

**IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN  
ACCORDANCE WITH THE TREATY BETWEEN THE FEDERAL REPUBLIC OF  
GERMANY AND THE PEOPLE'S REPUBLIC OF BULGARIA CONCERNING THE  
RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENTS, SIGNED 12  
APRIL 1986, ENTERED INTO FORCE 10 MARCH 1988**

**-and-**

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW, 2010**

**-between-**

**ST-AD GmbH (GERMANY)**

**(the "Claimant")**

**-and-**

**THE REPUBLIC OF BULGARIA**

**(the "Respondent," and, together with the Claimant, the "Parties")**

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**AWARD ON JURISDICTION**

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**Arbitral Tribunal**

Prof. Brigitte Stern (Presiding Arbitrator)  
Mr. Bohuslav Klein  
Mr. J. Christopher Thomas, Q.C.

**Registry**

The Permanent Court of Arbitration

18 July 2013

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**LIST OF DEFINED TERMS**

<b>Term(s)</b>	<b>Definition</b>
<b>2001 Contracts</b>	The two agreements entered into by LIDI-R and JMB in December 2001 relating to the payment of back rent by LIDI-R to JMB for the period of time during which LIDI-R allegedly occupied the Property illegally
<b>Annex 1 Requests</b>	The Respondent's Document Production Requests (Annex 1), submitted on 20 April 2012
<b>Annex 2 Requests</b>	The Claimant's Document Production Requests (Annex 2), submitted on 30 October 2012
<b>Annex 2.1 Requests</b>	The Claimant's outstanding Document Production Requests (Annex 2.1), submitted on 20 December 2012
<i>Austrian Airlines</i>	<i>Austrian Airlines v. Slovak Republic</i> , UNCITRAL, Final Award, 9 October 2009 [RLA-002]
<i>Berschader</i>	<i>Vladimir Berschader and Moïse Berschader v. Russian Federation</i> , SCC Case No. 080/2004, Award, 21 April 2006 [RLA-022]
<b>BIT or Germany-Bulgaria BIT</b>	Treaty between the Federal Republic of Germany and the People's Republic of Bulgaria concerning the Reciprocal Encouragement and Protection of Investments [Exhibit R-006]
<b>Bulgaria</b>	The Respondent
<b>Certificate</b>	Certificate issued by the Slatina Municipal Administration, 26 January 1993 [Exhibit C-33]
<b>Claimant</b>	ST-AD GmbH, a company incorporated in Germany, with its registered office located at Oppenheimstraße 2, Eisenach, Thüringen 99817, Germany
<b>Claimant's Submission on Article 4(5) of the BIT</b>	The Claimant's Submission on Article 4(5) of the BIT, dated 5 April 2013

<b>Term(s)</b>	<b>Definition</b>
<i>CMS</i>	<i>CMS v. Republic of Argentina</i> , ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003
<b>Counter-Memorial</b>	The Claimant's Counter-Memorial on Jurisdiction, dated 29 October 2012
<i>Daimler</i>	<i>Daimler Financial Services AG v. Argentine Republic</i> , ICSID Case No. ARB/05/1, Award, 22 August 2012 [RLA-042]
<b>Decision 1153</b>	Decision No. 1153, Case No. 1012-1998, Supreme Cassation Court, 16 June 2000 [Exhibit R-038]
<b>Decision 158</b>	Decision 158, Case No. 160-2006, Supreme Cassation Court, 22 May 2006 [Exhibit R-064]
<b>Decision 1515</b>	Decision No. 66, Case No. 1515-2010, Supreme Cassation Court, 7 March 2011 [Exhibit R-093]
<b>Decision 1730</b>	Decision No. 1730, Case No. 712-1997, Supreme Cassation Court, 12 September 1997 [Exhibit R-026]
<i>Desert Line</i>	<i>Desert Line Projects LLC v. Yemen</i> , ICSID Case No. ARB/05/17, Award, 6 February 2008 [RLA-028]
<b>ECHR</b>	European Court of Human Rights
<b>EU</b>	European Union
<b>Eurotour-B</b>	Predecessor company to JMB-1 AD
<i>Gas Natural</i>	<i>Gas Natural SDG, S.A. v. The Argentine Republic</i> , ICSID Case No. ARB/023/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005 [RLA-044]
<i>GAMI</i>	<i>GAMI Investments, Inc. v. Mexico</i> , UNCITRAL, Final Award, 15 November 2004 [RLA-009]
<b>Hearing on Jurisdiction</b>	Hearing on Jurisdiction, held at the Peace Palace in The Hague, the Netherlands, from 18 to 19 March 2013

<b>Term(s)</b>	<b>Definition</b>
<i>Hochtief</i>	<i>Hochtief AG v. The Argentine Republic</i> , ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011 [RLA-045]
<b>ICJ</b>	International Court of Justice
<i>ICS</i>	<i>ICS Inspection and Control Services Ltd. v. Argentine Republic</i> , UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012 [RLA-046]
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<i>Impregilo</i>	<i>Impregilo S.p.A. v. Argentine Republic</i> , ICSID Case No. ARB/07/17, Award, 21 June 2011
<b>Information Memorandum</b>	Information Memorandum for privatisation and auction of LIDI-R, dated May 2004 [Exhibit R-049]
<b>Information Note</b>	Information Note issued by the Slatina Municipal Administration, 12 October 1992 [Exhibit C-34]
<b>JMB</b>	JMB-1 AD (formerly known as Eurotour-B), a private company, which holds title to the Property
<i>Lanco</i>	<i>Lanco International Inc. v. Republic of Argentina</i> , ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal, 8 December 1998
<b>Legal Analysis</b>	Legal Analysis of Ownership of LIDI-R, prepared by the Bulgarian Privatisation Agency in May 2004 for the purpose of LIDI-R's privatisation [Exhibit R-051]
<b>LIDI-R</b>	<p>LIDI-R is a previously State-owned company which was privatised and sold to a Bulgarian national, Mr. Plamen Balev, in July 2004; LIDI-R presently owns the remaining 63 m<sup>2</sup> of Site I and the whole of Site II</p> <p>LIDI-R was previously called SF LIDI-R (1991 to June 1993), LIDI-R EOOD (June 1993 to 15 February 1996), LIDI-R EAD (16 February 1996 to 25 May 2006) and LIDI-R AD (25 May 2006 to the present)</p>

<b>Term(s)</b>	<b>Definition</b>
<i>Maffezini</i>	<i>Emilio Agustín Maffezini v. Kingdom of Spain</i> , ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000 [RLA-043]
<b>May 2008 Letter</b>	Letter from Prof. Verny to the Bulgarian Minister of Economy and Energy dated 15 May 2008
<i>M.C.I.</i>	<i>M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador</i> , ICSID Case ARB/03/6, Award, 31 July 2007
<b>Memorial</b>	The Respondent's Memorial on Objections to Jurisdiction, dated 20 April 2012
<b>Memorial on the Merits</b>	The Claimant's Memorial on the Merits, dated 28 November 2011
<i>Mobil</i>	<i>Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010
<b>Objections</b>	The Respondent's objections to all of Claimant's Document Production Requests (Annex 2), dated 14 November 2012
<b>Open Letter</b>	The Claimant's letter to the President of Bulgaria, several ministerial-level officials and the German embassy in Bulgaria of 30 May 2006 [Exhibit C-11]
<b>Parties</b>	The Claimant and the Respondent
<b>PCA</b>	Permanent Court of Arbitration
<i>Phoenix</i>	<i>Phoenix Action Limited v. Czech Republic</i> , ICSID Case No. Arb/06/5, Award, 15 April 2009 [RLA-014]
<i>Plama</i>	<i>Plama Consortium Ltd. v. Republic of Bulgaria</i> , ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 [RLA-049]

<b>Term(s)</b>	<b>Definition</b>
<b><i>Plama Award</i></b>	<i>Plama Consortium Limited v. Republic of Bulgaria</i> , ICSID Case No. ARB/03/24, Award, 27 August 2008
<b>PO No. 1</b>	Procedural Order No. 1, issued on 8 September 2011
<b>PO No. 2</b>	Procedural Order No. 2, issued on 9 January 2013
<b>Privatisation Valuation</b>	Privatisation Valuation for LIDI-R, prepared by the Bulgarian Privatisation Agency in May 2004 for the purpose of LIDI-R's privatisation [Exhibit R-050]
<b>Procedural Rules</b>	Procedural Rules, issued on 1 September 2011
<b>Property</b>	15,600 m <sup>2</sup> (99.6%) of the land and factory and commercial buildings on a tract of land located in Sofia, Bulgaria (Site I); the Parties' dispute is centered on title to the Property
<b>Rejoinder</b>	The Claimant's Rejoinder on Jurisdiction, dated 18 February 2013
<b><i>Renta 4</i></b>	<i>Renta 4 S.V.S.A. et al. v. Russian Federation</i> , SCC Case No. Arb. V. 024/2007, Award on Preliminary Objections, 20 March 2009 [RLA-015]
<b>Reply</b>	The Respondent's Reply on Objections to Jurisdiction, dated 18 January 2013
<b>Request for Arbitration</b>	The Claimant's Request for Arbitration, dated 17 September 2010
<b>Respondent</b>	Republic of Bulgaria
<b>Respondent's Submission on Article 4(5) of the BIT</b>	The Respondent's Submission on Article 4(5) of the BIT, dated 5 April 2013
<b>Response</b>	The Claimant's Response to Respondent's Objections to the Claimant's Document Production Requests (Annex 2), dated 10 December 2012

<b>Term(s)</b>	<b>Definition</b>
<b>Restitution</b>	The 25 February 1992 restitution of the Property to the heirs of its pre-nationalisation owners, the Semerdzhiev family, by virtue of Bulgaria's Restitution Act
<b><i>RosInvestCo</i></b>	<i>RosInvestCo UK Ltd. v. Russian Federation</i> , SCC Case No. Arb. V 079/2005, Award on Jurisdiction, October 2007 [RLA-016]
<b><i>RosInvestCo</i> Award</b>	<i>RosInvestCo UK Ltd. v. Russian Federation</i> , SCC Case No. Arb. V 079/2005, Final Award, 12 September 2010 [RLA-025]
<b><i>Saluka</i></b>	<i>Saluka Investments BV (The Netherlands) v. The Czech Republic</i> , UNCITRAL, Partial Award, 17 March 2006
<b><i>Siemens</i></b>	<i>Siemens AG v. The Argentine Republic</i> , ICSID Case No. ARB/02/08, Decision on Jurisdiction, 3 August 2004 [RLA-050]
<b>Site I</b>	A tract of land situated in Sofia, Bulgaria; the Property at issue in this arbitration consists of 15,600 m <sup>2</sup> (99.6%) of Site I; the remaining 63 m <sup>2</sup> (0.4%) of Site I is owned by LIDI-R and is not at issue in this arbitration
<b>Site II</b>	11,876 m <sup>2</sup> of land in Sofia, Bulgaria, and the improvements and buildings located on it, adjacent to Site I; Site II as such is not at issue in this arbitration; some claims have however been raised in relation to Site II
<b><i>Société Générale</i></b>	<i>Société Générale v. Dominican Republic</i> , UNCITRAL, LCIA Case No. UN7927, Preliminary Objections to Jurisdiction, 19 September 2008 [RLA-018]
<b>ST-AD</b>	The Claimant
<b><i>Telenor</i></b>	<i>Telenor Mobile Communications A.S. v. Republic of Hungary</i> , ICSID Case No. ARB/04/15, Award, 13 September 2006

<b>Term(s)</b>	<b>Definition</b>
<i>Tza Yap Shum</i>	<i>Mr. Tza Yap Shum v. Republic of Peru</i> , ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence of the Arbitration Tribunal, 19 June 2009 [RLA-020]
<b>Terms of Reference</b>	Terms of Reference, issued on 1 September 2011
<b>UNCITRAL Rules</b>	Arbitration Rules of the United Nations Commission on International Trade Law, 2010
<i>Wintershall</i>	<i>Wintershall Aktiengesellschaft v. Argentine Republic</i> , ICSID Case No. ARB/04/14, Award, 8 December 2008 [RLA-055]

## I. INTRODUCTION

### A. PARTIES

1. The Claimant in this arbitration is ST-AD GmbH, a company incorporated in Germany, with its registered office located at Oppenheimstraße 2, Eisenach, Thüringen 99817, Germany (“**ST-AD**” or the “**Claimant**”). The Claimant is represented by Prof. Dr. univ. Arsène Verny, M.E.S., Goethestraße 17, Dresden 01109, Germany, and Mr. Svetlin Dimitrov Stoynev, 11 Gen. Totleben Boulevard, 3<sup>rd</sup> Floor, 11<sup>th</sup> Apartment, Sofia 1606, Bulgaria.
2. The Respondent is the Republic of Bulgaria (“**Bulgaria**” or the “**Respondent**”). The Respondent is represented by Mr. Stanimir Alexandrov, Mr. James Mendenhall, Ms. Jennifer Haworth McCandless and Ms. Kerry K. Lee of Sidley Austin LLP, 1501 K Street, N.W., Washington, District of Columbia 20005, United States of America, Mr. Lazar Tomov of Tomov & Tomov, 4 Svetoslav Terter Street, 1<sup>st</sup> Floor, Sofia 1124, Bulgaria, and Mr. Ivan Kondov from Bulgaria’s Ministry of Finance, 102 Rakovski Street, Sofia 1040, Bulgaria.

### B. BACKGROUND OF THE DISPUTE

3. A dispute has arisen between ST-AD and Bulgaria, in respect of which ST-AD initiated arbitration proceedings pursuant to Article 4(3) of the Treaty between the Federal Republic of Germany and the People’s Republic of Bulgaria concerning the Reciprocal Encouragement and Protection of Investments<sup>1</sup> (the “**BIT**” or “**Germany-Bulgaria BIT**”). The subject matter of this dispute concerns an alleged expropriation of 15,600 m<sup>2</sup>, or 99.6%, of the land and factory and commercial buildings on a tract of land located in Sofia, Bulgaria (the “**Property**”).<sup>2</sup>

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<sup>1</sup> Treaty between the Federal Republic of Germany and the People’s Republic of Bulgaria concerning the Reciprocal Encouragement and Protection of Investments, signed 12 April 1986; date of entry into force 10 March 1988.

<sup>2</sup> The Respondent notes in its Memorial on Objections to Jurisdiction, dated 20 April 2012 (“**Memorial**”) ¶ 10, fn. 2 that the Claimant describes the Property, in its Memorial on the Merits, dated 28 November 2011 (“**Memorial on the Merits**”) at 2 as “99.6 percent of the parcel with a total area of 15,663 m<sup>2</sup>, plot IV-325 in ward 170 according to the City of Sofia’s land-use plan, Geo Milev residential neighbourhood – Studenski grad IV<sup>th</sup> km, Sofia, together with the factory building erected on it on a developed area of 2,452 m<sup>2</sup> and the commercial buildings with the numbers 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19 built on it as indicated on the sketch of expert engineers Dimitar Kebedshiev and Elena Karadshova-Stolarova dated 09 May 2000.” Note: footnotes referring to the Respondent’s submissions refer to paragraph numbers only; footnotes referring to the Claimant’s submissions refer to paragraph numbers to the extent possible, as well as page numbers when a paragraph extends over several pages, or page numbers only when the paragraphs of the submission are not numbered.

## II. PROCEDURAL HISTORY

4. On 17 September 2010, the Claimant filed a Request for Arbitration against the Respondent (the “**Request for Arbitration**”) pursuant to Article 4(3) of the BIT and Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law, 2010 (the “**UNCITRAL Rules**”).
5. On 21 October 2010, the Claimant appointed Mr. Bohuslav Klein, a national of the Czech Republic, as first arbitrator.
6. On 7 January 2011, the Claimant wrote to the Permanent Court of Arbitration (the “**PCA**”), requesting that the Secretary-General of the PCA act as appointing authority for the appointment of the second arbitrator.
7. On 8 February 2011, the Respondent appointed Mr. J. Christopher Thomas, Q.C., a national of Canada, as second arbitrator. Therefore, the Claimant withdrew its request for an intervention of the PCA on 21 January 2011.
8. In April 2011, the co-arbitrators, with the agreement of the Claimant and the Respondent (the “**Parties**”), appointed Prof. Brigitte Stern, a national of France, as Presiding Arbitrator.
9. On 11 May 2011, the Tribunal held a preliminary procedural meeting, during which the Parties undertook to provide the Tribunal with an agreed draft of the Procedural Rules and Terms of Reference by mid-June.
10. On 17 May 2011, with the agreement of the Parties, the Presiding Arbitrator chose the PCA to act as Registry.
11. On 19 May 2011, the Respondent sent the Claimant its revisions to the draft Procedural Rules and Terms of Reference. The Claimant responded on 31 May 2011 with minor revisions to the proposed Preliminary Schedule for the proceedings provided for in the draft Procedural Rules. The Parties convened a telephone conference to discuss the Claimant’s comments on 1 June 2011, following which the Respondent integrated the agreed changes and reverted with the revised documents on 7 June 2011.
12. On 15 June 2011, following an enquiry from the Respondent as to why it had not yet heard back from the Claimant, the Claimant’s counsel, Prof. Verny, responded by e-mail that he was awaiting comments from his client. On the same day, the Tribunal wrote to the Parties reminding them of their commitment to provide the draft Procedural Rules and Terms of Reference to the Tribunal by mid-June.

13. On 19 June 2011, Prof. Verny informed the Tribunal that his discussions with his client were “still in progress” and that he would notify the Tribunal of “the *status quo* during the next week” (by 24 June 2011).
14. On 29 June 2011, the Respondent sent another e-mail to Prof. Verny requesting confirmation of his acceptance of the draft Procedural Rules and Terms of Reference. The Respondent indicated that if Prof. Verny did not respond by the end of the week, it would submit the draft documents to the Tribunal and state that they reflected what the Respondent understood to be the Claimant’s preliminary agreement. Having not heard back from Prof. Verny by the specified date, the Respondent submitted the draft Procedural Rules and Terms of Reference to the Tribunal, copying the Claimant, on 5 July 2011.
15. Prof. Verny did not communicate with either the Tribunal or the Respondent until 13 July 2011, at which time his assistant informed the Tribunal that he was on an extended vacation and, consequently, would not be able to respond until 3 August 2011.
16. By letter dated 18 July 2011, the Respondent requested that the Tribunal dismiss the case and award the Respondent its costs and fees. In support of its request, the Respondent referred to Prof. Verny’s repeated delays in responding to the draft Procedural Order and Terms of Reference, asserting that his “attitude and conduct raise serious doubts as to whether Claimant seriously intends to pursue this arbitration.” The Respondent argued that “the Tribunal’s and Respondent’s repeated efforts to move the process forward have been met with silence, delay, and unmet promises on the part of Claimant’s counsel to finalize the procedures governing this arbitration.” The Respondent went on to provide a summary of the various discussions among the Parties and the Tribunal to date.
17. On 24 July 2011, the Tribunal granted the Claimant its request for an extension of the deadline for the submission of its Memorial on the Merits until 8 August 2011.
18. On 2 August 2011, the Respondent wrote to the Tribunal, informing it that on or around 22 June 2011, Mr. Christian Burczyk, a representative of the Claimant, had sent a letter to several high level Bulgarian officials demanding information and document production.<sup>3</sup> The Respondent objected to said letter, and requested “an order from the Tribunal that any future requests be submitted only in accordance with the procedures set forth in the [UNCITRAL Rules] and the draft Procedural Rules which Respondent submitted to the Tribunal on 5 July 2012.”
19. By letter dated 11 August 2011, the Claimant transmitted its agreement to the draft Terms of Reference, but not to the draft Procedural Rules, objecting to its Section 3 concerning the

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<sup>3</sup> The letter submitted by the Claimant is undated, but was received by Bulgaria’s Supreme Cassation Prosecution Office on 22 June 2011.

Preliminary Schedule. The Claimant asked the Tribunal to provide the Parties “with an appropriate alternative proposal.” The Claimant also addressed the Respondent’s letters dated 18 July and 2 August 2011. The Claimant provided further explanation for its delays in responding to the correspondence of the Tribunal and the Respondent and specified that the motivation behind its request to the Bulgarian officials for information and documents was to facilitate its domestic proceedings.<sup>4</sup>

20. By e-mail dated 29 August 2011, the Tribunal invited the Parties to comment on its revised version of the draft Terms of Reference and Procedural Rules, including a modified Preliminary Schedule, and suggested that a telephone conference between the Tribunal and the Parties be held on 1 September 2011.
21. On 1 September 2011, following the telephone conference and subsequent e-mail exchanges between the Parties and the Tribunal, the Parties finalised the Procedural Rules (the “**Procedural Rules**”) and Terms of Reference (the “**Terms of Reference**”).
22. Article 6 of the Terms of Reference describes the applicable procedural rules as follows:
  - (a) The proceedings shall be conducted in accordance with the UNCITRAL Rules.
  - (b) For issues not dealt with [in the UNCITRAL Rules,] the Tribunal shall apply the rules that the Parties have agreed upon. In the absence of such agreement, it shall apply the rules it deems appropriate.
  - (c) The Tribunal is empowered to issue Procedural Orders, after hearing the Parties’ opinion, on specific procedural issues if and when needed. These Procedural Orders may be signed solely by the Presiding Arbitrator after consultation with [her] co-arbitrators.
  - (d) The Parties agree that the IBA Rules on the taking of evidence shall serve as guidance in the conduct of the arbitration.
23. In the Terms of Reference, the Parties confirmed that the PCA was to act as Registry, and selected English as the language of the arbitration and The Hague as the place of arbitration. Section 13 of the document provides that “[t]he governing law is the Treaty and applicable rules

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<sup>4</sup> More specifically, the Claimant explained that it had sought “to put the company LIDI-R in a position to make progress in their various intrastate civil and penal legal proceedings.” LIDI-R EAD, as it was known before the Claimant finalised its acquisition of shares in the company in May 2006, and LIDI-AD, as it was named after the Claimant’s shares acquisition, will hereinafter be referred to as “**LIDI-R**”, except when describing its former names in the factual background below. LIDI-R is a previously State-owned company which was privatised and sold to a Bulgarian national, Mr. Plamen Balev, in July 2004. LIDI-R owns 0.4% of Site I (and claims for the other 99.6% of 15,663 m<sup>2</sup>) and the whole of Site II. The Claimant subsequently acquired shares in LIDI-R either in May 2006, according to the Respondent, or by way of a preliminary agreement on 4 May 2005, according to the Claimant.

and principles of international law.” The Parties also affirmed that the Tribunal had been validly appointed in accordance with the BIT and the UNCITRAL Rules, and that they had no objection to the appointment of any Member of the Tribunal on grounds of conflict of interest and/or lack of independence on the basis of matters known to them at the date of signature of the Terms of Reference. The Members of the Tribunal confirmed that they were, and would remain, impartial and independent of the Parties.

24. On 8 September 2011, the Tribunal issued Procedural Order No. 1 (“**PO No. 1**”), which reiterated the provisions of Article 4 of the Procedural Rules on document production at Section (I) and added at Section (II) provisions concerning documents that the Claimant had requested from third parties. Section (II)(a) of PO No. 1 provided, *inter alia*, that the Claimant must, within seven days, “transmit a copy of this Order to all third parties from which it has requested documents or other evidence to date,” as well as “inform all such parties that they are not legally obligated to produce any of the documents or other evidence previously requested by Claimant.” Section (II)(c) of PO No. 1, in turn, instructed the Claimant, upon the expiration of the seven-day deadline, to “furnish to the Tribunal appropriate evidence, including copies of mailing receipts or time-stamped electronic messages, demonstrating Claimant’s compliance with Section II(a) of this Order.”
25. The Claimant failed to comply with Sections II(a) and (c) of PO No. 1 in the time allotted, prompting the Tribunal to twice urge compliance without delay in letters from the PCA to the Parties dated 20 and 28 September 2011. In the second letter, the Tribunal advised the Claimant that the Tribunal would “draw all necessary consequences of the Claimant’s behaviour, especially with respect to documents that may have been obtained outside the document request procedure outlined in Section (I) of the Order.”
26. By e-mail dated 28 September 2011, Prof. VERNY sent the Tribunal eight of the eleven requested facsimile transmission confirmations for the letters that the Claimant had sent to various Bulgarian officials in June 2011. Prof. VERNY apologised for his delay in responding, explaining that it was due to “a technical problem affecting the communication” between ST-AD, LIDI-R and himself.
27. By letter from the PCA dated 29 September 2011, the Tribunal requested that the Claimant provide the Tribunal with the three missing facsimile transmission confirmations and a complete list of the facsimile numbers used to contact each of the Bulgarian officials. The Claimant’s satisfactory answer came on 5 October 2011 in the form of an e-mail signed by Mr. BURCZYK, although it was sent from the personal e-mail address of Mr. Plamen Balev.<sup>5</sup>

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<sup>5</sup> The Respondent contends that Mr. Balev is, in reality, the driving force behind ST-AD: see Memorial ¶ 122; Reply ¶ 66.

28. By letter from the PCA dated 6 October 2011, the Tribunal expressed its satisfaction that the Claimant had fully complied with Sections (II)(a) and (c) of PO No. 1.
29. On 30 November 2011, the Claimant submitted its Memorial on the Merits, dated 28 November 2011, in electronic copy form (the “**Memorial on the Merits**”).
30. On the same date, the Respondent wrote to the Tribunal, informing it of what it perceived to be the Claimant’s inattention to certain filing requirements contained in Section 5(a) of the Procedural Rules, namely, that it had failed to deliver an electronic copy of its submission to the Respondent’s counsel in Washington and an electronic and paper copy of the same to the Respondent’s counsel in Bulgaria.
31. On 1 December 2011, the Claimant wrote to the Tribunal and the Respondent, stating that it had sent an electronic copy of its submission to the Respondent’s counsel in Washington and apologising for not having included the Respondent’s counsel in Bulgaria in the shipping process.
32. On the same date, upon the instruction of the Tribunal, the Claimant remedied the defects in the delivery of its submission.
33. On 20 April 2012, the Respondent submitted its Memorial on Objections to Jurisdiction (the “**Memorial**”) and its Document Production Requests (Annex 1) (the “**Annex 1 Requests**”).
34. By letter dated 3 May 2012, the Claimant submitted its objections to the Respondent’s Annex 1 Requests, in accordance with Sections 4(a) and (b)(i) of the Procedural Rules.
35. By letter dated 14 May 2012, the Respondent provided its response to the Claimant’s objections to the Respondent’s Annex 1 Requests.
36. On the same date, Prof. VERNY requested a two-month extension until 30 September 2012 for filing the Claimant’s Counter-Memorial on Jurisdiction, on account of health reasons. The Respondent informed the Tribunal on 17 May 2012 that it had no objection to the Claimant’s request for an extension.
37. On 18 May 2012, the Tribunal granted the extension requested by the Claimant and accordingly revised the remaining submissions deadlines specified in Section 3(a)(ii)(1)(1.1) of the Procedural Rules. The Tribunal also informed the Parties that, after reviewing their submissions with respect to the Respondent’s Annex 1 Requests, it did not consider it necessary to make any orders on document production for the time being.
38. On 18 May 2012, the Claimant resubmitted its response to the Respondent’s Annex 1 Requests, along with the respective documentation.

39. By e-mail dated 11 July 2012, the PCA noted that the Parties had now confirmed their availability for the 18 to 22 March 2013 dates originally proposed by the Tribunal for the Hearing on Jurisdiction.
40. By letter dated 9 August 2012, the Claimant requested a further extension of time for submitting its Counter-Memorial on Jurisdiction, that is, until 31 October 2012, on account of health reasons. On 21 August 2012, after having received comments from the Respondent on the Claimant's request for a second extension, the Tribunal granted the extension and accordingly revised once more the submissions schedule for the outstanding pleadings.
41. On 29 October 2012, the Claimant submitted its Counter-Memorial on Jurisdiction (the "**Counter-Memorial**").
42. On 30 October 2012, the Claimant filed its Document Production Requests (Annex 2) (the "**Annex 2 Requests**") in the form of a Redfern Schedule.
43. On 14 November 2012, the Respondent filed a completed Redfern Schedule, objecting to all of the Claimant's Annex 2 Requests (the "**Objections**").
44. By letter dated 6 December 2012, Prof. Verny explained that he had missed the deadline provided in Section 4(b) of the Procedural Rules for the Claimant to reply to the Respondent's Objections due to "acute illness" and would provide a response on 10 December 2012.
45. By letter of the same date, the Respondent requested the Tribunal to deny the Claimant's request for an extension, asserting, *inter alia*, that the "Claimant has repeatedly delayed these proceedings by seeking multiple deadline extensions, and by failing to respond to communications from the Tribunal and Respondent in a timely manner." The Respondent characterised this latest extension request by the Claimant as "part of the same pattern of delaying and unresponsiveness that the Claimant has displayed throughout this arbitration."
46. By letter dated 7 December 2012, the Tribunal granted the Claimant's request for an extension but noted that it was "troubled by the Claimant's continued failure to meet the agreed deadlines in this proceeding and [that it] expects it to adhere to all deadlines set by the Tribunal so as to permit the orderly conduct of the proceedings." The Tribunal further informed the Parties that such "behaviour is susceptible to be taken into account in the determination of the distribution of costs at the end of the proceeding."
47. On 10 December 2012, the Claimant submitted its Response to Respondent's Objections to the Claimant's Document Production Requests (Annex 2) (the "**Response**"), disputing all of the Respondent's Objections to the Claimant's Annex 2 Requests. The Claimant also informed that, henceforth, Mr. Svetlin Dimitrov Stoynev would join Prof. Verny as counsel to the Claimant.

48. By letter from the PCA dated 12 December 2012, the Parties were invited to confer and reach agreement on the Claimant's Annex 2 Requests by 20 December 2012, pursuant to sub-section 4(b)(iii) of the Procedural Rules and sub-section I(b)(iii) of PO No. 1, failing which, the Claimant would have to submit all outstanding document production requests to the Tribunal for decision by 26 December 2012.
49. On 20 December 2012, following a telephone conference between the Parties, the Claimant informed the Tribunal that it accepted that some of its document requests had already been produced by the Respondent and submitted its outstanding Document Production Requests (Annex 2.1) (the "**Annex 2.1 Requests**") in a Redfern Schedule for the Tribunal's consideration. However, the Redfern Schedule did not contain the Respondent's Objections, as they had been submitted in .pdf format only. The Claimant's Annex 2.1 Requests included additional argumentation that had not been cited in the Claimant's Response of 10 December 2012.
50. On 20 December 2012, the Tribunal requested that the Respondent re-submit the Claimant's Annex 2.1 Requests in a Redfern Schedule alongside the Respondent's objections to said requests.
51. On 21 December 2012, the Respondent complied with the Tribunal's request. Its revised Redfern Schedule outlined its combined objections to the Claimant's reasons provided in its Annex 2 Requests, Response, and Annex 2.1 Requests. The Respondent's submission was accompanied by a letter dated 20 December 2012, in which the Respondent, *inter alia*, (i) asserted that by seeking to obtain documents outside the required document request procedure, the Claimant had failed again to comply with PO No. 1, which should be sanctioned by the Tribunal, (ii) argued that by filing its Annex 2.1 Requests on 20 December 2012, the Claimant had failed to follow the instructions given in the Tribunal's letter of 12 December 2012 as to the procedure for the filing of document production requests, and (iii) requested that the Tribunal order the Claimant to provide the original language versions of all the documents placed on the record in this arbitration and, in particular, provide the Bulgarian originals of several documents, which had previously only been submitted in English translation.
52. In its response dated 24 December 2012, the Claimant asserted that it required certain documents from the municipal authorities of Sofia/Slatina "both for the Domestic Judicial Proceedings involving LIDI-R/JMB-1 in relation to the existing access restriction of LIDI-R to its own property and the Domestic Judicial Proceedings No. 12785/2010 of the Sofia Municipal Court."
53. In its reply dated 26 December 2012, the Respondent requested that the Tribunal "(1) decline Claimant's document production requests in their entirety, (2) reiterate its order that Claimant

cease and desist from any future document production requests outside the discovery procedure applicable in this arbitration, and (3) in light of Claimant's open abuse of these proceedings, impose costs on Claimant as part of its final award."

54. On 27 December 2012, the Claimant wrote to the Tribunal, purporting to "correct the facts and circumstances falsely and distortedly described by Respondent" in its letter of 20 December 2012.
55. By letter dated 29 December 2012, the Respondent responded by reiterating its three requests to the Tribunal and advising that it would be requesting moral damages in its Reply on Jurisdiction.
56. On 9 January 2013, the Tribunal issued Procedural Order No. 2 ("**PO No. 2**") and its accompanying Redfern Schedule. The Tribunal noted the Parties' disregard for the instructions as to document production given in PO No. 1, "both regarding the time frame and the format" and went on to address the Claimant's document production requests as follows. First, the Tribunal concluded that "an order for the production of the classes of documents requested in the [Redfern] Schedule, which in its view pertain to the merits, may not be granted at this time." Second, the Tribunal explained that – contrary to what had happened with the letters sent in June 2011<sup>6</sup> – it did "not consider that the Claimant had failed to comply with the procedure for the submission of document production requests in asking for some documents from the Municipality of Sofia for its internal court proceedings, as it did not mention the Tribunal's authority under the UNCITRAL Rules in these requests." Third, the Tribunal ordered the Claimant to produce the Bulgarian originals for three sets of documents it had tendered in support of its document production of 18 May 2012, Counter-Memorial and Response. Finally, both Parties were requested "to focus on the issues presented in the Respondent's [Memorial]" for the jurisdictional phase.
57. On 17 January 2013, the Claimant submitted the Bulgarian originals, as ordered in PO No. 2.
58. On the same day, the Respondent wrote to Prof. Verny, copying the Tribunal, to alert him that as a result of his mislabelling of one of the Bulgarian originals, one document was still outstanding. Prof. Verny provided the missing document via e-mail on 21 January 2012.
59. On 18 January 2013, the Respondent submitted its Reply on Objections to Jurisdiction (the "**Reply**").
60. On 22 January 2013, the Claimant requested a two-week extension of each of the payment deadlines to submit its share of the supplementary deposit that was requested by the Tribunal on 18 January 2013.

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<sup>6</sup> See ¶ 18 of this Award.

61. On 23 January 2013, the Tribunal granted the Claimant's request for an extension of time to pay the first instalment of its share of the supplementary deposit until 15 February 2013. Underlining that "the full supplementary deposit is required in order to assure sufficient funds for the upcoming one-week Hearing on Jurisdiction scheduled to commence on 18 March 2013," the Tribunal declined to grant the Claimant's second extension request, thereby maintaining the 8 March 2013 deadline for its payment of the second instalment of the supplementary deposit.
62. By letter from the PCA dated 28 January 2013, the Presiding Arbitrator invited the Parties to confer and agree on logistical arrangements in preparation for the Hearing on Jurisdiction and to confirm their availability for a pre-hearing teleconference on 11 March 2013 "in the event that such a call is still needed to cover all logistical details and procedures that have not been agreed or ordered prior to that date."
63. By e-mail dated 30 January 2013, the Claimant informed that a paper copy and CD-ROM of the Respondent's Reply had not been received by Mr. Stoynev. By e-mail of the same date, the Presiding Arbitrator instructed the Respondent to courier its Reply to Mr. Stoynev at his address on file. On the same day, the Respondent replied that it had in fact sent its Reply to Mr. Stoynev at the address indicated in Prof. VERNY's letter of 10 December 2012, but that delivery had failed due to the address being incorrect. After several ensuing requests from the PCA, the Claimant provided the correct address for Mr. Stoynev on 2 February 2013.
64. By e-mail from the PCA dated 15 February 2013, the Tribunal enquired whether the Parties would have any objection to Mr. J. Christopher Thomas' assistant, Ms. Harpreet Dhillon, attending the Hearing on Jurisdiction scheduled to commence on 18 March 2013.
65. By e-mails dated 15 February 2013 and 19 February 2013, the Respondent and the Claimant respectively confirmed their consent to the presence of Ms. Dhillon at the Hearing.
66. On 18 February 2013, the Claimant submitted its Rejoinder on Jurisdiction (the "**Rejoinder**").
67. On 28 February 2013, the Claimant responded to the PCA's letter of 28 January 2013 concerning the logistical arrangements for the Hearing on Jurisdiction. The Claimant, *inter alia*, requested that the pre-hearing conference call (if needed) and the Hearing on Jurisdiction be held in English, German and Bulgarian and proposed that it be allowed to produce two witnesses, Mr. Plamen Balev and Mr. Ivan Ivanov, for examination at the Hearing.
68. On the same date, the Respondent responded to the PCA's letter of 28 January 2013 and the Claimant's letter of 28 February 2013, objecting to the Claimant's request that the Hearing on Jurisdiction be held in three languages and its proposal to have witnesses examined without

their having submitted written testimonies in advance. Further, the Respondent proposed that the costs of any interpretation services should be borne in full by the Claimant.

69. On 4 March 2013, the Respondent wrote to the Tribunal to refute what it called a “very serious and far-reaching allegation attacking the integrity of the Respondent and its counsel” made by the Claimant in its Rejoinder when it accused the Respondent of “attempting to dupe the Tribunal with false information” (*i.e.*, an allegedly falsified map of Site II). The Respondent argued that this occurrence was “emblematic of the consistent pattern of misbehaviour that Claimant has exhibited in these proceedings” and that it “reinforces Respondent’s case for legal fees and costs to be awarded in its favor as part of the Tribunal’s Decision on Jurisdiction.”
70. By letter dated 5 March 2013, the Claimant argued against any rejection of the witnesses it proposed to present at the Hearing on Jurisdiction.
71. By letter from the PCA of the same date, the Tribunal confirmed that a pre-hearing conference call would be held at the agreed time and date to address the outstanding issues relating to the preparation of the Hearing on Jurisdiction and informed the Parties that, considering the applicable provisions of the Terms of Reference and the Procedural Rules, it was not minded to have the call in a language other than English. The Tribunal asked the Parties to briefly present their arguments on whether there should be three languages at the Hearing and whether the Claimant’s proposed witness statements should be accepted in advance of the call.
72. On 7 March 2013, the Claimant responded to the Respondent’s letter of 4 March 2013, asserting that, in its Rejoinder, it “did not under any circumstances intend to attack the integrity of the respondent and her lawyer, but merely set out objective facts, the appraisal of which is solely subject of the tribunal seized.” In this respect, the Claimant argued, “it is not an accusation, but a presentation of the facts on the part of the Claimant devoid of any personal elements.”
73. On the same date, the Respondent responded to the Claimant’s letter of 7 March 2013.
74. By second letters of the same date, the Claimant and the Respondent each provided their response to the Tribunal’s letter of 5 March 2013.
75. By letter from the PCA dated 9 March 2013, the Tribunal confirmed that the pre-hearing conference call of 11 March 2013 would be held in English only and specified that the Claimant could organise for translation if it so wished, provided that such translation would be at its own costs and would not extend unduly the conference call.
76. On 11 March 2013, the pre-hearing conference call was held and the parties were given a full opportunity to address the outstanding issues relating to the conduct of the oral Hearing

77. On 12 March 2013, pursuant to its determinations provided orally during the course of the pre-hearing conference, the Tribunal issued Procedural Order No. 3, in which it (i) decided that, as a result of exceptional circumstances, it agreed to hear one of the witnesses proposed by the Claimant at the Hearing on Jurisdiction, under the condition that the Claimant files a written statement for his testimony by 6:00 PM (CET) on Thursday, 14 March 2013; (ii) confirmed that the Hearing would be held in English, but that the Claimant could have any part of the Hearing translated at its own costs and (iii) revised the timetable of the Hearing accordingly.
78. In accordance with the Procedural Rules, as amended in letters from the PCA dated 27 May and 11 August 2012, the Hearing on Jurisdiction was held from 18 to 19 March 2013 at the Peace Palace in The Hague, the Netherlands (the “**Hearing on Jurisdiction**”). Present at the Hearing on Jurisdiction were:

**The Tribunal**

Prof. Brigitte Stern  
Mr. Bohuslav Klein  
Mr. J. Christopher Thomas, Q.C.

Ms. Harpreet Dhillon (assistant to Mr. Thomas)

**For the Claimant**

Prof. Dr. Arsène Verny  
Ms. Lenka Korousová  
Mr. Svetlin Stojnev  
Ms. Yanita Peneva  
Mr. Andrej Nikolow  
Mr. Plamen Balev  
Mr. Ivan Ivanov (witness)  
Ms. Ricarda Gras (German-English interpreter)  
Ms. Eva Bodor (German-English interpreter)  
Ms. Angelina Sekulova (Bulgarian-English interpreter)  
Ms. Lyubomira Genova (Bulgarian-English interpreter)

**For the Respondent**

Mr. Ivan Kondov  
Mr. Stanimir A. Alexandrov  
Mr. Samuel B. Boxerman  
Ms. Solmaz Sedighi Rad  
Ms. Kerry K. Lee  
Mr. Lazar Tomov  
Ms. Sylvia Steeva

**For the PCA**

Ms. Claire de Tassigny Schuetze

79. At the Hearing on Jurisdiction, the Parties agreed to present their submissions on costs by 20 April 2013.<sup>7</sup>
80. By letter from the PCA dated 19 March 2013, in view of the fact that reference to Articles 3(5) and 4(5) of the Germany-Bulgaria BIT was made in relation to the Tribunal's jurisdiction at a very late stage in the proceedings (specifically, in the Claimant's closing arguments) and this had not been previously pleaded, the Tribunal requested that the Parties file submissions on the following question: *"To what extent, if any, can article 4(5) of the Germany-Bulgaria BIT have an impact on the extent of the Tribunal's jurisdiction?"*
81. On 5 April 2013, the Parties filed their submissions on Article 4(5) of the Germany-Bulgaria BIT (respectively, **"Claimant's Submission on Article 4(5) of the BIT"** and **"Respondent's Submission on Article 4(5) of the BIT"**). In its accompanying cover letter of the same date, the Respondent requested that the Tribunal "rule on all four of Respondent's objections to jurisdiction," specifying that "given Claimant's history of initiating repeated and redundant actions in order to harass Respondent and its various agencies, an award limited to the first jurisdictional objections is likely to encourage Claimant to pursue further litigation in Bulgarian courts."
82. By e-mail dated 20 April 2013, the Claimant submitted a summary of the expenses it incurred in connection with these arbitral proceedings.
83. By e-mail from the PCA dated 22 April 2013, the Tribunal reminded the Respondent of the deadline for the Parties' submissions on costs.
84. By letter dated 22 April 2013, the Respondent filed its submission on costs, explaining that it had understood the deadline to be the first business day following 20 April 2013.
85. By e-mail dated 24 April 2013, the Respondent requested clarification from the Claimant with respect to the entry concerning expert evidence in its submission on costs.
86. By e-mail dated 29 April 2013, the Claimant replied to the Respondent's e-mail of 24 April 2013.
87. By letter dated 2 May 2013, the Respondent replied to the Claimant's e-mail of 29 April 2013 and informed the Tribunal that on 26 April 2013, Mr. Burczyk, a representative of the Claimant, once again "sought to obtain documents directly from the Government of Bulgaria outside the document production procedures established by the Tribunal for this arbitration," including documentation in relation to the Respondent's costs submission of 22 April 2013. The Respondent requested that the Tribunal order the Claimant to "withdraw its document

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<sup>7</sup> Hearing Transcript, 19 March 2013, page 112, lines 5-22.

request” and “bear the additional costs that the Respondent has incurred as a result of the document request.”

88. By letter from the PCA dated 23 May 2013, the Tribunal denied the Respondent’s request, explaining that it was of the view that “the document production procedure set out in Procedural Order No. 1 concerns documents that are not otherwise public and that the existence of an international arbitration cannot deprive anyone of its rights to information existing under national laws” and that, this time, the Claimant’s document request did not wrongly refer to the Tribunal’s authority. The Tribunal added that its view “in no way determines that the Claimant is entitled to have the requested information under Bulgarian public law, or whether such information is privileged as claimed by the Respondent in its 2 May 2013 letter.”
89. By letter dated 20 June 2013, the Claimant requested that the Tribunal order the authorities of the Respondent to provide it with certain information that the Claimant had requested under the Bulgarian Access to Public Information Act.
90. By letter dated 25 June 2013, the Respondent objected to the Claimant’s request in its letter of 20 June 2013.
91. By letter from the PCA dated 27 June 2013, the Tribunal denied the Claimant’s request in its letter of 20 June 2013, on the basis that the Claimant’s document request to the Bulgarian authorities was not made under the Tribunal’s authority and implied the application of Bulgarian public law, which is outside of its jurisdiction. The Tribunal added that it does not have the authority to enforce the Bulgarian Access to Public Information Act.
92. By letter dated 29 June 2013, the Claimant requested that the Tribunal order the Respondent to produce (i) information concerning the Respondent’s legal representation and (ii) documents relating to the Respondent’s costs in this arbitration.
93. By letter dated 3 July 2013, the Respondent objected to the Claimant’s requests in its letter of 29 June 2013.
94. By letter from the PCA dated 10 July 2013, the Tribunal denied the Claimant’s requests in its letter of 29 June 2013, explaining that the first request was untimely and that the second request should be sufficiently satisfied by the Respondent’s submission on costs of 22 April 2013.
95. By letter dated 14 July 2013, the Claimant reiterated its requests in its letter dated 29 June 2013.
96. On 16 July 2013, the Claimant submitted a corrected version of its letter of 14 July 2013.
97. By letter from the PCA dated 18 July 2013, the Tribunal denied the Claimant’s requests in its letter of 14 July 2013 for the reasons stated in the letter from the PCA dated 10 July 2013.

### III. FACTUAL BACKGROUND

#### A. INTRODUCTION

98. The main subject of the dispute concerns title to the Property, which consists of 15,600 m<sup>2</sup> of land, including the factory and commercial buildings located on it, situated on a 15,663 m<sup>2</sup> tract of land in Sofia, Bulgaria (“**Site I**”). The Property comprises 99.6% of Site I and is presently owned by a private Bulgarian company called JMB-1 AD (“**JMB**”). The Claimant claims in this arbitration that the Property was expropriated by the Respondent.
99. A company called LIDI-R AD (hereinafter “**LIDI-R**”, except when describing its three previous names), of which the Claimant is a shareholder, presently holds title to the remaining 0.4%, or 63 m<sup>2</sup>, of Site I, as well as the entire adjacent tract of land (“**Site II**”). The Claimant also asserts certain claims in relation to Site II.
100. In July 2004, a Bulgarian national, Mr. Plamen Balev, acquired LIDI-R from the Respondent for an auction price of EUR 73,600. An information memorandum for privatisation and auction of LIDI-R, dated May 2004 (the “**Information Memorandum**”) which was made available for purchase prior to the auction, informed prospective bidders that LIDI-R owned 0.4 % of Site I and the whole of Site II. The Respondent maintains that the Information Memorandum clearly indicated that the Property – in other words, 99.6% of Site I – belonged to JMB, and specifically referred to a decision of the Supreme Cassation Court of Bulgaria in 2000 confirming said ownership. In its Memorial on the Merits, the Claimant appears to argue that, in acquiring shares in LIDI-R, it thought it was purchasing the whole of Site I. In its submissions on jurisdiction, however, the Claimant seems to have abandoned this position and instead focuses, *inter alia*, on the alleged unlawfulness of the restitution of the Property to the heirs of its original owners and its subsequent transfer to JMB.
101. Shortly after his acquisition of LIDI-R, Mr. Balev initiated litigation to have the Bulgarian Supreme Cassation Court’s decision in favour of JMB set aside.
102. On 25 May 2006, three days after LIDI-R’s first set-aside application was dismissed, Mr. Balev sold 40% of the shares in LIDI-R EAD to ST-AD, and LIDI-R EAD transformed into LIDI-R AD. The Respondent asserts that ST-AD only acquired an additional 40% of the shares in LIDI-R, so as to become a majority shareholder, on 2 May 2008.<sup>8</sup> The Claimant responds that it had reached a “preliminary contract” with LIDI-R to purchase 80% of its shares on 4 May 2005.<sup>9</sup>

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<sup>8</sup> Reply ¶ 64.

<sup>9</sup> Rejoinder at 18, ¶¶ 37-38.

103. On 17 September 2010, the Claimant initiated this arbitration under the Germany-Bulgaria BIT.
104. The factual background that follows traces the history of the dispute regarding title to the Property (A), followed by a description of other litigation to which the Claimant refers in its Memorial on the Merits (B).

## **B. DISPUTE REGARDING TITLE TO THE PROPERTY**

### **1. Restitution of the Property and Transformation of LIDI-R**

105. It is common ground that the Property originally belonged to Semerdzhiev AD, a Bulgarian joint-stock textile company.<sup>10</sup> The Property was nationalised in 1947 and placed under the management of State-owned enterprise Liliana Dimitrova, which was reorganised into “SF LIDI-R” in 1991.<sup>11</sup> SF LIDI-R, then a wholly State-owned company, was given the right to manage and use the Property pursuant to Articles 16 and 17 of the Constitution of the People’s Republic of Bulgaria of 1971.<sup>12</sup>
106. On 25 February 1992, the Property was restituted to the heirs of its pre-nationalisation owners, the Semerdzhiev family (the “**Restitution**”), by virtue of the Bulgarian Act on Restitution of Ownership over Nationalised Immovable Property.<sup>13</sup> The remaining 0.4 % (63 m<sup>2</sup>) of Site I and the whole of Site II (11,876 m<sup>2</sup>) were not included in the Restitution. SF LIDI-R did not immediately vacate the Property.<sup>14</sup>
107. By order dated 7 January 1993, the Mayor of Sofia, Bulgaria, deleted the deed that had recognised State ownership of the Property from the registry of deeds, thereby recognising the

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<sup>10</sup> Memorial ¶ 18; Memorial on the Merits at 7, ¶ 14.

<sup>11</sup> Memorial ¶ 18; Counter-Memorial at 16, ¶ 13.

<sup>12</sup> Memorial ¶¶ 13, 19; Founding Regulations of SF LIDI-R, 19 April 1991, Article 5 [**Exhibit R-008**]: “[t]he Company conducts independently its business activity on the basis of the property provided to it by the state for use and management of an establishment fund of BGN 6,469,000.” The Respondent notes at ¶ 19, fn. 15 of its Memorial that the “establishment fund” was capital and not land; Constitution of the People’s Republic of Bulgaria of 1971, 18 May 1971, published in SG Issue No. 39 [**Exhibit R-004**].

<sup>13</sup> Memorial ¶ 20; Act on Restitution of Ownership over Nationalised Immovable Property, entry into force 25 February 1992, published in SG Issue No. 15 [**Exhibit R-012**]; Counter-Memorial at 20, ¶ 20. The Claimant contends that the Restitution is “null and void” because “[a]ccording to Bulgarian law, when a company (in this case [**Eurotour-B**]) participates as buyer in a notarized business transaction, a decision of its governing body, the shareholders’ meeting, is required to decide on exchange and purchase of parcels” (Counter-Memorial at 22, ¶ 23).

<sup>14</sup> Memorial ¶ 21, citing Eurotour-B’s (later became JMB) 1993 claim in the Sofia City Court against SF LIDI-R.

Property's return to the Semerdzhiev family.<sup>15</sup> The Slatina Municipal Administration confirmed the deletion of the deed by way of a certificate dated 26 January 1993 (the "**Certificate**").<sup>16</sup>

108. On 3 February 1993, the Semerdzhiev family transferred the Property to JMB (then known as "**Eurotour-B**"<sup>17</sup>).<sup>18</sup>
109. In June 1993, SF LIDI-R was transformed into "LIDI-R EOOD", a sole owner limited liability company. By court decision dated 16 February 1996, it was transformed into LIDI-R EAD, a sole owner joint stock company still owned by the State.<sup>19</sup>
111. The Claimant alleges, *inter alia*, that LIDI-R and its predecessors "cultivated and administered" the Property "from the moment of nationalization in 1947 until 1993" and thereon constructed nineteen buildings.<sup>20</sup> The Claimant contends that these buildings "were [LIDI-R]'s assets and property ... represent[ing] an independent financial investment."<sup>21</sup>

## 2. Decision 1153

112. The Restitution of the Property to the Semerdzhiev family, as well as its subsequent transfer to Eurotour-B (later, JMB) was disputed by LIDI-R. Upon LIDI-R's refusal to vacate the Property, Eurotour-B commenced litigation against it in the Bulgarian courts claiming payment of back rent.
113. On 20 July 1994, the Sofia City Court ruled that Eurotour-B (later, JMB) was the legal owner of the Property.<sup>22</sup> On a rehearing of the case brought by LIDI-R and the Bulgarian Ministry of Finance,<sup>23</sup> the Sofia City Court again found in Eurotour-B's favour and ordered LIDI-R to pay back rent covering the period from 4 February to 31 March 1993. The decision in favour of

<sup>15</sup> Memorial ¶ 22; Order No. RD-57-12 issued by the Mayor of Sofia, 7 January 1993 [**Exhibit C-32.2**].

<sup>16</sup> Memorial ¶ 22; Certificate issued by the Slatina Municipal Administration, 26 January 1993 [**Exhibit C-33**].

<sup>17</sup> Referred to by the Claimant as "Evrotur-B".

<sup>18</sup> Memorial ¶ 23; Counter-Memorial at 22, ¶ 23.

<sup>19</sup> Memorial ¶ 24.

<sup>20</sup> Counter-Memorial at 20, ¶ 19.

<sup>21</sup> Counter-Memorial at 20, ¶ 19; *see also* Counter-Memorial at 22, ¶ 21: The Claimant further contends that "the municipal administration has attempted to reconstitute actually the parcels that LIDI-R AD erected after nationalization" and, as such, LIDI-R "owes no rent for the use of its own possessions, which were built after the nationalization."

<sup>22</sup> Memorial ¶ 26; Decision, Case No. 531-1993, Sofia City Court, 20 July 1994 at 3 [**Exhibit R-017**].

<sup>23</sup> The first appeal by the Ministry of Finance, later joined by LIDI-R EAD, was remanded for a rehearing; Request by LIDI-R, Decision No. 818, Case No. 336-1995, Supreme Court, 12 June 1995 at 10 [**Exhibit R-019**].

Eurotour-B was upheld on appeal by the Supreme Cassation Court in its decision rendered on 12 September 1997 (“**Decision 1730**”).<sup>24</sup>

114. Eurotour-B subsequently obtained several judgments for payment of back rent for the period after 31 March 1993. Copies of the enforcement warrants with respect to these decisions were included in Appendix 12-B of the Information Memorandum.
115. On 16 June 2000, upon successful leave to appeal by LIDI-R, the Supreme Cassation Court once more affirmed that the Restitution was valid and that JMB (formerly, Eurotour-B) held legal title to the Property (“**Decision 1153**”).<sup>25</sup> The Court further concluded that only two of the sixteen buildings<sup>26</sup> on Site I belonged to LIDI-R, and ordered LIDI-R to hand over possession of the Property to JMB and to pay the outstanding back rent. JMB was ordered to pay LIDI-R compensation for certain expansions by LIDI-R to a factory building on the Property. On 3 November 2000, JMB took possession of the Property.
116. The Respondent submits that Decision 1153 is “final and unappealable.”<sup>27</sup> The Claimant requests that the Tribunal reverse Decision 1153, alleging that it was decided on the basis of “manipulated expert opinion created by corrupted experts, which remains to be delved into in detail in the sequel.”<sup>28</sup> The Respondent asserts that four of the five experts in that case concluded that no significant changes were made to the Property after the nationalisation and that it belonged to JMB. The remaining expert, appointed at LIDI-R’s request, dissented.<sup>29</sup> The Claimant subsequently accused two of the experts of corruption. The Respondent notes that, in 2008, both experts were acquitted due to insufficient evidence of them having submitted incorrect opinions.<sup>30</sup>
117. The Respondent emphasises that, throughout the litigation that culminated in Decision 1153, the Ministry of Finance joined LIDI-R, by virtue of its State-owned status, in appealing the various decisions in favour of JMB. To the extent that the Claimant alleges that the Respondent improperly deprived LIDI-R of ownership over the Property, the Respondent points out that

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<sup>24</sup> Memorial ¶ 29; Decision No. 1730, Case No. 712-1997, Supreme Cassation Court, 12 September 1997 at 4 [Exhibit R-026].

<sup>25</sup> Memorial ¶ 30; Decision No. 1153, Case No. 1012-1998, Supreme Cassation Court, 16 June 2000 at 11-12 [Exhibit R-038].

<sup>26</sup> Counter-Memorial at 20, ¶ 19: The Claimant contends that there were instead nineteen buildings.

<sup>27</sup> Memorial ¶ 31.

<sup>28</sup> Memorial on the Merits at 5, ¶ 5.

<sup>29</sup> Memorial ¶ 32.

<sup>30</sup> Memorial ¶ 32; Decision Case No. 453-2009, Sofia City Court, 1 October 2009 [Exhibit C-30], which affirms Sofia Municipal Court’s acquittal of both experts on 30 June 2008.

Bulgaria “actually supported LIDI-R’s claims during critical phases of the domestic litigation.”<sup>31</sup>

### 3. Privatisation of LIDI-R

118. In early 2002, the Respondent decided to privatise LIDI-R and, in May 2004, the Bulgarian Privatisation Agency held a centralised public auction of LIDI-R’s shares.<sup>32</sup> In accordance with the regulations set forth in Bulgaria’s Privatisation and Post-Privatisation Control Act of 2002,<sup>33</sup> three documents were prepared in anticipation of LIDI-R’s privatisation: a privatisation valuation (the “**Privatisation Valuation**”), a legal analysis (the “**Legal Analysis**”), and the Information Memorandum.<sup>34</sup> Prospective bidders could purchase the Information Memorandum from the Bulgarian Stock Exchange up to a week prior to the auction.
119. On 30 June 2004, Mr. Balev finalised his purchase of the shares of LIDI-R for EUR 73,600; the shares were transferred to him on 9 July 2004.<sup>35</sup>
120. Section 2 of the Information Memorandum described LIDI-R’s ownership interests as comprising 63 m<sup>2</sup> of Site I and the whole of Site II. The Information Memorandum also provided the following disclosure with respect to Decision 1153:

The first site of the Company had an area of 15,726 m<sup>2</sup>, but by Decision No. 1153/16 June 2000 of the Supreme Cassation Court, in order to satisfy the restitution claims of the former owners united in [JMB], 15,663 m<sup>2</sup> were restituted, together with the one-story factory building erected on the land. The unclaimed 63 m<sup>2</sup> have been accounted for on the balance sheet of the [LIDI-R].<sup>36</sup>

Appendix 5 to the Information Memorandum also stated that LIDI-R owned only 63 m<sup>2</sup> of Site I.<sup>37</sup>

121. Similarly, the Privatisation Valuation premised the initial auction valuation on the assumption that only 63 m<sup>2</sup> of Site I was for sale.<sup>38</sup> The Legal Analysis also noted the Restitution of the Property in 1993.<sup>39</sup>

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<sup>31</sup> Memorial ¶ 33 (Emphasis in the original).

<sup>32</sup> Memorial ¶ 35.

<sup>33</sup> Privatisation and Post-Privatisation Control Act, entry into force 23 May 2002, published in SG Issue No. 28 [Exhibit R-046].

<sup>34</sup> Memorial ¶ 35.

<sup>35</sup> Memorial ¶ 39.

<sup>36</sup> Memorial ¶ 36; Information Memorandum at 3 [Exhibit R-049].

<sup>37</sup> Memorial ¶ 36; Information Memorandum at 21 [Exhibit R-049].

<sup>38</sup> Memorial ¶ 36; Privatisation Valuation at App. 8 [Exhibit R-050].

<sup>39</sup> Memorial ¶ 37; Legal Analysis at 7-8 [Exhibit R-051].

122. The Respondent asserts that Mr. Balev purchased a copy of the Information Memorandum before the auction. In support of its claim, the Respondent relies on Mr. Balev's interview with the Sofia Prosecution Office during its investigation of LIDI-R's former executive director, Ms. Solakova-Reliovska.<sup>40</sup> The Claimant does not deny that it reviewed the Information Memorandum. While initially the Claimant claimed that Decision 1153 "was made known after the acquisition of the [LIDI-R] company, and subsequent successful auditing of the balance sheets of the former state enterprise and the associated architectural plans,"<sup>41</sup> in its Counter-Memorial on Jurisdiction, it states that "1/3 of the information memorandum" that was provided at the time of the privatisation "deals with the carried out restitution and the properties taken away from LIDI-R AD."<sup>42</sup>

#### 4. First Application to Set Aside Decision 1153: Decision 158

123. After acquiring LIDI-R, Mr. Balev undertook the following actions with respect to Decision 1153 on behalf of LIDI-R:<sup>43</sup>

- On 5 May 2005, LIDI-R filed a claim against the Municipality of Sofia seeking to have the documents issued by the Slatina Municipality in the context of the Restitution declared erroneous; namely the Information Note dated 2 October 1992 (the "**Information Note**")<sup>44</sup> and the Certificate confirming the Restitution. The Municipality of Sofia did not respond to the claim. The Municipal Court found in favour of LIDI-R by default.
- On 6 February 2006, LIDI-R applied to the Supreme Cassation Court to set aside Decision 1153, asserting that the Court had relied upon the Information Note and Certificate alleged by LIDI-R to be erroneous. On 22 May 2006, the Supreme Cassation Court rejected LIDI-R's application ("**Decision 158**").
- In separate proceedings, LIDI-R accused two of the experts who had tendered opinions in the proceeding that led to Decision 1153 of being corrupt. In 2008, the two experts

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<sup>40</sup> Indictment Against Angelinka Antonova Solakova, Case No. 12436-2009, Sofia Municipal Court, 29 October 2009 at 5 [**Exhibit R-086**].

<sup>41</sup> Memorial on the Merits at 7, ¶ 13.

<sup>42</sup> Counter-Memorial ¶ 35.

<sup>43</sup> Memorial ¶¶ 40-48.

<sup>44</sup> Described by the Claimant as the Information Note to DI-07-00-35/12/10.1992 of the Slatina Municipal Administration (No exhibit number provided); Referred to by the Respondent in its Memorial at ¶¶ 41-42 and ¶ 22, fn. 22 as the Information Note issued by the Slatina Municipal Administration, 12 October 1992 [**Exhibit C-34**].

were acquitted of all charges by the Sofia Municipal Court; their acquittal was affirmed by the Sofia City Court in 2009.

## 5. The Claimant's Investment in LIDI-R

124. In its Request for Arbitration, the Claimant submits that it first acquired shares in LIDI-R on 25 May 2006.<sup>45</sup> In its Memorial on the Merits, the Claimant asserts that it holds an 80% interest in LIDI-R and that the remaining 20% is held by Mr. Balev.<sup>46</sup> In its Counter-Memorial, the Claimant argues that its investment in LIDI-R began in 2005:

By signing the pre-contract concerning the sale and purchase of shares in 2005, Claimant decided to invest in [LIDI-R]. The resolution of the shareholders meeting in 2005 saw the start of the acquisition, in the name of Claimant, of shares in the stock of [LIDI-R]. This is the point in time at which Claimant commenced its investment.<sup>47</sup>

125. With respect to the Claimant's argument in its Request for Arbitration that it made its investment on 25 May 2006, the Respondent draws attention to the fact that said investment was made only three days after the Supreme Cassation Court rejected LIDI-R's application to set aside Decision 1153 in its Decision 158.<sup>48</sup> Moreover, the Respondent argues that

[e]ven assuming the truthfulness of Claimant's statement that it acquired an 80 percent interest in LIDI-R in 2006, however, the acquisition would still have taken place two years after Mr. Balev acquired LIDI-R with full knowledge that LIDI-R had no right to the Property and six years after the Supreme Cassation Court decided conclusively that the Property belonged to JMB.<sup>49</sup>

126. The Respondent further submits that the Claimant sent a letter to the President of Bulgaria, several ministerial-level officials and the German embassy in Bulgaria on 30 May 2006 (the "**Open Letter**") a mere "five days after the date Claimant made its initial investment."<sup>50</sup> The Respondent draws attention to the repeated use of the word "we" in the Open Letter to refer collectively to LIDI-R and Mr. Balev, which, it argues, evidences the Claimant's intent "to mislead the governments of Bulgaria and Germany into believing that LIDI-R had been a German-owned company since 2004."<sup>51</sup>

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<sup>45</sup> Request for Arbitration at 3.

<sup>46</sup> Memorial on the Merits at 3, ¶ 1.

<sup>47</sup> Counter-Memorial at 33, ¶ 49.

<sup>48</sup> Memorial ¶ 49.

<sup>49</sup> Memorial ¶ 49 (Emphasis in the original).

<sup>50</sup> Memorial ¶ 50.

<sup>51</sup> Memorial ¶ 50; Open Letter from ST-AD to the President of the Republic and Others, 30 May 2006 [**Exhibit C-11**].

**6. Second Application to Set Aside Decision 1153: Decision 1515**

127. On 16 March 2010, LIDI-R applied to have Decision 158 overturned by filing a second application to the Supreme Cassation Court to set aside Decision 1153. Prof. VERNY attended the 8 February 2011 hearing that ensued and informed the Court that he was sitting in as an “observer” on account of the pending case being of “great importance for the international arbitration procedure.”<sup>52</sup>
128. On 7 March 2011, the Supreme Cassation Court dismissed LIDI-R’s application in its entirety (“**Decision 1515**”).<sup>53</sup> The Court held that LIDI-R’s action was precluded by Decision 158 of 22 May 2006, in which the Court had rejected LIDI-R’s first application to set aside Decision 1153. In other words, the Supreme Cassation Court reiterated the reasoning it had employed in Decision 158 and concluded that Decision 1153 could not be set aside. The Court also concluded that LIDI-R’s claims with respect to the validity of the Information Note and Certificate were time-barred by the Bulgarian statute of limitations and, in any event, inadmissible because an incorrect expert opinion could not constitute grounds to set aside a final decision where the impugned experts had been acquitted of all charges.<sup>54</sup> The Court awarded JMB its costs in those proceedings.
129. The Respondent asserts that LIDI-R “essentially repack[aged] as a ‘new’ application the very arguments that had been raised and rejected in [the] May 2006 [Decision 158], before Claimant acquired an interest in LIDI-R.”<sup>55</sup>
130. The Claimant, in turn, asserts that Decision 1515 is “incorrect and in breach of law.”<sup>56</sup> It contends that “[t]he fact that the final report of the expert was found to be incorrect, is sufficient reason for annulling this decision.”<sup>57</sup>

**C. OTHER LITIGATION REFERRED TO BY THE CLAIMANT**

131. The Claimant describes the following four additional lines of litigation in its Memorial on the Merits: (1) litigation regarding the transfer of the Property from the Semerdzhiev family to JMB (then, Eurotour-B); (2) litigation regarding the payment of back rent by LIDI-R to JMB

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<sup>52</sup> Memorial ¶¶ 52; Transcript of Court Hearing, Decision 1515 [Exhibit R-092].

<sup>53</sup> Memorial ¶¶ 53; Supreme Cassation Court Decision No. 66, Case No. 1515-2010, 7 March 2011 [Exhibit R-093].

<sup>54</sup> Memorial ¶¶ 53.

<sup>55</sup> Memorial ¶¶ 51.

<sup>56</sup> Counter-Memorial at 34, ¶¶ 53.

<sup>57</sup> Counter-Memorial at 34, ¶¶ 53.

(then, Eurotour-B); (3) bankruptcy proceedings initiated by JMB against LIDI-R; and (4) the Claimant's complaints at the European Court of Human Rights (the "ECHR").<sup>58</sup>

132. The Respondent is of the view that these additional claims by the Claimant "are unrelated to the Property and, as such, are extraneous to this arbitration."<sup>59</sup> The Parties' arguments with respect to the relevance of these strands of litigation are summarised in Section V(B)(7) below.

### 1. Litigation Regarding the Transfer of the Property from the Semerdzhiev Family to JMB

133. On 2 June 1993, the shareholders of Eurotour-B (the predecessor company to JMB) approved the purchase of the Property from the Semerdzhiev family. The Claimant alleges that one of the notary deeds was prepared based on a shareholder resolution on which the signatures of two shareholders were forged, while there was no shareholder resolution for another notary deed.<sup>60</sup>

134. In June 2006, LIDI-R initiated litigation in the Sofia City Court, challenging the legality of the 1993 transfer of the Property from the Semerdzhiev family to JMB on the ground that one of JMB's shareholders had not properly consented to the transfer contracts.<sup>61</sup> The Sofia City Court found in LIDI-R's favour, but the Sofia Court of Appeals subsequently declared the claim inadmissible because it viewed Decision 1153 as a final ruling on title in favour of JMB.<sup>62</sup> On 28 April 2009, the Supreme Cassation Court refused to grant LIDI-R leave to appeal.<sup>63</sup>

135. In its Counter-Memorial, the Claimant refers to another complaint filed by LIDI-R against JMB in 2012, but does not elaborate further, except to submit a letter from the Supreme Prosecutor's Office of Cassation on 3 September 2012. The letter mentions an application brought by LIDI-R's Executive Director, Mr. Yordanov, with respect to the impugned notary deeds.<sup>64</sup>

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<sup>58</sup> Memorial on the Merits at 4-8, 16; *see also* Counter-Memorial at 14, 28, 38, 40-44, 52.

<sup>59</sup> Reply ¶ 76.

<sup>60</sup> Counter-Memorial at 44, ¶ 70; Rejoinder at 16, ¶ 22.

<sup>61</sup> Memorial ¶ 70, citing LIDI-R's Statement of Claim in Case No. 01903-2006, Sofia City Court, 29 May 2006 [**Exhibit R-065**].

<sup>62</sup> Memorial ¶ 70; Reply ¶ 77; Decision, Case No. 01903-2006, Sofia City Court, 12 July 2007 [**Exhibit C-23**]; Decision No. 93, Case No. 2119-2007, Sofia Court of Appeals, 30 April 2008 [**Exhibit R-077**].

<sup>63</sup> Memorial ¶¶ 59(b), 70; Procedural Order No. 217, Case No. 501-2008, Supreme Cassation Court, 28 April 2009 [**Exhibit R-084**].

<sup>64</sup> Counter-Memorial at 52, ¶ 100; Reply ¶ 78, *see esp.* fn. 117: The Respondent contends that "[t]his application was an appeal to overturn a decision by the Sofia Appellate Prosecution Office [**Exhibit R-122**] which, in turn, affirmed a decision by the Sofia City Prosecution Office [**Exhibit R-120**] to reject a complaint that LIDI-R filed against JMB on 23 February 2012" [**Exhibit R-119**]; Resolution of the Supreme Prosecutor's Office of Cassation, Ref. No. 8780-2012, 3 September 2012 [**Exhibit R-137**]. (The Respondent contends that the Claimant's translation of the 3 September letter [**Exhibit C-109**] is inaccurate and thereby submits a corrected translation [**Exhibit R-137**].)

136. The Respondent explains that this complaint was dismissed by the Sofia City Prosecution Office and that, similarly, LIDI-R's appeal was rejected by the Sofia Appellate Prosecution Office.<sup>65</sup> According to the Respondent, the Supreme Prosecutor's Office of Cassation then issued a letter ordering the Sofia City Prosecution Office to inquire into the merits of LIDI-R's complaint.<sup>66</sup> The Respondent notes that the Sofia City Prosecution Office subsequently rejected the Claimant's request that it revoke the impugned notary deeds.<sup>67</sup>

## 2. Litigation Regarding the Payment of Back Rent by LIDI-R to JMB

137. From 1992 to 1994, the Bulgarian courts issued at least six decisions ordering LIDI-R to pay JMB (then, Eurotour-B) back rent for its occupation of the Property after the Restitution.<sup>68</sup>

138. In lieu of seeking court orders for back rent covering the period after 30 June 1995, JMB entered into two agreements with LIDI-R, on 19 and 20 December 2001 respectively, relating to the payment of back rent by LIDI-R to JMB (referred to collectively as the "**2001 Contracts**").<sup>69</sup> In the 2001 Contracts, LIDI-R recognised that it owed JMB approximately BGN 3.3 million in back rent for the period from 23 February 1992 to 3 November 2000.<sup>70</sup> Conversely, JMB recognised that it owed LIDI-R BGN 166,315 for improvements made to the Property. As summarised by the Respondent, "[a]s a global settlement, the parties agreed that all debts would be cancelled as soon as LIDI-R delivered the Property to JMB, pursuant to Decision 1153, and transferred title to other buildings and improvements not addressed in the Decision, with a total value of BGN 402,270."<sup>71</sup>

139. The 2001 Contracts contained a clause requiring the approval of Bulgaria's Ministry of Economy in order to transfer certain designated assets to JMB. Failing such approval, as was the case, Article 6 of the agreement provided that JMB "shall retain the right to claim the full amount of due receivables,"<sup>72</sup> amounting to BGN 3.3 million, from LIDI-R. To the Respondent's knowledge, the back rent has never been paid; the Claimant's submissions are silent in this regard.

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<sup>65</sup> [Exhibit R-120] and [Exhibit R-122].

<sup>66</sup> [Exhibit R-137].

<sup>67</sup> Reply ¶ 79, citing Letter from Sofia City Prosecution Office to Mr. Yordanov, 13 November 2012 [Exhibit R-126]; Letter from Sofia City Prosecution Office to Mr. Yordanov, 5 December 2012 [Exhibit R-128].

<sup>68</sup> Decisions described in Memorial ¶ 61; As mentioned above, the enforcement warrants for several decisions regarding back rent were provided in Annex 12-B of the Information Memorandum.

<sup>69</sup> Memorial ¶¶ 59(a), 62; Contract between LIDI-R and JMB, 19 December 2001 [Exhibit R-045]; Contract between LIDI-R and JMB, 20 December 2001 [Exhibit C-3].

<sup>70</sup> Memorial ¶ 62.

<sup>71</sup> Memorial ¶ 62; [Exhibit C-3].

<sup>72</sup> [Exhibit C-3] at 2, Articles 1 and 6.

140. The Claimant submits that the 2001 Contracts were unknown to Mr. Balev at the time he purchased LIDI-R. The Respondent maintains that the Claimant, by its own admission, was fully aware of these agreements when it acquired shares in LIDI-R.<sup>73</sup> For instance, on 2 February 2005, LIDI-R filed a crime report against LIDI-R's former Executive Director, Ms. Solakova-Reliovska, alleging that she had acted beyond her powers by signing the 2001 Contracts.<sup>74</sup>
141. The investigation of Ms. Solakova-Reliovska was terminated on 13 March 2008, due to lack of evidence that the 2001 Contracts caused LIDI-R to suffer damages.<sup>75</sup> On 20 December 2008, the termination order was annulled by the Sofia City Court, and the investigation of Ms. Solakova-Reliovska resumed.<sup>76</sup> The investigation was terminated on 7 December 2009, again for want of evidence that LIDI-R had suffered damages.<sup>77</sup> LIDI-R's subsequent appeal was dismissed for lack of standing.<sup>78</sup> The investigation was reopened in 2010 by the Sofia City Prosecution Office and is still pending.<sup>79</sup>

### **3. Bankruptcy Proceedings Initiated by JMB Against LIDI-R**

142. On 17 December 2004 and 12 October 2006, JMB initiated two bankruptcy proceedings against LIDI-R, both of which were unsuccessful. The Respondent was neither a plaintiff nor a defendant in these proceedings, and the courts actions did not deal with the question of legal title to the Property.<sup>80</sup>

### **4. The Claimant's Complaints at the ECHR**

143. From 2008 to 2011, LIDI-R filed four complaints against the Respondent at the ECHR, all of which were dismissed as inadmissible.<sup>81</sup>

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<sup>73</sup> Counter-Memorial at 14, 28, 38, 40-3; Memorial ¶¶ 64; Reply ¶ 82.

<sup>74</sup> Memorial ¶ 64; Crime Report of Mr. Balev, 28 January 2005 [**Exhibit R-060**].

<sup>75</sup> Memorial ¶ 65; Order issued by Sofia Public Prosecutor's Office, Prosecution File No. 1498-2005, 13 March 2008 (Respondent's Translation) [**Exhibit R-075**].

<sup>76</sup> Memorial ¶ 65; Procedural Order, Case No. P73-2008, Sofia City Court, 20 December 2008 [**Exhibit C-13**].

<sup>77</sup> Memorial ¶ 65; Order issued by Sofia Public Prosecutor's Office, Case No. 221-2010, 7 December 2009 at 2 [**Exhibit R-087**].

<sup>78</sup> Memorial ¶ 65; Procedural Order No. 49, Case No. 221-2010, Sofia Court of Appeals, 11 March 2010 [**Exhibit C-15**].

<sup>79</sup> Memorial ¶ 65; Report by the Investigator, Prosecution File No. 1498-2005, 13 June 2011 [**Exhibit R-096**].

<sup>80</sup> Memorial ¶¶ 59(c), 72-75; Reply ¶¶ 85-88.

<sup>81</sup> Memorial ¶ 76, *see esp. fn.* 136 for a listing of the cases; Reply ¶ 90.

**IV. KEY APPLICABLE LEGAL PROVISIONS**

144. Article 4(2) of the BIT states the following with respect to expropriation:

Investments from investors of either Contracting Party shall not be expropriated in the territory of the other Contracting Party except on the basis of legislation in the public interest and against compensation. Such compensation shall be equivalent to the value of the investment expropriated immediately before the date the expropriation or the impending expropriation has become publicly known. The compensation shall be paid without delay following the expropriation; it shall be effectively realizable and freely transferable.

145. With respect to the scope of the Tribunal's jurisdiction, Article 4(3) of the BIT provides that:

The lawfulness of the expropriation shall, at the request of the investor, be reviewed in a properly constituted legal proceeding of the Contracting Party which has carried out the expropriation measure. In the event of disagreement over the amount of compensation, the investor and the other Contracting Party shall hold consultations in order to determine the value of the expropriated investment. If agreement has not been reached within three months from the commencement of the consultations, the amount of the compensation shall, at the request of the investor, be reviewed either in a properly constituted proceeding of the Contracting Party that has carried out the expropriation measure, or by means of an international arbitral tribunal.

146. The UNCITRAL Rules, in turn, provide at Article 20(4) that “[t]he statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.” Similarly, Article 20(2) of the UNCITRAL Rules states, in relevant part, that the statement of claim shall include the following particulars:

...

(c) The points at issue;

(d) The relief or remedy sought;

(e) The legal grounds or arguments supporting the claim.

**V. THE PARTIES' ARGUMENTS**

147. The Claimant asserts in this arbitration that the Respondent expropriated the Property – being 15,600 m<sup>2</sup>, or 99.6%, of the land and factory and commercial buildings on Site I – from LIDI-R. In its Counter-Memorial, the Claimant raises the following three additional claims with respect to Site II: (i) a claim that relates to the construction of a national sports arena, (ii) a claim concerning the Slatina Municipality's division of Sites I and II, which the Claimant alleges left it without a guaranteed access route to the outer roads and (iii) a claim that pertains to the restitution of certain property to two other commercial entities, London AD and Slatina

AD. As already mentioned, in its Memorial on the Merits, the Claimant had also mentioned four additional lines of litigation.<sup>82</sup> The Claimant's arguments in these respects will be described in further detail below and the corresponding positions of the Respondent will also be presented.

## A. INTRODUCTION

### 1. A General Overview of the Respondent's Position

148. With respect to the claims concerning the Property, the Respondent advances four objections to the jurisdiction of the Tribunal under Article 4(3) of the BIT. First, the Respondent argues that the dispute does not relate to the amount of compensation owed for property found to be expropriated by a Bulgarian court. The Respondent maintains that the Claimant has never, at any point during the local litigation proceedings regarding title to the Property, raised a claim of expropriation. Moreover, the Respondent argues that LIDI-R has never held title to the Property, having only the right to use and manage it. In its Submission on Article 4(5) of the BIT, the Respondent also rejects the argument that the requirements of Article 4(3) can be overcome by the operation of the MFN provision in Article 4(5) of the BIT.<sup>83</sup> Second, the Respondent submits that the events giving rise to the dispute took place before the Claimant became an investor. Third, the Respondent contends that the Claimant has not demonstrated that it owns an investment protected by the BIT. The Respondent further contends that ST-AD's investment in LIDI-R "was a sham," as LIDI-R's original owner, Mr. Balev, a Bulgarian national, was the "majority owner of the two companies at least through 2008."<sup>84</sup> Fourth, the Respondent alleges that the Claimant has engaged in an abuse of process to manufacture jurisdiction over the dispute.<sup>85</sup>

149. In its Reply, the Respondent also addresses the Claimant's potential claims relating to Site II. The Respondent maintains that the Tribunal lacks jurisdiction over issues relating to this site because the Claimant has failed to state its claims clearly with respect to them.<sup>86</sup>

150. In addition, the Respondent argues that the additional claims made by the Claimant in its Memorial on the Merits are unrelated to the issue of title to the Property and, therefore, extraneous to this arbitration. These include (i) the litigation regarding the transfer of the

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<sup>82</sup> See ¶ 131 of this Award.

<sup>83</sup> Respondent's Submission on Article 4(5) of the BIT ¶ 4.

<sup>84</sup> Memorial ¶ 58; Letter from Prof. VERNY to the Bulgarian Minister of Economy and Energy, 15 May 2008 at Section II [Exhibit C-50].

<sup>85</sup> Memorial ¶¶ 127-135.

<sup>86</sup> Reply ¶¶ 67-75.

Property from the Semerdzhiev family to JMB (then, Eurotour-B),<sup>87</sup> (ii) the litigation regarding the payment of back rent to JMB (then, Eurotour-B),<sup>88</sup> (iii) the bankruptcy proceedings initiated by JMB against LIDI-R<sup>89</sup> and (iv) the Claimant's complaints at the ECHR.<sup>90</sup>

151. In the Respondent's view, the Claimant is abusing this arbitration by seeking to "internationalize" a domestic dispute and transform domestic litigation between two Bulgarian commercial entities into a bilateral investment treaty dispute with Bulgaria. The Respondent further asserts that the Claimant and its counsel have continually delayed these proceedings, imposed significant and unnecessary costs on the Respondent with their numerous document production requests, and have not submitted coherent submissions on the Claimant's purported claims.<sup>91</sup>
152. Finally, the Respondent seeks moral damages on account of, *inter alia*, what the Respondent characterises as the Claimant's repeated harassment of Bulgaria's judicial and law enforcement authorities.

## 2. A General Overview of the Claimant's Position

153. The Claimant's central argument in support of its assertion of jurisdiction in this arbitration appears to be based on its contention that the "unlawful" Restitution of the Property to the Semerdzhiev family and the "falsified" notary deeds subsequently transferring the Property to JMB are "equivalent to an unlawful expropriation."<sup>92</sup> The Claimant invokes European Union ("EU") law and urges the Tribunal to not base its decision "solely on the basis of the individual BIT viewed in isolation, but instead by taking all relevant rules and regulations into account."<sup>93</sup>
154. In its Counter-Memorial, the Claimant attempts to follow the same organisational structure as set out by the Respondent in its Memorial, addressing each of the Respondent's jurisdictional objections. In its Rejoinder, the Claimant reformulates its submissions into four affirmative arguments for why the Tribunal has jurisdiction. First, the Claimant argues that the Tribunal has jurisdiction "because the dispute relates to a sum of compensation payable by Respondent for the expropriated property."<sup>94</sup> In its Submission on Article 4(5) of the BIT filed after the Hearing

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<sup>87</sup> Reply ¶¶ 77-80.

<sup>88</sup> Reply ¶¶ 81-84.

<sup>89</sup> Reply ¶¶ 85-88.

<sup>90</sup> Reply ¶¶ 89-92.

<sup>91</sup> Reply ¶¶ 93-95.

<sup>92</sup> See e.g., Rejoinder at 15, ¶ 15.

<sup>93</sup> Rejoinder at 4.

<sup>94</sup> Rejoinder at 5.

on Jurisdiction, the Claimant also explains that it relies on the MFN provision in Article 4(5) of the BIT to invoke other BITs concluded by the Respondent which contain more favourable dispute resolution provisions.<sup>95</sup> Second, the Claimant submits that “[t]he Tribunal has jurisdiction, even though some of the violations against the protected property of Claimant took place before Claimant made the investment.”<sup>96</sup> Third, the Claimant asserts that the Tribunal has jurisdiction “because Claimant has not abused the process in order to establish jurisdiction in this legal dispute.”<sup>97</sup> Lastly, the Claimant maintains that the Tribunal has jurisdiction “due to the established coherence of the arbitration suit and the subsequent written submissions, including with respect to Site II.”<sup>98</sup> With respect to this last point, the Claimant specifies that “[c]ontrary to the assertions of Respondent ... Claimant in no way failed to raise the specified claims either in its Request for Arbitration or in its legal arguments” and adds that its claims relating to Site II are “likewise in no way inadmissible in view of Art. 20(2) of the 2010 UNCITRAL Rules.”<sup>99</sup>

## **B. ISSUES FOR ANALYSIS AND DECISION**

155. Based on the Parties’ written and oral submissions, the following issues arise for analysis and decision by the Tribunal for its determination of jurisdiction pursuant to Article 4(3) of the BIT:
1. Does the dispute relate to the amount of compensation owed for property found to be expropriated by a Bulgarian court?
  2. To what extent, if any, can Article 4(5) of the BIT have an impact on the extent of the Tribunal’s jurisdiction?
  3. Was the Claimant an “investor” under the BIT at the time the alleged breaches by the Respondent took place?
  4. Has the Claimant demonstrated that it made an “investment” under the BIT at the time the alleged breaches by the Respondent took place?
  5. Is the Claimant engaged in an abuse of process to manufacture jurisdiction over the dispute?

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<sup>95</sup> Claimant’s Submission on Article 4(5) of the BIT at 4-5, 10.

<sup>96</sup> Rejoinder at 11.

<sup>97</sup> Rejoinder at 12.

<sup>98</sup> Rejoinder at 13.

<sup>99</sup> Rejoinder at 13.

6. Has the Claimant made out its claims with respect to Site II?
7. Are the following additional litigations referred to by the Claimant relevant to the Tribunal's determination?
  - a. Litigation regarding the transfer of the Property from the Semerdzhiev family to JMB
  - b. Litigation regarding the payment of back rent by LIDI-R to JMB
  - c. Bankruptcy proceedings initiated by JMB against LIDI-R
  - d. The Claimant's complaints at the ECHR
8. Has the Claimant abused this arbitration process?
9. Is the Respondent entitled to moral damages?
- 1. Does the Dispute Relate to the Amount of Compensation Owed for Property Found to be Expropriated by a Bulgarian Court?**

*The Respondent's Position*

156. The Respondent contends that the Claimant has not complied with either the procedural or the substantive aspects of Article 4(3) of the BIT.<sup>100</sup>
157. With respect to the procedural prerequisites for initiating a claim, the Respondent submits that the Claimant has failed to: (a) initiate a legal proceeding in Bulgaria alleging expropriation of the Property; (b) obtain a decision by a Bulgarian court finding that the Property has been expropriated; (c) consult with the Respondent with respect to the amount of compensation for property that a Bulgarian court has found to be expropriated; and (d) wait three months after the start of such consultations before initiating the arbitration.<sup>101</sup>
158. With respect to the substantive aspects of Article 4(3), the Respondent argues that the Claimant's claims fall outside the scope of the arbitration clause, which confers jurisdiction on the Tribunal neither to resolve the question of whether an expropriation has taken place, nor to resolve any other claims that do not pertain to the amount of compensation owed for an expropriation. Accordingly, the Respondent argues that the Claimant's allegations of breach of

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<sup>100</sup> Memorial ¶ 81.

<sup>101</sup> Memorial ¶ 81.

the fair and equitable treatment obligation and of denial of justice by the local courts fall outside the scope of the Tribunal's jurisdiction.<sup>102</sup>

159. The Respondent relies on the following three decisions in support of a restrictive reading of arbitration clauses limiting jurisdiction to a determination on the amount of compensation for an expropriation, asserting that tribunals have no jurisdiction to determine whether an investment has been expropriated: *Austrian Airlines v. Slovak Republic* (“**Austrian Airlines**”), *RosInvestCo. UK Ltd. v. Russian Federation* (“**RosInvestCo**”) and *Vladimir Berschader and Moïse Berschader v. Russian Federation* (“**Berschader**”).<sup>103</sup>
160. Drawing upon the reasoning in *Austrian Airlines*, the Respondent contends that Article 10 of the Germany-Bulgaria BIT<sup>104</sup> distinguishes between the availability of, on the one hand, domestic review of the legitimacy of the expropriation and, on the other hand, domestic review or international arbitration of disputes over the amount of compensation for the expropriated investment. In the latter case, the investor has a choice of means, while in the former, the investor has no choice of forum. The Respondent explains that the tribunal in *Austrian Airlines* went on to conclude that this structure in the dispute resolution procedure “shows that access to arbitration was intended to be limited to the amount and conditions of the indemnity, as opposed to the ‘legitimacy’, or lawfulness, or principle of expropriation.”<sup>105</sup>
161. The Respondent asserts that the text of the Germany-Bulgaria BIT is “clear: the Tribunal only has jurisdiction over disputes regarding the amount of compensation owed for property found by a Bulgarian court to have been expropriated.”<sup>106</sup> The Claimant raises no such claim; it follows therefore that the Tribunal lacks jurisdiction over this dispute. The Respondent asserts that the Germany-Bulgaria BIT is even more circumscribed than the dispute settlement clauses at issue in *Austrian Airlines* (Austria-Czechoslovakia BIT), *RosInvestCo* (UK-USSR BIT) and *Berschader* (Belgium-USSR BIT). Indeed, rather than merely restricting a tribunal's jurisdiction to “any dispute” concerning the amount of compensation, the Germany-Bulgaria BIT explicitly limits international arbitration to disputes regarding the amount of compensation owed for property found by a Bulgarian court to have been expropriated.<sup>107</sup>

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<sup>102</sup> Memorial ¶ 82.

<sup>103</sup> Memorial ¶¶ 83-90; *Austrian Airlines v. Slovak Republic*, UNCITRAL, Final Award, 9 October 2009 (“**Austrian Airlines**”) ¶¶ 92-93, 96-98 [RLA-002]; *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. Arb. V 079/2005, Award on Jurisdiction, 1 October 2007 (“**RosInvestCo**”) ¶¶ 112, 114, 119 [RLA-016]; *Vladimir Berschader and Moïse Berschader v. Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006 (“**Berschader**”) ¶¶ 151-158 [RLA-022].

<sup>104</sup> Like Article 4 of the Austria-Czechoslovakia BIT in *Austrian Airlines*.

<sup>105</sup> Memorial ¶ 86, citing *Austrian Airlines* ¶ 97.

<sup>106</sup> Memorial ¶ 96.

<sup>107</sup> Memorial ¶ 90.

162. While the Respondent acknowledges that some tribunals have concluded that arbitration clauses nominally limited to the amount of compensation for expropriation also allow arbitration on the issue of whether an expropriation has in fact occurred, it contends that those authorities are not relevant to the case at hand for two reasons. First, the Respondent submits that the Claimant is not actually asserting a claim of expropriation. Rather, the Claimant requests that the Tribunal reverse Decision 1153 on the basis of breaches of the fair and equitable treatment obligation or denial of justice.<sup>108</sup> Second, the Respondent argues that the clauses at issue in the few cases where tribunals have concluded that they have jurisdiction over expropriation claims in addition to compensation claims were worded differently from Article 4(3) of the BIT. With respect to the Germany-Bulgaria BIT specifically, the Respondent makes the following distinctions:<sup>109</sup>

- there is no “fork in the road” provision as was the case in *Tza Yap Shum v. The Republic of Peru* (“*Tza Yap Shum*”), such that the Claimant would be forced to choose either local litigation or arbitration;<sup>110</sup>
- there is no language similar to that in the Spain-USSR BIT to support the conclusion in *Renta 4 S.V.S.A. et al. v. Russian Federation* (“*Renta 4*”) that the phrase “compensation due” means that the tribunal must determine whether an expropriation had occurred in the first place;<sup>111</sup> and,
- unlike the Belgium/Luxembourg-Czechoslovakia BIT at the heart of the dispute in *Czech Republic v. European Media Ventures S.A.* – where the English High Court upheld an arbitral tribunal’s assertion of jurisdiction over claims that the Czech Republic had indirectly expropriated the claimant’s investment – the BIT in the case at hand stipulates that claims of expropriation are to be submitted to local courts.<sup>112</sup>

163. The Respondent further notes that “it is not entirely clear what claims Claimant is asserting.” Rather, the Respondent argues, the Claimant merely asserts “unspecified rights” under “international law and under the constitutional, civil, and criminal aspects of the Bulgarian legal system in accordance with [Article 4(3) of the BIT].”<sup>113</sup> The Respondent contends that the

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<sup>108</sup> Memorial ¶ 91.

<sup>109</sup> Memorial ¶¶ 92-95.

<sup>110</sup> *Mr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence of the Arbitration Tribunal, 19 June 2009 (“*Tza Yap Shun*”) ¶¶ 144, 150-152, 159 [RLA-020].

<sup>111</sup> *Renta 4 S.V.S.A. et al. v. Russian Federation*, SCC Case No. Arb. V. 024/2007, Award on Preliminary Objections, 20 March 2009 (“*Renta 4*”) ¶¶ 5, 28-31, 59 [RLA-015].

<sup>112</sup> *Czech Republic v. European Media Ventures SA*, [2007] EWHC (Comm) 2851 (Eng.) ¶¶ 4, 6, 26, 43-47, 53 [RLA-007].

<sup>113</sup> Memorial ¶ 97 (Emphasis in the original); Memorial on the Merits at 14.

Claimant does not articulate precisely what rights under international or Bulgarian law have been breached and, moreover, how such rights relate to its rights under the BIT.<sup>114</sup>

164. The Respondent understands the Claimant's assertion that it was "permanently deprived in a confiscatory manner of legal ownership and usage rights in part of the factory premises acquired in the context of privatization" to be a claim that Bulgaria expropriated certain ownership rights.<sup>115</sup> However, the Respondent states that it is unsure which "part of the factory premises" the Claimant alleges has been expropriated.<sup>116</sup> The Respondent maintains that even if the Claimant had certain ownership rights, which it argues it does not, the Tribunal has no jurisdiction to decide upon expropriation claims. According to the Respondent, not only has there never been a finding by a Bulgarian court that the Property was expropriated, but the Claimant has never sought to obtain such finding. Moreover, the Bulgarian courts definitively concluded in Decision 1153 that the Property belongs to JMB.<sup>117</sup>
165. The Respondent also argues that the Claimant is not excused from submitting its expropriation claims to the local courts in Bulgaria simply by asserting that its property has been expropriated by virtue of a denial of justice.<sup>118</sup>
166. Lastly, the Respondent submits that the Claimant's general assertions of corruption in the Bulgarian judiciary are unsupported by the evidence on the record.<sup>119</sup>

*The Claimant's Position*

167. The Claimant asserts that the Respondent's contention that a finding of expropriation by a Bulgarian court is a prerequisite to the Tribunal's jurisdiction under the BIT is "untenable" and that there is no "such (absolute) duty on the part of Claimant ... but rather this is an option available to it."<sup>120</sup> The Claimant argues that "[a]bsolutely no other intention or obligation on the part of German investors was desired or intended by the parties concluding the treaty on the German side."<sup>121</sup> The Claimant is of the view that it is unreasonable to expect it to pursue "additional time consuming and cost-intensive court proceedings in Bulgaria, since these could not be expected to arrive at an objective, proper administrative or judicial decision based on the

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<sup>114</sup> Memorial ¶ 97; Memorial on the Merits at 14.

<sup>115</sup> Memorial ¶ 99; Memorial on the Merits at 14.

<sup>116</sup> Memorial ¶ 99.

<sup>117</sup> Memorial ¶ 99.

<sup>118</sup> Reply ¶¶ 26-34.

<sup>119</sup> Memorial ¶ 100; Memorial on the Merits at 14.

<sup>120</sup> Rejoinder at 5.

<sup>121</sup> Rejoinder at 5-6.

rule of law.”<sup>122</sup> The Claimant further submits that it “indisputably fulfilled” its obligation to consult with the Respondent in an effort to negotiate an amicable solution to the dispute. It adds that it presented requests which the “Respondent, without the merest application of the rule of law, consistently refused by fatally claiming that the [Germany-Bulgaria BIT] was inapplicable.”<sup>123</sup>

168. The Claimant alleges “deep-rooted corruption paralyzing the state system in Bulgaria,” which it purports is supported by the findings of the latest Report of the European Commission, findings which, the Claimant asserts, the Respondent “is required to accept and respect without any ‘ifs or buts.’”<sup>124</sup> Much of the Claimant’s Rejoinder – at least fourteen pages by the Tribunal’s count – is dedicated to elaborating upon its allegations of corruption against the Respondent, including flow-charts purporting to show the “porganisational [*sic*] structure of the corruption,” thirty quotes allegedly spoken by well-known public personalities on corruption in Bulgaria, and a summary of its assertions of corruption related to Decision 1153.<sup>125</sup>
169. The Claimant asserts that the serious infringement of rights and violations perpetrated by the Respondent is against the spirit and purpose of the BIT. It alleges that the Respondent “grossly breached the duty incumbent upon it to legally protect Claimant as a foreign investor deserving of such protection.”<sup>126</sup>
170. With respect to the protections ensured under the BIT, the Claimant argues that the “investments of the Contracting Parties must firstly be protected against discrimination.”<sup>127</sup> Second, the Claimant contends that “irrespective of the treatment of their own citizens,” the parties to a bilateral investment treaty undertake to afford foreign investors “a maximum degree of treatment based on the rule of law.”<sup>128</sup> Third, the Claimant argues that “direct and indirect expropriations are encompassed within the definition of the act, as are measures of equivalent effect, a category embracing *de facto* expropriations.”<sup>129</sup> The Claimant reiterates its argument that the BIT “embraces not only the direct expropriation of property, but also indirect expropriations as well as state measures that can be described as tantamount to expropriations

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<sup>122</sup> Rejoinder at 6.

<sup>123</sup> Rejoinder at 5.

<sup>124</sup> Rejoinder at 6, relying on Report from the Commission to the European Parliament and the Council: On Progress in Bulgaria under the Cooperation and Verification Mechanism, 18 July 2012, COM (2012) 411 (No exhibit number provided).

<sup>125</sup> Rejoinder at 6, 34-47.

<sup>126</sup> Rejoinder at 7.

<sup>127</sup> Rejoinder at 7.

<sup>128</sup> Rejoinder at 7 (Emphasis – in bold – in the original).

<sup>129</sup> Rejoinder at 7.

or which have an equivalent effect to them.”<sup>130</sup> The Claimant further asserts that the three pre-conditions for a lawful expropriation – that it be in the public interest, without discrimination and accompanied by compensation – have not been fulfilled in this case. Lastly, the Claimant submits that the BIT “guarantee[s] that all transfers in connection with investments will be executed freely and without delay.”<sup>131</sup>

171. The Claimant relies heavily on ECHR case law, asserting that it is a source of “fundamental information for concretising the act of expropriation as defined in the BITs ... [and] is not contradicted even by the different wording, because the protection of human rights can, at the very least, be understood as a minimum standard below which the Investment Protection Treaty cannot in any case fall.”<sup>132</sup> While acknowledging that it cannot “presume that a written, binding basic right to ownership has been issued,” the Claimant adds that “[i]ts existence is however recognised without doubt.”<sup>133</sup> In support of its claim, the Claimant relies on the European Court of Justice’s decision in *Lieselotte Hauer v. Land Rheinland-Pfalz*.<sup>134</sup>

172. The Claimant also invokes the dicta of the Supreme German Court’s decision in *Nassausgießungsbeschluss* (Gravel Mining Decision) to rebut the Respondent’s assertion that the Claimant’s right to arbitration is nullified where “no suit was initiated before a Bulgarian Court seeking damages due to expropriation, [and] the claim to compensation per se would be extinguished.”<sup>135</sup>

## **2. To what Extent, if Any, can Article 4(5) of the BIT have an Impact on the Extent of the Tribunal’s Jurisdiction?**

### *The Respondent’s Position*

173. The Respondent argues that Article 4(5) of the BIT has no impact on the extent of the Tribunal’s jurisdiction for the following three reasons: “(i) Article 4(5) cannot amend the terms of consent [to arbitration] set forth in Article 4(3); (ii) the jurisprudence is clear that an MFN provision cannot expand the scope of a party’s consent to arbitration; and (iii) the BIT’s text and negotiating history demonstrate that Germany and Bulgaria intended for Article 4(5) to

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<sup>130</sup> Rejoinder at 12.

<sup>131</sup> Rejoinder at 7.

<sup>132</sup> Rejoinder at 7-8.

<sup>133</sup> Rejoinder at 9.

<sup>134</sup> Rejoinder at 9; citation provided by the Claimant at fn. 10 reads: “EuGH, Slg. 1979, p. 3727 – Hauer” (No exhibit number provided).

<sup>135</sup> Rejoinder at 10, citing *Nassausgießungsbeschluss* (Gravel Mining Decision), Federal Constitutional Court, BverfGE 58, 300 (No exhibit number provided).

apply only to the substantive protections in Article 4 and not to Article 4(3).”<sup>136</sup> The Respondent specifies that its Submission on Article 4(5) of the BIT “does not seek to address the Claimant’s belated reliance on Article 4(5),” which was stated for the first time in these proceedings in the final stages of the Hearing on Jurisdiction (that is, in its final oral submissions).<sup>137</sup> The Respondent adds that even if the Tribunal were to find that the MFN obligation in Article 4(5) of the BIT applies to Article 4(3), the Tribunal would still lack jurisdiction based on the Respondent’s other jurisdictional objections set out in the sections below.<sup>138</sup>

174. First, with respect to Article 4(3) of the BIT, the Respondent contends that the condition for jurisdiction *ratione voluntatis* – a State’s consent to arbitration – cannot be altered or removed by virtue of the MFN provision.<sup>139</sup> In particular, an investor cannot accept an “offer” to arbitrate based on an MFN clause because the terms of the acceptance would not coincide with the terms of the offer.<sup>140</sup> Instead, the Respondent explains, “the investor would be making a counter-offer on broader terms than those offered by the State.”<sup>141</sup> The Respondent emphasises that, in the present dispute, it has not agreed to dispute settlement on any terms other than those specified in Article 4(3).<sup>142</sup>
175. The Respondent also rejects the argument that the MFN clause operates to expand the State’s offer in the BIT, arguing that this would have the effect of conferring on a tribunal the most expansive jurisdiction available under any of the treaties to which the State is a party. In the present case, Bulgaria never intended to extend to German investors an offer to arbitrate as broad as the most expansive offer made to an investor from any other State.<sup>143</sup>
176. Second, the Respondent submits that “[t]ribunals have consistently found that where a State has defined the scope of a tribunal’s jurisdiction in the State’s consent to arbitration, an MFN

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<sup>136</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 4.

<sup>137</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 5 and fn. 2.

<sup>138</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 5. The Respondent specifies that the Tribunal would still lack jurisdiction because “(i) all of the relevant events giving rise to the dispute occurred before Claimant became an investor; (ii) at no time did Claimant possess the alleged investment that is at issue in the dispute; and (iii) Claimant restructured its investment to manufacture jurisdiction only after it argued the same dispute in Bulgarian courts and lost.”

<sup>139</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 6.

<sup>140</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 7. See also Respondent’s Submission on Article 4(5) of the BIT ¶ 6, citing Christoph Schreuer, *The ICSID Convention: A Commentary* (2d ed. 2009) ¶ 25.514 [RLA-041].

<sup>141</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 7.

<sup>142</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 7.

<sup>143</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 8.

provision cannot be used to expand the scope of that jurisdiction.”<sup>144</sup> With reference to *Plama v. Bulgaria* (“*Plama*”),<sup>145</sup> the Respondent argues that an agreement to arbitrate cannot be expanded without an explicit indication that the MFN clause was intended to apply to dispute settlement.<sup>146</sup> The Respondent explains that the tribunal in *Plama* was concerned that, under the claimant’s interpretation of the MFN clause, “an investor has the option to pick and choose provisions from the various BITs,”<sup>147</sup> despite the absence of State consent to such terms in the applicable BIT.<sup>148</sup>

177. The Respondent also invokes the cases of *Berschader*,<sup>149</sup> *Telenor Mobile Communications A.S. v. Hungary*<sup>150</sup> and *Austrian Airlines*,<sup>151</sup> in which tribunals have similarly decided that a dispute resolution clause limited to disputes concerning the amount or mode of compensation for expropriation could not be extended to cover claims for expropriation by virtue of an MFN clause.<sup>152</sup>
178. The Respondent further submits that, whereas some cases have applied the MFN clause to avoid the application of pre-conditions for the exercise of a tribunal’s jurisdiction (such as advance notices or requirements that an investor litigate before domestic courts for a specified period prior to initiation of the arbitration), the tribunals in these cases have characterised the pre-conditions as procedural, not jurisdictional.<sup>153</sup> Conversely, where tribunals have concluded

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<sup>144</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 9. See also Respondent’s Submission on Article 4(5) of the BIT ¶ 9, fn. 6: the Respondent notes that “the outlier in the jurisprudence appears to be *RosInvestCo*, in which the tribunal found that the MFN clause could widen the scope of a dispute settlement clause that restricted arbitration to the amount of compensation for expropriation to allow the tribunal to also adjudicate the investor’s claims of expropriation.”

<sup>145</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 9, referring to *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 (“*Plama*”) ¶ 198 [RLA-049].

<sup>146</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 9.

<sup>147</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 9, citing *Plama* ¶ 219.

<sup>148</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 9.

<sup>149</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 10, referring to *Berschader* ¶¶ 47, 208, 181.

<sup>150</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 11, referring to *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006 (“*Telenor*”) ¶ 90 [RLA-039].

<sup>151</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 12, referring to *Austrian Airlines* ¶ 132.

<sup>152</sup> The Respondent submits that the tribunal in *Telenor* was likewise concerned that expanding the scope of a tribunal’s jurisdiction by operation of an MFN clause would give rise to “investor treaty-shopping and the cherry-picking of favourable elements (and discarding of unfavourable elements) within other dispute resolution provisions,” Respondent’s Submission on Article 4(5) of the BIT ¶ 11, referring to *Telenor* ¶ 93. Regarding *Austrian Airlines*, it is emphasised that the tribunal found that “it would be paradoxical to invalidate [the] specific intent [of dispute settlement provision limiting consent to arbitration to the amount of compensation] by virtue of the general, unspecific intent expressed in the MFN clause,” Respondent’s Submission on Article 4(5) of the BIT ¶ 12, referring to *Austrian Airlines* ¶¶ 135, 138-139.

<sup>153</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 13, referring to *Teinver S.A., Transportes de Cercanías S.A., and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012 ¶¶ 169-70 (“listing cases in which tribunals have allowed claimants

that the requirement in question is jurisdictional, they have ruled that these requirements cannot be avoided by operation of the MFN clause.<sup>154</sup>

179. The Respondent refers to the *Emilio Agustín Maffezini v. Kingdom of Spain* (“*Maffezini*”)<sup>155</sup> decision, in which the tribunal found that the State’s obligation to provide MFN treatment allowed for the investor to utilise the dispute settlement provision in another BIT that did not contain the same domestic litigation requirement.<sup>156</sup> The Respondent explains that, even in that case, the tribunal cautioned that the “beneficiary of the [MFN] clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question,”<sup>157</sup> including, for example, “if one contracting party has conditioned its consent to arbitration on the exhaustion of local remedies,” such condition being “a fundamental rule of international law.”<sup>158</sup>
180. In application of the jurisprudence just noted to the present dispute, the Respondent draws two conclusions. First, it argues that it is undisputable that the requirements in Article 4(3) of the BIT are jurisdictional rather than procedural, its terms limiting the scope of the Tribunal’s jurisdiction to deciding the amount of compensation due after a finding of expropriation by a domestic court.<sup>159</sup> Second, the Respondent submits that the limitations in Article 4(3) of the BIT cannot be overcome even under the reasoning in *Maffezini*, as they involve issues of public policy and fundamental conditions for the Parties’ acceptance of the BIT.<sup>160</sup> According to the Respondent, the public policy considerations in the present dispute are even stronger than in *Maffezini*, given that the requirement to first obtain a finding of expropriation from Bulgarian courts in Article 4(3) was intended to exclude from the State’s consent to arbitration any dispute not pertaining to the amount of compensation. By contrast, the domestic litigation

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to use the MFN clause to ‘override a procedural requirement’ to seek a remedy before domestic courts for some time before bringing arbitration”) [RLA-053].

<sup>154</sup> Respondent’s Submission on Article 4 (5) of the BIT ¶¶ 13-15, referring to *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008 (“*Wintershall*”) ¶¶ 162, 172 [RLA-055], *ICS Inspection and Control Services Ltd. v. Argentine Republic*, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012 (“*ICS*”) ¶¶ 262, 326 [RLA-046] and *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (“*Daimler*”) ¶ 281 (subject to annulment proceedings) [RLA-042].

<sup>155</sup> *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000 (“*Maffezini*”) [RLA-043].

<sup>156</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 15.

<sup>157</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 16, citing *Maffezini* ¶ 62.

<sup>158</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 16, citing *Maffezini* ¶ 63.

<sup>159</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 17.

<sup>160</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 18.

requirement in *Maffezini* was intended only to provide the State with a reasonable period of time to resolve the dispute domestically.<sup>161</sup>

181. Third, the Respondent submits that the text and the negotiating history of Article 4(5) of the BIT demonstrate that this provision applies to the substantive protections in Article 4 and not the dispute settlement provisions in Article 4(3). In particular, the Respondent contends that the reference to “treatment” in Article 4(5) can hardly be interpreted to cover dispute settlement.<sup>162</sup>
182. The Respondent provides the specific context of the negotiations of the Germany-Bulgaria BIT as the reason for the difference between the latter and contemporaneous German treaties.<sup>163</sup> Pointing to a draft of the BIT prepared by Bulgaria in February 1981 in which Article 4 did not include access to arbitration or an MFN clause,<sup>164</sup> and to a subsequent draft prepared by Germany in July 1981 which included an MFN provision in Article 4,<sup>165</sup> the Respondent concludes – based on the absence of an arbitration clause in the latter German draft – that the added MFN provision was intended only to apply to substantive protections and not dispute settlement.<sup>166</sup> According to the Respondent, subsequent German drafts show that the German position favouring access to international arbitration for expropriation-related disputes<sup>167</sup> resulted in the “carefully crafted compromise”<sup>168</sup> to add an arbitration clause in Article 4(3), but that there is no indication that the Parties ever contemplated that Article 4(5) would apply to Article 4(3).<sup>169</sup>

#### *The Claimant’s Position*

183. The Claimant rejects the Respondent’s assertion that reference to Article 4(5) of the BIT was introduced for the first time in the Claimant’s closing arguments during the Hearing on

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<sup>161</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 18.

<sup>162</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 19, referring to *Wintershall* ¶ 168, *ICS* ¶ 296 and *Daimler* ¶ 219, fn. 376.

<sup>163</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 20, 21 and fn. 30.

<sup>164</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 21, referring to Draft of Germany-Bulgaria BIT Submitted by Bulgaria, February 9, 1981, Art. 4 [Exhibit R-142] and *Plama* ¶ 196.

<sup>165</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 22, referring to Draft of Germany-Bulgaria BIT Submitted by Germany, July 24, 1981, Art. 4(4) [Exhibit R-143].

<sup>166</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 22.

<sup>167</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 23, referring to Memorandum Regarding Germany-Bulgaria BIT Negotiations, July 26, 1983 at 2-3 [Exhibit R-144] and Comparison of German and Bulgarian Drafts of Germany-Bulgaria BIT, August 8, 1983 at 3 [Exhibit R-145].

<sup>168</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 23.

<sup>169</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 23.

Jurisdiction.<sup>170</sup> The Claimant points to its Counter-Memorial and Rejoinder, in which it asserts that the Respondent “has violated [the BIT] in its entirety,”<sup>171</sup> quotes Article 4(5)<sup>172</sup> and alleges that the Claimant is entitled to protections afforded in instruments other than the BIT.<sup>173</sup>

184. In its Submission on Article 4(5) of the BIT, the Claimant argues that pursuant to that article, the Respondent has the obligation to “treat the investments of investors not less favourably than the investments of other states and the investors enjoy the right of the best treatment under the present BIT, other BITs providing better treatment of third investors and under Art. 3, Para. 5 and 6 of the Germany-Bulgaria BIT.”<sup>174</sup>
185. According to the Claimant, “[t]he most favoured treatment obligation initially relates to the material treatment of investments or investors,”<sup>175</sup> but also “comprises a procedural effect.”<sup>176</sup> Based on jurisprudential authority referred to in more detail below and a principle of broad interpretation of MFN clauses contained therein (referred to by the Claimant as the “maxim of effectiveness”),<sup>177</sup> the Claimant contends that the MFN clause in Article 4(5) of the BIT must be broadly interpreted in its favour, as it “has been inappropriately disadvantaged and discriminated due to the provision in Article 4 of the Germany-Bulgaria BIT.”<sup>178</sup>
186. The Claimant alleges that all of the provisions of the BIT are “united and interconnected.”<sup>179</sup> Further, it states that “[i]t is obvious from letter a) to Art. 4 of the Protocol to the Germany-Bulgaria BIT that the provisions of Art. 4 are also applicable for ‘... any such withdrawal or restriction of property rights.’”<sup>180</sup>
187. Concerning the applicability of MFN clauses to dispute settlement provisions, the Claimant refers to the *Maffezini* decision, in which the Tribunal “assumed that the dispute resolution

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<sup>170</sup> Claimant’s Submission on Article 4(5) of the BIT at 2.

<sup>171</sup> Counter-Memorial at 8, ¶ 2, referred to in Claimant’s Submission on Article 4(5) of the BIT at 2.

<sup>172</sup> Claimant’s Submission on Article 4(5) of the BIT at 2, referring to Counter-Memorial at 15, ¶ 9.

<sup>173</sup> Claimant’s Submission on Article 4(5) of the BIT at 2, citing Counter-Memorial at 33, ¶ 50 and referring to Rejoinder at 3-4, ¶ I, II.

<sup>174</sup> Claimant’s Submission on Article 4(5) of the BIT at 2. See also Claimant’s Submission on Article 4(5) of the BIT at 4 where, similarly, the Claimant asserts that it is entitled to “invoke those EU Intra-BITs subsequently concluded by the Respondent as well as other BITs which contain more favourable provisions for Claimant for the adverse effect of management, maintenance, use and disposal of the investment as well as the expropriation and enforcement of compensation.”

<sup>175</sup> Claimant’s Submission on Article 4(5) of the BIT at 9-10.

<sup>176</sup> Claimant’s Submission on Article 4(5) of the BIT at 10 (Emphasis – in bold – in the original).

<sup>177</sup> Claimant’s Submission on Article 4(5) of the BIT at 10.

<sup>178</sup> Claimant’s Submission on Article 4(5) of the BIT at 10.

<sup>179</sup> Claimant’s Submission on Article 4(5) of the BIT at 2.

<sup>180</sup> Claimant’s Submission on Article 4(5) of the BIT at 3 (Emphasis – in bold – in the original).

provisions are normally covered by most favoured treatment clauses, unless the interpretation leads to a contrary result.”<sup>181</sup>

188. On the basis of “a parallel” with the *Maffezini* case and the “broad terms of the most favoured treatment clause anchored in Article 4 Para. 5 of the Germany-Bulgaria BIT,”<sup>182</sup> the Claimant contends that it is entitled to invoke more favourable treaties that Bulgaria has concluded with other countries, including, *inter alia*, Poland, Finland, Spain, France, the Netherlands, Croatia and Macedonia.<sup>183</sup> The Claimant likewise refers to treaties concluded by the Respondent with non-EU members such as Russia, the USA, Norway, Switzerland and Israel.<sup>184</sup> According to the Claimant, all of the BITs concluded by Bulgaria with other countries are more favourable to investors than the Germany-Bulgaria BIT, leading “to a gross discrimination of the Claimant in this arbitration.”<sup>185</sup>
189. In support of the “principle of investor-friendly interpretation” of MFN clauses, the Claimant refers to the case *Siemens AG v. The Argentine Republic*,<sup>186</sup> in which “the Claimant was allowed to invoke the more favourable dispute settlement mechanism from the Chile-Argentina IFA – despite the absence of a comparable most favoured treatment clause in broad terms.”<sup>187</sup> The Claimant also emphasises the decision in *Gas Natural SDG, S.A. v. The Argentine Republic* (“*Gas Natural*”), in which the tribunal ruled in favour of international dispute settlement on the basis of an MFN clause and stated that “the international dispute settlement in the BITs is ‘... a significant, substantive incentive and protection for foreign investors ...’”<sup>188</sup> Further, the Claimant invokes *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal*,

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<sup>181</sup> Claimant’s Submission on Article 4(5) of the BIT at 5.

<sup>182</sup> Claimant’s Submission on Article 4(5) of the BIT at 5.

<sup>183</sup> Claimant’s Submission on Article 4(5) of the BIT at 5-7, citing dispute resolution provisions in investment treaties with these countries and referring to other treaties excerpted in an Annex to the Claimant’s Submission on Article 4(5) of the BIT.

<sup>184</sup> Claimant’s Submission on Article 4(5) of the BIT at 5.

<sup>185</sup> Claimant’s Submission on Article 4(5) of the BIT at 5. See also Claimant’s Submission on Article 4(5) of the BIT at 3: the “Respondent attempted to discriminate by denying empower of the investor in Germany-Bulgaria BIT to benefit from more favourable protection provided to third investors.”

<sup>186</sup> Claimant’s Submission on Article 4(5) of the BIT at 7, referring to *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/08, Decision on Jurisdiction, 3 August 2004 (“*Siemens*”) [RLA-050].

<sup>187</sup> Claimant’s Submission on Article 4(5) of the BIT at 5, referring to *Siemens* ¶¶ 54, 56.

<sup>188</sup> Claimant’s Submission on Article 4(5) of the BIT at 7, citing *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005 (Emphasis – in bold – in the original) [RLA-044].

*S.A. v. Argentine Republic* as a case where an MFN clause was applied to avoid an eighteen-months domestic litigation requirement.<sup>189</sup>

190. The Claimant distinguishes the decision in *Plama* from the present dispute, emphasising that the tribunal in that case rejected the applicability of the MFN clause to arbitration clauses by reason of the previous breaking down of negotiations between the parties for a new BIT that contained a revised arbitration clause, whereas the Germany-Bulgaria BIT has at no point been subject to renegotiation.<sup>190</sup>
191. Relying on the above-referenced authorities – in particular, *Gas Natural* – and on the fact that the majority of BITs to which Bulgaria is a party require no prior recourse to national courts,<sup>191</sup> the Claimant concludes that the dispute settlement provisions in all of the BITs entered into by Bulgaria in the last twenty-five years “form a key component of investor protection not to be separated from them.”<sup>192</sup> On the basis of this investment treaty practice of Bulgaria, the Claimant further concludes that the BIT’s requirement to establish expropriation in a Bulgarian court “is not covered by the concept of the ‘local remedies rules’ under international law.”<sup>193</sup>
192. Additionally, the Claimant emphasises that pursuant to a recent decision of the Frankfurt am Main EuCJ and a confirmation in a subsequent arbitral decision, “the in part imprecisely formulated protection rights of the investors in the BITs cannot be interpreted out of context from EU law.”<sup>194</sup> Further, the Claimant asserts that “all the property rights and legal protection guarantees, anchored in the ‘*acquis communautaire*’ adopted by the Respondent on accession to the EU are to be noted in favour of the Claimant.”<sup>195</sup>
193. Finally, the Claimant observes that a broadly formulated MFN clause such as that in Article 4 of the BIT “relates to the arbitration clause,”<sup>196</sup> which, in turn, is to be broadly interpreted. In the view of the Claimant, the principle of broad interpretation applies when the arbitration

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<sup>189</sup> Claimant’s Submission on Article 4(5) of the BIT at 7-8, citing *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006.

<sup>190</sup> Claimant’s Submission on Article 4(5) of the BIT at 8.

<sup>191</sup> Claimant’s Submission on Article 4(5) of the BIT at 8.

<sup>192</sup> Claimant’s Submission on Article 4(5) of the BIT at 8.

<sup>193</sup> Claimant’s Submission on Article 4(5) of the BIT at 8 (Emphasis – in bold – in the original).

<sup>194</sup> Claimant’s Submission on Article 4(5) of the BIT at 9, referring to Judgment of Frankfurt am Main EuCJ from 10.05.2012 Reference 26SchH11/10 and *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012.

<sup>195</sup> Claimant’s Submission on Article 4(5) of the BIT at 10.

<sup>196</sup> Claimant’s Submission on Article 4(5) of the BIT at 10 and fn. 19, referring to “generally accepted practice (both nationally and internationally).”

clause is formulated “in the most comprehensively imaginable manner,”<sup>197</sup> which is the case in the present dispute in view of the formulation of Articles 7(1) and 7(2) of the BIT. According to the Claimant, such method of interpretation of the MFN clause is also consistent with the intent and purpose of the BIT, namely, “to guarantee comprehensive, non-discriminatory legal security for investors.”<sup>198</sup>

### 3. Was the Claimant an “Investor” under the BIT at the Time the Alleged Breaches by the Respondent Took Place?

#### *The Respondent’s Position*

194. The Respondent submits that all of the events relevant to LIDI-R’s claim to title over the Property took place well before the Claimant invested in LIDI-R. Conversely, the Respondent asserts that no acts relevant to the Claimant’s claim to title over the Property took place after the Claimant became an “investor” within the meaning of Article 4(3) of the BIT.<sup>199</sup>
195. According to the Respondent, as there was no German investor at the time of each of the events invoked by the Claimant to be relevant to its alleged title over the Property, there was no obligation under the BIT that the Respondent could have breached.<sup>200</sup> The Respondent cites *Vito Gallo v. Canada*, *Phoenix Action v. Czech Republic* (“*Phoenix*”) and *Société Générale v. Dominican Republic* (“*Société Générale*”) in support of its contention that a tribunal has no jurisdiction *ratione temporis* to consider claims arising prior to the date of the alleged investment, because the BIT cannot be applied to acts committed by a State before the claimant invested in the host country.<sup>201</sup> The Respondent further cites *GAMI Investments, Inc. v. Mexico* (“*GAMI*”), *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, *GEA Group Aktiengesellschaft v. Ukraine* and *Libananco Holdings Co. Limited v. Republic of Turkey* in support of its assertion that the Claimant’s lack of an “investment” within the meaning of Article 4(3) of the BIT before the alleged treaty violations occurred is determinative of the Tribunal’s jurisdiction.<sup>202</sup>

<sup>197</sup> Claimant’s Submission on Article 4(5) of the BIT at 10, fn. 19.

<sup>198</sup> Claimant’s Submission on Article 4(5) of the BIT at 10.

<sup>199</sup> Memorial ¶ 103.

<sup>200</sup> Memorial ¶ 104.

<sup>201</sup> Memorial ¶¶ 104-106; *Vito Gallo v. Canada*, UNCITRAL, Award, 15 September 2011 ¶¶ 326, 328-330 [RLA-021]; *Phoenix Action Limited v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (“*Phoenix*”) ¶¶ 68, 71 [RLA-014]; *Société Générale v. Dominican Republic*, UNCITRAL, LCIA Case No. UN7927, Preliminary Objections to Jurisdiction, 19 September 2008 (“*Société Générale*”) [RLA-018].

<sup>202</sup> Memorial ¶¶ 108-109; *GAMI Investments, Inc. v. Mexico*, UNCITRAL, Final Award, 15 November 2004 (“*GAMI*”) ¶ 93 [RLA-009]; *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009 ¶ 112 [RLA-005]; *GEA Group Aktiengesellschaft v. Ukraine*,

196. The Respondent further argues that the Claimant's purchase of shares in LIDI-R cannot retroactively correct jurisdictional flaws that bar claims by other parties.<sup>203</sup> At the time most of the events giving rise to this dispute took place, Mr. Balev himself had no stake in LIDI-R. The Respondent asserts that Mr. Balev is a private Bulgarian citizen with no standing to arbitrate claims under the BIT and the Claimant's entitlement to protection as a German investor as a result of his investment in ST-AD "cannot compensate for the absence of a protected investor at the time the events giving rise to the dispute took place."<sup>204</sup>

*The Claimant's Position*

197. The Claimant asserts that the Tribunal has jurisdiction even though some of the violations concerning the Property took place before the Claimant made its investment in LIDI-R and, consequently, became an investor in Bulgaria. The Claimant appears to argue that its investment in LIDI-R crystallised at the time the preliminary agreement between the shareholders of LIDI-R and ST-AD was concluded on 4 May 2005.<sup>205</sup> According to the Claimant, the BIT's protections "can actually apply as early as the pre-investment phase."<sup>206</sup> In support, the Claimant submits that Canadian, Japanese and Norwegian model contracts, as well as the approach taken by NAFTA, allow for the application of the non-discrimination clause as early as the pre-investment phase.<sup>207</sup>
198. In any event, the Claimant submits that it "currently owns 80% of the Bulgarian subsidiary LIDI-R, meaning that this legal argumentation of Respondent is likewise inconsequential."<sup>208</sup>
199. In the alternative, the Claimant argues that a majority stake in LIDI-R is not required in order for ST-AD to be properly viewed as an investor under the BIT. The Claimant draws support for its assertion in this regard from the practice of the International Monetary Fund (IMF), the Organisation for Economic Co-operation and Development (OECD) and the German Foreign Trade and Payments Regulations, all of which, the Claimant submits, presume the existence of a direct investment, albeit for statistical purposes, where there is a minimum 10-20% stake-

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ICSID Case No. ARB/08/16, Award, 31 March 2011 ¶ 170 [RLA-010]; *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011 ¶¶ 536-537 [RLA-011].

<sup>203</sup> Memorial ¶ 107.

<sup>204</sup> Memorial ¶ 107, relying on three cases cited at fn. 173.

<sup>205</sup> Rejoinder at 11: "In particular Respondent is mistaken in asserting that Claimant, for its part, had already made a protectable investment within the definition of the German-Bulgarian BIT of 12.04.1986 by way of concluding the preliminary agreement in 2005."

<sup>206</sup> Rejoinder at 11.

<sup>207</sup> Rejoinder at 11.

<sup>208</sup> Rejoinder at 12.

holding.<sup>209</sup> The Claimant similarly relies on the decision in *Lanco v. Republic of Argentina* (“*Lanco*”), which held, according to the Claimant, that the Argentina-USA BIT “in no way meant that the investor was required to have control of the company much less hold the majority of its shares.”<sup>210</sup> The Claimant submits that “[c]onsequently, the investor’s 18.3% stake in an Argentinean company came under the protection of the treaty.”<sup>211</sup> The Claimant also relies on *Compañía De Aguas Del Aconguija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Republic of Argentina*, *CMS v. Republic of Argentina* (“*CMS*”) and *GAMI* in support of its contention that majority control is not required in order for a shareholder to be viewed as an investor under the BIT.<sup>212</sup>

#### 4. Has the Claimant Demonstrated that it Made an “Investment” under the BIT at the Time the Alleged Breaches by the Respondent Took Place?

##### *The Respondent’s Position*

200. The Respondent asserts that Article 4(2) of the BIT explicitly states that compensation is only owed for the expropriation of “investments,” which it argues that the Claimant has failed to prove it possessed at the relevant time. In particular, the Respondent contends that the Claimant conflates Mr. Balev, LIDI-R and ST-AD “in an attempt to make it appear that Claimant made an investment prior to 2006.”<sup>213</sup> For instance, the Respondent asserts that the Claimant’s repeated reference to the ownership rights of the “complainant” when discussing acts that occurred before the actual Claimant invested in LIDI-R “misleadingly create[s] a perception that Claimant had an investment prior to 2006.”<sup>214</sup> The Respondent emphasises that “[o]nly ST-AD can be an investor protected by the BIT, and such protection extends only to acts that occurred after it made the alleged investments in 2006.”<sup>215</sup>

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<sup>209</sup> Rejoinder at 11.

<sup>210</sup> *Lanco International Inc. v. Republic of Argentina*, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal, 8 December 1998 (“*Lanco*”) ¶ 10; Rejoinder at 11 (No exhibit number provided).

<sup>211</sup> Rejoinder at 11.

<sup>212</sup> Rejoinder at 12; *Compañía De Aguas Del Aconguija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Republic of Argentina*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 ¶ 50; *CMS v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003 ¶ 57 (No exhibit numbers provided); *GAMI* ¶ 26 [RLA-009].

<sup>213</sup> Memorial ¶ 112.

<sup>214</sup> Memorial ¶ 115.

<sup>215</sup> Memorial ¶ 115 (Emphasis in the original).

201. The Respondent contends that the Claimant only acquired a 40% interest in LIDI-R in May 2006, as opposed to the 80% interest alluded to by the Claimant.<sup>216</sup> The Respondent further contends that the Claimant's misrepresentation as to the size and timing of its investment is made evident by the following documents:

- the Claimant's letter of 2008 to Bulgaria's Ministry of Economy and Energy, wherein it states that ST-AD "acquired 22,267 shares from a total of 55,996 shares" (40%) of LIDI-R in 2005;<sup>217</sup>
- the 12 June 2006 decision of the Pleven District Court approving the transformation of LIDI R EAD into LIDI-R following the acquisition by ST-AD of a 40% share in the capital of the company;<sup>218</sup>
- LIDI-R's 27 June 2006 and 29 May 2007 applications for approval to increase LIDI-R's nominal share capital, in which Mr. Balev's relative contributions to the capital increase reflect that ST-AD only held a 40% interest in LIDI-R;<sup>219</sup>
- a corresponding loan to Mr. Balev in an amount identical to the total capital increase;
- the minutes of a meeting of LIDI-R's shareholders held on 17 April 2008, which state that Mr. Balev owned 60% of LIDI-R on that date, that the Claimant owned the remaining 40%; and
- the minutes of a meeting of LIDI-R's shareholders held in October 2008 indicating that sometime between April and October 2008, ST-AD had increased its stake in LIDI-R from 40% to 80%.<sup>220</sup>

202. With respect to this latter point, the Respondent submits that this increase in shareholding coincided with the Claimant's first letters to the Respondent demanding payment of compensation "under threat of treaty arbitration."<sup>221</sup>

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<sup>216</sup> Memorial ¶¶ 116-122.

<sup>217</sup> Memorial ¶ 117; Letter from ST-AD to the Bulgarian Minister of Economy and Energy, 15 May 2008 (the "May 2008 Letter") [Exhibit C-50].

<sup>218</sup> Memorial ¶ 119; Decision No. 843, Case No. 305-2006, Pleven District Court, 12 June 2006 [Exhibit R-066].

<sup>219</sup> Memorial ¶ 120; Certificate for Deposited Statutory Capital issued by UnionBank, 26 June 2006 [Exhibit R-067]; Decision No. 305-2006, Pleven District Court, 29 May 2007 [Exhibit R-071].

<sup>220</sup> Memorial ¶ 122.

<sup>221</sup> Memorial ¶ 122.

203. Further, the Respondent submits that the Claimant has failed to demonstrate that it acquired direct or indirect legal title to the Property under Bulgarian law at the time that ST-AD invested in LIDI-R.<sup>222</sup> The Respondent reiterates its assertion that title to the Property was definitively decided in favour of JMB by Decision 1153, and that Mr. Balev's subsequent challenge to that decision was denied a first time in 2006, before the acquisition of shares by the Claimant. The Respondent relies on the principle outlined in Andrew Newcombe and Lluís Paradell's *Law and Practice of Investment Treaties* that "for a particular asset to be able to qualify as an investment under the [international investment agreement], it must first exist and such existence is owed to the law of the territory in which such asset is allegedly held."<sup>223</sup> The Respondent also relies on the decisions in *EnCana Corporation v. Republic of Ecuador* and *RosInvestCo UK Ltd. v. Russian Federation* ("**RosInvestCo Award**") in support of its assertion that because LIDI-R had no legal right to the Property, it follows that Mr. Balev – who purchased LIDI-R in 2004 – and ST-AD – which purchased a share interest in LIDI-R in 2006 – also have no claim to the alleged investment.<sup>224</sup>
204. In its Reply, the Respondent maintains that the Claimant's "repeated insistence that it has certain rights in connection with the alleged expropriation of the Property create[d] the misleading impression that the Claimant was legally entitled to the Property before this dispute commenced."<sup>225</sup> Further, the Respondent asserts that the Claimant's "constant conflation of ST-AD, Mr. Balev, and LIDI-R" is but an attempt to make it "appear as though any offenses committed against LIDI-R (if indeed there were any) were in fact offenses against Claimant, although Claimant did not actually hold shares in LIDI-R until mid-2006."<sup>226</sup> In support, the Respondent refers to the following facts:
- Prior to 1992, the Property belonged to the State.
  - In 1992, the Property was restituted to the Semerdzhiev family.
  - In 1993, the Semerdzhiev heirs transferred the Property to JMB.

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<sup>222</sup> Memorial ¶¶ 123-126.

<sup>223</sup> Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties* at 91 [RLA-001], cited in the Memorial ¶ 125.

<sup>224</sup> Memorial ¶¶ 125-126; *EnCana Corporation v. Republic of Ecuador*, UNCITRAL, Award, 3 February 2006 ¶ 184 [RLA-008]; *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. Arb. V 079/2005, Final Award, 12 September 2010 ("**RosInvestCo Award**") ¶¶ 215-16 [RLA-025].

<sup>225</sup> Reply ¶ 51.

<sup>226</sup> Reply ¶ 51.

- Decision 1153: in 2000 – six years before the Claimant acquired any shares in LIDI-R – the Supreme Cassation Court definitively decided that JMB held legal title to the Property. At that time, LIDI-R was a State-owned company.
- LIDI-R was subsequently privatised and sold to Mr. Balev in 2004 on the understanding, contained in the Information Memorandum, that JMB was the legal owner of the Property.<sup>227</sup>
- The Claimant acquired 40% of the shares of LIDI-R on 25 May 2006.

205. Consequently, the Respondent submits that, in 2006, the Claimant acquired an interest in the company LIDI-R which had no legal title to the Property, and that, therefore, such claimed Property cannot be considered as an investment within the meaning of Article 4(3) of the BIT.<sup>228</sup>

*The Claimant's Position*

206. The Claimant counters the Respondent's allegation that it conflates LIDI-R, Mr. Balev and ST-AD by asserting that "the excerpts from the Commercial Register for LIDI-R" demonstrate that the "Claimant is a shareholder and investor of the company."<sup>229</sup> The Claimant submits that "[t]his official proof clearly shows the percentage of shares that shareholders have and the value of those shares."<sup>230</sup> The document that the Claimant tenders in support of its assertion that it was an "investor", and therefore had an "investment" within the meaning of the BIT at the time of the alleged breaches by the Respondent, is a letter to the Bulgarian Minister of Economy and Energy dated 15 May 2008 (the "**May 2008 Letter**").<sup>231</sup> The Claimant adds that "[p]roof that on 15 May 2008 Claimant is considered a shareholder of [LIDI-R] is evident from the information found in the Commercial Registry for the [Respondent]."<sup>232</sup>
207. The Claimant states that it acquired 80% of the company's capital, but does not specify at which date this occurred. The Claimant instead reiterates that ST-AD "was first in possession of 40% of the original share capital of [LIDI-R]" in 2006.<sup>233</sup> As described above under the third issue,

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<sup>227</sup> Memorial ¶ 36; Information Memorandum at 3 [**Exhibit R-049**]. For a complete version of Information Memorandum, see **Exhibit R-110**.

<sup>228</sup> Reply ¶ 52.

<sup>229</sup> Counter-Memorial at 56, ¶ 115.

<sup>230</sup> Counter-Memorial at 56, ¶ 115.

<sup>231</sup> Counter-Memorial at 56, ¶ 116; May 2008 Letter [**Exhibit C-50**].

<sup>232</sup> Counter-Memorial at 56, ¶ 117 (No exhibit provided).

<sup>233</sup> Counter-Memorial at 56, ¶ 116.

in its Rejoinder, the Claimant alternatively argues that a majority stake in a company is not required for the investor's shareholding to be considered an investment under the BIT. The Claimant also argues that it had a preliminary agreement to acquire the shares from LIDI-R in 2005 and, as such, had an investment at the relevant time.

**5. Is the Claimant Engaged in an Abuse of Process to Manufacture Jurisdiction over the Dispute?**

*The Respondent's Position*

208. The Respondent asserts that the Claimant's acquisition of a stake in LIDI-R was not a *bona fide* acquisition made for commercial purposes prior to the events giving rise to the dispute, but rather that the Claimant sought to acquire a litigation interest.<sup>234</sup> The Respondent contends that, by the time the Claimant made its investment, Mr. Balev had ran out of legal options.<sup>235</sup> The Respondent advances the view that, left with nowhere else to turn, Mr. Balev sought to "internationalize" the dispute and create jurisdiction under the BIT by virtue of ST-AD qualifying as a German investor.<sup>236</sup>
209. In support, the Respondent draws attention to the May 2008 Letter requesting consultations under the BIT, in which it is stated that Mr. Balev was a majority shareholder in both LIDI-R and ST-AD.<sup>237</sup> The Respondent also points to the following timely events. First, the alleged investment was made "a mere three days after the Supreme Cassation Court rejected Mr. Balev's application to set aside Decision 1153."<sup>238</sup> Second, five days after its initial investment, the Claimant sent a letter to the German embassy in Bulgaria and the President of Bulgaria, informing them of its challenges to Decision 1153 and the 2001 Contracts. The Respondent contends that the letter's use of the word "we", such as "after 'we' purchased the factory in 2004 'we became familiar with' Decision 1153" – importantly, bearing no mention that ST-AD only became a shareholder the week prior to the letter – conflates ST-AD with Mr. Balev.<sup>239</sup> The Respondent further points to the Claimant's assertion that the letter put the Respondent on

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<sup>234</sup> Memorial ¶ 135; Reply ¶ 62.

<sup>235</sup> Memorial ¶ 127; Reply ¶ 63.

<sup>236</sup> Memorial ¶ 128.

<sup>237</sup> Memorial ¶ 129; May 2008 Letter at 2 [Exhibit C-50].

<sup>238</sup> Memorial ¶ 130.

<sup>239</sup> Memorial ¶ 130.

notice of its claims under the BIT on behalf of three “plaintiffs”: ST-AD, LIDI-R (a private Bulgarian company) and Mr. Balev (a Bulgarian national).<sup>240</sup>

210. In its Reply, the Respondent maintains that the fact that the Claimant was fully aware that LIDI-R did not hold title to the Property at the time it acquired a stake in LIDI-R in 2006 is evidenced by the following. First, the events relevant to the Claimant’s claims arose before it made its investment.<sup>241</sup> Second, the Information Memorandum published by the Bulgarian Stock Exchange, and purchased by Mr. Balev, stipulated that JMB held legal title to the Property, comprising 99.6% of Site I, and that only 0.4% of Site I was for sale.<sup>242</sup> Third, LIDI-R sought in 2005 a legal opinion from Mr. Stoynev on the validity of the Restitution of the Property to the Semerdzhiev family, the conclusion of which clearly demonstrates, in the opinion of the Respondent, that, in acquiring a stake in LIDI-R, Mr. Balev was seeking to acquire a right to legal claims it could pursue through litigation.<sup>243</sup> Fourth, the Claimant acknowledges that LIDI-R’s annual account reflected the fact that it only owned 0.4% of Site I after Decision 1153 entered into force in 2000, and that “[t]he judicial process was already concluded at the time of privatization.”<sup>244</sup>
211. It follows, according to the Respondent, that Mr. Balev and the Claimant’s acquisitions of the Property were “premised on the expectation that LIDI-R would challenge” the Restitution “through litigation and obtain a windfall”, a motivation which the Respondent asserts the Claimant “concedes ... unabashedly.”<sup>245</sup> The Respondent asserts that the Claimant fails to understand that asserting claims under the BIT is “an altogether different exercise from asserting claims under Bulgarian law” and maintains that the Tribunal simply has no jurisdiction over any claims arising from alleged breaches that predated the investment.<sup>246</sup>
212. The Respondent invites the Tribunal to review Exhibits C-38 to C-44 to the Memorial on the Merits, which, according to the Respondent, show that the Claimant filed criminal complaints against the Respondent’s Prosecutor General and Supreme Judicial Council before the Sofia

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<sup>240</sup> Memorial ¶ 131, citing Memorial on the Merits at 15, which, in turn, cites the May 2008 Letter at 1-2 [Exhibit C-50].

<sup>241</sup> Reply ¶ 54.

<sup>242</sup> Reply ¶ 55; Information Memorandum at 2-3, Attachment 5 [Exhibit R-110].

<sup>243</sup> Reply ¶ 55; Memorandum by Mr. Svetlin Stoynev Regarding LIDI-R EAD, 14 March 2005 at 5 [Exhibit R-111] (Mr. Stoynev’s memorandum, *inter alia*, discussed “restitution claims to the company,” explained that “over 1/3 of the [I]nformation [M]emorandum is dedicated to the performed illegal restitution of the 1<sup>st</sup> project site to the heirs of Semerdzhiev & Co.” and ultimately concluded that “the inspection by the prosecutors and the lawsuits at three-institution legal proceedings are expected to end in favor of [LIDI-R] within three years and the above violations of the law to be ascertained.”)

<sup>244</sup> Reply ¶ 56, citing Counter-Memorial ¶¶ 28, 11.

<sup>245</sup> Reply ¶¶ 53-54, 57-58.

<sup>246</sup> Reply ¶ 59.

- City Court. The Respondent asserts that, in each complaint, the Claimant states its intention to pursue international arbitration against the Respondent.<sup>247</sup>
213. In addition, the Respondent argues that Prof. VERNY's participation at the hearing of the Supreme Cassation Court in February 2011 was "an attempt to influence the domestic court proceedings in LIDI-R's favor."<sup>248</sup>
214. The Respondent analogises the present case to the circumstances in the *Phoenix* case, in which the tribunal denied jurisdiction on the ground that the claimant sought to bring a "pre-existing national dispute ... to an [investment arbitration] tribunal by a transfer of the national economic interests to a foreign company in an attempt to seek protections under a BIT."<sup>249</sup> Likewise, the Respondent relies on the distinction drawn by the *Tokios Tokelés* tribunal between legitimate structuring that occurred before the advent of the dispute and unacceptable structuring that took place *ex post*.<sup>250</sup> In its Reply, the Respondent asserts that the Claimant "provides no reason for dismissing these cases except to assert that its investment was in 'good faith' and that 'it is a holder of rights due to the investment it made.'"<sup>251</sup>
215. The Respondent contends that the Claimant's aim to internationalise its failed domestic legal claim is further demonstrated by the purchase of an additional 40% share of LIDI-R by ST-AD's shareholders and managers on 2 May 2008 – *i.e.*, less than two weeks before it sent its first letter to the Respondent demanding compensation – thereby raising ST-AD's total ownership to a majority shareholding of 80%.<sup>252</sup>
216. The Respondent maintains that Mr. Balev is "the driving force behind this investor-State dispute" and that such blurring between the Claimant and Mr. Balev "strongly suggests that the Tribunal is dealing with the type of manufactured jurisdiction against which the *Phoenix* tribunal warned."<sup>253</sup> According to the Respondent, this abuse is evidenced by an e-mail dated 5 October 2011, addressed to the Tribunal and signed by Mr. Burczyk (the ST-AD representative), but sent from Mr. Balev's personal e-mail address. The Respondent also refers to Mr. Balev's participation in a telephone conference between the Parties, where he was introduced by the Claimant's counsel as "the representative of ST-AD."<sup>254</sup>

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<sup>247</sup> Memorial ¶ 138.

<sup>248</sup> Memorial ¶ 138.

<sup>249</sup> Memorial ¶ 133; Reply ¶ 60, both citing *Phoenix* ¶ 144 [RLA-014].

<sup>250</sup> Memorial ¶ 134; Reply ¶ 60, both citing *Tokios Tokelés* (No citation or exhibit number provided).

<sup>251</sup> Reply ¶ 61.

<sup>252</sup> Reply ¶ 64.

<sup>253</sup> Reply ¶ 66.

<sup>254</sup> Memorial ¶ 137; Reply ¶ 66.

*The Claimant's Position*

217. The Claimant asserts that “[t]here is absolutely no, not even a mediate connection between Mr. Plamen Balev and Claimant, from which one could conclude that Mr. Plamen Balev was involved with Claimant or could influence Claimant’s decisions.”<sup>255</sup> The Claimant further submits that “[t]here is no analogy and comparability between the [May 2008 Letter] referred to in Respondent’s [Memorial] and the increase in the share capital of [LIDI-R] that took place.”<sup>256</sup> According to the Claimant, the alleged connection between Mr. Balev and ST-AD is “unrealistic and absurd.”<sup>257</sup>
218. The Claimant argues that the Respondent’s assertions that the Claimant has committed an abuse of process by attempting to establish jurisdiction in this dispute “are undignified, paltry and shameful.”<sup>258</sup> The Claimant further argues that ST-AD “is in no way mistaken in thinking that, in acquiring the shares in the company LIDI-R, it procured all legal entitlements including its rights to initiate judicial proceedings before Bulgarian courts.”<sup>259</sup> In this regard, the Claimant readily concedes that it “would not have proceeded with the share acquisition had it not had the possibility to contest and have revised the corrupt judicial decisions issued by the Bulgarian administration and justice ministry.”<sup>260</sup>

**6. Has the Claimant Made Out its Claims with Respect to Site II?**<sup>261</sup>*The Respondent's Position*

219. The Respondent notes that the Claimant raises three additional claims with respect to Site II, namely (i) a claim that relates to the construction of a national sports arena, (ii) a claim concerning the Slatina Municipality’s division of Sites I and II, which the Claimant alleges left it without a guaranteed access route to the outer roads and (iii) a claim that pertains to the restitution of certain property to two other commercial entities, London AD and Slatina AD.

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<sup>255</sup> Counter-Memorial at 14, ¶ 8.

<sup>256</sup> Counter-Memorial at 58, ¶ 122.

<sup>257</sup> Counter-Memorial at 58, ¶ 122.

<sup>258</sup> Rejoinder at 12.

<sup>259</sup> Rejoinder at 13.

<sup>260</sup> Rejoinder at 13.

<sup>261</sup> Site II lies immediately to the east of Site I; north of Site II is the National Sports Arena, located on land that is itself separated from Site II by an east-to-west river, which is *not* claimed by LIDI-R. Site II and the Arena are bordered by a north-to-south highway. *See* recent map of the area at **Exhibit R-133** and a revised version of Claimant’s map [**Exhibit 46.1**] at **Exhibit R-134**.

220. The Respondent argues that the Claimant failed to raise these claims in either its Request for Arbitration or its Memorial on the Merits, and is thus in contravention of Articles 20(2) and (4) of the UNCITRAL Rules.<sup>262</sup> The Respondent further argues that any potential claim in relation to Site II is precluded by virtue of the Claimant's failure to submit said claim to a Bulgarian court and obtain a ruling that the measure or action was expropriatory. The Respondent submits therefore that the Claimant has not complied with the requirement in Article 4(3) of the BIT to obtain a finding of expropriation before submitting a claim for compensation.<sup>263</sup>
221. First, the Respondent maintains that the only semblance of a claim with respect to Site II in the Memorial on the Merits relates to an alleged encroachment of Site II due to the construction of the National Sports Arena (the Arena Armeec Sofia).<sup>264</sup> However, the Respondent notes that the Claimant newly asserts in its Counter-Memorial that a building was actually placed on Site II in connection with the construction of the arena. The Respondent argues that the Claimant "fails to specify where the building was, how big it was, what it was used for, whether it was permanent, and who currently owns it. Claimant fails even to provide any evidence that such a building in fact exists or that Respondent was responsible for it."<sup>265</sup> The Respondent further argues that the Claimant has failed to articulate the facts and claims with sufficient clarity to enable the Respondent to respond in a meaningful way.<sup>266</sup> The Respondent emphasises that the Claimant has "not specified what property was allegedly taken, when this alleged taking occurred, whom the property was taken by and for what purpose, or even the damages that it claims."<sup>267</sup>
222. Second, the Respondent submits that the Claimant's claim in relation to LIDI-R's alleged lack of access to the outer roads fails to explain why the Respondent should be held liable if indeed another private entity, JMB, is responsible for blocking LIDI-R's access to Site II.<sup>268</sup>
223. Third, the Respondent contends that the restitution of certain property by the Respondent to London AD and Slatina AD is unspecified and unsupported by any evidence. The Respondent corrects the Claimant's reference to the Information Memorandum, asserting that the document

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<sup>262</sup> Reply ¶ 74.

<sup>263</sup> Reply ¶ 73.

<sup>264</sup> Reply ¶ 70.

<sup>265</sup> Reply ¶ 70.

<sup>266</sup> Reply ¶ 75.

<sup>267</sup> Reply ¶ 69.

<sup>268</sup> Reply ¶ 71.

states that “[t]he heirs of the former owners of London AD have not filed any claims,”<sup>269</sup> as opposed to the assertion of the Claimant that both AD entities have “filed refund claims.”<sup>270</sup>

*The Claimant’s Position*

224. In its Counter-Memorial, the Claimant submits that “LIDI-R was in fact repeatedly and unlawfully dispossessed by the Bulgarian state, without being compensated for it in the proper legal manner and according to binding form stipulated in BIT.”<sup>271</sup>
225. The Claimant also contends that the division of Sites I and II by the Slatina Municipal Administration leaves Site II with no outer road access and, thus, constitutes a *de facto* expropriation attributable to the Respondent.<sup>272</sup> The Claimant further submits that as a “consequence of this decision a danger exists for [LIDI-R] of losing access to the road network of Sofia, which means *de facto* and *de jure*, that it will remain isolated and cannot pursue its activities.”<sup>273</sup>
226. In respect of the restitution of certain property by the Respondent to London AD and Slatina AD, the Claimant asserts that the Information Memorandum stated that both AD entities had “filed refund claims against LIDI-R and its property.”<sup>274</sup>
227. In its Rejoinder, the Claimant argues that the “scope of protection of the BIT does not merely cover the deprivation of the property, but also the ability to use the said property sites including the second actual expropriation [*sic*], affecting Site II caused by the construction of a sports hall by Respondent without any land use and planning permission procedure as such, and without any notification let alone involvement of Claimant or compensation of same.”<sup>275</sup> The Claimant contends that the construction on Site II is demonstrative of the “arbitrariness and perversion of justice practiced by the [Bulgarian] state authorities and justice agencies.”<sup>276</sup>
228. The Claimant maintains that it “in no way failed” to raise its additional claims with respect to Site II in its Request for Arbitration or “in its legal arguments.”<sup>277</sup> It adds that “[t]he claims are

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<sup>269</sup> Reply ¶ 72.

<sup>270</sup> Counter-Memorial at 21, ¶ 20.

<sup>271</sup> Counter-Memorial at 12-13.

<sup>272</sup> Counter-Memorial at 13.

<sup>273</sup> Counter-Memorial at 13.

<sup>274</sup> Counter-Memorial at 21.

<sup>275</sup> Rejoinder at 9.

<sup>276</sup> Rejoinder at 9.

<sup>277</sup> Rejoinder at 13.

likewise in no way inadmissible in view of Art. 20(2) of the 2010 UNCITRAL Rules,”<sup>278</sup> but does not expand further. The Claimant further contends that the Respondent “errs in thinking that, at the time the arbitration suit was raised, it was not possible to raise the issue of the actual new or continued expropriation of Site 2, because, as is known, these had not yet occurred at that time!”<sup>279</sup>

**7. Are the Following Additional Litigations Referred to by the Claimant Relevant to the Tribunal’s Determination?**

**(a) Litigation Regarding the Transfer of the Property from the Semerdzhiev Family to JMB**

*The Respondent’s Position*

229. The Respondent submits that the finding of forgery relied on by the Claimant “was overturned shortly thereafter by the Sofia Court of Appeals on the basis that the claim was precluded by Decision 1153, which had conclusively determined that JMB was the legal owner of the Property.”<sup>280</sup>
230. The Respondent alleges that LIDI-R’s subsequent complaint to the Prosecutor’s Office “lifts *verbatim* a substantial portion of LIDI-R’s previous complaint in Case No. 01903-2006, raising the very same issues that the Sofia Court of Appeals had already reviewed and dismissed on *res judicata* grounds.”<sup>281</sup> The Respondent submits that the content of the Prosecutor’s Office reply is “vastly exaggerated by Claimant” in that it merely states that “the competent prosecutor’s office must rule on the merits whether flaws in the non-contentious proceedings for issuing the notary deeds indicated by the appellant exist, and whether a claim must be filed for their annulment.”<sup>282</sup> The Respondent notes that the Sofia City Prosecution Office subsequently issued two letters to LIDI-R in which it rejected LIDI-R’s request that a claim be filed to revoke the notary deeds.<sup>283</sup>
231. The Respondent maintains that the Claimant’s assertions in this regard are irrelevant to its claim for title to the Property, for “[e]ven if the deeds were nullified, this would at best mean that the

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<sup>278</sup> Rejoinder at 13.

<sup>279</sup> Rejoinder at 13 (Exclamation mark in the original).

<sup>280</sup> Reply ¶ 77; Decision No. 93, Case No. 2119-2007, Sofia Court of Appeals, 30 April 2008 [Exhibit R-077].

<sup>281</sup> Reply ¶ 78.

<sup>282</sup> Reply ¶ 79; [Exhibit R-137].

<sup>283</sup> Reply ¶ 79; [Exhibit R-126] and [Exhibit R-128].

transfer from the Semerdzhiev family to JMB would be brought into question. It would not mean that title to the Property would vest in LIDI-R.”<sup>284</sup>

*The Claimant’s Position*

232. While acknowledging the decision by the Sofia Court of Appeals to the contrary, the Claimant maintains that, when the Semerdzhiev family transferred the Property to JMB, one notary deed was prepared based on a shareholder resolution on which the signatures of two shareholders were forged, while the other notary deed had no shareholder resolution.<sup>285</sup> The Claimant submits that it “has applied to the international court of arbitration, because the specified documents that have now come into force provide irrefutable evidence of unlawful disseizing [*sic*].”<sup>286</sup>
233. In response to the Respondent’s objections to jurisdiction in this regard, the Claimant raises the 3 September 2012 complaint by LIDI-R against JMB, in which it seeks to have the Supreme Prosecutor’s Office of Cassation declare the notary deeds null and void based on the allegedly defective shareholder resolutions by which the Property was transferred to JMB.<sup>287</sup> The Claimant submits that the subsequent letter from the Prosecutor’s Office ordering the Sofia City Prosecution Office to make an inquiry into the merits of LIDI-R’s complaints, had the effect of authorising what the Claimant characterises as “an investigation ... into all of the decisions (or non-decisions) enacted in the past ten (10) years by the public prosecutors and other authorities individually invoked by Claimant.”<sup>288</sup> According to the Claimant, this indicates that “there is just cause (suspicion) of criminal offenses committed within the state judiciary.”<sup>289</sup>

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<sup>284</sup> Reply ¶ 80.

<sup>285</sup> Counter-Memorial at 44, ¶ 70.

<sup>286</sup> Counter-Memorial at 45, ¶ 71.

<sup>287</sup> Counter-Memorial at 52, ¶ 100; Complaint by LIDI-R Regarding Notary Deed [**Exhibit R-119**]; Resolution of the Supreme Prosecutor’s Office of Cassation [**Exhibit R-137**].

<sup>288</sup> Counter-Memorial at 52, ¶ 100.

<sup>289</sup> Counter-Memorial at 52, ¶ 100.

**(b) Litigation Regarding the Payment of Back Rent by LIDI-R to JMB***The Respondent's Position*

234. The Respondent maintains that the proceedings relating to the 2001 Contracts “had nothing to do with the question of which entity held proper legal title over the Property, and both Mr. Balev and Claimant were well aware of the contracts before Claimant invested in LIDI-R.”<sup>290</sup>
235. The Respondent reiterates that ST-AD, and not Mr. Balev, is the Claimant in this arbitration, and argues that the Claimant itself concedes it had full knowledge of the 2001 Contracts when it acquired a stake in LIDI-R in 2006.<sup>291</sup> More specifically, the Respondent refers to Mr. Stoynev’s legal opinion of 14 May 2005, in which he discusses the 2001 Contracts and related bankruptcy proceedings at length and advises LIDI-R to seek to enforce its rights through further litigation in the Bulgarian courts and that a favourable decision is expected. The Respondent asserts that this document “flatly contradicts” the Claimant’s assertion that it was not aware of the 2001 Contracts when it acquired its shares in LIDI-R.<sup>292</sup>
236. The Respondent submits that, in any event, the series of lawsuits initiated by JMB against LIDI-R are irrelevant to this arbitration “because (i) they do not affect Claimant’s assertion of title over the Property, and (ii) Claimant was aware of the contracts and the potential indebtedness they created for LIDI-R over one year before it made its investment in LIDI-R.”<sup>293</sup>

*The Claimant's Position*

237. The Claimant repeatedly asserts that the 2001 Contracts regarding the back rent allegedly owned by LIDI-R to JMB were invalid and unknown to Mr. Balev at the time he acquired LIDI-R.<sup>294</sup> Further, the Claimant submits that it was not aware of the 2001 Contracts because, it states,

they were not included in both the information memorandum and the legal analysis done at the time of nationalization in the year 2004, nor were they included in the accounting statements of LIDI-R and of [JMB]. They were kept secret up to the time at which [JMB] brought two parallel bankruptcy actions for [LIDI-R].<sup>295</sup>

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<sup>290</sup> Memorial ¶ 59(a).

<sup>291</sup> Reply ¶ 82.

<sup>292</sup> Reply ¶ 82.

<sup>293</sup> Reply ¶ 83 (Emphasis in the original).

<sup>294</sup> Counter-Memorial at 14, ¶ 8; 28, ¶ 36; 38, ¶ 59; 40-43, ¶¶ 62-68.

<sup>295</sup> Counter-Memorial at 41, ¶ 64.

**(c) Bankruptcy Proceedings Initiated by JMB Against LIDI-R***The Respondent's Position*

238. The Respondent rejects the Claimant's contention that the bankruptcy proceedings constitute acts and omissions of the State "merely by virtue of the fact that 'the justice system is a part of the State.'"<sup>296</sup> It argues that "there are several bizarre aspects of Claimant's assertion on this matter,"<sup>297</sup> including the fact that the Bulgarian courts, in fact, found in LIDI-R's favour in the two bankruptcy proceedings.<sup>298</sup> More importantly, the Respondent argues that the Claimant does not articulate precisely how the bankruptcy proceedings give rise to any claim under the BIT. In the words of the Respondent, not only does the Claimant

fail to articulate a claim, it fails to articulate even the basic facts critical for alleging a claim, such as whether there was an actual expropriation (as opposed to an attempt "to cause" an expropriation), what damage was caused, whether any damage was permanent, what evidence supports the position that the insolvency administrator "was supposed to cause" an expropriation, whether the State was responsible for such actions of the administrator, and, most importantly, how the State could possibly be responsible for the decision of a private party (*i.e.*, JMB) to initiate the bankruptcy litigation in the first place.<sup>299</sup>

239. The Respondent asserts that, in any event, the Claimant has failed to meet the requirements of Article 4(3) of the BIT in that it never brought a claim of expropriation in the local courts.

*The Claimant's Position*

240. The Claimant submits that the bankruptcy proceedings initiated by JMB against LIDI-R also breach the BIT. The Claimant's assertion in this regard appears to be based on its previous allegation that the 2001 Contracts were not included in the Information Memorandum, which then "deprived the new owner access to them,"<sup>300</sup> as well as an alleged expropriation by a temporary insolvency administrator appointed to LIDI-R, who, in the words of the Claimant, caused "the financial situation ... to deteriorate even further and also expropriate the existing assets."<sup>301</sup>

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<sup>296</sup> Reply ¶ 86.

<sup>297</sup> Reply ¶ 87.

<sup>298</sup> Reply ¶ 87.

<sup>299</sup> Reply ¶ 87.

<sup>300</sup> Counter-Memorial at 39, ¶ 59.

<sup>301</sup> Counter-Memorial at 39, ¶ 59.

241. Relying on the ECHR's 1986 decision in *Van Marle et al. v. The Netherlands*, the Claimant states that the term "property" is "not only synonymous with the possession of objects," but "extends to an acquired circle of customers, or a good reputation or similar."<sup>302</sup> The Claimant contends that the bankruptcy proceedings caused LIDI-R to suffer reputational damage and that "[i]n application of the standard, which is applied by the European Court of Human Rights in the given process matter [the mentioned case of *Van Marle*], the following must be assumed in the case at hand; that the actions of the state are not only inadmissible, but they also damaged the good name of Claimant."<sup>303</sup>
242. While the Claimant acknowledges that the Respondent was "not directly involved" in the bankruptcy proceedings, it argues that "the justice system is a part of the State."<sup>304</sup>

**(d) The Claimant's Complaints at the ECHR**

*The Respondent's Position*

243. The Respondent asserts that the Claimant's arguments have "absolutely no merit."<sup>305</sup> First, the Respondent submits that the "Claimant fails to disclose that its actions before the ECHR have all been dismissed as inadmissible."<sup>306</sup> Second, the Respondent contends that the Claimant fails to provide cogent reasoning as to the relevance of its ECHR litigation to this arbitration. The Respondent views the Claimant's requested relief as tantamount to asking "the Tribunal to adjudicate the same claims that [the Claimant] made before the ECHR and to determine the consistency of various Bulgarian government measures and actions with other treaties, including ... the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Lisbon Treaty."<sup>307</sup> The Respondent concludes by stating that the "Claimant's assertions are misguided," as this Tribunal's mandate is to rule on the consistency of the Respondent's actions with the BIT, not to condemn the Bulgarian judiciary for any alleged lack of compliance with EU law.<sup>308</sup>

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<sup>302</sup> Counter-Memorial at 39, ¶ 59.

<sup>303</sup> Counter-Memorial at 39, ¶ 59; 46, ¶ 75.

<sup>304</sup> Counter-Memorial at 46, ¶ 75.

<sup>305</sup> Reply ¶ 89.

<sup>306</sup> Reply ¶ 90.

<sup>307</sup> Reply ¶ 91.

<sup>308</sup> Reply ¶ 92.

*The Claimant's Position*

244. The Claimant declares that “LIDI-R has also made use of its right to seek its rights at the European Court of Human Rights” and “has filed the corresponding lawsuits.”<sup>309</sup> The Claimant goes on to assert that the Respondent’s submissions with respect to the alleged irrelevance of the complaints at the ECHR to deciding the present arbitration “represent Respondent’s fundamental error concerning the extent of the disputed international remedy in Claimant’s favour.”<sup>310</sup> After a lengthy historical look at EU law in the context of bilateral investment treaties, the Claimant urges the Tribunal to consider “relevant international and EU law” and to take into account their “full extent for the sake of consistency, insofar as it contains protection standards in favour of Claimant, in relation to the jurisdiction of the court concerned.”<sup>311</sup>
245. More specifically, the Claimant asserts its entitlement to have “recourse to the BIT’s protective mechanisms and to assert the compensation rights to which it is entitled even without an established expropriation decision by a Bulgarian court.”<sup>312</sup> The Claimant maintains that “it is of vital importance that compensation can be demanded by the injured party for the de facto expropriation without prior exhaustion of the domestic legal process in the expropriating state, because NO EFFECTIVE LEGAL PROTECTION without any doubt – deni – de justice – exists in the expropriating state.”<sup>313</sup> The Claimant further argues that the “Respondent cannot hold against Claimant that suit has been brought before the Bulgarian courts without establishment of (de facto) expropriation. This would be unreasonable to Claimant in view of conditions in Respondent’s administration, penal jurisdiction, and civil jurisdiction, and would not even be regarded as acceptable in view of the associated financial costs.”<sup>314</sup>

**8. Has the Claimant Abused this Arbitration?***The Respondent's Position*

246. The Respondent is of the view that the Claimant and its counsel are abusing this arbitration, based on the following alleged indicia:

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<sup>309</sup> Counter-Memorial at 46, ¶ 76.

<sup>310</sup> Counter-Memorial at 46, ¶ 77.

<sup>311</sup> Counter-Memorial at 48, ¶ 77.

<sup>312</sup> Counter-Memorial at 49, ¶ 77.

<sup>313</sup> Counter-Memorial at 48, ¶ 77 (Emphasis in the original).

<sup>314</sup> Counter-Memorial at 49, ¶ 77.

- the “close coordination” between the Claimant and Mr. Balev, whereby the “Claimant was no more than a *façade* for Mr. Balev to act as a ‘foreign’ investor;”<sup>315</sup>
- the continual and significant delays in these proceedings caused by Prof. Verny’s “lack of responsiveness to communications from the Tribunal and Respondent, and his failure to comply fully with the Tribunal’s instructions;”<sup>316</sup>
- the “substantial and unnecessary costs on Respondent” on account of the Claimant’s numerous document production requests, which the Tribunal found to be entirely unrelated to this jurisdictional phase of the proceeding;<sup>317</sup> and
- the “vague, unsupported, and often internally contradictory nature of Claimant’s claims [that] have required that Respondent, in essence, reconstruct Claimant’s claims.”<sup>318</sup>

*The Claimant’s Position*

247. The Claimant, in turn, maintains that it has “always met the deadlines for the execution of this proceeding and has never caused a delay in the proceeding.”<sup>319</sup> In its Rejoinder, the Claimant adds that “[i]t is totally unacceptable for Respondent and its legal counsel to bait Claimant and its counsel with polemic language alleging dilatory tactics on their part.”<sup>320</sup>
248. The Claimant emphasises that Prof. Verny suffered from severe illness, and submits a medical certificate to that effect.<sup>321</sup> The Claimant explains that had it indeed not been interested in the “smooth and swift completion of the arbitration process,” it “would not have agreed to the reduction to just 4 weeks of the several months preparation time to which he was entitled.”<sup>322</sup>

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<sup>315</sup> Memorial ¶ 137.

<sup>316</sup> Memorial ¶ 139.

<sup>317</sup> Reply ¶ 95.

<sup>318</sup> Memorial ¶ 136.

<sup>319</sup> Counter-Memorial at 63, ¶ 139. More specifically, the Respondent alludes to Prof. Verny’s two-months delay in responding to the draft Terms of Reference and Procedural Rules for various reasons, “including an extended summer vacation,” the Claimant’s delay in submitting its Counter-Memorial and the more recent delay “without a timely explanation” of the filing of its response to the Respondent’s objection to its document production requests.

<sup>320</sup> Rejoinder at 13.

<sup>321</sup> Medical Certificate of Dr. med. Laukens, dated 1.2.2013 in respect of Prof. Verny [**Exhibit C-115**].

<sup>322</sup> Rejoinder at 14.

## 9. Is the Respondent Entitled to Moral Damages?

### *The Respondent's Position*

249. In its Reply, the Respondent requests that the Tribunal award the Respondent moral damages based on the following alleged conduct on the part of the Claimant:

- repeated harassment of the Respondent's judicial and law enforcement authorities by the filing of "frivolous lawsuits and criminal complaints;"<sup>323</sup>
- levelled accusations against high-level Bulgarian officials "specifically naming them and accusing them of wrongdoing without any evidence, support or justification;"<sup>324</sup>
- "unjustified and defamatory remarks about Respondent's judicial system, accusing it of corruption, perversion of justice and vulnerability to organized crime;"<sup>325</sup> and
- "another mass letter [sent on 21 November 2012] to, among others, the President of the European Commission, the President of Bulgaria, and the Chairwoman of the Bulgarian National Assembly," which, the Respondent contends, "reveals that Claimant has persisted with its slanderous letter-writing campaign even through the advanced stages of this proceeding."<sup>326</sup>

250. The Respondent submits that tribunals have awarded moral damages to a party where it has suffered substantial prejudice to its credit and reputation, or where the party's activities have been disturbed by actions taken by the opposing party.<sup>327</sup> In support, the Respondent refers to the award in *Desert Line Projects LLC v. Yemen* ("**Desert Line**"), where the tribunal granted the claimant USD 1 million in moral damages, including for loss of reputation.<sup>328</sup> The tribunal in that case drew guidance from the *Opinion in the Lusitania Cases (United States v. Germany)*, which held that the mere fact that nonmaterial damages were difficult to measure or estimate in monetary terms did not make such damages any less real and afforded no reason why the

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<sup>323</sup> Reply ¶¶ 97-98. The Respondent points the Tribunal to the Claimant's "Chronology of Complaints of LIDI-R" [**Exhibit C-105**], which lists almost 140 complaints that LIDI-R sent to various municipal, state, foreign, and other authorities over the past eight years, "including nearly every ministry in the Bulgarian government, the President of Bulgaria, the embassies of all EU Member States and the United States in Bulgaria, various German cabinet ministers, the President and Vice-President of the EU, and 'national and foreign media.'"

<sup>324</sup> Reply ¶ 97.

<sup>325</sup> Reply ¶ 97.

<sup>326</sup> Reply ¶ 99.

<sup>327</sup> Reply ¶ 101.

<sup>328</sup> Reply ¶¶ 101-102; *Desert Line Projects LLC v. Yemen*, ICSID Case No. Arb/05/17, Award, 6 February 2008 ("**Desert Line**") [**RLA-028**].

injured party should not be compensated for them.<sup>329</sup> The Respondent “submits that the malicious infliction of injury identified by the *Desert Line* tribunal as grounds for awarding moral damages exists in this case.”<sup>330</sup>

*The Claimant’s Position*

251. The Claimant argues that the Respondent’s request for moral damages is “hypocritical and unreasonable.”<sup>331</sup> The Claimant contends that if Bulgaria were “indeed a State subject to the rule of law,” it would not have been necessary to solicit further documentation and evidence by way of the Open Letter, and the Respondent “would not have to become agitated at being ‘unmasked.’”<sup>332</sup> The Claimant asserts that the Respondent’s administration of justice “indisputably falls short of every EU legal standard criteria.”<sup>333</sup> The Claimant submits that “[i]t is therefore unclear as to what grounds [*sic*] Respondent should be awarded such moral damages.”<sup>334</sup>

## VI. RELIEF REQUESTED

### A. THE RESPONDENT’S REQUEST ON JURISDICTION

252. The Respondent requests that the Tribunal dismiss the Claimant’s claims in their entirety for lack of jurisdiction and order the Claimant to bear all of the Respondent’s costs and fees in this arbitration, as well as compensate the Respondent for moral damages in an amount to be determined by the Tribunal.<sup>335</sup>

253. In its submission on costs dated 22 April 2013, the Respondent alleges a total of EUR 1,299,384.35 incurred in costs and fees in connection with this arbitration.

254. The Respondent’s request that the Tribunal decline jurisdiction is based on the following:

- The BIT only allows arbitration of claims related to the amount of compensation for property found to be expropriated by a Bulgarian court. In the case at hand, no such court

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<sup>329</sup> Reply ¶ 102; *Opinion in the Lusitania Cases (United States v. Germany)*, Award, 1 November 1923, VII R.I.A.A. 32 at 40 [RLA-035]; *Desert Line* ¶ 289.

<sup>330</sup> Reply ¶ 104.

<sup>331</sup> Rejoinder at 14.

<sup>332</sup> Rejoinder at 14.

<sup>333</sup> Rejoinder at 14.

<sup>334</sup> Rejoinder at 14.

<sup>335</sup> Reply ¶ 105.

has made a finding of expropriation. To the contrary, Bulgaria's highest civil court determined that title to the Property was vested in JMB.<sup>336</sup>

- The Claimant has failed to demonstrate that it was a German investor that made an investment at the time the events giving rise to the dispute took place.<sup>337</sup>
- This arbitration is an abuse of process. The Claimant's stake in LIDI-R was taken for the sole purpose of manufacturing jurisdiction over BIT claims.<sup>338</sup>

## B. THE CLAIMANT'S REQUEST ON JURISDICTION

255. The Claimant argues that the Respondent's position that the Tribunal does not have jurisdiction fails because "[t]he BIT does not concern itself *expressis verbis* with the case of a *de facto* expropriation by reason of a corrupted administration and judicial system," adding that the Respondent "had no functioning legal system at the time of expropriation, and still has none to date."<sup>339</sup> The Claimant urges the Tribunal to "close this systematic remedy loophole existing in Respondent's country."<sup>340</sup> It further asks the Tribunal to affirm jurisdiction, "decide on the amount of compensation" and award the Claimant its legal fees and other costs.<sup>341</sup>

256. In its submission on costs dated 19 April 2013, the Claimant alleges a total of EUR 994,016.46 incurred in costs and fees in connection with this arbitration.

## VII. THE TRIBUNAL'S ANALYSIS

257. When faced with several objections to its jurisdiction, an international tribunal has the choice to address either only one of the objections that leads to a denial of jurisdiction or all of the objections, even if more than one leads to a denial of jurisdiction. The Tribunal has chosen the second alternative, in order to answer all of the issues that have been thoroughly debated between the Parties, following here a similar approach adopted earlier by some other decisions, such as, for example, the awards in *Plama Consortium Limited v. Republic of Bulgaria* ("**Plama Award**")<sup>342</sup> and *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*,<sup>343</sup> in

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<sup>336</sup> Reply ¶ 55; Memorial at 146.

<sup>337</sup> Reply ¶ 58; Memorial at 146.

<sup>338</sup> Reply ¶ 57; Memorial at 146.

<sup>339</sup> Counter-Memorial at 65, ¶ 146.

<sup>340</sup> Counter-Memorial at 65, ¶ 146.

<sup>341</sup> Counter-Memorial at 65, ¶¶ 146-147.

<sup>342</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 ("**Plama Award**").

which the tribunals addressed the merits, although they did not consider that they had jurisdiction, “in acknowledgement of the Parties’ efforts.”<sup>344</sup> With the same concern, the Tribunal has decided to discuss all of the Respondent’s jurisdictional objections, in spite of the fact that the analysis of more than one of them ends up in a denial of its jurisdiction. It has, however, not entered into the merits, as the case has been bifurcated.

258. The Tribunal deals with the jurisdictional objections presented by the Respondent in a different order than the sequence in which the Respondent presented them. It is convenient for the purposes of this Award to address the Respondent’s jurisdictional objections under six separate headings: (A) the *ratione personae* issue, *i.e.*, whether the Claimant is a German investor; (B) the *ratione materiae* issue, *i.e.*, whether the Claimant has made an investment; (C) the *ratione temporis* issue, related to the allegation that the events giving rise to the dispute took place before the Claimant became an investor; (D) the *ratione voluntatis* issue, related to the allegation that the Respondent only gave its consent to arbitrate disputes concerning the amount of compensation owed for property found to have been expropriated by a Bulgarian court; (E) the MFN clause issue, which was elaborated on by the Parties after the Hearing on Jurisdiction, in response to a question raised by the Tribunal as to whether or not the clause permits an expansion of the grant of jurisdiction given in the BIT; and (F) the abuse of process issue, concerning the Respondent’s claim that the Claimant tried to manufacture jurisdiction over the dispute presented to the Tribunal or has in other ways abused this arbitration process, with the related question of whether the Respondent is, as a consequence, entitled to moral damages. The Parties’ respective claims for legal and arbitration costs are addressed in this last section (F).
259. In addressing these issues (A) to (F), the Tribunal has considered all of the written and oral submissions made by the Parties. In order to explain the grounds for this Award, it is necessary to cite or summarise a certain number of these submissions at some length, but not all of them. The fact that a submission is not cited or summarised does not signify that it was not considered by the Tribunal in arriving at this Award.
260. Before examining the different jurisdictional objections of the Respondent, the Tribunal wants to state, from the beginning, that the Claimant has presented some claims that are, on all accounts, completely extraneous to this arbitration and have no link with its alleged investment.

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<sup>343</sup> *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010.

<sup>344</sup> *Plama* Award ¶ 147.

The Tribunal will therefore not let itself be distracted by these collateral litigations presented to it by the Claimant in its submissions. These litigations are the following:<sup>345</sup>

- a) the litigation regarding the transfer of the Property from the Semerdzhiev family to JMB (then, Eurotour-B);
- b) the litigation regarding the payment of back rent by LIDI-R to JMB (then, Eurotour-B);
- c) the bankruptcy proceedings initiated by JMB against LIDI-R to recover the amounts of the back rent; and
- d) the Claimant's complaints at the ECHR.

261. The litigation regarding the transfer of the Property from the Semerdzhiev family to JMB (then, Eurotour-B) is between two private entities and can have no consequence on the alleged ownership of the Property by the Claimant. Indeed, if the Semerdzhiev family had not, supposedly, as argued by the Claimant, transferred ownership to JMB, this would only have as a consequence that the Property would still belong to the Semerdzhiev family, not that it would be the property of the Claimant.

262. The litigation regarding the payment of back rent by LIDI-R to JMB (then, Eurotour-B), again, concerns a purely commercial dispute between two economic entities, in which the State was not involved. This litigation relates to the two 2001 Contracts entered into by LIDI-R and JMB after the Supreme Cassation Court decided in its Decision 1730 rendered on 12 September 1997 that LIDI-R owed back rent to JMB (then, Eurotour-B) for the occupation of property belonging to the latter. It is difficult to see any link between that litigation based on contracts entered into between a private corporation and what was then a State-owned entity and the present arbitration dispute over the Property.

263. The bankruptcy proceedings initiated by JMB against LIDI-R consist, once again, of litigation between two economic entities, concerning a debt owed by one of the entities to the other. The Claimant admitted as much during the Hearing on Jurisdiction, when its counsel declared that "[t]his was really a dispute between two commercial entities ..."<sup>346</sup> Moreover, it should be noted that the Bulgarian courts ruled in favour of LIDI-R in that case.<sup>347</sup>

264. The Claimant's four complaints at the ECHR have all been found inadmissible and the Tribunal is at pains to find how they might relate to the present case before it.

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<sup>345</sup> See ¶ 131 of this Award.

<sup>346</sup> Hearing Transcript, 18 March 2013, page 165, lines 13-14.

<sup>347</sup> See ¶ 238 of this Award.

265. The Tribunal, therefore, will not consider this multi-dimensional litigation pattern concerning claims that are totally extraneous to the dispute in this arbitration as relevant to its Award in relation to the claims of the Claimant concerning the ownership of the Property and the alleged interference with Site II.

**A. THE *RATIONE PERSONAE* ISSUE**

266. It does not seem to be contested that the Claimant has the German nationality. ST-AD is a company incorporated in Germany, with its registered office in Thüringen. It therefore fulfils the requirement of Article 1(3) of the BIT, which provides that:

The term “investors” shall mean

In respect of the Federal Republic of Germany:

...

2. Any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the area of application of this Treaty.

267. The core question here is not whether the Claimant can be considered as a German investor today or when it presented its Request for Arbitration, but whether there was a German investor at the time of the alleged events. This question is examined by the Tribunal below, under section (C): the *ratione temporis* issue.

**B. THE *RATIONE MATERIAE* ISSUE**

268. The question here is to ascertain whether ST-AD has made an investment protected by the BIT. The Tribunal considers that there are two aspects to this question. The first is to ascertain when and to what extent the Claimant acquired shares in ST-AD. The second is the extent of the ownership of LIDI-R with respect to Site I and of its rights with respect to Site II at the time of the alleged damages suffered by the Claimant, it being noted that the main contention of the Claimant is an interference with the Property (99.6% of Site I) allegedly belonging to LIDI-R, which affects the value of its shares.

**1. The Acquisition of Shares in LIDI-R by the Claimant**

269. It is common ground that the Claimant owns shares in LIDI-R, and that, therefore, it can be considered to have made an investment in Bulgaria. According to Article 1(1) of the BIT, “(t)he term “investments” shall comprise corporate shares and other kinds of interests in companies ...”

270. The timing and scope of the Claimant's acquisition of such shares is, however, contested between the Parties. The Claimant contends that it owns 80% of the shares, while arguing that an investor does not need to have a majority stake in a company to be considered as such. The Respondent considers that it is not sufficient to accept that the Claimant owns 80% of the shares today, but rather that what is important is to ascertain when the Claimant acquired its interest in LIDI-R.
271. The Tribunal concurs with the Claimant when it contends that an investor whose investment consists of shares of a company does not need to have a majority of those shares in order to be considered as a protected investor under the BIT. The Claimant has rightly cited the *Lanco* decision – with which the Tribunal agrees on this point – in support of its position. In that decision, the interpretation of the definition of the term “investor” in Article 1 of the relevant BIT, which is similarly worded to the definition found in Article 1 of the Germany-Bulgaria BIT, was at stake. These were the words of the tribunal:

The Tribunal finds that the definition of this term in the ARGENTINA-U.S. Treaty is very broad and allows for many meanings. For example, as regards shareholder equity, the ARGENTINA-U.S. Treaty says nothing indicating that the investor in the capital stock has to have control over the administration of the company, or a majority share; thus the fact that LANCO holds an equity share of 18.3% in the capital stock of the Grantee allows one to conclude that it is an investor in the meaning of Article I of the ARGENTINA-U.S. Treaty.<sup>348</sup>

272. Concerning the timing of the acquisition, it results from the evidence submitted that the Claimant acquired 40% of the shares in LIDI-R on 25 May 2006. ST-AD argued that it had a preliminary agreement to acquire shares in LIDI-R in 2005 and, therefore, that its investment dates back to that year. For example, during the Hearing on Jurisdiction, counsel for the Claimant declared: “[w]e claim, by the signature of the preliminary sales agreement for shares ... [that] ST-AD actually is constituted in its capacity as an investor.”<sup>349</sup>
273. However, the Tribunal considers that an agreement to buy shares in the future is not equivalent to a sale and does not transfer property of the shares. The preliminary contract<sup>350</sup> referred to by the Claimant is a memorandum of understanding that gave it a potential right to buy shares in LIDI-R prior to the end of May 2006. It provides at Article 6, para. 2 that “[t]he BUYER has a right of signing a final contract for sale of shares,” and at Article 10 that “[t]he property right on the shares shall be transferred by endorsement as soon as both PARTIES sign a final contract for the sale no later than 31st May 2006 by both parties.” The Tribunal considers that

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<sup>348</sup> *Lanco* ¶ 10.

<sup>349</sup> Hearing Transcript, 18 March 2013, page 138, lines 9-11.

<sup>350</sup> Preliminary Contract for the Sale-Purchase of Shares from the Capital of LIDI-R EAD, 4 May 2005 [Exhibit R-112A].

the Claimant conflates an intention to invest with the investment itself, as was also apparent at the beginning of the Hearing on Jurisdiction, when counsel for the Claimant asked that one of its witnesses be heard “in order to be able to certify the investment intentions of the claimant.”<sup>351</sup> Yet, as was stated by the Respondent during the Hearing on Jurisdiction, “[a]n intent to acquire assets is not an investment.”<sup>352</sup> The Tribunal agrees with the Respondent and considers that the evidence presented shows that the Claimant’s investment materialised on 25 May 2006, when the final contract envisioned in the preliminary contract was duly signed.

274. With respect to the increase from 40% to 80% in the percentage of shares owned by the Claimant, this happened in 2008. According to the Respondent, this increase was effectuated in view of the forthcoming launching of this arbitration. The Tribunal considers this argument below under section (F): the abuse of process issue.
275. Whatever the percentage of shares owned by the Claimant, the Tribunal considers that from 25 May 2006 onwards, the Claimant had an investment in Bulgaria. It is well accepted that it is not necessary, unless explicitly so provided, that an investor owns the majority of the shares of a company in order to be able to have its rights protected through the mechanisms of international investment protection. This has been stated numerous times by international arbitral tribunals.
276. In the present case, the Claimant undoubtedly owns shares in LIDI-R, a Bulgarian company, and can, therefore, be considered to have made an investment in Bulgaria that is protected under the relevant BIT, if all other conditions are present.
277. However, as with the *ratione personae* issue, the core question raised here by the *ratione materiae* issue is not whether the Claimant has made an investment, but whether it owned this investment at the time of the alleged events. This question is examined by the Tribunal below under section (C): the *ratione temporis* issue.

## **2. The Extent of the Property of LIDI-R**

### **(a) The Absence of Rights of the Claimant over the Company’s Property**

278. As a first remark, the Tribunal wants to emphasise that the Claimant has no direct right it can claim over the property of LIDI-R, whatever this property consists of. It must be recalled that the main subject of the dispute concerns title to the Property allegedly belonging to LIDI-R, consisting of 15,600 m<sup>2</sup> of land, including the factory and commercial buildings located on it, situated on a 15,663 m<sup>2</sup> tract of land in Sofia, Bulgaria (Site I). There are also some claims

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<sup>351</sup> Hearing Transcript, 18 March 2013, page 8, lines 18-20.

<sup>352</sup> Hearing Transcript, 18 March 2013, page 54, lines 19-20.

relating to interferences with Site II, comprising 11,876 m<sup>2</sup> of land, which the Parties do not dispute to belong to LIDI-R. It has been repeatedly held by arbitral tribunals that an investor has no enforceable right in arbitration over the assets and contracts belonging to the company in which it owns shares.

279. An example of how this issue has to be dealt with can be given here through the case of *CMS*. *CMS* was complaining about the treatment it received as a foreign investor during the Argentine crisis, its investment being a minority shareholding in Transportadora de Gas del Norte (TGN), an Argentine company to which the Argentine Government had granted a concession for the transportation of natural gas. The claimant, the respondent and the tribunal made the same analysis of the situation in considering that the license, being an asset belonging to TNG, was not a protected investment. The respondent's position, as summarised by the tribunal in its decision on jurisdiction, was the following:

In its view, while the acquisition of shares qualifies as an investment under the Treaty, neither TGN, as an Argentine corporation, nor the License qualify as an investment under the BIT. TGN, the argument follows, has its own assets, including the License; because these assets do not constitute an investment under the Treaty, *CMS*'s claims, based on the alleged breach of TGN's rights under the License, cannot be considered to arise directly from an investment.<sup>353</sup>

280. The claimant did not disagree with this analysis, as again summarised by the tribunal:

*CMS* shares the view that TGN is not an investor under the Treaty, and that it has not been agreed to treat this company as a non-Argentine national because of foreign control. Neither is the License an investment under the Treaty. However, *CMS* adds, its 29.42% share in TGN qualifies as an investment covered under the Treaty ...<sup>354</sup>

281. The tribunal concluded along the same lines, and accepted jurisdiction, not on the basis of any rights of TGN or any rights relating to the license, which were not protected investments, but on the basis of the existence of the shareholding of *CMS* in the Argentine company:

Because ... the rights of the Claimant can be asserted independently from the rights of TGN and those relating to the License, and because the Claimant has a separate cause of action under the Treaty in connection with the protected investment, the Tribunal concludes that the present dispute arises directly from the investment made and that therefore there is no bar to the exercise of jurisdiction on this count.<sup>355</sup>

282. In other words, an investor whose investment consists of shares cannot claim, for example, that the assets of the company are its property and ask for compensation for interference with these

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<sup>353</sup> *CMS* ¶ 66.

<sup>354</sup> *CMS* ¶ 67.

<sup>355</sup> *CMS* ¶ 68.

assets. Such an investor can, however, claim for any loss of value of its shares resulting from an interference with the assets or contracts of the company in which it owns the shares. This has been aptly summarised in *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v. The Government of Mongolia*:

In the present instance, Claimants' investment are the shares of GEM, a company incorporated under Mongolian law as required by that country in order to engage into the mining business and, through ownership of those shares, Claimants are entitled to make claims concerning alleged Treaty breaches resulting from actions affecting the assets of GEM, including its rights to mine gold deposits or its contractual rights and thereby affecting the value of their shares ... To argue that Claimants could not make such Treaty claims would render it practically meaningless in many instances; a large number of countries require foreign investors to incorporate a local company in order to engage into activities in sectors which are considered of strategic importance (mining, oil and gas, communications etc.). In such situations, a BIT would be rendered practically without effect if it were right to argue that any action taken by a State against such local companies or their assets would be not be subject to Treaty claims by a foreign investor because its investment is merely constituted of shares in that local company.<sup>356</sup>

283. The same clear approach was reiterated in the *RosInvestCo* Award:

... modern investment treaty arbitration does not require that a shareholder can only claim protection in respect of measures that directly affect shares in their own right, but that the investor can also claim protection for the effect on its shares by measures of the host state taken against the company.<sup>357</sup>

284. In conclusion, the Tribunal considers that the Claimant made an investment when it acquired its shares of LIDI-R, and that the Tribunal has jurisdiction only to decide whether damages resulted for the Claimant from action attributable to the Bulgarian authorities – over which the Tribunal has jurisdiction – in relation to property belonging to LIDI-R, the company in which it owns shares, which affected the value of its shares. Of course, the Tribunal has no jurisdiction to deal, in whatever manner, with property which does not belong to LIDI-R.

285. In other words, if it could be proven by the Claimant that the Bulgarian authorities expropriated the Property belonging to LIDI-R, the Claimant could present a claim for the loss of value of its shares in that company resulting from such expropriation, if all other conditions for such claim were satisfied.

286. The Tribunal, however, still has to ascertain what constitutes the property of LIDI-R.

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<sup>356</sup> *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v. The Government of Mongolia*, Award on Jurisdiction and Liability, 28 April 2011 ¶ 202 (Emphasis added).

<sup>357</sup> *RosInvestCo* Award ¶ 608 (Emphasis added).

**(b) The Scope of the Company's Property, as Far as Site I is Concerned**

287. When LIDI-R was privatised in 2004, the privatisation process was accompanied by the Information Memorandum, which describes quite precisely what LIDI-R was acquiring. In this document, it was indicated to the prospective bidders that LIDI-R owned 0.4% of Site I and the whole of Site II and that, therefore, 99.6% of Site I did not belong to it. It was further indicated that this portion of Site I belonged instead to JMB, with specific reference to a decision of the Supreme Cassation Court of Bulgaria in 2000 confirming said ownership. The price paid by Mr. Balev, the first owner of all the shares of LIDI-R after the privatisation, was only EUR 73,600, which indeed seems to confirm that the whole of Site I did not belong to LIDI-R.
288. As presented by the Respondent during the Hearing on Jurisdiction, “this dispute arises not of claimant’s ownership of shares in LIDI-R, the company LIDI-R is there; it arises out of the Property, the 99.6 per cent of Site 1. ... when Mr Balev acquired LIDI-R, LIDI-R did not own the property. When claimant ST-AD acquired shares in LIDI-R, LIDI-R did not own the property. It had never owned the property.”<sup>358</sup>
289. The fact that at the time of privatisation it was clear that LIDI-R owned only 0.4% of Site I has been admitted by the Claimant, as noted by the Respondent during the Hearing on Jurisdiction: “[a]fter entering into force of Supreme Cassation Court decision number 1153 of 2000, a corresponding notation was entered into the accounting books of LIDI-R and, as a result, at the time of the privatisation, the annual account of the company stated that they owned 0.4 per cent of the disputed property.”<sup>359</sup>
290. Moreover, even if the Property – in other words, the remaining 99.6% of Site I – would not have been considered to belong to JMB after the restitution, the Respondent argues that LIDI-R never held title to the Property, having only a right to use and manage it.
291. The Tribunal concludes that the evidence presented demonstrates that LIDI-R did not own the Property at the time the Claimant acquired shares in LIDI-R. As a consequence, it appears therefore that, even if the Tribunal were to find that it has jurisdiction over the claims of the Claimant, such claims could not be indirectly based on the whole of Site I, but rather on only 0.4% of it.

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<sup>358</sup> Hearing Transcript, 18 March 2013, page 66, lines 13-15; page 67, lines 14-17.

<sup>359</sup> Hearing Transcript, 18 March 2013, page 70, lines 9-14. A reference is made to the Claimant’s Counter-Memorial at 23 and 28. Of course, although it recognises this, the Claimant argues that this does not deprive it of its right to pursue by all legal means what it considers to be its legitimate rights.

**(c) The Scope of the Company's Rights, as Far as Site II is Concerned**

292. It is not contested that LIDI-R is the owner of Site II comprising 11,876 m<sup>2</sup> of land. In other words, the Tribunal might have had jurisdiction over claims relating to Site II, on the basis of a negative effect on the shares of LIDI-R owned by the Claimant, if such claims had been articulated in a manner that the Tribunal could understand and apprehend. This is not the case, as explained below.
293. In order not to overburden this Award, the Tribunal considers that the different claims relating to Site II can be disposed of quite quickly. The Respondent contends that these claims should be considered as inadmissible because of untimeliness. As stated during the Hearing on Jurisdiction by counsel for the Respondent:

Those allegations, or claims, with respect to Site 2 are untimely because the claimant failed to raise them in either the request for arbitration or the memorial on the merits, and it was not until yesterday that they finally were able to articulate something from which we could discern to a certain extent what those claims were. Article 20(2) of the 2010 UNCITRAL rules:

“The points at issue including the relief or remedy sought and the legal grounds or arguments supporting the claim.”<sup>360</sup>

The claimant did not do that in its memorial on the merits, not even in the counter-memorial on jurisdiction, where the claimant did not indicate any relief or remedies sought or provide any argument in support of those claims.<sup>361</sup>

294. Moreover, the Respondent argues that, even if found admissible, these claims should be dismissed for two reasons: first, because they were not clearly articulated, and, second, because they do not relate to the amount of compensation of an expropriation found to exist in the national courts.
295. Firstly, the Tribunal considers that it does not need to rule on the admissibility or not of the claims relating to Site II on the basis of their late presentation, since, in any event, it finds them inadmissible on the basis that they were not properly articulated and that, as a result, the Tribunal could not really understand what the issues were. By way of example, the following allegations made at the Hearing on Jurisdiction by counsel for the Claimant concerning the

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<sup>360</sup> Article 20(2) of the UNCITRAL Rules provides:

The statement of claim shall include the following particulars:

- (a) The names and contact details of the parties;
- (b) A statement of the facts supporting the claim;
- (c) The points at issue;
- (d) The relief or remedy sought;
- (e) The legal grounds or arguments supporting the claim.

<sup>361</sup> Hearing Transcript, 19 March 2013, page 26, lines 20-25; page 27, lines 1-10.

damage caused to the Claimant by the construction of a sports hall were, in the Tribunal's view, quite confusing:

Indeed, the sports facility is outside the property of the investor, but, by its mere building, that part of the investor's property was actually adjoined to the property in which the sports facility, the sports hall was built, this part (indicates), and we proved that this regulation, which changes, alters the regulation line or boundary, has entered into force after November 2011, and the very building of the sports facility, as a site, fencing it off according to the lines drawn here, was made in 2008.

So we claim that, at the moment of the construction of the national sports facility, the property where it was built -- actually, within that property, there's some plot which is owned by the investor.<sup>362</sup>

296. Secondly and more importantly, the Tribunal concludes that it has no jurisdiction on the claims relating to Site II because, even if the Claimant had properly articulated them, it is common ground and not contested by the Claimant that it did not submit an expropriation claim to the Bulgarian courts prior to presenting its claims before this Tribunal, as required by Article 4(3) of the BIT.
297. In conclusion, as far as Site II is concerned, although the property belongs to LIDI-R, the Tribunal considers that, regardless of whether or not the claims were presented in an untimely manner, it has no jurisdiction over them for the two cumulative reasons expressed above.

### C. THE *RATIONE TEMPORIS* ISSUE

298. The Tribunal accepts that the Claimant presents itself as an investor having made an investment in Bulgaria when it bought shares in the Bulgarian company LIDI-R.
299. However, it remains to be ascertained whether the Claimant was an investor having made an investment in Bulgaria at the time of the events allegedly in breach of the BIT.
300. It is an uncontested principle that a tribunal has no jurisdiction *ratione temporis* to consider claims arising prior to the date of the alleged investment, since a BIT cannot be applied to acts committed by a State before the claimant invested in the host country. The BIT became applicable to the Claimant only on 25 May 2006, when it made its investment in Bulgaria. According to the well-known principle of non-retroactivity of treaties in international law, a BIT cannot apply to the protection of an investor before the latter indeed became an investor under said BIT.
301. Numerous international investment arbitration tribunals have applied the principle of non-retroactivity of treaties.

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<sup>362</sup> Hearing Transcript, 18 March 2013, page 153, lines 15-25; page 154, lines 1-3 (Emphasis added).

302. For example, in *Société Générale*, the following was stated, in unambiguous terms:

Accordingly, the Tribunal lacks jurisdiction over acts and events that took place before the Claimant acquired the investment, that is on November 12, 2004, at which time the investment became protected under the Treaty to the benefit of French nationals and companies only. It follows that the Tribunal will only have jurisdiction over acts and omissions that took place after November 12, 2004, at which time both the Treaty had entered into force and the investor had become a qualifying French national.<sup>363</sup>

303. Similarly, the tribunal in the *Phoenix* case clearly stated as follows:

It does not need extended explanation to assert that the Tribunal has no jurisdiction *ratione temporis* to consider Phoenix's claims arising prior to December 26, 2002, the date of Phoenix's alleged investment, because the BIT did not become applicable to Phoenix for acts committed by the Czech Republic until Phoenix "invested" in the Czech Republic.<sup>364</sup>

304. The following question still has to be dealt with: whether a violation which occurred before the claimant became an investor but the effects of which continue afterwards enters into the tribunal's jurisdiction. The answer is clearly to the negative, as has been held by several international tribunals.

305. Some decisions to this effect are worth citing here. For example, in *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador* ("*M.C.I.*"), the tribunal stated the following:

The non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force. Any dispute arising prior to that date will not be capable of being submitted to the dispute resolution system established by the BIT. The silence of the text of the BIT with respect to its scope in relation to disputes prior to its entry into force does not alter the effects of the principle of the non-retroactivity of treaties.

...

The Tribunal observes that prior dispute may evolve into a new dispute, but the fact that this new dispute has arisen does not change the effects of the non-retroactivity of the BIT with respect to the dispute prior to its entry into force. Prior disputes that continue after the entry into force of the BIT are not covered by the BIT.<sup>365</sup>

306. Applying this simple rule to the facts of this case, the Tribunal must analyse the different allegations of the Claimant in order to determine whether the alleged acts took place before it became a protected investor under the BIT.

<sup>363</sup> *Société Générale* ¶ 107 (Emphasis added).

<sup>364</sup> *Phoenix* ¶ 67.

<sup>365</sup> *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case ARB/03/6, Award, 31 July 2007 ("*M.C.I.*") ¶¶ 61-67.

307. The Tribunal first takes note of the fact that the Claimant abundantly describes all of the events since the nationalisation of the Property of the Semerdzhiev family in 1947, including its Restitution to the deprived owners in 1992, its privatisation in 2004, all the different court proceedings initiated by Mr. Balev, from whom the Claimant acquired its shares in 2006, in connection thereof, and certain events that occurred after 2006.
308. The Tribunal does not disregard this historic presentation of the events, but needs to explain to what limited extent it can be taken into account. While it can indeed help the Tribunal to understand the events that occurred after the Claimant became a protected investor, it cannot, by any means, serve as an independent basis for a claim.
309. This was also the approach adopted by other tribunals, such as in the already cited case of *M.C.I.*, in which it was recognised that acts and omissions effectuated before a claimant became an investor may be considered “for purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force.”<sup>366</sup>
310. However, in order to be able to successfully submit a claim to the jurisdiction of an international tribunal, some event occurring after the claimant has become a protected investor must exist, as was emphasised by the tribunal in *Mondev International Ltd. v. United States of America*:
- ... events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.<sup>367</sup>
311. The Tribunal further notes that the Claimant asserts both violations having occurred before it became an investor and events alleged to have occurred afterwards. In order to determine whether or not a new dispute arose after the Claimant became an investor, some facts need to be recalled:
- In 1947, the Property was nationalised and placed under the management of a State-owned company, which was to become LIDI-R;
  - On 25 February 1992, the contested Property was restituted to its former owners [an event complained of by the Claimant];
  - On 3 February 1993, the former owners sold the Property to JMB [an event complained of by the Claimant];

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<sup>366</sup> *M.C.I.* ¶ 93.

<sup>367</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/ 2, Award, 11 October 2002 ¶ 70 (Emphasis added).

- From 1993 to 2000, there was intense litigation between the private company JMB and the public company LIDI-R in relation to the ownership of the Property. Most notably:
  - On 12 September 1997, the Supreme Cassation Court of Bulgaria issued a final decision in favour of JMB in the dispute between JMB and LIDI-R concerning the ownership of the Property, when it dismissed a request by LIDI-R to set aside the two notary deeds on which the Restitution was based (Decision 1730) [a decision complained of by the Claimant];
  - On 16 June 2000, upon successful leave to appeal by LIDI-R against Decision 1730, the Supreme Cassation Court of Bulgaria reiterated its former decision that the Restitution was valid and that JMB held legal title to the Property (Decision 1153). This theoretically ended by a final and unappealable decision the dispute between the two economic entities, one private, one public [a decision complained of by the Claimant];
- On 9 July 2004, Mr. Balev acquired the shares of LIDI-R, after the two above-mentioned decisions of the Supreme Cassation Court of Bulgaria had already declared that the Property did not belong to LIDI-R;
- On 5 May 2005, LIDI-R filed a claim against the Municipality of Sofia to have certain documents on which the Restitution was based set aside;
- On 6 February 2006, LIDI-R filed with the Supreme Cassation Court of Bulgaria a first set aside application against Decision 1153;
- On 22 May 2006, the Supreme Cassation Court of Bulgaria reiterated its holding in Decision 1153 that the Restitution was valid and that JMB held legal title to the Property (Decision 158) [a decision complained of by the Claimant];
- On 25 May 2006, the Claimant made its first investment, when it acquired 40% of the shares of LIDI-R. This is the first moment when a German investor entered the scene; nothing that happened before can be the basis of a claim by such investor.

312. The Tribunal is compelled to note that all of the events mentioned in the former paragraph happened before the Claimant became a protected investor under the BIT. Three days after the third final and unappealable pronouncement of the Supreme Cassation Court of 22 May 2006 – Decision 158 – which recognised JMB’s ownership of the Property, the Claimant acquired its investment in Bulgaria, *i.e.*, on 25 May 2006. This means that the Claimant became a protected

investor six years after Decision 1153 and two years after the acquisition of the shares by Mr. Balev.

313. The Claimant, alternatively to its attempt to date back its investment to 2005 – or even 2004 – argues that the preliminary contract it entered into with LIDI-R on 4 May 2005 shows its intention to make a future investment and that, from that date onwards, it was in the pre-establishment period, and because certain BITs or other treaties such as NAFTA give protection to rights during the pre-investment period, its pre-establishment rights during such period should be protected. Faced with the undeniable fact that the BIT does not extend its protection to the pre-establishment period, the Claimant has, however, not seriously elaborated on that point. For example, it has not presented any treaty entered into by Bulgaria granting such rights.

314. The Tribunal will therefore now focus on the events and procedures that took place after the moment when the Claimant could claim protection under the BIT as a German investor. These can be summarised as follows:

- On 25 May 2006, the Claimant made its first investment, when it acquired 40% of the shares of LIDI-R.
- On 30 May 2006, the Claimant sent a letter to the President of Bulgaria, several ministerial-level officials and the German embassy in Bulgaria in order to warn of a possible international arbitration.
- On 2 March 2008, the Claimant acquired an additional 40% of the shares of LIDI-R, bringing its total percentage of shares to 80%.
- On 15 March 2008, the Claimant sent a first letter to Bulgaria threatening international arbitration.
- On 16 March 2010, LIDI-R, in which the Claimant now owned 80% of the shares, filed a second application to set aside Decision 1153;<sup>368</sup>
- On 7 March 2011, the Supreme Cassation Court rejected the second set aside application (Decision 1515) [a decision complained of by the Claimant].

315. The Tribunal has to take notice of the fact that, a mere five days after its initial investment, ST-AD sent a letter to several Bulgarian authorities, complaining of “criminal facts and circumstances committed by given persons regarding the hidden privatization and the following draining and attempt for bankrupting a company with foreign participation,” suggesting in the

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<sup>368</sup> Request by LIDI-R, Case No. 1515-2010, Supreme Cassation Court, 16 March 2010 [**Exhibit R-088**].

course of the letter that it had purchased its shares in 2004, by conflating Mr. Balev and ST-AD with the use of the term “we”.

316. What happened next is that the owner of some shares of LIDI-R, now a German investor, tried to have, for the second time, Decision 1153 set aside (the first request for leave having been made when Mr. Balev owned all of the shares of LIDI-R). In fact, that is the only possible relevant event that happened after the critical date of May 25, 2006, when the Claimant became a protected investor under the BIT, i.e., the second set aside application and its rejection by the Supreme Cassation Court (Decision 1515). At the Hearing on Jurisdiction, counsel for the Respondent explained what he considered to be the rationale behind this second attempt to set aside the final and unappealable Decision 1153. He expressed his view as follows:

We submit to you that the only reason for the second attempt is to be able to show that there was a court decision denying a review of 1153 after the time there was a German investment in Bulgaria.<sup>369</sup>

317. The Tribunal considers that a tactic based on the resubmission of an application that has been denied before a claimant becomes an investor after it has acquired such status is unacceptable. It creates an illusion of an event that happened when a protected investor was on the scene. But like all illusions, it is a misleading illusion.
318. For the sake of exhaustivity, the Tribunal will summarise the centrally relevant decisions of the Bulgarian Supreme Cassation Court, in order to confirm that nothing new happened after the Claimant entered into the scene as a German investor. It will, however, not attempt to summarise all of the proceedings that have been launched by LIDI-R. Indeed, the Claimant itself recognises that this would be an impossible task, as “(o)ver the course of eight years, dozens, and perhaps hundreds, of complaints and notices were submitted to various levels of the public prosecutor’s office.”<sup>370</sup>
319. In its Decision 1153, dated 16 June 2000 – a procedure in which the claimant, JMB, was asking that LIDI-R vacate the Property and pay back rent for its occupation that was allegedly in breach of Decision 1730, which had declared that such Property belonged to JMB – the Supreme Cassation Court reiterated that the Property belonged to JMB, while determining the exact scope of such property.
320. The Court clearly presented the issue to be decided as follows: “[t]he main issue in this case is about the size of the nationalized and then restituted immovable property ... The disputed issue in this case is what exactly had been restored to the former shareholders, because, as it was noted above, the ownership is restored only in size and dimensions of the immovable properties

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<sup>369</sup> Hearing Transcript, 18 March 2013, page 17, line 25; page 18, lines 1-3.

<sup>370</sup> Hearing Transcript, 18 March 2013, page 99, lines 21-23.

in which they were nationalized.”<sup>371</sup> Concerning the size of the land, the Supreme Cassation Court first concluded that the restituted property was identical to the property that had been nationalised. It then went on to carefully examine the different buildings on said property in order to determine whether they existed at the time of the nationalisation. Indeed, according to the Bulgarian Restitution Act, buildings that existed at the time of nationalisation have to be restored to their former owners in their initial size. Certain buildings on the property, consisting of a transformer station and a massive single-storey house, were new, and, therefore, the Court considered that they were the property of LIDI-R and did not have to be returned. Without needing to enter further into this for its Award, the Tribunal assumes that this non-restored part of the nationalised property is precisely the portion of Site I that belongs to LIDI-R.

321. LIDI-R, then belonging to Mr. Balev, filed a request to set aside Decision 1153, based on Article 231 of the Bulgarian Civil Procedure Code, which provides:

Article 231: (1) An interested party may request that a decision which has entered into force to be set aside:

...

c) where the decision is based on a document that, by the due court procedure, has been recognized to be forged, or is based on an act of a court or another state body that has been revoked afterwards;

322. In its request, LIDI-R invoked a decision of the Sofia Municipal Court of 7 November 2007, which found that the Certificate and Information Note that had been used in two expert reports relied on by the Supreme Cassation Court were untrue.

323. In its Decision 158, the Supreme Cassation Court refused to set aside Decision 1153. It based its rejection of LIDI-R’s application on two main arguments. First, according to the Supreme Cassation Court, one has to distinguish between different articles of the Bulgarian Civil Procedure Code:

Pursuant to Article 231 (1)(c) of the Civil Procedure Code, an interested party may request a decision which has entered into force be set aside where the said decision is based on a document which has been found, by due court procedure, to be forged. ... A decision under Article 97 (3) of the Civil Procedure Code whereby a document is found untrue does not constitute a ground for set aside under Article 231 (1)(c) of the Civil Procedure Code. The grounds for set aside exhaustively listed in the law may not be applied broadly ....<sup>372</sup>

The second reason put forward by the Supreme Cassation Court is that the experts on whom it had relied in its Decision 1153 did not base their report solely on the two documents referred to:

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<sup>371</sup> Decision 1153 at 2, 4-5.

<sup>372</sup> Decision 158 at 2 (Emphasis added).

the said decision is not based on those documents only. The allegation that the expert opinion and, through it, the Decision of the Supreme Cassation Court, Fourth Civil Department, in Civil Case No. 1012/1998 is based on those untrue documents is not supported by the evidence in the case. Three technical expert opinions were submitted in the proceedings before the Supreme Cassation Court, and the said opinions based their conclusions on technical documentation other than the documents whose truthfulness is subject matter of Civil Case No. 3393/2005 of the Sofia Municipal Court

...<sup>373</sup>

On this dual basis, the Supreme Cassation Court refused to set aside Decision 1153 on 22 May 2006.

324. As already mentioned, only three days later, on 25 May 2006, the Claimant acquired 40% of the shares of LIDI-R, and, on 2 March 2008, another 40%.
325. On 16 March 2008, LIDI-R filed a second application to set aside Decision 1153 based on Article 303 of the New Bulgarian Civil Procedure Code, which entered into force on 1 March 2008. Article 303 replaces Article 231 of the former Civil Procedural Code and is similar in effect:

Ground for set aside

Article 303: (1) An interested party may request that a decision which has entered into force to be set aside:

1. where new circumstances or new written evidence of material relevance to the case are discovered which could not have been known at the time of adjudication of the said case or which the party could not obtain in due time;
2. where, by the due court procedure, a document, a witness testimony, or an expert witness opinion on which the decision is based are found to be untrue, or a criminal action of a party, of its representative, of a member of the court panel or of a service officer in connection with the adjudication of the case is found;

326. In this new application, LIDI-R essentially restated the same arguments as those presented in support of its first application to set aside. Here again, in its Decision dated 7 March 2011 (Decision 1515), the Supreme Cassation Court refused the setting aside of Decision 1153. The Supreme Cassation Court examined the merits of the LIDI-R's arguments based on, respectively, Article 303(1)(2) and Article 303(1)(1) of the New Bulgarian Civil Procedure Code.
327. With regard to the first ground for setting aside a decision in force contained in the application, *i.e.*, Article 303(1)(2) of the New Bulgarian Civil Procedure Code, the Court found that it was

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<sup>373</sup> Decision 158 at 2-3.

the same argument as had been made under the equivalent Article 231(1)(c) of the former Bulgarian Civil Procedure Code and could not simply be re-presented:

Thus, the possibility to file an application for set aside on this ground, and on the basis of the said pieces of evidence, had been precluded by the rendered decision of the Supreme Cassation Court on civil case number 160/2006 and, for this reason, a new application on the ground of Article 303(1)(2) of the Civil Procedural Code (which is analogous to 231(1)(c) of the Civil Procedural Code (repealed) and on the basis of said pieces of evidence cannot be filed.<sup>374</sup>

328. Although LIDI-R had slightly added to its allegation, relying not only on the untrue Certificate and Information Note – a question which had already been disposed of, according to the Supreme Cassation Court – but also on the alleged untrue witness statements supposedly based on these documents and a decision of the Bulgarian Court of Appeal dated 1 October 2009 dealing with this question. However, as mentioned before, this issue had already been dealt with by the Supreme Cassation Court in its Decision 158. Moreover, the Court aptly underscored that this judgement was totally irrelevant, as the criminal court found that the experts were not guilty:

In the reasoning for the decision, the court found that such crime had not been perpetrated, as both the objective and the mental element of its definition were not met, because the comprehensive assessment of the evidence does not lead to a conclusion that the expert opinion provided by the defendants is untrue; they had provided an expert opinion according to their subjective judgment of the evidence and had not intentionally misled the court.<sup>375</sup>

329. An acquittal is not a ground for setting aside a decision that entered into force on the basis of Article 303(1)(2) of the New Bulgarian Civil Procedure Code.
330. With regard to the first ground for setting aside a decision in force contained in the application, *i.e.*, Article 303(1)(1) of the New Bulgarian Civil Procedure Code, as far as the purported new documents that would justify a setting aside are concerned, the Supreme Cassation Court considered that the bulk of them were not new:

As the above three pieces of evidence have been known to the claimant as early as 2005 ... the application for set aside on the grounds contended ... should be dismissed as inadmissible.<sup>376</sup>

In addition, the Supreme Cassation Court considered that the two documents that had not already been presented and could, therefore, be considered as new, were “not significant for the outcome of the dispute.”<sup>377</sup>

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<sup>374</sup> Decision 1515 at 2.

<sup>375</sup> Decision 1515 at 6.

<sup>376</sup> Decision 1515 at 2.

331. In other words, nothing new of any relevance was presented by LIDI-R in its second application to set aside Decision 1153, when it had a German shareholder. Rather, this application can be considered, as aptly described by the Respondent, as a “repackaging” of the first application to set aside that same Decision 1153, rendered six years before the Claimant became an investor in Bulgaria.
332. The Tribunal reiterates that it is not acceptable for a claimant to artificially create a new act of the State allegedly interfering with its rights by simply “mirroring” events that occurred before it became a protected investor. For example, if a claimant, before coming under the protection of a given BIT, had asked for and been refused a license, it could not simply purport to create an event posterior to it becoming a protected investor by presenting the very same request for a license that would, no doubt, be similarly refused. In the present case, the Claimant cannot establish jurisdiction for this Tribunal by presenting a request to set aside Decision 1153 after it became an investor on similar grounds than the request that was denied prior to its becoming a protected investor.
333. In sum, the Tribunal cannot find any alleged violation that occurred after the Claimant acquired the status of a German investor protected by the BIT and, therefore, concludes that it does not have jurisdiction *ratione temporis* over the claims presented by the Claimant.

**D. THE *RATIONE VOLUNTATIS* ISSUE**

334. As explained earlier, although the Tribunal concludes that it lacks jurisdiction *ratione temporis* over the Claimant’s claims, it will also address the remaining objections mentioned in the introduction to its analysis, starting with the *ratione voluntatis* issue.
335. The Tribunal will thus now consider the question of whether, even if the Claimant would have been found to be an investor having made an investment in Bulgaria at the time of the events allegedly in breach of the BIT – in other words, even if it had fulfilled the *ratione temporis* condition – the Respondent gave its consent in Article 4(3) of the BIT to be sued for the kind of claim presented by the Claimant before this Tribunal, or whether such consent is limited strictly to “disagreements over the amount of compensation” where an expropriation has been found to exist by a Bulgarian court.
336. In order for a claimant to benefit from the jurisdictional protection granted by an arbitration mechanism, there is a condition *ratione voluntatis*: the State must have given its consent to such procedure, which allows a foreign investor to sue the State directly at the international level. This consent is expressed broadly or restrictively, with or without conditions of exhaustion of

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<sup>377</sup> Decision 1515 at 2.

local remedies or waiting periods, as allowing all claims or only certain claims. In other words, the State's consent is given under certain conditions. Just as, for example, the conditions of nationality must be fulfilled before an investor can have access to rights under a BIT, the conditions subject to which the State gives its consent must be fulfilled before a right to arbitration can arise. Such conditions are an inherent part of the State's given consent. In other words, if these conditions are not fulfilled, there is indeed no consent.

337. At the outset, the Tribunal wants to restate that it is of the utmost importance not to forget that no participant in the international community, be it a State, an international organisation or a physical or a legal person, has an inherent right of access to a jurisdictional recourse. For such right to come into existence, specific consent has to be given. As far as investment arbitration is concerned, such consent can be given in a contract, a domestic law or an international bilateral or multilateral treaty. In all these different hypotheses, the State can shape its consent as it sees fit by providing the conditions under which it is given – in other words, the conditions subject to which an “offer to arbitrate” is made to the foreign investors.
338. The question that the Tribunal has to answer here is the following: does Article 4(3) of the BIT grant jurisdiction to the Tribunal over the claims presented by the Claimant?
339. The primary jurisdictional objection of the Respondent is that the Tribunal has no jurisdiction, because the Respondent has not consented to the arbitration of disputes that do not concern the amount of compensation for an investment that Bulgarian courts have already found to have been expropriated.
340. The Respondent argues that the Tribunal has no jurisdiction, because the consent to arbitration given by the two States in Article 4(3) of the BIT is subject to procedural and substantive conditions that have not been fulfilled.
341. According to the Respondent, the text of the BIT is unambiguous. For ease of reference, it is appropriate to cite here Article 4(3) in its entirety:

The lawfulness of the expropriation shall, at the request of the investor, be reviewed in a properly constituted legal proceeding of the Contracting Party which has carried out the expropriation measure. In the event of disagreement over the amount of the compensation, the investor and the other Contracting Party shall hold consultations in order to determine the value of the expropriated investment. If agreement has not been reached within three months from the commencement of the consultations, the amount of the compensation shall, at the request of the investor, be reviewed either in a properly constituted proceeding of the Contracting Party that has carried out the expropriation measure, or by means of an international arbitral tribunal.

342. For the Respondent, this clearly means that “the Tribunal only has jurisdiction over disputes regarding the amount of compensation owed for property found by a Bulgarian court to have

been expropriated.”<sup>378</sup> On the contrary, the Claimant argues that Article 4(3) of the BIT gives investors an unconditional right to go to arbitration in order to protect their rights. Indeed, the Claimant considers that it is not obliged to go to the Bulgarian courts prior to bringing its claims to arbitration, since the article provides that this shall be done “at the request of the investor.”

343. In its interpretation of Article 4(3) of the BIT, the Tribunal applies the principles set out in the well-known Article 31 of the Vienna Convention on the Law of Treaties, according to which “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”
344. In accordance with these principles, the Tribunal begins by considering the “ordinary meaning” of the terms used in Article 4(3) of the BIT. Here, complex reasoning does not appear to be required. In this article, the States have given a consent that is both limited in scope and conditioned on the fulfilment of certain procedural requirements.
345. More specifically, Article 4(3) of the BIT reserves disputes relating to the lawfulness of expropriation to the national authorities, while explicitly referring those relating to the amount of compensation either to the national authorities or to an arbitral tribunal, at the choice of the investor.
346. In the event of an alleged expropriation of a foreign investment by a State, a number of steps must be followed. First, the lawfulness of the expropriation must initially be reviewed by the courts of the State accused of it, or, more generally, by “a properly constituted legal proceeding” of that State. This could be the end of the matter. However, if there remains disagreement over the amount of compensation due as a consequence of the expropriation, then a second step follows, consisting of consultations between the investor and the State. Only then, as a possible third step, can recourse be made to “an international arbitral tribunal,” with the added condition that three months must have elapsed from the commencement of the consultations relating to the amount of compensation due for an expropriation.
347. In other words, there are two types of limitations to the consent to arbitration given by the State: the different steps to be followed are procedural conditions to the consent; the consent is moreover limited substantially to claims over the amount of compensation.
348. This means that the Tribunal has no jurisdiction if (i) the different required steps have not been successively followed prior to the initiation of international arbitration or (ii) if the claim relates to an issue other than the amount of compensation due for an expropriation found to exist by the national courts.

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<sup>378</sup> Memorial ¶¶ 96.

349. The Tribunal will now address the Claimant’s argument that the question of the legality of the expropriation does not necessarily have to be submitted to the Bulgarian courts prior to the launch of an international arbitration, since Article 4(3) of the BIT specifies that the initiation of such proceedings by the allegedly expropriated investor shall be “at the request of the investor.” The Claimant interprets this to mean that the investor is free to make this request or not. This is certainly true. An expropriated investor is not obliged to go to the national courts. However, it is obliged to do so if it wishes to start an international arbitration. Article 4(3) of the BIT is here to explain what steps have to be fulfilled before an investor can bring its claim to arbitration. If the investor wants to benefit from the arbitration mechanism, then it is indeed first obliged to present a request to the local courts to have them determine the legality or illegality of the expropriation.
350. A similar analysis was conducted by the tribunal in *Impregilo S.p.A. v. Argentine Republic* (“*Impregilo*”), where the applicable treaty also provided for a negotiation, a court proceeding and an arbitration phase.<sup>379</sup> In that case, the tribunal analysed the words “may be submitted,” such expression being analogous to the expression “shall, at the request of the investor, be reviewed” in the case at hand. The tribunal – unanimous on that point – held that there was indeed no obligation in the absolute to bring the claim before the national courts, but that such obligation existed as a condition for arbitration. It explained this quite clearly:

Article 8(2) of the Argentina-Italy BIT provides that, if a dispute cannot be settled amicably, it may be submitted to the competent judicial or administrative courts of the Party in whose territory the investment is located. It does not provide that the party “shall” or “must” submit the case to a local court.

However, there is a close connection between Article 8(2) and Article 8(3) which provides that international arbitration may be initiated where, after eighteen months from the date of notice of commencement of proceedings before the courts mentioned in Article 8(2), the dispute between the investor and the Contracting Party has not been resolved.

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<sup>379</sup> *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011 (“*Impregilo*”). Article 8 of the Italy-Argentina BIT provides:

**Settlement of Disputes between Investors and Contracting Parties**

1. Any dispute regarding an investment between an investor of one of the Contracting Parties and the other Party, arising out of or relating to this Agreement, shall, to the extent possible, be settled through friendly consultation between the parties to the dispute.
2. If the dispute cannot be settled amicably, it may be submitted to the competent judicial or administrative courts of the Party in whose territory the investment is made.
3. Where, after eighteen months from the date of notice of commencement of proceedings before the courts mentioned in paragraph 2 above, the dispute between an investor and one of the Contracting Parties has not been resolved, it may be referred to international arbitration.

...

There is thus, on the one hand, a clause providing that domestic court proceedings may be instituted and, on the other hand, another provision providing, as a condition for arbitration, that there have been such proceedings and that these proceedings have been going on for 18 months.<sup>380</sup>

351. The Tribunal, therefore, agrees with the Claimant's argument that there was no absolute obligation for it to go to the national courts, but does not agree with its reasoning to the effect that it did not have such an obligation prior to presenting its claims before an international arbitral tribunal. The *Impregilo* tribunal similarly concluded:

Moreover, the wording of Article 8(3) indicates that it contains a general condition for international arbitration, and there is no exception for the situation where there had been no domestic proceedings. ...

As the text now reads, the Tribunal considers that Article 8(3) should be interpreted ... to set out a general condition that must be complied with by the investor who wishes to submit the dispute to international arbitration.<sup>381</sup>

352. Counsel for the Claimant admitted as much at the Hearing on Jurisdiction when, in response to a question by a member of the Tribunal asking if there was "any reference to the Tribunal having the jurisdiction to determine the legality of the expropriation in the German original," he answered: "No, it is not there in the German original."<sup>382</sup>

353. The Tribunal agrees in particular with the award rendered in *Austrian Airlines*, which dealt with very similar provisions. The tribunal in that case unanimously concluded that the ordinary meaning of the words used in Articles 8, 4(4) and 4(5) of the Treaty between the Republic of

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<sup>380</sup> *Impregilo* ¶¶ 79-81 (Emphasis added).

<sup>381</sup> *Impregilo* ¶¶ 89-90.

<sup>382</sup> Hearing Transcript, 18 March 2013, page 184, lines 11-14.

Austria and the Czech and Slovak Federal Republic<sup>383</sup> – the equivalent of Article 4(3) of the BIT in the present case – meant that jurisdiction was “limited to disputes about the amount of the compensation and does not extend to review of the principles of expropriation.”<sup>384</sup> More specifically, the tribunal held that:

Claims about the principle of expropriation are for the local authorities under Article 4(4) and claims about the amount of compensation are for the local authorities or for an arbitral tribunal under Articles 4(5) and 8. In the second case, the investor has a choice of means. In the first one, he has no choice of means. His choice is limited to whether to challenge the principle of expropriation or not. If he decides to challenge it, he must do so before the local authorities. The ordinary meaning of Article 4(4) and 4(5) is plain.<sup>385</sup>

354. The *Austrian Airlines* tribunal rejected an argument that this conclusion was contrary to the object and purpose of the applicable treaty:

In assessing the scope of Article 8 of the Treaty in the light of the Treaty’s object and purpose, the Tribunal cannot ignore the investment protection regime set up by the Contracting States. Here they have in particular agreed that an investor may challenge the legality of an expropriation but only before the local authorities. The observation that they did not provide for arbitration on every aspect of all treaty breaches cannot be deemed to be contrary to the Treaty’s object and purpose of protecting investment. It all depends on the protection contracted for. Otherwise the provisions of an investment protection treaty (without or) with limited access to arbitration

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<sup>383</sup> Articles 4 and 8 of the Treaty between the Republic of Austria and the Czech and Slovak Federal Republic provide:

**Article 4 Compensation**

- (1) Expropriation measures, including nationalization or other measures having the same consequences, may be applied in the territory of the other Contracting Party to investments of investors of a Contracting Party only in cases where these expropriation measures are carried out for reasons of public interest, on the basis of legal proceedings and in return for compensation.[...]
- (4) The investor shall have the right to have the legitimacy of the expropriation reviewed by the competent authorities of the Contracting Party which prompted the expropriation.
- (5) The investor shall have the right to have the amount of the compensation and the conditions of payment reviewed either by the competent authorities of the Contracting Party which prompted the expropriation or by an arbitral tribunal according to Article 8 of this Agreement.

**Article 8 Settlement of investment disputes**

- (1) If disputes arise out of an investment, between a Contracting Party and an investor of the other Contracting Party, concerning the amount or the conditions of payment of a compensation pursuant to Article 4, or the transfer obligations pursuant to Article 5, of this Agreement, they shall, as far as possible, be settled amicably between the parties to the dispute.
- (2) If a dispute within the meaning of paragraph 1 above cannot be amicably settled within six months as from the date of a written notice containing sufficiently specified claims, the dispute shall, unless otherwise agreed, be decided upon the request of the Contracting Party or the investor of the other Contracting Party by way of arbitral proceedings in accordance with the UNCITRAL Arbitration Rules, as effective for both Contracting Parties at the date of the motion for the arbitration proceeding.

<sup>384</sup> *Austrian Airlines* ¶ 96.

<sup>385</sup> *Austrian Airlines* ¶ 96.

would necessarily have to be viewed as contrary to the object and purpose of that treaty consisting *inter alia* in protecting investment.<sup>386</sup>

355. The tribunal in *Austrian Airlines* thus analysed the relevant provisions of the applicable treaty in exactly the same way as the present Tribunal.
356. Other international tribunals confronted with such restrictive clauses of consent to arbitration have adopted a similar reasoning and reached the same conclusion.
357. For example, in *Berschader*, the tribunal analysed the arbitration clause in the Belgium-USSR BIT, which provided for arbitration of “any dispute ...concerning the amount or mode of compensation to be paid.” The tribunal considered that the ordinary meaning of that article was clear. Its analysis is in line with the conclusion reached by this Tribunal:

By virtue of Article 31 of the Vienna Convention, the Tribunal is, once again, obliged to interpret Article 10.1 in accordance with the ordinary meaning to be given to the terms thereof in their context and in the light of the object and purpose of the Treaty. The Tribunal is of the view that the ordinary meaning of Article 10.1 is quite clear. Only disputes concerning the amount or mode of compensation ... to be paid ... may be subjected to arbitration. The wording expressly limits the type of dispute, which may be subjected to arbitration under the Treaty, to a dispute concerning the amount or mode of compensation to be paid in the event of an expropriatory act occurring under the terms of Article 5.

The Tribunal is satisfied that the ordinary meaning of the provision excludes from the scope of the arbitration clause: (i) disputes concerning any of the provisions of the Treaty other than Article 5, and (ii) disputes concerning whether or not an act of expropriation actually occurred under Article 5.<sup>387</sup>

358. The Tribunal’s conclusion in favour of the Respondent’s case is also supported by *RosInvestCo*. That case arose under the 1989 UK-USSR BIT, the jurisdictional provision of which provides that:

This Article shall apply to any legal disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount or payment of compensation under Articles 4 or 5 of this Agreement, or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement, or concerning the consequences of the non-implementation, or of the incorrect implementation, of Article 6 of this Agreement.<sup>388</sup>

359. The text was thus similar to that in Article 4(3) of the present BIT in expressly referring to the “amount” of compensation. The tribunal unanimously concluded that the above-quoted clause

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<sup>386</sup> *Austrian Airlines* ¶ 103.

<sup>387</sup> *Berschader* ¶¶ 152-153.

<sup>388</sup> Article 8(1) of the 1989 UK-USSR BIT, cited in *RosInvestCo* ¶ 23.

did not confer it jurisdiction to determine whether there had been an expropriation. It considered that a grant of jurisdiction to determine a dispute regarding the “amount of compensation” did not extend to determining whether there had been an act giving rise to an entitlement to compensation.<sup>389</sup>

360. Another aspect of the Claimant’s argumentation has to be addressed here by the Tribunal. One of the arguments of the Claimant appears to be that, as long as the BIT provides certain protections, those protections are necessarily also covered by the dispute settlement provision. At the Hearing on Jurisdiction, Claimant’s counsel even went so far as to explain that his “understanding of an unlimited legal protection means that you can utilise all paths and opportunities to arrive at a justice ...”<sup>390</sup>
361. The Tribunal has to clarify here that this is an incorrect view of the essence of international arbitration. The scope of the substantive protections granted in an international treaty does not have to be, and is not in this particular BIT, coextensive with the scope of the dispute settlement mechanisms, in particular the scope of investor-state arbitration. It is indeed not because a State has given its consent to grant certain substantive rights to the investors of another State that it automatically flows from such consent that the State also gives its consent for these investors to sue the State directly in an international arbitration. For such right to come into existence, specific consent has to be given within the treaty. The State can shape this consent as it sees fit, by providing for the basic conditions under which it is given, or, in other words, the conditions under which the “offer to arbitrate” is made to the foreign investors. As already stated,<sup>391</sup> it is of the utmost importance not to forget that no participant in the international community, be it a State, an international organisation, or a physical or legal person, has an inherent right of access to a jurisdictional recourse. Just as a State cannot sue another State unless there is a specific consent to that effect – such as, for example, through a declaration recognising as compulsory the jurisdiction of the International Court of Justice (“ICJ”) – in the same manner, within the framework of BITs, investors cannot intervene at the international level against States for the recognition of their rights unless the States have granted them such rights under conditions that they determined. An arbitral tribunal – just as the ICJ or any other international court – does not have a general jurisdiction; it only has a “*compétence d’attribution*,” which has to respect the limits provided for by the States.
362. The Tribunal has to deal with a second line of argumentation of the Claimant to the effect that the prior submission to the Bulgarian courts was facultative in the present circumstances. This

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<sup>389</sup> *RosInvestCo* ¶¶ 110-114.

<sup>390</sup> Hearing Transcript, 19 March 2013, page 63, lines 18-20.

<sup>391</sup> See ¶ 337 of this Award.

is sometimes called the “frivolity argument,” and was explained at the Hearing on Jurisdiction by counsel for the Claimant in the following way:

... it was in no way reasonable to expect of the claimant to enter into additional time-consuming and cost-intensive court proceedings in Bulgaria, since these could not be expected to arrive at an objective, properly administrative or judicial decision based on the rule of law.<sup>392</sup>

363. The Respondent contends that such an argument should not be admitted. During the Hearing on Jurisdiction, for example, counsel for the Respondent argued that “futility is not an excuse for an investor to expand the limited scope of dispute settlement under this treaty.”<sup>393</sup> As justification for its position, the Respondent explained that there is no mention of it in the BIT:

This was not what was contemplated by the negotiators of the BIT. The negotiators chose their words carefully to reflect the contracting parties’ faith in the legitimacy of the legal proceedings in each other’s domestic courts.<sup>394</sup>

364. The Tribunal disagrees with the Respondent’s position, as it considers that every treaty or rule of international law has to be interpreted in good faith. As a consequence, it can be considered that there is an implied condition that if there is a clear and insuperable futility in following a required procedure, this procedure might, in these specific circumstances, be dispensed of.

365. This has long been admitted in public international law, with the requirement of the exhaustion of local remedies. The obligation to exhaust domestic remedies forms part of customary international law, recognised as such in the case law of the ICJ.<sup>395</sup> This rule is interpreted to mean that applicants are only required to exhaust domestic remedies that are available and effective. In determining whether any particular remedy meets the criteria of availability and effectiveness, regard must be had to the particular circumstances of the individual case.

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<sup>392</sup> Hearing Transcript, 18 March 2013, page 173, lines 15-20.

<sup>393</sup> Hearing Transcript, 18 March 2013, page 42, lines 9-11.

<sup>394</sup> Hearing Transcript, 18 March 2013, page 42, lines 11-15.

<sup>395</sup> See e.g., *Panevezys-Saldutiskis Railway Case* (1939), P.C.I.J. (Series A/B) No. 76 at 18; *Mavrommatis Jerusalem Concessions Case* (1924), Jurisdiction, P.C.I.J. (Series A) No. 2 at 12; *Electricity Company of Sofia Case* (1939), Preliminary Objection, P.C.I.J. (Series A/B) No. 77 at 79; *Interhandel Case (Switzerland v. United States of America)*, Judgment of 21 March 1959, [1959] I.C.J. Rep. 6. See also, arbitral awards to the same effect: *Robert E. Brown (United States) v. Great Britain*, 23 November 1923, VI R.I.A.A. 120; *Spanish Zone of Morocco Claims (Spain v. United Kingdom)*, 1 May 1925, II R.I.A.A. 615 at 731; *Mexican Union Railway (Ltd.) (Great Britain) v. United Mexican States*, February 1930, V R.I.A.A. 115 at 122; *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Finland, Great Britain)*, 9 May 1934, III R.I.A.A. 1479 at 1502; *Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)*, 6 March 1956, XII R.I.A.A. 83 at 118 and 122; *German External Debts Case*, 1958, 25 I.L.R. 42. See also Article 44(b) of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, in “Report of the International Law Commission on the work of its fifty-third session” (UN Doc. A/56/10) in *Yearbook of the International Law Commission 2001*, vol. 2, part 2, which refers to the exhaustion of any “available and effective local remedy.”

366. The Claimant bears the burden to prove that a reference to the Bulgarian courts would be futile. Besides providing general negative remarks on the judicial system of Bulgaria, the Claimant has not proven, to the satisfaction of the Tribunal, that a reference to Bulgarian courts would be futile. Although the Claimant refers to a number of European reports containing negative views on the Bulgarian judiciary system, these are all very general, with no link to the present case. More precisely, concerning the allegation of generalised corruption made by the Claimant, the Respondent argued the following during the Hearing on Jurisdiction:

... there is not a shred of evidence of any specific act of corruption, of any government official or institution involved in the particular proceedings in Bulgaria that concerned this dispute. It's all suspicions, it's all doubts ...<sup>396</sup>

367. As far as the futility argument is concerned, the Claimant's own behaviour proves to the contrary, as LIDI-R has engaged in more than a hundred litigations in Bulgaria in the years preceding this arbitration. The sheer volume of lawsuits that LIDI-R itself filed with respect to the Property in Bulgaria seems to suggest its high level of faith in the Bulgarian judicial system. It should also be noted that LIDI-R has won a certain number of these cases.

368. In other words, the Tribunal concludes that Article 4(3) of the BIT has to be interpreted as requiring that the question of the legality of an alleged expropriation be submitted to the national courts before the investor can gain access to international arbitration.

369. Applying this requirement to the facts of the case, it is common ground between the Parties that the Claimant has never submitted an expropriation claim to a Bulgarian court, let alone obtained a judgment of expropriation. Indeed, this was not its concern, as acknowledged by the Claimant itself in its Counter-Memorial, in which it is stated, with no ambiguity, that the "Claimant's desire was not to bring about the establishment of the expropriation."<sup>397</sup>

370. But even if the Claimant had fulfilled such step, the jurisdiction of the Tribunal would not have been unlimited, as it is strictly restricted to the question of the amount of compensation. The Tribunal cannot review a finding of a national court, and can no more make an assessment of the legality of the alleged expropriation on its own.

371. This means that the Tribunal has no jurisdiction to determine the question of the lawfulness of the expropriation, or any question concerning either the lawfulness of an act allegedly in violation of the FET or FPS standards or a denial of justice, or the compensation due as a result of the violation of a disposition other than the prohibition of expropriation.

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<sup>396</sup> Hearing Transcript, 19 March 2013, page 101, lines 3-7.

<sup>397</sup> Counter-Memorial at 19, ¶ 16.

372. As stated by the Respondent during the Hearing on Jurisdiction, the BIT provides a “narrow door”<sup>398</sup> to enter the realm of international arbitration. The Tribunal finds that the Claimant has not been able to pass through that door and concludes that under Article 4(3) of the Germany-Bulgaria BIT, it is very clear that the Tribunal’s jurisdiction is limited to one narrow issue only, that is, the amount of compensation for an investment found to be expropriated by a finding made by a Bulgarian court.
373. In other words, the Tribunal concludes that it has no jurisdiction *ratione voluntatis* to entertain the claims brought by ST-AD before this Tribunal, because of the absence of consent to arbitration by the State for such claims.
374. The Tribunal thus considers that it has no jurisdiction under Article 4(3) of the BIT.
375. As a supplementary question, it now turns to the issue of whether its jurisdiction can be extended to the determination of an expropriation under Article 4(5) of the treaty.

#### **E. THE MFN CLAUSE ISSUE**

376. The question here is whether Article 4(5) of the BIT – or the MFN clause – can grant jurisdiction to the Tribunal over the claims presented by the Claimant, by expanding the scope of Article 4(3) of the BIT.
377. At the outset, the Tribunal wants to state that it does not consider that the issue was raised too late by the Claimant to be examined, as argued by the Respondent when it referred to a “belated reliance.”<sup>399</sup> Even if it is true that the Claimant only started to refer a little more precisely to Article 4(5) during the Hearing on Jurisdiction, it is also beyond doubt that this article was fully quoted in the following paragraph of its Counter-Memorial:

From what was said above in this response, it is clear from the public authorities’ many unlawful acts, which violate both the BIT between the Federal Republic of Germany and the People’s Republic of Bulgaria as well as European law, which rights can be protected — “*the investments and the investors of one Contracting Party shall enjoy in the territory of the other Party treatment which is no less favourable than that accorded to investments and investors of those third countries that enjoy the best treatment in this regard.*”<sup>400</sup>

378. However, as the issue had not really been argued fully between the Parties, in its letter of 19 March 2013, following the Hearing on Jurisdiction, the Tribunal asked the Parties to address

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<sup>398</sup> Hearing Transcript, 18 March 2013, page 30, line 20.

<sup>399</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 5.

<sup>400</sup> Counter-Memorial at 15, ¶ 9 (Emphasis in the original).

the following question: “*To what extent, if any, can Article 4(5) of the Germany-Bulgaria BIT have an impact on the extent of the Tribunal’s jurisdiction?*”

379. The Respondent’s position is that “Article 4(5) has no impact on the extent of the Tribunal’s jurisdiction.”<sup>401</sup> On the contrary, the Claimant considers that it has an impact, *i.e.*, that “the most favoured treatment clause also encompasses procedural regulations, thus enabling Claimant to invoke the arbitration clauses from the more favoured bilateral BITs ...”<sup>402</sup>

380. The Tribunal will now examine the potential impact of Article 4(5) of the BIT on the extent of the Tribunal’s jurisdiction. The Tribunal thus turns to the arguments advanced by the Parties regarding the effect of the MFN clause in the BIT. That clause is contained in Article 4(5) of the BIT, which provides:

In matters governed by this article, the investments and investors of either Contracting Party shall enjoy treatment in the territory of the other Contracting Party that is no less favourable than that enjoyed by investments and investors of those third States that receive most favourable treatment in this respect.

381. A first remark concerns the standard of interpretation to be used with respect to Article 4(5) of the BIT. The Claimant insistently refers to the fact that arbitration clauses, and, in fact, all clauses in the BIT, including the MFN clause, have to be broadly interpreted.<sup>403</sup> In particular, the Claimant refers to the “recognised principle of the investor-friendly interpretation of the most favourable treatment clause ...”<sup>404</sup> and “the sustainable method of interpretation, the maxim of effectiveness.”<sup>405</sup> The Respondent, for its part, does not directly refer to an abstract standard of interpretation, but rather indirectly rejects the expansive standard favoured by the Claimant when it states that to accept that the MFN clause could operate to expand the State’s offer of jurisdiction in a BIT “would mean that an MFN clause could be used to confer on a tribunal the most expansive jurisdiction available under any of the treaties to which the State in question is a party.”<sup>406</sup> The Respondent adds that this would be “unsustainable.”<sup>407</sup>

382. In conducting its analysis, the Tribunal shall adopt neither a restrictive nor an expansive interpretation, but a balanced interpretation. The imbalanced approach suggested by the Claimant has been rejected by a series of tribunals, which instead have defended the need to

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<sup>401</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 1.

<sup>402</sup> Claimant’s Submission on Article 4(5) of the BIT at 10.

<sup>403</sup> Claimant’s Submission on Article 4(5) of the BIT at 10, fn. 19.

<sup>404</sup> Claimant’s Submission on Article 4(5) of the BIT at 7.

<sup>405</sup> Claimant’s Submission on Article 4(5) of the BIT at 10.

<sup>406</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 8.

<sup>407</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 8.

interpret investment treaties in a more neutral way. For example, the tribunal in *Noble Ventures, Inc. v. Romania* considered it “not permissible, as is too often done regarding BITs, to interpret clauses exclusively in favour of investors ...”<sup>408</sup> The tribunal in *Saluka Investments BV v. The Czech Republic* (“*Saluka*”) categorically rejected a pro-investor interpretation of investment treaty standards. It stated that “[t]he protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties’ economic relations.”<sup>409</sup> The *Saluka* tribunal then advocated a more “balanced approach to the interpretation of the Treaty’s substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties’ mutual economic relations.”<sup>410</sup> The same point was made by the tribunal in *El Paso Energy International Company v. The Argentine Republic*, in its decision on jurisdiction:

This Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State’s responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow.<sup>411</sup>

383. A similar idea had been formulated already in the early years of ICSID in the case *Amco Asia et al. v. Indonesia*, where it was stated:

[A] convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly* or *liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties ... Moreover, ... any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged.<sup>412</sup>

384. In the present case, the Tribunal does not consider that the object and purpose of the BIT require either a broad or a restrictive approach to the interpretation of its provisions for arbitration. Instead, the Tribunal adopts a neutral approach, based on the ordinary meaning of

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<sup>408</sup> *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 ¶ 52 (Emphasis in the original).

<sup>409</sup> *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ¶ 300 (“*Saluka*”).

<sup>410</sup> *Saluka* ¶ 300.

<sup>411</sup> *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 ¶ 70.

<sup>412</sup> *Amco Asia et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983 ¶ 14 i) (Emphasis in the original).

the text, with particular reference to the will of the parties to the BIT, as reflected in the *travaux préparatoires*.

385. The Tribunal mentions here that both Parties refer to a number of arbitration awards in support of their respective interpretations of Articles 4(5) of the BIT. The Tribunal has examined these awards with care.
386. The Tribunal considers that it can derive only limited assistance from the numerous awards of other tribunals referred to by the Parties. While the Tribunal has paid careful attention to these and other decisions, they clearly reveal that there is no clear arbitral consensus on this issue. Indeed, far from constituting a *jurisprudence constante*, they reflect a complete lack of consistency, which results from a fundamental difference of views between the various arbitrators.<sup>486</sup> Thus, arguments to the effect that an arbitration clause may be affected by the treaty's MFN provision have been accepted in *Maffezini, Camuzzi International S.A. v. República Argentina, Gas Natural, Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, Siemens, Telefónica S.A. v. The Argentine Republic, RosInvestCo, National Grid plc v. The Argentine Republic, AWG Group v. The Argentine Republic, Impregilo* (with a dissenting opinion by Prof. Brigitte Stern), *Hochtief AG v. The Argentine Republic* ("**Hochtief**") (with a dissenting opinion by Mr. J. Christopher Thomas, Q.C.) and *Teinver S.A. v. The Argentine Republic* (with a dissenting opinion by Dr. Kamal Hossain).<sup>413</sup> Such arguments have, however, been rejected by the tribunals in *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States, Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, Plama, Berschader* (with a dissenting opinion by Mr. Todd Weiler), *Telenor, Wintershall, Renta 4* (with a separate opinion by Judge Charles N. Brower), *Tza Yap Shum, Austrian Airlines* (with a dissenting opinion by Judge Charles N. Brower), *ICS*, and, most recently, *Daimler* (with a dissenting opinion by Judge Charles N. Brower).<sup>414</sup>

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<sup>413</sup> *Camuzzi International S.A. v. República Argentina*, ICSID Case No. ARB/03/7, Decision on Jurisdiction, 10 June 2005; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006; *Telefónica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006 [**RLA-054**]; *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006 [**RLA-048**]; *AWG Group v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 3 August 2006; *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011 ("**Hochtief**") [**RLA-045**]; *Teinver S.A., Transportes de Cercanías S.A., and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012 [**RLA-053**].

<sup>414</sup> *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004.

387. This lack of a *jurisprudence constante* cannot be explained simply on the basis of differences between the terms of the BITs involved (although such differences can prove to be significant). Of the four tribunals to have ruled on the effect of the MFN clause on the requirement in the arbitration clause in the Argentina-Germany BIT that disputes could be submitted to arbitration only after a period of eighteen months had elapsed from their submission to the local courts, those in *Wintershall* and *Daimler* rejected the MFN argument, while those in *Siemens* and *Hochtief* accepted it. Moreover, even where tribunals have come to the same conclusion, they have often done so for radically different reasons, as a comparison between the awards in *Plama* and *Renta 4* demonstrates. Accordingly, while the Tribunal draws on the reasoning in the various awards where appropriate, it does not feel compelled to follow any particular line of awards.
388. The only common ground seems to be with respect to situations where the MFN clause clearly refers to the dispute settlement mechanism, either to exclude or include it in its scope of application.
389. There are indeed cases where the parties have expressly stated that the MFN clause applies to the dispute settlement mechanism. For example, the drafters of the UK Model BIT provided in its Article 3(3) that “for avoidance of doubt MFN treatment shall apply to certain specified provisions of the BIT including the dispute settlement provision.”
390. The opposite hypothesis also exists where the parties have expressly excluded the dispute settlement mechanism from the interplay of the MFN clause. A good example of this position is the Free Trade Area of the Americas (FTAA) draft of 21 November 2003, which, in reaction to *Maffezini*, provides:
- The Parties note the recent decision of the arbitral tribunal in the *Maffezini* (Arg.) v. Kingdom of Spain, which found an unusually broad most favored nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. ... By contrast, the Most-Favored-Nation Article of this Agreement is expressly limited in its scope to matters “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms ...<sup>415</sup>
391. In this sense, the Tribunal is in agreement with the *Berschader* tribunal, which observed that “an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or

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<sup>415</sup> FTAA, Eighth Ministerial Meeting, *Third Draft of the Free Trade of the Americas (FTAA) Agreement*, 21 November 2003, Chapter XVII, Article 5, fn. 13, available at: [http://www.ftaa-alca.org/FTAADraft03/ChapterXVII\\_e.asp#uptonote13](http://www.ftaa-alca.org/FTAADraft03/ChapterXVII_e.asp#uptonote13).

where it can otherwise be clearly inferred that this was the intention of the contracting parties.”<sup>416</sup>

392. In the present case, as there is no explicit mention of the application or non-application of the MFN clause to the dispute settlement mechanism, the Tribunal is left to interpret the clause.

393. As required by the rules of interpretation of international treaties, the Tribunal starts with a reading of the ordinary meaning of the text, which is deemed to express the common will of the Parties. As Sir Gerald Fitzmaurice observed:

... the treaty was, after all, drafted precisely to give expression to the intentions of the parties, and must be presumed to do so. Accordingly, this intention is, *prima facie*, to be found in the text itself, and therefore the primary question is not what the parties intended by the text, but what the text itself means: whatever it clearly means on an ordinary and natural construction of its terms, such will be deemed to be what the parties intended.<sup>417</sup>

394. In looking at Article 4(5) of the BIT, it appears first that a reference to the words “treatment in the territory of the other Contracting Party” cannot be reconciled with an international arbitral procedure, which is not rooted in the territory.

395. This has been aptly explained by the tribunal in *Daimler* when it discusses the “[l]imiting effect of the words ‘in its territory’ on the scope of the MFN clauses”<sup>418</sup> as follows:

Where an MFN clause applies only to treatment in the territory of the Host State, the logical corollary is that treatment outside the territory of the Host State does not fall within the scope of the clause.

This observation is of critical importance. It is noteworthy that the resolution of an investor-State dispute within the domestic courts of a Host State would constitute an activity that takes place within its territory. Thus, if a Host State were to accord to the investors of some third State more favorable rights in relation to domestic dispute resolution than the rights accorded to the investors of the other contracting State party to the BIT, this could give rise to a violation of the MFN clause. ...

The same cannot be said, however, of international arbitration, which almost without exception takes place outside the territory of the Host State and which per definition proceeds independently of any State control. ...

In short, it seems that the very concept of extra-territorial dispute resolution and a Host State’s consent thereto are both ill-fitted to the clear and ordinary meaning of the words “treatment in its territory” as found in many BIT’s MFN clauses, including those in the present matter. It is difficult to see how

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<sup>416</sup> *Berschader* ¶ 181.

<sup>417</sup> Sir Gerald Fitzmaurice, “The Treaty and Procedures of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points” (1957) 33 *Brit. Y.B. Int’l L.* 203 at 205.

<sup>418</sup> *Daimler* ¶ 93.

an MFN clause containing this phrase could be applied to international arbitration proceedings without discounting the explicit territorial limitation upon the scope of the clause.<sup>419</sup>

396. Through its interpretation of the ordinary meaning of the text of Article 4(5) of the BIT, the Tribunal thus concludes that the MFN clause does not apply *prima facie* to the dispute settlement mechanism.
397. This conclusion is comforted by an interpretation of the object and purpose of Article 4(5) of the BIT. The object and purpose of the BIT's MFN clause is to grant protected investors the most favourable treatment found in other BITs. But before being able to ask for a "more favourable" treatment, an investor has to already be subjected to what it considers to be a less favourable treatment and the conditions for access to a more favourable treatment through the MFN clause have to be satisfied. More specifically, before a tribunal can apply the MFN clause, (i) there must be a foreign investor (and the conditions for being considered as a foreign investor under the BIT cannot be modified by the MFN clause), (ii) there must be an investment (and the conditions for finding that an investment exists under the BIT cannot be modified by the MFN clause), (iii) the BIT must be applicable *ratione temporis* to the situation (and the conditions of application *ratione temporis* under the BIT cannot be modified by the MFN clause), and (iv) above all, the tribunal must have jurisdiction *ratione voluntatis* (and the conditions for access to jurisdiction *ratione voluntatis* under the BIT cannot be modified by the MFN clause). As expressed by the Respondent, "(l)ike the three other jurisdictional conditions – *ratione personae*, *ratione materiae*, and *ratione temporis* – this condition, jurisdiction *ratione voluntatis*, cannot be altered or removed by virtue of the MFN provision."<sup>420</sup>
398. As the question here is one of jurisdiction, it must be stated quite firmly that the Tribunal has to determine its jurisdiction under the conditions of the BIT by application of the rule of *compétence-compétence*, but that this does not authorise the Tribunal to use the MFN clause to create a jurisdiction that it does not possess to begin with. In other words, consent has to be exchanged first, under the conditions stated in the BIT, before the Tribunal can even discuss the scope of the MFN clause.
399. This analysis reinforces the Tribunal's view that the MFN clause in Article 4(5) of the BIT does not apply to the dispute settlement mechanism.
400. However, the Tribunal notes that, contrary to many other BITs, the MFN clause here is included in the same article as the dispute settlement provision, which also includes both substantive protections (against a violation of the standard of FPS – Full Protection and Security – and

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<sup>419</sup> *Daimler* ¶¶ 226 - 228, 230 (Emphasis in original).

<sup>420</sup> Respondent's Submission on Article 4(5) of the BIT ¶ 6.

expropriation) as well as some procedural and jurisdictional aspects. The question of a possible implicit application of the MFN clause to the dispute settlement mechanism by the common will of the contracting parties to the BIT therefore merits to be discussed further. For the sake of prudence and an abundance of caution, the Tribunal, considering that some might consider that there remains an ambiguity on the non-application of the MFN clause to the dispute settlement mechanism, refers to Article 32 of the Vienna Convention on the Law of Treaties:

*Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

401. In order to lift any possible ambiguity, the Tribunal will therefore analyse the *travaux préparatoires*.

402. The Tribunal is convinced that the *travaux préparatoires*, which were presented and documented by the Respondent in its Submission on Article 4(5) of the BIT,<sup>421</sup> show that it was never the intention of the contracting parties to the BIT to apply the MFN clause to the narrow offer of arbitration. These documents reveal that there were long negotiations. In a first draft prepared by Bulgaria in February 1981, there was no mention of international arbitration and no MFN clause. In a subsequent draft prepared by Germany in July 1981, while there was still no mention of international arbitration, an MFN clause was included. As expressed by the Respondent, at that stage of the negotiations, “[g]iven that Article 4 did not contain an arbitration clause, it is clear that the new MFN provision was intended only to apply to substantive protections and not dispute settlement.”<sup>422</sup> The negotiations continued. Germany took the position that it wanted access to international arbitration. Bulgaria refused such access. The parties finally arrived at the current compromise, which is access to international arbitration limited to disputes over the amount of compensation for expropriation. It is

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<sup>421</sup> Respondent’s Submission on Article 4(5) of the BIT ¶¶ 19-23; Draft of Germany-Bulgaria BIT Submitted by Bulgaria, February 9, 1981 [Exhibit R-142], Art. 4; Draft of Germany-Bulgaria BIT Submitted by Germany, July 24, 1981 [Exhibit R-143], Art. 4(4); Memorandum Regarding Germany-Bulgaria BIT Negotiations, July 26, 1983 [Exhibit R-144] at 2-3; Comparison of German and Bulgarian Drafts of Germany-Bulgaria BIT, August 8, 1983 [Exhibit R-145] at 3, 1991; German Model Treaty on the Encouragement and Reciprocal Protection of Investments [Exhibit R-146].

<sup>422</sup> Respondent’s Submission on Article 4(5) of the BIT ¶ 22.

unreasonable to pretend that such a “carefully crafted compromise”<sup>423</sup> could be implicitly overturned by the MFN clause.

403. For all of the above reasons, the Tribunal concludes that Article 4(5) of the Germany-Bulgaria BIT has no impact on the Tribunal’s jurisdiction over this dispute, and, therefore, that it cannot expand the scope of this Tribunal’s jurisdiction, which is limited to disputes over the amount of compensation due for an expropriation found to have taken place by the national courts of Bulgaria.

#### **F. THE ABUSE OF PROCESS ISSUE**

404. Abuse of process can be divided into two categories, including the major or substantial issue of systemic abuse and the more minor one of procedural abuse.
405. First, the Respondent argues that the Claimant is abusing this arbitration by seeking to “internationalize” a domestic dispute between two commercial Bulgarian entities into a bilateral investment treaty dispute between a German investor and Bulgaria. The allegation here is one of manipulation of the international system of investment arbitration. This can be described as a claim of bad faith in the initiation of the arbitration.
406. Second, the Respondent asserts that the Claimant and its counsel have continually delayed these proceedings, have imposed significant and unnecessary costs on the Respondent with their numerous document production requests, and have not submitted coherent submissions on the Claimant’s purported claims. Moreover, there are also allegations by the Respondent of harassment by the Claimant of the Bulgarian authorities with respect to matters concerning this arbitration. This can be described as a claim of bad faith in the conduct of the arbitration.

##### **1. The Initiation of the Proceeding: the Manipulation of the Investment Arbitration System**

407. The argument of the Respondent on this first issue is two-fold. First, it considers that the Claimant could not have acquired any right that LIDI-R may have had to international arbitration. Second, it argues that the Claimant entered into the capital of LIDI-R precisely for the sole purpose of fabricating an international claim, all national claims having failed.

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<sup>423</sup> To use the words of the Respondent in Respondent’s Submission on Article 4(5) of the BIT ¶¶ 23.

**(a) The Claimant Could not Acquire a Right to International Arbitration from LIDI-R: the *Nemo dat ...* Principle**

408. A parallel may be drawn here with the ICSID system. It is common knowledge that the purpose of the ICSID system is not to protect nationals of a contracting State against their own State. Rather, the system was clearly “designed to facilitate the settlement of disputes between States and foreign investors” with a view to “stimulating a larger flow of private international capital into those countries which wish to attract it.”<sup>424</sup> It is settled jurisprudence that a national investment cannot give rise to an ICSID arbitration, which is reserved to international investments. More generally, a national of a State, whether a natural or a legal person, cannot, in principle, sue its own State in an international arbitration.
409. This is precisely what the Respondent argues. For example, during the Hearing on Jurisdiction, it was particularly clear on that point:

With respect to this arbitration, the question is: can the claimant acquire any right that LIDI-R has to arbitrate? And the answer is no, because the claimant could not have acquired any right to assert a BIT claim from LIDI-R, for the simple reason that LIDI-R is a Bulgarian company, it did not have and could not have any rights to international arbitration under the BIT, and, with the purchase of the shares in LIDI-R, claimant ST-AD could not have [a]quired any BIT rights from LIDI-R ...<sup>425</sup>

410. This rationale was applied by an ICSID tribunal in the *Mihaly International Corporation v. Sri Lanka* case, in which the similar question was raised of whether a Canadian company could validly assign an ICSID claim to an American company benefiting from a BIT. The answer was clearly no:

... no one could transfer a better title than what he really has. Thus, if Mihaly (Canada) had a claim which was procedurally defective against Sri Lanka before ICSID because of Mihaly (Canada)’s inability to invoke the ICSID Convention, Canada not being a Party thereto, this defect could not be perfected vis-à-vis ICSID by its assignment to Mihaly (USA). To allow such an assignment to operate in favour of Mihaly (Canada) would defeat the object and purpose of the ICSID Convention ... Accordingly, a Canadian claim which was not recoverable, nor compensable or indeed capable of being invoked before ICSID could not have been admissible or able to be entertained under the guise of its assignment to the US Claimant. A claim under the ICSID Convention with its carefully structured system is not a readily assignable chose in action ...<sup>426</sup>

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<sup>424</sup> International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Report of the Executive Directors, 18 March 1965, available at: <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB.htm> ¶ 9.

<sup>425</sup> Hearing Transcript, 18 March 2013, page 73, lines 2-11.

<sup>426</sup> *Mihaly International Corporation v. Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002 [**Exhibit RLA-013**] ¶ 24 (Emphasis added).

411. This is an application of the general principle of *nemo dat quod non habet*. The Claimant bought the shares from Mr. Balev. Mr. Balev, being a Bulgarian citizen, had no right to go to international arbitration against his State of nationality. Therefore, he could not transfer such right (that he did not have) to the Claimant. Of course, it remains to be seen if ST-AD can invoke a right of action on its own behalf.

**(b) The Claimant Could not Acquire an International Claim on its Own Account: the Principle of Good Faith**

412. When a tribunal is faced with a change of nationality – here, the change of nationality of the shareholders of the Claimant – it must always scrutinise the reasons and surrounding circumstances for such change. As stated by the tribunal in *Mobil v. Venezuela* (“*Mobil*”):

Such restructuring could be “legitimate corporate planning” as contended by the Claimants or an “abuse of right” as submitted by the Respondents. It depends upon the circumstances in which it happened.<sup>427</sup>

413. The tribunal in *Phoenix* clearly indicated where to draw the line between an abuse of right and a legitimate change:

International investors can of course structure *upstream* their investments, which meet the requirement of participating in the economy of the host State, in a manner that best fits their need for international protection, in choosing freely the vehicle through which they perform their investment. ...

But on the other side, an international investor cannot modify *downstream* the protection granted to its investment by the host State, once the acts which the investor considers are causing damages to its investment have already been committed.<sup>428</sup>

414. A similar analysis was conducted by the tribunal in the *Mobil* case:

As stated by the Claimants, the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes.

With respect to pre-existing disputes, the situation is different and the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the Phoenix Tribunal, “an abusive manipulation of the system of

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<sup>427</sup> *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 (“*Mobil*”) ¶ 191.

<sup>428</sup> *Phoenix* ¶¶ 94-95 (Emphasis in the original).

international investment protection under the ICSID Convention and the BITs.<sup>429</sup>

415. The Tribunal has already reached the conclusion that the main purpose for the acquisition of the shares by the Claimant was to open the possibility for a recourse to international arbitration.
416. It now has to determine whether such change was an abuse of process. In its appraisal, it will be guided by the *Phoenix* case, in which there was precisely a change of nationality after the events alleged to be in breach of the applicable treaty, and in which the tribunal considered that it had no jurisdiction because the investment was made in bad faith. In that case, the tribunal indicated that one of the important elements in its analysis was the timing of the investment, another being the timing of the claim. If the Tribunal looks at these two elements in the present case, the abuse of process is clearly delineated.
417. Concerning the timing of the investment, the *Phoenix* tribunal stated:

*The timing of the investment* is a first factor to be taken into account to establish whether or not the Claimant's engaged in an abusive attempt to get access to ICSID. Phoenix bought an "investment" that was already burdened with the civil litigation as well as the problems with the tax and customs authorities. The civil litigation was ongoing since fourteen months, the criminal investigation was ongoing since twenty months, and the bank accounts had been frozen for eighteen months. The Claimant was therefore well aware of the situation of the two Czech companies in which it decided to "invest". In other words, all the damages claimed by Phoenix had already occurred and were inflicted on the two Czech companies, when the alleged investment was made.<sup>430</sup>

418. Concerning the timing of the claim, the following was explained by the same tribunal:

*The timing of the claim* too needs to be considered to ascertain the overall situation. The whole file shows that Phoenix's "investment project" was made simply to assert a claim under the BIT. The Claimant presented Phoenix's notification of an investment dispute to the Czech Republic on March 2, 2003, even *before the registration of its ownership* of the two Czech companies in the Czech Republic and a mere *two months* after its acquisition of the Benet Companies and filed the dispute with the Centre eleven months later. In its letter to the Czech Ministry of Finance, Phoenix argued that a series of facts violated the BIT. If one looks only at the post investment events, which is what has to be done with due regard of the application *ratione temporis* of the Israeli/Czech BIT, the unavoidable conclusion is that the Claimant, when it first raised its ICSID claim, pretended that a *two months delay* in solving its investment problem was a violation of the FET as well as the full protection and security (hereafter "FPS") standards. The mere enunciation of such pretension clearly shows

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<sup>429</sup> *Mobil* ¶¶ 204-205.

<sup>430</sup> *Phoenix* ¶ 136 (Emphasis in the original).

that what was really at stake were indeed the pre-investment violations and damages.<sup>431</sup>

419. It has already been abundantly emphasised that all of the damaging facts occurred years before the Claimant acquired its investment in LIDI-R, and that the only event that the Claimant could mention as having taken place after it entered on the scene was a fabrication reproducing an event that took place before the Claimant became a protected German investor.
420. The Respondent insisted on these questions of timing when it stated, during the Hearing on Jurisdiction, that it wanted “to point out the remarkable coincidences in the timing that lead us to believe that this is an abuse of process,”<sup>432</sup> and proceeded to describe in detail these coincidences as follows:

So, just three days after the Supreme Cassation Court rejects LIDI-R’s first set aside application, Mr Balev and ST-AD sign a contract where the German company purchases 40 per cent of the shares in LIDI-R for Mr Balev. So that’s coincidence number one, just three days after the rejection, when there is nothing else to do under Bulgarian law.

Another interesting coincidence, less than two weeks after ST-AD purchases an additional 40 per cent and becomes the majority owner, it begins sending the first of its letters to Bulgaria demanding compensation under threat of treaty arbitration. It becomes the majority owner and, just two weeks later, launches the BIT campaign.

And just over a week after LIDI-R admitted its second set aside application to the Supreme Cassation Court, ST-AD sends its notice of arbitration to the government of Bulgaria demanding compensation. Interesting coincidences.<sup>433</sup>

421. In the Tribunal’s view, the timeline of the different events described above tends to indicate that the Claimant sought to manufacture jurisdiction by introducing a German investor in LIDI-R once all of its domestic legal options had failed. Indeed, the above-mentioned coincidences strongly support the Tribunal’s understanding of the events, according to which the essential purpose of the Claimant’s investment was for it to gain access to international jurisdiction to which the initial investor was not entitled.
422. The Tribunal is in agreement with the reasoning found in decisions of other international tribunals when faced with a similar manipulation of the international arbitral mechanism, and, in particular, with the decisions in *Phoenix* and *Mobil*, which articulate the principles to be applied when faced with such an attempt by an investor to use a mechanism to which it is not entitled.

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<sup>431</sup> *Phoenix* ¶ 138 (Emphasis in the original).

<sup>432</sup> Hearing Transcript, 18 March 2013, page 74, lines 16-18.

<sup>433</sup> Hearing Transcript, 18 March 2013, page 74, lines 18-25; page 75, lines 1-12 (Emphasis added).

423. The conclusion of the Tribunal is the same as in the *Phoenix* case. The Tribunal has come to the conclusion that the Claimant's initiation and pursuit of this arbitration is an abuse of the system of international investment arbitration. If it were accepted that the Tribunal has jurisdiction to decide ST-AD's claim, then any pre-existing national dispute could be brought to an international arbitration tribunal by an "after the fact" transfer of the national economic interests to a foreign company in an attempt to seek protections under a BIT. Such transfer from the domestic arena to the international scene would *ipso facto* constitute a "protected investment" – and the jurisdiction of an international arbitral tribunal under a BIT would be virtually unlimited. It is the duty of the Tribunal not to protect such an abusive manipulation of the system of international investment protection. It is indeed the Tribunal's view that to accept jurisdiction in this case would go against the basic objectives underlying bilateral investment treaties. The Tribunal has to ensure that the BIT mechanism does not protect investments that it was not designed to protect, that is, domestic investments disguised as international investments or domestic disputes repackaged as international disputes for the sole purpose of gaining access to international arbitration.

## **2. The Conduct of the Proceeding: an Abusive Behaviour**

424. In addition, the Respondent raises complaints about the Claimant's behaviour on several accounts and, as a consequence, requests that all costs of this arbitration be borne by the Claimant. Further, the Respondent requests that it be granted moral damages for what it describes as "harassment" by the Claimant.

425. The Respondent first refers to the requests for documentary evidence sent by the Claimant to numerous high level Bulgarian authorities outside the framework of the document production procedure provided in the procedural rules issued by the Tribunal, which led to the issuance of PO No. 1. In addition, the Claimant submitted to the Tribunal mass requests for documents that were contested by the Respondent, none of them relevant to the jurisdictional phase, which constrained the Tribunal, after careful examination, to refuse them all. Lastly, the Respondent raises the large number of claims presented by the Claimant with changing approaches and often insufficient articulation and lack of evidence, not to mention the Claimant's repeated requests for extensions of its deadlines. The Respondent summarised its position at the Hearing on Jurisdiction in the following way:

It is only right, members of the Tribunal, that the claimant bear all the costs, all the costs, incurred by the respondent as a result of claimant's dilatory and frivolous conduct in this proceeding, which is, itself, a frivolous action, the

whole proceeding is a frivolous action, that amounts to the abuse of the investment arbitration regime.<sup>434</sup>

426. The Tribunal now turns to the UNCITRAL Rules that apply to this case, which establish a presumption in favour of the losing party paying the costs of the arbitration. Article 42 of these rules provides that:

The costs of arbitration shall in principal be borne by the unsuccessful party or parties.

The arbitral tribunal may apportion such costs between the parties if it determines that the apportionment is reasonable, taking into account the circumstances of the case.

427. While there is indeed a margin of appreciation of the Tribunal for the apportionment of the costs, the Tribunal does not see in the present case any circumstance that would warrant a reversal of the presumption. The Tribunal feels compelled to add that it had difficulty in following some of the presentations made by the Claimant during the Hearing on Jurisdiction, including certain contradictory statements, which, when counsel for the Claimant was pressed to explain, were described as “mistakes.”<sup>435</sup>
428. Further, with respect to certain negative allegations made orally during the Hearing on Jurisdiction against counsel for the Respondent and his law firm, the Claimant first argued that they were misinterpreted, but then, when asked to be more explicit by the Presiding Arbitrator, added the following: “[w]e take back those accusations, if they were understood in such a manner ...”<sup>436</sup> In addition, upon a subsequent question from one of the co-arbitrators concerning written accusations to the same effect, counsel for the Claimant reiterated the withdrawal of all such accusations: “... we would like to, also on behalf of my client and colleague Stojnev, take back, withdraw, the written presentation and the oral presentation in this respect.”<sup>437</sup> The Tribunal takes note, with satisfaction, of this clear withdrawal of any accusations towards counsel for the Respondent and his law firm.
429. For all these reasons, the Tribunal therefore decides that the Claimant has to bear the costs of the Respondent.
430. However, the Tribunal is not ready to grant moral damages to the Respondent, for what the latter describes as unethical behaviour and harassment of the Bulgarian authorities. It is indeed a fact that more than one hundred complaints have been filed with the Bulgarian authorities in

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<sup>434</sup> Hearing Transcript, 18 March 2013, page 96, lines 19-25.

<sup>435</sup> See *e.g.*, Hearing Transcript, 18 March 2013, page 112, line 9; page 113, line 23.

<sup>436</sup> Hearing Transcript, 19 March 2013, page 61, lines 20-21.

<sup>437</sup> Hearing Transcript, 19 March 2013, page 63, lines 5-8.

relation to the issues dealt with in the present case. However, it is a right of every person, whether natural or legal, to pursue any avenues it believes it has to obtain what it considers its rights. The Tribunal does not consider such behaviour as being capable of constituting the legal basis for an award of moral damages to the State whose administrative and judicial authorities have been repeatedly approached.

## VIII. DECISION

431. For all the reasons stated above, the Tribunal:

- Rejects the jurisdictional objection based on *ratione personae* reasons;
- Rejects the jurisdictional objection based on *ratione materiae* reasons;
- Accepts the jurisdictional objection based on *ratione temporis* reasons;
- Accepts the jurisdictional objection based on *ratione voluntatis* reasons;
- Does not accept that the MFN clause can modify the grant of jurisdiction *ratione voluntatis*;
- Accepts the jurisdictional objection based on an abuse of right in the making of the investment;
- Holds, as a consequence, that the dispute brought by the Claimant is not within the the competence of the Tribunal;
- Decides that the Claimant shall pay to the Respondent EUR 1,124,384.35 and EUR 175,000.00, which represent the Respondent's legal fees and expenses and the Respondent's contribution to the costs of these proceedings;
- Rejects all other conclusions.

**[signature page follows]**

PCA Case No. 2011-06 (ST-BG)  
Award on Jurisdiction



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Mr. Bohuslav Klein



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Mr. J. Christopher Thomas, Q.C.



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Prof. Brigitte Stern  
Presiding Arbitrator

The Hague, the Netherlands

Date: 18 July 2013