CASE REPORT

Academic Director
Dr. Ignacio Torterola*

Coordinating Editors
Farhod Sharipov **

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Award Name and Date: *BRIF TRES d.o.o. Beograd and BRIF-TC d.o.o. Beograd v. Republic of Serbia,* (ICSID Case No. ARB/20/12) - Award – 30 January 2023

Case Report: Francisco Martínez ***, Editor Ignacio Torterola ****.

Summary: Claimants, BRIF TRES d.o.o. Beograd ("**BRIF TRES**") brought an action for relief against the Republic of Serbia under the Agreement between the Belgo-Luxemburg Economic Union and Serbia and Montenegro on the Reciprocal Promotion and Protection of Investments which entered into force on August 12, 2007 ("**BLEU-Serbia BIT**" or "**BIT**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14 1966 ("**ICSID Convention**"), (together, "the Treaties"). Claimants alleged that Serbia had breached, inter alia, obligations related to expropriation, fair and equitable treatment, complete protection and security, and other protections under the treaties above. The Tribunal addressed Serbia's jurisdictional objection to the abuse of process. It determined that it had no jurisdiction over the dispute, alone the competence of the Tribunal, while deciding to award Respondent 90% of its arbitration costs.

Principal Issues: The case centers on Serbia's consent to international arbitration under the BLEU-Serbia BIT and the ICSID Convention and the legal question of whether the Claimants had invested in these frameworks. A key issue involved the alleged expropriation of shares in BRIF TRES and breaches of the fair and equitable treatment standard. Another significant issue was the

* Director can be reached by email at iacl@transnational-dispute-management.com and itorterola@clarkhill.com
** Farhod Sharipov – International Associate at Clark Hill, arbitrator in commercial cases. sharipov.law@gmail.com.
*** Francisco Martínez is an LLB graduate with honors from the Universidad Católica de Colombia. I have a solid academic background, have distinguished participation in international arbitration competitions, and have prior experience in consulting. He is developing a specialization in International Legal Contracts at Externado de Colombia University. IACL's case reports do not offer personal views but strictly reflect the content of the decision. However, in case of doubts, the views set forth herein are the author's personal views and do not reflect those of ACICA or the IBA. Mr. Martínez can be contacted at andresmartinez9902@gmail.com.
**** Ignacio Torterola is the Academic Director of International Arbitration Case Law (IACL) and a partner in the International Arbitration and Litigation Practice at Clark Hill.

role of Beauvallon's actual acquisition of BRIF TRES and its wholly owned subsidiary BRIF-TC, as Beauvallon claimed it made the necessary adjustments to the acquisition through various contractual and corporate structures.

Tribunal: Mr Yves Derains, (President), Ms Samaa Haridi (Arbitrator), Prof. Brigitte Stern, (Arbitrator).

Claimant's Counsel: Mr. Christophe Maillard (CAS), Mr. Nenad Stankovic, Ms. Sara Pendjer (Stankovic & Partners), Mr. Raëd Fathallah, Mr. Jose Maria Perez, Ms. Marina Weiss, and Mr. Shane Daly (Bredin Prat).

Respondent's Counsel: Mr. John J. Buckley, Jr, Mr. Jonathan M. Landy, Mr. Benjamin W. Graham, Mr. Youlin Yuan (Williams & Connolly LLP), Mr. Nebojša Anđelković (Law Office Anđelković).

Digest:

1. Relevant facts

Montmontaža d.o.o. Beograd was incorporated in Serbia on September 18, 2003, as a wholly owned subsidiary of the Croatian company Montmontaža d.o.o. Zagreb, to participate in a public tender by the City of Belgrade for the Ada Huja Project ("Ada Huja Project" or "Project").

On March 6, 1975, the two largest parcels, Nos. 7/1 and 5112/5, in the Ada Huja Project area, were subject to an agreement to transfer rights of use over the same 1975 Agreement, which was concluded between the City of Belgrade and Luka Beograd a.d. Beograd.

Despite the 1975 Agreement, in December 1997, the Municipality of Palilula registered the rights of use over parcels Nos. 7/1 and 5112/5 in favour of the State-owned enterprise Eko Zona Ada Huja d.o.o. Beograd. The rights of use over the same parcels in favor of Eko Zona Ada Huja d.o.o. Beograd were terminated in favor of the City of Belgrade and for the use of the Belgrade Land Development Agency by Decisions of March 25, 2004, and April 10, 2007, by the Municipality of Palilula.

In May 2007, Luka Beograd commenced administrative proceedings to assert its rights over Nos parcels. 7/1 and 5112/5 in the Ada Huja Project area, on the ground that registration favors Eko Zona Ada Huja d.o.o. Beograd was illegal. On June 7, 2007, the Municipality of Palilula issued two decisions confirming Luka Beograd's rights of use over these two parcels on the grounds of illegality of registration of rights of use in favor of Eko Zona Ada Huja d.o.o. Beograd in 1997.

On December 28, 2007, BRIF SICAR sent a letter to Serbia's President requesting urgent intervention from Serbian authorities to safeguard its foreign direct investment. The letter also threatened legal action for damages if unacceptable treatment persisted, along with a legal analysis.

In February 2008, the City of Belgrade filed an administrative petition to assert its rights over specific parcels based on the 1975 Agreement, which the Higher Court of Belgrade dismissed on July 21, 2010.

In January 2009, Luka Beograd challenged the City of Belgrade's decision from June 15, 2004, authorizing Beoland to finalize a Lease Agreement with Montmontaža, contesting its validity.

On February 2, 2009, Montmontaža sent a letter to Serbia's Ministry of Foreign Affairs seeking protection for its investment. The letter included memoranda about alleged illegalities by Serbian authorities.

Disagreements between BRIF SICAR's majority shareholders and its management regarding the company's decision to acquire Montmontaža led to the shareholders' refusal to approve the annual accounts in June 2009 and March 2010 and to the revocation of BRIF SICAR's operating authorization in July 201024. The Luxembourg courts confirmed this revocation, and BRIF SICAR was placed in liquidation in October 2012.

On September 30, 2017, Mr. Jean-Pierre Ribes, a French national, entered an "Engagement Agreement" with Mr. Vuko Dragašević, a Serbian national and consultant. On March 30, 2019, Mr. Ribes became the beneficial owner of Beauvallon Europe S.A. SFP ("Beauvallon"), while Mr. Dragašević was the owner, director, and controller of Adriatic Investment Management d.o.o. Belgrade ("Adriatic").

On August 29, 2018, Wekare S.A. ("Wekare") and Adriatic signed a consultancy agreement for Adriatic to serve as an external consultant for acquiring BRIF SICAR, which was to be sold to Beauvallon. At the time, both Wekare and Beauvallon were owned by Mr. Steeve Simonetti until March 30, 2019. On October 30, 2018, Mr. Dragašević approached BRIF SICAR's Luxembourg Liquidator to acquire BRIF TRES and its subsidiary BRIF-TC through Adriatic, resulting in a "Share Transfer Deed" between BRIF SICAR as the Seller and Adriatic as the Buyer.

On January 15, 2019, Beauvallon and Adriatic signed a "Share Purchase Agreement" to acquire BRIF TRES for EUR 250,003. On February 21, 2019, the Belgrade Court of Appeal upheld the December 1, 2016, Belgrade court decision, which declared the Lease Agreement null and void. On December 31, 2020, the City of Belgrade requested bankruptcy proceedings against BRIF-TC due to the blockage of BRIF-TC's accounts by the National Bank of Serbia, which was caused by unpaid tax obligations related to the Lease Agreement. On January 15, 2021, the Commercial Court in Belgrade initiated the bankruptcy proceedings, appointing Mr. Dragan Perković as the bankruptcy administrator. In September 2021, the Municipality of Palilula reversed its decisions made on June 7, 2007, that had recognized Luka Beograd's rights over the two parcels. On April 21, 2022, Beoland requested the reopening of proceedings to annul the Lease Agreement and the June 15, 2004 decision by the City of Belgrade awarding the tender to BRIF-TC.

2. Procedural History

Claimants submitted their Request for Arbitration to ICSID on April 17, 2020, invoking the BLEU-Serbia BIT and the ICSID Convention. ICSID registered the case on April 27, 2020. The arbitral Tribunal was constituted on October 26, 2020, with Mr. Yves Derains, appointed by agreement of the co-arbitrators; Ms. Samaa Haridi, appointed by Claimants; and Prof. Brigitte Stern, appointed by Respondent.). ICSID was the administering authority for the proceedings conducted under the ICSID Arbitration Rules.

The first procedural consultation was held by videoconference on December 21, 2020, and on December 22, 2020, the Tribunal issued Procedural Order No. 1, establishing the procedural

calendar and defining other procedural aspects. Claimants filed their Memorial on the Merits on July 15, 2021, and Respondent submitted its Counter-Memorial, including a bifurcation request, on September 16, 2021.

The Tribunal granted the request for bifurcation on December 1, 2021, opting to proceed with jurisdiction regarding its second jurisdictional objection and dismissing the Request for Bifurcation regarding all remaining jurisdictional objections.

The jurisdiction, merits, and quantum hearing was ultimately scheduled for September 2, 2022, with the Tribunal permitting post-hearing submissions. The Tribunal granted a decision on costs.

3. Position of the Parties

The Respondent challenged the Tribunal's jurisdiction because, inter alia, the Claimant claims as constituting an abuse of Article 25(2)(b) of the ICSID Convention, which permits domestic companies to qualify as deemed foreign investors for purposes of ICSID jurisdiction. After all, (i) Beauvallon's acquisition of the BRIF TRES share was an abuse of process, and (ii) Beauvallon committed a separate abuse of process in asserting claims for an investment it did not make. Furthermore, the Respondent argued that an investor cannot restructure an investment after a dispute has become foreseeable to manufacture ICSID jurisdiction and claim treaty benefits. Respondent also contended that Mr Ribes' and Beauvallon's acquisition of ownership and control was not bona fide, as its sole purpose was getting involved in "international legal activity" rather than economic activity in Serbia.

3.1. Respondent's Position

3.1.1. Respondent's Jurisdictional Position

3.1.1.1. Second Jurisdictional Objection: existence of an investment under the ICSID Convention

3.1.1.1.1. Beauvallon's Acquisition of BRIF TRES Is an Abuse of Process

The Respondent established that the Arbitral Tribunal should apply a two-step analysis when dealing with an abuse of process objection: (i) to determine whether the restructuring took place after the dispute became foreseeable or had arisen and (ii) to determine whether the restructuring was undertaken for legitimate business reasons based on an economic rationale, not to gain access to ICSID jurisdiction.

For the first step, the Respondent argued that the dispute was foreseeable and had materialized at least 12 years before the restructuring date of April 22, 2019. The Respondent claims the 2019 restructuring, acknowledged by the Claimants, changed their nationality from Serbian to Luxembourgish, suggesting they had no ICSID access as Serbian entities before this change. They support this with correspondence from BRIF SICAR in 2007 and 2009, demonstrating ongoing issues that began long before the restructuring.

For the second step, the Respondent argues that the Claimants failed to show a legitimate business purpose for the restructuring, pointing out that it was meant to establish foreign control under relevant treaties and conventions, as the "Project Danube" PowerPoint presentation suggested. They claim Beauvallon had no real intention to develop the shopping center project, given that

BRIF TRES and BRIF-TC were dormant at the time of acquisition and entangled in disputed land-right claims, with the annulment of a Lease Agreement in 2016 further complicating the project.

Moreover, the Respondent notes that Beauvallon was primarily a special-purpose vehicle for holding financial assets, including ICSID claims, given its restriction from managing shareholdings and its limited capital of EUR 1 million. The only supporting document for Beauvallon's development plans was a preliminary Site Analysis from April 2018, which discussed a condominium project rather than a shopping center, implying that the project was not a genuine or feasible business venture.

3.1.1.1.2. Beauvallon Committed Abuse of Process in Asserting Claims for an Investment it Did Not Make

The Tribunal presented that the Respondent argued that Mr. Ribes and Beauvallon misused foreign control provisions of the BIT and ICSID Convention to benefit from treaty claims. They highlight that investments were made by BRIF SICAR, whose shareholders, the real investors, will not benefit from the claims in the arbitration. They emphasize that Mr. Ribes was not involved in BRIF SICAR's investment and did not assume any related risks.

Moreover, the Respondent warns that allowing such claims would undermine the investment dispute settlement system, encouraging foreign entities to acquire defunct companies solely to lodge claims over old disputes without significant investment. Citing the Phoenix v. Czech Republic award and other cases, they argue that Mr. Ribes' and Beauvallon's actions were not bona fide economic activities but strategies to engage in international legal disputes and wrongly claim substantial compensation for minimal investment.

3.2. Claimant's Position

3.2.1. Resort to ICSID Arbitration Was Not Contemplated Before Spring 2019

The Tribunal established that the Claimants dispute the Respondent's assertion that BRIF SICAR and BRIF-TC had planned for ICSID arbitration as early as October 2007, arguing that their correspondence with Serbian authorities primarily relied on Serbian law and only tangentially referenced the European Convention for the Protection of Human Rights and Fundamental Freedoms. They assert that these communications were intended to address and resolve the Ada Huja Project issues.

This effort led to several positive developments, such as the registration of leasehold rights, approval of technical documentation for infrastructure projects, issuing of a construction permit, approval of environmental impact assessments, and confirmation of proper filing for construction. The Claimants maintained confidence in their legal positions under Serbian law, supported by the city authorities and Beoland, who upheld the Lease Agreement's validity.

They also contend that Mr. Dragašević intended to negotiate a resolution and that while the existence of the BIT came to their knowledge through an email to Mr. Christophe Maillard on 6 February 2019, this occurred after the "preservation-restructuring" on 15 January 2019.

3.2.2. The Tribunal Has Jurisdiction Over the Dispute

The Claimants believed they had shown that the Tribunal has the authority to hear the case under the BLEU-Serbia BIT and the ICSID Convention regarding personal, material, temporal, and willingness aspects. They argued that the Tribunal had personal jurisdiction, as outlined in specific BIT and ICSID Convention articles. They noted that BRIF-TC and BRIF TRES were controlled by BRIF SICAR since August 2007, meeting the foreign control requirements. They also stated that the liquidation of BRIF SICAR and the sale to Beauvallon did not change the control situation. Beauvallon and its affiliate Wekare still effectively managed BRIF TRES and, indirectly, BRIF-TC. Additionally, even though Adriatic was a temporary legal owner, it operated under Beauvallon's instructions, and Beauvallon financed the restructuring and paid off BRIF-TC's debt.

3.2.3. Respondent's Abuse of Process Allegations Are Unfounded

The Claimants argued that both sides agree it's wrong for an investor to change their investment structure to gain ICSID jurisdiction after a dispute is expected. This is considered abuse of process or "treaty fraud." The Tribunal stated that proving this requires strong evidence, showing lousy intent, and the responsibility to prove it lies with the Respondent. The Claimants also said each case should be judged individually, needing clear evidence that the only reason for restructuring was to gain jurisdiction. They referenced several cases to show examples where changes in investment structure were not seen as abuse or fraud.

3.2.4. Beauvallon's Acquisition of BRIF TRES Does Not Constitute an Abuse of Process

The tribunal checked the information submitted by the Claimants, who said that Respondent (i) had not fulfilled its requirement to prove the legal standard of fraudulent intent; (ii) and that the state of facts in 2018 differed from the state of facts in the Spring 2019 and the developments ensued when they commenced the arbitration.

For the first idea, the Claimants argued that Serbia's accusation of restructuring BRIF TRES to initiate ICSID arbitration was unfounded. The restructuring was planned in 2017/2018 before AIM held shares, and the Claimants were protected under the BLEU-Serbia BIT from the start. The restructuring moved control from one Luxembourg company to another, maintaining legal protection. The goal was to protect a EUR 25 million investment in the Ada Huja Project Parcels without the intention of changing nationality for legal gain. The project followed a clear plan, which included adapting to beneficial changes in Serbian construction laws and wasn't focused on triggering arbitration.

For the second idea, the Claimants argued that the dispute has significantly changed since it was first notified in July 2019. They point out that in 2021, BRIF-TC became embroiled in unexpected and intrusive bankruptcy proceedings, with its bankruptcy administrator seeking compensation from Beoland due to the annulment of the Lease Agreement. Additionally, in 2021, the Municipality of Palilula reversed a 2007 decision recognizing Luka Beograd's rights over specific parcels of land. This reversal led Beoland to request, in 2022, the reopening of proceedings, which could ultimately annul the Lease Agreement and the 2004 decision that awarded the tender to BRIF-TC.

3.2.5. Beauvallon Did Not Commit Any Abuse Because It Does Not Assert Any Claims in Its Name.

Claimants argued that Serbia's claim of Beauvallon abusing the process is false. They stated that Beauvallon wasn't making claims in the arbitration, and thus, there is no substitution issue.

Beauvallon didn't need to be a separate investor, and the jurisdiction question hadn't been isolated for individual consideration. Changing the Luxembourg parent company wasn't illegal, and the BIT or ICSID rules didn't require continuous nationality. The restructuring was planned for business reasons, not to gain an ICSID claim, making Serbia's accusation unfounded.

4. Tribunal's Position.

The Tribunal deliberated if the transactions constituted an abuse of process by evaluating if the investment had crystallized claims foreseeable at the time of restructuring and whether the acquisitions had genuine business purposes and economic rationality. The "abuse of process" focused on situations where restructuring is undertaken to gain access to international arbitration under the protection of a BIT rather than for legitimate business reasons. The Tribunal established that the resolution largely depends on determining if BRIF TRES and BRIF-TC retained protection under the BLEU-Serbia BIT during their transfer to Beauvallon, which may affect the case outcome. It is important to emphasize that the assessment pointed to the complexity of international investment law and the thin line between legal restructuring and treaty abuse.

4.1. The Claimants were or were not under the ICSID Convention and the BLEU-Serbia BIT.

The Arbitral Tribunal had considered:

(i) The relevant provisions on foreign control under the ICSID Convention and the BIT

The Tribunal establishes that the ICSID Convention and the BLEU-Serbia BIT did not explicitly define what constitutes "control." As a result, the Tribunal interpreted the term "control" using the international law principles outlined in Article 31(1) of the Vienna Convention on the Law of Treaties. According to the Preamble of the BLEU-Serbia BIT, its object and purpose are to foster favorable conditions for investments made by investors from one contracting party in the territory of the other.
Consequently, to be protected under the BLEU-Serbia BIT, a Serbian company must be under the direct or indirect control of a Belgian or Luxembourgish company investing. This criteria gears towards offering arbitration capabilities to the controlling company.
Moreover, according to the Tribunal, when ownership does not reside with the controlled company, the controlling entity must have contractual or legal avenues to exercise the rights over the controlled company for protection under the BIT. It is recognized that Beauvallon gained control over the Claimants as of April 22, 2019. Before October 30, 2018, the Claimants were indisputably under Luxembourgish control.
Therefore, the Tribunal found no evidence to suggest that actual control was absent from January 15, 2019, the date of the Share Purchase Agreement, to April 22, 2019. Consequently, for the Tribunal to confirm that the Claimants consistently remained under Luxembourgish actual control, it firmly established that such power was uninterrupted between October 30, 2018, and January 15, 2019.

(ii) The burden of proof for a showing of foreign control:

The Parties disagreed on the burden of proof concerning the Respondent's jurisdictional objection but did not address it specifically regarding the Claimants' assertion of actual control. The Tribunal determined that the burden of proof rests with the Party making the claim. Since the Claimants alleged that AIM, despite being the titleholder of BRIF TRES for a short period, was never

intended to exercise control over BRIF TRES, the burden of proving actual power lies with the Claimants.

(iii) The evidence adduced.

The Tribunal finds that Beauvallon and/or Wekare did not exercise actual control over Claimants from October 30, 2018, to January 15, 2019. In other words, there was an interruption in Luxemburgish control, and Beauvallon stepped into Adriatic's shoes, a Serbian company that was not entitled to rely on the BLEU-Serbia BIT, let alone the ICSID Convention, to act against Serbia as Respondent.
Hence, the Claimants were not protected by the BLEU-Serbia BIT Article I(1)(c) and could not rely on ICSID arbitration under Article 25(2) of the ICSID Convention between November 30 2018 and at least January 15, 2019.

This argument did not persuade the Tribunal because at the time Beauvallon acquired BRIF TRES's shares from Adriatic, BRIF TRES was not covered under Article I(1)(c) of the BLEU-Serbia BIT and thus could not invoke ICSID arbitration under Article 25(2) of the ICSID Convention. The core question for the Tribunal is whether the Claimants regained such protection by coming under Beauvallon's control. This would be valid only if the Respondent fails to demonstrate that acquiring BRIF TRES's shares constituted an abuse of process, which the Tribunal will now scrutinize.

4.2. Claimants had abused the foreign control provisions under the relevant treaties.

The Tribunal discussed (i) whether the investment claims brought before it were already foreseeable at the time of Beauvallon's acquisition of BRIF TRES and its subsidiary BRIF-TC and (ii) whether such an acquisition sought an economic purpose to develop normal business activities.

For the first topic of discussion, the Tribunal addressed these main issues:

(i) To whom the dispute should be foreseeable: At the Jurisdiction Hearing, the Tribunal sought clarification on who the actors were in the alleged abuse. According to the Respondent, entities involved in the abuse included:

- **Beauvallon:** For buying the shares when a claim was contemplated.
- **Adriatic:** For aiding, abetting, participating, facilitating, and partnering in the abuse.
- **Claimants:** To gain access to treaty jurisdiction through these actions.

The Claimants objected to any findings of abuse and did not respond to the question. The Tribunal concluded that the foreseeability of the dispute pertains to the alleged abuser of the international investment arbitration system. Specifically, this includes entities such as Mr. Ribes, Mr. Simonetti, and Beauvallon, who were involved in restructuring or acquiring an investment to file or facilitate a claim about a foreseeable or crystalized dispute rather than genuinely investing in the host state.

(ii) What should be the applicable degree of foreseeability? The Tribunal referred to the standard established in the *Pac Rim v. El Salvador* case, which they endorsed. The standard for determining an abuse of process involves recognizing a dividing line:

- **Before the dividing line:** There is ordinarily no abuse of process.
- **After the dividing line**: There ordinarily is an abuse of process, but this judgment depends on specific facts and circumstances of each case, acknowledging the existence of a significant grey area between clear cases of foresight and uncertainty.

(iii) What needed to be foreseeable: The Tribunal asserted that what must be foreseeable is a dispute originating from deteriorated circumstances affecting an investment in the host state. The manipulation in question was knowing and taking advantage of the adverse circumstances already affecting the investment, which could lead to investment treaty arbitration. This determination was independent of whether a claimant presented the issues as a "domestic" or an "international" dispute.

The overall emphasis is on the substance over semantics. The abuse lies in the strategic and opportunistic restructuring of investments with the foreknowledge that the underlying adverse events could lead to arbitration claims.

For the second topic of discussion, the Tribunal pointed out that:

The dispute centers on whether Beauvallon's acquisition of BRIF TRES was economically motivated to revive normal business activities or a strategic move to leverage an ICSID arbitration claim. The Respondent argues that BRIF TRES and BRIF-TC were dormant when acquired, involved in annulled agreements, and unattractive projects, suggesting no genuine economic purpose. Conversely, the Claimants assert that they had invested EUR 24.5 million in the Ada Huja Project from 2006 to 2010 and sought to preserve this investment by selling to Beauvallon.

However, the Tribunal found that the Claimants' past investment losses did not indicate an intention to engage in ongoing business activities when Mr. Ribes and Beauvallon acquired BRIF TRES. Instead, the acquisition seems primarily aimed at recovering lost investments through an ICSID claim, with scant evidence indicating an intention to develop economic activity in Serbia.

Therefore, the Tribunal determined that Beauvallon's acquisition of BRIF SICAR's inactive investment held within BRIF TRES aimed mainly at acquiring a pre-existing ICSID claim instead of fulfilling a legitimate economic objective. This represents an exploitative manipulation of the investment treaty system. When the ICSID claim was filed, the Luxembourgish control over the Claimants stemmed from this manipulation, constituting an abuse of process.

4.3. Dissenting opinion

Samaa A. Haridi dissented from the majority opinion, which suggested that the Claimant should not committed an abuse of process by initiating this ISCID Arbitration. Haridi also emphasized that the Respondent did not convince its burden to prove a break in indirect control by Luxembourgish entities of Claimants.

Haridi took issue with the standard of burden proof, saying that abuse of process objectors ordinarily must pass an exacting legal test that depends on “the circumstances in which it happened." She also agreed with the Majority's use of a two-stepped analysis of abuse of process that involved Foreseeability of Investment Claims and Economic Purpose of Acquisition:

Nonetheless, she had doubts that the abuse of process legal authorities squarely applied in this case because:

- **A.** There were no prior abuse of process cases with a Similar Context. Hence, when the dispute arose, there was no known abuse of process cases involving claimants with existing treaty rights.
- **B.** The economic purpose allegations were ambivalent. Hence, the evidence regarding Respondent's claim that Beauvallon lacked an economic purpose is unclear.
- **C.** The argument that Respondent's claim that Beauvallon and Ribes were not legal successors of the previous owner, BRIF SICAR, was irrelevant.

The dissenting opinion highlighted Haridi's dissatisfaction with the issue of foreseeability and alleged abuses of process in the context of investment claims. She underscored that the claimants had access to BLEU-Serbia BIT claims for about ten years before and when the land dispute arose. Haridi also disagreed with the Majority's decision that there was an abuse of process, arguing that various distinguishing factors exist in this case compared to previous ones like Phoenix Action, Pac Rim Cayman, and others, where claimants did not have BIT protection before suspicious restructurings.

Furthermore, Haridi outlined how the Majority's approach diverges from previous abuse of process defenses, which typically focused on the Claimant's alleged actions and intent, not third parties' misdeeds. She quoted that in cases like Phoenix Action and Lao Holdings, tribunals looked for indications that claimants did not intend to engage in genuine economic activities. However, in this case, Haridi said that the Majority extends the abuse of process and foreseeability analysis to third parties connected to the claimants, attributing intentions and actions of these third parties to the claimants. This extension was seen as problematic by Haridi, emphasizing that the actual abuse or manipulation should be directly tied to the claimants themselves, not external entities like Ribes, Simonetti, or Beauvallon.

Haridi argued the economic purpose prong despite some evidence implying an intention to bring International Centre for Settlement of Investment Disputes (ICSID) claims. She argued that this did not conclusively prove that the sole purpose of the acquisition was litigation. Ambiguities in the evidence should benefit the Claimants, as the burden of proof for abuse of process lies with the Respondent. Haridi emphasized that claimant motivations can be mixed, and international law requires a higher threshold to establish that legal restructuring was conducted solely to manipulate jurisdiction. Haridi criticized the Majority opinion for holding Claimants accountable for alleged abuses without sufficient evidence and disregarding their legitimate treaty rights at the dispute's initiation.

Haridi found a clear break in Luxembourgish "control" of Claimants during the Critical Period. Haridi said that if no such loss occurred, the Respondent's defense—that the Claimants and their owners improperly manufactured an ICSID claim—would not stand. She also established that the responsibility to prove the alleged abuse of process falls on the Party making the claim, in this case, the Respondent, who must demonstrate that Luxembourgish entities lost control as defined by the relevant legal instruments.

In conclusion, she underscored that she was not convinced that the Claimants had "fabricated" treaty claims or abused the ICSID system. She also placed the burden of proof on the Claimants to demonstrate continuous control by the Luxembourg entities.

5. Costs

Respondent should bear 10% of its costs. Claimants should reimburse 90% of Respondent's arbitration costs. The Tribunal awarded Respondent USD 2,395,934.10 in legal fees and expenses from the Claimants. Claimants must also reimburse USD 238,894.52 for 90% of Respondent's share of the Tribunal and ICSID's administrative fees and expenses. Claimants should bear their own legal and arbitration costs.