

IN THE MATTER OF AN ARBITRATION BEFORE THE INTERNATIONAL
CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID Case No.
ARB/18/8)

BETWEEN

RAND INVESTMENTS LTD., WILLIAM ARCHIBALD RAND, KATHLEEN
ELIZABETH RAND, ALLISON RUTH RAND AND ROBERT HARRY LEANDER
RAND
(CANADA)

AND

SEMBI INVESTMENT LIMITED
(CYPRUS)
("Claimants")

- and -

THE REPUBLIC OF SERBIA
("Respondent")

**Respondent's Counter-Memorial with Request for
Bifurcation**

19 April 2019

BEFORE:

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal
Mr. Baiju S. Vasani, Arbitrator
Prof. Marcelo G. Kohen, Arbitrator

Secretary of the Tribunal
Ms. Marisa Planells-Valero

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DEFINITIONS

2013 Attorney's Opinion	Legal opinion prepared by the Attorney Violeta Mitrovic on 11 June 2013 (Exhibit CE-34)
221 Million Agreement	Short Term Loan Agreement no. K-571/10-00 concluded by BD Agro and Agrobanka on 22 December 2010 (Exhibit RE-6)
221 Million Loan	Funds loaned to BD Agro by Agrobanka under Short Term Loan Agreement no. K-571/10-00 of 22 December 2010
221 Million Pledge	Pledge registered on BD Agro's real estate as security for funds acquired by BD Agro from Agrobanka under the Short Term Loan Agreement no. K-571/10-00 of 22 December 2010
April 2015 Notice	Privatization Agency's Notice on additionally granted time for the Buyer's compliance of 27 April 2015 (Exhibit CE-348)
Article 5.3.4.	Article 5.3.4. of the Privatization Agreement (Exhibit RE-12)
Audit Reports	Audit reports prepared by Auditor doo in April 2011, July 2011, November 2011, February 2012, December 2012, and two audit reports prepared by Prva Revizija doo in January 2015 (Exhibits RE-13, RE-14, RE-17, RE-18, RE-19, RE-105, CE-327)
August 2012 Notice	Privatization Agency's Notice on additionally granted time for the Buyer's compliance of 3 August 2012 (Exhibit CE-78)
Buyer	Mr. Djura Obradovic, buyer of the socially-owned capital from the Privatization Agreement
Center for Control	Center for Control of Performance of Privatization Agreements within the Privatization Agency.
Commission for Control	Commission for Control of Performance of Obligations of Buyers, that is Strategic Investors from Agreements Concluded in the Process of Privatization, within the Privatization Agency
Crveni Signal	Crveni Signal ad Beograd, a Serbian joint-stock company owned by Mr. Obradovic
December 2011 Notice	Privatization Agency's Notice on additionally granted time for the Buyer's compliance of 27 December 2011 (Exhibit CE-32)
February 2011 Notice	Privatization Agency's Notice on additionally granted time for the Buyer's compliance of 25 February 2011 (Exhibit CE-31)
Grant Thornton Report	Expert Report of Sandy Cowan dated 19 April 2019
Inex	Inex ad Nova Varos, a Serbian joint-stock company owned by Mr. Obradovic
June 2011 Notice	Privatization Agency's Notice on additionally granted time for the Buyer's compliance of 24 June 2011 (Exhibit CE-96)
June 2012 Notice	Privatization Agency's Notice on additionally granted time for the Buyer's compliance of 22 June 2012 (Exhibit RE-15)
MDH doo	Marine drive holding doo, a Serbian limited liability company owned by

Mr. Rand

Ministry's 2012 Letter	Letter sent by the Ministry of Economy on 30 May 2012 to the Privatization Agency (Exhibit CE-33)
Ministry's Report	Report of the Ministry of Economy on concluded Supervision Proceedings over the Privatization Agency of 7 April 2015 (Exhibit CE-98)
Notice on Termination	Privatization Agency's Notice of 1 October 2015 informing Mr. Obradovic of termination of the Privatization Agreement (Exhibit CE-50)
November 2012 Notice	Privatization Agency's Notice on additionally granted time for the Buyer's compliance of 9 November 2012 (Exhibit CE-79)
October 2011 Notice	Privatization Agency's Notice on additionally granted time for the Buyer's compliance of 7 October 2011 (Exhibit CE-97)
Purchase Price	Price of the socially-owned capital that was the subject of the Privatization Agreement in the amount of RSD 470,000,000.00 (EUR 5,548,996.46)
Request for Assignment	Request for issuing of prior approval for assignment of the Privatization Agreement to Coropi, submitted by Mr. Obradovic on 1 August 2013 (Exhibit CE-273)
Supervision Proceedings	Ministry of Economy's control of the Privatization Agency's work in relation to BD Agro, commenced on 23 December 2013 and completed on 7 April 2015
Treaties	Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments of 27 April 2015 and Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments of 23 December 2005

I. INTRODUCTION

1. The dispute at hand revolves around the privatization of BD Agro, a socially-owned company primarily engaged in milk-producing business and located in Dobanovci, the Republic of Serbia.
2. In accordance with the 2001 Law on Privatization,¹ the public auction for the sale of 70% of BD Agro's shares was held on 29 September 2005. Mr. Djura Obradovic, a Serbian and Canadian citizen residing in Belgrade,² emerged as a winner at the auction. As a result, on 4 October 2005, Mr. Obradovic and the Privatization Agency entered into the Privatization Agreement.³
3. Under the terms of the Privatization Agreement, the Privatization Agency sold to Mr. Obradovic 70% of BD Agro's capital for the purchase price of EUR 5,548,996.46 payable in six equal annual installments,⁴ while approximately 30% of the shares were transferred to BD Agro's employees without compensation.⁵
4. The Privatization Agreement, which explicitly stated that it was concluded in accordance with the Law on Privatization, also contained various other obligations and warranties of Mr. Obradovic, apart from the payment of the purchase price. For instance, Mr. Obradovic committed to make an additional investment in the company⁶ and to refrain from selling or otherwise alienating shares of BD Agro in the period of two years from the conclusion of the Privatization Agreement.⁷ He was also restricted in selling fixed assets of the company until the full payment of the purchase price.⁸ Importantly for the present case, he took upon himself not to encumber with pledge assets of BD Agro during the term of the Agreement, except for securing claims against the company, created in the course of its regular business

¹ 2001 Law on Privatization, **CE-220**.

² Witness Statement of Djura Obradovic dated 20 September 2017, para. 1.

³ Privatization Agreement, **CE-17**.

⁴ Articles 1.2. and 1.3. of the Privatization Agreement, **CE-17**.

⁵ See recitals of the Privatization Agreement, **CE-17**.

⁶ Article 5.1. of the Privatization Agreement, **CE-17**.

⁷ Article 5.3.1. of the Privatization Agreement, **CE-17**.

⁸ Article 5.3.3. of the Privatization Agreement, **CE-17**.

activities, or for the purpose of obtaining funds that would be used exclusively by the company.⁹

5. As a guarantee for the fulfillment of the Buyer's obligations, the Privatization Agreement contained a provision obliging Mr. Obradovic and the Privatization Agency to conclude a share pledge agreement by which Mr. Obradovic pledged his shares to the Privatization Agency.¹⁰ The Share Pledge Agreement was an integral part of the Privatization Agreement and was concluded on the same day.¹¹
6. Under the relevant legislation in force at the time of BD Agro's sale, foreign natural persons and legal entities were in no way restricted from entering the privatization process as buyers of socially-owned capital.¹² The Law on Privatization provided requirements that the potential buyer had to fulfill, which applied regardless of nationality.¹³
7. Mr. Obradovic was in default on various obligations stipulated in the Privatization Agreement for almost the entire period of his contractual relationship with the Privatization Agency.¹⁴ Of particular importance for the present case is that he used assets of BD Agro as means for obtaining cash for his other companies, in breach of Article 5.3.4. of the Privatization Agreement.
8. The crux of Mr. Obradovic's dispute with the Privatization Agency is the RSD 221 million loan that BD Agro took from Agrobanka in December 2010.¹⁵ In January 2011, the Privatization Agency established that BD Agro had pledged its assets as a guarantee for this loan while almost 50% of the sum obtained from the bank was used for the benefit of two other Mr. Obradovic's companies (Crveni Signal and Inex). This was in breach of Article 5.3.4. of the Privatization Agreement.¹⁶ The Privatization Agency promptly advised Mr. Obradovic that he was in breach of his

⁹ Article 5.3.4. of the Privatization Agreement, **CE-17**.

¹⁰ Article 3.1.2. of the Privatization Agreement, **CE-17**.

¹¹ The Share Pledge Agreement, **CE-17**.

¹² Article 12(1) of the Law on Privatization (2001), **CE-220**.

¹³ See Article 12(3) of the Law on Privatization (2001), **CE-220**.

¹⁴ Between November 2005 and January 2011, Mr. Obradovic was granted the additional time period for the fulfillment of his contractual obligations on 18 different occasions. See Report of the Privatization Agency on Control of BD Agro dated 25 February 2011, p. 2, **CE-30**.

¹⁵ Short Term Loan Agreement no. K-571/10-00 of 22 December 2010, Article 7, **RE-6**.

¹⁶ Report of the Privatization Agency on Control of BD Agro of 25 February 2011, p. 12, **CE-30**. Proposal of the Center for Control for the session of the Commission for Control of 24 February 2011, **RE-68**.

contractual obligation and that it considered this breach to be a reason for the termination of the Privatization Agreement.¹⁷

9. What ensued was the period of several years in which the Privatization Agency attempted to persuade Mr. Obradovic to remedy the breach. During this time, it set a total of eight additional time periods in which he was requested to obtain repayment of the funds loaned to Inex and Crveni Signal. Although the Buyer on several occasions during this time accepted that he was in default on his obligations,¹⁸ and despite his assurances that the breach would be remedied, that has never happened.
10. During one of those additional periods, in April 2011, and, therefore, *after* the existence of the breach had already been notified to the Buyer and after he was given additional time to remedy the breach, Mr. Obradovic paid the remainder of the purchase price for BD Agro to the Privatization Agency.
11. Even though he did not live up to his part of the bargain, Mr. Obradovic saw fit to request the Privatization Agency to release his shares in BD Agro from the pledge. Naturally, the Privatization Agency refused, as it was fully entitled to do that under the Privatization Agreement and general contract law.¹⁹
12. In the meantime, in December 2013, the Ministry of Economy commenced Supervision Procedure over the privatization of BD Agro prompted by complaints of its employees about Mr. Obradovic's management of the company, which brought it to the verge of bankruptcy.²⁰
13. Shortly before, in April 2013, the Privatization Agency was approached by Mr. Rand, a Canadian national, who declared his interest to invest in BD Agro.²¹ Acting through one of his companies (Rand Investments), he attempted to assume Mr. Obradovic's role in the Privatization Agreement. An assignment agreement was indeed concluded between Mr. Obradovic and Coropi, another company apparently

¹⁷ Notice of the Privatization Agency on Additional Time Period of 24 February 2011, **CE-31**.

¹⁸ See, for instance, Letter from Mr. Obradovic and BD Agro to the Privatization Agency of 23 July 2012, **RE-21**.

¹⁹ Law on Obligations, Article 122 (1), **RE-32**.

²⁰ The Company's business account was blocked under the enforce collection procedure on 8 March 2013 and remained blocked ever since. See Pre-pack Reorganization Plan dated November 2014, p. 8, **CE-321**.

²¹ E mail from Mr. Jakovljevic to the Privatization Agency of 16 April 2013, **RE-108**.

owned by Mr. Rand, in September 2013.²² But in order for the assignment to be valid under the Law on Privatization, the approval of the Privatization Agency was required.²³ However, potential assignment and approval thereof could not have happened before Supervision Procedure ended, and what is even more important it could not have happened since the parties interested in the assignment failed to submit the necessary documents to the Privatization Agency..

14. On 7 April 2015 the Ministry of Economy concluded the Supervision Procedure. It instructed the Privatization Agency to grant yet another 90 day additional period which Mr. Obradovic could use to deliver evidence that he fulfilled his obligations under the Privatization Agreement in the additionally granted terms.²⁴ This final attempt of the Privatization Agency to save the Privatization Agreement was also to no avail. Mr. Obradovic again failed to submit evidence that he had remedied the breach of Article 5.3.4. Instead, in September 2015, he sent a letter to the Privatization Agency, now claiming that he had fulfilled all his contractual obligations and threatening to commence an arbitration against Respondent based on the Canada – Serbia BIT.²⁵
15. Finally, on 1 October 2015, the Privatization Agency did what it repeatedly warned it would do for the last four years - sent the Notice of termination of the Privatization Agreement to Mr. Obradovic.²⁶ The termination declared by the Agency was obviously justified, and in accordance with the contractual framework and Article 41a of the Law on Privatization. On 21 October 2015 the Privatization Agency rendered a decision on transfer of BD Agro's capital from Mr. Obradovic to the Privatization Agency.²⁷ The decision was issued based on the mandatory provision of the Law on Privatization²⁸ and represented an automatic consequence of the Privatization Agreement's termination due to the non-performance of the Buyer.²⁹ Mr. Obradovic initially challenged the termination before the commercial court in

²² Agreement on Assignment of Agreement on Sale of Socially Owned Capital Through Public Auction between Djura Obradović and Coropi Holdings Limited; **CE-274**.

²³ Ibid., Article 8. See, also, Article 41ž of the Law on Privatization (2001), **CE-220**.

²⁴ Report of Ministry of Economy on the Control over the Privatization Agency, p. 13, **CE-98**

²⁵ Letter from Mr. Obradovic to the Privatization Agency dated 8 September 2015, **CE-48**.

²⁶ Notice on Termination of the Privatization Agreement of 28 September 2015, p. 3, **CE-50**.

²⁷ Decision of the Privatization Agency on the Transfer of BD Agro's Capital dated 21 October 2015, **CE-105**.

²⁸ Article 41(2) of the 2014 Law on Privatization, **CE-223**.

²⁹ Expert Report of Professor Mirjana Radovic, para. 54.

Belgrade, but eventually decided to withdraw his lawsuit against the Privatization Agency.³⁰

16. In February 2018, the arbitration proceedings were indeed initiated but by Claimants, not by Mr. Obradovic. Although they unsuccessfully attempted to obtain the ownership of BD Agro through the assignment of the Privatization Agreement, Claimants now allege that they were actually the owners of the company all along. Their beneficial ownership theory also implies that, by entering into the Privatization Agreement with Mr. Obradovic, the Privatization Agency effectively sold BD Agro's capital to Mr. Rand and other Claimants, without even knowing it. But, as is demonstrated below, Claimants have never obtained ownership of BD Agro's shares according to Serbian law. This is the fundamental flaw of their case and the one which undoubtedly prevents them from meeting the jurisdictional threshold under the Treaties and the ICSID Convention.
17. In addition, and without prejudice to the jurisdictional objections raised, Respondent will also demonstrate that, in any event, it did not breach any of its obligations under the Treaties.
18. This Counter-Memorial begins with the present introduction (I), which is followed by a statement of facts (II), and then by a discussion of jurisdictional objections and a request for bifurcation (III), attribution (IV), the breaches alleged (V), and compensation (VI), after which Respondent makes its prayer for relief respectfully requesting that all claims be dismissed (VII).

³⁰ Witness Statement of Djura Obradović dated 20 September 2017, para. 30.

II. STATEMENT OF FACTS

A. Termination of the privatization agreement was lawful

19. Claimants build their entire case on the presumption that the termination of the Privatization Agreement concluded between Mr. Obradovic and the Privatization Agency was unlawful. This presumption is however incorrect. As will be elaborated below, Mr. Obradovic breached the Privatization Agreement (in particular Article 5.3.4), and although he was given several years to remedy that breach, he decided not to. On the other hand, the Privatization Agency acted consistently throughout the time. From the day it determined the breach until the day the Notice on Termination was sent, the Privatization Agency communicated the same message to Mr. Obradovic – the breach of Article 5.3.4. has to be remedied or the Privatization Agreement will be terminated in accordance with Article 41a of the Law on Privatization. In this proceeding, Claimants attempt to paint a different picture – that, somehow, termination of the Privatization Agreement “*came as an utter shock*”.³¹ As will be seen in the following summary of events and actions taken by the Privatization Agency, Claimants' contentions are clearly unfounded.

1. The 221 million loan TO BD AGRO

20. At the outset, it would be useful to explain the circumstances which caused the breach of the Privatization Agreement in the case of BD Agro and, ultimately, its termination. The understanding of these circumstances is of particular importance having in mind that Claimants' Memorial attempts to distort what was the reason for termination.
21. In December 2010 BD Agro concluded several agreements with Agrobanka and the Buyer's related entities, which resulted in disposition of BD Agro's assets contrary to Article 5.3.4., that forbids pledging the company's real estate for securing the loans that are used by third parties. In particular:

- i. **The 221 Million Agreement** – On 22 December 2010, Agrobanka as creditor and BD Agro as debtor concluded the 221 Million Agreement for the amount

³¹ Second Witness Statement of Erinn Broshko, para 61. Second Witness Statement of Igor Markicevic, para 187.

of RSD 221,000,000 (app EUR 2 million),³² to be used for “*the consolidation of the company and related entities*”.³³ As security for the loaned funds, BD Agro undertook to provide to Agrobanka, *inter alia*, a pledge over its real estates, land and buildings, located in cadastral municipality Dobanovci.³⁴

- ii. **Pledge for the 221 Million Loan** – Based on the 221 Million Agreement, BD Agro submitted to the court the request for registration of pledge accompanied by the statement of pledge.³⁵ On 14 January 2011, the court registered the 221 Million Pledge as security for repayment of the amount of RSD 221,000,000 (and other obligations from the agreement) over BD Agro’s real estates. This pledge remains until today.³⁶
- iii. **Agreement on Assumption of Debt of Crveni Signal** – In parallel, on 28 December 2010, Crveni Signal (a company also owned by Mr. Obradovic)³⁷, Agrobanka and BD Agro concluded the Agreement on Assumption of Debt under which BD Agro assumed the entire debt of Crveni Signal towards Agrobanka from the Short Term Loan Agreement of Crveni Signal, in the amount of RSD 65,000,000 (app EUR 600,000)³⁸ plus interest, whereas Crveni Signal was released from the said debt.³⁹
- iv. **Agreement on Interest-Free Loan to Inex** – At the same time, on 29 December 2010 BD Agro and Inex (conveniently, another company owned by

³² At the time the 221 Million Agreement was concluded, on 22 December 2010, the RSD middle exchange rate of the National Bank of Serbia for EUR was 106.44 (221,000,000 ÷ 106.44 = 2,076,287.11). National Bank of Serbia RSD Exchange Rate on 22 December 2010, **RE-44**.

³³ Short Term Loan Agreement no. K-571/10-00 of 22 December 2010, Article 1, **RE-6**.

³⁴ Short Term Loan Agreement no. K-571/10-00 of 22 December 2010, Article 7, **RE-6**.

³⁵ Request for registration of pledge in accordance with the Short Term Loan Agreement no. K-571/10-00, **RE-7**. Statement of pledge no. Ov-37246/2010 of 28 December 2010, **RE-8**.

³⁶ Pledge was constituted over cadastral parcels no. 4670, 4673-4684, 4686-4687, 5516-518, 5527-5528, 5544, 5546-5549, 5550/1, 5553, 5574-5584, 5587-5589, 5023/1, 5023/5, 5023/7, 5521 and 5522, all located in cadastral municipality Dobanovci and owned by BD Agro. Decision of the First Basic Court in Belgrade no. Dn-14124/10 of 14 January 2011, **RE-9**. Excerpt from the Land Register no. 4031, cadastral municipality Dobanovci of 13 March 2019, **RE-45**.

³⁷ Proposal of the Center for Control for the session of the Commission for Control of 25 April 2012, p. 2, **RE-72**.

³⁸ At the time the Agreement on Assumption of Debt of Crveni Signal was concluded, on 28 December 2010, the RSD middle exchange rate of the National Bank of Serbia for EUR was 106.08 (65,000,000 ÷ 106.08 = 612,745.09). National Bank of Serbia RSD Exchange Rate on 28 December 2010, **RE-81**.

³⁹ Agreement on Assumption of Debt of 28 December 2010, Articles 1 and 4, **RE-11**.

Mr. Obradovic)⁴⁰ concluded an Agreement on Interest-Free Loan to Inex by which BD Agro undertook to provide to Inex a cash loan in the amount of RSD 32,000,000 (app EUR 300,000).⁴¹

22. Apparently, the Buyer deemed it appropriate that BD Agro, which had no cash of its own and had to pledge its assets to get a loan from the bank, use the loaned funds for the benefit of Buyer's other companies. The fact that this was not allowed under Article 5.3.4. did not bother the Buyer, so BD Agro:

a) paid out Crveni Signal's debt towards Agrobanka that was the subject of the Agreement on Assumption of Debt, in the total amount of RSD 70,944,422.27 (EUR 670,045.54),⁴² and

b) paid RSD 30,670,690 (EUR 289,674.06) to Inex in accordance with the Agreement on Interest-Free Loan.⁴³

23. In other words, out of the 221 Million Loan, which was secured by the 221 Million Pledge, almost 50% i.e. RSD 101,615,112.57 (EUR 959,719.60), was used for benefit of other companies owned to Mr. Obradovic.

2. Privatization Agency's finding of breach and requests for compliance

24. The said transactions that occurred in December 2010, i.e. the use of the 221 Million Loan, clearly represented the breach of the obligation from Article 5.3.4, which prescribed:

"5.3.4. The Buyer will not encumber with pledge the fixed assets of the subject during the term of the Agreement, except for the purpose of securing claims towards the subject stemming from regular business

⁴⁰ Proposal of the Center for Control for the session of the Commission for Control of 25 April 2012, p. 2, **RE-72**.

⁴¹ Agreement on Interest-Free Loan of 29 December 2010, Articles 1 and 4, **RE-10**. At the time the Agreement on Interest-Free Loan to Inex was concluded, on 29 December 2010, the RSD middle exchange rate of the National Bank of Serbia for EUR was 105.88 (32,000,000 ÷ 105.88 = 302,228.94). National Bank of Serbia RSD Exchange Rate on 29 December 2010, **RE-82**.

⁴² Audit report by Auditor doo of 29 April 2011, **RE-13**. On 29 December 2010, the RSD middle exchange rate of the National Bank of Serbia for EUR was 105.88 (70,944,422.27 ÷ 105.88 = 670,045.54). National Bank of Serbia RSD Exchange Rate on 29 December 2010, **RE-82**.

⁴³ Audit report by Auditor doo of 29 April 2011, **RE-13**. On 29 December 2010, the RSD middle exchange rate of the National Bank of Serbia for EUR was 105.88 (30,670,690 ÷ 105.88 = 289,674.06). National Bank of Serbia RSD Exchange Rate on 29 December 2010, **RE-82**.

activities of the subject, or except for the purpose of acquiring of the funds to be used by the subject.”⁴⁴

25. The breach of quoted provision was noted by the Privatization Agency already in January 2011 and throughout the entire period leading up to the termination of the Privatization Agreement the Privatization Agency communicated to the Buyer:⁴⁵
- i. that the manner in which the 221 Million Loan was used represented a breach of Article 5.3.4,
 - ii. that this breach had to be remedied in additionally granted term by returning the funds given to Inex and Crveni Signal back to BD Agro, and
 - iii. that in case the breach was not remedied, the Privatization Agency would take the measures from Article 41a of the Law on Privatization, which prescribed that *“The agreement on sale of the capital or property shall be deemed terminated due to non-fulfillment, if the buyer, even within an additionally granted term for fulfillment (...) disposes of the property of the subject of privatization contrary to provisions of the agreement”*.⁴⁶
26. Although aware of the consequences, the Buyer decided to ignore the Privatization Agency’s warnings. As will be elaborated below, the fact that the Privatization Agency had been more than patient, that it was tolerant and forthcoming for more than 4 years, changed nothing – funds used to finance Inex and Crveni Signal remain unreturned and the 221 Million Pledge remains registered until this very day.⁴⁷

2.1. Privatization Agency’s bodies in charge of controlling the performance of buyers’ obligations

27. Before elaborating Privatization Agency’s activities with regard to performance of the Privatization Agreement, Respondent would like to note that the Privatization

⁴⁴ Article 5.3.4. of the Privatization Agreement, **RE-12**. Respondent notes that it provides the new translation of Article 5.3.4. of the Privatization Agreement seeing that the translation provided by Claimants is insufficiently accurate.

⁴⁵ See Section II.A.2.

⁴⁶ See the following paras.

⁴⁷ Notice on Termination of the Privatization Agreement, p. 3, **CE-50**. Excerpt from the Land Register no. 4031, cadastral municipality Dobanovci of 13 March 2019, **RE-45**. Analytic cards of debts owed by Crveni Signal and Inex on 25 March 2019, **RE-1** and **RE-190**.

Agency's control of the performance of privatization agreements included controlling the performance of buyers' obligations from privatization agreements and also determining which steps should be taken in respect to non-performing buyers. The *Center for Control* within the Privatization Agency was tasked with controlling of the performance of the buyer's contractual obligations, reviewing the submitted documentation, and drafting proposals on steps to be taken in relation to the buyer if breaches of privatization agreement were noted. The Center for Control would then deliver its proposal on measures to be taken to the *Commission for Control*, which would consider the Center for Control's proposal at its session. The Commission for Control was independent in its decision-making and was not obligated to follow the Center for Control's proposals.⁴⁸

2.2. January 2011 control, February 2011 Notice and April 2011 Audit Report

28. A few days after the 221 Million Pledge was registered over BD Agro's real property, on 17 January 2011, the Privatization Agency performed the control on fulfillment of the Buyer's obligations from the Privatization Agreement at BD Agro's premises.⁴⁹
29. Based on the gathered information, the Privatization Agency's, *inter alia*, determined:
 - i. that on 22 December 2010, BD Agro and Agrobanka concluded the 221 Million Agreement for "*the consolidation of the company and related entities*",
 - ii. that the 221 Million Pledge was registered on land in 44 cadastral parcels of BD Agro in the land registry sheet 3003, cadastral municipality Dobanovci, as well as on the land with buildings on parcels 5521 and 5522 in the land registry sheet 3002, cadastral municipality Dobanovci, as security for the 221 Million Loan, and

⁴⁸ Witness statement of Mr. Vladislav Cvetkovic, paras 7-8. See, also, Rulebook on undertaking of measures of 7 April 2014, **RE-93**. Rulebook on criteria for decision-making of 30 April 2015, **RE-92**. Procedure for conducting of activities of the Center for Control, **RE-107**.

⁴⁹ Report of the Privatization Agency on Control of BD Agro of 25 February 2011, p. 2, **CE-30**.

- iii. that the amount of RSD 70,944,422.27 from the 221 Million Loan was used to settle Crveni Signal's debt towards Agrobanka, whereas RSD 30,670,690 was loaned to Inex.⁵⁰
30. The above-mentioned facts were determined by the Center for Control.⁵¹ Thereafter, the Commission for Control held its session on 24 February 2011, on which it determined the breach of the Privatization Agreement and gave the Buyer additional time for, *inter alia*, performance of the obligations referred to in Article 5.3.4 of the Privatization Agreement and for submission of an audit report evidencing that the Buyer performed the said obligations i.e. that all the borrowings given by BD Agro to third parties, from credit funds secured by encumbrances on BD Agro's real estate, have been repaid.⁵² Following this decision, on 25 February 2011 the Privatization Agency issued the Notice on additional time for compliance to Mr. Obradovic.⁵³ In the February 2011 Notice, the Privatization Agency noted that:

“In [Article] 5.3.4 of the Agreement, the Buyer undertook that [he] will not, without previous written consent of the Privatization Agency, encumber with pledge the fixed assets of the subject during the term of the Agreement, unless for the purpose of securing claims towards the subject stemming from regular business activities of the subject, or, unless for the purpose of acquiring of the funds to be used by the subject.”⁵⁴

(...)

“[B]y the review of excerpts from real estate registers submitted by the Subject of privatization on 27 January 2011, it was noted that on the fixed assets of the Subject of privatization, inter alia, pledge rights were registered (...) to secure the funds (loans) whose beneficiaries are third parties (partially or fully), (...) in favor of AGROBANKA”⁵⁵

⁵⁰ Report of the Privatization Agency on Control of BD Agro of 25 February 2011, p. 12, **CE-30**.

⁵¹ Report of the Privatization Agency on Control of BD Agro of 25 February 2011, p. 12, **CE-30**. Proposal of the Center for Control for the session of the Commission for Control of 24 February 2011, **RE-68**.

⁵² Minutes from the session of the Commission for Control of 24 February 2011, **RE-46**.

⁵³ Notice of the Privatization Agency on Additional Time Period of 24 February 2011, **CE-31**.

⁵⁴ Notice of the Privatization Agency on Additional Time Period of 24 February 2011, p. 1, **CE-31**.

⁵⁵ Notice of the Privatization Agency on Additional Time Period of 24 February 2011, p. 2, **CE-31**.

31. Having in mind the above, in accordance with Article 41a of the Law on Privatization,⁵⁶ the Privatization Agency granted additional 60 days to Mr. Obradovic for (i) fulfillment of obligations referred to in Article 5.3.4 of the Privatization Agreement and (ii) submission of an audit report containing the findings on the Buyer's actions undertaken in the additionally granted term. The Privatization Agency stated that the audit report should address the question whether the Buyer fulfilled the obligations from Article 5.3.4 of the Agreement, specifically *"whether all the loans given to third parties by the Subject of privatization from loan amounts secured by encumbrances on the property of the Subject have been returned"*. Finally, the Privatization Agency stated that it would undertake measures from Article 41a of the Law on Privatization in case the breach was not remedied.⁵⁷
32. As can be seen, the February 2011 Notice was more than clear on (i) which obligation was breached, (ii) how it was breached, (iii) how the breach should be remedied and (iv) what are the consequences of the failure to remedy the breach.
33. Responding to the February 2011 Notice, on 29 April 2011 (after paying the last installment of the Purchase Price)⁵⁸ Mr. Obradovic submitted an audit report which confirmed:
- i. that the funds received by BD Agro from the 221 Million Loan were used for the benefit of third parties, i.e. Crveni Signal and Inex;
 - ii. that the amount of RSD 18,170,690.00 was still owed to by Inex;
 - iii. and that the amount of RSD 70,944,422.27 was still owed by Crveni Signal.⁵⁹
34. In other words, the auditor, engaged by Mr. Obradovic himself, determined that he had not complied with the February 2011 Notice, i.e. that the funds from the 221 Million Loan, secured by the 221 Million Pledge, BD Agro used to finance third parties, had not been returned.

⁵⁶Article 41a of the Law on Privatization provided that a buyer shall be granted an additional term for fulfilment of the contractual obligations in relation to which non-compliance had been noted. Law on Privatization from 2001, Article 41a, **CE-220**.

⁵⁷ Notice of the Privatization Agency on Additional Time Period of 24 February 2011, pp. 2-3, **CE-31**.

⁵⁸ The last installment of the purchase price was paid on 8 April 2011. Confirmation of the Privatization Agency on the Buyer's Full Payment of the Purchase Price of 6 January 2012, **CE-19**.

⁵⁹ Audit report by Auditor doo of 29 April 2011, pp. 7-8, **RE-13**.

2.3. June 2011 Notice and July 2011 Audit Report

35. After submission of the audit report on 29 April 2011, the Privatization Agency analyzed the report and concluded that the breach of obligation from Article 5.3.4. was not remedied. Thus, in the Notice that was sent to Mr. Obradovic on 24 June 2011 he was given an additional period of 60 days for compliance with Article 5.3.4.⁶⁰
36. In response to the June 2011 Notice, Mr. Obradovic submitted a supplemental audit report on 19 July 2011. However, this report did not analyze the Buyer's performance of obligations under Article 5.3.4. of the Privatization Agreement at all – it referred only to fulfillment of obligations under Article 5.3.3. of the Privatization Agreement.⁶¹

2.4. October and December 2011 Notices and February 2012 Audit Report

37. Having considered the audit report submitted by Mr. Obradovic on 19 July 2011, the Center for Control determined that it completely failed to address the issue of the Buyer's fulfilment of the Privatization Agreement in accordance with the Privatization Agency's notices, i.e. that the auditor failed to address the fulfilment of obligations under Article 5.3.4. Consequently, on 7 October 2011, the Privatization Agency issued a new Notice, giving the Buyer additional 30 days and repeating the same instructions contained in the previous Notices.⁶²
38. After the October 2011 Notice, at the Buyer's initiative, two meetings were organized with the Privatization Agency and the Ministry of Economy. At these meetings, the Buyer claimed that he had submitted to the Agency all available documentation and that the Agency's requests for additional documentation were unfounded. However, the Buyer was informed that the delivered documentation was not satisfactory and that the requested audit report needed to provide an explicit

⁶⁰ Proposal of the Center for Control for the session of the Commission for Control of 21 June 2011, **RE-69**. Minutes from the session of the Commission for Control held on 22 June 2011, **RE-34**. Notice of the Privatization Agency on Additional Time Period of 22 June 2011, p. 1, **CE-96**.

⁶¹ Audit report by Auditor doo of 19 July 2011, **RE-14**.

⁶² Proposal of the Center for Control for the session of the Commission for Control of 4 October 2011, **RE-70**. Minutes from the session of the Commission for Undertaking of Measures held on 6 October 2011, **RE-35**. Notice of the Privatization Agency on Additional Time Period of 6 October 2011, p. 1, **CE-97**.

statement whether the Buyer fulfilled obligations from Article 5.3.4.⁶³ Following the meeting, Mr. Obradovic chose to completely ignore all this and did not deliver any audit report.

39. Despite Mr. Obradovic's careless conduct, the Privatization Agency was still eager to maintain the Privatization Agreement in force, so another Notice on additional period for compliance was issued to Mr. Obradovic on 27 December 2011 with the same instructions, as in the previous Notices.⁶⁴
40. On 2 February 2012, Mr. Obradovic delivered another audit report which, however, confirmed that there had been no changes since the April 2011 Audit Report regarding the debts of Crveni Signal and Inex.⁶⁵ Sometime thereafter, at the meeting held on 21 March 2012, the Privatization Agency repeatedly urged the Buyer to comply with Privatization Agency's Decision from 22 December 2011 (i.e. with the December 2011 Notice). In response, Mr. Obradovic promised that he would undertake additional efforts to get Crveni Signal to repay the debt, as well as that Inex will repay its loan when the "conditions are met".⁶⁶
41. The fact that Mr. Obradovic did not object to the Privatization Agency's request for repayment of debts owed by Crveni Signal and Inex points to the conclusion that he deemed it to be legitimate and in line with his contractual obligations.⁶⁷ In other words, at the time, the Buyer fully understood – and accepted – that he was in breach of Article 5.3.4
42. Yet again, Mr. Obradovic did not honor what he had promised at the meeting from 21 March 2012.

⁶³ Proposal of the Center for Control for the session of the Commission for Control of 21 December 2011, **RE-71**.

⁶⁴ Proposal of the Center for Control for the session of the Commission for Control of 21 December 2011, **RE-71**. Minutes from the session of the Commission for Control held on 22 December 2011, **RE-83**. Notice of the Privatization Agency on Additional Time Period of 22 December 2011, p. 1, **CE-32**.

⁶⁵ Specifically, the audit report confirmed that Inex still owed RSD 18,170,690.00 while Crveni Signal still owed RSD 70,944,422.27. Audit report by Auditor doo of 2 February 2012, **RE-17**.

⁶⁶ Proposal of the Center for Control for the session of the Commission for Control of 25 April 2012, **RE-72**.

⁶⁷ Mr. Obradovic did not argue that request for repayment of debts of Crveni Signal and Inex were not justified, to the contrary. On the other hand, with regard to the request of the Privatization Agency that concerned remedy of other breaches of the Privatization agreement (request that the Buyer should reinvest in fixed assets of BD Agro since the previous subject of the investment obligation had been sold) Mr. Obradovic did not withheld from expressing his disagreement - he noted that the request was not legitimate and that he would not comply with it. Proposal of the Center for Control for the session of the Commission for Control of 25 April 2012, **RE-72**.

2.5. March and April 2012

43. In its Proposal of 27 March 2012, the Center for Control noted that the Buyer has constantly been granted additional periods for fulfilment of Article 5.3.4. since 24 February 2011, while the debts owed by Crveni Signal and Inex still existed. Consequently, the Center for Control concluded that it did not believe granting new additional periods to the Buyer was justified, and thus proposed that the Privatization Agreement be declared terminated for breach of Article 5.3.4. in line with Article 41a 1 (3) of the Law on Privatization.⁶⁸
44. However, few days later, on 30 March 2012, at the meeting between the Privatization Agency, the Ministry of Economy and Mr. Obradovic, the Buyer informed the Agency that he had prepared a “complaint” for the Ministry of Economy against the Agency’s decisions requesting remedial actions,⁶⁹ so Commission for Control decided to postpone rendering of the decision on the Buyer’s compliance with the Agency’s Notices and on the next steps to be taken.⁷⁰
45. In April 2012, the Privatization Agency noted once again that conditions for termination of the Privatization Agreement were met, since the Buyer disposed of the fixed assets of BD Agro contrary to the Privatization Agreement,⁷¹ however, it also regarded the fact that Mr. Obradovic’s had sent a complaint to the Ministry of Economy, and thus decided to address the Ministry of Economy for further guidance.⁷² In other words, although persistent with its stand that the Privatization Agreement was breached, the Privatization Agency decided to act cautiously and wait and see what the Ministry had to say about Buyer’s letter of complaint.

⁶⁸ Proposal of the Center for Control for the session of the Commission for Control of 27 March 2012, **RE-84**.

⁶⁹ What is interesting to note is that in the letter in which Mr. Obradovic complained to the Ministry about Agency’s request for remedial actions, he nevertheless confirmed that “*loans which have not been returned are the loans given to the company Crveni signal (70 million dinars) and Inex, N. Varos (18 million dinars)*”. Despite this explicit confirmation that the breach of Article 5.3.4. was not remedied, Mr. Obradovic’s letter also stated his opinion that all of his obligations from the Privatization Agreement were fulfilled. Finally, Mr. Obradovic repeatedly referred to himself as “the buyer” and stated that he invested more than EUR 20 million in Serbia. Letter from Mr. Djura Obradović to the Ministry of Economy of 2 April 2012, p. 2, **CE-77**.

⁷⁰ Minutes from the session of the Commission for Control held on 30 March 2012, **RE-85**.

⁷¹ Proposal of the Center for Control for the session of the Commission for Control of 25 April 2012, **RE-72**.

⁷² Minutes from the session of the Commission for Control held on 26 April 2012, **RE-86**.

46. In a letter dated 30 May 2012 the Ministry of Economy noted that it thought “*there is no economic justification to terminate the [Privatization] agreement*”.⁷³ However, as will be elaborated below,⁷⁴ the Ministry’s 2012 Letter said nothing about the issue of whether Article 5.3.4. had been breached or whether the legal conditions for termination of the Privatization Agreement were met. This issue was left for the Agency to decide.

2.6. June, August and November 2012 Notices and December 2012 Audit Report

47. After receipt of the Ministry’s 2012 Letter, Privatization Agency decided that Mr. Obradovic should be granted an additional period of 30 days for compliance with Article 5.3.4, so the Notice on additional time was sent on 22 June 2012.⁷⁵
48. One month later, on 23 July 2012, Mr. Obradovic sent a letter to the Privatization Agency, stating the following:

“Regarding your [Notice] of 21 June 2012, received by BG AGRO on 22 June 2012, concerning the additionally granted period for the Buyer to act in accordance with the Decision of the Agency dated 27 December 2011, we herewith inform you of the realization of part of contractual obligations which have not been carried out in the previous reports...

(...)

*“... we [Mr. Obradovic and BD Agro] submit the Request for an additional period during which the contractual obligations may be realized pursuant to your [Privatization Agency’s] Decision of 27 December 2012.”*⁷⁶

49. In other words, Mr. Obradovic again confirmed that there were obligations that were not yet fulfilled (“*realization of part of contractual obligations which have not been carried out*”) and requested “*additional period during which the contractual obligations may be realized*”. The Commission for Control decided that the Buyer’s

⁷³ Letter from the Ministry of Economy to the Privatization Agency of 30 May 2012, p. 1, **CE-33**.

⁷⁴ See Section II.A.3.2.2/

⁷⁵ Proposal of the Center for Control for the session of the Commission for undertaking measures of 13 June 2012, **RE-73**. Minutes from the session of the Commission for Control of 15 June 2012, **RE-47**. Notice on Additional Time Period of 22 June 2012, p. 1, **RE-15**.

⁷⁶ Letter from Mr. Obradovic and BD Agro to the Privatization Agency of 23 July 2012, **RE-21**.

request should be accepted. Therefore, in the Notice from 3 August 2012, Mr. Obradovic was granted additional 60 days for compliance with previous December 2011 and June 2012 Notices.⁷⁷

50. Surprisingly, although Mr. Obradovic requested “*additional period during which the contractual obligations may be realized*” and was given one, he completely ignored the Notice from 3 August 2012. Nevertheless, the Commission for Control thought that Mr. Obradovic deserves yet another chance, so it postponed its decision on the Buyer’s performance of the Privatization Agreement until after the meeting to be organized with the Buyer.⁷⁸
51. The said meeting was organized on 2 November 2012 between the Buyer, the Ministry of Economy and the Privatization Agency.⁷⁹ At the meeting, the Ministry of Economy confirmed to the Buyer that he was under the obligation to submit the requested audit report in which the auditor would confirm that Mr. Obradovic acquired repayment of the debts owed by Crveni Signal and Inex in the additionally granted term. In response, the Buyer stated that Crveni Signal and Inex would not be able to settle their debts towards BD Agro, and that, consequently, the 221 Million Pledge will remain registered on BD Agro’s fixed assets. The Buyer was then instructed to submit an explanation regarding this statement.⁸⁰
52. Considering the meeting held with the Buyer on 2 November 2012, the members of the Commission for Control decided to grant Mr. Obradovic additional 30 days to comply with the Privatization Agency’s August 2012 Notice. The new Notice was sent on 9 November 2012.⁸¹
53. On 13 December 2012, Mr. Obradovic submitted an audit report, which, regrettably again confirmed that, although some amount was repaid by Crveni Signal, it still

⁷⁷ Minutes from the session of the Commission for Control of 31 July 2012, **RE-48**. Proposal of the Center for Control for the session of the Commission for Control of 30 July 2012, **RE-74**. Proposal of the Center for Control for the session of the Commission for Control of 24 October 2012, **RE-87**. Notice on Additional Time Period of 3 August 2012, p. 1, **CE-78**.

⁷⁸ Minutes from the session of the Commission for Control held on 25 October 2012, **RE-88**.

⁷⁹ Invitation to Mr. Obradovic to attend the meeting of 30 October 2012, p. 1, **RE-80**.

⁸⁰ Proposal of the Centre for Control for BD Agro of 7 November 2012, **RE-75**.

⁸¹ Proposal of the Centre for Control for BD Agro of 7 November 2012, **RE-75**. Minutes from the session of the Commission for Undertaking of Measures of 8 November 2012, **RE-48**. Notice on Additional Time Period of 9 November 2012, p. 1, **CE-79**.

owed RSD 65,904,569.84, whereas Inex's debt had not changed and it still amounted to RSD 18,170,690.00.⁸²

2.7. Period from 2013 until April 2015

54. Having in mind the conclusions reached at the 2 November 2012 meeting, the Commission for Control decided to forward to the Ministry of Economy the December 2012 Audit Report, the Agency's Notices, as well as the Center for Control's Proposal for termination of the Privatization Agreement.⁸³ It was also decided that proposals concerning BD Agro shall not be considered by the Commission until receipt of the Ministry's response.⁸⁴
55. On 23 December 2013, the Ministry of Economy commenced the Supervision Proceedings concerning the privatization of BD Agro. Notably, that proceeding was commenced in view of the request of BD Agro's employees for termination of the Privatization Agreement, examination of the company's business and payment of unpaid salaries.⁸⁵
56. While the Supervision Proceedings were ongoing, a number of meetings took place between the Privatization Agency, Ministry of Economy, representatives of BD Agro and of Rand Investment (a company which declared an interest to take over Mr. Obradovic's role in the Privatization Agreement through the Cypriot company Coropi), and Mr. Obradovic. These meetings mostly concerned the transfer of the Privatization Agreement to Coropi. However, the fulfillment of the Buyer's obligations was also mentioned:
 - i. At the meeting held on 4 February 2014, the Privatization Agency reminded Mr. Obradovic that he still had not complied with the Privatization Agency's instructions to remedy the breaches of the Privatization Agreement noted in the January 2011 control and to deliver evidence thereof.⁸⁶

⁸² Audit report by Auditor doo of 13 December 2012, **RE-19**.

⁸³ Proposal of the Center for Control for the session of the Commission for Control of 17 January 2013, **RE-76**. Minutes from the session of the Commission for Control held on 18 January 2013, **RE-89**. Letter from the Privatization Agency to the Ministry of Economy of 22 January 2013, **RE-90**.

⁸⁴ Minutes from the session of the Commission for Control held on 10 July 2013, **RE-91**. Proposal of the Center for Control for the session of the Commission for Control of 20 April 2015, **RE-77**.

⁸⁵ See Decision of the Ministry of Economy, **CE-206**.

⁸⁶ Minutes from meeting held at the Privatization Agency on 4 February 2014, **RE-36**.

- ii. On 15 December 2014, another meeting was held, where Mr. Markicevic on behalf of BD Agro, undertook to prepare documentation on the status of pledges registered on the real estate of BD Agro.⁸⁷ Instead of providing up-to-date documentation, on 16 December 2014, BD Agro merely resubmitted February 2012 and December 2012 Audit Reports (which indicated that the debts of Crveni Signal and Inex were still unsettled).⁸⁸
 - iii. At the meeting held the following day, on 17 December 2014, Mr. Markicevic and Mr. Broshko (who was present as the representative of Rand Investments) stated that there had been no changes since the December 2012 Audit Report and that *“according to them, the biggest problems in fulfilment of the Buyer’s obligations under the said Privatization Agreement were the claims which the Subject [of privatization] has towards the companies Crveni signal, Belgrade and Inex Nova Varos.”* The Privatization Agency noted that the Buyer had to fulfil the obligations from Article 5.3.4. at the day the Purchase Price was paid.⁸⁹
 - iv. On 15 January 2015, an audit report commissioned by MDH doo was submitted to the Agency. At the meeting held on 16 January 2015, Mr. Markicevic was informed⁹⁰ that the audit report delivered on 15 January 2015 cannot be accepted because it was commissioned by MDH doo instead of the Buyer, as well as that the report nevertheless shows that Mr. Obradovic had disposed of BD Agro’s assets contrary to the Privatization Agreement.⁹¹
57. In short, during the above-mentioned meetings, it was reconfirmed that the obligations from Article 5.3.4. were not fulfilled and that the Privatization Agency remained at its position that this breach had to be remedied.

⁸⁷ Minutes from meeting held at the Ministry of Economy on 15 December 2014, **RE-38**.

⁸⁸ Letter from BD Agro to the Privatization Agency of 16 December 2014, p. 1, **CE-323**.

⁸⁹ Minutes from meeting held at the Ministry of Economy on 17 December 2014, **RE-38**.

⁹⁰ Conversely, Mr. Markicevic now claims that *“the Privatization Agency representatives, however, were not willing to discuss the content of the report”* (Second Witness Statement of Igor Markicevic, para 102). This statement is obviously a purposeful misrepresentation, as the minutes of meeting held on 16 January 2015 show otherwise (Minutes from meeting held at the Ministry of Economy on 16 January 2015, **RE-39**).

⁹¹ Minutes from meeting held at the Ministry of Economy on 16 January 2015, **RE-39**.

58. Despite the fact that he himself noted that debts of Crveni Signal and Inex represented the problem with regard to the fulfilment of the Privatization Agreement, on 23 March 2015, Mr. Markicevic requested from the Privatization Agency to issue a confirmation that the Buyer fulfilled all obligations from the Privatization Agreement.⁹² The Privatization Agency's response to his request came as no surprise – in line with its previous position, the Privatization Agency noted that the conditions for issuance of the said confirmation were not met.⁹³

2.8. April 2015 Notice, April 2015 Audit Report and Termination of the Privatization Agreement

59. The Ministry of Economy's Supervision Proceedings ended with the Report of 7 April 2015. The Ministry's Report instructed the Privatization Agency to "*send the notice to the Buyer, Djura Obradovic about additionally granted term of 90 days for delivery of evidence on actions in accordance with the provisions of the [Privatization] Agreement (...), that is in accordance with the Notice on additionally granted term of 9 November 2012.*"⁹⁴ In other words, according to Ministry's instruction the Buyer was to be invited to deliver the evidence that he acted in accordance with the Notice on additionally granted term of 9 November 2012 which obliged the Buyer to remedy the breaches of Article 5.3.4. by repaying the debts of Crveni Signal and Inex, in the additionally granted term.⁹⁵
60. At the same time, the Ministry's Report also noted that restrictions from Article 5.3.4. should be considered concluding with 8 April 2011,⁹⁶ i.e. that any disposal of

⁹² Request for issuance of confirmation on fulfillment of obligations from the Privatization Agreement of 23 March 2015, **RE-51**.

⁹³ Privatization Agency's response to request for issuance of confirmation on fulfillment of obligations from the Privatization Agreement of 3 April 2015, p. 1, **RE-52**.

⁹⁴ Report of Ministry of Economy on the Control over the Privatization Agency, p. 13, **CE-98**.

⁹⁵ In the November 2012 Notice it was noted that the Buyer did not comply with the previous Notice, and accordingly additional 30 days were granted to Mr. Obradovic to comply with the August 2012 Notice. Likewise, the August 2012 Notice established that Mr. Obradovic had not complied with June 2012 and December 2011 Notices and thus the Buyer was instructed to do so. The December 2011 Notice, in turn, instructed the Buyer to comply with October 2011 Notice, while the October 2011 Notice instructed the Buyer to comply with June 2011 Notice in which, *inter alia*, the Buyer was instructed to remedy the breaches of Article 5.3.4 and to deliver audit report proving that all loans given to third parties from loan funds secured by pledges on BD Agro's property were repaid. The same instruction from the June 2011 Notice is the one that was initially given to the Buyer in the February 2011 Notice, i.e. before payment of Purchase Price.

⁹⁶ Report of Ministry of Economy on the Control over the Privatization Agency, p. 13, **CE-98**.

assets in contradiction with Article 5.3.4. that occurred after 8 April 2011 should not be considered as the breach of the Privatization Agreement.

61. What is important to note here is that Claimants misrepresent the instruction of the Ministry of Economy and consequently what was stated in the April 2015 Notice. Claimants argue that *“According to the Ministry of Economy, Mr. Obradovic should have demonstrated his fulfillment of this condition as of 8 April 2011, i.e. as of the moment when the full purchase price was paid.”* This argument Claimants derive from the expert report of Milos Milosevic who stated that the termination was based on the Buyer's failure to provide evidence in the additionally granted term that he had complied with the obligation referred to in item 5.3.4 of the Agreement until the purchase price was paid in full on 8 April 2011. Mr. Milosevic state that this is wrong since *“Article 41a(1)(3) makes clear that the additional deadline must be given for compliance — i.e. remedy of the violation — rather than just for making a showing of past compliance”*.⁹⁷
62. Mr. Milosevic is at the same time right and wrong. He is right when stating that the additional deadline must be given for compliance, i.e. to remedy the violation, rather than just for demonstrating past compliance with the obligations from the Privatization Agreement. However, Mr. Milosevic is wrong to state that the Buyer was not given an additional period for compliance, i.e. to remedy the breach of Article 5.3.4. As amply elaborated above, the Buyer was given several additional deadlines to remedy the breach of Article 5.3.4., in particular to repay the debts of Crveni Signal and Inex but failed to comply.
63. What caused Mr. Milosevic to make this wrong conclusion is his interpretation of the instructions in the Ministry's Report. Apparently, Mr. Milosevic understands that the Ministry's Report instructed the Privatization Agency to grant the Buyer additional term of 90 days for delivery of evidence that prior to 8 April 2011 he complied with the Privatization Agreement.⁹⁸ This interpretation however clearly contradicts the Ministry's instruction which referred to delivery of evidence that the breach of article 5.3.4., that occurred before 8 April 2011, was remedied in the additionally granted term from the November 2012 Notice.

⁹⁷ Expert Report of Milos Milosevic, paras 87-91

⁹⁸ Expert Report of Milos Milosevic, para 91.

64. In any event, at the meeting organized on 20 April 2015, Mr. Markicevic was informed of the Ministry of Economy's Report, as well as that the Privatization Agency would consider the Ministry's instructions at the next Session of the Commission for Control.⁹⁹ Three days later, following the Center for Control's Proposal,¹⁰⁰ the Commission for Control decided to give Mr. Obradovic additional time for delivery of evidence that he complied with November 2012 Notice, as instructed by the Ministry of Economy's Report.¹⁰¹ The last Notice on additional time granted to Mr. Obradovic was sent to him on 27 April 2015.¹⁰²

2.8.1. April 2015 Notice

65. In the Notice dated 27 April 2015, the following was stated:

*“In line with the Ministry of Economy's Report of 7 April 2015 (...) the Buyer is given a subsequently granted 90-day term as of the receipt of Notice for submission of evidence on activities taken as per the Agreement (...), that is in line with the Notice on subsequently granted time of 9 November 2012, where the Buyer needs to (...) fulfill the obligation from (...) Article 5.3.4. of the Agreement concluding with 8 April 2011, as well as to submit evidence that (...) all loans have been returned that were given by the Subject [of privatization] to third parties from credit resources secured by burdens on the Subject's assets.”*¹⁰³

66. In other words, the Buyer was given an additional 90 days to deliver the evidence that in the additionally granted terms he has remedied the breach of Article 5.3.4. that occurred before 8 April 2011.
67. On the same day when the Notice was issued, a meeting was held in the Privatization Agency, where Mr. Markicevic stated that the Notice on additional time still had not been delivered, but that, however, the first step that needs to be taken upon receipt of the Notice was for Mr. Obradovic to deliver an audit report proving the fulfillment of the Buyer's obligations within the additionally granted

⁹⁹ Minutes from meeting held at the Privatization Agency on 20 April 2015, **RE-41**.

¹⁰⁰ Proposal of the Center for Control for the session of the Commission for Control of 20 April 2015, **RE-77**.

¹⁰¹ Minutes from the session of the Commission for Control held on 23 April 2015, **RE-40**.

¹⁰² Letter from the Privatization Agency to D. Obradovic of 27 April 2015, **CE-348**.

¹⁰³ Letter from the Privatization Agency to D. Obradovic of 27 April 2015, pp. 1-2, **CE-348**.

term.¹⁰⁴ Thus, neither Mr. Markicevic, as director of BD Agro, nor Mr. Broshko, as representative of Rand Investments, raised any objection to the obligation of submission of new audit report confirming the fulfillment of the Buyer's obligations – to the contrary, they accepted that this should be “step one.”¹⁰⁵

2.8.2. The last audit report dated January 2015

68. The final Notice on additional time was delivered to Mr. Obradovic on 28 April 2015. Two days later, on 30 April 2015, Mr. Obradovic resubmitted April 2011, February 2012, December 2012 and January 2015¹⁰⁶ Audit Reports to the Privatization Agency. He also, for the first time, submitted the November 2011 Audit Report.¹⁰⁷
69. However, all these reports only demonstrated that the debts owed to BD Agro by Crveni Signal and Inex still remained unpaid, and that the 221 Million Pledge was still registered.¹⁰⁸ None of the audit reports contained the auditor's statement that obligations from Article 5.3.4. were fulfilled.
70. Specifically, in the last audit report dated January 2015, it was concluded that

*“Until the day of issuing of the [January 2015] report, not all the borrowings given by BD Agro to third persons from loan assets secured by burdens on property of BD Agro have been returned on 8 April 2011”.*¹⁰⁹

71. The auditor established that:

¹⁰⁴ Minutes from meeting held at the Privatization Agency on 27 April 2015, **RE-23**.

¹⁰⁵ Conversely, Claimants now argue that the Agency's requests for new audit reports were “clearly vexatious” and that the Agency, in making such requests, “purposefully laid the foundation for the termination of the Privatization Agreement” (Memorial, paras 209-210), that “Serbian authorities failed to engage in any meaningful discussions” while insisting on submission of new audit reports (First witness statement of Igor Markicevic, para 28) and that the Agency's request of 27 April 2015 for submission of a new audit report “represented a 180 degree turn from the [earlier] position of the Privatization Agency” (Second witness statement of Erinn Broshko, para 59). However, it is evident from exhibits that both Claimants and Mr. Obradovic maintained a different position in the period 2011-2015.

¹⁰⁶ The audit report dated January 2015 was previously, on 15 January 2015, submitted as the audit report commissioned by MDH doo, and for that reason the Agency back then refused to accept it. The same audit report was resubmitted on 30 April 2015 as commissioned by Djura Obradovic.

¹⁰⁷ Letter from Mr. Obradovic to the Privatization Agency of 30 April 2015, **RE-42**.

¹⁰⁸ Audit report by Auditor doo of 29 April 2011, **RE-13**. Audit report by Auditor doo of 2 February 2012, **RE-17**. Audit report by Auditor doo of 22 November 2011, **RE-18**. Audit report by Auditor doo of 13 December 2012, **RE-19**. Audit report by Prva revizija of 15 January 2015, **RE-105**. Report on Factual Findings from Prva Revizija of 12 January 2015, p. 4-6, **CE-327**.

¹⁰⁹ Report on Factual Findings from Prva Revizija of 12 January 2015, p. 6, **CE-327**.

- i. The debt in the amount of RSD 18,170,690.00 owed by Inex on 8 April 2011 was still owed although the deadline for return of the loan lapsed on 29 December 2011.
- ii. The debt of Crveni Signal, which on 8 April 2011 amounted to RSD 70,944,422.27, decreased to RSD 65,904,569.84 following Crveni Signal's partial payment on 31 May 2012.
- iii. The 221 Million Pledge was still registered.¹¹⁰

2.8.3. Privatization Agency's final attempt to get the Buyer to comply with the Notices

72. The Audit Reports submitted on 30 April 2015 by Mr. Obradovic were subject of review of the Center for Control which in its Proposal accepted various findings from the Audit Reports concerning compliance with obligations from the Privatization Agreement, but also noted that all of them confirmed that debts of Crveni Signal and Inex remained unpaid. Thus, the Center for Control proposed,¹¹¹ and the Commission for Control accepted to remind the Buyer to submit the Audit Report in which the auditor would address the fulfillment of the obligations from Article 5.3.4. concluding with 8 April 2011, and in which the auditor would confirm that debts owed by third parties, stemming from the loans given to such entities from credit funds received by BD Agro and secured with pledges on BD Agro's assets, were repaid.¹¹² Mr. Obradovic was informed of the Commission for Control's decision in a letter dated 23 June 2015, and was requested to deliver an audit report until the expiration of the additional period granted in the April 2015 Notice, i.e. until 27 July 2015.¹¹³
73. In his communication to the Privatization Agency on 2 July 2015 Mr. Markicevic in fact confirmed the Agency's findings by stating, *inter alia*, the following:

“On 30 April 2015, the Buyer (...) submitted to the Agency the auditor reports of auditor companies ‘Auditor’ and ‘Prva revizija’ in which it is

¹¹⁰ Report on Factual Findings from Prva Revizija of 12 January 2015, pp. 4-6, **CE-327**.

¹¹¹ Proposal of the Center for Control for the session of the Commission for Control of 16 June 2015, **RE-78**.

¹¹² Minutes from the session of the Commission for Control held on 19 June 2015, **RE-43**.

¹¹³ Letter from the Privatization Agency to D. Obradović and BD Agro of 23 June 2015, p. 2, **CE-351**.

clearly and unequivocally stated that the Buyer fulfilled all contractual obligations as of the date of payment of the last installment of the purchase price (8 April 2011), except in relation to lending to third parties, namely Inex and Crveni signal".¹¹⁴

74. The Privatization Agency replied on 20 July 2015, reaffirming its previous stance – that the submitted Audit Reports confirmed the Buyer's non-performance of Article 5.3.4..¹¹⁵
75. The final deadline set for the Buyer's compliance with the April 2015 Notice lapsed on 27 July 2015. However, Mr. Obradovic never complied and never submitted the required audit report. Instead, on 10 September 2015, Mr. Obradovic sent a letter to the Privatization Agency making numerous incorrect statements concerning obligations from Article 5.3.4:
- i. that Article 5.3.4. of the Privatization Agreement does not contain any restrictions concerning loans to third parties, but only forbids constitution of pledges on the fixed assets of BD Agro¹¹⁶ – this assertion is wrong as Article 5.3.4. does not forbid constitution of pledges on the fixed assets of BD Agro, but forbids that loaned funds secured by pledges on BD Agro's fixed assets be used for third parties' benefit;¹¹⁷
 - ii. that the Buyer attaches to the letter the documents necessary for removal of the pledges constituted in favor of Agrobanka on BD Agro's real estate as security for the 221 Million Loan¹¹⁸ – this was a false statement, seeing that the submitted documents concerned another pledge, and not the 221 Million Pledge;¹¹⁹

¹¹⁴ Letter from BD Agro to Privatization Agency of 2 July 2015, p. 2, **CE-46**. On the other hand, Mr. Markicevic now states "*I went through the individual requests made by the Privatization Agency in that letter [sent by the Privatization Agency to BD Agro on 23 June 2015] and explained that we had already complied with them*" (Second witness statement of Igor Markicevic, para 166). Mr. Markicevic obviously forgot to mention in his witness statement that, in the letter in question, he also admitted that not all contractual obligations were fulfilled.

¹¹⁵ Letter from Privatization Agency to BD Agro of 20 July 2015, p. 3, **CE-47**.

¹¹⁶ Letter from Mr. Obradovic to the Privatization Agency of 10 September 2015, p. 3, **CE-48**.

¹¹⁷ See Section II.A.3.1.

¹¹⁸ Letter from Mr. Obradovic to the Privatization Agency of 10 September 2015, pp. 2-3, **CE-48**.

¹¹⁹ Decision of the First Basic Court in Belgrade no. Dn-7084/10 of 7 June 2010, **RE-3**. Short Term Loan Agreement no. 181/10-00 of 2 June 2010, **RE-4**. Guarantee Agreement no. J-182/10-00 of 2 June 2010,

- iii. that the auditor Prva Revizija explicitly confirmed that pledges registered as security instruments for obligations of third parties were not deleted, but that those obligations had been paid and that the conditions were met for deletion of the pledges¹²⁰ – this is a misrepresentation, since the auditor’s statement concerned another pledge and another third party debt, and not the 221 Million Pledge;¹²¹
- iv. that “*complete fulfillment of obligations referred to in Article 5.3.4 of the Agreement was ensured, since all of the conditions were met for the deletion of all disputed aforementioned pledges (all necessary documents were obtained), and BD Agro is waiting for an appropriate decision from the Republic Geodetic Authority-Real Estate Cadaster Office on deletion of the pledges*”¹²² – again, this was another false statement, having in mind that the 221 Million Pledge is still registered on this very day¹²³.

2.8.4. Privatization Agency’s decision to terminate the Privatization Agreement

- 76. After the final additional period expired on 27 July 2015, the Center for Control analyzed the Buyer’s actions undertaken following the 27 April 2015 Notice and prepared materials for the session of the Commission for Control. In the materials, the Center for Control noted (i) that the Buyer’s breach of Article 5.3.4. was determined in January 2011, (ii) that Article 5.3.4. was breached by payments made for the benefit of third parties from loans secured by pledge on BD Agro’s real estate, (iii) that the Buyer was granted the first additional period for compliance in February 2011, i.e. before payment of Purchase Price, (iv) that the Privatization Agency issued to the Buyer a number of notices on additional periods for compliance, (v) that the Pledge was still registered on BD Agro’s real estate as security for the 221 Million Loan, (vi) that the 221 Million Loan was used to pay out

RE-5. Confirmation by Nova Agrobanka on fulfillment of obligations from the Short Term Loan Agreement K-181/10-00 of 4 September 2015, p. 1, **RE-53.** BD Agro’s request for deletion of pledge registered in excerpt from the Land Register no. 2258, cadastral municipality Ugrinovci of 7 September 2015, p. 1, **RE-54.** Decision of the Land Register of 7 September, p. 1, **CE-87.** Letter from BD Agro to the Privatization Agency of 10 September 2015, **CE-357.**

¹²⁰ Letter from Mr. Obradovic to the Privatization Agency of 10 September 2015, p. 3, **CE-48.**

¹²¹ Report on Factual Findings from Prva Revizija of 12 January 2015, p. 5, **CE-327.**

¹²² Letter from Mr. Obradovic to the Privatization Agency of 10 September 2015, p. 3, **CE-48.**

¹²³ Excerpt from the Land Register no. 4031, cadastral municipality Dobanovci of 13 March 2019, **RE-39.**

Crveni Signal's debt towards Agrobanka and to give loan to Inex, and (vi) that the Audit Reports demonstrated that Crveni Signal still owed RSD 65,904,569.84 to BD Agro, while Inex still owed RSD 18,170,690.00 to BD Agro.¹²⁴

77. Having determined the above facts, the Center for Control proposed that the Commission for Control declare the Privatization Agreement terminated for breach of Article 5.3.4. in line with Article 41a of the Law on Privatization.¹²⁵
78. On 28 September 2015, based on the materials prepared by the Center for Control, the Commission for Control concluded that, pursuant to the January 2015 Audit Report (submitted on 30 April 2015), Inex still owed RSD 18,170,690.00 to BD Agro, whereas Crveni Signal still owed RSD 65,904,569.84, as well as that the 221 Million Pledge was still registered. Consequently, the Commission for Control decided that the Privatization Agreement should be declared terminated due to the Buyer's failure to fulfil its obligations under Article 5.3.4.¹²⁶
79. In accordance with the Commission for Control's decision, the Notice of Termination was issued to Mr. Obradovic on 1 October 2015. In the Notice, the Privatization Agency restated that the January 2015 Audit Report, submitted by the Buyer on 30 April 2015, showed that debts of Crveni Signal and Inex remained unreturned, and that:

*“Since the Buyer failed to provide evidence in the additionally granted term that he had complied with the obligation referred to in item 5.3.4 of the [Privatization] Agreement, and according to the auditor's reports of 2011, 2012 and 2015, as well as documentation submitted along with auditor's reports, the obligation has not been performed, we hereby inform you that, at its 22nd session held on 28 September 2015, the Commission for control (...) rendered the decision that the [Privatization] Agreement (...) is considered terminated due to non-fulfillment, in accordance with Article 88 (3) (...) in relation to Article 41a 1 (3) of the Law on Privatization (...).”*¹²⁷

¹²⁴ Materials for the Session of the Commission of 28 September 2015, pp. 23-24, 38-39, **CE-89**.

¹²⁵ Materials for the Session of the Commission of 28 September 2015, pp. 38-39, **CE-89**.

¹²⁶ Minutes of the Session of the Commission of 28 September 2015, pp. 3-4, **CE-117**.

¹²⁷ Notice on Termination of the Privatization Agreement of 28 September 2015, p. 3, **CE-50**.

80. As a consequence of the termination of the Privatization Agreement and in line with the Law on Privatization,¹²⁸ on 21 October 2015, Privatization Agency delivered its Decision on transfer of capital of BD Agro, by which the capital, divided into 666,621 shares owned by the Buyer prior to termination, was transferred to the Privatization Agency.¹²⁹ The Decision on transfer was also delivered to the Central Securities Depository and Clearing House and the Business Registers' Agency for registration.¹³⁰

2.9. Conclusion

81. From the above described chain of events, it can be concluded that the Privatization Agency was more than willing to keep the Privatization Agreement in force. Throughout 4 years, Privatization Agency granted 8 additional periods for fulfillment of the obligations from Article 5.3.4 and for delivery of the evidence thereof. Furthermore, on many meetings held during this period, the Agency also reminded the Buyer which breaches of the Privatization Agreement needed to be remedied and how.
82. On the other hand, Mr. Obradovic nonchalantly ignored the Notices – he never responded to 2 Notices¹³¹ and submitted 6 Audit Reports, all of which confirmed that he did not comply with the Agency's instructions, i.e. that debts owed by Crveni Signal and Inex had not been repaid and that the 221 Million Pledge was not removed.
83. What is also important to note is that throughout the 2011-2015 period, both Mr. Obradovic and Mr. Broshko, acting as representative of Rand Investment, were fully aware that fulfillment of the obligations from Article 5.3.4. was problematic and that it represented an impediment to the potential assignment of the Privatization Agreement. Contrary to what Claimants now assert, they did not “*maintain that all*

¹²⁸ Expert report of Prof Mirjana Radovic, Section 2.5.

¹²⁹ It should be noted that the said shares are no longer registered with the Privatization Agency, as the amendments of the Law on Privatization in 2016 predicted that all shares which were previously registered with the Privatization Agency (following termination of privatization agreements) are to be transferred to the Registry of shares, which is maintained by the Ministry of Economy. Expert report of Professor Mirjana Radovic, paras 53-54.

¹³⁰ Decision of the Privatization Agency on the Transfer of BD Agro's Capital of 21 October 2015, p. 1, **CE-105**.

¹³¹ Notice of the Privatization Agency on Additional Time Period of 6 October 2011, **CE-97**. Notice of the Privatization Agency on Additional Time Period of 31 July 2012, **CE-78**.

of the obligations under the Privatization Agreement had been duly fulfilled and no remedial actions were warranted.”¹³² On the contrary:¹³³

- i. in a letter submitted by Mr. Obradovic and BD Agro on 23 July 2012, it was noted that debts owed by Crveni Signal and Inex were as of yet unsettled, and that an additional period was needed so that the Buyer’s contractual obligations may be performed;¹³⁴
- ii. at the meeting held between the representatives of the Ministry of Economy, Privatization Agency, BD Agro and Mr. Broshko on 17 December 2014, Mr. Markicevic and Mr. Broshko stated that, according to them, the biggest problems in fulfilment of the Buyer’s obligations under the Privatization Agreement were the claims which BD Agro had towards Crveni Signal and Inex;¹³⁵
- iii. in the letter dated 2 July 2015, Mr. Markicevic expressly stated that Mr. Obradovic did not fulfil his obligation to acquire repayment of debts from Crveni Signal and Inex.¹³⁶

84. Now, interestingly, Claimants state that by financing Crveni Signal and Inex from the 221 Million Loan the Buyer did not breach the Privatization Agreement,¹³⁷ that,

¹³² Second witness statement of Erinn Broshko, para 13.

¹³³ In addition to the events mentioned in Section II.A.2.4-2.5., the Buyer’s awareness of non-fulfillment of the obligations from Article 5.3.4. can also be seen from other documents. One such example is Mr. Obradovic’s letter dated 5 November 2011 enclosing a statement of BD Agro’s director, where it was noted that the debts owed by Crveni Signal and Inex had not changed since the April 2011 audit report and that “*our [BD Agro’s] claim [towards Crveni Signal and Inex] will be realized*” from the sale of assets of Crveni Signal and Inex. In this way, the Buyer confirmed that he was aware of the fact that debts owed by Crveni Signal and Inex needed to be repaid. Letter from Mr. Obradovic to the Privatization Agency attaching the statement from BD Agro’s director of 9 November 2011, **RE-60**.

Another is a letter dated 5 November 2012, sent by Mr. Obradovic to Auditor doo, in which Mr. Obradovic expressly informed the auditor that debts owed by Crveni Signal and Inex were not repaid to BD Agro because Crveni Signal and Inex would need to take loans from banks in order to repay the debts, which Mr. Obradovic thought would entail only unnecessary costs for those companies. Letter from Mr. Obradovic and BD Agro to Auditor doo of 5 November 2012, **RE-20**

¹³⁴ Letter from Mr. Obradovic and BD Agro to the Privatization Agency of 23 July 2012, **RE-21**.

¹³⁵ Minutes from meeting held at the Ministry of Economy on 17 December 2014, **RE-22**. Conversely, Mr. Broshko has changed its position and now states that “*.... the Privatization Agreement had been fulfilled with the payment of the last installment of the purchase price in 2011. Thus, the privatization of BD Agro was concluded, and the Privatization Agency was no longer authorized to request any alleged remedial actions*” (Second witness statement of Erinn Broshko, para 14).

¹³⁶ Letter from BD Agro to Privatization Agency of 2 July 2015, p. 2, **CE-46**. Mr. Markicevic, however, now states that he “*did not consider these claims [breach of Article 5.3.4.] to be an issue as I was informed that Mr. Obradović had explained in detail to the Privatization Agency that he had fulfilled all of his obligations under the Privatization Agreement and provided audit reports confirming this fact*” (Second Witness Statement of Igor Markicevic, para 19).

consequently, the termination of the Privatization Agreement was not lawful¹³⁸ and (most interestingly) that the termination “*came as an utter shock*”.¹³⁹

3. Termination of the Privatization Agreement for breach of Article 5.3.4. was lawful and justified

85. Article 5.3.4. of the Privatization Agreement prescribes the following:

*“5.3.4. The Buyer will not encumber with pledge the fixed assets of the subject during the term of the Agreement, except for the purpose of securing claims towards the subject stemming from regular business activities of the subject, or except for the purpose of acquiring of the funds to be used by the subject.”*¹⁴⁰

86. Quoted provision is clear enough and leaves no room for different interpretations. However, in their Memorial Claimants managed to completely misrepresent this provision. In response to their contentions, the following issues have to be addressed: (i) whether provision of loans to third parties from the funds obtained by BD Agro and secured by pledge on its assets is forbidden by Article 5.3.4; (ii) whether the Privatization Agreement can be terminated after the payment of the Purchase Price; and (iii) whether a breach of Article 5.3.4. represents a reason for termination of the Privatization Agreement.

87. Respondent submits that the answers to all three questions are in the affirmative, as will be elaborated hereunder.

3.1. Disposals that are forbidden under Article 5.3.4.

88. Article 5.3.4. stipulates that the Buyer can pledge the fixed assets of BD Agro only in two situations:

- i. For the purpose of securing claims towards the subject stemming from regular business activities of the subject (in other words, in case the claim

¹³⁷ Memorial, paras 15, 107-110, 207.

¹³⁸ Memorial, paras 226-260.

¹³⁹ Second Witness Statement of Erinn Broshko, para 61. Second Witness Statement of Igor Markicevic, para 187.

¹⁴⁰ Article 5.3.4. of the Privatization Agreement, **RE-12**.

arises towards BD Agro due to its regular business activities, such a claim can be secured by the pledge on its assets);

or

- ii. For the purpose of acquiring funds to be used by the subject (i.e. in case BD Agro borrows the funds to be exclusively used by it).

89. Up until September 2015, neither the Buyer nor Claimants ever offered a different interpretation of the said provision. Surprisingly, in the letter of 10 September 2015, as well as in the Notice of Arbitration and the Memorial, the Buyer and Claimants put forward another, different interpretation, which is obviously wrong.
90. To start with, in a letter of 10 September 2015, the Buyer stated that Article 5.3.4. of the Privatization Agreement does not contain any restrictions concerning loans to third parties, but instead only forbids constitution of pledges on the fixed assets of BD Agro.¹⁴¹ This is completely wrong as the pledge on the fixed assets is not *a limine* forbidden under Article 5.3.4. What is forbidden is to give loans to third parties from the funds secured by the pledge on the fixed assets of BD Agro. This is clear from the second clause of Article 5.3.4 which provides that the pledges are allowed “*for the purpose of acquiring of the funds to be used by the subject*”.
91. In a further attempt to show that financing of Crveni Signal and Inex was in line with Article 5.3.4, Claimants twist the text of Article 5.3.4. and state:

*“The Privatization Agency did not explain why it believed that, due to the partial use of the loan for the benefit of third parties, the pledge securing the loan did not qualify for the exception under Article 5.3.4, which authorized pledges for the purpose of securing loans contracted ‘based on BD Agro’s regular business activities’.”*¹⁴²

And that:

“The Privatization Agency also failed to review the arrangements between BD Agro and the related companies to justify why it considered that such

¹⁴¹ Letter from Mr. Obradovic to the Privatization Agency of 10 September 2015, p. 3, **CE-48**.

¹⁴² Memorial, para 107.

*use was not 'based on BD Agro's regular business activities' within the meaning of Article 5.3.4 of the Privatization Agreement.”*¹⁴³

92. In other words, Claimants' position is that Article 5.3.4. allows pledges for securing loans contracted “*based on BD Agro's regular business activities*” and that it allows that loans are used by third parties if such use is “*based on BD Agro's regular business activities*”. However, this is incorrect.
93. Article 5.3.4. does not regulate whether a loan given to BD Agro has to be contracted “*based on BD Agro's regular business activities*”. Rather, it states that a pledge is allowed for securing claims towards BD Agro, which claims stem from “*regular business activities*” of BD Agro. In other words, if a claim towards BD Agro arises in the course of its regular business activities (in case of BD Agro, this is agricultural business), then this claim may be secured by the pledge.¹⁴⁴
94. On the other hand, with respect to lending of the funds by BD Agro to third parties, Article 5.3.4. clearly states that, if funds loaned to BD Agro are secured by the pledge on BD Agro's assets, they cannot be used by third parties – and there is no exception.
95. Further, Claimants' argument that “*Privatization Agency did not justify why the use of a minor part of the loan for the benefit of related companies would disqualify the pledge provided to secure the loan as a whole*”¹⁴⁵ is misplaced simply because it was not a “*minor part of the loan*” that was used for the benefit of third parties. Rather, out of the 221 Million Loan, not less than RSD 101,615,112.57 was used to finance Crveni Signal and Inex,¹⁴⁶ i.e. around 50% of the 221 Million Loan. This can hardly be considered “*a minor part*”, especially having in mind that, at the time, these transactions amounted to approximately EUR 1 million¹⁴⁷ (while, for example, the Purchase Price was EUR 5,549,000 according to Claimants' own calculation¹⁴⁸).

¹⁴³ Memorial, para 108.

¹⁴⁴ For instance, BD Agro was perfectly free to pledge its assets as security for claim of Konzul doo towards BD Agro, stemming from the agreement on sale and purchase of mercantile corn. Audit report by Auditor doo of 2 February 2012, **RE-17**.

¹⁴⁵ Memorial, para 108.

¹⁴⁶ Audit report by Auditor doo of 29 April 2011, **RE-13**.

¹⁴⁷ The loaned amount amounted to EUR 959,719.60 at the time. See *supra* at II.A.1.

¹⁴⁸ Memorial, para 9.

96. Another in a series of Claimants' unsubstantiated arguments is that "*Article 5.3.4. applied only to the actions of the buyer, not BD Agro*" and that no encumbrances established by BD Agro itself could thus violate the Privatization Agreement.¹⁴⁹ This argument simply has no basis in the common sense. If accepted, it would make Article 5.3.4. meaningless. While it is undisputed that, formally, only BD Agro can dispose with its assets (i.e. only the management of BD Agro can sign the documents concerning the disposal), the restriction from the Article 5.3.4. was imposed on the Buyer because the Buyer, as the majority owner of BD Agro's shares, is the one who exercises control over the company's business and decision-making processes. This, together with the fact that prior to the submission of the Memorial neither the Buyer nor Claimants ever came up with this "interpretation" of Article 5.3.4., confirms that it does not merit any further discussion.

3.2. Termination of the Privatization Agreement after payment of Purchase Price was lawful

97. Article 5.3.4. prescribes that restrictions imposed upon the Buyer exist during the "*term of the Privatization Agreement*". In other words, during the term of the agreement the Buyer cannot pledge assets of BD Agro in contradiction with Article 5.3.4. This is precisely what the Buyer did in the present case. In December 2010, before the payment of the Purchase Price, he pledged assets of BD Agro in order to loan the funds from Agrobanka and then used the loaned funds to finance Crveni Signal and Inex, although that was strictly forbidden by Article 5.3.4.
98. Breach of Article 5.3.4., which ultimately lead to termination of the Privatization Agreement, was noted by the Agency in January 2011, while the first Notice on additional period of 60 days for remedy of this breach was issued on 25 February 2011 and notified to the Buyer on 1 March 2011, all this prior to the payment of Purchase Price.
99. In short, both the breach of Article 5.3.4., as well as granting of an additional period for remedy of that breach, happened before the payment of the Purchase Price. These facts (together with the fact that the requested remedy did not take place)

¹⁴⁹ Memorial, paras 109 and 243.

make the termination of the Privatization Agreement lawful. This is also confirmed by the expert report of Professor Mirjana Radovic.¹⁵⁰

3.2.1. Case law of Serbian courts

100. According to the Serbian Supreme Court of Cassation, if, before the expiry of the term for fulfilment of obligations, the Privatization Agency determines breach of a privatization agreement and grants additional time for fulfillment to the buyer, it will not be precluded to terminate the agreement in case the buyer does not remedy the breach:

“The lower courts were correct to conclude that respondent [the Privatization Agency], before the expiry of the two-year term for fulfilment of obligations referred to in Article 5.3.2. of the agreement on sale of socially-owned capital, ascertained that claimant did not perform the contractual obligations contained in the cited provision. By virtue of subsequent controls and notices, [the Privatization Agency] granted to claimant the opportunity to fulfil the contractual obligations [...], however seeing that claimant failed to act in accordance with the notices and deliver evidence of fulfilment of the contractual obligations under Article 5.3.2., [the Privatization Agency] issued the notice of termination [...]. Accordingly, the courts found that [the Privatization Agency] was not precluded to terminate the said agreement.”¹⁵¹

101. Applying the rationale of this ruling to the facts of the present case, the Privatization Agency was not precluded to terminate the Privatization Agreement after the payment of the Purchase Price, since Mr. Obradovic was granted an additional period for compliance with, *inter alia*, Article 5.3.4. of the Privatization Agreement before the payment.
102. Also, there is a number of Supreme Court of Cassation decisions that, contrary to Claimants allegations,¹⁵² explicitly confirm that a privatization agreement is neither

¹⁵⁰ Expert report of Professor Mirjana Radovic, Section 2.3.1.

¹⁵¹ Judgment of the Supreme Court of Cassation of 30 September 2010, **RE-25**.

¹⁵² Memorial, paras 32, 80, 111, 126, 207, 219, 231, 234.

consummated, nor is its purpose achieved, by the payment of the purchase price, since all obligations are equally relevant:

“...obligations [pertaining to the realization of the social program] are from a legal standpoint equally relevant as the obligations concerning the payment of purchase price [...] seeing that the goal of privatization can only be achieved by full performance of all contractual obligations [...]”.¹⁵³

And:

*“Law [on privatization] prescribes that all contractual obligations are legally equally relevant for the achievement of the purpose of privatization (...) [and] as a consequence the **agreement may be lawfully terminated due to non-fulfilment of only one contractual obligation**”*¹⁵⁴

103. Put differently, non-fulfilment of only one obligation from privatization agreement is:

*“...a legally valid reason which constitutes the right of the other party to declare the agreement **terminated** (...) **regardless of the fact whether [the buyer] has and to which extent fulfilled the contractual obligations concerning payment of full purchase price.**”*¹⁵⁵

104. It should also be noted that even the case law relied on by Claimants does not support their contention that termination of the Privatization Agreement after full payment of purchase price was impossible.¹⁵⁶ As evident from the excerpt of the judgment of the Commercial Appellate Court provided by Claimants, the Agency’s right to terminate the Privatization Agreement exists while “*there is a determined obligation of the buyer to comply with various obligations from the agreement*”. Duty of the buyer to comply with the obligations from the agreement continues to exist if the buyer is put on notice and granted additional period to remedy its breach. In the present case, before payment of the Purchase Price, Mr. Obradovic was

¹⁵³ Judgment of the Supreme Court of Cassation of 19 October 2017, **RE-30**.

¹⁵⁴ Judgment of the Supreme Court of Cassation of 14 November 2013, **RE-62**.

¹⁵⁵ Judgment of the Supreme Court of Cassation of 18 May 2017, **RE-94**.

¹⁵⁶ Memorial, paras 231 and 232.

obliged to remedy the breach of Article 5.3.4., but he failed to do so, which means that he had not “*performed [the Privatization Agreement] in respect of the Agency*”. Accordingly, as per court practice relied on by Claimants, his (breached) obligation continues to exist and there is a possibility to terminate the non-performed agreement.

105. Finally, it should not be disregarded that, if accepted, Claimants’ standpoint would mean that, simply by paying the purchase price, the buyer would be in a position to legally validate the breaches committed prior to the payment. It is self-evident that this would lead to abuses, as the buyer would be in a position to preclude the Privatization Agency’s request for remedial actions by paying the purchase price. This would render any other obligation of the buyer, apart from the obligation to pay the purchase price, effectively meaningless.

3.2.2. Privatization Agency, the Buyer and Claimants shared the same understanding

106. In the period 2011 – 2015 the Privatization Agency was persistent with the stand that the payment of the Purchase Price did not release the Buyer from the obligation to remedy the breaches of the Privatization Agreement that occurred before the payment. This position was communicated to the Buyer in no uncertain terms:

“Payment of purchase price is only one of the contractual obligations and fulfilment of other contractual obligations is independent from the obligation concerning the payment of purchase price.

(...)

[B]reach of contractual obligations was noted before the Buyer paid the full purchase price and before payment of purchase price measures were taken towards the Buyer, that is an additional period was granted to the Buyer to deliver evidence that breaches were remedied...”¹⁵⁷

107. In fact, even the opinion of the Agency’s attorneys from 2013, saying that the Privatization Agreement could not be terminated after payment of full purchase

¹⁵⁷ Minutes from meeting held at the Privatization Agency on 4 February 2014, **RE-36**.

price,¹⁵⁸ did not change the different stance previously taken by the Agency. In particular, the Agency's Center for Privatization, including the Sector for Operational and Legal Affairs, was of the opinion that by giving an additional period for fulfillment of the obligations the agreement remained in force.¹⁵⁹ As already noted, the same position was taken in the court practice.¹⁶⁰ The Privatization Agency continued to hold the same position after (and despite) the Ministry's 2012 Letter. Here, it should be noted that the Ministry did not address the legal question whether termination of the Privatization Agreement after payment of Purchase Price would be lawful or not. Rather, it looked at this issue from the economic point of view (saying that there was no economic justification to terminate the agreement). Finally, and contrary to what Claimants suggest,¹⁶¹ the Privatization Agency was by no means obliged to follow – and it did not follow – either the 2013 Attorney's Opinion, or the Ministry's 2012 Letter.

108. Claimants also argue that the Commission for Control acted inconsistently because it found that Article 5.3.3. of the Agreement was not breached since Mr. Obradovic paid the entire purchase price on 8 April 2011 but did not apply the same principle with regard to Article 5.3.4.¹⁶² This is yet another misrepresentation. What the Center for Control concluded in its Proposal of 23 September 2015, and what the Commission for Control noted, was that the Center for Control “is unable to issue the statement about performance of the obligation referred to in Article 5.3.3 of the Agreement.”¹⁶³ Clearly, neither the Center for Control nor the Commission for Control stated that there was no breach of Article 5.3.3. because the Buyer paid full Purchase Price.

¹⁵⁸ Legal Opinion on the Privatization Agency's Recommendation for Termination of the Agreement on Sale of Socially Owned Capital of the Subject of Privatization, “PPK Buducnost” from Dobanovci (now “BD AGRO a.d.”), through Public Auction of 11 June 2013, p. 4, **CE-34**.

¹⁵⁹ Opinion of the Center for privatization of 28 February 2012, **RE-79**.

¹⁶⁰ As noted by the Supreme Court of Cassation: “*The lower courts were correct to conclude that respondent [the Privatization Agency], before the expiry of the two-year term for fulfilment of obligations referred to in Article 5.3.2. of the agreement on sale of socially-owned capital, ascertained that claimant did not perform the contractual obligations contained in the cited provision. By virtue of subsequent controls and notices, [the Privatization Agency] granted to claimant the opportunity to fulfil the contractual obligations [...], however seeing that claimant failed to act in accordance with the notices and deliver evidence of fulfilment of the contractual obligations under Article 5.3.2., [the Privatization Agency] issued the notice of termination [...]. Accordingly, the courts found that [the Privatization Agency] was not precluded to terminate the said agreement.*” Judgment of the Supreme Court of Cassation of 30 September 2010, **RE-25**.

¹⁶¹ Memorial, paras 23, 31, 141, 209.

¹⁶² Memorial, para 218.

¹⁶³ Materials for the Session of the Commission of 28 September 2015, pp. 36-37, **CE-89**.

109. In fact, the stand that privatization agreements can be terminated after the price had been paid in full has been applied not only to this case but represents well-established practice of the Privatization Agency.¹⁶⁴ Therefore, Mr. Markicevic's statement that "*according to [the Privatization Agency], the privatization of BD Agro had been finalized because the purchase price was paid*"¹⁶⁵ is clearly erroneous.
110. What is also important to note is that both the Buyer and Claimants shared the view that the payment of Purchase Price did not release Mr. Obradovic from remedying the recorded breaches of the Privatization Agreement.
111. For instance, in December 2011, the Buyer agreed that "*the analysis of the Buyer's compliance with the Privatization Agreement [should] be conducted concluding with the end of September/beginning of October of 2011.*"¹⁶⁶ Had the Buyer considered that the Privatization Agreement expired in April 2011, he would not have agreed that his compliance be determined with the end of September/October of 2011.
112. Also, in July 2012 – more than a year after the alleged *consummation of the Agreement* – Mr. Obradovic asked the Privatization Agency to grant him an additional period to perform his contractual obligations.¹⁶⁷
113. An additional example can be found in Mr. Markicevic's email sent to Ministry of Economy in January 2015 in which he proposed that a meeting be organized on the topic of "*potential signing of the amendments to [Privatization] Agreement (...) which would regulate the manner and dynamics for fulfilment of remaining obligations and finalization of the privatization procedure of the company [BD Agro]*".¹⁶⁸
114. Also, in Mr. Markicevic's letter submitted on 27 February 2015, it was stated that, in case of transfer of the Privatization Agreement to Coropi, pledge over shares in BD

¹⁶⁴ Termination of Zastava PES privatization agreement of 9 April 2013, **RE-59**. Termination of Geodetski biro privatization agreement of 27 March 2013, **RE-31**. Termination of Trayal korporacija privatization agreement of 6 December 2013, **RE-24**.

¹⁶⁵ Second witness statement of Igor Markicevic, para 143.

¹⁶⁶ Letter from Mr. Obradovic to the Privatization Agency of 29 December 2011, **RE-27**.

¹⁶⁷ Letter from Mr. Obradovic and BD Agro to the Privatization Agency of 23 July 2012, **RE-21**.

¹⁶⁸ Email communication between I. Makrićević, D. Stevanović, N. Galić et al. between 6-14 January 2015, p. 3, **CE-326**.

Agro would remain registered in favor of the Republic of Serbia “until the moment of fulfilment of remaining obligations from the [Privatization] Agreement.”¹⁶⁹

115. Likewise, even Mr. Rand himself considered the Privatization Agreement to be still in force in 2015. In a letter dated 7 May 2015, he conditioned his potential financial investments in BD Agro with “completion of the process of privatization of BD Agro by the Serbian Privatization Agency, [or] (a)lternatively (...) we are also willing to takeover (...) the sale and purchase agreement relating to the privatization of BD Agro in advance of the formal completion of the privatization procedure”.¹⁷⁰
116. The above correspondence utterly defeats Claimants’ assertion that they and Mr. Obradovic “*maintained their view that the Privatization Agreement had been consummated with the full payment of the purchase price [...]*.”¹⁷¹ To the contrary, it is clear that they did not maintain their view at all, but rather invented it in support of their interests and their position in the present dispute.

3.3. Article 5.3.4. of the Privatization Agreement is subsumed under grounds for termination contained in Article 41a 1 (3) of the Law on Privatization

117. Claimants argue that even “*a non-remedied continuing breach of Article 5.3.4.*” would not be a valid cause for termination, because Article 5.3.4. was not included in the allegedly exhaustive list of grounds for termination contained in Article 7.1. of the Privatization Agreement.¹⁷² They further state that the provision of Article 41a(1)(3) of the Law on Privatization, which was invoked by the Privatization Agency as the legal ground for termination, represents very general grounds for termination which could not be invoked directly, but only to the extent further specified in the Privatization Agreement. Therefore, the only disposal of property that could have justified the termination would be a violation of Article 5.3.3. and not Article 5.3.4.¹⁷³ Claimants are wrong.
118. According to Serbian law, the agreement can be terminated both for the reasons set forth in an agreement and in the relevant laws. The Constitutional Court of Serbia

¹⁶⁹ Letter from BD Agro to the Privatization Agency of 26 February 2015, p. 4, **CE-334**.

¹⁷⁰ Letter from Rand Investments to I. Markićević of 7 May 2015, p. 1, **CE-350**.

¹⁷¹ Memorial, para 126.

¹⁷² Memorial, para 236.

¹⁷³ Memorial, para 241.

noted that application of the provisions of the law prescribing termination of agreements *ex lege* in case of the debtor's non-performance is not excluded by "*the fact that the privatization agreement did not expressly stipulate that the agreement may be terminated in the case of the [buyer's] failure to perform the investment obligation in the subject of privatization*".¹⁷⁴

119. Therefore, the fact that the Article 7.1. of the Privatization Agreement does not mention the breach of Article 5.3.4. as a reason for termination does not mean that the termination due to breach of Article 5.3.4. is not lawful. Quite the opposite, it is lawful because this breach was a reason for termination according Article 41a 1 (3) of the Law on Privatization, which prescribes:

"The agreement on sale of the capital or property shall be deemed terminated due to non-fulfillment, if the buyer, even within an additionally granted term for fulfillment:

(...)

(3) Disposes of the property of the subject of privatization contrary to provisions of the agreement".¹⁷⁵

120. It goes without saying that *disposition of the property* can be done in many ways, and one of them certainly is encumbrance of the immovable property and loaning the funds to third parties. This is confirmed in the Law on Companies which reads:

"Acquisition or disposal of major assets is deemed to include the acquisition or disposal of assets in any way, including in particular any purchase, sale, lease, exchange, institution of lien or mortgage, entering into credit or loan agreements, issuing of sureties and guarantees and taking of any other action that creates a commitment for the company.

[...]

¹⁷⁴ Decision of the Constitutional court of Serbia of 6 October 2016, **RE-95**.

¹⁷⁵ Law on Privatization, Article 41a 1 (3), **CE-220**.

For the purposes of [...] this Article, assets shall include items and rights, including real property, movable property, cash, equity interests, securities, receivables, industrial property and other rights.”¹⁷⁶

121. The fact that disposition of assets encompasses any means of disposition is also confirmed in the case law – as noted by the Supreme Court of Cassation, *“acquisition or disposal of assets means acquisition or disposal of assets in any manner, including especially sale, lease, exchange, pledge or mortgage.”*¹⁷⁷

122. Having in mind the above, it is clear that Article 41a 1 (3) of the Law on Privatization, which prohibits disposal of the property of the subject of privatization contrary to the provisions of the agreement, prohibits both encumbrance of property and use of cash (as a means of disposal of the property) contrary to the agreement. In this particular case Article 5.3.4. specifies in which case encumbrance of property and use of cash would be contrary to the provisions of the Privatization Agreement and forbids the loan that is secured by pledge on assets of BD Agro to be used for the benefit of third parties. Therefore, if Article 5.3.4. is breached, then Article 41a 1 (3) of the Law on Privatization can be applied, as was correctly done by the Privatization Agency.

123. With regard to the above, Professor Mirjana Radovic explained in her expert report:

“Article 41a(1)(3) of the Law on Privatization from 2001 is specified by Article 5.3 of the Privatization Agreement (and not by Article 7 as implied by Mr. Milosevic), since this is where the parties defined which dispositions by the buyer are prohibited.”

And

“Each breach of contract prescribed in Article 41a(1)(1-6a) of the Law on Privatization from 2001 is in itself sufficient to trigger termination for non-performance.”

And

¹⁷⁶ Law on Companies, Article 470, **RE-96**. It should be noted that the provisions of the Law on Companies are not invoked as applicable law to the questions at issue, but as illustration of factual and legal actions traditionally construed as disposition of assets.

¹⁷⁷ Judgment of the Supreme Court of Cassation of 12 July 2018, **RE-29**.

“Therefore, cases of non-performance enumerated in the Law on Privatization cannot be overridden by contractual provisions, but instead are to be applied cumulatively with possible additional cases of non-performance regulated within the contract.”¹⁷⁸

124. The Privatization Agency’s practice has been consistent on this matter. For example, in the case of privatization of the company Betonjerka AD Aleksinac, the Privatization Agency noted that the buyer breached Article 5.3.4. of the relevant privatization agreement by encumbering fixed assets with pledge in favor of banks as security for loans and by subsequent loaning of the acquired funds to related companies. The buyer was granted an additional period to submit evidence that the amounts loaned to third parties from the loan acquired by the subject and secured by pledge on its assets were returned. As the additional period lapsed without the buyer’s compliance, the Privatization Agency concluded:

“In Article 5.3.4. of the Agreement, the Buyer undertook that he will not, without previous written consent of the Privatization Agency, encumber with pledge the fixed assets of the subject during the term of the Agreement, except for the purpose of securing claims towards the subject stemming from regular business activities of the subject, or except for the purpose of acquiring of the funds to be used by the subject...

(...)

Having in mind that the Buyer failed to submit appropriate and relevant evidence in the additionally granted term that he had fulfilled the said obligation, (...) the Agreement (...) is considered terminated due to non-fulfilment upon expiry of the additionally granted term, in line with Article 41a 1 (3) of the Law on Privatization.”¹⁷⁹

125. The similarities between the quoted case and BD Agro case are striking as in both cases: (i) the buyers breached Article 5.3.4. by using the funds acquired by the subject of privatization and secured by pledges on the subject’s assets for the benefit

¹⁷⁸ Expert report of Professor Mirjana Radovic, Section 2.2.1.

¹⁷⁹ Notice on termination of privatization agreement for subject of privatization Betonjerka of 30 December 2008, **RE-97**.

of third parties; (ii) the buyers failed to deliver evidence in the additionally granted term that debts owed by third parties, stemming from transactions prohibited under Article 5.3.4, were repaid; (iii) the privatization agreements did not list breach of Article 5.3.4. in the grounds for termination; and (iv) privatization agreements were terminated for breach of Article 5.3.4. in line with Article 41a(1)(3) of the Law on Privatization.¹⁸⁰

126. Finally, it should not be disregarded that during the term of the Privatization Agreement, event prior to 2011, the Privatization Agency consistently communicated to Mr. Obradovic that the breach of Article 5.3.4. represented a ground for termination of the agreement. For instance, in as many as five notices sent by the Privatization Agency during 2009 alone, the Buyer was informed that, should he fail to remedy the noted breaches of Article 5.3.4., the Privatization Agreement “*shall be considered terminated due to non-fulfilment, in accordance with Article 41a of the Law on Privatization.*”¹⁸¹

127. Noteworthy is also that the Buyer never disagreed with a position that the Privatization Agreement can be terminated for breach of Article 5.3.4. with reference to Article 41a of the Law on Privatization – that is, not until September 2015,¹⁸² when the last additional period expired and, thus, termination of the Privatization Agreement became imminent.

128. In conclusion, Claimants’ stance that the Privatization Agreement cannot be terminated because of the breach of Article 5.3.4. given that this breach is not mentioned in Article 7.1. as reason for termination, is wrong.

¹⁸⁰ Privatization Agreement with Annexes of 4 October 2005, **CE-17**. Article 5.3.4. of the Privatization Agreement, **RE-12**. Privatization agreement for subject of privatization Betonjerka of 10 January 2007, **RE-98**.

¹⁸¹ Notice on additionally granted term for compliance with Article 5.3.4. Of the Privatization Agreement of 24 February 2009, **RE-99**. Notice on additionally granted term for compliance with Article 5.3.4. Of the Privatization Agreement of 31 March 2009, **RE-100**. Notice on additionally granted term for compliance with Article 5.3.4. Of the Privatization Agreement of 13 April 2009, **RE-101**. Notice on additionally granted term for compliance with Article 5.3.4. Of the Privatization Agreement of 1 June 2009, **RE-102**. Notice on additionally granted term for compliance with Article 5.3.4. Of the Privatization Agreement of 30 July 2009, **RE-103**.

¹⁸² Letter from Mr. Djura Obradović to Privatization Agency of 8 September 2015, **CE-48**.

3.4. Reasons for termination were precise and clearly stated in the Notice

129. As demonstrated in Section II.A.2, in no less than eight Notices and numerous meetings held with the Buyer and his representatives, the Privatization Agency clearly and consistently stated (i) that the Buyer breached Article 5.3.4. of the Privatization Agreement, (ii) that Article 5.3.4. was breached by giving loans to Inex and Crveni Signal from the funds obtained by the 221 Million Loan which was secured by the 221 Million Pledge, and (iii) that the Buyer was given an additional period for compliance in accordance with Article 41a of the Law on Privatization. Finally, Privatization Agency terminated the Privatization Agreement on the grounds of the mentioned reasons and in line with Article 41a of the Law on Privatization.
130. However, in addition to the breach of Article 5.3.4. of the Privatization Agreement due to the prohibited use of the 221 Million Loan, following the control in January 2011, the Privatization Agency also noted some other actions of the Buyer which constituted breach of other obligations under the Privatization Agreement, namely, those stipulated by Article 5.3.3. Here, as well, Mr. Obradovic was granted additional periods for compliance.¹⁸³
131. Nevertheless, as is evident from the Proposal of the Center for Control prepared on 23 September 2015 for the Commission for Control's Session, only the breach of Article 5.3.4. was the reason for termination,¹⁸⁴ since the Center for Control undoubtedly established that 221 Million Pledge was registered on BD Agro's real estate as security for the 221 Million Loan which was used to finance Crveni Signal and Inex, as well as that the January 2015 Audit Report confirms that the debts owed

¹⁸³ Notice of the Privatization Agency on Additional Time Period of 24 February 2011, **CE-31**. Notice of the Privatization Agency on Additional Time Period of 22 December 2011, **CE-32**. Notice of the Privatization Agency on Additional Time Period of 31 July 2012, **CE-78**. Notice of the Privatization Agency on Additional Time Period of 8 November 2012, **CE-79**. Notice of the Privatization Agency on Additional Time Period of 22 June 2011, **CE-96**. Notice of the Privatization Agency on Additional Time Period of 6 October 2011, **CE-97**. Letter from the Privatization Agency to D. Obradović and BD Agro of 23 June 2015, **CE-351**. Notice on Additional Time Period of 22 June 2012, **RE-15**.

¹⁸⁴ With respect to Article 5.3.3., the Center for Control noted that it was unable to determine whether Article 5.3.3. had been fulfilled or not as well as that transaction that was considered as a potential breach were not expressly prohibited in the Privatization Agreement. Materials for the Session of the Commission of 28 September, pp. 38-41, **CE-89**. Minutes of the Session of the Commission of 28 September 2015, p. 3, **CE-117**.

by Crveni Signal and Inex were still not paid. Therefore, the Center for Control proposed termination of the Privatization Agreement due to breach Article 5.3.4.¹⁸⁵

132. The conclusions of the Center for Control were accepted by the Commission for Control which, accordingly, informed the Buyer in the Notice of Termination of 1 October 2015 that:

“Since the Buyer failed to provide evidence in the additionally granted term that he had complied with the obligation referred to in item 5.3.4 of the [Privatization] Agreement, and according to the auditor's reports of 2011, 2012 and 2015, as well as documentation submitted along with auditor's reports, the obligation has not been performed, we hereby inform you that, at its 22nd session held on 28 September 2015, the Commission for control (...) rendered the decision that the [Privatization] Agreement (...) is considered terminated due to non-fulfillment, in accordance with Article 88 (3) (...) in relation to Article 41a 1 (3) of the Law on Privatization (...)”.

133. In the Notice, it was mentioned that:

“the Commission also took into consideration actions of the Buyer in regards to the alienation of the fixed assets of the Subject, collection of payment for sold fixed assets of the Subject and spending of collected funds for the needs of the Subject, alienation and encumbering of fixed assets which are the subject of performance of the investment obligation of the Buyer and investment in the value of sold fixed assets which are the subject of performance of investment obligation of the Buyer (202,245 EUR).”

134. However, contrary to Claimants’ allegations,¹⁸⁶ this statement was not a “purposeful misrepresentation of the deliberations of the Commission for Control” – the Notice did not state that these obligations were violated, let alone that they were the reason for termination.

¹⁸⁵ Materials for the Session of the Commission of 28 September, pp. 38-41, **CE-89**. Minutes of the Session of the Commission of 28 September 2015, p. 3, **CE-117**.

¹⁸⁶ Memorial, paras 244-246.

B. OMBUDSMAN’S RECOMMENDATIONS DID NOT INFLUENCE THE PRIVATIZATION AGENCY’S DECISION TO TERMINATE THE PRIVATIZATION AGREEMENT

135. Claimants’ argument that the Ombudsman “*imposed, in a very public manner, his ill-conceived views on the Privatization Agency by demanding (sic) termination of the Privatization Agreement*”¹⁸⁷ is wrong.

136. *First*, it should be noted that Claimants’ argument that the Ombudsman demanded the termination of the Privatization Agreement is clearly defeated with reference to the Ombudsman’s Recommendation itself:

*“In cooperation with the Ministry of Economy, the Privatization Agency shall take all necessary measures to determine, within the shortest period of time, whether all conditions stipulated by the Law on Privatization of 2001 for termination of the Agreement [...] have been fulfilled, in order to finally clarify the legal status of the subject of privatization [...]”*¹⁸⁸

137. *Second*, the assertion that the Ombudsman’s intervention, i.e. publishing of the Ombudsman’s findings (on 23 June 2015), directly caused the Privatization Agency to send a letter to Mr. Obradovic on 23 June 2015 requesting additional evidence of his compliance with the Privatization Agreement,¹⁸⁹ is unfounded. The Privatization Agency decided to give instructions contained in its letter of 23 June 2015 before the Ombudsman made his findings publicly available. Namely, on 19 June 2015, the Commission for Control considered whether Audit Reports submitted by Mr. Obradovic on 30 April 2015 complied with the Agency’s April 2015 Notice and, having found that they did not, it was decided that a letter be sent to the Buyer instructing him to deliver the requested audit reports until the expiry of the previously granted additional deadline.¹⁹⁰ The corresponding letter, containing the Agency’s decision of 19 June 2015, was expedited to Mr. Obradovic on 23 June 2015.¹⁹¹

¹⁸⁷ Memorial, para 201.

¹⁸⁸ Opinion of the Ombudsman of 19 June 2015, p. 2, **CE-42**.

¹⁸⁹ Memorial, para 202.

¹⁹⁰ Minutes from the session of the Commission for Control held on 19 June 2015, **RE-43**.

¹⁹¹ Letter from the Privatization Agency to D. Obradović and BD Agro of 23 June 2015, **CE-351**.

138. *Third*, it should also be noted that, under the relevant law, the Ombudsman could not have *demand*ed anything from the Privatization Agency. He could only have *recomm*ended.¹⁹² However, in the present case, the Ombudsman did not even recommend termination of the Privatization Agreement, as Claimants wrongly contend – he only recommended that steps be taken in order to finally clarify the status of BD Agro and the Privatization Agreement.¹⁹³

1. Ombudsman conducted his investigation in accordance with the law

139. Claimants have also made a number of incorrect statements concerning the conduct of the Ombudsman’s investigation itself.

140. To start with, contrary to Claimants’ allegations the Ombudsman never “*opined that by not terminating the Privatization Agreement, the Privatization Agency and the Ministry of Economy violated rights of BD Agro’s employees*”.¹⁹⁴ To the contrary, Ombudsman only concluded that, by postponing the final decision on the status of the Privatization Agreement over several years, despite being informed by BD Agro’s employees of a difficult situation in BD Agro,¹⁹⁵ the Privatization Agency and Ministry of Economy “*failed to undertake necessary measures to end the state of legal uncertainty that BD Agro was going through*”.¹⁹⁶

141. Claimants also assert that the Ombudsman lacked authority to opine on interpretation of the Privatization Agreement to determine whether any breaches had occurred and whether such breaches justified termination of the Privatization Agreement.¹⁹⁷ However, this argument is also misplaced. The Ombudsman never considered whether any breaches of the Privatization Agreement occurred or whether such breaches justified termination of the Privatization Agreement – he merely noted that the Privatization Agency determined breaches of Articles 5.3.3. and 5.3.4. of the Privatization Agreement in January 2011, and that breach of Article 5.3.3. “constitutes a condition for termination as per the Agreement”, whereas

¹⁹² Law on Ombudsman, Article 31, **CE-112**.

¹⁹³ Opinion of the Ombudsman of 19 June 2015, p. 2, **CE-42**.

¹⁹⁴ Memorial, para 195.

¹⁹⁵ Requests of unions of BD Agro’s employees of 24 May 2013, **RE-104**.

¹⁹⁶ Opinion of the Ombudsman of 19 June 2015, pp. 6-7, **CE-42**.

¹⁹⁷ Memorial, para 198.

breach of Article 5.3.4. “*constitutes a condition for termination as per Article 41a of the Law on Privatization*”.¹⁹⁸

142. Further, Claimants state that the Ombudsman’s intervention violated the notion of due process, seeing that neither Claimants, Mr. Obradovic nor BD Agro were informed of the Ombudsman’s investigation.¹⁹⁹ Again, this argument is incorrect. Article 29 (1) of the Law on Ombudsman stipulates that the Ombudsman shall notify the *petitioner and the administrative body* involved about the commencement and completion of the investigation.²⁰⁰ This means that the Ombudsman had to notify *only* the Privatization Agency and the Ministry of Economy, as administrative bodies whose conduct was being investigated, as well as BD Agro’s employees who submitted the relevant complaint, and not Mr. Obradovic nor BD Agro. Informing Claimants or Mr. Obradovic of the investigation would also make no practical sense – the subject of the Ombudsman’s investigation was the lawfulness and correctness of the Privatization Agency and the Ministry of Economy’s conduct, and not the Buyer’s.
143. Claimants assert that the Ombudsman accepted without any independent review the conclusions of the Privatization Agency’s final control from January 2011 which demonstrated that the Buyer had breached Articles 5.3.3. and 5.3.4. of the Privatization Agreement.²⁰¹ This argument is also misplaced as the Ombudsman could not *review the conclusions of the Privatization Agency* as this would be out of the scope of his competencies.
144. Finally, Claimants assert that the Ombudsman “*cavalierly ignored the opinions of the competent Serbian authorities in charge of the Privatization Agreement*”, in particular, Privatization Agency’s letter of 14 November 2014 and Ministry of Economy’s letter of 11 May 2015 stating that Article 5.3.4. no longer applied after 8 April 2011.²⁰² Again, Claimants’ assertions are wrong as, none of the said letters stated that termination of the Privatization Agreement was not possible after 8 April

¹⁹⁸ Opinion of the Ombudsman of 19 June 2015, p. 6, **CE-42**.

¹⁹⁹ Memorial, para 199.

²⁰⁰ Law on Ombudsman, Article 29 (1), **CE-112**.

²⁰¹ Memorial, para 200.

²⁰² Memorial, paras 200 and 201.

2011.²⁰³ Nevertheless, the Ombudsman did not “*cavalierly ignore*” the opinions of the Privatization Agency and the Ministry of Economy, as it was not his job to determine whether the Privatization Agreement was in fact breached and whether the Agreement could be terminated for breach of Article 5.3.4. after payment of Purchase Price. As elaborated above, the Ombudsman only considered whether the Ministry of Economy and the Privatization Agency *acted lawfully and properly when postponing the final decision on the status of the Privatization Agreement by granting Mr. Obradovic additional periods for compliance.*

145. Respondent also notes that the expert report of Professor Radovic explains in clear terms that the Ombudsman’s actions were within his mandate and fully in accordance with the relevant law.²⁰⁴

C. THERE WAS NO OBLIGATION TO RELEASE PLEDGE OVER SHARES IN BD AGRO

146. Next in line of Claimants’ assertions is that the Privatization Agency was bound to release the pledge over Mr. Obradovic’s shares in BD Agro upon payment of Purchase Price on 8 April 2011.²⁰⁵ Yet again, Claimants are wrong.

147. Serbian Law on Obligations in Article 122 prescribes the following:

*“(1) In bilateral contracts, no party shall be bound to fulfill its obligation unless the other party fulfills, or is simultaneously ready to fulfill, its obligation [...]”*²⁰⁶

148. The quoted provision clearly applies to the Share Pledge Agreement as part of the Privatization Agreement – a bilateral contract under which both the Privatization Agency and the Buyer undertook to perform various obligations.

149. One such obligation assumed by the Privatization Agency was to release the pledge upon expiry of 5 years as of the day of conclusion of the Privatization Agreement,

²⁰³ Letter from the Privatization Agency to the Ombudsman dated 14 November 2014, p. 3, **CE-43**. Letter from the Ministry of Economy to the Ombudsman dated 11 May 2014, p. 2, **CE-44**.

²⁰⁴ Expert report of Professor Mirjana Radovic, Section 3.

²⁰⁵ Memorial, paras 18, 21, 23, 24, 118.

²⁰⁶ Law on Obligations, Article 122 (1), **RE-32**.

that is, upon full payment of the Purchase Price.²⁰⁷ On the other hand, one of the obligations assumed by Mr. Obradovic was to act in accordance with Article 5.3.4. Yet, the Buyer failed to do so, as well as to remedy the breaches despite numerous additional periods granted to him by the Privatization Agency. Therefore, according to the cited Article 122 of the Law on Obligations, the Agency was not bound to fulfill its obligation unless Mr. Obradovic fulfilled his.²⁰⁸

150. With regard to the pledge release Professor Radovic noted:

*“Under the Privatization Agreement the buyer undertook numerous obligations together with the obligation to pay the purchase price. I have already explained above (under the title “2.2. Conditions for termination of privatization agreements”) that all these obligations of the buyer are equally important, and that the obligation to pay the purchase price cannot be regarded as the only purpose of the whole agreement. Quite the contrary, the goal is not simply to sell the Company for the highest price, but to ensure its continuous, healthy, viable business activity. For this reason, in my opinion the agreed pledge served to secure all the claims of the Privatization Agency against the buyer from the Privatization Agreement. The fact that the deadline for paying the purchase price is mentioned when determining the duration of the pledge does not necessarily imply that only the purchase price is secured through this pledge.”*²⁰⁹

151. In addition to that, releasing the pledge before the Buyer remedies the breach of the Privatization Agreement would enable the Buyer to dispose of the shares even before he fulfils all his obligations under the Privatization Agreement. In such a situation, the Agency would no longer be able to enforce any decision on termination (because the Buyer would no longer be the owner of capital in BD Agro).²¹⁰ This was also noted by the Privatization Agency.²¹¹

²⁰⁷ Share Pledge Agreement, Article 2, **CE-17**.

²⁰⁸ Expert report of Professor Mirjana Radovic, Section 4.

²⁰⁹ Expert report of Professor Mirjana Radovic, Section 4.

²¹⁰ Expert report of Professor Mirjana Radovic, para 66.

²¹¹ Materials for the Session of the Commission of 28 September 2015, p. 35, **CE-89**.

152. It should also be noted that the Agency clearly and consistently stated that it would not release the pledge over shares before the Buyer demonstrates the performance of the Privatization Agreement in line with the Agency's Notices. For instance, at a meeting held on 4 February 2014, Mr. Obradovic was expressly informed that the Agency could not issue the decision on release of pledge since the Buyer still had not complied with the Notices instructing him to remedy the breaches of the Privatization Agreement noted in January 2011.²¹² Likewise, in the 27 April 2015 Notice, Mr. Obradovic was informed that his request for release of pledge would be considered *only after expiration of the additional term for compliance granted by the said Notice*.²¹³ The same stance was repeated in a letter sent to Mr. Obradovic's attorney on 26 June 2015, in response to the attorney's request of 16 June 2015 to have the pledge over the Buyer's shares in BD Agro released.²¹⁴

D. REQUEST FOR ASSIGNMENT OF THE PRIVATIZATION AGREEMENT TO COROPI

153. Claimants argue that in 2013 Mr. Rand directed Mr. Obradovic to conclude an assignment agreement with Coropi, a company within Rand Investments, but that the Privatization Agency refused to approve the assignment by stating that delivered documentation did not meet conditions for assignment, without specifying why those conditions were not met.²¹⁵ Once again, Claimants misrepresent the facts.

154. As explained below, the Privatization Agency could not consider the Request for Assignment before the formal conclusion of the Supervision Proceedings, which occurred on 7 April 2015. In addition, and regardless of that fact, Claimants have never submitted complete documentation necessary for the assignment of the Privatization Agreement in line with the relevant regulation. Both those facts were from the outset and more than once communicated to the Buyer, Mr. Markicevic and

²¹² Minutes from meeting held at the Privatization Agency on 4 February 2014, **RE-36**.

²¹³ Letter from the Privatization Agency to D. Obradović of 27 April 2015, p. 3, **CE-348**.

²¹⁴ Letter from Mr. Vasiljevic to the Privatization Agency of 16 June 2015, p. 1, **RE-65**. Letter from the Privatization Agency to Mr. Vasiljevic of 26 June 2015, p. 1, **RE-66**.

²¹⁵ Memorial, paras 142-147. Second witness statement of Igor Markicevic, paras 78.

Mr. Broshko (who represented Mr. Rand as an interested assignee). However, they did nothing in order to comply with the regulation.

1. Privatization Agency could not have considered Request for assignment before the end of supervision proceedings

155. On 1 August 2013, Mr. Obradovic submitted to the Privatization Agency a Request for Assignment of the Privatization Agreement to Coropi²¹⁶ on the basis of Article 41ž of the Law on Privatization.²¹⁷ Mr. Obradovic did not accompany the Request for Assignment of the Privatization Agreement with any documentation,²¹⁸ however, certain documentation was subsequently delivered to the Privatization Agency in August and September 2013.²¹⁹

156. At the meeting held on 30 January 2014 between the Privatization Agency, Mr. Markicevic and Mr. Broshko (as a representative of Rand Investments), the Privatization Agency noted:

- i. that the Ministry of Economy had commenced the Supervision Proceedings and that, while the Supervision Proceedings were ongoing, the Privatization Agency could not render any decision or undertake any measures concerning the Request for Assignment of the Privatization Agreement to Coropi, and
- ii. that, anyway, the documentation submitted with regard to Request for Assignment of the Privatization Agreement was incomplete.²²⁰

²¹⁶ Mr. Obradovic reasoned the request by stating that the “*fact that taking care of business operations of BD Agro a.d. Dobanovci requires maximum engagement and dedication, which is currently too big burden and obligation for [Mr. Obradovic] due to numerous private and business obligations.*” Letter from D. Obradović to the Privatization Agency of 1 August 2013, pp. 1-2, **CE-273**.

²¹⁷ Article 41ž (1) of the Law on Privatization that was in force on 2013 prescribed the following: “*Subject to prior consent of the Agency, the buyer of the capital (hereinafter: assignor) may assign the agreement on sale of the capital or property to a third party (hereinafter: assignee) under the conditions stipulated by this law and the law on obligations*”. 2001 Law on Privatization, **CE-220**.

²¹⁸ Letter from D. Obradović to the Privatization Agency of 1 August 2013, pp. 1-2, **CE-273**. Proposal of the Center for Control for the session of the Commission for Control of 20 April 2015, p. 2, **RE-77**.

²¹⁹ Record on submission of documents concerning the transfer of the Privatization Agreement to Coropi of 26 August 2013, **RE-55**. Letter from Mr. Doklestic to the Privatization Agency of 2 September 2013, p. 1, **RE-56**. Statement of the controlling shareholder of Coropi that he is not a party in the sense of Articles 12-12b of the Law on Privatization of 21 August 2013, **RE-57**. Letter from Coropi Holdings Ltd to the Privatization Agency of 26 September 2013, **CE-275**. Agreement on Assignment of Agreement on Sale of Socially Owned Capital Through Public Auction between Djura Obradović and Coropi Holdings Limited of 21 September 2013, **CE-274**.

²²⁰ Minutes from meeting held at the Privatization Agency on 30 January 2014, **RE-28**.

157. Having in mind the above, representatives of the Privatization Agency, Mr. Markicevic and Mr. Broshko agreed at the same meeting that the deficiencies of the documentation should be addressed at future meetings, if conditions for consideration of the Request for Assignment were met.²²¹
158. On 4 February 2014, the Privatization Agency held a meeting with Mr. Obradovic, who was also informed that the Ministry had commenced the Supervision Proceedings and that, until their completion, the Privatization Agency could not take any measures or render any decisions with regard to BD Agro.²²²
159. Above mentioned position of the Privatization Agency remained unchanged – it has always communicated to the Buyer, Mr. Markicevic and Mr. Broshko that completion of the Supervision Proceedings was the precondition for any decision by the Agency. This was communicated having in mind that possible outcomes of the Supervision Proceedings could be (i) termination of the Privatization Agreement, (ii) granting the Buyer additional time for compliance, or (iii) declaration of fulfillment of the Privatization Agreement. Needless to say that the assignment of the Privatization Agreement depended on the outcome of the Supervision Proceedings as it was not possible to assign the agreement if it was terminated or fulfilled. In addition, the Privatization Agency has always clearly stated that submitted documentation would not comply with the formal conditions stipulated in the relevant regulations, while, Ms. Galic from the Ministry of Economy stressed that solution concerning BD Agro needed to be in compliance with Serbian legislation.²²³
160. In other words, neither the Privatization Agency nor the Ministry of Economy gave any assurances that the assignment of the Privatization Agreement would be

²²¹ Minutes from meeting held at the Privatization Agency on 30 January 2014, **RE-28**.

²²² Minutes from meeting held at the Privatization Agency on 4 February 2014, **RE-36**.

²²³ Letter from BD Agro to the Privatization Agency of 13 August 2014, p. 2, **CE-316**. Letter from the Privatization Agency to BD Agro of 21 August 2014, pp. 1-2, **CE-317**. Minutes from meeting held at the Ministry of Economy on 3 November 2014, **RE-37**. Minutes from meeting held at the Ministry of Economy on 15 December 2014, **RE-38**. Minutes from meeting held at the Ministry of Economy on 17 December 2014, **RE-22**. Letter from the Privatization Agency to BD Agro of 3 April 2015, p. 1, **CE-347**. Email communication between I. Makrićević, D. Stevanović, N. Galić et al. between 6-14 January 2015, p. 2, **CE-326**. Minutes from meeting held at the Ministry of Economy on 16 January 2015, **RE-39**. Email from E. Broshko to N. Galić, W. Rand et al. attaching a letter to D. Stevanović, pp. 1-2, **CE-328**. Letter from BD Agro to the Privatization Agency of 26 February 2015, pp. 1 and 4, **CE-334**. Email from E. Broshko to N. Galić, W. Rand et al. attaching a letter for D. Stevanović of 18 December 2015, p. 1 (of the letter), **CE-325**.

approved, as Mr. Markicevic incorrectly testifies in his witness statement.²²⁴ To the contrary, it was clearly communicated to Mr. Markicevic and Mr. Broshko that there was a possibility that the Privatization Agreement could be terminated (in which case assignment of the Privatization Agreement would be impossible), as well as that any solution concerning BD Agro had to comply with Serbian legislation.

2. Failure to submit updated documents and Request for assignment

161. The Supervision Proceedings ended on 7 April 2015.²²⁵ Mr. Markicevic was informed accordingly at a meeting held on 20 April 2015, where he was yet again told that the documentation previously submitted in support of the assignment request was incomplete and should be updated. At his request, the Privatization Agency provided a list of documents that had been submitted with the Request for Assignment, along with the Privatization Agency's remarks on deficiencies of said documentation.²²⁶
162. A week later, at a meeting held on 27 April 2015 between representatives of the Privatization Agency, Mr. Markicevic as director of BD Agro, and Mr. Broshko as representative of Rand Investments, Mr. Markicevic noted that he was familiar with the Report of the Ministry of Economy, as well as that the "*Canadian investor refuses to deliver the bank guarantee which is a precondition for the Agency to consider the Buyer's Request for assignment of [the Privatization Agreement].*" The Privatization Agency responded that it was in contractual relationship with Mr. Obradovic as the Buyer, thus, it was Mr. Obradovic who should submit the bank guarantee and other documentation concerning the Request for Assignment. However, it also noted that the privatization regulation was undergoing changes and that it could happen that the obligation of delivery of a bank guarantee be excluded (which indeed happened 3 days later²²⁷). In the end, Mr. Markicevic concluded that first steps to be taken as a follow-up to the meeting would be (i) delivery of an audit report confirming fulfillment of the Buyer's obligations in the additionally granted

²²⁴ Second witness statement of Igor Markicevic, paras 70-74, 86, 97, 110-113, 119, 143-150.

²²⁵ Report of Ministry of Economy on the Control over the Privatization Agency of 7 April 2015, **CE-98**.

²²⁶ Minutes from meeting held at the Privatization Agency on 20 April 2015, **RE-41**.

²²⁷ See Section II.D.3.

period, (ii) submission of an updated Request for Assignment and (iii) an explanation why delivery of the bank guarantee was not possible.²²⁸

163. However, in April 2015, instead of providing an audit report confirming fulfillment of the Buyer's obligations in the additionally granted period, the Buyer delivered Audit Reports that reconfirmed that certain contractual obligations were still not fulfilled. Thus, on 23 June 2015, the Privatization Agency informed the Buyer that the delivered Audit Reports were not satisfactory and that an additional audit report, on specific issues, should be delivered.²²⁹ As a reaction to the Privatization Agency's request, Mr. Markicevic sent a letter on 2 July 2015 in which he apparently stated that no updated Request for Assignment or related documentation would be delivered to the Privatization Agency.²³⁰

164. With this in mind, on 20 July 2015 the Privatization Agency sent a letter to the Buyer and Mr. Markicevic in which they were informed that Mr. Markicevic's letter of 2 July 2015 could not be considered as updated request for assignment of the Privatization Agreement, because it did not meet the necessary conditions. Further, the Privatization Agency stated that the conditions for consideration were now regulated by the new Rulebook on Criteria for Decision-making of 30 April 2015.²³¹

165. Neither an updated Request for Assignment of the Privatization Agreement, nor any related documentation were ever submitted. Consequently, in its Proposal from 23 September 2015, the Center for Control restated what had previously been communicated to the Buyer and representatives of BD Agro and of Claimants, in particular:

- i. that the Request for Assignment could not have been considered before the receipt of the Ministry of Economy's instructions regarding future steps to be taken in relation to BD Agro;

²²⁸ Minutes from meeting held at the Privatization Agency on 27 April 2015, **RE-23**.

²²⁹ See Letter from the Privatization Agency to D. Obradović and BD Agro of 23 June 2015, **CE-351**.

²³⁰ Letter from BD Agro to Privatization Agency of 2 July 2015, **CE-46**. From the said letter, it can be concluded that this reaction was provoked by the Privatization Agency's letter of 23 June 2015 in which the Privatization Agency required delivery of an audit report concerning fulfillment of the Buyer's specific obligations from the Privatization Agreement.

²³¹ Letter from Privatization Agency to BD Agro of 20 July 2015, p. 1, **CE-47**.

- ii. that documentation submitted in relation to the Request for Assignment was in any event incomplete and did not satisfy formal conditions for consideration;
- iii. that the Request for Assignment could only be considered if the Privatization Agreement remained in force and if complete up-to-date documentation were submitted;
- iv. that, until the day of the preparation of the Proposal, no updated documentation which would comply with the conditions for assignment of the Privatization Agreement had been submitted.²³²

3. Supporting documentation required by the relevant regulation was never submitted

166. In the period following August 2013 (when the Request for Assignment was submitted), relevant regulation concerning assignment of privatization agreements had been changed on two occasions. However, as has been seen, the Request for Assignment was never accompanied with the complete supporting documentation.

3.1. Procedure for Conducting of Activities of the Center for Control from 29 November 2011

167. In the period between August 2013 and April 2014 the Procedure for Conducting of Activities of the Center for Control was in force. Article 8.2. of the said Procedure stipulated the following:

“8.2. Buyer desiring to assign a sale agreement is obligated to submit the following documentation to the Agency:

(...) certified statement on pledge provided by the buyer as guarantee that the assignee will perform his/her obligations from the assigned sale agreement (the pledge can be provided in the form of a bank guarantee, solo promissory note, pledge or other means of security or by signing as

²³² Materials for the Session of the Commission of 28 September 2015, pp. 35-35, **CE-89**.

the pledgor the Amendment to the Sale Agreement to be concluded by the Agency and the assignee)...”²³³

168. Mr. Markicevic states in his witness statement:

*“Later I learned that the requirement for a bank guarantee associated with the assignment of a privatization agreement was not prescribed by Serbian law; instead, it was a regulation adopted by the Privatization Agency in 2014, after we submitted our request for approval of the assignment”.*²³⁴

169. Obviously, this is not true, as the obligation to deliver a bank guarantee existed already at the time the Request for Assignment was submitted - Procedure for Conducting of Activities of the Center for Control was in force from 29 November 2011. What is more, not only was the said Procedure in force but, as Mr. Markicevic himself stated, he was given a “*a printed list of documents required for the Privatization Agency’s approval of the assignment*”, which in fact represented a copy- paste excerpt of the quoted Article 8.2. of the said Procedure.²³⁵ However, as is indisputable between the parties, the Buyer never delivered a bank guarantee despite the fact that representatives of BD Agro and of Claimants were constantly informed that documents they had delivered were not complete.

170. Additionally, the Buyer did not submit the certificate issued by the competent authority that the natural person who is the controlling shareholder of the receiver (i.e. Coropi) was not convicted for criminal acts from Article 12 of the Law on Privatization²³⁶ and that criminal proceedings are not being conducted against that person for these criminal acts. Delivery of these certificates was explicitly required by the Procedure²³⁷ but they were never submitted.

²³³ Procedure for Conducting of Activities of the Center for Control of 29 November 2011, Article 8.2., **RE-107**.

²³⁴ Second witness statement of Igor Markicevic, para 117

²³⁵ Second witness statement of Igor Markicevic, paras 26-29. List of documents requested by the Privatization Agency of 11 June 2013, **CE-272**.

²³⁶ Law on Privatization, Article 12, **CE-220**.

²³⁷ Procedure for Conducting of Activities of the Center for Control of 29 November 2011, Article 8.2., **RE-107**.

3.2. Rulebook on Undertaking of Measures from 7 April 2014

171. On 7 April 2014, the Rulebook on Undertaking of Measures replaced the Procedure for Conducting of Activities of the Center for Control. Article 34 of the 2014 Rulebook also envisaged delivery of the mentioned certificates, of a bank guarantee as means of security, as well as that documentation submitted with requests for assignment of privatization agreements could not be older than six months.²³⁸
172. After the 2014 Rulebook was enacted, the Privatization Agency continued to inform all concerned parties that documentation was still not complete and that it was outdated.²³⁹ However, no bank guarantee, certificates mentioned in Section II.D.2. above, and no updated documentation was ever submitted by the Buyer or by Claimants' representatives.²⁴⁰

3.3. Rulebook on Criteria for Decision-making from 30 April 2015

173. Finally, as announced at the meeting on 27 April 2015, the Privatization Agency's regulation concerning assignment of privatization agreements was changed on 30 April 2015. The new Rulebook on Criteria for Decision-making did not contain the obligation of submission of a bank guarantee, as a condition for assignment of a privatization agreement. However, it still prescribed that the documentation submitted with the request for assignment could not be older than six months, and requested delivery of the certificates mentioned in Section II.D.2. and delivery of the opinion of the competent organization for the prevention of money laundering that

²³⁸ In particular, with respect to the obligation of the buyer to submit a bank guarantee, Article 34 of the Rulebook stipulated the following: "*Commission [for Control] shall render decision on prior approval to the buyer for assignment of the [privatization] agreement if the buyer delivers the following documents: (...) certified statement on pledge by which the buyer guarantees that the assignee will perform his/her obligations from the assigned agreement in the form of a bank guarantee in the value of 30% of the purchase and sale price [from the privatization agreement] ...*" Rulebook on Undertaking of Measures of 7 April 2014, Article 34, **RE-93**.

²³⁹ Letter from the Privatization Agency to BD Agro of 21 August 2014, **CE-317**. Minutes from meeting held at the Ministry of Economy on 17 December 2014, **RE-22**. Minutes from meeting held at the Ministry of Economy on 16 January 2015, **RE-39**. Letter from the Privatization Agency to BD Agro of 3 April 2015, **CE-347**. Minutes from meeting held at the Privatization Agency on 20 April 2015, **RE-41**. Minutes from meeting held at the Privatization Agency on 27 April 2015, **RE-23**.

²⁴⁰ Letter from Privatization Agency to BD Agro of 20 July 2015, p. 2, **CE-47**.

there were no obstacles on the receiver's part for the assignment of the agreement, in accordance with Article 13 of the Law on Privatization.²⁴¹

174. In other words, after relevant regulation was changed in April 2015 the Buyer did not need to provide a bank guarantee. Nevertheless, the Buyer and Mr. Rand decided not to submit required documents, although at the meeting held on 27 April 2015, Mr. Markicevic announced their delivery as the next step to be taken.²⁴² The reason for this change of attitude is quite obvious. With the requirement of the bank guarantee out of the way, the problem for the parties requesting assignment was their inability to obtain another document that they had promised to deliver at the 27 April 2015 meeting – an audit report stating that Mr. Obradovic fulfilled his contractual obligations. In other words, Claimants and Mr. Obradovic knew that Mr. Obradovic's breach led to the situation in which the termination of the Privatization Agreement was imminent and, consequently, no assignment would be possible.

175. Having in mind all of the above, it is clear that Claimants' assertion that there was no reason for the Privatization Agency not to grant the approval for assignment, is simply wrong and refuted by record.

E. BD AGRO'S BANKRUPTCY

176. Claimants argue that the Privatization Agency is to blame for BD Agro's bankruptcy – in particular, they state that Termination of the Privatization Agreement “*caused a major disruption in BD Agro's business operations*”²⁴³ and imply that the Privatization Agency hampered Claimants' efforts in restructuring BD Agro's debt by refusing to release the pledge over Mr. Obradovic's shares in BD Agro and by not granting approval for assignment of the Privatization Agreement to Coropi.²⁴⁴

²⁴¹ Rulebook on Criteria for Decision-making of 30 April 2015, Article 25, **RE-92**. Article 13 of the Law on Privatization, **CE-223**.

²⁴² Minutes from meeting held at the Privatization Agency on 27 April 2015, **RE-23**.

²⁴³ Memorial, para 272.

²⁴⁴ Second witness statement of Igor Markicevic, paras 36, 42, 45. Witness statement of William Rand, paras 47-48. Second witness statement of Erinn Broshko, para 16.

177. However, the truth is quite different: it was not the Privatization Agency that “*put BD Agro’s survival in jeopardy*”²⁴⁵ – instead, bankruptcy of BD Agro was caused by the bad management of BD Agro in the period 2005 - 2015.

1. How Mr. Obradovic “managed” BD Agro

178. As will be elaborated below, in the period following conclusion of the Privatization Agreement, representatives BD Agro’s shareholders and employees were very concerned about how the Buyer managed the business, as they noted what they considered were various suspicious transactions with BD Agro’s assets. In addition to that, the Privatization Agency also established multiple irregularities in the Buyer’s conduct concerning BD Agro.

179. **Investment in BD Agro’s fixed assets** – Representatives of shareholders and of employees of BD Agro stated that Mr. Obradovic, as early as 2006, performed suspicious transactions from BD Agro’s accounts. For instance, they pointed out that his obligation to make additional investment in BD Agro’s fixed assets in the worth of EUR 2,200,000 was executed in such way that apparently more than 80% of invoices for acquisition of the fixed assets were issued to BD Agro, and not to the Buyer. The value of the investment obligation was registered in BD Agro’s books as a loan and subsequently repaid to the Buyer.²⁴⁶ Another example that drew attention was the acquisition of 32,000 egg-producing hens. This acquisition was counted towards the value of Mr. Obradovic’s investment obligation, but BD Agro’s employees stated that these hens never ended up in BD Agro.²⁴⁷

180. **Sale of BD Agro’s fixed assets** – Shareholders and employees further stated that, immediately after conclusion of the Privatization Agreement, Mr. Obradovic started selling BD Agro’s fixed assets. In particular, within months from the conclusion of the Privatization Agreement, Mr. Obradovic sold the entire cattle of BD Agro

²⁴⁵ Second witness statement of Igor Markicevic, para 110.

²⁴⁶ Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 26 January 2009, **RE-114**. Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 16 March 2009, **RE-115**. Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 11 February 2010, **RE-118**.

²⁴⁷ Letter from Center for education and representation of shareholders and employees to the Government of the Republic of Serbia of 20 December 2010, **RE-125**. Letter from Center for education and representation of shareholders and employees to the Government of Republic of Serbia of 26 April 2010, **RE-116**. Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 11 February 2010, **RE-118**.

numbering around 1,000 cows, 600 pigs and 20,000 chickens, but the proceeds were never paid to BD Agro's accounts.²⁴⁸

181. **Loans from banks** – Mr. Obradovic also had BD Agro take enormous loans from different banks. For instance, only in the period between June 2010 and December 2010, Mr. Obradovic had BD Agro take loans from Agrobanka in the amount of RSD 932,500,000 (app. EUR 8.8 million). At the time these loan agreements were concluded, BD Agro already had a loan agreement with Banca Intesa from 2008, in the amount of EUR 9.9 million, as well as outstanding loan agreements with Erste bank in the total amount of EUR 1,724,380, NLB Interfinanz AG Zurich in the amount of EUR 8,200,000 and Privredna banka in the amount of RSD 31,000,000 (app EUR 290,000). All these loans were secured by pledges on BD Agro's assets.²⁴⁹ Representatives of shareholders and of employees stated that the management of BD Agro *"took loans from a number of banks who now have pledges registered over our [BD Agro's] entire property"*.²⁵⁰
182. With all this in mind, it does not come as a surprise that indebtedness towards banks ultimately lead to BD Agro's bankruptcy. At the time the company applied for reorganization in order to restructure its debt, it had active loan arrangements with Agrobanka and Banca Intesa in the total amount of EUR 9.5 and 9.9 million, respectively. As was noted in BD Agro's reorganization plan from 6 March 2015, the company still owned RSD 2,528,203,072 (app. EUR 21 million) to Agrobanka and Banca Intesa.²⁵¹
183. **Loans arrangements with Mr. Obradovic and his companies** – Representatives of shareholders and of employees were also stating that from the moment Mr.

²⁴⁸ "They caused financial harm to the state in the amount of billion dinars!", Blic, 29 December 2015, **RE-124**. Letter from Center for education and representation of shareholders and employees to the Government of the Republic of Serbia of 20 December 2010, **RE-125**. Letter from Center for education and representation of shareholders and employees to the Government of Republic of Serbia of 26 April 2010, **RE-116**. Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 11 February 2010, **RE-118**.

²⁴⁹ Report of the Privatization Agency on Control of BD Agro of 24 February 2011, pp. 10-15, **CE-30**. Letter from Center for education and representation of shareholders and employees to the Government of Republic of Serbia of 26 April 2010, **RE-116**. Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 11 February 2010, **RE-118**.

²⁵⁰ Requests of unions of BD Agro's employees of 24 May 2013, **RE-104**. Letter from Center for education and representation of shareholders and employees to the Government of Republic of Serbia of 26 April 2010, **RE-116**. Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 11 February 2010, **RE-118**.

²⁵¹ Amendment to the Pre-pack Reorganization Plan of BD Agro of 6 March 2015, **CE-101**.

Obradovic took control of BD Agro's business, he started utilizing the company in different ways in order to perform various payments to himself or to his other companies. For instance, between October 2005 and November 2006 alone, Mr. Obradovic personally concluded as many as 58 loan agreements with PPK Buducnost Mlekara doo, lending the funds in the amount of RSD 373,774,854 (app. EUR 4.7 million). However, simultaneously with conclusion of these loan agreements, Mr. Obradovic had BD Agro conclude separate agreements with PPK Buducnost Mlekara doo whereby BD Agro assumed the former's obligation to repay these loans to Mr. Obradovic. Payments from BD Agro's accounts to Mr. Obradovic's continued in the following years as well. For instance, in 2010 only, BD Agro paid RSD 145,288,339.91 (app. EUR 1.3 million) to Mr. Obradovic as repayment of alleged previous loans.²⁵² Up to March 2012, more than RSD 500,000,000 (app. EUR 4.4 million) were said to be paid from BD Agro's accounts to Mr. Obradovic.²⁵³

184. In addition to effecting payments from BD Agro's accounts to his own, Mr. Obradovic also used BD Agro's funds to perform loans to his other companies, such as Vihor, Inex, PIK Pester, Crveni Signal, Beotrans. Often, such payments were performed from the funds acquired by BD Agro under various loan agreements with banks.²⁵⁴ Most prominently, this was the case with companies Inex and Crveni Signal – as explained in Section II.A.1., in one single transaction in December 2010, Mr. Obradovic effected payment of EUR 959,719.60 from BD Agro's funds to Crveni Signal and Inex. The funds in question were never returned.²⁵⁵
185. Representatives of shareholders and of employees further stated that Mr. Obradovic simulated payment of installments of Purchase Price, as he routinely used BD Agro's own funds to perform such payments. For instance, this was the case with funds acquired by BD Agro through a loan agreement concluded with NLB

²⁵² Report of the Privatization Agency on Control of BD Agro of 24 February 2011, pp. 10, 17, **CE-30**. Letter from Center for education and representation of shareholders and employees to the Government of Republic of Serbia of 26 April 2010, **RE-116**. Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 11 February 2010, **RE-118**.

²⁵³ Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 21 March 2012, **RE-147**.

²⁵⁴ Report of the Privatization Agency on Control of BD Agro of 24 February 2011, p. 10, **CE-30**.

²⁵⁵ Analytic cards of debts owed by Crveni Signal and Inex on 25 March 2019, **RE-1** and **RE-190**.

Interfinanz AG Zurich in the amount of EUR 8,200,000.²⁵⁶ Installments of Purchase Price were apparently also paid from the funds acquired from sale of BD Agro's land in industrial zones.²⁵⁷

186. **Machinations with BD Agro's land** – Examples of Mr. Obradovic's machinations with BD Agro's real estate are numerous and varied. Throughout his management of the company, the machinations assumed different forms. For instance, BD Agro transferred to Mr. Obradovic's associate, Zlatija Nedeljkovic, arable land of almost 1.5 hectares in cadastral municipality Surcin, free of any compensation, allegedly for resolving her *residential issues*. Mr. Obradovic, as the president of BD Agro's board of directors, approved that BD Agro assume the obligation of paying taxes and expenses related with the transaction.²⁵⁸
187. Furthermore, Mr. Obradovic also transferred BD Agro's land to himself. For example, BD Agro and Mr. Obradovic concluded an agreement on transfer of 2.5 hectares of land located in Dobanovci without any compensation. The parties "agreed" to set off the value of purchase price in the amount of EUR 400,000 against a debt allegedly owed by BD Agro to Mr. Obradovic on account of his previous loans.²⁵⁹ Similarly, on 12 April 2010, BD Agro and Mr. Obradovic concluded an agreement on sale of around 20 hectares of BD Agro's land in Dobanovci to Mr. Obradovic for the purchase price of EUR 3,038,880. After setting off previous debt owed by BD Agro to the Buyer, the remaining amount that Mr. Obradovic owed to BD Agro was EUR 2,972,468.03.²⁶⁰
188. Machinations with BD Agro's land also included unlawful exchange of BD Agro's land for the State-owned land without the consent of the competent Serbian

²⁵⁶ Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 16 March 2009, **RE-115**. Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 26 January 2009, **RE-114**. Specification of expenditures from NLB Bank, **RE-117**. Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 11 February 2010, **RE-118**.

²⁵⁷ "They caused financial harm to the state in the amount of billion dinars!", Blic, 29 December 2015, **RE-124**. Letter from Center for education and representation of shareholders and employees to the Government of Republic of Serbia of 26 April 2010, **RE-116**. Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 11 February 2010, **RE-118**.

²⁵⁸ Agreement on transfer of land without compensation of 28 March 2006, **RE-143**. Decision on approval of transfer of land without compensation of 29 March 2006, **RE-144**.

²⁵⁹ Agreement on transfer of land of 14 February 2007, **RE-145**. Decision on approval of transfer of land of 15 February 2007, **RE-146**.

²⁶⁰ Report of the Privatization Agency on Control of BD Agro of 25 February 2011, pp. 21-22, **CE-30**.

authority. In particular, Mr. Obradovic had BD Agro conclude agreements with the Ministry of Agriculture by which BD Agro exchanged 46 hectares of its land for new plots granted by the Ministry of Agriculture. However, this disposition was unlawful since the land disposed of by BD Agro had to be returned to its previous owners, pursuant to the legislation on restitution. Disposal of this land was expressly prohibited by Article 6.3.1. of the Privatization Agreement.²⁶¹

189. **Other unreasonable expenditures** – Representatives of shareholders and of employees also stated that Mr. Obradovic used BD Agro’s funds for a number of unreasonable purchases such as purchase of a helicopter, expensive cars, residential apartments in Belgrade equipped with luxury furniture for accommodating business partners during their stay, and the list goes on.²⁶²
190. Having in mind the weak financial condition in which BD Agro was in the period 2005-2015, it goes without saying that the above mentioned transactions could not possibly help the company, but instead further ruined it and ultimately led to its bankruptcy.

2. Strategic partners of BD Agro

191. Claimants state that they were focused on finding strategic partners for BD Agro “*who could help to further improve and expand BD Agro’s business*”. They argue that such strategic partnerships included milk-processing joint ventures, construction of a biogas power plant, and lease of pregnant heifers from milk processing-companies, but that none of these contemplated business models materialized because the Privatization Agency refused to release the pledge or approve assignment of the Privatization Agreement, which caused a “*serious blow to BD Agro’s business*.”²⁶³ However, apart from witness statements given by Mr. Markicevic and Mr. Broshko (who cannot be considered credible witnesses, since

²⁶¹ “They caused financial harm to the state in the amount of billion dinars!”, Blic, 29 December 2015, **RE-124**. Article 6.3.1. of the Privatization Agreement, **CE-17**.

²⁶² Requests of unions of BD Agro’s employees of 24 May 2013, **RE-104**. Letter from Center for education and representation of shareholders and employees to the Government of the Republic of Serbia of 20 December 2010, **RE-125**. Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 21 March 2012, **RE-147**. Letter from Center for education and representation of shareholders and employees to the Government of Republic of Serbia of 26 April 2010, **RE-116**. Letter from Center for education and representation of shareholders and employees to the Privatization Agency of 11 February 2010, **RE-118**.

²⁶³ Memorial, para 148-150. Second witness statement of Igor Markicevic, paras 33-46. Second witness statement of Erinn Broshko, paras 22-27.

Mr. Markicevic is a director of Sembi, whereas Mr. Broshko is a director of Rand Investments – both Claimants in this dispute),²⁶⁴ Claimants provided no other documents that would support their claims about the reason why strategic partners were not found.

192. In fact, the correspondence between potential strategic partners (such as Farmakom, Meggle, Lactalis, La Bovarina and Bigadan) and BD Agro, on which Mr. Markicevic and Mr. Broshko rely on in their witness statements, does not even mention the pledge over the shares of BD Agro, or the assignment of the Privatization Agreement.²⁶⁵ These emails contain discussions between BD Agro and potential business partners concerning potential future cooperation. Their content does not go beyond usual business talk of who would pay for what and to whom, if the companies decided to cooperate in business or have a joint-venture operation. Contrary to what Claimants argue, none of these emails demonstrate that “*all of the companies [BD Agro] approached were unwilling to enter into cooperation with BD Agro until transfer of [Mr. Obradovic’s shares] into the nominal ownership of Mr. Rand*” or that these companies decided to “*postpone potential cooperation until such time as (...) the nominal ownership [over Mr. Obradovic’s shares in BD Agro] is transferred to Mr. Rand or one of his companies.*”²⁶⁶ In any event, Claimants do not attempt to explain exactly *why and when* Mr. Rand’s “beneficial ownership” and the alleged complete control of BD Agro’s business (as a model of investment supposedly chosen by Mr. Rand in 2005) proved to be insufficient to attract potential partners. Thus, any further discussion on this topic is purposeless.

²⁶⁴ First witness statement of Erinn Broshko, para3. Second witness statement of Igor Markicevic, para11.

²⁶⁵ Email from I. Markićević to W. Rand dated 3 September 2013, **CE-276**. Email from I. Markićević to B. Bogdan dated 23 September 2013, **CE-277**. Email from W. Rand to M. Bogićević and I. Markićević dated 27 September 2013, **CE-278**. Email from I. Markićević to S. Živanović dated 6 October 2013, **CE-279**. Email from I. Markićević to E. Broshko dated 28 November 2013, **CE-280**. Email from I. Markićević to W. Rand and E. Broshko dated 16 November 2013, **CE-266**; Email from I. Markićević to E. Broshko dated 18 November 2013, **CE-281**. Draft term sheet for joint venture for the establishment and management of dairy in Dobanovci dated January 2014, **CE-282**. Email from I. Markićević to Remax dated 6 March 2014, **CE-283**. Email from I. Markićević to Remax dated 23 January 2014, **CE-284**. Email from Bigadan to I. Markićević dated 26 August 2013, **CE-285**. Email communication between Mr. Rand and Bigadan dated September-October 2013, **CE-286**. Email from I. Markićević to W. Rand dated 7 October 2013, **CE-265**. Email from I. Markićević to Bigadan dated 17 October 2013, **CE-287**.

²⁶⁶ Second witness statement of Igor Markicevic, paras 36, 42, 45.

3. Bankruptcy was a consequence of a bad management

193. Claimants argue that, since attempts to find strategic partners for BD Agro never materialized, “*the future of BD Agro depended on the willingness of the Ministry of Economy and the Privatization Agency to support the reorganization plan – including assignment of the Privatization Agreement*”, as the majority of BD Agro’s creditors allegedly conditioned their support of the pre-pack reorganization plan just on that. Also, Claimants assert that, following the Termination, the Agency’s failure to respond to Mr. Markicevic’s request for approval of amendments to BD Agro’s reorganization plan resulted in the dismissal of the plan and ultimately in bankruptcy of the company.²⁶⁷
194. All these assertions are wrong, because none of BD Agro’s creditors conditioned their support of the pre-pack reorganization plan upon prior approval of the assignment of the Privatization Agreement. In other words, the dismissal of the pre-pack reorganization plan and eventual bankruptcy of BD Agro had nothing to do with the Privatization Agency.

3.1. BD Agro’s creditors did not condition their approval upon assignment of the Privatization Agreement

195. Claimants state that, although BD Agro had acquired the support of the majority of creditors for the pre-pack reorganization plan, their support was conditional upon assignment of the Privatization Agreement to Coropi. They particularly state that this position was advanced by BD Agro’s biggest creditor, Nova Agrobanka, which

*“believed that the pre-pack reorganization plan would only succeed if the issues with transfer of the [Privatization Agreement] are resolved and Mr. Rand provided additional financing to BD Agro”.*²⁶⁸

196. Claimants’ assertions are however challenged by the mere fact that majority of the creditors, including Nova Agrobanka, voted for the pre-pack reorganization plan at the hearing on 25 June 2015, regardless of assignment of the Privatization

²⁶⁷ Memorial, para 151, 269-270. Second witness statement of Igor Markicevic, paras 77, 99, 103, 192-195.

²⁶⁸ Memorial, paras 152, 154.

Agreement.²⁶⁹ Mr. Markicevic confirms this in his witness statement.²⁷⁰ In addition, those creditors who did not vote for the pre-pack reorganization plan had other reasons for this, having nothing to do with the assignment of the Privatization Agreement.

3.2. BD Agro's reorganization plan

197. Decision of the Commercial Court of 25 June 2015 on adoption of the pre-pack reorganization plan was appealed by several dissatisfied creditors. Among other things, the creditor Banca Intesa stated that the Commercial Court failed to properly address its objections and consider different valuations of BD Agro's assets, as well as that reorganization plan itself contained certain deficiencies related to the valuation of BD Agro's assets (appeals were also filed Izoteks doo, Vihor doo, Komercijalna Banka ad, Tax Administration and other creditors).²⁷¹
198. On 30 September 2015, the Commercial Court of Appeals accepted Banca Intesa's appeal, revoked the decision of the Commercial Court and returned the case to the first instance court.²⁷² On 16 October 2015, the Commercial Court acted upon instructions of the Commercial Court of Appeals and issued the conclusion in which it invited BD Agro to comply with the decision of the Commercial Court of Appeals within 15 days, i.e. to submit a new audit report and consequently to update information contained in the pre-pack reorganization plan, and then to deliver the clean version of the plan to its creditors. The conclusion was delivered to BD Agro on 22 October 2015.²⁷³
199. With reference to the above court decisions, on 28 October 2015 Mr. Markicevic addressed the Privatization Agency requesting instructions on further steps concerning the pre-pack reorganization plan.²⁷⁴ However, as will be seen below, the Privatization Agency was not authorized to give any instructions and Mr.

²⁶⁹ Court hearing minutes of 25 June 2015, pp. 4-6, **CE-39**. Decision of the Commercial Court in Belgrade no. Reo-14/2014 of 1 December 2014, **RE-123**.

²⁷⁰ Second witness statement of Igor Markicevic, para. 161.

²⁷¹ Appeal of Banca Intesa of 30 July 2015, **CE-354**. Appeal of the City Administration of the City of Belgrade, Secretariat for Finance of 12 August 2015, **CE-40**. Appeal of the Tax Administration of the Republic of Serbia of 29 July 2015, **CE-41**. Decision of the Appellate Court of 30 September 2015, p. 1, **CE-358**. Second witness statement of Igor Markicevic, para. 164.

²⁷² Decision of the Appellate Court of 30 September 2015, pp. 1 and 4-7, **CE-358**.

²⁷³ Decision of the Appellate Court of 30 September 2015, pp. 4-8, **CE-358**. Notice from the Commercial Court in Belgrade of 16 October 2015, **CE-359**.

²⁷⁴ Letter from I. Markićević to the Privatization Agency of 26 October 2015, **CE-360**.

Markicevic apparently decided not to obey the court's decision within the set deadline. As a result, in its decision of 8 December 2015, the Commercial Court suspended the preliminary proceedings for determination of fulfilment of conditions for initiation of bankruptcy proceedings on the basis of the pre-pack reorganization plan and dismissed BD Agro's proposal.²⁷⁵

200. According to Claimants, pre-pack reorganization plan was dismissed due to inactivity of the Privatization Agency. In particular, they state that after termination of the Privatization Agreement Mr. Markicevic (as director of BD Agro) was obliged by Article 47 of the 2014 Law on Privatization to request approval from the Privatization Agency for any action with respect to bankruptcy procedure. Claimants further state that the fact that the Privatization Agency never responded to Mr. Markicevic's letter from 28 October 2015 prevented him from complying with the court order. As a consequence, the court dismissed the reorganization plan. Claimants argue that this chain of events ultimately lead to BD Agro's bankruptcy in August 2016.²⁷⁶

201. Once again, Claimants misrepresent the facts. Article 47 of the 2014 Law on Privatization does not prescribe the obligation of obtaining the Privatization Agency's approval for any actions of the subject of privatization after termination of the privatization agreement. In fact, this Article does not grant any authorization to the Privatization Agency to issue such approval.²⁷⁷ This means that the Privatization Agency could not lawfully give instructions to Mr. Markicevic on further actions in respect of BD Agro's reorganization procedure.

202. In fact, Article 47 of the 2014 Law on Privatization stipulates only that, after termination of the privatization agreement, the management of the subject of privatization shall not render decisions on reorganization of the company before new management bodies are selected and not that it cannot undertake any actions in

²⁷⁵ Decision of the Commercial Court in Belgrade of 8 December 2015, **CE-361**.

²⁷⁶ Memorial, paras 267-273. Second witness statement of Igor Markicevic, paras 191-197.

²⁷⁷ Article 47 (3) of the 2014 Law on Privatization stipulates the following:

"After termination of the agreement on sale of the capital, the management bodies of the subject of privatization cannot, prior to selection of new management bodies, render the decisions on the following: 1) decrease or increase of the capital of the company; 2) acquisition or disposal of real estate or the high value property; 3) reorganization of the company; 4) pledging assets, mortgaging, and applying other kinds of property encumbrance; 5) renting or leasing property; 6) settlement with creditors."

2014 Law on Privatization, Article 47 (3), **CE-223**.

the court proceedings initiated with regard to already rendered decision on reorganization. In other words, Article 47 only forbids that decisions on reorganization are rendered after the termination of a privatization agreement while it obviously does not apply to activities concerning ongoing reorganization proceedings, which had already been initiated prior to termination of privatization agreements.²⁷⁸

203. Thus, Mr. Markicevic's statement that the "*Law on Privatization obliged [him] to request approval from the Privatization Agency for any action with respect to the bankruptcy procedure, including approval of the reorganization plan*"²⁷⁹ is inaccurate. As director of BD Agro, he was neither obliged to request the Privatization Agency's approval, nor was the Privatization Agency authorized to give such approval.

204. Therefore, it can be concluded that Mr. Markicevic's misrepresentations are nothing more than an attempt to shift responsibility for BD Agro's subsequent bankruptcy from Mr. Obradovic's bad management of BD Agro to the Privatization Agency.

3.3. BD Agro's bankruptcy was opened at the request of Banca Intesa

205. Finally, Claimants argue that Termination of the Privatization Agreement "*caused a major disruption in BD Agro's business operations*" and imply that it was the new management of BD Agro, installed after the Termination, which caused BD Agro's bankruptcy in August 2016.²⁸⁰ This is incorrect.

206. On 6 January 2015, BD Agro's second biggest creditor, Banca Intesa, submitted to the Commercial Court a request for opening of bankruptcy proceedings over BD Agro due to the company's permanent insolvency. Banca Intesa's request was initially dismissed on 6 August 2015 since BD Agro's attempted reorganization was ongoing. All this was before the termination of the Privatization Agreement.

207. Thereupon, following to the court's dismissal of BD Agro's pre-pack reorganization plan on 8 December 2015 (caused by Mr. Markicevic's omission to comply with the

²⁷⁸ 2014 Law on Privatization, Article 47, CE-223.

²⁷⁹ Second witness statement of Igor Markicevic, para195.

²⁸⁰ Memorial, para 272.

court's instructions and amend the reorganization plan),²⁸¹ Banca Intesa's request for opening of bankruptcy proceedings was granted. Accordingly, on 30 August 2016 the Commercial Court rendered its decision on opening the bankruptcy proceedings over BD Agro due to its permanent insolvency. The court noted in its decision that BD Agro's account had been blocked for the amount of over RSD 900,000,000.00 (EUR 7,299,862.11)²⁸² for the period of over three years, which, as the court ruled, constituted permanent insolvency and thus ground for bankruptcy.²⁸³

3.4. Conclusion

208. What can be concluded is that release of the pledge over BD Agro's shares as well as the issue of assignment of the Privatization Agreement had nothing to do with unsuccessful pre-pack reorganization plan, nor with the opening of the bankruptcy proceedings. Nothing in the record points to a different conclusion. In addition, as amply explained in Sections II.C. and II.D., the Privatization Agency acted in accordance with the relevant regulations both with regard to the pledge over Mr. Obradovic's shares in BD Agro and assignment of the Privatization Agreement.
209. On the other hand, it is more than obvious that the pre-pack reorganization plan was dismissed due to Mr. Markicevic's failure to comply with the court's order. What is more, it is an undisputable fact that BD Agro's account had been blocked due to unpaid debt of several million euros for the period of over three years and, based on that fact, Banca Intesa requested opening of the bankruptcy proceeding. In other words, BD Agro's bankruptcy resulted from the bad management of BD Agro in the period when Mr. Obradovic was the majority owner, and he, Mr. Rand and Mr. Markicevic served as members of the board of directors.²⁸⁴

²⁸¹ See previous Section II.E.3.2.

²⁸² On 30 August 2016, the RSD middle exchange rate of the National Bank of Serbia for EUR was 123.29 (900,000,000 ÷ 123.29 = 7,299,862.11). National Bank of Serbia RSD Exchange Rate on 30 August 2016, **RE-26**.

²⁸³ Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro of 30 August 2016, **CE-109**.

²⁸⁴ Second witness statement of Igor Markicevic, paras 6-7. Witness statement of William Rand, para. 25.

III. JURISDICTIONAL OBJECTIONS

A. THE TRIBUNAL DOES NOT HAVE JURISDICTION *RATIONE MATERIAE* UNDER THE TREATIES

1. The Canadian Claimants' "investment" is not protected under the Canada – Serbia BIT

210. Article 1 of the Canada – Serbia BIT defines "covered investment" (with respect to the relevant Party) as "an investment in its territory that is owned or controlled, directly or indirectly, by an investor of the other Party existing on the date of entry into force of this Agreement, as well as an investment made or acquired thereafter".

211. With regard to the meaning of "investment" the same Article defines the term as follows:

"(a) an enterprise;

(b) a share, stock or other form of equity participation in an enterprise;

(c) a bond, debenture or other debt instrument of an enterprise;

(d) a loan to an enterprise;

(e) notwithstanding subparagraphs (c) and (d) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the Party in whose territory the financial institution is located;

(f) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(g) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution;

(h) an interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in that territory, such as under:

(i) a contract involving the presence of an investor's property in the territory of the Party, including a turnkey or construction contract, or a concession, or

(ii) a contract where remuneration depends substantially on the production, revenues or profits of an enterprise;

(i) intellectual property rights; and

(j) any other tangible or intangible, moveable or immovable, property and related property rights acquired in the expectation of or used for the purpose of economic benefit or other business purpose;”

212. The definition of “investment” (as well as the entire Canada-Serbia BIT) is evidently based on the Canada’s Model Foreign Investment Promotion and Protection Agreement (Canada Model BIT).²⁸⁵ Unlike some other, open-ended and broad definitions used in other BITs, the definition employed here is definite.²⁸⁶ This is evidenced further by the clarification that “investment” does not mean:

“(k) a claim to money that arises solely from:

(i) a commercial contract for the sale of a good or service by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing; or

(l) any other claim to money;

that does not involve the kinds of interests set out in subparagraphs (a) to (j);”

213. Therefore, any monetary claim apart from those listed above is explicitly excluded from the Canada – Serbia BIT’s scope of application.

²⁸⁵ Canadian Model Agreement for the Promotion and Protection of Investments (the Canada Model BIT), **RLA-41**.

²⁸⁶ See Céline Lévesque, Andrew Newcombe, Canada, in: Chester Brown (ed.), *Commentaries on Selected Model Investment Treaties*, Oxford University Press, 2013, p. 68, **RLA-1**.

214. According to the Claimants' Memorial,²⁸⁷ the Canadian Claimants' "investment operation" comprises of:

- the Beneficially Owned Shares of BD Agro;
- the Canadian Claimants' indirect interest in Sembi's rights under the agreement between Sembi and Mr. Obradovic
- the 3.9% shareholding in BD Agro held by Mr. Rand indirectly through MDH doo; and
- Mr. Rand's direct payments to BD Agro's Canadian suppliers for the purchase and transport of heifers and other payments and loans for the benefit of BD Agro.

215. However, the Canadian Claimants have never acquired the ownership over the shares of BD Agro (1). Furthermore, the Agreement between Sembi and Mr. Obradovic has never created any rights for Sembi and its shareholders with regards BD Agro (2). Finally, Mr. Rand's payments on behalf of BD Agro are not "investment" under the Canada – Serbia BIT (3). Consequently, the Canadian Claimants have never owned or controlled an investment in the sense of Article 1 of the Canada – Serbia BIT.

1.1. The Canadian Claimants have never acquired shares of BD Agro

216. Under the narrative offered here by Claimants, the "beneficial ownership" of BD Agro's shares was first acquired in October 2005 and held solely by Mr. William Rand until February 2008.²⁸⁸ Such ownership was allegedly a result of an agreement (the Share Purchase Agreement) concluded between Marine Drive Holding (MDH), a company incorporated in British Virgin Islands and Mr. Djura Obradovic on 19 September 2005.²⁸⁹ According to Claimants, the structure of their investment changed on 22 February 2008, when based on two agreements concluded with Mr. Obradovic as well as with other individuals (hereinafter the Sembi Agreements),²⁹⁰

²⁸⁷ Claimants' Memorial of 16 January 2019 (Memorial), para. 299.

²⁸⁸ Ibid., para. 41.

²⁸⁹ Ibid., paras. 69, 70.

²⁹⁰ See Claimants' exhibits **CE-28** and **CE-29**.

Sembi Investment Limited, a company registered in Cyprus, entered the scene as a “Purchaser”²⁹¹ of BD Agro’s shares.²⁹²

1.1.1. Serbian law is applicable to the issues of the existence, validity and substance of property rights protected under the Canada-Serbia BIT

217. There can be no doubt that Article 1 of the Canada – Serbia BIT establishes a list of assets/property rights enjoying protection under the Treaty. However, whether certain property rights were validly created, to whom they belong and what is their substance are issues that must be decided based on the law of the Host State.
218. This was unequivocally accepted by the Ad hoc Committee in *Mobile v. Venezuela*. There, the Committee found that “...*property is not a quantity that is, or can be, created by international law.*”²⁹³ The role of international law is “...*to recognize property created and defined by national law, and then to draw from that whatever consequences may flow on the international plane...*”.²⁹⁴
219. In a similar vein, the Ad hoc Committee in *Gambrinus v. Venezuela* confirmed the findings of the tribunal that the contractual rights relied on by the claimant were not created under, *inter alia*, the laws of Venezuela, rendering the claimant’s investment non-existent.²⁹⁵
220. The rule discussed here is elegantly stated by Zachary Douglas:

“Investment disputes are about investments, investments are about property, and property is about specific rights over tangibles and intangibles cognizable by the municipal law of the host state. General international law contains no substantive rules of property law... Whenever there is a dispute about the scope of the property rights comprising the investment, or to

²⁹¹ See Claimants’ exhibit **CE-29**.

²⁹² Memorial, paras. 42, 43.

²⁹³ *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, March 9, 2017, paras, 168, 170, **RLA-2**.

²⁹⁴ *Ibid*, (emphasis added).

²⁹⁵ *Gambrinus, Corp. v. Bolivarian Republic of Venezuela* ICSID Case No. ARB/11/31, Decision on Annulment, October 3, 2017, para. 202, **RLA-3**.

*whom such rights belong, there must be a reference to a municipal law of property.”*²⁹⁶

221. The author offers the example which fits squarely to the dispute at hand:

*“Take the example of an investment in shares. The protection of an investment treaty is contingent upon securing the legal rights to those shares in accordance with the relevant municipal law where the company is incorporated. If the investment in shares is made in England, legal ownership arises upon entry onto the share register. Thus, in order for a Russian investor in England to perfect its investment in the shares of an English company and attract the protection of the UK/Russia BIT, it would not be sufficient to accept delivery of share certificates, as would be the case in other jurisdictions such as New York.”*²⁹⁷

222. Therefore, in order to qualify for the protection under the BIT, the Canadian Claimants first need to prove that the property rights they invoke were validly created under the municipal (Serbian) law. The agreements they rely on (the Share and Purchase Agreement and the Sembi Agreements) as the legal ground for their alleged ownership over the shares of BD Agro must be able to create the right of ownership over the company under the applicable law.

223. When jurisdiction of a tribunal rests on the existence of certain facts, they need to be proven at the jurisdictional stage.²⁹⁸ Specifically, in relation to the ownership of shares, the rule was stated by the *Gallo v. Canada* tribunal:

*“In accordance with the principle actori incumbit probatio, it is for the Claimant to marshal convincing evidence showing the date when he acquired ownership of the Enterprise's share capital, in accordance with applicable law, in this case Ontario corporate law.”*²⁹⁹

²⁹⁶ Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, p. 52, **RLA-4** (Internal citations omitted).

²⁹⁷ *Ibid.*, pp. 52, 53. (Internal citations omitted).

²⁹⁸ See *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, para. 61, **RLA-5**.

²⁹⁹ *Vito G. Gallo v. The Government of Canada* (UNCITRAL), PCA Case No. 55798, Award, 15 September 2011, para. 284, **RLA-6**.

224. Claimants carry the burden of proving the existence of a protected investment. For the reasons explained below, it is abundantly clear that Claimants failed in meeting this burden.

1.1.2. The Share Purchase Agreement concluded between Marine Drive Holdings INC. and Mr. Obradovic created no effect under the applicable law

225. The Share Purchase Agreement of 19 September 2005 (the SPA) has not created any effect with regard to the ownership of BD Agro's shares. As a consequence, it did not result in transfer of ownership from Mr. Obradovic to MDH. There are several reasons rendering the SPA ineffective. **First**, the SPA has never been executed. **Second**, the contract at stake could not in any event result in the transfer of ownership since it is null and void under Serbian law. **Finally**, the SPA was concluded in breach of the Privatization Agreement.

a) The Share Purchase Agreement has never been executed

226. The SPA was concluded between MDH (designated as "the Purchaser") and Mr. Djura Obradovic (referred to as "the Seller"). Mr. Obradovic agreed to grant the Purchaser an option to buy all of his interest in BD Agro, including any shares acquired by the Seller after the acquisition of the shares from the Government and up to the date of the expiry of the option. The Purchaser was able to exercise this option at any time after 29 September 2006 for the price of 1000 Euros.³⁰⁰

227. Mr. Obradovic also guaranteed that, after the successful bid in the upcoming auction, he would become "the *sole and beneficial owner of the Shares and, on and after September 29, 2006; will have the exclusive right to sell and transfer same to the Purchaser as herein provided.*"³⁰¹

228. Paragraph 2 of the SPA regulated the manner in which Mr. Obradovic would enable MDH to become registered and beneficial owner of the Shares:

"Upon the exercise of the option, the Seller shall deliver the Shares and debt instruments in negotiable form (the "Share Transfer Materials") to the order

³⁰⁰ Paragraph 1 of the Share Purchase Agreement, **CE-15**.

³⁰¹ Paragraph 3 of the Share Purchase Agreement, **CE-15**.

*of the Purchaser. The Share Transfer Materials shall consist of share certificates duly endorsed for transfer and guaranteed or in street or bearer form and shall be in a form sufficient to enable the Purchaser to become the registered and beneficial owner of the Shares. At the Purchaser's request, at any time during the term of the option, the Share Transfer Materials shall be executed by the Seller and lodged with a trustee appointed by the Purchaser.”*³⁰²

229. It seems that Claimants now argue that Mr. Rand became the beneficial owner *automatically*, at the date on which Mr. Obradovic concluded his agreement with the Privatization Agency, just as the Privatization Agreement was concluded between Mr. Rand and the Privatization Agency.³⁰³ This is not only in conflict with the Law on Privatization and the general principle of contract law that a contract creates effects *inter partes*,³⁰⁴ but in contravention with the explicit stipulation of the SPA as well.
230. It follows from the clear and unequivocal language of the SPA that the acquisition of both registered and beneficial ownership over the shares by the Purchaser was preconditioned upon the exercise of its contractual option and the delivery of share certificates from Mr. Obradovic to MDH. The call option merely gave Marine Drive Holdings a legal power to “cause the creation of a share purchase agreement” during the time specified in the SPA.³⁰⁵ However, the option has never been exercised, leaving the Purchaser (and consequently Mr. Rand) without nominal and beneficial ownership over the shares. The assertion advanced here by Claimants - that the omission to use the option given by the contract and to acquire rights under the SPA can somehow give them those rights anyway – is simply untenable.
231. It should be noted as well that the Claimants’ argument is contradictory on its face. Claimants argue that, as a result of the SPA, Mr. Obradovic since October 2005 acted only as a nominal owner of BD Agro, with all economic rights associated with BD Agro’s shares belonging to Mr. Rand.³⁰⁶ Claimants do not venture to explain

³⁰² Paragraph 2 of the Share Purchase Agreement **CE-15** (emphasis added).

³⁰³ Memorial, paras. 40, 41.

³⁰⁴ Law on Obligations, Article 148, paragraph 1, **RE-32**.

³⁰⁵ Expert Report of Professor Mirjana Radovic, para. 76.

³⁰⁶ Memorial, paras. 68, 70.

why, in 2008, Sembi Investments would agree to settle Mr. Obradovic's debt of 9 million EUR towards the Lundin family in exchange for the assignment of the Privatization Agreement, if Mr. Obradovic did not have any economic interest in said Agreement.³⁰⁷

232. Furthermore, the main reason the SPA has never been executed is the fact that *it could not have been executed* under the Serbian legislation regulating acquisition and transfer of shares. The SPA was null and void under the relevant laws and could not result in transfer of ownership over the BD Agro's shares from Mr. Obradovic to MDH.

b) The Share Purchase Agreement is null and void under the applicable law

233. At the time the SPA was concluded, the acquisition of ownership of shares in joint stock companies incorporated in Serbia was regulated by two main laws: the Law on Companies (2004) and the Law on Market in Securities and other Financial Instruments (2002).

The relevant provision of the Law on Companies reads:

“Article 207

[1] A shareholder as against the joint stock company and third persons is the person entered into the Central Securities Registry, in accordance with the law regulating the market of securities.”³⁰⁸

234. The Law on Market in Securities and other Financial Instruments, for its part, regulated the acquisition and transfer of rights in securities in a following manner:

“Article 11

[1] Securities shall be personal (registered) documents.

³⁰⁷ Memorial, para. 89.

³⁰⁸ 2004 Law on Companies, Article 207, paragraph 1; emphasis added, **RE-96**. The Law is in effect from 30 November 2004.

[2] Legal title holders of securities shall acquire the pertaining rights by entering the securities into their account held with the Central Securities Registry.

[3] The owner of the securities account held with the Central Securities Registry shall be considered a legal title holder of securities (hereinafter: legal title holder).

[4] By exception to paragraph 3 of the present Article, when a custody bank keeps securities accounts with the Central Securities Registry on its own behalf and for the account of legal title holders who are the clients of the custody bank, and/or on behalf of its clients that are not legal title holders, but for the account of the legal title holders - a legal title holder of these securities shall be the person for whose account the custody bank keeps the securities accounts.

[5] Transfer of rights pertaining to securities shall be conducted by transferring the securities into the account of a new owner in the Central Securities

*[6] Third party rights arising from securities shall be acquired and transferred by entering such rights and their beneficiaries into legal title holders' securities account held with the Central Securities Registry.*³⁰⁹

235. The sale and purchase of shares in joint stock companies was at the time the SPA was concluded (as it is the case today as well), with few exceptions, possible only at the organized market of securities.³¹⁰ The Law on Market in Securities and other Financial Instruments in Article 52 stipulated that:

“[1] Securities shall be traded only through a public offer on an organized market, unless this law provides otherwise.

³⁰⁹ 2002 Law on Market in Securities and other Financial Instruments, **RE-119** (emphasis added); The Law was in effect from 30 November 2002 until 11 December 2006. The version of the law provided as RE-119 is the version that entered into force on 8 June 2005 and was in force at the time the SPA was concluded.

³¹⁰ Expert Report of Professor Mirjana Radovic, para. 77.

*[2] Only broker-dealer companies and authorized banks that are members of the stock exchange may trade in securities on the organized market, while other persons may trade only through the mediation of stock exchange members.”*³¹¹

236. Furthermore, the Law contained specific provisions on take-over bids for joint stock companies. Those provisions were applicable to person or entities intending to acquire 25% or more voting shares in a company.³¹² The take-over bid had to be previously approved by the Securities Commission.³¹³ The bidder was under obligation to forward the bid to all legal title holders of shares on a special form whose contents was proscribed by the Securities Commission.³¹⁴
237. Provisions of the Law on Companies and the Law on Market in Securities and other Financial Instruments were without doubt compulsory in their nature.³¹⁵ The requirements of Serbian law were by no means formalities. They were directed at protecting third parties, minority shareholders and at securing disposition of shares in companies in organized and transparent manner.
238. Clearly, the idea behind the SPA was for Mr. Obradovic to re-sell the shares he acquired from the Privatization Agency to MDH. That much is obvious from the title of the agreement as well as from the designation of contracting parties as “the Purchaser” and “the Seller”. However, the only way in which the buyer could lawfully acquire the shares would be through the registration as the owner with the Central Securities Registry.³¹⁶ The Law on Market in Securities contained only one exception to the mandatory rule that the registered owner is a “legal title holder” of shares – a possibility that a custody bank holds securities on account of its clients who are, in that instance, considered to be legal title holders of securities.³¹⁷ The Law did not provide for any other circumstances in which the beneficial ownership

³¹¹ 2002 Law on Market in Securities and other Financial Instruments, **RE-119**.

³¹² 2002 Law on Market in Securities and other Financial Instruments, Article 67 paragraph 1, **RE-119**.

³¹³ 2002 Law on Market in Securities and other Financial Instruments, Article 69, paragraphs 1 and 2, **RE-119**.

³¹⁴ 2002 Law on Market in Securities and other Financial Instruments, Article 70, **RE-119**.

³¹⁵ Expert Report of Professor Mirjana Radovic, para. 81.

³¹⁶ 2002 Law on Market in Securities and other financial Instruments, Article 11, paragraphs 2, 3 and 5, **RE-119**.

³¹⁷ 2002 Law on Market in Securities and other financial Instruments, Article 11, paragraph 4, **RE-119**.

could be separated from the nominal ownership of shares.³¹⁸ Therefore, even if MDH had exercised its option from the SPA that transaction would still have no effect with regard to the ownership of BD Agro's shares.

239. In *Anglo-Adriatic v. Albania*, the claimant argued that it had no legal obligation to register its beneficial ownership over the shares nominally held by the Albanian investment fund (*Anglo Adriatika Investment Fund*). The tribunal disagreed:

“Second, Arts. 2.2 and 6.4 LIFd provided that all rights in the shares of a fund must be held by the registered shareholders of these shares; the law further required that the transfer of any shares in the AAIF should be registered with the Albanian authorities within 10 days and that the identity of the shareholders had to be reported on an ongoing basis every quarter (Arts. 6.4(a) and 16.1 LIFd).

*There is no evidence in the record that either the AAIF or AAG ever informed the Albanian authorities that the Foreign Shareholders had transferred ownership of the AAIF Foreign Shares to AAG, or that AAG asked for registration as a new shareholder. The absence of such information and the inexistence of registration – both of which are required under Albanian law – undermines the credibility of Claimant’s argument that AAG was the beneficial owner of the shares since 1996.”*³¹⁹

240. Just as in the *Anglo-Adriatic* case, MDH has never attempted to register its rights over the shares of BD Agro, nor was it possible to obtain the registration based on the agreement that was clearly without any effect under the relevant legislation: a sale and purchase of shares in a joint stock company outside the organized market and without a public take-over bid directed at other shareholders of BD Agro was in blatant disregard of compulsory rules contained in Serbian legislation. To accept the Claimants’ assertion - that the entity that was unable to lawfully acquire the ownership of BD Agro’s shares could anyway be considered the owner of those shares (under the title of “beneficial ownership”) - would be to render relevant provisions of Serbian law meaningless.

³¹⁸ Expert Report of Professor Mirjana Radovic, para. 72.

³¹⁹ *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, February 7, 2019, paras. 239, 240, **RLA-7**.

241. Contracts that are concluded contrary to compulsory regulations are considered null and void under the Law on Obligations:³²⁰

“Nullity

Article 103.

[1] A contract that is contrary to compulsory regulations, public policy or fair usage shall be void unless the purpose of the breached rule indicates a different sanction, or unless the law provides otherwise in the specific case.

...”

242. That is also the stance of the Serbian Supreme Court. In a ruling specifically addressing the kind of transactions such as the SPA, the Supreme Court left no room for any ambiguity – the contract for sale of shares of a privatized entity that was concluded outside the organized market of securities, in contravention to Article 52 of the Law on Market in Securities and other Financial Instruments, is null and void in accordance with Article 103(1) of the Law of Contract and Torts.³²¹
243. Therefore, the SPA could not create the rights of ownership for MDH which Mr. Rand would be able to invoke as his investment under the BIT.
244. The Claimants strongly rely on *obiter* of the Annulment Committee in *Occidental v. Ecuador* to support their argument that even the beneficial ownership enjoys protection under international law.³²² However, even in the Annulment Committee’s findings, the conclusion that the claimant had successfully transferred 40% of its economic interest in the investment to a Bermudian company was based on the Committee’s understanding that the transaction could create legal effects under the Ecuadorian law, i.e. that the contract establishing the beneficial ownership was valid under the national law, until declared null and void by the competent court.³²³

³²⁰ The Law on Obligations, **RE-32**.

³²¹ Decision of the Supreme Court of Serbia, Prev. 438/2007, March 19, 2008, **RE-2**.

³²² Request for Arbitration of 9 February 2018, para. 192; Memorial, para. 303.

³²³ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, November 2, 2015, para. 234, **CLA-5**.

245. There is no such requirement under the Serbian law – the SPA is null and void *ab initio* and *ex lege*, without a need for a competent court to declare its nullity.³²⁴ Therefore, Claimants’ reliance on the *Occidental* Annulment decision is misplaced and does not help their case.

c) The Share Purchase Agreement was contrary to the Privatization Agreement

246. Finally, Mr. Obradovic was prohibited to dispose of BD Agro’s shares by the Privatization Agreement. Privatization agreements are agreements *intuitu personae*.³²⁵ This is evident from the fact that the Privatization Agreement was concluded with Mr. Obradovic as a winner of the public auction for the sale of BD Agro’s capital.³²⁶ The buyer at the auction needs to fulfill certain conditions envisaged by article 12 of the Law on Privatization which designates persons/entities that cannot assume the role of buyers (for example, an individual of an entity with outstanding obligations towards the subject of privatization or an individual convicted for certain criminal offences).³²⁷ This explains why the Privatization Agreement contains certain representations and warranties on behalf of Mr. Obradovic.³²⁸

247. Most importantly, the Privatization Agreement contains a specific obligation of the buyer not to alienate in any way the shares of BD Agro in the period of two years after the conclusion of the Agreement:

“5.3 Further obligations of the Buyer

The Buyer undertakes that he will not perform or allow performance of the following actions, without previous written approval by the Agency:

*5.3.1 he will not sell, assign or otherwise alienate shares in the period of 2 years as of the day of conclusion of the agreement;”*³²⁹

³²⁴ Expert Report of Professor Mirjana Radovic, para. 83.

³²⁵ Expert Report of Professor Mirjana Radovic, para. 89.

³²⁶ The Privatization Agreement, recitals, **CE-17**.

³²⁷ 2001 Law on Privatization, Articles 12-12b, **CE-220**.

³²⁸ The Privatization Agreement, Section 5, **CE-17**.

³²⁹ Emphasis added.

248. If Claimants' presentation of facts is deemed correct, Mr. Obradovic had knowingly breached the prohibition from Article 5.3.1. already on the day he entered into the agreement with the Privatization Agency.
249. According to Claimants, the SPA concluded in September 2005 "...gave Mr. Rand full control and economic rights associated with the Privatized Shares."³³⁰ Even if the SPA was able to give Mr. Rand "the beneficial ownership" over the shares – which for the reasons explained above it was not – this would be in clear contradiction to the specific provision of the Privatization Agreement.
250. The dispute at hand is to that regard similar to the circumstances of the *Gambrinus v. Venezuela* case. There, the claimant asserted that it had acquired 10% equity share in four Venezuelan companies established by the four-party agreement (*Joint Investors' Agreement*). The claimant allegedly bought the share through the share purchase agreement concluded with one of the original parties to the Joint Investors' Agreement. However, the tribunal found that the purchase was executed in breach of the Joint Investors' Agreement, leaving the transaction without any legal effect.³³¹ As a consequence, the claimant did not own an investment at the relevant date:

*"Claimant's claim in this arbitration is founded on Respondent's expropriation of its investment on October 10, 2010 in breach of Article 5 of the BIT as well as on the breach of the fair and equitable treatment of its investment under Article 2(2) of the BIT due to Respondent's expropriatory actions. Claimant owned no investment at the time of the alleged expropriation of Fertinitro shares on 10 October 2010, due to the Share Purchase Agreement with Inv. Polar being of no force and effect. Having made no investment which may fall within the BIT protection, Claimant's claim is not subject to the Tribunal's jurisdiction which, accordingly, must be declined."*³³²

³³⁰ Memorial, para. 70.

³³¹ *Gambrinus, Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/31, Award, June 15, 2015, paras. 272, 273, **RLA-8**.

³³² *Ibid.*, para. 276 (footnotes omitted).

251. The transfer of “economic rights” associated with the BD Agro’s shares from Mr. Obradovic to MDH – even if it had been executed under the SPA – would obviously be in the breach of the Privatization Agreement and, thus, without any legal effect.

d) The relevance of the alleged disclosure and acknowledgment of Claimants’ “beneficial ownership”

252. Claimants place greater emphasis on the assertion that “...the Claimants’ beneficial ownership was always disclosed to and acknowledged by Serbia.”³³³ Claimants submit that Messrs. Obradovic and Rand disclosed to Mr. Predrag Bubalo, then Minister of Economy, and his assistant Mr. Ljubisa Jovanovic, the arrangement by which it was Mr. Rand who would become the owner of BD Agro after its sale to Mr. Obradovic and that the disclosure was made before the public auction for the sale of the company.³³⁴ According to Claimants, Serbian officials did not express any reservations.³³⁵ It is unclear how this would give any validity to otherwise void agreement. However, there are two main points to be made here.

253. First, the probative value of Claimants’ evidence is dubious at best. There is no written evidence, no document of any kind that would prove that the SPA and its contents were disclosed to Mr Bubalo. The SPA was not court-certified, notarized or sent to the Privatization Agency or any governmental official. An e-mail that Mr. Rand sent to Mr. Bubalo in June 2005 referred only to Mr. Rand’s willingness to participate in the future auction for sale of BD Agro and contained no mention of the SPA or Mr Obradovic’s role as Mr. Rand’s nominee.³³⁶ The Claimants’ contention is based solely on witness statements of individuals who are clearly interested in the outcome of the proceedings. In line with the findings of the International Court of Justice in the *Nicaragua* case, those who are directly interested in the outcome of the procedure would not be reliable witnesses if their testimony speaks in their own favour.³³⁷

³³³ Memorial, para. 304.

³³⁴ Ibid., para. 304; Witness Statement of Djura Obradović dated 20 September 2017, para. 11; Witness Statement of William Rand dated 5 February 2018, para 20.

³³⁵ Memorial, para. 304.

³³⁶ E-mail from W. Rand to P. Bubalo dated 4 June 2005; **CE-14**.

³³⁷ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, I.C.J. Reports 1986, p. 14, paras. 69, 70 at 43, **RLA-9**.

254. Second and more importantly, Claimants do not even assert that the existence of the SPA was ever disclosed to or acknowledged by the Privatization Agency – the other contracting party of the Privatization Agreement and an entity that was in charge of the privatization process of BD Agro under Serbian legislation. There was no way in which the Privatization Agency would know, as Claimants now imply, that by entering into the Privatization Agreement it was selling the capital of BD Agro not to Mr. Obradovic, the winner of the public auction, but, in fact, to MDH and Mr. Rand. Nor would the Privatization Agency agree to enter the agreement in clear contravention to the Law on Privatization. As it was explained before, there was absolutely no legal obstacle for Mr. Rand to enter the auction in his own name.³³⁸
255. In any event, even if details of the purported arrangement between Messer. Obradovic and Rand were indeed revealed to any of Serbian officials, their alleged omission to express reservations would be irrelevant and could not in any way create the right of property for Mr. Rand with regard to the capital of BD Agro. As it was unequivocally stated by another ICSID tribunal – property rights cannot be created based on the doctrine of estoppel:

“The requirements for acquiring property rights over immovable assets situated in Venezuela are governed by specific norms of Venezuelan property law. For a private person to have a claim under international law arising from the deprivation of its property, it must hold that property in accordance with applicable rules of domestic law. The principle of estoppel cannot create otherwise inexistent property rights. This is so if one grounds the principle of estoppel on international law.”³³⁹

256. The Claimants also argue that in the period from 2013 until 2015, during discussions about the assignment of the Privatization Agreement from Mr. Obradovic to Coropi „...the Serbian officials treated Mr. Rand and his representatives Mr. Broshko and Mr. Markicevic, rather than Mr. Obradovic, as the competent representatives for

³³⁸ See Section I.

³³⁹ *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April, 2016, para. 257, **CLA-32**.

addressing and negotiating all matters regarding BD Agro and the Privatized Shares.”³⁴⁰ This is simply untrue.

257. The Privatization Agency and the officials from the Ministry of Economy treated Messrs. Rand, Broshko and Markicevic in accordance with their official status and capacity – during that time Mr. Markicevic was the general Manager of BD Agro³⁴¹ and Mr. Broshko was a representative of the company seeking to assume the role of Mr. Obradovic in the Privatization Agreement.³⁴²
258. For instance, the only reason why Ms. Galic from the Ministry of Economy requested a proof that Coropi was indeed “a company within Rand Investments” was because Mr. Broshko claimed to represent Rand Investments as a potential receiver of the Privatization Agreement.³⁴³ The argument advanced here by the Claimants is absurd – the discussions that were held precisely in order to explore a possibility to transfer the ownership of BD Agro’s shares to Rand Investments is used as the key evidence that Rand Investments and Mr. Rand have been treated as the owners all along.
259. Consultations between the Privatization Agency, on the one side, and the representatives of Rand Investments and BD Agro, on the other, were indeed held during the period between 2013 and 2015. Discussions did not result in the assignment of the Privatization Agreement, *inter alia*, because Mr. Obradovic was not ready to provide the Agency with a bank guarantee that would secure the fulfillment of the receiver’s obligations, in accordance with Article 41ž (3) of the Law on Privatization.³⁴⁴
260. Documents with regard to the matter of assignment, provided by Claimants themselves in this proceedings,³⁴⁵ introduce Mr. Rand as a Canadian investor who

³⁴⁰ Memorial, paras. 305, 306.

³⁴¹ Witness Statement of Igor Markićević dated 5 February 2018, para. 15.

³⁴² Witness Statement of Erinn Broshko dated 5 February 2018, para. 3.

³⁴³ See E-mail from Neda Galić to Erinn Broshko of 9 November 2014, **CE-70**.

³⁴⁴ See Sections II.D.2.-3.

³⁴⁵ See Claimants’ exhibit **CE-350**.

was ready to provide the financial support to BD Agro subject to the transfer of ownership from Mr. Obradovic to one of Mr. Rand's companies.³⁴⁶

261. In April 2013, Mr. Milos Jakovljevic, an attorney from Belgrade, sent an e-mail to the Privatization Agency, claiming he was hired by a national of Canada that was interested in the possibility of investing in BD Agro and taking over the Privatization Agreement from the majority shareholder.³⁴⁷ As it would turn out later on, the Canadian national Mr. Jakovljevic referred to was Mr. William Rand.
262. In August 2013, the Privatization Agency received a request signed by Mr. Obradovic, asking the Agency to allow the assignment of the Privatization Agreement to Coropi.³⁴⁸ Mr. Obradovic cited his inability to dedicate his time to the affairs of BD Agro, due to his other personal and professional engagements, as a reason for the request.³⁴⁹
263. In September 2013, Mr. Obradovic and Coropi concluded the Agreement on assignment of the Privatization Agreement.³⁵⁰ The Agreement stipulated that it would not produce legal effects if the Agency refuses to give its approval.³⁵¹
264. In January 2014 the Privatization Agency received the letter signed by Mr. Markicevic, notifying the Agency about the arrival of Mr. Broshko, "*the representative of a Canadian investor who is a contracting party and the assignee in the Agreement on assignment*" and asking for a meeting with the Agency's representatives.³⁵²
265. During the meeting at the Privatization Agency on 30 January 2014 Mr. Broshko, introduced by Mr. Markicevic as a director of Rand Investments, stated that he represented the company which had provided all of the funds invested into BD

³⁴⁶ For instance, in a letter sent to the Privatization Agency on 13 August 2014, Mr. Markicevic reminded the Privatization Agency of Mr. Rand's "*interest and readiness to invest into consolidation and further development of BD AGRO, in case the matter of ownership was solved within reasonable time and the conditions were met for the completion of the privatization procedure of the company.*" Letter from BD Agro to the Privatization Agency of 13 August 2014, p. 1, **CE-316**.

³⁴⁷ E mail from Mr. Jakovljevic to the Privatization Agency of 16 April 2013, **RE-108**.

³⁴⁸ Letter from D. Obradović to the Privatization Agency of 1 August 2013, **CE-273**.

³⁴⁹ Ibid.

³⁵⁰ Agreement on Assignment of Agreement on Sale of Socially Owned Capital Through Public Auction between Djura Obradović and Coropi Holdings Limited; **CE-274**.

³⁵¹ Ibid., Article 8.

³⁵² Email from I. Markićević to the Privatization Agency attaching letter to Ms. Uzelac, **CE-309**.

Agro.³⁵³ Mr. Broshko did not offer any proof for such assertion and no issue of the alleged ownership of Mr. Rand over the shares of BD Agro was raised.

266. In September 2014 Mr. Rand wrote to the Prime Minister of Serbia and Minister of Economy in connection to the proposed assignment of the Privatization Agreement. The letter is significant since it shows that Mr. Rand neither represented to be nor considered himself the owner of BD Agro.

267. The letter explains the status of BD Agro's privatization in the following manner:

"In October 2005, Mr. Djura Obradovic was the successful bidder for the purchase of a 70% interest in BD Agro AD. The purchase price was RSD 470,000,000 (€ 5,549,000) and the investment stipulated in the privatization was € 1,991,000. The purchase price was paid in full and to date a total of in excess of € 40,000,000 has been invested, including over € 2,000,000 by me personally.

Since the summer of 2013, I have supported BD Agro financially in the amount of approximately € 450,000. Without my support, BD Agro would not have survived."³⁵⁴

268. On this occasion Mr. Rand did not claim that he owned BD Agro. Moreover, the assertion that Mr. Rand and Rand Investments financed the purchase of BD Agro was missing as well.

269. The letter reveals that the deal to transfer the ownership of BD Agro from Mr. Obradovic to one of Mr. Rand's companies was struck in the summer of 2013:

*"With BD Agro struggling financially, a request was made last summer to the Privatization Agency to allow the transfer to me or a company owned by me of Mr. Obradovic's ownership in BD Agro, either within the pledge or upon the release of the pledge. Subsequently, the entire senior management of BD Agro was replaced and current management installed."*³⁵⁵

³⁵³ Minutes of the meeting in the Privatization Agency of 30 January 2014; **RE-28**.

³⁵⁴ Letter from Mr. William Rand to the Serbian Prime Minister and Minister of Economy of 18 September 2014, **CE-38**.

³⁵⁵ Ibid., p. 2 (emphasis added).

270. This explains the expenditure of 450 000 Euros referred to previously – the costs were obviously incurred in the expectation of the takeover previously agreed between Messrs. Rand and Obradovic.

271. Mr. Rand also explains that he helped BD Agro to obtain the expertise necessary for the reorganization process by guaranteeing the payment of consultants' fees:

*“BD Agro has engaged professional consultants to manage the process of reorganization and, as a condition to their engagement, I have personally guaranteed payment of their fees owing by BD Agro.”*³⁵⁶

272. Finally, Mr. Rand concludes by stating:

*“I have demonstrated financially my commitment to BD Agro and wish to continue supporting the company financially, making it a world-class example of innovative Serbian agriculture and dairy production. However, as I'm sure you understand, I am reluctant to continue doing so if the ownership cannot be transferred and the pledge released.”*³⁵⁷

273. Furthermore, the letter sent by Mr. Rand, in the capacity of Rand Investments' President, to Mr. Markicevic in May 2015 and submitted as the Claimants' evidence in the present proceedings is, on its face, the letter of a non-owner.³⁵⁸ The letter is a proposal to a domestic private investor who purchased shares in BD Agro for financing alongside with proposal how to secure the company's future loan to BD Agro. It offers various possible models of cooperation between Rand Investments and BD Agro, subject to the “adequate security” of Rand Investments' financial commitments:

“The providing of any financial support to BD Agro would be based on the needs and condition of the company from time to time and structured to be mutually beneficial to us and BD Agro (possibilities may include loans, strategic partnerships, various models of business cooperation, investments into equity of BD Agro, etc.). In any case, any chosen model of cooperation would have to provide us with adequate security for our investment while

³⁵⁶ Ibid.

³⁵⁷ Ibid., (emphasis added).

³⁵⁸ Letter from Rand Investments to I. Markićević dated 7 May 2015, **CE-350**.

*enabling BD Agro to duly settle its financial obligations towards creditors under the adopted pre-packed plan of reorganization.”*³⁵⁹

274. Likewise, in communication between Mr. Markicevic and various officials of the Privatization Agency and the Ministry of Economy between 2013 and 2015 Mr. Rand was regularly referred to as a Canadian investor ready to invest in consolidation of BD Agro³⁶⁰ or as the Canadian investor who “...expressed serious interest in taking over the majority shareholding in BD Agro...”³⁶¹ in case the issue of ownership over BD Agro was solved.³⁶² Again, the issue of the alleged already existing ownership of BD was not raised in those letters.
275. Consequently, sequence of events and documents on the record lead to two conclusions. First, the beneficial ownership theory is a mere construct offered by Claimants in an attempt to overcome imperative rules imposed by Serbian legislation on acquisition and transfer of shares and designed to circumvent the jurisdictional obstacle in the present dispute. Second, Mr. Rand *did* attempt to obtain the ownership of BD Agro beginning with the summer of 2013, at the time the Privatization Agency was already consistently maintaining that Mr. Obradovic had breached the Privatization Agreement.

1.1.3. The issue of the alleged Mr. Rand’s control over BD Agro

276. The other element of Claimants’ two-prong approach is the assertion that Mr. Rand *controlled the entirety of the investment*.³⁶³ In Claimants’ view, this alone is enough to satisfy the jurisdictional threshold of the Canada-Serbia BIT.³⁶⁴ The assertion is incorrect and unsupported by the facts of the case.
277. Control over the property (the shares) necessarily depends on the legal capacity of the controller. If such legal capacity is missing, there is no control, direct or indirect, within the meaning of the BIT.

³⁵⁹ Ibid., p. 1.

³⁶⁰ Letter from BD Agro to Privatization Agency dated 2 July 2015, **CE-46**.

³⁶¹ Letter from BD Agro to the Ministry of Economy and Privatization Agency dated 5 November 2014, p. 1, **CE-320**.

³⁶² Letter from BD Agro to the Privatization Agency dated 13 August 2014, **CE-316**.

³⁶³ Memorial, para. 308.

³⁶⁴ Ibid.

278. For instance: “*It would be meaningless for a claimant to assert that it is the de facto owner of the land that constitutes its investment or has some other form of de facto control in respect thereof. Either the claimant has a power to control that property that is recognized by the lex situs or it does not.*”³⁶⁵

279. Put differently – control is not an alternative to ownership for the purpose of jurisdictional requirements in Article 1 of the Canada – Serbia BIT.

280. That is the position stated by the *Aguas del Tunari v. Bolivia* tribunal which interpreted the meaning of the phrase “controlled directly or indirectly” from the Netherlands – Bolivia BIT in the following manner:

“As to the context in which the phrase —”controlled directly or indirectly” is found, the Tribunal notes that Article 1 in defining the concept of —”national” not only defines the scope of persons and entities that are to be regarded as the beneficiaries of the substantive rights of the BIT but also defines those persons and entities to whom the offer of arbitration is directed and who thus are potential claimants. Given the context of defining the scope of eligible claimants, the word —”controlled” is not intended as an alternative to ownership since control without an ownership interest would define a group of entities not necessarily possessing an interest which could be the subject of a claim. In this sense, —”controlled” indicates a quality of the ownership interest.”³⁶⁶

281. In the case at hand, neither the SPA nor the agreements concluded between Sembi and Mr. Obradovic ³⁶⁷ gave the Canadian Claimants the ownership of BD Agro’s shares and legal capacity to control BD Agro in accordance with Serbian law.

282. The only authority the Claimants rely on in support of their argument is the decision of the *Caratube v. Kazakhstan* Annulment Committee.³⁶⁸ However, the *Caratube* Annulment decision does not help their case for several reasons.

³⁶⁵ Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, p. 301; **RLA-4** (footnotes omitted and emphasis added).

³⁶⁶ *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, para. 242; emphasis added, **RLA-10**.

³⁶⁷ See Section III.A.1.1.2.

³⁶⁸ Memorial, para. 309.

283. First, the *Caratube* Annulment Committee confirmed the finding of the tribunal that the nominal ownership over the investment was not enough for the claimant to prove that he “owned or controlled” the investment in particular case, since he did not actually exercise rights given by the nominal ownership. In the words of the *Caratube* tribunal:

*“The Tribunal is not satisfied that a legal capacity to control a company, without evidence of an actual control, is enough in light of Devinci Hourani’s characterisation of his purported investment in CIOC.”*³⁶⁹

284. Thus, the tribunal declined jurisdiction because the nominal owner of the company did not engage into actual control of the investment. It did not find that a natural or juridical person who does not own an investment can be considered an investor based exclusively on informal, *de facto* control. In other words, the requirement of control has been used as a shield – to deny jurisdiction in the absence of it, not as a sword – to accept jurisdiction when the legal ownership over the investment does not exist. Claimants’ reliance on the decision is, therefore, entirely misplaced.

285. Second, the *Caratube* Annulment Committee established that the nominal ownership of shares creates a presumption of control:

*“Control is a factual element. The ownership of a majority of the share capital, granting the capacity to cast a majority of the votes, constitutes circumstantial evidence of control and even creates a presumption of control.”*³⁷⁰

286. The existence of such assumption was also accepted by the *Occidental v. Ecuador* Annulment Committee:

“It is a fact that OPC is the indirect owner of 100% of the shares in OEPC, and that both are U.S. corporations. There is a general presumption that a majority shareholder also controls the company, a presumption which can

³⁶⁹ *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, June 5, 2012, para. 407, **RLA-11**.

³⁷⁰ *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, para. 255, **CLA-16**.

only be rebutted if there are special elements which create doubts about the owner's control – and Ecuador has pled no such special elements.”³⁷¹

287. In any event, even if the *Caratube* rationale would be relevant for the present dispute – which it is not – there is abundant evidence that it was Mr. Obradovic who acted both as the nominal and beneficial owner of BD Agro.

288. As publicly available documents show, Mr. Obradovic has never hesitated to emphasize the scope of his investment in BD Agro and other business ventures in Serbia. In May 2009, in an interview given to a daily newspaper, reacting to assertions of minority shareholders that he had incurred damage to BD Agro through various misdoings, Mr. Obradovic stated:

*“I am clean before the law! The Tax Authority is aware of that! I have never, since I bought the farm, paid any fine. As an owner of 80 percent of shares I am under no legal obligation to buy shares from minority shareholders.”*³⁷²

289. On a different occasion, voicing his discontent with the State policy with regard to subsidies of milk producers, Mr. Obradovic leaves no doubt that he was the owner of 6000 acres of land in Serbia. According to Mr. Obradovic, he had invested 72 million Euros in BD Agro, including profits from all of his other companies.³⁷³

290. Likewise, it was Mr. Obradovic who in September 2015 threatened to submit a claim against Serbia in accordance with the Canada – Serbia BIT ³⁷⁴ and it was him who commenced a civil lawsuit against the Privatization Agency for the allegedly wrongful termination of the Privatization Agreement.³⁷⁵

291. However, more important than his public statements is the economic reality that unequivocally proves Mr. Obradovic's position of the BD Agro's owner. As it was

³⁷¹ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, November 2, 2015, para. 104, **CLA-5**.

³⁷² “Minority Shareholders accuse the owner of BD “Agro” Djura Obradovic for theft and misdeeds” (Mali akcionari optužuju vlasnika BD “Agro” Đuru Obradovića za pljačku i zloupotrebe), Kurir, 24 May 2009; emphasis added, **RE-109**.

³⁷³ “The Minister said th at he does not feed tycoons” (Ministar je rekao da ne hrani tajkune), Politika, 3 March 2010; **RE-110**.

³⁷⁴ Letter from Mr. Obradovic to the Privatization Agency dated 8 September 2015, p. 6; **CE-48**.

³⁷⁵ Witness Statement of Djura Obradović dated 20 September 2017, para. 30.

shown above, BD Agro was stripped of its assets with exceptional efficiency – a significant portion of those assets were used as collateral for debts of other Mr. Obradovic’s companies or ended up, in one form or the other, as his personal property.³⁷⁶

292. In conclusion – the SPA could not and did not establish any kind of ownership (beneficial or otherwise) over the shares of BD Agro for Mr. Rand. As a result, the “beneficially owned shares” cannot be deemed as Mr. Rand’s protected investment under the Canada-Serbia BIT. Furthermore, the alleged *de facto* control that Mr. Rand supposedly exercised over Mr. Obradovic and his company does not meet the jurisdictional requirements of the Canada – Serbia BIT. Finally, the record in this arbitration shows that it was in fact Mr. Obradovic who controlled the business of BD Agro.

1.1.4. The Agreements concluded between Sembi and Mr. Obradovic did not create the right of ownership of BD Agro’s shares for the Canadian Claimants

293. According to Claimants, since 22 February 2008 until 21 October 2015 the „direct beneficial owner“ of BD Agro shares was Sembi, a company incorporated in Cyprus.³⁷⁷ If one would follow the logic employed here by the Claimants, this would give the Canadian Claimants “indirect“ beneficial ownership of BD Agro shares, based on the fact that the owners of Sembi are Mr. Rand, Rand Investments (owned in turn also by Mr. Rand) and the Ahola Family Trust (acting as a trustee for the benefit of Mr. Rand’s family members).³⁷⁸
294. However, this would also mean that the ownership of Canadian Claimants over BD Agro’s shares depends on the existence of “direct beneficial ownership“ of Sembi. In other words – if Sembi did not acquire the ownership of BD Agro, that renders the indirect ownership of the Canadian Claimants (Mr. Rand, Rand Investments, Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand) non-existent as well.

³⁷⁶ See Section II.E.1.; see, also, Expert Report of Sandy Cowan, Appendix 7.

³⁷⁷ Memorial, paras. 46, 47.

³⁷⁸ Ibid., paras. 48-54.

295. The existences of ownership rights of both Sembi and Canadian claimants is contingent upon the validity of two agreements submitted by the Claimants as exhibits CE-28 and CE-29 (hereinafter: the Sembi Agreements). For the reasons explained in detail below,³⁷⁹ the Sembi Agreements are null and void *ab initio* and could not affect the ownership of BD Agro's shares in any way.

1.2. The Canadian Claimants have never acquired "indirect interests" in Sembi's rights under the agreement between Sembi and Mr. Obradovic

296. Claimants assert that the "investment operation" of the Canadian Claimants include, *inter alia*, their "indirect interest" in Sembi's rights under the agreement between Sembi and Mr. Obradovic.³⁸⁰

297. As a preliminary matter, it is not clear whether Claimants argue that such indirect interest could be seen as "protected investment" under Article 1 of the Canada – Serbia BIT alone and of itself, without the Canadian Claimants' title on BD Agro's shares.³⁸¹

298. Furthermore, the Claimants omit to explain to which interest precisely they are referring to. Contractual rights and obligations belong to contractual parties and the Canadian Claimants were not parties to the agreement between Sembi and Mr. Obradovic. Contractual rights under the said agreement do not belong to the Canadian Claimants and do not represent their investment in the meaning of Article 1 of the Canada-Serbia BIT.

299. In any event, even if the acquisition of "indirect" contractual interest in the agreement would be possible, it would still depend on the validity of such agreement. However, the agreement concluded between Sembi and Mr. Obradovic on 22 February 2008 is null and void and did not result in transfer of any interest from Mr. Obradovic to Sembi.

300. The purpose of the said agreement was for Mr. Obradovic to assign "all of his right, title and interest" in the Privatization Agreement to Sembi.³⁸² The assignment of

³⁷⁹ See Section III.A.2.1.1.

³⁸⁰ Memorial, para. 299.

³⁸¹ Ibid., para. 298.

³⁸² The Agreement between Sembi and Mr. Obradovic of 22 February 2008, paragraph 4; **CE-29**.

rights and duties under the Privatization Agreement was possible only upon the previous approval of the Privatization Agency. This was envisaged by the Law on Privatization in force at the relevant time:

“Article 41Ž

The buyer of the capital (hereinafter: Assignor) may assign the capital sales agreement to a third party (hereinafter referred to as: Receiver), under the conditions stipulated by this law and the law governing contractual obligation relations, with prior approval of the Agency.”³⁸³

301. Therefore, an assignment of rights and duties without approval (and in this case without the knowledge) of the Privatization Agency was in breach of the Law and Privatization and without any legal effect.
302. The fact that the transfer of “right, title and interest” from the Privatization Agreement demands prior approval was well known to the Claimants, since the record shows that they attempted to obtain such approval in connection to the agreement between Coropi and Mr. Obradovic.³⁸⁴
303. Thus, the agreement between Sembi and Mr. Obradovic could not result in transfer of Mr. Obradovic’s interest in the Privatization Agreement, any more than it could transfer the ownership of BD Agro’s shares to Sembi.³⁸⁵ Consequently, no indirect interest of the Canadian Claimants could emerge from the Sembi-Obradovic agreement.
304. The fact that the agreement between Sembi and Mr. Obradovic contains a choice of law clause designating the Cypriot law as applicable bears no importance – the only law applicable to the issue of whether the property rights (contractual rights included) enjoying protection under the BIT were validly created is the Respondent’s law.³⁸⁶

³⁸³ 2001 Law on Privatization, **CE-220**.

³⁸⁴ See Section II.D.

³⁸⁵ See Section III.A.2.1.1.

³⁸⁶ See Section III.A.1.1.1. and III.A.2.1.1.

1.3. Mr. Rand's payments for the benefit of BD Agro are not protected investment under the Canada – Serbia BIT

305. Claimants allege that Mr. Rand has made “*direct payments to BD Agro’s Canadian suppliers for the purchase and transport of heifers and other payments and loans for the benefit of BD Agro.*”³⁸⁷ According to Claimants, those payments and loans qualify as an investment under the Canada – Serbia BIT.³⁸⁸ However, these payments do not themselves constitute “*covered investment*” under the BIT.

306. As it was shown previously, Mr. Rand has never been the owner of BD Agro. Financing the investment owned by other entity or a person is not an investment itself. This was the conclusion of the *Burimi v. Albania* tribunal:

*“With respect to Burimi SRL’s alleged ownership of the 35 percent shareholding of Eagle Games, Claimants argue that the financing agreement and the share pledge agreement between Ms. Alma Leka and Burimi SRL together constitute an investment by Burimi SRL in Eagle Games. However, the financing agreement—by which Burimi SRL financed Ms. Alma Leka’s share purchase in exchange for 90 percent of the profits she would receive—does not represent ownership by Burimi SRL of Eagle Games. Rather, it represents a private, contractual loan agreement between Burimi SRL and Ms. Alma Leka, a private citizen, to finance investments belonging to her.”*³⁸⁹

307. In yet another award, an ICSID tribunal opined that payments themselves do not constitute “investments” if such payments did not lead to the acquisition of an asset:

“In the Tribunal’s view, Claimants’ focus on these expenditures is misguided in the context of jurisdictional objections. Claimants appear to be confusing the concept of an “investment” that is protected by the BIT (and that is subject to arbitration under the ICSID Convention) with the layman’s financial or economic notion of an “investment” as money expended in

³⁸⁷ Memorial, para. 299.

³⁸⁸ Ibid., para. 307.

³⁸⁹ *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Award, 29 May 2013, para. 144 (footnotes omitted; emphasis added), **RLA-12**.

expectation of a return. This may be a function of terminology—the word “investment” is common usage in both contexts.

But the investment that must be identified for purposes of establishing the Tribunal’s jurisdiction is of a specific kind. Article 1(1) of the BIT provides that “[t]he term ‘investment’ shall comprise all kinds of assets . . .” Thus, it is necessary to identify an “asset” to constitute an investment that is protected by the Treaty (provided all other jurisdictional requirements are met) ... It is the asset acquired by an investor, typically as a result of such payments, that is the investment—be it tangible, such as an enterprise or real property, or intangible, such as claims to money or claims to performance (as here). Accordingly, the Tribunal does not accept Claimants’ contention that their past payments toward the operation or repair of the Khersones, as such constitute investments protected under the Treaty on which this Tribunal’s jurisdiction may be founded.”³⁹⁰

308. Therefore, Mr. Rand’s payments and other expenditures with respect to BD Agro cannot constitute “*covered investment*”, in and of themselves, within the meaning of Article 1 of the Canada – Serbia BIT, since those expenditures did not lead to the acquisition of any assets.
309. In addition, Mr. Rand’s payments for the purchase and transport of heifers were acknowledged as his claim towards BD Agro in the bankruptcy proceedings.³⁹¹ The obvious conclusion is that Mr. Rand himself did not characterize those payments as an investment into BD Agro’s capital, but as a ground for *quasi*-contractual liability of the debtor. Since the payments were not based on any contract between BD Agro and Mr. Rand, the claim of Mr. Rand was reported as a claim arising out of carrying out the transaction of another person, without order or authority, in accordance with Article 220 of the Serbian Law on Obligations.³⁹² As such, the claim squarely fits

³⁹⁰ *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, paras. 100, 101.; emphasis added, **RLA-13**.

³⁹¹ Commercial Court in Belgrade Decision number 9. St-321/2015 (30 March 2018), Decision on the List of Determined and Contested Claims, p.2 (English translation), **CE-136**.

³⁹² *Ibid.* See Article 220 of the Law on Obligations, **RE-32**.

into exception envisaged by Article 1(l) of the Canada – Serbia BIT: “*other claim to money*” not falling under the definition of “investment”.³⁹³

2. Sembi’s “investment” is not protected under the Cyprus – Serbia BIT

310. Jurisdiction of the Tribunal, by virtue of Article 9(1) of the Cyprus – Serbia BIT, is limited to disputes about investments as defined in the BIT itself:

*“Disputes between one Contracting Party and an investor of the other Contracting Party in relation to an investment for the purpose of this Agreement, shall be submitted in written form, with all detailed information, by the investor of the other Contracting Party. Where possible, the parties shall endeavor to settle these disputes amicably.”*³⁹⁴

311. In turn, Article 1(1) of the BIT defines “investment” in the following manner:

*“The term “investment” shall mean any kind of assets invested by investor of one Contracting Party in the territory of the other Contracting Party in accordance with its laws and regulations and in particular, though not exclusively, shall include...”*³⁹⁵

312. As the provision clearly demonstrates, there are four requirements for the existence of “investment” that is afforded protection under the Cyprus – Serbia BIT: an investor must acquire assets (1); assets must be invested (2) in the territory of the other Contracting Party (3) in accordance with its laws and regulations (4).

313. The Respondent respectfully submits that none of those requirements are present in the case at hand. The current section of the Respondent’s submission deals with the non-existence of the first three requirements. The lack of the fourth requirement will be elaborated within the Respondent’s *ratione voluntatis* objection.

³⁹³ See Article 1(k) and 1(l) of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CLA-1**.

³⁹⁴ Article 9(1) of the Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments; emphasis added, **RLA-130**.

³⁹⁵ Article 1(1) of the Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **RLA-130**.

2.1. Sembi did not acquire any assets in Serbia

314. According to the Claimants' submission, Sembi invested in Serbia by acquiring the beneficial ownership of BD Agro's shares and Mr. Obradovic's interest vested in the Privatization Agreement. The acquisition was supposedly based on two agreements concluded between Sembi and Mr. Obradovic on the same day – 22 February 2008. However, Sembi has never acquired shares of BD Agro under the applicable law. Furthermore, it has not acquired any interest of Mr. Obradovic under the Privatization Agreement.
315. Before going into specifics it should be noted, as a preliminary matter, that there is no independent corroboration of the fact that the agreements were ever concluded. Other shareholders of BD Agro, general public and competent authorities in Serbia were never notified about the documents. The entire record of BD Agro's privatization contains no mention of Sembi Investment Limited. Unlike with Coropi, the Privatization Agency was never requested to allow assignment of the Privatization Agreement to Sembi. The Sembi agreements were not court-certified or notarized which raises the question when the documents were created.
316. Since Sembi has never been used as a vehicle for the direction and management of BD Agro's business, the only conceivable purpose of those documents would be to serve as a jurisdictional basis under the Cyprus – Serbia BIT. Namely, Claimants advance two claims that are fundamentally dependent on the most favoured nation clause from the Cyprus – Serbia BIT.³⁹⁶ Those claims could not be submitted if only the MFN clause from the Canada – Serbia BIT would apply.³⁹⁷

2.1.1. Sembi did not acquire shares of BD Agro

317. Just as it is the case with the Canadian Claimants' alleged investment under the Canada – Serbia BIT, the existence and acquisition of a property right that enjoys protection under the Cyprus – Serbia BIT depends exclusively on requirements contained in the legislation of the Host State, *i.e.* Serbian legislation. As it has

³⁹⁶ See Sections VI.B. and VI.D. of Memorial.

³⁹⁷ See the temporal reservation from Annex III(1) of the Canada – Serbia BIT.

already been submitted by the Respondent the rule is firmly established in the practice of investment tribunals.³⁹⁸

318. Consequently, in order to prove that it made “investment” within the meaning of Article 1(1) of the Cyprus – Serbia BIT, Sembi first needs to establish that it acquired the relevant property right (i.e. ownership of BD Agro’s shares) under Serbian legislation. However, the Claimants are unable to achieve this goal for two main reasons. First, the agreements between Sembi and Mr. Obradovic could not create any effect when it comes to the ownership of BD Agro’s shares and, second, it was impossible for Mr. Obradovic to transfer his ownership of shares to both MDH in 2005 and to Sembi in 2008.

a) Agreements concluded between Sembi and Mr. Obradovic had no effect with regard to the ownership of BD Agro’s shares

319. The argument about Sembi’s “direct” beneficial ownership of BD Agro’s shares is based on the effects of the two agreements allegedly concluded on 22 February 2008.
320. The first agreement was concluded between Mr. Obradovic, the Lundin Family, Mr. Rand and Sembi (the First Sembi Agreement). By virtue of this agreement, Sembi (denoted as “Purchaser”) declared its intention to acquire “all of interest in BD Agro from Mr. Obradovic” and to provide funds to Mr. Obradovic in order to enable him to repay the loan that Mr. Obradovic had obtained from the Lundin Family.³⁹⁹ Mr. Rand assumed the role of guarantor with regards the obligations of the Purchaser (Sembi) and Mr. Obradovic towards the Lundin Family.⁴⁰⁰ The agreement contains a choice of law clause in favor of Serbian law.⁴⁰¹
321. The second agreement (the Second Sembi Agreement) was concluded between Sembi and Mr. Obradovic. It contains reference to the First Sembi Agreement and explains that the funds borrowed from the Lundin Family were used by Mr.

³⁹⁸ See Section III.A.1.1.1. and III.A.2.1.1

³⁹⁹ Agreement between Dj. Obradović, The Lundin Family, W. Rand and Sembi dated 22 February 2008, para. C; **CE-28**.

⁴⁰⁰ Agreement between Dj. Obradović, The Lundin Family, W. Rand and Sembi dated 22 February 2008, paras E and 5; **CE-28**.

⁴⁰¹ Agreement between Dj. Obradović, The Lundin Family, W. Rand and Sembi dated 22 February 2008, para. 11; **CE-28**.

Obradovic to acquire BD Agro in the privatization process.⁴⁰² Mr. Obradovic agreed to transfer all of his “*right, title and interest*” in the Privatization Agreement in exchange for Sembi’s obligation to repay his debt to the Lundin Family and to the Privatization Agency.⁴⁰³ The Second Sembi Agreement contained a clause designating the Cypriot law as applicable.⁴⁰⁴

322. The underlying purpose of both agreements was for Sembi to acquire BD agro from Mr. Obradovic. However, the agreements were simply unable to produce any effect on the ownership of BD Agro’s shares.
323. The First Sembi Agreement could not result in any change with respect to the ownership of BD Agro’s shares under Serbian law. The fact that Mr. Milosevic, Claimants’ legal expert, now interprets the First Sembi agreement as an agreement on accessing debt (based on Serbian the Law on Obligations)⁴⁰⁵ is entirely off the point.
324. Whether the Lundin Family can, under the said agreement, hold Sembi or Mr. Rand responsible for debts of Mr. Obradovic and enforce its rights is completely irrelevant. The crucial point is that the First Sembi Agreement is not enforceable when it comes to the other, crucial part of the bargain – Sembi could never become the owner of BD Agro’s shares using the agreement as a valid ground for acquisition.⁴⁰⁶ This is so since, as will be discussed below, the acquisition and transfer of ownership over the shares in a joint stock company incorporated in Serbia were, at the time, regulated through the series of laws specifically forbidding transfer of shares in the manner envisaged by the First Sembi Agreement.
325. The same can be said for the Second Sembi Agreement. The intended result of the agreement was to transfer the title over BD Agro’s shares from Mr. Obradovic to Sembi. Such transfer would be in conflict with imperative rules of Serbian legislation, leaving the agreement null and void and without any legal effect.⁴⁰⁷

⁴⁰² Agreement between Dj. Obradović and Sembi dated 22 February 2008, paras. C and 1; **CE-29**.

⁴⁰³ Agreement between Dj. Obradović and Sembi dated 22 February 2008, paras. 1-4, **CE-29**.

⁴⁰⁴ Ibid., para. 9.

⁴⁰⁵ Miloš Milošević Expert Report dated 16 January 2019, para. 135.

⁴⁰⁶ Expert Report of Professor M Radovic, paras. 100. 101.

⁴⁰⁷ Ibid., paras. 81, 92. See, also, the Decision of The Supreme Court of Serbia, Prev. 438/2007, March 19, 2008, **RE- 2**.

326. The fact that the Second Sembi Agreement designates the Cypriot law as applicable has no relevance. As it was demonstrated above, a property right protected under international law must be created and defined by national law of the Host State.⁴⁰⁸
327. At the time the Second Sembi Agreement was concluded the relevant rules of Serbian law were essentially the same as the rules governing the acquisition and transfer of shares in force during the transaction between MDH and Mr. Obradovic recorded in the 2005 SPA.
328. A slight change in legislation⁴⁰⁹ did not affect the main features of the system: the ownership over the shares could be acquired exclusively through the registration of the ownership in the Central Securities Registry.⁴¹⁰ Transfer of rights pertaining to shares and other securities was possible only by transferring securities into the account of the new owner.⁴¹¹ Sale and purchase of shares was allowed, with minor exceptions, only in the organized market.⁴¹² Finally, takeovers of joint stock companies were possible through the publication of a takeover bid which would allow for the equivalent treatment of all shareholders.⁴¹³
329. Therefore, neither the First nor the Second Sembi Agreement could give Sembi the ownership of BD Agro's shares. The beneficial owner theory advanced by Claimants is simply an attempt to circumvent Serbian legislation on trading of shares. The whole purpose of organized market for sale and purchase of shares in Serbia, just as in any other country in the world, is precisely to avoid and prevent the kind of situations that the Tribunal is forced to deal with here – an entity which is unable to prove its legal ownership over the shares of a joint stock company claims that it is the owner all the same. Respondent respectfully requests that the Tribunal does not allow such outcome.

⁴⁰⁸ See *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, March 9, 2017, paras, 168, 170, **RLA-2**; See, also, Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, p. 52, **RLA-4**.

⁴⁰⁹ The most significant change introduced by the new Law on Market in Securities and other Financial Instruments (2006) was the fact that the Law did not regulate the procedure for takeover of joint stock companies. The issue was left for the newly introduced Law on Takeovers of Joint Stock Companies, **RE-121**.

⁴¹⁰ Article 19(1) of the 2006 Law on Market in Securities and other Financial Instruments, **RE-111**.

⁴¹¹ Article 19(3) of the Law on Market in Securities and other Financial Instruments (2006), **RE-111**.

⁴¹² Article 51 of the Law on Market in Securities and other Financial Instruments (2006), **RE-111**.

⁴¹³ Article 3(1) and 3(2) The Law on Takeovers of Joint Stock Companies, **RE-121**.

b) Mr. Obradovic could not have transferred his ownership to both MDH and Sembi

330. Without prejudice to what has been stated above, Respondent submits that it was impossible for Mr. Obradovic to transfer his “beneficial ownership” of BD Agro’s shares to both MDH (Mr. Rand) and to Sembi.
331. It is when it comes to Sembi’s alleged acquisition of BD Agro’s shares that Claimants’ argument becomes contradictory, confusing and even absurd.
332. Even if the Second Sembi Agreement could have any legal effect, it would not result in transfer of ownership over the shares to Sembi. Under the theory argued by Claimants, Mr. Obradovic had already transferred his beneficial ownership of shares to Mr. Rand (or rather to MDH).⁴¹⁴ If this would be true and if MDH had indeed acquired ownership over BD Agro’s shares from Mr. Obradovic in 2005, Mr. Obradovic would not be able to transfer his “beneficial ownership” over the shares twice – this time to Sembi, almost three years after he supposedly sold his shares to another purchaser.
333. Quite simply: Mr. Obradovic could not sell what he did not own - *Nemo dat quod non habet*. It is Claimants’ assertion that the beneficial owner of BD Agro’s shares from October 2005 was Mr. William Rand.⁴¹⁵ However, Sembi did not conclude the agreement with Mr. Rand but with Mr. Obradovic. Claimants’ argument is, thus, inconsistent and contradictory even on its face. Sembi did not acquire the BD Agro’s shares. Consequently, this defeats the argument about the alleged “indirect beneficial ownership” of the Canadian Claimants.
334. Claimants’ argument with regard to the alleged Sembi’s investment defeats itself in another, different way. The purpose of the beneficial ownership doctrine is precisely to “pierce a corporate veil” *i.e.* to establish the ultimate or the real/economic owner of a company. The notion by definition excludes the interpretation offered by Claimants – that each and every entity or person up the corporate chain can be

⁴¹⁴ Memorial, para. 70.

⁴¹⁵ Ibid., para. 41.

regarded as a beneficial owner of an asset. There can be no “direct” and “indirect” beneficial owners.⁴¹⁶

335. As it was submitted by Claimants themselves,⁴¹⁷ relying on the *Occidental* Annulment decision, the notion applies when the legal title is split between “*a nominee and a beneficial owner*.”⁴¹⁸ Assuming, *arguendo*, that the theory advanced by Claimants is accepted and that Mr. Obradovic was indeed only a nominal owner of BD Agro’s shares, this would mean that the beneficial ownership could be vested in either Sembi or its ultimate owner. It is impossible that Sembi, its shareholders (Rand Investments and Ahola Family Trust)⁴¹⁹ and Mr. Rand (who is the shareholder of Rand Investments)⁴²⁰ hold the position of beneficial owners simultaneously. Claimants simply cannot have their cake and eat it.

336. Based on foregoing, Sembi has never acquired the ownership of BD Agro’s shares.

2.1.2. Sembi did not acquire Mr. Obradovic’s “right, title and interest” in the Privatization Agreement

337. Claimants assert that Sembi’s investment comprises of “*the claims to...other performance under contract having economic value*.”⁴²¹ This would entail that, by virtue of the Second Sembi Agreement, Sembi has assumed the role of Mr. Obradovic in his agreement with the Privatization Agency. However, Sembi has never acquired Mr. Obradovic’s “*right, title and interest*” in the Privatization Agreement. Consequently, it has never held any “*claim to performance*” towards the Privatization Agency.

338. As it was already established, Sembi could take up the position of Mr. Obradovic in his contractual relationship with the Privatization Agency only upon prior approval of the Agency.⁴²² This is the requirement of the Law on Privatization that was well known to Claimants, since the representative of Rand Investments was engaged in

⁴¹⁶ See Witness Statement of William Rand dated 5 February 2018, para. 31.

⁴¹⁷ Memorial, para. 303.

⁴¹⁸ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* ICSID Case No. ARB/06/11, Decision on Annulment of the Award, November 2, 2015, para. 259, **RLA-5**.

⁴¹⁹ Memorial, para. 49.

⁴²⁰ *Ibid.*, para. 45.

⁴²¹ *Ibid.*, para. 315.

⁴²² 2001 Article 41ž(1) of the Law on Privatization , **CE-220**.

discussions with the Privatization Agency on the possible assignment of the Privatization Agreement to Coropi.⁴²³

339. Not only Sembi did not obtain such approval but it has not even requested it. In fact, during the entire course of the contractual relationship between Mr. Obradovic and the Privatization Agency, the Agency has never learned about the existence of Sembi. Mr. Obradovic has never notified the Privatization Agency that he attempted to transfer his rights and obligations from the Privatization Agreement to the Cypriot company.
340. Likewise, throughout the discussions on assignment between 2013 and 2015, representatives of BD Agro and of Rand Investments have not seen fit to warn the Privatization Agency that it should considered itself bound towards Sembi (and not Mr. Obradovic) in respect to the Privatization Agreement. The Second Sembi Agreement came up only in this arbitration, to serve the purpose of establishing the Tribunal's jurisdiction.
341. It should be reiterated once more that the designation of the Cypriot law as applicable to the Second Sembi Agreement bears no relevance⁴²⁴ – “*claims to...performance under contract*” that the Claimants are referring to in their submission are necessarily claims under the Privatization Agreement and the existence of those claims depends on the law applicable to that agreement which is indisputably Serbian law, i.e. the Law on Privatization.⁴²⁵ This is so even independently from the rule recognized in international law – that the existence of assets (intangible or tangible) comprising investment is contingent upon the national law of the State in which investment was made.

2.2. Sembi did not make an investment in the territory of Serbia

342. As it was already elaborated by the Respondent, in order to enjoy protection of the Cyprus – Serbia BIT, Sembi must prove that it invested in the territory of Serbia.⁴²⁶

⁴²³ See Section II.D.

⁴²⁴ Memorial, para. 316.

⁴²⁵ See recitals of the Privatization Agreement stating that the agreement was concluded “*in accordance with provisions of the Law on Privatization...*”, **CE-17**.

⁴²⁶ See Article 1(1) of the Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **RLA-130**.

343. Both of the requirements envisaged in the BIT (“*invested*” and “*in the territory of the other Contracting Party*”) necessarily imply the existence of *investment activities* by the putative investor.

344. In the practice of investment tribunals the term “*invested*” has been treated as a synonym for the term “*made*”.⁴²⁷ In *Standard Chartered Bank v. Venezuela* an ICSID tribunal concluded that making of investment requires an active involvement of an investor:

*“Having considered the ordinary meaning of the BIT’s provision for ICSID arbitration when a dispute arises between a Contracting State to the BIT and a national of the other Contracting State concerning an investment “of” the latter set out in Article 8(1) of the UK Tanzania BIT, the context of that provision and the object and purpose of the BIT, the Tribunal interprets the BIT to require an active relationship between the investor and the investment. To benefit from Article 8(1)’s arbitration provision, a claimant must demonstrate that the investment was made at the claimant’s direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner.”*⁴²⁸

345. The tribunal continued to state that:

*“Rather, for an investment to be “of” an investor in the present context, some activity of investing is needed, which implicates the claimant’s control over the investment or an action of transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to the other.”*⁴²⁹

346. In a similar vein, the tribunal in *Mera v. Serbia* found that “making investments” under the Cyprus – Serbia BIT comprises “...*more than the funding and acquisition of investments, but as well, the holding and management of investments.*”⁴³⁰

⁴²⁷ *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017, paras 157, 158, **RLA-14**.

⁴²⁸ *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case no. ARB/10/12, Award, 2 November 2012, para. 230; **RLA-15** (emphasis added).

⁴²⁹ *Ibid.*, para. 232; **RLA-15** (emphasis added).

⁴³⁰ *Mera Investment Fund Limited v. The Republic of Serbia*, Decision on Jurisdiction, 30 November 2018, para. 107; footnotes omitted; emphasis added, **CLA-22**.

347. Likewise, the territorial requirement revolves as well around the need of economic activities of an investor in the territory of the Host State. According to Jeswald W. Salacuse the requirement of territorial nexus is aimed at providing states with benefits in connection with foreign investments:

*“The rationale behind this practice is to ensure that the host state obtains the benefits from the operation of foreign investments within its territory, whether such benefits consist of obtaining new technologies, developing important economic sectors, creating new jobs, or collecting additional tax revenues.”*⁴³¹

348. This is why investment tribunals use the place of economic activity as a main criterion when establishing whether an investment was made in the territory of the respondent state.⁴³²

349. In the case at hand there is no evidence on the record that Sembi has ever invested anything of value in the territory of Serbia. Sembi allegedly obtained Mr. Obradovic’s rights in the Privatization Agreement by settling his debt towards the Lundin Family and by assuming some of his further debts. By virtue of the Second Sembi Agreement Sembi also took upon itself to pay the balance of the payments owed by Mr. Obradovic to the Privatization Agency in excess of 2 000 000 EUR.⁴³³ However, there is no evidence that Sembi has ever paid the balance to the Privatization Agency. In fact, all installments owed as a purchase price for the capital of BD Agro were paid by Mr. Obradovic himself.⁴³⁴

350. More importantly, no investment activity was ever conducted by Sembi in the territory of Serbia. There is no evidence that would even suggest any involvement of Sembi in the business activities of BD Agro. Sembi did not prove that it had made any expenditure for the benefit of BD Agro’s activities or that it had directed or managed business of the Serbian company in any way.

⁴³¹ Jeswald W. Salacuse, *The Law of Investment Treaties*, 2nd Edition, Oxford University Press, 2015, p. 188, **RLA-16**.

⁴³² See, for instance, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, paras. 279-281, **RLA-17**.

⁴³³ Agreement between Dj. Obradović and Sembi dated 22 February 2008, para. 3, **CE-29**.

⁴³⁴ Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic dated 15 October 2015, **RE-33**.

351. Therefore, even if it was possible for Sembi to acquire the ownership of BD Agro's shares or any other "*right, title or interest*" of Mr. Obradovic under Serbian law (which it was not), a passive ownership would not be enough to qualify Sembi's operation as an investment made in the territory of Serbia. To label Sembi even as only a shell company would be an overstatement of its role since it has never held the legal title over BD Agro's shares. The Respondent respectfully submits that granting Sembi the status of protected investor under the Cyprus – Serbia BIT would stretch the boundaries of protection far from the scope intended by the BIT.

B. THE TRIBUNAL DOES NOT HAVE JURISDICTION *RATIONE VOLUNTATIS* UNDER THE TREATIES

1. Respondent did not consent to arbitrate disputes about investments made in breach of its laws and regulations

352. As it was already elaborated above, under Serbian law as the law applicable to the issues of existence, validity and contents of property rights protected as investments under the Treaties, Claimants did not acquire any right of property that would enjoy protection. This fact deprives the Tribunal of jurisdiction *ratione materiae*.

353. Without prejudice to the *ratione materiae* objection, should the Tribunal find that the ownership of BD Agro's shares or contractual rights of Mr. Obradovic from the Privatization Agreement were acquired by any of Claimants, Respondent submits that their investment was made in breach of Respondent's law.

354. Various ICSID tribunals have so far found that the breach of the Host State's law in making of investment removes the offer to arbitrate previously given by the state.

355. For instance, the tribunal in *Fraport v. Philippines* award (*Fraport II*) stated:

"Based on the foregoing analysis and after due and thorough consideration of the Parties' arguments and the evidence on the record, the Tribunal finds that Fraport violated the ADL when making its Initial Investment, the latter being consequently excluded as investment protected by the BIT because of its illegality. The illegality of the investment at the time it is made goes to the root of the host State's offer of arbitration under the treaty... Lack of

jurisdiction is founded in this case on the absence of consent to arbitration by the State for failure to satisfy an essential condition of its offer of this method of dispute settlement.”⁴³⁵

356. The rationale of the rule was famously stated by the *Phoenix v. Czech Republic* tribunal: “*In the Tribunal’s view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws.*”⁴³⁶

357. The Cyprus – Serbia BIT contains an explicit requirement of legality within the definition of investment: “*The term "investment" shall mean any kind of assets invested by investor of one Contracting Party in the territory of the other Contracting Party in accordance with its laws and regulations...*”⁴³⁷

358. The fact that the Canada – Serbia BIT does not contain an explicit provision requiring that the investment was made in accordance with the laws and regulations of the respondent Party does not suggest that such Party agrees to arbitrate disputes from investments established in breach of its legislation. In the words of the *Mamidoil v. Albania* tribunal:

“As stated in the preliminary remarks, the Tribunal shares the widely-held opinion that investments are protected by international law only when they are made in accordance with the legislation of the host State. States accept arbitration and accept to waive part of their immunity from jurisdiction to encourage and protect investments in international conventions. In doing so, they cannot be expected to have agreed to extend that mechanism to investments that violate their laws; likewise, it cannot be expected that

⁴³⁵ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014, para. 467, **RLA-18** (emphasis added). See, also, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 207, **RLA-19**.

⁴³⁶ *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009, para. 101, **RLA-5**.

⁴³⁷ Article 1(1) of the Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **RLA-130**.

*States would want illegal investments by their nationals to be protected under those international conventions.”*⁴³⁸

359. The proposition that the legality requirement does not have to be explicitly stated in the text of the relevant treaty in order to apply has been widely accepted by other tribunals as well.⁴³⁹ Most recently, the notion of an implicit legality requirement was accepted by the tribunal in *Cortec v. Kenya*.⁴⁴⁰ In that case the tribunal suggested that an investment cannot enjoy protection if purported rights of an investor flow from the document which does not have any legal effect under the municipal law:

*“The Tribunal concludes that for an investment such as a license, which is the creature of the laws of the Host State, to qualify for protection, it must be made in accordance with the laws of the Host State. The claims do not relate to bricks and mortar, as earlier observed. The claimed rights flow from a document which has no legal existence or effect, and cannot therefore give rise to compensable rights.”*⁴⁴¹

360. In *Quiborax v. Bolivia*, the tribunal considered that there are two limitations of the legality requirement. According to the tribunal, the requirement is limited to (i) non-trivial violations of the host State’s legal order and (ii) to violations which occurred at the time the investment was made.⁴⁴²

361. At the time Mr. Rand allegedly made his investment (September/October 2005), as shown above, the transaction entered into by MDH and Mr. Obradovic was contrary

⁴³⁸ *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, para. 359, **RLA-20**.

⁴³⁹ See *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Final Award, para. 264, **RLA-21**; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014, para. 328, **RLA-18**; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 101, **RLA-5**; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, para. 138, **RLA-22**.;

⁴⁴⁰ *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award of the Tribunal, 22 October 2018, para. 333(a), **RLA-23**.

⁴⁴¹ *Ibid.*, para. 319.

⁴⁴² See *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 266, **RLA-24**.

to the Law on Market in Securities and other Financial Instruments (2002) and the Law on Privatization (2001).⁴⁴³

362. Likewise, the Second Sembi Agreement of 22 February 2008 by which Sembi supposedly acquired “direct” beneficial ownership of BD Agro’s shares and Mr. Obradovic’s rights and claims under the Privatization Agreement was concluded in breach of an entire set of Serbian laws: the Law in Market of Securities and other Financial Instruments (2006), the Law on Privatization (2001) and the Law on Takeovers of Joint Stock Companies (2006).⁴⁴⁴

363. Violations of Serbian legal order by the Claimants were by no means trivial. As explained above and in the expert opinion of Professor Radovic, the rules referenced here were of imperative nature and instrumental for the sound functioning of the Respondent’s market of securities.⁴⁴⁵

364. Consequently, even if it would be possible for Claimants to acquire assets that they consider as “investments” based on their transactions with Mr. Obradovic (which it was not), those transactions would still not enjoy any protection under the Treaties.

2. Respondent did not consent to arbitrate the claim with regard to MDH doo’s shareholding in BD Agro

365. According to the Claimants, their investment consists of, *inter alia*, the 3.9% shareholding in BD Agro held by Mr. Rand through MDH doo,⁴⁴⁶ a company incorporated under the laws of Serbia. It is the Claimants’ assertion that those shares were expropriated by the Respondent as a result of the Privatization Agreement’s termination and subsequent bankruptcy of BD Agro.⁴⁴⁷ It is, therefore, obvious that the alleged harm was inflicted directly on MDH doo. In such circumstances, the Canada – Serbia BIT requires that a potential claimant submits a waiver of local remedies issued by the company. Because Claimants failed to submit a proper

⁴⁴³ See Article 52 of the Law on Market in Securities and other Financial Instruments (2002), **RE-119**; Article 41ž(1) of the Law on Privatization (2001); **CE-220**.

⁴⁴⁴ See Article 51 of the Law on Market in Securities and other Financial Instruments (2006); **RE-11**; Article 41ž(1) of the Law on Privatization (2001); RE-; Article 3(1) and 3(2)The Law on Takeovers of Joint Stock Companies (2006); **CE-220**.

⁴⁴⁵ Expert Report of Professor M Radovic, para. 79.

⁴⁴⁶ Memorial, para. 299.

⁴⁴⁷ Memorial, paras. 387, 408.

waiver issued by MDH doo, Respondent's consent to arbitrate is nullified by virtue of Article 25 of the BIT.

366. Under the Canada – Serbia BIT, an investor of a Party can submit a claim for expropriation either on its own behalf or on behalf of an enterprise of the respondent Party:

“Article 21

Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise

[1] An investor of a Party may submit to arbitration under this Section a claim that:

(a) the respondent Party has breached an obligation under Section B, other than an obligation under Articles 8(3), 12, 15 or 16; and

(b) the investor has incurred loss or damage by reason of, or arising out of, that breach.

[2] An investor of a Party, on behalf of an enterprise of the respondent Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that:

(a) the respondent Party has breached an obligation under Section B, other than an obligation under Articles 8(3), 12, 15 or 16; and

(b) the enterprise has incurred loss or damage by reason of, or arising out of, that breach.”⁴⁴⁸

367. Therefore, when the alleged loss or damage was incurred by an enterprise of the respondent Party, an investor who owns the local enterprise cannot submit a claim *on his own behalf* for the harm suffered by the enterprise. More precisely, Mr. Rand cannot submit a claim on his own behalf, arguing that he is an “indirect owner” of assets belonging to MDH doo (in this case: shares of BD Agro).⁴⁴⁹ In such cases, the

⁴⁴⁸ Article 21 of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments; emphasis added, **CLA-1**.

⁴⁴⁹ See Memorial, para. 408.

BIT allows the investor to claim damages for the loss of his enterprise only if certain requirements are met.

368. Conditions precedent to submission of a claim to arbitration are listed in Article 22 of the Canada – Serbia BIT.

369. According to this provision, an investor is allowed to submit a claim on behalf of an enterprise of the respondent Party that he owns or controls only if that enterprise has consented to arbitration and has waived its right to initiate other dispute settlement procedures:

“Article 22

Conditions Precedent to Submission of a Claim to Arbitration

...

2. *An investor may submit a claim to arbitration under Article 21 only if:*

(a) the investor and, where a claim is made under Article 21(2), the enterprise, consent to arbitration in accordance with the procedures set out in this Agreement;

...

(f) in the case of a claim submitted under Article 21(2):

...

*(ii) both the investor and the enterprise waive their right to initiate or continue before an administrative tribunal or court under the domestic law of a Party, or other dispute settlement procedures, proceedings with respect to the measure of the respondent Party that is alleged to be a breach referred to in Article 21.*⁴⁵⁰”

⁴⁵⁰ Article 22(2)(a) and 22(2)(f)(ii) of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments; emphasis added, **CLA-1**.

370. Purpose of the waiver referred to above is to prevent double recovery and to eliminate the duplication of claims and proceedings.⁴⁵¹

371. It is undisputed between the parties that MDH doo is an enterprise incorporated under Serbian laws. It is also undisputed that it is MDH doo who is the owner of 3.9% of BD Agro's shares. Since it is the company (and not Mr. Rand) who owns the shares, it is MDH doo that could initiate proceedings before Serbian courts in order to obtain compensation for its shareholding interest. This could lead to double recovery (since both Mr. Rand and MDH doo could be awarded compensation for the company's shares) and it is precisely the kind of result that the provisions cited above are designed to prevent.

372. Furthermore, even if the claim with respect to the shareholding of MDH doo could be regarded as a claim submitted by Mr. Rand *on his own behalf* (under Article 21(1) of the BIT), a waiver of local remedies by MDH doo would still be necessary.

373. Article 22(2)(e) reads:

“2. An investor may submit a claim to arbitration under Article 21 only if:

(e) in the case of a claim submitted under Article 21(1):

(i) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby,

(ii) the investor waives its right to initiate or continue before an administrative tribunal or court under the domestic law of a Party, or other dispute settlement procedures, proceedings with respect to the measure of the respondent Party that is alleged to be a breach referred to in Article 21, and

(iii) if the claim is for loss or damage to an interest in an enterprise of the respondent Party that is a juridical person that

⁴⁵¹ *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Final Award, 18 January 2017, para. 294, **RLA-25**.

the investor owns or controls directly or indirectly, the enterprise waives the right referred to under subparagraph (ii);”

374. Under the unequivocal terms of the Canada – Serbia BIT, a claim of Mr. Rand with regard to the alleged expropriation of MDH doo’s shareholding in BD Agro can be considered by the Tribunal only if the Claimants have included the consent and the waiver of MDH doo in the submission of the claim to arbitration.⁴⁵² However, no such documents were delivered.
375. Consequences of Claimants’ failure to meet any of conditions envisaged in Article 22 of the Canada – Serbia BIT are spelled out in equally clear terms: an omission to follow the procedure from Article 22 nullifies the consent to arbitrate, thereby leaving the Tribunal without jurisdiction:

“Article 25

Consent to Arbitration

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement. Failure to meet a condition precedent listed in Article 22 nullifies that consent.”⁴⁵³

376. Bearing in mind what has been stated above, Respondent respectfully requests the Tribunal to conclude that it did not give its consent to arbitrate the claim with respect to MDH doo’s shareholding in BD Agro and to dismiss this claim accordingly.

C. THE TRIBUNAL DOES NOT HAVE JURISDICTION *RATIONE TEMPORIS* UNDER THE CANADA – SERBIA BIT

377. Respondent respectfully submits two separate *ratione temporis* objections. The first *ratione temporis* objection is based on Article 22 of the Canada – Serbia BIT. The second is based on the general principle of non-retroactivity envisaged by general

⁴⁵² Article 22(4) of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments; **CLA-1**.

⁴⁵³ Article 25(1) of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments; emphasis added; **CLA-1**.

international law and Article 28 of the Vienna Convention on the Law of Treaties (VCLT) in relation to Article 42 of the BIT.

378. Submission of these objections is without prejudice to other arguments raised by the Respondent for challenging jurisdiction or merits of Claimants' claims.

1. The Tribunal does not have jurisdiction because the three-year limitation period set forth in Article 22 of the BIT elapsed before the submission of the Claim to Arbitration

1.1. General

379. Article 22 of the BIT in relevant parts provides as follows:

“(e) in the case of a claim submitted under Article 21(1):

(i) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby,

(f) in the case of a claim submitted under Article 21(2):

(i) not more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage thereby...”

380. These are the cornerstone provisions of this BIT, which are parallel to the Canada Model BIT, the North American Free Trade Agreement (NAFTA)⁴⁵⁴ and several other international investment agreements. The Commentary of the Canada Model BIT describes the provisions on who may submit the claim (as Article 21 of the BIT, Articles 22 and 23 of the Canada Model BIT and Articles 1116 and 1117 of the NAFTA) and provisions on mandatory conditions for submitting such claim (as Article 22 of the BIT, Article 26 of the Canada Model BIT or Article 1121 of the NAFTA) in the following manner:

⁴⁵⁴ See Article 1116 and 1117 of the NAFTA, **RLA-26**.

*“Articles 22 and 23 [parallel to Articles 21 and 22 of the BIT] are key provisions in defining the scope of investor-State arbitration and the jurisdiction of an investor-State tribunal. First, these provisions define who can submit claims to arbitration *ratione personae*. An investor may submit a claim to arbitration on its own behalf or on behalf of a locally established ‘juridical person’ that the investor owns or controls directly or indirectly. Second, the listing of specific obligations defines the subject matter *ratione materiae* of the tribunal’s jurisdiction. Third, Articles 22(2) and 23(2), like the NAFTA, impose a three-year time limit *ratione temporis* for the making of claims.”*⁴⁵⁵

381. These are indeed key provisions because Article 24 of the BIT reiterates that only investor who meets the conditions under Article 22 (*Conditions Precedent to Submission of a Claim to Arbitration*) is entitled to submit a claim to arbitration:

“1. An investor that meets the conditions precedent in Article 22 may submit a claim to arbitration.”

382. The mandatory and categorical nature of these conditions, including the condition of the preclusive three-year limitation period, is unequivocally confirmed in Article 25 of the BIT:

“Article 25

Consent to Arbitration

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement. Failure to meet a condition precedent listed in Article 22 nullifies that consent.”

383. State’s consent to arbitration here is not unconditional as it may sometimes be the case in a variety of other BITs. Quite to the contrary, the consent depends on the fulfilment of all specifically agreed upon conditions prior to submitting the claim. This was aptly stated in the *Corona Materials v Dominican Republic* award in which the tribunal discussed the scope and meaning of Article 10.18 of Dominican

⁴⁵⁵ Céline Lévesque, Andrew Newcombe, Canada, in: Chester Brown (ed.), *Commentaries on Selected Model Investment Treaties*, Oxford University Press, 2013, p. 105, **RLA-1**.

Republic – Central America Free Trade Agreement (DR-CAFTA), the wording of which is identical to the relevant provisions of the Canada-Serbia BIT.⁴⁵⁶ The tribunal was categorical:

*“Having regard to the ordinary meaning of the terms, read in their context and in light of the Agreement’s object and purpose, the DR-CAFTA Parties have plainly conditioned their consents to arbitration. If a claimant does not comply with the conditions and limitations established in Article 10.18, its claim cannot be submitted to arbitration.”*⁴⁵⁷

384. Specific intent of the Parties to insert these conditions as mandatory and categorical is further confirmed by the commentary of the similar and new provisions in Canadian investment agreements:

*“It would appear that this express provision has been added to address conflicting NAFTA jurisprudence on whether procedural conditions for bringing a claim are also jurisdictional requirements. The additions to the Model can be explained in light of NAFTA arbitrations in which investor compliance with time and waiver requirements were at issue and in which tribunals suggested that non-compliance with procedural requirements should not be treated in an overly strict or technical manner. In contrast, the Model expressly provides that non-compliance with the required conditions nullifies consent, in which case the tribunal would have no jurisdiction.”*⁴⁵⁸

⁴⁵⁶ Dominican Republic – Central America Free Trade Agreement, **RLA-27**: Article 10.18.1

Conditions and Limitations on Consent of Each Party

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimants first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.1 6.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.

⁴⁵⁷ Corona Materials LLC v. Dominican Republic, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, para. 191, **RLA-28**.

⁴⁵⁸ Céline Lévesque, Andrew Newcombe, Canada, in: Chester Brown (ed.), *Commentaries on Selected Model Investment Treaties*, Oxford University Press, 2013, p. 109, **RLA-1**.

385. Therefore, failure to meet a condition precedent, including the preclusive three-year limitation period, which does not allow suspensions, extensions or other modifications,⁴⁵⁹ nullifies the consent.
386. This three-year limitation period provision is present in several international agreements so international investment tribunals did have opportunity to interpret the meaning, scope and relevance of this provision. The case law on the matter is abundant and consolidated: there are very few provisions in investment arbitration case law that has received such a uniform interpretation. The obligation of the investor to submit the claim within three years from the date s/he acquired knowledge of the breach and loss is strict and stringent not allowing for any suspensions, alterations or modification.
387. The recent case-law has plainly confirmed and solidified the mandatory character of the three-year period rule. In the *Corona Materials v Dominican Republic* case, the lack of jurisdiction was found precisely on the basis of the three-year limitation period. *Corona* Award finds that the treaty's limitation period clause is written in plain terms and does not contemplate the suspension or “tolling” of the three-year period. In interpreting Article 10.18.1. of the DR-CAFTA the tribunal relied on identical provisions in other treaties such as NAFTA. *Corona* tribunal confirmed that NAFTA tribunals described NAFTA’s limitation period as “*clear and rigid*” and not subject to any “*suspension, prolongation, or other qualification*”.⁴⁶⁰
388. In *Ansung v China* the tribunal upheld the respondent’s jurisdictional objection based on the limitation period found in Article 9(7) the China-Korea BIT.⁴⁶¹ It dismissed the claimant’s claim as “manifestly without legal merit” on the basis of Rule 41(5) of the ICSID Rules for being time-barred. So the *Ansung* tribunal quite early dismissed the case and it did it solely on the basis of the limitation period – in

⁴⁵⁹ “In substance, in view of the Tribunal, such suspension or “tolling” of the period of limitation is unwarranted. NAFTA Article 1117(2) does not provide for any suspension of the three-year period of limitation.” - *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 58, **RLA-29**.

⁴⁶⁰ *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, para. 192, **RLA-28**.

⁴⁶¹ Article 9(7) of the China-Korea BIT: “[A]n investor may not make a claim pursuant to paragraph 3 of this

Article if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge that the investor had incurred loss or damage.” See *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017, para. 29, **RLA-30**.

search of the *Dies a Quo* the tribunal looked for the *first* date of knowledge as evidenced by the claimant's pleadings. The tribunal thus concluded:

*“The limitation period begins with an investor’s first knowledge of the fact that it has incurred loss or damage, not with the date on which it gains knowledge of the quantum of that loss or damage. Ansung’s actual sale of its shares on December 17, 2011 marked the date on which it could finalize or liquidate its damage, not the first date on which it had to know it was incurring damage.”*⁴⁶²

1.2. Assessment of the date relevant for the application of the three-year limitation period from Article 22 of the Canada – Serbia BIT

389. In order to assess the *ratione temporis* jurisdiction there are three points in time that need to be determined. The first is the relevant critical date which marks the end and stops running of the three-year limitation period. This critical date is the date on which the ICSID Secretariat receives the Request for Arbitration from which the three-year period is calculated backwards. In this case the Request for Arbitration, dated 9 February 2018, was received by the ICSID Secretariat on 14 February 2018.⁴⁶³
390. The second date is the cut-off date which marks the beginning of the three-year limitation period that is calculated backwards from the critical date. In this case, calculating backwards the three-year limitation periods results in 14 February 2015 as the cut-off date. This period sets the limitation within which the investor must have both found out about the breach and loss and submitted the claim to arbitration.
391. The third date, which needs to fall within the three year limitation period between the critical and cut-off date is “the date on which the investor [and/or the enterprise] first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby”.⁴⁶⁴ The first date when the investor acquired knowledge (actual knowledge) or the first date when the investor should have acquired knowledge (constructive knowledge), have been set

⁴⁶² Ibid., para. 110; emphasis in the original text.

⁴⁶³ ICSID, Notice of Registration dated 22 March 2018.

⁴⁶⁴ Article 22 of the Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **RLA-130**.

alternatively and whichever comes first triggers the three-year limitation period. If either the actual or constructive knowledge of the breach and loss occurs before the cut-off date the claim as such is time-barred and it has to be dismissed in its entirety.

1.3. Canadian Claimants failed to observe the three years limitation period in the Canada-Serbia BIT

392. Respondent submits that Claimants, even if taken as investors, failed to observe the three years limitation period set out in Article 22 of the Canada-Serbia BIT, with the effect of nullifying the consent leading to the lack of jurisdiction of the Tribunal. This, in turn, nullifies Respondent's consent to this arbitration under Article 25 of the BIT.

393. The crux of the matter in this case is whether Mr. Obradovic, as the Buyer and party to the Privatization Agreement, breached Article 5.3.4. which prohibits burdening by pledge of the fixed assets of BD Agro. In its Report dated 25 February 2011 executed on the basis of the control conducted on 17 January 2011, the Privatization Agency found several breaches of the Privatization Agreement and multiple violations of Article 5.3.4. due to the unlawful mortgages contracted for the benefit of third parties.⁴⁶⁵ Following the Report of 25 February 2011 the Privatization Agency promptly sent the Notice on 1 March 2011.⁴⁶⁶ In this Notice the Privatization Agency listed the breaches of the Privatization Agreement including violations of Article 5.3.4. and provided reasons and evidence for finding the existence of these breaches. In addition, the Privatization Agency granted additional term of 60 days for remedying breaches and submitting evidence to that effect. The Privatization Agency's Notice concludes with the following statement:

*"In the event of failure to comply with the above stated contractual obligations within the additionally granted term as per this Notice, the Privatization Agency will undertake the measures under Article 41a of the Law on Privatization ("Official Gazette of RS", Nos. 38/01, 18/03, 45/05 and 123/07)."*⁴⁶⁷

⁴⁶⁵ Report of the Privatization Agency on Control of BD Agro dated 25 February 2011, **CE-30**.

⁴⁶⁶ Notice of the Privatization Agency on Additional Time Period dated 24 February 2011, **CE-31**.

⁴⁶⁷ *Ibid.*, p. 3.

394. Article 41a of the Law on Privatization provides for several grounds for termination of a privatization agreement. The relevant part of this provision on which the Privatization Agency expressly relied states as follows:

“The agreement on sale of the capital or property shall be deemed terminated due to non-fulfilment, if the buyer, even within an additionally granted term for fulfilment:

.....

*3. disposes of the property of the subject of privatization contrary to provisions of the agreement;”*⁴⁶⁸

395. Claimants concede that Mr. Obradovic, who now figures as the alleged alter ego of Claimants, received this Notice on 1 March 2011.⁴⁶⁹ Therefore, on this date the Privatization Agency made clear with this Notice that the Buyer (Mr. Obradovic) was in default and that termination of the Privatization Agreement was the next step to be taken. Invoking the violation of the Privatization Agreement was to trigger the termination clause in Article 41a of the Law on Privatization. Therefore, 1 March 2011 was the date on which the Buyer acquired knowledge of the violation of the Privatization Agreement and possible consequences of such violation.

396. In *Corona v Dominican Republic*, the tribunal searched for the “*the earliest possible date on which the Claimant would be permitted to have acquired actual or constructive knowledge of the alleged breach of the Treaty and of the incurred loss or damage for the Claimant’s claims to have been submitted within the time limit for the purpose of Article 10.18.1.*”⁴⁷⁰ The investment was a 75-year concession mine project agreement that was dependent on the approval of the environmental license. The claimant argued that the Dominican Republic unjustifiably prolonged the issuance of the license. Few years after the concession agreement was executed and a year after the request for the environmental license was submitted, the Ministry informed the claimant that the project was not environmentally viable. Negotiations ensued for almost a year with a view of reconsideration of the negative decision. A

⁴⁶⁸ Article 41a(3) of the 2001 Law on Privatization, **CE-220**.

⁴⁶⁹ Memorial, para. 98.

⁴⁷⁰ *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, para. 196, **RLA-28**.

principal of the claimant argued that: “*based on what he was told he still believed that there was a possibility that the Environmental Ministry may reconsider its Negative Environmental Decision and issue an Environmental Decision for the Project.*”⁴⁷¹ Nevertheless, the *Corona* tribunal found that despite all further developments, adverse effect of and circumstances surrounding the non-issuance of environmental license still did not change the fact that “*the relevant date of knowledge for the purpose of Article 10.18.1 is the date on which the Claimant first acquired, or should have first acquired, knowledge of the Respondent’s decision not to grant the environmental license for the Claimant’s project.*”⁴⁷² The tribunal upheld the *ratione temporis* objection and found that the claim was time-barred.

397. In the case at hand the earliest possible date on which Claimants would be permitted to have acquired knowledge of the alleged breach of the BIT and of the incurred loss or damage is 1 March 2011 when the Privatization Agency confirmed the findings of the 17 January control the result of which was the violation of the Privatization Agreement. The consequence of this finding was made crystal clear in the 1 March Notice. Moreover, all acts complained of in this arbitration are nothing but direct and imminent result of the Buyer’s breach of the Privatization Agreement that was made known to him on 1 March 2011. The finding of the violation of the Privatization Agreement is the gist of the alleged BIT breach pursued by Claimants.

398. One of the direct consequences now complained of by Claimants under all headings of their claim was the decision of the Privatization Agency not to release the pledge over Mr. Obradovic’s shares.⁴⁷³ The reason for not releasing the pledge was clearly stated by the Privatization Agency and was an imminent and direct consequence of the established breach of the Privatization Agreement. During the meeting held on 4 February 2014, the Privatization Agency informed Mr. Obradovic that it could not release the pledge over the shares precisely because Mr. Obradovic was in breach of the Privatization Agreement – the breach that he has failed to remedy since February 2011.⁴⁷⁴

⁴⁷¹ Ibid., para. 47.

⁴⁷² Ibid., para. 216

⁴⁷³ Claimants argue that the refusal to release the pledge serves as the ground for the following BIT claims: Expropriation claim – para. 424 of Memorial, Fair and Equitable Treatment claim – para. 437 of Memorial, the Umbrella Clause – para. 444 of Memorial.

⁴⁷⁴ Minutes of the meeting at the Privatization Agency held on 4 February 2014, **RE-36**.

399. Therefore, even if taken alone, the refusal to release the pledge was notified to Mr. Obradovic in February 2014. This again falls before the cut-off date i.e. February 2015 which in itself dismisses any claim based on the refusal to release the pledge.
400. On 1 March 2011 Mr. Obradovic became aware that the termination of the Privatization Agreement was imminent. 1 March 2011 thus represents the date which triggers the three-year limitation period within the meaning of Article 22 of the BIT, because this is the date on which Mr. Obradovic, allegedly alter ego of Claimants, first acquired knowledge of the alleged breach that now figures as the ground for their claim in this arbitration. Given that Claimants now argue that the Privatization Agency's finding of the violation of the Privatization Agreement, and consequences that resulted from this finding represent the breach of the BIT with the claimed loss,⁴⁷⁵ it means that the three year period started running on 1 March 2011 and expired on 1 March 2014. This falls before the cut-off date, i.e. 14 February 2015. Respondent therefore submits that the Claimants' claims in their entirety are time-barred and that the Tribunal has no jurisdiction *ratione temporis*.
401. The knowledge of the possible breach and loss must have been triggered at that point – it is not required to have loss at that time. The first appreciation that such loss may occur triggers the limitation clause: “*the limitation clause does not require full or precise knowledge of the loss or damage.... such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result.*”⁴⁷⁶
402. The appreciations that lie at the core of every allegation that Claimants here advance can be traced back to pre-14 February 2015 conduct of which Mr. Obradovic did have knowledge. The claims thus fall short of the conditions precedent set forth in Article 22 of the BIT.
403. The last moment for submitting the claim was on 1 March 2014 when the Treaty was not even in force. However, this does not change the fact that the conduct now

⁴⁷⁵ See Section III.U. of Memorial.

⁴⁷⁶ Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica, ICSID Case No. UNCT/13/2, Interim Award of the Tribunal (Corrected), 30 May 2017, para. 213, **RLA-31**.

complained of as the breach, became known to Mr. Obradovic. The period of three years starts running from the date of actual knowledge, which is “*a clear and rigid limitation defence – not subject to any suspension, prolongation or other qualification.*”⁴⁷⁷ Reconstructing the actual date of knowledge so as to conform to the effective date of the BIT would amount to its suspension, prolongation and modification expressly dismissed by a number of arbitral tribunals. As clearly stated by the *Corona* tribunal, in its decision upholding the preliminary objection based on the limitation period, “*the three-year period is a strict one, no suspension or ‘tolling’ of the three-year period is contemplated by the Treaty.*”⁴⁷⁸ *Corona* Tribunal took “*the earliest possible date*” of the investor’s knowledge to calculate the period of three years only to find out that the claim was submitted too late. The actual knowledge is easily assessable fact by evidence and here by the admission of Claimants – it happened on 1 March 2011 when the period unstopably started to run. As no “tolling”, “modification” or “suspension” is permitted, it means that the limitation period permanently and irreversibly expired on 1 March 2014. Respondent submits that there is an absolute preclusive limitation to Claimants’ claim.

2. The principle of non-retroactivity prevents the Tribunal from exercising jurisdiction over claims based on acts or facts preceding the BIT’s entry into force

2.1. General

404. The basic principle of international law is that a State can only be held internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach. The principle of non-retroactivity is set forth both in Article 28 of the Vienna Convention on the Law of Treaties and in Article 13 of the ILC’s Articles on State Responsibility, and has been repeatedly affirmed by international courts and tribunals.

⁴⁷⁷ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decisions on Objections to Jurisdiction, 20 July, 2006, para. 29, **RLA-32**; Also, *Marvin Roy Feldman Karpa v. United Mexican States*, para. 63, **RLA-29**: “*the Arbitral Tribunal stresses that, like many other legal systems, NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defense which, as such, is not subject to any suspension (see supra, para. 58), prolongation or other qualification.*”

⁴⁷⁸ *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, para. 199, **RLA-28**

405. Principle of non-retroactivity is envisaged in ILC Articles on State Responsibility:

“Article 13

International obligation in force for a State

*An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”*⁴⁷⁹

406. Well-known Article 28 of the Vienna Convention on the Law of Treaties embodies the customary international rule and provides as follows:

“Article 28

Non-Retroactivity of Treaties

*Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”*⁴⁸⁰

407. In the Canada-Serbia BIT there is nothing to the contrary. There is no different intention of the parties to have this BIT retroactively applied. This is quite clear from the wording of Article 42 of the BIT:

“ARTICLE 42

Application and Entry into Force

1. All Annexes are an integral part of this Agreement.

2. Each Party shall notify the other in writing of the completion of the procedures required in its territory for the entry into force of this Agreement. This Agreement enters into force on the date of the later of these notifications.

⁴⁷⁹ Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, **CLA-24**.

⁴⁸⁰ Vienna Convention on the law of treaties of 23 May 1969, **RLA-44**.

3. *This Agreement shall remain in force unless a Party notifies the other Party in writing of its intention to terminate it. The termination of this Agreement will be effective one year after notice of termination has been received by the other Party. In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, Articles 1 to 41 inclusive, as well as paragraphs 1 and 2 of this Article, shall remain in force for a period of 15 years.*⁴⁸¹

408. In the absence of any agreement to the contrary the general rule on temporal scope of application of treaties is to be applied and this rule simultaneously guards the *ratione temporis* jurisdiction of tribunals. As concluded by the *Impregilo v Pakistan* award in its operative part:

*“[T]he provisions of the BIT do not bind Pakistan in relation to any act that took place, or any situation that ceased to exist, before 22 June 2001 and the jurisdiction of the Tribunal ratione temporis is limited accordingly.”*⁴⁸²

409. Even in cases where dispute settlement provisions are silent on the timing of the dispute, investment tribunals applied the principle of non-retroactivity to exclude those disputes which arose before the entry into force of the applicable treaty. For example, in *M.C.I. v Ecuador* the tribunal made the following conclusion about such provision:

*“The Tribunal observes that a prior dispute may evolve into a new dispute, but the fact that this new dispute has arisen does not change the effects of the nonretroactivity 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.”*⁴⁸³

⁴⁸¹ Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **RLA-130**.

⁴⁸² *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 316(f), **RLA-33**.

⁴⁸³ *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, para. 66, **RLA-34**.

This conclusion of the *M.C.I.* tribunal was challenged in the annulment proceeding but the challenge failed.⁴⁸⁴

410. Rules of treaty law are thus applicable on treaty provisions on dispute settlement so as to impose the principle of non-retroactivity on their scope of application in absence of any provision to the contrary. As noted by Sir Humphry Waldock in his Third Report on the Law of Treaties:

*“[...] when a jurisdictional clause is found not in a treaty of arbitration or judicial settlement but attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle does operate indirectly to limit ratione temporis the application of the jurisdictional clause. The reason is that the "disputes" with which the clause is concerned are ex hypothesi limited to "disputes" regarding the interpretation and application of the substantive provisions of the treaty which [...] do not normally extend to matters occurring before the treaty came into force. In short, the disputes clause will only cover pretreaty occurrences in exceptional cases, like Protocol XII to the Treaty of Lausanne [...]"*⁴⁸⁵

411. In the context of NAFTA, the tribunals opined that the NAFTA itself limits *ratione temporis* jurisdiction because the NAFTA limits jurisdiction of tribunals to hear only claims that certain obligations under NAFTA have been breached:

*“The Tribunal ... observes that its jurisdiction under NAFTA Article 1117(1)(a), which is relied upon in this arbitration, is only limited to claims arising out of an alleged breach of an obligation under ... the NAFTA. The reliance of the Tribunal on an alleged violation of NAFTA ... also implies that the Tribunal’s jurisdiction ratione materiae becomes jurisdiction ratione temporis as well.”*⁴⁸⁶

⁴⁸⁴ *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, 19 October 2009, para. 57, **RLA-35**.

⁴⁸⁵ Cited from: *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para. 466, **RLA-36**.

⁴⁸⁶ *Marvin Roy Feldman Karpa v. United Mexican States*, paras. 61-62, **RLA-29**.

Similarities between Article 1117 of the NAFTA and Article 21 of the Canada-Serbia BIT are manifest, and Canada is party to both treaties. It follows that conclusions of the NAFTA tribunals *pertinent* to inherent temporal limits of tribunals' jurisdiction are equally applicable to the Canada-Serbia BIT.

412. In addition, there is nothing in Article 42 of the BIT that allows for retroactive application of the BIT nor the intention of the parties to this effect can be inferred therefrom: “*There is thus a presumption for non-retroactivity, retroactivity being the exception.*”⁴⁸⁷ The Parties did agree on the sunset clause as a departure from the general rule of the effect of termination of treaties, but did not agree to any exception of non-retroactivity. The Canada-Serbia BIT was “*drafted on a prospective basis*”⁴⁸⁸ which means that “*the thrust of the Treaty is prospective and does not provide for claims arising before the entry into force of the Treaty.*”⁴⁸⁹
413. It follows that acts or facts that took place before 27 April 2015, i.e. before the effective date of the BIT, cannot constitute a breach of the BIT because the standards of protection did not become binding and legally enforceable before that date.⁴⁹⁰
414. This is in line with the abundant jurisprudence on the matter. In *Tradex v Albania* the tribunal refused jurisdiction claimed on the basis of a bilateral treaty solely on the grounds of temporal scope of application of the treaty.⁴⁹¹ In *Mondev International Ltd v United States of America*, the application of the principle of non-retroactivity resulted in finding that the alleged interference with a Boston development which occurred before the NAFTA entered into force could not breach the treaty.⁴⁹² In the case *Impregilo S.p.A v. Islamic Republic of Pakistan*⁴⁹³ arbitral

⁴⁸⁷ Mark Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties, Martinus Nijhoff 2009, p. 384, **RLA-37**.

⁴⁸⁸ *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, para. 431, **RLA-36**.

⁴⁸⁹ *Ibid.*, para. 433

⁴⁹⁰ “*The obligations assumed by the two state parties to the BIT relating to the minimum standards of investment protection (including the prohibition against expropriation) did not become binding, and hence legally enforceable, until the BIT entered into force on 16 November 1996. It follows that a cause of action based on one of the BIT standards of protection must have arisen after 16 November 1996.*” – *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, para. 11.2., **RLA-74**.

⁴⁹¹ *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996, pp. 179-180, **RLA-38**.

⁴⁹² *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, 22 October 2002, paras. 57-75, **RLA-39**.

tribunal, proceeding upon the preliminary objection *ratione temporis* concluded that the provisions of the BIT do not bind Pakistan in relation to acts before the effective date of the applicable BIT.⁴⁹⁴

415. In *Spence International (Berkowitz) v Costa Rica* case two temporal issues were combined: the compliance with the limitation period provision and temporal application of the CAFTA given that the claimants challenged both pre- and post-effective date conduct of Costa Rica. Although the claimants based their arguments in terms of continuous and composite breach, the tribunal noted that “an assessment of whether jurisdiction exists in respect of a given dispute is required of all tribunals, whether a party raises the issue or not. (...) The relevance of this appreciation for present purposes is that, in determining jurisdiction, a tribunal cannot rest simply on how a claimant has formulated its case and the respondent formulated its reply.”⁴⁹⁵
416. Even though in the *Spence* case the tribunal found that majority of claims were time-barred by the operation of the limitation clause, the tribunal also concluded that “in any event, as the Tribunal has observed in its preceding discussion, the alleged conduct on which the Claimants found the claims is deeply and inseparably rooted in the Respondent’s pre-CAFTA entry into force conduct.”⁴⁹⁶ Therefore, had there been no first temporal impediment, the second temporal impediment of the principle of non-retroactivity would have still left the tribunal without jurisdiction. The *Spence* rationale for the case at hand is that the tribunal cannot evaluate conduct on which the Claimants found their claims because these claims are deeply and inseparably rooted in the pre-BIT entry into force conduct.

⁴⁹³ *Impregilo S.p.A v. Islamic Republic of Pakistan*, ICSID, Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, **RLA-33**.

⁴⁹⁴ *Ibid.*, para 314. See, also, *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, 29 November 2004, **RLA-40**; *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, para. 59, **RLA-34**.

⁴⁹⁵ *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award of the Tribunal, 30 May 2017, paras. 225-226, **RLA-31**.

⁴⁹⁶ *Ibid.*, para. 298.

2.2. The principle of non-retroactivity prevents the Tribunal from exercising jurisdiction

417. When the foregoing pronouncements about the principle of non-retroactivity of treaties in international law are applied to the case at hand, it follows that if events giving rise to the claim fall outside the temporal scope of the BIT, this leaves the tribunal without jurisdiction.
418. In terms of the facts, there is essentially one claim - about the breach of the Privatization Agreement that is based on the events starting back in 2009 that were legally articulated on 1 March 2011. The Privatization Agency made clear what will be the consequences following the failure of the buyer to remedy the breach – the consequences envisaged by law that are deemed to have direct and immediate effect. As explained above, Mr. Obradovic himself conceded to the breach.⁴⁹⁷ However, there is nothing in this or other subsequent factors that did not presume or were not merely the confirmation or development of earlier situations or facts.⁴⁹⁸ In such circumstances the meaning of the tribunal’s finding in *Eurogas & Belmont* case has specific relevance:

*“The Tribunal does not accept that an investor may invoke the last event in a series of related or similar actions by the State to claim the benefit of the treaty.”*⁴⁹⁹

419. In *Eurogas & Belmont v Slovakia* the tribunal entertained a similar clause and categorically concluded: *“What matters is the real cause of the dispute.”*⁵⁰⁰ *The*

⁴⁹⁷ See, for instance, Letter from Mr. Obradovic and BD Agro to the Privatization Agency of 23 July 2012, **RE-21**.

⁴⁹⁸ See *Phosphates in Morocco (Italy v France)*, PCIJ, Preliminary Objections, Judgment of 14 June 1938, PCIJ Series A/B No 74, p. 18, **RLA-42**: *“The principal duty of the Court is to examine the conditions which determine whether the objection submitted by the French Government is well-founded. The question whether a given situation or fact is prior or subsequent to a particular date is one to be decided in regard to each specific case, just as the question of the situations or facts with regard to which the dispute arose must be decided in regard to each specific case. However, in answering these questions it is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction disputes having actually arisen from situations or facts subsequent to its acceptance. But it would be impossible to admit the existence of such a relationship between a dispute and subsequent factors which either presume the existence or are merely the confirmation or development of earlier situations or facts constituting the real causes of the dispute.”*

⁴⁹⁹ *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017, para.460, **RLA-43**.

⁵⁰⁰ *Ibid.*, para. 453.

Eurogas & Belmont tribunal concluded, with respect to Belmont’s claims, that it lacked jurisdiction. In reaching its conclusion the tribunal stated:

*“To conclude otherwise would deprive Article 15(6) of the Canada-Slovakia BIT from any meaning and effect, and would require the Tribunal to engineer a legalistic and artificial reasoning to bypass this provision, and effectively extend the *ratione temporis* application of the Treaty to a long-standing dispute dating from well over three years prior to the entry into force of the treaty.”*⁵⁰¹

420. All these cases prove the textual approach to arbitration clauses in BITs as well as that the principle of non-retroactivity has been firmly embedded in international law and jurisprudence. Therefore, in the absence of the agreement of Parties to BIT to apply its provisions retroactively, arbitral tribunals will refrain from extending its application to the period preceding entry into force of the given BIT.
421. When applied to the case at hand it turns out that Claimants allege BIT breaches on the basis of act and facts that occurred before the effective date of the BIT. The real cause of all Claimants’ claims is Mr. Obradovic’s breach of the Privatization Agreement. Throughout their Memorial Claimants challenge the decision of the Privatization Agency which established the breach of Article 5.3.4 of the Privatization Agreement back in February 2011. Mr. Obradovic himself as early as July 2012 conceded the breach was in place, followed by his promises to remedy the breach.⁵⁰²
422. This unremedied breach is the only cause of Claimants’ claim in this arbitration. All that followed was foreseeable, inevitable and faulted consequence. Decision of the Privatization Agency not to release the pledge over the shares was equally the result of the same decision – breach by the Buyer. Nothing changed with respect to the finding of the breach, failure to remedy the breach and decision of the Privatization Agency not to release the pledges.

⁵⁰¹ Ibid., para. 458.

⁵⁰² In a letter sent to the Privatization Agency on 23 July 2012, Mr. Obradovic noted the following: “Regarding your other requests [to have the breaches of the Privatization Agreement remedied], there were no changes in the meantime, therefore we [Mr. Obradovic and BD Agro] submit the Request for an additional period during which the contractual obligations may be realized pursuant to your Decision of 27 December 2012.” Letter from Mr. Obradovic and BD Agro to the Privatization Agency of 23 July 2012, **RE-21**.

423. The fact that the Notice on termination of the Privatization Agreement took place after the effective date, i.e. BIT's entry into force, does not help much Claimants' case. Termination was inevitable and announced consequence of a deliberate breach of the Privatization Agreement. Grounds for termination materialized long before the effective date of the BIT and the only reason why the termination was delayed were Mr. Obradovic's false promises and insincere pledges. Since it was both the breach by and misrepresentations on behalf of Mr. Obradovic that led to this arbitration, to provide him and Claimants with the Canada-Serbia BIT protection would run contrary to the BIT but also to the core principles of the international investment protection.
424. It should be noted that the objection based on the principle of non-retroactivity is independent and separate from the objection based on the limitation period set forth in Article 22 of the BIT. However, they do not exclude but rather reinforce each other. If both temporal conditions (time limitation clause and the principle of non-retroactivity) are applied with respect to each and every event, if these events are taken separately, they individually should be assessed against each temporal condition set forth in the Canada-Serbia BIT. All claims based on the breach of the Privatization Agreement, for which the Respondent submits that it was the major if not the only ground for claims in this arbitration, must fall on the basis of *ratione temporis* limitations of Respondent's consent to arbitration. The same goes for the claim based on the allegedly unlawful refusal of the Privatization Agency to release the pledge which occurred on 4 February 2014. Also, all claims based on the Mr. Rand's complaints that he was unjustifiably denied substitution in the Privatization Agreement⁵⁰³ falls on the prohibition of retroactivity since this refusal occurred before the Canada – Serbia BIT entered into force on 27 April 2015.⁵⁰⁴

D. THE TRIBUNAL DOES NOT HAVE JURISDICTION *RATIONE PERSONAE* UNDER THE CYPRUS – SERBIA BIT

425. According to Article 1(3)(b) of the Cyprus – Serbia BIT, an investor is defined as “*a legal entity incorporated, constituted or otherwise duly organised according to the*

⁵⁰³ Memorial, para. 147.

⁵⁰⁴ According to the Second Witness Statement of Mr. Igor Markicevic, 19 February 2015 can be identified as the latest date on which the Privatization Agency refused to allow the substitution – see paras. 112-118.

laws and regulations of one Contracting Party having its seat in the territory of that same Contracting Party and investing in the territory of the other Contracting Party.”⁵⁰⁵

426. Contrary to Claimants’ assertion, Sembi does not have its seat in Cyprus and, therefore, cannot be regarded as “investor” under the applicable Treaty.

1. Sembi does not meet the jurisdictional requirements of the Cyprus – Serbia BIT because it does not have a seat in Cyprus

427. In order to satisfy the requirements of Article 1(3)(b) of the BIT, Claimants must prove that Sembi, apart from being a legal entity incorporated under the laws of Cyprus, is a company which has its seat in Cyprus as well. While Claimant recognizes the seat as a separate criterion that it must fulfill in order to be deemed investor,⁵⁰⁶ it argues that the word “seat” has the same meaning as registered office.⁵⁰⁷

428. Respondent will demonstrate that:

- The criterion of “*seat*” in Article 1(3)(b) of the BIT should be interpreted as a cumulative nationality criterion that needs to be satisfied, and that it entails the place of effective management;
- Sembi does not have seat in Cyprus as it is effectively managed by a Canadian national who resides in Canada and, consequently, does not meet the requirements of Article 1(3)(b) of the BIT.

1.1. Interpretation of the term seat

1.1.1. Under the Vienna Convention on the Law of Treaties

429. Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) contains the well-known rule on interpretation of treaties:

⁵⁰⁵ Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **RLA-130**.

⁵⁰⁶ Memorial, para. 280,

⁵⁰⁷ Ibid., paras. 287, 288.

*“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”.*⁵⁰⁸

430. VCLT clearly gives precedence to the so-called textual (objective) approach. In line with this approach, the premise is that the text of the treaty expresses the genuine intention of the parties, and that the task of interpretation is to determine the true meaning of the text used. Words of the treaty are to be read as they are written, and they will be given their ordinary meaning taking into account context of the treaty, its object and purpose.
431. As will be elaborated in detail in this section, the ordinary meaning of the term seat in the context of a nationality criterion of investment treaties is the place of effective management of a legal person.
432. Further, when reading the term seat in the context of the entire Article 1(3)(b) of the BIT it is apparent that it must have its own autonomous meaning, different from the other criteria imposed by the said article. If Claimants’ argument is accepted and the term “seat” is understood as a synonym of “registered office” then its existence in Article 1(3)(b) of the BIT would serve no purpose. Such interpretation would go against the principle of effectiveness - provisions of a treaty must be interpreted “so that they do not become devoid of effect.”⁵⁰⁹
433. The principle was described as generally accepted “canon of interpretation” by the tribunal in *AAPL v. Sri Lanka*:
- “Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than deprive it of meaning.”*⁵¹⁰
434. Therefore, the term seat read in the context of this article can only be understood as something additional to incorporation and therefore cannot be taken to mean registered office.

⁵⁰⁸ Vienna Convention on the Law of Treaties, Article 31(1); **RLA-44**.

⁵⁰⁹ *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, para. 151, **RLA-45**.

⁵¹⁰ *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 Jun 1990, para. 40, **RLA-46**.

435. That the term is intended to mean something additional to incorporation in accordance with the law of the country also flows from the purpose of the BIT, which is set out in its preamble - creation of favourable conditions for greater economic cooperation between the Contracting Parties, and contribution to the enhancement of entrepreneurial initiative and significant contribution to the development of economic relations between the Contracting Parties.⁵¹¹
436. As apparent from the above, BIT bestows protection upon investors in order to promote economic cooperation between Serbia and Cyprus. Such economic cooperation can only be promoted when investors who possess a true, genuine connection with one Contracting Party to the BIT, invest in territory of the other Contracting Party. Criterion of incorporation, which, in its essence, relates to formalistic criteria under municipal law (commonly related to registration before relevant state authorities), cannot reliably ensure existence of such genuine link. This is exactly why the additional criterion of seat is provided for in the BIT - it serves to counterbalance the formal criterion of incorporation with a criterion which looks at substance of matters. Only when the criteria of incorporation and seat are taken together as two distinct criteria, of different essential characters, do they create a nationality test that corresponds with the proclaimed goal of the BIT.
437. Finally, as BIT is a part of international law, it should be interpreted within the normative framework of international law. This is provided in Article 31(3)(c) of VCLT which prescribes that, in interpreting the provisions of international agreements, any relevant rules of international law applicable in the relations between the parties are to be taken into account.⁵¹² Therefore, legal theory of international law, international treaties and international arbitral practice, are all relevant when interpreting the meaning of the term seat in Article 1(3)(b) of the BIT.
438. That the term “seat” should be interpreted from the perspective of international law can also be inferred from the manner in which Article 1(3)(b) of the BIT defines incorporation. When it comes to this first jurisdictional requirement, the text of the BIT indisputably refers to the national law of the contracting state. For a Cypriot investor, this condition shall be interpreted in accordance with the Cypriot company

⁵¹¹ Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments; **RLA-130**.

⁵¹² Vienna Convention on the Law of Treaties, , Article 31(3)(c); **RLA-44**.

law. However, if one then looks at the formulation of the second condition (“*having its seat in the territory of that Contracting Party*”), it does not refer to the application of national law. It merely requires that the seat should be located in the territory of Cyprus, without indicating under which law one is to determine the meaning of the term “seat”. And, if the first condition refers to a specific national law, while others do not, the general rules of logical interpretation dictate that one cannot conclude that for companies established in Cyprus, the notion of seat must also be interpreted in accordance with Cypriot law. This follows from the contextual approach provided for in Article 31 of VCLT (“in their context”).

439. Consequently, the term ‘seat’ is to be interpreted with reference to international law. The relevance of international law for the application of the BIT is confirmed in the text of the Treaty – under Article 9(4) of the Cyprus – Serbia BIT, the award shall be executed in accordance with the provisions of the BIT as well as the principles of international law.⁵¹³

440. In the following, it will be demonstrated that the BITs and international arbitral practice recognize seat as a distinct criterion for determination of nationality of legal persons, as do other relevant international law instruments.

1.1.2. BITs have recognized seat as a separate criterion and defined it as place of effective management

441. The concept of seat in international law, in particular as a nationality criterion in investment agreements, has been understood as a criterion separate from incorporation and was understood to mean place of effective management.

442. In this regard, Professor Sauve noted the following:

“Some BITs combine the place of incorporation test with criteria focusing on a company’s “seat”. This test attributes the nationality of the place where the siege social is located. The “seat of a company” often refers to the place of effective management decision-making, and as such, while more

⁵¹³ The Agreement between the Republic of Cyprus and Serbia and Montenegro on Reciprocal Promotion and Protection of Investments, **RLA-130**.

*difficult to determine, reflects a more significant economic relationship between the corporation and the country granting nationality.”*⁵¹⁴

443. In other words, unlike the place of incorporation, the seat of a company (*siege social*) is the place where decisions are effectively made. This view is also shared by Professor Engela Schlemmer:

*“It has become more and more pertinent to look at the aspect of the control of a corporation when one wants to determine its nationality especially for purposes of international investment arbitration. [...] The test of the seat of the corporation requires something more, whether some activities are taking place and whether the corporation is managed from that particular state.”*⁵¹⁵

444. Above views are in line with the position expressed by the United Nations Conference on Trade and Development (UNCTAD). In its analysis of various nationality criteria in investment treaties, UNCTAD noted that different international investment agreements use different criteria for establishing nationality of the investor, including, among other, the country of incorporation and the country of seat.⁵¹⁶ With respect to the definition of seat, UNCTAD noted:

*“The seat of a company may not be as easy to determine as the country of organization, but it does reflect a more significant economic relationship between the company and the country of nationality. Generally speaking, “seat of a company” connotes the place where effective management takes place. The seat is also likely to be relatively permanent as well.”*⁵¹⁷

445. Consequently (i) incorporation and seat are two different nationality criteria in investment treaties; (ii) the term seat, when used as a nationality criterion in investment treaties, connotes a place where effective management takes place.

⁵¹⁴ Pierre Sauve, *Trade and Investment Rules: Latin American Perspectives*, UN Economic Commission for Latin America and the Caribbean, 2006, p. 22; **RLA-47**.

⁵¹⁵ E. Schlemmer, Investment, Investor, Nationality, and Shareholders, in Muchlinsky/Ortino/Schreuer (EDS), *International Investment Law* (2008), at 79, as cited in *Central European Aluminium Company (CEAC) v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, para. 127, **CLA-21**.

⁵¹⁶ UNCTAD Series on Issues in International Investment Agreements II, Scope and Definition (A sequel), p. 81, **RLA-49**.

⁵¹⁷ *Ibid.*, p. 83. (emphasis added).

1.2. Treaty practice of Cyprus and Serbia differentiates between seat and incorporation

446. Another source which should be taken into account when assessing whether seat and registered office are separate concepts is the treaty practice of Cyprus (alleged home state of Sembi) and Respondent.
447. **Cypriot BITs** - Overview of different BITs concluded by Cyprus shows that it has concluded BITs with different definitions of investors. Some BITs require only incorporation - such as BITs concluded with Albania, Hungary and Poland.⁵¹⁸ Others require that the legal person is both incorporated and has its seat on the territory of the contracting party - such as BITs concluded with Iran, Lebanon, Libya, San Marino, Syria, as well as the BIT with Serbia.⁵¹⁹ Cyprus has also concluded a number of BITs, which contain asymmetrical criteria that legal persons need to fulfill in order to be deemed investor - such as BITs with China, Moldova and Romania.⁵²⁰
448. **Serbian BITs** - The same conclusion goes for Respondent. It has concluded BITs which only require incorporation - such as BITs with Belarus, Ghana, Slovakia and

⁵¹⁸Agreement on the Promotion and the Reciprocal Protection of Investments between the Council of Ministers of the Republic of Albania and the Government of the Republic of Cyprus, Article 2(b), **RLA-50**; Agreement between the Government of the Republic Of Cyprus and the Government of the Hungarian People's Republic on Mutual Promotion and Protection of Investments, Article 1(3)(b), **RLA-51**; Agreement Between the Republic of Cyprus and the Republic of Poland for the Promotion and Reciprocal Protection of Investments, Article 1(3)(b), **RLA-52**.

⁵¹⁹ Agreement on reciprocal promotion and protection of investments between the Government of the Republic of Cyprus and the Government of the Islamic Republic of Iran, Article 1(2)(b), **RLA-53**; Agreement on the Reciprocal Promotion and Protection of Investments between the Lebanese Republic and the Republic of Cyprus, Article 1(1)(b), **RLA-54**; Agreement on the promotion and the reciprocal protection of investments between the Government of the Republic of Cyprus and the Great Socialist People's Libyan Arab Jamahiriya, Article 1(2), **RLA-55**; Agreement on the reciprocal promotion and protection of investments between the Government of the Republic of Cyprus and the Government of the Republic of San Marino, Article 1(1)(b), **RLA-56**; Agreement between the Government of the Republic of Cyprus and the Government of the Syrian Arab Republic on the promotion and reciprocal protection of investments, Article 1(2)(b), **RLA-57**; The Agreement between the Republic of Cyprus and Serbia and Montenegro on Reciprocal Promotion and Protection of Investments, Article 1(3)(b), **RLA-130**.

⁵²⁰ Agreement between the Government of the People's Republic of China and the Government of the Republic of Cyprus for the Reciprocal Promotion and Protection of Investments, Article 1(2), **RLA-59**; Agreement between the Government of the Republic of Cyprus and the Government of the Republic of Moldova for the reciprocal promotion and protection of investments, Article 1(2), **RLA-60**; Agreement between the Government of the Republic of Cyprus and the Government of Romania on the Mutual Promotion and Protection of Investments, Article 1(2), **RLA-58**.

Kazakhstan.⁵²¹ It has also concluded BITs which require both incorporation and seat - such as BITs with Spain, Poland, Portugal, India and China.⁵²²

449. Bearing in mind the above mentioned differences in nationality criteria in the BITs of both Serbia and Cyprus, it is evident that they both ascribe different meanings to criteria of incorporation and seat. Otherwise, all BITs of Serbia and Cyprus would only contain the criterion of incorporation. The fact that only some BITs contain criterion of seat shows that in those particular cases, signatories of the BIT wanted to include an additional criterion to incorporation.
450. This approach has been accepted in arbitral practice. In *KT Asia v. Kazakhstan*, the case concerned application of a BIT which defined the investor as “legal persons constituted under the law of that Contracting Party”.⁵²³ In those proceedings, Kazakhstan challenged the jurisdiction *rationae personae* stating that claimant’s ultimate owner was a Kazakh national.⁵²⁴ Tribunal ultimately rejected this argument, on the basis that criterion of nationality is fulfilled as long as the company is properly incorporated in Netherlands, but it has noted the following:

“the Tribunal's reading of the treaty language is further strengthened if one bears in mind that in twenty-four Kazakh BITs the Respondent has agreed to the same test as in the present one, the place of incorporation, while in ten

⁵²¹ Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Republic of Belarus on the Reciprocal Promotion and Protection of Investments, Article 1(3)(2), **RLA-62**; Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Republic of Ghana for the Reciprocal Promotion and Protection of Investments, Article 1(d), **RLA-63**; Agreement between the Government of The Slovak Republic and the Federal Government of the Federal Republic of Yugoslavia on the Promotion and Reciprocal Protection of Investments, Article 1(2)(2), **RLA-64**; Agreement between the Government of the Republic of Serbia and the Government of the Republic of Kazakhstan on Reciprocal Promotion and Protection of Investments, Article 1(3)(b), **RLA-65**.

⁵²² Agreement between the Kingdom of Spain and the Federal Republic of Yugoslavia on the Promotion and Reciprocal Protection of Investments, Article 1(2)(b), **RLA-66**; Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of The Republic of Poland on Reciprocal Promotion and Protection of Investments, Article 1(3)(b), **RLA-67**; Agreement Between the Republic of Serbia and the Portuguese Republic on the Mutual Promotion and Protection of Investments, Article 1(3)(b), **RLA-68**; Agreement between the Government of the Republic of India and the Federal Government of the Federal Republic of Yugoslavia for the Reciprocal Promotion and Protection of Investments, Article 1(b)(ii), **RLA-69**; Agreement between the Government of the People's Republic of China and the Government of the Federal Republic of Yugoslavia Concerning the Reciprocal Encouragement and Protection of Investments, Article 1(2)(2), **RLA-61**.

⁵²³ *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, para. 113, **RLA-95**.

⁵²⁴ *Ibid.*, paras. 7 and 95.

*other BITs it has added a requirement that the siege social or place of business be placed or “real economic activities” be conducted there”.*⁵²⁵

451. In other words, the arbitral tribunal considered that the fact that different BITs of the same country had different nationality criteria was of relevance when assessing the nationality criteria in the particular BIT. Consequently, just as it is not possible to treat the BITs which do not contain the criterion of seat in the same way as the ones which do, it is also not possible to treat the BITs which contain the criterion of seat as if they lacked such criterion. Therefore, with respect to the term “seat”, the Cyprus – Serbia BIT cannot be interpreted in the same way as the Serbian and Cypriot BITs which only stipulate the criterion of incorporation.

1.2.1. Arbitral practice recognizes seat as a distinct criterion

452. The idea that incorporation and seat are separate concepts and that seat is understood as the place of effective management is also endorsed in investment treaty arbitral practice.

453. In *AFT v. Slovakia*, arbitral tribunal noted that “seat” and “incorporation” are different criteria: “*The fact that Article 1(1)(b) if the BIT requires a Swiss „seat“ as a distinct element in addition to „constitution and organization under Swiss law“ demonstrates that the mere incorporation in Switzerland is insufficient to constitute a “seat“ in the terms of the BIT.*”⁵²⁶

454. Also, *AFT v. Slovakia* dealt with the meaning of the term seat and found that the seat entails “*effective center of administration of business operations*”⁵²⁷ i.e. that the claimant cannot prove the existence of seat by simply obtaining an excerpt from the company’s registry, tax declaration and by asserting that company books are kept in Switzerland.⁵²⁸

455. In similar vein, the tribunal in *Tenaris v. Venezuela* was tasked with interpreting terms “*siège social*” and “*sede*” from Belgium-Luxembourg Economic Union – Venezuela and Portugal – Venezuela BITs respectively, and concluded that

⁵²⁵ Ibid., para. 123; emphasis added.

⁵²⁶ *Alps Finance and Trade AG v. The Slovak Republic* (UNCITRAL), Award, 5 March 2011, para. 216, **RLA-71**.

⁵²⁷ Ibid., para. 217.

⁵²⁸ Ibid., para. 215.

“...both “*siège social*” and “*sede*” in the Treaties in issue in this case mean the place of actual or effective management.”⁵²⁹

456. That it is completely conceivable and acceptable that BITs formulate additional criteria for the nationality of legal entities, in addition to incorporation, has found further support in arbitral practice. *Tokios Tokeles* arbitral tribunal, when rejecting the jurisdictional objection *rationae personae*, explained that the jurisdictional objection is ungrounded because the BIT applicable to that case required only incorporation in accordance with applicable laws of the state, and did not stipulate any additional criteria:

“... the Claimant is an “investor” of Lithuania if it is a thing of real legal existence that was founded on a secure basis in the territory of Lithuania in conformity with its laws and regulations. The Treaty contains no additional requirements for an entity to qualify as an “investor” of Lithuania.”⁵³⁰

457. In line with this reasoning, just as it is not up to a tribunal to “write new, additional requirements”⁵³¹ for jurisdiction *ratione personae*, it is also equally true that it is not open to the Tribunal to disregard those requirements which the parties have added to the applicable bilateral investment treaty. The Cyprus – Serbia BIT requires both incorporation *and* seat in the territory of the Contracting Party and both requirements must be fulfilled with regard to Sembi in the dispute at hand.

1.2.2. Other relevant international law instruments

458. In addition to state practice reflected in BITs, treaty practice of both Cyprus and Respondent, as well as arbitral practice, there are also other notable instruments of international law which deal with the issue of different nationality criteria for corporations. In this regard, Article 9 of ILC Draft Articles on Diplomatic Protection provides the following:

⁵²⁹ *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, para. 154; emphasis added, **RLA-45**.

⁵³⁰ *Tokios Tokeles v. Ukraine* (ICSID Case No. ARB/02/18), Decision on Jurisdiction, 29 April 2004, para. 28; emphasis added; **RLA-72**; See, also, *Saluka Investments B. V. v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006, para. 241, **RLA-73**; *Yukos Universal Limited v. The Russian Federation* (UNCITRAL), PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, para. 415, **RLA-76**.

⁵³¹ *Yukos Universal Limited v. The Russian Federation* (UNCITRAL), PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, para. 415, **RLA-76**.

“For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.”⁵³²

459. The above provision also shows that there are two different ways in which one can determine the nationality of a corporation. One is the place of incorporation a formal criterion for which the determinative factor is under which law is the company incorporated. However, in cases where there is no actual connection of the company to its place of incorporation, ILC Draft Articles give advantage to a substantive criterion - seat of management and the financial control. In this way, ILC Draft Articles provide an insight into which factors, from the perspective of international law, are most determinative for establishing the actual and genuine nexus between a corporation and a particular country.
460. Respondent submits that these criteria are equally applicable for establishing the criteria of seat of a legal person in the context of investment treaties, especially considering that scholarly sources and arbitral practice also interpret the term seat in investment treaties in a similar manner - as the place of effective management.

1.2.3. The notion of effective management

461. As explained above, legal theory and arbitral practice understand that seat represents the place of effective management.
462. Dictionaries define the term “management” alternatively as (i) control and organization of something; and (ii) the group of people responsible for controlling

⁵³² Draft Articles on Diplomatic Protection with Commentaries with commentaries, International Law Commission, UN Doc. A/61/10, 2006, Article 9 (emphasis added); **RLA-96**.

and organizing a company.⁵³³ Term “effective” is defined as “in fact, although not officially.”⁵³⁴

463. Based on the above, the terms effective management can only be understood to refer to those people in an organization (legal person) who are actually responsible for controlling and organizing the organization, and who actually manage its business and operations. This shows that “seat” represents not a formal, but a substantial criterion - what is of relevance is who actually, genuinely manages the business affairs of a company, even if they do not have an official capacity in a company.

1.2.4. The Cypriot law also recognizes “seat” as a separate criterion

464. As explained, the proper basis for interpreting the term seat is from the perspective of international law. However, for the sake of argument, even if one takes into account municipal law of the signatories to the BIT in the interpretation of the term seat, its meaning would remain the same.
465. As explained by Professor Thomas Papadopoulos, Cypriot law accepts the incorporation theory in its company law which is based on English common law.⁵³⁵ In this regard, Professor Papadopoulos explains that, under Cypriot law, registered office represents a constitutive element of proper incorporation of a company in Cyprus, and is primarily related to various procedural aspects, sometimes purely bureaucratic, such as keeping of company registries.⁵³⁶
466. However, despite ascribing to the incorporation theory, the concept of “seat” is not unknown in Cypriot law and is used in its Companies’ Law. The concept of seat is included in various provisions of Cypriot Companies Law which govern issues such as transfer of company seat from abroad to Cyprus and the status of foreign companies in Cyprus.⁵³⁷ The concept of seat of a company has also been introduced

⁵³³ Cambridge Dictionary, definition of management; **RE-112**; Oxford Living Dictionaries, definition of management; **RE-132**.

⁵³⁴ Cambridge Dictionary, definition of effective; **RE-148**.

⁵³⁵ Expert Report of Dr. Thomas Papadopoulos, para. 8.

⁵³⁶ Ibid., para. 13.

⁵³⁷ Ibid., para. 16.

to Cyprus through the adoption of *Societas Europea*, which adopts a real seat principle.⁵³⁸

467. Therefore, it is obvious that even in the Cypriot law the term “seat” entails more than the existence of “registered office”.⁵³⁹ In its decision on jurisdiction, the tribunal in *Mera v. Serbia* held that the requirement of “seat” in Cyprus is indeed a second requirement, separate from the requirement of incorporation, for a legal entity to be considered as an investor under Article 1(3)(b) of the Cyprus – Serbia BIT.⁵⁴⁰ However, the tribunal continued from there to find that, under Cypriot law, the term “seat” can be equated with “registered office.”⁵⁴¹ Respondent respectfully submits that the conclusion reached by the *Mera* tribunal is erroneous for two main reasons.

468. First, reasoning of the tribunal neglects the fact that, under the law of Cyprus, a company cannot be lawfully established without a registered office.⁵⁴² Since a designation and maintenance of a registered office is an element of a company’s incorporation, the requirement of registered office cannot at the same time be deemed as a second condition for establishing the nationality of an investor under Article 1(3)(b).

469. Second, the *Mera* tribunal effectively omitted to deal with the argument that “registered office” and “seat” cannot be treated as synonyms since both terms are used in various instances in Cypriot Companies Law.⁵⁴³ The distinction that the legislator made between the two notions was evidently intentional.⁵⁴⁴ The fact that the term “seat” is “...essentially a concept of civil law tradition that does not have its origins in Cypriot law”⁵⁴⁵ does not in any way imply that it cannot have a distinct meaning. Rather, the opposite is true – the term was introduced in the Cypriot legal

⁵³⁸ Ibid., para. 21.

⁵³⁹ Ibid., para. 25.

⁵⁴⁰ *Mera Investment Fund Limited v. The Republic of Serbia*, ICISID Case No. ARB/17/2, Decision on Jurisdiction, para. 91, **CLA-22**.

⁵⁴¹ Ibid.

⁵⁴² Expert Report of Dr. Thomas Papadopoulos, para. 14.

⁵⁴³ *Mera Investment Fund Limited v. The Republic of Serbia*, ICISID Case No. ARB/17/2, Decision on Jurisdiction, para. 96, **CLA-22**.

⁵⁴⁴ Expert Report of Dr. Thomas Papadopoulos, paras. 18-20.

⁵⁴⁵ *Mera Investment Fund Limited v. The Republic of Serbia*, ICISID Case No. ARB/17/2, Decision on Jurisdiction, para. 96, **CLA-22**.

system starting from year 2000 with full awareness that it connotes criteria substantially different from “registered office.”⁵⁴⁶

470. Consequently, even if one looks at the law of Cyprus, it becomes apparent that it also recognizes the existence of, and difference between, the concepts of incorporation (registered office) and the seat.

1.2.5. Conclusion

471. As discussed in considerable detail above, seat is a separate nationality criterion, distinct from the criterion of incorporation. The term used in the BIT should be construed under international law. International law considers the notion of seat as a distinctive nationality criterion in investment treaties, and entails the place from where a company is effectively managed.
472. In addition, even if aspects of municipal law are taken into consideration, the conclusion would not change, since the Cypriot law is familiar with existence of distinct concepts of seat and incorporation as tests of corporate nationality.
473. Finally, and most importantly, the wording of Article 1(3)(b) of the applicable BIT clearly distinguishes criterion of incorporation and criterion of the seat and requires cumulative fulfillment of both of these criteria in order for the requirement of nationality to be met.
474. Consequently, Claimants’ argument that the term seat in Article 1(3)(b) of the BIT is to be understood as registered office is completely ungrounded.

1.3. Sembi does not have a seat in Cyprus

475. As it was already elaborated by Respondent, the rationale of the *Tenaris* award is equally applicable in the case at hand – if the term “seat” from the Cyprus – Serbia BIT is to be given any meaning at all it must indicate something more than “the purely formal matter of the address of a registered office or statutory seat... namely “effective management”, or some sort of actual or genuine corporate activity.”⁵⁴⁷

⁵⁴⁶ Expert Report of Dr. Thomas Papadopoulos, para. 19.

⁵⁴⁷ *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, para. 150, (emphasis added); **RLA-45**.

The concept of “seat” with the same meaning was introduced in the Cypriot legislation through adoption of the EU law.⁵⁴⁸

476. Therefore, under both international and the law of Cyprus, the notion connotes, *inter alia*, a place in which a company carries out its corporate activities. In the present case, Sembi has not been engaged in any genuine corporate activity in its purported home State. As it is evident from the expert report submitted by Claimants, Sembi does not have its own business premises and its registered office is in fact an office occupied by HLB Cyprus Limited, an accounting firm.⁵⁴⁹ It is unclear where exactly Sembi conducts its main corporate functions and where the meetings of the directors and annual general meetings of the company are held.
477. Due to its inactivity, Sembi has problems following basic statutory requirements for a limited liability company under Cypriot law. For instance, a simple on-line search of the Cypriot Department of Registrar of Companies and Current Receiver database reveals that the company has submitted its last Annual Return on 31 December 2011.⁵⁵⁰ Under the Companies Law, every company registered in Cyprus must, at least once every year, submit an Annual Return containing basic information of the company and its structure.⁵⁵¹
478. More importantly, as it was already shown by Respondent, in order to meet the jurisdictional requirement of nationality from the Cyprus – Serbia BIT, it is not enough for Claimants to prove that Sembi has an address in Cyprus to which the correspondence addressed to the company can be delivered – they must demonstrate that the company is effectively managed from Cyprus.
479. It is clear from Claimants’ submission alone that no effective management of Sembi’s business takes place in Cyprus. According to the extract from the Company Register regarding Sembi, the company currently has four directors – two of them residing in Canada and Serbia respectively and two in Cyprus.⁵⁵² However, the only person who is in reality in charge of Sembi’s business is Mr. Rand. This is the fact admitted by Claimants:

⁵⁴⁸ Expert Report of Dr. Thomas Papadopoulos, para. 21.

⁵⁴⁹ Expert Report of Mr. Agis Georgiades, para. 2.13.

⁵⁵⁰ Print-screens of the online search of Sembi’s corporate history, **RE-120**.

⁵⁵¹ Article 118(1) of the Companies Law of Cyprus, **RE-184**.

⁵⁵² Extract from the Company Register regarding Sembi dated 7 June 2017, **CE-53**.

*“Mr. Rand is not only one of Sembi’s indirect owners, but also one of its directors and, most importantly, he has a control agreement with the remaining directors of Sembi.”*⁵⁵³

480. This has been so from the date of Sembi’s incorporation on 31 December 2007 and it is evident from the instruction letter sent from Mr. William Rand to HLB Limited on the same day – Mr. Rand exclusively is authorized to give any instruction with regard to Sembi:

*“This is to advise you that all instructions regarding the above company registered with your office under registration number 218561 should be accepted only if given by myself, acting/signing singly, the specimen signature of which is attached herein below as Appendix A.”*⁵⁵⁴

481. That being the case, the seat of Sembi, the place from where it was and is effectively managed, and where its business decisions are made, from where its activities are steered is not in Cyprus. It is in Canada where the person who actually manages Sembi – Mr. Rand – resides.

E. CLAIMANTS DO NOT MEET JURISDICTIONAL REQUIREMENTS UNDER THE ICSID CONVENTION

1. Claimants do not have right of standing under the ICISD Convention

482. In order to have *ius standi* under the ICSID Convention, Claimants must own an investment which would be a basis of jurisdiction of an ICSID tribunal. Article 25(1) of the ICISID Convention reads:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the

⁵⁵³ See Memorial, para. 48. The fact that Mr. Rand was the only person who in reality exercised control over Sembi is also confirmed by Mr. Markicevic: “[After becoming director of Sembi in June 2013] I agreed with Mr. Rand to always follow his directions when acting as a director of Sembi. I understood that Mr. Rand has a control agreement with the two other directors of Sembi as well.” Second Witness Statement of Igor Markicevic, para. 21.

⁵⁵⁴ Instructions Letter from Rand Investments to HLB Axfentiu Limited dated 31 December 2007, **CE-7**.

parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”⁵⁵⁵

483. Clearly, if Claimants are unable to demonstrate their ownership over particular assets forming an investment there can be no “*legal dispute arising directly out of an investment*” between Claimants and the Republic of Serbia and, consequently, no jurisdiction of a tribunal under the ICSID Convention.
484. That the right of standing in ICSID arbitration depends on the claimant’s ownership of a purported investment was confirmed by the tribunal in *Eurogas & Belmont v. Slovakia*. There, the tribunal found that the US claimant has never validly acquired claims in relation to the investment in Slovakia through the merger with another US company.⁵⁵⁶ As a result, the tribunal concluded that it did not have jurisdiction over the claimant (*Eurogas*).⁵⁵⁷
485. In the case at hand, Claimants have never acquired ownership interest in BD Agro. As it was in detail explained earlier, the shareholding interest in a Serbian company can be acquired only in accordance with Serbian laws.⁵⁵⁸ Claimants did not obtain such interest by virtue of the Privatization Agreement between Mr. Obradovic and the Privatization Agency or by virtue of any transaction they entered with Mr. Obradovic.
486. In addition, if an investor is not a contracting party in a contract forming a basis of his investment, the investor has no right of standing before an ICSID tribunal. This conclusion stems from the award rendered by the tribunal in *Consortium v. Algeria*. There, the tribunal declined jurisdiction because the claimant was not a contracting party in the contract that represented the claimant’s investment and that was later on terminated by Algeria.⁵⁵⁹ The tribunal found that the original parties to the contract

⁵⁵⁵ Article 25(1) of the ICSID Convention, **CLA-17**.

⁵⁵⁶ *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award of the Tribunal, 18 August 2017, para. 420, **RLA-43**.

⁵⁵⁷ *Ibid*, para. 476.

⁵⁵⁸ See Section III.A.1.1.1.

⁵⁵⁹ *Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire*, ICSID Case No. ARB/03/08, Sentence, 10 janvier 2005, part II, para. 41; (English Translation from ICSID website), **RLA-98**.

have never ceded their contractual obligations to the consortium that acted as the claimant in the arbitration:⁵⁶⁰

*“It is evident to the Arbitral Tribunal that it cannot go into the substance of a claim if that claim is submitted to the Tribunal by a legal entity that is not bound by the Contract on which the claim is based. This point is so obvious that it does not need special documentation. The economic links that may exist between the companies do not matter here: thus, a parent company cannot claim payments due under contract to a subsidiary, even if that subsidiary is totally dependent on the parent company, unless there are very particular circumstances in play that have not been alleged in this case. These parties opted for different legal structures, for their own reasons, and they cannot now insist that the other party simply overlook that fact.”*⁵⁶¹

487. The decision of the tribunal in *Consortium v. Algeria* was not affected by the claimant’s contentions that it was the “*beneficial owner of the contract*”,⁵⁶² that it immediately took over the contract signed by two different companies and that this fact was communicated to and accepted by Algeria.⁵⁶³ The tribunal’s conclusion was unequivocal:

*“In the end, because the Claimant was not the holder of the rights and obligations of the Contract under which the investment was made, it follows that its Request for Arbitration is inadmissible and that it cannot claim to be an investor within the meaning of Article 25(1) of the Convention. For this reason, not only is the Request for Arbitration inadmissible but, applying the provisions of the Convention, the Arbitral Tribunal has no jurisdiction, since it can consider the matter only at the request of an investor within the meaning of the Convention.”*⁵⁶⁴

488. The rationale of the *Consortium v. Algeria* award fits perfectly to the facts of the case at hand. Although Claimants submit that their “investment” in BD Agro was affected by the termination of the Privatization Agreement, none of the Claimants

⁵⁶⁰ Ibid., part II, para. 37(iii).

⁵⁶¹ Ibid., part II, para. 37(iv); emphasis added.

⁵⁶² Ibid., part II, para. 36(ii).

⁵⁶³ Ibid. part II, para. 38.

⁵⁶⁴ Ibid., part II, para. 40; emphasis added.

has ever been a party to that contract. The Privatization Agreement was concluded between Mr. Obradovic and the Privatization Agency. The Privatization Agency has never been informed that MDH, Mr. Rand or Sembi took over Mr. Obradovic's position as a contracting party. Even if Claimants would be able to submit any kind of evidence that such substitution has ever been communicated to the Privatization Agency – the validity of the substitution would depend on the explicit approval of the Agency which has never been issued. Consequently, Claimants do not have right of standing in the present arbitration.

2. Claimants did not make “an investment” under the ICSID Convention

489. Apart from being unable to prove that they possess the right of standing before the Tribunal, Claimants' transaction as described in their submission does not meet the requirements of “an investment” under Article 25(1) of the ICSID Convention.
490. In order to fulfill jurisdictional requirements in the dispute at hand, Claimants must prove that their case meets conditions envisaged by instruments containing parties' consent to arbitrate (Canada – Serbia and Cyprus – Serbia BITs), as well as the requirements embodied in the ICSID Convention.
491. With regard to the notion of “investment” enjoying protection under the ICSID mechanism, this dual approach was described in the authoritative commentary:

*“In examining whether the requirements for an “investment” have been met, most tribunals apply a dual test: whether the activity in question is covered by the parties' consent and whether it meets the Convention's requirements. If jurisdiction is to be based on a treaty containing an offer of consent, the treaty's definition of investment will be relevant. In addition, the tribunal will have to establish that the activity is an investment in the sense of the Convention. This dual test has at times been referred to as the “double keyhole” approach or as a “double barrelled” test.”*⁵⁶⁵

492. This seems to be the proposition that Claimants accept as well.⁵⁶⁶ In their submission, Claimants rely on the so-called *Salini* test in an effort to prove that their

⁵⁶⁵ Christoph Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair, *The ICSID Convention: A Commentary*, 2nd ed., Cambridge University Press, 2009, p.117, para 124; (footnotes omitted), **RLA-97**.

⁵⁶⁶ Memorial, paras. 328, 329.

“investment” meets the characteristics of an investment under the ICSID Convention.⁵⁶⁷ The test encompasses four criteria: (1) the existence of a substantial contribution by the foreign national, (2) a certain duration of the economic activity in question, (3) the assumption of risk by the foreign national, and (4) the contribution of the activity to the host State’s development.⁵⁶⁸ As Respondent demonstrates below, the Claimants’ contention that their business operation fulfills said requirements is based on plain assertions and gross misinterpretation of facts.

493. **First**, Claimants failed to prove the existence of a substantial contribution in money or assets. As a preliminary matter, it should be noted that the Claimants’ submission cites to this regard only alleged contributions made by Mr. Rand himself or by Rand Investments.⁵⁶⁹ There is no reference to contributions of other Canadian Claimants and, more importantly, there is no mention of any contribution of money or other assets made by Sembi. This is unsurprising, since Sembi has never invested anything of value in BD Agro or in the Republic of Serbia.

494. The significance and the meaning of “contribution” were touched upon by the tribunal in *Malicorp v. Egypt*, in its explanation of the relationship between the notion of “investment” in the relevant BIT and in Article 25(1) of the ICSID Convention.⁵⁷⁰ In the tribunals view, the relevant BIT concentrates on “rights and assets” that enjoy protection, while the ICSID Convention insist that those rights and

⁵⁶⁷ Memorial, para. 329 .

⁵⁶⁸ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* [I], ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, para. 52, **CLA-20**.

⁵⁶⁹ Memorial, para. 330, fn. 356, 357: Confirmation of wire transfer from William Rand to Wiljill Farms Inc. for CAD 175,000.00 executed on 3 April 2008; Confirmation of wire transfer from William Rand to Wiljill Farms Inc. for CAD 607, 759.00 executed on 21 October 2008; Confirmation of wire transfer from William Rand to Wiljill Farms Inc. for CAD 199,816.00 executed on 22 December 2008; Confirmation of wire transfer from William Rand to Wiljill Farms Inc. for CAD 460,216.00 executed on 24 December 2008 **CE-21**; Confirmation of wiretransfer from William Rand to Sea Air International Forwarders of CAD 695,030.90 executed on 21 October 2008; Confirmation of wire transfer from William Rand to Sea Air International Forwarders of CAD 124,100 executed on 9 December 2008, Confirmation of wire transfer from William Rand to Sea Air International Forwarders of CAD 309,415 executed on 22 December 2008, **CE-22**; Confirmation of wire transfer from William Rand to Trudeau International Farms for CAD 443,080.00 executed on 21 October 2008, **CE-23**; Confirmation of wire transfer from William Rand to BD Agro for EUR 219,000.00 executed on 5 December 2008, **CE-24**; Overview of Payments to Mr. David Wood, **CE-62**; Overview of Payments to Mr. Gligor Calin, **CE-68**.

⁵⁷⁰ *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, **RLA-77**.

assets were acquired through contribution of capital.⁵⁷¹ In the words of the *Malicorp* tribunal:

“Both aspects are reflected in the two underlying texts, but in a complementary manner. Clearly Article 1(a) of the Agreement emphasises the fruits and assets resulting from the investment, which must be protected, whereas the definitions generally used in relation to Article 25 of the ICSID Convention lay stress on the contributions that have created such fruits and assets. It can be inferred from this that assets cannot be protected unless they result from contributions, and contributions will not be protected unless they have actually produced the assets of which the investor claims to have been deprived.”⁵⁷²

495. Applied to the case at hand, the *Malicorp* rationale suggests that the Treaties emphasize assets that enjoy protection (in this particular case: “the beneficially owned shares” supposedly acquired by Claimants), whereas Article 25(1) of the ICSID Convention demands that those assets were created by Claimants’ contribution of capital (payment of the purchase price for BD Agro’s shares).
496. The proposition laid in the *Malicorp* award was accepted in *KT Asia v. Kazakhstan*,⁵⁷³ where the tribunal found that it lacked jurisdiction under the ICSID Convention because the claimant failed to prove that it had made an initial contribution for the purpose of acquiring shares.⁵⁷⁴ Rather, the contribution was arguably made by another person.⁵⁷⁵
497. Just as it was the case in *KT Asia v. Kazakhstan*, Claimants are unable to demonstrate that the purported acquisition of BD Agro’s shares was “fruit” of their monetary contribution.
498. On the contrary, evidence on the record clearly show that it was Mr. Obradovic and not Mr. Rand who obtained funds for the purchase of BD Agro. It was Mr. Obradovic who paid all of installments of the purchase price agreed under the

⁵⁷¹ Ibid., paras. 108, 109.

⁵⁷² Ibid., para. 110; (emphasis added).

⁵⁷³ *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, para. 167, **RLA-95**.

⁵⁷⁴ Ibid., para. 206.

⁵⁷⁵ Ibid., para. 191.

Privatization Agreement.⁵⁷⁶ Even the evidence that Claimants submitted in the present proceedings do not state otherwise. For example, in his witness statement, Mr. Azrac confirmed that between 2005 and 2008, working on instructions from the Lundin family, he “*effected transfers of approximately EUR 13.8 million to Mr. Djura Obradovic and Marine Drive Holdings Ltd. for the BD Agro project.*”⁵⁷⁷ The beneficiary of those loans was Mr. Obradovic and this is evident from the First Sembi Agreement.⁵⁷⁸ The purpose of the Agreement was to settle his debts towards the Lundin Family and it clearly implies that those debts were acquired in the process of BD Agro’s acquisition.⁵⁷⁹ On the other hand, Claimants failed to submit any document proving that the payments for BD Agro capital were made by Mr. Rand or by MDH.

499. The same can be said about Claimants’ purported “additional investment of approximately EUR 2 Million” in BD Agro.⁵⁸⁰ Apart from their own assertions, Claimants do not offer any documentary evidence in that regard. In fact, the only evidence that the Claimants’ submission refer to is the conformation issued by the Privatization Agency stating that Mr. Obradovic fulfilled his investment obligation under the Privatization Agreement.⁵⁸¹ On the other hand, in May 2007 BD Agro notified the Privatization Agency that the entire additional investment under the Privatization Agreement was financed by Mr. Obradovic as a majority owner of the company.⁵⁸²

500. The only actual payments that Claimants are able to prove are Mr. Rand’s partial payments for purchase and transport of heifers in 2008 and certain expenditures for consultants’ fees paid by Rand Investments (as a guarantor for BD Agro’s obligations) starting from mid-2013.⁵⁸³ As already explained, Mr. Rand’s payments for heifers are recorded as his claim towards BD Agro in the bankruptcy

⁵⁷⁶ Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic dated 15 October 2015, **RE-33**.

⁵⁷⁷ Witness Statement of Mr. Aksel Azrac dated 16 January 2019, para. 13.

⁵⁷⁸ Agreement between Dj. Obradović, The Lundin Family, W. Rand and Sembi dated 22 February 2008, **CE-28**.

⁵⁷⁹ Ibid., points A. and B.

⁵⁸⁰ Memorial, para. 330.

⁵⁸¹ Confirmation of the Privatization Agency of the Completion of Investment dated 10 October 2006, **CE-18**.

18.

⁵⁸² Letter form BD Agro to the Privatization Agency dated 4 May 2007, **RE-61**.

⁵⁸³ Memorial, para. 330.

proceedings.⁵⁸⁴ Those payments were of auxiliary character and amount to financing of Mr. Obradovic's investment. They did not result in acquisition of BD Agro's assets and cannot be deemed as contribution in the meaning of Article 25(1) of the ICSID Convention.

501. As for payments of consulting fees, payments were evidently made in preparations for Coropi's intended takeover of BD Agro that was expected but has never materialized. As such, those payments can only be treated as pre-investment expenditures that do not represent an investment under the Treaties or the ICSID Convention.⁵⁸⁵
502. **Second**, Claimants' transactions did not involve any substantial risk. As it was explained by the *KT Asia* tribunal – in absence of contribution directed at acquisition of equity in a corporation, it is difficult to identify an investment risk.⁵⁸⁶ If Claimants' contentions about the structure of their purported investment are considered fully accurate, the entire purpose of the venture was to transfer any potential risk to Mr. Obradovic and BD Agro. As shown in the Grant Thornton , the business of BD Agro was almost entirely financed by the company itself – through borrowing funds from commercial banks and through sale of its assets.⁵⁸⁷ Since the funds for the purchase of BD Agro were secured by Mr. Obradovic and the influx of cash in BD Agro's operation was provided by additional loans guaranteed with BD Agro's assets, it is impossible to detect any considerable risk that Claimants would be facing.
503. **Finally**, no contribution to development of Serbian economy was made as a result of Mr. Obradovic's business venture. In effort to demonstrate the success of BD Agro under Mr. Obradovic's management Claimants are able to offer only a newspaper article with colorful title.⁵⁸⁸ The reality is much different. Less than seven years of Mr. Obradovic's management was enough to thoroughly destroy income generating potential of a company that has existed since 1947.

⁵⁸⁴ Commercial Court in Belgrade Decision number 9. St-321/2015 (30 March 2018), Decision on the List of Determined and Contested Claims, p.2 (English translation); **CE-136**.

⁵⁸⁵ See *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, paras. 50, 51, 60, 61, **RLA-78**.

⁵⁸⁶ *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, paras. 218, 219, **RLA-95**.

⁵⁸⁷ Expert Report of Sandy Cowan, para. 2.7.

⁵⁸⁸ News Article "Where cows listen to Beethoven" published on 27 November 2010, **CE-26**.

504. Bearing in mind aforementioned, Respondent respectfully request the Tribunal to find that Claimants' claim in the present proceedings does not meet the jurisdictional requirements under the ICSID Convention.

F. CLAIMANTS' CLAIMS AMOUNT TO ABUSE OF PROCESS

505. It is a well-established rule in the practice of investment tribunals that the mechanism of investment protection is available only to *bona fide* investments. As explained by the *Phoenix* tribunal:

*"...States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith. The protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance."*⁵⁸⁹

506. It is a duty of every ICSID tribunal to *"... prevent an abuse of the system of international investment protection under the ICSID Convention, in ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected."*⁵⁹⁰

507. This is the rule equally applicable outside the ICSID mechanism and it is recognized as a tool which should allow tribunals to decline jurisdiction and deny protection to *"...domestic investments disguised as international investments or domestic disputes repackaged as international disputes for the sole purpose of gaining access to international arbitration."*⁵⁹¹

508. Respondent submits that Claimants initiated the present proceedings with full awareness of the fact that they are not entitled to protection under the Treaties and the ICSID Convention, thereby committing an abuse of process.

509. As it was already demonstrated, Mr. Rand's actions and statements during his attempt to take over the Privatization Agreement and BD Agro's shares from mid-

⁵⁸⁹ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 106, **RLA-5**.

⁵⁹⁰ *Ibid.*, para. 113, **RLA-5**.

⁵⁹¹ *ST-AD GmbH v. Republic of Bulgaria* (UNCITRAL), PCA Case No. 2011-06, Award on Jurisdiction, para. 423; (emphasis added), **RLA-79**.

2013 to late 2015 clearly show that Mr. Rand did not consider himself to be an owner of BD Agro.⁵⁹² The same can be said about Sembi – Claimants must have been aware that Sembi’s purported acquisition of Mr. Obradovic’s rights under the Privatization Agreement had no effect under Serbian law because it lacked proper consent by the Privatization Agency, since some of them were subsequently engaged in discussions with the Agency about the possible assignment of the Privatization Agreement to Coropi.⁵⁹³

510. In reality, Claimants have constructed their case on the beneficial ownership theory in order to attract application of the Treaties and the ICSID Convention, while being fully cognizant of the fact that they were not protected investors since they did not own BD Agro under Serbian law.
511. The facts of the case also demonstrate that the beneficial ownership construct was Claimants’ back-up plan in an attempt to gain access to international arbitration. Mr. Rand evidently tried to take over Mr. Obradovic’s agreement with the Privatization Agency using a Cypriot company as a vehicle. This maneuver brings in mind a question for which Claimants have not provided an answer – why would one request to become a party to the contract and the owner of the contractual rights and shares in BD Agro if one is already the owner? How logical would it be to enter into the contract with oneself? There is no logic in it but the logic fortunately speaks for itself – Mr. Rand was not the owner of BD Agro’s shares but wanted to become one.
512. The point at which Mr. Rand sought to acquire Mr. Obradovic’s position in the Privatization Agreement is quite telling – at that time, between 2013 and 2015, there was more than high probability of a dispute - such dispute was immanent at least since 1 March 2011 when the Privatization Agency notified Mr. Obradovic that he was in breach of Article 5.3.4. and that it considered such breach to be a reason for the termination of the Privatization Agreement.
513. Attempt to acquire contractual rights and the shareholding in BD Agro in such circumstances reveals the reasons behind it – which are the same reasons that led Claimants to engineer the concept of “beneficial ownership” – to attract the protection of the BIT (the Cyprus – Serbia BIT at the time) and to gain access to

⁵⁹² See Section III.A.1.1.2.d.

⁵⁹³ See Section II.D.2.

international arbitration. However, this runs against the very essence of international protection of foreign investments. As the *Lao Holdings v Laos* tribunal emphatically stated:

*“The Tribunal does not view the Treaty as intending to provide legal weapons to investors for the purpose of re-engaging in a pre-existing legal dispute with the Lao Government.”*⁵⁹⁴

514. According to the tribunal in *Europe Cement v. Turkey*, a claim that is based on the false assertion of ownership cannot be regarded as a claim made in good faith, but rather as an abuse of process.⁵⁹⁵ Similarly, in the *Cementownia* case the tribunal found the claimant’s actions – representing that it was an investor when it knew that was not the case – to amount to bad faith and abuse of process.⁵⁹⁶
515. Whatever was the true nature of a business relationship between Mr. Rand and Mr. Obradovic, it is certain that it was Mr. Obradovic who was the owner of BD Agro.⁵⁹⁷ Claimants’ fabricated theory runs contrary to explicit and formal statements of Mr. Obradovic which unequivocally testify that Mr. Obradovic considered BD Agro to be his investment. A communication sent from Mr. Obradovic to the Privatization Agency in September 2015 is particularly telling in this context.
516. On 8 September 2015 Mr. Obradovic wrote to the Privatization Agency demanding a formal decision of completion of the privatization procedure and release of the pledge over the shares owned by him.⁵⁹⁸
517. In this letter, Mr. Obradovic once again refers to shares of BD Agro as being in his “ownership”.⁵⁹⁹ Again, Mr. Rand was introduced as an “interested investor” willing

⁵⁹⁴ *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014, para. 117, **RLA-80**.

⁵⁹⁵ *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, para. 175; **RLA-81**.

⁵⁹⁶ *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009, para. 159; **RLA-82**.

⁵⁹⁷ See Section III.A.1.1.1.

⁵⁹⁸ Letter from Mr. Obradovic to the Privatization Agency dated 8 September 2015, **CE-48**.

⁵⁹⁹ *Ibid.*, p. 4. It should be noted that Claimants’ translation of the Serbian word *власништво* as “possession” is incorrect. The correct translation of the word is “ownership”.

to provide “*necessary financial support for the recovery of BD Agro*” subject to the completion of the privatization procedure and deletion of pledge on shares.⁶⁰⁰

518. Most importantly, the letter demonstrates that it was Mr. Obradovic who considered himself to be a foreign investor, entitled to protection under Serbian laws and international treaties. The communication contained an explicit warning about potential arbitration against Respondent based on the Canada – Serbia BIT:

*“Finally, I also state that I am a citizen of Canada and, thus, a foreign investor in the Republic of Serbia and, as per the Law on Foreign Investments, I should enjoy legal security and legal protection in terms of the rights acquired through investments in the Republic of Serbia; my acquired rights cannot be retrospectively reduced through amendment of laws and other regulations. In addition, I would like to remind you of the fact that the Republic of Serbia and Canada have signed an Agreement on Promotion and Protection of Investment which came into force on April 27, 2015 and was published in the "Official Gazette of the Republic of Serbia — International Agreements" no. 9/2015, where the Agreement stipulates that the foreign investors may request protection of their rights not only before national courts, but also before established international arbitrations.”*⁶⁰¹

519. The sole aim of the beneficial ownership theory is evidently to transform Mr. Obradovic’s contractual dispute with the Privatization Agency into an international dispute under the ICSID Convention and it was developed after Claimants’ unsuccessful attempt to obtain the ownership of BD Agro. Whether the ultimate purpose of the present proceedings is to allow Mr. Rand to be compensated for his previous dealings with Mr. Obradovic or for both Messrs. Rand and Obradovic to profit from the potential award is impossible to conclude, bearing in mind their practice of concluding undisclosed agreements.

⁶⁰⁰ *Ibid.*, p. 5.

⁶⁰¹ *Ibid.*, p. 6 (emphasis added).

520. However, Respondent submits that the issue is also beside the point. What matters is the fact that Mr. Obradovic, as a Serbian national, cannot assign the right he does not have – the right to go to international arbitration against his State of nationality.⁶⁰²

521. If the Tribunal would allow Claimants’ argument to stand, it would always be possible for a national of the host State to invent a “beneficial owner” of his assets and consequently to bring his own State before an international forum. This would run contrary to the object and purpose of both the Canada – Serbia BIT and the ICSID Convention:

*“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.” 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.”*⁶⁰³

522. Finally, even if Claimants’ presentation of facts would be fully accurate - *quod non* – their case runs against the good faith principle and it is as such unattainable.

523. Under the Claimants’ narrative, Mr. Rand, although perfectly able to acquire shares of BD Agro in his own name, chose to engage secretly for no apparent reason. An “investment” of this kind enables putative investor to avoid any potential consequences of his actions, both civil and criminal. Outside the legal realm and without a lawfully acquired investment Mr. Rand remains invisible – and this alone should be enough to make him and other Claimants invisible for the protection of the Canada – Serbia BIT.

⁶⁰² *ST-AD GmbH v. Republic of Bulgaria* (UNCITRAL), PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, para. 411, **RLA-79**.

⁶⁰³ *Ibid.*, para. 408 (internal citations omitted; emphasis added); **RLA-79**.

524. Based on the foregoing, Respondent respectfully requests the Tribunal to find that it does not have jurisdiction to decide on Claimants' claims, as a result of their abuse of process in the present arbitration.

G. REQUEST FOR BIFURCATION

525. Under Article 41 of the ICSID Convention and Rule 41 of the ICSID Arbitration Rules, the Arbitral Tribunal has discretion whether to bifurcate the proceedings upon submission of a jurisdictional objection.

526. Although neither the ICSID Convention nor the Arbitration Rules contain any legal standard which an ICSID tribunal could use in order to decide on the request for bifurcation, arbitral practice has developed certain criteria that should help guide tribunals in that matter.

527. Recent decisions on the issue use the three-part test originally formulated by the tribunal in *Glamis Gold v. US*.⁶⁰⁴ The test is based on following criteria:

- Is the request substantial or frivolous?
- Would the request, if granted, lead to a material reduction in the scope and complexity of the case?
- Is the bifurcation impractical in the sense that the issues are too intertwined with the merits so that a reduction of time and costs cannot be expected?⁶⁰⁵

528. In the case at hand, all considerations as set above speak in favor of deciding on Respondent's objections as a preliminary matter.

⁶⁰⁴ *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Procedural Order no. 2, 31 May 2005, para. 12(c), **RLA-99**.

⁶⁰⁵ See, also, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation, 13 Jun 2013, para. 37(2), **RLA-100**; *A11Y LTD. v. Czech Republic*, ICSID Case No. UNCT/15/1, Procedural Order No. 2, 5 October 2015, para. 56, **RLA-70**; *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India*, PCA Case No. 2016-7, Procedural Order No. 4, 19 April 2017, paras. 76, 77, **RLA-101**; *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, Procedural Order No. 2, 21 April 2017, para. 18, **RLA-102**; *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2, 14 December 2017, paras. 99-101, **RLA-103**; *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2, 31 January 2018, para. 39, **RLA-104**.

529. First, as can be seen from the preceding discussion on the jurisdictional objections, they are far from frivolous. Respondent respectfully submits that they raise serious and well-founded doubts as to the Tribunal’s jurisdiction.
530. Second, if any of the jurisdictional objections raised by Respondent would be granted this would lead to substantial reduction in the scope and complexity of the case or even to its outright dismissal.
531. Respondent’s objection concerning Claimants’ inability to prove ownership over property rights allegedly conforming “investment” is particularly important in this regard. Should the objection going to the *ratione materiae* jurisdiction and Claimants’ lack of standing be accepted by the Tribunal, it would dispose of the entire case. The issue raised by Respondent concerns the existence and nature of property rights allegedly held by Claimants at the time of the purported breach of the Treaties. In similar circumstances, the tribunal in *Emmis v. Hungary* found that “...to defer the determination of that question to the merits phase might lead to confusion and lack of clarity on a fundamental question.”⁶⁰⁶ This is so since, as elaborated above, there can be no expropriation if Claimants did not hold, at the material time, any property rights capable of being expropriated.
532. Furthermore, a successful jurisdictional objection could lead to an outcome in which the Tribunal would not need to apply the Canada – Serbia BIT and the Cyprus – Serbia BIT simultaneously. This would result in substantial reduction in cost and time. For instance, should the Tribunal find that it does not have jurisdiction only with regard to the Cypriot claimant (Sembi), this would not only absolve the Tribunal from applying the Cyprus – Serbia BIT altogether, but it would also mean that two claims raised by Claimants exclusively based on that instrument would automatically become moot. As it is evident from the Claimants’ submission,⁶⁰⁷ the non-impairment claim and the claim based on the alleged breach of the umbrella clause by Respondent rest upon the MFN clause contained in Article 3(1) of the Cyprus – Serbia BIT. Since both claims are dependent on the application of said

⁶⁰⁶ *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, Decision on Respondent’s Application for Bifurcation, para. 50, **RLA-100**.

⁶⁰⁷ Memorial, Sections VI.B. and VI.D.

provision, a finding that the Tribunal does not have jurisdiction in relation to Sembi's would eliminate the need to discuss those claims at the merits stage.

533. On the other hand, even if the Tribunal would dismiss Respondent's jurisdictional objections, there would be no increase in cost or considerable delay in adjudication. The points raised by Respondent, if determined in the jurisdictional phase, would not need to be re-addressed in the merits phase of the case. Therefore, all the jurisdictional issues would need to be addressed only once (either in the jurisdictional phase or, if there is no bifurcation, in the merits phase). This means that the same cost would be simply allocated to an earlier phase of the proceedings, while at the same time, there would be a realistic possibility that this would save the enormous cost of the merits proceedings, should the jurisdictional objections be accepted.
534. Finally, the issues of jurisdiction raised in the present submission can be resolved without assessing the merits of the dispute.
535. For these reasons, bifurcation would be the most efficient way to proceed and would - if the jurisdictional objections were granted - lead to a substantial reduction of time and costs, if not to the dismissal of the claim as a whole, while not increasing the entire costs of the proceedings in the event that the objections are not granted.
536. Therefore, Respondent respectfully requests the Tribunal to use its discretion under Article 41 of the ICSID Convention and Arbitration Rule 41 and resolve Respondent's jurisdictional objections as a preliminary matter.

IV. ATTRIBUTION

A. GENERAL

537. It is not in dispute between the Parties that International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (“ILC Articles”) should govern the question of attribution to Respondent of the conduct which, according to Claimants, violated their rights under the Treaties.⁶⁰⁸

538. However, while Claimants’ rely on Articles 4, 5 and 8 of the ILC Articles, their submission lacks any fuller discussion of these provisions. As will be seen below, this is not a coincidence. A closer look at the ILC’s Commentary and other authorities discussing these provisions reveals that the conduct central for the present case – the conduct of the Privatization Agency – cannot be attributed to Respondent.

539. Claimants also contend that the conduct of the Ministry of Economy and the Ombudsman should be attributed to Respondent, which is not in dispute, since both are Respondent’s organs under Serbian law. However, as will be seen in the section discussing the alleged breaches, a careful analysis shows that not even Claimants’ allege that actions of these organs violated their rights under the Treaties.⁶⁰⁹

540. The following sections will discuss the question of attribution of the Privatization Agency’s conduct under Articles 4, 5, and 8 of the ILC Articles.

B. ARTICLE 4 OF ILC ARTICLES

1. General

541. According to Article 4 of ILC Articles:

“1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the

⁶⁰⁸ See, e.g., Memorial, paras. 349, 364, 365 & 375, relying on Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, **CLA-24**.

⁶⁰⁹ See below Section V.A.

organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”

542. It is clear from the text of Article 4 that the starting position for characterizing a person or entity as a state organ is internal law of the State.⁶¹⁰ The fact that an entity has a separate legal personality creates a strong presumption that it is not a state organ within the meaning of Article 4. This conclusion is further reinforced if the entity in question has a budgetary independence, autonomous management and engages, at least in some part, in commercial activities.

543. This approach was taken by the arbitral tribunal in the *Jan de Nul* case, which started from the fact that the Suez Canal Authority (“SCA”) was not classified as a state organ under Egyptian law, but had an independent legal personality.⁶¹¹ Further, although SCA exercised public activities (management and utilization of a nationalized activity), it had an autonomous budget and a commercial nature. All this led the arbitral tribunal to conclude that SCA was not a state organ under Article 4 of the ILC Articles.⁶¹²

544. Similarly, the arbitral tribunal in *Bayindir v. Pakistan* held that

*“Because of its separate legal status, the Tribunal discards the possibility of treating NHA as a State organ under Article 4 of the ILC Articles.”*⁶¹³

545. More recently, in 2016, the arbitral tribunal in *Almas v. Poland* undertook a similar analysis, with reference to the *Jan de Nul* award. The *Almas* case concerned a long-term agreement on the lease of land concluded between claimant’s subsidiary and the Polish Agricultural Property Agency (ANR). The dispute arose when the latter

⁶¹⁰ See Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, p. 42, para. 11, **CLA-24**; See also *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 163, **RLA-83** (“To determine whether an entity is a State organ, one must first look to domestic law.”).

⁶¹¹ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 160, **RLA-83**.

⁶¹² *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paras. 160-161, **RLA-83**.

⁶¹³ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 119, **RLA-84**.

terminated the lease agreement. The arbitral tribunal found that there was no attribution of ANR's conduct to Poland either under Article 4 or Article 5 of the ILC Articles. With respect to Article 4, it first determined that the ANR was not a State organ *de jure* under Polish law as it had a separate legal personality.⁶¹⁴ Then it considered whether ANR was a *de facto* organ of the Polish State and concluded that:

*"... ANR enjoys a level of autonomy not consistent with its being considered a de facto organ. This is confirmed by the financial factors which were considered as relevant in Jan de Nul... ANR has its own bank account. It holds property in its own name. In other words, it has financial autonomy similar to that enjoyed by the Suez Canal Authority. In light of its autonomous management and financial status, ANR is not a de facto organ of the Polish State."*⁶¹⁵

546. Here, it should be noted that the standard for *de facto* organs has been formulated by the ICJ as a very demanding one:

*"persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument."*⁶¹⁶

547. As can be seen, for an entity with a separate legal personality to be considered a *de facto* organ, it must act in "complete dependence" on the state. In other words, the notion of *de facto* organs is incompatible with any sort of managerial autonomy.

⁶¹⁴ *Kristian Almås and Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016, para.209, **RLA-85**.

⁶¹⁵ *Kristian Almås and Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016, para., para. 213 (footnotes omitted), **RLA-85**.

⁶¹⁶ *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgement of 26 February 2007, para. 392, **RLA-86**; *See also Case concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits), ICJ, Judgment of 27 June 1986 p. 52, para. 109, **RLA-9**.

2. Privatization Agency is not an organ under Article 4 of the ILC Articles

548. The Privatization Agency was established by a separate law and operated until 31 December 2015.⁶¹⁷ It had a separate legal personality and its own budget.⁶¹⁸ This is obviously sufficient to remove it from the ambit of Article 4 of the ILC Articles.⁶¹⁹
549. The Privatization Agency's budget was funded by its own revenues, including by taking a commission for selling state property.⁶²⁰ Claimant's pointing to the fact that the *initial* funds for its establishment were provided from the state budget⁶²¹ is irrelevant, in the same way as would be the fact that a state established a shareholding company and provided the founding capital.
550. Similarly, as the Polish Agricultural Property Agency in *Almas*, the Privatization Agency had its own bank account. The director of the Privatization Agency disposed with its funds, in accordance with the financial plan adopted by the Agency's Governing Board.⁶²²
551. Activities of the Privatization Agency include solicitation in the selling of public and social capital and property in the process of privatization, as well as promotion of privatization, implementation of the process of privatization and its control, as well as selling of certain types of publicly held shares and stock.⁶²³ Its activities relevant in the present case were the entry into the Privatization Agreement, monitoring and control of the buyer's performance, and taking steps to ensure his performance, including setting additional time limits for observance of his obligations and, ultimately, termination. All these activities are normally undertaken by any party to a commercial contract.
552. It clearly follows that the Privatization Agency was a separate entity from Respondent's state organs, that it had a separate budget and managerial autonomy, while its activity in the relevant part was commercial. As such, it is similar to the

⁶¹⁷ 2015 amendments to the 2001 Law on the Privatization Agency, Article 31, **CE-244**.

⁶¹⁸ See Memorial, para. 352. Its separate legal personality and the financial autonomy were established by Article 2 of the Law on Privatization Agency, **CE-238**.

⁶¹⁹ See *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 119, **RLA-84**.

⁶²⁰ Law on Privatization Agency, Article 5, para. 2(1) & (2a), **CE-238**.

⁶²¹ See Memorial, para. 352.

⁶²² Witness Statement of Vladislav Cvetkovic dated 4 April 2019, para. 4.

⁶²³ Law on Privatization Agency, Article 6(2), **CE-238**.

entities analyzed in *Jan de Nul* and *Almas*, which were not considered as state organs within the meaning of Article 4 of ILC Articles.

553. Claimants contend that the Privatization Agency was “*an organ of the State from the functional perspective*” because it was “*a public agency holding public authority, established by law and operating in accordance with the regulation of public services*”.⁶²⁴ However, as held by the arbitral tribunal in *Jan de Nul*, the fact that an entity is carrying out public activities is not determinative of its status as a state organ, if it is not so structurally:

“*There is no doubt that from a functional point of view, the SCA can be said to generally carry out public activities, as acknowledged by the Respondent itself. However, structurally, it is clear that the SCA is not part of the Egyptian State...*”⁶²⁵

554. The same goes for the Privatization Agency, which to an extent carried a public activity but was structurally separate from Respondent. Indeed, the fact that it operated in accordance with the Law on Public Services,⁶²⁶ underscores its separate nature, since this law applies to entities clearly separate from the state (“*institutions, enterprises and other forms of organization*”) which perform services of public interest, such as hospitals, kindergartens, and schools.⁶²⁷

555. Claimants mention that in 2014 two types of commissions were created within the Privatization Agency, one of which is the Commission for Control.⁶²⁸ It is not in dispute that the commission in question had, *inter alia*, members from the Ministry of Economy, Ministry of Finance and Ministry of Labor. What is important, however, is that both commissions operated within the Privatization Agency, as confirmed by Claimants’ expert and as accepted by Claimants.⁶²⁹ Since the Privatization Agency itself was not an organ under Article 4 of ILC Articles, the

⁶²⁴ Memorial, para. 358.

⁶²⁵ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 161, **RLA-83**.

⁶²⁶ Law on Privatization Agency, Article 2(1), **CE-238**.

⁶²⁷ See Law on Public Services, Art. 1(1), **CE-239** (“*institutions, enterprises and other forms of organization which perform activities or operations, which secure exercise of the rights of citizens or satisfying the needs of citizens and organizations...*”).

⁶²⁸ See Memorial, para. 355.

⁶²⁹ “*In 2014, an amendment to the Law on Privatization Agency provided for the creation of two types of commissions within the Privatization Agency.*” Expert Report of Milos Milosevic, para. 45; see also Memorial, para. 355.

commissions created within it also could not be regarded as such. The fact that some members of these commissions worked in certain ministries does not change this conclusion. As the arbitral tribunal in *Bayandir* noted,

*“The Claimant also asserts, however, that NHA's conduct was in fact the mere execution of decisions taken by government officials. This argument would appear to suggest that the acts incriminated emanate from government officials, who are themselves organs of the State under Article 4 of the ILC Articles. Given that – as already indicated above – NHA is a separate legal entity and that the acts in question are those of NHA as a party to the Contract, the Tribunal considers that there are no grounds for attribution by virtue of Article 4.”*⁶³⁰

556. Claimants are also wrong to contend that the Privatization Agency was “under direct control of the Ministry of Economy”.⁶³¹ The former director of the Privatization Agency testifies that this was not so, and that the Agency had full operational autonomy.⁶³² Legally, the Ministry of Economy had only the power to supervise the work of the Privatization Agency, so the latter had the obligation to provide it with activity reports twice a year.⁶³³ This has nothing to do with “direct control”. The autonomy of the Privatization Agency is confirmed by the fact, repeatedly mentioned by Claimants, that it did not follow the position of the Ministry of Economy that there was no economic justification to terminate the Privatization Agreement and “*nevertheless continued to insist that BD Agro take the remedial action requested in February 2011*”.⁶³⁴

557. Claimants also point to the fact that the Serbian Government appointed members of the Privatization Agency’s Governing Board and its Director.⁶³⁵ However, this is not determinative for the Agency’s status as an organ of state, as long as its Governing Board and Director operated with autonomy, as they did, both as a matter of law and fact.

⁶³⁰ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 119, **RLA-84**.

⁶³¹ See Memorial, para. 359.

⁶³² Witness Statement of Vladislav Cvetkovic dated 4 April 2019, para.5.

⁶³³ See Law on Privatization Agency, Article 18, **CE-238**.

⁶³⁴ Memorial, para. 125; see also *ibid.* para 123 (referring to the letter of the Ministry of Economy to the Privatization Agency dated 30 May 2012, **CE-33**).

⁶³⁵ See Memorial, para. 359.

558. As noted by the arbitral tribunal in *Almas v. Poland*, government's supervision over an entity and appointment of its management are insufficient evidence of full control:

*“While ANR is supervised by the Minister for Rural Development, Poland’s control over ANR’s Board is limited to the appointment and removal of its president and vice-president. Poland may direct ANR through regulations. The Council of Ministers additionally must approve sales of shares held by ANR of stock in companies of strategic importance to agriculture, a limited category of holdings. These facts suggest that overall ... ANR enjoys a level of autonomy not consistent with its being considered a de facto organ.”*⁶³⁶

559. Further, Claimants invoke the statement of the European Court of Human Rights in the case *Kačapor v. Serbia* that the Privatization Agency is “itself a State body”. However, this pronouncement of the European Court of Human Rights is inapposite in the present case, since it was made in a different and a very specific context – a human rights case which concerned the failure of the National Bank of Serbia to execute court judgments and corresponding violation of Article 6(1) of the European Convention of Human Rights and Article 1 of Protocol No 1.⁶³⁷

560. Claimant also relies on the award in *Awdi v. Romania*, where the arbitral tribunal considered that the Romanian privatization authority (AVAS) was an organ of the state, because the privatization contract “*was concluded in the frame of the State’s privatization policy by the state organ*”.⁶³⁸ However, the *Awdi* tribunal considered that AVAS was a state organ but did not provide any information whatsoever, let alone discussion, about its place in the state structure, or status or powers under Romanian law. Thus, it is unclear whether AVAS was formally within the Romanian state structure or not. As such, this award cannot provide meaningful guidance for

⁶³⁶ *Kristian Almås and Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016, para. 213, **RLA-85**.

⁶³⁷ See *R. Kačapor and others v. Serbia*, App. nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, ECtHR, Judgement of 15 January 2008, p. 17, *dispositif*, **CLA-25**.

⁶³⁸ See Memorial, para. 362, referring to *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, para. 322-323, **CLA-26**.

the present case. Further, as *Jan de Nul* award clearly pointed out, the fact that an entity acts in furtherance of a public activity does not make it a state organ.⁶³⁹

C. ARTICLE 5 OF ILC ARTICLES

1. General

561. Claimants also argue that, even if the Privatization Agency would not qualify as an organ of Respondent, its conduct would still be attributable under Article 5 of the ILC Articles.

562. According to Article 5 of the ILC Articles,

“The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

563. Application of Article 5 of ILC Articles presupposes that the entity in question is empowered to exercise governmental authority and that it exercised such authority in a particular instance. According to the arbitral tribunal in the *Jan de Nul* case:

“[F]or an act to be attributed to a State under Article 5, two cumulative conditions have to be fulfilled:

- first, the act must be performed by an entity empowered to exercise elements of governmental authority (i);*
- second, the act itself must be performed in the exercise of governmental authority (ii).”*⁶⁴⁰

564. According to the ILC commentary, in an Article 5 situation, an entity *"is empowered by the law of the State to exercise functions of a public character normally exercised*

⁶³⁹ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 161, **RLA-83**.

⁶⁴⁰ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 163, **RLA-83**.

by State organs".⁶⁴¹ In addition to content of the powers, other factors may also be taken into account, the way they are conferred on an entity, the purpose for which they are exercised and the extent to which the entity is accountable to the government for their exercise.⁶⁴²

2. The impugned acts were not exercise of governmental authority

565. Claimants argue that the Privatization Agency was exercising a wide range of governmental functions associated with privatization and specifically point to its acting as an "agent" of the Serbian state in administering the sale of socially and State-owned companies and assets.⁶⁴³ However, this is not relevant, since Article 5 of the ILC Articles requires that "*the person or entity is acting in governmental capacity in the particular instance*". As noted by the *Jan de Nul* tribunal, the impugned act "*itself must be performed in the exercise of governmental authority*".⁶⁴⁴

566. Therefore, only those acts that are the subject-matter of Claimants' complaints are of relevance in the context of Article 5. These acts are the Privatization Agency's refusal to release the pledge over the Privatized Shares, refusal to consent to assignment of the Privatization Agreement, and its termination.⁶⁴⁵ As will be discussed further below, these activities are clearly commercial in nature and may normally be undertaken by any party to a commercial contract. As noted by the ILC, Article 5 does not concern "*private or commercial activity in which the entity may engage*".⁶⁴⁶

567. Specifically, Claimants argue that "*with respect to the termination of the privatization agreements, the Privatization Agency was authorized to issue*

⁶⁴¹ Draft Articles on Responsibility of States for International Wrongful Acts with commentaries, p. 43, para. 2, **CLA-24**.

⁶⁴² See Draft Articles on Responsibility of States for International Wrongful Acts with commentaries, p.43, para. 6, **CLA-24**.

⁶⁴³ See Memorial, para. 368.

⁶⁴⁴ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 163, **RLA-83**.

⁶⁴⁵ Memorial, paras. 406, 424, 427, 428, 434, 437, 438, 444, 445.

⁶⁴⁶ Draft Articles on Responsibility of States for International Wrongful Acts with commentaries, p. 43, para. 5, **CLA-24**.

authoritative decisions declaring privatization agreements terminated ex lege and decisions on the transfer of capital."⁶⁴⁷

568. They are wrong. There is obviously nothing inherently "governmental" in termination of a contract by an entity. This is not a function "*of a public character normally exercised by State organs*", in the words of the ILC. Rather, this is a typical commercial act of a contracting party whose opposite is not performing its contractual obligations.

569. Claimants attempt to overcome this problem by arguing that this was an "authoritative" decision declaring Privatization Agreement terminated *ex lege*.⁶⁴⁸ However, Serbian courts have taken the position that termination of a privatization contract is not an administrative act.⁶⁴⁹ Claimants' expert disagrees, but fails to provide any authority for his position.⁶⁵⁰ As Professor Radovic has explained in detail, the notice of termination is a statement of intent within the meaning of general contract law, not an "authoritative" or "administrative" act. Her position is confirmed by consistent Serbian judicial practice. That this is a commercial matter is obvious from the fact that, as in all commercial disputes, the party dissatisfied with the termination may initiate court proceedings.⁶⁵¹ Indeed, Mr. Obradovic, as the buyer, did so, but withdrew his claim eventually.⁶⁵²

570. For all these reasons, Claimants and their expert are wrong to conclude that such "prerogatives" are unavailable to any commercial party.⁶⁵³

571. Concerning the transfer of shares to the Privatization Agency upon termination,⁶⁵⁴ it occurs pursuant to a mandatory statutory provision as an automatic consequence of out-of-court termination of a privatization contract.⁶⁵⁵ Namely, Article 41(2) of the 2014 Law on Privatization provided that the capital acquired by the buyer on the basis of a privatization agreement shall be transferred to the Privatization Agency

⁶⁴⁷ See Memorial, para. 369.

⁶⁴⁸ See Memorial, para. 369.

⁶⁴⁹ See Decision of the Administrative Court no I-2 U 4421/13 dated 25 April 2013, **CE-261**. Expert Report of Professor Mirjana Radovic, para. 50.

⁶⁵⁰ See Expert Report of Milos Milosevic, para. 117.

⁶⁵¹ See Expert Report of Professor Mirjana Radovic, para. 44 *et seq.*

⁶⁵² See Witness Statement of Djura Obradovic dated 20 September 2017, para. 30.

⁶⁵³ See Memorial, para. 369.

⁶⁵⁴ After the abolishment of the Privatization Agency, the shares are transferred to the Registry of Shares, see Expert Report of Professor Mirjana Radovic, para. 53.

⁶⁵⁵ See Expert Report of Professor Mirjana Radovic, para. 54.

upon the termination.⁶⁵⁶ As Professor Radovic explains, the Privatization Agency's decision on the transfer of shares does not have "any qualitative meaning".⁶⁵⁷ Here, as well, the buyer is free to challenge the termination in court and seek injunction to prevent the Privatization Agency from selling the shares until the end of proceedings.⁶⁵⁸

572. Claimants state that the "*governmental nature of the Privatization Agency's functions*" is further confirmed by the fact that these functions have been transferred to the Ministry of Economy following the dissolution of the Agency.⁶⁵⁹ This argument is inapposite since a transfer of certain function to a governmental organ does not, by itself and retroactively, make this function governmental in nature in the sense of Article 5. The fact that a state organ exercises contractual rights does not make such rights a governmental authority. Specifically, the fact that the Ministry of Economy terminates privatization contracts following the dissolution of the Privatization Agency does not make contract termination a governmental authority.

573. The "statutory foundation" of the Privatization Agency's powers, including the right to terminate privatization contracts, as well as the fact that it acted in advancement of public goals, do not make the termination an exercise of governmental authority as Claimants contend.⁶⁶⁰ As noted by the arbitral tribunal in *Jan de Nul*:

"It is true though that the Contract was awarded through a bidding process governed by the laws on public procurement. This is not a sufficient element, however, to establish that governmental authority was exercised in the SCA's relation to the Claimants and more particularly in relation to the acts and omissions complained of. What matters is not the "service public" element, but the use of "prérogatives de puissance publique" or governmental authority. In this sense, the refusal to grant an extension of time at the time of the tender does not show either that governmental authority was used,

⁶⁵⁶ 2014 Law on Privatization, Article 41, **CE-223**.

⁶⁵⁷ See Expert Report of Professor Mirjana Radovic, para. 54.

⁶⁵⁸ See Expert Report of Professor Mirjana Radovic, para. 54.

⁶⁵⁹ See Memorial, para. 370.

⁶⁶⁰ See Memorial, paras. 371-372.

irrespective of the reasons for such refusal. Any private contract partner could have acted in a similar manner."⁶⁶¹

574. When applied to the circumstances of the present case, neither the fact that the Privatization Agency's right to terminate the Privatization Agreement had a "statutory foundation", nor the fact that it was exercised in pursuance of public purpose ("*service public*"), could make the termination an exercise of governmental authority ("*prérogatives de puissance publique*"), because "[a]ny private contract partner could have acted in a similar manner".

575. Finally, Claimants argue that the degree of control of Serbian government over the Privatization Agency - appointment and removal of its officials, direction and control exercised by the Ministry of Economy, and ultimately control of the National Assembly - also points to the fact that this was the case of exercise of governmental powers.⁶⁶² This is inaccurate. As already discussed in the context of Article 4, the Privatization Agency had managerial and operational autonomy, its own budget and bank account.

576. Moreover, Claimants' contentions are irrelevant, because a degree of governmental involvement and interest in the exercise of certain activity does not make that activity a governmental authority in the sense of Article 5 of ILC Articles. As noted by the arbitral tribunal in Bayindir, governmental interest "*appears unsurprising if not normal for a project of major economic importance for the development of the country.*"⁶⁶³

577. In conclusion, Claimants' thesis that the Privatization Agency's termination of the privatization contract constituted exercise of governmental authority under Article 5 of ILC Article is unfounded.

⁶⁶¹ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 170, **RLA-83**.

⁶⁶² See Memorial, para. 373.

⁶⁶³ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 237, **RLA-84**.

D. ARTICLE 8 OF ILC ARTICLES

578. As a final alternative, Claimants allege that the Privatization Agency's conduct is attributable to Respondent on the basis of Article 8 of ILC Articles. This provision reads as follows:

"The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

579. Here, it is important to recall that attribution of conduct to the state on the basis of Article 8 of ILC Articles is possible if (and only if) instructions, direction and control are demonstrated with respect to a *specific conduct* of a person or group of persons. This was noted by the ILC:

*'[s]uch conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation.'*⁶⁶⁴

580. The specificity requirement was also upheld by the International Court of Justice:

*'It must however be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.'*⁶⁶⁵

581. Therefore, Claimants' general observations will not suffice to establish attribution on the basis of Article 8 of the ILC Articles. Instead, Claimants are required to identify specific conduct of the Privatization Agency that violated their rights and, then, to show that this specific conduct was exercised on the basis of instructions given by, or under direction or control of, Respondent.

⁶⁶⁴ See Draft Articles on Responsibility of States for International Wrongful Acts with commentaries, p. 47, para. 3, **CLA-24**.

⁶⁶⁵ *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgement of 26 February 2007 p. 169, para. 400 (emphasis added), **RLA-86**.

582. Claimants mention four reasons why there is attribution under Article 8, two of which are of general nature and do not meet the specificity requirement outlined by the ICJ. First, this applies to Claimants' argument that the Privatization Agency was acting under direct supervision of the Ministry of Economy, which also appointed and removed the members of its bodies.⁶⁶⁶ In any case, this argument has been refuted by showing that the Privatization Agency had significant autonomy.
583. Second, the specificity requirement also disposes of Claimants' argument that the decision to terminate the Privatization Agreement was taken by a commission in which there was a majority of representatives of government ministries.⁶⁶⁷ As already mentioned, Claimants and their expert Mr. Milosevic concede that this commission was an entity within the Privatization Agency,⁶⁶⁸ so Claimants must prove that it acted under instructions, direction or control of the government in a specific case, "*not generally with respect to [its] overall actions*", as the ICJ stated. Claimants provide no evidence whatsoever in this regard.
584. Claimants also put forward two instances of specific conduct by Respondent's authorities that, in their view, should make the Privatization Agencies termination of the Privatization Agreement attributable to Respondent under Article 8.
585. They first argue that the decision to terminate the Privatization Agreement "had been imposed" on the Privatization Agency by the Ministry of Economy's "instruction" of 7 April 2015.⁶⁶⁹ However, the text of the document invoked by Claimants reveals that the Ministry of Economy stated that the Privatization Agency should provide an additional deadline to Mr. Obradovic to provide evidence that he complied with the Privatization Agreement and

*"In case the Buyer failed to deliver evidence on fulfillment of the obligations within additionally granted term, the Privatization Agency shall undertake the measures within its legal [powers]."*⁶⁷⁰

⁶⁶⁶ See Memorial, para. 377.

⁶⁶⁷ See Memorial, para. 378.

⁶⁶⁸ Memorial, para. 355; Expert Report of Milos Milosevic, para 45.

⁶⁶⁹ See Memorial, para. 379.

⁶⁷⁰ See Report of Ministry of Economy on the Control over the Privatization Agency of 7 April 2015, p. 13, **CE-98**. The quoted text in the original document contains the term "ovlašćenja", which is better translated as "powers" or "competences" than as "authorizations", which is used in Claimants' translation.

586. Obviously, the Ministry of Economy “instructed” the Privatization Agency to “undertake the measures within its legal [powers]” – and nothing else. In other words, the Ministry of Economy did not indicate (instruct, direct or control) any specific conduct that should be performed by the Privatization Agency, which was free either to provide yet another deadline to the buyer or to terminate the Privatization Contract. It chose the latter. This choice alone shows that the Privatization Agency was not acting under instructions, direction and control, but of its own volition.

587. Claimants also argue that the Privatization Agency was acting also upon the instructions of the Ombudsman in terminating the Privatization Agreement.⁶⁷¹ This is a fancy. Ombudsman has the power to issue recommendations, which are not binding on the entities it controls. This is clear from the Law on Ombudsman, which provides that the controlled entities should inform the Ombudsman either that they acted upon recommendations or about the reasons for not acting upon them.⁶⁷²

588. In addition, the Ombudsman’s recommendation in the present case was never as specific as to direct, instruct or control a specific conduct of the Privatization Agency. Rather, the Ombudsman recommended that the Privatization Agency, in cooperation with the Ministry of Economy,

*“shall take necessary measures to determine... whether all conditions stipulated by the Law on Privatization of 2001 for termination of the Agreement for sale... have been fulfilled, in order to finally clarify legal status of the subject of privatization...”*⁶⁷³

589. Obviously, this is a recommendation to consider whether the conditions for termination obtained, not a recommendation to terminate the Privatization Agreement. Again, the Privatization Agency was free to decide what to do on the basis of its own judgment.

⁶⁷¹ See Memorial, para. 380.

⁶⁷² See Law on Ombudsman, Article 31(3), **CE-112**.

⁶⁷³ Opinion of the Ombudsman of 19 June 2015, p. 2, **CE-42**.

590. In conclusion, the Privatization Agency's decision to terminate the Privatization Agreement cannot be attributed to Respondent on the basis of Article 8 of ILC Articles.

V. NO VIOLATION OF SERBIA'S OBLIGATIONS UNDER THE TREATIES

A. THE CONDUCT COMPLAINED OF WAS NOT PERFORMED IN A SOVEREIGN CAPACITY

591. Claimants argue that "*the involvement of the State's sovereign powers is not a necessary condition for holding the State liable under an investment treaty*".⁶⁷⁴ In the alternative, they argue that even if the involvement of sovereign powers were a condition, this obtained in the present case.⁶⁷⁵ They are wrong on both counts.

1. Exercise of sovereign powers is necessary for a treaty breach

592. Claimants position that the exercise of sovereign powers is not necessary for a treaty breach has been rejected by numerous tribunals. As stated by the arbitral tribunal in *Impreglio v. Pakistan*,

*"Only the State in the exercise of its sovereign authority ('puissance publique'), and not as a contracting party, may breach the obligations assumed under the BIT".*⁶⁷⁶

593. In the same vein, the arbitral tribunal in *Duke Energy v. Argentina* noted:

*"Establishing a treaty breach is a different exercise from showing a contract breach. Subject to the particular question of the umbrella clause, in order to prove a treaty breach, the Claimants must establish a violation different in nature from a contractual breach, in other words a violation which the State commits in the exercise of its sovereign power"*⁶⁷⁷

⁶⁷⁴ Memorial, para. 447. They provide one decision to support their position, *SGS v. Paraguay*, which can be distinguished from the present case as it dealt with jurisdiction and involved a contract with a state organ. See Memorial, para. 447, fn. 456 citing *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, para. 135, **CLA-41**.

⁶⁷⁵ See Memorial, paras. 448-484.

⁶⁷⁶ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 260, **RLA-33**.

⁶⁷⁷ *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 345, **CLA-37**.

594. The same position has been taken in other cases, as well.⁶⁷⁸ Therefore, Claimants starting position - that the involvement of the State's sovereign powers is not necessary for finding a treaty breach - does not hold.

595. Whether there was involvement of sovereign powers in cases of non-compliance with a contract has been analyzed with reference to the distinction between ordinary commercial contractual practice, on the one hand, and exercise of the state functions, on the other.

596. For example, in *Joy Mining v. Egypt*, the arbitral tribunal held that a bank guarantee was "*clearly a commercial element of the Contract*" and then rejected claimant's arguments that its non-release amounted to a treaty violation.⁶⁷⁹ It noted that,

*"Disputes about the release of bank guarantees are a common occurrence in many jurisdictions and the fact that a State agency might be a party to the Contract involving a commercial transaction of this kind does not change its nature. It is still a commercial and contractual dispute to be settled as agreed to in the Contract."*⁶⁸⁰

597. In *Duke Energy*, the tribunal was of the opinion that a delay in performance of certain contractual obligations (poor performance, irregular imposition of contract fines and non-payment of interest on late payments) did not involve exercise of sovereign power:

*"These acts constitute conduct which any contract party could adopt; they are thus not capable of amounting to a breach of fair and equitable treatment".*⁶⁸¹

598. In conclusion, where a party to a contract is a state organ or an entity exercising governmental powers, their conduct does not involve exercise of sovereign power

⁶⁷⁸ *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, 22 December 2003, para. 51, **RLA-92**; *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 115, **RLA-93**; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 180, **RLA-84**.

⁶⁷⁹ *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award, 6 August 2004, para. 78, **RLA-94**.

⁶⁸⁰ *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award, 6 August 2004, para. 79, **RLA-94**.

⁶⁸¹ *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 348, **CLA-37**.

when this is a “conduct any contract party could adopt”. In other words, when they behave as commercial actors would behave, their conduct is regarded as commercial, not as an exercise of sovereign powers.

2. Respondent's conduct was not exercise of sovereign power

599. In the present case, Claimants allege three acts of the Privatization Agency which, in their view, amounted to a treaty violation: (i) refusal to release the pledge over the Privatized Shares, (ii) refusal to consent to assignment of the Privatization Agreement, and (iii) termination of the Privatization Agreement.⁶⁸² All these acts “constitute conduct which any contract party could adopt”.

600. To start with, refusal to release the pledge was lawful, as explained by Professor Radovic.⁶⁸³ Considering general rules of contract law, this was an exercise of the right to withhold contract performance in case the opposite party fails to perform its obligation, a well-known *exceptio non adimpleti contractus*.⁶⁸⁴ The Privatization Agency repeatedly informed the Buyer that it would not release the pledge until he remedied the breaches of the Privatization Agreement.⁶⁸⁵ This is clearly a normal, reasonable conduct of a contracting party.

601. The same goes for the refusal of the Privatization Agency to consent to the assignment of the Privatization Agreement in the situation where the other side did not submit the necessary paper work and refused to provide a bank guarantee.⁶⁸⁶ This is again a normal, commercial behavior of a contracting party.

602. Finally, the termination of the Privatization Agreement was a consequence of a long lasting failure of the Buyer to comply with its Article 5.3.4 obligation, although he had been repeatedly granted additional time to do so. Again, this is a “conduct which any contract party could adopt” - wait for performance, grant extensions to the opposite party, and, finally, terminate the contract when this does not work.

⁶⁸² Memorial, paras. 406, 424, 427, 428, 434, 437, 438, 444, 445.

⁶⁸³ See Expert Report of Professor Mirjana Radovic, para. 66.

⁶⁸⁴ Expert Report of Professor Mirjana Radovic, para. 67.

⁶⁸⁵ See, e.g., Minutes from meeting held at the Privatization Agency on 4 February 2014, **RE-36**; Letter from the Privatization Agency to D. Obradović of 27 April 2015, p. 3, **CE-348**; Letter from Mr. Vasiljevic to the Privatization Agency of 16 June 2015, p. 1, **RE-65**. Letter from the Privatization Agency to Mr. Vasiljevic of 26 June 215, p. 1, **RE-66**.

⁶⁸⁶ See above, section II.D.2.

3. Claimants fail to show that Respondent's conduct was exercise of sovereign power

603. As mentioned above, Claimants' fallback argument is that, in any case, Respondent conduct involved exercise of sovereign powers. They invoke a number of claims in support of this proposition: (i) the privatization in Serbia was a governmental process with sovereign goals, (ii) the Privatization Agreement was not an ordinary commercial contract; (iii) the Privatization Agency was not an ordinary commercial party as it was required by law to control buyers' compliance with privatization agreements; (iv) the termination was a result of Ombudsman's recommendations which were exercise of sovereign authority; (v) the termination of the Privatization Agreement was an administrative act and its consequences are radically different from termination of a commercial contract.⁶⁸⁷
604. Most of Claimants' arguments in this context are based on general remarks about the privatization process or the role of the Privatization Agency. However, all this is only marginally relevant for the present discussion, which concerns the question whether a *concrete, specific* conduct of the Privatization Agency in the present case constituted conduct of a contract party, or involved exercise of sovereign power. Only in the latter case, such conduct would be capable of being a treaty breach.
605. Respondent will now demonstrate that Claimants' specific allegations in this context are either irrelevant and/or inaccurate.
606. First, Claimants allege that the privatization in Serbia was "*an inherently governmental process pursuing sovereign goals*".⁶⁸⁸ However, as a general matter, they both fail to show what is so "inherently governmental" in the privatization, and in what way was it pursuing "sovereign goals". In fact, Claimants' argument presupposes that any change of ownership over state property is *per se* "governmental" because the owner is the state. This logic inevitably leads to the conclusion that that any matter involving state ownership is (inherently) "governmental". This is obviously not so and would be absurd.

⁶⁸⁷ Memorial, paras. 447-484.

⁶⁸⁸ Memorial, para. 448.

607. Further, Claimants confuse public policy goals with what they call (but never define) "sovereign goals". General remarks of their expert concerning the "*radical change in the socio-political and economic order*" and the shift from the social model to a market model dominated by private ownership are not helpful here.⁶⁸⁹ Why are these policy goals any different from any other policy goals? For example, what makes them "sovereign" in comparison with a system change from state to private health providers; would this also be a "sovereign" goal?
608. Claimants' statements about the privatization as a governmental process having sovereign goals are not only confusing, they are also irrelevant. In the present context, the relevant question is not what the overall context of a contract or conduct is, but rather whether a specific *conduct* related to a *specific contract* involved exercise of sovereign power.⁶⁹⁰ For example, defense is a quintessential sovereign function, but if a state enters into a commercial contract for buying military boots, its conduct as a contract party would not be an exercise of sovereign power.⁶⁹¹ Therefore, regardless of whether the privatization is a governmental process and how one characterizes its goals, the Privatization Agreement is a *commercial contract* and its termination a *commercial act* and cannot be, without more, considered an exercise of sovereign power. As the tribunal in *Impreglio v. Pakistan* warned: "*The threshold to establish that a breach of the Contracts constitutes a breach of the Treaty is a high one*".⁶⁹²
609. While it is not in dispute that the Privatization Agreement also contained provisions requesting the buyer to provide additional investment and comply with certain obligations concerning workers' rights, Claimants' reference to these provisions is inapposite in the present context.⁶⁹³ These provisions were not the reason why the Privatization Agreement was terminated. They cannot possibly explain what is the

⁶⁸⁹ Expert Report of Milos Milosevic, para. 28.

⁶⁹⁰ See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 169 ("*The Tribunal must look to the actual acts complained of*"), **RLA-83** *InterTrade Holding GmbH v. The Czech Republic*, UNCITRAL, PCA Case No. 2009-12, Final Award, 29 May 2012, para. 182 ("*The specific activities need to be scrutinized*"), **RLA-126**. See, also, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paras. 121-123, **RLA-84**.

⁶⁹¹ Congressional Committee Report on the Jurisdiction of United States Courts in Suits against Foreign States, 1976, 15 ILM 1389, p. 1406, **RE-149**.

⁶⁹² *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 267, **RLA-33**.

⁶⁹³ See Memorial, paras. 452-455.

nature of the termination and whether it constitutes exercise of sovereign powers. The same goes for the fact that the Privatization Agency also exercised certain public powers.⁶⁹⁴ It does not necessarily follow from this fact that it exercised public powers when it terminated the Privatization Contract, refused to release the pledge, or consent to assignment.

610. Claimants reliance on *Awdi v. Romania* in the present context is misplaced, because they rely on its part dealing with attribution, which is a different context from the present one. Although Respondent does not subscribe to the attribution analysis in *Awdi*, it is important to note that the *Awdi* tribunal considered the Romanian entity which concluded the privatization contract as a State organ within the meaning of Article 4 of the ILC Articles, and noted that it did not sign the relevant contract “merely in private law capacity”. However, the *Awdi* tribunal made its comment in the attribution context, and was not concerned with the distinction between ordinary behavior of a contract party and exercise of sovereign powers, so its analysis is of no help in the present context. Indeed, the contractual provision breached in *Awdi* arguably required exercise of sovereign powers. (It read: “*to make all reasonable efforts for the issuance of a normative document stipulating the granting to the Company by the State and the administrative-territorial units... of land owned by the latter and relating to the points of sale*”).⁶⁹⁵

611. For similar reasons, Claimants reliance on *Bosca v. Lithuania* is also inapposite, because its pronouncement about “*the privatization process [as] a governmental process*” was also made in the context of attribution.⁶⁹⁶ Moreover, the privatization process in *Bosca* included “a multi-step State-approval process”⁶⁹⁷ which was not so with the Privatization Agreement and its termination in the present case. Finally, *Bosca* concerned pre-contract negotiations (where the government involvement was

⁶⁹⁴ See Memorial, para. 458-461.

⁶⁹⁵ See *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, para. 321, **CLA-26**.

⁶⁹⁶ See Memorial, para. 462, quoting *Luigiterzo Bosca v. Lithuania* (UNCITRAL), PCA Case No. 2011-05, Award, 17 May 2013, para. 127, **CLA-42**.

⁶⁹⁷ *Luigiterzo Bosca v. Lithuania* (UNCITRAL), PCA Case No. 2011-05, Award, 17 May 2013, para. 127, also, para. 128 (“*Here, the Government acted at multiple steps, projecting sovereign authority*”), **CLA-42**.

heavy⁶⁹⁸), while the present case concerns conduct of a party to an existing commercial contract.

612. As already discussed, the test in the present context is whether any commercial contract party would behave in the same or similar manner as the Privatization Agency did.⁶⁹⁹ Specifically, whether a commercial contract party would leave additional time for compliance and terminate an agreement after continuous and long non-compliance of its opposite party. The obvious answer is: yes, any contract party would behave in a similar way. Thus, the termination in the present case was not an exercise of sovereign power.

613. In addition, it is also completely irrelevant whether the Privatization Agency acted in a sovereign capacity when it signed the Privatization Agreement, which is actually Claimants' conclusion.⁷⁰⁰ What is of relevance is whether it acted in a sovereign capacity when it *terminated* the Privatization Agreement, and also when it refused to release the pledge or consent to assignment. This is an additional reason to find the *Awdi* case irrelevant, as its pronouncement invoked by Claimants concerned entry into a contract and a subsequent violation thereof, not its termination by the Romanian state entity.⁷⁰¹

614. In support of their position, Claimants also point out that parties to a privatization agreement were not equal, which is an exception to a fundamental principle of contract law.⁷⁰² However, as Professor Radovic notes, there are numerous commercial contracts where parties are not in a position of full equality, such as contracts with banks.⁷⁰³

⁶⁹⁸ See *Luigiterzo Bosca v. Lithuania* (UNCITRAL), PCA Case No. 2011-05, Award, 17 May 2013, para. 127, note 112, **CLA-42**.

⁶⁹⁹ *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, 22 December 2003, para. 51, **RLA-92**; *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 115, **RLA-93**; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 345, **CLA-37**; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 180, **RLA-84**.

⁷⁰⁰ See Memorial, para. 456.

⁷⁰¹ See *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, paras. 318, 321-323, **CLA-26**.

⁷⁰² Memorial, para. 458.

⁷⁰³ Expert Report of Professor Mirjana Radovic, para. 27.

615. Claimants also contend that the Privatization Agency is legally required under Serbian law to perform regular controls of the buyer's performance under a privatization agreement and in this regard invoke a past submission of the Privatization Agency in another arbitration.⁷⁰⁴
616. At the outset, it should be noted that the submission of the Privatization Agency's counsel in a past arbitration cannot bind Respondent, because the former is a separate juridical person. More importantly, all this is clearly irrelevant as far as the substance is concerned. As already noted, the relevant conduct in the present case is not the Privatization Agency's control of the buyer's performance, but termination of the Privatization Agreement, refusal to release the pledge and give consent to the assignment. Claimants do not complain about the Privatization Agency's control of BD Agro. Rather, they complain about the termination. Although the termination was based on a breach found during control, it was clearly a distinct act and came as the result of commercial considerations of the Privatization Agency. The same goes for the refusal to release the pledge and consent to assignment of the Privatization Contract.
617. Claimants also invoke the fact that Ombudsman's "investigation" of the buyer's compliance with the Privatization Agreement and subsequent recommendations were sovereign acts.⁷⁰⁵ At the outset, it should be noted that Ombudsman's "investigation", in fact, did not concern the buyer, but the work of the Privatization Agency and the Ministry of Economy. Since neither Ombudsman's control, nor its recommendations directly impacted the buyer or BD Agro, they are not (and cannot be) measures that breached investors' rights. As a matter of fact, Ombudsman's recommendations were nor the reason for the Privatization Agency's decision to terminate the Privatization Agreement.⁷⁰⁶
618. Claimants compare Ombudsman's recommendations in the present case to the prosecutor's recommendations in the *Caratube* case. They contend that in both cases

⁷⁰⁴ See Memorial, para. 464, and also, para. 465, quoting *Uniworld v. Privatization Agency and Srbija-Turist A.D.*, ICC Case No. 14361/AVH/CCO/JRF/GZ, Award, 30 May 2011, para. 295, **CE-252**. ("The Privatization Agency further claims that UHL's view that it has acted negligently (*mala fide*) is unacceptable, since during execution of control of compliance with investor's obligations, the Privatization Agency actually performs its lawful duty – not [acting] as a contract party but as the holder of public powers.")

⁷⁰⁵ See Memorial, para. 467.

⁷⁰⁶ See above Sections II.B. and V.D.5.

state organs lacked authority to issue recommendations, but that their intervention “ignited the process that was intended to and actually resulted in the termination”, so the termination constituted exercise of sovereign powers.⁷⁰⁷

619. However, Claimants fail to note substantial differences between two cases, which make the *Caratube* rationale inapplicable in the present one. First, it is not accurate that the recommendations in both cases were issued without proper authority, because the Ombudsman clearly had legal authority for its actions. Second, the crucial difference is that, in *Caratube*, the ministry as a contracting party changed its conduct after the prosecutor’s recommendations:

*“Equally striking is the drastic change of the MEMR’s attitude towards CIOC following receipt of the “Recommendation” dated 7 September 2007. In particular, for a majority of the Tribunal, the evidence on the record shows that, following the “Recommendation”, the MEMR was set to terminate the Contract, notwithstanding the fact that the MEMR had adopted Amendment No. 3 regarding the extension of the Contract only shortly before.”*⁷⁰⁸

620. In this sense, the prosecutor’s recommendation “ignited” the process of contract termination in *Caratube*. This is not so in the present case, as the Privatization Agency from the very beginning threatened the buyer with termination of the Privatization Agreement and in this regard did not change its initial position after Ombudsman’s recommendation. Rather, it implemented the course of action that it had threatened to undertake for a long time, but postponed doing so in the expectation that the buyer would eventually remedy breaches of the Privatization Agreement.

621. Claimants further argue that the Privatization Agency’s termination of the Privatization Agreement was a sovereign act because it was an administrative act.⁷⁰⁹ This is inaccurate, as amply demonstrated by Professor Radovic.⁷¹⁰ Here, Claimants actually rely on their expert’s opinion that the notice of termination and the decision

⁷⁰⁷ See Memorial, paras. 476-477, quoting *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, para. 935, **CLA-28**.

⁷⁰⁸ *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, para. 925, **CLA-28**.

⁷⁰⁹ See Memorial, para. 478.

⁷¹⁰ Expert Report of Professor Mirjana Radovic, Section 2.3.2.2.

on the transfer of capital have the character of administrative acts, which by expert's own admission goes against Serbian court practice.⁷¹¹ Their expert has failed to find any authority, except his own position on the matter, that would share the same opinion.

622. Finally, Claimants argue that since legal consequences of the Privatization Agreement's termination "radically depart" from the rules governing termination of private contracts, this evidences the public character of the Privatization Agreement. In particular, they argue that Article 41a(3) of the Privatization Law of 2001 provides for "an irrebutable presumption" that, upon the termination of a privatization agreement, the buyer is deemed to be a dishonest party. All this is inaccurate. As Professor Radovic explains in detail, upon termination, the buyer's shares are *ex lege* and not by an administrative act transferred to the Registry of Shares.⁷¹² That this is not an administrative act has also been confirmed by Serbian courts.⁷¹³ However, the buyer always has the possibility to initiate civil court proceedings and to ask a competent court to declare that the termination of the privatization agreement was wrongful. If the lawsuit succeeds, the privatization agreement would not be considered terminated, but in operation.⁷¹⁴ Clearly, this regime, although somewhat different from general contract law still remains firmly in the field of private law. Here, it is also significant that the buyer, Mr. Obradovic, initially sought remedy before civil court in Serbia against the termination, which indicates his understanding that this was a civil law matter involving a commercial contract. Eventually, he withdrew his lawsuit in order to initiate this arbitration.⁷¹⁵
623. In conclusion, all Claimants' arguments that the termination of the Privatization Agreement constituted exercise of sovereign power clearly fail.

⁷¹¹ Expert Report of Milos Milosevic, paras. 116-117.

⁷¹² Expert Report of Professor Mirjana Radovic, paras. 53-54.

⁷¹³ Supreme Court of Serbia, Decision no. U. 2263/2006, 7 July 2006, **RE-113**; *see also* Expert Report of Professor Mirjana Radovic, para. 50.

⁷¹⁴ Expert Report of Professor Mirjana Radovic, paras. 53-54.

⁷¹⁵ Witness Statement of Djura Obradovic dated 20 September 2017, para. 30.

B. GENERAL EXCEPTION UNDER ARTICLE 18 OF CANADA-SERBIA BIT APPLIES

624. Article 18 of the Canada-Serbia BIT contains a general exception allowing a Contracting Party to adopt or enforce a measure necessary to ensure compliance with domestic law that is not inconsistent with the BIT, provided, *inter alia*, that the measure in question does not constitute arbitrary or unjustifiable discrimination. As has been discussed throughout this submission, Respondent considers that the conduct complained of in the present case was a commercial conduct of the Privatization Agency, which is a separate juridical person whose conduct is not attributable to Respondent. However, should the Tribunal conclude that the conduct complained of was not commercial and/or that it can be attributed to Respondent (*quod non*), then, in the alternative, Respondent invokes the general exception provided in Article 18.

625. According to Article 18 of the Canada-Serbia BIT:

“General Exceptions

1. For the purpose of this Agreement:

(a) a Party may adopt or enforce a measure necessary:

(i) to protect human, animal or plant life or health,

(ii) to ensure compliance with domestic law that is not inconsistent with this Agreement, or

(iii) for the conservation of living or non-living exhaustible natural resources;

(b) provided that the measure referred to in subparagraph (a) is not:

(i) applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or

(ii) a disguised restriction on international trade or investment.”⁷¹⁶

626. On the basis of Article 18, a party may adopt or enforce a measure necessary “*to ensure compliance with domestic law that is not inconsistent with this Agreement*”, provided that such measure is not “*applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors.*”

627. The conduct that Claimants complain of was undertaken as a measure necessary to ensure compliance with the Privatization Law. Specifically, the termination was a measure necessary to ensure compliance with Article 41a(1)(3) of the Privatization Law providing that the Privatization Agreement shall be declared terminated if the buyer disposes “*of the property of the subject of privatization contrary to provisions of the agreement*”.⁷¹⁷ The same goes for the Privatization Agency’s refusal to release the pledge over the Privatized Shares, since otherwise the enforcement of Article 41a(1)(3) would be futile, as there would be no possibility and no sense to terminate the Privatization Agreement. Finally, the refusal to consent to assignment of the Privatization Agreement was a measure necessary to enforce the applicable regulation, as well.⁷¹⁸

628. Claimants do not complain that the Privatization Law itself or its provisions invoked by the Privatization Agency are inconsistent with the Canada-Serbia BIT, so the requirement in Article 18(1)(a)(ii) (“*to ensure compliance with domestic law that is not inconsistent with this Agreement*”) has been met.

629. Further, Claimants do not complain that the measures complained of were “*applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors*”. There is no mention in their submission that any other investment or investor has been put in a better position, let alone that this was “arbitrary or unjustifiable discrimination”. The requirement under Article 18(1)(b)(i) has also been met.

630. Therefore, all requirements for the application of the general exception under Article 18(1) have been met in the present case. Consequently, the conduct complained of is

⁷¹⁶ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 18(1), **CLA-1**.

⁷¹⁷ 2001 Law on Privatization, Article 41a, **CE-220**.

⁷¹⁸ See Section II.D.2.

allowed under the Canada-Serbia BIT and all claims under this treaty should be dismissed.⁷¹⁹

C. RESPONDENT DID NOT EXPROPRIATE CLAIMANTS’ “INVESTMENTS”

631. In their Memorial, Claimants allege that “*Serbia directly expropriated the Beneficially Owned Shares and also indirectly expropriated Sembi’s rights under its agreement with Mr. Obradovic dated 22 February 2015 and the 3.9% shareholding in BD Agro held by Mr. Rand indirectly through MDH doo.*”⁷²⁰ Claimants’ claim on the alleged expropriation is unfounded since it is unsupported by law and relies on misinterpretation of the factual matrix of the dispute.

632. As Respondent has already explained above, the termination of the Privatization Agreement by the Privatization Agency was a lawful exercise of its contractual rights, in accordance with the Agreement and the applicable law.⁷²¹ This alone is enough to defeat Claimants’ claim on expropriation.

633. However, Respondent will demonstrate that the Claimants’ case is fatally flawed for several other reasons as well.

1. Transfer of BD Agro’s shares following the termination of the Privatization Agreement cannot serve as a separate ground for Respondent’s liability

634. According to the theory advanced here by Claimants, the termination of the Privatization Agreement and ensuing transfer of BD Agro’s shares as a result of Mr. Obradovic’s breach resulted in *both* indirect and direct expropriation of their investments.⁷²² The theory implies that the transfer of shares represents the act of direct expropriation, existing separately and independently from the termination of the Privatization Agreement. Respondent submits that the argument is misplaced.

635. The transfer of shares was merely an automatic consequence of the termination proscribed by the Law on Privatization and caused by Mr. Obradovic’s breach of the Privatization Agreement. The Privatization Agency has a legal duty to initiate the

⁷¹⁹ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 18(1), **CLA-1**.

⁷²⁰ Memorial, para. 387.

⁷²¹ See Section II.A.3.

⁷²² Memorial, paras. 387 and 406.

transfer once the termination of the contract with the buyer is effectuated and the buyer of a socially-owned company is free to commence civil litigation against the Privatization Agency if he/she believes that the termination was wrongful.⁷²³ What is more – the transfer is a consequence that was envisaged by the contractual framework and to which Mr. Obradovic consented once he chose to enter the agreement with the Privatization Agency – the Privatization Agreement was concluded in accordance with the Law on Privatization⁷²⁴ which specified the consequences of the contractual breach by a buyer of a socially-owned capital in the privatization procedure: one of those consequences being the transfer of shares upon the termination of the contract.⁷²⁵ In other words, if the termination of the Privatization Agreement was lawful (which it was) – there can be no “direct expropriation” of BD Agro’s shares.

636. The Claimants’ argument is similar to the one advanced by the claimant in *Vannessa v. Venezuela*.⁷²⁶ There, a Venezuelan Government agency (CVG) terminated the contract with the claimant’s subsidiary for exploration and development of a gold-mining site in *Las Cristinas* region in Venezuela. After the termination, CVG took possession of the mining site as well as certain associated physical assets.⁷²⁷ The claimant argued, *inter alia*, that the physical seizure of its assets amounted to unlawful expropriation.⁷²⁸ The tribunal disagreed:

“As to the taking of physical assets in the context of the November 2001 takeover of the Las Cristinas site, the Seventeenth Clause of the Work Contract provided that those assets would revert to Venezuela (or CVG) upon termination of the Contract:

Permanent works done by the Company [MINCA], including facilities, accessories, equipment and any other goods acquired in ownership to be used for the exploration, development and exploitation subject hereof shall

⁷²³ Expert Report of Professor Mirjana Radovic, para. 54.

⁷²⁴ The Privatization Agreement, recitals, **CE-17**.

⁷²⁵ 2014 Privatization Law, Article 41(2), **CE-223**; the analogous provision was contained in Article 41(5) of the 2001 Law on Privatization, in effect on the date the Privatization Agreement was concluded, **CE-220**.

⁷²⁶ *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)04/6), Award, 16 January 2013, **RLA-107**.

⁷²⁷ *Ibid.*, para. 100.

⁷²⁸ *Ibid.*, paras. 174, 183.

pass in full title to the Corporation [CVG], free of encumbrances and charges, and without any indemnity, once this Agreement terminates whatever the cause.

*While the Seventeenth Clause of the Work Contract was modified on April 7, 1999²¹⁵ to change the reference to “the Corporation” to “the Nation,” this change does not affect the analysis because, either way, Placer Dome had no right to them, and consequently Vannessa could have no right to claim damages for them.*⁷²⁹

637. Similarly, in the case at hand the contractual framework (the Privatization Agreement and the Law on Privatization to which it referred) envisaged the transfer of BD Agro’s shares in case of a contractual breach by the buyer (Mr. Obradovic). Here as well – a consequence of the Privatization Agreement’s breach that was accepted by the contractual parties cannot be regarded as “direct expropriation” of BD Agro’s shares.

638. In order to prove the assertion that the termination of a contract by a State can amount to direct expropriation, Claimants rely on the award rendered by the tribunal in *Siag v. Egypt*.⁷³⁰ However, their reliance on the *Siag* award is misplaced. Unlike in the case at hand, in *Siag v. Egypt* the State did not contest that it had expropriated the investment.⁷³¹ More importantly, there, the taking of the investor’s plot of land was not a consequence of the termination envisaged by the contract, but the result of a series of governmental resolutions issued by the Minister of Tourism, Prime Minister and President of Egypt.⁷³²

639. Circumstances in the case at hand are fundamentally different – the transfer of shares was conducted in the manner regulated by the applicable law and represented an exercise of the prerogative of a contractual party in case of the contractual breach. This is precisely why the Supreme Court of Serbia does not consider the

⁷²⁹ Ibid., para. 215 (footnotes omitted; emphasis added).

⁷³⁰ Memorial, paras. 396, 397.

⁷³¹ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 Jun 2009, para. 427, **CLA-9**.

⁷³² Ibid., para. 370.

Privatization Agency's decisions on transfer of shares following the termination of a privatization contract to represent an exercise of public authority.⁷³³

2. Claimants did not acquire assets or rights allegedly expropriated

640. Arbitral practice and legal doctrine unequivocally embrace the rule that – in order to be expropriated – a property right must first exist under the relevant domestic law (the law of the host State) and must be lawfully acquired by the putative investor.

641. The rule at stake has been in itself considered a principle of international law:

*“The rule or principle that a tribunal must first determine as a matter of national law what the claimant's rights are (or were until the matters complained of) is itself an applicable rule or principle of international law.”*⁷³⁴

642. In line with such reasoning *McLachlan, Shore and Weiniger* state that:

*“The property rights that are the subject of protection under the international law of expropriation are created by the host State law. Thus, it is for the host State law to define the nature and extent of property rights that a foreign investor can acquire.”*⁷³⁵

643. That the existence and the acquisition of a property right is a precondition for its expropriation has been recognized by various investment tribunals. For instance, the tribunal in *Quiborax v. Bolivia* stated: *“The Tribunal agrees with the Respondent that, in order for a right to be expropriated, it must first exist under the relevant domestic law (in this case, Bolivian law).”*⁷³⁶

⁷³³ The Supreme Court of Serbia, Decision no. U. 2263/2006, 7 July 2006; **RE-113**; Expert Report of Professor Mirjana Radovic, para. 55.

⁷³⁴ T. Roe and M. Happold, *Settlement of Investment Disputes under the Energy Charter Treaty*, Cambridge University Press, 2011, p. 51, as cited in: Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration (Interplay Between National and International Law)*, Oxford University Press, 2013, p. 242, **RLA-106**.

⁷³⁵ Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd Edition), Oxford University Press, 2017, para. 8.64, **RLA-105**.

⁷³⁶ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, para. 135, **RLA-108**; See, also, *EnCana Corporation v. Republic of Ecuador (UNCITRAL)*, LCIA Case No. UN3481, Award, 3 February 2006, para. 184, **RLA-109**; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No.

644. Most recently, the tribunal in *Gavrilovic v. Croatia* commented on the issue in the following manner:

*“The Tribunal observes that it does not seem to be in dispute between the Parties that Croatian law—at least in the first instance—determines whether the Claimants acquired and enjoyed property rights in Croatia. The Tribunal agrees with the Parties that Croatian law controls the establishment of property rights in Croatia.”*⁷³⁷

645. In the context of its jurisdictional objection, Respondent has already explained in considerable detail that Claimants have never acquired shares in BD Agro (the so-called “Beneficially Owned Shares”) under Serbian law. Same goes for Sembi’s purported “...contractual right to obtain assignment of the Privatization Agreement from Mr. Obradovic...”⁷³⁸ – since the Second Sembi Agreement was unable to create any legal effect under Serbian law.⁷³⁹ The conclusion is straightforward: Claimants could not lose what they have never had.

646. With regard to 3.9% shareholding of MDH doo in BD Agro, controlled by Mr. Rand by virtue of his ownership stake in MDH doo, there are two points that require the Tribunal’s attention.

647. First, Claimants’ insinuation that the Privatization Agency thwarted adoption of the pre-pack reorganization plan for BD Agro, thereby rendering worthless MDH doo’s shareholding in BD Agro,⁷⁴⁰ is incorrect as a matter of fact. As explained earlier,⁷⁴¹ and contrary to assertions Mr. Markicevic put forward in his second witness statement,⁷⁴² after termination of the Privatization Agreement, the Privatization Agency had neither legal duty nor competence to issue its approval of the reorganization plan.⁷⁴³ In any event, even if the issuance of approval would be possible, it is unclear how the Agency was expected to approve the revised pre-pack

ARB/12/2, Award, 16 April 2014, para. 162, **RLA-110**; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, para. 257, **CLA-32**.

⁷³⁷ *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 25 July 2018, para. 432, **RLA-111**.

⁷³⁸ Memorial, para. 407.

⁷³⁹ See Article 41Z of the 2001 Law on Privatization, **CE-220**.

⁷⁴⁰ Memorial, para. 408.

⁷⁴¹ See above Section II.E.3.2.

⁷⁴² Second Witness Statement of Igor Markicevic dated 16 January 2019, para. 195.

⁷⁴³ See Article 47 of the 2014 Law on Privatization, **CE-233**.

reorganization plan which was not even delivered to it and to do so in matter of days, in order to meet the deadline set by the Commercial Court of Appeal.⁷⁴⁴

648. Second, even though the Claimants' claim about the alleged expropriation of MHD Serbia's shareholding as a result of Respondent's actions is uncorroborated, for the sake of the clarity, Respondent submits that a bankruptcy proceedings conducted by a state court in a lawful manner cannot be deemed as expropriation.

649. This is the overwhelmingly accepted position of investment tribunals dealing with cases involving reorganization and bankruptcy. The issue was touched upon by the International Court of Justice in the *ELSI* case in which the Court found that the commencement of the bankruptcy proceedings over the company which was *de facto* insolvent cannot be deemed as taking.⁷⁴⁵ The position was confirmed by the tribunal in *Noble Ventures v. Romania* where the claim for expropriation was denied based on the fact that the judicial reorganization was conducted over an insolvent company, in a non-arbitrary manner and in accordance with the host state's law.⁷⁴⁶ Therefore, absent cases in which the bankruptcy is unlawful or irregular or that it pursues an expropriatory purpose – bankruptcy is not tantamount to expropriation.⁷⁴⁷

650. In BD Agro's case the bankruptcy was a long time coming. As it is evident from the company's financial records, it was *de facto* bankrupt at least from March 2013 and remained insolvent throughout entire time up to the termination of the Privatization Agreement.⁷⁴⁸ The bankruptcy proceedings was initiated by BD Agro's commercial creditor – *Banka Intesa*⁷⁴⁹ whose acts certainly cannot be attributed to Respondent under international law. There can be no doubt that the institution of the proceedings was justified and in accordance with the applicable legislation.

651. As for any possible irregularities or mistreatment of Mr. Rand's company in this procedure, apart from the casual statement about "*inefficiency of the bankruptcy*

⁷⁴⁴ See Letter from I. Markićević to the Privatization Agency dated 26 October 2015, **CE-360**.

⁷⁴⁵ *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989, ICJ Reports (1989) 15, paras. 100, 101, **RLA-89**.

⁷⁴⁶ *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award, October 12, 2005, paras. 212-216 and 176-178, **CLA-40**.

⁷⁴⁷ *Rupert Joseph Binder v. Czech Republic* (UNCITRAL), Award, 1 January 2012, para. 480, **RLA-112**.

⁷⁴⁸ See Pre-pack Reorganization Plan dated November 2014, p. 8, **CE-321**.

⁷⁴⁹ See Section II.E.3.3.

process in Serbia”⁷⁵⁰ no such concerns have been raised. Consequently, there has been no expropriation of MDH doo’s shareholding in BD Agro.

3. Termination of the Privatization Agreement did not amount to expropriation under the Treaties

652. The crux of the Claimants’ case on the alleged expropriation is their contention that the Privatization Agency unlawfully terminated the Privatization Agreement with Mr. Obradovic.⁷⁵¹ Without prejudice to the fact that the act of the Privatization Agency in this particular instance cannot be attributed to the Republic of Serbia,⁷⁵² Respondent submits that there are two requirements for its potential liability under the Treaties. In order to meet the evidentiary threshold in the case at hand, Claimants must prove, first, that the termination of the Privatization Agreement constituted its breach by the Privatization Agency and, second, that the Agency in doing so “stepped out of the contractual shoes,”⁷⁵³ i.e. that it breached the contract in abuse of sovereign authority.⁷⁵⁴ Respondent shall demonstrate that the claim on the alleged expropriation must fail on both accounts.

3.1. Termination of the Privatization Agreement was lawful under Serbian law

653. As it was already explained above by Respondent, the termination of the Privatization Agreement was declared in accordance with the applicable (Serbian) law. In brief:

- Termination of the Privatization Agreement could lawfully be declared after Mr. Obradovic’s payment of the purchase price.⁷⁵⁵ This is also the stance taken by Serbian courts in other, similar cases.⁷⁵⁶ Different interpretation would allow the buyer to “cure” any *breach* of the contract by simply paying the remainder of the purchase price. In fact, this is exactly what Mr. Obradovic attempted to do since the Privatization Agency advised him that he had breached Article 5.3.4. of the

⁷⁵⁰ Memorial, para. 408.

⁷⁵¹ Memorial, paras. 400-410.

⁷⁵² See Section IV.

⁷⁵³ *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award, 1 October 2014, para. 328, **RLA-113**.

⁷⁵⁴ See *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6, Award, 16 January 2013, para. 180, **RLA-107**.

⁷⁵⁵ See Section II.A.3.2.

⁷⁵⁶ Judgment of the Supreme Court of Cassation of 30 September 2010, **RE-25**.

Privatization Agreement well *before* full payment of the purchase price.⁷⁵⁷

- Interpretation of the Privatization Agreement offered by Claimant: - that the *Agreement* could have been terminated only for reasons specified in the Agreement – is equally untenable as a matter of law.⁷⁵⁸ The provision of Article 41a of the 2001 Law on Privatization contained a list of reasons for termination which was supplemented (not replaced) by Article 7 of the Privatization Agreement.⁷⁵⁹ In addition, the kind of logic employed by Claimants would allow parties to breach any other provision of the Agreement, apart from those listed in Article 7, without an effective sanction. This could not have been the intention of contractual parties.
- The argument that Claimants advance – that Article 5.3.4. prevents Mr. Obradovic from *encumbering* BD Agro's assets and not BD Agro itself from doing so⁷⁶⁰ – deserves no special attention. The logic that Claimants use here would render the prohibition from said provision meaningless. Furthermore, it is unclear how BD Agro could pledge its assets without Mr. Obradovic's approval as the majority owner of the company.
- The Privatization Agency, in the attempt to save the Privatization Agreement, gave Mr. Obradovic numerous *opportunities* to remedy the breach of Article 5.3.4 and to submit the evidence to that regard.⁷⁶¹ Not only that Mr. Obradovic did not prove that he remedied the breach until full payment of the purchase price (which is by Claimants' own account the moment when Mr. Obradovic's obligations towards the Privatization Agency ceased to exist), but the breach has never been fully remedied – the pledge on BD Agro's assets established by Mr. Obradovic remains until this day.⁷⁶²

⁷⁵⁷ See Section II.A.2.2.

⁷⁵⁸ Expert Report of Professor Mirjana Radovic, paras. 29-33.

⁷⁵⁹ Ibid., para. 32.

⁷⁶⁰ Memorial, para. 409(b).

⁷⁶¹ See Section II.A.2.

⁷⁶² See Section II.A.1.

654. Claimants also argue that “*even assuming, arguendo, that the Privatization Agency had had the right to declare the Privatization Agreement terminated ex lege—and it did not—the exercise of such right in the present circumstances was disproportionate, and thus expropriatory.*”⁷⁶³ The conclusion is a *non sequitur*. If the termination was declared lawfully, the proportionality analysis is irrelevant.⁷⁶⁴ Claimants’ reliance of the *Ampal* award⁷⁶⁵ does not help their argument but rather defeats it. There, the tribunal concluded, based on the previous ICC award on the matter and on its own independent analysis, that Egypt had wrongfully terminated the contract with the claimants’ Egyptian subsidiary.⁷⁶⁶ The ground for Egypt’s liability under the US – Egypt BIT was, hence, the wrongful termination of the contract at stake, and not a lawful termination that was deemed disproportionate.
655. Therefore, as explained here in a nutshell, Claimants’ case on expropriation must fail on the first hurdle – termination of the Privatization Agreement was in accordance with the applicable law due to what the Privatization Agency believed was a genuine breach of the Agreement by Mr. Obradovic. The dispute about the lawfulness of the termination is a typical contractual dispute. Mr. Obradovic did have an opportunity to contest the position of the other contracting party in the proceedings before the contractual forum and even to request a provisional measure which would prevent the Privatization Agency to dispose of shares before the issue of the termination’s lawfulness was finally settled by a competent court.⁷⁶⁷ He chose to use that right only to withdraw his lawsuit on 17 March 2016.⁷⁶⁸
656. Since the existence of the contractual breach is a precondition for the host State’s liability for expropriation of contractual rights, the expropriation cannot occur before the existence of the breach has been established. This is precisely the reason why an investor must follow the path envisaged by the dispute resolution clause contained in a contract in order to prove expropriation. The tribunal in *Waste Management v. Mexico* held that:

⁷⁶³ Memorial, para. 410.

⁷⁶⁴ Expert Report of Professor Mirjana Radovic, para. 35.

⁷⁶⁵ Ibid.

⁷⁶⁶ *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Award, 21 February 2017, paras. 329, 331-333, **CLA-31**.

⁷⁶⁷ Expert Report of Professor Mirjana Radovic, para. 54.

⁷⁶⁸ Witness Statement of Mr. Djura Obradovic dated 20 September 2017, para. 30.

“...the normal response by an investor faced with a breach of contract by its governmental counter-party (the breach not taking the form of an exercise of governmental prerogative, such as a legislative decree) is to sue in the appropriate court to remedy the breach. It is only where such access is legally or practically foreclosed that the breach could amount to an definitive denial of the right...”⁷⁶⁹

657. In the similar context of the investor’s fair and equitable treatment claim, the tribunal in *Pakerings v. Lithuania* found that the claimant was under an obligation to pursue its case before the local court in order to prove that the Municipality of Vilnius terminated the contract wrongfully:

“The failure to complain of the violation of the Agreement before the Lithuanian Court leads to two consequences. First, the Claimant failed to show that the Municipality of Vilnius terminated the Agreement wrongfully and therefore breached the Agreement. Second, even supposing that the Agreement has been wrongfully terminated, the Claimant failed to show that the right of BP to complain of the breach of the Agreement has been denied by the Republic of Lithuania and thus that its own investment was actually not accorded, by the Respondent, an equitable and reasonable treatment in such circumstances.”⁷⁷⁰

658. In its study on the issue of expropriation under international investment agreements, the United Nations Conference on Trade and Development elaborates on this “*limitation with respect to claims regarding the expropriation of contractual rights*”⁷⁷¹ in the following manner:

“This effectively means that an investor must first seek justice in the courts of the host State (if the contract so provides) and can raise an expropriation

⁷⁶⁹ *Waste Management, Inc. v. United Mexican States* (“Number 2”), ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 174, emphasis added, **RLA-93**.

⁷⁷⁰ *Pakerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para 319, **RLA-114**.

⁷⁷¹ UNCTAD Series on Issues in International Investment Agreements II: Expropriation, United Nations, 2012, p. 26, **CLA-27**.

*claim under an IIA only if the contractual remedies prove fruitless. There must be a definitive denial of the investor's contractual rights.*⁷⁷²

659. In the case at hand, for reasons described above (and leaving aside the fact that the Privatization Agreement was terminated lawfully) there was no *definite denial of contractual rights* enshrined in the Privatization Agreement. By declaring the Privatization Agreement terminated, the Privatization Agency did not decide on the right, obligation or legal interest of the buyer in an authoritative manner.⁷⁷³ Those issues are for the competent court to decide. For this reason alone Claimants' claim on expropriation should be dismissed.

3.2. Termination of the Privatization Agreement was lawful under the Treaties

660. In order to amount to liability under international law, a breach of the contract by the State is not enough. The breach itself must be a result of acts *ex iure imperii*, i.e. in the exercise of the State's sovereign powers.

661. The rule referred to here is so widely accepted by investment tribunals that the issue can be considered as a part of *jurisprudence constante*. For example, in *Impregilo v. Pakistan* the tribunal noted:

*"In fact, the State or its emanation, may have behaved as an ordinary contracting party having a difference of approach, in fact or in law, with the investor. In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority ("puissance publique"), and not as a contracting party, may breach the obligations assumed under the BIT."*⁷⁷⁴

662. In disputes concerning in particular termination of the contract as a purported expropriation, tribunals have focused on the issue whether the termination itself

⁷⁷² Ibid., p. 27 (emphasis added), **CLA-27**.

⁷⁷³ Expert Report of Professor Mirjana Radovic, para. 44.

⁷⁷⁴ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 260; footnotes omitted; emphasis added, **RLA-33**. See, also, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 444, **RLA-84**; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 248, **RLA-48**; *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 Jun 2010, para. 330, **RLA-115**; *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Final Award, 18 January 2017, para. 279, **RLA-25**.

represented exercise of public authority by the state. For instance, in *Suez v. Argentina* the tribunal stated:

*“While Argentina exercised its public authority on various occasions during the crisis, the Tribunal does not consider that its termination of the Concession Contract was an exercise of such authority. Rather, its actions were taken according to the rights it claimed under the Concession Contract and the legal framework.”*⁷⁷⁵

663. Respondent respectfully submits that the question before the Tribunal is not whether the Privatization Agency can exercise elements of public authority in general terms (which appears to be Claimants’ contention),⁷⁷⁶ but whether the Agency, in declaring formal termination of the Privatization Agreement due to Mr. Obradovic’s breach, acted in abuse of state prerogatives. The proposition is formulated by the tribunal in *Almas v. Poland*:

*“Investment tribunals have also made clear that the termination of a contract need not be actually justified in accordance with the applicable law governing the contract in order to exclude it being qualified as expropriatory or performed in the exercise of public powers/puissance publique. In the absence of an applicable umbrella clause, the question is not whether contract termination was lawful—that is a matter for the local courts or, as here, for the chosen contractual forum. The question is whether action purportedly taken under a contract is properly referable to it or is a disguised abuse of public authority.”*⁷⁷⁷

664. Furthermore, any actions taken by the Privatization Agency that were merely *consequential* upon the termination should not play any role in the analysis.

⁷⁷⁵ *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 154; emphasis added, **RLA-116**.

⁷⁷⁶ See Section VI.E. of Memorial.

⁷⁷⁷ *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland* (UNCITRAL), PCA Case No 2015-13, Award, 27 Jun 2016, para. 282; (footnotes omitted; emphasis added), **RLA-85**; See, also, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, para. 360: “The question for the Tribunal would nevertheless remain whether Emlak has gone beyond acting as an ordinary contractual party to utilise State power to interfere with the contractual arrangement (as was the case in *Abaclat*, where the State plainly went beyond acting as an ordinary contractual party in enacting legislation to shield itself from its bond obligations).”, **RLA-117**.

665. In his expert report, Mr. Milosevic submitted that the Privatization Agency's exercise of public authority was evident from its competence to request restitution of shares following the termination of the Privatization Agreement.⁷⁷⁸ Apart from the fact that Mr. Milosevic's opinion completely ignores the stance of Serbian Supreme Court that the decision of that kind does not represent an administrative act,⁷⁷⁹ the contention is also irrelevant.
666. As already explained above, transfer of shares was conducted as a regular consequence of the Privatization Agreement's termination. According to the tribunal in *Gold Reserve v. Venezuela* "*if the State was acting as a regulatory power enforcing contractual rights, no expropriation would have occurred.*"⁷⁸⁰ In other words, the fact that a state adopts legal measures that are "*consequent upon initial termination*"⁷⁸¹ of the contract, or that are "*a legitimate consequence of the termination*", does not alone and of itself transform the termination into expropriation of contractual rights.
667. Therefore, what is relevant in the case at hand is that the termination of the Privatization Agreement was a genuine consequence of Mr. Obradovic's breach of the contract and not merely "*a pretext designed to conceal a purely expropriatory measure*".⁷⁸²
668. With those considerations in mind, the tribunal in *Vigotop v. Hungary* has designed a test which should serve to establish whether a state's termination of a contract can amount to expropriation:

"The issues for determining an expropriation in the context of a contract termination are (i) whether the contract is terminated by the contractual procedure rather than a legislative act or executive decree, and (ii) whether there exists a legitimate contractual basis for termination, i.e., (a) the contract or the governing law provides the ground for termination, (b) the

⁷⁷⁸ Expert Report of Mr. Milos Milosevic, paras. 107, 108, 110.

⁷⁷⁹ Expert Report of Professor Mirjana Radovic, para. 55.

⁷⁸⁰ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, para. 664, **RLA-118**.

⁷⁸¹ *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6, Award, 16 January 2013, para. 209, **RLA-107**; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, paras. 416, 417, **RLA-117**.

⁷⁸² *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 142, **RLA-77**.

evidence substantiates a factual basis for invoking the contractual ground,
and (c) the State acts in good faith, not abusing its right by a fictitious or
malicious exercise of it.”⁷⁸³

669. When applied to the fact of the case, the *Vigotop* test clearly demonstrates that the Privatization Agency’s termination of the Privatization Agreement was not expropriatory.
670. First, the Privatization Agency declared the termination of the Privatization Agreement in the manner usually utilized by contractual parties in any contractual relationship – by sending a written notice to Mr. Obradovic on 1 October 2015.⁷⁸⁴ Unlike in some other cases,⁷⁸⁵ the contract was not terminated by a legislative act or a governmental decree. The contention of Mr. Milosevic, that even a notice of termination represents an administrative act under Serbian law⁷⁸⁶ is unsupported in case-law of Serbian courts or by any other authority.⁷⁸⁷
671. Second, Mr. Obradovic’s breach of Article 5.3.4 of the Privatization Agreement was a legitimate basis for the termination. As already explained, the Law on Privatization as the law applicable to the Agreement, provided necessary grounds for its termination.⁷⁸⁸ Evidence on the record clearly demonstrate that Mr. Obradovic did act in contravention to Article 5.3.4. in breach of his contractual obligations – which was acknowledged by Mr. Obradovic himself, for example, in his letter to the Privatization Agency in July 2012.⁷⁸⁹
672. Finally, the Privatization Agency did not act in bad faith. There is no evidence that the termination was used as an excuse to obtain benefits for the Agency, Respondent

⁷⁸³ *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award, 1 October 2014, para. 331 (emphasis added), **RLA-113**.

⁷⁸⁴ Notice on Termination of the Privatization Agreement, dated 28 September 2015, **CE-50**.

⁷⁸⁵ See, for instance, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 97, **RLA-48**; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, para 199, **RLA-119**; *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, para 76, **CLA-28**; *Copper Mesa Mining Corporation v. The Republic of Ecuador*, PCA Case No 2012-2, Award, 15 March 2016, paras 1.109, 1.110, 1.111, **RLA-120**; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergo v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, para 856, **RLA-121**.

⁷⁸⁶ Expert Report of Mr. Milos Milosevic, para. 111.

⁷⁸⁷ Expert Report of Professor Mirjana Radovic, paras. 47-50.

⁷⁸⁸ *Ibid.*, para. 32.

⁷⁸⁹ Letter from Mr. Obradovic and BD Agro to the Privatization Agency, 23 July 2012, **RE-21**.

or any other entity.⁷⁹⁰ The one constant of the case at hand is the Agency's firm insistence that Mr. Obradovic has been in default on his contractual obligations at least from January 2011.⁷⁹¹ The position of the Agency remained the same throughout the period in which it granted Mr. Obradovic numerous additional deadlines to remedy his breach, and even after the Ministry of Economy insisted that there was "...no economic justification to terminate the agreement of sale of socially owned capital."⁷⁹² Contrary to what Claimants submit in this arbitration, there was no "*Privatization Agency's unjustified about-face*"⁷⁹³ or "*complete change of the Privatization Agency's position.*"⁷⁹⁴ The Privatization Agency has constantly warned Mr. Obradovic that it considered his breach of Article 5.3.4. to be a reason for the termination in accordance with Article 41a of the Law on Privatization.

673. In conclusion, the Privatization Agency's termination of the Privatization Agreement was justified under the legal framework and due to the Mr. Obradovic's genuine breach of its contractual obligations. It did not represent a disguised abuse of sovereign authority and it was not aimed at furthering any hidden goals. As a result, Claimants' claim on the alleged expropriation should be dismissed.

4. Destruction of BD Agro's business was caused by Mr. Obradovic

674. Without prejudice to what has been stated above, Respondent submits that it was Mr. Obradovic's business practice that led to the economic demise of BD Agro and not the termination of the Privatization Agreement or any other measure attributable to Respondent.

675. The existence of a causal link between the measure adopted by the state and an impairment of the investor's rights under the BIT is a general precondition for the existence of expropriation under the Treaties. In order to succeed with its expropriation claim Claimants need to prove that a breach of their rights occurred as a direct consequence of the measure implemented by Respondent. If they are not

⁷⁹⁰ See *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6, Award, 16 January 2013, para. 213, **RLA-107**.

⁷⁹¹ Notice of the Privatization Agency on Additional Time Period dated 24 February 2011, **CE-31**.

⁷⁹² Letter from the Ministry of Economy to the Privatization Agency dated 30 May 2012, **CE-33**. See Section II.A.2.

⁷⁹³ See Section III.Q. of Memorial.

⁷⁹⁴ See Second Witness Statement of Mr. Igor Markicevic dated 16 January 2019, Section II.O.

able to meet the burden of proof in that regard, no responsibility of Respondent under international law can arise.

676. Although the rule of required causality between of an act and its consequences as a precondition for legal responsibility is self-explanatory, the issue has been discussed by investment tribunals. In *Link-Trading v. Moldova*, the claimant argued that its business was expropriated by Moldova through elimination of tax exemption for its customers.⁷⁹⁵ In discussing this claim the tribunal held that “*Claimant has the burden of proving the causal link between the measures complained of and the deprivation of its business.*”⁷⁹⁶ It continued adding that: “*To prove expropriation, Claimant must show that as a direct consequence of the measures complained of Claimant was deprived of its investment. Claimant has not carried its burden of proof of this causal link.*”⁷⁹⁷
677. Similarly, in *Oxus Gold v. Uzbekistan*, the tribunal held that there are two key components of the indirect expropriation: “*(i) the effective destruction of the value of the investment; and/or (ii) the causality link between the loss of such value and an act attributable to the State.*”⁷⁹⁸
678. The *Oxus Gold* award is relevant because it shows that when the destruction of a business venture is caused predominantly by business decisions of an investor no expropriation can occur:

“In summary, the Arbitral Tribunal finds that the loss of control over and the loss of the value of Claimant’s investment did not occur before 2011 and that, at that stage, a considerable number of diverse problems had affected AGF’s operations. Indeed, as arises out of the underlying facts and evidence, the degradation of Claimant’s investment was the result of a process of several years during which Respondent took certain actions directed at AGF and/or Oxus, whereby one cannot say that the degradation of Claimant’s investment is the direct result of Respondent’s actions. In fact, AGF suffered from internal management problems and incurred substantial

⁷⁹⁵ *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova* (UNCITRAL), Final Award, April 18, 2002, **RLA-122**.

⁷⁹⁶ *Ibid*, para 87

⁷⁹⁷ *Ibid*, para 91 (emphasis added).

⁷⁹⁸ *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Final Award, para. 748; (emphasis added), **RLA-123**.

operational delays for which AGF, and thereby Claimant, bear part of the responsibility...⁷⁹⁹

679. In the case at hand, BD Agro was *de facto* insolvent as early as 2013.⁸⁰⁰ The business model employed by Mr. Obradovic was untenable. The company was performing poorly and generated loss in every year since the privatization and up until the termination of the privatization Agreement, apart from 2008.⁸⁰¹ During this period, costs of BD Agro's production were constantly higher in comparison to its revenue.⁸⁰² The company was kept afloat only through selling its land.⁸⁰³ In addition, borrowing funds from creditors led to the situation in which the interest on loans alone was larger than the company's revenue in 2010, 2012 and 2013 which clearly indicates that the level of the debt was unsustainable.⁸⁰⁴
680. The fact that BD Agro had already applied for reorganization almost a year before the Privatization Agreement was terminated is equally telling.⁸⁰⁵ Following the unsuccessful attempt to agree on the adoption of the pre-pack reorganization plan with its creditors, the bankruptcy proceedings was instituted by Banka Intesa, one of BD Agro's biggest commercial creditors. On 30 August 2016 the Commercial Court accepted the initiative of Banka Intesa and rendered its decision of opening the bankruptcy proceedings.⁸⁰⁶
681. In accordance with the Serbian legislation on bankruptcy, the company was sold at the public auction for approximately EUR 13 million.⁸⁰⁷ Since the price achieved at the auction is significantly smaller in comparison to BD Agro's overall liabilities, Grant Thornton Report values the company on 9 April 2019 at € nil which is also the value of Claimants' claim on 21 October 2015 as the date of the alleged

⁷⁹⁹ Ibid., para. 752.

⁸⁰⁰ See Pre-pack Reorganization Plan dated November 2014, p. 8, **CE-321** – stating that the Company's business account was blocked under the enforce collection procedure on 8 March 2013 and has remained continuously blocked ever since.

⁸⁰¹ Expert Report of Sandy Cowan, para. 2.6.

⁸⁰² Ibid., para. 4.9.

⁸⁰³ Ibid., para. 4.3.

⁸⁰⁴ Ibid., para. 4.32.

⁸⁰⁵ BD Agro's submission accompanying the Pre-pack Reorganization Plan dated 25 November 2014, **CE-85**.

⁸⁰⁶ Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro of 30 August 2016, **CE-109**.

⁸⁰⁷ Evidence of the sale of BD Agro dated 9 April 2019, **RE-171**.

expropriation.⁸⁰⁸ The same result is achieved based on the JLL report on valuation of BD Agro's building land in Dobanovci.⁸⁰⁹

682. Bearing in mind that, at the relevant time, the value of Claimants' interest in BD Agro was effectively non-existent, destruction of Claimants' investment could not be attributed to acts or omissions of Respondent.

683. For reasons explained above, Respondent respectfully request that the Tribunal to dismiss the Claimants' claim on the alleged expropriation.

5. Requirements for lawful expropriation

684. Since Respondent did not expropriate Claimants' "investment" the issue of its lawfulness should be considered moot. However, for the sake of completeness, Respondent will here briefly address Claimants' argument in respect to the requirements for lawful expropriation under the Treaties.

685. First, in their attempt to prove that the purported expropriation lacked public purpose, Claimants erroneously and rather surprisingly concentrate on the recommendation issued by Ombudsman during the process of control over the Privatization Agency's and the Ministry of Economy's conduct in the privatization of BD Agro.⁸¹⁰ The argument implies that the recommendation is the measure that resulted in deprivation of Claimants' rights. This is contradiction with Claimants' previous argument that it was the termination of the Privatization Agreement and the subsequent transfer of BD Agro's shares that resulted in the alleged expropriation.⁸¹¹

686. As Respondent has already submitted, the recommendation was issued in accordance with the Ombudsman's competence, in conformity with the applicable law and, most importantly, it did not affect Claimants' rights in any way.⁸¹² The Ombudsman *did not* recommend termination of the Privatization Agreement.⁸¹³ Rather he has, reacting to the petition of BD Agro's employees, recommended that the Ministry and the Privatization Agency finally take the definitive position on

⁸⁰⁸ Expert Report of Sandy Cowan, para. 8.28.

⁸⁰⁹ Ibid., paras. 8.24., 8.25.

⁸¹⁰ Memorial, para. 414.

⁸¹¹ Ibid., para. 406.

⁸¹² See Section II.B.

⁸¹³ Ibid.

several previous complaints about irregular conducts of Mr. Obradovic submitted by employees of BD Agro.⁸¹⁴ There is absolutely no evidence which would entail that the recommendation affected the Privatization Agency's decision with regard to the faith of the Privatization Agreement.⁸¹⁵ Finally, even if the Ombudsman's act could be, for the sake of the argument, interpreted as a straightforward recommendation to terminate the Privatization Agreement – a mere recommendation to consider taking an action cannot be deemed as an improper exercise of sovereign power.⁸¹⁶

687. Although the recommendation could not and did not result in expropriation it was, in any event, issued in public purpose. The purpose of Ombudsman's recommendations is to rectify irregularities resulting from acts, actions or failure to act by state administrative bodies and other institutions which have been delegated public authority.⁸¹⁷ Respondent submits that the public purpose of such recommendation is self-explanatory.

688. In addition, it is up to the investor claiming that the measure, which is *prima facie* rendered in public purpose, is in fact adopted with ulterior motives, to prove the existence of such motives.⁸¹⁸ Claimants have failed to submit any evidence that would suggest, let alone prove, that the particular recommendation was rendered "*in blatant misuse of the power to set public policies.*"⁸¹⁹

689. Second, Claimants' argument that the Ombudsman's recommendation was issued in breach of their due process rights⁸²⁰ is equally misplaced. The Ombudsman does not conduct a judicial or administrative procedure that would result in final determination of Claimants' rights and that would involve Claimants' right to be heard or the right of appeal.

690. Furthermore, if one would accept the Claimants' argument that the expropriation was indeed a result of the Ombudsman's recommendation, this would entail that

⁸¹⁴ Ibid.

⁸¹⁵ Ibid

⁸¹⁶ *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, para. 418, **RLA-114**.

⁸¹⁷ Law on Ombudsman, Article 31(3), Article 1(1) and Article 17(1), **CE-112**.

⁸¹⁸ See *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 30 August 2018, paras. 565, 566, **RLA-124**.

⁸¹⁹ *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, para. 284, **CLA-32**.

⁸²⁰ Memorial, para. 415.

Claimants here in effect demand to participate in the process of decision-making that supposedly resulted in expropriation of their rights. This is not what the Treaties provide under the due process guarantee.

691. Article 10(4) of the Canada – Serbia BIT and Article 5(2) of the Cyprus – Serbia BIT provide already affected investor with the guarantee of prompt review of its case before an independent authority. The relevant provision of the Canada – Serbia BIT reads:

*“The affected investor shall have a right under the law of the expropriating Party to prompt review of its case and of the valuation of its investment by a judicial or other independent authority of that Party in accordance with the principles set out in this Article.”*⁸²¹

Similar provision is contained in the Cyprus – Serbia BIT:

*“The investor affected shall, under the laws and regulations of the Contracting Party making the expropriation, have the right to prompt review of its case and valuation of its investment by a judicial or other independent authority of that Contracting Party, in accordance with the principles set out in this Article.”*⁸²²

692. Clearly, the due process requirement becomes relevant *only after* the expropriation already occurred. This is explained by the tribunal in *South American Silver v. Bolivia* that was tasked with interpreting a similar provision of the UK – Bolivia BIT:

“Article 5 of the Treaty provides that “[t]he national or company affected shall have the right to establish promptly by due process of law in the territory of the Contracting Party making the expropriation, the legality of the expropriation and the amount of the compensation in accordance with the principle set out in this paragraph.” [Emphasis added]

⁸²¹ Article 10(4) of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments; emphasis added, **CLA-1**.

⁸²² Article 5(2) of the Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments; emphasis added, **RLA-130**.

*The text of the Treaty does not support the Claimant's position. The verbs governing the conduct of expropriation suggest that it is the "affected" investor of a Contracting Party that "makes" the expropriation who must challenge the "legality" of the expropriation, i.e. the question concerns a challenge to a decision that has already been taken and not participation in the decision-making process. In the context of an expropriation, and what due process under the Treaty requires is that the foreign investors have timely access to a legal proceeding in the territory of the host State of the investment which allows them to question the legality of the expropriation and the amount of the compensation, but not to participate in the making of the sovereign decision to expropriate."*⁸²³

693. This is the reason why the Claimants' contention that "...the Ministry of Economy and the Privatization Agency never gave Mr. Obradovic or the Claimants any chance to join issue with their erroneous interpretation of applicable law"⁸²⁴ must equally be rejected. Apart from the fact that the statement is simply incorrect - discussions between those bodies and Mr. Obradovic about his breach of Article 5.3.4. of the Privatization Agreement lasted over several years – it connotes that Claimants again demand for themselves a right that the Treaties simply do not contain: a right to participate in decision-making that supposedly led to expropriation.

694. Most importantly, Mr. Obradovic did have a right to challenge the measure that Claimants now label as a breach of their rights – the termination of the Privatization Agreement could have been challenged in the court proceedings under the dispute resolution clause provided for in the Agreement. Mr. Obradovic did commence a lawsuit against the Privatization Agency before the competent court alleging that the Privatization Agreement was terminated unlawfully.⁸²⁵ The fact that Mr. Obradovic later on decided to withdraw his lawsuit does not change the fact that he was indeed

⁸²³ *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 30 August 2018, paras. 581, 582, **RLA-124**.

⁸²⁴ Memorial, para. 415.

⁸²⁵ Witness Statement of Mr. Djura Obradovic dated 20 September 2017, para. 30.

provided with a right to “*prompt review*” of his case before “*a judicial or other independent authority*.”⁸²⁶

695. Finally, Respondent was under no obligation to compensate Claimants since it did not expropriate their investment. In any event, for the unlawfulness of expropriation “...*illegality must stem from a circumstance beyond mere absence of compensation*.”⁸²⁷ In other words, if all other requirements for lawful expropriation are met, the fact that the compensation has not been paid does not render the expropriation unlawful *per se* under international law.

D. THERE WAS NO IMPAIRMENT OF INVESTMENT BY ARBITRARY, UNREASONABLE AND DISCRIMINATORY MEASURES

1. General

696. Sembi alleges that Respondent impaired its investment by arbitrary, unreasonable and discriminatory measures.

697. At the outset, it should be recalled that Sembi did not make an investment within the meaning of the Cyprus-Serbia BIT.⁸²⁸ Further, it should be noted that Sembi invokes the most favored nation clause (“MFN clause”) in Article 3(1) of the Cyprus-Serbia BIT, in order to rely on the non-impairment standard provided in Article 2(3) of the Morocco-Serbia BIT and Article 2(3) of the Germany-Serbia BIT.⁸²⁹ The Cyprus-Serbia BIT does not contain an impairment clause and does not stipulate prohibition of arbitrary and discriminatory measures.

698. However, Sembi overlooks the fact that an MFN clause cannot create rights where none exist under the basic treaty. Since the Cyprus-Serbia BIT does not contain a clause prohibiting impairment of investments by arbitrary, unreasonable or

⁸²⁶ See Article 10(4) of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments; **CLA-1**; Article 5(2) of the Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **RLA-130**.

⁸²⁷ *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015, para. 130, **RLA-125**. The tribunal relied on the judgment of the Permanent Court of International Justice in *Case Concerning the Factory at Chorzów* (Germany v Poland) (Merits) 1928 PCIJ, Ser A, No 17, p. 46, **CLA-43**.

⁸²⁸ See Section III.A.2.

⁸²⁹ See Memorial, paras. 417-420.

discriminatory measures, Sembi cannot import such clause from another treaty via the MFN clause.

699. This was clearly established in *Hochtief v. Argentina*, which held that:

*"In the view of the Tribunal, it cannot be assumed that Argentina and Germany intended that the MFN clause should create wholly new rights where none otherwise existed under the Argentina- Germany BIT. The MFN clause stipulates a standard of treatment and defines it according to the treatment of third parties. The reference is to a standard of treatment accorded to third parties, not to the extent of the legal rights of third parties. Non-statutory concessions to third party investors could, in principle, form the basis of a complaint that the MFN obligation has not been secured. In contrast (to take an example comparable to the ILC example concerning commercial treaties and extradition), rights of visa-free entry for the purposes of study, given to nationals of a third State, could not form the basis of such a complaint under the BIT. The MFN clause is not a renvoi to a range of totally distinct sources and systems of rights and duties: it is a principle applicable to the exercise of rights and duties that are actually secured by the BIT in which the MFN clause is found."*⁸³⁰

700. Clearly, Sembi cannot rely on the MFN clause in Article 3(1) of the BIT in order to import the non-impairment clause from another BIT, because the latter is absent from the Cyprus-Serbia BIT.

701. In addition, even if Sembi could do so (*quod non*), it cannot rely on the Morocco-Serbia BIT since this treaty has not yet entered into force.⁸³¹ Thus, Respondent is not bound by this BIT and Claimants cannot request for themselves treatment that is not yet available to investors from Morocco.

702. Therefore, what would be left is its reliance on the Germany-Serbia BIT which in Article 2(3) provides that neither Contracting Party

⁸³⁰ *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, para 81 (emphasis added), **RLA-88**.

⁸³¹ Printout of the List of Bilateral Investment Treaties concluded by Serbia from the UNCTAD Investment Policy Hub website of 13 April 2019, **RE-141**.

*“shall in its territory prejudice in any way by means of arbitrary or discriminatory measures the management or use of investments by investors of the other Contracting Party.”*⁸³²

703. Therefore, the non-impairment clause in the Germany-Serbia BIT prevents arbitrary or discriminatory measures prejudicial for “the management or use of investments by investors”, which is significantly narrower than the corresponding provision in the Morocco-Serbia BIT. As will be seen, this will be important in the analysis of Sembi’s specific complaints.

704. Finally, it should also be noted that Claimants do not allege that Sembi’s investment was subjected to discrimination but only to unreasonable or arbitrary treatment.

2. The meaning of “arbitrary”

705. Claimants refer to Professor Schreuer and state that according to him, *“the following kinds of measures are arbitrary under international investment law:*

*[A.] a measure that inflicts damage on the investor without serving any apparent legitimate purpose [...] [B.] a measure that is not based on legal standards but on discretion, prejudice or personal preference; [C.] a measure taken for reasons that are different from those put forward by the decision maker [...] [D.] a measure taken in willful disregard of due process and proper procedure.”*⁸³³

706. However, a closer look at his text reveals that the categories in question were distilled as a summary of arbitral practice, not as the final statement of law. Indeed, Professor Schreuer concludes his article by carefully stating that

“The standard of protection against arbitrary or discriminatory measures, although widely used in the texts of treaties, has only generated a limited

⁸³² Agreement between the Federal Republic of Germany and the Socialist Federal Republic of Yugoslavia on Reciprocal Promotion and Protection of Investments, Article 2(3), **RLA-75**. It should be noted that Claimants’ Memorial also quotes the same (UNTS) version of the English translation of the BIT, but their exhibit CLA-36 contains a different English version.

⁸³³ Memorial, para. 421, quoting Christoph Schreuer, *Protection against Arbitrary or Discriminatory Measures*, 2009, p. 188, **CLA-13**.

amount of case law interpreting it. Its conceptual contours are still somewhat sketchy.”⁸³⁴

707. Since the “*conceptual contours are still somewhat sketchy*”, it is submitted that one should rely on the pronouncement of the International Court of Justice in the *ELSI* case:

*“Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law... It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.”*⁸³⁵

708. This pronouncement, from the most authoritative source,⁸³⁶ has been quoted favorably in the practice of investment tribunals ever since. For example, the arbitral tribunal in *Azurix v. Argentina*, found that “*the definition in ELSI is close to the ordinary meaning of arbitrary since it emphasizes the element of wilful disregard of the law.*”⁸³⁷

709. The threshold for finding arbitrary behavior is very high. This is obvious from *ELSI*, where the ICJ referred to “*an act which shocks, or at least surprises, a sense of judicial propriety*”. In other cases, it was similarly held that a finding of arbitrariness required that “*some important measure of impropriety is manifest*”,⁸³⁸ or that a state implemented a measure “*not based on reason*”,⁸³⁹ or “*without engaging in a rational decision-making process*”.⁸⁴⁰

⁸³⁴ Christoph Schreuer, *Protection against Arbitrary or Discriminatory Measures*, 2009, p. 198, **CLA-13**.

⁸³⁵ *Case Concerning Elettronica Sicula S.p.A. (United States of America v. Italy)*, ICJ, Judgment of 20 July 1989, I.C.J. Reports 1989, para. 128, **RLA-89**.

⁸³⁶ As noted by the tribunal in *Siemens v. Argentina*, “*the definition in ELSI is the most authoritative interpretation of international law and it is close to the ordinary meaning of the terms emphasizing the wilful disregard of the law.*” *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 318, **RLA-48**.

⁸³⁷ *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 392, **CLA-39**. See also, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 318, **RLA-48**; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, paras. 176-177, **CLA-40**; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 378, **CLA-37**.

⁸³⁸ *Enron Corporation and Ponderosa Assets LP v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 281, **CLA-50**.

⁸³⁹ *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 319, **RLA-48**.

⁸⁴⁰ *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 158, **CLA-8**.

710. As is obvious from *ELSI*, an ordinary failure to comply with law is not sufficient for a finding of arbitrariness, which is not concerned with “*something opposed to a rule of law, as something opposed to the rule of law*”. The same principle applies to contract violations. According to *Duke Energy*, “*contractual breaches do not amount, in themselves, to arbitrary conduct*”.⁸⁴¹ Therefore, Claimants must show differences going beyond a normal contract dispute in order to establish arbitrary behavior.⁸⁴²

711. As will be discussed in more detail below, actions of Respondent and of the Privatization Agency were reasonable, and not arbitrary, when analyzed against both the *ELSI* test and Professor Schreuer’s categories suggested by Claimants.

712. Before further analysis, it should also be clarified that Claimants are wrong to contend that the standard of reasonableness is broader in scope than the concept of non-arbitrariness. Rather, they have been regarded as interchangeable. According to Professor Schreuer’s article relied on by Claimants:

“*There does not appear to be a relevant distinction between the terms ‘arbitrary’, ‘unjustified’, and ‘unreasonable’ in this context. Rather, the terms seem to be used interchangeably.*”⁸⁴³

713. Claimants allege that the following conduct of the Privatization Agency was arbitrary: (i) its refusal to release the pledge over the Privatized Shares,⁸⁴⁴ (ii) its refusal to allow for the assignment of the Privatization Agreement from Mr. Obradovic to Coropi,⁸⁴⁵ and (iii) its termination of the Privatization Agreement.⁸⁴⁶ Each allegation will be discussed in turn. Here, it should be noted that none of the actions complained of constitutes exercise of governmental authority or *puissance*

⁸⁴¹ *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 381, **CLA-37**.

⁸⁴² *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 381, **CLA-37**, quoting *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, 22 December 2003.

⁸⁴³ Christoph Schreuer, *Protection against Arbitrary or Discriminatory Measures*, 2009, p. 183, **CLA-13**.

⁸⁴⁴ See Memorial, para. 424.

⁸⁴⁵ See Memorial, para. 427.

⁸⁴⁶ See Memorial, para. 428.

publique, rather, commercial acts of the Privatization Agency as a party to the Privatization Agreement in order to preserve its contractual rights.⁸⁴⁷

3. Refusal to release the pledge over the Privatized Shares

714. It should be recalled that, in order to violate the non-impairment clause in Article 2(3) of the Germany-Serbia BIT, a measure must be (i) arbitrary or discriminatory, and (ii) prejudice the management or use of investments by investors. Neither of the two occurred in the case of the Privatization Agency's refusal to release the pledge over the Privatized Shares.
715. At the outset, Article 2(3) of the Germany-Serbia BIT is inapplicable because the Privatization Agency's refusal to release the pledge over the Privatized Shares did not "prejudice the management or use of investments by investors" in any way. They freely managed and used the company (investment). The refusal to release the pledge over the Privatized Shares could only have affected their purported transfer to Sembi's nominee, Coropi, as confirmed by Claimants themselves.⁸⁴⁸ But the transfer is disposal of the shares, i.e. disposal of the ownership over the company (*ius disponendi*), which is obviously different from the use of the company (*ius utendi*) and its management.
716. The refusal to release the pledge was not arbitrary (discrimination is not alleged). Rather, it was a legitimate exercise of the Privatization Agency's legal rights.⁸⁴⁹ The purpose of the pledge was to prevent the Buyer from freely disposing of the shares while he still had obligations under the Privatization Agreement. In particular, the obligations secured by the pledge were all the Buyer's obligations under the Privatization Agreement, not only the obligation to pay the purchase price in full.⁸⁵⁰ Therefore, in the situation where the Buyer continued to be in breach, the duration of the pledge continued to run and the Privatization Agency's refusal to release it was fully justified.⁸⁵¹

⁸⁴⁷ See above Section V.A.2.-3.

⁸⁴⁸ See Memorial, para. 424.

⁸⁴⁹ See Expert Report of Professor Mirjana Radovic, paras. 66-67; see, also, above Section II.C.

⁸⁵⁰ See Expert Report of Professor Mirjana Radovic, para. 65.

⁸⁵¹ See Expert Report of Professor Mirjana Radovic, para. 66.

717. In addition, the Privatization Agency's conduct was justified under general contract law. According to Article 122(1) of the Law on Obligations:

“In reciprocal contracts neither party shall be bound to fulfill its obligation if the other party does not fulfill, or is not ready to simultaneously fulfill, its obligation, unless something else is agreed upon by contract, or determined by law, or unless something else result from the nature of the transaction.”

718. Therefore, one party to a contract is not obligated to perform its contractual obligation if another party does not, or is not, ready to fulfil its own obligation at the same time. This is the well-known *exceptio non adimpleti contractus*.⁸⁵²

719. The pledge over the Privatized Shares was established pursuant to Article 3.1.2. of the Privatization Agreement and its Appendix 1. The pledge was established for 5 years or until the complete payment of the price under the Privatization Agreement.⁸⁵³ At the time when the purchase price was paid in full, i.e. 8 April 2011, the buyer was in breach of the Privatization Agreement and was given additional time to remedy the breach.⁸⁵⁴ However, the Buyer's failure to perform its obligation under Article 5.3.4. of the Privatization Agreement continued until its termination.⁸⁵⁵ The Privatization Agency actually warned the Buyer that it would not release the pledge for as long as he did not remedy the breach of the Privatization Agreement.⁸⁵⁶ During all this time, according to Article 122(1) of the Law on Contracts and Torts, the Privatization Agency was entitled to withhold its performance, i.e. to refuse to release the pledge, on the basis of the fact that the buyer failed to perform its own obligation.⁸⁵⁷

720. Therefore, the Privatization Agency's conduct was fully in accordance with the Privatization Contract and general contract law. It also had a legitimate motivation

⁸⁵² See Expert Report of Professor Mirjana Radovic ER, para. 67

⁸⁵³ See Article 2 of the Pledge Agreement, Appendix 1 of the Privatization Agreement dated 4 October 2015, **CE-17**.

⁸⁵⁴ Notice of the Privatization Agency on Additional Time Period of 24 February 2011, **CE-31**.

⁸⁵⁵ See Section II.A.2. above.

⁸⁵⁶ See, e.g., Minutes from meeting held at the Privatization Agency on 4 February 2014, **RE-36**; Letter from the Privatization Agency to D. Obradović of 27 April 2015, p. 3, **CE-348**; Letter from Mr. Vasiljevic to the Privatization Agency of 16 June 2015, p. 1, **RE-65**. Letter from the Privatization Agency to Mr. Vasiljevic of 26 June 2015, p. 1, **RE-66**.

⁸⁵⁷ Expert Report of Professor Mirjana Radovic, para. 67.

and purpose, as can be seen from the following explanation provided by the Privatization Agency:

“The Agency have not issued the decision on deletion of pledge, because before payment of sale and purchase price, breach of the agreement had been established which presents legal grounds for termination of agreement, and that the Agency granted the Buyer additional terms and the Buyer failed to entirely proceed in accordance with these, therefore, there is still a reason for termination of the Agreement in line with the Law on Privatization.

-In case the Commission renders the decision that the Agency issues a decision on deletion of pledge on shares of the Buyer registered in its favor, the Buyer would be free to dispose of them, which is certain, having in mind the request of the Buyer for assignment of the Agreement and the letter of the Buyer of September 10, 2015. [If], after issuing of the decision on deletion of the pledge on shares of the Buyer, registered in favor of the Agency, the Buyer alienated them, and afterwards, the Agency rendered the decision on termination of the Agreement, the Agency could not terminate it, since it would not have grounds for undertaking of the measures towards the Buyer who would no longer be the owner of the capital of the Subject, or towards the new owner with whom it did not have contractual relation with, and could not, in accordance with the Law on Privatization, transfer the capital of the Subject which was the subject of sale to the Share Fund.”⁸⁵⁸

721. Claimants contend elsewhere (in the FET context) that the Privatization Agency acted in bad faith, “with the sole purpose of coercing the Claimants into compliance” with its demands to remedy the breaches.⁸⁵⁹ However, it is clear that the Privatization Agency’s refusal to release the pledge over the Privatized Shares was a reasonable conduct of a contracting party, which served a legitimate purpose – enforcement of a contract. There is not a hint of bad faith in this. Further, the Privatization Agency was fully entitled to protect its rights under the Privatization

⁸⁵⁸ Materials for the Session of the Commission of 28 September 2015, pp. 34-35, **CE-89**.

⁸⁵⁹ See Memorial, para. 437.

Agreement in this way, as discussed above. It did what any party to a contract would have done.

722. In conclusion, even if Article 2(3) of the Germany-Serbia BIT were applicable (*quod non*), the Privatization Agency's refusal to release the pledge over the Privatized Shares does not breach its requirements.

4. Refusal to allow for the assignment of the Privatization Agreement

723. Sembi also claims that the Privatization Agency's refusal to allow for the assignment of the Privatization Agreement from Mr. Obradovic to Coropi "*significantly contributed to BD Agro's insolvency*" and inflicted damage on the investor "*without serving any legitimate purpose*".⁸⁶⁰
724. Again, the Privatization Agency's refusal to allow the assignment created no prejudice whatsoever to "*the management or use of investment by investors of the other Contracting Party*" as per Article 2(3) of the Germany-Serbia BIT. They freely managed and used the company (investment). The assignment of the Privatization Agreement was disposal of the investment, which does not fall under Article 2(3), because it is neither its use, nor management.
725. Further, this measure was not arbitrary, because it was based on law and served a legitimate purpose. The request for share transfer could not be processed during the supervision procedure by the Ministry of Economy, but, in addition, it never contained all the necessary documents, as the Privatization Agency had repeatedly pointed out.⁸⁶¹ In particular, the Buyer was asked to provide a bank guarantee, which would secure the Privatization Agency's rights under the Privatization Agreement. However, the other side failed to provide the necessary documents.⁸⁶² It is important to note that in refusing to consent to assignment the Privatization Agency did not affect any contractual rights of the buyer under the Privatization Agreement. At the same time, it was fully entitled to refuse assignment and did so as any party to a contract would do in a situation where the other party is in breach of its obligations.

⁸⁶⁰ See Memorial, para. 427.

⁸⁶¹ See above, Sections II.D.2.-3.

⁸⁶² Ibid.

726. In conclusion, the Privatization Agency's refusal to consent to the proposed transfer does not fall within the scope of the impairment standard in Article 2(3) of the Germany-Serbia BIT.

5. Termination of the Privatization Agreement

727. Claimants allege that the termination of the Privatization Agreement constitutes unreasonable or arbitrary treatment. Their argument in this context is mainly based on the assumption that the Ombudsman's recommendation was the main cause and the main reason for the termination. As already discussed, this theory is patently absurd.⁸⁶³ Ombudsman's recommendations are just that – recommendations, without binding force.⁸⁶⁴ In addition, the substance of Ombudsman's recommendation in the present case is different from what Claimants say it was. The recommendation was not to terminate the Privatization Agreement. Rather, the recommendation was that the Privatization Agency should act and take a decision on whether or not the conditions for termination envisaged by the Law on Privatization had been fulfilled.⁸⁶⁵ Clearly, the Privatization Agency's was not required in any way to terminate the Privatization Agreement by the Ombudsman's recommendations, as it could as well determine that the conditions for termination had not been met and decide to maintain the contract.

728. The whole Claimants' construction about alleged arbitrary treatment in the termination of the Privatization Contract falls apart without the erroneous assumption that the Ombudsman somehow ordered the Privatization Agency to terminate.

729. Specifically, Claimants allege arbitrary treatment because the real reason for termination of the Privatization Agreement was the Ombudsman's recommendation, not the violation of Article 5.3.4., as stated in the termination notice. Here they rely

⁸⁶³ See above Section II.B.

⁸⁶⁴ See Expert Report of Professor Mirjana Radovic, para. 61 (“... recommendations of the Ombudsman are by no means binding for the authority.”); see, also, Law on Ombudsman, Article 31, **CLA-112**.

⁸⁶⁵ “In cooperation with the Ministry of Economy, the Privatization Agency shall take all necessary measures to determine, within the shortest period of time, whether all conditions stipulated by the Law on Privatization of 2001 for termination of the Agreement on sale of socially owned capital through the method of public auction of the subject of privatization “Buducnost” Dobanovci have been fulfilled, in order to finally clarify legal status of the subject of privatization, that is, of company “BD Agro AD” Dobanovci and its employees who, for a long period of time, have lacked any certainty regarding manner of exercising of their labour rights.” Opinion of the Ombudsman of 19 June 2015, p. 1, para. 1, **CE-42**.

on one of Professor Schreuer's categories of arbitrary treatment ("*A measure taken for the reasons that are different from those put forward by the decision maker*").⁸⁶⁶

But Claimants fail to mention that Professor Schreuer also stated that this category of arbitrary treatment applies "*in particular, where a public interest is put forward as a pretext to take measures that are designed to harm the investor*".⁸⁶⁷ Therefore, Claimants would have to show that there was also an element of bad faith and even an intention to harm the investor, in addition to showing that real reasons for a decision were different than those stated. They show neither.

730. As already discussed, the record clearly shows that the Privatization Agency's following of the Ombudsman's recommendations was not, and could not be, "the real reason for the termination" as Claimants allege.⁸⁶⁸ The real – and only – reason for the termination was put forward in the termination notice: the failure of the buyer to remedy the violation of Article 5.3.4. of the Privatization Agreement in additional time given and after numerous extensions.⁸⁶⁹ This same reason had been consistently and continuously mentioned over the several years in which the Privatization Agency had tried to persuade Mr. Obradovic (and BD Agro) to comply with his obligations under the Privatization Agreement, by giving him additional time for doing so. In this regard, the position of the Privatization Agency was consistent throughout and it time and again made the buyer and BD Agro aware that the Privatization Agreement could be terminated in case of further non-compliance.⁸⁷⁰ In this, the Privatization Agency behaved as any party to a contract would, and it was entitled to terminate the Privatization Agency as its reaction to persistent and continuous violation of Article 5.3.4. by the buyer.

731. Claimants also allege a difference between real reasons for the termination and those given in the notice because the latter "insinuated" that, apart from the violation of Article 5.3.4., the Commission for Control also declared the Privatization Agreement terminated due to the violation of Article 5.3.3, while in reality the sole reason for the termination was the violation of Article 5.3.4.⁸⁷¹ This is a conjecture, not

⁸⁶⁶ Christoph Schreuer, *Protection against Arbitrary or Discriminatory Measures*, 2009, p. 188, **CLA-13**.

⁸⁶⁷ Christoph Schreuer, *Protection against Arbitrary or Discriminatory Measures*, 2009, p. 188, **CLA-13**.

⁸⁶⁸ Compare Memorial, para. 428(a) and this submission at Section II.B. above.

⁸⁶⁹ See Notice on Termination of the Privatization Agreement of 28 September 2015, **CE-50**.

⁸⁷⁰ See e.g., Minutes from meeting held at the Privatization Agency on 30 January 2014, **RE-28**; Minutes from meeting held at the Ministry of Economy on 17 December 2014, **RE-22**.

⁸⁷¹ See Memorial, para. 428(a).

supported by the record. First, the termination notice does not "insinuate" anything. It clearly states that the Commission for Control took into account the conduct of the buyer with respect to the alienation of the fixed assets, but does not state that this was a reason for termination.⁸⁷² This fully corresponds to the minutes of the session of the Commission for Control, which reveal that it decided to terminate the Privatization Agreement on the basis of violation of Article 5.3.4, but also discussed the situation concerning possible violation of Article 5.3.3.⁸⁷³ However, while the latter was not the reason for the termination, it is fair to say and confirmed by the record that this was discussed and taken into account by the Commission for Control.

732. Obviously, there was no discrepancy between the real reasons for the termination and the reasons put forward in the termination notice, because neither the purported "instruction" from the Ombudsman, nor Article 5.3.3. of the Privatization Agreement, were the real reason for the termination.
733. Claimants also allege, with reference to Professor Schreuer, that the measures inflicted "*damage on the investor without serving any legitimate purpose*". According to Claimants, the Ombudsman's recommendations were concerned with the well-being of the employees, stating that they suffered due to lack of legal certainty regarding the exercise of their labor rights, which was completely unconnected to the purported breaches of the Privatization Agreement, hence, the termination did not serve any legitimate purpose.⁸⁷⁴ All this is obviously based on the erroneous assumption that the Privatization Agreement was terminated due to the Ombudsman's recommendation. This is completely inaccurate, as already discussed. Rather, the action that affected the investment was the termination of the Privatization Agreement by the Privatization Agency. The termination was a completely legitimate exercise of the Privatization Agency's contractual rights under the Privatization Agreement. It served a legitimate purpose of sanctioning non-compliance with the contract. Here, as well, Claimants fail to appreciate additional explanation provided by Professor Schreuer, who clarified that in this context the decisive criterion would be whether the measure in question "*can be justified in*

⁸⁷² See Notice on Termination of the Privatization Agreement of 28 September 2015, p. 3, **CE-50**.

⁸⁷³ Minutes of the Session of the Commission dated 28 September 2015, **CE-117**.

⁸⁷⁴ See Memorial, para. 428(b).

terms of rational reasons that are related to the facts".⁸⁷⁵ As Respondent has repeatedly demonstrated, this was indeed so.⁸⁷⁶

734. Claimants' further claim that the Ombudsman's intervention was arbitrary because it was illegal⁸⁷⁷ fails, as well, because he had competence to control the work of the Ministry of Economy and the Privatization Agency. Here, it should be noted that not even Claimants allege that the Ombudsman's intervention was based on caprice, i.e., on "*discretion, prejudice or personal preference*".
735. Claimants also allege, again with reference to Professor Schreuer's categories, that the Privatization Agency's decision was taken "*in willful disregard of due process and proper procedure*". However, they are unable to point to any actual violation of due process or procedure. Rather, they first state that the Privatization Agency's termination decision disregarded the opinion of the Ministry of Economy that there was no economic reason to terminate the Privatization Agreement. However, this was just an opinion of the Ministry of Economy, not a binding instruction.⁸⁷⁸ But even if it were binding, it is hard to see how the Privatization Agency's failure to follow it could be a due process violation to the detriment of Claimants.
736. Claimants' further allegation that the Privatization Agency violated due process by disregarding the opinion of its external legal counsel, commissioned to aid the process of internal decision making, is absurd. Obviously, the external legal counsel's opinion could not be binding for the Privatization Agency in any way.
737. It should also be noted that both the opinion of the Ministry of Economy and the opinion of the Privatization Agency's outside legal counsel were internal documents which could not possibly have any bearing on the buyer, Claimants or BD Agro.
738. At the very end, Claimants even allege that due process and proper procedure were violated by the Privatization Agency through its disregard of the alleged assurances given by the Serbian government. It is completely unclear how a failure to follow assurances could possibly amount to a violation of due process. But even more importantly: no assurances were given. Rather, Claimants intentionally misinterpret

⁸⁷⁵ Christoph Schreuer, *Protection against Arbitrary or Discriminatory Measures*, 2009, p. 188, **CLA-13**.

⁸⁷⁶ See Section II.A.3.

⁸⁷⁷ See Memorial, para. 428(c).

⁸⁷⁸ See above Section II.A.3.2.2.

government officials’ willingness to listen and look into their case as somehow providing assurances of a certain result.

739. For all these reasons, there has been no violation of the impairment standard by arbitrary treatment in the present case.

E. NO BREACH OF FAIR AND EQUITABLE TREATMENT

740. Claimants also allege violation of the FET standard in Article 6(1) of the Canada-Serbia BIT and Article 2(2) of the Cyprus-Serbia BIT. But their FET argument is extremely brief, as if they do not expect much from it.

741. At the onset, it should be noted that Claimants attempt to argue that the minimum standard of treatment under customary international law contained in Article 6 of the Canada – Serbia BIT and the autonomous fair and equitable treatment standard from Article 2(2) of the Cyprus – Serbia BIT are the same.⁸⁷⁹ However, the interpretation of the relevant provision from the Canada – Serbia BIT goes against the plain reading of the BIT’s text and the principle of effectiveness.

742. Article 6(2) of the BIT reads:

*"The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."*⁸⁸⁰

743. Therefore, unlike in cases on which Claimants rely in their submission,⁸⁸¹ the provision at stake defines the minimum standard of treatment not as a “floor” but rather as a “ceiling” of the Host State’s obligation – Canada and Serbia are under no obligation to provide an investor of the other Party with the treatment that would go beyond of what is required under customary international law.

744. Since Claimants argue that the contents of the autonomous FET standard and the minimum standard of treatment are essentially the same “...given the ever-evolving

⁸⁷⁹ Memorial, para. 432.

⁸⁸⁰ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments (emphasis added), **CLA-1**.

⁸⁸¹ See para. 432 and footnote 450 of Memorial.

*minimum standard of customary international law...*⁸⁸², the burden of establishing what the standard requires now under customary international law is upon Claimants.⁸⁸³ This burden cannot be discharged by plain assertions.

745. As it is established by different tribunals, interpreting the equivalent provision of the NAFTA Article 1105, the threshold for the State's liability under the minimum standard of treatment from customary international law is exceptionally high. The substance of the standard was recently defined by the tribunal in *Eli Lilly v. Canada* (relying on the *Glamis Gold* award):

“Second, as regards NAFTA Article 1105(1), the Tribunal accepts in principle the analysis and conclusions of the NAFTA Chapter Eleven tribunal in Glamis Gold on the content of the customary international law minimum standard of treatment addressed in NAFTA Article 1105(1) and, in particular, its conclusion as follows:

*The Tribunal therefore holds that a violation of the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105. Such a breach may be exhibited by a “gross denial of justice or manifest arbitrariness falling below acceptable international standards;” or the creation by the State of objective expectations in order to induce investment and the subsequent repudiation of those expectations. The Tribunal emphasizes that, although bad faith may often be present in such a determination and its presence certainly will be determinative of a violation, a finding of bad faith is not a requirement for a breach of Article 1105(1).”*⁸⁸⁴

⁸⁸² Ibid.

⁸⁸³ See *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, para. 601, **RLA-127**.

⁸⁸⁴ *Eli Lilly and Company v. The Government of Canada* (UNCITRAL), ICSID Case No. UNCT/14/2, Final Award, 16 March 2017, para. 222 (internal citations omitted; emphasis added), **RLA-128**.

746. Clearly, the content of the minimum standard of treatment under Article 6 of the Canada – Serbia BIT, does not correspond to the content of the so-called autonomous FET standard, as defined in the Claimants’ Memorial.⁸⁸⁵
747. Further, Claimants contend that their alleged expropriation was also a violation of the FET standard. This contention is immediately disposed of by Article 6(3) of the Canada-Serbia BIT, which expressly provides that “[a] breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article”. In other words, a finding of expropriation contrary to the BIT does not mean that there was also a violation of the FET standard or full protection and security. In any case, Claimants’ arguments concerning expropriation have already been refuted above.⁸⁸⁶
748. Finally, Claimants point to (i) Respondent’s refusal to release the pledge over the Privatized Shares, (ii) refusal to allow the assignment of the Privatization Agreement, and (iii) the Ombudsman’s investigation and recommendation concerning BD Agro, as instances of violations of FET standards. However, they fail to provide any analysis, let alone to show any violations of the FET standard distinct from what was already alleged in the context of the arbitrary treatment. Since Claimant’s discussion in the FET context does not add anything new, and since these three instances have already been extensively analyzed and Claimants’ allegations refuted in the previous section (D) dealing with alleged violations of non-impairment standard due to arbitrary treatment, the Tribunal is respectfully directed to that discussion.

F. NO BREACH OF THE UMBRELLA CLAUSE

749. Sembi invokes the MFN clause from the Cyprus-Serbia BIT in order to avail itself of the umbrella clause contained in Article 2(2) of the UK-Serbia BIT.⁸⁸⁷ On this basis, it alleges violation of the umbrella clause due to the Privatization Agency’s refusal to release the pledge over BDA shares after the full payment of the purchase price, as

⁸⁸⁵ See memorial, para. 433.

⁸⁸⁶ See above Section V.C.

⁸⁸⁷ See Memorial, para. 440.

well as due to its termination of the Privatization Agreement contrary to its provisions.⁸⁸⁸

750. At the outset, Respondent reiterates its position, already elaborated in the context of the non-impairment cause, that a MFN clause cannot create rights where none exist under the basic treaty.⁸⁸⁹ Since the Cyprus-Serbia BIT does not contain an umbrella clause, Sembi cannot use the MFN clause in Article 3(1) of this BIT to import it from another treaty.⁸⁹⁰

751. But even if Sembi could rely on the umbrella clause from the UK-Serbia BIT (*quod non*), this clause has not been violated for two separate reasons: (i) the conditions for its application have not been fulfilled, and (ii) the conduct complained of did not constitute its violation.

752. First, the umbrella clause from Article 2(2) of the UK-Serbia BIT is inapplicable to the present case and the Privatization Agreement. It provides that “*each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors...*”

753. The threshold issue here is the following question – has Respondent entered into any obligation *with regard to Sembi’s “investment”*? No detailed analysis is required to conclude that the answer to that question is clearly negative. The contention advanced by Claimants rest upon the presumption that, by entering into the Privatization Agreement with Mr. Obradovic, the Privatization Agency somehow entered into obligation towards Sembi. However, at the time the Privatization Agreement was concluded in October 2005, the Privatization Agency as a contracting party was unaware of Sembi’s existence. There is a perfectly reasonable explanation for that – Sembi did not even exist at the material time. As it is evident from the data recorded by relevant Cypriot authorities, Sembi was incorporated on 31 December 2007, more than two years after the date on which the Privatization

⁸⁸⁸ See Memorial, paras. 444-445.

⁸⁸⁹ See above, section V.D.1.

⁸⁹⁰ *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, para 81 (emphasis added), **RLA-88**.

Agreement was concluded.⁸⁹¹ Respondent respectfully submits that this fact alone is enough to effectively put an end to Sembi's umbrella clause claim.

754. In addition, not only that Sembi was not a party to the contract at stake - Respondent was not a party to the Privatization Agreement either. In the words of the umbrella clause, Respondent has not "entered into" obligations under this agreement, the Privatization Agency did, so Respondent cannot be responsible for its violation. The position was clearly stated by arbitral tribunal in *Amto v Ukraine*, noting that since *'the contractual obligations have been undertaken by a separate legal entity, [...] the umbrella clause has no direct application.'*⁸⁹²

755. This position was also taken by the tribunal in *EDF v. Romania*. Importantly, the case concerned the umbrella clause in the UK-Romania BIT, which was, in the relevant part, the same as the umbrella clause in the UK-Serbia BIT, as it also used the phrase "any obligation it may have entered into". The *EDF* tribunal emphatically stated that

*"The 'obligations entered into,' to which Article 2(2) refers, are obligations assumed by the Romanian State. The breach of contractual obligations by a party entails such party's responsibility at the contractual level. There is in principle no responsibility by the State for such breach in the instant case since the State, not being a party to the contract, has not directly assumed the contractual obligations the breach of which is invoked."*⁸⁹³

756. Therefore, since Respondent was not a party to the Privatization Agreement it "has not directly assumed the contractual obligations the breach of which is invoked" so it cannot be responsible for the breach.

757. This conclusion would apply even under the assumption that conduct of the Privatization Agency were attributable to Respondent. As clarified by the tribunal in *EDF v. Romania*:

⁸⁹¹ Extract from the Department of Registrar of Companies and Official Receiver concerning Sembi, dated 12 March 2019, **RE-142**.

⁸⁹² *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, para. 110, **RLA-90**.

⁸⁹³ *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para 317, **RLA-87**.

“... the attribution to Respondent of AIBO’s and TAROM’s acts and conduct does not render the State directly bound by the ASRO Contract and the SKY Contract for purposes of the umbrella clause.

*... Attribution does not change the extent and content of the obligations arising under the ASRO Contract and the SKY Contract, that remain contractual, nor does it make Romania party to such contracts.”*⁸⁹⁴

758. A further reason why the umbrella clause is not applicable in the present case is because it may be violated only by host state’s sovereign acts and not by commercial ones. According to *El Paso v Argentina*:

*“Interpreted in this way, the umbrella clause in Article II of the BIT, read in conjunction with Article VII, will not extend the Treaty protection to breaches of an ordinary commercial contract entered into by the State or a State-owned entity, but will cover additional investment protections contractually agreed by the State as a sovereign -- such as a stabilization clause -- inserted in an investment agreement.”*⁸⁹⁵

759. This position was espoused by a number of tribunals.⁸⁹⁶

760. As has been discussed above, the conduct complained of, including the contract termination, was ordinary commercial conduct undertaken by the Privatization Agency as a contracting party and a reasonable response to a persistent violation of the Privatization Agreement by the buyer.

761. Secondly, even if the umbrella clause would be applicable in the present case (*quod non*), it was not violated. In this regard, Claimants first point to the Privatization Agency's refusal to release the pledge over BD Agro's shares after the full payment

⁸⁹⁴ *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, paras. 318-319, **RLA-87**; see also, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 424, **RLA-17**; *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, para. 110, **RLA-90**.

⁸⁹⁵ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 para. 81, **CLA-19**.

⁸⁹⁶ See *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, paras. 108-109, **RLA-91**; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 310, **CLA-52**; *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 126, **RLA-77**.

of the purchase price, which, in their view was a violation of the Share Pledge Agreement.⁸⁹⁷ However, as already explained,⁸⁹⁸ the Privatization Agency was entitled under Article 122(1) of the Law on Contracts and Torts to withhold performance of its obligations under the Privatization Agreement (of which the Share Pledge Agreement is an integral part), for as long as the buyer did not comply with its obligation under Article 5.3.4. of the same agreement.

762. Claimants further allege that the Privatization Agency's termination of the Privatization Agreement was contrary to its plain language, and as such a violation of the umbrella clause.⁸⁹⁹ As has already extensively discussed, Claimants are wrong here, since the Privatization Agency was entitled to terminate the agreement under Article 41(a) of the Law on Privatization.⁹⁰⁰

763. In conclusion, Sembi cannot rely on the umbrella clause from the UK-Serbia BIT and, in any case, this clause has not been violated by the conduct complained of.

⁸⁹⁷ See Memorial, para. 444.

⁸⁹⁸ See Section V.D.3.

⁸⁹⁹ See Memorial, para. 445.

⁹⁰⁰ See above Sections II.A.3. and V.D.5.

VI. THE ISSUE OF COMPENSATION

A. GENERAL REMARKS

764. Claimants begin their discussion of compensation with reference to *Chorzów Factory* case in which the Permanent Court of International Justice stated that “*the reparation must, as far as possible, wipe out all the consequences of the illegal act...*” They also refer to Article 31 of the ILC Articles, which states that the responsible State is under the obligation “*to make full reparation for the injury caused by the internationally wrongful act*”.⁹⁰¹ These points are not in dispute.

765. However, payment of compensation presupposes a causal link between a treaty breach and the injury suffered for which compensation is sought.⁹⁰² As ILC noted “*causality in fact is a necessary but not sufficient condition for reparation*”.⁹⁰³ Claimants have completely failed to discuss the question of causality, and Respondent reserves its position in this regard, until Claimants carry their burden of proof.

B. VALUATION OF BD AGRO AND ITS ASSETS

1. BD Agro’s actual financial performance 2006-2015

766. Claimants paint a rosy picture of BD Agro’s business for several years following privatization, after which, they admit, its liquidity started to deteriorate due to extensive investments and temporary adverse market conditions.⁹⁰⁴

767. The real situation was grimmer, however. According to an expert report prepared by Mr. Sandy Cowan of Grant Thornton (hereinafter: “Grant Thornton report”), the company made “*heavy operational and cash losses between 2005 and 2014*”.⁹⁰⁵ It

⁹⁰¹ See Memorial, paras. 485-486, referring to *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) 1928 PCIJ, Ser A, No 17, **CLA-43** and Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, **CLA-24**.

⁹⁰² See Article 31(2) of ILC Articles, Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, **CLA-24**.

⁹⁰³ ILC Commentary, p. 92, para. 10, Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, **CLA-24**.

⁹⁰⁴ See Memorial, paras. 81-87 & 127.

⁹⁰⁵ Expert Report of Sandy Cowan, para. 4.3.

was kept afloat by selling the surplus land.⁹⁰⁶ Although its revenue increased significantly between 2008 and 2011 (while still being lower than projected in the company's business plans), it was still insufficient to cover interest expense in 2010, 2012 and 2013, which "*shows that the level of debt was unsustainable*".⁹⁰⁷ According to Grant Thornton report,

*"Excluding fixed assets held for sale, BD Agro's current liabilities significantly exceeded its current assets on each balance sheet date from 31 December 2006 to 31 December 2014, which implies that the company did not have enough cash and short-term assets to pay its short-term liabilities without selling the fixed assets held for sale (land)."*⁹⁰⁸

768. In particular, despite increase in milk revenue up to 2011 and over EUR 6 million of the land sold in 2012 and 2013, BD Agro generated net losses each year between 2009 and 2014.⁹⁰⁹

769. BD Agro's was heavily indebted. According to Grant Thornton report, its long-term debt fluctuated and peaked at EUR 15 million at 31 December 2013, while its short term debt exceeded EUR 29 million at 31 December 2011 and from 31 December 2014 onwards.⁹¹⁰ It is worth recalling here that these loans were partly also used to finance Mr. Obradovic's connected companies,⁹¹¹ which was a breach of the Privatization Agreement that eventually led to its termination.⁹¹²

770. BD Agro sold fixed assets to generate cash "*primarily to finance operating cash losses and pay interest and capital repayments on loans*".⁹¹³ As established by Grant Thornton report, "*[c]umulatively between 2008 and 2013, the business did not generate any net cash*".⁹¹⁴ This did not prevent the company from granting loans to third parties.⁹¹⁵

⁹⁰⁶ Expert Report of Sandy Cowan, para. 4.3.

⁹⁰⁷ Expert Report of Sandy Cowan, para. 4.5

⁹⁰⁸ Expert Report of Sandy Cowan, para. 4.7.

⁹⁰⁹ See Expert Report of Sandy Cowan, paras. 4.18-4.19.

⁹¹⁰ See Expert Report of Sandy Cowan, para. 4.43.

⁹¹¹ See Expert Report of Sandy Cowan, para. 4.45.

⁹¹² See Section II.E.1.

⁹¹³ Expert Report of Sandy Cowan, para. 4.51.

⁹¹⁴ Expert Report of Sandy Cowan, para. 4.52.

⁹¹⁵ See Expert Report of Sandy Cowan, para. 4.48.

771. The company's management had prepared several business plans to overcome these business difficulties. All of them had a similar strategy: to increase production by buying a large number of high-quality cows and to reduce production costs. All of them were equally unsuccessful. As noted by Grant Thornton report, “[a]ctual performance was very different from any of the plans”;⁹¹⁶ and there were “unrealistic expectations”.⁹¹⁷ In addition, poor management and syphoning money from BD Agro to the benefit of the Buyer, Mr. Obradovic, contributed to the company's utter failure.⁹¹⁸

2. Different valuations of BD Agro

772. Claimants start their discussion of BD Agro's value by mentioning that the company was the object of three “contemporaneous” valuations carried between December 2014 and February 2016, which established that the company's value was between EUR 56 and EUR 71 million. They mention the valuation by Mr. Mrgud and two Confineks valuations.⁹¹⁹

773. There is much more, however. On the basis of evidence provided by Claimants themselves one can conclude that there were no less than eight valuations of BD Agro's assets or land in the period between November 2014 and March 2017.⁹²⁰ They varied considerably. For example, the value of the company's land in Dobanovci, which Claimants consider to be its most valuable asset, varied between EUR 4.7 million and EUR 87.1 million.⁹²¹

774. Unsurprisingly, Claimants and their financial expert inevitably rely on the valuation reports that are at the top of the range. For example, they dismiss, without sufficient justification, the JLL valuation of BD Agro's land in Dobanovci, commissioned by Banca Intesa.⁹²² According to Grant Thornton report:

“Dr Hern dismisses the JLL report as he found ‘...no support for prices as low as those concluded in the JLL report.’ and he has not had sight of the

⁹¹⁶ Expert Report of Sandy Cowan, para. 5.3.

⁹¹⁷ Expert Report of Sandy Cowan, para. 5.5.

⁹¹⁸ See above Section II.E.1.

⁹¹⁹ See Memorial paras. 513-516.

⁹²⁰ See Expert Report of Sandy Cowan, para. 6.4, table.

⁹²¹ See Expert Report of Sandy Cowan, para. 6.3.

⁹²² See Jones Lang LaSalle d.o.o., Report on the Valuation of Immovable Property of BD Agro, located in Dobanovci, Serbia, **CE-176**.

*full methodology employed by JLL, despite JLL stating their valuation was at Market Value as defined by RICS ‘The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion’ Dr Hern prefers instead to rely on the valuation report prepared by Mr Mrgud, which was prepared for the purpose of the March 2015 Reorganisation plan. In Dr Hern’s own words ‘Albeit this evidence is not from actual transactions, it represents the seller’s expectations of the price of land comparable to BD Agro’s land in Zones A, B and C’, the use of Mr Mrgud’s report inflates Dr Hern’s range unit price.”*⁹²³

775. As mentioned by Grant Thornton report, the JLL valuation explicitly referred to the standards of the Royal Institute of Chartered Surveyors, “*which are globally recognized standards in the valuation of land and property*”, as well as to International Valuation Standards.⁹²⁴ The JLL valued the land in Dobanovci (in Zones A, B and C) at EUR 4.7 million in February 2015.⁹²⁵ In contrast to that, the valuation prepared by the Mr. Mrgud, used by Claimants, assessed the value of the land in Zones A, B, C to be EUR 87.1 million at 31 August 2014.⁹²⁶

776. In this context, Claimants contend that two Confineks valuations on which they rely were “accepted” by Respondent, because their preparation was “directed” by the Privatization Agency. Also, the Confineks valuations were used in preparation of BD Agro’s 2015 financial statements, which were subsequently approved at the company’s general assembly, where the Privatization Agency controlled majority of votes.⁹²⁷ Claimants’ argument implies that Respondent is somehow estopped from challenging Confineks reports. Apart from the fact that the Privatization Agency is a separate legal entity from Respondent which disposes of this argument immediately, it is absurd for at least two additional reasons.

⁹²³ Expert Report of Sandy Cowan, para. 7.8.5 (footnote omitted).

⁹²⁴ See Expert Report of Sandy Cowan, para. 6.7.

⁹²⁵ Jones Lang LaSalle d.o.o, Report on the Valuation of Immovable Property of BD Agro, located in Dobanovci, Serbia, **CE-176**.

⁹²⁶ Report on the valuation of the market value of construction land in the BD Agro complex Zones A, B and C in the town of Dobanovci, pp. 14-15, **CE-175**.

⁹²⁷ See Memorial, para. 517.

777. First, it would be absurd to hold one party bound by a third party's valuation simply due to the fact that it commissioned the valuation. However, in the present case it is not even alleged that the Privatization Agency commissioned the valuation reports, but that it "directed" their preparation. It is clear that the reports were commissioned by BD Agro.⁹²⁸ A request from the Privatization Agency or the administrator of shareholding to BD Agro to perform a valuation or even engage a certain appraiser cannot possibly give rise to Respondent's responsibility for the valuation itself.
778. Second, acceptance of a financial report at a company's shareholders meeting cannot be interpreted as automatic acceptance of all documents on which the financial report itself was based. Otherwise, shareholders would be compelled to double check all company records before voting for such report, so that they are not held responsible for their content. This would be also absurd.

3. Dr. Hern's valuation

779. Claimants' financial expert values BD Agro between EUR 55.3 million and EUR 81 million. He arrives at these numbers by (1) valuing BD Agro's non-core assets, primarily the construction land in Dobanovci, using the Adjusted Book Value method, and (2) valuing BD Agro's farming business using the Discount Cash Flow ("DCF") method.⁹²⁹ According to him, the total value of the company's assets is between EUR 96.3 million and EUR 124 million, from which he subtracts the value of current and non-current liabilities in line with their book value, as reported in the 2015 current accounts (EUR 43 million).
780. Grant Thornton report has detected a number of methodological flaws in the report of Claimants' financial expert,⁹³⁰ which put into question its reliability.
781. For example, he values the farm on the assumption that it was a going concern and fails to take into account the fact that it was in the situation of illiquidity for many years.⁹³¹ According to Grant Thornton report,

⁹²⁸ Email communication between I. Markićević and R. Knežević titled Offers for valuation of capital, **CE-170**.

⁹²⁹ See Expert Report of Richard Hern, paras. 123-124.

⁹³⁰ For a summary, see Expert Report of Sandy Cowan, para. 7.3.

⁹³¹ See Expert Report of Sandy Cowan, paras. 7.5-7.6.

*“[a]s the farm was not a going concern, its value would be less than Market Value. Mr. Hern has made no adjustment for the farm not being a going concern”.*⁹³²

782. But even assuming that BD Agro could be a going concern, Grant Thornton report concludes that *“the use of the DCF method seems inappropriate in this case”*⁹³³ for the following reason:

*“Dr Hern has valued BD Agro on the basis of the Claimants’ future plans for the business, not as the business was on 21 October 2015. At 21 October 2015, BD Agro was not profit making and was not earning any net positive cash flows therefore the DCF methodology in this situation is inappropriate. By valuing BD Agro on the basis of the Claimants’ future plans he is ignoring the current state of the business and is significantly inflating the valuation of BD Agro.”*⁹³⁴

783. A further problem is that, even assuming that two mentioned assumptions were accurate (i.e. that BD Agro was a going concern and that the future plans were appropriate for assessing the Market Value), the DCF projection would still be based on a business plan that was similar to two previous plans (increasing of the number of cows and the volume of milk produced) which were unsuccessfully implemented by the company and turned out not to be profitable.⁹³⁵ According to Grant Thornton report, Claimants’ expert

*“does not explain why a third attempt at this strategy would be successful leading to such markedly different financial outcomes than previously achieved.”*⁹³⁶

784. Also, Claimants’ expert uses a discount rate that seems low *“as it does not take into account the risk of investing in a small business in financial difficulty”*, which serves to increase the calculated business value.⁹³⁷

⁹³² Expert Report of Sandy Cowan, para. 7.7.

⁹³³ Expert Report of Sandy Cowan, para. 7.15.

⁹³⁴ Expert Report of Sandy Cowan, para. 7.18.

⁹³⁵ See Expert Report of Sandy Cowan, paras. 7.19-7.22.

⁹³⁶ Expert Report of Sandy Cowan, para. 7.22.

⁹³⁷ Expert Report of Sandy Cowan, para. 7.24.

785. The major element in the valuation provided by Claimants' expert is the value of certain land plots (in Zones A, B, and C in Dobanovci) registered as agricultural land which could have been sold at the value of construction land. He assumes that this land could be sold at high prices (between EUR 62.9 million and EUR 82.9 million⁹³⁸) on the basis of the Mrgud valuation, two Confineks valuations, as well as other sources.⁹³⁹
786. Grant Thornton report criticizes Mr. Hern's valuation of the land for a number of reasons. As already mentioned, he unjustifiably dismissed the JLL valuation, which was prepared for Banca Intesa and used reputable standards.⁹⁴⁰ Further, there is evidence that actual sales of BD Agro's land were for the amounts much lower than their estimated value. For example, in one transaction in 2012, agricultural land in Novi Becej was sold at 55% of its estimated value (sold at EUR 7.4 million, estimated at EUR 13.5 million). Even BD Agro's management acknowledged that the estimated value of the land in Dobanovci at EUR 120,000 per ha could not be achieved in the short term.⁹⁴¹ Indeed, the company encountered difficulties when it tried to sell the land in the past.⁹⁴²
787. Further, it seems that Claimants' expert assumed a lower fee for conversion of agricultural land to construction land. While he assumed the conversion fee would be 50% of the value of the *agricultural* land, in fact the fee could be as high as 20% of the *market value for construction land*. This alone could increase the conversion fee to between EUR 7.7 million and EUR 10.6 million,⁹⁴³ in contrast to Dr. Hern's estimate of between EUR 1.2 million and EUR 3.8 million.⁹⁴⁴ In addition, converting the land is a process that could take years. All in all, Grant Thornton report finds it "*surprising that Dr Hern does not seem to have considered the liquidity and marketability of the land before it is converted, the long lead-time or the extra costs that would be incurred.*"⁹⁴⁵

⁹³⁸ See Expert Report of Richard Hern, para. 94. This is after payment of the conversion fee.

⁹³⁹ See Expert Report of Richard Hern, Sec. 3.2.3, Memorial, para. 542.

⁹⁴⁰ See Expert Report of Sandy Cowan, para. 7.8.5.

⁹⁴¹ See Expert Report of Sandy Cowan, para. 7.8.2.

⁹⁴² See Expert Report of Sandy Cowan, para. 7.8.3.

⁹⁴³ See Expert Report of Sandy Cowan, para. 7.10.

⁹⁴⁴ See Expert Report of Richard Hern, para. 101.

⁹⁴⁵ Expert Report of Sandy Cowan, para. 7.12.

788. It is submitted that the analysis in Grant Thornton report has demonstrated that Dr. Hern's report has so many flaws that it should not be accepted as a reliable valuation of BD Agro.

4. Grant Thornton report's valuation

789. Grant Thornton report provides a valuation of BD Agro as at 21 October 2015 and concludes that it was between EUR nil and EUR 4.4 million.⁹⁴⁶

790. As already mentioned, Grant Thornton report concludes that BD Agro could not be valued as a going concern, which was one of the major deficiencies of Claimants' expert valuation. International valuation standards (IVS) define a going concern as "*a business enterprise that is expected to continue operations for the foreseeable future*".⁹⁴⁷

791. As already discussed, Grant Thornton report determined that BD Agro lacked profitability and was in a distressed situation. It had not been profitable and generated losses every year since privatization.⁹⁴⁸ In addition, in November 2014, BD Agro submitted the pre-pack reorganization plan, while at the beginning of 2015 Banca Intesa requested opening of the bankruptcy proceedings against the company. According to Grant Thornton report, this indicates that BD Agro was unable to "*continue operations for the foreseeable future*" as structured.⁹⁴⁹

792. As it is inappropriate to value the company as a going concern, Grant Thornton report considers it appropriate to use an asset based approach method in its valuation.⁹⁵⁰ Further, Grant Thornton report based its valuation on Confineks report dated 4 February 2016, as this was the basis for the asset value in BD Agro's financial statements of 31 December 2015. However, it adjusted the book values to reflect the bankruptcy scenario, because the financial statements were prepared on a going concern-basis.⁹⁵¹

⁹⁴⁶ Expert Report of Sandy Cowan, para. 8.1

⁹⁴⁷ See Expert Report of Sandy Cowan, para. 8.6.

⁹⁴⁸ See Expert Report of Sandy Cowan, paras. 8.7.

⁹⁴⁹ See Expert Report of Sandy Cowan, para. 8.8.

⁹⁵⁰ See Expert Report of Sandy Cowan, para. 8.9.

⁹⁵¹ See Expert Report of Sandy Cowan, para. 8.10.

793. Further, Grant Thornton report deemed it appropriate to apply a discount of 30% to the Confineks report dated 4 February 2016.⁹⁵² The discount is due

*“to the difficulty of marketing the business or assets to potential investors and their having time to complete due diligence and also the difficulty in assessing the land conversion and value.”*⁹⁵³

794. That the discount applied is appropriate is also confirmed by the fact that, for example, the March 2015 Pre-Pack Plan indicated that the unburdened property value could be 70% of market value.⁹⁵⁴ Also, previous sales of BD Agro’s land achieved the price which was at around 50% of its estimated value.⁹⁵⁵

795. Grant Thornton report bases its valuation on the Confineks report dated 4 February 2016, whose valuation of construction land did not factor in the liquidity and marketability of the land. For this reason, it considers the land valuation in Confineks report to be a maximum value.⁹⁵⁶ The Confineks report valued BD Agro’s assets at 31 December 2015 at RSD 6,854 million (EUR 56.4 million). On this basis, and after applying 30% discount, Grant Thornton report establishes the value of BD Agro’s total operating assets at EUR 67.3 million. At the same time, its total liabilities (after discount) are EUR 62.9 million, so the value of the company is EUR 4.4 million at 21 October 2015.⁹⁵⁷

796. The calculations are reproduced in the table at the following page⁹⁵⁸:

⁹⁵² See Expert Report of Sandy Cowan, para. 8.17.

⁹⁵³ Expert Report of Sandy Cowan, para. 8.12.

⁹⁵⁴ See Expert Report of Sandy Cowan, paras. 8.13-8.14.

⁹⁵⁵ See Expert Report of Sandy Cowan, para.8.15.

⁹⁵⁶ See Expert Report of Sandy Cowan, para. 8.18.

⁹⁵⁷ See Expert Report of Sandy Cowan, para. 8.20.

⁹⁵⁸ Expert Report of Sandy Cowan, para. 8.20.

Based on Confineks valuation at 31 December 2015			
21 October 2015, in €m	Source	100% of assessed value	70% of assessed value
Dobanovci - Industrial zone	Feb 16 Confineks Report	67.3	47.1
Other construction land	Feb 16 Confineks Report	1.2	0.8
Novi Becej	Feb 16 Confineks Report	0.2	0.1
Non-farm assets		68.7	48.1
			-
Agricultural land	Feb 16 Confineks Report	3.9	2.7
Other fixed assets	Feb 16 Confineks Report	18.5	13.0
Current assets	Feb 16 Confineks Report	4.9	3.4
Deferred tax assets	Feb 16 Confineks Report	0.1	0.1
Farm assets		27.5	19.2
Total operating assets		96.2	67.3
Total estimated liabilities	Feb 16 Confineks Report	(39.8)	(39.8)
Capital gains tax liability	Paragraph 8.24.1	(3.1)	(3.1)
Payment to Canadian suppliers	Paragraph 8.24.4	(2.2)	(2.2)
Conversion fee	Paragraph 8.24.2	(2.5)	(2.5)
Other costs related to the construction land	Paragraph 8.24.3	?	?
Bankruptcy costs	Paragraph 8.24.5	(19.2)	(13.5)
Redundancy payments	Paragraph 8.24.6	(0.7)	(1.8)
Value of liabilities		(67.5) -?	(62.9) -?
Net value of BD Agro at 21 October 2015		28.7 -?	4.4 -?

797. Since Claimants had 79.77% shareholding in the company, this means that the maximum value of their claim is EUR 3.5 million plus pre-award interest.⁹⁵⁹

798. Alternatively, Grant Thornton report contains a valuation based on the value of BD Agro's land, taking into account the JLL valuation. The latter was prepared for the purposes of obtaining a bank loan, "*which implies it reflects the value that the bank could realistically extract from the land it had to repossess and sell the business, i.e. if the business was in a bankruptcy situation*".⁹⁶⁰ JLL valued the land at EUR 4.7 million, in comparison to Confineks valuation of between EUR 65.8 million and EUR 67.3 million.⁹⁶¹

⁹⁵⁹ See Expert Report of Sandy Cowan, para. 8.1.

⁹⁶⁰ Expert Report of Sandy Cowan, para. 8.23.

⁹⁶¹ See Expert Report of Sandy Cowan, para. 8.23.

799. A valuation of BD Agro on the basis of JLL valuation would be EUR nil, since the liabilities of BD Agro would be significantly greater than its assets.⁹⁶²

800. Finally, one should recall that BD Agro was sold at an auction on 9 April 2019 for around EUR 13 million.⁹⁶³ Under the Serbian Bankruptcy Law, the company was sold free of any obligations or liens.⁹⁶⁴ The sale of BD Agro also implies a value of EUR nil at 9 April 2019, which, according to Grant Thornton report could also be used as a representative value for 21 October 2015.⁹⁶⁵

801. In conclusion, the value of BD Agro on 21 October 2015 was between EUR 4.4 and EUR nil, while the value of Claimants' shareholding was between EUR 3.5 million and EUR nil.

5. Value of Canadian Claimants' interest in BD Agro

802. Claimants submit that the Canadian Claimants' interest in BD Agro's equity includes (1) Mr. Rand's indirect shareholding of 3.9% in BD Agro through MDH doo, and (2) the interest of Rand Investments, Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand in Sembi and thus, indirectly, in BD Agro. Each of these should be considered in turn.⁹⁶⁶

803. First, Mr. Rand's indirect shareholding of 3.9% of BD Agro through MDH doo was, according to Claimants, expropriated indirectly because it lost all value due to the termination of the Privatization Agreement and seizure of Mr. Obradovic' shares which thwarted realization of the amended pre-pack reorganization plan and forced BD Agro into bankruptcy.⁹⁶⁷ As has already been discussed, this is inaccurate. The realization of the amended pre-pack reorganization plan ended in failure because Mr. Markicevic, company's general manager installed by the Buyer, did not comply with court order.⁹⁶⁸ Moreover, the company was insolvent for almost 3 years before the

⁹⁶² See Expert Report of Sandy Cowan, para. 8.24.

⁹⁶³ See **RE-171**. It was valued in the bankruptcy proceedings at EUR 26 million on 30 June 2018, see **RE-191**.

⁹⁶⁴ See Article 133 of the Bankruptcy Law, **RE-172**.

⁹⁶⁵ See Expert Report of Sandy Cowan, para. 8.28.

⁹⁶⁶ See Memorial, paras. 563-564.

⁹⁶⁷ See Memorial, para. 565.

⁹⁶⁸ See above Section II.E.3.2.

bankruptcy proceedings were initiated, since 8 March 2013,⁹⁶⁹ which indicates that MDH doo's shares were deprived of most of their value much earlier.

804. Claimants value MDH doo's shares indirectly held by Mr. Rand in proportion to Dr. Hern's valuation of BD Agro as a whole, which is inaccurate and unconvincing, as has been discussed in the previous section. In addition, Claimants accept that MDH doo would need to pay 15% corporate income tax in Serbia on the difference between the selling price and the original purchase price and claim that this tax would amount to EUR 0.4 million.
805. In their instructions to Dr. Hern, Claimants stated that the value of MDH doo's original purchase price of 3.9% of shares was EUR 200,000.⁹⁷⁰ Now they claim the value of the same shares on 21 October 2016 was EUR 3.2 million.⁹⁷¹ This in itself shows how unrealistic and absurd Claimants' calculation is: the value of MDH doo's share in a failing company somehow sky-rocketed from EUR 0.2 to 3.2 million.
806. Second, the Canadian Claimants who are direct or indirect shareholders in Sembi also claim damages, in the alternative to Sembi's.⁹⁷² On the one hand, Rand Investments and its 100% owner Mr. William Rand claim Rand Investment's indirect interest in BD Agro through Sembi.⁹⁷³
807. On the other hand, other Canadian Claimants are beneficiaries of the Ahola Family Trust (Bermuda) and on this basis claim indirect interest in BDO Agro through Sembi, whose one of shareholders is the Ahola Family Trust.⁹⁷⁴ However, they claim not only the perceived value of their share in BD Agro through Sembi and the Ahola Family Trust, but also seek a tax gross-up for the Canadian tax they would have to pay on any amounts of compensation they would receive on the basis of an award in these proceedings. They also claim that that no Canadian tax would have

⁹⁶⁹ See above Section II.E.3.3.

⁹⁷⁰ See Expert Report of Richard Hern, para. 169.

⁹⁷¹ See Memorial, para. 566.

⁹⁷² See Memorial, para. 564.

⁹⁷³ See Memorial, para. 574.

⁹⁷⁴ These are Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand, see Memorial, paras. 575-579.

been due if they had received distribution of capital from the Ahola Family Trust.⁹⁷⁵ On this basis, they seek a 33.2% gross-up on any amounts awarded to them.⁹⁷⁶

808. The situation for which these Canadian Claimants seek a tax gross-up might arise only if the Tribunal finds it has no jurisdiction with respect to Sembi. This would lead to the Canadian investors' alternative claim *in lieu* of Sembi.
809. Obviously, the whole structure Canadian Claimants – Ahola Family Trust (Bermuda) – Sembi (Cyprus) was set up in order to avoid paying Canadian taxes. By awarding a tax gross-up because this structure could not be utilized and taxes avoided, the Tribunal would signal its support for the whole endeavor, which may not be illegal, but is certainly unworthy of support and legitimization.
810. Further, the claim for a gross-up in this alternative scenario is based on the assumption the Canadian Claimants beneficiaries of the Ahola Family Trust could cash-in on BD Agro and then would transfer cash to the Ahola Family Trust through Sembi and not pay Canadian taxes. However, this scenario is absolutely unrealistic, because there was no realistic prospect of selling BD Agro at the price sought by Claimants or at any price that would result in their net cash gain. The price for which BD Agro was sold on 9 April 2019 was around EUR 13 million, which, taken together with the company's liabilities, means that its worth is nil.⁹⁷⁷ Therefore, no cash would ever be coming to the Ahola Family Trust and there would be no possibility to avoid Canadian taxes.

It is submitted that the claim for a tax gross-up should be rejected. Respondent reserves the right to further comment on all aspects of this claim, including Canadian tax law issues, as the case may be.

6. Mr. Rand's receivables

811. Finally, Mr. William Rand personally claims its payments to BD Agro's Canadian suppliers for the purchase and transport of heifers in the amount of EUR 2,177,903,

⁹⁷⁵ See Memorial, para. 581.

⁹⁷⁶ See Memorial, para. 590.

⁹⁷⁷ See Expert Report of Sandy Cowan, para. 8.28.

as well as a short-term loan he provided to BD Agro in the amount of EUR 219,000.⁹⁷⁸

812. As already discussed in the part dealing with jurisdictional objections, neither the expenditure for heifers, nor the loan, qualify as an investment under the Canada-Serbia BIT.⁹⁷⁹

813. Further, it is not in dispute that Mr. Rand claims payments for heifers in BD Agro's bankruptcy proceedings.⁹⁸⁰ Claimants contend that these proceedings appear to be stalled, which is obviously inaccurate, as the company was sold on 9 April 2019.⁹⁸¹ Obviously, Mr. Rand should be directed to satisfy its claim in the bankruptcy proceedings.

814. In this context, Claimants repeat their thesis that, due to BD Agro's bankruptcy, Mr. Rand's receivables have been rendered worthless, while the bankruptcy was caused by the termination of the Privatization Agreement and transfer of the Buyer's shares which prevented adoption of the pre-pack plan. As already discussed throughout this submission, Claimants' thesis is wrong and not based on facts. The bankruptcy was caused by long-term continuous insolvency of BD Agro, while the failure of Mr. Markicevic to follow court orders directly led to the initiation of the bankruptcy proceedings.⁹⁸² Moreover, it is obvious that Mr. Rand's receivables were deprived of their value much earlier, as they remained unpaid for seven years before the bankruptcy.⁹⁸³

815. For all these reasons, Mr. Rand's claims for compensation on the basis of his receivables against BD Agro should be dismissed in its entirety.

⁹⁷⁸ See Memorial, para. 592.

⁹⁷⁹ See above Section III.A.1.

⁹⁸⁰ See Memorial, para. 592.

⁹⁸¹ See Evidence of the sale of BD Agro dated 9 April 2019, **RE-171**.

⁹⁸² For more, see Section II.E.3.2.

⁹⁸³ See Memorial, para. 85.

C. INTEREST SHOULD BE CALCULATED ON THE BASIS OF INTERNATIONAL LAW

816. It is not in dispute that compensation should include interest on the principal amount due.⁹⁸⁴ What is in dispute, however, is how this interest should be calculated.

817. Claimants suggest that interest should be calculated pursuant to Serbian law at EURIBOR plus 8 percentage points.⁹⁸⁵ Their alternative proposal is that interest should be calculated on the basis of 6-month average EURIBOR plus 2 percentage points compounded semi-annually.⁹⁸⁶

818. Claimants principal submission – that interest should be calculated pursuant to Serbian law – has no basis in the Treaties.

819. According to Article 33(1) of Canada-Serbia BIT:

"Tribunal established under this Section shall decide the issues in dispute consistently with this Agreement and applicable rules of international law."

820. Similarly, the Cyprus-Serbia BIT provides in Article 9(4) that

*"The arbitral tribunal shall decide the dispute in accordance with provisions of this Agreement and the applicable rules and principles of international law."*⁹⁸⁷

821. It is clear that both Treaties stipulate that a decision in an investor-State dispute should be made on the basis of their provisions and applicable rules of international law (the Cyprus-Serbia BIT also refers to principles of international law).

⁹⁸⁴ See Memorial, para. 495.

⁹⁸⁵ See Memorial, para. 497.

⁹⁸⁶ See Memorial, para. 508.

⁹⁸⁷ Respondent provides copies of the signed versions of the Cyprus-Serbia BIT, as exhibit **RLA-130**. It should be noted that the signed Serbian version contains a typing error in Article 9(4), which is obvious from the repetition of the text stating that an award shall be final and binding, as well as from lack of punctuation. However, the signed English version, from where the text of Article 9(4) reproduced above has been taken, does not contain this error. According to the BIT itself (final provisions), in case of divergence between versions in different languages, the English text shall prevail. It should also be noted that Claimants' exhibit **CLA-2**, which contains what seems to be an English translation of the BIT, but without signature, apparently reproduces the error in Article 9(4) that exists in the Serbian version.

822. This excludes the possibility that Serbian legislation on calculation of interest, favored by Claimants, should be directly applied in the present case. Claimants are aware of this so they invoke the preservation of rights clauses in order to avail themselves of the Serbian legislation, which they consider to be more favorable than the calculation awarded under international law.⁹⁸⁸ In that regard, they face two insurmountable problems.

823. First, since the Canada-Serbia BIT does not contain a preservation of rights clause, Claimants cannot import one on the basis of its MFN clause.⁹⁸⁹ As already mentioned in the context of non-impairment, the tribunal in *Hochtief v. Argentina* clearly stated that

*“In the view of the Tribunal, it cannot be assumed that Argentina and Germany intended that the MFN clause should create wholly new rights where none otherwise existed under the Argentina-Germany BIT.”*⁹⁹⁰

824. Further, and in any case, the MFN clause in Article 5 of the Canada-Serbia BIT contains the terms “*treatment no less favourable than it accords, in like circumstances, to investors of a non-Party...*” This suggests that the MFN obligation exists only if the “circumstances” of an investor of the home State are “like circumstances” in comparison with those of an investor of third State. It is submitted that this requires a factual analysis that would determine whether the two investors are “in like circumstances”. This position was taken by the tribunal in *Ickale v. Turkmenistan*, which considered a MFN clause having a comparable wording (“similar situations”) to the one in Canada-Serbia MFN.⁹⁹¹

825. Therefore, Claimants reliance on the preservation of rights clause in Qatar-Serbia BIT on the basis of the MFN clause in Canada-Serbia BIT must fail.

826. Second, and more general, reason why Claimants cannot invoke the preservation of rights clauses to apply Serbian national provisions on calculation of interest is that these clauses relate to the treatment provided by the Treaties in which they are

⁹⁸⁸ See Memorial, para. 599.

⁹⁸⁹ See Memorial, paras. 503-504.

⁹⁹⁰ See *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, para. 81, **RLA-88**

⁹⁹¹ See *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016, paras. 328-329, **RLA-129**.

contained but do not expand their scope. Since compensation for treaty violations (including interest for such compensation) is not part of the treatment provided by the Treaties, but is provided under general international law, the preservation of rights clauses do not apply.

827. The Cyprus-Serbia BIT in Article 10 refers to “*a treatment more favourable than is provided in this Agreement*”. Similarly, the Qatar-Serbia BIT in Article 13(1) refers to “*a treatment more favourable than is provided for by this agreement*”. This clearly indicates that these preservation of rights clauses are tied to the treatment provided in the investments agreements themselves.

828. This is confirmed by Newcombe and Paradell (quoted by Claimants):

*“The [preservation of rights] clause, in its usual wording, simply say that in applying or enforcing the existing protections offered by the IIA, attention should be paid to any more favourable, but not unfavourable, provisions contained in domestic law or specific agreement.”*⁹⁹²

829. This clearly shows that the operation of a preservation of rights clause relates to the protection offered in the BIT itself, i.e. “the existing protection offered by the IIA”. As an example, Newcombe and Paradell mention a contractual clause that would result in higher compensation than the one under the treaty’s expropriation clause and should therefore be applied pursuant to a preservation of rights clause.⁹⁹³ Then, they conclude:

*“Thus, the clause confirms that the investor may benefit from more favourable treatment, but does not add a new, specific or distinct, treaty obligation to respect commitments made.”*⁹⁹⁴

⁹⁹² A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, p. 478, **CLA-54**.

⁹⁹³ A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, p. 478, **CLA-54**. (“Thus, for example, a contractual clause providing for a mechanism to calculate compensation and resulting in a higher amount than that under the treaty’s expropriation clause would need to be applied”).

⁹⁹⁴ A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, p. 478, **CLA-54**.

830. In other words, the compensation mechanism from the contract (in the present case, national law) could be used pursuant to the preservation of rights clause only because there was a compensation provision in the treaty's expropriation clause.
831. In the present case, however, the Treaties simply do not contain compensation provisions applicable to the breaches alleged by Claimants. Both the Cyprus-Serbia BIT and Canada-Serbia BIT contain provisions on compensation for losses resulting from certain extraordinary situations⁹⁹⁵ or the right to compensation in case of expropriation (with interest),⁹⁹⁶ but do not regulate compensation and interest for losses in cases of treaty breaches, including illegal expropriation. This is regulated by general international law, codified in Article 31 of the ILC Articles.
832. Therefore, interest on compensation cannot be calculated in accordance with Serbian law, pursuant to the preservation of rights clauses invoked by Claimants, but rather in accordance with international law.

⁹⁹⁵ See Article 4 of the Cyprus-Serbia BIT, **RLA-130**, and Article 7 of Canada-Serbia BIT, **CLA-1**.

⁹⁹⁶ See Article 5 of the Cyprus-Serbia BIT, **RLA-130**, and Article 10 of Canada-Serbia BIT, **CLA-1**.

VII. PRAYER FOR RELIEF

Respondent requests the Arbitral Tribunal to

- (1) *grant* Respondent's request for bifurcation of the proceedings on the merits, and *dismiss* all Claimants' claims for lack of jurisdiction,

in eventu, dismiss all, or any remaining, Claimants' claims due to the lack of jurisdiction or for the lack of merit,
- (2) *order* Claimants to reimburse Respondent all its costs of the proceedings, with interest.

Belgrade / Novi Sad, 19 April 2019

Respectfully submitted,

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