PCA Case No. 2018-42

IN THE MATTER OF AN ARBITRATION UNDER THE TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF ESTONIA FOR THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

-and-

THE UNCITRAL ARBITRATION RULES, 1976

-between-

ELA USA, Inc. (U.S.A.)

(the "Claimant")

-and-

THE REPUBLIC OF ESTONIA

(the "Respondent")

AWARD

Tribunal
Judge Bruno Simma (Presiding Arbitrator)
Professor Hélène Ruiz Fabri
Judge Peter Tomka

Registry
Permanent Court of Arbitration

21 February 2025

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GLOSSARY OF DEFINED TERMS AND ABBREVIATIONS

Submissions

Notice of Dispute	Letter from the Claimant to the Respondent notifying of the existence of a dispute between the Parties pursuant to Article VI of the Treaty, dated 1 August 2017
Notice of Arbitration	Claimant's Notice of Arbitration dated 18 April 2018, also serving as its Statement of Claim
Statement of Defense	Respondent's Statement of Defense dated 7 December 2018
Memorial	Claimant's Memorial dated 30 August 2019
Counter-Memorial	Respondent's Counter-Memorial dated 10 March 2020
Reply	Claimant's Reply Memorial dated 14 January 2021
Rejoinder	Respondent's Rejoinder Memorial dated 15 July 2021
1 October 2021 Submission	Claimant's Submission dated 1 October 2021 filed in accordance with the Tribunal's directions of 30 August 2021
3 November 2021 Submission	Respondent's response to the Claimant's 1 October 2021 Submission dated 3 November 2021
1 December 2021 Submission	Claimant's response to the Respondent's 3 November 2021 Submission dated 1 December 2021
Claimant's Answers to Tribunal Questions *or* **Claimant's Post-Hearing Brief** *or* **Claimant's PHB**	Claimant's Answers to the Tribunal's Questions dated 25 March 2022
Respondent's Answers to Tribunal Questions *or* **Respondent's Post-Hearing Brief** *or* **Respondent's PHB**	Respondent's Answers to the Tribunal's Questions dated 25 March 2022
21 April 2022 Submission	Respondent's Comments on the Claimant's Exhibit C-612 dated 21 April 2022
6 May 2022 Submission	Claimant's response to the Respondent's 21 April 2022 Submission dated 6 May 2022
Claimant's Cost Submission	Claimant's Statement of Costs dated 17 May 2024
Respondent's Cost Submission	Respondent's Statement of Costs dated 17 May 2024
Claimant's Response to Cost Submission	Claimant's response to the Respondent's Cost Submission dated 31 May 2024
Respondent's Response to Cost Submission	Respondent's response to the Claimant's Cost Submission dated 31 May 2024

Other Terms and Abbreviations

17 July 1990 Resolution	Resolution of the Presidium of the Supreme Council of the Republic of Estonia regarding the Initial Measures for Organizing the Privatization Process dated 17 July 1990

19 December 1990 Resolution	Resolution of the Supreme Council of the Republic of Estonia on the Restoration of Continuity of Right of Ownership dated 19 December 1990
1939 Estonia-USSR Treaty or **1939 Treaty**	Mutual Assistance Treaty concluded between Estonia and the USSR on 28 September 1939
1994 Supreme Court Decision	Decision of the Supreme Court of Estonia dated 12 December 1994
1995 Supreme Court Decision	Decision of the Supreme Court of Estonia dated 31 January 1995.
2006 Rail World Case	Allegations by Mr. Edward Burkhardt, CEO of Rail World, that demands for corrupt payments had been made during his investment in the privatization of Estonian Railways.
2010 Circuit Court Judgment	Circuit Court of Tallinn, Case No. 2-99-10, Judgment dated 12 March 2010
2021 Porto Franco Case	The resignation of the Prime Minister of Estonia, Juri Ratas, following an influence--peddling corruption scandal at Tallinn City Port on 13 January 2021.
23 January 1992 Resolution ***or*** **1992 Supreme Council Resolution**	Resolution of the Supreme Council of the Republic of Estonia regarding Declaration of Buildings, Structures, Military Weapons, Military Hardware, Supplies and other Assets Possessed by Former USSR Military Forces Located on ER Territory to Become the Property of the Estonian Republic dated 23 January 1992
Adjusted Forecasts	Amended forecasts projected by Deloitte for the calculation of damages
Agrin	OÜ Agrin Partion
Alcedo	OÜ Alcedo KV
August 2000 Judgment	Tallinn City Court, Civil Case No. 2/3/227-6180/97, Judgment dated 25 August 2000
B&E	OÜ B&E
BFC	Soviet Baltic Fleet
BIT	Bilateral Investment Treaty
BPV	AS BPV
CCF	Capitalized cash flow
Civil Code	Civil Code of the Estonian Soviet Socialist Republic of 12 June 1964
Claimant ***or*** **ELA**	ELA USA, Inc.
Compulsory Encumbrances Act	Act of Compulsory Encumbrances for the Needs of State Defense dated 30 September 1939
Contract No. 16	Contract No. 16 dated 22 May 1990 with Military Factory No. 84 and the Construction Department of the Baltic Fleet as sellers and OÜ B&E as buyer
Corona Resources	Corona Resources S.A.
DCF	Discounted cash flow

December 1994 Supreme Court Judgment	Judgment No. III-4/A-10/94 of Estonia's Supreme Court dated 21 December 1994
Deloitte	Deloitte LLP
Disciplinary Committee	Disciplinary Committee of the Estonian Supreme Court
Economic Losses	A combination of Operational Damages and Economic Losses
ELA Tolli	AS ELA Tolli
Ella Kaubanduse	Ella Kaubanduse AS
ESSR	Estonian Soviet Socialist Republic
Estonian Railways	AS Eesti Raudtee
Expropriation Losses	Damages claimed by the Claimant as a result of the Respondent's breach of Article III of the Treaty
Extradition Costs	Damages claimed by the Claimant arising out of the Respondent's request to extradite Mr. Aleksander Rotko
FET	Fair and equitable treatment
Fourth Geneva Convention or **GC IV**	Fourth Geneva Convention of 1949
Funder	Claimant's third-party funder, Therium Litigation Finance A IC
GDR	German Democratic Republic
GT	GT Projekt
Hague Regulations	Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907
Hearing	Oral hearing from 30 August to 3 September 2021
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILC Articles	Draft Articles on Responsibility of States for Internationally Wrongful Acts
July 2005 Judgment	Tallinn City Court, Civil Case No. 2/23, Judgment dated 4 July 2005
JVA	Joint Venture Agreement concluded by AS Verest, AS BPV and OÜ Agrin Partion dated 21 October 1999
LPAIA *or* **Law of Property Act**	Law of Property Act Implementation Act dated 27 October 1993
Lumber Plan	Claimant's business plan with respect to its lumber operations at the Seaplane Harbor dated 24 October 2000
March 1990 Resolution	Resolution of the Supreme Council of the ESSR on the National Status of Estonia dated 29 March 1990 declaring the restoration of the Republic of Estonia
March 2006 Appeal Judgment	Tallinn Circuit Court, Civil Case No. 2-02-270, Judgment dated 1 March 2006

May 2002 Appeal Judgment	Tallinn Circuit Court, Civil Case No. 2-2/21/02, Judgment dated 2 May 2002
MFN	Most-favored-nation
Ministry of Economic Affairs	Ministry of Economic Affairs and Communications
Ministry of Transport	Ministry of Transportations and Communications
NAFTA	North American Free Trade Agreement
Nautex	AS Nautex
NT	National treatment
Operating Losses	Damages claimed by the Claimant as a result of the Respondent's breach of Article II of the Treaty
Parties	Claimant and Respondent
PCA	Permanent Court of Arbitration
Port Act	Port Act of 1997, as amended on 1 January 2001
Port Plan	Claimant's business plan with respect to the operations of the Seaplane Harbor dated 17 August 2000
PRCA General Plan	The smaller-scale comprehensive plan for the coastline area between Paljasaare and Russalka adopted on 9 December 2004
Regulation No. 244 *or* **27 November 1991 Regulation**	Regulation No. 244 regarding Suspension of Transactions with Buildings, Structures and Other Real Estate in the Use by the Soviet Military and Located on the Territory of the Republic of Estonia dated 27 November 1991
Regulation. No. 215 *or* **24 July 1992 Regulation**	Regulation No. 215 regarding Registration of Transactions Concluded on the Territory of the Republic of Estonia between the Units of the Former USSR Armed Forces and Enterprises, Establishments, Organizations and Private Persons dated 24 July 1992
Resolution 940	Resolution of the USSR Council of Ministers No. 940 on "the procedure for the transfer of state enterprises, associations, organizations, institutions, buildings and structures" of 16 October 1979, as amended on 5 October 1989
Respondent *or* **Estonia**	Republic of Estonia
Riigi	Riigi Kinnisvara AS
Seaplane Harbor *or* **Lennusadam** *or* **Port and Portlands**	An ice-free port in Tallinn, which encompasses land, buildings, and structures located at an address specified as Küti 17 and 17a (during parts of the relevant period)
SEK Directive No. 17/90	Directive No. 17/90 dated 1 November 1990
Soviet Union *or* **USSR**	Union of Soviet Socialist Republics
State Assets List	A list of assets promulgated on 25 October 1993, identifying the assets that remain in the ownership of the Estonian State
Supreme Council of the ESSR *or* **Supreme Council**	Supreme Council of the Estonian Soviet Socialist Republic

Tallinn City Master Plan	A comprehensive development plan for the City of Tallinn, adopted on 22 January 2011
Tallinn's Planning Office	Tallinn Sustainable Development and Planning Office
Treaty *or* **US-Estonia BIT**	Treaty between the Government of the United States of America and the Government of the Republic of Estonia Concerning the Encouragement and Reciprocal Protection of Investment dated 19 April 1994
Tribunal Questions	Questions issued by the Tribunal to the Parties on 12 February 2022
UNCITRAL Rules *or* **1976 UNCITRAL Rules**	Arbitration Rules of the United Nations Commission on International Trade Law 1976
United States *or* **U.S.**	United States of America
USSR Constitution	Constitution of the Soviet Union dated 7 October 1977 (as amended on 14 March 1990)
USSR Fundamentals of Civil Legislation	Fundamentals of the civil legislation of the USSR and Soviet republics dated 8 December 1961 (in force until 31 December 1991)
USSR Ownership Law	Law No. 1305-1 "On ownership in the USSR", 6 March 1990 (as amended on 24 December 1990)
VCLT	Vienna Convention on the Law of the Treaties
Verest	AS Verest
WTO	World Trade Organization

I. INTRODUCTION

A. THE PARTIES AND THEIR REPRESENTATIVES

1. The claimant in this arbitration is ELA USA, Inc. (the "**Claimant**" or "**ELA**"), a company incorporated under the laws of the State of Minnesota and existing under the laws of the State of Florida, United States of America ("**United States**" or "**U.S.**"), with its registered address at 148 South Arabella Way, St. John, Florida 32259. The Claimant is represented in these proceedings by Professor Barry Appleton of Appleton & Associates International Lawyers LP, 121 Richmond St. W, Suite 602, Toronto, Ontario M5H 2K1, Canada, and Mr. Edward Mullins of Reed Smith LLP, 200 S Biscayne Blvd., Suite 2600, Miami, Florida 33131, United States, and previously also by Ms. Nabeela Latif of Appleton & Associates International Lawyers LP and Ms. Cristina Cárdenas of Reed Smith LLP.

2. The respondent in this arbitration is the Republic of Estonia, a sovereign State (the "**Respondent**" or "**Estonia**" and, together with the Claimant, the "**Parties**"). The Respondent is represented in these proceedings by Ms. Kairit Kirsipuu, and previously by Ms. Elin Uusväli, Mr. Marko Aavik and Mr. Viljar Peep, of the Ministry of Justice of Estonia, Suur-Ameerika 1, 10122 Tallinn, Estonia, and the following counsel: Mr. Toomas Vaher, Mr. Anton Sigal, Ms. Maria Teder, and Ms. Mailis Meier (until 1 November 2021) of Ellex Raidla Advokaadibüroo OÜ, Kaarli pst 1 / Roosikrantsi 2, EE-10119 Tallinn, Estonia.

B. OVERVIEW OF THE DISPUTE

3. The dispute arises out of the Claimant's alleged investments in a seaport in Tallinn, Estonia, known as the **Seaplane Harbor**, or *Lennusadam*, which the Claimant claims to have operated through its —partly indirect—subsidiaries, AS BPV ("**BPV**"), AS Verest ("**Verest**"), OÜ Agrin Partion ("**Agrin**"), and AS ELA Tolli ("**ELA Tolli**").[1]

4. According to the Claimant, the Respondent improperly interfered with the Claimant's operation of its investments from 1999 through a combination of administrative and criminal actions, and use of discriminatory measures and physical force, in breach of the fair and equitable treatment ("**FET**") standard, the most-favored-nation ("**MFN**") treatment standard, as well as the national treatment ("**NT**") standard under the Treaty between the Government of the United States of America and the Government of the Republic of Estonia Concerning the Encouragement and Reciprocal Protection of Investment, dated 19 April 1994, which entered into force on 16 February 1997 (the "**Treaty**" or "**US-Estonia BIT**").[2] The Claimant further argues that the Respondent expropriated its alleged investments through the acts of the Estonian judiciary without paying compensation in breach of the Treaty.

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1 Notice of Arbitration, ¶¶ 13, 16.

2 Notice of Arbitration, ¶¶ 4-10.

5. The Respondent requests that the Tribunal dismiss the Claimant's claims in their entirety.[3] According to the Respondent, the Claimant's claims fall outside the Tribunal's jurisdiction and are inadmissible because: (i) the Tribunal lacks jurisdiction *ratione personae* under Article I(1)(a) of the Treaty because the true identity of the Claimant is unclear,[4] and the only link between the Claimant and the alleged investments is Mr. Rotko, an Estonian national;[5] (ii) the Tribunal lacks jurisdiction *ratione materiae* because the Claimant failed to prove ownership or control of investments in Estonia within the meaning of the Treaty,[6] and the alleged investments were obtained illegally and in bad faith;[7] (iii) the Tribunal lacks jurisdiction *ratione temporis* over the Claimant's claims because they pertain to measures taken by the Respondent before the entry into force of the Treaty on 16 February 1997;[8] (iv) the claims are time-barred under the principles of acquiescence and extinctive prescription;[9] and (v) the Tribunal lacks jurisdiction over the Claimant's claim for moral damages.[10] In any event, the Respondent denies that it breached any obligation under the Treaty.[11]

II. PROCEDURAL HISTORY

A. COMMENCEMENT OF THE ARBITRATION AND CONSTITUTION OF THE TRIBUNAL

6. By letter dated 1 August 2017 (the "**Notice of Dispute**"), the Claimant notified the Respondent of the existence of an investment dispute between the Parties and of its intention to seek recourse to arbitration under Article VI of the Treaty in the event the dispute could not be settled amicably. The Respondent did not respond to the Claimant's Notice of Dispute.[12]

7. On 18 April 2018, the Claimant initiated these arbitration proceedings by serving a **Notice of Arbitration** on the Respondent pursuant to Article VI of the Treaty and Article 3 of the 1976 version of the UNCITRAL Arbitration Rules (the "**1976 UNCITRAL Rules**").

8. On 26 June 2018, the Claimant appointed Professor Hélène Ruiz Fabri as arbitrator in these proceedings. Her contact details are:

Professor Hélène Ruiz Fabri
22 avenue Alphand

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3 Statement of Defense, ¶ 53.

4 Statement of Defense, ¶¶ 20-23.

5 Statement of Defense, ¶¶ 24-27.

6 Statement of Defense, ¶¶ 29-30; Counter-Memorial, ¶¶ 33-36; 426-444; Rejoinder, ¶¶ 3-21, 287-302.

7 Statement of Defense, ¶¶ 31-37; Counter-Memorial, ¶¶ 37; 466-476; Rejoinder, ¶¶ 24 (where, unlike in the Statement of Defense and the Counter-Memorial, the Respondent treats the alleged illegality of the investment and bad faith as issues of admissibility and not of jurisdiction), 328-330.

8 Statement of Defense, ¶¶ 18, 40.

9 Counter-Memorial, ¶¶ 36; 452-465; Rejoinder, ¶¶ 309-327.

10 Statement of Defense, ¶ 18; Counter-Memorial, ¶ 35, Rejoinder, ¶¶ 303-308.

11 Statement of Defense, ¶ 44.

12 Notice of Arbitration, fn. 3.

94160 Saint Mandé
France

9. On 26 July 2018, the Respondent appointed Judge Peter Tomka as arbitrator in these proceedings. His contact details are:

Judge Peter Tomka
International Court of Justice
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands

10. On 9 August 2018, the co-arbitrators informed the Parties that they had agreed to appoint Judge Bruno Simma to serve as the presiding arbitrator in accordance with Article 7 of the 1976 UNCITRAL Rules. His contact details are:

Judge Bruno Simma
Iran-United States Claims Tribunal
Parkweg 13
2585 JH The Hague
The Netherlands

11. On 31 August 2018, the Tribunal notified the Permanent Court of Arbitration (the "**PCA**") of the Parties' agreement that the PCA act as registry and administer the arbitral proceedings. On the same day, the PCA confirmed that it was prepared to administer the proceedings.

B. Initial Procedural Steps, Statement of Defense, and First Decision on Interim Measures

12. On 21 September 2018, the Tribunal, *inter alia*, circulated draft Terms of Appointment and a draft Procedural Order No. 1 for the Parties' comments. The Parties submitted subsequently their comments on the drafts on 3 October 2018.

13. By letter dated 3 October 2018, the Claimant informed the Tribunal, *inter alia*, (i) that its Notice of Arbitration should serve as its **Statement of Claim**; and (ii) of its intention to request an interim measures order for the bilateral preservation of evidence and information.

14. On 11 October 2018, the Claimant filed its Submission on Place of Arbitration, in which it requested the Tribunal to set Washington, D.C. as the place of arbitration.

15. On 12 October 2018, the Tribunal invited the Respondent to submit comments on the Claimant's Submission on Place of Arbitration by 26 October 2018.

16. On 15 October 2018, a first procedural meeting was held by telephone conference, in which counsel and representatives for both Parties, all members of the Tribunal, and the PCA participated, to discuss the content of the draft Terms of Appointment and the draft Procedural Order No. 1. At this meeting, the Tribunal also granted the Claimant leave to submit a motion for interim measures.

17. On 16 October 2018, on the basis of the Parties' written and oral comments, the Tribunal adopted and circulated its **Terms of Appointment**, which *inter alia* established the 1976 UNCITRAL Rules as the applicable procedural rules for the arbitration and English as the language of the arbitration.

18. On 22 October 2018, the Tribunal issued **Procedural Order No. 1**, which *inter alia* established the rules of procedure and a procedural calendar for these proceedings, appointed Dr. Gebhard Bücheler as assistant to the Tribunal, and affirmed that the place of arbitration would be decided in due course.

19. On 25 October 2018, the Claimant submitted its Motion for Interim Measures pursuant to Article 26 of the 1976 UNCITRAL Rules, together with exhibits C-001 to C-010 and legal authorities CLA-001 to CLA-012. In its Motion, the Claimant sought (i) the preservation of documents, (ii) the production of documents; (iii) the maintenance or restoration of the *status quo*; and (iv) a cessation to criminal prosecution and extradition proceedings against Mr. Aleksander Rotko.

20. On 26 October 2018, the Respondent, together with exhibits R-001 to R-007 and legal authorities RLA-001 to RLA-021, filed its Submission on Place of Arbitration, requesting that the Tribunal designate The Hague, Geneva or, alternatively, Singapore as the place of arbitration.

21. On 12 November 2018, at the Tribunal's invitation, the Respondent submitted its Response to the Claimant's Motion for Interim Measures, requesting that the Tribunal reject the Claimant's Motion for Interim Measures of 25 October 2018 in its entirety. The Respondent's Response was accompanied by legal authorities RLA-022 to RLA-035.

22. On 3 December 2018, the Claimant submitted its Reply on Motion for Interim Measures, which was accompanied by (i) the First Witness Statement of Aleksander Rotko dated 28 November 2018 ("**First Rotko Statement**"); (ii) the Expert Legal Opinion of Paul Keres dated 2 December 2018; and (iii) legal authorities CLA-013 to CLA-016.

23. On 7 December 2018, the Respondent submitted its **Statement of Defense**, together with exhibits R-008 to R-016 and legal authorities RLA-036 to RLA-039.

24. On 20 December 2018, the Respondent submitted its Rejoinder on the Claimant's Motion for Interim Measures.

25. On 22 January 2019, the Tribunal issued **Procedural Order No. 2**, establishing Geneva, Switzerland as the place of arbitration.

26. On 4 March 2019, the Tribunal issued **Procedural Order No. 3**, in which it (i) affirmed its power to order interim measures at any stage of the proceedings; (ii) reminded the Parties of their general duty arising from the principle of good faith not to take any action that may aggravate the dispute or affect the integrity of the arbitration proceeding; and (iii) declined the Claimant's requests for interim measures.

C. AMENDMENTS TO THE PROCEDURAL TIMETABLE, FURTHER WRITTEN SUBMISSIONS, AND SECOND DECISION ON INTERIM MEASURES

27. On 6 March 2019, the Claimant submitted a Motion to Modify Procedural Order No. 1, requesting the Tribunal to modify the procedural calendar in consideration of unforeseen medical and personnel issues affecting its counsel. At the Tribunal's invitation, the Respondent and the Claimant made further submissions on this motion on 15 and 22 March 2019, respectively.

28. On 1 April 2019, having considered the Parties' submissions on the Claimant's motion, the Tribunal issued **Procedural Order No. 4**, amending the procedural calendar. Among other things in the revised procedural calendar, the deadline for the Claimant's memorial submission was postponed by 18 weeks along with corresponding adjustment to all subsequent procedural steps, and the hearing was rescheduled from November 2020 to January 2021.

29. On 30 August 2019, in accordance with Procedural Order No. 4, the Claimant submitted its **Memorial**, accompanied by (i) the Second Witness Statement of Mr. Aleksander Rotko dated 29 August 2019 ("**Second Rotko Statement**"); (ii) the Witness Statement of Ms. Olga Kotova dated 29 August 2019; (iii) the Second Expert Legal Opinion of Mr. Paul Keres dated 23 August 2019; (iv) the Expert Report of Mr. Richard Taylor dated 29 August 2019; (v) exhibits C-011 to C-277; and (vi) legal authorities CLA-017 to CLA-205.

30. By e-mail dated 6 December 2019, the Claimant informed the Tribunal that the Respondent had undertaken steps to have Mr. Rotko extradited to Estonia, and that, as a result, Mr. Rotko had been arrested and was in federal detention in the United States pending a detention hearing scheduled for 11 December 2019. The Claimant submitted that the Respondent's actions in pursuing Mr. Rotko's extradition were in direct violation of Procedural Order No. 3 and reserved the right to make a formal submission to the Tribunal after Mr. Rotko's detention hearing.

31. By e-mail dated 13 December 2019, at the Tribunal's invitation, the Respondent replied to the Claimant's 6 December 2018 e-mail along with exhibit R-017, denying that it had undertaken any measures to aggravate the dispute.

32. On 18 December 2019, the Claimant submitted its Interim Relief Request, together with exhibits C-278 to C-283 and legal exhibits CLA-206 to CLA-208, seeking (i) the production of documents; (ii) the suspension or revocation of extradition requests; (iii) the cessation and prohibition of judicial proceedings; (iv) the maintenance of the *status quo*; (v) the lifting of all bond release conditions; (vi) a costs order; and (vii) moral damages. In the same submission, the Claimant informed the Tribunal that Mr. Rotko's detention hearing had been postponed to 7 January 2020, and that he remained in federal detention.

33. On 6 January 2020, at the Tribunal's invitation, the Respondent submitted its Response to the Claimant's Request for Interim Relief, asking the Tribunal to reject the Claimant's requests in their entirety. The Respondent's Response was accompanied by legal authorities RLA-040 and RLA-041.

34. By e-mail dated 7 January 2020, the Tribunal invited the Claimant to provide by 14 January 2020 its reply comments to the Respondent's Response to the Claimant's Request for Interim Relief, including an update on Mr. Rotko's detention hearing scheduled for 7 January 2020.

35. By e-mail dated 10 January 2020, the Claimant informed the Tribunal that Mr. Rotko's detention hearing had taken place on 7 January 2020 before Judge James Klindt at the U.S. District Court for the Middle District of Florida, Jacksonville Division, but that no decision had yet been issued. In light of this, and of Claimant's counsel's other pre-existing commitments, the Claimant sought leave from the Tribunal to file its reply comments seven days after the issuance of Judge Klindt's decision.

36. By e-mail dated 14 January 2020, the Tribunal granted the Claimant's extension request and ordered the Claimant to inform the Tribunal and the Respondent of the issuance of the detention decision on the day on which it is issued.

37. By e-mail dated 23 January 2020, the Claimant circulated a copy of Judge Klindt's decision dated 22 January 2020. In view of Mr. Rotko's bond hearing scheduled for 29 January 2020, the Claimant proposed to file its reply comments to the Respondent's Response to the Claimant's Request for Interim Relief on 30 January 2020, one day after the bond hearing and the originally contemplated deadline, in order to enable it to at the same time update the Tribunal on the outcome of the bond hearing. The Tribunal granted the Claimant's extension request on the same day.

38. On 30 January 2020, the Claimant submitted its Reply to Estonia's Response to the Interim Relief Motion, and a report on the most recent judicial activity in Mr. Rotko's extradition proceedings, along with exhibits C-285 to C-294.

39. On 21 February 2020, with the Tribunal's leave, the Respondent submitted its Response to the Claimant's Submission on Interim Measures of 30 January 2020, together with exhibit R-018.

40. On 10 March 2020, the Respondent submitted its **Counter-Memorial**, accompanied by (i) the Expert Opinion of Professor Lauri Mälksoo dated 9 March 2020 ("**Mälksoo Report**") with exhibits LM-1 to LM-4; (ii) the Expert Report of Dr. Richard Hern dated 10 March 2020 with exhibits RH-1 to RH-48; (iii) the Expert Opinion of Dr. Sergey Stanislavovich Petrachkov dated 10 March 2020 with exhibits SP-1 to SP-36; (iv) exhibits R-019 to R-193; and (v) legal authorities RLA-042 to RLA-158. On 19 June 2020, the Respondent submitted an amended version of Dr. Petrachkov's expert report, which corrected certain discrepancies in the exhibit numbers referenced therein, as well as translations of the exhibits to his report.

41. On 23 March 2020, the Tribunal issued **Procedural Order No. 5**, (i) declining the Claimant's requests for interim measures dated 18 December 2019; and (ii) reserving its decision on damages and all cost-related decisions for a later stage of the proceedings.

D. DOCUMENT PRODUCTION AND DISCLOSURE OF THIRD-PARTY FUNDING

42. By e-mail dated 17 March 2020, the Claimant requested that the Tribunal modify the time limits for document production on account of the COVID-19 pandemic. The next day, the Respondent informed the Tribunal that it did not object to the Claimant's request for an extension, provided that the extension would not affect the schedule other than in respect of document production.

43. On 18 March 2020, the Tribunal issued a revised procedural calendar, making amendments only to the time limits for document production.

44. Between 7 April and 12 May 2020, the Parties exchanged their respective requests, objections, and replies on document production, and on 12 May 2020, the Parties filed their respective applications for an order on production of documents, in accordance with the revised procedural calendar.

45. On 8 June 2020, the Tribunal issued **Procedural Order No. 6**, setting out its decisions on the Parties' outstanding document production requests.

46. By e-mail dated 16 June 2020, pursuant to the Tribunal's direction set out in Procedural Order No. 6 in relation to the Respondent's Request 18, the Claimant disclosed that its third-party funder is Therium Litigation Finance A IC (the "**Funder**").

47. On 23 June 2020, with the Tribunal's leave, the Claimant submitted the Substantiation of its Objection to Production of Details Regarding Third-Party Funding, accompanied by legal authorities CLA-209 to CLA-232.

48. On 7 July 2020, the Respondent submitted its Response to the Claimant's Submission of 23 June 2020 on Production of Information on Third-Party Funding, accompanied by legal authority RLA-159, and requested the Tribunal to grant a modification to its Request 18.

49. On 14 July 2020, at the Tribunal's invitation, the Claimant submitted its Reply on Estonia's Production Request for Privileged Third-Party Funding Agreement, together with CLA-233 to CLA-235.

50. On 30 July 2020, the Tribunal, by majority, issued **Procedural Order No. 7**, granting the Respondent's modified Request 18 and ordering the Claimant to "disclose […] the terms in the funding agreement regulating whether the Funder (or any associated insurer) is liable for adverse costs and, if so, to what extent." The Tribunal majority further directed that "where no such terms […] exist, the Claimant is to inform the Tribunal and the Respondent of that fact."[13]

51. By e-mail dated 5 August 2020, in accordance with Procedural Order No. 7, the Claimant disclosed Section 8 of the Litigation Funding Agreement with the Funder, as well as a separate agreement it entered into with the Funder.

E. FURTHER AMENDMENTS TO THE PROCEDURAL TIMETABLE, FURTHER WRITTEN SUBMISSIONS, AND DECISION ON SECURITY FOR COSTS

52. On 14 August 2020, the Claimant requested that, on account of difficulties caused by the COVID-19 pandemic, the Tribunal extend by three months the deadline for the Claimant to submit its Reply, along with a corresponding adjustment to the subsequent procedural steps in the calendar, and postpone the hearing scheduled for January 2021.

53. On 21 August 2020, at the Tribunal's invitation, the Respondent submitted its response, asking the Tribunal to deny the Claimant's request, along with exhibits R-194 to R-196.

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13 Procedural Order No. 7, ¶ 33.

54. On 28 August 2020, at the Tribunal's invitation, the Claimant submitted its comments to the Respondent's response of 21 August 2020, together with exhibit C-295.

55. On 1 September 2020, the Tribunal modified the deadlines for the submission of the Claimant's Reply from 10 September 2020 to 10 December 2020, and the Respondent's Rejoinder from 3 December 2020 to 3 June 2021. The Tribunal further vacated all the remaining dates in the procedural calendar.

56. On 3 September 2020, the Tribunal indicated its availability for new hearing dates from 31 August to 4 September 2021. The Parties respectively confirmed to the Tribunal of their availabilities to the proposed hearing dates on 11 September 2020.

57. On 15 September 2020, the Tribunal confirmed the new hearing dates from 31 August 2021 to 4 September 2021.

58. On 30 November 2020, the Claimant requested that the Tribunal grant an eleven-day extension to file its Reply on account of a family emergency of the Claimant's lead counsel and the ongoing effects of the COVID-19 pandemic.

59. By e-mail dated 3 December 2020, the Respondent requested that the Tribunal extend the deadline to file its Rejoinder to 21 June 2021.

60. By e-mail dated 4 December 2020, the Claimant did not oppose the Respondent's corresponding request for an extension of the deadline to file the Rejoinder.

61. On 5 December 2020, the Tribunal granted the Parties' respective requests and extended the deadlines to file the Claimant's Reply to 21 December 2020 and the Respondent's Rejoinder to 21 June 2021.

62. By e-mails dated 15 and 17 December 2020, the Claimant requested that the Tribunal grant a further extension to file its Reply to 14 January 2021 in light of the continued family emergency of the Claimant's lead counsel.

63. By e-mail dated 17 December 2020, at the Tribunal's invitation, the Respondent objected to the Claimant's extension request, and asked the Tribunal to also move the Respondent's subsequent filing dates accordingly, in the event the Tribunal grants the Claimant's request.

64. On 18 December 2020, the Tribunal granted the Claimant's request, extending the deadlines to file the Claimant's Reply to 14 January 2021 and the Respondent's Rejoinder to 15 July 2021.

65. On 14 January 2021, the Claimant submitted its **Reply Memorial** (the "**Reply**"), together with (i) the Third Witness Statement of Mr. Aleksander Rotko dated 11 January 2021 ("**Third Rotko Statement**"); (ii) the Third Expert Legal Opinion of Paul Keres dated 12 January 2021 ("**Third Keres Report**"); (iii) the Expert Witness Report of Larry Andrade and Richard Taylor of Deloitte dated 23 December 2020; (iv) the Medical Report of Dr. Charles Haddad of Mr. Aleksander Rotko; (v) the Medical Report of Dr. Charles Haddad of Ms. Olga Kotova; (vi) exhibits C-296 to C-578; and (vii) legal authorities CLA-239 to CLA-369.

66. By e-mail dated 27 January 2021, the Respondent sought leave to submit an application for security for costs, in accordance with section 4.8 of Procedural Order No. 1. By e-mail of the same date, the Claimant requested that the Tribunal (i) reject the Respondent's request, but (ii) should the Respondent nevertheless be allowed to file the application, grant the Claimant an opportunity to respond.

67. On 30 January 2021, the Tribunal granted the Respondent leave to file a security for costs application by 15 February 2021 and invited the Claimant to respond to the Respondent's application by 1 March 2021.

68. On 1 February 2021, the Respondent submitted its Request for Security for Costs, together with exhibits R-197 to R-204 and legal authorities RLA-160 to RLA-166.

69. On 15 February 2021, the Respondent, noting that the deadline to file its security for costs application had not passed, supplemented its application.

70. On 1 March 2021, the Claimant submitted its Response on Security for Costs, together with the Fourth Witness Statement of Mr. Aleksander Rotko, exhibits C-579 to C-587, and legal authorities CLA-370 to CLA-393.

71. On 15 March 2021, the Respondent submitted its Reply on Security for Costs, together with exhibits R-205 to R-211 and legal authorities RLA-167 to RLA-170.

72. On 29 March 2021, the Claimant submitted its Rejoinder on Security for Costs, together with exhibits C-588 to C-590 and legal authorities CLA-394 to CLA-397.

73. On 20 April 2021, the Tribunal, informing the Parties of the Tribunal's scheduling conflict, invited the Parties to confer the possibility of moving the hearing by one day, such that it would take place from 30 August to 3 September 2021, instead of from 31 August to 4 September 2021.

74. On 26 April 2021, upon the Claimant's and the Respondent's e-mails of 23 and 26 April 2021, respectively, the Tribunal confirmed that the hearing shall take place from 30 August to 3 September 2021.

75. On 4 May 2021, the Tribunal issued **Procedural Order No. 8**, dismissing the Respondent's request for security for costs.

76. On 3 July 2021, in accordance with the Parties' agreement, the Tribunal confirmed that the hearing shall take place via video conference.

77. On 15 July 2021, the Respondent submitted its **Rejoinder Memorial** (the "**Rejoinder**"), together with (i) the Expert Report of Dr. Richard Hern dated 15 July 2021; (ii) the Witness Statement of Mr. Raul E. Molina dated 8 July 2021; (iii) exhibits R-212 to R-257; and (iv) legal authorities RLA-171 to RLA-224.

F. PRE-HEARING PROCEDURAL MATTERS; SCHEDULING OF THE HEARING; AND ADDITIONAL WRITTEN SUBMISSIONS

78. On 11 June 2021, the Tribunal, noting the travel restrictions that may apply in case of an in-person hearing in light of the COVID-19 pandemic, invited the Parties to confer and indicate by 28 June 2021 whether they would prefer the hearing to take place in person or via videoconference.

79. On 28 June 2021, the Parties respectively stated their preference for the hearing to take place via videoconference.

80. On 3 July 2021, the Tribunal confirmed that the hearing will take place via videoconference. In addition, the Tribunal circulated draft Procedural Order No. 9, setting forth provisions concerning the logistical and administrative arrangements of the hearing for the Parties' comments. The Parties submitted their comments on 19 July 2021.

81. On 21 July 2021, the Tribunal held a pre-hearing conference with the Parties via videoconference to discuss the organization of the hearing and various related issues. The Tribunal directed the Parties to confer and revert by 28 July 2021 with an agreed hearing schedule, as well as any further amendments to draft Procedural Order No. 9.

82. At the pre-hearing conference, the Claimant sought the production of the engagement letter between the Respondent and Mr. Raul Molina in relation to his expert witness statement. The Respondent, in response, stipulated 17 June 2021 as the date of Mr. Molina's engagement but declined to produce the engagement letter. The Tribunal thereafter directed that, if the Claimant so wished, it should submit a formal request for the production of documents after the pre-hearing conference.

83. On 21 July 2021, the Claimant submitted a request for the Respondent's production of (i) the letter of engagement between the Respondent (or the Respondent's agents) and Mr. Molina and any related modifications to that letter; and (ii) the communications provided by the Respondent to Mr. Molina in connection to his expert engagement on June 21, 2021, including the communications conveying evidence to be considered by the Expert.

84. On 22 July 2021, the Tribunal invited the Respondent to submit its response to the Claimant's requests by 23 July 2021, and the Claimant, in turn, to submit its reply to the Respondent's response by 26 July 2021.

85. On 23 July 2021, the Respondent submitted its response, along with legal authorities RLA-225 and RLA-226, and an updated index of legal authorities.

86. On 26 July 2021, the Claimant submitted its reply, along with legal authorities CLA-398 to CLA-402, and an updated index of legal authorities.

87. Also on 26 July 2021, the Respondent, on behalf of both Parties, requested that the Tribunal determine the outstanding disagreements between the Parties concerning the hearing schedule.

88. On 28 July 2021, the Tribunal set forth its directions on the issues set out in the Respondent's communication of 26 July 2021 and directed the Parties, on the basis of that guidance, to confer

and revert by 2 August with an agreed hearing schedule, as well as any further amendments to draft Procedural Order No. 9.

89. On 30 July 2021, the Claimant sought leave from the Tribunal to file certain pre-hearing motions, including a motion concerning "the Respondent's untimely expert witness on Panamanian law."

90. On 2 August 2021, the Tribunal partially granted the Claimant's document requests of 21 July 2021, directed the Respondent to produce the information and documents within two business days of the date of the letter, and granted the Claimant leave to file its pre-hearing motions within two business days of its receipt of the information and documents from the Respondent.

91. On 4 August 2021, in accordance with the Tribunal's 2 August 2021 directions, the Respondent submitted two documents that were responsive to the requests as granted.

92. On 5 August 2021, the Claimant submitted a pre-hearing motion, requesting that the Tribunal strike from the record of the case (i) the Respondent's allegedly untimely jurisdictional defenses; (ii) the expert evidence and opinions from Mr. Molina; (iii) the Respondent's untimely reliance on non-applicable reservations in Annex III of the Treaty; and (iv) unsupported technical opinions and conclusions in the Respondent's submissions. The Claimant further requested that the Tribunal dismiss the Respondent's requests for adverse inferences arising out of the Claimant's document production as set out in the Respondent's Rejoinder. The Claimant's pre-hearing motion was accompanied by exhibits C-592 to C-593 and legal authorities CLA-403 to CLA-409.

93. Also on 5 August 2021, the Parties respectively requested the Tribunal's position on the outstanding points of disagreement between the Parties in relation to the hearing, so that they could continue their discussions and so that draft Procedural Order No. 9 and the hearing schedule could be finalized.

94. On 7 August 2021, the Tribunal set forth its directions on the issues set out in the Parties' communications of 5 August 2021 and directed the Parties, on the basis of that guidance, to confer and revert by 11 August with an agreed hearing schedule, as well as any further amendments to draft Procedural Order No. 9. In addition, the Tribunal invited the Respondent to submit any response it may have to the Claimant's 5 August 2021 pre-hearing motion by 13 August 2021.

95. On 11 August 2021, the Parties respectively submitted their remaining outstanding points of disagreement in relation to the hearing, as well as their respective proposed edits to draft Procedural Order No. 9 and comments on the draft hearing schedule. The Claimant further set forth its understanding that, pursuant to section 10 of Procedural Order No. 1, the Parties could release awards (including the orders and directions) issued by the Tribunal in this arbitration.

96. On 13 August 2021, the Respondent submitted its response to the Claimant's 5 August 2021 pre-hearing motion, along with exhibits R-258 to R-259 and legal authorities RLA-228 to RLA-229. The Respondent requested that the Tribunal reject the Claimant's pre-hearing motion in its entirety.

97. On 15 August 2021, the Claimant submitted its reply to the Respondent's response of 13 August 2021, requesting that the Tribunal (i) strike the paragraphs from the Respondent's pleadings as set forth in the Claimant's 5 August 2021 motion, as amended by Annex B attached to its reply;

(ii) strike the Respondent's arguments relating to extinctive prescription and Annex to the US-Estonia BIT from its pleadings; (iii) strike expert evidence and opinions from Mr. Molina; (iii) deny the adverse inferences sought by the Respondent in the Rejoinder; and (iv) "prohibit the Respondent from raising the facts and conclusion in the struck paragraphs at the arbitration hearing."

98. On 16 August 2021, the Tribunal invited the Respondent to submit any comments it may have on the Claimant's submission of 11 August 2021 regarding the transparency regime governing this arbitration. The Tribunal further stated that it would render a decision with respect to the remaining outstanding issues in relation to the hearing after it has decided on the Claimant's 5 August 2021 pre-hearing motion.

99. On 18 August 2021, the Respondent filed its comments on the Claimant's submissions of 11 August 2021 regarding the transparency regime.

100. On 24 August 2021, the Claimant requested the postponement of the hearing that was scheduled to take place between 30 August and 4 September 2021 in light of an emergency involving a family member of one of its lead counsel. The Respondent submitted its comments on the Claimant's request on the same date.

101. On 25 August 2021, the Tribunal granted the Claimant's request to postpone the hearing and proposed alternative hearing dates.

102. On 27 August 2021, the Parties submitted their respective comments on the dates proposed by the Tribunal on 25 August 2021.

103. By e-mail of 30 August 2021, the Tribunal proposed to the Parties additional dates for the hearing. By separate letter of the same date, the Tribunal set out its decision regarding the Claimant's 5 August 2021 pre-hearing motion, (i) rejecting the Claimant's request to strike paragraphs regarding Estonian law from the Respondent's pleadings, but granting the Claimant the opportunity to respond to the points on Estonian law in the Rejoinder that were not already made in the Counter-Memorial before the oral hearing, including through the submission of a supplementary expert report by Mr. Keres, by 1 October 2021; (ii) rejecting the Claimant's request to strike the Respondent's arguments relating to extinctive prescription and Annex to the US-Estonia BIT, but granting the Claimant the opportunity to submit a response to the Respondent's submissions related to the Annex to the US-Estonia BIT by 1 October 2021; (iii) rejecting the Claimant's request to strike the Molina Report, but granting the Claimant the opportunity to respond to the Molina Report before the oral hearing, including through the submission of a responsive expert report, by 1 October 2021; (iv) inviting the Claimant to clarify "whether (copies of) the shares of Corona Resources that seem to be stored in the USA […] could be made available to the Tribunal and the Respondent," and, if that was the case, submit such copies by 1 October 2021; (v) rejecting the Claimant's request to deny the adverse inferences sought by the Respondent, subject to any later decision to the contrary by the Tribunal; and (vi) rejecting the Claimant's request to prohibit the Respondent from raising arguments set out in certain paragraphs of its pleadings. The Tribunal further confirmed its understanding that the word "award" in section 10.2 of Procedural Order No. 1 relates to the "final award" of this arbitration and would not include procedural orders or directions issued by the Tribunal.

104. On 1 September 2021, the Parties confirmed their availability for a hearing on the dates proposed by the Tribunal on 30 August 2021.

105. On 4 September 2021, the Tribunal confirmed that the hearing would take place on 19-22 and 24-25 January 2022. The Tribunal also invited the Parties to confer and revert by 15 November 2021 on the outcome of their discussions regarding the hearing schedule.

106. On 14 September 2021, the Tribunal issued **Procedural Order No. 9**, providing the rules of procedure for the hearing to be held via videoconference.

107. On 1 October 2021, in accordance with the Tribunal's directions of 30 August 2021, the Claimant filed its submission on issues relating to Estonian law, Corona Resources and Article 3 of the Annex to the US-Estonia BIT (the "**1 October 2021 Submission**"), together with (i) Fourth Expert Legal Opinion of Paul Keres dated 30 September 2021 ("**Fourth Keres Report**"); (ii) Fifth Witness Statement of Alex Rotko dated 30 September 2021 ("**Fifth Rotko Statement**"); (iii) exhibits C-594 to C-598; and (iv) legal authority CLA-410. In its Submission, in response to the Tribunal's direction that the Claimant produce a copy of the shares of Corona Resources, the Claimant explained that it had already filed a copy of the bearer share certificate of Corona Resources as exhibit C-589 on 29 March 2021.

108. On 11 October 2021, the Tribunal informed the Parties of its unavailability from 19 to 21 January 2022 and thus proposed to hold the hearing on 24-28 January 2022, with 29 January 2022 held as a reserve day. The Tribunal invited the Parties to formally confirm their availability for the new proposed hearing dates.

109. On 15 October 2021, the Respondent (i) confirmed its availability for the new hearing dates and (ii) requested leave to submit its brief observations on the Claimant's 1 October 2021 Submission for 15 days as of the Tribunal's decision on its request on the ground that the Claimant's Submission contained new allegations and evidence.

110. Also on 15 October 2021, the Claimant confirmed its availability for the new hearing dates. However, noting that its quantum expert would not be available to testify on his expert report after 25 January 2022 for a three-week period, the Claimant requested that the quantum experts be examined on 25 January 2022. As to the Respondent's request for leave, the Claimant rejected the Respondent's claim that its 1 October 2021 Submission contained new allegations and, therefore, did not consider a further submission by the Respondent was warranted. Notwithstanding, should the Tribunal decide to grant the Respondent a further submission, the Claimant requested that the Tribunal strictly limit the Respondent's submission to addressing two new exhibits and, in turn, grant the Claimant the opportunity to file a sur-reply.

111. On 19 October 2021, the Tribunal confirmed that the hearing would take place from 24 to 28 January 2022, with 29 January 2022 held in reserve, and that quantum experts would be examined after the Parties' opening statements on 25 January 2022, as requested by the Claimant.

112. In the same letter, the Tribunal granted the Respondent leave to submit, by 3 November 2021, brief observations on the Claimant's 1 October 2021 Submission, which was to be strictly responsive to the new allegations and arguments made therein. In turn, the Claimant was granted leave to submit, by 1 December 2021, its brief observations on the Respondent's 3 November

2021 submission, which must be strictly responsive to new allegations and arguments made therein.

113. On 3 November 2021, the Respondent submitted its response to the Claimant's 1 October 2021 Submission (the "**3 November 2021 Submission**"). In its Submission, the Respondent took issue with the Claimant's observations in the 1 October 2021 Submission, noting that most of them were responsive to the Counter-Memorial, not the Rejoinder, and as a result should be disregarded by the Tribunal.

114. Also on the same date, the Respondent informed the Tribunal of the change in its counsel team due to Ms. Mailis Meier-Lutterodt's departure from Ellex Raidla.

115. On 1 December 2021, the Claimant submitted its response to the Respondent's 3 November 2021 Submission (the "**1 December 2021 Submission**"), along with exhibits C-599 to C-603.

116. By e-mail dated 23 December 2021, the Claimant informed the Tribunal that, in light of the Respondent's explanations provided in its 1 December 2021 Submission regarding its failure to provide Mr. Molina the share certificates of Corona Resources, it no longer saw any need to cross-examine Mr. Molina in the hearing and thus would release Mr. Molina as a witness.

117. On 10 January 2022, having regard to the Parties' correspondence of 11 August 2021 and the Claimant's correspondence of 15 October 2021 and 23 December 2021, the Tribunal circulated an indicative hearing schedule and invited the Parties' comments.

118. On 14 January 2022, the Parties respectively submitted their comments on the indicative hearing schedule.

119. On 19 January 2022, the Claimant requested to introduce into the record a document regarding the Claimant's revised calculation of the "Beta factors" as exhibit C-604.

120. On the same date, the Tribunal invited the Respondent to comment on the Claimant's request of 19 January 2022 and issued a revised schedule for the hearing.

121. On 20 January 2022, the Respondent objected to the Claimant's request of 19 January 2022 to introduce a new document into the record.

122. On the same date, the Claimant informed the Tribunal that, based on exhibit C-604, it would be prepared to submit a revised Beta calculation, to be identified as exhibit C-605. The Claimant enclosed the document in its e-mail correspondence the next day.

123. On 22 January 2022, the Tribunal rejected the Claimant's requests to admit exhibits C-604 and C-605 to the record, determining that the current circumstances did not warrant an exception to consider new evidence in accordance with section 6.4 of Procedural Order No. 1. The Tribunal further noted that its decision was without prejudice to the Claimant's right to seek leave to submit these documents to the record after the hearing.

G. HEARING

124. From 24 to 28 January 2022, a hearing was held by videoconference ("**Hearing**"). The following persons attended the Hearing:

Tribunal
Judge Bruno Simma
Professor Hélène Ruiz Fabri
Judge Peter Tomka

Tribunal Assistant
Dr. Gebhard Bücheler

Claimant	**Respondent**
Party Representative Captain Aleksander Rotko	*Ellex Raidla* Mr. Anton Sigal Mr. Toomas Vaher Ms. Maria Teder Ms. Liisbeth Lillo
Appleton & Associates LP Professor Barry Appleton	
Reed Smith LLP Mr. Edward Mullins Ms. Cristina Cardenas Ms. Annabel Blanco Ms. Wesley Butensky Mr. Kevin Hernandez Mr. Jarol Gutierrez	

Witnesses and Experts

Fact Witness for Claimant Captain Aleksander Rotko Ms. Olga Kotova	*Expert Witness for Respondent* Dr. Richard Hern *NERA Economic Consulting* Mr. Tarek Badrakhan
Expert Witnesses for Claimant Mr. Paul Keres Mr. Richard Taylor *Levin Law* Mr. Joonas Põder Mr. Aleksander Muru	

Permanent Court of Arbitration
Dr. Túlio Di Giacomo Toledo
Ms. Jinyoung Seok
Ms. Diana Pyrikova

Court Reporter
Mr. Trevor McGowan

Interpreters
Mr. Evgeny Elshov
Mr. Yuri Somov

125. At the close of the hearing, the Tribunal informed the Parties that it would issue a list of questions to be addressed in the Parties' respective post-hearing submissions.

H. POST-HEARING PROCEEDINGS

126. On 12 February 2022, the Tribunal issued its Questions to the Parties (the "**Tribunal Questions**") inviting the Parties to provide their answers by way of simultaneous submissions by 25 March 2022.

127. On 25 March 2022, the Claimant submitted its Response to Tribunal's Post-Hearing Questions (the "**Claimant's Answers to the Tribunal's Questions**" or "**Claimant's Post-Hearing Brief**" or "**Claimant's PHB**"), together with exhibits C-604 to C-616. On the same date, the Respondent submitted its Answers to the Tribunal's Questions (the "**Respondent's Answers to the Tribunal's Questions**" or "**Respondent's Post-Hearing Brief**" or "**Respondent's PHB**"), enclosing seven annexes.

128. On 7 April 2022, in light of the Claimant's production of a copy of Corona Sources' share purchase agreement with BPV as exhibit C-612 and the Respondent's objection to the production of such agreement indicated in the Respondent's Answers to Tribunal Questions, the Tribunal invited the Respondent to provide comments on exhibit C-612 by 21 April 2022.

129. On 21 April 2022, the Respondent submitted its comments on exhibit C-612, together with two annexes, maintaining its objection to the admissibility of the document and disputing its authenticity.

130. On 26 April 2022, the Tribunal invited the Claimant to submit its response to the Respondent's challenge to the authenticity of exhibit C-612.

131. On 6 May 2022, at the Tribunal's invitation, the Claimant submitted its response to the Respondent's objections to exhibit C-612, requesting that the Tribunal (i) dismiss the Respondent's objection, (ii) admit exhibit C-612, and (iii) give it full weight.

132. On 18 May 2022, the Tribunal informed the Parties of its decision to admit exhibit C-612 into record. The Tribunal indicated that its ruling was without prejudice to any determination that it might make on the relevance or evidentiary weight, if any, of exhibit C-612 in this arbitration.

133. By letter dated 27 March 2024, the Tribunal invited the Parties to seek to agree on a timetable for the exchange of costs submissions and submit a proposal to the Tribunal by 10 April 2024. The Tribunal invited the Parties to agree on whether reply submissions would be needed and the degree of specificity required to substantiate and document the costs incurred.

134. By e-mail on 10 April 2024, the Parties requested an extension until 17 April 2024 of the time to report on their progress. By e-mail on 11 April 2024, the Parties' request was granted.

135. By e-mail on 17 April 2024, the Respondent informed the Tribunal of agreement between the Parties on the following matters. Concerning the format of submissions, the Parties agreed that "*any fees and expenditures related to pre-arbitral costs, ancillary court proceedings, and any contingency/success fee arrangements with counsel and/or third-party funders, if applicable, will be filed separately under this heading*," subject to the proviso that "*the Respondent does not accept that* [such] *costs* [could] *be claimed in these proceedings*". The Parties agreed to file supporting invoices for costs over a threshold of USD 8,000. The Parties proposed deadlines of 30 April 2024 for the first round of costs submissions and 14 May 2024 for responsive rounds.

136. In its e-mail of 17 April 2024, the Respondent conveyed the Parties' request that the Tribunal decide on matters not agreed, namely (i) the page limit for the detailed argumentation on costs, (ii) information regarding fees paid versus fees accrued, and (iii) the currency for legal costs. The Respondent's request was for a page limit of two pages; for costs submissions to set out the amount of legal fees paid versus the legal fees that are deemed to have accrued but or not yet paid; and for legal costs to be claimed in the currency in which they were incurred. The Claimant's request was for no page limit or requirement to differentiate between fees paid and fees accrued, and for all amounts to be expressed in US dollars. By e-mail on 18 April 2024, the Claimant elaborated its arguments in support of its requests.

137. On 29 April 2024, the Tribunal (i) set page limits for any detailed argumentation on costs of twelve (12) pages for the first-round submissions and six (6) pages for the second-round submissions; (ii) directed that the Parties differentiate in their cost submissions between the legal fees that have been paid and the fees accrued but not yet paid, and (iii) directed that the Parties adopt the practice of claiming costs in the currency in which they were incurred. The Tribunal invited the Parties to file their first-round submissions by 17 May 2024, and to file their second-round submissions by 31 May 2024.

138. On 17 May 2024, the Parties simultaneously filed their first-round submissions. The Claimant submitted its **Statement of Costs** together with exhibits B-Costs-1, C-Costs-1 through 3 and D-Costs-1 and legal authorities CLA-411 through CLA-422. The Respondent submitted its **Cost Submission** with Annexes 1 through 6.

139. On 31 May 2024, the Parties simultaneously filed their second-round submissions. The Claimant submitted its **Response on Costs**. The Respondent submitted its **Response to Claimant's Cost Submission** with legal authorities RLA-230 through RLA-234.

140. By letter dated 31 January 2025, the Tribunal noted that the Parties had agreed to make the award public and proposed a procedure for the designation of any information contained in the award as confidential or protected information. The Tribunal further proposed to remain constituted following the issuance of the award to decide any disagreement between the Parties in relation to the designation of any information contained in the award as confidential or protected information and redactions to be made to the award prior to its publication on the PCA's website. Finally, the Tribunal proposed to apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration as guidance when considering matters regarding the designation of confidential or protected information.

141. By e-mail of 7 February 2025, the Claimant, *inter alia,* consented to "the Tribunal applying the operative redaction categories in Article 7(2) of the [UNCITRAL Rules on Transparency in

Treaty-based Investor-State Arbitration] as guiding foundational principles, supplemented by additional factors necessary to protect [Personal Privacy Information].” Accordingly, it requested that the Tribunal “consider redactions of [Personal Privacy Information] alongside the criteria in Article 7(2) to safeguard the panoply of legitimate privacy and confidentiality interests.”

142. By e-mail of 10 February 2025, the Respondent confirmed its agreement to the Claimant’s proposal outlined in the paragraph 141 above.

III. FACTUAL BACKGROUND

143. This section sets out the factual background giving rise to this arbitration and, where appropriate, the different accounts that the Parties provide for contested facts. It provides context to the Tribunal’s decision and is not intended to set out exhaustively the Parties’ submissions on the facts or the supporting evidence. The Tribunal will refer to additional facts when needed in the context of its analysis.

A. THE CLAIMANT AND ITS AFFILIATES

144. ELA is a commodities trading company, which was incorporated in the State of Minnesota in 1993 by Mr. Mark Garbuz.[14] Later, Mr. Aleksander Rotko became ELA’s sole shareholder.[15]

145. The Claimant states that from 1993 until 2006, ELA engaged in trading commodities, including wood, fertilizers, chemicals, petroleum products, and cargo shipping in the Baltic region, mostly in Estonia.[16] In conducting its business, ELA made use of various ports in Estonia to handle the transit needs before it decided to operate and utilize the Seaplane Harbor from 1997.[17]

146. Before the establishment of ELA, Mr. Rotko allegedly operated commodity trade and shipping businesses through Ella Kaubanduse AS (“**Ella Kaubanduse**”), an Estonian company incorporated in 1991.[18]

147. BPV is an Estonian corporation, which was established in 1993 by ELA, Ella Kaubanduse and STC International to construct and operate a bulk terminal in Tallinn, Estonia.[19] According to the Respondent, the annual reports of BPV indicate that it had no business in the Seaplane Harbor or elsewhere until 1999.[20]

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14 ELA USA Certificate of Incorporation and Articles of Incorporation, 6 April 1993 (**C-044**).

15 First Rotko Statement, ¶ 2 (**CWS-1**); Second Rotko Statement, ¶¶ 8, 11-12 (**CWS-2**).

16 Notice of Arbitration, ¶¶ 23-24; Memorial, ¶ 37.

17 Notice of Arbitration, ¶¶ 24-25; Memorial, ¶ 38; Second Rotko Statement, ¶ 10 (**CWS-2**).

18 Second Rotko Statement, ¶ 7 (**CWS-2**); Third Rotko Statement, ¶ 7 (**CWS-4**).

19 Second Rotko Statement, ¶ 13 (**CWS-2**); BPV Foundation Agreement, 22 December 1993 (**C-076**); Hearing Transcript, Day 1, p. 131:10-14.

20 Counter-Memorial, ¶ 292.

148. On 1 March 1996, STC International entered into an agreement with ELA to transfer its shareholding in BPV.[21] By 25 June 1997, ELA owned 91% of BPV's shares.[22] On 20 October 1999, ELA allegedly obtained the remaining shares of BPV, wholly owning and controlling BPV.[23]

149. On 23 September and 8 December 1999, BPV respectively acquired Verest and Agrin, two Estonian companies with which BPV, according to the Claimant, had concluded lease agreements on 1 October 1997 in relation to a number of buildings at the Seaplane Harbor.[24]

150. On 22 March 2001, BPV sold its stake in Agrin to Ella Kaubanduse for EEK 250,000.[25] Ella Kaubanduse remained the sole shareholder of Agrin until Agrin's deletion from the Estonian commercial register on 31 July 2013.[26]

151. In 2000, ELA established ELA Tolli as its subsidiary, which was "intended to be used to handle customs services for the Lennusadam Port."[27] ELA Tolli was deleted from the Estonian commercial register on 21 March 2016.[28]

152. Verest was deleted from the Estonian commercial register on 13 September 2010.[29]

B. THE SEAPLANE HARBOR

153. The Seaplane Harbor, or *Lennusadam* in Estonian, is a generally ice-free port located in the vicinity of Tallinn, Estonia, bearing the address Küti 17 and 17a.[30] Considered an important engineering landmark in the region, in 1999, the Seaplane Harbor became a part of the Tallinn Heritage Conservation Area and its buffer zone.[31] It also became a part of the buffer zone when

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21 Agreement between STC and ELA USA, 1 March 1996 (**C-599**).

22 BPV Corporate Minutes, 25 June 1997 (**C-600**). *See also* Hearing Transcript, Day 1, p. 131:22-25.

23 Agreement between Ella Kaubanduse and ELA USA, 20 October 1999 (**C-601**).

24 Reply, ¶¶ 893-894; Second Rotko Statement, ¶ 32 (**CWS-2**); Share Purchase Agreement between BPV and Verest, 23 September 1999 (**C-055**); Share Sale Contract between BPV and Alcedo for the sale of Agrin, 8 December 1999 (**C-057**); Lease Agreement between BPV and Verest, 1 October 1997 (**C-046**); Lease Agreement BPV and Agrin, 1 October 1997 (**C-047**).

25 Share purchase agreement between BPV and Ella Kaubanduse for the sale of Agrin, 22 March 2001 (**R-150**).

26 Commercial Register extract of Agrin, 7 December 2018 (**R-015**).

27 Second Rotko Statement, ¶ 35 (**CWS-2**).

28 Commercial Register extract of ELA Tolli, 7 December 2018 (**R-014**).

29 Commercial Register extract of Verest, 7 December 2018 (**R-013**).

30 Memorial, ¶ 17; Counter-Memorial, ¶¶ 67, 374. While the formal address of the Seaplane Harbor land plot was Küti 17, the Respondent states that Küti 17a was also used to designate a part of the land plot, though no such address existed legally. *See* Counter-Memorial, fn. 8.

31 Counter-Memorial, ¶¶ 377-378. *See* Heritage Conservation Act, 9 March 1994 (**RLA-082**); Area map of cultural monuments Nos. 3115 and 2628 and their buffer zones, 20 February 2020 (**R-107**).

the Old Town of Tallinn was inscribed on the UNESCO World Cultural Heritage List in 1997.[32] Accordingly, the Seaplane Harbor became a protected object of cultural heritage under various regulations and statutes.[33]

154. The name—Seaplane Harbor—is derived from the building located on the seafront called the Seaplane Hangar, which together with the Seaplane Harbor was built in 1916 under the orders of the Tsar Nicholas II of Russia as part of a larger naval fortress project.[34] Following Estonia's declaration of independence on 24 February 1918, the Seaplane Harbor became a property of Estonia as a military port. It was taken over by the Red Army of the Union of Soviet Socialist Republics (the "**Soviet Union**" or the "**USSR**") on 21-22 June 1940.[35] After the occupation of Estonia by the German military between 1941 and 1944, which also made use of the Seaplane Harbor, the Soviet armed forces re-established their control over Estonia in the fall of 1944 and regained possession of the Seaplane Harbor.[36]

155. The below map shows the Seaplane Harbor area in 1946 separated into five distinct areas.[37] While the entire area was seized by the Soviet military, the areas relevant to this arbitration are areas [1], which houses the lumber facilities, and [3], where the Seaplane Hangar and the berths in dispute are located.[38] Areas [3] and [4] were designated as Military Camp No. 22 by the Soviet military.[39]

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32 Counter-Memorial, ¶ 378. *See* UNESCO Cultural Heritage List Documentation for file No. 822 – Historical Center of Tallinn, 25 February 2020 (**R-108**).

33 *See, e.g.*, Heritage Conservation Act, 9 March 1994 (**RLA-082**); Government of Estonia, Regulation No. 278, "Establishing the border and the buffer zone border for the Old Town of Tallinn", RT I 1999, 72, 692, 28 September 1999 (**RLA-083**); Government of Estonia, Regulation No. 155, "Statute of the Heritage Conservation Area of the Old Town of Tallinn, RT I 2003, 44, 303, 20 May 2003 (**RLA-084**); R. Alatalu, Tallinn Old Town Conservation Area 50, Estonian Cultural Heritage, Preservation and Conservation, Vol. 2, 2013-2017, pp. 6-7 (**R-109**).

34 Memorial, ¶ 17; Statement of Defense, ¶ 4.

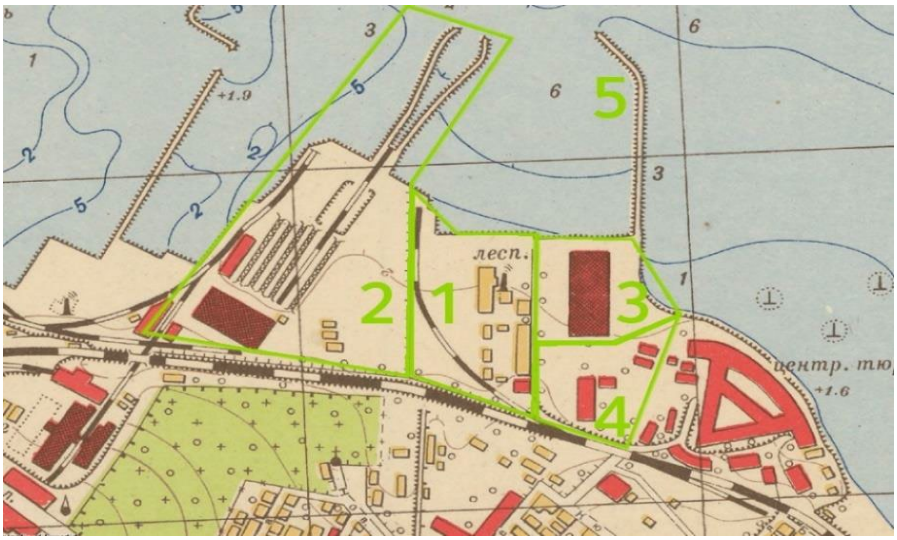
35 Memorial, ¶ 59; 'Timeline of the Seaplane Harbor/Seaplane Hangar' in *Tallinn's Seaplane Hangar: From Plane Shed to Museum*, 2015, p. 30 (**C-011**); Counter-Memorial, ¶ 7.

36 Memorial, ¶ 59; 'Timeline of the Seaplane Harbor/Seaplane Hangar' in *Tallinn's Seaplane Hangar: From Plane Shed to Museum*, 2015, pp. 30-31 (**C-011**).

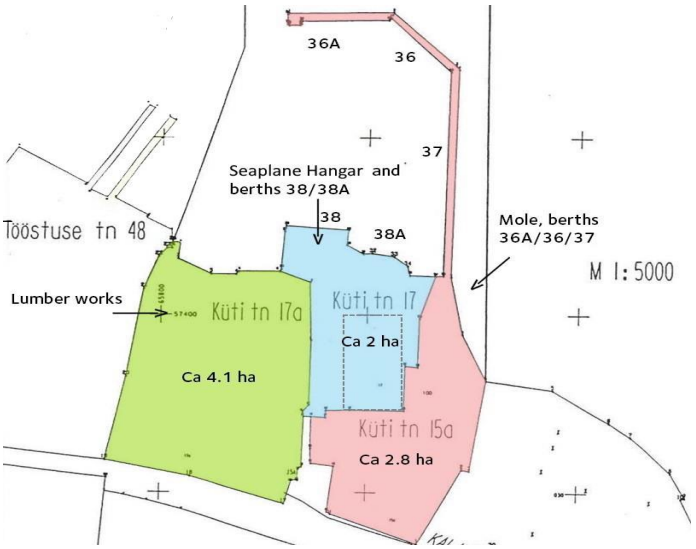
37 Map of the Noblessner Shipyard and the Seaplane Harbor area in 1946 (**R-019**).

38 Counter-Memorial, ¶¶ 67-75.

39 Counter-Memorial, ¶ 76.



156. The following map provides a simplified layout of the disputed area (areas colored only in green and blue) at the time of the Claimant's alleged investment:[40]



157. The area colored in blue (equivalent to area [3]) contains the Seaplane Hangar with berths Nos. 38 and 38A in front of it,[41] whereas the area colored in green (equivalent to area [1]) contains a lumber works site, including a sawmill building, lumber cutting shop, drying shop, boiler house, warehouses, clubhouse, canteen, medical station, and administrative buildings, which were serviced by a railway.[42]

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40 Counter-Memorial, ¶ 5, Figure 1. The part of the Harbor coloured in red, where the mole and Berth Nos. 36, 36A and 37 are located, is outside the scope of the dispute. *See* Counter-Memorial, ¶ 5(i).

41 Counter-Memorial, ¶ 5(ii). *See also* Counter-Memorial, ¶¶ 82-87.

42 Counter-Memorial, ¶¶ 5(iii). *See also* Counter-Memorial, ¶¶ 88-91. For a complete description of the buildings, the Claimant refers to the Ehitusekspert Evaluation Report dated 24 January 2000 (**C-016 / R-021**) which, according to the Claimant, contains a comprehensive assessment of the assets located on

158. During the Soviet administration, the Seaplane Harbor was repurposed to serve the military needs of the USSR, such as hosting navy construction units, a mine and torpedo base, warehouses, and a wooden building materials factory.[43] In particular, the area with the lumber works site was designated as Military Camp No. 158 and was used by Military Factory No. 84 to serve the military woodworking needs of the Soviet military.[44] The Seaplane Hangar and berth No. 38 in front of it, *i.e.*, Military Camp No. 22, were used mostly for storage purposes.[45]

159. The withdrawal of the armed forces of the USSR (then the Russian Federation) in Estonia began in July 1994 and was completed by 31 August 1994.[46]

160. In 2001, after a period of public consultations, a comprehensive plan for the entire city of Tallinn (the "**Tallinn City Master Plan**") was adopted, which designated the Seaplane Harbor along with several other former military sites as a recreational and passenger port.[47] As commercial shipping was already moving away from the city center, the Tallinn City Master Plan envisaged to eliminate the railway link to the Seaplane Harbor and other similarly located sites within ten years as part of the plan to integrate the coastal area in the city open space and due to the decrease in cargo transport volume.[48]

161. Subsequently, on 9 December 2004, the Tallinn City Council adopted a smaller-scale comprehensive plan for the coastline area between Paljassaare and Russalka (the "**PRCA General Plan**"), which covered approximately 20 km of coastal land in the City of Tallinn.[49] The PRCA General Plan established that the Seaplane Harbor would become a yacht and passenger port and that the eastern section of the railway, which served the Seaplane Harbor and the Old City Harbor, would be eliminated by 2005 due to the need to change the Old City Harbor into a passenger port.[50] It also allowed the port facility to be used as cargo port under the condition that there was no railway connection.[51]

Küti 17, Küti 17a, and Küti 15a and is a "reliable, contemporaneous source of information". *See* Claimant's Answers to Tribunal Questions, ¶¶ 115-124. The Respondent notes that the "exact composition and purpose of the buildings at the Seaplane Harbor has never been quite clear," given that the entire site was under military administration. *See* Respondent's Answers to Tribunal Question, ¶ 19.

43 Robert Treufeldt, "From Oblivion to Rediscovery: The Seaplane Harbor 1940-1990", *Tallinn's Seaplane Hangar: From Plane Shed to Museum*, 2015, p. 64 (**C-011**).

44 Memorial, ¶ 62; Counter-Memorial, ¶ 75.

45 Counter-Memorial, ¶ 76; Rejoinder, ¶ 69.

46 Counter-Memorial, ¶ 13; Agreement between Estonia and the Russian Federation regarding the withdrawal of military forces from Estonia, 26 July 1994 (**C-204**). This document had set the date of withdrawal of armed forces from Estonia to 31 August 1994.

47 Tallinn Master Plan, accepted on 11 February 1999, adopted on 11 January 2001 (**R-124**). *See* Counter-Memorial, ¶¶ 393-402. *See also* Planning and Building Act, RT I 1995, 59, 1006, 22 July 1995 (**RLA-223**).

48 Counter-Memorial, ¶¶ 397-398; Rejoinder, ¶ 218.

49 Tallinn City Council, Regulation No. 54, 9 December 2004 (**C-479**).

50 Explanatory Note to the PRCA General Plan (**R-118**).

51 Explanatory Note to the PRCA General Plan (**R-118**).

162. In 2012, the Seaplane Harbor, including the berths, was repurposed and reopened as a museum.[52]

C. LEGAL INSTRUMENTS ADOPTED IN THE TRANSITION PERIOD

1. The March 1990 Resolution and Prior Developments

163. From the mid-1980s, several movements on the "new national awakening" of Estonia emerged, where, by 1988, there was constant public discussion and protests in regard to ending the Soviet occupation and restoring Estonia's independence.[53] The demands for independence led to the decision of the Supreme Council of the Estonian Soviet Socialist Republic (the "**Supreme Council of the ESSR**" or the "**Supreme Council**") on 12 November 1989 to rule that the vote to join the USSR in July 1940 after Estonia's full military occupation had been illegal.[54] In February 1990, the Congress of Estonia—an "unofficial parliament"—was elected by more than 500.000 citizens of the pre-WW II Republic of Estonia and their descendants.[55] On 11 March 1990, the Congress of Estonia declared that "[o]n 17 June 1940, the USSR started the aggression against the Republic of Estonia", which is "a country occupied and annexed by the USSR until today".[56]

164. A week after this declaration, on 18 March 1990, elections to the Supreme Council of the ESSR took place. The elections were open to all residents of the ESSR, including the Russian-speaking population that had arrived after 1940.[57] On 29 March 1990, the Supreme Council adopted a resolution in which it declared the restoration of the Republic of Estonia pursuant to the principle of *restitutio ad integrum*, meaning that Estonia had been under Soviet occupation since 1940 but never ceased to be a *de jure* independent State (the "**March 1990 Resolution**").[58] Furthermore, the March 1990 Resolution "recognize[d] the illegitimacy of the state power of the USSR in Estonia from the date of its establishment" and "proclaime[d] a transitional period".[59]

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52 Counter-Memorial, ¶ 31. *See also* Hearing Transcript, Day 1, p. 92:20-25.

53 Counter-Memorial, ¶¶ 237-238; David J. Smith, *Estonia: Independence and European Integration* (Routledge, 2002), p. 48 (**C-014**).

54 David J. Smith, *Estonia: Independence and European Integration* (Routledge, 2002), p. 53 (**C-014**).

55 David J. Smith, *Estonia: Independence and European Integration* (Routledge, 2002), pp. 43-50 (**C-014**); Mälksoo Report, ¶ 41 (**RER-3**).

56 Mälksoo Report, Exhibit 4, Declaration of the Congress of Estonia regarding restoration of the legitimate state authority on the territory of Estonia, 11 March 1990 (**RER-3**).

57 David J. Smith, *Estonia: Independence and European Integration* (Routledge, 2002), pp. ix, 48, 54 (**C-014**).

58 Resolution of the Supreme Council of the ESSR on the National Status of Estonia, 29 March 1990 (**RLA-049**). While the copy of the March 1990 Resolution submitted by the Respondent is dated 29 March 1990, other sources state that the resolution was passed on 30 March 1990 *(see*, e.g. David J. Smith, *Estonia: Independence and European Integration* (Routledge, 2002), pp. ix, 54-55 (**C-014**)).

59 Resolution of the Supreme Council of the ESSR on the National Status of Estonia, 29 March 1990 (**RLA-049**).

2. From the 17 July 1990 Resolution to the 27 November 1991 Regulation

165. On 17 July 1990, a resolution was adopted by the Presidium of the Supreme Council concerning the initial measures for organizing the privatization process (the "**17 July 1990 Resolution**"), which *inter alia* suspended transactions involving public property.[60] The 17 July 1990 Resolution reads in relevant part as follows:

> In order to execute the ownership right of Estonian Republic regarding the property that is in the ownership of Estonian Republic in accordance with Property law of Estonian Republic the Presidium of the Supreme Council of the Republic of Estonia decides:
>
> 1. To suspend temporarily, until the adoption of Estonian legislative acts regulating the privatization of the property, all transactions with the statutory fund property of state-owned enterprises and other organisations, which cause a change in the ownership of such property, except in the cases provided in section 3.2. of this resolution and also the transfer of property from state farms to collective farms following the established procedure.[61]

166. On 19 December 1990, the resolution on the Restoration of Continuity of Right of Ownership (the "**19 December 1990 Resolution**") was adopted by the Supreme Council based on, *inter alia*, the March 1990 Resolution. The 19 December 1990 Resolution, *inter alia*, set out that the Government of the Estonian Republic shall prepare a list of previous owners and their successors whose property was nationalized by the Soviet Union since 1940 so that the property could be returned, or compensation be paid, in conformity with the Estonian legal order.[62]

167. On 20 August 1991, the Supreme Council of Estonia affirmed (and officially declared) Estonia's full independence from the USSR based on the continuity of the 1918 Republic as a subject of international law.[63]

168. In a decision of 29 August 1991, the Supreme Council of Estonia stated that assets managed and administered by the USSR within the territory of Estonia (except those owned or used by the USSR Ministry of Defense) "are the assets of the Republic of Estonia".[64] According to the Respondent, the assets owned or used by the USSR Ministry of Defense were omitted from the scope of that decision because the Soviet armed forces remained in Estonia until 31 August

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60 Resolution of the Presidium of the Supreme Council of the Republic of Estonia regarding the Initial Measures for Organising the Privatization Process, 17 July 1990 (**CLA-195**).

61 Resolution of the Presidium of the Supreme Council of the Republic of Estonia regarding the Initial Measures for Organising the Privatization Process, 17 July 1990 (**CLA-195**).

62 19 December 1990 Resolution (**CLA-196**).

63 David J. Smith, *Estonia: Independence and European Integration* (Routledge, 2002), p. xx (**C-014**); Counter-Memorial, ¶¶ 9, 186.

64 Respondent's Answers to Tribunal Questions, ¶ 2, Annex 5, Decision of 29 August 1991 of the Supreme Council of the Republic of Estonia on the assets and management of enterprises, agencies, and organizations in the Republic of Estonia subordinated to or administered by state bodies of the Union of Soviet Socialist Republics.

1994.[65] Consequently, the property owned or used by the USSR Ministry of Defense was subject to separate negotiations and agreements in order to be handed over to Estonia.[66]

169. On 27 November 1991, the Estonian Government adopted Regulation No. 244 regarding the Suspension of Transactions with Buildings, Structures and Other Property Assets that are Occupied by the USSR Military and Located on the Territory of the Republic of Estonia (the "**27 November 1991 Regulation**" or "**Regulation No. 244**"), requiring that all past transactions regarding real property with the USSR Ministry of Defense be registered with the relevant country or city administration within one month.[67] Regulation No. 244 provides, in relevant part:

> 1. To stop transactions made by USSR Defense Ministry without agreement from ER State Government with buildings, structures and other property assets located on ER territory until the corresponding decision is made by ER Supreme Council.
> 2. [To] [e]stablish that all transactions made before enactment of the current Ruling by USSR Defense Ministry or by its dependent legal entities with landholdings, buildings and other property assets located on ER territory have to be registered with the correspondent county or city administration within one month from enactment of the current Ruling.[68]

3. The 23 January 1992 Resolution

170. On 23 January 1992, the Supreme Council passed a resolution by which buildings, structures, and other assets possessed by the former USSR armed forces were declared the property of Estonia (the "**23 January 1992 Resolution**" or "**1992 Supreme Council Resolution**") and any transactions with these assets were prohibited[69]:

> 1. To declare buildings, structures, military weapons, military hardware, supplies and other assets possessed by former USSR military forces units located on ER territory to become the property of the Estonian Republic.
> 2. The ER State Government has to determine composition of the assets possessed by former USSR military forces units located on ER territory and has to solve administrative and technical problems of taking over assets by collaborating with appropriate agencies of the legal successor of USSR, also has to arrange the administration, usage and control over these assets.
> 3. Prohibit all transactions with land, buildings, structures, military weapons, military hardware, supplies and other assets located on ER territory and belonging to the former USSR military units without permission from the ER State Government.[70]

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65 Respondent's Answers to Tribunal Questions, ¶ 27.

66 Respondent's Answers to Tribunal Questions, ¶¶ 28-29. *See also* Transcript of the session of the Supreme Council, 21 January 1992, p. 10 (**C-199**).

67 Counter-Memorial, ¶ 191; Regulation No. 244 (**CLA-197**).

68 Regulation No. 244 (**CLA-197**).

69 *See*, e.g., Reply, ¶ 1244.

70 23 January 1992 Resolution (**C-197**).

4. The 24 July 1992 Regulation

171. A resolution of 24 July 1992 required that past real estate transactions with the Soviet armed forces must be "re-registered" with the Ministry of Defense of Estonia and forbid any further transactions with such assets acquired from the Soviet armed forces ("**Regulation No. 215**" or "**24 July 1992 Regulation**"):

> 1. Transactions concluded between former units of USSR armed forces and any enterprise, establishment, organization or private person regarding the land, buildings and structures on the territory of the Republic of Estonia that are in accordance with the law, must be re-registered in the Ministry of Defense of the Republic of Estonia by August 15, 1992.
>
> The Ministry of Defense has to take into account the standpoint of the government committee formed for the supervision of the legality of these transactions when re-registering the transactions.
>
> 2. To forbid any further transactions of the enterprises, establishments, organizations and private people of the Republic of Estonia with the land, buildings and structures on the Republic of Estonia acquired from the units of the former USSR armed forces.[71]

172. With respect to the phrase "that are in accordance with the law" expressed in section 1 of 24 July 1992 Regulation,[72] the Claimant submits that it applies to transactions that were submitted for re-registration and were found to be legal and concluded in good faith by the government committee referenced in the same section.[73] The Claimant takes the view that Resolution No. 215 only established an obligation for re-registration in the Ministry of Defense and did not extend an existing registration deadline.[74]

173. For the Respondent, the particular meaning of the phrase is not known as it has not been disclosed in the *travaux préparatoires*.[75] But it notes that Regulation No. 244 had already imposed the duty to register previously concluded transactions and to request permission from the Government Office for any future transactions. According to Regulation No. 244, upon failure to comply with these duties, those transactions which had not been registered or which had taken place without permission from the relevant administration might be deemed not to be in accordance with the law.[76]

174. The Respondent submits that the focus of section 1 of Resolution No. 215 is on the second paragraph, which "refers to the fact that the legality of any transaction was to be reviewed on a case-by-case basis by the Ministry of Defense."[77] The Respondent asserts that all transactions concluded with the Soviet military, including those made in good faith, were subject to the re-

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71 24 July 1992 Regulation (**C-198**).

72 *See* Tribunal Questions, Question 10.

73 Claimant's Answers to Tribunal Questions, ¶¶ 136-138, 141.

74 Claimant's Answers to Tribunal Questions, ¶ 142.

75 Respondent's Answers to Tribunal Questions, ¶ 30.

76 Respondent's Answers to Tribunal Questions, ¶ 34.

77 Respondent's Answers to Tribunal Questions, ¶¶ 30-31.

registration requirement, which could then be validated by the Ministry of Defense upon a case-by-case review.[78]

175. After restoring its independence, Estonia also amended or annulled certain parts of the Civil Code of the ESSR.[79] The provisions of the Civil Code regarding the validity of transactions were never retroactively annulled by Estonia, but were left in force by Estonia until 1 September 1994 when the all-new General Part of the Civil Code Act entered into force.[80]

D. THE ALLEGED CHAIN OF TITLE OF THE BUILDINGS IN THE SEAPLANE HARBOR

176. The Parties disagree as to the transfer of title to the buildings in the Seaplane Harbor after the Soviet occupation and before the Claimant allegedly acquired rights thereto.

177. According to the Claimant, the Soviet military sold the buildings and structures at the Seaplane Harbor to private entities before the Soviet occupation ended in Estonia, as the Seaplane Harbor was no longer viewed to be a vital asset.[81] The Respondent disagrees, arguing that the Claimant's alleged predecessors never acquired any rights to the assets they were using.[82] Instead, the Respondent contends that the assets at issue were officially transferred by the Soviet military to Estonia, rejecting the claim that the titles were passed down to the private entities.[83]

1. The Claimant's Position: Transactions from the Soviet Military to Private Entities

a) Sale Transactions to B&E

178. On 29 December 1989, the construction committee of the ESSR adopted Decree No. 477 to establish the small state enterprise SEK, whose founding members were: (i) Military Factory No. 84; (ii) another small state enterprise called Sevek; (iii) a company called Elektron; and (iv) the Construction Directorate of the Soviet Baltic Fleet ("**BFC**").[84] Decree No. 477 established SEK as a separate legal entity with its own balance sheet, recorded its address at Küti 17, Tallinn, and assigned Mr. Vladimir Truhan as the director.[85]

179. While SEK was directed to carry out a number of economic activities related to timber production, it was to "prioritis[e] the fulfilment of public procurements for [Military Factory No. 84] under

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78 Respondent's Answers to Tribunal Questions, ¶¶ 32-33.

79 Counter-Memorial, ¶ 198.

80 Counter-Memorial, ¶ 198; Overview of the Annulments of the Civil Code (**RLA-050**).

81 Memorial, ¶ 64.

82 Counter-Memorial, ¶ 92.

83 Counter-Memorial, ¶ 14.

84 Memorial, ¶ 67; ESSR Construction Committee, Decree No. 477 of the Soviet Civil Construction Authority on Establishing SEK, 29 December 1989 (**R-032** (English translation) / **C-018** (original language)).

85 ESSR Construction Committee, Decree No. 477 of the Soviet Civil Construction Authority on Establishing SEK, 29 December 1989, § 1 (**R-032** (English translation) / **C-018** (original language)). *See also* Articles of Association of SEK, 29 December 1989, §§ 1.4, 1.5.2 (**R-033**).

its operative management".[86] The assets and funds of SEK were to be composed by the contributions of the founders, whereas the resources for SEK's activities were to be provided by Military Factory No. 84 with the volumes mandated by the state procurement plan.[87]

180. On 22 May 1990, Military Factory No. 84 and BFC entered into an agreement with OÜ B&E ("**B&E**"), a joint enterprise between a German company called Bauman Import-Eksport and Elektron, to sell all of SEK's assets at the Seaplane Harbor for RUB 7.3 million ("**Contract No. 16**").[88]

181. On 5 June 1990, the parties to Contract No. 16 signed a protocol of transfer and acceptance, which included a list of 30 buildings and inventory at the lumber works site sold to B&E.[89] According to the Claimant, these transfers were recognized by the Tallinn Circuit Court in 2002.[90]

182. On 1 November 1990, Mr. Vladimir Truhan issued Directive No. 17/90 ("**SEK Directive No. 17/90**"), ordering, *inter alia*, (i) B&E to be deemed as the co-founder of SEK, instead of Elektron; and (ii) B&E to assume all the rights and obligations of SEK and become the "legal successor of SEK."[91] On the same day, Mr. Truhan issued another Directive No. 17/90 in which he ordered to take 22 buildings and structures "to the balance sheet of small enterprise SEK" and transfer these buildings to B&E in accordance with the co-founders' "approval" (or "consent").[92]

183. The Claimant argues that the Soviet military relinquished its interest in the buildings at the Seaplane Harbor, in part, when Military Factory No. 84 agreed to transfer the assets to B&E under Contract No. 16.[93] The transfer of assets, the Claimant continues, was finalized on 1 November 1990 when SEK Directive No. 17/90 was issued.[94] According to the Claimant, SEK's board approved the sale, and B&E's subsequent ownership of SEK's Port facilities was registered in the Tallinn Registry of Buildings.[95]

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86 Articles of Association of SEK, 29 December 1989, §§ 1.7.1, 3.1 (**R-033**).

87 Articles of Association of SEK, 29 December 1989, §§ 2.1, 4.1 (**R-033**).

88 Memorial, ¶ 68; Claimant's Answers to Tribunal Questions, ¶ 88; Contract No. 16 (**C-023** / **R-036**). The appendix, which lists the transferred assets, has not been submitted by the Claimant.

89 Counter-Memorial, ¶ 108; Act of Transfer pursuant to Contract No. 16 of 22 May 1990, 5 June 1990 (**C-141**); Protocol of Transfer with Appendices for Lumber Works Buildings between Military Factory No. 84 and B&E, 5 June 1990 (**R-030**).

90 Claimant's Answers to Tribunal Questions, ¶ 89, *referring to* May 2002 Appeal Judgment, p. 7 (**C-191**).

91 SEK Directive No. 17/90 (**C-019**).

92 While the Claimant translated the word to "pursuant to the approval," the Respondent's translation provides a different wording, "based on the consent." *Compare* SEK Directive No. 17/90 (**C-024**) *with* Respondent's Translation of Claimant's Exhibit C-024 (**R-035**).

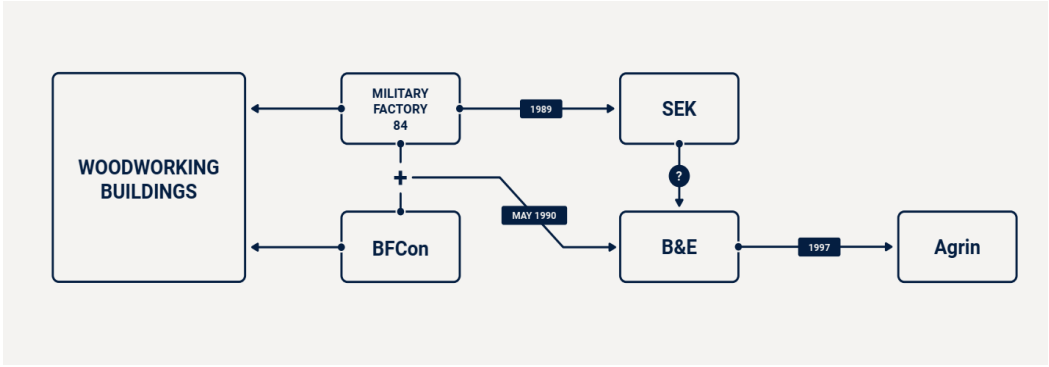
93 Memorial, ¶¶ 68, 253, *referring to* Contract No. 16 (**C-023 / R-036**).

94 Memorial, ¶ 68, *referring to* SEK Directive No. 17/90 (**C-019**).

95 Memorial, ¶¶ 253-254, *referring to* Tallinn Building Registry Certificate No. 8395 issued to B&E, 27 October 1995 (**C-033**).

184. According to the Claimant, B&E owned and operated the assets until it sold them to Agrin on 26 September 1997.[96]

185. To the contrary, the Respondent posits that Contract No. 16 "cannot exist in the same physical universe [with SEK Directive No. 17/90]" because they support two "mutually exclusive […] theories" concerning the purported transfer of assets to B&E, as shown below: (i) B&E obtained title from SEK pursuant to SEK Directive No. 17/90 after SEK took over all assets of Military Factory No. 84, or (ii) from Military Factory No. 84 and BFC *via* Contract No. 16:[97]



186. Addressing the first theory involving the alleged transfer from SEK, the Respondent contends that no document exists to indicate that SEK ever obtained title to any property on the lumber works site or replaced Military Factory No. 84 to be able to transfer them to others.[98] In this respect, the Respondent points out that a resolution of the Housing Commission for Tallinn dated 19 June 1990 shows Military Factory No. 84's ownership of the buildings at Küti 17 as of that date.[99]

187. In addition, the Respondent takes issue with SEK Directive No. 17/90, arguing that (i) "SEK could not simply 'order' assets to be transferred from an unnamed prior owner 'to its balance sheet', let alone transfer them onward to B&E"; (ii) the document only vaguely makes reference to "consent" by the co-founders of SEK and of B&E, without providing any details;[100] (iii) it purports to transfer the Seaplane Hangar and Berth Nos. 38 and 38A, which were never owned by Military Factory No. 84; and (iv) the remaining listed assets are inconsistent with other contemporaneous documents covering the area, which list 30 different buildings, rather than 22.[101]

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96 Memorial, ¶ 72; Contract of Purchase and Sales and Pledge Contract between Agrin and B&E, 26 September 1997 (**C-020**).

97 Counter-Memorial, ¶¶ 97-98, 110. *See* Counter-Memorial, Figure 9. *See also* Hearing Transcript, Day 5, p. 107:17-24.

98 Counter-Memorial, ¶¶ 101-102; Articles of Association of SEK, 29 December 1989 (**R-033**).

99 Counter-Memorial, ¶ 115, *referring to* Resolution of the Housing Commission, 19 June 1990 (**R-040**).

100 While the Claimant translated the word to "pursuant to the approval," the Respondent's translation provides a different wording, "based on the consent." *Compare* SEK Directive No. 17/90 (**C-024**) *with* Respondent's Translation of Claimant's Exhibit C-024 (**R-035**).

101 Counter-Memorial, ¶ 103, *referring to* Respondent's Translation of Claimant's Exhibit C-024 (**R-035**); Protocol of Transfer with Appendices for Lumber Works Buildings between Military Factory No. 84 and B&E, 5 June 1990 (**R-030**).

188. Contesting the second theory involving Contract No. 16, the Respondent points out that (i) the purchase price of the assets was to be paid only to BFC even though both BFC and Military Factory No. 84 were named sellers; (ii) the assets that were purportedly transferred to B&E were limited to lumber work buildings, excluding the Seaplane Hangar and the berths; and (iii) some of the assets listed in the 5 June 1990 protocol in fact no longer existed at the time of the purported transfer.[102] As such, "[i]f the buildings on the lumber working site were already sold to B&E on 22 May 1990, they could not have been transferred to SEK on 1 November 1990, and, on the same day, again to B&E."[103] Such inconsistency, in the Respondent's view, "further undermines the already non-existent credibility of the Directive."[104]

189. The Respondent notes that, in any event, there is another version of Contract No. 16 with key differences, such as naming Military Factory No. 84 as the only seller and containing a different map and a different list of assets in the appendix, which includes the Seaplane Hangar and berths Nos. 38 and 38A.[105] This second version of Contract No. 16, according to the Respondent, was submitted by B&E in the Estonian court proceedings, "apparently forgetting that it had previously submitted a different version (the one that the Claimant now relies on) to the Building Register."[106] In fact, B&E, the Respondent continues, admitted during the Estonian proceedings that "it [had] not acquired assets on the basis of [Contract No. 16]" and that Contract No. 16 was indeed a forgery.[107] The Respondent adds that the bank account listed in the first version of Contract No. 16 also points to forgery as it was not opened until 26 June 1990, a month after the alleged date of the contract.[108]

b) Sale Transactions to GT, Nautex, and Verest

190. On 26 July 1991, a resolution was adopted within the Soviet military that BFC (military unit 72068) would conduct certain hydrotechnical works for a private company, GT Projekt ("**GT**"), which was "the customer for port and hydrotechnical facilities construction in the Baltic Sea region."[109] According to the Respondent, the works were supposed to be listed in an appendix, which is not in its possession.[110]

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102 Counter-Memorial, ¶¶ 107-109, *referring to* Contract No. 16 (**C-023 / R-036**).

103 Counter-Memorial, ¶ 110.

104 Counter-Memorial, ¶ 105.

105 Counter-Memorial, ¶ 113, *referring to* Second version of Contract No. 16 (**R-038**).

106 Counter-Memorial, ¶ 113.

107 Counter-Memorial, ¶¶ 116-117, *citing* March 2006 Appeal Judgment (**C-081**). *See also* Hearing Transcript, Day 1, p. 97:2-9.

108 Counter-Memorial, ¶ 114, *referring to* Contract No. 16 (**C-023 / R-036**); Communications regarding existence of B&E's bank account, September 1995 (**R-039**). *See also* Hearing Transcript, Day 1, p. 96:16-97:1-25.

109 Resolution by the Head of the Main Military Construction Directorate of the Ministry of Defense of the USSR and the Deputy Commander of the Baltic Fleet for Construction, Engineering Support and Housing, 26 July 1991 (**R-041**).

110 Counter-Memorial, ¶ 119(i).

191. A subsequent resolution was adopted on 29 July 1991, "permit[ting] the paid transfer of land/territory/facilities held on the [military unit 10717] balance sheet to the company GT Projekt based on the residual value," pursuant to the 26 July 1991 resolution.[111] The Respondent states that the resolution mentions an appendix, which has not been preserved or has never existed.[112]

192. Also on 29 July 1991, the commander of another military unit 13016, referring to the aforementioned resolution of the same date, instructed the commander of military unit 10717 to transfer assets listed in the inventory attached to the resolution.[113] According to the Respondent, the inventory list mentioned in the resolution remains missing.[114]

193. On 31 July 1991, two protocols of transfer were signed by the USSR military unit 10717 to transfer assets to another military unit 1176 UNR.[115] The first protocol, stating that it was prepared "on the basis of the order no. 177 as of June 22, 1976 issued by the Naval Forces Commander regarding the reservation of the Hydrotechnical facilities and the resolution of the Baltic Fleet Commander-in-Chief," transferred the berths listed as "36A, 36-37, 36, 38A, 38, 39," as well as "outfitting quay" and "Paljassaare peninsula mine quay."[116] It was signed by captain II rank S. N. Romašetškin on behalf of unit 10717 and Directorate of the Chief of the Service D. L. Sukortsev, on behalf of 1176 UNR.[117]

194. The second protocol stated that it was prepared "on the basis of the order no. 75 of 22 February 1977 issued by the USSR Ministry of Defense and the decision of the Baltic Fleet Commander-in-Chief as of 2 July 1991," transferring *inter alia* "airship hangar at the Seaplane harbour (m/s no. 22, building no. 2)."[118] It was signed by captain II rank S. N. Romašetškin on behalf of unit 10717 and Lieutenant Colonel V. P. Sitnikov, on behalf of 1176 UNR.[119]

195. On 17 August 1991, V. P. Sitnikov, on behalf of 1176 UNR, signed a protocol of transfer with GT "on the basis of the order no. 177 as of 22 June 1976 issued by the Naval Forces Commander regarding the reservation of the Hydrotechnical facilities and the permit of the Baltic Fleet Commander-in-Chief," transferring the assets listed in the first protocol of 31 July 1991, *i.e.*, berths Nos. 36A, 36-37, 36, 38A, 38, 39 and the outfitting quay.[120] Five sale agreements dated

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111 Resolution by the Deputy to the Commander of the Soviet Naval Forces for Construction, Engineering Support and Housing, 29 July 1991 (**R-042**).

112 Counter-Memorial, ¶ 119(ii).

113 Resolution of Military Unit 13016, 29 July 1991 (**R-043**).

114 Counter-Memorial, ¶ 120.

115 First Protocol of Transfer by Military Unit 10717, 31 July 1991 (**C-200 / R-044**); Second Protocol of Transfer by Military Unit 10717, 31 July 1991 (**R-045**).

116 First Protocol of Transfer by Military Unit 10717, 31 July 1991 (**C-200 / R-044**).

117 First Protocol of Transfer by Military Unit 10717, 31 July 1991 (**C-200 / R-044**).

118 Second Protocol of Transfer by Military Unit 10717, 31 July 1991 (**R-045**).

119 Second Protocol of Transfer by Military Unit 10717, 31 July 1991 (**R-045**). For the Respondent, the fact that the two protocols of 31 July 1991 were signed by two different people is a sign that the documents were forged at a later date. *See* Counter-Memorial, ¶ 124.

120 Counter-Memorial, ¶ 122; Protocol of Transfer between Military Unit 1176 and GT, 17 August 1991 (**R-046**). *See also* First Protocol of Transfer by Military Unit 10717, 31 July 1991 (**C-200 / R-044**).

17 August 1991 were concluded between 1176 UNR and GT with respect to the sale of berth Nos. 38, 38A, 39, "Airship Hangar (m/s no. 22, building no. 2)" and the outfitting quay, all of which were located at "Küti St., 17, Seaplane Harbor."[121]

196. On the same day when GT acquired assets from 1176 UNR, GT further transferred ownership of the assets to AS Nautex ("**Nautex**") *via* three sale agreements.[122] The sale agreements between GT and 1176 UNR included the Seaplane Hangar, berths Nos. 38A, 38, 39, the outfitting quay, as well as berths Nos. 36A and 36-37, which were not included in the agreements between 1176 UNR and GT.[123] Therefore, the Claimant notes that, as provided in contemporaneous government records, the Port "was in the use of the armed forces of [the former] USSR" until 17 August 1991.[124]

197. On 17 August 1991, the day GT acquired assets from 1176 UNR, GT applied to the Tallinn Technical Survey Bureau to register a building at Tööstuse 55, berths Nos. 38, 38A, 39 and a slipway under its name.[125] On 1 September 1991, an identical application was filed by Nautex.[126]

198. On 1 November 1991, the Garrison Commander of the USSR in Tallinn issued Order No. 72, instructing the military unit 10717 to transfer certain assets to 1176 UNR pursuant to *inter alia* the resolutions adopted on 26 July and 29 July 1991.[127] The assets that were on the balance sheet of the military unit 10717 to be transferred to 1176 UNR included: (i) the Seaplane Harbor (berths Nos. 36A, 36, 36-37, 38A, 38, 39), (ii) the outfitting quay, (iii) the airship hangar (m/s No. 22), (iv) bureau of the 1176 UNR (Tööstuse 55, m/s No. 5), (v) building No. 11 at Paljassaare (m/s No. 1); (vi) Pier at Paljassaare (m/s No. 1), and (vii) the industrial base at Paljassaare (m/s No. 190).[128]

199. On 7 May 1992, Nautex concluded sales agreements with Verest with respect to (i) the airship hangar for RUB 29,500 and (ii) berths Nos. 38A, 38 and 39 located at Küti 17 for RUB 1.14 million.[129]

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121 Counter-Memorial, ¶ 123, Contract between Military Unit No. 1176 and GT, 17 August 1991 (**C-025**); Sale and Purchase Agreement between Military Unit 1176 and GT, 17 August 1991 (**R-047**).

122 Sale Agreement between GT and Nautex, 17 August 1991 (**R-048**).

123 Counter-Memorial, ¶ 126; Claimant's Answers to Tribunal Questions, ¶ 90; Sale Agreement between GT and Nautex, 17 August 1991 (**R-048**). *Contra* Sale and Purchase Agreement between Military Unit 1176 and GT, 17 August 1991 (**R-047**).

124 Claimant's Answers to Tribunal Questions, ¶ 91, *citing* Tallinn Building Registry Certificate No. 20215 issued to Verest, 17 November 1997 (**C-053**).

125 GT's Application to the Tallinn Technical Survey Bureau, 17 August 1991 (**R-049**).

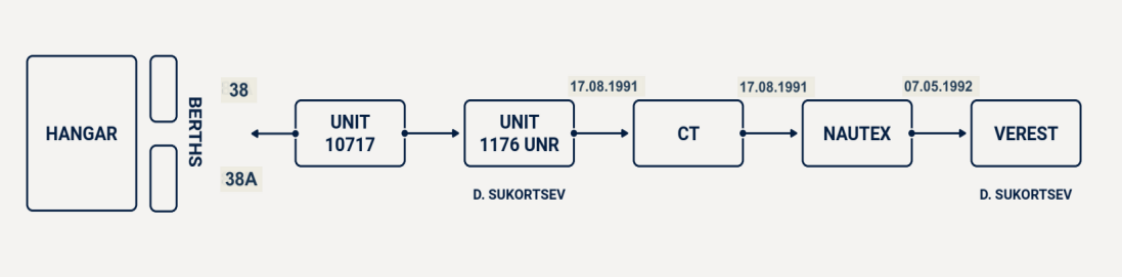
126 Nautex's Application to the Tallinn Technical Survey Bureau, 1 September 1991 (**R-050**).

127 Order No. 72 of the Soviet Garrison, 1 November 1991 (**R-051**). *See* paragraphs 190-191 above.

128 Order No. 72 of the Soviet Garrison, 1 November 1991 (**R-051**).

129 Counter-Memorial, ¶ 130; Claimant's Answers to Tribunal Questions, ¶ 92; Sale Agreement between Nautex and Verest, Protocols of Transfer, 7 May 1992 (**R-052**). The Respondent points out that the agreement refers to berth No. 38 as "outfitting quay" though the term "outfitting quay" was mentioned in other documents as a separate berth. Moreover, berth No. 39, according to the Respondent, was not a part

200. The alleged chain of transfers of the Seaplane Hangar and the berths advanced by the Claimant have been diagrammed by the Respondent as below (where GT is abbreviated as CT):[130]



201. In its letter to the City of Tallinn dated 27 May 1996, the Privatization Agency stated that the property at the Seaplane Harbor was private property and was therefore not subject to municipalization.[131]

202. On 22 October 1997, B&E wrote to the Office of the Chancellor of Justice to ask about the legal effect of the 23 January 1992 Resolution upon the transfer of rights regarding the Seaplane Harbor and its adjacent lands.[132] The Office of the Chancellor of Justice responded the next day, stating that the 23 January 1992 Resolution did not have retroactive effect and thus could not void the transfer of rights at the Seaplane Harbor, which was made in 1990.[133]

2. The Respondent's Position: Transfer of Assets by the USSR to Estonia

203. The Respondent denies that the sales transactions between the Soviet Military and private parties alleged by the Claimant ever took place. It posits that Contract No. 16 and SEK Directive No. 17/90, both adduced by the Claimant in support of its claims, cannot coexist.[134] It also disputes the two mutually exclusive theories arising from either Contract No. 16 or SEK Directive No. 17/90 being the means through which title was passed on to B&E. First, it argues that SEK Directive No. 17/90 could not transfer title to B&E because SEK's ownership of the assets was not substantiated, because it could not order a transfer from an unnamed company to its own balance sheet, and because the information contained therein is inconsistent with the assets of Military Factory 84.[135] Secondly, it argues that there are inconsistencies surrounding Contract No. 16, including the second version of the same contract which was filed by the Claimant in the

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of the Seaplane Harbor, but a part of the neighboring Noblessner Shipyard. *See* Counter-Memorial, ¶ 130, fn. 53.

130 Counter-Memorial, Figure 9.

131 Letter from Estonian Privatization Agency to Tallinn City Government, 27 May 1996 (**C-309**).

132 Letter from CEO of B&E to the Chancellor of Justice, 22 October 1997 (**C-310**).

133 Letter from the Advisor of Chancellor of Justice to B&E, 23 October 1997 (**C-331**). *See also* Hearing Transcript, Day 1, pp. 19:24 – 20:7.

134 *See* ¶ 185 above.

135 *See* ¶¶ 186-187 above. Counter-Memorial, ¶¶ 99-105; SEK Directive No. 17/90 (**C-019 / R-034**). *See also* SEK Directive No. 17/90 (**C-024 / R-035**).

domestic proceedings, which point to its forgery.[136] The Respondent finally contends that all documents concerning B&E's transactions were forged.[137]

204. The Respondent further disputes the transactions involving GT, Nautex and Verest. It argues that many documents on which the Claimant rests its allegations are missing or never existed, while others exist in multiple versions which are inconsistent and contradictory. The involvement of the same people throughout the transactions chain, especially of Mr. Sukortsev, commander of military unit 1176 and later Verest's majority shareholder, would suggest a profit motive behind the attempted sale of public property. According to the Respondent, these elements together point again to forgery.[138] The Respondent finally notes that, in any case, the alleged transactions would have been "illegal and impossible in the Soviet legal system."[139]

205. Therefore, according to the Respondent, the title of the disputed buildings never passed to the Claimant's alleged predecessors.[140] Rather, the Soviet military handed over the real estate to Estonia.[141] On 26 July 1994, a treaty on the withdrawal of Russian troops from Estonian territory and on the conditions of their temporary stay in Estonia was signed between Estonia and Russia.[142] With respect to the various assets located on the Seaplane Harbor, the handover of berths Nos. 36, 36A and 37 were completed by 29 July 1994, whereas the handover of Military Camp No. 22, which included the Seaplane Hangar, was completed by 30 July 1994.[143] The Russian troops completed its withdrawal from Estonia on 31 August 1994.[144]

206. On 19 September 1994, Mr. S. Mayorov, on behalf of BFC, sent a letter to the Estonian Ministry of Defense, offering to hand over Military Camp No. 158, *i.e.*, the lumber works site.[145] The undated handover protocol concerning Military Camp No. 158 attached to the letter was signed by the representatives from Estonia's Ministry of Defense and by the chief of 328 military station

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136 *See* ¶¶ 188-189 above. Counter-Memorial, ¶¶ 106-111; Contract No. 16 (**C-023 / R-036**); Second version of Contract No. 16 between Military Factory No. 84 and B&E, 22 May 1990 (**R-038**).

137 Counter-Memorial, ¶¶ 112-117; Rejoinder, ¶¶ 72, 74.

138 Counter-Memorial, ¶¶ 118-132, 205-206; Rejoinder, ¶¶ 72-76.

139 Rejoinder, ¶ 76.

140 Counter-Memorial, ¶¶ 92-94.

141 Counter-Memorial, ¶¶ 133-139.

142 Extract of the Ministry of Foreign Affairs website, 25 Years since the Withdrawal of Russian Troops from Estonia, 31 August 2019 (**R-054**).

143 Counter-Memorial, ¶¶ 134-135, *referring to* Handover Protocol of Military Camp 22, 15/20 February 1994 (**R-055**); Handover Protocol of berths Nos. 36, 36A, 37, 15 March 1994 (**R-028**). *See also* Hearing Transcript, Day 5, p. 115:6-12.

144 Extract of the Ministry of Foreign Affairs website, 25 Years since the Withdrawal of Russian Troops from Estonia, 31 August 2019 (**R-054**). The remaining assets at the Seaplane Harbor were taken over by Estonia by a unilateral instrument on 14 December 1994. *See* Instrument of Unilateral Takeover of the Assets at the Seaplane Harbor by the Ministry of Defense of Estonia, 14 December 1994 (**R-192**).

145 BFC Letter regarding Handover Protocols Handing Over Military Camp No. 158, 19 September 1994 (**R-057**). The Supreme Council of Estonia passed the Act on 13 April 1992 to establish the Ministry of Defense of Estonia. According to the Respondent, the Ministry of Defense is the successor to the Ministry of Defense (at times, the War Ministry) of Estonia that was first established in 1918. *See* Respondent's Answers to Tribunal Questions, ¶¶ 11-12. *See also* Claimant's Answers to Tribunal Questions, ¶ 60.

and the members of the commission from the Russian side.[146] However, on 19 January 1995, Mr. Mayorov sent another letter to the Estonian Ministry of Defense, requesting to consider the letter of 19 September 1994 void because it "contain[ed] a mistake due to a fault by its author."[147] In the letter, Mr. Mayorov clarified that (i) BFC did not own Military Camp No. 158 and (ii) the lumber working section of Military Factory No. 84, which was located at the same address, had been sold to B&E pursuant to Contract No. 16.[148]

207. On 25 October 1993, the Government of Estonia promulgated a list of assets that were to remain in the state's ownership as of 6 September 1993 (the "**State Assets List**").[149] None of the structures at the Seaplane Harbor were included in the list.[150] The structures at the Seaplane Harbor were added to the State Assets List pursuant to Regulation No. 258 of 22 October 1996 and entered into the newly founded State Assets Register in November 1996.[151]

208. In light of the foregoing, the Respondent argues that the buildings on the Seaplane Harbor "ha[d] always belonged to the Respondent" and that the Claimant has failed to discharge its burden to prove otherwise.[152]

E. THE CLAIMANT'S INTERESTS IN THE SEAPLANE HARBOR

1. Lease Agreements with Verest and Agrin

209. The Claimant states that in 1996, after being informed that the owners of the Lennusadam Port were looking to sell the port, Mr. Rotko was introduced to Mr. Dimitri Sukortsev, the owner of Verest, and Mr. Enn Laansoo, the owner of Agrin, respectively, by Mr. Aleksandr Meleško, a port dispatcher at the Old City Harbor (Vanasadam Port).[153] Given that BPV was using other ports in Estonia for its trading activities, Mr. Rotko considered that acquiring its own port would allow BPV, and correspondingly ELA, "to expand and vertically integrate [their] commercial operations with guaranteed port facility access."[154]

210. According to the Claimant, BPV— after conducting due diligence—entered into separate lease agreements with Verest and Agrin on 1 October 1997 to lease the buildings at the Seaplane Harbor

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146 BFC Letter regarding Handover Protocols Handing Over Military Camp No. 158, 19 September 1994 (**R-057**).

147 Counter-Memorial, ¶ 137; BFC Letter regarding Handover Protocol, 19 January 1995 (**R-058**).

148 BFC Letter regarding Handover Protocol, 19 January 1995 (**R-058**).

149 Counter-Memorial, ¶ 335; Government of Estonia, Regulation No. 328, 25 October 1993 (**RLA-079**).

150 Memorial, ¶ 76(d).

151 Counter-Memorial, ¶ 336; State Assets Act (Riigivaraseadus), RT I 1995, 22, 327, 15 February 1995 (**RLA-080**); Ministry of Finance, Certificate of Registration of the State Assets in the State Assets Register, 15 May 1997, pp. 2-3 (**C-038**); Government of Estonia Regulation No. 258, 22 October 1996 (**C-037**).

152 Rejoinder, ¶ 71; Respondent's Answers to Tribunal Questions, ¶¶ 15-16. *See also* Hearing Transcript, Day 1, p. 99:1-7.

153 Memorial, ¶¶ 81-82; Second Rotko Statement, ¶¶ 18, 21-22 (**CWS-2**).

154 Second Rotko Statement, ¶ 18 (**CWS-2**). *See also* Memorial, ¶ 81; Second Rotko Statement, ¶¶ 19-20 (**CWS-2**).

owned by the two companies.[155] The lease with Verest covered the use of berths Nos. 38, 38A and the Seaplane Hangar, all of which were located in Küti 17, Tallinn.[156] The lease with Agrin included the following buildings at the Seaplane Harbor on the Küti 17a premises: gate building, administrative building, machine building, carpentry factory, dryer, sorting factory, sawmill unit, residue warehouse, firewood warehouse, heating fuel warehouse, carpentry factory, fire alarm station, boiler plant, car garage, assembly factory, produce warehouse, and shelter (warehouse).[157]

211. The remaining terms of both lease agreements were identical. They stipulated *inter alia* that (i) BPV was "the owner of the buildings"; (ii) BPV would pay EEK 60,000 per year; (iii) BPV would "invest into the buildings and land for the processing of wood and development of the port up to [USD] 5,000,000 until 1 January 2001"; and (iv) the leases would continue for 20 years, expiring on 1 October 2017.[158] In addition, both lease agreements provided BPV "a grace period for the payment of rent until 1 January 2001," so long as it made the requisite USD 5 million investment to the covered buildings and structures.[159]

212. The Respondent disputes the authenticity of the lease agreements, stating that they did not surface until 2005 and were obviously backdated.[160] According to the Respondent, there is no evidence on file but for Mr. Rotko's witness testimony that the Claimant became active at the Seaplane Harbor before 1999.[161]

213. On 14 November 1997, six weeks after BPV had allegedly concluded the lease agreements with Verest and Agrin, Estonia brought a lawsuit in Tallinn City Court, claiming that it was the rightful owner of the buildings and structures at Küti 17 and 17a.[162] In the lawsuit, Estonia sought not only a declaration that it was the rightful owner of the buildings located on Küti 17 and 17a, but also an injunction barring their transfer and encumbrance.[163]

214. According to the Claimant, this lawsuit was the first time that Mr. Rotko or any other officers of ELA and BPV knew that the ownership of the Seaplane Harbor might be in dispute.[164] However, the Claimant considered that it "had no reason to believe that those leases were affected in any

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155 Memorial, ¶¶ 83-84; Second Rotko Statement, ¶¶ 23-25 (**CWS-2**); Lease Agreement between BPV and Verest, 1 October 1997 (**C-046**); Lease Agreement between BPV and Agrin, 1 October 1997 (**C-047**).

156 Lease Agreement between BPV and Verest, 1 October 1997, § 1.1 (**C-046**).

157 Lease Agreement between BPV and Agrin, 1 October 1997, § 1.1 (**C-047**).

158 Lease Agreement between BPV and Verest, 1 October 1997, §§ 1.3, 3.1, 7.1, 8.1 (**C-046**); Lease Agreement between BPV and Agrin, 1 October 1997, §§ 1.3, 3.1, 7.1, 8.1 (**C-047**).

159 Lease Agreement between BPV and Verest, 1 October 1997, § 7.2 (**C-046**); Lease Agreement between BPV and Agrin, 1 October 1997, § 7.2 (**C-047**).

160 Rejoinder, ¶¶ 11, 140-147.

161 Rejoinder, ¶ 10.

162 Second Rotko Statement, ¶ 26 (**CWS-2**); August 2000 Judgment, Statement of Claim, 14 November 1997 (**C-050**). *See* below paragraph 284.

163 August 2000 Judgment, Statement of Claim, 14 November 1997, p. 6 (**C-050**).

164 Memorial, ¶ 105; Second Rotko Statement, ¶ 26 (**CWS-2**).

way by Estonia's ownership claim," given that BPV had signed the leases over a month before the claim had been brought.[165]

215. The Claimant states that, in accordance with the contractual obligations under the lease agreements, ELA made a total investment of approximately USD 9.1 million, spending USD 7 million in Port improvements and another USD 2.19 million in the lumber facilities.[166]

2. BPV's Acquisition of Verest and Agrin

216. The Claimant states that when it first took possession of the Port, it observed that the Lennusadam Port required "significant harbor dredging and capital improvements throughout the facilities" in order to reach the Port's optimal efficiency and use.[167] Therefore, before making the necessary expenditures to refurbish the Port, Mr. Rotko "wanted to determine if [he] could obtain ownership of the Port from Verest and Agrin" since he was aware of the risk that Verest might lose its possession of the Port due to its financial instability.[168]

217. According to the Claimant, after consulting with Estonian lawyers about the pending lawsuit against Verest and Agrin brought by the Estonian Government, Mr. Rotko and other corporate officers concluded that the lawsuit "was nothing more than a nuisance complaint" lacking merit.[169] They also relied on a letter written by the Minister of Economy, Mr. Jaak Leimann, the day before the lawsuit was filed, confirming that the process by which the USSR created SEK in 1989 was legitimate and that SEK could be reorganized and liquidated by its board of directors without approval by the Ministry.[170]

218. Consequently, on 23 September 1999, BPV purchased Verest by paying EEK 10,000 (approximately USD 667) for all of Verest's shares and agreeing to assume EEK 526,000 (approximately USD 35,063) in debts that Verest had incurred.[171]

219. In respect of Agrin, Mr. Rotko personally acquired the company through Ella Kaubanduse on 8 December 1999, so that Agrin would become an affiliate of Verest and together they would become part of the ELA Corporate Group.[172] For the acquisition of Agrin's shares, Ella Kaubanduse paid EEK 180,000.[173]

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165 Memorial, ¶ 109.

166 Memorial, ¶ 110; Deloitte Valuation Report, 29 August 2019, pp. 55-56 (**CER-5**).

167 Second Rotko Statement, ¶¶ 27-31 (**CWS-2**).

168 Second Rotko Statement, ¶¶ 31-32 (**CWS-2**).

169 Second Rotko Statement, ¶ 33 (**CWS-2**).

170 Memorial, ¶ 113, *referring to* Letter from Jaak Leimann, Minister of Economy, to Tiina Mitt, Armit Law Office, 13 November 1997 (**C-202**).

171 Memorial, ¶ 114; Share Purchase Agreement between BPV and Verest, 23 September 1999, Articles 2.1, 5.2 (**C-055**).

172 Second Rotko Statement, ¶¶ 32, 34 (**CWS-2**).

173 Share Sale Contract between BPV and Alcedo for the sale of Agrin, 8 December 1999 (**C-057**).

3. Joint Venture Agreement

220. According to the Claimant, on 21 October 1999, Verest, BPV and Agrin entered into an agreement to jointly manage, use, and modernize the Port's buildings located on Küti 17 and 17a "with the goals to build a wood processing complex and a modern port" (the "**JVA**").[174] The Respondent submits that the JVA was very likely backdated. This is because the JVA states in its preamble that Agrin was represented by Mr. Jevgeni Skljarov, a member of its management board. Mr. Skljarov, however, was appointed as a member of Agrin's management board only on 7 December 1999 through a decision of Agrin's sole shareholder OÜ Alcedo KV ("**Alcedo**"), represented by Mr. Enn Laansoo.[175]

221. In the JVA, Verest and Agrin agreed to pay the annual rent for the land (recipient and amount not specified) and authorized BPV to act as a possessor of the Port.[176] In return, BPV agreed to perform and finance all the works necessary to achieve the stated goals, including repairing buildings that were owned and in the possession of Verest and Agrin and obtaining the necessary permits to perform such repair works.[177] The JVA was set to expire on 1 October 2047.[178]

222. On 15 December 2000, ELA Tolli became a fourth partner in the joint venture,[179] where all four partners "worked together to further the overall corporate interests of ELA."[180] While ELA directly controlled the process, Mr. Rotko testified that revenue, profits, and costs were allocated between the four partners pursuant to the JVA.[181] The JVA contains no provision on profit-sharing.

F. THE CLAIMANT'S ACTIVITIES AT THE SEAPLANE HARBOR

1. Reconstruction of Berth No. 38

223. After acquiring Verest and Agrin in 1999, BPV engaged in repairs,[182] dredging, building maintenance, and refurbishment of the Seaplane Harbor, which ELA allegedly funded.[183]

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174 JVA (**C-056**).

175 Counter-Memorial, ¶ 303, *referring to* Shareholder's Decision of Agrin, 7 December 1999 (**R-080**).

176 JVA, §§ 2, 5 (**C-056**).

177 JVA, § 3 (**C-056**).

178 JVA, § 7 (**C-056**).

179 Notice of Arbitration, ¶ 34.

180 Second Rotko Statement, ¶ 38 (**CWS-2**).

181 Second Rotko Statement, ¶ 38 (**CWS-2**).

182 Reply, ¶¶ 498-500. *See* Payment to the company Tamult AS, 18 May 2001 (**C-227**); Payment to the company Civen OÜ, 19 July 2000 (**C-511**); Payment to the company Aldermani Metall OÜ, 5 April 2000 (**C-510**); Payment to the company Plastic Toru OÜ, 18 May 2021 (**C-224**); Payment to the company Treede Rev-2 AS, 23 March 2001 (**C-228**).

183 Reply, ¶¶ 491, 493.

224. On 17 December 1999, the Estonian Marine Inspectorate issued building permit No. 48 to BPV for the "reconstruction of the berth No. 38 of port Lennusadam according to the project devised by GT PROJECT and dredging operations."[184] BPV obtained additional permits from the Estonian Marine Inspectorate for dredging.[185]

225. On 14 February 2000, BPV applied to the Maritime Administration to obtain authorization with respect to the reconstruction works of berth No. 38.[186] On 29 February 2000, the Maritime Associate wrote that the submitted documents were insufficient and asked for the following documents: "detailed plan of Seaplane Harbor, port basin allocation, land allocated for berth expansion and explanation letter of reconstruction technical description".[187]

226. On 21 July 2000, the Tallinn City Court issued a court ruling, prohibiting Verest, B&E and Agrin from changing the composition of the Seaplane Harbor, constructing new buildings and structures, and performing any kind of construction works.[188] Verest and Agrin appealed to the Tallinn Circuit Court, asserting that the repairs that were done were made in compliance with the Planning Act, which stated that the owner had the responsibility to eliminate a hazard if the building had become unsafe.[189] However, the Tallinn Circuit Court found on 28 July 2000 that the repairs did not fit within the urgent category of the Planning Act and issued no permit in this regard.[190]

227. On 1 August 2000, BPV sent a letter to the Minister of Environment, stating that, upon a review of court files, it became aware that Tallinn's Deputy Mayor Priit Vilba and the Minister of Justice Märt Rask had requested to revoke building permit No. 48 of 17 December 1999 and that B&E's Director, Mr. Viktor Perevalov, similarly requested to prohibit Agrin, Verest and BPV from accessing the port basin.[191] BPV requested that the Ministry of Environment maintain the validity of permit No. 48 for the reconstruction of berth No. 38 on the ground that the reconstruction "started in a timely manner and there was no false information submitted to obtain the permit."[192] BPV also considered that Mr. Perevalov had no legal ground to prevent Agrin, Verest and BPV from reconstructing berth No. 38 because, pursuant to the 26 September 1997 agreement between

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184 Estonian Marine Inspectorate Permit No. 48 to BPV, 17 December 1999 (**C-093**).

185 Estonian Marine Inspectorate Permit No. 41 to BPV, 1 November 1999 (**C-089**); Estonian Marine Inspectorate Permit No. 47 to BPV, 24 November 1999 (**C-091**); Estonian Marine Inspectorate Permit No. 25 to BPV, 17 December 1999 (**C-092**).

186 Rejoinder, ¶ 273. The application has not survived to date, but according to the Respondent, its date is evident from Maritime Administration Letter to BPV re Berth No. 38 Reconstruction Coordination, 29 February 2000 (**C-512**).

187 Maritime Administration Letter to BPV re Berth No. 38 Reconstruction Coordination, 29 February 2000 (**C-512**).

188 Reply, ¶ 502; August 2000 Judgment, Decision, 21 July 2000 (**C-064**).

189 Reply, ¶ 504; Verest and Agrin Appeal to 21 July 2000 Tallinn City Court Decision, 28 July 2000 (**C-428**).

190 Reply, ¶ 504.

191 BPV Letter to Minister of Environment re Berth No. 38 Reconstruction, 1 August 2000 (**C-468**).

192 BPV Letter to Minister of Environment re Berth No. 38 Reconstruction, 1 August 2000, p. 2 (**C-468**).

B&E and Agrin, Agrin possessed the right of ownership to the buildings and structure located at Küti 17, as well as the right of use for the land underneath them.[193]

228. In response, the Minister of Environment Kranich clarified the scope of permit No. 48, explaining that it only covered the extent and conditions for the special use of water pursuant to the Water Act and that if the special use of water is accompanied by construction, a building permit issued by the local government pursuant to Planning and Construction Act must be obtained in addition to the permit for the special use of water.[194] Taking into account the complaints submitted against BPV's activities, the Minister further ordered an independent auditor inspection to verify whether BPV's conditions for the special use of water had been met and submit a report by 1 September 2000.[195]

229. Considering that the Tallinn Circuit Court decision of 28 July 2000 did not apply to BPV, BPV sent a letter to the Deputy Mayor of Tallinn on 5 September 2000, (i) referring to the cooperation agreement between the City of Tallinn and BPV to work together to "transfer[] seaplane hangars to the City of Tallinn"; (ii) noting the urgency of the roof repairs and its willingness to invest in the restoration of the Seaplane Hangar; and (iii) requesting a construction permit to restore the roof of the Seaplane Hangar.[196]

230. On 23 April 2001, the Tallinn Sustainable Development Planning Office issued a report, finding that the construction of berths Nos. 38 and 38A was complete, that there was no active construction on the berths, and that the Seaplane Hangar was "in a technically poor condition."[197]

231. In carrying out the dredging and repairs at the Seaplane Harbor, ELA and BPV also purchased new equipment, including, *inter alia*, cranes, lifts, railway locomotive, spare parts, and auxiliary equipment.[198]

2. Port Operations

232. BPV provided a variety of services at the Seaplane Harbor, such as performing ship repairs, bunkering operations, storage services and office rentals.[199]

233. The Claimant's business plan with respect to the operations of the Seaplane Harbor (the "**Port Plan**") was prepared for use by third-party investors and was shared with municipal authorities of the City of Tallinn with a goal "to ensure the Lennusadam Port's efficient utilization through

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193 BPV Letter to Minister of Environment re Berth No. 38 Reconstruction, 1 August 2000, p. 3 (**C-468**).

194 Letter No. 20-2/2340 of the Ministry of Environment to BPV, 3 August 2000 (**R-136**).

195 Letter No. 20-2/2340 of the Ministry of Environment to BPV, 3 August 2000 (**R-136**).

196 Reply, ¶¶ 506-507; BPV Letter to Deputy Mayor of Tallinn re Seaplane Hangar, 5 September 2000 (**C-427**).

197 Instrument re Inspection of Berths 38 and 38A, 23 April 2001 (**C-472**).

198 Reply, ¶ 526; Third Rotko Statement, ¶ 133 (**CWS-4**). *See* Payment to the company EM-Serv, 2 March 2000 (**C-216**); Payment to the company Eesti Vesiehituse AS, 15 June 2000 (**C-514**); Payment to the company C.C.M.L, 9 June 2000 (**C-214**).

199 Memorial, ¶¶ 100-103.

as much specialization and vertical integration as possible."[200] According to the Claimant, it was developed in consultation with the City of Tallinn based on ELA's discussions with the Deputy Mayor of Tallinn at a meeting in August 2000.[201]

234. The overall Port Plan was to obtain cargo on ELA's rail trucks, rail tanks and other transportation containers, as it had already been doing from 1994-1999.[202] The Plan consisted of four steps, mainly divided into construction of the Port (including the berths and the Seaplane Hangar) and investment in new equipment, such as cranes, railways and forklifts.[203]

235. To enhance efficiency at the Port, the Claimant initiated negotiations with the producer of natural gas generators for the Port to secure competitive electricity costs and purchased additional equipment for better cargo handling.[204]

236. Observing that the railway siding, which Agrin allegedly acquired from B&E, could be viable and work for the Port, BPV and the Estonian Railways entered into a contract, where BPV would finish the construction of the rail switch and the connecting road.[205] Once repairs on two railway branches were complete, BPV considered that the existing infrastructure was insufficient to handle the cargo volume under the Port Plan.[206] Accordingly, it sought to construct a third railway branch on the Old City Port and liaised with the Estonian Railways to begin the reconstruction.[207] After the reconstruction of the railway branch was completed, the Estonian Railways confirmed that it would permit the temporary use of BPV's railway branch on Küti 17.[208]

237. In its letter dated 12 January 2004, the Tallinn Sustainable Development and Planning Office informed BPV that railway tracks from Kopli Cargo Station to the Old City Port were "unviable and set to be eliminated" and that the railway tracks from the Tallinn Old City Port would also be eliminated by 2005 based on the Tallinn City Master Plan and the PRCA General Plan.[209]

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200 Third Rotko Statement, ¶¶ 125, 130 (**CWS-4**), *referring to* Port Plan (**C-142**).

201 Third Rotko Statement, ¶¶ 142-145 (**CWS-4**).

202 Third Rotko Statement, ¶¶ 130-131 (**CWS-4**).

203 Port Plan, p. 4 (**C-142**).

204 Third Rotko Statement, ¶¶ 132, 137 (**CWS-4**).

205 Reply, ¶¶ 700-702; Third Rotko Statement, ¶¶ 284-285 (**CWS-4**); Contract between BPV and Estonian Railways, 18 May 2000 (**C-337**); Agreement between BPV and Estonian Railways, 12 December 2000 (**C-342**).

206 Reply, ¶¶ 704-708.

207 Reply, ¶¶ 708-712; BPV Letter to Estonian Railways re Railway Branch, 11 May 2000 (**C-402**); BPV Letter to Estonian Railways re Renewing Conditions, 13 July 2000 (**C-447**).

208 Estonian Railways Letter to BPV re Wagons, 9 November 2000 (**C-450**). On 27 January 2004, the Estonian Railway Inspectorate issued railway registration certificate No. 82 to BPV, confirming the three railways' tracks located at Küti 17 in the national registry, though about three weeks later, BPV was asked to return the certificate for a replacement because it was non-compliant to decree No. 60 dated 2 September 2003. *See* Reply, ¶¶ 719-720; Estonian Railway Inspectorate Permit No. 82 to BPV, 27 January 2004 (**C-106**); Letter from the Director of the Railway Inspectorate to BPV, 17 February 2004 (**C-453**).

209 Letter from Tallinn's Planning Office to BPV re Railway Branch between Kopli Cargo Station and Old City Port, 12 January 2004 (**C-451**).

238. In December 2004, the Tallinn Sustainable Development and Planning Office informed Agrin and BPV respectively of the adoption of the PRCA General Plan by the Tallinn City Council via Regulation No. 54.[210] BPV, Verest and Agrin, as the purported owners of the Seaplane Harbor, filed complaints to the Tallinn Administrative Court to request for the annulment of Regulation No. 54.[211] The Tallinn Administrative Court rejected the application, determining that the companies did not have the right to request the annulment of Regulation No. 54, which was based on the protection of the interest of the State.[212]

3. "Joint Venture" with the City of Tallinn

239. On 17 August 2000, Mr. Rotko met with the Mayor of Tallinn to discuss the Port Plan and the development of the Seaplane Harbor.[213] According to the minutes of the meeting, the Mayor promised to make efforts to municipalize Küti 15 and Küti 17, *i.e.*, to have the State transfer the ownership of land and buildings to the City, and to make a proposal to the Tallinn City Council to grant BPV the right of superficies (a registered right to use the land) for 30 years after the City obtained the land and the buildings to municipal ownership.[214] In return, BPV agreed to help with a faster transfer of ownership of the Seaplane Harbor to the City and to provide port services and activities in accordance with the right of superficies.[215]

240. According to the Claimant, the meeting of 17 August 2000 amounted to a 30-year-long "joint venture" to collaboratively develop the Seaplane Harbor based on the Port Plan.[216] The terms of the agreement, the Claimant asserts, made clear that the City of Tallinn would take care of the land use regulation conformity and local building permits, as well as expand the capacity of the Seaplane Harbor in exchange for the transfer of the Seaplane Harbor possessed by BPV.[217] Moreover, the Claimant alleges that President Meri's meeting with Mayor Mõis in May 2001 changed the City of Tallinn's position on the Lennusadam Port. Thereafter, President Meri

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210 Tallinn City Council, Regulation No. 54, 9 December 2004 (**C-479**); Letter from Tallinn City Council Chairman to Agrin, 10 December 2004 (**C-480**); Letter from Tallinn's Planning Office to BPV, 14 December 2004 (**C-481**).

211 Reply, ¶¶ 765-772; Verest complaint against Harju County governor Orm Valtson, 18 July 2004 (**C-501**); Agrin complaint against Harju County governor Orm Valtson, 18 July 2004 (**C-502**); BPV complaint against Harju County governor Orm Valtson, 18 July 2004 (**C-503**); BPV complaint against Regulation No. 54 re. adoption of PRCA General Plan, 15 January 2005 (**C-504**).

212 Tallinn Administrative Court Decision in the complaints of Verest, BPV, Agrin against Harju County governor, 8 February 2005 (**C-507**). *See also* Administrative Court Decision in the complaints of Verest, Agrin, BPV against Harju County governor, 9 March 2005 (**C-508**).

213 Third Rotko Statement, ¶¶ 146-147 (**CWS-4**).

214 Meeting Protocol with BPV and Mayor of Tallinn, 17 August 2000 (**C-067**).

215 Meeting Protocol with BPV and Mayor of Tallinn, 17 August 2000 (**C-067**).

216 Reply, ¶¶ 691-692, 697, 779; Third Rotko Statement, ¶¶ 142-154 (**CWS-4**). *See also* Hearing Transcript, Day 5, p. 5:9-24.

217 Reply, ¶¶ 779, 783. *See also* Hearing Transcript, Day 5, p. 6:18-20.

ordered the end of the "joint venture" between the Claimant and the City of Tallinn, and the Tallinn City Council adopted the PRCA General Plan.[218]

241. The Respondent disagrees, arguing that any future plans for the Seaplane Harbor were expressly made conditional upon the government agreeing to give up its rights to Küti 15 and 17 and that none of the conditions expressed during the meeting were binding.[219] Pointing out that the Port Plan was not attached to the minutes, the Respondent further disputes that the "joint venture" was based on the Port Plan.[220] Consequently, for the Respondent, the 17 August 2000 meeting could not have been construed by the Claimant "as a license to build whatever it wants at the Seaplane Harbor without building permits, or as a retroactive approval of prior illegal construction."[221]

242. In addition, the Respondent clarifies that the President's visit to the Harbor on 5 June 2000 predated the "joint venture" as recorded in a letter dated 27 June 2000.[222] Specifically, the Respondent notes that the PRCA General Plan was based on the Tallinn City Master Plan, which was on display for public consultation since 1999.[223]

4. Cultural Heritage Restrictions

243. As part of the buffer zone of the Tallinn Cultural Heritage Area, the entire area of the Seaplane Harbor was subject to the Heritage Conservation Act, which prohibited construction works in the buffer zone or on immovable cultural monuments.[224]

244. On 11 July 1996, the National Heritage Board warned Verest that under the Heritage Conservation Act, construction works in the buffer zone and the Seaplane Hangar were prohibited unless a prior permission was obtained from the National Heritage Board.[225] Noting that the buildings and the Seaplane Hangar were state properties in Verest's possession and use, the National Heritage Board requested that Verest "comply with the obligations established for the owner (possessor) in accordance with section 16 of the Heritage Conservation Act" and also "require[d] commercial lessees to comply with these obligations."[226]

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218 Reply, ¶¶ 721-726, 787; "President Meri Was Not Satisfied with the Explanations of Mõis", Baltic News Service, 22 May 2001 (**C-071**).

219 Rejoinder, ¶¶ 249, 252. *See also* Hearing Transcript, Day 1, p. 124:11-21.

220 Rejoinder, ¶ 250.

221 Rejoinder, ¶ 257.

222 Rejoinder, ¶ 248, *referring to* Letter of the President of Estonia, Lennart Meri, to the Minster of Environment, Heiki Kranich, 27 June 2000 (**C-208**)

223 Rejoinder, ¶ 248. *See* Tallinn City Planning Office, Procedures for Preparing the Tallinn Comprehensive Plan 2010, 2000 (**R-123**).

224 Counter-Memorial, ¶¶ 380-381; Heritage Conservation Act, 9 March 1994, sections 5, 23 (**RLA-082**). *See also* Map of the Building Conditions of the PRCA General Plan (**R-111**); Entry under Registration No. 2628 in the Register of Cultural Monuments – Settlement Site, 2020 (**R-110**).

225 Letter No. 620 from National Heritage Board to State Executive Office and to Verest, 11 July 1996 (**R-112**).

226 Letter No. 620 from National Heritage Board to State Executive Office and to Verest, 11 July 1996 (**R-112**).

245. Verest obtained permits from the Tallinn Heritage Conservation Department on 28 July 2000 and 25 October 2000, which approved repairs and conservation works, and restoration of monuments and buildings located on the heritage conservation area at the Seaplane Harbor.[227] The permits were valid until 31 November 2000 and 19 January 2001 respectively.[228]

5. The Lumber Plan

246. The Claimant's business plan based on Agrin's woodworking facility at the Seaplane Harbor and BPV's export market work (the "**Lumber Plan**") was developed on 24 October 2000.[229] The Lumber Plan was based on the pricing of log supply from Russia involving the following steps: (i) Faktotum (a Russian company with which BPV commenced a joint venture in 1999[230]) bought logs for rough sawing and initial drying at competitive pricing; (ii) it used rail bulk lumber carriers to transport to Agrin's lumber facilities; (iii) in crossing the Estonian border, ELA Tolli handled the customs processing; (iv) timber, when it arrived at Agrin's facility, was sent to be kiln-dried and was stored; (v) once BPV had an export customer, Agrin processed unedged timber into lumber under customer specification; and (vi) BPV and ELA conducted export sales.[231]

247. The companies were "vertically integrated, allowing for economies of scale and efficient procurement, sales, and marketing."[232] In the process, "Agrin earned a small fee for its work with the profit going either to BPV or ELA."[233]

248. In total, the wood business handled 3,500 cubic meters of wood per year, generating USD 325,000 in annual revenue.[234]

249. When BPV was denied the customs authorizations and the port passport, it was unable to ship any lumber out of the Seaplane Harbor.[235] In addition, the raw materials (wood from Faktotum) became more expensive when they were delivered to the lumber facilities at the Seaplane Harbor due to the lack of customs facilitation.[236]

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227 Reply, ¶¶ 258-259, 515-516; National Heritage Board Permit No. 85 to Verest, 28 July 2000 (**C-095**); National Heritage Board Permit No. 130 to Verest, 25 October 2000 (**C-096**).

228 National Heritage Board Permit No. 85 to Verest, 28 July 2000 (**C-095**); National Heritage Board Permit No. 130 to Verest, 25 October 2000 (**C-096**).

229 Third Rotko Statement, ¶ 159 (**CWS-4**); Lumber Plan (**C-143**).

230 Memorial, ¶ 94; Agreement between ELA USA and Faktotum Ltd, 1 November 1999 (**C-083**); Joint Activities Contract between ELA USA and Faktotum, 2 February 2000 (**C-084**).

231 Third Rotko Statement, ¶¶ 71-72, 163, 174-175 (**CWS-4**).

232 Third Rotko Statement, ¶ 174 (**CWS-4**).

233 Third Rotko Statement, ¶ 73 (**CWS-4**).

234 Memorial, ¶ 99.

235 Reply, ¶ 830.

236 Reply, ¶ 831; Third Rotko Statement, ¶ 335 (**CWS-4**).

G. EVENTS CONCERNING THE USE OF PORT FROM 1997 TO 2006

1. Relocation of the Icebreaker *Suur Tõll*

250. On 5 December 2003, the Claimant sent a letter to the Ministry of Environment noting that news articles reported that Estonia's Maritime Museum was planning to relocate the historical icebreaker *Suur Tõll* (or the "*Great Tõll*") from the center of Tallinn to berth 36A of the Port.[237] The Claimant asserted that given that berth 36A was recognized by the Maritime Administration "as unsafe and prone to accidents […] placing *Great Tõll* [was] categorically prohibited before the prior removal of any unsafe conditions."[238] The Claimant further noted that "the falling of the berth because of the pressure from the icebreaker, would violate the rights of the owners of other berths to use, possess and dispose of their berths as it would close the canal of the port and the vessels would not access in or out of the port."[239]

251. On 26 January 2004, the *Suur Tõll* icebreaker was relocated to berth 36A of the Port.[240] New reports recorded that after the conclusion of a three-year lease contract in its former city center location, the Maritime Museum needed to place the icebreaker in a new site for budgetary reasons.[241] The following picture shows the exact location in which the icebreaker was positioned:[242]

237 Letter from the Claimant to the Ministry of Environment, 5 December 2003 (**C-126**).

238 Letter from the Claimant to the Ministry of Environment, 5 December 2003 (**C-126**).

239 Letter from the Claimant to the Ministry of Environment, 5 December 2003 (**C-126**).

240 ERR, "The *Suur Tõll* Is Transported to the Seaplane Harbor", 25 January 2004 (**R-161**).

241 DELFI, "The *Suur Tõll* Will Be Moved To a More Favorable Area", 6 January 2004 (**R-160**).

242 Aerial Photo of the Position of the Icebreaker *Suur Tõll* at the Seaplane Harbor, 3 June 2004 (**R-158**).

2. Claimant's Applications to Obtain Administrative Permits

a) Application to obtain a Port Passport

252. In 1993, Verest's port passport was registered with the Estonian Maritime Administration.[243] Verest was the possessor of the (i) berths Nos. 38, 38A, and 39; (ii) open warehouse; (iii) portal crane; and (iv) closed warehouse, which was jointly possessed with AS Esman and GT.[244] Verest maintained the port passport that permitted customs clearance at the Lennusadam Port.[245]

253. In his witness statement, Mr. Aleksander Rotko, the Claimant's sole shareholder and chief executive officer, indicates that in 1999, the Estonian Maritime Administration informed BPV that the company's Port Passport was not recognized under the Port Act of 1997, as amended on 1 January 2001 (the "**Port Act**").[246]

254. As part of the process to obtain a new Port Passport, on 19 September 2001, BPV requested the Ministry of Transportations and Communications (the "**Ministry of Transport**") to assign the border points of the Port basin.[247] The Claimant explains that such border points identified the area that was to be used for the operation of the Port and that its delimitation was necessary to obtain a Port Passport.[248]

255. On 16 October 2001, the Ministry of Transport rejected BPV's request, stating that it did "not comply with […] the Port Act because the coordination of the city council of the local government is missing."[249]

256. On 17 December 2001, the Claimant requested the Tallinn Sustainable Development and Planning Office ("**Tallinn's Planning Office**") to assign the borders of the Port basin.[250]

257. On 10 January 2002, the Tallinn's Planning Office, informed BPV that pursuant to the Port Act its request could not be granted without a border proposal from the Minister of Transport.[251]

258. On 9 May 2002, the Ministry of Transport advised BPV that—according to a proper construction of the Port Act and the former practice of the Tallinn City Council—port basin borders are

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243 Lennusadam Port Passport, 7 October 1993 (**C-201**).

244 Lennusadam Port Passport, 7 October 1993 (**C-201**).

245 Reply, ¶ 531; Claimant's Answers to Tribunal Questions, ¶¶ 2-5.

246 Second Rotko Statement, ¶ 71 (**CWS-2**).

247 Letter from BPV to the Minister of Transport and Communications, 19 September 2001 (**C-551**).

248 Reply, ¶¶ 577, 586, *referring to* Letter from the Minister of Transport and Communications to BPV, 19 November 2002 (**C-465**).

249 Letter from the Minister of Transport and Communications to BPV, 16 October 2001 (**C-461**).

250 Letter from Tallinn's Planning Office to BPV, 10 January 2002 (**C-462**).

251 Letter from Tallinn's Planning Office to BPV, 10 January 2002 (**C-462**).

assigned by the Estonian government in accordance with the Minister of Transport's proposal, but only after "municipal council coordination".[252]

259. Thereafter, BPV submitted to the Tallinn City Council an application to coordinate the Port basin borders, which the Council did in the form of a draft legislation.[253] However, the Tallinn City Government decided not to discuss such draft because, according to the Port Act, private parties do not have the right to apply for an assignment of port basis borders, which is a public law task.[254]

260. On 4 November 2002, the Ministry of Transport reiterated that it could not propose the Port basin borders without having beforehand a municipal council coordination. [255] The Ministry further reiterated that this was in line with the Port Act and previous practice of the Tallinn City Council.[256]

261. On 23 December 2003, BPV requested the Ministry of Economic Affairs and Communications ("**Ministry of Economic Affairs**") to coordinate port basin border points for the Port on the basis of the Maritime Safety Act and the Port Act.[257]

262. On 28 January 2003, the Ministry of Economic Affairs rejected BPV's request on the basis that "BPV [was] not the possessor of the port, therefore [it did] not have the authority to apply for Seaplane Harbor port basin."[258] In this respect, the Ministry noted that to its knowledge "the possessor of berths on Seaplane Harbor 'L' shaped pier and the 28-hectare property located on port territory is the state, and the possessor is Ministry of the Environment."[259]

263. On 24 March 2004, Verest requested the Ministry of Economic Affairs to coordinate port basin border points for the Port.[260] Verest asserted that BPV was the possessor of the Port pursuant to section 33(1) of the Law of Property Act.[261]

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252 Letter from the Minister of Transport and Communications to BPV, 9 May 2002 (**C-463**).

253 Letter from the Tallinn City Office to BPV, 11 October 2002 (**C-464**).

254 Letter from the Tallinn City Office to BPV, 11 October 2002 (**C-464**).

255 Letter from the Minister of Transport and Communications to BPV, 19 November 2002 (**C-465**).

256 Letter from the Minister of Transport and Communications to BPV, 19 November 2002 (**C-465**).

257 Letter from BPV to the Ministry of Economics and Communications re Port Basin Border Coordination, 23 December 2002 (**C-426**).

258 Letter from the Ministry of Economic Affairs and Communications to BPV, 28 January 2003 (**C-466**).

259 Letter from the Ministry of Economic Affairs and Communications to BPV, 28 January 2003 (**C-466**).

260 Letter from Verest to the Ministry of Economic Affairs and Communications, 24 March 2004 (**C-467**).

261 Letter from Verest to the Ministry of Economic Affairs and Communications, 24 March 2004 (**C-467**).

264. After Verest asked on two additional occasions for a response to its communication of 24 March 2004,[262] the Ministry of Economic Affairs advised that it had sent an inquiry to the Ministry of Justice on the subject matter of that letter.[263]

265. On 15 July 2004, the Ministry of Economic Affairs informed BPV that until the conclusion of the ownership dispute before the Estonian courts regarding the ownership of the buildings and structures at the Port it was not able to assign the Port basin borders.[264]

266. Aside from BPV's application for the assignment of the basin borders at the Port, Mr. Rotko explains that BPV could not obtain a new Port Passport as it was not able to provide the geographic boundary information from Riigi Kinnisvara ("**Riigi**"), which was one of the applicable requirements.[265] The Claimant asserts that although BPV requested Riigi to provide its coordinating information from 2003 to 2005, the latter company did not provide any response.[266]

b) Application to obtain Authorization to operate as a Customs Zone

267. In April 2001, BPV submitted to the Tallinn Customs Inspectorate and the Seaplane Harbor Customs Control Zone an application to obtain authorization to operate the Port as a customs control zone.[267]

268. On 25 July 2001, a Tallinn customs inspector confirmed that the Port was "in compliance with custom's requirements for Customs control zone opening."[268]

269. On 13 June 2002, in response to a communication submitted by BPV, the Ministry of Finance stated that it was outside of its competence to grant an authorization to open a customs control zone.[269] Such authority, the Ministry of Finance noted, was held by the respective Customs Board.[270] In addition, the Ministry of Finance noted that the complications with the customs control zone at the Port were "due to ownership issue of port waters."[271] The Ministry added that, in its view, this issue should not prevent BPV from obtaining a customs control zone permit and

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262 Email from Verest to the Ministry of Economic Affairs and Communications, 26 April 2004 (**C-473**); Letter from Verest to the Ministry of Economic Affairs and Communications, 7 May 2004 (**C-475**).

263 Letter from the Ministry of Economic Affairs and Communications to Verest, 10 May 2004 (**C-405**).

264 Letter from the Ministry of Economic Affairs and Communications to BPV, 15 July 2004 (**C-477**).

265 Second Rotko Statement, ¶¶ 72-73 (**CWS-2**).

266 Second Rotko Statement, ¶¶ 72-73 (**CWS-2**).

267 BPV Application for the Customs Control Zone Coordination, 4 April 2001 (**C-265**); BPV Application for the Customs Control Zone of Seaplane Harbor, 27 April 2001 (**C-266**).

268 Legal Instrument No. 31 re. Eliminating Shortcomings, 25 July 2001 (**C-267**).

269 Letter from Ministry of Finance to BPV, 13 June 2002 (**C-268**).

270 Letter from Ministry of Finance to BPV, 13 June 2002 (**C-268**).

271 Letter from Ministry of Finance to BPV, 13 June 2002 (**C-268**).

that the Customs Board should consider "issuing a temporary permit during which the ownership issue could be resolved."[272]

270. On 12 August 2002, the Estonian Customs Board informed BPV and Verest that "[a]s the Seaplane Harbor territory is currently in state's ownership it [was] necessary to receive the approval from the representative of the state – Ministry of Justice in order to designate customs control zone."[273]

271. Following two communications submitted by BPV to the Ministry of Justice, on 14 August 2002 and 14 January 2004, the latter refused to coordinate a temporary customs control zone.[274] The Ministry asserted that there was an ongoing civil procedure in which Estonia was claiming the ownership of the buildings at the Port and that to the best of its knowledge "there is unlawful use of state property at the Seaplane Harbor." [275]

272. According to the Claimant, the loss of a customs zone resulted in operational losses of revenue for ELA Tolli, Verest, Agrin, and BPV.[276] To mitigate the revenue impact, ELA sold its equipment and ELA Tolli turned to alternative income sources, such as managing crane rentals at the Port.[277]

H. PROCEEDINGS ARISING OUT OF THE PARTIES' DISPUTE

1. Civil Proceedings

a) The relevant Civil Law Legislation

273. This subsection sets out the most important codes and provisions in the context of the civil law proceedings arising from the Parties' disputes.

i. Civil Code

274. The provisions on the validity of transactions of the Civil Code of the Estonian Soviet Socialist Republic of 12 June 1964 ("**Civil Code**") remained in force until 1 September 1994. Section 51(1) and section 62 of the Civil Code reads as follows:

> Section 51. Invalidity of a legal act which is not in accordance with the requirements of the law

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272 Letter from Ministry of Finance to BPV, 13 June 2002 (**C-268**).

273 Letter from Estonian Customs Board to Verest and BPV, 12 August 2002 (**C-269**).

274 Letter from Ministry of Justice to BPV, 23 September 2002 (**C-270**); Letter from the Ministry of Justice to BPV, 21 January 2004 (**C-271**).

275 Letter from Ministry of Justice to BPV, 23 September 2002 (**C-270**); Letter from the Ministry of Justice to BPV, 21 January 2004 (**C-271**).

276 Reply, ¶¶ 821-822; Claimant's Answers to Tribunal Questions, ¶ 40.

277 Reply, ¶¶ 826, 835.

> (1) A legal act which is not in accordance with the requirements of the law is invalid.[278]
>
> Section 62. The time from which a legal act is considered invalid
>
> (1) A legal act which is declared invalid is considered invalid from the time at which it was concluded.
>
> (2) However, if the content of the legal act indicates that it may be terminated only for the future, the effect of the legal act which has been declared invalid terminates for the future.[279]

275. Section 156 of the Civil Code set out the possibility to acquire assets in good faith from a person who is not the owner provided that the real owner did not lose the relevant asset against its will.

> Section 156. Reclaiming the thing from an acquirer in good faith
>
> (1) If a thing has been acquired for remuneration from a person who was not entitled to dispose of it, which the acquirer was not aware of and should not have been aware of (a person acting in good faith), the owner has the right to reclaim the thing only if the owner, or the person to whom the owner had transferred possession of the thing, had lost the thing or if the thing had been stolen or dispossessed from them against their will in any other manner.[280]

ii. Ownership Act

276. The Ownership Act of 13 June 1990 entered into force on 1 July 1990. Section 7 provides in the material part that:

> Section 7. Exercise of the Right of Ownership
>
> (1) A property owner possesses, uses and disposes of property belonging to him independently, and he is entitled to perform any actions with this property that are not contrary to law.
>
> (2) A property owner may alienate his property as well as transfer it to the possession, use and disposal of other persons without alienation.
>
> (3) Other persons exercise rights belonging to the property owner within limits foreseen by law or established by the property owner. [281]

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278 Civil Code, section 51(1) (**RLA-051**). In the Counter-Memorial, ¶ 199, and in the Rejoinder, ¶ 104, the Respondent provided a slightly different translation of section 51(1): "Any transaction concluded in violation of law is invalid."

279 Civil Code, section 62(1)-(2) (**RLA-051**). In the Counter-Memorial, ¶ 199, the Respondent provided a slightly different translation of section 62(1): "A transaction that has been declared invalid is deemed invalid as of its inception."

280 Civil Code, section 156 (**RLA-051**).

281 Ownership Act, 1 December 1993, section 7(2)-(3) (**RLA-065**). In the Counter-Memorial, ¶ 270, the Respondent translated section 7(3) slightly differently: "Third persons exercise the rights of the owner only to the extent provided for by law or as foreseen by the owner."

iii. Commercial Lease Act

277. The Commercial Lease Act of 26 September 1990, also referred to as Rental Act, entered into force on 1 October 1990. Its section 5(1) provides that:

> Section 5. Parties to a commercial lease contract
>
> (1) The lessor is the owner or title-compliant possessor of the property to be let. The title-compliant possessor may be the lessor where it is provided for in an Act of the Republic of Estonia, in a contract or in the foundation document of the title-compliant possessor. [282]

iv. Law of Property Act

278. The Law of Property Act of 9 June 1993 entered into force on 1 December 1993. Its purpose is described in section 1 as follows:

> Section 1. Purpose of Act
>
> The Law of Property Act provides for real rights, their content, creation and extinguishment and is the basis for other laws regulating real rights.

279. Section 5 defines the rights referred to under section 1:

> Section 5. Real rights
>
> (1) Real rights are ownership (right of ownership) and restricted real rights: servitudes, real encumbrances, right of superficies, right of pre-emption and right of security.
>
> (2) The law may provide for other real rights in addition to those specified in subsection (1) of this section.

280. Section 34 differentiates between legal and illegal possession:

> Section 34. Legal and illegal possession
>
> (1) Possession is legal or illegal depending on whether or not it is founded on a legal basis.
>
> (2) Possession shall be deemed legal until the contrary is proved.[283]

281. Section 35 distinguishes good faith from bad faith possession as follows:

> Section 35. Possession in good faith and bad faith
>
> (1) Possession is in good faith if a possessor does not or need not know that the possession by the possessor lacks a legal basis or that another person has a greater right to possess the thing.
>
> (2) Possession is in bad faith if a possessor knows or must know that the possession by the possessor lacks a legal basis or that another person has a greater right to possess the thing.
>
> (3) Possession shall be deemed in good faith until the contrary is proved.[284]

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282 The Rental Act, 1 October 1990, section 5(1) (**CLA-186**). The Respondent provided a slightly different translation of section 5(1) in the Counter-Memorial, ¶ 266: "A lessor is the owner or title-bearing possessor of the asset being leased. The title-bearing possessor may be a lessor if it is stipulated in the legislation of the Republic of Estonia, contract or in the founding document of the title-bearing possessor."

283 The Law of Property Act, RT I 2003, 13, 64 , section 34 (2) as at 1 July 2003 (**CLA-188**).

284 The Law of Property Act, RT I 2003, 13, 64, section 35 (3) as at 1 July 2003 (**CLA-188**).

282. Section 80 provides that:

> Section 80. Reclamation of thing from illegal possession
>
> (1) An owner has a right of claim against anyone who possesses a thing of the owner without legal basis.
>
> (2) The claim of the owner shall be for recognition of the right of ownership and reclamation of the thing from illegal possession into the owner's possession.[285]

283. Section 95 regulates acquisition in good faith as follows:

> Section 95. Acquisition in good faith
>
> (1) A person who has acquired a thing by delivery in good faith is the owner of the thing as of the time of receipt of the thing into the person's possession even if the transferor was not entitled to transfer ownership.
>
> (2) An acquirer is in bad faith if the acquirer knew or should have known that the transferor was not entitled to transfer ownership.
>
> (3) Acquisition pursuant to subsection (1) of this section is not effected if a thing was stolen, lost or dispossessed in any other manner from the owner against the will of the owner. This subsection does not apply to money or bearer securities or to a thing acquired by public auction.[286]

b) Civil Proceedings concerning the Ownership of Buildings and Structures at the Port

i. 1997-2000 Proceedings before the Tallinn City Court

284. On 14 November 1997, Estonia filed a lawsuit against Verest and B&E in the Tallinn City Court, seeking the recognition of its alleged ownership rights over the buildings and structures at the Port[287] and an order to recover such properties from the alleged unlawful possession by the defendants.[288] Agrin was included amongst the defendants on 3 December 1997.[289]

285. On the same date, the Tallinn City Court granted the Respondent's interim request to enjoin Verest and Agrin from transferring or otherwise encumbering the buildings and properties at the Port.[290] On 21 July 2000, the Tallinn City Court granted a further interim request by the

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285 The Law of Property Act, RT I 1993, 39, 590, section 80, as at 1 July 2003 (**CLA-188**).

286 The Law of Property Act, 9 June 1993, section 95(3) as at 17 February 1999 (**RLA-052**). The Claimant provided a slightly different translation of section 95(3) (**CLA-188**): "Acquisition pursuant to subsections (1) – (2) of this section is not effected if a thing was stolen, lost or dispossessed in any other manner from the owner against the will of the owner. If the owner was an indirect possessor, the same applies in case the thing is stolen, lost or dispossessed in any other manner from the direct possessor against the will of the direct possessor. This subsection does not apply to money or bearer securities or to a thing acquired by public auction."

287 In particular, in the address Küti 17 and 17A, Tallinn City, Estonia. *See* August 2000 Judgment, Statement of Claim, 14 November 1997, p. 1 (**C-050**).

288 August 2000 Judgment (**C-068**), Statement of Claim, 14 November 1997 (**C-050**).

289 August 2000 Judgment, p. 3 (**C-068**).

290 August 2000 Judgment, Decision, 3 December 1997 (**C-051**).

Respondent to prohibit any change in the composition of the buildings or structures and the construction of any new buildings or structures.[291]

286. By judgment of 25 August 2000, the Tallinn City Court upheld Estonia's claims against Verest, B&E and Agrin (the "**August 2000 Judgment**").[292] The City Court found that land registry files confirmed that up to July 1940 the buildings and structures at the Port were owned by Estonia.[293] The City Court considered that although in July 1940, the disputed properties were taken by force into the use of the USSR Army Forces, Estonia did not transfer the ownership of such assets.[294] The City Court observed that notwithstanding that a number of new buildings had been erected after 1940, there were no records proving that the said buildings had been registered as property of the USSR.[295] Further, the City Court held that a number of legal acts adopted by Estonia, including the 1992 Supreme Council Resolution, confirmed that it continued owning the buildings and structures at issue throughout the occupation period.[296] The City Court noted that its decision was consistent with Article 55 of the 1907 Hague Regulations (the "**Hague Regulations**"), which provides that "the occupying state cannot acquire the property of the occupied country."[297]

ii. Disciplinary Proceedings against Judge Jüri Mesipuu

287. On 21 November 2000, the Ministry of Justice initiated disciplinary proceedings before the Disciplinary Committee of the Estonian Supreme Court (the "**Disciplinary Committee**") against Judge Jüri Mesipuu, the judge of the Tallinn City Court that rendered the August 2000 Judgment.[298] The Ministry of Justice alleged that there had been an undue delay in the resolution of the referred local proceedings, including by failing to rule on the following day of the receipt of Estonia's motion for additional interim measures as prescribed in Estonia's Code of Civil Procedure.[299]

288. By decision of 1 February 2001, the Disciplinary Committee decided to terminate the proceedings initiated by the Ministry of Justice against Judge Jüri Mesipuu.[300] The Disciplinary Committee determined that the conduct of Judge Mesipuu did not constitute a disciplinary offense.[301] It considered *inter alia* that "there [was] a basis to say that the length of the proceeding was not caused by the wrongful activities of the judge but rather the activities of the parties."[302] In

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291 Letter from Bailiff A. Pink to B&E, Verest and Agrin, 1 April 2004 (**C-121**).

292 August 2000 Judgment, p. 3 (**C-068**).

293 August 2000 Judgment, pp. 4-5 (**C-068**).

294 August 2000 Judgment, p. 5 (**C-068**).

295 August 2000 Judgment, p. 5 (**C-068**).

296 August 2000 Judgment, pp. 5-6 (**C-068**).

297 August 2000 Judgment, p. 7 (**C-068**).

298 Decision of the Disciplinary Committee, Disciplinary matter No. 3-8-11-1, 1 February 2001, p. 1 (**C-122**).

299 Decision of the Disciplinary Committee, Disciplinary matter No. 3-8-11-1, 1 February 2001 (**C-122**).

300 Decision of the Disciplinary Committee, Disciplinary matter No. 3-8-11-1, 1 February 2001, p. 4 (**C-122**).

301 Decision of the Disciplinary Committee, Disciplinary matter No. 3-8-11-1, 1 February 2001, p. 3 (**C-122**).

302 Decision of the Disciplinary Committee, Disciplinary matter No. 3-8-11-1, 1 February 2001, p. 4 (**C-122**).

addition, the Disciplinary Committee stated that the Ministry of Justice had "derailed from the principles of objectivity and equality of the parties," it noted in this respect that:

> The disciplinary matter ha[d] been started in a civil case in which the Ministry of Justice is a party to and by the time the disciplinary proceeding was started, a court decision in that matter had not entered into force. This situation reasonably g[a]ve a basis to think that the Ministry of Justice ha[d] tried to influence the judge with non-procedural instruments; the applying of which is made possible by the Status of the Judges Act, however, the other party of the proceeding [did] not have these possibilities.[303]

iii. 2000-2002 Appeal Proceedings before the Tallinn Circuit Court

289. On 13 September 2000, Verest, Agrin, and B&E appealed the August 2000 Judgment. By judgment of 2 May 2002, the Tallinn Circuit Court ("**May 2002 Appeal Judgment**") annulled the August 2000 Judgment on the basis of certain procedural law violations and referred the matter back to the Tallinn City Court for a new hearing.[304]

iv. Statements by Government Officials Concerning the Proceedings against Verest, Agrin, and B&E

290. On 26 April 2001, the Office of the President of Estonia issued an official written statement containing certain remarks regarding a visit he conducted on 5 June 2000 to the Port as well as with respect to the proceedings against Verest, Agrin, and B&E.[305] The referred statement provided that:

> 1. With the wish to establish a unified vision about the architectural development of Tallinn, the president of the Republic of Estonia visited on 5.June of the previous year with the employees of the planning office, the mayor and the county governor the coastal area of Tallinn, in order to examine the opening of the capital city to the sea. The seaplane hangar on Küti Street was visited, where building activities not coordinated with the city government took place.
>
> 2. The President informed the ministers of defense, environment and auditor general about the illegal building activity on the structures belonging to the State. The President requested the illegal activity to be stopped and asked for an evaluation for what has happened.
>
> 3. The Minister of the Environment Heiki Kranich stated in his 21 July 2000 response to the President, that the inspectors of the Environmental Inspectorate checked the Seaplane Harbor and found violations of the law and presented the materials to the administrative court of Tallinn for the determination of an administrative punishment.
>
> 4. The Auditor General stated in its 08. August 2000 reply to the President that material and moral damages have incurred to the State because of what has happened in the Seaplane Harbor because it has shown a long-term incapability to ensure legal order. Because of the court action, it is not possible for the state to perform actual control and no legal means to ensure the preservation of the assets.

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303 Decision of the Disciplinary Committee, Disciplinary matter No. 3-8-11-1, 1 February 2001, p. 4 (**C-122**).

304 May 2002 Appeal Judgment, pp. 8-9 (**C-191**).

305 Office of the President of Estonia, Official Notices, 26 April 2001 (**C-073**).

> 5. On 25. August 2000 Tallinn City Court decided that the area of the Seaplane Harbor belongs to the state. The further proceedings regarding this area are continuing. The administrator of the assets is the Ministry of Justice.
>
> 6. In yesterday's meeting with the Prime Minister, the Prime Minister assured as an explanation to the information request of the President regarding the statements in the Daily Newspaper, that the areas of the Seaplane Harbor will stay in the ownership of the state and they are not municipalized.
>
> 7. The President assured once again today, that all legal questions are in the jurisdiction of the courts of Estonia, except the right and obligation of the Republic of Estonia to perform sovereign power in the Republic of Estonia. This beach with the seaplane harbor belonged to the Ministry of Defense of Estonia before the occupation and was taken forcefully for the use of the USSR Army on 22 and 23. June 1940. No new legal ties have arisen from this violence. The President awaits the performing of sovereign and executive power from the Government of RoE in this matter.
>
> 8. To assure the above, the President sent letters to the Auditor General and the Minister of Justice today.[306]

291. On 5 April 2004, the Minister of Justice provided comments regarding the proceedings against Verest, Agrin and B&E in a televised interview.[307] Among other matters, the Minister of Justice stated that the judge of the Tallinn City Court who was responsible for the procedural errors that led to the first judgment being quashed by the Circuit Court would be "held responsible."[308]

v. 2005 Tallinn City Court Proceedings

292. On 14 March 2005, BPV and ELA Tolli were included as defendants in the proceedings.[309]

293. By judgment of 4 July 2005, the Tallinn City Court ("**July 2005 Judgment**") (i) recognized the right of ownership of Estonia to the land of the Port and the buildings therein; (ii) determined that Agrin, Verest, B&E, and ELA Tolli were unlawfully holding the possession of the mentioned land plot and buildings, and in the case of non-voluntary transfer ordered to evict the co-possessors from the buildings (enumerated on pages 1-2 of that judgment); and (iii) determined that BPV was "a possessor in good faith and there [was] no basis to reclaim the assets from it."[310]

294. First, the Tallinn City Court held that it was undisputed that Estonia held the ownership of the land.[311] Relying on judgment No. III-4/A-10/94 of Estonia's Supreme Court of 21 December 1994 ("**December 1994 Supreme Court Judgment**"), the Tallinn City Court further found that Estonia owned the buildings and structures at the Port.[312] Regarding international law, the City Court noted that the Supreme Court found in its December 1994 judgment that—pursuant to Article 55 of the Hague Regulations—Estonia continued to be the owner of the "real estate" in its

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306 Office of the President of Estonia, Official Notices, 26 April 2001 (**C-073**).

307 Transcript of Justice Minister Vaher on Actuaalne Kaamera TV Program, 5 April 2004 (**C-209**).

308 Transcript of Justice Minister Vaher on Actuaalne Kaamera TV Program, 5 April 2004 (**C-209**).

309 July 2005 Judgment , p. 17 (**C-078**).

310 July 2005 Judgment, pp. 1-2, 28 (**C-078**).

311 July 2005 Judgment, p. 24 (**C-078**).

312 July 2005 Judgment, pp. 23-24 (**C-078**).

territory during the occupation by the USSR.[313] Thus, the City Court held that although the USSR Armed Forces were in possession of the Port during the occupation, they did not have the right to dispose of it.[314] As for Estonian law, the Court referred to the following instruments:

(a) The 1992 Supreme Council Resolution, by which "the buildings and other structures in the administration of the former USSR armed forces structural units were proclaimed to be the ownership of the Republic of Estonia and all transactions with these assets were forbidden without the permission of the government; the army assets are the state assets;"[315]

(b) The 17 July 1990 Resolution of Estonia's Supreme Council, according to which all transactions involving State assets, including those that were in the administration of the USSR armed forces, were suspended until legislation regulating the privatization of ownership was adopted;[316]

(c) Regulation No. 244, dated 27 November 1991, which "suspended the transactions by the USSR Ministry of Defense with buildings, structures and other real estate on the territory of Estonia without the permission of the Republic of Estonia and required that the transactions done before the adoption of this regulation had to be registered in a month in local country and city governments;"[317]

(d) Regulation No. 215, dated 24 July 1992, according to which "all the transactions previously concluded with the structural units of the USSR armed forces that complied with the legislation of Republic of Estonia had to be re-registered in the Ministry of Defense by 15 August 1992;"[318] and

(e) Judgment of Estonia's Supreme Court of 1998, that determined that the transactions that were not registered pursuant to regulation No. 215 were invalid because their compliance with the legislation of the Republic of Estonia has not been checked.[319]

295. Secondly, the City Court held that the transactions by which the USSR Armed Forces transferred the property of the buildings and structures at the Port and all the subsequent transactions disposing of the same assets were void and invalid.[320] The Court considered that the respective "acquirer[s] knew and should have known, that these assets were assets that had been in the administration of the USSR army and that the Republic of Estonia had confirmed that it is in the ownership of the Republic of Estonia and that all transactions were suspended with these assets."[321] The Court added that, in any event, the acquisition through good faith is impossible

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313 July 2005 Judgment, p. 23 (**C-078**). The Supreme Court had clarified in its decision of 21 December 1994 that the "real estate" possessed and used by the Soviet military encompassed "land, buildings and structures" (December 1994 Supreme Court Judgment, p. 3 (**CLA-191**)).

314 July 2005 Judgment, pp. 23-24 (**C-078**).

315 July 2005 Judgment, p. 23 (**C-078**).

316 July 2005 Judgment, p. 24 (**C-078**).

317 July 2005 Judgment, p. 24 (**C-078**).

318 July 2005 Judgment, p. 24 (**C-078**).

319 July 2005 Judgment, p. 24 (**C-078**).

320 July 2005 Judgment, p. 25-26, ¶ 4 (regarding Verest) and ¶¶ 9, 11 (regarding B&E) (**C-078**).

321 July 2005 Judgment, p. 25 (**C-078**).

under Estonian law if the assets were taken from the owner against its will, as set out under section 156(1) of the Civil Code and section 95(3) of the Law of Property Act. Given that the buildings and structures at the port were brought to the use of the Soviet military through the annexation of Estonia and its incorporation into the Soviet Union, Estonia lost possession of the relevant assets against its will, which is why private parties could not acquire the relevant assets even if they were good faith.[322] The Court concluded that Verest, Agrin, and B&E did not acquire their alleged rights over the buildings and structures at the Port, and thus, their possession over such assets lacked of legal basis.[323]

296. Third, in respect of the claims against BPV the City Court found that:

> [T]he bad faith of [BPV] was not persuasively proved. The assets in the use of this respondent cannot be viewed in the light of the 24. July 1992 regulation no.215 because according to its knowledge the assets belonging to legal persons governed by private law were given to its use. It is not reasonable to presume that in the years 1997 and 1999 when 7 years had already passed from the restoration of the Republic of Estonia, the lessee would have had to research the history of the assets that were the object of the contract […] The plaintiff did not present other basis for voidance or bad faith. Therefore, [BPV] is a possessor in good faith and there is no basis to reclaim the assets from it and therefore, the claim against [BPV] has to be left unsatisfied.[324]

vi. 2005 Appeal Proceedings

297. On 22 July 2005, BPV appealed the July 2005 Judgment to the Tallinn Circuit Court.[325] Verest, Agrin and ELA Tolli also filed a separate appeal to that decision on 25 July 2005.[326] Estonia also appealed the July 2005 Judgment in respect of the finding concerning BPV. [327]

298. By judgment of 1 March 2006, the Tallinn Circuit Court ("**March 2006 Appeal Judgment**") (i) annulled the portion of the July 2005 Judgment which concerned the dismissal of Estonia's claim with respect to BPV; (ii) recognized Estonia's ownership rights over all of the buildings and structures at the Port; (iii) determined that BPV was unlawfully possessing such assets; and (iv) upheld the rest of the July 2005 Judgment.[328]

299. In respect of BPV's rights under the Lease Agreements, the Tallinn Circuit Court concluded that such agreements did not provide a sufficient legal basis for BPV to retain the possession of any buildings or structures at the Port.[329] In reaching this conclusion, the Circuit Court considered that

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322 July 2005 Judgment, p. 27, para. 15 (**C-078**).

323 July 2005 Judgment, p. 27 (**C-078**).

324 July 2005 Judgment, p. 28 (**C-078**).

325 Petition for Appeal of BPV, 22 July 2005 (**C-021**).

326 Petition for Appeal of Agrin, Verest and ELA Tolli, 25 July 2005 (**C-043**).

327 March 2006 Appeal Judgment, p. 27 (**C-081**).

328 March 2006 Appeal Judgment (**C-081**).

329 March 2006 Appeal Judgment, p. 39 (**C-081**).

it was irrelevant whether BPV was a possessor in good faith or not.[330] Specifically, the Circuit Court held that:

> Even a valid agreement under the law of obligation[s], signed with some other person who is not related to the plaintiff as the owner of the property, would alone not be enough to retain the possession because it entails no obligations to the plaintiff. According to the judgment of the City Court, AS BPV as the defendant retains the possession of the above stated construction works without any legal grounds whatsoever. Pursuant to section 34 of the Law of Property Act, possession is lawful if it is based on legal grounds. Possession is not just a fact, but instead is a certain legally regulated relation of the person to the property, a legal relation. On the other hand, possession cannot be considered a right because it is not a property right or a right under the law of obligations or a burdening of the property; also, it cannot be entered into the Land Registry. The owner has the right of claim against anyone possessing the owner's property without legal grounds. The opinion of the plaintiff that possession in good faith or in bad faith can have any meaning only in issues related to recovery of the possession to the owner – for example, whether and in what scope the owner could have any damage compensation or other compensation claims against the possessor in addition to the recovery of the possession or whether the unlawful possessor could have any damage compensation or other compensation claims against the co-defendants who signed contracts with the possessor without legal grounds, is justified.
>
> […]
>
> On the basis of the above stated circumstances, the action of the Republic of Estonia shall be satisfied also against AS BPV as a defendant and the construction works at the addresses of Küti 17 and 17A shall be recovered from the possession by AS BPV.
>
> As the action against AS BPV shall be satisfied due to the justifications stated above and there is no requirement whatsoever to identify whether AS BPV is a possessor in good faith or not, the statements in clauses 2.2, 2.4 of the plaintiff's appeal are also of no importance and the Circuit Court shall not assess these statements.[331]

300. With respect to the remaining aspects of the July 2005 Judgment, the Circuit Court considered that it "fully agree[d] with the justifications stated in the challenged judgment and thus [did] not consider it necessary to repeat these justifications."[332] In its view, the City Court "correctly applied the provisions of the substantial law and ha[d] justifiably satisfied the action of the Republic of Estonia."[333]

vii. Cassation Appeal

301. On 27 March 2006, BPV filed a cassation appeal in respect of the March 2006 Appeal Judgment before the Supreme Court of Estonia.[334] Agrin, Verest and Ela Tolli also filed a separate cassation appeal on 30 March 2006.[335]

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330 March 2006 Appeal Judgment, p. 39 (**C-081**).

331 March 2006 Appeal Judgment, p. 39 (**C-081**).

332 March 2006 Appeal Judgment, p. 41 (**C-081**).

333 March 2006 Appeal Judgment, p. 41 (**C-081**).

334 Supreme Court of Estonia, *Estonia v. Verest and others*, Case No. 3-7-1-2-229, 7 June 2006 (**C-082**).

335 Supreme Court of Estonia, *Estonia v. Verest and others*, Case No. 3-7-1-2-229, 7 June 2006 (**C-082**).

302. By judgment of 7 June 2006, the Supreme Court decided not to hear the appeal to the March 2006 Judgment.[336]

viii. Enforcement

303. On 19 June 2006, Bailiff Arvi Pink notified BPV, Agrin and Verest that enforcement proceedings of the March 2006 Appeal Judgment had been commenced and requested them to inform him about the voluntary compliance with the enforcement of such decision.[337] The Bailiff further noted that in the absence of voluntary compliance, eviction would take place on 1 August 2006.[338]

304. On 1 August 2006, Estonia enforced the eviction order pursuant to the March 2006 Appeal Judgment and took possession of the buildings and structures at the Port.[339]

c) Proceedings before the Harju County Court

305. On 22 December 2006, Estonia filed a lawsuit against Verest, Agrin, BPV, and ELA Tolli in the Harju County Court seeking EEK 16,640,000 (USD 1,402,956) in compensation for the alleged unlawful use of the Port from 14 November 1997 to 1 August 2006.[340] Estonia later increased the amount claimed to EEK 107,420,000 (USD 9,250,000).[341]

306. On 2 January 2007, the Harju County Court granted Estonia's request for security for claim to seize the movable property in the ownership of Verest, Agrin and ELA Tolli in the sum of EEK 16,640,000, or alternatively seize the bank accounts of all the defendants for the same amount.[342] On 26 January 2007, Verest, Agrin, BPV and ELA Tolli appealed the said order by the Harju County Court before the Tallinn Circuit Court.[343]

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336 Supreme Court of Estonia, *Estonia v. Verest and others*, Case No. 3-7-1-2-229, 7 June 2006 (**C-082**). The Supreme Court of Estonia has discretion to decide whether to hear a cassation appeal. The specific criteria which the cassation appeal must meet for the Supreme Court to decide to hear the case is set forth in section 679(3) of the Estonian Code of Civil Procedure (**C-608**). *See* Claimant's Answers to Tribunal Questions, ¶¶ 50, 53; Respondent's Answers to Tribunal Questions, ¶¶ 8-10.

337 BPV Immovable Property Eviction Execution, 19 June 2006 (**C-129**); Agrin Immovable Property Eviction Execution, 19 June 2006 (**C-130**); Verest Immovable Property Eviction Execution, 19 June 2006 (**C-131**).

338 BPV Immovable Property Eviction Execution, 19 June 2006 (**C-129**); Agrin Immovable Property Eviction Execution, 19 June 2006 (**C-130**); Verest Immovable Property Eviction Execution, 19 June 2006 (**C-131**).

339 Harju County Court, *Estonia v. Verest, Agrin, BPV and ELA Tolli*, Judgment, 4 December 2008, p. 2 (**C-206**).

340 Harju County Court, *Estonia v. Verest, Agrin, BPV and ELA Tolli*, Statement of Claim, 22 December 2008, p. 12 (**C-135**).

341 Harju County Court, *Estonia v. Verest, Agrin, BPV and ELA Tolli*, Judgment, 4 December 2008, ¶ 5 (**C-206**).

342 Harju County Court, *Estonia v. Verest, Agrin, BPV and ELA Tolli*, Court Ruling, 2 January 2007 (**C-205**).

343 Tallinn Circuit Court, *Estonia v. Verest, Agrin, BPV and ELA Tolli*, 26 January 2007 (**C-137**).

307. On 4 December 2008, the Harju County Court issued a judgment in favor of Estonia.[344] Relying on the August 2005 Judgment, the Court stated that Estonia was the owner of the land and buildings at the Port, and thus, Verest, Agrin, BPV, and ELA Tolli "possessed the object under dispute from 14. November 1997 – 01. August 2006 without a legal basis."[345] On that basis, the Court concluded that Verest, Agrin, BPV, and ELA Tolli had to compensate Estonia for the advantages of use despite the using or non-using of the Port in the amount of EEK 107,420,000 (USD 9,250,000).[346]

2. Criminal Proceedings

308. On 22 September 2006, the Northern District Prosecutor's Office of Estonia commenced criminal proceedings alleging, *inter alia*, the removal and destruction on 1 August 2006 of certain State property and structures located at the Port. Mr. Aleksander Rotko and Ms. Olga Kotova, a board member of the Claimant and then the wife of Mr. Rotko, were identified as suspects in the mentioned criminal investigation.[347] After leaving Estonia in 2006, Mr. Rotko returned to the United States,[348] and Ms. Kotova spent some time in Russia with relatives (before she lived in Canada for four years and moved to the United States in 2011).[349]

309. On 25 August 2007, the Harju County Court in Estonia ordered that the suspects Mr. Rotko and Ms. Kotova be taken into custody as a preventive measure.[350] On 29 August 2007, European arrest warrants were issued with regard to both suspects.[351]

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344 Harju County Court, *Estonia v. Verest, Agrin, BPV and ELA Tolli*, Judgment, 4 December 2008, p. 1 (**C-206**).

345 Harju County Court, *Estonia v. Verest, Agrin, BPV and ELA Tolli*, Judgment, 4 December 2008, ¶ 33 (**C-206**).

346 Harju County Court, *Estonia v. Verest, Agrin, BPV and ELA Tolli*, Judgment, 4 December 2008, p. 1 (**C-206**).

347 Letter from Prosecutor Andrei Voronin, "Request to extend the term for holding in custody" re Olga Kotova, 18 November 2016, p. 2 (**C-004**).

348 First Rotko Statement, ¶ 6.

349 Witness Statement of Ms. Olga Kotova dated 29 August 2019, ¶ 39 (**CWS-3**).

350 Expert Evidence of Paul Keres, 9 December 2019, Exhibit 1, Harju County Court Ruling, 25 August 2007, pp. 16-25 (**C-280**).

351 Notice of Arbitration, ¶ 65; Second Rotko Statement, ¶ 96 (**CWS-2**); Letter from Prosecutor Andrei Voronin, "Request to extend the term for holding in custody" re: Olga Kotova, 18 November 2016, p. 1 (**C-004**).

310. In early 2013, Estonia filed a request to the competent U.S. judicial authority for the extradition of Mr. Rotko to Estonia,[352] based on the Extradition Treaty between the United States of America and Estonia.[353]

311. On 8 August 2016, Ms. Kotova was detained in Finland on the basis of the above-mentioned European arrest warrant and on 23 September 2016, she was extradited to Estonia.[354] On 8 December 2016, the Prosecutor's Office of Estonia issued an order on termination of criminal proceedings against Ms. Kotova. The same order imposed on Ms. Kotova an obligation to pay EUR 32,000 and annulled the Harju County Court's order of 25 August 2007 to take Ms. Kotova into custody.[355]

312. On 18 October 2019, the competent U.S. judicial authority made an inquiry regarding Mr. Rotko's extradition proceedings, requesting *inter alia,* clarifications as to (i) whether Estonia had dropped the criminal charges against Mr. Rotko in 2016; and (ii) whether and how Mr. Rotko's claims that the criminal proceedings against Ms. Kotova had been terminated affected Mr. Rotko's prosecution.[356]

313. On 23 October 2019, Mr. Andrei Voronin of the Northern District Prosecutor's Office of Estonia responded to the inquiry of 18 October 2019, *inter alia* confirming that "under sections 201 and 203 of the Penal Code […] it is possible to bring criminal charges against Aleksandr Rotko," and that "[t]he case against Aleksandr Rotko is still relevant and under investigation by the Prosecutor's Office."[357] Prosecutor Voronin requested "on behalf of the Republic of Estonia to extradite Aleksandr Rotko to the Republic of Estonia in order to continue with the criminal proceedings, bring charges against him, and prosecute him in court."[358]

314. On 3 December 2019, Mr. Rotko was arrested and detained in federal custody in the United States.[359]

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352 *See* Expert Evidence of Paul Keres, 9 December 2019, Exhibit 4, Request for Extradition of Aleksandr Rotko from the Northern District Prosecutor's Office, 30 January 2013, pp. 62-72 (**C-280**); Respondent's Response to the Claimant's Request for Interim Relief, ¶ 7; Request for Extradition of a Citizen of the Republic of Estonia Aleksandr Rotko, 13 March 2013 (**C-290**).

353 Extradition Treaty between the United States of America and Estonia, signed on 8 February 2006 (**RLA-040**).

354 *See* Prosecutor's Office, "Unreasoned Order on the Termination of Proceedings", 8 December 2016, ¶ 3 (**C-005**); Prosecutor's Office, "Order on Releasing a Person in Custody", 8 December 2016, p. 1 (**C-009**).

355 Prosecutor's Office, "Unreasoned Order on the Termination of Proceedings", 8 December 2016 (**C-005**).

356 Letter from Prosecutor Andrei Voronin to the Competent Judicial Authority of the United States of America, 23 October 2019, p. 1 (**C-279**).

357 Letter from Prosecutor Andrei Voronin to the Competent Judicial Authority of the United States of America, 23 October 2019, p. 4 (**C-279**).

358 Letter from Prosecutor Andrei Voronin to the Competent Judicial Authority of the United States of America, 23 October 2019, p. 4 (**C-279**).

359 U.S. Government Memorandum of Law Regarding Detention Pending Extradition Proceedings, 6 December 2019 (**C-292**).

315. On 7 January 2020, a preliminary detention hearing for Mr. Rotko took place before Judge James Klindt at the Jacksonville Court.[360]

316. On 22 January 2020, Judge Klindt issued his Detention Decision finding that pending the ultimate extradition determination, Mr. Rotko could be released upon his posting of a USD 1.5 million bond.[361]

317. On 29 January 2020, a bond hearing for Mr. Rotko took place before Judge Klindt at the Jacksonville Court, during which Judge Klindt issued an order for the immediate release of Mr. Rotko from federal custody subject to certain conditions, including the posting of a USD 1 million bond.[362] Mr. Rotko was released from federal custody that same day.[363]

318. On 25 August 2020, Mr. Rotko submitted to the Jacksonville Court a copy of the order terminating the Estonian criminal proceedings against him.[364] He explained that the termination order had been provided upon payment of an agreed sum to the Republic of Estonia.[365] Mr. Rotko further indicated that he (i) had forwarded the referred termination order to the U.S. Attorney's Office; and (ii) his counsel had been advised by the U.S. Attorney's Office that, on 14 August 2020, Estonia's Ministry of Justice asked Estonia's Ministry of Foreign Affairs to withdraw the extradition request.[366]

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360 Reply, ¶ 383.

361 Order Denying Government's Oral Motion for Detention, *In the Matter of the Extradition of Aleksandr Rotko*, Case No. 3:19-mc-27-J-39JRK, 22 January 2020, p. 9 (**C-289**).

362 United States District Court, Middle District of Florida, Jacksonville Division, *In the Matter of the Extradition of Aleksandr Rotko*, Case No. 3:19-mc-27-J-39JRK, Order Setting Conditions of Release, 29 January 2020 (**C-293**).

363 United States District Court, Middle District of Florida, Jacksonville Division, *In the Matter of the Extradition of Aleksandr Rotko*, Case No. 3:19-mc-27-J-39JRK, Order Setting Conditions of Release, 29 January 2020 (**C-293**).

364 United States District Court, Middle District of Florida, Jacksonville Division, *In the Matter of the Extradition of Mr. Aleksandr Rotko*, Case No. 3:19-mc-27-J-39JRK, Aleksandr Rotko's Notice of Filing Regarding Subsequent Developments in the Estonian Criminal Matter Underlying this Extradition Case, 25 August 2020, ¶ 3, Exhibit A (**C-330**).

365 United States District Court, Middle District of Florida, Jacksonville Division, *In the Matter of the Extradition of Mr. Aleksandr Rotko*, Case No. 3:19-mc-27-J-39JRK, Aleksandr Rotko's Notice of Filing Regarding Subsequent Developments in the Estonian Criminal Matter Underlying this Extradition Case, 25 August 2020, ¶¶ 1-3, Exhibit A (**C-330**).

366 United States District Court, Middle District of Florida, Jacksonville Division, *In the Matter of the Extradition of Mr. Aleksandr Rotko*, Case No. 3:19-mc-27-J-39JRK, Aleksandr Rotko's Notice of Filing Regarding Subsequent Developments in the Estonian Criminal Matter Underlying this Extradition Case, 25 August 2020, ¶¶ 4, 5, Exhibit A (**C-330**).

3. Interim Relief Application before the European Court of Human Rights

319. On 4 December 2006, Verest, Agrin, BPV, and ELA Tolli requested the European Court of Human Rights under Rule 39 of the Rules of Court to enjoin the Estonian authorities from pursuing any legal action against them.[367]

320. On 4 March 2008, the European Court of Human Rights decided that the above-mentioned application was inadmissible under Article 28 of the European Human Rights Convention, because it did not comply with the requirements of Articles 34 and 35 of that convention.[368] In reaching that conclusion the Court considered, in particular, that "[i]n the light of all the material in its possession, and in so far as the matters complained of were within its competence, the Court found that they did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols."[369]

IV. THE PARTIES' REQUESTS FOR RELIEF

321. In its Notice of Arbitration, the Claimant requests the following relief:

> a) A finding and declaration that Estonia has breached its obligations under the Treaty;
>
> b) Directing Estonia to pay compensatory damages to the Claimant of not less than USD 100 million without any deduction, withholding or setoff for taxes or expenses and to pay Claimant's taxes on all sums awarded;
>
> c) Directing Estonia to pay moral damages to the Claimant of not less than $50 million without any deduction, withholding or setoff for taxes or expenses and to pay Claimant's taxes on all sums awarded;
>
> d) Directing Estonia to pay pre and post-judgment interest on the sums award without deduction, withholding or setoff for taxes or expenses and to pay Claimant's taxes on all sums awarded;
>
> e) Directing Estonia to pay Claimants fees and costs associated with this proceeding, including but not limited to professional fees and disbursements;
>
> f) Directing Estonia to pay all amounts awarded to ELA USA, Inc in the United States, without any deductions, withholdings or setoff for taxes or expenses and to pay ELA USA, Inc., taxes on all sums awarded; and
>
> g) Ordering such other and further relief as the Tribunal deems appropriate in the circumstances.[370]

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

> a) A finding and declaration that Estonia has acted in a manner inconsistent with its Treaty obligations under Articles II and III;
>
> b) Directing Estonia to pay compensatory damages with respect to Expropriation to the Claimant of not less than US $175,748,846 without any deduction, withholding or setoff for taxes or expenses and to pay Claimant's taxes on all sums awarded; or

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367 Application for the European Human Rights Court, 4 December 2006 (**C-052**).

368 European Court of Human Rights Decision, Application No.48966/06, 4 March 2008 (**C-212**).

369 European Court of Human Rights Decision, Application No.48966/06, 4 March 2008 (**C-212**).

370 Notice of Arbitration, ¶ 107.

alternatively to pay damages with respect to the breach of Treaty Article II in the amount of US $192,638,870 without any deduction, withholding or setoff for taxes or expenses and to pay Claimant's taxes on all sums awarded.

c) Directing Estonia to pay post-judgment interest on the award of the sum without deduction, withholding or setoff for taxes or expenses and to pay Claimant's taxes on all sums awarded.

d) Directing Estonia to pay Claimants fees and costs associated with this proceeding, including but not limited to professional fees and disbursements.

e) Ordering such other and further relief as the Tribunal deems appropriate in the circumstances.[371]

323. In its Reply, the Claimant requests the following relief:

1693) A finding and declaration that Estonia has acted in a manner inconsistent with its Treaty obligations under Articles II and III.

1694) Directing Estonia to pay compensatory damages of not less than US $206 million comprising $156 million for financial damages and $50 million for moral damages (including pre-judgement interest to September 4, 2021) without any deduction, withholding, or set off for taxes or expenses and to pay Claimant's taxes on all sums awarded.

1695) Directing Estonia to pay post-judgment interest on the sums awarded without deduction, withholding, or setoff for taxes or expenses and to pay Claimant's taxes on all sums awarded.

1696) Directing Estonia to pay all Claimant's fees and costs associated with this proceeding, including but not limited to professional fees and disbursements.

1697) Directing Estonia to pay all amounts awarded to ELA U.S.A. Inc in the United States, without any deductions, withholdings or setoff for taxes or expenses and to pay ELA U.S.A. Inc., taxes on all sums awarded; and

1698) Ordering such other and further relief as the Tribunal deems appropriate in the circumstances.[372]

324. In its Statement of Defense, the Respondent requests the following relief:

1. Dismiss the claims of the Claimant in their entirety; and

2. Order the Claimant to carry all costs of these proceedings, such costs to be specified at a later date, with applicable interest.[373]

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

(i) a declaration dismissing the Claimant's claims;

(ii) an order that the Claimant pay the costs of these arbitral proceedings, including the cost of the Tribunal and the legal and other costs incurred by the Respondent, on a fully indemnity basis; and

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371 Memorial, ¶ 604.

372 Reply, ¶¶ 1693-1698.

373 Statement of Defense, ¶ 53.

(iii) interest on any costs awarded to the Respondent, in an amount to the determined by the Tribunal.[374]

326. The Tribunal notes that it has carefully considered all arguments advanced by the Parties in their written submissions and at the Oral Hearing as to the Tribunal's jurisdiction, admissibility, and the merits. If some of these arguments are not addressed below, this shall not be taken as an indication that the Tribunal has not considered them relevant. Rather, such arguments were unable to influence the decision of the Tribunal on the Parties' requests or individual issues based on the Tribunal's reasoning.

V. JURISDICTION AND ADMISSIBILITY

327. The Tribunal can address the merits of this dispute only if and to the extent that it has jurisdiction and the Claimant's claims are admissible.

328. The basis of the Tribunal's jurisdiction is Article VI of the Treaty, which reads in material parts as follows.

> 1. For the purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to:
>
> (a) an investment agreement between that Party and such national or company;
>
> (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or
>
> (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.
>
> 2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:
>
> […]
>
> (c) in accordance with the terms of paragraph 3.
>
> 3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:
>
> …
>
> (iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); […]
>
> 4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3 […].[375]

329. The Claimant has initiated these arbitration proceedings by submitting a Notice of Arbitration pursuant to the 1976 UNCITRAL Rules, as provided for in Article VI(3)(a) of the Treaty, and in

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374 Counter-Memorial, ¶ 737.

375 Treaty, Article VI (**RLA-001**).

compliance with the six-month waiting period set out in this provision. Respondent has consented to the submission of any investment dispute to arbitration, according to Article VI(4) of the Treaty. Therefore, the scope of the Respondent's consent—and consequently of the Tribunal's jurisdiction—hinges on whether and to what extent this dispute constitutes an investment dispute within the meaning of Article VI(1) of the Treaty. Given that the two categories of investment disputes listed in paragraphs (a) and (b) of this provision are irrelevant here, the Tribunal must determine whether and to what extent this dispute is brought by "a national or company" of the U.S. "arising out of or relating to […] an alleged breach of any right conferred or created by this Treaty with respect to an investment", as set out in Article VI(1)(c).

330. The term "investment" is key in this regard. It is defined in Article I(1)(a) of the Treaty, which provides that:

> Investment means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:
>
> (i) tangible and intangible property, including rights, such as mortgages, liens and pledges;
>
> (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
>
> (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
>
> (iv) intellectual property which includes, *inter alia*, rights relating to:
>
> literary and artistic work, including sound recordings, inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and
>
> (v) any right conferred by law or contract, and any licenses and permits pursuant to law.[376]

331. The term "company" is defined in Article I(1)(b) of the Treaty as

> any kind of corporation, company, association, partnership, or other organization, legally constituted under applicable laws and regulations of a Party whether or not organized for pecuniary gain, or privately or governmentally owned or controlled. [377]

332. With these observations in mind, the Tribunal now turns to the Respondent's objections regarding jurisdiction and inadmissibility, namely that:

(a) the Tribunal lacks jurisdiction *ratione personae* because the true identity of the Claimant is unclear, [378] and the only link between the Claimant and the alleged investment is Mr. Rotko, an Estonian national;[379]

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376 Treaty, Article I(1)(a) (**RLA-001**).

377 Treaty, Article I(1)(b) (**RLA-001**).

378 Statement of Defense, ¶¶ 20-23.

379 Statement of Defense, ¶¶ 24-27.

(b) the Tribunal lacks jurisdiction *ratione materiae* because the Claimant failed to prove ownership or control of investments in Estonia within the meaning of the US-Estonia BIT,[380] and the alleged investments were obtained illegally and in bad faith;[381]

(c) the Tribunal lacks jurisdiction *ratione temporis* over the Claimant's claims because they pertain to measures taken by the Respondent before the entry into force of the US-Estonia BIT on 16 February 1997; [382]

(d) the claims are time-barred under the principles of acquiescence and extinctive prescription;[383] and

(e) the Tribunal lacks jurisdiction over the Claimant's claim for moral damages.[384]

333. The Tribunal will address each of these points in turn.

A. THE TRIBUNAL'S JURISDICTION RATIONE PERSONAE

334. In its Statement of Defense, the Respondent argued that the Tribunal lacks jurisdiction *ratione personae* for two reasons. First, according to the Respondent, the true identity of the Claimant is unclear because publicly available data suggest that there are two entities named ELA USA: one incorporated in Florida in 2013, the other registered in Minnesota in 1993.[385] Secondly, according to the Respondent, the Claimant does not qualify as an investor within the meaning of the Treaty because it failed to establish that the Claimant—and not Mr. Rotko—owned or controlled an investment in Estonia.[386]

335. The Tribunal has no doubt as to the identity of the Claimant in this case. In his second witness statement, submitted with the Claimant's Memorial, Mr. Rotko stated that he set up ELA, the Claimant, in Minnesota in 1993. When Mr. Rotko moved to Florida in 2013, he domesticated the company there, where it continues to operate. Documentary evidence confirms Mr. Rotko's testimony. The Claimant submitted a certificate of incorporation issued by the State of Minnesota in 1993,[387] a certificate of domestication in Florida signed in 2013,[388] and an excerpt from the

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380 Statement of Defense, ¶¶ 29-30; Counter-Memorial, ¶¶ 33-36, 426-444; Rejoinder, ¶¶ 3-21, 287-302.

381 Statement of Defense, ¶¶ 31-37; Counter-Memorial, ¶¶ 37; 466-476; Rejoinder, ¶¶ 24 (where, unlike in the Statement of Defense and the Counter-Memorial, the Respondent treats the alleged illegality of the investment and bad faith as issues of admissibility and not of jurisdiction), 328-330.

382 Statement of Defense, ¶¶ 18, 40.

383 Counter-Memorial, ¶¶ 36, 452-465; Rejoinder, ¶¶ 309-327.

384 Statement of Defense, ¶ 18; Counter-Memorial, ¶ 35; Rejoinder, ¶¶ 303-308.

385 Statement of Defense, ¶¶ 20-23.

386 Statement of Defense, ¶¶ 24-27.

387 ELA USA Certificate of Incorporation and Articles of Incorporation, 6 April 1993 (**C-044**); Florida corporation domestication – ELA USA – 2013, 6 November 2013 (**C-210**); State of Florida Corporations website – confirmation of status of ELA U.S.A. Inc, 19 December 2020 (**C-553**).

388 ELA USA Certificate of Incorporation and Articles of Incorporation, 6 April 1993 (**C-044**).

webpage of the Florida Department of State dated 19 December 2020 confirming the active status of ELA.[389]

336. Following the submission of the Claimant's Memorial, the Respondent neither explicitly upheld nor withdrew its objections against the Tribunal's jurisdiction *ratione personae*. But it did not repeat its doubts regarding the identity of the Claimant. In light of the evidence filed by the Claimant after the Respondent's Statement of Defense, the Tribunal considers that it has jurisdiction *ratione personae* over the Claimant, a U.S. company within the meaning of Article I(1)(b) and Article VI(1) of the Treaty. The question of whether ELA owned or controlled an investment is an issue of the Tribunal's jurisdiction *ratione materiae*, to which the Tribunal turns next.

B. THE TRIBUNAL'S JURISDICTION RATIONE MATERIAE

337. Regarding its jurisdiction *ratione materiae*, the Tribunal will first address the Respondent's jurisdictional objection that the Claimant never held a relevant investment in Estonia. If the Tribunal finds that the Claimant held one or more such investments, it must in a second step address the Respondent's allegation that they were made illegally and in bad faith.

1. Whether the Claimant Owned or Controlled an Investment

338. The Tribunal has jurisdiction only if and to the extent that this is a dispute arising from or relating to an alleged breach of a right conferred or created by the Treaty with respect to an investment, as set out in paragraphs 329 and 330 above. According to Article I(1)(a) of the Treaty, protected investments by the Claimant can be "every kind of investment[s] in the territory of [Estonia] owned or controlled directly or indirectly" by the Claimant, such as "tangible and intangible property", "shares of stock or other interests in a company", or "a right conferred by law or contract".

339. The Claimant characterizes several assets, rights, and interests it allegedly owned or controlled in Estonia as investments protected by the Treaty, namely the shares in four Estonian entities (BPV, Verest, Agrin, and ELA Tolli); the Seaplane Harbor (or at least certain buildings and structures located at the Seaplane Harbor); the lease agreements BPV concluded with Verest and Agrin and the rights arising from the lease; the joint venture agreement, and loans. The Respondent disputes that the Claimant owned or controlled any of these assets, which the Tribunal will address in turn.

a) Shares in BPV, Verest, ELA Tolli, and Agrin

i. The Respondent's Position

340. The Respondent alleges that the Claimant has failed to substantiate that it owned or controlled BPV, Verest, ELA Tolli, and Agrin at the time of the alleged breaches, *i.e.*, between 1999 and 2006, and more specifically on 7 June 2006 when the Supreme Court declined to hear the appeal

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389 Florida corporation domestication – ELA USA – 2013, 6 November 2013 (**C-210**).

from the Circuit Court's decision of 1 March 2006 according to which Estonia was the rightful owner of the building at the Port.[390]

341. In the Counter-Memorial, the Respondent argued that the sole shareholder of BPV, Verest, and ELA Tolli at the time of the alleged breaches of the Treaty was Corona Resources, and that there was no evidence that the Claimant ever owned or controlled Corona Resources.[391] Regarding Mr. Rotko's witness testimony submitted with the Reply that Corona Resources was always wholly owned and controlled by the Claimant, the Respondent states that the Claimant's evidence is insufficient under Panamanian law to establish ownership in a Panamanian company.[392] According to Mr. Molina, the Respondent's expert witness, the Claimant would have had to provide original share certificates or a share registry issued by the corporation to establish ownership.[393]

342. The Respondent points out that, in any event, the discussion regarding the Claimant's ownership of Corona Resources has become redundant because the Respondent has learned, when preparing its Rejoinder, that Corona Resources never existed.[394] The Respondent submits that, as confirmed by its expert witness, Mr. Raul Eduardo Molina, and conceded by the Claimant, no company by the name of Corona Resources exists or has existed in Panama.[395] According to the Respondent, the Claimant "knew or must have known all along that Corona Resources does not exist" as it merely relied on Mr. Rotko's words as the sole source of evidence.[396] Similarly, the Respondent contends that the Claimant has failed to provide any documentary evidence in support of its "proclamations of innocence and ignorance with respect to the use of the non-existent Corona Resources."[397]

343. According to the Respondent, in the absence of Corona Resources, the Claimant has failed to show that it had any equity interest in any of its purported subsidiaries and Agrin during the alleged breaches because:[398]

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390 Counter-Memorial, ¶¶ 433-434. *See also* Counter-Memorial, ¶¶ 429-432.

391 Counter-Memorial, ¶¶ 433-438.

392 Rejoinder, ¶ 292, *referring to* Expert Witness Statement of Mr. Raul Molina ("**Molina Report**"), 8 July 2021 (**RER-4**).

393 Rejoinder, ¶ 292, *referring to* Molina Report (**RER-4**).

394 Rejoinder, ¶¶ 287-290.

395 Rejoinder, ¶¶ 289-290, *referring to* Molina Report, ¶ 13 (**RER-4**). *See also* Hearing Transcript, Day 1, p. 130:8-11.

396 3 November 2021 Submission, ¶ 30. *See also* Hearing Transcript, Day 1, p. 132:6-10.

397 3 November 2021 Submission, ¶¶ 32-33.

398 3 November 2021 Submission, ¶ 40. The Respondent submits that even Mr. Keres admitted that the evidence he relied on does not show who the last owner was for any of the Estonian companies prior to Corona Resources. In any event, the Respondent argues that the Tribunal has no basis to entertain the Claimant's alternative theory on its ownership of the alleged investment in the absence of Corona Resources. *See* 3 November 2021 Submission, ¶ 35; Hearing Transcript, Day 5, p. 156:20-23.

(a) There is no record showing from whom Corona Resources acquired shares in BPV and to whom these shares should revert absent such acquisitions.[399] While the Claimant alleges that it wholly owned and controlled BPV from 1995, it is also unclear when and from whom the Claimant acquired BPV shares.[400] As for the Share Purchase Agreement dated 20 November 2000, which purportedly evidences ELA's sale of BPV shares to Corona Resources,[401] the Respondent maintains its objections to the admissibility of the document, which was "filed long after the relevant issue arose and after all imaginable cut-off dates have come and gone in this arbitration."[402] Further, the Respondent challenges the authenticity of the document, contending that it is not consistent with the testimony of Mr. Rotko and the contemporaneous documentary record.[403] Consequently, it considers that the Claimant has not submitted any credible evidence with respect to the transaction in which Corona Resources acquired shares in BPV;[404]

(b) Given that Verest was owned by BPV from 23 September 1999 until it was purportedly transferred to Corona Resources in 2004, Verest was therefore only ever owned either by BPV (whose connection to the Claimant is not proven, as set out in subparagraph (a)) or by non-existent Corona Resources;[405] and

(c) As ELA Tolli was established by Mr. Toomas Rinne on 1 December 2000 before it was sold to Corona Resources, ELA Tolli would continue to be owned by Mr. Rinne, who is unrelated to these proceedings.[406]

344. The Respondent further submits that the Claimant's lack of equity interest in Agrin at the relevant time is fatal to the majority of its claim. According to the Respondent, while BPV became the owner of Agrin after its purchase on 8 December 1999, it then sold its stake to Ella Kaubanduse, another Estonian company belonging to Mr. Rotko, on 22 March 2001.[407] Ella Kaubanduse, the Respondent continues, remained the sole shareholder of Agrin until Agrin was deleted from the

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399 3 November 2021 Submission, ¶ 36. *See also* Hearing Transcript, Day 1, p. 130:21-22.

400 3 November 2021 Submission, ¶ 36. The Respondent notes that, only seven weeks before the hearing, the Claimant produced documents to evidence that STC International agreed to transfer all of its shares in BPV (*i.e.*, 51% of total BPV shares) to the Claimant and that the Claimant became the owner of 91% of BPV shares by 1997. The Respondent considers these documents belated and inadmissible, given that they were filed without leave from the Tribunal. In any event, the Respondent argues that these documents do not lead to who was the owner of BPV immediately before Corona Resources. *See* Hearing Transcript, Day 1, pp. 131:14 – 132:19, *referring to* Agreement between STC and ELA USA, 1 March 1996 (**C-599**); BPV Corporate Minutes, 25 June 1997 (**C-600**). *See also* Hearing Transcript, Day 1, p. 135:5-13.

401 Claimant's Answers to the Tribunal's Questions, Agreement of Purchase and Sale of Shares of BPV from ELA USA to Corona Resources, 20 November 2000 (**C-612**).

402 21 April 2022 Submission, p. 1.

403 21 April 2022 Submission, pp. 1-3, *referring to* Hearing Transcript, Day 2, pp. 20:6-22, 22:2 – 23:9; Commercial Register extract of BPV (**R-012**). *See also* Annex 2 to the 21 April 2022 Submission.

404 21 April 2022 Submission, p. 3.

405 3 November 2021 Submission, ¶ 37.

406 3 November 2021 Submission, ¶ 39.

407 Statement of Defense, ¶ 26; Counter-Memorial, ¶ 442, *referring to* Sale Contract between BPV and Alcedo for the sale of Agrin, 8 December 1999 (**C-057**); Share purchase agreement between BPV and Ella Kaubanduse for the sale of Agrin, 22 March 2001 (**R-150**).

Commercial Register on 31 July 2013.[408] As Ella Kaubanduse was wholly owned by Mr. Rotko at the time of the alleged breaches, the Respondent argues that no corporate linkage exists between Agrin and the Claimant, other than the fact that they were both owned by Mr. Rotko, who is neither a claimant in this arbitration nor a "national of the other Party."[409]

ii. The Claimant's Position

345. In the Claimant's view, the Respondent's jurisdictional objection with respect to the Claimant's standing should be dismissed because BPV, Verest, ELA Tolli, and Agrin were directly or indirectly owned and controlled by ELA, a U.S. company.[410] While the Claimant concedes that the ownership structure of the Claimant's investments underwent some modifications between 1997 and 2007, the transfer of ownership, according to the Claimant, does not affect the Claimant's standing to bring its claim in this arbitration.[411]

346. In respect of BPV, the Claimant asserted until the submission of the Respondent's Rejoinder that BPV was initially owned and controlled by ELA before ELA's subsidiary, Corona Resources, acquired all of its shares.[412] The Claimant explained that Corona Resources was owned and controlled by ELA, acting as its bare trustee without any active business operations, employees, or offices.[413] Therefore, according to the Claimant, when Corona Resources acquired BPV from ELA, there was "no change to any operations" as ELA "always controlled and owned" Corona Resources.[414]

347. In the same vein, the Claimant asserted that it controlled and indirectly owned Verest after BPV purchased the entire shares of the company on 23 September 1999.[415] The Claimant further notes that ELA owned and controlled ELA Tolli through Corona Resources from its creation in 2000 until its seizure by Estonia in 2007.[416] On this basis, the Claimant emphasizes that it "always" owned and controlled BPV, Verest, and ELA Tolli from 1999 until 2007, *i.e.*, when the Respondent seized BPV, Verest, ELA Tolli, and Agrin.[417]

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408 Counter-Memorial, ¶ 442, *referring to* Commercial Register extract of Agrin, 7 December 2018 (**R-015**).

409 Statement of Defense, ¶ 27; *referring to* Treaty, Article I(1)(a) (**RLA-001**); Counter-Memorial, ¶¶ 443-444.

410 Reply, ¶¶ 886, 919-920.

411 Reply, ¶¶ 892, 931.

412 Reply, ¶¶ 893(1)-(2).

413 Reply, ¶¶ 893(2), 923, *referring to* Second Rotko Statement, ¶ 39 (**CWS-2**); Third Rotko Statement, ¶¶ 20, 24 (**CWS-4**). *See* Letter from Corona Resources, 2 September 1999 (**C-556**).

414 Reply, ¶¶ 893(2), 924.

415 Reply, ¶¶ 924, 931; Third Rotko Statement, ¶¶ 20, 24 (**CWS-4**). *See* Share Purchase Agreement between BPV and Verest, 23 September 1999 (**C-055**).

416 Reply, ¶¶ 897(6), 897(c). *See* Shareholder list as of 07.06.2006 of ELA Tolli (**R-149**).

417 Reply, ¶¶ 888-890, 897.

348. The Claimant now concedes that Corona Resources never existed and, consequently, did not have the legal capacity to enter into transactions with ELA.[418] But according to the Claimant, Corona Resources' invalidity has no impact on the Claimant's claim in this arbitration.[419] This is because, relying on Mr. Keres' analysis, the Claimant contends that the share transactions concluded by Corona Resources with respect to BPV, Verest, and Ella Tolli are void *ab initio* under Article 26(1) of the Estonian General Part of the Civil Code Act.[420] Accordingly, the Claimant posits that, as a matter of Estonian law, the transactions entered with Corona Resources by ELA and BPV would be void *ex tunc* without having to go to a court for determination.[421] As such, the corporate structure of ELA would revert to its "original form" in 1999, *i.e.*, before the transactions with Corona Resources took place, where ELA was the corporate parent wholly owning BPV, which, in turn, owned Verest and ELA Tolli.[422]

349. Mr. Keres also opines that the changes arising from the effect of the nullity of Corona Resources would have no impact on the nationality of the investments as "they were initially Estonian and maintained their Estonian nationality throughout the entire time."[423] Similarly, Mr. Keres notes that there was no change in the ultimate control, which continued to be ELA throughout this time.[424]

350. With respect to Agrin, the Claimant submits that ELA directly controlled the operations of the joint venture partnership between Agrin, BPV, and Verest established on 21 October 1999 as "the agreement allowed for ELA to allocate the revenue, profits, and costs between the companies" and that Agrin and Verest transferred their right to the port assets to BPV.[425] Then, on 8 December 1999, the Claimant explains that BPV acquired and owned Agrin until it was sold to Ella Kaubanduse, an affiliated company of the Claimant owned entirely by Mr. Rotko, on 22 March

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418 1 December 2021 Submission, ¶ 18; Hearing Transcript, Day 1, p. 57:2-7. The Claimant explains that Mr. Rotko had always relied upon local Panamanian lawyers for the registration and annual maintenance of Corona Resources and, therefore, was not aware that Corona Resources may not have been a valid company under the laws of Panama until this arbitration was commenced. Therefore, the Claimant submits that ELA and Mr. Rotko are "victims of fraud, rather than the perpetrators" as they reasonably relied on the authenticity and completeness of the documents provided by the Panamanian lawyers. *See* 1 October 2021 Submission, ¶¶ 53-55, 58-62; 1 December 2021 Submission, ¶¶ 14-15, 18. *See also* Fifth Rotko Statement, ¶¶ 5-6, 11-12 (**CWS-6**).

419 1 December 2021 Submission, ¶ 38.

420 1 October 2021 Submission, ¶ 71, *referring to* Fourth Keres Report, ¶¶ 65-66 (**CER-8**); Claimant's Answers to Tribunal Questions, ¶¶ 66-67, *referring to* Hearing Transcript, Day 4, 75:1-9.

421 1 October 2021, Submission, ¶ 71; Fourth Keres Report, ¶ 66 (**CER-8**). According to the Claimant, there are three share transactions in Estonia, which are affected by the invalidity of Corona Resources: (i) ELA's transfer of BPV to Corona Resources dated 9 March 2001 (**R-146**); (ii) BPV's transfer of ELA Tolli to Corona Resources dated 1 June 2002 (**R-012**); and (iii) BPV's transfer of Verest to Corona Resources in 2004 (**R-013**). *See* 1 December 2021 Submission, ¶¶ 34-35.

422 1 October 2021 Submission, ¶¶ 72-73; 1 December 2021, Submission, ¶ 37; Fourth Keres Report, ¶¶ 67-69 (**CER-8**). *See also* Hearing Transcript, Day 1, p. 58:3-10.

423 Fourth Keres Report, ¶ 70 (**CER-8**).

424 Fourth Keres Report, ¶ 70 (**CER-8**). *See also* 1 December 2021 Submission, ¶ 33.

425 Reply, ¶¶ 921, 927, *referring to* JVA (**C-056**); Expert Report of Richard Taylor dated 29 August 2019, pp. 10-11 (**CER-3**). *See also* Second Rotko Statement, ¶ 38 (**CWS-2**).

2001.[426] Even after the transfer of shares, the Claimant contends that BPV made direct investments in Agrin until 2006 to finance their lumber operations at the Lennusadam Portlands.[427] According to the Claimant, Agrin thus remained part of the ELA's joint venture and was subject to the long-term profit-sharing agreement in respect of the possession over the Lennusadam Port.[428]

351. Accordingly, the Claimant insists that the transfer of Agrin to Ella Kaubanduse makes no difference to the damages claimed in this arbitration, given that (i) the losses arising from Agrin before its transfer in 2001 are property damages to ELA, and (ii) the damages arising after the transfer constitute the loss of revenue and income of BPV through the loss of its joint venture with Agrin due to the Respondent's seizure in 2007, as well as the loss of BPV's capital investments made in the Portlands.[429] Therefore, the issue regarding the change in the ownership of Agrin, in the Claimant's view, is not a matter of jurisdiction, but rather one relevant for quantum.[430]

iii. The Tribunal's Analysis

352. Before turning to the individual Estonian entities that Claimant alleges to have held, a few general remarks on Corona Resources seem helpful.

353. There was much discussion about Corona Resources in the Parties' written submissions since the Respondent had pointed out in its Statement of Defense that, according to the commercial register, Corona Resources—and not the Claimant—owned BPV, Verest, and ELA Tolli.[431] In the view of the Tribunal, large parts of this discussion have become irrelevant for the following reasons.

354. After attempting to gather information on Corona Resources in Panama, Respondent submitted in its Rejoinder that Corona Resources has never existed. Having subsequently investigated the matter itself, the Claimant concluded that it and Mr. Rotko had become victims of fraud by a Panamanian lawyer, who was paid by the Claimant but apparently did not take the necessary steps for the incorporation of Corona Resources.[432] At the latest since the oral hearing, the Parties agree that Corona Resources was never a valid company.[433] The Parties also agree that, as a matter of Estonian law, all transactions with Corona Resources are considered to be void *ab initio*, and all

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426 Reply, ¶¶ 893(5), 894, 928. *See* Sale Contract between BPV and OÜ Alcedo KV for the sale of Agrin, 8 December 1999, (**C-057**); Share purchase agreement between BPV and Ella Kaubanduse for the sale of Agrin, 22 March 2001 (**R-150**). *See also* Expert Report of Richard Taylor dated 29 August 2019, p. 10 (**CER-3**).

427 Reply, ¶¶ 895-896, 932; Third Rotko Statement, ¶ 71 (**CWS-4**). *See* Payment to the company Tamult AS, 18 May 2001 (**C-227**).

428 1 October 2021 Submission, ¶¶ 73-74.

429 Reply, ¶¶ 906, 930. *See also* Reply, ¶ 899.

430 Reply, ¶¶ 907, 930.

431 Statement of Defense, ¶ 26.

432 Claimant's 1 October 2022 Submission, ¶¶ 60-61.

433 Rejoinder, ¶¶ 21, 46; Hearing Transcript, Day 1, p. 130:6–12; Hearing Transcript, Day 5, p. 156:25–157:1; Claimant's PHB, ¶ 67.

shares transferred to Corona Resources revert to their original owners. [434] The Parties disagree, however, on who these original owners were. With these observations in mind, the Tribunal will now address, one by one, the Estonian entities in which the Claimant asserts to have held direct or indirect shareholdings.

(I.) BPV

355. To determine whether the Claimant held an investment protected by the Treaty in the form of shares in BPV, the Tribunal will address the relevant, partly contested, transactions in chronological order. According to BPV's founding agreement, the Claimant held a 40% stake in BPV when it was established in 1993.[435] Mr. Rotko states in his second witness statement that, beyond its original 40% shareholding, the Claimant solely owned and controlled BPV since 1995.[436] A settlement agreement dated 1 March 1996 submitted by the Claimant several weeks before the oral hearing contradicts this statement. In that agreement, STC International, who originally held a 51% stake in BPV, promised to transfer all its shares in BPV to the Claimant.[437] If the Claimant had already solely owned BPV in 1995, it would have been nonsensical to commit STC International to transfer all its shares in BPV to the Claimant in 1996.

356. The documentary evidence indicates, however, that STC International's shares in BPV were transferred to the Claimant at some point. According to the minutes of a BPV shareholder meeting held on 25 June 1997, the Claimant directly owned 91% of the shares in BPV on that date.[438] This figure corresponds to the Claimant's original 40% stake plus STC International's original 51% stake. As regards the remaining 9% of the shares in BPV, the Claimant submitted an agreement dated 20 October 1999, which states that the Claimant acquired those shares from Ella Kaubanduse.[439] Further documentary evidence seems to confirm that the Claimant owned 100% of the shares in BPV, at least during parts of the relevant period. A share purchase agreement dated 20 November 2000 states that ELA transfers "100% of the share capital" in BPV to Corona Resources.[440] In line with this purported share transfer, two subsequent documents list Corona Resources as BPV's sole shareholder, namely minutes regarding a shareholder decision dated 9 March 2001 and the Commercial Register extract of BPV.[441] The Commercial Register records Corona Resources as the only shareholder of BPV for the period from 1 January 2000 until BPV's deletion on 1 July 2011 (and notes that the register provides information only on shareholders who hold more than 10% of the votes).

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434 Hearing Transcript, Day 1, p. 130:18–21; Hearing Transcript, Day 5, p. 157:2-3.

435 BPV Foundation Agreement, 22 December 1993 (**C-076**).

436 Second Rotko Statement, ¶ 14 (**CWS-2**).

437 Agreement between STC and ELA USA, 1 March 1996, section 5 (**C-599**).

438 BPV Corporate Minutes, 25 June 1997 (**C-600**); BPV Foundation Agreement, 22 December 1993 (**C-076**).

439 Agreement between Ella Kaubanduse and ELA USA, 20 October 1999 (**C-601**).

440 Agreement of Purchase and Sale of Shares of BPV from ELA USA to Corona Resources, 20 November 2000, section 1.2. (**C-612**).

441 Minutes of the Decision of Sole Shareholder of BPV, 9 March 2001 (**R-146**); Commercial Register extract of BPV, 7 December 2018 (**R-012**).

357. In summary and considering that all transactions with Corona Resources are to be considered void, the documentary record suggests that the Claimant owned 40% of the shares in BPV from its establishment in 1993, increased the shareholding to 91% by 25 June 1997, acquired the remaining shares through an agreement dated 20 October 1999, and remained BPV's sole shareholder until that company's dissolution in 2011.

358. But the Tribunal needs to address two other issues raised by the Respondent before it can conclude that the Claimant owned an investment within the meaning of the Treaty in the form of shares in BPV. First, Respondent alleges that it is unclear who owned BPV immediately before the purported transfer of all shares to Corona Resources, and that it is therefore uncertain to which entity those shares revert because of the non-existence of Corona Resources. In this regard, the Claimant has submitted, after the oral hearing and upon request by the Tribunal, the document through which Corona Resources purportedly acquired the shares in BPV from the Claimant, namely the agreement dated 20 November 2000 (C-612), referred to in paragraph 356 above. Even if the Tribunal were to disregard C-612, it could not find any indication on file regarding a transfer of the shares in BPV to any company other than the Claimant (apart from the failed transfer to Corona Resources). In short, the proposition that the non-existence of Corona Resources renders an entity other than the Claimant the owner of the shares in BPV is speculative and contradicted by C-612.

359. Secondly, the Respondent states that the Tribunal must ignore certain documents regarding the Claimant's shareholding in BPV because they were filed too late, constitute forgeries, or both.[442]

360. The Tribunal would have expected several documents in this arbitration to be filed earlier. This is true, for example, for C-599, C-600, and C-601 (referred to in paragraphs 355-356 above), which Mr. Rotko found in November 2021 when he "investigated a set of twenty-year-old documents held in a storage locker".[443] C-612, the agreement through which Corona Resources sought to acquire the shares in BPV from the Claimant, was filed only upon request by the Tribunal, and, according to the Claimant, after a "hard review" by Mr. Rotko, who located the document in November 2021, which "had been misfiled in 2006 with his personal immigration records".[444] But given that the Respondent has had the opportunity to comment on the relevant documents, and that they help in determining what entities held the shares in BPV over time, the Tribunal would find it inappropriate to ignore these documents. On 18 May 2022, the Tribunal informed the Parties of its decision to admit C-612 into the record. The Tribunal will not treat the other documents regarding BPV—filed in late 2021, that is, prior to the oral hearing and the submission of C-612—differently.

361. Having decided that it will not ignore any documents submitted by the Parties because they could or should have been filed earlier, the Tribunal must now address the Respondent's allegations of forgery. In particular, the Respondent disputes the authenticity of Corona Resources' bearer share certificate of 1 May 1996 (C-589), the agreement through which Corona Resources sought to

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442 Hearing Transcript, Day 1, p. 132:2-4; 3 November 2021 Submission, ¶¶ 5, 36; 21 April 2022 Submission, p. 3.

443 1 December 2021 Submission, ¶ 26.

444 6 May 2022 Submission, ¶ 3.

acquire the shares in BPV from the Claimant dated 20 November 2000 (C-612), and the minutes regarding the shareholder's decision to increase BPV's share capital dated 9 March 2001 (R-146).[445] In the Respondent's view, the non-existence of Corona Resources "inevitably renders its share certificate […] a forgery.[446] The Tribunal considers it unnecessary to take a view on whether or not this statement is correct. The share certificate dated 1 May 1996 says nothing more than that the unnamed bearer of the document owns 100% of the shares in Corona Resources. The document is irrelevant regarding the question what entity owns the shares in BPV.

362. Nor does the shareholder structure of BPV hinge on the authenticity of C-612. It is common ground between the Parties that this agreement has no legal effect because Corona Resources never existed, and the Respondent alleges forgery as an additional reason for this lack of legal effect. As set out in paragraph 358 above, C-612 supports the proposition that in light of the non-existence of Corona Resources, the shares revert back to the Claimant and not to some other, unspecified entity, a theoretical possibility identified by the Respondent. Regarding the documents related to BPV, the Respondent raises its most specific allegations of forgery with respect to C-612. And while the Claimant's case does not depend on C-612 being part of the record, its case would certainly be undermined if the Tribunal were convinced that this document, which contains Mr. Rotko's signature, constitutes a forgery prepared at some point between 1 December 2021 and 25 March 2022, as suggested by the Respondent.[447] But based on the preponderance of evidence—and under any higher standard of proof that may be applicable regarding accusations of forgery—the Tribunal is not convinced that C-612 is an inauthentic document, for the following reasons.

363. The Respondent emphasizes that the date provided on C-612—that is, 20 November 2000—is inconsistent with Mr. Rotko's testimony, which reads as follows.

> Q. Do you have the agreement by which Corona Resources purchased the shares in BPV?
>
> A. I do not remember. I think we submitted that agreement. It was on the Business Register -- yes, it is there on the Estonian Business Register, so you can take it from there. All the documents are there, they are all filed in the Business Register. I do remember that.
>
> Q. Is it not true, Mr Rotko, that in your second witness statement you said that you were not aware that the Estonian Business Register even existed before this arbitration started?
>
> A. It's not that I was not aware; I didn't use the Business Register. It was all done by my assistant; I did not do that. I do understand it exists now and that something can be taken from there.
>
> Q. Was it you who signed the agreement for the sale of shares in BPV to Corona?
>
> A. I do not remember. I need to look [at] it in the documents.
>
> Q. Do you remember when that could have happened?
>
> A. As far as I can recall, that was in 2001. If my memory serves, around March 2001, if I'm not mistaken.

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445 3 November 2021 Submission, ¶¶ 5, 36; 21 April 2022 Submission, p. 3.

446 3 November 2021 Submission, ¶ 5.

447 *See* 21 April 2022 Submission, p. 3: "The Claimant then filed additional documents on 1 December 2021 […] Had a similar agreement existed between ELA USA Inc as the seller and Corona Resources S.A. as the buyer, the Claimant would no doubt have submitted it."

> Q. How come you remember it so precisely?
>
> A. You know, my memory is a strange phenomenon right now: all of a sudden I can remember something or forget something, and it's out of my control. You know, it's like a flashback. I see a document and I remember: yes, that's it, this is pretty serious. So if I remember something, I do remember it; if not, I ask to look in the documents.
>
> 7 Q. So you had a flashback right now concerning the signing of the agreement in March 2001?
>
> A. Yes, I remembered it.
>
> Q. Okay. [448]

364. In the Tribunal's view, Mr. Rotko's recollection of the date of the purported transaction between the Claimant and Corona Resources as well as other facts regarding the agreement between the Claimant and Corona Resources was at best vague. This was the Tribunal's impression at the oral hearing, and it is confirmed by the verbatim transcript reproduced above. Mr. Rotko could not even remember whether it was him who signed the agreement or someone else ("I do not remember. I need to look [at] it in the documents").[449] Nor did Mr. Rotko make a definitive statement regarding the precise date on which the agreement was allegedly concluded ("As far as I can recall, that was in 2001. If my memory serves, around March 2001, if I'm not mistaken").[450] In addition, Mr. Rotko stated that the agreement is part of the Estonian Business Register ("yes, it is there on the Estonian Business Register, so you can take it from there. All the documents are there, they are all filed in the Business Register. I do remember that"). [451] But it seems undisputed between the Parties that the Estonian Business Register does not contain copies of documents, as confirmed by the Claimant after the hearing.[452] In sum, the Tribunal is unconvinced that the inconsistencies between Mr. Rotko's recollections and the date provided on C-612 justify the conclusion that the document is forged.

365. Nor is the Tribunal convinced by the other points Respondent raises in support of the alleged inauthenticity of C-612. The Respondent notes that C-612 was signed on behalf of Corona Resources by Mr. Frank Tuuksam, who according to a newspaper article was involved in "a high-tech scheme to steal millions" in the 1990s, and not by Mr. Rotko, allegedly the sole representative of Corona Resources.[453] The Tribunal accepts the Claimant's explanation that Mr. Tuuksam was provided with a temporary power of attorney for that transaction only.[454] This seems plausible, given that Mr. Rotko signed the agreement on behalf of the Claimant and could

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448 Hearing Transcript, Day 2, pp. 23:2-24:10.

449 Hearing Transcript, Day 2, p. 23:19-20; Hearing Transcript, Day 2, p. 23:22-23.

450 Hearing Transcript, Day 2, p. 23:22-23. In the Tribunal's view, Mr. Rotko's recollection did not become more precise when asked by Respondent's counsel whether he "had a flashback right now concerning the signing of the agreement in March 2001" (Hearing Transcript, Day 2, p. 24:7-8). Mr. Rotko replied to this question "Yes, I remembered it". The past tense suggests that Mr. Rotko referred to his earlier statement and did not intend to add precision to his previous testimony.

451 Hearing Transcript, Day 2, p. 23:4-8.

452 6 May 2022 Submission, ¶ 9.

453 21 April 2022 Submission, pp. 2-3.

454 6 May 2022 Submission, ¶ 10.

hardly sign on behalf of both entities. The Tribunal also wishes to note that contacts or dealings with individuals suspected of or convicted for criminal behavior do not mean that Claimant or Mr. Rotko engaged in criminal activities. This is true with respect to both Mr. Tuuksam and Mr. Arrocha Graell, the lawyer hired by the Claimant for the registration of Corona Resources.

366. The Respondent further argues that the date of the purported share transfer from the Claimant to Corona Resources provided in C-612 (that is, 20 November 2000) is inconsistent with the Estonian Commercial Register, which states that Corona Resources was BPV's shareholder from 1 January 2000. But the Commercial Register itself contains a caveat that it provides data on shareholders for information purposes only.[455] Furthermore, the Register does not provide a comprehensive history of a company's shareholder structure. For example, the Commercial Register identifies 10 February 1998 as the date of the first entry regarding BPV but mentions no other shareholder than Corona Resources, who became a shareholder—according to the same excerpt—only on 1 January 2000.[456]

367. Another point raised by the Respondent regarding the alleged inauthenticity of C-612 is that this document provides a different street address of the Claimant in Minneapolis (405 Second Avenue) than other documents (8800 Highway), namely the Claimant's certificate of incorporation (C-44) and a BPV shareholder list (C-601, p. 2).[457] This difference does, in the Tribunal's view, not support the proposition that C-612 was forged. Other documents on file contain the same address of the Claimant in Minneapolis (405 Second Avenue) as C-612, for example BPV's foundation agreement dated 22 December 1993, and payment orders from the Claimant dated 23 September 1999 and 7 June 2000, all submitted with the Claimant's Memorial on 30 August 2019.[458] The explanation for the different addresses seems to be that the 8800 Highway address is not only the address of the registered office of the Claimant provided in its articles of incorporation but also that of the Claimant's incorporator, Mr. Mark Garbuz.[459] While the use of the two Minneapolis addresses might not have been fully consistent during the period from 1993 to 2000, this is, in the Tribunal's view, no reason to assume that C-612 is a forgery.

368. Nor is the Tribunal persuaded by the Respondent's argument that the lack of a bank or wire transfer from Corona Resources to the Claimant as payment for the shares in BPV speak for the inauthenticity of C-612. The Tribunal has no doubt that, in 2000, Claimant and Corona Resources were fully owned and controlled by Mr. Rotko, even if Corona Resources later turned out to be an invalid company. Hence, the Tribunal accepts the Claimant's explanation that payment for the shares in BPV occurred through internal bookkeeping transactions.[460]

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455 Commercial Register extract of AS BPV (**R-012**), p. 2.

456 Commercial Register extract of AS BPV (**R-012**), pp. 1-2.

457 21 April 2022 Submission, p. 3.

458 BPV Foundation Agreement, 22 December 1993 (**C-076**); Payment order from ELA USA, to Viktor Kaasik (**C-238**); Payment order from ELA USA, to Primultini (**C-235**).

459 ELA USA Certificate of Incorporation and Articles of Incorporation, 6 April 1993, sections II and IV (**C-044**).

460 *See* 6 May 2022 Submission, ¶¶ 11-13.

369. The Respondent mentions in passing that another document is a forgery: R-146, the 9 March 2001 minutes of Corona Resources (represented by its sole shareholder, Mr. Rotko) to increase the share capital of BPV. No argument is provided as to why that document would be a forgery other than that all documents related to Corona Resources must be a forgery.[461] The Tribunal is not convinced by this proposition, as set out in the paragraphs above regarding C-612.

370. In sum, the Tribunal finds that Claimant owned an investment within the meaning of Article I(1)(a)(iii) of the Treaty in the form of the shares in BPV, as specified in paragraph 357 above, which means that Claimant had held a 40% stake in BPV since 1993 that was increased to 91% by 25 June 1997 and to 100% through an agreement dated 20 October 1999. The Claimant remained BPV's sole shareholder until the company's dissolution in 2011.

(II.) Verest

371. The Respondent disputes the Claimant's (indirect) ownership of the shares in Verest on grounds that were already addressed in the previous subsection, namely the alleged lack of connection between the Claimant and BPV and the non-existence of Corona Resources.[462] Based on the findings above, the Tribunal considers that the Claimant indirectly owned all shares in Verest through BPV from 23 September 1999 to 13 September 2010, for the following reasons.

372. It seems undisputed that BPV acquired 100% of the shares in Verest from two individuals on 23 September 1999.[463] At that point, Claimant held a 91% stake in BPV, and it acquired the remaining 9% stake through an agreement dated 20 October 1999.[464] In 2004, BPV sought to transfer its shares in Verest to Corona Resources, but the Parties agree that all transactions involving Corona Resources are void. This means that BPV remained Verest's sole shareholder until Verest's dissolution on 13 September 2010. The documentary record confirms this account. The commercial register excerpt of Verest states that Corona Resources acquired all shares in Verest from BPV on 18 June 2004 and held them until 13 September 2010. [465]

373. The Claimant's indirect ownership of 100% of the shares in Verest (through BPV) from 23 September 1999 to 13 September 2010 constitutes an investment within the meaning of Article I(1)(a)(iii) of the Treaty.

(III.) Agrin

374. Based on the findings above, the Claimant's indirect shareholding in Agrin as well as its duration are straightforward. BPV acquired all shares in Agrin on 8 December 1999 and resold them to

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461 3 November 2022 Submission, ¶ 36.

462 *See*, e.g. 3 November 2022 Submission, ¶ 37.

463 Memorial, ¶ 37 and 3 November 2022 Submission, ¶ 37, *both referring to* Share Purchase Agreement between BPV and Verest, 23 September 1999 (**C-055**).

464 *See* ¶ 357 above.

465 Commercial Register extract of Verest, 7 December 2018 (**R-013**).

Ella Kaubanduse on 22 March 2001.[466] Since the Claimant fully owned BPV on 8 December 1999, but never owned Ella Kaubanduse, the Claimant (indirectly) held 100% of the shares in Agrin from 8 December 1999 to 22 March 2001. The Claimant held no shares in Agrin beyond 22 March 2001.

(IV.) ELA Tolli

375. The Parties offer two conflicting theories on who owned ELA Tolli given that Corona Resources was non-existent. The Claimant states that, on 1 June 2002, BPV purported to transfer its interest in ELA Tolli to Corona Resources, and because this transaction was invalid, the Claimant continued to own all shares in ELA Tolli through BPV.[467] According to the Respondent, ELA Tolli never had a different owner other than its founder Mr. Toomas Rinne, who sought to sell ELA Tolli to Corona Resources on 14 November 2000.[468]

376. The Claimant cites Exhibit R-012 in support of its proposition that full ownership of ELA Tolli returns to BPV. [469] But R-012 is the commercial register extract of BPV. ELA Tolli is not even mentioned in this extract. The commercial register extract of ELA Tolli (**R-014**), however, mentions in the section entitled "shareholders" only Corona Resources.[470] The only other (legal or natural) person listed in the extract as ever having held shares in ELA Tolli is Toomas Rinne. The relevant section states that Mr. Rinne was the "founder of the company" and specifies that he held the same number of shares that was later supposedly transferred to Corona Resources.[471] Therefore, the information provided in the commercial register extracts on file supports the Respondent's account.

377. The Fourth Expert Report of Mr. Keres contains verbatim the same sentence on the alleged transfer of ownership in ELA Tolli from BPV to Corona Resources as the Claimant's 1 October 2022 submission, including the (inexplicable) reference to R-012.[472] During cross-examination, Mr. Keres confirmed that this sentence constitutes merely a factual assumption based on which he rendered his legal opinion. Hence, Mr. Keres' expert report does not support the proposition that BPV (or the Claimant) ever owned shares in ELA Tolli.

378. Mr. Rotko briefly stated in his second witness statement that "in 2000, the Corporate Group was expanded for the last time when we established another company, ELA Tolli ("Tolli"), as a subsidiary of ELA."[473] But BPV is not mentioned in this context. Nor does Mr. Rotko offer any detail or explanation regarding the alleged parent-subsidiary relationship between the Claimant

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466 Share Sale Contract between BPV and Alcedo for the sale of Agrin, 8 December 1999 (**C-057**); Share purchase agreement between BPV and Ella Kaubanduse for the sale of Agrin, 22 March 2001 (**R-150**).

467 1 October 2021 Submission, ¶ 70; 1 December 2021 Submission, ¶¶ 34-35.

468 Counter-Memorial, ¶ 665; 3 November 2021 Submission, ¶ 39.

469 1 October 2021 Submission, ¶ 70; 1 December 2021 Submission, ¶¶ 34-35.

470 Commercial Register extract of ELA Tolli, 7 December 2018, p. 2 (**R-014**).

471 Commercial Register extract of ELA Tolli, 7 December 2018, p. 3 (**R-014**).

472 Fourth Expert Legal Opinion of Paul Keres dated 30 September 2021, ¶ 63 (**CER-8**).

473 Second Rotko Statement, ¶ 35 (**CWS-2**).

and ELA Tolli. Ms. Kotova was more specific. She testified that ELA Tolli was controlled by the Claimant because ELA Tolli was a "subsidiary" of Corona Resources, which was in turn "simply a holding company, which at all times was controlled by ELA".[474] This statement was made prior to the discovery that Corona Resources was not an existing company, but it seems to imply that Corona Resources was indispensable for the parent-subsidiary relationship between the Claimant and ELA Tolli, given that no mention is made of any shareholding in ELA Tolli by BPV.

379. Finally, the Tribunal notes that neither the Claimant nor any of its witnesses commented on Mr. Rinne's role as founder and former shareholder of ELA Tolli (as per the commercial register), discussed by the Respondent in the Counter-Memorial and the 3 November 2021 Submission.

380. Hence, the Tribunal holds that the Claimant did not establish that it has ever held shares in ELA Tolli, either directly or indirectly. It seems that ELA Tolli never had an owner other than Toomas Rinne.

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381. Considering the above, the Tribunal finds that the Claimant owned shares qualifying as investments within the meaning of Article I(1)(a)(iii) of the Treaty in BPV (from 1993 until 2011), Verest (from 1999 until 2011), and Agrin (from 1999 until 2001), as specified in paragraphs 357, 373, and 374 above. Regarding the extent of the Claimant's potential investments beyond the ownership of said shares, the Tribunal wishes to emphasize two points.

382. First, it is evident from the wording of Article 1(a) of the Treaty that an investment does not need to be owned *and* controlled by the Claimant to be protected by the Treaty. Rather, the two elements are disjunctive, that is, ownership *or* control are sufficient. But this does extend the scope of protection regarding the relevant share here. This is because there are no indications on file that the Claimant controlled BPV, Verest, or Agrin outside the periods in which the Claimant directly or indirectly owned the relevant shares in these companies, or that the Claimant ever controlled ELA Tolli. All entities, including the Claimant, may have belonged to the same corporate group controlled by the same individual, Mr. Rotko. But Mr. Rotko was not a U.S. national when the alleged breaches of the Treaty occurred, nor when the arbitration was commenced in 2018. To the extent that Mr. Rotko owned or controlled Estonian entities directly, or through non-US members of the corporate group, those Estonian entities and the shares therein do not constitute protected investments under the Treaty.

383. Secondly, the Claimant's share ownership outlined above satisfies the jurisdictional requirement that the Claimant must have owned or controlled an investment within the meaning of the Treaty. But the Tribunal considers it appropriate to analyze what rights and interests invoked by the Claimant in addition to those shares constitute relevant investments. The issues that the Tribunal must address in this context partly overlap with the merits, but the Tribunal considers it unhelpful to wait for the analysis of those issues until a later point in this award. In other circumstances, there may be good reasons to not determine the exact extent of a claimant's investment(s) at the jurisdictional stage, or to apply only a *prima facie* test to certain issues. This can be the case in bifurcated proceedings in which a tribunal deciding on its jurisdiction may not have been fully

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474 Witness Statement of Ms. Olga Kotova dated 29 August 2019, ¶ 10 (**CWS-3**).

briefed on issues relevant to both jurisdiction and the merits. No such considerations apply in the present case in which the taking of evidence regarding jurisdiction and the merits has been completed and the Parties have fully argued their respective cases at the Oral Hearing and in their written submissions. Here, determining what rights and interests invoked by the Claimant qualify as investments under the Treaty facilitates and streamlines the Tribunal's analysis. To provide one example, the Respondent argues (rightly, as will be seen below) that only investments made in compliance with the domestic law of the host State and in good faith are protected by the Treaty. This point can be adequately addressed only if it is clear what rights and interests invoked by the Claimant constitute investments within the meaning of the Treaty.

384. With these observations in mind, that Tribunal will now address the other proprietary and contractual rights for which the Claimant seeks protection, starting with the alleged ownership of buildings and structures.

b) Ownership of the Seaplane Harbor

385. The Claimant states that it (indirectly, through its subsidiaries) owned the "buildings and structures at the Port",[475] and that the "uncompensated taking of the Lennusadam Port and Portlands in 2006" entails the Respondent's liability under the Treaty.[476] According to the Respondent, the Claimant's subsidiaries never acquired title to the buildings and the structures at the port.[477]

i. The Respondent's Position

386. According to the Respondent, none of the transactions relied upon by the Claimant validly transferred title and ownership rights to the Claimant because (i) the USSR never obtained title to any of Estonia's assets during the Soviet occupation; (ii) any transaction of Estonia's immovable property by the Soviet military to third parties were illegal under international law; (iii) such illegal transactions were consequently void under Estonian law; (iv) any subsequent transactions by non-owners of the property did not create ownership rights under Estonian law.

387. First, the Respondent contends that the USSR did not obtain title to any of Estonia's assets, including the property at the Seaplane Harbor, as a result of occupation because the USSR was "merely an administrator, not the sovereign, of the occupied land."[478] Due to the unlawful nature

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475 Memorial, ¶¶ 49, 73-74; Reply, ¶ 793.

476 Reply, ¶¶ 890-891.

477 Counter-Memorial, ¶¶ 64-144.

478 Counter-Memorial, ¶ 152. *See also* Counter-Memorial, ¶¶ 151-153, *referring to* Eyal Benvenisti, *The International Law of Occupation* (2nd ed., OUP, 2004), p. 6 (**RLA-042**); U.S. Department of the Army Field Manual 27-10, *The Law of Land Warfare* (1956), ¶ 358 (**CLA-158**); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, ¶ 118 (**CLA-160**).

of the Soviet occupation achieved by way of the use of force, the Respondent posits that the USSR could not have enjoyed the rights for certain assets as an occupier under the Hague Regulations.[479]

388. Moreover, the Respondent rejects the Claimant's proposition that the Transfer Instruments signed in 1940 resulted in a transfer of title of the Seaplane Harbor to the Soviet military.[480] According to the Respondent, the recitals of the Transfer Instruments state only that the assets listed therein were "taken compulsorily for use for the purposes of the military" without referring to the transfer of ownership of the assets.[481] As such, the Respondent asserts that the USSR never legally acquired any title to the Seaplane Harbor and could not conclude transactions with private companies after Estonia gained independence.[482]

389. Secondly, the Respondent argues that even if the Soviet occupation were deemed legal, and as a result, the USSR could enjoy in full the rights of the occupier stemming from the Hague Regulations, the Soviet military could not validly sell the buildings at the Seaplane Harbor under Article 53 of the Hague Regulations.[483] This is because the current dispute concerns only objects or structures attached to the land, which do not constitute "movable property" or "means of transport" as stipulated in Article 53 of the Hague Regulations.[484] Referring to the dictionary meaning of "movable property," the Respondent asserts that real estate and other permanent structures that are fixed to the ground cannot be considered "movable objects."[485] The Respondent likewise contends that an immovable structure, like a port, cannot be considered "means of transport" because the ordinary meaning of the term includes only "vehicles […] used for transportation that are not physically attached to the ground, such as cars, ships, airplanes and trains."[486]

390. Further, the Respondent points to Article 55 of the Hague Regulations, which specifically refers to the rights of an occupier as to the "buildings" and the "real estate" in the occupied territory which, in the Respondent's view, are "clearly differentiated from 'movable property' of Article 53."[487] The understanding that Article 53 of the Hague Regulations applies to "movable property" while Article 55 applies to immovable property is further confirmed, according to the Respondent, by the study on customary international humanitarian law conducted by the

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479 Counter-Memorial, ¶¶ 154-156, *referring to* Mälksoo Report, ¶¶ 13-21 (**RER-3**).

480 Counter-Memorial, ¶ 157, *referring to* Instrument of Transfer dated 22 June 1940 (**C-192**); Instrument of Transfer dated 18 July 1940 (**C-193**); Inventory/Assessment List dated 8 July 1940 (**C-194**).

481 Counter-Memorial, ¶¶ 157-158 (emphasis added by the Respondent).

482 Statement of Defense, ¶ 34; Counter-Memorial, ¶¶ 150, 159.

483 Counter-Memorial, ¶ 160.

484 Counter-Memorial, ¶ 161, 173, *citing* **Hague Regulations**, Article 53 (**CLA-062**).

485 Counter-Memorial, ¶¶ 162-163, *citing* "Movable property", Cambridge English Dictionary (2020), accessed in March 2020 (**RLA-044**).

486 Counter-Memorial, ¶ 164, *referring to* "Means of transport", Collins English Dictionary (2020), accessed in March 2020 (**RLA-045**).

487 Counter-Memorial, ¶ 166, *citing* Hague Regulations, Article 55 (**CLA-062**).

International Committee of the Red Cross (the "**ICRC**"), several military manuals which the ICRC has taken into account as proof of customary law, and by scholars of the field.[488]

391. The Respondent also rejects the Claimant's proposition that buildings should be considered movables under Article 53 of the Hague Regulations because they were, for a limited time, considered legally equivalent to movable property under domestic law.[489] For the Respondent, the terms in Article 53 of the Hague Regulations have independent meanings, which should be interpreted pursuant to the Vienna Convention on the Law of the Treaties (the "**VCLT**"), rather than by domestic law.[490] In any event, the Respondent clarifies that section 13(a) of the Law of Property Act Implementation Act (the "**LPAIA**") was a "peculiarity during the transitional period," as acknowledged by the Claimant's expert and was never meant to reflect the actual legal definition of "buildings" in Estonia.[491]

392. Furthermore, the Respondent argues that the Seaplane Harbor could not be sold under Article 55 of the Hague Regulations because the provision limits the rights of an occupier to those of an "administrator and usufructuary of the public buildings."[492] According to the Respondent, it is clear from the legal authorities that the right to act as an administrator and usufructuary includes only the right to use the immovable property and to receive, sell or dispose of the proceeds, *i.e.*, "the title to fruits of an immovable."[493] Conversely, the Respondent asserts that none of the authorities indicate that the occupying power has the right to sell the buildings or that the specific nature of the building or the length of occupation justifies the extension of the rights therein.[494] In particular, the Respondent refutes the claim that an *ultra vires* sale, even if in direct contravention of the Hague Regulations, is protected under international law.[495]

393. According to the Respondent, the Estonian courts similarly reasoned that Estonia did not legally cease to exist during the Soviet occupation and that the transactions of the military property

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488 Counter-Memorial, ¶¶ 170-172, *referring to* Customary International Humanitarian Law Database of the International Committee of the Red Cross, Rule 51 (**RLA-046**); UK Ministry of Defense, *The Manual of the Law of Armed Conflict*, (OUP, 2004), p. 304 (**CLA-153**); U.S. Department of Defense, *Law of War Manual*, June 2015, p. 793 (**CLA-154**); U.S. Department of the Army Field Manual 27-10, *The Law of Land Warfare* (1956), ¶¶ 403-404 (**CLA-158**).

489 Counter-Memorial, ¶ 167.

490 Counter-Memorial, ¶ 167, *referring to* LPAIA (**CLA-189**).

491 Counter-Memorial, ¶ 168, *citing* Second Legal Opinion of Paul Keres dated 23 August 2019 ("**Second Keres Report**"), ¶ 40 (**CER-2**).

492 Counter-Memorial, ¶ 174-175, *citing* Hague Regulations, Article 55 (**CLA-062**).

493 Counter-Memorial, ¶¶ 176-180, 182, *referring to* Customary International Humanitarian Law Database of the International Committee of the Red Cross, Rule 51(b) (**RLA-046**); Yoram Dinstein, *The International Law of Belligerent Occupation*, (CUP, 2009), pp. 214-215, 219 (**RLA-047**); Dieter Fleck (ed), *The Handbook of International Humanitarian Law*, (OUP, 2013), pp. 292-293 (**RLA-048**); U.S. Department of Defense, *Law of War Manual*, June 2015, p. 792 (**CLA-154**); UK Ministry of Defense, *The Manual of the Law of Armed Conflict*, (OUP, 2004), p. 303 (**CLA-153**).

494 Counter-Memorial, ¶¶ 179, 181.

495 Rejoinder, ¶ 92.

belonging to Estonia concluded by the Soviet military were, therefore, illegal pursuant to Article 55 of the Hague Regulations.[496]

394. In respect of Soviet law, the Respondent maintains that the transactions concluded by the Soviet military with GT, Nautex and B&E were also "illegal and impossible," given that (i) Soviet law did not recognize the concept of private property until 31 May 1991; (ii) all military assets were considered State property, which could not be alienated; and (iii) any transfer of the military assets required express approval from the Ministry of Defense of the USSR, which the Soviet military lacked in concluding the transactions at issue.[497] The Respondent further argues that even if the transactions had not contravened Soviet law, "it was impossible to assume at the time that it was safe and legitimate to buy real estate from the Soviet military" since by March 1990, it was clear that the occupation regime was about to end.[498]

395. In response to the Claimant's claim that it was the ESSR, and not the Soviet military, that entered into the alleged sales transactions, the Respondent contends that the ESSR never had authority over military assets in its territory and that the ESSR, in any event, was not a precursor to the independent Estonian State, but was a "collective designation of the Soviet government apparatus on Estonia's territory."[499]

396. Thirdly, the Respondent posits that the transactions concluded by the Soviet military with GT and B&E were illegal pursuant to the domestic legislation of Estonia adopted during the transitional period.[500] In this respect, the Respondent rejects the Claimant's argument that Estonian domestic law is irrelevant because the arbitration is governed by international law.[501] In the Respondent's view, the determination of ownership rights is a question of domestic law, in particular, when dealing with the validity of real estate transactions with private companies.[502]

397. The Respondent emphasizes that while it was not necessary for Estonia to declare transactions that were already illegal under international law additionally illegal by virtue of domestic law, Estonia (i) adopted domestic legislation that underscored the illegality of transacting with the departing occupation forces and (ii) established a registration system that provided an opportunity to legalize some transactions concluded with the Soviet military on a case-by-case basis.[503] The

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496 Counter-Memorial, ¶ 215, *referring to* July 2005 Judgment, ¶¶ 2, 4, 10 (**C-078**); December 1994 Supreme Court Judgment, pp. 2-3 (**CLA-191**).

497 Counter-Memorial, ¶¶ 140-144, 242; Rejoinder, ¶ 93; Expert Opinion of Dr. Sergey Petrachkov dated 10 March 2020, amended on 18 June 2020 ("**Petrachkov Report**"), ¶¶ 27-33, 55-79, 123, 126, 156 (**RER-2**). *See also* Hearing Transcript, Day 1, pp. 99:22 – 100:6.

498 Rejoinder, ¶ 94. *See also* Counter-Memorial, ¶¶ 236-243.

499 Rejoinder, ¶ 89; Petrachkov Report, ¶¶ 27-35, 59-75, 156 (**RER-2**).

500 Counter-Memorial, ¶¶ 184, 471. *See* Section III.C above.

501 Rejoinder, ¶ 105.

502 Counter-Memorial, ¶ 197; Rejoinder, ¶ 106.

503 Counter-Memorial, ¶¶ 184-185; Rejoinder, ¶¶ 96-97, *referring to* Resolution of the Presidium of the Supreme Council of the Republic of Estonia regarding the Initial Measures for Organising the Privatization Process, 17 July 1990 (**CLA-195**); 19 December 1990 Resolution (**CLA-196**); Regulation No. 244 (**CLA-197**); 24 July 1992 Regulation (**C-198**). *See also* Hearing Transcript, Day 1, pp. 101:23 – 102:5.

Respondent points out that none of the transactions to which the Claimant traces its rights at the Seaplane Harbor were submitted for registration in accordance with the relevant legislation (that is, Resolutions Nos. 244 and 215).[504]

398. Addressing the Claimant's assertion that the 23 January 1992 Resolution was retroactively applied, the Respondent states that neither the Estonian courts nor the Respondent in this arbitration relied on the said Resolution to decide or reason that the transactions concluded by B&E and GT were illegal under Estonia's domestic law.[505] Rather, the relevant transactions were illegal on the basis of international law and remained illegal because they were not submitted for re-registration.[506] Furthermore, the Respondent states that the Tallinn City Court, in its July 2005 Judgment, mentioned the January 1992 Resolution not in its analysis of the legality of the relevant transactions but as part of the general historical background set out earlier in the judgment.[507] The Respondent adds that the ESSR resolutions of 17 July 1990 and 19 December 1990, which suspended transactions with State property and declared the disposals of property by the Soviet military unlawful, were adopted before GT and Nautex concluded their sales transactions (on 17 August 1991).[508] As such, the Respondent is of the view that the transactions between GT and Nautex would not have been possible already in light of the two resolutions.[509]

399. Accordingly, the Respondent posits that the transactions with the Soviet military concluded in violation of Estonian law were void pursuant to sections 51(1) and 62(1) of the 1965 Civil Code of Estonia since "[a]ny transaction concluded in violation of law is invalid" and is "deemed

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504 Counter-Memorial, ¶¶ 195-196, 471(ii); Rejoinder, ¶¶ 96, 97(iii), 101. The Respondent submits that it "took a simplified approach in these proceedings that essentially there had been two instances for the Claimant's predecessors to submit their alleged transactions for registration." *See* Respondent's Answers to Tribunal Questions, ¶ 35. In any event, the Respondent takes the view that the registrations could not have occurred, given that the contracts were most likely forged at a much later date to create a legal basis for the Claimant's presence during the Estonian court proceedings. *See* Statement of Defense, ¶ 37; Second Keres Report, ¶ 46 (**CER-2**); Counter-Memorial, ¶ 196.

505 Counter-Memorial, ¶ 217, *referring to* July 2005 Judgment, ¶¶ 4-5, 10 (**C-078**); Rejoinder, ¶¶ 98-100, *referring to* May 2002 Appeal Judgment (**C-191**); Tallinn City Court, Case No. 2/23-7262/02, Judgment, 4 July 2005 (**C-078**); March 2006 Appeal Judgment, pp. 38-42 (**C-081**). *See also* 3 November 2021 Submission, ¶¶ 22-23.

506 Rejoinder, ¶¶ 100-101.

507 Rejoinder, ¶ 99(ii). According to the Respondent, the Tallinn Circuit Court agreed with the Tallinn City Court on questions of transitional law without repeating its analysis (Rejoinder, ¶ 99(iii)).

508 Counter-Memorial, ¶¶ 221-223, *referring to* Resolution of the Presidium of the Supreme Council of the Republic of Estonia regarding the Initial Measures for Organising the Privatization Process, 17 July 1990 (**CLA-195**); Rejoinder, ¶ 97(ii), *referring to* Contract No. 16 (**C-023 / R-036**); Sale agreements between GT and Nautex, 17 August 1991 (**R-048**).

509 Rejoinder, ¶ 98.

invalid as of its inception."[510] In the Respondent's view, there is no basis for Estonia to uphold the transactions, which were concluded in bad faith as an attempt to benefit in uncertain times.[511]

400. Fourthly, given that the initial transactions allegedly concluded by the Soviet military with GT and B&E were illegal and void as analyzed above, the Respondent avers that none of the subsequent transactions involving Nautex, Verest and Agrin could have legal effect and transfer title of the buildings at the Seaplane Harbor.[512] This is because, according to the Respondent, under section 156(1) of the 1965 Civil Code,[513] it was impossible to acquire property in good faith if the owner had lost possession against its will.[514] Thus, with respect to the Seaplane Harbor, the owner of the Seaplane Harbor—the State of Estonia—had the right to reclaim its ownership that was "dispossessed from them against their will" under the threat of military force.[515] In the same vein, the Respondent advances that the 26 September 1997 contract between B&E and Agrin could not create property rights to buildings at the Seaplane Harbor under section 95(3) of the Law of Property Act because they were "stolen, lost or dispossessed in any other manner from the owner against the will of the owner."[516]

401. The Respondent further emphasizes that none of the subsequent transactions involving Nautex, Verest and Agrin were concluded in good faith because:

(a) the sellers and the buyers in the chain of transactions were managed and controlled by the same persons, namely Mr. Marko Purru, who signed the contract with the Soviet military on behalf of GT and the contract with Verest on behalf of Nautex, as well as Mr. Dimitri Sukortsev, who signed the contract with GT on behalf of the Soviet military and later became a member of the management board and a shareholder of Verest;[517]

(b) the 26 September 1997 contract with Agrin directly referred to Certificate No. 8395 issued by the Tallinn Building Register, which indicated that the buildings had been previously used by Military Factory No. 84;[518] and

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510 Counter-Memorial, ¶¶ 199, 228, *citing* Civil Code, sections 51(1), 62(1) (**RLA-051**); Rejoinder, ¶ 104. The Respondent notes that these provisions of the Civil Code concerning the validity of transactions were left in force by Estonia until 1 September 1994 when the all-new Civil Code Act entered into force. *See* Counter-Memorial, ¶ 198.

511 Counter-Memorial, ¶¶ 231-232, 234-240.

512 Counter-Memorial, ¶¶ 200-201; Rejoinder, ¶ 107.

513 The Respondent states that the 1965 Civil Code was the applicable law when the sale agreements were concluded as the Property Law Act of Estonia had not yet entered into force. *See* Counter-Memorial, ¶ 202.

514 Rejoinder, ¶ 107.

515 Counter-Memorial, ¶¶ 202-203, *citing* Civil Code, section 156(1) (**RLA-051**). *See also* Counter-Memorial, ¶¶ 331-337.

516 Counter-Memorial, ¶¶ 207-208, *citing* Law of Property Act, 9 June 1993, section 95 (**RLA-052**).

517 Counter-Memorial, ¶ 205, *referring to* Contract between Military Unit No. 1176 and GT, 17 August 1991 (**C-025**); Sale Agreement between Nautex and Verest, 7 May 1992 (**C-027**).

518 Counter-Memorial, ¶ 210, *referring to* Certificate No. 8395 of Tallinn Building Register issued to B&E, 16 September 1997 (**C-036**).

(c) Mr. Enn Laanso, who represented Agrin, had been an advisor to the Ministry of Justice of Estonia in relation to the Seaplane Harbor and thus should have known that the Estonian State was claiming ownership in regard to the Seaplane Harbor. [519]

402. In light of the foregoing, the Respondent maintains that the Claimant has failed to prove the chain of titles with respect to the Seaplane Harbor nor has it demonstrated that the Claimant and its predecessors had ownership rights of the buildings and structures therein under both international and domestic law.[520]

ii. The Claimant's Position

403. Emphasizing that this arbitration is governed by international law, the Claimant rejects the claim that the validity of its transactions involving the property rights of the Seaplane Harbor taken by third parties in good faith during and after occupation should be determined by Estonian domestic law, especially in the context of a long-term occupation.[521] Therefore, the Claimant argues that (i) the sale of the military property at the Seaplane Harbor during the occupation period were permitted under the Hague Regulations;[522] and (ii) in any event, international law necessitates that transactions taken by the Claimant in good faith must be given legal effect post-occupation, even if the transactions were deemed illegal under the law of occupation.[523]

404. The Claimant raises doubts regarding the applicability of the Hague Regulations because, in its view, the issue of whether Estonia was under military occupation is a "contentious" one.[524] To the extent that the ESSR had its own government and foreign policy, "the provisioning of the allied Soviet military personnel in Estonia would not constitute an occupation."[525] The Claimant asserts that if there was a military occupation in Estonia, the military installation at the Seaplane Harbor was transferred to the Soviet armed forces in 1940 by the Transfer Instruments and that the Soviet armed forces held an interest in the Seaplane Harbor before selling it to private

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519 Counter-Memorial, ¶ 209.

520 Counter-Memorial, ¶ 148; Rejoinder, ¶¶ 66, 71.

521 Reply, ¶¶ 24-26, 1028-1029.

522 Memorial, ¶¶ 297-298.

523 Memorial, ¶ 304; Reply, ¶ 30.

524 Reply, ¶ 1030. The Claimant notes that the issue of whether the law of occupation applies to Estonia is contentious since, to the extent that the ESSR was a State, the provisioning of the allied Soviet military personnel in the State of ESSR would not constitute an occupation. With respect to transitional property questions, the Claimant relies on Professor Crawford's reference to the UK High Court decision in *Jaakson and Roos* that "in 1940 Estonia was annexed by the USSR […] and Estonia had become part of the USSR de facto" and that "the Republic of Estonia as constituted prior to June 1940, has ceased de facto to have any existence." The Claimant states that the Hague Regulations are, in any event, part of the domestic law of Estonia because they are customary international law. *See* Memorial, ¶ 278; Reply, ¶¶ 1030-1036, *referring to* James Crawford, Creation of States in International Law (OUP, 2015), pp. 393-394, 689-690 (**CLA-162**); *Re an Application by Ernst Jaakson & Aarand Roos*, 85 ILR 53 (English High Court, 1990), pp. 54, 57 (**CLA-307**). *See also* Second Keres Report, ¶ 37 (**CER-2**); Kristen E. Boone, '*Obligations of the New Occupier: The Contours of a Jus Post Bellum*' (2008) Vo. 31(2), Loyola of Los Angeles International and Comparative Law Review, p. 109 (**CLA-281**).

525 Reply, ¶ 1030.

companies.[526] The Claimant further advances that the end of the occupation would have occurred in 1995, one year after the date when the Soviet military withdrew its forces from the territory on 1 June 1994, pursuant to Article 6(3) of the Fourth Geneva Convention.[527] The Claimant argues that the Soviet military was entitled to use, deplete, or dispose of the Seaplane Harbor and its facilities during the occupation pursuant to the Hague Regulations.[528]

405. Considering a port as an integral part of a "means of transport," the Claimant maintains that the Soviet military was entitled to use, deplete, or dispose of the Seaplane Harbor and its facilities for military purposes during occupation pursuant to Article 53 of the Hague Regulations.[529] In particular, the Claimant considers that the transactions of the Seaplane Harbor by Soviet military to private parties during occupation were lawful when (i) the majority of the facilities was transferred to SEK pursuant to Decree No. 477 on 29 December 1989 and then to B&E following SEK's liquidation and (ii) the remaining assets that were not transferred to SEK were sold to GT, Nautex, and then to Verest in 1992.[530]

406. In respect of Article 55 of the Hague Regulations, the Claimant notes that the provision imposes no limitations on the purposes of the disposal of the proceeds of exploitation of the public property.[531] In the context of a prolonged occupation, the Claimant posits that international law recognizes the occupier's authority to exploit public property and to "encroach on the 'principal'" to enhance and maintain infrastructure for the purpose of satisfying the needs of the people of the occupied territory.[532] Therefore, for the Claimant, the decision by the ESSR to privatize the Seaplane Harbor, which was in need of capital improvement, during the military occupation was justified as the action resulted in the betterment of the residents in the occupied territory.[533]

407. The Claimant rejects the Respondent's analysis that the legality of the transactions concluded by the Soviet military and by the Claimant's predecessors must be determined by domestic law.[534] To the extent that the transactions concluded during the occupation are "a historical fact,"[535] the Claimant stresses that international law principles require the Respondent to respect and protect

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526 Memorial, ¶¶ 253, 275, 316, *referring to* Instrument of Transfer dated 22 June 1940 (**C-192**); Instrument of Transfer dated 18 July 1940 (**C-193**).

527 Reply, ¶¶ 1047-1050, *referring to* Mälksoo Report, ¶ 21 (**RER-3**); Dana Wolf, Transitional Post-Occupation Obligations under the Law of Belligerent Occupation (2018), pp. 18, 54 (**CLA-285**).

528 Memorial, ¶¶ 284, 286, 296-297, *citing* Hague Regulations, Article 53 (**CLA-062**).

529 Memorial, ¶¶ 284, 286, 296-297, *citing* Hague Regulations, Article 53 (**CLA-062**).

530 Memorial, ¶¶ 253, 259, 316, *referring to* Decree 477 establishing SE SEK, 29 December 1989 (**C-018**). *See* Second Keres Report, ¶ 61 (**CER-2**). *See also* Section III.D.1.b) above.

531 Reply, ¶ 1054,

532 Memorial, ¶¶ 289-293, 295, 298-301, *referring to* Eyal Benvenisti, *The International Law of Occupation* (OUP, 2015), pp. 81-82 (**CLA-204**); Opinion of Advocate General in Western Sahara Case C-266/16, ¶ 268 (**CLA-147**); Reply, ¶¶ 1055-1057. *See also* Kristen E. Boon, *Obligations of the New Occupier: The Contours of a Jus Post Bellum*, Loyola of Los Angeles International and Comparative Law Review, Vol. 31, No. 2 (2008), p.110 (**CLA-281**).

533 Memorial, ¶ 321.

534 Reply, ¶ 26.

535 Reply, ¶ 23.

the rights acquired from transactions entered into in good faith during the occupation period.[536] According to the Claimant, such obligation to give effect to the facts and the legal situations arising from the acts created during occupation emerges from the principles of legal certainty and *ex factis jus oritur* ("law arises from the facts") regardless of their validity under domestic or international law.[537] It is this legal certainty, the Claimant underlines, that safeguards the rights and interests of the occupied, who relied in good faith on the legal system and developed expectations based on the norms the system had produced.[538]

408. Conversely, the Claimant considers that the application of the *ex injuria jus non oritur* ("unjust acts cannot create law") principle in the context of the Soviet occupation of Estonia would "produce illogical if not 'undesirable consequences'" and be "equated to 'denying reality' by 'Utopians.'"[539] In this respect, the Claimant agrees with Judge Dillard that "it would be too harsh to punish the occupied for the wrongs done by the occupiers."[540]

409. In support of its contention, the Claimant refers to cases in which contracts,[541] wills,[542] judgments,[543] and a co-operative society from an occupation era,[544] all of which did not meet the formal requirements of the post-occupation legal acts, were nonetheless upheld by the domestic courts on similar grounds to the *ex factis* principle.[545] Relying on Professor Mälksoo's commentary on the Soviet annexation, the Claimant underscores that the same principle was "especially relevant to the transfer of both property and sovereign authority to the Baltic states,

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536 Reply, ¶ 1059.

537 Memorial, ¶ 326; Reply, ¶¶ 1059, 1062-1063, 1105. *See also* Janusz Symonides, 'Acquisitive Prescription in International Law' (1970) Vol. 3, Polish Yearbook on International Law, p. 119 (**CLA-278**).

538 Reply, ¶¶ 1073, 1075-1079, 1105, 1109. *See also* Reply, ¶¶ 1106-1108, 1110; Christopher R. Rossi, 'Ex Injuria Jus Non Oritur, Ex Factis Jus Oritur, and the Elusive Search for Equilibrium After Ukraine' (2015) Vo. 24(1), Tulane Journal of International and Comparative Law, pp. 151-153 (**CLA-276**); Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR* (Martinus Nijhoff Publishers, 2003), pp. 324-327 (**CLA-291**). *See also* Hearing Transcript, Day 1, pp. 45:15 – 46:10.

539 Reply, ¶¶ 1066, 1077, *citing* Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR* (Martinus Nijhoff Publishers, 2003), pp. 196-197 (**CLA-291**); Christopher R. Rossi, 'Ex Injuria Jus Non Oritur, Ex Factis Jus Oritur, and the Elusive Search for Equilibrium After Ukraine' (2015) Vo. 24(1), Tulane Journal of International and Comparative Law, p. 153 (**CLA-276**).

540 Memorial, ¶ 307, *referring to* Separate Opinion of Judge Hardy Dillard, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Advisory Opinion, p. 167 (**CLA-161**).

541 Reply, ¶¶ 1082-1086, *referring to B v. T*, 24 ILR 962 (Poland Supreme Court), pp. 963, 965 (**CLA-297**). *See also* Reply, fn. 1121.

542 Reply, ¶ 1087, *referring to In re P. (Komotini Case)*, 15 ILR 566 (Greece, Court of First Instance of Phodope, 1948), pp. 556-557 (**CLA-303**).

543 Reply, ¶¶ 1088-1090, *referring to Endricci v. Eisenmayer*, 15 ILR 365 (Italy, Court of Appeal of Trent, 1949) (**CLA-304**); *Hungarian Soviet Government (Confiscation of Property) Case*, 1 ILR 56 (Austria, Supreme Court of Civil Matters, 1922), pp. 56-57 (**CLA-300**).

544 Reply, ¶¶ 1091-1093, *referring to* Expropriation of Sudeten-German Co-operative Society Case, 24 ILR 35 (German Federal Republic, Federal Supreme Court, 1957), pp. 35-36 (**CLA-302**).

545 *See also* Reply, ¶¶ 1103-1104.

struggling to establish effective governments and economics after 50 years of effective control by the USSR."[546] According to the Claimant, a similar approach was indeed extended to the regulation of property rights by the Turkish-Cypriot administration, by the Venice Commission, as well as by the European Court of Human Rights, which recognized the rights of the inhabitants under the *de facto* authorities, including "the right to peaceful enjoyment of one's possession" and the necessity for the post-occupation regimes to find regulations balancing the interests of the old and the potential new owners.[547]

410. Accordingly, the Claimant contends that the Respondent is required to provide legal certainty and *ex factis* respect for the property rights at the Seaplane Harbor, which the private parties (the Claimant's predecessors) acquired in good faith under the legal measures in force during the occupation.[548] On this basis, the Claimant argues that the Respondent cannot nullify the transactions of these "innocent parties" taken in conformity with the underlying laws and regulations of the occupier.[549]

411. In any event, the Claimant submits that neither the 17 July 1990 Resolution nor the 23 January 1992 Resolution were applicable to Contract No. 16 to render B&E's acquisition of the assets invalid under Estonian law, as Contract No. 16 pre-dated the two Supreme Council resolutions.[550] In support of its contention, the Claimant relies on two letters issued by the Government Office, which confirmed that the Seaplane Harbor was not public property, that B&E acquired the buildings and structures at the Seaplane Harbor "on the basis of a valid contract for purchase and sale," that the two Supreme Council resolutions did not have retroactive effect, and that the information in the Tallinn Building Register regarding B&E's possessory rights at the Seaplane Harbor was correct.[551] B&E's transfer of property to Agrin, according to the Claimant, was also outside the scope of the 23 January 1992 Resolution because the assets were controlled by B&E, a private party, from 22 May 1990.[552]

412. In response to the Respondent's argument that the 23 January 1992 Resolution was not relevant to the Estonian court decisions, the Claimant relies on Mr. Keres' review of the court file that "the only way in which the courts could have come to their conclusions about the status of the

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546 Reply, ¶¶ 1110-1111, *referring to* Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR* (Martinus Nijhoff Publishers, 2003), p. 194 (**CLA-291**).

547 Memorial, ¶¶ 312-313, *referring to* European Court of Human Rights, Grand Chamber Decision as to the Admissibility of Application No. 46113/99, 1 March 2020, ¶¶ 84-85 (**CLA-165**); Venice Commission, Opinion No. 516/2009, CDL-AD (2009)015, 17 March 2009, ¶¶ 24-25 (**CLA-166**); Reply, ¶¶ 1098-1097, *referring to Hesperides Hotels Ltd v. Aegean Turkish Holidays Ltd* [1978] Q.B. 206 (**CLA-163**).

548 Memorial, ¶ 323; Reply, ¶¶ 1120, 1123. *See also* Reply, ¶ 1121, *referring to Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, ¶ 125 (**CLA-160**).

549 Memorial, ¶ 308; Reply, ¶ 1119.

550 Reply, ¶ 354, *referring to* Contract No. 16 (**C-023 / R-036**).

551 Reply, ¶¶ 345-353, *citing* Letter from Government Office to Tallinn Building Register Municipal Enterprise, 2 June 1995 (**C-306**); Letter from the State Chancellery to the Ministry of Justice, 8 November 1995 (**C-307**). *See also* Hearing Transcript, Day 1, p. 39:7-15.

552 Reply, ¶ 356, *referring to* 23 January 1992 Resolution (**C-197**); Third Keres Report, ¶¶ 214-215 (**CER-4**).

Lennusadam Port is if the courts gave retroactive effect to the 23 January 1992 Resolution."[553] In this respect, the Claimant highlights that the 23 January 1992 Resolution was indeed cited by the Estonian courts and relied upon by Estonia in the court proceedings.[554]

413. In light of the above, given that (i) Estonia recognized private rights at the port after the end of the USSR and the withdrawal of the Soviet military forces,[555] and (ii) Agrin and Verest purchased property interests arising from earlier transactions taken in accordance with the laws in force during the occupation; and (iii) Estonia's repeatedly recognized the private possessory rights at the Seaplane Harbor after 1994,[556] the Claimant argues that it is neither practical nor fair to erase all practical consequences of a long-term occupation.[557]

iii. The Tribunal's Analysis

414. The Tribunal has no doubt that land, buildings, or structures owned by the Claimant's subsidiaries would constitute investments within the meaning of Article I(1)(a)(i) of the Treaty, that is "property" indirectly "owned" by the Claimant. The Parties rely on several legal regimes regarding the transfer and ownership of property—namely international law, Soviet law, and Estonian law. According to the Claimant, issues of ownership in this arbitration are governed by international law, and not domestic law.[558] The Respondent states that the initial transactions between the Soviet military and private parties were illegal under international law,[559] and that the subsequent transfers of ownership to the Claimant's subsidiaries were invalid under Estonian law.[560] Against this background, the Tribunal considers it necessary to first comment on the law that is applicable regarding issues of property and ownership in this arbitration.

(I.) The Applicable Law

415. The Treaty lists "tangible and intangible property" within the non-exhaustive enumeration of assets in Article I(1)(a) that may qualify as protected "investment in the territory" of the host State but it does not define the term "property". It is to state the obvious that the Treaty must be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, as set out and reflected in Article 31 VCLT.

416. The Treaty does not contain a general provision regarding the applicable law, nor does it specify what rules govern the issue of whether a foreign investor owns "property". In other contexts, however, the Treaty provides guidance on the applicable law. Disputes between the State parties

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553 1 October 2021 Submission, ¶ 30, *citing* Fourth Keres Report, ¶¶ 47-49 (**CER-8**). *See also* Hearing Transcript, Day 5, p. 51:20-25.

554 1 December 2021 Submission, ¶¶ 79-81.

555 Reply, ¶ 90.

556 Reply, ¶¶ 33, 286-352, 1227-1262; Third Keres Report, ¶¶ 128-143 (**CER-4**). *See also* Letter from the State Chancellery to the Ministry of Justice, 8 November 1995 (**C-307**).

557 Memorial, ¶¶ 19, 21, 263, 265; Reply, ¶¶ 1094-1124.

558 Reply, ¶ 26.

559 Counter-Memorial, ¶ 145.

560 Counter-Memorial, ¶¶ 197-199.

concerning the interpretation or application of the Treaty can be referred "to an arbitral tribunal for binding decision in accordance with the applicable *rules of international law*".[561] The investor-State dispute resolution clause in Article VI lacks a similar clarification. The reason might be that disputes relating to an alleged breach of the Treaty constitute only one of the three categories of disputes listed in that provision.[562] Disputes arising from investment agreements (mentioned under Article VI(1)(a)), for example, are typically governed by domestic law, often by that of the host State—and not by international law.

417. Article I of the Treaty specifies the law which governs certain issues, but those issues do not include the acquisition and ownership of property. A "national" of a party to the Treaty, for example, is a "natural person who is a national of a Party under *its applicable law*".[563] The absence of a corresponding clarification regarding the ownership of property does, in the view of the Tribunal, not necessarily mean that domestic law is irrelevant in this context. The Annex to the Treaty appears to confirm this point. In sections 1 and 2 of the Annex, the United States reserves its right to make exceptions to national treatment and most-favored-nation treatment regarding, *inter alia*, the "ownership of real property". In section 3 of the Annex, Estonia reserves its right to make exceptions to national treatment regarding the "initial acquisition from the Republic of Estonia and its municipalities of state and municipal property in the course of denationalization and privatization." It seems difficult to determine what constitutes (state and municipal) property and the acquisition of that property without considering the host State's domestic law, especially in the context of section 3 of the Annex.

418. Existing arbitral jurisprudence seems split on what law governs issues of property and its ownership in investment disputes. In *Emmis v. Hungary*, the tribunal held that issues regarding the existence of rights possibly protected by a treaty must be determined by reference to the domestic law under which those rights had arisen. It expressed this principle as follows:

> In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law.[564]

419. In a similar vein, in the *Total v. Argentina* case, the tribunal found that the "precise content and extent" of the investor's economic rights must be determined under the host State's legal system.[565] Legal scholarship seems to point in the same direction. Professor Schreuer, for example, concluded from his analysis of the relevant jurisprudence that "[s]ome questions with a

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561 Treaty, Article VII(1) (**RLA-001**).

562 Treaty, Article VI(1) (**RLA-001**).

563 Treaty, Article I(1)(c) (**RLA-001**).

564 *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶ 162 (**RLA-059**).

565 *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, ¶ 39.

bearing on jurisdiction, such as […] the existence of property rights, are governed by domestic law".[566]

420. The Tribunal is aware that determining whether an investor owns property by way of the host State's law may—at least in theory—lead to different scopes of protection under the same treaty, depending on the State in which the investment is made. Based on this consideration, the tribunal in *Saipem v. Bangladesh* dismissed the view that Bangladeshi law is relevant in determining the meaning of the term "any kind of property".[567] Professor Schreuer was one of the arbitrators in *Saipem*, but he did not address this part of the tribunal's decision in his scholarly contribution referred to in the previous paragraph, which seems to support the applicability of domestic law.

421. The relationship between domestic law and international law in deciding on a tribunal's jurisdiction is, as illustrated above, intricate, and no consistent jurisprudence has developed so far. In the present case, the transitional period that the Parties agree Estonia underwent in the 1990s adds a layer of complexity. The rules that may be applicable either stem from this transitional period or are part of the body of international law applicable to such periods. The Tribunal will start its analysis with the relevant rules of international law. Those rules shed light on the role of domestic law in the present case, as will be seen below.

(II.) International Law

422. The Claimant bases its proposition that its subsidiaries had become the owners of the relevant assets by operation of international law on three—arguably alternative but overlapping—grounds, namely that: (i) the USSR had acquired ownership of the Seaplane Harbor in 1940 through the so-called Transfer Instruments; (ii) the sales by the Soviet military to private parties were valid under the international law of occupation; and (iii) the Claimant's subsidiaries acquired the assets because of the *ex factis* rule. The Tribunal will address each of these grounds in turn.

(A.) Change in Ownership in 1940?

423. In its Memorial, the Claimant argues that the Seaplane Harbor was transferred to the military of the USSR through the "Transfer Instruments" in 1940, and that "international law suggests" that the Soviet Union had become the owner of the port. [568] The Claimant does not define the term "Transfer Instruments", but the Claimant's expert, Mr. Keres, uses this term as a collective reference to three documents signed between 20 June and 18 July 1940.[569] Mr. Keres notes that all of these documents cite as the legal basis for the transactions an Estonian law enacted in 1939, namely the Act of Compulsory Encumbrances for the Needs of State Defense ("**Compulsory Encumbrances Act**").[570] But this law does not, in the view of Mr. Keres, constitute the proper

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566 Christoph Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, Vol. 1:1, McGill Journal of Dispute Resolution (2014), p. 24 (**RLA-054**).

567 *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ¶ 124 (**CLA-215**).

568 Memorial, ¶¶ 187, 275.

569 Second Keres Report, ¶ 24 (**CER-2**), *referring to* Instrument of Transfer dated 22 June 1940 (**C-192**); Instrument of Transfer dated 18 July 1940 (**C-193**); Inventory/Assessment List dated 8 July 1940 (**C-194**).

570 Second Keres Report, ¶ 24 (**CER-2**).

legal basis for the transactions, given that under that law Estonia and not the USSR would have been the "beneficiary".[571] According to Mr. Keres, the Transfer Instruments were based on the Mutual Assistance Treaty concluded between Estonia and the USSR on 28 September 1939 ("**1939 Estonia-USSR Treaty**" or "**1939 Treaty**").[572] Mr. Keres adds that in the absence of relevant Estonian law, it is international law that governs any potential transfer of ownership based on that treaty.[573]

424. The Tribunal notes that the 1939 Treaty provided that the relations and mutual obligations of Estonia and the USSR continue to be based on the Peace Treaty of 2 February 1920 and the Treaty of Non-Aggression and Peaceful Settlement of Disputes of 4 May 1932.[574] Furthermore, Mr. Keres rightly points out that the 1939 Treaty set out a legal framework for the establishment of Soviet military bases in Estonia.[575] But nothing in the treaty—comprising only six articles, accompanied by a five-point confidential protocol—suggests that the Soviet Union would become the owner of any land and buildings constituting or forming part of these bases. To the contrary, Article 3 of the 1939 Treaty grants the USSR merely the right "to lease" the relevant bases.[576] In line with this provision, Article 5 of the 1939 Treaty confirms that areas allotted for the bases shall remain "territory of the Republic of Estonia". Therefore, the 1939 Estonia-USSR Treaty does not support the proposition that the USSR became the owner of the Seaplane Harbor in 1940.

425. Nor does the text of the Transfer Instruments suggest that the USSR acquired ownership of the Seaplane Harbor in 1940. The documents specify that the "[b]uildings and land plots [were] taken compulsorily for use".[577] The term "for use" indicates that no transfer of ownership was intended. The reference to the Compulsory Encumbrances Act in the Transfer Instruments confirms this point. Encumbrances are rights in connection with certain assets (typically lands or buildings) that survive the transfer of ownership in, or possession of, the relevant asset. But an encumbrance does not turn its holder into the owner of the underlying asset.

426. In addition, the Tribunal notes that the Claimant did not revert to the Transfer Instruments following the submission of the Respondent's Counter-Memorial. Furthermore, the Respondent's expert, Mr. Keres, stated with respect to the relevant land at the Hearing that:

> I have never made an assertion, and I wouldn't make an assertion, that the land under the buildings ever belonged to anyone other than the Estonian State.[578]

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571 Second Keres Report, ¶ 30 (**CER-2**).

572 Second Keres Report, ¶ 31 (**CER-2**).

573 Second Keres Report, ¶ 32 (**CER-2**).

574 1939 Estonia-USSR Treaty, Preamble, ¶ 3 (**C-196**).

575 Second Keres Report, ¶ 31 (**CER-2**).

576 1939 Estonia-USSR Treaty, Article 3 (**C-196**).

577 Instrument of Transfer dated 22 June 1940, p. 1, table heading (**C-192**); Instrument of Transfer dated 18 July 1940, p. 1, table heading (**C-193**).

578 Hearing Transcript, Day 4, p. 95: 7-10.

427. Considering the above, the Tribunal finds that the documents on file suggest that Estonia was the owner of the Seaplane Harbor in 1940 and did not lose ownership through the Transfer Instruments.

(B.) The Law of Occupation

428. At the beginning of its analysis of the law of occupation, the Tribunal wishes to clarify two points. First, there is no universal consensus within the international community on whether Estonia was occupied by the Soviet Union in the 20th century. The Respondent says it was occupied. The Claimant's view has developed during the proceedings. It first argued that the Soviet military obtained the Seaplane Harbor in 1940 when it occupied Estonia, and that the occupant was entitled to sell the relevant assets to private parties under the Hague Regulations.[579] In its Reply, the Claimant raises doubts whether Estonia was occupied and whether the Hague Regulations are applicable.

> The issue of whether occupation law even applies to the situation in Estonia is contentious. While many commentators consider Estonia to have been under military occupation, this is not a clear issue. The ESSR had its own government and foreign policy. To the extent that the ESSR was a State, then the provisioning of allied Soviet military personnel in Estonia would not constitute an occupation.[580]

429. But the Claimant does not go further and endorse the proposition that Estonia was not occupied by the Soviet Union. Rather, the Claimant states that Estonia had to respect property rights acquired by private parties such as its subsidiaries because of the *ex factis* rule.[581] The Tribunal will address this rule below. In addition, the Tribunal notes that the alternatives to the view that Estonia was occupied by the Soviet Union seem to be that either Estonia remained an independent State or that it joined the Soviet Union voluntarily. In those scenarios, it would seem logical that the relevant transactions are governed by Estonian law or Soviet law. These legal regimes are also part of the Tribunal's analysis. As will be seen below, the result of this analysis does not require a finding by the Tribunal on whether—as a matter of international law—Estonia was occupied by the Soviet Union.

430. Secondly, the provisions of the Hague Regulations relied on by the Parties—Article 53 and Article 55—are primary norms of international law under the law of State responsibility. Hence, they constitute international obligations that, if breached, entail the international responsibility of the State to whom the action or omission is attributable under international law. The content of the international responsibility of that State is set out in secondary norms of international law.[582] But the legal consequences of an internationally wrongful act of a potential occupant—here, of the Soviet Union—are not relevant in the present case. Rather, the Tribunal must determine the

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579 Memorial, ¶¶ 271-301.

580 Reply, ¶ 1030.

581 Reply, ¶ 30.

582 See, e.g., James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, (CUP, 2002), pp. 14-16 (**CLA-137**), which is a paperback version, with an introduction by James Crawford, on the International Law Commission Draft Articles of State Responsibility for Internationally Wrongful Acts ("**ILC Articles**") with commentaries, Vol. II, Part Two, 2001 **(CLA-126**).

consequences of the reversal of measures adopted by the occupant through the organs of the formerly occupied State. More specifically, the issue is whether the Claimant's subsidiaries became the owners of the Seaplane Harbor, although the Estonian courts declared the relevant transactions void.

431. Identifying the norms that govern such measures of the returning government is more complex than determining the norms that determine the lawfulness of the measures of the occupant.[583] Professor Eyal Benvenisti refers to the latter set of rules as primary norms and to the former as secondary norms of the law of occupation.[584] While the use of the term primary norms is consistent with the meaning of that term under the law of State responsibility, the Tribunal considers the term secondary norms misleading here. This is because Professor Benvenisti uses it differently from its established meaning in the law of State responsibility, where secondary norms govern the legal consequences for the State that breached the relevant primary norm. But under the terminology suggested by Professor Benvenisti, secondary norms apply to measures of the returning organs of the formerly occupied State that contradict the measures of the occupant. While the Tribunal will therefore not adopt his terminology, it considers the methodology used by Professor Benvenisti very helpful, and it will form part of the Tribunal's analysis that follows now.

(1.) The Relevant Rules and Principles

432. Two different periods of State practice and judicial decisions are relevant in determining and understanding the rules and principles of the law of occupation regarding the reversal of the occupant's measures. As explained by Professor Benvenisti, in the period until 1945, there was no generally recognized duty of returning governments to respect lawful occupation measures.[585] Returning governments tended to validate transactions made during the occupation. However, they did so not because of a sense of legal obligation, but for policy reasons, such as ensuring market stability—and without regard for the lawfulness of the occupation measure.[586] In general, private actors in occupied territories had to expect that returning governments and their courts might not respect lawful occupation measures and that they might uphold unlawful acts. [587]

433. In the period after 1945, two new developments set in, each of them with different effects. First, the question of whether an occupation measure complied with international law became more important for legislation and regulatory actions by States. This is reflected in the Fourth Geneva

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583 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), p. 337 (**CLA-282**).

584 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), pp. 330, 337, 342-343 (**CLA-282**).

585 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), p. 330 (**CLA-282**). The legal framework in this regard was, in Benvenisti's view, based on Article 43 of the Hague Regulations and relevant domestic laws. Hague Regulations, Article 43 (**CLA-062**) reads as follows: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

586 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), pp. 332-333 (**CLA-282**).

587 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), p. 333 (**CLA-282**).

Convention of 1949 ("**Fourth Geneva Convention**" or "**GC IV**").[588] Its Article 146 obliges States parties to enact legislation that penalizes "grave breaches" of the convention and "to take measures necessary for the suppression of all acts" that violate the convention but do not constitute grave breaches. Secondly, both international human rights law and domestic constitutional law increased the protection of individuals, including regarding their reliance in good faith on measures of the occupant that may have been in breach of the law of occupation.[589] Given that the alleged sales by the Soviet military to private parties occurred in the early 1990s (or in 1989, as partly stated by the Claimant), it is the law that developed after World War II that is relevant here.

434. From his analysis of pertinent State practice and judicial decisions, Benvenisti deduces several factors that matter and must be balanced when determining the lawfulness of a measure of the returning government that conflicts with an act of the occupant. First, the graver the harm to the interests protected by the relevant primary norm, the more likely it is that reversing the measure is lawful, especially if that measure constituted a *jus cogens* violation.[590] Secondly, the good faith of an individual who benefited from the consequences of a breach of a primary norm is a necessary condition for upholding a claim of that individual. [591] Thirdly, the weight to be accorded to the legitimate expectations of individuals who—in good faith—have relied on occupation measures increases over time, especially if the reversing measures occur generations later. [592] Fourthly, the "forward-looking wish" of the returning government to provide for a "smooth and effective" transition after the occupation matters in the balancing process.[593] Finally, the relevant States must be accorded a wide margin of appreciation concerning the consequences of an occupation and, therefore, in balancing conflicting claims. [594]

(i) Gravity of the Breach

435. Regarding the *first* factor, the gravity of the breach, the Tribunal notes that the Mälksoo Report states that Estonia was forcibly annexed by the Soviet Union following an act of aggression in 1940.[595] Moreover, according to the Mälksoo Report, acts of aggression were outlawed not only in 1945 with Article 2(4) of the UN Charter, but—to the extent relevant here—by the 1930s, because of the Briand-Kellogg Pact of 1928, the Litvinov Protocol of 1929, and the (regional) Convention for the Definition of Aggression of 1933.[596] The Tribunal considers acts of aggression to constitute violations of *jus cogens*. But for the present case, the Tribunal needs to decide neither

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588 *See* Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), pp. 333-334 (**CLA-282**), but who cites Article 147 GC IV (and not Article 146 GV IV) that defines "grave breaches".

589 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), pp. 333-334 (**CLA-282**).

590 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), pp. 342-343 (**CLA-282**).

591 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), p. 343 (**CLA-282**).

592 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), pp. 344-345 (**CLA-282**).

593 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), pp. 345-346 (**CLA-282**).

594 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), pp. 346-347 (**CLA-282**).

595 Mälksoo Report, ¶¶ 9, 18, 26 (**RER-3**).

596 Mälksoo Report, ¶ 19 (**RER-3**).

whether the Soviet Union's acts in 1940 constituted an aggression, nor whether that potential aggression violated a *jus cogens* norm, which might involve issues of inter-temporal law. Nor is it relevant for the Tribunal's decision whether an aggressor enjoys the same rights under the law of occupation as an occupant "unguilty" of an act of aggression for the following reason.

436. By reference to Benvenisti, the Mälksoo Report states that the law of occupation did not create any rights for the Soviet Union under that law because the occupation was a result of an aggression and thus illegal. [597] The relevant passage of Benvenisti's work, however, does not sustain the proposition that the Claimant's subsidiaries could by definition not acquire title in the relevant assets if the Soviet Union was an illegal occupant. For Benvenisti writes that the returning government is in principle entitled to reverse attempts by an illegal occupant to alienate territory, but only subject to individual rights acquired in good faith.[598] In this regard, Benvenisti explicitly refers to the chapter that contains the principles set out in para. 434 above. This means that if the potential acquisition of property by individuals in good faith is involved, the reversal of an illegal occupant's measures is lawful under the requirements addressed here. Therefore, the Tribunal considers it unnecessary to decide whether the Soviet Union committed acts of aggression in 1940 and whether it illegally occupied Estonia.

437. Furthermore, the Tribunal wishes to clarify that deciding the present case does not require a finding whether *jus cogens* norms were violated. *Jus cogens* norms are, for example, those on the prohibition of aggression, slavery, torture, and genocide. The deprivation of public or private property does not fall under this category, as rightly noted by the Claimant.[599] The Tribunal will address the issue of whether the alleged sales by the Soviet military to private parties were compatible with the Hague Regulations (under the assumption that Estonia was occupied by the Soviet Union) below. At this point of the analysis, it suffices to note that the gravity of such a potential breach of a primary norm of the law of occupation by the Soviet Union does not speak decisively for or against the lawfulness of Estonia's measures.

(ii) Good Faith

438. The reversal of a measure that is incompatible with the law of occupation may be unlawful itself if it violates the good faith expectations of the inhabitants of the occupied territory. For, as Benvenisti writes, persons who reside in an occupied territory are entitled to rely in their transactions on the legal system in force in that territory.[600] The rationale underlying this principle is that those persons have no choice but to live and work within the domestic legal system that governs everyday matters and commerce. This means that transactions that ought to be upheld regardless of the occupier's compliance with the law of occupation must have been valid under

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597 *See* Mälksoo Report, ¶ 21 (**RER-3**).

598 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), pp. 154-155 (**CLA-282**).

599 Reply, ¶ 1119.

600 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), p. 344 (**CLA-282**).

the prevailing local law.[601] Here, this local law can only be Soviet law or Estonian law. Both legal regimes will be addressed by the Tribunal as part of its analysis.

(iii) Time Factor

439. Individual rights acquired in good faith carry especially much weight in the balancing process if a long period of time has passed between the relevant acts of the occupant and the measures of the returning government that seek to reverse those acts or their consequences. In Benvenisti's view, this is certainly the case if the reversing measures occur "generations later" than the relevant acts of the occupant. [602] In this context, Benvenisti refers to case law by the ECtHR in which succeeding generations were affected after "several decades". [603]

440. In the present case, the Parties agree that the occupation ended in 1994, and that Estonia initiated litigation to reclaim the Seaplane Harbor in 1997 based on legislation enacted from 1990 onwards[604]. The entities that became the Claimant's subsidiaries in 1999 acquired the relevant assets in 1997 and 1992,[605] after the alleged sales by the Soviet military to other private parties in 1990 and 1991.[606]

441. Against this background, the Tribunal is not convinced that the time factor would add much, if any, weight to possible good faith expectations, which are necessary to consider Estonia's reversal of occupation measures unlawful and will be addressed in the domestic law section below.

(iv) Smooth Transition

442. Benvenisti states that an additional factor that plays a role in the balancing process is the returning government's "forward looking wish to ensure a smooth and effective post-conflict transitional process." [607] This seems to be a consideration that speaks, at first sight, in favor of the lawfulness of Estonia's measures, given that Estonia had stated throughout the early 1990s that it became illegally occupied by the Soviet Union in 1940 and wished to reinstate the status quo ante. But the scenarios mentioned by Benvenisti are very different, namely the possible return of refugees to the places they inhabited prior to the occupation. In this regard, Benvenisti considers policies

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601 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), p. 344 (**CLA-282**).

602 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), p. 345 (**CLA-282**).

603 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), p. 345 (**CLA-282**).

604 Resolution of the Presidium of the Supreme Council of the Republic of Estonia regarding the Initial Measures for Organising the Privatization Process, 17 July 1990 (**CLA-195**).

605 Contract of Purchase and Sales and Pledge Contract between Agrin and B&E, 26 September 1997 (**C-020**); Sale Agreement between Nautex and Verest, Protocols of Transfer, 7 May 1992 (**R-052**).

606 Contract No. 16 (**C-023 / R-036**); Resolution by the Deputy to the Commander of the Soviet Naval Forces for Construction, Engineering Support and Housing, 29 July 1991 (**R-042**); Resolution of Military Unit 13016, 29 July 1991 (**R-043**).

607 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), pp. 345-346 (**CLA-282**).

that seek to prevent inter-ethnic violence by requiring returning refugees to live in different parts of the country prior to their expulsion not per se unlawful.[608]

443. Therefore, the Tribunal finds that under the circumstances of the present case, Estonia's interest in a smooth transition does not add much to the margin of appreciation that it enjoys anyway, as set out next.

(v) Margin of Appreciation

444. The final factor to be considered is the wide margin of appreciation that international law accords to States when it comes to the regulation of their post-occupation phase. This margin of appreciation applies to bilateral or multilateral instruments (in the form of peace agreements) and to domestic legislative or regulatory acts of the formerly occupied State. [609] Regarding the domestic level, Benvenisti notes that the ECtHR granted Germany a wide margin of appreciation in overhauling the economic system in the new federal states as part of the unification process.[610]

445. The way in which Estonia exercised its margin of appreciation in the 1990s will be examined below in the context of the Estonian legal framework during the transition phase. But before turning to domestic law, the Tribunal will analyze the relevant primary norms of the law of occupation and set out the role of the *ex factis* rule for the Tribunal's analysis.

(2.) The Primary Norms

446. As mentioned above, the Tribunal assumes in its analysis of the law of occupation that Estonia was indeed occupied by the Soviet Union, as argued by the Claimant in its Memorial but doubted —though not explicitly disputed—in its Reply, and as argued by the Respondent throughout. The alleged sales by the Soviet military to private parties occurred roughly 50 years after the entering into force of the Fourth Geneva Convention of 1949. The Tribunal must therefore analyze whether the Fourth Geneva Convention or the older Hague Regulations apply to those sales. According to the *lex posterior* principle, it would seem logical that the provisions of the Fourth Geneva Convention on private and public property govern the relevant issues here.

447. In this regard, Article 53 GC IV prohibits the destruction of private or public property by the occupying power, but it does not mention any other acts with respect to that property. The scope of Article 147 GC IV is broader. It lists the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" as "grave breaches" of the convention. But given that Article 53 GC IV merely prohibits the destruction of property, it might be argued that all appropriations of property that fall short of constituting a grave breach of the convention be lawful. But this is not the status of the modern law of occupation, and it was not argued by any of the Parties. Rather, the prohibitions under Articles 53 and 55 of the Hague

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608 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), p. 346 (**CLA-282**).

609 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), pp. 346-347 (**CLA-282**).

610 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), p. 347 (**CLA-282**).

Regulations continue to apply, and Articles 53 and 147 GC IV must be read in conjunction with those provisions,[611] to which the Tribunal turns now.

(i) Article 53 Hague Regulations

448. The Claimant argues that the Soviet military was entitled to sell the buildings and the structures at the Seaplane Harbor to private parties under Article 53 of the Hague Regulations. This provision reads as follows.

> Any army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and generally, all movable property belonging to the State which may be used for military operations.
>
> All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.[612]

449. Mr. Keres opines that at the time of the alleged transfer, buildings constituted "movables" under Estonian law, and it was therefore possible that the buildings and the land on which they stood belonged to different owners. More specifically, Mr. Keres states:

> Pursuant to § 13 (1) of Law of Property Act Implementation Act (the ("LPAIA"), until the entry of land in the land register, a construction erected on a legal basis, including an unfinished construction, was not an essential part of the land and was deemed a movable unless otherwise provided by law. Under § 13 (3) LPAIA, an owner of a construction had the right to become the owner of the land under that construction as per the procedure set out in the Land Reform Act.[613]

450. As a movable "means of transport" within the meaning of Article 53 of the Hague Regulations, the Soviet military could, according to the Claimant, use, deplete, and dispose of the buildings and structures at the Seaplane Harbor facilities during the occupation.[614]

451. The Claimant does not seem to doubt that Article 53 of the Hague Regulations applies only to movable property and Article 55 to immovables.[615] As Yoram Dinstein notes, the extent to which the occupant may use public property hinges precisely on the distinction between movables and immovables, and the subsequent application of either Article 53 or 55.[616] The Tribunal doubts

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611 Anicée Van Engeland, 'Protection of Public Property', in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A commentary*, (OUP, 2018), ¶¶ 2, 43 (**CLA-151**); Geneva Convention IV, Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (ICRC Commentary ed. 1958), Introduction, p. 9 (**CLA-286**).

612 Hague Regulations, Article 53 (emphasis added) (**CLA-062**).

613 Second Keres Report, ¶ 41 (**CER-2**) *referring* to LPAIA (**CLA-189**).

614 Memorial, ¶¶ 284, 296-297.

615 Memorial, ¶¶ 284-286.

616 Yoram Dinstein, *The International Law of Belligerent Occupation*, (CUP, 2009), p. 213, ¶ 502 (**RLA-047**).

that the treatment of buildings as movable property under Estonian law for a few years in the 1990s should inform the construction of the Hague Regulations, a multilateral treaty from 1907.

452. Rather, the Tribunal agrees with the Respondent that Article 53 of the Hague Regulations is not applicable here because the buildings and structures at the Seaplane Harbor constitute immovable property. The latter is governed by Article 55, and the Tribunal has no doubt that the relevant assets at the Seaplane Harbor fall under that provision. The *UK Manual of the Law of Armed Conflict* lists the following assets under the heading "military lands and buildings": "supply depots, arsenals, dockyards, and barracks, as well as airfields, ports, railways, canals, bridges, piers, and their associated installations."[617] Similarly, Dinstein lists "airfields, naval dockyards, military barracks"[618] as examples of immovable property subject to Article 55. By contrast, movables under Article 53 are exemplified by means of transport such as "ships in port"[619] and as "bicycles, cars and railroad rolling stock to ships and aircraft [and] even ambulances."[620] The Tribunal has therefore no doubt that the buildings and structures at the Seaplane Harbor, as well as the Seaplane Harbor itself, constitute immovable property under the Hague Regulations.

453. Furthermore, even if the Tribunal were to consider the relevant assets to constitute movable property, this would not automatically mean that the Soviet military could validly transfer ownership of those assets to private parties. The scope of Article 53 of the Hague Regulations and the powers of the occupant under this provision are subject to scholarly debate. Some argue that the occupant may only use movable property for military purposes, while others contend that the occupant may also sell it to sustain the occupation and take care of the local population.[621] But no one seems to argue that Article 53 of the Hague Regulations grants the occupant an unfettered right to sell property belonging to the occupied state for whatever purpose it deems fit. The Tribunal finds it reasonable to require that acts covered by Article 53 must be taken for military purposes, to cover the costs of the occupation, or for the well-being of the local population.[622] The Tribunal is not persuaded that the transactions at issue here served one of those purposes. Finally, the Tribunal notes that the wording of both paragraphs of Article 53 seems to indicate

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617 UK Ministry of Defense, *The Manual of the Law of Armed Conflict*, (OUP, 2004), p. 303, ¶ 11.85 (**CLA-153**) (emphasis added).

618 Yoram Dinstein, *The International Law of Belligerent Occupation*, (CUP, 2009), p. 213, ¶ 503 (**RLA-047**) (emphasis added).

619 UK Ministry of Defense, *The Manual of the Law of Armed Conflict*, (OUP, 2004), p. 301, ¶ 11.81.1 (**CLA-153**).

620 Yoram Dinstein, *The International Law of Belligerent Occupation*, (CUP, 2009), pp. 218-219, ¶ 515 (**RLA-047**) (emphasis added).

621 Anicée Van Engeland, 'Protection of Public Property', in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A commentary*, (OUP, 2018), ¶¶ 33-34 (**CLA-151**); Dieter Fleck (ed), *The Handbook of International Humanitarian Law*, (OUP, 2013), p. 292, ¶ 557 (**RLA-048**); Yoram Dinstein, *The International Law of Belligerent Occupation*, (CUP, 2009), p. 219, ¶ 517 (**RLA-047**); UK Ministry of Defense, *The Manual of the Law of Armed Conflict*, (OUP, 2004), pp. 301, 304, ¶¶ 11.81, 11.88 (**CLA-153**).

622 *See* Antonio Cassese, 'Powers and Duties of an Occupant in Relation to Land and Natural Resources', in Antonio Cassese, Paola Gaeta, and Salvatore Zappalà (eds), *The Human Dimension of International Law: Selected Papers of Antonio Cassese*, (OUP, 2008), p. 422 (**CLA-155**), who applies these requirements to the following acts of the occupant: "requisitioning private property", "seizing public movables", and "using state-owned immovables" (id.) (emphasis added).

that this provision does not entitle the occupant to transfer title in assets belonging to the occupied State to others. [623] Under Article 53(1), the occupant can "take possession" of certain assets, but this does not make it the owner of those assets. And Article 53(2) provides that the assets "must be restored and compensation fixed when peace is made."[624]

(ii) Article 55 Hague Regulations

454. After having found that Article 53 of the Hague Regulations did not provide the Soviet military with the right to transfer title in the buildings and structures at the Seaplane Harbor to private parties, the Tribunal will now turn to Article 55 of the Hague Regulations, which states that:

> The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

455. The Claimant posits that in the context of prolonged occupation, Article 55 of the Hague Regulations does not constrain the authority of the occupant in using public property for the purpose of satisfying the needs of the people under occupation.[625] This statement seems broadly correct, but it needs to be put into context. Occupants are not only entitled but obliged to administer the occupied territory. In exercising their rights and duties under international law, occupants can also regulate and interfere with economic activities in the occupied territory. Regarding the use of state-owned immovables (governed by Article 55 of the Hague Regulations), the Tribunal considers the relevant principles to be aptly summarized by Antonio Cassese,[626] relied on by the Claimant as well. Cassese states that the occupant may use public immovable property only for the following three purposes: (i) to meet its own military or security needs; (ii) to cover the costs involved in the occupation; and (iii) to protect the interests and well-being of the population living on the occupied territory. These are "very strict limitations" on the power of the occupant, in the view of Cassese, but they are borne out by State practice. Cassese clarifies that using state-owned immovables for any other purposes is strictly forbidden, for example, if the occupant acts for the benefit of its own population or its national economy.[627]

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623 *See also* Anicée Van Engeland, 'Protection of Public Property', in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A commentary*, (OUP, 2018), ¶¶ 33-34 (**CLA-151**); UK Ministry of Defense, *The Manual of the Law of Armed Conflict*, (OUP, 2004), p. 301, ¶ 11.81 (**CLA-153**)

624 *See also* Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), pp. 87-88 (**CLA-282**).

625 Memorial, ¶¶ 289-293, 295, 298-301, *referring to* Eyal Benvenisti, *The International Law of Occupation* (OUP, 2015), pp. 81-82 (**CLA-204**); Opinion of Advocate General in Western Sahara Case C-266/16, ¶ 268 (**CLA-147**); Reply, ¶¶ 1055-1057. *See also* Kristen E. Boon, *Obligations of the New Occupier: The Contours of a Jus Post Bellum*, Loyola of Los Angeles International and Comparative Law Review, Vol. 31, No. 2 (2008), p.110 (**CLA-281**).

626 Antonio Cassese, 'Powers and Duties of an Occupant in Relation to Land and Natural Resources', in Antonio Cassese, Paola Gaeta, and Salvatore Zappalà (eds), *The Human Dimension of International Law: Selected Papers of Antonio Cassese*, (OUP, 2008), p. 419 *et seq.* (**CLA-155**).

627 Antonio Cassese, 'Powers and Duties of an Occupant in Relation to Land and Natural Resources', in Antonio Cassese, Paola Gaeta, and Salvatore Zappalà (eds), *The Human Dimension of International Law: Selected Papers of Antonio Cassese*, (OUP, 2008), p. 422 (**CLA-155**).

456. The Tribunal notes that there is no evidence on file that the Soviet military sold the buildings and structures at the Seaplane Harbor for any of the legitimate reasons set out above. Rather, it seems that those sales occurred for the personal gain of individual officers, as will be outlined below in the domestic law section. But in the end, the purpose of the sales by the Soviet military does not play a decisive role in the Tribunal's analysis. This is because even if the actions had occurred for a legitimate purpose, the occupant could sell only the fruits of the immovable property, and not appropriate or sell the immovable property itself. This understanding of Article 55 of the Hague Regulations seems to be widely accepted in legal scholarship.[628] Moreover, in the view of the Tribunal, it is the only construction of this provision that is compatible with its wording, according to which the occupant acts "only as administrator and usufructuary".

(iii) Interim Conclusion

457. In sum, the Tribunal finds that the sale of the buildings and structures at the Seaplane Harbor by the Soviet military to private parties was not in line with the law of occupation.

458. This alone, however, says little about the validity of those sales, or about the rights that the Claimant's subsidiaries may have acquired because of subsequent transactions. As set out above, the primary norms of the law of occupation do not address these issues. Rather, the Tribunal must establish whether the relevant rights were acquired in good faith, that is, in accordance with the local law applicable at the time. If this is the case, then the good faith of the Claimant's subsidiaries speaks against the lawfulness of Estonia's (judicial) acts that reversed the effects of the underlying transactions. For the sake of completeness, the Tribunal notes that even if the Soviet military had had the right to sell the relevant assets under the law of occupation, this would not mean that the reversal of the effects of those sales was automatically unlawful. But if there had been no breach of a primary norm, any good faith reliance on the local law would—in the Tribunal's view—be hard, if not impossible, to be outweighed in the balancing process.

459. The Tribunal's analysis of the relevant local law will be redundant, however, if the Claimant's understanding of the *ex factis* rule is correct, to which the Tribunal turns now.

(C.) The Ex Factis *Rule*

460. According to the Claimant, its subsidiaries became—or are to be treated as—the owners of the Seaplane Harbor because of the *ex factis* rule, irrespective of whether the relevant sales complied with the law of occupation or domestic law.[629] Regarding the content of this rule, the source most frequently referred to by the Claimant is a monograph of Lauri Mälksoo,[630] the Respondent's

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628 Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), p. 88(**CLA-282**); Mälksoo Report, ¶¶ 35-36 (**RER-3**); Dieter Fleck (ed), *The Handbook of International Humanitarian Law*, (OUP, 2013), pp. 292-293, ¶ 558 (**RLA-048**); Yoram Dinstein, *The International Law of Belligerent Occupation*, (CUP, 2009), pp. 213-215, ¶¶ 504-507 (**RLA-047**); Anicée Van Engeland, 'Protection of Public Property', in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A commentary*, (OUP, 2018), ¶ 19 (**CLA-151**).

629 Reply, ¶¶ 23-24; 1123; Hearing Transcript, Day 1, p. 45:23 – p. 48:12, Day 5, p. 57:5-8; Claimant's Answers to Tribunal Question, ¶ 74.

630 Reply, ¶¶ 87-88, 1066, 1074, 1081; Hearing Transcript, Day 1, p. 45:16 – p. 46:8, Day 5, p. 57:9-14.

expert (whom the Claimant chose not to cross-examine at the hearing). In particular, the Claimant relies on parts of a passage in which Mälksoo argues that, while the annexation in 1940 and the imposition of the Soviet economic system on Estonia violated international law, the same is not true for all acts taken under this system. The part quoted by the Claimant reads as follows.

> For instance, by imposing the Soviet economic system on the Baltic States, the USSR clearly violated the 1907 Hague rules of occupation. However, it is reasonable to argue that the principle [of] *ex factis ius oritur* compels acceptance of certain aspects of the foreign-imposed Soviet economic system in the decades following the illegal annexation as facts of life. The whole Soviet occupation period cannot be regarded as a legal *nullum*. Thus, the foreign-imposed Soviet economic system in the whole Eastern Europe became a fact of life which was ultimately borne by the local population and as such was accepted by the international community. Since it was no longer legally questioned, neither internationally nor domestically, it would be artificial to maintain that this system continued to violate the 1907 Hague Regulations.[631]

461. Mälksoo thus warns against considering the acts resulting from the Soviet economic systems to be unlawful only because its introduction in Estonia violated the law of occupation. But Mälksoo does not argue that the law of occupation became irrelevant for acts on Estonian territory that occurred after the establishment of the Soviet system. Nor does he posit that all transactions made under the economic regime in place at the time were valid as a matter of international law regardless of their compliance with the relevant domestic rules.

462. Nothing different follows from the concept of the "*normative Kraft des Faktischen*." This term was coined by Georg Jellinek, and as the Claimant rightly stresses, Mälksoo repeatedly refers to it in the context of the *ex factis* rule. Mälksoo uses it regarding the issue whether Estonia continued to exist as a State between 1940 and the 1990s or whether its statehood had ended following the events—or, in Mälksoo's words, the Soviet aggression—of 1940. Some authors point out that the Soviet annexation, spanning half a century, lasted twice as long as Estonia's independence until 1940. Given that Estonia could not exercise any powers of a State (*Staatsgewalt*) during that time, those authors consider the continued existence of Estonia from 1940 until its independence an unsustainable fiction.[632] Mälksoo rejects this view, stating that:

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631 Lauri Mälksoo, *Soviet Annexation and State Continuity: International Legal Status, Estonia, Latvia and Lithuania in 1940-1991 and after 1991, Investigating the Conflict Between Normativity and Force in International Law*, (Tartu University Press, 2003), (**CLA-291**), p. 194; *cited* by the Claimant in Reply, ¶¶ 1081 and 1110.

632 Lauri Mälksoo, *Soviet Annexation and State Continuity: International Legal Status, Estonia, Latvia and Lithuania in 1940-1991 and after 1991, Investigating the Conflict Between Normativity and Force in International Law*, (Tartu University Press, 2003), (**CLA-291**), pp. 74-75 (fn. 113), p. 111 ("Georg Dahm argued that protests and formal non-recognition cannot prevent prescription from taking place; rather the source of the prescription is the normative Kraft des Faktischen itself.")

> That the international legal system may appear to be uncapable of answering violations of one of its most fundamental norms—the prohibition of aggression—should be a bigger problem for lawyers who worry about the relevance of the rule of law in international relations, than the fear that international law would become 'irrealistic' when supporting legal fictions when fundamental legal norms have been violated. In any case, the so-called normative Kraft des Faktischen cannot have a legal significance (Kraft) of its own. [633]

463. Mälksoo concludes his monograph with the observations that—based on the principle of *ex injuria jus non oritur*—the international community has come to accept that illegally annexed States do not become extinct as subjects of international law. But complete adherence to this principle would have required the total restoration of all legal relations, rights, and duties of Estonia from the pre-annexation phase.[634] That this proved impossible is, according to Mälksoo, evidence of the *ex factis* principle, which in his view does not undermine the proposition that the Baltic States continued to exist throughout their occupation.[635] But nothing in Mälksoo's monograph suggests that transactions must be upheld regardless of their compliance with the local law that was in place at the time the transactions occurred because of the *ex factis* principle.

464. Another author on which the Claimant relies in the context of its arguments regarding the *ex factis* rule and legal certainty is Benvenisti. In this regard, the Claimant refers to the passages of Benvenisti outlined above, namely that good faith reliance of individuals on local law may require that acts taken in breach of the law of occupation remain valid.[636] The Tribunal agrees with this proposition. It is the basis of its analysis here. Particularly clear for present purposes is the following statement of Benvenisti, quoted by the Claimant:

> [I]n principle it is suggested that individuals who reside in an occupied territory are entitled to rely in their private transactions on the legal system actually in force in the country (a system which they themselves were not responsible for creating), and develop expectations based on the regular norms that system has produced.[637]

465. The cases, instruments, and other authorities cited by the Claimant either confirm that acquirers must have relied in good faith on the local law in place at the time to consider the restitution of property to original owners unlawful, or they say nothing that warrants a different conclusion. The Claimant quotes, for example, from a passage by Benvenisti in which the latter addresses the German unification. The unification treaty recognized the right of restoration of property expropriated by the authorities of the German Democratic Republic ("**GDR**") after 1949. But there were exceptions to this rule. A third person who had acquired the relevant property would

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633 Lauri Mälksoo, *Soviet Annexation and State Continuity: International Legal Status, Estonia, Latvia and Lithuania in 1940-1991 and after 1991, Investigating the Conflict Between Normativity and Force in International Law*, (Tartu University Press, 2003), (**CLA-291**), pp. 201-202.

634 Lauri Mälksoo, *Soviet Annexation and State Continuity: International Legal Status, Estonia, Latvia and Lithuania in 1940-1991 and after 1991, Investigating the Conflict Between Normativity and Force in International Law*, (Tartu University Press, 2003), (**CLA-291**), p. 324.

635 Lauri Mälksoo, *Soviet Annexation and State Continuity: International Legal Status, Estonia, Latvia and Lithuania in 1940-1991 and after 1991, Investigating the Conflict Between Normativity and Force in International Law*, (Tartu University Press, 2003), (**CLA-291**), pp. 326-327.

636 *See, e.g.* Reply, ¶¶ 1070, 1073, 1099, *referring* to Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), pp. 343-346 (**CLA-282**).

637 Reply, ¶¶ 1114; 1099; Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), p. 344 (**CLA-282**).

be allowed to keep it unless the acquisition did not comply with the law or regulatory practice of the GDR, and the acquirer knew or should have known this.[638]

466. Cases referred to by the Claimant in which the relevant measures complied with local law include *In re P. (Komotini Case)*, where a Greek Court upheld a will administered in accordance with the legal system imposed by the Bulgarian occupant.[639] Another example in this regard is the case *Hungarian Soviet Government (Confiscation of Property)*, decided by the Austrian Supreme Court in the early 1920s. The court upheld the sale of a bank confiscated by the government of the short-lived Hungarian Soviet Republic of 1919 to a Viennese merchant because the sale occurred in compliance with the decrees of that government.[640]

467. The International Court of Justice ("**ICJ**") Advisory Opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, supports the findings set out above as well. As stated in Security Council Resolution 276, the continued application and enforcement of South African law in Namibia violated international law. But this did not mean, in the words of the ICJ, that "acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory" were invalid.[641] In his separate opinion, Judge Hardy Dillard further elaborated on these words, emphasizing that "[a]s Lauterpacht has indicated the maxim *ex injuria jus non oritur* is not so severe as to deny that any source of right whatever can accrue to third persons acting in good faith."[642]

468. In its *Opinion on the Law on Occupied Territories of Georgia*, the Venice Commission stressed both the freedom of States to not recognize the acts of foreign powers in their legal order, but also the need to protect individuals who acquired property based on those acts. Regarding the first point, the Commission stated that "each State is free to recognize or not to recognize acts of state issued by other States or by de facto authorities […]. On the basis of international customary law there is no obligation to recognize such acts." [643] With a view to the second point, the protection of individuals, the Commission added that "this freedom ends where basic human rights would be violated".[644] In this regard, the commission clarified that "[i]f a person acquired a property on the basis of an act […] at a time when the law permitted such an acquisition, the annulment of the

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638 *See, e.g.* Reply, ¶¶ 1070, 1073, 1099, *referring* to Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), p. 344 (**CLA-282**).

639 *In re P. (Komotini Case)*, 15 ILR 566, ¶¶ 566 – 567 (**CLA-303**), *quoted* in Reply, ¶ 1087.

640 Hungarian Soviet Government (Confiscation of Property) Case, 1 ILR 56 (Austria, Supreme Court of Civil Matters, 1922), ¶¶ 56 -7 (**CLA-300**), *referred to* in the Reply, ¶¶ 1089 – 1090.

641 ICJ Advisory Opinion of 21 June 1971, "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)", ¶ 125 (**CLA-160**); *quoted* in Reply, ¶ 1121.

642 Separate Opinion of Judge Hardy Dillard, ICJ Advisory Opinion on Namibia ICJ, GL No 53, [1971], p. 167 (**CLA-161**).

643 Venice Commission, Opinion No. 516/2009 (March 17, 2009), CDL-AD(2009)015, ¶ 43 (**CLA-166**).

644 Venice Commission, Opinion No. 516/2009 (March 17, 2009), CDL-AD(2009)015, ¶ 43 (**CLA-166**).

acquisition act after a long period of time and without any compensation may represent a violation of the right to peaceful enjoyment of one's possession".[645]

469. In sum, the authorities cited by the Claimant regarding the *de factis* rule support the finding of the Tribunal that the Claimant's subsidiaries may have acquired ownership in the relevant assets only if they relied in good faith on the validity of those transactions under the applicable local law. The Tribunal turns to this question now.

(III.) Domestic Law

470. If the Soviet Union occupied Estonia until the early 1990s, the Tribunal should—under the methodology set out above—consider whether the relevant transactions were valid under the applicable domestic law, usually referred to as local law in the law of occupation.[646] In this subsection, the Tribunal will use the more generic term domestic law because Soviet law and Estonian law are relevant not only if the law of occupation applies but also under two alternative views. The first of these views considers the law of occupation to apply only if the period of foreign control is rather short, unlike in Estonia, where that period exceeded 50 years.[647] The second view posits that Estonia seceded from the Soviet Union in the early 1990s after it had joined the Soviet Union (voluntarily) in 1940.[648] It seems obvious to the Tribunal that under those alternative views, the only legal regimes that could possibly govern the transactions at issue here are Soviet law and Estonian law.

(A.) Soviet Law

471. The Respondent argues that the sales of the Soviet military to private parties were unlawful under the law of occupation, which is why their compliance with Soviet law does not matter. [649] As set out above, the Tribunal is unconvinced that the sales by the Soviet military were void and without legal effects only because the Soviet Union may have breached the Hague Regulations. In addition, the Respondent posits that those sales were, in any event, illegal under Soviet law.[650]

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645 Venice Commission, Opinion No. 516/2009 (March 17, 2009), CDL-AD(2009)015, ¶ 24 (**CLA-166**).

646 *See, e.g. supra* ¶ 438. The use of the term local law as opposed to domestic law in the context of the law of occupation is related to the rights and obligations of the occupant. Occupants are obliged to ensure public order and safety, which is, for example, recognized in Article 43 of the Hague Regulations. This provision reads as follows: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country". Occupants are entitled to enact rules in fulfillment of this obligation. They may also impose rules or entirely new legal system for other reasons, whether lawful or not. The term local law stresses that any rules enacted by the occupant are not necessarily identical to the domestic law in place at the occupying State or to the domestic law that applied in the occupied territory prior to the occupation.

647 *See, e.g.*, the reference provided in Lauri Mälksoo, *Soviet Annexation and State Continuity: International Legal Status, Estonia, Latvia and Lithuania in 1940-1991 and after 1991, Investigating the Conflict Between Normativity and Force in International Law*, (Tartu University Press, 2003), (**CLA-291**), pp. 74-75 (fn. 113).

648 See *supra* ¶ 429.

649 Counter-Memorial, ¶ 140.

650 Rejoinder, ¶ 93; Counter-Memorial, ¶¶ 141-144.

The Claimant states that Soviet law is irrelevant because, under the law of occupation, Estonia must accept the sales by the Soviet military as a historical fact.[651] The Tribunal has dealt with this argument above. In the present case, the law of occupation mandates the Tribunal's consideration of the local law in place when the transactions occurred, and the *de factis* rule provides nothing different.

472. The Tribunal considers it possible that Soviet law is part of the relevant analysis. For as will be outlined in this subsection, all sales by the Soviet military relied on by the Claimant occurred before 6 September 1991, the day until which— according to the Petrachkov Report, to which the Claimant did not respond—the constitution of the Soviet Union ("**USSR Constitution"**) applied in Estonia.[652] Also, on 6 September 1991, the State Council of the Soviet Union recognized the independence of Estonia, shortly after the Supreme Council of Estonia had announced Estonia's full independence from the USSR on 20 August 1991.[653]

473. The Hangar and the berths at the Seaplane Harbor were allegedly transferred from the Soviet military to GT, a private company before 20 August 1991. Because documents underlying or related to the alleged sales are partly contradictory and others are missing, the Respondent alleges that several documents on file are forged.[654] The Tribunal will return to this point later if necessary. For its analysis here, it suffices to note that on 31 July 1991, two protocols of transfer regarding the Hangar and the relevant berths were signed between military unit 10717 and 1176 UNR.[655] While the Respondent states that both entities were military units, the Petrachkov Report confirms this with respect to Military unit 10717, but clarifies that UNR 1176 was a state organization subordinated to the Ministry of Defense of the Soviet Union.[656] On 17 August 1991, 1176 UNR allegedly sold the Hangar and the berths to GT, which transferred those assets on the same day to Nautex, another private company (which in turn, on 7 May 1992, sold them to Verest, acquired by the Claimant's subsidiary BPV in 1999).

474. The lumber works at the Seaplane Harbor were, according to the Claimant, transferred by the Soviet military to a private party, B&E, even earlier than the Hangar and the berths. Many facts regarding the alleged transfer of the lumber works from the Soviet military to the B&E are contested. But if such a transaction occurred, then this happened on 22 May 1990 and/or 1 November 1990.[657]

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651 Reply, ¶ 23.

652 Petrachkov Report, ¶ 23 (**RER-2**).

653 *Supra* ¶ 167; Petrachkov Report, ¶ 23 (**RER-2**).

654 Counter-Memorial, ¶¶ 118-132.

655 *See, e.g.,* Counter-Memorial, ¶ 121.

656 Counter-Memorial, ¶ 121; Petrachkov Report, ¶¶ 159-160, 168 (**RER-2**).

657 In its Post-Hearing Brief, the Claimant stated that through Contract No. 16, Military Factory No. 84, one of the joint owners of SEK, agreed to sell all of SEK's port assets to B&E on 22 May 1990. This transfer was "finalized", according to the Claimant, through a so-called "directive" of SEK dated 1 November 1990 (Claimant's PHB, ¶ 88). In this directive, the director of SEK "order[ed]", firstly, to "take" the woodworking buildings and other buildings and structures listed in the directive "to the balance sheet of small enterprise SEK", and secondly, to "transfer" them to the "balance sheet" of B&E (SEK Directive

475. This means that the (alleged) sales by the Soviet military to private parties occurred not only while the USSR Constitution still applied in Estonia but also after March 1990. In that month, the Congress of Estonia declared that the Republic of Estonia must be restored based on the principle of State continuity and the Supreme Council of the ESSR proclaimed the "transitional period."[658] Hence, in the period in which the relevant sales occurred, the USSR Constitution was still in force in Estonia (according to Soviet law), and Estonia established a transitional legal regime. This may raise certain questions as to the relationship between Soviet law and Estonian law. The Tribunal will revert to this relationship after its analysis of the two legal regimes if they lead to diverging results regarding the questions at issue here.

476. The sale of the Hangar and the berths on 17 August 1991 from UNR 1176 to the private entity GT was, according to the Petrachkov Report, void under Soviet law.[659] The Claimant considers this finding irrelevant without disputing or confirming it. While possibly not strictly necessary under these circumstances, the Tribunal deems it appropriate to analyze whether, in its view, the relevant conclusions of the Petrachkov Report are correct. In this regard, the Tribunal has difficulties in imagining that individual Soviet military units or their commanders could sell at will military equipment, entire military bases, or parts of the real estate thereon to private parties. Having carefully reviewed the Petrachkov Report as well as the legislation and regulations referred to therein, the Tribunal is convinced that this is the proper result under Soviet law.

477. Under Article 74 of the USSR Constitution, the law of the Soviet Union had priority over the law of its individual republics. It clarified that:

> [T]he laws of the USSR have equal legal force in the territories of all Union republics. If the law of a Union republic contradicts the law of the USSR, the law of the USSR is to be applied.[660]

478. Private property did not exist under the USSR Constitution, nor under the Fundamentals of the Civil Legislation of the USSR and Soviet republics ("**USSR Fundamentals of Civil Legislation**") which remained in force until 31 December 1991.[661] There was individual ownership, but that included only a limited list of relatively insignificant (household) objects that were not allowed to be used for entrepreneurial activity.[662] In addition to individual ownership, there was only socialist and collective ownership.[663] The latter was partly considered a category

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No. 17/90 (**C-024**); Respondent's Translation of Claimant's Exhibit C-024 (**R-035**). On 26 September 1997, B&E allegedly transferred the lumber works to Agrin, which was owned by the Claimant's subsidiary BPV from 8 December 1999 until 22 March 2001.

658 Mälksoo Report, ¶ 41, Annex 4 (**RER-3**); Resolution of the Supreme Council of the ESSR on the National Status of Estonia, 29 March 1990 (**RLA-049**); Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR* (Martinus Nijhoff Publishers, 2003), p. 48 (**CLA-291**).

659 Petrachkov Report, ¶ 168 (**RER-2**).

660 Petrachkov Report, ¶ 36 (**RER-2**) *referring to* Constitution (the fundamental law) of the Union of Soviet Socialist Republics, 7 October 1977 (as amended on 14 March 1990), Article 74 (**SP-12**).

661 Petrachkov Report, ¶¶ 12(G), 22-58, especially ¶¶ 49-50 (**RER-2**).

662 Petrachkov Report, ¶¶ 48-49 (**RER-2**) Fundamentals of civil legislation of the USSR and Soviet republics, 8 December 1961 (in force until 31 December 1991), Article 25 (**SP-2**).

663 Petrachkov Report, ¶ 123(B) (**RER-2**).

of socialist ownership and partly a separate third form of ownership.[664] Here, the distinction does not matter. The most important category of socialist ownership was state ownership, and the others included cooperative ownership as well as ownership of labor union organizations and other social organizations.[665]

479. State ownership and the assets that fell under it were described in Article 21 of the USSR Fundamentals of Civil Legislation as follows.

> [S]tate ownership is the collective heritage of the Soviet people and the key form of socialist ownership.
>
> The state is the sole owner of all state property.
>
> Land, its subsoil, waters and woods stay in the exclusive ownership of the state and could be transferred only for use purposes. The state owns the capital assets of industrial, construction and agricultural production, assets of transport and communication, banks, property of state-organized commercial, public utility and other enterprises, main city housing fund, as well as other property necessary for achieving state purposes.[666]

480. The Petrachkov Report concludes from this provision—under reference to legal scholarship and other legal instruments—that all capital assets necessary for achieving state purposes fall under state ownership, and that only their use but not their ownership could be transferred to others.[667] Capital assets—as opposed to other assets—were defined as "material values existing in an inalterable natural form for a long period of time that gradually lose their value in parts" such as "buildings, constructions, equipment, transport, machines, etc."[668] Furthermore, to qualify as a "capital asset," the relevant asset must have been worth originally "100 rubles per unit" or more.[669]

481. On 1 July 1990, the law on ownership in the USSR ("**USSR Ownership Law**") entered into force, which built on the USSR Fundamentals of Civil Legislation without contradicting its basic tenets.[670] Regarding state ownership, the USSR Ownership Law followed the example of Article 13 of the USSR Constitution and distinguished between "all-Union ownership" on the one hand, and ownership of the constituent entities of the USSR, such as its individual republics on the other. Article 13 of the USSR Constitution reads as follows:

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664 See Petrachkov Report, ¶¶ 40, 123(B) (**RER-2**).

665 Petrachkov Report, ¶¶ 40, 58, 123(B) (**RER-2**).

666 Petrachkov Report, ¶ 62 (**RER-2**) *referring to* Fundamentals of civil legislation of the USSR and Soviet republics, 8 December 1961 (in force until 31 December 1991), Article 21 (**SP-2**).

667 Petrachkov Report, ¶¶ 63-69 (**RER-2**).

668 Petrachkov Report, ¶¶ 66-67 (**RER-2**) *referring to* Type Classification of the main funds (capital assets) of the national economic of the USSR approved by the Central Statistical Directorate of the USSR, 30 April 1970 (**SP-20**).

669 Petrachkov Report, ¶¶ 68 (**RER-2**) *referring to* Order of the Minister of Defense of the USSR No. 210, 15 August 1979, "With the announcement of the Regulation on financial statements and balances" (**SP-21**).

670 Petrachkov Report, ¶¶ 50-58 (**RER-2**).

> [S]tate ownership includes the all-Union ownership, the ownership of Union republics, the ownership of autonomy republics, the ownership of autonomy regions, the ownership of autonomy districts, territories, regions and other geographical administrative divisions.[671]

482. Along the same lines, Article 19(1) of the USSR Ownership Law provided that:

> [S]tate ownership comprises all-Union ownership, the ownership of Soviet republics, autonomous republics, regions, districts territorial and administrative division (community ownership). Disposal and operation of the state property are performed by the relevant Councils of People's Deputies and state bodies authorized by them on behalf of the nation (population of the territorial and administrative division).[672]

483. Assets of the Soviet military were in "all-Union ownership". This is reflected in Article 21 of the USSR Ownership Law, which stated (*inter alia*) that:

> [T]he following property is in the all-Union ownership: property of state governmental and administrative bodies of the USSR, […] property of the Soviet Armed Forces, the border, inner and railway forces, defense facilities, the USSR budget funds, State Bank of the USSR and other banks of the USSR and the property of all-Union reserve, insurance and other funds. [673]

484. According to the Petrachkov Report, the USSR Ownership Law therefore confirms the proposition set out above in paragraph 480 that land and capital assets in "all-Union ownership," such as property of the Soviet military, must remain state-owned.[674] For the property of the Soviet military, the Petrachkov Report considers this proposition especially compelling, given the paramount role of the military in the Soviet Union, reflected for example in Article 31 of the USSR Constitution:

> [T]he defense of the socialist Motherland is the key function of the state and is a national matter for the entire Soviet people. [675]

485. The USSR Ministry of Defense was charged with operating the property of the Soviet military (and any possible transfers of that property to other state entities). As provided by a regulation dated 14 November 1991, the Ministry of Defense continued to perform this function during the transitional period of the USSR, which was dissolved in December 1991.[676] Inventory regulations issued by the Minister of Defense confirmed in their first paragraph that land used by the USSR military, barracks, and all fighting and other equipment of the armed forces was state-owned.[677]

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671 Petrachkov Report, ¶¶ 60-61 (**RER-2**) *referring to* Constitution (the fundamental law) of the Union of Soviet Socialist Republics, 7 October 1977 (as amended on 14 March 1990), Article 13 (**SP-12**).

672 Petrachkov Report, ¶ 72 (**RER-2**) *referring to* Law No. 1305-1 "On ownership in the USSR", 6 March 1990 (as amended on 24 December 1990), Article 19(1) (**SP-4**).

673 Petrachkov Report, ¶ 76 (**RER-2**) *referring to* Law No. 1305-1 "On ownership in the USSR", 6 March 1990 (as amended on 24 December 1990), Article 21 (**SP-4**).

674 Petrachkov Report, ¶¶ 100-101 (**RER-2**).

675 Petrachkov Report, ¶ 95 (**RER-2**) *referring to* Constitution (the fundamental law) of the Union of Soviet Socialist Republics, 7 October 1977 (as amended on 14 March 1990), Article 31 (**SP-12**).

676 Petrachkov Report, ¶ 102 (**RER-2**) *referring to* Resolution of the State Council of the USSR No. GS-13, 14 November 1991 (**SP-26**).

677 Petrachkov Report, ¶ 103-104 (**RER-2**).

486. In sum, the Petrachkov Report opines that land and capital assets of the Soviet military, such as buildings, could not be sold to anybody outside the Soviet government and administration as those assets were in "exclusive state (all-Union) ownership."[678]

487. In addition, the Petrachkov Report also sets out under what conditions state property—which includes other assets than land and capital assets in exclusive all-Union ownership—could be transferred, and to what entities. Such transfers were strictly limited by the provisions of the Resolution of the USSR Council of Ministers No. 940 "On the procedure for the transfer of state enterprises, associations, organizations, institutions, buildings and structures" of 16 October 1979, as amended on 5 October 1989 ("**Resolution 940**").[679]

488. Resolution 940 basically provided for two forms of transfers. The first form was transfers on gratuitous grounds that had no impact on the state ownership of the relevant assets because both transferor and transferee were ministries, government departments, state enterprises, or other state entities.[680] This form of transfer was, according to the Petrachkov Report, called "from balance to balance transfer."[681] The second form included transfers against compensation of buildings and structures by state entities to cooperative and other social organizations that required the approval of the relevant ministry.[682]

489. According to Article 14 of the USSR Fundamentals of Civil Legislation, transactions that did not comply with the law were void.[683] This included the transfer of assets that were in exclusive state ownership to other than state entities and the lack of mandatory approvals.[684]

490. Against the legislative and regulatory background set out in paragraphs 477-489 above, the Tribunal shares the conclusion of the Petrachkov Report that the transfer of the buildings and structures from the Soviet military to GT on 17 August 1991 was void under Soviet law. For these assets were in exclusive state—more precisely, "all-Union"—ownership and could be transferred only to entities subordinated to the USSR Ministry of Defense, but not to other entities, and surely not to private parties.[685] The Petrachkov Report includes several other reasons why GT could not acquire those assets.[686] In this regard, the Tribunal wishes to mention only that neither the

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678 Petrachkov Report, ¶¶ 100, 105(A) (**RER-2**).

679 Petrachkov Report, ¶ 101 (**RER-2**).

680 Petrachkov Report, ¶¶ 117-118 (**RER-2**) *referring to* Resolution of the USSR Council of Ministers No. 940 "On the procedure for the transfer of state enterprises, associations, organizations, institutions, buildings and structures", 16 October 1979 (as amended on 5 October 1989), Articles 3, 5 (**SP-10**).

681 Petrachkov Report, ¶ 118 (**RER-2**).

682 Petrachkov Report, ¶¶ 119-120 (**RER-2**); Resolution of the USSR Council of Ministers No. 940 "On the procedure for the transfer of state enterprises, associations, organizations, institutions, buildings and structures", 16 October 1979 (as amended on 5 October 1989), Articles 7, 8 (**SP-10**).

683 Petrachkov Report, ¶ 133 (**RER-2**) *referring to* Fundamentals of civil legislation of the USSR and Soviet republics, 8 December 1961 (in force until 31 December 1991), Article 14 (**SP-2**).

684 Petrachkov Report, ¶ 102 (**RER-2**).

685 *See* Petrachkov Report, ¶ 168 (A)-(B) (**RER-2**).

686 *See* Petrachkov Report, ¶ 168 (C)-(E) (**RER-2**).

transaction between Military unit 10717 and 1176 UNR nor the transaction between 1176 UNR and GT seems to have been approved by the USSR Ministry of Defense.[687]

491. As regards the transaction in 1990 through which B&E allegedly acquired the buildings and structures that were supposed to serve the lumber operations of the Claimant, the Petrachkov Report includes even more reasons why this transaction was invalid.[688] As in the context of GT, the transaction was void because the military assets could not be sold to B&E as a private, non-State entity. [689] The only additional ground that the Tribunal wishes to mention here is again the lack of any approval by the USSR Ministry of Defense.[690]

492. For the sake of completeness, the Tribunal notes that the possible involvement of SEK in the transfer of the property to B&E is no ground for considering this transaction valid. The Respondent has pointed to inconsistencies in the documentary record regarding the alleged transfer of the relevant assets to B&E in its written submissions. At the Hearing, the Respondent reiterated that the Claimant has never clarified whether B&E acquired the relevant assets from SEK or whether it relies on Contract No. 16 dated 22 May 1990, to which SEK was not a party.[691] The Claimant then specified that through Contract No. 16, the parties agreed to sell SEK's port assets to B&E. The transfer was "finalized", according to the Claimant, through a so-called "directive" of SEK dated 1 November 1990.[692] In this directive, the director of SEK "order[ed]", firstly, to "take" the woodworking buildings and other buildings and structures listed in the directive "to the balance sheet of small enterprise SEK", and secondly, to "transfer" them to the "balance sheet" of B&E.[693] The Petrachkov Report explains that an internal act like a directive of SEK cannot have any effects on the relevant assets.[694] This sounds plausible but is not decisive for the Tribunal's finding. Rather, the two reasons for the invalidity of the transfer of assets belonging to the Soviet military to B&E set out above —that is, the inalienability of land and capital assets in all-Union ownership and the lack of approval by the Ministry of Defense—remain applicable.[695] The Petrachkov Report also sets out that a "small enterprise" had autonomy regarding its proceeds and profits. But this does not mean that it was the owner of any assets on its balance sheet.[696]

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687 *See* Petrachkov Report, ¶ 168 (C) (**RER-2**).

688 Petrachkov Report, ¶ 156 (A)-(G) (**RER-2**).

689 *See* Petrachkov Report, ¶ 156 (A) (**RER-2**).

690 *See* Petrachkov Report, ¶ 156 (E)-(G) (**RER-2**).

691 Hearing Transcript, Day 5, pp. 107:17-24.

692 Claimant's PHB, ¶ 88 *referring to* SEK Directive No. 17/90 (**C-019**).

693 SEK Directive No. 17/90 (**C-024**); Respondent's Translation of Claimant's Exhibit C-024 (**R-035**). Initially, the Claimant seems to have argued that (the majority of) the relevant assets were transferred to SEK pursuant to Decree No. 477 on 29 December 1989 (Memorial, ¶ 253, *referring to* Decree 477 establishing SE SEK, 29 December 1989 (**C-018**). But this decree merely established SEK. It does not mention any assets, let alone the transfer of such assets.

694 Petrachkov Report, ¶¶ 174-175, 179(E) (**RER-2**).

695 *See* Petrachkov Report, ¶ 179(A) & (C) (**RER-2**).

696 Petrachkov Report, ¶¶ 169-172, 179(B)-(D) (**RER-2**).

493. Having found—in accordance with the Petrachkov Report—that the relevant transactions were invalid under Soviet law, the Tribunal will now turn to Estonian law.

(B.) Estonian Law

494. As set out above, the Estonian courts have decided that the transactions by which the Soviet military allegedly transferred the relevant assets at the Seaplane Harbor to private parties were void and that the Claimant's subsidiaries never became the owners of those assets.[697] This requires the Tribunal to determine whether and to what extent it may revisit issues under Estonian law on which Estonian courts have already decided. The Tribunal will address this issue first, before it outlines and—within the appropriate bounds—assesses the reasoning of the Estonian courts.

(1.) Level of Scrutiny

495. Addressing ownership issues under Estonian law raises the question of how an international tribunal should determine the content of a host State's law. The tribunal in *Emmis v. Hungary* faced a similar task, which it described as follows:

> Where the Tribunal is presented with a question of municipal law essential to the issues raised by the Parties for its decision, the Tribunal, whilst retaining its independent powers of assessment and decision, must seek to determine the content of the applicable law in accordance with evidence presented to it as to the content of the law and the manner in which the law would be understood and applied by the municipal courts.[698]

496. The Tribunal agrees with the principle articulated in *Emmis* that the content of a host State's law must be determined based on how the relevant domestic courts would understand and apply that law. The present case is special insofar as the Estonian courts have ruled on the very issue of whether the Claimant's subsidiaries had acquired title to the buildings and structures at the Lennusadam Port. As set out above, they have answered this question in the negative.[699] As a tribunal constituted under international law that is supposed to be independent of the Parties, the Tribunal does not consider itself to be bound by these decisions. The States parties to an investment treaty can of course agree that an international tribunal must follow the findings of the domestic courts of the State whose conduct is alleged to be wrongful. But absent such a provision, it seems unlikely that States parties intended an international tribunal to be bound by the decisions of the domestic courts of the respondent State. This is because arbitration clauses are typically included in a treaty if the States parties want disputes to be decided by a neutral third-party adjudicator unrelated to one of the disputing parties.

497. While the Tribunal, therefore, cannot simply adopt the decisions of the Estonian courts without making its own assessment, it is also convinced that it would be wrong to second guess and possibly overrule the Estonian courts as if the Tribunal were a court of appeal. In principle, domestic judges are better suited to interpret and apply their domestic law than international tribunals. Hence, the Tribunal has no doubt that Estonia and the U.S. intended a tribunal

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697 *See* ¶¶ 284-302 above.

698 *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶ 175 (**RLA-059**).

699 *See* ¶¶ 284-302 above.

constituted under the Treaty to grant some deference to the decisions of their domestic courts. The scope of this deference is not necessarily uniform in all contexts. The tribunal in *Azinian v. Mexico*, for example, found that decisions of domestic courts violate the FET standard if they constitute a "clear and malicious misapplication of the law."[700] It is debatable whether the same or a similar standard is appropriate here, where the Tribunal must determine an issue regarding its jurisdiction based on domestic law. But defining the precise degree of deference owed to the Estonian courts regarding the Tribunal's jurisdiction is dispensable if the Tribunal does not consider that Estonian law was applied wrongly. The Tribunal will revert to this point later.

(2.) The Reasoning of the Estonian courts

498. The Estonian court's decision that neither Agrin nor Verest had become the owners of the buildings and structures at the Port became final in 2006, when the Supreme Court decided not to hear the appeal against the March 2006 Appeal Judgment of the Tallinn Circuit Court. The latter judgment fully endorsed the Tallinn City Court's reasoning regarding ownership, which it did not consider necessary to repeat or amend.[701] The Circuit Court disagreed with the city Court's interpretation of statutory provisions on possession, but this issue is relevant regarding the validity of the lease agreements and title-bearing possession and will be analyzed by the Tribunal later.

499. The City Court clarified that none of the parties disputed that the piece of land on which the buildings and structures were located belonged to the Republic of Estonia, which, according to the court, is confirmed by documentary evidence from the years 1924 to 1941.[702] Regarding the ownership of the buildings and structures, the City Court first outlined—by reference to a decision of a Supreme Court decision of 1994, on which more later—the political and legal developments from 1918 until the mid-1990s as. The court stated that after its creation in 1918, the Republic of Estonia was occupied in 1940 and unlawfully integrated into the Soviet Union, which, as the occupant, never owned the real estate in the occupied territory. In the words of the court:

> The Republic of Estonia has been created based on the national right of self-determination of the people of Estonia and proclaimed on 24 February 1918; the Republic of Estonia was occupied and annexed by the USSR in 1940 with the help of its armed forces based on the Molotov-Ribbentrop agreement and was incorporated unlawfully to the USSR.; it was illegal according to international law and in contradiction with the interests and goals of the state and the people of Estonia stated in the Constitution of the Republic of Estonia; arising from the superiority of international law the states are obliged to follow the provisions of international law including the provisions of international customary law; Article 55 of the IV Hague Convention states that the occupying country cannot acquire the real estate of the occupied country; it has to maintain the value of the immovable property and can only be the possessor or ususfructur[.][703]

500. The City Court also summarized the Estonian legislative and regulatory steps in the process of regaining full independence, and it stressed that the form and content of the relevant acts were

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700 *Azinian, Davitian, & Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, ¶ 103 (**CLA-087** and **RLA-122**).

701 March 2006 Appeal Judgment, p. 38 (**C-081**).

702 July 2005 Judgment, p. 23, ¶ 1 (**C-078**).

703 July 2005 Judgment, p. 23, ¶ 2 (**C-078**).

influenced by the political realities (which included the presence of the Soviet military until 1994). In this regard, the court stated inter alia that:

> [T]he restoration of the state of Estonia was a process and the scope, legal content and form of the political and legal decisions that were the basis of it has depended on the current opportunities of the forces restoring the state; on 30 March 1990 the ESSR Supreme Court [sic!] as the representative of the people at the time showed the will to restore the independence of the Republic of Estonia and proclaimed the USSR state power in Estonia illegal from the moments of its enacting and proclaimed the restoration of the Republic of Estonia; the 16 May 1990 decision of the Supreme Council stated that the legal system to be created is based on the will of the people of Estonia and the generally acknowledged principles of international law; the 17 July 1990 decision of the Supreme Council suspended the change of the form of ownership of the assets in the ownership of the state […][704]

501. As regards the specific transactions at issue, the City Court found that the transfers of the relevant assets to B&E (the alleged predecessor in title to Agrin) and GT (the alleged predecessor in title to Nautex and then Verest) were in breach of the 17 July 1990 Resolution.[705] This resolution suspended all transactions involving State assets until legislation regulating the privatization of ownership was adopted. The alleged transfer of the Hangar and the berths from the USSR Armed Forces to GT took place more than a year after that, namely on 17 August 1991. The alleged transfer of the lumber works to B&E could, according to the City Court, not have taken place before 11 September 1990, the date when SEK was registered.[706] The court also noted that it does not matter which (if any) of the two versions of Contract No. 16 dated 22 May 1990 presented to it was the authentic version. This is because SEK—the entity whose assets were supposed to be transferred to B&E under Contract No. 16—took the buildings and structures to its balance sheet only on 1 November 1990. This means that on 22 May 1990, they could not have constituted assets of SEK.[707]

502. In light of the above, the City Court concluded that GT and B&E did not become owners of the relevant assets because the transactions were in breach of the 17 July 1990 Resolution and thus void according to section 51(1) of the Civil Code.[708] The City Court also mentioned and relied on other resolutions and legal instruments in its analysis. To avoid unnecessary repetitions, the Tribunal will address them in the next subsection.

503. Regarding the alleged successors in title to GT and B&E, including Verest and Agrin, the Tallinn City Court held that none of the subsequent transactions effected a change in ownership by operation of good-faith provisions under Estonian law. This is because the relevant entities knew or should have known that the assets belonged to Estonia. The City Court added that good-faith acquisition is, in any event, impossible under Estonian law if the owner lost the property against

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704 July 2005 Judgment, p. 23, ¶ 2 (**C-078**). While the translation provided by the Claimant erroneously refers to the "ESSR Supreme Court" in the passage quoted above, it is undisputed that it was the Supreme Council who issued the March 1990 Resolution (*see also* paragraph 164 above).

705 July 2005 Judgment, pp. 25-26, ¶¶ 4, 11 (**C-078**).

706 July 2005 Judgment, pp. 25-26, ¶¶ 9, 11 (**C-078**).

707 July 2005 Judgment, pp. 25-26, ¶¶ 9, 11 (**C-078**).

708 July 2005 Judgment, pp. 25-26, ¶¶ 4, 11 (**C-078**).

their will, which was the case here because of the illegal Soviet annexation.[709] Additional details of the reasoning of the Estonian courts will be addressed in the context of the Tribunal's assessment, which follows now.

(3.) The Tribunal's Assessment

504. In principle, the decision of the Tallinn City Court involves two different legal regimes, namely international law and Estonian law. Both Parties are of the view that by virtue of the Estonian Constitution, rules and principles of the law of occupation that constitute customary international law are part of Estonian law, including the Hague Regulations.[710] Furthermore, neither the Parties nor the Keres Reports take issue with the fact that the Estonian courts applied international law. But the Claimant argues that the Estonian courts reached the wrong result when applying international law because they misinterpreted Article 55 of the Hague Regulations and failed to address Article 53 of the Hague Regulations altogether. More specifically, the Claimant argues that buildings were treated as movables under Estonian law at the time when the Soviet military transferred the assets to private parties in 1990 and 1991. Hence, the Estonian courts should have relied on Article 53 of the Hague Regulations and considered the sales by the Soviet military valid. All subsequent sales from one private party to the other were, according to the Claimant, valid as well, regardless of their compliance with Estonian law since those were governed by the *ex factis* rule.

505. As mentioned earlier, it is not universally accepted that Estonia was occupied by the Soviet Union for more than 50 years in the last century following acts or threats of aggression in 1940. Especially Soviet scholars used to argue that Estonia joined the Soviet Union voluntarily, and this also seems to be the position of the Russian Federation today. Others consider that the law of occupation initially applied in 1940 and for some time thereafter, but doubt that it continued to remain applicable for several decades until the 1990s. The Tribunal stated above that it does not need to determine those issues for the purposes of its decision. For, if the law of occupation is not applicable in the present dispute, it can only be Soviet law, Estonian law, or both that govern the relevant transactions.

506. The Estonian courts applied the Hague Regulations as part of Estonian law. The view that Estonia was occupied by the Soviet Union is shared by significant parts of the international community and is arguably the predominant opinion in legal scholarship.[711] Some authors doubt that the law of occupation can be applicable over several decades, but this is not the prevailing opinion in legal scholarship. Hence, by applying the Hague Regulations as part of Estonian law, the Estonian courts were certainly within the bounds of deference owed by the Tribunal to the courts of the States parties as regards compliance with their own legal system. Nor did the Estonian courts exceed any limits of this deference when they held that the law of occupation did not authorize

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709 July 2005 Judgment, p. 27, ¶ 15.

710 Memorial, ¶ 278; Counter-Memorial, ¶ 184.

711 Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR* (Martinus Nijhoff Publishers, 2003), p. 203 (**CLA-291**); Eyal Benvenisti, *The International Law of Occupation*, (OUP, 2012), p. 151 (**CLA-282**).

the Soviet military to sell occupied real estate to private parties. In fact, this is probably the better view, as set out by the Tribunal in its analysis above.

507. For its position that the Tallinn City Court misapplied Estonian laws and regulations, the Claimant relies on the expert testimony of Mr. Keres. The Second Keres Report assumes that the Soviet Union had become the owner of the Lennusadam Port as a matter of international law. At the Oral Hearing, Mr. Keres confirmed that he did not provide expert testimony on whether and how the Soviet military became the owner of the Lennusadam Port under international law.

> However, what was the basis under which the Soviet military acquired the property and became the owner of the property, I submit that's where my capabilities as an expert end and yours begin, because I believe that to be a matter of international law rather than Estonian domestic law.[712]

508. Based on the assumption that the Soviet military was the owner of the Lennusadam Port, the Second Keres Report analyzes whether any of the Estonian laws and regulations invalided the transactions between the Soviet military and the private parties. It answers this question in the negative.

> If the determination in respect of ownership of the Lennusadam Port is that it did transfer to the ownership of the USSR, then the question that logically follows is whether any of the various laws and regulations adopted by the newly independent Republic of Estonia would be applicable to either expropriate the Lennusadam Port or to invalidate any prior transactions.
>
> After careful review of the applicable laws and regulations, I am of the opinion that this is not the case here. [713]

509. The Fourth Keres Report replies to the Respondent's proposition that there was no need to invalidate the transactions by the Soviet military regarding the Lennusadam Port under Estonian law because they were already invalid under international law. In this regard, the Fourth Keres Report considers the parliamentary debate that led to the 23 January 1992 Resolution to be important. That debate and the resulting text of the resolution indicate, according to Mr. Keres, that the Estonian legislator never considered all sales of real estate by the Soviet military to private parties invalid and only sought to forbid them in the future.[714] From this, Mr. Keres concludes that the City Court applied the 23 January 1992 retroactively when finding that the relevant transactions by the Soviet military with GT and B&E were invalid, given that they occurred before 1992.

510. As outlined in paragraphs 504-506, the Tribunal accepts the findings of the Estonian court that the Soviet military did not become the owner of the Lennusadam Port as a matter of international law. But the Tribunal still needs to assess whether, under the relevant Estonian laws and regulations, the sales by the Soviet military to GT and B&E, as well as the subsequent transactions, can be considered void, as held by the Estonian courts.

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712 Hearing Transcript, Day 4, p. 125:16-21.

713 Second Keres Report, ¶¶ 46-47 (**CER-2**).

714 Fourth Keres Report, ¶¶ 57-70 (**CER-8**).

(i) Supreme Court Decisions of 1994 and 1995

511. In its reasoning, the City Court relied on a decision of the Supreme Court of Estonia dated 12 December 1994 ("**1994 Supreme Court Decision**)".[715] The Tribunal considers the decision to be particularly relevant for the present dispute. For, in this decision, Estonia's highest court set out its understanding of the legal instruments of Estonia's transitory regime from 1990 until 1993 that are at issue here as well. This was in 1994, that is, roughly a decade before the Estonian court decisions on the Seaplane Harbor in which the Claimant posits the courts misapplied the law, and several years before the Claimant became active at the port.

512. In its 1994 decision, the Supreme Court held that Estonia was occupied by, and illegally incorporated into, the Soviet Union with the help of its armed forces in 1940 and that, as the occupant, the Soviet Union could not become the owner of the real estate in Estonia. The relevant reasoning of the Supreme Court and its comments on the individual legal instruments—which are also at issue in the present dispute—are worth quoting at some length:

> [1.] [T]he Estonian state has been founded on the basis of the inextinguishable right of the people of Estonia to national self-determination and the Estonian state was proclaimed on 24 February 1918.
>
> [2.] On the basis of the Molotov-Ribbentrop Pact, the Republic of Estonia was occupied and annexed by the USSR in 1940 with the help of its armed forces and illegally incorporated into the USSR. It was illegal under international law and in conflict with the interests and goals of the people of Estonia set out in the Constitution.
>
> [3.] Based on the supremacy of international law, states are required to follow the rules of international law, including the rules of customary international law. It follows from Article 55 of the IV Hague Convention that the occupying state cannot become the owner of the real estate of the occupied state. It must safeguard the capital of these properties and act merely as their administrator and usufructuary.
>
> [4.] The restoration of Estonia's statehood has been a process whereby the scope, legal substance and form of the underlying political and legal decisions has been based on the opportunities of the restoration forces of the time.
>
> [5.] On 30 March 1990, the Supreme Council of the Estonian SSR as the representation of people at the time expressed its will to restore the independence of the Republic of Estonia and declared the state power of the USSR unlawful in Estonia as from its establishment and declared restoration of the Republic of Estonia (*restitutio ad integrum*). By a decision of 16 May 1990 of the Supreme Council of the Republic of Estonia 'About the Action Programme of the Supreme Council of the Republic of Estonia during the Transition Period until Restoration of the Independence of the Republic of Estonia and the Temporary Order of Government' it was stipulated that the established legal system of the Republic of Estonia is based on the will of the people of Estonia and the generally accepted rules of international law.

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715 July 2005 Judgment, pp. 23-24, ¶ 2 (**C-078**).

[6.] By a decision of the Presidium of the Supreme Council of the Republic of Estonia of 17 July 1990, changes to the form of ownership of the property belonging to the state were suspended. By a decision of 19 December 1990, the Supreme Council of the Republic of Estonia declared the change of ownership relationships by the USSR forceful and restored the principle of the continuity of ownership. Clause 1 of the decision of the Supreme Council of 29 August 1991 repealed all instruments adopted and passed by the state and governmental bodies of the Republic of Estonia or Estonian SSR after 16 June 1940 by which undertakings, authorities and organisations were transferred under the supervision, administration or management of the state authorities of the USSR. The assets of undertakings, authorities and organisations under the supervision, administration or management of the state authorities of the USSR, which were located in the territory of the Republic of Estonia, were also declared to be the property of the Republic of Estonia. By the decision of the Supreme Council of 23 January 1992 'On declaring the buildings and other assets administered by the armed forces of the former USSR, which are located in the territory of the Republic of Estonia, as the property of the Republic of Estonia,' the buildings and other structures in the possession of the structural units of the armed forces of the former USSR, which were located in the territory of the Republic of Estonia, were declared to be the property of the Republic of Estonia and all transactions with the property without the consent of the government were banned.

[7.] The property of the military is state property. The real estate (i.e. land, buildings and structures) possessed and used by the armed forces of the former USSR was and is the property of the Estonian state. The actual possession, use and disposal of the property became possible gradually as of the making of the decision to restore the Republic of Estonia on 30 March 1990. It follows from international law and the continuity of the Republic of Estonia that the armed forces of the USSR and its structural units were not the legal subject of the transactions made with the land, construction works or objects located in the territory of the Republic of Estonia.

[8.] The submission according to which the real property possessed and used by the armed forces of the USSR did not belong to the Republic of Estonia is erroneous also based on the fact that upon collapse of the USSR a portion of the assets of the former USSR belonged to the Estonian SSR.

[9.] A judicial assessment for the purpose of resolving civil law transactions made with the property of the military has also been given in an order made by the Civil Chamber of the Supreme Court of the Republic of Estonia on 29 January 1993 and in an order of the Presidium of the Supreme Court on 5 May 1993.

> [10.] It follows from the supremacy of the will of the people and the principle of the sovereignty of the state that the authority of the state established on a legal ground has the right to determine the procedure for the possession, use and disposal of the property, which the Riigikogu and the Government of the Republic have done in the present case. The legislature has the inherent right, taking into account the will of the people expressed in the Constitution, keeping in mind the overall interests of the state, and taking into account the actual situation and the principle of legality, to pass retroactively effective legislation that does not fall into the field of criminal law and that amends to annuls prior legislative instruments. However, in the present case there was no need to retroactively annul transactions by an Act and no ground for it, because the respective legal decisions had already been made. The provisions of § 1 of the Act of 18 May 1993 regarding the annulment of transactions blurred the legislation and are in conflict with the principles of the rule of law, according to which the legislature has the authority to formulate the grounds for the assessment of the validity of transactions, [while] only the judiciary has the authority to declare a transaction void. Therefore, § 1 of the Act of 18 May 1993 on the annulment of transactions is in conflict with the idea of the Constitution according to which the Republic of Estonia is based on the principles of the rule of law and § 146 of the Constitution under which only courts can administer justice. The other sections of the Act of 18 May 1993 do not have a separate regulatory meaning.[716]

513. As correctly pointed out by the Claimant, with its decision, the Supreme Court repealed the following provision in the Act of 18 May 1993:

> All transactions made regarding land, buildings and structures that have been or are possessed or used by the structural units of the armed forces of the former USSR, which located or locate in the territory of Estonia, after the 30 of March 1990 without the consent of the Government of the Republic of Estonia are void (including balance sheet transfers).[717]

514. But the Supreme Court considered this provision unconstitutional not because it disagreed with the proposition set out therein, namely that transactions made after 30 March 1990 that sought to transfer land or buildings formerly in possession of the Soviet military were invalid. Rather, the Supreme Court stated that the laws that sustained this proposition had already been enacted prior to the Act of 18 May 1993. Hence, the Supreme Court found that the Act of 18 May 1993 unnecessarily blurred prior legislation.[718] It also stated that the legislator might enact laws that stipulate the grounds for the invalidity of transactions, but it is for the judiciary to "declare a transaction void", which is why the court considered the Act of 18 May 1993 to violate the rule of law.[719]

515. For the present dispute, the salient point of the 1994 Supreme Court Decision is that it clarified the view of Estonia's highest court on the ownership of real estate controlled by the Soviet military during the occupation or parts thereof. The Supreme Court unequivocally stated that that property always was and is the property of the Estonian state, and that the Soviet military was not entitled to enter any sales contracts with others regarding that property.[720] The court also stressed that after 30 March 1990, when the restoration of the Republic of Estonia was declared (*restitutio ad*

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716 December 1994 Supreme Court Judgment, pp. 2-3 (paragraph numbers and emphasis added) (**CLA-191**).

717 Act on the Annulment of Transactions, 18 May 1993 (**C-614**).

718 *Supra* ¶ 512(10).

719 *Supra* ¶ 512(10).

720 *Supra* ¶ 512(7).

integrum), Estonia could possess and use that property only gradually over time.[721] This seems hardly surprising, given that the withdrawal of the Soviet military was a process that was completed only in 1994.

516. In a decision of 31 January 1995, the Estonian Supreme Court applied the principles just outlined in a case that involved the transfer of buildings and facilities from the Soviet military to a private party via several sales contracts dated 9 October 1991 ("**1995 Supreme Court Decision**"). Those sales contracts were considered valid by the Tallinn Circuit Court in a decision dated 19 October 1994, that is, a few weeks before the 1994 Supreme Court Decision. Without guidance from the Supreme Court, the Tallinn Circuit Court reasoned that the 17 July 1990 Resolution did not suspend transactions that involved property of the Soviet military.[722] This is also the position of the Claimant and the Keres Reports in the current dispute. But the Supreme Court overruled the Tallinn City Court's decision of 19 October 1994 in its 1995 Decision. It held that the 17 July 1990 Resolution also suspended all transactions with real estate controlled by the Soviet military. The most important part of the 1995 Supreme Court Decision, for the purposes of the present case, reads as follows:

> The decision of 30 March 1990 of the Supreme Council of the Estonian Soviet Socialist Republic on the national status of Estonia confirmed that the occupation of the Republic of Estonia by the Soviet Union on 17 June 1940 had not interrupted the existence of the Republic of Estonia de jure and the territory of the Republic of Estonia was still occupied to that day. In the same decision, the unlawfulness of the state power of the Soviet Union in Estonia from the moment of its establishment was recognised, and a transitional period for the restoration of the Republic of Estonia was declared. The restoration of the Estonian statehood has been a process in which the wording and form of the underlying legal decisions have depended on the current capabilities of the forces restoring the statehood. This must be taken into account when interpreting the legislation governing the dispute. The Civil Chamber of the Circuit Court has incorrectly interpreted the decision of the Presidium of the Supreme Council of the Republic of Estonia of 17 July 1990 […] This decision was adopted in the process of the restoration of the Republic of Estonia due to the need to ensure the preservation of state property as state property. Clause 1 of the decision temporarily suspended, pending the adoption of the legislative acts of the Republic of Estonia governing the privatisation of property, all transactions involving the fixed property of state-owned enterprises and other organisations that cause the ownership form of the property to change. Such suspension of transactions meant that the seller, the Baltic Fleet Construction Board, and the buyer, AS Fonon, registered in Estonia, were prohibited from concluding the contract of purchase and sale that changed the ownership form of the property owned by the state. This prohibition also applied to the property managed by the Armed Forces of the former Soviet Union in the territory of Estonia, which constituted state property. Clause 1 of regulation of 7 May 1991 […] is also based on the aforementioned interpretation of the decision of the Presidium of the Supreme Council of the Republic of Estonia of 17 July 1990, drawing the attention of the heads of state-owned enterprises, institutions and organisations subject to the Soviet Union to the fact that all transactions involving the fixed property of state-owned enterprises that cause the ownership form of the property to change are suspended.

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721 *Supra* ¶ 512(7).

722 *See* Supreme Court of Estonia, Case No. III-1/1-6/95, Judgment, 31 January 1995, p. 2 (**RLA-114**).

> The fact that the subsequent legal acts referred to in the decision of the Civil Chamber of the Circuit Court (subsection 2 (2) of the decision of 29 August 1991 of the Supreme Council of the Republic of Estonia […], and clause 5 of the regulation of 12 September 1991 of the Government of the Republic of Estonia " […]) dealt with the issues related to the ownership of the property in the possession of or used by the Ministry of Defense of the Soviet Union or its structural units does not mean that the temporary suspension of transactions indicated in the decision of 17 July 1990 of the Presidium of the Supreme Council of the Republic of Estonia did not prohibit the Baltic Fleet Construction Authority from selling and AS Fonon from purchasing the disputed property on 9 October 1991.[723]

517. The Tribunal finds this reasoning important in assessing whether the courts misapplied Estonian law when deciding that the transactions by B&E and GT with the Soviet military were invalid, and that the subsequent transactions did not lead to a change in ownership of the Seaplane Harbor. With these observations in mind, the Tribunal will now address some of the legal instruments that the Claimant and the Keres Reports opine were misapplied by the Tallinn City Court in its July 2005 Judgment.

(ii) 17 July 1990 Resolution

518. As set out above in paragraphs 501 and 502, the Tallinn City Court considered the transfers of the relevant assets from the Soviet military to B&E and GT invalid because they were not in line with the 17 July 1990 Resolution. That resolution read as follows:

> 1. To suspend temporarily, until the adoption of Estonian legislative acts regulating the privatization of the property, all transactions with the statutory fund property of state-owned enterprises and other organisations, which cause a change in the ownership of such property, except in the cases provided in section 3.2. of this resolution and also the transfer of property from state farms to collective farms following the established procedure.
> 2. To acknowledge that based on the protocol decision from May 27th this year the Government of Estonian Republic will develop the privatization concept (the general principles of the privatization process and their execution in specific areas) and will submit it by September 1st this year to the Supreme Council of Estonian Republic for review.
> 3. To assign the Government of Estonian Republic:
>
> 3.1. To compile an overview of the state-owned property at the territory of Estonian Republic and outside of it and the state's obligations regarding the return or compensation of the unlawfully transferred property to its prior owners or their legal successors.
>
> 3.2. To prepare by August 10th the draft of Estonian law regarding the procedure and conditions of privatization of consumer service, trade and catering enterprises with the balance sheet value until 500 000 roubles.
>
> 3.3. […][724]

519. The reasons provided by the Claimant and the Keres Reports for the alleged inapplicability of the 17 July 1990 Resolution to the transfer of the relevant buildings and structures at the Seaplane

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723 Supreme Court of Estonia, Case No. III-1/1-6/95, Judgment, 31 January 1995, pp. 3-4 (**RLA-114**).

724 Resolution of the Presidium of the Supreme Council of the Republic of Estonia regarding the Initial Measures for Organising the Privatization Process, 17 July 1990 (**CLA-195**).

Harbor to B&E and GT appear to be threefold. First, the Keres Reports state that this resolution was meant to ban only the transfer of assets by Estonian state-owned entities and not by the Soviet military within Estonia.[725] The Tribunal notes that the unclear wording of section 1 of the 17 July 1990 Resolution does not exclude the interpretation suggested by the Claimant and the Keres Reports. In section 1, the Supreme Council "suspend[ed] temporarily, until the adoption of Estonian legislative acts regulating the privatization of the property, all transactions with the statutory fund property of state-owned enterprises and other organisations."[726]

520. But nor does this wording exclude the view adopted by the Tallinn City Court in 2005 and by the Estonian Supreme Court as early as 1995, namely that section 1 includes property of the Soviet military.[727] Already in its 1994 Decision, the Supreme Court clarified its understanding of the March 1990 Resolution, the acts subsequently adopted during the transition phase, and the relevant principles of international law. It stated that the Soviet military had never become the owner of real estate it controlled as an occupant until the 1990s following the forced integration of Estonia into the Soviet Union in 1940. Consequently, the March 1990 Resolution declared (i) that the territory of Estonia is "still occupied", (ii) the "restoration of the Republic of Estonia (*restitutio ad integrum*)", and (iii) that a "temporary management regime" will be developed for the "transitional period".[728] The 17 July 1990 Resolution was one of the first steps of the transitory regime established after the March 1990 Resolution.

521. At that time, the Soviet armed forces were still present in Estonia, and their withdrawal, as well as (property) issues related thereto, were subject to negotiations that would continue for several years. The Supreme Court explained in its 1994 Decision that reestablishing Estonia's statehood and its ownership rights was a process influenced by the circumstances on the ground.[729] Against this background, the Tribunal finds it unsurprising that later legislative and regulatory acts were more explicit than the 17 July 1990 Resolution when addressing assets controlled by the Soviet military that Estonia deemed to be its own. But the text of section 1 is vague enough to include those assets. The context of this provision provides additional support for the view of the Estonian courts. For as per its preamble, the 17 July 1990 Resolution sought "to execute the ownership right of the Estonian Republic." Its section 3.1 ordered the government to prepare an overview of all "state-owned property," with a view to its possible return to prior owners expropriated after 1940. There is no reason why real estate controlled by the Soviet military should be excluded from the scope of the 17 July 1990 Resolution or any of its provisions.

522. The *second* reason why the Keres Reports consider the 17 July 1990 Resolution to be inapplicable is that it governs only the transfer of property through state-owned—and not private—enterprises and organizations.[730] The premise of this argument seems to be that with so-called

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725 *See, e.g.,* Second Keres Report, ¶¶ 80, 84 (**CER-2**); Third Keres Report, ¶ 78 (**CER-4**).

726 *See supra,* ¶ 518.

727 *See supra,* ¶ 516.

728 Resolution of the Supreme Council of the ESSR on the National Status of Estonia, 29 March 1990 (**RLA-049**).

729 *Supra*, ¶ 512(4).

730 Fourth Keres Report, ¶ 50 (**CER-8**).

Resolution 477, the "Lennusadam Port in its entirety was transferred from the military to private companies on 29 December 1989".[731] But Resolution 477 records only the establishment of the small enterprise SEK (by the Baltic Fleet Building Government, Military Factory 84, and two other founding members). It says nothing about the transfer of assets, let alone of those at issue here. Rather, according to SEK's own directive 17/90, the relevant buildings and other structures were taken to its balance sheet only on 1 November 1990 and on that day transferred to B&E.[732] This means that prior to 1 November 1990, the relevant assets were under the control of the Soviet military even under the assumption that SEK is a "private company." In any event, the Tribunal finds the categorization of SEK as a "state small enterprise" in the Petrachkov Report more persuasive than its characterization as a private company.[733] This seems to be more in line with the view undisputed by the Claimant that military bases were state-owned under Soviet law and could not be transferred to private parties.

523. The *third* argument in the Keres Reports for why the transfer of property to B&E remained unaffected by the 17 July 1990 Resolution is that this resolution is not applicable retroactively.[734] But as set out above, the relevant assets were not transferred to B&E until 1 November 1990. In this regard, it seems immaterial whether one of the two incompatible versions of Contract No. 16 dated 22 May 1990 is authentic, or whether—as suggested by the Respondent—both are forged.[735] This is because such a contract may have obliged Military Company No. 84 to transfer certain assets to B&E, but this is different from the transfer itself.[736] Nor does the Tribunal consider it decisive whether B&E gained control of the relevant assets already on 5 June 1990, as recorded in a document allegedly signed by BFC, Military Company 84, and B&E on that day.[737] For, this document is compatible with Resolution 477 of 1 November 1990 only if B&E became the possessor but not the owner of the relevant buildings and structures on 5 June 1990.

524. In sum, the Tribunal agrees with the Estonian courts' conclusion that the transfer of the relevant assets to B&E was in breach of the 17 July 1990 Resolution. The same applies to the transfers by the Soviet military of the other assets at the Port to GT Project on 17 August 1991, that is, more than a year after the 17 July 1990 Resolution was enacted.

(iii) The Transitory Legal Regime after 17 July 1990

525. As set out above, the Keres Reports assume that the Soviet military became the legal owner of the Seaplane Harbor under international law. Based on this assumption, the Keres Reports

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731 Fourth Keres Report, ¶ 50 (**CER-8**).

732 SEK Directive No. 17/90 (**C-024**).

733 Petrachkov Report, ¶¶ 12, 16 (**RER-2**).

734 Third Keres Report, ¶ 232 (**CER-4**).

735 *See* Counter-Memorial, ¶¶ 116-117.

736 *See also* Memorial, ¶ 68, where the Claimant states that "[i]n May 1990, Military Factor No. 84, one of the joint owners of SEK, agreed to sell all of SEK's Port assets to OÜ B&E ("B&E") […] That transfer was finalized on November 1, 1990."

737 The Respondent seems to consider this document to be forged as well, *see* Counter-Memorial, ¶¶ 112-117 in the section entitled "Evidence confirming forgery of all B&E documents".

consider it necessary that one of the legal instruments enacted by Estonia during the transition phase had annulled the sales of the Soviet military to the private parties. Given that the Tribunal neither shares the basic assumption of the Keres Reports nor considers the 17 July 1990 Resolution inapplicable, much of the discussion regarding the transitory regime might be redundant. Still, the Tribunal will analyze whether any of the acts invoked in the Keres Reports justify the conclusion that the Estonian courts erred when they considered the relevant transactions to be invalid.

526. From the legal instruments enacted by Estonia between July 1990 and 1992 introduced in paragraphs 163-175 above, the Keres Reports focuses on three of them to establish that B&E and GT became the lawful owners of the relevant real estate. These acts are the 19 December 1990 Resolution, the 27 November 1991 Regulation, and the 23 January 1992 Resolution,[738] which the Tribunal will address in turn.

The 19 December 1990 Resolution

527. The 19 December 1990 Resolution acknowledged that certain acts of the ESSR and the Soviet Union regarding the nationalization and collectivization of property were unlawful. To enable the return of that property to their rightful owners, the resolution requested the government to recommend steps regarding the listing of previous owners and their successors.[739] The Keres Reports opine that this resolution applies only to property taken after 23 July 1940. This date is mentioned in section 1, which addresses specified regulatory acts, e.g., the "Declaration of nationalization of banks and major industries". But the issue of whether the Soviet military took over the Seaplane Plane Harbor before or after a possible start date regarding the nationalizations covered by this resolution seems irrelevant. This is because the resolution was concerned with preparatory steps regarding the return of state assets to their original owners from whom those assets were taken between 1940 and 1990. It seems nonsensical to ask whether such a resolution applies to real estate that, between 1918 and 1990, had never been in private ownership but always in the possession of state authorities, since 1940 in that of the Soviet military. The declaration of certain acts of nationalization as unlawful in the 19 December 1990 Resolution does not mean that the Soviet military was the rightful owner of real estate not covered by those acts. Rather, the 30 March 1990 Resolution (as interpreted by the Supreme Court in 1994 and 1995) established that the Soviet Union as an illegal occupant had never become the owner of the real estate in Estonia.

27 November 1991 Regulation

528. The 27 November 1991 Regulation, in contrast, seems to apply to the alleged transfers of the relevant assets by the Soviet military to B&E and GT. However, the Claimant and the Keres Reports correctly point out that those transfers do not fall under the ban on transactions made by the USSR Defense Ministry stipulated in section 1. The 27 November 1991 Regulation reads in relevant part as follows:

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738 *See* Fourth Keres Report, ¶ 50 (**CER-8**).

739 19 December 1990 Resolution (**CLA-196**).

> According to the Estonian Republic Supreme Council's decision "About independence of the state of Estonia" dated 20 Aug 1991 and taking into consideration the need for quick withdrawal of forces of USSR Military from ER territory and in this respect the defense of the ER economic interests, the ER State Government decides:
>
> 1. To stop transactions made by USSR Defense Ministry without agreement from ER State Government with buildings, structures and other property assets located on ER territory until the corresponding decision is made by ER Supreme Council.
>
> 2. Establish that all transactions made before enactment of the current Ruling by USSR Defense Ministry or by its dependent legal entities with landholdings, buildings and other property assets located on ER territory have to be registered with the correspondent county or city administration within one month from enactment of the current Ruling.
>
> New transactions can be made only when coordinated with ER State Chancellery. [740]

529. Since the transfers of the buildings and structures at the Seaplane Harbor from the Soviet military to B&E and GT occurred before the 27 November 1991 Regulation was enacted, the stop of transactions set out in section 1 does not apply to those transfers. But they had to be registered according to section 2. Neither of the Parties denies that. The Claimant argues that non-registration entailed no penalties, which seems correct, and unsurprising considering the legal framework put in place since March 1990. As held in the 1994 and 1995 Supreme Court Decisions, Estonia always owned the real estate controlled by the Soviet military, who could not validly sell that real estate to private parties without Estonia's consent. The only way for private parties to ensure they could remain in possession of the real estate purchased from the Soviet military and acquire ownership was to register that property and await the outcome of administrative proceedings. Registration was therefore in the very interest of private parties, and penalization of non-registration unnecessary.

530. In this regard, it bears emphasis that the Estonian courts considered the transfer of the relevant buildings and structures to B&E and GT invalid not only because of the 17 July 1990 Resolution. Rather, the Tallinn City Court added that these transactions were, in any case, void because they did not comply with the registration requirements of the 27 November 1991 Regulation and the 24 July 1992 Regulation. [741] The Tribunal based this conclusion on section 51(1) and section 62(1) of the Civil Code, which read as follows:

> Section 51. Invalidity of a legal act which is not in accordance with the requirements of the law
>
> (1) A legal act which is not in accordance with the requirements of the law is invalid.
>
> Section 62. The time from which a legal act is considered invalid
>
> (1) A legal act which is declared invalid is considered invalid from the time at which it was concluded.
>
> (2) However, if the content of the legal act indicates that it may be terminated only for the future, the effect of the legal act which has been declared invalid terminates for the future. [742]

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740 Regulation No. 244 (**CLA-197**).

741 July 2005 Judgment, p. 26, ¶ 4 (regarding the transfer to GT) and ¶ 10 (regarding the transfer to B&E) (**C-078**)

742 Civil Code of the Estonian Soviet Socialist Republic, 12 June 1964, sections 51, 62 (**RLA-051**).

531. Against this background, the Tribunal finds the conclusion that the non-registration of the relevant transactions was in breach of the 27 November 1991 Regulation, and therefore void according to section 51(1) and section 62(1) of the Civil Code, plausible and correct.

The 23 January 1992 Resolution

532. One of the key arguments of the Claimant and the Keres Reports is that the Estonian courts invalidated the sales by the Soviet military to private parties based on an unlawful retroactive application of the 23 January 1992 Resolution, which reads as follows.

> Considering the need for quick withdrawal of USSR Military forces from ER territory and in this respect the defense of the ER economic interests, the ER State Supreme Council decides:
>
> 1. To declare buildings, structures, military weapons, military hardware, supplies and other assets possessed by former USSR military forces units located on ER territory to become the property of the Estonian Republic.
>
> 2. The ER State Government has to determine composition of the assets possessed by former USSR military forces units located on ER territory and has to solve administrative and technical problems of taking over assets by collaborating with appropriate agencies of the legal successor of USSR, also has to arrange the administration, usage and control over these assets.
>
> 3. Prohibit all transactions with land, buildings, structures, military weapons, military hardware, supplies and other assets located on ER territory and belonging to the former USSR military units without permission from the ER State Government.
>
> 4. Annul all land allotments made by Estonian Soviet Republic to soviet army, navy and USSR State Safety Committee and void all regional special regimes […].[743]

533. Read in isolation, the 23 January 1992 Resolution provides support for the Claimant's position. Since section 1 declared certain assets (including buildings) possessed by the former Soviet military to "become" the property of the Estonian Republic, it seems arguable that—*e contrario*—they were not owned by Estonia before 23 January 1992. In a similar vein, it is not unreasonable to argue that if section 2 prohibits transactions regarding those assets without permission of the Estonian government, such transactions must have been valid if made prior to 23 January 1992.

534. In the view of the Tribunal, however, these points do not warrant the conclusion that the Tallinn City Court decided the ownership issues regarding the Seaplane Harbor wrongly. To begin with, the court did not base its decision on the 23 January 1992 Resolution. Rather it referred to this Resolution when setting out the content of the 1994 Supreme Court Decision, jointly with the other legal instruments cited in paragraph 512 above. When applying the law to the facts, the Tallinn City Court considered the relevant transactions void because of two other, independent reasons, namely non-compliance with the 17 July 1990 Resolution and the failure to register the transactions (in breach of the 27 November 1991 Regulation and the 24 July 1992 Regulation). Moreover, it seems understandable that the clarity of the language in Estonian legal acts unfavorable to the occupying forces increased over time. As the Estonian Supreme Court put it in 1994, "the restoration of Estonia's statehood has been a process whereby the scope, legal

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743 Supreme Council of Estonia, Resolution regarding Declaration of Buildings, Structures, Military Weapons, Military Hardware, Supplies and Other Assets Possessed by Former USSR Military Forces Located on ER Territory to Become the Property of the Estonian Republic, 23 January 1992 (**C-197**).

substance and form of the underlying political and legal decisions has been based on the opportunities of the restoration forces of the time."[744]

535. For the same reason, the Tribunal does not consider it decisive that the drafting history of the 23 January 1992 Resolution may have revealed different views among the delegates to the Estonian Supreme Council regarding the proper formulation of the relevant legal instruments. The Keres Reports rightly point out that the final text of section 3 of the 23 January 1992 Resolution was proposed by the delegate, Mr. Ahti Kõo. The prior draft of that section stated that the Supreme Council decided to:

> declare any and all transactions made with land, buildings, structures, arms, battle equipment, supplies and other property located in the territory of the Republic of Estonia, which belong to the structural units of the armed forces of the former USSR, and are in conflict with the legislative acts of the Republic of Estonia, invalid.[745]

536. Mr. Kõo's concern regarding that draft provision was mainly as follows:

> As I understand it, the current version declares transactions retroactively invalid as well. I wouldn't argue against the idea but I have a question regarding those that have in good faith and without disregarding the normative instruments currently in force concluded transactions and acquired the real or movable property of the military. Is it correct to extrajudicially declare these transactions invalid?
>
> Second. If you do consider it correct and should it happen that such a decision that is in conflict with the principles of the rule of law is adopted, how will the issues of the individuals and entities that have acquired property in good faith and in line with the laws in force to date be solved? How will they be compensated for the damage suffered by them by purchasing property and paying for it in cash or in other things of value? [746]

537. The Tribunal considers two points of this criticism particularly important. First, Mr. Kõo was concerned that the initial draft would declare transactions "extrajudicially" invalid, that is, without involvement of the courts. This was a legitimate concern. In its 1994 Decision set out above, the Estonian Supreme Court found a provision unconstitutional that contained a similar formulation as the initial draft of section 2. In that decision, the Supreme Court reasoned that it was for the legislator to provide grounds for the invalidity of transactions but for the courts to declare those transactions invalid. The change from "declare" to "prohibit" in section 2 may have avoided a similar problem with respect to the 23 January 1992 Resolution.

538. The second point that the Tribunal considers important is that Mr. Kõo sought protection for those "who have acquired property in good faith and in line with the laws in force to date". [747] This seems to imply that Mr. Kõo did not doubt that non-compliance with the regulatory regime in place prior to the 23 January 1992 Resolution is a ground for the invalidity of earlier transactions.

539. In response to Mr. Kõo's concerns, Mr. Vare—the state minister who presented the draft—invited Mr. Kõo to suggest a wording that would make it clearer that avenues for the protection of those

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744 *Supra*, para. 512(4).

745 Transcript of the session of the Supreme Council, 21 January 1992, p. 17 (**C-199**) (emphasis added).

746 Transcript of the session of the Supreme Council, 21 January 1992, pp. 4-5 (**C-199**) (emphasis added).

747 Transcript of the session of the Supreme Council, 21 January 1992, p. 5 (**C-199**) (emphasis added).

who bought property from the Soviet military in good faith would remain available. Mr. Vare stated that:

> For those who have acted in good faith, if there is indeed such a need, we should simply introduce a clause. Kindly suggest your wording that would make the provision clearer in the decision. Nevertheless, we should carefully examine all the transactions, including those made in good faith. Otherwise we will not gain control of the scope of the actual transactions. In that regard I do not consider the decision to be in conflict with legal principles. In reality, the sale of the property of the armed forces without the participation of Estonia is considered to conflict with these principles. Thereby the unlawfulness of the matter exists a priori and in that regard we cannot use the excuse of the unawareness of the law or procedure also in the case of these good faith transactions. Those who acted in good faith while being perfectly aware of the situation will need to address the government on the basis of the procedure in force.[748]

540. The words with which Mr. Kõo later introduced his draft provision strongly suggest that he agreed that real estate transactions between the Soviet military and private parties that occurred prior to the 23 January 1992 Resolution were not necessarily valid. He stated that:

> Now comes the amendment. Instead of concluded transactions we should speak of banning transactions with the property belonging to the armed forces of the former USSR or their structural units. In such a situation it would be logically clear that prior transactions have to be judicially declared invalid, where necessary.[749]

541. The 2005 Decisions of the Estonian courts regarding the ownership of the Seaplane Hangar seem in line with this position. After all, the courts held that the relevant transactions made with the Soviet military in 1990 and 1991 were invalid because they were in breach of the 17 July 1990 Resolution and, in addition, the buyers did not comply with the registration requirements. In any event, even a different understanding of the 23 January 1992 Resolution and its drafting history would not mean that the Estonian court misapplied the law. This is because subsequent legislation—here, the 23 January 1992 Resolution—may be relevant in interpreting prior legal instruments at issue, that is, here the 17 July 1990 Resolution and the 27 November 1991 Regulation. But this does not mean that this interpretative means outweighs other considerations, such as the reasons the Tallinn City Court provided for its decision.

The 24 July 1992 Regulation

542. As set out above, one of those reasons was the non-compliance of the buyers with the relevant registration requirements, stipulated not only in the 27 November 1991 Regulation, but also subsequently in the 24 July 1992 Regulation, which read as follows:

> 1. Transactions concluded between former units of USSR armed forces and any enterprise, establishment, organization or private person regarding the land, buildings and structures on the territory of the Republic of Estonia that are in accordance with the law must be re-registered in the Ministry of Defense of the Republic of Estonia by August 15, 1992.
>
> The Ministry of Defense has to take into account the standpoint of the government committee formed for the supervision of the legality of these transactions when re-registering the transactions.

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748 Transcript of the session of the Supreme Council, 21 January 1992, p. 5 (**C-199**) (emphasis added).

749 Transcript of the session of the Supreme Council, 21 January 1992, p. 5 (**C-199**) (emphasis added).

> 2. To forbid any further transactions of the enterprises, establishments, organizations and private people of the Republic of Estonia with the land, buildings and structures on the Republic of Estonia acquired from the units of the former USSR armed forces.[750]

543. Section 1 of this Resolution names the Ministry of Defense as the addressee of the re-registrations. Under the prior 27 November 1991 Regulation, the relevant registrations had to be made with the country or city administration within one month from 27 November 1991. It seems possible to understand the requirement to re-register the transaction as an extension of the one-month deadline imposed by the 27 November 1991 Regulation. But given the use of the word "re-registration" and the new addressee, it seems more plausible to interpret section 1 not as an additional registration opportunity but as a separate obligation. This seems in line with one of the explanations provided by the Respondent in response to the Tribunal's question regarding the meaning of the term "in accordance with the law" in section 1. In this regard, the Respondent suggests that only transactions that had already been registered on the municipal level were "in accordance with the law" and subject to the possibility of validation.[751] In any event, the precise relationship between the two registration requirements was not decisive for the outcome of the proceedings before the Estonian courts regarding the Seaplane Hangar, for it is common ground between the Parties that the relevant transactions were registered neither on the municipal level nor with the Ministry of Defense.

544. Section 2 of the 24 July 1992 Regulation "forbid any transactions" with the real estate and other assets "acquired from the units of the former USSR armed forces." This wording seems to suggest that section 2 prohibited transactions between public or private parties regarding real estate once acquired from former units of the Soviet military, and not only purchases from such units. But given that the Tallinn City Court did not rely on such a proposition, its merit is irrelevant here.

(iv) Ex Nunc *or* Ex Tunc *Invalidity?*

545. Having found that the Estonian courts did not err when they considered the transfers of the buildings and structures at the port to GT and B&E to be invalid, the Tribunal must now assess the Estonian courts' holding that the transaction was invalid *ex tunc*. *Ex tunc* invalidity is the general rule in section 62 of the Civil Code, and *ex nunc* invalidity is the exception:

> Section 62. The time from which a legal act is considered invalid
>
> (1) A legal act which is declared invalid is considered invalid from the time at which it was concluded.
>
> (2) However, if the content of the legal act indicates that it may be terminated only for the future, the effect of the legal act which has been declared invalid terminates for the future.

546. According to the plain reading of this provision, it seems correct that the Tallinn City Court relied on section 62(1) of the Civil Code and considered the transactions by the Soviet military invalid *ex tunc*.[752]

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750 24 July 1992 Regulation (**C-198**).

751 Respondent's PHB, ¶ 30.

752 July 2005 Judgment, pp. 25-26, ¶¶ 4, 10 (**C-078**).

547. The Second Keres Report opines that the 23 January 1992 Resolution "cannot be interpreted to have an effect of voiding *ab initio* all transactions with the former Soviet armed forces."[753] The Tribunal is not convinced that this consideration is relevant here. For the City Court did not base the invalidity of the transactions on the 23 January 1992 Resolution but on the 17 July 1990 Resolution and the lack of their registration (as required by the 27 November 1991 Regulation and the 24 July 1992 Regulation). But the Tribunal is not even persuaded that a hypothetical transaction in violation of the 23 January 1992 Resolution that took place in 1993 could be invalidated only with effect from the date on which the relevant judgment was rendered, say in 2005. The drafting history of the 23 January 1992 Resolution does not seem to support such an *ex nunc* invalidity. This is because Mr. Kõo was not concerned with the date from which transactions that were found invalid by the Estonian courts would have to be treated as invalid. Rather, his concern was that the initial draft of the 23 January 1992 Resolution declared past transactions invalid, "retroactively" and "extrajudicially", without the involvement of the courts.[754]

548. Nor does the Tribunal find that the 1994 Supreme Court Decision relied on in the Keres Reports speaks for the *ex nunc*—as opposed to *ex tunc*—invalidity of the attempted property transfers from the Soviet military to the GT and B&E.[755] In that decision, the Supreme Court repealed a law of 1993. That law declared transactions with the Soviet military invalid that were —in the view of the court—already invalid based on a proper interpretation of the prior acts enacted since March 1990 as part of the transitory regime. But since the 1993 law unnecessarily blurred that prior legislation, and it is for courts and not the legislator to declare transactions invalid, the Supreme Court held that the 1993 law was unconstitutional.[756] Nothing in the 1994 Supreme Court Decision suggests that court decisions that find transactions to be invalid should lead only to the *ex nunc* invalidity of such transactions.

549. Therefore, the Tribunal shares the opinion of the Tallinn City Court that the transfers of the relevant assets to B&E and GT were invalid *ex tunc* pursuant to section 62(1) of the Civil Code.

(v) Good Faith Acquisition by Agrin and Verest?

550. The last issue to be addressed is whether the Tallinn City Court misapplied the law when it found that Agrin and Verest did not become the owners of the relevant assets through the acquisition of those assets in good faith. As mentioned in paragraph 503 above, the Tallinn City Court held that such good-faith acquisitions by those entities (and prior to Verest, by Nautex) were impossible under Estonian law, for two different stand-alone reasons. First, good faith acquisition from non-owners is impossible if the owner—here, the Republic of Estonia—lost the relevant asset against its will. Second, none of the alleged successors in title to B&E and GT was in good faith.

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753 Second Keres Report, ¶ 64 (**CER-2**).

754 Transcript of the session of the Supreme Council, 21 January 1992, pp. 4-5 (**C-199**) (emphasis added).

755 Second Keres Report, ¶¶ 62-63 (**CER-2**).

756 *See supra* ¶¶ 511-515.

551. The rule underlying the *first* proposition is part of many civil law systems and clearly set out in section 156(1) of the Civil Code and section 95 of the Law of Property Act.[757] Given that the March 1990 Resolution stated that the Soviet occupation was illegal, the Estonian court's reasoning that Estonia lost the Seaplane Harbor against its will in 1940 as a matter of Estonian law is plausible. It is also consistent with the transitory regime in its entirety and then with the 1994 Decision of the Estonian Supreme Court, which stated that the Soviet Union had never become the owner of Estonian real estate.[758]

552. The Tribunal's analysis could stop here, but a few remarks are in order regarding the Estonian court's alternative reasoning that none of the relevant entities was in good faith. It bears emphasis that the relevant entities are GT, Nautex, and Verest, as well as B&E and Agrin. Any possible good faith of BPV is irrelevant as regards questions of ownership. BPV acquired Verest and Agrin in 1999. The alleged transfers of the assets to Verest and Agrin took place before that, namely in 1992 and 1997, respectively. Through the acquisition of Verest and Agrin in 1999, BPV could not become the indirect owner of assets that Verest and Agrin had never acquired.

553. Based on the documentary record and the facts established by the Estonian courts, the Tribunal considers it impossible that any of the relevant entities did not know that the real estate at the Seaplane Harbor was in the possession of the Soviet military. The reoccurrence of individuals in the history of the Seaplane Harbor during the transactional history until 1997, and indeed 1999, is extraordinary. An individual who was apparently involved in some role or other until 1999 is the former army officer Dmitri Sukortsev. On behalf of 1176 UNR, he signed the contract with GT dated 17 August 1991. GT was represented in that transaction by Margo Purru. On the same day, that is, 17 August 1991, GT passed the relevant assets on to Nautex. On 7 May 1992, Nautex—represented by Margo Purro (who had represented GT on 17 August 1991), concluded the sales contract with Verest. The shares in Verest, in turn, were held by Dmitri Sukortsev and Mr. Toom from August 1991 until 23 September 1999.

554. Regarding B&E, the Claimant argues that this entity remained the owner of the relevant buildings and structures from 1990 until they were sold to Agrin on 26 September 1997. On behalf of Agrin the sales contract was signed by Enn Laansoo, who had been a consultant to the Ministry of Justice in 1996 and apparently suggested that the state sell the entire real estate.

* * *

555. In sum, the Tribunal shares the opinion of the Estonian courts that none of the Claimant's subsidiaries became the owner of the buildings and structures at the Seaplane Harbor, let alone of the underlying land. As set out above, the Tribunal is also convinced that the sale of the Seaplane Harbor to private entities would have been illegal under Soviet law. If the law of occupation is applicable here, on which the Tribunal takes no final view, then Estonia was acting well within its margin of appreciation when it reversed the alleged sales of the buildings and structures at the Seaplane Harbor through the Soviet military to private parties. This is because those sales were

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757 *See supra*, ¶¶ 275, 283. The Estonian Code from 1964 remained in force until 1994. The Law of Property Act from 1993 governs the transfer of the relevant assets from B&E that allegedly occurred in 1997.

758 *See supra*, ¶¶ 512(3), (7).

not in line with the applicable local law, a necessary requirement for any finding that, through their reversal, Estonia acted in violation of international law.

c) The Lease Agreements and Possessory Rights

i. The Respondent's Position

556. In the absence of a title, the Respondent objects to the Claimant's reliance on its alleged good faith possession of the property to claim Treaty protection because, according to the Respondent, good faith possession is not a recognized property right under Estonian law and thus cannot be protected under the Treaty.[759] In this respect, the Respondent stresses that an investment exists only when the investor can demonstrate the existence of an underlying right created according to municipal law.[760] Therefore, even if good faith possession could fit under the broad definition of investment in Article I(1)(a) of the Treaty, the Respondent argues that "it would not be afforded treaty protection if it is simultaneously not protected under Estonian law."[761]

557. Contrary to Mr. Keres' claim that possession is an absolute right, the Respondent asserts that possession is not a right under Estonian law as confirmed by the Estonian court, but is a description of a factual situation.[762] According to the Respondent, there are only two types of possession under Estonian law—lawful and unlawful—and that possession is protected by law only to the extent that it is lawful.[763] Therefore, a lawful possessor, the Respondent states, may refuse to return the property to the owner as long as the legal basis for the possession persists.[764] To the contrary, the Respondent contends that a good faith possession, which is a form of unlawful possession, enjoys no protection under Estonian law, other than protecting the good faith possessor from liability for the accidental destruction of the property because good faith is merely a subjective attribute.[765] In the present case, the Respondent is of the view that the Claimant had neither lawful nor good faith possession of buildings and structures at the Seaplane Harbor.[766]

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759 Counter-Memorial, ¶ 244.

760 Counter-Memorial, ¶¶ 247-251, *referring to EnCana Corporation v. Ecuador*, LCIA Case No. UN 3481, Award, 3 February 2006, ¶ 184 (**RLA-058**); *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶ 162 (**RLA-059**); Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, Vol. 74(1), British Yearbook of International Law (2003), p. 198 (**RLA-057**).

761 Counter-Memorial, ¶ 252.

762 3 November 2021 Submission, ¶ 18; Hearing Transcript, Day 1, pp. 106:22 – 107:6, *referring to* March 2006 Appeal Judgment (**C-081**).

763 Counter-Memorial, ¶¶ 252-253, *referring to* Law of Property Act, 1 December 1993, section 80(1) (**CLA-188**).

764 Counter-Memorial, ¶ 253, *referring to* Law of Property Act, 1 December 1993, section 83 (**CLA-188**).

765 Counter-Memorial, ¶¶ 254-256, *referring to* Law of Property Act, 1 December 1993, section 84(3) (**CLA-188**). *See also* Hearing Transcript, Day 1, p. 106:18-21.

766 Counter-Memorial, ¶ 244.

558. As to lawful possession, the Respondent rejects Mr. Keres' analysis that Verest and Agrin could conclude lease agreements and transfer their possession to BPV under section 5(1) of the Commercial Lease Act as "title-bearing possessors."[767] According to the Respondent, the term "title-bearing possessor" under the Commercial Lease Act was a remnant of Soviet law, which simply meant "lawful possessor" whose possession was based on a legal ground, such as ownership, contract, etc.[768] The Respondent adds that the term was a special term necessary to define a group of persons who had a right of possession of certain assets if it was so decided by the owner in accordance with the Ownership Act.[769] As such, the Respondent rejects Mr. Keres' interpretation that a "title-bearing possessor" in section 5(1) of the Commercial Lease Act is "any person who has the direct or indirect possession of the property by *prima facie* legal means."[770] In fact, the Respondent points out that the Tallinn District Court, in the Claimant's own case, determined that although the leases signed by Verest and Agrin were proven not to be fake (*i.e.*, *prima facie* lawful), they were signed "in conflict with section 5(1) of the Commercial Lease Act."[771]

559. As to the Claimant's argument regarding the presumptions set out in the Law of Property Act, "until proven otherwise," the Respondent contends that the burden lies on the person contesting possession to prove that he or she is the lawful possessor.[772] In addition, the Respondent maintains that there is no rule under Estonian law nor under international law that obliges the government to ignore convincing *prima facie* evidence of the illegality of possession pending a final court decision.[773]

560. Instead, the Respondent advances that the "grammatical, systematic, historical and purposive interpretation" of the term "title-bearing possessor" demonstrates that the term refers to possession with a legal basis that must not only appear valid but be in fact valid.[774] In response to

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767 Counter-Memorial, ¶ 260.

768 Counter-Memorial, ¶ 273; Rejoinder, ¶ 125; Respondent's Answers to Tribunal Question, ¶ 21; Petrachkov Report, ¶ 3 (**RER-2**).

769 Counter-Memorial, ¶¶ 269-272, *referring to* Ownership Act, 1 December 1993 sections 7, 18 (**RLA-065**). The Respondent explains that the reason for using the term "tiitlipärane valdaja" (title-bearing possessor) instead of "seaduslik valdus" (lawful possession) was because the latter term was not known at the time of enacting the Rental Act and was only introduced with the adoption of the Law of Property Act on 8 June 1993. The Law of Property Act, according to the Respondent, changed the understanding of ownership and, as such, the term "title-bearing possessor" was not contained in the Law of Property Act as "the ambiguous category of non-owners no longer existed." *See* Counter-Memorial, ¶ 274. *See also* Priidu Pärna, Asjaõigusseadus. Kommenteeritud väljaanne (2004), pp. 37-38, § 6 (**RLA-067**).

770 Counter-Memorial, ¶¶ 259, 261, *citing* Second Keres Report, ¶ 104 (**CER-2**). According to the Respondent, any attempts by the Claimant and Mr. Keres on the concept of "title-bearing possession" in the Claimant's 1 October 2021 Submission should be disregarded because the Respondent had already addressed the issue in its Counter-Memorial. *See* 3 November 2021 Submission, ¶ 20.

771 Respondent's Answers to Tribunal Questions, ¶ 23, *referring to* March 2006 Appeal Judgment (**C-081**). *See also* Hearing Transcript, Day 1, p. 107:19-21.

772 3 November 2021 Submission, ¶ 15, *citing* Law of Property Act, 1 December 1993, sections 34(2), 35(3) (**CLA-188**).

773 3 November 2021 Submission, ¶ 17. *See also* Hearing Transcript, Day 5, p. 144:3-10.

774 Counter-Memorial, ¶¶ 262-266, 268-272.

Mr. Keres' proposition that no two different terms with the same meaning could have existed contemporaneously under the Commercial Lease Act and the Law of Property Act, the Respondent contends that "the fact that the language of the Rental Act lagged behind the more recent Law of Property Act means nothing," considering the "comprehensive reform of the entire legal system after five decades of occupation."[775]

561. The Respondent further contests Mr. Keres' reliance on a sole decision of the Circuit decision, which touches upon the disputed issues only passingly and is, in any event, not binding under Estonia's civil law-based system.[776] Conversely, the Respondent considers the Chancellor of Justice's conclusion, which equated the term to that of lawful possessor, more convincing as he undertook a thorough examination of the meaning of the term in the legal system as a whole.[777]

562. Even assuming *arguendo* that Mr. Keres' interpretation was correct, the Respondent contends that the status of Verest and Agrin as "title-bearing possessors" does not shield them from the owner's claim for the restitution of possession under section 80 of the Law of Property Act.[778] According to the Respondent, Estonian courts, including in the March 2006 Appeal Judgment, have confirmed that the owner has a right of claim against a third person who possesses property under a lease agreement with someone who retains possession without any legal grounds, *i.e.*, was not entitled to lease the property.[779]

563. Accordingly, without a legal basis for rendering possession lawful, the Respondent expounds that the lease agreements concluded by BPV were void because Verest and Agrin never had the right to contract as either the owner or the title-bearing possessor.[780] The Respondent further highlights that the Claimant never made submissions in the Estonian court proceedings that they were "title-bearing possessors" but only argued that they were owners of the buildings at the Seaplane Harbor.[781] In response to the Claimant's argument regarding the Estonian court's discretion to consider the issue of title-bearing possession *ex officio* under the principle of *iura novit curia*, the

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775 Rejoinder, ¶ 126.

776 Counter-Memorial, ¶¶ 262, 267, *referring to* Circuit Court of Tallinn, Case No. 2-99-10, 12 March 2010, Judgment, p. 2 (**CLA-193**); Rejoinder, ¶ 127.

777 Counter-Memorial, ¶ 275, *referring to* Chancellor of Justice Mr. E.-J. Truuväli, Transcript of the session of Parliament of 17 March 1997, pp. 10-12 (**RLA-068**); Rejoinder, ¶ 128.

778 Rejoinder, ¶¶ 129, 133, *referring to* Law of Property Act, RT I 1993, 39, 590, section 80, as at 1 July 2003 (**CLA-188**); Respondent's Answer to Tribunal Questions, ¶ 22. *See also* Hearing Transcript, Day 5, p. 121:9-21.

779 Rejoinder, ¶¶ 130-132, *referring to* March 2006 Appeal Judgment (**C-081**); Supreme Court of Estonia, *Estonia v. Verest and others*, Case No. 3-7-1-2-229, 7 June 2006 (**C-082**); Supreme Court of Estonia, Case No. 2-16-99519, 31 October 2018, ¶ 28 (**RLA-173**). *See also* Hearing Transcript, Day 5, pp. 121:22 – 122:7.

780 Counter-Memorial, ¶¶ 260, 278.

781 Counter-Memorial, ¶ 277; Rejoinder, ¶ 134. The Respondent asserts that any new comments on the concept of "title-bearing possession" raised in the Claimant's 1 October 2021 Submission should be disregarded because they are not responsive to the Rejoinder. Instead, the Respondent states that its analysis of the Claimant's "title-bearing possession" argument was submitted in the Counter-Memorial. *See* 3 November 2021 Submission, ¶ 20.

Respondent points out that neither the Claimant nor Mr. Keres has cited any legal support for this claim.[782]

564. As to the second type of possession (that is, good faith possession), the Respondent avers that the Claimant was not a good faith possessor of the property at the Seaplane Harbor because (i) there is no evidence that the Claimant engaged in any activity before summer 1999 other than the set of "backdated" agreements; and (ii) these agreements were first presented to the court only in 2005 in support of the Claimant's claims of lawful possession of the Harbor against Estonia.[783]

565. According to the Respondent, despite the alleged leases in 1997, BPV did not engage in any economic activity until 1999 and did not report any notable business until 2000.[784] In particular, the Respondent points out that BPV's purchase of the berths and the Seaplane Hangar by acquiring shares in Verest occurred on 23 September 1999, that its purchase of the lumber works buildings by acquiring Agrin occurred on 8 December 1999, and that all major contracts for the development of the Harbor and the lumber business were signed between July 1999 and December 2000.[785] The Respondent adds that the Claimant's corporate decisions in relation to its investment plans, including *inter alia* establishing ELA Tolli, obtaining a license for shipping agency services, and changing its address in the Commercial Register to Küti 17, also only started to roll out in 2000.[786]

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782 3 November 2021 Submission, ¶ 9. In any event, the Respondent considers that the Claimant's submissions on the principle of *iura novit curia* should be disregarded because they fall outside the leave granted by the Tribunal on 30 August 2021. *See* 3 November 2021 Submission, ¶ 11.

783 Counter-Memorial, ¶¶ 280-282, 300, *referring to* Lease Agreement between BPV and Verest, 1 October 1997 (**C-046**); Lease Agreement between BPV and Agrin, 1 October 1997 (**C-047**); JVA (**C-056**).

784 Counter-Memorial, ¶ 292. *See also* Annual Report of AS BPV (1998) (**R-089**); BPV's income report for 1998 (**RH-19**). *See also* Hearing Transcript, Day 5, p. 124:5-11.

785 Counter-Memorial, ¶¶ 287-290, *referring to* Share Purchase Agreement between BPV and Verest, 23 September 1999 (**C-055**); Share Sale Contract between BPV and Alcedo for the sale of Agrin, 8 December 1999 (**C-057**); Contract between AS Moonsund Shipping and BPV, 16 November 1999, p. 3 (**C-221**); Payment to the company Ling Group OU, 18 December 2000, p. 3 (**C-219**) (showing that BPV contracted Ling on 15 December 1999 to build the new birth); Payment to the company Siglindo Ehitus OU, 19 July 2001, p. 2 (**C-226**) (showing that BPV contracted Siglindo on 25 February 2000 to reconstruct wood production facilities); Payment to the company Plastic Toru OÜ, 18 May 2001, p. 3 (**C-224**) (showing that BPV contracted Plastic Toru on 7 August 2000 to renovate the lumber drying building); Contract between BPV and Primultini, 25 January 2000, p. 2 (**C-225**); Order from UJ Trading, 2 March 2000, p. 2 (**C-231**); Payment to the company Tamult AS, 18 May 2001, p. 2 (**C-227**) (showing that BPV contracted Tamult on 5 May 2000 to rebuild the boiler house); Contract between AS Moonsund Shipping and BPV, 15 December 2000, p. 9 (**C-221**); Payment to the company EM-Serv, 2 March 2000, p. 33 (**C-216**); Payment to the company Liebherr-Werk Nenzing GmbH, 21 March 2000, p. 15 (**C-218**); Rejoinder, ¶ 139, *referring* to BPV Letter to Minister of Environment re Berth No. 38 Reconstruction, 1 August 2000 (**C-468**).

786 Counter-Memorial, ¶ 291, *referring to* Register extract of OOO Faktotum, 11 February 2020 (**R-062**); BPV Application for the Customs Control Zone Coordination, 4 April 2001 (**C-265**); License for providing shipping agency services, 3 May 2000 (**R-063**); Decision of sole shareholder of AS BPV, 30 June 2000 (**R-064**).

566. Similarly, the Respondent points out that Agrin and Verest earned only negligible revenue between 1997 and 2000, given that the Harbor was most likely not usable as a port to handle cargo until it was cleared of debris in February 2000 and the new berth was built thereafter.[787]

567. In the Respondent's view, the evidence submitted by the Claimant to show its "heavy involvement" since 1997 in fact "prove the opposite" as they show Verest and Agrin as owners and possessors of the Seaplane Harbor area between 1997 and 1999, and even as late as 22 May 2001 when Verest leased substantial territory to ELA Tolli.[788]

568. Furthermore, the Respondent argues that the following circumstances prove beyond reasonable doubt that "BPV, Verest and Agrin backdated their lease agreements to 1 October 1997, a date conveniently placed six weeks before Estonia initiated the court case to regain possession of the harbour":[789]

(a) Both lease agreements make reference to BPV's economic activities in lumber processing and port development, which were not included in BPV's Articles of Association until April 2000;[790]

(b) The lease agreements were not relied upon in the Estonian court proceedings until 2005, even though Agrin and Verest could have argued that they no longer held possession of the buildings because the ownership was transferred to BPV;[791]

(c) When BPV later joined the proceedings, it submitted only the JVA and the lease agreement with Agrin to the court and made no mention of the lease agreement it concluded with Verest;[792]

(d) Mr. Rotko "inadvertently confirm[ed] forgery when he state[d] that Agrin operated at the harbour for 'many years' prior to their first discussion" before concluding the lease agreement, "placing that discussion – and the signing of the backdated lease agreement – firmly in the 2000s" since Agrin was established on 18 August 1997, *i.e.*, less than two months before the alleged lease agreement was signed;[793]

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787 Counter-Memorial, ¶ 292. *See* Certificate of completion by contractor AS Moonsund Shipping, 10 February 2000, p. 7 (**C-221**).

788 Rejoinder, ¶ 139, *referring to* ELA Tolli Certificate about the Right of Use of Customs Warehouse and Terminal, 6 June 2001 (**C-406**).

789 Counter-Memorial, ¶¶ 294, 299.

790 Counter-Memorial, ¶ 295, *referring to* Lease Agreement between BPV and Verest, 1 October 1997, § 1.5 (**C-046**); Lease Agreement between BPV and Agrin, 1 October 1997, § 1.5 (**C-047**); Decision of sole shareholder of AS BPV, 3 April 2000 (**R-065**); Articles of Association of AS BPV, 3 April 2000 (**R-066**); Rejoinder, ¶ 142.

791 Counter-Memorial, ¶ 296; Rejoinder, ¶¶ 143-144.

792 Counter-Memorial, ¶ 296. *See* AS BPV response in Case No. 2/3/23-7262/02, 25 April 2005 (**R-068**).

793 Counter-Memorial, ¶ 297(i), *referring to* Second Rotko Statement, ¶¶ 22-24 (**CWS-2**). *See* Founding decision of Agrin Partion OÜ, 18 August 1997 (**R-069**); Rejoinder, ¶ 145(i).

(e) There is ample evidence that the premises of Küti 17a were managed and operated by B&E until May 1999 and by Alcedo thereafter until 31 August 1999, and not by BPV;[794]

(f) Verest should not have earned any revenue between 1997 and 2001 from renting berths Nos. 38 and 38A out to BPV pursuant to section 7.2 of the lease agreement, whereas BPV should have recorded its revenue from the berths since 1997;[795]

(g) Mr. Anti Nööp, who worked as the captain of the Seaplane Harbor from 1992, testified that he first met Mr. Rotko and was employed by BPV in 1999, meaning that he worked for Verest between 1992 and 1999;[796]

(h) Agrin had no reason to make a settlement proposal to the Prison Board in 1998 without involving BPV and Verest, or to undermine Verest's position in the dispute with the government if the lease agreements were indeed concluded;[797] and

(i) ELA Tolli could not have entered into a lease with Verest on 22 May 2001 if Verest concluded lease agreements with BPV on 1 October 1997.[798]

569. According to the Respondent, the JVA (referred to in paragraph 568(c) above) is also likely to be backdated and thus cannot be the source of the Claimant's good faith possession of the Seaplane Harbor, as Mr. Jevegeni Skljarov, who signed the JVA on behalf of Agrin allegedly on 21 October 1999, was in fact the management board member of Verest and BPV at the time and did not become a board member of Agrin until 7 December 1999.[799] Moreover, the Respondent takes issue with the contents of the JVA, including, *inter alia*, (i) Agrin and Verest handing over their powers to BPV to act as the possessor of the Seaplane Harbor when BPV was supposed to already have full possession of the Harbor based on the two lease agreements, and (ii) the expiration date being set to 1 October 2047 when the two lease agreements BPV entered into with Agrin and Verest were to expire 20 years earlier.[800]

570. Pointing to Mr. Rotko's statement that he considered the pending lawsuit initiated by Estonia against Verest and Agrin as a mere "nuisance complaint" before he purchased Verest, *i.e.*, a month prior to the conclusion of the JVA, the Respondent emphasizes that such awareness of the lawsuit

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794 Counter-Memorial, ¶¶ 297(ii)-(iii), *referring to* Contract between B&E and Eesti Telefon, 19 March 1999 (**R-070**); City Court of Tallinn, Civil Case No. 2/4/43-3042/01, Judgment, 23 December 2003 (**R-071**); Agrin letter to B&E, 11 July 2000 (**R-072**); Request by B&E, 15 November 1999 (**R-073**); Report on working hours of Alcedo employees, June 1999 (**R-074**); Fax from Agrin to Lilto Turvateenistuse AS, 27 July 1999 (**R-075**); Invoice and delivery note for wood processing services, 14/17 July 1999 (**R-076**); Delivery note from Alcedo to Forewood LTD, 31 August 1999 (**R-077**); Rejoinder, ¶ 145(ii).

795 Counter-Memorial, ¶ 298(i), *referring to* Lease Agreement between BPV and Verest, 1 October 1997, § 7.2 (**C-046**); Rejoinder, ¶ 145(iii). *See also* Annual report of Verest (1998), pp. 4, 7 (**R-078**).

796 Counter-Memorial, ¶ 298(ii), *referring to* Minutes of the hearing of Mr. Anti Nööp, 8 January 2007 (**R-079**); Rejoinder, ¶ 145(iv).

797 Rejoinder, ¶ 146, *referring to* Agrin Settlement Proposal, 22 June 1998 (**R-225**).

798 Rejoinder, ¶ 147, *referring to* ELA Tolli Certificate about the Right of Use of Customs Warehouse and Terminal, 6 June 2001 (**C-406**).

799 Counter-Memorial, ¶ 303, *referring to* JVA (**C-056**); Shareholder's decision of Agrin, 7 December 1999 (**R-080**).

800 Counter-Memorial, ¶¶ 301-302, *referring to* JVA, §§ 2, 3, 7 (**C-056**).

renders BPV's claim of having good faith regarding the ownership rights of Verest and Agrin concerning the Seaplane Harbor moot.[801] As the dispute over the Seaplane Harbor was widely publicized, the Respondent takes the view that "even the shallowest of due diligence should have revealed grave legal issues leading any reasonable and good faith investor to pull out."[802] In this respect, the Respondent highlights that there is "no trace of due diligence" with respect to the lease agreements or the Claimant's business plans.[803]

571. Accordingly, the Respondent stresses that the three agreements, which point to "outright forgery," cannot be the source of any good belief in the legitimacy of the Claimant's possession of the Seaplane Harbor and that any "property rights central to the Claimant's claims never came to be."[804]

ii. The Claimant's Position

572. Rejecting the Respondent's claims in their entirety, the Claimant maintains that Estonian law recognizes the validity of the possessory rights the Claimant acquired when BPV entered into *bona fide* lease agreements with Verest and Agrin on 1 October 1997.[805] Specifically, the Claimant asserts that its acquisition of lease rights and its subsequent purchase of the companies holding these rights were made lawfully under section 5(1) of the Commercial Lease Act and thus triggers protection under the Treaty.[806]

573. According to the Claimant's expert, Mr. Keres, possession is an absolute right, rather than a fact, as argued by the Respondent.[807] Mr. Keres explains that under the Estonian Law of Property Act, the existence of possession creates legal presumptions of lawfulness, legality, and good faith until the contrary is proven in a court of law.[808] As such, Mr. Keres states that the Claimant was entitled to these legal presumptions regarding its possession of the Seaplane Harbor as a matter of Estonian law.[809]

574. Further, the Claimant disagrees with the Respondent's interpretation that the term "title-bearing possessor" in section 5(1) of the Commercial Lease Act was, in effect, equivalent to the term "lawful possessor" as set out in the Law of Property Act.[810] According to the Claimant, "title-bearing possessor" is a special category of possession pursuant to the Commercial Lease Act that

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801 Counter-Memorial, ¶ 304, *citing* Second Rotko Statement, ¶ 33 (**CWS-2**); Rejoinder, ¶ 148.

802 Counter-Memorial, ¶¶ 471(iv), 472. *See also* Hearing Transcript, Day 5, pp. 127:24 – 128:7, 128:19-22.

803 Rejoinder, ¶¶ 162-168.

804 Statement of Defense, ¶ 31; Counter-Memorial, ¶¶ 244, 282.

805 Reply, ¶ 1674; Claimant's Answers to Tribunal Questions, ¶ 113.

806 Reply, ¶¶ 19, 33.

807 1 December 2021 Submission, ¶¶ 59, 62; Fourth Keres Report, ¶ 26 (**CER-8**).

808 1 October 2021 Submission, ¶¶ 22-25; Fourth Keres Report, ¶¶ 27-28 (**CER-8**). *See* Law of Property Act, 1 December 1993, sections 34(2), 34(3), 90 (**CLA-188**).

809 Fourth Keres Report, ¶ 31.

810 Claimant's Answers to Tribunal Questions, ¶ 125; Third Keres Report, ¶¶ 83-85 (**CER-4**).

applied to rental agreements.[811] Unlike "lawful possession," which is founded on a legal basis, Mr. Keres opines that "title-bearing possession" should be understood to mean "direct or indirect possession of a thing, which the lessor has acquired by *prima facie* legal means […] even if the transfer later turns out to lack a legal foundation."[812] Therefore, the concept of "title-bearing possession," Mr. Keres continues, creates legal certainty and is specifically intended to apply even if the lessor has no title.[813] On this basis, the Claimant argues that the leasehold rights arising from title-bearing possession constitute an intangible property right that is protected as an investment under the Treaty.[814]

575. Noting that the term "title-bearing possessor" is "linguistically bizarre in Estonian legal terminology," Mr. Keres advances that it was the legislators' intention to include certain persons other than property owners, such as primary lessor in a sublease contract, in the Commercial Lease Act.[815] Otherwise, Mr. Keres takes the view that there was no reason for the Law of Property Act, which was adopted after the Commercial Lease Act, not to harmonize the terminology if "title-bearing possession" had in fact the same meaning as "lawful possession."[816] In addition, even if the term was borrowed from the Soviet law, Mr. Keres contends that the actual meaning of the term under Estonian law depends on the context of the legislative act in which it is used, as well as the broader context of the Estonian legal system.[817]

576. Expounding on this point, Mr. Keres asserts that the Respondent's interpretation had already been ruled out by the Tallinn District Court, which decided that despite the unlawfulness of possession, a lease agreement was still valid, if the lessor had acquired the possession of the property through a legal instrument which appeared valid and legal at the time of its conclusion.[818] While Mr. Keres concedes that the facts of that case are distinguishable from the ones in the current dispute, he argues that the jurisprudence, which clearly defined and applied the term "title-bearing possessor," should not be disregarded.[819] Therefore, according to Mr. Keres, the same principle of title-bearing possession should apply to the facts of this case because Verest, Agrin and BPV entered from 1 October 1997 into 20-year leases with a title-bearing possessor, which were subsequently, in 1999, extended to BPV with a term extension of 40 years.[820] In Mr. Keres' view,

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811 Claimant's Answers to Tribunal Questions, ¶¶ 128-129; 1 December Submission 2021, ¶ 50; Fourth Keres Report, ¶ 33 (**CER-8**).

812 Second Keres Report, ¶ 103 (**CER-2**); Third Keres Report, ¶ 86 (**CER-4**).

813 Fourth Keres Report, ¶ 39 (**CER-8**). *See also* Hearing Transcript, Day 1, p. 49:2-10.

814 1 October 2021 Submission, ¶ 29. *See also* Hearing Transcript, Day 5, p. 27:16-19.

815 Second Keres Report, ¶ 97 (**CER-2**).

816 Second Keres Report, ¶ 98 (**CER-2**); Third Keres Report, ¶ 85 (**CER-4**).

817 Third Keres Report, ¶ 89 (**CER-4**).

818 Second Keres Report, ¶¶ 99-100, 102 (**CER-2**), *referring to* the District Court of Tallinn, Case No. 2-99-10, Judgment, 12 March 2010 (**CLA-193**); Third Keres Report, ¶ 88 (**CER-4**).

819 Second Keres Report, ¶ 102 (**CER-2**); Third Keres Report, ¶ 90 (**CER-4**). Mr. Keres further notes that due to the short period of implementation, there are no abundant cases where the court has defined the term "title-bearing possessor."

820 Fourth Keres Report, ¶¶ 36, 50(d) (**CER-8**). *See also* 1 December 2021 Submission, ¶¶ 66-67, 73.

Estonia was factually bound to respect ELA's subsidiaries as lawful possessors of the Seaplane Harbor.[821]

577. As such, Mr. Keres considers that the Tallinn Circuit Court's decision to hold the lease agreements under which BPV had acquired possessions of the Seaplane Harbor at Küti 17 null and void *ab initio* due to a violation of section 5(1) of the Commercial Lease Act on the ground that Verest and Agrin were not owners of the property was "unreasonably restrictive," as both Verest and Agrin acquired possession of the property by *prima facie* legal means and were thus title-bearing possessors within the meaning of section 5(1) of the Commercial Lease Act.[822] This title-bearing possessors' right to lease, Mr. Keres adds, was derived from section 7(2) of the Ownership Act, or alternatively, from section 68(1) of the Law of Property Act.[823]

578. Further, Mr. Keres is of the view that the Estonian courts made a "serious error" under the principle of *iura novit curia* by failing to consider title-bearing possession as a basis for ongoing possession, even if those legal arguments or relevant evidence were not brought before the courts by the parties.[824] The principle of *iura novit curia*, the Claimant continues, is fundamental to all Estonian proceedings, as set out in section 436(7) of the Estonian Code of Civil Procedure.[825]

579. In any event, relying on Judge Brower's separate opinion in *Renta 4 v. Russia*, the Claimant argues that the existence of an investment under the Treaty "must be interpreted autonomously, *i.e.*, not in accordance with the domestic legal orders of the contracting State parties involved" but by international law principles, including the European Convention on Human Rights which, by using the term "possession," extends the right to property under Article 1 to a wide variety of property interests, including the use of land and commercial activities attached thereto.[826]

580. Refuting the Respondent's allegation that the Claimant was not a good faith possessor of the property of the Seaplane Harbor, the Claimant maintains that the two leases signed by BPV with Verest and Agrin were properly executed on 1 October 1997 with legal assistance.[827] In addition, the Claimant takes issues with the Respondent's argument that the Claimant did not make any

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821 Fourth Keres Report, ¶ 57 (**CER-8**). *See also* Hearing Transcript, Day 1, p. 51:1-8.

822 Second Keres Report, ¶¶ 90-95, 104 (**CER-2**), *referring to* March 2006 Appeal Judgment (**C-081**). *See also* Claimant's Answers to Tribunal Questions, ¶ 130.

823 Third Keres Report, ¶ 86 (**CER-4**), *referring to* Ownership Act, 1 December 1993, section 7(2) (**RLA-065**); Law of Property Act, 9 June 1993, section 68(1) (**RLA-052**).

824 1 October 2021 Submission, ¶¶ 20-21; Fourth Keres Report, ¶¶ 21-22, 40-41 (**CER-8**), *referring to* Letter from the Advisor of Chancellor of Justice to B&E, 23 October 1997 (**C-331**). The Claimant denies that its argument on the *iura novit curia* principle falls outside the scope of the leave granted by the Tribunal, noting that the principle was already raised in Mr. Keres' Third Legal Opinion of 12 January 2021. *See* 1 December 2021 Submission, ¶¶ 44-45, *referring to* Third Keres Report, ¶ 242 (**CER-4**).

825 1 December 2021 Submission, ¶¶ 46-48, *referring to* Estonian Code of Civil Procedure, 9 August 2001, ¶ 436 (**C-603**); Estonian Code of Civil Procedure, 22 April 1998, section 228 (**CLA-184**).

826 Memorial, ¶¶ 223-228, *citing Renta 4 S.V.A. et al. v. The Russian Federation*, SCC Case No. 24/2007, Separate Opinion of Charles N. Brower, ¶ 28 (**CLA-017**); Reply, ¶ 26. *See also* Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1, Article 1 (**C-169**); *Marckx v. Belgium*, No. 6833/74, Judgment (1979) Series A No. 31, ¶ 63 (**CLA-170**).

827 Reply, ¶¶ 165-168, 170, 172-173; Third Rotko Statement, ¶¶ 14, 29, 31, 33, 44, 85-88 (**CWS-4**).

investment prior to 1999 by referring only to the monetary sums invested beginning in 1999, when the Treaty explicitly recognizes that "investment" can take a wide variety of forms.[828]

581. Expounding further, the Claimant notes that it "was not in a rush to utilize the Port and [the] Portlands immediately" because the operation of the Seaplane Harbor as a cargo terminal entailed "a long term capital investment plan" and BPV was required only to pay a small annual rent under the lease terms.[829] Therefore, instead of immediately occupying the premises, the Claimant asserts that it "undertook careful assessment of how to develop the Port and the Portlands best," as identified in the Port Plan and the Lumber Plan.[830]

582. According to the Claimant, as the required financial input for its rehabilitation far exceeded the Claimant's anticipation,[831] it "avoided putting in capital improvements at that time, which would make any eventual purchase of Verest and Agrin more expensive."[832] Rather, recognizing the value of obtaining long-term possessory rights, the Claimant contends that it acquired Verest and Agrin in September and December 1999.[833]

583. Accordingly, noting that Article II(4) of the Treaty recognizes and protects economic activities that may take time to get underway, the Claimant argues that its standing cannot be dismissed on the ground that it took time to develop and administer its investment at the Seaplane Harbor.

584. As to the two lease agreements concluded by BPV, the Claimant maintains that the Respondent has failed to discharge its burden to prove their alleged invalidity.[834] In response to the allegation that the facilities at the Seaplane Harbor were not used by BPV but by others, the Claimant contends that:

(a) The terms of the lease agreements, which were carefully drafted by lawyers involved in the transactions, recorded BPV's actual businesses at the Seaplane Harbor, rather than merely containing the formalistic language in the BPV's Articles of Association;[835]

(b) The lease agreements were not introduced to the courts until 2005 due to a different opinion in the litigation strategy adopted by the Claimant's new counsel;[836]

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828 Reply, ¶¶ 188-190.

829 Reply, ¶¶ 170, 176, 179, 233; Third Rotko Statement, ¶¶ 44, 96-97 (**CWS-4**). The Claimant explains that the leases only required a total investment over the term of the lease (USD 5 million in at the Lennusadam Port and another USD 5 million in the Portlands by 1 January 2001), without requiring annual investments to reach the thresholds. *See* Reply, ¶ 193.

830 Reply, ¶¶ 177, 182, *referring to* Port Plan (**C-142**); Lumber Plan (**C-143**); Third Rotko Statement, ¶¶ 97, 101-106 (**CWS-4**).

831 Reply, ¶¶ 178, 181, 200; Third Rotko Statement, ¶ 100 (**CWS-4**).

832 Reply, ¶ 184; Third Rotko Statement, ¶ 109 (**CWS-4**).

833 Reply, ¶¶ 185-186; Third Rotko Statement, ¶¶ 111-112 (**CWS-4**).

834 Reply, ¶¶ 199, 203-204; Claimant's Answers to Tribunal Questions, ¶ 113.

835 Reply, ¶¶ 208-211.

836 Reply, ¶¶ 212-216; Third Rotko Statement, ¶¶ 60-61 (**CWS-4**).

(c) Agrin's letter to the security services company asking about the company's refusal to allow Alcedo access to the premises confirms that BPV did in fact have possession of the Harbor and that all authorizations for use at the Harbor thus had to come from BPV;[837]

(d) Mr. Rotko's statement that "Agrin had been at the port for many years" was a reference to the woodworking facilities owned by Agrin that had been at the Seaplane Harbor for many years;[838]

(e) BPV agreed to B&E using some of the offices at the Harbor since BPV did not need all of the space at the time;[839]

(f) BPV allowed Alcedo to continue its use of the wood processing facilities until BPV was ready to commence construction, given the risks of squatting and looting;[840]

(g) Verest engaging in carryover work at the Seaplane Harbor and earning small revenue in 1998 was not of material concern since "BPV was interested in fundamental change" and was ready to make substantial capital investment to redevelop the Harbor following its acquisition of Verest in 1999;[841] and

(h) The statements of Mr. Anti Nööp, which the Respondent relies on to argue that Mr. Nööp was employed by Verest until 1999, were obtained through "unfair and coercive criminal interrogation" and thus should not be admissible.[842]

585. Rejecting the Respondent's claim that the chain of transactions was "orchestrated," the Claimant asserts that Mr. Sukortsev was hired due to his experience and knowledge about the conditions of the Seaplane Harbor.[843]

586. While the Claimant admits that it was aware of the ownership dispute initiated by Estonia, it considers that discontinuing business merely on the knowledge of the dispute would be "nonsensical" when it had relied in good faith on the advice of its local counsel and had concluded that Estonia's claims lacked merit.[844] As such, the Claimant refutes the assertion that the lease agreements were concluded due to a "lack of due diligence."[845]

iii. The Tribunal's Analysis

587. In the view of the Tribunal, the Parties' arguments in the context of the lease agreements and the Claimant's alleged possessory rights give rise to three main issues: first, whether Agrin and Verest

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837 Reply, ¶¶ 224-226, *referring to* Fax from Agrin to Lilto Turvateenistuse AS, 27 July 1999 (**R-075**).

838 Reply, ¶¶ 220-221; Third Rotko Statement, ¶¶ 68-69 (**CWS-4**).

839 Reply, ¶¶ 217-218; Third Rotko Statement, ¶¶ 65-66 (**CWS-4**). *See also* Contract between B&E and Esti Telefon, 19 March 1999 (**R-070**).

840 Reply, ¶¶ 180, 223, 227; Third Rotko Statement, ¶ 74 (**CWS-4**).

841 Reply, ¶ 227; Third Rotko Statement, ¶ 78 (**CWS-4**). *See also* Annual Report of Verest (1998), p. 4 (**R-078**).

842 Reply, ¶ 229, *referring to* Minutes of the hearing of Mr. Anti Nööp, 8 January 2007 (**R-079**).

843 Reply, ¶¶ 235-238; Third Rotko Statement, ¶¶ 114-116 (**CWS-4**).

844 Reply, ¶¶ 194, 197.

845 Reply, ¶ 203.

were so-called title-bearing possessors that could conclude valid lease agreements with BPV; secondly, whether the lease agreements were concluded in 1997, or submitted as backdated and forged documents in the Estonian Court proceedings in 2005; and thirdly whether regardless of the validity and conclusion of the lease agreements in 1997, the Claimant's (indirect) possession of the buildings and structures at the Port would still constitute an investment under the Treaty. The Tribunal will address each of these points in turn.

(I.) Title-bearing Possession

588. If the lease agreements between BPV on the one hand and Agrin and Verest on the other hand were validly concluded, they would arguably constitute (or at least contain) investments under the Treaty. Article I(1)(a)(iii) of the Treaty clarifies that a protected investment can be "a claim to performance having economic value, and associated with an investment". The last part of this sentence seems to require a certain link (or association) between the relevant claim and an investment that exists independently of the claim to performance. Given that the Claimant's shares in BPV constitute an investment within the meaning of the Treaty, and that BPV is the lessee under the relevant agreements, the Tribunal is convinced that such a sufficiently close link would exist.

589. The decisive issue is whether Agrin and Verest could conclude valid lease agreements regarding the structures and buildings at the Port. The Estonian Courts considered the lease agreements to be invalid because they were in conflict with section 5(1) of the Commercial Lease Act, which reads as follows:

> (1) The lessor is the owner or title-compliant possessor of the property to be let. The title-compliant possessor may be the lessor where it is provided for in an Act of the Republic of Estonia, in a contract or in the foundation document of the title-compliant possessor […][846]

590. The text of this provision makes it clear that the lessor of a property must either be its owner or, according to the translation of the Commercial Lease Act provided by the Claimant, a "title-compliant possessor". Instead of "title-compliant", the Parties and Mr. Keres use the adjective "title-bearing", and the Tribunal adopts this term as well for reasons of consistency. According to the Claimant, the lease agreements concluded by BPV were valid because even if Agrin and Verest were not owners, they were at least title-bearing possessors. In this regard, the Claimant relies on the definition provided by Mr. Keres, who opines that title-bearing possession means "direct or indirect possession of a thing, which the lessor has acquired by prima facie legal means". [847] The Respondent argues that the term title-bearing possessor is to be equated with the term lawful possessor.

591. The Parties did not submit much jurisprudence or scholarly writings in support of their respective understandings of the term title-bearing possessor. Mr. Keres referred to a decision of the Tallinn Circuit Court of 2010 in support of his view that a possessor qualifies as title-bearing if its

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846 The Rental Act, 1 October 1990, section 5(1) (**CLA-186**).

847 Second Keres Report, ¶ 104 (**CER-2**).

possession rests *prima facie* on a legal basis.[848] The factual background of that case was as follows. In 1989, the City of Tallinn granted the claimant (OÜ Esra Ko, a corporate entity) the right to use what was then a residential building. From 1990 to 1993, the claimant renovated and enlarged the building and turned it into an office building. In 1994, the City of Tallinn issued an administrative decision through which the building was "returned" to its original owner, Linda Kruusman (who passed away in 2003 and was the legal predecessor of the defendant, Maire Kruusman). Following this administrative decision, Linda Kruusman leased the building to the claimant through a commercial lease contract concluded in 1995. In 2000, the City of Tallinn annulled its decision of 1994, reasoning that the city—and not Linda Kruusman—was the actual owner of the building (because the building had not been preserved in its original form). In 2007, the Harju County Court confirmed that the City of Tallin is the owner of the building.

592. The claimant sued for the repayment of rent paid under the commercial lease contract concluded in 1995, arguing that the contract was void because the lessor, Linda Kruusman, was not the owner of the building. The Tallin Circuit Court dismissed the claim. It held that the contract was valid, given that at the time of its conclusion Linda Kruusman was a "title-compliant possessor". While the court did not provide an all-encompassing definition of the term, it emphasized the following points:

> Since the legislature has not clarified the contents of the term 'title-compliant possessor,' the Chamber finds that the term must be interpreted in a manner where the property could be let by a direct as well as an indirect possessor. The Chamber finds that at the time of conclusion of the commercial lease contract the defendant was the owner of the property and the indirect possessor of the property and had the right to conclude the commercial lease contract. Possession had been transferred to the defendant on the basis of property delivery report no. 121 made on 1 October 1994 based on order no. 1830-k of the Tallinn City Administration of 24 August 1994. The Chamber finds that the annulment of the administrative decisions after the conclusion of the commercial lease contract and the return of the ownership of the building to the City of Tallinn does not mean that the commercial lease contract concluded by the defendant was void as a result thereof. By the judgment of Harju County Court of 3 April 2007, the ownership of the construction works located at xxx in Tallinn by City of Tallinn was recognized because the administrative decision by which the property was returned had been declared invalid and the court established in its judgment that the defendant had not acquired the property. Nevertheless, the Chamber finds that the defendant was lawfully entitled to let the property owing to the fact that the property was in the defendant's possession. Therefore, the Chamber finds that the commercial lease contract made between the parties on 1 February 1995 was not in conflict with the law or void.[849]

593. The Tribunal shares Mr. Keres' view that the judgment supports the proposition that not only direct but also indirect possessors can be title-bearing possessors. Individual sentences of the passage cited above can even be understood to indicate that a title-bearing possessor is anyone who has direct or indirect possession, without the need to fulfill further requirements. But as Mr. Keres rightly noted, this understanding is open to criticism, as possession acquired by theft or fraud would be considered title-bearing.[850] More importantly, equating the term "title-bearing

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848 Circuit Court of Tallinn, Case No. 2-99-10, 12 March 2010, Judgment (**CLA-193**) ("**2010 Circuit Court Judgment**").

849 2010 Circuit Court Judgment, p. 5 (**CLA-193**).

850 Second Keres Report, ¶ 101 (**CER-2**); Third Keres Report, ¶ ¶ 83-101 (**CER-4**).

possession" with "direct or indirect possession" would in the view of the Tribunal deprive the term "title-bearing" and large parts of section 5(1) of the Commercial Lease Act of any meaning. The provision could then simply read: "The lessor is the owner or possessor of the property to be let".

594. Based on the 2010 Tallinn Circuit Court Judgment, Mr. Keres proposes that, in addition to having direct or indirect possession, a title-bearing possessor must have acquired possession by *prima facie* legal means. In this regard, Mr. Keres distinguishes title-bearing possession from lawful possession, which—according to the Law of Property Act—requires a valid legal basis.[851] In the Respondent's view, the two terms are synonymous. Title-bearing possession is, according to the Respondent, a remnant of Soviet law.[852] The term lawful possessor, in contrast, became part of Estonian law only with the Law of Property Act of 9 June 1993, and hence after the enactment of the Commercial Lease Act, which remained in force until 1 July 2002.[853]

595. Strong support for the Respondent's position offer, in the view of the Tribunal, the comments made by the Chancellor of Justice before the Parliament on 17 March 1997. The Chancellor of Justice was asked to explain the meaning of the term title-bearing possessor in the Dwelling Act. He stressed that the Commercial Lease Act uses the same term and expressed the view that title-bearing possession means lawful possession. Having put the term title-bearing possessor in historical context, the Chancellor explained that with the definitions of unlawful and lawful possession in section 34 of the Law of Property Act, "[t]hings have been wrapped up and loose ends tied up".[854] Given that the Chancellor of Justice made those comments more than six months before Estonia initiated proceedings against the Claimant's subsidiaries in an unrelated matter, it seems unlikely that the comments were meant to disadvantage the Claimant or its subsidiaries.

596. Mr. Keres argues that if title-bearing possession were to mean the same as lawful possession, the Parliament could have changed the wording of the Commercial Lease Act when it enacted the Law of Property Act in 1993. [855] In the Tribunal's view, the Parliament's need for clarification of the term "title-bearing possessor" in 1997 helps explain why the two terms were not harmonized in 1993. Furthermore, the Tribunal finds it unremarkable that the term "title-bearing possessor" remained part of the Commercial Lease Act in the five remaining years of its existence after the Chancellor of Justice's comments in 1997. Undefined terms in statutory texts often remain undefined even after judges, scholars, or others have elucidated their meaning. In addition, considering that the Parties submitted only one judgment and no scholarly article regarding the meaning of the term "title-bearing possessor", it seems uncertain whether the Chancellor of Justice's comments were considered as bringing undisputed clarity on this issue.

597. According to Mr. Keres, the Tallinn Circuit Court shared his opinion in its 2010 Judgment that title-bearing possession means that "the right to lease must be established in an instrument that

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851 Second Keres Report, ¶ 102 (**CER-2**); Third Keres Report, ¶¶ 83-87 (**CER-4**).

852 Counter-Memorial, ¶ 273; Rejoinder, ¶ 125; Respondent's Answers to Tribunal Question, ¶ 21. Petrachkov Report, ¶ 3 (**RER-2**).

853 Third Keres Report, ¶ 84 (**CER-4**).

854 Transcript of the session of Parliament of 17 March 1997, p. 2 (of the English translation) (**RLA-068**).

855 Third Keres Report, ¶ 85 (**CER-4**).

appears-to-be valid and legal". [856] The Tribunal is not convinced that the judgment supports the proposition that title-bearing possession exists whenever there is a legal instrument that appears prima facie valid and grants the right to lease. In the 2010 Judgment, it was the City of Tallinn—that is, the entity that was finally determined to be the *owner* of the relevant building—that issued the administrative act based on which the title-bearing possessor was entitled to lease the building. Requiring that the right to lease must be traced back to an instrument signed or issued by the real owner, as opposed to any third party, also seems to be more in line with the wording of the term "title-bearing" (or, in the words of Claimant's translation, "title-compliant") possessor. Linda Kruusman was entitled to lease the buildings and structures at the Port through an act of the actual owner, the City of Tallinn. Verest and Agrin, in contrast, derived their alleged rights to lease the buildings and structures at the Port from contracts with B&E and Nautex, respectively, who had never acquired ownership.

598. On balance, the Tribunal is not persuaded by the Claimant's proposition that the lease agreements concluded by BPV with Verest and Agrin were valid because these two entities were title-bearing possessors by virtue of the contracts they had concluded with B&E and Nautex. Rather, the Estonian Court's holding that the lease agreements were invalid because of their incompatibility with section 5(1) of the Commercial Lease Act seems correct.

599. The Claimant's argument regarding the principle of *iura novit curia* would be relevant here only if the Tribunal considered Verest and Agrin to have been title-bearing possessors. As set out above, this is not the case. Furthermore, it seems questionable whether the Estonian courts did indeed overlook the concept of title-bearing possession (which not even the Claimant's subsidiaries invoked in the court proceedings). The Tallinn City Court held that the relevant buildings and structures: "were given to [BPV's] possession by persons who were not the owners and had no other *legal basis* to make transactions with this property. Therefore, the transactions were in contradiction with the Commercial Lease Act in force at the time." [857] The first sentence seems to mirror the two types of lessors that the Respondent argues are meant in section 5(1) of the Commercial Lease Act, that is, (i) owners and (ii) title-bearing possessors who are nothing else but lawful possessors. Lawful possession is, according to section 34(1) of the Law of Property Act, "founded on a *legal basis*", which the Tallinn City Court held was missing as regards Agrin's and Verest's possession of the building and structures at the Port. The fact that the Tallinn City Court did not enter into an in-depth discussion of the meaning of the term title-bearing possessor does not render its conclusions wrong.

600. Since the Tribunal finds the proposition that the lease agreements were invalid under Estonian law convincing, it is unnecessary to specify the conditions under which the Tribunal would have felt entitled or obliged to interpret and apply Estonian law differently than the Estonian courts.

(II.) Other Possessory Rights

601. The Tribunal now turns to the Claimant's argument that—even in the absence of title-bearing possession—it held so-called "possessory rights" that qualify as investments (within the meaning

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856 Third Keres Report, ¶ 86 (**CER-4**).

857 July 2005 Judgment, ¶ 18 (**C-078**).

of Article 1(1)(a)(v) of the Treaty, which provides that the term investment includes "any right conferred by law or contract, and any licenses and permits pursuant to law"). In this regard, the Claimant relies on Mr. Keres' expert testimony, according to which "possession is an absolute right".[858] This is because, according to Mr. Keres, even if possession is unlawful, the owner must wait for a court judgment before infringing upon the "possessor's rights". [859] In support of his proposition, Mr. Keres cites presumptions in the Law of Property Act, according to which possession is lawful and in good faith until the contrary is proved. [860] The Tribunal is reluctant to infer from these presumptions that possession constitutes a right under Estonian law (and "a right conferred by law" within the meaning of the Treaty). Otherwise, even a stolen asset would constitute an investment within the meaning of the Treaty until a court has determined that the possession is unlawful.

602. Mr. Keres offers no jurisprudence or scholarly writings in support of the proposition that possession is an "absolute right." The Tribunal considers it significant that the Law of Property Act, which contains the presumptions regarding possession quoted by Mr. Keres, explicitly lists the "rights" that the act codifies.[861] Unlike ownership, servitudes, rights of preemption, and some other rights, possession is not mentioned in this enumeration, as rightly pointed out by the Respondent. The Respondent argues that the possession is not a right but simply a description of a factual relation. [862] The Tribunal finds the following characterization of possession by the Tallinn Circuit Court and its distinction from a right to be more accurate:

> Pursuant to section 34 of the Law of Property Act, possession is lawful if it is based on legal grounds. Possession is not just a fact, but instead is a certain legally regulated relation of the person to the property, a legal relation. On the other hand, possession cannot be considered a right because it is not a property right or a right under the law of obligations or a burdening of the property; also, it cannot be entered into the Land Registry. The owner has the right of claim against anyone possessing the owner's property without legal grounds. The opinion of the plaintiff that possession in good faith or in bad faith can have any meaning only in issues related to recovery of the possession to the owner – for example, whether and in what scope the owner could have any damage compensation or other compensation claims against the possessor in addition to the recovery of the possession or whether the unlawful possessor could have any damage compensation or other compensation claims against the co-defendants who signed contracts with the possessor without legal grounds, is justified.[863]

603. The Tribunal has little to add to this paragraph. It accurately reflects the Tribunal's reading of the relevant statutory texts and is in line with the notions of possession under other civil law systems. Possession is not a right. Nor is good faith possession a right. But whether possession is in good or bad faith is relevant in determining what, if any, monetary claims the owner has against the possessor. Lawful possession means that the owner cannot successfully demand that the possessor return the property during the time in which possession is founded on a valid legal basis, for

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858 Fourth Keres Report, ¶ 26 (**CER-8**).

859 Fourth Keres Report, ¶ 26 (**CER-8**).

860 Fourth Keres Report, ¶ 27 (**CER-8**).

861 *See supra*, ¶¶ 278-279.

862 3 November 2021 Submission, ¶ 18.

863 March 2006 Appeal Judgment, p. 39 (**C-081**).

example, a lease contract. Since the lease agreements were invalid, BPV was not a lawful possessor.

604. International law does not warrant a different assessment. The Claimant argues that the terms of the Treaty must be interpreted autonomously. But given that the Treaty explicitly states that the relevant "right" must be conferred by "law or contract", the Tribunal finds it inappropriate to detach the meaning of the term "right" from the relevant domestic legal system. In any event, the Tribunal is unpersuaded that mere possession is a right under international law. The right to property may (or may not) be a human right. However, this does not mean that unlawful possession by corporate entities is protected under international law.

(III.) The Authenticity of the Lease Agreements

605. Given that the Tribunal did not deviate from the Estonian courts' findings that the lease agreements were invalid, and that mere possession is not a right, it is unnecessary to determine whether the lease agreements were, as submitted by the Respondent, backdated.

d) The JVA

606. According to the Claimant, the JVA concluded by Agrin, Verest, and BPV forms an investment under the Treaty.[864] Based on the Claimant's submission, the salient feature of the JVA seems to be that it "allowed BPV to jointly process, manage, use, repair and modernize the Port". [865] The Parties address the JVA foremost with respect to the Claimant's alleged damages. Since the Claimant held the shares in Agrin only until 2001, possible rights of BPV under the JVA might matter, especially when quantifying lost profits from (planned) wood processing activities. For the purposes of the Tribunal's jurisdiction, the JVA does not seem to be material. This is because the Tribunal determined above that the Claimant increased its 91% shareholding in BPV to 100% through the SPA dated 20 October 1999. These shares constitute an investment within the meaning of the Treaty. Rights that BPV might hold are therefore protected through the Claimant's shareholding in BPV.

607. In any event, the Tribunal notes that the JVA mainly contains obligations vis-à-vis BPV, especially the duty to "perform and finance all the works" necessary to "build a wood processing complex and a modern port."[866] According to the text of the JVA, the only rights conferred on BPV were the authorization to act as a "possessor according to the Port Law Article 5" and "the right to put up its own buildings." [867] As determined above, Verest and Agrin were neither owners nor lawful possessors of the buildings and structures at the Port, and the Parties agree that the land did not belong to the Claimant's subsidiaries. Hence, Verest and Agrin could not transfer lawful possession to BPV. Against this background, the Tribunal finds that the JVA is irrelevant for the

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864 Memorial, ¶ 359. *See also* Counter-Memorial, ¶¶ 484-485.

865 Respondent's Answers to Tribunal Questions, ¶ 8.

866 JVA, §§ 1, 3 (**C-056**).

867 JVA, §§ 2, 4 (**C-056**).

purposes of the Tribunal's jurisdiction, and it is not necessary to decide whether the JVA was indeed concluded on 21 October 1999 or, as the Respondent argues, backdated.[868]

e) Other Potential Investments

608. The Claimant states that it continued to hold "investments" in Agrin after BPV had sold its shares in Agrin in 2001. In this regard, the Claimant refers to financing by BPV and "loans and economic investment in its operations from 2000 to 2006". [869] The Respondent states that it is irrelevant whether BPV held investments in Agrin in the form of loans because the Claimant has not raised any claims based on the loss of such loans.[870]

609. The Tribunal notes that the Claimant made its statements regarding loans (and other "economic investments") only in passing and did not substantiate them. Not even the amount of the relevant loans was specified. Therefore, the Tribunal is not convinced that there are any investments within the meaning of the Treaty beyond the Claimant's shares in its subsidiaries that the Tribunal must consider in its subsequent analysis. In any event, the Tribunal does not believe that the existence of such additional investments in the form of loans or other financial contributions in the period from 2000 to 2006 would make a difference regarding the merits of the Claimant's case.

2. Whether the Claimant's Investments Were Made Illegally and in Bad Faith

a) The Respondent's Position

610. Regardless of any rights capable of Treaty protection, the Respondent argues that the Claimant's investments were made in violation of domestic laws and regulations and in contravention of court orders.[871]

611. According to the Respondent, the requirement that the investments be made and acquired *bona fide* in accordance with the laws of the host State is a general principle of international law accepted by investment tribunals.[872]

612. Even if the Claimant owned or controlled the investments, the Respondent submits that the Claimant does not hold any title to the investments because they were acquired illegally in contravention of both international and domestic law.[873] In the absence of title, the Respondent

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868 *See* ¶ 220 above.

869 Reply, ¶¶ 895, 897.

870 Counter-Memorial, ¶ 440; Rejoinder, ¶¶ 294-300. *See also* Hearing Transcript, Day 1, p. 133:11-19.

871 Counter-Memorial, ¶ 474.

872 Statement of Defense, ¶ 32, *referring to Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016, ¶ 301 (**RLA-036**); Counter-Memorial, ¶ 468, *referring to Plasma Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶¶ 138-139 (**RLA-110**); Counter-Memorial, ¶ 468. *See also* Counter-Memorial, fns. 431-432.

873 Statement of Defense, ¶ 31; Counter-Memorial, ¶¶ 145, 148, 466.

argues that the Claimant's alleged good faith possession of the assets at the Seaplane Harbor is not a property entitling Treaty protection.[874]

613. In addition, the Respondent highlights that the 1925 Treaty between the Government of the United States of America and the Government of the Republic of Estonia concerning the Development of Trade and Investment Relations, cited in the preamble of the Treaty, contains the requirement of legality in Article I and that such requirement of legality of investments is also recognized in Article VIII(a) of the Treaty.[875] Consequently, even if the Claimant owned or controlled the alleged investments, the Respondent submits that the Tribunal lacks jurisdiction over investments that were made in violation of Estonia's laws and were made in bad faith.[876]

614. According to the Respondent, notwithstanding the ownership dispute of the buildings at the Seaplane Harbor initiated by Estonia whereby the court preliminarily enjoined Verest and Agrin from selling the buildings on 3 December 1997,[877] the Claimant "knowingly circumvented [the prohibition] by purchasing Verest and Agrin instead of their property."[878] However, there was nothing, in the Respondent's view, that suggested the Claimant would secure the ownership of the buildings, considering that (i) in November 1998, B&E had disputed the 26 September 1997 agreement of the buildings at Küti 17a between itself and Agrin, claiming that the contract was invalid; [879] (ii) the Seaplane Harbor was recognized as a state asset since 1993; [880] (iii) the Claimant's subsidiaries were well aware of the government's ownership claim long before 1997;[881] (iv) Estonia consistently rejected all settlement offers from the Claimant's subsidiaries and was adamant in pursuing legal action;[882] and (v) the Claimant "knew" that the Estonian Supreme Court consistently enforced the regulations in place, determining that the Soviet armed forces could not legitimately conclude transactions of the Estonian State-owned assets and that such unauthorized transactions were, as a result, void.[883]

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874 Counter-Memorial, ¶ 244.

875 Statement of Defense, ¶ 33, *referring to* Treaty between the Government of the between the Government of the United States of America and the Government of the Republic of Estonia concerning the Development of Trade and Investment Relations dated 23 December 1925 (**RLA-037**); Counter-Memorial, ¶ 469.

876 Counter-Memorial, ¶¶ 466-467, 470.

877 Counter-Memorial, ¶¶ 345, 471(iii), *referring to* Memorial, ¶ 105; August 2000 Judgment, Decision, 3 December 1997 (**C-051**). *See also* Counter-Memorial, ¶¶ 348, 350-352, *referring to* August 2000 Judgment, Statement of Claim, 14 November 1997 (**C-050**).

878 Counter-Memorial, ¶ 471(iv).

879 Counter-Memorial, ¶¶ 354, 356, 471(v), *referring to* Statement of Claim by OÜ B&E, 19 November 1998 (**R-178**); Rejoinder, ¶ 329(i).

880 Counter-Memorial, ¶¶ 331-337.

881 Rejoinder, ¶¶ 157-159. *See* Letter from Verest to Prison Board, 8 July 1996 (**R-220**); Letter from Verest to Prison Board, 24 July 1996 (**R-221**); Letter from B&E to Prison Board, 22 July 1996 (**R-222**).

882 Counter-Memorial, ¶¶ 350, 357; Rejoinder, ¶ 329 (ii).

883 Counter-Memorial, ¶ 471(i), *referring to* December 1994 Supreme Court Judgment (**CLA-191**); Civil Chamber of the Supreme Court, Case No. III-2/1-59/94, Judgment, 27 December 1994 (**RLA-113**); Civil Chamber of the Supreme Court, Case No. III-2/1-6/95, Judgment, 31 January 1995 (**RLA-114**). *See also*

615. The Respondent maintains that the construction of new structures, including the new berth, railway works, buildings and sewerage systems, was engaged without obtaining any building permit pursuant to the local regulations.[884] Indeed, according to the Respondent, the City of Tallinn repeatedly pointed out that the Claimant's construction works were entirely illegal.[885] In this respect, the Respondent clarifies that (i) the work permits issued by the Marine Inspectorate to BPV for dredging works did not enable construction works on the land;[886] (ii) permit No. 48 issued by the Marine Inspectorate was insufficient to build a new berth as the Claimant was required to obtain a building permit from the local municipality and approval from the Maritime Administration;[887] and (iii) the two permits issued by the National Heritage Board were for the emergency repairs and conservations works only and not for the Claimant's commercial development and building plans surrounding the Seaplane Hangar.[888]

616. The Respondent further rejects the Claimant's allegation that the government blocked the issuance of all building permits, pointing out that the Claimant has not submitted any documentary evidence in this regard.[889] In fact, despite obtaining emergency construction work permits on the Seaplane Hangar, the Respondent contends that "Verest and Agrin let the Hangar deteriorate even more."[890]

617. The Respondent argues that the Claimant continued to carry out construction activities in direct contravention of the injunction issued on 21 July 2000, which prohibited any construction works

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Counter-Memorial, ¶¶ 214-218, *referring to* July 2005 Judgment, ¶ 2 (**C-078**); December 1994 Supreme Court Judgment, pp. 2-3 (**CLA-191**); July 2005 Judgment, ¶¶ 4, 10 (**C-078**). Noting that the Estonian property held by the Soviet military had never been owned by the USSR as a matter of international law and the status of such property had already been decided by virtue of earlier legal acts, the Supreme Court on 21 December 1993 declared the parliamentary law of 18 May 1993, which proclaimed that all transactions made with the Soviet military were void, unconstitutional. *See* Respondent's Answers to Tribunal Questions, ¶ 38, Annex 7; Claimant's Answers to Tribunal Questions, ¶¶ 95, 143, *referring to* December 1994 Supreme Court Judgment (**CLA-191**); Act on the Annulment of Transactions, 18 May 1993 (**C-614**). *See also* Second Keres Report, ¶ 70 (**CER-2**).

884 Counter-Memorial, ¶¶ 379-382, 474-475, *referring to* Planning and Building Act, entered into force on 14 June 1995 (**RLA-158**); Planning and Building Act, entered into force on 22 July 1995 (**RLA-085**); Building Act, entered into force on 1 January 2003 (**RLA-134**); Heritage Conservation Act, 9 March 1994, sections 25-26 (**RLA-082**); Rejoinder, ¶ 214. *See also* Counter-Memorial, ¶¶ 375-378, 412-423; Hearing Transcript, Day 1, p. 127:9-13; Day 5, p. 110:2-19, 24-25.

885 Hearing Transcript, Day 1, p. 127:14-17, *referring to* Letter of Tallinn City Secretary Toomas Seep No. 221539, 6 July 2000 (**R-135**).

886 Rejoinder, ¶ 269, *referring to* Estonian Marine Inspectorate Permit No. 41 to BPV, 1 November 1999 (**C-089**); Estonian Marine Inspectorate Permit No. 47 to BPV, 24 November 1999 (**C-091**); Estonian Marine Inspectorate Permit No. 25 to BPV, 17 December 1999 (**C-092**); Estonian Marine Inspectorate Permit No. 48 to BPV, 17 December 1999 (**C-093**). *See also* Rejoinder, ¶¶ 266-258; Planning and Building Act, RT I 1995, 59, 1006, sections 38-39 (**RLA-223**).

887 Rejoinder, ¶¶ 270-273, *referring to* Estonian Marine Inspectorate Permit No. 48 to BPV, 17 December 1999 (**C-093**). *See also* Statutes of Maritime Administration, section 8(6) (**RLA-183**).

888 Rejoinder, ¶ 216, *referring to* National Heritage Board Permit No. 85 to Verest, 28 July 2000 (**C-095**); National Heritage Board Permit No. 130 to Verest, 25 October 2000 (**C-096**); Rejoinder, ¶ 275.

889 Rejoinder, ¶¶ 277, 279.

890 Rejoinder, ¶ 278. *See* Instrument re Inspection of Berths 38 and 38A, 23 April 2001 (**C-472**).

at the Seaplane Harbor, except for the emergency works on the Seaplane Hangar.[891] According to the Respondent, it is irrelevant that BPV was not listed in the entities enjoined in the court's order because under the Planning and Building Act, "the building right was connected to the immovable itself rather than to a specific person, meaning that a prohibition to building something at a certain address could not be overridden by enlisting the services of a third party."[892]

b) The Claimant's Position

618. In response to the Respondent's argument that the Claimant made investments in bad faith, the Claimant submits that it complied with all relevant regulations and statutes, including obtaining permits for all the reconstruction works and the repair works.[893]

619. Further, the Claimant clarifies that the 21 July 2001 injunction prohibiting construction works did not apply to BPV and that BPV was willing to cooperate with the City of Tallinn and obtain the necessary construction permits for restoration works, as confirmed in BPV's letter to the Tallinn authorities.[894] The Claimant notes that it was nevertheless the Respondent, through the Minister of Justice, that abused its power to refuse the issuance of the building permits and the customs authorizations on the basis that BPV had "unlawful possession" of the Seaplane Harbor.[895]

c) The Tribunal's Analysis

620. The Tribunal agrees with the analysis made in *Phoenix Action v. Czech Republic*,[896] and *Plama v. Bulgaria*,[897] that an investment may not qualify for protection under a BIT where such investment was made in breach of relevant laws and regulations. But the illegality must affect the "making" of the investment, and not the implementation or operation. As set out above, the only assets that qualify as an investment under the Treaty are the shares that the Claimant held in its Estonian subsidiaries. The purchase of those shares was certainly not illegal and not in bad faith.

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891 Counter-Memorial, ¶ 474, *referring to* City Court of Tallinn, Civil Case No. 2/3/227/6180/97, Ruling, 21 July 2000 (**C-064**); Planning and Building Act, as adopted on 14 June 1995 (**RLA-158**); Planning and Building Act, entered into force on 1 June 2002 (**RLA-085**); Building Act, entered into force on 20 March 2011 (**RLA-134**); Rejoinder, ¶ 276. *See also* Counter-Memorial, ¶¶ 417-420.

892 Rejoinder, ¶ 276, *referring to* Planning and Building Act, RT I 1995, 59, 1006, sections 38-39 (**RLA-223**).

893 Reply, ¶¶ 239, 252-260, 515-516, *referring to* Estonian Marine Inspectorate Permit No. 48 to BPV, 17 December 1999 (**C-093**); National Heritage Board Permit No. 85 to Verest, 28 July 2000 (**C-095**); National Heritage Board Permit No. 130 to Verest, 25 October 2000 (**C-096**); Third Rotko Statement, ¶¶ 117, 199 (**CWS-4**).

894 Reply, ¶¶ 503, 505-507. *See* BPV Letter to Deputy Mayor of Tallinn re Seaplane Hangar, 5 September 2000 (**C-427**).

895 Reply, ¶¶ 523-525, *referring to* Letter from Ministry of Justice to BPV, 23 September 2002 (**C-270**).

896 *Phoenix Action v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 101 fol. (**RLA-090**).

897 *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶¶ 138 fol. (**RLA-110**).

3. Whether the Respondent's Objection to Jurisdiction *Ratione Materiae* in Respect of the Claimant's Lack of Title is Precluded by Estoppel

a) The Claimant's Position

621. The Claimant submits that the international law principle of estoppel "arises from the principle of good faith, which is protected by Article II of the Treaty and its [FET] obligation".[898] The doctrine has been applied by various international tribunals[899] and requires parties to behave consistently with their prior actions.[900] In particular, according to the Claimant, estoppel applies when the following conditions are met, namely, if: (i) a party made a clear and unambiguous statement of fact; (ii) the statement was authorized and made voluntarily and unconditionally; and (iii) the other party relied in good faith upon the statement either to its detriment or to the advantage of the party making the statement.[901]

622. The Claimant submits that the above-mentioned three conditions have been met in this case because, first, the Respondent made clear and unambiguous representations regarding the ownership of the Seaplane Harbor.[902]

623. By way of evidence, the Claimant submits that the following official government records confirmed Verest's and Agrin's ownership of the Port and that, since 1991, the Port had been under private property:

(a) The Estonian Maritime Administration's records of the purchase agreement between Nautex and Verest in 1992, by which the latter acquired ownership of the berths and seaplane hangar;[903]

(b) The certification made by a notary public of the authenticity of the transaction by which Agrin purchased the buildings at the Port from B&E on 26 September 1997;[904] and

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898 Reply, ¶¶ 1468-1469, 1479. *See also* Memorial, ¶ 431.

899 Memorial, ¶¶ 438-440, *referring to ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 475 (**CLA-028**); *Desert Line Projects v. Yemen*, ICSID Arb/05/17, ¶¶ 119–120, 207 (**CLA-029**). *See also* Reply, ¶¶ 1475-1476, *referring to* Rep. Int'l Arb. Awards, S.S. "Lisman", Disposal of pecuniary claims arising out of the recent war (1914 – 1918), (United States, Great Britain), Vol. III, 5 October 1937, ¶ 1790 (**CLA-030**).

900 Memorial, ¶ 431; Reply, ¶¶ 1470-1471, *referring to* James Crawford, *Brownlie's Principles of International Law*, (Edition 8th, 2012), p. 422, (**CLA-023**); Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals*, (1953), pp. 141–142 (**CLA-020**).

901 Memorial, ¶ 462; Reply, ¶ 1474, *referring to* D. W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, British Yearbook Int'l Law 176, Vol. 33, 1957, pp. 183-184 (**CLA-024**).

902 Memorial, ¶¶ 464-466; Reply, ¶¶ 1484-1486. *See also* Hearing Transcript, Day 1, p. 59:7-20.

903 Memorial, ¶ 466(a), *referring to* Lennusadam Port Passport, 7 October 1993 (**C-201**).

904 Memorial, ¶ 466(b), *referring to* Contract of Purchase and Sales and Pledge Contract between Agrin and B&E, 26 September 1997 (**C-020**).

(c) The Tallinn Building Registry's records from 20 April 1994 to 27 October 1998 of all the above transactions, listing B&E, Agrin, and Verest as owners.[905]

624. The Claimant further submits that the Respondent "repeatedly took actions that implicitly recognized B&E, Agrin's, and Verest's proprietary use of the Port", including:

(d) The acceptance by the Municipality of Tallinn of tax payments made by the Claimant's local companies for many years, "even for time after the time Estonia claimed that it owned the Lennusadam;"[906]

(e) Certificates issued by the Tallinn Building Registry to Verest in April 1994, June 1994, July 1996, and June 1997, acknowledging Verest's ownership and/or use of the seaplane hangar and berths;[907]

(f) Approval issued by the Estonian Customs Board of Verest's application to use the Port for the import and export of wood;[908] and

(g) Certificate issued by the Tallinn Sustainable Development and Planning Office to Verest "recognizing its use of the Lennusadam Port."[909]

625. Secondly, the Claimant posits that "[t]hese representations were voluntary, unconditional, and authorized."[910]

626. Thirdly, the Claimant contends that it relied, to its own detriment, on the above-listed statements, which led it to believe that it was acquiring property rights that rightfully belonged to Verest and Agrin when it concluded the Lease Agreements through BPV on 1 October 1997.[911] In addition, the Claimant asserts that it also relied on the above-mentioned statements "before the Privatization agency, the Tax authorities, the courts, and before this Tribunal."[912]

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905 Memorial, ¶ 466(c), *referring to* Tallinn Building Registry Certificate No. 8395 issued to B&E, 27 October 1995 (**C-033**); Tallinn Building Registry Certificate No. 20215 issued to Verest, April 20, 1994 (**C-028**); Building Registry Certificate No. 154 to Agrin, 29 January 2003 (**C-102**).

906 Reply, ¶ 1485, *referring to* Tallinn Tax and Customs Board notice to Verest, 19 October 2006 (**C-203**); Tallinn Tax and Customs Board notice to Agrin, 19 October 2006 (**C-195**).

907 Reply, ¶ 1486, *referring to* Tallinn Building Registry Certificate No. 20215 issued to Verest, 20 April 1994 (**C-028**); Tallinn Building Registry Certificate No. 20215 issued to Verest, 21 June 1994 (**C-029**); Tallinn Building Registry Certificate No. 20215 issued to Verest, 8 July 1996 (**C-030**); Tallinn Building Registry Certificate No. 20215 issued to Verest, 13 June 1997 (**C-031**).

908 Reply, ¶ 1486, *referring to* Verest application for permit of import-export cargo through port Lennusadam, 26 July 1994 (**C-040**).

909 Reply, ¶ 1486, *referring to* Tallinn City Planning Office Certificate about the scope of building right and use, 21 August 1997 (**C-041**).

910 Memorial, ¶ 467. *See also* Hearing Transcript, Day 1, p. 59:18-24.

911 Memorial, ¶ 467.

912 Reply, ¶ 1482.

b) The Respondent's Position

627. The Respondent maintains that estoppel does not apply in respect of claims under the FET standard,[913] rather, it is mainly applicable in the relations between States and has been applied by arbitral tribunals only in the context of jurisdictional issues.[914]

628. Further, the Respondent argues that, as the tribunal in *Vestey v. Venezuela* found, the Claimant cannot attempt to use the international law principle of estoppel to create property rights that never existed under the applicable municipal law.[915] It is the municipal law that has the authority to define the existence and scope of property rights. International law "only monitors unlawful governmental interference with property rights but cannot create them,[916] especially through the concept of estoppel."[917] For these reasons, the Respondent considers the Claimant's estoppel argument to be "fundamentally flawed" and that it should "be dismissed without substantive inquiry."[918]

629. Even if estoppel were to apply, the Respondent notes that "estoppel is an exceptional claim only granted in exceptional circumstances"[919] and submits that its pre-requisites are not met in the present case.[920]

630. First, the Respondent contends that the Claimant "cannot point to clear and unambiguous state conduct by which Estonia can be said to have accepted the Claimant's title to the buildings"[921] or that it has expropriated the Claimant's investment.[922] To the contrary, the Respondent maintains that "throughout the relevant time, [it] considered itself to be the true owner of the buildings and took active steps to gain possession."[923] Further, about the relevant state conduct, the Respondent contends that "[t]o the extent that the alleged sources of positive reassurance are in the form of opinions by government officials on points of law, they are additionally unsuitable for an estoppel claim because they do not pertain to facts."[924]

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913 Counter-Memorial, ¶ 538.

914 Counter-Memorial, ¶ 538, *citing* Andreas Kulick, *About the Order of Cart and Horse Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals*, EJIL, Vol. 27 No. 1, 2016, p. 113 (**CLA-027**).

915 Rejoinder, ¶¶ 430-431, *citing Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 257 (**RLA-208**).

916 Rejoinder, ¶ 430, *referring to* Counter-Memorial, Section 4.1.

917 Rejoinder, ¶ 430.

918 Rejoinder, ¶ 432.

919 Rejoinder, ¶ 433, *citing Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [I]*, Case No. AA 277, PCA, Interim Award, 1 December 2008, ¶ 143 (**RLA-209**).

920 Counter-Memorial, ¶ 546; Rejoinder, ¶ 434.

921 Rejoinder, ¶ 438.

922 Rejoinder, ¶ 436.

923 Rejoinder, ¶ 443.

924 Rejoinder ¶ 442.

631. Secondly, the Respondent alleges that the Claimant has failed to establish that the relevant conduct or statement emanated from an authorized official with authority to bind the state, as required under Article 4 of the ILC's Guiding Principles on Unilateral Declarations, and consistent with treaty practice.[925]

632. Thirdly, the Respondent contends that the Claimant has failed to demonstrate that it acted to its detriment by relying on the Respondent's representations.[926] This is because the Respondent in fact made no admissions and representations to the Claimant, and the Claimant has not evidenced any reliance on the Building Register notices, the letter from the advisor of the Chancellor of Justice, or the letter from the official of the State Chancellery to its detriment.[927]

c) The Tribunal's Analysis

i. Legal Standard

633. The Parties agree,[928] as does the Tribunal, that proof of estoppel requires the following three elements, as proposed by Bowett[929] and Kulick,[930] that is:

a. a clear and unambiguous statement of fact;

b. made voluntarily, unconditionally, and authorized; and

c. relied upon by the other party either to its detriment or to the advantage of the party making the statement.

634. According to the commentary cited by both Parties, in the circumstances meeting these requirements, the party that has made the relevant clear, unambiguous statement of fact, even if the former representation of fact may not be true, would be precluded from asserting the contrary.[931] These circumstances are exceptional:

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925 Rejoinder, ¶¶ 444-446, *citing* International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, 2006 (**RLA-210**); *and referring to ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, Award, ICSID Case No. ARB/03/16, 2 October 2006, ¶ 475 (**CLA-028**); *Desert Line Projects v. Yemen*, ICSID Arb/05/17, ¶¶ 119-120, 207 (**CLA-029**).

926 Rejoinder, ¶ 449.

927 Rejoinder, ¶¶ 450-451.

928 Memorial, ¶ 462; Rejoinder, ¶ 433.

929 D. W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, British Yearbook Int'l Law 176, Vol. 33, 1957, pp. 188 et seq (**CLA-024**).

930 Andreas Kulick, *About the Order of Cart and Horse Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals*, EJIL, Vol. 27 No. 1, 2016, p 113 (**CLA-027**).

931 D. W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, British Yearbook Int'l Law 176, Vol. 33, 1957, pp. 183-184 (**CLA-024**): "Representations of a state of fact may be made expressly or impliedly where, upon a reasonable construction of a party's conduct, the conduct presupposes a certain state of fact to exist. Assuming that another party to whom the statement is made acts to its detriment in reliance upon that statement, or from that statement the party making the statement secures

> Any right leads normally and automatically to a claim for its holder. It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim.[932]

635. The concept of estoppel is not to be confused with related concepts or tests, such as recognition, waiver, or acquiescence.[933] The same set of facts may give rise to an estoppel or one of those related concepts, but they are based on different legal reasoning:

> Recognition is the explicit, acquiescence the implicit, creation of an obligation by consent, whereas waiver is the reversed image of the two – that is, the consent to give up a right that actually existed.[934]

636. An estoppel is "a representation the truth of which the entity on whose behalf it is made is precluded from denying in certain circumstances".[935] It is an essential distinguishing feature of estoppel that the relevant representation must be one of fact:

> The estoppel rests on the representation of fact, whereas the conduct of the parties in construing their respective rights and duties does not appear as a representation of fact so much as a representation of law. The interpretation of the rights and duties of parties of a treaty, however, should lie ultimately with an impartial international tribunal, and it would be wrong to allow the conduct of the parties in interpreting these rights and duties to become a binding interpretation of them.[936]

637. Estoppel is a rule of international law. In a claim for expropriation contrary to international law, where the property rights concerned are to be determined in accordance with the municipal law of the host State, the international law principle of estoppel cannot be used to create property rights that would not exist under that law. In *Vestey Group Ltd v. Bolivarian Republic of Venezuela*,[937] the investor argued that in light of the government's prior recognition of its title,

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some advantage, the principle of good faith requires that the party adhere to its statement whether it be true or not. It is possible to construe the estoppel as resting upon a responsibility incurred by the party making the statement for having created an appearance of fact, or as a necessary assumption of the risk of another party acting upon the statement." *See also* Andreas Kulick, *About the Order of Cart and Horse Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals*, EJIL, Vol. 27 No. 1, 2016, p. 109 (**CLA-027**).

932 *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [I]*, Case No. AA 277, PCA, Interim Award, 1 December 2008, ¶ 143 (**RLA-209**) *cited in* Rejoinder, ¶ 433.

933 Andreas Kulick, *About the Order of Cart and Horse Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals*, EJIL, Vol. 27 No. 1, 2016, p. 108 (**CLA-027**).

934 Andreas Kulick, *About the Order of Cart and Horse Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals*, EJIL, Vol. 27 No. 1, 2016, pp. 108-109, *referring* inter alia *to Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v. United States of America), Judgment, 12 October 1984, ICJ Reports (1984) 246, at 305, para. 130 (**CLA-027**).

935 J. Crawford, *Brownlie's Principles of International Law*, (8th ed., 2012), at 422, *cited in* Andreas Kulick, *About the Order of Cart and Horse Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals*, EJIL, Vol. 27 No. 1, 2016, p. 109 (**CLA-027**).

936 D. W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, British Yearbook Int'l Law 176, Vol. 33, 1957, pp. 189-190 (**CLA-024**).

937 *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 257 (**RLA-208**).

Venezuela must be prevented from denying the validity of Vestey's title in the arbitration. The tribunal dismissed that argument:

> The requirements for acquiring property rights over immovable assets situated in Venezuela are governed by specific norms of Venezuelan property law. For a private person to have a claim under international law arising from the deprivation of its property, it must hold that property in accordance with applicable rules of domestic law. The principle of estoppel cannot create otherwise inexistent property rights.[938]

638. The tribunal found that Vestey had acquired the title to the disputed property on other grounds but denied the use of the international law principle of estoppel for the creation of property rights.

ii. Application to the Facts

639. The Claimant claims that the Respondent is estopped from objecting to jurisdiction over the expropriation claim on the basis that the Claimant's subsidiaries never acquired title to the buildings and structures at the port. The Claimant specifies this claim as follows:

a. "The impact of estoppel requires Estonia to acknowledge the Claimant's investments and to acknowledge that Estonia expropriated the properties."[939]

b. "Estonia is estopped from arguing that the Claimant does not have valid title to property. Estonia is also estopped from arguing that it did not expropriate the Claimants' property."[940]

c. "Estonia is estopped from claiming that the Claimants never had a valid title."[941]

d. "Estonia is estopped from asserting that the Claimant does not own full property rights."[942]

640. The definition of estoppel cited by both Parties requires, first, a representation which, among other qualities, must be one of fact.[943] This is recognized as a critical part of the concept of estoppel and a feature that distinguishes it from waiver, recognition, and acquiescence.[944] The Tribunal agrees that this distinguishing feature is essential. The representation must be one of fact because

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938 Rejoinder ¶ 431, *referring to Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 257 (**RLA-208**).

939 Reply, ¶ 1468.

940 Reply, ¶ 1479.

941 Reply, ¶ 1482.

942 Reply, ¶ 1484. In other words, according to the Claimant, the assertions which the Tribunal must accept without hearing the Respondent's arguments to the contrary are: that Estonia must "acknowledge the Claimant's investments"; that the Claimant has "valid title to property"; and that the Claimant owned "full property rights".

943 Memorial, ¶ 462; Rejoinder, ¶ 433.

944 D. W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, British Yearbook Int'l Law 176, Vol. 33, 1957, pp. 188 et seq. (**CLA-024**); Andreas Kulick, *About the Order of Cart and Horse Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals*, EJIL, Vol. 27 No. 1, 2016, pp. 125-127 (**CLA-027**).

the representor is then estopped from contending otherwise, even if the fact may not be true. A representation of law may lead to a similar outcome by way of waiver or admission, but an argument to that effect would fall to be examined on its merits.

641. The Respondent asserts that the alleged sources of positive reassurance from government officials were opinions on points of law and were unsuitable for an estoppel claim because they do not pertain to facts.[945] The Claimant has not shown how the requirement of a representation of fact was met in this case or addressed the Respondent's argument to the contrary.

642. The Claimant pleads that Estonia "has made many admissions in documents before the local courts in Estonia";[946] "has recognized the rights and obligations of ELA U.S.A. concerning its investment at the Port and Portlands";[947] and "has recognized the Claimant as the possessor in multiple instances over a significant period".[948] The Claimant contends that ELA U.S.A. had registered property which had not been challenged prior to the lawsuits;[949] that "Estonia's own officials concluded that ELA USA's local subsidiaries had *bona fide* and legitimate possessory rights";[950] that "Estonia has recognized the Claimant as the possessor in multiple instances over a significant period."[951]

643. As put by the Claimant, the Respondent is estopped from "arguing" against the validity of the Claimant's claims. The representations invoked by the Claimant are described as admissions or recognitions. Their subject matter is the contention that the Claimant's claim to title or possession of the Lennusadam Port was valid under Estonian law. This pertains solely to an appreciation of the Parties' respective rights and obligations under Estonian law. The effect to be given to such a "admission" or "recognition" is for determination under Estonian law. This is a matter for the substantive enquiry into the Claimant's claim to valid title.

644. In the Tribunal's view, moreover, the Claimant's position amounts to the creation of a proprietary interest, which would bypass the essential exercise of considering the substance of Estonian law on that matter. It is closely comparable to the situation in *Vestey v. Venezuela*[952] in that there is no rule of estoppel under Estonian law,[953] but the preclusion of the Respondent's objection would

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945 Rejoinder, ¶ 442, *referring to* D. W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, British Yearbook Int'l Law 176, Vol. 33, 1957, at pp. 189-190 (**CLA-024**).

946 Reply, ¶ 1476.

947 Reply, ¶ 1480.

948 Reply, ¶ 1484.

949 Reply, ¶ 1481.

950 Reply, ¶ 1483.

951 Reply, ¶ 1484.

952 Rejoinder, ¶ 431, *referring to Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 ¶ 257 (**RLA-208**).

953 In the expert analysis of Mr. Keres, the word "estoppel" is mentioned only by analogy, in commenting on the separate issue of legitimate expectations under Estonian law, relation to a rule of good faith which Mr. Keres describes as "much like estoppel". *See* Third Keres Report, ¶ 234 (**CER-4**). The existence of a similar but not identical concept does not suffice: D. W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, British Yearbook Int'l Law 176, Vol. 33, 1957, pp. 189-190 (**CLA-024**).

amount to a proprietary claim made enforceable against the Respondent by operation of the alleged estoppel.

645. The Claimant's argument on this basis is dismissed. The Tribunal notes that conduct or facts that fall short of meeting all of the requirements of an estoppel might still form the basis of a claim in relation to each one of those related concepts, or the formation of legitimate expectations. That question is discussed in the part of this Award addressing fair and equitable treatment.

C. THE TRIBUNAL'S JURISDICTION RATIONE TEMPORIS

646. In its Statement of Defense, the Respondent argued that the legal acts that established the Respondent's right of ownership of the Seaplane Harbor were enacted before the Treaty entered into force in 1997, which is why the Tribunal does not have jurisdiction *ratione temporis* over the Claimant's claims.[954] The Respondent did not repeat this jurisdictional objection in its further submission or at the Hearing, and for good reason, given that all measures that the Claimant argues were in breach of the US-Estonia BIT occurred after the Treaty entered into force in 1997.

D. WHETHER THE CLAIMANT'S CLAIMS ARE TIME-BARRED

647. According to the Respondent, the Claimant's claims are inadmissible because the Claimant's claims were filed with an unreasonable delay. The Claimant disagrees, maintaining that there is no applicable time limit to its claims in this dispute and that, in any event, any delay that occurred in bringing its claims was reasonable.

1. The Respondent's Position

648. The Respondent submits that the Claimant's claims are time-barred because they were filed after undue delay.[955]

649. As to the permissibility of this objection, the Respondent submits that its time-bar objection pertains to the admissibility of the claim, and therefore Article 21(3) of the 1976 UNCITRAL Rules did not require the Respondent to raise this objection no later than in its Statement of Defense.[956] In the Respondent's view, Article 21(3) of the 1976 UNCITRAL Rules does not apply because it only concerns pleas relating to the Tribunal's jurisdiction, and not those relating to the admissibility of the claim.[957] Moreover, even if the Claimant's undue delay in bringing the claim were a question of jurisdiction, the Respondent contends that its arguments would merely be a further substantiation of the Respondent's objections to the Tribunal's jurisdiction already pleaded in the Statement of Defense.[958]

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954 Statement of Defense, ¶¶ 40-41.

955 Counter-Memorial, ¶¶ 36, 465.

956 Rejoinder, ¶ 309.

957 Rejoinder, ¶¶ 309-310.

958 Rejoinder, ¶ 310.

650. Turning to the substance of its time-bar objection, the Respondent submits that both the ICJ and investment tribunals have applied the international principles of acquiescence and extinctive prescription developed under customary international law to determine whether the passage of time renders a claim inadmissible when the relevant treaties are silent on the limitation periods, as is the Treaty in this case.[959]

651. Rejecting the cases the Claimant cites to the contrary, the Respondent explains that each of these cases is distinguishable and therefore inapposite because (i) the Claimant did not sit idly but pursued litigation in the courts of the host state before bringing a treaty claim;[960] (ii) the Respondent relied solely on municipal law as the basis for its time-bar objection;[961] and (iii) no undue delay was found because the claimant notified the respondent of its claim only four years after the alleged breach.[962]

652. The Respondent further maintains that, notwithstanding the Claimant's claim that it is not applicable in this situation, Article 45(b) of the ILC Articles, which codifies the principle of acquiescence, is still "a useful reference point for determining the content of customary international law."[963] In addition, the Respondent rejects the Claimant's argument that an explicit waiver or an agreement by the Parties on the time limits is necessary for the application of extinctive prescription.[964] Unless there is evidence in the *travaux préparatoires*, the absence of the time limitation in the Treaty, according to the Respondent, cannot be interpreted as an intentional omission by the Contracting Parties.[965]

653. Turning to the facts of this case, the Respondent submits that the conditions for the application of the principles of acquiescence and extinctive prescription are met in this case to render the

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959 Counter-Memorial, ¶¶ 452-457, 461, *referring to Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 17-18, ¶ 32 (**RLA-093**); *Ronald S. Lauder v. Czech Republic*, UNCITRAL (*ad hoc*), Final Award, 3 September 2001, ¶ 273 (**RLA-094**); *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID No. ARB/13/13, Award, 27 September 2017, ¶ 420 (**RLA-095**); *Nordzucker AG v. Republic of Poland*, UNCITRAL (*ad hoc*), Partial Award (Jurisdiction), 10 December 2008, ¶ 221 (**RLA-096**).

960 Rejoinder, ¶ 312, *referring to Interocean Oil Development and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID No. ARB/13/20, Decision on Preliminary Objections, 29 October 2014, ¶¶ 125-127 (**CLA-249**).

961 Rejoinder, ¶¶ 313, 315, *referring to Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 April 2015, ¶ 319 (**CLA-259**); *The Pious Fund of the Californias (The United States of America v. The United Mexican States)*, Award, 14 October 1902, RIAA, Vol. IX (**CLA-257**).

962 Rejoinder, ¶ 314, *referring to Luigiterzo Bosca v. The Republic of Lithuania*, PCA Case No. 2011-05, Award, 17 May 2013, ¶ 120 (**CLA-247**).

963 Rejoinder, ¶ 316, *referring to* Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission, Article 13 (**RLA-038**); Vienna Convention on the Law of Treaties, Article 45(b) (**RLA-039**).

964 Rejoinder, ¶¶ 311, 315, *referring to Gentini Case*, Italy-Venezuela Claims Commission, RIAA Vol. X, 551 (**RLA-092**).

965 Rejoinder, ¶ 316.

Claimant's claim time-barred because: (i) there is a delay in the presentation of the Claimant's claim, and (ii) the delay is attributable to the negligence of the Claimant.[966]

654. In determining the unreasonableness of the delay, the Respondent posits that investment tribunals have taken into account the statute of limitations under national laws when deciding over the timeliness of the claim under international treaties in the absence of time limitations.[967] Thus, considering that the limitation periods for claims arising from unlawful causing of damage in Estonia, the state of Minnesota and the state of Florida run between three to six years and that investment treaties with an express limitation period usually set the period between three to five years,[968] the Respondent takes the view that the Claimant's delay in bringing the claim after more than ten years had passed since the Claimant became aware of the alleged Treaty breaches is unreasonable.[969] The Respondent further contends that the Claimant should have brought its claim before the seven-year period to preserve accounting records under Estonian law expired.[970]

655. For the Respondent, the Claimant has failed to substantiate its reasons to justify its undue delay.[971] Specifically, the Respondent highlights that the Claimant has not offered anything to substantiate its claims about the difficulties of obtaining legal counsel, did not notify the Respondent of the existence of its claim within a reasonable time, and could have sought third-party funding during the 12 years preceding its claim.[972]

656. The Respondent asserts that there is no evidence of funding having been sought by the Claimant "at any point in time during the 12 years preceding its claim",[973] and disputes that the lack of funding was a cause of difficulty, on the basis that third-party funding became a serious industry

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966 Counter-Memorial, ¶ 458, *referring to* Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (CUP, 1953), p. 379 (**CLA-020**).

967 Counter-Memorial, ¶¶ 459-460, *referring to Yury Bogdanov v. Moldova*, SCC Arbitration No. V (114/2009), Final Award, 30 March 2010, ¶ 94 (**RLA-097**); *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID No. ARB/13/13, Award, 27 September 2017, ¶¶ 421. 424 (**RLA-095**); *Alan Craig v. Ministry of Energy of Iran*, IUST Case No. 346, Award, 2 September 1983, ¶ 45 (**RLA-098**); Rejoinder, ¶ 317.

968 Counter-Memorial, ¶ 460, *referring to* North American Free Trade Agreement (1992), Articles 1116(2), 1117(2) (**RLA-101**); Canada-Czech Republic BIT (2009), Article 10(5)(c) (**RLA-102**); France-Mexico BIT (1998), Article 9(3) (**RLA-103**); Germany-Mexico BIT (1998), Article 12(3) (**RLA-104**); Colombia-Switzerland BIT (2006), Article 11(5) (**RLA-105**); Japan-Papua New Guinea BIT (2011), Article 16(6) (**RLA-106**). *See also* Hearing Transcript, Day 1, p. 136:23-25.

969 Counter-Memorial, ¶ 460.

970 Counter-Memorial, ¶ 462, *referring to* Estonian Accounting Act, RT I 1994, 48, 790, section 40 (in force 1994-2003) (**RLA-107**); Estonian Accounting Act, RT I 2002, 102, 600, section 12 (in force 2003-to date) (**RLA-108**).

971 Rejoinder, ¶ 319.

972 Rejoinder, ¶¶ 320-322. *See also* Hearing Transcript, Day 1, 137:6-16.

973 Rejoinder, ¶ 321.

in the period 2006-2008. The Respondent points to two litigation funding companies, including Therium, the current funder of the Claimant, which were launched in 2009.[974]

657. Addressing the prejudice resulting from the Claimant's delay, the Respondent underscores that the Claimant's "factual claims that are supported by nothing except Mr. Rotko's testimony or by the documents provided by him" have placed the Respondent at a "distinct disadvantage" because they cannot be verified objectively.[975] In addition, the Respondent asserts that several witnesses it would have called to clarify the circumstances relating to the title of the Seaplane Harbor, such as the members of the handover committee from the Estonian Ministry of Defense who signed the handover protocol in 1994, have died or are unable to be located.[976] Some financial documents, the Respondent adds, were in fact in the possession of Ms. Irina Somova, the auditor of Verest and BPV, until 2015 before she destroyed the materials due to the passage of time.[977]

658. In response to the Claimant's assertion that the Respondent is not prejudiced because relevant evidence is preserved in the files of Estonian court cases, the Respondent underlines that the Claimant relies on facts that have not been the subject of the Estonian court proceedings, including those that rely on "historical and archival evidence that is not easily available."[978] The Respondent further clarifies that none of the relevant financial documents were confiscated by the Estonian authorities during the criminal proceedings, contrary to the Claimant's assertion.[979]

659. As to the Claimant's claim that the Respondent took new measures after 2006 that operate to preclude any time-bar, the Respondent notes that these alleged measures are only relevant for the Claimant's moral damages claim which, if the Tribunal deems it otherwise admissible, the Respondent agrees is likely not time-barred, while all other claims are.[980]

2. The Claimant's Position

660. Preliminarily, the Claimant argues that the Respondent's time-bar objection is a jurisdictional objection that must be dismissed because the Respondent did not raise it in a timely manner in its Statement of Defense, as required under Article 21(3) of the 1976 UNCITRAL Rules.[981]

661. To the extent that the Respondent's time-bar objection is an admissibility objection, which, according to the Claimant, is not subject to the procedure under Article 21(3) of the 1976

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974 Rejoinder, ¶ 321, *citing* Burford Capital website extract, obtained 13 July 2021 (**R-236**); Therium Litigation Funding website extract, obtained 13 July 2021 (**R-237**).

975 Rejoinder, ¶ 323.

976 Counter-Memorial, ¶ 464.

977 Counter-Memorial, ¶ 463.

978 Rejoinder, ¶¶ 324-325.

979 Counter-Memorial, ¶ 463.

980 Rejoinder, ¶ 326.

981 Reply, ¶¶ 934-936.

UNCITRAL Rules, the Claimant likewise contends that the Respondent has failed to discharge its burden of proving that the claims are time-barred for the following reasons.[982]

662. First, the Claimant contends that there is no applicable time limitation to its claims under the governing rules in this case, namely the Treaty, the 1976 UNCITRAL Rules, international law and any mandatory provisions under Swiss law, the *lex arbitri*. Concerning the Treaty, the 1976 UNCITRAL Rules, and Swiss law, the Claimant points out that there exists no express mandatory limitation period for the commencement of claims.[983] Relying on *King and Gracie Case* and *Interocean Oil v. Nigeria*, the Claimant maintains that in the absence of an express limitation in the Treaty, which the Claimant argues was a conscious decision of Estonia and the U.S. rather than an omission, there is no legal bar to its claims based on the lapse of time.[984]

663. Second, under customary international law, the Claimant likewise asserts that "[t]here is no authority setting forth […] a limitations or prescription period," whether under the principle of extinctive prescription or acquiescence.[985] To the contrary, according to the Claimant, there is a long-standing international practice to reject the existence of binding limitation periods unless the underlying treaty imposed one.[986] In light of this, the Claimant considers the Respondent's sole reliance on the decision in the *Gentini Case* to argue that customary international law imposes limitation periods "both incomplete and incorrect."[987]

664. In the Claimant's view, the Respondent also misconstrues the cases it has cited in support of its argument on the principle of extinctive prescription under international law as the tribunals held that "[i]nternational law has no rule that specifies the time period which must elapse in order to render extinctive prescription operative" in the context of analyzing treaty claims under investment treaties that did not contain a time bar.[988] In this respect, the Claimant notes that

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982 Reply, ¶¶ 937- 938.

983 Reply, ¶¶ 949-950.

984 Reply, ¶¶ 944-948, 961, *referring to* 'US v. UK Commission (known as the King and Gracie Case, 1853)' in John Bassett Moore (ed), *History and Digest of the International Arbitrations to which the United States has been a Party* (1898), pp. 4179-4180 (**CLA-245**); *Interocean Oil Development and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID No. ARB/13/20, Decision on Preliminary Objections, 29 October 2014, ¶¶ 125-127 (**CLA-249**).

985 Reply, ¶¶ 960, 970, *citing* Pedro J. Martinez-Fraga, C. Ryan Reetz, *The Status of the Limitations Period Doctrine in Public International Law – Devising a Functional Analytical Framework for Investors and Host-States*, McGill Journal of Dispute Resolutions, Vol. 4 (2017-2018), p. 119 (**CLA-258**).

986 Reply, ¶¶ 967-969, *referring to Gentini Case*, Italy-Venezuela Claims Commission, 1903, RIAA Vol. X, p. 561 (**RLA-092**); *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 17-18, ¶ 32 (**RLA-093**); Francis Wharton (ed), *A Digest of International Law of the United States*, Vol. III (1886), p. 329 (**CLA-250**).

987 Reply, ¶ 951, *referring to Gentini Case*, Italy-Venezuela Claims Commission, 1903, RIAA Vol. X, p. 557 (**RLA-092**). *See also* Reply, ¶¶ 958-959, *referring to Gentini Case*, Italy-Venezuela Claims Commission, 1903, RIAA Vol. X, p. 553 (**RLA-092**).

988 Reply, ¶¶ 972-973, *citing Nordzucker AG v. Republic of Poland*, UNCITRAL (*ad hoc*), Partial Award (Jurisdiction), 10 December 2008, ¶ 221 (**RLA-096**); *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶ 415 (**RLA-095**).

international claims with extensive delays of two or three decades have been heard by international tribunals.[989]

665. Moreover, the Claimant considers the Respondent's reliance on Article 45(b) of the ILC Articles misplaced to suggest that the Claimant has acquiesced in the lapse of its claims, which are therefore time-barred.[990] The ILC Articles, according to the Claimant, do not apply to the Claimant in this case, given that it is neither a State actor nor connected to the State.[991] The Claimant adds that the Respondent has never pleaded otherwise to invoke the ILC Articles.[992]

666. In any event, the Claimant underlines that the principle of extinctive prescription cannot be invoked in the circumstances when a record of facts is available to the Respondent and valid reasons exist for the delay in the presentation of the claim.[993] For the Claimant, any delay in the commencement of the proceedings was reasonable in the circumstances, where (i) the Respondent continues to engage in measures that constitute part of the Claimant's claim in this arbitration and (ii) the Claimant has consistently taken steps since the fall of 2006 to avail itself of its rights under the Treaty.[994]

667. Relying on *Ambatielos*, the Claimant maintains that the Respondent's new measures after the issuance of the Supreme Court judgment in June 2006, including the seizure of all of the Claimant's investments in 2006 and 2007, the failed extradition action against Mr. Rotko in 2013, the involuntary detention of Ms. Kotova in 2016, and the renewed efforts to extradite Mr. Rotko in 2019, gave rise to claims covered under the Treaty.[995] In particular, the Claimant highlights that the criminal proceedings of Mr. Rotko in Estonia were pending until the statute of limitations expired in September 2021.[996] Accordingly, these ongoing aggravating developments after June 2006, the Claimant asserts, preclude the operation of prescription and set this arbitration distinct from the *Gentini Case*, where the claimant waited more than 30 years with its "paper ready" to present its claims.[997]

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989 Reply, ¶ 980, *referring to The Pious Fund of the Californias (The United States of America v. The United Mexican States)*, Award, 14 October 1902, RIAA, Vol. IX, p. 1 (**CLA-257**); *Giacopini Case (Italy v. Venezuela)*, RIAA Vol. X, p. 594 (**CLA-251**); *Tagliaferro Case (Italy v. Venezuela)*, RIAA Vol. X, p. 592 (**CLA-256**); 'US v. UK Commission (known as the King and Gracie Case, 1853)' in John Bassett Moore (ed), *History and Digest of the International Arbitrations to which the United States has been a Party* (1898), pp. 4179-4180 (**CLA-245**).

990 Reply, ¶¶ 962-963.

991 Reply, ¶ 964.

992 Reply, ¶ 965.

993 Replay, ¶¶ 974-977, *referring to* Jan Wouters and Sten Verhoeven, 'Prescription', Max Planck Encyclopaedias of International Law, November 2008, § 6 (**CLA-255**).

994 Reply, ¶¶ 979, 994.

995 Reply, ¶¶ 982, 984-987, *referring to The Ambatielos Claim (Greece, United Kingdom of Great Britain, and Northern Ireland)*, RIAA Vol. XII, p. 104 (**CLA-246**). *See also* Reply, ¶ 993.

996 Reply, ¶¶ 988-990.

997 Reply, ¶¶ 979, 991, *referring to Gentini Case*, Italy-Venezuela Claims Commission, RIAA Vol. X, 551 (**RLA-092**). *See also* Hearing Transcript, Day 5, p. 73:15-21.

668. According to the Claimant, any consideration on extinctive prescription must consider the Respondent's actions and weigh the prejudice suffered by each Party under the circumstances.[998] The Claimant emphasizes that it took persistent and consistent actions on a timely basis despite its limited fiscal capacity to pursue its claims under the Treaty, including engaging in discussions between 2009 and 2016 to obtain representation for this arbitration, filing an application for relief in the European Court of Human Rights, and securing third-party funding in 2017.[999] Given that this arbitration is the only opportunity left for redress, the Claimant considers that the prejudice of its claims being dismissed in this arbitration is "real and total."[1000] Therefore, the effect upon its access to justice, the Claimant asserts, should be "heavily weighted," similar to the ICJ's decision in the *LaGrand Case* to permit Germany's application to proceed almost seven years after the breach had become known to it.[1001]

669. In the same vein, the Claimant contests the Respondent's assertion that limitation periods under the local laws of Estonia or the U.S. may apply to impose limitation periods for claims to be brought under the Treaty.[1002] In support of this proposition, the Claimant relies on *Gavazzi v. Romania* as well as two other cases in which the tribunals determined that no other rules, including the local statute of limitations, applied to the proceedings other than international law.[1003]

670. The Claimant also rejects the claim that it is itself the cause of the missing evidence.[1004] Highlighting the Respondent's admission that it was difficult to preserve documents due to "a profound transformation on all levels of public life and administration," the Claimant criticizes the Respondent's "double-standard" of blaming the Claimant for not maintaining a full set of financial records or for the destruction of records by third-party service providers due to the passage of time when all of the Claimant's assets in Estonia had been taken away by the State.[1005]

671. In any event, the Claimant emphasizes that it had taken measures throughout these proceedings to preserve documentary evidence and minimize any detrimental impact caused by the delay, such as filing a motion for interim measures.[1006] To the contrary, the Claimant highlights the Respondent's submissions to the Tribunal, in response to the Claimant's motion, that it would not be prejudiced for not freezing the documents, given that the "per Estonian law, civil court files

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998 Reply, ¶ 1006.

999 Reply, ¶¶ 995-998. *See also* Third Rotko Statement, ¶¶ 447-450, 454 (**CWS-4**).

1000 Reply, ¶ 1007.

1001 Reply, ¶¶ 999-1000, *referring to LaGrand Case (Germany v. United States of America)*, I.C.J. Reports 2001, p. 466, pp. 486-487, ¶¶ 53-57 (**CLA-252**).

1002 Reply, ¶ 949.

1003 Reply, ¶¶ 952-957, *referring to Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 April 2015, ¶ 147 (**CLA-259**); *Luigiterzo Bosca v. The Republic of Estonia*, PCA Case No. 2011-05, Award, 17 May 2013, ¶ 120 (**CLA-247**); *The Pious Fund of the Californias (The United States of America v. The United Mexican States)*, Award, 14 October 1902, RIAA Vol. IX, p. 3 (**CLA-257**).

1004 Reply, ¶ 1014.

1005 Reply, ¶¶ 1013-1014, *citing* Respondent's Response to the Claimant's Motion for Interim Measures, 12 November 2018, ¶ 20.

1006 Reply, ¶¶ 1008, 1010.

must be – and will be – preserved indefinitely" and that the statutory requirements "apply[ing] to the preservation of documents in criminal cases, both in and out of court, require[…] the preservation of documents generally for a minimum period of 10 years after the termination of the proceedings."[1007] In light of these previous admissions, the Claimant takes the view that the Respondent cannot claim prejudice due to any delay at this stage of the proceedings.[1008]

3. The Tribunal's Analysis

a) Legal Standard

672. The US-Estonia BIT does not contain any rule of limitation as to the time in which a claim must be brought, or lapse of claim due to delay. In the absence of a treaty rule or specific agreement, tribunals have applied an equitable principle[1009] that a claimant should not unreasonably delay the pursuit of its claim.[1010]

673. International law does not specify any particular time period.[1011] The passage of time must be examined in the circumstances of each case.[1012] Tribunals examining this question have not referred to any particular approximate figure as to the measure of time. Statutory limitation periods under the law of the host State have on occasion been taken into account by international tribunals in considering periods of delay, including but not limited to limitation periods found in the municipal law applicable to the dispute. In most of the cases invoked by the Parties, tribunals have taken the relevant municipal limitation periods into account, among other factors, without

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1007 Reply, ¶¶ 1011-1012, *citing* Respondent's Response to the Claimant's Motion for Interim Measures, 12 November 2018, ¶¶ 24-25.

1008 Reply, ¶ 1017.

1009 *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 17-18, ¶ 32 (**RLA-093**); *Ambatielos Claim (Greece, United Kingdom of Great Britain, and Northern Ireland)*, RIAA Vol. XII, pp. 103-104 (**CLA-246**). The tribunal in the *Ambatielos* case found that the rule had been applied in numerous previous cases (referring to Oppenheim — Lauterpacht — *International Law,* 7th Edition, I, paragraph 155c; Ralston— *The Law and Procedure of International Tribunals,* paragraphs 683-698, and *Supplement,* paragraphs 683 *(a)* and 687 *(a)).* L'Institut de Droit international expressed a view to this effect at its session at The Hague in 1925.)

1010 *Nordzucker AG v. Republic of Poland*, UNCITRAL (*ad hoc*), Partial Award (Jurisdiction), 10 December 2008, ¶ 221 (**RLA-096**); *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID No. ARB/13/13, Award, 27 September 2017, ¶ 420 (**RLA-095**); *Gentini Case*, Italy-Venezuela Claims Commission, RIAA Vol. X, 551 (**RLA-092**); *Barberie,* cited in the *Gentini* case RLA-092 at p. 560 (**RLA-092**).

1011 Reply, ¶ 967; Rejoinder, ¶ 317; *Gentini Case*, Italy-Venezuela Claims Commission, RIAA Vol. X, 551, at p. 561 (**RLA-092**); *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 17-18, ¶ 32 (**RLA-093**); *Nordzucker AG v. Republic of Poland*, UNCITRAL (*ad hoc*), Partial Award (Jurisdiction), 10 December 2008, ¶ 221 (**RLA-096**).

1012 *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 17-18, ¶ 32 (**RLA-093**); *Nordzucker AG v. Republic of Poland*, UNCITRAL (*ad hoc*), Partial Award (Jurisdiction), 10 December 2008, ¶ 221 (**RLA-096**); *Gentini Case*, Italy-Venezuela Claims Commission, RIAA Vol. X, 551 (**RLA-092**).

applying them as such.[1013] In the single case cited by the Respondent, where a sole arbitrator applied the domestic statute of limitations as such, despite the lack of any limitation provision in the underlying treaty, the Tribunal notes that the relevant claim was based directly on domestic law.[1014]

674. The primary issue is whether the time taken by a party before initiating arbitration was justified or reasonable in the circumstances of the specific case.[1015] As held by the tribunal in *Interocean:* "no tribunal would look positively on a claim filed after the Claimants had waited unduly, sitting on its rights for an inordinate amount of time."[1016] A clear case for exclusion was found where a claimant had "so long neglected his supposed rights as to justify a belief in their nonexistence."[1017] Taken together, the jurisprudence invoked by the Parties suggests that the following factors appear relevant when assessing the specific circumstances of a case.

675. First, one must consider the point in time at which it would have been reasonable to bring the claim, bearing in mind, in particular, (*a*) the point at which the claimant had knowledge of all the circumstances relevant to its claim; (*b*) any continued development of the factual circumstances relevant to the assertion of the claim;[1018] and (c) whether the claim was presented before any competent authority,[1019] the principle that such presentation within proper time "will interrupt the

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1013 *Alan Craig v. Ministry of Energy of Iran*, IUSCT Case No. 346, Award, 2 September 1983, ¶ 45 (**RLA--098**); *Nordzucker AG v. Republic of Poland*, UNCITRAL (*ad hoc*), Partial Award (Jurisdiction), 10 December 2008, ¶ 223 (**RLA-096**); *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID No. ARB/13/13, Award, 27 September 2017, ¶ 415 (**RLA-095**).

1014 *Bogdanov v. Moldova,* Arbitration No. V114/2009, Final Award, 3 March 2010, ¶¶ 30, 94 **(RLA-097**). The sole arbitrator applied the Moldovan statute of limitations to exclude a specific portion of the damages to be awarded for a breach of Article 2.2 of the Moldova-Russia bilateral investment treaty, which provides: "Each Contracting Party guarantees under its legislation a complete and unconditional legal protection of the capital investments of the investors of the other Contracting Party."

1015 *Gentini Case*, Italy-Venezuela Claims Commission, RIAA Vol. X, 551 (**RLA-092**); *Nordzucker AG v. Republic of Poland*, UNCITRAL (*ad hoc*), Partial Award (Jurisdiction), 10 December 2008, ¶ 221 (**RLA-096**); *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID No. ARB/13/13, Award, 27 September 2017, ¶ 420 (**RLA-095**); *Bosca v. The Republic of Lithuania*, PCA Case No. 2011-05, Award, 17 May 2013, ¶ 120 (**CLA-247**); *Alan Craig v. Ministry of Energy of Iran*, IUST Case No. 346, Award, 2 September 1983, ¶ 45 (**RLA-098**).

1016 *Interocean Oil Development and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID No. ARB/13/20, Decision on Preliminary Objections, 29 October 2014, ¶ 125 (**CLA-249**).

1017 *Gentini Case*, Italy-Venezuela Claims Commission, RIAA Vol. X, 551 (**RLA-092**).

1018 *The Ambatielos Claim (Greece, United Kingdom of Great Britain, and Northern Ireland)*, RIAA Vol. XII, p. 104 (**CLA-246**); *Nordzucker AG v. Republic of Poland*, UNCITRAL (*ad hoc*), Partial Award (Jurisdiction), 10 December 2008, ¶ 222 (**RLA-096**).

1019 *Gentini Case*, Italy-Venezuela Claims Commission, RIAA Vol. X, 551 (**RLA-092**); *Giacopini Case (Italy v. Venezuela)*, RIAA Vol. X, p. 594 (**CLA-251**); *Tagliaferro Case (Italy v. Venezuela)*, RIAA Vol. X, p. 592 (**CLA-256**); *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID No. ARB/13/13, Award, 27 September 2017, ¶ 426 (**RLA-095**).

running of prescription"[1020] having been given effect in relation to domestic litigation[1021] and international arbitration proceedings.[1022]

676. Secondly, one must assess whether the period of delay was justified, with particular reference to the conduct of the claimant party during the interim period, including (*a*) the extent, if any, to which the claim was raised with the respondent party; [1023] and (*b*) the extent, if any, to which the claimant was inactive due to its own negligence[1024] or was otherwise "in repose" about or "sitting on" its rights.[1025]

677. Thirdly, one must examine the degree, if any, to which the lapse of time would occasion prejudice to the respondent party or otherwise hinder a just consideration of the case, [1026] including (a) whether there remains a clear evidentiary record of the case;[1027] and (b) whether it would have been reasonable to presume that no claim would be brought.[1028]

b) Application to the Facts

678. The Tribunal will first consider whether the Respondent's time-bar objection relates to the jurisdiction of the Tribunal, as contended by the Claimant, in which case it ought to have been raised in the Statement of Defense pursuant to Article 21(3) of the 1976 UNCITRAL Rules, or to the admissibility of the Claimant's claims, as characterized by the Respondent, in which case the objection was properly raised in the Counter-Memorial.

679. In the absence of an express provision for a limitation period or timeliness of claim in the US-Estonia BIT, the expression of consent to arbitration by the States parties to the US-Estonia BIT is not conditional upon the timing of claims, save for the minimum period of six months after the dispute has arisen. Any applicable time bar is an equitable consideration under international law and relates to the admissibility of the claim rather than the scope of consent to the jurisdiction of

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1020 *Gentini Case*, Italy-Venezuela Claims Commission, RIAA Vol. X, 551, at 561 (**RLA-092**).

1021 *Bosca v. The Republic of Lithuania*, PCA Case No. 2011-05, Award, 17 May 2013, ¶ 120 (**CLA-247**).

1022 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID No. ARB/13/13, Award, 27 September 2017, ¶¶ 425-426 (**RLA-095**).

1023 *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 17-18, ¶ 32 (**RLA-093**); *Ambatielos Claim (Greece, United Kingdom of Great Britain, and Northern Ireland)*, RIAA Vol. XII, pp. 103-104 (**CLA-246**); *Giacopini Case (Italy v. Venezuela)*, RIAA Vol. X, p. 594 (**CLA-251**); *Bosca v. The Republic of Lithuania*, PCA Case No. 2011-05, Award, 17 May 2013, ¶ 120 (**CLA-247**).

1024 *Gentini Case*, Italy-Venezuela Claims Commission, RIAA Vol. X, 551, at p. 558 (**RLA-092**). *See also* the factors agreed by both parties to the case of *Bosca v. The Republic of Lithuania*, PCA Case No. 2011-05, Award, 17 May 2013, ¶¶ 110, 115 (**CLA-247**).

1025 *Interocean Oil Development and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID No. ARB/13/20, Decision on Preliminary Objections, 29 October 2014, ¶¶ 125-126 (**CLA-249**).

1026 *Ambatielos Claim (Greece, United Kingdom of Great Britain, and Northern Ireland)*, RIAA Vol. XII, pp. 103-104 (**CLA-246**); *Gentini Case*, Italy-Venezuela Claims Commission, RIAA Vol. X, 551 (**RLA-092**); *Barberie, cited* in the *Gentini Case* p. 560 (**RLA-092**).

1027 *Barberie, cited* in the *Gentini Case*, p. 560 (**RLA-092**).

1028 *Gentini Case*, Italy-Venezuela Claims Commission, RIAA Vol. X, 551, p. 561 (**RLA-092**).

the Tribunal. The rule has been described as one of admissibility, a characterization with which the Tribunal agrees.[1029] For these reasons, the Respondent's prescription objection goes to the admissibility of the claim rather than to jurisdiction. The Respondent was therefore not precluded from raising this objection by Article 21(3) of the UNCITRAL Rules.

i. Period of Delay

680. As to the relevant time period, the Claimant contends that "aggravating developments" and ongoing wrongful acts continue to the present day; these circumstances are very different from the *Gentini* case in which the claimant waited with its "papers ready" during a three-decade period.[1030] The Respondent contends that the new measures taken relate exclusively to the detention of Ms. Kotova and the extradition of Mr. Rotko and are relevant only to the moral damages claim.[1031] The Respondent accepts that the moral damages claim would not be time-barred if it is otherwise admissible.[1032]

681. Concerning the remainder of the Claimant's claims, the Tribunal notes that the criminal proceedings did not preclude or prevent the Claimant from commencing arbitration. The existence of criminal proceedings does bear relevance to the question of whether the delay was reasonable, which is examined below. They have not paused or restarted the period of time that is to be considered as a delay.

682. As to that period of time, the domestic litigation concerning the validity of the Claimant's possession became final with the decision of the Supreme Court denying leave to appeal the 2006 Tallinn Judgment, made on 7 June 2006.[1033] The Claimant asserted this claim as of 1 August 2017, when it notified the government of Estonia of an investment dispute by letter in connection with the requirement under Article VI(3)(a) that six months have elapsed from the date on which the dispute arose.[1034] The Tribunal will examine the events and circumstances arising in the interim period.

1029 *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 17-18, ¶ 32 (**RLA-093**).

1030 Reply, ¶ 991.

1031 Rejoinder, ¶ 326.

1032 Rejoinder, ¶ 326.

1033 Memorial, ¶ 197; Supreme Court of Estonia, *Estonia v. Verest and others*, Case No. 3-7-1-2-229, 7 June 2006 (**C-082**).

1034 Counter-Memorial, ¶ 452; Notice of Dispute, p. 1; Reply, ¶ 993.

ii. Relevant Events between June 2006 and August 2017

(I.) Proceedings before the European Court of Human Rights between December 2006 and 26 February/5 March 2008[1035]

683. After 7 June 2006, the Claimant made efforts to secure redress from the European Court of Human Rights, which it commenced less than six months after the finality and enforcement of the ownership dispute.

684. The human rights complaint was initiated by Verest, Agrin, BPV, and ELA Tolli on 4 December 2006 on the basis of alleged violations of Article 6 (right to a fair trial), Article 14 (prohibition against discrimination), and Article 17 (prohibition against corruption) of the European Convention on Human Rights, as well as Article 1 (right to property) of Protocol No. 1 to the Convention.[1036] According to the Claimant, this was the only recourse that ELA believed to be available at the time.[1037] The European Court of Human Rights declined to hear the case by decision issued on 4 March 2008. It found that the material in its possession, and in so far as the matters complained of were within its competence, did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.1038 For this reason, the Court ruled the case inadmissible under Article 28 of the European Human Rights Convention for lack of compliance with the requirements set out in Articles 34 and 35 of the Convention.[1039]

685. The Claimant was within its rights to seek redress under the European Convention on Human Rights. Even in the absence of financial difficulties, it was reasonable not to commence a BIT claim simultaneously.

(II.) Financial Difficulties

686. The Claimant submits that although it has sought to deal with this dispute since 2006, the Respondent's action rendered the Claimant's attempts extremely difficult due to the depletion of corporate financial resources.[1040] The Claimant contends that its financial distress was caused by the proceedings to enforce the Supreme Court Judgment and the compensation adjudged to be owed to the Government.

1035 Memorial, ¶¶ 201, 205, 209. Application for the European Human Rights Court, 4 December 2006, (**C-052**); Letter from Pascale Hecker to European Court of Human Rights regarding application, 30 May 2007, p. 2 (**C-134**).

1036 Notice of Arbitration, ¶ 68; Memorial, ¶ 201; Application for the European Human Rights Court, 4 December 2006, pp. 6-51 (**C-052**).

1037 Notice of Arbitration, ¶ 68; Memorial, ¶ 209; European Court of Human Rights Decision, Application No. 48966/06, 4 March 2008 (**C-212**).

1038 Notice of Arbitration, ¶¶ 68-69; European Court of Human Rights Decision, Application No. 48966/06, 4 March 2008 (**C-212**).

1039 European Court of Human Rights Decision, Application No. 48966/06, 4 March 2008 (**C-212**).

1040 Third Rotko Statement, ¶¶ 438-440 (**CWS-4**).

687. The Tribunal accepts that following the Supreme Court decision of 7 June 2006, the Claimant and its subsidiaries faced legal actions for enforcement (June-August 2006),[1041] damages (December 2006-December 2008),[1042] the seizure of assets (January 2007),[1043] and insolvency (2008).[1044] The record shows, further, that the Claimant's corporate officers were subject to a criminal procedure that commenced on 22 September 2006, in which an extradition request was made in respect of Captain Rotko on 30 January 2013.[1045] Mr. Rotko testified that these proceedings, of which he became aware in 2016, cost him all of his savings.[1046]

688. The Tribunal has no difficulty in concluding that these circumstances caused the Claimant to experience financial difficulties, and is convinced that such difficulties affected the Claimant's ability to act upon its rights.

(III.) The Claimant's Attempts to Secure Legal Representation and Funding

689. According to correspondence provided by the Claimant, in 2007 the Claimant's local counsel in Estonia withdrew its representation.[1047] Mr. Rotko contends that he consulted with counsel during the intervening period (2009, 2010, 2012, 2013 and 2016)[1048] and was unable to secure the necessary legal representation due to lack of funds. Mr. Rotko's queries included seeking representation on a contingency basis, which were also unsuccessful.[1049] Mr. Rotko states that this situation changed only in 2016 following the prevalence and development of third-party funding.

690. The Respondent disputes whether those discussions with legal counsel occurred and contends that it would have been easy to prove the fact without breaking legal privilege.[1050] The Respondent has not offered evidence to the contrary. Commenting separately on the merits of the Claimant's case, counsel for the Respondent stated: "I don't have any trouble believing that Mr. Rotko had difficulty finding counsel."[1051] The Tribunal has no reason to doubt that Mr. Rotko sought legal counsel before obtaining the necessary funding.

1041 Enforcement: Memorial, ¶ 198, *citing* Agrin Immovable property eviction execution, 19 June 2006, pp. 1-2 (**C-130**); Verest Immovable property eviction execution, 19 June 2006, pp. 1-2 (**C-131**).

1042 Damages: Memorial, ¶ 202, *citing* Estonia's Statement of Claim against Verest, Agrin, Ela Tolli and BPV, 22 December 2006, pp. 1-13 (**C-135**); Estonia's Petition for Securing the Action, 22 December 2006, pp. 1-5 (**C-136**).

1043 Asset seizure: Memorial, ¶ 203, *citing* Harju County Court order seizing assets and bank account, 2 January 2007 (**C-205**).

1044 Insolvency: Memorial, ¶ 212; Reply, ¶ 1566.

1045 Counter-Memorial, ¶ 732, *referring to* Letter from Pascale Hecker to European Court of Human Rights regarding application, 30 May 2007 (**C-134**); Extradition Request, 30 January 2013 (**C-550**).

1046 Fourth Rotko Statement, ¶ 516 (**CWS-5**).

1047 Memorial para. 207, *citing* Letter from Pascale Hecker to European Court of Human Rights regarding application, 30 May 2007 (**C-134**).

1048 Third Rotko Statement, ¶ 447 (**CWS-4**).

1049 Third Rotko Statement, ¶ 446 (**CWS-4**).

1050 Rejoinder, ¶ 320.

1051 Hearing Transcript, Day 5, p. 136:17-18.

691. Concerning the timing of the Claimant's third-party funding arrangement, Mr. Rotko states: "it was only in 2016, after the concept of third-party funding was developed and more prevalent in the United States that ELA U.S.A. could bring our case against the Republic of Estonia".[1052] The Respondent contends that "arbitration financing was available since 2008 at the latest", which is when the practice of third-party funding of investor-State arbitration commenced.[1053]

692. Third-party funding is a relatively new practice in investor-State arbitration. As of 2019 it remained an industry about which "little is known" due to a lack of transparency.[1054] Funding of claims is not available as of right. Funders deciding whether to fund an individual case consider factors such as "the merits of the case; the enforceability of the award against the host-state; its development level, and ability to mount an effective legal team; the potential value of compensation; any adverse costs that may be faced if the claim is unsuccessful; and the expertise of the legal team they will be funding."[1055] In these circumstances, the Tribunal finds that there was no undue delay in Mr. Rotko taking steps to secure third-party funding upon that practice having developed and become more prevalent.

693. The Respondent contends that difficulties in securing funding should not have prevented the Claimant from notifying the Respondent of the existence of a dispute.[1056] The Tribunal does not accept this argument. A party intending to commence contentious legal proceedings is entitled and would indeed be well advised to secure adequate legal advice, representation, and resources before engaging in pre-action correspondence.

iii. Reasonableness

694. As detailed above, the Claimant was faced with a series of challenging circumstances in the form of legal proceedings, asset seizure, lack of financial resources, and a lack of legal advice and representation. It is logical to suppose that any party facing such actions would need to expend resources to exercise its legal rights therein. The Tribunal is satisfied that the Claimant's financial difficulties did not result from its own negligence. The Claimant was within its rights to pursue redress from the European Court of Human Rights and to await the outcome of those proceedings before commencing arbitration. In the circumstances, the Tribunal finds that the actions of the Claimant in the relevant period of delay were not unreasonable.

iv. Prejudice

695. The Tribunal must next consider whether prejudice would be occasioned to the Respondent. The Respondent argues that since the deadline for preserving accounting records is 7 years under

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1052 Third Rotko Statement, ¶ 515 (**CWS-4**).

1053 Rejoinder, ¶ 23.

1054 S. Xin Chen, K. Hough, *Researching Third-Party Funding in Investor-State Dispute Settlement*, (GlobaLex, May 2019), p. 5 (**RLA-222**).

1055 S. Xin Chen, K. Hough, *Researching Third-Party Funding in Investor-State Dispute Settlement*, (GlobaLex, May 2019), p. 2 (**RLA-222**).

1056 Rejoinder, ¶ 23.

Estonian law, a claimant must at least bring a claim "well ahead" of that time.[1057] The Respondent contends that it is prejudiced by the fact that the detailed books and records of the relevant Estonian companies "have most likely been destroyed" and that the failure to preserve the necessary evidence for this arbitration is the Claimant's responsibility.[1058] The Respondent submits in particular that it has been prejudiced because the signatories of the handover protocol by which the Seaplane Harbor property and buildings were handed over to the Respondent in 1994 have passed away or cannot be identified by the Ministry of Defense or the Estonian War Museum.[1059] It states: "These are just a few examples of how the passage of more than two decades from the events relevant to the claim" causes it prejudice, but does not detail further examples.[1060]

696. The Claimant points to the fact that in the Interim Measures motion before this Tribunal, the Respondent relied upon the availability of civil and criminal court files.[1061] According to the Claimant, difficulties in maintaining evidence are not ELA's responsibility.[1062]

697. The Tribunal is satisfied that the record pertaining to the Claimant's dispute is found "in large part" in the documents and evidence filed in the civil court proceedings No. 2/23-7262 (2-02-270)[1063] and No. 2-06-39447.[1064] It is uncontentious in this connection that the civil court files "must be – and will be – preserved indefinitely".[1065] Nor is there a dispute as to the availability of the framework of laws and regulations relevant to the dispute at the material times.

698. In relation to the series of transactions by which the possession of the Lennusadam Port changed hands, each Party relies primarily on the face of the record. In any event, it is not clear which issues, if any, would turn upon the circumstances in which the handover protocol of 15/22 February 1994 was concluded, such that it would be prejudicial not to hear the evidence of its signatories. The handover protocol of 15/22 February 1994 is mentioned only once more in the written pleadings, in the Respondent's narration of the facts.[1066]

699. The Respondent adds that much of the Claimant's evidence is uncorroborated witness testimony, and states that whether prejudice will be caused to it depends on the Tribunal's view on the burden

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1057 Counter-Memorial, ¶ 462.

1058 Counter-Memorial, ¶ 463.

1059 Counter-Memorial, ¶ 464, *referring to* Handover Protocol of Military Camp 22, 15/20 February 1994 (**R-055**); Therium Litigation Funding website extract, obtained 13 July 2021 (**R-237**).

1060 Counter-Memorial, ¶ 464.

1061 Respondent submission of 12 November 2018, ¶¶ 24-25, *cited in* Reply, ¶ 1011.

1062 Reply, ¶ 1014.

1063 March 2006 Appeal Judgment (**C-081**).

1064 Estonia's Statement of Claim against Verest, Agrin, Ela Tolli and BPV, 22 December 2006 (**C-135**).

1065 Reply, ¶ 1011, *citing* Response to Motion for Interim Measures, ¶ 24-25, fn. 15-16, *citing Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction Admissibility and Liability, 21 April 2015 (**RLA-207**).

1066 Counter-Memorial, ¶ 134.

of proof.[1067] The burden of proof prescribed by Article 24(1) of the UNCITRAL Rules states: "Each party shall have the burden of proving the facts relied on to support his claim or defense." It follows from this rule, from which this Tribunal has not been mandated to deviate, that the Claimant is assigned the burden of proof in proving its claims. The absence of documentary evidence in support of the Claimant's case does not prejudice the Respondent.

700. The Tribunal is not satisfied that the Respondent has been prejudiced by delay in relation to this claim.

701. For the above reasons, the Tribunal dismisses the Respondent's objection based on prescription.

E. WHETHER THE TRIBUNAL LACKS JURISDICTION OVER MORAL DAMAGES

702. The Respondent submits that the Tribunal lacks jurisdiction over a claim for moral damages for the alleged human rights violations and the resulting distress suffered by the Claimant's corporate officials. The Claimant disagrees, maintaining that its claim for moral damages is connected to the Claimant and its investments.

1. The Respondent's Position

703. With reference to *Biloune v. Ghana Investment Centre*, the Respondent contends that a claim alleging a violation of the human rights of an investor, let alone any other individual, cannot proceed under the Treaty as it does not relate to the rights of the investor conferred or created by the Treaty with respect to an investment.[1068]

704. The Claimant's claim for moral damages in this arbitration, the Respondent continues, involves the personal rights of the Claimant's corporate officials in connection with a criminal case that commenced in September 2006, *i.e.*, after the investment was allegedly expropriated.[1069] For the Respondent, such claim for moral damages falls outside the scope of its consent to arbitrate disputes arising from an investment under Article VI(1)(c) of the Treaty.[1070]

705. The Respondent argues that the alleged human rights violations during the criminal proceedings arise from measures directly against individuals only "linked to" the Claimant rather than against the Claimant or the investment itself.[1071] Accordingly, in the Respondent's view, the rights of Mr. Rotko and Ms. Kotova are "personal and distinct" from those of the Claimant, and the Respondent is, therefore, under no obligation to compensate for the harm suffered by two individuals, neither of whom is a party to this arbitration.[1072]

1067 Rejoinder, ¶ 323.

1068 Counter-Memorial, ¶ 447, *referring to Biloune v. Ghana Investments Centre*, UNCITRAL (*ad hoc*), Award on Jurisdiction and Liability, 27 October 1989, p. 203 (**RLA-091**).

1069 Counter-Memorial, ¶¶ 445, 448, 718; Rejoinder, ¶ 305. *See also* Counter-Memorial, fn. 406.

1070 Counter-Memorial, ¶¶ 445-446, 451; Rejoinder, ¶ 307.

1071 Counter-Memorial, ¶ 450. *See also* Hearing Transcript, Day 5, p. 141:6-15.

1072 Counter-Memorial, ¶ 450; Rejoinder, ¶ 308.

706. The Respondent further underscores that Mr. Rotko's extradition proceedings and Ms. Kotova's detention were "completely avoidable" only if they engaged with the pending criminal proceedings, which they were fully aware of in 2007.[1073] Rather, they "chose to ignore it."[1074]

2. The Claimant's Position

707. As a preliminary matter, the Claimant asserts that the issue of moral damages is not a question of jurisdiction.[1075]

708. In any event, the Claimant argues that the Tribunal has the authority to consider its claim for moral damages on the grounds that the incorporeal harm alleged is (i) connected to the Claimant or its investments in Estonia and (ii) caused by the Respondent's actions or at its direction and control in order to "denigrate and harm the reputation of [ELA] and its corporate officials and advisors."[1076] Specifically, the Claimant contends that the Respondent's expropriation of the investments in breach of the Treaty, the actions taken by Government officials to harm the reputation of ELA Corporate Group and its officers, as well as Estonia's request to extradite Mr. Rotko from the U.S., form a solid basis for the Tribunal to address its moral damages claim, which the Claimant has substantiated with both documentary and medical evidence.[1077]

709. In support of its claim, the Claimant notes that it is not uncommon in investment arbitrations for a claimant to be awarded moral damages on account of physiological suffering and stress suffered by its corporate officials and the loss of reputation caused by the conduct of the respondent State. Therefore, the Claimant disagrees with the Respondent's contention that any damage suffered by ELA's officers constitutes personal injury and is separate from the damage suffered by ELA.

3. The Tribunal's Analysis

a) Legal Standard

710. The Tribunal's jurisdiction to hear any moral damages claim is circumscribed by the terms of the US-Estonia BIT. The scope of Estonia's consent to arbitration under Article VI(4) of the US-Estonia BIT extends only to any "investment dispute", such being defined in Article VI(1) as:

> a dispute between a Party and a national or company of the other Party arising out of or relating to:
>
> (a) an investment agreement between that Party and such national or company;
>
> (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or

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1073 Hearing Transcript, Day 5, pp. 140:20 – 141:5.

1074 Hearing Transcript, Day 5, p. 141:5.

1075 Reply, ¶ 908.

1076 Reply, ¶ 909.

1077 Reply, ¶¶ 908-914.

> (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

711. The US-Estonia BIT thus does not provide for claims for the violation of human rights as an independent cause of action.

712. This important distinction was considered in the *Biloune v. Ghana Investments Centre* case.[1078] The investors asserted that compensation for a human rights violation could be required in a commercial arbitration and that their claim should be considered because the tribunal was the only forum in which redress could be sought. The tribunal accepted that a State is required by customary international law to accord foreign nationals within its territory a standard of treatment no less than that prescribed by international law, and that contemporary international law recognized the entitlement of all individuals to fundamental human rights. This did not render the tribunal "competent to pass upon every type of departure from the minimum standard to which foreign nationals are entitled," or "authorized to deal with allegations of violations of fundamental human rights." Acts alleged to violate international human rights could be relevant in considering the investment dispute under arbitration. However, in circumstances where the host State had agreed to arbitrate only disputes "'in respect of' the foreign investment," the tribunal held that "other matters – however compelling the claim or wrongful the alleged act" were outside its jurisdiction.

713. Damages for breaches of international law have not been confined to material losses. Non-material damage, as summarized in the commentary to Article 36 of the ILC Draft Articles, "is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life."[1079]

714. Claims for compensation of non-material damage were upheld, for example, in the 1905 *Fabiani* case, in relation to bankruptcy, loss of prestige, pain, and suffering arising from "repeated denials of justice."[1080] In the 1923 *Lusitania* case, the position under international law was stated as follows:

> That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefore as compensatory damages, but not as a penalty.[1081]

715. In investor-State claims, tribunals ruling on damages, having found a breach of the investment treaty concerned, have recognized or awarded monetary compensation for "moral damages",

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1078 *Biloune v. Ghana Investments Centre*, UNCITRAL (*ad hoc*), Award on Jurisdiction and Liability, 27 October 1989, p. 203 (**RLA-091**).

1079 Reply ¶ 1571, *referring to* Int'l Law Commission Draft Articles of State Responsibility for Internationally Wrongful Acts with commentaries, Vol. II, Part Two, 2001, Commentary on Article 36, at ¶ 16, **(CLA-126**).

1080 *Antoine Fabiani* Case (Venezuela – Italy Mixed Commission decision 1905), p. 62 (**CLA-353**).

1081 *Lusitania* Cases, 7 R.I.A.A. 32, 40 (1923), p. 40 (**CLA-140)**), p. 40.

"intangible losses", or "dommage moral".[1082] In *Desert Line Projects LLC v. Yemen,* while the host State had not questioned the possibility for the Claimant to obtain moral damages in the context of the ICSID procedure, the tribunal stated as follows:

> Even if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages. It is generally accepted in most legal systems that moral damages may also be recovered besides pure economic damages. There are indeed no reasons to exclude them.[1083]

716. Forms of non-material harm held to be compensable by investor-State tribunals have included physical threat or duress, illegal detention, prejudice to credit and reputation, stress, anxiety, or other mental suffering such as humiliation, shame and degradation.[1084]

717. Investors are expected to exercise a degree of resilience. An exceptionally high threshold of seriousness or gravity must be met before moral damages claims are upheld on their merits. The investor must establish an unbroken chain of causation between the treaty breach and the moral injury.[1085] Whether the breach of the rights of a corporate claimant would incur liability for moral harm to individual executives who are not parties to the arbitration would depend on the facts of the case. These questions pertain to the merits of a claim for moral damages and do not further limit the tribunal's jurisdiction beyond a requirement to establish a breach of the treaty.

b) Application to the Facts

718. The Claimant asserts that by reason of the facts and matters which it claims amount to breaches of the US-Estonia BIT, ELA and its corporate officers suffered reputational harm,[1086] and ELA's corporate officers further suffered psychological and emotional harm due to harassment, intimidation, expatriation from Estonia, and concerns for their personal safety.[1087]

719. As was the case in *Biloune v. Ghana*, this Tribunal has not been given jurisdiction over a claim for moral damages or the violation of human rights norms as an independent cause of action. It

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1082 *Víctor Pey Casado v. Republic of Chile*, ICSID Case No ARB/98/2, Award 8 May 2008 ¶ 704 (**RLA-220**); *Desert Line Projects LLC v. The Republic of Yemen*, ICSID No. ARB/05/17, Award, 6 February 2008, ¶ 286 (286-291) (**CLA-029**). *Mohammed Al-Kharafi & Sons v. Libya and others*, Final Arbitral Award, 22 March 2013, pp. 368-369 (**CLA-142**). In one such case, the tribunal had been empowered to decide *ex aequo et bono* but did not invoke this as an express basis for its reasoning on moral damages: *S.A.R.L. Benvenuti & Bonfant v. People's Republic of Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980, ¶¶ 2.3, 4.44, 4.65, 4.96 (**CLA-354**).

1083 *Desert Line Projects LLC v. The Republic of Yemen*, ICSID No. ARB/05/17, Award, 6 February 2008, ¶ 289 (**CLA-029**).

1084 *See* summary in *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶ 333 (**RLA-150**).

1085 *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶ 157 (**RLA-150**).

1086 Memorial, ¶¶ 575-581.

1087 Memorial, ¶¶ 591-597.

has not been empowered to decide any aspect of the case *ex aequo et bono.* There is no prior admission or agreement establishing the Respondent's liability for any of the Claimants' claims.

720. The Claimant accepts that it is necessary to demonstrate unlawful actions taken by the State.[1088] The Tribunal's jurisdiction to award relief for moral harm depends, more specifically, on whether it finds any "breach of any right conferred or created by this Treaty with respect to an investment". Non-compliance with norms other than the protections conferred by the US-Estonia BIT would not be sufficient.

721. Consistently with this rule, in the decisions cited by the Claimant in which moral damages were awarded, such damages formed part of the relief for liability that had been admitted[1089] or upheld.[1090] Likewise, in *Victor Pey Casado v. Chile*, the tribunal upheld claims of denial of justice and breach of the fair and equitable treatment standard before considering appropriate relief for the resulting moral injury.[1091] In *Arif v. Moldova* and *Lemire v. Ukraine*, each tribunal had found a breach of the fair and equitable treatment standard before it engaged in assessing the substance or gravity of the moral harm caused.[1092]

722. The Tribunal agrees with the dictum of the tribunal in *Desert Line* that "[e]ven if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages."[1093] This does not alter the rule that the US-Estonia BIT protects exclusively the rights of the investors and only such rights that arise directly out of the investment.

723. Jurisdiction over moral damages would not be excluded because the claimed harm had been suffered by Mr. Rotko and Ms. Kotova, who are individual corporate officers of ELA U.S.A. and are not parties to the arbitration. Such harm was not excluded, for example, in *Desert Line Projects LLC v. Yemen*, where the claimant's executives were not parties to the case but were found to have suffered stress, anxiety, and harm to their physical health arising out of the treaty breach.[1094] Non-material loss to a corporate investor or its executives of the type alleged in this case rest within the purview of damages that this Tribunal could award, should the Claimant establish a breach of "rights of investors" or "rights arising directly out of the investment". The

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1088 Reply, ¶ 910.

1089 *Lusitania* Cases, 7 R.I.A.A. 32, 40 (1923), p. 40 (**CLA-140**).

1090 *Antoine Fabiani* Case (Venezuela – Italy Mixed Commission decision 1905), 10 R.I.A.A, 83 (**CLA-353**); *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980 (**CLA-354**); *Desert Line Projects LLC v. The Republic of Yemen*, ICSID No. ARB/05/17, Award, 6 February 2008, (**CLA-029**); *Mohammed Al-Kharafi & Sons v. Libya and others*, Final Arbitral Award, 22 March 2013 (**CLA-142**).

1091 *Víctor Pey Casado v. Republic of Chile*, ICSID Case No ARB/98/2, Award 8 May 2008 ¶ 704 (**RLA-220**).

1092 *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶ 157 (**RLA-150**); *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 (**RLA-193**).

1093 *Desert Line Projects LLC v. The Republic of Yemen*, ICSID No. ARB/05/17, Award, 6 February 2008, ¶ 289 (**CLA-029**).

1094 *Desert Line Projects LLC v. The Republic of Yemen*, ICSID No. ARB/05/17, Award, 6 February 2008, ¶ 290 (**CLA-029**).

relationship of individual moral injuries to the treaty rights of ELA U.S.A. would form part of the Tribunal's analysis on liability, as would the causal relationship with the alleged treaty breach and the seriousness of the harm.

724. In conclusion, the Tribunal considers that it would not be precluded from considering moral harm caused to the Claimant or its corporate officers, such as deprivation of liberty, injury to health, fear for personal safety, the need to change the country of residence, or loss of reputation, in assessing damages for any breach of the US-Estonia BIT. Whether or not any breach of the US-Estonia BIT is established is, however, a question of the merits.

VI. MERITS

725. In its findings on jurisdiction, the Tribunal has held that the Claimant's only investments within the meaning of Article I(1)(a)(iii) of the Treaty were its shares in BPV and, indirectly, in Verest and Agrin. Before turning to the merits, the Tribunal must address the question of whether the Claimant's investments are protected from State measures that are not directed against its shares, but rather against the companies in which it held shares.[1095] There is widespread consensus in arbitral jurisprudence that a "cut-off point" exists after which an indirect shareholder is too far removed from its investment to claim protection under a treaty.[1096] But there is significant uncertainty on where exactly this cut-off point lies. Relevant factors include the number of layers between the investor and the relevant investment, that is, the company directly affected by the State measures, as well as the level of control the investor can exercise over that company.

726. Here, the Claimant was the direct or indirect majority or sole shareholder of BPV (from 1997 until 2011), Verest (from 1999 until 2010), and Agrin (from 1999 to 2001).[1097] Furthermore, the Claimant has substantiated how it controlled the economic activities performed by its subsidiaries either directly or through one intermediary, that is, BPV. Against this background, the Tribunal does not consider the connection between the Claimant and its subsidiaries to be too remote for the Treaty to offer protection against measures affecting those subsidiaries.

727. With these observations in mind, the Tribunal now turns to the standards of protection invoked by the Claimant.

A. ARTICLES II(3) & (7) OF THE TREATY: FAIR AND EQUITABLE TREATMENT

728. Article II, in paragraphs (3) and (7), of the Treaty provides, in relevant part, as follows:

> 3. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than required by international law.

1095 *See El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Legal Opinion of M. Sornarajah, 5 March 2007, ¶ 10 (**RLA-055**).

1096 *Noble Energy Inc. and MachalaPower Cia. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, ¶¶ 80-82 (**RLA-012**).

1097 *See supra* ¶¶ 370, 373, 374.

> (b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purpose of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.
>
> […]
>
> 7. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.

729. The Claimant submits that the Respondent violated its obligations under paragraphs (3) and (7) of Article II to accord its investments fair and equitable treatment, including by frustrating the Claimant's legitimate expectations, impairing the Claimant's investments through arbitrary and discriminatory measures, corrupt practices and unlawful interfering in the judicial process, and denying the Claimant an effective means of asserting its claims in relation to its investment. The Respondent denies the Claimant's claims in their entirety.

1. Art. II(3)(a) – Fair and Equitable Treatment

730. The Claimant, alleging a violation of Article II(3)(a), invokes the doctrines of estoppel and legitimate expectations as protections under the FET standard.[1098]

a) The Content of the FET Standard

i. The Claimant's Position

731. The Claimant submits that Article II(3)(a) of the Treaty requires the Respondent to accord protected investors FET treatment.[1099] This standard, the Claimant asserts, is not equivalent to the one articulated in the *Neer* case.[1100] While the Respondent has relied on this authority in its submissions, the Claimant contends that tribunals have rejected the application of the *Neer* standard, considering *inter alia* that there has been an evolution in customary international law since the 1920s, when the award in that case was rendered.[1101]

732. According to the Claimant, a claim under the FET standard should be assessed in light of the specific circumstances of each case.[1102] Relying on the practice of arbitral tribunals, the Claimant submits that the FET standard, which includes obligations articulated under Article II(3)(a), II(3)(b) and II(7) of the Treaty, encompasses a host state's obligation (i) to act in good faith, which

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1098 Memorial, ¶¶ 461-473; Reply, ¶¶ 1467-1472.

1099 Memorial, ¶¶ 378-379; Reply, ¶ 1143.

1100 Reply, ¶¶ 1138-1142, *referring to Neer v. Mexico, Opinion*, US-Mexico General Claims Commission, 15 October 1926, p. 61 (**RLA-127**).

1101 Reply, ¶¶ 1139-1141, *referring to Pope & Talbot Inc v. Government of Canada*, Award on Damages, 31 May 2002, ¶¶ 57-60 (**CLA-357**); *Mondev International Ltd. v. United States*, Award, 11 October 2002, ¶¶ 115-116 (**CLA-093**).

1102 Reply, ¶¶ 1191-1195, *referring to Waste Management Inc. v. United Mexican States (II)*, Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 99 (**CLA-066**); *Mondev International Ltd. v. United States*, Award, 11 October 2002, ¶ 118 (**CLA-093**).

encompasses the principle of estoppel;[1103] (ii) not to act in an arbitrary or discriminatory manner (including under Article II(3)(b));[1104] (iii) to respect due process;[1105] (iv) to provide the investor and its investments with full protection and security;[1106] (v) to provide investors with an effective means of protection (including under Article II(7));[1107] (vi) to act transparently and without corruption;[1108] and (vii) to protect investors against an abuse of rights.[1109]

733. The Claimant submits that the Respondent has violated the above obligations through a variety of measures, each of which the Tribunal shall address in the following sections in turn.

ii. The Respondent's Position

734. The Respondent submits that the Claimant's claim under Article II(3)(a) of the Treaty should be rejected as: (i) "the Claimant has not established that it had any legitimate expectations;" (ii) "the Respondent afforded the Claimant due process and acted in a reasonable and justified manner;" and (iii) "the claims for corruption and unlawful interference are simply not substantiated."[1110]

735. The Respondent submits that the FET standard provided for in Article II(3)(a) of the Treaty is equivalent to the minimum standard of treatment under customary international law.[1111] This is evidenced, the Respondent asserts, by the express reference in Article II(3)(a) to the treatment "required by international law."[1112] The Respondent further relies, in this regard, on the explicative letter from the United States' Secretary of State to the President before the ratification of the Treaty and the award in *Genin v. Estonia*.[1113]

736. According to the Respondent, the contemporaneous understanding of the minimum standard of treatment is reflected in the award in *Waste Management v. Mexico (II)*.[1114] That tribunal defined the minimum standard of treatment as treatment that would not be "arbitrary, grossly unfair, unjust or idiosyncratic, [] discriminatory and expose[] the claimant to sectional or racial prejudice,

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1103 Memorial, ¶¶ 387-390, 431-448.

1104 Memorial, ¶¶ 391-404; Reply, ¶¶ 1180-1189.

1105 Memorial, ¶¶ 417-422; Reply, ¶¶ 1146-1155.

1106 Memorial, ¶¶ 449-460.

1107 Reply, ¶¶ 1156-1167.

1108 Memorial, ¶¶ 423-430.

1109 Memorial, ¶¶ 405-416; Reply, ¶¶ 1168-1179.

1110 Counter-Memorial, ¶ 525.

1111 Counter-Memorial, ¶¶ 526-531; Rejoinder, ¶ 352.

1112 Counter-Memorial, ¶¶ 526-527; Rejoinder, ¶ 352.

1113 Counter-Memorial, ¶¶ 528-529*, referring to* Letter of Submittal from Warren Christopher, Department of State, to William J. Clinton, President of the United States, 7 September 1994, p. 7 (**R-157**); *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, ¶ 367 (**RLA-126**). *See also* Rejoinder, ¶ 353.

1114 Counter-Memorial, ¶ 531, *referring to Waste Management, Inc. v. Mexico (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98 (**CLA-066**).

or involve[] a lack of due process leading to an outcome which offends judicial propriety."[1115] Under the mentioned standard, the Respondent contends, a "simple 'unreasonableness' is not sufficient" to establish a breach of the FET standard.[1116] Rather it is required to prove "a more pronounced degree of misdoing" such as "serious malfeasance, manifestly arbitrary behavior or denial of justice causing apparent harm and damages to the claimant."[1117] Moreover, the Respondent contends that, to establish a breach of the FET standard, "there must be a causal link between the action and the damage."[1118]

737. In addition, the Respondent states that in assessing the Claimant's claims under Article II(3)(a) of the Treaty, the Tribunal should consider the factual background of this dispute, which is "that of a newly independent state in the midst of a land reform."[1119] In this regard, the Respondent alleges that, at the time the dispute arose, the States' systems and databases concerning State assets "were still being set up."[1120]

iii. The Tribunal's Analysis

738. The Tribunal acknowledges the Parties' submissions on the content of the FET standard. It is nonetheless not persuaded that the outcome of the case hinges on the question of whether the US-Estonia BIT includes an autonomous FET standard or only provides the protection offered by an international minimum standard of treatment.

739. The Claimant's submissions in favor of an autonomous treaty standard are supported by an analysis of the terms of the US-Estonia BIT as per Article 31(1) VCLT. The language of Article II(3)(a) points first to an autonomous FET treaty standard, second to full protection and security, and only third to an international treatment standard, serving as the minimum threshold:

> Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than required by international law.[1121]

740. Nonetheless, as put forward by the Respondent, other elements suggest that the international minimum standard applies instead. In particular, the Letter by Warren Christopher, Secretary of State, addressed to the U.S. Senate states that Article II(3) "sets out a minimum standard of treatment based on customary international law."[1122] Even though this statement offers support

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1115 Counter-Memorial, ¶ 531, *referring to Waste Management, Inc. v. Mexico (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98 (**CLA-066**).

1116 Counter-Memorial, ¶ 533.

1117 Counter-Memorial, ¶ 533, *referring to Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on the Remaining Issues of Jurisdiction and on Liability, 12 September 2014, ¶ 558 (**RLA-124**).

1118 Counter-Memorial, ¶ 535.

1119 Counter-Memorial, ¶ 534.

1120 Counter-Memorial, ¶ 534, *referring to* Äripäev, "State asset register will start in autumn", 17 June 1996 (**R-097**).

1121 BIT, Article II(3)(a).

1122 Letter of Submittal from Warren Christopher, Department of State, 7 September 1994 (**R-157**).

to the Respondent's position, it is doubtful whether this clarification relates to the whole paragraph or simply to the third standard indicated therein. Further, the Tribunal finds that this statement can only bear little weight, as a unilateral statement made after the conclusion of a treaty does not fall into any of the means of interpretation provided by Articles 31 and 32 VCLT.

741. A similar interpretation would also be supported by the precedent of *Genin v. Estonia*—the only case on file involving the US-Estonia BIT— in which the tribunal found the FET standard "to require an 'international minimum standard' that is separate from domestic law, but that is, indeed, a *minimum* standard."[1123] While this test is indeed reminiscent of the *Neer* standard, the tribunal in *Genin v. Estonia* also noted that there is no general consensus on the content of the FET standard.

742. On balance, the Tribunal is persuaded by neither argument. It finds, instead, that no differentiation is necessary between these two standards. In *Azurix v. Argentina*, the FET provision of the relevant BIT—the United States-Argentina BIT—contained the same formulation as the clause at issue here, namely that:

> [i]nvestment shall at all times be accorded fair and equitable treatment, -- and shall in no case be accorded treatment less than that required by international law.[1124]

743. The *Azurix* tribunal found that the reference to a minimum standard under customary international law was merely intended as a floor under which the provision could not be interpreted. Regardless, the tribunal finally stated that:

> the minimum requirement to satisfy this standard has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law.[1125]

744. Likewise, the tribunal in *Rumeli Telekom AS v. Kazakhstan* reasoned that the distinction between an autonomous FET standard and the international minimum standard of treatment "is more theoretical than real"[1126] and that, like other several ICSID tribunals, it found no material differences between the two.[1127]

745. Ultimately, the Tribunal is more persuaded by the quoted investment jurisprudence. It agrees that this distinction is more perceived than material, and that it would, in any case, not lead to a different result.

1123 *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, ¶ 367 (**RLA-126**).

1124 *Azurix Corp. v. The Argentine Republic*, Award, ICSID Case No. ARB/01/12, 14 July 2006, ¶ 324 (**CLA-072**)

1125 *Azurix Corp. v. The Argentine Republic*, Award, ICSID Case No. ARB/01/12, 14 July 2006, ¶ 361 (**CLA-072**).

1126 *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 2008 WL 4819868, 29 July 2008, ¶ 611 (**CLA-076**).

1127 *See Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 592 (**CLA-073**); *Saluka, Investments B.V. v. Czech Republic*, UNCITRAL Arbitration Rules, Partial Award, 2006 WL 1342817, 17 March 2006, ¶ 291 (**CLA-069**).

b) Estoppel

i. The Claimant's Position

746. The Claimant submits that, in accordance with the international law principle of estoppel, which "arises from the principle of good faith, which is protected by Article II of the Treaty and its [FET] obligation," the Respondent is estopped from arguing that the Claimant has no valid title to the Seaplane Harbor and that it did not expropriate the Claimant's property.[1128]

747. According to the Claimant, this international law principle, which has been applied by various international tribunals,[1129] requires parties to act consistently with their prior actions.[1130] In particular, according to the Claimant, estoppel applies when the following conditions are met, namely, if the respective party: (i) made a clear and unambiguous statement of fact; (ii) made the statement voluntarily, unconditionally, and authorized; and (iii) relied in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.[1131]

748. The Claimant submits that the above-mentioned three conditions have been met in this case because, first, the Respondent made clear and unambiguous representations regarding the ownership of the Seaplane Harbor.[1132] In particular, the Claimant alleges that the following official government records confirmed Verest's and Agrin's ownership of the Port and that since 1991 the Port had been under private property:

(a) The Estonian Maritime Administration's records of the purchase agreement between Nautex and Verest in 1992, by which the latter acquired ownership of the berths and seaplane hangar;[1133]

(b) The certification made by a notary public of the authenticity of the transaction by which Agrin purchased the buildings at the Port from B&E on 26 September 1997;[1134] and

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1128 Reply, ¶¶ 1468-1469, 1479. *See also* Memorial, ¶ 431.

1129 Memorial, ¶¶ 438-440, *referring to ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 475 (**CLA-028**); *Desert Line Projects v. Yemen*, ICSID Arb/05/17, ¶¶ 119–120, 207 (**CLA-029**). *See also* Reply, ¶¶ 1475-1476, *referring to* Rep. Int'l Arb. Awards, S.S. "Lisman", Disposal of pecuniary claims arising out of the recent war (1914 – 1918), (United States, Great Britain), Vol. III, 5 October 1937, ¶ 1790 (**CLA-030**).

1130 Memorial, ¶ 431; Reply, ¶¶ 1470-1471, *referring to* James Crawford, *Brownlie's Principles of International Law*, (Edition 8th, 2012), p. 422, (**CLA-023**); Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals*, (1953), pp. 141–142 (**CLA-020**).

1131 Memorial, ¶ 462; Reply, ¶ 1474, *referring to* D. W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, British Yearbook Int'l Law 176, Vol. 33, 1957, pp. 183-184 (**CLA-024**).

1132 Memorial, ¶¶ 464-466; Reply, ¶¶ 1484-1486. *See also* Hearing Transcript, Day 1, p. 59:7-20.

1133 Memorial, ¶ 466(a), *referring to* Lennusadam Port Passport, 7 October 1993 (**C-201**).

1134 Memorial, ¶ 466(b), *referring to* Contract of Purchase and Sales and Pledge Contract between Agrin and B&E, 26 September 1997 (**C-020**).

(c) The Tallinn Building Registry's records from 20 April 1994 to 27 October 1998 of all the above transactions, listing B&E, Agrin, and Verest as owners.[1135]

749. The Claimant further submits that the Respondent "repeatedly took actions that implicitly recognized B&E, Agrin's, and Verest's proprietary use of the Port,"[1136] including:

(a) The acceptance by the Municipality of Tallinn of tax payments made by the Claimant's local companies for many years, "even for time after the time Estonia claimed that it owned the Lennusadam";[1137]

(b) Certificates issued by the Tallinn Building Registry to Verest in April 1994, June 1994, July 1996, and June 1997, acknowledging Verest's ownership and/or use of the seaplane hangar and berths;[1138]

(c) Approval issued by the Estonian Customs Board of Verest's application to use the Port for the import and export of wood;[1139] and

(d) Certificate issued by the Tallinn Sustainable Development and Planning Office to Verest "recognizing its use of the Lennusadam Port."[1140]

750. Secondly, the Claimant posits that "[t]hese representations were voluntary, unconditional, and authorized."[1141]

751. Thirdly, the Claimant contends that it relied, to its own detriment, on the above-listed statements, which led it to believe that it was acquiring property rights that rightfully belonged to Verest and Agrin when it concluded the Lease Agreements through BPV on 1 October 1997.[1142] In addition, the Claimant asserts that it also relied on the above-mentioned statements "before the Privatization agency, the Tax authorities, the courts, and before this Tribunal."[1143]

1135 Memorial, ¶ 466(c), *referring to* Tallinn Building Registry Certificate No. 8395 issued to B&E, 27 October 1995 (**C-033**); Tallinn Building Registry Certificate No. 20215 issued to Verest, April 20, 1994 (**C-028**); Building Registry Certificate No. 154 to Agrin, 29 January 2003 (**C-102**).

1136 Reply, ¶ 1486.

1137 Reply, ¶ 1485, *referring to* Tallinn Tax and Customs Board notice to Verest, 19 October 2006 (**C-203**); Tallinn Tax and Customs Board notice to Agrin, 19 October 2006 (**C-195**).

1138 Reply, ¶ 1486, *referring to* Tallinn Building Registry Certificate No. 20215 issued to Verest, 20 April 1994 (**C-028**); Tallinn Building Registry Certificate No.20215 issued to Verest, 21 June 1994 (**C-029**); Tallinn Building Registry Certificate No. 20215 issued to Verest, 8 July 1996 (**C-030**); Tallinn Building Registry Certificate No. 20215 issued to Verest, 13 June 1997 (**C-031**).

1139 Reply, ¶ 1486, *referring to* Verest application for permit of import-export cargo through port Lennusadam, 26 July 1994 (**C-040**).

1140 Reply, ¶ 1486, *referring to* Tallinn City Planning Office Certificate about the scope of building right and use, 21 August 1997 (**C-041**).

1141 Memorial, ¶ 467. *See also* Hearing Transcript, Day 1, p. 59:18-24.

1142 Memorial, ¶ 467.

1143 Reply, ¶ 1482.

ii. The Respondent's Position

752. The Respondent maintains that estoppel does not apply in respect of claims under the FET standard,[1144] rather, it is mainly applicable in the relations between States and has been applied by arbitral tribunals only in the context of jurisdictional issues.[1145] Further, the Respondent argues, as the tribunal in *Vestey v. Venezuela* found, the Claimant cannot attempt to use the international law principle of estoppel to create property rights that never existed under the applicable municipal law.[1146] For these reasons, the Respondent considers the Claimant's estoppel argument to be "fundamentally flawed" and that it should "be dismissed without substantive inquiry."[1147]

753. Even if estoppel were to apply, the Respondent notes that "estoppel is an exceptional claim only granted in exceptional circumstances"[1148] and submits that its pre-requisites are not met in the present case.[1149] First, the Respondent contends that the Claimant "cannot point to clear and unambiguous state conduct by which Estonia can be said to have accepted the Claimant's title to the buildings"[1150] or that it has expropriated the Claimant's investment.[1151] To the contrary, the Respondent maintains that "throughout the relevant time, [it] considered itself to be the true owner of the buildings and took active steps to gain possession."[1152]

754. Secondly, the Respondent alleges that the Claimant has failed to establish that the relevant conduct or statement emanated from an authorized official with authority to bind the state, as required under Article 4 of the ILC's Guiding Principles on Unilateral declarations, and consistent with treaty practice.[1153]

755. Finally, the Respondent contends that the Claimant has failed to demonstrate that it acted to its detriment by relying on the Respondent's representations.[1154] This is because the Respondent in fact made no admissions and representations to the Claimant, and the Claimant has not evidenced

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1144 Counter-Memorial, ¶ 538.

1145 Counter-Memorial, ¶ 538.

1146 Rejoinder, ¶¶ 430-431, *citing Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 257 (**RLA-208**).

1147 Rejoinder, ¶ 432.

1148 Rejoinder, ¶ 433, *citing Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [I]*, Case No. AA 277, PCA, Interim Award, 1 December 2008, ¶ 143 (**RLA-209**).

1149 Counter-Memorial, ¶ 546; Rejoinder, ¶ 434.

1150 Rejoinder, ¶ 438.

1151 Rejoinder, ¶ 436.

1152 Rejoinder, ¶ 443.

1153 Rejoinder, ¶¶ 444-446, *citing* International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, 2006 (**RLA-210**); *and referring to ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, Award, ICSID Case No. ARB/03/16, 2 October 2006, ¶ 475 (**CLA-028**); *Desert Line Projects v. Yemen*, ICSID Arb/05/17, ¶¶ 119-120, 207 (**CLA-029**).

1154 Rejoinder, ¶ 449.

any reliance on the Building Register notices, the letter from the advisor of the Chancellor of Justice, or the letter from the official of the State Chancellery to its detriment.[1155]

iii. The Tribunal's Analysis

756. The doctrines of estoppel and of legitimate expectations are both expressions of the principle of good faith under international law. By precluding one from contradicting itself after its statement or conduct has induced another into detrimental reliance, both doctrines are corollaries to good faith obligations as they prohibit *venire contra factum proprium*.[1156]

757. However, their applications by international tribunals differ. Estoppel, originally an equitable common law doctrine,[1157] has found its application under international law in State-to-State disputes, many of which concern territorial issues. Crawford warned that estoppel must be approached with caution.[1158] Similarly, Kulick describes estoppel as it developed and established in the Permanent Court of International Justice and ICJ jurisprudence.[1159] By contrast, estoppel is rarely raised under the merits of investment arbitration decisions,[1160] and its use is deemed "inconsistent"[1161] by Kulick. In accordance with this application of estoppel under international law, the Tribunal agrees with Respondent's statement[1162] in that estoppel mainly applies to disputes between sovereign States and is not the appropriate legal standard for an alleged FET breach.

1155 Rejoinder, ¶¶ 450-451.

1156 James Crawford, *Brownlie's Principles of International Law*, (Edition 8th, 2012), p. 234 (**CLA-023**); *International Thunderbird Gaming Corporation v. The United Mexican States*, 2006 WL 247692, UNCITRAL, Separate Opinion of Thomas Wälde, 1 December 2005, ¶ 27, fn. 30 (**CLA-094**). *See also* Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals*, (1953), p. 144 (**CLA-020**).

1157 English Exchequer Court in *Hurlstone & Norman*, England, Court of Exchequer: Cave v. Mills, February 1862, p. 747 (**CLA-021**): "[…] a man shall not be allowed to blow hot and cold – to affirm at one time and deny at another – making a claim on those whom he has deluded to their disadvantage, and founding that claim on the very matters of the delusion. Such a principle has its basis in common sense and common justice, and whether it is called "estoppel," or by any other name, it is one which Courts of law have in modern times most usefully adopted."

1158 James Crawford, *Brownlie's Principles of International Law*, (Edition 8th, 2012), p. 236 (**CLA-023**): "Resting on good faith and the principle of consistency in state relations, estoppel may involve holding a government to a declaration which in fact does not correspond to its real intention, if the declaration is unequivocal and the state to which it is made has relied on it to its detriment. Such a principle must be used with caution, more particularly in dealing with territorial issues."

1159 Andreas Kulick, *About the Order of Cart and Horse Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals*, EJIL, Vol. 27 No. 1, 2016, pp. 110-112 (**CLA-027**).

1160 Andreas Kulick, *About the Order of Cart and Horse Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals*, EJIL, Vol. 27 No. 1, 2016, p. 113 (**CLA-027**): "Of all 53 decisions, […] 12 decisions raised the subject of estoppel at the merits stage."

1161 Andreas Kulick, *About the Order of Cart and Horse Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals*, EJIL, Vol. 27 No. 1, 2016, p. 128 (**CLA-027**).

1162 Counter-Memorial, ¶ 538.

758. The Tribunal is also persuaded that the doctrine of legitimate expectations constitutes the proper standard applicable to the Claimant's FET claims under the US-Estonia BIT. Investment tribunals have generally considered that the FET standard enshrines the substantive protection of an investor's legitimate expectations.[1163] Further, while the Parties disagree on the applicability of estoppel, it remains undisputed that legitimate expectations are protected by the FET standard.[1164]

759. Nevertheless, even if estoppel were an applicable standard in this case, its strict test requirements would not be met. As established by ICJ jurisprudence, estoppel requires a strict test, only successful in exceptional circumstances and when all its elements are present.[1165] As undisputed between the Parties and agreed by the Tribunal, such test is composed of a clear and unambiguous statement of fact; made voluntarily, unconditionally, and authorized; and relied upon by the other party either to its detriment or to the advantage of the party making the statement.[1166]

760. The Tribunal is persuaded that the Respondent's statements could not amount to an *unambiguous* statement of fact. As stated by Bowett, such a requirement must be evaluated in light of the statement's context and history:

> This much is apparent from the estoppel cases, that a tribunal will not take a phrase out of its context and upon that isolated phrase create an estoppel: on the contrary, the tribunal will review the whole circumstances and the background of diplomatic negotiation and correspondence even for a period of thirty years prior to the hearing of the case as it did in the Russian Indemnity case.[1167]

761. Having regard not only to the Claimant's allegations regarding estoppel but also to the wider background of the facts of the case and their time span, the Tribunal is convinced that the Respondent did not take a sufficiently unambiguous and clear position at any point in time to meet the high threshold that would be required for estoppel.[1168]

762. Despite the failure of any hypothetical estoppel test, the Tribunal recognizes the underlying principle of the estoppel doctrine, namely that *allegans contraria non audiendus est*.[1169] Such a

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1163 James Crawford, *Brownlie's Principles of International Law*, (Edition 8th, 2012), pp. 617-618 (**CLA-023**).

1164 Memorial, ¶ 386; Counter-Memorial, ¶ 539.

1165 D. W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, British Yearbook Int'l Law 176, Vol. 33, 1957, p. 188 (**CLA-024**); Andreas Kulick, *About the Order of Cart and Horse Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals*, EJIL, Vol. 27 No. 1, 2016, pp. 111-122 (**CLA-027**): "the Court has confirmed this clear and unequivocal endorsement of the strict view of estoppel as has been done in most of public international law scholarship." *See also* p. 125 (**CLA-027**): "Admittedly, all decisions of investment arbitration tribunals – and, in fact, all ICJ decisions of the last few decades – explicitly embracing the strict view have rejected an estoppel claim."

1166 *See* V.B.3.c)i.

1167 D. W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, British Yearbook Int'l Law 176, Vol. 33, 1957, p. 189 (**CLA-024**) *referring to* Scott, Hague Court Reports, p. 297 at p. 325.

1168 D. W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, British Yearbook Int'l Law 176, Vol. 33, 1957, p. 189 (**CLA-024**): "unless and until the meaning of the representation is clear, there is no justification for binding one or other of the parties to that meaning."

1169 D. W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, British Yearbook Int'l Law 176, Vol. 33, 1957, pp. 195-196 (**CLA-024**).

principle, that a State cannot blow hot and cold, is once again better expressed in investment arbitration by the legitimate expectations doctrine, to which the Tribunal turns in the next section.

763. Those representations for which the Claimant invoked estoppel will therefore not be considered as binding, but rather as evidence under the legitimate expectations test. According to Bowett, if a statement lacks an element of estoppel, it retains nonetheless "a certain probative value"[1170] and may as such be evaluated by the Tribunal as indicative of the inconsistency of the entity making it:

> Where one or other of the foregoing essentials of a binding estoppel is absent the representation, whether by words or conduct, does not lose all value for, although lacking conclusive effect, it may still be adduced in evidence as an admission to show a lack of consistency or weakness in a party's position.[1171]

764. Further, the Claimant itself did not clearly outline which representations it submitted as an element of estoppel and which as giving rise to legitimate expectations. By stating that "[w]hether it be under the banner of estoppel or legitimate expectations, it is clear under international law that Estonia should not now be able to seize ELA's investment,"[1172] the Claimant implied the equivalency of an analysis of said representations under either doctrine for the purposes of its FET claims. The Tribunal is therefore satisfied that the statements adduced by the Claimant do not produce any binding effects on the Respondent but are to be evaluated merely as evidence for its legitimate expectations claims.[1173]

c) Legitimate Expectations

i. The Claimant's Position

765. The Claimant submits that the Respondent frustrated its legitimate expectations that its Estonian subsidiaries had private rights in the Seaplane Harbor buildings, in violation of the FET standard in Article II(3)(a) of the Treaty.[1174]

766. According to the Claimant, the FET standard protects a qualifying investor's legitimate expectations, which "can arise from a variety of sources" such as from explicit or implicit

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1170 D. W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, British Yearbook Int'l Law 176, Vol. 33, 1957, p. 202 (**CLA-024**).

1171 D. W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, British Yearbook Int'l Law 176, Vol. 33, 1957, p. 195 (**CLA-024**).

1172 Memorial, ¶ 471. *See* Memorial, ¶ 461 (emphasis added): "Estonia failed to act in a fair and equitable manner 1. Estonia should be *estopped* from taking ELA's investment after creating a *legitimate expectation* that private parties owned the Port." *See also* Reply, ¶ 1472.

1173 D. W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, British Yearbook Int'l Law 176, Vol. 33, 1957, p. 196 (**CLA-024**): "the answer lies in ascertaining whether the statement fulfils the essential conditions of an estoppel. If it does not, then, although denied binding effect, it can still be adduced as evidence to weaken the case which the party making the statement or admission now puts forward."

1174 Reply, ¶ 1233.

assurances by the host State.[1175] In particular, the Claimant submits that investors may legitimately expect that a host State would (i) provide an appropriate investment environment;[1176] and (ii) act consistently "without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments."[1177] The Claimant refers to *TECMED v. Mexico*, *MTD v. Chile*, *Bilcon v. Canada* and *Occidental v. Ecuador* as instances in which arbitral tribunals have concluded that inconsistencies in the treatment of an investment or investors were contrary to the obligation to provide FET treatment.[1178] Additionally, the Claimant acknowledges that in order to enjoy the protection of its legitimate expectations, an investor must show that it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances.[1179]

767. In the instant case, the Claimant submits that the Respondent frustrated (i) its legitimate expectations that its Estonian subsidiaries Agrin and Verest would continue to enjoy possessory title of the Seaplane Harbor buildings; and (ii) its legitimate expectations that the Respondent would maintain a stable business environment.[1180]

768. First, the Claimant maintains that it held legitimate expectations that it would continue to have possessory title of the Seaplane Harbor buildings because the Respondent made multiple assurances recognizing Verest and Agrin, the companies that leased the Seaplane Harbor and its buildings to BPV, as the lawful owners of the Seaplane Harbor.[1181] The Claimant reiterates that multiple records on the Tallinn Building Register from 20 April 1994 to 27 October 1998 confirm "the private possessory rights and ownership of buildings and structures at the Lennusadam Port and Portlands."[1182] Relying on Mr. Keres' opinion, the Claimant submits that these Building

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1175 Reply, ¶ 1204, *referring to Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 318 (**CLA-072**).

1176 Reply, ¶ 1205, *referring to* W. Michael Reisman & Robert D. Sloane, *Indirect Expropriation, and its Valuation in the BIT Generation,* 74 The British Yearbook of International Law 115 (2004), p. 117 (**CLA-261**).

1177 Reply, ¶ 1219, *referring to Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶¶ 153-154 (**CLA-055**).

1178 Reply, ¶¶ 1206-1214, *referring to Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶¶ 153-154, 157, 163-164 (**CLA-055**); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶¶ 114-115, 188 (**CLA-071**); *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2005, ¶ 589 (**CLA-082**); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Final Award, 5 October 2012, ¶ 184 (**CLA-089**).

1179 Reply, ¶ 1215, *referring to Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 333 (**CLA-123**).

1180 Reply, ¶¶ 1233-1253.

1181 Reply, ¶¶ 1233-1253; Claimant's Answers to Tribunal Questions, ¶¶ 81-82. *See also* Third Keres Report, ¶¶ 148-150 (**CER-4**); Hearing Transcript, Day 1, pp. 61:6-13, 62:23 – 63:16.

1182 Reply, ¶ 1235, *referring to* Third Keres Report, ¶¶ 177, 180 (**CER-4**); Claimant's Answers to Tribunal Questions, ¶¶ 81-111, *referring to* Tallinn Building Registry Certificate No. 20215 issued to Verest, 20 April 1994, (**C-028**); Tallinn Building Registry Certificate No.20215 issued to Verest, 21 June 1994 (**C-029**); Tallinn Building Registry Certificate No. 8395 issued to B&E, 27 October 1995 (**C-033**); Tallinn

Registers, were "trustworthy and accurate information on the ownership and use of the buildings," carrying the same importance as the Land Register does now.[1183] In addition, the Claimant submits that the authorities of Tallinn City issued "the determination of the price of land for taxation and approvals of the borders of the plot for privatization of land."[1184] On the basis of the formerly-mentioned assurances, the Claimant asserts that at the time it made its investments it had the legitimate expectation that it held private rights to the Seaplane Harbor buildings.[1185]

769. Such expectation, the Claimant posits, should have been protected by the Respondent as it was reasonable and given that the Claimant exercised adequate due diligence.[1186] The Claimant argues that the Tallin City Court itself determined that BPV was "a possessor in good faith" of the Port.[1187] The Claimant underscores that the Tallin City Court considered that "it was not reasonable to presume that" at the time the Lease Agreements were signed (*i.e.*, on 1 October 1997) "when 7 years had already passed from the restoration of the Republic of Estonia, the lessee would have had to research the history of the assets that were the object of the contract."[1188] On the other hand, the Claimant maintains that "[o]n three different occasions, ELA U.S.A. consulted Estonian counsel and was persuaded that the Estonia Prison Board's lawsuit lacked merit."[1189]

770. Having established these legitimate expectations, the Claimant contends that they were frustrated when the Respondent judicially contested the validity of its subsidiaries' title to the Seaplane Harbor on 14 November 1997, and when the Respondent subsequently engaged in the judicial taking of its investments.[1190]

771. According to the Claimant, these breaches cannot be justified by the retroactive application of the 1992 Supreme Council Resolution.[1191] The Claimant argues that the Government Office, the Privatization Agency and the advisor of Chancellor of Justice confirmed that this resolution had

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Building Registry Certificate No. 8395 issued to B&E, 8 December 1995 (**C-034**); Tallinn Building Registry Certificate No. 20215 issued to Verest, 8 July 1996 (**C-030**); Tallinn Building Registry Certificate No. 8395 issued to B&E, 21 November 1996 (**C-035**); Tallinn Building Registry Certificate No. 8395 issued to B&E, 16 September 1997 (**C-036**); Tallinn Building Registry Certificate No. 20215 issued to Verest, 17 November 1997 (**C-053**). *See also* Hearing Transcript, Day 1, pp. 63:22 – 64:10.

1183 Claimant's Answers to Tribunal Questions, ¶¶ 76-77, 79, *referring to* Third Keres Report, ¶¶ 161-162, 191 (**CER-4**). *See also* Hearing Transcript, Day 5, pp. 57:14-20, 58:1-10.

1184 Reply, ¶ 1238. *See also* Hearing Transcript, Day 1, pp. 64:24 – 65:5.

1185 Reply, ¶ 1233.

1186 Reply, ¶¶ 1253-1254.

1187 Memorial, ¶ 470; Reply, ¶ 1252, *referring to* July 2005 Judgment ¶ 18 (**C-078**); Claimant's Answers to Tribunal Questions, ¶ 83.

1188 Memorial, ¶ 470; Reply, ¶ 1252, *referring to* July 2005 Judgment ¶ 18 (**C-078**); Claimant's Answers to Tribunal Questions, ¶ 84.

1189 Reply, ¶ 1249.

1190 Memorial, ¶¶ 468, 471-473; Reply, ¶¶ 1247, 1260.

1191 Reply, ¶¶ 1242-1245.

no retroactive effect.[1192] Thus, it did not apply to the privatization of the Port, as this transaction occurred prior to the issuance of the 1992 Supreme Council Resolution.[1193]

772. Secondly, the Claimant claims that the Respondent frustrated its legitimate expectation that it would be provided with a sound investment environment.[1194] The Claimant argues that the Respondent "changed its customs law after ELA U.S.A. made investments, 'without providing any clarity about its meaning and extent' and Estonian 'practice and regulations were also inconsistent with [the] changes [to the law].'"[1195]

ii. The Respondent's Position

773. The Respondent denies that it frustrated the Claimant's legitimate expectations in violation of the FET standard in Article II(3)(a) of the Treaty.

774. According to the Respondent, for an investor's legitimate expectations to be protected under the FET standard, such expectations must (i) be based on specific commitments made by competent government officials and relied upon by the investor prior to or at the time of the making of the investment;[1196] and (ii) have an objective basis.[1197]

775. Applying the above standard to the case at hand, the Respondent submits that the Claimant could not have had any legitimate expectations.[1198] First, the Respondent posits that the Claimant's alleged expectation that Verest and Agrin had ownership rights over the Port and could thus conclude the Lease Agreements "was not based on any assurances given by government officials to the Claimant."[1199] The Respondent observes that the Claimant has relied on (i) the port passport for the Seaplane Harbor; (ii) three certificates issued by Tallin Building Register; and (iii) contract of purchase and sale between B&E and Agrin, attested by the notary public on 26 September 1997.[1200]

776. According to the Respondent, none of the above-mentioned documents could have created legitimate expectations on the part of the Claimant because none of them (i) contained promises

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1192 Reply, ¶ 1245, *referring to* Third Keres Report, ¶ 61 (**CER-4**); Letter from the State Chancellery to the Ministry of Justice, 8 November 1995 (**C-307**); Letter from Tallinn City Government to Ministry of Defense and to Estonian Privatization Agency, 26 April 1996 (**C-308**).

1193 Reply, ¶ 1245.

1194 Reply, ¶¶ 1239-1241.

1195 Reply, ¶ 1239; Claimant's Answer to Tribunal Questions, ¶ 9.

1196 Counter-Memorial, ¶¶ 540-543, *referring to Mamidoil Jetoil Greek Petroleum Products Societe SA v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶ 643 (**RLA-111**); *ECE Projektmanagement v. The Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, ¶¶ 4.762, 4.771 (**RLA-132**); *Invesmart, B.V. v. Czech Republic*, Award, 26 June 2009, ¶ 258 (**RLA-128**).

1197 Counter-Memorial, ¶ 544, *referring to Invesmart, B.V. v. Czech Republic*, Award, 26 June 2009, ¶ 250 (**RLA-128**).

1198 Counter-Memorial, ¶ 545.

1199 Counter-Memorial, ¶ 547. *See also* Rejoinder, ¶¶ 362-366.

1200 Counter-Memorial, ¶ 548, *referring to* Memorial, ¶ 466.

made "directly and specifically to the Claimant;"[1201] (ii) contained "any assurance by the state about the validity of the contracts underlying Verest and Agrin's possession of the Seaplane Harbor;" [1202] or (iii) "were made by a competent government official (*e.g.*, ministers or representatives of ministries) in their capacity of representing the state with the intent to induce investment."[1203] Moreover, the Respondent points out that:

(a) The 1993 port passport "was drafted by Verest and its neighbours on its own initiative, was not required by law, and conveyed no rights";[1204] and

(b) The Tallinn Building Register notices were unavailable to the Claimant before its decision to invest, their content pointed to defects in title and thus should have been a cause for concern not encouragement, and their legal status precluded their use as a source of reliable information on title.[1205]

777. Secondly, the Respondent states that the Claimant's alleged expectations were not reasonable due to "complete lack of due diligence."[1206] As was discussed in detail in respect of the jurisdictional objections, the Respondent submits that the Claimant established its investment in 1999.[1207] At that time, the Respondent argues, any diligent investor would have verified the existence of the dispute over the title to the buildings.[1208] The Respondent underlines that official communications confirmed that "the government had no intention to settle [that] case." [1209] Separately, the Respondent contends that the Claimant should have been aware of the heritage restrictions and the zoning proceedings, which would have prevented the Claimant from executing its alleged business plan.[1210]

778. In the event it were to be considered that the Claimant made its investments in 1997, the Respondent contends that the Claimant "should have discovered that the Respondent considered itself to be the owner of the buildings and structures at the Seaplane Harbor."[1211] The Respondent argues that, as the Claimant itself confirms, "the buildings were added to the list of state assets in October 1996, and that the information was added to the State Asset Registry in May 1997."[1212]

1201 Counter-Memorial, ¶ 550.

1202 Counter-Memorial, ¶ 551.

1203 Counter-Memorial, ¶ 553. *See also* Hearing Transcript, Day 1, pp. 117:9-14, 118:25 – 119:2.

1204 *See* Rejoinder, ¶¶ 179-184. *See also* Hearing Transcript, Day, 1, p. 116:11-21.

1205 *See* Rejoinder, ¶¶ 169-178. *See also* Hearing Transcript, Day 1, pp. 115:20 – 116:10.

1206 Counter-Memorial, ¶¶ 545, 554-557; Rejoinder, ¶¶ 161-168. *See also* Hearing Transcript, Day 1, p. 114:19-23.

1207 *See* Section V.B.1.a)i above. *See also* Hearing Transcript, Day 1, pp. 109:9 – 111:11.

1208 Counter-Memorial, ¶ 555.

1209 Counter-Memorial, ¶ 555, *referring to* Letter from Ministry of Justice to Verest, 12 January 2000 (**C-059**); Letter from Chancellor of the Ministry of Justice to Mr. G.T. Carroll, 24 April 2000 (**C-063**).

1210 Hearing Transcript, Day 1, pp. 120:22 – 122:15.

1211 Counter-Memorial, ¶ 556.

1212 Counter-Memorial, ¶ 556, *referring to* Government of Estonia Regulation No. 258, 22 October 1996 (**C-037**); Ministry of Finance, Certificate of Registration of the State Assets in the State Assets Register, 15 May 1997(**C-038**).

Furthermore, the Respondent notes that a diligent inquiry would have revealed that there were inconsistencies in the registration of the land plots, including that the address in which all the structures and buildings which were located did not exist in the registry in 1997.[1213]

779. In addition, the Respondent claims that the Claimant's Estonian subsidiaries were well aware of the government's claim to title over the Seaplane Harbor long before 1997, because already in the summer of 1996, Verest and B&E were requested to produce documents showing proof of their title, and they responded to said requests.[1214]

780. Thirdly, responding to the Claimant's allegation that the Respondent frustrated its legitimate expectations to a stable business environment, the Respondent maintains that it "is a mere restatement of the original claim," which cannot stand for the same reasons.[1215]

iii. The Tribunal's Analysis

(I.) Legal Standard

781. The Tribunal accepts that the legitimate expectations doctrine, as developed in the case law of investment tribunals under the FET standard,[1216] can be generally defined as the protection from frustration of an investor's legitimate expectations as arising from a host state's representations.

782. The Parties, however, present two diverging standards under which state acts or conducts may qualify as representations in this sense. The Claimant's assertion that official government records and, more generally, a state's publicly stated positions constitute such representations[1217] is too broad of an interpretation. Likewise, the Respondent's view that any expectations must be based on specific commitments made by competent government officials to induce an investment[1218] is far too narrow. The Tribunal is rather convinced that the truth lies somewhere between these two extremes. It suffices to say that while a certain degree of specificity is required to constitute such a representation,[1219] any other requirements are left to a second stage of the analysis, to which the Tribunal will revert if necessary.

1213 Counter-Memorial, ¶ 556, *referring to* BFC Letter regarding Handover Protocols Handing Over Military camp 158, 19 September 1994 (**R-057**); Ministry of Finance, Certificate of Registration of the State Assets in the State Assets Register, 15 May 1997 (**C-038**). *See also* Rejoinder, ¶¶ 155-156.

1214 Rejoinder, ¶¶ 157-158, *referring to* Letter from Verest to Prison Board, 8 July 1996 (**R-220**); Letter from Verest to Prison Board, 24 July 1996 (**R-221**); Letter from B&E to Prison Board, 22 July 1996 (**R-222**).

1215 Rejoinder, ¶¶ 367-370.

1216 Michele Potestà, *Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept*, 28 ICSID Review (2013), p. 2 (**CLA-254**).

1217 Memorial, ¶¶ 263-270; Reply, ¶ 1216; Reply, ¶ 1402 *quoting Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, ¶ 129 (**CLA-095**): "legal protection from harm caused by a public authority retreating from a previous publicly stated position, whether that be in the form of a formal decision or in the form of a representation."

1218 Counter-Memorial, ¶¶ 539-542.

1219 Michele Potestà, *Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept*, 28 ICSID Review (2013), p. 21 (**CLA-254**).

783. Regardless, representations giving rise to legitimate expectations must have been made to the investor, or at least known by the investor, at the time of the making of the investment.[1220] As is undisputed by the Parties,[1221] the Tribunal is persuaded that an investor must have taken into account those representations when making the investment. Otherwise, they could not possibly serve as the basis for its expectations.[1222]

784. The Tribunal also agrees with the Parties that expectations are legitimate only when they are both reasonable and the result of due diligence exercised by the investor.[1223]

785. The requirement of reasonableness is generally intended to exclude from protection those expectations that are "ill-informed or overly optimistic."[1224] However, particular circumstances "including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions"[1225] of the host state may require a higher standard of reasonableness.[1226] This holds especially true for states in transition. In the most chaotic moments of the history of a country, "the presumably greater instability will be indeed part of the business risk"[1227] taken by those seeking a higher return on their investments. As was the case in *Bayindir v. Pakistan*, reasonableness must be evaluated in light of the investor's full awareness of "a degree of political volatility."[1228] Similarly, in *Parkerings v. Lithuania*, the tribunal held that:

1220 *ECE Projektmanagement v. The Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, ¶¶ 4.762 (**RLA-132**).

1221 Counter-Memorial, ¶ 543; Reply, ¶ 1204.

1222 *Técnicas Medio ambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154 (**CLA-055**); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Pakistan,* ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 190 (**RLA-142**).

1223 Counter-Memorial, ¶ 544; Reply, ¶ 1215 *quoting Parkerings-Compagniet AS* v. *Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 333 (**CLA-123**): "The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances."

1224 Counter-Memorial, ¶ 544 *quoting RLA-128 Invesmart, B.V. v. Czech Republic*, Award, 26 June 2009, ¶ 250 (**RLA-128**).

1225 *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 391 (**CLA-262**).

1226 Michele Potestà, *Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept*, 28 ICSID Review (2013), pp. 35-36 (**CLA-254**).

1227 Michele Potestà, *Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept*, 28 ICSID Review (2013), p. 37 (**CLA-254**).

1228 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Pakistan,* ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 195 (**RLA-142**).

> the political environment in Lithuania was characteristic of a country in transition from its past being part of the Soviet Union to candidate for the European Union membership. Thus, legislative changes, far from being unpredictable, were in fact to be regarded as likely. As any businessman would, the Claimant was aware of the risk that changes of laws would probably occur after the conclusion of the Agreement. The circumstances surrounding the decision to invest in Lithuania were certainly not an indication of stability of the legal environment. Therefore, in such a situation, no expectation that the laws would remain unchanged was legitimate.[1229]

786. Therefore, the Tribunal is persuaded that expectations may be reasonable only when they account for the critical situation existing at the place and time of the investment. While a State must act fairly even during transitional periods, it would be unreasonable to expect the same level of stability from a state in transition as from an established economy.

787. The requirement of due diligence demands that an investor actively structure its investment "in order to adapt it to the potential changes of legal environment."[1230] The tribunal of *Parkerings v. Lithuania* also held that the investor should have sought to protect its investment at the negotiation stage by inserting more stringent provisions in the contract it concluded with the state.[1231] Similarly, this Tribunal is persuaded that due diligence must be exercised before and in the making of the investment. Any investor failing to exercise care at that stage could hardly complain that its expectations were disattended.

788. Frustration constitutes the final element of the legitimate expectations doctrine. As the FET standard requires a balancing exercise between the legitimate interests of investors and those of a State to regulation and policy,[1232] its breach must meet a high standard. Frustration is something more than a mere inconsistency or deviation from the law in the conduct of a state. Rather, it occurs "only when a State's acts or procedural omissions are, on the facts and in the context before the adjudicator, manifestly unfair or unreasonable."[1233] The Tribunal acknowledges this important distinction and is persuaded that, in its balancing exercise, it must consider the scale of the breach. As stated in *Eastern Sugar v. Czech Republic*:

1229 *Parkerings-Compagniet AS* v. *Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 335 (**CLA-123**).

1230 *Parkerings-Compagniet AS* v. *Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 333 (**CLA-123**).

1231 *Parkerings-Compagniet AS* v. *Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 336 (**CLA-123**).

1232 Michele Potestà, *Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept*, 28 ICSID Review (2013), pp. 40-41 (**CLA-254**).

1233 *AES Summit Generation Limited and AES-Tisza Erömü Kft v Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶ 9.3.40 (**RLA-192**).

> A violation of a BIT does not only occur through blatant and outrageous interference. However, a BIT may also not be invoked each time the law is flawed or not fully and properly implemented by a state. Some attempt to balance the interests of the various constituents within a country, some measure of inefficiency, a degree of trial and error, a modicum of human imperfection must be overstepped before a party may complain of a violation of a BIT. Otherwise, every aspect of any legislation of a host state or its implementation could be brought before an international arbitral tribunal under the guise of a violation of the BIT. This is obviously not what BITs are for.[1234]

789. It follows then that not every failing, imperfection, inconsistency or inadequacy can amount to frustration.[1235] Rather, in line with the purpose of BITs, to breach the FET standard, a state must disattend at a fundamental level the expectations legitimately held by foreign investors.

(II.) Application to the Facts

790. The Tribunal will first consider, having regard to their date, specificity, and content, whether the statements and conducts of the State amount to representations, as alleged by the Claimant. Then, it will examine if any expectations arising therefrom are reasonable and the result of due diligence. Finally, the Tribunal will consider whether any legitimate expectations were frustrated.

791. Given the findings as to jurisdiction, the relevant time of the making of Claimant's only investments under the US-Estonia BIT – the share purchases of Verest and Agrin – is respectively 23 September and 8 December 1999. Only the acts which were known by the Claimant at those points in time will be considered as the possible bases for its expectations. Nonetheless, the Tribunal's analysis would remain unchanged even if it considered the circumstances present in 1997, as proposed by the Claimant,[1236] because the critical elements at the basis of this reasoning would remain the same.

792. As to the content of expectations, the Claimant argues that the Respondent's governmental acts generated expectations to property rights, to lawful possession, and to the continuity of the acts and facts of the occupation.[1237] However, the Tribunal must disregard those acts which do not pertain to the Claimant's investments as found under the jurisdictional section. Considering then that the lease agreements were invalid, and that mere possession is not a right, the Tribunal will only acknowledge those acts which were at the basis of the Claimant's share purchase of Verest and Agrin.

793. Similarly, regarding the requirement of specificity, the Tribunal will consider as specific only those acts which point directly to ownership or to another title, and not to mere factual control of a property.

1234 *Eastern Sugar B.V. v Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, ¶ 272 (**CLA-266**).

1235 *AES Summit Generation Limited and AES-Tisza Erömü Kft v Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶ 9.3.40 (**RLA-192**). *See also* Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33, Award, 27 October 2015, ¶ 390 (**RLA-191**).

1236 Reply, ¶ 195.

1237 Memorial, ¶¶ 264, 304, 443; Reply, ¶¶ 1231-1233.

(A.) The Representations

794. The Claimant has summarized the critical government acts which are the basis for its expectations in a "six-pack"[1238] which the Tribunal will address in order: the Port Passport, the Privatization Letter, the Legal Chancellor Letter, the Building Register's acts, the Building Permits, and the Tax Department's acts. Further, in the context of its estoppel claims, the Claimant has also submitted the Customs Authorization and the Planning Office Certificate as grounds for expectations which were allegedly disattended.

(1.) The Port Passport

795. The Port Passport is dated 7 October 1993.[1239] The Claimant adduces it as one of the bases for its expectations to the ownership of the Port as it "showed that the Port had been under private ownership since 1991."[1240] Namely, the Claimant argues that the Port Passport shows that "the Estonian Maritime Administration registered Verest as the new owner."[1241]

796. However, the letter and the function of the Port Passport indicate otherwise. First, Verest is listed as "Possessor of the port", "Possessor" of Berths 38A, 38 and 39, as well as "possessor", jointly with AS Esman and AS GT-Projekt, of the Open Warehouse and of the Closed Warehouse.[1242] Secondly, the Claimant itself describes the Port Passport as "giv[ing] its holder the right to run the port, direct ships, transmit on certain radio frequencies to maritime shipping,"[1243] without any implications as to its ownership. While at the time it was issued port passports were unregulated, the Estonian Maritime Agency was nonetheless gathering technical information on the ports previously possessed by the Soviet military and issuing "port certificates".[1244] Years later, in section 11(1) of the Port Act adopted on 22 October 1997, a port passport would similarly be defined as "a document which proves that a port complies with the norms established by legislation and is open for safe shipping and port operations"[1245] and therefore merely certifies the safety of the facility.

797. On balance, the Tribunal is persuaded that the Port Passport does not constitute a representation because there is no correlation between the right of ownership and the right to run a port as its possessor. No expectations could therefore be formed on the basis of the Port Passport.

1238 Hearing Transcript, Day 1, p. 60:6-9: "These six acts were the basis upon which ELA USA had legitimate expectations about possession. We call them a 'six-pack.'" *See also* Claimant's Opening Slides, p. 14.

1239 Lennusadam Port Passport, 7 October 1993 (**C-201**).

1240 Memorial, ¶ 466.

1241 Memorial, ¶ 466(a).

1242 Lennusadam Port Passport, 7 October 1993, pp. 1, 5, 6 (**C-201**).

1243 Hearing Transcript, Day 1, p. 60, 18-20.

1244 Rejoinder, ¶ 181 *referring to* Letter of Estonian Maritime Administration to Tallinn Administrative Court, 13 June 2002 (**R-098**).

1245 Port Act, 22 October 1997 (**C-604**).

(2.) The Estonian Privatization Agency

798. The Claimant also submits as bases for its expectations the correspondence between the Estonian Privatization Agency and the Tallinn City Government from 1996 concerning the issue of ownership and privatization of the Seaplane Harbor.[1246] It also submits the legal instruments issued by the Estonian Privatization Agency to Verest and B&E from 1997 concerning the procedure of land privatization of Küti 17 and 17a.[1247]

799. The correspondence with the Tallinn City Government, despite taking place certainly before the making of the Claimant's investment, constituted an internal government communication. As argued by the Respondent,[1248] those letters could not have been known by the Claimant because they constituted an exchange to which it was not privy. As the Claimant did not make any statements nor presented any evidence to the contrary, the Tribunal must assume that the Claimant did not know of the correspondence before the making of its investment. No expectations could therefore be formed on the basis of the Tallinn City Government's letter.

800. The legal instruments issued by the Estonian Privatization Agency constitute respectively a proposal and an order concerning the boundaries and the taxable value of the land subject to the privatization process. It is undisputed between the Parties that the ownership of the buildings above the land was a requirement for its privatization,[1249] but the preliminary instruments in question do not point to ownership, as admitted by Mr. Rotko.[1250] Further, as rightly argued by the Respondent, the abstract possibility of obtaining privatization could not in itself be ground for expectations. Especially so if less than one month after the instruments were issued, the Tallinn City Court put an end to the privatization process with an interim order.[1251] Therefore, the Tribunal must conclude that at the time of the making of the investment in 1999, the Claimant could not possibly rely on an unfinished administrative procedure as a basis for its expectations.

1246 Letter from Tallinn City Government to Ministry of Defense and to Estonian Privatization Agency, 26 April 1996 (**C-308**); Letter from Estonian Privatization Agency to Tallinn City Government, 27 May 1996 (**C-309**); Hearing Transcript, Day 1, pp. 61-62:24-6.

1247 Resolution of the Administrative Board of the Northern District of Tallinn, 1 October 1997 (**C-356**); Tallinn Ownership Reform Office Legal Instrument No. 195, 3 October 1997 (**C-446**); Hearing Transcript, Day 1, p. 61:15-23.

1248 Rejoinder, ¶ 199; Hearing Transcript, Day 1, p. 119:1-3: "the Claimant wasn't privy to the letters that we've just discussed before investing in the harbour". *See also Invesmart B.V. v. Czech Republic*, Award, 26 June 2009, ¶ 253 (**CLA-234**).

1249 Rejoinder, ¶ 194; Third Rotko Statement, ¶ 223 (**CWS-4**).

1250 Third Rotko Statement, ¶ 252 (**CWS-4**): "The plot borders for both Kuti 17 and Kuti 17a were approved, with Verest and B&E identified as the possessors."

1251 Rejoinder, ¶¶ 195-199.

(3.) The Legal Chancellor Letter

801. The Claimant relies on a letter sent by the Office of the Legal Chancellor to B&E on 23 October 1997 that the Respondent produced during the document production process.[1252] The one-paragraph letter reads as follows:

> As assigned by the Chancellor of Justice I hereby clarify in response to questions posed in your letter that the [23 January 1992 Resolution] did not possess retroactive effect. Said resolution cannot be relied on when requesting that transactions performed in 1990 be declared null and void.[1253]

802. Based on this letter (and the letter of the Privatization Office), the Claimant argues that it had the expectation that Estonia would "follow the instruments issued by the Office of the Legal Chancellor" and be "in lawful possession of the Lennusadam Port". [1254] The letter was sent after the alleged conclusion of the lease agreement but before the purchase of Agrin and Verest through BPV in 1999, which is the relevant point in time for determining the Claimant's expectations.

803. The Parties disagree on whether the Claimant was aware of the letter prior to its production by the Respondent in the document production process. Mr. Rotko testifies in his Third Witness Statement that he saw the letter and that he and his advisors concluded from it that Estonia could not claim ownership of the properties transferred by B&E to Agrin on 26 September 1997.[1255] The Respondent does not find this testimony credible and states that there is no evidence to confirm Mr. Rotko's statement that he had even seen the letter.[1256]

804. The Tribunal does not consider it necessary to decide whether the Claimant has successfully established that Mr. Rotko has seen the letter or not. This is because the letter simply replies to a query presented by B&E on 22 October 1997 on whether the 23 January 1992 Resolution could retroactively apply to transactions concluded before the resolution was enacted. The Office of the Legal Chancellor replied in the negative, with the single paragraph quoted above. It is common ground between the Parties that the 23 January 1992 Resolution does not apply retroactively. Nor did the Estonian courts, in the view of the Tribunal, rely on this resolution in their decisions that Estonia is the owner of the buildings and structure as the Seaplane Harbor. But as correctly pointed out by the Respondent,[1257] the letter does not state that transactions could not be invalid for other reasons, nor does it recognize the ownership or lawful possession of B&E. On this basis, the Tribunal is satisfied that the Legal Chancellor letter is not sufficiently specific and therefore does not amount to a representation that could create expectations of ownership or lawful possession by the Claimant.

1252 Letter from the Advisor of Chancellor of Justice to B&E, 23 October 1997 (**C-331**).

1253 Letter from the Advisor of Chancellor of Justice to B&E, 23 October 1997 (**C-331**).

1254 Reply, ¶¶ 1223, 1233.

1255 Third Rotko Statement, ¶¶ 217, 221, 222.

1256 Rejoinder, ¶¶ 189-190.

1257 Rejoinder, ¶¶ 189-191.

(4.) The Building Register

805. The Building Register notices were issued between 1994 and 2003 under respectively file number 20215 for Küti 17 and file number 8395 for Küti 17a.[1258]

806. The Tribunal will consider all in its analysis, with the exception of the notice dated 29 January 2003, as it was issued after the making of the investments.[1259] On this point, the Respondent alleges that the notices were not known by the Claimant at the time of the investment, but rather "discovered retroactively and used by the Claimant to justify the expectations it did not actually hold."[1260] The Tribunal acknowledges that while there is no record of the Claimant consulting the notices, it may well have done so, as the Building Register was accessible to "companies, entities, and organizations and even individuals"[1261] and Mr. Rotko declared to have seen it.[1262] The Tribunal will therefore assume that the Claimant was aware of the Building Register notices at the relevant time.

807. As to the purpose of the Building Register and its notices, the Parties agree, also on the basis of Mr. Keres' opinion, that it was not constitutive of rights.[1263] The Tribunal agrees, but is likewise convinced that the Building Register operated as a public source of reliable information during Estonia's transition.[1264] Further, even though the Building Register coexisted with the Land Register when the relevant notices were issued, and must have therefore had a different function, the Building Register was according to its establishing Order "a component of the Republic of Estonia construction information system."[1265] As such, the Tribunal cannot ignore the Building Register notices as a possible source of expectations and must therefore turn to their content.

808. Under file number 20215, the Building Register notices indicate Verest as having "right of ownership" without any further annotations on 20 April 1994, on 5 September 1995, on 27 October 1995, and on 8 July 1996.[1266] Verest was also identified as the owner in the notices dated 21 November 1996, 17 November 1997, and 22 June 1998, but with annotations indicating respectively that "the buildings [had] been included in the balance sheet of the State Prison Board"[1267] and in the other two that the "property was used by the armed forces of the former

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1258 Memorial, ¶ 466(c); Reply, ¶ 277; Rejoinder, ¶ 170; Respondent's Opening Slides, p. 40.

1259 Building Registry Certificate No. 154 to Agrin, 29 January 2003 (**C-102**).

1260 Transcript, Day 1, pp. 115-116:25-1.

1261 Third Keres Report, ¶ 162 (**CER-4**) *referring to* Order No. 378-k of the Government of the Republic of Estonia, 20 December 1990 (**RLA-069**).

1262 Third Rotko Statement, ¶ 223 (**CWS-4**).

1263 Reply, ¶¶ 303-304; Rejoinder, ¶ 177; Third Keres Report, ¶ 189 (**CER-4**).

1264 Third Keres Report, ¶¶ 189-190 (**CER-4**). *See also* Order No. 378-k of the Government of the Republic of Estonia, 20 December 1990, ¶ 2 (**RLA-069**).

1265 Order No. 378-k of the Government of the Republic of Estonia, 20 December 1990, ¶ 4 (**RLA-069**). *See also* Rejoinder, ¶ 175.

1266 Tallinn Building Registry Certificate No. 20215 issued to Verest, 20 April 1994 (**C-028**); Statement No. 20215, 5 September 1995 (**C-319**); Statement No. 20215, 27 October 1995 (**C-320**); Tallinn Building Registry Certificate No. 20215 issued to Verest, 8 July 1996 (**C-030**).

1267 Statement No. 20215, 21 November 1996 (**C-322**).

USSR until 17 August 1991."[1268] Instead, the only notice indicating the ownership of Estonia is dated 21 June 1994 and reads that "pursuant to the 18 May 1993 act of the Republic of Estonia regarding the assets of the former USSR armed forces, it belongs to the Republic of Estonia" but is used by Verest.[1269]

809. Under file number 8395, the Building Register notices indicate B&E as having "right of ownership" without any further annotations on 27 October 1995, 8 December 1995, 8 July 1996, and 13 June 1997.[1270] B&E was also identified as the owner in the notices dated 22 November 1996, 9 June 1997, and 16 September 1997, but with annotations indicating respectively that the property was taken to the balance sheets of the "State Executive Office"[1271] and of the "State Prison Board"[1272] and that it had been "initially acquired from USSR Armed Forces Baltic Fleet Construction Government and Military Factory no. 84."[1273] Further, the notice dated 27 October 1998 indicates Agrin as the owner and that, *inter alia*, the transfer and privatization of the property was prohibited according to an order issued during the civil proceedings before the Tallinn City Court.[1274]

810. The Tribunal acknowledges that not all notices are consistent. The Respondent is therefore correct in arguing that such inconsistent information should have given rise to rigorous due diligence to ascertain any defects in title,[1275] and the Tribunal will revert to this point. Even so, all but one of the notices point to an owner other than the Respondent and all but one refer to the contracts with which the Claimant alleges that Küti 17 and 17a were transferred to private owners.[1276] Further, even though the annotations suggest that the right of ownership could be disputed or uncertain, the owner is indicated as a private entity in 15 out of 16 notices. On balance, the Tribunal is therefore persuaded that the Building Register notices overall constitute representations which point with sufficient specificity to the private ownership of Küti 17 and 17a. In a second stage of the analysis, the Tribunal will consider whether such representations could give rise to legitimate expectations and whether these were frustrated.

1268 Tallinn Building Registry Certificate No. 20215 issued to Verest, 17 November 1997 (**C-053**); Certificate No. 20215, 1998 (**R-091**).

1269 Tallinn Building Registry Certificate No .20215 issued to Verest, 21 June 1994 (**C-029**).

1270 Tallinn Building Registry Certificate No. 8395 issued to B&E, 27 October 1995 (**C-033**); Tallinn 8395 issued to B&E, 8 December 1995 (**C-034**); Tallinn Building Registry Statement No. 8395, 21 November 1996 (**C-312**); Tallinn Building Registry Statement No. 8395, 9 June 1997 (**C-315**).

1271 Tallinn Building Registry Certificate No. 8395 issued to B&E, 21 November 1996 (**C-035**).

1272 Tallinn Building Registry Statement No. 8395, 9 June 1997 (**C-314**).

1273 Certificate No. 8395 of Tallinn Building Register issued to OÜ B&E, 16 September 1996 (**C-036**).

1274 Tallinn Building Registry Statement No. 8395, 27 October 1998 (**C-317**).

1275 Rejoinder, ¶ 173.

1276 *See* Sale Agreement between Nautex and Verest, 7 May 1992 (**C-027**); Contract No. 16 (**C-023 / R-036**). *See also* Transcript, Day 1, p. 64, 1-3: "the buildings of the port and the port lands were registered to private entities, not in the name of the state."

(5.) The Administrative Permits

811. The Claimant adduces various administrative permits issued to its subsidiaries between 1999 and 2000 as a basis for its expectations, arguing that they confirm both rightful possession and private ownership.[1277]

812. The Tribunal must first exclude from its analysis the permits which were issued after the making of the investment, as they could not possibly have created any expectations in the Claimant. The Tribunal will therefore disregard the permits issued on 17 December 1999, 28 July 2000, and 25 October 2000.[1278] Upon closer inspection, also the permits dated 1st and 24 November 1999 were issued after the making of the investment.[1279] These permits allowed dredging work in the Seaplane Harbor's port basin, which was under the possession of Verest, which in turn had already been acquired by BPV on 23 September 1999. The Tribunal must therefore conclude that none of the administrative permits submitted by the Claimant were issued before the making of its investment and that none could constitute a representation capable of creating legitimate expectations.

(6.) The Tax Instruments

813. The Claimant also adduces the Respondent's acceptance of tax payments as a basis for its expectations and, in particular, it submits several tax notices and instruments concerning the taxable value of the disputed properties.[1280] Referring to these exhibits, the Claimant asserts that "Tallinn issued orders naming the owner and user of the land and describing the plot of land taxed."[1281]

1277 Transcript, Day 1, p. 64:13-25: "All of these permits were issued to private entities; they were not issued to the state. The Building Department knows who owns what […] they are the people who have rightful possession. That's why they have the permits." *See also* Reply, ¶¶ 252-260.

1278 Estonian Marine Inspectorate Permit No. 25 to BPV, 17 December 1999 (**C-092**); Estonian Marine Inspectorate Permit No. 48 to BPV, 17 December 1999 (**C-093**); National Heritage Board of Tallinn issued Permit No. 85, 28 July 2000 (**C-095**); National Heritage Board Permit No. 130 to Verest, 25 October 2000 (**C-096**).

1279 Estonian Marine Inspectorate Permit No. 41 to BPV, 1 November 1999 (**C-089**); Estonian Marine Inspectorate Permit No. 47 to BPV, 24 November 1999 (**C-091**).

1280 Tax and Customs Board notice to Agrin, 19 October 2006 (**C-195**); Tax Notice to Verest for payment of Land Tax, 19 October 2006 (**C-203**); Tallinn Instrument of the Taxable value of a plot of land, Number 70438 issued to B&E, 22 December 1999 (**C-325**); Tallinn Instrument of the taxable value of Kuti 17a issued to Agrin, 23 January 2002 (**C-327**); Tallinn Instrument of the taxable value of Kuti 17 issued to Verest, 18 January 2000 (**C-328**); Tallinn Instrument of the taxable value of Kuti 17a issued to B&E, 18 January 2000 (**C-329**); Tallinn Instrument of the taxable value of Kuti 17 issued to Verest, 22 January 2003 (**C-354**); Tallinn Instrument of the taxable value of Kuti 17 issued to Agrin, 22 January 2003 (**C-355**).

1281 Reply, ¶ 338.

814. The Tribunal disagrees with the Claimant's statement. It finds, instead, that B&E and Verest are referred to as "Owner/superficiary/user,"[1282] Verest and Agrin as "land taxable person,"[1283] or again as merely the addressees of the tax instruments, without any further qualifications.[1284] While the Tribunal acknowledges that the Tax Department recognized Verest and Agrin's use of the disputed properties, nothing in the aforementioned exhibits points to ownership with sufficient specificity.

815. Further, all submitted tax notices and instruments are dated after the Claimant made its investments on respectively 23 September and 8 December 1999, so they could not have possibly been the basis for its expectations. The Tribunal must therefore disregard them.

(7.) Customs Authorization

816. The Claimant submits that the Estonian Customs Board's approval of Verest's application to use the Lennusadam Port for the import and export of wood would have implicitly recognized B&E, Agrin, and Verest as owners of the port.[1285]

817. However, the document presented by Claimant only includes the application, and not the actual approval. Even if as alleged by the Claimant, the application was later approved, such a response could not be considered a recognition of ownership, as it merely asked the competent authority to recognize the Seaplane Harbor as "as a port that carries out hydro-technical works and processes imported-exported goods",[1286] whereas no statement was made as to ownership. The Claimant has therefore failed to demonstrate that the Estonian Customs Board made a representation as to its ownership of the Lennusadam Port.

(8.) Planning Office Certificate

818. The Claimant adduces the Certificate issued by the Tallinn Sustainable Development and Planning Office to Verest in 1997 as "recognizing its use of the Lennusadam Port."[1287]

819. The Tribunal finds, however, that the Certificate simply provides building restrictions for detail planning proceedings for Küti 17.[1288] Even though its full name reads "Certificate about scope of

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1282 Tallinn Instrument of the taxable value of Kuti 17 issued to Verest, 18 January 2000 (**C-328**); Tallinn Instrument of the taxable value of Kuti 17a issued to B&E, 18 January 2000 (**C-329**).

1283 Tallinn Instrument of the taxable value of Kuti 17 issued to Verest, 22 January 2003 (**C-354**); Tallinn Instrument of the taxable value of Kuti 17 issued to Agrin, 22 January 2003 (**C-355**).

1284 Tax and Customs Board notice to Agrin, 19 October 2006 (**C-195**); Tax Notice to Verest for payment of Land Tax, 19 October 2006 (**C-203**); Tallinn Instrument of the Taxable value of a plot of land, Number 70438 issued to B&E, 22 December 1999 (**C-325**); Tallinn Instrument of the taxable value of Kuti 17a issued to Agrin, 23 January 2002 (**C-327**).

1285 Reply, ¶ 1486, *referring to* Verest application for permit of import-export cargo through port Lennusadam, 26 July 1994 (**C-040**).

1286 Verest application for permit of import-export cargo through port Lennusadam, 26 July 1994 (**C-040**).

1287 Reply, ¶ 1486, *referring to* Tallinn City Planning Office Certificate about the scope of building right and use, 21 August 1997 (**C-041**).

1288 Counter-Memorial, ¶ 342.

building rights and intended purpose", the document in question does not mention, or for that matter recognize, Verest as owner of the site. Rather, it merely states that a detailed plan needs to be prepared for the lot at Küti 17. [1289]

820. On this basis, the Tribunal is satisfied that the Planning Office Certificate is not sufficiently specific and therefore does not amount to a representation which could possibly create expectations in the Claimant.

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821. Considering the above, the only representation made to the Claimant by the Respondent amounts to the Building Register notices, which represented, with sufficient specificity and before the making of the investment, the Claimant as the owner of the disputed property.

(B.) Legitimacy and Reasonableness

822. The tribunals in the cases of *Bayindir v. Pakistan* and *Parkerings v. Lithuania* found that the reasonableness and legitimacy of expectations must be evaluated in light of the historical circumstances at the time and place of investment, and the Tribunal agrees with this proposition. As well put by the Respondent, there was a high degree of instability, especially concerning private and public ownership, in the years preceding the Claimant's investment:

> The process of land reform and privatization in Estonia following the restoration of independence was complex; there was no concept of land ownership in the Soviet Union; the system had to be built from scratch and account for the rights of the state, the newly formed municipal entities, and the pre-occupation owners of land.[1290]

823. In this context, the Claimant's reliance on so few and inconsistent representations from the Building Register was unreasonable, especially when so many other representations pointed to the contrary. The overwhelming number of adverse representations would have made most if not all investors wary of the elevated risk of their investments in a country that was emerging from decade-long Soviet occupation and re-establishing land ownership. Instead, the Claimant ignored Estonia's position as to the disputed properties, including clear stances such as *inter alia* the initiation of the court proceedings, the Tallinn Master Plan, the heritage restrictions, and the early attempts to reclaim the Seaplane Harbor as municipal ownership.[1291] It was clear long before 1999 that its ownership was disputed and that the Respondent was actively trying to re-establish it.

824. Under these circumstances, the Tribunal is not convinced that extensive due diligence that resulted in conclusions later contradicted by the reasonable assessment of the Estonian authorities could have given rise to legitimate expectations by the Claimant. But, in any event, the Tribunal finds that the Claimant did not establish that an appropriate level of due diligence was performed. Apart from the unspecific claim by Mr. Rotko that appropriate due diligence took place, there is

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1289 Tallinn City Planning Office Certificate about the scope of building right and use, 21 August 1997 (**C-041**).

1290 Rejoinder, ¶ 193.

1291 Letter from Tallinn City Government to Ministry of Defense and to Estonian Privatization Agency, 26 April 1996 (**C-308**); Tallinn City Development Plan 1994-1997, 5 May 1994 (**R-122**); Letter No. 620 from National Heritage Board to State Executive Office and to Verest, 11 July 1996 (**R-112**).

little, if any, evidence on file that would corroborate this allegation disputed by the Respondent. The privilege log indicates that two communications with counsel took place before the making of the investment.[1292] But the Claimant chose not to disclose the content of these communications, and there is no record of other professional advice. The Claimant may well be within its rights not to disclose the content of the advice it received prior to making its investment because of attorney-client privilege. But this does not relieve the Claimant from its burden of proof. It is undisputed that Mr. Rotko was aware of the court proceedings and that, nonetheless, he proceeded with the purchase of Verest and Agrin in 1999.[1293] Proper due diligence would have revealed critical deficiencies or at least uncertainties in the chain of title of Küti 17 and 17a.

825. Considering the above, the Tribunal finds that, in making its investment, the Claimant took on a business risk whose materialization is not protected by the legitimate expectations doctrine.

(C.) Frustration

826. Because of the Tribunal's finding above that the expectations the Claimant alleges to have had were not legitimate, it is unnecessary to analyze whether those expectations were frustrated. But the Tribunal doubts whether the inconsistencies in Estonia's behavior did indeed amount to the frustration of any expectations.

2. Art. II.(3)(b) – Impairment by Arbitrary and Discriminatory Practices

a) The Claimant's Position

827. The Claimant maintains that the Respondent also breached the prohibition of arbitrary and discriminatory measures under Article II(3)(b) of the Treaty.[1294]

828. According to the Claimant, many of the Respondent's measures at issue in this arbitration were not based on reason, but on prejudice toward the Claimant because its owner and employees were Russian-speaking and of Russian heritage.[1295] The Claimant maintains that as a result of the five-decade-long occupation of Estonia by the USSR, a majority of the Estonian population has "antagonistic feelings" towards Russian-speaking Estonians.[1296] This is evidenced, the Claimant asserts, by the fact that the media reports that covered events related to the present dispute emphasized that the companies involved were controlled by Russian speakers.[1297] The Claimant underlines that following a visit to the Seaplane Harbor, the President of Estonia stated that he

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1292 Claimant's Privilege Log, 30 June 2020 (**R-201**).

1293 First Rotko Statement, ¶¶ 33-34 (**CWS-1**); Hearing Transcript, Day 1, p. 199:10-15.

1294 Memorial, ¶¶ 474-486.

1295 Memorial, ¶ 476. *See also* Hearing Transcript, Day 1, p. 70:12-16.

1296 Memorial, ¶ 477, *referring to* Ryo Nakai, "The Influence of Party Competition on Minority Politics: A Comparison of Latvia and Estonia", Journal on Ethnopolitics and Minority Issues in Europe, 13(1), 2004, p. 62 (**C-272**).

1297 Memorial, ¶¶ 478-479, *referring to* Rask Started Disciplinary Proceedings Against Judge, Baltic News Service, 20 November 2000 (**C-072**); Laar Confirms that the Conflicting Seaplane Harbor Will Stay in the Ownership of the State", Baltic News Service, 17 June 2002 (**C-075**).

"found a large scaled state theft in the area of the seaplane hangar […] by self-appointed Russian thieves."[1298]

829. As examples of the arbitrary and discriminatory actions the Respondent took towards the Claimant, the Claimant cites to:

(a) the Respondent's decision to move the icebreaker *Great Tõll* to the entranceway of the Seaplane Harbor, cutting off large ship traffic and forcing the Claimant's subsidiaries to reduce their activities to small ship repairs.[1299] This measure, the Claimant contends, was not based on reason because (i) the Maritime Administration had recognized that the berth was unsafe and prone to accidents;[1300] and (ii) at the time, the decision of the Tallinn City Court, finding that Estonia was the rightful owner of the Seaplane Harbor buildings, had been quashed by the Circuit Court, so Estonia had no right "founded on law" to place the icebreaker there;[1301] and

(b) the Respondent's failure to grant BPV a Port Passport and customs control zone with respect to the Seaplane Harbor. According to the Claimant, Verest held "an unlimited duration operating customs operation permit"—a Port Passport, in 1993, which allowed "Estonian customs operations to take place at the [Seaplane Harbor]."[1302] After BPV acquired Verest and sought to have the customs permits transferred to its name, the Claimant asserts that the Respondent "made this impossible" by arbitrarily (i) refusing to recognize the validity of Verest's Port Passport from 1 January 1999 onwards, thereby forcing BPV to apply for a new Port Passport and authorization for a customs control zone;[1303] (ii) refusing to coordinate the port basin assignment, which was necessary for BPV to qualify for a Port Passport, on the ground that the ownership of the port territory was disputed;[1304] and (iii) refusing to grant BPV a customs control zone.[1305] The Claimant

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1298 Memorial, ¶ 480 (emphasis original), *referring to* Letter of the President of Estonia, Lennart Meri, to the Minster of Environment, Heiki Kranich, 27 June 2000 (**C-208**). *See also* Hearing Transcript, Day 1, pp. 76:15 – 77:10.

1299 Memorial, ¶ 481; Reply, ¶ 248.

1300 Memorial, ¶ 483, *referring to* Letter from the Claimant to the Ministry of Environment, 5 December 2003 (**C-126**).

1301 Memorial, ¶ 482, *referring to* May 2002 Appeal Judgment (**C-191**).

1302 Reply, ¶¶ 528, 530, 574, 827; Claimant's Answers to Tribunal Questions, ¶ 3. *See also* Hearing Transcript, Day 5, p. 4:17-21.

1303 Reply, ¶¶ 539, 576, 820; Claimant's Answers to Tribunal Questions, ¶¶ 21-22.

1304 Reply, ¶¶ 568, 577-601. The Claimant, relying on Mr. Kere's analysis, argues that the Respondent "could have approved the port basin since [ELA]'s subsidiaries' possession was presumably lawful, in good faith and legal pursuant to the Law of Property Act. *See* 1 October 2021 Submission, ¶¶ 32-34, *citing* Fourth Keres Report, ¶ 57 (**CER-8**). Moreover, contrary to what the Respondent alleges, the Claimant contends that there is nothing in the Haltransa decision to support that legality of the port possession was a factor in determining port basin coordinates. *See* Fourth Keres Report, ¶ 54, *referring to* Tallinn City Council Decision No. 209, 15 June 2006 (**R-235**).

1305 Reply, ¶¶ 544-565; Claimants' Answers to Tribunal Questions, ¶ 26. The Claimant submits that BPV was entitled to establish a customs control zone because (i) Verest operated a *de facto* customs zone in light of the Maritime Administration's recognition of Verest's Port Passport; (ii) the JVA gave BPV the possessory rights at the Lennusadam Port, *i.e.*, BPV and Verest had presumptively valid title at the Lennusadam Port under Estonian law; and (iii) only BPV's consent was necessary for a customs zone to be awarded. Therefore, the Claimant argues that BPV, as the presumptive legal owner of the Lennusadam Port, was

alleges that the Respondent arbitrarily and "falsely relied on the legal fiction that Verest had no lawful possession at the Lennusadam Port" to reject its applications,[1306] while at the same time granting other post assignments and permits to other Estonian ports in similar situations.[1307]

b) The Respondent's Position

830. The Respondent submits that the prerequisites of a breach of Article II(3)(b) of the Treaty "are a showing of arbitrary or discriminatory measures which impair in some way the management of the investments and which are attributable to the state."[1308] The Respondent avers that whilst "a measure is arbitrary if it is made without reason, in willful disregard of the due process of law," a host State acts in a discriminatory manner "if like situations are not treated similarly without a rational justification."[1309]

831. The Respondent maintains that the Claimant fails to meet the above-mentioned prerequisites, and thus, its claim under Article II(3)(b) must be rejected.[1310]

832. First, the Respondent argues that the Claimant has not even explained or provided any evidence on "how the alleged discriminatory and arbitrary treatment impaired the 'management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal' of its investments."[1311]

833. Secondly, the Respondent contends that the Claimant has not identified the comparator(s) in respect of which it has allegedly been treated disadvantageously, as it is required to prove discriminatory treatment.[1312]

834. Thirdly, the Respondent asserts that none of the measures the Claimant takes issue with were arbitrary.[1313] In particular, the Respondent argues that:

(a) The articles published in the media and the general sentiment of the local population, on which the Claimant relies to support its claim, "are not conduct attributable to the state";[1314]

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entitled to apply for and receive authorization to operate a customs zone. *See* Claimant's Answers to Tribunal Questions, ¶¶ 1, 5-8, 31-36, 38-39. *See also* Third Keres Report, ¶¶ 360-362 (**CER-4**); Fourth Keres Report, ¶ 55 (**CER-8**).

1306 Reply, ¶¶ 600, 610, 1179.

1307 Reply, ¶¶ 603-604, 829, 1237.

1308 Counter-Memorial, ¶ 559.

1309 Counter-Memorial, ¶ 560, *referring to Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, ¶ 371 (**RLA-126**); *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, ¶ 710 (**RLA-138**).

1310 Counter-Memorial, ¶ 561.

1311 Counter-Memorial, ¶ 562.

1312 Counter-Memorial, ¶ 563, *referring to South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, ¶ 711 (**RLA-138**).

1313 Counter-Memorial, ¶¶ 564-570.

1314 Counter-Memorial, ¶ 564.

(b) The icebreaker *Suur Tõll* was relocated to berth No. 36A for budgetary reasons, specifically so that the State would not have to pay substantial berthing fees at a different location.[1315] Moreover, the Respondent emphasizes that since berth No. 36A is owned by Estonia, and there has been no dispute over its title or possession of this berth, the Respondent could make use of it "for any purpose it saw fit."[1316] Moreover, the Respondent points out that, as an aerial image of the area clearly demonstrates, the icebreaker was not "blocking the entrance to the port nor limiting the use of the port in any other unreasonable manner";[1317]

(c) Contrary to the Claimant's contention, none of the Claimant's Estonian subsidiaries held "pre-existing permits that needed to be or could be prolonged, re-issued or transferred." Rather, the Claimant's subsidiary, BPV, sought a port passport and the coordination of the port basin for the first time in 2002 and sought customs authorization for the first time in 2001, and these applications were all denied for good reason; [1318]

(d) Concerning the port passport, the Respondent alleges that the Claimant's application was denied because of its unsuccessful efforts to obtain coordination of the port basin, which was a necessary prerequisite.[1319] In any event, the Respondent maintains that "[t]here is nothing on the record that would suggest that the absence of a port passport either before 1 January 2001 or after that date, prevented the Claimant from operating the port";[1320] and

(e) Concerning the coordination of the port basin, the Respondent's refusal to do so is justified because (i) there was no *prima facie* basis to treat the Claimant temporarily as a lawful possessor of the Seaplane Harbor and waive the requirement for the port possessor to produce proof of ownership or lawful possession – a requirement that had been uniformly applied to all ports in Estonia;[1321] (ii) the Claimant failed to obtain coordination from its neighbors, as affirmed in the Haltransa case;[1322] and (iii) the Respondent was under no public law obligation, as the owner of the neighboring mole and berths, to allow the use of the port basin by a third party.[1323]

835. Concerning the customs authorization, the Respondent maintains that, contrary to the Claimant's contention, a customs control zone never existed at the Seaplane Harbor,[1324] and when BPV applied for this authorization in 2002, the decision of the Ministry of Justice to deny the application was made in the former's capacity as the owner of the land "because it was convinced that the subsidiaries and affiliates of the Claimant were illegal possessors of the Seaplane

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1315 Counter-Memorial, ¶ 567; Rejoinder, ¶ 371.

1316 Counter-Memorial, ¶ 566.

1317 Counter-Memorial, ¶¶ 565-567, *referring to* Aerial Photo of the Position of the Icebreaker *Suur Tõll* at the Seaplane Harbor, 3 June 2004 (**R-158**). *See also* Rejoinder, ¶ 372.

1318 Rejoinder, ¶ 376.

1319 Rejoinder, ¶ 381. *See also* Hearing Transcript, Day 1, pp. 143:25 – 144:12.

1320 Rejoinder, ¶ 381.

1321 Rejoinder, ¶¶ 392, 395.

1322 Rejoinder, ¶¶ 391, 394; 3 November 2021 Submission, ¶ 19, *referring to* Tallinn City Council Decision No. 209, 15 June 2006 (**R-235**).

1323 Rejoinder, ¶ 393.

1324 Rejoinder, ¶¶ 403-406; Respondent's Answers to Tribunal Questions, ¶ 7. *See also* Hearing Transcript, Day 1, p. 146:17-19.

Harbor."[1325] In this respect, the Respondent contends that BPV was not entitled under Estonian law to grant consent for the Customs Board to open a customs control zone at the Seaplane Harbor, given that it could not demonstrate ownership or lawful possession of the port and its basin.[1326]

c) The Tribunal's Analysis

836. Article II(3)(b) of the Treaty establishes that "Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments."

837. Therefore, to be successful with its claim, the Claimant would need to demonstrate that the Respondent's actions were arbitrary or discriminatory and that these impaired the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of its investments.

838. The Tribunal will address the notion of arbitrariness under s. i. below, that of discriminatory measures under s. ii, and the impairment of the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of the investment under s. iii.

i. Arbitrary Measures

(I.) Legal Standard

839. The Treaty does not define the concept of arbitrariness or what arbitrary measures are, but the Parties substantially agree that a measure is arbitrary when it is not founded on reason.[1327]

840. Consistently with investment case law, to qualify as arbitrary, a measure must depart from either reason, law or fact, as articulated by the tribunals in *Genin v. Estonia*[1328] and *Lauder v. Czech Republic*.[1329]

841. The *Genin* tribunal referred to "procedural irregularity" that amounts to "bad faith", "a wilful disregard of due process of law," or "an extreme insufficiency of action," or that violates the "Tribunal's sense of juridical propriety."[1330] The *Lauder* tribunal, by reference to the dictionary meaning of the term, considered arbitrary the measures "founded on prejudice or preference."[1331]

1325 Counter-Memorial, ¶¶ 568-569; Rejoinder, ¶ 407.

1326 Respondent's Answers to Tribunal Questions, ¶¶ 2-4. *See also* Hearing Transcript, Day 1, p. 145:9-15.

1327 Memorial, ¶ 494, *referring to Lauder v. Czech Republic*, 2001 WL 347860000, Final Award, 3 September 2001, ¶¶ 221, 232 (**CLA-085**); Counter-Memorial, ¶ 560, *referring to Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, ¶ 371 (**RLA-126**).

1328 *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, ¶ 371 (**RLA-126**).

1329 *Lauder v. Czech Republic*, 2001 WL 347860000, Final Award, 3 September 2001, ¶ 232 (**CLA-085**).

1330 A*lex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, ¶ 371 (**RLA-126**).

1331 *Lauder v. Czech Republic*, 2001 WL 347860000, Final Award, 3 September 2001, ¶ 232 (**CLA-085**)

842. Therefore, to be successful with its claim of arbitrary behavior, an investor would need to prove that the State's challenged actions were based on an improper motivation (such as fear reflecting national preference or hostility towards a group of people) rather than on a reasonable rationale.

(II.) Application to the Facts

843. The Tribunal will first consider whether the contested measures were based on an improper motivation, as alleged by the Claimant. Then, it will examine if any reasonable rationale could instead be the ground for the allegedly arbitrary measures.

(A.) Improper Motivation

844. The Claimant argues that the Respondent's measures "were arbitrary […] because they were not based on reason, but on prejudice toward ELA because its owner and employees were of Russian heritage and spoke Russian."[1332] To support its statements, the Claimant adduces as evidence first the Estonian newspapers' emphasis on the Russian identity of the Lennusadam Port's possessors, second a letter by the Estonian President Meri addressing the dispute and again the Russian identity of the Claimant, and third the move of the *Suur Tõll* to berth 36A in proximity of the Claimant's possessions.[1333]

845. The Tribunal acknowledges that the articles and books referenced by the Claimant indicate the existence of an "anti-Russian" sentiment in the Estonian people in the aftermath of the Soviet occupation.[1334] Nonetheless, they constitute general information that is unrelated to the conduct of the State. Independent reporting sources such as the Baltic News Service and the Journal of Ethnopolitics and Minority Issues in Europe can hardly serve to establish a prejudicial attitude of the Respondent towards the Claimant. The Tribunal must therefore disregard them in its analysis.

846. The statements made by President Lennart Meri to the Minister of the Environment Heiki Kranich on "a large scaled state theft in the area of the seaplane hangar […] by self-appointed Russians thieves"[1335] are instead the expression of a State organ. Even though there is no evidence that the President was involved in the decisions leading to the contested measures, his statements are improper and indicate malicious motives rather than a well-reasoned decision. However, the Tribunal finds that these motives alone could not substantiate a claim of arbitrary behavior. Only together with the absence of a reasonable rationale could they support a finding of arbitrary measures. Also, given the ongoing dispute over the ownership of the harbor, more emotional statements could hardly give rise to a breach of the FET standard if the relevant measures were also supported by reason, law or fact, to which the Tribunal will turn later in its analysis.

1332 Memorial, ¶ 476.

1333 Memorial, ¶¶ 477-486.

1334 Rask Started Disciplinary Proceedings Against Judge, Baltic News Service, 20 November 2000 (**C-072**); "Laar Confirms that the Conflicting Seaplane Harbor Will Stay in the Ownership of the State", Baltic News Service, 17 June 2002 (**C-075**); Ryo Nakai, "The Influence of Party Competition on Minority Politics: A Comparison of Latvia and Estonia", Journal on Ethnopolitics and Minority Issues in Europe, 13(1), 2004, p. 62 (**C-272**).

1335 Letter of the President of Estonia, Lennart Meri, to the Minster of Environment, Heiki Kranich, 27 June 2000 (**C-208**). *See also* Hearing Transcript, Day 1, pp. 76-77:24-14.

847. The relocation of the *Suur Tõll* to berth 36A of the Port on 26 January 2004[1336] was, according to the Claimant, "clearly arbitrary and solely intended to harass the ELA Estonian Subsidiaries."[1337]

848. The Claimant objected to the planned move on 5 December 2003. The Claimant asserts that given that berth 36A was recognized by the Maritime Administration "as unsafe and prone to accidents […] placing *Great Tõll* [was] categorically prohibited before the prior removal of any unsafe conditions." [1338] The Claimant further noted that "the falling of the berth because of the pressure from the icebreaker, would violate the rights of the owners of other berths to use, possess and dispose of their berths as it would close the canal of the port and the vessels would not access in or out of the port."[1339]

849. The Claimant asserts that the Icebreaker partially blocked off the entranceway of the Lennusadam Port, cutting off large ship traffic, and that, as a result, afterward BPV could only use the Port for small ship repairs.[1340] Eventually, the icebreaker was moved slightly to permit some limited small ship access to the Port.[1341]

850. To support its assertion that the relocation was arbitrary, the Claimant submitted a newspaper article that emphasized the hostile Russian speakers present at the relocation and their complaints in Russian as reminiscing of the Soviet occupation to the other attendees.[1342] The Tribunal must disregard it for the same reasons as above, that is, because the Postimees newspaper is not an expression of the State.

851. Whether the relocation was malicious in itself depends on the presence of an improper motivation. On this point, the Respondent denies not only any malicious intent, but also the danger and encumbrance of the *Suur Tõll* at its new location. Strong support for the Respondent's position is offered, in the view of the Tribunal, by the following aerial photographs showing the location of the icebreaker at berth 36A of the Lennusadam Port.[1343]

1336 ERR, "The *Suur Tõll* Is Transported to the Seaplane Harbor", 25 January 2004 (**R-161**).

1337 Memorial, ¶ 484.

1338 Letter from the Claimant to the Ministry of Environment, 5 December 2003 (**C-126**).

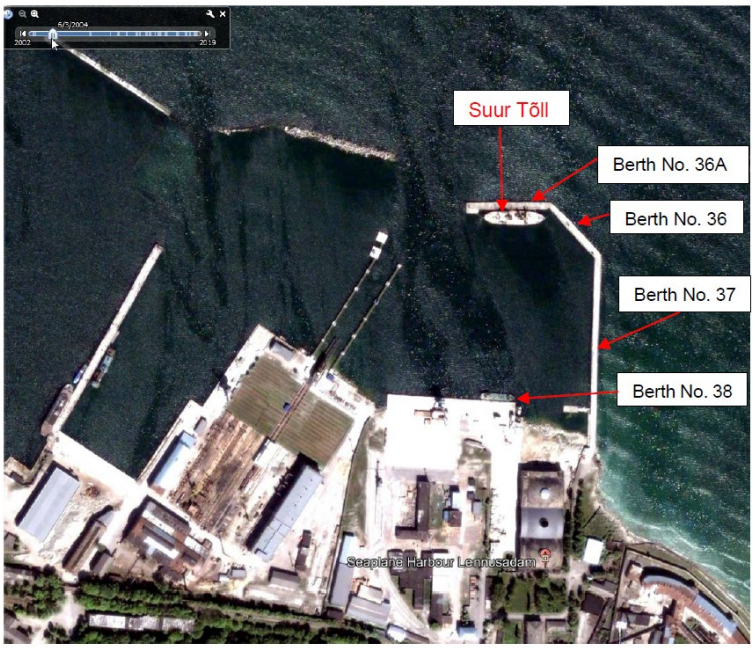
1339 Letter from the Claimant to the Ministry of Environment, 5 December 2003 (**C-126**).

1340 Memorial, ¶ 165, *citing* Second Rotko Statement, ¶ 80 (**CWS-2**). *See also* Witness Statement of Ms. Olga Kotova dated 29 August 2019, ¶ 21 (**CWS-3**): "Over time, this caused great economic harm to ELA as we could not have any large ships come to the Port."

1341 Second Rotko Statement, ¶ 81 (**CWS-2**).

1342 "*Great Tõll* found a new home base in the hostile Seaplane Harbor", Postimees, 27 January 2004 (**C-125**): "'Do not be shy! Nelsja shvartovatsya! (Exit from here! You cannot dock here! - ed.)' The Russian-language order was heard from the radio […] The people of the sea museum and journalists waiting for the icebreaker felt like the time maschine had been turnt back 10 years and the Russian army had still not left Estonia [sic]." *See also* Hearing Transcript, Day 3, pp. 34-35:16-22.

1343 Aerial Photo of the Position of the Icebreaker *Suur Tõll* at the Seaplane Harbor, 3 June 2004 (**R-158**); M. Karu Article "An Architectural Memorial in the Whirlwind of Changes. The Seaplane Harbor from 1990 to 2010" in *Tallinn's Seaplane Hangar: From Plane Shed to Museum*, 2015, p. 8 (**R-133**).



852. If moving the *Suur Tõll* was indeed an encumbrance and unsafe, this might indicate that there was some improper motivation behind the move. From the evidence presented, the *Suur Tõll* did not pose an obstacle to the Claimant's port operations, and, as stated by Mr. Rotko, it was even slightly moved to accommodate more ship traffic into the Lennusadam Port. Further, the only evidence presented as to the safety hazard posed by the ship at berth 36A is a letter from BPV to the Ministry of Environment.[1344] No neutral source suggests that the new position of the *Suur Tõll* was dangerous in any way. Consequently, the Tribunal finds that the Claimant failed to

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1344 Letter from the Claimant to the Ministry of Environment, 5 December 2003 (**C-126**).

demonstrate that harassment and anti-Russian sentiments were the real basis of the Respondent's actions.

(B.) Reasonable Rationale

853. The Tribunal will now consider whether a reasonable rationale motivated instead the allegedly arbitrary actions of the Respondent, namely the relocation of the *Suur Tõll* and the denial of permits related to the port.

(1.) The Suur Tõll "Blockade"

854. The Icebreaker *Suur Tõll*, built in 1914, is a museum exhibit of the Maritime Museum of Estonia. Prior to January 2004, the *Suur Tõll* was located in the Admiral Pool at the Port of Tallinn.[1345] In October 2003, the Baltic News Service announced that the Estonian government was going to move the *Suur Tõll* into berth 36A at the Lennusadam Port.[1346] It is uncontested that berth 36A is owned by the Respondent and not subject to dispute.[1347] As such, it is doubtful whether the Respondent's use of its own property could constitute an arbitrary measure or, for that matter, require a particular reason.

855. Regardless, at the time news reports recorded that, after the conclusion of a three-year lease contract in its former city center location, the Maritime Museum needed to place the icebreaker in a new site for budgetary reasons.[1348] The Respondent further explained that the previous berthing fees were too costly and that the relocation to the Lennusadam Port "was in line with the Maritime Museum's plan to move all its ship exhibits in the future to its berths at the Seaplane Harbor."[1349]

856. The Tribunal is satisfied with the Respondent's reasons, which are credible and sufficiently substantiated by reports of the time.

(2.) The Administrative "Blockade"

857. The Claimant contends that it was treated unfavorably by way of an "administrative blockade" in the treatment of its applications for a Port Passport, for coordination of the Port Basin, and for a Customs Zone, which the Claimant ultimately failed to obtain because of the ownership dispute.

858. While the Respondent has pointed to certain shortfalls in the Claimant's compliance with the relevant application processes, the record shows that the Claimant's inability to obtain the

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1345 DELFI, "The *Suur Tõll* Will Be Moved To a More Favorable Area", 6 January 2004 (**R-160**).

1346 Memorial, ¶¶ 161-162; "*Great Tõll* will permanently leave the Admiral Pool", Postimees, 28 October 2003 (**C-124**).

1347 Counter-Memorial, ¶ 5(i); Reply, ¶ 64.

1348 DELFI, "The *Suur Tõll* Will Be Moved To a More Favorable Area", 6 January 2004 (**R-160**).

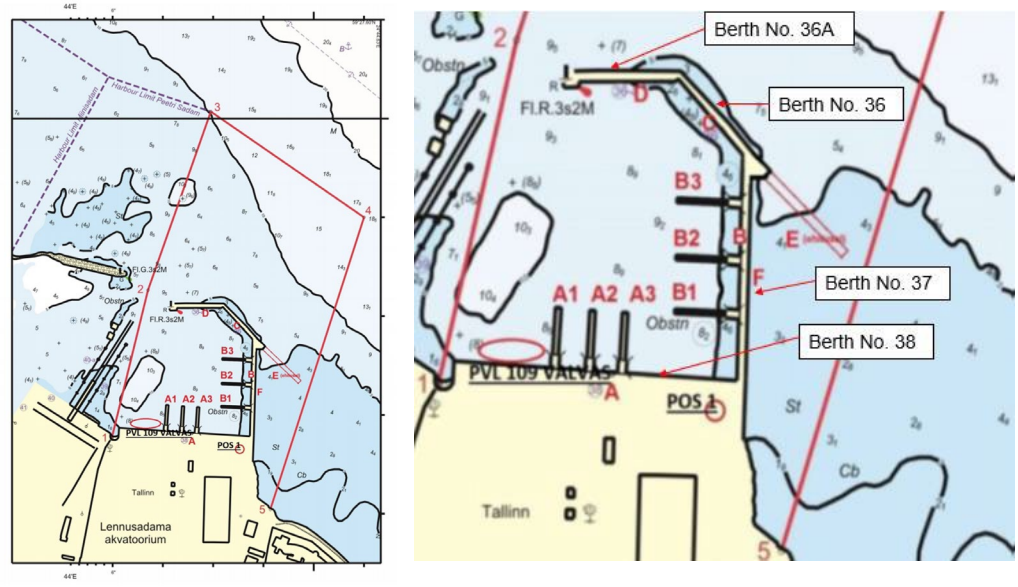
1349 Counter-memorial, ¶ 567 *referring to* DELFI, "The *Suur Tõll* Will Be Moved To a More Favorable Area", 6 January 2004 (**R-160**); "*Suur Tõll* leaves Admiraliteedi Pool permanently", Postimees, 28 October 2003 (**C-124**).

necessary port basin approvals, port passport, customs authorization, or building permits was ultimately due to the ownership dispute.

(i) Coordination of the Port Basin

859. The approvals of the Government of Estonia were required in two capacities: first, approval of the port basin in the capacity of the owner; and second, approval of the port basin boundary coordinates as the owner of the immediately adjacent port basin on the eastern side. Pursuant to section 4(2) of the 1997 Ports Act, the limits of a seaport basin were to be established by the Government of the Republic on the basis of a proposal by the Minister for Roads and Communications and with the approval of the council (the legislative body) of the relevant local municipality.[1350] To obtain the approval of the port basin from the local municipality, the Claimant had to obtain coordination of the boundary of the sea basin by agreement with the possessors of the neighboring areas and hold ownership or lawful possession of the port, or authorization from the lawful possessor.[1351]

860. The basin of the Seaplane Harbor is delimited on the western side by the sea basin of the Noblessner/Peetri Port. The Seaplane Harbor basin is delimited on the eastern side by the L-shaped eastern mole and its berths (Küti 15A). A chart showing the port basin of the Seaplane Harbor as of 25 February 2020 is shown here:[1352]



861. The Claimant obtained coordination with AS S Tallinna Meretehas (Noblessner/Peetri Port) with the Noblessner/Peetri side as of 23 August 2002.[1353] The owner of Küti 15A, including the mole

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1350 Rejoinder, ¶ 383.

1351 Rejoinder, ¶¶ 391, 394.

1352 Map of the port basin of the Seaplane Harbor from the Port Registry, accessed on 25 February 2020 (**R-104**).

1353 Letter from BPV to State Real Estate, 30 September 2003 (**C-274**).

and berths, is the State of Estonia. Until 2003, Küti 15A was administered by the Ministry of the Environment, at which point it was transferred to Riigi Kinnisvara AS ("**Riigi Kinnisvara**"), the state-owned real estate company.[1354]

862. From June 1999 onwards, the Claimant's subsidiaries sought assistance in the coordination of the port basin. The Ministry of Transport declined to coordinate the port basin on the grounds of the lack of owner's consent, as confirmed by a letter dated 28 January 2003:

> the possessor of berths on Seaplane Harbor "L" shaped pier and the 28-hectare property located on port territory is the state, and the possessor is Ministry of the Environment. AS BPV is not the possessor of the port, therefore you do not have the authority to apply for Seaplane Harbor port basin. You would have the authority as the port possessor or as a person/enterprise authorized by the possessor. We return your submitted documents and recommend reaching an agreement with the port possessor. After receiving corresponding documents, we are willing to submit them ourselves to Tallinn City Council coordination for an accelerated processing and thereafter to Government of the Republic approval.[1355]

863. BPV requested coordination of the port basin boundary coordinates with Riigi Kinnisvara on five occasions between 2003 and 2005 without success.[1356] BPV could not complete this process unless and until Riigi supplied coordinating information to the Maritime Administration. In a letter of 15 July 2004,[1357] the Ministry of Economic Affairs and Communications (the successor to the Ministry for Roads and Communications) informed the Claimant that the State would not coordinate the basin until the ownership dispute over the Seaplane Harbor was resolved.

864. The Respondent admits that it might have been obliged to initiate coordination of the port basin with the Claimant if it was the *prima facie* owner of the port, but this was not the case. The Respondent further argues that there was never any customs-related activity in the port,[1358] so there was no permit that should merely be transferred from Verest to BPV.

865. The Tribunal finds that the Claimant's arguments are premised on the conviction that it was the owner or at least rightful possessor of the Lennusadam Port but, as previously established, this was not the case. Given the Tribunal's findings as to the Claimant's lack of ownership, its claims cannot rest on the presumption that it was a *prima facie* owner. Even if the legal situation regarding the ownership of the Port was unclear at the time, it was not irrational for the State to deny permits to entities that it reasonably held to be unlawful possessors of State property.

1354 Rejoinder, ¶ 390.

1355 Letter from the Ministry of Economic Affairs and Communications to BPV, 28 January 2003 (**C-466**).

1356 Letter from BPV to State Real Estate, 30 May 2003 (**C-273**); Letter from BPV to State Real Estate, 30 September 2003 (**C-274**); Letter from BPV to State Real Estate (with attachment), 1 March 2004 (**C-275**); BPV application for coordination of port basin borders, 27 January 2004 (**C-276**); Verest letter to State Real Estate re. Port Basin, 7 January 2005 (**C-277**).

1357 Letter from the Ministry of Economic Affairs and Communications to BPV, 15 July 2004 (**C-477**).

1358 Rejoinder, ¶¶ 403-404.

(ii) Port Passport

866. The Port Act made port passports mandatory, and the explanatory memorandum explained the prerequisites for their issuance: the applicant must prove ownership or right of use of port land (i.e., a right to possession) to acquire the port passport.[1359] The procedure for obtaining a port passport was specified in a governmental decree No. 63 of 17 March 1998 and required a prior inspection by a governmental commission on the application of the port's possessor.[1360] The inspection could not be passed unless the port's possessor was able to produce documents proving the allocation of the port territory (land territory and sea basin). For land territory, this meant documents proving either ownership or lawful possession; for the sea basin, which could not be privately owned, this required coordination from the government.[1361] The Claimant failed to obtain these prerequisites, as made clear in the correspondence exchanged between 2002 and 2004 in relation to the port basin.

867. The Claimant argues that, since Verest held a port passport, it should have been transferred to BPV upon acquiring Verest. When Estonia denied the transfer and stated that BPV would have to apply for a new license due to the change in ownership, BPV was prevented from clearing commercial shipments and operating the customs zone.

868. Further, the Parties disagree on the notion of port passports and custom authorizations. According to the Respondent, the Claimant confuses the port passport with the customs authorization.[1362] While the Claimant states that "an unlimited duration operating customs operation permit is 'known as a Port Passport'",[1363] the Respondent asserts that a port passport has nothing to do with customs.[1364] In the Tribunal's view, this misunderstanding gives rise to further doubts as to the Claimant's argument on the port passport and its allegedly arbitrary denial.

869. In any event, the denial of the port passport could arguably only constitute arbitrary behavior if the Claimant was entitled to receive a port passport or to have Verest's port passport transferred to BPV, and if there was no reasonable rationale behind its denial.

870. In its submissions, the Claimant relies on the Certificate about the scope of the building right and use issued by the Tallinn City Planning Office[1365] to state that the "Maritime Administration re-registered the Verest port passport,"[1366] but the document mentions neither Verest nor the term

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1359 The Port Act § 20 Amendment Act, Explanatory Memorandum, 1977 (**C-525**); *cf. also* Third Keres Report, ¶¶ 276 et seq. (**CER-4**).

1360 Rejoinder, ¶ 379; Government Regulation on the Approval of the Procedure for Opening the Port to Shipping, 31 December 2004 (**C-536**).

1361 Rejoinder, ¶ 380.

1362 Rejoinder, ¶ 397.

1363 Reply, ¶ 528.

1364 Rejoinder, ¶ 397.

1365 Tallinn City Planning Office Certificate about the scope of building right and use, 21 August 1997 (**C-041**).

1366 Reply, ¶ 529.

"Port passport". Only the Port Passport issued to Verest and dated 7 October 1993[1367] states that it was first registered in 1993 and then re-registered in 1994. Further, the Claimant asserts that the port passport was denied because Verest needed to apply for a new passport due to the change in control of Verest after the acquisition by BPV, but that this explanation finds no basis in law.[1368]

871. The Tribunal finds that the Claimant failed to substantiate that it was legally entitled to receive or transfer a port passport. There is indeed no provision submitted by the Claimant that would give rise to a legal entitlement to transfer a port passport. Rather, the legal framework on port operations suggests that no such legal entitlement existed. Support for this view is offered by Mr. Keres' statement that "there was no reason the port passport could not have been transferred as there were no relevant rules in place."[1369]

872. In 1993, there was no requirement of law to have a port passport.[1370] Instead, port operations were regulated by the Merchant Shipping Code,[1371] which does not elaborate on the prerequisites of receiving a port passport.

873. The Port Act made port passports mandatory, and its explanatory memorandum set out the prerequisites for their issue: the applicant must prove ownership or right of use of port land (i.e., a right to possession) to acquire the port passport.[1372] There is no reason to believe that the Maritime Administration had already assessed Verest's ownership of lawful possession of the port in 1993. Hence, with new legal rules in place, it seems reasonable for the Respondent to demand a new application for a port passport from BPV.

874. Respondent's denial of transferring the port passport to BPV, or granting BPV a new port passport, was therefore not arbitrary as it was based on a reasonable rationale.

(iii) Customs Authorization

875. The approval of the State of Estonia was required in the capacity of the owner of the land. The Ministry of Justice explained that it was not possible to issue consent while the ownership dispute was pending.

1367 Lennusadam Port Passport, 7 October 1993 (**C-201**).

1368 Reply, ¶ 534(1).

1369 Third Keres Report, ¶ 262.

1370 Counter-Memorial, ¶ 341.

1371 Rejoinder, ¶ 180; Third Keres Report, ¶ 256 (**CER-4**); Merchant Shipping Code, 9 December 1991 (**C-540**).

1372 The Port Act § 20 Amendment Act, Explanatory Memorandum, 1977 (**C-525**); *cf. also* Third Keres Report, ¶¶ 276 et seq. (**CER-4**).

876. Contrary to the Claimant's assertion, the fact that Verest applied for a customs permit in 1994 does not prove that it was ever issued.[1373] The Respondent submits that Verest never had any kind of customs permit.[1374]

877. Beginning in April 2001, BPV made a number of applications and requests for a customs control zone at the Seaplane Harbor.[1375] These requests were unsuccessful, *inter alia*, because they did not specify or submit documentation of the water area for the zone and generally due to shortcomings of the port layout, which made it unsuitable for a customs control zone.[1376] By letter dated 12 August 2002, the Customs Board stated that BPV needed the approval of the Ministry of Justice, which was the owner, before the Port could be designated a customs control zone.[1377]

878. In 2002,[1378] BPV sought to obtain that approval from the Ministry of Justice, which Minister Märt Rask refused on 23 September 2002.[1379] As the basis for this refusal, Minister Rask stated the "ongoing court action in regards to Küti 17 where the Republic of Estonia is claiming the ownership."[1380]

879. In 2003, BPV again sought the approval of the Ministry of Justice. On 21 January 2004, the Ministry of Justice, Minister Ken-Marti Vaher, responded to BPV,[1381] explaining that it was not possible to issue consent due to the pending ownership dispute. It also explained that regardless of the existence of the customs control zone, it would be impossible to operate the Seaplane Harbor as long as it lacked a port passport. Minister Vaher also noted that the Ministry's approval would not matter, as BPV had not yet obtained a port passport and thus could not use the Port even with customs authorization.[1382]

880. Overall, the Tribunal is satisfied that the permit was denied on the basis of the reasonable rationale that there was no approval by the owner of the port, namely the State. The contested measure was, therefore, not arbitrary.

1373 Verest application for permit of import-export cargo through port Lennusadam, 26 July 1994 (**C-040**).

1374 Rejoinder, ¶ 406.

1375 BPV Application for the Customs Control Zone Coordination, 4 April 2001 (**C-265**); BPV Application for the Customs Control Zone of Seaplane Harbor, 27 April 2001 (**C-266**).

1376 Estonian Customs Board letter no. 4.1./1803 to BPV, 29 May 2001 (**C-431**); Legal Instrument No. 20, 21 May 2001 (**C-429**); Estonian Customs Board letter no. 3.1.-20/2031 to BPV, 22 October 2011 (**C-430**).

1377 Letter from Estonian Customs Board to Verest and BPV, 12 August 2002 (**C-269**). The Customs Board noted: "As the Seaplane Harbor territory is currently in state's ownership, it is necessary to receive the approval from the representative of the state –Ministry of Justice in order to designate customs control zone. The territory in your use and the proposed customs control zone area is on the Ministry of Justice balance."

1378 Letter from BPV to Ministry of Justice, 14 August 2002 (**C-407**).

1379 Letter from Ministry of Justice to BPV, 23 September 2002 (**C-270**).

1380 Letter from Ministry of Justice to BPV, 23 September 2002 (**C-270**).

1381 Letter from the Ministry of Justice to BPV, 21 January 2004 (**C-271**).

1382 Letter from the Ministry of Justice to BPV, 21 January 2004 (**C-271**).

(iv) Building Permits

881. The Respondent maintains that the Claimant did not obtain building permits because it did not apply for any. However, the Respondent recognizes that after the court prohibited all construction works at the Seaplane Harbor on 21 July 2000, for the duration of the dispute regarding the ownership of the buildings, such applications would not be successful.[1383]

882. In the ownership lawsuit, Estonia petitioned the Tallinn City Court to enjoin all construction works at the Seaplane Harbor. In its order of 21 July 2000, the Tallinn City Court explicitly prohibited further changes to the composition of the buildings and structures on the site or the erection of new buildings and structures.[1384] On 21 August 2000, the Tallinn Urban Planning Department ordered the immediate termination of the construction works,[1385] but the works continued. [1386] On 4 September 2000, the Tallinn City Planning Office issued a further prescription to suspend the unauthorized construction, followed by proceedings for an administrative offence.[1387]

883. Ultimately, the Tribunal is satisfied that the contested measures were based on reasonable grounds. While the icebreaker *Suur Tõll* was moved due to higher berthing fees at the original location, the permits were denied because the Claimant had no ownership or right to possession of the port.

ii. Discriminatory Measures

(I.) Legal Standard

884. The Treaty does not define what discriminatory measures are. Case law considers discriminatory "a differential treatment of people or companies in like circumstances, without a rational justification for that differential treatment."[1388]

1383 Rejoinder, ¶ 279.

1384 Counter-Memorial, ¶¶ 358-359, Letter from Verest to the Ministry of Justice regarding settlement offer, 15 December 1999 (**C-058**); Letter from Ministry of Justice to Verest, 12 January 2000 (**C-059**); Toomas Kümmel, "Mõis played the area of the Seaplane Harbor with the help of Lao to the violator of law," Eesti Päevaleht, 25 April 2001 (**C-069**); August 2000 Judgment, Decision, 21 July 2000, ¶ 419 (**C-064**); August 2000 Judgment (**C-068**). *See* May 2002 Appeal Judgment (**C-191**); July 2005 Judgment (**C-078**); Republic of Estonia's appeal to the Tallinn City Court Judgment of 4 July 2005, 25 July 2005 (**R-102**); March 2006 Appeal Judgment (**C-081**).

1385 Counter-Memorial, ¶ 422, *referring to* Prescription of Tallinn City Planning Office no. 976, 21 August 2000 (**R-142**).

1386 Counter-Memorial, ¶ 422, *referring to* Prescription of the Tallinn City Planning Office, 4 September 2000 (**R-143**).

1387 Counter-Memorial, ¶ 422, *referring to* Administrative offence report no. 980A, 4 September 2000 (**R-144**); Reply, ¶ 520, *referring to* Report of administrative offense to P.Toom, 3 August 2000 (**C-469**).

1388 *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, ¶¶ 710-711 (**RLA-138**). *See* Counter-Memorial, ¶ 560. *See also CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB701/08, Award, 25 April 2005, ¶ 289 (**CLA-090**); *Saluka Investments BC (the Netherlands) v. The Czech Republic*, Partial Award, 17 March 2006, ¶ 309 (**CLA-069**).

885. Therefore, the Tribunal is persuaded that, to be successful with its claim of discriminatory behavior, an investor must prove that other investors in like circumstances were treated differently and that there was no justification for this difference of treatment.

(II.) Application to the Facts

886. The Claimant asserts that it was in "like circumstances" with the Noblessner/Peetri, Bekker, Muuga, Miiduranna, Kunda, Loksa, and Paldiski North Ports, on the basis that likeness is to be applied in the case of regulatory measures of general applicability.[1389] It also submits that, like the Lennusadam Port, these comparable ports used to be government property and partially even used by the Soviet military.[1390] Similarly, they "were privatized around the same period of time."[1391]

887. It is undisputed that the investors to which the Claimant points for comparison, namely, investors in the Noblessner/Peetri, Bekker, Miiduranna, Muuga, Loksa, Kunda, and Paldiski North Ports, were able to conduct operations with the necessary permits. The Respondent asserts that those other ports were not in "like circumstances" because not one of them was subject to a legal dispute over possession. In respect of each of the allegedly "like" circumstances, the Respondent has provided evidence of the circumstances in which the relevant interests were transferred to private ownership.

888. The Government of Estonia effected the transfer to private ownership of the Miiduranna Port[1392] and the Kunda Port in 1991.[1393] The Government of Estonia, via the Estonian Privatization Agency, effected the transfers to private ownership of the Peetri/Noblessner Port in 1995,[1394] and

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1389 Reply, ¶ 1311.

1390 Memorial, ¶ 515.

1391 Memorial, ¶ 513.

1392 Counter-Memorial, ¶ 593 (table); Kristiina Liivapuu, "Business in a changing financial environment and future prospects of AS Pärnu Sadam" 2014, Thesis, Tallinn University of Technology, Tallinn College, Accounting Department: "In 1995, the Republic of Estonia concluded a lease agreement with AS N-Terminal, which started using the complex for oil trading. [...] As a result of the ownership reform, Miiduranna port transferred to private persons in the 90s and the new owners initiated a wood-chipping business."; Government of Estonia regulation No. 334-k, 31 March 1995 (**RLA-155**) authorizes the Ministry of Economy to rent the Viimsi oil base territory in Miiduranna to AS N-Terminaal.

1393 Counter-Memorial, ¶ 593 (table); Juhan Tere, "25 years from the beginning of the renovation of Kunda cement plant in Estonia", 25 April 2016 (**C-048**): "An American entrepreneur Ronald S. Lauder and a Greek concrete industrialist George A. Tsatsos signed a preliminary agreement with the Government of the Republic of Estonia, which was the kick-off for the privatization [...]."

1394 Counter-Memorial, ¶ 593 (table). Äripäev, "Paldiski North Port is acquired by an unknown", 16 July 1999 (**R-165**); Meremes, "At Tallinn Maritime Factory", 25 April 1995 (**C-054**): "Tallinn Maritime Factory is the successor to the Noblessner factory built during the Tsarist era. For a long time it was known as the 7th factory (if any). The factory is under the jurisdiction of the Ministry of Economic Affairs of the Republic of Estonia only since September 1994 as a public limited company. [...] Today (i.e. April 6), privatization was announced in the newspaper."; Ministry of Finance letter, 11 February 2002 (**R-166**): Tallinn Maritime Factory was privatised on 24 November 1995 by the Estonian Privatization Agency pursuant to the "Contract of purchase and sale concerning privatization" between the Tallinn Maritime Factory (company) and AS Vavekor (purchaser). Pursuant to the agreement, the purchaser acquired 50,999% of the shares of the company, the Republic of Estonia retained the remaining shares.

the Bekkeri Port[1395] and Loksa Port[1396] in 1994. The transfer to private ownership of the Paldiski North Port was first effected by the City of Paldiski.[1397] The Muuga Port is not in private ownership. It belongs to date to AS Tallinna Sadam, a state-owned company, that was publicly listed in 2018.[1398]

889. The Respondent has also pointed to another distinction – the Seaplane Harbor was sold during the occupation by the occupier, and not "after the USSR ended their military occupation of Estonia,"[1399] as the Claimant itself submits in relation to the other ports.

890. Not one of the "like circumstances" referred to by the Claimant involved investors whose rights of property or possession were in doubt or dispute. The Respondent has drawn attention to the fact that it did assert its ownership rights against OÜ B&E in the same 1997 lawsuit.[1400]

891. According to the Claimant, the fact that the other Estonian Ports were subject to the same general regulatory scheme is a sufficient factor to establish that they were in "like" circumstances.[1401] The

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1395 Counter-Memorial, ¶ 593 (table). Ehitusekspert Evaluation Report, 24 January 2000 (**C-116**): "In 1994 AS Hoisti Kraana privatized 51% of the shares of Balti Base, which manages the Bekker harbor, for 28 million kroons"; "The city wants port-based land, Oil transportation through the city", Postimees, 5 March 1997 (**C-118**): "The council proposed to the state to municipalize the state-owned 49 per cent of shares of AS Balti Baas, a company that manages Bekker Harbor. [...] The Baltic Base Company has been privatized from the RAS Baltic Base." Äripäev, Article "Compensation from Balti Baas and the buyer", 3 February 1999 (**R-167**) provides: "The Privatisation Agency's claim is based on a contract of sale dated 7 October 1994, pursuant to which the state sold 51 percent of the shares of state owned public limited company RAS Balti Baas to public limited company AS Hoisti Kraana. The buyer was immediately obligated to pay 5.6 million kroons, and 22.4 million kroons in instalments, of which just over 14 million kroons had been paid when Balti Baas was declared bankrupt. The business plan was also unfilled."

1396 Counter-Memorial, ¶ 593 (table). Loksa Shipyard Presentation, 28 October 2010: Slide 3: Company history Historical development of Loksa Shipyard (**C-079**) states: "In 1994 OSS acquired Loksa Shipyard from the Estonian Government"; Maersk Post, "Loksa, a port in Tallinn", 1 March 1994, p. 6 (**R-163**) states: "Loksa was just about to embark upon a privatization programme, and negotiations during the spring of 1994 led to Lindo tendering an offer for the purchase of the entire enterprise. The sale of the state-owned company was arranged through the Privatization Agency in Tallinn [...]".

1397 Port of Paldiski website: About Port page (**C-112**) provides: "In April 1995 Paldiski Sadamate AS was founded, which possesses the territory and aquatory of the Paldiski Northern Port."; Paldiski City Government, Order for registering AS Paldiski Sadamate, 25 August 1997 (**R-164**) provides: "The share capital of PALDISKI SADAMATE AS is 4,500,000 Estonian kroons, which is divided into thousand shares with a nominal value of 4,500 kroons. All shares belong to Paldiski City."; Äripäev, "Paldiski North Port is acquired by an unknown", 16 July 1999 (**R-165**) provides: "In September 1998, BRI bought 50% of the shares of public limited company Paldiski Sadamate AS from Paldiski City for 7.8 million kroons. Paldiski City Council (Paldiski Linnavolikogu) confirmed that the buyer's investment obligation over five years was 200 million kroons; to this day, the buyer is still paying the amount in instalments."

1398 Counter-Memorial, ¶ 593 (table); Regulation No. 256 of the Government of the Republic of Estonia, 12 July 1994 (**RLA-156**) states: "Approving Muuga Harbour's port basin and leaving the land in state ownership"; AS Tallinna Sadam, Port of Tallinn investor presentation, 15 September 2019 (**R-168**) states: "Limited liability company, 67% state owned. [...] As a landlord port, we own infrastructure in our 4 harbours."

1399 Memorial, ¶ 513.

1400 Statement of Defense, ¶ 49.

1401 See *Bilcon, Clayton et al v. Canada*, PCA Case No. 2009-04, Jurisdiction and Merits Award, 17 March 2005, ¶ 693 (**CLA-082**); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 402 (**RLA -142**).

Claimant argues that the relevance of the ownership dispute is inappropriately specific, as it amounts to a requirement of identical situations.[1402]

892. The Claimant alleges that permits for other ports in Estonia were not conditioned on there being conclusive determinations of title. As a matter of logic, a treatment of permits that were "not conditioned" on "conclusive determination" of title could only be established in situations where there was some uncertainty as to title that went unresolved. The Claimant does not assert that there was any other Estonian port that had been transferred to private ownership by an entity that could not validly do so, as had the Soviet military purported to do in the case of the Seaplane Harbor, or that there was any other reason to doubt the validity of the title of the other port operators.[1403]

893. There is no precedent of a port basin having been approved for a port with a disputed ownership status. On the contrary, the Respondent has presented an instance where a company requesting the coordination of port basin borders was unsuccessful because it lacked the necessary authorizations from its neighbors.[1404] The Tallinn City Council did not approve AS Haltransa's request for coordination of the port basin borders at Haltransa port because it lacked coordination from the neighboring Paljassaare harbor. The Respondent has also cited the decision of the Supreme Court in the case of AS Maseka, in respect of a port in Pärnu City, which confirms that the courts at the time treated the ownership or lawful possession of the port territory as a necessary condition for the approval of a port basin.[1405]

894. The Claimant argues that since the question of ownership is the subject of the Parties' dispute, this difference is "self-judging". The Claimant alleges that the Respondent cannot treat it disparately, "creating disparate circumstances" and then rely on such disparate circumstances to justify the original disparate treatment.[1406] The Respondent contends that its decision to contest the lawfulness of the possession of the Claimant's subsidiaries and reclaim the possession was not arbitrary nor discriminatory but based on a valid assessment of the factual situation.[1407]

895. The decision to contest the lawfulness of the possession of the Lennusadam Port was taken on the basis of the circumstances in which, according to the Claimant, title had been passed from State to private ownership prior to the Claimant's involvement. Those factual circumstances pre-dated the Claimant's involvement and the Respondent's decision to claim possession of the Lennusadam Port. The decision to initiate litigation did not create the facts on which it was based. Those facts were unique to the Seaplane Harbor. Not one of the other port investors derives its possession and use from transactions with the Soviet army during the occupation. The Tribunal

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1402 Reply, ¶¶ 1318, 1343-1346.

1403 Reply, ¶¶ 1365-1367.

1404 Rejoinder, ¶ 395. Response To Claimant's 1 October 2021 Submission**,** 3 November 2021, ¶ 19, *citing* (**RLA-229**). Tallinn City Council Decision No. 209, 15 June 2006 (**R-235**). The circumstances of the Haltransa case are explained in the Tallinn Circuit Court judgment of 16 July 2007, case no. 3-06-95 (**RLA-229**).

1405 Judgment of the Supreme Court of Estonia, case 3-3-1-72-05, 12 January 2006 (**RLA-201**).

1406 Reply, ¶ 1287.

1407 Rejoinder, ¶ 475 (**RLA-201**).

does not consider that the Respondent created disparate circumstances by treating the Claimant disparately.

896. By contrast, the Claimant submits that the litigation was a discriminatory measure in itself, as "[n]one of the other private Port owners had litigation brought against them, none of the other private Port owners were denied a port passport, and none of the other Port owners had their investments taken from them."[1408]

897. On this point, the Tribunal is persuaded that to establish "like circumstances", the Claimant would have to demonstrate that there was another port whose ownership was equally contested as the Lennusadam's. The ownership dispute is indeed a differentiating factor between the disputed port and the others brought as a comparison by the Claimant. The denial of the port passport and the alleged "taking" of the investment were also based on the ownership dispute.

898. The Claimant therefore failed to demonstrate that the other investors, who were allegedly treated better, were in like circumstances, as they did not derive their possession and use of the port from transactions with the Soviet army during the occupation. The perceived differential treatment was instead grounded on the different circumstances surrounding ownership.

iii. Impairment of the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of the investment

899. As to impairment, the Tribunal agrees with the Respondent's statement that an arbitrary or discriminatory measure must have an impact on the investment in order to constitute a violation of the Treaty.[1409]

900. The Claimant has brought limited evidence to support the claims that its investments were impaired. While the Claimant states that "ELA U.S.A. lost a great deal of business because customers realized that this delay in getting the customs issue resolved could be indefinite,"[1410] there seems to be little, if any, evidence in this regard. The Claimant's impairment argument that its subsidiaries should have received a license under Estonian law is still premised on the fact that they were the owners or lawful possessors of the Port, which they were not.[1411] It also remains unsubstantiated what kind of ship traffic could be impaired by the *Suur Tõll* when positioned at berth 36A.

901. The Tribunal, therefore, finds that the Claimant failed to prove that its investments suffered impairment. In any case, also based on its previous findings, no arbitrary or discriminatory measures were taken against the Claimant in the first place. The Tribunal finds that no violation of Article II(3)(b) has occurred.

1408 Memorial, ¶ 367.

1409 Counter-Memorial, ¶ 560.

1410 Reply, ¶ 541.

1411 Reply, ¶ 565.

3. Art. II.(7) – Breach of Effective Means of Asserting Claims and Enforcing Rights

a) Alleged Corrupt Practices

i. The Claimant's Position

902. The Claimant maintains that the due process element of the FET standard entails the protection of investors against coercion, harassment and corruption, this being consistently recognized in investment arbitration case law.[1412] According to the Claimant, a State breaches this obligation "whenever a State government official or branch of the government uses its power perversely for its own gain."[1413] The Claimant further notes that prohibition of corruption has been embodied in many domestic anti-corruption statutes, anti-corruption conventions, and codes.[1414]

903. The Claimant alleges that the Respondent's "corrupt acts breached its obligation to conduct itself fairly and equitably."[1415] Relying on the witness statement of Mr. Aleksander Rotko, the Claimant submits that, on at least three occasions, individuals claiming to represent the Minister of Justice offered to let the Claimant's subsidiaries acquire ownership of the Seaplane Harbor buildings in exchange for a bribe or some other type of unlawful action.[1416]

904. The first of these meetings, the Claimant avers, took place on 11 March 2000 between Mr. Raivo Laus, allegedly a lawyer of the Minister of Justice, and Mr. Aleksander Rotko in the parking lot of a gas station.[1417] The Claimant alleges that such meeting was convened at the request of Mr. Laus.[1418] In this meeting, the Claimant asserts, Mr. Laus told Mr. Rotko that the Seaplane Harbor buildings could be transferred to one of the Claimant's subsidiaries via a bankruptcy proceeding if Mr. Rotko paid USD 300,000 and Verest, Agrin, and BPV named Mr. Laus as their legal representative in the lawsuit brought by the Ministry of Justice.[1419]

1412 Memorial, ¶¶ 426-430, *referring to Saluka Investments BC (the Netherlands) v. The Czech Republic*, Partial Award, 17 March 2006, ¶ 308 (**CLA-069**); *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, 6 February 2008, ¶ 179 (**CLA-029**); Reply, ¶ 1263.

1413 Reply, ¶ 487, Aloysius Llamzon, *Corruption in International Investment Arbitration*, (Oxford University Press, 2014), p. 20 (**CLA-157**).

1414 Memorial, ¶ 428, *referring to* The Organization of American States' Inter-American Convention Against Corruption (**CLA-114**); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (**CLA-115**); Council of Europe's Criminal Law Convention on Corruption (**CLA-116**); Civil Law Convention on Corruption (**CLA-117**); African Union Convention on Preventing and Combatting Corruption (**CLA-118**); United Nations Convention Against Corruption. (**CLA-119**); Reply, ¶ 1264.

1415 Reply, ¶ 1267. *See also* Memorial, ¶ 488.

1416 Memorial, ¶ 489; Hearing Transcript, Day 1, p. 9:8-17.

1417 Memorial, ¶ 490, *referring to* Second Rotko Statement, ¶ 43 (**CWS-2**).

1418 Memorial, ¶ 490, *referring to* Second Rotko Statement, ¶ 43 (**CWS-2**).

1419 Memorial, ¶ 491, *referring to* Second Rotko Statement, ¶ 45 (**CWS-2**); Hearing Transcript, Day 1, 10:25 – 11:2.

905. The Claimant maintains that the veracity of Mr. Rotko's description of this first meeting is confirmed by the following chain of events:

(a) On 15 December 1999, the Claimant sent a letter to the Minister of Justice seeking to initiate settlement talks in respect of the local proceedings against Verest, Agrin, and BPV.[1420]

(b) The Ministry of Justice rejected that offer on 12 January 2000, stating that the Port could only be sold by public auction, which according to the Claimant, "explains why Mr. Laus said that a transfer had to be conducted via a bankruptcy auction."[1421]

(c) On 9 February 2000, the Claimant's bank, Unibank, sent Mr. Laus a "comfort letter", which was allegedly "issued in the context of the privatization of the Lennusadam Port" and "confirmed that the bank was aware of the ongoing banking and business operations of ELA U.S.A. and that ELA U.S.A. had engaged in approximately five million dollars' worth of business in the second half of 1999", but which "resulted in negative attention, as Minister Rask took it as an opportunity for extortion rather than cooperation."[1422]

(d) On 7 March 2000, the Claimant sent a letter to the Minister of Justice, in which it repeated its request to initiate settlement talks.[1423]

(e) At the alleged meeting of 11 March 2000, the mechanism by which Mr. Laus offered to transfer the ownership of the Seaplane Harbor buildings was consistent with the Ministry of Justice's position at the time that the Seaplane Harbor buildings could only be sold by auction.[1424]

(f) Following the meeting on 13 March 2000, the Tallinn Ownership Reform Department faxed BPV a form by which it could designate Mr. Laus as the attorney for Verest, Agrin, and BPV.[1425]

(g) After the alleged meeting, and after Mr. Rotko confirmed that he was not going to accept Mr. Laus's offer, the Claimant's second offer to reach a settlement with the Ministry of Justice was rejected.[1426]

906. The second meeting described by Mr. Rotko was allegedly held when the appeal proceedings in respect of the Tallinn City Court's judgment were ongoing, also at the request of Mr. Laus, between the latter and Mr. Rotko at the Hotel Olympia in Tallinn.[1427] At that meeting, the

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1420 Memorial, ¶ 493, *referring to* Letter from Verest to the Ministry of Justice regarding settlement offer, 15 December 1999 (**C-058**).

1421 Memorial, ¶ 493, *referring to* Letter from Ministry of Justice to Verest, 12 January 2000 (**C-059**).

1422 Reply, ¶¶ 853-857, *referring to* Unibank Comfort Letter to Raivo Laus, 9 February 2000 (**C-301**).

1423 Gerald Carroll, legal counsel for ELA USA, Inc., Letter to the Ministry of Justice with the proposal of settlement negotiation, 7 March 2000 (**C-061**).

1424 Memorial, ¶ 493.

1425 Memorial, ¶ 494, *referring to* Verest, Agrin, B&E authorisation to lawyer Raivo Laus, 13 March 2000 (**C-062**).

1426 Memorial, ¶ 493.

1427 Memorial, ¶ 495, *referring to* Second Rotko Statement, ¶ 55 (**CWS-2**).

Claimant asserts, Mr. Laus "told Mr. Rotko that he could become the owner of the Lennusadam Port and the neighboring prison in exchange for a payment of USD 5 million."[1428]

907. The Claimant posits that the third meeting occurred on 5 June 2006 between Mr. Rotko and two government agents at a Turkish café in downtown Tallinn.[1429] At that occasion, the Claimant maintains, the two agents told Mr. Rotko that he could privatize the Port if he declared bankruptcy and allowed the Port to be sold via a bankruptcy proceeding.[1430] During this meeting, upon Mr. Rotko's refusal of this offer, the Claimant alleges, the government representatives called Mr. Märt Rask, Chief Justice of the Estonian Supreme Court at the time, who stated that Mr. Rotko should be informed "that a decision had been made and the government would be taking the Port."[1431] The Claimant stresses that only two days later, the Supreme Court declined to hear the appeal of the Claimant's subsidiaries.[1432]

908. In support of its allegations of attempts to bribe or extort payment from Mr. Rotko, the Claimant cites "similar fact evidence of Estonian corruption."[1433] In 2006, Mr. Edward Burkhardt, CEO of Rail World, alleged that demands for corrupt payments had been made during his investment in the privatization of Estonian Railways (the **"2006 Rail World Case"**).[1434] On 13 January 2021, the Prime Minister of Estonia, Juri Ratas, resigned following an influence-peddling corruption scandal at Tallinn City Port (the **"2021 Porto Franco Case"**).[1435] The Claimant asserts that "Estonia has a history of operating outside of the law. Estonian officials solicited bribes, offered

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1428 Memorial, ¶ 495, *referring to* Second Rotko Statement, ¶ 56 (**CWS-2**); Hearing Transcript, Day 1, pp. 11:19 – 12:2.

1429 Memorial, ¶ 496, *referring to* Second Rotko Statement, ¶ 65 (**CWS-2**).

1430 Memorial, ¶ 496, *referring to* Second Rotko Statement, ¶ 65 (**CWS-2**).

1431 Memorial, ¶ 496, *referring to* Second Rotko Statement, ¶ 66 (**CWS-2**); Hearing Transcript, Day 1, p. 9:19-24.

1432 Memorial, ¶ 496, *referring to* Second Rotko Statement, ¶ 67.

1433 Reply, ¶¶ 867-882.

1434 Reply, ¶¶ 870-880, *referring* to "Relations between government, Estonian Railway deteriorate completely", The Baltic Times, 4 January 2006 (**C-303**); "Estonian railway's majority investors claim country is violating bilateral investment treaties", Progressive Railroading, 10 June 2005 (**C-302**); Robert Wright, "Estonia completes rail renationalization", Financial Times, 16 January 2007 (**C-305**); "Estonian railway privatized at last," The Baltic Times, 3 May 2001 (**C-304**); Transcript from ERR Eyewitness TV program - Interview with Edward Burkhardt, 6 January 2020, p.4 (**C-299**); Video from ERR Eyewitness TV program - Interview with Edward Burkhardt, 17 January 2007 (**C-334**).

1435 Reply, ¶¶ 845-849, *referring to* "Estonian premier quits after Tallinn development scandal", EE News Service bne IntelliNews, 13 January 2021 (**C-571**); Richard Milne, "Estonia's PM resigns as corruption scandal hits ruling coalition", Financial Times, 13 January 2021 (**C-572**); "Estonian premier quits after Tallinn development scandal", EE News Service bne IntelliNews, 13 January 2021 (**C-576**); Richard Milne, "Estonia's PM resigns as corruption scandal hits ruling coalition", Financial Times, 13 January 2021 (**C-572**); The developers video on the Porto Franco development, 12 January 2021 (**C-568**); Andrew Higgins, "Estonia's Prime Minister Steps Down Under a Cloud", New York Times, 13 January 2021 (**C-573**); "Top Center Party official suspected of corruption in Tallinn real estate scandal", EE News Service bne IntelliNews, 13 January 2021 (**C-570**); "Court to announce decision on Savisaar corruption case on Tuesday", EE News Service, BNS, 13 January 2021 (**C-577**).

shady deals, and sought harsh economic and reputational reprisals against innocent investors when rebuffed."[1436]

ii. The Respondent's Position

909. The Respondent submits that international tribunals have consistently held that the required level of proof with respect to corruption "is as high as the one for proving judicial impropriety."[1437] The Respondent further asserts that when allegations of corruption are made as part of a claim under the FET standard it "must be shown that the person soliciting the bribe is acting in the state's interests."[1438]

910. The Respondent maintains that the Claimant's allegations of corruption lack sufficient evidentiary basis.[1439] The Respondent observes that the Claimant relies on four items of evidence to support its claim on corruption: (i) the witness statement of Mr. Aleksander Rotko; (ii) the witness statement of Ms. Olga Kotova; (iii) an unsigned power of attorney to Mr. Raivo Laus;[1440] and (iv) the comfort letter from Unibank dated 8 February 2000.[1441]

911. With respect to the witness statements, the Respondent argues that Mr. Rotko, being the sole beneficiary of the Claimant, "is clearly not an independent and impartial witness."[1442] According to the Respondent, "the words of one witness are never enough for a finding of corruption in international arbitration, especially where the witness in question happens to be the sole beneficiary of the claim; and especially where his testimony, even taken at face value, does not lead to anyone in a position of power."[1443]

912. Ms. Kotova "only recounts what Mr. Rotko has told her and has no first-hand evidence to offer."[1444]

913. In respect of the power of attorney to Mr. Raivo Laus, the Respondent contends that "[t]his document provides no clarification of connections between Mr. Laus and the Ministry of Justice or any other governmental agency."[1445] Further, based on certain elements of the document, such

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1436 Reply, ¶ 881.

1437 Counter-Memorial, ¶ 582, *referring to Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Pakistan,* ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶¶ 141-142 (**RLA-142**).

1438 Counter-Memorial, ¶ 583, *referring to EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 232 (**RLA-133**).

1439 Counter-Memorial, ¶ 586. *See also* Hearing Transcript, Day 5, pp. 131:24 – 132:2, 132:20-25, 135:9-17.

1440 Counter-Memorial, ¶¶ 584-585, *referring to* Verest, Agrin, B&E authorisation to lawyer Raivo Laus, 13 March 2000 (**C-062**).

1441 Rejoinder, ¶ 426.

1442 Counter-Memorial, ¶ 584.

1443 Hearing Transcript, Day 5, p. 134:3-9.

1444 Counter-Memorial, ¶ 584. *See also* Hearing Transcript, Day 5, p. 131:7-18.

1445 Counter-Memorial, ¶ 585.

as the format of its heading and the inclusion of the logo of BPV, the Respondent questions whether the sender of this document was the Tallinn Ownership Reform Department.[1446]

914. Concerning the comfort letter from Unibank, the Respondent notes that its significance is not clear and that there is no evidence to support the Claimant's allegation that "Minister Rask took it as an opportunity for extortion rather than cooperation."[1447] To the contrary, the Respondent emphasizes that the privatization process did not require any comfort letters, there was no connection between Mr. Laus and Mr. Rask, and there is no evidence that the letter in question was sent anywhere, especially in the absence of the request the Claimant submitted to Unibank as a response to which the letter was drafted.[1448]

915. The Respondent notes that Mr. Rotko reported the relevant incidents neither to the Estonian police nor to the U.S. authorities.[1449] While understanding "why a victim of corruption might be afraid to go to the [local] police", the Respondent asserts that it would have been safe to contact the U.S. authorities.[1450] Hence, according to the Respondent, it was Mr. Rotko's choice not to report the incident, which caused his allegations not to be investigated at the time and the lack of a paper trail.[1451]

916. In response to the Claimant's allegations of similar facts in the 2006 Rail World Case and the 2021 Porto Franco Case, the Respondent states that these "are both irrelevant to these proceedings and as such do not merit comment."[1452]

iii. The Tribunal's Analysis

(I.) Legal Standard

917. There is no dispute between the Parties that solicitation for corrupt payment attributable to a State is a violation of the FET standard. [1453] The two forms of corruption that are potentially relevant here are bribery and extortion. When a public official solicits payment in return for "better than fair" treatment, then this usually constitutes bribery. Extortion includes situations in which a public official solicits payment under threat of withholding a service or benefit otherwise required by law.[1454]

1446 Counter-Memorial, ¶ 585.

1447 Rejoinder, ¶ 426, *referring to* Reply, ¶ 857.

1448 Rejoinder, ¶ 426.

1449 Transcript, Day 5, p. 133:1-4.

1450 Transcript, Day 5, p. 133:4-7.

1451 Hearing Transcript, Day 5, pp. 133:7-10.

1452 Rejoinder, ¶ 425.

1453 *See, e.g.*, *EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 221 (**RLA-133**).

1454 A Llamzon, *Corruption in International Investment Arbitration,* (Oxford University Press, 2014), ¶¶ 2.05. 2.08 (**CLA-157**).

918. As the party alleging acts of corruption in violation of the FET standard, the Claimant bears the burden of proof that these acts have occurred. There is no universally accepted formulation regarding the standard of proof that a foreign investor must meet to successfully raise a treaty claim based on corruption. The Tribunal notes that in civil law cases domestic courts typically decide factual issues on the balance of probabilities. Since acts of corruption are *de facto* of a criminal law nature and entail, if attributable, the international responsibility of the State party, the Tribunal considers a higher standard of proof appropriate. The arbitral jurisprudence submitted by the Parties supports this view. In *Bayindir. v. Pakistan*, for example, the tribunal assessed whether the evidence submitted in support of the allegation of corruption is sufficient to exclude any reasonable doubt. [1455] Domestic courts typically apply this standard as the relevant threshold to convict individuals for felonies or other criminal offenses. It seems doubtful whether such a strict standard is appropriate here. The Tribunal decides an investment dispute under a treaty and does not exercise criminal jurisdiction. In addition, the relevant acts occurred around 20 years ago. It seems unlikely that a finding by the Tribunal that Estonia violated the FET standard would trigger criminal proceedings against former state officials.

919. Considering the above, the Tribunal is of the view that the appropriate standard of proof lies somewhere on the continuum between the balance of probabilities as a lenient standard and the exclusion of reasonable doubts as a very strict standard. Furthermore, the Tribunal agrees with the statement of the tribunal in *EDF v Romania* that the "seriousness of the accusation of corruption" matters. [1456] In the view of the Tribunal, this requires a bespoke standard of proof based on the circumstances of the relevant case, including the nature of the allegations. The graver the accusations the more convincing the evidence must be for an international tribunal to find that a State incurs international responsibility for an alleged act of corruption.

920. Here, the Claimant raises allegations against "most senior Estonian officials" and describes their acts as "as outrageous […] reprehensible and unconscionable […] and shameful." [1457] Assuming that the acts have indeed occurred, the Tribunal agrees with this characterization. Against this background, the Tribunal finds it appropriate to require that the evidence submitted in support of those accusations be "clear and convincing", a standard applied in *EDF v. Romania* as well. [1458]

(II.) Application of the Law to the Facts

921. It is undisputed between the Parties that no corrupt payments were made. The Claimant alleges, however, that Estonian officials attempted at three occasions to solicit corrupt payments. The Tribunal will now analyze whether there is clear and convincing evidence that one or more of these three attempts have indeed occurred.

1455 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan,* ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶¶ 141-142, *referring to Corfu Channel Case (UK v. Albania),* Merits, Judgment of 9 April 1949, ICJ Reports 1949, p. 4 (**RLA-142**).

1456 *EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 221 (**RLA-133**).

1457 Reply, ¶¶ 1270, 1679.

1458 *EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 221 (**RLA-133**).

(A.) The First Attempt

922. The first attempt was allegedly a request for US$ 300,000 in exchange for ownership of the Port, made by Mr. Raivo Laus—acting in collusion with Minister Rask—at a meeting with Mr. Rotko on 11 March 2000. Mr. Rotko's account of the incident is as follows.

> I met with Mr. Laus in his car at a Shell petrol station across from my house on the morning of Saturday, March 11, 2000. It was very unusual to meet someone for a meeting in a car. I thought that the car radio was bugged and mentioned this suspicion to Mr. Laus. He laughed and turned off the radio.
>
> I was scared during this meeting. Mr. Laus said that ownership of the port could be transferred to an ELA subsidiary via a bankruptcy proceeding if ELA temporarily gave control of Verest, Agrin, and BPV to Mr. Laus and paid US$ 300,000 to Minister Rask. On Monday, March 13, 2000, a document was faxed to BPV from the Tallinn Ownership Reform Department. The document would have transferred the representation of our investments before the local courts from my current legal team to Mr. Laus. I refused to sign the document or accept his proposal.[1459]

923. The Claimant submits that Mr. Rotko's account is corroborated by the timing of the Claimant's attempts to settle the lawsuit, and the chronology of events outlined in paragraph 905 above. The Tribunal has examined closely the documentary evidence in that regard and its findings are as follows.

924. If the alleged conversation between Mr. Laus and Mr. Rotko on 11 March 2000 took place, and Mr. Laus acted on behalf of Mr. Rask in his function as minister, then the Claimant's FET claim based on corruption would in the Tribunal's view be successful. The Tribunal will analyze first whether there is clear and convincing evidence that Mr. Laus acted on behalf of Mr. Rask.

925. While the Claimant describes Mr. Laus as "a lawyer who claimed to act for Minister Rask"[1460] and as "Minister Rask's lawyer and advisor,"[1461] the Respondent denies that Mr. Laus ever worked for the government.[1462] Mr. Rotko was unable to recall when he met Mr. Laus for the first time and how they were introduced.[1463] There are three factual exhibits on file that mention the name of Mr. Laus. The Tribunal will address these documents in their chronological order.

926. First, Mr. Laus's business card was apparently affixed to a letter dated 6 January 2000 from Verest and Agrin to Ehitusekspert ("the **6 January 2000 Letter**"), a company that provided an expert report regarding the assets at the Port dated 24 January 2000 ("**the Ehitusekspert Report**").[1464] The Ehitusekspert Report was submitted in the Estonian court proceedings. The 6 January 2000 Letter was attached as an exhibit to that report and Mr. Laus's business card was apparently affixed to the letter before it was photocopied.[1465] If anything, then this document

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1459 Second Rotko Statement, ¶¶ 44-45 (**CWS-2**).

1460 Memorial, ¶ 123.

1461 Reply, ¶ 853.

1462 Counter-Memorial, ¶ 585.

1463 Hearing Transcript, Day 2, pp. 25:15 – 29:12.

1464 Ehitusekspert Evaluation Report, 24 January 2000, p. 71 in the original Estonian version (**C-016**).

1465 Ehitusekspert Evaluation Report, 24 January 2000, p. 71 in the original Estonian version (**C-016**).

seems to indicate that Mr. Laus has acted on behalf of Verest and Agrin in 2000, but it certainly does not offer support for the allegation that Mr. Laus was instructed by Minister Rusk.

927. The second document that mentions Mr. Laus' name is a Unibank comfort letter dated 9 February 2000 ("**Unibank Letter**"). This letter consists of a two-page fax addressed by Mr. Jens Kragh of Unibank to Mr. Rotko. Its first page reads as:

> Dear Alexandr
>
> Interesting to hear about the privatization plans.
>
> Please find enclosed our proposal of a bank reference on your company [..].[1466]

928. The second page of the Unibank Letter consists of the "bank reference" mentioned by Mr. Kragh. It is addressed to Mr. Laus and signed by Mr. Kragh and Mr. Hansen of Unibank. Its first sentence states that "[a]t the request of ELA U.S.A Inc. we hereby provide you with a reference on the said company". [1467] Further, the letter states: "ELA U.S.A. Inc. has been a customer of Unibank for approximately four years. Unibank A/S mainly provides deposit services for the company. There has been a substantial turnover on the account (approx. USD 5 million during the second half of 1999) and our experience has been satisfactory."[1468] There is nothing in the letter that would support the proposition that Mr. Laus sought to solicit corrupt payments from the Claimant. Nor does the letter provide evidence in support of a connection between Mr. Laus and Mr. Rask.

929. The third document containing Mr. Laus's name is an unsigned power of attorney dated 13 March 2000 regarding a possible instruction of Mr. Laus by Verest, B&E, and Agrin.[1469] The Respondent raises doubts concerning the authenticity and relevance of this document. [1470] According to the Claimant, the power of attorney was drafted by Mr. Raivo Laus and sent to the Claimant. However, the document bears BPV's logo and its contact information in the footer, a discrepancy that Mr. Rotko was unable to explain.[1471] The top line of the fax is cut off.[1472] The power of attorney is only valid for two months. It does not mention the bankruptcy proceedings. It is not clear what connection the Tallinn Ownership Reform Department has to the case; Mr. Rotko testified that: "We only used documents issued by the Municipal Reform 20 Department, as far as I can recall, in the lawsuit proceedings. And that's the extent of the relationship."[1473] The Tribunal does not find this document to support the Claimant's allegations, neither as to an attempt to solicit payment, nor regarding Ms. Laus' alleged connection with Mr. Rask.

1466 Unibank Comfort Letter to Raivo Laus, 9 February 2000, p. 1 (**C-301**).

1467 Unibank Comfort Letter to Raivo Laus, 9 February 2000, p. 2 (**C-301**).

1468 Unibank Comfort Letter to Raivo Laus, 9 February 2000, p. 2 (**C-301**).

1469 Verest, Agrin, B&E authorization to lawyer Raivo Laus, 13 March 2000 (**C-062**); Hearing Transcript, Day 5, pp. 131:17 – 132:10.

1470 Verest, Agrin, B&E authorization to lawyer Raivo Laus, 13 March 2000 (**C-062**); Hearing Transcript, Day 5, pp.131:17 – 132:10.

1471 Hearing Transcript, Day 2, p. 32:11-15.

1472 Hearing Transcript, Day 2, p. 30:2-3 (question not answered).

1473 Transcript, Day 2, p. 31:2-21.

930. According to Mr. Rotko, Mr. Laus told him that he was acting on behalf of Mr. Rask. Whether or not Mr. Laus made this statement is not decisive for the findings of the Tribunal. This is because the mere allegation by an attorney in a conversation with a potential client that he cooperates with a government official is no clear evidence that establishes the existence of such cooperation.

931. The Tribunal will now turn to the other documents relied on by the Claimant regarding the first attempt, none of which mention Mr. Laus.

932. In a letter of 15 December 1999 to the Ministry of Justice, Verest made a proposal to pay the sum of EEK 360,966, being the value of the contested property, in consideration of discontinuation of the court action.[1474] The response from the Ministry of Justice, dated 12 January 2000,[1475] stated that "[t]he State Asset Act does not allow the transfer of state assets in the form suggested in your letter. In case the state assets are not necessary for [exercising] state power, then the transfer is only possible by a public auction based on the order of the Government of the Republic."[1476] According to the Claimant, the representation that the Port could only be sold by public auction supports the allegation that Minister Rask sought a bribe for a transfer of ownership to be conducted via bankruptcy proceedings.[1477] The Tribunal notes that the letter was not signed by Minister Rusk but by Mihkel Oviir, Chancellor of the Ministry of Justice. Moreover, a public auction based on statutory rules seems to be a more appropriate way to sell State assets than the discontinuance of court proceedings against payment by private parties.[1478] Therefore, the Tribunal finds that the exchange of letters of 15 December 1999 and 12 January 2000 does not support the Claimant's allegations.

933. Similar considerations apply to the exchange of letters of 7 March 2000 and 24 April 2000. In the first letter, addressed to the Minister of Justice, Mr. Caroll—then the Claimant's attorney based in Wisconsin—set out several legal arguments and suggested engaging in negotiations instead of continuing the court proceedings.[1479] The proposal was declined in the letter of the Ministry of Justice dated 24 April 2000, signed by Mihkel Oviir, who had already rejected the settlement offer of Verest of 15 December 1999.[1480] The letter of 24 April 2000 stated that the Ministry of Justice had examined Mr. Caroll's letter, that the judicial proceedings were still ongoing, and that the Ministry of Justice did not agree with the proposal to settle the matter by means of negotiations.

1474 Letter from Verest to the Ministry of Justice regarding settlement offer, 15 December 1999 (**C-058**). The letter was sent by Jevgeni Skljarov, board member of Verest. The letter states *inter alia* that "all respondents [identified as Verest, B&E, Agrin in the first paragraph of the letter] have consolidated their interests and conducted a new business plan, which foreign investors have shown interest in…[T]he value of action is 360 966 EEK. Respondents are willing to pay the state mentioned amount should the court action be discontinued. In case that the value of challenged property has changed, respondents are willing to negotiate the value of compensation."

1475 Ministry of Justice letter to Verest, 12 January 2000 (**C-059**).

1476 Ministry of Justice letter to Verest, 12 January 2000 (**C-059**).

1477 Memorial, ¶ 493.

1478 Ministry of Justice letter to Verest, 12 January 2000 (**C-059**).

1479 Exchange of letters between Gerald Carroll, legal counsel for ELA USA, Inc., and Mihkel Oviir, Chancellor of the Ministry of Justice, of 7 March 2000 and 20 April 2000, pp. 1-3 (**C-061**).

1480 *See supra* ¶ 932.

The Tribunal finds neither the content of this letter nor its circumstances suspicious or unusual. Rather, the letter is consistent with the position of the Ministry of Justice taken before the alleged first corruption attempt of 11 March 2000, especially in the letter of 12 January 2000, namely that Estonia cannot give up its assets by way of a settlement in judicial proceedings.

934. Considering the above, the documents on file do not support the Claimant's allegation that Mr. Laus—acting on behalf of Minister Rask—told Mr. Rotko that the Claimant could gain control over the Port through bankruptcy proceedings against payment of US$ 300,000. It is also unclear to the Tribunal how the alleged bribe would have worked. Not even the Claimant or Mr. Rotko could explain what the proposal to "sell the port through bankruptcy proceedings" would entail, who would declare bankruptcy, nor how such proceedings could be assured to lead to the Claimant acquiring ownership of the Port. Mr. Rotko, when asked about how the proposal would have worked, affirmed that he "had no idea why bankruptcy was suggested" or why Mr. Laus suggested that Mr. Rotko transfer control of the companies to him.[1481]

935. Overall, the Claimant's corruption allegations regarding the first attempt find their support merely in Mr. Rotko's testimony regarding a conversation between him and Mr. Laus on 11 March 2000. Even if Mr. Rotko's recollection of this alleged conversation is correct, there is no evidence that Mr. Laus indeed acted on behalf of Mr. Rask. The evidence on file regarding the first alleged attempt to solicit corrupt payment is therefore neither clear nor convincing.

(B.) The Second Attempt

936. The alleged second attempt at bribery was according to the Claimant also made by Mr. Laus. At the meeting in the lobby of the Hotel Olympia, Mr. Laus allegedly told Mr. Rotko that Mr. Rotko could become the owner of the Lennusadam Port and the neighboring Patarei prison if he made a payment of US$ 5,000,000, and that Mr. Laus could arrange for the Seaplane Hangar to be removed from the UNESCO cultural heritage list, so it could be destroyed if necessary.[1482]

937. When asked at the Hearing whether Mr. Laus offered any explanation for the price having increased compared to the first alleged attempt of 11 March 2000, Mr. Rotko stated:

> There was no discussion about that. It was said that I should pay [$]5 million, and that will include not just the port but the neighboring territory with the prison and privatization. I do not pay too much attention to that, I don't ask for reasons. I just say, "Okay, I will tell you my decision later," to avoid any physical danger.[1483]

938. Ms. Olga Kotova confirms in her witness testimony that Mr. Rotko told her at the time about the second attempt:

1481 Transcript, Day 2, p. 28:2-16.

1482 Memorial, ¶ 155; Second Rotko Statement, ¶¶ 55-56 (**CWS-2**).

1483 Hearing Transcript, Day 2, p. 37:16-22.

> During the time that I was a board member for the ELA Estonian subsidiaries, Alex would provide me with updates on the litigation. He also told me about several instances in which Estonia asked him for bribes to drop the case. For example, Alex met with Raivo Laus, a lawyer who worked with then Minister of Justice Märt Rask, at the Hotel Olympia in 2001. I was not a board member for the ELA Estonian investments yet, but I knew Alex. After his meeting with Mr. Laus, Alex and I met downtown, and he told me about the meeting. According to Alex, Mr. Laus said that Minister Rask would give Alex both the Port and the prison next door in return for a payment of US$5 million. Alex was scared and told me that he left the meeting without agreeing to anything.[1484]

939. But Ms. Kotova did not witness the meeting in person or provide any information regarding the alleged corruption attempt other than Mr. Rotko's account of it to her. According to the Claimant, later in the year, Mr. Laus again called Mr. Rotko and said that the Estonian government was willing to pay Mr. Rotko US$ 1,500,000 if he would recognize Estonia's ownership of the Lennusadam Port and his companies left the Port. Mr. Rotko rejected the offer and informed Mr. Laus that he had already invested much more than that into the Port.[1485]

940. There is no documentary evidence on file regarding the second attempt, Moreover, Mr. Rotko's and Ms. Kotova's testimonies can at most establish that Mr. Laus told Mr. Rotko that he acted on behalf of Mr. Rask. This is far from constituting clear and convincing evidence in support of a corruption attempt attributable to the Estonian State.

(C.) The Third Attempt

941. Unlike the first two attempts, the alleged third attempt does not involve Mr. Laus. The alleged meeting of 5 June 2006 took place two days before the Supreme Court of Estonia dismissed the appeals of the Claimant's subsidiaries in the ownership lawsuit.

942. Mr. Rotko's account of the meeting is as follows. The meeting was requested by a telephone call to Mr. Rotko "from a secret police agent" and was arranged at a Turkish café.[1486] At this café, Mr. Rotko met with two individuals whom he assumed to be "secret agents" based on their behavior and haircuts.[1487] The agents told Mr. Rotko that he could privatize the Port if he declared bankruptcy. Mr. Rotko described the (limited) information he was allegedly provided with regarding those bankruptcy proceedings as follows: [1488]

> Q. Did the secret agents ask you to pay a bribe?
>
> A. No.
>
> Q. Then what was the purpose of the meeting?

1484 Witness Statement of Ms. Olga Kotova dated 29 August 2019, ¶¶ 17-18 (**CWS-3**).

1485 Memorial, ¶ 157.

1486 Second Rotko Statement, ¶¶ 65-67; Hearing Transcript, Day 2, pp. 15:17 – 16:19.

1487 Hearing Transcript, Day 2, pp. 37:23 – 38:4.

1488 Hearing Transcript, Day 2, p. 38:10-25.

> A. For my company BPV, that owned, well, all the companies in the port, to go through bankruptcy. And one of them said, "This person will be the bankruptcy manager. He's a good guy; he's a little fat. He's got military -- shaped as a military man", and he spoke with an Estonian accent. And they suggested that I should go through bankruptcy and everything would be fine. The premises of the port, I will get them in my possession through bankruptcy proceedings: that's what they said.
>
> Q. What was their interest in the whole deal then?
>
> A. It was Rask's interest, I believe, because he wanted to somehow put the company into bankruptcy, as he always has said.

943. According to Mr. Rotko, he refused to agree with this plan, upon which—outside the café—the agents made a telephone call to a person whom Mr. Rotko identified as Minister Rask:

> They stepped away, literally 3 feet away from me, placed a phone call. It was already outside the café, we had stepped out of the café. They called Rask. Why am I saying Rask? It's because I did hear his voice. He has a very distinctive kind of voice. I had met with him, and I heard his voice while I was next to him. They said that I had turned down the offer and he told them to convey to me that my port had already been taken away. [1489]

944. There are no documents on file containing further information on the identity of the alleged agents for the Tribunal to address. The only means to ascertain their identity and connection to the State of Estonia remains Mr. Rotko's testimony. However, Mr. Rotko was unable to provide names, and assumed their role based on their appearance and body language. No documentary evidence on record suggests that the persons allegedly present at the Turkish café were "secret police agents" or any other kind of agents acting on behalf of the State. Mr. Rotko testifies that he identified Minister Rask's voice by overhearing a phone call outdoors from three feet away. The Tribunal does not consider such a form of identification very reliable. It surely does not constitute clear and convincing evidence that Mr. Rask offered Mr. Rotko ownership of the Port through bankruptcy proceedings against payment of a bribe.

(D.) Allegedly similar incidents

945. The Claimant wishes to draw inferences from the "history" or general environment of corruption in Estonia. The 2006 Rail World and 2021 Porto Franco Cases are, however, unrelated to the present proceedings. [1490] In the Rail World Case, the record shows only an unspecific, uncorroborated, and unproven allegation made by an aggrieved investor in an unrelated case. The events in the 2021 Porto Franco Case postdate the Claimant's involvement in Estonia by almost two decades and are not connected to the Claimant's investment.

946. In conclusion, the Tribunal considers that there is no clear and convincing evidence in support of the alleged attempt to solicit corrupt payments by individuals whose conduct would be attributable to Estonia and therefore rejects the Claimant's FET claim based on corruption.

1489 Hearing Transcript, Day 2, p. 16:8-16.

1490 Reply, ¶¶ 36-43, 880.

b) Alleged Unlawful Interference in the Judicial Process

i. The Claimant's Position

947. The Claimant submits that the Respondent unlawfully interfered in the judicial process when its executive branch attempted to influence the outcome of the local proceedings against Agrin, Verest and BPV on at least two occasions during the pendency of those proceedings,[1491] namely through (1) disciplinary proceedings against judge Jüri Mesipuu, and (2) statements made by the Minister of Justice in a televised interview.

948. Concerning the legal standard, the Claimant contends that the broadest possible protections are necessary "to cover the judicial branch with the protections of the rule of law". According to the Claimant, such protections would be weakened by the application of a "special and higher standard of proof".[1492] It submits that such an approach as taken in *Vannessa Ventures v. Venezuela* would "weaken protections for the rule of law" and is contrary to the fundamental concept of breach of treaty obligation under Article 2 of the ILC Articles, which does not establish a special threshold rule for cases involving judicial independence.[1493]

(I.) Disciplinary Proceedings

949. In November 2000, the Minister of Justice initiated disciplinary proceedings before the Disciplinary Committee against Judge Jüri Mesipuu of the Tallinn City Court, alleging that there had been undue delay in the referred local proceedings.[1494] The Disciplinary Committee rejected the complaint and emphasized that the Ministry of Justice "in [that] disciplinary matter [had] derailed from the principles of objectivity and equality of the parties."[1495]

950. According to the Claimant, while Minister Rask decided not to appeal the decision of the Disciplinary Committee,[1496] his actions in bringing the complaint against Judge Mesipuu were cited in a 2001 report by George Soros' Open Society Institute on Judicial Independence in Estonia. The report stated:

1491 Memorial, ¶ 497.

1492 Reply, ¶ 364.

1493 Reply, ¶¶ 265-266, *citing* Article 2 of the ILC Articles, (**CLA-137**).

1494 Memorial, ¶ 498, *referring to* Rask Started Disciplinary Proceedings Against Judge, Baltic News Service, 20 November 2000 (**C-072**).

1495 Memorial, ¶ 499, *citing* Decision of the Disciplinary Committee, Disciplinary matter No. 3-8-11-1, 1 February 2001, ¶ 5 (**C-122**).

1496 Memorial, ¶ 143, *citing* News Article. Rask will not appeal the decision of the committee about Judge Mesipuu. 9 February 2001 (**C-127**).

> The Minister of Justice continues to exercise a predominant influence on the administration of the judiciary and supervision of court presidents, affording it opportunities indirectly to influence judges' deliberations. […] As long as the district and regional courts are under the supervision of the Ministry of Justice, the Ministry will have opportunities to exert undue influence on the judges and especially the President of the courts through its discretionary administrative decisions. For example, the Minister of Justice recently initiated disciplinary action against a judge for unduly prolonging administrative court proceedings in a highly publicized case in which the Government was a party.[1497]

951. The Claimant states that "[t]he public opprobrium caused by the transparency from the Open Societies Project made the other judges more careful in finding arguments that pleased the Government. Further, the judges did not veer from the Government's goal of economic capital punishment."[1498]

(II.) Remarks by the Minister of Justice

952. The Claimant claims that on 5 April 2004, the Minister of Justice, Minister Ken-Marti Vaher, stated in a televised interview that local courts should rule that the Port was State property.[1499] The Claimant alleges that, in the same interview, the Minister also stated that the judge of the Tallinn City Court who was responsible for the procedural error that led to the first judgment being quashed by the Circuit Court would be "held responsible."[1500]

953. The Claimant submits that the above acts by the Respondent frustrated its expectation of a stable business and regulatory environment, constituted an abuse of process and violated the principles of due process and good faith, and therefore, breached the FET standard.[1501]

ii. The Respondent's Position

954. Relying on *Vannessa Ventures v. Venezuela*, the Respondent submits that "[a]ny allegations of partiality by the courts due to alleged governmental pressure must be proven to the highest standard of proof."[1502] The Respondent characterizes the Claimant's pleadings on this point as an argument that the Respondent "misunderstood the severity of the allegations and that the sanctioning of Judge Mesipuu and a TV appearance by the Minister of Justice must have had a specific and direct effect on the courts."[1503]

1497 Memorial, ¶ 143, *citing* Open Society Institute, 'Judicial Independence in Estonia' in *Monitoring the EU Accession Process-Judicial Independence*, 2001, p. 164 (**C-128**). In this report, the Disciplinary Committee is referred to as the "Disciplinary Commission."

1498 Reply, ¶ 377.

1499 Memorial, ¶ 502, *referring to* Transcript of Justice Minister Vaher on Actuaalne Kaamera TV Program, 5 April 2004 (**C-209**).

1500 Memorial, ¶ 503, *referring to* Transcript of Justice Minister Vaher on Actuaalne Kaamera TV Program, 5 April 2004 (**C-209**).

1501 Memorial, ¶ 505; Reply, ¶¶ 1268-1271.

1502 Counter-Memorial, ¶ 575, *referring to Vannessa Ventures v. Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, ¶ 228 (**RLA-140**).

1503 Rejoinder, ¶ 422.

955. The Respondent argues that the Claimant's allegations in this regard do not reach the threshold of that standard.[1504] The Respondent contends that "[t]here is no reason to believe that the courts were in any way influenced by the actions of government representatives."[1505] According to the Respondent, Estonian courts afforded Agrin, Verest and BPV a fair opportunity to present their case and make full use of their rights and rendered "an independent and well-reasoned verdict."[1506]

956. As for the conduct of the Ministry of Justice, the Respondent asserts that this branch of the government acted as a private party in the proceedings against Agrin, Verest and BPV "to protect its rights" and "used the legal remedies available to it."[1507]

(I.) Disciplinary Proceedings

957. The Respondent argues that the Minister of Justice "had a lawful and reasonable basis" to initiate disciplinary proceedings against Tallinn City Court judge Jüri Mesipuu.[1508] According to the Respondent, the Minister, which has the authority to initiate that type of proceedings, relied on a breach of section 19(1)(1) of the Status of Judges Act for undue delay.[1509] The Respondent contends that Judge Jüri Mesipuu had taken several months to rule on a request for interim measures that, under Estonian law, should have been resolved within one day.[1510] In any event, the Respondent argues that the disciplinary proceedings could not have influenced Judge Mesipuu's decision as such proceedings were initiated after the Tallinn City Court's judgment of 20 November 2000 was rendered.[1511]

(II.) Public Remarks by Minister of Justice

958. As for the public statements made by Minister Ken-Marti Vaher in the televised interview of 5 April 2004, the Respondent submits that the Claimant must, and has failed to, show that these had a specific and direct effect on the process or outcome of the court proceedings.[1512] According to the Respondent, there is no reason to believe that the courts were in any way influenced by the actions of government representatives; rather, the Tallinn City Court's actions that succeeded the public statements identified by the Claimant confirm that the court acted impartially.[1513] Specifically, the Respondent maintains that after the referred statements took place in 2004, the

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1504 Counter-Memorial, ¶ 576; Rejoinder, ¶ 421.

1505 Counter-Memorial, ¶ 576.

1506 Counter-Memorial, ¶ 576.

1507 Counter-Memorial, ¶ 573.

1508 Counter-Memorial, ¶ 578; Rejoinder, ¶ 421.

1509 Counter-Memorial, ¶ 578, *referring to* Status of Judges Act (Eesti Vabariigi kohtuniku staatuse seadus), RT 1991, 38, 473, section 21 (**RLA-141**). *See also* Rejoinder, ¶ 421.

1510 Counter-Memorial, ¶ 578; Rejoinder, ¶ 421.

1511 Counter-Memorial, ¶ 579, *referring to* August 2000 Judgment (**C-068**); Decision of the Disciplinary Committee, Disciplinary matter No. 3-8-11-1, 1 February 2001, ¶ 3.1 (**C-122**).

1512 Counter-Memorial ¶¶ 574-576; Rejoinder, ¶ 422.

1513 Counter-Memorial, ¶ 577.

Tallinn City Court decided in 2005 to reject the Respondent's claim against BPV.[1514] Although this decision was overturned on appeal, the Respondent avers that had the Tallinn City Court been "swayed by the media coverage" then "the proceedings would surely have been conducted in a shorter timeframe and with a more positive outcome for the Respondent."[1515]

iii. The Tribunal's Analysis

(I.) Legal Standard

959. The US-Estonia BIT does not expressly mention or define "unlawful interference." The illegality must relate to a breach of international law. Not every illegality under domestic law constitutes a treaty breach. Some degree of inefficiency, trial and error, or human imperfection must be overstepped before a party may complain of a violation of a BIT, or else "every aspect of any legislation of a host state or its implementation could be brought before an international arbitral tribunal under the guise of a violation of the BIT," which is not the purpose of such treaties.[1516] As in the case of the NAFTA Chapter 11 tribunal in *SD Myers*, this Tribunal:

> does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.[1517]

960. State conduct that is not in violation of specific regulations may be recognized as being contrary to the law because: "(it) shocks, or at least surprises, a sense of juridical propriety."[1518] The test is not whether the host State met a standard of "perfection"[1519] or its legal system was performing as efficiently as it ideally could.[1520]

961. In jurisprudence relating to judicial propriety, formulations of the standard of fair and equitable treatment demand a high threshold, requiring, for instance, acts that "weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below

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1514 Counter-Memorial, ¶ 577, *referring to* July 2005 Judgment (**C-078**).

1515 Counter-Memorial, ¶ 577.

1516 *Eastern Sugar B.V. v Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, ¶ 272 (**CLA-266**).

1517 *S.D. Myers, Inc. v. Government of Canada*, First Partial Award, 2000 WL 34510032, 13 November 2000, ¶ 261 (**CLA-048**).

1518 *Tecnicas Mediambientales Tecmed S.A. v. the United Mexican States,* ICSID Case no. ARB (AF)/00/02, Award, 29 May 2003, ¶ 154 *citing* Neer v. México case, (1926) R.I.A.A. iv. 60.; International Court of Justice Case: Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), 128, p. 65, July 20, 1989, ICJ, General List No. 76 (**CLA-055**).

1519 *AES Summit Generation Limited and AES-Tisza Erömü Kft v Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶ 9.3.40 (**RLA-192**).

1520 *Vannessa Ventures v. Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, ¶ 227 (**RLA-140**).

acceptable international standards."[1521] A breach of the minimum standard of fair and equitable treatment has been described as conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic" or that "offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process."[1522]

962. Internationally unlawful conduct of judicial proceedings was found, for example, in an arbitration under NAFTA where the trial court "permitted the jury to be influenced by persistent appeals to local favoritism as against a foreign litigant," conduct held to be "improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment."[1523]

963. The standard of proof in a claim that the judiciary lacked independence insofar as they were influenced by actions of the executive of the State has also been described as particularly high.

964. The case of *Vannessa Ventures v. Venezuela* concerned an alleged breach of the right to fair and equitable treatment through obstruction of access to the courts in judicial proceedings to which the State was a party. The tribunal found failures of the courts to deal with applications for interim relief promptly or at all, as well as considerable and multiple delays in dealing with applications.[1524] The investor alleged that the courts "were less than independent and impartial and were acting against the background of political controversy."[1525] Endorsing the high threshold formulated in other cases, the tribunal held:

> The question is not whether the host State legal system is performing as efficiently as it ideally could: it is whether it is performing so badly as to violate treaty obligations to accord fair and equitable treatment and full protection and security. The Tribunal does not consider that the delays in this case are of an order that constitutes conduct that falls below the minimum standard demanded by the Treaty.

1521 *Thunderbird v. United Mexican States* (UNCITRAL arbitration), Award of 26 January 2006, ¶ 194, *cited in Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 598 (**CLA-073**).

1522 *Waste Management, Inc. v. Mexico (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98 (**CLA-066**), on the basis of the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases.

1523 *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Award, ICSID Case No. ARB(AF)/98/3, 26 June 2003, ¶ 136 (**CLA-088**).

1524 *Vannessa Ventures v. Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, ¶ 226 (**RLA-140**).

1525 *Vannessa Ventures v. Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, ¶ 217 (**RLA-140**).

> Allegations of a lack of independence and impartiality are more difficult to deal with. They often amount to **allegations of violations of professional rules, or even of criminal laws, and it is not to be expected that evidence will be readily available**. Such allegations would, if proven, constitute very serious violations of the State's treaty obligations. **But they must be properly proved; and the proof must, at least ordinarily, relate to the specific cases in which the impropriety is alleged to have occurred. Inferences of a serious and endemic lack of independence and impartiality in the judiciary, drawn from an examination of other cases or from anecdotal or circumstantial evidence, will not ordinarily suffice** to prove an allegation of impropriety in a particular case. The evidence in this case does not warrant a conclusion that the decisions of the courts in Venezuela in the proceedings instituted by Claimant demonstrate a lack of independence or impartiality, and the Tribunal does not accept that they amount to breaches of either the right to fair and equitable treatment or the right to full protection and security."[1526]

965. The Claimant has questioned whether the standard of proof adopted in *Vannessa Ventures* is appropriate because safeguarding the ability of judges to rule against the government "necessitates the broadest possible international protections – not a rule protecting states that engage in punishment of judges who rule against government policy".[1527] The Claimant submits that such an approach conflates the fair and equitable treatment standard with the requirements to establish a denial of justice.[1528]

966. In the Tribunal's view, it is appropriate to require specific proof in relation to allegations of a lack of judicial independence and impartiality, wherein anecdotal or circumstantial evidence would not suffice. It is not an extraordinarily high standard to accept that "the proof must, at least ordinarily, relate to the specific cases in which the impropriety is alleged to have occurred."[1529] As held in *Vannessa Ventures,* establishing unlawful interference with the judiciary would require a showing of the effect on the conduct of the judiciary towards the Claimant.[1530] It is logical that the evidentiary requirements would be similar under the related standard of denial of justice.

967. In substance, certain principles articulated in the concept of denial of justice claims are relevant to the Claimant's case. The actionable element of unlawful interference in judicial proceedings is a lack of access to independent and impartial justice. Cases on expropriation through a denial of justice have applied the principle that where an investor had the opportunity to seek remedial action in the courts of the host State, the decision that could have been so challenged does not amount to a denial of justice.[1531] Failure to seek redress from national authorities has been held capable of disqualifying an international claim, "not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable - not necessarily exhaustive - effort by the investor to obtain

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1526 *Vannessa Ventures v. Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, ¶¶ 227-228 (**RLA-140**) (emphasis added).

1527 Reply, ¶ 368.

1528 Reply, ¶ 369.

1529 *Vannessa Ventures v. Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, ¶ 228 (**RLA-140**).

1530 *Vannessa Ventures v. Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, ¶¶ 227-228 (**RLA-140**).

1531 *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶ 151 (**CLA-088**).

correction."[1532] Similarly, the availability of local remedies to an investor has been held relevant to the question of State compliance with a standard such as "treatment in accordance with international law, including fair and equitable treatment and full protection and security" under Article 1105(1) of NAFTA.[1533]

968. If the mere availability of a challenge would preclude a finding of denial of justice or breach of the right to fair and equitable treatment, it follows *a fortiori* that a successful challenge has the same effect, as implied by the tribunal in *EnCana v. Ecuador*. In considering a claim of expropriation through breach of contract, the Tribunal distinguished "a questionable position taken by the executive in relation to a matter governed by the local law" from "a definitive determination contrary to law."[1534] It held that the mere refusal to make a payment would not constitute an expropriation of the value of the payment "provided at least that (a) the refusal is not merely willful, (b) the courts are open to the aggrieved private party, (c) the courts' decisions are not themselves overridden or repudiated by the State."[1535] A potential claim for unlawful interference may no longer arise should the alleged defect have been remedied in the judicial system of the host State.

(II.) Application to the Facts

(A.) The Disciplinary Proceedings

969. The Disciplinary Committee, sitting in panels of three to five judges, may apply sanctions, including reprimand, warning, or a fine. A judge whose behavior is examined has the right to be heard, the right to legal assistance, and the right to appeal to the Supreme Court where appeals are heard by the Supreme Court *en banc.*[1536]

970. In the proceeding against Judge Mesipuu, the Ministry of Justice alleged (i) that the judge failed to rule on the request for interim relief by the deadline set in section 158 subsection 1 of the Code of Civil Procedure; (ii) that he unduly delayed the proceedings by taking over two years for the decision; and (iii) that he irresponsibly departed on vacation without notification of the need for urgent decisions or leaving access to the case file. However, the Ministry itself submitted that the latter two allegations do not amount to disciplinary offences, but rather showed shortcomings in the judge's work.[1537]

1532 *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶ 20.30 (**RLA-115**).

1533 *Waste Management, Inc. v. Mexico (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 116 (**CLA-066**).

1534 *EnCana Corporation v. Ecuador*, LCIA Case No. UN 3481, Award, 3 February 2006, ¶ 193 (**RLA-058**).

1535 *EnCana Corporation v. Ecuador*, LCIA Case No. UN 3481, Award, 3 February 2006, ¶ 194 (emphasis added) (**RLA-058**).

1536 Open Society Institute, 'Judicial Independence in Estonia' in *Monitoring the EU Accession Process-Judicial Independence*, 2001, p. 179, *citing* Statute of the Disciplinary Committee adopted by the Supreme Court and available at <http://www.nc.ee/riigikohus>, in Estonian (accessed 11 June 2001) (**C-128**).

1537 Decision of the Disciplinary Committee, Disciplinary matter No. 3-8-11-1, 1 February 2001, ¶ 2 (**C-122**).

971. The Ministry had therefore initiated disciplinary proceedings on the basis of three claims, two of which the Ministry itself did not even find to be prosecutable (which raises the question of why they started the proceedings in the first place, if not to pressure the judiciary) and the third was essentially an unfounded protest against a decision that was disadvantageous to the ministry. In view of this, the Disciplinary Committee found that it was the Ministry of Justice who had acted improperly: "The disciplinary committee also finds that the Ministry of Justice has in this disciplinary matter derailed from the principles of objectivity and equality of the parties."[1538]

972. The Disciplinary Committee dismissed the first charge: it found that the judge had simply denied the request for interim relief, not failed to rule on it. As to the second charge, the Ministry submitted that the proceeding "lasted for over two and a half years" and thereby "exceeded the limit of reasonable time."[1539] The Disciplinary Committee dismissed this claim, finding that the length of the proceeding "was not caused by the wrongful activities of the judge but rather the activities of the parties," given *inter alia* that, as accepted by the Ministry of Justice during the hearing, the plaintiff did not prove the necessary authorization until 11 August 2000.[1540]

973. As to the complaint that the judge had been "very irresponsible" in taking a vacation of one month without arranging for the case to be attended to timeously,[1541] the Ministry of Justice pursued "a minimal punishment" and considered that the two-year time period taken and the failure to transfer the file during vacation "do not constitute a disciplinary offence but show shortcomings in the work of Judge Mesipuu."[1542] As to the fact that the civil file could not be retrieved in a timely manner during Judge Mesipuu's vacation, the Disciplinary Committee reviewed the internal processes leading to that delay, which were hampered by unforeseen illness and internal lapses in communication among the responsible administrative staff. It concluded that the delay was not the fault of Judge Mesipuu, who "did not have to foresee" those issues.[1543]

974. Concerning the conduct of the Ministry of Justice, and having received submissions on this point from Judge Mesipuu and from Verest and Agrin, the Disciplinary Committee found that the Ministry of Justice had "derailed from the principles of objectivity and equality of the parties." It stated:

1538 Decision of the Disciplinary Committee, Disciplinary matter No. 3-8-11-1, 1 February 2001, ¶ 5 (**C-122**).

1539 Decision of the Disciplinary Committee, Disciplinary matter No. 3-8-11-1, 1 February 2001, ¶ 1 (**C-122**).

1540 Decision of the Disciplinary Committee, Disciplinary matter No. 3-8-11-1, 1 February 2001, ¶ 4.1 (**C-122**).

1541 Decision of the Disciplinary Committee, Disciplinary matter No. 3-8-11-1, 1 February 2001, ¶ 1.3 (**C-122**).

1542 Decision of the Disciplinary Committee, Disciplinary matter No. 3-8-11-1, 1 February 2001, ¶ 2 (**C-122**).

1543 Decision of the Disciplinary Committee, Disciplinary matter No. 3-8-11-1, 1 February 2001, ¶ 4.2 (**C-122**).

> The disciplinary matter has been started in a civil case in which the Ministry of Justice is a party to and by the time the disciplinary proceeding was started, a court decision in that matter had not entered into force. This situation reasonably gives a basis to think that the Ministry of Justice has tried to influence the judge with non-procedural instruments; the applying of which is made possible by the Status of the Judges Act, however, the other party of the proceeding does not have these possibilities. The reasoning of this conclusion is also proven with the letter sent by the representative of AS Verest and OÜ Agrin Partion, lawyer Heiki Ojamaa, on 19. January 2001.[1544]

975. In an interview with ETA, Minister Rask stated that he did not deem it necessary to appeal the decision to the Supreme Court.[1545]

976. The Respondent argues that the disciplinary proceeding had no impact on the outcome of the proceedings before the Tallinn City Court because the judgment had already been passed on 25 August 2000, i.e., before the initiation of the disciplinary proceedings. The Tribunal is not convinced by this argument. While judgment at first instance had been passed, the ownership lawsuit remained pending prior to the decision by the Tallinn Circuit Court. The demonstration by the Minister of Justice to commence disciplinary proceedings in a case to which the government was a party certainly had the potential to affect the lawsuit in the same case.

977. In its 2001 report, the Open Society Institute cited the fact that "the Minister of Justice recently initiated disciplinary action against a judge for unduly prolonging administrative court proceedings in a highly publicized case in which the Government was a party"[1546] in stating that the Ministry "continues to exercise a predominant influence on the administration of the judiciary and supervision of court presidents, affording it opportunities indirectly to influence judges' deliberations."[1547] In relation to potential law reform, the report stated:

> As long as the district and regional courts are under the supervision of the Ministry of Justice, the Ministry will have opportunities to exert undue influence on the judges and especially the Presidents of the courts through its discretionary administrative decisions. [1548]

978. The Open Society Institute concluded that the fact that proceedings are actually heard by the Disciplinary Committee, whose members are selected only by the courts, "mitigates this potential harm to some degree,"[1549] and concluded that:

1544 Decision of the Disciplinary Committee, Disciplinary matter No. 3-8-11-1, 1 February 2001, ¶ 5 (**C-122**).

1545 News Article. Rask will not appeal the decision of the committee about Judge Mesipuu. February 9, 2001 (**C-127**).

1546 Open Society Institute, 'Judicial Independence in Estonia' in *Monitoring the EU Accession Process-Judicial Independence*, 2001, p. 164 (**C-128**).

1547 Open Society Institute, 'Judicial Independence in Estonia' in *Monitoring the EU Accession Process-Judicial Independence*, 2001, p. 164, *citing* Statute of the Ministry of Justice, RTI 1997, 1, 7, RTI 2001, 8, 39; Sections 8, 12 (**C-128**).

1548 Open Society Institute, 'Judicial Independence in Estonia' in *Monitoring the EU Accession Process-Judicial Independence*, 2001, p. 164, *citing* Statute of the Ministry of Justice, RTI 1997, 1, 7, RTI 2001, 8, 39; Sections 8, 12 (**C-128**).

1549 Open Society Institute, 'Judicial Independence in Estonia' in *Monitoring the EU Accession Process-Judicial Independence*, 2001, p. 180 (**C-128**).

> In practice the Ministry of Justice has not abused these powers; however, in some cases judges have reported that the Ministry has informed them of its interest in speeding up proceedings.[1550]

979. It may well be criticized that in Estonia, the Minister of Justice has the power to initiate disciplinary proceedings against judges (even if the Ministry of Justice itself is a party to the proceedings), as does the Open Society Institute. This being said, the Claimant must show that the impact of the disciplinary proceedings led to an outcome that would rise to a breach of the FET standard. In particular, allegations of a lack of independence and impartiality, as noted above:

> must be properly proved; and the proof must, at least ordinarily, relate to the specific cases in which the impropriety is alleged to have occurred. Inferences of a serious and endemic lack of independence and impartiality in the judiciary, drawn from an examination of other cases or from anecdotal or circumstantial evidence, will not ordinarily suffice to prove an allegation of impropriety in a particular case.[1551]

980. The evidence does give cause for concern in this specific situation. The use of the Minister's authority to instigate disciplinary proceedings in a case to which the State was a party and represented by the same Ministry was reproachful. The disciplinary proceedings were heard independently, mitigating the potential for harm. A reproach of the same conduct was administered by the Disciplinary Committee in its decision on the case. In response to that decision, the Minister stated that he did not intend to appeal against it and that he was prepared to apologize to the Judge.

981. In establishing whether the conduct was "unlawful" under international law:

> A violation of a BIT does not only occur through blatant and outrageous interference. However, a BIT may also not be invoked each time the law is flawed or not fully and properly implemented by a state. Some attempt to balance the interests of the various constituents within a country, some measure of inefficiency, a degree of trial and error, a modicum of human imperfection must be overstepped before a party may complain of a violation of a BIT. Otherwise, every aspect of any legislation of a host state or its implementation could be brought before an international arbitral tribunal under the guise of a violation of the BIT. This is obviously not what BITs are for.[1552]

982. In the Tribunal's view, the decisive question is whether the decision of the Disciplinary Committee adequately redressed the harm, occasioned by the proceedings against Judge Mesipuu, which could amount to a lack of judicial independence in this specific case. If so, in the Tribunal's view, this conduct would not form the basis of a claim under the obligation to provide fair and equitable treatment.

983. In making this assessment, it is appropriate to refer to the legal standard on denial of justice (discussed above). In cases where a remedy under domestic law was available, tribunals have ruled that the conduct does not rise to a breach of the right to fair and equitable treatment. It

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1550 Open Society Institute, 'Judicial Independence in Estonia' in *Monitoring the EU Accession Process-Judicial Independence*, 2001, p. 165 (**C-128**).

1551 *Vannessa Ventures v. Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, ¶ 228 (**RLA-140**).

1552 *Eastern Sugar B.V. v Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, ¶ 272 (**CLA-266**).

follows *a fortiori* that where a remedy was available and was successfully used to correct the irregularity, the conduct of the State does not amount to a violation of international law.

984. Notably, the independent review citing the case of Judge Mesipuu as an example did not conclude that the situations it had examined amounted to an abuse of power. It opined that while reform of the procedure was warranted, the potential for harm under the existing system is mitigated by the fact that disciplinary proceedings are heard by a Disciplinary Committee appointed by and comprising independent judges. The Open Societies report concerns the Estonian judicial system as a whole,[1553] and evaluates *inter alia* whether draft legislation is sufficient to achieve the reforms it identifies as advisable.[1554] In that connection, it is not the mandate of this Tribunal to second-guess the decision-making of the Government; the proper avenue for redress of such issues in modern governments is "through internal political and legal processes, including elections."[1555]

985. In the Tribunal's view, the actual or apparent lapses in the administration of justice were adequately remedied by the Disciplinary Commission's decision to dismiss the proceedings, the declaration made therein, and the subsequent public statements of the Minister. The Tribunal concludes that the conduct of the State did not amount to unlawful interference.

(B.) Public Remarks by Minister

986. On 5 April 2004, Minister Ken-Marti Vaher carried out a visit to the Seaplane Harbor and at 9pm that evening, appeared on the television program *Aktuaalne Kaamera* where he was interviewed for comments. The relevant parts of the interview, in the context of the questions to which the Minister was responding, are as follows:

> Presenter: A president, several Ministers and Mayors have dealt with this situation. From today it is different, isn't it?
>
> Minister: The difference starting from today is the fact that we now have quite a clear overview of what exactly has happened in the Seaplane Harbor. What are the buildings that have been built after the prohibition to do so? Third, we have quite a clear plan on how to act hereinafter. We will definitely use all of the legal possibilities to reclaim the ownership of the State of the assets the value of which is in tens of millions of Kroon's. When speaking about the court proceeding, the next process takes place on 21. April. For sure, they will again try to use the delaying tactic but I think we should use significantly more of the opportunities provided in law, for example-compelled attendance. That the people delaying would stop these activities and the Republic of Estonia would restore its ownership on that territory.
>
> Presenter: Today, then, just some new knowledge? Today nothing was done for the territory to be released? This visitation by the Ministry of Justice should show to the court what the decision should be?

1553 Open Society Institute, 'Judicial Independence in Estonia' in *Monitoring the EU Accession Process-Judicial Independence*, 2001, Executive Summary, pp. 150-153 (**C-128**).

1554 Open Society Institute, 'Judicial Independence in Estonia' in *Monitoring the EU Accession Process-Judicial Independence*, 2001, p. 164, *citing* Statute of the Ministry of Justice, RTI 1997, 1, 7, RTI 2001, 8, 39; Sections 8, 12, and stating: "The draft Courts Act does little to address executive involvement." (**C-128**).

1555 *S.D. Myers, Inc. v. Government of Canada*, 2000 WL 34510032, First Partial Award, 13 November 2000, ¶ 261 (**CLA-048**).

> Minister: I think it was a very clear signal by the State, by all the institutions of the state who have a joint opinion about this dispute. These are state assets that are in unlawful possession, the reclaiming of which is just a question of time and we have extremely strong arguments and are using all the possibilities to end this situation as soon as possible. Last year, we took steps to expedite the court processes. The lasting of the court proceeding has decreased by a month compared to 2002. We will use these methods hereinafter. Therefore, the goal is to finish the court proceeding as fast as possible and to monitor very carefully, what is happening in the Seaplane Harbor. The bailiff will definitely visit this object more often, to monitor the condition of the state assets. We want to ensure with all legal means that the situation would be as uncomfortable as possible for the unlawful possessors.
>
> Presenter: The content of the dispute is the fact whether the assets are state assets or not, isn't it?
>
> Minister: No. The content of the dispute is the illegal possession. Quite shady transactions that were concluded in the middle of the 90's and pursuant to the Constitution and Civil Procedure act this final truth can be proven in court. Our arguments are strong. We have managed to win these companies once in 2000.[1556] Then, unfortunately, some processual errors were made and it was sent back to the court of first instance. Therefore, [overspeaking] there is no question regarding the substance. The question is only in time, that the law would win.
>
> Presenter: Have the people who made errors been punished?
>
> Minister: They will definitely be made held responsible.
>
> Presenter: How much longer will the dispute last? Will it go the European Court, or the bailiff will go and look for a few years whether something is happening or not?
>
> Minister: I, as a Ministry of Justice, want to do everything in my power so that the dispute would end as soon as possible. Of course, I cannot state a time limit, because the judicial power is the third power in the State.[1557]

987. As to the statements opining that the courts should rule in Estonia's favor, in the Tribunal's view, these were the Minister's accurate restatement of the State's position in the proceedings, as was taken in the courts. As a litigant in the proceedings, it was not improper to make a public statement of the position taken in therein; the action being taken to address the delays that had arisen and enforcing what the Ministry of Justice considered to be the legal status of property of the Republic of Estonia. It was open to Mr. Rotko to do the same.

988. Concerning the statement that "the people who made errors" would be "held responsible", the Tribunal does find that this may be inappropriate in tone when publicly making what could be interpreted as a reference to the conduct of the judiciary. At the same time, neither the question nor the Minister's answer made specific mention of the judges who issued the first Tallinn City Court judgment. The Minister concluded by recognizing that "the judicial power is the third power in the State". The Tribunal does not find that his statements were a "clear" message that the courts "should rule in their favor or face repercussions."[1558] Any "threat" was a matter of intimation. There is no evidence that these statements had the potential to influence the courts.

989. Notably, in substance, the procedural errors in question went to the disadvantage of the Claimant's subsidiaries, Agrin and Verest, as well as their predecessor in possession of the port, B&E. It was

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1556 Judgment of the Tallinn City Court dated 25 August 2000. *See* May 2002 Appeal Judgment (**C-191**).

1557 Transcript of Justice Minister Vaher on Actuaalne Kaamera TV Program, 5 April 2004 (**C-209**).

1558 Reply, ¶ 503.

those parties who took action to seek redress of those procedural errors in their appeal to the Tallinn Circuit Court, and who were successful in their appeal.[1559]

990. On the whole, the procedural errors did not go to the disadvantage of the Respondent in particular. Any disadvantage occasioned by the delay between 14 November 1997 (the date of the action), 25 August 2000 (the date of the judgment quashed), and 5 April 2004 (the date of the Minister's remarks) did not affect the Respondent any more than it did the other parties. Further circumstantial evidence suggests that the courts were not influenced by the remarks. The judgment of the court of first instance in 2005 initially rejected the claim of Estonia against BPV. The courts thereby did not make the most positive possible ruling for Estonia.[1560] To the extent that inferences are to be drawn from the facts, and as argued by the Respondent, it is reasonable to suppose that had the media comments unduly swayed the courts, Estonia would have prevailed more fully.

991. In conclusion, the Tribunal finds that the Claimant has not substantiated its allegation of lack of judicial independence with proof relating specifically to the alleged improprieties. Neither the disciplinary proceedings against Judge Jüri Mesipuu of the Tallinn City Court in November 2000 nor the public remark by the Minister of Justice Ken-Marti Vaher on 5 April 2004 constituted a breach of FET through unlawful interference in the conduct of the ownership lawsuit proceedings.

c) Alleged Denial of Justice / Breach of the Effective Means Requirement

i. The Claimant's Position

992. The Claimant submits that investment tribunals have consistently held that the due process component of the FET Standard may be breached when it is determined that the conduct of a host State amounted to a denial of justice.[1561] Quoting the *Chevron I v. Ecuador* tribunal, the Claimant posits that the test for establishing denial of justice "requires demonstration of 'a particularly serious shortcoming' and egregious conduct that 'shocks, or at least surprises, a sense of judicial propriety'."[1562] According to the Claimant, international law requires that there be certain substantive due process guarantees for the determination of any controversy, which involve "notice, the full opportunity to be heard, impartial consideration and reasoned judgment."[1563] The

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1559 May 2002 Appeal Judgment (**C-191**). The Claimant's subsidiaries established procedural errors on the basis of: (i) failure to pass judgment on or consider all the claims in the counterclaim of OÜ B&E, in contravention of section 228 and subsection 231(4) of the Code of Civil Procedure; (ii) failure to fulfil the aims of the pre-trial proceeding through clarifying the claims of the plaintiff, the objection of the defendants, and the evidence to be provided in contravention of Section 164 of the Code of Civil Procedure; and (iii) failure to establish the wishes of the participants for adjudicating the matter collegially, in contravention of clause 164(1)95) of the Code of Civil Procedure.

1560 July 2005 Judgment (**C-078**).

1561 Reply, ¶ 1153, *referring to International Thunderbird Gaming Corporation v. The United Mexican States*, Award, 26 January 2006, ¶ 197 (**CLA-86**).

1562 Reply, ¶ 1162, *citing Chevron-Texaco v. Ecuador*, Partial Award on the Merits, 30 March 2010, ¶ 244 (**CLA-363**).

1563 Reply, ¶ 1458, *referring to Salvador Commercial Company* Case, XV RIAA 467, 1902, p. 478. (**CLA-368**).

Claimant notes that the tribunal in *Azinian v. Mexico* held that "'clear and malicious misapplication of the law' constitutes denial of justice."[1564]

993. The Claimant further contends that under Article II(7) of the Treaty, the Respondent is required to provide the Claimant with an effective means for asserting its claims and enforcing its rights.[1565] Citing the *Chevron I v. Ecuador* tribunal, the Claimant contends that this standard "constitutes a *lex specialis* and [is] not a mere restatement of the law on denial of justice."[1566] Rather, the Claimant submits, the "effective means" standard is "a distinct and potentially less demanding test, in comparison to denial of justice in customary international law" and may be breached by, *inter alia*, government interference in judicial proceedings, manifestly unjust decisions, and draconian legislation.[1567] Proof of malicious intent, the Claimant adds, is not a requirement to prove a breach of the effective means standard.[1568]

994. In the instant case, the Claimant asserts, the Respondent undertook, through its courts, actions that amounted to a denial of justice[1569] and a failure to provide an effective means of protection.[1570] In particular, the Claimant asserts that "the judgment of the Tallinn City Court of 4 July 2005 was 'grossly unfair' and inconsistent with both Estonian and international law."[1571]

995. According to the Claimant, Estonia failed to provide effective means of protection because it "engaged in manifestly unjust decisions through a gross failure to apply due process and fairness;" it "applied its laws retroactively;" and the courts "systematically ignored evidence favorable to the investments of ELA U.S.A. in an arbitrary and discriminatory fashion."[1572]

996. The Claimant asserts that pursuant to the Tallinn City Court's decision of 4 July 2005, upheld by the Circuit Court's judgment of 1 March 2006, it was unlawfully determined that Estonia was the owner of the buildings at the Seaplane Harbor.[1573] The Claimant indicates that the referred

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1564 Memorial, ¶ 395, *citing Azinian, Davitian, & Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, ¶ 103 (**CLA-087**).

1565 Reply, ¶ 1156. *See also* Hearing Transcript, Day 5, p. 67:4-11.

1566 Reply, ¶ 1162, *citing Chevron-Texaco v. Ecuador*, Partial Award on the Merits, 30 March 2010, ¶ 247 (**CLA-363**).

1567 Reply, ¶¶ 1165-1166, *referring to White Industries v India*, Final Award, 30 November 2011, ¶ 11.3.2 (**CLA-362**); *Chevron-Texaco v. Ecuador*, Partial Award on the Merits, 30 March 2010, ¶ 248 (**CLA-363**); *Limited Liability Company AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, ¶ 87 (**CLA-359**).

1568 Hearing Transcript, Day 5, p. 67:20-22.

1569 Reply, ¶¶ 1259, 1452.

1570 Reply, ¶¶ 1167, 1257.

1571 Reply, ¶ 1416.

1572 Reply, ¶ 1167.

1573 Memorial, ¶¶ 182-183, 192-194, *referring to* July 2005 Judgment (**C-078**); March 2006 Appeal Judgment (**C-081**).

decisions also determined that Verest's and Agrin's purchase agreements and BPV's Lease Agreements were invalid under Estonian law.[1574]

997. The Claimant alleges the following major misapplications of substantive Estonian law.[1575]

998. First, the Claimant argues that the Estonian Courts' decision to give retroactive effect to the 1992 Supreme Council Resolution was manifestly in disregard of Estonian law and the rule of law.[1576] Given that the 1992 Supreme Council Resolution was enacted after the Seaplane Harbor had been privatized by the USSR, "it could not, and expressly do[es] not, apply to the transaction."[1577] This contention is further confirmed, the Claimant asserts, by the opinion of a number of public bodies, such as the office of the Chancellor of Justice which at the time considered that the 1992 Supreme Council Resolution had no retroactive effect.[1578]

999. Secondly, the Claimant alleges that the principle of *iura novit curia* is a rule of Estonian law, under which "the courts are required to address all the relevant arguments that could be before them *ex officio*, even if those legal arguments have not been brought before the Court by the parties."[1579] According to Mr. Keres:

> So whether or not the particular legal provision was relied upon by the counsel, it doesn't matter, because in Estonia we have the principle of iura novit curia, which means that it's for the courts and not the parties to get the law right. The defendants only had to establish the facts that the law could be applied to, and they did. The courts would have been able to, if they had done their job properly, to draw the key legal conclusions from title-bearing possession and breach of good faith. But these facts and evidence were wholly ignored.[1580]

1000. Under this rule, according to the Claimant, the courts should, of their own motion, have considered "the obviously relevant law" concerning the ELA subsidiaries' holding of "title-bearing possession."[1581]

1001. The Claimant contends that in further contravention of the *iura novit curia* rule, the courts failed to consider "highly relevant and important evidence" before them of contradictory behavior of the government in breach of good faith.[1582] In particular, the Claimant contests that Estonian courts ignored a letter from the Office of the Chancellor of Justice of 23 October 1997, confirming that the 1992 Supreme Council Resolution had no retroactive effect, and the letter from the head

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1574 Memorial, ¶¶ 182-183, 192-194, *referring to* July 2005 Judgment (**C-078**); March 2006 Appeal Judgment (**C-081**).

1575 Reply, ¶¶ 1416-1423, *referring to* Second Keres Report, ¶¶ 18-19, 66-89, 128, 132 (**CER-2**).

1576 Reply, ¶¶ 1417-1418, 1465, *referring to* Third Keres Report, ¶¶ 214-219 (**CER-4**).

1577 Reply, ¶ 1417.

1578 Reply, ¶ 1419, *referring to* Third Keres Report, ¶¶ 123-125 (**CER-4**).

1579 Fourth Keres Report, ¶ 121 (**CER-8**).

1580 Hearing Transcript, Day 4, p. 60:7-17.

1581 Hearing Transcript, Day 4, p. 60:23-24.

1582 Reply, ¶¶ 1419, 1422, 1465.

of the Government Office of 8 November 1995.[1583] The Claimant argues that under Estonian law, a court's failure to provide sound reasoning in respect of each of the parties' submissions of fact and law "constitutes a serious violation of procedure."[1584]

1002. Additionally, the Claimant alleges that the courts of Estonia "manifestly misinterpreted international law by failing to consider the *ex factis* rule in their determination of matters."[1585] The Claimant's arguments on the application of the *ex factis* rule are set forth above (*see* paragraphs 407-410 above).

1003. Although alleging that it is not a necessary condition for claiming denial of justice, the Claimant also notes that its subsidiaries exhausted all local remedies available in Estonia.[1586]

ii. The Respondent's Position

1004. The Respondent contends that the "Claimant attempts to package its disagreement with the decisions of the Estonian courts under two labels – briefly as denial of justice […] and mostly as a breach of the effective means requirement of the FET."[1587] The Respondent denies both claims of breach in their entirety.

1005. The Respondent first submits that there was no denial of justice, which, it maintains, is a claim that is more appropriately addressed in the context of the Claimant's expropriation, instead of FET, claim.[1588] Under the proper analysis of whether a judicial act resulted in the compensable taking of the Claimant's investment, as addressed in detail in Section VI.B.2 below, the Respondent submits, however, that there has been no compensable taking and, therefore, no denial of justice.[1589]

1006. The Respondent also maintains that it did not breach the effective means requirement of the FET standard in the Treaty. According to the Respondent, the purpose of this provision is "to require the contracting parties to provide an effective system under which claims may be asserted and rights enforced."[1590] In this regard, the Respondent emphasizes that there "was no intent to undertake an obligation to assure that such system would be perfectly effective in every individual case, beyond the protection against a denial of justice."[1591] In particular, the Respondent submits

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1583 Reply, ¶¶ 1419, 1422, *referring to* Third Keres Report, ¶¶ 123-125 (**CER-4**); Letter from the Advisor of Chancellor of Justice to B&E, 23 October 1997 (**C-331**); Letter from the State Chancellery to the Ministry of Justice, 8 November 1995 (**C-307**).

1584 Reply, ¶ 1422, *referring to* Third Keres Report, ¶ 128 (**CER-4**).

1585 Reply, ¶ 1430.

1586 Reply, ¶ 1466.

1587 Rejoinder, ¶ 409.

1588 *See* Rejoinder, ¶¶ 340-341.

1589 Counter-Memorial, ¶¶ 510-513.

1590 Rejoinder, ¶ 411.

1591 Rejoinder, ¶ 411.

that the effective means standard "cannot be used to lower the threshold necessary to find a denial of justice" and "deals with access of justice rather than with its administration."[1592]

1007. In the instant case, the Respondent maintains that there was no breach of this standard because the Claimant and its subsidiaries "were able to fully exercise their rights of defense and present their position in the judicial proceedings regarding the possession of the Seaplane Harbor buildings, effectively delaying the proceedings for years", and "were duly heard" in respect of their claims in administrative proceedings against the PRCA General Plan.[1593]

1008. As to the alleged errors of Estonian law, the Respondent denies the allegation that the 23 January 1992 Resolution was applied retroactively because the courts did not base their decision on the application of that resolution. The Respondent's position on this is set forth above (*see* paragraph 398 above).

1009. To the extent that the Claimant argues that the Estonian courts erred by failing to consider the concept of "title-bearing possession," which the parties did not raise in the proceedings before the Estonian courts, the Respondent considers such argument belated and thus to be disregarded.[1594] In any event, the Respondent contends that the Claimant has not cited authorities in support of the rule of *iura novit curia* under Estonian law and that "title-bearing possession" is not a concept of Estonian law.[1595]

1010. In relation to the alleged failure to consider the material and relevant evidence found in the letters of 8 November 1995 and 23 October 1997, the Respondent asserts that the ELA subsidiaries did not place reliance on that evidence in the Estonian proceedings, save only for a reference in the appeal of 25 July 2005.[1596] The letters were relied on in that appeal only in relation to the question of retroactive application of the 23 January 1992 Resolution, and were not material to the case as claimed by the Claimant.[1597] The allegedly ignored evidence was not relied upon in relation to the claims of legitimate expectations of ownership that the Claimant makes in this arbitration.[1598] The Claimant's subsidiaries "never proposed that the Respondent has acted in a contradictory manner and that it should be prevented from bringing the claim in the first place."[1599]

1011. As to the courts' alleged dereliction of a duty to consider bad faith, the Respondent submits that for such a duty to arise, "the relevant evidence must be submitted and given the correct

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1592 Rejoinder, ¶ 413, *referring to Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 391 (**CLA-262**).

1593 Rejoinder, ¶ 412.

1594 3 November 2021 Submission, ¶ 12. The Respondent asserts that the Claimant's submissions are responsive to the Counter-Memorial, not the Rejoinder, and thus are outside the leave granted by the Tribunal on 30 August 2021. *See* 3 November 2021 Submission, ¶¶ 10-11.

1595 3 November 2021 Submission, ¶ 12.

1596 Rejoinder, ¶ 343, *citing* Petition for Appeal of Agrin, Verest and ELA Tolli, 25 July 2005, p. 10 (**C-043**).

1597 Rejoinder, ¶ 343.

1598 Rejoinder, ¶ 344.

1599 Rejoinder, ¶ 113.

context."[1600] Before the Estonian courts, the Claimant's subsidiaries "did not rely on the Respondent's alleged bad faith behavior" and "never proposed that the Respondent has acted in a contradictory manner."[1601] The argument should also fail because "the Respondent has not acted in bad faith nor in a contradictory manner."[1602]

1012. As to the application of the *ex factis* rule, the Respondent maintains that in the specific circumstances of the Soviet occupation in Estonia and the transactions on which the Claimant relies, "it must be concluded that these transactions should not have been upheld by Estonia after the end of the Soviet occupation."[1603]

iii. The Tribunal's Analysis

(I.) Preliminary Issue: Timeliness

1013. The Tribunal will consider as a preliminary matter the Respondent's procedural objection to certain of the Claimant's arguments. The Respondent objects to the Claimant's post-Rejoinder arguments on *iura novit curia* because these are allegedly responsive to the Respondent's Counter-Memorial and, therefore, outside the Tribunal's directions of 30 August 2021.[1604]

1014. The Respondent had mentioned in its Counter-Memorial the adversarial nature of Estonian court proceedings.[1605] At that stage, the Respondent's position was that the judicial proceedings "do not rise to the level of denial of justice and this has also not been argued by the Claimant."[1606] Only in the Rejoinder did the Respondent discuss whether a denial of justice followed from the Estonian courts not applying *proprio motu* the principles of title-bearing possession and good faith in response to the expert evidence supporting the Claimant's Reply.[1607] In light of the sequence of

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1600 Rejoinder, ¶ 113.

1601 Rejoinder, ¶ 113.

1602 Rejoinder, ¶ 114.

1603 Counter-Memorial, ¶ 235.

1604 Respondent's 3 November 2021 Submission, ¶ 10, *citing* Counter-Memorial, ¶ 277. The Tribunal directed that "As regards points on Estonian law in the Rejoinder that were not already made in the Counter-Memorial, the Tribunal considers it appropriate to grant the Claimant the opportunity to respond before the oral hearing, including through the submission of a supplementary expert report by Mr. Keres. Any submission by the Claimant shall be limited to new issues of Estonian law raised for the first time by Respondent in its Rejoinder."

1605 Counter-Memorial, ¶ 277: "It is also relevant that in the national court proceedings BPV never made the argument that its possession of the Seaplane Harbor buildings and structures was lawful because Agrin and Verest were 'title-bearing possessors.' The Estonian civil court proceedings are of adversarial nature and the court can rely in its argumentation only on the statements and submissions the parties have made."

1606 Counter-Memorial, ¶ 523. The non-articulation of the arguments in prior legal proceedings was cited as "relevant" in the context of the question whether the Claimant was a lawful possessor of the Seaplane Harbor" and was not discussed in the context of denial of justice in that pleading.

1607 Rejoinder, ¶¶ 111-113. *See* Third Expert Report, ¶ 242, stating that the principle of good faith "is recognized and under *iura novit curia* its application is within the purview of the courts regardless of legal position advanced by either party." (**CER-4**); The Respondent stated *inter alia* that the arguments on title-bearing possession and good faith were "invented by Mr. Keres solely for this arbitration." *See* Rejoinder, ¶ 111.

pleadings, the Tribunal adjudges the Claimant's post-Rejoinder submissions to fall within the permission given in its directions of 30 August 2021.

(II.) Legal Standards

(A.) Denial of Justice

1015. The Claimant makes its claim under Article II(3)(a) of the Treaty, which provides:

> Investments shall at all times be accorded fair and equitable treatment, shall be accorded full protection and security and shall in no case be accorded treatment less than required by international law.

1016. The Respondent asserts that the alleged "denial of justice" must be considered as an element of expropriation under Article III(1) of the Treaty as part of the Claimant's claim on expropriation. The Tribunal considers that the claim for denial of justice constitutes part of the alleged failure to provide "fair and equitable treatment" and the alleged treatment "less than required by international law," as well as forming an element of a claim for expropriation, in relation to which Article III(1) of the Treaty requires compliance with "due process of law and the general principles of treatment provided for in Article II(3)." The alleged denial of justice forms an element of both the fair and equitable treatment and expropriation claims. The Tribunal will, therefore, consider the claim for denial of justice in relation to fair and equitable treatment in this section, as well as separately below in relation to the claim for expropriation (*see* Section VI.B).

1017. While the Claimant attributes an "abuse of process" to the courts, it does not allege a denial of justice (or breach of the effective means requirement) through interference by other branches of government or insufficient legislation or unjust procedure, but only on the basis that the Tallinn City Court's 2005 judgment was flawed in its underlying reasoning. Accordingly, the Tribunal need not necessarily establish an overall, abstract standard for denial of justice, but only a specific one for this type of action.

1018. Where a "denial of justice" arises through allegedly flawed decision-making by an independent national judiciary, the error or irregularity concerned must reach a certain level of seriousness before it engages the responsibility of the State. The threshold of seriousness that must be met in this respect can be characterized in such terms as: "clearly improper, discreditable or in shocking disregard of [municipal] law,"[1608] "manifestly arbitrary or unfair,"[1609] "a particularly serious shortcoming" and egregious conduct that "shocks, or at least surprises, a sense of judicial propriety"[1610] the administration of justice "in a seriously inadequate" way,[1611] "the clear and

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1608 *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 May 2015, ¶ 769 (**RLA-111**).

1609 *International Thunderbird Gaming Corporation v. The United Mexican States*, Award, 26 January 2006, ¶ 197 (**CLA-86**).

1610 *Chevron-Texaco v. Ecuador*, Partial Award on the Merits, 30 March 2010, ¶ 244 (**CLA-363**).

1611 *Azinian, Davitian, & Baca v. United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, ¶ 102 (**CLA-087**).

malicious misapplication of the law,"[1612] a substantive decision that is "inexcusable, being one that no reasonably competent judge could make,"[1613] or "extremely gross misconduct" by the judiciary."[1614]

(B.) Effective Means

1019. Article II(7) of the Treaty provides:

> Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.

1020. The Respondent submits that the effective means requirement demands a demonstration of systemic failure (*AMTO*), whereas the Claimant submits that misconduct in the individual case is sufficient (*Chevron*).

1021. Out of the awards that dealt with clauses similar to Article II(7) of the Treaty, the Respondent submits that the effective means requirement demands a demonstration of systemic failure as stated by the tribunal in *AMTO*, which found that "[i]ndividual failures might be evidence of systematic inadequacies, but are not themselves a breach of [the effective means requirement]," [1615] whereas the Claimant submits that misconduct in the individual case is sufficient as stated by the tribunal in *Chevron v. Ecuador*, which found "that it may directly examine individual cases under Article II(7)."[1616]

1022. The Respondent also relies on the statement in the *Duke* award that "[s]uch provision guarantees the access to the courts"[1617] to argue that that tribunal held that only a systemic failure to guarantee judicial recourse violates the provision, not individual failures in the administration of justice.[1618] However, no such general statement can be derived from the award. The tribunal did, in fact, go on to assess the circumstances of the individual case. In the same vein, the tribunal in *Petrobart*, although finding initially that the effective means requirement obliges the State "to ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to investments,"[1619] nevertheless went on to examine the specific case at hand and not just the legislation in general.

1612 *Azinian, Davitian, & Baca v. United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, ¶ 103 (**CLA-087**).

1613 *Fouad Alghanim v. Jordan*, ICSID Case No ARB/13/38, Award, 14 December 2017, ¶ 281 (**CLA-358**).

1614 *Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 April 2015 (**RLA-207**).

1615 *Limited Liability Company Amto v Ukraine*, SCC Arbitration No. 080/2005, Award, 26 March 2008, ¶ 88 (**CLA-348**).

1616 *Chevron-Texaco v. Ecuador*, Partial Award on the Merits, 30 March 2010, ¶ 247 (**CLA-363**).

1617 *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 391 (**CLA-262**).

1618 Rejoinder, ¶ 413.

1619 *Petrobart Limited v. Kyrgyz Republic*, ARB No. 126/2003, Arbitral Award, 29 March 2005, Chapter 8, p. 77 (**CLA-361**).

1023. To the Tribunal, the approach taken by the *Chevron* tribunal towards the examination of individual cases under the effective means requirement seems preferable. On the ordinary meaning of the terms of the Treaty, the denial to an individual investor of "effective means of asserting claims and enforcing rights with respect to investment" would constitute a breach of a "right conferred or created by the Treaty with respect to an investment" under Article VI(1)(C) of the Treaty. Moreover, the effective means provision of Article II(7) of the Treaty is located in the context of the other sections of Article II, all of which confer individual rights upon the investor. It would go against the spirit of conferring such individual rights if the investor had to show an across-the-board, systemic deficiency in the host State's legislation instead of just the misconduct concerning that specific investor.

1024. The positive wording of Article II(7) as an obligation rather than a prohibition indicates that any judicial recourse that falls short of being "effective" violates the Treaty.[1620] This being said, such a shortcoming must be of a certain degree of seriousness in order to engage the responsibility of the State, being that the Tribunal must afford appropriate deference to the municipal courts in questions of municipal law. The Tribunal is not an appellate instance in charge of reviewing the domestic courts' decisions *de novo* as part of its analysis of whether the Respondent breached any of the US-Estonia BIT's substantive standards of protection.[1621]

1025. Accordingly, with regard to the review of domestic court judgments, it is proper for the standard of review under the effective means requirement to be informed by the decisions on denial of justice, in that it requires the reaching of a high threshold, such as for example conduct that is "manifestly arbitrary or unfair,"[1622] subject to "errors of a degree which no competent judge could reasonably have made" [1623] "clearly improper, discreditable or in shocking disregard of [municipal] law,"[1624] or "so insubstantial, or so bereft of a basis in law, that the judgments were in effect arbitrary or malicious, they simply cannot prevail."[1625]

1026. In this manner, the denial of justice and the effective means requirement, as they apply to judicial decision-making in individual cases, overlap to a significant degree, as has been recognized in most of the cases relied upon by the Parties. The Tribunal will consider both of these standards in its assessment of each alleged breach.

1620 *See Chevron-Texaco v. Ecuador*, Partial Award on the Merits, 30 March 2010, ¶ 244 (**CLA-363**).

1621 *Mamidoil Jetoil Greek Petroleum Products Societe SA v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶ 768 (**RLA-111**); *Chevron-Texaco v. Ecuador*, Partial Award on the Merits, 30 March 2010, ¶ 247 (**CLA-363**); *Fouad Alghanim v. Jordan*, ICSID Case No ARB/13/38, Award, 14 December 2017, ¶¶ 366, 429 (**CLA-358**); *Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 April 2015, ¶ 260 (**CLA-259**).

1622 *International Thunderbird Gaming Corporation v. The United Mexican States*, Award, 26 January 2006, ¶ 197 (**CLA-86**).

1623 *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶ 751 (**RLA-111**).

1624 *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶ 769 (**RLA-111**).

1625 *Azinian, Davitian, & Baca v. United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, ¶ 103 (**CLA-087**).

(III.) Application of the Law to the Facts

(A.) Allegation that the courts retroactively applied the 23 January 1992 Resolution

1027. The retroactive application of the 23 January 1992 Resolution in the manner alleged by the Claimant could potentially amount to a breach of Estonian principles of due process and legal certainty, should such retroactive application be established.

1028. With regard to the question of whether the Tallinn City Court actually applied this resolution, the Claimant simply states that it "cited the 23 January 1992 Resolution, and hence it was applied."[1626] The Respondent maintains that the 23 January 1992 Resolution was not applied by the courts and was not relevant to the Seaplane Harbor,[1627] The Tribunal has thoroughly analyzed the reasoning of Tallinn City Court in the part on jurisdiction. The court found that the sale of the Seaplane Hangar and Berth No. 38 to GT and the sale of the lumber works site to B&E were void because they contravened Resolution 17 July 1990 and because those sales were never registered.[1628] Hence, the Tribunal does not share the Claimant's view that the Tallinn City Court applied the 23 January 1992 Resolution retroactively.[1629] In its judgment on appeal, the Tallinn Circuit Court endorsed the reasoning of the Tallinn City Court regarding questions of transitional law.[1630]

1029. For these reasons, the Tribunal rejects the claim that the Estonian courts committed a denial of justice or breach of the effective means requirement through retroactive application of the law.

(B.) Allegation that the courts systematically ignored relevant and material evidence

1030. The Claimant asserts that the Estonian courts deliberately ignored "highly relevant and important evidence" by failing to give weight to "material and relevant evidence harmful to the position of the government and highly helpful to the position of the Claimant" that the courts "systematically" ignored.[1631] According to the Claimant, the two pieces of such evidence were the letter from the

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1626 C's 1 December 2021 submission, ¶ 79.

1627 Rejoinder, ¶ 109.

1628 Rejoinder, ¶ 99(ii).

1629 *See supra* ¶¶ 507-549.

1630 July 2005 Judgment (**C-078**); March 2006 Appeal Judgment, pp. 38-42 (**C-081**).

1631 Reply, ¶ 1456, *citing* Third Keres Report, ¶¶ 119-128 (**CER-4**). *See* ¶ 124: "The courts failed to consider several relevant and material documents from very senior parts of the government. These documents were the letter from the Office of the Chancellor of Justice [C-331] and the Letter from the head of the Government Office [C-307]." *See also* ¶ 130: "The courts had the letter from the Chancellor of Justice before them, but failed not consider this highly relevant and important evidence." *See also* Hearing Transcript, Day 5, p. 59:22-60:11; p. 62:15-63:6.

State Chancellery to the Ministry of Justice of 8 November 1995[1632] and the letter from the Advisor of Chancellor of Justice to B&E of 23 October 1997.[1633]

1031. The Claimant introduced these letters into the proceedings with its Reply after the document production process. The Respondent notes that the only occasion on which the Claimant's subsidiaries brought up this evidence in the Estonian court proceedings was in the Petition for Appeal of the Claimant's subsidiaries against the July 2005 Judgment.[1634] There, the Claimant's subsidiaries relied on those letters in the context of their argument that the 23 January 1992 Resolution did not have a retroactive effect.[1635]

1032. The Tribunal must now consider whether the omission of the Tallinn Circuit Court to address the two letters in its reasoning was so manifestly or grossly unjust as to engage the international responsibility of the State.

1033. After noting that the buildings claimed by B&E were not listed as public property in the relevant government documents, the letter dated 8 November 1995 continues as follows:

> A valid contract of purchase and sale can only be declared null and void by an action if requested by one party to the contract (an interested party).
>
> At the moment of providing this opinion, the contract of purchase and sale for the buildings at 17 Küti St was valid, declaration of the contract null and void was not being heard by the court.
>
> There are no further written documents at the disposal of the Government office which would enable providing a comprehensive response to the questions asked by you or form an opinion in the legal issues which you are interested in.
>
> In connection with entry into force of the State Assets Act, the department for immovable property of government authorities has been reorganised into the immovable property department of the Government Office and its functions have changed significantly. The head of the department has been ordered to refrain from providing such opinions in the future.[1636]

1034. In the Tribunal's view, the content of this letter seems fully compatible with the reasoning of the Estonian courts (analyzed by the Tribunal in detail above, especially in paragraphs 498-555). The letter states that (i) contracts, including Contract No. 16, can be declared void only by a court; (ii) no court actions are currently pending regarding Contract No. 16; (iii) the government office cannot provide a legal opinion on the legal issues B&E was interested in because of the lack of further written documents; and (iv) because of its changed function, the government office cannot provide similar opinions in the future.

1035. The one-paragraph letter dated 23 October 1997 clarifies that the 23 January 1992 Resolution does not have retroactive effect.

1632 Letter from the State Chancellery to the Ministry of Justice, 8 November 1995 (**C-307**).

1633 Letter from the Advisor of Chancellor of Justice to B&E of 23 October 1997 (**C-331**).

1634 Rejoinder ¶ 343.

1635 Petition for Appeal of Agrin, Verest and ELA Tolli, 25 July 2005, p. 10 (**C-043**).

1636 Letter from the State Chancellery to the Ministry of Justice, 8 November 1995, pp. 1-2 (**C-307**).

> As assigned by the Chancellor of Justice I hereby clarify in response to questions posed in your letter that [23 January 1992 Resolution] did not possess retroactive effect. Said resolution cannot be relied on when requesting that transactions performed in 1990 be declared null and void.[1637]

1036. As set out above, the Tribunal shares the Respondent's view that the Estonian courts did not apply the 23 January 1992 Resolution. And none of the two letters contradicts, in the view of the Tribunal, the reasoning and the findings of the Estonian courts. The Tribunal is not familiar with a legal system in which courts must weigh and consider every piece of evidence in their reasoning, especially if that evidence supports a legal proposition irrelevant to the outcome of the case. The Claimant has not argued otherwise.

1037. Considering the above, the Tribunal finds that the omission of the Tallinn Circuit Court to address the two letters in its reasoning is far from constituting manifestly or grossly unjust behavior that could give rise to a denial of justice or a breach of the effective means requirement. The Claimant states that the omission of the relevant evidence was a deliberate abuse.[1638] The Tribunal finds no support for this proposition in the case record.

(C.) Alleged failures to apply the principle of iura novit curia

1038. The Tribunal turns next to the alleged obligation of the Estonian courts to apply legal rules that were not raised by the parties to the lawsuit. The Claimant's argument rests on the alleged obligation of the Estonian courts, under the doctrine of *iura novit curia,* to act on their own motion to identify and apply legal principles whether or not invoked by the parties. Under the rule as framed by Mr. Keres, the non-application of obviously relevant law would amount to a breach of Estonian law and a denial of justice.

1039. The Claimant submits that the rule is set out in section 436(7) of the Code of Civil Procedure, which provides that:

> In making a judgment, the Court is not bound by the legal allegations made by the parties.[1639]

1040. An older version of that code (which was in force from 22 April 1998 to 1 January 2006) contained what the Claimant calls a similar provision in section 228:

> When making a decision, the Court shall assess the evidence, decides which facts have been established, which law or other legal act shall be applied to the matter and whether the action is successful. If the matter comprises several claims, the Court shall make a decision with respect to each claim.[1640]

1041. The Tribunal notes that the alleged rule of *iura novit curia* is disputed by the Respondent, which submits that the Claimant has not cited legal support for this proposition.[1641] The Respondent

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1637 Letter from the Advisor of Chancellor of Justice to B&E, 23 October 1997 (**C-331**).

1638 Transcript Day 5, p. 69:6-70:8, 71:6-13.

1639 Claimant Rejoinder Submission of 1 December 2021, ¶ 46, *citing* section 436 of the 2006 Estonian Code of Civil Procedure (**C-603**).

1640 Claimant Rejoinder Submission of 1 December 2021, ¶ 47, *citing* section 228 of the 1998 Code of Civil Procedure (**CLA-184**).

1641 Respondent Submission of 3 November 2021, ¶ 9.

seems to accept to some extent the possibility of the courts considering legal rules *ex officio*, submitting that:

> For the court to apply the [good faith] principle on its own, the relevant evidence must be submitted and given the correct context.[1642]

1042. In any event, assuming that such a rule would operate as put forward by Mr. Keres, it would require an "obviously relevant law" in light of the facts before the court. The threshold for a denial of justice or breach of effective means under international law is particularly high when it comes to the conduct of the judiciary, as apparent in the frequent use of intensified collocations such as "clearly improper," "manifestly arbitrary or unfair," "particularly serious," "in shocking disregard," and "extremely gross". To reach such a threshold, in the Tribunal's view, the domestic law concerned would have to have a correspondingly intense degree of obviousness and relevance.

1043. As regards "title-bearing possession," the Tribunal notes that it has been a central point of contention between the Parties whether the concept of "title-bearing possession" even exists under Estonian law as a category different from lawful possession. The Parties had difficulties submitting case law and legal scholarship on that point. For this reason alone, the Tribunal is not persuaded that "title-bearing possession" was a point "obviously relevant" under Estonian law. Moreover, and as set out above, the Tribunal is not convinced that the Estonian courts have not applied this principle in substance, though not in name. In any event, as shown above, the Tribunal believes that a proper application of the principle of title-bearing (or rather, title-compliant) possession does not lead to a different result than that reached by the Estonian courts.

1044. With respect to the obligation to apply the principle of good faith due to the Respondent's earlier contradictory behavior, and again assuming that the rule of *iura novit curia* applies as contended by Mr. Keres, the Tribunal finds the Claimant's argument to be without merit. Mr. Keres posits that the rule required the defendants to "establish the facts" and the courts to "draw the key legal conclusions."[1643] As noted in the previous subsection, the Claimant's subsidiaries have submitted the letters dated 8 November 1995 and 23 October 1997 only in the appeals proceedings, they related to points of little or no relevance for the Estonian courts' reasoning. Given the content of these letters set out above, the Tribunal does not share the assessment that they, or any related arguments based on good faith, were "obviously relevant". Rather, the Tribunal shares the view of the Estonian courts that none of the Claimant's subsidiaries could acquire ownership in the relevant assets based on the principles of good faith applicable under Estonian law.[1644] Furthermore, the Tribunal agrees with the Estonian courts that no different result is warranted because of the notions of title-bearing (or title-compliant) possession and of lawful possession under Estonian law.[1645]

1642 Rejoinder, ¶ 113.

1643 Hearing Transcript, Day 4, p. 60:7-17.

1644 *See supra* ¶¶ 550-554.

1645 *See supra* ¶¶ 587-604.

1045. For these reasons, the Estonian courts did not commit a denial of justice or a failure to provide effective means by omitting to consider *proprio motu* the rights of the ELA subsidiaries under the principles of "title-bearing possession" or of good faith.

(D.) Error of International Law

1046. Turning to the alleged error in the application of the rule *ex factis jus oritur,* the Tribunal recalls that it has determined, for the reasons set forth above (*see* paragraphs 460-555 above), that a proper application of the *ex factis* rule does not lead to a different result than that reached by the Estonian courts.[1646] This being the Tribunal's assessment of the position under international law, the Claimant's argument that the Estonian courts erred in their application of the *ex factis* rule is rejected.

(E.) Conclusions

1047. The claims under the "denial of justice" standard as part of the FET obligation in Article II(3) and under the "effective means requirement" under Article II(7) both fail because the contested domestic court decisions did not err in law, whether "manifestly" or to any other degree (*see* paragraph 1018 above).

B. ARTICLE III OF THE TREATY: EXPROPRIATION

1048. Article III of the Treaty concerning expropriation provides:

> 1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(3). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable.
>
> 2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any associated compensation, conforms to the principles of international law.
>
> 3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the most favorable treatment, as regards any measures it adopts in relation to such losses.

1646 *See supra* ¶¶ 460-555.

1. The Claimant's Position

a) The Claimant Held Rights Protected against Expropriation under Article III of the Treaty

1049. The Claimant, contrary to the Respondent's contention, submits that it held rights protected against expropriation under Article III of the Treaty.[1647] The Claimant asserts that it owned BPV, Verest, and ELA Tolli, all companies incorporated in Estonia, and had a joint venture and profit-sharing agreement with Agrin, also an Estonian company.[1648] The Claimant further claims that it had "property rights owned by BPV arising from the leases with Verest and Agrin which were explicitly protected under Article I of the Treaty."[1649] The Claimant submits that its rights over its Estonian subsidiaries, as well as over the assets held by them, constitute rights susceptible of being expropriated under the Treaty and Estonian law.[1650]

1050. Recalling the arguments it made in response to the Respondent's jurisdictional objection (*see* Section V.B.1.c)ii above), the Claimant avers that, consistent with the expert opinion of Mr. Paul Keres, BPV, Verest and Agrin "had lawful rights to possessory title at the Lennusadam Port" as a matter of Estonian law.[1651]

1051. Moreover, the Claimant maintains that "it was a settled view that Estonia did not own the Lennusadam Port and that private parties did."[1652] According to the Claimant, this is supported by "key letters" from the Estonian government, issued before the commencement of the lawsuit against Verest and Agrin,[1653] and which, among other things, demonstrate that "Estonia's conduct leading up to the litigation was consistent in that all arms of government regarded the Lennusadam Port and the buildings on the port lands as belonging to ELA USA's subsidiaries."[1654]

1052. The Claimant maintains that Article III of the Treaty sets forth a prohibition against expropriation that has not been undertaken "for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(3)."[1655]

1647 Reply, ¶¶ 1405-1414.

1648 Memorial, ¶ 359.

1649 Reply, ¶ 1387.

1650 Memorial, ¶ 359.

1651 Reply, ¶¶ 1405-1414.

1652 Reply, ¶ 1410.

1653 Reply, ¶ 1409, *referring to* Third Keres Report, ¶¶ 206-210 (**CER-4**).

1654 Reply, ¶ 1408, *citing* Third Keres Report, ¶ 205 (**CER-4**).

1655 Memorial, ¶ 329.

b) Alleged Violation of Article III of the Treaty

i. Interpretative Considerations of Article III

1053. According to the Claimant, Article III of the Treaty expressly provides that an expropriation may occur "either directly or indirectly through measures tantamount to expropriation or nationalization."[1656] The Claimant alleges that the indirect expropriation of an investment exists where the host State's conduct has had the effect of substantially depriving the investor of "the economical use and enjoyment of its investments."[1657] The assessment of a claim of indirect expropriation, the Claimant alleges, requires conducting "an objective analysis of the facts of each case," including the nature of the investment and the government action at stake.[1658]

1054. The Claimant notes that previous tribunals have found that judicial acts can amount to an expropriation. In particular, the Claimant indicates that the tribunal in *Saipem v. Bangladesh* found that a national court's decision to *inter alia* revoke the authority of an arbitral tribunal and refuse to enforce an arbitration award was in breach of the expropriation provision of the treaty at issue.[1659] The *Saipem v. Bangladesh* tribunal considered that the mentioned conduct by the respondent's judiciary was (i) "a grossly unfair ruling" that "violated the internationally accepted principle of prohibition of abuse of rights"; and (ii) "was contrary to international law, in particular […] the New York Convention."[1660]

1055. The Claimant further asserts that pursuant to Article 31(3)(c) of the VCLT, the Respondent's obligation under Article III of the Treaty must be construed in accordance with the human rights treaties to which the Respondent is a party.[1661] The Claimant refers, in particular, to the protection of the right to property under the Universal Declaration of Human Rights.[1662]

1656 Memorial, ¶ 329.

1657 Memorial, ¶¶ 338, 343, *citing Técnicas Medio ambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 115 (**CLA-055**). *See also* Memorial, ¶¶ 339-342, 344-346, *referring to* G.C. Christie, 'What Constitutes Taking of Property under International Law' (1962) Vol. 38, British Yearbook of International Law, p. 337 (**CLA-050**); Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Int'l Law, 2009), pp. 326-327 (**CLA-052**); *Metalclad Corporation v. United Mexican States*, Award, 30 August 2000), ¶ 103 (**CLA-054**); *Pope & Talbot v. Canada*, Interim Merits Award, 26 June 2000, ¶ 102 (**CLA-026**); *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶ 285 (**CLA-056**); Lowenfeld, *A. International Economic Law* (Oxford, Cambridge, 2002), pp. 479-480 (**CLA-063**).

1658 Memorial, ¶ 350.

1659 Memorial, ¶ 370, *referring to Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009, ¶¶ 37, 40, 50 (**CLA-200**).

1660 Memorial, ¶ 371, *referring to Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009, ¶¶ 149-170 (**CLA-200**).

1661 Reply, ¶¶ 1399-1401.

1662 Reply, ¶ 1399, *referring to* Universal Declaration of Human Rights (1948), Article 17 (**CLA-112**). *See also* Memorial, ¶¶ 243-251, *referring to* European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1, 20 March 1952, 213 U.N.T.S. 262, Article 1 (**CLA-169**).

ii. The Respondent Unlawfully Expropriated the Claimant's Investments

1056. The Claimant submits that a scheme orchestrated by its executive branch, as well as the local lawsuits commenced by the Respondent against the Claimant's subsidiaries, resulted in the dispossession of the latter's property rights at the Seaplane Harbor, which amounted to an indirect expropriation of its investments in Estonia.[1663] The Claimant alleges that the deprivation of the use and enjoyment of its investments "became effective on June 7, 2006 when the Estonian Supreme Court refused to review the March 1, 2006 opinion of the Tallinn Circuit Court [of 4 July 2005], and was further effectuated by subsequent actions taken by Estonia to seize all assets of the ELA Estonian Subsidiaries."[1664] According to the Claimant, the Respondent further deprived it of the use and enjoyment of its investments by initiating a civil action on 22 December 2006 seeking compensation from the Claimant's subsidiaries for their unjust enrichment from the occupation of the Seaplane Harbor without considering the capital investment put into the Seaplane Harbor.[1665]

1057. The Claimant submits that the "expropriation was part of a scheme designed by the executive branch of the Estonian government" and that its "actions were not *bona fide* or taken in good faith" but were instead "part of a systemic and discriminatory approach that was designed to harm the economic interests of the foreign investor."[1666] The Claimant submits that this branch of the government "disregard[ed] judicial independence and pressure[d] the Tallinn courts to rule in its favor"[1667], resulting in the "substantial and total taking" of its investments.[1668] Specifically, the Claimant alleges that:

(a) In November 2000, the Minister of Justice initiated disciplinary proceedings before the Disciplinary Committee against a judge of the Tallinn City Court, alleging that there had been a delay in the resolution of the local proceedings concerning the Seaplane Harbor.[1669] The Disciplinary Committee, however, rejected such complaint and emphasized that the Ministry of Justice "in [that] disciplinary matter [had] derailed from the principles of objectivity and equality of the parties";[1670]

(b) On 26 April 2001, the President of Estonia issued a public statement asserting that in the case concerning the Seaplane Harbor "all legal questions are in the jurisdiction of the court of Estonia, except the right and obligation of the Republic of Estonia to perform sovereign power in the Republic of Estonia."[1671] The Claimant underscores that the President assured that the disputed land and buildings "belonged to the Ministry of Defense of Estonia before

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1663 Memorial, ¶¶ 362-376; Reply, ¶¶ 1383-1404.

1664 Memorial, ¶ 360; Reply, ¶ 1383.

1665 Reply, ¶ 1388.

1666 Reply, ¶ 1424. *See also* Hearing Transcript, p. 63:14-17.

1667 Memorial, Section IV.H. *See also* Memorial, ¶ 372; Reply, ¶¶ 1424-1425.

1668 Reply, ¶ 1432.

1669 Memorial, ¶ 138, *referring to* Rask Started Disciplinary Proceedings Against Judge, Baltic News Service, 20 November 2000 (**C-072**).

1670 Memorial, ¶ 142, *citing* Decision of the Disciplinary Committee, Disciplinary matter No. 3-8-11-1, 1 February 2001, ¶ 5 (**C-122**).

1671 Memorial, ¶ 149, *citing* Statement of the Office of the President of Estonia, 26 April 2001 (**C-073**).

the occupation and was taken forcefully or the use of the USSR Army on 22 and 23 June 1940";[1672] and

(c) On 5 April 2004, the Minister of Justice stated in a televised interview that local courts should rule that the Seaplane Harbor was State property,[1673] and that the judge of the Tallinn City Court who was responsible for the procedural error that led to the first judgment being quashed by the Circuit Court would be "held responsible."[1674]

1058. Since the Estonian "Executive branch […] is responsible for the taking," the Claimant contends, "there is no need to establish any wrongdoing on the part of the courts to establish a compensable taking in this arbitration."[1675] However, in the event that the Tribunal were to deem it necessary to review the conduct of the Respondent's judiciary, the Claimant submits that such conduct "constitutes the type of wrongfulness that would require compensation under international law"[1676] and that "there was a denial of justice."[1677]

1059. The Claimant submits that "Estonian Courts engaged in a miscarriage of justice through the denial of the rule of law by applying laws retroactively and by systemically ignoring material and relevant evidence."[1678] In particular, the Claimant argues that the Estonian courts retroactively applied the 23 January 1992 Resolution and failed to consider highly relevant letters from the Estonian government that support its entitlement to the Seaplane Harbor.[1679] This is further elaborated in the context of the Claimant's arguments in support of its claim under Article II(3)(a) of the Treaty (*see* Section VI.A.3.c) above).

1060. Further to the above, the Claimant alleges that the Respondent's expropriation of its investments was unlawful for the following reasons.

1061. Firstly, the Claimant submits that its investments were not taken in the public interest.[1680] The Claimant asserts that "[t]he domestic litigation by which Estonia illegally expropriated ELA's investments was merely a pretext to justify taking the port from Russian-speaking owners and avoid international responsibility to pay compensation."[1681] The Claimant argues that even though the Soviet occupation ended in August 1994, the Respondent only initiated the mentioned local

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1672 Memorial, ¶ 149, *citing* Statement of the Office of the President of Estonia, 26 April 2001 (**C-073**).

1673 Reply, ¶ 1420; Memorial, ¶¶ 177-178, *referring to* Transcript of Justice Minister Vaher on Actuaalne Kaamera TV Program, 5 April 2004 (**C-209**).

1674 Memorial, ¶ 179, *referring to* Transcript of Justice Minister Vaher on Actuaalne Kaamera TV Program, 5 April 2004 (**C-209**).

1675 Reply, ¶¶ 1424-1425. *See also* Reply, ¶ 1451.

1676 Reply, ¶ 1426.

1677 Reply, ¶ 1452.

1678 Reply, ¶ 1465, *referring to* Third Keres Report, ¶¶ 119-128 (**CER-4**).

1679 Reply, ¶¶ 1465-1466.

1680 Memorial, ¶¶ 365-366.

1681 Memorial, ¶ 6. *See also* Memorial, ¶¶ 365-366.

proceedings in November 1997.[1682] This is just a few weeks after BPV, a company owned by a Russian-speaking businessman, signed the Lease Agreements.[1683]

1062. Secondly, the Claimant argues that the expropriation was discriminatory.[1684] The Claimant contends that no other private port owner in Estonia was faced with litigations against the State, was denied a port passport or was disposed of its investments.[1685] In this regard, the Claimant reiterates that its investments were targeted because they were ultimately owned by a Russian-speaking businessman, who had Russian-speaking employees and possessed the Seaplane Hangar, which is "an item of Estonian cultural heritage."[1686]

1063. Thirdly, the Claimant asserts that it did not receive any compensation for the expropriation of its investments.[1687] To the contrary, the Claimant contends that as a result of the judgment rendered by the Harju County Court on 4 December 2008, its subsidiaries were forced to pay compensation to the Ministry of Justice for those companies' alleged unlawful use of the Seaplane Harbor.[1688]

1064. Fourthly, the Claimant maintains that the expropriation was not in accordance with due process of law and the general principles of treatment provided for in Article II(3) of the Treaty.[1689] According to the Claimant, the executive branch of the government "engag[ed] in an abuse of process and a willful neglect of duty."[1690]

1065. In response to the Respondent's contention, the Claimant maintains that even if the Tribunal were to find that the expropriation of its investments was a result of the Respondent's exercise of police powers, the Respondent would still be required to provide compensation. The Claimant contends that "[m]any tribunals have determined that a state might have to pay for damages for actions taken under its police power."[1691] For instance, the Claimant notes that the *TECMED v. Mexico* tribunal held that "regulatory measures that fall within a state's police powers may nevertheless be expropriatory if the impact of such measures on foreign investment effectively neutralizes the

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1682 Memorial, ¶ 366, *referring to* Agreement between Estonia and the Russian Federation regarding the withdrawal of military forces from Estonia, 26 July 1994 (**C-204**); August 2000 Judgment, Statement of Claim, 14 November 1997 (**C-050**).

1683 Memorial, ¶ 366.

1684 Memorial, ¶ 367.

1685 Memorial, ¶ 367.

1686 Memorial, ¶ 367.

1687 Memorial, ¶ 368.

1688 Memorial, ¶ 368, *referring to* Estonia's Statement of Claim against Verest, Agrin, Ela Tolli and BPV, 22 December 2006 (**C-135**); Estonia's Petition for Securing the Action, 22 December 2006 (**C-136**).

1689 Memorial, ¶ 369.

1690 Reply, ¶ 1451.

1691 Memorial, ¶ 1435.

value of investment."[1692] In this regard, the Claimant argues that in the present case, "the taking was substantial and total" and was not justified by any public policy objectives.[1693]

2. The Respondent's Position

1066. The Respondent submits that the Claimant's claim for expropriation under Article III of the Treaty must be dismissed for lack of merit.[1694] In support, the Respondent submits that "the Claimant never had the rights to property which it claims were expropriated."[1695] Alternatively, the Respondent argues that there was no compensable taking because (ii) a domestic court decision cannot constitute an expropriatory act;[1696] and (iii) "[t]he judgments of the national courts were in accordance with the applicable national and international laws."[1697]

a) The Claimant Had no Rights Capable of Protection

1067. The Respondent maintains that it is broadly accepted that "expropriation must affect fundamental rights of ownership."[1698] In turn, the existence, nature, and scope of a claimant's property rights, according to the Respondent, "must be determined pursuant to the national laws which create them."[1699]

1068. The Respondent argues that the Claimant has failed to prove that it ever owned or controlled the assets that it alleges were expropriated.[1700] As argued in respect of its jurisdictional objections, the Respondent reiterates that the evidence of the record confirms that Agrin and Verest had no rights to the buildings and structures they were using at the Seaplane Harbor and that the Claimant has made no effort to contest that evidence.[1701] While the Claimant asserts that its expert, Mr. Keres, confirms that its subsidiaries BPV, Verest and Agrin had legal property rights to buildings at the Seaplane Harbor under Estonian law, the Respondent points out that Mr. Keres, in fact, "merely opines that the Estonian companies might have been entitled to an expectation of 'possessory title'," not actual, or even possessory, title.[1702] In this respect, the Respondent reiterates that there is no such thing as possessory title, much less an expectation of possessory

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1692 Reply, ¶ 1438, *referring to TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 121 (**CLA-055**).

1693 Reply, ¶¶ 1432, 1434.

1694 Counter-Memorial, ¶ 477.

1695 Counter-Memorial, ¶ 478. *See also* Counter-Memorial, ¶¶ 481-488.

1696 Counter-Memorial, ¶¶ 489-510.

1697 Counter-Memorial, ¶ 480. *See also* Counter-Memorial, ¶¶ 511-523.

1698 Counter-Memorial, ¶ 482, *referring to Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶¶ 8.8, 22.1 (**RLA-115**); *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶ 159 (**RLA-059**). *See also* Rejoinder, ¶ 331.

1699 Counter-Memorial, ¶ 483. *See also* Rejoinder, ¶ 331.

1700 Counter-Memorial, ¶¶ 486-488; Rejoinder, ¶ 332.

1701 Counter-Memorial, ¶ 486.

1702 Rejoinder, ¶ 332, *referring to* Third Keres Report, ¶ 20 (**CER-4**).

title under Estonian law, and accordingly, the Claimant's alleged investments cannot qualify as a protected property interest.[1703]

1069. The Respondent additionally refutes the Claimant's contention that the Lease Agreements constitute property rights that were expropriated.[1704] The Respondent argues that the Lease Agreements "merit no separate protection because the[ir] validity […] depends on whether the lessors had existing property rights," which Verest and Agrin did not in this case.[1705]

b) In the Alternative, There Was no Compensable Taking

1070. In the alternative, the Respondent argues that there was no compensable taking under Article III of the Treaty.[1706]

1071. First, the Respondent contends that the impugned actions of its judiciary in this case cannot amount to an expropriation.[1707] According to the Respondent, "the only appropriate and available claim for review of this taking under international law is a claim of denial of justice."[1708] Moreover, the Respondent maintains that "[a] judicial determination by a national court about the existence of rights under the applicable national laws cannot amount to expropriation without a manifest breach of due process."[1709] Any position to the contrary would entail, according to the Respondent, a situation where "the courts would be engaged in expropriation on a daily basis."[1710] The Respondent refers to the decisions of multiple tribunals to this effect as well as academic writings and the non-disputing Party submission of the United States in *Eli Lilly v. Canada*.[1711]

1072. The Respondent contends that even in *Saipem v. Bangladesh*, the only case on which the Claimant relies, the tribunal held that "refusal to enforce an international arbitration award was a violation of the expropriation standard not solely because it deprived the claimant of its rights but because

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1703 Rejoinder, ¶ 333. *See also* Hearing Transcript, Day 1, p. 138:12-15.

1704 Rejoinder, ¶ 334.

1705 Rejoinder, ¶ 334; Counter-Memorial, ¶ 487.

1706 Counter-Memorial, ¶¶ 489-523.

1707 Counter-Memorial, ¶¶ 489-510.

1708 Counter-Memorial, ¶ 510. *See also* Hearing Transcript, Day 1, p. 139:4-7.

1709 Counter-Memorial, ¶ 510.

1710 Counter-Memorial, ¶ 495.

1711 Counter-Memorial, ¶¶ 495-510, *referring to Eli Lilly and Company v. The Government of Canada*, ICSID Case No. UNCT/14/2, Submission of the United States of America, 18 March 2016, ¶ 29 (**RLA-117**); *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, ¶ 99 (**CLA-087**); *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of the Award, 22 June 2010, ¶ 430 (**RLA-118**); *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of the Award, 2 July 2018, ¶ 709 (**RLA-119**). The Respondent notes that even though the last authority concerned an arbitration under the North American Free Trade Agreement, it should be deemed relevant in light of the similarities of the expropriation provision in the applicable treaty in that dispute and Article III. *See* Counter-Memorial, ¶ 496.

the court decision constituted an abuse of rights and was illegal."[1712] The Respondent underscores that *Saipem v. Bangladesh* must be distinguished from this arbitration given that in that case "there was no dispute over whether the claimant actually had obtained the underlying property rights it claimed were expropriated."[1713]

1073. In this case, the Respondent submits that the "determinations of the court that the Claimant never held title to the Seaplane Harbor buildings are not measures capable of constituting expropriation without a denial of justice for a simple reason—they are measures determining that property never existed, not measures taking that property."[1714] Moreover, contrary to the Claimant's claims, the Estonian courts did not rely on the retroactive application of the 23 January 1992 Resolution and did not fail to consider the allegedly highly relevant letters from the Estonian government that support its entitlement to the Seaplane Harbor.[1715] In any event, the Respondent maintains that these letters "could not create any ownership or possessory rights in a situation where none existed."[1716]

1074. Secondly, the Respondent submits that the judicial decisions the Claimant challenges were rendered in accordance with the applicable national and international law.[1717] The Respondent maintains that "[f]or a misapplication of national law to rise to a level of treaty breach and be reviewable by an international tribunal, the breach of national law must be clear and malicious so as to leave no doubt about the impropriety of the decision-making process."[1718] In this case, however, the Respondent contends that the Claimant has failed to make such a showing, not least because its courts grounded their conclusions on Estonian law after a "thorough analysis of the documents underlying the possession of the Seaplane Harbor."[1719]

1075. Regarding the application of international law, the Respondent contests that pursuant to Article VI(1)(c), the Tribunal's jurisdiction is limited to disputes arising out of an alleged breach of its provisions.[1720] Hence, notwithstanding the Claimant's allegation that the Estonian court decisions were made in violation of the Hague Regulations, the Respondent asserts that the Tribunal "does not have jurisdiction to examine breaches of other international treaties."[1721] In any event, the Respondent refers to its arguments on the international law of occupation (*see*

1712 Counter-Memorial, ¶ 506, *referring to Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, ¶¶ 155, 159 (**CLA-200**).

1713 Counter-Memorial, ¶ 504.

1714 Rejoinder, ¶ 340.

1715 Rejoinder, ¶¶ 341-343; 3 November 2021 Submission, ¶¶ 22-23.

1716 Rejoinder, ¶ 344.

1717 Counter-Memorial, ¶¶ 511-523.

1718 Counter-Memorial, ¶ 517, *referring to Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, ¶ 103 (**RLA-122**).

1719 Counter-Memorial, ¶ 512.

1720 Counter-Memorial, ¶ 521.

1721 Counter-Memorial, ¶ 521.

Section V.B.1.b)i above) to submit that its courts applied international law, and in particular the Hague Regulations, correctly.[1722]

1076. Thirdly, the Respondent likewise dismisses as groundless the Claimant's "new theory" that "the alleged judicial expropriation was a scheme designed by the executive branch of the Estonian government," in which "the executive branch has abused process and willfully neglected its duty by issuing conflicting statements about ownership of buildings, and thus carried out a taking."[1723] In the Respondent's view, the alleged "scheme" could not amount to an expropriation because the Respondent was merely "act[ing] as a regular property owner, and sought the protection of its property rights in a civil court."[1724] The Respondent emphasizes that it "has not attempted to evade its obligations through the adoption of legislation, or by taking executive action not normally available to a private party."

1077. In any event, the Respondent maintains that there is no abuse of process because "states are permitted a certain degree of inconsistency and some leeway" and that the "abstract opinion of one state official that there is no ground to invalidate Verest and B&E's contracts for the purchase of the buildings, issued without analyzing the contracts themselves, does not bind the state and was clearly superseded when the Respondent explicitly informed Verest and B&E of the opposite."[1725]

3. The Tribunal's Analysis

a) Legal Standard

1078. The Tribunal is persuaded that a State may be responsible for the acts of its domestic judicial organs contrary to the suggestion by the Respondent that judicial acts cannot amount to expropriation.[1726] An international tribunal called upon to rule on the State's compliance with an international treaty "is not paralysed by the fact that the national courts have approved the relevant conduct of public officials."[1727] This being said, it is equally well established that where an alleged taking occurs by operation of a municipal court decision on an issue of municipal law, an international arbitration is required to show deference to the municipal courts.[1728]

1722 Counter-Memorial, ¶ 522.

1723 Rejoinder, ¶ 346.

1724 Rejoinder, ¶ 347.

1725 Rejoinder, ¶ 348.

1726 *See* for example, *Saipem S.p.A. v. Bangladesh,* ICSID Case No. ARB/05/07, Award, 30 June 2009, ¶ 149 (**CLA-200**); *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of the Award, 22 June 2010, ¶ 430 (**RLA-118**); *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of the Award, 2 July 2018, ¶ 709 (**RLA-119**).

1727 *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, ¶ 98 (**CLA-087**).

1728 *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of the Award, 22 June 2010, ¶ 430 (**RLA-118**); *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of the Award, 2 July 2018, ¶ 709 (**RLA-119**); *Garanti Koza LLP v*

1079. As articulated by the tribunal in *Azinian,* a governmental authority "cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level."[1729] To establish unlawfulness at the international level, it would not suffice for an international tribunal simply to disagree with the determination of the municipal courts. There must be an irregularity of sufficient gravity (*see* Section VI.A.3.c)iii(II.) above), such as clear incompatibility with a rule of international law, undue influence from other State organs,[1730] an abuse of rights,[1731] a serious and fundamental impropriety in the legal process,[1732] a denial of justice or a pretense of form,[1733] or, in certain exceptional circumstances, a judicial decision contrary to municipal law.[1734] The mere fact that a judicial decision is incorrect as a matter of municipal law does not suffice. The possibility of holding the state liable for judicial decisions does not entitle an investor "to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction."[1735] As stated by the tribunal in *Krederi Ltd. Ukraine* with specific reference to the judicial determination of property disputes:

> While it is possible that judicial action amounts to expropriation, it is the exception rather than the norm. In any kind of private law dispute over ownership of movable or immovable property, courts will make a decision which of the disputing parties claiming ownership rights prevails. This will result in a finding that one party will be entitled to ownership whereas the other (or others) will not. Such judicial determinations do not constitute expropriation. Similarly, where property transfers are held to be invalid, the resulting transfers of ownership do not amount to expropriation.[1736]

1080. In sum, a seizure of property by a court as the result of normal domestic legal process does not amount to an expropriation under international law unless there was a fundamental and serious element of impropriety about the legal process.

Turkmenistan, ICSID Case No ARB/11/20, Award, 19 December 2016, ¶ 365 (**RLA-189**). As the tribunal in Middle East Cement put it, "normally a seizure and auction ordered by the national courts do not qualify as a taking" unless "they are not taken 'under due process of law.'" – see *Garanti* at ¶ 365 (**RLA-189**).

1729 *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, ¶ 97 (**CLA-087**).

1730 *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Submission of the United States of America, 18 March 2016, ¶ 29 (**RLA-117**).

1731 *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, ¶ 145 (**CLA-200**).

1732 *Garanti Koza LLP v Turkmenistan*, ICSID Case No ARB/11/20, Award, 19 December 2016, ¶ 365 (**RLA-189**).

1733 *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, ¶ 98 (**CLA-087**).

1734 *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, ¶ 98 (**CLA-087**), *citing* Eduardo Jiménez de Aréchaga, "International Law in the Past Third of a Century," 159-1 Recueil des cours (General Course in Public International law, The Hague, 1978).

1735 *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, ¶ 99 (**CLA-087**).

1736 *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of the Award, 2 July 2018, ¶ 709 (**RLA-119**).

b) Application to the Facts

i. Rights Capable of Expropriation

1081. The Tribunal has determined in its rulings on jurisdiction *ratione materiae* that the rights of ownership and possession, which the Claimant claims were expropriated, were not validly held by the Claimant and therefore were not investments held by the Claimant within the meaning of the Treaty. This is, by reason of the findings of the Estonian courts, to the effect that the transactions by which the Claimant's subsidiaries acquired title were void *ab initio.* The result of the *ab initio* nullity of the alleged acquisition is that the Claimant, never having validly acquired title or title-bearing possession, did not hold the property rights which it claims were taken by the Respondent. Even assuming, for the sake of argument, that the judicial decisions amounted to a "taking" of rights or property vested in the Claimant's subsidiaries, the Tribunal considers that the Claimant's expropriation claim fails for the reasons that follow below.

ii. Alleged Expropriation by the Executive

1082. The Claimant has alleged that the executive organs of the Estonian State conspired in a scheme to dispossess the ELA subsidiaries by unlawfully interfering with the court proceedings. A taking of property by the executive under the guise of court proceedings, through undue interference with the judicial process, could amount to an unlawful expropriation. The Tribunal has examined above whether the executive engaged in undue interference with the judicial proceedings and has found that no such undue interference has been established (*see* paragraph 991 above). The Claimant's claim that there was a "scheme" of the executive branch by which the Respondent carried out an expropriation is rejected.

iii. Alleged Expropriation by the Judiciary

1083. As to whether the court decisions in themselves constituted a violation of international law, it does not suffice for the Claimant to establish grounds for disagreeing with the courts' decisions, nor does it suffice to show that the decisions were incorrect as a matter of Estonian law. The courts' rulings would be in violation of international law only if grossly unfair, arbitrary, unjust or idiosyncratic at a fundamental and serious level.

1084. In *Saipem v. Bangladesh,* the tribunal did not engage in a full scrutiny of the domestic court judgment. Instead, the tribunal evaluated the court judgments on the basis of the conviction "that international law requires state courts to abide by "'generally accepted standards of the administration of justice' and that 'grossly unfair […] arbitrary, unjust or idiosyncratic' court rulings constitute a violation of international law".[1737] This is reminiscent of the high standard necessary to demonstrate a denial of justice. Here, for reasons that the Tribunal has considered in applying that standard, the Claimant has not established that there was any substantial error in the reasoning or decisions of the Tallinn City Court or Tallinn Circuit Court (*see* paragraph 1047 above).

[1737] *Saipem S.p.A. v. Bangladesh,* ICSID Case No. ARB/05/07, Award, 30 June 2009, ¶ 149 (**CLA-200**).

1085. As set out above, the Tribunal is not persuaded by the contention that the courts applied the 23 January 1992 Resolution "retroactively."[1738] Rather, the reasoning of the Tallinn City Court demonstrates that it relied on the 17 July 1990 Resolution and, as an additional and alternative ground, on the non-registration of the relevant transactions to declare them void.

1086. Concerning the Claimant's complaint that the courts "systematically" ignored "material and relevant evidence" by failing to consider highly relevant letters from the Estonian government that supported its claim to the Seaplane Harbor.[1739] The Claimant refers here only to the letter of 8 November 1995 and the letter of 23 October 1997.[1740] It has not demonstrated significant reliance on these pieces of evidence before the Tallinn City and Circuit Courts, nor did it seek at that time to establish property rights on the basis of contrary behavior, bad faith, or legitimate expectations. The Tribunal again refers to its previous findings. The courts' treatment of the allegedly ignored evidence was not a denial of justice (*see* paragraph 1047 above).

1087. In relation to the alleged breach of the courts' duty to apply *proprio motu* the rules of "title-bearing possession" or contradictory behavior contrary to good faith, which would have led to a finding in favor of the ELA subsidiaries, the Tribunal has rejected the Claimant's arguments. In the Tribunal's view, the alleged rule of "title-bearing possession" cannot be described as a principle of "obviously relevant law" (*see* paragraph 1043 above). The alleged rule of contradictory behavior contrary to good faith was not relevant to the facts before the courts (*see* paragraph 1044 above).

1088. The Tribunal has determined, further, that there was no incompatibility with international law through non-application of the *ex factis* rule (*see* paragraph 1046 above).

1089. In conclusion, the Claimant has not shown any irregularity such as to justify a deviation from the general position of deference towards the Estonian courts on questions of Estonian law. As the Estonian court decisions merely applied the existing law and did so without undue influence by the executive or manifestly wrongful decision-making on the part of the judiciary, the judgments did not amount to a taking or expropriation. Therefore, the Claimant's claim fails, and it is not necessary to consider the conditions of lawfulness specified in Article III(1).

C. ARTICLE II(1) OF THE TREATY: MOST-FAVORED-NATION AND NATIONAL TREATMENT

1090. Article II(1) of the Treaty provides:

> Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party on its request of all such laws and regulations

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1738 *Supra* ¶¶ 498-544, 1028.

1739 Reply, ¶ 1465, *referring to* Third Keres Report, ¶¶ 119-128 (**CER-4**).

1740 Letter from the State Chancellery to the Ministry of Justice, 8 November 1995 (**C-307**); Letter from the Advisor of Chancellor of Justice to B&E, 23 October 1997 (**C-331**).

> concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Annex, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

1. The Claimant's Position

a) Analysis of "Like Circumstances"

1091. The Claimant submits that Article II(1) of the Treaty contains MFN treatment and NT clauses, which require Contracting Parties to afford "no less favorable" treatment than that accorded to nationals or companies of any third country and local investors, respectively, in "like situations."[1741]

1092. According to the Claimant, in assessing whether the Respondent breached either of these obligations, the Tribunal should verify that (i) the Claimant and/or its investments are in "like situations" to certain domestic or foreign investors and/or their investments; and that (ii) the Claimant and/or its investments has been accorded "less favorable treatment" than those investors and/or investments.[1742]

1093. With respect to the first prong, the Claimant contends that the ordinary meaning of "like situations" in Article II(1) of the Treaty is not "identical" or "most like" situations, as the Respondent suggests.[1743] Rather, the Claimant argues, Article II(1) sets forth protections that "were meant to be broad,"[1744] and adopting a restrictive interpretation of the term "like situations" would "run counter to [such] specific context"[1745] and eliminate any protection to investments that, whilst not being identical, do maintain the type of competitive relationship that the MFN and NT obligations are designed to protect.[1746]

1094. In accordance with Article 31(3)(c) of the VCLT,[1747] the Claimant further submits that the meaning of the term "like situations" should be interpreted in light of relevant WTO jurisprudence.[1748] Based on this jurisprudence, the Claimant notes that adjudicators have applied different approaches to determine whether different investors or investments are in like

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1741 Reply, ¶ 1276.

1742 Reply, ¶¶ 1300-1305, *referring to Bilcon, Clayton et al v. Canada*, Jurisdiction and Merits Award, 17 March 2005, ¶¶ 694-696, 702-705 (**CLA-082**); *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 2005 WL 1950817, 3 August 2005, part IV, Chapter B, ¶ 29 (**CLA-328**).

1743 Reply, ¶¶ 1334-1346.

1744 Reply, ¶ 1335.

1745 Reply, ¶ 1335.

1746 Reply, ¶¶ 1336-1337, *referring to UPS v. Canada*, Separate Statement of Dean Ronald A. Cass, 24 May 2000, ¶ 14 (**CLA-331**).

1747 Reply, ¶¶ 1293, 1310.

1748 *See e.g.*, Reply, ¶¶ 1288-1296.

situations.[1749] First, the Claimant asserts that some tribunals have applied an "objective approach" which focuses on the competitive relationship between the investments, investors or products at issue.[1750] For instance, the Claimant asserts that adjudicators have examined the "likeness" of two products, using comparators such as "physical characteristics, tariff classification, end-uses or even the act of exportation."[1751] In this respect, the Claimant underlines that arbitral tribunals have recognized that the comparative criteria between investors should not be limited to the economic sector in which investors operate.[1752] This is so because, the Claimant contends, the purpose of an NT provision "cannot be done by addressing exclusively the sector in which that particular activity is undertaken."[1753]

1095. Secondly, the Claimant contends that other tribunals, have relied on a "subjective approach" also referred to as the "aims and effects" test according to which the comparator is defined by the regulatory purpose and impact of the measure under scrutiny.[1754] The Claimant notes that, in cases in which the disputed measure concerned a regulation of general application, arbitral tribunals and WTO panels have considered the impact of the regulation on certain companies or products as the relevant comparator.[1755] Thus, the Claimant avers that when applying this approach, the relevant comparator(s) is/are determined by the tribunal depending on the characteristics of the measure(s) at issue.[1756]

1096. In the instant case, the Claimant submits that the "like situations" analysis needs to focus on the functional similarities and differences between Seaplane Harbor and other ports.[1757] According to the Claimant, therefore, "[t]he proper comparator is to consider those seeking approval under a general regulatory scheme to be in like."[1758]

1097. The Claimant argues that the existence of an ownership dispute between the Claimant and the host State over possessory rights over the Seaplane Harbor is irrelevant to this analysis.[1759] This

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1749 Reply, ¶ 1306.

1750 Reply, ¶¶ 1326-1327. *See also* Reply, ¶¶ 1314-1325, 1338.

1751 Reply, ¶ 1327, *referring to* Nicolas Diebold, "Non-Discrimination and the Pillars of International Economic Law - Comparative Analysis and Building Coherency", Society of International Economic Law 23, 30 June 2010, p. 5 (**CLA-336**).

1752 Reply, ¶¶ 1316-1317.

1753 Reply, ¶ 1317, *citing Occidental Production Company v. Republic of Ecuador,* LCIA Case No. UN 3467, Final Award, 1 July 2004, ¶ 173 (**CLA-089**).

1754 Reply, ¶ 1328.

1755 Reply, ¶¶ 1319-1320, 1340-1342, *referring to United States - Foreign Sales Corporations,* Panel Report under Article 21.5 of the Dispute Settlement Understanding, WTO Case No. WT/DS108/RW, 20 August 2001, ¶ 8.132 (**CLA-332**); *Colombia -Indicative Prices and Restrictions on Ports of Entry*, Panel Report, WTO Case No. WT /DS366/R, 27 April 2009, ¶¶ 7.355-357 (**CLA-339**).

1756 Reply, ¶ 1327. *See also* Reply, ¶¶ 1320, 1322, *citing Bilcon, Clayton et al v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2005, ¶ 694 (**CLA-82**).

1757 Reply, ¶ 1343.

1758 Reply, ¶ 1345.

1759 Reply, ¶¶ 1345-1346. *See also* Hearing Transcript, Day 5, p. 34:7-13.

is especially the case, the Claimant contends, when it was the Respondent itself that created this dissimilarity by initiating the dispute over the rights over the Seaplane Harbor.[1760]

1098. Concerning the Respondent's reservation to the Treaty which excludes certain matters from the scope of the NT obligation, the Claimant contends that it is not dispositive of its claim because (i) the Respondent has not relied upon it and is now estopped from doing so going forward;[1761] (ii) even if the reservations may be invoked at this stage of the proceeding, the reservations do not apply to the facts of this case;[1762] and (iii) even if the reservations apply, under the MFN obligation in Article II(1), the Claimant is entitled to the protection of broader NT obligations available in Estonia's other treaties.[1763]

b) Alleged Violation of the NT and MFN Obligation

1099. The Claimant submits that the Respondent breached its MFN obligation under Article II(1) of the Treaty by affording Kunda Port, the Loksa Port, and the Paldiski North Port more favorable treatment than that accorded to its investments.[1764] The Claimant draws attention to the following features of those ports:

(a) The Kunda Port, located in Lääne-Viru County of Estonia, is a cargo port privatized in 1991.[1765]

(b) Its private ownership was initially held by investors from the United States and Greece and subsequently acquired by Swedish and Dutch investors.[1766]

(c) The Loksa Port, located in the town of Loksa, Estonia, is a port dealing with shipbuilding, construction, and concrete handling. It was sold to a Danish investor after the USSR ended their military occupation of Estonia.[1767]

(d) The Paldiski North Port is a port that handles oversized cargoes, general and bulk cargoes, passenger cars, construction and agricultural equipment and freight equipment which was

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1760 Reply, ¶ 1287.

1761 Reply, ¶ 1350; 1 October 2021 Submission, ¶¶ 80-81.

1762 Reply, ¶ 1352; 1 October 2021 Submission, ¶ 78.

1763 Reply, ¶¶ 1353-1354; 1 October 2021 Submission, ¶¶ 82-89.

1764 Memorial, ¶ 516; Reply, ¶ 1369.

1765 Memorial, ¶ 511.

1766 Memorial, ¶ 511, *referring to* Juhan Tere, "25 years from the beginning of the renovation of Kunda cement plant in Estonia", 25 April 2016 (**C-048**); Port of Kunda website, About us, 20 August 2019 (**C-049**); Case Study 1: Kunda Nordic Tsement Ltd. Estonia: "Kunda Nordic Tsement – from environmental disaster to environmental recognition", in Environmental Management Systems and Certification, by Philipp Weiß, Jörg Bentlage, (Baltic University Press, 2006), p. 201 (**C-108**).

1767 Memorial, ¶ 512-513, *referring to* Loksa Shipyard Presentation: Slide 3: Company history Historical development of Loksa Shipyard, 28 October 2010 (**C-079**); Urmo Kohv, "Loksa Ship Repair Company donates 10 million to the state", ärileht.ee EST, 9 December 1996 (**C-080**).

privatized in 1995. Although the port is currently owned by an Estonian company, in 2002 it was owned and controlled by a German company.[1768]

1100. The Claimant maintains that the Respondent breached its national treatment obligations by according the Claimant and its investments less favorable treatment than that accorded to four Estonian investors in like situations: BLRT Grupp, OÜ Tallinna Bekkeri Sadam, AS Miiduranna Sadam and Port of Tallinn.[1769] The Claimant draws attention to the following features of those ports:

(a) The Noblessner/Peetri Port, now known as the Tallinn Maritime Plant, is immediately adjacent to the Lennusadam Port. It has been owned and operated by BLRT Grupp since 2001. The Noblessner/Peetri Port was used by the USSR during their time of occupation in Estonia for military purposes and was privatized in 1995.[1770]

(b) The Bekker Port is a commercial port owned by OÜ Tallinna Bekkeri Sadam. During the Soviet occupation the Bekker port was managed by RAS Balti Bas, a state-owned company. In 1994, 51% of the shares in RAS Balti Bas were acquired by an Estonian private company, the remainder 49% of the shares was held by the Ministry of Economy. In 1997, the Tallinn City Council introduced the proposal to municipalize 49% of the state-owned shares in OÜ Tallinna Bekkeri Sadam.[1771]

(c) The Miiduranna Port is a mixed-use port facilitating cargo, fuel, and fish products, which has been owned by AS Miiduranna Sadam since 1991.[1772]

(d) Port of Tallinn owns the majority interest in the Muuga Port, the biggest cargo harbor in Estonia.[1773]

1101. According to the Claimant, the Respondent afforded more favorable treatment to the above-mentioned entities as follows.[1774]

1768 Memorial, ¶ 514-515, *referring to* Port of Paldiski website: About Port page (**C-112**); Sulev Vedler, Raul Ranne, "Who governs Paldiski North Harbor?", Eesti Ekspress, 27 November 2002 (**C-132**); Kristiina Liivapuu, "Business in a changing financial environment and future prospects of AS Pärnu Sadam", 2014, Thesis, Tallinn University of Technology, Tallinn College, Accounting Department (**C-138**).

1769 Memorial, ¶ 519; Reply, ¶ 1373.

1770 Memorial, ¶ 520, *referring to* Tallinn City Council Decision on Zoning of Ports, 7 October 1993 (**C-060**).

1771 Memorial, ¶ 521, *referring to* Bekker Port Website (**C-114**); "Review of OÜ Rasmusson's appeal in cassation regarding the initiation and adoption of the detailed plan and the contestation of the planning procedure operations", 18 February 2002 (**C-115**); Chronicle of Bekker harbor conflict - Archive – Postimees, 14 January 1998 (**C-116**); "The city wants port-based land, Oil transportation through the city", Postimees, 5 March 1997 (**C-118**).

1772 Memorial, ¶ 522, *referring to* Miiduranna Sadam Website, Services Page (accessed 8-20-2019) (**C-119**); Antti Sarasmo, "The Kirov fishing kolkhoz: A socialist success story" in Competition in socialist society [electronic resource] /edited by Katalin Miklóssy and Melanie Ilic. London and New York: Routledge, Taylor & Francis Group, 2014, p. 69 (**C-117**); "Public Financing and Charging Practices of Seaports in the EU" (Bremen, 2006), p. 92 (**C-113**).

1773 Memorial, ¶ 523.

1774 Memorial, ¶ 524.

i. Physical "Blockade"

1102. The PRCA General Plan "downzoned" the Seaplane Harbor and cut off its railway access, while the neighboring Noblessner Port was allowed to continue operating and keep its railway connection.[1775]

1103. Unlike at any of the other ports, the Respondent caused the Icebreaker *Suur Tõll* to be docked at the Seaplane Harbor, blocking the entrance.[1776]

ii. Administrative "Blockade"

1104. The Claimant submits that all other ports operated without restriction on their customs operations between 1999 and 2006, while at the same time the Claimant's subsidiaries were not permitted to establish coordination of the port basin points or obtain a port passport, customs zone, or building permits.[1777] Unlike the Claimant, other Port operators did not have to comply with the mandatory requirements of the 1997 Port Act.[1778] In contrast to the actions taken in respect of the Seaplane Harbor, the Respondent paid compensation to OÜ Tallinna Bekkeri Sadam for the part of the Bekker Port that it nationalized.[1779]

1105. As to the Respondent's argument that the Claimant was not in a like situation with any of the other port owners because the Claimant failed to prove its ownership, the Claimant's expert, Mr. Keres, asserts that the Claimant was entitled to the presumption of legality and lawfulness regarding its possession of the Seaplane Harbor as a matter of Estonian law.[1780] Therefore, Mr. Keres states that the Claimant's investments of BPV and Verest were entitled to be treated like other port investments seeking government permits until such a time the court concluded otherwise.[1781] Any actions taken by the Respondent contrary to the legal presumptions under Estonian law were in direct contravention of Estonian law and the rule of law.[1782]

c) More Favorable Treatment Guaranteed in Third-Party Treaties

1106. The Claimant submits that the Respondent must provide treatment not less favorable than that guaranteed in investment treaties concluded with third States.[1783]

1775 Reply, ¶¶ 108, 790-791. *See also* Memorial, ¶ 524.

1776 Reply, ¶ 250.

1777 Reply, ¶¶ 1369-1372.

1778 Reply, ¶ 1377, *referring to* The Port Act § 20 Amendment Act, Explanatory Memorandum, 1977 (**C-525**).

1779 Memorial, ¶ 525.

1780 Fourth Keres Report, ¶¶ 27, 31 (**CER-8**). *See* ¶ 573 above.

1781 Fourth Keres Report, ¶¶ 26, 31 (**CER-8**).

1782 Fourth Keres Report, ¶ 29, 51-55 (**CER-8**).

1783 Memorial, ¶ 527.

1107. The Claimant mentions fifteen such treaties, namely the bilateral investment treaties into which Estonia has entered with Jordan,[1784] Kazakhstan,[1785] Moldova,[1786] Azerbaijan,[1787] Georgia,[1788] Morocco,[1789] Vietnam,[1790] Spain,[1791] Turkey,[1792] Greece,[1793] Ukraine,[1794] Austria,[1795] Germany,[1796] France[1797] and the Belgium-Luxembourg Economic Union.[1798] The Claimant

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1784 Memorial, ¶ 527.A, *referring to* Agreement between the Government of the Republic of Estonia and the Government of the Hashemite Kingdom of Jordan on the Reciprocal Promotion and Protection of Investments, signed on 10 May 2010 (**CLA-036**).

1785 Memorial, ¶ 527.B, *referring to* Agreement between the Government of the Republic of Estonia and Government of the Republic of Kazakhstan on the Promotion and Reciprocal Protection of Investments, signed on 20 April 2011 (**CLA-035**).

1786 Memorial, ¶ 527.C, *referring to* Agreement between the Government of the Republic of Moldova and the Government of the Republic of Estonia on the Promotion and Reciprocal Protection of Investments, 2011 (**CLA-108**).

1787 Memorial, ¶ 527.D, *referring to* Agreement between the Government of the Republic of Azerbaijan and the Government of the Republic of Estonia on the Promotion and Reciprocal Protection of Investments, signed on 7 April 2010 (**CLA-201**).

1788 Memorial, ¶ 527.E, *referring to* Agreement between the Government of the Republic of Estonia and Georgia on the Promotion and Reciprocal Protection of Investments, signed on 24 November 2009 (**CLA-202**).

1789 Memorial, ¶ 527.F, *referring to* Agreement between the Government of the Republic of Estonia and the Government of the Kingdom of Morocco for the reciprocal promotion and protection of investments, signed on 25 September 2009, entered into force on 4 November 2011 (**CLA-092**).

1790 Memorial, ¶ 527.G, *referring to* Agreement between the Government of the Republic of Estonia and the Government of the Socialist Republic of Viet Nam on the Promotion and Reciprocal Protection of Investments, signed on 24 September 2009 (**CLA-078**).

1791 Memorial, ¶ 527.H, *referring to* Agreement between the Government of the Republic of Estonia and the Kingdom of Spain on the Promotion and Reciprocal Protection of Investments, signed on 11 November 1997 (**CLA-179**).

1792 Memorial, ¶ 527.I, *referring to* Agreement between the Republic of Turkey and the Republic of Estonia concerning the Reciprocal Promotion and Protection of Investments, 1999 (**CLA-084**).

1793 Memorial, ¶ 527.J, *referring to* Agreement between the Government of the Hellenic Republic and the Government of the Republic of Estonia on the Promotion and Reciprocal Protection of Investments, 1998 (**CLA-204**).

1794 Memorial, ¶ 527.K, *referring to* Agreement between the Government of the Republic of Estonia and the Government of the Republic of Ukraine for the Promotion and Reciprocal Protection of Investments, signed on 15 February 1995 (**CLA-079**).

1795 Memorial, ¶ 527.L, *referring to* Agreement between the Government of the Republic of Estonia and Austria on the Promotion and Reciprocal Protection of Investments, 1995 (**CLA-058**).

1796 Memorial, ¶ 527.M, *referring to* Agreement between the Government of the Republic of Estonia and Germany on the Promotion and Reciprocal Protection of Investments, 1997 (**CLA-074**).

1797 Memorial, ¶ 527.N, *referring to* Agreement between the Government of the Republic of Estonia and France on the Promotion and Reciprocal Protection of Investments, 1995 (**CLA-124**).

1798 Memorial, ¶ 527, *referring to* Agreement between the Belgium-Luxembourg Economic Union and the Government of the Republic of Estonia on the Promotion and Reciprocal Protection of Investments, 1999 (**CLA-124**).

contends that, by virtue of MFN provision in Article II(1), such treaties should be applicable to the instant case.[1799]

1108. As to the relevant differences in treatment, the Claimant asserts that the listed treaties "provided broader national treatment obligations and with fewer reservations and exceptions."[1800] The specific difference on which the Claimant relies in the terms of those treaties is the absence of the reservation provided in paragraph 3 of the Annex to the US-Estonia BIT.

2. The Respondent's Position

a) Analysis of "Like Circumstances"

1109. The Respondent states that, in order to establish a breach of the MFN and NT obligations, the Claimant bears the burden of establishing that "(i) the Respondent accorded its investment some kind of treatment, (ii) that the Claimant's investment was in a "like situation" to those of local or other foreign investors and (iii) the treatment was less favorable than that accorded to other investors."[1801]

1110. Concerning the assessment of "like circumstances," the Respondent submits that, consistent with the conclusions of numerous investment treaty tribunals,[1802] the Tribunal "must take into account circumstances that would justify governmental measures that treat certain investors differently," and that "if there is a justification for the different treatment, investors are not in a like situation for the purposes of the MFN and national treatment analysis."[1803] For this reason, the Respondent disagrees with the Claimant's contention that all persons seeking government permissions are in like situations.[1804]

1111. In this case, the Respondent argues that not one of the ports in Estonia that the Claimant identifies was in "like situations" to the Claimant's alleged investments.[1805] The Respondent alleges that, unlike the Seaplane Harbor, the comparators the Claimant refers to were privatized through

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1799 Memorial, ¶ 528; Reply, ¶ 1355.

1800 Reply, ¶ 1348.

1801 Counter-Memorial, ¶ 589.

1802 Rejoinder, ¶¶ 465-469, *referring to Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶¶ 363, 371 (**CLA-123**); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakista*n, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶¶ 375, 400, 410 (**RLA-142**); *Pope & Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2000, ¶¶ 78, 87, 93, 103 (**CLA-205**); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, ¶ 344 (**RLA-212**).

1803 Rejoinder, ¶ 470.

1804 Rejoinder, ¶ 466.

1805 Counter-Memorial, ¶¶ 592-595.

transactions that involved the Estonian State,[1806] and as such, were not the object of an ownership dispute before Estonian courts.[1807]

1112. In respect of the other port investor whose rights were in dispute, OÜ B&E, the Respondent did assert its ownership rights in the same 1997 lawsuit.[1808]

1113. In this respect, the Respondent rejects the Claimant's allegation that the Respondent is relying on a "self-judging" difference among the comparators that it created itself—namely, the ownership dispute over the Seaplane Harbor before Estonian courts.[1809] To the contrary, the Respondent contends that "it is the Claimant who is requesting differential treatment by asking that its lack of title would not be taken into account when issuing authorizations and permits."[1810]

1114. The Respondent distinguishes the other Estonian Ports further in that none of them includes a designated cultural monument such as the Seaplane Hangar.[1811]

b) Alleged Violation of the MFN and NT Obligation

1115. If and to the extent the Claimant should establish "like circumstances," the Respondent contends that there is no MFN or NT violation. The Respondent states that it asserted its right of ownership equally against OÜ B&E, one of the two original defendants in the ownership dispute, not affiliated with the Claimant.[1812]

1116. The Respondent maintains that the Claimant was treated differently from other investors for a legitimate reason, namely that, unlike the other investors, the Claimant lacked title to the

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1806 Counter-Memorial, ¶¶ 593-594, *referring to* "25 years from the beginning of the renovation of Kunda cement plant in Estonia", Juhan Tere, Baltic Course, Tallinn, 25 April 2016 (**C-048**); Loksa Shipyard Presentation, 28 October 2010: Slide 3: Company history Historical development of Loksa Shipyard (**C-079**); Maersk Post, "Loksa, a port in Tallinn", 1 March 1994 (**R-163**); Port of Paldiski website: About Port page (**C-112**); Paldiski City Government, Order for registering AS Paldiski Sadamate, 25 August 1997 (**R-164**); Äripäev, "Paldiski North Port is acquired by an unknown", 16 July 1999 (**R-165**); Meremes, "At Tallinn Maritime Factory", 25 April 1995 (**C-054**); Ministry of Finance letter, 11 February 2002 (**R-166**); Chronicle of Bekker harbor conflict – Archive – Postimees, 14 January 1998 (**C-116**); Postimees, "The city wants port-based land, Oil transportation through the city", 5 March 1997 (**C-118**); Äripäev, Article "Compensation from Balti Baas and the buyer", 3 February 1999 (**R-167**); Kristiina Liivapuu, "Business in a changing financial environment and future prospects of AS Pärnu Sadam" 2014, Thesis, Tallinn University of Technology, Tallinn College, Accounting Department (**C-138**); Government of Estonia regulation No. 334-k, 31 March 1995 (**RLA-155**); Regulation No. 256 of the Government of the Republic of Estonia, 12 July 1994 (**RLA-156**); AS Tallinna Sadam, Port of Tallinn investor presentation, 15 September 2019 (**R-168**).

1807 Counter-Memorial, ¶ 593.

1808 Statement of Defense, ¶ 49.

1809 Rejoinder, ¶ 475.

1810 Rejoinder, ¶ 476.

1811 Counter-Memorial, ¶ 595, *referring to* Regulation No. 488 of the Council of Ministers of Estonian Soviet Socialist Republic, 4 October 1988 (**RLA-157**); Regulation No. 10 of the Minister of Culture on the designation of the Seaplane Hangar as a cultural monument, 30 August 1996 (**RLA-081**).

1812 Statement of Defense, ¶ 49.

underlying land and unlawfully possessed the Seaplane Harbor buildings.[1813] The Respondent further contends that not having lawful title or possession, the Claimant's subsidiaries were unable to obtain permits or regulatory approvals because they did not meet the required criteria.[1814]

1117. According to the Respondent, the Claimant "has failed to show the existence of the alleged measures targeting the Claimant as opposed to other ports" owned by nationals or companies of third countries.[1815]

i. Physical "Blockade"

1118. According to the Respondent, the elimination of the railway link at the Seaplane Harbor is not evidence of preferential treatment of the Noblessner/Peetri Port because (i) the latter, unlike the Seaplane Harbor, is a shipyard that never operated as a cargo port and therefore was never in a "like situation"; and (ii) the non-removal of the railway leading to the Noblessner shipyard as opposed to the planned removal of the railway link to the Seaplane Harbor is easily understood and justified by the topology of railways in the area.[1816]

1119. The Respondent submits that the Claimant was not discriminated against in respect of the berthing of the icebreaker *Suur Tõll* at the Seaplane Harbor because it "was relocated for legitimate budgetary reasons, to a berth not covered by the Claimant's leases, and did not block the entrance to the port."[1817]

ii. Administrative "Blockade"

1120. The Respondent submits that the Claimant failed to obtain coordination of the Port basin points or authorization of a customs control zone because, unlike other ports, it was unable to show ownership or lawful possession of the land underlying the Seaplane Harbor or its basin.[1818] The Respondent was under no obligation to "ignore convincing *prima facie* evidence of the illegality of possession pending a final court decision."[1819] The Respondent refutes the Claimant's argument that the presumption of lawfulness arising out of the Law of Property Act was to be applied in this case. In particular, the Respondent notes that sections 34(2) and 35(3) of the Law of Property Act place the burden of proof on the person contesting possession and does not require

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1813 Rejoinder, ¶ 474.

1814 Rejoinder, ¶ 473.

1815 Rejoinder ¶ 477. *See also* Counter-Memorial, ¶ 591.

1816 Rejoinder, ¶¶ 480-486, *referring to* Tallinn Master Plan, accepted on 11 February 1999, adopted on 11 February 1999, p. 3 (**R-124**).

1817 Rejoinder, ¶ 371. *See also* Counter-Memorial, ¶¶ 565-567.

1818 Rejoinder, ¶ 490; Counter-Memorial, ¶ 591.

1819 Rejoinder, ¶ 488; 3 November 2021 Submission, ¶¶ 14-15, 17. The Respondent considers that, in any event, the Claimant's submissions, as well as Mr. Keres' observations, on the effects of possession should be disregarded because, in the Respondent's view, they are outside the scope of the leave granted by the Tribunal on 30 August 2021.

third parties to "treat a possessor as a lawful possessor in all possible legal contexts until a judgment to the contrary."[1820]

1121. According to the Respondent, the Claimant failed to show that it was treated differently from others in relation to the requirements under the Port Act because, as in the case of the other Estonian Ports, the Seaplane Harbor was not required to have a port passport until 2001. The Claimant failed to show that it was treated differently from others in relation to the granting of building permits because the Claimant never applied for any building permits.[1821]

c) More Favorable Treatment Guarantee in Third-Party Treaties

1122. The Respondent's primary position is that the MFN clause in the US-Estonia BIT was designed to provide MFN treatment only in like situations, which the Claimant has failed to establish in this case.[1822]

1123. In response to the Claimant's submissions on the reservation made in the Annex to the US-Estonia BIT in paragraph 3, the Respondent submits that in any event, the reasons for treating the Claimant differently from the Estonian-operators, being the lack of ownership of real property or right to the use of land and natural resources, fall within the applicable exceptions.[1823] The Respondent argues that those terms cannot be bypassed by importing the absence of such an exception from other treaties through the MFN clause in Article II(1), given that the Respondent "has specifically chosen not to provide [NT] protection in the sectors listed in Annex 1 of the BIT."[1824]

3. The Tribunal's Analysis

a) Legal Standard

1124. Article II(1) of the Treaty provides:

> Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party on its request of all such laws and regulations concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to limit such exceptions to a minimum. Any future exception by either Party shall not apply to

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1820 3 November 2021 Submission, ¶ 15.

1821 Rejoinder, ¶ 491.

1822 Rejoinder, ¶¶ 499-501, *referring to İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016, ¶ 329 (**RLA-213**). *See also* Hearing Transcript, Day 1, p. 150:15-20.

1823 Rejoinder, ¶¶ 492-494.

1824 Rejoinder, ¶¶ 495-498, *referring to Tecnicas Mediambientales Tecmed S.A. v. the United Mexican States*, ICSID Case No. ARB (AF)/00/02, Award, 29 May 2003, ¶ 69 (**CLA-055**); *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB701/08, Award, 25 April 2005, ¶ 343 (**CLA-090**).

> investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Annex, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

1125. The Annex to the US-Estonia BIT provides, in paragraph 3:

> The Government of the Republic of Estonia reserves the right to make or maintain limited exceptions to national treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:
>
> banking, including loan and saving institutions; government grants; government insurance and loan programs; ownership of real property; use of land and natural resources; and initial acquisition from the Republic of Estonia and its municipalities of state and municipal property in the course of denationalization and privatization.

i. Like Situations

1126. The Tribunal considers it appropriate to take the three-part approach, as adopted in the *UPS* and *Bilcon* cases,[1825] in establishing whether there is a *prima facie* case of discrimination. The necessary elements are: (1) that a government accorded the investor or its investment treatment and that the same government accorded treatment to other domestic or foreign investors or investments; (2) that the treatment was less favorable than that accorded to other domestic or foreign proponents; and (3) the government accorded the allegedly discriminatory treatment in question in like situations.[1826]

1127. While the MFN/NT provision uses the expression "like situations",[1827] the Parties rightly attach the same meaning to this term as has been developed in relation to the term "like circumstances" in other investment treaties. The Tribunal notes, on the other hand, that definitions of "like" goods and services under international trade law pertain to *lex specialis* of a different order and do not require consideration here. [1828]

1128. The analysis of "like situations" is specific to the facts and regulatory context of the case, as articulated by the tribunal in *Total v. Argentina* as follows:

> In order to determine whether treatment is discriminatory, it is necessary to compare the treatment challenged with the treatment of persons or things in a comparable situation. In economic matters the criterion of "like situation" or "similarly-situated" is widely followed because it requires the existence of some competitive relation between those situations

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1825 *United Parcel Service of America Inc. (UPS) v. Government of Canada*, UNCITRAL Arbitration Rules, Award on the Merits, 24 May 2007, ¶¶ 83-84, referenced in *Bilcon, Clayton et al v. Canada*, Jurisdiction and Merits Award, 17 March 2005, ¶¶ 717-720 (**CLA-082**).

1826 *United Parcel Service of America Inc. (UPS) v. Government of Canada*, UNCITRAL Arbitration Rules, Award on the Merits, 24 May 2007, ¶¶ 83-84, *referenced* in *Bilcon, Clayton et al v. Canada*, Jurisdiction and Merits Award, 17 March 2005, ¶¶ 717-720 (**CLA-082**).

1827 *Occidental Production Company v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, ¶ 167 (**CLA-089**).

1828 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 389 (**RLA-142**); *Methanex Corporation v. United States of America*, UNCITRAL Arbitration Rules, Final Award of the Tribunal on Jurisdiction and Merits, 2005 WL 1950817, 3 August 2005, ¶¶ 29-33 (**CLA-328**).

> compared that should not be distorted by the State's intervention against the protected foreigner.
>
> […]
>
> The elements that are at the basis of likeness vary depending on the legal context in which the notion has to be applied and the specific circumstances of any individual case.[1829]

1129. As held in *Parkerings-Compagniet v. Lithuania*,[1830] the situation of two investors "will not be in *like circumstances* if a justification of the different treatment is established."[1831]

ii. Establishing Less Favorable Treatment

1130. To determine whether a certain treatment was "less favorable" than another, the *UPS* test does not require a demonstration of discriminatory intent.[1832] It would suffice to assume that the differential treatment was a result of the investor's nationality in the absence of evidence to the contrary.[1833] This principle was supported in *Pope & Talbot:* "Differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA."[1834]

1131. This view was endorsed by the Tribunal in *Bilcon*, which stated:

> Consistently with the approach taken in the *Feldman* case, however, the present Tribunal is also of the view that once a *prima facie* case is made out under the three-part *UPS* test, the onus is on the host state to show that a measure is still sustainable within the terms of Article 1102. It is the host state that is in a position to identify and substantiate the case, in terms of its own laws, policies and circumstances, that an apparently discriminatory measure is in fact compliant with the "national treatment" norm set out in Article 1102.[1835]

1132. If the *UPS* criteria are fulfilled, the burden shifts to the host State to show the justification. The investor need not show discriminatory intent.

1829 *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability of 27 December 2010, ¶ 210 (**RLA-212**).

1830 *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 (**CLA-123**).

1831 *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 375 (**CLA-123**).

1832 *Bilcon, Clayton et al v. Canada*, Jurisdiction and Merits Award, 17 March 2005, ¶ 719 (**CLA-082**), *quoting Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 181.

1833 *Bilcon, Clayton et al v. Canada*, Jurisdiction and Merits Award, 17 March 2005, ¶ 719 (**CLA-082**), *quoting Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 181.

1834 *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL Arbitration Rules, Award on the Merits of Phase 2, 10 April 2001, ¶ 78 (**CLA-205**).

1835 *Bilcon, Clayton et al v. Canada*, Jurisdiction and Merits Award, 17 March 2005, ¶ 723 (**CLA-082**).

iii. Objective Justification

1133. Should the Tribunal find that the three criteria in the *UPS* test are met, it would have to assess whether any differential treatment is justified.[1836] As in *Pope & Talbot* and *Bilcon,* this Tribunal will apply the principle that if a *prima facie* case is made under that three-part test, there is latitude for a host state "to pursue reasonable and non-discriminatory domestic policy objectives through appropriate measures even when there is an incidental and reasonably unavoidable burden on foreign enterprises."[1837] In such cases, the burden is on the host state to identify and substantiate the case, in terms of its own laws, policies and circumstances, that the apparently discriminatory measure is an appropriate one taken in the pursuit of reasonable and non-discriminatory policy objectives.[1838]

b) Application to the Facts

i. The Administrative "Blockade"

1134. The Tribunal has found above (*see* Section VI.A.2.c)), that the Claimant failed to prove that the denial of the various administrative permits sought constituted an arbitrary or discriminatory measure. The Tribunal found instead that the Respondent's conduct during the administrative proceedings had a reasonable and justified basis.

1135. While not arbitrarily or discriminatorily, the Tribunal must now examine whether the Claimant was treated unfavorably in comparison with investors "in like situations" in its pursuit of the necessary port basin approvals, port passport, customs authorization, and building permits.

ii. Investors in "Like Situations" for Purposes of Administrative Blockade

1136. The Claimant asserts that it was in "like situations" with the Noblessner/Peetri, Bekker, Muuga, Miiduranna, Kunda, Loksa, and Paldiski North Ports.[1839]

1137. The Tribunal agrees that the Claimant is not required to show "identical" situations, but merely "like" ones.[1840] The Claimant also argues that the Respondent's construction of "like" is too narrow and substantially corresponds with "identical" or "most like" circumstances.[1841] In the Tribunal's view, the Respondent's definition of "like" is not the same as that of "identical"

1836 *See Bilcon, Clayton et al v. Canada*, Jurisdiction and Merits Award, 17 March 2005, ¶¶ 720-723 (**CLA-082**), *quoting Pope & Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2001, ¶ 78 (**CLA-205**).

1837 *Bilcon, Clayton et al v. Canada*, Jurisdiction and Merits Award, 17 March 2005, ¶ 723 (**CLA-082**), *citing Pope & Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2001, ¶ 78 (**CLA-205**).

1838 *Bilcon, Clayton et al v. Canada*, Jurisdiction and Merits Award, 17 March 2005, ¶ 723 (**CLA-082**), *citing Pope & Talbot Inc. v. Government of Canada*, UNCITRAL Arbitration Rules, Award on the Merits of Phase 2, 10 April 2001, ¶ 78 (**CLA-205**).

1839 Reply, ¶¶ 1311-1313.

1840 *UPS v. Canada, Separate Statement of Dean Ronald A. Cass*, ¶ 14 (**CLA-331**).

1841 Reply, ¶ 1335.

circumstances. Rather, the Respondent identifies the lack of valid ownership or possession as the principal factor that excludes the cited other investors from being comparators. As an additional factor, the Respondent also identifies the cultural significance of the Seaplane Hangar.[1842]

1138. To establish "like circumstances", the Claimant would therefore have to demonstrate that there was another port whose title was similarly contested. However, based on the Tribunal's previous findings under Section VI.A.2.c), the Claimant was not in "like situations" with the other ports because the underlying ownership dispute constituted a substantial element of distinction.

1139. In addition, the Tribunal sets out below that, even if there had been other ports in like situations, there would nonetheless have been an objective justification for a different treatment under the MFN and NT standards.

iii. Objective Justification for Treatment of Disputed Possession

1140. The existence of an objective justification for a difference in treatment is a reason for not considering investors to be "in like situations".[1843] In any event, it has been consistently found that different treatment that meets the three-part *UPS* criteria can be justified when the treatment has a reasonable nexus to a rational government policy.[1844] Even accepting, for the sake of argument, that all subjects of the regulatory scheme for port, customs and building permits were in "like situations", in the view of the Tribunal, the difference in treatment where the relevant operations would be affected by an ownership dispute had a reasonable nexus to a rational government policy.

1141. The Tribunal considers that there was an objective basis for differentiation in the present case. The relevant port operations necessarily depended on rights of physical possession and use. It logically makes a difference whether operators hold rights of possession or not. For purposes of the regulatory scheme concerning transport and infrastructure, it was reasonable for the regulatory authorities to require that occupiers hold such rights. The Claimant was the only operator whose rights of ownership or possession were in dispute. The Respondent was under no obligation to disregard the dispute over title by treating the Claimant as if it were a lawful possessor for all purposes.

1142. The Claimant asserts that the Respondent was under an obligation to disregard the ownership dispute on the basis of the presumption of lawfulness of possession under Estonian law. According to the Claimant, the fact that it was in possession of the port gave the Claimant the right to presumption of lawfulness of possession until determined to the contrary by a court:

1842 Counter-Memorial, ¶¶ 594-595.

1843 *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶¶ 363, 375 (**CLA-123**).

1844 *Bilcon, Clayton et al v. Canada*, Jurisdiction and Merits Award, 17 March 2005, ¶ 722 (**CLA-082**), *quoting Pope & Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2000, ¶ 78 (**CLA-205**).

> Any possessor is entitled to legal protection against interference with their possession and may rely on the presumption of the lawfulness (§ 90 Law of Property Act), legality (§ 34(2) Law of Property Act), and good faith (§ 34(3) Law of Property Act) of their possession until the opposite is determined by a court. In the absence of a court determination to the contrary, Estonia was factually bound to respect ELA USA's subsidiaries as lawful possessors. Estonia could not take the law into its own hands and make determinations out of self-interest separately from the appropriate judicial proceedings.[1845]

1143. The Claimant submits that "[o]nce there is possession, specific legal rights automatically arise. These rights include the right to deter any action against one's possession and interference in addition to that."[1846] The Claimant asserts that "Estonia could have approved BPV's port basin" since BPV, Verest and Agrin "presumptively had good possession of the Lennusadam Port arising from the fact of possession."[1847]

1144. The Respondent disputes the Claimant's reliance on the effect of possession. The property rights under Estonian law are set out in section 5 of the Law of Property Act and do not include possession. Possession is not a right but a description of a factual situation. According to the Respondent, sections 34(2) and 35(3) of the Law of Property Act stipulate that possession is deemed respectively lawful and in good faith "until proven otherwise". These provisions place the burden of proof on the person contesting possession. They do not say that everyone must treat a possessor as a lawful possessor in all possible legal contexts until a judgment to the contrary. There is no rule of Estonian or international law requiring the government to ignore convincing *prima facie* evidence of the illegality of possession pending a final court decision. The procedural presumption of lawfulness arising out of the Law of Property Act can be and was refuted.[1848]

1145. In the Tribunal's view, the origin of the transactions is at the core of the dispute between the Parties[1849] and justifies categorically setting the Claimant's investment apart from those of the proposed national and foreign comparators. Therefore, the Tribunal concludes that the Claimant was not "in like situations" with the domestic investors in the Noblessner/Peetri, Bekker, Miiduranna, or Muuga Ports, nor with the foreign investors in the Kunda, Loksa, or Paldiski Ports.

iv. Elimination of the Railway Link

1146. The Claimant asserts that the Noblessner/Peetri Port received better treatment in rail service and access than the Lennusadam Port. The Noblessner/Peetri Port is immediately adjacent to the Lennusadam Port and, like the Lennusadam Port, was subject to the Tallinn Master Plan and PRCA General Plan.[1850]

1845 *See* Fourth Keres Report, ¶¶ 26, 28 (**CER-8**).

1846 1 December 2021 Submission, ¶ 62.

1847 1 December 2021 Submission, ¶ 73, *citing* Fourth Keres Report, ¶¶ 50(d), 57 (**CER-8**): in the absence of a court determination to the contrary, "Estonia was factually bound to respect ELA USA's subsidiaries as lawful possessors. Estonia could not take the law into its own hands and make determinations out of self-interest separately from the appropriate judicial proceedings."

1848 3 November 2021 Submission, ¶¶ 15-18.

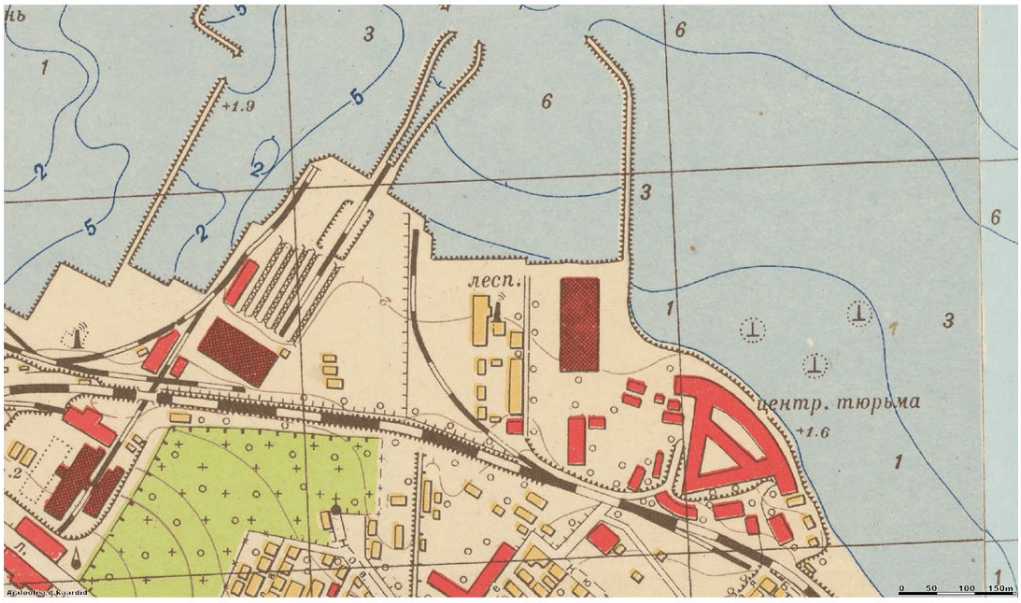
1849 See Rejoinder, ¶¶ 473-474.

1850 Memorial, ¶ 524; Reply, ¶¶ 1373-1375.

1147. The Claimant claims that it received less favorable treatment because the railway connecting the Lennusadam Port was eliminated under municipal "downzoning", whereas the rail link of the neighboring Noblessner/Peetri rail link was not.[1851] The Claimant alleges that the Respondent took regulatory steps as part of an "economic blockade" of the port "to sever all rail line activity to the Lennusadam Port to make ELA U.S.A.'s business operations unviable."[1852]

(I.) The Lennusadam Historic Railway Tracks

1148. The historic railway links of the Lennusadam Port are shown in this image, from a 1946 map of the Noblessner Shipyard and Seaplane Harbor area:[1853]



1149. The historic track at the Seaplane Harbor was connected to a 4.2 km railway branch known as the Old City Harbor (Vanasadam) branch line, which linked it to Kopli cargo station.[1854]

1150. As of December 1999, the Lennusadam Port site "had the remains of demolished railway tracks, consisting of remains of rotten sleepers in the place of former railway branches, c. 30 of them, and two old rails."[1855] The engineering consulting firm Ehitusekspert, commissioned by BPV to assess the assets on the site, reported as follows:

1851 Reply, ¶ 1375.

1852 Reply, ¶ 58.

1853 Map of the Noblessner Shipyard and the Seaplane Harbor area in 1946 (**R-019**).

1854 Tallinn City Master Plan as on display as of 20 July 1999 (original) (**R-126**).

1855 Legal Instrument No. 28/2012, 20 December 1999 (**C-300**).

> The plot is supplied with a railway line running from Tallinn railway station to the storage facility of the plot, with a jib crane KII-300 (1987, requires renovation). The railway line need[s] major repairs on the whole territory; the length of the line to rail switches i[s] about 500 m. see Annex no. 1, pp. 61, 62.[1856]

1151. On 17 January 2000, Agrin recorded these remains of a railway as its own property because they were allegedly "ownerless assets."[1857] The Claimant then engaged a contractor to rebuild the old track and build two more. On 18 May 2000, BPV entered into an agreement with AS Eesti Raudtee (Estonian Railways), the owner of most railway branches in Tallinn, to connect the "BPV's railroad" to the Tallinn railway system.[1858] The Claimant's activities to rehabilitate the railway were completed later in 2000.[1859] The Claimant's Port Plan, dated 17 August 2000, envisaged that by the end of 2006, the Port "will be able to take up to 100 rail trucks, unloading 40 rail trucks per day."[1860] The railway track was operational between the end of 2000 and the end of 2004.

(II.) Elimination of the Vanasadam Branch Line

1152. In 1999, the City of Tallinn adopted plans for the formerly militarized and heavily industrial areas on the coast of the city to be redeveloped as a residential environment. These plans entailed changes to the uses of land and the transport infrastructure. The area of the Lennusadam Port was to be re-zoned from cargo and heavy industry to residential and recreational use. The Vanasadam branch line, along with any connections to the Seaplane Harbor, was to be removed within the next ten years.[1861] The former railway link would then be rebuilt as a motorway known as the Kalamaja bypass.

1153. The Tallinn Master Plan, including the removal of the Old Harbor Railway link, was published in 1999.[1862] The railway connections designated for elimination are shown in the following map, as displayed in 1999 (**R-130**):

1856 Estonia's English Translation of the Ehitusekspert Expert Report, 24 January 2000, p. 32 (**R-021**).

1857 Legal Instrument No. 29/1001, 17 January 2000, (**C-335**); *cf.* Reply ¶ 700.

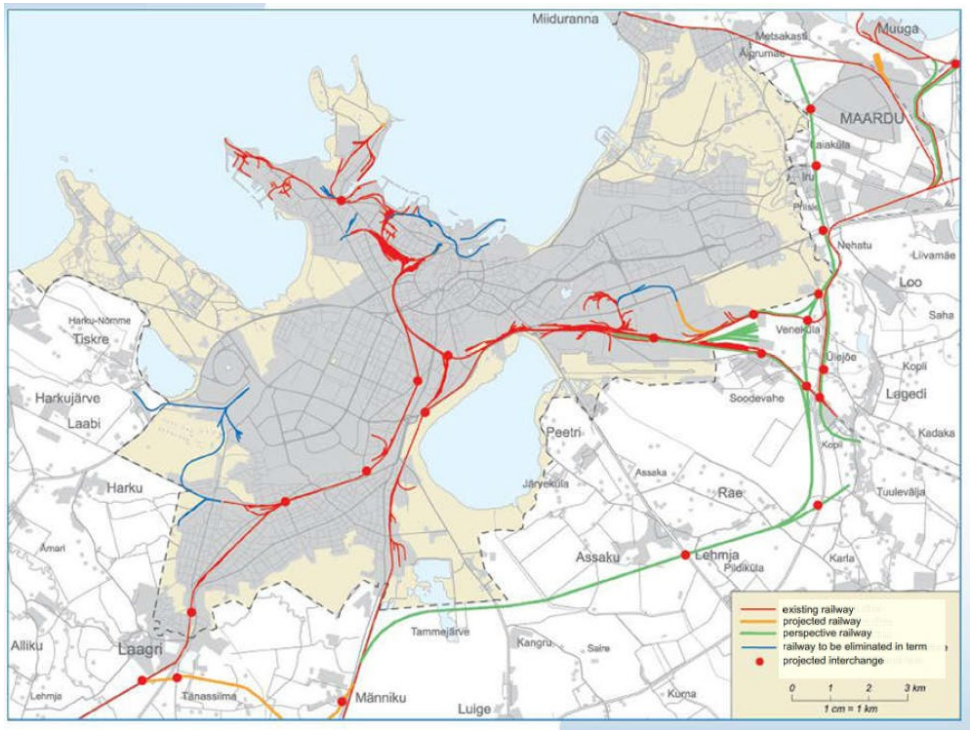
1858 Contract between BPV and Estonian Railways, 18 May 2000 (**C-337**).

1859 Report of Inspection at Kuti 17, 28 August 2000 (**C-399**).

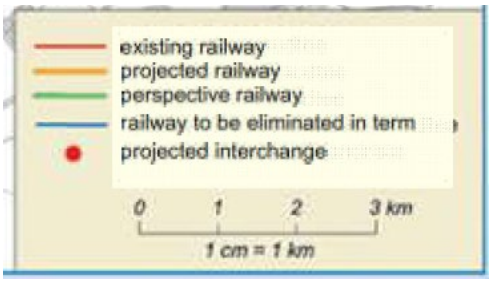
1860 Port Plan (**C-142**).

1861 Tallinn Master Plan, accepted on 11 February 1999, adopted on 11 January 2001, p. 4 (**R-124**).

1862 Tallinn City Master Plan as on display as of 20 July 1999 (original), p. 10 (**R-126**); Plan of the railway network included in the Tallinn City Master Plan (**R-130**).



Enlargements:



1154. Between 2002 and 2004, the Claimant's subsidiaries raised objections to the elimination of the railway link, which were heard by the municipal authorities in various meetings. The Claimant was not successful. The elimination of the railway link remained foreseen in the PRCA General Plan as adopted by Regulation No. 54 of the City Government on 9 December 2004.[1863] The development of any commercial activities would have had to have been conditional upon the site being operated without a railway connection.[1864]

1863 Tallinn City Council, Regulation No. 54, 9 December 2004 (**C-479**).

1864 Explanatory Note to the PRCA General Plan, p. 4 (**R-118**).

1155. Preliminary work for removing the railway started in January 2005.[1865] On 15 January 2005, BPV filed a complaint against the regulation of the city government adopting the Paljassaare and Russalka coastal area general plan.[1866]

1156. On 9 March 2005, the Tallinn Administrative Court issued its judgment in which it dismissed the complaint.[1867] Among other reasons, the court found that the liquidation of the railway link was mandated already by the Tallinn Master Plan.[1868]

1157. The court ruled:

> Based on the aforementioned reasons, the statements about violating the legal certainty with the plan are unreasoned. The court has referenced the Tallinn general plan, which planned the elimination of the railway branch and the scheme confirming that was added to the materials of the matter, as well as creating the industrial park away from the city center. All circumstances have been considered in the plan and found that the concentrating of the industry to the planned area allows avoiding cargo transport through the city center. In addition, the existence of Kalamaja as the oldest urban neighborhood and cultural heritage next to industry is not reasoned, as the architectural heritage on this land area needs maintaining and protection. The complainant, making additional investments to bring the business plans to life, without taking into account the development plan foreseen with the general plan, took to bear the risk arising from it, which does not give a basis to request the changing of the plan.[1869]

1158. The decision of 9 March 2005 ended the prospects of maintaining railway access for the Lennusadam Port.

(III.) The Noblessner Railway Link

1159. The connection of the Noblessner shipyard to the Tallinn Railway Network, as depicted in the Tallinn Master Plan, is illustrated here:[1870]

1865 *See* Tallinn Administrative Court Decision in the complaints of Verest, BPV, Agrin against Harju County governor, 8 February 2005 (**C-507**).

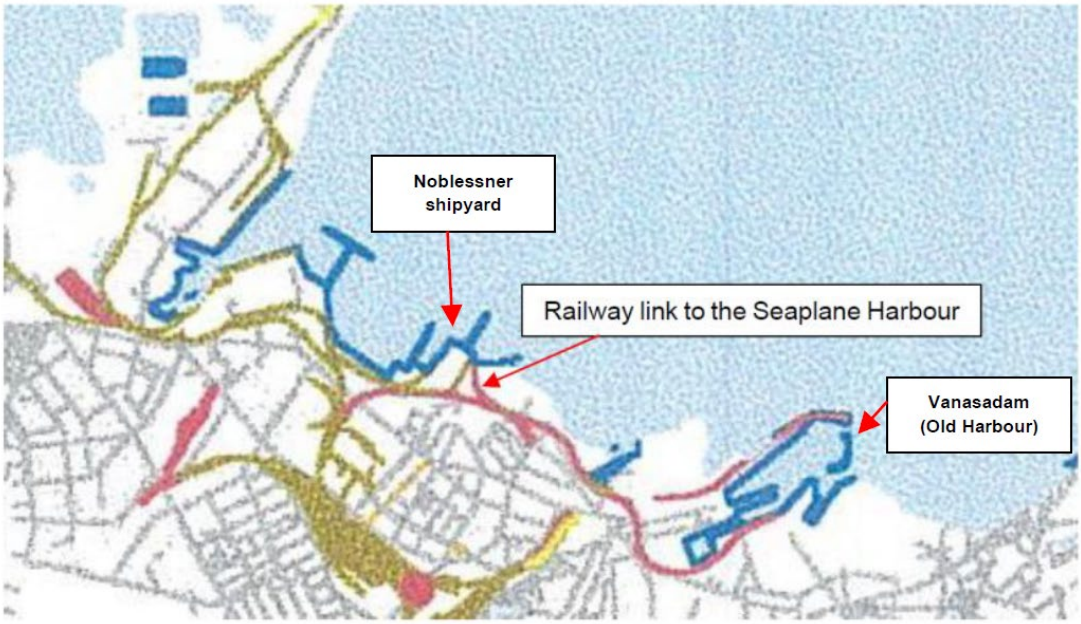
1866 BPV complaint against Regulation No. 54 re. adoption of PRCA General Plan, 15 January 2005, 15 January 2005 (**C-504**).

1867 Administrative court decision in complaints of Verest, Agrin, BPV against Harju County Governor, 9 March 2005 (**C-508**); Reply ¶ 777.

1868 Administrative court decision in complaints of Verest, Agrin, BPV against Harju County Governor, 9 March 2005, pp. 11, 14-15 (**C-508**).

1869 Administrative court decision in complaints of Verest, Agrin, BPV against Harju County Governor, 9 March 2005, p. 16 (**C-508**).

1870 Tallinn Master Plan, accepted on 11 February 1999, adopted on 11 January 2001, p. 2 (**R-124**), annotated by Respondent and shown in Counter-Memorial, ¶ 405, and Rejoinder, ¶ 484.



1160. The Noblessner/Peetri Port never operated as a cargo port. It was used for ship repairs and as a shipyard for small boats, and its operations did not require railway access. Between 1991 and 2001, the shipyard operated as "Tallinna Meretehas" (*Tallinn Ship Factory* in Estonian). The Tallinn Ship Factory went bankrupt in 2001, and the port was bought by the BLRT Group, which continued using it for ship repairs until it was closed.[1871] The ship repair and boatyard activities of the Noblessner/Peetri Port were not inconsistent with the aims of the Tallinn Master Plan as they did not involve heavy traffic or require a railway connection.[1872] The site is no longer used for ship repairs and has since been developed as a residential/recreational area and a yacht harbor.[1873]

1161. Unlike the Lennusadam Port, the Noblessner/Peetri Port did not depend on the Old City Harbor (Vanasadam) branch line. The Noblessner/Peetri Port was connected to the national railway via the western section of the line running from the Balti station, which did not, in principle, conflict with the prospective Kalamaja bypass road.[1874]

1162. The Respondent contends that since the Noblessner/Peetri Port did not require rail access via the Vanasadam branch line for access to the main rail network, nor did its operations require rail cargo services, the Noblessner/Peetri and Lennusadam Ports were not in "like situations" in respect of their respective railway links.[1875]

1163. The Tribunal considers that the Lennusadam and Noblessner/Peetri Ports were not "in like situations" because the Noblessner/Peetri Port did not depend on a railway link that was

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1871 Rejoinder, ¶ 480.

1872 Rejoinder, ¶ 482.

1873 Rejoinder, ¶ 245.

1874 Rejoinder, ¶¶ 484-485.

1875 Rejoinder, ¶¶ 485-486.

designated for elimination by the Tallinn Master Plan. This fact, which forms an obvious basis for the different treatment of the Lennusadam and Noblessner/Peetri railway links, was not rebutted by the Claimant.

1164. Indeed, as upheld by the Tallinn Administrative Court, the removal of the Vanasadam railway branch was a planning decision taken by the City of Tallinn within its discretion and with due regard to the publication and consultation procedures. The right of port operators to request that their interests be taken into consideration did not extend to a right of veto over the City's planning decisions. The Tallinn Administrative Court noted that planning policy decisions were not for the court to make. In the absence of a breach of due process or rules, as opposed to the reaching of an outcome with which the Claimant disagreed, there is no basis for a finding that the treatment of the Claimant's objections was not an objectively justified decision in the implementation of a reasonable government policy.

v. Alleged "Blockade" by Icebreaker Suur Tõll

1165. The Tribunal has found above (*see* Section VI.A.2.c)), that the Claimant has not proved that the berthing of the Icebreaker caused a physical block. The Tribunal has also found to be unsubstantiated the Claimant's allegations that the decision to move the Icebreaker lacked basis in legal right or was improperly motivated or that the berth was unsafe.

1166. While not arbitrary or discriminatory, it could still be the case that the treatment of the Claimant through the relocation of the Icebreaker was less favorable than that of investors "in like situations." The Tribunal observes, first of all, that the Icebreaker could only be berthed in one Port. It has not been suggested that the Icebreaker ought to have been placed in any one of the other Ports. On the contrary, the evidence demonstrates that the Seaplane Harbor was a reasonable choice. The Seaplane Harbor is designated as a cultural heritage site, as the location of the historic Seaplane Hangar. None of the Ports cited by the Claimant bears this feature. These are objective justifications for the Seaplane Harbor not to be considered in "like situations" with any other Port as a prospective location for the Icebreaker. For the reasons detailed above (*see* paragraph 1145 above), the difference in treatment was justified.

vi. The Reservation of Right to Make Exceptions under Paragraph 3 of the Annex to the Treaty

1167. It bears emphasis that the Respondent has not invoked the right to make exceptions under paragraph 3 of the Annex to the US-Estonia BIT, save "in any event" to counter the Claimant's claim that such reservation could be circumvented by way of the MFN clause in Article II(1) of the US-Estonia BIT. In these circumstances, the Tribunal would not be precluded from the reservation to the Annex to the US-Estonia BIT by reason of the time at which the Respondent's submissions were made.

1168. As a matter of law, the Claimant proposes that the provision in paragraph 3 of the Annex is "subject to the Treaty".[1876] The Tribunal does not agree with this argument. Article II(1) states

[1876] 1 October 2021 Submission, ¶ 79.

(emphasis added): "Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, **subject to** the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty." Both the MFN requirement and national treatment requirement are "subject to" the reservations listed in the Annex to the US-Estonia BIT.

1169. As a matter of fact, and for the reasons set out by the Tribunal above, the Claimant has not established that it was "in like situations" with any of the local investors allegedly afforded better treatment in respect of the Peetri/Noblessner, Bekker, Muuga, or Miiduranna Ports. As a result, there was no treatment in relation to which the Respondent needed to rely on the national treatment reservation. The Tribunal finds it unnecessary to engage in further consideration of paragraph 3 of the Annex to the US-Estonia BIT.

1170. In conclusion, the Claimant's claim under Article II(1) of the US-Estonia BIT is dismissed.

VII. COSTS

A. THE COSTS OF THE ARBITRATION

1. The Claimant's Position

1171. The Claimant states that its costs in this arbitration are as follows: [1877]

Item	Amount
Fees for legal representation and assistance	USD 8,076,073.20
Disbursements for legal counsel	USD 112,256.69
Expert fees and expenses	USD 508,304.51
Travel and other expenses of witnesses	USD 1,388.98
Costs advanced to the Registry[1878]	USD 945,360.74
Additional claims	
Ancillary and other costs: extradition expenses	USD 651,649.18
Litigation financing costs	USD 21,393,166.40

1172. The Claimant claims that the extradition expenses were costs of the arbitration because "the criminal allegations were inextricably linked to the issues in the arbitration" and "the extradition claim arose entirely out of the issues that gave rise to this arbitration and were taken against a corporate officer."[1879] According to the Claimant, the costs of the "ancillary proceedings" are

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[1877] Claimant Submission on Costs, ¶ 30; Claimant's Response on Costs, IV. Appendices with summaries.

[1878] These are the totals paid to the Claimant's share of the deposit, in the sum of EUR 850,000, as paid in US dollars at the conversion rates of the dates of payment. *See* Claimant's Response on Costs, ¶ 2.

[1879] Claimant Submission on Costs, ¶ 12.

"natural and consequential damages arising from this arbitration" and thus are properly recoverable in this arbitration.[1880]

1173. Concerning the costs of litigation financing, the Claimant claims that these costs were reasonable costs of the arbitration because "on account of the dire financial condition resulting from Estonia's measures, the only way ELA USA could obtain access to justice was through third-party funding."[1881] The Claimant contends that "the involvement of third-party funding arose due to Estonia's actions, which financially crippled ELA USA."[1882] The Claimant cites precedent in which funding costs were awarded in "situations in which the funded party has faced reprehensible conduct by the respondent."[1883] The Claimant refers, further, to a case in which an award of third-party funding costs was made on the basis of the claimant requiring funding and the reasonableness of the funded amount, with no need for the claimant's financial difficulties to be caused exclusively by the Respondent.[1884]

1174. The Claimant claims a total of USD 10,295,033.20 before financing costs and financing costs of USD 21,393,166.40.[1885]

1175. The Claimant claims interest on all costs awarded to it "at the same applicable interest rate applied for damages."[1886]

1176. The Claimant does not comment on the costs claimed by the Respondent, save for the interest rate sought by the Respondent. The Claimant submits that this rate is "arbitrary," is not substantiated under the Treaty,[1887] and is inconsistent with the interest rate of LIBOR +1% claimed as appropriate by the Respondent in its Rejoinder.[1888]

2. The Respondent's Position

1177. The Respondent affirms that its reasonable costs related to this arbitration are as follows:[1889]

Item	Amount
Fees for legal representation and assistance	EUR 797,782.00
Expert fees and expenses	EUR 432,209.00

1880 Claimant Submission on Costs, ¶ 12.

1881 Claimant Submission on Costs, ¶¶ 20-21.

1882 Claimant Submission on Costs, ¶ 17.

1883 Claimant Submission on Costs, ¶¶ 17, 22 *citing Essar Oil Fields Services Lt v. Norscot Rig Management PVT Ltd,* [2016] EWHC 23611 (Comm), ¶¶ 21, 69 (**CLA-419**).

1884 Claimant Submission on Costs, ¶ 24, *citing Tenke Fungurume Mining S.A. v. Katanga Contracting Services S.A.S.,* [2021] EWHC 3301, ¶¶ 68-71 (**CLA-420**).

1885 Claimant's Response on Costs, IV. Appendices with summaries.

1886 Claimant's Response on Costs, ¶ 4.

1887 Claimant's Response on Costs, ¶ 5.

1888 Claimant's Response on Costs, ¶ 6.

1889 Respondent's Cost Submission, ¶ 2.

Travel and other expenses of witnesses	0.00
Miscellaneous costs	EUR 26,541.00
Arbitration costs advanced to the Registry	EUR 850,000.00
TOTAL	EUR 2,106,532.00

1178. The total costs claimed by the Respondent are EUR 2,106,532.00.[1890]

1179. The Respondent claims interest on legal costs "at a 6-month average EURIBOR + 2%, or at any other rate the Tribunal deems appropriate, per year calculated on a simple basis from the date of the award on costs until the date of full and final payment."[1891]

1180. The Respondent disputes that the extradition expenses claimed by the Claimant were costs of the arbitration for which reimbursement can be requested under the 1976 UNCITRAL Rules because the costs of U.S. court proceedings are best dealt with in that forum under the specific procedural rules applying the principle articulated by the tribunal in *British Caribbean Bank v Belize* that "as a general matter, the costs of a proceeding in a particular forum are most appropriately assessed by that forum."[1892] The Respondent adds that the Claimant's extradition costs are "wholly unsubstantiated with invoices."[1893]

1181. The Respondent claims that the Claimant's costs of legal representation and assistance were not reasonable because (i) the Claimant's figures exceed the average and median costs of submissions for investors;[1894] (ii) there is a "huge disparity" in the hours worked by counsel in the case, being 14,000 hours for the Claimant compared with 3,788 hours for the Respondent's counsel;[1895] (iii) any additional complexity or novelty would affect both parties equally and does not explain the disproportion,[1896] and (iv) the only costs of legal representation that can be deemed reasonable, if any, are those that have been paid.[1897]

1182. The Respondent does not dispute the general reasonableness of the Claimant's costs of expert witnesses, with the exception of "the alleged witness statement by an Estonian attorney Leho Pihkva." The Claimant's costs submission states that "Leho Pihkva, an Estonian Attorney at the Glimstedt law firm, provided Estonian legal advice. He was paid US$ 2,877.89."[1898] The Respondent's objection is that "no such person has been called as an expert by the Claimant in these proceedings."[1899]

1890 Respondent's Cost Submission, ¶¶ 2 and 16(1).

1891 Respondent's Cost Submission, ¶ 16(2).

1892 Respondent's Response on Costs, ¶¶ 20-21, *citing British Caribbean Bank v Belize,* ¶ 326 (**RLA-233**).

1893 Respondent's Response on Costs, ¶ 23.

1894 Respondent's Response on Costs, ¶ 8.

1895 Respondent's Response on Costs, ¶ 9.

1896 Respondent's Response on Costs, ¶ 11.

1897 Respondent's Response on Costs, ¶ 13.

1898 Claimant Submission on Costs, ¶ 45(c).

1899 Respondent's Response on Costs, ¶ 16.

1183. The Respondent states that the Claimant has failed to submit the relevant invoices to substantiate its costs.[1900] The Respondent particularizes this objection by reference to the following invoices of Mr. Paul Keres: (i) Invoice No. 2200007 for EUR 14,907.00 is "nowhere to be found;"[1901] and Invoice No. 1901500 for EUR 9,598.81 submitted in Exhibit C-Costs-2 "relates to the extradition proceedings as per its description."[1902]

1184. The Respondent does not contest the reasonableness of the Claimant's witness costs or its payments to the PCA.[1903]

3. The Tribunal's Analysis

1185. As set out in Articles 38 and 40 of the 1976 UNCITRAL Rules, the Tribunal must first fix the costs of the arbitration before apportioning those costs between the Parties.

1186. Article 38 of the 1976 UNCITRAL Rules reads as follows:

> The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:
>
> (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
>
> (b) The travel and other expenses incurred by the arbitrators;
>
> (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
>
> (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
>
> (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
>
> (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

1187. The Tribunal will address the costs of this arbitration in the order set out in this provision.

1188. The fees of the Tribunal, stated separately as to each arbitrator (as provided by Article 38(a) of the 1976 UNCITRAL Rules), are as follows:

(a)	Judge Tomka	EUR 258,212.50
(b)	Prof. Ruiz Fabri	EUR 197,973.90
(c)	Judge Simma (incl. VAT)	EUR 702,394.24

1900 Respondent's Response on Costs, ¶ 17.

1901 Respondent's Response on Costs, ¶ 17.

1902 Respondent's Response on Costs, ¶ 17.

1903 Respondent's Response on Costs, ¶ 18.

1189. The travel and other expenses of the arbitrators (under Article 38(b) of the 1976 UNCITRAL Rules) amount to EUR 1,914.25.

1190. As regards costs mentioned in Article 38(c) of the 1976 UNCITRAL Rules, the Tribunal required the following assistance:

(a)	PCA fees and expenses	EUR 174,493.61
(b)	Fees and expenses of the Assistants to the Tribunal (incl. VAT)	EUR 367,215.20
(c)	PCA disbursements for the Hearing and other expenses	EUR 43,536.00

1191. The travel and other expenses of the witnesses (that is, of Mr. Rotko and Ms. Kotova) amount to USD 1,388.98 and are approved by the Tribunal under Article 38(d) of the 1976 UNCITRAL Rules.

1192. According to Article 38(e) of the 1976 UNCITRAL Rules, the costs for legal representation and assistance of the successful party form part of the costs of arbitration if the amount of such costs is reasonable. The costs for legal representation and assistance of the unsuccessful party are not part of the costs to be fixed by the Tribunal. The wording of Article 38 of the 1976 UNCITRAL Rules is clear in this regard. The second sentence of this provision clarifies that the list of relevant costs in paragraphs (a) to (f) is exhaustive. Paragraph (e) is limited to the costs of the successful party and none of the other paragraphs covers the costs for legal representation and assistance of the unsuccessful party. Jurisprudence on file confirms this account.[1904] The Respondent is the successful party in this arbitration, given that the Tribunal determined that the Respondent did not breach the US-Estonia BIT. While the Claimant has in parts prevailed on jurisdiction, the Tribunal has rejected all claims of the Claimant on the merits.

1193. The Tribunal must next assess whether the amount of costs for legal representation and assistance claimed by the Respondent under Article 38(e) of the 1976 UNCITRAL Rules is reasonable. Considering the procedural and substantive complexities of this arbitration, the Tribunal finds that the amount claimed by the Respondent—that, is EUR 1,256,532.00[1905]—is reasonable. By way of comparison, the Claimant claims USD 8,076,073.20 million in costs for legal representation (without the costs for extradition expenses, disbursements for legal counsel, and expert fees and disbursements).[1906] USD 2,796,379.46 (that is, roughly 35%) of this amount have been paid and the rest (that is, USD 5,279,693.74) is owed to Claimant's counsel, Appleton & Associates LP and Reed Smith LLP. [1907] The Claimant states that an additional amount of more

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1904 E.g. *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*, Final Award, 23 December 2019, ¶ 584 (**CLA-410**); *Maya Dangelas (Dang Thi Hoang Yen), U.S. Global Institute, Inc. and Angels Company, Inc. v. The Socialist Republic of Vietnam*, Corrected Partial Award on Costs – Jurisdiction, 9 March 2022, ¶¶ 22, 35 (**RLA-230**).

1905 This sum is composed of EUR 797,782.00 in fees for legal representation and assistance, EUR 432,209.00 in expert fees and expenses, and EUR 26,541.00 in miscellaneous costs such as research and printing expenses, Respondent's Cost Submission, ¶ 2.

1906 *See supra* ¶ 1171.

1907 Claimant Submission on Costs, ¶ 30.

than USD 21 million is contractually due to the Funder. [1908] As the Claimant is the unsuccessful Party, these sums are not part of the costs of arbitration under Article 38 of the 1976 UNCITRAL Cost. But the size of these amounts underlines the complexity of the matter and the reasonableness of the costs claimed by the Respondent under Article 38(e) of the 1976 UNCITRAL Rules.

1194. In accordance with Article 38 of the 1976 UNCITRAL Rules, the Tribunal fixes the costs of the arbitration as follows:

Item	**Amount**
(a) The fees of the arbitral tribunal, stated separately as to each arbitrator:	
• Judge Tomka	EUR 258,212.50
• Prof. Ruiz Fabri	EUR 197,973.90
• Judge Simma (incl. VAT)	EUR 702,394.24
(b) The travel and other expenses incurred by the arbitrators;	EUR 1,914.25
(c) The costs of expert advice and of other assistance required by the arbitral tribunal:	
• PCA fees and expenses	EUR 174,493.61
• Fees and expenses of the Assistants to the Tribunal (incl. VAT)	EUR 367,215.20
• PCA disbursements for the Hearing and other expenses (incl. court reporting, interpretation, IT/AV, printing and supplies, bank costs, courier expenses, etc.)	EUR 43,536.00
(d) The travel and other expenses of witnesses	USD 1,388.98
(e) The successful Party's (that is, the Respondent's) costs for legal representation and assistance[1909]	EUR 1,256,532.00
TOTAL	EUR 3,002,271.70 and USD 1,388.98

1195. In accordance with Article 41 of the 1976 UNCITRAL Rules, a tribunal may request the parties to make deposits as advances for the Tribunal's fees and expenses. In these proceedings, the Parties deposited a total amount of EUR 1,770,000.00, each Party having deposited EUR 885,000.

1196. Based on the above figures, the costs comprising the items covered in Article 38(a) to (c) of the 1976 UNCITRAL Rules, total EUR 1,745,739.70. After payment of these costs from the deposit, an unexpended balance of EUR 24,260.30 remains. In accordance with Article 41(5) of the 1976 UNCITRAL Rules, the PCA shall return EUR 12,130.15 to each Party.

B. APPORTIONMENT OF THE COSTS OF THE ARBITRATION

1. The Claimant's Position

1197. The Claimant contends that it should be awarded costs (1) under the presumption of loser pays if it is successful and also (2) on the basis of Tribunal discretion to apportion costs in any event.[1910] The Claimant asserts that it should not bear Estonia's arbitration or representation costs,[1911] and

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1908 Claimant Submission on Costs, ¶ 30. The exact amount is USD 21,393,166.40.

1909 Excludes PCA deposit.

1910 Claimant Submission on Costs, ¶ 41.

1911 Claimant Submission on Costs, ¶ 41; Claimant's Response on Costs, ¶ 15.

should "in any event" be awarded costs for "those specific instances in which Estonia's conduct and argumentation caused Claimant to incur unwarranted and voidable additional costs."[1912]

1198. The Claimant states that if it is unsuccessful in this arbitration, the Claimant should not bear Estonia's arbitration or representation costs.[1913]

1199. The Claimant states that several claims were novel and raised issues of first impression;[1914] and its claims were made reasonably and in good faith.[1915] There was no unreasonable or wasteful conduct on Claimant's part, whereas Estonia's conduct of the proceedings caused delay and additional work.[1916] The Claimant also refers to the particular egregiousness of the Respondent's conduct as alleged, in the form of abuse of human rights, reliance on coerced evidence, arbitrary detention and extortion, unjust extradition and retaliation.[1917] The Claimant further refers to certain especially egregious aspects of the Respondent's allegedly unlawful treatment of the Claimant's investment, namely, systemic disinformation, discriminatory practices, stealing property rights of the investments, conspiring to hide information, and a campaign to "demean and disparage" the Claimant.[1918]

2. The Respondent's Position

1200. The Respondent submits that the Claimant should bear the costs of legal representation "regardless of the outcome of the case."[1919] According to the Respondent, "the fact that issues are complex and novel, etc. affects the parties similarly."[1920] The Claimant's arguments on the Respondent's alleged human rights abuses and unlawful conduct reflect the merits of the case and should be disregarded.[1921] The behavior of the parties in conducting the case should be taken into account, and it was the Claimant's actions that added to the costs in "making unsolicited requests and submissions"[1922] and causing delays.[1923]

3. The Tribunal's Analysis

1201. Article 40 of the 1976 UNCITRAL Rules provides:

1912 Claimant Submission on Costs, ¶ 41.

1913 Claimant's Response on Costs, ¶ 15.

1914 Claimant Submission on Costs, ¶¶ 34, 42-43.

1915 Claimant Submission on Costs, ¶ 35.

1916 Claimant Submission on Costs, ¶ 35.

1917 Claimant Submission on Costs, ¶¶ 36-38.

1918 Claimant Submission on Costs, ¶¶ 39-40.

1919 Respondent Submission on Costs ¶ 14; Respondent Response Cost Submission, ¶ 28.

1920 Respondent Response Cost Submission, ¶ 11.

1921 Respondent Response Submission on Costs, ¶ 27.

1922 Respondent Response Cost Submission, ¶ 29.

1923 Respondent Response Cost Submission, ¶ 30.

> 1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
>
> 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

1202. The costs of arbitration (save for legal representation and assistance) "shall in principle be borne by the unsuccessful party". There is no presumption in respect of the costs of legal representation and assistance.

1203. The in-principle presumption stated in Article 40(1) does not mean automatic recovery by the successful party, as the Respondent has emphasized.[1924] The Tribunal, in any event, has discretion to apportion the costs of arbitration between the Parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

1204. In the circumstances of the present case, the Tribunal considers that it is reasonable to order that each Party bear in equal shares the fees and expenses of the Tribunal and the other costs referenced in Article 40(1) of the 1976 UNCITRAL Rules and that each Party shall bear its own expenses incurred in connection with the proceedings. The circumstances that the Tribunal considers relevant are as follows.

1205. It is clear that the Claimant genuinely perceived that it had been treated unfairly and, prior to its arbitration claim, pursued redress for such treatment at the material times through appropriate avenues, including before the Estonian courts and the European Court of Human Rights. It took significant financial commitments over a period spanning more than a decade for the Claimant to pursue those avenues and secure the means to bring the present claim. The Tribunal accordingly finds that the Claimant acted in good faith in bringing its claims in this arbitration.

1206. Relatedly, the Tribunal finds that the present case was not frivolous or vexatious, but rather, it presented serious and complex issues. The Claimant has emerged as the "unsuccessful party" only after the hearing of extensive evidence and submissions and the Tribunal's close examination of complex and novel issues. The Respondent has not contested the novelty or complexity of the issues involved in this case but rather acknowledges "[t]he fact that issues are complex and novel, etc." while stating that such complexities "affect the parties similarly."[1925]

1207. As to the conduct of the proceedings, the Tribunal notes that the Parties, and the counsel and others assisting them, behaved with all of the appropriate professionalism, seriousness, and efficiency. The Tribunal does not find the manner in which the case was conducted to warrant that either Party bears more than its own costs.

1208. The Claimant has pointed to the particular egregiousness of the allegedly unlawful conduct. The Tribunal has not upheld any of the claims for alleged breaches of the US-Estonia BIT. Since the

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[1924] Respondent's Response on Costs, ¶ 12, *citing Naftogaz and others v. Russia*, PCA Case No. 2017-16, Final Award, 12 April 2023 (**RLA-232**).

[1925] Respondent's Response Submission on Costs, ¶ 11.

apportionment of costs would not be an appropriate avenue for the Tribunal to revisit its decision on the merits of the claim, and in the absence of a finding of liability, it is not appropriate to apportion costs in favor of the Claimant on this basis.

1209. For the sake of completeness, each Party having sought an award of costs "in any event," the Tribunal notes the Claimant's contention that even if unsuccessful, it should be allocated an award of costs against the Respondent. In the Tribunal's view, the circumstances do not warrant an adverse order of costs against the Respondent.

1210. In light of the above circumstances, the Tribunal concludes that the Parties should bear in equal shares the fees and expenses of the Tribunal and the PCA and other costs (Article 38(a) to (c) of the 1976 UNCITRAL Rules), and that each Party shall bear its own expenses incurred in connection with the proceedings (Article 38(d) and (e) of the 1976 UNCITRAL Rules). Having so decided, the Tribunal does not need to make an award of interest.

VIII. DISPOSITIF

1211. For the reasons set out above, the Tribunal **DECIDES** as follows:

(a) The Tribunal rejects the Respondent's jurisdictional objections and sees no reason to refrain from exercising its jurisdiction in the present case.

(b) The Tribunal decides that the Claimant's pleaded claims are admissible and may be decided by the Tribunal in this arbitration on their factual and legal merits under the Treaty.

(c) The Tribunal rejects the Claimant's claims that the Respondent has acted in a manner inconsistent with its obligations under Articles II and III of the Treaty.

(d) The Claimant's claims are accordingly dismissed in their entirety.

(e) The Tribunal fixes the costs of the arbitration at EUR 3,002,271.70 and USD 1,388.98.

(f) The Parties shall bear in equal shares the fees and expenses of the Tribunal, as well as the costs of assistance required by the Tribunal and other expenses (incl. court reporting, interpretation, IT/AV, printing and supplies, bank costs, courier expenses, etc.).

(g) Each Party shall bear its own costs for legal representation and assistance.

(h) Any claim, request or defense of either Party that has not been expressly accepted in this Section VIII is hereby dismissed.

(*Signature page follows*)

Place of Arbitration: Geneva, Switzerland

Date: 21 February 2025

Prof. Hélène Ruiz Fabri
Arbitrator

Judge Peter Tomka
Arbitrator

Judge Bruno Simma
Presiding Arbitrator