EXCERPT PURSUANT TO ICSID ARBITRATION RULE 48(4)
WITH ADDITIONAL REDACTIONS BY THE RESPONDENT

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

CYPRUS POPULAR BANK PUBLIC CO. LTD.

Claimant

and

HELLENIC REPUBLIC

Respondent

ICSID Case No. ARB/14/16

AWARD

Members of the Tribunal
Prof. Juan Fernández-Armesto, President
Prof. Philippe Sands, Arbitrator
Prof. Giorgio Sacerdoti, Arbitrator

Secretary of the Tribunal
Ms. Martina Polasek

Assistant to the Tribunal
Mr. Edward J. Thorn

Date of dispatch to the Parties: 15 April 2021

REPRESENTATION OF THE PARTIES

Representing Cyprus Popular Bank Public Co. Ltd.:	*Representing the Hellenic Republic*:
Mr. Joe Hage Mr. Daniel Margolin QC Mr. Richard Kiddell Mr. John Marjason-Stamp Ms. Lucy Needle Joseph Hage Aaronson LLP 7th Floor 280 High Holborn London WC1V 7EE United Kingdom and Mr. Nicos Markides Markides, Markides & Co LLC Markides House 1-1A Heroes Street Nicosia 1703 Republic of Cyprus	Ms. Styliani Charitaki Ms. Maria Vlassi Member of the Legal Council of the State Ministry of Finance Kar. Servias 10 101 84 Athens Hellenic Republic and Ms. Emmanuela Panopoulou Member of the Legal Council of the State General Accounting Office Amerikis 6 106 71 Athens Hellenic Republic and Mr. Christopher Moore Cleary Gottlieb Steen & Hamilton LLP 2 London Wall Place London EC2Y 5AU United Kingdom and Dr. Claudia Annacker Dechert LLP 32 rue de Monceau 75008 Paris French Republic

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GLOSSARY OF TERMS AND ABBREVIATIONS

Art(s).	Article(s)
BIT or **Treaty**	Agreement between the Government of the Republic of Cyprus and the Government of the Hellenic Republic on the Mutual Promotion and Protection of Investments dated 30 March 1992
CBofC	Central Bank of Cyprus
[redacted]	[redacted]
C-CS I	Claimant's First Submission on Costs
C-CS II	Claimant's Second Submission on Costs
Claimant or **Laiki**	Cyprus Popular Bank Public Co. Ltd.
C-MQ	Claimant's Memorial on Quantum
[redacted]	Expert reports of [redacted] dated 23 September 2019
C-PHB	Claimant's Post-Hearing Brief
Decision	Decision on Jurisdiction and Liability of the Arbitral Tribunal, dated 8 January 2019
DCF	Discounted cash flow
ECB	European Central Bank
[redacted]	[redacted]
EUR	Euro
FET	Fair and Equitable Treatment
Fn.	Footnote
[redacted]	[redacted]
HQ-x	Quantum demonstrative exhibit
[redacted]	[redacted]
ICSID or **Centre**	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966
ILC Articles	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts
Loss 1	Laiki's first head of loss
Loss 2	Laiki's second head of loss
Loss 3	Laiki's third head of loss
[redacted]	[redacted]
[redacted] **III**	Third expert report of [redacted] dated 17 May 2019
P(p).	Page(s)
[redacted] **III**	Third Witness Statement of [redacted]
Parties	Claimant and Respondent
P/B	Price-to-Book
PCIJ	Permanent Court of International Justice
[redacted] **Adverse Scenario**	Adverse macroeconomic scenario estimated by [redacted]
[redacted] **Base Scenario**	Base macroeconomic scenario estimated by [redacted]
[redacted]	[redacted]
QHT, Day x, p. x, l. x	Quantum Hearing Transcript, Day, page, line
R-CS I	Respondent's First Cost Submission
R-CS II	Respondent's Second Cost Submission
R-MQ	Respondent's Counter-Memorial on Quantum

R-PHB	Respondent's Post-Hearing Brief
Respondent or **Greece**	The Hellenic Republic
[redacted]	[redacted]
[redacted] **III**	Third Witness Statement of [redacted]
[redacted]	[redacted]

I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ["**ICSID**" or the "**Centre**"] on the basis of the Agreement between the Government of the Republic of Cyprus and the Government of the Hellenic Republic on the Mutual Promotion and Protection of Investments dated 30 March 1992 [the "**Greece-Cyprus BIT**" or "**BIT**"] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 [the "**ICSID Convention**"].

2. The Claimant is Cyprus Popular Bank Public Co. Ltd. ["**Laiki**" or "**Claimant**"], a company established under the laws of the Republic of Cyprus, and under special administration, as the Special Administrator of Laiki.

3. The Respondent is the Hellenic Republic [the "**Respondent**" or "**Greece**"].

4. The Claimant and Respondent are hereinafter collectively referred to as the "**Parties**". The Parties' representatives are listed above on page (ii).

II. PROCEDURAL HISTORY

5. The request for arbitration in this case was submitted on 23 June 2014 and registered on 16 July 2014. The Arbitral Tribunal, composed of Prof. Juan Fernández-Armesto, a national of Spain (appointed by the Parties); Prof. Giorgio Sacerdoti, a national of Italy (appointed by the Claimant); and Prof. Philippe Sands Q.C., a national of the U.K., France and Mauritius (appointed by the Respondent) [the "**Tribunal**"], was constituted on 16 October 2014.

6. On 8 April 2016 the Tribunal issued Procedural Order No. 3 laying out the Tribunal's decision to bifurcate the proceedings into two phases. Phase 1 would involve all issues relating to jurisdiction, competence, admissibility, and liability. Phase 2 would follow (if applicable), where all issues regarding quantification of damages, interest and costs, and any other outstanding issues not adjudicated in Phase 1 would be decided and formalized in an award also incorporating the Tribunal's decisions in Phase 1.

7. On 8 January 2019 the Tribunal issued the Decision on Jurisdiction and Liability [the "**Decision**"], by which it ruled as follows:

> "1535. For the reasons set out above, the Tribunal unanimously rules as follows:
>
> (1) Dismisses the jurisdictional and admissibility arguments of Respondent in respect of the Inter-State Dispute Objection, Transfer of Claims Objection, EU Law Incompatibility Objection and Amicable Settlement Requirement Objection;
>
> (2) Upholds the jurisdictional and admissibility arguments of Respondent in respect of the EU Law Claims and Human Rights Objection;
>
> (3) Decides that the Centre has jurisdiction and the Tribunal is competent to adjudicate the claims put forward by Claimant in respect of the Debt Exchange Claim, [redacted], [redacted] and the Composite Breach Claim;
>
> (4) Decides that Respondent, [redacted], has violated its obligations under Articles 2 and 3 of the BIT.
>
> (5) Dismisses all other Claims put forward by Claimant.
>
> (6) Decides to proceed to determine the consequences that follow from the violation of Articles 2 and 3 of the BIT identified at paragraph 4 above, including the measure and quantum of damages that are to be paid, if any, in accordance with Procedural Order No. 3; and
>
> (7) Reserves its decision on the costs of the proceedings."

8. The Decision, including the procedural history leading up to the date it was issued, is incorporated into and forms integral part of the present Award (*see* Annex). Terms defined in the Decision shall have the same meaning when used in this Award.

9. Together with the issuance of the Decision, the Tribunal invited the Parties to consult regarding the continuation of the procedure and to file a joint proposal by 29 January 2019[1]. The time limit was subsequently extended to 8 February 2019[2].

10. On 22 January 2019, Respondent informed the Tribunal that the Contracting Parties to the BIT and twenty other EU Member States had on 15 January 2019 signed a "Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgement of the Court of Justice in *Achmea* and on Investment Protection in the European Union", pursuant to which the arbitration clause in Art. 9 of the BIT "is contrary to European Union law, and thus inapplicable." Respondent attached the Declaration and stated that the Tribunal lacked jurisdiction but did not make any application.

11. On 8 February 2019, the Parties filed a joint proposal concerning a procedural calendar for the quantum phase of the proceeding, which would conclude with a hearing in September/October 2020. On 11 February 2020, the Tribunal proposed a telephone conference with the Parties to discuss the duration of the written part of the proceeding on quantum.

12. During the conference call on 26 February 2019, the Tribunal and the Parties agreed on a shorter procedural timetable for the second phase of the proceeding. It was agreed that the hearing on quantum would be held on 16-17 April 2020 in Zurich. The President of the Tribunal also notified the Parties that Mr. Aragón Barrero would be replaced by Ms. Bianca McDonnel as Assistant to the Tribunal. This was approved by the Parties. The Parties' agreements were recorded in Procedural Order No. 8 dated 20 March 2019, which appended the procedural calendar on quantum. The Parties and the Tribunal subsequently revised the hearing dates to 6-7 April 2020 due to the Orthodox holidays.

13. On 5 May 2019, Respondent submitted a "Joint Information Note" executed by the Hellenic Republic and the Republic of Cyprus pursuant to Section 2 of the Declaration of 15 January 2019. The Joint Information Note stated that the investor-State arbitration clause in Art. 9 of the BIT was inapplicable and that the Tribunal therefore lacked jurisdiction.

14. Further to the Tribunal's invitation, Claimant commented on the Joint Information Note by letter of 20 May 2020, stating that the Tribunal addressed its jurisdiction under the BIT, including the EU Law objection, in the Decision, and that these matters should not be reopened. The Tribunal acknowledged receipt of the Joint Information Note and Claimant's response.

15. In accordance with the Parties' agreed procedural calendar, on 17 May 2019, Claimant submitted its Memorial on Quantum ["**C-MQ**"], including a third witness statement of [redacted] ["[redacted] **III**"], a third expert report of [redacted] ["[redacted] **III**"], and Exhibits C-290 – C-294. On the same date, Claimant submitted requests for the production of documents.

[1] ICSID Letter of 8 January 2019, p. 2.
[2] ICSID Email of 17 January 2019.

16. On 23 September 2019, Respondent submitted its Counter-Memorial on Quantum ["**R-MQ**"], together with the third witness statement of [redacted] ["[redacted] **III**"], the expert report of [redacted] ["[redacted]"] and Exhibits R-423 – R-441. The Respondent also submitted a request for production of documents.

17. Following the Parties' exchanges on document production, on 18 November 2019, the Tribunal issued a decision on the Parties' respective requests for production of documents and reminded them of the 13 December 2019 deadline for production.

18. On 13 December 2019, Respondent submitted two affidavits signed by its legal counsellor and external counsel respectively, detailing full compliance with the rules for document production as set out in paragraph 45 of Procedural Order No. 3. On 16 December 2019, Claimant submitted two similar affidavits signed by its Special Administrator and external legal counsel respectively. The Parties were subsequently invited to indicate whether they would like to hold a case management conference. The Parties confirmed that such conference was not necessary.

19. By email of 3 March 2020, the Parties were notified that Ms. Bianca McDonnell had ceased to act as the Assistant to the Tribunal.

20. On 4 March 2020, the Tribunal enquired with the Parties whether they had any concern in relation to the upcoming hearing in view of the COVID-19 spread.

21. On 9 March 2020, the Parties exchanged notifications about the witnesses and experts that they wished to call for cross-examination at the hearing on quantum.

22. By joint letter of 12 March 2020, due to the COVID-19 pandemic, the Parties requested an adjournment of the hearing until after 1 June 2020. The Tribunal confirmed that it would cancel the arrangements in Zurich and revert about rescheduling.

23. On 9 April 2020, Respondent requested an in-person hearing in London in September 2020, or alternatively to forego a hearing and submit additional written submissions. Claimant responded that it would consider a hearing in September in London but was not prepared to forego a hearing altogether.

24. On 14 April 2020, the President of the Tribunal requested the Parties' approval to appoint Mr. Edward J. Thorn as the new Assistant to the Tribunal. The Parties subsequently approved Mr. Thorn's appointment by emails of 15 April 2020 (Claimant) and 16 April 2020 (Respondent).

25. The Tribunal and the Parties held a case management conference on 21 April 2020 to discuss the hearing. On the same date, the Tribunal issued directions that the hearing would be held on 20 and 21 July 2020 by virtual means. The Parties were further invited to submit documents to the Tribunal which they had produced in the last document production exercise and wanted to introduce into the record.

26. On 25 April 2020, the Respondent raised concerns about a virtual hearing and requested to hold a hearing in person on 3-4 September 2020. Following the Tribunal's invitation, Claimant responded that its expert was not available on the proposed dates and stated that it could not see any compelling reason to alter the

20-21 July 2020 hearing dates. Respondent filed a further response claiming there was no guarantee that every participant in the virtual hearing would have the ability to participate meaningfully and effectively, and that conducting the Hearing via videoconference would be more difficult generally.

27. On 11 May 2020, the Tribunal issued Procedural Order No. 9 deciding to proceed with the hearing on 20-21 July by virtual means. The Tribunal found that postponing the hearing in the hope that it may be held in person was too uncertain in the circumstances, and that it would cause unnecessary delay if the hearing in any event would need to be held by virtual means. Noting Respondent's concerns that its representatives in Greece would not be able to participate meaningfully, the Tribunal was not convinced that the technological difficulties could not be overcome and suggested that they liaise with the ICSID Secretariat regarding necessary equipment and testing. The Tribunal also noted that there were no major concerns with regard to the time difference, as all participants would be sitting in Europe. Finally, the Tribunal noted that nothing in the ICSID Rules or the BIT prevented the Tribunal from holding a virtual hearing. It directed the Parties to confer amongst themselves and with their experts and witnesses regarding the preferred modalities for any cross-examination and presentation of demonstrative exhibits and evidence.

28. Further to the Tribunal's invitation, by email of 13 May 2020, Respondent indicated that it was not in position to agree to the publication of the Decision on Jurisdiction and Liability of 8 January 2019 and requested to defer the matter of publication until after the rendering of the Award.

29. On 8 June 2020, the Tribunal issued Procedural Order No. 10 setting out the Parties' agreements on the organization of the Hearing, as approved by the Tribunal. In accordance with the Order, the Parties subsequently agreed on a tentative hearing schedule, transmitted to the Tribunal on 13 July 2020.

30. The ICSID Secretariat held video conference tests with each Party on 18 and 21 May and 10 and 14 July 2020. Further tests with all participants were held on 13 and 15 July 2020.

31. A draft Remote Hearing Protocol was distributed to the Parties for comments on 15 July 2020 and adopted on 17 July 2020.

32. The Hearing on Quantum was held on 20-21 July 2020. The following persons participated remotely:

Tribunal:	
Prof. Juan Fernández-Armesto	President
Prof. Philippe Sands	Arbitrator
Prof. Giorgio Sacerdoti	Arbitrator
ICSID Secretariat:	
Ms. Martina Polasek	Secretary of the Tribunal
Ms. Phoebe Ngan	Paralegal

Assistant to the Tribunal

Mr. Edward J. Thorn	Assistant to the Tribunal

For the Claimant:

Mr. Daniel Margolin QC	Joseph Hage Aaronson LLP
Mr. Richard Kiddell	Joseph Hage Aaronson LLP
Mr. John Marjason-Stamp	Joseph Hage Aaronson LLP
Ms. Lucy Needle	Joseph Hage Aaronson LLP
Mr. Nicos Makrides	Markides, Markides & Co. LLC
Mr. Cleovoulos T. Alexandrou	Cyprus Popular Bank Public Co. Ltd
[redacted]	[redacted]

For the Respondent:

Ms. Styliani Charitaki	Legal Council of the State, Hellenic Republic
Ms. Emmanouela Panopoulou	Legal Council of the State, Hellenic Republic
Ms. Maria Vlassi	Legal Council of the State, Hellenic Republic
Dr. Claudia Annacker	Cleary Gottlieb Steen & Hamilton LLP
Mr. Christopher Moore	Cleary Gottlieb Steen & Hamilton LLP
Dr. Enikö Horváth	Cleary Gottlieb Steen & Hamilton LLP
Mr. Paul Kleist	Cleary Gottlieb Steen & Hamilton LLP
Ms. Robert Garden	Cleary Gottlieb Steen & Hamilton LLP
Mr. Alexandru Diaconu	Cleary Gottlieb Steen & Hamilton LLP
[redacted]	[redacted]

Court Reporter:

Mr. Trevor McGowan	English Court Reporter

33. During the Hearing, the following persons were examined:

On behalf of the Claimant:

[redacted]

On behalf of the Respondent:

[redacted]

34. A verbatim transcript was made of the Hearing and distributed to the Parties. The Parties transmitted agreed corrections to the transcript on 3 August 2020. The corrections were incorporated into the transcript and the final transcript was circulated on 2 September 2020.

35. In accordance with Procedural Order No. 10, the Parties filed Post-Hearing Briefs ["**C-PHB**" and "**R-PHB**"] on 25 September 2020 and Submissions on Costs on 9 October 2020.

36. By letter of 9 October 2020, Claimant stated that Respondent's Post-Hearing Brief contained a new argument. Respondent replied by letter of 12 October 2020. The Tribunal acknowledged receipt of the communications.

37. The proceeding was declared closed in accordance with ICSID Arbitration Rule 38(1) on 23 March 2021.

38. The present Award decides on the quantification of damages and interest of the claims over which the Tribunal has decided it has jurisdiction, namely points (4), (6) and (7) of paragraph 1535 of the Decision as reproduced at paragraph 7 hereabove. The Award also decides on costs.

III. REQUEST FOR RELIEF

1. CLAIMANT'S REQUEST FOR RELIEF

39. In its Memorial on Quantum Claimant requests an award granting the following relief[3]:

> "58.1 Compensation in the amount necessary to make Laiki whole, for all losses Laiki has suffered as a result of Greece's violation of Articles 2 and 3 of the Treaty;
>
> 58.2 An award of all costs Laiki has incurred in bringing the claims in this arbitration, including but not limited to the arbitrators' fees and expenses, and those of legal counsel, experts, consultants and Laiki's own staff; and
>
> 58.3 An award of pre-award and post-award interest the rate of EURIBOR plus 2% per annum on the amount awarded, to be compounded annually until the date damages are paid."

40. In Claimant's Post-Hearing Brief on Quantum, Claimant states that[4]:

> "Laiki therefore seeks an award of compensation in the amount necessary to make Laiki whole in respect of all the losses which Laiki has suffered as a result of Greece's violation of Articles 2 and 3 of the Treaty and as set out in the Memorial on Quantum, with compound interest so as to ensure that Laiki receives full reparation."

2. RESPONDENT'S REQUEST FOR RELIEF

41. In its Counter-Memorial on Quantum Respondent requests the Tribunal to[5]:

> "(a) Reject Claimant's damages for Losses 1, 2 and 3;
>
> (b) Order Claimant to pay to the Hellenic Republic the full costs of the quantum phase of this arbitration, including, without limitation, arbitrators' fees and expenses, administrative costs, counsel fees, expenses and any other costs associated with this arbitration;
>
> (c) Order Claimant to pay to the Hellenic Republic interest on the amounts awarded under (b) above until the date of full payment; and
>
> (d) Grant any further relief to the Hellenic Republic as it may deem appropriate."

[3] C-MQ, para. 58.
[4] C-PHB, para. 77.
[5] R-MQ, para. 264.

IV. POSITION OF THE PARTIES

42. In its Decision, the Tribunal decided that [redacted] ith the consequence that the Hellenic Republic, [redacted], incurred in a breach of Arts. 2(2) and 3(1) of the BIT[6].

43. Therefore, the Tribunal decided to determine in the second phase of the procedure the consequences that follow from the violation of such provisions of the BIT, including the measure and quantum of damages that are to be paid, if any[7].

44. [redacted]

- [redacted]
- [redacted]
- [redacted]

45. [redacted]

46. The Tribunal will summarize the Parties' positions (**IV.1** and **IV.2**) and then will adopt its decision (**V**).

[6] Decision, para. 1345.
[7] Decision, para. 1535(6).
[redacted]

IV.1. POSITION OF CLAIMANT

1. APPLICABLE STANDARD OF COMPENSATION

Full reparation

47. Laiki argues that, in the absence of specific remedies for breach of Arts. 2 and 3 of the BIT, the applicable standard of compensation is that of "full reparation"[11]. When reparation in kind is not possible, it is appropriate to award monetary damages equivalent to full restitution or reparation[12]. According to Claimant, the Tribunal has a wide discretion to award a reasonably approximate compensation in cases such as the present one[13].

Burden of proof

48. Laiki avers that in counterfactual exercises there is usually an absence of evidence regarding precisely how events would have unfolded had the State not breached its obligations. Laiki finds that Greece is responsible for Laiki's difficulties in proving its losses and should not be permitted to escape liability. Greece cannot be permitted to rely on its own wrongdoing to prevent effective counterfactual scenarios being developed. Therefore, Laiki suggests that the burden of proof must shift to Greece to demonstrate why Laiki's arguments about what would, or might, have happened are incorrect[14].

Loss of opportunity

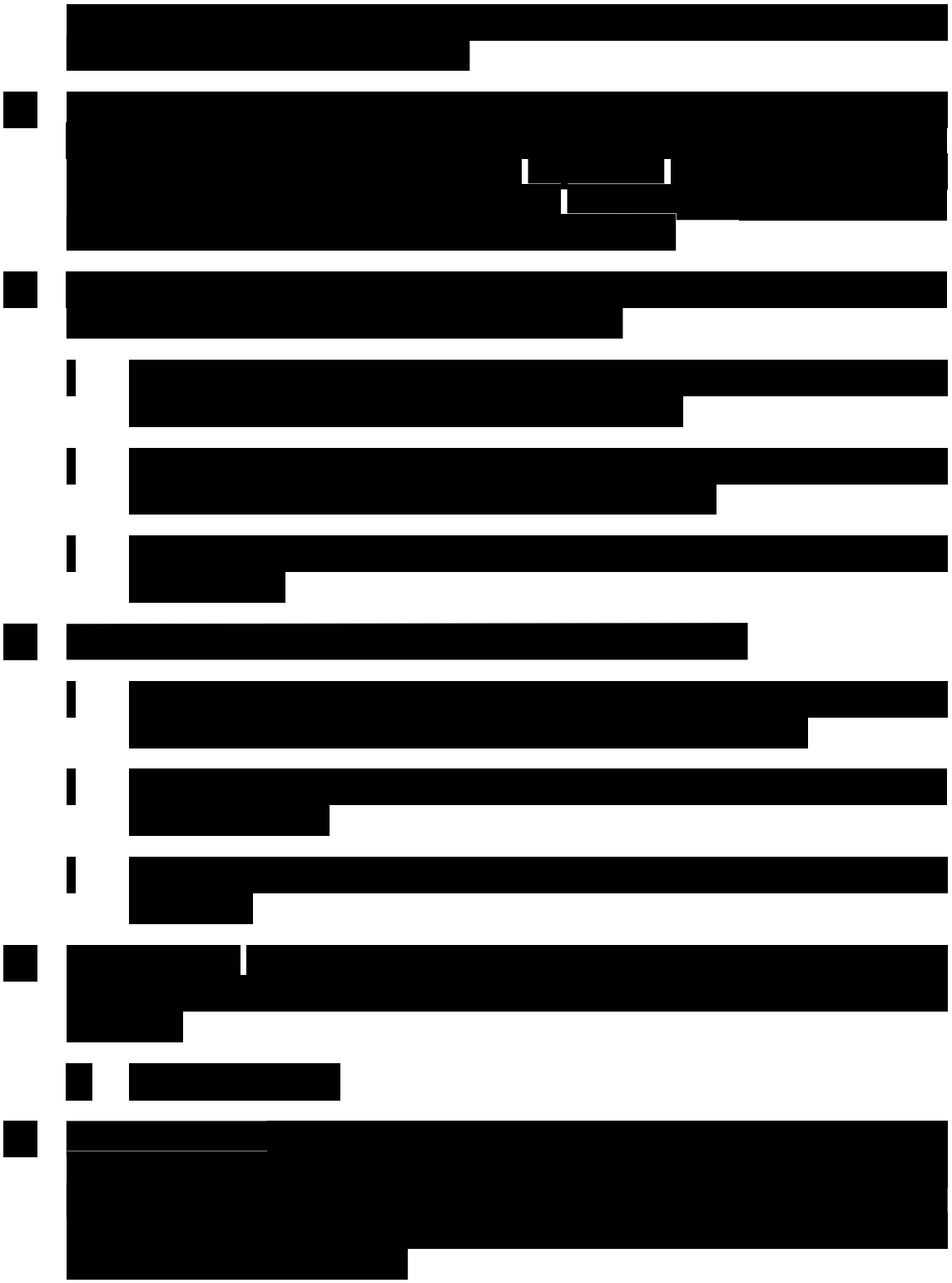
49. In any case, [redacted]
Contrary to Respondent's position, Laiki argues that loss of opportunity claims are not about "absolute certainty" but about "reasonable certainty" or "sufficient certainty", and there is no basis for restricting them to claims for lost profits as Respondent appears to contend[16].

2. CLAIMANT'S HEADS OF LOSS

[redacted]

[11] C-MQ, paras. 7-10; C-PHB, para. 11.1; HQ-1, slide 9.
[12] C-MQ, paras. 12-13.
[13] C-MQ, paras. 14-16; C-PHB, para. 11.1; HQ-1, slides 10-11.
[14] C-MQ, paras. 21-22; C-PHB, para. 11.3; HQ-1, slides 20-22.
[redacted]
[16] C-PHB, para. 11.2; HQ-1, slide 13.
[redacted]

[redacted]



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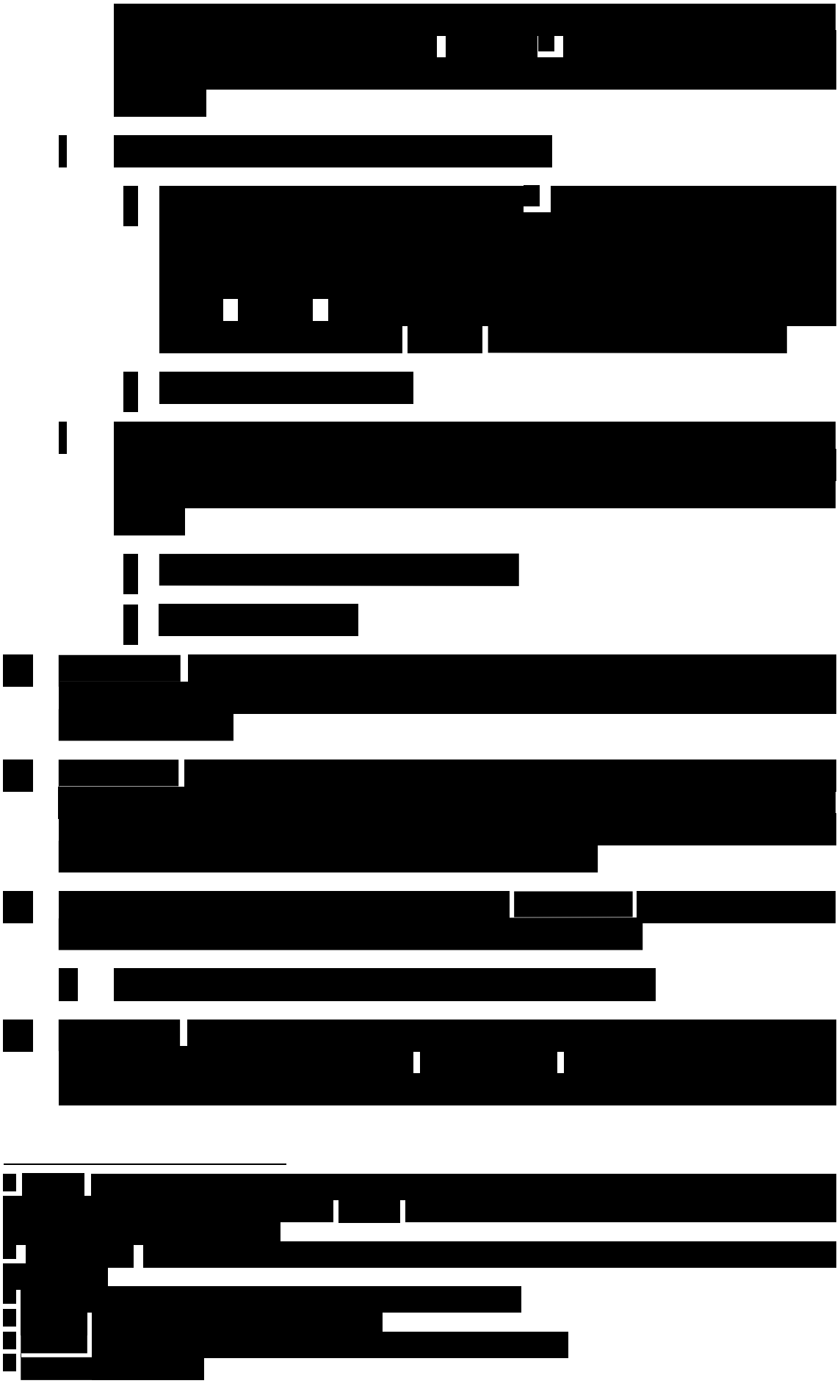

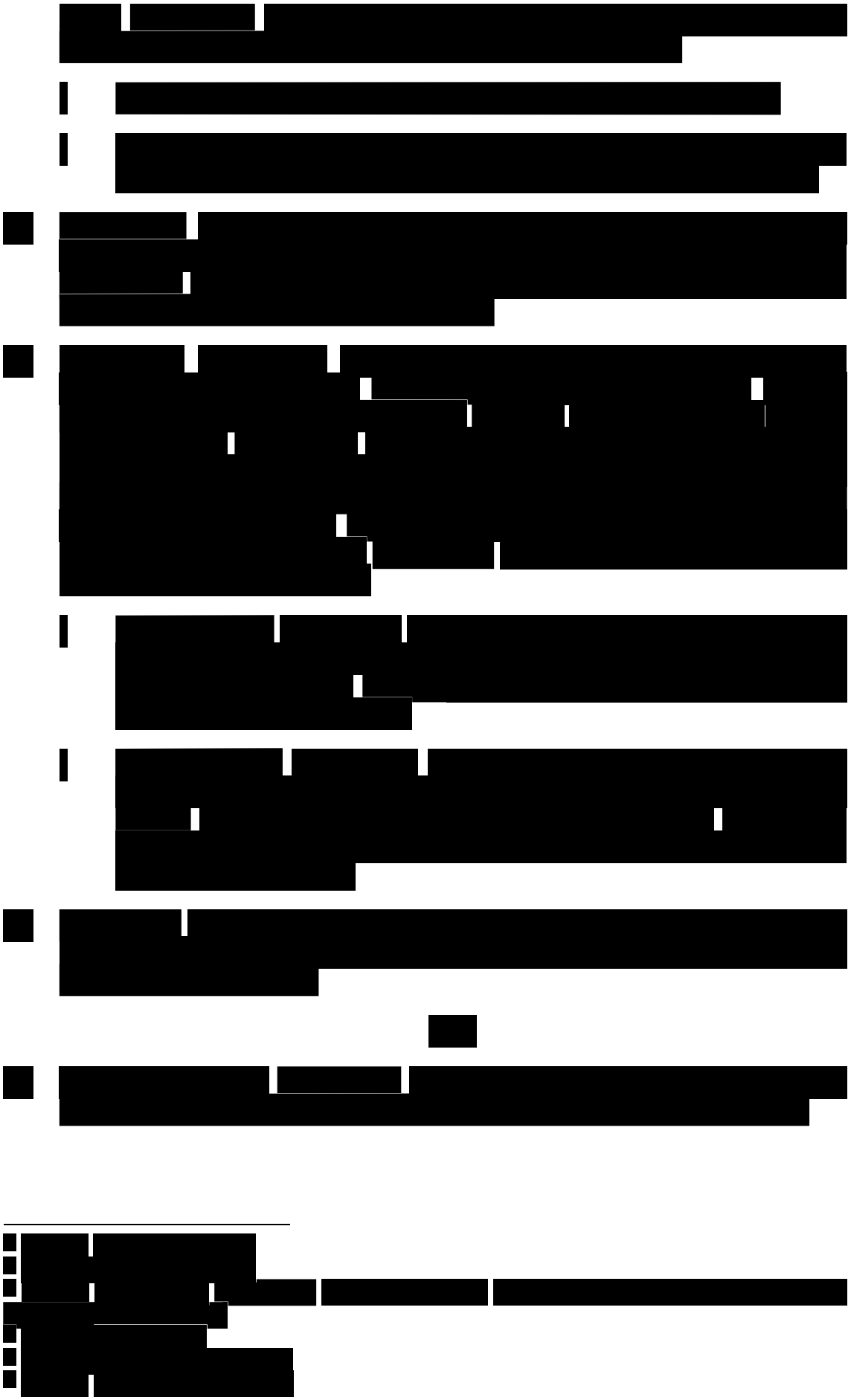

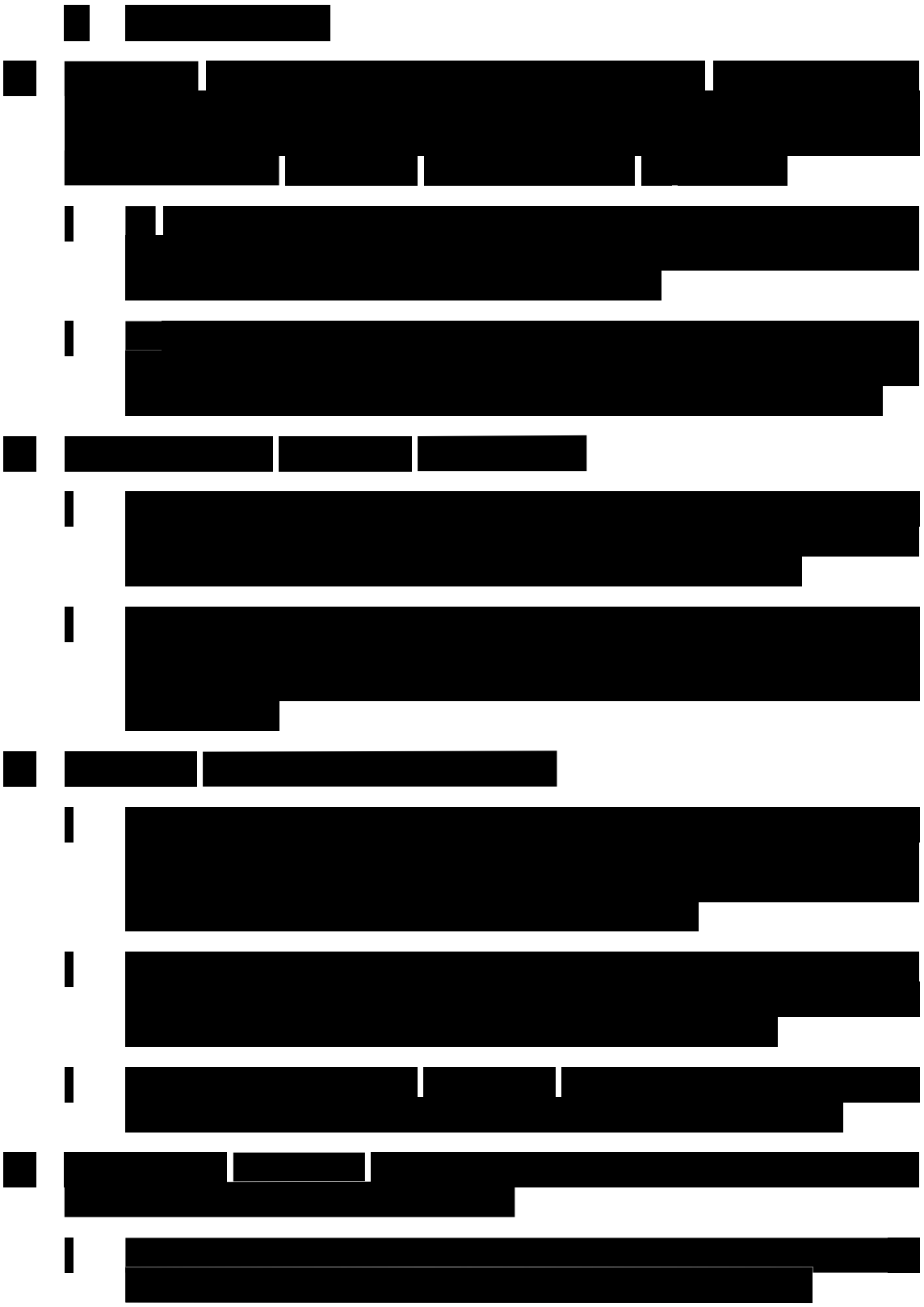

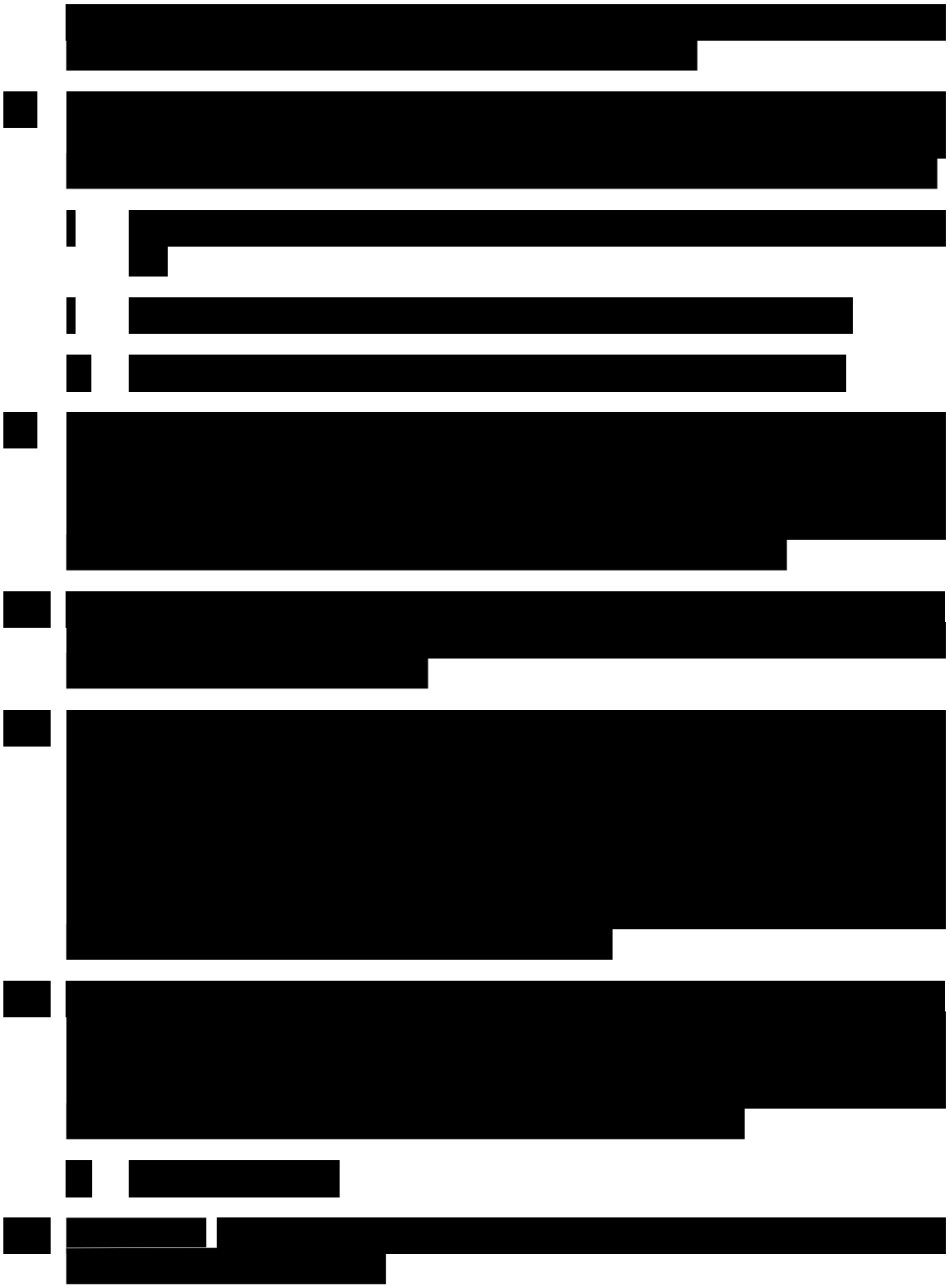

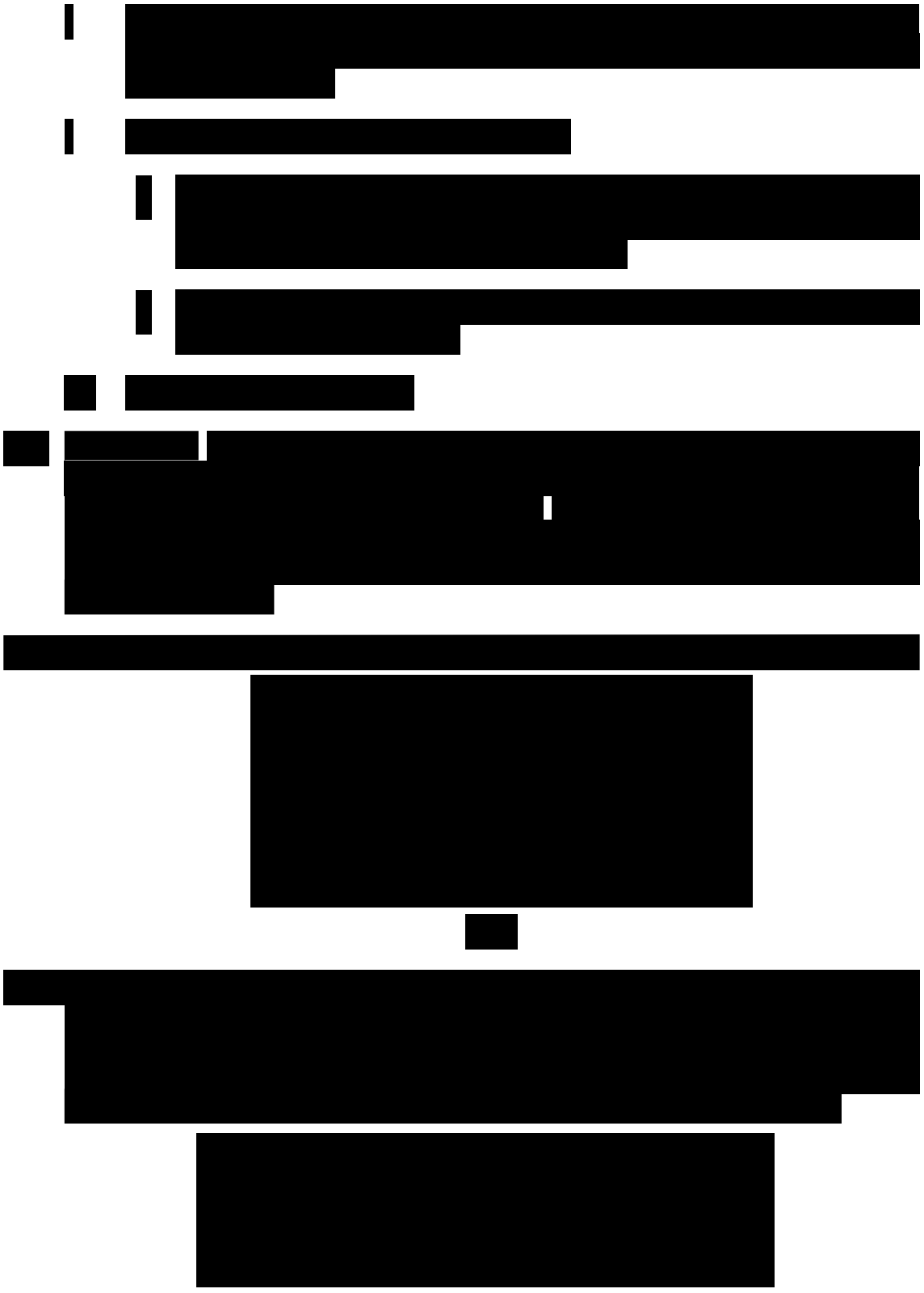

3. INTEREST

117. Laiki submits that it is entitled to interest, as the only means of achieving "full reparation"[99]. Laiki's position will be summarized in Chapter **V.4.1.A** *infra*.

IV.2. POSITION OF RESPONDENT

1. APPLICABLE LEGAL STANDARD

Claimant bears the burden of proof

118. Respondent submits that Claimant bears the burden of proof to establish the fact and the amount of the loss it alleges to have suffered, as well as causation; however, it has failed to discharge its burden[100].

119. Respondent avers that Claimant must prove the fact and the amount of the loss with reasonable certainty, since no reparation for speculative or uncertain damage can be awarded[101]. If follows that if Claimant fails to prove that it suffered any damages, it must not be awarded damages, even if liability has been established[102]. Moreover, Respondent notes that Claimant had a duty to mitigate damage and is not entitled to any damage that it could have avoided[103].

120. In what concerns causation, Respondent notes that compensation is due only for damage caused by an internationally wrongful act[104]. This means that Claimant must establish a causal link between the specific Treaty breach found and the loss allegedly sustained[105]. More importantly, Claimant must demonstrate that the loss is not remote, but a sufficiently proximate consequence of the breach[106].

121. Respondent avers that Claimant's contention, according to which the burden of proof shifts to respondent based solely on the respondent having committed an internationally wrongful act, is misleading[107]. In *Gemplus* and *Gavazzi*, the tribunals shifted the burden of proof[108]:

- Only in relation to quantum, not the fact of the loss or causation,

- Only in the context of a claim for a lost chance, and

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[99] C-MQ, para. 53; HQ-1, slide 51.
[100] R-MQ, para. 66; R-PHB, para. 13; HQ-2, Vol. II, slides 3-4.
[101] HQ-2, Vol. II, slides 5-8, 29-33.
[102] HQ-2, Vol. II, slide 9.
[103] HQ-2, Vol. II, slide 12.
[104] HQ-2, Vol. II, slides 14-17.
[105] HQ-2, Vol. II, slides 18-19.
[106] HQ-2, Vol. II, slides 20-22.
[107] R-PHB, para. 15.
[108] R-MQ, para. 67; R-PHB, para. 14. Citing to *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States (ICSID Cases Nos. ARB(AF)/04/3 & ARB/(AF)/04/4*) ("***Gemplus***"), Award, 16 June 2010, **Exh. RL-275**; *Marco Gavazzi and Stefano Gavazzi v. Romania (ICSID Case No. ARB/12/25)* ("***Gavazzi***"), Excerpts of Award, 18 April 2017, **Exh. CL-229**.

- Only to the extent that the evidentiary difficulties faced by the claims were directly caused by the treaty violations of the respondent State.

Loss of opportunity

122. Respondent notes that compensation for loss of opportunity has not been widely accepted by investment treaty tribunals[109]. To the extent that it has, damages for the loss of an opportunity have been awarded as an alternative to an award for lost profits; this is because an opportunity of making profits is an asset with a financially assessable value[110].

[redacted]

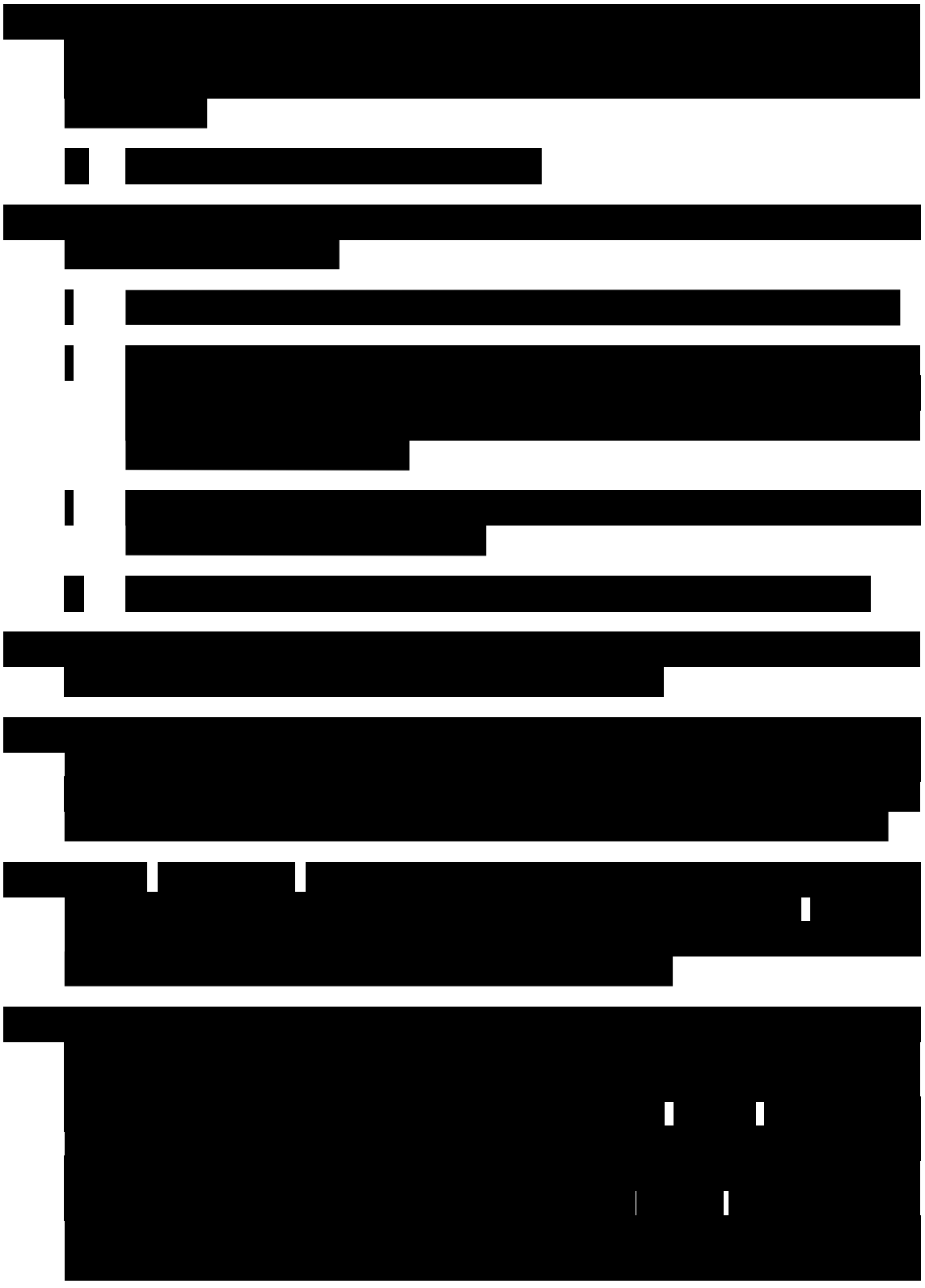
124. Respondent avers, in any case, that Claimant has not come close to satisfying the "high threshold of sufficient probability [that] must be applied to a claim for lost opportunity"[113]. Therefore, Respondent finds that Claimant's claim for loss of opportunity to avoid losses allegedly suffered as a result of the Piraeus Bank sale (Loss 2) fails.

2. CLAIMANT HAS NOT ESTABLISHED THAT IT SUFFERED ANY LOSSES

[redacted]

[109] R-PHB, para. 18; HQ-2, Vol. II, slide 36.
[110] R-PHB, para. 18; HQ-2, Vol. II, slide 37.
[redacted]
[113] R-PHB, para. 20; HQ-2, Vol. II, slides 45-46.
[redacted]

[redacted]



the book value would have been needed to reflect Laiki's poor performance and [redacted]

[redacted]

[redacted]

2.3 CLAIMANT CANNOT SEEK DAMAGES BASED ON ARGUMENTS THAT WERE DISMISSED

167. It is Greece's position that Claimant's damages theories are based on claims that the Tribunal already dismissed in its Decision[161]:

[redacted]

168. Respondent finds that Claimant cannot use the quantum phase to re-litigate claims it already presented in the previous phase, which were analysed by the Tribunal, whose decisions are binding upon the Parties[162].

3. INTEREST

169. Respondent argues that no interest is due[163]. Respondent's position on interest will be summarized in Chapter **V.4.1.B** *infra*.

[redacted]

[162] R-MQ, para. 65.
[163] R-MQ, para. 260; R-PHB, fn. 161.

V. DECISION OF THE ARBITRAL TRIBUNAL

170. To make its decision on quantum, the Tribunal must start by briefly recalling the proven facts (**V.1**) and establishing the applicable standard of compensation (**V.2**). Thereafter, the Tribunal will assess Claimant's alleged losses (**V.3**) and finally make a decision regarding interest (**V.4**).

[redacted]

[redacted]

4. TRIBUNAL'S FINDINGS

184. In deciding Laiki's claims against the Hellenic Republic, the Tribunal found, *inter alia*:

[redacted]

[181] Decision, para. 1384.

[redacted]

V.2. APPLICABLE STANDARD

185. Claimant is entitled to reparation for any damage caused by Greece's breach of Arts. 2 and 3 of the BIT and [redacted] As a first step the Tribunal must establish the standard of reparation for such damage.

1. FULL REPARATION

186. Arts. 2 and 3 of the BIT do not provide any rule regarding the appropriate redress in cases of violation of the fair and equitable ["**FET**"] standard. This is in contrast to Art. 4 of the BIT, which prohibits expropriation without immediate, adequate, and effective "compensation", and sets out rules for the calculation of such compensation[185].

187. The silence of Arts. 2 and 3 of the BIT regarding the relief which an aggrieved investor can seek does not imply that a violation of the FET standard is to be left without redress: a wrong committed by a State against an investor gives rise to a right to reparation of the economic harm sustained, in accordance with principles

[redacted]

[185] Art. 4 of the BIT: "Investments by investors […] shall not be subject to expropriation […] except under the following conditions: […] c) the measures are accompanied by provisions for the payment of immediate, adequate and effective compensation. Such compensation will be equal to the market value of the affected investment immediately before the measures referred to in this paragraph were implemented or became public knowledge. Such compensation will be paid immediately upon completion of the legal procedures for the expropriation and shall be transferred in a freely convertible currency. If payment of the compensation is delayed by the Party liable for the payment, it will be obliged to pay interest, calculated on the basis of the six-month London Interbank Offered Rate applicable to the same currency. The amount of compensation is subject to review by due process of law."

of general international law. As stated by the Permanent Court of International Justice ["**PCIJ**"] in the *Case Concerning the Factory at Chorzów*[186]:

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."

The *quaestio vexata* is how the economic harm sustained by the investor is to be measured[187].

188. The BIT specifically provides that in case of unlawful expropriation, compensation will be equal to the "fair market value" of the affected investment[188]. However, this principle is of little use in the present case, since the finding of the Tribunal is not one of expropriation and the breach has not resulted in the total loss or deprivation of an asset or property right. [redacted] Thus, compensation cannot be based on the fair market value of the asset.

189. The Treaty being silent, recourse must be had to principles of general (customary) international law[190]. It is well established that in situations where the breach of the FET standard does not lead to the total loss of the investment, the purpose of compensation must be to place the investor in the same pecuniary position in which it would have been if the State had not violated its obligations under the BIT[191]. In the *Case Concerning the Factory at Chorzów* the PCIJ found that[192]:

> "[…] reparation must, so far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law. […]" [Emphasis added]

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[186] *Case concerning the Factory at Chorzów*, **Exh. CL-39**, p. 21. See also *Greentech*, **Exh. CL-222**, para. 548: "The Tribunal agrees with Claimants that, absent an applicable treaty provision on damages, the Chorzów Factory 'full compensation' standard is the appropriate starting point for quantum assessment. The Tribunal finds that this general standard applies to FET, umbrella clause, and other treaty violations, and is therefore not limited to cases of expropriation."

[187] *Joseph C. Lemire v. Ukraine (ICSID Case No. ARB/06/18)* ("***Lemire***"), Award, 28 March 2011, **Exh. RL-233**, para. 147.

[188] Art. 4 of the BIT.

[redacted]

[190] S. Ripinsky & K. Williams, **Exh. CL-221**, p. 89.

[191] *Lemire*, Award, **Exh. RL-233**, para. 149; S. Ripinsky & K. Williams, **Exh. CL-221**, p. 89, referring to *AMT v. Zaire*, para. 6.21; *SD Myers v. Canada*, para. 315 and *Petrobart v. Kyrgyz Republic*, para. 78.

[192] *Case concerning the Factory at Chorzów*, **Exh. CL-40**, p. 47.

190. This principle has been reflected in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ["**ILC Articles**"], which state, in Art. 31(1), that[193]:

> "1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."

191. The standard is thus that of full reparation ("wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed"), which can be obtained through restitution in kind or, if this is not possible, payment of compensation[194].

2. COMPENSATION

192. In the present case, Claimant only seeks reparation in the form of compensation.

193. Compensation aims at eliminating all negative consequences of the wrongful act, through the payment to the injured investor of an amount sufficient to cover "any financially assessable damage including loss of profits insofar as it is established"[195].

194. The Parties have addressed the extent to which a tribunal, faced with a situation where it is difficult to establish the precise damage suffered, may grant an approximate amount of compensation: while Claimant suggests that the Tribunal has a wide discretion or margin of appreciation to award reasonably approximate compensation[196], Respondent finds that though the quantum of damages may be approximate, the fact of the damage must be certain; in other words, there can be no compensation for uncertain or speculative damage[197].

195. Under Art. 36(2) of the ILC Articles, damage is due "insofar as it is established". This means that the existence of a damage must be proved with reasonable certainty, even if the precise quantification of such damage may be subject to some degree of approximation[198], especially in cases where the claimant is trying to prove loss of profits[199]:

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[193] ILC Articles, Art. 31(1), **Exh. RL-41**.
[194] See also ILC Articles, Art. 34, **Exh. RL-41**: "Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."
[195] ILC Articles, Art. 36(2), **Exh. RL-41**: "The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.". See also S. Ripinsky & K. Williams, **Exh. CL-221**, p. 278: "It is universally accepted that international law provides for the recovery of lost profits. The award of lost profits is consonant with the objective of full compensation: to wipe out all consequences of the illegal act with a view to re-establishing the situation that the claimant would have been in, had the act not occurred."
[196] C-MQ, paras. 14-15; C-PHB, para. 11.1.
[197] R-MQ, paras. 71-76; R-PHB, para. 17.
[198] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan (ICSID Case No. ARB/05/16)* ("***Rumeli***"), Decision of the *ad hoc* Committee, **Exh. CL-226**, paras. 144-148; B. Sabahi, K. Duggal & N. Birch, **Exh. RL-483**, pp. 337-338; S. Ripinsky & K. Williams, **Exh. CL-221**, pp. 280-281; *Crystallex International Corporation v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/2*) ("***Crystallex***"), Award, 4 April 2016, **Exh. RL-191**, paras. 867-868.
[199] *Lemire*, Award, **Exh. RL-233**, para. 246.

> "[…] it is a commonly accepted standard for awarding forward looking compensation that damages must not be speculative or uncertain, but proved with reasonable certainty; the level of certainty is unlikely, however, to be the same with respect to the conclusion that damages have been caused, and the precise quantification of such damages. Once causation has been established, and it has been proven that the *in bonis* party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss."

196. To ascertain the fact (*i.e.*, the existence) of a damage, the investor who seeks reparation must prove that there is a direct causal link between the State's wrongful act (cause) and the damage suffered (effect)[200]. Indeed, as established in Art. 31(1) of the ILC Articles, it is only the "injury caused by the internationally wrongful act" that can be compensated[201].

197. As to the calculation of the damage suffered and amount of compensation owed, the Tribunal has a degree of flexibility to define the appropriate financial methodology[202] for the determination of a financial amount which, delivered to the investor, produces the equivalent economic value which, in all probability, the investor would enjoy, "but for" the State's breach[203].

V.3. LOSSES SUFFERED BY CLAIMANT

[redacted]

199. Respondent argues that the losses claimed by Laiki are speculative, given that Laiki has failed to establish with any degree of certainty[204]:

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[200] B. Sabahi, K. Duggal & N. Birch, **Exh. RL-483**, p. 328.
[201] B. Sabahi, K. Duggal & N. Birch, **Exh. RL-483**, p. 329; Commentaries 9-10 to Art. 31 of the ILC Articles, **Exh. RL-41**.
[202] S. Ripinsky & K. Williams, **Exh. CL-221**, pp. 90-91: "The customary rule of full compensation is of a very general nature and it does not offer a conceptual framework for the recovery of damages that would be comparable in specificity to the 'value' approach generally applicable in expropriation cases. […] The generality of the customary rule provides tribunals with flexibility as to what the precise methodology for assessing damages should be in a specific case."
[203] *Lemire*, Award, **Exh. RL-233**, para. 152; S. Ripinsky & K. Williams, **Exh. RL-481**, p. 117.
[204] R-MQ, para. 81; R-PHB, para. 16.

- That a damage exists, [redacted] or

- The precise amount of any alleged damage.

200. The Tribunal will first examine Claimant's alleged losses based on [redacted] (**1.**), and then Claimant's alleged losses based on [redacted] (**2.**).

1. LOSSES BASED ON ACTUAL ASSETS

201. The Tribunal must start its analysis by establishing whether there is causation (**1.1**). If so, the Tribunal must then proceed to define the counterfactual scenario (**1.2**). Lastly, the Tribunal must calculate the amount of compensation having regard to that scenario (**1.3**).

1.1 CAUSATION

202. Causation requires that there be a link between the cause (*i.e.*, the wrongful act by the State) and the effect (*i.e.*, the damage suffered by the investor).

[redacted]

[redacted]

[redacted]

A. Reflective loss

206. Claimant says that at the relevant time [redacted] and that as a controlling shareholder it is entitled to claim the impairment in the value of its shareholding[208]. Claimant invokes the precedents in *ST-AD*, *El Paso* and *CMS* to support its position[209].

207. The Tribunal concurs. Protected investors who hold shares in companies incorporated in the host country can be harmed in two ways:

- Investors can suffer direct injury to their rights as shareholders (*e.g.*, by depriving them of their voting rights), or their shareholding may be expropriated or impaired;

- But they can also suffer indirect injury, frequently referred to as reflective loss, in situations where the host State causes injury to the company (*e.g.*, by expropriating or impairing an asset owned by the company); such reflective loss is normally expressed as a decline in the value of the shares owned by the investor.

208. In the present case, Greece has not caused direct injury to Claimant's shareholding, [redacted] But Claimant may have indeed suffered a reflective loss, if it is able to prove that Respondent's wrongful measures caused a loss in value of its shareholding in [redacted].

209. Thus, the first head of loss caused to Laiki can be defined as the difference (if any) between:

- The actual value, [redacted] of Claimant's shareholding [redacted] (the so-called "as is" value); and

- The hypothetical value of these shares if the Hellenic Republic had not [redacted] (the "but for" value).

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[208] C-MQ, para. 23.

[209] C-MQ, footnote 24, referring to *ST-AD GmbH v. Republic of Bulgaria, UNCITRAL (PCA Case No. 2011-06)* ("***ST-AD***"), Award on Jurisdiction, 18 July 2013, **Exh. RL-151**, paras. 278-282; *El Paso Energy International Company v. Argentine Republic (ICSID Case No. ARB/03/15*) ("***El Paso***"), Award, 31 October 2011, **Exh. RL-224**, paras. 144 and 148; *CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8)* ("***CMS***"), Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, **Exh. CL-96**, paras. 66-68.

[redacted]

[redacted]

1.2 DEFINITION OF THE "BUT FOR" COUNTERFACTUAL SCENARIO

213. Calculating the precise amount of loss or damage suffered by Claimant as a consequence of Respondent's wrongful acts is not an entirely straightforward task. It requires the definition of a counterfactual "but for" scenario, a hypothetical conjecture as to how the situation would have unfolded, and how the Claimant's economic position would have evolved, assuming that Respondent had not adopted the wrongful measures.

214. The necessity of a counterfactual scenario does not undermine the general principle *actori incumbit probatio*: the burden of proof rests on Claimant, who must prove that but for the breach of the State's obligations certain scenarios would have occurred. That said, proving a hypothesis is fraught with difficulties; therefore, in weighing the evidence marshalled by Claimant, the Tribunal must show some flexibility. Applying reasonableness and experience, the Tribunal must gauge whether there is a fair possibility that the hypothesis raised by Claimant would have materialized. Claimant cannot be placed in the situation of facing an insurmountable burden of proving with exact certainty what would have occurred – as recognized in *Gavazzi*[211] and *Gemplus*[212] on which Claimant relies; otherwise, compensation would be illusory.

215. Laiki argues that but for [redacted] denial [redacted]:

[redacted]

[211] *Gavazzi*, Award, **Exh. CL-229**, para. 224.
[212] *Gemplus*, **Exh. RL-275**, paras. 13-92.

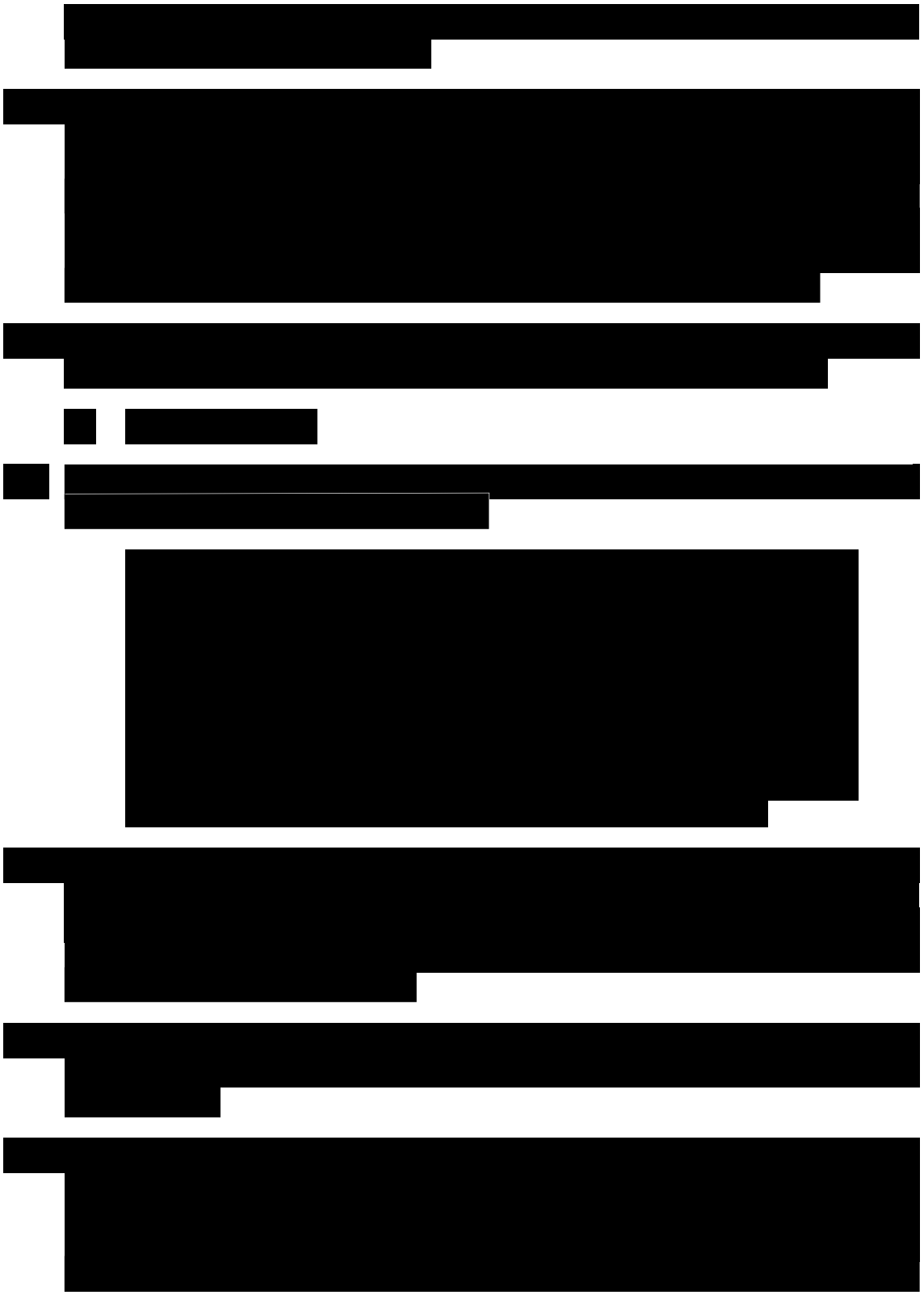
[redacted]

[redacted]

216. The Tribunal must determine whether there is a fair probability that this counterfactual scenario would actually have materialized.

[redacted]

[redacted]



[redacted]

1.3 AMOUNT OF COMPENSATION

267. The Tribunal has established that but for Greece's wrongful conduct, the following counterfactual scenario would have pertained:

[redacted]

268. The damage suffered by Claimant must be assessed by comparing this counterfactual "but for" scenario, and the actual scenario, as it occurred upon the Hellenic Republic's wrongful conduct. The proper way of doing this requires assessing separately the amount of compensation due to Claimant for Loss 1 (**A.**) and for Loss 3, sub-head 1 (**B.**).

A. Compensation for Loss 1

[redacted]

[redacted]

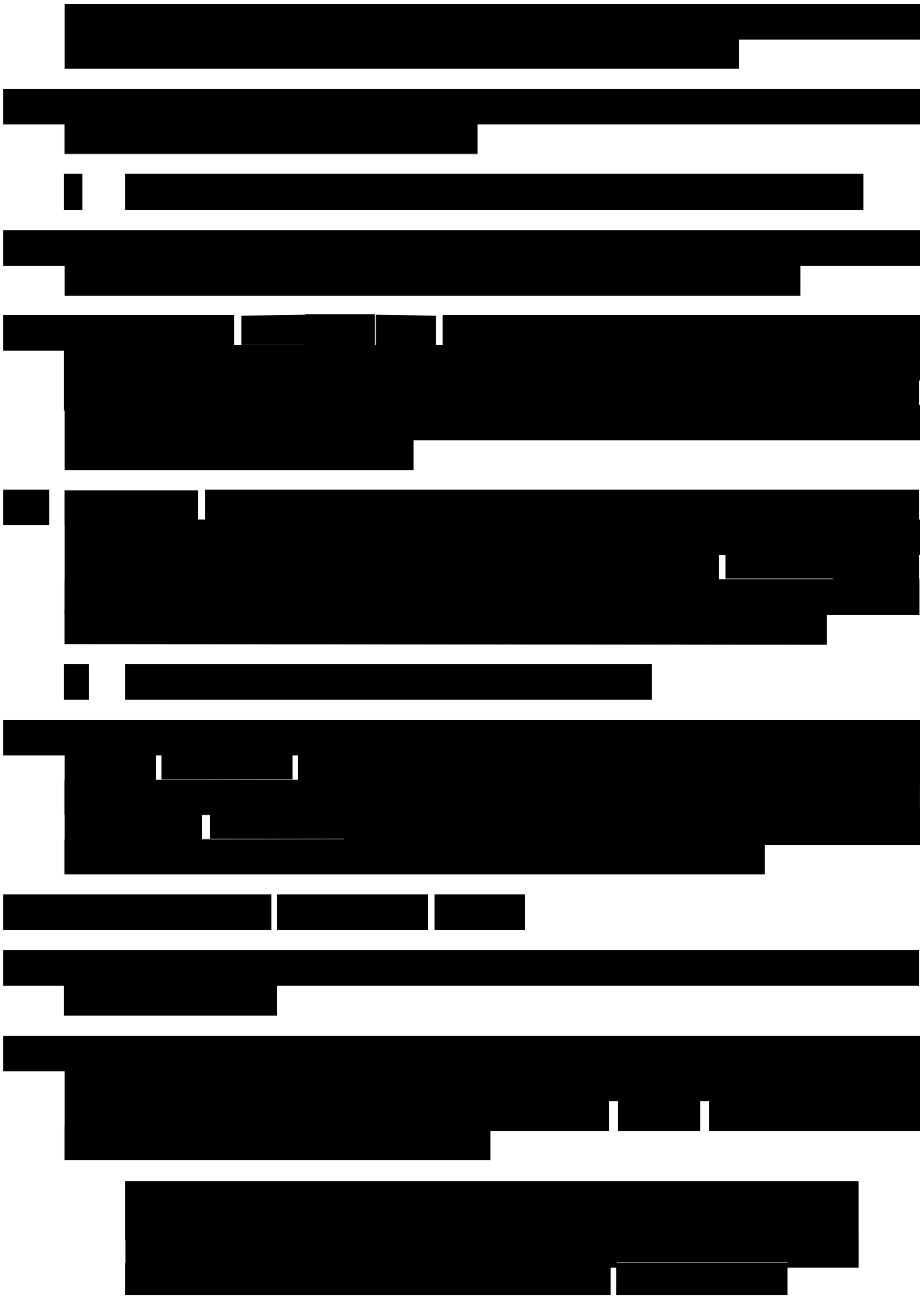
[redacted]

[redacted]

280. Respondent's experts have not challenged [redacted] methodology, and the Tribunal finds the approach [redacted] has proposed to be reasonable.

[redacted]

[redacted]



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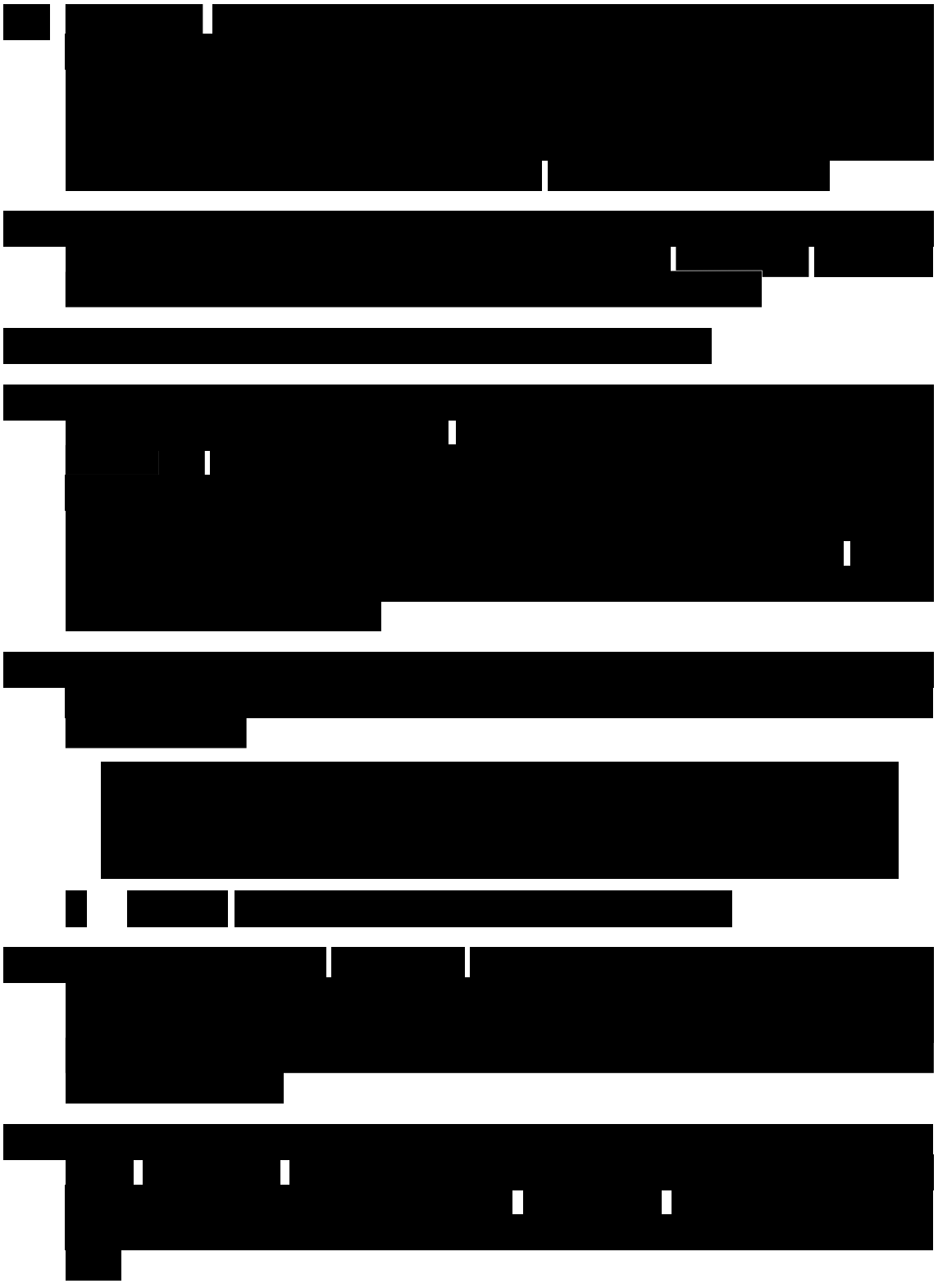

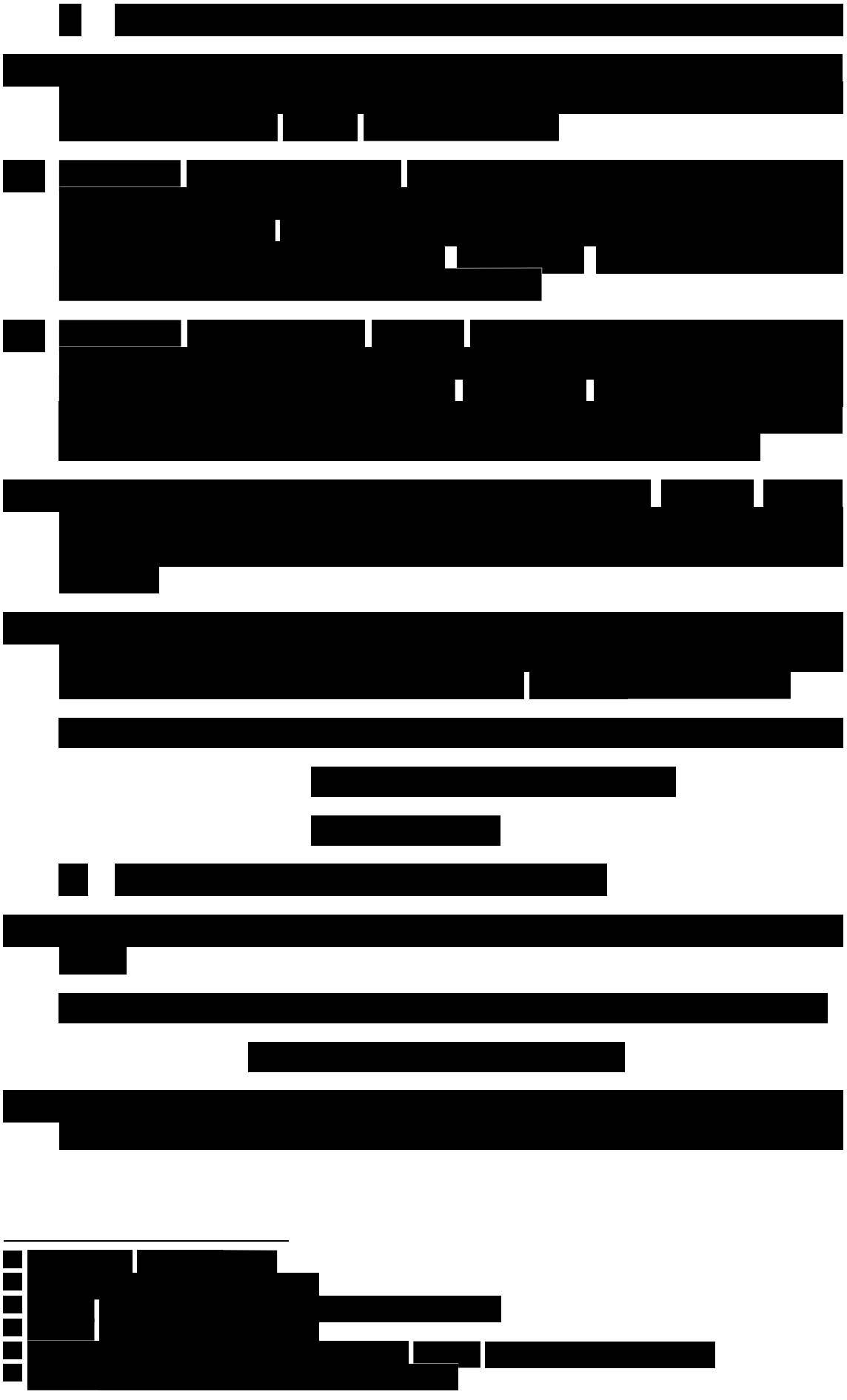

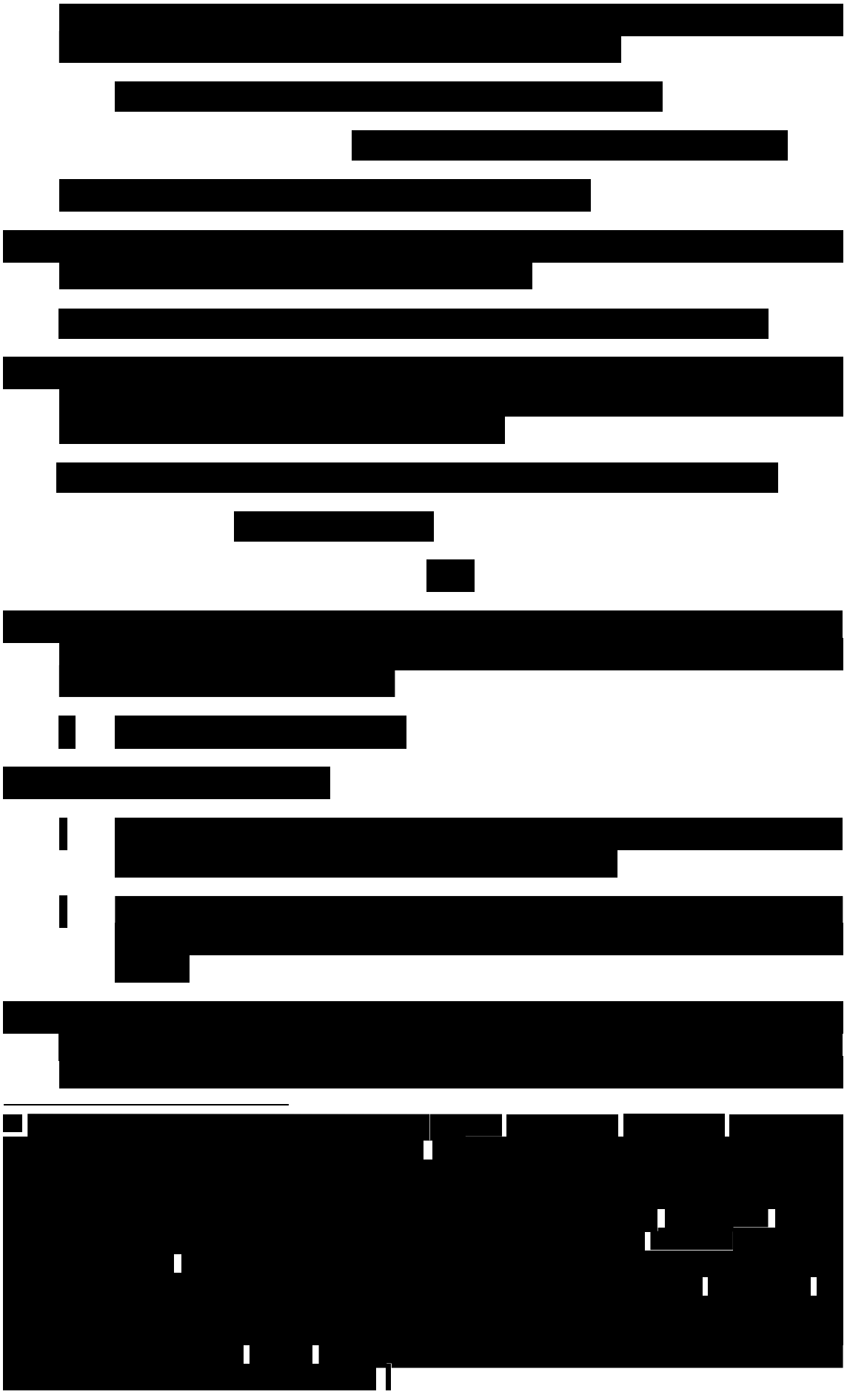

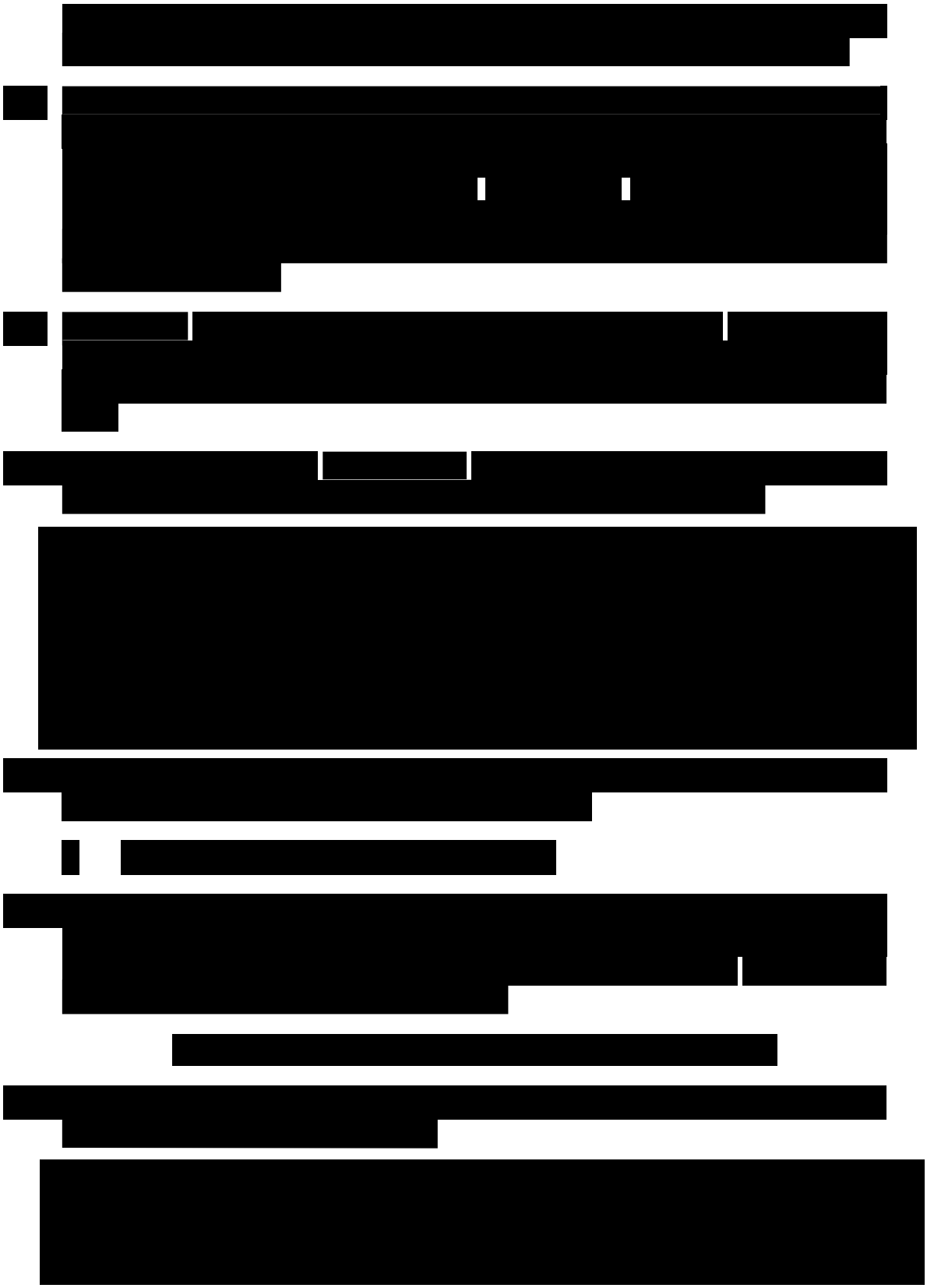

[redacted]

345. Claimant submits that it suffered two categories of [redacted]

- Suffered a loss of the opportunity [redacted] (Loss 2); and

- Incurred additional costs [redacted] (Loss 3, sub-head 2).

[redacted]

347. The Tribunal finds, however, that this is not a case of loss of opportunity (**2.1**) and that Laiki has failed to establish the existence of a causality link for this second category of losses. Indeed, Claimant has failed to prove that, but for Greece's wrongful acts, there was a reasonable probability that:

[redacted]

2.1 NO LOSS OF OPPORTUNITY

[redacted]

349. Claimant's Loss 2, as submitted, is not, strictly speaking, a loss of opportunity (or loss of chance).

Standard of loss of opportunity

350. The possibility of obtaining compensation for "loss of opportunity" or "loss of chance"[330] is recognized in a number of national legal systems[331] and is reflected

[redacted].

[330] S. Ripinsky & K. Williams, **Exh. CL-221**, p. 291.

[331] S. Ripinsky & K. Williams, **Exh. CL-221**, p. 291; "XXI. Compensation, Damages, and Restitution", *in* B. Sabahi, N. Rubins, et al., *Investor-State Arbitration*, 2nd edition, Oxford University Press (2019), p. 744.

in Art. 7.4.3(2) of the UNIDROIT Principles of International Commercial Contracts[332]:

> "Compensation may be due for the loss of a chance in proportion to the probability of its occurrence."

351. Loss of chance or opportunity can be differentiated from loss of profits, although in practice the concepts of lost profits and loss of opportunity are often used interchangeably.

352. In a claim for loss of profits there must be a degree of certainty that, but for the wrongful breach of the State, the investor would have made a profit, although there may be uncertainty as to the quantification of such profit. Financially, lost profits are frequently calculated through discounted cash flow models, which seek to predict hypothetical cash flows the investor would have received in the future, but for the State's wrongful conduct. Any prediction of the future includes an element of probability, and there are various financial tools which permit that the DCF model, and the future cash flows it predicts, reflect this uncertainty.

353. A loss of opportunity arises where there is uncertainty as to whether the investor would have enjoyed (or not) the chance to achieve a profit. The uncertainty is created by an exogenous factor, which causes the chance to occur or not to occur, and to which the tribunal must attribute a probability (*e.g.*, were it not for the host State's wrongful conduct, the investor would have participated in a bid and would or would not have been awarded the contract). The tribunal must first calculate the probability that the exogenous event occurs, and the loss of profit is moderated taking into consideration this probability.

Case-law

354. The Parties have discussed several cases of loss of opportunity. The Tribunal finds that a persuasive example in the context of this case is *Sapphire*[333].

355. The National Iranian Oil Company and Sapphire Petroleums Ltd., a Canadian company, had entered into a contract to expand the production and exportation of Iranian oil. Sapphire's local subsidiary started working in the assigned concession area and subsequently claimed the reimbursement of its expenses incurred in prospecting, pursuant to the contract. When the National Iranian Oil Company refused to reimburse such expenses and repudiated the contract, Sapphire started arbitration proceedings, claiming compensation for expenses and lost profits[334].

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[332] UNIDROIT Principles of International Commercial Contracts, **Exh. CL-231**, Art. 7.4.3: "(1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty. (2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence. (3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court."

[333] *Sapphire International Petroleums Ltd. v. National Iranian Oil Company* (1963) 35 ILR 136 ("***Sapphire***"), **Exh. CL-228**.

[334] *Sapphire*, **Exh. CL-228**, pp. 136-139, 165-166, 176-177.

356. The sole arbitrator analyzed the claim for lost profits and found that there was in fact a loss of opportunity, which can give right to compensation[335]:

> "Under item 2(e) the plaintiff claims the payment of $U.S. 5,000,000 for 'loss of profit'. Once the principle on which such an award is based is recognized in law, the determination of the amount of compensation becomes a question of fact to be evaluated by the arbitrator.
>
> Since the question concerns the concession of an area which has not yet been prospected and where therefore the presence of oil-bearing beds in commercially workable quantities was and still is today uncertain, the existence of damage is not without doubt. No one today can affirm that the operation would have been profitable, and no one can deny it. But if the existence of damage is uncertain, it is nevertheless clear that the plaintiff had an opportunity to discover oil, an opportunity which both parties regarded as very favourable. Does the loss of this opportunity give the right to compensation?
>
> It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behaviour of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage." [Emphasis added]

357. The sole arbitrator further concluded that, in the case at hand, compensation for the loss of opportunity was due since[336]:

> "[…] the plaintiff has satisfied the legal requirement of proof by showing a sufficient probability of the success of the prospecting undertaken, if they had been able to carry through to a finish. The plaintiff can therefore claim compensation for 'loss of profit'." [Emphasis added]

358. *Sapphire* is the textbook case of loss of opportunity: were it not for the respondent's breaches of its obligations, the plaintiff had a dichotomic probability of striking oil. It is the percentage of such probability that must be applied to the profits that the plaintiff would have obtained if there was indeed oil.

359. Although other cases discussed by the Parties refer to a loss of opportunity[337], these cases lack an exogenous risk factor and strictly speaking belong to the category of awards which discuss loss of profits.

No loss of opportunity in the present case

360. Claimant's case is not based on a loss of opportunity: there is no exogenous risk factor that interrupts the causality chain. The causality chain on which Laiki relies is that of a standard loss of profits claim:

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[335] *Sapphire*, **Exh. CL-228**, pp. 187-188.
[336] *Sapphire*, **Exh. CL-228**, p. 189.
[337] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt (ICSID Case No. ARB/84/3)*, Award, 20 May 1992, **Exh. CL-230**, paras. 214-218; *Gavazzi*, Award, **Exh. CL-229**, paras. 222-232; *Gemplus*, **Exh. RL-275**, para. 13.94.

[redacted]

361. This is a standard case of lost profits, in which the Tribunal must assess what would have happened in a counterfactual scenario. There is no factor exogenous to the State's conduct which disturbs the chain of causality.

2.2 NO EVIDENCE THAT [redacted] WOULD HAVE OCCURRED

[redacted]

363. The scenario described by Claimant is purely hypothetical (sometimes referred to as "a castle in the air"). As explained in paras. 213-214 *supra*, the Tribunal acknowledges that the threshold of plausibility required for loss profit scenarios cannot be excessively demanding – otherwise legitimate claims would become illusory. But Claimant bears the burden of marshalling some sign of evidence, which provides at least an indication that, but for the wrongful act, there would have been a reasonable chance that the alleged scenario would have occurred[340].

364. In the present case, Claimant has failed to marshal any convincing evidence to support its allegation [redacted]

[redacted]

[340] *Rumeli*, Decision of the *ad hoc* Committee, **Exh. CL-226**, paras. 144-148; B. Sabahi, K. Duggal & N. Birch, **Exh. RL-483**, pp. 337-338; S. Ripinsky & K. Williams, **Exh. CL-221**, pp. 280-281; *Crystallex*, Award, **Exh. RL-191**, paras. 867-868; *Lemire*, Award, **Exh. RL-233**, para. 246.

[redacted]

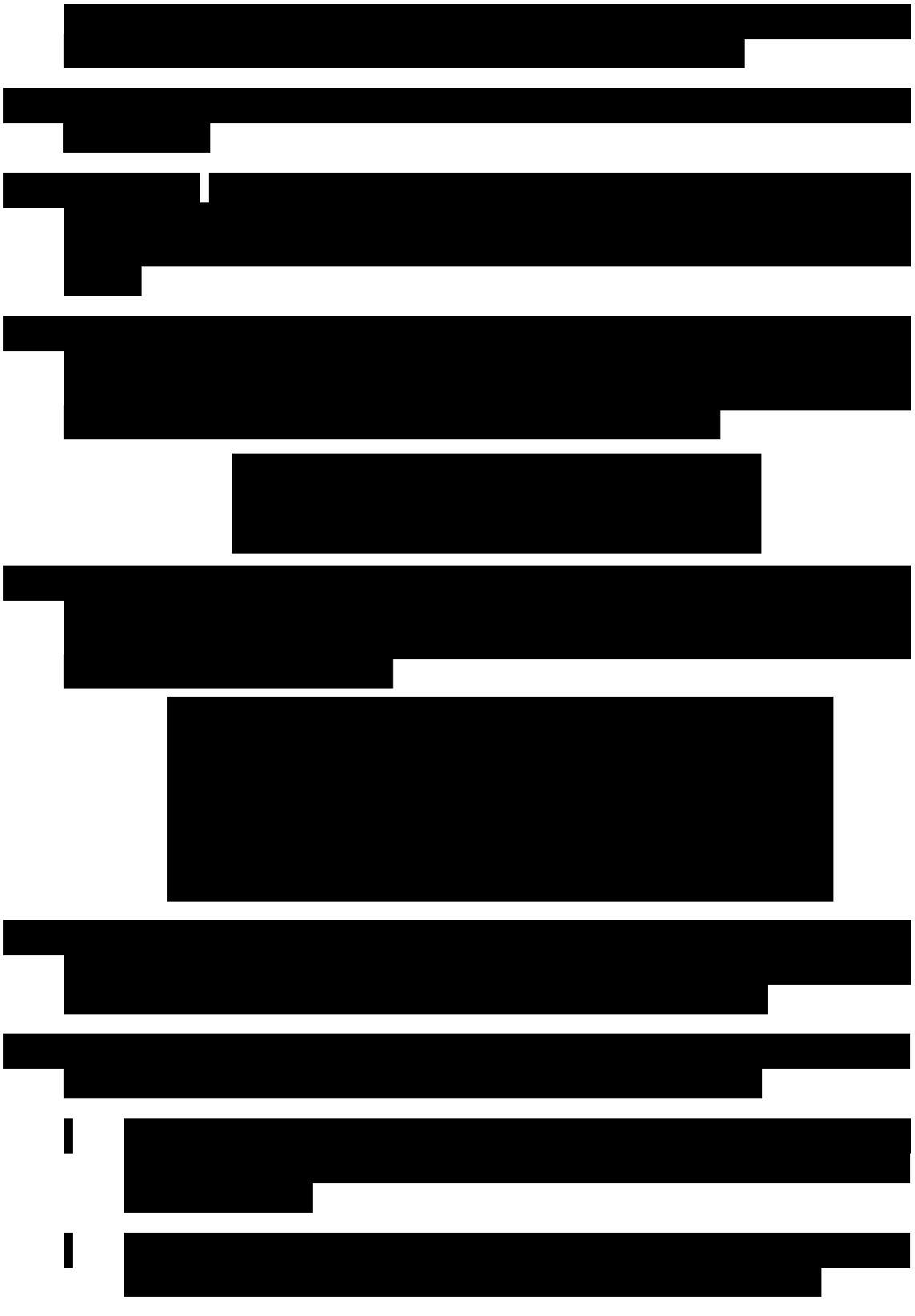
369. And, as the Tribunal concluded in the Decision, even though the ball was in Laiki's court, there is no evidence in the record that Laiki ever followed up on this undertaking[346].

[redacted]

[redacted].

[346] Decision, paras. 1372 and 1376-1377.

[redacted]



[redacted]

[redacted]

401. Summing up, the Tribunal finds that the proposed transfer of Greek Assets (be it of [redacted] or of [redacted]) would most likely have been considered by [redacted] an artificial move to book assets in a small and thinly capitalized subsidiary in Greece, of which Laiki was not even the sole shareholder. It is more likely than not, on the basis of the evidence, that [redacted] would have denied the necessary approval.

402. The Tribunal concludes that Claimant has failed to establish with any degree of certainty that, assuming [redacted] Laiki would have [redacted]

403. Consequently, Laiki's Loss 2 is dismissed. Laiki's Loss 3, sub-head 2, which is based on the premise that [redacted] is equally dismissed.

[redacted]

3. CONCLUSION

404. The Tribunal concluded that, but for the wrongful conduct of the Hellenic Republic, on [redacted] would have drawn down [redacted] in Greek [redacted] and would have used these funds to repay the intercompany loan granted by its parent Laiki. Having been ringfenced from the crisis of its parent, [redacted] assets and liabilities would not have been included in [redacted]. As a result of Greece's wrongful conduct, Laiki's [redacted] suffered a loss of EUR 32.9 million.

405. Additionally, the Tribunal concluded that, but for the wrongful conduct of the Hellenic Republic, Laiki would have [redacted] to reduce its most expensive source of funding, *i.e.*, its customer deposits. Greece's wrongful conduct caused Laiki to incur EUR 1.6 million additional funding costs.

406. Finally, the Tribunal decided that Laiki's Loss 2 and Loss 3, sub-head 2, have not been established with any degree of certainty and are dismissed.

407. Therefore, the Hellenic Republic must pay a total of **EUR 34.5 million** to Laiki, as compensation for breach of Arts. 2 and 3 of the BIT.

V.4. INTEREST

1. PARTIES' POSITIONS

A. Claimant's position

408. Laiki submits that it is entitled to pre-award and post-award interest over any awarded amounts, as the only means of achieving "full reparation"[370].

409. Laiki considers that the Tribunal should apply the rate of EURIBOR plus 2% per annum, which is considerably less than the return on capital Laiki was achieving of *circa* 6% per annum[371].

410. Furthermore, according to Laiki, the Tribunal has discretion to, and should, award compound interest[372]. This is particularly appropriate in the present situation, since Laiki is a financial institution and could have invested those funds and received compound interest, but for Greece's breach of its obligations under the Treaty without payment of adequate compensation[373].

[370] C-MQ, para. 53; HQ-1, slide 51.
[371] C-MQ, para. 55; C-PHB, para. 76; HQ-1, slide 54.
[372] C-MQ, para. 54; C-PHB, para. 76; HQ-1, slides 52-53.
[373] C-MQ, para. 54.

B. Respondent's position

411. In its Counter-Memorial on Quantum, Respondent argued that because Claimant did not suffer and cannot establish any losses as a result of Respondent's wrongful conduct, it is also not entitled to the payment of interest[374].

412. In its Post-Hearing Brief, Respondent added that even if a loss were established, any interest should be calculated based on the rate provided for in Art. 4 of the BIT, *i.e.*, the six-month LIBOR for Euros. In Respondent's view, it is incorrect to say that "EURIBOR plus 2%" applies. Respondent avers that because the LIBOR rate has been negative for most of the time since the date of any alleged loss, no interest is due[375]. Lastly, Respondent submits that the Tribunal should deny Claimant's request for compound interest[376].

C. Additional submissions

413. After receiving Respondent's Post-Hearing Brief, Laiki addressed a letter to the Tribunal arguing that Greece's argumentation on interest was extemporaneous, given that it had only been presented in the Post-Hearing Brief and Laiki had had no opportunity to respond. In Laiki's opinion, Respondent's arguments on interest should be dismissed because[377]:

- Art. 4 of the BIT applies only to the calculation of post-award interest for an expropriation claim, which makes it irrelevant for the present case;

- *Lemire* is not authority for the proposition that LIBOR should apply, since in that case the parties agreed to apply LIBOR;

- By contrast, the tribunal in *Lemire* agreed with the claimant that a 2% margin on top of LIBOR was appropriate notwithstanding an objection from the respondent.

414. In response, Respondent submitted that, in the event any interest is awarded, the Tribunal should apply the LIBOR rate without any additional margin, consistent with the BIT[378].

2. DECISION OF THE ARBITRAL TRIBUNAL

415. The Tribunal has concluded that Claimant is entitled to compensation for its Losses in the amount of EUR 32.9 million and EUR 1.6 million – a total of EUR 34.5 million. As part of the standard of "full reparation" discussed in Chapter **V.2.1** *supra*, Claimant is entitled to receive interest on the awarded amounts[379].

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[374] R-MQ, para. 260.
[375] R-PHB, fn. 161.
[376] R-PHB, fn. 161.
[377] Claimant's letter to the Tribunal dated 9 October 2020.
[378] Respondent's letter to the Tribunal dated 12 October 2020.
[379] S. Ripinsky & K. Williams, **Exh. CL-221**, pp. 362-363, referring to *LG&E v. Argentina*, Award of 25 July 2007, para. 55; ILC Articles, **Exh. RL-41**, Art. 38(1); *Crystallex*, Award, **Exh. RL-191**, para. 932.

416. The Parties disagree on the applicable interest rate and whether it should be simple or compounded:

- While Laiki considers that the Tribunal should award pre- and post-award interest at a rate of EURIBOR plus 2% per annum, compounded annually;

- Respondent submits that the Tribunal should apply simple interest at the six-month LIBOR rate for Euros, consistent with Art. 4 of the BIT.

417. As provided in Art. 38(1) of the ILC Articles, "the interest rate and mode of calculation shall be set so as to achieve" full reparation[380]. With this aim in mind, the Tribunal will decide on the applicable rate (**A.**), whether interest should be simple or compounded (**B.**), and the *dies a quo* and *dies ad quem* (**C.**).

A. Applicable interest rate

418. The Parties disagree on whether interest should accrue at the rate of EURIBOR plus 2% per annum or at the six-month LIBOR rate for Euros with no additional margin. In the absence of an agreement between the Parties, the Tribunal must establish the reference rate (**i**) and whether any additional margin should be applied (**ii**).

(i) Reference rate

419. The only mention of interest in the BIT is contained in Art. 4 on claims for expropriation, which provides that if the payment of adequate compensation is delayed, the State will be obliged to pay interest, calculated on the basis of the six-month LIBOR applicable to the same currency[381]:

> "Such compensation will be paid immediately upon completion of the legal procedures for the expropriation and shall be transferred in a freely convertible currency. If payment of the compensation is delayed by the Party liable for the payment, it will be obliged to pay interest, calculated on the basis of the six-month London Interbank Offered Rate applicable to the same currency." [Emphasis added]

420. The Tribunal decides that in the present case it is appropriate to apply the LIBOR rate for six-month deposits denominated in Euros. This rate is consistent with Art. 4 of the BIT, which deals with the compensation due in cases of unlawful expropriation. In the absence of any other provision in the BIT, it seems reasonable to extend this rate by analogy to violations of the Treaty other than expropriation. If this is the rate applied to the most egregious type of violation of the Treaty (expropriation), it is also presumably the rate that the States parties to the BIT expected would be applied in case of other breaches of the BIT.

421. LIBOR represents the interest rate at which banks can borrow funds from other banks in the London interbank market and is fixed daily by the British Bankers' Association for different maturities and for different currencies. LIBOR is

[380] ILC Articles, **Exh. RL-41**, Art. 38(1): "Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result."
[381] BIT, **Exh. RL-391**, Art. 4.

universally accepted as a valid reference for the calculation of variable interest rates.

(ii) Margin

422. The Tribunal, however, decides in favor of Claimant that a margin of 2% should be applied to the six-month LIBOR reference rate. Indeed, Art. 4 of the BIT provides that interest will be calculated "on the basis" of the six-month LIBOR applicable to the same currency. The BIT does not preclude the Tribunal from adding a margin on top of the LIBOR rate. Such margin seems particularly appropriate in the present case, since the six-month LIBOR applicable to deposits denominated in Euros has been negative or close to zero for most of the relevant period.

423. *A contrario*, if the Tribunal were to apply the six-month LIBOR rate without a margin, it would fail to adequately compensate Laiki for its losses. Therefore, the Tribunal finds that a 2% margin should be applied.

* * *

424. In view of the above, the applicable interest rate is the LIBOR rate applicable to six-month deposits denominated in Euros, plus a margin of 2%. This rate shall apply to pre- and post-award interest, since Claimant has not asked that post-award interest accrue at a different rate.

B. Simple or compound interest

425. Claimant has requested that the interest be compounded annually[382]. Respondent asks the Tribunal to deny this request.

426. As explained by the tribunal in the *Lemire* case, the question whether interest should be accumulated periodically to the principal has been the subject of diverging decisions[383]. While older case law tended to repudiate this possibility, recent case law tends to accept annual or semi-annual capitalisation of unpaid interest[384].

427. The Tribunal follows the more recent approach of awarding compound interest, since this is consistent with an award of six-month LIBOR plus a margin of 2%. As explained in *Lemire*[385]:

> "Loan agreements in which interest is calculated on the basis of LIBOR plus a margin usually include a provision that unpaid interest must be capitalised at the end of the interest period, and will thereafter be considered as capital and accrue interest. The financial reason for this provision is that an unpaid lender has to resort to the LIBOR market, in order to fund the amounts due

[382] C-MQ, para. 58.3.
[383] *Lemire*, Award, **Exh. RL-233**, para. 359.
[384] *Crystallex*, **Exh. RL-191**, para. 935; *Wena*, **Exh. CL-7**, para. 129; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (ICSID Case No. ARB/06/11)*, Award, 5 October 2012, **Exh. CL-32**, paras. 834-840; *Khan Resources, Khan Resources Inc., et al. v. Government of Mongolia (PCA Case No. 2011-09)*, Award on the Merits, 2 March 2015, **Exh. CL-35**, para. 425.
[385] *Lemire*, Award, **Exh. RL-233**, para. 360.

but defaulted, and the lender's additional funding costs have to be covered by the defaulting borrower."

428. Therefore, interest should be capitalised at the end of each six-month interest period (semi-annually).

C. ***Dies a quo* and *dies ad quem***

429. Laiki has requested pre- and post-award interest until the date damages are paid[386]. Laiki submits that interest on Loss 1 should accrue from [redacted] Laiki considers that the losses in Loss 3, sub-head 1 arise over the period of [redacted]

430. Respondent has not made allegations on this point, despite having the opportunity to do so.

431. Art. 38(2) of the ILC Articles provides that[388]:

> "Interest runs from the date on which the principal sum should have been paid until the date the obligation to pay is fulfilled."

[redacted]

433. The Tribunal decides that interest for both losses should start accruing from [redacted] as the date in which the losses crystalized. Interest shall continue to accrue until the amounts owed in accordance with this Award have been finally paid.

[386] C-MQ, para. 58.3.

[redacted]

[388] ILC Articles, **Exh. RL-41**, Art. 38(2).

VI. COSTS

434. In the present Award, the Tribunal must also determine the costs of the proceedings, since in the Decision the Tribunal "[r]eserve[d] its decision on the costs of the proceedings"[389].

435. The Parties have made submissions on costs at both stages of the proceedings:

- In the jurisdiction and liability phase [Claimant's first costs submission shall be referred to as "**C-CS I**" and Respondent's as "**R-CS I**"]; and

- In the quantum phase [Claimant's second costs submission shall be referred to as "**C-CS II**" and Respondent's as "**R-CS II**"].

436. The Tribunal will start by summarizing the Parties' positions and requests (**1.** and **2.**) and will then adopt its decision (**3.**).

1. POSITION OF CLAIMANT

A. Criteria for cost allocation

437. Claimant submits that the Parties are essentially in agreement that the "loser pays" principle should be followed and that costs should be awarded in proportion to the relative success of each Party[390]. Accordingly, Claimant argues that it should be indemnified by Respondent for:

- The costs incurred in responding to Respondent's Request for Bifurcation, together with costs occasioned by the Hearing on Bifurcation, since the request was not granted by the Tribunal[391];

- A percentage of the costs relating to the jurisdiction and merits phase, proportional to the jurisdictional challenges which have failed;

- Costs arising from the successful merits issues[392]; and

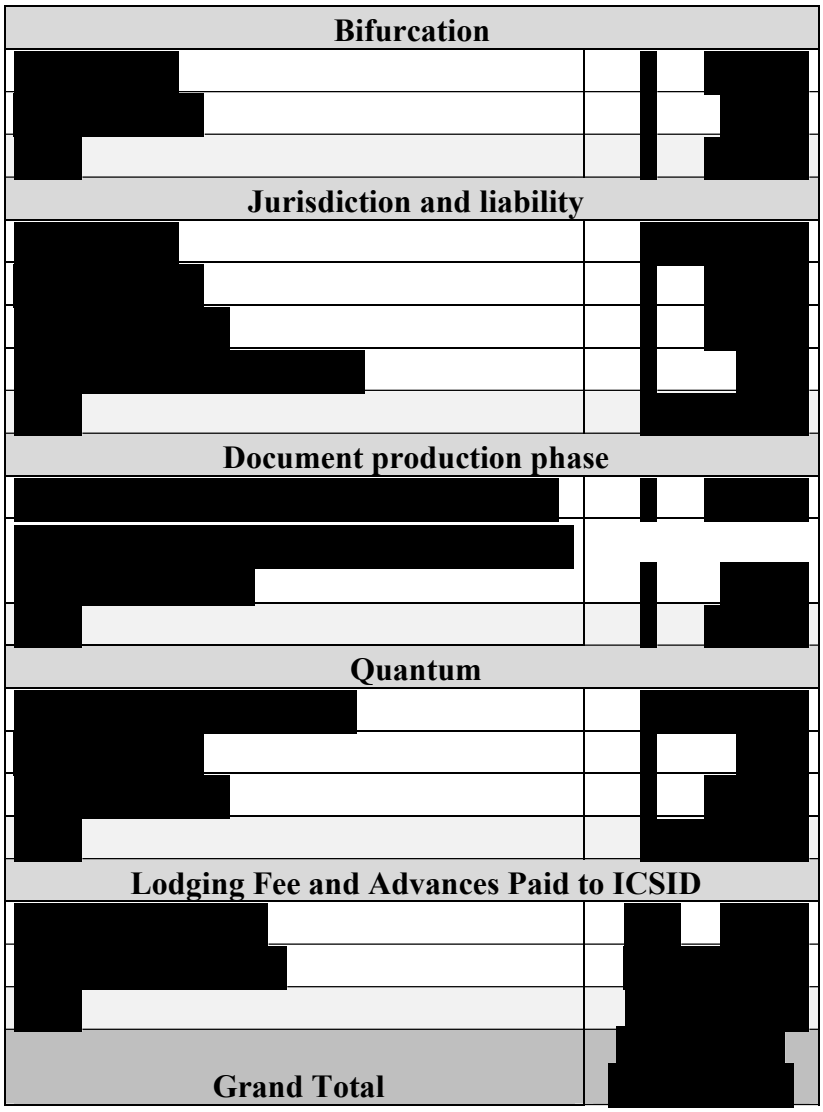
- Costs arising from the quantum phase, should Laiki be successful on any of its heads of loss[393].

438. Claimant further contends that the Tribunal should consider the Parties' conduct in the arbitration, particularly the increase in the Claimant's costs occasioned by Respondent' unreasonable and disproportionate approach to the proceedings[394].

[389] Decision, para. 1535(7).
[390] C-CS I, para. 5; C-CS II, para. 6.
[391] C-CS I, para. 6.
[392] C-CS I, para. 8.
[393] C-CS II, para. 7.
[394] C-CS I, para. 9.

B. Request for costs

439. Claimant requests the following amounts[395]:



2. POSITION OF RESPONDENT

A. Criteria for cost allocation

440. Respondent argues that, in the absence of agreement between the Parties, the allocation of costs is left to the discretion of the Tribunal, pursuant to Art. 61(2) of the ICSID Convention[396].

441. Respondent submits that the Tribunal should award costs on the basis of the Parties' relative success in the arbitration[397].

[395] Table prepared by the Tribunal based on Annex 1 to C-CS I and Annex 2 to C-CS II. All amounts are rounded to the nearest Pound Sterling.
[396] R-CS I, para. 2; R-CS II, para. 3.
[397] R-CS I, para. 4; R-CS II, para. 4.

442. Respondent contends that it has prevailed with respect to more than 90% of the claims asserted by Claimant in these proceedings, given that the Tribunal dismissed three of Claimant's four set of claims in their entirety: the Debt Exchange, [redacted] and Composite Breach claims, which together accounted for more than EUR 2.85 billion in alleged damages. As to Claimant's fourth claim ([redacted], it was composed of three sub-claims. The Tribunal rejected two sub-claims and only upheld a minor sub-claim[398]. Therefore, Respondent posits that it should be awarded all costs and expenses associated with its defense in the present arbitration[399].

443. At the very least, Respondent finds that it should be entitled to recover all of the costs it incurred during the jurisdiction and liability phase of the proceedings, which total [redacted] (or at a minimum, 91.66% of that amount)[400].

444. As to the costs of the quantum phase, since Claimant's damages submission will not prevail, Claimant should not be permitted to recover any costs[401]. Respondent submits that, to the extent that Claimant were entitled to recover any portion of the costs that it incurred during the quantum phase, any amount should be offset against the more than [redacted] of costs incurred by Respondent[402].

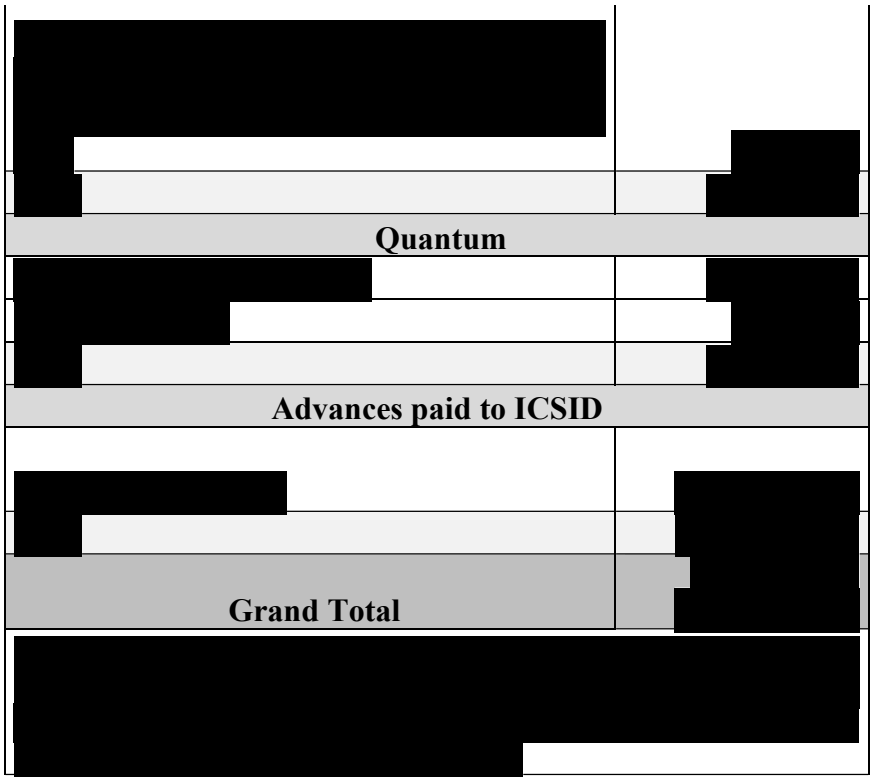
445. Respondent further avers that the Tribunal should take into account Claimant's conduct in deciding on the costs: Claimant has sought to artificially expand the scope of the narrow quantum phase. Respondent has had to incur in substantial legal and expert fees, which Claimant should bear[403].

B. Request for costs

446. Respondent's costs can be broken down as follows[404]:

Bifurcation	
[redacted]	[redacted]
[redacted]	[redacted]
Jurisdiction and liability	
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
Document production phase in jurisdiction and liability	
[redacted]	[redacted]

[398] R-CS II, paras. 5-7.
[399] R-CS II, para. 4.
[400] R-CS II, para. 8.
[401] R-CS II, para. 9.
[402] R-CS II, para. 12.
[403] R-CS II, para. 10.
[404] Table prepared by the Tribunal based on Annex 1 to R-CS II. All amounts are rounded to the nearest Euro.



3. DECISION OF THE ARBITRAL TRIBUNAL

447. Pursuant to Art. 61(2) of the ICSID Convention:

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

448. The BIT, on the other hand, is silent regarding the allocation of costs.

449. The Tribunal must define the criteria for the allocation of costs (**A.**) and decide how such allocation will be made (**B**). Lastly, the Tribunal will determine whether interest is applicable (**C.**).

A. Criteria for cost allocation

450. Neither the ICSID Arbitration Rules, nor the BIT contain any guidelines for the apportionment of costs. Therefore, the Tribunal enjoys a broad discretion to decide how the costs of this proceeding are to be allocated.

451. The Parties agree that costs should be awarded in proportion to the relative success of each Party – the so-called principle of "costs follow the event"[405]. Furthermore, each of the Parties contends that the Tribunal should take into account the conduct

[405] C-CS I, para. 5; C-CS II, para. 6; R-CS I, para. 4; R-CS II, para. 4.

of the other Party, which could be said to have led to increased costs for each of the Parties.

452. The Tribunal will follow the principle of "costs follow the event". However, the Tribunal will not consider the Parties' conduct in making its decision. Although both Parties have fought hard to defend their cases and interests, the Tribunal considers that in all respects the Parties have proceeded with diligence and care, and has found no signs of procedural misconduct.

B. Allocation of costs

453. The Parties have incurred two main categories of costs:

- The expenses incurred by the Parties to further their position in the arbitration (counsel's fees, disbursements, expenses with expert witnesses, travel and accommodation, etc.) [the "**Defense Expenses**"] (**a.**); and

- The lodging fee and advance on costs paid to ICSID (including the fees and expenses of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees and direct expenses) [the "**Costs of Arbitration**"] (**b.**).

a. Defense Expenses

454. The Parties' Defense Expenses include costs incurred with bifurcation, jurisdiction and liability, document production, and quantum.

Bifurcation

455. In November 2015, Respondent presented a request for bifurcation of the proceedings, arguing that Respondent's jurisdictional and admissibility objections should be resolved as a preliminary matter.

456. Claimant was generally successful in the bifurcation phase, in the sense that the Tribunal decided to join the issues of jurisdiction, competence, admissibility, and liability. Therefore, Respondent should reimburse [redacted] incurred by Claimant in the bifurcation phase.

Jurisdiction and Liability

457. In the Decision on Jurisdiction and Liability, the Tribunal:

- Dismissed four of the five jurisdictional and admissibility arguments of Respondent, *i.e.*, the Inter-State Dispute Objection[406], the Transfer of Claims Objection[407], the EU Law Incompatibility Objection[408] and the Amicable Settlement Requirement Objection[409];

[406] Decision, para. 404.
[407] Decision, para. 464.
[408] Decision, para. 735.
[409] Decision, para. 827.

- Upheld one of the five jurisdictional and admissibility arguments of Respondent, *i.e.*, the EU Law Claims and Human Rights Objection[410];

- Upheld Claimant's [redacted] Claim related to [redacted] and concluded that Respondent, [redacted] violated its obligations under Arts. 2 and 3 of the BIT[411]; and

- Dismissed the remaining claims put forward by Claimant, *i.e.*, the Debt Exchange Claim [redacted] the Composite Breach Claim [redacted] and [redacted].

458. The Tribunal thus decided to dismiss four out of five jurisdictional and admissibility objections put forward by Respondent and three out of four liability claims put forward by Claimant.

459. Claimant was generally the successful party in relation to the jurisdictional and admissibility objections, given that the Tribunal dismissed all the major objections put forth by Respondent and only upheld one relatively minor jurisdictional objection.

460. As to liability, *prima facie*, Claimant was only partially successful – only one of its four claims was eventually successful. The Tribunal did determine that Greece had violated its obligations under Arts. 2 and 3 of the BIT, by granting Laiki a treatment "less favourable" than that accorded to other investors.

461. Considering this outcome, the Tribunal decides that Claimant is entitled to reimbursement for a quarter of its Defense Expenses in the jurisdiction and liability phase, *i.e.*, [redacted]

Document production

462. The Tribunal does not find that one of the Parties was more successful than the other in the document production phase. Therefore, each Party shall bear its own Defense Expenses related to the document production phase.

Quantum

463. Lastly, in the quantum phase Laiki put forward a claim for compensation for breach of Arts. 2 and 3 of the BIT.

464. Overall, Claimant was the successful party, given that the Tribunal upheld the general claim that Laiki was entitled to compensation for Greece's wrongful conduct.

[410] Decision, para. 754.
[411] Decision, paras. 1345 and 1387.
[redacted]

465. However, Laiki invoked three heads of loss as the basis for its claim. The Tribunal decided to uphold Claimant's Loss 1 and Loss 3, sub-head 1, but dismissed Claimant's Loss 2 and Loss 3, sub-head 2.

466. In view of this, the Tribunal finds that Claimant is entitled to reimbursement of half of its Defense Expenses incurred in the quantum phase, *i.e.*, [redacted]

b. Costs of Arbitration

467. The Tribunal must now turn to the Costs of Arbitration. The Costs of Arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses Prof. Juan Fernández-Armesto Prof. Philippe Sands Prof. Giorgio Sacerdoti	 USD 516,773.48 USD 148,308.73 USD 202,979.95
Mr. Felipe Aragón Barrero's expenses	USD 7,254.25
ICSID's administrative fees	USD 264,000
Direct expenses (estimated)	USD 175,022.40[418]
Total	**USD 1,314,338.81**

468. The above costs have been paid out of the advances made by the Parties in equal parts[419]. As a result, each Party's share of the Costs of Arbitration amounts to USD 657,169.41. In addition, the Claimant has paid a lodging fee of USD 25,000.

469. The Tribunal finds that these Costs should be treated somewhat differently to Defense Expenses, since these are the Costs incurred for having to resort to arbitration and cannot be divided between the different phases of the proceedings or the Parties' respective claims. The Tribunal must thus look to the general outcome of the arbitration.

470. The Tribunal finds that, in general, Claimant was the party successful in this dispute: it suffered discrimination caused by the Hellenic Republic. Claimant had a legitimate reason to resort to arbitration, to pursue redress for the violation of its rights as an investor in Greece.

471. Therefore, the Tribunal decides that Respondent should bear Claimant's Costs of Arbitration.

* * *

[redacted]

[418] The direct expenses do not include any shipping of hard copies of the Award that may be requested by the Parties.

[419] The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

472. Accordingly, the Tribunal orders Respondent to pay Claimant [redacted] to cover Claimant's Defense Expenses and **USD 682,169.41**[421] to cover Claimant's Costs of Arbitration.

C. Interest

473. Claimant has requested an award of interest "on the amount awarded"[422], thus including any amount awarded as costs.

474. The Tribunal has already decided that the compensation owed to Claimant for breach of Arts. 2 and 3 of the BIT shall accrue pre- and post-award interest at a LIBOR rate applicable to six-months deposits denominated in EUR plus a 2% margin, compounded semi-annually.

475. However, considering that:

- The amounts claimed by Claimant as Defense Expenses are quantified in British Pound Sterling (GBP);

- The amounts claimed by Claimant as Costs of Arbitration are quantified in United States Dollar (USD); and

- Art. 4 of the BIT – which the Tribunal applies by analogy[423] – provides that payment of interest shall be "calculated on the basis of the six-month London Interbank Offered Rate applicable to the same currency";

the Tribunal decides that interest over:

- The Defense Expenses shall accrue at a LIBOR rate applicable to six-months deposits denominated in GBP plus a 2% margin, compounded semi-annually;

- The Costs of Arbitration shall accrue at a LIBOR rate applicable to six-months deposits denominated in USD plus a 2% margin, compounded semi-annually.

476. The *dies a quo* shall be the date of issuance of this Award and the *dies ad quem* shall be the date of effective payment.

[redacted]

[421] **USD 657,169.41 + USD 25,000 = USD 682,169.41.**
[422] C-MQ, para. 58.3.
[423] See para. 420 *supra*.

VII. AWARD

477. For the reasons set out above, the Tribunal unanimously rules as follows:

1. Orders the Hellenic Republic to pay EUR 34,500,000 to Cyprus Popular Bank Public Co. Ltd as compensation for the breach of Articles 2 and 3 of the BIT;

2. Orders the Hellenic Republic to pay pre-award and post-award interest over the amount of EUR 34,500,000 at the LIBOR rate applicable to six-month deposits denominated in Euros, plus a margin of 2%, compounded semi-annually, from [redacted] until the date of effective payment;

3. Orders the Hellenic Republic to pay to Cyprus Popular Bank Public Co. Ltd [redacted] as Defense Expenses and USD 682,169.41 as Costs of Arbitration;

4. Orders the Hellenic Republic to pay interest over the amount of [redacted] at the LIBOR rate applicable to six-months deposits denominated in Pound Sterling, plus a 2% margin, compounded semi-annually, from the date of issuance of this Award until the date of effective payment;

5. Orders the Hellenic Republic to pay interest over the amount of USD 682,169.41 at the LIBOR rate applicable to six-months deposits denominated in United States Dollar, plus a 2% margin, compounded semi-annually, from the date of issuance of this Award until the date of effective payment;

6. All other claims and requests by the Parties are dismissed.

[redacted]

Prof. Philippe Sands
Arbitrator

Date: 6 April 2021.

Prof. Giorgio Sacerdoti
Arbitrator

Date:

Prof. Juan Fernández-Armesto
President of the Tribunal

Date:

[redacted]

Prof. Philippe Sands
Arbitrator

Date:

Prof. Giorgio Sacerdoti
Arbitrator

Date: 6 April 2021

Prof. Juan Fernández-Armesto
President of the Tribunal

Date:

Prof. Philippe Sands
Arbitrator

Date:

Prof. Giorgio Sacerdoti
Arbitrator

Date:

Prof. Juan Fernández-Armesto
President of the Tribunal

Date: 14 April 2021

ANNEX
DECISION ON JURISDICTION AND LIABILITY
8 JANUARY 2019

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

CYPRUS POPULAR BANK PUBLIC CO. LTD.

Claimant

and

HELLENIC REPUBLIC

Respondent

ICSID Case No. ARB/14/16

DECISION ON JURISDICTION AND LIABILITY

Members of the Tribunal
Prof. Juan Fernández-Armesto, President
Prof. Philippe Sands, Arbitrator
Prof. Giorgio Sacerdoti, Arbitrator

Secretary of the Tribunal
Ms. Martina Polasek

Assistant to the Tribunal
Mr. Felipe Aragón Barrero

Date of dispatch to the Parties: 8 January 2019

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TABLE OF CONTENTS

GLOSSARY OF TERMS AND ABREVIATIONS

[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	Legal Opinion of [redacted] of 3 February 2017
[redacted] **I and II**	Legal Opinions of [redacted] of 2 October 2016 and 9 May 2017
[redacted] **I and II**	Legal Opinions of [redacted] of 29 September 2016 and 5 May 2017
BGH	German Federal Court of Justice
BIT or Greece-Cyprus BIT	Agreement between the Government of the Republic of Cyprus and the Government of the Hellenic Republic on the Mutual Promotion and Protection of Investments of 30 March 1992
Bondholder Law	Law No. 4050/2012 of 23 February 2012
C I	Claimant's Memorial of 30 September 2015
C II	Claimant's Reply of 6 February 2017
C III	[redacted]
C IV	Claimant's Post-Hearing Brief of 8 September 2017
C V	Claimant's Submission on the Achmea Judgment of 20 April 2018
C VI	Claimant's Response to the Tribunal's Questions on the Achmea Judgment of 8 June 2018
CAC	Collective Action Clause
CBofC	Central Bank of Cyprus
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted] **I and II**	Witness statements of [redacted] of 30 September 2016 and 5 May 2017
CJEU	Court of Justice of the European Union
Claimant	Cyprus Popular Bank Public Co. Ltd.
[redacted] **and II**	Expert Reports of [redacted] of 29 September 2015 and 3 February 2017
EBA	European Banking Authority
EBA Recommendation	EBA recommendation of 8 December 2011

ECB	European Central Bank
[redacted]	[redacted]
ECHFR	European Charter of Fundamental Rights
ECHR	European Convention on Human Rights
EFSF	European Financial Stability Facility
EFSM	European Financial Stabilization Mechanism
[redacted]	[redacted]
ESM	European Stability Mechanism
ESM Treaty	Treaty establishing the European Stability Mechanism, of 2 February 2012
EU Treaties	The TEU and the TFEU
Eurogroup	Informal body composed of the Ministers of Finance of the Eurozone
[redacted]	[redacted]
FL-GGBs	Greek Government Bonds governed by Foreign Law
GL-GGBs	Greek Government Bonds governed by Greek Law
[redacted]	Witness statement of [redacted] of 24 September 2015
Hearing	Hearing on jurisdiction, admissibility and liability held in Zurich, Switzerland from 5 to 13 June 2017
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	Legal Opinion of [redacted] of 29 September 2015
HT	Hearing Transcript
[redacted]	[redacted]
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, of 18 March 1965
IIF	Institute of International Finance
IMF	International Monetary Fund
[redacted]	[redacted]
Laiki	Cyprus Popular Bank Public Co. Ltd.
[redacted]	Legal Opinion of [redacted] of 10 May 2017
Marfin	Marfin Investment Group
Master Agreement	Master Agreement for Financial Transaction between Laiki and the CBofC, of 27 September 2011
[redacted]	[redacted]
[redacted] **I and II**	Witness statements of [redacted] of 30 September 2016 and 9 May 2017
[redacted] **I and II**	Legal Opinions of [redacted] of 29 September 2015 and 2 February 2017

[redacted]	[redacted]
[redacted] **I and II**	Expert Reports of [redacted] of 29 September 2015 and 3 February 2017
[redacted] **I and II**	Witness statements of [redacted] of 30 September 2016 and 9 May 2017
[redacted] **I and II**	Witness statements of [redacted] of 29 September 2016 and 9 May 2017
Parties	Cyprus Popular Bank Public Co. Ltd. and the Hellenic Republic
PCIC	Private Creditor Investor Committee
PDMA	Public Debt Management Agency
[redacted] **I and II**	Expert Reports of [redacted] of 3 October 2016 and 10 May 2017
[redacted]	[redacted]
R I	Respondent's Counter-Memorial of 3 October 2016
R II	Respondent's Rejoinder of 10 May 2017
R III	[redacted]
R IV	Respondent's Post-Hearing Brief of 8 September 2017
R V	Respondent's Submission on the Achmea Judgment of 30 March 2018
R VI	Respondent's Response to the Tribunal's Questions on the Achmea Judgment of 8 June 2018
Request for Arbitration	Claimant's Request for Arbitration of 20 June 2014
Resolution Law	Law No. 17(I)/2013 on the Resolution of Credit and Other Institutions of 22 March 2013
Respondent	The Hellenic Republic
[redacted]	Witness statements of [redacted] of 22 September 2015 and 27 January 2017
[redacted]	[redacted]
[redacted] **I and II**	Witness statements of [redacted] of 22 September 2015 and 30 January 2017
[redacted] **I and II**	Witness statements of [redacted] of 26 September 2015 and 2 February 2017
[redacted]	[redacted]
TEU	Treaty on the European Union
TFUE	Treaty on the Functioning of the European Union
[redacted]	Witness statement of [redacted] of 28 September 2015
Troika	The European Commission, the ECB and the IMF
[redacted]	[redacted]
VCLT	Vienna Convention on the Law of Treaties

LIST OF INVESTMENT ARBITRATION CASES

Abaclat	*Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011
Achmea (Award)	*Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Final Award, 7 December 2012.
Achmea (Jurisdiction)	*Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010
ADC	*ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006
Aguas del Tunari	*Aguas del Tunari, S.A. v. The Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005
Ambiente Ufficio	*Ambiente Ufficio S.p.A. and others v. The Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013
Anglia	*Anglia Auto Accessories Ltd. v. The Czech Republic*, SCC Case No. V 2014/181, Final Award, 10 March 2017
Azurix	*Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006
Bayindir	*Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009
Champion	*Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award, 26 October 2006
CMS	*CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003
Crystallex	*Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016
CSOB	*Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award, 29 December 2004
Duke Energy	*Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2018
Eastern Sugar	*Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 88/2004, Partial Award, 27 March 2007.

EFD	*EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009
El Paso	*El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011
Electrabel	*Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015
Euram	*European American Investment Bank AG (EURAM) v. The Slovak Republic*, UNCITRAL, PCA Case No. 2010-12, Award on Jurisdiction, 22 October 2012
Fedax	*Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, 11 July 1997
Flughafen	*Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014.
Generation Ukraine	*Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003
Glaims	*Glamis Gold Ltd. v. United States of America*, UNICITRAL, Award, 8 June 2009
Global Trading	*Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010
Hochtief	*Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014
Invesmart	*Invesmart v. The Czech Republic, ad hoc* UNCITRAL, Award, 26 June 2009
KT Asia	*KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013
Lemire	*Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010
Levy	*Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014
LG&E (Jurisdiction)	*LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Jurisdiction, 30 April 2004
LG&E (Liability)	*LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006
Loewen	*Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003

MHS (Annulment)	*Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009
MTD	*MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004
Nova Scotia	*Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014
Occidental (Annulment)	*Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015
OI European	*OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015
Oostergetel	*Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, ad hoc UNCITRAL, Decision on Jurisdiction, 30 April 2010
Parkerings	*Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007
Phoenix	*Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009
Poštová	*Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015
Quiborax	*Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012
Romak	*Romak S.A. v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009
Rompetrol	*The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013
Ronald S. Lauder	*Ronald S. Lauder v. The Czech Republic*, ad hoc UNCITRAL, Final Award, 3 September 2001
Rosinvest	*RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010
Ruby Roz	*Ruby Roz Agricol and Kaseem Omar v. Kazakhstan*, UNCITRAL, Award on Jurisdiction, 1 August 2013
Rusoro	*Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016
S.D. Myers	*S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000

Salini	*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 21 July 2001
Saluka	*Saluka Investments B.V. v. The Czech Republic*, *ad hoc* UNCITRAL, Partial Award, 17 March 2006
Santa Elena	*Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000
SGS	*SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/06, Decision on Jurisdiction, 29 January 2004
Siemens	*Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007
Tecmed	*Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003
Teinver (Jurisdiction)	*Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012
Thunderbird	*International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award 26 January 2006
UP and CD Holding	*UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018
Vattenfall	*Vattenfall AB, et al v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018.
Vivendi (Annulment)	*Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic, ICSID Case No. ARB/97/3*, Decision on Annulment, 3 July 2002
Vivendi II	*Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007
Waste Management II	*Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004

I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ["**ICSID**" or the "**Centre**"] on the basis of the Agreement between the Government of the Republic of Cyprus and the Government of the Hellenic Republic on the Mutual Promotion and Protection of Investments dated 30 March 1992 [the "**Greece-Cyprus BIT**" or "**BIT**"] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 [the "**ICSID Convention**"].

2. The Claimant is Cyprus Popular Bank Public Co. Ltd. ["**Laiki**" or "**Claimant**"], a company established under the laws of the Republic of Cyprus, and under special administration of Ms. Andri Antoniades, as the Special Administrator of Laiki.

3. The Claimant is represented by Mr. Thomas Beazley Q.C. of the law firm of Joseph Hage Aaronson LLP, London, U.K., and Mr. Alecos Markides of the law firm of Markides, Markides & Co LLC, Nicosia, Cyprus. Mr. Pushpinder Saini Q.C. of Blackstone Chambers, London, subsequently joined the team representing the Claimant.

4. The Respondent is the Hellenic Republic [the "**Respondent**" or "**Greece**"].

5. The Respondent is represented by Dr. Claudia Annacker and Mr. Christopher Moore of the law firm of Cleary Gottlieb Steen & Hamilton LLP, Paris, France, London, and U.K., and Ms. Styliani Charitaki, Ms. Emmanouela Panopoulou, and Ms. Maria Vlassi, Members of the Legal Council of the Hellenic Republic.

6. The Claimant and Respondent are hereinafter collectively referred to as the "**Parties**".

II. PROCEDURAL HISTORY

7. On 23 June 2014 ICSID received a Request for Arbitration dated 20 June 2014 from the Claimant [the "**Request for Arbitration**"]. On 16 July 2014 the Secretary-General of ICSID registered the request for the institution of arbitration proceedings in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. The Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

8. The Parties agreed that the Tribunal would consist of three members. One arbitrator to be appointed by each party and the presiding arbitrator to be appointed by agreement of the Parties.

9. Following appointment by the Claimant, Professor Philippe Sands Q.C., a national of the U.K. and France, accepted his appointment as arbitrator on 15 September 2014. Subsequently, following appointment by the Respondent, Professor Giorgio Sacerdoti, a national of Italy, accepted his appointment as arbitrator on 3 October 2014. Professor Juan Fernández-Armesto, a national of Spain, was appointed by the

Parties as presiding arbitrator. He accepted his appointment as presiding arbitrator on 7 October 2014. The Tribunal was thus constituted in accordance with Article 37(2)(a) of the ICSID Convention on 16 October 2014.

10. In accordance with ICSID Arbitration Rule 13(1), the first session must be held within 60 days after the constitution of the Tribunal. The Tribunal proposed for the first session to be held on 3 December 2014 by telephone conference.

11. On 6 November 2014 the Parties agreed to extend the deadline for the first session to 19 December 2014 in accordance with ICSID Arbitration Rule 13(1). On 24 November 2014 the Claimant requested that the first session be rescheduled to 12 January 2015. The Respondent consented to the rescheduling of the first session.

12. On 12 January 2015, the Tribunal held a first session with the Parties by telephone conference. The Parties' agreements and the Tribunal's determinations on procedural matters discussed at the first session were laid out in Procedural Order No. 1 of 21 January 2015.

13. Among other things, it was agreed that the applicable arbitration rules would be the ICSID Arbitration Rules in force as of 10 April 2006, that the procedural language would be English and that the place of proceedings would be Washington D.C. No party had any objection to the appointment of any Member of the Tribunal, and the parties agreed to appoint Mr. Felipe Aragón, lawyer at Armesto & Asociados, as Assistant to the Tribunal.

14. The Respondent informed the Tribunal that it intended to raise objections to jurisdiction and admissibility, and to propose bifurcation of the proceedings. The Parties were unable to agree on whether proceedings on the merits should be suspended pending the hearing of the Respondent's intended objections. The Parties were also unable to agree on a timetable for the filing of the parties' observations on these intended objections, including whether there should be production of documents or any rulings on production before the filing of such observations.

15. Because the Parties could not agree on the procedural timetable, Procedural Order No.1 laid out the Parties' agreement that the Respondent would produce to the Claimant a request for production of documents relevant to the Respondent's case on Jurisdiction by 30 January 2015. The procedure following the Respondent's request for production of documents would then be agreed between the Parties and/or referred to the Tribunal thereafter. The production of documents would be guided by Article 3 of the *International Bar Association Rules on the Taking of Evidence in International Arbitration (2010)* except when inconsistent with Procedural Order No. 1 or any later order of the Tribunal, in which case the orders of the Tribunal were to prevail.

16. On 18 March 2015 the Tribunal issued Procedural Order No. 2 setting out the number and sequence of pleadings and a procedural timetable for the arbitration. The timeline took into account a potential request for bifurcation by the Respondent.

17. On 30 September 2015 Claimant filed its Memorial. Subsequently the Respondent filed its request for bifurcation of proceedings on 4 November 2015. The Claimant

then presented its reply to the Respondent's request for bifurcation on 25 November 2015.

18. On 25 February 2016, the Tribunal and the Parties held a hearing on the issue of bifurcation in Zurich, Switzerland. The following persons were present at the hearing on bifurcation:

Tribunal:	
Prof. Juan Fernández-Armesto	President
Prof. Philippe Sands	Arbitrator
Prof. Giorgio Sacerdoti	Arbitrator
ICSID Secretariat:	
Ms. Natali Sequeira	Acting Secretary of the Tribunal
Assistant to the Tribunal	
Mr. Felipe Aragon Barrero	Assistant to the Tribunal
For the Claimant:	
Mr. Tom Beazley Q.C.	Joseph Hage Aaronson LLP
Mr. Joe Hage	Joseph Hage Aaronson LLP
Mr. Jonathan Dawid	Joseph Hage Aaronson LLP
Ms. Anna Shumilova	Joseph Hage Aaronson LLP
Mr. Peter Stewart	Joseph Hage Aaronson LLP
Mr. Alecos Markides	Markides, Markides & Co. LLC
Mr. Nicos Makrides	Markides, Markides & Co. LLC
Mrs. Maria Vassiliou	Office of the Special Administrator of Cyprus Popular Bank Public Co. Ltd.
For the Respondent:	
Ms. Styliani Charitaki	Legal Council of the State, Hellenic Republic
Ms. Emmanouela Panopoulou	Legal Council of the State, Hellenic Republic
Ms. Maria Vlassi	Legal Council of the State, Hellenic Republic
Dr. Claudia Annacker	Cleary Gottlieb Steen & Hamilton LLP
Mr. Christopher Moore	Cleary Gottlieb Steen & Hamilton LLP
Ms. Ariella Rosenberg	Cleary Gottlieb Steen & Hamilton LLP
Ms. Rikki Stern	Cleary Gottlieb Steen & Hamilton LLP
Ms. Sarah Schröder	Cleary Gottlieb Steen & Hamilton LLP
Mr. Antonios Vassiloconstandakis	Cleary Gottlieb Steen & Hamilton LLP

19. On 8 April 2016 the Tribunal issued Procedural Order No. 3 laying out the Tribunal's decision to bifurcate proceedings into two phases. Phase 1 would involve all issues relating to jurisdiction, competence, admissibility, and liability. Phase 2 would follow (if applicable), where all issues regarding quantification of damages, interest and costs, and any other outstanding issues not adjudicated in Phase 1 would be decided and formalized in an award also incorporating the Tribunal's decisions in Phase 1.

20. Procedural Order No. 3 also laid out the new procedural timetable for Phase 1 of the arbitration and gave guidance on the Parties' document production exercise. Specifically, it laid out certain requirements that each request for document production must fulfill, and the grounds on which a party could object to disclosure.

21. On 3 October 2016 the Respondent filed a counter-memorial on jurisdiction and liability.

22. On 16 November 2016, following exchanges between both Parties, each party filed a request for the Tribunal to decide on the production of documents. On that same date, the Claimant submitted to the Secretariat 57 requests for document production. This included an introductory note on the Respondent's objections to the Claimant's requests and accompanying legal authorities CL-88 to CL-92.

23. On 17 November 2016 the Respondent submitted to the Secretariat 40 requests for document production. This included an introductory note on the Claimant's objections to the Respondent's requests and the Respondent's cover letter of 16 November 2016 which responded to the Claimant's objections. On that same date, the Secretariat simultaneously transmitted the Parties' submissions on document production to the Tribunal and the Parties (in accordance with paragraph 13.3 of Procedural Order No.1).

24. On 17 November 2016 the Tribunal issued Procedural Order No. 4 which gave effect to the Parties' joint proposal to extend the deadline for subsequent submissions in the document production stage.

25. On 16 December 2016 the Tribunal issued Procedural Order No. 5, where the Tribunal adopted a partial decision on document production and deferred the decision in relation to objections to disclosure based on privilege to a later stage. On 3 January 2017 the Tribunal issued Procedural Order No. 6 updating the procedural timetable in relation to the dispute on privilege.

26. On 13 January 2017 each Party submitted two affidavits signed by its chief legal officers and its head external counsel representing full compliance with the rules for document production in this arbitration, pursuant to paragraph 45 of Procedural Order No. 3. In the Claimant's affidavit, the Claimant's chief officer, Mr. Cleovoulos Alexandrou, represented that the Claimant had sent letters to various Cypriot institutions and [redacted] requesting access to documents in their possession which the Tribunal had ordered to be produced. Mr. Alexandrou stated that the Claimant would produce any responsive document obtained from these third parties, subject to privilege.

27. On 13 January 2017 the Respondent submitted a Privilege Log which identified 114 documents and two categories of documents. The Respondent's Privilege Log provided brief information on the content of each document and the claim for objecting to its production based on privilege. The Claimant did not submit a Privilege Log.

28. On 20 January 2017 the Claimant filed a response challenging the privilege objections raised by the Respondent. On 23 January 2017 the Tribunal granted the

Respondent leave to file a brief answer to the Claimant's challenge. The Respondent filed its answer on 25 January 2017.

29. On 26 January 2017 the Tribunal informed the Parties that it had been sufficiently briefed and that no further submissions were required on privilege objections.

30. On 6 February 2017 the Claimant filed its reply on jurisdiction and liability.

31. On 1 March 2017 the Tribunal issued Procedural Order No. 7, which detailed its decision on the attorney-client privilege, commercial or technical confidentiality, special political or institutional sensitivity, and fairness and equality objections raised by the Respondent. The Respondent was ordered to produce documents that the Tribunal did not deem to be protected by the above grounds.

32. On 10 May 2017 the Respondent filed a rejoinder on jurisdiction and liability. On 22 May 2017 the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference.

33. From 5 to 13 June 2017 the Tribunal held a hearing on jurisdiction, admissibility, and liability in Zurich, Switzerland [the "**Hearing**"]. The following persons were present at the Hearing:

Tribunal:	
Prof. Juan Fernández-Armesto	President
Prof. Philippe Sands	Arbitrator
Prof. Giorgio Sacerdoti	Arbitrator
ICSID Secretariat:	
Ms. Martina Polasek	Secretary of the Tribunal
Assistant to the Tribunal	
Mr. Felipe Aragon Barrero	Assistant to the Tribunal
For the Claimant:	
Mr. Pushpinder Saini Q.C.	Blackstone Chambers
Mr. Tom Beazley Q.C.	Joseph Hage Aaronson LLP
Mr. Joseph Hage	Joseph Hage Aaronson LLP
Mr. Alecos Markides	Markides, Markides & Co. LLC
Mr. Nicos Makrides	Markides, Markides & Co. LLC
Ms. Samantha Wilson	Joseph Hage Aaronson LLP
Ms. Noor Kadhim	Joseph Hage Aaronson LLP
Mr. Seth Cumming	Joseph Hage Aaronson LLP
Ms. Laura Beardshall	Joseph Hage Aaronson LLP
Ms. Lucy Needle	Joseph Hage Aaronson LLP
Dr. Federico Ortino	King's College London
For the Respondent:	
Dr. Claudia Annacker	Cleary Gottlieb Steen & Hamilton LLP

Mr. Christopher Moore	Cleary Gottlieb Steen & Hamilton LLP
Ms. Styliani Charitaki	Legal Council of the State, Hellenic Republic
Ms. Emmanouela Panopoulou	Legal Council of the State, Hellenic Republic
Ms. Maria Vlassi	Legal Council of the State, Hellenic Republic
Ms. Laurie Achtouk-Spivak	Cleary Gottlieb Steen & Hamilton LLP
Dr. Enrikő Horváth	Cleary Gottlieb Steen & Hamilton LLP
Ms. Ariella Rosenberg	Cleary Gottlieb Steen & Hamilton LLP
Ms. Rikki Stern	Cleary Gottlieb Steen & Hamilton LLP
Ms. Sarah Schröder	Cleary Gottlieb Steen & Hamilton LLP
Mr. Antonios Vassiloconstandakis	Cleary Gottlieb Steen & Hamilton LLP
Dr. Severin Klinkmüller	Cleary Gottlieb Steen & Hamilton LLP
Mr. Pablo Mateos Rodriguez	Cleary Gottlieb Steen & Hamilton LLP
Ms. Anastasia Poorhassan (paralegal assistant)	Cleary Gottlieb Steen & Hamilton LLP
Ms. Barbara Okerenta (paralegal assistant)	Cleary Gottlieb Steen & Hamilton LLP
Ms. Sharon Hughes (paralegal assistant)	Cleary Gottlieb Steen & Hamilton LLP
Ms. Georgia Orfanou (paralegal assistant)	Cleary Gottlieb Steen & Hamilton LLP

Court Reporter:

Ms. Claire Hill	English Court Reporter

Interpreter:

Mr. Angelos Kaklamanis	English – Greek Interpreter

34. During the Hearing, the following persons were examined:

On behalf of the Claimant:

[redacted] [redacted]

On behalf of the Respondent:

[redacted] [redacted]

35. On 8 September 2017 each party filed a post-hearing brief. On 16 October 2017 each party filed a submission on costs.

36. On 9 March 2018 the Respondent sent a letter to the Tribunal, directing its attention to the Court of Justice of the European Union's [the "**CJEU**"] decision in *Slovak Republic v. Achmea B.V.* of 6 March 2018[1] [the "***Achmea Judgment***"]. The Claimant filed its response to the Respondent's letter on 15 March 2018.

37. On 16 March 2018 the Tribunal directed the Respondent to file its observations on the *Achmea Judgment* by 30 March 2018 and the Claimant to file its reply within two weeks of the Respondent's observations. The Respondent filed its observations as scheduled and the Claimant filed its reply on 20 April 2018 after an approved extension. The Tribunal subsequently requested the Parties to consult and to indicate to the Tribunal their joint or separate proposals with regard to any further submissions on the *Achmea Judgment*.

38. On 3 May 2018 the Parties submitted a joint letter to the Tribunal, proposing alternative formats for a second round of submissions. The Tribunal opted to pose questions to the parties.

39. On 8 May 2018 the Tribunal addressed both Parties with specific questions regarding the implications of EU law on the present case following the *Achmea Judgment*. The parties filed their responses to the questions simultaneously on 8 June 2018.

III. FACTS

1. ***DRAMATIS PERSONAE***

40. The Claimant is Cyprus Popular Bank Public Co. Ltd ["**Laiki**"][2], founded in 1901, and incorporated under the laws of Cyprus. Laiki eventually became the second largest bank in Cyprus in terms of deposits and loans[3].

41. By 2012 more than 50%[4] of Laiki's business was carried out in Greece: Laiki had over 200 branches and 3,600 employees in the Hellenic Republic[5]; it held deposits for Greek customers of approximately EUR 6.8 B and had issued loans in excess of EUR 13 B[6]. Laiki's operations in Greece were carried out mainly through two channels:

- In 2007 Laiki bought a significant Greek bank, [redacted] operated as a subsidiary until March 2011, when it was subject to a cross-border merger and became a branch of Laiki; the majority

[1] Judgment of 6 March 2018, *Slovak Republic v. Achmea B.V.*, Case C-284/16, ECLI:EU:C:2018:158.
[2] Founded as People's Savings Bank Limassol Limited and renamed Laiki Cypriot Bank Ltd in 1969, Laiki Cypriot Bank Public Co Ltd in 2005, Marfin Popular Bank Public Co Ltd in 2006 and Cyprus Popular Bank Co Ltd in 2012.
[3] C-12, p. 3.
[4] C-137.
[5] C-21, p. 20; C-48, pp. 72-75.
[6] Ranking the sixth largest lender in the Greek economy (C-11, pp. 6 and 7).

of Laiki's Greek operations were conducted through [redacted], first as a subsidiary and then as a branch[7];

- Laiki also held a 97% equity participation in [redacted] a bank incorporated under the laws of Greece and supervised by [redacted] carried out investment banking and brokerage activities in Greece[8].

42. Laiki (directly or through [redacted]) also acquired, between March 2008 and March 2012, a substantial portfolio of sovereign bonds issued by the Hellenic Republic ["**GGBs**"]. In February 2012 the nominal value of GGB's held by Laiki was EUR 3.06 B, divided in EUR 2.8 B of Greek-law GGBs ["**GL-GGBs**"] and EUR 261 M holdings of foreign-law GGBs ["**FL-GGBs**"][9].

43. The Respondent is the Hellenic Republic. The acts impugned by Claimant as breaches of the BIT were performed by:

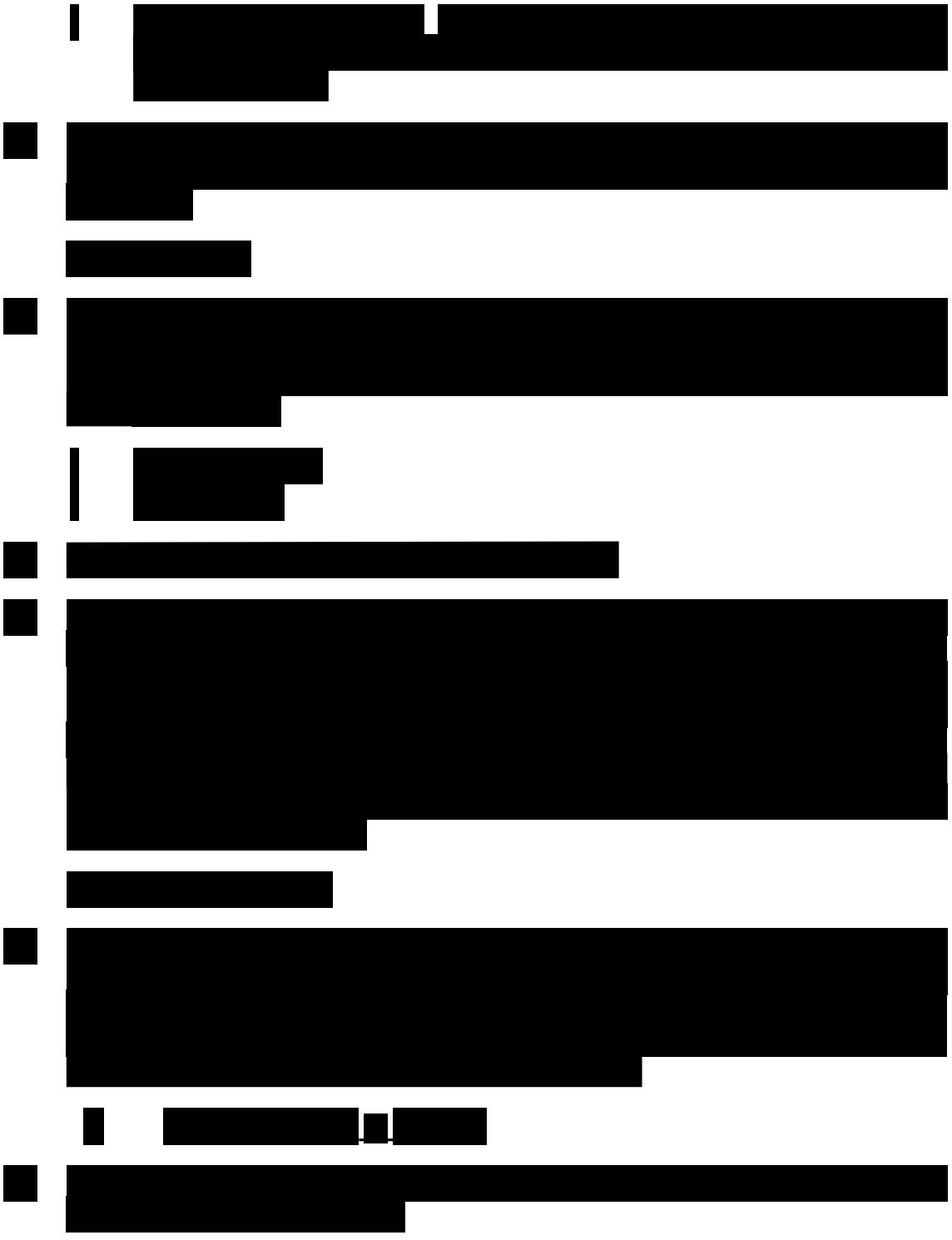
[redacted]

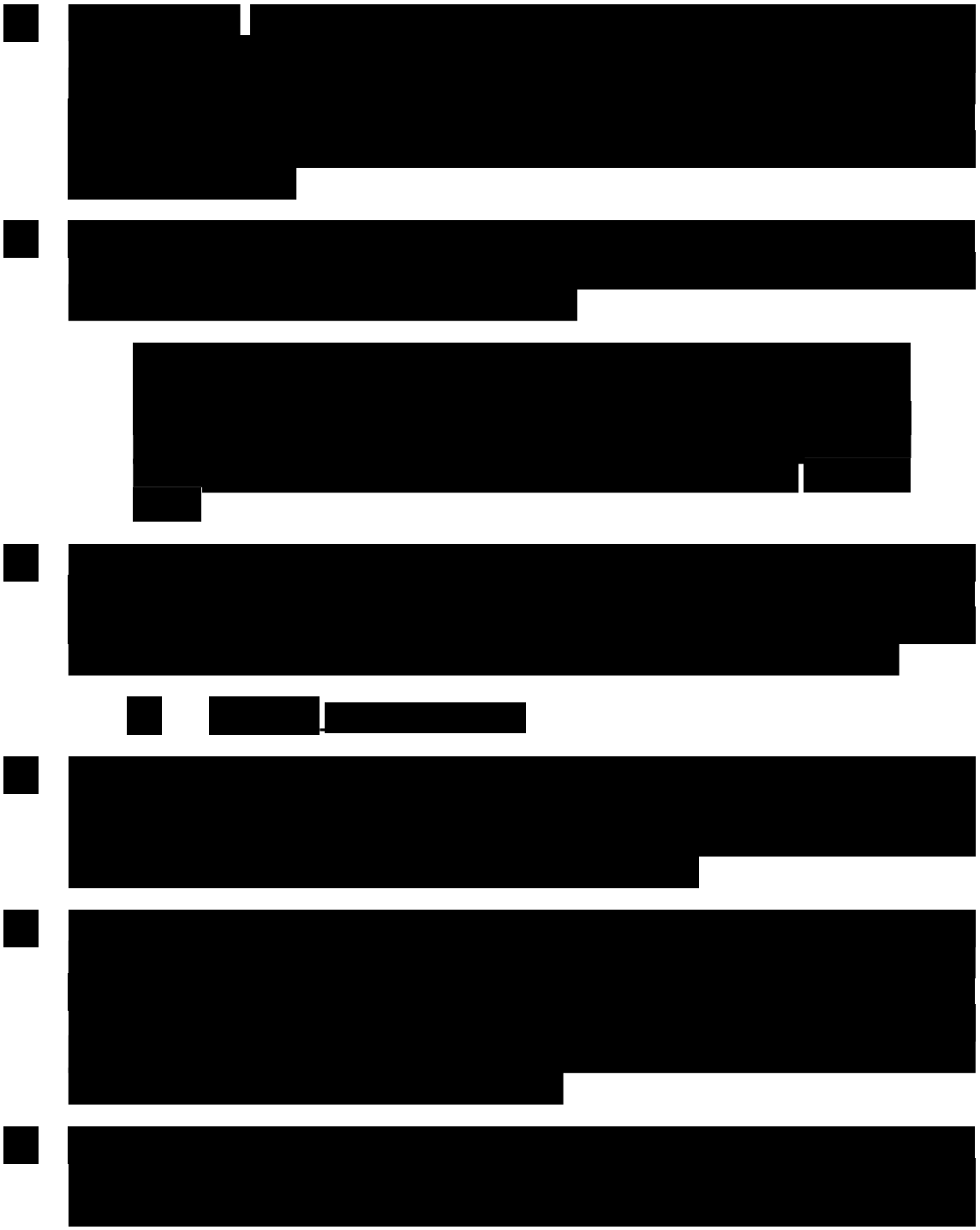
[7] [redacted] I, para. 9.
[8] C-24.
[9] See [redacted] I, para. 4.4 and Table 8.
[10] And its predecessor, the European Financial Stability Facility ["**EFSF**"].

2. CHRONOLOGY OF EVENTS

47. The Tribunal will provide in this section a chronology of main events (see Sections **3.** through **10.**). A more detailed analysis is to be found in each of the merits sections.

[redacted]





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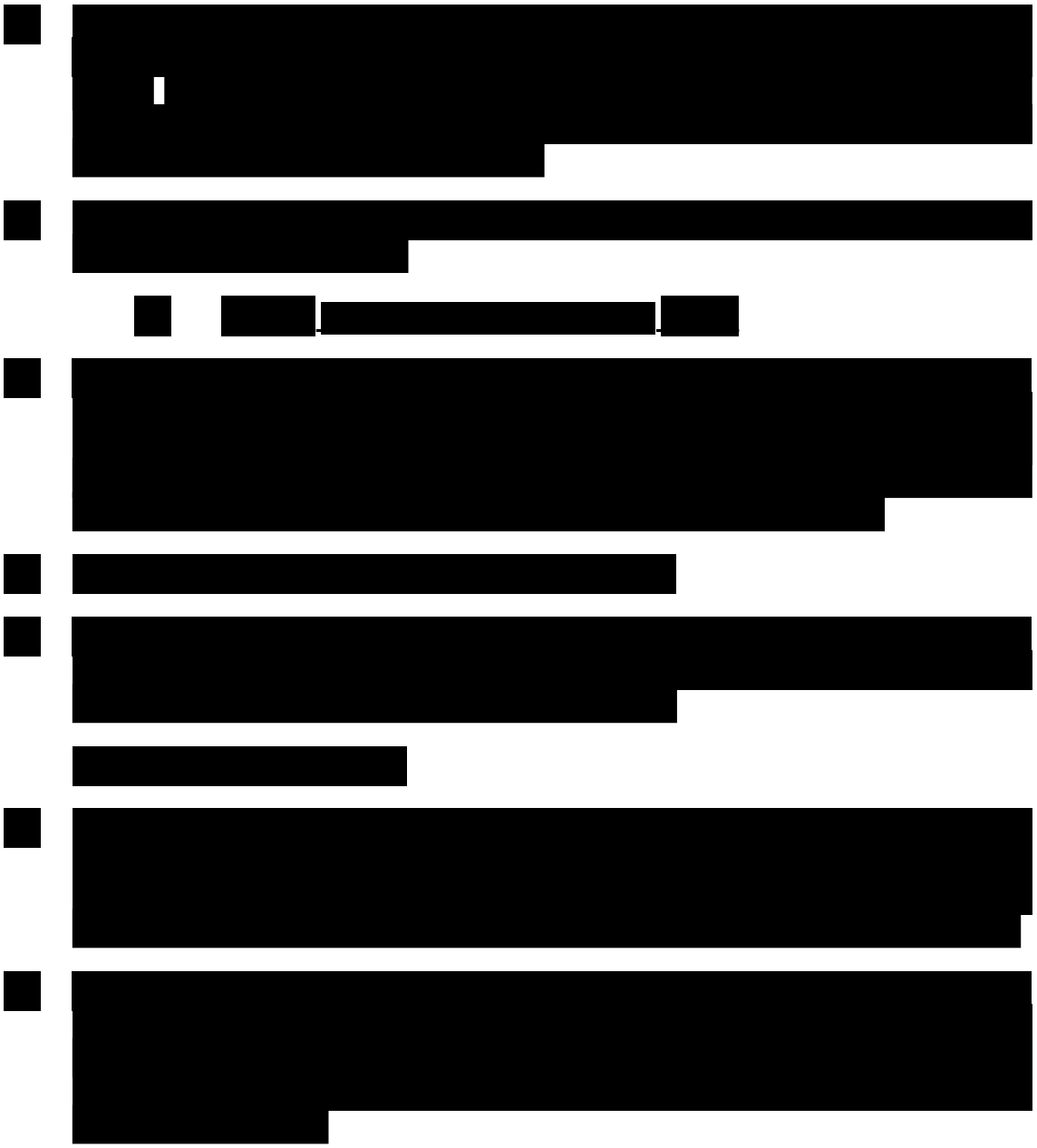

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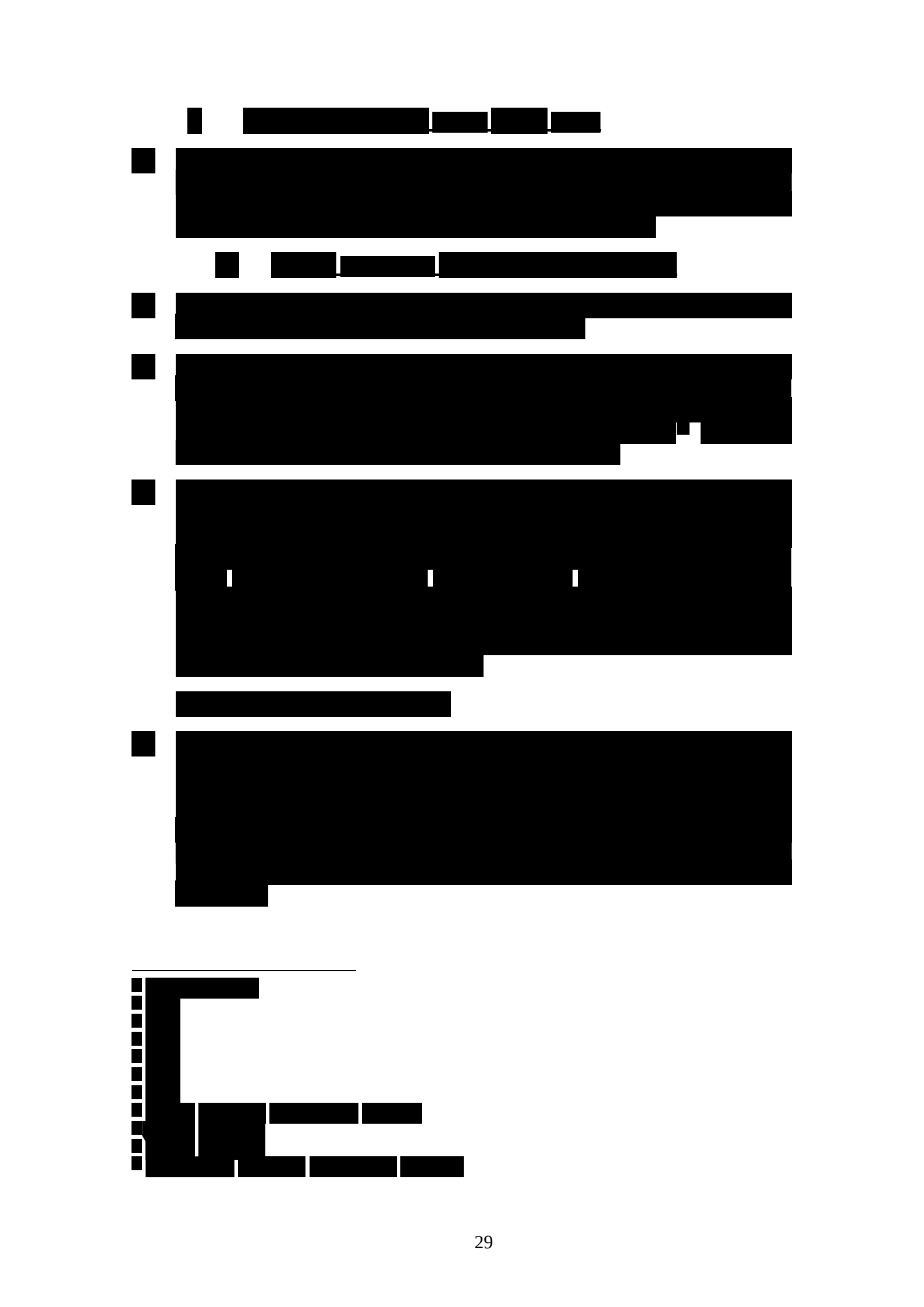

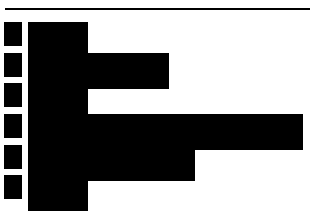

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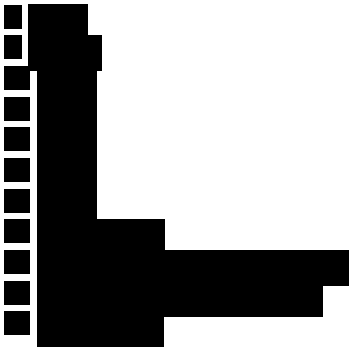

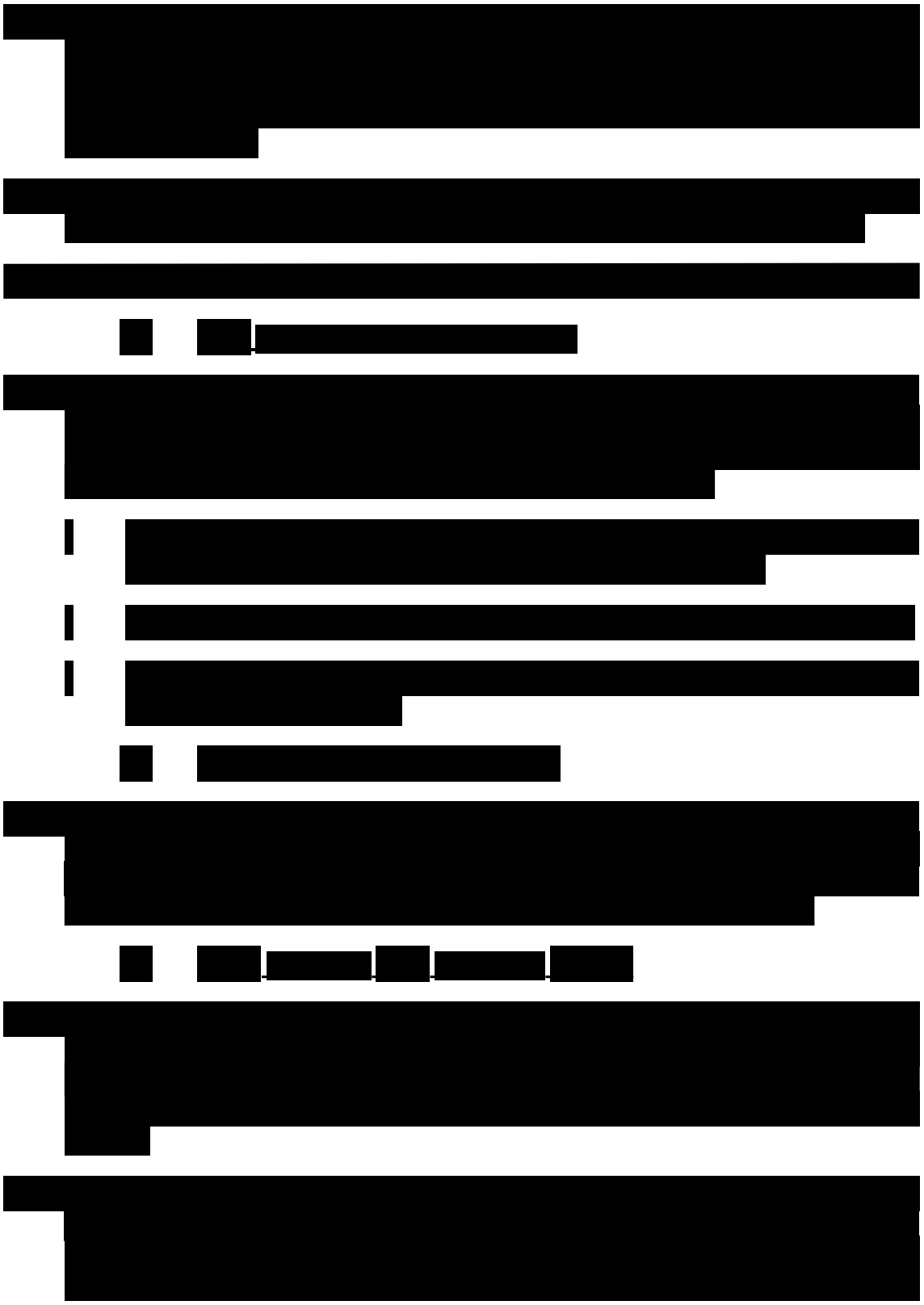

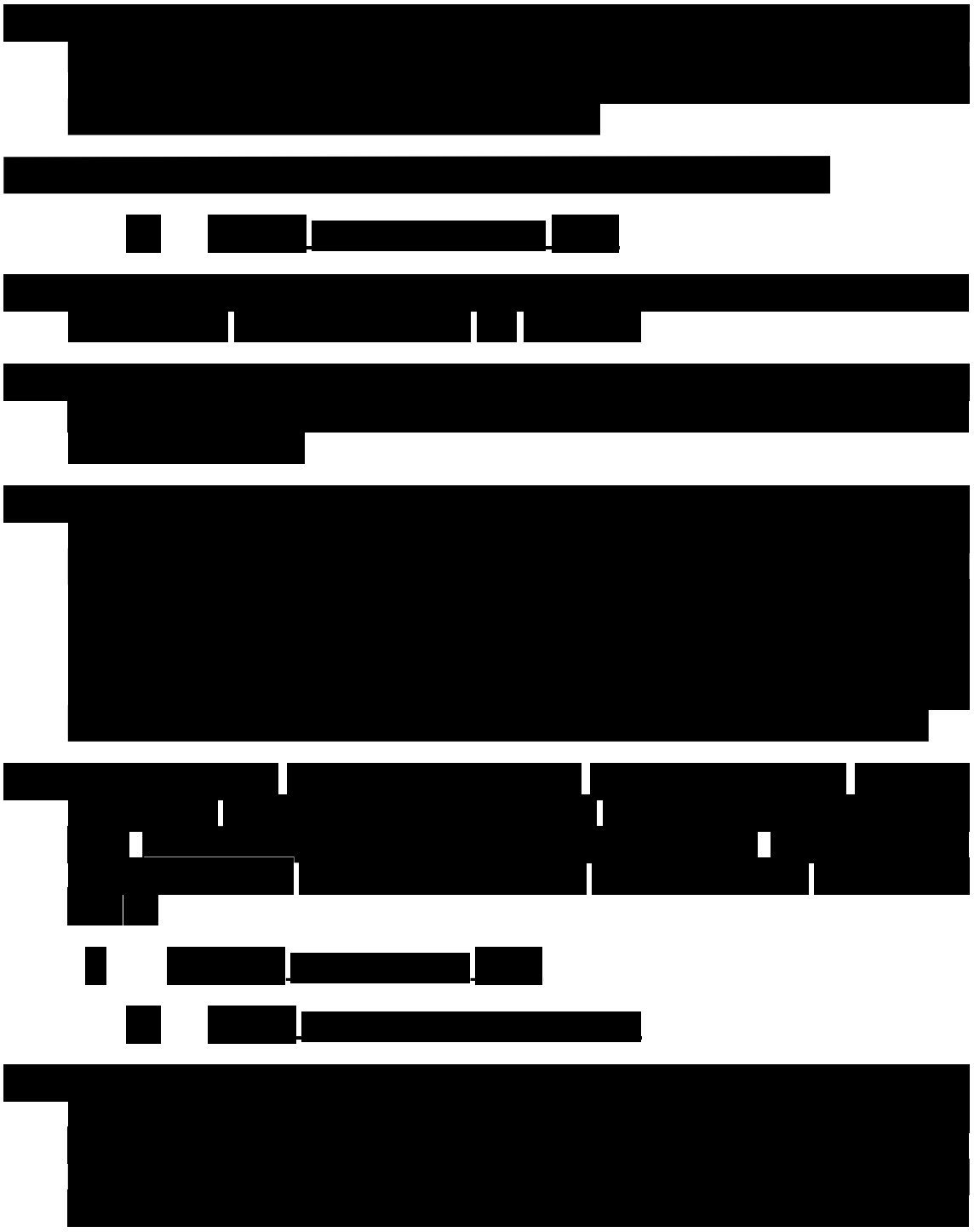

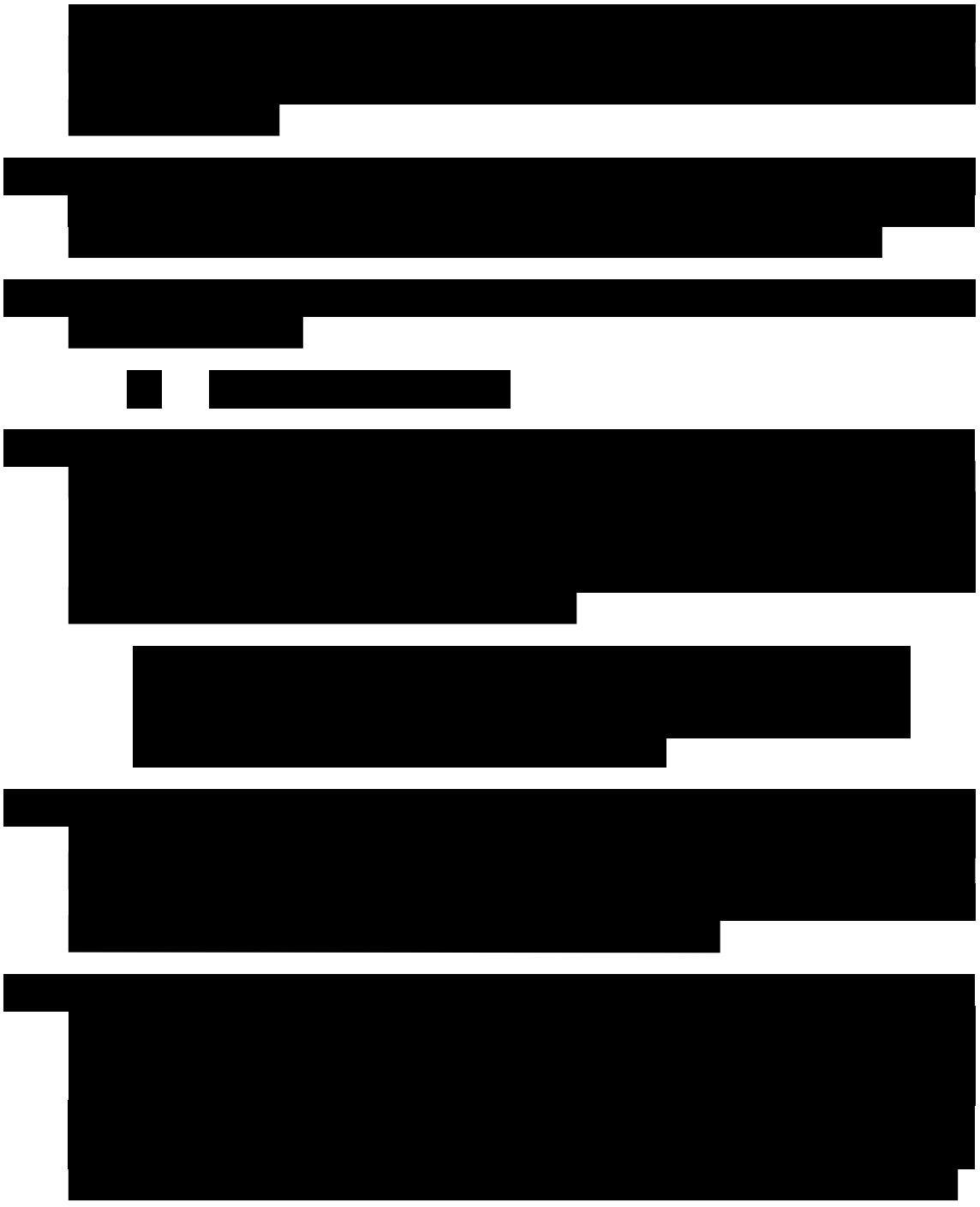

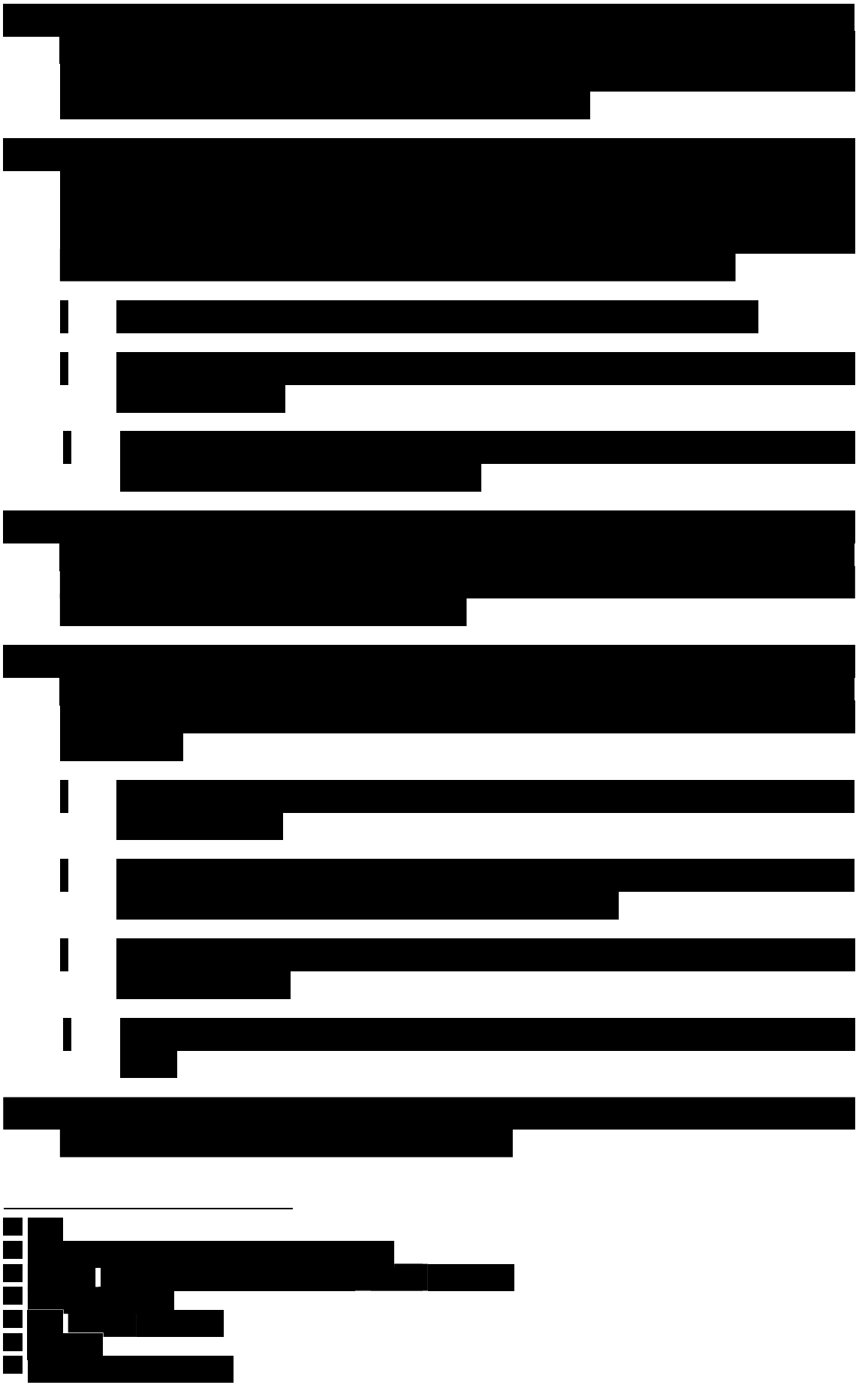

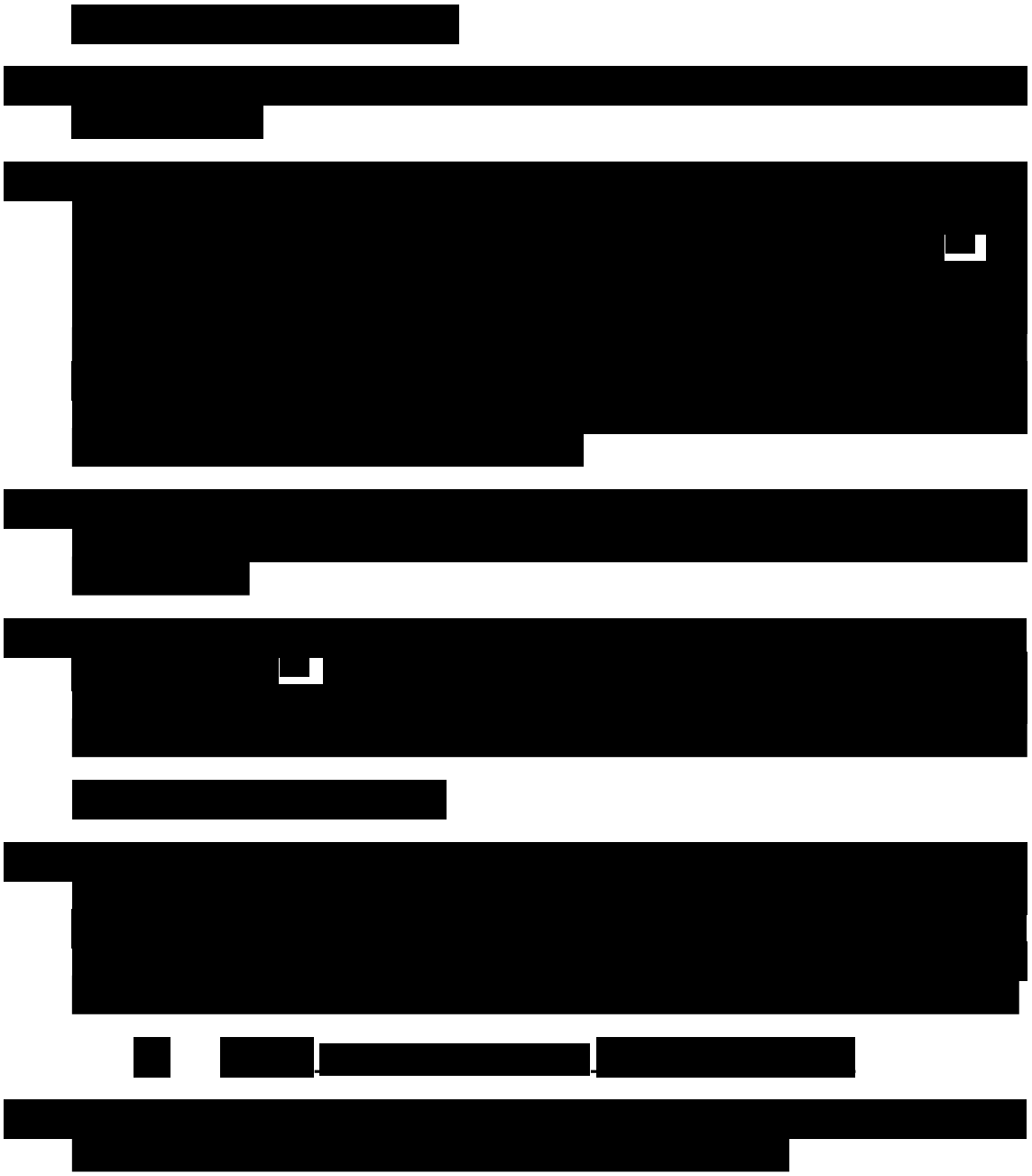

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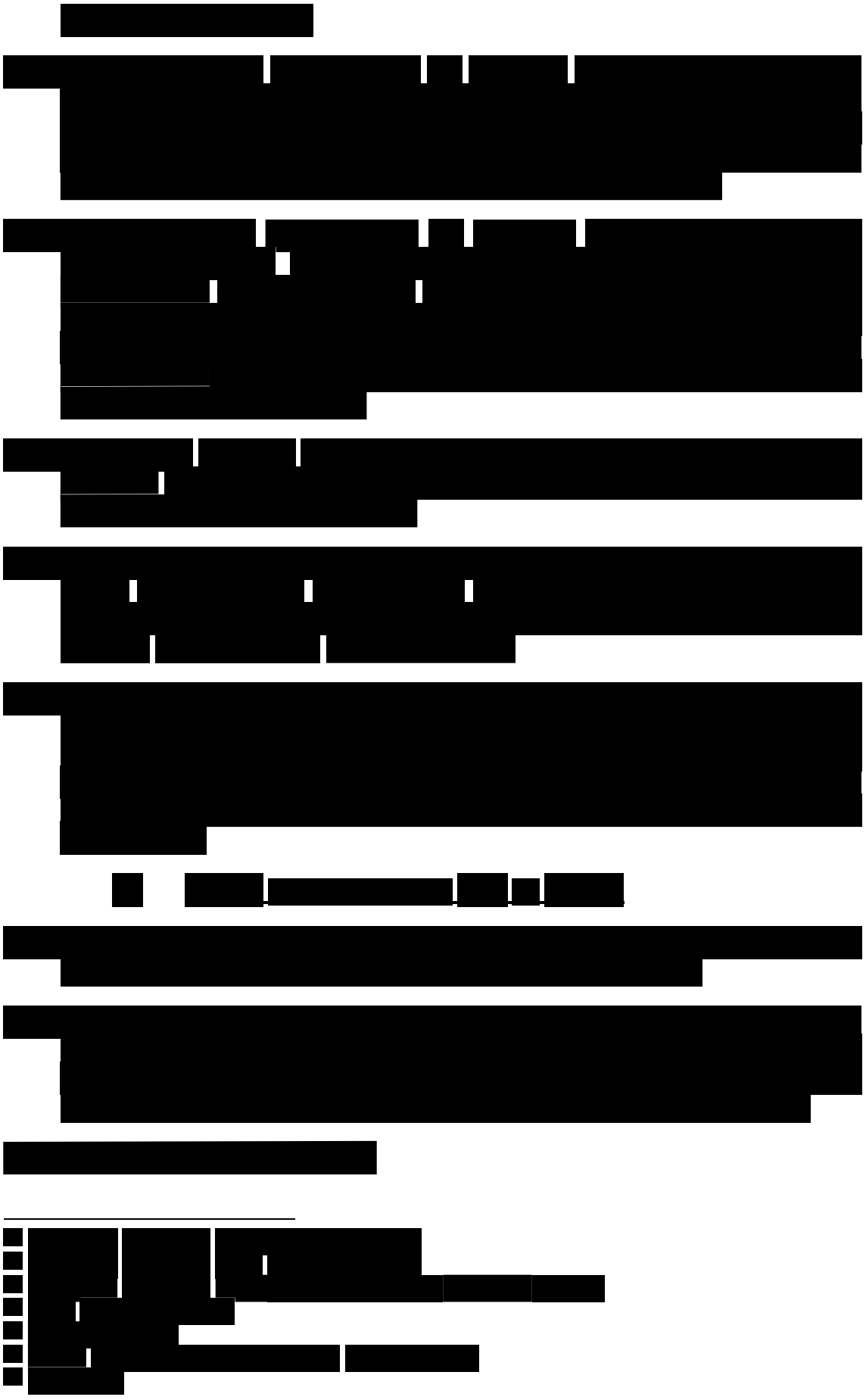

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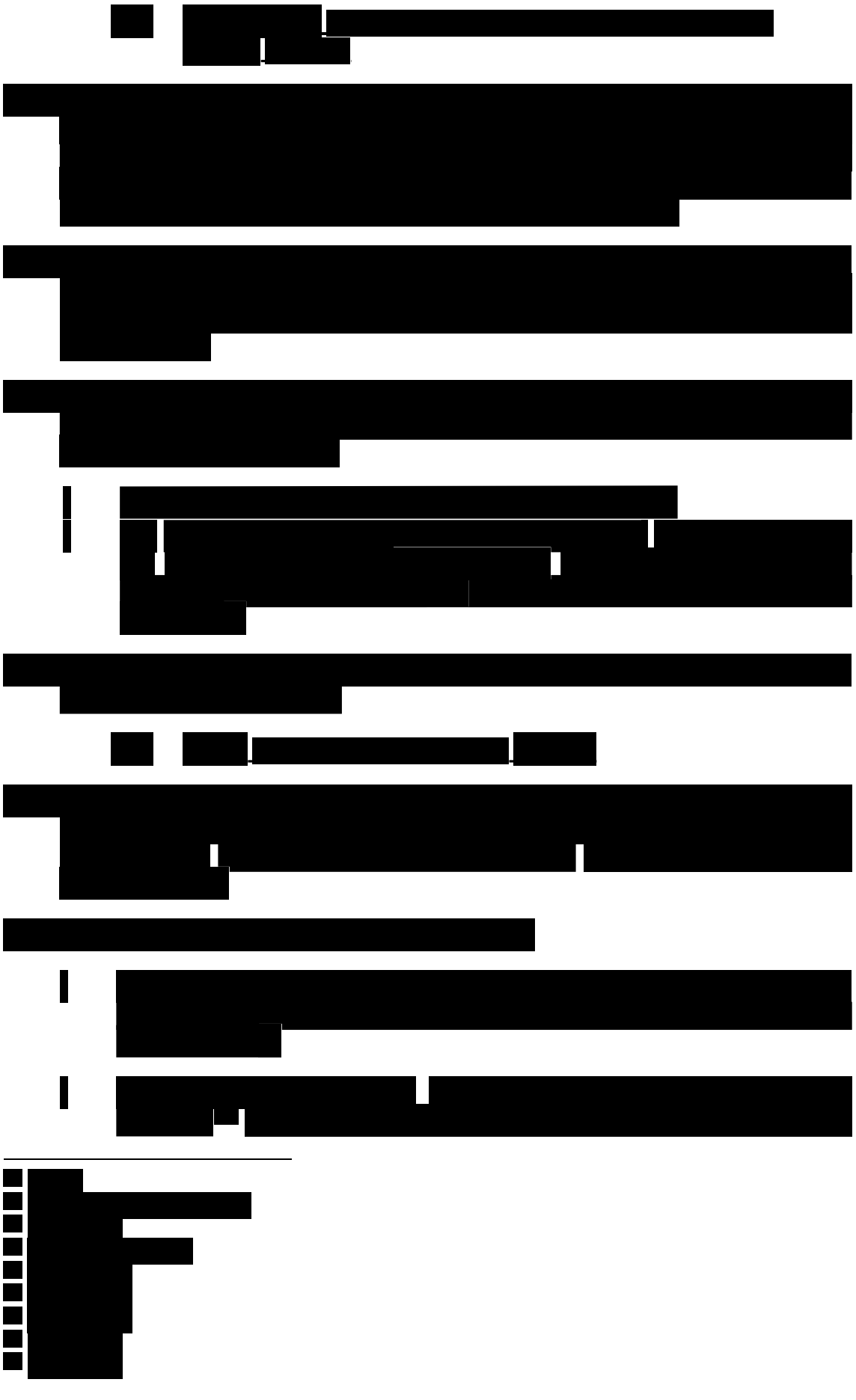

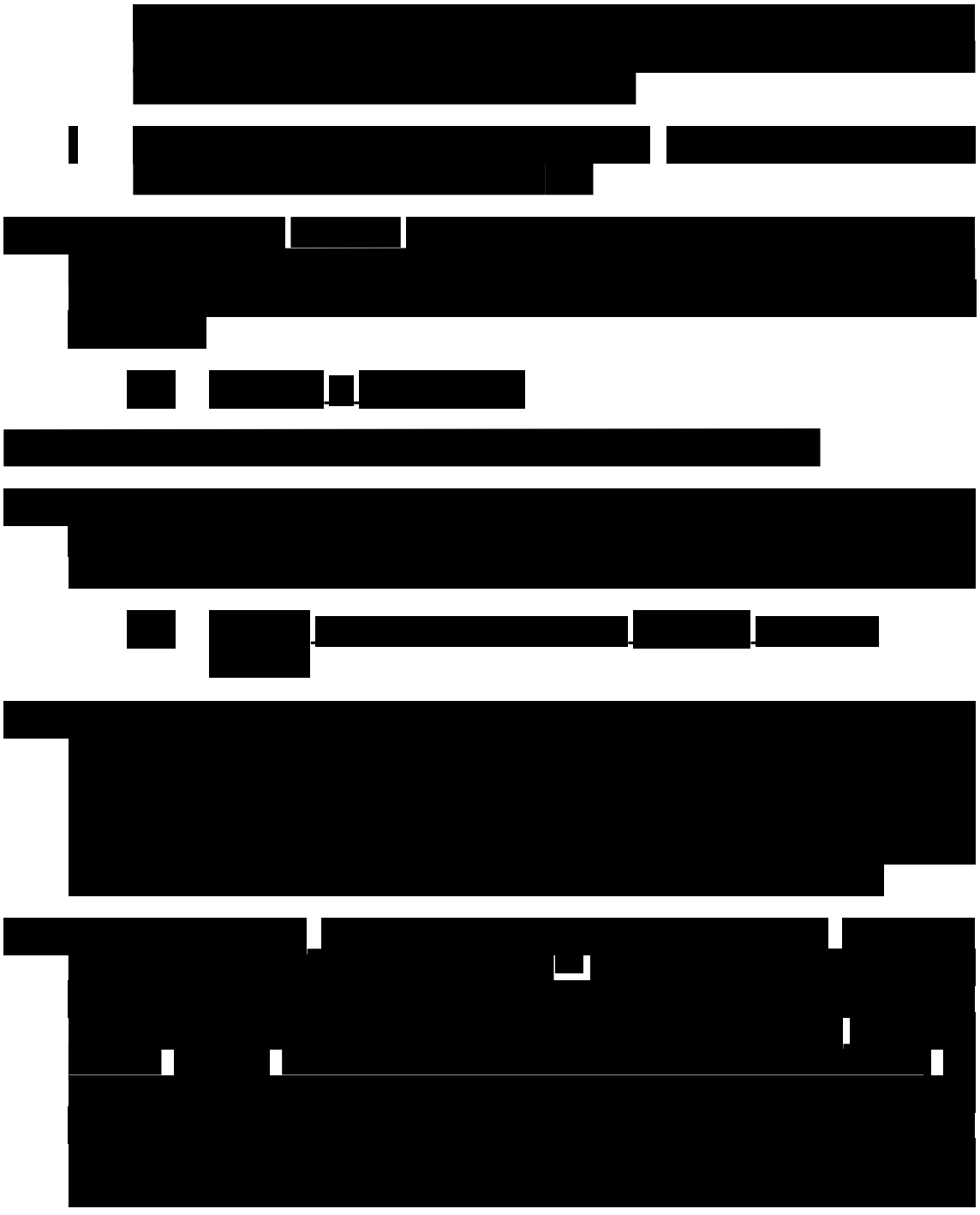

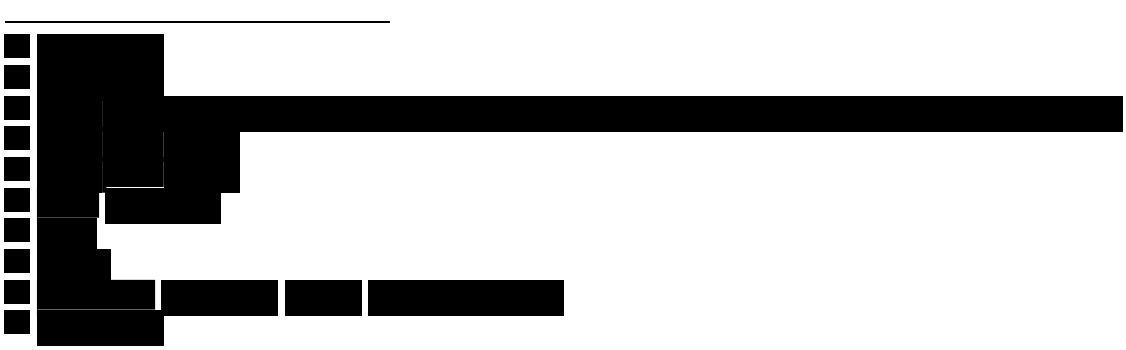

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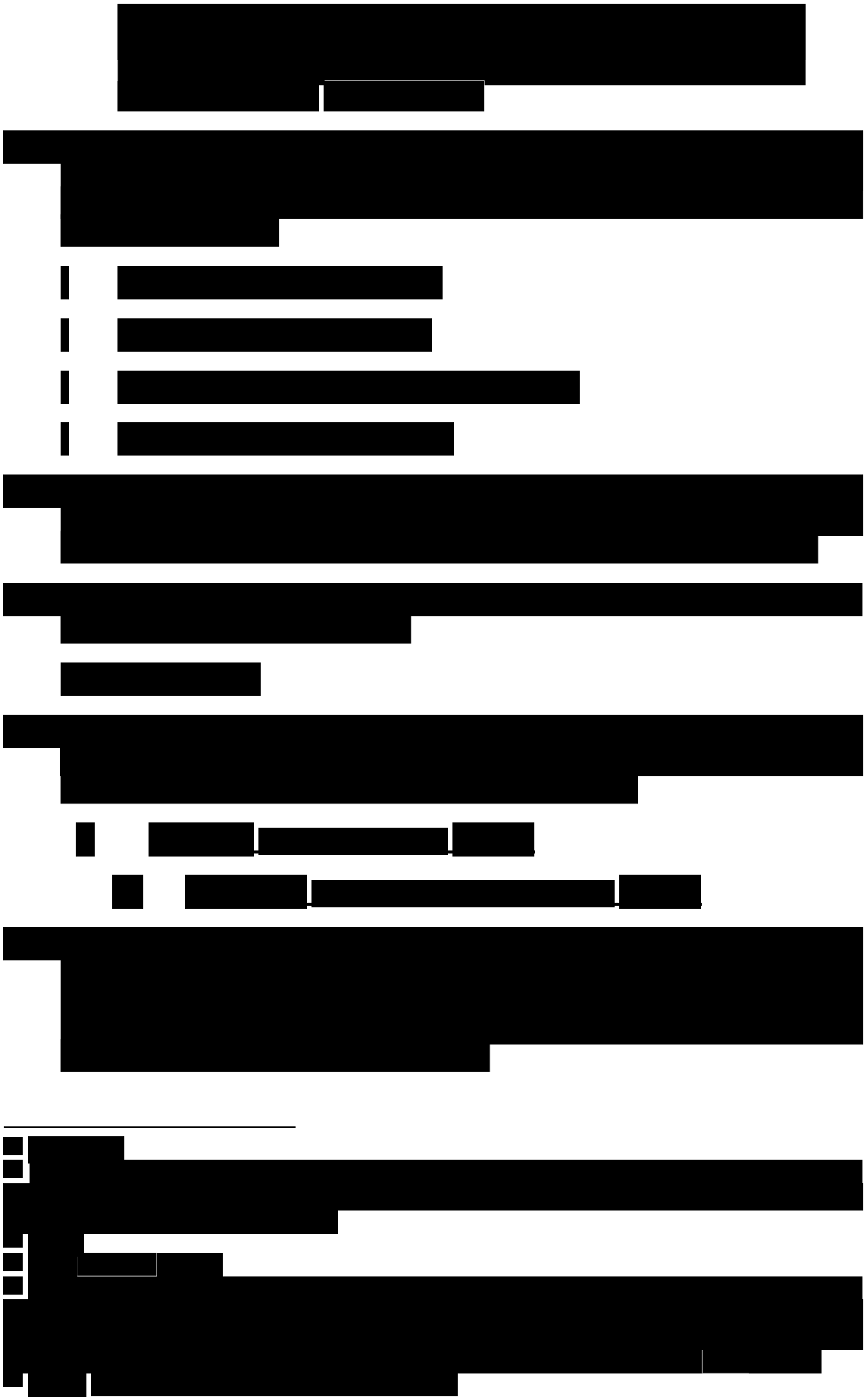

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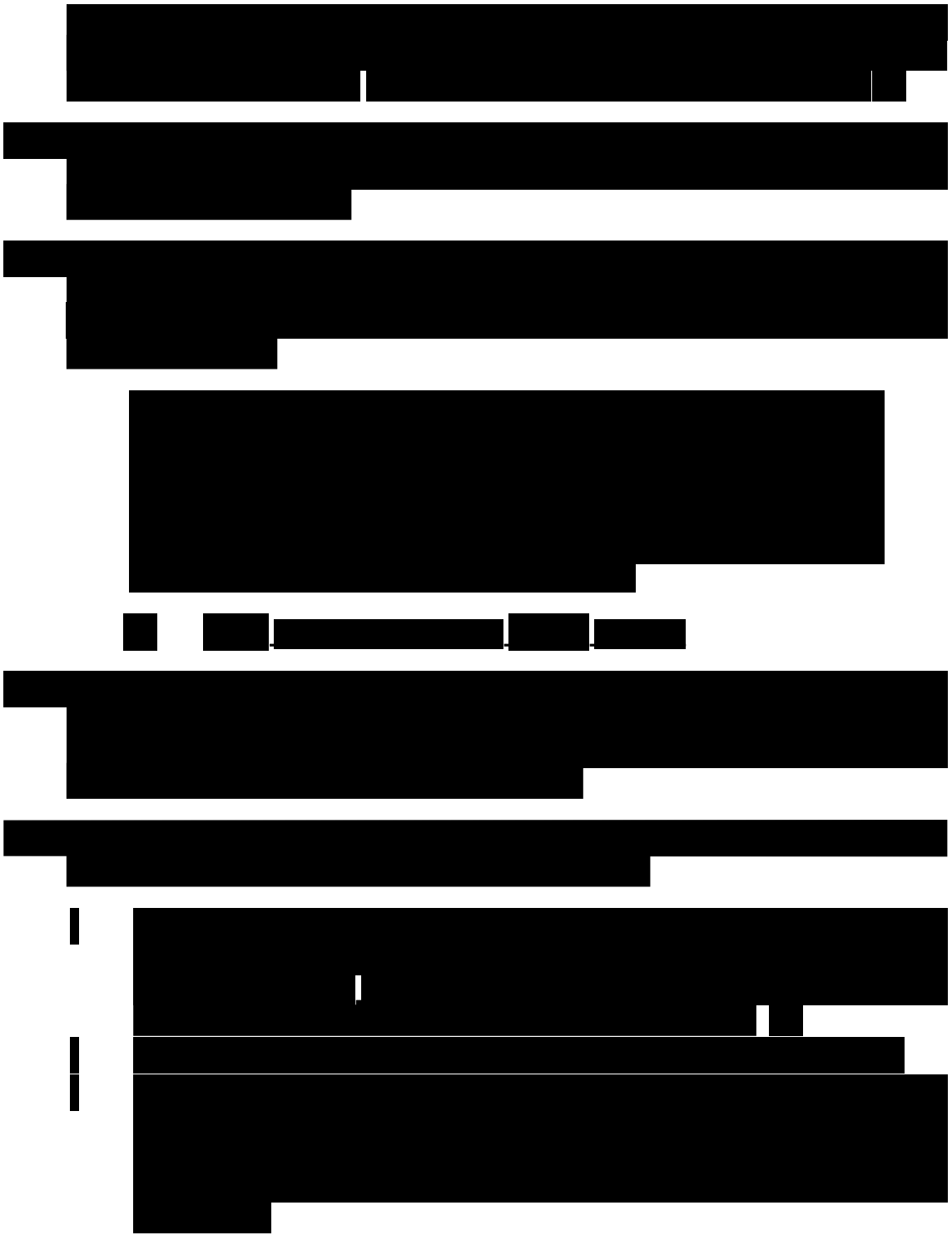

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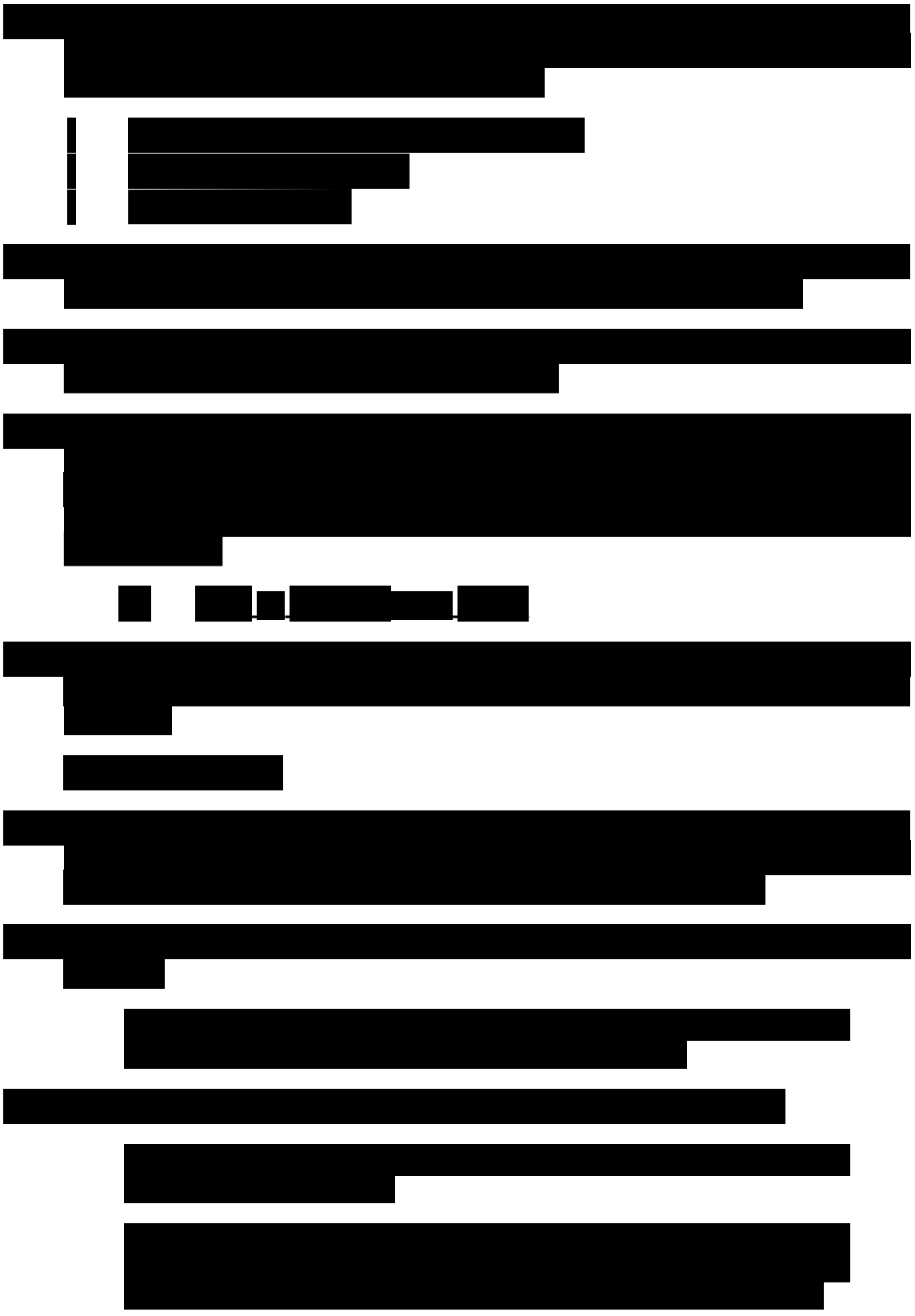

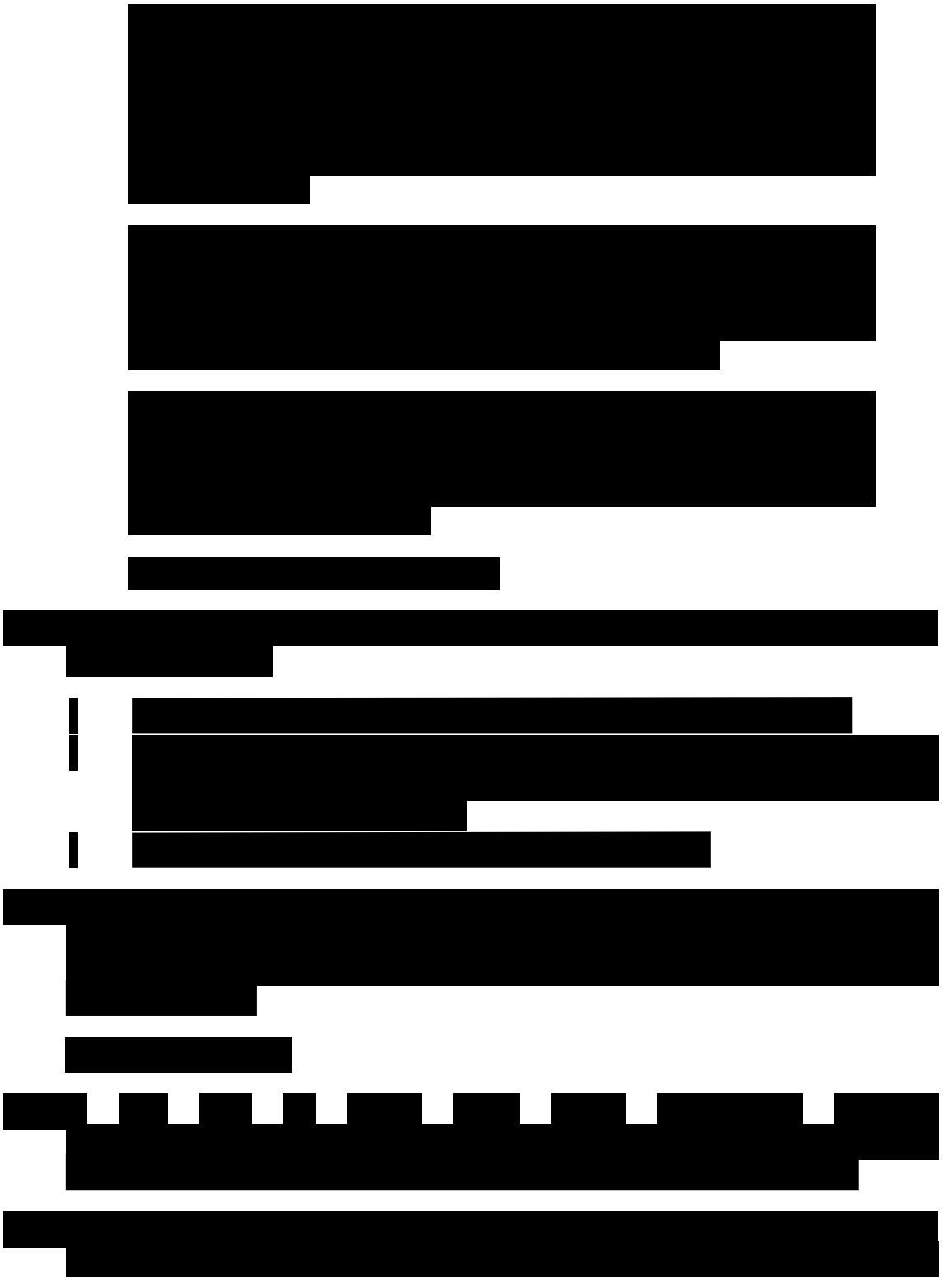

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IV. REQUEST FOR RELIEF

297. In its Memorial Claimant submitted the following request for relief[358]:

> "For the reasons set out above, Laiki requests an award granting the following relief:
>
> (a) A declaration that it has jurisdiction to decide Laiki's claims;
>
> (b) A declaration that Greece has violated its obligations under the Treaty and/or international law and/or Greek law in respect of the Claimant's investments;

[354] Hold-to-maturity bonds rating higher than A- and available-for-sale bonds rating above BBB-.
[355] R-34, pp. 6 and 7.
[356] C-198, p. 1.
[357] C-198, p. 4.
[358] C I, para. 333.

(c) A declaration that the Respondent has expropriated property of the Claimant

(d) Compensation in the amount necessary to make Laiki whole, as determined by the Tribunal for all losses Laiki has suffered as a result of Greece's violation of its obligations to Laiki under the Treaty, international law and Greek law;

(e) An award of all costs Laiki has incurred in bringing the claims in this arbitration, including but not limited to the arbitrators' fees and expenses, and those of legal counsel, experts, consultants and Laiki's own staff;

(f) An award of pre-award and post-award interests on any amount awarded at a rate to be fixed, to be compounded annually;

(g) Such further or other relief as the Tribunal sees fit".

298. The Hellenic Republic presented its Counter-Memorial on Jurisdiction and Liability containing several admissibility and jurisdictional objections and asking the Tribunal[359]:

"For the foregoing reasons, the Hellenic Republic respectfully requests the Arbitral Tribunal to:

(a) Dismiss Claimant's claims for lack of jurisdiction and/or as inadmissible;

(b) Alternatively, dismiss Claimant's claims on the merits;

(c) Order Claimant to pay to the Hellenic Republic the full costs of this arbitration, including, without limitation, arbitrator's fees and expenses, administrative costs, counsel fees, expenses and any other costs associated with this arbitration;

(d) Order Claimant to pay to the Hellenic Republic interest on the amounts awarded under c) above until the date of full payment; and

(e) Grant any further relief to the Hellenic Republic as it may deem appropriate".

299. Laiki and the Hellenic Republic submitted with their Reply, Rejoinder and Post-Hearing Briefs, identical requests as formulated in their Memorial and Counter Memorial, respectively[360].

[359] R I, para. 918.
[360] C II, para. 624; R II, para. 1039; C IV, para. 181; R IV, para. 162.

V. SUMMARY OF THE DISPUTE

300. The Claimant has brought this arbitration seeking compensation for the damages allegedly caused to its investment in Greece by the measures adopted by the Hellenic Republic to resolve its sovereign debt and financial crisis.

301. Laiki avers that the Hellenic Republic breached its obligations under the Greece-Cyprus BIT in three instances:

- First, Laiki argues that Respondent implemented the PSI Debt Exchange in an arbitrary and discriminatory manner, that caused it to suffer substantial losses [the "**Debt Exchange Claim**"];

[redacted]

302. Laiki submits each of these claims on a stand-alone basis. However, it also claims that taken together, all acts and omissions of the Hellenic Republic in relation to the above events amount to an unlawful creeping expropriation and a cumulative breach of the FET standard [the "**Composite Breach Claim**"].

Position of the Hellenic Republic

[redacted]

304. In any case, the Republic says that the Tribunal does not need to address the merits of Laiki's claims because these should be dismissed for lack of jurisdiction or as inadmissible. Respondent raises the following jurisdictional and/or admissibility objections:

- That Laiki is an instrumentality of the Republic of Cyprus, and therefore, this is an inter-state dispute between Cyprus and Greece [the "**Inter-State Dispute Objection**"];

- That Laiki transferred the right to bring this ICSID claim to the Commercial Bank of Cyprus before commencing this arbitration [the "**Transfer of Claims Objection**"];

- That the jurisdiction of this arbitral tribunal is incompatible with EU Law [the "**EU Law Incompatibility Objection**"];

- That the Tribunal has no jurisdiction over Laiki's claims for breaches of EU Law and human rights law [the "**EU Law and Human Rights Law Claims Objection**"];

- That Laiki did not comply with the BIT procedural requirements to initiate arbitration with respect to the Debt Exchange and [redacted] Claims ["**Amicable Settlement Requirement Objection**"];

VI. APPLICABLE LAW

305. The Parties have made extensive submissions on applicable law, and more specifically on the role of EU law – an issue of special relevance in view of the Hellenic Republic's EU Law Incompatibility Objection.

306. To properly decide the issue, it is necessary to differentiate between jurisdiction (**1.**) and merits (**2.**).

1. JURISDICTION

307. The Centre's jurisdiction and the Tribunal's competence derive from the Parties' consent to arbitration, formalized in the Hellenic Republic's standing offer under Art. 9 of the Greece-Cyprus BIT and Laiki's acceptance in the Request for Arbitration.

308. The BIT is an international treaty. Its interpretation and the rules governing its application, invalidity, termination and suspension must be assessed applying general principles of international law, as codified in the Vienna Convention on the Law of Treaties ["**VCLT**"].

EU Treaties

309. The Treaty on the European Union ["**TEU**"] and the Treaty on the Functioning of the European Union ["**TFEU**"] (jointly referred to as the "**EU Treaties"**) also form part of international law: under Art. 38(1)(a) of the Statute of the International Court of Justice any kind of international convention "whether general or particular", constitutes international law. This conclusion is reflected in the well-known finding of the tribunal in *Electrabel*:

> "EU law is international law because it is rooted in international treaties"[361].

[361] *Electrabel*, para. 4.120; See also *Vattenfall*, para. 145.

310. Since both the BIT and the EU Treaties are international conventions, the international law rules on the termination and succession of treaties regulate their reciprocal application; these rules can impact on the validity or enforceability of the BIT, on Greece's consent to ICSID arbitration and ultimately on the jurisdiction/competence of this Tribunal – as will be further discussed when the Tribunal analyzes Greece's EU Law Incompatibility Objection.

ICSID Convention

311. The ICSID Convention, and in particular Art. 25, are also relevant to establish the Centre's jurisdiction and the Tribunal's competence: under Art. 9(2) of the BIT the investor had the option of submitting the dispute to the competent Greek courts, or to ICSID arbitration; Laiki opted for the latter.

312. The terms of the ICSID Convention, however, do not add to the Tribunal's jurisdiction and competence, but rather provide, as the *Vattenfall* tribunal said, its "outer limits"[362] – including the principle that consent, once granted, may not be withdrawn[363].

313. (Art. 42(1) of the Convention, however, is irrelevant for establishing the law applicable to jurisdiction: this rule only concerns the law applicable to the merits of the dispute. This conclusion is supported by the text of the provision, which uses the words "decide a dispute"; the ordinary meaning of that phrase [pursuant to Art. 31 VCLT] refers to the substantive dispute between the parties – not to any jurisdictional objection[364].)

2. MERITS

314. Art. 42(1) of the ICSID Convention defines the "rules of law" which the Tribunal must apply to adjudicate the merits of the dispute:

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

315. The primary rule is thus any agreement between the host State and the investor relating to the "rules of law" to be applied to adjudicate the merits: if such agreement exists, then the Tribunal is bound to respect the parties' choice. In the absence of such agreement, the default rule is that the Tribunal "apply the law" of the Host State and "such rules of international law as may be applicable".

Agreement on applicable "rules of law"

316. Have the Hellenic Republic and Laiki agreed on the "rules of law" which the Tribunal is to apply to adjudicate the merits?

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[362] *Vattenfall*, para. 126.
[363] ICSID Convention, Art. 25(1) *in fine.*
[364] *Vattenfall*, para. 118.

317. Art. 9 of the BIT reads as follows[365]:

> "1. Any dispute between a Contracting Party and an investor of the other Contracting Party concerning an investment, expropriation or nationalization of an investment, shall, as far as possible, be settled between the disputing parties in an amicable way.
>
> 2. If such dispute cannot be settled within six months from the date on which either party requested amicable settlement, the investor concerned may submit the dispute either
>
> • before the competent court of the Contracting Party or
>
> • before the "International Centre for Settlement of Investment Disputes" which was established with the Convention of 18 March 1965 "for the Settlement of Investment Disputes between States and Nationals of Other States".
>
> The Contracting Parties hereby declare that they accept this arbitration procedure.
>
> 3. The arbitration decision shall be binding and not subject to redress/judicial remedies, other than those provided for in the abovementioned Agreement. The decision shall be enforced according to the national law.
>
> […]".

318. Art. 9(1) of the BIT defines the scope of disputes that can be submitted to amicable settlement and if settlement fails to arbitration:

> "Any dispute between [Greece] and an investor of [Cyprus] concerning an investment, expropriation or nationalization of an investment".

319. Under this rule, the only disputes which are arbitrable are those "concerning an investment", including its "expropriation or nationalization" – i.e. disputes where the investor invokes that measures adopted by Greece have resulted in a breach of the rights granted and the guarantees made under the BIT.

320. If such an investment dispute has arisen, and amicable settlement has failed, the BIT authorizes the investor to "submit" the issue to adjudication by an ICSID tribunal (or alternatively to domestic Courts). Once the investment dispute is submitted to ICSID arbitration, the tribunal will eventually issue an "arbitration decision", which is "binding" on the parties and which "shall be enforced according to the national law".

321. The task entrusted to the Tribunal is thus to resolve the investment dispute that has been submitted to it: to settle whether the host State has breached any of the rights granted and guarantees made to the protected investor under the BIT. To do so, the Tribunal must establish the proven facts (based on the evidence marshalled by the Parties), and then decide whether such facts constitute a breach of the BIT. The fundamental "rule of law" which the Tribunal must apply is the BIT itself – an international treaty which defines the obligations assumed and guarantees granted

[365] RL-391.

by the Hellenic Republic to protected Cypriot investors. Being a treaty, the BIT must be interpreted and applied in accordance with the general principles of international law, as set forth in the VCLT[366].

322. This conclusion is reinforced by Art. 9(3) of the BIT, when it provides that the arbitration award "shall be enforced according to the national law". This rule implies *a sensu contrario* that the adjudication of the merits is not subject to "national laws" - but rather to the provisions of the BIT itself and subsidiarily to international law.

323. Art. 42 of the Convention defines a primary rule: The Tribunal must apply the "rules of law […] agreed by the parties", provided that such an agreement exists.

324. The Tribunal finds that in the present case, the Hellenic Republic's offer to submit to arbitration, formalized in Art. 9 of the BIT, includes the implicit condition that the tribunal will adjudicate the dispute applying as "rules of law" the provisions of the BIT and subsidiarily general principles of international law. When Laiki eventually accepted the offer and submitted the dispute to ICSID arbitration, agreement on the choice of applicable "rules of law" was locked[367].

325. Summing up, the Tribunal will adjudicate the merits of the investment dispute submitted by Claimant applying the "rules of law" agreed upon by the parties: the BIT and, subsidiarily, general principles of international law[368].

Municipal law

326. Municipal law in this case includes Greek law, plus certain rules of EU law, either because such EU law has been incorporated into and forms part of Greek law, or because EU law has direct effect within the Hellenic Republic, without need for formal incorporation[369].

327. The Tribunal reiterates that its task is to establish whether any measure adopted by Greece and affecting a protected Cypriot investor amounts to a breach of the international law obligations and guarantees promised in the BIT.

328. When performing this task, the Tribunal is not required to interpret or apply Greek or EU law nor to establish the legality under such legal systems of measures adopted by the Hellenic Republic or the EU authorities. The Tribunal is also not entrusted with the task of judging whether Greece has breached its obligations under the TEU or the TFEU. To adjudicate the investment dispute, the Tribunal will simply

[366] See Parra: "Applicable Substantive Law in ICSID Arbitrations Initiated under Investment Treaties", 16 ICSID Review (2001), p. 21.
[367] See Sacerdoti: "Investment Arbitration under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards", 19 ICSID Review (2004), p. 24: "in case of arbitration on the basis of a BIT, international law, *in primis* the very BIT provision and the standards of treatment and protection they refer to, have to be applied, including when the BIT does not contain any indication as to the applicable law".
[368] The same conclusion was reached in *MTD*, para. 87; *ADC*, para. 290; *contra*, however, *LG&E*, para. 85.
[369] EU law not only forms part of Greek municipal law; it also derives from the EU treaties and consequently forms part of the international law order. In the *Achmea Judgment*, the CJEU recognized the dual nature of EU law*;* see *Achmea Judgment*, para. 41.

consider and establish municipal law as a matter of fact[370]. In doing so, the Tribunal shall follow the prevailing interpretation given to municipal law by the courts or authorities of Greece and the EU.

VII. JURISDICTIONAL OBJECTIONS

329. In this Section the Tribunal will address the jurisdictional objections that Respondent has raised:

- **Inter-State Dispute Objection**: whether this is an Inter-State dispute between Cyprus and Greece (**VII.1.**).

- **Transfer of Claims Objection**: whether Claimant lacks standing because it transferred the Claims to a third party before the arbitration (**VII.2.**).

- **EU Law Incompatibility Objection**: whether this arbitration incompatible with EU Law (**VII.3.**);

- **EU Law and Human Rights Law Claims Objection**: whether the Tribunal has competence to rule on violations of EU Law and Human Rights Law (**VII.4.**).

- **Amicable Settlement Requirement Objection**: whether Laiki complied with the BIT procedural requirements to initiate arbitration with respect to the Debt Exchange and [redacted] Claims (**VII.5.**).

VII.1. INTER-STATE DISPUTE OBJECTION

330. Article 25 ICSID Convention establishes the jurisdiction *ratione personae* of this Tribunal:

> "(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) "National of another Contracting State" means:
>
> (a) …
>
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be

[370] *Serbian Loans Case*, para. 242; *Electrabel*, para. 4.129. See also *Azurix*, para. 67, *El Paso*, paras. 135 and 141.

> treated as a national of another Contracting State for the purposes of this Convention". [Emphasis added]

331. Art. 9 of the BIT contains the offer made by the Hellenic Republic to Cypriot investors to arbitrate investment disputes:

> "1. Any dispute between a Contracting Party and an investor of the other Contracting Party concerning an investment, expropriation or nationalization of an investment, shall, as far as possible, be settled between the disputing parties in an amicable way.
>
> 2. If such dispute cannot be settled within six months from the date on which either party requested amicable settlement, the investor concerned may submit the dispute either
>
> • before the competent court of the Contracting Party or
>
> • before the "International Centre for Settlement of Investment Disputes" which was established with the Convention of 18 March 1965 "for the Settlement of Investment Disputes between States and Nationals of Other States
>
> […]".

332. And Art. 1(3)(b) of the BIT defines the term "investor" for the purposes of the BIT:

> "The term "investor", in relation to each Contracting Party, comprises:
>
> (a) natural persons […]
>
> (b) legal persons constituted in accordance with the laws of the Contracting Party and having their seat within its territory".

333. The Hellenic Republic makes its first jurisdictional objection, the **Inter-State Dispute Objection**, averring that Laiki does not qualify as a "national of another Contracting State", because it is owned and controlled by the Republic of Cyprus and is used as an instrumentality of the Republic to pursue public interest. According to Respondent this is an inter-state dispute between the Hellenic Republic and the Republic of Cyprus.

334. On the other side, Laiki says that it complies with the *ratione personae* requirements of the BIT: it is a national of Cyprus under Art. 25 of the ICSID Convention and a Cypriot investor under the BIT, claiming damages for the alleged wrongful acts of the Hellenic Republic. Claimant further says that its nationalization by the Cypriot Government and subsequent resolution by the CBofC is a consequence of Respondent's wrongful acts under international law. In Claimant's view, these circumstances cannot bar Laiki from pursuing its rights under the ICSID Convention and the BIT.

335. Each Party presented legal opinions from two former judges of the Supreme Court of Cyprus, on the role of Cyprus in respect of ownership, control and activities of Laiki[371].

336. The Tribunal will first summarize the arguments on which the Parties rely (**1.** and **2.**); and will then adopt a decision (**3.**).

1. RESPONDENT'S POSITION

337. Respondent avers that Claimant cannot be considered a "national of another Contracting State" within the meaning of Art. 25 ICSID Convention, nor an "investor of the other Contracting Party" under Art. 9 of the BIT[372], because:

338. (i) In June 2012 the Republic of Cyprus nationalized Laiki [redacted] Since then the Republic of Cyprus owns and controls Laiki[373].

[redacted]

340. (iii) On 20 June 2014 Claimant submitted its Request for Arbitration[380]. At this point – which is the relevant time to determine whether the Centre has jurisdiction and the Tribunal has competence over this dispute – Claimant was already owned and controlled by the Republic and managed under the resolution regime[381].

341. In light of these events, Laiki cannot qualify as "a national of another Contracting State" under Art. 25 ICSID Convention. The rules on attribution of conduct[382] of the ILC ASR deem the acts of an entity attributable to the State if the entity is owned

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[371] Respondent presented two legal opinions of [redacted] ["[redacted] **I and II**"] and Claimant presented one legal opinions of [redacted] ["[redacted]"].
[372] R I, para. 233.
[373] R I, para. 261-264; [redacted] I, paras. 10-22.
[redacted]
[380] R II, para. 261.
[381] R II, para. 263.
[382] In particular ILC ASR, Arts. 4, 5 and 8.

or controlled by the State or if the purpose and objectives of the entity's activities are governmental in nature[383]. Respondent also relies on the so-called Broches test, which dictates that a government-owned company should be disqualified as a 'national of another Contracting State' if it acts as "an agent for the government or is discharging an essentially governmental function"[384].

342. In the present case Laiki is an instrumentality of the Republic of Cyprus, acting under the State's direction and control and through which the Republic of Cyprus pursues its public interests[385], to deal with its financial and banking crisis[386]. Despite maintaining a separate legal personality, Laiki only retains residual powers and qualities of the former commercial entity[387].

[redacted]

2. CLAIMANT'S POSITION

344. Claimant says that the ICSID Convention and the BIT, which do not contain restrictive criteria for establishing jurisdiction, such as ownership and control[394].

[383] R I, para. 242; R II, para. 244 and 254-258.
[384] R I, para. 239, citing CL-83, p. 355; R II, para. 250.
[385] R I, para. 233; [redacted] I, paras. 23-24; [redacted] II, paras. 14-19 and 25.
[386] R I, para. 259; [redacted] I, paras. 27-33 and 36-38; R II, para. 263; HT1, pp. 220-221.
[387] R II, para. 269.
[redacted]
[394] C II, para. 198 and 199.

Laiki is an investor within the meaning of Art. 1(3)(b) of the BIT, i.e. a "legal person constituted in accordance with the laws of the Contracting Party and having their seat within its territory"; and a "national of another Contracting State" under Art. 25of the ICSID Convention[395].

345. At the time of the events on which Laiki grounds its Debt Exchange Claim, it was an independent privately-owned company; and even after it came under majority state ownership – as a consequence of Greece's illicit conduct[396] – the nature of the activities being performed by Laiki were not "essentially governmental functions"[397]. Laiki continues to achieve (or recover) value for its shareholders and creditors, and does not exist to defend the public interest of the Republic of Cyprus, nor can its activities be described as essentially governmental[398].

346. Claimant does not dispute that the Resolution Authority is a public body acting in the public interest and has the ability to exercise control over Laiki. However, the Tribunal must distinguish the Resolution Authority from Laiki[399]:

- Laiki remains a separate commercial and legal entity, despite being placed under resolution, pursuant to the Companies Laws CAP 113[400]:
- the Resolution Law, the State Participation to Private Sector Credit Institutions Law and the relevant Cypriot jurisprudence also distinguish Laiki as a private entity different from the State[401].
- Laiki's Special Administrator enjoys freedom and independence from the Resolution Authority and from the Government of Cyprus[402];

347. Claimant responds to the specific events on which Respondent relies to aver that Laiki is an instrumentality of the Republic of Cyprus:

[redacted]

[redacted]

[redacted]

[395] C II, paras. 171-173.
[396] C II, para. 178.
[397] C II, para. 180.
[398] C II, para. 182.
[399] C II, paras. 183 and 184. See also HT1, p. 80.
[400] [redacted], paras. 42-47.
[401] [redacted], paras. 9-1421 h), 23-24, 26-28, 30-32.
[402] [redacted], para. 20.
[redacted]

[redacted]

Additional defence

353. Claimant makes a final argument regarding the Inter-State Dispute Objection: Respondent is barred from arguing that Laiki is an instrumentality of the Republic of Cyprus by the general principle of international law that a State cannot take advantage of its own wrongdoing[409]. [redacted]

3. THE TRIBUNAL'S DECISION

[redacted]

355. Respondent relies on two main facts to argue that Laiki is an instrumentality of the Republic of Cyprus:

- that in June 2012 the Republic of Cyprus subscribed 84% of Laiki's shares and
- that in March 2013 it decreed the resolution of the bank, under the aegis of the CBofC acting as resolution authority.

[redacted]

[409] C II, para. 5.1 and 6.

[redacted]

356. Claimant rejects Respondent's proposition and submits that Laiki meets the *ratione personae* requirements under the ICSID Convention and the BIT: Laiki is a distinct juridical person constituted under the laws of Cyprus, and a Cypriot investor with an investment in Greece.

357. Claimant says that Laiki is not required to pass the Broches test – proving that it is not an agent for the government or that it is not discharging an essentially governmental function – because it is not a mixed economy company: Laiki was a privately-owned company for the majority of the time period when the dispute arose; and it was only after Greece's illicit conduct that Laiki came under state ownership and was later put under resolution[411]. In the alternative, Claimant submits that it passes the Broches test, because it is not an agent of the Cypriot government and its activities are not "essential governmental functions"[412].

358. On the basis of the evidence before it, and the arguments made by the Parties, the Tribunal is more persuaded by the arguments of the Claimant. Laiki meets the *ratione personae* requirements under the ICSID Convention and the BIT.

359. The Tribunal will first summarize the proven facts (**3.1.**); then it will establish the applicable law that govern its jurisdiction (**3.2.**); and then will subsume the proven facts into the applicable law (**3.3.**).

[411] C II, para. 178.
[412] C II, para. 180.

[redacted]

3.2 APPLICABLE LAW

369. Article 25 of the ICSID Convention provides:

> "(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) "National of another Contracting State" means:
>
> (a) […]

[redacted]

> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to […] arbitration […]".

370. Art 1(3)(b) of the BIT defines the term "investor" as follows:

> "The term "investor", in relation to each Contracting Party, comprises:
>
> (c) Natural persons […]
>
> (d) Legal persons constituted in accordance with the laws of the Contracting Party and having their seat within its territory".

<u>*Ratione personae* jurisdiction</u>

371. Under the Convention, the Centre and the Tribunal only have *ratione personae* jurisdiction and competence to adjudicate a legal dispute between a "Contracting State" and a "national of another Contracting State"; the BIT additionally requires that this national qualifies as an "investor" under the BIT.

372. The term "national of another Contracting State" refers to natural and juridical person having the nationality of the contracting state, but it is commonly construed to exclude the Contracting State itself. The reason is that ICSID Convention (and the BIT) are designed for the adjudication of investment disputes between the host state and private law nationals of the other contracting state. The Convention and the BIT do not provide for protection in situations where the investor is the other Contracting State. These inter-state disputes do not meet the requirements of the Convention and the BIT and must be resolved in other *fora*[427].

373. The above conclusion is not controversial. Doubts only arise in situations where the investor asking for protection is not the other Contracting State, but a company (or other juridical person) owned or controlled by such state. Do state-owned companies meet the subjective requirements defined in Convention and BIT, or must the corporate veil be lifted, and the company be considered as a mere instrumentality of the contracting state?

<u>Broches test</u>

374. The question was authoritatively addressed by Broches as early as 1972, and both Parties have referred approvingly to his opinion[428]:

> "[…] there is another question which is not dealt with by the Convention, namely whether an entity in order to qualify as a 'national of another Contracting State' must be a privately owned entity. <u>The broad purpose of the Convention is the promotion of private foreign investment and the first preambular clause of the Convention uses the term private international investment</u>. On the other hand, it was recognized in the discussions leading up to the formulation of the Convention that in today's world the <u>classical distinction between private and public investment, based on the source of the</u>

[427] Schreuer: "The ICSID Convention: A Commentary", Cambridge University Press (2nd edition, 2009), p. 161.
[428] Aron Broches: "Selected essays, World Bank, ICSID, and other subjects of public and private international law", Dordrecht: Marinus Nijhoff Publishers (1995), pp. 192-193.

> capital, is no longer meaningful, if not outdated. There are many companies which combine capital from private and governmental sources and corporations all of whose shares are owned by the government, but who are practically indistinguishable from the completely privately owned enterprise both in their legal characteristics and in their activities. It would seem, therefore, that for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essential governmental function. I believe that it is fair to say that there was a consensus on this point among those participating in the preparation of the Convention".

375. In accordance with the so-called "Broches test", mixed-economy or government-owned corporations which have invested in the other contracting state are entitled to investment protection, except if such corporations have acted "as an agent" for their own government, or are "discharging an essentially government function".

Case law

376. Tribunals have consistently applied the Broches test[429].

377. In *Flughafen,* a consortium formed by Chilean and Swiss companies filed an arbitration against Venezuela under the Chile-Venezuela and Swiss-Venezuela BITs for the unlawful cancelation of a concession contract to administer the airport in Isla Margarita. The tribunal applied the Broches test and concluded that a partially state-owned Swiss company, Flughafen Zürich A.G., did not act as an agent of the State and did not undertake essentially governmental functions[430]. In assessing Venezuela's objection that the claimant was an instrumentality of the State, the Tribunal gave significant weight to the commercial character of the activities of the company[431].

378. In *CSOB,* the tribunal was also confronted with the question of whether a state-owned bank had standing to bring an ICSID claim. CSBO was a Czech bank, in which the Czech Republic and the Slovak Republic held 65% and 24% of the shares, respectively[432].The tribunal gave prevalence to the Broches test and assessed whether the state-owned bank acted as an agent for the State or discharged any essential governmental function[433]. The tribunal found that the bank's activities were commercial in nature, and thus the threshold of the Broches test was not met[434].

3.3 DISCUSSION

379. Until the end of June 2012 Laiki was a privately owned Cypriot bank, incorporated and with its seat in Cyprus, a company which undisputedly met the *ratione*

[429] Respondent has also directed the Tribunal to the customary International law principles regarding state responsibility, and in particular to the ILC ASR and supporting case law. The Tribunal agrees with Claimant that this body of law is of limited relevance when addressing this objection – see C II, para. 197.
[430] *Flughafen*, paras. 284-286.
[431] *Flughafen*, para. 264.
[432] *CSOB*, para. 18.
[433] *CSOB*, para. 17.
[434] *CSOB*, para. 20.

personae jurisdictional requirements provided for in the Convention and the BIT: it was a "juridical person which had the nationality" of Cyprus, "constituted in accordance with the laws of" Cyprus and "having [its] seat within its territory".

A. Subscription of Laiki shares by Cyprus

380. Being one of the three largest banks in Cyprus, Laiki was also systemically relevant: its disorderly collapse would have caused widespread harm in the Cypriot financial system and could have led to a general crisis of the Cypriot economy. To avoid these consequences, on 30 June 2012 the Republic of Cyprus acted to subscribe 84% of Laiki's share capital, and to effectively take control of the bank.

381. Laiki's forced rescue by the Cypriot state did not impact on or otherwise alter its legal personality as a matter of Cypriot law. It continued to be a juridical person with Cypriot nationality, constituted in accordance with the laws of Cyprus, having its seat within its territory – albeit owned and controlled by the Republic of Cyprus. Laiki's activities continued to be those of a private bank: taking deposits from the public and on-lending the funds to private and public borrowers; its ultimate purpose was still commercial in nature, namely the creation of value for its shareholders.

382. Applying the Broches test, there is no doubt that Laiki continued to qualify for investment protection: it was not acting "as an agent" of the Cypriot government (i.e. acting on behalf and for the account of the Republic), nor was it "discharging an essentially government function" – it continued to function as a commercial bank.

B. Notice of Dispute

383. On 21 November 2012 Laiki submitted its Notice of Dispute to the Hellenic Republic, which eventually led to the present procedure[435].

[redacted]

386. When the Notice of Dispute was submitted, the Republic of Cyprus was the controlling shareholder of Laiki. Although the Notice of Dispute was passed by Laiki's corporate bodies, the decision was additionally submitted to approval from [redacted], deposed at the Hearing and declared that the decision had already been adopted by Laiki, and [redacted] approval was required because filing the Notice of Dispute had political ramifications; and that [redacted] approved the decision because [redacted] believed it was in the best interests of the shareholders of Laiki[436].

[435] C-19.
[436] [redacted] II, para. 11.

387. In private corporations with a controlling shareholder, it is frequent that important decisions are approved not only by the internal corporate organs, but that additionally the consent of the controlling shareholder is obtained, in accordance with its constitutional or other applicable requirements. This is what happened in this case. [redacted]

388. The fact that Laiki's management sought ratification from its controlling shareholder, does not affect its character by reference to the Broches test: Laiki did not assume essential government functions, nor was it converted into an agent of the Cypriot State merely because of the approval processes that were required to be followed. The purpose of the Notice of Dispute was for Laiki to bring proceedings to obtain compensation for the damage allegedly suffered in Greece – compensation that would flow to all its shareholders, public and private. In so acting, Laiki was not acting as an agent for and on behalf of the Cypriot Republic – it was acting in its own interest.

C. Resolution

389. The subscription of Laiki's capital increase was insufficient to avert its failure. On 26 March 2013 the Republic of Cyprus decreed Laiki's resolution in accordance with the Resolution Law, which Parliament had approved a few days before.

390. Resolution is a special procedure developed by European law to solve the failure of systemically relevant credit institutions. It authorizes the resolution authority to adopt so-called "resolution tools" and to exercise very wide intervention powers, in order to achieve certain legally defined objectives. These objectives include both general interests (the protection of the financial system in general, the minimization of public financial support required) and also specific interests of the affected credit institution (protection of its depositors, of its client funds and client assets)[437].

391. To avoid the collapse of its financial system, Cyprus decided to resolve Laiki and to appoint the CBofC as Resolution Authority. Laiki's legal personality remained unaffected: it continued to be a company incorporated in Cyprus, with seat in Cyprus.

392. Its activities and management, however, were deeply affected.

393. In particular, Laiki ceased all banking operations, lost its license as a credit institution and was delisted from the stock exchange. A special administrator – appointed by the Resolution Authority – immediately assumed the management of Laiki[438] and was vested with [redacted]

[437] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014. The Directive was adopted after the resolution of Laiki, but its regulation was already foreshadowed by the Cypriot Resolution Law; GA-6.
[438] R-233, Art. 14.

[redacted]

Broches test

397. The Broches test excludes from protection state owned companies that perform "essential governmental functions" or act as "agents of the state".

398. Laiki does not meet either of these tests.

399. Laiki's functions were at all material times exclusively commercial and non-public in nature: before resolution, its function was to provide banking services to its customers; after resolution, its purpose turned to satisfying its creditors and shareholders through an orderly liquidation process.

400. Laiki has never been, and is not now, an agent of the Cypriot state.

401. Resolution in fact is not materially different from other forms of winding up of insolvent or failed corporations. Such procedures are routinely carried out under the supervision of an authority, designated either by the judicial system (for

[redacted]

commercial companies) or by the public administration (when the failure affects corporations subject to a special supervisory regime).

402. In the present case, since the insolvent company was a systemic Cypriot bank, its resolution and liquidation were entrusted to the CBofC, which is indeed an agency of the Cypriot state. The CBofC was then forced to adopt the resolution tools. In so doing, the CBofC may have taken into consideration not only the interests of Laiki's creditors and shareholders, but also wider interests, such as the defence of the Cypriot financial system – Laiki being a systemic bank, whose failure could provoke devastating effects on the economy of Cyprus.

403. But the use of resolution tools by the CBofC when liquidating Laiki does not change the basic character of the entity: Laiki never was and never became an agent of the Cypriot state; it was a private bank, which at one stage took the decision to invest in Greece, then suffered significant losses, eventually failed and was forced into liquidation. Its liquidator may be a state agency, which by law must defend the proper functioning of the Cypriot financial sector – but that does not, as such, turn the private company into an agent of the state.

* * *

404. To sum up, the Tribunal concludes that Laiki did not exercise an essentially governmental function, and did not act as an agent of the State, either at the time the decision to invest in Greece was made, or at any other time. The decision to invest was made by a publicly traded commercial bank, for the sole purpose of creating value for its shareholders. Laiki never exercised sovereign powers, either directly or by delegation. The acts adopted by the CBofC, in its capacity as Resolution Authority, do not affect Laiki's standing as a private investor, which allegedly suffered harm affecting its banking investments in the Hellenic Republic.

VII.2. TRANSFER OF CLAIMS OBJECTION

405. In its second jurisdictional objection, the Transfer of Claims Objection, the Hellenic Republic argues that Laiki does not have standing to bring these "**BIT Claims"**, because Laiki allegedly transferred such Claims to the Commercial Bank of Cyprus when it implemented the resolution measures mandated by the CBofC in March 2013. According to Respondent, when the CBofC issued Decree No. 104/2013, it ordered the transfer of all of Laiki's "good" Cypriot assets to the Commercial Bank of Cyprus, including the right to bring these BIT Claims.

406. Claimant denies that the BIT Claims were ever transferred to the Commercial Bank of Cyprus. And in any case, Laiki could only have transferred a beneficial right to the Commercial Bank of Cyprus, retaining the legal right of action to bring these BIT Claims.

407. The Parties' experts on Cypriot law also address in their legal opinions Decree No. 104/2013 purely form a Cypriot law perspective[444].

408. The Tribunal will first summarize the position of the Parties (**1., 2.** and **3.**) and then will adopt a decision (**4.**).

1. RESPONDENT'S POSITION

409. Respondent avers that Claimant lacks standing because it did not own the BIT Claims it seeks to enforce in this arbitration. After the resolution of Laiki in March 2013 and [redacted] the Commercial Bank of Cyprus acquired what remained of Laiki's Cypriot operations (in the good bank/bad bank restructuring), including any investment treaty claims that Claimant may have had:

- On 29 March 2013, the Resolution Authority adopted Decree No. 104/2013 to transfer Laiki's "good" Cypriot operations to the Commercial Bank of Cyprus[445]; and
- On 14 May 2013 the Resolution Authority passed Decree No. 156/2013 to transfer further assets from Laiki to the Commercial Bank of Cyprus, which had been excluded from the transfer pursuant to Decree No. 104/2013[446].

410. This occurred more than a year before Claimant submitted its Request for Arbitration on 20 June 2014[447].

411. Respondent's case is that, pursuant to Art. 5(1) of Decree No. 104/2013, Laiki transferred to the Commercial Bank of Cyprus all its assets and liabilities, other than those specified in Annex I of the Decree. Since Annex I of the Decree does not exclude from the transfer the right to demand compensation for injury allegedly suffered from an investment treaty violation, Laiki's transferred its BIT Claims[448].

412. Under international law, BIT Claims for investment treaty violations are separable from the underlying assets, and can therefore be assigned[449]. Whether the assignee – in this case the Commercial Bank of Cyprus – has standing and can submit the ICSID claim is irrelevant to the effectiveness or validity of the transfer made by Laiki[450].

413. And even if Laiki only transferred the beneficial interest of its BIT Claims, the right to initiate a claim would still be vested in the Commercial Bank of Cyprus, and not Laiki[451].

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[444] Respondent presented two legal opinions of [redacted] ["[redacted] **I and II**"] and Claimant presented one legal opinions of [redacted] ["[redacted]"].
[445] R-12, Art. 5(1).
[446] R-242.
[447] R I, para 283.
[448] [redacted] I, paras. 53-56 and 58-59; [redacted] II, para. 51.
[449] R I, para. 285.
[450] R II, para. 312.
[451] R II, para. 315 and 321-322; [redacted] II, paras. 54-60.

2. CLAIMANT'S POSITON

414. Claimant makes three arguments in response to the Hellenic Republic's objection:

415. First, as a matter of international law, the right to bring this arbitration was incapable of being transferred to the Commercial Bank of Cyprus through Decree No. 104/2013[452]. Claimant argues that a claimant that has standing and who sells the underlying assets of his investment, retains the right to bring a claim, provided that it does not explicitly relinquish this right[453]. This position is reinforced by the fact that the ICSID Convention and BITs only accord standing to the original investor which fulfils the *ratione personae* requirements. Accordingly the transfer of the asset to a third party, who would not qualify as an investor, cannot automatically dilute the BIT Claim[454].

416. Claimant adds that the Commercial Bank of Cyprus never owned the investment that underlies the present BIT Claims: Laiki's GGBs tendered in the Exchange Offer, [redacted] and the shares in Laiki's Greek subsidiary [redacted] that remain vested in Laiki[455]. Thus, only Laiki has standing to bring this arbitration[456].

417. Claimant's alternative argument is that, at best, under Cypriot Law, Decree No. 104/2013 only transferred the benefit of the BIT Claims, but not the legal right of action itself[457]. Claimant's expert says that the consequence of an equitable assignment such as the one in Decree No. 104/2013, is that the legal right of action remains vested in Laiki; thus any interest of the Commercial Bank of Cyprus in the claim (if any, which is denied) is only beneficial[458]. Likewise, under international law a transfer of a beneficial interest in a claim does not affect the standing of the transferor[459].

418. In the further alternative, Claimant says that the Hellenic Republic cannot take advantage of its own wrongdoing to absolve itself from liability[460]: Laiki's losses as a result of Greece's conduct led to it being placed under resolution and its assets being transferred to the Commercial Bank of Cyprus against the wishes of its board[461]. Accordingly, Greece is may not use the circumstances of the transfer of assets as a defence. To do so would be against the fundamental principle that a state may not reap any advantage from its own wrongdoing[462].

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[452] C II, para. 363.
[453] C II, para. 357.
[454] C II, paras. 358-359.
[455] C II, para. 361.
[456] C II, para. 362.
[457] C II, paras. 363 and 364.
[458] C II, para. 371; [redacted] paras. 70-73.
[459] C II, para. 365.
[460] C II, para. 7.
[461] C II, paras.373 and 5-8.
[462] C II, para. 8.

3. HEARING AND PHB

419. In the Hearing the Parties informed the Tribunal that the Commercial Bank of Cyprus had instituted an ICSID arbitration against the Hellenic Republic[463].

420. Respondent said that Commercial Bank of Cyprus' claims in that arbitration were related to the same legal and factual issues raised by Laiki in this arbitration; but also acknowledged that, due to the early stage of the arbitration, it was not possible to discern whether the Commercial Bank of Cyprus would submit the same claims as Laiki in this arbitration. Respondent suggested that counsel for Claimant clarify this issue, since it represents both the Commercial Bank of Cyprus and Laiki in the respective arbitrations[464].

421. Claimant's counsel, however, said it was not in a position to speak on behalf of Commercial Bank of Cyprus[465].

422. The President suggested the Claimant ask the Commercial Bank of Cyprus for a statement confirming whether a transfer of ownership of Laiki's BIT Claim had occurred[466].

Request from the Tribunal

423. After the Hearing, the Tribunal issued a new procedural calendar including a deadline for Claimant to present a "clarification on the assignment of rights to the [Commercial] Bank of Cyprus"[467].

[redacted]

[463] *Bank of Cyprus Public Company Limited v. Hellenic Republic*, ICSID Case No. ARB/17/4.
[464] HT5, pp. 197-201.
[465] HT5, p. 199.
[466] HT6, pp. 167-172.
[467] Calendar of 2 July 2017.
[redacted]

PHBs

425. In its PHB Respondent reiterated its objection, adding that the letter from the Commercial Bank of Cyprus dated 1 August 2017 does not address the issue whether the claims had been transferred to it; the letter simply states that the Bank will not assert such claims[469].

426. Claimant submits in its PHB that the letter from the Commercial Bank of Cyprus dated 1 August 2017 clarifies that it is not arguing in its ICSID arbitration that it acquired Laiki's BIT Claims and it confirms that it will not seek to assert such claims in the future[470].

427. Claimant adds that the Commercial Bank of Cyprus' position is consistent with the letter signed by the [redacted] on 22 February 2016, which confirms that

[redacted][471].

4. TRIBUNAL'S DECISION

428. This Tribunal must decide whether under Decree No. 104/2013, adopted by the CBofC in its capacity as the Resolution Authority, Laiki's right to bring this arbitration against the Hellenic Republic was assigned to the Commercial Bank of Cyprus – depriving Laiki of its standing.

429. To address the Transfer of Claims Objection the Tribunal will first summarize the proven facts (**4.1.**) and will then adopt a decision (**4.2.**).

[redacted]

[469] R IV, para. 14.
[470] C IV, para. 21.
[471] C IV, para. 22, citing to C-204.

[redacted]

[redacted]

[redacted]

[redacted]

> [redacted]

> [redacted]

> [redacted]

[redacted]

[redacted]

> [redacted]

> [redacted]

4.2 DISCUSSION

442. On 21 November 2012 Laiki submitted an official Notice of Dispute to the Hellenic Republic, alleging breaches of the Hellenic Republic's commitments under the BIT and announcing "damages measured in billions of euros". Laiki said that these breaches affected protected investments, consisting in its portfolio of GGBs and its

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[redacted]

Greek banking operations, structured as a branch ([redacted]) and as a subsidiary [redacted]. The Notice of Dispute eventually led to the filing of this procedure, in which Claimant asserts certain BIT Claims against the Respondent.

443. In this second Objection the Hellenic Republic argues, that, when the CBofC, acting as Resolution Authority, ordered Laiki to transfer its "good bank" to the Commercial Bank of Cyprus, the assets transferred included Laiki's BIT Claims against Greece. The legal consequence – says Greece – is that Laiki has been deprived of such rights and that consequently it has lost its standing to act as Claimant in this procedure.

444. A preliminary clarification is important: the Republic argues that under the resolution measures what has been transferred to the Commercial Bank of Cyprus were Laiki's BIT Claims – not Laiki's protected investments located in Greece.

445. There is indeed no dispute that Laiki's Greek investment was never transferred to the Commercial Bank of Cyprus:

- Laiki's GGBs were exchanged in the March 2012 Exchange Offer for New Securities, which were then cashed in December 2012[481]; and
- [redacted] a Greek bank re-capitalized by the Hellenic Republic, not to the Commercial Bank of Cyprus[482].

446. Laiki and the CBofC, acting as Laiki's Resolution Authority, reject Respondent's Objection. In their submission, the BIT Claims were never transferred to the Commercial Bank of Cyprus and continue to belong to Laiki.

Tribunal's position

447. On the basis of the evidence before it, and the arguments of the Parties, the Tribunal concludes that the argument of the Claimant is the more persuasive.

448. The difficulty with the position adopted by the Hellenic Republic is that it rests on an interpretation of Decree No. 104/2013, the resolution measure adopted by Laiki's Resolution Authority, which is only defended by Greece: the Resolution Authority (the authority which approved the Decree), the assignee and the assignor of the hypothetical transfer adopt a differing reading of Decree No. 104/2013. They firmly assert that the BIT Claims have not been transferred to the Commercial Bank of Cyprus and are still in Laiki's books.

449. The only support for Respondent's case derives from a literal reading of the words of Art. 5(1) of Decree No. 104/2013:

> "Laiki Bank transfers to the Acquiring Entity all assets, title deeds and rights other than those specified in Annex I on the terms and subject to the conditions [set out] in this Decree".

[481] C-155, p. 2.
[482] See paras. 272 *et seq supra*.

450. Respondent's expert, [redacted], explains, that Cypriot Courts apply the grammatical method of interpretation of rules of law like Decree No. 104/2013[483]. [redacted] adds that since Laiki's BIT Claims have not been included in Annex I as a reserved asset or right excluded from the transaction, these claims have not been transferred to the Commercial Bank of Cyprus[484]. [redacted] says that Decree No. 104/2013 is a form of [redacted][485].

451. The Tribunal is not convinced by the argument. In the Tribunal's opinion the proper reading of Decree No. 104/2013 in its totality leads to a more nuanced conclusion.

452. Art. 5(1) of the Decree defines the assets transferred from Laiki to the Commercial Bank of Cyprus. But it does not cover the ancillary rights deriving from "legal or other proceedings" in relation to such assets. This issue is regulated in Art. 13, which provides:

> "The Acquiring Entity is substituted for Laiki Bank in relation to any legal or other proceedings, related to titles assets, rights or liabilities which are transferred".

453. Art. 13 of the Decree mandates that, as a general rule, the "legal or other proceedings" follow the assets: if an asset is transferred to the Commercial Bank of Cyprus, all "legal or other proceedings" deriving from such asset are also included in the assignment. "Legal or other proceedings" is an expansive concept, which must be interpreted to cover all types of judicial or arbitral actions, related to the asset, which benefitted or prejudiced Laiki either as claimant or as defendant.

454. This is the positive reading of the general rule. A negative reading *a contrario sensu* is also possible: if an asset is not transferred, Art. 13 can be construed to imply that, the "legal and other proceedings" relating to such asset are also excluded from the scope of assignment.

455. It is undisputed that Laiki never transferred the protected assets– the GGBs and the Greek banking operations – to the Commercial Bank of Cyprus. It is also undisputed that the Decrees lack any specific rule regarding the BIT Claims. In this situation, Art. 13 of the Decree, interpreted *a contrario sensu*, supports the conclusion that the "legal or other proceedings" deriving from such assets, i.e. the BIT Claims, were not included in the scope of assets transferred to the Commercial Bank of Cyprus.

Confirmation by the CBofC

456. This interpretation is confirmed by the CBofC, the authority which drafted, approved and issued Decree No. 104/2013. In a letter dated 25 February 2016, the Resolution Authority invoked Art. 13 and averred that Laiki's "actionable rights of arbitration ICSID Case No. ARB/14/16", had not been transferred pursuant to the Resolution Decrees, and remain in the books of Laiki[486].

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[483] [redacted] I, para. 58.
[484] [redacted] II, paras. 59-60
[485] [redacted] II, para. 61, citing to [redacted]-39 – *Vassos Ayiomamitis Developments Ltd and others v. Artemi Thomaides*, Appeal No.10238 (24 Feb. 2000).
[486] C-204.

457. Respondent argues that these statements from the CBofC provide no assistance in determining whether Laiki's BIT Claim was effectively transferred. In particular, Respondent says that the CBofC has no authority to interpret the Decree, and that its statement contradicts the plain reading of the Decrees.

458. The Tribunal is not able to concur with Respondent's views.

459. First, the Tribunal does not share Respondent's position that the Decrees offer a clear-cut answer to the question whether Laiki's BIT Claims were indeed transferred to the Commercial Bank of Cyprus.

460. Decree 104/2013 (and the subsequent Decree 156/2013) simply fail to explicitly mention the BIT Claims. The absence of the BIT Claims within the list of assets not transferred to the Commercial Bank of Cyprus cannot be construed – as Greece proposes – as a confirmation that an automatic transfer has taken place. A construction of the Decree in its entirety supports a different conclusion: Art. 13 defines the general principle that "legal or other procedures" follow the assets from which they derive – and the assets underlying the BIT Claim were never transferred to the Commercial Bank of Cyprus.

461. Second, the Decree formalizes a resolution measure, adopted by the CBofC as Resolution Authority – not a rule of general application. To establish the proper construction of such measure, the decisive factor must be the intention of the authority which adopted it. The letter submitted by the CBofC leaves no room for doubt: the Authority avers that its intention, when it adopted the resolution measure, was to exclude the BIT Claims from the assets transferred to the Commercial Bank of Greece.

462. Third, the interpretation defended by the CBofC is supported by the stance adopted by the Commercial Bank of Cyprus, the potential beneficiary of the alleged assignment. Upon the Tribunal's instructions, Claimant approached the Commercial Bank of Cyprus and on 1 August 2017, such bank submitted a letter, for use in the present procedure, clarifying that such Bank[487]

[redacted]

[487] C-267.

[redacted]

464. In conclusion, the Tribunal dismisses Respondent's Transfer of Claims Objection: it rules that the BIT Claims were never transferred to the Commercial Bank of Cyprus, and accordingly Laiki has standing to act as a Claimant in this arbitration.

VII.3. EU LAW INCOMPATIBLITY OBJECTION

465. In the third jurisdictional Objection – the EU Law Incompatibility Objection – Respondent says that the Tribunal lacks jurisdiction because this arbitration is incompatible with EU Law.

466. The Parties' positions regarding this Objection have evolved throughout the proceedings.

467. Initially – from Respondent's Counter-Memorial until the Parties' PHBs – the Parties discussed the compatibility of the BIT by reference to the EU Treaties. Respondent argued that there is an incompatibility between Art. 9 of the Greece-Cyprus BIT (the offer to ICSID arbitration) and several provisions of the TFEU, that grant exclusive jurisdiction on EU law to EU institutions. Claimant rejected this proposition.

468. On 6 March 2018, more than two years after these proceedings had been initiated, the CJEU issued its *Achmea Judgment*. The CJEU ruled that Arts. 267 and 344 TFEU preclude the application of certain intra-EU BIT arbitration clauses. Thereafter, the Parties made additional submissions on the effect of *Achmea* to the present dispute.[489] The Tribunal posed a number of questions, which the Parties answered.[490] The issues coalesced around the consequences of the *Achmea Judgment*, if any, on this Tribunal's jurisdiction, or exercise of jurisdiction.

[489] C V and R V.
[490] C VI and R VI.

469. The Tribunal will summarize the Parties' positions (**1.** and **2.**), including their answers to specific questions posed by the Tribunal (**3.**) and then will adopt a decision (**4.**).

1. RESPONDENT POSITION

470. The Hellenic Republic argues that this arbitration is incompatible with EU law, because Art. 9 of the BIT – the arbitration clause – is incompatible with Arts. 258 and 259, 267 and 344 of TFEU and Art. 4(3) TEU.

471. In view of such incompatibility, the conflict rules of the VCLT and of EU law dictate that the provisions of the EU Treaties prevail. Accordingly, Art. 9 of the BIT is rendered inapplicable and the Tribunal lacks jurisdiction.

1.1 INCOMPATIBILITY OF ART. 9 BIT AND THE TFEU

472. Respondent says that the resolution of this dispute requires the interpretation and application of EU Law, because it raises questions regarding the expectations of Claimant's purported investment within the EU monetary, economic and fiscal policy framework. [redacted]

473. Accordingly, since the resolution of the dispute requires interpretation and application of novel issues of EU law that would require their referral to the CJEU[492], this arbitration is incompatible with EU law. In particular with the following provisions of the EU Treaties[493]:

- Art. 258 TFEU and Art. 259 TFEU that grant exclusive jurisdiction to the CJEU to adjudicate whether the Hellenic Republic has breached EU law. Claimant's claims for alleged breaches of EU Law are therefore impermissible[494].
- Adjudication of the present dispute is incompatible with Article 344 TFEU and 4(3) TEU, because this is a dispute between the Republic of Cyprus and the Hellenic Republic[495].
- Pursuant to Art. 267 TFEU, the CJEU has the monopoly on the final and authoritative interpretation of EU Law, through the preliminary reference procedure, by which national courts of the EU Member States may refer to the CJEU any question of the interpretation and application of EU Law[496]. This Tribunal may not apply for a preliminary reference under Art. 267, and thus, the resolution of this dispute is incompatible with the jurisdiction of the CJEU[497].

[redacted]

[492] R II, para. 353-356; R IV, para. 22; R V, paras. 23-27.
[493] R II, para. 323.
[494] R I, paras. 348-350; R II, paras. 357-358.
[495] R I, para. 351-359; R II, paras. 359-364
[496] R I, para. 364.
[497] R I, para. 368; R II, paras. 365-370.

[redacted]

475. Lastly, Respondent says that this arbitration is subject to the ICSID Convention, and thus, the EU courts would have no powers of review in the enforcement stage. The only "tool" available to the EU institutions to ensure compliance with EU law, would be the application of infringement proceedings against the Member States that try to comply with an award in violation of EU law[499].

1.2 CONFLICT OF LAW RULES

476. In view of such incompatibility, the conflict rules of the VCLT and of EU law dictate that the provisions of the EU Treaties prevail[500]. Accordingly, Art. 9 of the BIT is rendered inapplicable and the Tribunal lacks jurisdiction[501]:

477. (i) Art. 30(3) of the VCLT: in the event of successive treaties relating to the same subject matter, an existing treaty that is incompatible with a later treaty "applies only to the extent that its provisions are compatible with those of the later treaty"[502]. Cyprus acceded to the EU Treaties on 1 May 2004[503], and thus, Greece-Cyprus BIT – in force as of 26 February 1993 – applies only to the extent that it is compatible with the EU Treaties[504].

478. (ii) Primacy of EU law: it is a well settled EU Law principle that EU Law takes precedence over domestic law of EU Member States and treaties concluded among them, prior to their accession to the EU[505]. The CJEU established the principle of EU Law primacy in 1962 in *Commission v. Italy*, stating that[506]:

> "…in matters governed by the EEC Treaty [now TFEU], that treaty takes precedence over agreements concluded between Member States before its entry into force".

479. This principle has been consistently applied by the CJEU[507], and has also been recognized by investment treaty tribunals, such as the ICSID tribunal in *Electrabel*, which confirmed that "EU law would prevail over the ECT in case of any material inconsistency"[508].

[redacted]

[499] R II, para. 367.
[500] R IV, para. 20.
[501] R V, paras. 7 and 35-37.
[502] R I, para. 311, citing to Art. 30(3) VCLT
[503] R I, para. 312, RL-63 and RL-64. The Hellenic Republic acceded to the EU on 1 January 1981.
[504] R I, para. 312; R II, para. 327-330; R V, paras. 40-43.
[505] R I, para. 313; R V, paras. 37-39.
[506] Judgment of 27 February 1962, *Commission of the EEC v. Government of the Italian Republic*, Judgment, Case 7/61, ECLI:EU:C:1962:2, Section II.B, p. 10.
[507] R I, para. 313, RL-068; RL-69
[508] R I, para. 314.

480. Thus, provisions of intra-EU BITs, such as the Greece-Cyprus BIT, apply only to the extent they are compatible with EU Law[509].

1.3 EFFECT OF THE ACHMEA JUDGMENT

481. Respondent says that the *Achmea Judgment* confirms its position in this arbitration: that Art 267 and 344 preclude the dispute resolution provisions of Intra-EU BITs – such as the Cyprus-Greece BIT – enabling investors to submit to arbitration an investment dispute with a EU Member State[510]:

- The CJEU held that, since investment arbitral tribunals may be called upon to interpret and apply EU law[511], and these tribunals are not entitled to make preliminary reference procedures pursuant to Art. 267 TFEU[512], an award issued by an intra-EU BIT arbitral tribunal would not be subject to the mechanisms that guarantee the uniform interpretation and application of EU law[513];
- The Court also held that the judicial review of intra-EU BIT arbitral awards by domestic courts does not ensure that the questions of EU law adjudicated by the arbitral tribunal can be submitted to the CJEU thorough a preliminary reference procedure[514].

482. Pursuant to Art. Art. 42(1) ICSID Convention this ICSID Tribunal may be called upon to interpret and apply EU to rule on possible violations of the BIT[515]. And since it cannot refer preliminary rulings to the CJEU its awards are not subject to judicial review by domestic courts of the EU[516].

Enforceability of the award

483. Respondent says that if this Tribunal assumes jurisdiction its award would be contrary to EU public policy and could only be recognized or enforced in contravention of EU law, including the TFEU and the *Achmea Judgment*[517].

484. Under these circumstances, the Hellenic Republic would be prohibited from complying with the award under EU law[518]. Furthermore, since Laiki is controlled by the CBofC, the latter could not authorize or facilitate – and indeed would be obliged to prevent – any effort by Claimant to seek recognition or enforcement of the award, pursuant to the Republic of Cyprus' obligation of sincere cooperation under Art. 344 TFEU Art. 4(3) TEU[519]. The CJEU has held that EU Member State

[509] R I, para. 314.
[510] R V, para. 6 and 19-21.
[511] R V, para. 11.
[512] R V, para. 12.
[513] R V, para. 13.
[514] R V, para. 14.
[515] R V, para. 21.
[516] R V, para. 20.
[517] R V, para. 44.
[518] R V, para. 45.
[519] R V, para. 46.

courts must ensure that any judgment, whether an arbitral award[520], or domestic court judgments, are compatible with EU law, and judgments in violation of EU law cannot be enforced[521].

2. CLAIMANT'S POSITON

485. Claimant submits as a first argument that Laiki's claims do not require this Tribunal to interpret and apply EU Law, as Respondent suggests; at most, EU Law provides the relevant context for determining certain of Laiki's substantive BIT breaches[522].

486. The Tribunal is the judge of its own competence, which is governed by the BIT and the ICSID Convention: neither of these instruments contains a provision which precludes the Tribunal from determining matters of EU Law, and there is no basis to assert that it has no competence to do so[523].

2.1 EU LAW IS CONSISTENT WITH AND DOES NOT PREVAIL OVER THE BIT

487. The argument that investment arbitration is incompatible with EU Law under Art. 30(3) VCLT and the principle of EU Law primacy has been dismissed by several investment arbitration tribunals[524]:

- There is no incompatibility between EU Law and a dispute resolution clause providing for investor-State arbitration, and thus, Art. 30(3) VCLT cannot divest the tribunal of jurisdiction. The arbitration provision of Art. 9 BIT is not related to the same subject matter governed by the EU Treaties: EU Law contains no rule prohibiting investor-State arbitration and does not provide a mechanism whereby investors of Member States could directly access an independent dispute element body to claim violations of substantive guarantees by another Member State[525].
- The primacy of EU Law over national law and other international treaties cannot deprive the tribunal of jurisdiction[526]. The principle of primacy is not material to the present case, because EU law cannot deprive investors from protection under the BIT and the ICSID Convention, no more than any other domestic system of rules could[527].

488. Claimant argues that there is no incompatibility between the provisions of the EU Treaties and the BIT, as Respondent alleges[528]:

- Articles 258 and 259 TFEU concern the CJEU's exclusive jurisdiction over infringement proceedings bought by the European Commission or any EU

[520] Judgment of 1 June 1999, *Eco Swiss China Time Ltd v. Benetton International NV*, Case C-126/97, EU:C:1999:269, para. 36.
[521] RV, para. 48.
[522] C II, para. 314.
[523] C II, para. 315-317
[524] C II, para. 320-323.
[525] C V, para. 28.
[526] C II, para. 322.
[527] C V, paras. 9-15.
[528] C IV, para. 32.

Member State against other EU Member States. This does not affect Laiki's standing before this Tribunal as an investor under the BIT[529].

- Art. 344 TFEU relates to the jurisdiction of the CJEU to adjudicate disputes between EU Member States, concerning the interpretation and application of EU Treaties. In this arbitration Laiki is a private investor seeking protection under the BIT[530]. Likewise, Art. 4(3) TEU is irrelevant: the Republic of Cyprus' duties under Article 4(3) TEU do not apply to Laiki. If the Hellenic Republic considers that the Republic of Cyprus is in breach of Art. 4(3) TEU, it should submit such a claim before the EU Courts[531].
- Claimant does not deny that the CJEU has exclusive jurisdiction to issue rulings of EU Law with effect *erga omnes*, pursuant to the preliminary reference procedure of Art. 267 TFEU. In this case, however, the Tribunal is called upon to decide a claim by a private investor against Greece. Any finding of the Tribunal with respect to EU Law has only *inter-partes* effect. Therefore, this Tribunal cannot trespass the exclusive jurisdiction of the CJEU[532]. The fact that arbitral tribunals cannot refer preliminary rulings to the CJEU pursuant to Art. 267 TFEU, does not mean that such lack of referral when assessing issues of EU law would constitute a breach of Art. 267 TFEU[533].

489. Claimant argues that, even if the arbitration clause in intra-EU BITs are deem incompatible with other international treaties, such as the EU Treaties, such incompatibility cannot operate *ipso iure*. The appropriate course of action is the termination of the BIT through its own termination mechanism. If Greece wants to terminate the Greece-Cyprus BIT, it has to do it pursuant to the proper and lawful procedures[534], complying with its obligations and respecting accrued rights and legitimate expectations of particular investors[535].

490. Claimant says it is impermissible for the termination mechanism to be bypassed, in particular with respect to the present case, when Laiki has already accepted Greece's offer to arbitrate the investment dispute, prior to the termination of the BIT. The contrary would be inconsistent with the doctrines of acquired rights, estoppel and legitimate expectations under customary international law[536]

491. Additionally Claimant relies on Art. 45 VCLT, which precludes a State from invoking a ground for invalidity of a treaty

> "if, after becoming aware of the facts […] it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be".

[529] C II, paras. 333-334.
[530] C II, para. 336.
[531] C II, paras. 338-339.
[532] C V, para. 54.
[533] C II, para. 342.
[534] C V, paras. 22-25.
[535] C V, para. 18.
[536] C V, paras. 36-38.

492. The Commission has been opposing the applicability of intra-EU BITs for years, because of its alleged incompatibility with EU law. Greece, however, has never sought to terminate the Cyprus-Greece BIT[537].

2.2 THE TRIBUNAL MAY ADJUDICATE QUESTIONS OF EU LAW

493. Claimant says that this Tribunal may adjudicate questions of EU law[538]. The CJEU does not have the monopoly to interpret and apply EU Law. Courts and arbitral tribunals throughout the EU frequently interpret and apply EU Law. The CJEU is, however, the "final and authoritative interpretation of EU law". The arbitral tribunal can thus consider and apply EU Law, both as an instrument of international law, or as municipal law[539].

494. In any case, the adjudication of Laiki's claims for breaches of the BIT do not require the Tribunal to determine any issue of EU Law[540]. The role of EU law is to provide a factual context. It is precisely Claimant's case that, within that factual context, Greece could have acted in a manner consistent with the Treaty and did not do so[541]

2.3 THE EFFECT OF THE ACHMEA JUDGMENT

495. Claimant says that the *Achmea Judgment* is not determinative of the question whether the Tribunal or the Centre has jurisdiction or competence over this arbitration[542].

496. The *Achmea Judgment* relates to a non-ICSID arbitration with its seat in the EU, under the Czechoslovak-Netherlands BIT. The CJEU ruled that "Articles 267 and 344 must be interpreted as precluding" an Intra-EU arbitration provision. The judgment, however, does not declare the invalidity or nullity of the arbitration clause[543].

497. Even if Art. 9 of the BIT were deemed incompatible with EU Law, such determination under the EU legal order is incapable, in the same way as Greek domestic law, of depriving this Tribunal of its jurisdiction[544]. The only effect of such alleged incompatibility, as a matter of EU law, is that Greece is under the obligation to terminate the BIT. By contrast, the alleged incompatibility does not entail an automatic termination of the BIT or withdrawal of the consent to arbitration under the BIT[545].

498. The rules governing competence and jurisdiction are the Greece-Cyprus BIT and the ICSID Convention Pursuant to Arts. 41(1) and 25 ICSID Convention the Tribunal is the judge of its own competence, on the grounds of the consent of the Parties, that cannot be unilaterally revoked. The arbitration is binding on the Parties

[537] C V, para. 39.
[538] C II, paras. 326-327.
[539] C II, para. 327.
[540] C II, paras. 330, 331, 344-345; 348-349; C IV, para. 30.
[541] C IV, paras. 31-33.
[542] C V, para. 51.
[543] C V, para. 17.
[544] C V, para. 6.
[545] C V, paras. 16-20.

with the exclusion of any other remedies, and the resulting award is only subject to the remedies provided in the ICSID Convention[546].

499. With regard to Respondent's argument on the enforcement of a potential award, Claimant avers that, even if Greece would be prohibited by EU law from complying with the award, this would be irrelevant: enforcement against Greece would still be available against Greek assets in third countries which are ICSID Member States, subject only to rules of sovereign immunity from execution[547].

3. ANSWERS OF THE PARTIES TO THE TRIBUNAL'S QUESTIONS

500. After the Parties' submissions on the *Achmea Judgment*, the Tribunal requested the Parties to address a series of questions:

501. ***"1. While Art. 8 of the Netherlands-Slovakia BIT provides for the application of domestic and EU law, the Cyprus-Greece BIT does not include an explicit clause on the law to be applied. Is this difference relevant with regard to the potential effects, if any, of the CJEU "Achmea Judgment" on the present dispute?"***

Respondent's position

502. Respondent said that, in the absence of an explicit choice of applicable law in the Greece-Cyprus BIT, Art. 42(1) ICSID Convention mandates that the Tribunal "shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable" to decide the dispute before it[548]. Accordingly, the Tribunal must take into account EU law as the domestic law of the contracting State Parties and as the applicable rules of international law between the Parties[549].

503. Thus, the *Achmea Judgment* also applies in the context of the Greece-Cyprus BIT because this Tribunal also "may be called on to interpret or indeed to apply EU law" [550].

Claimant's position

504. Claimant says that the arbitral tribunal under the Netherlands-Slovakia BIT was explicitly required to take EU law into account to decide on infringements of the BIT[551]. In contrast, under the Cyprus-Greece BIT this Tribunal is not obliged to consider EU law to rule on infringements of the Treaty[552]. Therefore, the key part of the CJEU's reasoning that the Netherlands-Slovakia BIT was incompatible with EU law, does not apply to the Greece-Cyprus BIT [553].

[546] C V, para. 7.
[547] C V, para. 53.
[548] R VI, paras. 3-4.
[549] R VI, paras. 3-4.
[550] R VI, para. 4.
[551] C VI, para. 2.
[552] C VI, para. 3.
[553] C VI, para. 3.

505. ***"2. Having regard to paragraph 43 of the Respondent's Observations on the Achmea judgment, that "the Hellenic Republic has not consented to submit the dispute to the Centre, as required by Article 25(1) of the ICSID Convention":***

506. ***A) assuming that this statement is true, (i) was the consent provided by Respondent invalid or void ab initio (i.e. from the moment when the Hellenic Republic concluded the BIT), or (ii) did the consent become invalid or void on the date that Cyprus acceded to the EU in 2004, or (iii) on the date of the Achmea judgment, or (iv) on some other date?***

507. ***B) How does the statement conform (i) with Article 25(1) of the ICSID Convention, last sentence ("When the parties have given their consent, no party may withdraw its consent unilaterally"), and (ii) with VCLT Article 26 ("Pacta sunt servanda"), Article 27 ("Internal law and observance of treaties"), and Article 45 ("Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty")?".***

Respondent's position

508. The Respondent submits that the Contracting Parties' offer of consent to ICSID arbitration in Art. 9 of the BIT became inapplicable on 1 May 2004, when the Treaty of Accession between the Republic of Cyprus and EU Member States entered into force. On that day, the Republic of Cyprus became a Contracting Party to the EU Treaties, and the BIT's offer of consent to arbitration became incompatible with EU law[554], either by application of (i) the principle of supremacy of EU law over inconsistent treaties concluded between EU Member States; or (ii) Art. 30(3) VCLT on the application of successive treaties[555].

509. Consent to arbitration is immune from the effects of the conflict clauses only after consent is perfected through acceptance by the investor[556]. In this case, when the Claimant purported to accept the consent expressed in Art. 9 of the BIT – on June 2014 – the offer had been inapplicable for more than a decade[557]; therefore, the prohibition against unilateral withdrawal of consent in Art. 25(1) ICSID Convention was not triggered[558].

510. The result is that Respondent has not consented to submit the present dispute to the Centre, as required by Art. 25(1) ICSID Convention[559].

511. In regard to Art. 26 VCLT's *pacta sunt servanda* rule, there can be no violation in circumstances where all contracting parties to a treaty agree on a conflict clause which, in the event of a conflict between two treaties, applies to subordinate compliance with the initial treaty in favor of compliance with the later treaty[560].

[554] R VI, para. 5.
[555] R VI, para. 6.
[556] R VI, paras. 10 and 20.
[557] R VI, para. 10.
[558] R VI, para. 23.
[559] R VI, para. 17.
[560] R VI, para. 24.

512. With respect to Art. 27 VCLT on internal law and the observance of treaties, it is not applicable to the present case, as Respondent is not invoking its internal law to justify a failure to perform the BIT; Respondent invokes the conflict rules in Art. 30(3) VCLT and the conflict rule inherent in the primacy of EU law over intra-EU treaties, which is a rule of international nature[561].

513. Art. 45 VCLT is also inapplicable, as Respondent is not invoking a ground for invalidating, terminating, withdrawing from or suspending the Hellenic Republic-Cyprus BIT under Part V VCLT[562]. In any case, Respondent argues that it did not lose the right to invoke the inconsistency with EU law of the Contracting Parties' offer of consent to ICSID arbitration in the BIT[563]. The Hellenic Republic has not "expressly agreed" to the continued applicability of the offer of consent as required by Art. 45(a) VCLT; nor can the Hellenic Republic "by reason of its conduct be considered as having acquiesced" to the continued applicability of the offer, in accordance with Art. 45(b) VCLT[564].

Claimant's position

514. Claimant says that there is no legal basis to conclude that Respondent's consent became invalid or void on the date that Cyprus acceded to the EU in 2004. The Greece-Cyprus BIT is valid and in force, and thus, binding pursuant to Art. 26 VCLT. Its validity can only be impeached through the application of the termination and invalidation provisions of the VCLT. There is no automatic termination or invalidation of treaties by the operation of law, and Art. 30(3) provides that the treaty itself continues to be in force, albeit that it only applies to the extent that its provisions are compatible with those of the later treaty[565].

515. Claimant also reiterates the importance of Art. 25(1) ICSID Convention: "When the parties have given their consent, no party may withdraw its consent unilaterally".

516. Additionally, Claimant says that the *Achmea Judgment* is incapable of invaliding the BIT[566]. Member States may be under an obligation to amend or terminate a BIT that has been declared incompatible with EU law, but the CJEU's preliminary ruling cannot have such an effect under EU law[567]. Respondent cannot invoke the provisions of its internal law to justify the failure to perform a treaty, pursuant to Art. 27 and Art. 46 VCLT [568].

517. ***"3. In international law, what are the legal effects (ex tunc or ex nunc) of the incompatibility of treaty provisions under Art. 30(3) VCLT, especially in relation to rights and obligations of a third-party beneficiary of the anterior treaty?".***

[561] R VI, paras. 26-27.
[562] R VI, para. 28.
[563] R VI, para. 29.
[564] R VI, para. 29.
[565] C VI, para. 14.
[566] C VI, para. 16.
[567] C VI, para. 16.
[568] C VI, para. 17.

Respondent's position

518. Respondent states that the conflict rule of Art. 30(3) VCLT operates from the moment that a normative conflict arises, i.e. when a State becomes bound by conflicting treaty provisions. Thus, according to Respondent, the offer of consent to ICSID arbitration contained in the BIT became inapplicable on 1 May 2004, when Cyprus became a party to the EU treaties and the conflict between Art. 9 of the BIT and EU law arose[569].

519. The VCLT does not provide third party beneficiary rights to natural or legal persons, only third States or international organizations[570]. But even if Arts. 34-47 VCLT were to apply by analogy to rights conferred on natural and legal persons under investment treaties, the Contracting Parties would still be permitted to revoke the offers of consent to arbitration[571]. Under Art. 37 VCLT a beneficiary State, and by analogy, an investor, would be required to show that[572]:

- The right it invokes has arisen in conformity with Article 36 VCLT, meaning that the Contracting Parties made their offer and the third State has given its consent in the manner prescribed by the provisions; and
- that the right was intended not to be revocable or subject to modification without the consent of the third State.

520. Any offer to ICSID arbitration under the Greece-Cyprus BIT was intended to be revocable until the moment the investor accepts the offer to arbitrate in writing[573]. Claimant had no acquired right because Laiki purported to accept Respondent's offer on 20 June 2014, but such offer became inapplicable on 1 May 2004 due to its incompatibility with EU law[574].

521. The sunset clause of the BIT has no relevance in this case, because it would not confer any rights with respect to investments made after 1 May 2004, and any protection accorded by the sunset clause would have expired on May 1, 2014, before Laiki purported to accept the Hellenic Republic's offer of consent to ICSID arbitration[575].

Claimant's position

522. Claimant argues that in the event of an incompatibility under Art. 30(3) VCLT, the past and future rights of third parties cannot be denied[576]. This is consistent with conclusions of an ILC study group which found that[577]:

> "States bound by the treaty obligations should try to implement them as far as possible with the view of mutual accommodation and in accordance with the

[569] R VI, para. 32.
[570] R VI, para. 33.
[571] R VI, para. 35.
[572] R VI, para. 35.
[573] R VI, paras. 38-39.
[574] R VI, para. 36.
[575] R VI, para. 42.
[576] C VI, para. 23.
[577] C VI, para. 25.

> principle of harmonization. However, the substantive rights of treaty parties or third party beneficiaries should not be undermined."

523. ***"4. What are the legal effects (ex tunc or ex nunc) of the declaration by the CJEU of the incompatibility of the provisions contained in an anterior treaty between EU Member States, with the provisions of the TFEU (such as in Case 10/61-Commission v Italy or in the Achmea Judgment)? Please specifically refer to the effects of incompatibility on pre-existing rights and obligations of EU nationals deriving from the anterior treaty".***

Respondent's position

524. Respondent argues that the *Achmea Judgment* has *ex tunc* legal effect, and therefore, the CJEU's declaration of incompatibility confirms the existence of an incompatibility from the date of entry into force of the respective rule of EU law. This is because the rulings of the CJEU establish the law from the time it entered into force, and should therefore be applied to legal relationships which existed prior to the ruling[578].

> "It is therefore the rule that the preliminary reference ruling has an effect *ex tunc*, that is for the entire period during which the legal provision in question has been applied".

525. Thus, arbitration clauses in Intra-EU BITs are rendered inapplicable from the date of the entry into force of the TFEU for the EU Member States concerned[579]. As a result, the rights or obligations under the earlier treaty, including those of EU nationals, also become inapplicable[580].

Claimant's position

526. Claimant says that the *Achmea Judgment* is not capable of invalidating a treaty concluded between two Member States. At most Member States have an obligation to amend or terminate BITs that have been declared incompatible with EU law[581].

527. Any legal effects of a declaration of incompatibility would only take effect as a matter of EU domestic law, and not under international law, and therefore could not affect the rights of EU nationals under international law deriving from the treaty, which would remain valid and in force until terminated[582].

528. EU law recognises the principle of the continued validity of international law treaty rights over EU law obligations, as evident in Art. 351 TFEU[583]. As outlined by settled case law[584]:

> "… the purpose of the first paragraph of Article 307 EC is to make clear, in accordance with the principles of international law, as set out in, *inter alia*,

[578] R VI, para. 45.
[579] R VI, para. 46.
[580] R VI, para. 46.
[581] C VI, para. 26.
[582] C VI, para. 27.
[583] C VI, para. 28.
[584] C VI, para. 28.

> Article 30(4)(b) of the Vienna Convention on the Law of Treaties of 23 May 1969, that the application of the EC Treaty does not affect the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder...".

529. Claimant avers that this principle of international law extends to protect the rights of third parties under pre-accession agreements in the face of incompatible EU laws[585]. Further, no distinction should be made between agreements between a Member State and a non-member State, and agreements between two Member States, one of which concluded the BIT before acceding to the EU[586]. Claimant argues that such treaties remain in force under international law, and investors should be able to enforce any rights against Member States, even if that involves derogating from EU law[587].

530. ***"5. Who are the addressees of the Achmea Judgment, and to what extent are they obliged to comply with the decision? (Please consider the following: Commission, EU Member States, EU Courts, Courts of Third States, investment arbitral tribunals sitting within the EU, investment arbitral tribunals sitting outside the EU, investment arbitral tribunals constituted under the ICSID Convention)".***

Respondent's position

531. Respondent avers that the immediate addressee of *Achmea Judgment* is the referring court, i.e., the BGH[588]. Additionally, pursuant to Art. 4(3) TEU, EU Member States also have an obligation to ensure the effective application of and respect for EU Law. Therefore, the CJEU's declaration of incompatibility requires Member States to take any appropriate measures to ensure the fulfillment of the obligations arising out of the TEU[589]. Respondent states that this responsibility would prevent it from complying with any award rendered in favor of Claimant. Further under EU law, Cyprus is under an obligation to ensure that Laiki discontinues the present arbitration, and to prevent any effort of enforcement and recognition of any eventual award[590].

532. The CJEU's judgments have *erga omnes* effects[591], and thus, they also bind all organs throughout the EU, including the European Commission, the Member States and their courts and tribunals[592].

533. Additionally, in light of the principle of "comity", courts of third States must be expected to recognize and follow the judgment, as it comes from the highest court of the EU legal order[593].

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[585] C VI, para. 29.
[586] C VI, para. 29.
[587] C VI, paras. 29-30.
[588] R VI, para. 50.
[589] R VI, para. 51.
[590] R VI, para. 52.
[591] R VI, para. 53, quoting Claimant's Written Observations with respect to Respondent's Request for Bifurcation, ¶ 59.
[592] R VI, para. 54.
[593] R VI, para. 56.

534. An investment tribunal seated within the EU must also follow the *Achmea Judgment* as part of the *lex loci arbitri,* which includes EU Law[594]. In addition, investment tribunals sitting outside the EU or ICSID tribunals cannot disregard the *Achmea Judgment*. The award of an ICSID tribunal would be susceptible to annulment pursuant to Art. 52(b) ICSID Convention, because the tribunal would manifestly exceed its power; likewise the award would not be enforceable in any EU Member State[595].

Claimant's position

535. The judgments by the CJEU in preliminary ruling procedures are only binding to the referring court, as regards the interpretation or the validity of the acts of the Union institutions in questions[596].

536. While there is a preponderance of academic opinion that there should be some legal effect beyond the parties to the preliminary ruling procedures and the referring court, there is no consensus on the effects of preliminary rulings. The Claimant states this is an unresolved matter of EU Law[597].

537. The European Commission is likely to consider the *Achmea Judgment* binding[598].

538. On the other hand, Member States should generally support preliminary rulings, but can exceptionally challenge a ruling; there is no certainty that all Member States are obliged to take steps to bring their obligations under intra-EU BITs to an end[599].

539. With respect to courts of EU Member States, the interpretation of EU law in the *Achmea Judgment* may be regarded as binding, but this may depend upon the precise context, the interpretation of the Judgment, the national constitutions and the court in question; the obligation of the courts is to apply the interpretative ruling to the circumstances of the case and give appropriate remedy; in some cases, the referring court can find the ruling has no applicability to the particular case; for this reason, courts may seek further rulings on issues to determine the extent to which principles already laid out apply; so, until there is a succession of reference on the same or similar subjects, no broader impact of a ruling can be assessed[600].

540. For courts of third States, investment arbitral tribunals sitting outside the EU and investment tribunals under the ICSID Convention, the *Achmea Judgment* is not binding[601].

4. THE TRIBUNAL'S DECISION

541. The Hellenic Republic argues that the Tribunal lacks competence and the Centre jurisdiction over the present dispute because the arbitration of Claimant's claims

[594] R VI, para. 55.
[595] R VI, para. 58.
[596] C VI, para. 31.
[597] C VI, para. 32.
[598] C VI, para. 33.1.
[599] C VI, para. 33.2.
[600] C VI, para. 33.3.
[601] C VI, paras. 33.4-33.6.

pursuant to Art. 9 of the BIT is incompatible with Arts. 258 and 259 TFEU and Art. 4(3) TEU, and more importantly, with Arts. 267 and 344 TFEU, as established by the *Achmea Judgment*[602].

542. Greece adds that its offer to consent to ICSID arbitration in Art. 9 of the BIT became inapplicable on 1 May 2004, when the Treaty of Accession between Cyprus and the EU Member States entered into force. On that date, Cyprus became a contracting party to "the Treaties on which the Union is founded, as amended or supplemented", and on that date the consent offer became incompatible with EU law. When Laiki purported to accept the offer by submitting its Request for Arbitration on 20 June 2014, that offer had been inapplicable for more than a decade[603].

543. Claimant disagrees. In its opinion the Tribunal is competent and the Centre has jurisdiction. The Tribunal and the Centre derive their authority from separate international law instruments with provisions which protect against removal of the investor's protection by virtue of State action. Greece held itself out to investors as being subject to the BIT and the ICSID Convention; and has thereby promised to investors to abide by such international law instruments. The international law doctrine of *pacta sunt servanda*, the international law protection for acquired rights, legitimate expectations and estoppel support Claimant's case[604].

544. The Tribunal is more persuaded by the arguments of the Claimant.

545. The alleged incompatibility between EU law and Art. 9 of the BIT does not deprive the Tribunal of competence and the Centre of jurisdiction.

546. To support this conclusion the Tribunal will first provide *pro memoria* a chronology of relevant events (**4.1.**), and then it will discuss Respondent's proposition and establish reasons (**4.2.**) to support its decision to dismiss this jurisdictional objection.

4.1 CHRONOLOGY OF EVENTS

547. It is useful to summarize chronologically a number of events which are relevant for the adjudication of the jurisdictional objection raised by Respondent.

A. 1966-1969: ICSID Convention

548. Cyprus and Greece ratified the ICSID Convention on 25 November 1966 and 21 April 1969 – before either of the two States became members of the EU.

B. 1974-1976: VCLT

549. The VCLT was adopted on 22 May 1969. Greece and Cyprus acceded to the VCLT in 1974 and 1976 respectively, and the Convention entered into force on 27 January 1980 – again before either State became a party to the EU Treaties.

[602] R V, paras. 1-7.
[603] R VI, para. 5.
[604] C V, para. 3.

C. 1979- 1981: Greece accedes the European Economic Community

550. In 1979 Greece signed and ratified the Treaty of Accession to the European Community, and accession officially occurred in 1981.

D. 1992-1993: The Greece-Cyprus BIT

551. Ten years later, in 1992, Greece, an EU Member State, and Cyprus concluded the Greece-Cyprus BIT, which came into force on 26 February 1993. At that time, Cyprus, which had signed an Association Agreement with the European Community in 1972, was not yet an EU Member State.

552. Art. 12 of the BIT regulates the initial period and the tacit renewal of the BIT:

> "1. This Agreement shall entry into effect one month after the date on which the ratification documents are exchanged. It shall remain in force for a period of ten years.
>
> 2. Unless terminated following notification by either Contracting Party at least six months prior to its termination date, this Agreement shall be renewed tacitly every ten years.
>
> Each Contracting Party reserves the right to terminate the Agreement upon notification of at least six months prior to termination date of its current effective period." [Emphasis added]

Tacit renewal

553. The BIT was tacitly renewed twice, in 2003 and in 2013, in accordance with Art. 12(2). After the 2013 renewal, the BIT is extended to apply until 2023. On that date it will again be tacitly renewed, except if either Contracting Party notifies its decision to terminate the agreement, at least six months before the next renewal date.

Sunset clause

554. Additionally, Art. 12(3) provides for a so-called sunset clause, which establishes that the BIT shall continue to apply after its termination for a period of ten years, but only to the benefit of investments made prior to the termination date:

> "3. In regard to investments that took place before the termination date of this Agreement, the foregoing provisions will continue to be effective for an additional period of ten years from that date".

The European Union

555. In parallel, in 1992 the members of the European Communities (the EEC, ECSC and EURATOM) concluded the Treaty of Maastricht or Treaty of the European Union ["**TEU**"], thereby merging the three communities in one.

E. 2004: Cyprus accedes the European Union

556. On 1 May 2004 the largest single enlargement of the European Union took place, when the so-called A10 countries, which included Cyprus and several former Eastern Bloc countries joined the Union[605].

557. To pave the way for accession, the European Union had entered into so-called **Association Agreements** with each of the A10 countries. Many of the Association Agreements included a provision inviting the candidate States to sign BITs with the Member States[606]. BITs were encouraged by the European Union as instruments necessary to prepare for accession to the Union[607]. Although the Cyprus Association Agreement lacked such an explicit provision[608] (no doubt because it had been signed 30 years earlier, in 1972), Cyprus negotiated and signed BITs with EU Member States[609].

558. The consequence of these policies was that on 1 May 2014, the date of accession to the EU, the candidate States and the existing Member States were bound by a significant number of BITs.

No express termination of intra-EU BITs

559. There is evidence that during the accession negotiations with the A10 States, the question of the existing BITs was discussed. The European Commission has confirmed that during such negotiation the "concerns of the Commission services on BITs in general was raised"; this happened "at a specific TAIEX seminar on the subject with all candidate countries" on 17 January 2000, and that the question was again raised "subsequently in the external relations chapter of the negotiation process"[610].

560. Although the EC raised "concerns", and although all candidate countries had entered into BITs with existing Union countries, the evidence before the Tribunal establishes that no reference to such BITs was included in the Accession Treaties: all Accession Treaties are silent about the fate of the intra-EU BITs (the term used to describe existing BITs).

561. As Advocate General Wathelet has remarked, it is noteworthy that, although the issue was discussed during the negotiations between the European Commission and the candidate countries, none of the A10 Accession Treaties includes a specific

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[605] R I, para. 312, RL-63 and RL-64.
[606] See e.g. Association Agreement of Czech Republic or Romania, Art. 74.
[607] Opinion of Advocate General Wathelet of 19 September 2017, Slovak Republic v. Achmea B.V., Case C-284/16, ECLI:EU:C:2017:699 ["***Achmea Opinion AG***"], paras. 40-41.
[608] Agreement establishing an Association between the European Economic Community and the Republic of Cyprus of 19 December 1972 (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:21972A1219(01)&rid=5).
[609] With Belgium and Luxemburg (1998) and Greece (1992). Cyprus also entered into BITs with several of the A10 acceding States: Czech Republic (2001), Hungary (1989), Malta (2002) and Poland (1992); and with Romania (1991) and Bulgaria (1987), which would join the European Union in 2007.
[610] Letter dated 13 January 2006 from the EC Internal Market and Services to the Czech Deputy Minister of Finance; quoted in *Eastern Sugar*, para. 119.

provision declaring, or otherwise calling for, the termination of intra-EU BITs (or a declaration of their incompatibility with EU law)[611].

F. 2005-2009: Laiki's investment in Greece

562. Laiki was founded in Cyprus in 1901. By 2005 Laiki was operating in Greece through a subsidiary, Laiki Bank (Hellas) S.A., which had 55 branches in Greece, and accounted for 16% of the profits of the Group. On 30 June 2007 Laiki Bank (Hellas) S.A. merged with [redacted]. The resulting company was a new Greek bank, called [redacted] After the merger, Laiki held a 95% stake in [redacted]

563. In the following years, Laiki decided to substantially expand its Greek banking operation, through [redacted] and through its wholly-owned Greek banking subsidiary, [redacted]

564. During this period, Laiki also acquired a substantial portfolio of GGBs.

G. 2006-2007: the Commission's position in *Eastern Sugar*

565. The issue of compatibility between intra-EU BITs and EU law apparently arose for the first time in the 2007 partial award rendered in *Eastern Sugar v. Czech Republic*. This seems to be the first time when this issue is mentioned in a published investment arbitration award.

566. *Eastern Sugar* was an UNCITRAL arbitration seated in Paris, under the Czech and Slovak-Netherlands BIT of 1991. The Dutch investor, Eastern Sugar B.V, contested certain regulatory measures adopted by the Czech Republic between 2000 and 2003, that had negatively affected its investment in the sugar beet industry in the Czech Republic.

567. The Czech Republic raised the objection that upon the Republic's accession to the EU in May 2004, the EU Treaties had superseded the intra-EU BIT, since both agreements regulated the same subject-matter[614].

The Commission's position

568. During the arbitration, the Czech Republic consulted the European Commission and obtained the European Commission's opinion (in form of a letter dated 13 January 2006), which is reproduced in the partial award[615]:

a) EC law prevails in a Community context as of accession

[611] *Achmea Opinion AG*, para 41.
[redacted]

[614] *Eastern Sugar*, para. 94 and 117. The Czech Republic's argument was that the BIT was implicitly terminated (pursuant to Art. 59 VCLT) when the Czech Republic acceded to the EU Treaties, which related to the same subject-matter as the BIT.
[615] *Eastern Sugar*, pp. 24-26. Emphasis added.

Given that the rights and obligations of membership come into force on accession rather than on signature or ratification, the applicable date can be considered as 1 May 2004.

Based on ECJ jurisprudence Article 307 EC is not applicable once all parties of an agreement have become Member States. Consequently, such agreements cannot prevail over Community law.

For facts occurring after accession, the BIT is not applicable to matters falling under Community competence. Only certain residual matters, such as diplomatic representation, expropriation and eventually investment promotion, would appear to remain in question.

Therefore, where the EC Treaty or secondary legislation are in conflict with some of these BITs' provisions - or should the EU adopt such rules in the future - Community law will automatically prevail over the non-conforming BIT provisions.

As you mention correctly, the application of intra-EU BITs could lead to a more favourable treatment of investors and investments between the parties covered by the BITs and consequently discriminate against other Member States, a situation which would not be in accordance with the relevant Treaty provisions. The Commission therefore takes the view that intra-EU BITs should be terminated in so far as the matters under the agreements fall under Community competence.

b) Effect on existing BITs

However, the effective prevalence of the EU acquis does not entail, at the same time, the automatic termination of the concerned BITs or, necessarily, the non-application of all their provisions.

Without prejudice to the primacy of Community law, to terminate these agreements, Member States would have to strictly follow the relevant procedure provided for this in regard in the agreements themselves. Such termination cannot have a retroactive effect.

c) Dispute settlement procedures

As mentioned above, Community law, including the jurisdiction of the Court of Justice, in principle prevails from the date of accession. However, the transitional situation until the BITs are formally terminated may result in complex questions of interpretation with regard to jurisdiction in particularly with regard to pending arbitration procedures but also in relation to rules such as Article 13 in the BIT between the Czech Republic and the Netherlands, which provides for an extended application of the agreement in a certain period after termination.

In so far as conflicts between Member States are concerned, it follows from Article 292 EC that the Member States cannot apply the settlement procedures provided for in the BITs in so far as the dispute concerns a matter falling under Community competence.

On the other hand, if the dispute concerns an investor-to-state claim under a BIT, the legal situation is more complex. Since Community law prevails from

> the time of accession, the dispute should be decided on basis of Community law (which indirectly also follows from Article 8(6) first bullet point in the agreement between the Czech Republic and the Netherlands). However, it may be argued that the private investor could continue to rely on the settlement procedures provided for in the agreement until formal termination of the BIT if the dispute concerns facts which occurred before accession. The primacy of Community law should in such instance be considered by the arbitration instance.
>
> The primacy of EU law and its definite interpretation by the European Court of Justice would not necessarily preclude a legal instance (arbitration) in another jurisdiction arriving at a different conclusion, even in an international agreement between two Member States.
>
> In particular, in order to avoid any legal problem with regard to an arbitration procedure, existing BITs between member States should, as mentioned above, therefore be terminated. The formal termination can only be done according to the provisions of the agreement in question. I would note that this principle would not only apply to the Czech BIT with the Netherlands, which would seem to have given rise to a significant amount of litigation, but also those of the Czech Republic with 21 other Member States. Without prejudice to the primacy of Community law, termination of the BIT would take effect according to the respective provisions of each such BIT". [Emphasis added]

569. The view of the Commission was that EU law prevails over international agreements between Member States, including intra-EU BITs. The Commission also noted that accession to the EU does not entail the automatic termination of BITs, and that Member States should terminate these agreements, as far as those BITs interfere with EU competences, by "strictly" following the relevant procedure. The Commission has recognised that "[s]uch termination cannot have retroactive effect"[616]. Regarding pending investor-State arbitration, the Commission acknowledged that investors could still rely on investment arbitration and that arbitration tribunals should apply EU law.

570. In another Note dated November 2006 (from the Internal Market Services DG to the Economic and Financial Committee) the Commission recommended that Member States should "exchange notes to the effect that such [intra-EU] BITs are no longer applicable, and also formally rescind such agreements"[617].

The positions of Greece and Cyprus

571. Greece and Cyprus did not follow the Commission's advice. They did not exchange notes to the effect that their BIT was no longer applicable. Nor did they give notice of the termination of the agreement, either in accordance with the requirements of the BIT or otherwise.

[616] This position was reiterated by the European Commission and the Netherlands in the *Achmea* arbitration (See *Achmea (Jurisdiction)*, paras. 156, 180 and 187).
[617] *Eastern Sugar*, para. 126.

Decision in *Eastern Sugar*

572. The *Eastern Sugar* tribunal dismissed the jurisdictional objection raised by the Czech Republic. It noted that the BIT had not been expressly terminated by the Accession Treaty of the Czech Republic, nor by the Contracting States pursuant to the termination procedure of the BIT[618]. The tribunal dismissed the Czech Republic's argument that the BIT had been implicitly terminated pursuant to Art. 59 VCLT.

573. In several subsequent cases, arbitral tribunals reached the same conclusion as in *Eastern Sugar*[619].

H. 2009: The Treaty of Lisbon

574. The last substantial reform to the European Union was implemented through the Treaty of Lisbon, with entry into force on 1 December 2009. The Treaty of Lisbon amended the TEU and replaced the EEC Treaty with the Treaty on the Functioning of the European Union ["**TFEU**"].

I. 2018: the Achmea Judgment

a. Background

575. Achmea B.V., a Dutch insurance company, established a subsidiary in Slovakia to market private health insurance products, following the liberalization of the insurance market in Slovakia in 2004[620] (around the time Slovakia became a Member State of the EU, on 1 May 2004). In 2006 Slovakia reversed the liberalization process of the insurance sector, allegedly affecting Achmea's investment[621].

576. Achmea initiated an arbitration against the Slovak Republic pursuant to the Czechoslovakia-Netherlands BIT (in force as of March 1992[622]) and the UNCITRAL Rules. The parties agreed on Frankfurt as the seat of the arbitration.

577. On 28 October 2010 the tribunal in the *Achmea* arbitration issued a partial award on jurisdiction, dismissing Slovakia's jurisdictional objections that:

- Pursuant to Arts. 59 and 30 VCLT the Czechoslovakia-Netherlands BIT had been terminated or was inapplicable because of Slovakia's accession to the EU[623]; and
- the Czechoslovakia-Netherlands BIT was incompatible with the EU Treaties, the autonomy of the EU legal order and the supremacy of EU Law[624].

[618] *Eastern Sugar*, paras. 143-146 and 153
[619] See e.g. *Achmea*, *Euram*, *Electrabel*, *Oostergetel* and *Anglia*.
[620] *Achmea (Jurisdiction)*, paras. 7 and 51-53.
[621] *Achmea (Jurisdiction)*, para. 54
[622] *Achmea (Jurisdiction)*, para. 46.
[623] *Achmea (Jurisdiction)*, paras. 265 and 277.
[624] *Achmea (Jurisdiction)*, paras. 278-283.

578. On 7 December 2012 the arbitral tribunal issued its final award, concluding that Slovakia's conduct amounted to a breach of the FET standard and the free transfer of payments provision of the Czechoslovakia-Netherlands BIT[625], and awarded damages in the amount of EUR 22 M[626].

b. Setting aside proceedings before the German Courts

579. Slovakia sought to set aside the *Achmea* award before the *Oberlandesgericht Frankfurt am Main*. When that court dismissed the action, the Slovak Republic appealed on a point of law against the dismissal to the *Bundesgerichtshof* ["**BGH**"][627].

580. The Slovak Republic expressed doubts as to the compatibility of the arbitration clause in Art. 8 of the Czechoslovak-Netherlands BIT with Art. 18, 267 and 344 TFEU[628]. Although in the BGH's opinion such incompatibility does not exist, and it provided extensive reasoning to support its position[629], the BGH decided to stay the set aside proceedings and to refer the following questions to the CJEU for a preliminary ruling:

> "1. Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date?
>
> If Question 1 is to be answered in the negative:
>
> 2. Does Article 267 TFEU preclude the application of such a provision?
>
> If Questions 1 and 2 are answered in the negative:
>
> 3. Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?".

c. The procedure before the CJEU

581. In the course of the preliminary ruling procedure, the CJEU heard submissions from Achmea BV, from the Slovak Republic, from the Advocate General, from the European Commission and from 15 EU Member States[630]. The Hellenic Republic and the Republic of Cyprus adopted the position that intra-EU BITs are

[625] *Achmea (Award)*, paras. 278-286.
[626] *Achmea (Award)*, para. 333.
[627] *Achmea Judgment*, para. 13
[628] *Achmea Judgment*, para 14.
[629] GA-40, BGH Request for Preliminary Ruling, para. 36; *Achmea Judgment*, paras. 15-23.
[630] Germany, Czech Republic, Estonia, Greece, Spain, France, Italy, Cyprus, Latvia, Hungary, Netherlands, Austria, Poland, Romania and Finland.

incompatible with Arts. 267[631] and 344 TFEU[632]; the same position was taken by the European Commission[633].

Opinion by the Advocate General

582. The Advocate General, Melchior Wathelet, issued his opinion to the CJEU on 19 September 2017.

583. The Advocate General started by addressing Question 3. His proposal was that the CJEU answer that an arbitration clause as that established by Art. 8 of the BIT, which confers on Dutch investors the right to have recourse to international arbitration against the Slovak Republic does not constitute discrimination on the ground of nationality prohibited by Art. 18 TFEU[634].

584. Wathelet then addressed Question 2. In his opinion an arbitral tribunal constituted in accordance with Art. 8 of the BIT is a court or tribunal within the meaning of Art. 267 TFEU, common to two Member States, namely the Kingdom of Netherlands and the Slovak Republic, and is therefore permitted to request the Court to give a preliminary ruling[635]. Consequently, the Advocate General proposed that the Court's answer to the second question should be that Art. 267 TFEU must be interpreted as not precluding a provision such as Art. 8 of the BIT[636].

585. The Advocate General finally turned to Question 1. The starting point of his analysis is that, if the CJEU follows his proposal that investment arbitral tribunals are to be considered as courts or tribunals of Member States within the meaning of Art. 267 TFEU, and are authorized to request preliminary rulings, that automatically mean that there is no incompatibility with Art. 344 TFEU[637].

586. The Advocate General then explored the possibility that the Court should come to the opposite conclusion: that investment arbitral tribunals do not pass the Art. 267 TFEU test. In such case, his conclusions are the following:

- Investment disputes between investors and Member States do not come under Art. 344 TFEU[638];
- Investment disputes also do not "concern the interpretation or application of the [TEU and TFEU] Treaties", because the jurisdiction of the investment arbitral tribunal is confined to ruling on breaches of the BIT[639];
- The investment arbitration clause in Art. 8 of the BIT does not undermine the allocation of powers fixed by the TEU and TFEU nor the autonomy of the EU legal system[640].

[631] R-358, paras. 25-30; R-359, paras. 31-43.
[632] R-358, para. 15; R-359, paras. 17-30.
[633] *Achmea Opinion AG*, para. 40.
[634] *Achmea Opinion AG*, para. 82
[635] *Achmea Opinion AG*, para. 85.
[636] *Achmea Opinion AG*, para. 131.
[637] *Achmea Opinion AG*, paras. 85 and 133.
[638] *Achmea Opinion AG*, para. 153.
[639] *Achmea Opinion AG*, para. 172.
[640] *Achmea Opinion AG*, para 272.

d. The CJEU's Achmea Judgment

587. On 6 March 2018 the CJEU (Grand Chamber) issued its ruling on the *Achmea* case:

> "Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept". [Emphasis added]

588. The CJEU thus disagreed with the opinion of Advocate General Wathelet, and concluded that investment arbitration provisions in intra-EU investment treaties are precluded by Art. 267 and 344 TFEU, as interpreted by the Court.

589. In reaching this conclusion, the Court took Questions 1 and 2 together.

590. The CJEU first recalled that in accordance with settled case law an international agreement cannot affect the allocation of powers fixed by the Treaties or the autonomy of the EU legal system, observance of which is ensured by the CJEU[641]. The Court also recalled other basic characteristics of EU law: the law stems from an independent source of law, it enjoys primacy over the laws of the Member States and a whole series of its provisions enjoy direct effect on nationals and Member States[642]. It is for the national courts and tribunals and for the CJEU to ensure the full application of EU law in all Member States[643]. The system has as its keystone the preliminary ruling procedure in Art. 267 TFEU, which, by setting up a dialogue between the CJEU and the tribunals of the Member States, secures uniform application of EU law[644].

591. Having recalled these principles, the CJEU addresses the preliminary question whether investment disputes submitted to an investment arbitral tribunal under Art. 8 of the Czechoslovak-Netherlands BIT relate to the interpretation or application of EU law.

592. Although the Court acknowledges that investment arbitral tribunals are called to rule on possible infringements of the BIT, the fact remains that to do so the arbitral tribunal must, in accordance with Art. 8(6) of the BIT, take account of the law in force in the contracting state concerned and other relevant agreements between the Contracting Parties. EU law forms part of the law in force in every Member State and derives from an international agreement between Member States[645]. This implies that investment arbitral tribunals may be called upon to interpret and apply EU law.

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[641] *Achmea Judgment*, para. 32.
[642] *Achmea Judgment*, para. 33.
[643] *Achmea Judgment*, para. 36.
[644] *Achmea Judgment*, para. 37.
[645] *Achmea Judgment*, paras. 40-41.

593. This conclusion leads the CJEU to the second question: whether an investment arbitral tribunal is a court or tribunal of a Member State within the meaning of Art. 267 TFEU and, as such, is authorized to submit requests for preliminary rulings to the CJEU. The Court concludes that an investment arbitral tribunal does not pass the test defined in Art. 267 TFEU[646].

594. This conclusion prompts the third question: the CJEU raises the question whether an award made by such investment arbitral tribunal is subject to review by a court of a Member State, ensuring that the questions of EU law addressed by the arbitral tribunal can be submitted to the CJEU through a reference for a preliminary ruling[647].

595. Although the CJEU acknowledges that in the present case the place of arbitration was Germany, and that German law permitted the Slovak Republic to seek judicial review and to have a request for a preliminary ruling submitted to the CJEU, the CJEU underlines that the scope of such judicial review is limited by national laws. This possible limitation implies, in the opinion of the CJEU, that

> "by concluding the BIT the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law"[648].[Emphasis added]

596. The CJEU adds a further argument. The possibility of submitting investment disputes to a body which does not form part of the EU judicial system is provided for by an agreement which was concluded exclusively by two Member States, without participation of the EU. And the judgment adds the following argument:

> "Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation referred to in paragraph 34 above [which includes a reference to Article 4(3) TEU].
>
> In those circumstances, Article 8 of the BIT has an adverse effect on the autonomy of EU law"[649].

597. Based on this reasoning, the CJEU concludes:

> "Consequently, the answer to Question 1 and 2 is that Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT"[650].

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[646] *Achmea Judgment*, para. 49.
[647] *Achmea Judgment*, para. 50.
[648] *Achmea Judgment*, para. 56.
[649] *Achmea Judgment*, paras. 58-59.
[650] *Achmea Judgment*, para. 60.

598. In view of the answer to Questions 1 and 2, the CJEU found that there was no need to answer Question 3[651].

J. 2018: The position of the Commission *post-Achmea Judgment*

599. In July 2018, after the *Achmea Judgment*, the European Commission issued a communication to the European Parliament and the Council[652]:

> "Following the *Achmea* judgment, the Commission has intensified its dialogue with all Member States, calling on them to take action to terminate the intra-EU BITs, given their incontestable incompatibility with EU law. The Commission will monitor the progress in this respect and, if necessary, may decide to further pursue the infringement procedures
>
> […]
>
> This implies that all investor-State arbitration clauses in intra-EU BITS are inapplicable and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement. As a consequence, national courts are under the obligation to annul any arbitral award rendered on that basis and to refuse to enforce it. Member States that are parties to pending cases, in whatever capacity, must also draw all necessary consequences from the *Achmea* judgment. Moreover, pursuant to the principle of legal certainty, they are bound to formally terminate their intra-EU BITs." [Emphasis added]

600. The present position of the Commission in 2018 is significantly different from that which it held in 2006. It is true that the Commission repeated its call that Member States should "formally terminate" their intra-EU BITs. But beyond that call, in other respects the position adopted by the Commission has taken a Copernican turn: while in 2006 the Commission considered that "[s]uch termination cannot have retroactive effect", so that investors could continue to rely on BITs as instruments to protect their investments, in 2018 it holds that an arbitral tribunal in any pending arbitrations was required, as a matter of law, to decline jurisdiction and that national courts "are under an obligation to annul any arbitral award".

4.2 DISCUSSION

601. The Hellenic Republic argues that the Tribunal lacks competence and the Centre jurisdiction over the present dispute because the arbitration of Claimant's claims pursuant to Art. 9 of the BIT is incompatible with EU law, including Art. 267 and 344 TFEU, as established by the 2018 *Achmea Judgment*. It further argues that this incompatibility became effective as of 1 May 2004, when the Treaty of Accession between Cyprus and the EU Member States entered into force, well before (i) Laiki initiated proceedings in this case, with its Request for Arbitration on 20 June 2014, and (ii) the CJEU gave its judgment in the Achmea case on 6 March 2018.

602. In addressing the consequences of the *Achmea Judgment* on this case, the Tribunal considers that there are a number of considerations that must be taken into account:

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[651] *Achmea Judgment*, para. 61.
[652] http://ec.europa.eu/finance/docs/policy/180719-communication-protection-of-investments_en.pdf

- neither the BIT nor the ICSID Convention have been terminated or invalidated, and consent to investment arbitration was duly perfected on 20 June 2014, when Claimant filed its Request for Arbitration (**A.**),
- under Art. 25(1) of the ICSID Convention consent, once given, cannot be withdrawn (**B.**),
- the future termination of the BIT can only operate *ex nunc* (**C.**),
- no succession of treaties within the meaning of Art. 30(3) VCLT has occurred (**D.**),
- even if such succession had taken place (*quod non*), it could not, as a matter of principle, have retroactive effect (**E.**),
- Laiki had a legitimate expectation to and validly acquired the right to access investment arbitration, while Greece is now estopped from claiming otherwise (**F.**),
- the principle of primacy of European Union Law is of limited relevance in an investment arbitration governed by international law (**G.**),
- a distinction is to be drawn between the jurisdiction of a tribunal, on the one hand, and the enforcement of an award it has rendered, on the other (**H.**).

A. Consent to arbitration was perfected on 20 June 2014

603. This Tribunal is an international arbitration tribunal, constituted under the ICSID Convention and the BIT – two international treaties validly entered into by the Hellenic Republic and the Republic of Cyprus. Neither treaty has been invalidated, terminated or suspended.

604. Under Art. 41(1) of the ICSID Convention:

> "The Tribunal shall be the judge of its own competence".

605. It is thus for this Tribunal to establish the jurisdiction of the Centre and its own competence.

606. The jurisdiction of the Tribunal derives from the consent of the Parties.

607. Art. 25 of the ICSID Convention requires that consent be given in writing[653]:

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State… and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre…". [Emphasis added]

608. The Parties have indeed consented in writing to submit this dispute to the jurisdiction of the Centre and the competence of the Tribunal.

a. Consent by the Hellenic Republic

609. On 26 February 1993 – when the BIT entered into force – the Hellenic Republic consented in writing when it gave its approval to Art. 9 of the Greece-Cyprus BIT:

[653] Emphasis added by the Tribunal

> "1. Any dispute between a Contracting Party and an investor of the other Contracting Party concerning an investment, expropriation or nationalization of an investment, shall, as far as possible, be settled between the disputing parties in amicable way.
>
> 2. If such dispute cannot be settled within six months from the date on which either party requested amicable settlement, the investor concerned may submit the dispute either
>
> • before the competent court of the Contracting Party or
>
> • before the "International Centre for Settlement of Investment Disputes" which was established with the Convention of 18 March 1965 "for the Settlement of Investment Disputes between States and Nationals of Other States".
>
> The Contracting Parties hereby declare that they accept this arbitration procedure.
>
> 3. The arbitration decision shall be binding and not subject to redress/judicial remedies, other than those provided for in the abovementioned Agreement. The decision shall be enforced according to the national law".

610. As a matter of international law, the acceptance of this provision by Greece constitutes an offer which can, in turn, be accepted by any Cypriot investor.

No invalidity, no termination pleaded

611. Greece is not pleading that the BIT is invalid.

612. It is undisputed that Greece and Cyprus validly concluded the BIT in 1992, and that the BIT is not affected by any of the causes for partial or total invalidity established in the VCLT.

613. Greece is also not pleading that the BIT has been terminated.

614. Neither Greece nor Cyprus have taken any step to formally terminate the BIT, or to amend it by withdrawing their offer to ICSID arbitration; to the contrary, in 2013 both Greece and Cyprus consented that the BIT should be tacitly renewed for a further 10-year period. Consequently, the BIT is to be treated as being fully applicable and in force until at least 2023.

615. The tacit renewal of the BIT in 2013 took place in the face of concerns expressed by the European Commission since 2006, recommending that Member States should formally terminate existing intra-EU BITS.

616. Art. 42 VCLT, concerning the "**Validity and continuance in force of treaties**", provides that:

> "1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.
>
> 2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty

> or of the present Convention. The same rule applies to suspension of the operation of a treaty".

617. Termination of a treaty under the VCLT is also subject to a specific procedure, set out in its Art. 65:

> "**Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty**
>
> 1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.
>
> 2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.
>
> 3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.
>
> 4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.
>
> 5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation".

618. As the arbitration tribunal in *Achmea* said[654]:

> "In the view of the Tribunal, it is therefore clear from the text of the VCLT that the invalidity or termination of a treaty must be invoked, according to the Article 65 procedure. The VCLT does not provide for the automatic termination of treaties by operation of law (with the exception of treaties that conflict with rules of jus cogens)".

619. The Tribunal has no doubt that, in accordance with Art. 42 and 65 VCLT, the BIT – and the consent to arbitration embedded in it – was validly entered into in 1993, and that it continued in force in 2013 and beyond, when the treaty was tacitly renewed for a further 10-year period. In particular, as a matter of international law, the BIT was in full force and effect in 2014, on the date when Laiki initiated these proceedings and accepted the offer by Greece to allow the dispute to be resolved under the ICSID Convention.

[654] Achmea (Jurisdiction), para. 235.

ICSID Convention

620. Greece is also not pleading that its consent to the ICSID Convention is invalid, or that it has terminated its participation in such multilateral treaty.

b. Consent by Laiki

621. One year after the tacit renewal of the BIT, on 20 June 2014, Laiki submitted its Request for Arbitration. In so doing it accepted the offer made by the Hellenic Republic.

622. At that date, the ICSID Convention and the BIT were international treaties concluded by Greece, which had not been invalidated or terminated in accordance with the requirements of the VCLT, and which under international law were binding upon Greece.

623. Consequently, on 20 June 2014 the offer made by Greece in Art. 9 of the BIT, permitting Cypriot investors to submit investment disputes to ICSID arbitration, was in force and binding upon the Republic. When Laiki accepted the offer by filing the Request for Arbitration, consent was perfected.

B. Irrevocability of consent under Art. 25(1) ICSID Convention

624. Once consent was perfected on 20 June 2014, it became irrevocable. That is the logical consequence of Art. 25(1) *in fine* of the Convention:

> "When the parties have given their consent no party may withdraw its consent unilaterally"

625. By submitting this jurisdictional objection, Greece is acting in direct violation of Art. 25(1) of the Convention. In 2014 the BIT and the ICSID Convention were in force and binding on Greece. The contention by the Hellenic Republic that Art. 9 of the BIT is incompatible with Art. 267 and 344 TFEU, and that this incompatibility has retroactive effects as of 1 May 2004, was raised for the first time in 2018, upon the issuance of the *Achmea Judgment* by CJEU. The contention purports to withdraw – with retroactive effect – the consent to arbitration which had been perfected on 20 June 2014.

626. Art. 25(1) was inserted in the Convention precisely to disallow unilateral withdrawals of consent, made *ex post* by States, to escape from the agreed dispute settlement procedure. Its purpose is precisely to thwart jurisdictional objections as this one.

C. Future termination will operate *ex nunc*

627. One of the consequences of the CJEU's *Achmea Judgment* is that Greece and Cyprus appear to be bound to terminate the BIT. That is at least the position adopted by the European Commission, in a communication to Parliament and Council, in

which it called on all Member States "to take action to terminate the intra-EU BITs, given their incontestable incompatibility with EU law"[655]

628. Art. 70 VCLT provides for the consequences of the termination of a treaty:

> "1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
>
> (a) Releases the parties from any obligation further to perform the treaty;
>
> (b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination". [Emphasis added]

629. Termination operates *ex nunc*: its effects apply from the moment the treaty is terminated, but not retroactively.

630. If and when Greece and Cyprus decide to terminate the BIT, in accordance with international law such termination will operate *ex nunc* and will

> "not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination".

631. Since in the present case consent to investment arbitration was locked in 2014 "through the execution of the treaty", any eventual future termination will not affect Claimant's present "right or legal situation": the right to have the investment dispute adjudicated by an ICSID Tribunal.

632. (As opposed to invalidity, which in accordance with the VCLT produces *ex tunc* effects - while termination applies *ex nunc* when it is declared[656].)

D. No succession of treaties under Art. 30(3) VCLT

633. Respondent argues that Art. 30(3) VCLT is applicable to the relationship between the BIT and EU Treaties. The BIT and the TFEU and TEU (to which Cyprus acceded through the Accession Treaty in 2004) are successive treaties relating to the same subject matter. After the *Achmea Judgment* Greece and Cyprus can comply with Art. 9 of the BIT only by failing to comply with Art. 267 and 344 TFEU. If two treaties collide, they must relate to the same subject matter, and consequently Art. 30(3) VCLT mandates that the earlier treaty become inapplicable[657].

634. The Tribunal disagrees.

635. To reason its decision the Tribunal will briefly summarize the VCLT's rules regarding the conclusion of successive treaties dealing with the same subject matter (**a.**), it will then provide a preliminary reason why Respondent's argument fails (**b.**), followed by an explanation that the BIT and the EU Treaties do not cover the same

[655] http://ec.europa.eu/finance/docs/policy/180719-communication-protection-of-investments_en.pdf
[656] Ascensio: "The Vienna Convention on the Law of Treaties, A Commentary", Art. 70, p. 1589.
[657] R VI, paras. 14-15.

subject matter (**c**.), concluding that Art. 9 of the BIT in any case is not incompatible with Art. 267 and 344 TFEU (**d.**)

a. Conclusion of treaties relating to the same subject-matter

636. Conclusion by the same States of a later treaty relating to the same subject matter can result, depending on the circumstances, in the termination of the earlier treaty (i.) or in its partial inapplicability (ii).

(i) Termination of the earlier treaty

637. If a later treaty covers the same subject matter as an earlier treaty, the earlier treaty must be deemed terminated if the requirements of Art. 59(1) VCLT are met:

> "**Termination or suspension of the operation of a treaty implied by conclusion of a later treaty**
>
> 1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
>
> (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
>
> (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time".

638. The rule set forth in Art. 59(1) VCLT is clear: conclusion of a later treaty relating to the same subject matter only results in the termination of the earlier treaty

- if the later treaty says so,
- if it can be established that the intention of the States was that the later treaty should govern the matter, or
- if the provisions of both treaties are totally incompatible.

639. In the present case, Greece is not pleading application of Art. 59(1) VCLT.

(ii) Partial inapplicability of the earlier treaty

640. This situation is governed by Art. 30(3) VCLT:

> "**Application of successive treaties to the same subject-matter**
>
> […]
>
> (3) When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".

641. Art. 30(3) VCLT governs a situation where the earlier treaty is not terminated in accordance with Art. 59 VCLT, because the intention to terminate the earlier treaty does not appear from the later treaty or is otherwise established. In such case, both

treaties continue to be simultaneously in force, but singular provisions of earlier treaty apply only to the extent that such provisions are compatible with those of the later treaty. If declared incompatible, such provisions of the earlier treaty cease to be applicable.

642. Greece is pleading the relevance of Art. 30(3) VCLT. It submits that the earlier treaty is the BIT and the later treaty the TFEU, and that both treaties continue to be in force, except for Art. 9 of the BIT, which has become inapplicable since there is an incompatibility between Art. 9 of the BIT and Art. 267 and 344 TFEU.

643. Greece is thus pleading a partial implicit derogation - Art. 30(3) only comes into application if the later treaty does not explicitly derogate from the former treaty.

644. Implicit derogations should always be viewed with caution. Such caution should be reinforced when the later treaty is of general nature, while the earlier treaty, which is to be implicitly disapplied, is of more specific scope. The principle that Art. 30 VCLT should be strictly construed was already voiced by the representative of the United Kingdom during the discussions of the VCLT[658]:

> "He suggested that the formulation should only cover cases in which treaties refer to the same specific subject matter. If a general treaty, however 'impinged indirectly on the content of a particular provision of an earlier treaty', Art. 30 should not be applicable. Most legal scholars have followed this point of view".

b. No notification

645. There is a preliminary reason why Greece's argument must fail: Greece never notified Cyprus of its claim that Art. 9 of the BIT had become inapplicable due to Art. 30(3) VCLT. This behaviour is incompatible with Art. 65 VCLT, a provision which requires that States invoking the invalidity or inapplicability of a treaty notify the other contracting State of their position.

c. The BIT and the TFEU do not deal with the same subject matter

646. Greece's argument fails not only due to the absence of notification, but also because the BIT and the TFEU cannot be said to deal with "the same subject matter", in the sense required by Art. 30 VCLT.

Case law

647. Several investment tribunals have examined this question in detail and have come to the same conclusion. The Tribunal in *Euram* concluded[659]:

> "The Tribunal after thorough analysis, has come to the conclusion that the two treaties do not have the same overall subject matter. When asking "with what issues do the rules of the two treaties deal?" it is evident that the treaties do

[658] Odendahl, in Dörr/Schmalenbach (eds.): "Vienna Convention on the Law of Treaties", (2012), p. 510; footnotes omitted.
[659] *Euram*, para. 178; the discussion took place in the context of Art. 59 VCLT, but the same finding was applied to Art. 30(3) in paras. 279-280.

> not deal with the same issues. The ECT [now TFEU] deals with the creation of an internal market, the BIT with the fostering of international flows of investment by protecting the rights of the investors".

648. Applying different criteria for their analyses, the tribunals in *Eastern Sugar*[660], *Achmea*[661] and *Anglia*[662] arrived at the same conclusion. The Tribunal in *Anglia* specifically reviewed the alleged incompatibility of the arbitration clause in an intra-EU BIT and Articles 344 and 267 TFEU (the same provisions invoked in *Achmea*) and reached the following conclusion[663]:

> "Given its earlier finding that the BIT and the TFEU do not have the same subject matter […], the Tribunal does not find that there is an incompatibility between the dispute resolution mechanism under Art 8(1) of the [Czech-Cyprus] BIT".

649. A similar conclusion was reached in *Oostergetel*[664]:

> "As explained above, the Tribunal sees no incompatibility between the BIT and the EC Treaty, which could pose an obstacle for the Tribunal to decide the present dispute. That said, in light of the Tribunal's finding that the EC Treaty and the BIT do not cover the same subject matter, they cannot be considered successive treaties pursuant to Article 30. Therefore, Article 30 of the Vienna Convention bears no relevance to the present case".

650. Recently, in *Vattenfall*, the arbitral tribunal expressly rejected the contention that Arts. 267 and 344 TFEU related to the "same subject-matter" as the dispute resolution mechanism of Art. 26 of the Energy Charter Treaty[665].

Discussion

651. The Tribunal concurs with these precedents.

652. A comparison of the content of the BIT and of the TFEU shows that both treaties do not relate to the same subject matter.

653. Greece and Cyprus concluded the BIT to encourage and protect foreign direct investment by creating "favorable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party"[666]. While the TEU and TFEU have a much broader purpose: these treaties were concluded to create an internal market, and then evolved to foster political integration between members States in the areas of common foreign and security policy and judicial and home affairs.

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[660] *Eastern Sugar*, paras. 159-165
[661] *Achmea (Jurisdiction)*, para. 242.
[662] *Anglia*, paras. 116-118.
[663] *Anglia*, para. 126.
[664] *Oostergetel*, para. 104.
[665] *Vattenfall*, para. 218.
[666] BIT, Preamble.

654. Advocate General Wathelet, in his opinion in *Achmea*, has performed a detailed comparison between a BIT (in that case the Dutch-Slovak BIT) and the EU Treaties. His conclusion is as follows[667]:

> "In my view, intra-EU BITS and more particularly the BIT at issue in the main proceedings, establish rights and obligations which neither reproduce nor contradict the guarantees of the protection of cross-border investments afforded by EU law".

655. In his detailed analysis, the Advocate General explains that the scope of the BIT is wider than that of the EU Treaties[668], that most legal rules of the BIT have no equivalent in EU law[669], and that there is only partial overlap between EU law and the FPS, FET and expropriation standards under the BIT, an overlap which does not render the BIT rules incompatible with EU law[670].

656. The Advocate General's opinion supports the conclusion that the subject matter of the BIT does not coincide with that of the EU Treaties, most rules of the BIT having no equivalent in the EU Treaties – with the result, that the rule enshrined in Art. 30(3) VCLT, which requires that the earlier and later treaties refer to the same "subject-matter", is inapplicable.

Respondent's counter-argument

657. Respondent raises a counter-argument. Greece says that after *Achmea* the contracting parties to the BIT can only comply with the investor-State arbitration clause by failing to comply with Art. 267 and 344 TFEU, adding that if two treaties collide, they must necessarily relate to the same subject-matter. Respondent draws support from a statement made by E.W. Vierdag in the 1988 BYIL[671]:

> "The requirement that the instruments must relate to the same subject-matter seems to raise extremely difficult problems in theory, but may turn out not to be so very difficult in practice. If an attempted simultaneous application of two rules to one set of facts or actions leads to incompatible results it can safely be assumed that the test of sameness is satisfied".

658. Vierdag's statement is made in the context of a discussion whether there is a conflict between Art. 19(2) of the 1966 UN Covenant on Civil and Political Rights (which authorizes everyone to disseminate information of all kinds) and Art. 428 A of the 1971 International Radio Regulations (which submits television broadcasting through satellites to the agreement of neighbouring States) – two treaties which on their face refer to the same subject matter, the dissemination of information. Vierdag's statement has little persuasive force for the problem at hand[672].

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[667] *Achmea Opinion AG*, para. 180.
[668] *Achmea Opinion AG*, paras. 183-198.
[669] *Achmea Opinion AG*, paras. 190-209.
[670] *Achmea Opinion AG*, paras. 210-228.
[671] Vierdag: "The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions", British Yearbook of International Law, Vol 59 (1988).
[672] The argument is taken up by Hindelang. See Hindelang: "Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se

d. Art. 9 of the BIT is not incompatible with Art. 267 and 344 TFEU

659. Even if it is assumed *arguendo* that the BIT and the EU Treaties refer to the same subject matter (*quod non*), the final requirement for the inapplication of Art. 9 of the BIT is also not met: the *Achmea Judgment* does not imply that Art. 9 BIT and Art. 267 and 344 TFEU are incompatible.

660. There is a marked difference between the Czechoslovak-Dutch BIT, which underlies the decision in *Achmea*, and the BIT which is applied in the present case.

661. Art. 8(6) of the Slovak-Dutch BIT provides that the tribunal shall decide (*inter alia*) on the basis "of the law in force of the Contracting Party concerned".

662. Such rule is absent in the BIT between Cyprus and the Hellenic Republic. The Tribunal has already found that it will adjudicate this investment dispute applying as "rules of law" the BIT and subsidiarily general principles of international law.

663. The Tribunal has also established that it will not interpret or apply Greek or EU law, and will not express a view on the legality under such laws of measures adopted by the Hellenic Republic or the EU authorities. The Tribunal is also not entrusted with the task of judging whether Greece has breached its obligations under the TEU or the TFEU. The Tribunal will simply consider and establish municipal law as a matter of fact, following the prevailing interpretation given to municipal law by the courts or authorities of Greece and the EU, including the decisions of the CJEU[673].

The *Achmea Judgment*

664. In the *Achmea Judgment* the CJEU addresses as a preliminary question whether investment disputes submitted to an investment arbitral tribunal under Art. 8 of the Czechoslovak-Netherlands BIT relate to the interpretation or application of EU law. The Court says that the arbitral tribunal must, in accordance with Art. 8(6) of the BIT, take account of the law in force in the contracting state concerned. EU law forms part of the law in force in every Member State and derives from an international agreement between Member States[674]. This implies that an investment arbitral tribunal under the Czechoslovak-Dutch BIT may be called upon to interpret and apply EU law.

665. Since an investment tribunal is not authorized to submit requests for preliminary rulings to the CJEU under Art. 267 TFEU and judicial review of awards may be limited by national law, the CJEU finds that[675]

> "by concluding the BIT the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that

Treaties? The Case of Intra-EU Investment Arbitration", Legal Issus of Economic Integration, Vol. 39 (2012), pp. 193 and 194.

[673] See Section **VI.2** *supra*.

[674] *Achmea Judgment*, paras. 40-41.

[675] *Achmea Judgment*, para. 56.

> ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law".[Emphasis added]

666. The judgment adds the following argument[676]:

> "Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation referred to in paragraph 34 above [which includes a reference to Article 4(3) TEU].
>
> In those circumstances, Article 8 of the BIT has an adverse effect on the autonomy of EU law".

667. Based on this reasoning, the CJEU concludes[677]:

> "Consequently, the answer to Question 1 and 2 is that Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT […]".

No incompatibility in this case

668. The CJEU thus found that there is indeed an incompatibility between Art. 8 of the Czechoslovak-Netherlands BIT and Art. 267 and 344 TFEU, because Art. 8 foresees that the arbitral tribunal will interpret and apply EU law, without being entitled to submit a request for preliminary ruling to the CJEU (and there being no certainty that a court, when reviewing the award, will be entitled to submit such request). There is thus a danger that the interpretation of EU law is not uniform, and that full effectiveness of EU law is jeopardized.

669. This argument cannot be extended to the present case: Art. 9 of the Cyprus-Greece BIT does not foresee the possibility that the Tribunal shall apply EU Law as such. As set out above, the Tribunal will adjudicate this dispute applying the BIT and subsidiarily general principles of international law, considering EU Law as a matter of fact and following the prevailing interpretation given by EU courts (including the decisions of the CJEU). The danger envisaged by the CJEU in the *Achmea Judgment* does not arise in the present case, and consequently the doctrine of incompatibility, which the CJEU established between Art. 8 of the Czechoslovak-Dutch BIT and Art. 267 and 344 TFEU, cannot be extended to Art. 9 of the Cyprus-Greece BIT.

E. Succession would never have retroactive effect

670. In the previous section, the Tribunal has already concluded that in its opinion Art. 30(3) VCLT is not applicable to the present situation. But even if it is assumed *ad arguendum* that the Tribunal's conclusion is wrong, and that the *Achmea Judgment* indeed provoked – as Respondent argues – the inapplicability of Art. 9

[676] *Achmea Judgment*, paras. 58-59.
[677] *Achmea Judgment*, para. 60.

of the BIT, such conclusion would not result in the Centre being deprived of jurisdiction and the Tribunal of competence.

671. If two States bound by a treaty conclude a later treaty, which covers the same subject matter, this may result either in:

- the termination of the earlier treaty under Art. 59 VCLT, or
- in a declaration that certain incompatible rules of the earlier treaty have become inapplicable under Art. 30(3) VCLT.

672. In both cases the effects will operate *ex nunc*, *i.e.* on the date when the declaration of termination or of inapplicability is made, with the consequence that rights or legal positions crystalized before that date remain unaffected.

673. This conclusion is supported by Art. 69 and 70 VCLT, which establish that the abrogation of a treaty only produces retroactive effects when caused by a declaration of invalidity. If the abrogation is caused by termination of the treaty the effects operate *ex nunc*.

674. The same rule must apply in case of inapplicability of certain provisions of an earlier treaty under Art. 30(3) VCLT – if termination of the totality of the treaty operates *ex nunc*, the consequences of partial inapplicability cannot be more severe[678].

675. Respondent says that the declaration which provoked the inapplicability of Art. 9 of the BIT, in accordance with Art. 30(3) VCLT, was the *Achmea Judgment* which the CJEU issued in 2018. Greece argues that as of that date it is prevented from complying with Art. 9 of the BIT without breaching Art. 267 and 344 TFEU.

676. The argument of the Hellenic Republic can only be applied *post Achmea*: An Art. 30(3) VCLT declaration does not produce retroactive effects. Thus, the *Achmea Judgment* is incapable of thwarting Claimant's pre-existing rights or legal positions, with the result that the jurisdiction of the Centre and the competence of the Tribunal remain unaffected.

677. In sum: even if it accepted *arguendo* that, as a consequence of the 2018 *Achmea Judgment* Art. 9 of the BIT became inapplicable under Art. 30(3) VCLT, such inapplicability would, as a matter of the law of treaties, operate *ex nunc*. It could not deprive the Centre and Tribunal of their jurisdiction and competence, which was perfected in 2014, when Claimant and Respondent locked their irrevocable consent.

F. Acquired rights, estoppel and legitimate expectations

678. The Tribunal's conclusions have been reached on the basis of the applicable rules of international law, and specifically of the VCLT, to which the BIT and the TFEU are both subject.

[678] Dörr and Schmalenbach: "Vienna Convention on the Law of Treaties: A Commentary", (2012, Springer), Art. 30 VCLT, p. 518.

679. The Tribunal's conclusions are reinforced by the customary international law doctrines of acquired rights, estoppel and, to the extent that they exist, legitimate expectations.

680. The respect for vested rights forms part of the generally accepted principles of international law[679], as does the rule that a State is estopped from resiling from a representation on which another party has relied[680]. Closely related is the principle of legitimate expectations, arising in the field of investment treaty arbitration, when a State creates reasonable and justifiable expectations, and the investor acts in reliance on such conduct[681].

681. When Laiki made its contested investments in Greece, the publicly available information regarding the validity or applicability of Art. 9 of the BIT was as follows:

- prior to November 2006, the Commission had offered no view on intra-EU BITs;
- in November 2006 the Commission for the first time recommended that Member States "exchange notes to the effect that such [intra-EU] BITs are no longer applicable, and also formally rescind such agreements"[682];
- the Commission indicated that States should terminate the intra-EU BITs by "strictly" following the relevant procedures, in accordance with international law;
- the Commission explicitly recognised that if such termination occurred, it "cannot have retroactive effect"[683], so that in pending investor-State arbitration, investors would be able to rely on investment arbitration procedures;
- Greece did not give effect to the Commission's recommendation (as it was apparently entitled to do) and made no public announcement regarding the validity or applicability of Art. 9 of this BIT (or of any other BIT) – and neither did Cyprus.

682. In these circumstances, when Laiki invested in Greece between 2005 and 2009, it would be aware (or can be assumed to have been aware) of the European Commission's recommendation to Member State that intra-EU BITs should be terminated, and also of the Commission's assurances that the termination would be carried out strictly following the procedure established in the BITs (including the sunset clause in Art. 12.3) and in the VCLT, and that such termination would not have retroactive effects.

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[679] Case concerning certain German interests in Polish Upper Silesia (Germany v. Poland), Judgment, 25 August 1925, 1926 P.C.I.J. (ser. A) No. 7 (May 25).
[680] Kotuby and Sobota: "General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes", OUP (2017), p. 125.
[681] *Thunderbird*, para. 147.vIV
[682] *Eastern Sugar*, para. 126.
[683] This position was reiterated by the European Commission and the Netherlands in the *Achmea* arbitration (See *Achmea Jurisdiction*, paras. 156, 180 and 187).

683. The situation remained unchanged for at least eight years, until 20 June 2014, when Claimant submitted its Request for Arbitration and, as set out above, consent was perfected. On that day Laiki was entitled to proceed on the assumption that:

- Art. 9 of the BIT continued in full force and effect, as neither Greece nor the EC had made any public statement raising any doubt about its validity or effect; and
- that if in the future Greece, heeding the recommendation of the Commission, wished to abrogate Art. 9 of the BIT, it would do so in accordance with the relevant rules of applicable international law (in particular, the Vienna Convention on the Law of Treaties) through a formal declaration of termination, operating *ex nunc*, without affecting Laiki's entitlement to investment arbitration.

684. In sum, on 20 June 2014 Claimant accrued a vested right: once consent had been locked, Laiki was entitled to the settlement of its investment dispute through ICSID arbitration - the method of adjudication offered by Greece and accepted by the investor[684].

Respondent's counter-argument

685. The Hellenic Republic says that a host State may revoke an offer of ICSID arbitration before its acceptance by an investor, and avers that is did so on 1 May 2004, when Cyprus acceded to the EU. Revocation occurred more than a decade before Claimant purported to accept the offer, and consequently Laiki never accrued a right to ICSID arbitration – not even under the 10-year sunset clause of Art. 12.3 BIT, which expired on 1 May 2014, before the Request of Arbitration[685].

686. The Tribunal is not persuaded by such an argument.

687. The difficulty with the argument which Greece now submits is that it was never voiced *in tempore insuspecto* – it was submitted for the first time in this arbitration (and more specifically, only in Greece's last submission).

688. Under the VCLT, the conclusion and entry into force of treaties must follow a defined procedure. The reason for that is obvious: to do otherwise would introduce great instability in international relations, creating doubts about the validity and effect of international treaties. The same principle applies to the abrogation of agreements – be it by invalidity, termination, suspension or by incompatibility. The procedure is set forth in Art. 65 VCLT, and the fundamental requirement is a notification to the other contracting party. Treaties cannot be abrogated implicitly and without the proper notifications.

689. In the present case, Greece is now saying that Art. 9 of the BIT was abrogated (through inapplicability) on 1 May 2004, when Cyprus concluded the Accession Treaty.

[684] *Ruby Roz,* para 156..
[685] R VI, paras. 38-42

690. The problem with this argument is that, even assuming that the abrogation of Art. 9 BIT took place in May 2004, it remained unknown (and unknowable) to all affected parties.

691. The issue of continuation or termination of intra-EU BITs was raised and discussed during the negotiations which led to Cyprus' accession. Notwithstanding the above, it is a fact that the Accession Treaty is silent on this question.

692. It is also a fact that the Hellenic Republic never notified Cyprus of the position it raised for the first time when these proceedings had already been initiated: that on 1 May 2004 Art. 9 of the BIT had become inapplicable. Greece failed to notify Cyprus in 2004 (when the Accession Treaty was concluded), in the period 2005-2009 (when Laiki was investing), nor at any time before 20 June 2014 (when consent was perfected). The argument that Art. 9 had been tacitly abrogated as of 1 May 2004 was in fact raised for the first time in this arbitration, and more specifically in Respondent's submission R VI – filed on 8 June 2018.

693. By 20 June 2014 consent had been locked and Claimant had accrued its entitlement to investment arbitration, in accordance with Art. 25 of the Convention ("when the parties have given their consent, no party may withdraw its consent unilaterally") and Art. 9 (2) of the BIT ("The Contracting Parties hereby declare that they accept this arbitration procedure").

694. By then, neither Greece (nor the European Commission) had ever voiced the argument that Art. 9 of the Treaty had become inapplicable ten years before, on 1 May 2004. When it accepted the offer, Laiki thus had the legitimate expectation that Art 9 of the BIT continued in force. Greece is now estopped from arguing that such provision of an international treaty has been secretly been abrogated.

G. The principle of primacy of European law is not applicable

695. Respondent says that EU law prevails over conflicting provisions of treaties concluded between EU Member States prior to the accession pursuant to the principle of primacy of EU law.

696. In the opinion of the Hellenic Republic, the principle of primacy of EU law over inconsistent treaties concluded between EU Member States, confirmed by settled case-law of the CJEU, operates as an inherent conflict rule, which renders treaty provisions which conflict with EU law inapplicable in intra-EU treaty relations. The *Achmea Judgment* conclusively establishes that there is a conflict between Art. 267 and 344 TFEU and Art. 9 of the BIT and the principle of primacy of EU law dictates that this conflict be resolved in favor of EU law[686].

697. Respondent adds that declarations of incompatibility by the CJEU have legal effects *ex tunc*: the *Achmea Judgment* confirms the existence of incompatibility since 2004, when Cyprus' Accession Treaty came into force. Respondent avers that the *ex tunc* principle also affects rights and obligations of EU nationals deriving from an earlier

[686] R V, paras 36-39.

treaty, and thus, those rights and obligations deriving from Art. 9 of the BIT also became inapplicable as of 1 May 2004[687].

698. The Tribunal disagrees.

699. The Tribunal is required to apply principles of international law to assess its jurisdiction or competence (**a.**). Furthermore, even if *arguendo* it is assumed that the principle of primacy of EU law is relevant, it is far from certain that this would deprive the Tribunal from jurisdiction/competence (**b.**).

a. Jurisdiction must be assessed under international law

700. EU law cannot affect this Tribunal's jurisdiction. Under Art. 41 of the ICSID Convention the Tribunal is the judge of its own competence, and in assessing its jurisdiction the Tribunal should only apply the BIT, the ICSID Convention, and the general principles of international law – to the exclusion of municipal law[688].

701. It is a well-established principle of customary international law, reflected in the VCLT, that State parties to a treaty are under an obligation to perform the treaty in good faith (under Art. 26 VCLT), that this obligation continues to apply as long as the treaty is in force, and that States cannot invoke their domestic legislation to evade international liability or to contest the jurisdiction of a Tribunal to which they have validly submitted under international law. Art. 27 VCLT embodies this principle:

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

(i) The principle of primacy of EU law

702. Respondent seeks support for its position invoking a "conflict rule inherent in the principle of primacy of EU law".

703. The principle of primacy was not included in the Treaty of Rome nor in the TEU, and has not been codified in the latest reform of the TEU and TFEU by the Treaty of Lisbon[689].

Development by the CJEU

704. It is an internal conflict rule of law developed by the CJEU in the seminal case *Costa v. ENEL*[690] to resolve conflicts in the application of EU law and conflicting national legislation of the Member States. The rule operates so that, if there is a conflict between national legislation and the EU law, the latter prevails. The consequences are that:

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[687] R VI, paras. 46 and 49.
[688] See Section **VI.1** *supra*.
[689] The project for the European Constitution did include the principle of primacy in its provisions (Art. I-6), but it was rejected in referendum by France and The Netherlands. The principle of primacy was then relegated to a Declaration in the Treaty of Lisbon.
[690] Judgment of 15 July 1964, *Flaminio Costa v ENEL*, Case 6/64, ECLI:EU:C:1964:66.

- the national legislation in conflict with EU law is rendered inapplicable[691];
- the national courts of the Member State are under a legal duty to disapply conflicting provisions of national law[692];
- the legislator of the Member State is under an obligation to amend the conflicting national norm so that it complies with EU law[693].

705. The principle was also used in conflicts between EU law and international agreements which bind Member States (the seminal case being *Commission v. Italy*[694]). Similarly, the rule in these cases is that, where an international agreement between Member States is contrary to the EU law, the Member States have a duty not to apply such international agreement[695].

706. This does not mean that, under international law, such treaty is invalidated, terminated or suspended. The CJEU does not have the power to do so. In *Bogiatzi*, for instance, the Court acknowledged that it does not have the power to interpret these international agreements[696] (even less so to invalidate or derogate them) [697]:

> "In the main proceedings, it is common ground that the Community is not a contracting party to the Warsaw Convention. Accordingly, the Court does not, in principle, have jurisdiction to interpret the provisions of that convention in preliminary ruling proceedings".

707. Member States have an EU law obligation, pursuant to the principle of sincere cooperation of Art. 4(3) TEU, to "take all appropriate measures" to resolve the conflict of provisions, which could include the termination of the international agreement.

Extra-EU international agreements

708. Similarly, an international agreement between a Member State and a third State, that is incompatible with EU law, is not automatically derogated or invalidated. Art. 351 TFEU provides that

> "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession,

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[691] Judgment of 22 October 1998, *Ministero delle Finanze v IN.CO.GE.'90 Srl, et al*, Joined Cases C-10/97 to C-22/97, ECLI:EU:C:1998:498.
[692] Judgment of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA.*, Case 106/77, ECLI:EU:C:1978:49, para. 24.
[693] Judgment of 4 April 1974, *Commission of the European Communities v French Republic*, Case 167-73, ECLI:EU:C:1974:35, paras. 41-48; Judgment of 25 October 1979, *Commission of the European Communities v Italian Republic*, Case 159/78, ECLI:EU:C:1979:243, para. 22.
[694] Judgment of 27 February 1962, *Commission of the European Economic Community v Italian Republic*, Case 10/61, ECLI:EU:C:1962:2.
[695] Judgment of 27 February 1962, *Commission of the European Economic Community v Italian Republic*, Case 10/61, ECLI:EU:C:1962:2, p. 10; Judgment of 27 September 1988, *Annunziata Matteucci v Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium*, Case 235/87, ECLI:EU:C:1988:460, para. 22.
[696]Judgment of 22 October 2009, *Bogiatzi v. Deutscher Luftpool*, Case C-301/08, ECLI:EU:C:2009:649, para. 24.
[697]See also Judgment of 27 November 1973, *Magdalena Vandeweghe and others v Berufsgenossenschaft für die chemische Industrie*, Case 130/73, ECLI:EU:C:1973:131, para. 2.

between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties

To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude …". [Emphasis added]

709. The Member State can still apply these extra-EU agreements; they are, however, under an EU obligation to "take all appropriate steps" to eliminate the incompatibility, i.e., by amending or terminating its extra-EU agreement.

710. Such was the case with the extra-EU BITs of Austria[698], Sweden[699] and Finland[700], which the CJEU deemed incompatible with EU law[701]. This declaration had no effect under international law; the extra-EU BITs were still valid and in force. The only consequence was that, by failing to renegotiate the BITs eliminating the incompatible provisions, the Member States involved had breached their EU law obligations.

(ii) Application to the present case

711. In the Tribunal's opinion, the principle of primacy of EU law has internal effects only and Greece cannot invoke it to impugn the jurisdiction of the Centre and competence of this Tribunal.

712. The CJEU's declaration of incompatibility with EU law of an international treaty (whether intra-EU or extra-EU) entered into by an EU Member State, does not imply that such treaty is *ipso iure* derogated or invalidated. Such power is reserved to the contracting parties to the intra-EU (the Member States) or extra-EU international agreement (Member State and third State). The effect of the CJEU's declaration is different: it obliges the Member State to amend or terminate the conflicting treaty.

713. But, until this happens, the principle of primacy of EU law cannot deprive this Tribunal of competence, afforded to it by the BIT and the ICSID Convention,

[698] Judgment of 3 March 2009, *Commission v Austria*, Case C-205/06, EU:C:2009:118. It concerned different BITs entered into by Austria with Republic of Korea, the Republic of Cape Verde, the People's Republic of China, Malaysia, the Russian Federation and the Republic of Turkey.

[699] Judgment of 3 March 2009, *Commission v Sweden*, Case C-249/06, EU:C:2009:119. It concerned different BITs entered into by Sweden with the Argentine Republic, the Republic of Bolivia, the Republic of Côte d'Ivoire, the Arab Republic of Egypt, Hong Kong, the Republic of Indonesia, the People's Republic of China, the Republic of Madagascar, Malaysia, the Islamic Republic of Pakistan, the Republic of Peru, the Republic of Senegal, the Democratic Socialist Republic of Sri Lanka, the Republic of Tunisia, the Socialist Republic of Vietnam, the Republic of Yemen and the former Socialist Federal Republic of Yugoslavia.

[700] Judgment of 19 November 2009, *Commission v Finland*, Case C-118/07, EU:C:2009:715. It concerned different BITs entered into by Austria with the Russian Federation, the Republic of Belarus, the People's Republic of China, Malaysia, the Democratic Socialist Republic of Sri Lanka and the Republic of Uzbekistan.

[701] The CJEU concluded that the free movement of capitals provisions of the Extra-EU BITs were incompatible with EU law, in particular, Articles 64(2), 66 and 75 TFEU.

applied in accordance with the Vienna Convention on the Law of Treaties and the rules of international law. Greece offered to consent to arbitration in an international treaty, the investor accepted the offer, and Greece cannot invoke such principle to impugn the jurisdiction of the Centre and the competence of this Tribunal, and to deprive the investor from its acquired right to have the investment dispute adjudicated by an ICSID tribunal.

714. Under the principles of international law, the only guidelines to which this Tribunal may look to assess its jurisdiction and competence are the ICSID Convention, the BIT and general principles of international law. Neither Greece nor the EU can invoke their own legislation, seeking to deprive protected investors of their international law protection under the ICSID Convention and the BIT. For the purpose of determining consent to arbitration under international law, the *Achmea Judgment* is to be treated as an internal law decision[702], which purports to abrogate Art. 9 of the BIT, an international treaty, and Art. 25(1) of the ICSID Convention, to frustrate Laiki's entitlement to investment arbitration.

715. Claimant and Respondent consented to investment arbitration on 20 June 2014, and since then the Parties' consent is irrevocable under international law. The 2018 *Achmea Judgment*, establishing the incompatibility of the BIT arbitration clause and two articles of the TFEU, may require Member States to terminate the offending provision of the BIT – but the decision is incapable of invalidating a treaty concluded between two sovereign States or of affecting Claimant's pre-existing international law rights.

716. (Only the EU Treaties (TEU and TFEU) – as public international law instruments that contain Greece's consent under international law – could hypothetically have an impact on the validity or applicability of Greece's consent to ICSID arbitration under the BIT. But this could only happen by applying the international law rules on termination and succession of treaties (Art. 59 or 30(3) VCLT) – a possibility which the Tribunal has analyzed and dismissed in Section **D**. *supra*).

b. Uncertain consequences of primacy of EU law

717. Even if it is accepted *arguendo* that the Achmea Judgment and the principle of primacy could have some relevance for adjudicating this jurisdictional objection, it is far from certain that it would result in the Tribunal's lack of jurisdiction and competence, as argued by Greece.

718. *Achmea* does not address at all the question of whether it affects (or not) the jurisdiction of already existing investment arbitration tribunals.

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[702] See *contra Vattenfall*, para. 148: "Since the [CJEU] is empowered by the EU Treaties to give preliminary rulings on the interpretation of EU law, including the EU Treaties […] the Tribunal considers the [CJEU] Judgement's interpretation of the EU Treaties likewise to constitute a part of the relevant international law". The Tribunal only partially agrees with this *obiter* in *Vattenfall*. The *Achmea Judgment* – as EU law – can simultaneously have international and municipal nature (see *Electrabel*, para. 4.118; *Achmea Judgment*, para. 41). In the present discussion, however, the *Achmea Judgment* must be regarded as municipal law of the EU autonomous legal order, with the consequence – pursuant to the international law of treaties – that it cannot retroactively nullify Greece's consent to arbitration under international law.

719. Respondent submits that preliminary rulings operate *ex tunc* and are capable of affecting pre-existing rights of EU individuals.

720. The Tribunal remains unconvinced.

721. It is true that, as a matter of EU law, the general rule seems to be that preliminary rulings have *ex tunc* effect, since such decisions establish how EU law "must be or ought to have been understood and applied from the time of its coming into force"[703]. Respondent has quoted several cases, where the CJEU has accepted the *ex tunc* effects of preliminary rulings. But in all cases the retroactive effect of the ruling has resulted in increased benefits or rights to individuals[704].

722. These cases can be distinguished from the present dispute.

723. In this arbitration, Respondent is arguing in favor of a retroactive application of the *Achmea* doctrine, not for increasing rights, but for depriving citizens of an acquired right: the entitlement of Laiki to have its investment dispute with the Hellenic Republic adjudicated via ICSID investment arbitration, as consented by the Republic and accepted by Laiki.

724. There are indeed precedents where the CJEU refused to give retroactive effects to its preliminary rulings on considerations of *res iudicata*, legal certainty, good faith, behaviour of EC institutions or legitimate expectations[705].

725. Summing up, even if the Tribunal were to apply EU law in order to establish its jurisdiction and competence (*quod non*), the result would be far from certain (and might require further clarification from the CJEU). There do not seem to be any precedents where a preliminary ruling is applied retroactively, to deprive a European citizen of an acquired right.

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[703] Judgment of 27 March 1980, *Amministrazione delle Finanze dello Stato v Denkavit Italiana S.R.L.*, Case 61/79, ECLI:EU:C:1980:100, para. 16.

[704] See Judgment of 27 March 1980, *Amministrazione delle Finanze dello Stato v Denkavit Italiana S.R.L.*, Case 61/79, ECLI:EU:C:1980:100; Judgment of 13 February 1985, *Françoise Gravier v City of Liège*, Case C-293/83, ECLI:EU:C:1985:69; Judgment of 2 February 1988, *Bruno Barra v Belgian State and City of Liège*, Case C-309/85, ECLI:EU:C:1988:42; Judgment of 12 June 1980, *Express Dairy Foods Limited v Intervention Board for Agricultural Produce*, Case 130/79, ECLI:EU:C:1980:155.

[705] Judgment of 8 April 1976, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, Case 43/75, ECLI:EU:C:1976:56, paras. 74 and 75; Judgment of 2 February 1988, *Vincent Blaizot v University of Liège and others*, Case C-24/86, ECLI:EU:C:1988:43, paras. 28-34; Judgment of 16 July 1992, *Administration des Douanes et Droits Indirects v Léopold Legros and others*, Case C-163/90, ECLI:EU:C:1992:326, paras. 34 and 35; Judgment of 15 December 1995, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, Case C-415/93, ECLI:EU:C:1995:463, paras. 144 and 145; Judgment of 10 January 2006, *Skov Æg v Bilka Lavprisvarehus A/S and Bilka Lavprisvarehus A/S v Jette Mikkelsen and Michael Due Nielsen*, Case C-402/03, ECLI:EU:C:2006:6, para. 51; Judgment of 3 June 2010, *Regionalna Mitnicheska Direktsia - Plovdiv v Petar Dimitrov Kalinchev*, Case C-2/09, ECLI:EU:C:2010:312, paras. 50 and 51; Judgment of 27 April 2006, *Sarah Margaret Richards v Secretary of State for Work and Pensions*, Case C-423/04, ECLI:EU:C:2006:256, paras. 40-42.

H. Enforceability of the Award

726. Respondent makes a final argument.

727. The Republic says that if the Tribunal assumed jurisdiction, any award rendered would be unenforceable. Such award would be contrary to EU public policy and could be complied with, recognized or enforced only in contravention of EU law. In its communication of July 2018, the European Commission also suggests that national courts of EU Member States are obliged to annul awards rendered under Intra-EU BITs and to refuse to enforce them[706].

728. Claimant, on the other hand, says that Greece's refusal to enforce the award would be in breach of its international law obligations. And even if enforcement would be questioned in Greek or European courts, Laiki could still enforce Greek assets in third States[707].

729. Additionally, Claimant says regarding enforcement within the EU, that there have been instances where courts of Member States have refused to follow preliminary rulings, in light of the factual and legal context of the particular cases. Accordingly, enforcement within the EU cannot be absolutely discarded.

The Tribunal's decision

730. The basis of the Tribunal's jurisdiction is the consent of the Parties, as expressed in the relevant instruments (the BIT, ICSID Convention and the Request for Arbitration). If there is consent, as there is in this case, the Tribunal has jurisdiction.

731. If the Tribunal finds it has jurisdiction and competence, it cannot refuse to exercise because of a claim that its award might not be enforceable in certain jurisdictions. A failure to adjudicate the case might be regarded as a denial of justice or as a manifest excess of power under Art. 52(1)(b) ICSID Convention, for failure to exercise jurisdiction[708].

I. Conclusion

732. Summing up, Respondent's EU Law Incompatibility Objection is based on the CJEU's *Achmea Judgment*. This case, however, differs in significant and determinative aspects from *Achmea.*

733. In this ICSID arbitration, and contrary to *Achmea*, the jurisdiction is based on the ICSID Convention, i.e. a multilateral public international treaty for the specific purpose of resolving investment disputes between private parties and a State. This has an important consequence, which was underlined in *UP and C.D Holding Internationale*, an award which was also confronted with an intra-EU ICSID arbitration[709]:

[706] R V paras 44-54.
[707] C V, paras 52-53.
[708] *MHS (Annulment)*, para. 80.
[709] *UP and CD Holding*, para 253.

"Thus, this Tribunal is placed in a public international law context and not in a national or regional context".

734. The *Achmea Judgment* contains no reference to the ICSID Convention, or to ICSID arbitration. EU law (as interpreted by the CJEU in the *Achmea Judgment*) does not have the effect of validly withdrawing Respondent's consent to arbitration with retroactive effect. The prohibition that consent given cannot be unilaterally withdrawn (provided for in Art. 25(1) *in fine* of the ICSID Convention) applies, with the consequences that the Centre has jurisdiction and the Tribunal is competent[710].

735. In light of the reasons set forth in the preceding sections, the Tribunal dismisses Respondent's EU Law Objection.

VII.4. EU LAW CLAIMS AND HUMAN RIGHTS CLAIMS OBJECTION

736. In this Section the Tribunal will address Respondent's objection that the Tribunal does not have jurisdiction to adjudicate some of Laiki's claims requesting declaratory relief that the Hellenic Republic breached its obligations under the TFEU, the European Charter of Fundamental Rights ["**ECFR**"] and the European Convention on Human Rights ["**ECHR**"].

737. The Tribunal will summarize the Parties' positions (**1.** and **2.**) and then will adopt a decision (**3.**).

1. RESPONDENT'S POSITION

738. Respondent argues that Laiki is asserting certain violations of the TFEU, ECFR and the First Protocol of the ECHR, and characterizes these violations as breaches of the Republic's own municipal law; and requests compensation for such breaches[711]. Respondent refers specifically to the following claims asserted by Laiki[712]:

- (i) Violation of Art. 63 TFEU (free movement of capitals), Art. 17(1) EU Charter Fundamental Rights (right to property) and the First Protocol of the ECHR: Laiki says that, by inserting the CACs into the terms of the GGBs, Respondent coerced Laiki into accepting the Debt Exchange; this constituted an unlawful restriction on the free movement of capital, in breach of Art. 63 TFEU; and a breach of Laiki's fundamental right to property established in Art. 17(1) ECFR and the First Protocol of the ECHR, by failing to provide a fair compensation for that measure;
- (ii) Violation of Art. 49 TFEU (freedom of establishment): [redacted]

[710] *UP and CD Holding*, paras. 258, 264.
[711] R I, paras. 412 and 420.
[712] R I, fn. 836.

739. First, Respondent argues that the Hellenic Republic has not consented to arbitrate EU or ECHR claims under Art. 9 of the BIT[713]. Respondent rejects Claimant's unsupported assertion that the Hellenic Republic's obligations under the TFEU, the ECFR and ECHR are enforceable under Art. 2 BIT (FET and FPS provisions), and thus, fall within the scope of disputes that may be submitted by an investor under Art. 9 of the BIT[714]. Respondent says that there is no basis in the BIT for the Tribunal to exert jurisdiction over causes of actions based on obligations arising under other international treaties[715].

740. Second, Claimant ignores that claims arising from breaches of the TFEU and ECFR on one hand, and the ECHR on the other, are subject to specialized dispute resolution provisions with their own adjudicatory bodies[716]:

- The ECHR: Articles 32, 33, 34 and 47 establish the exclusive jurisdiction of the European Court of Human Rights over matters concerning the interpretation and application of the ECHR and its Protocols, through inter-State proceedings, individual applications and advisory opinions[717].
- With respect to the TFEU and the ECFR, EU Law provides for its own mechanisms to ensure compliance by EU Member States of their obligations under the EU treaties, in which the CJEU plays an eminent role[718].

741. Investment tribunals and commentators have unanimously stated that claims asserting a violation of EU Law or international human rights, such as the ECHR, fall outside the scope of the jurisdiction of a tribunal instituted under a BIT and thus, are not directly enforceable in an investment treaty arbitration[719].

2. CLAIMANT'S POSITION

742. Claimant says that Art. 9 of the BIT contains no limitation on the legal basis of the dispute. The only limitation is a factual one: it must concern an investment[720].

743. Laiki says that its EU and ECHR claims are presented as claims arising under Greek municipal law. Claimant says it is entitled to do so, by reference to Art. 9 of the BIT, which also allows Laiki to bring these claims before the Greek courts. In that case, the Greek court would be competent to decide on EU Law and ECHR claims[721].

744. Laiki further submits that in any event, its claims for breaches of EU Law and ECHR are within the scope of the FET and FPS protections of Art. 2 of the BIT[722].

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[713] R I, para. 412; R II, para. 405.
[714] R I, para. 413; R II, para. 408.
[715] R I, para. 413.
[716] R I, para. 421.
[717] R I, para. 422.
[718] R I, para. 423.
[719] R I, paras. 414-419.
[720] C II, paras. 292-293.
[721] C II, paras. 295-296.
[722] C II, paras. 302-303.

745. With respect to the Hellenic Republic's position that EU Law and ECHR have their own dispute resolution mechanisms, Claimant says that such instruments provide the enforcement of rights in civil litigation. They do not preclude parties from agreeing to arbitrate disputes involving issues of EU Law or ECHR. In Claimant's view, it is Greece which voluntarily agreed to establish two alternative dispute resolution mechanisms, and it cannot now allege that Laiki is trying to bypass the procedural requirements under EU Law and the ECHR[723].

3. THE TRIBUNAL'S DECISION

746. Claimant requests a declaratory relief that the Hellenic Republic breached its obligations under Articles 63 and 49 TFEU, 17(1) ECHR and the First Protocol of the ECHR, for the implementation of the Debt Exchange and [redacted] and that the Tribunal orders the Republic to compensate Laiki for these breaches.

747. Respondent says that the Hellenic Republic never consented to arbitrate disputes for alleged violations of its obligations under the TFEU, ECFR and ECHR. If this Tribunal were to decide Laiki's claims for breaches of the TFEU, ECFR and ECHR, it would trespass the exclusive jurisdiction of the domestic courts of the EU, the CJEU and the European Court of Human Rights to adjudicate these claims.

748. Claimant's defence is that Article 9 of the BIT permits investors to submit to arbitration any legal dispute concerning an investment; and that in any case, the FET and the FPS provisions of the BIT are wide enough to encompass claims for breaches of other Treaties.

749. The Tribunal unhesitatingly agrees with the arguments of Respondent.

750. First, the Tribunal only has jurisdiction to resolve claims that arise out of obligations assumed by the Hellenic Republic under the BIT. Laiki's causes of action for its EU Law and human rights claims arise from obligations assumed by the Hellenic Republic that are distinct, arising under the TFEU, ECFR and ECHR.

751. There is a cardinal distinction between causes of action arising under different instruments[724].

752. The Tribunal does not share Claimant's views that the FET and FPS provisions of the BIT are broad enough to entitle an investor to bring a direct claim for alleged breaches of the Republic's obligations under other international treaties. Laiki is requesting a declaratory relief (and compensation) that this Tribunal has not been entrusted to grant. The Hellenic Republic never consented to the judgment by the Tribunal on whether the Republic is in compliance with its obligations under the TFEU, ECFR or the ECHR, or to order compensation for an alleged breach of the Hellenic Republic of its obligations under those treaties.

[723] C II, para. 312.
[724] *Vivendi (Annulment)*, paras. 98-101.

753. Second, the ECHR and TFEU provide procedures and competent courts to adjudicate Laiki's claims for alleged breaches of Articles 63 and 49 TFEU, 17(1) ECHR and the First Protocol of the ECHR:

- Article 32(2) of the ECHR establishes the jurisdiction of the European Court of Human Rights on:

  "all matters concerning the interpretation and application of the Convention and the Protocols thereto as provided in Articles 33 [inter-State proceedings], 34 [individual applications] and 47 [advisory opinions]".

- With respect to breaches of the TFEU and ECFR, EU law permits individual applicants to bring a liability claim before EU courts concerning an EU Member State's failure to fulfil its obligations under the EU Treaties – albeit only if certain conditions are met.

754. In conclusion, the Tribunal does not have jurisdiction to adjudicate Laiki's claims for alleged breaches of Articles 63 and 49 TFEU, Article 17(1) ECFR and the First Protocol of the ECHR.

VII.5. AMICABLE SETTLEMENT REQUIREMENT OBJECTION

755. The Hellenic Republic alleges that the Claimant did not comply with the amicable settlement requirement in Art. 9(1) of the BIT by failing to notify or attempt to settle the dispute concerning the Debt Exchange or [redacted] This condition constituted a jurisdictional requirement which Claimant failed to fulfil. Thus, the Tribunal lacks jurisdiction *ratione voluntatis*.

756. Claimant rejects Respondent's contention. In Claimant's view, the Notice of Dispute notified Respondent of the [redacted] and Debt Exchange Claims. Laiki's third claim, [redacted], was part of ongoing damage caused by matters expressly covered by the Notice of Dispute. In any case, Respondent made no effort to settle the dispute amicably after receiving the Notice of Dispute, thus rendering any further negotiation futile.

757. The Tribunal will summarize the arguments on which the Parties rely (**1.** and **2.**) and will adopt a decision (**3.**).

1. RESPONDENT'S POSITION

758. According to Respondent, Claimant failed to notify (**A.**) or attempt (**B.**) an amicable settlement of the dispute in relation to the Debt Exchange or [redacted] Claims, for a period of six months prior to submitting the dispute to arbitration, as required by Art. 9(1) of the BIT[725].

[725] R I, para. 378; R II, paras. 381 and 386.

A. Failure to notify of the dispute

759. In the Notice of Dispute Claimant only raised the [redacted] Claim, but not the Debt Exchange or [redacted] Claim[726]:

> "…unfair and discriminatory treatment received [redacted]

760. Claimant failed to reference the Exchange Offer or the Debt Exchange in the Notice of Dispute Section IV 'Violations of the Treaty, V 'Relief Requested' and VI 'Request for Amicable Negotiation'; the Debt Exchange was only referenced in Part II of the Notice of Dispute, 'Facts Giving Rise to the Dispute'[727] – this reference, along with an unspecified reference to "[t]he actions described in Part II" when discussing breaches of the treaty, is insufficient to constitute notification of the Debt Exchange dispute[728].

761. In relation to the [redacted] Claim, Claimant's claims are not part of the "ongoing damage caused by matters expressly covered in the Notice of Dispute"; rather, Claimant asserts separate acts said to be in violation of the BIT[729]

762. The Debt Exchange Claim was raised for the first time in the Request for Arbitration and the [redacted] was only raised in Claimant's Memorial[730].

Ancillary claims

763. Furthermore, Respondent asserts that the Debt Exchange and [redacted] Claims cannot be introduced as ancillary claims under Rule 40 of the ICSID Arbitration Rules, as they do not arise from the same subject matter as the [redacted] Claim – the only claim which was identified by Claimant in the Notice of Dispute[731]. It thus, fails the applicable test for asserting ancillary claims, which was described by the ICSID Secretariat in the following way[732]:

> "…whether the factual connection between the original and the ancillary claim is so close as to require the adjudication of the latter in order to achieve the final settlement of the dispute…"

B. Failure to negotiate the dispute

764. Claimant has not attempted to amicably settle any dispute regarding the Debt Exchange or [redacted] Claims prior to filing its Request for Arbitration and Memorial, and has thus, failed to comply with the amicable settlement requirement in Art. 9(1) of the BIT[733].

[redacted]

[727] R II, para. 382.
[728] R II, para. 382.
[729] R II, para. 386.
[730] R I, para. 402.
[731] R I, para. 400.
[732] R I, para. 401; R II, para. 398.
[733] R II, para. 400-401.

765. Respondent further denies that negotiations between the Parties relating to the Debt Exchange and [redacted] Claims would have been futile lacks foundation, as an amicable settlement requirement imposes an obligation of means, not of result[734].

766. Respondent avers that contrary to Claimant's assertion in its Written Observations on Respondent's Request for Bifurcation, the objective requirements for jurisdiction under the BIT cannot be waived by the Parties; and the Tribunal's jurisdiction cannot be created or extended based on the doctrines of acquiescence, waiver or estoppel, which are neither applicable to the present case, nor have the conditions been met[735].

767. In view of the above, the Tribunal therefore lacks jurisdiction *ratione voluntatis* over Claimant's Debt Exchange and [redacted] Claims[736].

2. CLAIMANT'S POSITION

768. Claimant rejects both arguments.

A. Notification of the dispute

769. Claimant avers that Laiki requested an amicable settlement of the legal dispute through the Notice of Dispute of 21 November 2012[737]. When the dispute could not be settled, Laiki filed its request for arbitration on 20 June 2014, which was over six months after providing Respondent with the Notice of Dispute, as required by Art. 9(2) of the BIT. Thus, Claimant complied with the amicable settlement requirement in Art. 9(1) of the BIT[738].

770. Claimant says that the Notice of Dispute clearly raises the [redacted] and Debt Exchange Claims and seeks relief for the dispute[739]. Claimant's investment in the GGBs were linked to and formed part of Claimant's overall investments in Greece[740]. Further, the sale to Piraeus Bank which took place after the Notice of Dispute was filed, was part of ongoing damage caused by matters expressly covered by the Notice of Dispute[741].

Ancillary claims

771. Claimant avers in the alternative, that to the extent that not all claims were raised in the Notice of Dispute, Claimant is not barred from raising them in this arbitration. Art. 46 of the ICSID Convention and Rule 40 of the Arbitration Rules allows parties to raise incidental or additional claims arising out of the same subject-matter, where

[734] R I, para. 408.
[735] R I, para. 405-406, citing Claimant's Written Observations with respect to Respondent's Request for Bifurcation, paras. 122, 103.
[736] R I, para. 411.
[737] C II, para. 274.
[738] C II, para. 274.
[739] C II, para. 276.1, citing Notice of Dispute, paras. 10-13, 35 and 43.
[740] C II, para. 283.
[741] C II, para. 276.2.

the factual connection is so close as to require joint adjudication to achieve the final settlement of the dispute[742].

B. Futility of negotiations

772. Claimant further argues that due to the stance taken by Greece it would have been futile to allow for an additional period of negotiations that were not going to occur[743]. This does not prevent the Tribunal from having jurisdiction, as ICSID tribunals have consistently held that a negotiation period can be waived if further negotiations would have been futile[744].

773. In addition, Greece had ample opportunity to pursue amicable settlement of any of the disputes, since over six months had passed since the Request for Arbitration and Memorial were filed[745].

774. Claimant avers in the alternative that Greece is estopped from contending that the six-month period of negotiation in Art. 9(2) of the BIT is mandatory, by failing to raise this objection in the 15 months prior to its Request for Bifurcation[746].

775. Claimant additionally refutes Respondent's contention that the six-month period in Art. 9(2) of the BIT is a condition precedent to its consent to jurisdiction[747]. Claimant avers that it relates to admissibility, not jurisdiction[748].

3. THE TRIBUNAL'S DECISION

776. In this objection Respondent argues that Claimant did not fulfil its obligation to attempt an amicable settlement of the dispute under the BIT, in relation to the Debt Exchange and [redacted] claims. Claimant holds the opposite position.

777. The relevant provision is Art. 9 of the BIT:

> "1. Any dispute between a Contracting Party and an investor of the other Contracting Party concerning an investment, expropriation or nationalization of an investment, shall, as far as possible, be settled between the disputing parties in an amicable way.
>
> 2. If such dispute cannot be settled within six months from the date on which either party requested amicable settlement, the investor concerned may submit the dispute either
>
> - before the competent court of the Contracting Party; or
>
> - before the 'International Centre for Settlement of Investment Disputes' which was established with the Convention of 18 March 1965 'for the

[742] C II, paras. 276.3 and 281.
[743] C II, para. 276.4.
[744] C II, para. 285-288.
[745] C II, para. 276.5.
[746] C II, para. 276.6.
[747] C II, para. 276.7.
[748] C II, para. 291.

Settlement of Investment Disputes between States and Nationals of Other States'".

778. Art. 9(1) requires the investor to notify the Contracting State of a dispute concerning an investment, in order to attempt its amicable settlement. If the dispute cannot be settled after six months, Art. 9(2) permits the claimant to proceed to adjudication by a competent court or ICSID tribunal.

779. Claimant sent Respondent a Notice of Dispute on 21 November 2012. The Introduction to the Notice of Dispute provides[749]:

> "2. The dispute arises from Greece's unlawful treatment of the very substantial investments made by CPB [Laiki] in the Greek banking sector through [redacted] and the [redacted]
>
> [redacted]
>
> 4. Notwithstanding Greece's breaches of the Treaty, CPB remains hopeful that this matter can be resolved amicably. CPB hereby requests that Greece appoint one or more senior representatives to discuss with CPB whether or not an amicable solution can be reached, as contemplated by Article 9 of the Treaty.
>
> 5. Failing a prompt, amicable resolution of the claims identified in this Notice, CPB reserves the right to proceed to arbitration pursuant to Article 9 of the Treaty and Article 36 of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**")."

780. Respondent does not dispute that the Notice of Dispute constituted an attempt to amicably settle the Claimant's [redacted] Claim. However, Respondent avers that the Notice of Dispute did not constitute a request to amicably settle the Debt Exchange Claim or the [redacted] Claim. Thus, the Tribunal must first determine whether the Notice of Dispute properly informed the Respondent of the existence of a dispute in relation to the Debt Exchange Claim (**3.1.**); and then determine whether Claimant had an obligation to reattempt amicable negotiation before raising the [redacted] (**3.2.**); and whether the [redacted] Claim is admissible as an ancillary claim (**3.3.**).

3.1 THE CLAIMS NOTIFICATION

781. Respondent avers that the Notice of Dispute did not properly notify it of the Debt Exchange dispute.

782. The Tribunal disagrees.

[749] C-19.

783. Respondent agrees that Claimant discusses the Debt Exchange in Part II, 'Facts Giving Rise to the Dispute', and provides a reference to "[t]he actions described in Part II" in Part IV 'Violations of the Treaty'[750]. However, according to Respondent, this is insufficient to constitute a proper notification of the Debt Exchange dispute[751].

784. Claimant disagrees, arguing that the Notice of Dispute clearly raises the Debt Exchange Claim, and seeks relief for the dispute[752].

Notice of Dispute

785. In Part II, 'Facts Giving Rise to the Dispute', Claimant provides the context to the dispute and describes its investments in Greece, including through its ownership of GGBs:

> "6. Through [redacted] and [redacted] CPB is one of the largest foreign investors in the Greek banking sector [...]
>
> 9. […] [redacted] has purchased €2 billion of Greek Government bonds, and CPB has purchased another €1.1 billion of those bonds, thus making the total amount invested equal to €3.1 billion in terms of nominal value as of 31 December 2011. These substantial investments have provided direct capital support to the Government of Greece and the Greek people".

786. Claimant then explains the losses suffered as a result of Respondent's actions in regard to the GGBs:

> "**B. Losses incurred as a result of PSI+ and exposure to the Greek economy**
>
> 10. In February 2012, [redacted] and CPB had no choice but to accept a write-down of 53.5% on the nominal value of their Greek Government bond holdings, which translated into a write-off of 76% of net present value under the conditions of PSI+, after the Greek Government imposed such a write-off by retroactively introducing and enforcing a collective action clause on its Greek law governed sovereign bonds. This failure by Greece to meet its sovereign debt obligations imposed direct losses of 61.5 billion on [redacted] and €0.8 billion on CPB, for a total of €2.3 billion, thereby writing off 70% of the total regulatory capital of CPB (representing 13% of Cyprus's GDP. assuming Cypriot GDP at €17.3 billion), undermining its operations licence and threatening CPB's ultimate survival.
>
> 11. At the same time, as a result of the prevailing economic conditions in Greece and failure by the Bank of Greece to exercise comprehensive supervision over [redacted] (prior to the merger through which [redacted] became a branch of CPB), [redacted] suffered additional significant losses on its Greek loan portfolio which, for 2011 and the first six months of 2012, stand at €1.7 billion. These losses are expected to increase much further following internal and external evaluations currently being undertaken by CPB and on behalf of the

[750] R II, para. 382.
[751] R II, para. 382.
[752] C II, para. 276.1, citing Notice of Dispute, paras. 10-13, 35 and 43.

> Troika. The combined losses to-date sustained by CPB on its PSI+ participation and its Greek loan book amount to approximately €4 billion.
>
> 12. …CPB's situation was exacerbated by Greece's failure to pay the debts it owed to [redacted] and CPB under its sovereign bonds, and the Bank of Greece's failure to supervise [redacted] effectively". [Emphasis added]

787. Claimant sufficiently described its investments in Greece through the ownership of €3.1 billion worth of GGBs. Claimant stated that because of Respondent's actions throughout the Debt Exchange of February 2012 – in particular, the retroactive imposition of the CACs in GLG-GGBs – Claimant had no choice but to accept a significant loss to the value of its GGBs.

788. Further, in Part IV 'Violations of the Treaty', Claimant cross references back to the description of the facts provided in Part II, which described the loss Claimant suffered as a result of the Debt Exchange:

> "35. The actions described in Part II of this Notice are contrary to Greece's obligations under the Treaty, including (without limitation) the guarantees contained in Articles 2, 3 and 4 thereof (emphasis added).
>
> […]
>
> 42. Greece's conduct also gives rise to an indirect expropriation of CPB's investment contrary to customary international law and Article 4 of the Treaty". [Emphasis added]

789. Further, in the Part V 'Relief Requested' Claimant states:

> "43. [redacted] as well as damages for all losses caused to CPB which are not made good by restitution. In the absence of prompt restitution, CPB will be entitled to damages measured in billions of euros, in addition to the very substantial losses already suffered, each of which can be quantified through negotiation or arbitration proceedings, as appropriate." [Emphasis added]

[redacted]

[redacted]

792. The Tribunal is of the opinion that the wording of the Notice of Dispute, coupled with the detailed description of the investments in Greece through the purchase of GGBs, which as a result of Greece's failure "to meet its sovereign debt obligations imposed direct losses of 61.5 billion on [redacted] and €0.8 billion on CPB, for a total of €2.3 billion", was broad enough to sufficiently notify Respondent of a "dispute… concerning an investment, expropriation or nationalization of an investment"; and that Claimant was likely to bring a claim in relation to the Debt Exchange, in the event that an amicable settlement was not reached.

793. Therefore, Respondent was made aware of the facts underpinning both the [redacted] Claim and the Debt Exchange Claim, which formed the basis of the dispute.

794. This is further reinforced in Part VI 'Request for Amicable Negotiation', where Claimant restates the request for good faith settlement negotiations in relation to the facts giving rise to the dispute:

> "44. Greece has been on notice of the facts giving rise to this dispute for many months already. Despite CPB's best efforts, the matter remains unresolved. Nevertheless, and without prejudice to its right to commence ICSID arbitration, CPB invites Greece to seek to resolve this dispute promptly through good faith settlement negotiations. Representatives of CPB stand ready to meet members of the Greek Government in Athens at their earliest convenience." [Emphasis added]

795. The Tribunal thus finds that, in relation to the [redacted] and the Debt Exchange Claims, Claimant fulfilled the requirement in Art. 9 of the BIT to attempt amicable settlement of the dispute.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

799. The Tribunal agrees with Claimant.

800. Claimant extended an offer of negotiation when filing the Notice of Dispute on 21 November 2012. However, Claimant's offer was met with silence. Respondent cannot then say that amicable settlement was not impossible, when the record fails to show that the Respondent was willing to engage in any form of negotiation of the dispute.

801. The six-month time constraint built into the BIT is not merely a waiting period; it serves a specific purpose: it aims to encourage parties to avoid the need for formal dispute resolution, and to settle the dispute in an amicable way. If one party refuses to engage in settlement discussions, the very purpose of the provision is rendered null. In such circumstances, a claimant cannot be held to have breached the provision, when complying would not have achieved the intended purpose.

802. It follows that Respondent cannot use an amicable settlement requirement that they did not respect, to prevent the adjudication of Claimant's claim.

803. In view of the above, Claimant fulfilled its obligation to attempt settlement of the dispute in relation to the request [redacted] and the devaluation of the GGBs. Respondent's failure to engage in settlement dialogue rendered any further settlement attempts futile. Thus, Claimant was not required to attempt negotiation following the sale to [redacted], as to do so would not have prevented the need for external assistance in resolving the dispute.

Supporting case law

804. ICSID case law supports the proposition that a negotiation period in a BIT can be waived if further negotiations would be futile.

805. The annulment committee in *Occidental Petroleum* confirmed that the law is settled: a six-month waiting period can be waived in circumstances where any attempt at reaching a negotiated solution would be futile[756].

806. Further, in *Teinver* the tribunal found that where claimant and respondent had engaged in negotiations for at least six months but were ultimately unable to reach a settlement, "requiring Claimants to engage in any further settlement attempts would serve no further purpose"[757].

807. Separate from the finding of futility, the Tribunal questioned whether it was enough for the purposes of the treaty's six-month amicable negotiation period, that the

[755] C II, para. 276.4.
[756] *Occidental (Annulment)*, para. 132.
[757] *Teinver (Jurisdiction)*, para. 129.

negotiation period was fulfilled in regard to one claim, even if a clear disagreement regarding the additional claim had not yet crystallized[758]:

> "In other words, are these two disagreements sufficiently related that negotiations under the first disagreement are enough to satisfy Article X(2)?"

808. The tribunal answered this question in the affirmative, finding that international jurisprudence suggests that if the subject matter of the initial negotiations is the same as the dispute that is brought before the court or tribunal, this is enough to satisfy the treaty's negotiation requirement in relation to the subsequent claim[759].

809. In addition, in *Ambiente Ufficio* the tribunal analysed a treaty provision requiring, insofar as possible, amicable consultations between the parties. As regards the qualifying phrase "insofar as possible" the tribunal found[760]:

> "[…] that if the Claimants can show that consultations were not possible, they cannot be held to have breached the duty incumbent upon them. This does not mean reading a futility exception into Art. 8(1) of the Argentina-Italy BIT, but it is a direct and independent consequence of the very wording of the provision in question".

810. The tribunal further outlined that[761]:

> "[…] there is considerable authority for the proposition that mandatory waiting periods for consultations (let alone a simple duty to consult, as in the present case) do not pose an obstacle for a claim to proceed to the merits phase if there is no realistic chance for meaningful consultations because they have become futile or deadlocked".

811. The tribunal endorsed the *Abaclat* tribunal's reasoning that consultation refers not only to the technical possibility, but also to the likelihood of a positive result, and that "it would be futile to force the Parties to enter into a consultation exercise which is deemed to fail from the outset. Willingness to settle is the *sine qua non* condition for the success of any amicable settlement talk"[762].

812. Thus, the *Ambiente* tribunal concluded that while a requirement for consultation as far as possible creates a legal obligation, such an obligation is not violated if either[763]:

> "[…] (a) the sufficient minimum amount of consultations was actually conducted, or at least offered, or that (b) amicable consultations in order to resolve the case at stake were not possible in the first place".

*** * ***

813. <u>In conclusion</u>, in the present proceedings Claimant was not required to reattempt amicable settlement of the dispute under Art. 9 of the BIT, following the allegedly

[758] *Teinver (Jurisdiction)*, para. 122.
[759] *Teinver (Jurisdiction)*, para. 123.
[760] *Ambiente Ufficio*, paras. 582-583.
[761] *Ambiente Ufficio*, para. 582.
[762] *Ambiente Ufficio*, para. 582.
[763] *Ambiente Ufficio*, para. 583.

wrongful conduct which gave rise to the [redacted] Claim, as any such negotiation would have been futile.

3.3 ANCILLARY NATURE OF THE [redacted] CLAIM

814. The Parties disagree on whether the [redacted] Claim is ancillary to the properly notified claims and thus, whether there was a need for an additional notice of dispute.

815. Art. 46 of the ICSID Convention provides:

> "Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre".

816. Rule 40 of the Arbitration Rules provides:

> "(1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.
>
> (2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial […]".

817. Claimant raised the [redacted] Claim in its Memorial, within the time limit prescribed by Rule 40(2) of the Arbitration Rules.

818. As regards Rule 40(1), the claim must arise directly out of the subject-matter of the dispute to be considered an incidental or additional claim. In other words, the factual background of the additional claim must be closely linked to the facts underpinning the general dispute.

819. The Tribunal is of the opinion that the facts underpinning the [redacted] Claim are closely related to the facts which gave rise to the [redacted] and Debt Exchange Claims, which were notified in the Notice of Dispute.

820. Precisely, the three claims form part of a single and continuous narrative underpinning the dispute: the [redacted]

821. It would therefore not make sense to adjudicate the claim raised by the [redacted] separately from the [redacted] and Debt Exchange Claims, due to the closely related subject matter of the claims.

Supporting case law

822. The Tribunal's finding is supported by ICSID case law.

823. In *LG&E* the Tribunal examined whether additional claims could be adjudicated in the same proceedings, and found[764]:

> "The acts of the Respondent complained of by the Claimants in the "Additional Request" are sequential to those alleged by the Claimants in their original Request. Already for that reason and for reasons of efficiency, they need not be addressed in a separate proceeding. Moreover, the Respondent had not shown any prejudice in having the disputes adjudicated in one single set of proceedings".

824. Further, in *CMS* the tribunal found that multiple types of sovereign actions are not necessarily separate and distinct just because they emerge at different times, as long as the multiple different actions affect the investor in violation of its rights and cover the same subject matter[765].

825. To sum up, as the [redacted] Claim arises out of the same subject-matter as the [redacted] and Debt Exchange Claims, the [redacted] Claim can be adjudicated by the Tribunal as an ancillary claim under Art. 46 of the ICSID Convention and Rule 40 of the Arbitration Rules. Therefore, an additional notice of dispute was not necessary to provide the Tribunal with jurisdiction to decide the [redacted] Claim.

* * *

826. To conclude, the Tribunal finds that:

- Claimant properly notified Respondent of the [redacted] Claim and Debt Exchange Claim by providing Respondent with the Notice of Dispute, and thus fulfilled the sufficient minimum attempt at amicable settlement mandated by Art. 9(1) of the BIT;
- In relation to the [redacted] Claim, Claimant was not required to reattempt amicable settlement prior to asserting the claim in this arbitration, as the evidence suggests that any further attempt at amicable settlement would have been unavailing, due to the Hellenic Republic's actions when the dispute was first brought to their attention in the Notice of Dispute;
- Further, Claimant's [redacted] Claim satisfies the requirements of an ancillary claim under Art. 46 of the ICSID Convention and Rule 40 of the Arbitration Rules; thus, Claimant is not barred from raising it in this arbitration.

827. The Tribunal rejects Respondent's Amicable Settlement Requirement Objection, and finds that it has jurisdiction over the Debt Exchange Claim and the [redacted] Claim.

VIII. MERITS

828. In this Section the Tribunal will address Claimant's:

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[764] *LG&E (Decision on Jurisdiction)*, para. 81.
[765] *CMS*, para. 109.

- **Debt Exchange Claim**: whether the Hellenic Republic breached the BIT through the implementation of the PSI Debt Exchange; the Tribunal will also address Respondent's jurisdictional and admissibility objections that pertain exclusively to the Debt Exchange Claim (**VIII.1.**).

- [redacted]

- **Composite Breach Claim** (**VIII.4.**): whether the Hellenic Republic's acts and omissions that underlie all of Laiki's Claims amounts to a composite breach of the BIT.

VIII.1. DEBT EXCHANGE CLAIM

829. Claimant says that in enacting the Bondholder Law Greece unilaterally exercised its sovereign powers to pass legislation which retroactively modified the terms of the GL-GGBs, fundamentally changing the bondholders' rights and obligations. It is Laiki's case that this abusive use of legislation was in breach of various provisions of the BIT[766]:

    - Breach of the FET/FPS standard defined in Art. 2, by disregarding Laiki's legitimate expectations, through arbitrariness and discrimination and by failing to maintain a stable and predictable legal and business framework;
    - Breach of Art. 4 of the Treaty through the unlawful expropriation of Laiki's investment;
    - Breach of Art. 3 of the Treaty: the debt exchange amounts to a breach of municipal law performance obligations, enforceable under Art. 3 of the BIT (MFN clause) taken in combination with the umbrella clause contained in Art. 2(4) of the Greece-Slovenia BIT.

830. Respondent raises a jurisdictional objection arguing that the Tribunal has no jurisdiction over the Debt Exchange Claim because Laiki's GGBs do not qualify as a protected investment.

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[766] C III, para. 47. In its Memorial and Reply (C I and C II) Claimant also made the argument that the Hellenic Republic's conduct in relation to the PSI Debt Exchange was also contrary to the freedom of movement of capital movement of Art. 63 TFEU. The Tribunal has already established in Section **VII.4** *supra* that the Tribunal has no jurisdiction over EU Law Claims. In its last submission Claimant submitted that "Although EU law questions have been mentioned in this arbitration, the claim is ultimately for breach of the obligations under the Cyprus-Greece BIT, and the Tribunal is not (if it does not, contrary to Laiki's earlier submissions, consider that it can or should) obliged to interpret or to apply EU law, let alone the provisions concerning the fundamental freedoms, in the sense envisaged by the CJEU in the *Achmea* Judgment or at all, in order to find that there have been infringements of the Cyprus-Greece BIT" (C VI, fn. 2.).

831. Additionally, with respect to the merits of Laiki's claim, Respondent says that:

- Claimant is precluded from bringing its Debt Exchange Claim because it waived the right to challenge the Debt Exchange;
- Claimant has failed to establish a breach of Art. 2, 3 or 4 of the BIT;
- Any alleged wrongfulness would be precluded by the Republic of Cyprus' consent; and
- Any alleged wrongfulness would be precluded by a state of necessity.

832. The Tribunal will first address and dismiss Respondent's jurisdictional objection (**VIII.1.1.**), and then will conclude that Claimant has waived its right to access investment arbitration with regard to the Debt Exchange Claim (**VIII.1.2.**)

VIII.1.1. THE JURISDICTIONAL OBJECTION

833. The Hellenic Republic submits three jurisdictional objections, specifically in regard to the Debt Exchange Claim:

- that sovereign bonds are not investments as per the definition in the BIT,
- that GGBs do not meet the objective and inherent characteristics of investments, and
- that Claimant was not the owner of the GGBs at the relevant time.

834. The Tribunal will first summarize Respondent's and Claimant's positions (**1.** and **2.**) and will then adopt a decision (**3.**).

1. RESPONDENT'S POSITION

835. Respondent submits that the Tribunal lacks jurisdiction *ratione materiae* over the GGBs, and thus, over Laiki's Debt Exchange Claim, because:

- Laiki's GGBs are not a protected investment under the BIT and the ICSID Convention (**1.1.**)
- The GGB purchases were free-standing transactions independent from Laiki's banking operations (**1.2.**)
- Laiki did not own the GGBs at the time of the alleged BIT violation (**1.3.**)

1.1 THE GGBS ARE NOT A PROTECTED INVESTMENT

836. Greece avers that Laiki's GGBs

- Are not investments within the meaning of Art. 1(1) of the BIT (**A.**)
- The GGBs do not have the inherent characteristics of investments under the BIT and the ICSID Convention (**B.**)

A. No investment under Art. 1(1) of the BIT

837. Respondent says that Art. 1(1) of the BIT does not include public debt within the category of protected assets. Greece relies heavily on the *Poštová* award – issued under the Greece-Slovak BIT – which found that GGBs were not a protected

investment, because state bonds were not included in the definition of investment in the applicable treaty. Likewise, the Greece-Cyprus BIT does not list sovereign bonds within the protected assets, and therefore the Tribunal has no jurisdiction over the claim with respect to the GGB's [767].

838. Respondent says that the cases relied upon by Claimant[768] – which consider sovereign bonds to be protected investments – were rendered under the Italy-Argentina BIT, which is distinguishable from the Greece-Cyprus BIT: in the list of protected assets the Italy-Argentina BIT includes a reference to "public titles", whilst the Greece-Cyprus BIT does not. The absence of such a reference in the Greece-Cyprus BIT means that the Contracting Parties did not intend to include sovereign debt as a protected asset[769].

839. Respondent rejects Claimant's attempt to include the GGBs in two of the categories listed in Art. 1(1):

840. (i) GGBs do not fit within Art. 1(1)(b) – "shares in and stock and debentures of a company" – because these assets are associated with a commercial undertaking in the host State. By contrast, public debt is not linked to any specific economic activity or associated with a commercial venture[770].

841. (ii) Neither do they fall under Art. 1(1)(c) "monetary claims or any contractual claims having financial value" because Laiki never held legal title to any GGB. [redacted] only had a contractual relationship with the Primary Dealers and relevant authorized participants in [redacted] Book Entry System (in this case, [redacted]). [redacted] transferred its interest in the GGBs to Laiki only with *inter partes* effect. Thus, Laiki had no "monetary claim" whatsoever against Greece[771].

842. Respondent also says that the GGBs were held in a [redacted] account in Luxemburg, thus, they lacked the required territorial nexus to an investment enterprise in the Hellenic Republic, in order to qualify as protected investments under the BIT[772].

B. The GGBs lack the inherent characteristics of investments

843. Respondent alleges that a protected investment under Art. 25 ICSID Convention must satisfy certain inherent characteristics as outlined in the *Salini* case: (i) contribution through money or assets; (ii) a certain duration; (iii) an element of risk; and (iv) a contribution to the economic development of the host state[773]. These objective requirements can also be derived from the ordinary meaning of the term "investment" in the BIT[774].

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[767] R I, paras. 436-442; R II, para. 431.
[768] *Abaclat* and *Ambiente Ufficio.*
[769] R I, paras. 444-445.
[770] R I, para. 446; R II, paras. 435-439.
[771] R I, paras. 449-452; R II, paras. 442-445.
[772] R I, paras. 455-456.
[773] R I, paras. 457-460.
[774] R I, para. 461.

844. Respondent says that the GGBs do not satisfy the requirements of:

845. (i) Contribution to the economic development: the GGBs were dematerialized secondary market transactions. The Hellenic Republic only received funds from primary dealers at the time the GGBs were issued. Laiki or [redacted] merely purchased the GGBs in the secondary market, and thus, there was no flow of funds from Laiki into the Hellenic Republic[775]. The *Poštová* award also confirmed that secondary market purchases of sovereign debt do not meet the requirement of contribution to the economy[776].

846. (ii) The assumption of risk: the risk assumed by Laiki with the GGB purchases was an ordinary commercial risk, rather than the risk associated with the investment activity[777], which requires an additional "operational risk"[778].

847. (iii) Duration: Laiki's acquisitions of the GGBs do not comply with the endurance requirement necessary to qualify as a protected investment. Respondent points to the fact that Laiki made speculative purchases, buying and selling GGBs on the same day, which shows that Laiki had no commitment to its alleged investment, and that they were mere commercial transactions in a secondary market[779].

1.2 THE GGB PURCHASES ARE FREE-STANDING TRANSACTIONS INDEPENDENT FROM AN INVESTMENT

848. Through this argument, Respondent seeks to counter the theory of "unity of investment", by which ancillary operations (GGBs) of protected investments (Laiki's banking operations in Greece), would also be protected under the BIT[780].

849. Respondent avers that the GGBs cannot be considered protected ancillary operations because they were purchased years after Claimant had established its banking operations in the Hellenic Republic, back in 1992[781]. The vast majority of GGBs were purchased in 2009 and 2010; they were free-standing transactions, not linked to any operational framework, and solely motivated by a speculative strategy to benefit from rising yields of the Greek sovereign debt[782].

1.3 LAIKI DID NOT OWN THE GGBS AT THE TIME OF THE ALLEGED BREACH

850. As a last argument, Respondent avers that Laiki did not own the GGBs when the Debt Exchange took place and since ownership of the investment is "essential to establish jurisdiction", the Tribunal should decline jurisdiction"[783].

[775] R I, paras. 475-483; R II, paras. 454-469.
[776] R I, para. 471.
[777] R I, paras. 484-492.
[778] R I, para. 486; R II, paras. 470-478.
[779] R II, paras. 479-481.
[780] See R I, paras. 493-499.
[781] R II, paras. 490-491.
[782] R I, paras. 501-504.
[783] R I, paras. 507 and 515;

[redacted]

2. CLAIMANT'S POSITION

852. Claimant's primary defense to Respondent's objection is that Laiki's GGBs and banking operations in Greece must be considered as one protected investment (**2.1.**); in the alternative, Laiki submits that the GGBs would also qualify as protected investments on a stand-alone basis (**2.2.**). Claimant also says that it owned the GGBs at the relevant time (**2.3.**)

2.1 LAIKI'S INVESTMENTS IN GREECE ARE TO BE CONSIDERED AS A WHOLE

853. Claimant rejects Greece's proposition that the GGBs must be considered free-standing transactions, unrelated to Laiki's banking operations in Greece.

854. Laiki avers that its GGBs formed a "unity of investment" with its banking activities in Greece. The economic reality behind Laiki's banking operations and GGB acquisitions was the following[787]:

- Laiki's business model, as any other commercial bank, is to take deposits, and invest the deposited funds to generate income. The income received from the investment has to exceed the interest paid to the depositors. In a competitive environment, such as the Greek one, Laiki had to offer its depositors similar interests than those offered by Greek banks[788].
- Commercial banks hold government bonds for regulatory reasons, but also because their yields serve as benchmarks by reference to which deposit rates are set. Thus, an obvious way to generate sufficient interest income to pay depositors an interest similar to the yield of government bonds, is to invest funds from deposits in sovereign debt[789].

855. Therefore, Laiki's acquisition of GGBs was directly related to its lending operations in Greece. Laiki's increase in GGB holdings are correlated with the expansion of its lending operations in Greece, which went from EUR 6.2 B in 2006 to 13.8 B in 2010[790]. Its holdings were comparable to that of its Greek competitors with a similar lending portfolio in Greece[791]. [redacted] testified that, in order to remain

[redacted]

[787] C II, para. 208 and 212.
[788] C II, para. 78.
[789] C II, para. 80.
[790] C II, para. 81; C I, para. 157.
[791] C II, paras. 73-87.

competitive with Greek banks, Laiki needed to offer comparable interests, which could only be achieved by purchasing GGBs[792].

2.2 THE GGBS ARE PROTECTED INVESTMENTS

A. The definition of "investment" under the BIT includes sovereign debt

856. Claimant says that Art. 1(1) of the BIT makes a broad definition of protected investment: as a starting point "every kind of asset" is protected; and then a non-exhaustive list of examples that qualify as investments is offered[793]. According to Respondent the inclusion of "corporate bonds" in the non-exhaustive list (Art. 1(1)(b)) should be construed as excluding sovereign bonds, because they differ in nature: corporate bonds are associated with a commercial activity, whilst sovereign bonds are not. Claimant disagrees for two reasons: first, it ignores that fact that Art. 1(1)(b) refers to forms of participation of a company (none of the other defined categories of assets does this)[794]; and second, it disregards the reality that sovereign bonds provide funds for the state to re-invest in a range of economic activities – even if they form part of state budget[795].

857. Claimant avers that the *Poštová* award incorrectly excluded sovereign bonds from protection under the Greek-Slovak BIT[796]. In any event, that case is distinguishable from the present one, because Poštová Banka had no systemic investment in Greece as Laiki did[797].

B. GGBs are "monetary claims" within the meaning of Art. 1(1)(c) BIT

858. Laiki argues that the GGBs fall within Art. (1)(1)(c) of the BIT, as "monetary claims or any contractual claim with an economic value"[798].

859. Claimant presented two expert reports on Luxemburg and Greek law, concerning the rights and obligations attached to the GGBs. The expert reports conclude that, under both Luxemburg and Greek law, Laiki had a monetary claim against the Hellenic Republic in case of default[799].

C. Alleged lack of territorial nexus

860. Laiki rejects Respondent's argument that the GGBs lack territorial nexus with Greece. By purchasing the GGBs, Claimant made funds available to the Hellenic Republic, thereby contributing to the economic development of Greece.

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[792] [redacted] II, para. 7.1.
[793] C II, para. 219.
[794] C II, para. 226.
[795] C II, para. 228.
[796] C II, paras. 221-227.
[797] C II, para. 221.
[798] C II, para. 230.
[799] [redacted].

Overlooking this economic reality would also ignore the very reasons for which Greece undertook to issue the bonds in question in the first place[800].

D. Salini criteria

861. First, Claimant says that the Salini criteria should be applied flexibly and in any event, cannot entail the application of additional jurisdictional requirements not foreseen in the BIT[801].

862. In any case, Laiki contends that its investment in GGBs contributed to the economic development of Greece, because the State was able to raise funds which could later be used for its budgetary needs. The fact that Laiki acquired the GGBs in the secondary market is irrelevant and does not affect this conclusion[802].

863. As for Greece's allegation that Laiki did not incur in "operational risk", Claimant avers that the characterization of "operational" is not mentioned in the Salini criteria, and the test must be applied flexibly[803]. In any case, Laiki did sustain "operational risk", since the value of its GGBs was dependent on Greece's economy. Laiki's assumption of risk is evidenced by the losses suffered with the Debt Exchange; the materialization of the loss cannot be classified as the result of "ordinary commercial risk", as Respondent suggests[804].

2.3 LAIKI OWNED THE GGBS AT THE RELEVANT TIME

864. Lastly, Laiki rejects Greece's assertion that the Tribunal lacks jurisdiction because at the time of the alleged breach Laiki did not own the GGBs.

[redacted]

3. THE TRIBUNAL'S DECISION

866. The Hellenic Republic makes three arguments to sustain its jurisdictional objections:

- that sovereign bonds are not a protected investment, as defined in the BIT;
- that GGB transactions do not meet the objective and inherent characteristics of an investment; and

[800] C II, paras. 231-233.
[801] C II, paras. 236-238.
[802] C II, paras. 244-256.
[803] C II, paras. 257-259.
[804] C II, paras. 260-262.
[redacted]

- that Laiki did not own the GGBs at the relevant time: [redacted]

867. The Tribunal will first summarize the relevant facts (**3.1.**) and then discuss and eventually dismiss Respondent's three jurisdictional objections (**3.2.**).

[redacted]

[redacted]

3.2 DISCUSSION

872. For the Centre to have jurisdiction under the Convention and the Tribunal to have competence under the BIT, a protected investor must own an investment which meets the requirements established under both the Convention and the BIT[811].

873. The relevant provisions are Article 25 of the ICSID Convention and Article 1 of the BIT:

874. Article 25(1) of the ICSID Convention provides:

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State […] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre […]". [Emphasis added]

875. Article 25 of the Convention restricts ICSID's jurisdiction to disputes which arise "directly out of an investment".

876. The Convention lacks a definition of "investment". A preliminary draft did provide a generic definition ("any contribution of money or other assets of economic value for an indefinite period, or … not less than five years"), but the proposal was quickly dropped for lack of agreement[812]. Notwithstanding this lack of guidance, it is commonly accepted that Art. 25(1) requires that a protected investment must meet certain "objective and inherent requirements", which States must respect, when defining "investments" in their treaties[813].

877. Article 1 of the BIT reads as follows:

> "The term "investment" means every kind of asset and includes in particular but not exclusively:
>
> (a) movable and immovable property and any other property rights, such as mortgages, liens and pledges,
>
> (b) shares in and stock and debentures of a company and any other form of participation in a company,
>
> (c) monetary claims or any other contractual claim having a financial value,
>
> (d) intellectual property rights, goodwill, technical process and know-how,

[redacted]

[811] *Phoenix*, para. 74.
[812] Schreuer: "The ICSID Convention: A Commentary", Cambridge University Press (2nd edition, 2009), p. 115; See also *Ambiente Ufficio*, para. 448.
[813] *OI European*, para. 216.

> (e) concessions of business rights conferred by law or under contract, including concessions for exploration, cultivation, extraction or exploitation of natural resources, and
>
> (f) goods which under a leasing agreement are placed at the disposal of a lessee in the territory of a Contracting Party, in conformity with its legislation.
>
> (2) The term "returns" means the income yielded by an investment and, in particular, but not exclusively includes profits, interest, dividends, capital gains, royalties for intellectual and industrial property rights and fees."

878. Article 1 of the BIT provides a succinct definition of investment, stating that investment "means every kind of asset", and then adds a non-exhaustive list of examples. These examples share certain features: investments are held or owned by "investors" in the "territory" of the Contracting Parties and yield "returns": investors derive a certain income (such as dividends, interests, capital gains and royalties) from their holding of the investment.

879. The mere fact that an asset is mentioned in the list defined in Article 1 of the BIT does not necessarily imply that such asset can also be considered as a protected investment under the Convention. An additional requirement must be met: the asset must also meet the objective and inherent features which are shared by all investments[814]. As the Tribunal in *Nova Scotia* said[815]:

> "[…] the ordinary meaning of an investment in the relevant bilateral investment treaty derives from something more than a list of examples and calls for examination of the inherent features of an investment".

Inherent meaning of investment

880. What is the objective and inherent meaning of the term investment?

881. This issue is one of the *quaestiones vexatae* of investment arbitration. And it is a question to which there is no clear answer, because in its origin "investment" is not a legal concept: the term was imported from the economic/financial realm, in which it refers to the economic "process" of converting money to assets in the expectation of income. For economists the process occurs in a wide variety of situations, e.g. when an investor

- creates or controls a business enterprise;
- acquires ownership of real estate for profit;
- buys a portfolio of shares or bonds;
- operates an administrative concession or
- grants a long-term loan to an enterprise.

882. From an economic perspective, these "processes" are unified by the fact that the investor transforms cash into the ownership of an asset, from which the investor

[814] *OI European*, para. 218*; Romak*, para. 180*; KT* Asia, para. 165*; Global Trading*, para. 43*; Quiborax*, para. 214. A lottery ticket may constitute a monetary claim against the lottery operator, but it is not an investment.
[815] *Nova Scotia*, para. 80.

expects to receive a return. But from a legal perspective, the activities differ significantly. Legally speaking, investments can be formalized (*inter alia*) by the creation of an enterprise or branch, by the incorporation of a local company, by the awarding of a concession, by the acquisition of ownership or other rights *in rem* over property, by the subscription of shares or debentures or by the execution of a contract.

883. No treaty, however skillfully drafted or construed, can provide a precise or complete legal definition which covers all these legal institutions, and which is entirely free from interpretative ambiguity. The route followed by most investment treaties (including the Greece-Cyprus BIT) provides a general concept ("every kind of assets") and a non-exhaustive list of examples, which offers guidance as to which situations the Contracting Parties intended to classify as investments (and *a contrario sensu* which are to be excluded).

884. This approach has one disadvantage: doubts may remain whether a certain asset not specifically mentioned in the list (e.g. a weekend home, a commercial contract, a loan or a portfolio of government bonds) is or not an investment within a particular BIT.

Direct investments

885. There is however one category of assets where there can be no discussion that the requirements must be deemed to have been met and that treaty protection should prevail: when the investor contributes capital and know-how and creates (or acquires) an enterprise (i.e. an organization of capital and labor which produces goods or services to be placed in a market) located in the host country. Legally speaking, these so-called "direct investments" can be structured

- by creating a local branch (which replicates in the host country the same entrepreneurial activity carried out by the investor in the home country) or
- by taking a capital participation in a local corporation (which in turn performs the entrepreneurial activity).

886. Whatever the legal form, the foreign investor who makes a direct investment owns an entrepreneurial "asset" in the host country, and this asset meets *ex natura* the requirements set forth in Article 25 of the Convention and Article 1 of the BIT.

A. Laiki's direct investment in Greece

887. Laiki created and at all relevant times owned and controlled a significant banking enterprise in Greece, with hundreds of local branches and thousands of employees, providing banking services and loans to thousands of Greek clients. The enterprise initially took the form of a Greek incorporated subsidiary with its own legal personality, controlled by Laiki (Laiki Hellas first, [redacted] thereafter); but then in March 2011 [redacted] and Laiki merged and formed one single legal entity, which carried out banking activities in Cyprus and Greece. The merger did not affect the substance of Laiki's activity in Greece. The banking enterprise continued as before, and the change was merely legal: instead of a subsidiary, [redacted] now became a branch in Greece of a Cypriot corporation.

888. In sum, Laiki owned at all relevant times a protected investment in Greece, which met the requirements established in Article 25 of the ICSID Convention and Article 1 of the BIT; this investment consisted of a banking enterprise and was formalized at different times as either a subsidiary controlled by Laiki or a branch of the Cypriot bank.

889. The Tribunal consequently finds that the Centre has jurisdiction and the Tribunal is competent to adjudicate any claim related to such investment.

B. Respondent's counter-argument

890. The Hellenic Republic does not dispute that Claimant owned and operated a banking enterprise in Greece. But it argues that the Centre lacks jurisdiction and the Tribunal competence to adjudicate the Debt Exchange Claim, because the purchases of GGBs were speculative, were carried out long after the creation of the investment and were neither critical nor ancillary to the banking operations in Greece[816].

891. Claimant rejects Greece's proposition that the GGBs must be considered free-standing transactions, unrelated to Laiki's banking operations in Greece: the GGB portfolio formed a "unity of investment" and was linked to its overall banking operations[817].

892. The Tribunal sides with Claimant.

893. The relevant issue is not whether the purchases of GGBs were or not speculative, or whether they were performed at the time of creation of the enterprise or thereafter, or whether they were critical or ancillary to the entrepreneurial activities. A protected investor, who operates an enterprise in a host country, is entitled to protection for all assets which form part of that enterprise.

894. The relevant question is consequently whether the GGBs purchased formed part of Laiki's Greek banking enterprise.

[redacted]

3.3 RESPONDENT'S OTHER OBJECTIONS

896. Respondent submits three additional jurisdictional objections relating to the Debt Exchange Claim, which the Tribunal will briefly analyse and dismiss:

- that sovereign bonds are not investments as defined in the BIT (A.),

[816] R III, para. 40.
[817] C II, paras. 208 and 212.
[818] C-34, p. 1.

- that GGB transactions do not meet the objective and inherent characteristics of investment (**B.**) and
- [redacted]

A. Sovereign bonds are excluded from the BIT

897. Respondent says that the definition of investment in Article 1 of the BIT expressly mentions bonds or debentures issued by companies, but does not reference sovereign bonds or public titles. From this omission Respondent deduces that the intention of Cyprus and Greece was to exclude protection for sovereign bonds[819].

898. The Tribunal is unconvinced.

899. Article 25 of the Convention and Article 1 of the BIT require that the protected investor owns or controls an investment in the host country. In the present case, Claimant indeed owned and controlled at all relevant times a protected investment in Greek territory: its banking enterprise in Greece, structured as a branch, through which Claimant held its consolidated GGB portfolio.

Poštová

900. Respondent's argument relies heavily on a specific decision: the award in *Poštová.*

901. In that case, Poštová Bank – a Slovak bank – had acquired a substantial portfolio of GGBs in the secondary market, and suffered losses caused by the Debt Exchange. The tribunal in *Poštová* held that sovereign debt was not expressly referred to in the definition of investment under the Slovak-Greece BIT and concluded that Poštová's GGB portfolio did not qualify as an investment[820].

902. The present situation can be differentiated from *Poštová*, because in that case the investor's only investment in Greece was its holding of GGBs; while in the present case, Laiki has at all relevant times been the owner of a banking enterprise in Greece[821].

[819] R III, para. 28.
[820] *Poštová*, para. 350.
[821] Respondent's additional argument that Laiki never held legal title to its GGBs (see para. 841 *supra*) adds nothing. Laiki's GGBs form part of its banking operations in Greece, which overall qualify as a protected investment under the BIT. In any event, Laiki – as the beneficial owner of the GGBs – had a direct claim against the Hellenic Republic in case of default (Law 21898/1994 on Dematerialized Government Securities (AM-18), Art. 8) and [redacted] issued the participation order according to the instructions and consent of Laiki (see Bondholder Law, C-4, Art. 1(7): "The Bondholder participation in the decision-making process of this article shall be considered, as far as the Process Administrator, the Greek Government, the PDMA and their agents are concerned, to be conducted in accordance with the instructions and with the consent of the investor)".

B. The GGB holding is not an investment under Article 25 of the Convention

903. Respondent also says that the term "investment" in Article 25(1) of the Convention has an inherent meaning and submits that Claimant's GGB transactions fail to pass this test, because these debt purchases:

- did not make a contribution to an economic venture in the Hellenic Republic;
- did not involve a sharing of operational risk; or
- did not implicate any long-term commitment of financial resources.

904. Laiki disagrees: it says that the "*Salini* criteria", which an investment must allegedly meet to qualify under Article 25(1) of the Convention, are irrelevant, because if an investment qualifies under Article 1 of the BIT, it will also qualify under the Convention[822]. In any event, Laiki's investment in the GGBs did contribute to the economic development of Greece and involved a sharing of risk[823].

The *Salini* test

905. Respondent is referring to a frequently used list of characteristic features of investments, the so-called *Salini* test[824], either in its original structure (contribution/duration/risk/economic development of the host state) or in the simplified version (contribution/duration/risk) preferred by Respondent[825].

906. The *Salini* test was developed to establish whether a construction contract could constitute an investment under the ICSID Convention.

907. In the present case, the investor is the owner of a significant banking enterprise situated in the host country, with hundreds of branches and thousands of employees, which holds significant portfolios of loans granted to private and public Greek borrowers; there can be no discussion that the investor owns an investment in Greece, and that such investment meets the requirements under Art. 1 of the BIT and Art. 25(1) of the Convention. The *Salini* criteria may have some relevance to discern whether a construction contract can be considered as an investment. In the present case the test is inapposite.

C. Claimant did not own the GGBs

908. Respondent makes two arguments under this heading:

909. First the Republic says that the owner of the GGB portfolio at the time when the Debt Exchange was performed – 8 March 2012 – was the CBofC.

910. The facts refute this statement.

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[822] C II, paras. 234-263.
[823] C II, para. 244.
[824] Named after the award in *Salini* para. 52-57, although used before that in *Fedax*, para. 43.
[825] R I, para. 19; R II, para. 35.

[redacted]

913. Respondent's argument is misplaced.

[redacted]

915. Under the BIT, standing to bring a claim lies with the "investor", i.e. the owner of the investment. The intention of Laiki and [redacted] was that the GGBs be transferred to the creditor as a security – not that full ownership pass to [redacted]. When assets are given as security to creditors, standing remains with the owner. This is the solution adopted under international law[828].

VIII.1.2. WAIVER OF THE DEBT EXCHANGE CLAIM

916. Respondent objects to the admissibility of Claimant's Debt Exchange Claim. It argues that when Claimant tendered its GGBs and accepted the terms of the Invitation Memorandum, [redacted]

917. Claimant rejects Respondent's proposition. First, it argues that [redacted] is not effective to waive Claimant's rights under the BIT; and in any case, Laiki was induced through coercion to tender its GGBs and accept the terms included in the Invitation Memorandum, [redacted]

918. The Tribunal will first summarize Respondent's and Claimant's positions (**1.** and **2.**) and will then adopt a decision (**3.**).

[redacted]

827 R II, para. 501.

828 See *Occidental (Annulment)*, paras. 259-264.

1. RESPONDENT'S POSITION

919. Respondent says that it is undisputed that Claimant consented to the Debt Exchange and to the amendments to the GGBs that allowed the Hellenic Republic to exchange them for a package of New Securities[829].

[redacted]

921. Respondent also argues that, irrespective of the waiver, Laiki is barred from challenging the Debt Exchange on the ground of the principle of good faith: a party that acts contrary to the right it is claiming before an international court or tribunal is precluded from claiming that right. This consequence derives from the doctrine of estoppel or the principle *allegans contraria non audiendum est, venire contra factum proprium*[832].

922. Laiki endorsed the Debt Exchange through its participation in the PCIC, it consented to the Debt Exchange, tendered its GGBs and accepted the terms of the Invitation Memorandum[833]; and the Hellenic Republic fulfilled its side of the bargain: on 12 March 2012 it delivered the New Securities to Laiki, composed by English law governed GGBs with standard creditor protection and highly rated-EFSF notes[834].

923. Claimant reaped the advantages of the Debt Exchange – avoiding the risk of default – and now it seeks to retract on its side of the bargain to obtain a second bite of the apple[835].

No coercion

924. Claimant alleges it was coerced into accepting the Exchange Offer. According to Respondent's expert on Greek law – [redacted] – coercion requires[836]:

- a great, imminent and direct threat to property that is illegal or contrary to public morals, that is sufficient to cause fear to a rational person;
- the intention to coerce by way of the threat; and

[829] R I, paras. 517-521.
[redacted]
[832] R I, para. 551; R II. paras. 546-548.
[833] R I, paras. 557-558.
[834] R I, para. 559.
[835] R I, para. 560.
[836] [redacted]I, paras. 100-109.

- a causal link between the conduct of the one who carries out the threat and the threatened person.

925. Respondent says that the standard of coercion is not met because[837]:

928. The enactment of the Bondholder Law complied with all substantive and procedural guarantees under Greek and international law[840]. Its legality has been upheld by the Greek Council of State[841] and the European Court of Human Rights[842].

930. The Exchange Offer – – was the result of the normal operation of economic forces, rather than pressure or compulsion by the Hellenic Republic[846]: the bondholder's acceptance of the Debt Exchange was driven by the prospects of avoiding default and instead receiving a new package of securities, governed by English law and

931. As for Claimant's assertion that the two-week period to accept or reject the Exchange Offer was insufficient,

[837] R II, paras. 514-516.

[840] R I, para. 528; I, paras. 54-55 and 91-94.
[841] R II, para. 515, citing to R-265.
[842] R II, para. 227, citing *Mamatas and Others v Greece* (RL-176).

[846] R II, para. 519.

[redacted]

932. Finally, with respect to the statements made by the Greek Minister of Finance on 5 March 2012 and the press release of the Hellenic Republic of 6 March 2012, Respondent says that these were mere statements of fact, already contained in the Invitation Memorandum: that the official sector funding for the Debt Exchange did not include money to pay holdouts; and that the official sector conditioned the Second Adjustment Program on the successful Debt Exchange. These statements were not threats, but mere acknowledgements of the economic reality[849].

2. CLAIMANT'S POSITION

933. Laiki makes four arguments:

- Laiki did not waive its BIT rights by accepting the terms of the Invitation Memorandum (**A**.);
- In any event, Laiki accepted the terms of the Invitation Memorandum through coercion, and thus, [redacted] (**B**.);
- As a matter of Greek law, Laiki did not waive its BIT rights (**C**.); and
- Laiki is not estopped from enforcing its BIT rights by the principle of good faith (**D**.).

A. No waiver under international law

934. Claimant argues that the prevalent position in investment treaty arbitration jurisprudence is that contractual waivers of claims by investors are generally not regarded as extending to international law rights under BITs, unless there is an express waiver of these rights[850].

[redacted]

B. Any purported waiver is vitiated by coercion

936. Claimant argues in the alternative, even if the Tribunal considers that the waiver is effective with respect to Laiki's BIT claims, such waiver was provided under coercion[852].

[redacted]

[849] R II, para. 532.

[850] C II, paras. 377-378.

[redacted]

[852] C II, para. 381.

937. Whether Greece's conduct amounts to coercion is governed by the BIT and general principles of international law, not Greek law, as Respondent suggests[853].

938. Under international law, consent is not freely given if it is obtained under coercion, and the victim may avoid the contract or waiver of rights[854]. Claimant also offers the Black's Law Dictionary's definition of "economic coercion" as the "conduct that constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it"[855].

939. Claimant describes Greece's coercive conduct as follows[856]:

- The Bondholder Law retroactively inserted CACs in the GLG-GGBs without consent of the bondholders; this was made to facilitate and permit the restructuring of those GLG-GGBs, provided that a qualified majority of the bondholders agreed in aggregate.
- Before the Bondholder Law holders of GLG-GGBs could not be forced into accepting the debt restructuring; they were free to stay out as hold-out creditors; the nature of the CACs made it impossible for Laiki to put together a blocking minority against the restructuring.
- Before the Bondholder law, any amendment to the original terms of the bonds would have required a separate vote for each issue and would require unanimity of the bondholders of that issue; with the CACs inserted through the Bondholder Law, a quorum of 50% of the face value of all the outstanding GLG-GGBs (not by independent issue) and consent by 2/3 of the face value participating in the vote, was sufficient to enable the restructuring of all outstanding GLG-GGBs.

[redacted]

[redacted]

[redacted]

[redacted]

[853] C II, para. 382.
[854] C II, paras. 383-384.
[855] C II, para. 387, citing to CL-153.
[856] C II, para. 382, referring to C I, paras. 36-43 and 49-60.
[redacted]

940. Laiki says that these threats exerted pressure on Laiki to accept the terms of the Exchange Offer:

- [redacted] Claimant alleges that this was done to avoid allowing bondholders to secure a potentially blocking minority position[859].
- It cannot be argued, as Respondent suggests, [redacted]

C. Waiver not effective under Greek law

941. Even if Greek law was applicable, the waiver [redacted] is ineffective because it is contrary to Greek law[860]. Claimant submitted a legal opinion of [redacted], in which [redacted] avers that the Bondholder Law is contrary to the principles of legitimate expectations and rule of law in Greek Law, embodied in Art. 25 of the Greek Constitution.

942. [redacted] explains that the ruling of the Greek Council of State upholding the legality of the Bondholder Law on the grounds of public interest reasons is flawed and should not be considered binding by this Tribunal[861].

D. Principles of good faith or estoppel do not bar Laiki from challenging the Debt Exchange

943. Claimant says that the requirements of estoppel are not satisfied in the present case[862]:

- Laiki's participation in the Debt Exchange cannot be regarded as a clear and unambiguous statement of its lawfulness;
- the participation was not voluntary: it is Laiki's case that it was coerced into accepting the exchange;
- Greece cannot point to detrimental reliance.

3. THE TRIBUNAL'S DECISION

[redacted]

945. Respondent argues that after submitting to the Invitation Memorandum and participating in the Debt Exchange, Laiki is now precluded from asserting the Debt Exchange Claim in this ICSID arbitration.

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[859] C II, para. 388.
[860] See [redacted] I and II.
[861] [redacted] I, p. 36-42; [redacted] II, paras. 23-27.
[862] C II, para. 402.

946. Respondent alternatively avers that, under the principles of good faith and estoppel, Claimant is barred from challenging the Debt Exchange: Claimant voluntarily consented to tender its GGBs and the Republic relied on such conduct (and the aggregate consent of the majority of bondholders) to implement the Debt Exchange. Claimant's position in this arbitration is inconsistent with that held during the debt restructuring. Laiki must not be allowed to reverse its response to the Exchange Offer and claim full payment of the GGBs.

947. Claimant replies that under international law the waiver [redacted] is ineffective with respect to BIT claims. Laiki adds that it tendered its GGBs and made the waiver under economic coercion exerted by the Hellenic Republic; thus, Laiki's purported declarations of intent are void.

948. With respect to the estoppel argument, Claimant says that none of the elements of the exception are satisfied in the present case: Laiki did not voluntarily agree to the Exchange Offer and Greece cannot prove detrimental reliance.

949. The Tribunal will first review the proven facts (**3.1.**), and then will adopt a decision (**3.2.**).

[redacted]

[redacted]

[redacted]

3.2 DISCUSSION

981. Holders of GGBs which decided to participate in the Debt Exchange were required to submit a "participation instruction" addressed to the Hellenic Republic, expressing their consent and specifically submitting to the terms of the Invitation Memorandum.

The Invitation Memorandum

982. The Invitation Memorandum[902] is the legal document formalizing the terms and conditions of the Debt Exchange. It is a long and detailed document, which describes the invitation being made to holders of GGBs, the terms and conditions of the new securities to be issued, the risk factors associated with the exchange, the tax consequences and a significant number of ancillary questions. The Invitation Memorandum is headed by the following caption, printed in bold type:

> [redacted]

983. One of the main sections of the Invitation Memorandum are the [redacted] and within that section a sub-section is headed [redacted] This sub-section contains the following waiver of rights:

> [redacted]
>
> [redacted]
>
> [redacted]
>
> [redacted]
>
> [redacted]

[redacted]

[902] C-5.

[redacted]

[redacted]

984. [redacted] These terms and conditions include a triple waiver of rights:

- First, the consenting holder [redacted] in the GGBs which are being tendered;
- Second, the consenting holder [redacted] arising with respect to its GGBs [redacted] f such GGBs;
- Third, the consenting holder finally [redacted] the Republic [redacted], present or future, (including specifically claims formalized as arbitral awards), relating to the GGBs which are being exchanged.

985. It is undisputed that Laiki executed the participation instruction, accepted the Invitation Memorandum and participated with its GGB portfolio in the Debt Exchange.

986. What is disputed is the legal effect of Laiki's actions.

987. Respondent argues that Claimant waived its right to access investment arbitration and is now precluded from submitting the Debt Exchange Claim in this arbitration. Subsidiarily, Greece says that Laiki is also estopped from pursuing this Claim.

988. Claimant, on the other side, says that [redacted] is insufficient to bar Laiki's access to investment arbitration under the BIT. And subsidiarily, Laiki alleges that it was coerced to accept the terms and conditions of the Debt Exchange, with the result that the waiver is not binding upon it.

989. The Tribunal agrees with Respondent.

990. To support its decision the Tribunal will first address in general terms whether investors can waive their right to access investment arbitration (**A.**) and will then apply its findings to the present case (**B.**). Having concluded that Laiki did in fact waive its right to investment arbitration, the Tribunal will briefly address Respondent's subsidiary argument of estoppel (**C.**).

A. Waiver of access to investment arbitration

991. Neither the ICSID Convention nor the BIT foresee a situation where an investor agrees with the host State to waive the investor's right to access investment arbitration.

992. Claimant's main argument is that [redacted] is invalid both under Greek law and also under international law.

Greek law

993. Claimant says that the Bondholder Law should be regarded as invalid and contrary to the Greek Constitution, and that the validity of the ensuing Invitation Memorandum must also be called into question[905].

994. The Tribunal disagrees, because this is not the accepted interpretation of Greek law: the Bondholder Law and the Invitation Memorandum have not been annulled or invalidated by the Greek courts.

995. Several retail investors challenged the validity of the Bondholder Law and the Invitation Memorandum before the Greek Council of State (Greece's highest administrative court[906]), arguing that specific provisions of the Greek Constitution relating to legitimate expectations, the right to enjoy the use of property and the principle of equality had been breached. The Greek Council of State dismissed the applications for annulment and upheld the validity of the Debt Exchange[907].

996. In [redacted] two reports Claimant's legal expert, [redacted], insists that the Bondholder Law and the Invitation Memorandum are contrary to the Greek Constitution[908]. [redacted] reports reflect the dissenting opinions issued in the proceedings before the Greek Council of State. But the fact is that the Council of State disagreed and finally decided (albeit by majority) that the administrative acts leading to the Debt Exchange conformed with the Greek Constitution.

997. The Tribunal concludes that Claimant has failed to prove that the Invitation Memorandum, [redacted] is contrary to the Greek Constitution or otherwise invalid under Greek law.

Validity under international law

998. Claimant argues that the waiver of rights is also invalid by application of the general principles of international law.

999. The question before the Tribunal is whether an investor, who already owns a protected investment, can validly agree with the State a waiver of the investor's

[905] C II, para. 398.
[906] [redacted] I, para. 63.
[907] [redacted] I, para. 67.
[908] [redacted] I, p. 36-42; [redacted] II, paras. 23-27.

right to access investment arbitration for the adjudication of a specified range of disputes.

1000. It is true, as Claimant invokes, that certain investment tribunals have voiced doubts whether an investor can *ex ante* waive treaty protection – especially if such implied waiver is to be induced from the forum selection clause agreed upon between investor and host State in the investment contract[909].

1001. But these concerns are inapposite in present case: Laiki's waiver was not made *ex ante,* before the investment took place, but *ex post,* many years after the investment had been made and at a time when a specific dispute between the investor and the State had already crystalized. No persuasive legal reason has been put forward as to why effect should not be given to an agreement between an investor and a host State, in which the investor undertakes not to pursue any remedies, including BIT remedies, with regard to an already existing dispute. The terms of the BIT and the Convention do not prohibit such an agreement, and there appears to be no reason why such agreement should not be respected as an expression of freedom of contract[910].

B. Application to the present case

1002. Having concluded that protected investors can in principle waive their right to access investment arbitration when a dispute has arisen, the next question is whether in the present case Laiki validly consented to such a waiver (**a.**), or whether – as Claimant submits - consent was obtained by coercion (**b.**).

a. Valid consent to the waiver

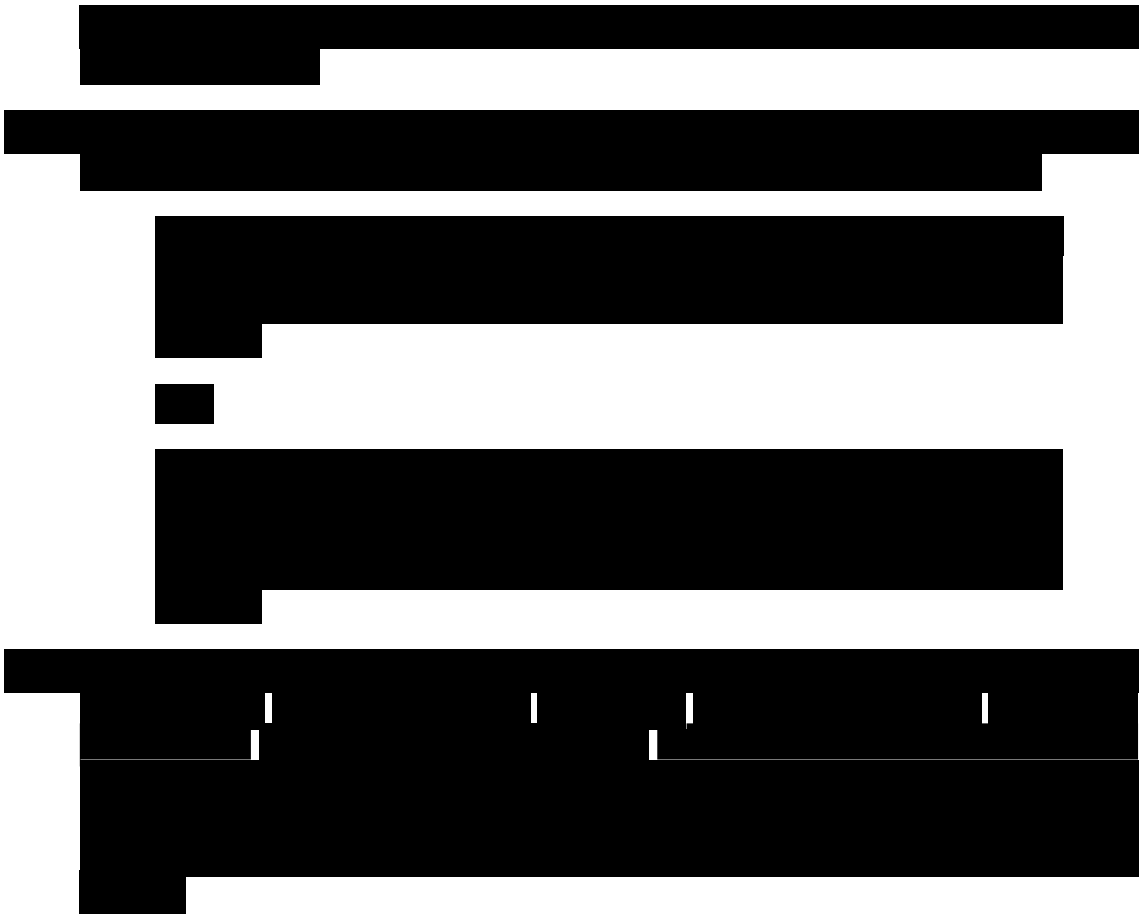
1003. The common opinion among commentators is that "international law specifies no requirements as to the form of a waiver"[911]. That said, waiver of a fundamental right, like access to investment arbitration, should be unequivocal – the investor must have made a clear declaration of intent renouncing its right to protection via investment arbitration. And if there is serious inequality of bargaining power between the parties, scholars have cautioned that waivers should be reviewed with special care[912].

1004. In the present case, the caution is inapposite, and the requirement is met.

1005. First, there can be no argument of a serious inequality of bargaining power between Laiki and the Hellenic Republic. Claimant was a multinational bank, holding a GGB portfolio of EUR 3 B, with the ability to carefully analyze the legal terms of the Invitation Memorandum, and to weigh up the pros and cons of accepting or rejecting the offer.

[redacted]

[909] *SGS*, para 92; *Aguas del Tunari*, paras. 110-111.
[910] A similar position is adopted by *Hochtief*, para 191.
[911] Strong: "Contractual Waivers of Investment Arbitration: Waive of the Future", (2014) ICSID Review, 29, No. 3, p. 699.
[912] *Ibid*, p. 700.



1009. In sum: by accepting [redacted] and the Debt Exchange, Laiki freely and knowingly waived its right to access investment arbitration under the Cyprus-Greece BIT with regard to any dispute affecting the Debt Exchange.

b. No coercion

1010. Claimant offers an alternative argument to try to overcome the fact that it tendered its GGBs [redacted] Laiki submits that it was coerced by the Hellenic Republic.

1011. The Tribunal is not convinced by the arguments put forward.

1012. The Tribunal agrees that consent obtained by coercion is invalid. But an examination of Claimant's behaviour and the facts surrounding the Debt Exchange do not establish that any coercion was involved – to the contrary, the evidence shows that Laiki freely and voluntarily gave its informed consent to the Debt Exchange offer submitted by the Hellenic Republic.

Participation in the PCIC

1013. The clearest evidence of Claimant's voluntary and informed consent is provided by its participation in the PCIC.

1014. Laiki was one of the 32 major credit and financial institutions which formed the PCIC, the Committee that negotiated the debt restructuring with the Hellenic Republic. Once the negotiations with Greece had concluded, on 7 March 2012 the

PCIC issued a press release, expressing the Committee's "strong support" for the Debt Exchange. The press release then went on to identify by name certain members of the PCIC which publicly stated their "intent to participate in the debt exchange". Laiki is one among the 30 identified institutions which undertake to tender their GGB holdings.

1015. If Laiki, a major Cypriot bank and a member of the PCIC, had actually felt that it was being coerced, it would never have publicly announced its decision to participate in the Debt Exchange – an announcement intended to stimulate other holders of GGBs to adopt the same approach. The fact that *in tempore insuspecto* Laiki openly supported the Debt Exchange, and encouraged others to participate, undermines the credibility of its present claim that consent was vitiated by coercion. It is not credible that a financial institution under coercion publicly invites other credit institutions and bondholders to submit to that very coercion.

Laiki's counter-argument

1016. Claimant says that although it formed part of the PCIC, its interests were not aligned to those of the other members of the committee: Laiki's GGB portfolio was predominantly composed of GGBs with a short-term maturity, as opposed to the portfolios of other institutions, which held GGBs with longer terms. [redacted]

1017. The Parties and their experts discussed the different outcomes, if the Republic had carried out the debt restructuring on a present value basis, rather than a face value basis as it eventually did. [redacted]

1018. Respondent's expert says that the restructuring did not treat short-term and long-term bondholders differently. It was done on a face value basis –standard practice in sovereign debt restructuring – because in the event of default, maturity becomes irrelevant: all claims may be accelerated and become due and payable irrespective of the remaining maturity of the instruments[914].

1019. The Tribunal does not consider this issue to be pertinent to the present discussion.

1020. Irrespective of the different manners in which the Hellenic Republic could have configured the restructuring, the relevant fact is that Laiki accepted the exchange of its GGBs for new securities, [redacted]

[913] [redacted] I, paras. 6.3 and 6.4.
[914] [redacted] I, paras. 70-72.
[redacted]

Laiki also exchanged its FL-GGBs

1021. Laiki's coercion argument fails for a further reason: Claimant's case is based on the argument that the Bondholder Law and its introduction of CACs into the GL-GGBs allegedly forced Claimant to tender its GGBs.

1022. However, Claimant also tendered its FL-GGBs, which were unaffected by the Bondholder Law, yet it offers no explanation on how it was "coerced" into tendering this type of GGBs.

[redacted]

Greece's offer to hold-outs

1025. A benchmark to measure the level of coercion in a debt exchange is the treatment that the sovereign grants to the hold-outs. In many instances, the debt exchange terms provide that a bondholder who voluntarily agrees to the exchange, will obtain a certain package of new securities with a given haircut; and that those who hold out, will obtain a different package with an even greater haircut[917].

1026. Such a strategy incentivizes acceptance by bondholders. Although used in the past, there is room for argument whether it would constitute a legitimate measure, or be considered as an illicit coercive instrument.

1027. Be that as it may, in the present case Greece opted not to use such a drastic mechanism. It offered (and eventually delivered) the same package of new securities to all GGB holders.

1028. Economic commentators assess the "coerciveness" of a debt restructuring, based, among other factors, on the treatment of hold-outs. In a comparative study done for

[916] See R II, para. 173, referring for the data to: [redacted]I, Table 6 (p. 34); R-326; R-327; R-328; R-329.
[917] C-184, pp. 25-26.

the Greek case, commentators concluded that the Greek PSI Debt Exchange was one of the least coercive debt restructurings since the 1990s[918].

Statements by the authorities of the Hellenic Republic

1029. Claimant further relies on two statements made by Greek authorities to aver that it was coerced into accepting the terms of the exchange.

1030. The Tribunal does not share Claimant's view.

1031. The statement of the Greek Minister of Finance and the press release by the Ministry of Finance of 6 March 2012 simply repeat factual information that was already in the public domain: that the Republic was unable to comply with its financial obligations and that the second assistance package from the official sector did not include any funding for hold-outs.

1032. These public statements fall significantly short of behaviour that could constitute coercive conduct under international law.

C. Estoppel

1033. Respondent submits an additional argument: that Laiki is estopped from challenging the Debt Exchange based on the principles of good faith, estoppel and *venire contra factum proprium*.

1034. The argument is moot, because the Tribunal has found that Claimant waived its right to access investment arbitration regarding the Debt Exchange Claim.

1035. That said, the Tribunal concurs with Respondent that Laiki cannot have it both ways: in the face of a debt restructuring, bondholders must choose between participating in the debt restructuring or holding out and seeking full payment through litigation[919]. *Tertium non datur*: permitting bondholders who had accepted the terms of the restructuring to later challenge the deal, would not only be grossly unfair, but would render debt restructurings impossible.

D. Conclusion

1036. In conclusion, by accepting [redacted] and the Debt Exchange, Laiki freely, knowingly and validly waived its right to access investment arbitration under the Cyprus-Greece BIT with regard to any dispute affecting the Debt Exchange.

[918] C-184, p. 27.

[919] The majority of investment arbitrations regarding sovereign debt restructuring were initiated by hold-outs: *Abaclat*, para. 81; *Alemani*, para. 43; *Ambiente*, para. 532. In the case of *Poštová*, the claimant was not a hold-out, because it participated in the Exchange Offer by voting against the Proposed Amendments, and thus, it accepted the terms of the Invitation Memorandum, [redacted] (See C-4, p. 38). The *Poštová* tribunal, however, made no judgment to this effect, since it found that the claimant had no protected investment in Greece.

1037. Accordingly, the Tribunal finds that the Debt Exchange Claim is inadmissible, Laiki having waived its right to access investment arbitration under the BIT for any dispute in regard of such claim.

[redacted]

A. FET and FPS

1044. Claimant says that the Hellenic Republic's conduct was inconsistent and against Laiki's legitimate expectations that its Greek operations would be treated reasonable and fairly by the Greek authorities, [redacted]

1045. Laiki suffered an unfair and/or inequitable treatment due to Respondent's arbitrary and/or discriminatory conduct[924]. [redacted]

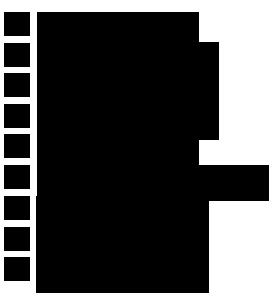
[redacted]

B. MFN and NT

1049. Claimant avers that Greece also breached the MFN and NT standards of Art. 3 BIT, [redacted] The only distinction between these banks and Laiki was that these banks were incorporated in Greece and Laiki in Cyprus. In Claimant's view this is a classic discrimination on the basis of nationality[933].

[923] C I, para. 214.
[924] C I, paras. 230-238.
[redacted]
[933] C III, para. 6

[redacted]



[redacted]

2. RESPONDENT'S POSITION

1071. The Hellenic Republic responds to Claimant's allegation that the Republic breached the FET and FPS provisions of Art. 2(2) of the BIT (**A.**); and the MFN and NT standards of Art. 3 of the BIT (**B.**), by [redacted] (**C.**) and [redacted] (**D.**).

A. FET and FPS

1072. Respondent rejects that it breached Art. 2(2) of the BIT:

[redacted]

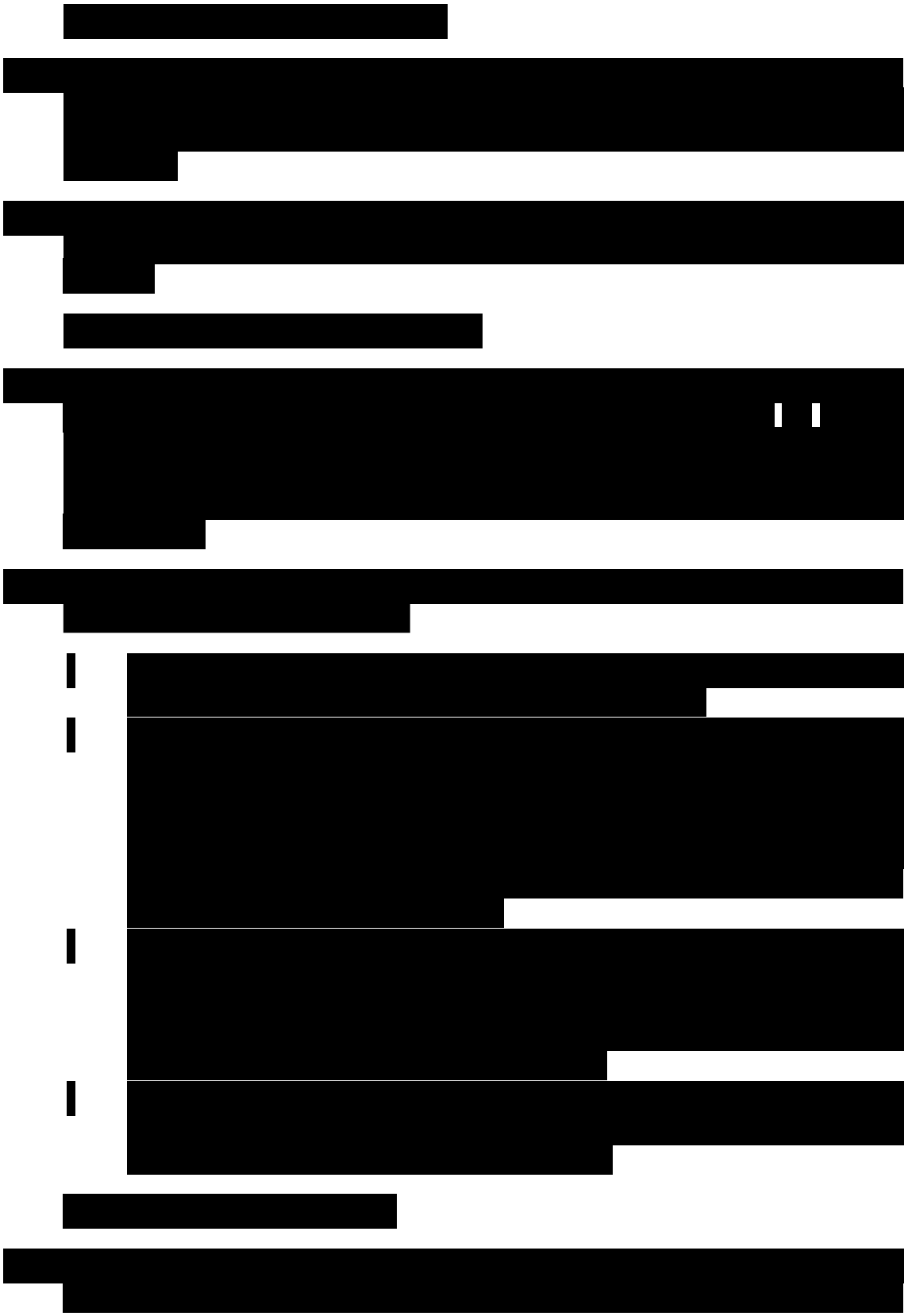
[redacted]

B. MFN and NT

1080. Claimant has not established that it was treated less favourable than other banks in similar circumstances as Laiki, because of its nationality[978].

[978] R I, para. 902; R II, para. 958.

[redacted]



[redacted]

3. THE TRIBUNAL'S DECISION

[redacted]

[redacted]

1116. The Tribunal will first address the applicable law (**3.1.**) and review the proven facts (**3.2.**). Then will separately analyze the claim [redacted] (**3.3.**) and the claim [redacted] (**3.4.**).

3.1 APPLICABLE LAW

1117. To adjudicate this claim, the Tribunal must determine which rules are to be applied under the BIT.

1118. Claimant says that Respondent's conduct resulted in a breach of Art. 2(2) and Art. 3(1) of the BIT.

A. Art. 2(2)

1119. This provision reads as follows:

> "Investments by investors of one Contracting Party in the territory of the other Contracting Party shall always be accorded fair and equitable treatment and shall enjoy full protection and security. Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal of the other Party's investors' investments in its own territory is not impaired in any way due to arbitrary or discriminatory measures".

1120. Art. 2(2) of the BIT is a rule of Delphic economy of language, which purports in just two sentences to formulate a series of wide-ranging principles:

- The rule creates a positive obligation to accord FET (and FPS) to the protected investment, plus
- A negative obligation to abstain from arbitrary or discriminatory measures.

1121. Any arbitrary or discriminatory measure may, by definition, also be said to be unfair and inequitable. The reverse is not true, though. A government measure may fall short of the FET (or FPS) standard, without being discriminatory or arbitrary[1021]. The prohibition of arbitrary or discriminatory measures is an example of possible government measures in breach of the FET standard. Putting it another way, protection from arbitrary or unreasonable behaviour is subsumed under the FET standard.

1122. A literal interpretation of the rule also shows that for a measure to violate the BIT it is sufficient if it is either arbitrary or discriminatory; it need not be both.

Arbitrariness

1123. An arbitrary conduct has been described as one "founded on prejudice or preference rather than on reason or fact"[1022]; "…contrary to the law because…[it] shocks, or

[1021] *Lemire*, para. 259.
[1022] *Ronald S. Lauder*, para. 221.

at least surprises, a sense of juridical propriety"[1023]; or "wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety"[1024]; or conduct which "manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination"[1025].

1124. The Tribunal in *EDF* has described as "arbitrary"[1026]:

> "a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
>
> b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;
>
> c. a measure taken for reasons that are different from those put forward by the decision maker;
>
> d. a measure taken in wilful disregard of due process and proper procedure."

1125. Summing up, the underlying notion of arbitrariness is that of a government measure infected by prejudice, preference or bias, or in total disregard of the rule of law.

Discrimination

1126. Discrimination means unequal or different treatment. But this in itself is insufficient. To amount to discrimination, the protected investment must be treated differently from similar cases without justification[1027], the host State "expos[ing] the claimant to sectional or racial prejudice"[1028] or "target[ing] Claimants' investments specifically as foreign investments"[1029].

1127. Discrimination is a relative standard, which requires a comparative analysis between the measures applied to the protected investment, and the measures applied to investments in similar situations. One leading commentator provides the following guidance in order to establish whether similar cases are being treated differently[1030]:

> "… by looking at a narrow circle of comparators that are closest to the case at hand. In other words, the treatment of other investors in the same line of business will have to be looked at first. If there are clear indications of discrimination already on that basis, the matter may be regarded as settled. But the absence of discrimination within this narrow group is not necessarily conclusive. For instance, if the particular sector of the economy is small or is strongly dominated by foreign interests, it would not be sufficient for the tribunal to satisfy itself that no discrimination has occurred within that group

[1023] *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, 20 July 1989, ICJ General List No. 76, para. 128.
[1024] *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, 20 July 1989, ICJ General List No. 76, para. 128.
[1025] *Saluka*, para. 307.
[1026] *EDF*, para. 303.
[1027] *Saluka*, para. 313.
[1028] *Waste Management II*, para. 98.
[1029] *LG&E (Liability)*, para. 147.
[1030] C. Schreuer, "Protection Against Arbitrary and Discriminatory Matters", in C. Rogers and R. Alford (eds), The Future of Investment Arbitration (2009), p. 196.

> of investors. The circle may be widened to a broader sector of activity that includes a variety of economic actors until a workable basis for comparison can be found".

FET standard

1128. The scope of protection afforded by Art. 2(2) of the BIT is wider than a simple prohibition of arbitrary or discriminatory measures: the FET standard requires that the host State treats the protected investment in an even-handed and just manner, avoiding intentional harassment and denial of justice. The precise scope of protection is intimately related[1031]:

- to the legitimate and reasonable expectations, on which the investor relied, including the stability of the host State's legal framework; and
- on the specific undertakings and representation proffered by the host State at the time when the investment was made.

1129. The legitimacy or reasonableness of the investor's expectations must be assessed in conjunction with the political, socioeconomic, cultural and historical conditions in the host State[1032], and in particular, balancing the right of the State under international law to regulate within its borders[1033].

B. Art. 3(1) and 3(2)

1130. Art. 3(1) defines the National Treatment ["**NT**"] and the Most Favored-Nation ["**MFN**"] standards:

> "Neither Contracting Party shall subject investments in its territory, owned in whole or in part by investors of the other Contracting Party, to less favorable treatment than that which it accords to the investments of its own investors or the investors of any third State".

1131. While Art. 3(2) reiterates the same standards for protected investors:

> "Neither Contracting Party shall treat the investors of the other Contracting Party, with regard to their activity in connection with investments in its territory, in a less favorable way than that which it accords to its investors or to those of any third State".

1132. The NT and MFN standards, which are closely related to the wider and overreaching FET standard[1034], prohibit discrimination based on nationality. Under these standards Greece may not subject protected Cypriot investors or their investments to a treatment which is "less favorable" than that which Greece accords to investments owned by other investors – both Greek or from other countries. To establish that the treatment effectively is "less favorable" a comparator in like

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[1031] *Lemire*, para. 264.
[1032] *Duke Energy*, para. 340; *Bayindir*, paras. 192-197.
[1033] *S.D. Myers*, para. 263.
[1034] Newcombe and Paradell: "Law and Practice of Investment Treaties: Standards of Treatment", Kluwer Law International (2009), pp. 194, 224 and 290.

circumstances must be defined[1035]. It is also widely accepted that there must be no objective reason which justifies the differential treatment[1036].

C. Investment arbitration case law

1133. The Parties have also made reference to numerous arbitral awards. These decisions do not constitute a formal source of international law, do not have a binding character and are mere "sources of inspiration, comfort or reference to arbitrators"[1037]. That said, the Tribunal finds certain assistance in having regard to convincing and consistent case law.

1134. There are three awards quoted by the Parties in which the alleged breach by the respondent state was the failure to provide emergency liquidity or capital support to a domestic bank owned by the protected investor. The awards are the following:

Saluka

1135. The *Saluka* case arose during the privatization of the banking sector in the late 1990s in the Czech Republic. The first privatization was that of IPB: in 1998 Saluka B.V. (a subsidiary of the Nomura Group) acquired a controlling block of shares in IPB and committed to put IPB's finances in order – without the need of State capital support to resolve the bad debt problem. At the final stage of the negotiations for the acquisition Saluka sought an assurance from the Ministry of Finance that the privatization of the other Czech banks would be carried out under no more favourable conditions than those offered to Saluka, and that no state aid would be granted to the other Czech banks prior to their privatization.

1136. In 1999 the Czech National Bank fixed higher capital requirements. The new and stringent regulatory environment and the continued bad debt problem of the other three Czech banks stagnated the privatization process intended by the Czech Republic. The State then decided to intervene and acquired large packages of non-performing loans from the three Czech banks, in order improve their financial position and accelerate their privatization.

1137. IPB received no such state aid. By mid-1999 – as a consequence of the new capital requirements and the non-performing loans – the bank's viability was called into question, and no agreement was reached between Saluka and the Czech Republic to address the problems the bank was facing. This led to IPB's intervention by the State and the transfer of IPB's good assets to CSBO – one of the other big four Czech banks, recently acquired by the Belgian KBC. The configuration of the new CSBO was accompanied by substantial state aid.

1138. Saluka submitted – among other claims – that IPB had been discriminated when the Czech Republic assisted the other three Czech banks to remedy the systemic bad

[1035] *Parkerings*, para. 369.
[1036] *Champion*, para 128; *Bayindir*, para. 399. See also C Schreuer and R. Dolzer: "Principles of International Investment Law", Oxford University Press (2012), p. 202.
[1037] In the formulation of *Romak*, para. 170.

debt problem that affected all of them. While its competitors received state aid, IPB was excluded without justification, and this resulted in Saluka losing its investment.

1139. The *Saluka* tribunal applied the following standard to assess the discrimination claims[1038]:

- that similar cases,
- are treated differently,
- without reasonable justification.

1140. The tribunal found that:

- The four banks were in similar situation: all four Czech banks were in a comparable situation with respect to their macroeconomic significance to the Czech banking sector and they all shared similar level of distress debt[1039]; furthermore, they were all subject to the same regulatory framework of the Czech National Bank, which impacted their capital requirements[1040];
- IPB was discriminated against: During IPB's privatization, the Government had expressed its opposition towards financial assistance for the banking sector; however, shortly after Saluka's acquisition of IPB, the Government changed its stance with regard to state aid to Czech banks; it implemented programs of direct and indirect financial assistance to the other three Czech Banks and excluded IPB from the programs[1041].
- No reasonable justification was offered: Saluka had a legitimate expectation that its Czech bank would be treated in the same manner as the other three banks with respect to the serious financial problems the four systemic banks were facing, the Czech Republic offered no reasonable justification for the differential treatment[1042].

Invesmart

1141. The *Invesmart* arbitration also concerns an allegation of discrimination in the access to state aid in the Czech banking sector. But as opposed to *Saluka*, the tribunal concluded that Invesmart had not proven that its Czech bank – Union Banka – was in a comparable situation to that of the Czech banks that received state aid[1043].

1142. By 2001 Union Banka faced financial struggle as a consequence of the problems inherited by the insolvent banks it had acquired, and the insufficient compensation schemes agreed with the Czech authorities[1044]; and also due to related party loans

[1038] *Saluka*, para. 313.
[1039] *Saluka*, para. 39: the level of non-performing loans was in KB 34%, in CS 23.3%, in CSOB 16.6% and in IPB 21.75%.
[1040] *Saluka*, paras. 314-323.
[1041] *Saluka*, paras. 324-326.
[1042] *Saluka*, paras. 336-337.
[1043] *Invesmart*, para. 415.
[1044] The compensation schemes agreed with the Czech authorities was the following: the Česká Finanční, a government entity, would acquire the non-performing loans at nominal value; and then, after seven years, the bank would repurchase at nominal value any outstanding non-performing loans. This had the effect of offering the banks a seven year interest free loan.

that were unsecured and non-performing. Accordingly, between 2001 and 2003 it made several requests to the Czech authorities to access state aid schemes which were discussed with the different actors involved. On 19 February 2003, at the peak of Union Banka's crisis, its CEO made a request for extraordinary liquidity support. That request was denied[1045]. In the next days the bank filed for bankruptcy.

1143. Invesmart – Union Banka's Dutch owner – initiated arbitration proceedings alleging discriminatory treatment for the Czech Republic's failure to provide Union Banka with state aid capital support and emergency liquidity loans, while granting both types of financial assistance to other Czech banks in similar situations.

1144. The *Invesmart* tribunal applied the same standard for assessing discrimination as the one applied by the *Saluka* tribunal: similar situation, different treatment and no reasonable justification[1046].

1145. The tribunal dismissed the investor's claim because it found that Union Banka was not in a similar position to the other Czech Banks that received state aid:

- The Republic's policy on state aid during the 1990's came to an end by 2001, when the Republic was more reluctant to grant aid in light of its commitments towards the European Union during the pre-accession period; Thus, Union Banka could not compare its situation and requests for aid from 2001 onwards, with the preceding situation in which aid had been granted as part of the plan to restructure the Czech banking sector[1047];
- Further, the tribunal concluded that Union Banka was not in a comparable position to that of the two banks that did obtain state aid in 2002 and 2003[1048];
- Additionally, the tribunal took into account that between 2000 and 2004 there were many other banks that were denied state aid and were allowed to fail[1049].

1146. In conclusion, the *Invesmart* tribunal held that the comparator requirement was not met; in doing so it proposed the standard that the comparator must meet for the assessment of discrimination[1050]:

> "The question of whether Union Banka was similarly situated to other banks requires more than an identification of single points of similarity, such as size, origin or private ownership. There must be a broad coincidence of similarities covering a range of factors. The comparators must be similarly placed in the market and the circumstances of the request for state aid must be similar".

Renée Rose Levy

1147. The *Levy* case also concerns alleged violation of treaty standards in the intervention and liquidation of Banco Nuevo Mundo – a Peruvian bank owned and controlled by Ms. Levy, a French national.

[1045] *Invesmart*, paras. 145-146.
[1046] *Invesmart*, para. 403.
[1047] *Invesmart*, para. 409.
[1048] *Invesmart*, para. 412.
[1049] *Invesmart*, para. 413.
[1050] *Invesmart*, para. 415.

1148. On 5 December 2000 the bank requested an emergency liquidity loan of USD 12 M. On that same day the Central Bank of Peru granted only a 10% of the amount requested (USD 1.2 M). The emergency loan could not solve the bank's substantial problems and the *Superintendencia Bancaria* announced the intervention of Banco Nuevo Mundo and appointed intervenors.

1149. Ms. Levy argued in the arbitration that Perú had violated the NT standard because it the Bank received treatment less favourable than other comparable Peruvian banks.

1150. The tribunal considered that the criteria to determine a comparator cannot be reduced to the economic sector in which the investor operates[1051]; other circumstances such as the market share, loan portfolio and type of depositors are relevant[1052].

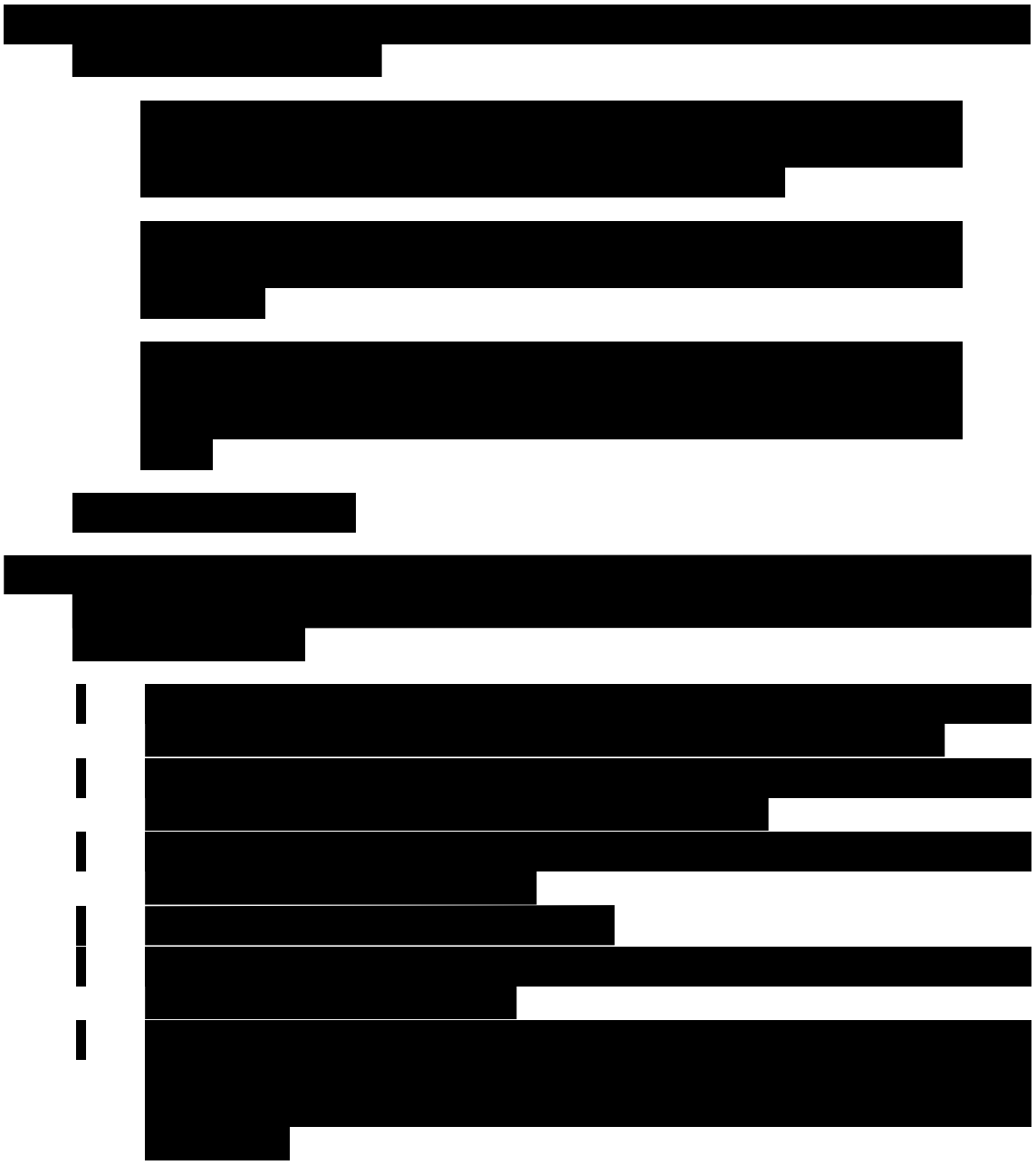
1151. In this case the tribunal found that the claimant purported to compare a bank holding 4% of loans and 2% of deposits in Peru with the first and second largest banks in the country, which together accounted for 44% of loans and 51% of deposits[1053]. Banco Latino, which was comparable in size to Banco Nuevo Mundo, had primarily individual consumer depositors, as opposed to Banco Nuevo Mundo, which mainly had institutional investors (which was, in the tribunal's view, relevant for the issue of systemic importance and contagion)[1054].

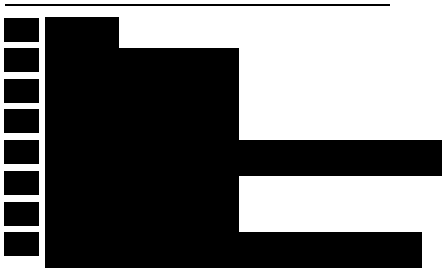
1152. The tribunal concluded that the claimant failed to properly establish that it was in a comparable situation to other Peruvian banks, and thus, dismissed the allegation of unfavourable treatment[1055].

1153. Another of Ms. Levy's allegations was that Banco Nuevo Mundo was treated unfairly – against her legitimate expectations – when the Central Bank of Peru refused to grant Banco Nuevo Mundo the whole emergency liquidity loan it requested in the amount of USD 12 M. The tribunal dismissed such claim, considering that the Central Bank of Peru – as lender of last resort – legitimately refused to grant the whole amount in absence of sufficient collateral[1056].

[1051] *Levy*, para. 396.
[1052] *Levy*, para. 396.
[1053] *Levy*, para. 398.

[1054] *Levy*, para. 398.
[1055] *Levy*, paras. 400-401.
[1056] *Levy*, paras. 337-338.





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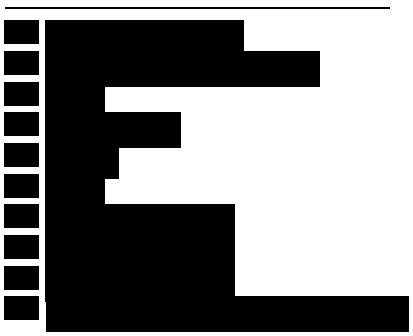

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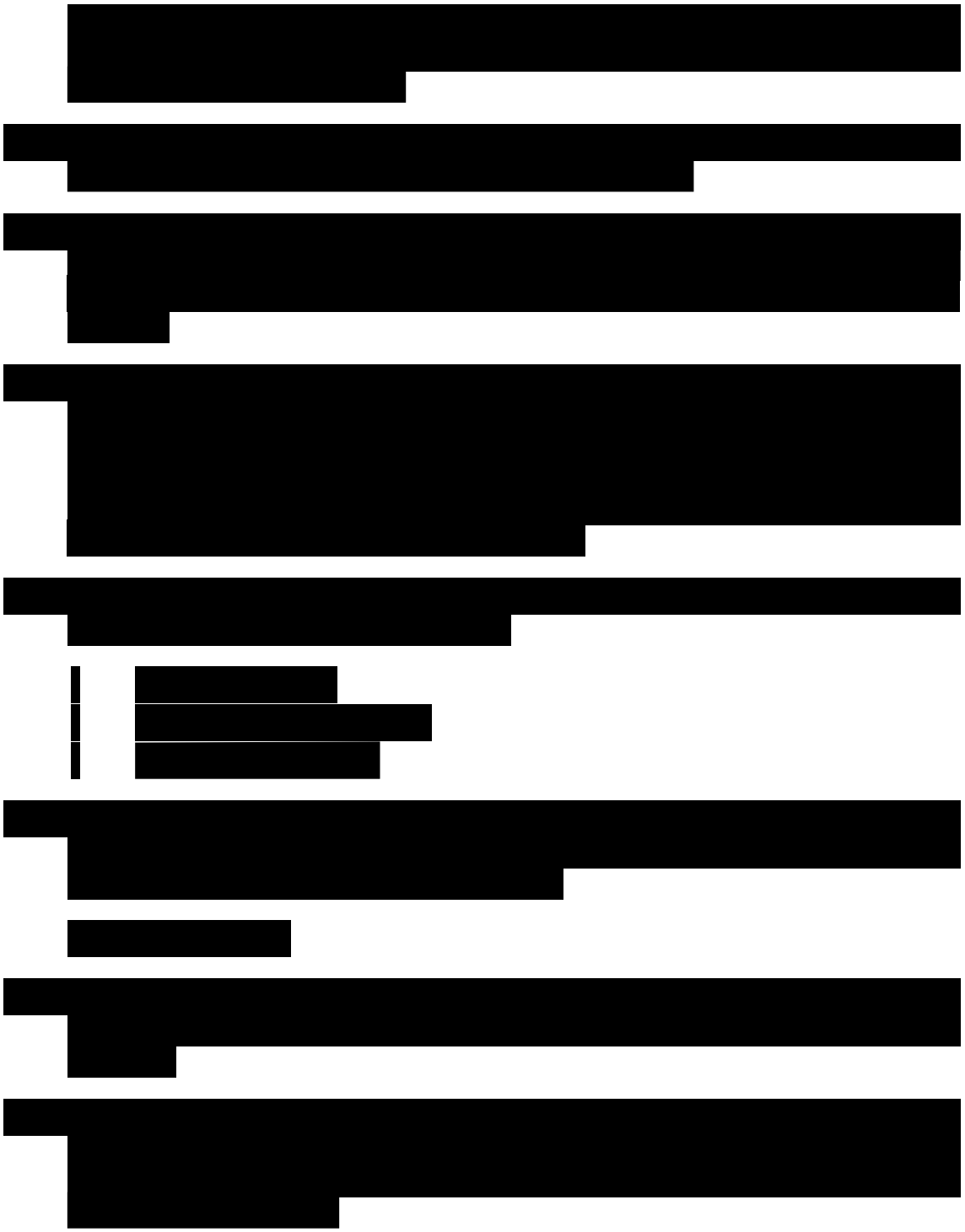

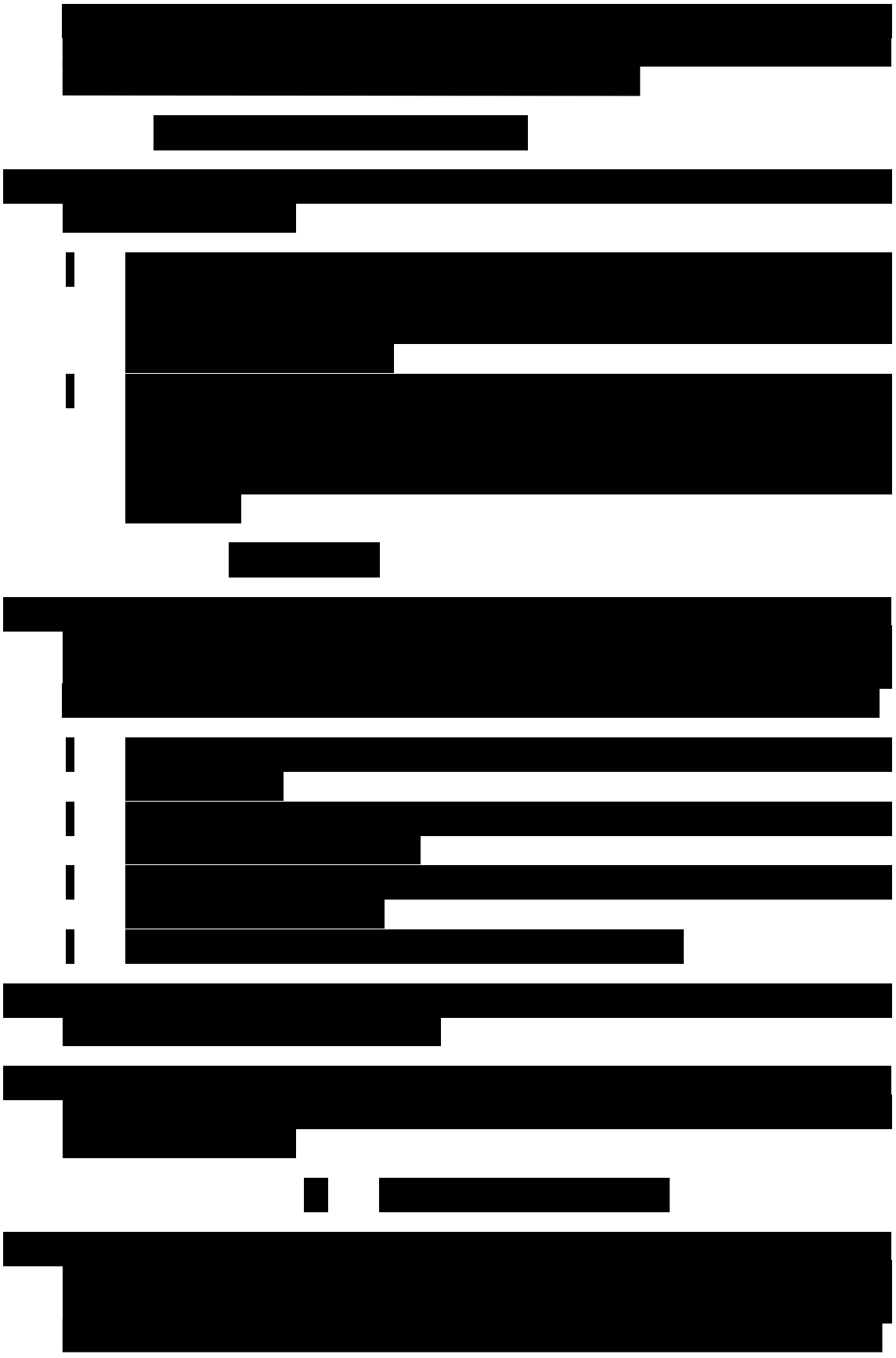

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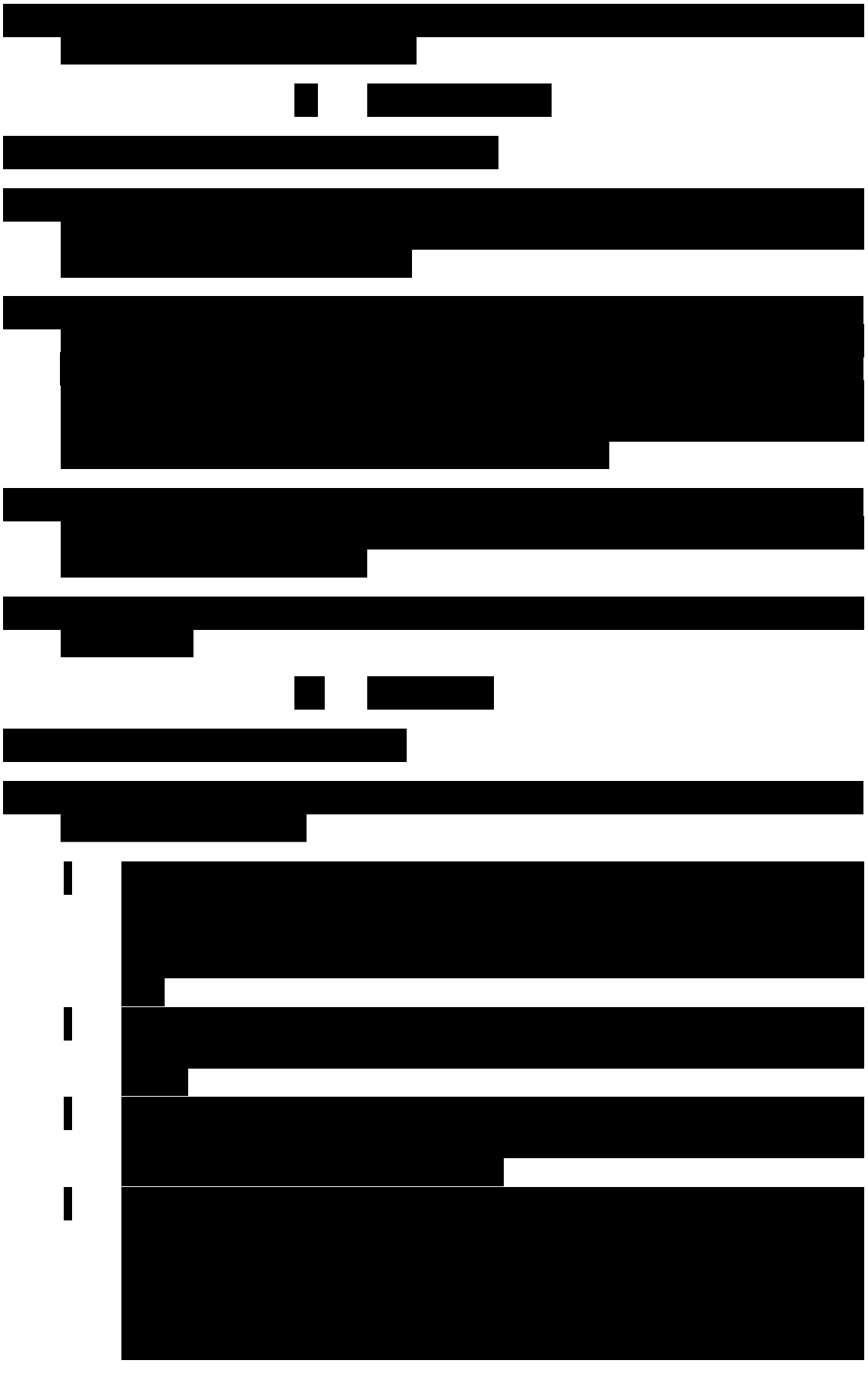


[redacted]

1269. The Tribunal concludes that [redacted] was neither arbitrary nor discriminatory.

(iii) No breach of the FET standard in general

1270. The Claimant has also not made out its case that such decision breached the FET standard in general.

[redacted]

1273. In the absence of any evidence of a clear and explicit (or even implicit) representation made by or attributable to the Hellenic Republic in order to induce the Claimant's investment, Laiki is not in a position to argue that it had any legitimate expectation that Greece would [redacted]

* * *

1274. In sum, the Tribunal concludes that [redacted] does not amount to a breach of the FET standard assumed by Greece under the BIT.

[redacted]

[redacted]

[redacted]

d. Conclusion

1340. Art. 2(2) of the BIT guarantees that protected investments will "not be impaired in any way due to arbitrary or discriminatory measures". And Art. 3(1) guarantees that protected investments "owned in whole or in part by investors of the other Contracting Party" will not be subject to "less favorable treatment" than that accorded to the investments "of its own investors or of any third State".

[redacted]

1344. Greece has failed to submit a plausible explanation as to why [redacted] decided to grant [redacted] to the Comparator Banks, while at the same time deciding to reject [redacted] applications. It has also failed to offer a plausible explanation as to why the [redacted] eventually changed direction. It would have been easy for the Hellenic Republic to produce evidence proving such justification. As [redacted] testified in the Hearing[1191], [redacted] requests (as other administrative procedures) must conclude with a resolution that must be notified to the requesting party (even if the content of the resolution is confidential). Despite being ordered to produce relevant documents[1192], Greece has failed to do so.

1345. Absent such justification, the Tribunal concludes that [redacted] decision to deny [redacted] to [redacted] was a "discriminatory measure". It was a measure which subjected [redacted] to a "less favorable treatment" than that accorded to Greek banks and French investors, with the consequence that the Hellenic Republic, which is responsible for the measures adopted by [redacted], has incurred in a breach of Art. 2(2) and 3(1) of the BIT.

1346. Having reached this conclusion, the Tribunal need not additionally decide whether [redacted] decision was also arbitrary, or whether Greece breached other sections of Art. 2 or Art. 3 of the BIT.

[1191] HT4 ([redacted]), pp. 12-16.
[1192] PO 7, p. 41.

[redacted]

[redacted]

(ii) [redacted] conduct

1373. The conduct of [redacted] was neither discriminatory nor arbitrary (or otherwise in violation of the FET commitment):

1374. There was no discrimination, because Laiki has failed to provide any evidence that [redacted] in a similar situation provided more favourable treatment to another bank - whether Greek or foreign owned.

1375. There also was no arbitrariness.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

3.5 CONCLUSION

1382. Claimant submitted three separate sub-claims within its [redacted] Claim.

1383. First, Laiki argues that [redacted] denied [redacted] to [redacted] Laiki's Greek branch, in breach of the Treaty. The Tribunal, not without some hesitation, concludes that [redacted] refusal to grant [redacted] to [redacted] was neither discriminatory nor arbitrary, nor did it otherwise breach Art. 2 and/or 3 of the BIT.

1384. Second, Laiki claims that [redacted] unlawfully denied [redacted] to Laiki's Foreign Subsidiary in Greece, [redacted]. The Tribunal finds that that [redacted] decision to deny [redacted] to [redacted] was a "discriminatory measure", which subjected [redacted] to a "less favorable treatment" than that accorded to Greek banks and to Foreign Subsidiaries owned by French investors. The result is that the Hellenic Republic breached Art. 2 and 3 of the BIT.

1385. The precise amounts of [redacted] which [redacted] could have drawn, absent the Republic's breach, the conditions under which such [redacted] would have been granted and the quantification of the damage caused, are issues which will be assessed in the next phase of this procedure.

1386. Third, Laiki claims that Greece unlawfully denied Laiki the capital support which [redacted] provided to the four biggest Greek banks. The Tribunal concludes that Laiki, providing banking activities through a branch in Greece, did not meet the requirements, established by [redacted] as dictated by the Troika, to access [redacted] funding. The [redacted] decision to treat Foreign Subsidiaries and branches of foreign banks differently is not in itself discriminatory – it simply reflects the structural differences between a branch and a subsidiary. [redacted]

1387. In conclusion, the Hellenic Republic, [redacted], incurred in discriminatory measures and subjected Claimant's investment in Greece to less favorable treatment than it afforded to the investments of its own investors or the investors of a third State and thus breached its obligations under Art. 2 and 3 of the BIT.

VIII.3. [redacted]

1388. According to Claimant, Respondent's conduct in relation to [redacted] constituted a breach of the FET and FPS provisions of the BIT. [redacted]

1389. The Hellenic Republic denies any breach of the BIT, asserting that Claimant has failed to discharge its burden of establishing any wrongful conduct attributable to Respondent and has failed to discharge its burden of proving a breach of the FET and FPS standards or an unlawful expropriation under the BIT.

1390. The Tribunal will summarize the Parties' positions (**1.** and **2.**) and then will adopt a decision (**3.**).

1. CLAIMANT'S POSITION

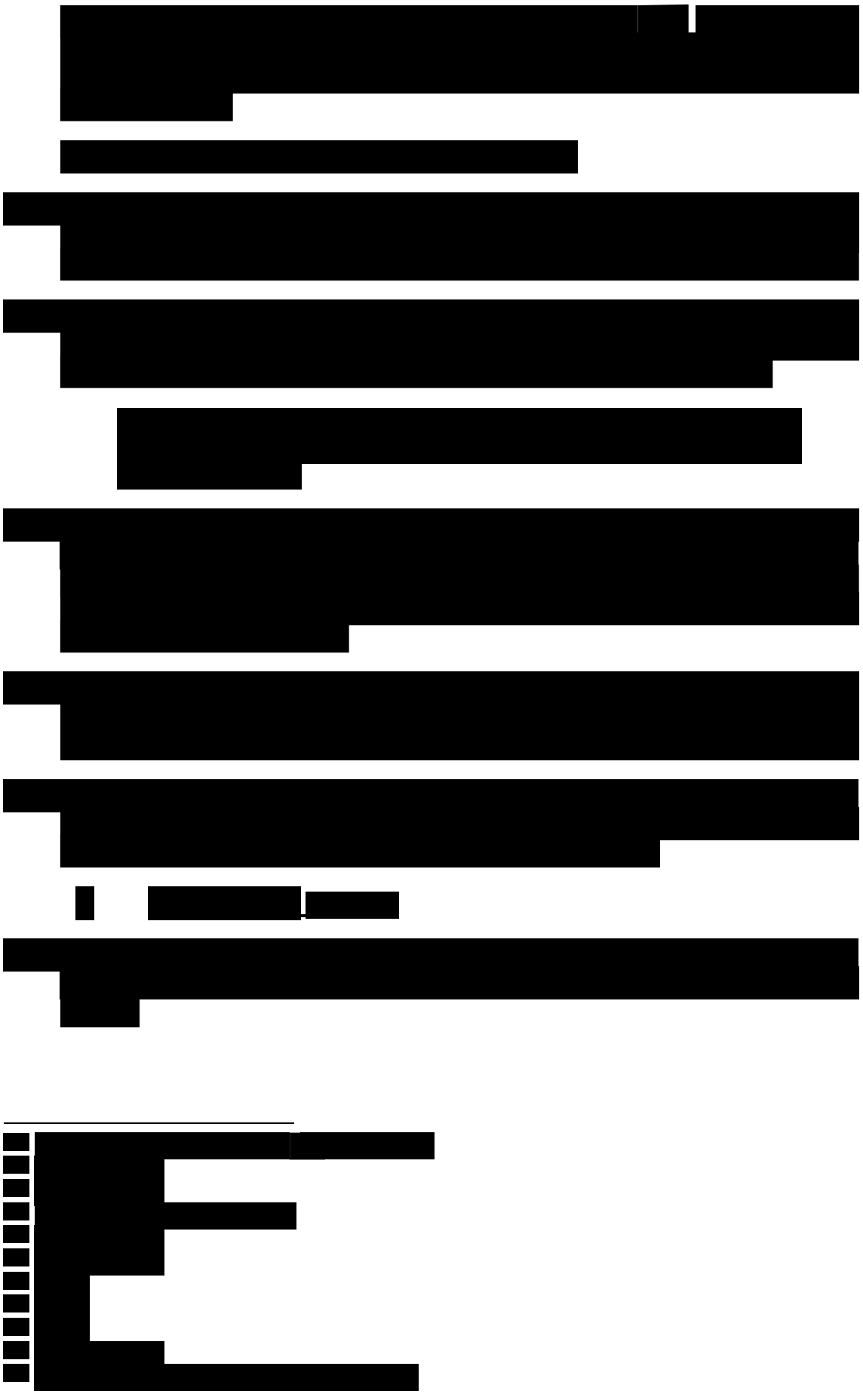
[redacted]

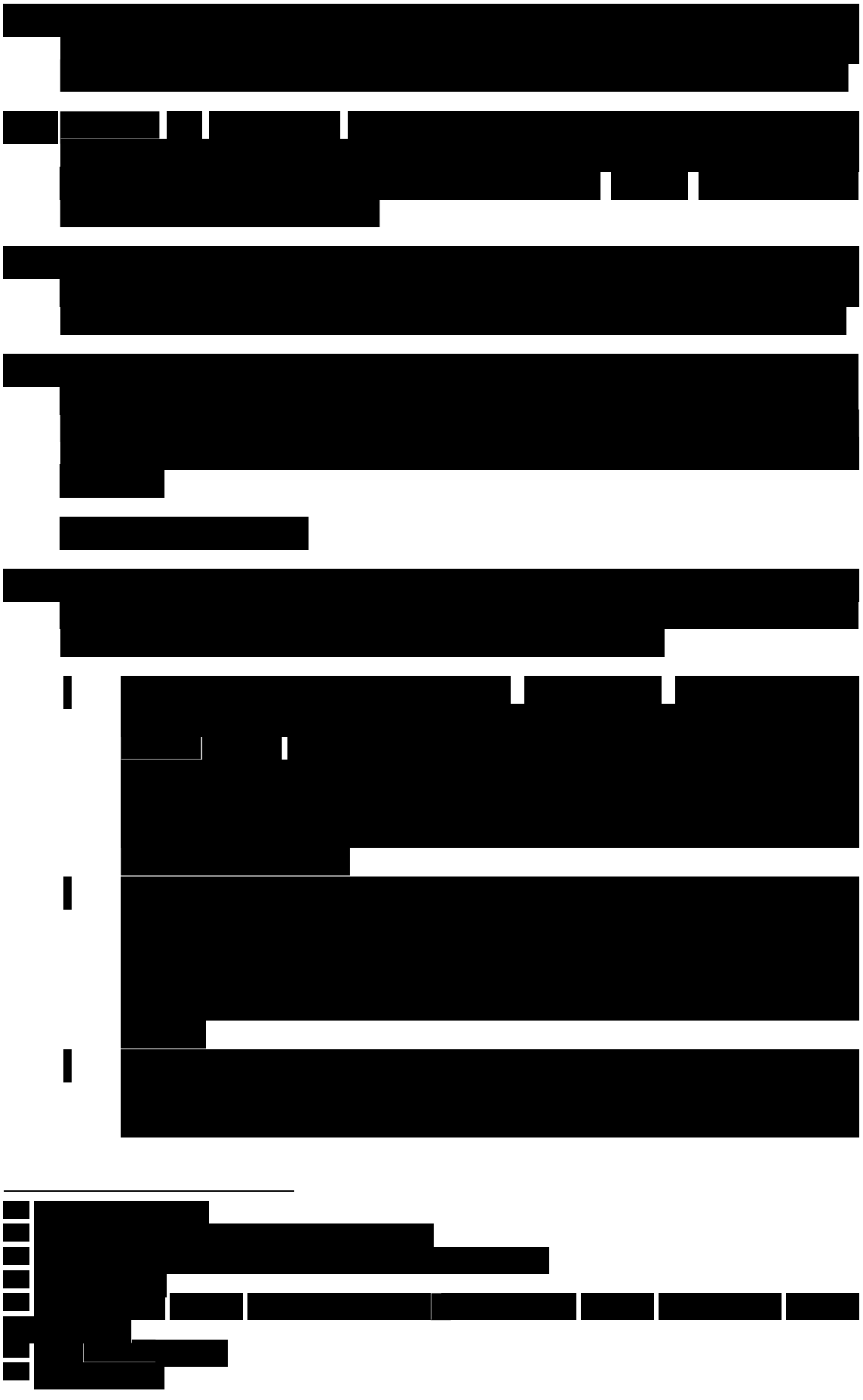
[redacted]

[redacted]

[redacted]

[redacted]





[redacted]

3. THE TRIBUNAL'S DECISION

[redacted]

1412. The Tribunal is persuaded by the arguments of Respondent.

[redacted]

1414. The Tribunal will first outline the requirements for attribution under customary international law (**3.1.**); summarize the relevant proven facts (**3.2.**); evaluate whether [redacted] can be attributed to Respondent (**3.3.**) and dismiss Claimant's main arguments (**3.4.**).

3.1 THE LAW OF STATE ATTRIBUTION

1415. The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ["**ILC ASR**"] codifies the customary rules of attribution under international law.

1416. Under Article 2 of the ILC ASR s a State may be held liable for a wrongful act under international law in the following case:

> "There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> (a) is attributable to the State under international law;
>
> (b) constitutes a breach of an international obligation of the State". [Emphasis added]

[1228] R IV, para. 154, citing to C-11, p. 7 and C-12, p. 3.
[1229] C-161.

1417. An act or omission is attributable to a State under international law if the act was committed by:

- the State's organs[1230];
- persons or entities empowered by the State to exercise elements of governmental authority[1231]; or
- persons acting under the instructions, direction or control, of that State, when committing the act[1232].

1418. Therefore, in order for Greece to be held responsible for the losses suffered by Claimant as a result of [redacted], Claimant must establish that the internationally wrongful act – [redacted] – was committed either by an organ of the Hellenic Republic, or by an entity empowered by Greece to exercise governmental authority, or by persons acting under the instructions, direction or control of Greece.

[redacted]

[1230] Art. 4(1) ILC ASR: "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State".

[1231] Art. 5 ILC ASR: "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance". See Also Art. 9 ILC ASR: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority".

[1232] Art. 8 ILC ASR: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct".

[redacted]

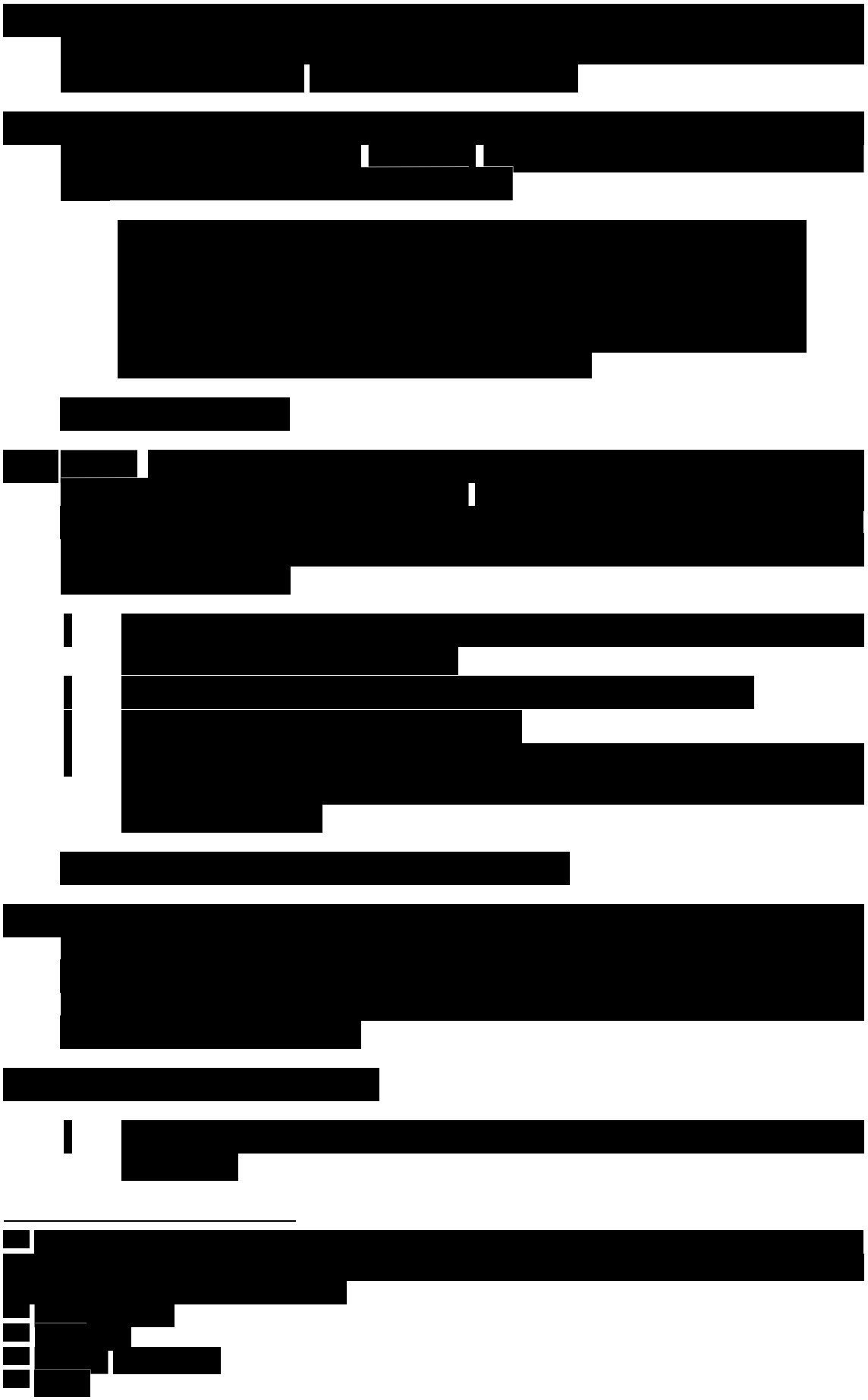
[redacted]

3.3 DISCUSSION

1443. Claimant has failed to establish that [redacted] amounts to an internationally wrongful act and a breach of the BIT which can be attributed to the Hellenic Republic.

[redacted]

[redacted]



[redacted]

1466. In sum, the Tribunal finds that Greece has not engaged, in respect of this claim, in culpable conduct which constitutes an internationally wrongful act or a breach of

the BIT, attributable to the Hellenic Republic under the customary international law principles of State attribution. Neither

- a Greek State organ[1283],
- nor a person or entity empowered by Greece to exercise elements of governmental authority[1284],
- nor persons acting under the instruction, direction or control of Greece[1285],

can be held responsible for [redacted]

[redacted]

[redacted]

[redacted]

3.5 CONCLUSION

[redacted]

[redacted]

[redacted]

[redacted]

1483. In conclusion, the [redacted] Claim fails for lack of attribution, and thus, Respondent cannot be held liable for any international wrong concerning [redacted] if any, derived from it. Laiki's [redacted] Claim is thus dismissed.

VIII.4. COMPOSITE BREACH CLAIM

1484. Laiki asserts its Debt Exchange, [redacted] and [redacted] Claims on a stand-alone basis. Additionally, Laiki makes an alternative argument, saying that, even if the Tribunal finds that Greece's acts and omissions underlying its individual Claims do not constitute a breach on their own, cumulatively, they do amount to a violation of Arts. 2 and 4 of the BIT.

1485. Respondent argues that Laiki has not proven any direct causal link or common pattern between the measures impugned, which would permit that such measures are considered a composite breach.

1486. The Tribunal will summarize the Parties' positions (**1.** and **2.**) and then will adopt a decision (**3.**).

[redacted]

1. CLAIMANT'S POSITION

1487. Claimant alleges that all measures impugned which form the basis for its three claims (Debt Exchange Claim, [redacted] Claim and [redacted] Claim) also constitute a creeping or gradual expropriation of its investment in Greece or a cumulative breach of the FET standard[1293].

1488. Claimant invokes Art. 15(1) of the ILC ASR[1294] and avers that all of Greece's acts and omissions taken together constitute a creeping expropriation:

[redacted]

[1293] C II, paras. 407 and 490; C IV, para. 45.

[1294] Art. 15 ILC ASR: "The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act".

[redacted]

[redacted]

2. RESPONDENT'S POSITION

1497. Respondent says that, to establish a composite breach, the Claimant must show an underlying pattern, common denominator, or purpose or intent. Laiki has failed to prove any of these elements to establish a composite breach of the FET standard[1302] or a creeping expropriation of Laiki's banking operations[1303].

[redacted]

[redacted]

[1302] R II, paras. 551-552.

[1303] R II, paras. 713-714; R IV, para. 158

[redacted]

[redacted]

3. THE TRIBUNAL'S DECISION

1502. The Tribunal will first address the applicable law (**3.1.**), review the proven facts (**3.2.**) and then adopt a decision with respect to the Composite Breach Claim (**3.3.**)

3.1 APPLICABLE LAW

1503. Laiki alleges that the Hellenic Republic breached Arts. 2(2) and 4 of the BIT, through a sequence of actions and omissions.

1504. It is well-established that a State may incur international responsibility as a result of a series of acts or omissions, that, taken together, amount to a breach of its international obligations. This is possible, even if the acts or omissions, assessed individually, do not give rise to international responsibility[1312].

1505. The BIT itself envisages, in its Art. 2(2), the possibility that the host State may incur in a violation of the FET and FPS standards through several "measures":

> "Investments by investors of one Contracting Party in the territory of the other Contracting Party shall always be accorded fair and equitable treatment and shall enjoy full protection and security. Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal of the other Party's investors' investments in its own territory is not impaired in any way due to arbitrary or discriminatory measures". [Emphasis added]

1506. Likewise, pursuant to Art. 4, an expropriation includes the prohibition of indirect expropriation, even if carried out through a series of "measures"[1313]:

> Investments by investors of either Contracting Party shall not be subject to expropriation or nationalization or any other measure the effects of which would be equivalent to expropriation or nationalization within the territory of the other Contracting Party, except under the following conditions:
>
> (a) the measures are taken for reasons of public interest and under due process of law,
>
> (b) the measures are clear and not discriminatory, and

[redacted]

[1312] *Vivendi II*, para. 7.5.31; *Siemens*, para. 263; *Santa Elena*, para. 76; *El Paso*, para. 518.
[1313] Art. 4 BIT.

(c) the measures are accompanied by provisions for the payment of immediate, adequate and effective compensation. Such compensation will be equal to the market value of the affected investment immediately before the measures referred to in this paragraph were implemented or became public knowledge

[…]". [Emphasis added]

1507. The principle that a State may breach its international obligations through a series of acts or omissions taken in the aggregate is included in Art. 15 ILC ASR:

> "Breach consisting of a composite act
>
> 1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
>
> 2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation".

1508. Art. 15 ILC ASR concern the timing of the composite breach: the breach occurs when the last act or omission of the sequence takes place, which taken together with the previous conduct, amounts to a breach of the international obligation. The tribunal in *Siemens* offers a description of the nature of the composite breach in the context of an assessment of creeping expropriation[1314]:

> "By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break".

1509. Once the breach is determined by the conclusive act or omission, it is considered to be extended for the period between the first and the last act or omission of the series. This is relevant, in the case of creeping expropriations, for the assessment of the compensation due for the composite breach.

Systemic character of the series of acts or omissions of the composite breach

1510. The Commentary to the ILC ARS emphasises the importance of Art. 15 in relation to "composite obligation[s]", which can only be breached through a series of "systematic" acts or omissions defined as wrongful in the aggregate.

1511. Previous investment arbitration tribunals have confirmed that a series of isolated acts by the State that affect the investment are not in themselves sufficient to characterize the aggregate of those acts as a composite breach. The acts must be

[1314] *Siemens*, para. 263.

interconnected, in the sense that they are adopted as part of a systematic policy of the State to target the investor. Thus a composite breach may only arise "where the actions in question disclose some link of underlying pattern or purpose between them"[1315], or adopted "under a common denominator"[1316]. An assessment of the series of events leading to the composite breach will usually reveal the purpose intended by the host State[1317].

Attribution

1512. The acts or omissions forming part of the composite breach must be attributable to the State. Otherwise, the host State would end up responding for events that are out of its control. The Tribunal in *Generation Ukraine*, in the assessment of a creeping expropriation, said[1318]:

> "Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property …
>
> A plea of creeping expropriation must proceed on the basis that the investment existed at a particular point in time and that subsequent acts attributable to the State have eroded the investor's rights to its investment to an extent that is violative of the relevant international standard of protection against expropriation".

[redacted]

[1315] *Rompetrol*, para. 271.
[1316] *Rosinvest*, para. 621.
[1317] *Rosinvest*, para. 621; *Glamis*, para. 826; *Rusoro*, para. 430-438; *Crystallex*, paras. 672-708.
[1318] *Generation Ukraine*, para. 20.26.
[redacted]

[redacted]

3.3 DISCUSSION

[redacted]

[redacted]

1528. Laiki suggests that the underlying "pattern" behind Greece's conduct is the discriminatory treatment Laiki suffered, despite being in a comparable position to its competitors in the Greek market.

1529. The Tribunal is not able to accept this argument.

1530. In the Tribunal's opinion, Claimant has failed to tender evidence that establishes a systematic policy of the Hellenic Republic revealing a pattern of discrimination towards Laiki.

1531. In the Tribunal's opinion, what the evidence shows is an unfortunate chronological sequence which interconnects with the events alleged by Claimant. In the Tribunal's view, Claimant's argument is an example of the *post hoc, ergo propter hoc* fallacy:

[redacted]

[redacted]

1533. The Tribunal has only found one isolated instance, where Greece actually discriminated against Laiki: [redacted] And in that case, the Tribunal has found for Claimant and established that Greece failed to meet its treaty obligations.

* * *

1534. In conclusion, Laiki has failed to prove that the Hellenic Republic implemented a systematic policy of discrimination against Laiki that resulted in the creeping expropriation of its investment, or a composite breach of the FET standard.

IX. DECISION

1535. For the reasons set out above, the Tribunal unanimously rules as follows:

(1) Dismisses the jurisdictional and admissibility arguments of Respondent in respect of the Inter-State Dispute Objection, Transfer of Claims Objection, EU Law Incompatibility Objection and Amicable Settlement Requirement Objection;

(2) Upholds the jurisdictional and admissibility arguments of Respondent in respect of the EU Law Claims and Human Rights Objection;

(3) Decides that the Centre has jurisdiction and the Tribunal is competent to adjudicate the claims put forward by Claimant in respect of the Debt Exchange Claim, the [redacted] Claim, the [redacted] Claim and the Composite Breach Claim;

(4) Decides that Respondent, [redacted], has violated its obligations under Articles 2 and 3 of the BIT.

(5) Dismisses all other Claims put forward by Claimant.

(6) Decides to proceed to determine the consequences that follow from the violation of Articles 2 and 3 of the BIT identified at paragraph 4 above, including the measure and quantum of damages that are to be paid, if any, in accordance with Procedural Order No. 3; and

(7) Reserves its decision on the costs of the proceedings.

[redacted]

Philippe Sands
Arbitrator

Date: 16.12.2018

[redacted]

Giorgio Sacerdoti
Arbitrator

Date: 11.12.2018

[redacted]

Juan Fernández-Armesto
President of the Tribunal

Date: 7.12.18