal. The Serbian TPPs, however, refused to purchase Rudnik Kovin's coal. Claimant was therefore constrained to rely on logistically inconvenient sales outside of Serbia and more seasonal sales to individual and industrial customers, which went against its business plan.[221]

c. The Privatization Agency wrongfully terminated the Privatization Agreement on 11 June 2010

308. Third, Claimant submits that the Privatization Agency wrongfully declared the Privatization Agreement terminated on 11 June 2010. According to Claimant, the termination of the Privatization Agreement for Claimant's purported breaches of the Core Activity and Social Program Obligations was unlawful, disproportionate, and lacked good faith.[222]

309. With respect to the Privatization Agency's termination of the Privatization Agreement for Claimant's purported breach of the Core Activity Obligation, Claimant makes the following submissions.

---

[217] Memorial, at 199; Kacharov-I, at 46; Goranov-I, at 19.
[218] Memorial, at 200; *Abengoa S.A. v. Mexico*, at 598, 610 (Exhibit CL-26); *Siemens v. Argentina*, at 254-260 (Exhibit CL-27); *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, at 103 (Exhibit CL-33) ("*Feldman v. Mexico*").
[219] Reply, at 300; *Abengoa S.A. v. Mexico*, at 610 (Exhibit CL-26); *Siemens v. Argentina*, at 262-266, 271 (Exhibit CL-27); *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, at 455 (Exhibit CL-59); *Crystallex Int. v. Venezuela*, at 668-672 (Exhibit CL-6).
[220] Reply, at 301-303; Minutes of Kornikom and Rudnik Kovin Working Meeting, 30 June 2009 (Exhibit C-5).
[221] Reply, at 304; Kacharov-I, at 50.
[222] Memorial, at 201-202, §§ II.F.1-II.F.2; Milošević-I, at 12.

310. First, the termination of the Privatization Agreement on this ground was untimely. Clause 5.3.2 of the Privatization Agreement (see paragraph 148 above) prescribed that the Core Activity Obligation would expire three years after the date of the signing of the agreement. Given that the Privatization Agreement was signed on 23 April 2007, the Core Activity Obligation expired on 23 April 2010. Respondent's termination of the Privatization Agreement on 11 June 2010 on this ground was therefore unlawful.[223]

311. Alternatively, even assuming that termination was timely, the termination was still wrongful under Serbian law because Claimant satisfied the Core Activity Obligation. Rudnik Kovin continued to carry out its core activity, namely, extracting and briquetting lignite and continued to produce coal for the relevant time period. This was in fact acknowledged by the Privatization Agency, which noted, among other things, that Rudnik Kovin had (i) increased its income from its core activity, (ii) increased the number of employees (from 103 to 132), and (iii) complied with its obligations in respect of staff training, bonuses and labor disputes.[224]

312. Respondent, however, interpreted the Core Activity Obligation in a much broader and arbitrary manner that went beyond what was stipulated in the Privatization Agreement and the Law on Privatization. It did so by placing emphasis on factors such as Claimant's blocked bank accounts.[225]

313. Claimant argues that this was incorrect because the fact that Rudnik Kovin's bank accounts were blocked for some time did not prevent it from performing its core activity. Rather, as pointed out above, Rudnik Kovin managed to increase its profits and the levels of employment. Moreover, and in any event, this issue was addressed at the time of the termination of the Privatization Agreement because Claimant was in negotiations with Banca Intesa to lift the blockage of its accounts and the Privatization Agency was aware of these negotiations. The Privatization Agency however chose to disregard this information and nevertheless terminate the Privatization Agreement.[226]

314. Claimant submits that the abovementioned actions show that Respondent did not act in good faith as mandated by the Serbian Law on Obligations. Its actions were not proportionate either, contrary to the requirements of the Serbian Constitution. For these

[223] Memorial, at 203, § II.F.1; Reply, at 315-319; Milošević-I, § IV.B.2; Milošević-II, at 101-104; Cvetković-I, at 34; Lepetić, at 105; Ninth Control Report, p.7 (Exhibit C-42); Privatization Agreement, Clauses 5.3.2, 8.2 (Exhibit C-1); Law on Privatization, Article 41a (Exhibit C-144); Letter from the Privatization Agency to Kornikom, 18 March 2010 (Exhibit C-195).
[224] Memorial, at 204, § II.F.1(a); Reply, at 325-326; Letter from Kornikom to the Privatization Agency, 20 May 2010, p.4 (Exhibit C-11); Ninth Control Report, p.5, 15 (Exhibit C-42); Milošević-I, at 71; Law on Privatization, Article 2, p.1 (Exhibit C-144).
[225] Reply, 321, 323-324; Judgment of the Commercial Appellate Court Pž 504/2020, 2 July 2020, at 4 (Exhibit C-325).
[226] Memorial, at 205-206; Reply, at 322; Milošević-I, at 81; Goranov-I, at 16-18, 43; Goranov-II, at 12; Kacharov-I, at 72-75, 81; Kacharov-II, at 18-19; Versant-I, at 74.

reasons, Claimant maintains that Respondent's termination of the Privatization Agreement on this ground was unlawful.[227]

315. In a similar vein, Claimant argues that the termination of the Privatization Agreement for its purported failure to perform the Social Program Obligation was unlawful. Claimant makes the following arguments in support of its position.

316. First, Article 41a(1)(6) of the Law on Privatization upon which the Privatization Agency relied in issuing the Termination Notice did not require Claimant to pay taxes and contributions on employees' salaries. It simply required Claimant to "provide means for resolving the issues of the employees."[228] According to Claimant, one way to provide such means was to put in place an individual bargaining agreement. Claimant did exactly that. It ensured that the individual bargaining agreement that was in place in 2006 remained in force. Claimant therefore discharged its obligation under Article 41a(1)(6).[229]

317. Second, the Privatization Agency did not indicate which proviso of the Social Program was not complied with when it stipulated in the Termination Notice that Claimant "failed to provide proof of […] compliance with the Social Program." Claimant points out that the Social Program (included in Annex I to the Privatization Agreement) comprised five titles, none of which stipulated that Claimant was obliged to ensure that taxes and contributions on Rudnik Kovin's employees' salaries were paid.[230]

318. The fact that neither Annex 1 to the Privatization Agreement nor the Law on Privatization expressly obliged Claimant to ensure that gross salaries (or net salaries, for that matter) were paid is borne out from the fact that in 2007, Respondent amended the Law on Privatization to impose a new obligation on buyers. Specifically, the newly-enacted Article 41a(6a), which entered into force in 2008, provided that the Privatization Agency could terminate a privatization agreement if a buyer failed to ensure that the privatization subject paid salaries, taxes and contributions "for [a] period of at least nine months during a calendar year".[231] Claimant submits that this provision did not apply to the Privatization Agreement because it post-dated the agreement and had no retroactive effect.[232]

319. Third, even assuming that an obligation to ensure the payment of taxes and contributions on employees' salaries flowed from the Employee Protection title of

---

[227] Memorial, at 207; Milošević-I, at 90-92; Constitution of the Republic of Serbia (Official Gazette of the Republic of Serbia No. 98/2006), Article 20(3) (Exhibit C-149); 2005 Serbian Law on State Administration (Official Gazette of the Republic of Serbia No. 79/2005, 101/2007), Article 51 (Exhibit C-159).
[228] Law on Privatization, Article 41a(1)(6) (Exhibit C-144).
[229] Memorial, at 208; Milošević-I, § IV.B.3, at 97-99.
[230] Memorial, at 209; Termination Notice, p.2 (Exhibit C-2); Privatization Agreement, p.2,11, Annex I (including the following titles: (i) Employee Protection; (ii) Employee Policy; (iii) Protection of Trade Union Rights and Representatives; (iv) Employees' Salaries, and (v) Other Employee Benefits) (Exhibit C-1).
[231] Law on Privatization, Article 41a(6)(a) (Exhibit C-205).
[232] Reply, at 335-336; Law on Privatization, Article 41a(6)(a) (Exhibit C-205); Milošević-I, at 98; Milošević-II, at 11, 113.

Annex I to the Privatization Agreement, the Privatization Agency was still not entitled lawfully to terminate the Privatization Agreement on this ground because Claimant's obligation to ensure compliance with the Individual Bargaining Agreement was limited to a two-year period. This period lapsed on 23 April 2009. Respondent therefore could not have invoked this ground on 11 June 2010.[233]

320. If *arguendo*, it was possible for the Privatization Agency to terminate the Privatization Agreement on that ground after 23 April 2009 (which it could not), Claimant nevertheless complied with its obligation in the prescribed two-year period. The only outstanding contributions for the relevant period were Pension Contributions for the period between January-April 2009. These contributions, however, were subject to a Serbian Ministry of Finance Scheme ("**MoF Scheme**") which the Privatization Agency's recognized and approved in the 9th Control Report.[234]

321. In these circumstances, Claimant submits that the termination of the Privatization Agreement on this ground shows a lack of good faith, in breach of Articles 12 and 13 of the Law on Obligations. It also demonstrates a lack of proportionality because the alleged breach was minor both quantitatively (EUR 85,400 approximately) and qualitatively.[235]

322. In sum, Claimant contends that the Privatization Agreement was unlawfully terminated by the Privatization Agency. Claimant contends that this unlawful termination of the Privatization Agreement amounts to an unlawful expropriation of its investment for the following reasons.

323. First, Serbia, acting through the Privatization Agency, went beyond its role of a party to a contract because the termination was unlawful and disproportionate under Serbian law. The Core Activity Obligation and the Social Program Obligation deal with the "development of the economy and social stability." In other words, these provisions deal with State interests, and are not terms found in ordinary commercial contracts. The termination of the Privatization Agreement on these grounds was therefore not based on commercial considerations. Instead, it was undertaken in furtherance of the State's public policy objectives.[236]

324. Second, the record shows that the termination of the Privatization Agreement was pretextual. The minutes of the Commission's meeting, where the decision to terminate

[233] Memorial, at 210; Reply, at 333; Privatization Agreement, p.11, Annex No. 1 (Exhibit C-1); Rudnik Kovin Individual Bargaining Agreement, 7 February 2006, Articles 40 and 43 (Exhibit C-208); Milošević-I, at 100-102.
[234] Memorial, at 211; Milošević-I, at 102, 105-110; Ninth Control Report, p.16-17 (Exhibit C-42).
[235] Memorial, at 212; Reply, at 337-343; Milošević-I, at 113, § IV.B.3(b), (c); Letter from Kornikom to the Privatization Agency, 20 May 2010, p.16 (Exhibit C-11); Ninth Control Report, p.16 (Exhibit C-42); Letter from Rudnik Kovin to the Privatization Agency, 8 June 2010, p.7 (Exhibit C-40); Versant-I, at 130; 1978 Serbian Law on Obligations (Official Gazette of the FRY No. 29/78, 39/85, 45/89, 31/93), Articles 12-13 and 131 (Exhibit C-175). Claimant explains the MoF scheme as a Government-instituted Program for defraying payments of pension and disability insurance, allowing certain companies to take a loan from the State for the purposes of payment of non-paid contributions.
[236] Reply, at 344-345.

the Privatization Agreement was taken, show that the issue received approximately five minutes of consideration. There was no discussion or analysis concerning the termination decision itself. Indeed, although the multiple Control Reports never recommended the termination of the Privatization Agreement, Claimant's multi-million dollar investment and rights to Rudnik Kovin were taken away from it in just a few minutes due to a broader strategy within the Serbian Ministry of Economy and the Privatization Agency to reverse privatizations implemented by the former government.[237]

325. According to Claimant, investment tribunals have found such conduct to amount to unlawful expropriation.[238]

d. Alongside the termination of the Privatization Agreement, the Privatization Agency deprived Claimant of its shares in Rudnik Kovin

326. Fourth and finally, Claimant points out that alongside the termination of the Privatization Agreement, the Privatization Agency also adopted the Decisions on Transfer, which were expropriatory in nature.

327. The Decision on the Transfer of Capital deprived Claimant of the legal title to its shares in Rudnik Kovin without compensation and without a refund of the purchase price.[239]

328. Similarly, the Decision on the Transfer of the Treasury Shares deprived Claimant of 174,589 Treasury Shares without compensation, despite Claimant being entitled to receive such compensation with interest under Article 132(2) of the Law on Obligations. Claimant argues that Privatization Agency failed to compensate it by unlawfully and retroactively applying an amended iteration of Article 41 of the Law on Privatization (the "**2007 Amendment**").[240]

329. In sum, Claimant argues that all of the abovementioned actions and omissions of Serbia taken individually and / or cumulatively amount to expropriation under international law.[241]

---

[237] Reply, at 160-164, 346-348.

[238] Memorial, at 214; Reply, at 344-348; *SAUR Int'l S.A. v. Argentina*, at 445 (Exhibit CL-11); Milošević-I, at 58; 2005 Serbian Law on Public Agencies (Official Gazette of the Republic of Serbia No. 18/2005, 81/2005), Articles 1 and 57 (Exhibit C-165); 2005 Serbian Law on State Administration (Official Gazette of the Republic of Serbia No. 79/2005, 101/2007), Articles 4 and 51 (Exhibit C-159); *Caratube v. Kazakhstan*, at 938-939 (Exhibit CL-15); *Flemingo v. Poland*, at 594-596, 902 (Exhibit CL-31).

[239] Memorial, at 215-216; Reply, at 349; Milošević-I, at 127, 131; Law on Privatization, Article 41a(3) (Exhibit C-144).

[240] Memorial, at 219; Reply, at 349; 1978 Serbian Law on Obligations (Official Gazette of the FRY No. 29/78, 39/85, 45/89, 31/93), Article 132(2) (Exhibit C-175); Milošević-I, at 135-138; 2001 Serbian Law on Privatization (Official Gazette of the Republic of Serbia No. 38/2001, 18/2003, 45/2005, 123/2007), Article 41(5) (Exhibit C-205).

[241] Memorial, at 217-218, 220, 222; Milošević-I, at 58, 128-131; 2005 Serbian Law on Public Agencies (Official Gazette of the Republic of Serbia No. 18/2005, 81/2005), Articles 1 and 57 (Exhibit C-165); 2005 Serbian Law

iii. **Serbia's expropriation was unlawful**

330. As a final point, Claimant submits that Serbia's expropriation of its investments was unlawful because it was not carried out: (i) by virtue of law, (ii) in the public interest, (iii) on a non-discriminatory basis, and (iv) against prompt and adequate compensation.[242]

331. First, the expropriation was not carried out against prompt and adequate compensation. In fact, no compensation was paid or offered to Claimant. Claimant submits that this failure is enough to characterize Respondent's expropriation as unlawful. According to Claimant, it is irrelevant that Serbian law permits the State to seize an investor's shares when it terminates a privatization agreement without providing any reimbursement because a State's actions are evaluated under international law. A State cannot evade responsibility for an unlawful expropriation by claiming that its internal law does not require any compensation.[243]

332. Second, the expropriation was not carried out in accordance with law. Claimant refers to its submissions above in support of its contention.[244]

333. Third, the expropriation of Claimant's investments was not in public interest but was carried out under a pretext. Tribunals have interpreted the public interest requirement in BITs to mean that there was a public purpose behind the expropriation. Respondent, however, has articulated no reason for why it terminated the Privatization Agreement.

---

on State Administration (Official Gazette of the Republic of Serbia No. 79/2005, 101/2007), Articles 4 and 51 (Exhibit C-159); Law on Privatization, Article 41a(3) (Exhibit C-144); *Crystallex Int. v. Venezuela*, at 667, 708-709 (Exhibit CL-6); *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, at 427 (Exhibit CL-12) ("*Siag v. Egypt*"); *Metalclad v. Mexico*, at 103 (Exhibit CL-16); *Rumeli Telekom v. Kazakhstan*, at 688 (Exhibit CL-23); *Abengoa S.A. v. Mexico*, at 605 (Exhibit CL-26).

[242] Memorial, at 223; BIT, Article 5 (Exhibit CL-1).

[243] Memorial, at 224; Reply, at 355-357; ILC Articles, Article 3, Commentary (1) (Exhibit CL-18); *Maygar Farming Co. Ltd., Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case ARB No. 17/27, Award, 13 November 2019, at 368 (Exhibit CL-34); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, at 543-545 (Exhibit CL-35); *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014, at 441-442 (Exhibit CL-36); *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, at 497 (Exhibit CL-37) ("*Bernhard von Pezold v. Zimbabwe*"); *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, at 7.5.21 (Exhibit CL-38) ("*Compañía de Aguas v. Argentina*"); *Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, at 98 and 107 (Exhibit CL-39); *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Arbitration V, Case No. 079/2005, Final Award, 12 September 2010, at 632-33 (Exhibit CL-40); *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p.180 (Exhibit CL-181); *Greco-Bulgarian "Communities,"* Advisory Opinion, 1930, P.C.I.J., Series B, No. 17, p.32 (Exhibit CL-182); *Elettronica Sicula S.p.A. (ELSI), (US v. Italy)*, Judgment, I.C.J. Reports 1989, at p.51, 73 (Exhibit CL-183).

[244] Memorial, at 225; Milošević-I, at 12.

Neither the Termination Notice nor the Privatization Agency's Decisions on Transfer contain any reference to any "public interest," as required under the BIT.[245]

334. In any event, even if there were a stated public purpose, there is no evidence that the termination of the Privatization Agreement and the Decisions on Transfer were reasonably related to the fulfilment of such purpose. Claimant points out that under its ownership, Rudnik Kovin (i) received valuable mining equipment; (ii) operated more efficiently; and (iii) had more employees with increased salaries, when compared to the period before its privatization. Respondent's actions, therefore, did not serve any public purpose.[246]

335. Finally, Claimant submits that Respondent's expropriation of its investments was discriminatory. Claimant submits that discrimination is an effects-based analysis, where the subjective intention to discriminate is not a necessary element. Instead, it is the impact of the measure on the investment which is a decisive factor.[247]

336. In the present case, Respondent's refusal to purchase coal from Rudnik Kovin was motivated by an anti-Bulgarian sentiment. Moreover, the Privatization Agency's decision to terminate the Privatization Agreement on spurious grounds was discriminatory as compared to other investors whose agreements were not terminated. In particular, the termination due to Rudnik Kovin's bank accounts being blocked, disguised as a non-compliance with the Core Activity Obligation, placed Claimant in a less favorable position than thousands of other Serbian companies, which operated with blocked accounts at the time. The expropriation of Claimant's investments was therefore discriminatory.[248]

337. For all these reasons, Claimant maintains that Respondent expropriated Claimant's investments and that such expropriation was unlawful and in contravention of Article 5 of the BIT.[249]

---

[245] Memorial, at 226-229; Ivanov-I, at 59-64; *Siag v. Egypt*, at 431 (Exhibit CL-12); *Siemens v. Argentina*, at 273 (Exhibit CL-27); *ADC v. Hungary*, at 432 (Exhibit CL-41); *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, at 294, 296 (Exhibit CL-42); Termination Notice (Exhibit C-2); Decision on the Transfer of Capital (Exhibit C-128); Decision on the Transfer of the Treasury Shares (Exhibit C-86).

[246] Memorial, at 230; Goranov-I, at 14,45; Kacharov-I, at 24, 79.

[247] Memorial, at 231-233; *Libyan American Oil Co. (LIAMCO) v. Libyan Arab Republic*, Award, 12 April 1977, at 244 (Exhibit CL-43); J. M. Cox, Expropriation in Investment Treaty Arbitration (2019), at 4.82 (Exhibit CL-44); *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, at 247 (Exhibit CL-45); *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, at 313 (Exhibit CL-7); A.Newcombe and L.Paradell, Chapter 6 – Minimum Standards of Treatment, Law and Practice of Investment Treaties (2009), § 6.39 (Exhibit CL-46); *Siemens v. Argentina*, at 321 (Exhibit CL-27); *Bayindir v. Pakistan*, Award, at 390 (Exhibit CL-47); *LG&E Energy Corp., LG&E Capital Corp., and LG&E Int'l Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, at 146 (Exhibit CL-48); *ADC v. Hungary*, at 442-443 (Exhibit CL-41); *Eureko B.V. v. Poland*, Ad Hoc Arbitration, Partial Award, 19 August 2005, at 233, 242 (Exhibit CL-49); *Olin Hldgs. Ltd. V. State of Libya*, ICC Case No. 20355/MCP, Final Award, 25 May 2018, at 92-93, 210-215, 218 (Exhibit CL-50).

[248] Memorial, at 234; Kacharov-I, at 50; Goranov-I, at 38.

[249] Memorial, at 235.

B. Respondent's Position

338. Respondent submits that Claimant has failed to prove its case on expropriation. Respondent advances the following arguments in support of its position: (i) the termination of the Privatization Agreement by the Privatization Agency was based on legitimate and valid contractual grounds, and was therefore not expropriation; (ii) Respondent did not directly expropriate Claimant's investment; and (iii) Respondent did not indirectly expropriate Claimant's investment. Each of these submissions is canvassed below.

i. The termination of the Privatization Agreement was based on legitimate and valid contractual grounds, and was therefore not expropriation.

339. According to Respondent, the fact that the Privatization Agency relied on legitimate contractual grounds for terminating the Privatization Agreement precludes Claimant's expropriation claim. However, if there was any question of the propriety of the Privatization Agency's conduct, the record shows that the Agency acted reasonably and in accordance with Serbian law.[250]

a. The fact that the Privatization Agency relied on legitimate contractual grounds for terminating the Privatization Agreement precludes Claimant's expropriation claim

340. Respondent submits that Claimant's expropriation claim based on the termination of the Privatization Agreement must fail because the Privatization Agency relied on legitimate and valid contractual grounds in terminating the Privatization Agreement.

341. According to Respondent, where a claimant bases its expropriation claim on a State's termination of a contract, "the pivotal question is whether the Respondent, in terminating the contract, acted in the exercise of its sovereign powers (*puissance publique*) rather than as an ordinary contracting party."[251] In other words, a claim of expropriation cannot succeed "unless it be proved that the State or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign authority."[252] Thus, Claimant cannot simply assert that the Privatization Agency "unlawfully terminated" the Privatization Agreement. Instead, it must prove that the Privatization Agency's "contractual breach" constitutes a "sovereign act."[253]

342. Claimant, however, cannot meet this burden because the Privatization Agency was acting in its capacity as a contractual party, and not as a holder of sovereign powers,

[250] Counter-Memorial, at 336; R-PHB, at 80-81.
[251] Counter-Memorial, at 339-340; *Crystallex Int. v. Venezuela*, at 692 (Exhibit CL-6).
[252] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, at 278 (Exhibit RL-164) ("*Impregilo v. Pakistan*, Decision on Jurisdiction").
[253] Counter-Memorial, at 339; Rejoinder, at 239-240.

when it purported to terminate the Privatization Agreement.[254] Moreover, the Privatization Agency relied on legitimate and valid grounds when it terminated the Privatization Agreement. Specifically, the Privatization Agency clearly delineated the extent of Claimant's contractual breaches in the Termination Notice, during on-site controls, and in numerous notice letters extending deadlines for Claimant to fulfil its contractual obligations. In Respondent's opinion, the validity of the Privatization Agency's actions precludes expropriation.[255]

343. However, even assuming *arguendo* that the Privatization Agreement was unlawfully terminated, Respondent argues that it still would not amount to expropriation because the Privatization Agency unquestionably, "with some justification, considered that [claimant] had grossly failed in fulfilling its contractual obligations,"[256] and terminated the Privatization Agreement as a "legitimate contractual response."[257]

344. Respondent submits that the authorities cited by Claimant are unhelpful to its case because they demonstrate the "high threshold" that separates a contractual dispute from a violation of a treaty prohibition on expropriation.[258] Respondent argues that unlike in *Crystallex v. Venezuela*, *Caratube v. Kazakhstan*, and *Flemingo v. Poland*, the Privatization Agency repeatedly notified Claimant of the specific details of its contractual breaches and gave Claimant numerous opportunities to remedy the breaches one year before the eventual termination. There is therefore no evidence of the termination being pretextual.[259]

345. For all these reasons, Claimant contends that the termination of the Privatization Agreement was not an exercise of sovereign authority and cannot therefore form the basis of an expropriation claim.

b. The Privatization Agency lawfully terminated the Privatization Agreement because Claimant breached the Business Continuity Obligation

346. Respondent notes that Claimant makes the following three arguments as to why the termination of the Privatization Agreement for Claimant's breach of the Business Continuity Obligation was unlawful: (i) The termination of the Privatization Agreement

[254] Counter-Memorial, at 339.
[255] Counter-Memorial, at 340-341; *Vannessa Ventures Ltd. V. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, at 210-214 (Exhibit RL-165) ("*Vannessa Ventures v. Venezuela"*) (quoting *Impregilo v. Pakistan*, Decision on Jurisdiction, at 267 (Exhibit RL-164)); *Caratube v. Kazakhstan*, at 908 (Exhibit CL-15); *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, at 278–83 (Exhibit RL-163) ("*Impregilo v. Argentina*"); *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award, 1 October 2014, at 331 (Exhibit RL-162).
[256] Counter-Memorial, at 341; *Impregilo v. Argentina*, at 283 (Exhibit RL-163).
[257] Counter-Memorial, at 341; *Vannessa Ventures v. Venezuela*, at 210 (Exhibit RL-165).
[258] Counter-Memorial, at 342; Rejoinder, at 211-214; *Crystallex Int. v. Venezuela*, at 675-685, 700, 705 (Exhibit CL-6); *Caratube v. Kazakhstan*, at 936-938 (Exhibit CL-15); *Flemingo v. Poland*, at 545-553 (Exhibit CL-31); *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004 at 174 (Exhibit RL-202); *European Media v. Czech Republic,* Partial Award on Liability, at 50(2) (Exhibit CL-30).
[259] Counter-Memorial, at 342.

was untimely because the Business Continuity Obligation expired on 23 April 2010; (ii) The Business Continuity Obligation simply required Rudnik Kovin to continue to produce and export coal, which it did; and (iii) Claimant actually improved Rudnik Kovin's performance.[260]

347. Respondent addresses each of these arguments in sequence.

348. First, Claimant's argument that the Business Continuity Obligation "expired on 23 April 2010" is incorrect because when a buyer fails to comply with a contractual obligation, the Privatization Agency is empowered under Serbian law to grant the buyer an extension and set an additional deadline for compliance. If there is still no compliance, the Privatization Agency may terminate the agreement within the extended period. This is in accordance with Article 41a of the Law on Privatization as well as decisions of the Serbian courts, which do not put a limit on the number of extensions that can be granted.[261]

349. In the present case, Claimant was in breach of the Business Continuity Obligation from November 2008 when Rudnik Kovin's bank accounts were blocked. That was well before the expiry of the three-year period. Claimant was also in breach of the Business Continuity Obligation for other reasons, all of which predated the expiry of the three-year term and continued until contract termination. In light of these breaches, the Privatization Agency issued a warning notice on 19 June 2009, *i.e.*, before the expiry of the original three-year period, highlighting Claimant's non-compliance with the Business Continuity Obligation. The Privatization Agency thereafter granted Claimant four extensions of time to remedy the breach and prove compliance. Claimant failed to do so. The three-year period for ensuring business continuity was therefore continuously extended from November 2008 until shortly before termination of the contract. The termination of the Privatization Agreement, therefore, was timely and lawful.[262]

350. Second, Claimant's narrow reading of the Business Continuity Obligation to require only that "Rudnik Kovin continued to produce and export coal" is contrary to Serbian law. According to Respondent, the Business Continuity Obligation under Serbian law, "requires that the buyer ensure that the privatized entity's financial condition and performance at the time of privatization be maintained, that the business grow and develop, and the obligations to the company's employees as set forth in the Social Program be observed […]."[263] In other words, the obligation is not limited merely to continuing to operate the business in a specific field as Claimant suggests but is indeed broader. Respondent highlights that the Serbian courts look at a broad range of factors

[260] Memorial, at 203-204.
[261] Counter-Memorial, at 345-348; Rejoinder, at 243-250; Vučković-I, at 117; Law on Privatization, Article 41a (Exhibit RL-161); Cvetković-I, at 34; Lepetić-I, at 104-107; Decision of the Higher Commercial Court Pž 5907/2007, 11 December 2007 – Court Practice of Commercial Courts – Bulletin No. 4/2007 (Exhibit RL-51); Decision of the Supreme Court of Cassation, Prev. 72/10, 30 September 2010 (Exhibit RL-18).
[262] Counter-Memorial, at 349; Rejoinder, at 241.
[263] Counter-Memorial, at 353.

to assess the health of the business such as a contraction in sales, a decline in profit, a decrease in liquidity, an increase in debt, or the non-payment of employee salaries and contributions. Respondent relies on the evidence of its expert Professor Lepetić as well as the decision of Serbian courts in support of this position.[264]

351. Third, Respondent contends that Claimant incorrectly cherry-picks numbers to suggest that it complied with the Business Continuity Obligation. Specifically, Claimant points to the increased income of Rudnik Kovin and the increase in the number of employees in support of its position. This, however, is a distorted view of the Rudnik Kovin's financial health and performance. According to Respondent, the Control Reports document a very different picture, *i.e.*, one of a company rendered illiquid and unable to meet its obligations, with its bank accounts continuously blocked for more than 500 days. Referring to its expert's analysis, Respondent submits that Rudnik Kovin (i) experienced four years of negative EBIT during Claimant's ownership; (ii) generated a net profit in only one year (largely an anomalous result owing to the one-off removal of liabilities from its books); (iii) experienced a significant decline in financial performance and economic health during the relevant period; and (iv) experienced increased liabilities and reduced liquidity, which posed a threat to its business continuity and its status as a going concern.[265]

352. For all these reasons, Respondent maintains that the termination of the Privatization Agreement was timely and lawful.

c. The Privatization Agency lawfully terminated the Privatization Agreement because Claimant breached the Social Program Obligation

353. Respondent maintains that the Privatization Agency lawfully terminated the Privatization Agreement due to Claimant's breach of the Social Program Obligation. Claimant argues that the Privatization Agency's termination of the Privatization Agreement on this ground was unlawful because: (i) Claimant's obligations under the Social Program expired after two years, *i.e.*, in April 2009; (ii) the Social Program did not impose an affirmative obligation on Claimant to pay salaries, benefits, and taxes;

[264] Counter-Memorial, at 351-357; Rejoinder, at 251-253; Lepetić-I, at 4(b), 4(c), 51-54; Lepetić-II, at 26; Vučković-II, at 19; Decision by the Supreme Court of Cassation Prev 200/2013, 17 April 2014 (Exhibit RL-36); Decision of the Commercial Court of Appeal Pž 1187/14, 19 November 2015 (Exhibit RL-31); Decision of the Commercial Court of Appeal Pz 4616/12, 21 August 2013 (Exhibit RL-25).

[265] Counter-Memorial, at 358-360; Rejoinder, at 256-262; Lepetić-I, at 53; Vučković-II, at 22; Cvetković-II, at 25, 37-39, 57–60; Deloitte-I, at 25; Decision by the Supreme Court of Cassation Prev 150/2017, 25 May 2017 (Exhibit RL-30); Decision of the Supreme Court of Cassation Prev 387/2016, 18 May 2017 (Exhibit RL-27); Decision of the Supreme Court of Cassation Prev 37/2013, 16 May 2013 (Exhibit RL-15); Decision by the Supreme Court of Cassation Prev 129/2013, 19 June 2014 (Exhibit RL-37); Decision of the Commercial Court of Appeal Pz 4616/12, 21 August 2013 (Exhibit RL-25); Letter from the Privatization Agency to Kornikom, 18 March 2010, p.1 (Exhibit R-40); Ninth Control Report, p.8 (Exhibit R-29); Privatization Agency, Instructions for Monitoring Compliance with Contracts for the Sale of Capital or Assets, Article 1.5.8, (May 2010) (Exhibit R-43).

and (iii) any breach by Claimant was "insignificant" and therefore not a ground for termination.[266] Respondent addresses each of these arguments in turn.

354. First, Respondent contends that the timeliness objection can be dismissed for the same reasons set forth above with respect to the Business Continuity Obligation. In the 3rd Control held on 6 March 2009, the Privatization Agency found that Claimant had failed to comply with the Social Program Obligation since at least November 2008. The Privatization Agency therefore gave Claimant and Rudnik Kovin a formal warning notice of non-compliance on 3 April 2009 and granted it several additional opportunities to comply. Claimant, however, failed to remedy its breaches until the date of the Termination Notice in June 2010. The Social Program Obligation thus continued from at least November 2008 until the termination of the Privatization Agreement.[267]

355. Second, the assertion that the Social Program Obligation did not require Claimant to ensure that Rudnik Kovin paid social contributions is without basis. Annex No. 1 to the Privatization Agreement required Claimant to ensure "compliance with the employees' rights stipulated under the individual bargaining agreement and other […] bylaws" in effect at Rudnik Kovin. Under Serbian labor law and practice, the "individual bargaining agreement" referred to in the Social Program was the Collective Agreement for Employer Rudnik Kovin that applied collectively to all Rudnik Kovin employees. That agreement protected the employees' rights to salaries and other benefits, which meant that it protected a worker's right to the "so-called gross salary, *i.e.*, salary including taxes and contributions payable on salary and other employment benefits that are deemed salary in accordance with the law." Claimant therefore had a contractual obligation under the Social Program to ensure that Rudnik Kovin paid salaries, benefits, and taxes.[268]

356. Third, Claimant's argument that its breaches of the Social Program Obligation were "insignificant" both in a "quantitative sense" and in a "qualitative sense" is incorrect for the following reasons.

357. First and foremost, Claimant's argument that the Privatization Agreement "cannot be terminated due to non-performance of an insignificant part of the obligation" cannot be sustained because the background provision of the Law on Obligations on which it is premised, *i.e.*, Article 132 does not apply in the present context. Claimant and the Privatization Agency, as parties to the Privatization Agreement, agreed to contractual terms that displaced that background rule under the Law on Obligations and agreed that

[266] Counter-Memorial, at 361.
[267] Counter-Memorial, at 362; Rejoinder, at 269, 271-273; Third Control Report, p.1, 11 (Exhibit R-23); Letter from the Privatization Agency to Kornikom, 3 April 2009 (Exhibit R-36); Vučković-I, at 118.
[268] Counter-Memorial, at 363-364; Rejoinder, at 268, 277-278; Privatization Agreement, Annex 1 (Exhibit C-1); Rudnik Kovin Individual Bargaining Agreement, January 2006, Articles 2, 8, 40 (Exhibit C-208); Vučković-I, at 40.

the contract "shall be deemed terminated by force of law due to non-performance" if the buyer failed to discharge any one of several obligations.[269]

358. In any event, Claimant's breach was not insignificant either in a "qualitative" sense or in a "quantitative" sense. In the "qualitative" sense, providing for social stability and the compensation of workers was one of the primary purposes of the Privatization Agreement and the Serbian privatization project more broadly. It was for this reason that it was included as an explicit contractual obligation and a ground for potential termination. As for the "quantitative" aspect of the breach, Claimant misstates the figures. Rudnik Kovin's total unpaid liabilities as at the date of the 9th Control, *i.e.*, 24 May 2010 was significantly more than Claimant suggests.[270]

359. As a last point, Respondent points out that the Supreme Court of Cassation ("**the Serbian Supreme Court**") has held that a buyer's breach of a single obligation "may not be regarded as insignificant non-performance of the agreement".[271]

360. For all these reasons, Respondent maintains that the termination of the Privatization Agreement for Claimant's breach of the Social Program Obligation was timely and lawful.

d. The Privatization Agency did not violate any background obligations under Serbian law

361. Finally, Respondent rejects Claimant's argument that the Privatization Agency's termination of the Privatization Agreement violated the Law on Obligations or the Serbian Constitution.

362. Respondent submits that Claimant's argument that the Privatization Agency's termination was hasty and in bad faith ignores the fact that as of June 2010, Rudnik Kovin's business account had been continuously blocked for more than a year and a half and that Rudnik Kovin was on the brink of bankruptcy. According to Respondent, the Privatization Agency always acted in good faith throughout its interactions with Claimant. This is evidenced by the numerous and lengthy extensions it granted to Claimant in order to allow Claimant to remedy its breaches. This obligation of "good faith", however, did not require the Privatization Agency to provide Claimant unlimited extensions. When the Commission met in June 2010 to assess Claimant's compliance, Claimant had not presented the Privatization Agency with any evidence that its accounts

[269] Counter-Memorial, at 366; Lepetić-I, at 94-95; Decision of the Supreme Court of Cassation Prev 54/2018, 12 July 2018 (Exhibit RL-47); Privatization Agreement, Clauses 7.1, 7.1.5, 7.1.6 (Exhibit R-20); Decision by the Supreme Court of Cassation Prev 129/2013, 19 June 2014 (Exhibit RL-37); Decision of the Supreme Court of Cassation Prev. 104/2013, 19 June 2014 (Exhibit RL-48); Decision of the Supreme Court of Cassation, Prev 387/2016, 18 May 2017 (Exhibit RL-27).
[270] Counter-Memorial, at 367-368; Rejoinder, at 279; Vučković-I, at 94.
[271] Counter-Memorial, at 369; Lepetić-I, at 96; Decision of the Supreme Court of Serbia in Decision Prev 410/05, 1 March 2006 (Exhibit RL-45).

would be unblocked imminently.[272] The Privatization Agency's termination was therefore justified.

363. Similarly, Respondent maintains that Claimant's argument that the Privatization Agency's actions were disproportionate and unconstitutional is incorrect because it is contrary to Serbian law. Serbian courts have held that both the termination of a privatization agreement and its consequences (*i.e.*, the transfer of shares) are not an administrative act of the state. The principle of proportionality is therefore inapposite because it applies only to State actors.[273]

364. For all of these reasons, Respondent submits the Privatization Agency's Termination Notice of the Privatization Agreement was in accordance with Serbian law. Alternatively, even if the Privatization Agency's actions were unlawful under Serbian law, the fact that the Privatization Agreement was terminated pursuant to valid and legitimate contractual grounds, rather than as an exercise of sovereign power precludes a treaty claim of expropriation.[274]

ii. Serbia did not directly expropriate Claimant's investment

365. Respondent argues that Claimant cannot succeed in its claim for direct expropriation because the provisions of both the Privatization Agreement and the Law on Privatization make it clear that the share and capital transfers are automatic consequences of the Privatization Agency's lawful and legitimate termination of the Privatization Agreement. Claimant refers to Article 7.2 of the Privatization Agreement (see paragraph 150 above), Article 41a of the Law on Privatization (see paragraph 127 above) and Article 41(5) of the Law on Privatization in support of its position.[275]

366. According to Respondent, because the transfer of Claimant's shares is an automatic consequence of the termination of the Privatization Agreement, and because Claimant undertook in the Privatization Agreement to "lose its right to reimbursement," Claimant cannot sustain an expropriation claim based on the share transfer. To hold otherwise would not only rewrite the Privatization Agreement but also Serbian law.[276] Respondent

[272] Counter-Memorial, at 372; Rejoinder, at 263-266, 280; Cvetković-I, at 36,38, 45; Cvetković-II, at 25-29, 57, 63; Vučković-I, at 97; Vučković-II, at 36; Privatization Agreement, Clause 7.2 (Exhibit R-20); Fourth Control Report, p.8 (Exhibit R-24); Fifth Control Report, p.7 (Exhibit R-25); Sixth Control Report, p.7 (Exhibit R-26); Seventh Control Report, p.9 (Exhibit R-27); Eighth Control Report, p.8 (Exhibit R-28); Letter from the Privatization Agency to Kornikom, 18 March 2010, p.2 (Exhibit R-40).
[273] Counter-Memorial, at 375; Lepetić-I, at 98-100; Lepetić-II, at 45; Decision of the Supreme Court of Serbia U. 2263/06, 10 July 2006 (Exhibit RL-44); Decision of the Higher Commercial Court Pz 9899/2008, 21 January 2009 – Court Practice of the Commercial Courts Bulletin, No. l/2009 (Exhibit RL-49).
[274] Rejoinder, at 267; *Impregilo v. Argentina*, at 283 (Exhibit RL-163); *Impregilo v. Pakistan*, Decision on Jurisdiction, at 267 (Exhibit RL-164); *Vannessa Ventures v. Venezuela*, at 210 (Exhibit RL-165).
[275] Counter-Memorial, at 377-378; Rejoinder, at 209, 282-283; Article 41(5) provides that "[i]n case of termination of the agreement on sale of capital, and/or of property, the [treasury shares] shall be transferred to the Share Fund which shall sell them together with the shares of the subject of privatization which were transferred to it in accordance with the law."
[276] Counter-Memorial, at 378.

refers to the decision in *Vannessa v. Venezuela*, where the tribunal faced a similar claim and found no expropriation.[277]

367. In a similar vein, Respondent submits that Claimant's direct expropriation claim based on the transfer of the Treasury Shares also fails because Claimant never owned the Treasury Shares. Rather, the Treasury Shares were issued in Rudnik Kovin's name and were intended to be transferred to Claimant only upon confirmation that it had complied with its obligations under the Privatization Agreement. Claimant therefore had no more than a contingent right to the Treasury Shares upon completion of its obligations. Claimant, however, breached those obligations under the Privatization Agreement and thus did not receive those shares.[278]

368. As for the various arguments made by Claimant, Respondent provides the following responses:

- With respect to the transfer of Claimant's shares in Rudnik Kovin, Respondent notes that while Claimant acknowledges that the Law on Privatization mandated transfer of shares upon termination, it ignores the fact that Claimant also undertook in the Privatization Agreement to "lose its right to reimbursement."[279]

- Claimant's assertion that the transfer is disproportionate under Serbian law does not apply in the present case because the principle of proportionality does not apply to the Privatization Agency's termination of a privatization agreement.[280]

- Claimant's reliance on *Siag v. Egypt* is inapposite because the direct expropriation in that case involved issuance of governmental decrees to transfer ownership of land rather than as an automatic contractual and statutory consequence of an investor's non-fulfilment of contractual obligations.[281]

- Claimant's contention that the Privatization Agency exercised "administrative authority" in transferring shares is incorrect because the Privatization Agency's notice terminating the Privatization Agreement was an exercise of its contractual rights. According to Respondent, the automatic consequence of such termination cannot form the basis of an expropriation claim.[282]

- Finally, Respondent rebuts Claimant's contention that Article 41(5) of the Law on Privatization, introduced pursuant to the 2007 Amendment, could not apply retroactively to privatizations that were initiated before its enactment by pointing out that Article 29 of the 2007 Amendment specifically observed that "the amendments would apply to any 'privatization procedure started before the day this

[277] Counter-Memorial, at 379; *Vannessa Ventures v. Venezuela*, at 100–01, 173-174, 209, 214 (Exhibit RL-165).
[278] Counter-Memorial, at 381; Rejoinder, at 284-285.
[279] Counter-Memorial, at 382(a); Privatization Agreement, Clause 7.2 (Exhibit R-20).
[280] Counter-Memorial, at 382(b).
[281] Counter-Memorial, at 382I; *Siag v. Egypt*, at 427-429 (Exhibit CL-12).
[282] Counter-Memorial, at 382(d).

law enters into force' and that such privatizations would then 'continue according to the provisions of this law.'"[283]

369. In light of the above arguments, Respondent submits neither the termination of the Privatization Agreement nor the Decisions on Transfer should be considered expropriatory conduct. Claimant agreed in the Privatization Agreement to "lose its right to reimbursement" in case of termination, and it should be held to its end of the bargain.

iii. Serbia did not indirectly expropriate Claimant's investment

370. In its pleadings, Claimant alleges that Respondent indirectly expropriated its investment in Rudnik Kovin through a "series of actions which culminated in the termination of the Privatization Agreement." Specifically, Claimant alleges that Respondent allegedly (i) sold Rudnik Kovin "without the necessary authorizations, permits, and rights" and (ii) interfered with Claimant's rights under the Privatization Agreement.[284]

371. According to Respondent, these arguments must fail for two reasons: First, even assuming Claimant's allegations are true, they still fall short of the requirement for indirect expropriation under international law. And second, Respondent is not responsible for any of the conduct alleged to be a basis for indirect expropriation**.**[285] Each of these submissions is set out below.

a. Claimant's allegations, even if assumed to be true, fall short of the standard for indirect expropriation

372. At the outset, Respondent submits that a claim of indirect or "creeping" expropriation requires a claimant to show that a State's measure interfered with the operation or use of the investment to such an extent that it rendered it virtually valueless. Respondent points out that although different tribunals adopt different formulations, they all prescribe a high threshold.[286]

373. According to Respondent, Claimant fails to meet this high evidentiary bar for three reasons. First, even assuming that Respondent (i) was responsible for selling Rudnik Kovin to Claimant without the necessary permits and authorizations, (ii) obstructed Claimant from obtaining these permits and authorizations, and (iii) wrongfully declined to recognize Claimant's investment in light of the absence of a permit, Claimant's claim still fails because such conduct did not render Claimant's investment "virtually valueless." The lack of a permanent operating permit did not hamper Rudnik Kovin's activities. On the contrary, Rudnik Kovin operated with temporary permits without a

[283] Counter-Memorial, at 382(e); Lepetić-I, at 83; Constitution of the Republic of Serbia, Article 197 (Exhibit C-149); Law Amending Law on Privatization, RS Official Gazette, No. 123/07, Article 29 (Exhibit RL-55).
[284] Counter-Memorial, at 384.
[285] Counter-Memorial, at 385.
[286] Counter-Memorial, at 386; Rejoinder, at 217; *Archer Daniels v. Mexico*, at 242 (Exhibit RL-118); *PL Holdings S.A.R.L. v. Republic of Poland*, SCC Case No V2014/163, Partial Award, 28 June 2017, at 320 (Exhibit RL-166); *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, at 6.53 (Exhibit RL-167); *Caratube v. Kazakhstan,* at 822 (Exhibit CL-15); *Tecmed, S.A. v. Mexico*, at 116 (Exhibit CL-28).

single day's work disrupted, just like it did before it was privatized. Respondent points out that this fact is tacitly acknowledged by Claimant because Claimant waited until June 2009, *i.e.*, more than two years after acquiring Rudnik Kovin, before applying for a permanent operating permit. In reality therefore, the use of temporary permits had no practical consequence on Rudnik Kovin's business whatsoever. Indeed, the only concrete impact that Claimant ever identified was that it had to prepare documentation for temporary permits and had to deal with certain commissioning procedures which, it contends, cost a lot of effort and expense. This falls far short of the standard for indirect expropriation.[287]

374. Second, as to the EPS-related allegations, even assuming counterfactually that the EPS-run TPPs had purchased pea-sized coal from Rudnik Kovin prior to privatization and refused to do so after privatization due to "anti-Bulgarian sentiment", that still would not amount to indirect expropriation because (i) Rudnik Kovin was not prevented from selling other sizes of coal, which accounted for approximately 90% of Rudnik Kovin's sales revenue before privatization; (ii) Rudnik Kovin was not prevented from selling pea-sized coal to TPPs outside of Serbia, which Rudnik Kovin did both before and after privatization; and (iii) Claimant asserts that it had "maintained—and, in fact, increased" the income from coal sales. Therefore, the EPS-related allegations, even assumed to be true, do not prove indirect expropriation**.**[288]

375. Finally, Respondent argues that Claimant's attempt to blame the termination of the Privatization Agreement on the absence of operating permits and the lack of sales to EPS-run TPPs is without merit. According to Respondent, Rudnik Kovin's financial troubles were caused by Claimant's mismanagement and abuse. These financial troubles in turn led to Claimant defaulting on its loan and breaching the Business Continuity and Social Program Obligations, which, in turn, "culminated in the termination of the Privatization Agreement."[289]

376. All in all, Respondent submits that none of the authorities relied on by Claimant are helpful to its case because all of Claimant's allegations, even taken together, do not even remotely prove the "total or near-total deprivation of an investment" required for a claim of indirect expropriation to be sustained.[290]

[287] Counter-Memorial, at 181-186, 388-389; Rejoinder, at 217; Kacharov-I, at 26.
[288] Counter-Memorial, at 152, 163,390.
[289] Counter-Memorial, at 391.
[290] Counter-Memorial, at 391-392; *Metalclad v. Mexico*, at 108 (Exhibit CL-16); *Abengoa S.A. v. Mexico*, at 608-610 (Exhibit CL-26); *Siemens v. Argentina*, at 255– 259, 271 (Exhibit CL-27); *Crystallex Int. v. Venezuela*, at 674–708 (Exhibit CL-6).

b. Respondent is not responsible for the permit related and EPS related allegations, many of which are unsupported

377. Respondent submits that Claimant's permit-related and EPS-related allegations are factually unsupported, and, in many instances, incorrect.[291]

378. First, Respondent rejects Claimant's allegation that Respondent failed to disclose Rudnik Kovin's lack of permits in the privatization process. Respondent points out that the status of Rudnik Kovin's permits was evident from the auction documentation provided to all bidders and could not have been missed by Claimant, which was owned by a sophisticated coal baron and which had the assistance of several technical advisors and consultants. Moreover, before participating in the auction, Claimant confirmed that it had "been allowed to analyze and conduct a due diligence review of the Privatization Subject".[292] Claimant also agreed and warranted that it was relying solely on its own due diligence (and thus not on the auction documentation or anything else) and was aware that its purchase of Rudnik Kovin was on an "as is" basis.[293]

379. According to Respondent, had Claimant actually read the auction documentation or conducted even minimal due diligence, it readily would have ascertained the status of Rudnik Kovin's permits because this is an issue fundamental to operation of a coalmine, and there can be little doubt that Claimant, like other bidders, understood that. For instance, one potential bidder, Mr. Ivković, sent a letter to the Privatization Agency on 26 March 2007 inquiring about a missing exploitation permit for Rudnik Kovin. The Privatization Agency responded by letter dated 28 March 2007, advising Mr. Ivković that he should consult the Ministry of Mining and Energy for further information. Thus, if the status of Rudnik Kovin's permits was "unbeknown to Kornikom", that is solely Claimant's fault, and it is contractually precluded from trying to place the blame elsewhere.[294]

380. Second, having belatedly initiated the permit application process, Claimant complains that the application process was "cumbersome and quixotic." Claimant, however, does not explain how that could be actionable as indirect expropriation. In any event, Respondent submits that Claimant's factual allegations are incorrect because Respondent did not hinder or prevent Claimant from pursuing its application. Nor did it impede Claimant from obtaining the requested permit. To the contrary, the permanent operating permit was issued in June 2010, within 16 days of receiving a completed

[291] Counter-Memorial, at 393; Rejoinder, at 208.
[292] Counter-Memorial, at 394.
[293] Counter-Memorial, at 394; Rejoinder, at 223.
[294] Counter-Memorial, at 394-395; Rejoinder, at 224-225; Privatization Agreement, Clause 5.1.5 (Exhibit C-1); Letter from Zoran Ivković to the Privatization Agency, 26 March 2007 (Exhibit R-45); Letter from the Provincial Secretariat for Energy and Mineral Resources to the Ministry of Mining and Energy and the Privatization Agency, 21 September 2006, at 1 (Exhibit R-44).

application from Claimant. The only reason it took until then was because Claimant's initial application lacked the elements required by the governing statute.[295]

381. Third, Respondent refutes as false Claimant's allegation that "almost immediately after the acquisition of Rudnik Kovin by Kornikom, all of Respondent's State-owned TPPs operated by EPS refused to continue buying coal from Rudnik Kovin." Respondent maintains that those TPPs never purchased coal from Rudnik Kovin, whether before or after privatization and that Claimant should have known of this when it bid on Rudnik Kovin. Moreover, no such representation was made to Claimant by Respondent during the privatization process. If, at all, any representations were in fact made in the Privatization Program, those are not attributable to Respondent because they were prepared by the erstwhile management of Rudnik Kovin.[296]

382. Respondent argues that had Claimant conducted any due diligence, it would have learned that EPS operated a vertically integrated business model, in which its large open-pit mines supplied the coal for its TPPs. In other words, it had no need for additional sources and Claimant's business idea to sell to the TPPs was "foolhardy".[297]

383. For all these reasons, Respondent submits that Claimant's treaty claim of expropriation, whether direct or indirect, fails in its entirety.

C. The Tribunal's Analysis

384. In order to decide Claimant's unlawful expropriation claim, the Tribunal must begin its analysis by reviewing the applicable legal standard. The Tribunal must then examine whether Claimant's allegations of unlawful expropriation meet the said legal standard.

i. The applicable legal standard

385. Claimant argues that Respondent has breached Article 5 of the BIT, which prohibits a State from unlawfully expropriating investments made by investors of the other Contracting Party. Article 5 of the BIT titled "Expropriation" provides:

> "Investments of investors of either Contracting Party, made in the territory of the other Contracting Party, shall not be expropriated or nationalized in the territory of […] that other Contracting Party except only by virtue of law, in the public interest, on a non-discriminatory basis and against prompt and adequate compensation."[298]

[295] Counter-Memorial, at 187-188, 397; Rejoinder, at 222.
[296] Counter-Memorial, at 399; Rejoinder, at 232-235; Kacharov-II, at 7; Mićić-I, at 17, 24.
[297] Rejoinder, at 236; Mićić-I, at 16, 20.
[298] BIT, Article 5 (Exhibit CL-1).

386. According to Claimant, this prohibition of unlawful expropriation in Article 5 of the BIT is not confined to cases of direct expropriation alone but includes cases of indirect expropriation.[299] Respondent also seems to share this view.[300]

387. The Tribunal agrees with the Parties. It is not very controversial that the term 'expropriation' includes any State conduct that has the effect of depriving the investor of all or a substantial part of the use and enjoyment of its investment, regardless of whether or not there is a formal transfer of title. For instance, the tribunal in *Metalclad v. Mexico* has observed:

> "[E]xpropriation […] includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[301]

388. The Tribunal therefore concludes that on a proper construction, the term 'expropriation' in Article 5 of the BIT includes cases of both direct expropriation and indirect expropriation.

389. As for how the Tribunal should identify whether or not there has been an expropriation, Claimant refers to several legal authorities setting out what it considers to be the relevant standard. For instance, Claimant refers to *Siag v. Egypt* to argue that a direct expropriation occurs "when the title of the owner is affected by the measure in question".[302] Similarly, Claimant contends that an indirect expropriation takes place when a State action "has the effect of depriving the investor of all or a substantial part of the use and enjoyment of its investment".[303]

390. The Tribunal agrees with Claimant. There is no controversy that direct expropriation occurs when there is a formal transfer of title. Equally uncontroversial is the proposition that an indirect expropriation occurs when the action of a State substantially deprives an investor of the use and enjoyment of its investment.

391. What the Tribunal would like to place emphasis on, however, is that the standard to demonstrate an indirect expropriation is an exacting one. As is clear from the tests set out by different investment tribunals, a party alleging indirect expropriation is required to show that "the interference is sufficiently restrictive to support a conclusion that the

---

[299] Memorial, at 177-189.
[300] Counter-Memorial, at 334-338.
[301] *Metalclad v. Mexico*, at 103 (Exhibit CL-16); See also *Parkerings v. Lithuania*, at 438 (Exhibit CL-17).
[302] *Siag v. Egypt*, at 427 (Exhibit CL-12); *Ioannis Kardassopoulous & Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 & ARB/07/15, Award, 3 March 2010, at 387 (Exhibit CL-8) ("*Ioannis Kardassopoulous v. Georgia*").
[303] *Pope & Talbot v. Canada*, at 102 (Exhibit CL-20); *Archer Daniels v. Mexico*, at 240 (Exhibit CL-21); *Telenor v. Hungary*, at 65 (Exhibit CL-22); R. Dolzer and C. Schreuer, Principles of International Investment Law (2012) (Extract), p.118 (Exhibit CL-13).

property has been 'taken' from the owner"[304] or that "the interference with the investor's rights [is] such as substantially to deprive the investor of the economic value, use or enjoyment of its investment."[305]

392. Having identified the meaning of the term 'expropriation' in Article 5 of the BIT as well as the standard that needs to be met in order to find that there has indeed been an expropriation, the Tribunal comes to the final aspect relevant to understanding the purport of Article 5 of the BIT - the question of lawfulness of the expropriatory conduct.

393. Claimant argues that an expropriation is lawful only if it is carried out (i) by virtue of law, (ii) in the public interest, (iii) on a non-discriminatory basis, and (iv) against prompt and adequate compensation. If any of the above conditions is not satisfied, the expropriation is unlawful and would constitute a breach of Article 5.[306] Respondent does not dispute this suggestion.

394. The Tribunal agrees with Claimant. A plain reading of Article 5 shows that an expropriation may be lawful only if it is undertaken "by virtue of law, in the public interest, on a non-discriminatory basis and against prompt and adequate compensation". If any of the above conditions are not satisfied, the expropriation will be unlawful and in contravention of Article 5 of the BIT.[307] Numerous other tribunals have also endorsed this view. For instance, in *Crystallex v. Venezuela*, the tribunal has remarked:

> "716. […] When a treaty cumulatively requires several conditions for a lawful expropriation, arbitral tribunals seem uniformly to hold that failure of any one of those conditions entails a breach of the expropriation provision."[308]

395. Taking into account the above findings, the Tribunal notes that its expropriation analysis in the present case must proceed in the following manner. First, the Tribunal must identify whether or not there has been any expropriatory conduct by Respondent. If the Tribunal finds that there has been no expropriatory conduct, the Tribunal need not go any further. If, however, the Tribunal finds that there has been expropriatory conduct, the Tribunal must assess the lawfulness of the expropriation.

396. The Tribunal therefore proceeds to address the next question, *i.e.*, whether Serbia expropriated Claimant's investment.

---

[304] *Pope & Talbot v. Canada*, at 102 (Exhibit CL-20).
[305] *Telenor v. Hungary*, at 65 (Exhibit CL-22).
[306] Memorial, at 223.
[307] BIT, Article 5 (Exhibit CL-1).
[308] *Crystallex Int. v. Venezuela*, at 716 (Exhibit CL-6).

ii. Did Serbia expropriate Claimant's investments?

397. To answer this question, the Tribunal must delve into the various factual allegations made by Claimant and examine whether Serbia's conduct, taken in isolation or as a whole, is tantamount to an unlawful expropriation of its investments.

398. Specifically, the Tribunal will have to examine the following issues:

i. Whether the Privatization Agency's sale of Rudnik Kovin to Kornikom without the necessary authorizations, permits and rights constitutes expropriatory conduct prohibited by Article 5 of the BIT?

ii. Whether Serbia's alleged action of shutting Kornikom out of the EPS-run TPP market constitutes expropriatory conduct prohibited by Article 5 of the BIT?

iii. Whether the Privatization Agency's termination of the Privatization Agreement constitutes expropriatory conduct prohibited by Article 5 of the BIT?

iv. Whether the Privatization Agency's Decisions on Transfer constitute expropriatory conduct prohibited by Article 5 of the BIT?

v. Whether Serbia's conduct taken as a whole constitutes an unlawful expropriation of Kornikom's investment prohibited by Article 5 of the BIT?

399. The Tribunal examines each of the above questions in sequence.

a. Whether the Privatization Agency's sale of Rudnik Kovin to Kornikom without the necessary authorizations, permits and rights constitutes expropriatory conduct prohibited by Article 5 of the BIT?

400. Claimant contends that Serbia privatized Rudnik Kovin in such a manner that it made Kornikom's performance of its obligations under the Privatization Agreement unduly burdensome. More specifically, Claimant argues that Serbia sold Rudnik Kovin, whose key asset was the Kovin Mine, without the authorizations, permits and rights to land necessary to operate the mine. To make matters worse, Serbia failed to disclose any of these deficiencies during the privatization process, *i.e.*, prior to Kornikom's acquisition of Rudnik Kovin. Instead, it confirmed that EPS had transferred the right to use the land to Rudnik Kovin both during the privatization process and after.[309]

401. According to Claimant, these actions and omissions of the Privatization Agency and Serbia in privatizing and selling Rudnik Kovin to Kornikom, without the obvious authorizations and use of land, amount to a "covert or incidental interference with the

[309] Memorial, at 72-82, 192-193.

use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit" of its investment.[310]

402. For its part, Respondent rejects Claimant's allegations as factually unsupported. It points out that, contrary to Claimant's allegations, the status of Rudnik Kovin's permits was "evident from the auction documentation" provided to all participants in the auction process and "could not have been missed by Claimant, whose owner was a sophisticated coal baron".[311] Moreover, Claimant stipulated during the auction process that it had "been allowed to analyze and conduct a due diligence review of the Privatization Subject […]"[312] and further agreed and warranted that it was relying solely on its own due diligence.[313]

403. In Respondent's view, had Claimant conducted its due diligence and read the auction documentation, it would have become readily apparent to Claimant which permits Rudnik Kovin had in its possession, and which permits it lacked. Claimant should therefore be precluded from trying to place the blame elsewhere.[314]

404. As for Claimant's allegation that the Privatization Agency was unhelpful after Claimant discovered the lack of permits, Respondent submits that it did not in any manner prevent or obstruct Claimant's application for the requested permit. To the contrary, the permanent operating permit was issued in June 2010, *i.e.*, 16 days after Claimant submitted a completed application.[315]

405. The Tribunal has considered the Parties' positions. As a preliminary matter, the Tribunal notes that Claimant impugns Respondents' conduct in two separate timeframes. Claimant's first set of arguments relate to Serbia's sale of Rudnik Kovin (through the Privatization Agency) to Claimant without valid permits and authorizations. Claimant's second set of arguments relate to Serbia's obstruction of Claimant's attempts to obtain the permits and authorizations once Claimant discovered that Rudnik Kovin did not in fact have the necessary permits and authorizations. According to Claimant, Respondent's abovementioned conduct taken in isolation or together with Serbia's other conduct constitutes an unlawful expropriation of Kornikom's investment.

406. To reach a decision on this issue, the Tribunal will need to answer three factual questions on which the Parties disagree. They are as below:

    i. Did the Privatization Agency fail to disclose to Kornikom that Rudnik Kovin lacked a permanent operating permit to operate the Kovin Mine?

[310] Memorial, at 196; *Metalclad v. Mexico*, at 103 (Exhibit CL-16).
[311] Counter-Memorial, at 394.
[312] Privatization Agreement, Clause 5.1.5 (Exhibit C-1).
[313] Counter-Memorial, at 394.
[314] Counter-Memorial, at 395; Letter from Zoran Ivković to the Privatization Agency, 26 March 2007 (Exhibit R-45).
[315] Counter-Memorial, at 396.

ii. Could Claimant have separately discovered that Rudnik Kovin did not have a permanent operating permit to operate the Kovin Mine?

iii. Did Serbia obstruct Claimant's attempts to obtain the permits and authorizations once Claimant discovered that Rudnik Kovin did not in fact have the necessary permits and authorizations?

407. Based on the Tribunal's findings on the above questions, the Tribunal will then need to evaluate whether Serbia's conduct constitutes expropriatory conduct prohibited by Article 5 of the BIT.

Did the Privatization Agency fail to disclose that Rudnik Kovin lacked a permanent operating permit to operate the Kovin Mine?

408. At the outset, the Tribunal notes that Rudnik Kovin did not have a permanent operating permit at the time of its auction. Neither Party claims that it did. The point of contention between the Parties is whether this fact was disclosed to Claimant at the relevant time.

409. Claimant argues that no such disclosure was made in the Privatization Program, and it was therefore reasonable for it to proceed with the understanding that Rudnik Kovin held all permits, land and water rights necessary to operate the Kovin Mine.[316]

410. In support of its position that it was unaware of the lack of permits, Claimant refers to the Minutes of a Kornikom and Rudnik Kovin Working Group meeting in Sofia, where Mr. Goranov, the former General Director of Rudnik Kovin, observed that the lack of a permanent operating permit for Rudnik Kovin was not specified in the tender documentation.[317]

411. In response, Respondent maintains that all prospective bidders were informed that Rudnik Kovin did not have a permanent operating permit in the auction documentation. Respondent argues that the auction documentation packet provided to all bidders included at least five annexes, one of which contained a letter dated 21 September 2006 from the Vojvodina Secretariat to the Serbian Ministry of Mining and Energy, informing the Serbian Ministry of Mining and Energy that Rudnik Kovin did not possess an exploitation right.[318]

412. This 21 September 2006 letter from the Vojvodina Secretariat to the Serbian Ministry of Mining and Energy provides in relevant part:

> "[…] Based on the review of cadastral records of the exploration areas and exploitation fields on the territory of the AP Vojvodina, it was established that the

[316] Memorial, at 72. Privatization Agreement, Clause 1.1 (Exhibit C-1); Privatization Program, p.3 (Exhibit C-71).
[317] Minutes of Kornikom and Rudnik Kovin Working Meeting, 30 June 2009, p.1 (Exhibit C-5).
[318] Letter from Zoran Ivković to the Privatization Agency (26 Mar. 2007), p.1 (Exhibit R-45).

> Company „Rudnik Kovin“ d.o.o. Kovin, Company for underwater coal exploitation, established by spin-off from the Public Entreprise (sic.) Elektroprivreda Srbije, […] **does not possess the exploitation right**.
>
> […]
>
> **Based on the aforementioned, it follows <u>that the Company „Rudnik Kovin“ d.o.o. Kovin does not meet the legally prescribed requirements for the performance of its core business activity, i.e. exploitation of mineral resources</u>.**
>
> […]
>
> Despite the above, the Provincial Secretariat for Energy and Mineral Resources proposes for practical reasons that **<u>the previously initiated privatization procedure should proceed, but that […] the following facts and requirements should be stated in the public bidding documents:</u>**
>
> 1. That Rudnik “Kovin“ (sic.) d.o.o. Kovin, Company for underwater coal exploitation, pursuant to Article 18 of the Mining Law, does not possess a valid authorization for the performance of its core activity, i.e. for the exploitation of mineral raw materials – coal and gravel.
>
> […]”[319] (Emphasis in original)

413. Claimant disputes having received this letter as part of the auction documentation.[320]

414. The easiest way for the Tribunal to resolve this controversy would have been for it to consider the auction documentation sent to Claimant. Neither Party, however, has been able to adduce a full copy. In the Tribunal’s view, this is understandable given that the present case relates to events that transpired more than 10 years ago.

415. Despite this impediment, however, the Tribunal is nevertheless satisfied that Claimant would have likely received the 21 September 2006 letter from the Vojvodina Secretariat to the Serbian Ministry of Mining and Energy for the reasons set out below.

416. First, Claimant did not, in its Request for Arbitration or its Memorial, contend that it did not have access to the full auction documentation at the time of the bid. This argument was raised for the first time in Claimant’s Reply, when it was pointed out that such a letter formed part of the auction documentation.

417. Second, Respondent has shown that other bidders received the 21 September 2006 letter from the Vojvodina Secretariat to the Serbian Ministry of Mining and Energy. In fact, one other bidder raised queries in response to the letter.

[319] Letter from the Provincial Secretariat for Energy and Mineral Resources to the Ministry of Mining and Energy and the Privatization Agency, 21 September 2006, p.1-2 (Exhibit R-44).
[320] Reply, at 39-41; Tr., Day 1, p.9-10.

418. Specifically, the record shows that on 26 March 2007, one bidder, Mr. Zoran Ivković sought clarifications from the Privatization Agency regarding the operations of Rudnik Kovin in the absence of a permanent operating permit, and inquired whether a buyer would be allowed to proceed with coal production activities during the permit application process.[321]

419. In response to this letter, the Privatization Agency informed Mr. Ivković on 28 March 2007 that it was unable to respond to questions regarding the "legal regulations" and that he should direct his inquiry to the Ministry of Mining.[322]

420. It is unclear from the record whether Mr. Ivković did in fact contact the Ministry of Mining. The record, however, does show that Mr. Ivković eventually paid the auction deposit and attended the auction on 18 April 2017.[323]

421. In the Tribunal's view, the above facts show that recipients of the auction documentation would, or should, have been aware that Rudnik Kovin lacked the necessary permits to operate the Kovin Mine. In the absence of any evidence, this Tribunal cannot find that some parties were not provided the entire auction documentation. This is more so when these entities were sophisticated businesses participating in an auction process to make sizeable investments in Serbia.[324]

422. On balance, it is therefore more likely than not that Claimant received the entire auction documentation.

Could Claimant have separately discovered that the Kovin Mine did not have a permanent operating permit?

423. As a secondary point, Respondent contends that even if Claimant had not been privy to the 21 September 2006 letter from the Vojvodina Secretariat to the Serbian Ministry of Mining and Energy, it should nevertheless have discovered that the Kovin Mine did not have a permanent operating permit because it undertook a due diligence of Rudnik Kovin before participating in the auction.[325]

424. Claimant argues otherwise. According to Claimant, the Privatization Program was silent on the issue and the Privatization Agreement represented that "[t]he Agency shall sell to the Buyer the state-owned capital of the Privatization Subject and all the rights and obligations attached thereto." Claimant was therefore entitled to have a "reasonable understanding that Rudnik Kovin held all permits, land and water rights necessary to operate the Mine".[326]

[321] Letter from Zoran Ivković to the Privatization Agency, 26 March 2007, p.1–2 (Exhibit R-45)
[322] Letter from the Privatization Agency to Zoran Ivković, 28 March 2007, p.1 (Exhibit R-46).
[323] Minutes - Auction for Rudnik Kovin, p.16 (Exhibit C-73).
[324] Kornikom's application for participation in the auction for Rudnik Kovin, 10 April 2007 (Exhibit C-234).
[325] Counter-Memorial, at 394.
[326] Memorial, at 72; Privatization Agreement, Clause 1.1 (Exhibit C-1).

425. Having considered the evidence on the record, the Tribunal agrees with Respondent for the following reasons:

426. First, although Claimant correctly quotes the Privatization Agreement, the inference it draws from the quoted statement is incorrect. Clause 1.1 of the Privatization Agreement provides:

> "The Agency shall sell to the Buyer the state-owned capital of the Privatization Subject and all the rights and obligations attached thereto in accordance with the Privatization Act and the provisions hereof."[327]

427. This sentence does not in any manner represent to a prospective buyer that Rudnik Kovin had a permanent operating permit. The only message the above quoted provision conveyed to a prospective buyer was that the Privatization Agency would transfer Rudnik Kovin along with all its existing rights and obligations.

428. Second, both Parties agree that Claimant was permitted to conduct a due diligence of Rudnik Kovin before participating in the auction process. The performance of a due diligence exercise was in fact encouraged given that a prospective buyer had to confirm that it had conducted its own due diligence exercise in the following terms:

> "The Buyer confirms that it has been allowed to analyze and conduct a due diligence review of the Privatization Subject, its assets and financial operation, and that it fully relies on its own analyses and reviews conducted prior to purchasing the capital."[328]

429. The importance attached to the prospective buyer's due diligence in the privatization process is further confirmed by the testimony of Mr. Vladislav Cvetković, the former Deputy Director of the Privatization Agency, who explained the role of due diligence in the privatization process as below:

> "28. […] As provided by the Law on Privatization and communicated to interested buyers, the Privatization Agency does not conduct any due diligence to check the accuracy of the information provided in the program. Rather, the Privatization Agency only reviews the program to ensure that it is submitted timely, has received authorizations from competent bodies within the subject of privatization, and contains all the elements required by the Law on Privatization. Indeed, in light of the significant number of ongoing privatizations and limited resources of the Privatization Agency at the time, it would have been impossible for it to conduct due diligence into the subjects of privatization.
>
> 29. The privatization process was based on the principle that buyers would perform and rely solely on their own due diligence regarding the subject of privatization. Prior to bidding in the auction, prospective bidders were given ample opportunity

[327] Privatization Agreement, Clause 1.1 (Exhibit C-1).
[328] Privatization Agreement, Clause 5.1.5 (Exhibit C-1).

> to conduct due diligence and test the information contained in the privatization program prepared by the company's management. Potential bidders were entitled to audit the company's books, conduct on-site inspections, and access publicly available information (including information relating to the company's permit rights and land use information) from the relevant government authorities. In sum, potential bidders were advised to make and rely solely on their own assessment in deciding whether to bid and how much.
>
> 30. Prior to bidding, Kornikom and other prospective bidders were provided with and required to execute a draft of the Privatization Agreement. That draft agreement contained a representation and warranty that the Buyer "confirms that it has been allowed to analyze and conduct a due diligence review of the Privatization Subject, its assets and financial operation, and that it fully relies on its own analyses and reviews conducted prior to purchasing the capital. […]"[329]

430. Third, the record shows that Claimant did in fact conduct a due diligence exercise. Claimant also hired an external consultant to assess Rudnik Kovin's financial status and prepare a projected business model.[330]

431. In its Memorial, Claimant, in fact, specifically discusses how Mr. Kacharov, Kornikom's consultant, visited Rudnik Kovin on two occasions and met with Rudnik Kovin's staff and management.[331] Claimant notes:

> "27. […] Kornikom considered the opportunity offered by Rudnik Kovin carefully and, with the help of an external consultant, produced a business model to analyse it. That financial model helped Kornikom to get comfortable with its final bid price.
>
> 28. Mr. Vasil Kacharov, a technical consultant to Kornikom with extensive mining experience, visited Rudnik Kovin in two site visits in April 2007, during which he walked around the Mine site and met with Rudnik Kovin's staff and management. The site visits gave Mr. Kacharov "a positive impression of Rudnik Kovin as a good business opportunity, with lots of unrealised potential."[332] (citations omitted)

432. Mr. Kacharov explained his site visit in similar terms in his witness statement.[333] During cross-examination, when Mr. Kacharov was asked whether he undertook a due diligence of Rudnik Kovin, he answered in the negative. He, however, clarified that he "researched the technological and technical status of the mine", met with the staff on site, met with the management team of Rudnik Kovin including "the director, the

[329] Cvetković-I, at 28-30. During cross-examination, Mr. Cvetković was not asked any follow-up questions on this testimony (See Tr., Day 3, p.9-58).
[330] Memorial, at 27; Counter-Memorial, at 58; Ivanov-I, at 9; Invitation to participate in the Rudnik Kovin auction, p.1-2 (Exhibit C-116).
[331] Memorial, at 27-28.
[332] Memorial, at 27-28.
[333] Kacharov-I, at 17-19.

technical director, the enrichment technologist or specialist [and] the geologist of the coal mine", and reviewed several documents as part of the process.[334]

433. In the Tribunal's view, the above evidence leaves no room for doubt that Claimant was given ample opportunity to conduct a detailed review of the functioning of Rudnik Kovin, in the period prior to the auction. As indicated above, Claimant has not been able to demonstrate to the Tribunal an express representation in any of the auction documents that Rudnik Kovin possessed all relevant permits and land use authorizations. In the absence of such an express representation, the Tribunal would expect any reasonable buyer with significant experience in the industry to investigate these issues. It goes without saying that such an investigation would also have been necessary to get comfort regarding the auction price. The fact that Claimant's due diligence was lacking cannot be held against Serbia.[335]

434. For all these reasons, the Tribunal agrees with Respondent that Claimant could have separately discovered that the Kovin Mine did not have a permanent operating permit had it conducted its due diligence effectively.

Did Serbia obstruct Claimant's attempts to obtain the permits and authorizations once Claimant discovered that Rudnik Kovin did not in fact have the necessary permits and authorizations?

435. The third factual question for the Tribunal to address is whether Serbia obstructed Claimant's attempts to obtain the permits and authorizations once Claimant discovered that Rudnik Kovin did not in fact have the necessary permits and authorizations.

436. Claimant argues that on 4 June 2009, Rudnik Kovin applied to the Vojvodina Energy Secretariat for a license to operate the coal separation machine that Kornikom had purchased for the Kovin Mine.[336] The Vojvodina Energy Secretariat, however, advised Kornikom and Rudnik Kovin that it could not issue the requested authorization because Rudnik Kovin did not have the permit necessary to operate the Kovin Mine. Moreover, it requested Rudnik Kovin to provide proof of its right to use the land on which the Kovin Mine was located.[337]

437. According to Claimant, this was the first time that it discovered that Rudnik Kovin did not have the mining authorization for the Kovin Mine or the right to use the land on which the Kovin Mine was located.[338]

438. Claimant argues this lack of mining authorization for the Kovin Mine and the land ownership issue required it to expend considerable time and effort. Moreover, this problem was compounded by the fact that "Respondent did not take responsibility for

[334] Tr., Day 1, 156:11-157:14.
[335] Kacharov-I, at 17.
[336] Letter from Rudnik Kovin to the Privatization Agency, 4 May 2010 (Exhibit C-51).
[337] Letter from Rudnik Kovin to the Privatization Agency, 4 May 2010 (Exhibit C-51).
[338] Memorial, at 75.

its failure to ensure that Rudnik Kovin held the requisite authorisations, or assist Kornikom and Rudnik Kovin in dealing with these hurdles".[339]

439. In support of its position that the Privatization Agency's (and by extension, Serbia's) conduct was unhelpful, Claimant refers to (i) the contemporaneous minutes of a Kornikom and Rudnik Kovin Working Meeting, which took place on 20 January 2009; (ii) a letter addressed to the Privatization Agency in September 2009; and (iii) the testimony of Mr. Vasil Kacharov.[340]

440. Respondent strongly denies these allegations. According to Respondent, "there is no truth to Claimant's accusation that Respondent 'obstruct[ed]' Claimant's efforts to obtain the operating permit". To the contrary, the evidence shows that various Serbian government entities assisted with Claimant's application for the permanent permit.[341]

441. The Tribunal agrees with Respondent for the following reasons.

442. First and foremost, the precise allegation that Claimant seeks to make on this issue is not entirely clear to the Tribunal. On the one hand, Claimant argues that Serbia "did not take responsibility […] or assist Kornikom and Rudnik Kovin" in obtaining the relevant permits. Yet, in the same pleadings, Claimant alleges that Serbia "obstructed" Kornikom and Rudnik Kovin's efforts to obtain authorizations and permits.[342] In the Tribunal's view, these allegations are materially different from one another. While the first set of allegations suggest some degree of passiveness on part of Respondent, the second set of allegations suggest that Respondent actively prevented Claimant from obtaining the relevant authorizations and permits.

443. Second, the Tribunal notes that Claimant does not explain what it believed the Privatization Agency could have done to assist it in the process of obtaining the relevant permits and authorizations.[343] Respondent argues that the Privatization Agency had limited capability to assist in this context because it was in charge of neither mining permits nor land registrations.[344] The Tribunal finds this explanation persuasive. In any event, the conduct of the Privatization Agency alone is not determinative of whether or

[339] Memorial, at 77. Claimant makes similar allegations elsewhere in its pleadings. For instance, in paragraph 80 of the Memorial, Claimant contends, "[w]hile Kornikom sought the involvement of the Privatization Agency to help resolve the situation, the Privatization Agency neither acknowledged nor assisted Kornikom in resolving these difficulties." Similarly, in paragraph 190 of the Memorial, Claimant argues, "[Serbia] then interfered with Kornikom's performance of and its rights under the Privatization Agreement by […] obstructing Kornikom and Rudnik Kovin's efforts to obtain authorisations and permits." Further, in paragraph 296 of the Reply, Claimant states, "[…] Serbia […] obstructed Kornikom's operation of Rudnik Kovin by failing to cooperate to enable Rudnik Kovin to obtain the authorisations".
[340] Kacharov-I, at 26; Minutes of Kornikom and Rudnik Kovin Working Meeting, 20 January 2009, p.2 (Exhibit C-3); Letter from Kornikom to the Privatization Agency, 18 September 2009, p.1, at 1.3 (Exhibit C-49).
[341] Counter-Memorial, at 187.
[342] Compare Memorial, at 77, 80 with Memorial, at 190, Reply, at 296 and C-PHB, at 49.
[343] Reply, at 42. Claimant's grievance appears to be that the Privatization Agency did not acknowledge or remedy the problem.
[344] Ninth Control Report, p.16 (Exhibit R-29).

not Respondent obstructed Claimant's various application. The Tribunal is required to examine the State's conduct as a whole.

444. Reviewing Respondent's conduct based on the evidence on the record, the Tribunal is convinced that there is nothing to suggest that Serbia, acting through the Privatization Agency or otherwise, prevented or obstructed Claimant from obtaining the relevant authorizations.

445. The record shows the chronology of events as below:

- On 4 June 2009, Rudnik Kovin applied for a license to operate the coal separation machine that Kornikom had purchased for the Kovin Mine.[345]

- On 26 June 2009, the Vojvodina Energy Secretariat advised Kornikom and Rudnik Kovin that it could not issue the requested authorization because Rudnik Kovin did not have an authorization to operate the Kovin Mine. The Vojvodina Energy Secretariat also requested Rudnik Kovin to provide proof of its right to use the land on which the Kovin Mine was located.[346]

- On 7 July 2009, Rudnik Kovin applied to the Cadastre Office to register itself as the holder of the relevant usufruct right to that land.[347] This request was rejected by the Cadastre Office on 4 September 2009. While rejecting Rudnik Kovin's request, the Cadastre Office informed Claimant and Rudnik Kovin that it was not satisfied with the evidence that had been presented.[348]

- On 18 September 2009, Rudnik Kovin wrote to the Privatization Agency where it, among other things, explained the steps it was taking to obtain the authorization for the use of the coal separation machine.[349]

- Thereafter, on 29 September 2009, EPS sent a letter to Rudnik Kovin confirming that it had, prior to the conclusion of the Privatization Agreement, transferred the land rights to Rudnik Kovin.[350]

- On 27 October 2009, the Geodetic Authority of the Republic of Serbia annulled the Cadastre Office's initial decision rejecting Rudnik Kovin's land registration application. In this decision, the Geodetic Authority of the Republic of Serbia agreed

[345] Letter from Rudnik Kovin to the Privatization Agency, 4 May 2010 (Exhibit C-51).
[346] Letter from Rudnik Kovin to the Privatization Agency, 4 May 2010 (Exhibit C-51).
[347] Letter from Rudnik Kovin to the Kovin Real Estate Cadastre Office, 7 July 2009 (Exhibit C-57).
[348] Real Estate Cadastre Office Kovin decision rejecting Rudnik Kovin's request, 4 September 2009, p.2-3 (Exhibit C-58).
[349] Letter from Kornikom to the Privatization Agency, 18 September 2009, p.1-2 (Exhibit C-49).
[350] Letter from EPS to Rudnik Kovin, 29 September 2009 (Exhibit C-54); Letter from EPS to Rudnik Kovin, 30 November 2009 (Exhibit C-56).

with the substance of the Cadastre Office's decision, but ordered the authority to reconsider Claimant's request based on the new evidence submitted by EPS.[351]

- On 30 November 2009, EPS sent another letter to Rudnik Kovin, documenting the transfer of land rights from EPS to Rudnik Kovin.[352]

- On 4 May 2010, Rudnik Kovin wrote to the Privatization Agency, setting out the steps it had taken to obtain the relevant permits and authorizations and requested the Privatization Agency to allow Claimant to engage a "competent institution" to, among other things, prepare a report on the technical condition of the facility.[353]

- On 25 May 2010, Rudnik Kovin filed a supplement to its original application of 4 June 2009.[354]

- On 10 June 2010, the Vojvodina Energy Secretariat granted Rudnik Kovin an operating permit for the Kovin Mine.[355] In this decision, the Vojvodina Energy Secretariat noted that Rudnik Kovin's land registration application continued to remain pending. It therefore instructed Rudnik Kovin to obtain an authorization to use the land by 25 December 2010.[356]

446. In the Tribunal's view, the chronology of events set out above does not demonstrate any obstruction or interference by Serbia in Claimant's application for the relevant permits and authorizations. On the contrary, the evidence shows that some agencies of the Serbian state, including the Vojvodina Energy Secretariat assisted Claimant in the process. Claimant acknowledges this fact in its Memorial. For instance, in paragraph 81 of its Memorial, Claimant states:

> "The serious adverse impacts that this had on Kornikom's ability to develop the Kovin Mine and its plans for the Novi Kovin Project were recognised by the Vojvodina Energy Secretariat, which also committed to assist Kornikom in fulfilment of these issues, stating that a "pre-condition" for the successful completion of the Novi Kovin Project "is to resolve the partners' ownership issues".[357]

447. Claimant also acknowledged this fact during the oral hearing. In Mr. Ivanov's cross-examination, he observed:

> "Q. The local authorities were enthusiastic about the project.

[351] Decision of the Republic Geodetic Authority, 27 October 2009 (Exhibit C-55).
[352] Letter from EPS to Rudnik Kovin, 30 November 2009 (Exhibit C-56).
[353] Letter from Rudnik Kovin to the Privatization Agency, 4 May 2010 (Exhibit C-51).
[354] Decision by Vojvodina Regional Secretariat of Energy and Mineral Resources, 10 June 2010, p.2 (Exhibit C-12).
[355] Memorial, at 82; Counter-Memorial, at 189(d); Decision by Vojvodina Regional Secretariat of Energy and Mineral Resources, 10 June 2010, p.2 (Exhibit C-12).
[356] Memorial, at 82; Counter-Memorial, at 189(d); Decision by Vojvodina Regional Secretariat of Energy and Mineral Resources, 10 June 2010, p.2 (Exhibit C-12).
[357] Memorial, at 81.

A. To some time, yes.

Q. Okay, and they provided support which was critical to enabling you to obtaining the permits and land that you needed to pursue the project; correct?

A. Yes, they provided it."[358]

448. For all these reasons, the Tribunal concludes that Serbia did not obstruct Claimant's attempts to obtain the permits and authorizations once Claimant discovered that Rudnik Kovin did not in fact have the necessary permits and authorizations.

***

449. In the above section, the Tribunal has found that (i) Serbia bears no responsibility for the sale of Rudnik Kovin to Claimant without a permanent operating permit to operate the Kovin Mine; and (ii) Serbia did not obstruct Claimant's attempts to obtain the permits and authorizations once Claimant discovered that Rudnik Kovin did not in fact have the necessary permits and authorizations.

450. Claimant has therefore failed to prove the factual allegations underpinning the first prong of its expropriation claim. In these circumstances, Claimant's contention that the sale of Rudnik Kovin to Kornikom without the relevant authorizations, permits and rights to land constitutes an indirect expropriation fails at the threshold.

b. Whether Serbia's action of shutting Kornikom out of the EPS-run TPP market constitutes expropriatory conduct prohibited by Article 5 of the BIT?

451. As indicated in paragraph 398 above, the second issue for the Tribunal to consider in the context of Claimant's expropriation claim is whether Serbia's action of shutting Kornikom off from the EPS-run TPP market constitutes expropriatory conduct.

452. Claimant contends that immediately after Kornikom acquired Rudnik Kovin, all of Serbia's State-owned TPPs that were operated by EPS, refused to buy coal from Rudnik Kovin, despite their continued need for coal and despite it being more logistically convenient and less expensive for them to do so. According to Claimant, although EPS purchased coal from Rudnik Kovin prior to Rudnik Kovin's privatization, "EPS refused to purchase coal from Rudnik Kovin [later] because the company was no longer part of the EPS network and, instead, was privately owned by Bulgarians".[359]

453. More concretely, Claimant argues that the Privatization Program described Rudnik Kovin's sales to local TPPs in the period prior to its privatization, and influenced Claimant's decision to invest in Rudnik Kovin. Claimant, therefore, planned that it would increase production of the 'pea' size fractions burnt by TPPs and take advantage

[358] Tr., Day 2, 120:1-7.
[359] Memorial, at 68, 198; Reply, at 33; Kacharov-I, at 46.

of the increasing local TPP demand in order to increase profitability of the Kovin Mine.[360]

454. Accordingly, in the period after privatization, Rudnik Kovin began producing more and more "pea" size coal for sale to the TPPs. Claimant also purchased an ore-separation machine, pursuant to which Rudnik Kovin was able to increase the output of pea-sized coal to the point that it constituted almost 50% of Rudnik Kovin's total production. The State-owned TPPs, however, refused to purchase coal from Claimant.[361]

455. In these circumstances, given that the 'pea' size coal was produced specifically for TPPs, Rudnik Kovin's inability to sell these fractions to the TPPs was extremely damaging. Referring to the evidence of Mr. Ivanov, Claimant states that, "[n]o amount of sales of the medium and large-sized coal to factories or households could address the lack of sales to TPPs." Claimant, however, had to mitigate this negative impact and therefore made every attempt to sell the small fraction coal. Eventually, Claimant managed to sell Rudnik Kovin's small fraction coal to TPPs in Romania.[362]

456. In Claimant's view, Respondent's conduct was not only "internally inconsistent, misleading, and contrary to its own prior conduct, but it also was biased, and resulted in a legal and business environment in which Kornikom, through Rudnik Kovin, faced mounting hostility and financial difficulties in operating the Kovin Mine".[363] According to Claimant, similar behavior has been found to be in violation of a State's obligation to refrain from unlawful expropriations.[364]

457. Respondent rejects these allegations in their entirety. In addition to identifying issues relating to attribution, Respondent maintains that none of Claimant's factual assertions have any merit.[365]

458. The Tribunal has considered the Parties' positions.

459. As with the permit issue, for Claimant to succeed in its claim that Serbia's conduct with respect to the sale of coal to the TPPs is expropriatory, it must clear three hurdles. First, it must show that the actions of the EPS-run TPPs are attributable to Serbia. Second, it must show that its factual allegations are true. Finally, it must show that Serbia's actions meet the standard of unlawful expropriatory conduct discussed above.

460. The Tribunal will thus consider the question of attribution first, before proceeding to assess the veracity of Claimant's allegations.

---

[360] Memorial, at 67-68; Reply, at 21-26; C-PHB, at 12-13; Ivanov-I, at 17-28.
[361] Memorial, at 67-69; C-PHB, at 18, 22; Ivanov-I, at 20; Kacharov-I, at 46.
[362] Memorial, at 69-70; Reply, at 304; Ivanov-I, at 29.
[363] Memorial, at 199-200; Reply, at 304, 311; *Abengoa S.A. v. Mexico*, at 598, 610 (Exhibit CL-26); *Siemens v. Argentina*, at 254-260 (Exhibit CL-27); *Feldman v. Mexico*, at 103 (Exhibit CL-33).
[364] Memorial, at 200.
[365] Counter-Memorial, at 149-164, 165-168, 386, 390, 399; Rejoinder, at 27-35, 42-48.

461. Claimant's submissions on this issue suggest that Claimant considers actions of EPS and its TPPs to be attributable to Serbia. Claimant has, however, not shown how this is the case. A perusal of Claimant's pleadings shows that the arguments on attribution entirely relate to the conduct of the Privatization Agency. There is no mention of EPS or its TPPs at all.

462. In these circumstances, the Tribunal cannot find that the actions of the EPS-run TPPs are attributable to Serbia. Claimant's claim therefore fails at the threshold.

463. For the sake of completeness, however, the Tribunal nevertheless assesses Claimant's various factual allegations in sequence below. The factual allegations made by Claimant require the Tribunal to consider the following questions:

i. Did Rudnik Kovin sell coal to EPS-operated TPPs in the period prior to privatization?

ii. Did the Privatization Program represent that Rudnik Kovin had sold or could sell coal to EPS-operated TPPs?

iii. Did any senior officials of EPS or Rudnik Kovin represent to Kornikom that Rudnik Kovin had sold or could sell coal to EPS-operated TPPs?

iv. Did the fact that Rudnik Kovin was "privately owned by Bulgarians" influence the EPS-operated TPPs in refusing to buy coal from Rudnik Kovin?

Did Rudnik Kovin sell coal to EPS-operated TPPs in the period prior to privatization?

464. The first question for the Tribunal to consider is whether Rudnik Kovin sold any coal to EPS-operated TPPs in the period prior to privatization.

465. Claimant contends that it did. Relying on the evidence of Mr. Vasil Kacharov, Claimant observes in its Memorial, "[p]rior to its privatisation, Rudnik Kovin had sold its coal to these EPS-operated TPPs."[366]

466. Respondent strongly challenges this assertion. According to Respondent, "the Kovin mine simply did not sell coal to EPS-run TPPs". Instead, the only time before Rudnik Kovin's privatization that it sold any coal to a TPP was in December 2006, when it exported coal to a TPP in Romania which had no connection with EPS.[367]

467. The Tribunal agrees with Respondent.

[366] Memorial, at 66; Kacharov-I, at 47. A similar assertion is made in paragraph 198 of the Memorial, where Claimant states: "This was despite the fact that before Konikom's acquisition of Rudnik Kovin, the Kovin Mine sold its coal to EPS's TPPs."
[367] Counter-Memorial, at 150; Budimlić-I, at 15.

468. Claimant's assertion that Rudnik Kovin sold coal to EPS-run TPPs in the period prior to its privatization is based on the evidence of Messrs. Kacharov, Goranov and Ivanov.[368]

469. Mr. Kacharov, for instance, noted in his first witness statement:

> "Before its privatisation, as part of the EPS network, Rudnik Kovin had a ready market for this coal among the EPS power stations; for example the Company supplied coal to the Morava Svilajnac TPP."[369]

470. Similarly, Mr. Goranov observed in his first witness statement:

> "[…] prior to privitisation Rudnik Kovin was quite dependent on selling to EPS-operated power plants (such as the Morava Svilajnac TPP and the Kostolac TPP)."[370]

471. This view of theirs, however, changed in their second witness statements. In these witness statements, Messrs. Kacharov and Goranov no longer maintained that Rudnik Kovin regularly supplied coal to EPS-run TTPs. Instead, they indicated that there was only one instance when Rudnik Kovin sent shipments of coal to an EPS-run TPP, TPP Morava Svilajnac, and that was so that the TPP could "evaluate the coal". This is clear from the extracts below:

Mr. Kacharov's Second Witness Statement:

> "6. […] I would like to clarify the statements in my first Witness Statement regarding these sales.
>
> 7. During my visits to Rudnik Kovin in April 2007, I met with Executive Director Elenko Michich, Technical Director Zoran Miloslavlevich, and Coal Quality Specialist Mikica Lukich of Rudnik Kovin. These representatives informed me that Rudnik Kovin sold several shipments of coal to EPS TPPs, in particular TPP Morava Svilajnac. I understood that these sales were made so that TPP Morava Svilajnac could evaluate the coal. Furthermore, the senior officials I met at Rudnik Kovin informed me that it maintained a good relationship with EPS, as the Kovin Mine had formerly been part of EPS for many years, and that, after the privatisation, they would be willing to arrange meetings between Rudnik Kovin's purchaser and EPS to further develop this relationship."[371]

Mr. Goranov's Second Witness Statement:

[368] Goranov-I, at 38; Ivanov-I, at 14.
[369] Kacharov-I, at 47.
[370] Goranov-I, at 38.
[371] Kacharov-II, at 6-7.

> "5. Having reviewed documents produced by Serbia during this proceeding, I would like to clarify the observations in my first Witness Statement regarding Rudnik Kovin's preprivatisation sales to EPS TPPs. With the benefit of these documents to refresh my memory, I now accept that Rudnik Kovin's pre-privatisation sales to EPS were limited to determining the suitability of Rudnik Kovin's coal for the TPPs."[372]

472. During cross-examination, Claimant's third witness, Mr. Ivanov also admitted that Rudnik Kovin was not a long-standing supplier to the EPS-run TTPs in the pre-privatization period. This is clear from the following excerpt:

> "Q. Okay, and you further say -- strike that. You don't say "It was my understanding that Rudnik Kovin was a long-established supplier to these plants", you assert it as a declarative fact: "Being a long-established supplier to these plants ..." Right? That also was not true. Rudnik Kovin was not a long-established supplier to the EPS-run TPPs; correct?
>
> A. Yes, sir -- as I just explained, maybe it's bad language used by me, this was the situation pre-privatisation, was our understanding.
>
> Q. Okay, and it wasn't true.
>
> A. At the end of the day it wasn't."[373]

473. The about-turn performed by Claimant's witnesses suggests that Rudnik Kovin did not supply coal to any EPS-run TPPs in the period prior to its privatization.

474. This finding is corroborated by Respondent's witness, Mr. Budimlić, who states:

> "18. […] I have been working at Rudnik Kovin since 1995, and involved in the preparation of sales plan during the entire period. I can confirm that, before privatization, ***EPS-owned*** thermal power plants were not Rudnik Kovin's customers, and Rudnik Kovin had not delivered any coal to EPS-owned thermal power plants prior to privatization. Instead, ***EPS-owned*** TPPs had a long history of sourcing their coals from other mines whose supply of coal more than fulfilled their demand."[374] (Emphasis in original)

475. It is also given further credence by the documentary record. Contrary to the various assertions made by Claimant's witnesses, the record shows that Claimant addressed a letter to the Privatization Agency in 2008 in which it confirmed that EPS could not use the coal from the Kovin Mine in the period prior to privatization because of the quality

[372] Goranov-II, at 5.
[373] Tr., Day 2, 94:2-14.
[374] Budimlić-I, at 18. In his second witness statement, Mr. Budimlić clarifies that one shipment of 16,000 tonnes of coal was made to TPP Morava in 1997 (see Budimlić-II, at 7).

of the coal produced. For ease of reference, the relevant extract of Claimant's 14 November 2008 letter addressed to the Privatization Agency is reproduced below:

> "[B]efore the sale, the Mine operated as a part of EPS [Serbia's power supply utility] as an investment, and the market it mainly relied on was Vojvodina. EPS could not use the coal from Rudnik Kovin in its thermal power plants, as the coal was unseparated, which resulted in damage to equipment in the thermal power plants. In the meantime, a gas supply pipeline was built for the consumers in Vojvodina, considerably reducing demand for Rudnik Kovin coal. In order to overcome these issues, Rudnik Kovin decided to introduce a coal separator, because EPS, as one of its largest customers, required control of coal quality following the introduction of the separation process. In the meantime, some quantities of coal were sold on the Romanian market, for the purposes of their thermal power plants. […]."[375] (Emphasis supplied)

476. For all these reasons, the Tribunal concludes that Rudnik Kovin did not sell coal to EPS-operated TPPs in the period prior to privatization.

Did the Privatization Program represent that Rudnik Kovin sold or could sell coal to EPS-operated TPPs?

477. The second question for the Tribunal to consider is whether the Privatization Program represented to Claimant that Rudnik Kovin had sold or could sell coal to EPS-operated TPPs.

478. Claimant argues that it did. Specifically, Claimant states, "Rudnik Kovin's sales to local TPPs were described in the Privatization Program, and formed an important draw for Kornikom when deciding to invest in Rudnik Kovin."[376]

479. In support of its position, Claimant relies on the following extract of the Privatization Program:

> "Low-grade coal - lignite, which is extracted from the mining pools of Kolubara and Kostolac, accounts for 65% of Serbia's electricity. A significant fact is that only one open pit in Colombara, Field D, extracts coal which accounts for 32% of electricity in Serbia.
>
> The total consumption of solid fuels in Serbia in 2002 amounted to 33.95 million tons. Of this quantity, 32.13 million tons were lignite coals extracted from the open pits in Kolubara and Kostolac. Most of these coal was used to produce electricity in the thermal power stations of Kolubara, Morava, Nikola Tesla and Kostolac. About 2.2 million tons is the consumption of business and household consumers in the form of dried lignite. In addition to lignite, 1.14 million tons of pit coal and

[375] Letter from Kornikom to the Privatization Agency, 14 November 2008, p.1–2 (Exhibit C-30). A similar observation is made in another letter addressed by Kornikom to the Privatization Agency dated 22 May 2009 (See Letter from Kornikom to the Privatization Agency, 22 May 2009, p.2 (Exhibit C-31)).
[376] Memorial, at 67.

> 0.68 million tons of brown coal were also extracted. In the period up to 2010, an increase in the demand of about 20% is foreseen.
>
> As for the Kovin mine, with no major marketing efforts, the sales volumes are about a level of 200,000 tons. The quantities currently available are about 23.5 thousand tons in the smaller fractions. With small investments in the commercial function of the mine, the volume of sales may increase to 300-350 thousand tons of coal per year."[377]

480. According to Claimant, the paragraphs quoted above related to "Rudnik Kovin's sales" and linked the "projected growth in Rudnik Kovin's sales to Serbia's TPP market". Moreover, it showed that "pea-sized coal sales to TPPs were a major growth area for coal mines in Serbia – both generally, and specifically for Rudnik Kovin" and that increase in Rudnik Kovin's sales would be through the sale of the "as-yet under-marketed smaller fractions to EPS TPPs".[378]

481. Respondent disagrees with this characterization. According to Respondent, the Privatization Program made no representation that Rudnik Kovin had sold, or could be expected to sell, coal to EPS-run TPPs. Instead, Claimant misreads the text of the Privatization Program in drawing its inferences.[379]

482. Second and in any event, Claimant is precluded from relying on the Privatization Program because it has expressly stipulated in the Privatization Agreement that "it has been allowed to analyze and conduct a due diligence review of the Privatization Subject, its assets and financial operation, and that it fully relies on its own analyses and reviews conducted prior to purchasing the capital." In contrast, the Privatization Agency "did not prepare, do any due diligence on, or vouch for the accuracy of the statements in the Privatization Program", which was prepared by Rudnik Kovin's management.[380]

483. A review of the Parties' submissions shows that this entire issue hinges on the meaning of the paragraphs of the Privatization Program quoted above (see paragraph 479 above).

484. In the Tribunal's opinion, although Claimant correctly observes that the paragraphs quoted above discuss Rudnik Kovin's sales, the Tribunal does not agree with Claimant's view that the quoted excerpt is linked to the "projected growth in Rudnik Kovin's sales to Serbia's TPP market" or that the increase in Rudnik Kovin's sales would be through the sale of the "as-yet under-marketed smaller fractions to EPS TPPs". Nor does the Tribunal agree that the Privatization Program represented that Rudnik Kovin sold or could sell coal to EPS-operated TPPs.

485. As Respondent correctly points out, the first two paragraphs of the quoted text do not say anything specifically about Rudnik Kovin. Instead, they address the Serbian coal

[377] Privatization Program, p.9 (Exhibit C-71).
[378] Memorial, at 67; Reply, at 21. Similar allegations have also been made at paragraph 304 of the Reply.
[379] Counter-Memorial, at 156.
[380] Counter-Memorial, at 165; Rejoinder, at 47.

industry in general. The third paragraph, on the other hand, does reference Rudnik Kovin's coal sales but is entirely silent on the sale of coal to EPS-operated TPPs. It merely gives a snapshot of the Kovin Mine's sales at the relevant time (noting that the sales volume was 200,000 tons, with about 23,500 tons of small fractions) and suggests that with small investments in the commercial function, the sales volume could increase to 300,000 / 350,000 tons.[381]

486. Claimant argues that an increase in sales from 200,000 tons to 300,000 / 350,000 tons "could only be achieved by supplying the Serbian TPPs".[382] It is unclear to the Tribunal on what basis Claimant makes this assertion. The Tribunal is, however, satisfied that this inference was not from the Privatization Program itself.

487. For these reasons, the Tribunal concludes that the Privatization Program did not represent that Rudnik Kovin sold or could sell coal to EPS-operated TPPs.

Did any senior officials of EPS or Rudnik Kovin represent to Kornikom that Rudnik Kovin had sold or could sell coal to EPS-operated TPPs?

488. The third question for the Tribunal's attention is whether senior officials of EPS or Rudnik Kovin represented to Claimant that Rudnik Kovin sold or could sell coal to EPS-operated TPPs.

489. Claimant argues in its Reply, that when Mr. Kacharov visited Rudnik Kovin in April 2007, the Executive Director, Technical Director, and Coal Quality Specialist of Rudnik Kovin informed him that Rudnik Kovin had sold several shipments of coal to TPP Morava Svilajnac. These senior officials moreover informed Mr. Kacharov that Rudnik Kovin had a good relationship with EPS and that, after the privatization, they would be willing to arrange meetings between Rudnik Kovin's purchaser and EPS to further develop this relationship.[383]

490. Respondent contests this assertion and relies on Mr. Jelenko Mićić's testimony to argue that Rudnik Kovin's management made no such representation to Mr. Kacharov.[384]

491. Having considered the testimony of both Mr. Kacharov and Mr. Mićić, the Tribunal is not convinced that the representations that Claimant contends were made, were in fact made.

492. As indicated above (see paragraphs 469 and 471), Mr. Kacharov has not been consistent with his recollection of events during the relevant time period. Although he states that representatives of Rudnik Kovin, particularly the Executive Director Mr. Elenko Michich, the Technical Director Mr. Zoran Miloslavlevich, and the Coal Quality

[381] Privatization Program, p.9 (Exhibit C-71).
[382] Memorial, at 67. Claimant makes a similar observation in paragraph 21 of the Reply, where it observes: "The implication is clear: these new sales would be sales of the as-yet under-marketed smaller fractions to EPS TPPs".
[383] Reply, at 24, 304.
[384] Rejoinder, at 34; Mićić-I, at 23–25.

Specialist Mr. Mikica Lukich informed him that Rudnik Kovin sold several shipments of coal to EPS-run TPPs in the past, he made no mention of this in the first witness statement and presented his recollections only as a matter of correction after it was pointed out to him that Rudnik Kovin did not have a "ready market" for supply of its coal in EPS-operated TPPs.

493. During cross-examination when this issue was pointed out to him, Mr. Kacharov agreed that the corrections he made were after reading what Respondent presented in response to his original testimony. This is clear from the following extract:

> "Q. Now, you admit in your second witness statement that part of your testimony in your first witness statement was "not correct"; do you recall that, sir?
>
> A. I corrected my statement in connection to what I read in the witness statement of the Serbian colleagues.
>
> Q. Okay, so after reading what you say you read, you made a correction in your second witness statement about testimony you had provided in your original witness statement; yes?
>
> A. Yes."[385]

494. In fact, he later admitted that he did not recollect the "minor details" but remembered only the "main ones". This is clear from the extract reproduced below:

> "Q. Okay, thank you, sir. Now, your witness statements concern events that occurred as many as 15 years ago; correct?
>
> A. Yes.
>
> Q. And you've testified that with the passage of time you don't recall all the detail (sic.) about those events; correct?
>
> A. The minor details are lost. However, the main ones do remain."[386]

495. In the Tribunal's view, although one cannot fault Mr. Kacharov for his inability to recall the finer details of events that transpired in 2007, his incorrect recollection of events does not instill much confidence in his testimony. The Tribunal does not therefore give much weight to Mr. Kacharov's testimony.

496. Thus, in the absence of any other evidence to corroborate Mr. Kacharov's testimony, the Tribunal finds that Claimant has failed to demonstrate to the Tribunal's satisfaction that representatives of Rudnik Kovin represented to Claimant that (i) Rudnik Kovin had

[385] Tr., Day 1, 147:24-148:8. For clarity, in Mr. Kacharov's second witness statement, he observes, "I also accept that my first Witness Statement is not correct in suggesting that there were regular purchases of coal by EPS TPPs before the privatisation, as opposed to the more limited sales […]" (see Kacharov-II, at 13).
[386] Tr., Day 1, 149:15-22.

sold several shipments of coal to TPP Morava Svilajnac or (ii) Rudnik Kovin had a good relationship with EPS and that, after the privatization, they would be willing to arrange meetings between Rudnik Kovin's purchaser and EPS to further develop the relationship.

497. This is all the more the case when, Respondent's witness, Mr. Jelenko Mićić, who was intrinsically connected with the operations of Rudnik Kovin, observes in his witness statement that no such representations were made.[387] The relevant extract is set out below:

> "23. Counsel have advised me that Mr. Vasil Kacharov claims my colleagues and I told him that "Rudnik Kovin sold several shipments of coal to EPS TPPs, in particular TPP Morava Svilajnac," as well as that sales of coal to EPS "would be possible after the privatisation," and that "EPS was envisaging using Rudnik Kovin's coal in the new plant" EPS was planning to build in the Kovin basin. These allegations made by Mr. Kacharov do not correspond to the facts, since EPS did not buy coal from Rudnik Kovin even prior to the privatization of Rudnik Kovin, and consequently I could not have told him, nor did I tell him, that it would be possible for Rudnik Kovin to sell coal to EPS after privatization.
>
> 24. Mr. Kacharov's claims are untrue. Neither I nor, to the best of my knowledge, any other member of the mine's management told him in early 2007 or at any time thereafter that it was possible to sell Rudnik Kovin's coal to EPS-owned TPPs for electricity production.
>
> 25. As the Manager of Rudnik Kovin before privatization and the Director of EPS's Directorate for Production, Processing, and Transport of Coal before that—I knew well that neither the business nor technical conditions existed for Rudnik Kovin to sell coal to EPS-owned TPPs. The other members of the mine's management knew this as well."[388]

498. For these reasons, the Tribunal is not convinced that any representations were made by senior officials of EPS or Rudnik Kovin to Kornikom that Rudnik Kovin had sold or could sell coal to EPS-operated TPPs.

Did the fact that Rudnik Kovin was "privately owned by Bulgarians" influence the EPS-operated TPPs in refusing to buy coal from Rudnik Kovin?

499. The final factual question for the Tribunal to address is whether there was any anti-Bulgarian sentiment which influenced the EPS-operated TPPs' decision to not deal with Rudnik Kovin.

[387] Mićić-I, at 23-25.
[388] Mićić-I, at 23-25. It is relevant to note that Mr. Mićić was not cross-examined on this point during the hearing. (See Tr., Day 3, 94:19-118:25).

500. Claimant contends that there was. In its Memorial, Claimant alleges that as soon as it purchased Rudnik Kovin, the EPS-operated TPPs refused to purchase its coal, despite their continued need for coal and despite it being far more logistically convenient for them to purchase coal from the Kovin Mine.[389] According to Claimant, this was because the "Company was no longer part of the EPS network and, instead, […] privately owned by Bulgarians."[390]

501. Respondent rejects these allegations. According to Respondent, the decisions of the EPS-operated TPPs were commercial decisions and were not motivated by an "anti-Bulgarian sentiment".[391] Respondent relies on the evidence of Mr. Goran Budimlić, an employee and, later, officer of Rudnik Kovin in support of its position.

502. Having reviewed the record, the Tribunal agrees with Respondent for the following reasons:

503. First, Claimant's allegations regarding discrimination by EPS-operated TPPs have not been consistent throughout the proceedings. Whereas in its Memorial, Claimant argued that Rudnik Kovin had sold coal to EPS-operated TPPs in the period prior to privatization but "the EPS-run TPPs refused to purchase" its coal in the period after privatization, it significantly altered its position in the Reply. In the Reply, Claimant admitted that Rudnik Kovin had not sold coal to EPS-operated TPPs in the period prior to privatization. Instead, it questioned why "EPS TPPs […] refused to buy coal from Rudnik Kovin".[392]

504. Put differently, Claimant's entire argument that it was discriminated against was initially premised on the allegation that EPS-operated TPPs adopted a different approach towards Rudnik Kovin once Claimant entered the fray. Claimant's specific allegation was that "[Respondent] then interfered with Kornikom's performance of and its rights under the Privatisation Agreement by, among other things, having its State-owned power plants stop purchasing Rudnik Kovin's coal."[393] However, when it was discovered that this argument could no longer be sustained, Claimant contended that there was no commercial reason why EPS-operated TPPs would not purchase coal from Rudnik Kovin and the only explanation was an "anti-Bulgarian sentiment".[394] The Tribunal finds this change of position striking and one that undermines Claimant's case.

505. Second, Claimant's witnesses do not adequately explain why they felt that the EPS-operated TPPs' refusal to purchase coal from Rudnik Kovin was motivated by an "anti-Bulgarian sentiment". Instead, the allegations made are vague and without reference to

[389] Memorial, at 198; Kacharov-I, at 47
[390] Memorial, at 67; Kacharov-I, at 49-50.
[391] Counter-Memorial, at 155.
[392] Compare Memorial, at 65-66 with Reply, at 33.
[393] Memorial, at 190.
[394] Reply, at 33.

any particular instance or interaction where such discrimination was perceived. This is evident from the following extract of Mr. Goranov's witness statement:

> "We understood at the time, and I still believe, that EPS refused to buy from us because the Kovin Mine was Bulgarian-operated."[395]

506. This is similarly evident from Mr. Kacharov's testimony set out below:

> "I believe that EPS refused to purchase coal from Rudnik Kovin because the Company was no longer part of the EPS network and, instead, was privately owned by Bulgarians."[396]

507. Third, the record appears to have only one documented effort of Rudnik Kovin attempting to sell coal to an EPS-operated TPP under Claimant's ownership. Materially, in the communications exchanged between Rudnik Kovin and the TPP in the context of this discussion, Rudnik Kovin acknowledged that the TPP previously had reservations regarding the quality of the coal.[397]

508. Fourth, Respondent's witness, Mr. Budimlić, very clearly explains the commercial reasons why the EPS-operated TPPs never purchased coal from Rudnik Kovin both before and after privatization. In his testimony, he provides the following explanations as to why Claimant's allegations regarding discrimination are unfounded:

- First, the EPS-operated TPPs did not purchase coal from Rudnik Kovin, both before and during privatization, because they had longstanding supply relationships with other coal mines that more than fulfilled their demand requirements.

- Second, Rudnik Kovin's coal production volume was so small, it would have been wholly insufficient to meet the needs of the TPPs.

- Third, even after the termination of the Privatization Agreement, EPS-operated TPPs did not purchase coal consistently from Rudnik Kovin. There was only one instance in 2014, where Rudnik Kovin was called upon to deliver coal to a few EPS-operated TPPs.[398]

509. Claimant does not contest these observations made by Mr. Budimlić with any vigor but simply notes that there was no reason why EPS-operated TPPs could not have bought coal from Rudnik Kovin to fulfil "only part of their demand".[399] In the Tribunal's opinion, this response from Claimant is insufficient to discharge the high burden of

[395] Goranov-I, at 38.
[396] Kacharov-I, at 50.
[397] Letter from Rudnik Kovin to EPS, 28 February 2008 (Exhibit C-259); Letter from Rudnik Kovin to TPP Morava Svilajnac, 20 June 2008 (Exhibit C-260).
[398] Counter-Memorial, at 153; Budimlić-I, at 18.
[399] Reply, at 34.

demonstrating that the EPS-operated TPPs systematically discriminated against Rudnik Kovin after it was acquired by Kornikom.

510. For all these reasons, the Tribunal concludes that the decision of EPS-operated TPPs to not purchase coal from Rudnik Kovin was not influenced by any anti-Bulgarian sentiment.

***

511. In the above section, the Tribunal has made the following findings:

- First, Rudnik Kovin did not sell coal to EPS-operated TPPs in the period prior to privatization.

- Second, the Privatization Program did not represent that Rudnik Kovin had sold or could sell coal to EPS-operated TPPs.

- Third, senior officials of EPS or Rudnik Kovin did not represent to Kornikom that Rudnik Kovin had sold or could sell coal to EPS-operated TPPs.

- Fourth and finally, the decisions of the EPS-operated TPPs to not buy coal from Rudnik Kovin was not motivated by "anti-Bulgarian" sentiments.

512. Claimant has therefore failed to prove to the Tribunal's satisfaction, the facts underpinning the second prong of its claim that Serbia expropriated Kornikom's investment by obstructing Rudnik Kovin's sale of coal to EPS-operated TPPs. Claimant's indirect expropriation claim on this ground must therefore be rejected.

c. Whether the Privatization Agency's termination of the Privatization Agreement constitutes expropriatory conduct prohibited by Article 5 of the BIT?

513. The third question for the Tribunal to consider is whether the Privatization Agency's termination of the Privatization Agreement amounts to expropriatory conduct prohibited by Article 5 of the BIT.

514. Claimant argues that it does because the actions of the Privatization Agency, which are attributable to Serbia, resulted in "Kornikom being permanently and completely deprived of its investments".[400]

515. Specifically, Claimant argues that termination was based upon "illegitimate grounds" and was carried out pursuant to "State interests".[401] Claimant characterizes the Privatization Agency's termination of the Privatization Agreement as "unlawful",

[400] Memorial, at 190; Reply at 245-294; C-PHB, at 34-72.
[401] Reply, at 312.

"untimely, "disproportionate" and "arbitrary", and argues that it was a pretextual exercise of sovereign authority.[402]

516. Respondent disagrees with Claimant's assertions. Respondent argues that the termination of the Privatization Agreement cannot be expropriatory conduct because the agreement was terminated based on legitimate contractual grounds and not in the exercise of sovereign authority.[403]

517. Both Parties seem to agree that whether or not the Privatization Agency's impugned conduct constitutes unlawful expropriation hinges on whether or not it acted in a sovereign capacity. They have dedicated several pages to making submissions on this point. For instance, Claimant argues:

> "The termination of the Privatisation Agreement was carried out by the Privatisation Agency, a public agency holding public authority with the same rights and obligations as state administrative organs, under special powers granted to it under the Privatisation Law and the Law on Privatisation Agency, and accordingly amounted to the "administrative authority exercis[ing] sovereign powers beyond the reach of private persons." As in *Caratube v. Kazakhstan*, Kornikom's investments were expropriated through the "unlawful termination of the Contract by the Respondent acting in its sovereign capacity." Like in *Caratube*, any breaches of the Privatisation Agreement, even if established, would have been too immaterial to justify the termination. Further, as in *Flemingo v. Poland*, the pretextual termination of the Privatisation Agreement triggers Serbia's responsibility under the BIT, just as a pretextual termination of a lease agreement by the Polish Airport Authority engaged Poland's responsibility under the applicable treaty."[404] (internal references omitted)

518. Respondent, on the other hand, argues:

> "Absent the exercise of sovereign power, there can be no expropriation. That is clear and established under international law. Expropriation requires that a State, rather than "act[ing] as an ordinary contracting party," have exercised its "sovereign power (*puissance publique*)" to interfere with a contract. When a State acts as an ordinary contracting party, there can be no claim for expropriation. That is true even when a State misunderstands its contractual obligations, performs the contract poorly, or commits a breach. […] Because the Privatization Agency acted in all relevant respects as an ordinary contracting party, Claimant's claim of expropriation must fail."[405]

519. The Tribunal agrees with the Parties.

---

[402] Memorial, at 201-221; Reply, at 312-348; C-PHB, at 51-70.
[403] Counter-Memorial, at 338-376; Rejoinder, at 239-285; R-PHB, at 14-118.
[404] Memorial, at 214. See also, Reply, at 344-348; C-PHB, at 66-70.
[405] R-PHB, at 14; See also, Counter-Memorial, at 338; Rejoinder, at 210-216.

520. It is not controversial that the wrongful termination of a contract may, in some circumstances, be considered to be expropriatory conduct.[406] However, not every wrongful termination of a contract is a breach of a treaty.[407] What makes a contract breach an expropriation claim under a BIT depends on the nature of the State's conduct. If the State acts as any ordinary contracting party, there can be no case for expropriation. On the other hand, if the State exercises its sovereign power (*puissance publique*), there may be a claim for a breach of the relevant treaty under international law.[408]

521. Put differently, the material question is whether the State performs the contract or interferes with it. This marks the distinction between a claim arising under a contract and one that arises under the treaty.[409]

522. The Tribunal finds support for this approach in a long-established line of cases.

523. For instance, in *Impreglio v. Pakistan*, the tribunal highlighted the difference between an ordinary contractual claim and a treaty claim in the following terms:

> "260. In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority ("*puissance publique*"), and not as a contracting party, may breach the obligations assumed under the BIT. In other words, the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behaviour of the Host State acting in breach of the obligations it had assumed under the treaty."
>
> […]
>
> "278. […] Host State acting as a contracting party does not "interfere" with a contract; it "performs" it. If it performs the contract badly, this will not result in a breach of the provisions of the Treaty relating to expropriation or nationalisation, unless it be proved that the State or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign authority."[410]

524. Similarly, in *Crystallex v. Venezuela*, the tribunal observed:

> "In the Tribunal's view, the pivotal question is whether the Respondent, in terminating the contract, acted in the exercise of its sovereign powers (*puissance publique*) rather than as an ordinary contracting party. The presence of this element

[406] See for e.g. *Caratube v. Kazakhstan* (Exhibit CL-15); *Flemingo v. Poland* (Exhibit CL-31); *Copper Mesa v. Ecuador*, at 6.64-6.69 (Exhibit CL-32); *SAUR Int'l S.A. v. Argentina* (Exhibit CL-11); *Crystallex Int. v. Venezuela* (Exhibit CL-6).
[407] See for *e.g.*, *Impregilo v. Pakistan*, Decision on Jurisdiction, at 260 (Exhibit RL-164).
[408] *Impregilo v. Pakistan*, Decision on Jurisdiction, at 260 (Exhibit RL-164).
[409] *Crystallex Int. v. Venezuela*, at 694 (Exhibit CL-6); *Impregilo v. Pakistan*, Decision on Jurisdiction, at 260 (Exhibit RL-164).
[410] *Impregilo v. Pakistan*, Decision on Jurisdiction, at 260, 278 (Exhibit RL-164).

> allows distinguishing between mere breaches of contracts (which would normally not give rise to international responsibility) and acts which, while expressed as contractual, are in reality sovereign acts which may implicate state responsibility. Differently put, the Tribunal must objectively determine whether the purported exercise of a contractual act is evidencing the characteristics of the exercise of sovereign power and is thus to be characterized as a sovereign act."[411]

525. Several other tribunals have also taken a similar view.[412]

526. The first question for the Tribunal to consider therefore is whether the Privatization Agency's conduct in issuing the Termination Notice was a contractual act or an act in the exercise of sovereign authority. If the Tribunal finds that the Privatization Agency's actions were in the exercise of sovereign authority, its actions could give rise to a colorable expropriation claim. If, on the other hand, the Tribunal finds that the Privatization Agency acted as an ordinary contracting party, there will be no case for expropriation.

527. On its face, it seems that the Privatization Agency's termination of the Privatization Agreement was a legal consequence of Claimant's purported breaches of the agreement. Claimant, however, suggests that the termination was pretextual and an exercise of sovereign power for the following reasons:

- First, the termination of the Privatization Agreement was motivated by anti-Bulgarian sentiment;[413]

- Second, the Privatization Agreement was terminated at the instance of the Serbian Minister of Economy, following pressure by a wealthy local businessman;[414] and

- Third, the alleged contractual breaches did not exist and were invoked as a pretense to mask what was in fact an expropriation.[415]

528. The Tribunal considers each of these arguments below.

Was Serbia's conduct, through the Privatization Agency or otherwise, motivated by an anti-Bulgarian Sentiment?

529. Claimant argues that Serbia's conduct, through the Privatization Agency or otherwise, was motivated by an anti-Bulgarian sentiment. Specifically, Claimant alleges that

[411] *Crystallex Int. v. Venezuela*, at 692 (Exhibit CL-6).
[412] *Vannessa Ventures v. Venezuela*, at 209 (Exhibit RL-165); *Siemens v. Argentina*, at 253 (Exhibit CL-27).
[413] Memorial, at 68, 198, 213, 234; Reply, at 33, 312, 344, 358; C-PHB, at 66-70; Kacharov-I, at 50; Goranov-I, at 38.
[414] Memorial, at 161-165, 213; Reply, at 312, 344; C-PHB, at 66-70; Ivanov-I, at 57-66.
[415] Memorial, at 213; Reply, at 344; C-PHB, at 66-70.

Serbia's actions were influenced by the fact that "Rudnik Kovin […] was privately owned by Bulgarians".[416]

530. Respondent rejects these allegations. According to Respondent, the termination of the Privatization Agreement was not because Serbia "did not like Bulgarians" or any other reason, but because "Claimant repeatedly and continuously breached the Privatization Agreement".[417]

531. The Tribunal has already discussed this allegation at length above and concluded that there is no evidence to suggest that any of Serbia's actions were influenced by an anti-Bulgarian sentiment (see paragraphs 499 to 510). The Tribunal, therefore, need not consider this allegation again.

532. Instead, the Tribunal will proceed to consider Claimant's second argument, *i.e.*, that the Privatization Agreement was terminated by the Privatization Agency at the instance of the Serbian Minister of the Economy.[418]

Was the Privatization Agreement terminated by the Privatization Agency at the instance of the Ministry of Economy, following pressure from a wealthy local businessman?

533. Claimant contends that the Privatization Agreement was terminated by the Privatization Agency "at the instance of the Serbian Minister of the Economy, Mlađan Dinkić, following pressure from a wealthy local businessman, Mr. Miodrag Kostic".[419] In support of this allegation, Claimant relies on the testimony of Mr. Ivanov, who received this information from Mr. Dragan Ćirić, a close relative of the State Secretary in the Serbian Ministry of Economy and from Mr. Nebojša Ćirić.[420]

534. Respondent contests this allegation and maintains that Claimant's suggestion is without any merit.[421]

535. Having considered the Parties' submissions on this issue, the Tribunal finds that Claimant's argument has no merit for the following reasons.

536. First, the Tribunal does not have confidence in Mr. Ivanov's testimony, which is based entirely on hearsay. Mr. Ivanov's assertion that the Privatization Agreement was terminated at the instance of the Serbian Minister of Economy is not based on any direct interactions with the concerned individuals but is something he heard from Mr. Dragan Ćirić who, in turn, received this information from another source.[422]

---

[416] Memorial, at 68, 198, 234; Reply, at 33, 358; Kacharov-I, at 50; Goranov-I, at 38.
[417] Counter-Memorial, at 210-211.
[418] Memorial, at 163.
[419] Memorial, at 161-165; Ivanov-I, at 57-66.
[420] Ivanov-I, at 62.
[421] Reply, at 38-40.
[422] Tr., Day 2, 125:24-127:22.

537. Given the seriousness of the allegation being made, the Tribunal cannot attach much weight to Mr. Ivanov's testimony, in the absence of corroborating evidence. This is all the more the case when Mr. Ivanov's has undermined his credibility by making incorrect statements of fact in his witness statement (see paragraphs 468 to 473).[423]

538. Second, there is no other evidence apart from Mr. Ivanov's testimony to support Claimant's allegation. There is no evidence to show that there was pressure from a Serbian businessman on the Minister of Economy to terminate the Privatization Agreement. There is equally no evidence to show that the Ministry of Economy exerted any pressure on the Privatization Agency.

539. On the contrary, the evidence points to the fact that the Privatization Agency made the decision to terminate the Privatization Agreement without any outside influence.

540. Mr. Cvetković, the Director of the Privatization Agency at the time of termination, has testified that there was no interference with the Privatization Agency's decision to terminate the Privatization Agreement. Specifically, he noted in cross-examination:

> "Q. During your time at the agency, did the Ministry of Economy ever instruct, direct or advise the agency to terminate any privatisation contracts?
>
> A. No, the straight answer is no, and it never happened during any of the privatisation times during my term, so basically the agency had a very, very, very defined role and the Ministry also had had a defined role, so it was never any kind of intervention, nor -- not instruction or any other sort of interference with the work of the agency."[424]

541. Claimant's expert, Mr. Milošević, echoed this view in cross-examination, where he observed that there was no intervention from the Ministry of Economy in the present case. This can be seen in the following extract:

> "Ministry of Economy did not involve in the same manner in this case, but that is only because the agency performed its administrative task as it was supposed to perform it."[425]

542. Third, the record shows that when Serbia attempted to reprivatize Rudnik Kovin, there were no bidders for it. In the Tribunal's view, had there been any teeth at all to Claimant's allegations, the Serbian businessman who purportedly instigated the Ministry of Economy to terminate the Privatization Agreement would have participated in the bidding process. But this was not the case.

[423] Tr., Day 2, 92:09-94:15
[424] Tr., Day 3, 5:13-22.
[425] Tr., Day 4, 54:14-17.

543. For all these reasons, the Tribunal finds that the termination of the Privatization Agreement was not at the instance of the Serbian Ministry of Economy.

Did the alleged contractual breaches exist and was the Privatization Agency justified in terminating the Privatization Agreement?

544. The third question for the Tribunal is whether there were indeed breaches of the Privatization Agreement at the relevant time and whether the Privatization Agency was justified in terminating the agreement.

545. Before entering into this discussion, the Tribunal considers it important to clarify that its observations below are for the limited purpose of determining whether the Privatization Agency's actions were commercial acts of an ordinary contract party or whether they constituted acts in the exercise of sovereign authority (*puissance publique*). Put differently, the Tribunal's observations in the discussion below are limited to examining the propriety of Serbia's conduct under the BIT and do not authoritatively decide issues of contract, which are outside the remit of this Tribunal's jurisdiction.

546. Having made the above clarification, the Tribunal can begin its analysis. A perusal of the Termination Notice shows that the Privatization Agreement was terminated on two grounds: (i) a breach of the Business Continuity Obligation; and (ii) a breach of the Social Program Obligation (see the Termination Notice at paragraph 201).

547. The Tribunal considers the propriety of the Privatization Agency's actions in the context of each breach in sequence below.

Was the termination of the Privatization Agreement for the alleged breach of the Business Continuity Obligation unlawful, untimely, disproportionate or lacking good faith?

548. Claimant advances three broad arguments as to why it considers the termination for the alleged breach of the Business Continuity Obligation to be unlawful.

549. First, on the date of the Termination Notice, both Kornikom's obligation to maintain business continuity and the Privatization Agency's ability to terminate the Privatization Agreement had expired. Second, Kornikom had satisfied the Business Continuity Obligation. And third, Serbia's conduct was disproportionate and contrary to Serbian law.[426]

550. The Tribunal considers each of these arguments in sequence,

[426] Memorial, at 105-136. For the sake of clarity, the Tribunal notes that Claimant refers to the Business Continuity Obligation as the Core Activity Obligation.

551. Beginning with the issue of timeliness, Claimant argues that the Privatization Agency's termination of the Privatization Agreement was untimely because Kornikom's obligation to comply with the Business Continuity Obligation expired on 23 April 2010. According to Claimant, any additionally granted term to comply with the Privatization Agreement is only tied to the fulfilment of the obligation and cannot change the expiry date of the obligation. Claimant relies on the opinion of Mr. Milošević in support of its position. [427]

552. In the Tribunal's view, this is an incorrect reading of the Privatization Agreement and the Law on Privatization. Both the Privatization Agreement and the Law on Privatization allow for the Privatization Agency to grant the buyer an additional deadline for compliance. This is clear from a reading of Clause 7.1 of the Privatization Agreement and Article 41a of the Law on Privatization, which, for ease of reference, are reproduced below.

553. Clause 7.1 of the Privatization Agreement provides:

> "7.1 The agreement shall be deemed terminated by operation of law on grounds of non-performance if, within an additionally provided time period for performance, the Buyer: […]
>
> 7.1.5 fails to ensure business continuity at the Privatization Subject as per clause 5.3.2 hereof;
>
> 7.1.6 fails to comply with the provisions of ANNEX 1 to this agreement, that is, resolves employment matters contrary to the provisions of ANNEX 1 to the agreement;"[428] (Emphasis added)

554. Article 41a of the Law on Privatization provides in relevant part:

> "The contract on the sale of capital and/or property shall be deemed terminated due to non-fulfilment if, even within an additionally granted term for fulfilment, the buyer: […]
>
> 4) fails to ensure the continuity in performing the registered business activity for the purpose of which the privatized entity was established;
>
> […]
>
> 6) fails to execute the provisions on the manner of resolving employee matters;
>
> […]

[427] Memorial, at 121-122, 203; Reply, at 316.
[428] Privatization Agreement, Clause 7.1.5 (Exhibit C-1).

> In case of terminaton (sic.) of the contract on the sale of capital and/or property due to non-fulfiment (sic.) of contractual obligations by the buyer of capital, the buyer of capital, being a party in bad faith, shall have no right to recover the amount paid as the contract price, for the protection of public interest."[429] (Emphasis added)

555. These provisions suggest that even though the Business Continuity Obligation would have ordinarily expired on 23 April 2010, the cut-off date for the expiration of this obligation was extended due to Claimant's non-compliance in the contractually stipulated period.

556. To hold otherwise would lead to absurd results when considering the obligations under the Privatization Agreement. For instance, when one considers the investment obligation under the Privatization Agreement, it requires the buyer to invest a specified sum into the business in the first year after acquisition and a similar sum in the second year of acquisition.[430]

557. If there is non-compliance by the buyer at the expiry of the original deadline and an additional term is granted by the Privatization Agency (as it is empowered to do under the Privatization Agreement), it must necessarily mean that the term of the obligation itself has been extended. Any other conclusion would lead to the bizarre result that the buyer would never be able to fulfil the obligation because it was in default on the date that the obligation purportedly expired. The opportunity to cure a default therefore necessarily implies that the expiration date of the obligation is also correspondingly extended.

558. Second, Claimant argues that the Privatization Agency could not issue the Termination Notice after 23 April 2010, *i.e.*, the date on which the Business Continuity Obligation expired under the Privatization Agreement.[431]

559. The Tribunal is not persuaded by this argument. Both Clause 7.1 of the Privatization Agreement and Article 41a of the Law on Privatization clarify that the Privatization Agency is empowered to grant Claimant an additional deadline to demonstrate compliance. If the buyer fails to demonstrate compliance within this additional period, then the Privatization Agreement is *ex lege* terminated and the Privatization Agency is obligated to notify the buyer of such termination.

560. Third, Claimant argues that it was excused from its ongoing breach of the Business Continuity Obligation because Kornikom and the Privatization Agency did not agree in writing to amend Clause 5.3.2 of the Privatization Agreement and extend the time-period for compliance.[432] The Tribunal finds this argument to be equally unavailing. As Respondent correctly points out, the Privatization Agreement did not need any

[429] Law on Privatization (as amended 2005), Article 41a. (Exhibit RL-161).
[430] By way of example, see Privatization Agreement, Clause 5.2.1 (Exhibit C-1).
[431] Memorial, at 121-122, 203; Reply, at 316.
[432] Reply, at 317.

amendment because it expressly contemplated the possibility of additional terms being granted to Claimant for the fulfilment of its obligations.[433]

561. Finally, Claimant argues that even assuming the Privatization Agency could issue a termination notice, this notice could only be issued within the additionally granted term in order for it to be timely.[434] In the Tribunal's view, this argument can also be dismissed easily. The additionally granted term is for Claimant to demonstrate compliance and not for Respondent to terminate the Privatization Agreement. In the Tribunal's opinion, termination of the Privatization Agreement before the expiration of the additional deadline for compliance would be premature because the buyer would, in theory, have until the expiry of the deadline to demonstrate compliance with the relevant obligation.

562. In fact, this is exactly how the circumstances played out in the present case. As noted above in the Factual Background section, the Privatization Agency issued a letter to Claimant on 18 March 2010, which granted Claimant 60 additional days, *i.e.*, until 18 May 2010, to demonstrate compliance (see paragraph 172). In this letter, it stated:

> "If you do not comply with this notice, the Agreement on the Sale of State Capital by the Method of Public Auction of the Privatization Subject "Rudnik Kovin" Kovin (II/1 Cert.No. 425/07 of 23/04/2007) shall be considered terminated for failure to comply, in accordance with the provisions of Article 41a of the Law on Privatization ("Official Gazette of RS" No. 38/2001, 18/2003, 45/2005 and 123/2007)."[435]

563. In the period thereafter, the 9th Control was held on 24 May 2010 to see if Claimant had complied with its obligations (see paragraph 173). In this Control, the Control Center once again observed Claimant's non-compliance. The termination of the Privatization Agreement therefore took effect by operation of law, and this was notified to Claimant by way of the Termination Notice.

564. For all these reasons, the Tribunal does not find any merit to Claimant's argument that the termination of the Privatization Agreement was untimely.

565. The Tribunal therefore proceeds to consider Claimant's second argument, *i.e.*, the termination of the Privatization Agreement was unlawful because Claimant had complied with the Business Continuity Obligation.[436]

566. To determine whether there was indeed a breach of the Business Continuity Obligation and whether the Privatization Agency's termination of the Privatization Agreement was lawful, the Tribunal must first determine what the obligation to maintain business

[433] Rejoinder, at 245; Privatization Agreement, Clause 7.1 (Exhibit C-1).
[434] Reply, at 318.
[435] Letter from the Privatization Agency to Kornikom, 18 March 2010 (Exhibit R-40).
[436] Memorial, at 111-120, 124-136, 201-207; Reply, at 304-331; C-PHB, at 51-58.

continuity means under the Privatization Agreement and Serbian law. Only then can the Tribunal determine whether or not there was compliance with the obligation.

567. Claimant contends that Clause 5.3.2 of the Privatization Agreement, which set out the Business Continuity Obligation, simply required a buyer to ensure that the company it acquired maintained its core activity for a period of three years after privatization. In other words, Clause 5.3.2 required Kornikom to ensure that Rudnik Kovin continued to mine lignite for three years after privatization because its core activity at the date of the auction was the extraction and briquetting of lignite coal.[437]

568. In support of its position, Claimant relies on the evidence of its expert, Mr. Milošević, certain decisions of the Serbian courts, the Privatization Agency's 2007 Rulebook on Performance Control on Implementation of the Privatization Agreements ("**the 2007 Rulebook**") and Article 41a(1)(4) of the Law on Privatization.[438]

569. Respondent advances a different proposition. According to Respondent, the concept of business continuity is a 'term of art', which has both a narrow and a broad sense.

570. In the narrow sense, the Business Continuity Obligation required a buyer to "maintain[] and develop[] the primary activity carried on by" the privatized entity at the time of auction.[439] In the context of the present case, this would require Kornikom to ensure that Rudnik Kovin continued to remain a coalmine.[440]

571. In the broad sense, on the other hand, the Business Continuity Obligation required a buyer to "maintain[] and improv[e] the quality and volume of business of the entity being privatized".[441] In other words, the Business Continuity Obligation required a buyer to, among other things, make the business profitable, grow the business and fulfil its social obligations to employees.[442]

572. Respondent points out that the obligation under both the Privatization Agreement and the Law on Privatization was to "ensure" that business continuity is maintained and that the Privatization Agency considered the following situations in gauging whether or not there had been compliance with the obligation:

    a. Whether the business maintained liquidity (enough cash to meet obligations as they became due);

---

[437] Memorial, at 111.
[438] Memorial, at 111-113; Reply, at 320-324; Milošević-I, at 69 et seq; Decision of the Serbian Commercial Appellate Court (Pž. 2522/14), 19 June 2014 (Exhibit C-191); Rulebook on Performance Control on Implementation of the Privatization Agreements, December 2007, Article 1.5.8 (Exhibit C-189); Law on Privatization, Article 41a(1)(4) (Exhibit C-144).
[439] Privatization Agency, Instructions for Monitoring Compliance with Contracts for the Sale of Capital or Assets, May 2010, Article 1.5.8 (Exhibit R-43).
[440] Counter-Memorial, at 70.
[441] Privatization Agency, Instructions for Monitoring Compliance with Contracts for the Sale of Capital or Assets, May 2010, Article 1.5.8 (Exhibit R-43).
[442] Memorial, at 71.

b. Whether the business failed to pay liabilities owed to creditors when due and in full;
c. Whether the business had its bank accounts blocked or frozen, particularly where the blockage continued for more than 45 days, which gave any creditor the right to initiate bankruptcy proceedings under Serbian bankruptcy law;
d. Whether the business displayed an inability or failed to service loan liabilities, particularly debt obligations assumed post-privatization;
e. Whether the business increased total liabilities as compared to the time of the auction, particularly where there had not been a corresponding increase in revenues or the value of assets (*i.e.*, liabilities greatly increased as compared to the time of the auction or increased by a greater percentage than the value of the assets);
f. Whether the business experienced a decrease in operating revenues as compared to the time of the auction;
g. Whether the business experienced operating expenditures in excess of operating revenues (net operating losses) in one or more years post-privatization;
h. Whether the business generated losses in one or more years post-privatization;
i. Whether the business failed to comply with the Social Program in Annex 1;
j. Whether the business failed to pay, when due and in full, employees' gross salaries, consisting of (i) net salaries, (ii) taxes on salaries, and (iii) contributions on salaries (health insurance, pension and disability insurance, and unemployment insurance);
k. Whether the business had employees' salaries paid by a third-party under an assignment agreement, and not directly by the company itself; or
l. Whether the business maintained continuous solvency (ability to pay).[443]

573. Respondent relies on the evidence of Ms. Vučković, the Privatization Agency's 2010 Instructions for Monitoring Compliance with Contracts for the Sale of Capital or Assets ("**the 2010 Rulebook**"), the opinion of Professor Lepetić and the decisions of Serbian courts in support of its position.[444]

574. The Tribunal agrees with Respondent.

575. At the outset, the Tribunal notes that both Parties seem to agree that the term 'business continuity' has not been defined either in the Privatization Agreement or under Serbian law.[445] Instead, Clause 5.3.2 of the Privatization Agreement, *i.e.*, the source of the Business Continuity Obligation, simply requires the buyer to "ensure, during a period of three years as of the date of conclusion of the agreement, business continuity at the

[443] Counter-Memorial, at 73-74; Vučković-I, at 37.
[444] See Lepetić-I generally; Privatization Agency, Instructions for Monitoring Compliance with Contracts for the Sale of Capital or Assets, May 2010, Article 1.5.8 (Exhibit R-43); Decision of the Commercial Court of Appeal Pz 4616/12, 21 August 2013 (Exhibit RL-25); Decision of the Commercial Court of Appeal Pž 1187/14 of 19 November 2015 (Exhibit RL-31); Decision by the Supreme Court of Cassation Prev 200/2013, 17 April 2014 (Exhibit RL-36).
[445] Memorial, at 111; Counter-Memorial, at 69. Respondent characterizes the concept of business continuity as a 'term of art'.

company with respect to its core business activity registered on the date of auction" (see paragraph 148 above).[446]

576. Similarly, the Tribunal finds Article 41a(1)(4) of the Law on Privatization (see paragraph 554 above) upon which both Parties rely to be equally unhelpful. Article 41(1)(4) does not shed much light on the nature of Business Continuity Obligation. Instead, it simply provides that the Privatization Agreement "shall be deemed terminated" if the buyer fails to "ensure the continuity in performing the registered business activity that was the reason for establishing the subject of privatization".[447]

577. What the Tribunal finds helpful though are the Privatization Agency's rulebooks and the decisions of the Serbian courts.

578. In the 2007 Rulebook to which Claimant refers, the Business Continuity Obligation is referred to in both a narrow sense and a broad sense. It provides in relevant part:

> "The business continuity concept, within the meaning of the provisions of the agreement, may be interpreted:
>
> • in the narrower sense of the term - the obligation of continuity assumes that the business will keep operating its activities registered as at the date of auction (excluding leasing of buildings, as this is frequently a secondary, unregistered activity);
>
> • in the broader sense of the term - it assumes that the quality and scope of business of the privatisation subject will be maintained and improved, knowing that the subject generates the majority of its operating income by simultaneously engaging in other activities, which were not its main business activity pre-privatisation."[448]

579. The 2010 Rulebook referred to by Respondent makes similar observations but goes one step further and clarifies that when assessing business continuity, the Privatization Agency needs to look at a whole array of factors including but not limited to the company's production data, revenue, expenditure, liability and liquidity status in the post-privatization period and compare these data points against the position of the company in the period prior to privatization.[449] This is clear from the following extract:

> "When assessing business continuity as part of the monitoring process, the physical volume of production, the amount of revenue generated (total, operating and sales revenues), total and operating expenditure and operating results, liabilities,

[446] Privatization Agreement, Clause 5.3.2 (Exhibit C-1).
[447] Law on Privatization, Article 41a(1)(4) (Exhibit C-144).
[448] Rulebook on Performance Control on Implementation of the Privatization Agreements, December 2007, Article 1.5.8 (Exhibit C-189).
[449] Privatization Agency, Instructions for Monitoring Compliance with Contracts for the Sale of Capital or Assets, May 2010, Article 1.5.8 (Exhibit R-43).

liquidity of the entity in the period after the sale of the company are compared to those in pre-privatization period."[450]

580. Given that the 2010 Rulebook was issued after the privatization of Rudnik Kovin, the Tribunal does not give much weight to what it states. The Tribunal, however, finds the 2007 Rulebook to be relevant because it was issued around the same time as the conclusion of the Privatization Agreement. The 2007 Rulebook demonstrates the Parties' understanding at the relevant time that the Business Continuity Obligation could be understood in both a narrow sense and a broad sense and that compliance with the Business Continuity Obligation required compliance in both senses of the term.[451]

581. Similarly, Serbian court practice also favors a broad construction of the Business Continuity Obligation. Although there are a few instances where some lower courts have interpreted the Business Continuity Obligation narrowly,[452] there are multiple occasions where the Serbian Supreme Court has favored a broad interpretation of the Business Continuity Obligation.[453]

582. For instance, the Serbian Supreme Court has found that a decrease in business volume and operating income, the illiquidity of the company and the non-payment of salaries were all justifiable grounds to terminate a privatization agreement for breach of the Business Continuity Obligation.[454] This can be seen from the extract of the decision below:

> "As stated above, in the course of the proceedings it was found, and in fact not disputed, that there has been a significant slump in business volume at the entity being privatized, that its operating income, for example in 2010 was down 54% as against operating income in 2007 as the benchmark year that preceded privatization, that the current liquidity of entity being privatized has been maintained through short-term loans from companies owned by the plaintiff, that salaries are in arrears, therefore, all these are facts based on which it was concluded that the plaintiff as buyer of state-owned capital failed to fulfil the agreed obligation to ensure business continuity at the entity being privatized, neither within the agreed time limit nor within the subsequent time limits, with the result that the Privatization Agency justifiably terminated the contract."[455]

---

[450] Privatization Agency, Instructions for Monitoring Compliance with Contracts for the Sale of Capital or Assets, May 2010, Article 1.5.8 (Exhibit R-43).
[451] The Privatization Agreement was signed in April 2007. The 2007 Rulebook was published in December 2007.
[452] Decision of the Serbian Commercial Appellate Court (Pž. 2522/14), 19 June 2014 (Exhibit C-191); Judgment of the Commercial Appellate Court Pž 504/2020, 2 July 2020, p.4 (Exhibit C-325).
[453] Decision by the Supreme Court of Cassation Prev 200/2013, 17 April 2014, p.3-4 (Exhibit RL-36); Decision of the Commercial Court of Appeal Pz 4616/12, 21 August 2013, p.4 (Exhibit RL-25); Decision of the Commercial Court of Appeal Pž 1187/14, 19 November 2015 (Exhibit RL-31); Decision by the Supreme Court of Cassation Prev 150/2017, 25 May 2017, p.3 (Exhibit RL-30); Decision of the Supreme Court of Cassation Prev 387/2016, 18 May 2017, p.3-5 (Exhibit RL-27); Decision of the Supreme Court of Cassation Prev 37/2013, 16 May 2013, p.4 (Exhibit RL-15); Decision by the Supreme Court of Cassation Prev 129/2013, 19 June 2014, p.1 (Exhibit RL-37).
[454] Decision by the Supreme Court of Cassation Prev 200/2013, 17 April 2014, p.3-4 (Exhibit RL-36).
[455] Decision by the Supreme Court of Cassation Prev 200/2013, 17 April 2014, p.3-4 (Exhibit RL-36).

583. Similarly, the Serbian Supreme Court has also found that there was a breach of the Business Continuity Obligation when a buyer failed to maintain liquidity in the business. The court observed:

> "As concluded by the second-instance court, the definition of ensuring business continuity meant assessing whether the customers of the privatization subject managed to maintain liquidity during the contracted period. It is evident from the established factual findings that liquidity was not maintained and that such a situation in the privatization subject after the termination of the Agreement led to the initializing of bankruptcy proceedings against the privatization subject. Those facts confirm that the contractual obligations were not fulfilled and that the purpose and the goal of privatization was not achieved by this Agreement."[456]

584. The Tribunal finds these decisions very persuasive. These decisions show that the Business Continuity Obligation is not to be understood only in the narrow sense of maintaining the core business activity but in a broader sense requiring an assessment into the quality and scope of the business. In fact, some of the factors referred to by the Serbian courts closely resemble the list of factors identified by Respondent's witness, Ms. Vučković, who was the Director of the Control Center at the relevant time (see paragraph 572 above).

585. Finally, the Tribunal notes that the Parties' experts seem to agree that this was indeed the position in Serbian law at the relevant time.[457] Claimant's expert, Mr. Milošević in fact specifically observes:

> "I am aware that there is Serbian court practice that interprets continuity of business activity in a different way, namely, that it is jeopardized due to the fact that:
>
> • The company operated at a loss.
>
> • There was significant reduction of business operations and illiquidity (the volume of operations was reduced by 54% from 2007 to 2010; financing was carried out on the basis of short-term loans; there was a decrease of total revenue of 20% or 77%)"[458] (footnotes omitted)

586. Although Mr. Milošević does not consider Serbian court practice to be persuasive,[459] the Tribunal in the present instance does not sit in appeal of the findings of the Serbian courts. Its task is to understand what Serbian law states on matters which are governed by it and to apply the law to the facts of the present case.

587. For all these reasons, the Tribunal finds that the Business Continuity Obligation did not simply require Kornikom to ensure that Rudnik Kovin continued to mine lignite for the

[456] Decision by the Supreme Court of Cassation Prev 150/2017, 25 May 2017, p.3 (Exhibit RL-30).
[457] Lepetić-I, at 23-64; Milošević-I, at 74.
[458] Milošević-I, at 74.
[459] Milošević-II, at 96. Tr. Day 3, 132:13-22.

three years after privatization. Instead, it required Kornikom to maintain and improve the quality and volume of Rudnik Kovin's business, compliance with which would be determined by way of a global assessment of several factors.

588. Having identified the meaning of the Business Continuity Obligation, the next task for the Tribunal is to determine whether the Claimant in fact breached the Business Continuity Obligation.

589. Respondent argues that Claimant breached the Business Continuity Obligation by, among other things, depleting Rudnik Kovin's cash reserves, causing Rudnik Kovin to incur long-term and short-term liabilities, causing Rudnik Kovin to generate losses and incur increasing liabilities, causing Rudnik Kovin to become illiquid, and preventing Rudnik Kovin from paying employee salaries and benefits.[460]

590. The Tribunal considers each of these allegations in turn.

591. The first allegation made by Respondent is that Claimant depleted Rudnik Kovin's cash reserves by using the cash reserves to pay for equipment that Claimant was obligated to purchase and by granting interest free loans to companies tied to Kornikom's owner.[461]

592. Claimant contends that these issues were irrelevant to the termination of the Privatization Agreement because these issues had been resolved prior to the Termination Notice.[462]

593. The Tribunal agrees with Claimant.

594. Although Respondent is correct that Claimant did initially use Rudnik Kovin's cash reserves to pay for equipment that Claimant was obligated to purchase, Respondent did not contemporaneously find this conduct to breach the Business Continuity Obligation. Instead, its remarks were made in the context of Claimant's Investment Obligation as can be seen from the extract of the 1st Control Report below:

> "The following fixed assets were purchased using the Entity's own funds:
>
> […]
>
> 4. "Kučuk Makina" - ore separating plant, used, total value RSD 18,179,995.12, from supplier "Vagledobiv Černo more" Bulgaria under invoice No. 17 of 17 September 2007, paid on 28 June 2007, registered and put into operation on 1 January 2008,
>
> […]

[460] Counter-Memorial, at 87-112, 347-360.
[461] Counter-Memorial, at 87-95.
[462] Reply, at 105-111.

> Given the fact that the investment was made using the Entity's funds, that the investments were put into operation and used during 2007, and that liabilities on these grounds were settled from the Entity's account well in advance of the date when the Buyer paid the investment obligation amount arising under the Agreement, the conditions have not been met for recognizing the Buyer's investment obligation under Article 5.2.1 of the Agreement."[463]

595. Whether or not Claimant's conduct amounted to a breach of the Investment Obligation in the Privatization Agreement does not need to be considered here because it was not a ground cited by the Privatization Agency in its termination of the Privatization Agreement.

596. Similarly, Respondent's contention that Claimant granted interest free loans to companies tied to Kornikom's owner is equally irrelevant in the present case.

597. While Respondent is correct that certain interest free loans were granted by Claimant, it did not find this conduct to breach the Business Continuity Obligation. The record is unequivocally clear that notwithstanding the grant of these loans, Claimant had maintained Rudnik Kovin's business continuity during the 1st Control. This can once again be seen from the relevant extract of the 1st Control Report reproduced below:

> "Under the loan agreement of 10 April 2008, the Entity, as lender, loaned RSD 4,000,000.00 to "Nova Srbijanka" of Valjevo with a loan term until 31 December 2008.
>
> Under the loan agreement of 24 April 2008, the Entity, as lender, loaned RSD 4,000,000.00 to "Božo Tomić" of Čačak (the Buyer is "Čestijm" d.o.o. of Sofia, Bulgaria) with a 12-month loan term as of the [loan] lodgment date.
>
> Under the loan agreement of 24 April 2008, the Entity, as lender, loaned RSD 20,000,000.00 to "FOPA Vladičin Han" of Vladičin Han for a fixed period.
> **The Entity borrows from commercial banks and pays interest on those loans, while simultaneously providing interest-free loans to other companies.**
>
> […]
>
> **It can be concluded that business continuity has been maintained.**"[464] (Emphasis in original)

[463] First Control Report, p.6-7 (Exhibit R-21). Similar observations can be found in the First Control Report produced by Claimant as well. See Privatization Agency's First Control Report, 19 May 2008, p.6-7 (Exhibit C-330).
[464] First Control Report, p.4 (Exhibit R-21). Similar observations can be found in the First Control Report produced by Claimant as well. See Privatization Agency's First Control Report, 19 May 2008, p.4 (Exhibit C-330).

598. In any event, the record shows that each of these loans were repaid in full between 2008 and 2009, *i.e.*, well before the termination of the Privatization Agreement. This can be seen in the 7th Control Report, where the Control Centre observes:

> "A review of the remaining documentation presented during this inspection (assignment agreements, ledger cards for the borrowers as of October 20, 2009, bank statements of the Entity, etc.) found that "Nova Srbijanka" AD Valjevo and "Fopa" AD Vladičin Han have settled their liabilities towards the Entity stemming from the loans provided to them, therefore, against that background the Buyer has complied with the Notice sent following 223rd sitting of the Measures Commission (from September 10, 2009)."[465]

599. The Tribunal therefore turns to Respondent's second allegation, *i.e.*, that Kornikom caused Rudnik Kovin to incur long-term and short-term liabilities by guaranteeing certain debt obligations of another entity and by taking on an RSD 50 Million loan from Banca Intesa.[466]

600. Claimant denies that either of these actions were the basis on which the Privatization Agency found a breach of the Business Continuity Obligation.[467]

601. The Tribunal agrees with Claimant.

602. While it is correct that Claimant guaranteed 12 promissory notes which a company called Trayal Corporation a.d. Kruševac had issued in favor of a bank for an RSD 26,148,000 (EUR 360,000) loan, the Control Centre did not find this conduct to be a breach of the Business Continuity Obligation. Instead, it found this conduct to breach another obligation under the Privatization Agreement. This is clear from the following extract of the 1st Control Report:

> "By virtue of Guarantee Agreement No. 899/2007 of 21 November 2007 (recorded by the Entity under Ref No. 66302-4/07 of 21 November 2007) the entity being privatized guarantees 12 blank bills of exchange without protest and 1 letter of authorization that "Trayal Korporacija" a.d. Kruševac shall repay EUR 360,000 to "Credy banka" a.d. Kragujevac.
>
> The Guarantee Agreement in question is indirectly contrary to the Agreement's provisions that the assets of the entity being privatized shall be used to secure third-party liabilities."[468]

[465] Seventh Control Report, p.8 (Exhibit R-27). Similar observations can be found in the Seventh Control Report produced by Claimant as well. See Privatization Agency's Seventh Control Report, 20 November 2009, p.7-8 (Exhibit C-32).
[466] Counter-Memorial, at 100-101.
[467] Reply, at 112-117.
[468] First Control Report, p.5 (Exhibit R-21). Similar observations can be found in the First Control Report produced by Claimant as well. See Privatization Agency's First Control Report, 19 May 2008, p.4-5 (Exhibit C-330).

603. A indicated above, the 1st Control Report was clear that business continuity of Rudnik Kovin had been maintained at the relevant time.[469]

604. In the Tribunal's view, whether or not Claimant breached another obligation in the Privatization Agreement is not germane to the present issue because it was not a ground cited by the Privatization Agency in the Termination Notice.

605. Similarly, the Tribunal does not find that the Privatization Agency considered the RSD 50 million loan from Banca Intesa to, in and of itself, amount to a breach of the Business Continuity Obligation.

606. The record shows that Respondent was aware of the existence of the loan and the purpose for which it was being utilized. This is clear from the following extract of the 6th Control Report:

> "It was noted during the inspection that the entirety of the RSD 50,000,000.00 borrowed from "Banca Intesa" AD Beograd has been spent on preparatory works for lignite exploitation (excavation of a surface layer of earth, 15 meters deep, on an area of about 2000 ha), thus ensuring the uninterrupted and continuous extraction of lignite at the specified depth over the next five years."[470]

607. The Privatization Agency therefore did not consider these actions to amount to a breach of the Business Continuity Obligation.

608. The Tribunal then proceeds to consider Respondent's third allegation, *i.e.*, Claimant caused Rudnik Kovin to generate losses and incur increasing liabilities. In support of its position, Respondent relies on the observations made by the Control Center in the 9th Control Report.[471]

609. Claimant disagrees. According to Claimant, the record is clear that any alleged increase in losses and liabilities was not the basis on which the Privatization Agency found Claimant to be in breach of the Business Continuity Obligation.[472]

610. The Tribunal agrees with Claimant.

611. In the 9th Control Report, the Control Center did not specifically find the increase in losses and liabilities to contravene the Business Continuity Obligation. In fact, as Claimant correctly points out, the Control Center concluded that the "Entity", *i.e.*, Rudnik Kovin was not overleveraged.[473] This can be seen from the following extract:

---

[469] First Control Report, p.4 (Exhibit R-21). Similar observations can be found in the First Control Report produced by Claimant as well. See Privatization Agency's First Control Report, 19 May 2008, p.4 (Exhibit C-330).
[470] Sixth Control Report, p.7 (Exhibit R-26). Similar observations can be found in the Sixth Control Report produced by Claimant as well. See Privatization Agency's Sixth Control Report, 20 October 2009, p.7 (Exhibit C-335).
[471] Ninth Control Report (Exhibit R-29).
[472] Reply, at 125-128.
[473] Ninth Control Report, p.9 (Exhibit R-29).

> "Figures from the gross balance sheet for the period January 1 – May 24, 2010 show fixed assets of RSD 956,036,000.00, working capital of RSD 544,386,188.31 (inventories of RSD 265,451,768.76, receivables and investments of RSD 278,934,419.55) and total liabilities of RSD 376,419,184.30. These figures suggest that the Entity is not overleveraged."[474]

612. Moreover, the record suggests that the Control Center was, to some extent, content with Rudnik Kovin's commercial performance, noting that the company's revenue in 2010 was up 39% compared to the period prior to privatization.[475]

613. This, however, does not suggest that the Control Center was satisfied that Rudnik Kovin's business continuity had been maintained. The record shows that the Control Center's principal gripe was that Rudnik Kovin was plagued with illiquidity and that its business accounts were significantly overdrawn.[476]

614. This brings the Tribunal to Respondent's next allegation, *i.e.*, that Kornikom caused Rudnik Kovin to become illiquid.

615. With respect to illiquidity, Claimant advances two arguments. First, it contends that the fact that Rudnik Kovin's accounts were blocked and that it was illiquid is irrelevant to the question of whether it had complied with the Business Continuity Obligation. Second, it argues that even if Rudnik Kovin was illiquid, termination of the Privatization Agreement on this ground was disproportionate and contrary to Serbian law.[477]

616. The Tribunal finds that Claimant's arguments lack merit.

617. Looking at the first question, *i.e.*, whether illiquidity and blocked accounts are relevant factors to be considered in examining compliance with the Business Continuity Obligation, the Tribunal has already referred in this respect to several decisions of the Serbian Supreme Court (see paragraphs 582 and 583). These decisions demonstrate that under Serbian law a failure to maintain liquidity can be considered as a ground to terminate a privatization agreement for failure to maintain business continuity. The Tribunal considers these decisions persuasive.

618. In the present case, the Tribunal is mindful that it does not sit in review of the Serbian courts. It cannot second guess the law applicable to the present dispute. Instead, its task is to identify the law and examine whether it has been applied in a manner consistent with Serbia's obligations under the BIT.

619. Thus, although Claimant and its expert are of the opinion that the existence of blocked accounts and illiquidity is not, in itself, a breach of the Business Continuity Obligation,

[474] Ninth Control Report, p.8 (Exhibit R-29).
[475] Ninth Control Report, p.9 (Exhibit R-29).
[476] Ninth Control Report, p.8, 12 (Exhibit R-29).
[477] Memorial, at 110, 124, 125-132, 205-206.

the Tribunal is satisfied that under Serbian law, a failure to maintain liquidity can be a ground to terminate a privatization agreement for breach of the Business Continuity Obligation.

620. With this finding, the Tribunal proceeds to evaluate whether Rudnik Kovin was, in fact, illiquid and whether the Privatization Agency's termination on this ground was lawful.

621. The Tribunal has comprehensively set out the chronology of events regarding the Business Continuity Obligation in the Factual Background section (see paragraphs 160 to 174 above).

622. These paragraphs make it apparent that although the Control Center found Claimant to be in compliance with the Business Continuity Obligation in the first 3 Controls, the situation changed around the time of the 4th Control.

623. In the 4th Control held on 8 June 2009, the Control Center found Rudnik Kovin's business continuity to be "jeopardized" because Rudnik Kovin's accounts had been frozen since 26 November 2008 and because it was unable to service the Banca Intesa loan.[478] This is clear from the following extract:

> "Head inspector's opinion: […] Based on the documentation provided during the inspection, it can be said that business continuity is jeopardized. The basis for this statement is as follows:
>
> • The account has been continuously frozen since November 26, 2008 (it was overdrawn by RSD 54,806,047.60 on the day of inspection i.e. June 8, 2009). An account frozen for more than 45 days continuously may trigger bankruptcy proceedings;
>
> […]
>
> • Liabilities under the Banca Intesa loan are not being serviced and are one of the reasons why the Entity's account is frozen (according to the ledger, as of June 8, 2009 the liabilities amount to RSD 44,228,699.59, the loan repayment term was May 5, 2009)."[479] (Emphasis added)

624. In a bid to allow Claimant to comply with the Business Continuity Obligation, the Privatization Agency sent a letter to Claimant on 19 June 2009 granting it additional time. In this letter, the Privatization Agency directed Claimant's attention to the following points. First, it noted that Claimant had undertaken certain obligations in the Privatization Agreement and that breach of these obligations could result in its termination. Second, it pointed out that Claimant was in breach of the Business Continuity Obligation because it had, among other things, caused Rudnik Kovin's account to be blocked since 26 November 2008 and because Rudnik Kovin was unable

[478] Fourth Control Report, p.2, 9 (Exhibit R-24); Fifth Control Report, p.1, 9 (Exhibit R-25).
[479] Fourth Control Report, p.9-10 (Exhibit R-24).

to service its debt to Banca Intesa. Third, the Privatization Agency granted Claimant 60 additional days to comply with the Business Continuity Obligation.[480]

625. For ease of reference, the relevant extract of the 19 June 2009 letter is reproduced below:

> "Pursuant to the Agreement on the Sale of State Capital by the Method of Public Auction of the Privatization Subject Rudnik Kovin, Kovin (II / 1 Cert.no. 425/07 of 23/04/2007) you have made specific obligations, the failure of which entails the possibility of termination of the agreement.
>
> […]
>
> Also, pursuant to Article 5 of the Law on Privatization and Art. 10 of the Law on the Privatization Agency, Inspection Center, Privatization Agency, during the procedure of inspection of the execution of contractual obligations in the Subject, on 08/06/2009, it was determined that the Buyer did not fulfill obligations related to ensuring continuity in the predominant activity for which the Subject was registered on the day of the auction, starting from the following facts:
>
> • Continuous account blockage since 26/11/2008 (on the day of inspection 08/06/2009, it amounts to RSD 54,806,047.60),
>
> […]
>
> • Liabilities arising from the Loan from Banca Intesa are not serviced and are in the structure of the blockage of the business account of the Subject (according to the analytical card on 08/06/2009, liabilities amount to RSD 44,228,699.59;
>
> […]
>
> Bearing in mind the aforementioned, you are hereby invited to execute the contractual obligations within 60 days from the day of receipt of this notice and submit to the Privatization Agency the proof thereof, according to the following:
>
> […]
>
> - proof relating to the maintenance of continuity in the predominant activity for which the Subject was registered on the day of the auction,
>
> […]
>
> If you do not comply with this notice, the Agreement on the Sale of State Capital by the Method of Public Auction of the Privatization Subject "Rudnik Kovin" Kovin (II/1 Cert.No. 425/07 of 23/04/2007) shall be considered terminated for failure to comply, in accordance with the provisions of Article 41a of the Law on

[480] Letter from the Privatization Agency to Kornikom, 19 June 2009, p.1-2 (Exhibit R-37).

Privatization ("Official Gazette of RS" No. 38/2001, 18/2003, 45/2005 and 123/2007)."[481]

626. Similar observations of non-compliance were made in the 5th Control Report as well.[482] For ease of reference, the relevant findings in the 5th Control Report are set out below:

> "The documentation provided during the inspection demonstrates that business continuity is jeopardized. The basis for this statement is as follows:
>
> • According to information from the NBS Creditworthiness Center dated August 26, 2009, the Entity's business account is overdrawn by RSD 50,003,853.85. A breakdown of the freezing orders (Statement of the Director as of August 26, 2009) shows that the account is frozen largely due to liabilities to Banca Intesa under the short-term loan for RSD 45,100,962.38 (the loan matured on May 5, 2009). On 6 August 2009, a Protocol was signed between the Bank (Banca Intesa), the Entity and «Hidrobaza» d.o.o. Beograd, whereby "Hidrobaza" d.o.o. Beograd undertook to settle part of the bank loan to the sum of RSD 30,727,000.00 by March 31, 2010 (total liability under the loan, determined by the bank as of June 30, 2009 amounted to RSD 46,804,000.00), and in return, AD «Rudnik» Kovin undertook to deliver 40,000 tons of coal. On the basis of the Debt Assignment Agreements concluded on August 11, 2009 and August 17, 2009 between the aforementioned parties, a total of RSD 1,470,840.36 was lodged to the account of Banca Intesa (Statement No. 169 dated August 13, 2009 and Statement No. 175 dated August 17, 2009). In the last year, the account has been frozen for 289 days, 273 days of which it has been continually frozen (since November 26, 2008). An account frozen for more than 45 days continuously may trigger bankruptcy proceedings."[483] (Emphasis added)

627. Pursuant to the findings of the Control Center in the 5th Control Report, another letter was sent to Claimant on 15 September 2009 by the Privatization Agency. In this letter, the Privatization Agency once again reminded Claimant that it was in breach of the Business Continuity Obligation for, among other things, causing Rudnik Kovin's accounts to be blocked and for Rudnik Kovin to be illiquid and granted Claimant a further 60 days to comply with the Business Continuity Obligation.[484]

628. Thereafter, in the 6th and 7th Controls held on 20 October 2009 and 24 November 2009, the Control Center observed that the business continuity of Rudnik Kovin was "in the process of being restored". It, however, continued to note that Rudnik Kovin's business account had been frozen for 363 consecutive days.[485]

629. The 7th Control was therefore followed by another letter from the Privatization Agency to Claimant on 14 December 2009 inviting Claimant to demonstrate compliance with

[481] Letter from the Privatization Agency to Kornikom, 19 June 2009, p.1-2 (Exhibit R-37).
[482] Fifth Control Report, p.1, 9 (Exhibit R-25).
[483] Fifth Control Report, p.9 (Exhibit R-25).
[484] Letter from the Privatization Agency to Kornikom, 15 September 2009, p.2-3 (Exhibit R-38).
[485] Sixth Control Report, p.7 (Exhibit R-26); Seventh Control Report, p.1, 8, 10 (Exhibit R-27).

the Business Continuity Obligation.[486] In this letter, the Privatization Agency observed in relevant part:

> "Also, on 15/09/2009, a notice was sent to the Buyer about the subsequent deadline for submission of evidence on maintaining the business continuity, as well as evidence of compliance with the provisions of Annex 1 of the Agreement, on which the Buyer failed to act.
>
> Namely, in the process of the inspection of the execution of the Agreement at the headquarters of the Subject, on 20/11/2009 the following was determined:
>
> […] The business account of the Subject is illiquid as of 26/01/2008, and on the day of the inspection, the account is illiquid for the amount of RSD 41,135,678.06.
>
> […]
>
> With this in mind, you are hereby called upon to, within the subsequent period starting from the day of receiving of this notice, fulfill the contractual obligations and submit to the Privatization Agency evidence of this, according to the following:
>
> […]
>
> - within 60 days, evidence relating the maintenance of business continuity in the core activity for which the Subject was registered on the day of the auction,"[487]

630. Claimant, however, failed to demonstrate to the Privatization Agency's satisfaction that it had complied with the Business Continuity Obligation. The record shows that during the 8th Control held on 18 February 2010, further non-compliances were observed and the business continuity of Rudnik Kovin was once again "jeopardized".[488] The Head Inspector, therefore, once again recommended that Claimant be given an additional 60 days to demonstrate compliance.[489] This is clear from the following extract:

> "The documentation demonstrates that the continuity in respect of the Entity's primary activity remains jeopardized (in 2009 the business operated at a loss, the account has been permanently frozen since that year), and bearing in mind the negotiations with "Banca Intesa" AD Belgrade (one of the reasons the account is frozen are installment arrears under the Loan Agreement concluded with the bank), it is proposed that a Notice be sent to the Buyer leaving another additional 60-day deadline for furnishing the Privatization Agency with proof that the contractual obligation has been discharged."[490]

[486] Letter from the Privatization Agency to Kornikom, 14 December 2009 (Exhibit R-39).
[487] Letter from the Privatization Agency to Kornikom, 14 December 2009 (Exhibit R-39).
[488] Eighth Control Report, p.1, 10 (Exhibit R-28).
[489] Eighth Control Report, p.1, 10 (Exhibit R-28).
[490] Eighth Control Report, p.19 (Exhibit R-28).

631. Based on the Head Inspector's recommendation, the Privatization Agency once again sent a letter to Claimant on 18 March 2010, inviting Claimant to demonstrate compliance. Just like the earlier letters, this letter too cautioned Claimant that if it failed to demonstrate compliance with the Business Continuity Obligation within 60 days, the Privatization Agreement would be terminated by operation of law.[491] The relevant extract of the letter is reproduced below:

> "Also on 14/12/2009, a notice was sent to the Buyer about the subsequent deadline for submission of proof on maintaining business continuity, as well as evidence of compliance with the provisions of Annex 1 of the Agreement, which the Buyer failed to act on.
>
> Upon expiry of the subsequent period specified in the Notification of14/12/2009, in the process of inspection of execution of the Agreement at the headquarters of the Subject, on 18/02/2010, the following was established:
>
> […]
>
> The total liabilities of the Subject were multiplied by several times and according to the data from the Gross Balance Sheet as of 31/12/2009, they amounted to RSD 404,254,930.66 (as of 31/12/2008, they amounted to RSD 245,794,000.00). Prior to the privatization in 2006, the Subject's total liabilities amounted to RSD 28,861,000.00.
>
> The business account of the Subject has been illiquid continuously for the last year and on the day of inspection the account is illiquid for the amount of RSD 37,628,197.96.
>
> […]
>
> Bearing in mind the aforementioned you are hereby invited to execute the contractual obligations within 60 days from the day of receipt of this notice and submit to the Privatization Agency the proof thereof, according to the following:
>
> […]
>
> - proof relating to the maintenance of continuity in the predominant activity for which the Subject was registered on the day of the auction,
>
> […]
>
> If you do not comply with this notice, the Agreement on the Sale of State Capital by the Method of Public Auction of the Privatization Subject "Rudnik Kovin" Kovin […] shall be considered terminated for failure to comply, in accordance with the provisions of Article 41a of the Law on Privatization […]."[492]

[491] Letter from the Privatization Agency to Kornikom, 18 March 2010 (Exhibit R-40).
[492] Letter from the Privatization Agency to Kornikom, 18 March 2010 (Exhibit R-40).

632. Eventually, the 9th Control was held on 24 May 2010.[493] Claimant argues that this Control did not find a breach of the Business Continuity Obligation.[494] This is incorrect. A perusal of the 9th Control Report leaves no room for doubt that the Control Center found Rudnik Kovin's business continuity to be jeopardized due to the business's illiquidity and blocked accounts. This is clear from the following extract:

> "Business continuity was to be maintained for three years (monitoring until April 23, 2010).
>
> Notice leaving an additional 60-day deadline for complying with Article 5.3.2 of the Agreement was sent to the Buyer on March 15, 2010 (at the 248th sitting of the Measures Commission).
>
> The Buyer failed to comply with the measure within the additional deadline.
>
> The documentation submitted during the inspection demonstrates that continuity of the primary business activity remains jeopardized owing to the Entity's business account being frozen."[495]

633. The 9th Control Report was followed by the Termination Notice on 11 June 2010. Although Claimant correctly notes that the Termination Notice did not set out how Claimant breached the Business Continuity Obligation, it is self-evident that the Privatization Agency considered Rudnik Kovin's illiquidity to be one of the primary factors. This is abundantly clear from the fact that the Termination Notice referred to the 4 notices the Privatization Agency had issued earlier identifying Claimant's breaches and granting Claimant additional time to comply (see paragraphs 625, 627, 629 and 631 above). The Termination Notice in fact highlighted how Claimant was given a further opportunity to demonstrate compliance at the 9th Control, which it failed to do. This full text of the Termination Notice has been set out above (see paragraph 201).

634. For all these reasons, the Tribunal finds merit in Respondent's conclusion that Claimant was in breach of the Business Continuity Obligation.

635. The Tribunal, therefore, proceeds to address Claimant's final argument vis-à-vis the Business Continuity Obligation, *i.e.*, the termination of the Privatization Agreement was disproportionate and contrary to Serbian law.

---

[493] Ninth Control Report, p.2, 12 (Exhibit R-29).
[494] Memorial, at 107-108.
[495] Ninth Control Report, p.12 (Exhibit R-29). See also p.8 of the same document where the Control Center observes: "The gross balance sheet figures for the period January 1 – May 24, 2010 and financial statements from earlier years, included in the tables above, suggest that continuity of primary activity of the entity being privatized – lignite extraction and briquetting remains jeopardized owing to the Entity's illiquidity".

636. According to Claimant, Respondent's termination of the Privatization Agreement was disproportionate because Claimant was, among other things, negotiating with Banca Intesa to remove the blockages to Rudnik Kovin's bank account.[496]

637. The Tribunal is not persuaded by this argument.

638. Even assuming that Respondent was required to act in a proportionate manner, a point which Respondent disputes, the Tribunal is satisfied that this was the case for the following reasons.

639. First, both the Law on Privatization and the Privatization Agreement specifically provide that the agreement will be deemed terminated in the event that a buyer fails to ensure compliance with the Business Continuity Obligation (see paragraphs 553 and 554 above).

640. In the present case, the record shows that Claimant had caused Rudnik Kovin's bank accounts to remain illiquid and continuously blocked for almost 18 months. Moreover, the bank accounts were also overdrawn in significant amounts and could have exposed Rudnik Kovin to bankruptcy proceedings.

641. Although these non-compliances would have been enough for the Privatization Agreement to be terminated, the Privatization Agency granted Claimant several opportunities to demonstrate compliance. Claimant, however, did not prove to the Privatization Agency's satisfaction that it had complied with the Business Continuity Obligation.

642. Second, the Tribunal is not persuaded by Claimant's argument that the Privatization Agency should have given Claimant additional time for compliance in light of its ongoing negotiations with Banca Intesa. Although the 9th Control Report does show that Claimant was in negotiations with Banca Intesa, there is no evidence to show that an agreement would have been reached. In fact, similar negotiations were underway Banca Intesa during the earlier controls as well, but Rudnik Kovin's accounts continued to remain frozen.[497]

643. The Privatization Agency was therefore well within its rights to terminate the Privatization Agreement and the Tribunal does not find this conduct to be in contravention of Serbian law.

644. The Tribunal, therefore, shifts its focus to Respondent's final allegation, *i.e.*, that Claimant breached the Business Continuity Obligation by preventing Rudnik Kovin from paying employee salaries and benefits.

[496] Memorial, at 133-136; Reply, at 330-331.
[497] Fourth Control Report, p.8 (Exhibit R-24); Fifth Control Report, p.7 (Exhibit R-25); Sixth Control Report, p.7 (Exhibit R-26); Seventh Control Report, p.9 (Exhibit R-27); Eighth Control Report, p.8 (Exhibit R-28).

645. Claimant argues that these allegations are unrelated to the content of the Business Continuity Obligation but are relevant, if at all, only to the Social Program Obligation.[498]

646. The Tribunal is unable to accept this argument.

647. In the Section above, the Tribunal referred to several decisions of the Serbian Supreme Court (see paragraphs 582 and 583) in its attempt to understand the contours of the Business Continuity Obligation under Serbian law. These decisions demonstrate that under Serbian law a failure to pay employee salaries and benefits on time can be considered as a ground to terminate a privatization agreement for failure to maintain business continuity. This also can be seen, for instance, from the following extract of the decision of the Serbian Supreme Court:

> "The Plaintiffs have violated Annex I of the Sales Contract, which specifies the obligation to ensure that all of the rights of employees are observed within the entity, given that the right to earnings is one of the basic rights of employees, since the social program was not fully complied with, specifically in the part relating to the payment of salaries and the regularity of payment, as was determined on the basis of the expert's report. The first instance court correctly assessed the fulfillment of conditions for the termination of the relevant contract through the connection between the contractual obligations of continuity of business operations and the social program. Article 2 of the Privatization Law stipulates that privatization is based on the principle of creating conditions for development of the economy and social stability. According to the quoted provision, the privatization objective is achieved only if all obligations under the contract annex are met. Employees were not paid their owed salaries with the due contributions, which means that the social program was not complied with in this part. The above, in the case at hand, means that the obligations relating to the manner of resolving employee-related issues were not fulfilled, in the context of Article 41a of the Privatization Law, which in turn affected the continuity of business operations, and as the first instance court correctly concludes, this is broader than the continuity of production, which resulted in fulfillment of the condition subsequently. The same legal viewpoint on the conditional connection between the social program and business continuity, as well as the application of the provisions of Articles 2 and 41a of the Privatization Law, to contractual obligations that continue after the entry into force of the Amendments to the Privatization Law (regardless of the date of the conclusion of the contract-annex itself), as well as the conditions for termination, are contained in the judgments of the Supreme Court of Cassation Prev 127-13 dated May 29, 2014 and Prev 132-13 dated May 29, 2014."[499]

648. The Tribunal considers these decisions persuasive.

649. Thus, even though Claimant believes that the non payment of employee salaries and benefits is not relevant to the Business Continuity Obligation, the Tribunal is satisfied that under Serbian law, a failure to pay salaries and benefits can be a ground to terminate a privatization agreement for breach of the Business Continuity Obligation.

---

[498] Reply, at 130.
[499] Judgement of the Commercial Court of Appeal Pž 1006/15, 13 October 2015, p.4 (Exhibit RL-28).

650. The question therefore is a factual one, *i.e.*, was Claimant defaulting in the timely payment of salaries and benefits. If Claimant had failed to cause Rudnik Kovin to pay its employee salaries and benefits on time, the Privatization Agency would have been within its right to declare the Privatization Agreement terminated for a breach of the Business Continuity Obligation.

651. The Tribunal notes that this question is intrinsically connected to the question of whether the Privatization Agency's termination of the Privatization Agreement for breach of the Social Program Obligation was lawful. The Tribunal will therefore consider the factual issues relevant to this allegation in the next section.

Was the termination of the Privatization Agreement for the alleged breach of the Social Program Obligation unlawful, untimely, disproportionate or lacking good faith?

652. This issue presents questions similar to those addressed above.

653. As with the Business Continuity Obligation, Claimant argues that Respondent's termination of the Privatization Agreement due to a purported breach of the Social Program Obligation is unlawful for three reasons. First, by the date of the Termination Notice, the Privatization Agency's right to terminate the Privatization Agreement had expired. Second and *arguendo*, Kornikom had not breached the Social Program Obligation. And third, even assuming there was a breach, Serbia's conduct was disproportionate and contrary to Serbian law.[500]

654. Respondent contests each of the above arguments and maintains that that the Termination Notice was in accordance with law.[501]

655. The Tribunal considers each of these issues in sequence.

656. As with the Business Continuity Obligation, Claimant's first argument relates to the timeliness of Respondent's actions. Claimant argues that Kornikom's obligation to comply with the Social Program Obligation in Annex No. 1 of the Privatization Agreement expired on 23 April 2009. Any additionally granted term to comply with the Privatization Agreement therefore was only tied to the fulfilment of the obligation and could not change the expiry date of the obligation.[502]

657. The Tribunal has already addressed this question above in its discussion regarding the timeliness of the Termination Notice vis-à-vis the Business Continuity Obligation (see paragraphs 551 to 557). The Tribunal's views therein are equally relevant here. The Tribunal therefore concludes that although ordinarily Claimant's Social Program Obligation would have expired on 23 April 2009, in light of the apparent breaches and

[500] Memorial, at 137-160; Reply, at 332-343.
[501] Counter-Memorial, at 113-127, 361-369; Rejoinder, at 268-280.
[502] Memorial, at 144-145, 210; Reply, at 333.

Respondent granting Claimant additional time to comply, the expiration date of the obligation would also be correspondingly extended.

658. Having said that, the Tribunal nevertheless agrees with Respondent that the question is academic in the context of the Social Program Obligation because Respondent's case remains that some of Claimant's breaches ran from when the Social Program Obligation had not expired, *i.e.*, prior to 23 April 2009. This can be seen in the 9th Control Report (see paragraph 182) where the Control Centre found that pension and disability insurance contributions for the period January to December 2009 remained outstanding.

659. Second, Claimant argues that the Privatization Agency could not issue the Termination Notice after 23 April 2009.[503]

660. The Tribunal has also addressed this question in its analysis of the timeliness of the termination vis-à-vis the Business Continuity Obligation (see paragraphs 558 to 559). For the sake of brevity, the Tribunal does not restate its observations here but they are equally applicable in the present context as well.

661. In a similar vein, the Tribunal finds no merit to Claimant's other contentions, *i.e.,* that (i) Claimant was excused from its ongoing breach of the Social Program Obligation because Kornikom and the Privatization Agency did not agree in writing to amend and extend the time-period for compliance; and (ii) the Termination Notice could only be issued within the additionally granted term in order for it to be timely.[504] The Tribunal's reasoning in the context of the Business Continuity Obligation is equally applicable vis-à-vis the Social Program Obligation (see paragraphs 560 to 563).

662. For all these reasons, the Tribunal finds no merit to Claimant's argument that the Termination Notice was untimely.

663. The Tribunal therefore proceeds to consider the second question relevant to the Social Program Obligation, *i.e.*, whether Kornikom was in breach of the Social Program Obligation.

664. To answer this question, the Tribunal needs to first identify the meaning and purport of the Social Program Obligation and then determine based on the evidence on the record whether Claimant was in breach of it.

665. In order to understand the meaning of the Social Program Obligation under the Privatization Agreement and determine what Claimant needed to do to be in compliance, the starting point for the Tribunal must be the Privatization Agreement itself.

[503] Memorial, at 144-145, 210; Reply, at 316.
[504] Reply, at 318.

666. A perusal of Annex No. 1 of the Privatization Agreement (see paragraph 149 above) shows that Claimant was required to perform several obligations relating to the welfare of Rudnik Kovin's employees, including, among other things, compliance with the employees' rights stipulated in the individual bargaining agreement, employee policy, protection of trade union rights and employee salaries.

667. In the present case, Respondent argues that Claimant breached the first set of these obligations, *i.e.*, those requiring compliance with the employees' rights stipulated in the individual bargaining agreement.[505] The specific obligation in Annex 1 which Respondent believes Claimant failed to comply with is reproduced below:

> "The Buyer undertakes to ensure, within the Privatization Subject, compliance with the employees' rights stipulated under the individual bargaining agreement and other Privatization Subject's bylaws valid at the time of conclusion of this agreement, for a period of two years as of the date of conclusion of this agreement."[506]

668. The Tribunal, therefore, needs to concern itself only with the first obligation and the relevant text set out above.

669. Respondent argues that compliance with the individual bargaining agreement meant that Claimant had to protect Rudnik Kovin's employees' rights to salaries and other benefits set out therein and in other labor laws. This right to salaries did not include just the net salary of an employee but the "so-called gross salary" including (i) net salaries payable directly to employees; (ii) taxes payable on salaries; and (iii) contributions payable on salaries, including contributions for employee health insurance, unemployment insurance, and pension and disability insurance.[507]

670. Claimant disagrees. According to Claimant, payment of taxes and contributions did not form part of its obligations under the Privatization Agreement or the Law on Privatization. Claimant was simply required to "put in place a manner of resolving such issues, which most typically is done by entering into an individual bargaining agreement".[508] Claimant points out that before Rudnik Kovin's privatization, there was an individual bargaining agreement in place and, post-privatization, the employees continued to benefit from such agreements entered into with Rudnik Kovin. Claimant had therefore complied with the Social Program Obligation.[509]

---

[505] Counter-Memorial, at 75-79. This is also clear from the Termination Notice (see Termination Notice, p.1 (Exhibit C-2)).
[506] Privatization Agreement, Annex No. 1 (Exhibit C-1).
[507] Counter-Memorial, at 77-78, 363-364; Rejoinder, at 277-278; R-PHB, at 92-96; Rudnik Kovin Individual Bargaining Agreement, January 2006 (Exhibit C-208).
[508] Memorial, at 138.
[509] Memorial, at 138-143, 147, 154-155, 208-209; Reply, at 131-135, 139-140, 335-337; C-PHB, at 60-61; Milošević-I, at 97.

671. Claimant argues that its understanding of the obligation to comply with the employees' rights stipulated in the individual bargaining agreement is correct for two reasons. First, after the Privatization Agreement with Kornikom was concluded, Respondent amended Article 41a of the Privatization Law to introduce a new provision, Article 41a(1)(6a), giving the Privatization Agency the right to terminate the agreement if a party failed "to fully pay minimum wages to the employees in the subject of privatization and corresponding contributions, for the period of at least nine months during a calendar year." In Claimant's view, this provision would be redundant if Article 41a(1)(6) already imposed that requirement on a party to a privatization agreement.[510]

672. Second, on 14 April 2010, the Serbian Ministry of Labor confirmed that, since Rudnik Kovin had paid its employees' net salaries, Claimant was in fact in compliance with its Social Program Obligation.[511]

673. The Tribunal is not persuaded by Claimant's arguments for the following reasons.

674. First, the relevant obligation set out in Annex No. 1 to the Privatization Agreement (see paragraph 667) requires the buyer to comply with those rights of employees which are stipulated in the individual bargaining agreement and other bylaws of the company. Kornikom was thus required under the Privatization Agreement to ensure that Rudnik Kovin complied with the rights of the employees set out in their individual bargaining agreement with Rudnik Kovin. Kornikom also had to ensure that Rudnik Kovin complied with the employees' rights set out in its bylaws.

675. A perusal of the individual bargaining agreement between the employees and Rudnik Kovin, particularly Article 40 therein, shows that Claimant's obligation under the Privatization Agreement required it to, among other things, pay employees' salaries on time. Article 40 further clarifies that this duty to pay salaries was not confined to the net salaries alone but extended to gross salaries, including taxes and contributions. This is clear from the following extract:

> "Article 40
>
> An employee shall be entitled to a salary in accordance with the law, this Collective Agreement and the employment contract. An employee's salary shall consist of:
>
> 1. salary for work done and time spent at work,
> 2. salary based on an employee's contribution to the Employer's business success (rewards, bonuses, etc.) and
> 3. other employment benefits in accordance with this Collective Agreement and the employment contract.

[510] Memorial, at 154; Reply, at 336; C-PHB, at 61; 2001 Serbian Law on Privatization (Official Gazette of the Republic of Serbia No. 38/2001, 18/2003, 45/2005, 123/2007), Article 41a(6)(a) (Exhibit C-205); 2008 Explanatory Notes to the 2001 Serbian Law on Privatization, p.1 (Exhibit C-206); Milošević-I, at 98.
[511] Reply, at 133; Letter from the Privatization Agency to the Serbian Ministry of Labour, 18 March 2010 (Exhibit C-41); Serbian Ministry of Labour Report, 14 April 2010, p.3 (Exhibit C-38).

> Salary within the meaning of paragraph 1 of this Article means so-called gross salary, i.e. salary including taxes and contributions payable on salary and other employment benefits that are deemed salary in accordance with the law.[512]

676. A similar conclusion is reached from a perusal of Articles 104 and 105 of the Labor Law in Serbia as well. According to the Article 104(1) of the Labor Law, "the employee has the right to an appropriate salary which shall be determined in accordance with the law, the general act and the employment contract." Article 105(2) defines this salary to "include [] taxes and contributions that are paid from the salary."[513]

677. In the Tribunal's view, these provisions make it clear that Claimant was required to pay the gross salaries of Rudnik Kovin's employees in a timely manner, failing which it would be in violation of the individual bargaining agreement, the Labor Law and consequently Annex 1 of the Privatization Agreement. This conclusion is reinforced by the fact that Claimant did not contemporaneously suggest to the Privatization Agency that it was not obliged to pay gross salaries under Annex No. 1. Instead, the record shows that when Claimant was called upon to demonstrate compliance, it tried to demonstrate to the Privatization Agency's satisfaction how it was fulfilling its Social Program Obligation.[514]

678. Second, although Claimant makes reference to Article 41a(1)(6a) of the Law on Privatization and argues that it was not possible to terminate a privatization agreement for failure to pay employees' salaries under the Privatization Agreement, Respondent has invited the Tribunal's attention to two decisions of the Serbian Supreme Court which indicate otherwise. One of these decisions in fact relates to a privatization agreement entered into in 2003, *i.e.*, much before the Privatization Agreement and the entry into force of Article 41a(1)(6a). These decisions demonstrate that privatization agreements could indeed be terminated for failure to pay employees' salaries.[515]

679. Third, Claimant's argument that the Serbian Ministry of Labor found it to be in compliance with its Social Program Obligation is unsupported by the record. A perusal of the Ministry of Labor and Social Policy's letter of 14 April 2010, upon which Claimant relies, shows that the ministry simply noted that Claimant had paid net salaries. It did not make any observations on Claimant's payment of gross salaries or Claimant's compliance with the Social Program Obligation under the Privatization Agreement.[516]

---

[512] Rudnik Kovin Individual Bargaining Agreement, January 2006, Article 40, p.10 (Exhibit C-208).
[513] Lepetić-II, at 52; Labor Law, RS Official Gazette, No. 24/2005 and 61/2005 (Exhibit C-207).
[514] See for e.g., Letter from Kornikom to the Privatization Agency, 20 May 2010, p.6 (Exhibit C-11).
[515] Decision of the Supreme Court of Cassation, Prev 87/2013, p.2-3, 19 September 2013 (Exhibit RL-196); Judgment of the Supreme Court of Cassation, Prev 445/2019, p.3-4, 9 July 2020 (Exhibit RL-195).
[516] Serbian Ministry of Labour Report, 14 April 2010 (Exhibit C-38).

680. For all these reasons, the Tribunal finds that the Social Program Obligation required Claimant to pay Rudnik Kovin employees their gross salaries and that the Privatization Agreement could be terminated for Claimant's failure to do so.

681. Having identified the meaning of the Social Program Obligation, the next task for the Tribunal is to examine the record and determine whether Claimant, in fact, breached this obligation.

682. The record shows that although Claimant was in compliance with the Social Program Obligation in the first 2 Controls, the Control Centre found that Claimant was persistently in default of paying Rudnik Kovin's employees their gross salaries from the 3rd Control until the 8th Control (see paragraphs 175 to 183).

683. Claimant does not dispute the findings made in these Control Reports. On the contrary, it admits that Rudnik Kovin had, "on occasion, [] delayed payment of some Pension Contributions".[517]

684. Claimant's case, however, is that it was "actively working with Serbia to resolve this issue" and that Rudnik Kovin had invoked an MoF Scheme to bridge the pension contributions.[518] Claimant relies on an observation by the Control Centre in the 9th Control Report and a letter it had addressed to the Privatization Agency on 20 May 2010 in support of these assertions.[519]

685. The Tribunal has considered these documents. Although there is some truth to Claimant's suggestion that it had invoked the MoF Scheme to bridge the pension contributions due to Rudnik Kovin's employees, the fact remains that Claimant was in default. Moreover, the pension contributions formed just a part of Claimant's default at the time the Privatization Agreement was terminated.[520]

686. As at the 9th Control Report, Claimant's default extended to the following items:

- Taxes on salaries for the period from January 2010 to March 2010;
- Health insurance contributions for the half month of November 2009 and December 2009 and for the month of March 2010;
- Unemployment insurance contributions for the period from January 2010 to March 2010; and
- Pension and disability insurance contributions for the period January to December 2009 and for the period January to March 2010.[521]

[517] Memorial, at 148.
[518] Memorial, at 148.
[519] Memorial, at 148-149; Ninth Control Report, p.11, 21.
[520] Letter from Kornikom to the Privatization Agency, 20 May 2010, p.6 (Exhibit C-11); Ninth Control Report, p.21 (Exhibit R-29).
[521] Ninth Control Report, p.20-24 (Exhibit R-29).

687. Claimant in fact admits as much in its letter to the Privatization Agency on 20 May 2010. This can be seen from the following extract:

> "**3. Regarding the fulfillment of obligation under annex 1 of the Sale and Purchase Agreement - Social program applied in the Entity after the conclusion of Sale and Purchase Agreement we inform you as follows:**
>
> 3.1 Regarding the payment of salaries with attributable taxes and contributions the entity fulfilled this obligation under Annex 1 of the Agreement on sale of state-owned capital for the period of two years from the date of signing the Sale and Purchase Agreement, i.e. conclusive with April 2009 as follows:
>
> - Net salary is paid according to regular schedule with small derogation; (by May 20, 2010 the net salary for March 2010 was paid)
> - Obligation for taxes and contributions for salaries (social program) under Annex 1 of the Agreement on sale of state-owned capital for the period of two years from the date of privatization, i.e. for the period April 23, 2007 – April 30, 2009 we have paid conclusive with April 20, 2010, except for contributions for pension and invalidity insurance for which the Treasury approved the procedure of Bridging of service periods. The bridging of service periods was approved for the period January 1-December 31, 2009 in total amount of RSD 21.481.008,00.
>
> […]
>
> 3.2 Net salaries as well as taxes and contributions, for the period May 1 –December 31, 2009 are paid, except for:
>
> - Contributions for pension and invalidity insurance for which the Treasury Department approved the procedure of Bridging of service periods
> - Contributions for medical insurance for half of November (advance) and half of December (final account) of 2009.
>
> 3.3 Net salaries for period January 1- April 30, 2010 are paid conclusive with March 2010.
> 3.4 Taxes and contributions for salaries, for period January 1 – April 30, 2010 are not paid, except for:
> - Contributions for medical insurance which were paid for January and February 2010
>
> We believe that by these actions we have fulfilled the contractual obligations assumed by signing the Agreement on the sale of the state-owned capital by public auction of privatization entity "Rudnik Kovin" Kovin (II/1 Ov. No. 425/07 dated April 23, 2007)."[522] (Emphasis added)

[522] Letter from Kornikom to the Privatization Agency, 20 May 2010, p.6 (Exhibit C-11).

688. In these circumstances, the Tribunal finds merit to Respondent's conclusion that Claimant and Rudnik Kovin had failed to pay Rudnik Kovin's employees' salaries and contributions on time and that Claimant was in breach of the Social Program Obligation. Respondent's findings are borne out from the record and appear to flow from the text of Privatization Agreement as supplemented by Serbian law. Moreover, the Tribunal also finds Claimant to be in breach of the Business Continuity Obligation for the reasons set out above (see paragraphs 644 to 650).

689. The Tribunal, therefore, proceeds to address Claimant's final argument vis-à-vis the Social Program Obligation, *i.e.*, the termination of the Privatization Agreement on this ground was disproportionate and contrary to Serbian law.

690. Claimant advances the following arguments as to why the termination of the Privatization Agreement on this ground was disproportionate and unlawful. First, the Privatization Agency knew that the outstanding contributions were soon to be funded by the MoF Scheme. Second, only an insignificant part of Claimant's obligations were outstanding and Article 131 of the Law on Obligations prohibits the termination of an agreement in such circumstances.[523]

691. The Tribunal is not persuaded by these arguments.

692. First, even assuming that there was a duty on the Privatization Agency to act proportionately, the Privatization Agreement and the Law on Privatization provide for termination of the agreement in the event of breach of the Social Program Obligation (see paragraphs 652 to 554 above).

693. Second, the record shows that Claimant had failed to pay Rudnik Kovin's employees their gross salaries for a lengthy time period. Although these non-compliances would have been enough for the Privatization Agency to terminate the Privatization, it exercised restraint and granted Claimant several opportunities to demonstrate compliance. Claimant, however, does not appear to have proved compliance with the Social Program Obligation to the Privatization Agency's satisfaction.

694. Third, although Claimant is correct that some of the outstanding contributions were to be funded by the MoF Scheme, the record shows that this was not done before the date of the 9th Control. In any event, Claimant's recourse to MoF Scheme would only take care of a few outstanding liabilities with Claimant being in default of several others (see paragraph 686 above).

695. Finally, even assuming that the obligation to pay salaries and taxes was an insignificant obligation under the Privatization Agreement, the Tribunal finds that Claimant cannot rely on the provisions of the Law on Obligations because Serbian courts consider the

[523] Memorial, at 156-160; Reply, at 141-147; C-PHB, at 63-65.

terms of the Privatization Agreement and the Law on Privatization to prevail as *lex specialis* over the Law on Obligations.[524]

696. This can be seen, for instance, in the following extract:

> "When assessing the fulfillment of conditions for termination of the agreement on the sale of the socially-owned capital, the nature of this contract must be taken into account, i.e. that it is a *sui generis* contract. This is because the legal nature of this contract is not determined only by the Law on Obligations, but also by other systemic laws: the Law on Companies, the Law on Privatization, the Law on Entry into the Court Register. Therefore, when assessing the fulfillment of the conditions for termination of this *sui generis* contract, exclusively general rules of the contractual law relating to the termination of the contract due to failure to fulfill the contract, or the termination of the contract in case the obligations are partially fulfilled, cannot be applied. The primary objective of privatization is not the sale of the subject of privatization by itself, but the investment in the development of the subject in order to promote the overall economic development of the society and the creation of stable business and social security conditions. In cases where this primary objective has not been fulfilled, the basic principles of the Law on Privatization expressed in the provisions of Article 2 of this Law have been violated. Therefore, in a situation where the contract is partially executed, the contract can be terminated."[525]

697. Similarly, another decision of the Serbian Supreme Court notes:

> "[…] the Agreement on the sale of socially-owned capital is concluded in accordance with the provisions of the Law on Privatization and is a special type of legal obligation that derives its legislation primarily from the Law on Privatization as "lex specialis", and then from the provisions of the Law on Obligations. Article 20 of the Law on Obligations stipulates the manner in which parties may regulate their mutual relations differently from the Law, unless otherwise stipulated by any provisions of this Law or the meaning thereof. In the specific case, contractual parties explicitly provided for, according to the Agreement, the legal consequences of the termination of the Agreement, in the provision of Article 7, item 1 of the Agreement. If the buyer fails to submit to the Agency a guarantee for the placement of investment, as provided for through Article 7.1 of the Agreement, if he fails to vote on the basis of his shares in favor of decisions at the General Meeting, as provided for in paragraph 3.3 of the Agreement, or fails to ensure business continuity, as provided for in paragraph 3.2 of the Agreement, the Agency has the right to terminate the Agreement by giving written notice to the buyer and, in that case, the buyer shall no longer be entitled to the right to a refund of the deposit, the right to a refund of the paid portion of the purchase price, and all rights and receivables under this Agreement. For the above reason, the provisions of Article 132 (2) and (5) of the Law on Obligations may not be applied to the matter of the

[524] Decision by the Supreme Court of Cassation Prev 129/2013, 19 June 2014, p.1 (Exhibit RL-37); Decision of the Supreme Court of Cassation, Prev 387/2016 of 18 May 2017, p.4-5 (Exhibit RL-27); Decision of the Supreme Court of Cassation Prev. 104/2013, 19 June 2014, p.3 (Exhibit RL-48).
[525] Decision by the Supreme Court of Cassation Prev 129/2013, 19 June 2014, p.1 (Exhibit RL-37).

> right of a buyer of socially-owned capital to claim compensation of damages after unilateral termination of the related Agreement by the defendant, but exclusively the contractually agreed provisions as properly concluded by lower-instance courts."[526]

698. For all these reasons, the Tribunal finds that the Privatization Agency did not contravene Serbian law and was within its rights to terminate the Privatization Agreement for Claimant's breach of the Social Program Obligation.

***

699. In the above section, the Tribunal has made the following findings:

- First, Serbia's conduct, through the Privatization Agency or otherwise, was not motivated by an anti-Bulgarian sentiment.

- Second, the termination of the Privatization Agreement was not at the instance of the Serbian Ministry of Economy.

- Third, the alleged breaches of the Privatization Agreement did in fact exist and the Privatization Agency's termination of the agreement was not pretextual but justified.

700. The Tribunal therefore concludes that the Privatization Agency's termination of the Privatization Agreement was not an act in the exercise of sovereign authority. Rather, the Privatization Agency was exercising its contractual rights under Serbian law and was acting as an ordinary contracting party.

701. As noted earlier, both Parties seem to agree that whether the Privatization Agency's impugned conduct amounts to unlawful expropriation rests on whether or not it acted in a sovereign capacity.[527] Given that the Tribunal finds the Privatization Agency's conduct to be contractual as opposed to sovereign in nature, Claimant's claim that Serbia's termination of the Privatization Agreement is tantamount to expropriation is not made out.

d. Whether the Privatization Agency's Decisions on Transfer constitute expropriatory conduct prohibited by Article 5 of the BIT.

702. The penultimate question for the Tribunal to consider with respect to Claimant's expropriation allegations is whether the Decisions on Transfer constitute expropriatory conduct.

[526] Decision of the Supreme Court of Cassation, Prev 387/2016, 18 May 2017, p.4 (Exhibit RL-27).
[527] Memorial, at 214; Reply, at 344-348; C-PHB, at 66-70; Counter-Memorial, at 338; Rejoinder, at 210-216; R-PHB, at 14.

703. Following the termination of the Privatization Agreement, the Privatization Agency issued the Decision on Transfer of Capital pursuant to Article 41a(3) of the Law on Privatization and appropriated Kornikom's shares in Rudnik Kovin without compensation and without a refund of the purchase price.[528]

704. On the same day, the Privatization Agency also issued Decision on the Transfer of the Treasury Shares, which took away from Rudnik Kovin the Treasury Shares it received for Kornikom's compliance with the investment obligation under the Privatization Agreement.[529]

705. Claimant argues that these actions amount to unlawful expropriation for the following reasons. First, the Decisions on Transfer and the subsequent transfer of shares were not automatic consequences of the termination of the Privatization Agreement. The Privatization Agreement did not contain any right of the Privatization Agency to take away the shares of Claimant upon termination.[530]

706. Second, even assuming that these actions were automatic consequences of the lawful termination of the Privatization Agreement, these actions were unlawful because the termination of the Privatization Agreement was unlawful.[531]

707. Third, the Decision on the Transfer of the Treasury Shares was wrongful under Serbian law because the Treasury Shares were taken without compensation and because the Privatization Agency relied on an amended provision of the Law on Privatization, which did not apply to the Privatization Agreement.[532] Claimant refers to the 2007 Amendment to Article 41 of the Law on Privatization, which provides in relevant part:

> "The shares acquired by the buyer from new emissions based on increase of the capital of the subject of privatization during fulfilment of contractual obligations shall be considered own shares of the subject of privatization which have been fully paid.
>
> When the buyer of the capital, and/or of the property fulfils the obligations from the agreement on sale of capital, and/or of the property, which is proven by the certificate from the Agency, the subject of privatization which acquired own shares shall be under obligation to transfer them free of charge to the buyer of the capital, and/or of the property, from which it acquired them.
>
> [...]
>
> In case of termination of the agreement on sale of capital, and/or of property, the shares referred to in paragraph 2 of this Article shall be transferred to the Share Fund which shall sell them together with the shares of the subject of privatization

[528] Memorial, at 166-167.
[529] Memorial, at 169-175.
[530] Reply, at 351; C-PHB, at 71.
[531] Reply, at 350.
[532] Memorial, at 172-175; Reply, at 354; C-PHB, at 71.

> which were transferred to it in accordance with the law. The funds received from sale of own shares acquired based on increase of capital by new contributions, upon deduction of the costs of sale, shall be transferred by the Share Fund to the buyer with which the agreement on sale of capital, and/or of the property, has been terminated."[533]

708. Claimant argues that this amendment was introduced after the execution of the Privatization Agreement and had no retroactive effect. The absence of retroactive effect was in fact confirmed by the Serbian Supreme Court, which observed that the provision could only be applied to agreements concluded after the amendments came into force.[534]

709. Fourth, it is irrelevant whether Claimant owned the Treasury Shares or whether the Shares were owned by Rudnik Kovin. Although the Treasury Shares were issued in Rudnik Kovin's name, Claimant was nevertheless entitled to compensation.[535]

710. Finally, Serbia cannot rely on the text of the Privatization Agreement to escape its obligation under Article 5 of the BIT to provide "prompt and adequate compensation" to Claimant because the characterization of an act of a State as internationally wrongful is governed by international law and such characterization is not affected by the same act being characterized as lawful under domestic law.[536]

711. In response, Respondent maintains that the Privatization Agency's Decisions on Transfer cannot be considered expropriatory acts because both the Privatization Agreement and the Law on Privatization provide that the share and capital transfers are automatic consequences of the Privatization Agency's lawful termination of the Privatization Agreement.[537]

712. The Tribunal agrees with Respondent for the following reasons.

713. First, the Tribunal finds the transfer of shares to be an automatic consequence of the lawful termination of the Privatization Agreement. Article 7(2) of the Privatization Agreement provides that "[i]n the event of termination of the agreement on grounds of non-performance of the Buyer's contractual obligations, the Buyer as defaulting party shall forfeit its right to reimbursement of the amount of purchase price already paid and all its rights and claims arising out of this agreement".[538]

714. In other words, Article 7(2) of the Privatization Agreement shows that Kornikom understood and agreed that if it were found to be in breach of its obligations under the

[533] Law on Privatization, Article 41 (Exhibit C-205).
[534] Memorial, at 172-175; Reply, at 354; Milošević-I, at 137-139; Milošević-II, at 139-141; Decision of the Serbian Constitutional Court (U 8751/12), 30 November 2015 (Exhibit C-216).
[535] Reply, at 354.
[536] Reply, at 355; C-PHB, at 71; ILC Articles, Article 3 (Exhibit CL-18).
[537] Counter-Memorial, at 378.
[538] Privatization Agreement, Clause 7.2 (Exhibit C-1).

agreement, it would forfeit not only "its right to reimbursement" of the purchase price but also "all its rights and claims" arising out of the agreement.

715. In the present case, the Tribunal has already found that Respondent's termination of the Privatization Agreement was in accordance with the agreement's terms and Serbian law more generally (see paragraphs 529 to 698). The Decisions on Transfer transferring Kornikom's shares in Rudnik Kovin and the Treasury Shares to the Privatization Agency appear to be no more than a consequence of this termination.

716. In the Tribunal's view, this observation is given further credence by the text of Article 41a of the Law on Privatization, which was incorporated by reference in the Privatization Agreement, and which provides in relevant part:

> "In the event of termination of the agreement referred to in paragraph 1 of this Article, the employees of the subject of privatization shall retain the ownership rights on the capital, acquired in accordance with the provisions of Articles 42 through 44 of this Law, and the capital that was the subject of sale shall be transferred to the Share Fund.
>
> In case of termination of the agreement on sale of the capital, and/or of the property due to failure of the buyer of capital to fulfil contractual obligations, the buyer of capital, as the dishonest party, shall have no right to the refund of the amount paid as the purchase price in order to protect the public interest."[539]

717. Thus, under both the Privatization Agreement and the Law on Privatization, Kornikom was made aware that if the agreement was terminated on account of its breach, it would not receive a refund of its purchase price, its shares in Rudnik Kovin would be transferred to the Share Fund and that it would lose all its claims and rights arising out of the agreement. In the Tribunal's view, the broad expanse of the phrase "all its rights and claims" would necessarily include not just Kornikom's shares in Rudnik Kovin but also the Treasury Shares which Claimant would have received from Rudnik Kovin had it fully complied with the Privatization Agreement.

718. As Respondent has correctly pointed out, a similar issue was considered in *Vannessa v. Venezuela*. In that case, the claimant therein impugned Venezuela's taking over of its physical assets after the contract that formed the basis of its expropriation claim was terminated and sought damages from the tribunal. The tribunal dismissed this claim. The tribunal noted that Venezuela's termination of the contract was both "justified and legitimate" and without any pretext and that the taking over of the claimant's assets was a consequence of the termination of the contract.[540] For ease of reference, the relevant extract of the tribunal's award is reproduced below:

[539] Law on Privatization, Article 41a (Exhibit C-144). The full provision is reproduced above in paragraph 127.
[540] *Vannessa Ventures v. Venezuela*, at 190, 213 (Exhibit RL-165).

> "213. The Tribunal finds no evidence that termination was motivated by an intention to confer benefits upon CVG, Crystallex (with whom Respondent subsequently made an agreement concerning Las Cristinas), or any other entity.
>
> 214. The Tribunal does not consider that the termination of the Work Contract rises above the "high threshold" that separates a contractual dispute from a violation of a treaty prohibition on expropriation. The claim that Respondent has violated Article VII of the Canada-Venezuela BIT by the termination of the Work Contract and the steps consequential upon that termination is accordingly rejected.
>
> 215. As to the taking of physical assets in the context of the November 2001 takeover of the Las Cristinas site, the Seventeenth Clause of the Work Contract provided that those assets would revert to Venezuela (or CVG) upon termination of the Contract:
>
> > Permanent works done by the Company [MINCA], including facilities, accessories, equipment and any other goods acquired in ownership to be used for the exploration, development and exploitation subject hereof shall pass in full title to the Corporation [CVG], free of encumbrances and charges, and without any indemnity, once this Agreement terminates, whatever the cause.
>
> While the Seventeenth Clause of the Work Contract was modified on April 7, 1999 to change the reference to "the Corporation" (sic.) to "the Nation," this change does not affect the analysis because, either way, Placer Dome had no right to them, and consequently Vannessa could have no right to claim damages for them."[541] (internal references omitted)

719. The Tribunal finds this decision persuasive.

720. Second, although Claimant is correct that the Privatization Agency's Decision on the Transfer of the Treasury Shares relied on an amendment to the Law on Privatization that was introduced after the execution of the Privatization Agreement, the Tribunal finds this to be of limited relevance when the Privatization Agreement itself contemplated that Claimant would forfeit all of its rights and claims.

721. In any event, the Tribunal agrees with Respondent that at the time the Termination Notice and the Decisions on Transfer were issued, the 2007 Amendment did indeed have retroactive effect.

722. Respondent has produced a decision of the Serbian Supreme Court dated 25 December 2008, where the court upheld the constitutional validity of the amended Article 41a of the Law on Privatization. This suggests that at the time of the Termination Notice and the Decisions on Transfer, the Privatization Agency's actions were in accordance with

[541] *Vannessa Ventures v. Venezuela*, at 213-215 (Exhibit RL-165).

Serbian law. It is only in 2015 that the Serbian Supreme Court reached a different conclusion in the context of one specific privatization agreement.[542]

723. Finally, the Tribunal finds Claimant's argument that Serbia cannot escape its obligation under Article 5 of the BIT to provide "prompt and adequate compensation" to be entirely misplaced. The duty to provide "prompt and adequate compensation" under the BIT presupposes the existence of expropriatory conduct in the first place arises. When the question before the Tribunal is whether there is expropriation at all and the conclusion reached is that there has been no expropriation, the question of failure to pay compensation does not arise.

***

724. For all these reasons, the Tribunal rejects Claimant's argument that the Privatization Agency's Decisions on Transfer constitute expropriatory conduct prohibited by Article 5 of the BIT.

e. Whether Serbia's conduct taken as a whole constitutes unlawful expropriation under Article 5 of the BIT?

725. The final question for the Tribunal vis-à-vis Claimant's expropriation claim is whether Serbia's conduct taken as a whole constitutes expropriatory conduct prohibited by Article 5 of the BIT.

726. The Tribunal has in its expropriation analysis above found that:

- Serbia bears no responsibility for the sale of Rudnik Kovin to Claimant without a permanent operating permit to operate the Kovin Mine (see paragraph 449 above).

- Serbia did not obstruct Claimant's attempts to obtain the permits and authorizations once Claimant discovered that Rudnik Kovin did not in fact have the necessary permits and authorizations (see paragraph 449 above).

- Serbia did not prevent Rudnik Kovin from selling its coal to EPS-operated TPPs (see paragraph 512 above).

- The Privatization Agency's termination of the Privatization Agreement was in accordance with the terms of the agreement and was not an exercise of sovereign authority (see paragraphs 700 and 701 above).

- The Privatization Agency's Decisions on Transfer were automatic consequences of the termination of the Privatization Agreement (see paragraph 713 above).

[542] Decision of the Constitutional Court of Serbia IU-166/2005, 25 December 2008, p.5 (Exhibit RL-53); Decision of the Serbian Constitutional Court (U 8751/12), 30 November 2015 (Exhibit C-216).

727. In light of these findings, none of the facts underpinning Claimant's creeping expropriation claim survive.

728. The Tribunal therefore finds no merit to Claimant's argument that Serbia's conduct taken as a whole constitutes expropriatory conduct prohibited by Article 5 of the BIT.

4. WHETHER CLAIMANT IS ENTITLED TO THE QUANTUM OF DAMAGES IT CLAIMS?

729. In the previous Section, the Tribunal has found that Respondent committed no breach of the BIT. In light of this finding, Claimant's claim for damages does not survive. It is therefore dismissed.

730. In line with the principle of judicial economy, the Tribunal does not consider it necessary to discuss the Parties' respective positions on damages any further.

5. WHICH PARTY SHOULD BEAR THE COSTS OF THESE PROCEEDINGS?

A. Claimant's Position

731. Claimant's statement of costs is as below:

A. COUNSEL FEES AND EXPENSES

Category	Amount
Fees	EUR 3,947,455.31
Expenses[25]	EUR 478,736.97
Total	**EUR 4,426,192.28**

B. EXPERT FEES AND EXPENSES

Category	Amount
Miloš Milošević Advokat	EUR 93,874.79
Versant Partners, LLC	EUR 395,892.23
Total	**EUR 489,767.02**

C. ICSID COSTS

Category	Amount
Registration Fee	US$ 25,000
Advance on Costs[26]	US$ 350,000
Total	**US$ 375,000**

732. The total costs claimed by Claimant is therefore EUR 4,915,959.30 and US$ 375,000.[543] Claimant submits that Respondent should bear all of these costs.

733. Claimant notes that pursuant to Article 61(2) of the ICSID Convention, the Tribunal has discretion in its decision on how to allocate costs. Claimant requests the Tribunal

[543] Claimant's Cost Submission, at 13.

to exercise this discretion and order Respondent to bear all legal fees and costs incurred by Claimant in connection with this arbitration, including the fees and expenses of its counsel and experts, and Claimant's share of ICSID's costs.[544] Claimant advances the following arguments in support of its position.

734. First, Respondent should bear the costs of these proceedings because it is Respondent's actions that have given rise to the present dispute. According to Claimant, if Respondent has violated its treaty obligations, then the Tribunal should apply the "loser pays" or "costs follow the event" principle as applied by numerous investment arbitration tribunals to award Claimant all or a significant portion of its costs as the successful party.[545]

735. Second, and following the same principle, Respondent should be ordered to compensate Claimant for the unnecessary costs Claimant has incurred in addressing Respondent's unsuccessful Bifurcation Request. Given that the Tribunal denied Respondent's Bifurcation Request, Respondent should bear the costs associated with responding to its misconceived request.[546]

736. Third, Respondent should be ordered to compensate Claimant for the fees and costs incurred in responding to Respondent's unmeritorious jurisdictional objections, the majority of which Respondent withdrew belatedly in its PHB. For the purpose of cost allocation, Claimant should be deemed to have prevailed on the objections that Respondent has belatedly withdrawn, consistent with the approach taken by other investment arbitration tribunals.[547]

737. In this regard, Claimant estimates that approximately 20% of counsel fees and expenses it incurred in this arbitration resulted from the "useless" work undertaken to address Respondent's jurisdictional objections. Similarly, the Tribunal was also forced to spend time considering Respondent's jurisdictional objections, which are now moot.[548]

---

[544] Claimant's Cost Submission, at 2.
[545] Claimant's Cost Submission, at 3-5; *Lion v. Mexico*, ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021, at 902-916 ("*Lion v. Mexico*"); *Tethyan Copper Co. v. Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, at 1845-1855; *Gavrilović v. Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, at 1316; *Bear Creek Mining v. Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, at 731-736 (Exhibit CL-175); *Teinver v. Argentina*, at 1140 (Exhibit CL-25); *Bernhard von Pezold v. Zimbabwe*, at 1002-1008 (Exhibit CL-37); *Hrvatska v. Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015, at 599 (Exhibit CL-74); *Gold Reserve v. Venezuela*, ICSID Case No ARB(AF)/09/1, Award, 22 September 2014, at 860, 862 (Exhibit CL-75); *TECO v. Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, at 776-777; *Deutsche Bank v. Sri Lanka*, at 588, 590 (Exhibit CL-170); *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, at 380 (Exhibit CL-57) ("*Lemire v. Ukraine*"); *Ioannis Kardassopoulous v. Georgia*, at 689, 692 (Exhibit CL-8); *Siag v. Egypt*, at 618-631 (Exhibit CL-12); *Siemens v. Argentina*, at 402 (Exhibit CL-27); *ADC v. Hungary*, at 533 (Exhibit CL-41); *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, at 441 (Exhibit CL-68).
[546] Claimant's Cost Submission, at 6.
[547] Claimant's Cost Submission, at 7-10; *Compañía de Aguas v. Argentina*, at 10.2.3, 10.2.6 (Exhibit CL-38); *Lion v. Mexico*, at 914; *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, at 171-173.
[548] Claimant's Cost Submission, at 11-12.

738. Finally, Claimant submits that the legal fees and costs it has incurred in this arbitration are reasonable. Claimant notes that tribunals take into account a number of factors when deciding whether claimed costs are reasonable including, the importance and complexity of the matter, the amount in dispute, the amount and extent of factual and expert evidence adduced, the conduct of the parties during the proceedings and whether the work required efforts across multiple jurisdictions, extensive arrangements for travel or translation work.[549]

B. Respondent's Position

739. Respondent's statement of costs is as below:

I. Counsel Fees and Expenses

Category	Amount	
Fees	USD	4,978,783
Expenses	USD	311,886
Total	USD	5,290,699

II. Experts

Category	Amount	
Ms. Petrovic and Professors Lepetic, Radovic, and Jovanovic	USD	127,659

III. ICSID Costs

Category	Amount	
Advance on Costs	USD	349,965

740. The total costs claimed by Respondent amount to USD 5,768,293.[550]

741. Respondent contends that these costs should be borne by Claimant for the following reasons.

742. First, Respondent agrees with Claimant that the Tribunal should apply the "costs follow event" approach to allocating costs. Accordingly, Respondent submits that the Tribunal should award Respondent its full costs of defending the case as the successful party.[551]

743. More specifically, Respondent contends that (i) Claimant's case was predicated on a series of false factual assertions; (ii) Claimant's legal theories were admittedly contrary

[549] Claimant's Cost Submission, at 14-16; *Libananco v. Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, at 562(a)-(d) ("*Libananco v. Turkey*").
[550] Respondent's Statement of Costs.
[551] Respondent's Cost Submission.

to Serbian law and the practice of Serbian courts; (iii) Claimant had abandoned much of its case by the hearing; (iv) Claimant unnecessarily multiplied the cost and complexity of resolving the dispute; and (v) the Tribunal should reject Claimant's arguments about Respondent's jurisdictional objections because there was nothing "tactical" about Respondent's withdrawal of its admissibility objections. Rather, it is the collapse of Claimant's case at the hearing that made those issues irrelevant.[552]

C. Costs of the Arbitration

744. The costs of the arbitration, including the fees and expenses of the Tribunal and its assistant, ICSID's administrative fees and direct expenses, amount to:

Arbitrators' fees and expenses	
Prof. Bernard Hanotiau	USD 339,693.48
Mr. J. William Rowley KC	USD 80,616.40
Prof. Pierre Mayer	USD 74,522.34
Tribunal's Assistant	USD 2,930.00
ICSID's administrative fees	USD 210,000.00
Direct expenses (estimated)	USD 88,474.61
Total	**USD 796,236.83**

745. The above costs have been paid out of the advances made by the parties. As reflected in ICSID's financial statement, the Claimant and the Respondent have each made advance payments in the amount of USD 500,000 to cover the cost of the arbitration.

D. The Tribunal's Analysis

746. The Tribunal has considered the Parties' cost submissions.

747. As Claimant rightly points out, Article 61(2) of the ICSID Convention does indeed grant the Tribunal discretion on the question of how to allocate costs in the proceedings. Article 61(2) of the ICSID Convention provides in relevant part:

> "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."[553]

[552] Respondent's Cost Submission.
[553] ICSID Convention, Article 61(2).

748. Both Parties also agree that the starting point for the Tribunal's approach to the allocation of costs should be the "costs follow the event" or "loser pays" principle. The Tribunal sees no reason to deviate from the Parties' suggested approach, which has also been applied by other investment arbitration tribunals.[554]

749. Applying this principle to the present case, the Tribunal notes that Respondent is the Party that has prevailed on the merits. The Tribunal therefore considers it appropriate that Claimant bear the costs of the arbitration, as well as Respondent's other costs and expenses. As indicated above (see paragraphs 744 and 745), the costs of the arbitration amount to USD 796,236.83, and these costs have been paid out of the advances made by the Parties in equal shares. Respondent is therefore entitled to a reimbursement by Claimant in an amount of USD 398,118.42. The balance of the case's account, *i.e.* the unspent portion of the advances paid by the Parties, shall be refunded to them by the Centre in equal shares.

750. The question that, however, remains open is the extent to which Claimant should be required to bear Respondent's other costs and expenses. This requires an investigation into, among other things, the Parties' conduct during the proceedings and the reasonableness of the other costs and expenses claimed by Respondent.

751. Looking at the Parties' conduct first, Claimant argues that the Tribunal should take into account Respondent's unsuccessful Bifurcation Request and its belated withdrawal of the objections on jurisdiction and admissibility. Claimant suggests that numerous tribunals have allocated costs based on the success or failure of a respondent's jurisdictional objections. Moreover, tribunals have also considered the "tactical withdrawal" of a claim in the allocation of costs.[555]

752. Respondent disagrees. According to Respondent, there was nothing "tactical" about its withdrawal of the fork-in-the-road and extinctive prescription objections. Rather, these objections were withdrawn because they were made irrelevant by the collapse of Claimant's case at the hearing.[556]

753. The Tribunal agrees with Respondent. While it is true that Respondent withdrew its jurisdictional objections only after the hearing, the Tribunal does not consider it unreasonable for Respondents to have raised its jurisdictional and admissibility objections and to have sought bifurcation of these issues initially. Moreover, the Tribunal does not find Respondent's withdrawal to be "tactical" at all. Rather, the Tribunal is persuaded by Respondent's explanation as to why it withdrew these objections in the PHB.

---

[554] See for e.g., *Lemire v. Ukraine*, at 380 (Exhibit CL-57).
[555] Claimant's Cost Submission, at 8-10; *Compañía de Aguas v. Argentina*, at 10.2.3, 10.2.6 (Exhibit CL-38); *Lion v. Mexico*, at 914; *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, at 171-173.
[556] Respondent's Cost Submission.

754. In these circumstances, the Tribunal does not consider it necessary to make any reduction to the costs claimed by Respondent on this ground.

755. As for the reasonableness of Respondent's other costs and expenses, the Tribunal does not find the sum of USD 5,418,328 to be unreasonable.[557] As Claimant has rightly pointed out, the reasonableness of a party's costs depends on several factors including but not limited to the complexity of the case.[558] Taking this into account, and taking into account the fact that both Parties' claimed costs and expenses are in a similar range, the Tribunal is satisfied that the costs claimed by Respondent are reasonable.

756. The Tribunal, therefore, concludes that Claimant should bear all of Respondent's other costs and expenses incurred in these proceedings, *i.e.*, a sum of USD 5,418,328.

757. As a last point, the Tribunal notes that Respondent seeks pre- and post-award interest on the costs of arbitration.[559] Neither Party has advanced any arguments on the appropriate form of interest (*i.e.*, simple or compound interest) or the rate of interest in their cost submissions. They have, however, made arguments on interest in the context of Claimant's claim for damages. In the context of Claimant's claim for damages, Respondent argued that the Tribunal should award simple interest and should be guided by rates of interest in Serbia as published by the National Bank of Serbia.[560] The Tribunal considers this reasonable, but only from the date of the award.

758. In these circumstances, the Tribunal considers it appropriate to award Respondent simple interest at the policy rate of the National Bank of Serbia as at the date of the award.

[557] The Tribunal obtains the figure of USD 5,418,328 by adding the costs and expenses incurred by Respondent towards 'Counsel Fees and Expenses' and 'Experts' from the tables set out in paragraph 739 above.
[558] Claimant's Cost Submission, at 14-16; *Libananco v. Turkey*, at 562(a)-(d).
[559] R-PHB, at 124(b).
[560] Counter-Memorial, at 442-443; Rejoinder, at 315-318.

VIII. DISPOSITIVE

759. For all the reasons developed in this Award, the Arbitral Tribunal:

(a) **DECLARES** that Claimant's claims are admissible;

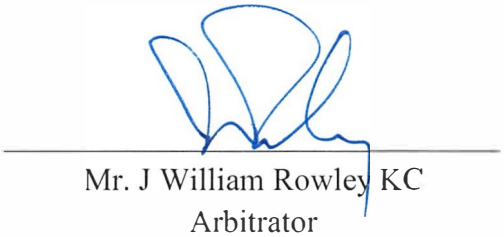
(b) **FINDS** that the Republic of Serbia did not unlawfully expropriate Claimant's investment and, as a consequence, **DISMISSES** Claimant's claim that the Republic of Serbia expropriated Claimant's investments in violation of its obligation under the BIT.

(c) **DISMISSES** Claimant's claims for damages;

(d) **ORDERS** Claimant to reimburse Respondent the sum of USD 398,118.42 towards the costs of the arbitration, together with simple interest at the policy rate of the National Bank of Serbia as at the date of the award until payment.

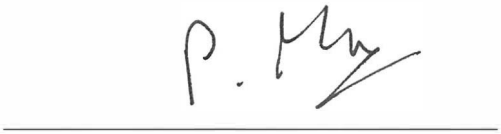
(e) **ORDERS** Claimant to reimburse Respondent the sum of USD 5,418,328 towards the other costs and expenses incurred by Respondent in this arbitration, together with simple interest at the policy rate of the National Bank of Serbia as at the date of the award until payment.

(f) **DISMISSES** all other claims and requests for relief by either Party.



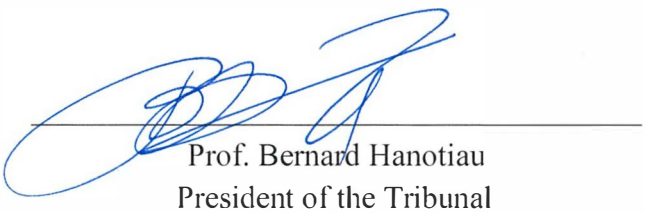
Mr. J William Rowley KC
Arbitrator

Date: 20 September 2023



Prof. Pierre Mayer
Arbitrator

Date: 20 September 2023



Prof. Bernard Hanotiau
President of the Tribunal

Date: 20 September 2023