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IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE (2017)

- between -

KOMAKSAVIA AIRPORT INVEST LTD
(Republic of Cyprus)

the "Claimant"

- and -

THE REPUBLIC OF MOLDOVA

the "Respondent"

REPUBLIC OF MOLDOVA'S MEMORIAL ON BIFURCATED JURISDICTIONAL ISSUES (SCC ARBITRATION 2020/074)

28 MAY 2021

Tribunal
Ms. Jean Kalicki (Chair)
Prof. Philippe Sands QC
Prof. Brigitte Stern

Administrative Secretary to the Chair
Dr. Joel Dahlquist

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LIST OF ABBREVIATIONS / DEFINED TERMS

to the Republic of Moldova's Memorial on Bifurcated Jurisdictional Issues

(SCC Arbitration V 2020/074)

Abbreviation	Word or Phrase
AML	Anti-money Laundering
AO *(Rus)*	Joint-Stock Company
AS. *(Lat.)*	Joint-Stock Company
Avia Invest	Avia Invest SRL
BIT	Agreement Between the Government of the Republic of Moldova and the Government of the Republic of Cyprus for the Reciprocal Promotion and Protection of Investments of 13 September 2007
CB or BC *(Rom.)*	Commercial Bank
CIA	Chisinau International Airport
EUR	Euro
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
Komaksavia	Komaksavia Airport Invest Ltd
MD	ISO two-letter country code of the Republic of Moldova
MDL	Moldovan Lei
NBM	National Bank of Moldova
NCFM	National Commission for Financial Market of the Republic of Moldova
ООО *(Rus.)*	Limited Liability Company
Para.	Paragraph

PPA	Public Property Agency
PJSC (Rus)	Public Joint Stock Company
PJSCHC (Rus)	Public Joint Stock Company Holding Company
PoA PoAs (pl.)	Power of Attorney
PSC	Person with significant control
S.A. or SA (Rom.)	Joint Stock Company
SC (Rom.)	Commercial Company
SCC	Stockholm Chamber of Commerce
SECIA	State Enterprise "Chisinau International Airport"
S.E.	State Enterprise
SE Chisinau International Airport	SE Chisinau International Airport, a Moldovan State-owned company
S.R.L. or SRL (Rom.)	Limited Liability Company
Tender Application / Tender Offer	Application submitted by the bidding consortium "The Association of Legal Persons 'Avia Invest"'
UBO	Ultimate Beneficial Owner
USD or US$	Dollar of the United States of America

I. INTRODUCTION

1. Pursuant to the Tribunal's Procedural Order No. 5 dated 26 March 2021, as amended by the Tribunal's Procedural Order No. 6 dated 6 May 2021, which was amended by the Tribunal's Letter dated 21 May 2021, the Republic of Moldova hereby submits the Memorial on Bifurcated Jurisdictional Issues.

2. The Republic of Moldova's Application for Revocation of the Emergency Award on Interim Measures Issued by the Emergency Arbitrator in the Arbitration SEC EA 2020/130, and the exhibits thereto, submitted on 27 November 2020 (the **"Respondent's Application dated 27 November 2020"),** as well as the Republic of Moldova's Reply to Claimant's Response to Respondent's Application for the Revocation of the Emergency Award on Interim Measures Issued by the Emergency Arbitrator in the Arbitration SEC EA 2020/130, and the exhibits thereto, submitted on 4 January 2021 (the **"Respondent's Reply dated 4 January 2021"),** the Republic of Moldova's Request for Summary Procedure, and the exhibits thereto, submitted on 5 February 2021 (the **"Respondent's Request for Summary Procedure dated 5 February 2021")** should be treated as incorporated into this Memorial, and the Respondent relies upon the factual and legal arguments put forward therein. Unless otherwise specified herein, the Republic of Moldova adopts the defined terms set in the aforementioned submissions.

3. The Respondent is not aware of the facts and circumstances alleged by the Claimant in its submissions, including the Request for Arbitration (the **"RfA")** and Statement of Claim (the **"SoC").** The Claimant shall be held to the strict standard of proof of the facts and circumstances it refers to in the instant case.

4. The Respondent notes that in the Statement of Claim, the Claimant has completely ignored and failed to engage with the Respondent's arguments raised and the evidence adduced in the Respondent's Application dated 27 November 2020 and the Respondent's Reply dated 4 January 2021.

5. The Republic of Moldova reserves the right to raise further jurisdictional and other objections in the next phases of these proceedings. The Republic of Moldova further reserves all its rights to develop, amend, expand and/or otherwise modify its case and the relief sought.

II. GENERAL PROCEDURAL ISSUES

A. General Remarks

6. Exhibits, statement of fact witnesses / reports of experts and legal authorities will be referenced as set out in sections 13.5, 13.6, 13.7 and 13.8 of the Procedural Order No. 1.

B. Applicable Law

7. Pursuant to Art. 10.4 of the Agreement Between the Government of the Republic of Moldova and the Government of the Republic of Cyprus for the Reciprocal Promotion and Protection of Investments of 13 September 2007 (the **"BIT") [Exhibit RLA-1 *bis],*** the Tribunal should apply:

> "- the provisions of this Agreement; and
>
> - the rules and universally accepted principles of international law."

C. Level of Substantiation

8. The Claimant shall substantiate its assertion in such detail for evidence to possible to be taken on it. The consequence of insufficient substantiation or evidence is the rejection of the claim.

D. Structure of this Memorial

9. The Respondent will first elaborate on the lack of jurisdiction ratione personae of the Arbitral Tribunal (III.).

10. Thereupon, the Respondent will demonstrate that the Arbitral Tribunal lacks jurisdiction ratione materiae **(IV.).**

11. The Respondent will then develop on the lack of jurisdiction of the Arbitral Tribunal because of the Claimant's failure to properly request and proceed with the amicable settlement **(V.).**

12. Finally, the Respondent will delineate the relief sought **(VI.).**

III. THE TRIBUNAL DOES NOT HAVE JURISDICTION *RATIONE PERSONAE*

A. Introduction

13. To qualify as an investor under the BIT, the Claimant shall prove that it satisfies the requirements of the BIT Article 1(3)(b)(ii) and, particularly, that apart from being **a legal person constituted or incorporated** under the law of Cyprus, it had its **seat in the territory of Cyprus.**

14. The BIT Article 1(3) provides, in relevant part, that:

> "3. The term 'investor' means:
>
> a) In respect of the Republic of Moldova:
>
> i) [...]

> ii) Legal persons or any other legal entity incorporated, constituted or otherwise duly organised under the applicable law of the Republic of Moldova, as well as individual entrepreneurs, having its seat and performing real business activity in the territory of the Republic of Moldova.
>
> b) In respect of the Republic of Cyprus:
>
> (i) [...]
>
> (ii) Legal person **constituted or incorporated in compliance with law** of the Republic of Cyprus and **having their seat in the territory** of the Republic of Cyprus."[1]

15. Accordingly, the Claimant shall be "constituted or incorporated in compliance with the law of the Republic of Cyprus" and shall have its seat in the territory of the Republic of Cyprus"[2] in order to benefit *ratione personae* from the BIT. Those two criteria must be met cumulatively (simultaneously) in order to qualify as a Cypriot investor under the BIT Article 1(3)(b)(ii).

16. The aim of this cumulative set of nationality of a juridical person was mainly to reduce the practice of treaty shopping. This stricter set of nationality criteria under the BIT Article 1(3)(b)(ii) requires for genuine close links between a legal person and Cyprus, as the State of its nationality, the home State. Furthermore, the combination of those two nationality criteria should render more difficult the possibility of creating a mere "mailbox" subsidiary.

17. The Claimant recognises that "incorporation" and "seat" are two different nationality criteria provided for in the BIT Article 1(3)(b)(ii).3 Specifically, the Claimant recognises "seat" as a separate, distinct criterion that the Claimant should fulfil to be considered an "investor" under the BIT.4 To that extent, there is no dispute between the parties.

18. However, in the RfA and SoC, the Claimant merely states that it has its seat in the territory of the Republic of Cyprus, while bringing no evidence that it in fact has its seat in Cyprus and/or that it meets that criterion.5 Indeed, it is surprising how little to no evidence has been submitted by the Claimant with its submissions, where it has the burden of proof of what has been alleged by it in those proceedings. Particularly, almost no evidence has been submitted by the Claimant to prove its asserted status of a qualified investor under the BIT. There is evidence that in

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[1] Art. 1 para. 3 b) (ii) of the BIT **[Exhibit RLA-1 *bis*].**
[2] *Ibid.*
[3] See RfA, paras. 1, 18; Claimant's Comments to Respondent's Answer, para. 18, 19, 20; Soc, paras. 1, 32, 35, 36, 37; Claimant's Reply dated 5 March 2021, para. 58.
[4] See RfA, paras. 1, 18; Claimant's Comments to Respondent's Answer, para. 18, 19, 20; SoC, paras. 1, 32, 35, 36, 37; Claimant's Reply dated 5 March 2021, para. 59.
[5] See RfA, paras. 1, 18; SoC, paras. 1, 32, 35, 36, 37.

these proceedings the Claimant has espoused a tactic of post-factum recreation of the reality.[6]

19. In any event, contrary to the Claimant's assertions, Komaksavia does not have the seat in Cyprus and does not meet that criterion set out in the BIT Article 1(3)(b)(ii). Furthermore, the Claimant does not have its registered office, which is subsumed in the notion of "incorporation", in the territory of the Republic of Cyprus.

20. In both the RfA and Soc, the Claimant asserts that:

> "The Claimant is ... a private limited liability company **incorporated** ... and having its **seat in the territory of the Republic of Cyprus with the following contact details:**
>
> Komaksavia Airport Invest Ltd
> Makareiou, 256, EFTAPATON COURT,
> Flat/Office C3, 3107, Limassol, Cyprus
> Tel: +357 96 675665
> Email: andreas.menelaou@komaksavia.com"[7] *(emphasis added).*

21. Thus, it appears that the Claimant has not provided the address of its purported "seat" in the territory of Cyprus. The Claimant merely provides the Claimant's "contact details" for the purposes of this arbitration.

22. In the SCWS-Menelaou, Menelaou asserts that the Claimant has physical presence in Cyprus, renting the "working space 02" from Andreas Menelaou LLC *(ANIJPEAL MENE/\AOY IJ.E.n.E.* in Greek characters) at the address: Makarious Avenue, Eftapaton Court, Office C4 *[sic],* 3105, Limassol, Republic of Cyprus.[8]

23. Further, Menelaou asserts that Claimant has business activity in Cyprus, because it "holds share capital *[sic]* and shares of another business entity", "is involved in legitimate business, with identifiable ultimate beneficial owner(s) (Mr Tenev and Mr Goncharenko)."[9]

24. He also asserts that Claimant's sole director resides in Cyprus, Claimant's important decisions are taken by the Cypriot director, Claimant's headquarters are in Cyprus, Claimant holds shares in Avia Invest, Claimant can dispose of funds received from

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[6] Such as the issue with the translation by the Claimant of certain documents, *inter alia,* of the Concession Agreement. The Respondent further notes that the in paras. 4.1. and 11.1. (the 4th line) of the Concession Conditions **[Exhibit [SC-24]],** the Claimant wrongly and purposefully translated the term *"fntreprinderii concesionale"* as "concessionaire" instead of "concession enterprise". This is a clear intent by the Claimant to mislead the Tribunal regarding the obligations which were unequivocally and differentially prescribed to the *concessionaire,* on the one hand, and the *concession enterprise,* on the other hand. The legal requirements regarding the certified translations in the Republic of Moldova are governed by the Law on the Status, Authorisation and Organisation of the Activity of Interpreter and Translator in the Justice Sector, specifically Art. 19 thereof **[Exhibit R-102].**

[7] RfA, para. 1; Soc, para. 1.

[8] See SCWS-Menelaou, para. 36.1. **[Exhibit [SC-751).**

[9] *Ibid.,* para. 36.2.

its business activity and has no binding obligations of transferring its income to third parties, Clamant is the actual beneficiary of revenues, Claimant "as a holding company exercises management and control in the territory of the Republic of Cyprus related to holding and protecting the shares of Avia Invest", Claimant can dispose of its income, and Claimant has no due tax arrears. [10] Except a purported sub-lease agreement,11 no other document has been put forward to prove those assertions.

25. In the Claimant's Reply dated 5 March 2021, the Claimant asserted that it has its "seat being located in the Republic of Cyprus", [12] because:

25.1. the Claimant was incorporated in Cyprus and no change occurred "in its status at any time since incorporation"; [13]

25.2. the Claimant provided in its submissions an address and a telephone number in Cyprus; [14]

25.3. the Claimant's managing director, Menelaou, has an address in Cyprus, from where he carries out business operations "including his responsibilities as managing director of the Claimant" [sic]; [15]

25.4. the CSWS-Menelaou "is the evidence of a Cypriot lawyer"[16] and "[t]here is no conceivable basis to contend that he is not telling the truth" [sic] when Menelaou has stated [17] that:

25.4.1. he works predominantly from Cyprus; [18]

25.4.2. the short-lived purchase of 100% of the shares in Komaksavia by NR Investments Limited was carried out from Menelaou's office in Cyprus; [19]

25.4.3. as a practicing lawyer in Cyprus, he is familiar "with the requirements imposed upon Cypriot companies such as the Claimant"; [20]

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[10] *Ibid.,* para. 36.3. (including sub-paras. 36.3.1. to 36.3.10.).
[11] See **Exhibit C-8** to the Claimant's Reply dated 5 March 2021; cf. **Exhibit [SC-75),** as well as **Exhibit [C-2)** and **Exhibit [CA-35)** (the latter two being exhibits to the Claimants' Response dated 18 December 2020).
[12] Claimant's Reply dated 5 March 2021, para. 86.
[13] See *ibid.,* paras. 86.1. and 86.2.
[14] See *ibid.,* para. 86.3.
[15] *Ibid.,* para. 86.4.
[16] The Respondent notes, however, that contrary to this statement, pursuant to para. 1 of the SCWS-Menelaou, Menelaou provides his second witness statement as "the managing director of Komaksavia", rather than as a legal expert or in any other quality.
[17] See Claimant's Reply dated 5 March 2021, para. 86.5.
[18] See Claimant's Reply dated 5 March 2021, para. 86.5.1.; see also SCWS-Menelaou, para. 5 **[Exhibit [SC-75]].**
[19] See Claimant's Reply dated 5 March 2021, para. 86.5.2.; see also SCWS-Menelaou, para. 8 **[Exhibit [SC-75)].** It shall, however, be noted that Menelaou was not a director of the Claimant at the time of alleged short-lived purchase by NR Investments Limited.
[2O] Claimant's Reply dated 5 March 2021, para. 86.5.3.; see also SCWS-Menelaou, paras. 28 and 35 **[Exhibit [SC-75)).**

25.4.4. the Claimant complies with anti-money laundering legislation in Cyprus because: [21]

25.4.4.1. the Claimant has "a physical presence in Cyprus", as evidenced, inter alia, by the Sublease Agreement; [22]

25.4.4.2. "[t]he Claimant has established business activities in Cyprus because it holds shares in another business and it has identifiable ultimate beneficial owners"; [23]

25.4.4.3. the Claimant meets various other 'substance criteria' allegedly provided by the Claimant in its submissions. [24]

26. The Claimant considers that for the determination of the Claimant's nationality in the instant case the Tribunal should apply "the narrower/municipal-law" analysis[25] developed in Renta 4 S.V.S.A., et al v The Russian Federation[26] and Sanum Investments Limited v Lao People's Democratic Republic.[27] This is to be denied.

27. The Claimant further asserts that it satisfies the relevant factors considered in CEAC v Montenegro[28] for the determination of a company's seat in Cyprus, because Komaksavia has a physical premise - working space 02 - which it rents from the Sublessor; [29] the building is accessible during office hours, and the Claimant accepts notices and services at the address of the premises; [30] books and registers are kept at the Claimant's office; [31] the Claimant's name is affixed outside of the main entrance to the office. [32]

28. Most of the Claimant's allegations are simple assertions without any underlying evidence. In fact, a majority of the Claimant's assertions are proved to be wrong.

29. In fact, besides being incorporated in Cyprus, the Claimant has no connection with Cyprus. It does not have business, no place of business, and no employees in Cyprus. The decisions with regard to its purported shareholding in Avia Invest are not taken in Cyprus. Komaksavia has no substantive funds in Cyprus. Furthermore, it has no income and no means of generating funds in Cyprus.

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21 See Claimant's Reply dated 5 March 2021, para. 86.5.4.
22 See ibid., para. 86.5.4.1.
23 Ibid., para. 86.5.4.2.
24 See ibid., para. 86.5.4.3.
25 See ibid., paras. 78 and 87.
26 See Renta 4 S.V.S.A., et al v The Russian Federation, SCC Arbitration V (24/2007), Award on Preliminary Objections **[Exhibit [CLA-9]).**
27 See Sanum Investments Limited v Lao People's Democratic Republic, UNCITRAL, PCA Case No. 2013-13, Award on Jurisdiction **[Exhibit [CLA- 10)].**
28 Central European Aluminum Company {CEAC) v. Montenegro, ICSID Case No. ARB/14/8, Award, dated 26 July 2016, para. 208 **[Exhibit RLA-17].**
29 See Claimant's Reply dated 5 March 2021, para. 89.1.(a) and (b).
30 See ibid., para. 89.1.(c).
31 See ibid., para. 89.1.(d).
32 See ibid., para. 89.1.(e).

30. The Claimant has not discharged its burden of proof regarding "their seat in the territory of the Republic of Cyprus" (the second nationality criterion). Furthermore, the Claimant has not discharged its burden of proof that it has its registered office, which is entailed in the "incorporation" (as the first nationality criterion), in the territory of the Republic of Cyprus.[33] In fact, the Claimant does not have its seat in Cyprus. Furthermore, the Claimant does not have its registered office in Cyprus.

31. In the Respondent's Answer to the Claimant's Request for Arbitration dated 9 July 2020, the Respondent raised the objection that the Claimant had not proved its seat in the territory of the Republic of Cyprus.[34] Furthermore, the Respondent raised the lack of seat's objection in the Respondent's Application dated 27 November 2020 and the Respondent's Reply dated 4 January 2021. Notwithstanding those repeated objections, in the Soc dated 14 January 2021, the Claimant totally failed to tender any evidence to address those objections and to prove that it is duly incorporated, has its registered office, and has its seat in the Republic of Cyprus.

B. No "Seat" in the Territory of Cyprus

32. Contrary to the Claimant's assertion, the Claimant does not have its "seat" in the territory of the Republic of Cyprus and, therefore, may not qualify *ratione personae* as a Cyprus "investor" under the BIT Article 1(3)(b)(ii). Furthermore, the Claimant does not have its "registered office" - an element of "incorporation" - in the territory of the Republic of Cyprus, because not all elements required under the Cypriot company law are met at the designated address of the registered office indicated by the Claimant.

33. The Respondent will prove in the following paragraphs that:

33.1. the criterion of "seat" in the BIT Article 1(3){b)(ii) should be interpreted as a separate from "incorporation" and, at the same time, cumulative nationality criterion that needs to be satisfied, and that it entails the place of effective management and financial control;

33.2. the Claimant does not have its seat in the territory of Cyprus as it is effectively managed by Shor through agents and proxies, including through a Bulgarian national, Tenev, who resides in Bulgaria, and through a Russian citizen, Goncharenko, who resides in the Russian Federation, and, in any event, it is effectively managed from outside of Cyprus, and, consequently, does not meet the requirements of the BIT Article 1(3)(b)(ii).

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33 In para. 4 of the Respondent's Answer to the Claimant's Request for Arbitration dated 9 July 2020, the Republic of Moldova raised the objection that the Claimant has not proved its nationality **[Exhibit SC-9].**

34 *Ibid.*

1. The "Seat" Should Be Interpreted Autonomously Under the BIT

34. While the first the criterion in the in the BIT Article 1(3)(b)(ii) - that of "incorporation" (entailing the "registered office") - shall be assessed under the law of the Republic of Cyprus, the criterion of "seat" shall be assessed from the perspective of international law.

35. "Seat" may not represent something that is an inseparable effect of "incorporation". As a matter of fact, the "incorporation" and "seat" of a company may be and often are located in different countries. Certainly, being aware of that fact and to avoid such territorial disconnect between these two places in the interest of achieving the object and purpose of the BIT, Moldova and Cyprus agreed in the BIT Article 1(3)(b)(ii) that both the "incorporation" and "seat" be located in the Republic of Cyprus.

36. Since the Claimant is a company, inevitably the decisions for it have to be and are taken by natural persons as members of the general meeting or Board of Directors of the Claimant. The location where the decisions regarding the central policy core of the whole company of Komaksavia are in substance made by such organs shall be considered the place of the location of Komaksavia's seat.

37. In the instant case, Komaksavia has been controlled by nationals of other States, and Komaksavia has had no business activities in the State of incorporation (Cyprus), and the seat of management and the financial control are both located in another State, in any event, outside Cyprus.

38. It shall be further distinguished between and investigated into, on the one side, a company's statutory organs which the company established in order to achieve compliance with the laws and regulations for the purpose of registration with the registrar of companies, and, on the other side, where the effective, as a matter of substance, not simply as formality, decisions for the company were taken. "Seat" is a real concept and is concerned with where decisions in substance, having "real influence",35 and not as a matter of form, are taken for the company.

39. The "seat" of a legal person is similar to the "residence" of a natural person which is the place where the natural person factually resides, and not the place where it should be residing. That place shall be established based on the particular facts existing in each case with regard to the particular person.

40. The Republic of Moldova submits that the "seat"36 under the BIT Article 1(3)(b)(ii) should ordinarily mean the place of effective management and financial control, which is the place where the organs of direction, management and control of the

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[35] In many jurisdictions, including Cyprus and Moldova, those with "real influence" in a company are called shadow directors and are treated for liability purposes as the company's appointed directors.

[36] "Seat" is called *"t6pa" ("edra")* in the Greek language text and *"sediu"* (or *"sediul"* with definite article) in the Romanian (Moldovan) language text of the BIT.

company are, in fact, mainly located, that is, where the central policy core of the whole company is in substance made.

41. Where considered as a connecting factor, "seat" in its turn relies on more specific category of connecting factors which are capable of localising a legal person in a specific State. Those are the "decision making within" the legal person and the "internal governance structure". In turn, those latter factors are capable of directly localising a legal person through the "place of effective management and financial control" of the legal person.

42. "Seat", that is, place of effective management and financial control shall be determined by analysing how the affairs of a company were in fact conducted, rather than as it was prescribed under the company's internal regulations. It is the actual place of effective management and financial control of a company that would determine corporate "seat", rather than the place where the company ought to be managed or controlled. This results from the literal meaning of **"having** their seat" *(emphasis added).* The factual position of "place of effective management" and "financial control" may only be determined by scrutinising what the company actually does, as this will ascertain how a corporation's actions are directed.

43. Neither the BIT Article 1(3)(b)(ii) nor other BIT's provisions do further define the criterion of "seat". Given the BIT's silence in that regard, in order to define and determine the meaning of "seat" recourse must be had to the interpretative techniques provided for in the Vienna Convention on the Law of Treaties (the **"VCLT").** Indeed, the lack of further definition of "seat" in the BIT itself necessitates an analysis of that term grounded in the established rules of treaty interpretation under international law.

a. Interpretation Pursuant to Vienna Convention

44. The starting point of the interpretation inquiry is Art. 31(1) of the VCLT which sets forth the well-known general rule on interpretation of treaties:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". [37]

45. The VCLT clearly gives precedence to the so-called textual (objective) approach. In line with that approach, the premise is that the text of the treaty expresses the genuine intention of the parties, and that the task of interpretation is to determine the true meaning of the text used. Words of the treaty are to be read as they are written, and they will be given their ordinary meaning taking into account the treaty's context, its object and purpose.

46. When reading the term "seat" in the context of the entire BIT Article 1(3)(b)(ii) it is apparent that it shall have its own autonomous meaning, different from the other

[37] Vienna Convention on the Law ofTreaties, Article 31(1) **[Exhibit RLA-13).**

criteria imposed by that provision. That is, "seat" shall not be made an element of "incorporation" or "constitution", because such interpretation would go against the principle of "effectiveness" pursuant to which provisions of a treaty shall be interpreted as to give each such treaty provision *"effet utile",* that is, "so that they do not become devoid of effect."[38]

47. The principle of "effectiveness" *("effet utile")* was described as a settled "canon of interpretation in all systems of law" by the tribunal in *Cayuga Indians (Great Britain) v. United States:*

> "Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than deprive it of meaning."[39]

48. Therefore, the term "seat" as read in the context of the BIT Article 1(3)(b)(ii) may only be understood as something additional to "incorporation" or "constitution" and, therefore, may not be taken to mean "registered office", which is an element of "incorporation".

49. That the term "seat" is intended to mean something additional to the being "constituted or incorporated in compliance with the law of the Republic of Cyprus" also flows from the object and purpose of the BIT, which is set out in the BIT's Preamble - the creation of favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party whilst the Contracting Parties desire to extend and intensify the long-term economic cooperation between themselves.[40]

SO. As apparent from the above, the BIT awards protection to investors in order to extend and intensify the long-term economic cooperation between the Republic of Moldova and the Republic of Cyprus. Such economic cooperation can only be promoted when investors who possess a true, genuine connection with one Contracting Party to the BIT, invest in territory of the other Contracting Party. The criterion of "incorporation", which, in its essence, relates to formalistic criteria under the national law (commonly related to registration before relevant state authorities), cannot reliably ensure existence of such genuine link. This is exactly why the additional criterion of "seat" is provided for in the BIT - it serves to counterbalance the formal criterion of "incorporation" with a criterion which presents a substantial connection to the home State. Only when the criteria of "incorporation" and "seat" are taken together, as two distinct criteria of different essential characters, do they create a nationality test that corresponds with the proclaimed goal of the BIT.

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[38] *Tenaris S.A. and Ta/ta - Trading e Marketing Sociedade Unipessoa/ Lda. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/26, Award, 29 January 2016, para. 151 **[Exhibit RLA-37].**

[39] *Cayuga Indians {Great Britain) v. United States,* Award, 22 January 1926, UN Reports of International Arbitral Awards, 2006, vol. VI, p. 184 **[Exhibit RLA-38].** See also *Asian Agricultural Products Ltd. v. Republic of Sri Lanka,* ICSID Case No. ARB/87/3, Final Award, 27 Jun 1990, para. 40, Rule (E) **[Exhibit RLA-39).**

[40] See the Bil's Preamble **[Exhibit RLA-1 *bis].***

b. No *Renvoi* to Cypriot Law

51. The Respondent submits that the term "seat" in the BIT Article 1 para. 3 let. b) (ii) shall be interpreted with reference to international law rather than with *renvoi* to national law of the Republic of Cyprus. That may plainly be inferred (also in a *per a contrario* interpretation) from the manner in which the BIT Article 1 para. 3 let. b) (ii) defines "incorporation". Thus, when it comes to that first jurisdictional requirement - "constituted or incorporated" - the text of the BIT Article 1 para. 3 let. b) (ii) expressly requires (that is, *renvoi)* that it be done "in compliance with law of the Republic of Cyprus".41 Yet, when it comes to the second jurisdictional requirement - "having their seat in the territory of the Republic of Cyprus" - that provision does not refer (no *renvoi)* to the application of the national law of Cyprus. It merely requires that the location of the "seat" be in the Republic of Cyprus, with no indication from the perspective of which law the "seat" shall be interpreted.

52. Hence, whilst the first condition is expressly defined and governed by the law of the Republic of Cyprus, the second condition escapes the application of the law of the Republic of Cyprus. This conclusion is reinforced by wording in Cyprus - Bulgaria BIT in which it is explicitly provided that the term "seat" shall be defined and governed by "the Cypriot legislation"[42]. Had the BIT's Contracting Parties intended that the second condition be also defined and governed by the law of the Republic of Cyprus, they would have expressly introduced such specific wording.

53. This interpretation is also underpinned by the contextual approach provided for in Art. 31(1) of the VCLT ("in their context").

54. In addition, the BIT should be interpreted within the normative framework of international law. That is provided in Art. 31(3)(c) of the VCLT which sets forth as follows:

> "3. There shall be taken into account, together with the context:
>
> [...]
>
> (c) any relevant rules of international law applicable in the relations between the parties." [43]

55. Accordingly, rules stemming from all sources of international law are relevant upon interpretation of the term "seat" as provided in the BIT Article 1 para. 3 let. b) (ii).

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[41] Art. 1 para. 3 b) (ii): ,,Legal person constituted or incorporated in compliance with law of the Republic of Cyprus [...]." **[Exhibit RLA-1 *bis*].**

[42] Art. 1(3)(8) of the Cyprus - Bulgaria BIT provided:"... legal persons **with registration and seat according to the Cypriot legislation,** who, in compliance with this Agreement are making investments in the territory of the other Contracting Party" *(emphasis added)* **[Exhibit RLA-40].**

[43] Vienna Convention on the Law of Treaties, Art. 31(3)(c) **[Exhibit RLA-13].**

The Respondent will analyse various relevant sources in the paragraphs further below.

56. The relevance of international law for the application of the BIT is also confirmed in the BIT Art. 10 para. 4:

> "The arbitration award shall be based on:
>
> - the provision of this Agreement; and
>
> - the rules and universally accepted principles of international law."[44]

57. Consequently, the term "seat" shall be interpreted with reference to international law.

c. BITs Have Recognized "Seat" as a Separate Criterion and Defined It as the "Place of Effective Management"

58. "Seat" as a nationality criterion in BITs has largely been accepted as a criterion separate from "incorporation" and has been understood to mean the effective seat, that is, the "place of effective management".

59. In its analysis of various nationality criteria in investment treaties, the United Nations Conference on Trade and Development **("UNCTAD")** noted:

> "The seat of a company may not be as easy to determine as the country of organization, but it does **reflect a more significant economic relationship** between the company and the country of nationality. Generally speaking, **"seat of a company" connotes the place where effective management takes place."45** *(emphasis added).*

Accordingly, the "seat" requires something more than the mere "incorporation" and is located at the "place where effective management takes place". The UNCTAD position on "seat" as the place of the "effective management" has been consistent throughout the years.[46]

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[44] BIT Art. 10 (4) **[Exhibit RLA-1 *bis].***
It shall be noted that under the customary international law, the claims for shareholder reflective loss, such as the Claimant's claim in the instant case, are not recognized. Should this Tribunal find that the Claimant has an investment under the BIT, which is denied, the Tribunal is invited to interpret the BIT by not departing from the universal no-shareholder reflective loss rule in the international customary law.
Only Claimant's claims for direct loss, which it has none, shall be permitted under the BIT.

[45] UNCTAD Series on Issues in International Investment Agreements II, Scope and Definition: A Sequel, New York and Geneva, 2011, p. 83 **[Exhibit RLA-41].**

[46] See the United Nations Conference on Trade and Development (UNCTAD), *Scope and Definition,* 2 UNCTAD Series on Issues in International Investment Agreements, 36, U.N. Doc. UNCTAD/ITE/IIT/11 (1999), p. 39; United Nations Conference on Trade and Development, Dispute Settlement, International Centre for Settlement of Investment

60. Two senior experts at the World Bank, America Beviglia Zampetti and Pierre Sauve opined that:

> "BITs have in recent years tried to address such complexities, often by combining the traditional nationality tests or criteria, namely the place of incorporation; the location of the **'seat' of the corporation (sometimes referred to as the *siege social.* real seat. or the principal place of management):** and the nationality of the shareholders who own or control the corporation [...]
>
> [...] Some BITs combine the place of incorporation test with criteria focusing on a company's 'seat'. **This test attributes the nationality of the place where the *siege social* is located. The 'seat of a company' often refers to the place of effective management decision-making.** and as such, while more difficult to determine, **reflects a more significant economic relationship between the corporation and the country granting nationality."**[47] *(emphasis added).*

Accordingly, unlike the place of "incorporation", the "seat" of a company *('siege social')* is the place where corporate decisions are effectively made and reflects a stronger economic link between a company and a State. "Seat" also reduces the risk of 'mailbox' companies.

61. M. Sornarajah takes the view that:

> "European states have generally favoured the *siege social* theory, which determines nationality by looking for the place where the **seat of its effective management is located.** "[48] *(emphasis added).*

62. That view is also shared by Professor Franco Ferrari, who recently stated that:

> "A second approach seen in IIAs is for a corporation to be deemed a national of the country in which it has its **seat,** sometimes called the **"main office," "residence," or "siege social."** [...]
>
> For tribunals determining whether a corporate investor qualifies for protection under a treaty, this formulation typically **requires some inquiry into the factual and economic circumstances of the company.** since the tribunal is seeking to determine **where the company's "effective**

Disputes, 2.4 Requirements Ratione Personae, 2003, p. 15 ("seat *(siege social),* i.e., the State where the headquarters or the centre of its management is located.").

[47] America Beviglia Zampetti and Pierre Sauve, International investment, in: Andrew T. Guzman and Alan 0. Sykes (eds.), *Research Handbook in International Economic Law,* Edward Elgar, 2007, p. 219-220 **[Exhibit RLA-42].**

[48] M. Sornarajah, *The International Law on Foreign Investment,* third edition, Cambridge University Press, 2011, p. 324 **[Exhibit RLA-65].**

> **management" takes place.** The seat of a corporation may also change, which means that a corporation's nationality-when determined by reference to its seat-can be fluid over time.[49] *(emphasis added).*

Accordingly, to find out where a company's "seat" is located, a tribunal shall inquire into the factual and economic circumstances of the company. A company is able to transfer its "seat" to another State and thus change the nationality.

63. Consequently, (i) "incorporation" and "seat" are two distinguishable criteria for establishing corporate investor's nationality in the BITs; (ii) "seat", as a criterium for determining corporate investor's nationality in investment treaties, connotes a location where company's 'effective management' takes place.

d. Treaty Practice of Cyprus and Moldova Differentiates Between "Seat" and "Incorporation"

64. Another source providing authority for "seat" and "incorporation" as distinguishable criteria is the treaty practice of the Republic of Cyprus (the alleged home State of the Claimant) and of the Republic of Moldova.

(i) BITs of the Republic of Cyprus

65. An analysis of different Cyprus BITs reveals various definitions of corporate investors' nationality. Cyprus BITs concluded with Albania, China, Egypt, and Qatar require only incorporation.[50] A number of Cyprus BITs require that the legal person is both incorporated and has its seat in the territory of the contracting party: such as the BITs concluded with Lebanon, Libya, Montenegro, San Marino, Serbia, Syria,[51] as well as the Moldova-Cyprus BIT.[52] Among those Cyprus BITs, there are

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[49] Franco Ferrari and D. Brian King, *International Investment Arbitration in a Nutshell,* West Academic Publishing, 2020, p. 146-147 **[Exhibit RLA-43].**

[50] Agreement on the Promotion and the Reciprocal Protection of Investments between the Government of the Republic of Cyprus and the Council of Ministers of the Republic of Albania, Article 2(b) **[Exhibit RLA-44];** Agreement between the Government of the Republic of Cyprus and the Government of the People's Republic of China for the Reciprocal Promotion and Protection of Investments, Article 1(2) **[Exhibit RLA-45];** Agreement between the Republic of Cyprus and the Arab Republic of Egypt for the Reciprocal Promotion and Reciprocal Protection of Investments, Article 1(3)(b) **[Exhibit RLA-46];** Agreement between the Government of the Republic of Cyprus and the Government of the State of Qatar for the reciprocal promotion and protection of investments, Article I(a)(ii) **[Exhibit RLA-47].**

[51] Agreement on the Reciprocal Promotion and Protection of Investments between the Republic of Cyprus and the Lebanese Republic, Article I(I)(b) **[Exhibit RLA-48];** Agreement on the promotion and the reciprocal protection of investments between the Government of the Republic of Cyprus and the Great Socialist People's Libyan Arab Jamahiriya, Article 1(2) **[Exhibit RLA-49];** Agreement on the reciprocal promotion and protection of investments between the Government of the Republic of Cyprus and the Government of the Republic of San Marino, Article I(I)(b) **[Exhibit RLA-50];** Agreement between the Government of the Republic of Cyprus and the Government of the Syrian Arab Republic on the promotion and reciprocal protection of investments, Article 1(2)(b) **[Exhibit RLA-51];** The Agreement between the Republic of Cyprus and Serbia and Montenegro on Reciprocal Promotion and Protection of Investments, Article 1(3)(b) **[Exhibit RLA-34].**

[52] See **Exhibit RLA-1** ***bis.***

some which contain asymmetrical criteria for qualification of investors from either contracting party: Cyprus-China BIT, Cyprus-Qatar BIT and Moldova-Cyprus BIT.

(ii) BITs of the Republic of Moldova

66. The BITs concluded by the Republic of Moldova also reveal various criteria for corporate investor's nationality. The BITs concluded with Canada, Finland, Greece, Hungary, Lithuania, the USA require incorporation for the corporate investors.[53] The BITs concluded with Belgium and Luxembourg, Spain, Romania require both incorporation and the presence of the seat in the territory of the home State.[54]

(iii) Both Moldova and Cyprus Distinguish Between "Seat" and "Incorporation"

67. Accordingly, each the Republic of Moldova and the Republic of Cyprus has the practice of ascribing clearly distinguishable meanings to the criteria of "incorporation" (which entails the "registered office") and "seat". Had they not distinguished between those two criteria, they would have availed themselves of only one criterion (that of incorporation).

68. In that respect, the case *KT Asia v Kazakhstan*[55] is relevant. That case concerned the application of the Netherlands-Kazakhstan BIT which defined the term "nationals" *inter a/ia* as "legal persons constituted under the law of that Contracting Party".[56] Kazakhstan challenged the jurisdiction *rationae personae* stating that claimant's ultimate owner was a Kazakh national.[57] The tribunal ultimately rejected

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[53] Agreement between the Government of the Republic of Moldova and the Government of Canada for the Promotion and Protection of Investments, concluded on 12 June 2018, Article 1 **[Exhibit RLA-52];** Agreement between the Government of the Republic of Moldova and the Government of the Republic of Finland on the Promotion and Protection of Investments, concluded on 25 August 1995, Article 1(3)(b) **[Exhibit RLA-53];** Agreement between the Government of the Republic of Moldova and the Government of the Hellenic Republic on the Promotion and reciprocal Protection of Investments, concluded on 23 March 1998, Article 1(3)(b) **[Exhibit RLA-54];** Agreement between the Republic of Moldova and the Republic of Hungary for the Promotion and Reciprocal Protection of Investments, concluded on 16 April 1995, Article 1(2)(b) **[Exhibit RLA-55];** Agreement between the Government of the Republic of Moldova and the Government of the Republic of Lithuania on the promotion and reciprocal protection of investments, dated 20 September 1999, Article 1(3)(b) **[Exhibit RLA-56];** Treaty between the United States of America and the Republic of Moldova Concerning the Encouragement and Reciprocal Protection of Investment, concluded on 21 April 1993, Article I(l)(b) **[Exhibit RLA-57].**

[54] Agreement between the Government of Republic of Moldova, on the one Part, and the Belgian-Luxembourg Economic Union, on the other Part, Concerning the Encouragement and Reciprocal Protection of Investments, Article 1(1)(b) **[Exhibit RLA-58];** Agreement on the Promotion and Reciprocal Protection of Investments between the Republic of Moldova and the Kingdom of Spain, concluded on 11 May 2006, Article 1(1)(b) **[Exhibit RLA-59];** Agreement concerning the promotion and reciprocal protection on investments between the Government of Romania and the Government of the Republic of Moldova, dated 14 August 1992, as amended by Protocol between the Government of Romania and the Government of the Republic of Moldova on the Agreement concerning the promotion and reciprocal protection of investments between the Government of Romania and the Government of the Republic of Moldova, signed on 14 August 1992, Article 1(3) **[Exhibit RLA-60].**

[55] *KT Asia Investment Group B. V. v. Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013 **[Exhibit RLA-61].**

[56] *Ibid.,* para. 113.

[57] *Ibid.,* paras. 7 and 95.

Kazakhstan's challenges on the basis that the criterion of nationality was fulfilled as long as the company was properly incorporated in Netherlands, **but** it noted as follows:

> "[7]he Tribunal's reading of the treaty language is further strengthened if one bears in mind that in **twenty-four** Kazakh BITs the Respondent has agreed to the same test as in the present one, the place of incorporation, while in **ten** other BITs it has added a requirement that the *siege social* or place of business be placed or "real economic activities" be conducted there [...]. When negotiating this BIT, Kazakhstan could have insisted on a more demanding wording of Article I(b)(ii) of the BIT. For example, it could have required additional links to the State of incorporation or insisted on the inclusion of a "denial of benefits" clause. It did not. Kazakhstan has therefore accepted that the nationality of Dutch legal persons be determined by their place of incorporation."[58] *(emphasis added).*

69. The tribunal thus found that where different BITs concluded by the same country (Kazakhstan) contained various nationality criteria that was of relevance when assessing the nationality criteria in a particular BIT (the Netherlands - Kazakhstan BIT), because the country (Kazakhstan) deliberately chose and accepted various criteria for the nationality of investors in different BITs and shall be held to its choice in that particular BIT (the Netherlands-Kazakhstan BIT).

70. Consequently, in the Moldova-Cyprus BIT, each Cyprus and Moldova made deliberate choice of determining the nationality of the Cyprus investors based on separate and distinguishable criteria of "creation or incorporation" and "seat".

e. Arbitral Practice Recognizes "Seat" as a Distinct Criterion Which Means "Place of Effective Management"

71. That "incorporation" and "seat" are distinguishable concepts, and that "seat" is understood as the "place of effective management" is further endorsed in investment treaty arbitral practice.

72. In the case *AFT v Slovakia,* the tribunal found that "incorporation" and "seat" were distinctive criteria, and that a mere "incorporation" of the company did not make it "seated" in that country. In that regard, the tribunal stated:

> "The fact that Article I(I)(b) of the BIT requires a Swiss 'seat' as a distinct element in addition to 'constitution and organization under Swiss law' demonstrates that the mere incorporation in Switzerland is insufficient to constitute a 'seat' in the terms of the BIT."[59]

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[58] *Ibid.,* para. 123.

[59] *Alps Finance and Trade AG v. The Slovak Republic* (UNCITRAL), Award, 5 March 2011, para. 216 **[Exhibit RLA-15).**

73. The *AFT v Slovakia's* tribunal specifically dealt with the meaning of the term "seat" and found that it entailed **"effective center of administration of business operations"** and that the proof thereof was dependent on how the affairs of the company were **in fact conducted**[60] *(emphasis added).* The tribunal stated that:

> "Proof of a 'business seat', in the meaning of an effective center of administration of the business operations, requires additional elements, such as the proof that: the place where the company board of directors regularly meets or the shareholders' meetings are held is in Swiss territory; there is a management at the top of the company sitting in Switzerland; the company has a certain number of employees working at the seat; an address with phone and fax numbers are offered to third parties entering in contact with the company; certain general expenses or overhead costs are incurred for the maintenance of the physical location of the seat and related services, which would be a clear indication that a business entity is effectively organized at a given Swiss place." [61]

74. Contrary to the Claimant's unfounded speculations that the tribunal in *AFT v Slovakia* might have equated, comingled, or confused "seat" with the performance of "real economic activities",[62] that tribunal clearly kept those criteria distinctly and analysed them separately[63] and explicitly defined the "seat" to be the "effective center of administration of the business operations" separately and independently from the "real economic activities".[64]

75. The tribunal in that case further found that an excerpt from the company's registry, a tax declaration and/or an assertion that the company registers were kept in Switzerland were all insufficient to prove the existence of "seat".[65]

76. The tribunal interpreted the "seat" autonomously, with **no** *renvoi* to Swiss law.[66]

77. The tribunal in *Tenaris v Venezuela* had interpreted the terms *'siege social'* in Belgium-Luxembourg Economic Union - Venezuela BIT and *'sede'* in Portugal - Venezuela BIT and with express reference to the doctrine of *effet utile* stated that:

> "[I]f *'siege social'* and *'sede'* are to have any meaning, and not be entirely superfluous, **each must connote something different to, or over and above, the purely formal matter of the address of a registered office or statutory seat.** And this leads one to apply the other well-accepted meaning of both terms, namely **'effective management',** or some sort of

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[60] *Ibid.,* para. 217.
[61] *Ibid.*
[62] See Claimant's Reply dated 5 March 2021, paras. 61, 62, 65.
[63] See *Alps Finance and Trade AG v. The Slovak Republic* (UNCITRAL), Award, 5 March 2011, paras. 215 to 218 ("seat") and 219 to 223 ("real economic activities") **[Exhibit RLA-15].**
[64] *Ibid.,* para. 217 (see also paras. 219 to 227).
[65] *Ibid.,* para. 215.
[66] *Ibid.,* para. 216.

actual or genuine corporate activity."[67] (emphasis added).

78. The tribunal also found that:

> "[N]either 'siege social' nor 'sede' can mean simply 'registered office' or 'statutory seat' in a purely narrow and formal sense, since neither term would then have any effective meaning."[68]

79. That tribunal in Tenaris v Venezuela then concluded that:

> "[...] both 'siege social' and 'sede' in the Treaties in issue in this case mean **the place of actual or effective management.** "[69] (emphasis added).

80. In Tokios Toke/es v Ukraine, the tribunal, when rejecting the jurisdictional objection rationae personae, explained that the jurisdictional objection was ungrounded because Ukraine-Lithuania BIT **required only incorporation** in accordance with applicable laws of the home State and **did not contain any additional criteria:**

> "[...] the Claimant is an 'investor' of Lithuania if it is a thing of real legal existence that was founded on a secure basis in the territory of Lithuania in conformity with its laws and regulations. The Treaty contains **no additional requirements** for an entity to qualify as an "investor" of Lithuania."[70] (emphasis added).

81. Under Moldova-Cyprus BIT, however, there is an additional requirement for a juridical person to qualify as an investor in Cyprus: **location of the corporate seat in the territory of Cyprus.**

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[67] *Tenaris S.A. and Ta/ta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/26, Award, 29 January 2016, para. 150 **[Exhibit RLA-37).** In the relevant part, Art. 1(1) of the Belgium-Luxembourg Economic Union - Venezuela BIT provides as follows:
"1. Le terme «investisseurs» designe:
A) [...];
B) les «societes», c'est-a-dire toute personne morale **constituee** conformement a la legislation du Royaume de Belgique, du grand-duche de Luxembourg ou de la Republique du Venezuela et **ayant son siege social sur le territoire** du Royaume de Belgique; du grand-duche de Luxembourg ou de la Republique du Venezuela respectivement, ainsi que toute personne morale effectivement controlee par un investisseur compris dans le paragraphe 1, a) et b);
Qui ont fait un investissement dans le territoire de l'autre Partie contractante." *(emphasis added).*

[68] *Tenaris S.A. and Ta/ta - Trading e Marketing Sociedade Unipessoal Lda. v. Bo/ivarian Republic of Venezuela,* ICSID Case No. ARB/11/26, Award, 29 January 2016, para. 148 **[Exhibit RLA-37).**

[69] *Tenaris S.A. and Ta/ta - Trading e Marketing Sociedade Unipessoa/ Lda. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/26, Award, 29 January 2016, para. 154 **[Exhibit RLA-37).**

[70] *Tokios Toke/es v. Ukraine* (ICSID Case No. ARB/02/18), Decision on Jurisdiction, 29 April 2004, para. 28 **[Exhibit Auth-9];** See also *Saluka Investments B. V. v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006, para. 241 **[Exhibit Auth-32];** *Yukos Universal Limited v. The Russian Federation* (UNCITRAL), PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, para. 415 **[Exhibit RLA-35].**

82. In *CEAC v Montenegro,* a case governed by the Cyprus-Serbia and Montenegro BIT,[71] with reference to *Flutie* cases[72] and *Soufraki v. UAE*[73] (power of the tribunal to make their own nationality determination) the tribunal found that a certificate of registered office issued under Cypriot was not conclusive evidence of an **existing registered office** at the address in Cyprus identified by the claimant.[74] Furthermore, it found that the evidence on record did not support a finding of CEAC's registered office in Cyprus.[75] The tribunal concluded that, although incorporated in Cyprus, the CEAC had no registered office in and was not managed and controlled from Cyprus.[76]

83. The tribunal also stated that the term '"seat' cannot be equated with 'tax residence"'.[77]

84. Finally, the tribunal *CEAC v Montenegro* came to the conclusion that "CEAC *[did]* not meet the definition of 'seat' put forward by Respondent",[78] that "CEAC [was] not an 'investor' in accordance with the terms [...] of the Treaty", and that the tribunal lacked jurisdiction to hear the case.[79]

85. The Respondent notes that if such a finding could be made in *CEAC v Montenegro,* a case governed by the Cyprus-Serbia and Montenegro BIT, where the same, more generic provision was to apply to the companies of both Contracting States,[80] the Cyprus-Moldova BIT contains distinct, and customized, provisions for the companies of each Contracting State, as described above. The Moldova-Cyprus BIT is also subsequent,[81] representing increased experience, and maturity, on the part of the Republic of Cyprus's representatives.

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71 See the **Exhibit RLA-34.** Pursuant to Art. 1(3)(b) of that Cyprus-Serbia and Montenegro BIT, an investor is "a legal entity **incorporated, constituted** or otherwise duly organised according to the laws and regulations of one Contracting Party having its **seat in the territory** of that same Contracting Party[...]" *(emphasis added).*

72 See *Flutie* cases, 1903-1905, Volume IX, Reports of International Arbitral Awards, pp., 151, 152 **[Exhibit RLA-32].**

73 See *Houssein Nuaman Soufraki v. The United Arab Emirates* (ICSID Case No. ARB/02/7), Decision of the ad hoc Committee on the Application for Annulment of Mr. Soufraki, 5 June 2007, paras. 62, 64, 76, 78 **[Exhibit RLA-33).**

74 See *Central European Aluminum Company {CEAC) v. Montenegro,* ICSID Case No. ARB/14/8, Award, dated 26 July 2016, paras. 160-169 **[Exhibit RLA-17).**

75 See *Central European Aluminum Company {CEAC) v. Montenegro,* ICSID Case No. ARB/14/8, Award, dated 26 July 2016, paras. 170-200 **[Exhibit RLA-17).**

76 *Central European Aluminum Company (CEAC) v. Montenegro,* ICSID Case No. ARB/14/8, Award, dated 26 July 2016, para. 148 **[Exhibit RLA-17).**

77 *Ibid.,* 209.

78 *Central European Aluminum Company {CEAC) v. Montenegro,* ICSID Case No. ARB/14/8, Award, dated 26 July 2016, para. 208 **[Exhibit RLA-17).**

79 *Ibid.,* para. 212.

80 Pursuant to Art. 1(3)(b) of that Cyprus-Serbia and Montenegro BIT **[Exhibit RLA-34),** an investor is "a legal entity incorporated, constituted or otherwise duly organised according to the laws and regulations of one Contracting Party having its seat in the territory of that same Contracting Party [...]".

81 Cyprus-Serbia and Montenegro BIT was concluded on 21 July 2005. Moldova-Cyprus BIT was concluded on 13 September 2007.

86. The Respondent also notes that, just as it is not up to a tribunal to "add other requirements"[82] or to "write new, additional requirements"[83] for jurisdiction *ratione personae,* it is also equally true that it is not open to a tribunal to disregard those requirements, which have been agreed by the contracting parties. The BIT Article 1(3)(b)(ii) requires both "incorporation" and "seat" in the territory of the Republic of Cyprus, and both requirements shall be fulfilled in respect to the Claimant.

f. The Notion of "Effective", "Management", "Control" in the English Language Dictionaries

87. As analysed above, the "seat" should be understood as the place of effective management and financial control.

88. For the ordinary and plain meaning of "effective", "management", "control" reference can be made to the English language dictionaries. The Cambridge online dictionary defines the term "management" as (i) "the control and organisation of something"; and (ii) "the group of people responsible for controlling and organising a company".[84] The term "effective" is defined as "in fact, although not officially."[85] The term "control" is defined as (i) "to order, limit, or rule something, or someone's actions or behaviour"; and (ii) "the act of controlling something or someone, or the power to do this".[86]

89. Accordingly, the phrase "effective management" can only be understood to refer to those people in an organization (juridical person) who are actually responsible for controlling and organizing the organization, and who actually manage its business and operations. Based on the above, the "seat" represents a substantial, not a formal criterion. Under that substantial criterion, of paramount importance are the persons, who actually, genuinely manage the business affairs of a company, even where they do not have an official capacity in the company.

2. Cypriot Law Recognizes "Seat" as a Distinguishable Criterion

90. Should the Arbitral Tribunal find that for the interpretation of "seat" under the BIT Art. 1(3) recourse shall be had to municipal law for the reason that it is within the realm of each Contracting Party's sovereignty to determine the nationality of its

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[82] *Sa/uka Investments B. V. v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006, para. 241 **[Exhibit Auth- 32).**

[83] *Yukos Universal Limited v. The Russian Federation* (UNCITRAL), PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, para. 415 **[Exhibit RLA-35).**

[84] Definition of "management" from the Cambridge Dictionary **[Exhibit R-110),** available online at https://dictionary.cambridge.org/dictionary/english/management (last visited on 22 March 2021).

[85] Definition of "effective" from the Cambridge Dictionary **[Exhibit R-111),** available online at https://dictionary.cambridge.org/dictionary/english/effective (last visited on 22 March 2021).

[86] Definition of "control" from the Cambridge Dictionary **[Exhibit R-112),** available online at https://dictionary.cambridge.org/dictionary/english/control (last visited on 26 March 2021).

own investors[87] or for any other reasons, the term "seat" retains the meaning of the effective management and financial control also under the municipal law of the Republic of Cyprus.[88]This has also been in detail explained by the Expert Report of Dr. Thomas Papadopoulos (the **"RER-Papadopoulos").**

91. Cyprus has a mixed legal system, and its company law is mainly based on the English company law.[89] Nonetheless, despite ascribing for the most part the "incorporation theory", the concept of "seat" is well known in Cypriot company law and used, *inter alia,* in the Companies Law of the Republic of Cyprus.[90] Thus, various provisions of the Companies Law make use of "seat" to regulate issues such as transfer of company seat from abroad to Cyprus or the status of foreign companies in Cyprus.91

92. The incorporation test has not been adopted in its absolute form in Cyprus, and it allows for the simultaneous coexistence of the "seat" and "registered office" in various legislative and regulatory acts pertaining to company law.[92] And the fact that private international law (conflicts of law rules) uses the "registered office" as the connecting factor does not interfere with "seat" having a different meaning as compared to "registered office" in the company law of Cyprus.[93]

93. The concept of "seat" has been introduced in the company law of Cyprus starting the year 2000, as the country had been preparing to adhere to the European Union.[94] The concept of "seat" has further been introduced into Cypriot legal system by the application of the Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) (the "SE **Regulation") [Exhibit RLA-68],** which adopts the "real seat" theory in that SE Regulation[95] requires that a *Societas Europea* have both the registered office and the head office in the same EU Member State. Thus, Art. 7 of the SE Regulation provides as follows:

> "The **registered office** of an SE shall be located within the Community, in **the same** Member State as its **head office.** A Member State may in addition impose on SEs registered in its territory the obligation of locating their head office and their registered office in the same place."96 *(emphasis added).*

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[87] This reason, however, may be at odds with the specific wording in the BIT Article 1 para. 3 let. b} (ii} "having their seat in the territory of the Republic of Cyprus", which does not explicitly provide that municipal law of the Republic of Cyprus should be applied in order to determine / find "seat" in the territory of the Republic of Cyprus.

[88] See RER-Papadopoulos, pp. 7, 13, 15, 18.

[89] See RER-Papadopoulos, p. 20

[90] See Companies Law of the Republic of Cyprus **[Exhibit R-52** ***bis].***

[91] See RER-Papadopoulos, p. 19, 27.

[92] See RER-Papadopoulos, p. 9, 12, 27.

[93] *Ibid.*

[94] *Ibid.,* p. 16.

[95] See Council Regulation (EC} No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE} [10.11.2001) OJ L 294/1 **[Exhibit RLA-68),** available at EUR-Lex - 32001R2157 - EN - EUR-Lex (europa.eu), last accessed on 23.04.2021.

[96] *Ibid.,* Art. 7. See also RER-Papadopoulos, para. 7}, p. 18-20.

94. Therefore, the term "seat" under the BIT should have and should be construed to have a similar meaning with that term under the SE Regulation as applied in Cypriot legal system.

95. Under Cypriot law, that term "seat" does not mean and does not correspond to the term "statutory seat".[97] And as a matter of fact, "seat" and "statutory seat" are not the same.[98]

96. "Seat" should not be equated with and should not be construed to equate "incorporation", which would effectively make redundant the letter - as well as negate the spirit - of the provision in BIT Art. 1(3)(b)(ii). "Seat" refers to the decision making within the company and internal governance of a company, whereas "incorporation" refers to creation of the company as a legal person.

97. As explained in the RER-Papadopoulos, under Cypriot company law the "registered office" and "seat" are two different legal concepts, with distinct meaning.[99] On the one part, "seat" denotes the place of the effective management and financial control,100 the "central administration".101 On the other part, the "registered office" denotes the place where the official address is located, as a matter of fact, where communications and notices are addressed, where records and documents are kept.102

98. A further difference is that of the "registered office" being related to procedural company law and of the "seat" being related to the substantive company law.103

99. A distinction between the "registered office" and "seat" may be made along the lines of the existing distinction between "domicile" and "residence". On the one side, as mentioned in the RER-Papadopoulos, the *lex domicilii* of a legal person is the law of the country where the company has its "registered office".104 On the other side, "residence" is a substantive concept and denotes the location with which a legal person has a real connection, that is, the place of the effective management and control. When applying these concepts to the BIT Art. 1(3), the "incorporation" designates the "domicile", whereas the "seat" denotes the "residence" of a legal person, that is, the place of the effective management and control.105

100. As analysed in the RER-Papadopoulos, the Notification of the Address of the Registered office of a Company or Change in Address dated 4 July 2018 filed by the

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[97] See RER-Papadopoulos, p. 19.
[98] *Ibid.*
[99] See RER-Papadopoulos, p. 9, 12, 16, 27.
[100] See RER-Papadopoulos, para. 3), p. 7; para. 5), pp. 12-15.
[101] *Ibid.,* pp. 7-8; 12-15.
[102] *Ibid.,* pp. 9, 13.
[103] See RER-Papadopoulos, para. 4), pp. 8-11; para. 7), pp. 17-18.
[104] See RER-Papadopoulos, pp. 6, 18.
[105] See RER-Papadopoulos, p.18.

Claimant with the Registrar of Companies on 31 October 2018[106] (the **"Notification of the Address of the Registered Office") [Exhibit R-61]** attests only the address indicated therein and on record with the Registrar of Companies as such has been indicated by the Claimant. The Notification of the Address of the Registered Office does not attest the **actual existence** of a registered office located at the address indicated therein. This is because the Registrar of Companies only records the notifications when and as received from the companies, and it itself does not make any independent investigation of whether the address indicated in the notification is correct or actual, or whether a company actually maintains a registered office.[107]

101. As further explained in the RER-Papadopoulos, a company could potentially even mislead the Registrar of Companies by negligently or erroneously indicating a wrong address in the notification filed with the Registrar of Companies.[108] The result of such action would be a discrepancy between, on the one side, the actual address and, on the other side, the recorded address of the registered office. A company potentially may move to a new address without filing a notification for a period of time (as it was the case with the Claimant, who allegedly moved to a new address on 4 July 2018, but only filed the Notification of the Address of the Registered Office with the Registrar of Companies on 31 October 2018 **[Exhibit R-61]).** Accordingly, the timing of filing of the notification of the address with the Registrar of Companies is under a company's control and not under the control of the Registrar of Companies. Furthermore, the address, as well as other relevant information, indicated in the notification of the address is under a company's control and not under the control of the Registrar of Companies. Therefore, that much evidentiary weight shall be attributed to the Notification of the Address of the Registered Office **[Exhibit R-61].**

102. Accordingly, a company with of the registered office at a designated address may in fact not have the registered office there, at the designated address, but at a different address.[109]

103. It was precisely aher Cyprus had introduced the term "seat" into its legislation that Moldova-Cyprus BIT was signed, in 2007. The reference to "seat" in the BIT was a

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[106] There is a 4-month time discrepancy between the date indicated on the Notification of the Address of the Registered Office of a Company or Change in Address and the date of filing of the said Notification with the Registrar of Companies. The Claimant claims that it changed its address of the registered office on 4 July 2018, but in fact it filed that change in address on 31 October 2018 only. So, the Claimant allegedly moved to a new address without however recording it for the next four months. This actually proves that the address on file with the Registrar of Companies might not be actual, that it might be outdated at any one time (assuming that it was correctly indicated in the first place). Accordingly, one should make a distinction between the address of the registered office **on file** with the Registrar of Companies and the **actual existence** of a registered office at the address on file with the Registrar of Companies. See also RER-Papadopoulos, p. 7 et *seqq.*

[107] See RER-Papadopoulos, paras. 3, 4, 5, 6.

[108] *1bid.*

[109] See RER-Papadopoulos, p.8.

logical and assumed stance of the Republic of Cyprus after it had introduced the concept of "seat" in its municipal law.

104. Cypriot BITs are part of the **Cypriot law on foreign economic relations,** that is, part of Cypriot legal system. Cypriot BITs practice is not an area of practice that is separated from developments in domestic law of Cyprus. Cypriot BITs should be and are mirroring the rules of Cypriot company law and the practice in their approach to establishing when a legal person qualifies as a Cypriot investor. As analysed in the paragraphs above, under the Cypriot BITs, both the "incorporation theory" and the "seat theory" are accepted for the purposes of determining the corporate nationality of the Cypriot investors who would benefit of protection under those BITs.[110] Where, as in the Moldova-Cyprus BIT, both the "incorporation" and the "seat" in Cyprus are required in order to be considered a qualified Cypriot investor, both those criteria must be fully met.

105. It is obvious that under the law of the Republic of Cyprus the term "seat" entails more than the existence of "registered office".[111] The tribunal in Mera v. Serbia found that "seat" in the territory of Cyprus is a distinct and separate criterion from the criterion of "incorporation" in Cyprus under Article 1(3)(b) of the Cyprus-Serbia and Montenegro BIT.[112] However, that tribunal equated "seat" with "registered office" under Cypriot law.[113] The Respondent respectfully submits that the characterisation of "seat" to mean "registered office" was erroneous for at least two main reasons.

106. Firstly, the reasoning of the tribunal ignored the fact that, under the law of Cyprus, a company cannot be lawfully established without a registered office.[114] The existence of a registered office (Greek: συσταμμτvο γραcρsio) is a precondition for

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[110] A similar trend, albeit inversed, is taking place in German law. Until 2009, Germany followed in its BITs, as well as in its corporate law, conflicts of law, constitutional law, and law of foreign economic relations and policy exclusively the "seat theory" for determination of corporate nationality to qualify as an investor for protection under German BITs (see Stephan W. Schill, Linking Private and Public International Law: The Example of Determining Corporate Nationality in German's Investment Treaty Network, Amsterdam Centre for International Law No. 2020-07, 2020, p. 9 et seqq. **[Exhibit RLA-20]).** The situation changed in with the advent of Germany's 2008 Model BIT in which "Germany indicated that it would change its future BIT practice, under the influence of EU law and accompanying changes to its corporate law, towards accepting the theory of incorporation" *{Ibid.,* p. 16).

[111] See RER-Papadopoulos, paras. 3, 4, 5, 6.

[112] See *Mera Investment Fund Limited v. The Republic of Serbia,* ICISID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, para. 91 **[Exhibit RLA-62].** See also Cyprus-Serbia and Montenegro BIT **[Exhibit RLA-34].** For convenience, Article 1(3){b) of the Cyprus-Serbia and Montenegro BIT provides, in relevant part, as follows:
"The term 'investor' shall mean:

[...]

b) a legal entity incorporated, constituted or otherwise duly organised according to the laws and regulations of one Contracting Party having its seat in the territory of that same Contracting Party and investing in the territory of the other Contracting Party."

[113] See *Mera Investment Fund Limited v. The Republic of Serbia,* ICISID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, para. 91 **[Exhibit RLA-62].** RER-Papadopoulos, para. 11.

[114] RER-Papadopoulos, paras. 11.

the constitution of a company in Cyprus. Since a designation and maintenance of a registered office is an element of a company's incorporation, the condition of "registered office" cannot at the same time be deemed as a second condition ("seat") for establishing the nationality of an investor under Article 1(3)(b) of the Cyprus-Serbia and Montenegro BIT.

107. A company incorporated in Cyprus shall have the "registered office" in the territory of the Republic of Cyprus under the Companies Law. A company incorporated in Cyprus may not have its registered office outside the territory of Cyprus. Pursuant to Art. 102(1) of the Companies Law (as amended in 2015):

> "Art. 102 Registered office of company
>
> (1) A **company shall,** as from the **date of the issuance of the certificate** mentioned in Article 15 *[i.e. the Certificate of Incorporation],* **have a registered office in the Republic,** to which all communications and notices may be addressed."115 *(emphasis added).*

108. It had long been universal practice for the Registrar of Companies to require a **declaration of registered office** in order to incorporate the company. The Registrar of Companies does not independently investigate whether the declaration is actually correct or whether the company keeps it registered office at the designated addressed.

109. Therefore, the phrase in Art. 1(3)(b) of Cyprus-Serbia and Montenegro BIT **"having its seat in the territory** of that same Contracting Party"116 *(emphasis added)* should have not meant, did not mean, and should have not been equated to **having its registered office in the territory** of the same Contracting Party, because the latter was **already. as a matter of Cypriot law, included in the "incorporation".** Since a company incorporated in Cyprus was under the duty to have the "registered office" in the territory of Cyprus and could not have the "registered office" outside the territory of Cyprus, it was manifestly unreasonable to read, and the tribunal in *Mera* v. *Serbia* erred in that it read and interpreted, the phrase in Art. 1(3)(b) of Cyprus-Serbia and Montenegro BIT **"having its seat in the territory** of that same Contracting Party" to mean **having its registered office in the territory** of the Republic of Cyprus. Consequently, the phrase **"having its seat in the territory** of that same Contracting Party"117 did mean and should have meant something different, that is, having the effective management and control in the territory of Cyprus.

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[115] In Greek language, Art. 102(1), as amended in 2015, has the following content: "Κεφ8Ε Εταιρεία αη6 ττ1ν 1-ιμΕρα ΕΚΟσττις; rou mcrtoTtOLl']tLKou nou avacpEpEtm crto cxp8po 15, OLatl']pEl EyyEypαμμΕvo ypacpElo crrri riμοΚpatla, crto onolo Μvarm va anEu8uvovrm 6;\Ε<; ot Kotvonot crEL<; Km ELOonm crEt<;". Art. 102(1) of the Companies Law of the Republic of Cyprus **[Exhibit R-52 *bis].***

[116] Art. 1(3)(b) of the Cyprus-Serbia and Montenegro BIT **[Exhibit RLA-34).**

[117] *Ibid.*

110. Secondly, the tribunal in *Mera* v. *Serbia* effectively omitted to deal with the argument that "registered office" and "seat" cannot be characterized as synonyms since both terms were used in various and distinct instances in the Companies Law, in other laws and regulations of the Republic of Cyprus, and in the practice of the Republic of Cyprus.[118] The distinction that the Cypriot legislator made between those two notions was evidently intentional, and the tribunal should have not neglected it.[119] The finding of the tribunal that the term "seat" was "essentially a concept of civil law tradition that d[id] not have its origins in Cypriot law"[120] did not in any way imply that it could not have a distinct meaning. Rather, the opposite was true - the term was introduced in the Cypriot legal system starting from year 2000 with full awareness that it denoted criteria substantially different from "registered office."[121]

111. In the instant case, the Respondent notes that a company incorporated in Cyprus shall have from the day of its incorporation the "registered office" in the territory of the Republic of Cyprus under the Companies Law of the Republic of Cyprus.[122] A company incorporated in Cyprus may not have its registered office outside the territory of Cyprus. Accordingly, the phrase in Art. 1(3)(b)(ii) of the BIT **"having their seat in the territory** of the Republic of Cyprus"[123] *(emphasis added)* shall not mean, does not mean, and shall not be equated to **having their registered office in the territory** of the Republic of Cyprus, because the latter **is already. as a matter of Cypriot law. entailed in the "incorporation".** Since a company incorporated in Cyprus has the legal obligation to set up the "registered office" in the territory of Cyprus and may not have the "registered office" outside the territory of Cyprus, it would be manifestly unreasonable if the phrase in Art. 1(3)(b)(ii) of the BIT **"having their seat in the territory** of the Republic of Cyprus"[124] *(emphasis added)* would be read and/or interpreted to mean **having their registered office in the territory** of the Republic of Cyprus. Accordingly, the phrase **"having their seat in the territory** of the Republic of Cyprus" *(emphasis added)* does and shall mean something different, specifically, having the effective management and control in the territory of Cyprus.

112. In conclusion, the law of the Republic of Cyprus recognizes the existence and the distinct meaning of the concepts of "incorporation" (entailing "registered office")

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[118] See *Mera Investment Fund Limited v. The Republic of Serbia,* ICISID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, paras. 85-97 **[Exhibit RLA-62).** RER-Papadopoulos, paras. 11.

[119] RER-Papadopoulos, paras. 11.

[120] *Mera Investment Fund Limited v. The Republic of Serbia,* ICISID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, para. 96 **[Exhibit RLA-62).**

[121] RER-Papadopoulos, para. 6.

[122] See Art. 102(1) of the Companies Law of the Republic of Cyprus (as amended in 2002):
"Art. 102 Registered office of company
(1) A company shall, as from the date of the issuance of the certificate mentioned in Article 15 [i.e. *the Certificate of Incorporation],* have a registered office in the Republic, to which all communications and notices may be addressed."
[Exhibit R-52 *bis].*

[123] Art. 1 para. 3 b) (ii) of the BIT **[Exhibit RLA-1 *bis].***

[124] *Ibid.*

and "seat". Furthermore, "seat" denotes the place of the effective management and control, the "central administration". Finally, the Cypriot law does not characterize "seat" as "registered office".

3. Komaksavia Has No Seat and No Registered Office in Cyprus

113. Applying the *Tenaris v Venezuela* test to the instant case, if the term "seat" in the BIT Article 1(3)(b)(ii) is to be given any meaning at all it must signify something different than "the purely formal matter of the address of a registered office or statutory seat [...] namely 'effective management', or some sort of actual or genuine corporate activity."[125] There is no evidence that the effective management or control of Komaksavia occurred in the territory of Cyprus. In fact, there is plenty of evidence that the effective management and control occurred outside the territory of Cyprus.

114. With regard to its business activities, the Claimant's various statements are in direct contradiction with each other. Thus, on the one part, the Claimant claims to have business activities in Cyprus and that it is "a Cypriot company with its place of business firmly rooted in Cyprus".[126] On the other part, the Claimant demonstrates that it is "a holding company".[127] The Respondent notes that pursuant to Clause 3 (sub-clauses 1 to 37) of the Memorandum of Association, the objects for which Komaksavia has been established are enormously various **[Exhibit R-127** part I].

115. It is not enough for the Claimant to demonstrate that it has an address in Cyprus to which the correspondence addressed to the company can be delivered. The Claimant should prove that Komaksavia is effectively managed and financially controlled from Cyprus.

a. Komaksavia's Effective Management and Control by Shareholders Exercised Outside Cyprus

116. All the Claimant's shareholders, except the first one,[128] were and are foreign citizens residing outside the Republic of Cyprus, and the effective management and control by the shareholders over the Claimant has been exercised throughout from outside the territory of the Republic of Cyprus. No management or control by the shareholders of the Claimant has been exercised in the territory of the Republic of Cyprus. This substantiates the Respondent's argument that Komaksavia's seat has not been located in Cyprus.

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[125] *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/26, Award, 29 January 2016, para. 150 **[Exhibit RLA-37].**

[126] Para. 77 of the Claimant's Reply dated 5 March 2021.

[127] Para. 36.3. (including sub-paras. 36.3.1. to 36.3.10.) of SCWS-Menelaou **[Exhibit [SC-75)].** Cf. para. 86.5.4. (including sub-paras. 86.5.4.1. to 86.5.4.3.) of the Claimant's Reply dated 5 March 2021.

[128] Kyriakos Y. Panagos was the nominee shareholder for three days, from 19.08.2016 to 22.08.2016, for the purpose of Komaksavia's incorporation.

117. Komaksavia, "a private limited liability company" in Cyprus,[129] was a single-member company from its incorporation until 23 December 2019. From 23 December 2019 to present, Komaksavia is alleged to be a two-member company.[130] As a matter of both principle and practice, the shareholders in a private company are more closely and directly involved in the management of the company's business than is the case in a public company. This is more so in a single-member or two-member private company. In the instant case, Komaksavia's shareholders have directly and intimately exercised the effective management and control of Komaksavia at any given time throughout its lifetime.

118. Furthermore, as the real ultimate beneficial owner (the **"UBO")**[131] of the investment in Avia Invest **[Exhibit R-132],** Shor has had the ultimate power and control of Komaksavia. Shor changed Komaksavia's shareholders and directors in a cyclical manner.

119. The Republic of Moldova notes that Shor was elected as a member of the Board of Directors and the Chairman of the Board of Directors of Avia Invest on 17 July 2014 **[Exhibit R-129],** and he held that office until 11 October 2019 **[Exhibit C-14].** Ilona Shor, Ilan Shor's stepmother, was elected as a member of the Board of Directors and the Deputy Chairman of the Board of Directors of Avia Invest at the extraordinary general shareholders' meeting of Avia Invest dated 26 September 2016 **[Exhibit R-131].** The Republic of Moldova tendered sufficient proof on how Shor through Dufremol and other affiliates and proxies[132] had acquired the control over the shares in Avia Invest,[133] and he has been controlling the shares in Avia Invest ever since. The Republic of Moldova notes that Shor is also the real UBO of Habarov Airport Invest Ltd, a limited liability company registered in Cyprus, registration No. 324796, on 02 September 2013[134] **[Exhibit R-150;** cf. **Exhibit R-94** - Eurosell's transfers of EURl000.00 on 13.09.2013, of EURl,250,000.00 on 18.11.2013, of EURl,250,500.00 on 18.12.2013].

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[129] Cf. para. 1 of the Soc.

[13°] Cf. SCWS-Menelaou, pdf page 68-69 **[Exhibit [SC-75]].** Cf. **Exhibits R-2; R-115.**

[131] That is, the person who otherwise exercises a decisive influence on the Claimant.

[132] Apart from acting through its affiliates and proxies already indicated by the Respondent, **Shor acted,** *inter alia,* through **Ghenadie Gheorghita,** a citizen of the Republic of Moldova, identity card A02093015 (who also was the founder and director of the limited liability company "Avia Trade" SRL, registration number 1014600022181, with the registered address at Blvd Dacia 80/3, MD-2026 Chisinau, Republic of Moldova) by PoAs issued by Dufremol SRL, inter alia, on 05.05.2015; **Vadim Fotescu** (a citizen of the Republic of Moldova, identity card B42013353 issued on 06.03.2014) by PoAs issued by Dufremol SRL, inter alia, on 15.04.2014, 23.07.2015.

[133] See paras. 71-131 of the Respondents' Reply dated 4 January 2021 (and the respective exhibits).

[134] The Republic of Moldova notes that Habarov Airport Invest Ltd issued a Power of Attorney to Ilan Shor on 16.09.2013, Cyprus apostille No. 254561/13, dated 17.09.2013. Habarov Airport Invest Ltd also issued a Power of Attorney to **Sokirko Oleg** on 16.09.2013, Cyprus apostille No. 254562/13, dated 17.09.2013. It shall be reminded that Sokirko Oleg, a citizen of the Russian Federation, was the first General Director of 000 Komaksavia, from 10.01.2014 to 05.02.2015 **[Exhibits R-37; R-103; R-104].** There is little doubt that Shor has incorporated Habarov Airport Invest Ltd simultaneously with the participation in the tender competition for the concession of the assets of SECIA for purposes related to the shares in Avia Invest, as well as to the Concession Agreement.

120. The instant case is a case where management and control of Komaksavia has been exercised independently of, and without regard to, the corporate bodies of Komaksavia.

121. The shareholders of Komaksavia, as well as Shor, have exercised real influence in the corporate governance of Komaksavia. They have influenced at least a certain category of board decisions on a continuing basis and, therefore, shall be deemed shadow directors of Komaksavia under the Cypriot law.[135]

122. In the following paragraphs, the Respondent will analyse the current and former shareholders of Komaksavia.

(i) Current Nominal Shareholders: Goncharenko and Tenev

123. The Respondent received copies of the Forms HE57 "Transfer of Private Company Shares" from the file of the Registrar of Companies which have been filed by the Claimant and are currently on record with the Registrar of Companies.[136] The following paragraphs in this subsection are based on the information contained in those Forms HE57 on file with the Registrar of Companies and are not statements made by the Republic of Moldova, except as otherwise specifically stated.

124. The current Claimant's nominal shareholders are:

124.1. Marin Mihov Tenev [aka Map111H M111xos TeHes], born 24 December 1957, a citizen of Bulgaria, passport No. 384936603, address: Ivan Bogrov 7, Of./ Ap. 9, BG-8000 Burgas, Bulgaria (hereinafter referred to as **"Tenev") [Exhibit R-62 *bis],*** holding 700 ordinary shares; and

124.2. Andrey Nikolaevich Goncharenko [aka Andrey Goncharenko; AHApei'.1 H111Konaes1114 roH4apeHKo], born 27 December 1965, a citizen of Russian Federation, passport No. 713152007, address: Profsouznaya Street 91, Of./ Ap. 128, RU- 117279 Moscow, Russian Federation (hereinafter referred to as **"Goncharenko") [Exhibit R- 107],** holding 300 ordinary shares **[Exhibits R-2; R- 115].**

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135 See RER-Papadopoulos, pp. 53-57. See also Art. 118(4) of the Companies Law **[Exhibit R-52 *bis]*** sets forts as follows: "For the purposes of this section and of Part I of the Sixth Schedule, the expressions **"director" and "officer" shall include any person in accordance with whose directions or instructions the directors of the company are accustomed to act."** *(emphasis added).* See also Art. 2 of the Law Regulating Companies Providing Administrative Services and Related Matters of 21 December 2012 **[Exhibit R-136]** (that catches also "shadow directors"):
"Article 2

"Interpretation

[...]

"director" means a person occupying the position of director in a company or who has the power to effectively exercise the same powers as those exercised by a director in a company, **and includes a person on whose instructions a director or directors usually act;"** *(emphasis added}.*

136 See **Exhibits R-2, R-3, R-5, R-7, R-9, R-115.**

125. Accordingly, the current shareholders of Komaksavia are both foreign citizens residing outside the territory of the Republic of Cyprus. Their decisions and resolutions regarding the business and affairs of Komaksavia are not located / taken in the territory of the Republic of Cyprus.

126. Goncharenko became the nominal holder of 300 ordinary shares of Claimant on 23 December 2019 **[Exhibit R-2].** The 300 ordinary shares have been transferred to him by Tenev on 23 December 2019. The Form HE57 "Transfer of Private Company Shares" filed with the Registrar of Companies dated 23 December 2019 was signed by the Claimant's Secretary, Lydia Menelaou, who was appointed as the Claimant's Secretary on the same day of 23 December 2019 **[Exhibit R-11].** The Registrar received the Form HE57 and registered the transfer on 28 January 2020 **[Exhibits R-2; R-115].**

127. The last time Tenev became the nominal holder of all 1000 Claimant's ordinary shares was on 12 December 2019 **[Exhibit R-3].** The 1000 ordinary shares had been transferred to him by NR Investments Limited, a company incorporated in Guernsey on 30 April 2007, incorporation No. 46839, with the registered office at Trafalgar Court 2nd Floor, East Wing Admiral Park, St Peter Port, GY1 3EL Guernsey, which itself became holder of those shares on 28 August 2019 **[Exhibit R-4].** The Form HE57 "Transfer of Private Company Shares" filed to the Registrar of Companies had been signed by Claimant's Director, Andreas Menelaou, on 12 December 2019 **[Exhibit R-3].** Thus, the 1000 shares were transferred back to Tenev. This was the second time that Tenev nominally held the shares in Komaksavia.

128. The first time Tenev nominally held the 1000 ordinary shares in the Claimant was from 04 April 2018 to 28 August 2019 **[Exhibit R-7].** At that latter date (of 28 August 2019) he transferred the shares to NR Investments Limited **[Exhibit R- 4],** which then transferred them all back to Tenev on 12 December 2019 **[Exhibit R- 3]** (this is addressed further below).

(ii) Former Nominal Shareholders

129. During the time from 19 August 2016 to 23 December 2019, the nominal ownership of the shares in the Claimant changed a number of hands, however, it was held by one sole nominal shareholder at any one time within that period. Starting 23 December 2019, the shares in the Claimant have been nominally held by two shareholders **[Exhibit R-2].** Also, starting 23 December 2019, two separate individuals - Andreas Menelaou, the member of the law firm Andreas Menelaou LLC, and Lydia Menelaou, an employee / legal consultant thereof - provide their professional services of nominal director and nominal secretary to the Claimant.

(aa) Kyriakos Y. Panagos - 19.08.-22.08.2016

130. Kyriakos Y. Panagos, a Cyprus lawyer, born 12.05.1986, a citizen of Cyprus, ID number 1025140, with the address at Masaoria 29, Nea Ledra, Dali, CY-2549

Nicosia, Cyprus, phone number +357 70001033, was registered the first sole nominal holder of the 1000 common / ordinary shares of the Claimant upon the Claimant's incorporation on 19 August 2016.[137] Kyriakos Y. Panagos had also been registered as Komaksavia's first director and secretary. The Republic of Moldova notes that the reason of having Kyriakos Y. Panagos registered as the first Claimant's nominal shareholder was the fact that, under the Cyprus law, upon a company's incorporation the original signature of the subscriber of the shares was needed in the Memorandum of Association, as well as in the Articles of Association, and Kyriakos Y. Panagos was obviously available to put his signature.

131. Kyriakos Y. Panagos acted upon the instructions of Tenev, Karklinsh, Shor. This was, inter alia, substantiated by the fact that the main word in the name of the Claimant - "Komaksavia" - was the same with the name of the company 0 0 0 Komaksavia **[Exhibits R-37; R-103; R-104],** which was incorporated in the Russian Federation, and from which Komaksavia allegedly agreed to purchase - of the shares in Avia Invest.[138] Those who managed and controlled 0 0 0 Komaksavia - Tenev, Karklinsh, Shor - also managed and controlled Komaksavia.

132. Already on 22 August 2016, that is, three days after the Claimant's incorporation, Kyriakos Y. Panagos transferred all - ordinary shares of Claimant to Modris Karklinsh, a citizen of the Russian Federation **[Exhibit R-5].** The Form HE57 "Transfer of Private Company Shares" filed with the Registrar of Companies was signed by Claimant's new Director, Tenev, who himself was registered as the Claimant's Director and Secretary on the same day of 22 August 2016 **[Exhibit R- 6].** As evidenced in the Form HES7, the Registrar of Companies received and registered the Form HE57 on 29 August 2016.

133. Furthermore, on the fourth day of Komaksavia's incorporation, that is, on 23 August 2016, with Shor as the Chairman of Avia Invest's Board of Directors **[Exhibit R-129],** and Karklinsh as the General Director of 0 0 0 Komaksavia **[Exhibits R-37; R-103; R-104; R-151],** the general shareholders' meeting of Avia Invest adopted the decision to approve the sale of the - of the shares in Avia Invest by 0 0 0 Komaksavia to Komaksavia Airport Invest Ltd **[Exhibit R- 130].**

134. The Claimant does not allege that at the time of Kyriakos Y. Panagos holding the shares in Komaksavia, the Claimant was a qualified investor under the BIT. The Claimant alleges that it became a qualified investor under the BIT on 6 September 2016, the date Komaksavia allegedly agreed to purchase - of the shares in Avia Invest.[139] At that latter date, Komaksavia was under the full control and management of Shor, Karklinsh, and Tenev - each residing outside Cyprus.

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[137] It shall be noted that Panagiotis Panagos was the lawyer who provided the corporate services of incorporating Komaksavia **[Exhibit R-1].**

[138] Cf. paras. 30 (30.1.), 92 of the Soc.

[139] Cf. paras. 30 (30.1.), 92 of the SoC.

(bb) Modris Karklinsh - 22.08.2016-04.04.2018

135. Modris Karklinsh (aka Modris Zigmundovich Karklinsh; M0Ap1t1c 31t1rMYHAOB1t14 KapKn1t1HbW), born on 15 October 1954, a citizen of the Russian Federation, passport No. 713112121, with the address at Lane Kazarmenyi (Pereulok Kazarmennyi) 10/1, Ap. 2, RU-109028 Moscow, Russian Federation, **("Karklinsh") [Exhibit R-76 *bis]*** became the sole nominal holder of the [redacted] of Claimant on 22 August 2016 **[Exhibit R-5].** The shares had been transferred to him by Kyriakos Y. Panagos on 22 August 2016. The Form HE57 "Transfer of Private Company Shares" filed with the Registrar of Companies was signed by Claimant's Director, Tenev, on 22 August 2016 **[Exhibit R-5].** In his turn, Karklinsh transferred the ordinary shares to Tenev on 04 April 2018 **[Exhibit R-7],** and on the same day, Tenev transferred the directorship in the Claimant to Karklinsh **[Exhibit R-8].** Both Tenev and Karklinsh were acting upon instructions, and for the interest of Shor, who held the control of Komaksavia.

136. The Respondent notes that Karklinsh applied for and was issued on 03.04.2017 with a provisional residence permit for a foreign citizen in the Republic of Moldova No. B 41028445, personal code 2016802659160, with the domicile at: MD- 2001, Lev Tolstoy Street 27, Ap. 7, Chisinau, Republic of Moldova.

137. The Respondent further notes that Karklinsh and Tenev have been the shareholders (each with - of the shares) and codirectors of "Euro Partners Consulting" SRL, a limited liability company incorporated on 23 January 2017 and existing under the law of the Republic of Moldova, state registration number 1017600002892, with the registered address at Blvd Dacia 80/3, MD-2026 Chisinau, Republic of Moldova.

(cc) Marin Mihov Tenev - 04.04.2018-28.08.2019

138. Marin Mihov Tenev (aka Map1t1H M1t1xos TeHes) **[Exhibit R-62 *bis]*** became the sole nominal holder of all 1000 ordinary shares of Claimant on 04 April 2018 **[Exhibit R-7].** The 1000 ordinary shares were transferred to him by Karklinsh on the same day of 04 April 2018. The Form HE57 "Transfer of Private Company Shares" for the 1000 ordinary shares' transfer filed with the Registrar of Companies was signed by Claimant's Director, Karklinsh (who took over from Tenev as both Claimant's Director and Secretary), on 04 April 2018 **[Exhibit R-8].** The Registrar received the Form HE57 on 16 May 2018. Tenev in his turn transferred the [redacted] -to NR Investment Limited on 28 August 2019 **[Exhibit R-9].**

139. The Respondent notes that the rotation between Karklinsh and Tenev (that is, between the sole shareholder and sole individual director of Komaksavia) was effectively controlled and operated by Shor, who exercised the actual control of the Claimant.

140. The Respondent further notes that Tenev applied for and was issued on 17.03.2017 with a provisional residence permit for a foreign citizen in the Republic of Moldova No. B 41028152, personal code 2012802490972, with the domicile at: MD- 2001, Lev Tolstoy Street 27, Ap. 8, Chisinau, Republic of Moldova.

(dd) NR Investments Limited - 28.08.-12.12.2019

141. NR Investments Limited, a company incorporated in Guernsey on 30 April 2007, incorporation No. 46839, with the registered office at Trafalgar Court 2nd Floor, East Wing Admiral Park, St Peter Port, GY1 3EL Guernsey **[Exhibit R-4],** became the sole shareholder of all [redacted] in Komaksavia on 28 August 2019 **[Exhibit R-9].** The [redacted] had been transferred to NR Investments Limited by Tenev on the same day of 28 August 2019 **[Exhibit R-9].** The Form HE57 "Transfer of Private Company Shares" had been signed by the Claimant's Director, Karklinsh, dated 28 August 2019 **[Exhibit R-9].** The Registrar of Companies received and registered the Form HE57 on 29 August 2019.

142. It shall be noted that Tenev, as the Seller, and NR Investments Limited, as the Buyer, entered into a share sale-purchase agreement for the sale of 100% shares in Komaksavia on 28 August 2019. The price of the [redacted] shares was established at [redacted]. This fact denotes that the sale of the shares in Komaksavia to NR Investments Limited pursued a different purpose than the real change of the sole shareholder.

143. NR Investments Limited transferred the - shares back to Tenev on 12 December 2019 **[Exhibit R-3].**

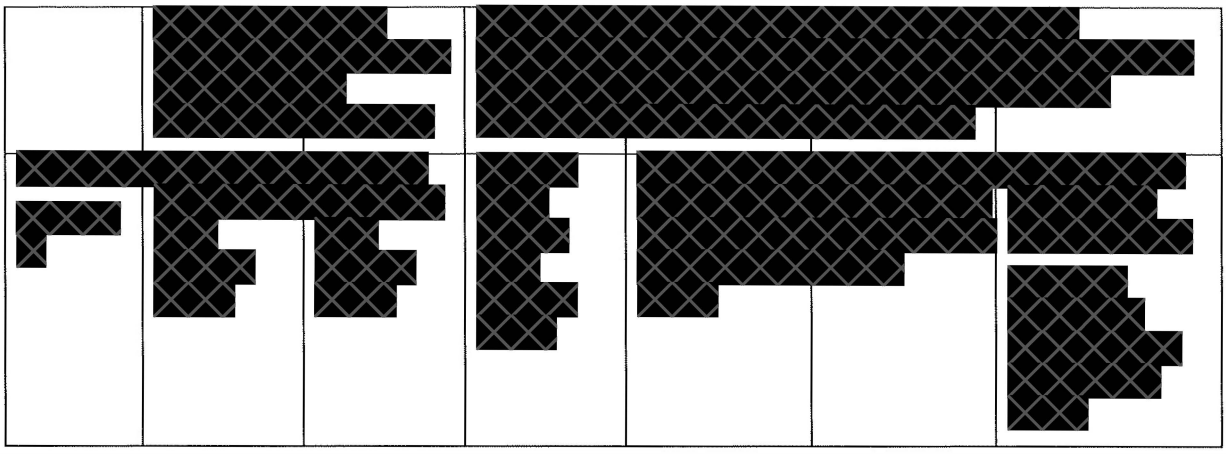
144. It shall be noted that both Tenev and NR Investments Limited were acting under the instructions, control, and for the interest of Shor and Goncharenko.

(ee) Marin Mihov Tenev - 12.12.-23.12.2019

145. Tenev **[Exhibit R-62 *bis]*** became again the sole nominal shareholder of al[redacted] ordinary shares in the Claimant on 12 December **2019[Exhibit R-3].** The [redacted] ordinary shares had been transferred back to him by NR Investments Limited on the same day of 12 December 2019. The Form HE57 "Transfer of Private Company Shares" for the - ordinary/ common shares filed with the Registrar of Companies was signed by the Claimant's Director Andreas Menelaou on 12 December 2019 **[Exhibit R-3].** As in a relay race, Tenev gave way to NR Investments Limited on 28 August 2019 which then returned the shares in Komaksavia back to Tenev on 12 December 2019. All those changes were effectively controlled and operated by Shor who ultimately and effectively owned and controlled the Claimant and Avia Invest to achieve their pursued goals.

146. Tenev in his turn transferred - ut of the total of ordinary shares to Goncharenko on 23 December 2019 **[Exhibit R-2].** Accordingly, as of 23 December 2019, Tenev and Goncharenko were the two nominal stockholders of the ordinary shares in the Claimant. As of the day of this Memorial, the data from the Registrar of Companies evidence no further changes in Komaksavia's shareholders.

147. The following table summarises the dates of nominal shareholding in Claimant:



(iii) Situs of Management and Control by Shareholders is Outside Cyprus

148. The circumstance of this case indicate that the effective management and control of the Claimant has been exercised by the shareholders, and in any event the *situs* of the effective management and control of the Claimant has been throughout outside Cyprus.

149. Komaksavia's shareholders were and are neither citizens nor residents of Cyprus. Thus, Karklinsh was a citizen and resident of the Russian Federation **[Exhibit R- 76 *bis*].** Tenev was and is a citizen and resident of Bulgaria **[Exhibits R-62 *bis*].** NR Investments Limited was a foreign company with no presence in Cyprus **[Exhibit R-3; R-4].** Goncharenko was and is a citizen and resident of the Russian Federation **[Exhibit R-107].** Accordingly, shareholders' decisions had been taken exclusively outside Cyprus.

150. Thus, the Resolution of the sole shareholder of Komaksavia on the acquisition of the - of the shares in Avia Invest dated 5 September 2016 (the **"Resolution dated 5 September 2016")** was taken in Chisinau, the Republic of Moldova **[Exhibit R-75].** This was the paramount and ultimate decision ever taken by Komaksavia. This supreme corporate opportunity came to the Claimant through the shareholders and the real UBO of Komaksavia, and not through the board or management. The Republic of Moldova submits that the Resolution dated 5 September 2016 refers to Komaksavia's business affairs and, as such, should have been taken by Komaksavia's Board of Directors, because pursuant to para. 87 of the Articles of Association **[Exhibit R-127** part I]:

> "The business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and registering the company, and may exercise all such powers of the company as are not, by the Law or by these regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Law and to such regulations, being not inconsistent with the aforesaid regulations or provisions as may

be prescribed by the company in general meeting but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made."[140]

151. However, despite the provisions of the Articles of Association which attributes such decisions to the power of the Board of Directors, the Resolution dated 5 September 2016 was adopted by Komaksavia's sole shareholder, and that fact proves that the pivotal business decisions of Komaksavia were as a matter of fact taken by the shareholders, with the Board of Directors playing no role in Komaksavia's purported business.

152. In a highly coordinated manner, with the involvement of Avia Invest, Khabarovsky, 0 0 0 Komaksavia, and Komaksavia, on **23 August 2016,** that is, on the day following the formal transfer of the shareholding in Komaksavia from Kyriakos Y. Panagos to Karklinsh:

152.1. Avia Invest allegedly received "the offer of 0 0 0 Komaksavia to sell - f the shares in the share capital" of Avia Invest to Komaksavia Airport Invest Ltd **[Exhibit R-130].** It shall be noted that "the offer", which allegedly was brought to the knowledge of Avia Invest, presupposed the existence of a preliminary agreement between 0 0 0 Komaksavia and Komaksavia Airport Invest Ltd to buy/sell the - of the shares in Avia Invest, as well as the approval by each 0 0 0 Komaksavia and Komaksavia Airport Invest Ltd of such a sale and purchase. That decision to adopt the approval of purchase by Komaksavia was not taken in Cyprus;

152.2. On the same day, Avia Invest forwarded the offer of 0 0 0 Komaksavia to the second shareholder, Khabarovsky **[Exhibit R-130];**

152.3. On the same day, Khabarovsky executed a declaration in a public notary office in Moscow renouncing its pre-emptive right to acquire the - of the shares in Avia Invest from 0 0 0 Komaksavia **[Exhibit R-130];**

152.4. On the same day, an extraordinary general members' meeting of Avia Invest was held in Moscow at which, *inter alia,* the sale o - of the shares in Avia Invest by 0 0 0 Komaksavia to Komaksavia Airport Invest Ltd was debated and unanimously approved by the shareholders **[Exhibit R-130].**

153. 0 0 0 Komaksavia was represented at the extraordinary general members' meeting of Avia Invest SRL dated 23 August 2016 "by the general director Karklinsh Modris, acting pursuant to the Articles of Incorporation" of 0 0 0 Komaksavia **[Exhibit R- 130].** Further and important, **Karklinsh also represented TB Team Management LLP**[141] (which was the sole shareholder of 0 0 0 Komaksavia[142]) by the Power of Attorney issued before a Moldovan public notary on 10 June 2016 by

[140] Para. 87 of Komaksavia's Articles of Association **[Exhibit R-127** part I].
[141] See **Exhibit R-38.**
[142] See **Exhibit R-37, R-103, R-104.**

TB Team Management LLC's proxy, Azizbekian Karlen Nersesovich [143] (aka *A31136eKRH KapneH Hepcecoaw-l)*, born 21.02.1965, a citizen of the Russian Federation, passport No. 72 6708970.144

154. In light of this and other evidence, the Claimant's assertion that "[w]hen the opportunity arose, Komaksavia was willing to invest in Avia Invest ..."145 is a contradiction in terms, because Komaksavia itself was conceived and implemented by or through Tenev, Karklinsh and others as a vehicle to be bestowed with the [redacted] of the shares in Avia Invest in order to acquire Cyprus nationality for the purported investment. The opportunity did not arise, as wrongly alleged by the Claimant. That opportunity was brought to Komaksavia by Shor through Tenev, Karklinsh and other affiliates. It was transferred from one of their vehicles to another of their vehicles without any payment being made between those vehicles, as none had been shown on the balance sheet of the 000 Komaksavia [Exhibit R-37, see pages 10 to 23] for the year 2016 or the following years.

155. The Respondent notes that holding the [redacted] of the shares in Avia Invest was the only business of 000 Komaksavia and selling it would not have been in the interest of 000 Komaksavia, had 000 Komaksavia decided for itself, in an arm's length transaction. However, the Share Sale-Purchase Contract dated 6 September 2016 was not an arm's length transaction. This is so, moreover, as 000 Komaksavia has

143 [redacted]

received no payment for selling the - of the shares. The Share Sale-Purchase Contract dated 6 September 2016 was part and parcel of a larger scam operation conceived and implemented by Shor through various individuals (i.e., Tenev, Karklinsh) and companies.

156. Such a precise coordination and cooperation among four various actors, in addition to the unanimous vote at the extraordinary general members' meeting of Avia Invest, were impossible without the preliminary knowledge, common intention, common purpose, and direction, as well as without those actors being ordered or commanded by Shor to carry out those measures and actions.

157. The above coordinated measures and actions were the elements of a larger planned operation of acquiring the Cypriot nationality for the purported investment. Komaksavia's decisions in that respect were not taken in Cyprus.

158. The decision to distribute dividends to the shareholders of Avia Invest were allegedly taken in Moscow, Russian Federation **[Exhibit [SC-11]].**

159. The decision on the issuance of the purported Notice of Dispute dated 2 October 2019 **[Exhibit [SC-5]]** was taken outside Cyprus. It was allegedly signed by a non-resident of Cyprus purportedly on behalf of Komaksavia.[146] It is not disputed that neither NR Investments Limited nor Nat Rothschild was not a resident of Cyprus.

160. The Notice of Dispute dated 2 October 2019 was not signed by Komaksavia's contemporaneous director, Karklinsh. But even if it were signed by Karklinsh, the Notice of Dispute would have been decided in any event outside Cyprus, as the Claimant's Director and sole shareholder resided outside Cyprus, in the Russian Federation. The Respondent notes that the purported Notice of Dispute did not contain the Claimant's address of the registered office as required under Art. 103(1) of the Companies Law for letters issued by a Cypriot company **[Exhibit R-52 *bis].*** The purported Notice of Dispute actually lacked any address or contact details.

161. One of the most important Claimant's decisions - the commencement of the arbitration proceedings against the Republic of Moldova - was taken outside Cyprus by Shor and the Claimant's shareholders. Thus, in the purported Notice of Dispute dated 2 October 2019 reference is made to the intention of the "Investors" to "resort to international arbitration [...] as set forth in Article 10(2) of the Cyprus-Moldova BIT" **[Exhibit [SC-5]].** With the sole shareholder, the director (also the secretary), and the real UBO of Komaksavia all residing outside Cyprus, the decision to commence arbitration proceedings against the Republic of Moldova could not have been taken and was not taken inside Cyprus.

162. The decision regarding the funding of the costs and expenses of this arbitration was taken outside Cyprus as well, as Goncharenko was not residing in Cyprus. Thus, the

[146] It shall be noted that at no time was Nat Rothschild Komaksavia's director or shareholder.

Claimant alleges that the funds for this arbitration's costs and expenses, including the advance payments, were provided to the Claimant pursuant to the decisions of the Claimant's shareholder **Goncharenko** by two loans from two companies registered in the Russian Federation, Komaks (000 YK KoMaKc[147]) and 000 Diamand Estate (000 .[\viaMaHA 3cTe111T[148]) [see paras. 1-6 of the Claimant's Response to Tribunal's Question 4 for the Hearing on the Respondent's Application for (A) Revocation of the Emergency Decision on Interim Measures and (B) Security for Costs and Related Relief, dated 5 February 2021 (the **"Claimant's Response to Tribunal's Question 4").** (None of those loans provide "cover for an adverse award of costs" in these proceedings.)1[49]Thus, para. 2 of the Claimant Response to Tribunal's Question 4 provides as follows:

> "2. These funds were allocated by the Claimant from two loans received from two shareholder companies controlled by its majority ultimate beneficial owner, Mr Goncharenko: 1) UK Komaks LLC (a Russian company, registration number 1117746721157); and 2) Diamand Estate LLC (a Russian company, registration number 1127746769700)."150

163. Thus, the Claimant asserts that all those decisions regarding the funding of the arbitration costs and expenses were taken by Goncharenko.

164. However, in addition to the above, in para 2 of the Claimant's Response to Tribunal's Question 4, the Claimant makes additional assertions: that Goncharenko is the "majority ultimate beneficial owner" of Komaksavia; that Goncharenko controls 000 Diamand Estate; and further that Goncharenko controls Komaks. Those assertions have not been explained, let alone proved, by the Claimant. Moreover, the Claimant has not substantiated at what time had Goncharenko become the majority UBO of the Claimant, and the controller of 000 Diamand Estate and Komaks.

164.1. The Respondent notes that Goncharenko was registered as the sole shareholder of 000 Diamand Estate (a company registered in the Russian Federation) for 20 days, from 22 August 2019 to 12 September 2019 **[Exhibit R-117,** page 18]. He transferred its shares in 000 Diamand Estate to Air Investments SRL, a limited liability company registered and existing under the laws of the Republic of Moldova, state identification number and fiscal code 1016600039392, with the office at the same address as Avia

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[147] Cf. **Exhibit R-40.**

[148] Cf. **Exhibit R-117.**

[149] See para. 6 of the Claimant's Response to Tribunal's Question 4 for the Hearing on the Respondent's Application for (Al Revocation of the Emergency Decision on Interim Measures and (Bl Security for Costs and Related Relief, dated 5 February 2021.

[150] Para. 2 of the Claimant's Response to Tribunal's Question 4 for the Hearing on the Respondent's Application for (Al Revocation of the Emergency Decision on Interim Measures and (Bl Security for Costs and Related Relief, dated 5 February 2021.

Invest: Blvd Dacia 80/3, MD-2026 mun. Chisinau, Republic of Moldova[151] **[Exhibit R-119],** for the amount of [redacted] **[Exhibit R- 117,** page 18].[153] Air Investments SRL was registered as the sole shareholder for three months and in its turn transferred the shares in 000 Diamand Estate to Polunin Alexey Vladimirovich (a citizen of the Russian Federation, ITN 570301246895), the current sole shareholder of 000 Diamand Estate, on 11 December 2019 **[Exhibit R- 117,** pages 4, 18].

164.2. Air Investments SRL is a company affiliated to Shor. Air Investments SRL acquired - of the shares in Air Handling SRL from Air Clasica SRL[154] on 14.08.2017 **[Exhibit R-134].** On 19.02.2019, Air Investments SRL transferred - of the shares in Air Handling SRL to Buruiana Andrian **[Exhibit R-134],** a citizen of the Republic of Moldova who acts in the interests of and is controlled by Shor.

164.3. Air Handling SRL is a company affiliated to Shor **[Exhibit R-66,** pdf pages 15, 18; **Exhibit R-134].** From 29.05.2014 to 18.12.2018, Air Handling SRL held - of the shares in Aeroport Handling SRL,[155] a limited liability company registered and existing under the law of the Republic of Moldova, state registration number and fiscal code 1002600010480, with the address at Blvd Dacia 80/3, MD-2026 mun. Chisinau, Republic of Moldova[156] **[Exhibit R-121],** which is the quasi-monopolist provider of ground handling services at Chisinau International Airport **[Exhibit R-120].** Aeroport Handling SRL was found by the Competition Council to be in the economic dependence of Avia Invest **[Exhibit R-120].** By a resolution of the Competition Counsel dated 17.09.2020, Avia Invest was found in violation of the Competition Law **[Exhibit R-120].**

164.4. Air Clasica SRL (in a number of documents also referred to as "ICS Air Clasica SRL") is a company affiliated to Shor **[Exhibit R-66,** pdf pages 16, 19, 34, 36, 38, 74, 194; **Exhibit R-133].** The sole shareholder of Air Clasica SRL until 27 April 2016 was Wester Alliance LLP, a limited liability partnership incorporated in Scotland on 22 November 2010, dissolved on 16 April 2019 **[Exhibits R-122, R-133].**[157] Wester Alliance LLP acted in the

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[151] This is the address of the administrative building of Chisinau International Airport under the management of Avia Invest.

[152] See the official exchange rate on 11.09.2019 **[Exhibit R-118].**

[153] It is believed that Air Investments SRL was used for tunnelling money out of Avia Invest and other Shor's affiliates.

[154] Air Clasica SRL shall not be confused with Classica Air SRL or Airklassica Group SRL, all three companies belonging to Shor's group.

[155] See the Resolution of the Competition Council dated 17.09.2020 **[Exhibit R-120,** pdf page 5].

[156] This is the address of the administrative building of Chisinau International Airport under the management of Avia Invest.

[157] It shall be noted that Wester Alliance LLP issued a Power of Attorney immediately after the incorporation on 3 December 2010 to Maria Gutuleac [see **Exhibit R-122,** pdf pages 10-15], who reputedly is the cousin of Ilan Shor [see **Exhibit R-65,** page 27, para. 1].

Republic of Moldova through Maria Gutuleac (Sher's cousin) under the Power of Attorney issued immediately after incorporation, on 3 December 2010 **[Exhibit R-122].**[158] From 27 April 2016 until 18 January 2019, the sole shareholder of Air Clasica SRL was Egor Ertagaev **[Exhibit R-133],** a citizen of the Republic of Moldova who acted and acts in the interests of Shor, and was and is controlled by Shor. Egor Ertagaev is also the sole director of Air Clasica SRL **[Exhibit R-133].**

164.5. The current sole shareholder of Air Clasica SRL is Infoton-Com SRL, a limited liability company registered and existing under the law of the Republic of Moldova, state registration number and fiscal code 1008600002418, with the office at Blvd Constantin Negruzzi 2, mun. Chisinau, Republic of Moldova **[Exhibit R-123; R-133].** Upon its incorporation on 17 January 2008, Infoton- Com SRL's sole shareholder and sole director was Cojocaru Ion **[Exhibit R-123; Exhibit R-105],** a citizen of the Republic of Moldova, the car driver of Shor, who acted and acts in the interests of Shor, and was and is controlled by Shor **[Exhibit R-66,** pdf pages 80, 163-168, 189, 242, 260, 279, 282, 283, 285, 294, 295, 297-299, 301-307, 321-330]. Infoton-Com SRL is a company affiliated to Shor **[Exhibit R-66,** pdf page 189, 221, 244, 248, 249, 250, 251, 253).

164.6. The above substantiates that Goncharenko and Shor have cooperated very closely with each other regarding the purported investment in Avia Invest and, moreover, regarding business operations of Avia Invest under the Concession Agreement.

165. Komaksavia's decisions regarding or involving finances have been taken by the shareholders of the Claimant, as the Claimant did not and does not draw its financial resources from its own operations or activities, which it has none of. The Claimant has provided no evidence that it owns assets.[159] Furthermore, the Claimant alleges that it never received dividends from Avia Invest.[160] The Claimant declared that it was funded by "two loans received from two shareholder companies controlled by its majority ultimate beneficial owner, Mr Goncharenko" to pay for the arbitration costs and expenses, including the advance payments,[161] and that as of 31 August 2020 it had "not yet secured enough funds to pay the Respondent's share of advance or arbitration costs" **[Exhibit R-54].** Accordingly, the Claimant exclusively relies on third parties' funds for Komaksavia corporate finances. The

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[158] Maria Gutuleac was involved in other capacities in the operations with of funds which eventually caused the insolvency and winding up of three commercial banks, *Banca de Economii, Banca Socia/a,* and *Unibank* **[Exhibit R-65,** pages 26-27, 30; **Exhibit R-66,** pdf pages 55, 126, 166, 189, 302, 304, 324-328).

[159] The Claimant alleged that it only agreed to **purchase** the shares in Avia Invest (para. 30 of the SoC).

[160] See the Soc, paras. 39-40.

[161] Para. 2 of the Claimant's Response to Tribunal's Question 4 for the Hearing on the Respondent's Application for (A) Revocation of the Emergency Decision on Interim Measures and (B) Security for Costs and Related Relief, dated 5 February 2021.

Claimant alleges that such funds were ensured by the shareholders. Those decisions were taken outside Cyprus as well.

166. Since 2018 onwards to the present time, the Bulgarian phone number of Tenev has officially been on file with the Registrar of Companies as the "Correspondence Contact Details" of Komaksavia **[Exhibit R-61].** This has not change since the appointment of Menelaou as Komaksavia's director on 5 November 2019. This proves that Tenev, not Menelaou, is officially and publicly in charge of and responsible for communication with any third party on behalf of Komaksavia.

167. The selection of the Counsel for the Claimant in these arbitration proceedings, a Ukrainian law firm with Russian language skills, was decided by the shareholders, Goncharenko and Tenev, and the real UBO, Shor, and was not decided by the Claimant's registered director. Menelaou would not have gone to Ukraine to select a local law firm as the Claimant's Counsel in these proceedings. Nor would NR Investments Limited have gone to Ukraine to seek legal assistance in these proceedings from a local law firm.

168. Since his appointment as Komaksavia's director on 5 November 2019, Menelaou is accustomed to act in accordance with the instructions and directions of the shareholders and the real UBO of Komaksavia.

169. Accordingly, the most important corporate body of the Claimant was not located at the alleged address in Cyprus, and not in the territory of Cyprus. Hence, the most important corporate governance decisions of and for the Claimant were and are taken not at that address in Cyprus, and not in Cyprus at all, but outside the Republic of Cyprus, which indicates *prima facie* that the seat of the Claimant is located outside Cyprus.

b. Komaksavia's Management by Former Directors Exercised Outside Cyprus

170. Komaksavia's Board of Directors has been at all times composed of one individual member. [162]

171. The sole individual member of the Board of Directors from 22 August 2016 to 5 November 2019 - Tenev and, subsequently, Karklinsh - was a foreign citizen with the residence outside Cyprus. The Republic of Moldova notes that both Tenev and Karklinsh received provisional residence permits of the Republic of Moldova on 17 March and 3 April 2027, respectively. Accordingly, the *situs* of the Board of Directors' decisions was located outside Cyprus at any given time during the period from 22 August 2016 to 5 November 2019.

172. However, the Respondent submits that as a matter of fact the effective management and financial control of Komaksavia has been carried out throughout Komaksavia's lifetime, from the date of incorporation until present, by the real UBO

[162] See the Excerpts regarding the directors and secretaries of Komaksavia **[Exhibit R-114].** See also the Forms HE4 "Notification of Change of Officers or change to their information" **[Exhibits R-6, R-8, R-10].**

of Komaksavia. The real UBO of Komaksavia has been a foreign resident throughout the lifetime of Komaksavia, therefore the situs of management and control has been outside Cyprus at any given time.

173. As a matter of formality, the shareholders of Komaksavia have been foreign persons, individuals and a company, therefore the management and control has always been located outside the territory of the Republic of Cyprus.

174. It has not been alleged by the Claimant that Komaksavia was a qualified investor under the BIT prior to 22 August 2016. For the sake of argument, however, with Kyriakos Y. Panagos formally holding the position of director during those three days (19 August to 22 August 2016), the management and control of Komaksavia was actually exercised by Shor, Karklinsh, Tenev.[163]

(i) Kyriakos Y. Panagos - 19.08.-22.08.2016

175. Kyriakos Y. Panagos was on record as the Claimant's initial nominal Director and Secretary upon the incorporation of the Claimant. Kyriakos Y. Panagos resigned the offices of Director and Secretary on 22 August 2016 and was succeeded by Martin Mihov Tenev, who was appointed as Claimant's Director and Secretary on the same day of 22 August 2016 **[Exhibit R-6].** The Registrar of Companies received and registered the Form HE4 "Notification of Changes of Officers or change to their information" on 29 August 2016.

176. As the Claimant's initial director and shareholder, Kyriakos Y. Panagos acted upon the instructions of Tenev, Karklinsh, Shor, and did not take any management or control decisions on his own. A practicing advocate in Cyprus, Kyriakos Y. Panagos provided professional services of the director and shareholder to Komaksavia. In any event, the Claimant does not allege that at the time of Kyriakos Y. Panagos holding the position of Komaksavia's director, the Claimant was a qualified investor under the BIT. The Claimant alleges that it qualified as an investor under the BIT on 6 September 2016, the date at which Komaksavia allegedly agreed to purchase . , f the shares in Avia Invest from 0 0 0 Komaksavia.[164] At that latter date, Komaksavia was under the direct management and control of Shor, Karklinsh, and Tenev, who were foreign citizens residing outside Cyprus.

(ii) Marin Mihov Tenev - 22.08.2016-04.04.2018

177. Tenev became Claimant's Director and Secretary on 22 August 2016 **[Exhibit R-6].** He succeeded Kyriakos Y. Panagos in the office of the Claimant's Director and Secretary. The Form HE4 was signed by Tenev on 22 August 2016, and the Registrar of Companies received and registered the Form HE4 on 29 August 2016. Tenev resigned his Director's and Secretary's offices on 04 April 2018, that is, in

[163] The Respondent submits that Komaksavia was not registered as a shelf company because (1) of its specific name which denotes a continuity of intent and control from 0 0 0 Komaksavia, and (2) immediately after its incorporation, it agreed to purchases from 0 0 0 Komaksavia the 95 of the shares in Avia Invest.
[164] Cf. paras. 30 (30.1.), 92 of the Soc.

the same day, in which he became the nominal owner of the 1000 ordinary shares of Claimant which were transferred to him by Karklinsh.

(iii) Modris Karklinsh - 04.04.2018-05.11.2019

178. Karklinsh was appointed as the Claimant's Director and Secretary on 04 April 2018 that is, in the same day, in which he resigned as the nominal owner of the 1000 of the Claimant's ordinary shares which he transferred to the name of Tenev **[Exhibit R - 8].** Karklinsh succeeded Tenev in the office of Claimant's Director and Secretary. The Form HE4 was signed by Karklinsh on 04 April 2018, and the Registrar of Companies registered the Form HE4 on 16 May 2018 **[Exhibit R-8].** Karklinsh resigned his office of Claimant's Director and Secretary on 05 November 2019 and was succeeded the by the current Claimant's Director, Andreas Menelaou **[Exhibit R-10].**

179. As evidenced in the Form HES7 and Form HE4 dated 4 April 2018 **[Exhibits R-7, R - 8]**[165] on file with the Registrar of Companies, there was a rotation of the Claimant's Director (and Secretary) and nominal shareholder between Tenev and Karklinsh on 04 April 2018. Shor, who exercised the actual control of the Claimant, rotated those two positions. On the one side, Tenev, who had been the Claimant's Director and Secretary since 22 August 2016, took over the place of Karklinsh and became the Claimant's sole nominal shareholder on 04 April 2018. On the other side, Karklinsh, who had been the Claimant's sole nominal shareholder since 22 August 2016, took over the position of Tenev and became the Claimant's Director and Secretary on 04 April 2018.

180. As Komaksavia Director, Karklinsh acted from the territory of the Russian Federation, being a citizen thereof and residing in Moscow. For instance, he issued a Power of Attorney in Moscow in the name of Komaksavia (as the Principal) to a lawyer (as the Attorney) in the Republic of Moldova to represent Komaksavia at the general shareholders' meeting of Avia Invest and vote on all issues of the meeting's agenda as the Attorney considered fit **[Exhibit R-128].**

181. It should be noted that after being registered as the sole shareholder of Komaksavia on 28 August 2019, NR Investments Limited had not replaced Komaksavia's director Karklinsh. This substantiates the fact that, although the ownership of shares was formally transferred to NR Investments Limited (the Respondent submits that that was done for the purpose of improving the "image" of the Claimant and its purported investment tainted by fraud and illegality, with Rothschild acting as a celebrity[166]), Shor remained in control of Komaksavia.

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[165] Cf. **Exhibits R-114** and **R-115.**

[166] Rothschild visited Avia Invest and Chisinau International Airport on 19 August 2019 **[Exhibit R-108]** on the instructions received from Shor.

182. The Republic of Moldova notes that the way in which the Claimant has insisted in his written submissions in this arbitration on the name "Rothschild",[167] although Nathaniel Rothschild has not been a shareholder, or director, or manager of the Komaksavia, denotes that the Claimant continues to exploit associations related to that family name in order to polish the image of the Claimant, of the shareholders thereof, Tenev and Goncharenko, of the Claimant's purported investment, of the real UBO, Shor, in order to impress the Tribunal, and for other hitherto undisclosed purposes.

183. The following table summarises the dates of changes in the Claimant's former officers:

	From 19.8.2016 to 22.8.2016	**From 22.8.2016 to 04.04.2018**	**From 04.04.2018 to 05.11.2019**
Director	KyriakosY. Panagos	Marin Mihov Tenev	Modris Karklinsh
Secretary	Kyriakos Y. Panagos	Marin Mihov Tenev	Modris Karklinsh

c. Komaksavia's Management by Shadow Directors Exercised Outside Cyprus

(i) Claimant's Current Director Manages About Fifty Companies

184. The Claimant essentially asserts that the law firm Andreas Menelaou LLC rents the "working space 02" to Komaksavia, where the latter purportedly has a registered office address since 4 July 2018,[168] and that Andreas Menelaou provides the administrative services of director to Komaksavia since late 2019.[169]

185. The forms and other documents on file with the Registrar of Companies of Cyprus indicate that the name partner of the law firm Andreas Menelaou LLC, Mr Andreas Menelaou, born on 26 January 1988, a citizen of Cyprus, ID number 1024436, passport No. K00354136, address: Kantaras 34B, Ap. 201, Strovolos, CY-2049 Nicosia, Cyprus, phone number +357 99218135, is currently the Director of the Claimant on record with the Registrar of Companies. He was appointed as Claimant's Director and Secretary on **5 November 2019 [Exhibit R-10].170** Menelaou simultaneously held both offices of Director and Secretary between 5 November and 23 December 2019. Andreas Menelaou succeeded Karklinsh in the offices of the Claimant's Director and Secretary who resigned on 5 November 2019.

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[167] See, for instance, para. 86.5.2., 90.4. of the Claimant's Reply dated 5 March 2019; page 5 of the Annex I to the Claimant's Response dated 18 December 2020.

[168] See paras. 86.5.4.1., 89.I{a), 89.I{b) of the Claimant's Reply dated 5 March 2021.

[169] The Claimant actually alleges that Menelaou was appointed as the director of Komaksavia on 23 October 2019: see page 23 of the Appendix I to the Claimant's Response; See also para. 14 of the SCWS-Menelaou **[Exhibit [SC-75]].**

[170] The Respondent notes that in para. 6 of the [first] CWS-Menelaou (filed with the Claimant's Application dated 24 July 2020), Andreas Menelaou falsely and groundlessly stated that he was appointed as director of Komaksavia on 23 October 2019. It shall be noted that in para. 6 of the [first] CWS-Menelaou, whilst referring to "NR Investments", Andreas Menelaou used the plural "shareholders" ("I was appointed to this role by the former shareholder!" *(emphasis added)).*

The Registrar of Companies received and registered the Form HE4 on 11 November 2019 **[Exhibit R-10).** Andreas Menelaou was succeeded in the office of the Claimant's Secretary by Lydia Menelaou on 23 December 2019 **[Exhibit R-11).**

186. The Republic of Moldova notes that Menelaou pretends that he has been appointed by NR Investments Limited as Komaksavia's director,[171] without, however, explaining why NR Investments Limited would have appointed Menelaou, a Russian speaking Cypriot advocate, as "a director of Komaksavia" just one month[172] prior to the purported transfer of the 100% of the shares in Komaksavia back to Tenev. Neither has this been explained by the Claimant.

187. The current Secretary of the Claimant is Lydia Menelaou, born on 09 April 1993, a citizen of Cyprus, national card No. 967430, address: Eptanisou 8, Strovolos, CY-2049 Nicosia, Cyprus **[Exhibit R-11).** She was appointed as Claimant's Secretary on 23 December 2019. She succeeded Andreas Menelaou in the office of Claimant's Secretary who had been appointed as Claimant's Secretary on 5 November 2019. The Form HE4 was signed by Lydia Menelaou on 23 December 2019, and the Registrar of Companies received and registered the Form HE4 on 28 January 2020 **[Exhibit R-11).**

188. Andreas Menelaou currently provides administrative services of rendering directors to legal persons,[173] mostly as the sole director, to well **over** fifty **{SO) companies** incorporated in Cyprus,[174] as well in other countries.17[5] Andreas Menelaou also

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[171] See para. 6 of the [first] CWS-Menelaou; see also para. 14 of the SCWS-Menelaou **[Exhibit [SC-75)).** The Respondent notes that also in the SCWS-Menelaou, Andreas Menelaou falsely and baselessly stated that he was appointed as "a director of Komaksavia" on 23 October 2019 (see para. 14).

[172] The Respondent has proved that pursuant to the Claimant's Notification to the Registrar of Companies [Form HE4] **[Exhibit R-10],** Menelaou was appointed on 5 November 2019.

[173] For the definition of the administrative services, see Art. 4 of the Law Regulating Companies Providing Administrative Services and Related Matters of 21 December 2012 **[Exhibit R-136].**

[174] See, for example, **Exhibits R-13; R-14; R-16; R-18; R-19; R-20; R-21; R-22; R-24; R-25; R-26; R-29; R-31; R-32; R-33; R-34; R-35,** as well as of other Cypriot companies, *inter alia,* Lenta PLC (reg. No. HE407296), Amashen Limited (HE398867), Rouanari Enterprises Limited (HE365980), IDF Holding Ltd (HE317558), SP Cosmoart Studio Lashes Limited (HE400195), Gluckstenson Holding Limited (HE389102), Netmaco Limited (reg. No. HE367384), Galaga Investments Limited (HE417170), Kerfirua Holding Limited (reg. No. HE241818), Fondport Ltd (reg. No. HE412231), Creative Universe (reg. No. HE411619), Zinagori Limited (reg. No. HE338346), Propexperts Ltd (reg. No. HE377867), Alson Limited (reg. No. HE207982), AB Beneficio Neto Investments Limited (reg. No. HE394768), Hedonism Wine Trading I Ltd (HE412245), AS Sales Revenue Investments Limited (HE394766), Bravarus Limited (HE392200), Joferno Limited (HE310431), Quasiva Limited (HE400898), Betop Holding Group Investment and Management Ltd (HE363750), Otmostio Limited (HE416326), Shenron Limited (HE383308), Marlini Executive OV Limited (HE394938), Actencia Limited (HE302515), Lnex Limited (HE363789), Saule Invest Properties Ltd (HE401043), SB Regulus Lucens Investments Limited (HE394953), A. Menelaou Mechanical Services Ltd (HE395509), Greista Investments Limited (HE194433), BP-Properties Limited (HE234901), Vneshposyltorg Group Limited (HE349385), Solagran Limited (HE182963), Trustville Limited (HE241364), Cadillacing Investments Limited (HE244719), I.M.C. Demand (CY) Limited (HE347429), Starbiz Limited (HE349385), AIFG Trading Company Limited (HE371042). Andreas Menelaou is the Director and Secretary of the Law Firm Andreas Menelaou LLC, see **Exhibit R-27.**

[175] Andreas Menelaou is the director of the company Pewdie Productions UK Limited (No. 09742888) **[Exhibit R-124],** oversea company Hedonism Wine Trading I (No. FC038142) **[Exhibit R-125],** company PDPUK Limited (former PXM Network Limited) (No. 9795904) **[Exhibit R-126),** all registered in England and Wales.

provides administrative services of rendering secretary to legal persons to numerous active companies incorporated in Cyprus.[176] In addition, the law firm Andreas Menelaou LLC purportedly rents the same "working spaces" to a large number of companies: **more than twenty five (25) companies** have notified their registered office address at the address of the law firm Andreas Menelaou LLC in Limassol.[177] Furthermore, as a practicing advocate, the sole member of the law firm Andreas Menelaou LLC, Andreas Menelaou provides legal services to clients in the areas as advertised on the law firm's website www.menelaou-law.com **[Exhibit R-49]**.

189. The law firm Andreas Menelaou LLC positions itself as "Advocates I Legal Consultants" on its website www.menelaou-law.com.[178] It provides the following information about "THE FIRM":

> **"ANDREAS MENELAOU LLC** is a licensed law firm in the Republic of Cyprus, with its office located in Limassol, the commercial centre of Cyprus, providing services to Local and International clients in Cyprus and abroad. [...] Our experience allows us to provide innovative and practical solutions to legal, financial and taxation issues faced by our clients enabling them to implement their strategic goals in the most skilful and beneficial manner."[179]

190. Accordingly, Andreas Menelaou's availability and ability to devote the time and attention to the management of, have the knowledge and information, and taking meaningful decisions for, the Claimant is impaired and objectively only extremely limited.

191. Menelaou's actions and measures are concerned with housekeeping, clerical, supportive matters rather than with policy, strategic or management matters pertaining to the conduct of business of Komaksavia. He provides indiscriminate administrative services to all companies under his directorship. Being overwhelmed with so many clerical and housekeeping issues, Andreas Menelaou performs poorly even on them, as he himself has proved time and time again. Thus, in his SCWS-Menelaou, Andreas Menelaou submitted a purported sub-lease agreement of Komaksavia Investment Ltd to prove the purported physical presence in Cyprus of another company - Komaksavia Airport Invest Ltd **[Exhibit [SC-75],** paras. 36.1.

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[176] Andreas Menelaou is the secretary, *inter alia,* of the following Cypriot companies: Zinorel Limited (HE299392), AB Beneficio Neto Investments Limited (reg. No. HE394768), MSS Global Trade Consultants Limited (HE360952), Stratosoft Limited (HE377486), AS Sales Revenue Investments Limited (HE394766), MGC Construction Limited (HE88729), A. Menelaou Mechanical Services Ltd (HE395509), Gluckstenson Holding Limited (HE389102), Saule Invest Properties Ltd, HE401043, A.M.Menelaou Bros Food & Beverage Limited (HE325283), Q.M.S. Network Limited (HE379109), Propexperts Ltd (HE377867), Sarbitek Limited (HE302321).

[177] See, for example, **Exhibits R-13; R-14; R-15; R-16; R-17; R-18; R-19; R-20; R-21; R-22; R-23; R-24; R-25; R-29; R-31; R-32; R-33; R-34; R-36.** The Law Firm Andreas Menelaou LLC has its registered office at the same address, see **Exhibit R-27.**

[178] See the screenshots of the website of Andreas Menelaou LLC **[Exhibit R-49].**

[179] The screenshots of the website www.menelaou-law.com of Andreas Menelaou LLC **[Exhibit R-49].**

and 36.3.8., and pdf pages 358-360].[180] In another instance, on 18 May 2020, Andreas Menelaou issued a purported letter to Avia Invest on behalf of Komaksavia **("Komaksavia's Letter dated 18 May 2020")** stating that "the shareholders of the company have completed negotiations with a group of creditors on the provision of an amount [redacted] That, it turned out, by Menelaou's own admission, "was a mistake on *[his]* part", and in the CWS-Menelaou,[182] Andreas Menelaou, whilst referring to that wrong statement, indicated that "the document erroneously states [redacted] but that was a mistake on my part and the correct figure is [redacted]

192. Komaksavia's Letter dated 18 May 2020 **[Exhibit C-2** (pdf page 95); **Exhibit [SC-75]** pdf page 229], which is the only letter of Komaksavia signed by Menelaou and submitted in these proceedings, is a clear evidence that Andreas Menelaou does not have the management of Komaksavia. In Komaksavia's Letter dated 18 May 2020 Menelaou states that the **"the shareholders** of the company have completed the negotiations with a group of creditors on the provision" of money for the purposes of Avia Invest to comply with the Concession Agreement *(emphasis added).*[184] He further states that as a result of the negotiations, there was "reached an agreement on the provision of the necessary funds for the above purposes in the nearest future".[185] In addition, he states that "the legal and technical aspects of the loans' provision are being clarified".[186] In top of that he does not even have the knowledge of and is not informed on the purported negotiated amount, because he indicates in figures and words the amount of [redacted] Those actions as stated in Komaksavia's Letter dated 18 May 2020 underly the duties, which by their nature belong to company's management and, also, pursuant to para. 87 of Komaksavia's Articles of Association - "[t]he business of the company shall be managed by the directors" - belong to Komaksavia's directors but have been carried out by Komaksavia's shareholders. This in turn demonstrates that the effective management and financial control of Komaksavia was with Komaksavia's shareholders who acted as shadow directors thereof.

193. Para. 12.3. of the CWS-Menelaou **[Exhibit C-2** to the Claimant's Application dated 24 July 2020,] and Komaksavia's Letter dated 18 May 2020 contain **mutually exclusive** statements. Thus, in para. 12.3., Andreas Menelaou first referred to a purported press release of Avia Invest dated **14 July 2020** containing the following

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[180] The Claimant referred to it as "a simple administrative error, as an incorrect (but similarly named) company's Sublease Agreement was exhibited instead of the correct version" (Footnote 13 to the Claimant's Reply dated 5 March 2021).

[181] Letter of Komaksavia to Avia Invest dated 18 May 2020, attached to the CWS-Menelaou **[Exhibit C-2** (pdf page 95) to the Claimant's Application dated 24 July 2020].

[182] CWS-Menelaou **[Exhibit C-2** to the Claimant's Application dated 24 July 2020].

[183] Para. 12.3. of CWS-Menelaou **[Exhibit C-2** to the Claimant's Application dated 24 July 2020].

[184] See **Exhibit C-2** (pdf page 95) to the Claimant's Application dated 24 July 2020; see also SCWS-Menelaou, pdf page 229.

[185] *Ibid.*

[186] *Ibid.*

phrase: "AVIA INVEST also notifies about the **signed agreement** on the allocation of funds from investors in the amount of 170 million euros, which will be available in the next 30 days."[187] *(emphasis added).* In para. 12.3. Menelaou then stated that "[o]n **18 May 2020,** I personally signed a letter to Avia Invest confirming that Komaksavia's shareholders had recently **completed negotiations** in order to ensure that EUR 170 million would be available to Avia Invest for the second stage of its investment obligations"[188] *(emphasis added).* In Komaksavia's Letter dated 18 May 2020, however, Menelaou had stated that "[a]t present, the **legal and technical aspects of the loans' provision are being clarified,** and the funds can be provided **upon completion of all procedural issues and activities,** which is expected in the shortest possible time."[189] *(emphasis added).* Thus, that last phrase of Komaksavia's Letter dated 18 May 2020 **directly contradicted** the statements on the "signed agreement" and on the "completed negotiations", and actually indicated that, as of 14 May 2020, neither the negotiations were completed, nor any agreement was signed, because the legal and technical aspects of an agreement were to be clarified before a loan agreement was signed, and where they were not yet clarified, the negotiations were still ongoing, and no agreement was signed. The Respondent also notes that Komaksavia's Letter dated 18 May 2020 is a highly unusual letter with a highly unusual and contradictory content in its own terms and is rather part of the Claimant's efforts to create a post factum reality.

194. The paragraphs above clearly demonstrate that Andreas Menelaou is a director in name only, provides administrative services to Komaksavia and about SO other companies as a practicing lawyer, is poorly informed about Komaksavia's particular business affairs and moreover about his own capacity in Komaksavia. It is manifestly evident that the company's business is run by other persons, and not by Andreas Menelaou, and that Andreas Menelaou is accustomed to act in accordance with the instructions of the shareholders and the real UBO.

195. Providing simultaneously such a large range of various legal and administrative services to so many companies renders those services completely devoid of any business and/or economic component/substance. Although part of management decisions making,[190] the economic and business decisions of the Claimant cannot be taken in their substance by Menelaou as he lacks the time, information, knowledge, first-hand experience, context, sophistication, details of the Claimant's business. They are exercised by the shareholders and the real UBO, who are the only persons informed about the details and substance of the Claimant's purported investment, and who are the only ones that may take meaningful and informed decisions for the Claimant.

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[187] CWS-Menelaou, pdf page 93 and para. 12.3. **[Exhibit C-2** to the Claimant's Application dated 24 July 2020].
[188] CWS-Menelaou, para. 12.3. **[Exhibit C-2** to the Claimant's Application dated 24 July 2020].
[189] CWS-Menelaou, pdf page 93 **[Exhibit C-2** to the Claimant's Application dated 24 July 2020].
[190] See para. 87 of Komaksavia's Articles of Association **[Exhibit R-127** part I].

(ii) Komaksavia's Effective Management Decisions Have Been Taken by Shadow Directors

196. In paras. 148 et **seqq.,** the Respondent has demonstrated that the most important business and managerial decisions of the Claimant have been adopted by the shareholders and real UBO.

197. As analysed in the previous subsection (paras. 184 et **seqq.),** the effective management of Komaksavia is in fact not taken place in the territory of Cyprus.

198. As the Claimant's director, Menelaou is fully dependable on the finances provided by the shareholders and real UBO from external sources. Since Komaksavia has had no income, Menelaou does not dispose money of Komaksavia and cannot take decisions involving finances. Such money or financial decisions for Komaksavia are taken by the shareholders, although they normally pertain to the company's management.[191] Menelaou is accustomed to act under the guidelines of the shareholders and the real UBO.

199. Menelaou cannot bring new and meaningful corporate opportunities to the Claimant,[192] and, as a matter of fact, he has not. Moreover, if someone is to bring a corporate opportunity to the attention of Komaksavia, she would do it by calling the phone number provided as the "Correspondence Contact Details" on file with the Registrar of Companies, which has been the Bulgarian phone number of Tenev form 2018 onward to the present time **[Exhibit R-61].**

200. His purported office of "managing director" of Komaksavia is devoid of any substance, as Menelaou cannot and does not have the time, knowledge, information, first-hand experience, context, sophistication, details of the business for the necessary meaningful and detailed decisions for Komaksavia. In any event, the Claimant has presented no evidence to substantiate the allegation that Menelaou is in fact the "managing director". But as the sole director on the board of directors in a majority of those about 50 companies to which he provides administrative services as director, as he is in Komaksavia, it may not be difficult for Menelaou to allege or pretend that he has appointed himself to the office of the "managing director" in any one of those majority companies.[193]

201. Also, the regulatory environment for Cypriot advocates prohibits the latter to be actively involved in the conduct of any business or commercial or other economic nature. Thus, under Art. 18(2) of the Code of Conduct Regulations of 2002 of Cyprus Bar Association **[Exhibit R-51],** an advocate shall **"abstain from actively participating in the conduct of any business of commercial or other economic nature** or from being an active member of such business."

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[191] *Ibid.*

[192] See RER-Papadopoulos, pp. 49-50.

[193] Pursuant to para. 109 of Komaksavia's Articles of Association **[Exhibit R-127** part I): "The directors may from time to time appoint one or more of their body to the office of managing director for such period and on such terms as they think fit, and, subject to the terms of any agreement entered into in any particular case, may revoke such appointment."

Furthermore, pursuant to the same Art. 18(2), Cypriot advocates may not be **"managing directors"** of firms and companies, whether in Cyprus or abroad. Those provisions fully apply to Menelaou, as he is an advocate, a member of Cyprus Bar Association **[Exhibit R-48].**

202. The economic and business decisions have been taken by Komaksavia's shareholders and real UBO, not by its director or purported "managing director". For his director's decisions, Menelaou has been systematically and continuously dependent on the directions and instructions of the shareholders and the real UBO. Even the Counsel for the Claimant in these arbitration proceedings was not selected by the Claimant's purported director Menelaou.

203. The Claimant's shareholders and real UBO are persons who exercise the real influence in the corporate affairs of the Claimant. They have provided instructions and directions to Komaksavia's director, particularly since the office of the director is held by Menelaou. Tenev has been officially in charge of and responsible for communication with any third persons on behalf of Komaksavia, since his Bulgarian phone number as "Correspondence Contact Details" has been on file with the Registrar of Companies from 2018 onward to the present time **[Exhibit R-61].** Consequently, the shareholders and real UBO of Komaksavia shall be considered the shadow directors of Komaksavia pursuant to the provisions of the Companies Law **[Exhibit R-52 *bis]*** and Law Regulating Companies Providing Administrative Services and Related Matters **[Exhibit R-136].**

204. Art. 118(4) of the Companies Law **[Exhibit R-52 *bis]*** provides as follows:

> "For the purposes of this section and of Part I of the Sixth Schedule, the expressions **"director"** and **"officer" shall include any person in accordance with whose directions or instructions the directors of the company are accustomed to act."**[194] (emphasis added).

205. Art. 2 of the Law Regulating Companies Providing Administrative Services and Related Matters **[Exhibit R-136]** provides, in relevant part, as follows:

> **"director"** means a person occupying the position of director in a company or **who has the power to effectively exercise the same powers as those exercised by a director** in a company, and **includes a person on whose instructions a director or directors usually act;** "[195] (emphasis added).

206. The Tribunal should find that the shareholders and the real UBO of Komaksavia are the shadow directors of Komaksavia and, as such, they have exercised the effective management of Komaksavia.

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[194] Art. 118(4) of the Companies Law of the Republic of Cyprus **[Exhibit R-52 *bis].***

[195] Art. 2 of the Law Regulating Companies Providing Administrative Services and Related Matters of 21 December 2012 **[Exhibit R-136).**

207. The shadow directors have not resided in Cyprus, hence the place of the effective management of Komaksavia has been throughout located outside the territory of Cyprus. Accordingly, the Claimant has at any one time had its "seat" outside the territory of Cyprus.

(iii) No Seat Established in Cyprus After 5 November 2019

208. As demonstrated in paras. 177-182 above, until 5 November 2019, Komaksavia's directors Tenev and Karklinsh, who both were foreign citizens with residence outside the territory of Cyprus, adopted their decisions as directors outside the territory of Cyprus. No effective management and control of the Claimant occurred in the territory of Cyprus until 5 November 2019.

209. Andreas Menelaou has been appointed on 5 November 2019 as Komaksavia's director. However, the effective management and control has been actually and continuously exercised by the Claimant's shareholders, and not by the Claimant's Board of Directors. Despite the provision of para. 87 of Komaksavia's Articles of Association **[Exhibit R-127** part I] - "[t]he business of the company shall be managed by the directors" - the pivotal management decisions of Komaksavia were as a matter of fact taken by the shareholders, who exercised the real power and influence on the management. Consequently, no seat, that is, no place of the effective management and control, has been established in the territory of Cyprus since 5 November 2019.

(iv) Andreas Menelaou Is Not the "Managing Director" of Komaksavia as Falsely Alleged

210. Both in the CWS-Menelaou[196] and SCWS-Menelaou, Andreas Menelaou stated that he was "the **managing** director of Komaksavia" *(emphasis added)* and was making the "witness statement in support of" the Claimant's submission **[Exhibit C-2,** para. 1; **Exhibit [SC-75],** para. 1]. No evidence was adduced by the Claimant to substantiate its allegation. However, there is evidence indicating that the statement (that he was "the **managing** director of Komaksavia") of Andreas Menelaou may actually be false and misleading.

211. Firstly, in the documents on record with the Companies Registrar in Cyprus, Andreas Menelaou (Av<Spfoc; M£v£Mou or AN8PEA:r MENEMOY, in Greek) was registered as the "Director" as of 11 November 2019 **[Exhibit R-10],** and not as the **'managing** director', of Komaksavia, and as of the day of the RfA dated 15 May 2020, Andreas Menelaou was the "Director" of Komaksavia on record with the Companies Registrar **[Exhibits R-10; R-114].**[197] Accordingly, Komaksavia

[196] The Witness Statement of Andreas Menelaou submitted [as **Exhibit C-2)** with the Claimant's Application for the Appointment of an Emergency Arbitrator and an Emergency Decision on Interim Measures, dated 24 July 2020.
[197] However, as of 23 December 2019, he is no longer [also) the Secretary of Komaksavia. The Secretary of Komaksavia on record as of 23 December 2019 is Lydia Menelaou, a legal consultant, from the same law firm Andreas Menelaou LLC **[Exhibit R-11).**

appointed and registered Andreas Menelaou as its director (a service that he provides to Komaksavia against a fee) and not as the managing director.

212. Secondly, the purported Komaksavia's Letter to Avia Invest dated 18 May 2020 has been signed by Andreas Menelaou as **"Director** of Komaksavia Airport Invest Ltd" *(emphasis added)* **[Exhibit [SC-75]** pdf page 229]. The Respondent observes that the Letter of Komaksavia dated 18 May 2020 is the only letter signed by Menelaou which has been submitted by the Claimant in these proceedings.

213. Thirdly, Andreas Menelaou is a practicing lawyer (advocate) in Cyprus,[198] member of the Cyprus Bar Association since September 2012 **[Exhibit R-48]** and the name partner of the Cyprus law firm Andreas Menelaou LLC, which has the address of the registered office at 256 Makarios Avenue, Eftapaton Court, Office C3, Limassol 3107, Cyprus **[Exhibit R-49].** Menelaou offers and provides, *inter alia,* company and commercial legal services as the sole member of the law firm Andreas Menelaou LLC **[Exhibit R-49].** The Claimant itself specifically referred to Menelaou as to "a practising lawyer within the territory of the Republic of Cyprus".[199]

214. The Republic of Moldova submits that Andreas Menelaou as a practicing lawyer and advocate in Cyprus may not be the purported "managing director" of Komaksavia, because those two capacities are incompatible and at odds with each other as a matter of law, and may not be simultaneously exercised by an advocate under the Cyprus law. Thus, Art. 18 of the of the Code of Conduct Regulations of 2002 as approved by the Cyprus Bar Association sets forth as follows:

> "18. *(Incompatibility)*
>
> (1) In order for advocates to be in a position to exercise their function with the necessary independence and in a manner conformable to their obligation to participate in the administration of justice, the **exercise of professions or activities which are incompatible with the legal profession is prohibited.**
>
> (2) Subject to the generality of paragraph (1), advocates must, in particular, **abstain from actively participating in the conduct of any business of commercial or other economic nature or from being an active member of such business.**
>
> Provided that the management of their property or assets or of those of their family is not considered to be an active participation in any business of commercial or other economic nature.
>
> Further provided that advocates may be members of the board

[198] The notions of "practising as an advocate", "practising advocate" are defined in Art. 11(1) of "The Advocates Law" of Cyprus **[Exhibit R-50].**
[199] Para. 90.5 of the Claimant's Reply dated 5 March 2021.

> of directors or secretary (but not employees) of a firm or company, but **not managing directors.**
>
> (3) For the purposes of this Regulation, a firm, group, union, partnership or legal entity (controlled by advocates) providing counselling or other services which are ancillary, related, successive or supplementary to those which an advocate provides or may provide in person or as a trustee, are not businesses of commercial or other economic nature."[200] (*emphasis added).*

215. Had Andreas Menelaou acted in violation of those rules in Art. 18 above, he would not be able to practice as a lawyer (advocate) in Cyprus, because according to Art. 17 of the Advocates Law of the Republic of Cyprus:

> "(1) If any advocate is convicted by any Court of any criminal offence which, in the opinion of the Disciplinary Board, involves moral turpitude or if such advocate is, in the opinion of the Disciplinary Board, guilty of disgraceful, fraudulent or unprofessional conduct towards the profession or **if he has acted or behaved in a manner contravening or conflicting with the provisions of the Advocates' Code of Conduct Regulations,** the Disciplinary Board may -
>
> (a) order the **name of the advocate to be struck off the Register of Advocates;**
>
> (b) **suspend the advocate from practising** for such period as the Disciplinary Board may think fit;
>
> (c) order the advocate to pay, by way of fine, any sum not exceeding twenty thousand euros:
>
> Provided that any amount paid under this paragraph shall be deposited to the Bar Council's Fund and for its objects.
>
> (d) warn or reprimand the advocate;
>
> (e) make such order as to the payment of the costs of the proceedings before the Disciplinary Board as the Disciplinary Board may think fit, either against the convicted advocate or, in case of his innocence, against the complainant, and such acts shall be calculated by the Extra Judicial Reward Committee of the Cyprus Bar Association and approved by the Disciplinary Board, on the scale of €10.000.00 to €50.000,00 of civil actions and collected by it as a penalty."[201]

[200] Art. 18 of the Code of Conduct Regulations of 2002 (in English), Cyprus Bar Association **[Exhibit R-51].**
[201] Art. 17 of the Advocate Law **[Exhibit RLA-50]**

216. Fourthly, the law firm Andreas Menelaou LLC's services include the **provision of physical directors to companies** for a fee. Thus, the member of that law firm and advocate Menelaou is registered as the director of a very large number of companies incorporated in Cyprus.[202] He is also a director of a company registered with the Registrar of Companies in England and Wales **[Exhibit R-28].** In none of those companies is he registered as "managing director". In addition, Andreas Menelaou holds the office of the secretary in numerous active companies incorporated in Cyprus.[203] The Claimant has not explained how Menelaou's serving simultaneously as a multiple director and a multiple secretary is compatible with him allegedly serving as the purported "managing director" of Komaksavia.

217. Accordingly, Andreas Menelaou is not the "managing director" of Komaksavia, and he does not exercise the effective management and control of the Claimant.

218. The Claimant submitted a copy of a Sublease Agreement dated 4 July 2018 allegedly concluded between Andreas Menelaou LLC and Komaksavia Airport Invest Ltd (the **"Sublease Agreement")** to substantiate its allegation of the Claimant's physical presence in Cyprus **[Exhibit C-8 to the Claimant's Reply to the Respondent's Request for Summary Procedure dated 5 March 2021].** Furthermore, based on that Sublease Agreement, the Claimant suggested that Menelaou was appointed director of Komaksavia at an earlier time rather than on 5 November 2019, and falsely asserted that it was Menelaou acting "as managing director" who sold shares in Komaksavia "to Mr Rothschild" which allegedly occurred on 19 August 2019 [para. 90.4 of the Claimant's Reply dated 5 March 2021].

219. The Claimant's statement about:

> "the copious evidence of Mr Menelaou who states that he takes (and continues to take) decisions on behalf of the Claimant as its managing director from Cyprus **(for instance, its sale to Mr Rothschild)"**[204] (emphasis added)

is false, is a confusion in terms, and goes against the own evidence brought by the Claimant.

220. Firstly, there is **no evidence** introduced by the Claimant or otherwise that Menelaou takes decisions on behalf of the Claimant.

221. Secondly, the Respondent notes that on 4 July 2018, the date of the conclusion of the purported Sublease Agreement, Andreas Menelaou was not the Claimant's director. Andreas Menelaou was appointed as the Claimant's Director on 5 November 2019 **[Exhibit R-10].** Any allegation made by the Claimant that

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[202] See, for example, **Exhibits R-13; R-14; R-16; R-18; R-19; R-20; R-21; R-22; R-24; R-25; R-26; R-29; R-31; R-32; R-33; R-34; R-35.** He is the Director of the Law Firm Andreas Menelaou LLC, see **Exhibit R-27.**
[203] See, for example, **Exhibit R-30.**
[204] Para. 90.4. of the Claimant's Reply dated 5 March 2021.

Menelaou somehow acted as the Claimant's director before the date of 5 November 2019 is false and is denied.

222. Particularly, the Claimant's allegation in para. 90.4. of the Claimant's Reply dated 5 March 2021 that it was Menelaou who sold shares in Komaksavia "to Mr Rothschild" is false. Even if it were true, which it is not, Menelaou could not have taken that decision, because the shares in Komaksavia which were allegedly sold to NR Investments Limited belonged to Tenev, as the Claimant's nominee shareholder, and not to Komaksavia. Furthermore, even if it were true, which it is not, Tenev allegedly sold the shares in Komaksavia to NR Investments Limited, and not "to Mr Rothschild" as falsely stated by the Claimant. That was not a decision which could substantiate the Claimant's wrong allegation that Komaksavia's important decisions were taken inside Cyprus.[205]

223. The Respondent submits that decision-making within the Claimant occurred and occurs outside Cyprus throughout the lifetime of Komaksavia. Thus, both Tenev and Karklinsh were foreign citizens residing outside Cyprus, in Bulgaria and Russian Federation, respectively **[Exhibits R-62 bis** and **R- 76 *bis].*** NR Investments Limited was a foreign company with no presence in Cyprus **[Exhibit R-3; R-4].** Goncharenko as well was a foreign citizen residing in the Russian Federation **[Exhibit R-107].** Accordingly, throughout the time Tenev and Karklinsh succeeded each other as Komaksavia's director - from 22 August 2016 to 5 November 2019 - director's decisions had been all taken outside Cyprus. Menelaou, who was appointed Komaksavia's director on 5 November 2019, is not a relevant decision-maker in Komaksavia. There is no evidence that he ever was.

224. Furthermore, shareholders' decisions had been taken exclusively outside Cyprus, as none of Komaksavia's shareholder was or is a resident of Cyprus.

225. Finally, Shor, the ultimate beneficial owner of Komaksavia, was a citizen of the Republic of Moldova residing outside of Cyprus, in the Republic of Moldova **[Exhibit R-63].**

(v) Advocate-Client Relationship

226. Under the Cyprus law, the relationship between the advocate Menelaou and Komaksavia is an advocate-client relationship, rather than a director-company relationship.

227. As indicated in Art. 18(2) of the Code of Conduct Regulations of 2002 of Cyprus Bar Association **[Exhibit R-51],** an advocate shall "abstain from actively participating in the conduct of any business of commercial or other economic nature or from being an active member of such business." Furthermore, pursuant to the same

[205] As a matter of law, such a decision is taken by the owner of the shares, and not by the company which issued the shares.

Art. 18(2), Cypriot advocates may not be "managing directors" of firms and companies, whether in Cyprus or abroad.

228. Accordingly, since Menelaou is a member of the Cyprus Bar Association and practices law in Cyprus as an advocate, as the sole member of the law firm Andreas Menelaou LLC, which advertises its legal services, he may not at the same time lawfully be the "managing director" of Komaksavia, as he has wrongly alleged.

229. Furthermore, the prohibition in Art. 18(2) of the Code of Conduct Regulations of 2002 applies to Menelaou as well, and therefore he may not actively participate in the conduct of the business, commercial or economic activity of Komaksavia. Consequently, he cannot exercise the effective management and control of Komaksavia.

230. In addition, since pursuant to Art. 18(2) of the Code of Conduct Regulations of 2002 he may only be a member "of the board of directors or secretary", Menelaou may not lawfully be the "managing director" of Komaksavia.

(vi) Andreas Menelaou Was Not Appointed on 23 October 2019 as Falsely Alleged

231. Andreas Menelaou stated in the CWS-Menelaou that he had been "appointed director of Komaksavia" on 23 October 2019 **[Exhibit C-2,** paras. 6, 14]. Also, in his SCWS-Menelaou he stated that he "was appointed as a director of Komaksavia" on 23 October 2019 **[Exhibit [SC-75],** paras. 14, 29, 38]. Those statements are false and misleading.

232. In fact, Menelaou contradicted himself: in the Notification of Changes of Officers or change of their information (the **"Form HE4 dated 5 November 2019"),** which was signed and submitted by Menelaou and which is currently on file with the Registrar of Companies, there was indicated that Andreas Menelaou had been "[a]ppointed on: 05/11/2019" as the director of Komaksavia **[Exhibits R- 10,** page 1; **R-114]** and that the former director Modris Karklinsh "[r]esigned on 5/11/2019/" **[Exhibits R-10,** page 2; **R-114].** Moreover, the Form HE4 dated 5 November 2019 was received and recorded with the Registrar of Companies on 11 November 2020 **[Exhibit R-10].**

233. The Respondent submits that the date of "05/11/2019" was actually the true date of the appointment, and Komaksavia was under a duty to provide the true date of the appointment pursuant to Art. 192 of the Companies Law **[Exhibit R- 52].**

234. The relevant part of the Form HE4 dated 5 November 2019 as filed by the Claimant with the Registrar of Companies **[Exhibit R-10]** is reproduced here below:

HEMLIG

Fee £5 CYP

THE COMPANIES LAW
CAP.113

HE4

Company Number:
HE 359258

Notification of Change of Officers or change to their information

Pursuant to Article 192

REGISTRAR OF COMPANIES
& OFFICIAL RECEIVER
NICOSIA- CYPRUS
RECEIVED
11 NOV2019

Name of Company KOMAKSAVIA AIRPORT INVEST LTD

Appointment of Officers

Office:	DIRECTOR		
Name:	ANDREAS	Registration No.:	
Surname:	MENELAOU		
Name in Latin Script:	ANDREAS	Surname in Latin Script:	MENELAOU
Previous Name:		Previous Surname:	
ID Card No.:		Passport Number:	K00354136
Date of Birth:	26/01/1988	Country of Citizenship:	
Occupation:	ADVOCATE	Director at another Company:	
Street/Avenue:	34B KANTARAS STR., STROVOLOS		No.:
Building:		Floor:	Apt.:201
Parish/Town/Village:	NICOSIA	District:	
Post Code:	2049	Country: CYPRUS	
Replacement of Directors (name):			
Appointed on:	05/11/2019	ID Card/Reg. No.:	

Office:	SECRETARY		
Name:	ANDREAS	Registration No.:	
Surname:	MENELAOU		
Name in Latin Script:	ANDREAS	Surname in Latin Script:	MENELAOU
Previous Name:		Previous Surname:	
ID Card No.:		Passport Number:	K00354136
Date of Birth:	26/01/.1988	Country of Citizenship:	
Occupation:	ADVOCATE	Director at another Company:	
Street/Avenue:	34B KANTARAS STR., STROVOLOS		No.:
Building:		Floor:	Apt.:201
Parish/Town/Village:	NICOSIA	District:	
Post Code:	2049	Country: CYPRUS	
Replacement of Directors (name):			
Appointed on:	05/11/2019	ID Card/Reg. No.:	

Correspondence Contact Details

Name:	HARNEYS FIDUCIARY CYPRUS LIMITED		
Address:	28th October Street, No. 313, 3rd Floor, Llmassol, Cyprus		
Post Code:	3105	Telephone:	25820020

235. It is therefore **proved** that Andreas Menelaou had provided **false testimony** about the date of his appointment as the director of the Claimant [cf. paras. 6, 14 of CWS-Menelaou, **Exhibit C-2;** paras. 14, 29, 38 of SCWS-Menelaou, **Exhibit [SC- 75]].**

236. Although, in the Claimant's Response dated 18 December 2020, the Claimant's half-heartedly admitted its false statement on the date of Menelaou's appointment,[206] it nonetheless continued to falsely suggest that Andreas Menelaou had been earlier appointed as the Claimant's Director (see page 23 of the Appendix I to the Claimant's Response dated 18 December 2020). However, that Claimant's suggestion was not grounded in any evidence provided in these proceedings [cf. **Exhibits R-10; R- 114].**

237. The Claimant has produced a document called "Register of Directors of Komaksavia Airport Invest Ltd, Registration Number HE359258, Date of Registration: the 19th August 2016, Registered Office Address: 256 Makareiou Street, Eftapaton Court, Flat/Office C3, 3107 Limassol, Cyprus" (the **"Register of Directors Held by Komaksavia"),** allegedly signed by the Secretary Lydia Menelaou on 23.12.2019 **[Exhibit [C-3]; Exhibit [SC-75],** pdf page 70]. The Register of Directors Held by Komaksavia indicates the date of "23/10/2019"as the "Date of Appointment" of Andreas Menelaou as the Claimant's director. The Claimant has failed to explain the reasons of the entries in the Register of Directors Held by Komaksavia which precede 23 December 2019 being confirmed and signed by Lydia Menelaou, as she was appointed as secretary only on 23 December 2019 **[Exhibit R-11],** and how those entries were to reflect the true dates of the directors' appointment.

238. However, the Respondent submits that the Form HE4 dated 5 November 2019 **[Exhibit R-10],** which was filed by the Claimant itself with the Registrar of Companies of Cyprus and confirmed by the Claimant to be "true and accurate" and "in accordance with the corporate Register of the Company" **[Exhibit R-109],** is a better proof, which contradicts the entries in the Register of Directors Held by Komaksavia **[Exhibit [C-3]; Exhibit [SC-75],** pdf page 70], which might have been created post factum by the Claimant.

239. The information in the Form HE4 dated 5 November 2019 **[Exhibit R-10]** is even more credible than the alleged information in the Register of Directors Held by Komaksavia **[Exhibit [C-3]; Exhibit [SC-75],** pdf page 70], as it is based on the provisions of Art. 192 of the Companies Law of the Republic of Cyprus. Art. 192 provides in its relevant part as follows:

> 192.- (1) Every company shall keep at its registered office a register of its directors and secretaries.
>
> [...]
>
> (4) The company shall, within the periods respectively

[206] See page 23 of the Appendix I to the Claimant's Response dated 18 December 2020.

> mentioned in subsection (5), **send to the registrar of companies a return in the prescribed form containing the particulars specified in the said register and ii. notification in the prescribed form of any change among its directors or in its secretary or in any of the particulars contained in the register, specifying the date of the change.** *(emphasis added)*
>
> (5) The periods referred to in subsection (4) are the following, namely:-
>
> (a) the period within which the said return is to be sent shall be a period of fourteen days from the appointment of the first directors of the company; and
>
> (b) the period within which the said notification of a change is to be sent shall be fourteen days from the happening thereof:
>
> Provided that, in the case of a return containing particulars with respect of any person who is the company's secretary at the commencement of this Law, the period shall be fourteen days from the commencement of this Law.
>
> [...)207

240. Accordingly, the Form HE4 dated 5 November 2019 **[Exhibit R-10],** containing the particulars specified in the register of the Claimant's directors and secretaries and **change among its directors** and in its secretary, **specifying the date of the change,** was filed/sent by the Claimant to the Registrar of Companies pursuant to Art. 192 of the Companies Law and was received by the Registrar of Companies on 11 November 2019. The Form HE4 dated 5 November 2019 was a contemporaneous document. In contrast, the Register of Directors Held by Komaksavia **[Exhibit [C-3]; Exhibit [SC-75],** pdf page 70] might have been created after the event. Its evidentiary value regarding the date of appointment of Andreas Menelaou is destroyed by the Form HE4 dated 5 November 2019 **[Exhibit R - 10].**

241. Thus, the date of 5 November 2019 was the date of the change among the directors of Komaksavia and, as specified in the Form HE4 dated 5 November 2019 on file with the Registrar of Companies, Andreas Menelaou was appointed as director (and secretary[208]) of Komaksavia on 5 November 2019 and not, as falsely testified by Andreas Menelaou, on 23 October 2019. Menelaou's testimony in the CWS-Menelaou and SCWS-Menelaou is on most accounts flawed, in contradiction to

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[207] Art. 192 of the Companies Law of the Republic of Cyprus **[Exhibit R-52).**

[208] Andreas Menelaou served as the Secretary of Komaksavia allegedly until 23.12.2019 **[Exhibit R-11).** However, the Notification of Change of Officers or change to their information with regard to the appointment of Lydia Menelaou as the Secretary of Komaksavia and resignation of Andreas Menelaou from the office of the Secretary of Komaksavia was filed late, in violation of the 14-day term as provided for in Art. 192(5) of the Companies Law, and was only received by the Registrar of Companies on 28 January 2020.

the facts and evidence; it is anything but "truth" [cf. **Exhibit C-2,** page 10, the alleged "Statement of Truth"; **Exhibit [SC-75],** pages 18-19, the alleged "Statement of Truth"].

242. At the time of the issuance of the purported Notice of Dispute dated 2 October 2019, Menelaou was not the director of Komaksavia. At that time, as the records showed **[Exhibits** R-8], Komaksavia's director was Karklinsh, who resided in Moscow, Russian Federation. Certainly, the decision to issue the purported Notice of Dispute was not taken at the Claimant's designated address of the registered office in Cyprus.

243. There is no proof that the place of the effective management and control of Komaksavia until 5 November 2019

(vii) Andreas Menelaou Has No Direct Knowledge of Alleged Facts, Events, Circumstances

244. As to the substance of Andreas Menelaou's written testimony in the CWS-Menelaou, paras. 7, 8, 9, 11 (including 11.1., 11.2., 11.3.), 12.1., 12.2., 14, 15, 23 refer to the alleged events, facts or circumstances that predated his appointment as the director of Komaksavia. He has no direct knowledge of and was not a witness to those facts, events, and circumstance, and he actually only speculates about them.

245. Furthermore, in fact in the CWS-Menelaou Andreas Menelaou has acknowledged that he has no direct knowledge of the alleged facts, events, or circumstances portraited by him in paras. 11 (including 11.1., 11.2., 11.3.), 13-18, 23-29, 32.2. and other paragraphs of the CWS-Menelaou, because those alleged acts or measures of the Republic of Moldova which he testifies about are allegedly directed towards the 'Concessionaire (Concession Enterprise)', not towards the Claimant. Andreas Menelaou states wholesalely that he "agree[s] with the description of those measures in the Application" **[Exhibit C-2,** para. 14].

246. That Andreas Menelaou has no direct knowledge of the alleged facts, events and circumstances is further evidenced by the "List of the documents submitted with the Witness Statement of Mr Andreas Menelaou" **[Exhibit C-2,** page 11]. That List (of the Exhibit AM1) is reproduced hereunder.

Exhibit AMI
List of documents submitted with the Witness Statement of Mr Andreas Menelaou

	Document Name
I.	Concession Monitorin!:! Committee Minutes No. 3 dated 29 December 2016
2.	Concession Monitoring Committee Minutes No. 4 dated 25 Att!:!ust 2017
3.	Concession Monitoring Committee Minutes No. 5 dated 27 December 2018
4.	Excerpts from Avia Invest's financial statements for the year ended 31 December 2018 (audited by Moore Steohens)
S.	Notarised Contract of Sale dated 6 Seotember 2016
6.	Minutes of the general meeting of shareholders of Avia Invest dated 11 October 2019
7.	Press release of Avia Invest dated 14 May 2020
8.	Letter from Komaksavia to Avia Invest dated 18 May 2020
9.	Calculation of financial losses of Avia Invest
10.	Notification ofTennination dated 8 July 2020
11.	Letter of Avia Invest to the PPA dated 13 Julv 2020
12.	Letter of Avia Invest to the PPA and the Concession Monitoring Committee dated 13 July 2020
13.	Letter from the PPA to Avia Invest dated 17 Julv 2020
14.	Second letter from the PPA to Avia Invest dated 17 July 2020

247. 11 out of the 14 documents listed in the List are documents either issued by Avia Invest to third parties or received by Avia Invest from third parties (not to or from Komaksavia) [see Nos. 1, 2, 3, 4, 7, 9, 10, 11, 12, 13, 14 of the List]. Furthermore, documents Nos. 5 and 6 of the List refer to the facts and events predating Andreas Menelaou's appointment as the director of the Claimant.

248. In the SCWS-Menelaou, the alleged events, facts or circumstances referred to by Menelaou in a majority of paragraphs, *inter alia,* in para. 33 (including 33.1., 33.2. and 33.3.), predate Menelaou's appointment as Komaksavia's director. Accordingly, Menelaou has no direct knowledge of and has not been a witness to those facts, events, and circumstance, and he actually only speculates about them.

249. The Respondent notes that the Claimant has not proved that Menelaou has ever visited Avia Invest (in Moldova) and/or has any first-hand knowledge about the business of Avia Invest.

(viii) Andreas Menelaou Actually Acts Under the Directions and Instructions of Shareholders and real UBO

250. The document No. 8 from the above reproduced List (of the Exhibit AM1) is the only document allegedly issued by Komaksavia at the time at which Andreas Menelaou was its director [see **Exhibit C-2,** page 95]. In that document Andreas Menelaou actually acknowledges that he does not control anything in Komaksavia, and that "the shareholders of the company" have full control over Komaksavia's affairs, particularly, with regard to "negotiations with a group of creditors" on the provision of loans, "reach[ing] an agreement on the provision of the necessary funds",

clarification of "the legal and technical aspects of the loans' provision" **[Exhibit C-2,** page 95]. As he himself recognises, he does not even have the knowledge about the alleged amount allegedly negotiated by the company's shareholders [see **Exhibit C-2,** para. 12.3.; cf. **Exhibit C-2,** page 95].

251. The paragraphs above clearly show that Andreas Menelaou is a director in name only, provides corporate services to Komaksavia as a practicing lawyer, is poorly informed about Komaksavia's corporate and business affairs and even about his own capacity in Komaksavia. It is patently obvious that the company's business is run by other persons, and not by Andreas Menelaou.

252. According to Art. 192 para. (9) of the Companies Law of the Republic of Cyprus **[Exhibit R-52 bis]:**

> (9) For the purposes of this section-
>
> (a) a person in accordance with whose directions or instructions the directors of the company are accustomed to act shall be deemed to be a director and officer of the company;
>
> [...]209

253. Accordingly, those who direct and instruct Andreas Menelaou shall be held as officers (directors) of the Claimant.

(ix) Andreas Menelaou Falsely Refers to Wrong or Inexistent Content of Claimant's Application

254. In para. 13 of the CWS-Menelaou, Andreas Menelaou referred to an alleged "description of the RM's hostile and unlawful actions since 2019 [...]" which was alleged to be found in para. 43 of the Claimant's Application dated 24 July 2020 [see **Exhibit C-2,** para. 13]. However, para. 43 of the Claimant's Application dated 24 July 2020 did actually refer to the alleged incorporation and existence of Avia Invest under Moldovan law [see **Claimant's Application dated 24 July 2020,** para. 43)210 and did not refer to any alleged "description of the RM's hostile and unlawful actions since 2019 [...]" as falsely alleged by Andreas Menelaou.

255. As evidenced in para. 13 of the CWS-Menelaou, Andreas Menelaou has in fact not "read the Application fully and carefully" as he falsely and invalidly stated in para. 2 of the CWS-Menelaou **[Exhibit C-2,** para. 2]. Furthermore, his statement in para. 2 of the CWS-Menelaou that "I approve its contents being in agreement with all of the statements therein" is actually in sheer dis-agreement with the contradiction between his statement in para. 13 of the CWS-Menelaou and para. 43 of the Claimant's

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209 Art. 192(9) of Companies Law **[Exhibit R-52 *bis*].**

210 Para. 43 of Claimant's Application for the Appointment of an Emergency Arbitrator and an Emergency Decision on Interim Measures, dated 24 July 2020.

Application dated 24 July 2020, as well as with other false and invalid statements in the CWS-Menelaou.

(x) Menelaou Was Appointed as Director for Komaksavia to Request Tax Residency Certificate

256. Whether incorporated in Cyprus or in a foreign country, companies with foreign shareholders or with business outside Cyprus often appoint and register Cypriot residents as directors for the purpose of acquiring the tax residency certificate in Cyprus. By its nature, an appointment of a Cypriot resident as director based on such rationale is a matter of **formality,** and the effective decision-making and control in such companies do not therefore have to relocate to Cyprus.

257. In the instant case, with no proven business activity in the territory of Cyprus[211] and with non-resident shareholders of Cyprus, Komaksavia purportedly appointed Menelaou as its sole director on 5 November 2019 in order to request a tax residency certificate form the tax authority in Cyprus.

258. Furthermore, Menelaou was appointed as Komaksavia's director at the stage of Komaksavia's preparation for this arbitration.

259. Before appointing Menelaou as its director, Komaksavia's directors and shareholders were foreign citizens and non-residents of Cyprus.

260. With the appointment of Menelaou as its sole director, the effective decision-making and control in Komaksavia did not however relocate to Cyprus.

261. The Tax Certificate for the year 2020 **[Exhibit C4** to the RfA; **Exhibit [SC-75],** pdf page 66] does not evidence the Claimant's seat is being located in Cyprus. The Tax Certificate states that Komaksavia "is registered in Cyprus" and for the year 2020 is a tax resident of Cyprus. It does not and may not state that Komaksavia has its seat or registered office in Cyprus, because the certificate's issuer authority, the Tax Department, is not an authority that investigates whether a company actually has or not its seat or registered office in Cyprus.

262. Under Cypriot law, a tax certificate is issued entirely based on the information filed via a questionnaire by the legal entity,[212] and the actual content of the information provided in the questionnaire is not independently verified by the tax authority in any way. Therefore, the Tax Certificate for the year 2020 does not and may not serve as conclusive proof that Komaksavia is a tax resident of Cyprus for the year 2020. This matter may and should be determined alone by the Tribunal.

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211 Despite its allegation that "the Claimant is Cypriot company with its place of business firmly rooted in Cyprus" [para. 77 of the Claimant's Reply dated 5 March 2021], no such "firmly rooted" business has been introduced into evidence by the Claimant.

212 See the Form of the Tax Residency Certificate Request and Questionnaire for Legal Entities, Republic of Cyprus **[Exhibit R-138).**

263. Under the Income Tax Law of Cyprus, '"resident in the Republic' … means a company whose management and control is exercised in the Republic".[213] As proved by the Respondent the management and control of Komaksavia is not exercised in the Republic of Cyprus.

264. The Claimant submitted a purported Certificate of Incorporation issued by the Registrar of Companies of Cyprus on 19 August 2016 **[Exhibit C-4,** page 1, to the RfA] apparently to substantiate that Komaksavia has its registered office in Cyprus. The Certificate of Incorporation does not provide an address.

265. However, a certificate of incorporation does not deem certification of the company's incorporation by the Registrar of Companies as a sufficient condition for holding a registered office in existence. Such an interpretation, however, would defeat the very purpose of a registered office and Cyprus corporate practice. It would lead to imposing on the Registrar of Companies a time-consuming, and costly, obligation of an actual inspection of the premises and supporting documents as to the company's right to use them.

266. In Laerstate BV v. The Commissioner for Her Majesty's Revenue and Customs[214] which was decided in the UK, a jurisdiction from which Cyprus also takes inspiration, the court said:

> "There is no assumption that CMC [central management and control] must be found where the directors meet. It is entirely a question of fact where it is found. Where a company is managed by its directors in board meetings it will normally be where the board meetings are held. But if the management is carried out outside board meetings one needs to ask who was managing the company by making high level decisions and where, even where this is contrary to the company's constitution. "[215]

267. The court in that case went on to say that the test is not confined to looking at particular actions of the company (e.g., signing documents or making board resolutions) if a more general overview of the course of business and trading shows that as a matter of fact the **central management and control** abides elsewhere.[216] The court indicated that **the mere fact that the director was resident in the UK during the relevant time did not of itself mean that *Laerstate,*** which was incorporated in the Netherlands, **was resident in the UK.217** Rather, as the court indicated, the question was whether the director was

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[213] Art. 2 {definition of "resident in the Republic") of the Income Tax Law, 2002, No.118(1)/2002 **[Exhibit R-137].**
[214] See the Decision in *Laerstate BV v. The Commissioner for Her Majesty's Revenue and Customs,* released on 11 August 2009 **[Exhibit R-139].**
[215] *Ibid.,* para. 27.
[216] *Ibid.,* para. 28. The court applied the legal test developed in *De Beers Consolidated Mines Ltd v. Howe* {Surveyor of Taxes) {1906) AC 455, in which Lord Loreburn (at p. 458) said: "I regard that as the true rule, and the real business is carried on where the central management and control actual abides."
[217] *Ibid.,* para. 39.

exercising central management and control in the UK.[218] Because of the key decisions having been taken in the UK, *Laerstate* was held to be UK resident under domestic law.[219]

268. As the evidence on the record proves, the central management and financial control of Komaksavia has not been exercised by its sole director, but by the shareholders and the real UBO outside the territory of Cyprus. Furthermore, the Claimant has had no business in the territory of Cyprus, despite the unproven assertion that "the Claimant is a Cypriot company with its place of business firmly rooted in Cyprus".[220] Accordingly, the central management and control does not abide in Cyprus.

269. Accordingly, the Tax Certificate for the year 2020 **[Exhibit C4** to the RfA; **Exhibit [SC-75],** pdf page 66] cannot be considered conclusive evidence that "for the year 2020" the Claimant is tax resident of Cyprus.

270. In any event, the Tax Certificate does not prove that the Claimant has its seat in the territory of Cyprus, as Cypriot tax legislation shall be strictly interpreted in accordance with its peculiar notions and definitions and may not help in defining the term "seat" under the BIT. For similar reasons, the tribunal in CEAC v *Montenegro* found that '"seat' cannot be equated with 'tax residence'"[221] and that "regardless of whether Claimant is a tax resident of Cyprus or not, its tax residency cannot serve to prove that CEAC has a 'seat' in Cyprus for the purposes of Article 1(3)(b) of the BIT".[222]

271. In any event, the key condition of the provision of Art. 1(3)(b)(ii) - "having their seat in the territory of the Republic of Cyprus" - is not met by the Claimant.

d. No Proper Physical Premises for "Registered Office" and/or "Seat" in Cyprus

(i) The "Working Place 02" May Not and Does Not Serve as the "Registered Office" and/or "Seat"

272. Komaksavia has not proved that it has business premises in Cyprus. The "working space 02", which it allegedly rents under the alleged Sublease Agreement dated 4 July 2018 **[Exhibit [C-8]]** in the office of the law firm Andreas Menelaou LLC[223] does not mean business premisses. No physical parameters of the "working space 2" (which is improperly referred to as the "Office") have been provided, let alone

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[218] *Ibid.,* para. 39.
[219] *Ibid.,* paras. 41, 45, 51.
[220] Para. 77 of the Claimant's Reply dated 5 March 2021.
[221] *Central European Aluminum Company {CEAC) v. Montenegro,* ICSID Case No. ARB/14/8, Award, dated 26 July 2016, para. 209 **[Exhibit RLA-17].**
[222] *Ibid.,* para. 211.
[223] See SCWS-Menelaou, para. 36.1. **[Exhibit [SC-75)].**

proven, by the Claimant. The "working space 02" has not been shown to be measurable or measured in units of area [cf. **Exhibit [C-8]].**

273. It is not clear whether the "working space 02" in the Sublease Agreement between Andreas Menelaou LLC and Komaksavia Airport Invest Ltd is the same as the "working space 02" in the Sublease Agreement between Andreas Menelaou LLC and Komaksavia Investment Ltd **[Exhibit [SC-75]; Exhibit [C-2]; Exhibit [CA-35]** [224].[225] There is no doubt that the same "working space 02" in the Sublease Agreement between Andreas Menelaou LLC and Komaksavia Airport Invest Ltd is the co-working space shared by an exceptionally large number of companies as their "registered office", as substantiated in the following paragraphs. Given these circumstances, the "working space 02" indicates a cubicle or a pigeonhole, and not a separate room. Therefore, the "working space 02" may not be equated with an "Office", as improperly referred to in the Sublease Agreement dated 4 July 2018 **[Exhibit [C-8]].**

274. The space rented to the Claimant as the "working space 02" lacks functional autonomy and, indeed, any kind of autonomy to serve as a "registered office". And by any standards, the "working space 02" may not serve as the "seat" of the Claimant. The "working space 02" is an integral and functional part of a "larger space", "situated in the offices",[226] used by a vast number of other companies and for the purposes of various other administrative services and legal services by the law firm Andreas Menelaou LLC and the lawyers thereof.

275. The "working space 02" may not be delimitated or separated so that it is not continuously trespassed by the users of the other integral parts of the "larger space". Moreover, the "working space 02" may not be used without continuously trespassing other spaces and/or "working spaces".

276. Furthermore, a more substantial problem is the one concerning the possibility of an effective, functional and purposeful use of the "registered office", as it is defined in Sections 102 and 103 of the Companies Law **[Exhibit R-52 *bis],*** in the "working space 02". This is even more so problematic, as the Claimant has alleged that it

> "conducts **real economic activity on the territory of the Republic of Cyprus,** which, inter alia, **could be proven with the office sub-lease agreement [see exhibit CA-35]], employment agreements** confirming general business costs, liabilities and owned assets, extracts and analytical statements from financial statements confirming general administrative or operational expenses related to the company's business

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[224] It should be noted that the same sublease agreement between Andreas Menelaou LLC and Komaksavia Investment Ltd was submitted twice, as **Exhibit [C-2]** and **Exhibit [CA-35],** with the Claimant's Response dated 18 December 2020.
[225] In a footnote [Footnote 13] to the Claimant's Reply dated 5 March 2021, the Claimant has halfheartedly recognized an "administrative error" in that it introduced into evidence the purported Sublease Agreement concluded between Andreas Menelaou LLC and Komaksavia Investment Ltd on 4 July 2018 **[Exhibit [SC-75]; Exhibit [C-2]; Exhibit [CA-35)].**
[226] SCWS-Menelaou, para. 36.1. **[Exhibit [SC-75)].**

activity; "[227] (*emphasis added).*

277. The alleged "[r]eal economic activity on the territory of the Republic of Cyprus" (which has not been proven by the Claimant) cannot be conducted from a cubicle or pigeonhole. Such "real economic activity" would require proper functional and adequate physical premises which the "working space 02" is not. Moreover, the conduct of any corporate activity would require adequate physical premises to meet the conditions set out in Sections 102 and 103 of the Companies Law, and the Claimant has not substantiated, let alone proved, that the "working space 02" is in conformity with those required conditions.

278. Co-sharing business spaces has its physical limits there, where it encroaches on the functionality and autonomy of a "registered office" and/or "seat", or the physical capacity or limits thereof. Since the "working space 02" should be continuously trespassed by the users of the other dozen "working spaces" rented to those numerous companies, it cannot have the meaningful functions of the Claimant's "registered office" and/or "seat".

279. At the same time, co-providing that large range of administrative services (see para. 284 below) to so many companies encroaches on the physical capacity and limits of Menelaou to take meaningful and detailed business decisions as Komaksavia's director which he, as a matter of fact, does not take. As indicated in other subsection of this Memorial, Menelaou's decision-making within Komaksavia is of a clerical, housekeeping, front-desk nature only, not of a management nature.

280. In any event, the provision of the "working space 02" to the Claimant does not locate the decision-making of the Claimant at the "working space 02" or at the address indicated by the Claimant.

281. The object of the purported Sublease Agreement dated 4 July 2018 is the rent of the "working space 02" and not the administrative services of "provision of registered office address"[228] to Komaksavia [Cf. **Exhibit [C-8]].** The use of the address of the law firm Andreas Menelaou LLC as the designated address of the Komaksavia's registered office is not even mentioned in the Sublease Agreement dated 4 July 2018. Furthermore, the "working space 02" has not been mentioned or specified as the "registered office address" of Komaksavia in the Notification of the Address of the Registered Office **[Exhibit R-61].** Thus, the "working space 02" does not equate the "registered office address", nor should it be construed to constitute Komaksavia's "registered office address". The Claimant however has mixed up those two issues.

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[227] Para. 13S(vi) of the Claimant's Response dated 18 December 2020. Except the purported Sublease Agreement dated 14 July 2018, none of the documents listed by the Claimant to prove its alleged economic activities has been introduced into evidence.

[228] Such as regulated in Art. 4(1)(iv) of the Law regulating Companies Providing Administrative Services and Related Matters **[Exhibit R-136).**

282. In any event, even the provision of a registered office address would not locate the decision-making in Komaksavia at that address given that Komaksavia's decision-making is not with its director, but it is with the shareholders and the real UBO.

283. The Claimant has not proved that it had paid the "agreed rent" (in the amount of EUR225) for the "working space 02" under the Sublease Agreement to the law firm Andreas Menelaou LLC. Furthermore, Claimant has not proved that it has had any income from which it would pay the "agreed rent", or whether it has been issued with invoices by the law firm Andreas Menelaou LLC.

284. The address indicated by the Claimant[229] is an address of the law firm Andreas Menelaou LLC at which address **more than twenty-five other companies** also have notified their address of their registered offices with the Registrar of Companies,[230] highly likely on the basis of the same terms and conditions as the Sublease agreements submitted by the Claimant in these proceedings **[Exhibit-[C- 8]; Exhibit [SC-75]; Exhibit [C-2]; Exhibit [CA-35]].** In addition, as described elsewhere in this Memorial, at the same address of the law firm Andreas Menelaou LLC, Andreas Menelaou provides simultaneously the administrative services of rendering directors, mostly in form of a sole director, to **well over fifty (SO) companies** incorporated in Cyprus,[231] as well in other countries.[232] Also at the same address/ in the same office of the law firm Andreas Menelaou LLC, Andreas Menelaou provides administrative services of rendering secretary to numerous active companies incorporated in Cyprus.[233] Furthermore, the same

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[229] See para. 1 of the SoC; see also para. 1 of the RfA.

[230] See, for example, **Exhibits R-13; R-14; R-15; R-16; R-17; R-18; R-19; R-20; R-21; R-22; R-23; R-24; R-25; R-29; R-31; R-32; R-33; R-34; R-36.** The Law Firm Andreas Menelaou LLC has its registered office at the same address, see **Exhibit R-27.**

[231] See, for example, **Exhibits R-13; R-14; R-16; R-18; R-19; R-20; R-21; R-22; R-24; R-25; R-26; R-29; R-31; R-32; R-33; R-34; R-35,** as well as of other Cypriot companies, *inter alia,* Lenta PLC (reg. No. HE407296), Amashen Limited (HE398867), Rouanari Enterprises Limited (HE365980), IDF Holding Ltd (HE317558), SP Cosmoart Studio Lashes Limited (HE400195), Gluckstenson Holding Limited (HE389102), Netmaco Limited (reg. No. HE367384), Galaga Investments Limited (HE417170), Kerfirua Holding Limited (reg. No. HE241818), Fondport Ltd (reg. No. HE412231), Creative Universe (reg. No. HE411619), Zinagori Limited (reg. No. HE338346), Propexperts Ltd (reg. No. HE377867), Alson Limited (reg. No. HE207982), AB Beneficio Neto Investments Limited (reg. No. HE394768), Hedonism Wine Trading I Ltd (HE412245), AS Sales Revenue Investments Limited (HE394766), Bravarus Limited (HE392200), Joferno Limited (HE310431), Quasiva Limited (HE400898), Betop Holding Group Investment and Management Ltd (HE363750), Otmostio Limited (HE416326), Shenron Limited (HE383308), Marlini Executive OV Limited (HE394938), Actencia Limited (HE302515), Lnex Limited (HE363789), Saule Invest Properties Ltd (HE401043), SB Regulus Lucens Investments Limited (HE394953), A. Menelaou Mechanical Services Ltd (HE395509), Greista Investments Limited (HE194433), BP-Properties Limited (HE234901), Vneshposyltorg Group Limited (HE349385), Solagran Limited (HE182963), Trustville Limited (HE241364), Cadillacing Investments Limited (HE244719), I.M.C. Demand (CY) Limited (HE347429), Starbiz Limited (HE349385), AIFG Trading Company Limited (HE371042). Andreas Menelaou is the Director and Secretary of the Law Firm Andreas Menelaou LLC, see **Exhibit R-27.**

[232] Andreas Menelaou is the director of the company Pewdie Productions UK Limited (No. 09742888) **[Exhibit R-1241,** oversea company Hedonism Wine Trading I (No. FC038142) **[Exhibit R-125),** company PDPUK Limited (former PXM Network Limited) (No. 9795904) **[Exhibit R-126),** all registered in England and Wales.

[233] Andreas Menelaou is the secretary, *inter alia,* of the following Cypriot companies: Zinorel Limited (HE299392), AB Beneficio Neto Investments Limited (reg. No. HE394768), MSS Global Trade Consultants Limited (HE360952), Stratosoft Limited (HE377486), AS Sales Revenue Investments Limited (HE394766), MGC Construction Limited (HE88729), A. Menelaou Mechanical Services Ltd (HE395509), Gluckstenson Holding Limited (HE389102), Saule Invest

address / the same office of the law firm Andreas Menelaou LLC is used by the advocate Andreas Menelaou to provide legal services to clients in the areas as advertised on the law firm's website www.menelaou-law.com **[Exhibit R-49].** Moreover, at the same address, Lydia Menelaou provides administrative services of rendering secretary to a very large number of active companies registered in Cyprus.

285. Thus, the "working place 02" may not and does not serve as the "seat" and/or "registered office" of the Claimant.

286. Furthermore, the "working space 02" may not and does not server as the address of the registered office of the Claimant. Nor has it been indicated in the Notification of the Address of the Registered Office **[Exhibit R-61].**

287. The Respondent has brought sufficient evidence in paras. 148 et seqq. and 196 et seqq. that the decisions taken by the shareholders of Komaksavia have not been located at the "working space 02" or at the address indicated by the Claimant in the RfA and Soc and, moreover, not in the territory of Cyprus. Also, the financial control of Komaksavia has not been located at the "working space 02" or at that address and, furthermore, not in the territory of Cyprus. In addition, the decisions of the shadow directors, which actually have continuously exercised the effective management of Komaksavia, have definitely not been located at the "working space 02" or at that address, or otherwise in the territory of Cyprus. Accordingly, the "seat" of the Claimant has not been located at the "working space 02" or at the address provided by the Claimant and, furthermore, not in the territory of Cyprus.

288. The address provided by the Claimant is a purely formal address. It is not the place where the effective management and control of the Claimant has been carried out. Also, it is not the place of "some sort of actual or genuine corporate activity."[234]

(ii) The Purported Sublease Agreement Is Not Valid

289. The Sublease Agreement between the law firm Andreas Menelaou LLC and Komaksavia Investment Ltd dated 4 July 2018, which was the first such sub-leases submitted by the Claimant in these proceedings **[Exhibit [SC-75]; Exhibit [C-2]; Exhibit [CA-35]],** is signed by Menelaou and sealed with the company seal of the law firm Andreas Menelaou LLC which contains the name of the law firm engraved in Greek characters: "AND.PEAL MENEMOY b..E.n.E." and the registration number "HE 357259". The relevant part of the signature block, including the seal of Andreas Menelaou LLC, of that Sublease Agreement is reproduced here below:

Properties Ltd, HE401043, A.M.Menelaou Bros Food & Beverage Limited (HE325283), Q.M.S. Network Limited (HE379109), Propexperts Ltd (HE377867), Sarbitek Limited (HE302321).

[234] *Tenaris S.A. and Ta/ta - Trading e Marketing Sociedade Unipessoa/ Lda. v. Bo/ivarian Republic of Venezuela,* ICSID Case No. ARB/11/26, Award, 29 January 2016, para. 150 **[Exhibit RLA-37].**

290. The purported Sublease Agreement between the law firm Andreas Menelaou LLC and Komaksavia Airport Invest Ltd dated 4 July 2018, which was submitted by the Claimant in these proceedings on 5 March 2021 **[Exhibit [C-8]],**[235] is signed by Menelaou and sealed with the company seal of the law firm Andreas Menelaou LLC which contains the name of the law firm engraved in Latin characters: "ANDREAS MENELAOU LLC" and the registration number "HE 357259". The relevant part of the signature block of that Sublease Agreement is as well reproduced here below:

291. It is highly suspicious that the two Sublease agreements concluded by the law firm Andreas Menelaou LLC with either of the two companies, Komaksavia Airport Invest Ltd and Komaksavia Investment Ltd (the latter being a company registered in Cyprus under the No. HE359254 on 19 August 2016; with the same Kyriakos Y. Panagos as the first shareholder, director and secretary; and, starting 21.12.2016, having Marin Mihov Tenev as the sole shareholder, sole director and secretary; with 1000 ordinary shares; with a "Reminder letter sent" on the same date of 10.10.2019),[236] each purportedly dated with the same date of 4 July 2018, each having its object the rent of the "working space 02", each containing the same terms and conditions, were nonetheless sealed with distinct seals of the law firm Andreas Menelaou LLC.

292. Accordingly, if the two Sublease agreements are real, on 4 July 2018, the law firm Andreas Menelaou LLC had and used two various company seals. This is, however, unlawful, because under the Companies Law, a company shall have one "common

[235] Submitted as an exhibit to the Claimant's Reply dated 5 March 2021.
[236] See the Excerpt regarding Komaksavia Investment Ltd from the file of the electronic records of the Companies Section of the Department of Registrar of Companies and Official Receiver of the Republic of Cyprus **[Exhibit R-143).**

seal" (Art. 15(1)) **[Exhibit R-52 *bis].*** Also, Art. 1 of Andreas Menelaou LLC's Articles of Association defines "Seal" as "the common seal of the Company" **[Exhibit R-144].** Furthermore, Art. 115 of the Articles of Association regulates the "custody of the Seal" and how "the Seal shall be affixed". There is no provision in Art. 115 about any official seal (as regulated under Art. 36(1) of the Companies Law) in addition to the common seal. In any event, neither of the two seals of Andreas Menelaou LLC were issued pursuant to Art. 36(1) of the Companies Law. Accordingly, Andreas Menelaou LLC should have had only one company seal - the common seal - on 4 July 2018. Thus, one of the two seals were not the "common seal" of Andreas Menelaou LLC and, therefore, invalid, with the consequence that also at least one of the two Sublease agreements were invalid as well.

293. The Respondent submits that the purported Sublease Agreement between the law firm Andreas Menelaou LLC and Komaksavia Airport Invest Ltd dated 4 July 2018 **[Exhibit [C-8]]** was invalid on the ground provided in previous paragraphs. That Agreement bore the seal which contained the name of the law firm engraved in Latin characters "ANDREAS MENELAOU LLC", which was not the common seal of Andreas Menelaou LLC on 4 July 2018. At that time, the common seal of Andreas Menelaou LLC was the seal which contained the name of the law firm engraved in Greek characters *"ANfJ.PEAX MENEI\AOY fJ..E.n.E.".*

294. Furthermore, pursuant to Section 77(1) of the Contract Law (Cap. 149) of the Republic of Cyprus,[237] in the case of a lease contract of an immovable property for a period exceeding one year, it **shall not be valid and enforceable** unless it is in writing and signed at the end thereof by each contracting party, in **the presence of at least two witnesses** who are competent to contract **[Exhibit R-145].** It has not been proved by the Claimant that the signatures of the Parties had been witnessed by both witnesses, Lydia Menelaou and Svetlana Ulanova,2[38] that both witnesses were present in person at the places where the Sublease Agreement was signed by the one and the other Party thereof.

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[237] Section 77(1) of the Contract Law (Cap. 149) provides as follows:
"Contracts relating to leases of immovable property for any term exceeding one year shall not be valid and enforceable unless--

(a) expressed in writing; and

(b) signed at the end thereof, in the presence of at least two witnesses themselves competent to contract who have subscribed their names as witnesses, by each party to be charged therewith or by a person who is himself competent to contract and who has been duly authorised to sign on behalf of such party."

[238] Svetlana Ulanova, a Moldovan lawyer, is the spouse of Denis Ulanov, a Moldovan lawyer, the permanent lawyer of Shor and its affiliates in the Republic of Moldova.
The Republic of Moldova notes that **Ulanov Denis represented 0 0 0 Komaksavia** before all organs of the Republic of Moldova by a Power of Attorney issued on 21.12.2015 and legalised by the Moldovan public notary Bondarciuc Olga (entry No. 6472).
Ulanov Denis also represented TB Team Management LLP by a Power of Attorney issued on 10.06.2016 and legalised by public notary Bondarciuc Olga. Furthermore, **Ulanov Denis represented Dylox United Ltd.,** the alleged executive partner of TB Team Management LLP.

295. It shall be reminded here that the purported Sublease Agreement between the law firm Andreas Menelaou LLC and Komaksavia Airport Invest Ltd **[Exhibit [C-8]** was submitted by the Claimant in these proceedings only upon the objections raised by the Respondent regarding the repeatedly submitted wrong Sublease agreement **[Exhibit [C-2]; Exhibit [CA-35]; Exhibit [SC-75]].**

296. In any event, the Sublease Agreement dated 4 July 2018 proves neither the seat nor the registered office of Komaksavia at the address of the law firm Andreas Menelaou LLC. Firstly, the object of the Sublease Agreement is renting the "working space 02" **[Exhibit [C-8]].** The object of the Sublease Agreement is not the administrative services of "provision of registered office address" to Komaksavia. Komaksavia did not and does not purchase a "registered office address" under the Sublease Agreement. Accordingly, Andreas Menelaou LLC does not provide "registered office address" to Komaksavia, as regulated in Art. 4(1)(b)(iv) of the Law regulating Companies Providing Administrative Services and Related Matters **[Exhibit R-136].**

297. Under the Sublease Agreement, Komaksavia is provided with the right to use the "working space 02"; it is not provided with the address of the law firm Andreas Menelaou LLC for its purported "registered office address". Furthermore, the "working space 02" was not and is not the "registered office address" of Komaksavia, nor should it be construed to constitute Komaksavia's "registered office address". Accordingly, the Sublease Agreement could have not constituted the basis for the establishment of the purported "registered office" at the address of the law firm Andreas Menelaou LLC. Komaksavia notified its purported "registered office" at the address of Andreas Menelaou LLC **[Exhibit R-61],** however, as analysed by the Respondent in paras. 100, 108, 319,239 the Registrar of Companies did not independently investigate the Sublease Agreement and whether Komaksavia had actually been provided with an address of its purported registered office.

298. Secondly, on 4 July 2018, the director of Komaksavia was Karklinsh, a resident of the Russian Federation **[Exhibits R-8; R-10].** Menelaou was not the director of Komaksavia on 4 July 2018. Hence, the purported management decisions by Komaksavia's director were not located in Cyprus. The purported rent of the "working space 02" under the Sublease Agreement did not cause the seat of Komaksavia to relocate to or to establish in Cyprus on 4 July 2018.

299. Thirdly, no management decisions have been located at the "working space 02" in the law firm Andreas Menelaou LLC since the appointment of Andreas Menelaou as Komaksavia's director on 5 November 2019, because as argued by the Respondent in paras. 196 to 207, as well as at para. 148 et *seqq.,* the effective management and control of Komaksavia has been exercised by its shareholders and real UBO, who have acted as Komaksavia's shadow directors.

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[239] See also the RER-Papadopoulos, pp. 35-36.

(iii) Komaksavia Does Not Meet the Substance Criteria of AML Directive

300. The Claimants has asserted that it "should not be considered a shell company under the laws of Cyprus".[240] The Claimant has referred to the Central Bank of Cyprus's Fifth Directive to Credit Institutions on "Prevention of Money Laundering and Terrorist Financing" dated February 2019 (the **"AML Directive") [Exhibit [CA-34**]] issued under the Prevention and Suppression of Money Laundering Activities Law of the Republic of Cyprus of 2007 (Law No. 188(1)/2007), as amended in 2019 **[Exhibit R-113],** which has transposed into Cyprus law the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing **[Exhibit R-69].** The Claimant has further argued that it meets the "substance" criteria set out in the AML Directive.

301. It shall be noted that the AML Directive "falls within the scope of banking law and not within the scope of company law".[241] However, should the AML Directive found applicable to the Claimant's status, the Respondent notes that, despite its assertions, the Claimant does not meet the substance criteria set out in the AML Directive.

302. Art. 151(a) of the AML Directive sets out, in relevant part, as follows:

> "The **physical presence** of a company/entity is interpreted as the existence of a **place of business or activity** (owned or leased buildings) in the country of incorporation/registration. Also, the **absence of substantial management (meaningful mind} and administration** could be interpreted as lack of physical presence. The presence of a third person who merely provides services as a representative/proxy person, including the duties of the secretary of the company, is **not in itself an indication of physical presence.** "[242]

303. Firstly, with regard to physical presence requirement, it should be noted that it is not satisfied by "a postal address", a cubical, a pigeonhole, or the "working space 02", because "a place of business or activity" is needed. The Claimant has produced a Sublease Agreement dated 4 July 2018 through which it has allegedly obtained rights to "working space 02" in the premises of the law firm Andreas Menelaou LLC. This does not by itself satisfy the physical presence requirement.

304. Secondly, it should be further noted that "the absence of substantial management (meaningful mind) and administration could be interpreted as lack of physical presence."[243] As proved by the Respondent, the management, administration, and control of Komaksavia has been throughout carried out by the shareholders and the

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[240] Para. 134 of the Claimant's Response dated 18 December 2020.
[241] RER-Papadopoulos, pp. 59-60.
[242] Art. 151(a) of the AML Directive **[Exhibit [CA-34)).**
[243] *Ibid.*

real UBO, not by Komaksavia's director Menelaou. Furthermore, the AML Directive makes it clear that "the presence of a third person who merely provides services as a representative/proxy person, including the duties of the secretary of the company, is not in itself an indication of physical presence."[244] Menelaou in fact merely provides services that are not related to managing Komaksavia. He is not the "meaningful mind" of Komaksavia.

305. Thirdly, concerning the business activity, no evidence of any Cyprus-related business activity performed by Komaksavia itself has been introduced into evidence, although Komaksavia has alleged it has "its place of business firmly rooted in Cyprus".[245] Until the beginning of 2021, Komaksavia has deposited no accounts, annual return [Form HE32], or any other document providing information about its operations to the Registrar of Companies, as required by Cyprus law.

306. Fourthly, the Claimant does not fall under the "circumstances *[which]* could indicate a business activity".[246] Art. 151(b) sets out, in relevant part, as follows:

> "i. the company/entity was **established/incorporated for the purpose of holding share capital** or shares or equity instruments of another business entity or entities dealing with legitimate business with **identifiable** ultimate beneficial owner(s),
>
> ii. the company/entity was established/incorporated for the purpose of holding intangible or other assets, including immovable property, ships, aircrafts, investment portfolio, debt and financial instruments,
> iii. the company/entity was established/incorporated to facilitate monetary transactions and assets transfers, corporate mergers, and also for the execution of asset management activities and the trading of shares,
> iv. the company/entity acts as treasurer for companies recognised as a group or manages the activities of the group,
> v. any other case where conclusive evidence can be provided that the company/entity is involved in a legitimate business, with **identifiable** ultimate beneficial owner(s) ."[247]

307. Firstly, as evidenced in Clause 3 ("The objects for which the company is established …") (sub-closes 1 to 37) of the Memorandum of Association, Komaksavia was established/incorporated for a whole range of business activities **[Exhibit R-127** part I], and not solely "established/incorporated for the purpose of holding shares capital or shares or equity instruments of another business entity …".[248] In fact, Komaksavia has alleged it has "its place of business firmly

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[244] *Ibid.*
[245] Para. 77 of the Claimant's Reply dated 5 March 2021.
[246] See Art. 151(b) of the AML Directive **[Exhibit [CA-34)).**
[247] Art. 151(b) of the AML Directive **[Exhibit [CA-34)].**
[248] */bid.,* para. 151(b)(i).

rooted in Cyprus".[249] Furthermore, the Claimant has not proved who the "identifiable" UBO(s) of "another business entity" is (are). Accordingly, the Claimant does not meet the circumstances under Art. 151(b)(i).

308. In addition, Menelaou is not and may not be[250] the Managing Director of the Claimant as substantiated by the Respondent in paras. 210 et *seqq.*

309. Secondly, the Claimant has not proved who its "identifiable" UBO(s) is (are). In fact, the Claimant's real UBO is Shor. Therefore, the Claimant does not meet the circumstances under Art. 151(b)(v).[251]

310. Accordingly, there is no physical presence of Komaksavia in the territory of Cyprus pursuant to the AML Directive.

(iv) Komaksavia's Director Denies Access to the Purported Registered Office

311. On 14 May 2021, Aimilia Efstathiou, a lawyer at the law firm Elias Neocleous & Co LLC, Limassol, Cyprus,[252] contacted Komaksavia's registered director, Andreas Menelaou via e-mail (andreas.menelaou@komaksavia.com) and mobile phone number (+357 96 675665) to agree on a visit of Mrs Efstathiou to Komaksavia's purported registered office on 17 May 2021 with the purpose of a discussion on whether the necessary registers are located at the registered office of the company and to receive some information. Mrs Efstathiou told Menelaou that she will be a witness in this Arbitration.

312. Menelaou told Mrs Efstathiou that there was no such a possibility and, in light of the fact that Komaksavia and the Republic of Moldova were opponent parties in the arbitration, Komaksavia had no willingness for such a meeting. Menelaou further told Mrs Efstathiou that he was going to inform his clients accordingly, and then he was going to reply to Mrs Efstathiou's e-mail.[253]

313. This phone discussion between Mrs Efstathiou and Menelaou on 14 May 2021 is highly relevant of Menelaou's role in Komaksavia. The dialog reveals that Menelaou told Mrs Efstathiou that has to go back to "his clients", whoever they actually are, as Menelaou would not reveal, and only then he could answer any questions or requests of Mrs Efstathiou. This wording of Menelaou denotes that as a matter of fact he does not take decisions in Komaksavia, that the decisions are taken by "his clients", and what Menelaou has to report back to Mrs Efstathiou as a reply to her email is the decision of "his clients". This was precisely a situation where Menelaou

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[249] Para. 77 of the Claimant's Reply dated 5 March 2021.

[250] The Regulation 18 of the Code of Conduct Regulations of 2002, Cyprus Bar Association **[Exhibit R-51),** does not permit an advocate to manage/ conduct any business or being an active member of such business, including to be managing director of any business. The Respondent notes that the Regulation derives its authority from Art. 32 of the Advocates Law {Cap.2) **[Exhibit R-50).**

[251] The other condition of Art. 151(b)(v) has as well not been proved by the Claimant.

[252] RWS-Efstathiou.

[253] *Ibid.*

showed and proved that he was accustomed to act under the directions and instructions of the shareholders and the real UBO.

314. On 17 May 2021, Mrs Efstathiou called Menelaou a second time to inquire whether his clients had approved the communication and the visit by Mrs Efstathiou to Komaksavia registered office to inspect the registers that shall be kept at a company's office and available for inspection by any third party.[254] Menelaou told her that he received no positive instructions to respond to Mrs Efstathiou in writing. He further told Mrs Efstathiou that they denied the visit to the purported registered office of Komaksavia. Menelaou also stated that the information which the Respondent sought could be found in Komaksavia's file of the Registrar of Companies which is updated.

315. On 17 May 2021, after the call conference between Mrs Efstathiou and Menelaou, Mrs Efstathiou visited the building Eftapaton Court, located at Makareiou, 256, CY-3107 Limassol, Cyprus, where the purported registered office of Komaksavia is located.[255] A number of companies' offices are located in Eftapaton building. At the entrance of the building there was a large vertical board with companies' names **[Exhibit R-152].** Among those names there was the name of law firm Andreas Menelaou LLC, but no name of Komaksavia. She went up to the third floor, where the office C3 was located. Next to the entrance door to C3 there was a board with the name of the law firm Andreas Menelaou LLC. However, the name of Komaksavia was not shown in there either. The entrance door of C3 was closed, and Mrs Efstathiou did not attempt to knock the door because Menelaou had earlier denied her the visit to the purported registered office of Komaksavia. She did not manage to note whether employees were inside the office or not. Furthermore, she was not able to see what "working place 02" would look like.[256]

316. The Respondent notes that Menelaou denied the visit of Mrs Efstathiou on the ground that he had not received positive instructions from his clients to do so. Also, since there were no positive instructions form Menelaou's clients, he did not respond to the e-mail sent by Mrs Efstathiou to Komaksavia on 14 May 2021. This again substantiates the role the "clients", that is, of those behind Komaksavia, in the management and control of Komaksavia - the paramount role. Menelaou answers are further proof of him following the instructions and directors of the "clients" and being accustomed to follow such instructions and directions. Those instances prove that Mr Menelaou is not in charge of the management and control of Komaksavia and, accordingly, Komaksavia's seat is not located in Cyprus.

e. No Certificate of Registered Office Submitted by the Claimant

317. The Claimant has provided no certificate of registered office issued by the Registrar of Companies.

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[254] *Ibid.*
[255] *Ibid.*
[256] *Ibid.*

318. However, even if the Claimant were to present such a certificate, it would not prove that Komaksavia's registered office is located at the designated address in Cyprus and, moreover, that Komaksavia's registered office is located in Cyprus.

319. The Respondent notes that it has long been universal practice of the Registrar of Companies of Cyprus to require a declaration of registered office in order to incorporate the company, without, however, independently investigating whether the declaration is actually correct, whether the company has actually been provided with an address of its purported registered office, or whether the company keeps its registered office at the designated addressed.

320. This Tribunal is entitled and should make its own determination based on the evidence introduced in these proceedings as to whether the Claimant has its purported registered office in Cyprus, or whether it has its purported registered office at the designated address.

f. Komaksavia's Cyprus-Bulgarian Mixed "Correspondence Contact Details" in the Notification of Address

321. Komaksavia's correspondence contact details notified to the Registrar of Companies via the Notification of the Address of the Registered Office dated 4 July 2018 and filed on 31 October 2018 are not all located "within the jurisdiction" of Cyprus **[Exhibit R-61).** A correspondence contact detail thus notified is located in Bulgaria - the phone number **"+359898883898"** *(emphasis added),* which belongs to Tenev, the majority shareholder of Komaksavia. Thus, the correspondence contact details on file with the Registrar of Companies since 4 July 2018 have been split up and located in two countries, Cyprus and Bulgaria. That is an essential criterion evidencing that the location of the Claimant's purported "registered office" and/or the "seat" is not in the territory of the Republic of Cyprus and, accordingly, the Tribunal should deny the Claimant's assertions to the contrary.

322. The Notification of the Address of the Registered Office is the last such Address Notification [Form HE2] filed by the Claimant, which is currently on file Registrar of Companies **[Exhibit R-61).** No other changes in the correspondence contact details have been notified or filed with the Registrar of Companies since 31 October 2018 with a Form HE2. The relevant part of the Notification of the Address of the Registered Office is reproduced here below:

(HEMLIG

Fee €17.09

THE COMPANIES LAW
CAP.113

HE2

Company Number:
HE 359258

2383418 - 1

REGISTRAR OF COMPANIES
& OFFICIAL RECEIVER
NICOSIA – CYPRUS
RECEIVED
31 OCT 2018

Notification of the Address of the Registered Office of a Company, or Change in Address
Pursuant to Article 102

Name of Company | **KOMAKSAVIA AIRPORT INVEST LTD**

The address of the Registered Office of the above-mentioned Company is situated at:

Street/Avenue:	Makariou (Avenue)		No.: 256
Building:	Eftapaton Court	Floor:	Apt.:C3
Parish/Town/Village:	LIMA5SOL		
District:	LIMASSOL	Post Code:	3107

Change made on: 04/07/2018
(not to be completed on the first notification of address)

Signature | (Sgd.)
Secretary or Director

Date: | 04/07/2018

(Stamp: KOMAKSAVIA AIRPORT INVEST LTD-HE359258}

Correspondence Contact Details

Name:	KOMAKSAVIA AIRPORT INVEST LTD		
Address:	Makariou (Avenue), Eftapaton Court, Office: C3		
	LIMASSOL		
Post Code:	3107	Telephone:	C+359898883898

323. The Claimant indicated a Bulgarian phone number **"+359898883898"** *(emphasis added),* which is the phone number of Tenev, as the Claimant's "Correspondence Contact Details". Since 4 July 2018, Tenev's phone number has been on file with the Registrar of Companies as Komaksavia "Correspondence Contact Details".

324. The code "359" is the Bulgarian assigned country phone code by the International Telecommunication Union **[Exhibit R-146].** The code "89" is for the GSM mobile network Telenor in Bulgaria. The seven digits telephone number "8883898" is the Telenor mobile phone number of Tenev.

325. The Respondent notes that the same Bulgarian telephone number **"+359898883898"** *(emphasis added)* of Tenev has been also indicated as the "Correspondence Contact Details" for the company Komaksavia Investment Ltd (HE359254) in the Notification of the Address of the Registered Office of a

Company or Change in Address signed by Marin Mihov Tenev, dated 4 July 2018, and received by the Registrar of Companies on 31 October 2018 in which Komaksavia Investment Ltd also indicated the address: Makariou (Avenue), 256, Eftapaton Court, Ap. C3, 3107, Limassol **[Exhibit R-147].** It shall be reminded here that the sole shareholder and sole director of Komaksavia Investment Ltd is Marin Mihov Tenev **[Exhibit R-143].**

326. Accordingly, as evidenced in the Notification of the Address of the Registered Office dated 4 July 2018 **[Exhibit R-61],** not all "Correspondence Contact Details" of the Claimant have been located in the Republic of Cyprus. At least one Correspondence Contact Details has been located in Bulgaria and not at Claimant's designated address of the "registered office" in the territory of Cyprus.

327. As of 4 July 2018, Tenev was the sole shareholder of Komaksavia, and he has been the shareholder of Komaksavia ever since, except for a short period of time from 28 August 2019 to 12 December 2019, when the shares in Komaksavia were allegedly transferred for hitherto undisclosed reasons to NR Investments Limited. During the time from 4 July 2018 to present, Komaksavia's registered directors have been Karklinsh (from 4 April 2018 to 5 November 2019) and Menelaou (from 5 November 2019 to present). However, throughout the time from 4 July 2018 to present, Tenev's phone number "+359898883898" as "Correspondence Contact Details" has been on file with the Registrar of Companies. By indicating the phone number "+359898883898" in the Notification of the Address of the Registered Office, Komaksavia puts everyone who is to contact Komaksavia on public notice to call that number. There is no other telephone number indicated in the Notification of the Address of the Registered Office. The appointment of Menelaou as Komaksavia's director on 5 November 2019 **has caused no change** in the contact phone number of Komaksavia on file with the Registrar of Companies. This proves that **Tenev,** not Menelaou, has officially and publicly been **in charge of and responsible for communication with any third party on behalf of Komaksavia.**

328. A company which has "its place of business firmly rooted in Cyprus",257 as the Claimant alleges it has, would not provide a Bulgarian telephone number of the Bulgarian shareholder as its "Correspondence Contact Details".

329. The communication with third parties of the Claimant is an integral part of the effective management of the Claimant, however, it is not carried out by the Claimant's director and, moreover, it is carried out from outside the territory of Cyprus. Communication through the telephone must be crucial for the Claimant, because, as alleged by Claimant, he holds shares in Avia Invest, which is a company registered and carrying business in the Republic of Moldova. Any third party to communicate with the Claimant would do it through the telephone number of the Claimant, as it is the only phone number publicly on file with the Registrar of Companies.

[257] Para. 77 of the Claimant's Reply dated 5 March 2021.

330. The Claimant has no website which would contain the contacting details brought to the knowledge of the public. The subdomain komaksavia.com has been registered on 12 May 2020, that is, just three days before the filing of the RfA, and, no doubt, it has been registered with the view of providing more "evidence" of Komaksavia being a regular company **[Exhibit R-101].** There is no website hosted on the subdomain komaksavia.com.

331. The purported e-mail address andreas.menelaou@komaksavia.com, if a real e-mail address, could possibly have been created at best one or two days before the filing of the RfA on 15 May 2020. There is little doubt that has been created with the purpose of showing the Tribunal that Komaksavia has one, that Komaksavia is a regular company. Furthermore, the Claimant has brought no evidence that as of the day of its RfA, the purported e-mail address was functional. That purported e-mail address or, indeed, any e-mail address has not been notified to the Registrar of Companies. Thus, anyone to contact Komaksavia had and has to use the Bulgarian telephone number publicly on file with the Registrar of Companies as the official contact details of Komaksavia since 4 July 2018.

332. The provision of the Bulgarian phone number in the Notification of the Address of the Registered Office puts officially Tenev in charge of and responsible for communications with third parties for and on behalf of the Claimant. Thus, Komaksavia's shareholder Tenev, and not Komaksavia's purported director Menelaou, is officially managing the communications of Komaksavia with any third parties for and on behalf of Komaksavia.

333. This is not surprising and corroborates with all the evidence that Komaksavia's shareholders and the real UBO have in fact been acting as Komaksavia's shadow directors throughout in that the run, manage and operate Komaksavia's affairs. Menelaou, the registered director, handles only clerical and housekeeping matters whilst accustomed to act under the directions and instructions of the shareholders and the real UBO.

334. Consequently, the notification of the Bulgarian telephone number by the Claimant with the Registrar of Companies unequivocally denotes that the **"registered office"** and **"seat" of the Claimant are not located in Cyprus.**

335. In para. 86.3. of the Claimant's Reply dated 5 March 2021 the Claimant argues that in the Soc and RfA it has provided an address in the Republic of Cyprus and a telephone number within the Republic of Cyprus. The Respondent notes that in para. 1 of the RfA and para. 1 of the Soc, the Claimant has indicated a phone number "+357 96 675665",[258] which is not on Komaksavia's file with the Registrar of Companies.[259] That phone number has been provided by the Claimant in these arbitration proceedings for non-specified purposes. Furthermore, that phone number has not been publicly notified by the Claimant through a notification of the

[258] See also para. 11 of the Claimant's Application dated 24 July 2020, in which the same phone number has been provided.
[259] Cf. **Exhibit R-61.**

address of the registered office of a company, or change in address [a form HE2] to the Registrar of Companies. In addition, that phone number is not part of the "Correspondence Contact Details" of the Claimant, and it is not otherwise known to third parties. On the day of filing the RfA, the Bulgarian phone number "+359898883898" of Tenev was on Komaksavia's file with the Registrar of Companies as its "Correspondence Contact Details".

336. No phone number or e-mail address of Komaksavia's director was or is officially on file with the Registrar of Companies since 4 July 2018.[260] Moreover, no phone number or e-mail address of Menelaou was ever officially on file with the Registrar of Companies in a Form HE2. Thus, the Claimant's assertion that it has provided a Cypriot phone number and an e-mail address in the RfA and Soc does not change anything with regard to the fact that **Tenev, not Menelaou,** has officially and publicly been **in charge of and responsible for communications with third parties on behalf of Komaksavia.** This, in turn, serves as evidence that Komaksavia's "seat" and "registered office" has not been in Cyprus.

g. Komaksavia's "Correspondence Contact Details" at Other Addresses for Shares' Transfer and Officers' Change

337. In the last notification of Transfer of Private Company Shares [Form HE57] dated 23 December 2019 and filed by the Secretary of Komaksavia with the Registrar of Companies on 28 January 2020 **[Exhibit R-2],** which provides the status of Komaksavia's current shareholders, Komaksavia indicated the following "Correspondence Contact Details" of the law firm Andreas Menelaou LLC, which provides the purported "working space 02" in Limassol to Komaksavia:

> "ANDREAS MENELAOU LLC - 406998
> 2A Elia Venezi Street, Athienitis Strovolos Park, 1st Floor,
> Office 102
> Nicosia
> *[Post Code]* 2042 *[Telephone]* 99-218135"[261]

338. That address of the law firm Andreas Menelaou LLC is located in Nicosia. It is not the address of the law firm Andreas Menelaou LLC in Limassol where this law firm provides the "working space 02" to Komaksavia.[262] Thus, Komaksavia has indicated the address in Nicosia as its "Correspondence Contact Details" and not the address in Limassol for the purposes of the transfer of shares.

339. The same address in Nicosia was notified by Komaksavia (by Menelaou, as Director/Secretary thereof) in the notification of the Transfer of Private Company Shares [Form HE57] dated 12 December 2019 and filed by the Secretary of Komaksavia with the Registrar of Companies on 16 December 2019 **[Exhibit R-3].**

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[260] Cf. **Exhibit R-61.**
[261] **Exhibit R-2.**
[262] Cf. **Exhibit [C-8].**

340. [Accordingly, for the purposes of the transfer of shares in Komaksavia, the law firm Andreas Menelaou has indicated its address in Nicosia, not in Limassol].

341. Earlier on 28 August 2019, when Tenev transferred the 100% shares in Komaksavia to NR Investments Limited, Komaksavia indicated in the notification of the Transfer of Private Company Shares [Form HE57] dated 28 August 2019 and filed by Komaksavia with the Registrar of Companies on 29 August 2019 **[Exhibit R-9]** the following address for its "Correspondence Contact Details":

> "HARNEYS FIDUCIARY CYPRUS LIMITED
> 28th October Street, No. 313, Omrania Building
> *[Telephone]* 25820020"[263]

342. Accordingly, for the purposes of the notification of the transfer of shares in Komaksavia, Komaksavia has put on public record various addresses of various firms as its "Correspondence Contact Details", none of which is the designated address of its purported registered office in Limassol, Cyprus.

343. Komaksavia used various other addresses as its "Correspondence Contact Details" not only for the purposes of notification of the transfer of shares by its shareholders, but also for the purposes of the notification of change of officers or change to their information [Form HE4]. Thus, in the Form HE4 on the notification of appointment of Menelaou as Komaksavia's Director and Secretary dated 5 November 2019 and filed with the Registrar of Companies on 11 November 2019 **[Exhibit R-10], <u>which provides the status of Komaksavia's current Director,</u>** Komaksavia (by its Director/Secretary, Menelaou) indicated the following address as the "Correspondence Contact Details" of Komaksavia:

> "HARNEYS FIDUCIARY CYPRUS LIMITED
> 28th October Street, No. 313, 3rd Floor, Limassol, Cyprus
> *[Post Code]* 3105 *[Telephone]* 25820020"[264]

344. Furthermore, in the latest Notification of Changes of Officers or change to their information dated 23 December 2019 and filed with the Registrar of Companies on 28 January 2020 **[Exhibit R-11], <u>which provides the status of Komaksavia's current Secretary,</u>** Komaksavia (by its Secretary, Lydia Menelaou) indicated the following "Correspondence Contact Details":

> "ANDREAS MENELAOU LLC - 406998
> 2A Elia Venezi Street, Athienitis Strovolos Park, 1st Floor,
> Office 102
> Nicosia
> *[Post Code]* 2042 *[Telephone]* 99-218135"[265]

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[263] **Exhibit R-9.** It shall be observed that the address contained no postcode, no city name. This was not a functional address.

[264] **Exhibit R-10.**

[265] **Exhibit R-11.**

345. As demonstrated above, none of those addresses for "Correspondence Contact Details" is the designated address of the purported "working space 02" or the address of the law firm Andreas Menelaou LLC in Limassol, Cyprus.

h. Komaksavia's Confusions About Its Own Address

346. In the SCWS-Menelaou, Andreas Menelaou has made two statements as to the purported address of Komaksavia. Thus, the first statement is comprised by the Preamble of his testimony and contains the following text:

> "I, Andreas Menelaou of **Makareiou,** 256, Eftapaton Court, Flat/Office **C3, 3107,** Limassol, Cyprus…".[266] *(emphasis added).*

347. In para. 36.1. of the SCWS-Menelaou, however, Andreas Menelaou has stated that the Claimant has its physical presence:

> "according to the Sublease Agreement dated 4 July 2018, the Claimant as the Subtenant rented from Andreas Menelaou LLC as the Sublessor the working space 02, situated in the offices on the **third floor** of the building named "Eftapaton Court" at 256 Makarios Avenue, Eftapaton Court, Office **C4, 3105,** Limassol, Republic of Cyprus".[267] *(emphasis added).*

348. The recital (A) of the purported Sublease Agreement between the law firm Andreas Menelaou LLC and Komaksavia Airport Invest Ltd dated 4 July 2018 contains, in relevant part, the following wording:

> "The Sublessor is the tenant of the offices situated on the **3.5 floor** of the building named "Eftapaton Court" situated at 256 Makarios Avenue, Eftapaton Court, Office **C3, 3105** Limassol, Republic of Cyprus…"[268] *(emphasis added).*

349. However, the recital (A) of the purported Sublease Agreement between the law firm Andreas Menelaou LLC and Komaksavia Investment Ltd dated 4 July 2018 contains, in relevant part, the following wording:

> "The Sublessor is the tenant of the offices situated on the **3.5 floor** of the building named "Eftapaton Court" situated at 256 Makarios Avenue, Eftapaton Court, Office **C4, 3105** Limassol, Republic of Cyprus…"[269] *(emphasis added).*

350. As recorded in those various accounts of the Claimant, two different postal codes "3105" and "3107" have been provided by the Claimant as its alleged postal code.

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[266] SCWS-Menelaou, Preamble **[Exhibit [SC-75]).**

[267] *Ibid.,* para. 36.1.

[268] The Sublease Agreement between the law firm Andreas Menelaou LLC and Komaksavia Airport Invest Ltd dated 4 July 2018 **[Exhibit [C-8]].**

[269] The Sublease Agreement between the law firm Andreas Menelaou LLC and Komaksavia Investment Ltd dated 4 July 2018 **[Exhibit [C-2]; Exhibit [CA-35]; [Exhibit [SC-75]].**

This is the more surprising considering that both have been indicated by Andreas Menelaou in the same SCWS-Menelaou. It shall be noted that a designated address with a wrong postcode or without a postcode is not a functional address.

351. In addition, whereas the two submitted sublease agreements indicate that the office "C3" and "C4" are located on the "3.5 floor", Andreas Menelaou stated in the SCWS-Menelaou that the office "C4" is located on the "third floor".

352. The Respondent notes that the Claimant has provided no explanation on those confusing accounts regarding the designation of its purported address in various Claimant's exhibits and submissions.

i. Komaksavia's Delinquency in Complying with Statutory Obligations

353. Pursuant to Art. 327 of the Companies Law, the Registrar of Companies may move to strike the name of the company off the register, in which case the company ceases to be regarded as constituted or incorporated under Cyprus law.[270] Art. 327 also contains the procedure to be followed by the Registrar of Companies. The procedure is triggered in cases where there is "reasonable cause to believe that the company is not carrying on business or *[is not]* in operation",271 where the company has not paid its annual dues for a year,[272] where the company omits to file any document whose filing with the Registrar of Companies is required by the Law, including not submitting the Annual Return [Form HE32].[273]

354. Komaksavia had filed no annual returns for a number of consecutive years **[Exhibit R-141],** which prompted the Registrar of Companies to send a "Reminder Letter" to Komaksavia.[274] The excerpt from the records of the Registrar of Companies regarding the HE32 Archive of Komaksavia shows that no annual returns had been submitted from the day of Komaksavia's incorporation until at least the beginning of 2021.[275] It might also have been that the cause of the "Reminder Letter" was the Registrar's belief that Komaksavia was not carrying on business and/or was not in operation. In any event, the two extracts from the electronic recordings of the Registrar in **Exhibits R-140** and **R-141** indicate that the Claimant failed to submit to the Registrar of Companies the annual returns it was required to submit under Art. 118 of the Companies Law.

355. Komaksavia has problems following basic statutory requirements for a limited liability company under Cypriot law.

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[270] See Art. 327 of the Companies Law **[Exhibit R-52 *bis*].**
[271] *Ibid.,* Art. 327(1).
[272] Pursuant to the provisions of the Law 190(1)/2012, all companies registered with the Registrar of Companies have to pay by 30th June an annual levy in order to be considered in good standing and for their name to be retained on the register maintained by the Companies registry.
[273] Cf. Art. 118 of the Companies Law **[Exhibit R-52 *bis*].**
[274] See **Exhibit R-141.** See also **Exhibit R-140.**
[275] See **Exhibit R-141.** See also **Exhibit R-142** showing Komaksavia's filings with the Registrar of Companies in 2021.

356. Surprisingly and with no evidence whatsoever, the Claimant asserted in the Claimant's Response dated 18 December 2020 that:

> "the Claimant has paid all necessary taxes in the Republic of Cyprus, which is **proven by tax returns/** letter of confirmation from the tax authorities confirming that the Claimant's income was taken into account when calculating tax liabilities and there was no unreasonable tax benefit received."[276] (emphasis added).

No such alleged "tax returns" were ever "proven" in these proceedings.

357. The Respondent notes that, pursuant to Companies Law, the annual return shall contain the details of the registered office, registers of shareholders and debenture holders, shares and debentures, indebtedness, past and present members and directors and directors and secretary, and other details.[277] The annual return shall be prepared and filed "once at least in every year" together with the audited financial statements, within 12 months from the previous annual return, without disregarding the calendar year.

358. Thus, Komaksavia was delinquent in complying with the statutory obligations under Cyprus law for several consecutive years since its incorporation, including throughout the year 2020.

359. Although Menelaou was appointed as the sole director on 5 November 2019, the delinquency continued until at the beginning of 2021,[278] as the excerpts contained in **Exhibit R-141** ("Organisation status: Reminder letter sent") and **Exhibit R-142** demonstrate. Menelaou failed to resolve those pure clerical, housekeeping matters during 2019 and 2020 for reasons that the Claimant did not provide or explain.

360. It appears that Komaksavia might have filed the annual return as recently as on 16.03.2021 for the first time since its incorporation **[Exhibit R-142],** although no copy of that annual return/those annual returns can be downloaded from the electronic recordings of the Registrar of Companies. The timing of the filing of the annual return/returns reveals that this was manifestly an opportunistic move by the Claimant to show to the Arbitral Tribunal that it was not anymore delinquent, that it contemporaneously complied with the statutory obligations, that it lately kept its public filings updated. The sustained and concerted efforts of the Claimant to create a post factum reality is evidenced by this move as well.

361. The Respondent notes that it is not able in this Memorial to provide an argument based on the substance of the Claimant's filings with the Registrar of Companies in 2021, as it has been impossible to obtain and/or access the copies of those filings from the Registrar of Companies as of the date of this Memorial. The Registrar of Companies has yet to make them available in the electronic archive, as they are

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[276] Para. 135(viii) of the Claimant's Response dated 18 December 2020.

[277] See Art. 118 and the Sixth Schedule (Part I and Part II) of the Companies Law **[Exhibit R-52 *bis*].**

[278] From **Exhibit R-142** can actually be inferred that the delinquency continued to 2021.

not available and cannot be accessed at this moment. However, the Respondent will provide such an argument once the Claimant will have produced the documents filed by it with the Registrar of Companies in 2021.

j. Komaksavia Holds Someone Else's Shareholding in Avia Invest

362. Komaksavia was conceived and implemented by Shor through Tenev, Karklinsh and others as a vehicle to be bestowed with the [redacted] of the shares in Avia Invest in order to acquire Cyprus nationality for the purported investment. Komaksavia is a shell company holding the [redacted] of the shares in Avia Invest for someone else. Komaksavia has not proved that it has paid for the [redacted] the shares in Avia Invest that it allegedly purchased from 000 Komaksavia through the Share Sale-Purchase Contract dated 6 September 2016. In fact, the balance sheet of the 000 Komaksavia **[Exhibit R-37,** see pages 10 to 23] did not record or reflect any amount received in 2016 or thereafter from the sale of the [redacted] of the shares in Avia Invest, and this is *prima facie* evidence that Komaksavia did not pay the price of the shares.

363. As already indicated by the Respondent, the only business of 000 Komaksavia was to hold the [redacted] of the shares in Avia Invest and selling it would not have been in the interest of 000 Komaksavia, had 000 Komaksavia decided for itself, in an arm's length transaction. However, the Share Sale-Purchase Contract dated 6 September 2016 was not an arm's length transaction. Clause 5 of the said Contract provides sufficient evidence that that Contract was a non-arm's length transaction. This is so, moreover, as 000 Komaksavia has received no payment of the price of the [redacted] of the shares. By the Share Sale-Purchase Contract dated 6 September 2016, Shor through various individuals and companies transferred the shares in Avia Invest from one vehicle, 000 Komaksavia, to another vehicle, Komaksavia.

C. Conclusion

364. The effective management and control of the Claimant is not located at the designated address of the registered office.

365. Accordingly, neither the "seat" nor the "registered office" of the Claimant has been located at the address provided by the Claimant and, furthermore, not in the territory of Cyprus.

366. It was the Claimant choice to keep its seat outside Cyprus, and so it must also face the negative consequences of the waver of Cyprus protection under the BIT.

367. The Claimant is not a national of Cyprus and, therefore it does not qualify as an investor "of one Contracting Party" under BIT Art. 1(1).

368. The Arbitral Tribunal lacks jurisdiction *ratione personae* because the Claimant is not an investor.

IV. THE TRIBUNAL LACKS JURISDICTION *RATIONE MATERIAE*

1. Introduction

369. The Arbitral Tribunal has no jurisdiction *ratione materiae,* because the Claimant has made no investment and has no investment in the Republic of Moldova.

370. Art. 1(1) of the BIT is the 'gateway' to the BIT arbitration, and the powers of the Arbitral Tribunal can only come into existence if the requirements of Art. 1(1) are met.

371. Art. 1(1) of the BIT provides as follows:

> "The term **'investments' means** every kind of **asset invested** by investors, for the purpose of acquisition of economic benefit or other business purpose, of one Contracting Party in the territory of the other Contracting Party in accordance with the legislation of the latter and in particular, though not exclusively, shall include:
>
> a) Movable and unmovable property as well as any other property rights;
>
> b) Rights derived from shares, bonds and other kinds of interests in companies;
>
> c) Claims to money or other claims and rights having an economic value;
>
> d) Intellectual property rights, technical processes and know-how;
>
> Provided that a possible change in the form in which the investments or reinvestments have been made shall not affect their character as investments so long as such a change does not contravene laws and regulations of the Contracting Party in the territory of which the investments were made."[279] (*emphasis added).*

372. Accordingly, to benefit *ratione materiae* from the BIT, an **investor should have "invested"** "every **kind of asset"** *(emphasis added)* for the purpose of acquisition of economic benefit or other business purpose in the territory of the host State *(emphasis added).* That is, under Art. 1(1), an investor shall **invest assets** ("every kind of asset invested") for **economic benefit** or other **business purposes** in

[279] Art. 1 para. 1 of the BIT **[Exhibit RLA-1 *bis].***

order for the **assets to qualify as investments.** Those criteria should be met cumulatively under the BIT Art. 1(1).

373. It is incumbent on the Claimant to prove that it has **made a qualifying investment** in the Republic of Moldova pursuant to the BIT Art. 1(1) to be able to invoke the substantive investment protection provisions under the BIT. The Claimant has failed to do so and accordingly the Arbitral Tribunal lacks jurisdiction *ratione materiae.*

374. In the Respondent's Answer to the Claimant's Request for Arbitration dated 9 July 2020, the Respondent raised the objection that the Claimant had not proved that it had invested in the territory of the Republic of Cyprus.[280] Furthermore, the Respondent raised the lack of investment's objection in the Respondent's Application dated 27 November 2020 and the Respondent's Reply dated 4 January 2021. Despite those repeated objections, in the Soc dated 14 January 2021, the Claimant totally failed to tender any evidence to address those objections and to prove that it made an investment in the Republic of Moldova as required under Art. 1(1) of the BIT.

2. Claimant Failed to Discharge Its Burden of Proof

375. In the Soc, the Claimant's alleges that, on 6 September 2016, it has "invested in the territory of the RM **by agreeing to purchaselllllllof** the shares in Avia Invest"[281] *(emphasis added),* and has in so doing invested in an asset "in the form of rights derived from shares, bonds and other kinds of interest in companies [sic]"[282], "in the form of obtaining claims to money or to other claims and rights having an economic value"[283], "in the form of obtaining intellectual property rights, technical processes and know-how"[284], and/or "has in so doing invested in an asset which falls within the broad definition of 'every kind of asset"'[285]. Further, the Claimant alleges that it has invested in Avia Invest for Avia Invest's obligations under the Concession Agreement **"by agreeing to pay** the share purchase price for a - shareholding in Avia Invest in the sum of EUR 3,658,247,70"[286] *(emphasis added)* and "by forgoing dividends from Avia Invest in order that surplus revenue is reinvested in the development of Chisinau Airport".[287]

376. In its RfA, th◆mant alleged that it "invested in the territory of the RM **by the purchase** of Ill of the shares in Avia Invest",[288] *(emphasis added)* and that it

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[280] *Ibid.*
[281] Soc, para. 30. See also paras. 92, 93.1. of the Soc.
[282] *Ibid.,* para. 30.2.
[283] *Ibid.,* para. 30.3.
[284] *Ibid.,* para. 30.4.
[285] *Ibid.,* para. 30.5.
[286] *Ibid.,* paras. 93, 93.1.
[287] *Ibid.,* para. 93.2.
[288] RfA, para. 16. See also para. 57 of the Claimant's Application for the Appointment of an Emergency Arbitrator and an Emergency Decision on Interim Measures dated 24 July 2020 {SCC EA 2020/130), in which the Claimant alleged that

"invested in Avia Invest for the fulfilment of Avia Invest's obligations under the Concession Agreement"[289] **"by payment of the share purchase price** for a [redacted] (emphasis added), "by acting as parent company surety and/or guarantor on loans made by the Avia Invest to various entities in order to ensure that its investment obligations under the Concession Agreement have been fulfilled"[291], and "by forgoing dividends from Avia Invest in order that surplus revenue is reinvested in the development of Chisinau Airport"[292]. 1111

377. Thus, by written suppositions and speculations in the Claimant's submissions, RfA and Soc, the Claimant surprisingly **transformed** its purported investment **from purchasing** [redacted] **into agreeing to purchase** [redacted] and **from paying** the share purchase price **into agreeing to pay** the share purchase price. The Claimant put forward no explanation, let alone any evidence, for that metamorphosis in its allegations regarding its "investment".

378. The burden of proof to show that the Claimant's purported investment qualify as investment under the BIT is upon the Claimant. In the RfA and Soc, the Claimant tendered speculations, confusing, and contradictory statements, but no evidence, with regard to its purported investment in the territory of the Republic of Moldova.

379. The Republic of Moldova notes that in the Respondent's Reply dated 4 January 2021 (paras. 27-32) it has raised the objection that **the Claimant never paid the price** of the purported purchase of the [redacted] m Avia Invest pursuant to the Share Sale-Purchase Contract dated 6 September 2016. Moreover, the Republic of Moldova tendered evidence that no price of the purported shares purchase had been ever paid. However, the Claimant simply ignored the objections and evidence, and completely failed to adequately engage and address those issues, and discharge its burden of proof, in the Soc, which was filed thereafter, and the Claimant had sufficient time and was able to address them. There is little doubt that the Claimant employs various technics and tactics to enable it to create a post factum reality with regard to its purported investment in the Republic of Moldova. The Republic of Moldova specifically reserves its right to make the arguments and provide additional evidence, and to request the Arbitral Tribunal to make such arguments and provide such evidence, once the Claimant has clarified its position on the purported investment.

[redacted]

[289] *Ibid.,* para. 37.
[290] *Ibid.,* para. 37.1.
[291] *Ibid.,* para. 37.2.
[292] *Ibid.,* para. 37.3.

3. The Claimant Made No Investment and Has No Investment

a. Claimant's Contradictory Statements About Its Purported Investment

380. The Claimant asserts that it invested in the territory of the Republic of Moldova on 6 September 2016 "by agreeing to purchase- of the shares in Avia Invest",[293] and it "made an investment in the Republic of Moldova" in that it "agreed to purchase [redacted] of the shareholding in Avia Invest" on 6 September 2016.[294]

381. The Claimant further asserts that:

> "93. By that investment and since 6 September 2016, Komaksavia has invested in Avia Invest for the fulfilment of Avia Invest's obligations under the Concession Agreement in at least the following ways:
>
> [redacted]

382. In the paras. 92-93 (including sub-paras. 93.1.-93.2.), the Claimant appears to differentiate between "agreeing to purchase [redacted], on the one side, and "agreeing to pay the share purchase price for a [redacted], on the other side. The same differentiation is made in para. 30 (including sub-paras. 30.1.-30.5.) of the Soc. The Claimant has failed to provide any explanation of that differentiation and the ground thereof.

383. It appears from paras. 30 and 92 of the Soc that the Claimant alleges that its purported initial investment has been made by "agreeing to purchase--only. Furthermore, the Claimants has decoupled the Claimant's "agreeing to pay the share purchase price for a [redacted] from the Claimant's "agreeing to purchase [redacted]

384. The Claimant's assertions in para. 93 and sub-paras. 93.1.-93.2. are confusing and equivocal, as the Claimant has not clarified whether the "agreeing to pay" the price (see para. 93.1.) has occurred *"[b]y* that investment", or it has occurred "since 6 September 2016" (para. 93).

385. Furthermore, in para. 93.1. of the Soc the Claimant has footnoted para. 33.1. of the SCWS-Menelaou **[Exhibit [SC-75]],** which refers to the alleged investments made by Avia Invest in the time from 30 August 2013 to 31 December 2017. The Claimant **failed** to explain, let alone to prove, **how his "agreeing" to pay the**

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[293] See Soc, para. 30.
[294] See Soc, para. 92.
[295] Soc, paras. 93, 93.1 and 93.2 (footnotes omitted).

price for the - of the shares, on the one side, and the alleged **amount of Avia Invest's purported investment** during the indicated period, on the other side, **are related.**

386. In addition, in para. 93.2. of the Soc the Claimant has footnoted para. 33.2. of the SCWS-Menelaou, which refers to the alleged investments made by Avia Invest in the time from 1 January 2018 to 31 December 2018. The Claimant again **failed** to explain, let alone to prove, **how his "forgoing dividends from Avia Invest",** on the one side, and the alleged **amount of Avia Invest's purported investment** during the referred period, on the other side, **are related.**

387. Also, the Claimant's "agreeing to purchase [redacted] and the Claimant's "agreeing to pay the share purchase price for a [redacted] could not by any stretch of the imagination be "invested in Avia Invest for the **fulfilment of Avia Invest's obligations under the Concession Agreement"** (para. 93) (*emphasis added).*

388. The Respondent notes that the Claimant has tendered the Contract of Sale-Purchase of Share in the Share Capital between 000 Komaksavia and Komaksavia dated 6 September 2016 [the **"Share Sale-Purchase Contract dated 6 September 2016"] [Exhibit [SC-30]]**[296] as evidence for its purported "agreeing to purchase [redacted][297] The Claimant, however, has not demonstrated how its "agreeing to purchase [redacted] shall mean the purported investment or making the purported investment.

389. The Claimant has provided no evidence for its purported "agreeing to pay the share purchase price for a [redacted]. Furthermore, the Claimant has not demonstrated how its "agreeing to pay the share purchase price for a - [redacted] shall mean the purported investment or making the purported investment.

390. The Claimant has made no investment in the Republic of Moldova by the purported "forgoing of dividends" as it never invested in the Republic of Moldova and, in any event, never had a crystallised right to receive dividends from Avia Invest. The Republic of Moldova notes that the right of a shareholder to dividend crystallizes only when the dividend is declared, and Avia Invest never declared or distributed dividends to Komaksavia.

b. Claimant's "Agreeing to Purchase [redacted] Is Not an Investment

391. In the Soc, the Claimant contends that by agreeing to purchase shares in Avia Invest pursuant to Share Sale-Purchase Contract dated 6 September 2016 it has

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[296] The Respondent notes that some phrases of the Share Sale-Purchase Contract dated 6 September 2016 **[Exhibit [SC-301]** have been misleadingly translated by the Claimant. Also, Clauses 2 to 8 are wrongly numerated in the translation.

[297] Soc, para. 30. See also para. 92.

"made an investment in the territory" of the Republic of Moldova.[298] The Claimant further asserts that by "agreeing to purchase a shareholding", it has made an investment "for the purposes of the acquisition of economic benefit and/or for some other business purpose" (para. 30.1.);[299] "invested in an asset in the form of rights derived from shares, bonds and other kinds of interests in companies" (para. 30.2.);[300] that it "invested in an asset in the form of obtaining claims to money or to other claims and rights having an economic value" (para. 30.3.);[301] that it "invested in an asset in the form of obtaining intellectual property rights, technical processes and know-how" (para. 30.4.);[302] and/or that it "invested in an asset which falls within the broad definition of 'every kind of asset'" (para. 30.3.).[303] Thus, the Claimant disingenuously puts forward a list almost identical to the wording of Art. 1(1) of the BIT, without however even substantiating it, let alone proving it.

392. However, contrary to the Claimant's contentions, the mere "agreeing to purchase a shareholding" does not in itself constitute a protected investment when **no** Claimant's **contribution** has been made. Furthermore, the mere "agreeing to purchase a shareholding" does not constitute an investment within the **inherent meaning** of that term and does not satisfy the definition of "investments" in Art.1(1) of the BIT (see sub-section g. below).

c. Claimant's "Agreeing to Pay the Share Purchase Price" Is Not an Investment

393. Pursuant to Clause 5 of the Share Sale-Purchase Contract dated 6 September 2016 **[Exhibit [CS-30]],** Komaksavia was under an obligation to pay the price of the [redacted]n Avia Invest to 000 Komaksavia. Clause 5 of the Share Sale-Purchase Contract dated 6 September 2016 provides as follows:

[redacted]

[298] See Soc, paras. 30, 92.
[299] No evidence whatsoever has been tendered by the Claimant.
[300] No evidence whatsoever has been tendered by the Claimant.
[301] No evidence whatsoever has been tendered by the Claimant.
[302] No evidence whatsoever has been tendered by the Claimant.
[303] No evidence whatsoever has been tendered by the Claimant.

[redacted]

394. Accordingly, pursuant to Clause 5 above, the Buyer, Komaksavia, should pay the price, which is the countervalue of the [redacted] within 90 days from the signing of the Share Sale-Purchase Contract dated 6 September 2016.

395. The Claimant has not even suggested, let alone proved, the day when it made its purported investment in the way of "agreeing to pay the share purchase price".

396. Upon the moment of the conclusion of the Share Sale-Purchase Contract dated 6 September 2016, the Claimant had not paid the price of the shares. Should the Claimant have paid the price upon the notarisation of the said Contract, the notary would have reduced that fact to writing, and the Share Sale-Purchase Contract dated 6 September 2016 would have contained a clause (or a subclause) in that regard. However, the said Contract does not contain any such clause. Instead, the parties to Share Sale-Purchase Contract dated 6 September 2016 agreed, as provided in the Clause 5 thereof, that the price be paid within 90 days.

397. No investment was made by the Claimant, and no Claimant's investment existed on 6 September 2016.

398. The Claimant tendered **no evidence** that **it ever paid the price** of the purchase of [redacted] in Avia Invest pursuant to the Share Sale-Purchase Contract dated 6 September 2016. The shares were transferred to the Claimant without the Claimant paying for the shares.

399. The Claimant tendered no evidence that it funded the purported investment.

400. The Claimant failed to provide any evidence that it ever had any income, funds of any significance, or generated itself funds.

401. The Claimant has acknowledged that it has financed "its arbitration costs and expenses"[305] through third party finding. Thus, the Claimant has stated that "two loans" have been "received from companies controlled by its majority ultimate beneficial owner, Mr Goncharenko: 1) UK Komaks LLC [...]; and 2) Diamand Estate LLC [...]."[306] In this respect, as a side note, the Respondent notes that while the Arbitral Tribunal's question No. 4(1] requested the Claimant to **"disclose** (i) the

[304] Clause 5 of the Share Sale-Purchase Contract dated 6 September 2016 [see **Exhibit [CS-30],** where it is wrongly numbered as clause 6). The Respondent notes that it slightly amended the translation of Clause 5 provided by the Claimant so that it faithfully follows the original language text.

[305] Claimant's Response to Tribunal's Question 4 for the Hearing on the Respondent's Application for (A) Revocation of the Emergency Decision on Interim Measures and (B) Security for Costs and Related Relief, dated 5 February 2021, para. 1.

[306] *Ibid.,* para. 2.

identity of the funder, and (ii) whether the terms of the funding arrangement would or would not cover any adverse award of costs"[307] (emphasis added), the Claimant failed to make a **disclose** as requested (no documents were disclosed), whilst limiting itself to its own statements.

402. Accordingly, the Claimant has failed to prove that it has made **any capital contribution**[308] in the Republic of Moldova, and thus that it has made any investment. The mere agreeing to purchase [redacted] and/or the mere agreeing to pay the shares' price does not constitute an investment within the **inherent meaning** of that term and does not satisfy the definition of "investments" in BIT Art.1(1).

403. In fact, there is prima facie evidence that the Claimant **did not pay** for the alleged acquisition of the [redacted] Thus, the balance sheet of the Seller, 0 0 0 Komaksavia **[Exhibit R-37,** see pages 10 to 23], did not record or reflect any amount received in 2016 or thereafter from the sale of t h [redacted]

d. Nature of the Share Sale-Purchase Contract

404. It shall be noted that Clause 5 of the Share Sale-Purchase Contract dated 6 September 2016 between 0 0 0 Komaksavia and Komaksavia is clearly indicative of a non-arm's length nature of that transaction. The provisions regarding payment to be made "within 90 days", "payment [...] on other conditions that may be agreed additionally", that the Seller "waives its redemption and retention rights", that "the indicated price [redacted] is the real price of the transaction" and others are neither normal nor usual terms of an arm's-length transaction with shares on the market. The Share Sale-Purchase Contract dated 6 September 2016 was a sham transaction.

405. The Claimant has not explained how the "real price" of [redacted] of the Share Sale-Purchase Contract dated 6 September 2016 squares with the Claimant's valuation of its purported investment in "the sum of [redacted] (para. 57.5. of the RfA). In a similar context, the tribunal in Phoenix indicated as follows:

> "The Tribunal considers that the existence of a **nominal price** for the acquisition of an investment raises necessarily some **doubts about the existence of an 'investment'** and requires an in depth inquiry into the circumstances of the transaction at stake."[309] (emphasis added).

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[307] Tribunal Questions to the Parties for the Hearing on the Respondent's Application for (A) Revocation of the Emergency Decision on Interim Measures and (B) Security for Costs and Related Relief dated 26 January 2021, Question 4 - Third Party Funding, page 2.

[308] In the Soc (para. 48, and sub-paras. 48.1. to 48.3.), the Claimant does not even suggest that it has made a financial contribution.

[309] See *Phoenix Action, Ltd. v The Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009, para 119 **[Exhibit RLA-22].**

406. Also, the tribunal in *Saba Fakes* held that the payment of a mere nominal price could not be reconciled with the significance of the underlying business as expressed in the claimant's valuation of its alleged shareholding.[310]

407. Furthermore, the tribunal in *Caratube* observed that payment of a nominal price shall be interpreted as an indication that the purported investment has **not been an economic arrangement** and shall not be qualified for treaty protection.[311]

408. Similarly, the tribunal in *KT Asia* found that a company sold the shares to the investor at less than their true value (about one-eighth of their value)[312] and held that that should not amount to investment under the applicable treaty.[313]

409. It is remarkable that the Claimant in either of the RfA, the applications for interim measures (dated 18 May 2020[314] and 24 July 2020, respectively), the Claimant's Response dated 18 December 2020, the Soc, and other submissions in these arbitration proceedings, completely avoided to suggest, let alone to mention, that it "purchased" or "agreed to purchase" the [redacted] in Avia Invest **from 000 Komaksavia,** as well as the circumstances of that transaction. The 000 Komaksavia was not mentioned at all in any of the Claimant's submissions.

410. The Claimant described and characterised its purported investment as if it were acquired in an initial public offer, or on a stock exchange, or at auction, or otherwise in an arm's length transaction, which in fact was not.

411. The non-arm's length nature of the Share Sale-Purchase Contract dated 6 September 2016 between 000 Komaksavia and Komaksavia is further evidenced by Tenev and Karklinsh being simultaneously on both the Seller's and the Buyer's sides of that transaction. Karklinsh was the Sole Shareholder of the Claimant (the Buyer)[315] **[Exhibit R-5],** and the Director of 000 Komaksavia (the Seller)[316] **[Exhibit R-37].** At the very same time Tenev was the Director of the Claimant (the Buyer) **[Exhibit R-6]** and in control of 100% of the shares in 000 Komaksavia (the Seller), through the TB Team, which was registered as the Sole Shareholder of 000 Komaksavia **[Exhibit R-37; Exhibit R-38,** pdf page 28]. Tenev was registered the individual person with significant control of TB Team **[Exhibit R-38,** pdf page 28].

412. There is no doubt that they acted at an external direction.

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[310] See *Mr. Saba Fakes v Republic of Turkey* (ICSID Case No. ARB/07/20), Award, 14 July 2010, para. 139 **[Exhibit RLA-69].**

[311] *Caratube International Oil Company LLP v. The Republic of Kazakhstan,* ICSID Case No. ARB/08/12, Award, 5 June 2012, para. 435 **[Exhibit RLA-70).**

[312] *KT Asia Investment Group B.V. v. Republic of Kazakhstan* {ICSID Case No. ARB/09/8), Award, 17 October 2013, paras. 200 **[Exhibit RLA-61).**

[313] *Ibid.,* para. 206.

[314] See **Exhibit R-82.**

[315] Karklinsh was the Sole Shareholder of the Claimant from 22.08.2016 to 04.04.2018, and not, as falsely stated by the Claimant in the Appendix I (see page 5) to the Claimant's Response, from "22 October 2016 to 4 April 2018".

[316] Karklinsh was registered as the Director of 000 Komaksavia on 12.05.2016.

413. The Share Sale-Purchase Contract dated 6 September 2016 was a scam transaction controlled and conducted by Shor/Tenev and their affiliates to **whitewash the investment wrongdoing.** abandon the legal entities - TB Team and 000 Komaksavia[317] - which they used and exposed for participating in scam transactions with the purported investment in Avia Invest,[318] and create a new vehicle to take over the purported investment in view of a foreseeable dispute with the Republic of Moldova.

414. By the Share Sale-Purchase Contract dated 6 September 2016, Shor through various individuals and companies transferred the shareholding in Avia Invest from one vehicle, 000 Komaksavia, to another vehicle, Komaksavia. Both of those vehicles were bestowed with the shareholding in Avia Invest which economically belonged to Shor acting through Tenev, Karklinsh and others. Thus, although 000 Komaksavia held the - of the shares in Avia Invest from February 2014 to September 2016, the balance sheet of the 000 Komaksavia for the years 2014, 2015, or 2016 did not record or reflect any shareholding in Avia Invest **[Exhibit R-37, see pages 10 to 23]**.

415. Furthermore, the Republic of Moldova notes that the acquisition, holding, and sale by TB Team of the [redacted] in Avia Invest **had never been reflected on the balance sheet of TB Team** for the years 2013 and 2014, or for any other year [cf. **Exhibit R-38].** TB Team's balance sheet for the year 2013, in relevant part, is reproduced here below:

[redacted]

e. Claimant's Purported Forgoing of Dividends Is Not an Investment

417. The Claimant alleges that it has invested in Avia Invest for Avia Invest's obligations under the Concession Agreement **"by forgoing dividends** from Avia Invest in order that surplus revenue is reinvested in the development of Chisinau Airport".[319] It refers to a general meeting of shareholder of Avia Invest dated 11 October 2019 (the **"Shareholders' Resolution dated 11 October 2019")** that allegedly adopted a decision to make a partial distribution of undistributed profits from the previous years in the amount of [redacted] to its shareholders and the balance of undistributed profits to remain at Avia Invest's disposal until it is further distributed **[Exhibit SC-11].32**[0] Furthermore, it alleges that that the Shareholders' Resolution dated 11 October 2019 "was never carried out" by Avia Invest.

418. The Respondent submits that the Claimant has not made any investment by the purported "forgoing of dividends". The Claimant has made no contribution in the first place in order to have a protected investment under the BIT. Indeed, the Claimant had not "invested" any kind of asset that could rise the right to the protected dividends under Art. 1(1) of the BIT.

419. The tribunal in Malicorp stressed that "assets cannot be protected unless they result from contributions".[321] In the instant case, the Claimant's purported "forgoing of dividends" or the unpaid dividends may not qualify as protected investment because the alleged forgone dividends or unpaid dividends do not result from the Claimant's contribution.

420. An expectation of profit or return may only be entailed in the commitment of resources, in the economic materialisation of an investment in the first place.[322] The Claimant does not have a right to claim the BIT protection for its alleged forgone dividends or unpaid dividends from its purported investment as it has committed no resources, has no economically materialised investment in the first place.

421. The Shareholders' Resolution of Avia Invest dated 11 October 2019 could not turn a hitherto unprotected investment of the Claimant into a protected investment under the BIT.

422. The Respondent notes that the Claimant confuses various terms such as "forgoing of dividends", "undistributed profits". Furthermore, the Claimant by its own admission states [para. 39 of the SoC; see also **Exhibit [SC-11]]** that the shareholders have never actually distributed the profits, but solely "have **proposed** to make a partial distribution of undistributed profits".[323] In addition, the Claimant

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[319] The Soc, para. 93.2. see also RfA, para. 37.3.
[320] See the Soc, paras. 39-40.
[321] Malicorp Limited v The Arab Republic of Egypt, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 110 **[Exhibit RLA-71].**
[322] See Zachary Douglas, The International Law of Investment Claims, Cambridge University Press, 2009, {Rule 23), p. 189 et seqq. **[Exhibit RLA-74].**
[323] **Exhibit [SC-11],**

alleges that "Avia Invest **never distributed profits** to the Claimant or to any of its shareholders" [para. 40 of the SoC; para. 33.2. of SCWS-Menelaou]. Thus, it appears that Avia Invest's shareholders never actually distributed the purported profits of Avia Invest.

423. The Respondent notes that under the law of the Republic of Moldova, Avia Invest's "undistributed profits" are the profits and the ownership of Avia Invest and are not profits or ownership of Avia Invest's shareholders. The shareholders have no claim to any "undistributed profits".

424. Furthermore, under the law of the Republic of Moldova the "undistributed profits" are not and shall not be construed as being synonymous with "forgone dividends" ("forgoing of dividends"). Those are two different institutions of corporate law.

425. In addition, pursuant to Art. 39(1) of the Law on Limited Liability Companies, a company's annual registered net profit shall be distributed and not the purported historically accumulated net profit, unless the company's articles of association provide otherwise **[Exhibit R-135].** The Claimant has not demonstrated that the articles of association of Avia Invest provide otherwise, that is, that general shareholders' meeting may distribute dividends "from previous years" as decided by the Shareholders' Resolution dated 11 October 2019.

426. Also, pursuant to Art. 49(1)(h) of the Law on Limited Liability Companies, it is the exclusive competence of the company's general shareholders' meeting to distribute between shareholders the company's annual registered net profit **[Exhibit R-135].** In the instant case, by the Shareholders' Resolution dated 11 October 2019 the general shareholders' meeting had only **"proposed** to make a partial distribution of undistributed profits in the amount of [redacted] from the previous years" **[Exhibit [SC-11]].** That is, there was **no actual distribution** decided by the Shareholders' Resolution of Avia Invest dated 11 October 2019, and no right to dividends of the Claimant have ever crystallised. As the Claimant stated, "Avia Invest has never distributed profits to the Claimant or to any of its shareholders".[324]

427. Thus, the Claimant had no right to any dividends from Avia Invest; no right of the Claimant to dividends from Avia Invest ever crystallised. Avia Invest never distributed any dividends to the Claimant.

428. Accordingly, the Claimant's allegation that it has forgone dividends, and that it has invested "by forgoing dividends from Avia Invest in order to surplus revenue is reinvested in the development of Chisinau Airport"[325] is false and not grounded in the arguments and evidence put forward by the Claimant in these proceedings.

429. For the sake of argument, the Claimant's purported right to dividends, *quod non,* could only had arisen on 11 October 2019, that is, on the day of the Shareholders' Resolution dated 11 October 2019. However, the Claimant alleged that already on

[324] Para. 40 of the Soc.
[325] Para. 93.2. of the Soc.

2 October 2019 it had sent the purported Notice of Dispute dated 2 October 2019 to the Respondent **[Exhibit SC-5].** That is, the Claimant had sent the Notice of Dispute dated 2 October 2019 before even having a purported right to being paid dividends from Avia Invest.

430. A dispute between the Claimant and the Respondent could in principle have not arisen prior the Claimant even having a right to dividends (before the right to dividends crystallises) regarding Avia's Invest shares. As noted above, under the law of the Republic of Moldova, the right to dividends arises only when the general shareholders' meeting agrees upon the distribution of company registered net profits. The Claimant sent the purported Notice of Dispute dated 2 October 2019 before a dispute even arose between the Claimant and the Respondent. Accordingly, the purported Notice of Dispute dated 2 October 2019 as a unilateral act allegedly issued by the Claimant is null and void, as it referred to an inexistent dispute between the Claimant and the Respondent.

f. Siphoning Money out of Avia Invest Is Not an Investment

431. The Claimant claimed in the RfA that it invested in Avia Invest "by acting as parent company surety and/or guarantor on loans made by Avia Invest to various entities in order to ensure that its investment obligations under the Concession Agreement have been fulfilled" (para. 37.2. of the RfA). The Soc contains no such claim anymore.

432. The Claimant has not provided any explanation, let alone any evidence, of such acting as surety and/or guarantor. Moreover, it has not advanced any arguments that such "acting as a parent company surety and/or guarantor on loans made ◆ Avia Invest" *(emphasis added)* qualifies as a protected investment under the BIT. This is denied.

433. It is not clear from the Claimant's submissions, and the Claimant has not expressly asserted, whether the Claimant assumes that it is a concessionaire under the Concession Agreement, or it has any obligations under the Concession Agreement. Furthermore, the Claimant has not explained what the legal basis is for such purported "acting as parent company surety and/or guarantor on loans made ◆ Avia Invest" *(emphasis added)".*

434. It is upon the Claimant to discharge its burden of proof with respect to that unsubstantiated allegation in the RfA.

435. The Claimant's assertion in the RfA appears to be a blatant claim that the Claimant in fact actively acted towards *divesting* in Avia Invest, that is, siphoning money out of Avia Invest.[326] It shall be noted that important amounts of money siphoned out

[326] Avia Invest granted during 2014-2019 interest-free loans, or loans at low interest, or long-term loans, or advance payments "to various entities" in the amount of about EUR 88 million. During those years, Avia Invest collected the interest on those loans and advanced payments in the amount of about EUR 85 thousand only. On or about 31 August 2019, the balance of the outstanding loans and/or advances granted by Avia Invest amounted to about EUR 66 million. At the same time, however, as indicated by the Claimant itself, Avia Invest had tax arrears, as well as

of Avia Invest ended up on the accounts of offshore companies and have never been repaid to Avia Invest.

g. No Investment Within Its Inherent Meaning

436. Contrary to the Claimant's contentions, the mere agreeing to purchase shares and/or agreeing to pay the shares' price does not in itself constitute a protected investment when **no** Claimant's **contribution** has been made. Furthermore, the mere agreeing to purchase shares and/or agreeing to pay the shares' price does not constitute an investment within the **inherent meaning** of that term and does not satisfy the definition of "investments" in Art.1(1) of the BIT.

437. The Claimant's literal construction of Art. 1(1) of the BIT[327] is contrary to the established rules of treaty interpretation.

438. The provisions of the BIT should be interpreted in accordance with the Vienna Convention on the Law of Treaties (the **"VCLT") [Exhibit RLA-13].** Pursuant to Art. 31(1) of the VCLT, Art. 1(1) of the BIT shall be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in light of its object and purpose.[328]

439. The BIT does not contain a substantive definition of the protected "investments". Art. 1(1) of the BIT merely lists the forms that an investment may take, that is, the types of assets that may be invested, but does not define the term "investments" (or "investment") itself:

> "The term 'investments' means every kind of asset invested by investors, for the purpose of acquisition of economic benefit or other business purpose, of one Contracting Party in the territory of the other Contracting Party in accordance with the legislation of the latter and **in particular. though not exclusively,** shall include:
>
> a) Movable and unmovable property as well as any other property rights;
>
> b) Rights derived from shares, bonds and other kinds of interests in companies;
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> c) Claims to money or other claims and rights having an economic value;

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arrears on payments due to the Civil Aviation Authority and the PPA, and apparently needed loans from "a shareholder in Komaksavia in order to discharge in their entirety Avia Invest's debts to the CAA and to the PPA". All those transactions appear to have been designed to overburden Avia Invest and to other improper purposes.

[327] See paras. 30 (including 30.1. to 30.5.), 43, 93 (including 93.1. and 93.2.) of the SoC; see paras. 16 (including 16.1 to 16.5.), 36, 37 (including 37.1. to 37.3.) of the RfA.

[328] See, e.g., *Romak SA v Uzbekistan,* Award, PCA Case No. AA280, 26 November 2009, para. 176 **[Exhibit RLA-18);** *Alps Finance and Trade AG v The Slovak Republic,* Award, UNCITRAL, 5 March 2011, paras. 236-237 **[Exhibit RLA- 15).**

> d) Intellectual property rights, technical processes and know-how;
>
> Provided that a possible change in the form in which the investments or reinvestments have been made shall not affect their character as investments so long as such a change does not contravene laws and regulations of the Contracting Party in the territory of which the investments were made."[329] (emphasis added).

440. A straight-forward reading of the introductory clause of Art. 1(1) of the BIT "in particular, though not exclusively" confirms that it merely provides for a **non-exhaustive list of assets** that **may** qualify as investments. In order to determine whether the Claimant's alleged shares qualify as a protected investment under the BIT, the relevant test is therefore not whether they fall within one or more categories of assets listed in Art. 1(1) of the BIT, but rather whether they meet the **inherent definition** of "investments" ("investment") under the BIT. And they do not.

441. Such inherent definition derives from the ordinary meaning of the term "investment" and, as further demonstrated below by reference to investment treaty awards, includes elements of contribution, risk and duration.

442. This is confirmed by the BIT's Preamble which underlines that the "purpose" pursued by the Contracting Parties is to "extend and intensify the long-term economic cooperation" by "create[ing] favourable conditions for investments".[330] It would be manifestly absurd and unreasonable to assume that these goals and object could be achieved by granting BIT protection to "agreeing to purchase a shareholding" and/or agreeing to pay the shares' price. The existence of an investment is not a matter of form but a **substantive** requirement for jurisdiction - and hence a requirement for jurisdiction ratione materiae.

443. The need to refer to the intrinsically substantive definition of "investment" rather than to the non-exhaustive lists of assets contained in investment treaties (which merely list the assets that may be "invested") has been recognised by tribunals in **ICSID**[331] and **non-ICSID**[332] investment treaty arbitrations alike.[333] The tribunal in

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[329] Art. 1 para. 1 of the BIT **[Exhibit RLA-1 *bis*].**

[330] BIT, Preamble **[Exhibit RLA-1 *bis*].**

[331] The tribunal in *GEA v Ukraine* considered that the objective meaning of the term "investment" was inherent to the term investment, irrespective of the application of the ICSID Convention. The tribunal stressed that: "it is not so much the term "investment" in the ICSID Convention than the term "investment" *per se* that is often considered as having an objective meaning in itself, whether it is mentioned in the ICSID Convention or in a BIT." *(GEA Group Aktiengesel/schaft v Ukraine,* ICSID Case No. ARB/08/16, Award, 31 March 2011, para. 141 **[Exhibit RLA-72]).**

[332] The Claimant's assertion that the Salini criteria have been applied *only once* outside an ICSID context (para. 44.4. of the SoC) is obviously wrong as it contradicts the available statistics (investor-state cases).

[333] See, e.g., *Salini Cosrruttori S.p.A. and lta/strade S.p.A. v. Kingdom of Morocco,* ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52 *et seqq.* **[Exhibit RLA-19];** *Joy Machinery Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/03/11, Decision on Jurisdiction of 6 August 2004, para. 42 *et seqq.* **[Exhibit RLA-12];** *Romak SA v*

KT Asia v Kazakhstan stressed that "[i]t is inherent to the word 'investment', irrespective of the application of the ICSID Convention".[334]

444. The tribunal in *AFT v Slovakia,* whilst applying Art. 1(1) of the Switzerland-Czech and Slovak Federal Republic BIT, which contains and asset-based investment definition similar to that of Art. 1(1) of the BIT, found that "the BIT definition of investment is not entirely self-standing concept, but refers to the more general concept given by international law rules".[335]

445. A non-exhaustive enumeration of assets in an investment treaty does not constitute a substantive definition of the term "investment". As correctly noted by the tribunal in the case *Romak v Uzbekistan,* the term "investment" has an intrinsic meaning, independent of the categories enumerated in the treaty, and that meaning cannot be ignored:

> "[T]he categories of investments enumerated in Article 1(2) of the BIT are not exhaustive, and **do not constitute an all-encompassing definition of 'investment.'** Both Parties agree that this is the case. Therefore, there may well exist categories different from those mentioned in the list which, nevertheless, could properly be considered investments protected under the BIT. Accordingly, there must be a **benchmark** against which to assess those non-listed assets or categories of assets in order to determine whether they constitute an 'investment' within the meaning of Article 1(2). The term 'investment' has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the BIT."[336] *(emphasis added).*

446. The tribunal in *Romak v Uzbekistan* further highlighted that assets what would not meet the **inherent characteristics** of "investments" are not automatically transformed into "investments" by the mere fact that they fall into one or more categories listed in the treaty definition of "investment".

> "The term 'investment' has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the BIT. [...] The Arbitral Tribunal therefore considers that the term 'investments' under the BIT has an inherent meaning

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Uzbekistan, Award, PCA Case No AA280, 26 November 2009, para. 173 *et seqq.* **[Exhibit RLA-18);** *Alps Finance and Trade AG v The Slovak Republic,* Award, UNCITRAL, 5 March 2011, para. 230 *et seqq.* **[Exhibit RLA-15).**

[334] *KT Asia Investment Group B. V. v. Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, para. 165 **[Exhibit RLA-61).**

[335] *Alps Finance and Trade AG v The Slovak Republic,* Award, UNCITRAL, 5 March 2011, para. 240 **[Exhibit RLA-15).** The tribunal in that case highlighted (para. 239) that it "is aware that the multitude of bilateral and multilateral investment treaties - although containing different definitions (either narrow or broad) of what constitutes an 'investment' - explicitly or implicitly refers to an 'objective' definition given by international law, as applied by other treaty-based tribunals. Tribunals must therefore be cautious to enforce the true intention of the Contracting Parties to the specific treaty forming the basis of their jurisdiction, which cannot grossly depart from the 'objective' case-law definition."

[336] *Romak SA v Uzbekistan,* Award, PCA Case No AA280, 26 November 2009, para. 180 **[Exhibit RLA-18).**

> (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk. The Arbitral Tribunal is further comforted in its analysis by the reasoning adopted by other **arbitral tribunals** [...] **which consistently incorporates contribution, duration and risk as hallmarks of an 'investment.'** By their nature, asset types enumerated in the BIT's non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of 'investment,' the fact that it falls within one of the categories listed in Article 1 does not transform it into an 'investment.' In the general formulation of the tribunal in Azinian, **'labeling** [...] **is no substitute for analysis.'"337** (emphasis added).

447. As indicated by the tribunal in Romak v Uzbekistan, a "mechanical application" of the categories of assets listed in an investment treaty's definition would lead to "a result which is manifestly absurd or unreasonable"[338] - a result which is contrary to Art. 32(b) of the VCLT.[339]

448. The tribunal in AFT v Slovakia also pointed out that an investment shall fulfil the following characteristics in order to benefit from investment treaty protection:

> "It is now common ground that the necessary conditions or characteristics to be satisfied for attributing the quality of 'investment' to a contractual relationship include: *(a)* a **capital contribution** to the host-State by the private contracting party, *(b)* a significant **duration** over which the project is implemented and *(c)* a sharing of operational **risks inherent to the contribution** together with long-term commitments."[340] (emphasis added).

449. As it is clear from the cases mentioned above, the inherent meaning of the investment is also present in the BIT. In the instant case, **"by agreeing to purchase** - of the shares in Avia Invest"[341] (emphasis added) and/or **"12Y: agreeing to pay** the share purchase price for a - shareholding"[342] (emphasis added) the Claimant has not invested in the Republic of Moldova, and his such "agreeing" **does not constitute an investment within the inherent meaning** of that term, which comprises these elements: (a) capital contribution, (b) risk, and (c) duration.

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[337] *Ibid.,* para. 207 *(emphasis altered; footnote omitted).*
[338] VCLT, Art. 32(b) **[Exhibit RLA-13).**
[339] *Romak SA v Uzbekistan,* Award, PCA Case No AA280, 26 November 2009, para. 184 **[Exhibit RLA-18).**
[340] *Alps Finance and Trade AG v The Slovak Republic,* Award, UNCITRAL, 5 March 2011, para. 241 **[Exhibit RLA-15)** *(footnotes omitted).*
[341] Soc, para. 30. See also para. 92.
[342] SoC, para. 93.1.

450. As to (a), the Claimant has made **no capital contribution.**[343] The fact that the Claimant "agreed" to purchase shares and/or to pay the price, or the Claimant's "forgoing of dividends" is of no relevance, since there is no evidence that the Claimant ever paid the price of the shares in Avia Invest allegedly acquired in the non-arm's length Share Sale-Purchase Contract dated 6 September 2016 concluded with 000 Komaksavia. In fact, there is *prima facie* evidence that the Claimant has not paid the price of the shares in Avia Invest **[Exhibit R-37,** the balance sheet of 000 Komaksavia, which does not reflect any amount received in 2016 or thereafter].

451. The Claimant has not committed any resources, and therefore its "agreeing" to purchase and its "agreeing" to pay the price, and its "forgoing of dividends" cannot constitute an investment within the meaning of the BIT. The Claimant's intentions for the future are irrelevant for the purposes of establishing the jurisdiction of the Arbitral Tribunal.

452. Since the Claimant has made no contribution, that is, has not "invested" any kind of asset, its purported "forgoing dividends from Avia Invest"[344] is not protected by Art. 1(1) of the BIT.

453. Art. 1(1) of the BIT requires that for the purposes of "economic benefit" or for "other business purpose", the Claimant should have first **"invested"** an **"asset"** ("every kind of asset"). The Claimant has **not** demonstrated that it "invested", that it **made any investment** in the first place. As indicated by the tribunal in *Malicorp:*

> **"[A]ssets cannot be protected unless they result from contributions,** and contributions will not be protected unless they have actually produced the assets of which the investor claims to have been deprived."[345] *(emphasis added).*

454. The purported "forgo[ne] dividends"[346] that allegedly remained at Avia Invest's disposal may not qualify as protected "investments" under para. 1(1) of the BIT, because they do not result from the Claimant's contributions. Moreover, as demonstrated above, the Claimant had actually not forgone any dividends, as no dividends had ever been distributed by the general shareholders' meeting of Avia Invest. The undistributed profits[347] were and are the profits of Avia Invest not of the Claimant. Moreover, the undistributed profits were and are the ownership of Avia Invest, and the Claimant has no ownership right on the undistributed profits of Avia Invest.

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[343] In the Soc, the Claimant does not even allege that it has made a contribution (see, for example, para. 48, including sub-paras. 48.1., 48.2., 48.3.).

[344] Soc, para. 93.2. See also paras. 38-40 of the SoC.

[345] Malicorp Limited v The Arab Republic of Egypt, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 110 **[Exhibit RLA-71).**

[346] See Soc, paras. 38, 39, 40, 93.2.

[347] Cf. para. 39 of the Soc.

455. As to (b), having made no capital contribution, the Claimant has, by definition, **no risk** of losing it.

456. As to (c), since the Claimant failed to make a capital contribution, its purported investment has, by definition, **no duration.**

457. Accordingly, the Claimant's "agreeing to purchase - of the shares in Avia Invest"[348] and/or "agreeing to pay the share purchase price for a - shareholding",[349] or "forgoing dividends"[350] does not qualify as investments under the BIT. As such, the claim falls outside the scope of the BIT, and the Tribunal lacks jurisdiction ratione materiae.

458. The Claimant argument that the "Salini criteria are inapplicable to s e c arbitration" (Soc, para. 44.6.) misses the point, because the inherent definition of "investments" ("investment") is based on the BIT and international law, not on s e c Rules.[351] The Claimant asserts that if Salini test were applicable, its purported investment would satisfy the following Salini test criteria: "a view to a certain regularity of profit and return over a certain period of time"; "an assumption of risk"; and "a substantial commitment with significance for the Republic of Moldova's economic, infrastructural and strategic development" (sub-paras. 48.1., 48.2., 48.3. of the SoC). The Claimant's statement thus impliedly **admits** that its purported investment fails to meet two other criteria: **contribution** and **duration.** The Respondent submits that the Claimant meets none of those criteria.

459. The tribunals in various investor-state cases have endorsed an objective definition of "investment" with three[352] and more elements.[353] However, the criterium of contribution is common for all such tests, it is inherent to the objective definition of "investment", and the failure to make a contribution shall render the purported investment unprotected under the applicable investment treaty. In the instant case, the Claimant has not made a contribution, and its purported investment is not protected by the BIT.

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[348] Soc, para. 30. See also para. 92.
[349] Soc, para. 93.1.
[350] Soc, para. 93.2.
[351] The tribunal in *Salini* (paras. 50-58) stated four criteria for the term "investment": (i) a contribution, (ii) a certain duration, (iii) an element of risk, and (iv) a contribution to the host State's economic development **[Exhibit RLA-19].**
[352] The tribunals in *Saba Fakes v Turkey* (paras. 110-111) **[Exhibit RLA-69]** and *Quiborax v Bolivia* (para. 219; 227) **[Exhibit RLA-73],** *KT Asia v Kazakhstan* (para. 173) **[Exhibit RLA-61]** considered three criteria: (i) contribution or allocation of resources; (ii) duration; (iii) risk.
[353] As already mentioned, the tribunal in *Salini* stated four criteria (paras. 50-58): (i) a contribution, (ii) a certain duration, (iii) an element of risk, and (iv) a contribution to the host State's economic development **[Exhibit RLA-19].** The tribunal in *Joy Mining v Egypt,* para 53 **[Exhibit RLA-12]** considered five criteria: four *Salini* criteria plus the requirement of a regularity of profit and return. The Tribunal in *Phoenix,* para. 114 **[Exhibit RLA-22]** extended the criteria to six, including in the *Salini* test, the two additional criteria: (v) assets must be invested in good faith and (vi) in accordance with the laws of the host State.

460. Should the Arbitral Tribunal embrace any of those tests with more than three elements, the Respondent submits that the Claimant has met none of the criteria accepted in such tests.

461. The Respondent indicated in the previous paragraphs that the Claimant has made no contribution (and the Claimant admits that this criterium has not been met), and that without a commitment of resources the Claimant faces no risk of losing them, and that the purported investment entails no duration without the resources being committed first.

462. As to the contribution to the Respondent's economic development, the transfer of the shares in Avia Invest to the Claimant was made with the sole purpose of bringing a claim under the BIT against the Respondent and to harm the Respondent in other ways. This does **not** amount to **a contribution** to the Respondent's development or to its economic prosperity. Moreover, since the Claimant made no contribution, there is nothing that could contribute to the Respondent's development or prosperity.

463. The Respondent notes the Claimant's repeated pretence that the Republic of Moldova was struggling to attract foreign investment in the modernisation of the Chisinau International Airport back in 2013.[354] The Claimant thus aims at asserting the saviour role of Shor and its affiliates, who through various scams ended up in controlling the concession and the purported investment. By its form, the Claimant's pretence appears to be a recognition of the continuity of control over the shares in Avia Invest; that the Claimant controls nothing. In its substance, the Claimant's pretence is false, because Chisinau International Airport had been a profitable business and, moreover, because the EBRD provided loans for the reconstruction of Chisinau International Airport when it was necessary to reconstruct the Airport.

464. As to the regularity of profit and return, the Claimant could not expect any regularity of profit and return without having "every kind of asset invested",[355] that is, a contribution, in the first place. Only the commitment of resources, that is, the economic materialisation of the purported investment, could contain an expectation of profit and return. This has been highlighted by Zachary Douglas (in the Rule 23):

> "The **economic materialisation** of an investment requires the **commitment of resources to the economy of the host state** by the claimant **entailing** the assumption of risk in expectation of i!. commercial **return."**[356] *(emphasis added).*

465. In the RfA, the Claimant claimed that it invested in Avia Invest "by acting as parent company surety and/or guarantor on loans made by the Avia Invest to various entities in order to ensure that its investment obligations under the Concession

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[354] See, inter alia, para. 48.3. of the SoC; para. 22 of the RfA.

[355] Art. 1(1) of the BIT **[Exhibit RLA-1 *bis].***

[356] Zachary Douglas, *The International Law of Investment Claims,* Cambridge University Press, 2009, p. 189 et seqq. **[Exhibit RLA-74).**

Agreement have been fulfilled".[357] The Respondent notes that the Claimant has tendered no evidence in that respect. However, this appears to be the Claimant's admission that it in fact has actively acted towards *divesting* in Avia Invest, that is, siphoning money out of Avia Invest.[358]

466. As to the requirement of good faith and conformity with the laws of the Republic of Moldova, in the Respondent's Application dated 27 November 2020, the Respondent's Reply dated 4 January 2021, the Respondent's Request for Summary Procedure dated 5 February 2021, the Respondent brought *prima facie* evidence regarding the purported investment being made in bad faith and in violation of the legislation of the Republic of Moldova.

[357] Para. 37.2. of the RfA.

[358] Avia Invest granted during 2014-2019 interest-free loans, or loans at low interest, or long-term loans, or advance payments "to various entities" in the amount of about EUR 88 million. During those years, Avia Invest collected the interest on those loans and advanced payments in the amount of about EUR 85 thousand only. On or about 31 August 2019, the balance of the outstanding loans and/or advances granted by Avia Invest amounted to about EUR 66 million. At the same time, however, as indicated by the Claimant itself, Avia Invest had tax arrears, as well as arrears on payments due to the Civil Aviation Authority and the PPA, and apparently needed loans from "a shareholder in Komaksavia in order to discharge in their entirety Avia Invest's debts to the CAA and to the PPA". All those transactions appear to have been designed to overburden Avia Invest and to other improper purposes.

V. THE TRIBUNAL HAS NO JURISDICTION BECAUSE THE CLAIMANT FAILED TO PROPERLY REQUEST AND PROCEED WITH THE AMICABLE SETTLEMENT

467. The Arbitral Tribunal has no jurisdiction because the Claimant has failed to properly request and proceed with the amicable settlement of the alleged dispute.

468. The Republic of Moldova notes that the requirements of Art. 10 paras. 1 and 2 (first part) of the BIT shall be firstly fully met before a claimant could submit an alleged dispute to an arbitral tribunal pursuant to Art. 2 (second part) and 2(d) of the BIT. The provisions of Art. 10 paras. 1 and 2 (first part) of the BIT are an integral aspect of the Contracting Parties' consent to arbitration, and shall be interpreted and applied in a manner that respects the procedures and terms that the Contracting Parties put in place as an integral part of their consent.

469. Art. 10 of the BIT provides in relevant part as follows:

> **"Settlement of Disputes between an Investor and a Contracting Party**
>
> 1. Any dispute which may arise between one Contracting Parry and an investor of the other Contracting Party in connection with an investment on the territory of that other Contracting Party shall be settled amicably through consultations and negotiations.
>
> 2. If a dispute can not be settled in accordance with paragraph 1 of this Article within a period of six months from the date on which either party to the dispute requested amicable settlement, the investor concerned may submit the dispute either to:
>
> a) The competent court or administrative tribunal of the Contracting Party in the territory of which the investment has been made; or
>
> b) *[...]*
>
> c) *[...]*
>
> d) The Arbitration Institute of the Arbitral Tribunal of the Chamber of Commerce in Stockholm; or
>
> e) *[...]*
>
> 3. *[...]*
>
> 4. The arbitration award shall be based on:
>
> - the provisions of this Agreement, and
>
> - the rules and universally accepted principles of international

law.

5. The arbitration award shall be final and binding on both parties to the dispute and shall be executed according to the law of the Contracting Party concerned.

6. [. ..)[359]

470. Obviously, the Claimant has not complied with the requirements of Art. 10 paras. 1 and 2 (first part) of the BIT.

471. The alleged Notice of an investment dispute under the BIT dated 2 October 2019 (the **"Notice of Dispute") [Exhibit SC-5]** has purportedly been submitted by "Investors" and "Investors' investments", although it appears that only one such 'investor' signed it. In the purported Notice of Dispute there has been no suggestion, let alone any description, as to what the "investments" of Komaksavia were so that the Government could be engaged in meaningful consultations and negotiations.

472. As mentioned earlier in this Memorial, should the Claimant have a purported right to dividends, *quod non,* such right could only had arisen on 11 October 2019, that is, on the day of the Shareholders' Resolution dated 11 October 2019. The Notice of Dispute has been dated with 2 October 2019. That is, the Claimant allegedly submitted the Notice of Dispute before even having a purported right to dividends from Avia Invest. Put differently, the Claimant sent the Notice of Dispute before even a dispute could, as a matter of principle, have arisen between the Claimant and the Respondent regarding the purported investment allegedly made in way of "forgoing dividends".[360] To that extent, the purported Notice of Dispute as a unilateral act allegedly issued by the Claimant is null and void, as it referred to an inexistent dispute between the Claimant and the Respondent.

473. Independently from the arguments in the previous paragraphs, the Notice of Dispute was not and is **not valid** on various other grounds. Firstly, it has been signed by a person who was **not the Director** of the Claimant[361] and did **not** otherwise submitted, presented, showed **any power of attorney** that he could represent the Claimant. The Notice of Dispute was not signed by the contemporaneous director of Komaksavia, Karklinsh.

474. The relevant part of the alleged Notice of Dispute **[Exhibit SC-5]** is reproduced here below:

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[359] Art. 10 of the BIT.

[360] Cf. para. 93.2. of the Soc.

[361] The alleged registered nominal Director of the Claimant on 2 October 2019 was Karklinsh **[Exhibits R-8** and **R-10].**

Yours sincerely,

Komaksavia Airport Invest Ltd.

Nat Rothschild

Avia Invest S.R.L.

.....

Boris Salov

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475. Secondly, the Notice of Dispute contained **no address, no contact details** or, indeed, **any details** of the alleged petitioner or of the Claimant. That was even in violation of Section 103(1)(c) of the Companies Law of the Republic of Cyprus pursuant to which a company:

> "[S]hall have mentioned in legible characters in all business letters of the company and in all notices and other official publications of the company, and in all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts and letters of credit of the company:
>
> (i) the name of the company;
> (ii) the number of registration of the company;
> (iii) whether it concerns a private or a public company;
> (iv) the registered office of the company;
> (v) if in the documents mention is made of the capital of the company, the reference must mention the allotted and paid capital;
> (vi) if there is good reason, the stage of the liquidation in which the company finds itself. "[362]

[362] Para. 103{1)(c) of the Companies Law of the Republic of Cyprus **[Exhibit R-52 *bis*].**

476. The first page of the alleged Notice of Dispute is reproduced here below:

Via international courier service

His Excellency Igor Dodon
The President of the Republic of Moldova
154 Stefan eel Mare bd., Chisinau, MD-2073, Republic of Moldova

Ms Maia Sandu
Prime Minister of the Republic of Moldova
Piata Marii Adunari Nationale, 1, Chi inau, MD-2033, Republic of Moldova

Ms Olesea Stamate
Minister of Justice of the Republic of Moldova
Str. 31 August 1989, 82, Chisinau, MD-2012, Republic of Moldova

Mr Vadim Brinzan
Minister of Economy and Infrastructure of the Republic of Moldova
Piata Marii Adunari Nationale, 1, Chi inau, MD-2033, Republic of Moldova

Mr Eugenlu Moraru
Director General of the Agency of Public Property of the Republic of Moldova
Piata Marii Adunari Nationale, 1, Chi inau, MD-2033, Republic of Moldova

October 2, 2019

NOTICE

of an investment dispute under the Agreement between the Government of the Republic of Cyprus and the Government of the Republic of Moldova for the reciprocal promotion and protection of investments of 13 September 2007

Komaksavia Airport Invest Ltd. is a limited liability company incorporated and existing under the laws of the Republic of Cyprus with registered number 359258 ("Komaksavia"). Avia Invest S.R.L. is an entity incorporated and existing under the laws of the Republic of Moldova with registered number 1013600025635 ("Avia Invest"). These entities are referred to as the "Investors". Komaksavia is a majority shareholder (g) of Avia Invest, a concessionaire and an operator of the Chisinau International Airport ("Chisinau Airport").

477. Accordingly, the Republic of Moldova could not engage in any meaningful consultations because of the lack of the Claimant's address and contact details.

478. Thirdly, there was no indication, let alone proof, that the Notice of Dispute was ever submitted to any authority in the Republic of Moldova.

479. Fourthly, there was no proof that the Notice of Dispute was sent and/or submitted, or when and where it was submitted, or that it reached the Government of the Republic of Moldova.

480. The sole shareholder that issued the purported Notice of Dispute is no longer Komaksavia's shareholder. There is no evidence in this case that after the departure of the issuing shareholder, the incoming shareholders of Komaksavia formally approved the purported Notice of Dispute.

481. Nothing in the purported Notice of Dispute has made its way into the Request for Arbitration.

482. Hence, the alleged Notice of Dispute, which is **invalid,** should not be considered a proper notice for the purposes of the BIT Art. 10 para. 1 and/or for triggering the six-month cooling-off period prescribed in the BIT Art. 10 para. 2 (first part).

483. The Claimant's core claim in this arbitration is the alleged termination of the Concession Agreement concluded between the PPA and Avia Invest. The Notification of Resiliation (Notification of Termination), dated 8 July 2020, was issued by the Granter, the PPA, which as Party to the Concession Agreement "shall not be considered a Governmental Entity".[363] Even if the Notification of Resiliation (Notification of Termination) were to be attributed to the Republic of Moldova, *quod non,* the Notice of Dispute did not and, in fact, could not identify those challenged measures, as the Notification of Resiliation (Notification of Termination) was issued on 8 July 2020, that is, post-dated the Notice of Dispute. Likewise, other challenged measures were also not identified in the Notice of Dispute, because allegedly they also post-dated the Notice of Dispute. Accordingly, the Claimant failed to observe the "cooling-off" period prescribed by Art. 10 para. 2 (first part) of the BIT with regard to measures which are at the core of Claimant's claim. Moreover, the Notice of Dispute pre-dates the main allegation in these arbitration proceedings: the purported illegal termination of the Concession Agreement.

484. Furthermore, the response of the Ministry of Justice dated 16 December 2019 **[Exhibit SC-6]** has been addressed to Avia Invest and not the Claimant, and the Claimant has not tried to explain that issue but pretends that it is the addressee of that response by the Ministry of Justice. The Claimant has not tried to explain, let alone to prove, that it has engaged in any meaningful consultations and negotiations with the Ministry of Economy and Infrastructure, "the authority responsible for the investment sector", as prescribed in the response of the Ministry

[363] Art.1.1 (definition of the "Governmental Entity") of the Concession Agreement **[Exhibit R-12).**

of Justice. Accordingly, the Claimant has not complied with the BIT Art. 10 para. 1 and 2 (first part) and, therefore, no jurisdiction has been established by the Claimant under the BIT Art. 10 para. 2 let. d).

485. The Claimant should not be permitted to flout the notice and colling-off period provisions of Art. 10 para. 1 and 2 (first part) of the BIT. The Arbitral Tribunal should apply the notice and six-month waiting period requirements in accordance with their plain meaning and deny its own jurisdiction (or, alternatively, hold that the Claimant's claim is inadmissible).

VI. RELIEF SOUGHT

486. The Respondent respectfully requests that the Arbitral Tribunal:

486.1. dismiss the Claimant's claims for lack of jurisdiction *ratione personae;* or

486.2. dismiss the Claimant's claims for lack of jurisdiction *ratione materiae;* or

486.3. dismiss the Claimant's claims for failure of the Claimant to properly request and proceed with the amicable settlement under para. 10 of the BIT; and

in any event

486.4. order the Claimant to pay the Respondent's costs of the arbitration on a full indemnity basis, i.e., the Respondent's costs, including but not limited to the fees and expenses of the Tribunal and the Respondent's costs of legal representation and assistance, experts, witnesses, and consultants, and all other fees and expenses incurred in participating in the arbitration, including internal costs, with post-award interest at a commercially reasonable rate; and

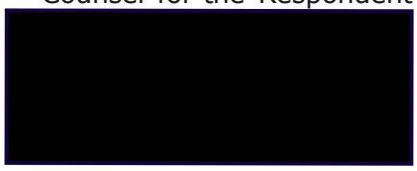
486.5. order such other relief as the Arbitral Tribunal, in its discretion, considers appropriate.

Dated 28 May 2021

Respectfully submitted on behalf of the Respondent

Buruiana & Partners

Counsel for the Respondent



Mihail Buruiana