

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mera Investment Fund Limited

v.

Republic of Serbia

(ICSID Case No. ARB/17/2)

DECISION ON JURISDICTION

Members of the Tribunal

Dr. Georg von Segesser, President of the Tribunal
Dr. Bernardo M. Cremades, Arbitrator
The Honourable L. Yves Fortier, P.C., C.C., Q.C., Arbitrator

Secretary of the Tribunal

Ms. Milanka Kostadinova

Date of issuance: 30 November 2018

Decision on Jurisdiction

TABLE OF CONTENTS

I.	THE FACTS RELEVANT TO JURISDICTION.....	5
A.	The Parties.....	5
1)	The Claimant	5
1.1)	Incorporation and re-domiciliation.....	5
1.2)	Organization and registered office	5
1.3)	Activities as an investment holding company.....	6
2)	The Respondent	7
B.	The origin of the present dispute.....	7
C.	The BIT	7
II.	PROCEDURAL HISTORY.....	8
A.	Initial phase	8
B.	Document production, bifurcation and written pleadings on jurisdiction.....	9
C.	The hearing on jurisdiction and subsequent filings.....	11
D.	The Parties’ requests for relief	12
III.	ANALYSIS	12
A.	Law applicable to jurisdiction	12
B.	The Respondent’s objections to jurisdiction	14
1)	Whether the Claimant is an “investor” pursuant to Article 1(3)(b) of the BIT (jurisdiction <i>ratione personae</i>)?.....	15
1.1)	Whether the Claimant is “a legal entity incorporated, constituted or otherwise duly organized in accordance with the laws and regulations of” Cyprus?.....	15
1.1.1)	The Respondent’s position.....	15
1.1.2)	The Claimant’s position.....	16
1.1.3)	The Arbitral Tribunal’s findings.....	17
1.2)	Whether the Claimant has “its seat in the territory of” Cyprus?.....	19
1.2.1)	The Respondent’s position.....	19
1.2.2)	The Claimant’s position.....	20
1.2.3)	The Arbitral Tribunal’s findings.....	21
1.3)	Whether the Claimant can be considered as “making investments in the territory of” Serbia?.....	26
1.3.1)	The Respondent’s position.....	26
1.3.2)	The Claimant’s position.....	27
1.3.3)	The Arbitral Tribunal’s findings.....	27
2)	Whether the Claimant meets the jurisdictional requirements of “investment” as defined by Article 1(1) of the BIT (jurisdiction <i>ratione materiae</i>)?.....	28
2.1)	The Respondent’s position	28
2.2)	The Claimant’s position	29

Decision on Jurisdiction

2.3)	The Arbitral Tribunal’s findings	30
3)	Whether granting jurisdiction would go against the object and purpose of the BIT?	35
3.1)	The Respondent’s position	35
3.2)	The Claimant’s position	36
3.3)	The Arbitral Tribunal’s findings	37
4)	Whether granting jurisdiction would go against the object and purpose of the ICSID Convention?	39
4.1)	The Respondent’s position	39
4.2)	The Claimant’s position	41
4.3)	The Arbitral Tribunal’s findings	42
C.	Costs	44
1)	The Respondent’s costs	44
2)	The Claimant’s costs	45
3)	The Arbitral Tribunal’s findings	46
IV.	DECISION	46

Decision on Jurisdiction

TABLE OF ABBREVIATIONS

Arbitral Tribunal	Tribunal composed of Dr. Georg von Segesser, The Honourable L. Yves Fortier and Dr. Bernardo M. Cremades
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT or Cyprus-Serbia BIT	Bilateral investment treaty; specifically, “Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments” of 21 July 2005 (CL-001)
Cyprus	Republic of Cyprus
C-CoJ	Claimant’s Comments on Respondent’s Preliminary Objections to Jurisdiction dated 5 February 2018
C-M	Claimant’s Memorandum on the Merits dated 31 October 2017
C-JCS	Claimant’s Statement of Costs dated 8 October 2018
C-JPHB	Claimant’s Post Hearing Submission dated 26 September 2018
C-RJ	Claimant’s Reply on Jurisdictional Objections dated 31 July 2018
C-RoB	Claimant’s Reply to the Request for Bifurcation dated 27 April 2018
Claimant	Mera Investment Fund Limited
EUR	Euro
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States (C-004)
ICSID Rules	Rules of Procedure for Arbitration Proceedings (Arbitration Rules)
Lease Agreement	Lease agreement dated 31 December 2013 (R-102)
Mera Invest	Mera Invest d.o.o
PO 1	Procedural Order No. 1 dated 1 August 2017
PO 2	Procedural Order No. 2 dated 9 February 2018
PO 3	Procedural Order No. 3 dated 14 August 2018
PO 4	Procedural Order No. 4 dated 23 August 2018
PZP Nis	Preduzeće za puteve Niš a.d.
R-CM	Respondent’s Counter Memorial dated 31 March 2018, including its Request for Bifurcation
R-JCS	Respondent’s Statement of Costs dated 8 October 2018
R-JPHB	Respondent’s Post Hearing Brief dated 26 September 2018
R-POJ	Respondent’s Preliminary Objections to Jurisdiction dated 26 January 2018
Respondent	Republic of Serbia
RfA	Request for Arbitration dated 28 December 2016, filed 3 January 2017 and registered 23 January 2017
RSD	Serbia Dinar
Serbia	Republic of Serbia
Secretary-General	Secretary-General of ICSID
Tr. J. [I/II] [page:line]	Transcript of the hearing on jurisdiction [day I / day II]
USD	USA Dollar
Vienna Convention	Vienna Convention on the Law of Treaties of 23 May 1969 (RL-006)

Decision on Jurisdiction

I. THE FACTS RELEVANT TO JURISDICTION

1. This chapter summarizes the factual background of this arbitration insofar as it is necessary to rule on the Respondent's objections to jurisdiction.

A. The Parties

1) The Claimant

2. The Claimant is the Cypriot limited liability company Mera Investment Fund Limited, established and organized in conformity with the laws of the Republic of Cyprus ("Cyprus"). The Claimant is represented in this arbitration by Mr. Christoph Lindinger, Mr. Leon Kopecký and Ms. Victoria Pernt of Schönherr Rechtsanwälte GmbH, in collaboration with Mr. Matija Vojnović, Mr. Nikola Filipović, Ms. Hristina Todorović and Ms. Natasa Lalatovic Djordjević of Moravčević Vojnović and Partners, and Ms. Milica Glavaš of Glavaš Law Office.

1.1) Incorporation and re-domiciliation

3. On 8 May 2006, the Claimant was incorporated as the limited liability company "Mera Investment Fund B.V." in Curaçao, Netherlands Antilles.¹
4. In November 2008, the Claimant initiated its conversion into a company under the laws of Cyprus with a change to its name to "Mera Investment Fund Limited".² The transfer was conducted in accordance with the laws of the Netherlands Antilles and pursuant to the Cypriot rules on re-domiciliation of companies.³ The Cypriot Registrar of Companies issued a Temporary Certificate of Continuation of Company on 20 March 2009,⁴ followed by a Certificate of Continuation dated 1 June 2009.⁵ Since 20 March 2009, the Claimant operates as a limited liability company incorporated under the laws of Cyprus.⁶ The conversion from a company established in the Netherlands Antilles into a Cyprus company did not end the existence of the Claimant, the Claimant continued its existence as a Cypriot company.⁷

1.2) Organization and registered office

5. The Claimant's sole shareholder is Parmidoli Investement Corp. a Panamanian corporation.⁸ The sole shareholder of Parmidoli Investement Corp. is Mr. Marko

¹ C-005 and C-006.

² C-007; C-008; C-010; C-011; C-012; C-013; C-014.

³ C-015; C-016; C-017.

⁴ C-011.

⁵ C-004.

⁶ C-014.

⁷ C-016; C-015; C-017: "The successful Cypriot tax regime can now be utilised by foreign companies without the need to fully restructure e.g. transfer their assets and liabilities to a newly incorporated Cyprus company and liquidate the former, thus avoiding possible tax and other implications in the country of origin. An additional and equally important advantage is that the business of the company can continue without interruption and hence there will be a significant saving in administration and other costs."

⁸ C-021, C-022; C-010.

Decision on Jurisdiction

Miskovic,⁹ a national of the Republic of Serbia (“**Serbia**”) and son of Mr. Miroslav Miskovic.¹⁰ The directors of the Claimant are Mr. Christakis Myrianthous and Ms. Elena Charalambous.¹¹

6. With its certificates dated 12 January 2011 and 24 May 2017, the Cypriot Department of Registrar of Companies and Official Receiver of Nicosia confirms that the Claimant’s registered office is located at Arch. Makariou III 66, Kronos Court, 1st floor, Office 12, 1770 Nicosia, Cyprus.¹²
7. The Claimant has a physical presence at the site of its registered office.¹³ The books and records of the Claimant are kept at its registered office.¹⁴ The Claimant also conducts its board meetings as well as general shareholder meetings at the place of its registered office.¹⁵
8. The Claimant employs Ms. Tatiana Ieronimides as its manager.¹⁶ Ms. Ieronimides manages the five investment companies of the Mišković family, including the Claimant, out of the shared office space located at Arch. Makariou III 66. Ms. Ieronimides testified that her function is to implement the shareholders’ visions, and while not taking investment decisions without the input of shareholders, she is responsible for hiring employees, choosing premises, paying services, negotiating the contracts, as well as structuring and financing the investments.¹⁷ Ms. Ieronimides is also in charge of organizing shareholder and director meetings, keeping administrative and accounting records, making corporate filings, engaging auditors, filing tax returns and keeping management records.¹⁸

1.3) Activities as an investment holding company

9. The Claimant acts as an investment holding company.¹⁹
10. In 2006, the Claimant subscribed to 262,016 newly issued shares in Preduzeće za puteve Niš a.d. (“**PZP Nis**”), a construction company in Southeastern Serbia.²⁰ By subscribing to these shares, the Claimant acquired a participation of 47.59% in PZP Nis’ equity.²¹ In September 2008, the Claimant, as the sole shareholder and founder, established Mera Invest as a Serbian limited liability company.²² Shortly after its

⁹ C-M, para. 45.

¹⁰ R-CM, para. 6.

¹¹ C-019; C-183; C-184; C-185; C-186; C-208; C-188; C-190; C-209; C-210.

¹² C-020; C-223; C-018.

¹³ Expert Opinion of Mr. Alecos Markides, dated 31 July 2018, para. 64 et seq., Appendix J (CEX-3).

¹⁴ Expert Opinion of Mr. Alecos Markides, dated 31 July 2018, para. 62 et seq., Appendix J (CEX-3).

¹⁵ C-231; C-232; C-187; C-233; C-234; C-183; C-184; C-185; C-186; C-208; C-188; C-190; C-209; C-210.

¹⁶ Witness Statement of Ms. Tatiana Ieronymides, dated 31 July 2018, para. 12 (CWS-4); Tr. J. I 117:22-118:9; 118:20-119:1; 119:21-120:3 (Ms. Tatiana Ieronymides).

¹⁷ Witness Statement of Ms. Tatiana Ieronymides, dated 31 July 2018, para. 9 (CWS-4); Tr. J. I 117:22-118:9; 118:20-119:1; 119:21-120:3 (Ms. Tatiana Ieronymides).

¹⁸ Witness Statement of Ms. Tatiana Ieronymides, dated 31 July 2018, para. 11 (CWS-4); Tr. J. I 117:22-118:9; 118:20-119:1; 119:21-120:3 (Ms. Tatiana Ieronymides).

¹⁹ C-006; C-023; C-024.

²⁰ C-028; C-029; C-030; C-025.

²¹ C-M, para. 54.

²² C-038.

Decision on Jurisdiction

incorporation, on 22 September 2008, the Claimant contributed 225,736 of its 262,016 shares in PZP Nis (i.e. its 41% shareholding) to Mera Invest by way of a contribution in kind.²³ In January 2010, the Claimant contributed the remainder of its shares in PZP Nis to Mera Invest (i.e. its remaining 6.59% shareholding).²⁴

11. The Claimant's principal business activity is the holding and administering of its share in Mera Invest.²⁵ Mera Invest is set up as a small investment fund for investing in projects throughout Serbia.²⁶ Mera Invest purchased shares in Serbian banks, offered fixed-term RSD deposits and made investments into related and non-related Serbian entities.²⁷

2) The Respondent

12. The Respondent is the Republic of Serbia ("**Respondent**"). The Respondent is represented in this arbitration by Ms. Senka Mihaj, Mr. Aleksandar Fillen, Ms. Bojana Bilanko of Mihaj, Ilic & Milanovic, in collaboration with Prof. Dr. Vladimir Pavic of the Faculty of Law of the University of Belgrade, Mr. Vladimir Djeric of Mikijelj Jankovic & Bogdanovic, along with Ms. Olivera Stanimirovic, State Attorney of Serbia, and Ms. Milena Babic of the Serbian State Attorney's Office.

B. The origin of the present dispute

13. According to the Claimant's case, from early 2013 until the present the Respondent adopted a number of measures against Mera Invest, including the freezing of all of its assets, the fabrication of a tax claim against Mera Invest, and the blocking of Mera Invest's bank accounts, accounts receivables from related companies and bank accounts and accounts receivables of certain companies affiliated with Mera Invest.²⁸
14. It is the Claimant's case that these measures in turn caused Mera Invest's businesses to cease trading and be destroyed, projects came to a complete halt and were abandoned, term deposits were lost and Mera Invest became overindebted.²⁹ The Claimant submits that as a result, the Respondent has deprived the Claimant of its investments in Serbia.³⁰

C. The BIT

15. The present proceedings are brought based on the Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments ("**BIT**" or "**Cyprus-Serbia BIT**").³¹

²³ C-039.

²⁴ C-205.

²⁵ C-006; C-023; C-024.

²⁶ Witness Statement of Mr Živojin Petrović, dated 31 October 2017, para. 8 (CWS-1).

²⁷ Witness Statement of Mr Živojin Petrović, dated 31 October 2017, paras 11, 13, 14 et seq. (CWS-1).

²⁸ C-M, para. 7.

²⁹ C-M, para. 8.

³⁰ C-M, paras 9-10.

³¹ CL-001.

Decision on Jurisdiction

16. The Republic of Cyprus and the Republic of Serbia (at the time of signing still the State Union of Serbia and Montenegro) signed the BIT on 21 July 2005, which entered into force on 23 December 2005. Serbia is the universal legal successor of the State Union of Serbia and Montenegro and has fully inherited its international legal personality and international agreements.³²
17. Specifically, the Claimant relies upon Article 5(1) of the BIT, pursuant to which investments under the BIT shall not be nationalized, expropriated or subjected to measures having the effect equivalent to nationalization or expropriation.³³
18. The Claimant also relies on Article 2(2) of the BIT, requiring that “[i]nvestments of investors of each contracting party shall at all times be accorded fair and equitable treatment [...] in the territory of the other *Contracting Party*.”³⁴
19. The Claimant bases further claims under the portion of Article 2(2) of the BIT which mandates full protection and security over investments of investors covered under the BIT.³⁵
20. Lastly, the Claimant cites Article 10 of the BIT for its claims. The relevant provision states that “[i]f the laws of either Contracting Party [...] contain provisions entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such laws [...] shall to the extent that they are more favourable prevail over this Agreement.”³⁶

II. PROCEDURAL HISTORY

A. Initial phase

21. On 3 January 2017, the Claimant filed a request for arbitration dated 28 December 2016 (“**RfA**”)³⁷ with ICSID.
22. Upon receipt of the prescribed lodging fee from the Claimant on 23 January 2017, and in accordance with Article 36 of the ICSID Convention, the Secretary-General of ICSID (“**Secretary-General**”) registered the Request for Arbitration and notified the Parties on the same date.
23. In accordance with the Parties’ agreed method of constituting the arbitral tribunal, the tribunal is composed of Dr. Georg von Segesser, a national of Switzerland, as the presiding arbitrator; The Honourable L. Yves Fortier, a national of Canada, appointed by the Claimant; and Dr. Bernardo M. Cremades, a national of the Republic of Spain, appointed by the Respondent (together referred to as the “**Arbitral Tribunal**”).
24. On 22 May 2017, pursuant to ICSID Arbitration Rule 6(1), the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and

³² C-181.

³³ Cyprus-Serbia BIT, Article 5 (CL-001).

³⁴ Cyprus-Serbia BIT, Article 2(2) (CL-001).

³⁵ Cyprus-Serbia BIT, Article 2(2) (CL-001).

³⁶ Cyprus-Serbia BIT, Article 10 (CL-001).

³⁷ The Request for Arbitration was accompanied by factual exhibits (C-001 to C-004) and one legal authority (CL-1).

Decision on Jurisdiction

that the Arbitral Tribunal was therefore deemed to have been constituted on such date. Ms. Milanka Kostadinova, ICSID Senior Legal Adviser, was also designated to serve as the Secretary of the Tribunal.

25. On 27 July 2017, the Arbitral Tribunal held the first session at the World Bank Conference Centre in Paris. Subsequently, on 1 August 2017, the Arbitral Tribunal issued Procedural Order No. 1 setting out the procedure to be followed in the arbitration (“**PO 1**”). At the first session, the Respondent indicated that it considered submitting jurisdictional objections and filing a request for bifurcation. The Procedural Timetable attached as Annex A to PO 1 provided for alternative scenarios, with and without bifurcation.
26. On 31 October 2017, the Claimant submitted its Memorial on the Merits (“**C-M**”), together with two witness statements,³⁸ two expert reports,³⁹ factual exhibits⁴⁰ and legal authorities.⁴¹

B. Document production, bifurcation and written pleadings on jurisdiction

27. Between 30 November 2017 and 9 January 2018, the Parties exchanged Requests for Production of Documents and their corresponding objections in the form of Redfern Schedules.
28. After a review of the Respondent’s Reply to Claimant’s Objections to Document Production Requests and the completed Redfern Schedule, the Arbitral Tribunal concluded that without a preliminary substantiation of the objections to the Arbitral Tribunal’s jurisdiction, it was premature to determine with sufficient reliability which documents may be relevant and material to the outcome of its decision on jurisdiction. On this basis, on 15 January 2018, the Arbitral Tribunal invited the Respondent to submit its Preliminary Objections to Jurisdiction together with any corresponding revision to its document production requests, and set a time limit for when the Claimant was to submit its comments.
29. Pursuant to the Arbitral Tribunal’s instructions of 15 January 2018, on 26 January 2018, the Respondent submitted its Preliminary Objections to Jurisdiction (“**R-POJ**”), together with an accompanying witness statement⁴² and legal authorities.⁴³ Included in its submission was a request by the Respondent to bifurcate the proceedings.
30. On 5 February 2018, the Claimant submitted its comments on the Respondent’s Preliminary Objections to Jurisdiction (“**C-CoJ**”) with legal authorities.⁴⁴

³⁸ Witness Statement of Mr Živojin Petrović, dated 31 October 2017 (CWS-1) and Witness Statement of Ms. Jadranka Bardić, dated 31 October 2017 (CWS-2).

³⁹ Expert Opinion of Mr Dejan Popovic, dated 31 October 2017 (CEX-1) and Expert Opinion of Ms. Laura Hardin dated 31 October 2017 (CEX-2).

⁴⁰ C-005 to C-203.

⁴¹ CL-002 to CL-063.

⁴² Witness Statement of Ms. Tatiana Ieronymides, dated 11 February 2013 (R-001).

⁴³ RL-001 to RL-010.

⁴⁴ CL-064 to CL-076.

Decision on Jurisdiction

31. With its Procedural Order No. 2, dated 9 February 2018, the Arbitral Tribunal issued its decisions on document production requests (“**PO 2**”). Thereafter, the Claimant produced the documents ordered by the Arbitral Tribunal without the need for an intervention by the Arbitral Tribunal on the matter.
32. On 31 March 2018, the Respondent submitted its Counter Memorial (“**R-CM**”), together with two witness statements,⁴⁵ four expert reports,⁴⁶ factual exhibits⁴⁷ and legal authorities.⁴⁸ In its Counter Memorial the Respondent set out its position on jurisdiction, the admissibility of the Claimant’s claim and on bifurcation.
33. On 27 April 2018, the Claimant submitted its Reply to the Request for Bifurcation (“**C-RoB**”) together with legal authorities.⁴⁹
34. On 16 May 2018, the Arbitral Tribunal issued its Decision on Bifurcation bifurcating the proceedings to address the Respondent’s objections to jurisdiction concerning the Claimant’s status as an investor under the BIT, as well as the Respondent’s objection regarding the jurisdictional requirements of “investment” as defined by Article 1(1) of the BIT. The Arbitral Tribunal denied the Respondent’s request for bifurcation for the Respondent’s third objection concerning the admissibility of the Claimant’s claim based on the fork in the road principle.
35. On 31 July 2018, the Claimant filed its Reply on Jurisdictional Objections (“**C-RJ**”) accompanied by two witness statements,⁵⁰ two expert reports,⁵¹ factual exhibits⁵² and legal authorities.⁵³
36. On 14 August 2018, the Arbitral Tribunal issued Procedural Order No. 3 on the organization of the hearing on jurisdictional issues (“**PO 3**”).
37. By letter dated 17 August 2018, the Respondent requested leave from the Arbitral Tribunal to submit additional evidence. On 22 August 2018, the Claimant provided its reply to the Respondent’s request. With its Procedural Order No. 4 (“**PO 4**”) of 23 August 2018, the Arbitral Tribunal dismissed the Respondent’s request of 17 August 2018 to add additional evidence to the record.

⁴⁵ Witness Statement of Mr. Ivan Ivanovic, dated 26 March 2018 (RWS-1) and Witness Statement of Mr. Dušan Novaković, dated 23 March 2018 (RWS-2).

⁴⁶ Expert Opinion of Mr. Zoran Skopljak, dated 30 March 2018 (REX-1), Expert Opinion of Professor Vuk Radović, dated 28 March 2018 (REX-2), Expert Opinion of Dr. Thomas Papadopoulos, dated 26 March 2018 (REX-3), and Expert Opinion of Mr. Will Davies of Grant Thornton, dated 29 March 2018 (REX-4).

⁴⁷ R-001 to R-121

⁴⁸ RL-011 to RL-082

⁴⁹ CL-077 to CL-102.

⁵⁰ Witness Statement of Mr. Georgios Iacovou, dated 31 July 2018 (CWS-3) and Witness Statement of Ms. Tatiana Ieronymides, dated 31 July 2018 (CWS-4).

⁵¹ Expert Opinion of Mr. Alecos Markides, dated 31 July 2018 (CEX-3) and Expert Opinion of Prof. Dr. Tatjana Jevremović-Petrović, dated 31 July 2018 (CEX-4).

⁵² C-001 to C-244.

⁵³ CL-001 to CL-177.

Decision on Jurisdiction

C. The hearing on jurisdiction and subsequent filings

38. The hearing on jurisdiction was held at the World Bank Conference Centre in Paris on 5-6 September 2018.
39. In addition to the members of the Arbitral Tribunal, the Secretary of the Tribunal, the following persons attended the hearing:
40. On behalf of the Claimant:
 - Mr. Christoph Lindinger, Schönherr Rechtsanwälte GmbH
 - Mr. Leon Kopecký, Schönherr Rechtsanwälte GmbH
 - Ms. Victoria Pernt, Schönherr Rechtsanwälte GmbH
 - Ms. Marina Stanisavljevic, Schönherr Rechtsanwälte GmbH
 - Mr. Matija Vojnović, Moravčević Vojnović and Partners
 - Mr. Nikola Filipović, Moravčević Vojnović and Partners
 - Ms. Hristina Todorović, Moravčević Vojnović and Partners
 - Ms. Milica Glavaš, Glavaš Law Office
41. On behalf of the Respondent:
 - Ms. Senka Mihaj, Mihaj, Ilic & Milanovic
 - Mr. Aleksandar Fillen, Mihaj, Ilic & Milanovic
 - Ms. Bojana Bilankov, Mihaj, Ilic & Milanovic
 - Prof. Dr. Vladimir Pavic, Faculty of Law, University of Belgrade
 - Dr. Vladimir Djeric, Mikijelj Jankovic & Bogdanovic
 - Ms. Olivera Stanimirovic, State Attorney, Republic of Serbia
 - Ms. Milena Babic, State Attorney's Office, Republic of Serbia
42. Witnesses
 - Ms. Tatiana Ieronymides
 - Mr. Georgios Iacovou
43. Experts
 - Prof. Tatjana Jevremovic-Petrovic
 - Mr. Alecos Markides
 - Mr. Nicos Markides (assistant to Mr. Alecos Markides)
 - Ms. Ekaterine Patsalidou (assistant to Mr. Alecos Markides)
 - Prof. Vuk Radovic, Faculty of Law, University of Belgrade
 - Dr. Thomas Papadopoulos

Decision on Jurisdiction

44. Court reporters⁵⁴
- Mr. Trevor McGowan
 - Ms. Georgina Vaughn
 - Ms. Lisa Gulland
45. On 26 September 2018, the Claimant and the Respondent submitted their respective post hearing briefs (“**C-JPHB**” and “**R-JPHB**”).
46. On 8 October 2018, the Claimant and the Respondent each submitted their respective statements of costs (“**C-JCS**” and “**R-JCS**”).

D. The Parties’ requests for relief

47. In its post-hearing submission, the Respondent requests:
- “With respect to the present stage of proceedings, Respondent requests the Tribunal to
- a. Dismiss all of Claimant’s claims for lack of jurisdiction, or,
 - b. In the alternative
 - i. dismiss all of Claimant’s claims related to investment made prior to its incorporation in Cyprus, and
 - ii. dismiss all of Claimant’s claims related to assets of Mera d.o.o.
 - c. And order Claimant to reimburse Respondent for all the associated costs.”⁵⁵
48. In its post-hearing submission, the Claimant requests:
- “For the reasons stated above and further to its request for relief in the Memorial, and expressly reserving the right to modify and/or add to this request, Claimant respectfully requests that the Tribunal
- (A) DISMISS Serbia’s Jurisdictional Objections, and
 - (B) ORDER Serbia to pay for all the associated costs.”⁵⁶

III. ANALYSIS

A. Law applicable to jurisdiction

49. The Parties agree that the jurisdictional requirements for a case to be brought before an ICSID Tribunal are contained in the ICSID Convention and in the BIT. More precisely, the Arbitral Tribunal’s jurisdiction is determined by the provisions of Article 25 of the ICSID Convention and Article 9 of the BIT.
50. The relevant provision of Article 25(1) of the ICSID Convention reads as follows: “The jurisdiction of the Centre shall extend to any legal dispute arising directly out

⁵⁴ In addition to an audio recording of the hearing on jurisdiction deposited in the archives of ICSID, a transcript of the hearing was prepared by the court reporters and shall be cited in the following as Tr. J. [I/II] [page:line].

⁵⁵ R-JPHB, para. 116.

⁵⁶ C-JPHB, para. 110 (emphasis omitted).

Decision on Jurisdiction

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.”⁵⁷

51. The text of Article 25 of the ICSID Convention requires that four conditions must be met for the Tribunal to have jurisdiction: (i) the dispute must be between a Contracting State and a national of another Contracting State, (ii) the parties must have expressed their consent to ICSID arbitration in writing, (iii) the dispute must be a legal one, and (iv) it must arise directly out of an investment.
52. The Arbitral Tribunal observes that both States that are relevant to this dispute are Contracting States of the ICSID Convention. Serbia signed the ICSID Convention and deposited the instrument of ratification on 9 May 2007. The ICSID Convention entered into force in Serbia on 8 June 2007. Serbia is therefore a Contracting State for the purposes of the ICSID Convention. Cyprus signed the Convention on 9 March 1966 and deposited its ratification on 25 November 1966. The ICSID Convention entered into force in the Republic of Cyprus on 25 December 1966.
53. The Arbitral Tribunal’s jurisdiction is also contingent upon the terms of the document in which consent to arbitration is contained, in this case the BIT. The Arbitral Tribunal must be satisfied that the terms of Article 9 of the BIT, and by extension the terms of Article 1 (which defines the terms “investor” and “investment”), have been complied with.
54. Article 9 of the BIT provides for ICSID arbitration in the following terms:
 - “1. Disputes between one Contracting Party and an investor of the other Contracting Party in relation to an investment for the purpose of this Agreement, shall be submitted in written form, with all detailed information, by the investor of the other Contracting Party. Where possible, the parties shall endeavor to settle these disputes amicably.
 2. If these disputes cannot be settled by negotiations within six months from the written notification under paragraph 1 of this Article, they may be submitted, by the choice of the investor, to:
 - a competent court of the Contracting Party in whose territory the investment is made;
 - an ad hoc tribunal of arbitration, in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL);
 - arbitration court of the International Chamber of Commerce in Paris; or
 - International Centre for the Settlement of Investment Disputes (ICSID) set up by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, from 18th March 1965.”

⁵⁷ ICSID Convention, Article 25 (CL-004).

Decision on Jurisdiction

55. In line with the general practice of other ICSID tribunals, the Arbitral Tribunal interprets the BIT and the ICSID Convention according to the rules set forth in the Vienna Convention on the Laws of Treaties (“**Vienna Convention**”), much of which reflects customary international law.⁵⁸
56. Article 31 of the Vienna Convention provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”⁵⁹ The terms of the BIT shall therefore be interpreted against the background of the provision in which it appears, as well as the background of the BIT as a whole.
57. According to Article 31(2) of the Vienna Convention the context for the purposes of interpreting the treaty includes the text of the treaty as well as “its preamble and annexes”.⁶⁰ Under Article 31(3)(c) “[a]ny relevant rules of international law applicable in the relations between the parties” shall also be considered.⁶¹
58. Furthermore, the Arbitral Tribunal may take recourse to supplementary means of interpretation under Article 32 of the Vienna Convention either “to confirm the meaning resulting from the application of [A]rticle 31” or to determine the meaning when the interpretation according to Article 31 leaves the meaning of the term “ambiguous or obscure” or leads to a result which is “manifestly absurd or unreasonable.”⁶²

B. The Respondent’s objections to jurisdiction

59. In the following, the Arbitral Tribunal will review and analyze the Respondent’s specific objections to jurisdiction over the Claimant’s claim in the following order:
 - (1) Whether the Claimant is an “investor” as defined by Article 1(3)(b) of the BIT (jurisdiction *ratione personae*)?
 - (2) Whether the Claimant meets the jurisdictional requirements of “investment” as defined by Article 1(1) of the BIT (jurisdiction *ratione materiae*)?
 - (3) Whether granting jurisdiction would defeat the object and purpose of the BIT?
 - (4) Whether granting jurisdiction would go against the object and purpose of the ICSID Convention?
60. The Arbitral Tribunal summarizes the Parties’ respective positions in the below, which are further dealt with to the extent relevant in the sections of the Arbitral Tribunal’s findings.

⁵⁸ Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, dated 29 April 2004, para. 27 (CL-066) citing *Mondev Int’l Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, dated 11 October 2002, para. 43 (C-026); *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, dated 25 January 2000, para. 27; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award, dated 2 June 2000, n. 9.

⁵⁹ Vienna Convention on the Law of Treaties, Article 31(1) (RL-006).

⁶⁰ Vienna Convention on the Law of Treaties, Article 31(2) (RL-006).

⁶¹ Vienna Convention on the Law of Treaties, Article 31(3)(c) (RL-006).

⁶² Vienna Convention on the Law of Treaties, Article 32 (RL-006).

Decision on Jurisdiction

- 1) Whether the Claimant is an “investor” pursuant to Article 1(3)(b) of the BIT (jurisdiction *ratione personae*)?**
61. Article 1(3)(b) of the BIT provides that ‘investor’ shall mean “a legal entity incorporated, constituted or otherwise duly organized in accordance with the laws and regulations of one Contracting Party, having its seat in the territory of that Contracting Party and making investments in the territory of the other Contracting Party.”
62. Thus, for the Claimant to qualify as an investor, it must be a legal entity (i) incorporated, constituted or otherwise duly organized according to the laws of the Republic of Cyprus, (ii) having its seat in the territory of the Republic of Cyprus, and (iii) making investments in the territory of Serbia. Article 1(3)(b) of the BIT does not on its face contain any additional requirements for an entity to qualify as an investor under the BIT.
63. The Arbitral Tribunal must decide what is meant by the terms of Article 1(3)(b) of the BIT and will address the Respondent’s objections to each of these three cumulative conditions in the following.

1.1) Whether the Claimant is “a legal entity incorporated, constituted or otherwise duly organized in accordance with the laws and regulations of” Cyprus?

1.1.1) The Respondent’s position

64. According to the Respondent, the Claimant does not fulfill all of the requirements mandated under Cypriot law for proper incorporation.⁶³ The Respondent argues that under Cypriot law, in order for a company to be properly incorporated it must have a registered office, and in order for an address to qualify as a registered office, the company must have “some right to use such premises”.⁶⁴
65. The Respondent contests the validity of the lease agreement of 31 December 2013 (“**Lease Agreement**”) produced by the Claimant in these proceedings for its office space at Arch. Makariou III 66, Kronos Court, 1st floor, Office 12, 1770 Nicosia, Cyprus.⁶⁵ According to the Respondent, Article 77 of the Cypriot Contract Law requires real estate lease agreements for periods in excess of twelve months be “concluded in written form and must be countersigned by two witnesses”.⁶⁶ The Respondent argues that since the Lease Agreement was issued for an indefinite term, it had to be signed before two witnesses, which it was not. The Respondent concludes that the Claimant fails to meet the requirement of having a registered office and, as such, also fails to satisfy the requirement of proper incorporation. According to the Respondent, the Claimant cannot thereby be deemed an investor pursuant to Article 1(3)(b) of the BIT.⁶⁷

⁶³ R-POJ, para. 36 et seq.; R-CM, para. 294 et seq.; R-JPHB, para. 78 et seq.

⁶⁴ R-CM, para. 295, citing Expert Opinion of Dr. Thomas Papadopoulos, dated 26 March 2018, paras 32-36 (REX-3); R-JPHB, paras 78-79.

⁶⁵ R-CM, paras 294-298; R-JPHB, paras 80-82; R-102.

⁶⁶ R-CM, para. 297 citing Cypriot Contract Law, Article 77 (R-109).

⁶⁷ R-CM, para. 298.

Decision on Jurisdiction

66. In addition, the Respondent claims that the Claimant undertook steps in bad faith to obtain proper incorporation only in preparation for a potential investment arbitration.⁶⁸ The Respondent argues that the Lease Agreement was only allegedly issued well after the beginning of the alleged breaches of the BIT by the Respondent.⁶⁹ Furthermore, in the Respondent's view, the "[s]udden invoicing and rent payments occurred only after the dispute has already arisen and Claimant undoubtedly became cognizant of the jurisdictional obstacles it will face."⁷⁰ For the Respondent, the nationality of a party must be assessed against the timing of the dispute, and the manipulation of nationality requirements for pre-existing disputes has to be regarded as abusive.⁷¹ As a result, the Respondent asks that the Claimant's "abusive tactics" be sanctioned by finding that it does not meet the incorporation requirement under the BIT.⁷²

1.1.2) The Claimant's position

67. The Claimant maintains that it is validly incorporated in Cyprus.⁷³ The Claimant relies on the certificates issued by the relevant legal authorities in Cyprus as proof of its incorporation in Cyprus since March 2009,⁷⁴ as well as the evidentiary testimony of its expert Mr. Alecos Markides, former Attorney General of Cyprus.⁷⁵
68. The Claimant rejects the Respondent's argument that a registered office is an element of incorporation under the BIT or Cypriot law.⁷⁶ According to the Claimant, "incorporation" and "registered office" are two distinct notions and the requirements to establish a registered office are built on those for incorporation.⁷⁷ In any event, the Claimant maintains that even if one were to accept that a registered office is an element of incorporation, as well as, accept the Respondent's argument that the Lease Agreement is null and void, the Claimant still has a valid title to its registered office.⁷⁸
69. Citing the Respondent's own expert, the Claimant argues that under Cypriot law "if a contract of lease is void and the rent is paid by the tenant possessing this property on a monthly or annual basis, the status of the tenant is construed that he is a tenant from month to month or from year to year pursuant to a verbal agreement of monthly or annual duration."⁷⁹ The Claimant relies on payment confirmations,⁸⁰ as

⁶⁸ R-POJ, paras 37-38; R-JPHB, paras 81-82.

⁶⁹ R-POJ, para. 37; R-JPHB, para. 81.

⁷⁰ R-JPHB, para. 82.

⁷¹ R-JPHB, para. 75 citing Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, dated 10 June 2010, para. 205 (CL-109).

⁷² R-POJ, para. 38; R-JPHB, para. 82.

⁷³ C-RJ, para. 438 et seq.; C-JPHB, para. 91 et seq.

⁷⁴ C-RJ, para. 440, citing C-011; C-013; C-014; C-223; C-004; C-018.

⁷⁵ Expert Opinion of Mr. Alecos Markides, dated 31 July 2018, paras 20-23, 56 (CEX-3); C-RJ, paras 448-449.

⁷⁶ C-RJ, paras 441, 444 et seq.

⁷⁷ C-RJ, para. 444-445, citing Expert Opinion of Mr. Alecos Markides, dated 31 July 2018, paras 12.2 and 58 (CEX-3).

⁷⁸ C-RJ, paras 452-457.

⁷⁹ C-RJ, para. 453, citing Expert Opinion of Dr. Thomas Papadopoulos, dated 26 March 2018, para. 45 (REX-3).

⁸⁰ C-RJ, para. 455, citing C-238; C-239; C-240; C-241; C-242.

Decision on Jurisdiction

well as witness testimony of Ms. Tatiana Ieronymides,⁸¹ as proof that the lease for its registered office is valid and has been concluded since 2012.

1.1.3) The Arbitral Tribunal's findings

70. The Arbitral Tribunal accepts the incorporation certificates submitted by the Claimant as proof of its valid incorporation in Cyprus.⁸² There is nothing on the face of these documents which prevents the Arbitral Tribunal from finding that they were validly issued by the relevant authorities on the dates indicated. Thus, as of the date when the provisional certificate of continuation was obtained on 20 March 2009, the Claimant Company is to be treated by operation of the law as having been incorporated in Cyprus. The Arbitral Tribunal finds no reason to discredit the expert testimony of Mr. Alecos Markides confirming this fact.⁸³
71. Nevertheless, even if the Arbitral Tribunal were to accept the Respondent's line of reasoning that a registered office is a precondition to incorporation in Cyprus, and that in order to establish a registered office one must evidence some right of use over the property – of which the Arbitral Tribunal is not convinced – these elements are considered to be satisfied in the present case.
72. The fact that the Lease Agreement was not signed before two witnesses is in the end irrelevant. Irrespective of the validity or enforceability of the Lease Agreement, the document demonstrates the intention of the concerned entities to enter into a legally binding agreement. The Respondent acknowledges that “[t]he validity for avoidance of lack of written form allows [...] someone to prove that there was, in place of that, an oral agreement for this period of time. [...] in absence of contract in proper written form, then proof of when the contract was concluded, whether it was performed, relies purely on payments.”⁸⁴
73. The Claimant has submitted a number of confirmations of rent payments and rental invoices issued by the lessor of the property in question.⁸⁵ The Claimant's physical presence at its registered office has also been confirmed by the Claimant's expert Mr. Alecos Markides, on whose instructions his associate lawyer made an unannounced visit to the Claimant's premises, took pictures of the facilities, and inspected the company documents available for public viewing.⁸⁶ Taken together, this evidence, coupled with the credible witness testimony of the Claimant's

⁸¹ C-RJ, para. 455 citing Witness Statement of Ms. Tatiana Ieronymides, dated 31 July 2018, paras 7, 23-24 (CWS-4).

⁸² See *supra* para. 4.

⁸³ Expert Opinion of Mr. Alecos Markides, dated 31 July 2018, para. 57 (CEX-3).

⁸⁴ Tr. J. I 150:21-25, 151:8-10 (Mr Vladimir Pavic, Counsel for the Respondent); See also Expert Opinion of Dr. Thomas Papadopoulos, dated 26 March 2018, paras 45-46 (REX-3): “Moreover, if a contract of lease is void and the rent is paid by the tenant possessing this property on a monthly or annual basis, the status of the tenant is construed that he is a tenant from month to month or from year to year pursuant to a verbal agreement of a monthly or annual duration.”; Expert Opinion of Mr. Alecos Markides, dated 31 July 2018, para. 87 (m) (CEX-3): “However, the fact that by virtue of section 77(1) of the Contract Law, Cap. 149, the lease agreement in question is void (not illegal) makes no difference as regards the case at hand [...] as expressly stated in the last 3 lines of paragraph 46 at page 29 of PD, ‘This tenancy from month to month complies with the requirements of Cyprus Companies Law and creates sufficient right of use or property’ (see, also, paragraphs 48 and 49 of PD)”.

⁸⁵ C-238; C-239; C-240; C-241; C-242.

⁸⁶ Expert Opinion of Mr. Alecos Markides, dated 31 July 2018, para. 62 et seq. Appendix J (CEX-3).

Decision on Jurisdiction

manager Ms. Tatiana Ieronymides,⁸⁷ is sufficient to demonstrate that the Claimant had occupied the premises located at Arch. Makariou III 66, Kronos Court, 1st floor, Office 12, 1770 Nicosia, Cyprus.⁸⁸ This is, in the Arbitral Tribunal's view, enough to be considered as having a right to use the premises in question, thereby validating the status of the Claimant's registered office and incorporation based on the Respondent's argumentation. The exact terms and scope of the Claimant's tenancy, be it of short-term or indefinite duration, is not of relevance to the present case and need not be decided by the Arbitral Tribunal.

74. Furthermore, the Arbitral Tribunal is not convinced by the Respondent's multiple allegations of malfeasance on the part of the Claimant.⁸⁹ Insofar as the Respondent argues that the Claimant deceptively attempts to meet the requirements set out by the majority in the *CEAC v. Montenegro* case for an office to qualify as a registered office under Cyprus law,⁹⁰ the Arbitral Tribunal takes note of the fact that the decision in the *CEAC* case was issued on 26 July 2016, whereas the Lease Agreement produced by the Respondent is dated 31 December 2013. Thus, even if the Arbitral Tribunal were to accept the requirements established by the majority in *CEAC*, which is not the case,⁹¹ it could not be that the Respondent only entered into the Lease Agreement in order to avoid jurisdictional pitfalls and meet the requirements established by the majority in the *CEAC* case, since the Lease Agreement was issued two and a half years before the ICSID decision was rendered. The Arbitral Tribunal has no reason not to believe that the Lease Agreement was created in December 2013. The fact that there are signatures missing, again, does not in the view of the Arbitral Tribunal lead to a finding that the Claimant did not have the right to use the premises mentioned in such document. In addition, as regard to the timing of the confirmation of rent payments and rental invoices submitted by the Claimant in these proceedings, there is nothing on the face of these documents which requires the Arbitral Tribunal to call into question their authenticity or their evidentiary value.
75. With the right of the Claimant to use the property in question, even without a validly executed written lease agreement, and the payment of a rent starting well before the present arbitration has been initiated, there can be no reason to assume that the Claimant undertook steps in bad faith to obtain proper incorporation in Cyprus, as

⁸⁷ Tr. J. I 152:5-15 (Ms. Tatiana Ieronymides): "Mera moved to my office, 66 Makariou Avenue, back in 2012, and that's what gave right. So to have all accounts there, everything was managed from there, the meetings were happening there; the directors would come to sign, you know, the documents which needed. I was talking to the banks from that office. So for me this is only a formalisation of the things, and the lease agreement and the payment. Mera is there in this 66 Makariou Avenue; nothing changes that. And I am sitting in that office [...]"; Witness Statement of Ms. Tatiana Ieronymides, dated 31 July 2018, paras 7, 23-24 (CWS-4). Ms. Ieronymides' testimony confirms that she resides in Nicosia, Cyprus and has run the "family office" of the companies of the Mišković family, i.e. the five investment companies which include the Claimant, out of their office in Nicosia (Witness Statement of Ms. Tatiana Ieronymides, dated 31 July 2018, paras 7-8 (CWS-4)). In the Arbitral Tribunal's view there can be no question that the Claimant has a physical presence at its registered office.

⁸⁸ See *supra* para. 7.

⁸⁹ R-POJ, paras 36-38; R-JPHB, paras 75-82.

⁹⁰ Central European Aluminium Company (CEAC) v. Montenegro, ICSID Case No. ARB/14/8, Award, dated 26 July 2016, para. 170 et seq. (RL-003).

⁹¹ See *infra* para. 94.

Decision on Jurisdiction

the Respondent suggests, only in preparation of its claims in the present proceedings.

1.2) Whether the Claimant has “its seat in the territory of” Cyprus?

1.2.1) The Respondent’s position

76. According to the Respondent, the term “seat” as used in Article 1(3)(b) of the BIT, should be understood by its ordinary meaning in the context of a nationality criterion of investment treaties, as meaning the place of effective management.⁹² The Respondent argues that effective management refers to “those people in an organization (legal person) who are actually responsible for controlling and organizing the organization, and who actually manage its business and operations.”⁹³ For the Respondent, the purpose of the BIT, being the creation of favourable conditions for greater economic cooperation between the Contracting Parties, can only be served “when investors who possess a true, genuine connection with one Contracting Party to the BIT, invest in [the] territory of the other Contracting Party.”⁹⁴ The Respondent maintains that there must be a substantive link between the company and the country in which it is organized and to assess the seat of a company one must look to who actually makes the decisions with regards to its business.⁹⁵
77. The Respondent argues for the interpretation of the second condition of Article 1(3)(b) of the BIT under international law without renvoi to municipal law.⁹⁶ This is, according to the Respondent, supported by the fact that Article 1(3)(b) of the BIT refers to national law only in respect of incorporation, and not in respect of seat.⁹⁷ The Respondent also cites Article 9(4) of the BIT which stipulates the application of international law in case of disputes under the BIT.⁹⁸
78. In the Respondent’s view since the Claimant’s place of effective management was not in Cyprus, but rather in Serbia, the Claimant fails to fulfill the second requirement of Article 1(3)(b) of the BIT, and hence cannot be deemed an investor under the BIT.⁹⁹ The Respondent takes the position that “none of the decisions concerning the business operations of the Claimant were made by anyone in Cyprus”, but that rather, “the decision-making process was at all times in the hands of Serbian nationals, Messrs. Miskovic.”¹⁰⁰ According to the Respondent, the Claimant is nothing more than a conduit for the Claimant’s owners to conduct its

⁹² R-POJ, paras 32-35; R-CM, para. 216; R-JPHB, para. 12.

⁹³ R-CM, para. 254 (emphasis omitted); See also R-POJ, para. 32: “[...] seat entails more than registered address, it entails actual activity and a place where the effective centre of administration of a legal entity is located – that is, the place where the relevant decisions of a company are made.”

⁹⁴ R-CM, para. 219.

⁹⁵ R-POJ, para. 33.

⁹⁶ R-CM, para. 220; R-JPHB, para. 13 et seq.

⁹⁷ R-JPHB, para 13 et seq.

⁹⁸ R-JPHB, para. 13 et seq.

⁹⁹ R-CM, paras 279-293; R-JPHB, paras 69-74.

¹⁰⁰ R-POJ, para. 35; See also R-CM, para. 213: “Claimant does not have a seat in Cyprus as it is effectively managed by Serbian nationals from Serbia and, consequently, does not meet the requirements of Article 1(3)(b) of the BIT.”

Decision on Jurisdiction

business activities and gain access to a dispute settlement mechanism reserved for investments and investors of foreign character.¹⁰¹

79. Furthermore, the Respondent argues that even if renvoi is made to Cypriot law, the term seat would not mean a registered office.¹⁰² The Respondent maintains that the term “seat” as contained in the BIT cannot be equated with a “registered office” as proposed by the Claimant since a registered office is a formal prerequisite for legal existence of a company under Cypriot law.¹⁰³ The Respondent argues that in order to give meaning to the term seat, as read in the context of Article 1(3)(b) of the BIT, it must indicate something in addition to incorporation, like management of and control over the investment, and therefore it cannot be taken to signify a registered office.¹⁰⁴

1.2.2) The Claimant’s position

80. The Claimant argues that it satisfies the second condition of Article 1(3)(b) of the BIT as it maintains a seat in Cyprus. According to the Claimant, international law requires that the term “seat”, as set out in the context of the BIT, be interpreted as the physical location of a legal entity in the unoccupied territory of Cyprus following the Turkish invasion of northern Cyprus in 1974.¹⁰⁵
81. Alternatively, the Claimant argues that even if the term “seat” were interpreted outside of its context, international law dictates a renvoi to Cypriot municipal law, according to which “seat” means a registered office.¹⁰⁶ The Claimant claims to fulfill all of the requirements of the substantive requirements prescribed under the Cypriot Companies Law for its registered office located at Arch. Makariou III 66, Kronos Court, 1st floor, Office 12, 1770 Nicosia, Cyprus.¹⁰⁷ According to the Claimant, this is also the “place where its board of directors meets and where its shareholder convene [sic]”,¹⁰⁸ thus being the place where it “conducts [its] main corporate functions”.¹⁰⁹
82. The Claimant submits that the term seat, as utilized in the BIT, is to be interpreted broadly, and does not require any particular activity.¹¹⁰ Thus even if no renvoi to Cypriot municipal law were made, under international law, the Claimant maintains that the term “seat” as set forth in the relevant BIT does not imply any “real economic activities”, “beneficial ownership” or “ultimate control”.¹¹¹

¹⁰¹ R-POJ, paras 9, 27.

¹⁰² R-CM, para. 270 et seq.; R-JPHB, para. 13 et seq.

¹⁰³ R-POJ, para. 31.

¹⁰⁴ R-POJ, para. 31; R-CM, para. 217.

¹⁰⁵ C-RJ, paras 128-169.

¹⁰⁶ C-M, para. 425; C-RJ, para. 171.

¹⁰⁷ C-M, paras 426-428.

¹⁰⁸ C-M, paras 429.

¹⁰⁹ C-M, paras 431.

¹¹⁰ C-RJ, para. 259.

¹¹¹ C-RJ, para. 117, 230 et seq.

Decision on Jurisdiction

83. Furthermore, even if no renvoi to Cypriot municipal law were made and under international law seat means effective management, the Claimant argues that this would entail the management of company by its statutory directors and managers and not the activities of shareholders and beneficiaries, and that in the present case the Claimant’s place of effective management is in Cyprus.¹¹²

1.2.3) The Arbitral Tribunal’s findings

84. The Arbitral Tribunal undertakes to analyze the meaning of the term “seat” as set out in Article 1(3)(b) of the BIT pursuant to international law.

85. Looking first to the ICSID Convention, it is well-accepted that Article 25 of the ICSID Convention leaves it to the contracting parties to determine nationality, including corporate nationality. Accordingly, the ICSID Convention does not specify what should be understood as the seat of a legal entity. The tribunal in *Romp petrol* recognized that “[a]s ICSID tribunals and commentators have regularly observed, the drafters of the Convention abandoned efforts to define ‘nationality’ for the purposes of Article 25, and instead left the State Parties wide latitude to agree on criteria by which nationality would be determined.”¹¹³ The latitude granted to define nationality for purpose of Article 25 is considered to be “at its greatest in the context of corporate nationality under a BIT”.¹¹⁴ In the present case, although the BIT sets out the three-part test for establishing the nationality of a legal person, it fails to provide further guidance as to what is to be understood by the requirement of a “seat in the territory of that Contracting Party”.¹¹⁵

86. As acknowledged in the separate opinion of Prof. William W. Park in the CEAC case, “[i]nternational law as it currently stands provides no uniformly accepted ‘ordinary meaning’ of corporate seat.”¹¹⁶ The tribunal in *Tenaris & Talta* also observed that similarly “[...] it is clear that neither [‘sede’ or ‘siège social’] has been used in international law and practice as a consistent ‘legal term of art’, with only one meaning”.¹¹⁷

87. The Arbitral Tribunal finds it difficult to accept the Respondent’s position that the term “seat” is ordinarily understood in international law to convey the place of effective management, i.e. where decisions are effectively made. Absent from the wording of Article 1(3)(b) of the BIT is language requiring that there be a substantive link between the company and the country in which it is organized. When interpreting the same provision of the BIT as in issue in the present arbitration, Prof. William W. Park noted in CEAC that “[s]ometimes ‘seat’ marries

¹¹² C-RJ, paras 67-71, 117, 401 et seq.

¹¹³ The *Romp petrol* Group N.V v. Romania, ICSID Case No. ARB/06/3, Decision on Respondent’s Preliminary Objections to Jurisdiction and Admissibility, dated 18 April 2008, para. 80 (CL-064).

¹¹⁴ The *Romp petrol* Group N.V v. Romania, ICSID Case No. ARB/06/3, Decision on Respondent’s Preliminary Objections to Jurisdiction and Admissibility, dated 18 April 2008, para. 81 (CL-064).

¹¹⁵ Cyprus-Serbia BIT, Article 1(3)(b) (CL-001).

¹¹⁶ Central European Aluminium Company (CEAC) v. Montenegro, ICSID Case No. ARB/14/8, Award (Separate Opinion of William W. Park), dated 26 July 2016, para. 18 (RL-003).

¹¹⁷ *Tenaris S.A. & Talta-Trading E Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, dated 29 January 2016, para. 144 (CL-112).

Decision on Jurisdiction

with a qualifier to become *siège réel* or ‘real seat’”, but however noted that the present BIT “did not adopt such language” and “[a]n arbitral tribunal would be bold indeed to add adjectives on its own initiative [as the] Treaty drafters introduced no such additional requirements”.¹¹⁸ As recognized in the decision on jurisdiction and admissibility in the *Yukos Universal Limited v. The Russian Federation* case, “[t]he principles of international law, which have an unquestionable importance in treaty interpretation, do not allow an arbitral tribunal to write new, additional requirements – which the drafters did not include – into a treaty, no matter how auspicious or appropriate they may appear.”¹¹⁹

88. To require that the “effective management” take place in Cyprus absent such wording in the BIT would be to import into the treaty an obligation which is absent. As correctly noted by Prof. William W. Park in the CEAC case, however desirable this may be from a policy perspective “an arbitral tribunal bears a duty of fidelity to the treaty text as drafted, and cannot rewrite the contract states’ bargain.”¹²⁰ According to the Respondent it is “usual practice in Cyprus as it has been known for years as a popular offshore jurisdiction, and one need only google ‘Cyprus offshore’ to find a plethora of links to various law and consultancy firms offering services of incorporating and maintaining companies on Cyprus.”¹²¹ If the Respondent is of this viewpoint, then when it negotiated the BIT in question it could have required that in order for a legal entity to qualify as an investor under the BIT, it would need to be managed and controlled in the place of incorporation. It is not for the Arbitral Tribunal to insert additional requirements into the BIT which could have easily been inserted by the negotiators at the time of drafting, but were not.¹²²
89. Since there is no definition of “seat” in the ICSID Convention, nor in the BIT, and no uniform definition under international law, the Arbitral Tribunal considers that the term in question must be interpreted by way of *renvoi* to municipal law. In *Barcelona Traction*, the International Court of Justice affirmed that “[...] international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant

¹¹⁸ Central European Aluminium Company (CEAC) v. Montenegro, ICSID Case No. ARB/14/8, Award (Separate Opinion of William W. Park), dated 26 July 2016, para. 16 (RL-003).

¹¹⁹ *Yukos Universal Limited v. The Russian Federation*, UNCITRAL, Interim Award on Jurisdiction and Admissibility, dated 30 November 2009, para. 415, (RL-076).

¹²⁰ Central European Aluminium Company (CEAC) v. Montenegro, ICSID Case No. ARB/14/8, Award (Separate Opinion of William W. Park), dated 26 July 2016, para. 20 (RL-003), and going on to further state that “If the negotiators of this Treaty had wished to require investors to prove ‘management and control’ they could have done so by adding those three words.”

¹²¹ R-CM, para. 282.

¹²² See also *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award, dated 17 March 2006, para. 241 (CL-033) “[...] it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add.”

Decision on Jurisdiction

rules of municipal law.”¹²³ The renvoi approach for the treatment of corporate entities is also promoted by the commentary to Article 9 of the International Law Commission's Draft Articles on Diplomatic Protection, which states that “[...] international law has no rules of its own for the creation, management and dissolution of a corporation or for the rights of shareholders and their relationship with the corporation, and must consequently turn to municipal law for guidance on this subject [...]”.¹²⁴ Professor Schreuer admits that municipal law may be relevant for ICSID jurisdiction. According to Prof. Schreuer, “[d]efinitions of corporate nationality in national legislation or in treaties providing for ICSID’s jurisdiction are directly relevant to the determination of whether the nationality requirements of Art. 25(2)(b) have been met [...] Therefore, any reasonable determination of the nationality of juridical persons contained in national legislation or in a treaty should be accepted by an ICSID commission or tribunal.”¹²⁵

90. The concept of a “seat” of a legal entity remains essentially a municipal law concept derived from civil law tradition and is foreign to Cypriot law which is rooted in English common law. As confirmed by the Claimant’s legal expert, former Attorney General of Cyprus, Mr. Alecos Markides, Cypriot law “does not recognise any notion equivalent to the French law concept of ‘siège social’ or the German law concept of ‘real or effective seat’”.¹²⁶ Mr. Alecos Markides goes on to propose that “[i]nstead, Cypriot law adopts the so-called ‘incorporation’ approach to determining a company’s *lex societatis*”,¹²⁷ and that as a result “a company ‘seated’ in Cyprus is one that is incorporated in Cyprus and maintains a registered office in the Republic”.¹²⁸ Professor William W. Park in CEAC, also understood the term “seat” as set out in Article 1(3)(b) of the BIT to mean a “registered office” and thereby established that “the plain meaning of registered office, best matches the meaning of ‘seat’ in Cyprus as used in this particular Treaty.”¹²⁹
91. The Arbitral Tribunal considers this approach of defining the term seat to be fitting in the present case. Given the placement of the term “seat” as a second condition in the list of requirements for a legal entity to qualify as an investor under the BIT, the Arbitral Tribunal accepts that this term should be understood as a different and separate criterion than the requirement of incorporation. In the Arbitral Tribunal’s view, as compared to incorporation which relies generally on the execution of documents, the requirement of a seat involves what the Arbitral Tribunal considers to be an element of physical presence. The Arbitral Tribunal finds the statements made by the Claimant’s witness, Mr. Georgios Iacovou, to be relevant. The former Minister of Foreign Affairs, and signatory of the BIT for Cyprus, stated that “[i]n

¹²³ Barcelona Traction, Light and Power Co., Ltd (Belgium v. Spain), Judgment, 1970 ICJ Rep. 3, dated 5 February 1970, para. 38 (CL-071).

¹²⁴ Draft Articles on Diplomatic Protection with Commentaries, 2006, p. 53 (CL-070).

¹²⁵ Christoph Schreuer, Commentary on the ICSID Convention (2001), p. 287.

¹²⁶ Expert Opinion of Mr. Alecos Markides, dated 31 July 2018, para. 10 (CEX-3).

¹²⁷ Expert Opinion of Mr. Alecos Markides, dated 31 July 2018, para. 10 (CEX-3).

¹²⁸ Expert Opinion of Mr. Alecos Markides, dated 31 July 2018, para. 41 (CEX-3).

¹²⁹ Central European Aluminium Company (CEAC) v. Montenegro, ICSID Case No. ARB/14/8, Award (Separate Opinion of William W. Park), dated 26 July 2016, para. 22 (RL-003).

Decision on Jurisdiction

this sense, ‘seat’ means the seat of the legal person, the registered office, the physical location of a company where it can be visited, where service can be made”.¹³⁰ The Arbitral Tribunal therefore accepts that the meaning of the term “seat” must be understood to have been a reference to an actual location, place or address. Thus, in the Arbitral Tribunal’s view the equivalent of this condition under Cypriot law is the registered office of an entity.

92. Section 102 of the Cypriot Companies Law requires a registered office in Cyprus “to which all communications and notices may be addressed”.¹³¹ The registered office of a company serves various purposes, including serving as the place where the company shall keep: the register of holder of debentures;¹³² every instrument creating any charge requiring registration or any mortgage requiring recording;¹³³ the register of its members;¹³⁴ the book containing the minutes of proceedings of any general meeting;¹³⁵ the books of account;¹³⁶ and the register of its directors and secretaries.¹³⁷
93. The Arbitral Tribunal finds the Claimant’s certificates issued by the relevant authorities in Cyprus confirming its registered office located at Arch. Makariou III 66, Kronos Court, 1st floor, Office 12, 1770 Nicosia, Cyprus, to be conclusive evidence for the existence of its registered office.¹³⁸ Furthermore, based on the additional submitted evidence, the Arbitral Tribunal can only draw the conclusion that the relevant criteria for a registered office are met in this case.¹³⁹
94. The Arbitral Tribunal does not accept the “requirements” established by the majority in *CEAC*.¹⁴⁰ The additional conditions applied by the majority in the *CEAC* case went beyond assessment of the confirmation of a registered office by the relevant authorities, to also include inquiry into: (i) the existence of physical premises, (ii) a lease or license to use the premises, (iii) accessibility of the premises for at least two hours per day, (iv) the keeping of books and registers, and (v) the company’s name affixed to the outside of the building. The present Arbitral Tribunal agrees with the position taken by Prof. William W. Park in *CEAC*, that this test “finds no support in either domestic or international law” and that the “[a]doption of that standard would require arbitrators to assume a policy-making mission in excess of their authority.”¹⁴¹

¹³⁰ Witness Statement of Mr. Georgios Iacovou, dated 31 July 2018, para. 33 (CWS-3).

¹³¹ Section 102(1) of the Cypriot Companies Law (RL-4).

¹³² Section 83 of the Cypriot Companies Law (CL-3).

¹³³ Section 99 of the Cypriot Companies Law (CL-3).

¹³⁴ Section 105 of the Cypriot Companies Law (CL-3).

¹³⁵ Section 140 of the Cypriot Companies Law (CL-3).

¹³⁶ Section 141 of the Cypriot Companies Law (CL-3).

¹³⁷ Section 192 of the Cypriot Companies Law (CL-3).

¹³⁸ *See supra* para. 6; C-020; C-223; C-018.

¹³⁹ *See supra* para. 6 et seq.

¹⁴⁰ Central European Aluminium Company (CEAC) v. Montenegro, ICSID Case No. ARB/14/8, Award, dated 26 July 2016, para. 170 et seq. (RL-003).

¹⁴¹ Central European Aluminium Company (CEAC) v. Montenegro, ICSID Case No. ARB/14/8, Award (Separate Opinion of William W. Park), dated 26 July 2016, para. 21 (RL-003).

Decision on Jurisdiction

95. In any event, even if the Arbitral Tribunal were to accept the test established by the majority in CEAC, these requirements are considered to be fulfilled in the present case since the factual elements of the Claimant’s case are quite different than the ones of claimant in CEAC. The evidence establishes that the Claimant has a physical presence at the indicated address where it exercises some right of use.¹⁴² As noted earlier, the Claimant’s physical presence at its registered office has also been confirmed by the Claimant’s expert Mr. Alecos Markides, on whose instructions his associate lawyer made an unannounced visit to the Claimant’s premises, took pictures of the facilities, and inspected the company documents available for public viewing.¹⁴³
96. Lastly, the Arbitral Tribunal turns to the Respondent’s arguments relating to the use of the term “seat” or (edra in Greek) in the Cypriot Companies Law. According to the Respondent, since the Cypriot Companies Law refers both to the term for “seat”, as well as the term for “registered office”, the two cannot be the same, but rather the concept of seat must be understood as a distinct concept from that of a registered office.¹⁴⁴ The Arbitral Tribunal finds this variance irrelevant as it is due to the fact that the term seat is essentially a concept of civil law tradition that does not have its origins in Cypriot law.¹⁴⁵ The Arbitral Tribunal therefore reconfirms its interpretation that a registered office according to Cypriot law best lends itself to the meaning of seat as used in the BIT.¹⁴⁶
97. Worthy of noting in this context is that according to the Respondent, the concept of seat under Cypriot law is included in various provisions of Cypriot Companies law which govern issues such as transfer of company seat from abroad to Cyprus.¹⁴⁷ Remarkably in the present case the Claimant undertook such re-domiciliation from Netherlands Antilles to Cyprus in 2009.¹⁴⁸ The legal opinion of Ioannides Demetriou law offices on the “Re-Domiciliation of Foreign Companies into Cyprus” speaks of the “[t]ransfer of a company’s ‘seat of incorporation’”.¹⁴⁹ The proxy and waiver of notice executed in support of the transfer, state that the purpose of the document was “[t]o approve the conversion of the [Claimant] into a company under Cypriot Law, as per the date that all formalities required to effectuate such conversion have been met and to Transfer the [Claimant’s] seat from Curacao, the Netherlands Antilles to the Republic of Cyprus.”¹⁵⁰ The extract from the Netherland Antilles’ register also states that “[...] according to a statement filed April 3, 2009, it was resolved to transfer the statutory seat of the corporation to the Republic of

¹⁴² See *supra* paras 72-73.

¹⁴³ Expert Opinion of Mr. Alecos Markides, dated 31 July 2018, para. 64 et seq., Appendix J (CEX-3).

¹⁴⁴ R-JPHB, paras 16-18.

¹⁴⁵ See *supra* para. 90.

¹⁴⁶ See *supra* paras 90 and 91.

¹⁴⁷ See R-CM, para. 273: “The concept of seat is included in various provisions of Cypriot Companies Law which govern issues such as transfer of company seat from abroad to Cyprus and vice versa [...]”

¹⁴⁸ See *supra* para. 4.

¹⁴⁹ C-017 (emphasis added).

¹⁵⁰ C-007 (emphasis added).

Decision on Jurisdiction

Cyprus”.¹⁵¹ The Arbitral Tribunal accepting, as the Respondent has, that the term seat as included in the Cyprus Companies Act concerning the re-domiciliation of companies from abroad to Cyprus is the same as the definition of seat as contained in the BIT, arrives at the conclusion that the Claimant has its seat in Cyprus since it is undisputed that the Claimant validly redomiciled from the Netherlands Antilles to Cyprus by application of said legislation.

1.3) Whether the Claimant can be considered as “making investments in the territory of” Serbia?

1.3.1) The Respondent’s position

98. The Respondent takes the position that the Claimant’s investment is the purchase of PZP shares, and the later incorporation of Serbian entity Mera Invest, where the Claimant contributed a large portion of its PZP shares as Mera Invest’s founding capital.¹⁵² According to the Respondent, since these activities took place in 2006 and 2008 respectively, and since at the time of these events the Claimant was a Netherlands Antilles’ company, the Claimant cannot be regarded as an investor within the meaning of Article 1(3)(b) of the BIT as the Claimant was not “making” the investments as a company incorporated in Cyprus.¹⁵³
99. The Respondent asserts that in order to benefit from protection under the BIT, the Claimant must be a protected investor at the time it makes its investment.¹⁵⁴ For the Respondent, the conditions for an “investor” as set out in Article 1(3)(b) of the BIT are not only cumulative but must occur “at the same time”.¹⁵⁵ According to the Respondent, “the phrase ‘making investments’ denotes an act of investing, which is actually performed [...] and not future or to completed investments.”¹⁵⁶ For the Respondent the nationality of the investor cannot be decoupled from the moment or period in which the investment was made.¹⁵⁷
100. The Respondent’s objection to jurisdiction based on the third condition of Article 1(3)(b) of the BIT is qualified. The Respondent appears to accept the fulfillment of this criteria to the extent the Claimant made investments in Serbia after its relocation to Cyprus.¹⁵⁸

¹⁵¹ C-012 (emphasis added); *see also* Shareholder Resolution dated 11 November 2011, by which the Claimant’s shareholder put on record that it approved “the transfer of the *seat* of the company which will continue its corporate existence under the Laws of the Republic of Cyprus” (C-008) (emphasis added).

¹⁵² R-POJ, paras 40-41; R-CM, paras 300-301; R-JPHB, para. 83.

¹⁵³ R-POJ, para. 42; R-CM, para. 299 et seq.; R-JPHB, para. 83 et seq.

¹⁵⁴ R-POJ, para. 42; R-CM, para. 304 et seq.; R-JPHB, para. 87 et seq.

¹⁵⁵ R-CM, paras 304, 306, 308; R-JPHB, paras 87-88.

¹⁵⁶ R-CM, para. 305; *see also* R-JPHB, para. 89.

¹⁵⁷ R-CM, paras 299-311.

¹⁵⁸ R-JPHB, para. 86: “In 2010, Claimant, this time as a Cypriot company, contributed the rest of its PZP shares to [Mera Invest]. The 2010 contribution amounted to 14% of [Mera Invest’s] total equity. It is only this contribution that was made by an investor in the sense of Article 1(3)(b) of the BIT and, consequently, only this contribution is the protected investment in the sense of the BIT. In conclusion, the Arbitral Tribunal may have jurisdiction with regard to disputes concerning this contribution, and nothing more (provided that Claimant meets other requirements under Article 1(3)(b), *quod non*).”; *See also* Tr. J. I 46:7-15 (Dr. Vladimir Djerić, Counsel for the Respondent): “[...] only Claimant’s 2010 investment of shares into [Mera Invest] may qualify as an investment under the BIT, since only investments made by

Decision on Jurisdiction

101. The Respondent also argues that based on Article 12 of the BIT the investment treaty shall apply “to investments made by investors of one Contracting Party prior to as well as after the date of the entry into force of this Agreement”, and that since in its view the Claimant’s investment was not “made by” an investor of one Contracting Party, the BIT is not applicable.¹⁵⁹

1.3.2) The Claimant’s position

102. The Claimant submits that there is no requirement under the BIT which mandates that an investor only qualifies as such if it is a company registered in Cyprus at the time of making of the investment.¹⁶⁰

103. Notwithstanding, the Claimant argues that the holding and managing of assets qualifies as “making investments” under the BIT.¹⁶¹ For the Claimant, ongoing activities must also be protected under the BIT so that a restructuring, such as the transfer of the seat from the Netherlands Antilles to Cyprus, does not divest an investor of protection.¹⁶² The Claimant argues that this interpretation results from the words “[...] and maintain favourable conditions” of the preamble of the BIT.¹⁶³

104. The Claimant also submits that its investments did not stop with establishing Mera Invest, but that the Claimant after moving to Cyprus, has been “making investments” through Mera Invest right until the Respondent’s measures forced the investments to lay dormant.¹⁶⁴

105. The Claimant contends that as per Article 12 of the BIT, the BIT applies to cause of action that arose after the treaty’s entry into force, i.e. after 23 December 2005.¹⁶⁵ Thus, in the Claimant’s view, what is relevant for jurisdiction *ratione temporis* is that the Claimant had the nationality of a Cyprus entity at the time of consent, which is commonly equated with the time when the dispute arises.¹⁶⁶ The Claimant highlights the fact that the nationality change of the Claimant took place years before the dispute had arisen.¹⁶⁷

1.3.3) The Arbitral Tribunal’s findings

106. To the extent that there is a requirement of activity when determining the status of an investor – of which the Arbitral Tribunal is not convinced – the Arbitral Tribunal considers that this is satisfied in the present case.

qualified investors enjoy the treaty’s protection. So, consequently, if Claimant proves its case, it may claim damages only in proportion to the value of its presented investment in [Mera Invest]: that is 14% of its equity.”

¹⁵⁹ R-POJ, para. 43 (emphasis omitted); R-CM, paras 309-311 (emphasis omitted).

¹⁶⁰ C-RJ, para. 465 et seq.

¹⁶¹ C-RJ, para. 470-522.

¹⁶² C-RJ, para. 504 et seq.

¹⁶³ C-RJ, para. 492 et seq.

¹⁶⁴ C-RJ, para. 523-528.

¹⁶⁵ C-CoJ, para. 35-44.

¹⁶⁶ C-CoJ, para. 41.

¹⁶⁷ C-CoJ, para. 43.

Decision on Jurisdiction

107. In the Arbitral Tribunal’s view, “making investments” comprises more than the funding and acquisition of investments, but as well, the holding and management of investments. This is derived from the object and purpose of the BIT to provide broad investment protection,¹⁶⁸ as well as an ordinary reading of Article 1(3)(b) of the BIT. It is evident that the Claimant actively held and managed the investments after it became a Cyprus entity,¹⁶⁹ thereby “making investments” in Serbia as required by Article 1(3)(b) of the BIT.
108. The BIT expressly provides that “[a] change in the form in which assets are invested or reinvested shall not affect their character as investments”.¹⁷⁰ Accordingly, in the Arbitral Tribunal’s view, the BIT provides broad investment and investor protection so that the rights and interests regarding an investment should remain intact even with a change in the form in which they are held, i.e. even with a re-domiciliation of the investor.
109. Similarly, in *PSEG Global v. Turkey*, where two investment vehicles bought a claim against Turkey, the tribunal supported a finding that “whatever rights or interests the branch office had [regarding the investment] were transferred to [the investment vehicles]” and that “[b]ecause of this continuity”, the “jurisdiction of the Tribunal is therefore not affected [by] the change of corporate structure”.¹⁷¹
110. The Arbitral Tribunal considers that the continuity of entities is even more prevalent in the current case where the Claimant remained the same entity that made the investment but with a later change in domicile. Where changes in corporate structure should not alter the rights in an investment, so should it also be the case where there is no successor in law and business, but in fact the same entity involved. Cypriot law allows the transfer of a company seat from abroad to Cyprus without the need to liquidate the former company and transfer their assets and liability to a newly incorporated Cyprus company.¹⁷² Thus, factually-speaking the ownership of the investment never changed. The Claimant, although having moved from the Netherlands Antilles to Cyprus, remained the same legal entity that made the investment in Mera Invest. Thus, the Arbitral Tribunal concludes that the third condition of Article 1(3)(b) of the BIT is satisfied in the present case.

2) Whether the Claimant meets the jurisdictional requirements of “investment” as defined by Article 1(1) of the BIT (jurisdiction *ratione materiae*)?

2.1) The Respondent’s position

111. The Respondent contends that the assets of Mera Invest (as opposed to the Claimant’s share in Mera Invest) do not fall under the definition of investment in Article 1 BIT because they are not assets that were invested by a protected investor,

¹⁶⁸ See *supra* paras 108 and 122.

¹⁶⁹ See *supra* para. 9 et seq.

¹⁷⁰ Cyprus-Serbia BIT, Article 1(1) (CL-001).

¹⁷¹ *PSEG Global Inc., the North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, dated 4 June 2004, paras 184-185, 187 (CL-074).

¹⁷² See *supra* para. 4.

Decision on Jurisdiction

even if one were to assume the Claimant is a protected investor under the BIT (quod non).¹⁷³

112. Thus, while the Respondent accepts the Arbitral Tribunal’s jurisdiction over claims relating to the alleged impairment of the value of the Claimant’s shares in Mera Invest,¹⁷⁴ the Respondent submits that the Arbitral Tribunal lacks jurisdiction *ratione materiae* over any claims that arise from the rights in assets held by the Claimant’s subsidiary Mera Invest.¹⁷⁵
113. The Respondent asserts that according to generally accepted principles and rules of international law, a distinction must be drawn between a shareholder, on the one hand, and the company and the company’s assets, on the other hand.¹⁷⁶ According to the Respondent, the Claimant as a shareholder does not have standing to directly pursue claims concerning the assets of its subsidiary, since, from the Respondent’s perspective, only Mera Invest has standing to pursue such claims.
114. In support of its position, the Respondent argues that the BIT does not expressly allow shareholders to file claims on behalf of their companies.¹⁷⁷ Furthermore, the Respondent cautions that there would be a risk of double recovery in the present case if the Arbitral Tribunal were to allow the Claimant to seek damages over Mera Invest’s assets in addition to the alleged diminution in the value of its shares in Mera Invest.¹⁷⁸

2.2) The Claimant’s position

115. According to the Claimant, the present arbitration concerns the direct and indirect investments made by the Claimant in Serbia. Specifically, the Claimant submits that “the present dispute arises out of:
- Claimant’s 100% share in Mera Invest, *i.e.* direct investments, and
 - Reinvestment of proceeds from the sale of PZP Shares, done in the form of Mera Invest, *i.e.* indirect investments, in particular:
 - o the factoring business;
 - o equity stakes in Craford and Mercuren;
 - o special purpose fixed-term deposits including the term deposit in Univerzal bank Beograd: RSD 220,324,674 and EUR 7,500; and interest proceeds on the amount of RSD 199,924,674 from the deposit account in Univerzal bank Beograd;
 - o shares in Serbian banks;
 - o debt investments into related and non-related entities in Serbia; and

¹⁷³ R-CM para. 339 et seq.; R-JPHB, para. 97 et seq.

¹⁷⁴ R-CM, para. 341; See also R-JPHB, para. 86; Tr. J. I 46:7-15 (Dr. Vladimir Djeric, Counsel for the Respondent).

¹⁷⁵ R-CM para. 339 et seq.; R-JPHB, para. 97 et seq.

¹⁷⁶ R-JPHB, paras 99, 102.

¹⁷⁷ R-CM, para. 346; R-JPHB, para. 103.

¹⁷⁸ R-JPHB, para. 100.

Decision on Jurisdiction

- o various projects developed by Mera Invest, such as the Hotel Project, movie studio, call centre and a construction of five small hydropower plans [sic].”¹⁷⁹

116. The Claimant maintains that the BIT definition of investment certainly covers all of the Claimant’s investments in Serbia, both direct (i.e. shares in a company) and indirect (i.e. the investments made through a local subsidiary).¹⁸⁰ According to the Claimant, this finding flows from the broad definition of investment in Article 1(1) of the BIT; the BIT’s preamble; the alteration of form clause in Article 1(1) of the BIT; and established treaty practice, with other BITs expressly excluding indirect investments from their protections.¹⁸¹
117. In any event, according to the Claimant it does not seek compensation for assets of Mera Invest, but rather seeks compensation for the impairment of its shares in Mera Invest.¹⁸² In the Claimant’s view, the value of its 100% interest in Mera Invest is, by definition, equal to the value of Mera Invest’s assets. Thus, the Claimant submits that any loss suffered by Mera Invest as a result of the Respondent’s measures leads to an equal impairment of the value of the Claimant’s shares.¹⁸³ For the Claimant, the valuation of its equity interest in Mera Invest requires the valuation of Mera Invest, or rather, Mera Invest’s businesses and prospects.¹⁸⁴

2.3) The Arbitral Tribunal’s findings

118. In the present case, the Parties agree that the Arbitral Tribunal has jurisdiction to hear claims concerning the alleged diminution of the value of the Claimant’s shareholding in Mera Invest arising from the measures taken by Serbia against Mera Invest.¹⁸⁵ The Claimant submits that this is “precisely what Claimant claims” and that the Respondent’s qualified jurisdictional objection is based on a misconstruction of the Claimant’s case.¹⁸⁶ It would appear that insofar as the Claimant seeks compensation for the impairment of its shares in Mera Invest, the Parties submit to the Arbitral Tribunal’s jurisdiction and there is no objection to jurisdiction *rationae materiae* for the Arbitral Tribunal to decide.
119. Nonetheless, it may well turn out in the ongoing proceedings on the merits that a distinction between direct and indirect investments may not always be so clear. It is therefore appropriate to address jurisdiction also under this extended aspect. To the extent that the Claimant’s claims may be categorized as claims over the assets of Mera Invest, the Arbitral Tribunal will now address the issue of whether assets held by a company (as opposed to its shares) constitute protected investments

¹⁷⁹ C-RJ, para. 673 (emphasis and citations omitted).

¹⁸⁰ C-RJ, para. 598 et seq.

¹⁸¹ C-RJ, para. 604.

¹⁸² C-RJ, para. 679 et seq.

¹⁸³ C-RJ, para. 680.

¹⁸⁴ C-RJ, para. 690.

¹⁸⁵ R-CM, para. 341-344; C-RJ, para. 679 et seq.

¹⁸⁶ C-RJ, para. 698.

Decision on Jurisdiction

pursuant to the BIT in respect to which an investor that is its shareholder may bring a claim.

120. The BIT determines the question of protected investments. According to Article 9 of the BIT, only “[d]isputes that may arise between one of the Contracting Parties and an investor of the other Contracting Party with regard to an investment in the sense of the present Agreement” are protected.¹⁸⁷ Pursuant to Article 1(1) of the governing BIT, the term investment shall mean:

“every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter and in particular, though not exclusively, shall include:

- a) movable and immovable property and any other rights in rem such as mortgages, liens or pledges;
- b) shares, bonds and other kinds of securities;
- c) claims to money or other claims under contract having an economic value;

[...]

A change in the form in which assets are invested or reinvested shall not affect their character as investments, provided that such a change does not contradict the laws and regulations of the Contracting Party in the territory of which the investments were made.”¹⁸⁸

121. According to the Vienna Convention “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”¹⁸⁹ Due consideration of the preamble to the BIT is relevant to determine the BIT’s object and purpose and the scope of the protected investment.
122. In the present case, the preamble of the BIT states *inter alia* that the contracting parties entered into the BIT with the desire “to create favourable conditions for greater economic cooperation between the Contracting Parties” and “to create and maintain favourable conditions for reciprocal investments”.¹⁹⁰ The Arbitral Tribunal considers this language to support a reading of the BIT, which is a treaty concerning “the Reciprocal Promotion and Protection of Investments”,¹⁹¹ to provide broad investment protection.

¹⁸⁷ Cyprus-Serbia BIT, Article 9 (CL-001).

¹⁸⁸ Cyprus-Serbia BIT, Article 1(1) (CL-001).

¹⁸⁹ Vienna Convention, Article 31(1) (RL-006).

¹⁹⁰ Cyprus-Serbia BIT, Preamble (CL-001).

¹⁹¹ Cyprus-Serbia BIT (CL-001).

Decision on Jurisdiction

123. Tribunals interpreting similarly worded preambles also found that they foster broad investment protection.¹⁹² For instance, in the *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* case, where the preamble of the bilateral agreement between the Swiss Confederation and the Republic of the Philippines confirms that the treaty is intended “to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other”,¹⁹³ the tribunal found that “[i]t is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.”¹⁹⁴
124. Similarly, in the *Telefónica S.A. v. The Argentine Republic* case, where the preamble of the bilateral investment treaty between the Argentine Republic and the Kingdom of Spain states that the parties “intend to establish favorable conditions for the investments carried out by investors of each party in the territory of the other one”,¹⁹⁵ the tribunal found that “[d]isregard of the actual treatment of the company representing the investment, by removing it from the [bilateral investment treaty’s] coverage, would therefore require a restrictive interpretation of the [bilateral investment treaty’s] terms contrary to its object and purpose.”¹⁹⁶
125. The Arbitral Tribunal considers that the object and the purpose of the BIT to protect an investment regardless of the form and change in the form in which the investment is held is also expressly reflected in the text of the BIT. Article 1(1) of the BIT provides that “[a] change in the form in which assets are invested or reinvested shall not affect their character as investments”.¹⁹⁷ Thus, according to the Arbitral Tribunal’s reading of this clause, an investor is free to choose the form of its investment, be it direct or indirect; and to change its form at a later stage, in order to invest or reinvest the proceeds.
126. The BIT also adopts a broad asset-based definition of investment with an open-ended illustrative list of covered assets. The definition of investment is framed in the broadest terms to include “every kind of asset”. The specific categories of investment included in the definition are listed as examples rather than with the purpose of excluding those not mentioned. The definition of investment as provided

¹⁹² *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, dated 29 January 2004, paras 116-117 (CL-120); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, dated 29 April 2004, para. 31 (CL-066).

¹⁹³ The bilateral Agreement of 1997 between the Swiss Confederation and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments, Preamble, cited in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, dated 29 January 2004, paras 116 (CL-120).

¹⁹⁴ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, dated 29 January 2004, paras 116 (CL-120).

¹⁹⁵ Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, Preamble, cited in *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, dated 25 May 2006, para. 77 (CL-119).

¹⁹⁶ *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, dated 25 May 2006, para. 77 (CL-119).

¹⁹⁷ Cyprus-Serbia BIT, Article 1(1) (CL-001).

Decision on Jurisdiction

in the BIT focus on what is to be protected, i.e., “the fruits and values generated by the investment”¹⁹⁸

127. The definition of “investment” contained in Article 1(1) of the BIT is silent as to whether the investor’s ownership over the protected investment, is direct or indirect. There is also nothing in the language of Article 1(1) of the BIT which would preclude a finding that the Claimant can bring a claim in respect to underlying assets of its subsidiary. The fact that the BIT does not expressly anticipate such claims does not suggest that such claims should be excluded.
128. Notably, where the Respondent wished to exclude indirect investment from the scope of protection, it did so with express language in other investment treaties it negotiated. For example, the bilateral Agreement between Serbia and the Government of the Republic of Azerbaijan on the Promotion and Reciprocal Protection of Investments defines investment as “every kind of assets established or acquired *directly* by an investor of one Contracting Party in the state territory of the other Contracting Party [...]”.¹⁹⁹ In the same way, the bilateral Agreement between the Government of the Republic of Turkey and Serbia Concerning the Reciprocal Promotion and Protection of Investments provides that the term investment “shall refer to all *direct* investments made in accordance with the laws and regulations in the territory of the Party where the investments are made”.²⁰⁰
129. It is in fact not unusual that an investor, who wants to make an investment abroad, uses a company as a vehicle, thereby investing in the host country. The tribunal in *EURAM v. Slovak Republic*, in interpreting an equally broad definition of investment,²⁰¹ held that “[t]his is broad language which is quite wide enough to encompass what is today the very common situation of a foreign company making an investment through a subsidiary incorporated in the host State.”²⁰²
130. Other tribunals when faced with the similar issue have supported the principle that where a company is controlled, legally or factually, by a certain shareholder or group of shareholders, the latter may be entitled to a direct claim in respect of the

¹⁹⁸ Abaclat and others (formerly Giovanna a Beccara and others) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, dated 4 August 2011, para. 350 (CL-110) “[...] the definition of investment provided in the [bilateral investment treaty] focuses on what is to be protected, i.e., the fruits and value generated by the investment, whilst the general definitions developed with regard to Article 25 ICSID Convention focus on the contributions, which constitute the investment and create the fruits and value.”

¹⁹⁹ Agreement between Serbia and the Government of the Republic of Azerbaijan on the Promotion and Reciprocal Protection of Investments, Article 1(1) (CL-134) (emphasis added).

²⁰⁰ Agreement between the Government of the Republic of Turkey and Serbia Concerning the Reciprocal Promotion and Protection of Investments, Article 1(2) (CL-175) (emphasis added).

²⁰¹ European American Investment Bank AG (EURAM) v. Slovak Republic, UNCITRAL, PCA Case No. 2010-17, Award on Jurisdiction, dated 22 October 2012, para. 321 (C-158): “The Tribunal is not persuaded, however, that the [bilateral investment treaty] requires that the investor be the direct owner of the asset. Article 1(1) makes no reference to ownership. Rather, it stipulates that ‘the term ‘investment’ shall mean all assets which an investor of one Contracting Party invests in the territory of the other Contracting Party in accordance with its legislation.’”

²⁰² European American Investment Bank AG (EURAM) v. Slovak Republic, UNCITRAL, PCA Case No. 2010-17, Award on Jurisdiction, dated 22 October 2012, para. 321 (CL-158); *See also* Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, dated 28 July 2015, para. 321 (CL-065): “One might pause to interpolate that the practice is not only ‘not unusual’, in the words of the *Sedelmayer* tribunal, but widespread.”

Decision on Jurisdiction

assets of the former.²⁰³ Accordingly, in situations where a shareholder controls the company that owns the assets in issue, tribunals may consider those underlying assets to be the investments of the shareholder.

131. In the *von Pezold v. Zimbabwe* case, the tribunal recognized that “[t]his principle – that where a company is controlled, legally or factually, by a certain shareholder or group of shareholders, the latter may be entitled to a direct claim in respect of the assets of the former – has, as the von Pezold Claimants submit, since gained currency in investment treaty arbitration,” and that there may be instances where an individual who makes his investments through a company might be regarded as a *de facto* investor.²⁰⁴
132. The tribunal in *Azurix v. Argentina* also recognized that “even where a foreign investor is not the actual legal owner of the assets constituting an investment [...] that foreign investor may nonetheless have a financial or other commercial interest in that investment. This is so, irrespective of whether the actual legal owner of the assets [...] is a wholly or partly owned subsidiary of the investor [...]”²⁰⁵ As to the separate legal personalities and legal obligations, the tribunal in *Azurix* confirmed that “[a]n investment protection treaty having this effect does not alter the legal nature of the investor’s interest nor that of the legal owner of the investment, nor does it ignore the separate legal personalities and separate legal rights and obligations of the shareholder and the company. Rather, it merely ensures that whatever interest, legal or otherwise, that the investor does have will be accorded certain protections.”²⁰⁶
133. In the *Telefónica* case, when interpreting a similarly broad “every kind of asset” definition of investment,²⁰⁷ the tribunal held that the investor’s rights were not limited to the mere title to the shareholding in the local subsidiary, but that the tribunal was competent “to entertain claims that measures affecting the legal regime of [the local subsidiary’s] operations have breached [the shareholder’s] rights under the [bilateral investment treaty].”²⁰⁸ The *Telefónica* tribunal found that “in case of an acquisition by an investor of one Contracting Party of the entire capital of a company of the other Party, treaty protection is not limited to the free enjoyment of

²⁰³ Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, dated 28 July 2015, para. 321 (CL-065); Telefónica S.A v. Argentine Republic, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, dated 25 May 2006, para. 76 (CL-119); Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, the Application for Annulment of the Argentine Republic, dated 8 December 2003, para. 108 (CL-156).

²⁰⁴ Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, dated 28 July 2015, para. 321 (CL-065).

²⁰⁵ Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, dated 8 December 2003, para. 108 (CL-156).

²⁰⁶ Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, dated 8 December 2003, para. 108 (CL-156).

²⁰⁷ Telefónica S.A. v. The Argentine Republic, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, dated 25 May 2006, para. 71 (CL-119): “As to the definition, the [bilateral investment treaty] contains in Art.II.1 an all-inclusive definition of ‘Investments’, namely ‘every kind of assets, such as goods and rights of any nature, acquired or made in accordance with the legislation of the host country, and particularly, but not exclusively...’”

²⁰⁸ Telefónica S.A v. Argentine Republic, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, dated 25 May 2006, para. 81 (CL-119).

Decision on Jurisdiction

the shares, that is the exercise of the rights inherent in the position of a shareholder. It also extends to the standards of protection spelled out in the [bilateral investment treaty] with regard to the operation of the local company that constitutes the investment.”²⁰⁹

134. In the present case, the Claimant not only invested in its subsidiary Mera Invest, but also through its wholly owned and controlled subsidiary.²¹⁰ The Respondent’s argument that the Claimant was not required under Serbian law to establish a local company in order to invest,²¹¹ even if accepted, does not change the fact that the Claimant made investments which are eligible for protection by setting up a local company through which it invested in Serbia.²¹² Furthermore, the Arbitral Tribunal is not convinced by the Respondent’s arguments that Mera Invest is not controlled by the Claimant and that the Arbitral Tribunal should by some means look through the Claimant’s entity structure to the ultimate shareholder of the Claimant.²¹³
135. Based on the foregoing, the Arbitral Tribunal finds that the assets held by the local company, Mera Invest, constitute protected investments pursuant to the BIT, in respect to which the Claimant as its shareholder may bring claims not only for the impairment of the value of its shares in its subsidiary, but also for the impairment of its subsidiary’s assets.

3) Whether granting jurisdiction would go against the object and purpose of the BIT?

3.1) The Respondent’s position

136. In its Counter-Memorial, the Respondent argues that not only does the Claimant not meet the jurisdictional requirements imposed by Article 1(3)(b) of the BIT, but that if the Arbitral Tribunal were to grant jurisdiction to the Claimant it would defeat the object and purpose of the BIT.²¹⁴
137. Relying on Article 31(2) of the Vienna Convention,²¹⁵ and language included in the preamble of the BIT,²¹⁶ the Respondent submits that the goal and purpose of the

²⁰⁹ Telefónica S.A v. Argentine Republic, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, dated 25 May 2006, para. 76 (CL-119).

²¹⁰ See *supra* paras 9-11.

²¹¹ R-JPHB, para. 110.

²¹² See *supra* paras 9-11.

²¹³ R-JPHB, para. 111-114; see *infra* III.B.3) and III.B.4).

²¹⁴ R-CM, para. 312 et seq.

²¹⁵ Vienna Convention, Article 31(2) (RL-006): “The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes.”

²¹⁶ Cyprus-Serbia BIT, Preamble (CL-001): “The Republic of Cyprus and Serbia and Montenegro, hereinafter referred to as the Contracting Parties, Desiring to *create favourable conditions for greater economic cooperation between the Contracting Parties*, Desiring to create and maintain favourable conditions for reciprocal investments, Convinced that the promotion and protection of investments will *contribute to the enhancement of entrepreneurial initiative and thereby significantly contribute to development of economic relations between the Contracting Parties*, Have agreed as follows:” (emphasis added).

Decision on Jurisdiction

BIT is the “stimulation of entrepreneurial initiative leading to development of economic relations between Serbia and Cyprus.”²¹⁷

138. The Respondent contends that the Claimant’s activities in no way stimulated entrepreneurial initiatives in Serbia or contributed to a greater economic cooperation between Cyprus and Serbia since, according to the Respondent, the Claimant is fully owned and controlled by Serbian nationals which utilize funds obtained in Serbia for its investment in Serbia.²¹⁸
139. The Respondent submits that “economic cooperation between Serbia and Cyprus [...] can only benefit from investments made in Serbia which have their origin in Cyprus (and *vice versa*)”.²¹⁹ For the Respondent, “[n]o furthering of economic relations between Serbia and Cyprus can occur in a situation where a Serbian national makes an investment into Serbia in a round-trip manner.”²²⁰ The Respondent focuses on the fact that, in its view, “it was the capital of a Serbian businessman which originated from business activities in Serbia that Claimant used to make its investment.”²²¹
140. In addition, the Respondent further argues that the “entire business undertaking that is the subject of these proceedings is an entrepreneurial undertaking of Mr. Miroslav Miskovic, a Serbian businessman” and that there “was absolutely no entrepreneurial involvement of Cypriot nationals in said business undertaking”.²²²
141. The Respondent claims that allowing jurisdiction in this case would be another confirmation that the abuse of bilateral investment treaties is becoming more prevalent, since in the present case the Claimant has no connection to Cyprus and its end-owners are Serbian.²²³ The Respondent cites the *Saluka* case, cautioning against treaty shopping through shell companies.²²⁴

3.2) The Claimant’s position

142. The Claimant submits that the object and purpose of the BIT is to be interpreted with reference to both the full text of the preamble and the text of the BIT, both of which support broad investment protection.²²⁵
143. The Claimant maintains that on a plain reading of the entire preamble, the object and purpose of the BIT is to, first and foremost, “create favorable conditions for investments, and to promote and protect them; in turn, this promotion and protection should then contribute to enhancing entrepreneurial initiative and

²¹⁷ R-CM, para. 314.

²¹⁸ R-CM, para. 314 et seq.

²¹⁹ R-CM, para. 316.

²²⁰ R-CM, para. 316.

²²¹ R-CM, para. 319.

²²² R-CM, para. 323.

²²³ R-CM, para. 321 et seq.

²²⁴ R-CM, para. 322 citing *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 240 (CL-033).

²²⁵ C-RJ, para. 537 et seq.

Decision on Jurisdiction

economic relations.”²²⁶ Furthermore, the Claimant submits that arbitral practice interpreting similar preambles support interpreting the object and purpose of the BIT to provide broad protection of investors and their investments.

144. The Claimant also argues that the BIT does not require that the investor itself contribute to enhancing entrepreneurial initiative and economic relations.²²⁷ For the Claimant, the mentioning of these terms in the preamble of the BIT “was merely the result that the Parties believed [...] might be achieved by their promise to promote and protect investments.”²²⁸
145. According to the Claimant, there is also nothing in the text of the BIT, including its preamble, which would contain any reference or requirement regarding the origin of the funds invested.²²⁹ In the Claimant’s view, introducing such a requirement would be impermissible, and given the BIT’s broad protective purpose, inconsistent with its object and purpose.²³⁰

3.3) The Arbitral Tribunal’s findings

146. As established in the above sections, the Arbitral Tribunal considers the object and purpose of the BIT to be broader than the Respondent contends.²³¹ This understanding is supported by the text of the BIT, including its preamble.²³²
147. The Contracting States of the BIT had complete freedom of choice and they chose to limit treaty protection to those qualifying as investors according to Article 1(3)(b) of the BIT, and investments pursuant to Article 1(1) of the BIT. Although the preamble of the BIT refers to “economic cooperation between the Contracting Parties” and “favourable conditions for reciprocal investments”, the above provisions of the BIT fall silent as to any specific requirements of a stimulation of entrepreneurial initiative or development of economic relations between Contracting States. In addition, the BIT contains no requirement that the capital used by the investor to make its investment originate in the place of the investor, or that such capital not originate from the place of investment. If the Arbitral Tribunal were to now interpret the BIT to include these additional conditions, as the Respondent suggests, it would be disregarding what the Contracting States have expressly agreed. A requirement that the origin of the capital is decisive for the international character of an investment cannot be read into the provisions of the BIT.
148. As elaborated in the *Saluka* case, “the predominant factor which must guide the Tribunal’s exercise of its functions is the terms in which the parties to the Treaty now in question have agreed to establish the Tribunal’s jurisdiction [...] that means

²²⁶ C-RJ, para. 541.

²²⁷ C-RJ, para. 542.

²²⁸ C-RJ, para. 542.

²²⁹ C-RJ, para. 558 et seq.

²³⁰ C-RJ, paras 567, 589 et seq. According to the Claimant, a tribunal may not impose additional requirements into the BIT that the Contracting Parties have not expressly agreed on.

²³¹ See *supra* paras 108 and 122 et seq.

²³² See *supra* paras 108 and 122 et seq.

Decision on Jurisdiction

the terms in which they have agreed upon who is an investor who may become a claimant entitled to invoke the Treaty's arbitration procedures."²³³ Similarly, in *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, the tribunal confirmed that it "cannot in effect impose upon the parties a definition of 'Investment' other than that which the parties to the [treaty], including Respondent, have agreed."²³⁴

149. It is reiterated time and again by investment tribunals that "it is not for tribunals to impose limits on the scope of [bilateral investment treaties] not found in the text, much less limits nowhere evident from the negotiating history. An international tribunal of defined jurisdiction should not reach out to exercise a jurisdiction beyond the borders of the definition. But equally an international tribunal should exercise, and indeed is bound to exercise, the measure of jurisdiction with which it is endowed."²³⁵
150. Thus, in light of the foregoing, the Arbitral Tribunal is reluctant to read into the BIT additional requirements which conflict with its object and purpose and chosen definitions of investor and investment.
151. Furthermore, the Respondent's insinuation that the Claimant has engaged in some sort of treaty shopping fails. As set out above, the Claimant had been incorporated in the Netherlands Antilles in May 2006 and established Mera Invest in September 2008.²³⁶ In November 2008, the Claimant initiated its seat transfer to Cyprus, which was completed by March 2009.²³⁷ In January 2010, the Claimant contributed its remaining 6.59% shareholding in PZP Nis to Mera Invest.²³⁸ Thereafter, Mera Invest purchased shares in Serbian banks, offered fixed-term RSD deposits and made investments into related and non-related Serbian entities.²³⁹ According to the Claimant's case, from early 2013 until the present the Respondent adopted a number of measures against Mera Invest.²⁴⁰
152. On the basis of the foregoing timeline, there cannot be any suspicion of treaty shopping by the Claimant, since the Claimant's decision to move from the Netherlands Antilles to Cyprus was taken in late 2008, and the Respondent's actions which form the basis of the Claimant's case took place four years later. Tribunals have found that an investor will not qualify for the protection of the BIT concerned only if the nationality is changed after the dispute has arisen or "when the relevant

²³³ Saluka Investments B. V. v. The Czech Republic, UNCITRAL, Partial Award, dated 17 March 2006, para. 241 (CL-033).

²³⁴ *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA Case No. 228, Interim Award on Jurisdiction and Admissibility, dated 30 November 2009, para. 488 (CL-153).

²³⁵ *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, dated 29 April 2004, para. 36 (CL-066).

²³⁶ See *supra* paras 3 and 10.

²³⁷ See *supra* para. 4.

²³⁸ See *supra* para. 10.

²³⁹ See *supra* para. 11.

²⁴⁰ C-M, para. 7.

Decision on Jurisdiction

party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy.”²⁴¹ This is not the case here.

153. In any event, even if, as the Respondent suggests, the Claimant’s sole aim had been to seek investment protection, this would in the view of the Arbitral Tribunal still be irrelevant. To structure an investment with the aim to seek protection of a BIT is not per se in breach of the good faith expected of an investor. It is “not uncommon in practice, and – absent a particular limitation – not illegal to locate one’s operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples [sic], of taxation or the substantive law of the jurisdiction, including the availability of a [bilateral investment treaty].”²⁴²
154. To prevent forum shopping, the Respondent could have included a “denial of benefits” provision in the BIT requiring the investing company to have substantive business activities in Cyprus in order to qualify under the BIT. Alternatively, the Contracting States could have insisted that a corporate investor have “real economic activities” in the country in which it is located, as they each did in their respective investment treaties with Iran²⁴³ and Switzerland²⁴⁴. It is not for the Arbitral Tribunal to now insert such restrictions which are absent from the BIT.

4) Whether granting jurisdiction would go against the object and purpose of the ICSID Convention?

4.1) The Respondent’s position

155. In its Preliminary Objections to Jurisdiction, the Respondent argues that the Arbitral Tribunal lacks jurisdiction under Article 25 of the ICSID Convention. According to the Respondent, when assessing jurisdiction “what must first be examined is whether jurisdiction exists under ICSID Convention, and only if it does, would a further analysis be conducted by assessing the provisions contained in the relevant BIT (or a multilateral treaty)”.²⁴⁵
156. In its discussion of the requirements of Article 25 of the ICSID Convention the Respondent looks to what it considers to be the object and purpose of the ICSID Convention. In the Respondent’s view the ICSID Convention “applies to and concerns investments which are of an international character – that is, foreign

²⁴¹ MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award, dated 4 May 2016, para. 182 (CL-075) citing *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, dated 1 June 2012, para 2.99.

²⁴² *Agua del Tunari, S.A. v. Republic of Bolivia*, Decision on Respondent’s Objections to Jurisdiction, dated 21 October 2005, para. 330.d) (CL-076).

²⁴³ Agreement on Reciprocal Promotion and Protection of Investments between Cyprus and the Government of the Islamic Republic of Iran, Article 1(2)(b) which defines corporate investor as “legal persons constituted or incorporated in compliance with the law of that Contracting Party and having their seat together with *real economic activities* in the territory of the same Contracting Party” (RL-057) (emphasis added).

²⁴⁴ Agreement between the Swiss Confederation and Serbia and Montenegro on the Promotion and Reciprocal Protection of Investments, Article 1(2)(b) which defines corporate investor as “legal entities [...], which are constituted or otherwise duly organized under the law of that Contracting Party and have their seat, together with *real economic activities*, in the territory of the same Contracting Party.” (CL-131) (emphasis added).

²⁴⁵ R-POJ, para. 13.

Decision on Jurisdiction

investments made by foreign investors”.²⁴⁶ The Respondent submits that when assessing “whether an investment is of domestic or of foreign character, two elements are crucial – (i) the origin of capital and (ii) effective control of the investment”.²⁴⁷ It is the Respondent’s case that foreign investments must entail the flow of foreign capital into the host state, and that in the present case the invested capital originated in the host state, and therefore does not have foreign character.²⁴⁸

157. In its later pleading, the Respondent submits that the ICSID Convention sets the outer limits to jurisdiction, and while these limits are hard to define, in the absence of explicitly stated criteria, and through a process of interpretation, the object and purpose of the ICISD Convention must be considered.²⁴⁹ According to the Respondent, when defining the outer limits of the ICSID Convention, the criteria espoused by Professor Weil in his dissenting opinion in *Tokios Tokelés v. Ukraine* – control and origin of capital, are both reasonable and understandable, as they are in line with the object and purpose of ICSID Convention.²⁵⁰
158. Relying on the Report of the Executive Directors on the ICSID Convention, the Respondent argues that the object and purpose of ICSID Convention is “to stimulate inter-state partnership in cause of economic development and to stimulate flow of international capital.”²⁵¹ For the Respondent, the ICSID Convention strives to stimulate foreign investments – to incentivize investors from one country to invest their capital in other countries, and does so by establishing a dispute settlement mechanism which is meant to give recourse to foreign investors, as opposed to domestic ones.²⁵²
159. The Respondent claims that regarding the Claimant’s case, the true investor cannot be the Claimant, as it is only an instrumentality of the actual investor, a Serbian national.²⁵³ The Respondent submits that since in the present case the origin of the capital is Serbian, and the effective control over the investment is Serbian, there is no foreign investor or foreign investment as required by the ICSID Convention, and thus the Claimant lacks jurisdiction. Thus, according to the Respondent if the Arbitral Tribunal were to confirm jurisdiction in this case it would go against the object and purpose of the ICSID Convention.
160. The Respondent urges that when assessing its jurisdiction, the Arbitral Tribunal should look at actual relationships, and not formal appearances.²⁵⁴ The Respondent

²⁴⁶ R-POJ, para. 20.

²⁴⁷ R-POJ, para. 21.

²⁴⁸ R-POJ, para. 22 et seq.

²⁴⁹ R-CM, para. 302; 330. Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 *Recueil des cours* 331 (1972-II), p. 361 (RL-011).

²⁵⁰ R-CM, para. 329 et seq.

²⁵¹ R-CM, para. 328.

²⁵² R-CM, para. 328.

²⁵³ R-CM, para. 338.

²⁵⁴ R-CM, para. 336 et seq.

Decision on Jurisdiction

warns that an overly rigid and formal approach to assessing the jurisdictional criteria under the ICSID Convention may open the door to possibility of abuses.²⁵⁵

4.2) The Claimant's position

161. The Claimant submits that all jurisdictional requirements under the ICSID Convention are met.²⁵⁶ According to the Claimant, the Respondent's interpretation of Article 25(2)(b) of the ICSID Convention as limiting (instead of expanding) jurisdiction has been uniformly rejected by doctrine and tribunal practice.²⁵⁷
162. In the Claimant's view, the ICSID Convention does not set forth any requirements for origin of capital or effective control.²⁵⁸ Citing the tribunal in the *Rompetrol* case, the Claimant argues that the criteria espoused by Professor Weil in his dissenting opinion in *Tokios Tokelés* "[have] not been widely approved in the academic and professional literature, or generally adopted by subsequent tribunals", and that "[any] Tribunal would in any case have a great difficulty in an approach that was tantamount to setting aside the clear language agreed upon by the treaty Parties in favour of a wide-ranging policy discussion. Such approach could not be reconciled with Article 31 of the Vienna Convention on the Law of Treaties."²⁵⁹
163. The Claimant also argues that the Respondent's narrow interpretation of the object and purpose of the ICSID Convention "is simply incorrect".²⁶⁰ According to the Claimant, based on the ICSID Convention's preamble and text,²⁶¹ the object and purpose of the convention is to "establish an investor-state dispute settlement center, in an effort to contribute to a favorable investment climate".²⁶² The Claimant argues that the ICSID Convention is not an attempt to develop substantive rules for the protection of private investments, but rather an effort to improve the investment environment by offering a procedural framework for the settlement of disputes.²⁶³
164. According to the Claimant, the ICSID Convention accepts the contracting States freedom to define their own requirements for ICSID jurisdiction, which a tribunal should then defer to.²⁶⁴

²⁵⁵ R-CM, para. 337.

²⁵⁶ C-M, para. 440 et seq.

²⁵⁷ C-CoJ, paras 1, 10 et seq.

²⁵⁸ C-CoJ, paras 3-4, 5 et seq., 9 et seq.; C-RJ, para. 579 et seq.

²⁵⁹ C-CoJ, paras 7-9 and C-RJ, para. 586: quoting *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, dated 18 April 2008, para. 85 (CL-064).

²⁶⁰ C-RJ, para. 570.

²⁶¹ C-RJ, para. 571 citing Vienna Convention on the Law of Treaties, Article 31(2) (RL-006): "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: [...]".

²⁶² C-RJ, para. 571.

²⁶³ C-RJ, para. 573 citing Christoph Schreuer, *Commentary on the ICSID Convention* (2001), p. 5 (CL-111).

²⁶⁴ C-RJ, para. 588.

Decision on Jurisdiction

4.3) The Arbitral Tribunal’s findings

165. The Arbitral Tribunal accepts that based on the preamble²⁶⁵ and text²⁶⁶ of the ICSID Convention, the object of the treaty is to promote economic development through the creation of a favorable investment climate.²⁶⁷
166. Article 25(1) of the ICSID Convention provides that “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre”.²⁶⁸
167. In *Abaclat v. Argentina*, the tribunal clarified that the criteria developed by a number of arbitral tribunals with regard to Article 25 of the ICSID Convention and the definitions of investment contained in bilateral investment treaties often do not coincide because “they can be said to focus each on a different aspect of the investment, i.e., they each look at the investment from a different perspective.”²⁶⁹ The *Abaclat* tribunal went on to state that “[t]he two perspectives can be viewed to be complementary, and to merely reflect a two-folded approach of the [bilateral investment treaty]and the ICSID Convention towards investment: At first, it is about encouraging investments, i.e., creating the frame conditions to encourage foreign investors to make certain contributions, and once such contributions are made, it is about protecting the fruits and value generated by these contributions.”²⁷⁰
168. Article 25 of the ICSID Convention is silent on definitions of several key terms – including what is to be understood by investor and investment. Indeed, contracting parties are given the widest possible latitude to determine the extent of their consent to ICSID jurisdiction. Undeniably, the “[c]onsent of the parties is the cornerstone of the jurisdiction of the Center”.²⁷¹
169. If the Arbitral Tribunal were to accept the Respondent’s arguments that the ICSID Convention sets the outer limits of jurisdiction, and that such outer limits should be

²⁶⁵ ICSID Convention, Preamble: “[c]onsidering the need for international cooperation for economic development, and the role of private international investment therein; [b]earing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States [...]; [a]ttaching particular importance to the availability of facilities for international conciliation or arbitration [...]; [d]esiring to establish such facilities [...]”.

²⁶⁶ ICSID Convention, Article 1(2) of the ICSID Convention states that “The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes [...]”.

²⁶⁷ Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, (2nd Edition, Oxford 2012) p. 238 (CL-165): “The aim of the ICSID Convention, as expressed in its Preamble, is to promote economic development through the creation of a favourable investment climate.”; Christoph Schreuer, *Commentary on the ICSID Convention* (2001), p. 5 (CL-111): “The Convention does not attempt to develop substantive rules for the protection of private international investments [...]. It contributes to the improvement of the investment climate by offering a procedural framework for the settlement of disputes”.

²⁶⁸ ICSID Convention, Article 25 (CL-004).

²⁶⁹ *Abaclat and others (formerly Giovanna a Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, dated 4 August 2011, 349 (CL-110).

²⁷⁰ *Abaclat and others (formerly Giovanna a Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, dated 4 August 2011, 349 (CL-110).

²⁷¹ ICSID Convention, Regulations and Rules, Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, para. 23 (CL-004).

Decision on Jurisdiction

understood to contain requirements pertaining to the origin of capital and effective control of the investment, the Arbitral Tribunal would override the Contracting Parties' explicit choice on how to define the nationality of an investor and the scope of investments covered under the BIT. The Arbitral Tribunal is reluctant to do so.

170. In the Arbitral Tribunal's view, the ICSID Convention contains no requirement that the capital used by the investor to make its investment originate from the place of the investor, or that such capital cannot originate from the place of investment.
171. Other ICSID tribunals have come to a similar finding. Notably, the majority in *Tokios Tokelés* found that "the ICSID Convention does not require an 'investment' to be financed from capital of any particular origin" and that "the origin of the capital used to acquire [the] assets is not relevant to the question of jurisdiction under the Convention."²⁷² The tribunal in *Tokios Tokelés* goes on to further state that "the ICSID Convention contains no inchoate requirement that the investment at issue in a dispute have an international character in which the origin of the capital is decisive."²⁷³
172. Similarly, the tribunal in *von Pezold* also confirmed that "[t]here is no origin of capital requirement in the [bilateral investment treaties] or under the ICSID Convention."²⁷⁴ As did, the tribunal in the *Lemire v. Ukraine* case "[...] neither the [bilateral investment treaty] nor the ICSID Convention includes an origin-of-capital requirement. Nor is such a requirement to be inferred from the purposes of the [bilateral investment treaty] and/or the ICSID Convention."²⁷⁵
173. In addition, foreign effective control of the investment is not a criterion provided for under the ICSID Convention to determine nationality. There is no basis in the ICSID Convention to set aside the agreed definition of nationality contained in Article 1(3) of the BIT, in favor of a test based on the nationality of the ultimate beneficiary of the Claimant.²⁷⁶
174. When faced with a similar question, the ICSID tribunal in *Caratube v. Kazakhstan* came to the same finding. The tribunal held that "[t]here can be no dispute that the wording of Article 25(2)(b) of the ICSID Convention does not specify the required form and extent of foreign control and, more specifically, does not expressly require actual, effective control, rather than legal control."²⁷⁷

²⁷² Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, dated 29 April 2004, para. 81 (CL-066).

²⁷³ Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, dated 29 April 2004, paras 82 (CL-066).

²⁷⁴ Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, dated 28 July 2015, para. 288 (CL-065).

²⁷⁵ Joseph C. Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, dated 14 January 2010, para. 56 (CL-015).

²⁷⁶ Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, dated 29 April 2004, para. 52 (CL-066): "no basis in the [bilateral investment treaty] or the Convention to set aside the Contracting Parties' agreed definition of corporate nationality with respect to investors of either party in favor of a test based on the nationality of the controlling shareholders".

²⁷⁷ Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Award, dated 27 September 2017, para. 615 (CL-068).

Decision on Jurisdiction

175. The tribunal in the *Tokios Tokelés* case found that “[t]he use of a control-test to define the nationality of a corporation to restrict the jurisdiction of the Centre would be inconsistent with the object and purpose of Article 25(2)(b) [...] the purpose of the control-test in the second portion of Article 25(2)(b) is to *expand* the jurisdiction of the Centre.”²⁷⁸ The tribunal in *Tokios Tokelés* went on to state that “Article 25(2)(b) does not mandatorily constrict ICSID jurisdiction for disputes arising in the inverse context from the one envisaged by this provision: a dispute between a Contracting Party and an entity of another Contracting Party that is controlled by nationals of the respondent Contracting Party”.²⁷⁹ Similarly, the tribunal in *Wena Hotels v. Egypt* found that “the literature rather convincingly demonstrates” that Article 25(2)(b) of the ICSID Convention is meant to expand ICSID jurisdiction.²⁸⁰
176. Based on the foregoing, in the Arbitral Tribunal’s view, accepting jurisdiction in the present case would not go against the object and purpose of the ICSID Convention. The Arbitral Tribunal is of the opinion that its interpretation of the BIT, and more specifically what is to be understood as investor and investment, are compatible with the ICSID Convention. The ICSID Convention has set the frame conditions to encourage foreign investors to make certain contributions, and the BIT in question sets out the protection of the fruits and values generated by these contributions.²⁸¹

C. Costs

1) The Respondent’s costs

177. The Respondent submits that its costs for these arbitration proceedings so far total EUR 451’389.41 and USD 350’000, which it breaks down into the following categories of costs:²⁸²

Legal fees of the Counsel for the Respondent	EUR 362’346.78
Expert Witness’ fees	EUR 77’971.55
Translation and Administrative expenses	EUR 1’660.52
Travel, accommodation and related expenses	EUR 9’410.56
Costs of proceedings	USD 350’000.00

178. The Respondent requests that the Arbitral Tribunal award the entirety of the costs the Respondent incurred in these proceedings, should the Arbitral Tribunal accept

²⁷⁸ *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, dated 29 April 2004, para. 46 (CL-066) (emphasis in original).

²⁷⁹ *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, dated 29 April 2004, para. 51 (CL-066).

²⁸⁰ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Minutes of 25 May 1999, p. 888 (CL-067).

²⁸¹ *Abaclat and others (formerly Giovanna a Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, dated 4 August 2011, para. 349 (CL-110).

²⁸² R-JCS, para. 4.

Decision on Jurisdiction

the Respondent's request for relief and determine that it does not have the jurisdiction to resolve the present dispute.²⁸³

2) The Claimant's costs

179. The Claimant submits that its costs for the merits phase of the proceedings so far total EUR 699'995.04 and USD 150'000.²⁸⁴ The Claimant excludes from its calculation of the costs arising in the merits phase of the proceedings costs related to the Respondent's jurisdictional objections as raised in its Counter Memorial dated 31 March 2018 and the subsequent bifurcation of proceedings. As for the jurisdictional phase of the proceedings, the Claimant submits that it is incurred costs totaling EUR 786'569.05 and USD 200'000.²⁸⁵ Taken together, the Claimant submits that its total costs amount to EUR 1'486'564.09 and USD 350'000.²⁸⁶

180. The Claimant's total costs can be categorized as follows:²⁸⁷

Legal Fees	EUR 1'108'089.66
Expert Fees	EUR 300'962.70
Other Expenses (incl. accommodation, translations, etc.)	EUR 77'511.73
Advances on costs	USD 350'000.00

181. The Claimant's total costs for the jurisdictional phase of the proceedings can be summarized as follows:²⁸⁸

Legal Fees	EUR 669'841.65
Expert Fees	EUR 64'196.79
Other Expenses (incl. accommodation, translations, etc.)	EUR 52'530.61
Advances on costs	USD 200'000.00

182. The Claimant submits that its costs were largely avoidable and primarily caused by the Respondent's conduct in these proceedings.²⁸⁹ As such, the Claimant requests that the Arbitral Tribunal order the Respondent "to pay for all associated costs in its Decision on Jurisdiction" or *in eventum* "to pay for all associated costs in its Final Award".²⁹⁰

²⁸³ R-JCS, p.3.

²⁸⁴ C-JCS, para. 6.

²⁸⁵ C-JCS, para. 6.

²⁸⁶ C-JCS, para. 6.

²⁸⁷ C-JCS, para. 6.

²⁸⁸ C-JCS, para. 6.

²⁸⁹ C-JCS, para. 11.

²⁹⁰ C-JCS, para. 13.

Decision on Jurisdiction

3) The Arbitral Tribunal's findings

183. Article 61(2) of the ICSID Convention prescribes that “[i]n 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.”²⁹¹
184. ICSID Rule 28(1)(b) gives arbitral tribunals the authority to decide “with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.”²⁹²
185. The Arbitral Tribunal has decided to defer its decision on the awarding of costs having arisen in the proceedings so far until the Arbitral Tribunal's final ruling on the merits.

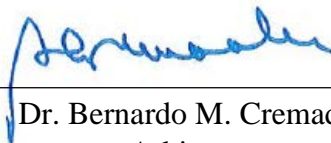
IV. DECISION

For the reasons set forth above

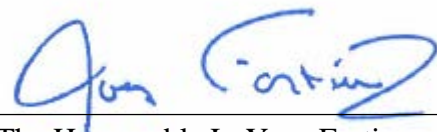
1. The jurisdictional objections of the Respondent are dismissed.
2. The Tribunal has jurisdiction over the dispute submitted to it in this arbitration.
3. The decision on costs is deferred to the second phase of the arbitration on the merits.

Place of the Arbitration: Paris France

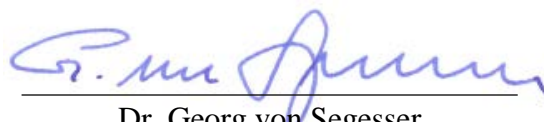
The Arbitral Tribunal



Dr. Bernardo M. Cremades
Arbitrator



The Honourable L. Yves Fortier
P.C., C.C., Q.C.
Arbitrator



Dr. Georg von Segesser
President of the Tribunal

²⁹¹ ICSID Convention, Article 61(2) (CL-004).

²⁹² ICSID Rule 28(1)(b) (CL-004).