INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

RAND INVESTMENTS LTD., WILLIAM ARCHIBALD RAND, KATHLEEN ELIZABETH RAND, ALLISON RUTH RAND, ROBERT HARRY LEANDER RAND AND SEMBI INVESTMENT LIMITED

Claimants

and

REPUBLIC OF SERBIA

Respondent

ICSID Case No. ARB/18/8

AWARD

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

Secretary of the Tribunal
Ms. Marisa Planells-Valero

Assistant to the Tribunal
Mr. Rahul Donde

Date of dispatch to the Parties: 29 June 2023

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TABLE OF SELECTED ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings [2006]
Azrac WS I	Witness Statement of Aksel Azrac dated 16 January 2019
BD Agro	BD Agro AD
Brkušanin ER I	Expert Report of Bojana Tomić Brkušanin dated 3 October 2019
Broshko WS I	Witness Statement of Erinn Broshko dated 5 February 2018
Broshko WS II	Second Witness Statement of Erinn Broshko dated 16 January 2019
Broshko WS III	Third Witness Statement of Erinn Broshko date 3 October 2019
Broshko WS IV	Fourth Witness Statement of Erinn Broshko date 5 March 2020
Canada-Serbia BIT	Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, which entered into force on 27 April 2015
Claimants	Rand Investments Ltd., William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand, Robert Harry Leander Rand, and Sembi Investment Limited
C-Mem.	Respondent's Counter-Memorial with Request for Bifurcation dated 19 April 2019
Coropi	Coropi Holdings Limited
Cowan ER I	Expert Report of Sandy Cowan dated 19 April 2019
Cowan ER II	Second Expert Report of Mr. Sandy Cowan dated 24 January 2020
Cowan ER III	Third Expert Report of Mr. Sandy Cowan dated 16 March 2020

C-PHB 1	Claimants' Post Hearing Brief dated 27 September 2021
C-PHB 2	Claimants' Second Post Hearing Brief dated 22 October 2021
Cvetkovic WS I	Witness Statement of Vladislav Cvetkovic dated 4 April 2019
Exh. CE-[#]	Claimant's Exhibit
Exh. CLA-[#]	Claimants' Legal Authority
Exh. RE-[#]	Respondent's Exhibit
Exh. RLA-[#]	Respondent's Legal Authority
Georgiades ER II	Second Expert Report of Agis Georgiades of Cyprus Law dated 3 October 2019
Grusic ER I	Expert Report of Uglješa Grušić dated 3 October 2019
Grzesik ER I	Expert Report of Krzystof Grzesik dated 3 October 2019
Hearing on Jurisdiction and Merits	Hearing on jurisdiction, merits and damages held at the Permanent Court of Arbitration from 12 to 20 July 2021
Hern ER I	Expert Report of Dr. Richard Hern dated 16 January 2019
Hern ER II	Second Expert Report of Richard Hern dated 3 October 2019
Hern ER III	Third Expert Report of Richard Hern dated 6 March 2020
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Jennings WS I	Witness Statement of Robert Jennings dated 3 October 2019
MDH Serbia	Marine Drive Holding d.o.o.

Markićević WS I	Witness Statement of Igor Markićević dated 5 February 2018
Markićević WS II	Second Witness Statement of Igor Markićević dated 16 January 2019
Markićević WS III	Third Witness Statement of Igor Markićević dated 3 October 2019
Markićević WS IV	Fourth Witness Statement of Igor Markićević dated 5 March 2020
Mem.	Claimant's Memorial on the Merits dated 16 January 2019
Milošević ER I	Expert Report of Miloš V. Milošević dated 16 January 2019
Milošević ER II	Second Expert Report of Miloš V. Milošević dated 3 October 2019
Milošević ER III	Third Expert Report of Miloš V. Milošević dated 5 March 2020
NoD	Notice of Dispute dated 4 August 2017
Obradović WS I	Witness Statement of Djura Obradović dated 20 September 2017
Obradović WS II	Second Witness Statement of Djura Obradović dated 3 October 2019
Obradović WS III	Third Witness Statement of Djura Obradović dated 5 March 2020
Privatization Agency	Privatization Agency of the Republic of Serbia and Montenegro
Privatization Agreement	Privatization Agreement between Mr. Obradović and the Privatization Agency of the Republic of Serbia and Montenegro dated 4 October 2005
Radović ER I	Expert Report of Professor Mirjana Radović dated 19 April 2019
Radović ER II	Second Expert Report of Professor Mirjana Radović dated 22 January 2020
Rand Investments	Rand Investments Ltd.

Rand WS I	Witness Statement of William Rand dated 5 February 2018
Rand WS II	Second Witness Statement of William Rand dated 3 October 2019
Rand WS III	Third Witness Statement of William Rand dated 5 March 2020
Rej.	Respondent's Rejoinder on the Merits and Counter-Memorial on Jurisdiction dated 24 January 2020
Rej. J.	Claimants' Rejoinder on Jurisdiction dated 6 March 2020
Reply	Claimants' Reply dated 4 October 2019
Request for Arbitration	Request for Arbitration dated 9 February 2018
Respondent or Serbia	Republic of Serbia
R-Submission on Quantum	Respondent's Submission on Quantum dated 16 March 2020
R-PHB 1	Respondent's Post Hearing Brief dated 27 September 2021
R-PHB 2	Respondent's Second Post Hearing Brief dated 22 October 2021
Sembi	Sembi Investment
Serbia-Cyprus BIT	Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, which entered into force on 23 December 2005
Tr., Hearing on Jurisdiction and Merits, Day [#] [page:line]	Transcript of the Hearing
Tribunal	Arbitral Tribunal constituted on 2 October 2018 in ICSID Case No. ARB/18/8
Vienna Convention or VCLT	Vienna Convention on the Law of Treaties

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") on the basis of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, signed on 1 September 2014 and which entered into force on 27 April 2015 (the "Canada-Serbia BIT"), the Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, signed on 21 July 2005 and which entered into force on 23 December 2005 (the "Cyprus-Serbia BIT") (together, "the Treaties"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the "ICSID Convention").

A. The Claimants

2. The claimants are Rand Investments Ltd., ("Rand Investments"), a company incorporated under the laws of Canada, Mr. William Archibald Rand ("Mr. Rand"), a natural person having the nationality of Canada, Ms. Kathleen Elizabeth Rand ("Ms. Kathleen Rand"), a natural person having the nationality of Canada, Ms. Allison Ruth Rand ("Ms. Allison Rand"), a natural person having the nationality of Canada, Mr. Robert Harry Leander Rand ("Mr. Robert Rand") a natural person having the nationality of Canada (together, the "Canadian Claimants"), and Sembi Investment Limited ("Sembi"), a company incorporated under the laws of Cyprus (together, the Canadian Claimants and Sembi are referred to as the "Claimants"). The Claimants are represented in this arbitration by:

Mr. Rostislav Pekař
Mr. Matej Pustay
Mr. David Seidl
Squire Patton Boggs s.r.o., advokátní kancelář
Václavské náměstí 813/57
110 00 Prague 1
Czech Republic

Mr. Stephen Anway
Mr. Douglas Pilawa
2550 M Street NW
Washington DC 20037
United States of America

Mr. Luka Misetic
Squire Patton Boggs (US) LLP
30 Rockefeller Plaza, 23rd Floor
New York, New York 10112
United States of America

Mr. Nenad Stankovič
Ms. Sara Pendjer
Stankovic & Partners
Njegoševa 19/II
11000 Belgrade
Republic of Serbia

B. The Respondent

3. The respondent is the Republic of Serbia ("Serbia" or the "Respondent"). The Respondent is represented in this arbitration by:

Ms. Olivera Stanimirović
State Attorney of the Republic of Serbia
22 – 26 Nemanjina street
11000 Belgrade
Republic of Serbia

Ms. Senka Mihaj
Attorney at Law
Čika Ljubina 12
11000 Belgrade
Republic of Serbia

Prof. Petar Djundic
Faculty of Law University of Novi Sad
Trg Dositeja Obradovića 1
21101 Novi Sad
Republic of Serbia

Dr. Vladimir Djeric
Attorney at law
Vlajkoviceva 28
11000 Belgrade
Republic of Serbia

4. The Claimants and the Respondent are collectively referred to as the "Parties." The Parties' representatives and their addresses are listed above.

II. FACTUAL BACKGROUND

5. The following summary is meant to give a general overview of the factual background of the dispute as alleged by the Parties. The facts referred to are not necessarily regarded as established; where they are disputed and relevant, they are discussed in the analysis. The summary is limited to the milestones that the Tribunal considers most useful to understand the merits of this dispute. Other facts may be referred to as part of the analysis if and when appropriate.

A. BD Agro

6. BD Agro AD ("BD Agro") is a dairy farm located on the outskirts of Belgrade, Serbia, close to the Belgrade International Airport.[1]

7. In 1989, it was transformed from a state-owned producers' cooperative into a "socially-owned" company under State control.[2]

B. The Privatization of BD Agro

8. In 2005, BD Agro was sought to be privatized with 70% of its shares (the "Privatized Shares") put up for auction by the Privatization Agency (the "Privatization Agency" or the "Agency"). The remaining 30% of BD Agro shares were owned by a large number of small shareholders, mainly BD Agro's employees.

C. The MDH Agreement

9. On 19 September 2005, in view of the impending public auction of BD Agro's shares, Marine Drive Holdings Inc., a company held in majority by Mr. Rand and incorporated in the British Virgin Islands ("MDH") and Mr. Obradović entered into a written agreement concerning BD Agro (the "MDH Agreement").[3] Under the terms of that agreement, Mr. Obradović would take part in BD Agro's public auction, and, if successful, he would become the owner of the Privatized Shares.[4] The Agreement further specified that Mr. Obradović would hold the shares at the risk of MDH and that MDH would have a call option to purchase the Privatized

[1] Reply, §30.
[2] Mem., §§59-60.
[3] Exh. CE-15, Share Purchase Agreement, 19 September 2005.
[4] Ibid., Art. 3

Shares, as well as any shares in BD Agro subsequently acquired by Mr. Obradović, for a nominal price of EUR 1,000.[5]

D. The Privatization Agreement

10. On 4 October 2005, following a public auction, Mr. Obradović, as *"*Buyer*"*, and the Privatization Agency entered into a Privatization Agreement (the "Privatization Agreement").[6] Under the terms of that agreement, Mr. Obradović purchased 70% of the socially owned capital of BD Agro for EUR 5,548,996.46 to be paid in six annual instalments.[7] Mr. Obradović also committed to invest in BD Agro an additional amount of approximately EUR 2 million within the following year.[8]

11. The Privatization Agreement was coupled with a Share Pledge Agreement concluded on the same day between Mr. Obradović and the Agency.[9] Under the terms of the Share Pledge Agreement, Mr. Obradović pledged the Privatized Shares to the Privatization Agency for a five-year period within which he agreed to pay the full purchase price.[10]

12. On 9 January 2006, the Privatization Agreement was amended with the amount of additional investment in BD Agro required under Article 5.2.1 being increased to EUR 1,998,554. Deadlines for making the investments were extended.[11]

13. On 15 March 2006, the Privatization Agreement was amended again, requiring the submission to the Privatization Agency of four consecutive bank guarantees: two for EUR 501,153 and another two for EUR 493,123.[12]

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[5] Ibid., Art. 1.

[6] Exh. CE-17, Privatization Agreement, 4 October 2005.

[7] Exh. CE-17, Privatization Agreement, 4 October 2005, Arts. 1.2 and 1.3.

[8] Exh. CE-50, Notice on Termination of the Privatization Agreement, Art. 5.2.1 as amended on 9 January 2006, Exh. CE-110, Amendment I to the Privatization Agreement, 9 January 2006. It is not disputed that the Agency, on 10 October 2006, confirmed that such additional investment had been made, see Exh. CE-18, Confirmation of the Privatization Agency of the Completion of Investment, 10 October 2006; Mem., §78 and Rej., §§389-390. However, the Respondent argues in this arbitration that Mr. Obradović, at the time, "misrepresented" financial information and that, in reality, "there have been no 'investments' paid by any of the other affiliated companies of Mr. Obradović, nor any such payments from Mr. Rand and his affiliated companies", Rej., §§388-389.

[9] Exh. CE-17, Privatization Agreement, 4 October 2005, p. 10.

[10] Ibid., Art. 2.

[11] Exh. CE-110, Amendment I to the Privatization Agreement, 9 January 2006, Art. 2.

[12] Exh. CE-76, Amendment II to the Privatization Agreement, 15 March 2006, Art. 2.

14. On 29 August 2006, BD Agro's General Assembly resolved to increase its capital by issuing an additional 171,974 shares at a nominal value of 1,000 RSD per share, all of which were issued to Mr. Obradović (the "New Shares").[13] On 25 October 2006, the Serbian Business Register Agency registered this capital increase.[14] Accordingly, Mr. Obradović's shareholding in BD Agro increased from 70% to 75.87%.

15. On 6 January 2012, the Privatization Agency confirmed that "the buyer, as of April 8, 2011, has settled his obligations in respect of the 1st, 2nd, 3rd, 4th, 5th and 6th installment and thus paid the entire sale and purchase price."[15]

E. The Claimants' Beneficial Ownership of BD Agro

16. The Claimants contend that the combined effect of the MDH Agreement and the Privatization Agreement was that Mr. Rand became the beneficial owner of 75.87% of BD Agro's shares (the "Beneficially Owned Shares", consisting of the "Privatized Shares" and the "New Shares").

F. The Claimants' Indirect Shareholding of BD Agro

17. Mr. Rand is the indirect owner of an additional 3.9% shareholding in BD Agro (the "Indirect Shareholding") that he holds through his 100% owned Serbian company, Marine Drive Holding d.o.o. ("MDH Serbia").[16]

G. The Sembi Agreement

18. Mr. Rand allegedly arranged funds for the purchase and subsequent investments in BD Agro from Mr. Rand's long-time business partners, the Lundin family from Geneva, Switzerland (the "Lundin Family" or the "Lundins") and their investment bank, 1875 Finance S.A.[17] At the end of 2007, the Lundin family decided to exit the project and requested

[13] Mem., §77.

[14] Ibid.

[15] Exh. CE-19, Confirmation of the Privatization Agency on the Buyer's full payment of the Purchase Price, 6 January 2012.

[16] MDH Serbia is different from MDH. As mentioned above (§9), the latter is a company held in majority by Mr. Rand and incorporated in the British Virgin Islands.

[17] Rand WS II, §27, Azrac WS, §12.

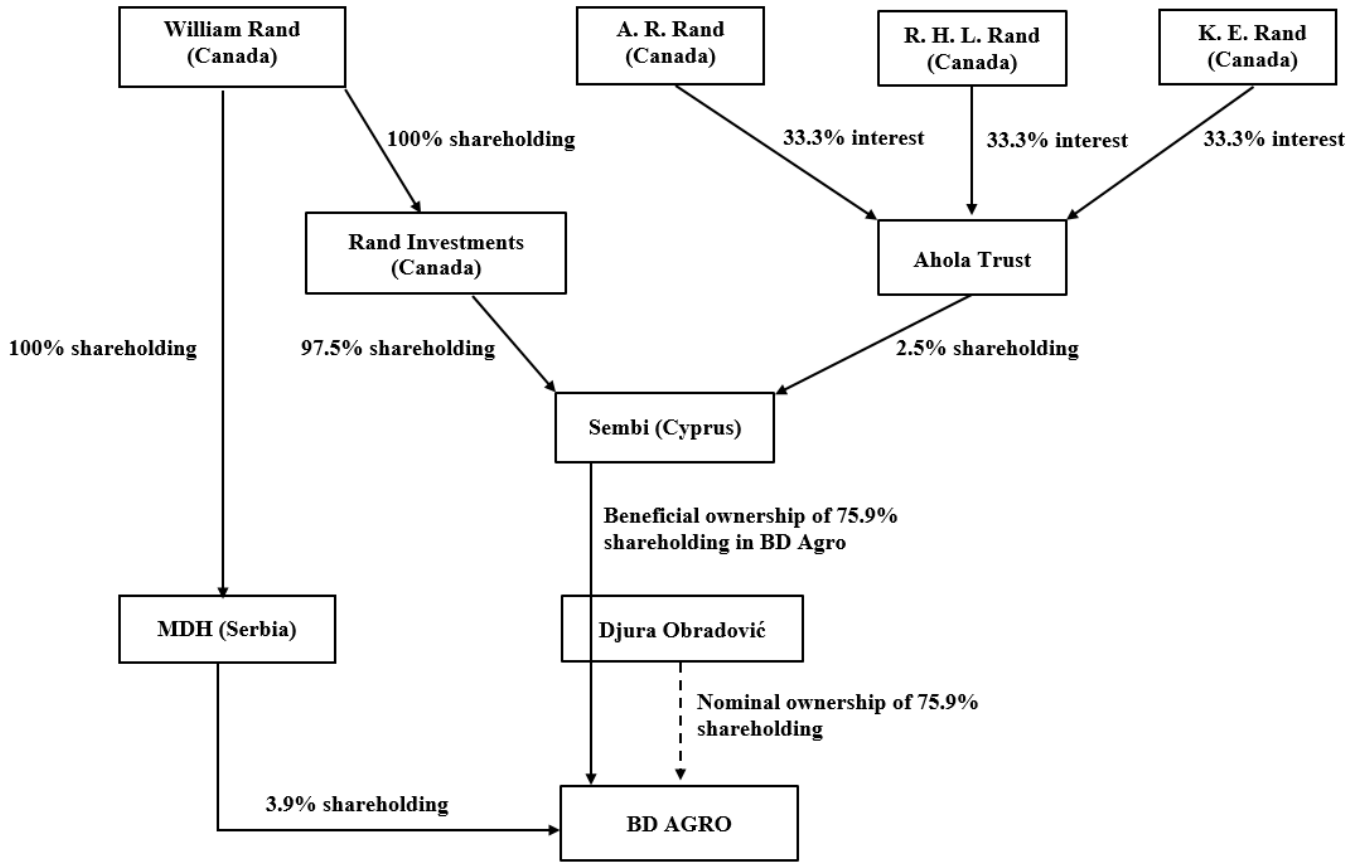
repayment of the funds lent to Mr. Obradović.[18] Mr. Rand decided to replace the Lundins' funds with his own.[19]

19. Mr. Rand also decided to change the holding structure of the Beneficially Owned Shares, to include his three children, Ms. Kathleen Rand, Ms. Allison Rand and Mr. Robert Rand.[20]

20. Mr. Rand thus purchased a Cypriot shelf company called Sembi Investment ("Sembi") to serve as the new holding company of the Beneficially Owned Shares.[21] Sembi is a limited liability company organized under the laws of Cyprus. All of the preferred shares issued by Sembi were owned by Rand Investments.[22] All of the ordinary shares issued by Sembi were owned by The Ahola Family Trust, a trust domiciled in Guernsey whose beneficiaries are, and have always been, Mr. Rand's three children.[23] The Claimants allege that Sembi is, and was at all relevant times, controlled by Mr. Rand.

21. The investment structure on the alleged expropriation date of 21 October 2015 was thus:

[18] Azrac WS, §15.
[19] Rand WS I, §30; Rand WS II, §52; Rand WS III, §53.
[20] Rand WS I, §31; Rand WS III, §54.
[21] Rand WS III, §54.
[22] Exh. CE-6, Certificate of Shareholders of Sembi, 8 June 2017.
[23] Ibid.



22. On 22 February 2008, Mr. Obradović, the Lundin Family, Mr. Rand and Sembi entered into an agreement on the repayment of the Lundins' funds by Sembi, whereby Sembi agreed to repay EUR 9 million to the Lundin Family (the "Lundin Agreement").[24] The Lundin Family in turn extinguished any claims it had in respect of the Privatization Agreement and BD Agro.[25] Mr. Rand personally guaranteed all of Sembi's and Mr. Obradović's obligations to the Lundins.[26] By October 2010, Sembi had repaid EUR 5.6 million to the Lundins.[27] The Lundins waived the outstanding debt.[28]

[24] Exh. CE-28, Agreement between D. Obradović, the Lundin Family, W. Rand and Sembi, 22 February 2008.

[25] Ibid., Art. 6.

[26] Ibid., Art. 5.

[27] Rand WS I, §33; Rand WS II, §59; Azrac WS, §16.

[28] Azrac WS, §16.

23. On the same date, i.e. 22 February 2008, Mr. Obradović entered into a second agreement with Sembi (the "Sembi Agreement"). Under the Sembi Agreement, Sembi assumed all of Mr. Obradović's obligations, including any payments owing to the Privatization Agency and the repayment of loans provided by the Lundins.[29] In consideration, Mr. Obradović agreed to transfer to Sembi "all of his right, title and interest in and to [the Privatization Agreement]" and to "sign any such documents and do all such things as may be necessary to effect the transfer to [Sembi] of the [Privatization Agreement] together with any other assets whatsoever held by Mr. Obradović which are related to BD Agro."[30] The Sembi Agreement contains a choice of Cypriot law.[31]

24. The Claimants contend that the result of the Sembi Agreement was that Sembi became the beneficial owner of the Beneficially Owned Shares.

H. The Financial condition of BD Agro from 2005 to 2011

25. The Parties disagree on the financial condition of BD Agro and the quality of the management of BD Agro during the period from 2005 to 2011.[32]

26. In particular, the Respondent alleges that BD Agro was "disastrously mismanaged" and that BD Agro, through "machinations", in particular relating to BD Agro's real estate, paid the price for its own shares and financed the investments made in the business.[33]

27. On their side, the Claimants state that BD Agro "flourished" under their control and that they invested more than EUR 30 million within a few years after the conclusion of the Privatization Agreement.[34] The Claimants concede that BD Agro's liquidity at some point started to "deteriorate", but stress that this was due to "extensive investments" and "temporary adverse market conditions."[35]

[29] Exh. CE-29, Agreement between Mr. Obradović and Sembi, 22 February 2008.
[30] Ibid., Art. 4.
[31] Ibid., Art. 9.
[32] Reply, §§77-96; Rej., §§324-401.
[33] Rej., §§324-401, in particular §§324-325.
[34] Reply, §§77-96, in particular §§88-90.
[35] Mem., §127.

I. The 2010 Loan Agreement

28. On 2 June 2010, Crveni Signal (a Serbian company owned by Mr. Obradović and allegedly beneficially owned by Mr. Rand) and the Serbian bank Agrobanka ("Agrobanka") concluded a loan agreement for approximately EUR 670,000. BD Agro guaranteed the loan (the "Guarantee Agreement").[36]

29. On 22 December 2010, BD Agro and Agrobanka concluded a loan agreement for approximately EUR 2 million (the "2010 Loan Agreement")[37] "for the purposes of consolidation of the company [BD Agro] and related entities."[38] The loan was secured with pledges on BD Agro's fixed assets including its real estate, land and buildings, located in cadastral municipality Dobanovci.[39] The court registered the pledge on 14 January 2011.

30. On 28 December 2010, Crveni Signal, Agrobanka and BD Agro concluded an Agreement on Assumption of Debt under which BD Agro assumed the EUR 670,000 loan of Crveni Signal towards Agrobanka.[40]

31. On 29 December 2010, BD Agro and Inex (another Serbian company owned by Mr. Obradović and allegedly beneficially owned by Mr. Rand) concluded an Agreement on Interest-Free Loan to Inex by which BD Agro provided Inex a cash loan of approximately EUR 300,000.[41]

J. The Privatization Agency's First Notice of 25 February 2011

32. The Privatization Agency conducted periodic controls of BD Agro to monitor its compliance with the Privatization Agreement. The final control was conducted on 17 January 2011 and a report was prepared on 25 February 2011. On that date, the Agency sent a "Notice on additionally granted terms for fulfilment of contractual obligations" (the "First Notice") to Mr. Obradović and BD Agro. The Agency found Mr. Obradović in breach of the Privatization Agreement *inter alia* in respect of the pledges created in favor of Agrobanka under the 2010

[36] Exh. RE-5, Guarantee agreement between BD Agro and Agrobanka, 2 June 2010. See also Obradović WS II, §§ 66-67.

[37] Exh. RE-6, Short Term Loan Agreement no, K-571/10-00, 22 December 2010.

[38] Exh. RE-6, Short Term Loan Agreement no, K-571/10-00, 22 December 2010, p. 1.

[39] Exh. RE-6, Short Term Loan Agreement no, K-571/10-00, 22 December 2010, pp. 2-3.

[40] Exh. RE-11, Agreement on Assumption of Debt of 28 December 2010.

[41] Exh. RE-10, Agreement on Interest-Free Loan of 29 December 2010.

Loan Agreement. The Agency granted Mr. Obradović 60 days "for fulfillment of obligations referred to in items 5.3.3 and 5.3.4 of the Agreement" and "submission of a report […] stating whether the Buyer has fulfilled the obligations."[42]

K. Subsequent notices and discussions

33. In the wake of the First Notice, the Agency and Mr. Obradović corresponded and held several meetings. The Agency issued further notices extending the time limits provided in the First Notice. On his part, Mr. Obradović explained BD Agro's position on the various alleged breaches of Article 5.3.3 and 5.3.4 of the Agreement, requested extensions to the time-limits set by the Agency, and submitted several audit reports and letters concerning the financial transactions at issue.[43]

L. The Payment of Final Instalment of the Purchase Price

34. On 8 April 2011, the final instalment of the purchase price under the Privatization Agreement was paid.[44]

M. Mr. Obradović's requests to release the pledge on the Privatized Shares

35. In parallel with the discussions between Mr. Obradović and the Privatization Agency on the alleged breach of the Privatization Agreement, and in light of the payment of the final instalment of the purchase price, Mr. Obradović requested that the Agency release the Privatized Shares pledged under the Agreement. For instance, on 2 April 2012, Mr. Obradović wrote to the Ministry of Economy that he had complied with his obligations under the Privatization Agreement but that the Agency had not released the pledge on the Privatized Shares.[45]

[42] Exh. CE-31, Notice of the Privatization Agency on Additional Time Period, 24 February 2011, p. 2.

[43] See, for instance, Exhs. RE-13, 15, 17, 19, 21, 27, 60 and CE-32, 77, 78, 79.

[44] Exh. CE-19, Confirmation of the Privatization Agency on the Buyer's Full Payment of the Purchase Price, 6 January 2012.

[45] Exh. CE-77, Letter from Mr. Djura Obradović to the Ministry of Economy, 2 April 2012, p. 2.

N. The Agency's request for instructions from the Ministry of Economy

36. On 10 May 2012, the Privatization Agency requested that the Ministry of Economy issue "further instructions and directions for additional actions" concerning BD Agro and the Privatization Agreement.[46]

37. On 5 June 2012, the Ministry of Economy replied that "there is no economic justification to terminate the agreement."[47]

38. On 31 July 2012 and 8 November 2012, the Privatization Agency extended the time limit for Mr. Obradović to "comply with the terms of the Privatization Agreement."[48]

O. The 2012 Loan Agreement

39. On 22 June 2012, BD Agro and Nova Agrobanka, a bridge bank owned and controlled by Serbia, that was assigned Agrobanka's loan portfolio, entered into an agreement for "Long-term Dinar Loan with Currency Clause for Restructuring of Claims" in an amount of EUR 9'500'000 (the "2012 Loan Agreement").[49] Part of this amount was used to fully repay the loan that BD Agro had taken under the 2010 Loan Agreement.[50] Crveni Signal acted as guarantor for BD Agro's obligations under the 2012 Loan Agreement.[51]

P. Mr. Obradović's request for assignment of the Agreement

40. On 1 August 2013, Mr. Obradović requested that the Privatization Agency "issue prior approval for the assignment" of the Privatization Agreement to Coropi Holdings Limited ("Coropi"), a Cypriot company solely owned by Mr. Robert Jennings, a Canadian lawyer acting as the trustee of the Ahola Family Trust.[52]

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[46] Exh. CE-33, Letter from the Ministry of Economy to the Privatization Agency, 30 May 2012; see also Exhs. RE-65, Letter from Mr. Vasiljevic to the Privatization Agency, 16 June 2015 and RE-66, Letter from the Privatization Agency to Mr. Vasiljevic of 26 June 2015.

[47] Exh. CE-33, Letter from the Ministry of Economy to the Privatization Agency, 30 May 2012.

[48] Exhs. CE-78, Notice of the Privatization Agency on Additional Time Period, 31 July 2012 and CE-79, Notice of the Privatization Agency on Additional Time Period, 8 November 2012.

[49] Exh. CE-441, Loan agreement between BD Agro and Nova Agrobanka, 22 June 2012.

[50] Exh. CE-441, Loan agreement between BD Agro and Nova Agrobanka, 22 June 2012, Art. 8.

[51] Exh. CE-442, Guarantee agreement between Crveni Signal and Nova Agrobanka, 22 June 2012.

[52] Exh. CE-273, Letter from D. Obradović to the Privatization Agency, 1 August 2013; see also Mem., §145.

41. On 6 August 2013, allegedly at Mr. Rand's behest, Mr. Obradović concluded an agreement with Coropi through which he agreed to assign to Coropi "the [Privatization Agreement] with all rights and obligations arising out of that Agreement" (the "Coropi Agreement").[53] The assignment was conditional upon the Privatization Agency's approval.[54]

Q. The Ombudsman's investigation

42. In November 2013, allegedly prompted by complaints from employees of BD Agro, the Serbian Ombudsman launched an investigation into allegations of "omissions committed by the Privatization Agency in its control of fulfillment of contractual obligations from the Agreement on sale of this company."[55]

R. The Ministry of Economy's supervision proceedings

43. On 23 December 2013, the Ministry of Economy decided to initiate a "procedure of supervision of the work of the Privatization Agency in the case of privatization of the company AD 'BD Agro.'"[56]

44. In its reasoning, the Ministry of Economy referred to a request for termination of the Agreement submitted by BD Agro's "unions and strike committee" and the ongoing processes of the Privatization Agency relating to the alleged breaches of the Privatization Agreement.[57]

S. The pre-pack reorganization plans

45. On 25 November 2014, BD Agro filed a "pre-pack reorganisation plan" before the Commercial Court of Belgrade to improve the financial situation of the company, while it continued its business.[58]

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[53] Exh. CE-35, Agreement on Assignment of Agreement on Sale of Socially Owned Capital Through Public Auction between Djura Obradović and Coropi Holdings Limited, 6 August 2013.

[54] Ibid., Art. 8.

[55] Exh. CE-42, Opinion of the Ombudsman, 19 June 2015, p. 2.

[56] Exh. CE-206, Decision of the Ministry of Economy, 23 December 2013, p. 1.

[57] Exh. CE-206, Decision of the Ministry of Economy, 23 December 2013, p. 1.

[58] Exh. CE-85, BD Agro's submission accompanying the Pre-pack Reorganization Plan received by the Commercial Court in Belgrade, 25 November 2014; see also accompanying Adventis Valuation, Exh. CE-508, Valuation Report of real estate owned by BD Agro a,d. Dobanovci at several locations in Serbia as at 30 August 2014 by Adventis Real Estate Management D.O.O., September 2014.

46. On 6 March 2015, BD Agro filed an amended reorganization plan before the Commercial Court of Belgrade.[59]

T. The Ministry of Economy's report of 7 April 2015

47. On 7 April 2015, the Ministry of Economy finalized its supervision proceedings by issuing a report "instructing" the Agency to grant Mr. Obradović an additional term of 90 days to remedy the breaches of the Privatization Agreement and, in case of his failure to comply, to "undertake the measures within its legal authorizations."[60]

U. The Ombudsman's recommendation of 23 June 2015

48. On 23 June 2015, having completed its investigation into the conduct of the Agency relating to the Agreement, the Ombudsman published a "recommendation" "directing" the Agency and the Ministry of Economy to "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 legal status of the subject of privatization."[61]

[59] Exh. CE-101, Amendment to the Pre-pack Reorganization Plan of BD Agro, 6 March 2015 and Exh. CE-116; BD Agro's submission to Commercial Court accompanying the Pre-pack Reorganization Plan, 6 March 2015see also accompanying Mrgud Valution, Exh. CE-175, 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, December 2014.

[60] Exh. CE-98, Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 13.

[61] Exh. CE-42, Opinion of the Ombudsman, 19 June 2015 and Exh. CE-45, The Ombudsman's On-Line Statement, 23 June 2015.

V. The Agency's notice of 24 June 2015

49. On 24 June 2015, the Privatization Agency granted Mr. Obradović until 27 July 2015 to remedy the alleged breaches of the Privatization Agreement.[62]

W. The initial approval of the amended pre-pack reorganization plan

50. On 25 June 2015, the Commercial Court of Belgrade, after hearing the creditors' votes, approved the amended pre-pack reorganization plan submitted by BD Agro on 6 March 2015.[63]

X. The renewed request for assignment of the Agreement

51. On 2 July 2015, Mr. Markićević, the General Manager of BD Agro at the time, renewed the earlier request for the Agency to approve the assignment of the Privatization Agreement from Mr. Obradović to Coropi Holdings Limited.[64]

52. On 20 July 2015, the Agency denied Mr. Markićević's request citing "unresolved legal status of the Subject of privatization and incomplete documentation submitted with the request for assignment of the said agreement."[65]

Y. The Ombudsman's letters to the Agency and the Ministry of Economy of 18 September 2015

53. On 18 September 2015, the Ombudsman sent two identical letters to the Agency and the Ministry of Economy whereby he requested these entities to "submit to us a new notice on actions based on the recommendations and undertaken measures in which you will inform us whether the issue of validity of disputable Agreement on sale of socially owned capital was solved or not."[66]

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[62] Exh. CE-351, Letter from the Privatization Agency to D. Obradović and BD Agro, 23 June 2015.

[63] Exh. CE-39, Court hearing minutes, 25 June 2015.

[64] Exh. CE-46, Letter from BD Agro to Privatization Agency, 2 July 2015.

[65] Exh. CE-47, Letter from Privatization Agency to BD Agro, 20 July 2015, p. 2.

[66] Exh. CE-88, Letter from the Ombudsman to the Privatization Agency, 18 September 2015 and Exh. CE-115, Letter from the Ombudsman to the Ministry of Economy, 18 September 2015.

Z. The reversal of the approval of the amended pre-pack reorganization plan and Subsequent Steps

54. On 30 September 2015, the Commercial Court of Appeal (the "Appellate Court") reversed the approval of the amended pre-pack reorganization plan and remanded the case to the Commercial Court of Belgrade.[67]

55. On 22 October 2015, the Commercial Court ordered BD Agro to amend the reorganization plan in accordance with the decision of the Appellate Court within 15 days.[68]

56. On 26 October 2015, Mr. Markićević, the then General Director of BD Agro, sent a letter to the Privatization Agency attaching the court's notice and requested instructions.[69]

57. The Privatization Agency did not respond and the 15-day time-limit provided by the Court expired. On 8 December 2015, the Commercial Court rejected the reorganization plan.[70]

AA. The Agency's Termination of the Agreement

58. On 28 September 2015, the Agency terminated the Agreement for failure to "provide evidence in the additionally granted term that he [Mr. Obradović] had complied with the obligation referred to in item 5.3.4 of the Agreement" (the "Termination").[71]

BB. The transfer of the Privatized Shares

59. On 21 October 2015, the Agency issued a decision ordering the transfer of BD Agro's capital to itself (the "Decision on Transfer of Capital").[72] The Decision on Transfer of Capital allegedly covered both the Privatized Shares and the New Shares.[73]

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[67] Exh. CE-358, Decision of the Appellate Court, 30 September 2015.

[68] Markićević WS II, § 191.

[69] Exh. CE-360, Letter from I. Markićević to the Privatization Agency of 26 October 2015. Markićević WS II, §196.

[70] Exh. CE-361, Decision of the Commercial Court in Belgrade of 8 December 2015; Markićević WS II, §197.

[71] Exh. CE-50, Notice on Termination of the Privatization Agreement.

[72] Exh. CE-105, Decision of the Privatization Agency on the Transfer of BD Agro's Capital, 21 October 2015.

[73] Milošević ER I, §102.

60. The Decision on Transfer of Capital was sent to the Central Securities Depository and Clearing House, a joint stock company owned by Serbia.[74] The Depository registered the Privatization Agency as the new owner of the Beneficially Owned Shares on 21 October 2015. In 2016, upon the dissolution of the Privatization Agency, the Beneficially Owned Shares were transferred to the Register of Stocks and Shares maintained by the Ministry of Economy.[75]

CC. BD Agro's Bankruptcy

61. On 30 August 2016, BD Agro was declared bankrupt.[76]

III. PROCEDURAL HISTORY

A. Initial Steps

62. On 14 February 2018, ICSID received a request for arbitration dated 9 February 2018 from the Claimants against Serbia (the "Request for Arbitration"), with exhibits CE-1 to CE-118, and legal authorities CLA-1 to CLA-20. The Request for Arbitration was also accompanied by four witness statements: (i) Witness Statement of Mr. William Archibald Rand dated 5 February 2018 ("Rand WS I"); (ii) Witness Statement of Mr. Igor Markićević dated 5 February 2018 ("Markićević WS I"); (iii) Witness Statement of Mr. Erinn Bernard Broshko dated 5 February 2018 ("Broshko WS I"); and (iv) Witness Statement of Mr. Djura Obradović dated 20 September 2017 ("Obradović WS I"). The Request was supplemented by the Claimants' letter dated 16 March 2018.

63. On 22 March 2018, the Acting Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Acting Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

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[74] Milošević ER I, §56.

[75] Milošević ER I, §103.

[76] Exh. CE-109, Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro, 30 August 2016.

64. In accordance with Article 37(2)(a) of the ICSID Convention, the Parties agreed that the Tribunal would be composed of three arbitrators, one to be appointed by each Party and the third presiding arbitrator to be appointed by agreement of the Party-appointed arbitrators from a list of potential candidates prepared after consultation with the Parties or, in case of disagreement, by the Secretary General of ICSID. On 16 May 2018, following appointment by the Claimants, Mr. Baiju S. Vasani a national of the United Kingdom and the United States of America, accepted his appointment as arbitrator. On 17 May 2018, following appointment by the Respondent, Prof. Marcelo Kohen, a national of Argentina, accepted his appointment as arbitrator. On 20 September 2018, in view of the party-appointed arbitrator's failure to agree on a candidate from the list, the Secretary-General informed the Parties that, pursuant to the Parties' agreement, she had selected Prof. Gabrielle Kaufmann-Kohler out of the candidates included in the list to act as President of the Tribunal. On 2 October 2018, following appointment by the Secretary-General, Prof. Gabrielle Kaufmann-Kohler, a national of Switzerland, accepted her appointment as presiding arbitrator, making certain disclosures for the sake of transparency.

65. Accordingly, the Tribunal is composed of Prof. Gabrielle Kaufmann-Kohler, a national of Switzerland, President, appointed by the Secretary-General pursuant to the Parties' agreement; Mr. Baiju S. Vasani, a national of the United Kingdom and the United States of America, appointed by the Claimants; and Prof. Marcelo G. Kohen, a national of Argentina, appointed by the Respondent.

66. On 2 October 2018, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Marisa Planells-Valero, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

67. On 13 November 2018, the ICSID Secretariat, acting on behalf of the Tribunal, sent the Parties a draft Procedural Order No. 1 for their discussion. On that same date, the President of the Tribunal proposed to appoint Mr. Rahul Donde of Lévy Kaufmann-Kohler as Assistant to the Tribunal, whose tasks were described in the draft PO.

68. On 20 November 2018, the Parties submitted their joint comments regarding the draft Procedural Order No. 1.

69. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 23 November 2018 by telephone conference

70. On 29 November 2018, the Tribunal issued Procedural Order No. 1 ("PO 1") recording the Parties' agreements on various procedural matters. As the Parties' agreed, Mr. Rahul Donde was appointed as Assistant to the Tribunal. Procedural Order No. 1 also set out a schedule for the proceeding and stated that the transparency regime applicable to the proceeding would be addressed in a separate procedural order. At the Parties' request, the procedural calendar contained in PO 1 was amended on 19 December 2018.

B. Written Phase

71. On 17 January 2019, the Claimants filed a Memorial on the Merits dated 16 January 2019 (the "Claimants' Memorial"),[77] with exhibits CE-119 to CE-374 and legal authorities CLA-21 to CLA-57. The pleading was also accompanied by three witness statements and three experts reports, as follows: (i) Second Witness Statement of Igor Markićević dated 16 January 2019 ("Markićević WS II"); (ii) Second Witness Statement of Erinn Broshko dated 16 January 2019 ("Broshko WS II"); (iii) Witness Statement of Aksel Azrac dated 16 January 2019 ("Azrac WS I"); (iv) Expert Report of Miloš V. Milošević dated 16 January 2019 ("Milošević ER I"); (v) Expert Report of Dr. Richard Hern dated 16 January 2019 ("Hern ER I"); (vi) Expert Report of Agis Georgiades dated 16 January 2019 ("Georgiades ER I").

72. On 12 February 2019, the Tribunal issued Procedural Order No. 2 concerning the transparency regime applicable to the proceeding and attaching a draft Transparency Order and Draft Transparency Rules for the Parties' comments. A dissenting opinion by Prof. Marcelo Kohen was also attached to the Order.

73. On 22 February 2019, each Party filed observations on the draft Transparency Order. Together with their comments, the Claimants included a new legal authority CLA-58.

74. On 5 March 2019, the Tribunal advised the Parties that, on the basis of the record at the time, the Tribunal considered appropriate to reserve its decision on the transparency regime(s) applicable to this proceeding until after the filing of the Respondent's Counter-Memorial due on 19 April 2019.

[77] A corrected version of the Memorial was submitted on 21 January 2019.

75. On 19 April 2019, the Respondent filed its Counter-Memorial on the Merits (the "Counter-Memorial" or "C-Mem.") with a Request for Bifurcation of the proceeding (the "Request for Bifurcation"), together with exhibits RE-1 to RE-194 and legal authorities RLA-1 to RLA-30. The pleading was also accompanied by one witness statement and three expert reports, as follows: (i) Witness Statement of Vladislav Cvetkovic dated 4 April 2019 ("Cvetkovic WS I"); (ii) Expert Report of Sandy Cowan dated 19 April 2019 ("Cowan ER I"); (ii) Expert Report of Thomas Papadopoulos dated 18 April 2019 ("Papadopoulos ER I"); and (iii) Expert Report of Professor Mirjana Radović dated 19 April 2019 ("Radović ER I").

76. On 23 April 2019, the Tribunal and the Parties were informed that the Secretary of the Tribunal would be taking temporary leave, and that Ms. Anna Toubiana, ICSID Legal Counsel, would serve as Secretary of the Tribunal during her absence.

77. On 26 April 2019, the Tribunal invited the Parties to submit any additional comments on the question of the applicable transparency regime in this proceeding by 3 May 2019. On 30 April 2019, the Respondent indicated that it did not have further comments. On 3 May 2019, the Claimants submitted a further communication on the matter.

78. On 17 May 2019, the Claimants filed their Reply to the Request for Bifurcation, with legal authorities CLA-59 to CLA-68.

79. On 31 May 2019, the Tribunal, by majority, denied the Request for Bifurcation and indicated that, in view of this decision, the Parties were to follow the non-bifurcated scenario under item 1(b) in the Revised Annex A to Procedural Order No. 1. The Parties were also advised that the reasons for the decision as well as a dissenting opinion by Prof. Kohen would be conveyed shortly.

80. On 24 June 2019, the Tribunal issued Procedural Order No. 3 concerning its decision on the Respondent's request for bifurcation. The dissenting opinion of Prof. Kohen was also appended to the Order.

81. By letter of 11 July 2019, the Claimants informed the Tribunal of Serbia's alleged efforts to intimidate Mr. Igor Markićević, one of the Claimants' main witnesses in this arbitration. The Claimants' letter was accompanied by exhibits CE-375 and CE-376. On 22 July 2019, the Respondent submitted comments to the Claimants' letter of 11 July 2019. The Respondent's letter was accompanied by exhibits RE-195 to RE-196 and legal authority RLA-131.

82. On 23 July 2019, the Claimants requested leave from the Tribunal to submit a reply to the Respondent's communication of 22 July 2019. On 24 July 2019, the Respondent opposed the Claimants' request.

83. On 25 July 2019, the Tribunal denied the Claimants' request of 23 July 2019, noting the content of the Parties' communications on the matter and indicating that it trusted that the Parties would avoid actions contrary to their duty of good faith not to aggravate the dispute and not to affect the integrity of the arbitration.

84. On 26 July 2019, the Parties sent their respective document production requests for the Tribunal's decision. The Claimants' request was accompanied by exhibit CE-377 and the Respondent's request was accompanied by exhibits RE-197 to RE-199. On 29 July 2019, the Claimants submitted a further communication regarding the Respondent's submission of 26 July 2019.

85. On 7 August 2019, the Tribunal issued Procedural Order No. 4 ruling on the Parties' respective requests for document production.

86. On 15 August 2019, the Respondent informed the Tribunal of its efforts to locate certain documents requested by the Claimants.

87. On 20 August 2019, the Claimants informed the Tribunal of certain disagreements regarding a draft non-disclosure agreement ("NDA") negotiated by the Parties for document production purposes in accordance with Procedural Order No. 4. The Claimants shared the draft NDA with the Tribunal. Additional comments on the NDA were submitted by the Respondent on 23 August 2019 and by the Claimants on 26 August 2019.

88. On 28 August 2019, the Tribunal resolved most of the disputed issues regarding the NDA and made additional proposals for the Parties' review on the outstanding matters.

89. On 29 August 2019, the Tribunal, by majority, issued Procedural Order No. 5, concerning the transparency regime applicable in this proceeding, and providing that this arbitration would be conducted under the Transparency Rules attached to the Order. A dissenting opinion by Prof. Kohen was attached to the Order.

90. Additional communications regarding the wording of the NDA were received from the Respondent on 30 August 2019 and from the Claimants on 2 September 2019. On 6

September 2019 the Tribunal suggested additional wording regarding the NDA to the Parties. A further communication on the matter was received from the Respondent on 7 September 2019.

91. On 12 September 2019, the Tribunal confirmed that, as agreed by the Parties, the language of the arbitration clause in the Parties' NDA was to be read as set out in the Respondent's communication of 7 September 2019.

92. On 13 September 2019, the Respondent submitted its proposed redactions to the Claimants' Request for Arbitration, the Claimants' Memorial, the Consolidated List of Claimants' Documents dated 16 January 2019, the Second Markićević Statement, and the Respondent's Counter-Memorial. The Respondent also proposed complete exclusion from publication of the First Hern Report and the First Cowan Report.

93. On 16 September 2019, the Tribunal noted that, pursuant to the Transparency Rules, the Claimants had a 15-day period to make reasoned objections, if any, to the Respondent's proposed redactions. By this same communication, the Tribunal conveyed a Transparency Schedule for future use, if necessary.

94. On 27 September 2019, the Respondent submitted its request for redaction of certain parts of Annex A to Procedural Order No. 4.

95. On 30 September 2019, the Claimants opposed Serbia's proposed redactions of 13 September 2019. The Claimants' communication was accompanied by exhibits CE-378 and CE-379.

96. On 1 October 2019, the Tribunal invited the Claimants to comment on the Respondent's proposed redactions of 27 September 2019 to Annex A of Procedural Order No. 4 by 14 October 2019.

97. On 4 October 2019, the Claimants' filed a Reply on the Merits and Counter-Memorial on Jurisdiction ("Reply"),[78] with exhibits CE-380 to CE-796 and legal authorities CLA-69 to CLA-152. The pleading was also accompanied by five witness statements and seven expert report, as follows: (i) First Witness Statement of Robert Jennings dated 3 October 2019 ("Jennings WS I"); (ii) Second Witness Statement of William Rand dated 3 October 2019

[78] A corrected version of the Reply was submitted on 9 October 2019.

("Rand WS II"); (iii) Second Witness Statement of Djura Obradović dated 3 October 2019 ("Obradović WS II"); (iv) Third Witness Statement of Erinn Broshko dated 3 October 2019 ("Broshko WS III"); (v) Third Witness Statement of Igor Markićević dated 3 October 2019 ("Markićević WS III"); (vi) Expert Report of Bojana Tomić Brkušanin dated 3 October 2019 ("Brkušanin ER"); (vi) Expert Report of Krzystof Grzesik dated 3 October 2019 ("Grzesik ER"); (vii) Expert Report of Robert J.C. Deane dated 3 October 2019 ("Deane ER"); (viii) Expert Report of Uglješa Grušić dated 3 October 2019 ("Grušić ER"); (ix) Second Expert Report of Miloš V. Milošević dated 3 October 2019 ("Milošević ER II"); (x) Second Expert Report of Agis Georgiades dated 3 October 2019 ("Georgiades ER II"); (xi) Second Expert Report of Richard Hern dated 3 October 2019 ("Hern ER II").

98. On 14 October 2019, the Claimants opposed Serbia's request for redaction of certain parts of Annex A to Procedural Order No. 4.

99. On 19 October 2019, the Respondent proposed certain redactions to the Claimants' Reply and accompanying documentation.

100. On 21 October 2019, the Tribunal invited (i) the Respondent to comment on the Claimants' objections to the Respondent's proposed redactions by 28 October 2019; and (ii) the Claimants to respond by 4 November 2019 in the form of the Transparency Schedule.

101. On 28 October 2019, the Respondent submitted its response to the Claimants' objections to its proposed redactions of 13 and 27 September and 19 October 2019 (the "Proposed Redactions").

102. On 3 November 2019, the Claimants responded to the Respondent's additional comments in connection with the Proposed Redactions. The Claimants' communication was accompanied by exhibits CE-797 to CE-803 and corrected exhibits CE-419 and CE-593.

103. On 5 November 2019, the Tribunal and the Parties were informed that Ms. Planells-Valero had reassumed her functions as Secretary of the Tribunal.

104. On 13 January 2020, the Tribunal issued Procedural Order No. 6, by which it denied the Respondent's Proposed Redactions. The Tribunal advised that, in accordance with Article 20 of the Transparency Rules, the Respondent had the option to withdraw from the record all or part of the information that it sought to protect from publication and, in that case, to submit these documents without the respective information. Once this process was

completed, the Tribunal would order ICSID to publish the documents mentioned in Article 8 of the Transparency Rules. A declaration by Prof. Kohen was appended to the Order.

105. On 24 January 2020, the Respondent filed a Rejoinder on the Merits and a Reply on Jurisdiction ("Respondent's Rejoinder" or "Rej."),[79] with exhibits RE-200 to RE-565 and legal authorities RLA-132 to RLA-200. The pleading was also accompanied by three witness statements and five expert reports, as follows: (i) Witness Statement of Ms. Julijana Vuckovic dated 22 January 2020 ("Vuckovic WS"); (ii) Witness Statement of Mr. Dragan Stevanovic dated 23 January 2020 ("Stevanovic WS"); (iii) Witness Statement of Ms. Branka Radović Jankovic dated 24 January 2020 ("Radović WS"); (iv) Second Expert Report of Mr. Sandy Cowan dated 24 January 2020 ("Cowan ER II"); (v) Second Expert Report of Dr. Thomas Papadopoulos dated 24 January 2020 ("Papadopoulos ER II"); (vi) Second Expert Report of Prof. Mirjana Radović dated 24 January 2020 ("Radović ER II"); (vii) Expert Report of Ms. Danijela Ilic dated 23 January 2020 ("Ilic ER"); and (viii) Expert Report of Achilles C. Emilianides dated 23 January 2020 ("Emilianides ER").

106. On 11 February 2020, the Claimants requested that the Tribunal strike from the record certain new factual and legal defenses on jurisdiction, merits and quantum allegedly presented for the first time by Serbia in its Rejoinder, in the Ilic Report, and in the Second Cowan Report (the "Respondent's New Arguments"). In the alternative, the Claimants proposed that they file an additional submission and an additional expert report by Dr. Hern together with their Rejoinder on Jurisdiction due on 6 March 2020.

107. On 17 February 2017, the Respondent requested that the Tribunal dismiss the Claimants' application of 11 February 2020. In the alternative, the Respondent asked to be granted the right to file an additional submission.

108. On 20 February 2020, the Tribunal granted the Claimants request to address the Respondent's New Arguments in their Rejoinder on Jurisdiction and to file an additional expert report of Dr. Richard Hern with supporting evidence by 6 March 2020. The Tribunal also granted the Respondent the opportunity to respond by 16 March 2020. In addition, the Tribunal advised the Parties that they would have an opportunity to make further submissions at the hearing and/or in their post-hearing submissions, if any. On 24 February

[79] A corrected version of the Rejoinder was submitted on 29 January 2020.

2020, the Claimants sought clarification from the Tribunal regarding Serbia's response due by 16 March 2020, which the Tribunal provided on the same day.

109. On 2 March 2020, the Tribunal sent the Parties a draft Procedural Order on the organization of the hearing scheduled to take place between 30 March and 4 April 2020 in Geneva (Switzerland) and invited their comments. The Tribunal also indicated that during the pre-hearing teleconference ("PHTC") scheduled to take place on 16 March 2020, it wished to discuss with the Parties whether any measures needed to be taken for the organization of the hearing as a result of the coronavirus outbreak.

110. On 7 March 2020, the Claimants filed their Rejoinder on Jurisdiction ("Rejoinder on Jurisdiction" or "Rej. J."), [80] with exhibits CE-804 to CE-899 and legal authorities CLA-153 to CLA-173. The pleading was accompanied by four witness statements and five expert reports as follows: (i) Third Witness Statement of Mr. William Archibald Rand of 5 March 2020 ("Rand WS III"); (ii) Third Witness Statement of Mr. Djura Obradović of 5 March 2020 ("Obradović WS III"); (iii) Fourth Witness Statement of Mr. Erinn Bernard Broshko of 5 March 2020 ("Broshko WS IV"); (iv) Fourth Witness Statement of Mr. Igor Markićević of 5 March 2020 ("Markićević WS IV"); (v) Second Expert Report of Ms. Bojana Tomić Brkušanin of 5 March 2020 ("Brkušanin ER 2"); (vi) Second Expert Report of Dr. Uglješa Grušić of 5 March 2020 ("Grušić ER 2"); (vii) Third Expert Report of Dr. Richard Hern of 6 March 2020 ("Hern ER III"); (viii) Third Expert Report of Mr. Miloš Milošević of 5 March 2020 ("Milošević ER III"), and (ix) Third Expert Report of Mr. Agis Georgiades of 5 March 2020 ("Georgiades ER III").

111. On 11 March 2020, the Claimants sought the Tribunal's assistance regarding Serbia's conduct in connection with an ongoing investigation involving Mr. Djura Obradović. The Claimants informed the Tribunal that in December 2015 a criminal court in Serbia decided to withhold Mr. Obradović's passport preventing him from any international travel. The Claimants requested that the Tribunal order Serbia to use its best efforts to release Mr. Obradović's passport to make his appearance at the hearing in Geneva possible and reserved the right to ask the Tribunal to draw adverse inferences against Serbia if Mr. Obradović was prevented from attending the hearing.

[80] A corrected version of the Rejoinder on Jurisdiction was submitted on 12 March 2020.

112. On 11 March 2020, in view of the uncertainty created by the coronavirus outbreak, the Respondent requested a postponement of the hearing. On the next day, the Claimants agreed with this request.

113. On 12 March 2020, the Tribunal confirmed the postponement of the hearing and invited the Parties to discuss the rescheduling of the hearing and the remaining procedural steps at the PHTC.

114. At the PHTC of 16 March 2020 and in subsequent correspondence, the Tribunal and the Parties discussed possible new dates for the hearing.

115. Also on 16 March 2020, the Respondent filed its additional submission on quantum ("Respondent's Additional Submission on Quantum"), with exhibits RE-567 to RE-655.[81] The pleading was accompanied by the Second Expert Report of Ms. Danijela Ilic of 16 March 2020 ("Second Ilic Report") and the Third Expert Report of Mr. Sandy Cowan of 16 March 2020 ("Third Cowan Report").

116. Further communications regarding the potential new hearing dates were received from the Claimants on 18 and 24 March and on 7 April 2020, and from the Respondent on 19, and 24 March and 8 April 2020.

117. On 9 April 2020, the Tribunal confirmed that the hearing would take place from 28 October to 1 November 2020, with 2 November 2020 held in reserve.

118. On 20 April 2020, the Tribunal issued Procedural Order No. 7 containing a revised procedural calendar.

119. On 29 April 2020, the Claimants requested the Tribunal to strike from the record certain new arguments and new valuations set out in the Respondent's Additional Submission on Quantum, as well as certain parts of the Second Ilic Report and the Third Cowan Report (the "Contested Issues and New Valuations").

120. On 4 May 2020, the Tribunal informed the Parties that the Meeting Center at the Graduate Institute in Geneva was unavailable during the new hearing dates, that it had contacted other arbitral institutions in Europe to find an alternative venue, and that the Permanent

[81] A corrected version of exhibit RE-652 was submitted on 31 March 2020.

Court of Arbitration (PCA) in The Hague had confirmed availability during the hearing dates. The Tribunal invited the Parties' views regarding this hearing venue as well as on the possibility of holding the hearing virtually.

121. On 8 May 2020, the Respondent commented on the Claimants' application of 29 April 2020 regarding the Contested Issues and New Valuations.

122. By communications of the same date, the Parties reiterated their strong preference for an in-person hearing, indicating that they had no objection with respect to the PCA as a potential choice. The Parties also expressed concerns regarding the possibility of holding the hearing virtually.

123. On 1 June 2020, the Tribunal denied the Claimants' application of 29 April 2020 as it considered, *inter alia*, that both the Contested Issues and New Valuations responded to argument made in the Claimants' Rejoinder on Jurisdiction.

124. On 2 June 2020, the President of the Tribunal disclosed, for the sake of transparency, that Dr. Silja Schaffstein, a counsel at Lévy Kaufmann-Kohler, had been asked to act as legal expert for a party in a commercial arbitration represented by Squire Patton Boggs.

125. On 3 June 2020, the Tribunal noted the Parties' reservations regarding the possibility of holding a virtual hearing, informed the Parties of the costs of a potential in-person hearing and the safety measures put in place by the PCA, and indicated its intention to monitor the situation closely and revisit the matter closer to the hearing dates taking into account the prevailing travel restrictions at the time.

126. Also on 3 June 2020, the Respondent requested further information regarding the disclosure made on 2 June 2021 by the President of the Tribunal which she provided by the next day. On 5 June 2020, the Respondent objected to the appointment of Dr. Silja Schaffstein by Squire Patton Boggs. On 8 June 2020, the President of the Tribunal informed the Parties that, in view of the Respondent's objection, Dr. Schaffstein had refused the proposed assignment as legal expert.

127. On 21 August 2020, given the evolution of the coronavirus pandemic and the perspectives for the fall, the Tribunal proposed to the Parties a contingency plan for conducting the hearing virtually, if need be. It also proposed to conduct the hearing in two parts to allow for sufficient time and hold the second part in January 2021.

128. On 28 August 2020, the Parties provided their comments regarding the contingency plan proposed by the Tribunal. The Parties emphasized their strong preference for an in-person hearing and their willingness to revisit the matter closer to the hearing dates in light of the then prevailing travel restrictions.

129. On 14 September 2020, in accordance with the procedural calendar in Procedural Order No. 7, the Parties proposed a draft Joint Hearing Schedule contemplating an in-person hearing.

130. On 24 September 2020, the Government of Canada advised the Tribunal of its intention to exercise its right to attend the hearing in accordance with Article 29.2 of the Serbia-Canada BIT.

131. On 27 September 2020, the Tribunal wrote to the Parties noting that the COVID-19 pandemic was worse in some States than it was when it first wrote to the Parties about it. As a result, it remained concerned about the health and safety of the hearing participants, who would be gathered in the same room for long days and would need to travel to the hearing venue, some of them on long haul flights. Further, it could not be ruled out that one or more of the participants would eventually be unable to attend the hearing due to travel restrictions or health reasons, which could jeopardize the hearing and cause a last-minute postponement or require an additional hearing, neither of which would be time or cost efficient. The Tribunal also noted that the draft Joint Hearing Schedule proposed by the Parties would be difficult to put into practice, because the time actually available for the Parties each day (after deducting procedural issues, breaks, and Tribunal questions) was insufficient to complete the examinations as planned.

132. The Tribunal proposed to review these matters during the forthcoming PHTC, including discussing the two alternative proposals earlier prepared by the Tribunal to address the uncertainty and risks caused by the pandemic and to accommodate the Parties' proposed draft Joint Hearing Schedule.

133. On 30 September 2020, the Tribunal held a PHTC with the Parties.

134. On 2 October 2020, the Tribunal confirmed that, on the basis of the Claimants' request and the Respondent's consent at the PHTC, the hearing was postponed to 12 to 20 July 2021, with Sunday, 18 July 2021 being a day off and Tuesday, 20 July 2021 being a reserve day.

On that same date, the ICSID Secretariat informed the Government of Canada of the revised hearing dates.

135. On 13 October 2020, the Tribunal confirmed that the potential new in-person hearing was to be held on the premises of the PCA in The Hague. On 22 October 2020, the Claimants inquired about the schedule for the steps preceding the hearing, namely the dates for submission of the hearing schedule and pre-hearing conference call.

136. On 3 November 2020, following the Parties' confirmation of their availability for a PHTC on 7 June 2021, the Tribunal issued Procedural Order No. 8 containing the revised procedural calendar.

137. On 15 January 2021, the Claimants submitted a request to file new documents into the record (the "Request to File New Evidence") and a request for assistance to obtain certain documents (the "Request for Assistance").

138. On the same day, the Claimants made a request for provisional measures with respect to a criminal investigation allegedly initiated by the Respondent against Mr. Obradović, the former nominal owner of BD Agro and a witness in this arbitration (the "Request for Provisional Measures") with factual exhibits CE-901 to CE-902 and legal authorities CLA-174 to CLA-182. They also sought an order from the Tribunal directing the Respondent not to use documents from the criminal investigation in the arbitration, including in the Respondent's submissions on the Request for Provisional Measures, until the Tribunal decided on that request.

139. On 19 January 2021, the Tribunal invited the Respondent to comment on these requests. It also instructed the Respondent to label the documents obtained through the criminal proceedings appended to its response, if any, and indicated that its decision regarding the admissibility of such documents would be reserved for a later determination. Finally, the Tribunal invited the Parties to reserve a date for a hearing by videoconference on the Request for Provisional Measures in the event the Tribunal found such a hearing useful after reviewing the Parties' submissions.

140. On 26 January 2021, following receipt of the Claimants' communications of 20 and 26 January 2021 and the Respondent's communication of 25 January 2021 regarding their availability for a hearing on the Claimants' Request for Provisional Measures, the Tribunal

informed the Parties that it had decided to reserve 16 February 2021 for a hearing by videoconference on the Request for Provisional Measures, for the event that it deemed it helpful after having reviewed the Parties' submissions. The Tribunal also indicated that it would advise after 5 February 2021 whether the hearing on Provisional Measures would take place.

141. On 5 February 2021, the Respondent submitted its Response to the Claimants' Request to File New Evidence and the Request for Assistance, together with Annexes 1 to 15. On that same date, the Respondent also filed its response to the Claimants' Request for Provisional Measures with factual exhibits RE-656 to RE-673 and legal authorities RLA-201 to RLA-208.

142. On 9 February 2021, the Parties were advised that the Tribunal preferred to hear the Parties orally on the Request for Provisional Measures and confirmed that the hearing on Provisional Measures was to take place on 16 February 2021 via Zoom.

143. On the same day, the Claimants informed the Tribunal that nine documents submitted by the Respondent along with its Response (Exhibits RE-657, RE-658, RE-660-662, RE-667-670) had not been labelled in accordance with the Tribunal's ruling of 19 January 2021. The Claimants also requested leave to file one more document, namely an announcement published by BD Agro's bankruptcy trustee in respect of the sale of BD Agro's land.

144. On 9 February 2021, the Tribunal circulated the agenda for the hearing on Provisional Measures. A modified agenda was circulated on 11 February 2021.

145. Also on 9 February 2021, the Claimants submitted additional communications regarding the Respondent's responses of 5 February 2021 to the Claimants' Request to File New Evidence and Request for Assistance.

146. On 11 February 2021, the Tribunal invited the Respondent to comment on the Claimants' communications of 9 February 2021 and advised the Parties that it would decide at a later stage on the admissibility of the nine documents submitted by the Respondent with its Response, along with Exhibits RE-671-673. Further, if the Parties intended to refer to the content of these documents at the forthcoming hearing on Provisional Measures, they were requested to advise the Tribunal by 15 February 2021 to allow the Tribunal to give directions in this respect prior to the hearing.

147. On 14 February 2021, the Tribunal noted that, in accordance with Section IV of the Transparency Rules of 29 August 2019, the hearing on Provisional Measures was to be made public. It further indicated that the hearing would be video recorded, and the video recording would be streamed on the ICSID website as soon as possible after the conclusion of the hearing.

148. On 15 February 2021, the Respondent commented on the Claimants' communications of 9 February 2021. The Respondent advised the Tribunal that it intended to rely on the exhibits submitted with its Response in the course of its oral argument at the Hearing and objected to the Claimants' request for leave to file the public announcement concerning the sale of BD Agro's land. On the same day, the Tribunal ruled that the Respondent had not mislabelled the nine exhibits as alleged by the Claimants. The Tribunal also confirmed that Exhibits RE-657-658, 660-662, 667-673 were to be part of the record of the arbitration, and that the Parties could rely on those exhibits at the hearing on provisional measures. A further communication on this matter was received from the Claimants on 16 February 2021 stating, *inter alia*, that they did not wish to rely on exhibits CE-901 and CE-902 during the hearing on provisional measures.

149. On 16 February 2021, at the Tribunal and the Parties held a hearing on the Request for Provisional Measures.

150. On 18 February 2021, the Tribunal provided further instructions to the Parties regarding the corrections to the hearing transcripts and confirmed the publication of the video recordings of the hearing on the ICSID Website. On 25 and 26 February 2021, the Parties informed the Tribunal of their agreed corrections to the transcripts.

151. On 12 March 2021, the Tribunal issued Procedural Order No. 9 denying the Claimant's Request for Provisional Measures. By this same order, the Tribunal granted in part the Request to File New Evidence and denied the request for Assistance to acquire certain documents. On 19 March 2021, pursuant to the Tribunal's instructions, the Claimants submitted Exhibit CE-903 to the record.

152. On 9 April 2021, the Claimants requested the Tribunal to direct the Respondent to produce a valuation report of 28 May 2020 prepared or commissioned by the Serbian Tax Authority relating to certain land plots located in Dobanovci (the "Request to Produce"). They also requested the Tribunal to reconsider a part of its rulings in Procedural Order No. 9 (the

"Request for Reconsideration"). On 12 April 2021, the Tribunal invited the Respondent to comment on the Request to Produce and the Request for Reconsideration, which Serbia did on 22 April together with Annexes 1 to 8. The Claimants commented on the Respondent's submission on 24 April 2021, and the Respondent replied on 28 April 2021.

153. On 26 April 2021, considering the uncertainties related to the COVID-19 pandemic, the Tribunal invited the Parties to confer on the way they wished to proceed in relation to the hearing scheduled to take place from 12 to 20 July 2021 (the "Hearing").

154. On 5 May 2021, the Parties informed the Tribunal of their continued strong preference for an in-person hearing. The Parties also indicated that they were discussing several alternative venues for the hearing in Europe. The Parties proposed to report to the Tribunal about their efforts to find a suitable venue for the Hearing by the end of May 2021.

155. On 10 May 2021, the Parties proposed two alternative hearing schedules for an in-person hearing. The Parties further indicated that given the number of witnesses and experts to be cross-examined during the Hearing, the Parties had a strong preference to adopt the first scenario, where Tuesday 20 July 2021 was used for examination of the witnesses rather than kept in reserve.

156. On 12 May 2021, the Tribunal noted, *inter alia*, that it remained open to consider the possibility on an in-person hearing if less restrictive rules for travel and gathering were to be implemented in Europe before the hearing and invited the Parties to advise of their efforts to find a suitable venue for the Hearing by 28 May 2021.

157. On 21 May 2021, the Tribunal issued Procedural Order No. 10 denying the Claimants' Request to Produce and the Request for Reconsideration of 9 April 2021.

158. On 29 May 2021, the Parties reaffirmed their strong preference for an in-person hearing in Europe and asked the Tribunal to postpone the decision on the place and format of the hearing until 11 June 2021. The Parties also informed the Tribunal about the witnesses and experts that would need to attend a potential in-person hearing remotely. On 3 June 2021, the Tribunal granted the Parties' request.

159. On 11 June 2021, the Parties indicated that, given the continuously improving situation regarding the COVID-19 pandemic all over Europe, it should be possible to hold the July hearing in-person. The Parties also noted, *inter alia*, that The Hague, in The Netherlands,

appeared to be a convenient location for the hearing because all hearing participants could be exempt from travel restrictions and quarantine requirements.

160. On 17 June 2021, the Tribunal informed the Parties that in view of their strong preference for an in-person hearing, the improved health situation in Continental Europe, the absence of health risks for all those who were vaccinated, it had decided that the hearing would take place in person on the premises of the PCA in The Hague. On that same day, the Tribunal circulated the draft of a procedural order addressing the organization of the forthcoming hearing for the Parties' comments.

161. On 18 June 2021, the Tribunal invited the Government of Canada to indicate whether it wished to attend the hearing in-person or remotely via Zoom.

162. On 22 June 2021, the Tribunal and the Parties held a PHC to discuss the organization of the hearing.

163. Also on 22 June 2021, the Government of Canada responded to the Tribunal's invitation of 18 June 2021 indicating that its representatives would attend the hearing via Zoom.

164. On 1 July 2021, the Tribunal issued Procedural Order No. 11 on the organization of the hearing.

C. Hearing on Merits, Liability and Quantum

165. A hearing on jurisdiction, merits and quantum was held from 12 to 20 July 2021 on the premises of the Permanent Court of Arbitration in The Hague. The following persons were present at the hearing:

Tribunal:	
Prof. Gabrielle Kaufmann-Kohler	President
Mr. Baiju S. Vasani	Arbitrator
Prof. Marcelo G. Kohen	Arbitrator
ICSID Secretariat:	
Ms. Marisa Planells-Valero	Secretary of the Tribunal
Assistant to the Tribunal	
Mr. Raul Donde[82]	Assistant to the Tribunal

[82] Participated remotely via Zoom.

For the Claimants:

Counsel

Mr. Rostislav Pekař	Squire Patton Boggs
Mr. Stephen Anway	Squire Patton Boggs
Mr. Luka Misetic	Squire Patton Boggs
Mr. Matej Pustay	Squire Patton Boggs
Mr. David Seidl	Squire Patton Boggs
Mr. Nenad Stanković	Stankovic & Partners (NSTLAW)
Ms. Sara Pendjer	Stankovic & Partners (NSTLAW)

Party Representatives and Witnesses

Mr. William Rand	
Mr. Erinn Broshko	Rand Investments Ltd.
Ms. Li-Jeen Broshko	Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand, Mr. Robert Harry Leander Rand
Mr. Igor Markićević	Sembi Investment Limited

Witnesses

Mr. Djura Obradović	
Mr. Aksel Azrac	1875 FINANCE
Mr. Robert Jennings[83]	The Ahola Family Trust

Experts

Dr. Richard Hern	NERA Economic Consulting
Ms. Zuzana Janečková	NERA Economic Consulting
Mr. Agis Georgiades	Christos Georgiades & Associates LLC
Mr. Miloš Milošević	Živković|Samardžić Law office
Ms. Bojana Tomić-Brkušanin	Foreign Investors Council
Mr. Krzysztof Grzesik	Polish Properties Sp z o.o.
Mr. Uglješa Grušić	University College London
Mr. Robert J.C. Deane[84]	Borden Ladner Gervais LLP

For the Respondent:

Counsel

Ms. Senka Mihaj	Mihaj, Ilic & Milanovic
Mr. Vladimir Djeric	Mikijelj, Jankovic & Bogdanovic
Mr. Petar Djundic	Faculty of Law, University of Novi Sad
Ms. Bojana Bilankov	Mihaj, Ilic & Milanovic
Mr. Nemanja Galic	Mihaj, Ilic & Milanovic
Ms. Milica Volarev	Mihaj, Ilic & Milanovic
Ms. Lena Petrovic	Mikijelj, Jankovic & Bogdanovic
Ms. Ivana Vukcevic	Mikijelj, Jankovic & Bogdanovic

[83] Participated remotely via Zoom.

[84] Participated remotely via Zoom.

Party Representatives	
Ms. Olivera Stanimirovic	State Attorney Office of the Republic of Serbia
Ms. Ksenija Maksic	State Attorney Office of the Republic of Serbia
Mr. Marinko Cobanin	State Attorney Office of the Republic of Serbia
Witnesses	
Mr. Vladislav Cvetkovic	Director and Markets Leader at PwC Belgrade Advisory Services, former director of the Privatization Agency of the Republic of Serbia
Mr. Dragan Stevanovic	State Secretary in the Ministry of Economy of the Republic of Serbia
Ms. Julijana Vuckovic	Chief of Department for Control of Performance of Agreements and Supervision of Capital Representative's Work, within the Sector for Privatization, Bankruptcy and Industrial Development within the Ministry of Economy; former director of the Center for Control of Performance of Agreements on Sale of Capital and Property within the Privatization Agency of the Republic of Serbia
Ms. Branka Radovic Jankovic	Former deputy director of the Privatization Agency of the Republic of Serbia; former special legal advisor and specific legal advisor to the Director of the Privatization Agency of the Republic of Serbia
Experts	
Mr. Sandy Cowan	Partner at Mazars, former Director at Grant Thornton UK LLP; Fellow of the Institute of Chartered Accountants in England and Wales
Dr. Thomas Papadopoulos[85]	Lecturer at the University of Cyprus
Prof. Mirjana Radović	Professor at the Faculty of Law, University of Belgrade
Ms. Danijela Ilic	Licensed valuator, employed by Sarufo d.o.o. and Millennial Consultancy d.o.o.
Prof. Achilles C. Emilianides[86]	Professor at the University of Nicosia; practicing advocate with A&E C. Emilianides, C. Katsaros and Associates LLC

[85] Participated remotely via Zoom.

[86] Participated remotely via Zoom.

Government Of Canada Representatives:

Mr. Scott Little	Director and General Counsel Trade Law Bureau
Ms. Heather Squires	Deputy Director and Senior Counsel Trade Law Bureau
Ms. Maria Cristina Harris	Counsel Trade Law Bureau

Court Reporter(s):
Ms. Claire Hill[87]

Interpreters:
Ms. Milena Maric,
Ms. Sanja Rasovic
Ms. Vesna Bulatovic

166. During the hearing, the Tribunal heard opening submissions by counsel, asked questions to the Parties, and heard evidence from the following witnesses and experts:

On behalf of the Claimants:

Mr. William Rand	
Mr. Igor Markićević	
Mr. Djura Obradović	
Mr. Erinn Broshko	
Mr. Aksel Azrac	
Mr. Robert Jennings	
Mr. Miloš V. Milošević	
Dr. Richard Hern	
Mr. Agis Georgiades	Christos Georgiades & Associates LLC
Ms. Bojana Tomić Brkušanin	
Mr. Krzystof Grzesik	Polish Properties
Mr. Robert J.C. Deane	Borden Ladner Gervais LLP
Dr. Uglješa Grušić	

On behalf of the Respondent:

Mr. Vladislav Cvetkovic	
Ms. Julijana Vuckovic	
Mr. Dragan Stevanovic	
Ms. Branka Radović Jankovic	
Mr. Sandy Cowan	Grant Thornton UK LLP
Dr. Thomas Papadopoulos	
Prof. Mirjana Radović	
Ms. Danijela Ilic	
Dr. Achilles C. Emilianides	

[87] Participated remotely via Zoom.

D. Post-Hearing Phase

167. On 30 July 2021, the Tribunal issued Procedural Order No. 12 addressing the post-hearing matters discussed at the hearing including the Parties post-hearing submissions, transcript corrections and cost submissions.

168. On 27 August 2021, the Respondent requested leave to submit new documents into the record. On 6 September 2021, the Claimants opposed the Respondent's request and offered to produce additional evidence responsive to the Respondent's request. On 17 September 2021, the Tribunal granted in part the Respondent's request and invited the Claimants to produce the additional evidence offered in their letter of 6 September 2021. Accordingly, on 20 September 2021, the Respondent filed Exhibits RE-674 to RE-675 and the Claimants filed Exhibits CE-904 to CE-906.

169. On 21 September 2021, the Claimants requested leave from the Tribunal to introduced five new documents into the record. On 23 September 2021, the Respondent objected to the Claimants' request.

170. On 23 September 2021, the Claimants requested leave from the Tribunal to file two further documents into the record stating that the Respondent did not oppose their request. On 24 September 2021, in view of the absence of objection against the Claimants' request of 23 September 2021, the Tribunal admitted the two new documents.

171. On 24 September 2021, the Claimants requested leave from the Tribunal to introduce a new document into the record and withdrew their request to submit one of the documents identified in their request of 21 September 2021. On the same day, the Tribunal invited the Respondent to provide comments on the Claimants' request of 24 September 2021 and denied the Claimants' request of 21 September 2021, as amended on 24 September 2021.

172. Still on the same day, the Respondent confirmed that it did not object to the Claimants' request of 24 September 2021. It also indicated that, together with its post-hearing brief, it would file additional translations of Exhibits RE-13, RE-18, RE-19 and RE-223.

173. On 26 September 2021, pursuant to the Tribunal's instructions of 24 September 2022, the Claimants filed Exhibits CE-907 and CE-908. They also confirmed that they did not oppose the Respondent's request to introduce additional translations of certain exhibits as long as those translations were not used to raise new arguments in the post-hearing briefs.

174. On 27 September 2021, the Parties filed their respective post-hearing briefs. The Claimants' Post-Hearing Brief ("C-PHB 1") was accompanied by Exhibit CE-909, and the Respondent's Post-Hearing Brief ("R-PHB 1") was accompanied by additional translations of Exhibits RE-13, RE-18, RE-19 and RE-223.

175. On 8 October 2021, the Claimants sought the Tribunal's leave to admit still further documents into the record, which the Respondent opposed on 14 October 2021. On 18 October 2021, the Tribunal granted the Claimants' request following which the latter filed Exhibits CE-910 and CE-911 on 19 October 2021.

176. On 22 October 2021, the Parties filed their second post-hearing briefs ("C-PHB 2" and "R-PHB 2").

177. On 12 November 2021, each Party filed a statement on costs.

178. On 27 November 2021 and 29 November 2021, the Parties submitted their respective requests for redaction of certain parts of their statement of costs. In view of the Parties' agreement, the Tribunal instructed the Secretariat to publish the documents as redacted by the Parties on 1 December 2021.

179. On 23 March 2023, the Claimants amended their request for relief regarding Mr. Rand's receivables against BD Agro. On 27 March 2023, the Tribunal invited the Respondent to submit comments, if any, regarding the Claimants' communication by 31 March 2023. No comments were received from the Respondent.

180. On 2 June 2023, the Tribunal declared the proceeding closed.

IV. REQUESTS FOR RELIEF

A. Claimants' Request for Relief

181. In their first post-hearing submission, the Claimants sought the following relief:

"The Claimants request that the Tribunal issues an award:

a. declaring that Serbia has breached the Serbia-Cyprus BIT;

b. ordering Serbia to pay compensation to Sembi of no less than EUR 87.5 million;

c. declaring that Serbia has breached the Canada-Serbia BIT;

d. in the alternative to request b. above, ordering Serbia to pay compensation to:

(i) Rand Investments of no less than EUR 16.5 million;
(ii) Ms. Kathleen Elizabeth Rand of no less than EUR 23.7 million, plus a gross-up of 33.2% on that amount;
(iii) Ms. Allison Ruth Rand of no less than EUR 23.7 million, plus a gross-up of 33.2% on that amount; and
(iv) Mr. Robert Harry Leander Rand of no less than EUR 23.7 million, plus a gross-up of 33.2% on that amount;

e. in the alternative to request d.(i) above, ordering Serbia to pay compensation to Mr. William Rand of no less than EUR 16.5 million.

f. in the alternative to requests d.(i) and e., and/or d(ii), d(iii) and d(iv) above, ordering Serbia to pay compensation to Mr. William Rand of no less than EUR 87.5 million.

g. ordering Serbia to pay compensation to Mr. William Rand:

(i) no less than EUR 3.9 million for loss of value of Mr. Rand's Indirect Shareholding; and
(ii) no less than EUR 3.31 million for loss of value of Mr. Rand's receivables against BD Agro;[88]

h. ordering Serbia to pay interest on any amounts awarded at the rate of Serbian statutory default interest rate (currently 8%) from 27 September 2021 until payment in full;

i. ordering Serbia to pay the costs of this proceeding, including costs of legal representation; and

j. ordering such other relief as the Tribunal may deem appropriate in the circumstances."[89]

182. These requests remained unchanged thereafter.

B. Respondent's Request for Relief

183. In its reply post-hearing submission, the Respondent sought the following relief:

"Respondent requests the Arbitral Tribunal to

(1) *dismiss* all Claimants' claims for the lack of jurisdiction, *in eventu*, dismiss all Claimants' claims for the lack of merit,

[88] As modified by the Claimants' communication of 23 March 2023. See §179 above.

[89] C-PHB 1, §353.

(2) *order* Claimants to reimburse Respondent all its costs of the proceedings, with interest."[90]

184. These requests remained unchanged.

V. PRELIMINARY MATTERS

185. At the outset, the Tribunal wishes to note that, for the reasons set out in his dissenting opinion, Professor Kohen disagrees with the decisions, as well with the supporting fact findings and legal analysis dealing with the Tribunal's jurisdiction over Mr. Rand (§715 (a), first part), the admissibility of Mr. Rand's claims (§715(a), second part), the breach of Article 6(1) of the Canada-Serbia BIT (§715 (c)) and, by way of consequence, the award of damages (§715 (d)). These decisions are thus made by majority.

186. Prior to considering the merits of the Parties' positions, the Tribunal will address the scope of this Award (A); the maxim *iura novit curia* (B); the relevance of previous decisions or awards (C); and transparency (D).

A. Scope of this Award

187. This Award deals with jurisdiction and with the merits of the claims over which the Tribunal has jurisdiction.

B. *Iura Novit* Arbiter

188. When applying the governing law, the Tribunal is not bound by the arguments or sources invoked by the Parties. Under the maxim *iura novit curia* – or, better, *iura novit arbiter* – the Tribunal is required to apply the law on its own motion, provided always that it gives the Parties an opportunity to comment if it intends to base its decision on a legal theory that was not addressed and that the Parties could not reasonably anticipate.[91]

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[90] R-PHB 2, §125.

[91] *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, § 295 ("[…] an arbitral tribunal is not limited to referring to or relying upon only the authorities cited by the parties. It can, *sua sponte*, rely on other publicly available authorities, even if they have not been cited by the parties, provided that the issue has been raised before the tribunal and the parties were provided an opportunity to address it"); *Albert Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Case ("*Oostergetel*"), Award, 23 April 2012, § 141; Exh. RLA-161, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, § 287.

C. Relevance of Previous Decisions and Awards

189. In support of their positions, the Parties have relied on previous decisions or awards, either to conclude that the same or similar approaches or solutions should be adopted in the present case, or to explain why this Tribunal should depart from an approach or a solution reached by another tribunal.

190. The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it should pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it should be respectful of the reasoning and solutions established in a series of consistent cases. It also believes that, subject to the circumstances of an actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.

D. Transparency

191. The Canada-Serbia BIT that applies to Claimants 1 to 5 requires the publication of the award.[92] By contrast, the Cyprus-Serbia BIT that applies to Claimant 6 contains no rules on transparency. In Procedural Order No. 5, the Tribunal recalled that Serbia had conditionally agreed to the publication of the award under the Cyprus-Serbia BIT as well.[93] It went on to determine that the rules governing transparency in this arbitration would be identical for claims under both BITs.[94] Those rules were provided in the Transparency Rules annexed to Procedural Order No. 5.

192. Accordingly, this award shall be made available to the public. Pursuant to the Transparency Rules, the Parties can notify the Tribunal within 15 days from the issuance of the award if

[92] Exh. CLA-1, Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Art. 31(1) ("A Tribunal award under this Section shall be publicly available, subject to the redaction of confidential information. All other documents submitted to, or issued by, the Tribunal shall be publicly available unless the disputing parties otherwise agree, subject to the redaction of confidential information.").

[93] PO 5, §25.

[94] PO 5, §29. Prof. Kohen's dissent to PO 5 was appended to that Order.

they seek protection of any confidential information in the award.[95] The other Party may then reply within 15 days, after which the Tribunal will rule.

193. As a result, the Tribunal will remain in office until it has resolved any transparency objections that the Parties may raise.

194. Finally, the video recordings of the hearings and all documents referred to in Section III of the Transparency Rules shall, upon completion of the case, continue to be made available to the public on the ICSID website.

VI. JURISDICTION

195. The Claimants have initiated this ICSID arbitration under two Treaties, the Canada-Serbia BIT for the Canadian Claimants and the Cyprus-Serbia BIT for the Cypriot Claimant. It is not disputed that all Claimants must meet the requirements of the ICSID Convention. Further, the Canadian Claimants must meet the requirements of the Canada-Serbia BIT and the Cypriot Claimant must meet the requirements of the Cyprus-Serbia BIT.

196. The Tribunal first determines its jurisdiction under the ICSID Convention (A) after which it reviews its jurisdiction under the BITs (B).

A. Jurisdiction under the ICSID Convention

197. Article 25(1) of the ICSID Convention, which provides for the jurisdiction of the Centre, reads as follows:

> "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 parties to the dispute consent in writing to submit to the Centre. […]."

198. Article 25 (1) prescribes four requirements for a tribunal to have jurisdiction under the Convention: (i) the arbitration must be between a Contracting State and a national of another Contracting State, (ii) there must be a legal dispute (iii) arising directly out of an investment, and (iv) the Contracting State and the investor must have consented in writing to ICSID

[95] PO 5, Transparency Rules, §16.

arbitration. In addition, of course, the ICSID Convention must have been applicable at the relevant time.

199. Serbia does not dispute that the first requirement related to nationality is satisfied, and rightly so. This dispute opposes nationals of Canada and of Cyprus, on the one hand, and Serbia, on the other hand. Serbia, Canada and Cyprus are all Contracting States to the ICSID Convention.[96]

200. Neither does Serbia challenge the second requirement of a legal dispute, again rightly so, as the dispute concerns Serbia's alleged breaches of its obligations under the Treaties owed to the Claimants, which is a legal dispute.

201. By contrast, Serbia does contest the fulfilment of the third and fourth requirements, i.e. that the Claimants have an investment within the meaning of the ICSID Convention (1); and that Serbia has consented to ICSID arbitration (2). Serbia also challenges the Claimants' standing under the ICSID Convention (3).These objections are considered in turn below, before the Tribunal reaches its conclusion (4).

1. Investment under the ICSID Convention

202. According to the Claimants, their investments in Serbia consist of:

a. For the Canadian Claimants:

a. their beneficial ownership over the Beneficially Owned Shares;

b. their control over BD Agro;

c. their indirect interest in Sembi's rights under the Sembi Agreement;

d. Mr. Rand's Indirect Shareholding; and

e. 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.[97]

[96] Exh. CE-104, List of Contracting States to the ICSID Convention, 2018.
[97] Rej. J., §III.A; C-PHB 1, §14.

b. For the Cypriot Claimant:

a. "Sembi's rights stemming from the Sembi Agreement."[98]

203. In its review, the Tribunal will group the first three items together (items (a)-(c) above), as they all relate to the Canadian Claimants' interest in the Beneficially Owned Shares. With this clarification, it will examine each of the alleged investments below.

a. Interest in the Beneficially Owned Shares

(1) Respondent's Position

204. The Respondent argues that the definition of investment under Article 25(1) of the ICSID Convention is based on four elements contained in the *Salini* test: the existence of a substantial contribution by the investor; a certain duration; the assumption of risk, and a contribution to the host State's development. It submits that the Claimants' investments do not satisfy these requirements.[99]

(i) Contribution

205. The Respondent notes that the Claimants' contributions for the interest they allegedly acquired in BD Agro through the Beneficially Owned Shares would include (a) the payment of the EUR 5,549,000 purchase price for the Privatized Shares and (b) the EUR 2 million additional investment in BD Agro.

206. On (a), *i.e.* the payment of the purchase price of EUR 5,549,000 for the Privatized Shares, the Respondent asserts that there is no evidence that such funds were committed by the Claimants. The money used by Mr. Obradović to pay the purchase price and to invest in BD Agro was not provided by any of the Claimants. There are no documents such as wire transfer records or bank account statements that would suggest that the funds used to purchase BD Agro originated from Mr. Rand, MDH or Sembi. It was Mr. Obradović who obtained the necessary funds through loans taken from the Lundin Family and paid all of the instalments of the purchase price.

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[98] Rej. J., §454.

[99] C-Mem., §492 relying on Exh. CLA-20, *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, §52.

207. Serbia points out that Mr. Rand cannot be considered as an investor simply because he allegedly "arranged" the loans which Mr. Obradović received from the Lundins. The Claimants have not explained precisely what Mr. Rand did in this context. Neither have they furnished any documents despite Serbia's request. The funds that the Lundins extended to Mr. Obradović were not Mr. Rand's funds. Mr. Rand did not even guarantee the repayment of the loans granted by the Lundins – it was only the 2008 Lundin Agreement that made Mr. Rand and Mr. Obradović jointly liable for borrowed funds.

208. Serbia further points out that Mr. Obradović paid for the initial instalment of the purchase price for BD Agro's acquisition, just as he did for all the other instalments. The first instalment was paid in October 2005, before Mr. Obradović started receiving funds from the Lundins. While the Claimants insist that the initial payment was made from funds transferred by the Lundins to MDH's bank account in Serbia in September 2005, they have offered no proof of this allegation. Neither have they tendered any evidence to support their contention that Mr. Obradović had access to MDH's account or that he was authorized to use it, let alone evidence establishing that he actually withdrew funds from that account. The only "reasonable explanation" says Serbia is that Mr. Obradović used his own money to make the payment.

209. For Serbia, the repayment of Mr. Obradović's debts under the 2008 Lundin Agreement cannot be treated as payment of the purchase price for BD Agro either. It explains its position as follows: "[t]ransfers that Mr. Rand effectuated through Sembi were the result of his assumption of Mr. Obradović 's debt under Article 1 of the 2008 Lundin Agreement. The purchase price was paid by Mr. Obradović, using funds apparently originating from the Lundins. Repayment of funds previously borrowed by Mr. Obradović also did not lead to the injection of new capital in BD Agro or serve to further its business in any way."[100]

210. On (b), *i.e.* the EUR 2 million additional investment in BD Agro, the Respondent stresses the absence of evidence in support of the Claimants' assertion that this contribution was made by them. The Claimants have not proven that this payment was actually made nor that it was made by them.

211. Serbia also argues that the Claimants have failed to explain the Lundins' role in securing the financing for the Claimants' investments. The precise role of Mr. Rand is not established

[100] R-PHB 1, §157.

either. For instance, in the absence of the terms of the financial arrangement between Mr. Rand, the Lundin Family and Mr. Obradović, it is unclear whether Mr. Rand's repayment of Mr. Obradović's debt to the Lundin Family in 2008 and 2010 should be treated as the Claimants' payment of the purchase price for BD Agro on behalf of Mr. Obradović or not. In any event, funds which Mr. Obradović obtained through the loan from the Lundin Family were not used to pay the acquisition of BD Agro, and Mr. Rand's settlement of Mr. Obradović's debt cannot be treated as payment of the purchase price. Additionally, the transfer of money from Mr. Rand to the Lundin Family and their companies is irrelevant since it did not lead to the acquisition of Mr. Obradović's shares in BD Agro by Sembi and the funds were not used for the purpose of furthering BD Agro's business.

212. Serbia further challenges the Claimants' view that the monetary contribution of one of them should count as contribution of each and every Claimant. For instance, they admit that Sembi's bank account was used to transfer funds that were "ultimately committed" by Mr. Rand to the Lundins. The Claimants then claim that the same contribution gives investor status to Mr. Rand under the Canada–Serbia BIT and to Sembi under the Cyprus–Serbia BIT. To be investors, both Mr. Rand and Sembi must prove that each of them made a separate contribution, which is not the case.

213. Serbia adds that Sembi has made no contribution of capital to BD Agro. The repayment of Mr. Obradović's loan was effected with funds committed by Mr. Rand. There is no evidence that Sembi ever paid the remaining instalments of the purchase price under the Sembi Agreement. Even if it was accepted that Sembi owned the shares in BD Agro, mere ownership cannot constitute a contribution.

(ii) Duration

214. Serbia submits that the Claimants have not obtained any asset that could be deemed an "investment" under the two BITs or the ICSID Convention, with the result that there can be no question of a duration.

(iii) Risk

215. Serbia contends that Mr. Obradović acquired and managed BD Agro, not any of the Claimants. The funds required for BD Agro's acquisition were obtained by Mr. Obradović. It is clear that Mr. Rand's three children made no commitment of capital or other resources to

BD Agro. In the circumstances, in absence of a contribution, the risk that would follow from the investment does not exist.

(iv) Contribution to development

216. Serbia contends that BD Agro was de facto bankrupt since March 2013 when the company's bank account was blocked by its creditors. This was not a result of any actions or omissions of Respondent, but a consequence of Mr. Obradović's management. BD Agro generated losses in almost every year it was managed by Mr. Obradović. In the circumstances, the Claimants' "investment" did not contribute to the development of the Republic of Serbia. This is all the more so as Mr. Obradović's activities related to BD Agro were illegal and resulted in criminal prosecution.

217. In addition to the requirements just mentioned, in reliance on *Phoenix Action v Czech Republic*, Serbia adds that "it is generally established that access to protection under the ICSID Convention itself is also restricted by an implicit legality requirement."[101] It says that this requirement is not met either in this case.

(2) Claimants' Position

218. The Claimants insist that this Tribunal should follow the approach of numerous ICSID Tribunals and conclude, from the absence of a definition of "investment" in the ICSID Convention, that the ICSID Convention does not impose any jurisdictional requirements *ratione materiae* additional to those set forth in the Treaties. However, should the Tribunal choose not to follow this approach, the Claimants contend that their investments satisfy even the "broadest of tests" for an investment put forth by any tribunal.

(i) Contribution

219. The Claimants submit that they have made "long-term substantial contributions" to BD Agro and the Serbian economy including (a) the EUR 5,549,000 purchase price for the Beneficially Owned Shares, and (b) the EUR 2 million additional investment in BD Agro.

220. According to the Claimants, Serbia's argument that the purchase price cannot be regarded as a contribution because Mr. Obradović made payments with loans proceeds from the

[101] Rej., §775 relying on Exh. RLA-5, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009.

Lundins is ill-conceived. The Lundins started to provide funding on 15 September 2005 when they wired EUR 3.3 million to MDH's account in Serbia. Mr. Obradović had access to that account and used part of these funds to pay the first instalment of the purchase price. Mr. Rand's assumption, through Sembi, of Mr. Obradović's EUR 13.8 million debt to the Lundins and its subsequent repayment (up to EUR 5.6 million) constitutes Mr. Rand's contribution. Further, the Privatization Agency expressly confirmed the making of the additional EUR 2 million investment, and the Claimants have shown that this additional investment was also financed from the money loaned by the Lundins.

221. The Claimants further submit that, in any event, as Sembi's direct and indirect co-owners, all of the Canadian Claimants can benefit from Sembi's contributions, including those made prior to Mr. Rand's children becoming the indirect co-owners of Sembi. An indirect owner of an investment cannot be excluded from investment protection simply because the investment in the host country had been made by the holding company before the indirect owner acquired an interest in the holding company.

222. The Claimants oppose Serbia's theory that the transfer of money from Mr. Rand to the Lundin Family and their companies is irrelevant since it did not lead to the acquisition of Mr. Obradović's shares in BD Agro by Sembi and the funds were not used for the purpose of furthering the BD Agro's business. They point out that if that theory were to be accepted, an investor buying an existing investment would never be able to satisfy the "contribution" criterion of the *Salini* test.

223. The Claimants equally rebut Serbia's submission that the same contribution cannot count for both Mr. Rand and Sembi. The channelling of investments through holding companies, such as Sembi, is commonplace. The contribution made by the holding company is also a contribution by its shareholder.

(ii) Duration

224. The Claimants contend that the duration of the Claimants' investment was ten years with respect to Mr. Rand and seven years for the remaining Claimants. This amply satisfies the duration requirement.

(iii) Risk

225. The Claimants submit that their investment in BD Agro involved not only risks inherent to the volatile agricultural business, but also significant risks connected with the unpredictable legal and business environment in Serbia. This suffices to fulfil the "risk" condition.

(iv) Contribution to development

226. The Claimants submit that BD Agro substantially contributed to Serbia's development. It was praised by politicians in Serbia and Canada, business partners, and the media, for such achievement.

(3) Analysis

227. The ICSID Convention does not define the term "investment." For Serbia, the Tribunal should ascribe an "objective" definition to that term, while the Claimants consider that the Tribunal should limit itself to applying the definition of investment contained in the Treaties.

228. To resolve this disagreement, the Tribunal turns to the rules of interpretation of treaties contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention"). Applying those rules, the Tribunal must interpret the term "investment" in Article 25(1) by giving the term its ordinary meaning, in its context and in light of the object and purpose of the Treaty. As held by many investment awards, in the ordinary meaning of the term, an investment is (i) a contribution or allocation of resources, (ii) made for a duration; and (iii) involving risk, which includes the expectation of a profit (albeit not necessarily fulfilled). As noted by the tribunal in *Saba Fakes*, these components "are both necessary and sufficient to define an investment within the framework of the ICSID Convention."[102] The development of the host State's economy is a consequence of a successful investment, not a self-standing condition of the latter's existence. As such, it is not a component of an investment, an opinion shared by a number of prior investment awards.[103]

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[102] Exh. CLA-90, *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, §§108-110.

[103] See, for instance, Exh. CLA-90, *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, §111; Exh. RLA-024, *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, §§224-25; Exh. RLA-095, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case

229. The Tribunal does not share the view expressed for instance by the *Phoenix* tribunal pursuant to which compliance with the laws of the host State and respect of good faith are elements of the objective definition of investment under Article 25(1) of the ICSID Convention. Contracting Parties to an investment treaty are free to include these requirements in their investment treaties, and many do so. This does not mean, however, that requirements of lawfulness and compliance with good faith are part of the definition of investment and should thus be implied into Article 25(1) of the Convention, as several tribunals have observed.

230. In *Saba Fakes*, for example, the tribunal explained:

> "As far as the legality of investments is concerned, this question does not relate to the definition of 'investment' provided in Article 25(1) of the ICSID Convention and in Article 1(b) of the BIT. In the Tribunal's opinion, while the ICSID Convention remains neutral on this issue, bilateral investment treaties are at liberty to condition their application and the whole protection they afford, including consent to arbitration, to a legality requirement of one form or another."[104]

231. Similarly, the *Metal-Tech* tribunal held:

> "[…] the Contracting Parties to an investment treaty may limit the protections of the treaty to investments made in accordance with the laws and regulations of the host State. Depending on the wording of the investment treaty, this limitation may be a bar to jurisdiction, i.e. to the procedural protections under the BIT, or a defense on the merits, i.e. to the application of the substantive treaty guarantees. Similarly, a breach of the general prohibition of abuse of right, which is a manifestation of the principle of good faith, may give rise to an objection to jurisdiction or to a defense on the merits."[105]

232. In conclusion, Article 25(1) of the Convention contains no such requirements, and the Tribunal sees no legal justification for reading them into the Convention. As a consequence, the Tribunal therefore turns to determine whether the three elements of the objective definition of investment identified above (§228) are met in this case.

No. ARB/09/8, Award, 17 October 2013, §§171-73; Exh. CLA-067, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, §295; Exh. CLA-032, *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, §187.

[104] Exh. CLA-90, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, §114.

[105] Exh. RLA-161, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, §127.

(i) Contribution

233. The Claimants insist that their contribution towards their investment in Serbia being the interest they acquired in BD Agro through the Beneficially Owned Shares is the payment of the EUR 5.5 million purchase price for the Beneficially Owned Shares as well as the EUR 2 million additional investment in BD Agro. Serbia argues to the contrary that these payments cannot be considered as the Claimants' contribution because they were made by Mr. Obradović from loans he had obtained from the Lundins.

234. In the context of the assessment of the existence of a contribution as a prerequisite for an investment, investment tribunals have long held that contributions to the host State can take several forms,[106] that the origin of capital is irrelevant,[107] and that the reality of the contribution is to be assessed taking into account the totality of the circumstances and the elements of the economic goal pursued.[108]

235. In *Caratube v. Kazakhstan*,[109] for instance, the tribunal observed:

> "The Tribunal agrees with Claimant that, subject to express provisions to the contrary, the origin of capital used to make an investment is immaterial for jurisdiction purposes. However, there still needs to be some economic link between that capital and the purported investor that enables the Tribunal to find that a given investment is an investment of that particular investor."

236. That tribunal further explained:

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[106] Exh. RLA-171, *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, §125 ("Contributions to the host State can take several forms, not only financial."). See also, Exh. CLA-67, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka,* ICSID Case No. ARB/09/02, Award, 31 October 2012, §297 ("[a] contribution can take any form [and] […] is not limited to financial terms but also includes know-how, equipment, personnel and services."); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, §131.

[107] *Tradex Hellas S. A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999; Exh. CLA-152, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000; Exh. RLA-72, *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004; *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007; *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007.

[108] Exh. RLA-171, *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, §125.

[109] Exh. CLA-28, *Caratube International Oil Company LLP v. Republic of Kazakhstan,* ICSID Case No. ARB/08/12, Award, 5 June 2012, §355.

> "The capital can come from the investor's own funds located in any country, from its subsidiaries or affiliates located in any country, from loan, credit or other arrangements."

237. There must thus be an economic link between the funds and the investor which is such that the contribution made with the funds is that of the investor. What matters is the economic reality of the contribution in consideration of all the relevant circumstances, not the formal arrangements used. An investor could very well borrow money from third parties to make an investment. What matters is that the investor is the one ultimately bearing the financial burden of the contribution.

238. Here, the facts ranging from the commencement of the privatization process until the termination of the Privatization Agreement show that Mr. Rand was the one bearing the financial burden of the investment:

- The MDH Agreement, which was concluded between MDH, Mr. Rand's company, and Mr. Obradović on 19 September 2005, gave the former the right to cause Mr. Obradović to exercise the voting rights attached to the shares of BD Agro as instructed by Mr. Rand through MDH:

  > "The Seller [Mr. Obradović] agrees to execute any documents from time to time in order to acknowledge the claims of the Purchaser herein and agrees to vote any Shares held by him from time to time at any Shareholders Meeting of the Company in accordance with instructions received from the Purchaser [MDH]."[110]

- The Board of Directors of BD Agro was to be composed of Mr. Rand's nominees:

  > "The Seller further agrees to cause the Board of Directors of the Company to consist of those parties nominated or agreed to by the Purchaser [MDH]."[111]

- BD Agro was to be managed in accordance with MDH's, *i.e.* Mr. Rand's, instructions:

[110] Exh. CE-15, Share Purchase Agreement, 19 September 2005, Art.5.

[111] Exh. CE-15, Share Purchase Agreement, 19 September 2005, Art.5.

> "The Seller shall follow the instructions of the Purchaser with regard to the management of the Company and shall use his best efforts at all times to enhance the value and income of the Property."[112]

- On the day on which Mr. Obradović acquired the shares of BD Agro through the privatization process, the Assistant Minister of Economy, Mr. Jovanović, congratulated Mr. Rand for the "farm acquisition":

> "Dear Bill,
> I presume that George has already informed that you all succeeded in farm acquisition! […] I will coordinate with George our presence at the farm!"[113]

- After the privatization, Mr. Rand was appointed to BD Agro's Board and exercised control over its operations. This included receiving financial reports and discussing BD Agro's financing needs with senior management,[114] receiving reports on a number of other issues affecting BD Agro,[115] visiting BD Agro himself to control its operations[116] and communicating with external consultants and business partners[117] towards whom he presented himself as

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[112] Exh. CE-15, Share Purchase Agreement, 19 September 2005, Art.5.

[113] Exh. CE-16, E-mail from Mr. Ljubiša Jovanović to Mr. William Rand, 29 September 2005. The email appears to have been sent from Mr. Jovanović's official email address and signed by him with his official title ("Assistant Minister, Republic of Serbia, Ministry of Economy"). That Mr. Jovanović was later appointed as BD Agro's CEO does not alter these facts.

[114] Exhs.CE-622 to CE-637, CE-443, Email from Marine Drive Holdings Inc. to W. Rand and P. Bagnara, 29 December 2006, CE-413, Email from K. Lutz to D. Obradović, 16 November 2006.

[115] Exhs. CE-598, Email from BD Agro to W. Rand, 10 January 2008, CE-608, Email from A. Janicić (BD Agro) to K. Lutz, 20 December 2007, CE-609, Email from Marine Drive Holdings Inc. to W. Rand, 10 January 2008, CE-610, Email from W. Rand to Marine Drive Holdings Inc., 15 February 2006, CE-611, Email communication between W. Rand and BD Agro, 26 July 2006, CE-605, Email communication between W. Rand and A. Jorga, 10 August 2006, CE-612, Email from Marine Drive Holdings Inc. to W. Rand re Sokolac, 10 January 2008, CE-613, Email from L. Jovanović to W. Rand, 27 February 2006, CE-601, Email from L. Jovanović to W. Rand, 1 June 2006, CE-614, Email from A. Jorga to W. Rand, 1 August 2006, CE-620, Email from A. Jorga to W. Rand, 30 June 2006, CE-608, Email from A. Janicić (BD Agro) to K. Lutz, 20 December 2007.

[116] Exhs. CE-638, Email communication between W. Rand and L. Jovanović, 31 March 2006, CE-414, Email from W. Rand to D. Obradović et al., 1 September 2006 ("BD Agro is a much more complicated situation and I will be discussing the financial information and statements with George and Ljubisa when I get there […] also would like to review, for each company, their financial performance, staffing levels, business prospects and projected cash flow numbers for the balance of 2006 and for calendar 2007. I also want to get a complete inventory schedule including book and fair values, a list of all employees, their job and their salary and a detailed list of all non-current accounts payable and an explanation of their history.").

[117] Exhs. CE-641 to CE-647. See also Exh. CE-649, Email communication between W. Rand and R. Kovaćević, 19 November 2006 ("have asked my agent in Serbia, Mr. George Obradović, to give you a call to discuss the business proposals in your letter.").

the owner or operator of BD Agro.[118] This evidence also shows that Mr. Rand often controlled BD Agro's operations directly without any involvement from Mr. Obradović.

- On 22 February 2008, Mr. Obradović and Sembi concluded the Sembi Agreement in the circumstances described above (§23), Mr. Rand signing the Agreement on Sembi's behalf. The Agreement provided that, as of that date, Mr. Obradović assigned all of his rights, title and interest in the Privatization Agreement to Sembi.[119] Mr. Rand was always in full control of Sembi[120] and continued to control BD Agro through Sembi. For instance, over the course of 2008-2010, the Board of Directors of Sembi repeatedly discussed BD Agro matters,[121] including issues such as progress on farm construction work and

[118] Exhs. CE-696, Email communication between W. Rand and A. King (EBRD), 10 June 2008, CE-701, Email communication between W. Rand and L. Rougeau, 16 September 2008, CE-698, Email communication between W. Rand and T. Smith (Dairy Strategies), 28 July 2008, CE-700, Email from V. Nedeljković to W. Rand, 22 August 2010.

[119] Exh. CE-29, Agreement between Dj. Obradović and Sembi, 22 February 2008, Art. 4 ("Mr. Obradović, in consideration for [Sembi] assuming such obligations, has agreed to transfer to the Purchaser all his right, title and interest in and to the [the Privatization Agreement].").

[120] Serbia does not deny that Mr. Rand controlled Sembi. Mr. Markićević, one of Sembi's directors testified that he would follow Mr. Rand's directions when acting as a director of Sembi. See Markićević WS II, §12 ("I agreed with Mr. Rand to always follow his directions when acting as a director of Sembi."). Mr. Obradović, another of Sembi's directors said the same. See Obradović WS II, §39 ("[I] […] agreed that, as director of Sembi, I would always follow Mr. Rand's orders."). See also Mr. Rand's contemporaneous communications at Exh. CE-7, Instructions Letter from Rand Investments to HLB Axfentiou Limited, 31 December 2007 ("[A]ll instructions regarding [Sembi] should be accepted only if given by myself, acting /signing singly […]"). Sembi's two shareholders are Rand Investments Ltd., a company solely owned by Mr. Rand, and the Ahola Family Trust, the beneficiaries of which are Mr. Rand's children. Mr. Rand had an oral control agreement with Mr. Jennings, the sole trustee of the Ahola Family Trust (see Jennings WS 1, §7 ("My appointment as trustee was conditioned upon an agreement (the "Control Agreement") that I had with Mr. Rand that I would, so long as I was trustee, seek and follow instructions from him in respect of all matters involving the Trust. I consider this agreement to be enforceable by Mr. Rand against me and I have at all times acted consistent with this agreement and sought and followed all instructions from Mr. Rand in respect of the Trust."; see also Tr., Hearing on Jurisdiction and Merits, Day 2, 123:01-05). While Serbia points out that the Trust Indenture (Exh. CE-8, The Ahola Family Trust Indenture, 6 March 1995) does not mention Mr. Rand, this does not change the fact that Mr. Jennings sought and followed Mr. Rand's directions pursuant to their oral control agreement. Serbia has not cogently contested the validity of this agreement.

[121] Exh. CE-422, Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 12 May 2008, pp. 1-2; Exh. CE-423, Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 28 November 2008, pp. 1-2; Exh. CE-425, Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 11 May 2009, pp. 1-2; Exh. CE-426, Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 27 November 2009; Exh. CE-427, Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 7 May 2010, p. 1; Exh. CE-191, Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 12 October 2010, p. 2.

the status of BD Agro's herd and crops.[122] It approved strategic decisions, including the sale of BD Agro's land, the acquisition and reconstruction of the Sokolac farm, and the reconstruction of BD Agro's premises.[123]

- Later in 2008, Mr. Rand paid EUR 2.2 million directly to Canadian suppliers and vendors for the purchase and transport of heifers from Canada to BD Agro.[124]

- Over the course of 2008 to 2010, Mr. Rand forwarded funds to Sembi that were then used for partial repayment of Sembi's debts under the Lundin Agreement.[125] That Agreement recognizes that, if any payment under that Agreement was delayed for more than three months, Mr. Obradović and Sembi (controlled by Mr. Rand) would immediately list BD Agro for sale.[126]

- In March 2013, Mr. Rand advised BD Agro's management, including Messrs. Obradović, Jovanović, Markićević and Broshko, that Mr. Wood would arrive to Belgrade in the upcoming week "to take over supervision of cattle and farm operations and assist [Mr. Jovanović] with all other farm issues" and instructed them to make appropriate logistical arrangements.[127]

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[122] Exh. CE-422, Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 12 May 2008, pp. 1-2; Exh. CE-423, Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 28 November 2008, pp. 1-2; Exh. CE-425, Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 11 May 2009, pp. 1-2; Exh. CE-426, Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 27 November 2009; Exh. CE-427, Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 7 May 2010, p. 1; Exh. CE-191, Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 12 October 2010, p. 2.

[123] Exh. CE-422, Minutes of a meeting of the Board of Directors of Sembi Investment Limited, 12 May 2008, pp. 1-2.

[124] Exh. CE-21, 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.

[125] See for e.g., Exhs. CE-57, Confirmation of wire transfer from Sembi to Mr. Ian Lundin for EUR 1,200,000.00, 16 July 2008, CE-58, Confirmation of wire transfer from Sembi to FBT Avocats for EUR 2,400,000.00 executed, 16 July 2008, CE-60, Confirmation of EUR 3,610,000.00 wire transfer from William Rand to Sembi, 3 August 2008, CE-61, Confirmation of EUR 2.010.000.00 wire transfer from Indonesian Developments Co. Ltd. to Sembi, 13 October 2010. Rand WS I, §33; Azrac WS I, §16.

[126] Exh. CE-28, Agreement between Mr. Djura Obradović, The Lundin Family, Mr. William Rand and Sembi, 22 February 2008, Art. 2.

[127] Exh. CE-429, Email from W. Rand to BD Agro, 29 March 2013.

- In April 2013, Mr. Rand sent BD Agro's management including Messrs. Obradović, Jovanović, Markićević and Wood, the agenda for an upcoming meeting of BD Agro's Management Board, which included important matters such as the appointment of Mr. Wood as a member and of Mr. Markićević as Chairman of BD Agro's Management Board.[128]

- In 2013, Mr. Rand, who was not sitting on BD Agro's Board at the time, [129] instructed Mr. Obradović to step away from the management of BD Agro. Further, he caused Mr. Igor Markićević to be appointed as Chairman[130] and Mr. David Wood as member of the Board of Directors.[131]

- In 2013, Mr. Rand directed Mr. Obradović to assign the Privatization Agreement to Coropi Holdings Limited,[132] a Cypriot company nominally owned by Mr. Jennings as trustee of the Ahola Family Trust.[133] There was no link between Mr. Obradović and Coropi, except through Mr. Rand, who was in control of the Ahola Family Trust.

- In 2014, in the course of BD Agro's bankruptcy, Serbian state agencies were informed that BD Agro's owner was Canadian and that his representative would like to discuss the pre-pack reorganization plan which was then being considered.[134]

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[128] Exh.CE-428, Email from W. Rand to L. Jovanović et al., 10 April 2013.

[129] Mr. Rand left BD Agro's Management Board nine months earlier, on 9 July 2012. See Exh. CE-72, Confirmation of the Serbian Business Register Agency on the Members of Management Board and Board of Directors of BD Agro, 23 August 2017, p. 4 (pdf).

[130] Markićević WS I, §15; WS II §§6-7, Broshko WS II, §§6-12. See also Exh. CE-428, Email from Mr. Rand to Mr. Obradović, 10 April 2013 ("This will confirm our discussions of this morning that a BD Agro board meeting will be held at the offices of Crveni Signal tomorrow at 10 am local time. The agreed agenda is as follows: 1. David Wood is appointed a director to fill the vacancy. 2. Igor Markicevic is appointed Chairman of the Board of Directors.").

[131] Markićević WS II, §§6-7, 21; Broshko WS II, §§6-12.

[132] Rand WS I, §45; Obradović WS I, §37.

[133] Exh. CE-83, Certificate of Shareholders in Coropi Holdings Limited, 15 July 2013.

[134] Exh. CE-289, Email from Mr. Markićević to Mr. Ristović, 22 April 2014 ("Representative of the owner from Canada is arriving in Belgrade today and the plan is for him to meet all key creditors whose support we need to adopt the PPRP.").

239. For the Tribunal, the evidence just reviewed unequivocally demonstrates that Mr. Rand was the investor involved in BD Agro's acquisition and operation. Serbia too was aware of Mr. Rand's involvement:

- Prior to the privatization of BD Agro, Mr. Rand corresponded with senior Serbian government officials[135] *inter alia* indicating his interest in purchasing BD Agro.[136]

- As already mentioned, on the day when Mr. Obradović succeeded in acquiring the shares of BD Agro through the privatization process, the Deputy Minister of Economy, Mr. Jovanović,[137] wrote to Mr. Rand to congratulate him on the acquisition of the farm.

- In 2013, the then Minister of Economy was asked to arrange a meeting with Mr. Broshko "the representative of the owner of the company BD Agro Dobanovci from Canada", for furthering the development plan of BD Agro and informing Mr. Rand, "who is a majority owner of PD BD Agro."[138]

- At a meeting held on 15 December 2014 with representatives of the Ministry of Economy[139] and the Privatization Agency[140] to discuss BD Agro's breaches of the Privatization Agreement, Messrs. Broshko and Markićević were recognized as "representatives" of BD Agro not as representatives of Coropi or of Mr. Obradović.[141] At the time, Mr. Broshko

[135] Exh. CE-13, Email from L. Jovanović to W. Rand, 16 May 2005; CE-816; Email from L. Jovanović to W. Rand, 13 May 2005; Exh. CE-16, E-mail from L. Jovanović to W. Rand, 29 September 2005.

[136] Exh. CE-14, Email from W. Rand to P. Bubalo, 4 June 2005 ("While in Belgrade I made two visits to see the 'Buducnost', Dobanovci agricultural operation. […] I would be interested in participating in the auction sale of the company […].").

[137] Exh. CE-16, E-mail from L. Jovanović to W. Rand, 29 September 2005.

[138] Exh. CE-769, Email communication between M. Kostić, S. Radulović and V. Milenković, 18 December 2013, pp. 1-3.

[139] Exh. RE-38, Dragan Stevanovic, State Secretary, Ministry of Economy, Neda Galic, Ministry of Economy, Andrijana Stojkovic, Ministry of Economy, Jasmina Rankovic, Ministry of Economy. See Minutes of the meeting at the Ministry of Economy, 15 December 2014, p. 1.

[140] Exh. RE-38 Branka Radovic Jankovic, Privatization Agency, Julijana Vuckovic, Privatization Agency and Mira Kostic, Privatization Agency. See Minutes of the meeting at the Ministry of Economy, 15 December 2014, p. 1.

[141] Exh. RE-38, Minutes of the meeting at the Ministry of Economy, 15 December 2014, p. 1. While the English translation of this document uses the word "representative" in singular, at the hearing it was clarified

was Executive Director of Rand Investments. More significantly, before the meeting even began, Ministry officials asked Mr. Obradović – not Rand Investments' representative, Mr. Broshko - to leave the room and the meeting was then held without his presence with Messrs. Broshko and Markićević.

- As was previously noted, in the course of BD Agro's bankruptcy, competent Serbian state agencies were informed that BD Agro's owner was Canadian and that his representatives intended to address the pre-pack reorganization plan then in discussion.[142]

240. It is equally clear to the Tribunal that the funds for the acquisition of the Beneficially Owned Shares came from Mr. Rand. Indeed, it is not disputed that the purchase price of EUR 5.5 million was fully paid.[143] Mr. Obradović did not have funds to finance the acquisition of the Beneficially Owned Shares himself,[144] and took loans from the Lundin family for the same.[145] Mr. Rand arranged these loans,[146] Mr. Obradović receiving approximately EUR 13.8 million

that the Serbian original uses the word "representatives" in plural. See Tr., Hearing on Jurisdiction and Merits, Day 4, 12:9-24.

[142] Exh. CE-289, Email from Mr. Markićević to Mr. Ristović, 22 April 2014 ("Representative of the owner from Canada is arriving in Belgrade today and the plan is for him to meet all key creditors whose support we need to adopt the PPRP."). For the sake of completeness, the Tribunal notes that some exhibits in the record might be understood as showing that certain state officials did not know that Mr. Rand controlled BD Agro (Exhs. CE-320, Letter from BD Agro to the Ministry of Economy and Privatization Agency, 5 November 2014, CE-48, Letter from Mr. Djura Obradović to Privatization Agency, 8 September 2015, and CE-907, Decision of the Court of Appeal in Belgrade, 26 May 2021). Having reviewed them, it finds that they are insufficient to displace the evidence just referred to, not to speak of the fact that there is no requirement of knowledge on the part of the Host State under the Canada-Serbia BIT.

[143] Exh. CE-19, Confirmation of the Privatization Agency on the Buyer's full payment of the Purchase Price, 6 January 2012.

[144] Obradović WS II, §§7, 19-20.

[145] Exh. CE-28, Agreement between Mr. Djura Obradović, The Lundin Family, W. Rand and Sembi, 22 February 2008. The Respondent agrees. See C-Mem, §498. ("The purpose of the [Sembi Agreement] was to settle [Mr. Obradović's] debts towards the Lundin Family and it clearly implies that those debts were acquired in the process of BD Agro's acquisition.").

[146] Serbia recognizes this. See Respondent's Opening Presentation, pp. 10,12. See also Rand WS II, §§13, 27, 52, 57; Obradović WS II, §§19-20; Azrac WS I, §12.

from the Lundins.[147] Mr. Rand,[148] Mr. Azrac[149] and Mr. Obradović[150] all testify that these loans were used to fund BD Agro's privatization. This is also clear from the fact that Mr. Lundin, a second-generation billionaire, was on BD Agro's Management Board and the Lundins' had an option to convert their receivables into equity.[151] Mr. Rand was liable to repay the loans[152] and did so by October 2010,[153] after which the sixth instalment of the purchase price was paid in April 2011.[154] Interest that had accrued because of the delay in payments of the purchase price was paid even later on 30 December 2011,[155] long after the Lundins indicated their interest to exit from the project in 2008.[156] Further, under the Sembi Agreement, Sembi was to make the additional EUR 2 million investment required by the Privatization Agreement.[157] While Serbia does question whether this payment was made, the record shows that it was.[158] Monies paid by Sembi were "ultimately committed" by Mr. Rand, who also personally guaranteed all of Sembi's and Mr. Obradović's obligations to the Lundins.[159] Thus, while Mr. Obradović formally paid the purchase price, he did so with money originating from a loan that Mr. Rand arranged and was liable to repay. There is thus a clear economic link between the funds and Mr. Rand, the circumstances showing that the

[147] Rej. J., fn. 39. Serbia agrees that "foreign payments" were made to Mr. Obradović's personal bank accounts. Rej., §§ 327-328.

[148] Rand WS I, §§16-17, §§30-33.

[149] Azrac WS I, §§9-16.

[150] Obradović WS II, §§19-20 ("[A]ll of the funds used for the acquisition of the Privatized Shares and for further investment in BD Agro, were secured by Mr. Rand. They were provided to me through loans from the Lundin family […]."). See also, Obradović WS II, §48.

[151] Tr., Hearing on Jurisdiction and Merits, Day 2, 65:5-12 (Azrac). See also Azrac WS, §13; Rand WS I, §16; Rand WS II, §13.

[152] See, for instance, the 2008 Lundin Agreement, which makes Mr. Rand liable for the loans taken from the Lundins. Exh. CE-28, Agreement between Mr. Djura Obradović, The Lundin Family, W. Rand and Sembi, 22 February 2008.

[153] Rand WS I, §33; Azrac WS I, §16.

[154] Exh. RE-33, Banking excerpts confirming payment of installments of purchase price by Mr. Obradović, 15 October 2015.

[155] Exh. RE-33, Banking excerpts confirming payment of installments of purchase price by Mr. Obradović, 15 October 2015.

[156] Exh. CE-28, Agreement between Mr. Djura Obradović, The Lundin Family, W. Rand and Sembi, 22 February 2008.

[157] Exh. CE-29, Agreement between Dj. Obradović and Sembi, 22 February 2008, §3.

[158] Exh. CE-18, Confirmation of the Privatization Agency of the Completion of Investment, 10 October 2006.

[159] Exh. CE-28, Agreement between Mr. Djura Obradović, the Lundin Family, W. Rand and Sembi, 22 February 2008.

payment of the purchase price was his contribution, not that of Mr. Obradović or the Lundins.[160]

241. For the same reasons, the Tribunal rejects Serbia's argument that the "Claimants have not adduced contemporaneous evidence that the Lundins', the Claimants' and/or Mr. Obradović's money was in fact used to finance the Privatization of BD Agro."[161] The evidence just reviewed shows that the Lundins' and then Mr. Rand's funds were used to fund BD Agro's privatization, in exchange for which Mr. Rand acquired an interest in the Beneficially Owned Shares and exercised control over BD Agro's operation and management.

242. The Tribunal also rejects Serbia's argument that the first instalment of the purchase price of EUR 2.1 million, made on 15 October 2005, must have been paid with Mr. Obradović's own funds because he allegedly received the first payment from the Lundins only on 2 January 2006. The record shown that the Lundins started providing funding on 15 September 2005 when they wired EUR 3.3 million to MDH's account in Serbia.[162] Mr. Obradović had access to that account and used a part of these funds to pay the first instalment of the purchase price.[163] As already explained, Mr. Rand arranged for this loan and later assumed Mr. Obradović's entire debt to the Lundins.

243. The Tribunal equally rejects Serbia's challenges to the payment of four of the remaining five instalments of the purchase price. To the extent Serbia contests whether these payments came from the Lundins/Mr. Rand's monies, this has just been addressed. To the extent that Serbia also contests that these instalments were paid out of money siphoned out of BD Agro, this argument is addressed below in the context of Serbia's legality objections (§§348 et seq.) to the extent necessary.

244. The Respondent appears to question Mr. Rand's involvement in BD Agro on the basis that Mr. Obradović concluded certain transactions without the former's knowledge, pointing specifically to the land assignment transaction or the loans to Inex and Crveni Signal. At its

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[160] Exh. CE-28, Agreement between Mr. Djura Obradović, the Lundin Family, W. Rand and Sembi, 22 February 2008; Rand WS I, §§16-17, §§30-33; Azrac WS I, §§9-16. See also documentary evidence mentioned at Reply, fn.748.

[161] Rej. §327.

[162] Exh. CE-384, Confirmation of transfer of EUR 3,312,740 from Mr. Lundin to Marine Drive Holding, 15 September 2005.

[163] Rej. J., §476.

height, BD Agro was one of the largest dairy farms in the region, with numerous operations. It would be unreasonable to expect Mr. Rand, the ultimate controller of the farm to be aware of each of Mr. Obradović's dealings. That Mr. Rand was unaware of some BD Agro's operations does not overcome the wealth of evidence of Mr. Rand's involvement or his financial contribution set out above. Mr. Obradović's testimony that Mr. Rand gave him "a lot of leeway" in the operations of BD Agro only confirms Mr. Rand's involvement.[164]

245. Neither does the Tribunal see the relevance of Mr. Obradović's motivation to operate BD Agro at Mr. Rand's behest[165] or Mr. Jovanovic's statement holding Mr. Obradović out as owner of BD Agro.[166] What matters for the present purposes is that contemporaneous evidence shows that Mr. Rand was involved in BD Agro, either directly or through Mr. Obradović, for which he contributed.

246. The Respondent also emphasizes that there is no evidence of any written instructions from Mr. Rand to Mr. Obradović concerning BD Agro. In this respect, the Tribunal recalls Mr. Rand's testimony at the hearing that he gave oral instructions to Mr. Obradović.[167] In any event, there is evidence of written instructions as well.[168] Anyhow, the absence of written instructions would not alter the evidence examined above, all of which points to Mr. Rand's involvement.

247. Furthermore, Serbia objects that it had no knowledge of Mr. Rand's control of BD Agro, which was not disclosed by Mr. Rand, Mr. Obradović or other BD Agro representatives. In this connection, the Tribunal notes that the BIT does not require that the host State have knowledge of the foreign nature of an investment and of the identity of the investor at the

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[164] Tr., Hearing on Jurisdiction and Merits, Day 2, 102:16-19 (Obradović)

[165] In this context, the Tribunal recalls that Mr. Obradović testified that he worked for Mr. Rand based on a success fee which would be paid if Mr. Rand's investments became profitable. Mr. Rand also advanced funds to Mr. Obradović's personal expenses (Obradović WS I, §7; Obradović WS II, §7; Obradović WS III, §8; Tr., Hearing on Jurisdiction and Merits, Day 2, 85:21-86:21).

[166] Rej., §30.

[167] Tr., Hearing on Jurisdiction and Merits, Day 2, 6:10-7:13.

[168] Tr., Hearing on Jurisdiction and Merits, Day 2, 6:10-7:13. Mr. Rand confirmed that he sent instructions by email to Mr. Obradović's address president@bdagro.com. See also Exh. CE- 428, E-mail from Mr. Rand to Messrs. Markićević, Jovanović, Broshko, and Obradović, 10 April 2013; Exh. CE-429, E-mail from Mr. Rand to BD Agro, 29 March 2013; Exh. CE-649, Email communication between W. Rand and R. Kovaćević, 19 November 2006 ("have asked my agent in Serbia, Mr. George Obradović, to give you a call to discuss the business proposals in your letter.").

time of a breach. In any event, as was seen above, the evidence on record shows that Serbia was aware of Mr. Rand's control over BD Agro.

248. Similarly, the Tribunal is unconvinced by Serbia's submission that Mr. Rand's involvement in BD Agro's affairs can be explained away because he was a director and indirectly held a minority stake in BD Agro. The fact that Mr. Rand was appointed to BD Agro's board on 9 December 2005 itself suggests that he exercised an element of control over BD Agro.[169] It is true that Mr. Rand stepped down from the board on 9 July 2012. However, the evidence examined above demonstrates that he continued to exercise control over BD Agro well after that date and that his control exceeded the powers of a minority shareholder. For the same reasons, the Respondent's speculation that "it is perfectly conceivable that the ultimate de facto owner or controller of BD Agro was not Mr. Rand but some member of the Lundin family"[170] does not appear plausible.

249. Finally, Serbia also questions the Lundins' motives in funding the acquisition of BD Agro,[171] as well as the fact that they decided to abandon the project in 2008.[172] Neither of these arguments are pertinent to assess the existence of a contribution.

250. The Tribunal thus concludes that Mr. Rand did indeed contribute towards the acquisition of an interest in BD Agro through investments in Serbia.

251. The contributions of the remaining Claimants are less clear.

252. As far as Claimant 1 is concerned, the Claimants do not allege that Rand Investments contributed towards the acquisition of an interest in BD Agro through the Beneficially Owned Shares separately from Mr. Rand's contributions.[173] For the reasons set out below, the Tribunal regards this contribution as Mr. Rand's contribution, not as a separate contribution of Rand Investment Ltd.

[169] He only commenced to acquire the 3.9% stake held through MDH in October 2008.
[170] Tr., Hearing on Jurisdiction and Merits, Day 1, 171:23-25.
[171] R-PHB 1, §24.
[172] R-PHB 1, §§24, 35.
[173] Rej. J., §481 et seq.

253. For Claimants 3, 4 and 5, i.e. Mr. Rand's children, the Claimants admit that their contributions depend entirely on the contributions of (i) Mr. Rand and (ii) Sembi.[174]

254. For (i), relying on the decision in *Renée Rose Levy de Levi v. Peru*, the Claimants contend that Mr. Rand's children can rely on contributions made by Mr. Rand. [175] However, the facts of that case significantly differ from those of the present dispute. The initial investment in that case was made by the claimant's relatives and was later transferred to Ms. Levy de Levi. Neither her father nor any other relative brought claims in the arbitration. By contrast, here, the Claimants argue that both Mr. Rand and his children made an investment based on the same contribution. However, the analysis above makes clear that the contribution was not made by his children or out of the children's money, which, as mentioned, the Claimants also accept. Therefore, that contribution cannot be credited to the children. This may have been different if Mr. Rand and his children had made the contribution jointly. However, there is no indication on record to this effect. Here, Mr. Rand's contribution cannot be used to open access to arbitration to the other claimants who made no contribution.

255. As for (ii), i.e. whether the children can rely on Sembi's contribution, the preliminary question that arises is whether Sembi has at all contributed.

256. The Claimants insist that Claimant 6, i.e. Sembi, "made a substantial contribution because it repaid Mr. Obradović's loans to the Lundins."[176] They admit, however, that Mr. Rand controlled Sembi since February 2008[177] and that it was Mr. Rand, not Sembi, who repaid

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[174] Reply, §§677-679 ("The remaining Canadian Claimants—Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand—were not required to make any independent contribution. First, as the beneficiaries of the Ahola Trust (which owned shares in Sembi), Mr. Rand's children can rely on the contribution made by Sembi. […] Second, as his children, they can rely on contributions made by Mr. Rand.").

[175] Reply, §679.

[176] Reply, §676.

[177] See, for e.g., C-PHB 2, §30 ("Mr. Rand has controlled Sembi at all times since February 2008."). Mr. Markićević testified that he would follow Mr. Rand's directions when acting as a director of Sembi. See Markićević WS II, §12 ("I agreed with Mr. Rand to always follow his directions when acting as a director of Sembi.") and Jennings WS I, §14 ("I have left the management of and control over both Sembi and Coropi to Mr. Rand"). Mr. Obradović said the same. See Obradović WS II, §39 ("[I] agreed that, as the director of Sembi, I would always follow Mr. Rand's orders."). See also Mr. Rand's contemporaneous communications at Exh. CE-7, Instructions Letter from Rand Investments to HLB Axfentiou Limited, 31 December 2007 ("[A]ll instructions regarding [Sembi] should be accepted only if given by myself, acting/signing singly […].").

these loans.[178] All funds paid by Sembi towards the BD Agro project were "ultimately committed" by Mr. Rand,[179] with Sembi's bank accounts merely acting as a conduit for such payments. While Sembi agreed to repay the Lundins in exchange for the latter extinguishing any claims they may have towards the Privatization Agreement and BD Agro, it was Mr. Rand who personally guaranteed all of Sembi's and Mr. Obradović's obligations to the Lundins[180] and committed funds for repaying the loans.[181] It was Mr. Rand who was involved in BD Agro's acquisition and operation. Sembi has not made any expenditure for the benefit of BD Agro's activities nor did it direct or manage BD Agro in any way. It was not involved in the acquisition of the Beneficially Owned Shares other than through Mr. Rand's involvement. In effect, Mr. Rand and Sembi seek protection under two investment treaties based on one and the same allocation of resources. They both claim that allocation as their contribution,[182] without proving that it is a joint contribution nor apportioning one part of the contribution to one and another part to the other or otherwise sharing the allocation. In the Tribunal's view, the contribution was either made by one Claimant or by another.[183]

257. A similar situation arose in *KT Asia v Kazakhstan*. There Mr. Ablyazov, a Kazakh national, acted via a number of foreign intermediaries, unofficially owning and controlling a majority

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[178] See, for instance, Reply, §625 ("Sembi committed capital in Serbia by repaying the loans of Mr. Obradović (a Serbian national), owed by him to the Lundin Family for the acquisition of shares in, and further investment to, BD Agro (a Serbian company). The funds for repaying such loans were provided to Sembi, and thus ultimately committed, by Mr. Rand."); C-PHB 2, §3(q) ("In 2008 - 2010, Mr. Rand forwarded to Sembi the funds that Sembi used for partial repayment of its debts under the Lundins Agreement."); Mem., §93.

[179] See, for instance, Reply, §625 ("Sembi committed capital in Serbia by repaying the loans of Mr. Obradović (a Serbian national), owed by him to the Lundin Family for the acquisition of shares in, and further investment to, BD Agro (a Serbian company). The funds for repaying such loans were provided to Sembi, and thus ultimately committed, by Mr. Rand.").

[180] Exh. CE-28, Agreement between Mr. Djura Obradović, the Lundin Family, W. Rand and Sembi, 22 February 2008.

[181] See, for instance, Reply, §625 ("Sembi committed capital in Serbia by repaying the loans of Mr. Obradović (a Serbian national), owed by him to the Lundin Family for the acquisition of shares in, and further investment to, BD Agro (a Serbian company). The funds for repaying such loans were provided to Sembi, and thus ultimately committed, by Mr. Rand."); C-PHB 2, §3(q) ("In 2008 - 2010, Mr. Rand forwarded to Sembi the funds that Sembi used for partial repayment of its debts under the Lundins Agreement."); Mem., §93.

[182] See, for instance, C-PHB 2, §§74-75 ("Serbia also cannot seriously claim that this contribution [being "Sembi's assumption of Mr. Obradović's EUR 13.8 million debt to the Lundins and its subsequent partial repayment (up to EUR 5.6 million)"], made by Sembi with funds provided by Mr. Rand, cannot count for both Sembi and its owners."). See also Rej. J., §676.

[183] While the Claimants insist "the contribution made by the holding company also counts as a contribution by all of its shareholders" it has advanced no authority in support of its position. C-PHB 2, §75. See also Rej. J., fn.566 ("This is completely different from a shareholder making a contribution through the holding company. In such a vertical structure, both the shareholder and the holding company make a contribution.").

interest in the Kazakh BTA Bank. In its analysis, the tribunal first noted that to establish jurisdiction, KT Asia was attempting to rely on the contribution made by its ultimate beneficial owner Mr. Ablyazov:

> "[T]he real issue is whether KT Asia can at all rely on Mr. Ablyazov's original contribution in support of the argument that it itself made an investment. In other words, the question is whether the Claimant must itself have made a contribution or whether it can benefit from a contribution made by someone else, here its ultimate beneficial owner. On this point, the Respondent insists that the contribution behind the BTA shares was made long ago by entities other than and unrelated to the Claimant, which did not contribute anything upon acquiring or while holding these shares." [184]

258. It then went on:

> "There may be nothing unlawful in Mr. Ablyazov treating the assets of companies formally owned by other persons as his personal property. However, he cannot do so and at the same time argue that the companies should be treated as a conventional commercial group when it comes to claiming treaty protection. In a sense, by seeking credit for Mr. Ablyazov's initial contribution, the Claimant [KT Asia] disavows the separate personality which it invoked previously for purposes of nationality."[185]

259. Like in *KT Asia*, here too, Sembi is seeking credit for Mr. Rand's contribution, thereby disavowing the separate personality which it invokes for seeking protection under the Cyprus-Serbia BIT. This cannot be allowed.

260. A parallel can also be drawn with *Doutremepuich v. Mauritius*. There, the tribunal found that the payment of EUR 300,000 into the account of a holding company owned jointly by two claimants were made solely by the first claimant, Christian Doutremepuich. As the second claimant, Antoine Doutremepuich, had not made a separate contribution, the tribunal determined that he had not made an investment under the France-Mauritius BIT.[186]

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[184] Exh. RLA-95, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, §192.

[185] Exh. RLA-95, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, §205.

[186] Exh. RLA-171, *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, §§13, 128-130. Although this determination was made under the France-Mauritius BIT, there too, the tribunal gave the term "investment" in Article 1(1) of the France-Mauritius BIT the same objective meaning as this Tribunal has given the term "investment" in Article 25(1) of the ICSID Convention i.e. (i) a contribution to the host State; (ii) of a certain duration; (iii) that entails participating in the risks of the operation (§§117-118).

261. Yet another parallel can be drawn with *Orascom v. Algeria*.[187] There the tribunal observed that an investor who controls several entities in a vertical chain could commit an abuse of right if he impugned the same measures for the same harm relying on different investment treaties concluded by the same state, as that was contrary to the purpose of investment treaties.[188] It is true that, unlike in this dispute, in *Orascom v. Algeria* the entities had brought separate arbitrations and that the objection turned on abuse of right and admissibility, as opposed to contribution and jurisdiction. However, there are also multiple similarities and the ratio underlying *Orascom* is equally applicable in the present circumstances.

262. Like in *Orascom*, here too, (i) the group of entities of which the Claimants form part are organized as a vertical chain; (ii) the entities in the chain were under the control of Mr. Rand, the ultimate beneficial owner; (iii) the measures complained of by the various entities, particularly by Mr. Rand and Sembi, are the same; and (iv) the damage claimed by the various entities is, in its economic essence, the same. While there is no question of an abuse, it remains that investment tribunals have long guarded against entities in a vertical chain like the one in the present dispute filing claims under different investment treaties and counting (or double-counting) the contribution of one entity as that of another in the chain, in an attempt to confer jurisdiction on several claimants.

263. Here, Mr. Rand's contribution towards the investment being an interest in BD Agro through the Beneficially Owned Shares is clear. His contribution confers *ratione materiae* jurisdiction on this ICSID tribunal to determine his claims under the Canada-Serbia BIT, provided the other jurisdictional requirements are met.

264. By contrast, Sembi has made no separate contribution towards this investment and, hence, cannot claim to have an investment of its own. It follows that, in respect of Sembi, one of the elements of the definition of investment under Article 25(1) of the ICSID Convention is not satisfied. Therefore, Sembi has no investment and, therefore, the Tribunal has no jurisdiction over Sembi's claims under the Cyprus-Serbia BIT. It does not have jurisdiction over the claims of Claimants 1, 3, 4 and 5 either. Indeed, as mentioned, these Claimants

[187] Exh. CLA-111, *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, 31 May 2017.

[188] Exh. CLA-111, *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, 31 May 2017, §§542-543.

only contributed through Sembi or through Mr. Rand. However, Mr. Rand's contribution cannot count as the contribution of every other Claimant.

265. The Tribunal's conclusion is not affected by the Claimants' later submission that Sembi made "another contribution" because Mr. Obradović paid most of the remaining instalments of the purchase price using funds obtained from BD Agro's repayment of the shareholder loans to BD Agro, which loans he had assigned to Sembi under the Sembi Agreement.[189] The Tribunal does not understand this to be a contribution different from the one already reviewed above concerning the payments of the purchase price. As already explained, while payments were formally made by Mr. Obradović, he did so with money originating from a loan that Mr. Rand arranged and was liable to repay. There is a clear economic link between the funds and Mr. Rand, the circumstances showing that the payment of the purchase price was his contribution, not that of Mr. Obradović, the Lundins or Sembi.

(ii) Duration

266. As described above, Mr. Rand acquired an interest in BD Agro through the Beneficially Owned Shares in 2005 when he arranged loans from the Lundin family for Mr. Obradović to pay the initial instalment of the purchase price. Later, through the Lundin Agreement of 2008, Mr. Rand personally guaranteed all of Sembi's and Mr. Obradović's obligations to the Lundins[190] and subsequently repaid them.[191] The sixth instalment of the Purchase Price was paid thereafter, as was the interest payable because of late payment of the instalments of the Purchase Price. Mr. Rand's involvement continued until 2015 when the Privatization Agreement was terminated, and the Beneficially Owned Shares were seized. This clearly meets the duration required under Article 25(1) of the Convention.

267. Serbia argues that the Claimants' investment lacked a duration because they had not acquired any assets in Serbia. The argument that the Claimants had no assets in Serbia has already been rejected above and has thus no bearing in the present context.

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[189] Rej. J., §482.

[190] Exh. CE-28, Agreement between Mr. Djura Obradović, the Lundin Family, W. Rand and Sembi, 22 February 2008.

[191] Rand WS I, §33; Azrac WS I, §16.

(iii) Risk

268. Mr. Rand's investment faced the usual business risks involved in investing in a foreign country. The Tribunal is satisfied that by acquiring an interest in BD Agro through the Beneficially Owned Shares, Mr. Rand bore the risk inherent in such an investment, namely the risk that the value of BD Agro might decline. This suffices to fulfil the risk requirement included in the objective definition of investment under Article 25(1) of the Convention.

269. The Respondent submits that the Claimants bore no risk because they had made no contribution. Of course, if an investor makes no contribution, it incurs no risk of losing such (inexistent) contribution.[192] Here, however, the Tribunal has found that Mr. Rand did make a contribution (§250). He bore the risks associated with that contribution, which, as just mentioned, meets the requirements of the objective definition of investment under Article 25(1) of the Convention.

b. Mr. Rand's Indirect Shareholding in BD Agro through MDH Serbia

270. The Claimants contend that they paid EUR 0.2 million to buy Mr. Rand's Indirect Shareholding in BD Agro through MDH Serbia between October 2008 and October 2012.[193] Serbia does not dispute that Mr. Rand indirectly owns 3.9% of BD Agro through MDH Serbia. It does, however, challenge that Mr. Rand paid EUR 0.2 million for this indirect ownership.[194]

271. It is well-accepted that the Claimants bear the burden of proving their contribution.[195] It is also well-accepted that the mere ownership of an asset is no proof of an allocation of resources. For instance, the tribunal in *Quiborax* stressed that "mere ownership of a share is, in and of itself, insufficient to prove a contribution of money or assets."[196]

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[192] Exh. RLA-95, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, §219.

[193] Reply, §673(c).

[194] See, for instance, R-PHB 1, §15. ("[S]ome of Claimants' alleged expenditures still remain undocumented and unproven. This is, for example, the case […] with the price of EUR 200,000 allegedly paid for MDH Serbia's 3.9 % stock in BD Agro."). See also Rej., §1028 ("is unclear exactly how did Claimants come up with the price of 200,000 EUR allegedly paid for the shares. No evidence of such payment has ever been submitted. Since the owner of shares was Mr. Rand's Serbian company (MDH Serbia), it can be inferred that it was MDH Serbia that paid for the acquisition of those shares.").

[195] See, for instance, *Raymond Charles Eyre and Montrose Developments Limited v. Democratic Socialist Republic of Sri Lanka,* ICSID Case No. ARB/16/25, Award, 5 March 2020, §§298-300.

[196] Exh. RLA-24, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Pliurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, §233.

272. Similarly, the *Caratube* tribunal observed that even if it were assumed that the claimant Hourani owned the asset in question, the tribunal would still lack jurisdiction as no evidence of a contribution of any kind was presented:

> "[E]ven if Devincci Hourani acquired formal ownership and nominal control over CIOC, no plausible economic motive was given to explain the negligible purchase price he paid for the shares and any other kind of interest and to explain his investment in CIOC. No evidence was presented of a contribution of any kind or any risk undertaken by Devincci Hourani. There was no capital flow between him and CIOC that contributed anything to the business venture operated by CIOC.
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> […]
>
> Claimant […] insisted that the origin of capital used in investments is immaterial. This is correct, however, the capital must still be linked to the person purporting to have made an investment. In this case there is not even evidence of such a link."[197]

273. The Claimants have proffered no evidence whatsoever of Mr. Rand's alleged contribution of EUR 0.2 million to acquire MDH Serbia's 3.9% stake in BD Agro. Therefore, the Tribunal must conclude that Mr. Rand's contribution towards the indirect shareholding in BD Agro is not established, with the consequence that an element of the definition of the term investment in Article 25(1) of the ICSID Convention is not met. The Tribunal thus lacks *ratione materiae* jurisdiction over this alleged investment.

c. Payments for the benefit of BD Agro

274. The Claimants allege that Mr. Rand made payments of approximately EUR 2.2 million for the replacement of BD Agro's herd. In addition, through Rand Investments, Mr. Rand also paid approximately EUR 160,000 to remunerate the services provided to BD Agro by herd management experts Messrs. Wood and Calin. The Tribunal is not convinced that these payments satisfy the duration criteria of the objective definition of investment in Article 25(1) of the Convention. For instance, the payment of consulting fees by Rand Investments does not have a significant duration, and the Claimants have not established the contrary.

275. As one of the elements of the objective definition of investment under Article 25(1) of the ICSID Convention is not met, the Tribunal does not have *ratione materiae* jurisdiction to

[197] Exh. CLA-28, *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan,* ICSID Case No. ARB/13/13, Award, 27 September 2017, §§ 675, 678.

entertain claims arising out of these payments. In addition, as seen below, these payments do not qualify as investments under the Canada-Serbia BIT (§333 et seq.).

d. Sembi's rights stemming from the Sembi Agreement

276. Mr. Rand and Sembi claim to have made one and the same investment being Sembi's acquisition of an interest in the Beneficially Owned Shares. For this investment, they allocated the same resources as their contribution.[198] As explained above, this contribution is to be considered as Mr. Rand's contribution. Sembi, in fact, has made no contribution of its own. It follows that one of the elements of the definition of investment under Article 25(1) of the ICSID Convention is not met. The Tribunal thus does not have *ratione materiae* jurisdiction to determine Sembi's claims.

e. Conclusion on the existence of an investment under the ICSID Convention

277. It follows from the foregoing discussion that the Tribunal has jurisdiction *ratione materiae* under the ICSID Convention over the claims brought by Mr. Rand under the Canada-Serbia BIT in respect of his interest in the Beneficially Owned Shares but lacks jurisdiction over his claims in respect of his payments for the benefit of BD Agro and his indirect shareholding in BD Agro. It also lacks jurisdiction under the ICSID Convention over the claims of Claimants 1, 3, 4 and 5 brought under the Canada-Serbia BIT. Finally, the Tribunal lacks jurisdiction under the ICSID Convention over the claims brought by Sembi under the Cyprus-Serbia BIT.

2. Consent

278. It is undisputed that Serbia has agreed to arbitrate disputes arising under the Canada-Serbia BIT. However, Serbia contests having given its consent to arbitrate this specific dispute pursuant to that Treaty, which the Tribunal examines below (§§348 et seq.).

[198] See, for instance, C-PHB 2, §§74-75 ("Serbia also cannot seriously claim that this contribution [being "Sembi's assumption of Mr. Obradović's EUR 13.8 million debt to the Lundins and its subsequent partial repayment (up to EUR 5.6 million)"], made by Sembi with funds provided by Mr. Rand, cannot count for both Sembi and its owners."). See also Rej. J., §676.

3. Standing under the ICSID Convention

279. Serbia contends that "[i]n 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."[199] Additionally, it points out that all claims raised in this arbitration are based on the incorrect assumption that the Privatization Agency illegally terminated the Privatization Agreement. That Agreement was concluded with Mr. Obradović, not with Mr. Rand. Therefore, relying on *LESI-Dipenta*, Serbia argues that the "Claimants do not have *jus standi* to advance those claims before the Tribunal, since the Tribunal '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.'"[200]

280. The Tribunal has trouble following this argument. The ICSID Convention does not require an investor to be a party to all contracts relevant to the dispute. Mr. Rand invokes breaches of the Privatization Agreement only to the extent they constitute or evidence a breach of the Canada-Serbia BIT. It is a different question whether Mr. Rand holds substantive rights which Serbia has infringed. That is a question for the merits.

4. Conclusion on jurisdiction under the ICSID Convention

281. It follows from the foregoing that this Tribunal only has jurisdiction under the ICSID Convention over the claims brought by Mr. Rand pursuant to the Canada-Serbia BIT in respect of his interest in the Beneficially Owned Shares. Accordingly, in the following sections, the Tribunal only discusses Serbia's jurisdictional arguments relevant to these claims.

B. Jurisdiction under the Canada-Serbia BIT

282. The Tribunal first sets out the legal framework relevant to its jurisdiction under the Canada-Serbia BIT (1) after which it examines Serbia's jurisdictional objections ((2)-(5)).

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[199] C-Mem., §482.

[200] Rej., §1039 quoting Exh. RLA-98, *Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire*, ICSID Case No. ARB/03/08, Sentence, 10 January 2005, part II, §41 (English Translation from ICSID website), part II, §37(iv).

1. Legal Framework

283. Article 2 of the Canada-Serbia BIT addresses the scope of application of the Treaty in the following terms:

> "1. This Agreement shall apply to measures adopted or maintained by a Party relating to:
>
> (a) an investor of the other Party; and
> (b) a covered investment.
>
> 2. The obligations in Section B apply to a person of a Party when it exercises a regulatory, administrative or other governmental authority delegated to it by that Party."

284. Serbia's consent to arbitrate disputes with Canadian nationals is included in Article 24(1)(a) of the Canada-Serbia BIT:

> "1. An investor that meets the conditions precedent in Article 22 may submit a claim to arbitration under: (a) the ICSID Convention, provided that both Parties are parties to the ICSID Convention […]."

285. Article 22 of the Canada-Serbia BIT, to which the dispute resolution clause just quoted refers contains several "conditions precedent" to arbitration and reads as follows:

> "Conditions Precedent to Submission of a Claim to Arbitration
>
> 1. The disputing parties shall hold consultations and attempt to settle a claim amicably before an investor may submit a claim to arbitration. Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the notice of intent to submit a claim to arbitration under subparagraph 2(c). The place of consultation shall be the capital of the respondent Party, unless the disputing parties otherwise agree.
>
> 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;
>
> (b) at least six months have elapsed since the events giving rise to the claim;
> (c) the investor has delivered to the respondent Party a written notice of its intent to submit a claim to arbitration at least 90 days prior to submitting the claim, which notice shall specify:
>
> (i) the name and address of the investor and, where a claim is made under Article 21(2), the name and address of the enterprise,

(ii) the provisions of this Agreement alleged to have been breached and any other relevant provisions,
(iii) the legal and the factual basis for the claim, including the measures at issue, and
(iv) the relief sought and the approximate amount of damages claimed;

(d) the investor has delivered evidence establishing that it is an investor of the other Party with its notice of intent to submit a claim to arbitration under subparagraph 2(c);

(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 the investor owns or controls directly or indirectly, the enterprise waives the right referred to under subparagraph (ii);

[…]

4. The disputing investor or the enterprise shall deliver the consent and waiver required under paragraph 2 to the respondent Party and the investor shall include them in the submission of a claim to arbitration. A waiver from the enterprise under subparagraphs 2(e)(iii) or 2(f)(ii) is not required if the respondent Party has deprived the investor of control of the enterprise."

286. Accordingly, as a first condition, Article 22(2)(a) requires that the investor "consent to arbitration in accordance with procedures set out in this agreement." Serbia does not contest that by filing their Request for Arbitration, the Canadian Claimants consented to arbitration in accordance with the Canada-Serbia BIT.

287. Second, Article 22(2)(b) requires that six months have elapsed since the events giving rise to the claim. In addition, Article 22(2)(e) stipulates that not more than three years must 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. Serbia challenges the Tribunal's "*ratione temporis"* jurisdiction on this basis.[201]

288. Third, Article 22(2)(c) of the Canada-Serbia BIT provides that the investor must deliver a notice of intent to resort to arbitration at least 90 days prior to submitting the claim. Pursuant to Article 22(2)(d), such notice must include evidence that the investor is an "investor of the other Party." Serbia does not put into question that the Notice of Dispute served on Serbia on 8 August 2017 met this condition.

289. Before examining the "*ratione temporis"* objection just identified ((4) below), the Tribunal first examines Serbia's challenges the Tribunal's jurisdiction *"ratione materiae"* ((2) below) and "*ratione voluntatis*" ((3) below). In reviewing these objections, the Tribunal has borne in mind the Claimants' investment structure reproduced above (§21).

2. Investment

290. For the reasons mentioned above, only Mr. Rand's investments related to the Beneficially Owned Shares ((a) below) and his payments for the benefit of BD Agro ((b) below) remain to be considered. Serbia's objections to the Tribunal's *ratione materiae* jurisdiction in respect of these alleged investments are considered below.

a. Interest in the Beneficially Owned Shares

(1) Respondent's Position

291. Relying on Article 1 of the Canada-Serbia BIT, Serbia contends that the Tribunal's jurisdiction depends on the Claimants' ability to prove that it held an investment as defined in Article 1 of the Treaty. In addition, the Claimants must show that they owned or controlled that investment. Here, says Serbia, the Claimants have failed on both counts.

292. Serbia opposes the Claimants' view that their investment falls under multiple categories of investments listed in the Treaty's definition of "investment" under (a) to (j), in particular (a) (enterprise), (b) (share or other equity participation), (f) (interest in an enterprise), and (h) (interest arising from a commitment of resources). In respect of the Claimants' submission

[201] See, for instance, C-Mem., §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 international law and Article 28 of the Vienna Convention on the Law of Treaties (VCLT) in relation to Article 42 of the BIT.").

that their investment falls within Article 1(h), Serbia contends that the Canadian Claimants did not acquire any "indirect interest" in Sembi's rights under the Sembi Agreement, and that it is not clear how these Claimants could have acquired such rights without having any title on BD Agro's shares. Further, the Claimants have not explained to which precise interests they refer. Contractual rights and obligations obviously belong to the contract parties. The Canadian Claimants were not parties to the Sembi Agreement and acquired no contract rights thereunder which could be regarded as an investment under Article 1. In any event, even if the Canadian Claimants acquired "indirect" contract interests in the Sembi Agreement, such acquisition would naturally depend on the validity of the Agreement. As explained below, the Sembi Agreement was null and void and therefore, could not be the basis of a transfer of interest from Mr. Obradović to Sembi.

293. Serbia further submits that even if the Sembi Agreement were considered lawful and could give rise to rights for Sembi (*quod non*), it remains that the Canadian Claimants would still not be entitled to make a direct claim based on Sembi's contract rights. Investment tribunals have repeatedly held that investors do not have standing to assert claims based on the host State's treatment of the contracts and assets of the company in which the investor holds shares.[202]

294. Moreover, Serbia argues that the Sembi Agreement, which purported to transfer Mr. Obradović's shares in BD Agro to Sembi is invalid as it contravenes the Privatization Agreement. Indeed, Article 5.3.1 of the Privatization Agreement precludes Mr. Obradović from selling, assigning or otherwise alienating his shares in BD Agro for two years from the date of the Agreement. The provision prohibits all kinds of disposition of shares. It does not allow Mr. Obradović to alienate the attributes of ownership, merely keep nominal title to the shares.

295. Serbia also contends that the Sembi Agreement breaches the Law on Privatization, specifically Article 41(ž), which prohibits any assignment without the prior authorization of the Privatization Agency. It denies the Claimants' argument that Article 41(ž) is inapplicable because the Sembi Agreement does not include the Agency as a contracting party. In Serbia's submission, this argument is "plainly absurd" as it would mean that no assignment would be covered by Article 41(ž), as long as the assignment contract did not mention the

[202] Rej., §738, citing Exh. RLA-79, *ST-AD GmbH v. Republic of Bulgaria* (UNCITRAL), PCA Case No. 2011-06, Award on Jurisdiction, §278.

Agency or the requirement for prior authorization from the Agency. The Claimants also assert that the purpose of the Sembi Agreement was to transfer Mr. Obradović's rights and obligations under the Privatization Agreement without assigning the Privatization Agreement itself. For the Respondent, this interpretation according to which any contract right and obligation is freely assignable as long as the nominal position of a contract party remains unchanged is "downright preposterous." Article 41(ž) would be meaningless if it were read to prohibit only an assignment of nominal title.

296. Furthermore, the Respondent contends that the Claimants' argument that Sembi Agreement is both a contract for the sale of shares and an assignment cannot be accepted. The Sembi Agreement "creatively" evolves from an assignment to a sale and back, in order to produce the intended effects under Cypriot law and, at the same time, avoid any prohibition of Serbian law. In any event, even if correct, this argument would not assist the Claimants. In Serbian law, ownership in shares is acquired and transferred through the registration of the new owner in the Central Securities Registry. Separate transfer of beneficial title is impossible. The Sembi Agreement thus could not result in an ownership change. If the Sembi Agreement were considered a sale of shares, it would still contradict mandatory Serbian law that prohibits trade of shares of public joint stock companies outside the stock exchange. In addition, the Agreement is invalid because of Article 359 of the 2011 Law on Companies, pursuant to which the agreement of a shareholder to vote according to instructions of a member of the board of directors is void.

297. Serbia also rejects the Claimants' position that under Cypriot law a prohibited or restricted assignment can still produce valid effects between the assignee and the assignor, if the assignment is not void for reasons of illegality or public policy. It notes that, under Section 23 of Cypriot Contract Law, a contract with an object that is, it forbidden by law or would defeat the law, is null and void and produces no effects. Since the Sembi Agreement violates Article 41(z) of the Privatization Law, and, if allowed, would defeat the purpose of that norm, is null and void. In any event, rights under a contract are assignable in equity under Cypriot law only if the change in the identity of the obligor makes no difference to the obligee. This is not the case here. For Serbia, "[t]he fact that the contract could have been concluded only with Mr. Obradović as the winner of the public auction and that Mr. Obradović, based on his Serbian citizenship, was given the option unavailable to the assignee (Sembi) – to pay the purchase price in annual instalments – demonstrate [….] that personal characteristics of the

Agency's counterparty were so important to the Agency as to prevent the assignment without its consent."[203]

298. Moreover, Serbia disputes the Claimants' interpretation that the Sembi Agreement transferred legal title in rights and assets that could be transferred on the date of the agreement and beneficial title to those rights and assets whose transfer required additional steps or third-party consent. The word "together" used in Article 4 of the Sembi Agreement connecting the transfer of the Privatization Agreement and that of other assets related to BD Agro's business held by Mr. Obradović shows that the transfer of such other assets was meant to follow as a result of the transfer of the Privatization Agreement, and not separately and independently.

299. The Claimants are wrong, so says Serbia, in relying on the subsequent conduct of Sembi and Mr. Obradović to allege that they intended for the beneficial interest in the shares to pass to Sembi immediately after the conclusion of the Agreement. First, Cypriot law does not confirm that interpretation. Second and in any event, the documents on which the Claimants rely, particularly its 2008 financial statements and 2008 income declaration are questionable as evidence. Third, the Claimants and Mr. Obradović's conduct indicates that they considered the Sembi Agreement "nonexistent." The Coropi Agreement of 2013 stipulates that Mr. Obradović's shares in BD Agro would be transferred to Coropi, including his "right of management, participation in profit, […] right to a part of the liquidation mass, proportionately to the amount of purchased capital", as well as "[t]he right to free disposal of purchased capital […]", entirely omitting to mention that Sembi (and not Mr. Obradović) was the purported owner or beneficial owner of those shares. Fourth, Mr. Obradović continued to act as BD Agro's owner even after the Sembi Agreement. For instance, funds obtained by Crveni Signal from the 2010 Loan were eventually transferred to Mr. Obradović's personal bank accounts in the period starting from December 2010, nearly three years after the conclusion of the Sembi Agreement. Finally, there is no proof that Sembi ever fulfilled its obligations under the Sembi Agreement, including taking over the EUR 4.8 million debt of Mr. Obradović's mentioned there.

[203] R-PHB 1, §80.

(2) Claimants' Position

300. The Claimants insist that their investment falls within multiple categories of investment listed in sub-articles (a) to (j), including sub-articles (a)(b)(f) and (h) of the Canada-Serbia BIT.[204] In the Claimants' submission, they only need to establish that their alleged investments fall within the ambit of any one asset listed in Article 1 of the Canada-Serbia BIT.[205] Further, as the Canada-Serbia BIT expressly applies to investments "directly or indirectly owned or controlled" by Canadian nationals, even those investments indirectly controlled by the Canadian Claimants would fall within the scope of the Treaty.

301. The Claimants submit that the rights stemming from the Sembi Agreement qualify as an investment under sub-article (h) of the Canada-Serbia BIT. Sembi committed capital in Serbia by repaying the loans taken by Mr. Obradović from the Lundin family for the acquisition of BD Agro's shares and for investments in BD Agro's operations. The funds for repaying such loans were provided to Sembi, and thus ultimately committed by Mr. Rand.

302. The Claimants reject Serbia's assertion that Serbian law governs the assignment of equitable rights in the Beneficially Owned Shares. They argue that the parties to the Sembi Agreement were free to choose the governing law and chose Cypriot law. The result is that Cypriot law governs the relationship between Mr. Obradović and Sembi. Serbian law only applies to the transfer of legal title in the Beneficially Owned Shares.

303. The Claimants also dispute Serbia's allegation that the Sembi Agreement conflicts with Article 41(ž) of the Law on Privatization and is thus null and void. Cypriot law, which is the law of the contract, recognizes the transfer of interest as valid and enforceable. Even if Article 41(ž) were considered mandatory and would thus override Cypriot law, the outcome would be the same. Pursuant to Cypriot law, even if an assignment is not effective against the debtor (Serbia), it produces effects between the assignee (the Claimants) and the assignor (Mr. Obradović).

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[204] See, for instance, Reply, §§625, 630, Rej. J., §446, C-PHB 1, §61.

[205] C-PHB 1, §14 ("The Claimants' investments are protected in three distinct capacities: (i) their beneficial ownership over the Beneficially Owned Shares, (ii) their control over BD Agro, and (iii) their interest in Sembi's rights under the Sembi Agreement. Even one would be sufficient to trigger the protections of the BITs.").

304. Further and again in any event, according to Serbian law, the notion of assignment is narrower than under Cypriot law. It only denotes a transfer of legal title. Under the Sembi Agreement, legal title to the assets which could be transferred to Sembi without the need for additional documents, did vest in Sembi immediately upon conclusion. For those assets for which additional steps were required, beneficial ownership passed immediately. Since the immediate transfer contemplated in the Agreement does not qualify as an assignment under Serbian law, it cannot trigger the application of Article 41(ž). In addition, the Privatization Agreement was not "assigned" to Sembi, as Serbia would have it, because Mr. Obradović remained the party to the Privatization Agreement. There was thus no need for the Privatization Agency's approval. When the Claimants intended to assign the Privatization Agreement to Coropi, they indeed asked for the Agency's approval (which was arbitrarily withheld).

305. Fourth, the Respondent's witnesses admitted that shares could be "alienated" separately from the Privatization Agreement itself. Nothing prevented Mr. Obradović from transferring the Beneficially Owned Shares to Sembi independently of the Privatization Agreement, which is what he did through the Sembi Agreement.

306. The Claimants also challenge Serbia's argument that contracts cannot be assigned to a third party when the identity of the original party is of particular importance. It stresses that Serbia has not cited any authority for this proposition. This is all the more revealing considering that Serbia's experts testified that, even when the identity of the contract party matters, the economic benefit of the contract can be assigned to a third party. In any event, even if such a requirement existed (*quod non*), senior officials in the Serbian government and the Privatization Agency were aware of Mr. Rand's involvement.

307. The Claimants further submit that both the terms of the Sembi Agreement and the Parties' subsequent conduct confirm that they understood that the Sembi Agreement transferred equitable rights over the Beneficially Owned Shares to Sembi. At the outset, the Claimants submit that the terms of the Agreement, particularly Article 4, are "clear and unambiguous" and cover the transfer of equitable rights over the Beneficial Owned Shares. There is thus no need to look any further to determine the Parties' intent. However, even if the Tribunal were to do so, it would only confirm this position. The effective parties to the Sembi Agreement, i.e. Messrs. Obradović and Rand, attest that they intended to transfer beneficial ownership in the Beneficially Owned Shares through the Sembi Agreement. This fact is

evident from the conduct of the parties to the Sembi Agreement. Indeed, immediately after signing the Sembi Agreement, Sembi became involved in BD Agro's affairs and discussed those affairs at meetings of the Board of Directors. Sembi also recorded its beneficial ownership of the Beneficially Owned Shares in its 2008 financial statements.

(3) Analysis

308. Article 2 of the Canada-Serbia BIT reproduced above (§283) sets out that the Treaty applies to measures adopted by a Party relating to an investor of the other Party and a covered investment.

309. Article 1 of the Treaty defines a "covered investment" in the following terms:[206]

> "'covered investment' means, with respect to a Party, 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."

310. The same BIT provision gives the following definition of an investment:

> "'investment' means:
>
> (a) an enterprise;
>
> (b) a share, stock or other form of equity participation in an enterprise;
>
> (c) bond, debenture or other debt instrument of an enterprise;
>
> (d) a loan to an enterprise;
>
> […]
>
> (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: […] (ii) a contract where remuneration depends substantially on the production, revenues or profits of an enterprise
> […]."

[206] Exh. CLA-1, Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, 27 April 2015.

311. The Tribunal will first examine whether Mr. Rand had an investment (i) under the Canada-Serbia BIT, and, if so, whether it was a covered investment (ii).

(i) Investment

312. The Claimants argue that their investment falls within several categories of investment listed in sub-articles (a) to (j), in particular sub-articles (a)(b)(f) and (h).[207] They insist that it is sufficient for their investment to correspond to one of the categories mentioned in Article 1.

313. The Tribunal considers that Mr. Rand's investment falls within the ambit of Article 1(h) of the Treaty i.e. "an interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in that territory." Indeed, each of the requirements of Article 1(h) are satisfied in this case:

(a) Interest

314. To qualify as in investment under Article 1(h) of the Serbia-Canada BIT, there must first be an "interest." This term is undefined. As it appears in an international treaty, it must be interpreted in accordance with the Vienna Convention by giving the term its ordinary meaning, in its context and in light of the object and purpose of the Treaty. The term "interest" has a wide range of meanings from "wanting to be involved with and to discover more about something" to "something that brings advantages to or affects someone or something" among others.[208] In an economic sense, "interest" is understood as "money that is charged, esp. by a bank, when you borrow money, or money that is paid to you for the use of your money" and "an involvement or a legal right, usually relating to a business or possessions." In the context of Article 1 and the definition of investment, it is this latter connotation that is relevant. Any involvement or legal right would thus suffice to constitute an "interest" in its ordinary meaning. That the term is to be interpreted broadly is also evident from its context: items (i) and (ii) in sub-article (h) recognize that an interest can arise out of a broad range of contracts ("contract involving the presence of an investor's property in the territory of the Party"; "contract where remuneration depends substantially on production, revenues, or profits of an enterprise"). Moreover, Articles 1(k) and (l) recognize that all types of investments listed in Articles 1(a)-(h) are "kinds of interests", once again making clear

[207] See, for instance, Reply, §§625, 630, Rej. J., §446, C-PHB 1, §61.

[208] Cambridge Dictionary, available at https://dictionary.cambridge.org/dictionary/english/interest.

that the term is to be understood broadly.[209] Thus, shares, bonds, loans, are all interests that are protected by the Treaty as is any contractual right relating to a business.[210]

315. Through the Privatization Agreement, Mr. Obradović acquired "70% of the socially owned capital" of BD Agro, i.e. the Privatized Shares and later the New Shares[211] with "all rights and obligations, pursuant to the law and provisions of this agreement."[212] He then entered into the Sembi Agreement, through which Sembi assumed all of his obligations, including payments owing to the Privatization Agency and the repayment of the loans provided by the Lundins.[213] On his part, Mr. Obradović agreed to assign "all his right, title and interest" in the Privatization Agreement to Sembi, as referred in Article 4 of the Sembi Agreement:

> "Mr. Obradović , in consideration for [Sembi] assuming such obligations, has agreed to transfer to [Sembi] all his right, title and interest in and to the [Privatization Agreement]. Mr. Obradović agrees to sign any such documents

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[209] Exh. CLA-1, Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, 27 April 2015, Art. 1 ("but '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).").

[210] Arbitral tribunals have also recognized several different types of "interests" as investments. See, for instance, Claimants' Opening Presentation, pp. 182, 183 referring *inter alia* to Exh. CLA-5, *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, 2 November 2015, §272 ("[n]either the international law principles nor the Committee's decision imply that investors holding beneficial ownership are left unprotected from interferences by host States. Such investors will enjoy protection granted under the treaties which benefit their nationality."). See also Exh. RLA-193, *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 Jurisdiction, 10 June 2010, §165 ("The definition of investment given in Article 1 is very broad. It includes 'every kind of assets' and enumerates specific categories of investments as examples. One of those categories consists of 'shares, bonds or other kinds of interests in companies and joint ventures.' The plain meaning of this provision is that shares or other kind of interests held by Dutch shareholders in a company or in a joint venture having made investment on Venezuelan territory are protected under Article 1."); Exh. CLA-153, *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009, §§144-145 (beneficial ownership protected under the treaty in question). Promissory notes, hedging agreements, sovereign bonds, contracts for the provision of services and arbitral awards crystallizing a party's rights and obligations have all been recognized as protected investments. See Can Yeğinsu and Calum Mulderrig, The Investment Treaty Arbitration Review: Covered Investment, available at https://thelawreviews.co.uk/title/the-investment-treaty-arbitration-review/covered-investment#footnote-034-backlink.

[211] As mentioned above, on 29 August 2006, BD Agro's General Assembly increased its capital by issuing an additional 171,974 shares, all of which were issued to Mr. Obradović (the New Shares). Accordingly, Mr. Obradović's shareholding in BD Agro increased from 70% to 75.87%. The Privatized Shares and the New Shares make up the Beneficially Owned Shares.

[212] Exh. CE-17, Privatization Agreement, 4 October 2005, Art. 1.1.

[213] Exh. CE-29, Agreement between D. Obradović and Sembi, 22 February 2008.

> and do all such things as may be necessary to effect the transfer to [Sembi] of the [Privatization Agreement] together with any other assets whatsoever held by Mr. Obradović which are related to the business of BD Agro."[214]

316. In other words, through the Sembi Agreement, Sembi acquired a contractual "interest" in the Privatization Agreement which, at least, included an interest in the Beneficially Owned Shares.

317. Initially, the Claimants asserted that their interest was their "beneficial ownership" over the Beneficially Owned Shares. Serbia objected *inter alia* that "beneficial ownership" was not recognized in Serbia at the time of the Sembi Agreement. Later, the Claimants submitted that, irrespective of beneficial ownership, they had a protected interest arising out of the Sembi Agreement.[215] The Tribunal agrees. As just mentioned, through the Sembi Agreement, Sembi acquired a contractual interest in the Beneficially Owned Shares. The type of interest and whether it is recognized under domestic law is not determinative for purposes of sub-section (h). What matters is that Sembi has an interest that falls within the ambit of Article 1(h).

318. Serbia objects that no interest was transferred through the Sembi Agreement because the Agreement itself is invalid. That objection is not well-founded. The Sembi Agreement contains a choice of Cypriot law. The Parties' experts agree, and rightly so, that Cypriot law governs the relationship between Mr. Obradović and Sembi.[216] There is no indication that the Sembi Agreement is invalid under the applicable law of Cyprus. At the hearing, Serbia's expert Professor Emilianides, admitted that interests in the Beneficially Owned Shares transferred to Sembi immediately upon conclusion of the Sembi Agreement.[217] Thus, there is no ground to argue that the Sembi Agreement did not give rise to a valid interest in Sembi's favour.

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[214] Exh. CE-29, Agreement between D. Obradović and Sembi, 22 February 2008.

[215] See C-PHB 1, §90 ("[L]eaving aside beneficial ownership as a special category of ownership (i.e., leaving aside the Occidental annulment decision), the Sembi Agreement created enforceable rights against Mr. Obradović under Cypriot law (regardless of whether they are labelled as an assignment of beneficial ownership of the Beneficially Owned Shares or not). Those rights constitute an 'investment' […]. It matters not that the rights are only enforceable against Mr. Obradović; this is indeed normal for all contractual rights. From the perspective of the Canada-Serbia BIT, the same rights would also create an indirectly owned/held interest in BD Agro under Articles (f) and (h)(ii) of the definition of "investment" in Article 1 of the Canada-Serbia BIT.").

[216] Georgiades ER II, §§3.5-3.6; Tr., Hearing on Jurisdiction and Merits, Day 6, 182:3-10 (Emilianides).

[217] Tr., Hearing on Jurisdiction and Merits, Day 6, 184:24-185:25 (Emilianides).

319. The Respondent challenges the validity of the Sembi Agreement on the basis of Serbian law. It argues that the Agreement is invalid because it violates Article 41(ž) of the Privatization Law, which it contends applies despite the choice of Cypriot law because it is mandatory. The Claimants do not appear to seriously contest that Article 41(ž) is mandatory but contest its application in this case.

320. Pursuant to ordinary rules of conflict of laws, a mandatory norm of a legal system other than the one applicable to a contract cannot displace the law of the contract unless it is a so-called overriding mandatory rule, also called *loi d'application immédiate* or *loi de police*[218] Even assuming that Article 41(ž) of the Privatization Law is such an overriding mandatory norm, an issue that the Tribunal can leave open, the Tribunal is of the opinion that it would not nullify the Sembi Agreement.

321. Article 41(ž) of the Privatization Law reads:[219]

> "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.
> The assignee may be a person who meets the conditions prescribed for the buyer of the capital or the propriety.
> The assignor shall guarantee to the Agency that the assignee will meet his obligations from the assigned agreement on sale of the capital or property.
> After the assignment of agreement on sale of the capital or property, the assignee shall attain all the rights and obligations from the agreement on sale."

322. Article 41(ž) thus requires the Privatization Agency's approval for the assignment of privatization agreements. To the Tribunal, this provision does not apply in this instance. Article 4 of the Sembi Agreement (reproduced above) contemplates two transfers: the transfer of "right, title and interest" in the Privatization Agreement for which no further actions are required, and the transfer of the Privatization Agreement itself for which Mr. Obradović agreed to sign any documents and do any further acts required to effectuate the transfer of the Agreement. These transfers could take place independently of each other, with only the

[218] Ugljesa Grusic ER I, §§63, 76 ("Despite the fact that the [Serbian] Private International Law Act does not mention the concept of overriding mandatory provisions, there is an agreement in legal theory that Serbian private international law recognises this concept. The concept is known under the name of "norme neposredne primene," which is a literal translation of the French term "lois d'application immédiate," or under the name "prinudni propisi u međunarodnom smislu," which can be translated into English as "mandatory provisions in the international sense" […] Articles 41ž and 59 of the 2001 Law on Privatisation […] can be regarded as overriding mandatory provisions under Serbian private international law.").

[219] Exh. CE-220, 2001 Law on Privatization, Art. 41(ž).

latter requiring the approval of the Agency. The Claimants' expert, Mr. Georgiades confirmed this interpretation of the Agreement,[220] and his testimony was not convincingly rebutted. As the Sembi Agreement does not immediately transfer the Privatization Agreement itself but does transfer Mr. Obradović's "interests" in the Privatization Agreement to Sembi, the provisions of Article 41(ž) would not be attracted.

323. The Tribunal finds confirmation of this position in the text of the Privatization Agreement itself: through Article 5.3.1, BD Agro's shares could be sold, assigned, or alienated two years after the conclusion of the Agreement without the approval of the Agency.[221] The Agreement thus contemplates a transfer of shares (for which no approval is required) as an act distinct from the transfer of the Privatization Agreement (for which approval is required). Ms. Julijana Vučković, Director of the Privatization Agency's Center for Control, admitted that it was possible to "alienate" the interests in a privatization agreement (including the shares of the privatized entity) separately from the privatization agreement itself:

> "Mr. Misetic: Ms Vučković, the transcript says you said: "... we had as a clear omission in our agreements ... where we allowed disposal of capital during the validity of the agreement, we generally allowed shares to be alienated and we were still monitoring the agreement which was a substantial problem." That's what you told the Commission, correct?
> Ms. Vučković: Yes, that's correct. It had to do exactly with this. You allow alienation of the shares by removing the pledge, and you allow the buyer to dispose of the shares, while the agreement is in force, and it's not been honoured, so you have no further influence when it comes to the privatization agreement."[222]

[220] Georgiades ER II, §3.12 et. seq., particularly, §§3.21-3.23 ("In respect of the rights and assets, such as the BD Agro Shares or the interest in the Privatization Agreement, whose legal title remained with Mr Obradović, transfer of legal title would have to be effected in accordance with the law applicable to such rights. […] Therefore, even if Serbian law did not allow transfer of rights in the Privatization Agreement, this would not defeat the equitable assignment of such rights under Cyprus law, by virtue of the Sembi Agreement. In other words, the equitable assignment of these rights to Sembi is unaffected by Serbian law. […] The transfer of legal title to the BD Agro Shares from Mr Obradović to Sembi had to be effected in accordance with Serbian law. Nevertheless, under the Sembi Agreement, Sembi became the beneficial owner of the BD Agro Shares regardless of any restrictions on the transfer of legal title to the BD Agro Shares under Serbian law").

[221] Exh. CE-17, Privatization Agreement, 4 October 2005, Art. 5.3.1 ("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.").

[222] Tr., Hearing on Jurisdiction and Merits, Day 4, 66:17-67:04. (Vučković).

324. As a result, Serbia's challenge to the validity of the Sembi Agreement based on of Article 41(ž) of the Privatization Law cannot be sustained.

325. The Respondent also disputes the validity of the Sembi Agreement on the ground of another mandatory Serbian law, the 2006 Securities Law, which prohibits the sale of shares in a public joint stock company outside the organized share market.[223] The Claimants do not appear to seriously contest that Article 52(2) is mandatory,[224] but dispute its application to the present facts. However, this provision restricts the "trading" or sale of securities.[225] A "sale" under Serbian law results in the change of the legal owner of an asset.[226] Thus, this provision is only concerned with the transfer of legal title to shares, not the transfer of an interest in shares. As a result, it would not apply in the present situation, which does not contemplate a change in legal title to the Beneficially Owned Shares but only the creation of an interest in those shares.

326. For the same reason, the Tribunal dismisses Serbia's argument that "if Serbian law allows for separate transfer of beneficial ownership in shares, rules regulating the market of securities must apply to such transfer as well […]", to which the Respondent adds that the "Claimants' interpretation would leave restrictive rules from national laws of the state parties to the BITs without any purpose – those rules would be easily circumvented by simply labeling investors' rights as beneficial."[227] As just explained, Article 52(2) does not prohibit the transfer of interests in shares. It attaches to the transfer of legal title in shares, which produces certain legal effects such as the registration in the Central Securities Depository.[228] Sembi does not take advantage of those legal effects, circumventing the restrictions of Serbian law. To the contrary, the Claimants admit that Sembi does not hold legal title to the Beneficially Owned Shares. Sembi does, however, hold an interest in the Beneficially Owned shares, which is not prohibited by Article 52(2).

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[223] Exh. RE-111, 2006 Law on Market in Securities and Other Financial Instruments, Art. 52(2).

[224] Ugljesa Grusic ER I, §76 ("Article 52(2) of the 2006 Law on Market in Securities and Other Financial Instruments can be regarded as overriding mandatory provisions under Serbian private international law").

[225] Exh. RE-111, 2006 Law on Market in Securities and Other Financial Instruments, Art. 52 ("Trade of securities shall be performed exclusively in organized market in the Republic which includes stock exchange and over-the-counter markets, unless otherwise determined by this Law. Trade of securities [just] specified shall be performed exclusively in compliance with the provisions of this Law, unless otherwise determined by this Law.").

[226] Milošević ER II, §188.

[227] R-PHB 2, §52.

[228] See, for instances, Radović ER I, §71.

327. Furthermore, Serbia invokes the invalidity of the Sembi Agreement based on Article 295(1) of the 2004 Law on Companies and Article 359 of the 2011 Law on Companies, which are in essence identical:

> "Agreement by which a shareholder or proxy undertakes obligation to vote according to instructions of joint stock company or member of the board of directors, director or member of executive board is null and void."

328. The Tribunal recalls that Mr. Rand was not a party to the Sembi Agreement. The restriction contained in Article 359 would thus not automatically apply, especially when Serbian law provides that any restrictions on rights are to be interpreted narrowly.[229] Besides, Mr. Rand ceased to be a member of BD Agro's board on 9 July 2012. Thus, the breach, if any, of Article 359 of the Law on Companies was cured on that date. Further still, it is not evident that Article 359 would negate the entire Sembi Agreement or only the part thereof requiring Mr. Obradović to vote as instructed by Sembi.

329. It follows from the analysis above that, through the Sembi Agreement, Sembi acquired a contractual interest in the Beneficially Owned Shares. That interest was acquired through the commitment of capital in Serbia. Indeed, as was already discussed, through Sembi, Mr. Rand repaid to the Lundin Family the monies lent to Mr. Obradović for the acquisition of shares in further investment in BD Agro.

(b) Capital or other resources committed in Serbia

330. In addition to an interest, Article 1(h) of the Canada-Serbia BIT requires that the interest be acquired through the commitment of capital in Serbia. This requirement is satisfied too. Indeed, funds lent by the Lundins, for which Mr. Rand bore the financial burden, were transferred to bank accounts in Serbia for use in the country, as is clear from the corresponding payment confirmations.[230]

(c) Economic activity in Serbia

331. The commitment of capital and other resources was made towards the activity of the BD Agro farm, which is economic in nature. At the time of Mr. Rand's initial investment in 2005,

[229] Milošević ER III, §57.

[230] See, for e.g., Exh. CE-384, Confirmation of transfer of EUR 3,312,740 from Mr. Lundin to Marine Drive Holding, 15 September 2005.

BD Agro was in a poor condition.[231] During his involvement, it became one of the most modern dairy farms in Europe.[232] It is therefore clear that the contribution of resources at issue was made towards an economic activity in Serbia in the meaning of Article 1(h) of the BIT.

332. The Tribunal thus concludes that Sembi's contractual interest in the Beneficially Owned Shares is an investment falling within the meaning of Article 1(h) of the Canada-Serbia BIT.

(ii) Covered investment

According to the Treaty definition reproduced above, a "covered investment" is an investment in the territory of a Contracting Party that is owned or controlled, directly or indirectly by an investor of the other Contracting Party. Serbia does not challenge the fact that, as a Canadian national, Mr. Rand is an investor.[233] Neither does it dispute that Mr. Rand controlled Sembi. Instead, it relies on such control to argue that Sembi does not have a seat in Cyprus.[234] As Mr. Rand controls Sembi's contractual interest in the Beneficially Owned Shares, his investment is a covered investment, which is protected by the Treaty.

b. Payments for the benefit of BD Agro

333. For the reasons mentioned above, the Tribunal does not have *ratione materiae* jurisdiction under the ICSID Convention to consider claims arising out of these alleged investments (§§274 et seq.). As a result, the Tribunal could dispense with examining whether jurisdiction exists in accordance with the Canada-Serbia BIT. However, in particular because the Claimants have not addressed this issue in the context of the ICSID Convention, the Tribunal will also examine Serbia's jurisdictional objections under the Canada-Serbia BIT.

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[231] Tr., Hearing on Jurisdiction and Merits, Day 2, 3:15-4:17 (Rand).

[232] Tr., Hearing on Jurisdiction and Merits, Day 2, 4:18-5:9 (Rand). Exh. CE-26, News Article "Where cows listen to Beethoven" published on 27 November 2010, Exh. CE-33, Letter from the Ministry of Economy to the Privatization Agency, 30 May 2012.

[233] Exh. CLA-1, Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, 27 April 2015, ("Canada-Serbia BIT"), Art. 1: "'investor of a Party" means a Party, or a national or an enterprise of a Party, that seeks to make, is making or has made an investment. For greater certainty, it is understood that an investor seeks to make an investment only when the investor has taken concrete steps necessary to make the said investment, such as when the investor has made an application for permit or licence authorising the establishment of an investment."

[234] See, for e.g. Rej., §1001 quoting Reply, §105.

(1) Respondent's Position

334. Serbia argues that Mr. Rand's payments for the benefit of BD Agro do not qualify as investments under the Canada-Serbia BIT. Although the Claimants characterize these payments as "loans to an enterprise" under Article 1(d) of the BIT, their submissions are unclear as to whether the payments are loans or rather expenses aimed at securing the continuity of BD Agro's business operations. As observed in *Inmaris v. Ukraine*, payments made in furtherance of an investment are not investments themselves. Thus, if the Claimants were the owners of BD Agro, the payments made and expenses incurred in the day-to-day operations of BD Agro could not be regarded as a separate investment under the Canada-Serbia BIT.

335. The Respondent further submits that not all monetary claims fall within the scope of the Canada-Serbia BIT. In reality, most of such claims are expressly excluded. Thus, payments made for the benefit of BD Agro could give rise to a monetary claim by Mr. Rand against the company but would not constitute investments under the Canada-Serbia BIT.

336. Moreover, Serbia alleges that there are no documents on record that establish the so-called "loans" granted by Mr. Rand to BD Agro. For example, the majority of Mr. Rand's payments – nearly EUR 2.2 million – were made for the purchase and transport of heifers to BD Agro. Those payments were recorded as claims of Mr. Rand against BD Agro in the bankruptcy proceedings. However, the Commercial Court in Belgrade held that Mr. Rand had not made such payments and the payments for the purchase of livestock were recorded in the bankruptcy as "unofficial uncommanded agency under Article 220 of the Law on Contracts and Torts [Law on Obligations]." As a result, they must be treated as "any other claim to money", which are expressly excluded from the protection offered by the Canada-Serbia BIT. The same applies to the payments made to BD Agro's consultants.

337. Serbia adds that, even if the payments in question were considered as loans, they would not be part of the definition of investment under the Canada-Serbia BIT, which does not cover "the extension of credit in connection with a commercial transaction, such as trade financing" (Article 1(k)(ii)). The negotiating history of the BIT confirms that it was the Parties' intention to exclude loans for the purchase of goods and services from the ambit of the Treaty.

(2) Claimants' Position

338. The Claimants submit that Mr. Rand made payments of approximately EUR 2.2 million for the replacement of BD Agro's herd. Through Rand Investments, Mr. Rand also paid approximately EUR 160,000 for the services provided to BD Agro by herd management experts Messrs. Wood and Calin. These payments were loans to an enterprise, qualifying as investment under Article 1(d) of the Canada-Serbia BIT.

339. The Claimants reject Serbia's argument that, if they really were the owners of BD Agro, these payments cannot constitute loans, because monies expended towards day to day operations are not separate investments. That argument assumes that a shareholder cannot grant a loan to a company, which is obviously wrong. Moreover, "shares" and "loans" are separate categories of "investment" in the Canada-Serbia BIT and must be treated as such.

340. The Claimants equally dispute Serbia's view that they have not furnished evidence of Mr. Rand's loans. The Canada-Serbia BIT does not require that a loan be based on a written contract to constitute an investment.

341. In respect of Serbia's assertion that some of Mr. Rand's payments cannot constitute an investment because they are in the nature of a "claim to money that arises solely from […] the extension of credit in connection with a commercial transaction, such as trade financing", the Claimants emphasize that payments for the replacement of BD Agro's herd did not constitute trade financing, because they were linked to Mr. Rand's beneficial ownership of BD Agro.

(3) Analysis

342. The Claimants submit that Mr. Rand made payments of approximately EUR 2.2 million for the replacement of BD Agro's herd and that he paid approximately EUR 160,000 for the services that the herd management experts Messrs. Wood and Calin provided to BD Agro. The Claimants insist that these payments were "loans" to BD Agro and thus "loans to an enterprise", qualifying as an investment under Article 1(d) of the Canada-Serbia BIT.

343. The evidence on record shows that, in 2008, Mr. Rand paid EUR 2.2 million directly to Canadian suppliers and vendors for the purchase of heifers and for their transport from

Canada to BD Agro.[235] It also shows that Mr. Rand made payments to Messrs. Wood and Calin.[236] However, except for Mr. Rand's testimony, there is no evidence on record that these payments were loans granted by Mr. Rand to BD Agro.[237]

344. In the circumstances, all that Mr. Rand had in respect of the EUR 2.2 million and the EUR 160,000 payments, was a claim to money. This is all the more evident for the EUR 2.2 million payments as, in BD Agro's bankruptcy, these purchases were registered as "unofficial uncommanded agency in accordance with Article 220 of the Law on Contracts and Torts [Law on Obligations]."[238] Such claims are expressly excluded under Articles 1(k) and (l) of the Canada-Serbia BIT, which provide 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)."

345. In any event, even if the payments for the purchases of livestock and services were deemed to be loans, they would still be excluded under the Treaty. As was just seen, Article 1 (k)(ii) excepts from the definition of investment "the extension of credit in connection with a

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[235] Exh. CE-21, 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; Exh. CE-22, Confirmation of wire transfer 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; Exh. CE-23, Confirmation of wire transfer from William Rand to Trudeau International Farms for CAD 443,080.00 executed on 21 October 2008; Exh. CE-24, Confirmation of wire transfer from William Rand to BD Agro for EUR 219,000.00 executed on 5 December 2008.

[236] Exh. CE-62, Overview of Payments to Mr. David Wood; Exh. CE-68, Overview of Payments to Mr. Gligor Calin. See also, Rand WS I, §§40, 44.

[237] The Tribunal recalls that the Commercial Court in Belgrade examined Mr. Rand's claim of EUR 2.2 million in the course of BD Agro's bankruptcy proceedings and found that those payments were not made in accordance with an agreement: "[t]he Creditor [Mr. Rand] did not make payments on grounds of an agreement concluded with the bankruptcy debtor [BD Agro]." See Exh. CE-136, 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). The Claimants have supplied no evidence to the contrary.

[238] Exh. CE-136, 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).

commercial transaction, such as trade financing." The meaning of "commercial transaction" is evident from Article 1 (k)(i), which describes a commercial contract as a "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." The purchase and transport of heifers as well as the provision of management services thus fall within the notion of "commercial transaction."

346. In its post-hearing submission, Serbia articulated a separate jurisdictional challenge, according to which this Tribunal does not have *ratione materiae* jurisdiction under the Canada-Serbia BIT, because the impugned measures do not relate to the Canadian Claimants as required by Article 2 of the BIT.[239] The Tribunal does not agree. Article 2 of the Treaty specifies that it applies to measures of a Party relating to an investor of the other Party who holds a covered investment.[240] These requirements are met in this case. Mr. Rand is an investor under the Canada-Serbia BIT having a protected investment. The impugned measures, including the Agency's failure to release the pledge, termination of the Privatization Agreement, and seizure of the Beneficially Owned Shares, all relate to Mr. Rand's investment.

c. Conclusion

347. It follows from the discussion above that Mr. Rand's control over Sembi's contractual interest in the Beneficially Owned Shares is a covered investment satisfying the requirements of Article 1 of the Canada-Serbia BIT. Accordingly, the Tribunal has *ratione materiae* jurisdiction in respect of claims arising out of that investment.

3. Illegality

348. Serbia submits that the Claimants have shown "utter disrespect" to Serbian law and that their purported investment is tainted with "unlawfulness, fraud and deceit", making it "unworthy of protection." In particular, Serbia contends that Mr. Rand's investment is unlawful "due to illicit and deceitful conduct" in the participation in the public auction for BD Agro and conclusion of the Privatization Agreement; payment of the purchase price; fulfilment of investment obligations; disposal of BD Agro's land; and overall asset extraction scheme applied against BD Agro. Serbia alleges that Mr. Obradović violated Serbian law by breaching regulations governing the trading of securities (the "Securities Law Objection");

[239] R-PHB I, §112 et seq.

failing to disclose Mr. Rand's beneficial ownership to the Privatization Agency (the "Non-Disclosure Objection"); misappropriating funds from BD Agro's bank accounts (the "Siphoning Objection"); and illegally disposing of BD Agro's land (the "Land Machination Objection") (the latter three objections are referred to together as the "New Illegality Objections").

a. Respondent's Position

(1) Admissibility of the new illegality objections

349. The Respondent opposes the Claimants' challenge to the admissibility of the New Illegality Objections on the basis that the objections are not new. According to Serbia, these objections were mentioned in the Counter-Memorial and Rejoinder and arise out of issues and facts discussed by the Parties in their submissions. In any event, the illegality complained of is of such a character that the Tribunal must review it at its own discretion.

(2) Scope of the illegality objections

350. Serbia contends that the legality requirement is not limited to a breach of national laws and regulations, but also relates to the breach of general international legal principles, such as the principle of good faith. Further, the Tribunal should not focus only on one aspect of the investment but assess the investor's conduct comprehensively throughout the relevant period. This is especially so as the Claimants' purported investment was not a "one-time act conducted on a single day", but rather consisted in a complex set of transactions starting with the initial privatization process and continuing throughout the following years. For the Respondent, while illegality at the time of making the investment deprives the Tribunal of jurisdiction, illegality during the performance of the investment is equally relevant as it defeats claims as a matter of merits.

351. The Respondent refutes the Claimants' position that the objections are not concerned with the "making" of the Claimants' investment. It insists that the illegality analysis must continue at least until 8 April 2011, which is the date on which the last instalment of the purchase price was paid. The Securities Law Objection is concerned with the making of the Claimants' investment as it is based on breaches of rules on trading in securities. Similarly, the Non-Disclosure Objection relates to deceitful conduct in obtaining BD Agro's capital, and the Siphoning and Land Machination Objections address how monies to pay the purchase price

of BD Agro were obtained. Therefore, all these objections deal with establishing or making the investment.

(3) Merits of the illegality objections

352. In any event, according to Serbia, even if the Tribunal were not to follow the submissions above, it would nevertheless have to sustain Serbia's illegality objections on their merits.

(i) The Securities Law Objection

353. Serbia alleges that the MDH and Sembi Agreements were both contracts that contemplated the transfer of shares in a joint stock company outside the stock exchange. They thus contravened the 2002 and 2006 Securities Laws, pursuant to which securities can only be traded over the Belgrade Stock Exchange. The Sembi Agreement additionally violated Article 41(ž) of the Privatization Law.

354. Serbia further submits that Mr. Rand's acquisition of 3.9% shareholding in BD Agro through MDH Serbia triggered an obligation on Mr. Obradović, Mr. Rand, MDH, Sembi and MDH Serbia to issue a mandatory takeover bid for the BD Agro shares held by others. Had their failure to do so been discovered by the Serbian authorities, Messrs. Obradović and Rand would have lost control over BD Agro.[241] For Serbia, the indirect acquisition of 3.9% of BD Agro's equity by Mr. Rand through MDH Serbia was illegal as it breached mandatory rules of Serbian law.

(ii) The Non-Disclosure Objection

355. For Serbia, Mr. Rand misled the Agency during the Privatization and obtained his investment through "misrepresentation", "deceitful conduct",[242] "fraud", "breaching Serbian laws and by taking unlawful advantage over other participants at the auction for Privatization."[243] Serbia's legislation at the time of BD Agro's auction allowed an individual or an entity to participate in an auction through an agent. If so, the agent was to submit a certified power of attorney before the auction. However, Mr. Obradović appeared at the auction acting in his own name and on his own behalf and there was no mention whatsoever of Mr. Rand.

[241] Rej., §823.
[242] Rej., §12.
[243] Rej., §808.

356. Serbia further contends that Mr. Rand did not disclose that he was the actual buyer of BD Agro and presented Mr. Obradović as such because, unlike a foreign national, a Serbian citizen would benefit from the possibility to pay the purchase price in instalments. It adds that "Mr. Rand effectively had a grace period of one year following the auction, after which he had to pay the remaining Purchase Price in five equal annual instalments, with no interest." Another reason for Mr. Rand's non-disclosure, says Serbia, was an "evasion of liability"[244]: the arrangement with Mr. Obradović would make it impossible to determine the actual owner of the investment. For Serbia, "[i]n the event that the illegalities were to be discovered by the authorities, any criminal prosecution would be directed towards the "nominal" controlling owner and manager of the company."[245] Serbia adds that the Claimants have not furnished any credible explanation of Mr. Obradović's motives to participate in this arrangement with Mr. Rand.

(iii) Siphoning Objection

357. Serbia claims that the payment of the purchase price was the obligation of the buyer, *i.e.* Mr. Obradović. Therefore, using funds of the privatized company itself to pay the purchase price constituted fraud. In this context, the Respondent alleges that most of the instalments of the purchase price were settled with BD Agro funds:

- The third instalment was paid out of a loan transferred from NLB Bank to BD Agro and forwarded on that same day from BD Agro's account to Mr. Obradović's account;
- The fourth instalment was paid out of the proceeds of the sale of BD Agro's land as well as loans from Agrobanka and Banka Intesa to BD Agro, which were transferred to Mr. Obradović's account;
- The fifth instalment was paid out of a loan from Agrobanka to BD Agro, and forwarded on that same day to Mr. Obradović; and
- The sixth instalment and late interest was paid out of funds transferred from BD Agro's account to Inex's and Mr. Obradović's accounts.

[244] Rej., §804.
[245] Rej., §803.

358. For the Respondent, the record evidences that Mr. Obradović's business model consisted in BD Agro borrowing money from banks and transferring it to Mr. Obradović to pay the purchase price to the Agency. This was only possible, says Serbia, because the Privatization Agency was tricked into believing that it provided the option of payment in instalments to a person entitled to this incentive, which turned out not to be the case.

359. In response to the Claimants' argument that Serbia has not considered transactions outside those reflected in BD Agro's bank accounts, Serbia contends that even if such transactions are considered, Mr. Obradović extracted at least EUR 0.5 million from BD Agro, as the Claimants' own expert confirmed. Moreover, while the Claimants complain about Serbia's reliance on the descriptions of the transaction listed in the BD Agro's bank statements, they have not explained why those descriptions were wrong.

3. *Land Machination Objection*

360. Serbia contends that Mr. Obradović fraudulently extracted between EUR 1.4 to 3.3 million for himself and his associates through "land machinations." For example, land which was nominally assigned to Mr. Obradović for EUR 400,000 was resold by him in a matter of months for EUR 1,417,000, and then later for EUR 3.3 million (the "Land Swap Case"). The value of the land was thus 3.5 to 8 times higher than the amount of the shareholder loan that it was supposed to settle. There was still another attempt to extract an even higher amount through other disposals of BD Agro's land, which was, however, successfully prevented by the Agency.

361. Mr. Obradović's acquittal in the Land Swap Case, says the Respondent, does not support the Claimant's case. The appellate court did not conclude that Mr. Obradović did not engage in any illegal conduct; it merely found that his actions did not reach the requisite level to trigger criminal liability. The judgment actually confirms that the land swap transaction was unlawful. It also notes that BD Agro acted in bad faith. In addition, the court found that Mr. Obradović was the majority owner who controlled BD Agro.

b. Claimants' Position

362. The Claimants stress that Serbia only raised the Securities Law Objection in its Counter-Memorial and added the New Illegality Objections in its Rejoinder. For the Claimants, (a) the New Illegality Objections are belated and thus inadmissible; (b) the scope of the illegality objections is limited; and (c) all the illegality objections are without merit.

(1) Inadmissibility of the New Illegality Objections

363. The Claimants point out that Article 41(1) of the ICSID Arbitration Rules prescribes that jurisdictional objections must be raised "*as early as possible*" and at the latest in the Counter-Memorial. The New Illegality Objections do not comply with this rule, because they were presented in the Rejoinder. They are therefore inadmissible.

364. The Claimants accept that the New Illegality Objections could be admissible if they were based on facts that Serbia could not reasonably have known on or before 19 April 2019, when it filed its Counter-Memorial. However, that exception does not apply here.

365. The Non-Disclosure Objection, the first New Illegality Objection, is based on an assertion that Mr. Obradović violated Serbian law by failing to formally disclose Mr. Rand's beneficial ownership to the Privatization Agency. It is undisputed that Serbia knew of the Claimants' beneficial ownership at the latest since August 2017, when it received the Claimants' Notice of Dispute ("NoD"). The NoD contained a detailed description of the Claimants' ownership structure and their acquisition and subsequent beneficial ownership and control. In spite of this knowledge, Serbia did not raise the Non-Disclosure Objection in time. It should not be permitted to do so now.

366. The Money Siphoning Objection, the second New Illegality Objection, is founded on allegations that Mr. Obradović used funds from BD Agro's accounts to purchase the Beneficially Owned Shares. These allegations were made in 2009 already, when the representatives of BD Agro's minority shareholders and employees complained to various Serbian authorities, including to the Privatization Agency, about suspicious transfers from BD Agro's accounts. The Claimants submit that "while these allegations form the bedrock of Serbia's Rejoinder, they were not even hinted at in the Counter-Memorial." As a result, this objection is also untimely and must be denied.

367. The Land Machination Objection, the third New Illegality Objection, arises from assertions that Mr. Obradović stripped BD Agro of some of its land, extracting millions from BD Agro, and used BD Agro land for an illegal land swap with the Ministry of Agriculture. The Claimants stress that these "machinations" have been the subject of criminal complaints and investigations since at least 2015 and, in the case of the land swap, of ongoing criminal proceedings. The State Attorney's Office that represents Serbia in this arbitration became aware of the land swap matter in 2010. Accordingly, this objection is also untimely.

368. The Claimants further submit that the Tribunal should not exercise its power under Article 41(2) of the ICSID Arbitration Rules to hear the New Illegality Objections *ex officio*. They insist that "Serbia's strategic choice to only raise the New Illegality Objections in its Rejoinder was obviously premised on a gamble that the Tribunal would exercise its discretionary powers and would entertain the New Illegality Objections despite their belatedness and despite all the difficulties that their belated filing caused to the Claimants, who only had six weeks to address them."[246]

(2) Scope of the illegality objections

369. The Claimants concede that, under certain circumstances, the illegality of an investment may deprive an arbitral tribunal of jurisdiction. However, they emphasize that international law imposes strict limitations on illegality objections. Most importantly, illegality only affects jurisdiction if the illegal conduct occurs at the time when the investment is made. Here, the investment in the Beneficially Owned Shares was made on 4 October 2005 when Mr. Obradović entered into the Privatization Agreement, which formed the legal basis of Mr. Obradović's and thus also the Claimants' acquisition of the Beneficially Owned Shares. The only two objections that could thus fall within the required temporal scope are the Securities Law Objection and the Non-Disclosure Objection. The Siphoning and Land Machination Objections arise from allegations that Mr. Obradović and the Claimants took improper advantage of the Beneficially Owned Shares. These objections do not relate to the making of the investment and, therefore, cannot impact the Tribunal's jurisdiction.

370. The Claimants oppose Serbia's argument that the "making" of the investment covers the entire period from the conclusion of the Privatization Agreement until full payment of the purchase price on 8 April 2011. As investment tribunals have observed, the legality requirement applies only to the "making" of an investment and not its implementation and operation. Here, the relevant date is 4 October 2005, when Mr. Obradović executed the Privatization Agreement.

371. The Claimants further submit that only "fundamental violations" of legal rules that apply to the making of an investment deprive a tribunal of jurisdiction. None of Serbia's allegations meet this requirement.

[246] Rej. J., §520.

(3) Merits of the illegality objections

372. In any event, according to the Claimants, even if the Tribunal were not to follow their submissions above, it would reach the conclusion that the illegality objections are unfounded.

(i) The Securities Law Objection

373. The Claimants submit that the Securities Law Objection incorporates by reference the arguments presented in the Respondent's *ratione materiae* objections. Such arguments cannot be accepted for the reasons mentioned earlier. Particularly, the provisions which the Respondent contends have been breached – Article 59 of the 2001 Law on Privatization, Article 52(1) of the 2002 Law on Capital Markets and its equivalent Article 52(2) of the 2006 Law on Capital Markets – do not apply to transfers of beneficial ownership; they only relate to transfers of legal title to shares in public companies. Restrictions on trading with shares of public companies are thus irrelevant to the Tribunal's jurisdiction.

374. The only additional argument, so say the Claimants, relates to Mr. Rand's Indirect Shareholding, which was acquired by MDH Serbia between October 2008 and October 2012, and allegedly triggered the obligation for Mr. Obradović, Mr. Rand, MDH, Sembi and MDH Serbia to bid for the BD Agro shares which they did not hold. Serbia's argument that had this failure been discovered by Serbian authorities, Messrs. Obradović and Rand would completely lose control over BD Agro does not withstand scrutiny. The Serbian Securities Commission could only have imposed (i) the temporary suspension of MDH Serbia's right to vote the 3.9% shareholding; (ii) a misdemeanor fine; and (iii) an obligation to launch a mandatory takeover bid. For the Claimants, an omission to make a takeover bid would not affect the Tribunal's jurisdiction, because it does not affect any "fundamental legal principle of Serbian law."

(ii) The Non-Disclosure Objection

375. The Claimants deny Serbia's allegation that Mr. Rand deceived the Serbian authorities when he allegedly failed to disclose his beneficial ownership during the auction for the Beneficially Owned Shares or thereafter.

376. First, the Claimants stress that Serbia has not identified any provision of the Canada-Serbia BIT that requires Mr. Obradović and/or Mr. Rand to formally disclose their beneficial

ownership arrangement.[247] Indeed, the Treaty does not require an investment to be disclosed to the host State. Moreover, Serbia has failed to identify a provision of Serbian law which would contain a disclosure obligation. Even if Article 2 of the Law on Privatization contained such an obligation as Serbia alleges (*quod non*), that provision would only apply to the public entities involved in the privatization process, and not to the buyers. Further, there is no sanction for failure to comply with Article 2. Nor has Serbia cited any decision of a Serbian body sanctioning a private entity for breach of Article 2. Moreover, even if Serbian law required a formal disclosure of beneficial ownership (*quod non*), and even if the beneficial ownership was not disclosed, Serbia is estopped from relying on the lack of disclosure due to the Agency's acquiescence to, and lack of interest in, the Claimants' beneficial ownership of BD Agro. Finally, the Claimants notes that the Agency did not require the disclosure of beneficial ownership in BD Agro's privatization, although it did request disclosures in other privatizations, such as "Vranje" and Beopetrol.

377. Second and in any event, the Claimants repeatedly disclosed their beneficial ownership to the Serbian authorities, including the Privatization Agency.[248] Mr. Rand's beneficial ownership of BD Agro was widely known, as is, for instance, evident from the following facts:

- In May 2005, Mr. Rand visited BD Agro and met with various Government officials to discuss his potential investment. These officials included Mr. Predrag Bubalo, the then Minister of Economy, Mr. Ljubiša Jovanović, the then Assistant (Deputy) Minister of Economy, Mr. Mladjan Dinkić, the then Minister of Finance, and Mr. Danilo Golubović, the then Deputy Minister of Agriculture, Forestry and Water Management;

- On 16 May 2005, Mr. Jovanović, Assistant Deputy Minister of Economy sent an email to Mr. Rand, in which he summarized the status and economic condition of BD Agro, the improvements that could be made and the reasons "WHY TO INVEST IN DOBANOVCI", including the fact that, as a result of its location, the value of BD Agro's land would be "permanently increasing";

- On 4 June 2005, i.e. approximately three weeks after Mr. Jovanović sent him the information about BD Agro, Mr. Rand wrote to Minister Bubalo to thank him for his

[247] Rej. J., §§108 et seq.

[248] Rej. J., §§126 et seq. and §§185 et seq.

hospitality during his visit to Belgrade and to inform him that he was interested in participating in the public auction of BD Agro;

- When Mr. Obradović submitted the winning bid at the public auction on 29 September 2005, Mr. Jovanović immediately reported the outcome of the auction to Mr. Rand. He sent the email from his official email account at the Ministry of Economy, stating that he "presume[d] that [Mr. Obradović] ha[d] already informed that you all succeeded in farm acquisition!"

378. The Claimants challenge Serbia's conjectures about the motivation for investing through Mr. Obradović. They explain that the reason for proceeding through Mr. Obradović was "purely practical": Mr. Rand lives in Vancouver and does not speak Serbian. He was thus unable to attend to various matters pertaining to his Serbian companies that required the owner's local attention. Mr. Obradović becoming the nominal owner was thus the most practical solution to address these concerns. As the nominal owner, Mr. Obradović was able to act upon Mr. Rand's informal instructions because he did not need to prove his authority vis-à-vis third parties. The nominal ownership also gave Mr. Obradović more credibility in Serbia.

379. As for the questions which Serbia raises about Mr. Obradović's motives, they are "entirely irrelevant", say the Claimants. Whatever they were, Mr. Rand and Sembi had beneficial ownership of and control over BD Agro. In any event, Mr. Obradović's motivations are not questionable: he worked for Mr. Rand based on a success fee payable if and when Mr. Rand's investments became profitable. Mr. Rand also advanced funds to cover Mr. Obradović's expenses, including, among other things, the purchase of an apartment in Belgrade and his daughter's tuition fees in the United States.

(iii) The Siphoning Objection

380. The Claimants submit that Serbia has failed to demonstrate any impropriety with respect to the money transfers between Mr. Obradović and BD Agro or between BD Agro, Mr. Obradović and other Serbian companies beneficially owned by Mr. Rand. This is, in particular, evidenced by the absence of criminal proceedings against Mr. Obradović in relation to these transfers.

381. In any event, the Claimants dispute Serbia's claim that Mr. Obradović owed any monies to Sembi. They contend that, if all relevant transactions are taken into consideration, the net balance of payments between BD Agro, on one side, and Mr. Obradović together with Mr. Rand and his Serbian companies, on the other side, is in favour of BD Agro.

382. The Claimants also challenge the analysis of the transactions on which Serbia relies for its Siphoning Objection. First, some of the transactions that created a financial benefit for BD Agro were not reflected in BD Agro's bank accounts. Second, Serbia's review was based on descriptions of transactions included in BD Agro's bank statements. These descriptions were in part incorrect or inconclusive. For example, several transactions which were labelled as purchase of goods and therefore excluded from Serbia's analysis were in reality shareholder loans.

(iv) The Land Machination Objection

383. The Claimants argue that the Land Machination Objection relates to the performance of the Privatization Agreement rather than its conclusion and thus can have no bearing on the Tribunal's jurisdiction. In any event, the objection is ill-founded, since all of the impugned transactions involving BD Agro's land were legitimate. Although Serbia now raises an objection, the Privatization Agency never complained at the time that these transactions breached the Privatization Agreement. Additionally, the Belgrade Court of Appeal acquitted Mr. Obradović in the Land Swap case.

c. Analysis

384. The Tribunal examines the admissibility of the New Illegality Objections (a), before reviewing the scope of all of Serbia's illegality objections (b) and the merits of those objections (c).

(1) Admissibility of the New illegality Objections

385. The Claimants contest the admissibility of the New Illegality Objections as they were advanced for the first time in Serbia's Rejoinder. Serbia disagrees, contending that these objections were "presented" in its Counter-Memorial and "further developed" in its Rejoinder. Pursuant to Article 41(2) of the ICSID Arbitration Rules, the Tribunal has the power to review its jurisdiction *ex officio*. Hence, the Tribunal can dispense with deciding the Claimants' admissibility objection and allow the New Illegality Objections *ex officio*, which it does. It is satisfied that the Claimants had the opportunity to address the Tribunal on these objections. They did so orally at the hearing and in writing both before and after the hearing.

(2) Scope of the illegality objections

386. Serbia raises four objections to the Tribunal's jurisdiction "*ratione voluntatis*": the Securities Law Objection, the Disclosure Objection, the Siphoning Objection and the Land Machination Objection. Serbia acknowledges that the Canada-Serbia BIT does not contain an express legality requirement but insists that the Treaty implicitly requires legality.

387. Contracting Parties to an investment treaty are free to introduce a legality requirement, i.e. to limit the protections of the treaty to investments made in accordance with the laws and regulations of the host State. Depending on the language used in the investment treaty, this limitation may be a bar to jurisdiction, i.e. to the procedural protection under the treaty, or a defense on the merits, i.e. to the application of the substantive treaty guarantees. Here, the Contracting Parties to the Canada-Serbia BIT did not include any such limitation into the text of BIT. The definitions of "investment" and "covered investment" in Article 1 of the BIT and the dispute settlement clause in Article 22 do not require investments under the BIT to be made in accordance with host State law. In application of the treaty interpretation rules codified in the Vienna Convention, the Tribunal does not find it correct to read into the Treaty to introduce a requirement that the Contracting Parties have not provided, especially in circumstances where other provisions in the BIT expressly refer to domestic law.[249] Serbia has advanced no reason why the Tribunal should do so.

388. In the circumstances, the Tribunal dismisses the Respondent's "*ratione voluntatis*" jurisdictional objections.

389. Additionally, even if the Tribunal were to review these objections, it would also dismiss them.

(3) Merits of the illegality objections

390. The first issue arising in implying a legality requirement into a treaty turns on the time at which the requirement must be met. With an express requirement, the answer is likely to lie in the treaty wording. Here, the Tribunal will simply adopt the same view as the majority of investment tribunals and opt for the time when the investment is established, i.e. when it is

[249] E.g. Exh. CLA-1, Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, 27 April 2015, Art. 1 ("'confidential information' means confidential business information or information that is privileged or otherwise protected from disclosure under the law of a Party"; "enterprise" means an entity constituted or organized under applicable law […]").

made, not when it is operated.[250] In this context, it notes that Article 12 of the Privatization Agreement provides that the Buyer will acquire ownership rights over BD Agro in proportion to the instalments paid.[251] Thus, the "making" of the investment, i.e. Mr. Rand's indirect acquisition of interest in the Beneficially Owned Shares lasted throughout the period when payment instalments were paid, ending on 8 April 2011 with the last instalment. Further, it is common ground between the Parties, and rightly so, that only violations of fundamental rules of law would deprive a tribunal of jurisdiction.[252]

(i) Securities Law Objection

391. Serbia's Securities Law Objection is presented in two parts. First, Serbia alleges that, as the MDH Agreement and the Sembi Agreement contemplated a transfer of shares in a joint stock company outside the Belgrade Stock Exchange, they violated Serbian Securities Laws. Serbia further alleges that the Sembi Agreement also contravened Article 41(ž) of the Privatization Law. As mentioned above, the investment in this case is Mr. Rand's control over Sembi's contractual interest in the Beneficially Owned Shares. Sembi's contractual interest arises through the Sembi Agreement, not the MDH Agreement. The latter Agreement is thus irrelevant for the present purposes. The Tribunal has already reviewed and dismissed the objections in relation to the Sembi Agreement above (§§320 et seq.).

392. Second, Serbia submits that Mr. Rand's acquisition of 3.9% of BD Agro's equity through MDH Serbia starting in 2008 required Mr. Obradović, Mr. Rand, MDH, Sembi and MDH Serbia to make a bid to take over BD Agro's shares still in the hands of third parties, and that they failed to do. Serbia asserts that, had this failure been discovered,

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[250] See, for instance, Exh. RLA-123, *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, §707; Exh. CLA-169, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, §327.

[251] Exh. CE-17, Privatization Agreement, 4 October 2005, Art. 12: "With conclusion of this agreement, which has the effect of the articles of incorporation of the subject, the buyer acquires the right of management, participation in profit and the right to a part of the liquidation mass, proportionately to the amount of purchased capital. The right to free disposal of purchased capital is acquired by the buyer pursuant to the provisions of Article 456 of the Company Law and provisions of the agreement, and in proportion to paid value of sale and purchase price."

[252] Exh. CLA-170, *Liman Caspian Oil BV and NCL Dutch Investments v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010 (excerpts), §187; Exh. CLA-171, *Peter A. Allard v. Government of Barbados*, PCA Case No. 2012-06, Award on Jurisdiction, 13 June 2014, §94.

Messrs. Obradović and Rand would lose their voting rights in BD Agro pursuant to Article 37 of the Takeover Law.

393. The Tribunal does not agree. The Claimants' omission to issue a takeover bid would not automatically trigger the loss of Messrs. Obradović and Rand's voting rights. It is not evident that the sanction in Article 37, which came into force in 2012, would apply to an alleged breach that occurred in 2008 when MDH Serbia first acquired BD Agro's shares. Indeed, the testimony of the Claimants' expert Ms. Tomić Brkušanin according to which Article 37 could not be applied retroactively was not cogently rebutted.[253] Moreover and in any event, as observed, only violations of fundamental rules would deprive a tribunal of its jurisdiction and Serbia has not established that the failure to issue a takeover bid would affect a fundamental principle of Serbian law. The contrary rather emerges from the fact that a failure to issue a takeover bid does not affect the validity of the transfer of shares, nor the ownership of the newly acquired shares.[254]

394. As a result, the Tribunal dismisses this Objection.

(ii) Non-Disclosure Objection

395. Serbia contends that Mr. Obradović violated Serbian law by failing to formally disclose Mr. Rand's beneficial ownership to the Privatization Agency. There is no rule under Serbian law that required Mr. Rand to disclose his investment structure. Article 2 of the Law on Privatization, on which Serbia relies, does not contain such an obligation,[255] and Serbia has pointed to no decisions of any Serbian authority sanctioning a private entity for the breach of the principle of transparency under Article 2. Article 19 of the Decree on Sale of Capital and Assets by Public Auction, another provision on which Serbia relies, does not provide either for a disclosure of the kind alleged by Serbia.[256] Further, the Tribunal recalls that the Agency did not require the disclosure of beneficial ownership in BD Agro's privatization, although it did request disclosures in other privatizations.[257] Further and in any event, even

[253] Tr., Hearing on Jurisdiction and Merits, Day 4, 186:12-190:05.

[254] Ms. Brkušanin ER 1 §114 The Respondent's expert Dr. Radovic did not contest this evidence.

[255] Exh. CE-220, Law on Privatization, Art. 2: "Privatization is based on the following principles: 1) Creation of conditions for economic development and social stability; 2) Transparency; 3) Flexibility; 4) Establishing of sale price in accordance with market conditions."

[256] Exh. RE-218, Regulation on the Sale of Capital and Property at a Public Auction (52/2005), Art. 19.

[257] In the public invitations for tender in respect of Duvanska Industrija "Vranje" (2003), the Agency expressly asked for the disclosure of beneficial ownership structures. See Exh. CE-890, Public Invitation for

if disclosure was required, for the reasons mentioned above, the Tribunal has determined that Serbian government officials were well aware of Mr. Rand's control over BD Agro.

396. In respect of Serbia's allegations that Mr. Rand acted abusively by "hiding behind" Mr. Obradović, it is true that only Serbian natural persons were permitted to pay for privatized companies in instalments.[258] However, it remains that nothing prevents non-Serbian nationals from participating in privatizations. Therefore, by participating indirectly in BD Agro's privatization through Mr. Obradović, Mr. Rand did not create for himself an opportunity that otherwise he would have lacked. He could have bought BD Agro directly. By acting through Mr. Obradović, Mr. Rand did, of course, receive the benefit of paying the purchase price in instalments and it is true, that Mr. Obradovic effectively paid the purchase price in 11 instead of six instalments. However, these facts in and of themselves do not meet the high threshold set for an abuse, especially in circumstances where Mr. Rand advanced good reasons for involving Mr. Obradović,[259] and interest was paid on the overdue instalments, which monies the Agency accepted without protest.[260] Further and in any event, as already explained, Serbia was well aware of Mr. Rand's involvement in BD Agro from the very beginning (§239), and cannot now be heard to complain about Mr. Rand acting through Mr. Obradović.

397. In the circumstances, the Tribunal dismisses this Objection.

(iii) Siphoning Objection

398. The Siphoning Objection is principally based on allegations that Mr. Obradović used funds from BD Agro's accounts to pay the purchase price for the Beneficially Owned Shares, to fulfil his investment obligations under the Privatization Agreement, and for his personal enrichment. The Respondent submits that the allegedly improper money transfers amounted to fraud under Serbian law.

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participation in a public tender process for the sale of socially owned capital of Duvanska industrija "Vranje" a.d., p. 2 (pdf). It did the same in the public invitation for Beopetrol a.d. (2003). See Exh. CE-891, Public Invitation for participation in a public tender process for the acquisition of a controlling interest in Beopetrol a.d. Beograd, p. 2 (pdf).

[258] Exh. RE-218, Regulation on the Sale of Capital and Property at a Public Auction (52/2005), Art. 39(1).

[259] Rand WS III, §§11-14.

[260] Exh. RE-33, Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic, 15 October 2015.

399. Serbia has not cogently explained which rules have been breached and how. There are no criminal proceedings pending against Mr. Obradović regarding any such alleged fraud, despite similar allegations being made against him in 2009 when the representatives of BD Agro's minority shareholders and employees complained to various Serbian bodies, including the Privatization Agency, of the alleged "suspicious transactions from BD Agro's accounts."[261] This is all the more surprising as Serbia was in control of BD Agro from 21 October 2015. Yet, no claim of financial or other irregularity has been made against Mr. Obradović. It also remains that, as BD Agro was a publicly traded company, its financial statements, which form the bases of Serbia's allegations, were audited by three different auditors, including PricewaterhouseCoopers, that found no irregularity.[262] Mr. Rand's own accountant, who visited BD Agro on a quarterly basis and reviewed the financial documents of the company, did not raise any issues either.[263] Finally, Serbia's expert, Mr. Sandy Cowan, on whom Serbia relied to make this objection, admitted that he had not considered certain transactions in his analysis,[264] and that his analysis was based on descriptions of transactions used in BD Agro's bank statements, which could be incorrect or inconclusive.[265]

400. Therefore, the Tribunal concludes that this objection is not well-founded and dismisses it.

(iv) Land Machination Objection

401. The Land Machination Objection is grounded on allegations that Mr. Obradović stripped BD Agro of some of its land and thereby extracted large sums from BD Agro. Serbia also alleges that Mr. Obradović committed some of BD Agro's land to an illegal land swap with the Ministry of Agriculture.

402. While Serbia complains of "machinations" in respect of a number of transactions, and while there might have been some irregularities in some transactions, here again, Serbia has not cogently explained which rules have been breached and how. Serbia's allegations are not supported by domestic proceedings against Mr. Obradović in respect of these transactions, despite BD Agro being within Serbia's control since 2015. For instance, there are no court decisions against Mr. Obradović for the transfer of land to Calpro or the transfer to

[261] C-Mem., §179; Rej., §515.
[262] Obradović WS III, §52.
[263] Obradović WS III, §52; Rand WS III, §48.
[264] Tr., Hearing on Jurisdiction and Merits, Day 8, 164:11-165:10 (Cowan).
[265] Tr., Hearing on Jurisdiction and Merits, Day 8, 163:13-164:6 (Cowan).

Ms. Nedeljkovic. Although the contract in the Land Swap Case was declared null and void, it remains that such contract was concluded on a recommendation from the cadaster office[266] and on the express approval of the Ministry of Agriculture.[267] It also noted that, the Court of Appeal in Belgrade acquitted Mr. Obradović in that case.[268] For these reasons, the Tribunal denies this objection.

d. Conclusion

403. It follows from the discussion above that the Tribunal has "*ratione voluntatis"* jurisdiction in respect of claims arising out of Mr. Rand's investment in Serbia.

4. Non-Retroactivity and Time Bar

a. Respondent's Position

404. The Respondent addresses two legally distinct issues under the heading of temporal jurisdiction (items (b) and (c) below). First, however, it opposes the Claimants' characterization of the factual basis of their claims (item (a) below).

(1) Characterization of the factual basis of the claims

405. The Respondent recalls that the Tribunal joined jurisdiction to the merits in Procedural Order No. 3. This "incontrovertibly" showed that the Tribunal considered that the facts underlying jurisdiction were "such as to necessitate full consideration which may only be achieved by hearing both parties – and decidedly not by merely relying on what the Claimants allege."[269] Moreover, the Claimants' themselves argued that the factual basis of most of the Respondent's jurisdictional objections were "inextricably intertwined" with the merits.[270]

406. While in a treaty arbitration it is for the claimant to allege the facts which in its view constitute treaty breaches, a respondent has the right to dispute those facts and their characterization as treaty breaches.

[266] Exh. RE-395, Letter from the Cadaster Office to BD Agro, 8 February 2008.
[267] Exh. CE-762, Decision of Ministry of Agriculture, 4 January 2010.
[268] Exh. CE-907, Decision of the Court of Appeal in Belgrade, 26 May 2021.
[269] Rej., §949.
[270] Rej., §951 relying on Claimants' Reply to the Request for Bifurcation, §7.

(2) Non-retroactivity

407. Serbia submits that the principle of non-retroactivity according to which legal obligations arising under an international agreement cannot bind parties with respect to acts committed before the legal obligation came into existence deprives the Tribunal of jurisdiction over claims based on acts and facts preceding the entry into force of the Canada-Serbia BIT. More specifically, the Respondent argues, all the claims raised in this arbitration arise from acts and facts which were committed or were in existence before the Treaty's entry into force or were the direct result of Mr. Obradović's breach of the Privatization Agreement that also occurred prior to the entry into force. These claims are therefore precluded by the principle of non-retroactivity.

408. The Respondent insists that the alleged breaches are "deeply and inseparably rooted" in the Respondent's pre-BIT conduct. For Serbia, "it is impossible to divorce termination of the contract from its breach, or to divide the retention of pledge from the performance under the contract, or equally to delineate breaches of contract and interests of BD Agro's employees and minority shareholders initiating the procedure with the Ombudsman."[271] The Claimants' argument that the breaches are based on the formal act of termination is "artificial" and "purposefully tailored" to overcome the temporal limitation. Serbia adds that, once the breach was declared and remedies suggested, there were only two possible options: termination by the Agency or performance by Mr. Obradović. It is true that the Agreement was formally terminated after the BIT's effective date, but this was only because Mr. Obradović made "false promises" that the breaches would be remedied.[272] He "misled" the Agency causing the postponement of the termination and the Claimants now seek international protection on that basis.[273]

409. Serbia also stresses that the Claimants admitted that the dispute arose prior to the entry into force of the Canada-Serbia BIT. Indeed, they conceded that Sembi found the Agency's refusal to release the pledge to be a violation of the Cyprus-Serbia BIT before it became a violation of the Canada-Serbia BIT. Sembi's owners are Canadian nationals who appear in this arbitration as Claimants in their own right. It therefore follows, so says the Respondent,

[271] Rej., §939.
[272] Rej., §929.
[273] Rej., §929.

that a dispute arose between the Parties prior to the effective date of the Canada-Serbia BIT, which deprives the Tribunal of jurisdiction over the claims of the Canadian Claimants.

(3) Time bar

410. Serbia submits that Article 22 of the Canada-Serbia BIT sets forth an unconditional preclusive three-year limitation period within which an investor/enterprise must submit a claim from the date on which they first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that they had incurred loss or damage. These are "imperative conditions", without the satisfaction of which the Tribunal cannot exercise jurisdiction.

411. According to Serbia, since the Request for Arbitration was received by the ICSID Secretariat on 14 February 2018, the cut-off date is 14 February 2015 (the "Cut-Off-Date"). Therefore, Mr. Rand must have acquired actual or constructive knowledge of a breach causing loss not earlier than 14 February 2015. If he acquired knowledge before that date, the claim is time barred.

(i) Knowledge of breach

412. For the Respondent, Mr. Rand was well aware of all circumstances leading to the alleged breaches and loss as he was familiar with all the facts constituting the cause of action well before the Cut-Off Date. In particular, from the moment when Mr. Obradović received the First Notice dated 25 February 2011 (which the Claimants received on 1 March 2011), he must have known about the potential loss.

413. Serbia challenges the Claimants' argument according to which Mr. Rand could not possibly know on 1 March 2011 or at any time prior to the Cut-Off Date that the Privatization Agreement would be terminated due to a substantial breach of the contract. The First Notice sets out several breaches of the Privatization Agreement and multiple violations of its Article 5.3.4. It provides reasons and evidence seeking to establish these breaches. It also grants 60 days to remedy the breaches of Articles 5.3.3 and 5.3.4 and specifies the consequences of a failure to remedy.

414. Serbia notes that, while it was possible to avoid termination by remedying the breach of Article 5.3.4, i.e. by reinstating the funds that were unlawfully lent to third parties, remediation was entirely within Mr. Obradović's control, as opposed to Serbia's. Further,

there were six other notices of breach before the Cut-Off Date and several meetings during which Mr. Obradović or representatives of BD Agro were advised that the existence of an unremedied breach was the main issue pending between the contract parties.

415. Serbia contends that it is "suspicious" that Mr. Obradović never challenged the retention of the pledge as a contractual breach before the forum chosen in the Privatization Agreement. Equally suspicious is the Claimants' submission that they could not "realistically foresee" the termination of the Agreement despite the numerous notices of the breach of Articles 5.3.3 and 5.3.4.[274] It is "simply impossible" that dozens of warnings did not alert Mr. Obradović and that argument illustrates how the Claimants built their case to overcome the *ratione temporis* hurdle.[275]

416. According to the Respondent, the Agency's refusal to release the pledge (1), as well as the Ombudsman's intervention, (2) and the termination of the Privatization Agreement and the seizure of the Beneficially Owned Shares (3) are time barred.

(a) Refusal to release the pledge

417. Serbia observes that the Privatization Agency clearly communicated the reason for not releasing the pledge in 2014, which was an "imminent and direct consequence" of the breach of Article 5.3.4 of the Privatization Agreement. During a meeting held on 4 February 2014, the Privatization Agency informed Mr. Obradović that it could not release the pledge over the shares because of the breach. Therefore, Mr. Obradović was aware of the Agency's refusal to release the pledge already in February 2014, much before the Cut-Off Date.

418. Serbia rejects the argument that its refusal to release the pledge over BD Agro's shares on the Cut-Off Date and subsequently was a wrongful "continuous act." The Agency was contractually entitled to retain the pledge and "[a] [c]ontractual act is not in itself a wrongful act and as such cannot qualify for a continuing wrongful act under international law."[276] The Respondent adds that "the continuing act, in terms of the retention of the pledge as a security for the performance under the contract, has never come into existence under international law as it has never reached the threshold of an internationally wrongful

[274] Rej., §912.
[275] Rej., §912.
[276] Rej., §914.

continuing act."[277] It also notes that the Claimants failed to challenge such act before the Commercial Court in Belgrade in accordance with the choice of forum clause in the Privatization Agreement. Moreover, argues Serbia, the Claimants should not be allowed to rely on their own failures. Mr. Obradović's failure to remedy the alleged breach of Article 5.3.4, together with his "manipulative promises" to the Privatization Agency, cannot be used to overcome the time bar of the Canada-Serbia BIT

(b) Ombudsman's intervention

419. Serbia points out that the Ombudsman commenced his investigation into BD Agro in late 2014 based on complaints received from BD Agro's employees. Thus, says Serbia, "the concern of the employees/stockholders over their status and property rights that gave rise to their complaint to the Ombudsman did exist before [14 February 2015]."[278]

(c) Termination of the Privatization Agreement and seizure of the Beneficially Owned Shares

420. Serbia submits that the events following the breach of the Privatization Agreement were foreseeable and inevitably led to the termination of the Privatization Agreement. Foreseeability arises, so says Serbia, from numerous letters exchanged between Mr. Obradović and the Agency, the existing legal framework, and Mr. Obradović's prior experience with the privatization process in Serbia.[279]

(ii) Knowledge of loss

421. The Respondent submits that knowledge of possible loss is sufficient to trigger the limitation period under the Treaty. The investor need not have suffered actual loss. Here, the Claimants should be regarded as having knowledge of their alleged loss or damage on the date of the First Notice which was given on 1 March 2011. The three-year period thus expired on 1 March 2014, well before the Cut-Off Date.

[277] Rej., §914.
[278] Rej., §922.
[279] Rej., §927.

b. Claimants' Position

(1) Characterization of the factual basis of the claims

422. The Claimants contend that it is for them, not for Serbia, to formulate their claims and identify the measures that they deem to constitute breaches of the Canada-Serbia BIT. The Tribunal must assess its jurisdiction based on the Claimants' characterization of their claims. Serbia's attempts to mischaracterize the factual matrix of the claims should not be followed. The Respondent cannot be allowed to recast the claims to its advantage thereby manufacturing a *ratione temporis* objection.

423. In their submission, the Claimants have made it "abundantly clear" that they impugn three instances of Serbia's conduct: "*(i)* the continuous refusal to release the pledge over the Privatized Shares; *(ii)* the unjustified and arbitrary investigation of BD Agro by the Ombudsman and the unlawful issuance of his 'recommendations'; and (iii) the unlawful termination of the Privatization Agreement and the subsequent unlawful seizure of the Beneficially Owned Shares." Contrary to the Respondent's suggestions, the Claimants have never argued that the Privatization Agency's finding of a purported violation of the Privatization Agreement, which was notified to Mr. Obradović for the first time in March 2011, constituted the basis of their claims.

(2) Non-Retroactivity

424. In the Claimants' submission, the claims under the Canada-Serbia BIT are not precluded by the principle of non-retroactivity of international treaties because they are based on conduct that occurred after the Treaty's entry into force.

425. The Claimants emphasize that the Privatization Agency was in continuous breach of its obligation to release the pledge over the Beneficially Owned Shares from its first refusal on 8 April 2011 until the shares were expropriated on 21 October 2015. From the time when the Canada-Serbia BIT entered into force on 27 April 2015, this conduct fell within the scope of the BIT and there is no violation of the principle of non-retroactivity.

426. The Claimants further submit that while the Ombudsman initiated his unlawful investigation of BD Agro in late 2014, he pursued it until he issued his recommendation on 23 June 2015. Hence, the claims based on the investigations which were ongoing at the time of the Treaty's entry into force and on the later recommendations comply with the principle of non-retroactivity.

427. Further still, the Claimants underline that the Privatization Agency terminated the Privatization Agreement on 28 September 2015 and transferred the Beneficially Owned Shares on 21 October 2015. Once again, both measures occurred when the Treaty was in effect and there is thus no violation of the principle of non-retroactivity.

428. Moreover, say the Claimants, Serbia's argument that the present "dispute" arose before the Treaty's entry into force is misguided. It is irrelevant when a dispute arises. What matters is that the Claimants bring claims for breaches of the Canada-Serbia BIT. In any event, the present dispute arose after the Treaty's into force. The First Notice is not the source of this dispute. At that time, the Claimants could not have known that Serbia would expropriate their investment more than four years later. In addition, the notices of contract breach which the Respondent invokes show at best that the termination of the Privatization Agreement and the expropriation were neither automatic nor unavoidable. For the Claimants, the relevant date to determine whether the claims respect the principle of non-retroactivity is that of the expropriation, not those of the first and later notices.

(3) Time-bar

429. The Claimants insist that their claims fall within the Tribunal's jurisdiction because they became aware of the breaches and resulting loss on or after the Cut-Off-Date, at a time when the Canada-Serbia BIT was in force. Contrary to the Respondent's assertion, neither the First Notice nor the Privatization Agency's subsequent notices could have possibly triggered the three-year time limit because the Canada-Serbia BIT was not in force at that time.

(i) Knowledge of breach

430. The Claimants insist that none of their claims described above, be it the refusal to release the pledge (1), the intervention of the Ombudsman (2), or the unlawful termination of the Privatization Agreement (3), are time-barred.

(a) Refusal to release the pledge

431. As mentioned above, the Claimants became aware of the breach perpetrated through the continuous refusal to release the pledge, which lasted until the expropriation of the Claimants' investment, on 27 April 2015. In response to Serbia's challenge of the wrongful and continuous nature of that action, they argue that it does not matter whether conduct is

contractual or not to determine whether it is continuous.[280] In *SGS v. Philippines,* for instance, the tribunal recognized that non-performance of a contract may constitute a continuous breach under international law.

432. The Claimants equally dispute Serbia's argument linked to the lack of challenge in local courts. They assert that international claims are not predicated on the exhaustion of local remedies and add that the expropriation was the result of the conduct of the Privatization Agency. Had the Privatization Agency released the pledge, there would have been no seizure of the Beneficially Owned Shares, with the result that "the Claimants are absolutely not required to have sought redress before the courts in order to assert a claim of Serbia's breach of its international obligations on the basis of the Privatization Agency's refusal to release the pledge."[281]

433. Finally, the Claimants reject Serbia's conclusion that the above factors, taken together with Mr. Obradović's "indolence" to remedy the alleged breaches amount to an "impermissible […] modification" of the Cut-Off-Date. More specifically, they explain that "Mr. Obradović's alleged 'indolence to remedy the alleged breaches' could not have possibly amounted to any 'tolling' of the time limitation period for submitting a claim to arbitration under the Canada-Serbia BIT because the Claimants did not even have a claim to arbitrate at the time of that alleged conduct."[282]

(b) Ombudsman's intervention

434. The Claimants submit that one of the reasons why Serbia breached the Canada-Serbia BIT lies in the Ombudsman starting an unjustified, heavily publicized and politically-motivated investigation of BD Agro that culminated in the issuance of unlawful "recommendations" and prompted the termination of the Privatization Agreement and the expropriation of the investment. The Claimants became aware of the Ombudsman's unlawful investigation and of his "recommendations" on 23 June 2015, i.e. after the Cut-Off-Date.

[280] Rej. J., §621.
[281] Rej. J., §629.
[282] Rej. J., §630.

(c) Termination of the Privatization Agreement and seizure of the Beneficially Owned Shares

435. The Claimants also assert a breach of the Canada-Serbia BIT due to the Agency's unlawful termination of the Privatization Agreement on 28 September 2015 and the subsequent unlawful order to transfer the Beneficially Owned Shares on 21 October 2015. These events occurred after the Cut-Off-Date and, therefore, the related breaches cannot be time barred.

(ii) Knowledge of loss

436. The Claimants stress that the limitation is only triggered once the investor has become aware of the "loss or damage" inflicted by the breach. For the claims to be time barred, Serbia must thus prove that the Claimants acquired knowledge that they suffered loss as a result of Serbia's breach of the Canada-Serbia BIT more than three years before initiating this arbitration, which is obviously impossible.

437. The Claimants insist that they became aware of the loss caused by Serbia's violations of the Treaty only on 21 October 2015 when the Beneficially Owned Shares were seized, and the Claimants were thus definitively deprived of their investment. This was after the Cut-Off-Date. Even if the Claimants could be said to have acquired knowledge of the loss due to the failure to release the pledge and the Ombudsman's unlawful interference on 27 April 2015 and 23 June 2015, respectively, both these dates would also fall after the Cut-Off-Date.

438. According to the Claimants, it is incorrect that the termination of the Privatization Agreement and subsequent seizure of the Beneficially Owned Shares are mere consequences of the first notice, of which the Claimants should have been aware upon receipt of that first notice long before the Cut-Off-Date. While Article 22(2)(e)(i) of the Canada-Serbia BIT contemplates two forms of knowledge of breach and loss, i.e. actual knowledge (what the claimant did in fact know) and constructive knowledge (what the claimant should have known), very few investment tribunals have enquired whether the claimant had constructive knowledge of the alleged breach and loss. Further, constructive knowledge does not mean that the investor is required to anticipate before the Cut-Off-Date, what the State's conduct will be thereafter, with the result that the investor would be deemed to have knowledge of the State's conduct before it actually occurred.

c. Analysis

439. The Tribunal first examines the Parties' submissions on the characterization of the factual basis of the claims (a). Then, it reviews the two legally distinct issues of temporal scope of application of the Treaty and non-retroactivity (b). Finally, it discusses the time bar or statute of limitation of claims (c).

(1) Characterization of the factual basis of the claims

440. At the outset, the Parties diverge when it comes to the basis on which the Tribunal must assess its temporal jurisdiction. The Respondent argues that the Tribunal should adopt its own characterization of the alleged breaches, whereas the Claimants submit that it must accept the claims as pled.

441. The Tribunal tends to agree with the Claimants. Article 22(2)(e)(i) of the Canada-Serbia BIT reproduced above provides that an investor may submit a claim to arbitration if 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. The use of the word "alleged" to qualify the breach suggests that the Tribunal must assess its jurisdiction on the basis of the claims as pled. Other tribunals, interpreting similarly worded investment agreements, have reached the same conclusion.[283] Serbia advances no convincing explanation why this reasoning should be different in respect of non-retroactivity.

(2) Non-retroactivity

442. As a matter of principle and subject to a contrary agreement which is not at issue here, only a treaty that is in force binds the Contracting States.[284] As a corollary, acts carried out at a time when the treaty had not yet entered into force are not subject to the treaty rules. In other words, a treaty does not have retroactive effect, it does not capture acts or omissions

[283] See, for instance, Exh. CLA-103, *Infinito Gold Ltd. v. Republic of Costa Rica,* ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017, §§186, 187 ("at the jurisdictional stage, a tribunal must be guided by the case as put forward by the claimant in order to avoid breaching the claimant's due process rights. To proceed otherwise is to incur the risk of dismissing the case based on arguments not put forward by the claimant, at a great procedural cost for that party. […] [T]he Tribunal must assess the case before it focusing on the measures that the Claimant has deemed fit to challenge, and determine its jurisdiction, the admissibility of these claims and, if appropriate, the prima facie existence of rights to be protected at the merits phase, on that basis."). See also, Exh. RLA-127, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, §349; Exh. RLA-128, *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Award, 16 March 2017, §§163-165.

[284] RLA-44, Vienna Convention on the Law of Treaties ("VCLT"), Art. 26.

predating its effectiveness.[285] There are exceptions to the non-retroactivity principle, but the Parties have not invoked any such exception, and rightly so, continuing acts that are ongoing on the date of entry into force of the treaty fall within the temporal scope of application of the treaty for the period that follows the entry into force. As observed in *Société Générale v. Dominican Republic,* prior acts may only be taken into consideration for "'purposes of understanding the background, the causes, or scope of the violations of the BIT that occurred after the entry into force' or the relevance of prior events to breaches taking place after the treaty's entry into force."[286]

443. The Canada-Serbia BIT implements these principles, in particular, in Article 21(1) of the BIT, which provides that investors may only assert claims in respect of a host state's breach of the Treaty, implying that there can be no breach if the Treaty is not effective:

> "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; […]."

444. As the Canada-Serbia BIT entered into force on 27 April 2015, the Tribunal can only assert jurisdiction over measures which were adopted (or ongoing) on or after that date,[287] which is the case of all the claims put forward:

i. *Termination of the Privatization Agreement and seizure of the Beneficially Owned Shares*: The "heart" of the Claimants' case – so say the Claimants – is Serbia's allegedly unlawful termination of the Privatization Agreement and subsequent

[285] RLA-44, VCLT, Art. 28. See also Exh. RLA-74, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, §11.2; Exh. RLA-38, *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996, pp. 179-180; Exh. RLA-39, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, 11 October 2002, §§57-75; Exh. RLA-33, *Impregilo S.p.A v. Islamic Republic of Pakistan*, ICSID, Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005; Exh. RLA-36, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, §431; Exh. RLA-34, *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; Exh. RLA-29, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, §§61-62.

[286] Exh. CLA-106, *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, §§73, 87, 90-92.

[287] Exh. RLA-31, *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, §220.

seizure of the Beneficially Owned Shares.[288] The Agreement was terminated on 28 September 2015.[289] The Beneficially Owned Shares were seized on 21 October 2015.[290] Both measures post-date the Treaty's entry into force on 27 April 2015;

ii. *Refusal to release the pledge*: The Claimants challenge the Privatization Agency's "continuous refusal" to release the pledge over the Beneficially Owned Shares. The Agency first refused to release the pledge at a meeting with Mr. Obradović on 4 February 2014[291] before the Treaty's entry into force. However, it repeated its refusal on several occasions thereafter, including after 27 April 2015.[292] In the circumstances, this claim falls within the temporal scope of the Canada-Serbia BIT in respect of the period post-dating 27 April 2015.

iii. *Ombudsman's intervention*: The Claimants also contest the "unjustified and arbitrary investigation" of BD Agro by the Ombudsman and the unlawful issuance of his "recommendations."[293] The Ombudsman's investigation started in late 2014, was "ongoing" when the Treaty entered into force on 27 April 2015, became known to Mr. Rand on 23 June 2015,[294] the "recommendations" being issued four days later on 27 June 2015. Claims arising from these measures thus also fall within the temporal scope of the Canada-Serbia BIT with respect to the time following 27 April 2015.

(3) Time bar

445. The second issue that the Parties have addressed under the title of "temporal jurisdiction" refers to the three year time bar found in Article 22(ii)(e)(i) of the Canada-Serbia BIT. That provision only applies to claims that are within the temporal scope of the Treaty, as discussed in section (b) above.

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[288] Rej. J., §593.

[289] Exh. CE-50, Notice on Termination of the Privatization Agreement, p. 3.

[290] Exh. CE-105, Decision of the Privatization Agency on the Transfer of BD Agro's Capital, 21 October 2015.

[291] Exh. RE-36, Minutes from meeting held at the Privatization Agency, 4 February 2014.

[292] See, for instance, Exh. CE-767, Audio recording from meeting of the Commission for Control, 23 April 2015; Exh. CE-768, Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015.

[293] Rej. J., §598.

[294] Reply, §799; Exh. CE-45, The Ombudsman's On-Line Statement, 23 June 2015.

446. Article 22(ii)(e)(i) of the BIT prescribes that an investor cannot bring claims if more than three years have elapsed from the time when the investor first acquired, or should have first acquired, knowledge of the alleged breach and loss:

> "Conditions Precedent to Submission of a Claim to Arbitration
> […]
> 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
> […]"

447. The Parties agree that the relevant Cut-Off-Date is 14 February 2015, i.e. three years before the Claimants initiated the present arbitration. They similarly concur that knowledge can be actual or constructive and that what matters is first knowledge.[295] It appears further undisputed that continuing acts that are ongoing on the Cut-Off Date are within the ambit of the Treaty for the period that follows the Cut-Off Date.[296] Finally, pursuant to the wording of the Treaty, the three-year time limit is only triggered if the investor not only has knowledge of a breach of the treaty but also of the damage caused by that breach.[297]

448. Applying these principles, the Tribunal finds that the none of the claims are time-barred.

(i) Refusal to release the pledge

449. As noted in the context of non-retroactivity, the Claimants challenge the Privatization Agency's "continuous refusal" to release the pledge of the shares. Here again, Mr. Rand acquired knowledge of breach after the cut-off date of 14 February 2015.

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[295] See, for e.g., Rej., §896.

[296] Rej., §936 ("Respondent does not contest the existence of the concept of internationally wrongful acts of a continuous character nor Article 14 of the ILC Draft Articles."). The Commentaries to the ILC Draft Articles clarify that a course of conduct, which has started before the underlying treaty entered into force, can give rise to a continuing wrongful act in the present ("In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the 'first' of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence."). Exh. CLA-024, ILC Draft Articles, pp. 63-64.

[297] See also, for instance, Exh. RLA-31, *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, §211; Exh. RLA-028, *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, §194.

(ii) Ombudsman's intervention

450. The Claimants contest the "unjustified and arbitrary investigation" of BD Agro by the Ombudsman and the unlawful issuance of his "recommendations."[298] As was already noted, the Ombudsman's "recommendations" were issued on 27 June 2015, after the Cut-Off Date. The Claimants also allege that the Ombudsman "prompted" the seizure of the Beneficially Owned Shares, in which case, Mr. Rand could only acquire the relevant knowledge after the shares were seized *i.e.* after 21 October 2015, again well after the cut-off date.

(iii) Termination of the Privatization Agreement and seizure of the Beneficially Owned Shares

451. The "heart" of the Claimants' case is Serbia's allegedly unlawful termination of the Privatization Agreement and subsequent seizure of the Beneficially Owned Shares.[299] The Agreement was terminated on 28 September 2015[300] and the Beneficially Owned Shares were seized on 21 October 2015.[301] Hence, neither of these events pre-date the Cut-Off Date of 14 February 2015.

452. This being so, Serbia argues the Claimants must have been aware that the Agreement could be terminated, and they could incur a loss as soon as on 1 March 2011 when BD Agro received the First Notice dated 25 February 2011. However, the breach alleged by the Claimants arises out of the termination of the Agreement not of the First Notice or any subsequent ones.[302]

d. Conclusion

453. It follows from the foregoing discussion, that the Treaty's temporal scope of application and the statute of limitation are no bar to the Tribunal's jurisdiction.

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[298] Rej. J., §598.

[299] Rej. J., §593.

[300] Exh. CE-50, Notice on Termination of the Privatization Agreement, p. 3.

[301] Exh. CE-105, Decision of the Privatization Agency on the Transfer of BD Agro's Capital, 21 October 2015.

[302] Rej. J., §§599-600 ("Nowhere in their submissions did the Claimants ever argue that the Privatization Agency's finding of the purported violation of the Privatization Agreement, which was notified to Mr. Obradović for the first time in March 2011, constituted the basis of their claims […] the Claimants obviously mention in their submissions the Privatization Agency's notifications as well as the Privatization Agency's other problematic actions that also predate the Canada-Serbia BIT. The Claimants, however, do not refer to these pre-treaty facts because they would consider such facts to constitute Serbia's breaches of the Canada-Serbia BIT.").

5. Abuse of Process

454. The Respondent also objects to the Tribunal's jurisdiction on the ground of abuse of process. The Claimants do not take issue with the characterization of this objection as a matter of jurisdiction rather than admissibility. As this distinction makes no difference to the outcome reached below, the Tribunal will review this objection in the present context.

a. Respondent's Position

455. The Respondent submits that the "Claimants' conduct represents an abuse of the arbitration mechanism" with the consequence that their investment should be denied protection. It first contends that Mr. Rand's conduct is abusive because he initiated this arbitration "fully cognizant of the fact that [he] did not acquire a property right that was recognized and protected under the laws of the host State."[303]

456. The arbitration is also abusive, says Serbia, because it arises out of a domestic investment, and essentially concerns whether the Privatization Agency validly terminated the contract it had concluded with Mr. Obradović, a Serbian national and the buyer of BD Agro. The initiation of the present arbitration is thus "nothing more than an attempt of Claimants to internationalize [a] domestic dispute and to misuse the ICSID System for purposes it was not intended, in contravention with the principle of good faith."[304]

457. Serbia also considers that Mr. Rand's "fabricated" his beneficial ownership of BD Agro to "circumvent" jurisdictional requirements. It emphasizes that Sembi's 2008 financial statements that allegedly record the beneficial ownership were filed with the Cypriot Registrar of Companies as late as August 2014, at a time when the dispute with the Agency was foreseeable. For Serbia, this shows Mr. Rand's intention to "deceive" the Respondent and "manipulate" the Tribunal and constitutes an "abuse of the arbitration mechanism."[305]

458. The Respondent adds that, between 2013-2015, Mr. Rand attempted to transfer the Privatization Agreement to Mr. Rand's Cypriot company, Coropi, knowing fully well that the Agency's consent was required for the transfer. That attempt failed. Yet, Mr. Rand nevertheless commenced this arbitration, based on his alleged beneficial ownership,

[303] Rej., §1047.
[304] Rej., §1045.
[305] R-PHB 1, §169.

effectively acting as if the transfer had taken place. For the Respondent, this claim is not in good faith and should thus be dismissed as such.

459. Finally, the Respondent contends that Mr. Rand intends to use this arbitration to collect EUR 2.7 million that Mr. Obradović admitted owning to Sembi, trying to settle this business issues in a manner that constitutes an abuse of process.[306]

b. Claimants' Position

460. The Claimants put forward that this objection rests entirely on the incorrect premise that treaties only protect property rights that were "recognized and protected under the laws of the host state." They recall that, international investment law protects not only proprietary rights, but also rights *in personam* and rights of beneficial ownership. According to them, numerous international tribunals and scholars share this view.

461. For the Claimants, Serbia's contention that "the beneficial ownership theory was fabricated in order to circumvent jurisdictional obstacles" is contradicted by several facts which occurred years before the dispute arose. For instance, the MDH Agreement through which beneficial ownership was transferred to MDH was concluded in 2005, which shows that Messrs. Rand and Obradović both intended that Mr. Rand become the beneficial owner of BD Agro upon its privatization. In 2008, on the basis of the Sembi Agreement, Sembi recorded its beneficial ownership of the Beneficially Owned Shares in its annual returns, which were filed in 2009. Still in 2008, Mr. Rand paid EUR 2.2. million for the purchase and transport of heifers from Canada to BD Agro. He would not have made these payments if he had not been the beneficial owner of BD Agro.

462. Similarly, the Claimants find "disingenuous" Serbia's portrayal of the Claimants' efforts to obtain nominal ownership of BD Agro in 2013-2015 as an attempt to restructure the investment to gain international protection for a foreseeable dispute. When Mr. Rand first sought to assign the Privatization Agreement to Coropi in 2013, the termination of the Privatization Agreement, let alone the subsequent seizure of the Beneficially Owned Shares, was not foreseeable.

463. The Claimants also oppose Serbia's submission that the claims are abusive because they are motivated by an attempt to collect EUR 2.7 million from Mr. Obradović. For one, this

[306] R-PHB 1, §168.

allegation was raised belatedly. Further, even if true, this would not constitute an abuse of process as it does not involve fictitious transactions or the restructuring of an investment after the impugned breach. Further still, Mr. Obradović does not owe EUR 2.7 million to Sembi. Under the Sembi Agreement, Sembi acquired receivables against BD Agro of EUR 4.7 million, arising under loans that Mr. Obradović had granted to BD Agro from the Lundins' funds. BD Agro later repaid these loans to Mr. Obradović. Sembi directed Mr. Obradović to use EUR 2 million to pay the last two instalments of the purchase price of BD Agro. The remaining EUR 2.7 million were used for other purposes, unrelated to BD Agro. It is on the ground of accounting rules that Sembi records these amounts as owed by Mr. Obradović.

c. Analysis

464. The doctrine of abuse of right is a general principle of law that "prohibits the exercise of a right for purposes other than those for which the right was established."[307] Abuse of process is a subcategory of abuse of right focusing on the misuse of a procedural right and especially of the right to arbitrate. For instance, a corporate restructuring to benefit from treaty jurisdiction over a foreseeable dispute has been found to constitute an abuse of process.[308] It is well-settled that the threshold for finding an abuse of right or process is high.[309]

465. In the circumstances of this dispute, the Tribunal does not discern an abuse.

466. Serbia's position that Mr. Rand started this arbitration knowing that he had no rights and seeking to "internationalize" a domestic dispute is misconceived. The foregoing analysis has shown that the dispute has connections with more than one national legal system and is thus international in nature.

467. Similarly, there is no evidence to support the assertion that Mr. Rand fabricated transactions to benefit from the arbitration clause in the Canada-Serbia BIT. The Tribunal's jurisdiction under the Treaty arises out of the contractual interest Mr. Rand acquired in the Beneficially

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[307] Exh. CLA-111, *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, 31 May 2017, §540.

[308] Exh. RLA-188, *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, §554. See also Exh. CLA-28, *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan,* ICSID Case No. ARB/13/13, Award, 27 September 2017, §376, where the Claimants commence an arbitration to gain a benefit which is inconsistent with the purpose of international arbitration.

[309] See, for instance, Exh. RLA-188, *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, §539.

Owned Shares through the Sembi Agreement. Serbia does not allege that that Agreement was forged or fictitious. It only challenges whether and, if so, when Sembi's 2008 financial statements were filed with the Cyprus Registrar of Companies. Yet, other contemporaneous documents prove that Sembi's relationship with BD Agro commenced in 2008.[310] Neither does Serbia contend that the dispute with the Agency was foreseeable at the time Messrs. Rand and Obradović entered into the Sembi Agreement in 2008.

468. In the same vein, the Respondent's argumentation in connection with the assignment to Coropi is unfounded. The Tribunal's assessment of the record does not confirm Serbia's views. As explained earlier, in 2008, through the Sembi Agreement, Mr. Obradović transferred certain interests to Sembi. The Agency's approval was not required for the transfer as the Privatization Agreement itself was not transferred. In 2013, when the Claimants intended to assign the Agreement as such to Coropi, they asked for the Agency's approval. That attempt was unsuccessful. Mr. Rand initiated the present arbitration in 2019 based on the interests he had indirectly acquired through the Sembi Agreement, not based on the assignment of the Agreement.

469. Finally, Serbia's contention with respect to Mr. Rand's attempted collection of a EUR 2,7 million debt of Mr. Obradović cannot be given more credit. It is entirely speculative; Serbia produces no evidence whatsoever in support. Moreover, either Serbia is responsible for breaching the Canada-Serbia BIT in which event it will have to compensate Mr. Rand or it is not. Whatever the outcome, there will be no collection of Mr. Obradović's alleged debt. Further, even if the facts underlying Serbia's argument were accepted, the Tribunal does not consider that they show an abuse of process.

470. For the foregoing reasons, the Tribunal dismisses Serbia's abuse of process objection.

d. Conclusion on Jurisdiction

471. On the basis of the foregoing, the Tribunal concludes that it has jurisdiction over Mr. Rand's claims under the ICSID Convention and the Canada-Serbia BIT in respect of his interest in the Beneficially Owned Shares but lacks jurisdiction over his claims in respect of his payments for the benefit of BD Agro and his indirect shareholding in BD Agro. It also does not have jurisdiction over the claims of the other Claimants under the Canada-Serbia BIT,

[310] See C-PHB 2, §33(e) and Exh. CE-911, Sembi's Income Declaration for 2008 filed with Cyprus Income Tax Office, 7 June 2010.

nor does it have jurisdiction over Sembi under the Cyprus-Serbia BIT. Accordingly, in the liability section below the Tribunal will only review the alleged breaches of the Canada-Serbia BIT.

VII. LIABILITY

472. The Tribunal will first address the Parties' arguments on attribution ((A) below), the general defense based on the exercise of sovereign powers invoked by Serbia ((B) below), and then the Parties' positions on each alleged breach ((C) and (D) below) followed by a discussion of the exception under Article 18(1) of the Canada-Serbia BIT ((E) below).

A. Attribution

1. Claimants' Position

473. The Claimants submit that the Privatization Agency was structurally and functionally part of the Serbian administration and, thus, represented a *de facto* organ of Serbia under Article 4 of the ILC Articles. Specifically, it points to the following elements:

- The Serbian Government appointed the Agency's Board of Directors, the Management Board as well as the Director of the Agency;
- The Commission for Control, the body that decided upon the termination of the Privatization Agreement, was established by the Ministry of Economy;
- The Agency was supervised by the Ministry of Economy and the Serbian Government. For instance, the Agency's own representatives confirmed that the entire privatization process was supervised by the Ministry of Economy and the Council of Ministers. The Agency also had to report to the Ministry of Economy at least twice a year;
- "Most of the money" earned by the Agency from the sale of privatized assets was forwarded to the state budget. These funds were then put to Government use in accordance with the national investment plan;
- The European Court for Human Rights "repeatedly and unequivocally" confirmed that the Agency was a "state body."

474. In the alternative, the Claimants argue that the conduct of the Agency is attributable to Serbia under Article 5 of the ILC Articles. For them, the fact that the Agency exercises governmental authority is evident from the following facts:

- Privatization agreements, which fell within the Agency's purview, are not ordinary commercial agreements. They are deemed *sui generis* contracts pursuing a specific aim of promoting economic development and social security;

- The Agency was a "holder of public powers" under Article 46 of the Law on State Administration. The Agency exercised such public powers when concluding, performing and terminating the Privatization Agreement. This was also confirmed in arbitral proceedings involving the Agency, including the *Uniworld* arbitration;

- The Notice of Termination and the Decision on Transfer of Capital have characteristics of administrative acts. In addition, the unilateral seizure and transfer of the Beneficially Owned Shares by the Agency was an exercise of governmental authority. No private party could have done so, and Serbia does not argue to the contrary.

475. In the further alternative, the Claimants contend that the impugned actions of the Agency were directed and controlled by Serbia within the meaning of Article 8 of the ILC Articles. They observe that the Agency always acted under binding instructions given by the Ministry of Economy. In fact, the Agency's representatives referred to the Ministry's instructions as "orders" and considered themselves bound to follow such orders. They further note that the Agency refused to take any decision regarding the Privatization Agreement before it received the Ministry's conclusions from the latter's supervision procedure. When it received those conclusions, it followed them and terminated the Agreement "in line with the Report of the Ministry of Economy."[311]

2. Respondent's Position

476. Serbia submits that a "closer look" at the relevant authorities including the ILC Articles reveals that the Privatization Agency's conduct in the present case cannot be attributed to it.

[311] Exh. CE-50, Notice on Termination of the Privatization Agreement.

477. Serbia denies that the Agency is a *de facto* organ under Article 4 of the ILC Article, noting that the Agency has a separate legal personality which, it says, creates a "strong presumption" against the existence of a *de facto* organ.[312] This conclusion is all the more certain as the Agency does not act in "complete dependence" on the State. Quite the opposite, the Agency has an independent budget and autonomous management, and engages in commercial activities. Contrary to the Claimants' suggestion, the fact that the Agency is an organ of the State from a "functional perspective" is irrelevant. Several arbitral tribunals have held that the fact that an entity carries out public activities is not determinative of its status as a state organ, if it is not structurally an organ.[313]

478. Serbia equally disputes that the Agency's conduct can be attributed to it under Article 5 of the ILC Articles. The Claimants' position that the Agency acted as an "agent" of Serbia in administering the sale of socially and State-owned assets is irrelevant. Only those acts that are the subject-matter of the Claimants' complaints are of relevance. These acts, including the Agency's refusal to release the pledge over the Privatized Shares and to consent to the assignment of the Privatization Agreement, and the termination of such agreement are commercial in nature. They can be undertaken by any party to a commercial contract, with the result that they would not fall within the ambit of Article 5 of the ILC Articles. Further, the transfer of the Agency's functions to the Ministry of Economy following the dissolution of the Agency cannot as such make these functions governmental in nature.[314]

479. Serbia also challenges the Claimants' allegation that the Agency's conduct is attributable on the basis of Article 8 of the ILC Articles. It emphasizes that conduct can only be attributed to the state on this ground if instructions, direction and control are established with respect to specific conduct of a person or group of persons. Here, the Claimants have failed to establish the specific conduct by the Agency that violated their rights, nor have they shown that such conduct was exercised on the instructions of, or under the direction or control of Serbia. For instance, while the Claimants insist that the Agency's decision to terminate the Privatization Agreement "had been imposed" by the Ministry of Economy, the record contains no such instruction.[315] Similarly, although the Claimants argue that the Agency

[312] C-Mem., §542.
[313] C-Mem., §§542 et seq.
[314] C-Mem., §§572.
[315] C-Mem., §585.

acted on the instructions of the Ombudsman in terminating the Privatization Agreement, the Ombudsman's recommendations are not binding.

3. Analysis

480. The Claimants submit that the acts of the Ministry of Economy, the Ombudsman and the Privatization Agency are attributable to Serbia under Articles 4, 5 or 8 of the ILC Articles. Serbia does not contest the application of the ILC Articles, nor that the actions of the Ministry of Economy and the Ombudsman are attributable to it, since both are its organs under Serbian law.[316] It does, however, dispute that the conduct of the Agency is attributable to the State.

a. Article 4 of the ILC Articles

481. Article 4 of the ILC Articles sets out the basic rule that the conduct of a State organ is an act of the State and is thus attributed to the State:

> "Article 4 - Conduct of organs of a State
>
> 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 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."

482. The Claimants appear to have abandoned their claim that the Privatization Agency is a *de jure* organ of Serbia under Article 4 of the ILC Articles.[317] They are right to have done so. The starting point for characterizing an entity as a state organ is the internal law of the State in question[318] and the fact that an entity has separate legal personality creates a

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[316] C-Mem., §§537, 539 ("It is not in dispute between the Parties that [the ILC Articles] should govern the question of attribution to Respondent […] 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.").

[317] See Mem., p. 94 ("The Privatization Agency was an organ of the Republic of Serbia within the meaning of Article 4 of the ILC Articles") and Reply, §940 ("Although the Privatization Agency is not explicitly described as a State organ under Serbian law,"); C-PHB 1, §171.

[318] *See* Exh. CLA-24, Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, p. 42, §11. See also Exh. RLA-83, *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, §160 ("[t]o determine whether an entity is a State organ, one must first look to domestic law.").

presumption that it is not a state organ within the meaning of Article 4.[319] Here, according to the Law on Privatization Agency, the Agency has independent legal personality.[320]

483. This being so, Article 4 specifies that an organ "includes" a person or entity which has that status under domestic law. The use of the word "include" shows that a body which acts as an organ but does not qualify as such under the internal law of the State may nevertheless be deemed an organ under Article 4 (ILC Commentary 11 ad Article 4).[321] On this basis, the International Court of Justice has developed the notion of *de facto* organ in the context of the attribution of activities of paramilitary groups.[322] Persons or groups may thus be equated to a *de jure* organ if they act "in 'complete dependence' on the State, of which they are ultimately merely the instrument."[323] This is not the case here. The Agency was not "completely dependent" on the State. It had its own independent means of financing (commission from sales),[324] its own bank account,[325] and was independent in disposing of its budget.[326] Further, the Agency's activities were largely commercial, including, for instance, selling certain types of publicly held shares and stock.[327] This, of itself suffices to dispel the notion that the Agency is a *de facto* organ of the State,[328] not to speak of the lack of "complete dependence" from the State.

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[319] Exh. RLA-85, *Kristian Almås and Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016, §209; Exh. RLA-83, *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, §§160-161; Exh. RLA-84, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, §119.

[320] Exh. CE-238, Law on Privatization Agency, Art. 2 ("[t]he Agency has the capacity of a legal entity, with rights, obligations and responsibilities defined by this law and the statute.").

[321] See Exh. CLA-24, Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, p.40 (Commentary on Article 4).

[322] Exh. RLA-9, *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, §109; Exh. RLA-86, *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, §392.

[323] Exh. RLA-86, *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, §392.

[324] Exh. CE-238, Law on Privatization Agency, Art. 5, § 2(1) & (2a).

[325] Exh. CE-238, Law on Privatization Agency, Art. 2 ("[t]he Agency has a bank account.").

[326] Cvetkovic WS I, § 4.

[327] Exh. CE-238, Law on Privatization Agency, Art. 6(2).

[328] See, for e.g., Exh. RLA-85, *Kristian Almås and Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016, §210 ("The ILC's commentary to Article 4 suggests that 'the conduct of

484. In the circumstances, the Tribunal finds that the Agency was not an organ of the State under Article 4 of the ILC Articles. The fact that the Agency carried out "public services", that members from Serbian ministries sat on Commissions set up within the Agency, or that the Agency had to advise the Ministry Economy on its activities twice a year does not change the fact that, structurally, the Agency is not an organ of Serbia. Neither does the fact that the European Court of Human Rights characterized the Agency as a "state body" lead to a different conclusion. All of these factors might, however, be relevant for the Tribunal's examination of whether the acts of the Agency can be attributed to Serbia under Articles 5 or 8 of the ILC Articles, to which the Tribunal now turns.

b. Article 5 of the ILC Articles

485. Article 5 of the ILC Articles provides that the acts of entities which are not organs but exercise governmental authority may be attributable to the State if they are carried out in that capacity:

> "Article 5 - Conduct of persons or entities exercising elements of governmental authority
>
> 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."

486. For an act to be attributed to a State under Article 5, two conditions have to be fulfilled cumulatively: first, the impugned act must be performed by an entity empowered to exercise elements of governmental authority; and second, the act itself must be performed in the exercise of governmental authority.[329]

487. The first requirement that the Agency be empowered to exercise elements of governmental authority does not appear to be in dispute between the Parties, and correctly so. The Privatization Agency was empowered by the Law on Privatization Agency[330] and the

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certain institutions performing public functions and exercising public powers (e.g. the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government'. By contrast, where an entity engages on its own account in commercial transactions, even if these are important to the national economy, this inference will not be drawn.").

[329] See Exh. RLA-83, *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, §163.

[330] Exh. CE-238, Law on Privatization Agency, Art. 6.

Privatization Law[331] to exercise certain tasks and assume certain responsibilities that originally belonged to the Ministry of Economy[332] in the process of privatization of State or socially-owned assets. The privatization process itself, which the Agency implemented and controlled, was entirely non-commercial, which the Supreme Court of Cassation of Serbia recognized as well.[333] The Privatization Agency itself recognized that, when performing its tasks under the Law on Privatization Agency and the Privatization Law, it was "not [acting] as a contract party but as the holder of public powers."[334] The Ministry of Economy justified its supervision of the work of the Agency by referring to Article 46 of the Law on State Administration,[335] which provision entitled the Ministry of Economy to supervise "holders of public authorities while performing delegated state administration tasks."[336] The Ombudsman too can review the activities of an entity only when it has acted as a public authority.[337]

488. By contrast, the Parties are in disagreement on the second requirement according to which the impugned acts must have been performed in the exercise of governmental authority.

489. The term "governmental authority" is not defined in the ILC Articles. In the context of ILC Article 5, the tribunal in *Jan de Nul* held that "governmental authority" meant the use of "prérogatives de puissance publique",[338] an interpretation that has since been followed by a number of tribunals. Not every act of an entity empowered to exercise governmental

[331] Exh. CE-220, 2001 Law on Privatization, Art. 5.

[332] Milošević ER I, §§35, 41.

[333] Exh. CE-253, Judgment of the Supreme Court of Cassation of the Republic Serbia, Prev 104/2013, 19 June 2014.

[334] Exh. CE-252, *Uniworld v. Privatization Agency and Srbija-Turist A.D.*, ICC Case No. 14361/AVB/CCO/JRF/GZ, Award, 30 May 2011, §295.

[335] Exh. CE-98, Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 2 (pdf).

[336] Exh CE-98, Report of Ministry of Economy on the Control over the Privatization Agency, 7 April 2015, p. 2 (pdf).

[337] Tr., Hearing on Jurisdiction and Merits, Day 6, 78:20-79:2 (Radović) ("Mr. Pekař: I am sorry, I don't -- maybe you answered my question and I did not realise that. My question was: is the Ombudsman authorised to review all activities of holders of public authority, or only their activities that constitute delegated state administration tasks? Prof. Radović: Not all activities, only activities where the public authority acts as an authority.").

[338] Exh. RLA-83, *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, §170; Exh RLA-115, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana,* ICSID Case No. ARB/07/24, Award, 18 June 2010, §202 ("[i]t is not enough for an act of a public entity to have been performed in the general fulfilment of some general interest, mission or purpose to qualify as an attributable act.").

authority is attributable to the state: the commentary to the ILC Articles clarifies that "the conduct of an entity must […] concern governmental activity and not other private or commercial activity in which the entity may engage."[339] Thus, if the conduct in question was one that could be undertaken by a private counterparty,[340] then that would not satisfy the second limb of Article 5, and that conduct would not be attributable to the state.

490. As discussed below, the Agency's seizure of the Beneficially Owned Shares deprived Mr. Rand of the entirety of his investment. No further harm could be suffered by him. As a result, the Tribunal focuses its analysis on whether the seizure of the Beneficially Owned Shares was performed in the exercise of governmental authority or whether the Agency acted in a commercial or private capacity when it seized the Shares.

491. There can be no doubt that the seizure of the Beneficially Owned Shares involved the exercise of governmental authority. Article 41(2) of the 2014 Privatization Law provided that the capital acquired by the buyer on the basis of a privatization agreement would be transferred to the Privatization Agency upon termination.[341] After it terminated the Agreement, through its Decision on Transfer of Capital, the Agency seized all the Beneficially Owned Shares. No private party could have done so. Serbia does not appear to challenge that a private entity cannot seize shares from a buyer without first securing its consent or prevailing in litigation before a competent court or tribunal.

492. Serbia's objection that the seizure is an "automatic consequence"[342] of the termination of the Privatization Agreement does not change the assessment. If anything, it would rather reinforce it. The Agency's power to unilaterally appropriate for itself the ownership of the Beneficially Owned Shares is sovereign in nature, whether or not it is the consequence of another act.

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[339] Exh. CLA-24, Draft Articles on Responsibility of States for International Wrongful Acts with commentaries, p. 43, §5.

[340] See Exh. RLA-83, *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, §170 ("[a]ny private contract partner could have acted in a similar manner.").

[341] Exh. CE-223, Article 41(2) of the 2014 Privatization Law: "In case of termination of the agreement on sale of the capital, the entire capital referred to in paragraph 1 of this Article, including own shares acquired based on the capital increase through new stakes, shall be transferred to the Agency." An analogous provision was contained in Article 41(5) of the 2001 Law on Privatization, in effect on the date the Privatization Agreement was concluded, Exh. CE-220, 2001 Law on Privatization.

[342] C-Mem., §571.

493. Therefore, the Tribunal concludes that the Agency's seizure of the Beneficially Owned Share is attributable to Serbia. Having reached this conclusion, the Tribunal can dispense with reviewing the third basis for attribution under Article 8 of the ILC Articles.

B. Exercise of Sovereign Powers

1. Claimants' Position

494. The Claimants contend that the Respondent's "primary defense" to its "clear" Treaty breaches is that the Agency purportedly acted as a regular commercial party and its conduct, therefore, cannot violate international law. They stress that this defense lacks merits for the reasons explained in the context of attribution as well as for other reasons.

495. First, so argue the Claimants, there is no "firm requirement" that any treaty breach must involve the exercise of sovereign powers. Several investment tribunals have held that every act of a sovereign State can be characterized as a "sovereign act", including the breach or termination of a contract to which the State is a party. For the Claimants, there is no reason to allow a State to escape its liability under an investment treaty merely because its relationship with an investor is contractual. The formalism advocated by the Respondent would enable States to pursue sovereign objectives with impunity under the "guise" of a contractual relationship.[343]

496. The Claimants' second argument is that several investment awards have confirmed that privatization *per se* is governmental, not commercial in nature. Here, the privatization process was an "inherently governmental process" pursuing "governmental interests."[344] The public policy goals underlying the privatization of BD Agro can be seen from the Privatization Agreement itself. No ordinary share purchase agreement would require the buyer to invest in the target company, maintain its business operations and set forth a comprehensive social program, as the Privatization Agreement did. The fact that aspects of the Privatization Agreement were governed by private law is without relevance. Investment tribunals have found that the application of private law to elements of the activity of state agencies does not change the governmental nature of the other acts of that agency. In

[343] Reply, §1018.

[344] Reply, §§1021-1024.

addition, the legal framework of the Agreement "substantially differed" from regular private law contracts.[345]

497. In third place, the Claimants assess that it is obvious that the Agency was vested with and exercised sovereign powers unavailable to any commercial party. The Agency benefited from "special powers" under the Law on Privatization. In the present case, the Agency's conduct had "nothing to do with an ordinary commercial conduct."[346] For instance, commercial parties cannot seize shares from their counterparts without first securing their consent or prevailing in litigation before a competent court. For the Claimants, the termination of the Privatization Agreement and the subsequent seizure of the Beneficially Owned Shares were sovereign acts "par excellence." Serbian law confirms that the conduct of the Agency in connection with the performance and termination of the Privatization Agreement was the conduct of "holders of public authorities while performing delegated state administration tasks" within the meaning of Article 46 of the Law on State Administration. Further, the Claimants emphasize that the termination produced legal effects that "no ordinary commercial legal relationship could conceivably have had."[347]

498. Fourth, say the Claimants, the termination of the Privatization Agreement and the seizure of the Beneficially Owned Shares were sovereign acts because they were not motivated by any commercial consideration. They represented abuses of governmental power motivated by a desire to maintain the Privatized Shares within the Agency's reach for "impending seizure."[348]

499. The Claimants' fifth and last argument is that the termination and seizure resulted from, and implemented, the Ombudsman's unlawful investigation and his recommendations, which were sovereign acts. Further, the Agency "sought and received instructions" from the Ministry of Economy in respect of the termination.[349] Investment awards have concluded that the termination of a contract involved a State's sovereign powers because it was based on the intervention of State bodies, which was clearly the case here.

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[345] Reply, §§1028-1029.
[346] Rely, §§1006-1007.
[347] Reply, §1039.
[348] Reply, §1032; see also Reply, §§ 213 ff. and Mem., §146.
[349] Reply, §§1034-1035 and 1043-1046.

2. Respondent's Position

500. The Respondent submits that, even if the Agency's conduct in relation to the Agreement were unlawful, such conduct could not trigger Serbia's liability under the BITs because the Agency did not exercise sovereign powers.[350] The relevant test to determine whether an entity exercised sovereign powers is whether the complained conduct was a "conduct any contract party could adopt."[351] The Tribunal must assess and distinguish, on the one hand, "ordinary commercial contractual practice" and, on the other hand, "exercise of […] state functions."[352]

501. The Respondent disputes the Claimants' argument that the "sovereign objectives" behind the Agreement necessarily lead to the conclusion that the Agency exercised sovereign powers.[353] In the same vein, Serbia challenges the Claimants' argument that the "inherently governmental" nature of the Agreement characterizes the Agency's acts as sovereign. It stresses that the "broader social purpose" of privatization is beside the point. What matters, says the Respondent, is the use of "*prérogatives de puissance publique*" or "governmental authority", which is clearly missing here. Further, the exercise of governmental authority must be established in each specific instance of impugned conduct and "cannot be drawn from generalizations about the nature of the process"[354]. The Agency's refusal to release the pledge and assign the Agreement and the termination were "normal", "lawful" "reasonable" and "commercial" acts of a "contracting party."[355]

502. Further, the Respondent objects to the Claimants' argument that the termination and transfer of shares were sovereign acts because they were not motivated by any commercial considerations. It considers that the argument starts from a "wrong premise", because it assumes that, for an act to be governmental in nature, it cannot be motivated by commercial considerations. Yet, what matters is the substance of an act, not its motivation. Investment tribunals have not looked into the reasons behind an act but into whether the act itself was

[350] C-Mem., §§591-623; Rej., §§1132-1154.

[351] C-Mem., §§592-598, referring to Exh. CLA-37, *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, §348.

[352] C-Mem., §595; see also Rej., §1154.

[353] Rej., §1137.

[354] R-PHB 2, §72.

[355] C-Mem., §§599-602.

an exercise of governmental authority irrespective of the reasons for which it was undertaken.

503. Serbia also counters the Claimants' argument that the Privatization Agency acted in a sovereign capacity when terminating the Agreement because it had received instructions on termination from the Ministry. For the Respondent, the Ministry supervised the Agency's control over the performance of the Agreement and provided instructions in this regard but did not address termination itself. In any case, even if there were instructions to the Agency to terminate the Privatization Agreement (*quod non*), this still would not make the termination an exercise of governmental powers. The involvement of state organs is insufficient to transform a commercial act into an exercise of governmental powers.

504. The Respondent also disputes that the legal consequences of the termination and especially the transfer of the Privatized Shares confer "public character" to the Agency's acts. While it is correct that the legal framework governing the Agency is different from general contract law, it "remains firmly in the field of private law" and within the jurisdiction of civil courts as opposed to administrative courts.[356]

505. The Respondent also disputes the Claimants' position that, since the Agency terminated the Agreement in reliance not on its Article 7 but on the Law on Privatization, the termination constituted an exercise of governmental powers. The grounds for termination in Article 7 of the Privatization Agreement supplement the grounds in Article 41a of the Law on Privatization. They were all part of the commercial relationship "entered freely" by the Buyer and the Agency. Moreover, the Respondent insists that the reason for the termination was the violation of a contract provision, which is a commercial reason that has "nothing to do" with exercise of governmental powers.

3. Analysis

506. Serbia insists that none of the impugned acts involve the exercise of sovereign power, with the result that the Tribunal must dismiss all of the claims. By contrast, the Claimants stress that the Treaty contains no such requirement, which should thus not be imposed by the Tribunal. They also emphasize that in any event each of the acts complained of involved sovereign power.

[356] C-Mem., §622; see also Rej., §§1150 and 1152.

507. The Canada-Serbia BIT does not expressly require that the measures alleged as breaches must have been carried out by a State in its sovereign capacity. There is no question, however, that the international responsibility of a State under a treaty can only be engaged in the exercise of sovereign powers for acts not as a party to a contract. [357] Indeed, the substantive standards of investment treaties are intended to protect foreign investors from unlawful measures taken by the host State in its capacity as sovereign.[358] Therefore, save possibly for certain umbrella clause claims, treaty breaches can only result from actions performed by the State as a sovereign.

508. For the reasons previously mentioned, the Tribunal will focus its analysis on the seizure of the Beneficially Owned Shares (§490). In other words, it will review whether the Agency exercised sovereign prerogatives in seizing the Beneficially Owned Shares. Attribution in and of itself is not sufficient. As it is clear from ILC Articles 1 and 2, for the international responsibility of a State to be engaged, it must have committed an internationally wrongful act, *i.e*. an act that is attributable to that State under international law and that constitutes a breach of an international obligation of that State. [359]

509. The Tribunal recalls that Article 41(2) of the Privatization Law empowered the Agency to seize the Beneficially Owned Shares automatically, without the intervention of a court or tribunal and without returning the purchase price. Private contract parties do not have such rights. The seizure is an authoritative decision of the Agency, which determines the rights

[357] See, for instance Exh. RLA-116, *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, §§ 153, 154 ("[i]n investor-State arbitrations which involve breaches of contracts concluded between a claimant and a host government, tribunals have made a distinction between *acta iure imperii* and acta *iure gestionis*, that is to say, actions by a State in exercise of its sovereign powers and actions of a State as a contracting party. It is the use by a State of its sovereign powers that gives rise to treaty breaches, while actions as a contracting party merely give rise to contract claims not ordinarily covered by an investment treaty."). See also Exh. CLA-24, Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries.

[358] Exh. CLA-37, *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, §348 (holding that that there is no exercise of sovereign power if the conduct in question is "conduct which any contract party could adopt.").

[359] See also for instance Exh. RLA-84, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, §129 ("finding of attribution does not necessarily entail that the acts under review qualify as sovereign acts.").

of the Buyer in a definitive manner and cannot be directly challenged.[360] On this basis, it is clear that in seizing the shares, the Agency exercised sovereign powers.

C. Fair and Equitable Treatment

1. Claimants' Position

510. The Claimants submit that Serbia failed to accord them fair and equitable treatment (FET) as required under the Canada-Serbia BIT. They argue that the Canada-Serbia BIT envisages "essentially the same level of protection"[361] as the Cyprus-Serbia BIT and dispute Serbia's submission that Article 6(1) of the Canada-Serbia BIT is "less generous" than Article 2(2) of the Cyprus-Serbia BIT as the former is linked to the international minimum standard of treatment.[362] They also reject Serbia's stand that the international minimum standard of treatment is restricted to conduct that is "shocking or egregious"[363], and assert that the Tribunal should apply the standard set in *Waste Management II v. Mexico*.[364]

511. For the Claimants, the following measures breached the FET provision of the Canada-Serbia BIT: (a) the termination of the Privatization Agreement; (b) the seizure of the Beneficially Owned Shares; (c) the refusal to release the pledge; (d) the refusal to allow the assignment of the Privatization Agreement; and (e) the Ombudsman's interventions.

a. The Termination of the Privatization Agreement

512. The Claimants submit that the termination of the Privatization Agreement was unlawful. First, the Privatization Agreement was not breached ((i) below). Even if it were, the alleged breach was not a valid ground for termination ((ii) below). In any event, termination was in bad faith ((iii) below) and disproportionate ((iv) below).

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[360] Serbia agrees. See Rej., §1118 ("[a]s the termination could be challenged by the buyer in a civil court, the latter could also seek interim measure to prevent the Agency from further disposing with shares."). See also Mirjana Radović ER I, §54.

[361] Reply, §§1205-1212.

[362] Reply, §§1206-1207.

[363] Reply, §1213.

[364] Reply, §§1206-1222, also referring to Exh. RLA-39, *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, §125, Exh. CLA-132, *Pope & Talbot v. Government of Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002, §§53-54 and 118, *Clayton v. Canada*, Exh. CLA-139, §435, and Exh. CLA-134, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, §§218-219.

(1) The Privatization Agreement was not breached

513. It is the Claimants' submission that Mr. Obradović did not breach Article 5.3.4 of the Privatization Agreement when BD Agro took a loan of approximately EUR 2 million from Agrobanka, secured it with a pledge on its land, and used the monies for the benefit of Mr. Obradovic's companies as described above, and re-lent part of the funds to Crveni Signal and Inex.

514. First, the Claimants point out that Article 5.3.4 of the Privatization Agreement imposed obligations solely on Mr. Obradović while the pledge that allegedly violated Article 5.3.4 was established by BD Agro, not Mr. Obradović.

515. Second, Article 5.3.4 only precluded Mr. Obradović from pledging BD Agro's assets as security for loans taken by third parties. Here, BD Agro pledged its land to secure a loan which it took for itself and used for the operation of its farm to a significant extent. For the Claimants, re-lending money originally lent to BD Agro constitutes use of funds by BD Agro and, therefore, cannot violate Article 5.3.4. They further stress that there was nothing irregular in BD Agro's use of the funds, as is evident from the fact that both Crveni Signal and Inex partially repaid their debts to BD Agro.

516. The Claimants consider that Serbia's assertion according to which Mr. Obradović also breached Article 5.3.4 because BD Agro pledged its assets as security for the EUR 0.6 million loan taken by Crveni Signal on 2 June 2010 is "irrelevant, baseless and belated." They submit that this argument was raised for the first time in the Respondent's post-hearing submission and was not mentioned in the Notice of Termination. Further, and in any event, Serbia admitted that Crveni Signal's June 2010 loan was repaid on 29 December 2010. While the pledge securing this loan remained registered thereafter, this was due to the failure of the state-controlled Nova Agrobanka to provide the confirmations necessary to remove the pledge. Yet, the pledge was no longer enforceable and could thus not be in breach of the Privatization Agreement.

(2) There was no valid ground for termination

517. The Claimants submit that, even if there had been a breach, Article 5.3.4 is not among the grounds for termination exhaustively listed in Article 7.1 of the Privatization Agreement. The Agreement could not, therefore, be terminated for breach of Article 5.3.4, which Radović &

Ratković, the law firm engaged by the Agency, confirmed. Serbia's contrary arguments cannot be sustained for several reasons.

518. First, according to the Claimants, Serbia's position that the Agency could terminate the Privatization Agreement for any breach would render Article 7.1 useless. Serbia has not explained why the Agency, which drafted the Privatization Agreement and had detailed knowledge of the Law on Privatization, would include a meaningless provision in the Agreement.

519. Second, so the Claimants submit, Article 41a(1)(3) of the Law on Privatization, which Serbia also invokes, does not entitle the Agency to terminate the Agreement. Article 41a(1)(3) is a "generic provision" that provides that a privatization agreement can be deemed terminated if, within an additional period granted to a buyer, the buyer disposes of the property subject to privatization in a manner contrary to the agreement. Article 41a(1)(3) cannot be read in isolation; it must be considered in the context of an actual privatization agreement. Here, Article 41a(1)(3) cannot override the Agreement and the choice of the Agency, as the sole drafter of the Agreement, not to include the breach of Article 5.3.4 among the grounds for termination under Article 7. Moreover, the Respondent's interpretation is contrary to the wording of Article 41a(1)(3) of the Law on Privatization, which refers to compliance with the "provisions" (in plural) of a privatization agreement. Article 41a(1)(3) thus refers to both Article 5.3.4 and Article 7.1 of the Privatization Agreement.

520. Their view, say the Claimants, is consistent with the opinion of Radović & Ratković, the law firm retained by the Agency. That firm found that, pursuant to Article 7 of the Privatization Agreement and Article 41a(1)(3) of the Law on Privatization, the Agency had no right to terminate the Privatization Agreement for the alleged breach of Article 5.3.4. At the time of the termination, the Agency was aware of its lawyers' assessment of the legal position.

521. Third, for the Claimants, the alleged breach of Article 5.3.4 of the Agreement was minor and did not concern an essential term of the Agreement. Under Article 131 of the Law on Obligations, an agreement can only be terminated for the violation of an essential obligation, provided that violation is not minor.

522. For the Claimants, the purported breach of Article 5.3.4 did not meet either of the conditions set forth under Article 131. Article 5.3.4 is not an essential obligation because its breach would not endanger the achievement of the main purpose of the Agreement. The provision

only secures the buyer's performance of its other obligations in the Agreement. The accessory character of the provision is further evidenced by the fact that it is not included in the exhaustive list of termination grounds in Article 7.1. Additionally, even if Article 5.3.4 imposed an essential obligation (*quod non*), the alleged violation would be minor in a quantitative sense because the pledge in question was "insignificant" compared to the value of BD Agro's assets. The violation would also be minor in a qualitative sense because the violation would not affect the achievement of the remaining "main goal and purpose" of the Agreement, which was the payment of the final instalment of the purchase price. In fact, only four months after the alleged breach, the purchase price was paid in full and the Privatization Agreement was consummated.

523. Fourth, the Claimants put forward that the Privatization Agreement could not be terminated for the alleged violation of Article 5.3.4 after the obligations under Article 5.3.4 had expired on their own terms, *i.e.* after the payment of the full purchase price.

524. Fifth and in any event, the purported breach was cured before the termination. The Claimants point out that the 2010 Loan was repaid long before the Agency terminated the Privatization Agreement. While the underlying pledges remained registered in the cadaster, this was only because the state-controlled and managed Nova Agrobanka arbitrarily refused to issue a confirmation necessary for their deletion.

525. Sixth, it is the Claimants' position that under the Privatization Law, the Agency was only entitled to monitor the buyer's compliance with its obligations under the Privatization Agreement. Unlike what it sought to do, it could not request any remedies that it deemed appropriate. In any event, the remedies which the Agency pursued were unjustified and unlawful:

- For instance, the alleged breach of Article 5.3.3 could not have been remedied; the cows were culled and could not be risen from the dead. Moreover, the crux of the allegation was that BD Agro had pledged its assets and used the borrowed funds for the benefit of third parties. That alleged breach could have been cured by cancelling the pledge or obtaining the return of the funds. Either one of these actions would have been sufficient to remedy the alleged breach of Article 5.3.4. There was therefore no justification for the Agency's request that Mr. Obradović perform both.

- The Agency's insistence that the pledge be deleted from the cadaster "served no purpose." Nova Agrobanka could not have exercised any rights under the pledge given that the secured loan had been repaid. Moreover, Nova Agrobanka was controlled by Serbia and Mr. Obradović could not be held accountable for the bank's failure to take action for the deletion of the pledge.

- The Agency repeated all of its requests without engaging with the factual evidence and legal reasoning with which it was provided and which showed that no breach had occurred; that had there been a breach, it had been cured; and that the Agency was not entitled to terminate the Privatization Agreement. The Agency repeatedly requested the same information, the information was provided, and then the Agency requested it again.

526. The Claimants refute the Respondent's position that the Agency was under an obligation to determine whether a breach had been remedied. They emphasize that, after the performance of the Agreement on 8 April 2011, the Agency was limited to ascertaining whether the alleged breach was "still present", which is different from assessing whether a breach has been remedied. Indeed, a party can cease to be in breach not only when it remedies the breach, but also when the breached obligation no longer applies. For the Claimants, the latter is exactly what happened – the obligations arising out of Article 5.3.4 ceased to apply when the full purchase price was paid on 8 April 2011. As Mr. Obradović had no further obligations under the Privatization Agreement after 8 April 2011, the Privatization Agreement could not be terminated after that date.

527. The Claimants equally dispute the Respondent's argument that a buyer's duty to remedy a pre-existing breach of an obligation survives the expiration of such an obligation, stating that this argument finds no support in Article 41a(1)(3) of the Law on Privatization. Following the Respondent's view would mean that a buyer would be required to remedy a pre-existing breach while at the same time it would be entitled to engage in the very same conduct that led to the alleged breach in the first place (as the obligation baring such conduct had expired). This would obviously be an absurd situation.

528. The Claimants strongly reject the Respondent's argument that all issues with the Privatization Agency would have been resolved had Inex and Crveni Signal repaid the funds

owed to BD Agro. This is clearly a "made-for-arbitration argument", contrary to contemporaneous documentary evidence and testimony of witnesses on both sides.

529. Finally, the Claimants underline that most of the practice and case law relied upon by the Respondent in support of its arguments concern privatization agreements concluded before Article 41a(1)(3) of the Law on Privatization was "substantially amended" in 2005.[365] The Tribunal should therefore be cautious in relying on those authorities.

(3) Termination was in bad faith

530. The Claimants contend that the Agency acted in bad faith in terminating the Privatization Agreement, which say the Claimants, is evident from the following facts:

- The Agency kept the Claimants "in limbo" for years refusing to finalize BD Agro's privatization. As explained below, it made several requests which it must have known to be unlawful and not susceptible of being fulfilled. For instance, in April 2015, the Agency requested that Mr. Obradović submit evidence that he had performed his obligations under Article 5.3.3 and 5.3.4 "no later than" 8 April 2011. This request was clearly unlawful because Article 41a(1)(3) of the Law on Privatization only entitles the Agency to verify compliance at the end of the additional term for compliance, not in the past;

- In October 2006, the Agency declared that Mr. Obradović had complied with Article 5.2.1 of the Agreement which required him to contribute approximately EUR 2 million to BD Agro. Nevertheless, it continued to ask for evidence of compliance nine years after its statement;

- The Agency also continued to request proof that Mr. Obradović had fulfilled his obligations under Article 5.3.3 despite knowing that the alleged breach of Article 5.3.3, *i.e.* the culling of cows could not be complied with as the cows had been culled long before 8 April 2011. In addition, the culling represented a force majeure event which the Agency acknowledged during internal meetings. In any event, despite the fact that the culling of the cows obviously could not have been cured, the Agency continued to

[365] Reply, §§407-408.

request evidence of compliance with Article 5.3.3 until the Privatization Agreement was terminated;

- The Agency's conduct was "procedurally abusive." To take but one example, in the last notice sent to Mr. Obradović, the Agency asked for performance of several obligations within a five-day period, which was plainly impossible;

- When the Agency eventually proceeded to terminate the Privatization Agreement, it did so even though it had opinions from the Ministry of Economy and its law firm Radović & Ratković that there was neither an economic nor a legal justification for termination;

- The Agency retained the pledge of the Beneficially Owned Shares after the payment of the purchase price despite acknowledging that the pledge should have been lifted once the price was paid.

(4) Termination was disproportionate

531. The Claimants also submit that the termination of the Privatization Agreement and the subsequent transfer of the Beneficially Owned Shares was unlawful under Serbian law and resulted in an unlawful expropriation of the Claimants' investment. Even if the Tribunal held that the termination and share transfer complied with the law, the expropriation would still be unlawful, since Serbia's acts were "completely disproportionate" under Serbian and international law.

532. The Claimants argue that the constitutional principle of proportionality requires the Privatization Agency, as a holder of public powers, to proceed with the termination of the Privatization Agreement only if it is proportionate and necessary. Even if the Privatization Agency were not found to hold public powers and its acts were examined on a mere contractual level (*quod non*), those acts would constitute a violation of Articles 12 and 13 of the Law on Obligations, which impose a duty of good faith and prohibit the abuse of a right.

533. According to the Claimants, the proportionality test under Serbian law is based on three sequential questions: first, whether a measure was taken for legitimate reasons; second, whether less obstructive alternatives were available; and, third, whether the benefits of the measure outweigh its costs. The termination of the Privatization Agreement fails this test on all counts:

- The termination did not serve any legitimate purpose as Mr. Obradović had complied with his obligations under Article 5.3.4, and breaches of that provision were not valid termination grounds pursuant to Article 7.1 of the Privatization Agreement;

- Even if Mr. Obradović had violated Article 5.3.4 of the Privatization Agreement, the Agency should have provided him with a reasonable opportunity to remedy the violation requesting the repayment of loans from third parties or the "non-exercise" of the pledge on BD Agro's assets. Instead, the Privatization Agency insisted on the return of the funds as well as on the deletion of the pledge, ignoring the fact that Nova Agrobanka could no longer exercise the pledge after BD Agro had fully repaid its EUR 2 million loan on 22 June 2012. The Privatization Agency's reactions to alleged breaches of Article 5.3.4 of the Privatization Agreement were thus excessively restrictive;

- The termination was disproportionate *stricto sensu* because the Privatization Agency's requests to remedy the alleged breach of Article 5.3.4 lost their purpose following the full payment of the purchase price on 8 April 2011.

534. The Claimants further contend that the principle of proportionality is part of international law and has been applied by several investment tribunals. The tribunal in *Occidental v. Ecuador* for instance observed that the principle of proportionality meant that even if an investor has violated its duties, any penalty imposed by the State must be proportionate to the violation and its consequences.

535. For the Claimants, the termination of the Privatization Agreement was a disproportionate response to the purported breach of Article 5.3.4. The pledge caused no damage: the existence of the pledge did not impact on BD Agro's value. The Ministry of Economy itself recognized it when it considered in 2012 that there was no economic justification for terminating the Privatization Agreement because Mr. Obradović had already paid the purchase price and the encumbrances did not threaten the continuity of BD Agro's business. The lack of proportionality is also evident from the fact that the termination of the Privatization Agreement and seizure of the Beneficially Owned Shares occurred over four years after the full price for BD Agro was paid.

536. The Claimants dismiss the Respondent's contention that the Agency had no option but to terminate the Agreement. They note that the Respondent has not explained, for instance,

why the Agency could not issue a contractual penalty for the purported breach of Article 5.3.4. Neither has Serbia explained why the Agency could not waive a breach of the Privatization Agreement. In fact, the Privatization Agreement suggests the contrary: under Article 5.3.4, the Agency could give prior consent to a disposition that would otherwise breach that provision. Thus, there is no reason why the Agency would lack the authority to subsequently waive any breach based on such a disposition. Moreover, the Respondent's experts confirmed that privatization agreements cannot be terminated for minor breaches, which can only mean that the Agency could waive minor breaches.

537. The Claimants also dispute Serbia's argument that their proportionality challenge was belated. Since the beginning of the arbitration, they have submitted that the termination of the Privatization Agreement and the expropriation of the Beneficially Owned Shares was disproportionate. Even if the claim had been raised at the Hearing, as Serbia argues, Serbia would still suffer no prejudice. The claim was not based on new facts and Serbia had ample opportunity to address it in its post-hearing briefs, which it actually did.

538. For the Claimants, Serbia's submission that the Privatization Agreement was terminated because the Privatization Agency needed to send a message that non-compliance would not be tolerated shows that the Agency failed to weigh the seriousness of the alleged breach and harm against the significance of the termination sanction. It simply imposed an exemplary punishment, which was the "antithesis" of proportionality.

539. The Claimants finally challenge Serbia's argument that the requested remedies were meant to "protect the well-being of BD Agro" from Mr. Obradović's mismanagement. They turned BD Agro into one of the largest and most modern farms in Europe despite the enforced slaughter of the original herd, the ban on cow imports, and the severe drought in 2012. By contrast, under Serbia's stewardship, BD Agro wound up in bankruptcy.

b. Seizure of the Beneficially Owned Shares

540. The Claimants submit that the seizure of the Beneficially Owned Shares pursuant to a Decision on Transfer of Capital, by which the ownership of the shares passed to the Privatization Agency through registration on the Agency's account with the Central Securities Depository, was in "willful disregard of the law."

541. The Claimants also deny the Respondent's argument that, because the transfer of shares was an "automatic" consequence of termination under the Law on Privatization, it cannot be

wrongful. Such defence has no basis in international law.[366] Serbia bears liability for its "individual volitional acts" as well as for acts which "automatically" result from the application of its domestic legislation, as long as they impact the Claimants' investment. Further, the Respondent cannot rely on the "legal characteristics" of the measures under its own domestic laws to escape its international liability.[367] Therefore, it is irrelevant whether the transfer of the Beneficially Owned Shares automatically resulted from the termination of the Privatization Agreement or not.

c. Refusal to release the pledge

542. The Claimants point out that the Privatization Agency was entitled to maintain the pledge for a period of five years only, *i.e.* from the conclusion of the Privatization Agreement until the payment of the full purchase price. Accordingly, the Agency should have released the pledge immediately after Mr. Obradović's payment of the last price instalment on 8 April 2011. Discussions within the Agency's Commission of Control show that the Agency knew that it had to release the pledge upon payment of the price. However, it did not do so, thereby breaching the non-impairment clause.

543. The Claimants dispute that the Agency could lawfully maintain the pledge as long as it considered Mr. Obradović to be in breach of any obligations under the Privatization Agreement. First, the purpose of the pledge was to secure monetary receivables, not Mr. Obradović's compliance with all obligations under the Agreement, including those arising under Article 5.3.4. As soon as the last instalment of the purchase price was paid, the pledge should have been released. Second, even if the pledge had secured Mr. Obradović's obligations under Article 5.3.4 (*quod non*), the Privatization Agency would still have been required to release the pledge on 8 April 2011, when the term of the Privatization Agreement ended. Third, Article 2 of the Share Pledge Agreement is unambiguous in that it does not allow the Agency to retain the pledge after payment in full. Even if there was an ambiguity, it would have to be resolved in favor of Mr. Obradović as the non-drafting party.

d. Refusal to allow the assignment of the Privatization Agreement

544. The Claimants submit that the Agency's "refusal to allow" the assignment of the Agreement "significantly contributed to BD Agro's insolvency" and "constituted an arbitrary and

[366] Reply, §§1076-1079.
[367] Reply, §1078.

unreasonable measure."[368] They further contend that "Serbia had no problems with approving of assignment of privatization agreements for other companies [Mr. Rand] acquired in Serbia" and that "[t]he fact that the Agency refused to do so in the case of BD Agro thus clearly demonstrate[d] the arbitrariness of its conduct."[369]

545. The Claimants dispute Serbia's submission that the assignment could not be approved because Mr. Obradović and Coropi did not provide the documents requested by the Agency. Some documents – such as the confirmation of compliance with Article 12 of the Privatization Agreement – simply could not be provided. The request for other documents, such as the bank guarantee requested by Serbia in January 2015, a year and a half after the Agency's consent to the assignment was first sought, was "entirely unreasonable." The entire purchase price had been paid by then and the Agency was not entitled to any further payments that the guarantee would have secured. At any rate, the Claimants stress that the Respondent's contentions are "at odds with reality" because the negotiations relating to the assignment never progressed as the Agency acted in bad faith throughout the process.[370]

546. The Claimants also dispute Serbia's claim that the refusal to allow the assignment of the Privatization Agreement did not impair the Claimants' investments because it did not affect Mr. Obradović's rights under the Privatization Agreement. This contention is absurd, say the Claimants, because "the purpose of the entire Privatization Agreement was to transfer the ownership of the Beneficially Owned Shares to Mr. Obradović" and "[o]ne of the most fundamental aspects of ownership is the owner's ability to dispose with the property."[371] On this basis, the Claimants insist that the "Privatization Agency prevented Mr. Obradović from transferring the nominal title to the Beneficially Owned Share [sic] not only by arbitrarily refusing to release the pledge but also by rejecting without any legitimate reasons the requests for the assignment of the Privatization Agreement to Coropi."[372]

[368] Reply, §§1177-1180.

[369] C-PHB 1, §272.

[370] Reply, §1179, referring to Exh. CE-768 (transcript from Agency Control Commission Meeting of 23 April 2015), p. 9.

[371] Reply, §1180.

[372] Reply, §1180.

e. Ombudsman's interventions

547. The Claimants submit that the Ombudsman's "intervention" was grossly arbitrary and a "patent example of an abuse of powers without any legitimate purpose."[373] They insist that the Ombudsman "blatantly overstepped" his legal mandate when he "pushed" for the termination of the Privatization Agreement. Moreover, rather than protecting the rights of Serbian citizens, the Ombudsman's recommendations showed little concern for the rights of BD Agro's employees. His purported recommendations served as a pretext for his "willful pressure" on the Ministry of Economy and the Privatization Agency to terminate the Agreement. The latter terminated the Privatization Agreement only after the Ombudsman's unlawful intervention, which was arbitrary and unreasonable.

f. Other breaches

548. Serbia also breached the FET standard, argue the Claimants, by adopting measures against the Claimants' investment in bad faith. First, the Privatization Agency acted in bad faith when it refused to release the pledge and refused to allow the assignment of the Privatization Agreement. This was done with the sole aim of retaining the option to expropriate the Claimants' shares. Second, the Privatization Agency acted in bad faith when it terminated the Privatization Agreement as it knew that the alleged violation of Article 5.3.4 was not a valid ground for termination under Article 7.1 of the Privatization Agreement. For the Claimants, Serbia's bad faith alone suffices to constitute a breach of the FET standard.

549. The Claimants submit that still another breach of the FET standard occurred as a result of Serbia' actions that "amounted to a pattern of orchestrated wrongful conduct"[374] that effectively destroyed the Claimants' investment. Serbia "deliberately and consistently" adopted measures aimed at destroying the Claimants' investment in BD Agro, including by refusing to release the pledge and approve the assignment of the Privatization Agreement. Further, the actions of the Privatization Agency, the Ombudsman and the Ministry of Economy, "completely deprived" the Claimants of all their interests in BD Agro. Moreover, Serbia also failed "to pay any regard whatsoever to the protection of the Claimants' interests."[375]

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[373] Reply, §1190-1199, in particular, §§1194 and 1198.

[374] Reply, §1232.

[375] Reply, §§1248, 1252-1253.

550. Finally, the Claimants argue that the Agency and the Ombudsman frustrated their legitimate expectations by "blatantly disregard[ing]" the terms of the Agreement,[376] which constitutes yet another breach of the FET standard. In particular, the Agency deceived the Claimants' legitimate expectations (i) that the pledge over BD Agro's shares would be released after full payment of the purchase price and that the Claimants would be free to dispose of the shares; (ii) that the Privatization Agreement would not be terminated for reasons not stipulated therein; (iii) that the Claimants business would be conducted in a stable regulatory framework, without undue government influence. They add that the Ombudsman also breached the Claimants' legitimate expectations by his unlawful interference with and pressure on the Ministry of Economy and the Privatization Agency to terminate the Privatization Agreement.

2. Respondent's Position

551. Serbia disputes that any of the measures identified by the Claimants were wrongful. It submits that the relevant standard of treatment accorded under Article 6(1) of the Canada-Serbia BIT is the "customary international law minimum standard", which differs from "autonomous" standards such as the one found in Article 2(2) of the Serbia-Cyprus BIT.[377] The Claimants' submission that the two standards are essentially identical "blatantly disregards" the wording of Article 6(1) of the Canada-Serbia BIT.[378] Autonomous standards cannot be regarded as reflecting customary rules.[379]

552. Serbia further contends that the applicable threshold to find a breach under customary international law is "exceptionally high" and require "manifest" arbitrariness,[380] which the Claimants have failed to prove. Moreover, it points out that a mere contractual breach cannot be considered an arbitrary act in breach of FET, unless it is also shown that the State committed an "outright and unjustified repudiation of the transaction" and prevented the

[376] Reply, §§1255-1272, in particular, §1260.

[377] Rej., §§1318-1320.

[378] Rej., §§1321-1322, referring to Exh. RLA-136, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, 24 March 2016, §503, and Exh. RLA-138, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America,* UNCITRAL, Award, 12 January 2011, §176.

[379] Rej., §1324, referring to Exh. CLA-129, *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, §§271-273.

[380] Rej., §§1329-1334, in particular §§1333 and 1334.

investor from resorting to any remedy to resolve the problem, or that the breach of contract was "motivated by sectoral or local prejudice."

a. Termination of the Privatization Agreement

(1) The Privatization Agreement was breached

553. The Respondent explains that, in principle, a breach of Article 5.3.4 could take two forms: first, a loan taken by the buyer for which the privatized entity's property is pledged as security and second, a loan taken by the privatized entity itself against a pledge of its property as security and the transfer of the borrowed funds to a third party. In both cases, there is a pledge in favor of the lender on the privatized entity's property, while the user of the borrowed funds secured by the pledge is a third party, and there is a breach of Article 5.3.4. Such breach can be remedied by deleting the pledge on the privatized entity's property or by the third party repaying the funds to the privatized entity. Neither happened in this case.

554. The Respondent points out that there were several breaches of Article 5.3.4 of the Privatization Agreement. All of these breaches were remedied, but for the breach due to the 2010 Loan, as a result of which the Agreement was terminated.

555. Serbia insists that there was an "obvious" and "straightforward" breach of Article 5.3.4 of the Agreement.[381] For the Respondent, it is clear that the transactions relating to the 2010 Loan Agreement involving Crveni Signal and Inex were not part of BD Agro's "regular business activity."[382] It would make "no sense" and "completely ignore […] the ordinary meaning" of the wording of Article 5.3.4 of the Agreement if loans to third parties and the assumption/repayment of third party debts were to qualify for the exception in Article 5.3.4 of the Agreement.[383]

556. According to the Respondent, the Claimants' position that the funds used to assume Crveni Signal's debt and to provide Inex with a loan were "used by" BD Agro within the meaning of Article 5.3.4 of the Agreement leads to "absurd results."[384] That position relies on an "inaccurate translation" of Article 5.3.4 of the Agreement when the proper construction of

[381] Rej., §§95 ff. and 116-125.
[382] Rej., §§100-101.
[383] Rej., §102.
[384] Rej., §103.

the Serbian wording of the provision confirms that the exception envisaged therein is limited to funds used "for the benefit of BD Agro and nobody else."[385]

557. Further, the Respondent challenges the Claimants' argument according to which a pledge under Article 5.3.4 should be interpreted so that the words "to be used by the subject" encompass lending funds secured by a pledge to third persons. It submits that the Claimants' interpretation is wrong considering the text and purpose of Article 5.3.4 as well as Serbian court practice. As far as the text is concerned, the Serbian original emphasizes the end use of the funds by the privatized entity. As for the purpose of Article 5.3.4, it is clear as well and consists in safeguarding the property of the privatized company and preventing its use for the benefit of third persons. While the privatized company could give loans to third persons, Article 5.3.4 prohibits loans given from funds obtained by pledging the company's assets as it "endanger[s] its very substance."[386]

(2) There was a valid ground for termination

558. The Respondent insists that the termination of the Privatization Agreement due to Mr. Obradović's breach of Article 5.3.4 was valid and in accordance with Serbian law. The Privatization Agreement could be terminated for a breach of Article 5.3.4 even after the purchase price was paid in full, as can be seen from the Agency's consistent practice and judicial decisions.

559. According to Serbia, the objective of privatization, as set out in Article 2 of the Law on Privatization and interpreted by the Serbian Supreme Court, was not limited to the sale of the entity being privatized, but included the development of the entity to promote overall economic growth, the creation of stable business and social security conditions.[387] The Supreme Court further observed that all obligations in a privatization agreement are equally relevant for the achievement of the goal of privatization. Failure to perform any of the contractual obligations obstructs the very purpose of privatization. Thus, says the Respondent, a privatization agreement can be terminated on the ground of a Buyer's failure to perform any of its contractual obligations. This is exactly what happened here: the

[385] Rej., §104, referring to the Radović ER II, §24.

[386] R-PHB 1, §181.

[387] R-PHB 1, §172, citing Exh. RE-165, Judgment of the Supreme Court of Cassation of the Republic Serbia, Prev 129/2013, 19 June 2014, p. 2.

Privatization Agreement was rightfully terminated because Mr. Obradović breached Article 5.3.4 of the Agreement.

560. The Respondent stresses that the motive for Mr. Obradović's breaches of Article 5.3.4 of the Privatization Agreement is relevant. It points out that Mr. Obradović benefited from each breach of Article 5.3.4. For instance, in June 2010, on the same day that Crveni Signal took a loan from Agrobanka which was guaranteed by BD Agro, Crveni Signal also concluded a loan agreement with Mr. Obradović through which it lent him RSD 65 million. Thus, the money that Crveni Signal received from Agrobanka, which was secured by BD Agro's assets, was actually used to benefit Mr. Obradović. Similarly, the funds BD Agro received from Agrobanka under the 2011 Loan that BD Agro later transferred to Inex, also eventually ended up in Mr. Obradović's personal bank account. Mr. Obradović then used part of that money – received from Inex and Crveni Signal – to pay the last instalment of the purchase price on 8 April 2011.

561. Serbia also challenges the Claimants' submission that Mr. Obradović and others, including Mr. Markićević, were unaware that the breach of Article 5.3.4 of the Privatization Agreement could have been remedied by simply repaying the outstanding loans given to Crveni Signal and Inex. It insists that the opposite is true. For instance, the letter which Mr. Markićević sent as general manager of BD Agro on 2 July 2015, months before the termination, recognized that the problem with the fulfilment of the Privatization Agreement was "in relation to lending to third parties, namely Inex Nova Varos ad Nova Varos and Crveni signal a.d. Beograd." Mr. Markićević thus admitted that obligations under the Privatization Agreement were not complied with in relation to Crveni Signal and Inex.

562. The Respondent also contests the Claimants' argument that the Agreement could not be terminated under Article 41a(1)(3) of the Privatization Law. The Claimants' interpretation presupposes that, when Article 41a(1)(3) refers to the Privatization Agreement, it refers to its Article 7 only. This is not correct, since under Article 41a(1)(3) one must determine "what kind of disposal of the property is contrary to the privatization agreement and not which disposal represents the reason for termination according to privatization agreement itself."[388] A reference to the termination grounds listed in the privatization agreement is

[388] R-PHB 1, §243.

required to apply a different provision, *i.e.* Article 41a(1)(7), which provides for termination "in other cases provided for by the agreement."[389]

563. Furthermore, for Serbia, the Claimants' interpretation would make Article 41a(1)(3) redundant by limiting it to cases that are already covered by Article 41a(1)(7). Once the parties to the Privatization Agreement stipulated a prohibition of certain dispositions in the Agreement, a breach of that prohibition "automatically" became a reason for termination by force of law under Article 41a(1)(3). This situation must be distinguished from the parties' stipulating additional reasons for termination in the privatization agreement itself, which would fall under Article 41a(1)(7). Serbian court decisions support this view.

564. The Respondent rejects the Claimants' position that the termination of the Privatization Agreement was illegal because the obligation under Article 5.3.4 had "ceased to exist" when the purchase price was paid in full. It points out that the Agency has terminated other privatization agreements after that time and that the Serbian courts have not held such termination unlawful.

565. Moreover, Serbia rejects the Claimants' contention that the termination was illegal because Article 5.3.4 is not an "essential term" of the Privatization Agreement. Serbian law does not recognize the concept of essential obligations. Article 131 of the Law on Obligations which the Claimants invoke, does not contain these words. Further and in any event, says the Respondent, the purported distinction between essential and non-essential obligations has no place in the specific context of privatization. It would contradict the decisions of Serbian courts that in a privatization all contractual obligations are equally important to achieve the purpose of privatization.

566. In addition, the Respondent disputes the Claimants' argument that the breach of Article 5.3.4 of the Privatization Agreement was "minor", and as such did not allow a termination of the Privatization Agreement. The funds borrowed in 2010 did not represent an insignificant part of BD Agro's assets. BD Agro's purchase price was EUR 5.5 million. The funds that were used for the benefit of Crveni Signal and Inex were EUR 959,719, approximately 17% of the total purchase price, and 140% of the value of its one instalment. As failing to pay just one instalment was a reason for termination, "the pertinent funds were obviously far from

[389] R-PHB 1, §243.

minor."[390] Second, the breach did threaten the main purpose of the Privatization Agreement. As already observed, Serbian courts have repeatedly found that, in such respect, all contractual obligations in a privatization process are equally relevant.

567. The Respondent further submits that the Claimants cannot now challenge the validity of the termination as they "deliberately" chose not to repay the outstanding loans given to Crveni Signal and Inex.[391] It emphasizes that BD Agro was overly indebted at the time and that its bank accounts were blocked, which were likely the reasons for BD Agro's failure to do so, as it was "evident" that BD Agro's creditors would collect any payments ending up in BD Agro's accounts.

568. It is the Respondent's further submission that the Claimants' allegation that they failed to remedy the breach of the Privatization Agreement because the Agency was not clear in its communications are wrong. The Agency repeatedly invited Mr. Obradović to remedy the breach, but the Claimants made a "deliberate decision" that debts of Crveni Signal and Inex would not be repaid. For the Respondent, "this situation is nothing else but a manifestation of bad faith."[392]

569. Serbia also disagrees with the Claimants' argument that the Agency "requested the impossible" when it asked them to remedy the earlier breach of Article 5.3.3 of the Privatization Agreement. The Agency did not require that Mr. Obradović retroactively cure this breach, but simply asked for an audit report containing an unequivocal statement that Article 5.3.3 of the Privatization Agreement had not been breached.

570. According to the Respondent, the Agency had no option other than to terminate the Agreement. It could not claim damages, as the Claimants suggest, as it had not suffered any damages due to the breach of Article 5.3.4. Neither could it waive the breach. Either the privatization was successful, and all obligations were completed, or it was not. Judicial decisions support this view. The Agency could either prolong the time limit for compliance or terminate. As Mr. Obradović had repeatedly failed to remedy a breach, extending the deadline for doing so would have been "pointless." In addition, in September 2015, when

[390] Rej., §222.
[391] R-PHB 1, §§221-222.
[392] R-PHB 1, §223.

Mr. Obradović threatened to sue the Agency, "it was obviously pointless and unreasonable to grant him additional time to comply with Article 5.3.4."[393]

571. For Serbia, the Claimants' submission that the payment of the last instalment of the purchase price made the breach of Article 5.3.4 of the Agreement irrelevant, cannot be sustained. Since a breach of Article 5.3.4 occurred and an additional period for compliance was granted before the payment of the purchase price, Mr. Obradović's obligations under the Agreement *"*continue[d] to exist.*"*[394] Further, Mr. Obradović continued to pay interest for late payment to the Agency until December 2011.[395] For the Respondent, the sequence of events described above "shows that the breach was important and significant not only from the perspective of the Privatization Agreement but also from the perspective of Mr. Obradovic who paid the last instalment by committing the breach."[396]

572. The Respondent also argues that the Claimants wrongly assert that the pledges were retained due to the state-owned Agrobanka's failure to issue a necessary confirmation. The refinancing agreement for the 2011 Loan explicitly retained the pertinent pledges. There was thus no basis for them to be deleted. In addition, there was no evidence that the Claimants had ever requested deletion, nor sought deletion in court.

573. Serbia essentially disagrees that the case law on which it relies is irrelevant as it relates to the termination of privatization agreements concluded before the Law on Privatization was amended in 2005. It points out that the relevant provisions of the Privatization Law have remained unchanged. The import of the court judgments is not limited to the termination of pre-2005 privatization agreements, and, the Claimants have not supplied a single decision on the Law on Privatization before or after 2005 that contradicts the Respondent's assertions.

(3) Termination was not in bad faith

574. The Respondent denies the Claimants' contentions that termination of the Agreement was declared in bad faith. Termination was the measure of last resort in response to Mr. Obradović's failure to remedy the breach after repeated notices of the Agency. BD

[393] R-PHB 1, §262.
[394] C-Mem., §§99, 101 and 104; Rej., §214
[395] Rej., §214.
[396] R-PHB 2, §78.

Agro's bankruptcy, which was an unavoidable result from Mr. Obradović's mismanagement, does not change the purpose behind the termination, which was to protect the company.

575. Another equally important purpose behind the termination, says the Respondent, was to "strengthen" compliance with third party privatization agreements. Indeed, "[w]hen the Buyer is asked to remedy an already existing violation of Article 5.3.4, this sends a message to thousands of other buyers that non-compliance has not been and will not be tolerated."[397] This was especially important as the Agency was faced with having to terminate around 20-30% of the privatization agreements. If the Agency had waived non-compliance, it would have encouraged other buyers not to comply with their own obligations. It might even have led to discrimination claims.

576. Further, for the Respondent, the Claimants are wrong in arguing that the Agency acted in bad faith because it knew that the violation of Article 5.3.4 was not a valid ground for termination under Article 7 of the Privatization Agreement. The transcript of the meeting of the Commission for Control reveals that the Agency was aware that it could terminate on the basis of Article 41a of the Law on Privatization irrespective of the content of the Privatization Agreement. The Agency had, in fact, terminated privatization agreements on the basis of Article 41a alone, even when the breach did not appear among the grounds of termination in the agreement itself.

577. The Claimants are equally wrong, says Serbia, when they assert that the Agency continued to ask Mr. Obradović to remedy the breaches of the Privatization Agreement, despite the opinions of the Ministry and the Agency's own external legal advisors. The Ministry did not address the legal aspects of Mr. Obradović's compliance with the Agreement. As far as the external legal advisors, theirs was merely an opinion which did not bind the Agency. The Agency considered different opinions and took its decision based on the law, which can hardly be considered unreasonable, arbitrary or in bad faith.

578. Finally, the Respondent submits that the Agency was under an obligation to terminate the Privatization Agreement in application of Article 41a(1)(3) of the Law on Privatization, if it did not provide additional time for compliance. As many deadlines had passed without Mr. Obradović remedying the breach, providing additional time would have been pointless.

[397] R-PHB 1, §264.

(4) Termination was not disproportionate

579. The Respondent argues that the termination of the Privatization Agreement was proportionate. While the Claimants argue that the "lack of proportionality" under Serbian law was one of the reasons why the termination of the Privatization Agreement was unlawful, Serbia states that proportionality is irrelevant as "the principle of proportionality in the Constitution of Serbia applies to restrictions of human and minority rights, and has no place in contractual relationships."[398] For the Respondent, the "idea" of proportionality in a contractual context is reflected in Article 131 of the Law on Obligations, which bars termination of contracts in cases where only an insignificant part of the obligation remains unfulfilled. For the reasons explained below, a violation of Article 5.3.4 was not a minor breach, which confirms that the Agency's termination was proportionate.

580. The Respondent further submits that the termination meets the Claimants' own "made up" test for proportionality under Serbian law. The termination pursued "legitimate aims" and was the only viable option available to the Agency. The proportionality analysis must not only balance the purpose to be achieved and the means employed from an economic point of view, but also take into account the buyer's "bad faith" and "recalcitrant attitude", as well as the general purpose of privatization. From this perspective, the termination was "clearly proportional."

581. The Respondent opposes the Claimants' contention that the termination of the Privatization Agreement breached the standard of proportionality applicable to all treaty standards under general international law. This argument was raised at the hearing for the first time in "gross violation" of the applicable procedural rules, putting the Respondent in a position of "gross inequality"; it should thus be disregarded.

582. In any event, the Respondent submits that the proportionality argument should be rejected because it is based on the wrong factual assumptions. For instance, while the Claimants insist that it is undisputed that the purpose of Article 5.3.4 was to ensure that Serbia would be paid the full purchase price, the purpose of that provision was not limited in this manner. Rather, the purpose of Article 5.3.4 "was to ensure that BD Agro would be 'a stable company with a continuous, viable business activity'", in order to secure the fulfilment of all the obligations

[398] R-PHB 1, §294.

under the Privatization Agreement and "to secure a general public interest in the well-being of privatized companies."[399]

583. While the Claimants insist that upon the payment of the purchase price, the contract was completed and Article 5.3.4 no longer had any purpose, the Respondent objects that the Agency's insistence on remedying the breach of Article 5.3.4 also sought to strengthen general compliance with privatization agreements in a situation where there was widespread non-compliance. It was particularly important not to turn a "blind eye" to the breach of the Privatization Agreement as it would have encouraged non-performance by others. The Agency could not tolerate contract breaches on the basis of their alleged minor significance, as the Claimants suggest, because managing such differentiation would be difficult, if not impossible, in an environment of extensive non-performance.

584. Serbia also argues that the Claimants' argument that Serbia did not suffer harm as a result of the breach of the Privatization Agreement such as to justify termination, is inaccurate as it was the Agency, not the Respondent, that terminated the Privatization Agreement. In any event, says Serbia, direct economic harm to the Agency was irrelevant. Considering the purposes of Article 5.3.4, what was "economically relevant" was BD Agro's "well-being", which was "clearly endangered."[400] In addition, economic harm should not be a "decisive consideration" with regard to termination of privatization agreements, since termination served to induce general compliance, which is important to meet the goals of privatization.

585. Serbia also disputes the Claimants' submission that the Agency took the most severe action it possibly could when terminating the Agreement. As already discussed, the Agency had only two options, either to set another time limit for compliance or to terminate. It obviously could not issue a certificate of compliance, because there was no compliance. Neither could it sue for damages, because the damage was not inflicted to the Agency but to BD Agro. For the Respondent, in view of Mr. Obradović's bad faith, as he attempted to deceive the Agency and stated that he intended to sue the Agency, granting further extensions for compliance would have served no purpose. Thus, the only "viable and reasonable" option was termination.

[399] R-PHB §1, §280.
[400] R-PHB §1, §280.

b. Seizure of the Beneficially Owned Shares

586. The Respondent submits that the fact that, after the termination, the Beneficially Owned Shares were transferred to the Agency without compensation was an "automatic consequence" of the termination provided by the Privatization Law to which Mr. Obradović had consented when concluding the Privatization Agreement.[401] As such, the transfer of shares represented the exercise of a contractual right of the Agency. It was not an act *iure imperii*, entailing international responsibility.

587. According to Serbia, the physical taking of assets that occurred in this case, *i.e.* the transfer of the Beneficially Owned Shares, cannot by itself represent an act of direct expropriation. By entering into the Privatization Agreement, Mr. Obradović accepted all of the consequences of a possible breach and termination of the Agreement. The Agency did not invent the transfer of shares as a consequence of the termination. This possibility was well known to Mr. Obradović at the time when he concluded the Agreement. The Respondent insists that the Claimants cannot seriously dispute that Mr. Obradović accepted the obligation to return the shares in case of termination.

588. The Respondent opposes the Claimants' argument that the application of the Law on Privatization as part of the contractual framework amounts to Serbia invoking national law to escape liability under international law. For Serbia, Mr. Obradović accepted the application of the Law on Privatization (including the provision on transfer of shares in case of termination) when he entered into the Agreement. The Law on Privatization was incorporated into the Privatization Agreement. It is thus wrong that the Agency's use of its contractual prerogatives would run against Serbia's international obligations. The Claimants' view that contract provisions are subject to an "international constitutionality" test cannot be shared.

589. Finally, the Respondent rejects the Claimants' contention that the Ombudsman's intervention lacked due process. As the Ombudsman did not conduct any proceedings that could affect the Claimants' rights, there is "no room" to resort to due process guarantees to protect the Claimants.

[401] C-Mem., §635.

c. Refusal to release the pledge

590. The Respondent notes that the Claimants only allege unlawfulness in respect of the Agency's refusal to release the pledge because, according to them, the refusal to release the pledge was contrary to the Privatization Agreement and the Share Pledge Agreement, and not because the Agency's conduct contravened Serbian law. However, Serbian contract law allowed the refusal to release the pledge. The purpose of the pledge was to ensure compliance with all obligations under the Privatization Agreement. That purpose was not exhausted by the payment of the full purchase price and therefore the Agency was under no obligation to immediately release the pledge on payment of the last instalment. Further, Article 122 of the Law on Obligations entitles the Agency to refuse to perform its obligations to release the pledge until Mr. Obradović complied with his obligation under Article 5.3.4, which meant that the Agency was right in refusing to release the pledge until Mr. Obradović rectified his breaches of Article 5.3.4 of the Agreement.

591. In respect of the Claimants' argument that the refusal to release the pledge was arbitrary and unreasonable because the discussions within the Commission of Control show that the Agency acted in bad faith, the Respondent submits that such commission retained the pledge for the reason that the Agency had mentioned from the beginning, *i.e.* to ensure Mr. Obradović's compliance. There was nothing new in the Agency's position which had not been previously communicated to Mr. Obradović. The Agency had taken the same position in other privatizations as well. For the Respondent, the evidence on record bears out that the Commission did not act arbitrarily or unreasonably, "but engaged in rational decision making, carefully weighing issues before it and then took a rational decision not to release the pledge."[402]

592. As regards the Claimants' submission that the pledge could only secure monetary receivables and could thus not be retained to secure Mr. Obradović's compliance with other obligations, the Respondent points out that this is not supported by Serbian law. Relying on its expert, the Respondent insists that "in case of privatization, the pledge secured the Privatization Agency's (future and conditional) right to claim shares back from the buyer in

[402] R-PHB 1, §306.

case his potential breach of contract eventually led to termination of the privatization agreement."[403]

d. Refusal to allow assignment of the Privatization Agreement

593. It is the Respondent's submission that the Agency's refusal to permit the assignment of the Agreement did not affect Mr. Obradović's rights under the Privatization Agreement. Further, the Agency's "insistence on proper documentation" to decide on the assignment was not arbitrary.[404] The Agency did not, for instance, have to accept the security provided by Mr. Obradović, especially when he had a "proven record of negligence." Moreover, the Agency was always clear that it could not take any decision with regard to BD Agro while the Ministry's Supervision Proceedings were ongoing. Therefore, the Agency's conduct "clearly shows" that there was no bad faith on its part.

e. Ombudsman's interventions

594. Serbia disagrees that the Ombudsman's investigations and recommendations influenced the Agency's decision to terminate the Agreement and notes that there is no evidence in the record to this effect.[405] These recommendations were not binding and, in any event, the Ombudsman did not ask for termination, only for a decision on the status of the Agreement.

f. Other breaches

595. In connection with other alleged breaches, Serbia considers that it did not breach FET on the ground that the Agency acted in bad faith when it refused to release the pledge or to consent to the assignment of the Privatization Agreement or when it terminated the Privatization Agreement for breach of Article 5.3.4. Nor did the Agency know that it could not do so under Article 7.1 of the Agreement. All these arguments have been addressed above.

596. The Respondent equally disputes that there was a "pattern of orchestrated conduct" aimed at destroying Claimants' investment. For Serbia, this is simply a reiteration of the Claimants' bad faith argument, which has already been addressed.

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[403] Rej., §1284.

[404] Rej., §1303.

[405] Rej., §§1252-1256.

597. According to the Respondent, it did not frustrate the Claimants' legitimate expectations. First, the minimum standard of treatment to be applied pursuant to the Canada-Serbia BIT does not protect legitimate expectations as a stand-alone element of FET. Neither does it protect the expectation of a stable regulatory framework. Further, contract violations, without more such as a denial of justice or discrimination do not suffice to establish FET breaches. Second and in any event, the Claimants could not possibly have held reasonable expectations about the release of the pledge or the termination because neither Mr. Obradović nor Mr. Rand sought professional legal advice with respect to these matters. Further, both Messrs. Obradović and Markićević accepted that the Agreement had been breached, so it is "absurd and double-faced" for the Claimants to assert now that they had an expectation that is contrary to the one they actually held at the time. Third, the Agency's conduct was always in line with Serbian law and the Privatization Agreement and therefore the Agency's conduct could not be said to violate the Claimants' legitimate expectations.

3. Analysis

598. The Claimants allege that Serbia has breached the FET guarantee which is contained in Article 6 of the Canada-Serbia BIT and reads as:

> "ARTICLE 6
>
> Minimum Standard of Treatment
> 1. Each Party shall accord to a covered investment treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.
>
> 2. 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.
>
> 3. 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."

599. The wording just quoted unequivocally limits FET to the customary international law minimum standard of treatment of aliens ("MST"). The Parties diverge on the content of MST: the Claimants consider that it has evolved over time and is now equivalent to the so-called "autonomous" FET standard found in other BITs, while Serbia holds a much narrower view.

600. The decision of the U.S.-Mexico Claims Commission in *Neer* of 1926 adopted a restrictive definition of the standard:

> "[T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[406]

601. It is by now well accepted that such definition has evolved over the years and now offers wider protection to foreign investors than that contemplated in *Neer*.[407] How has it evolved and what is the contemporary scope of the protection? On the basis of the authorities cited by the Parties, the Tribunal is of the opinion that the award in *Waste Management II,* which interpreted Article 1105 of the NAFTA, a provision equivalent to Article 6 of the Canada-Serbia BIT, correctly identified the content of the standard:

> "[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant. Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case."[408]

602. Recently, the tribunal in *Eco Oro*, interpreting the MST provision of the 2008 Free Trade Agreement between Canada and the Republic of Colombia, which is textually similar to Article 6 of the Canada-Serbia BIT,[409] reached a similar conclusion:

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[406] Exh. CLA-133, *LFH Neer and Pauline Neer (USA) v. United Mexican States* (1926), §4.

[407] Exh. RLA-136, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016, §504; Exh. CLA-139, *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, §441; EXH. RLA-39, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, §115 et seq.

[408] Exh. RLA-93, *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB (AF)/00/3, Award, 30 April 2004, §§98-99.

[409] Article 805 of the 2008 Free Trade Agreement between Canada and the Republic of Colombia: "Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."

> "Having reviewed the relevant decisions, whilst malicious intention, wilful neglect of duty or bad faith are not requisite elements of MST under customary international law, there must be some aggravating factor such that the acts identified comprise more than a minor derogation from that which is deemed to be internationally acceptable. The conduct in question must engender a sense of outrage or shock, amount to gross unfairness or manifest arbitrariness falling below acceptable standards, or there must have been a lack of due process which has led to an outcome which offends a sense of judicial propriety. The treatment complained of must therefore be unacceptable from an international perspective whilst set against the high measure of deference that international law extends to States to regulate matters within their own borders."[410]

603. The *Mesa* tribunal observed that the standard contained the following components:

> "On this basis, the Tribunal considers that the following components can be said to form part of Article 1105: arbitrariness; 'gross' unfairness; discrimination; 'complete' lack of transparency and candor in an administrative process; lack of due process 'leading to an outcome which offends judicial propriety'; and 'manifest failure' of natural justice in judicial proceedings.[fn. omitted] Further, the Tribunal shares the view held by a majority of NAFTA tribunals [fn. omitted] that the failure to respect an investor's legitimate expectations in and of itself does not constitute a breach of Article 1105, but is an element to take into account when assessing whether other components of the standard are breached."[411]

604. Tribunals have also found that the threshold for breaching the customary international law minimum standard of treatment is high.[412]

605. In their submissions, the Claimants have argued that numerous measures breached Article 6 of the Canada-Serbia BIT, including the Agency's refusal to release the pledge over the Beneficially Owned Shares, its termination of the Agreement, and the Ombudsman's interventions. For the reasons mentioned below, the Tribunal finds that the Agency's conduct in terminating the Agreement was unlawful and, therefore, the seizure of the Beneficially Owned Shares breached Article 6 of the BIT. Having reached this conclusion, for reasons of procedural economy, the Tribunal can dispense with reviewing whether the other measures invoked were also taken in violation of Article 6. Indeed, even if they did,

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[410] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, §755.

[411] Exh. RLA-136, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016, §502.

[412] See, for instance, Exh. RLA-136, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016, §504; Exh. CLA-95, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, §194.

Mr. Rand would not have incurred additional harm, as the seizure of the shares deprived him of the entirety of his investment.

a. ***Seizure of the Beneficially Owned Shares***

606. The Tribunal recalls that the Agency seized the Beneficially Owned Shares pursuant to its Decision on the Transfer of BD Agro's Capital of 21 October 2015,[413] which in relevant part reads as follows:

> "DECISION ON TRANSFER OF CAPITAL
> of the subject of privatization BD Agro ad Dobanovci
>
> 1. *The Privatization Agency is transferred the capital* of the subject of privatization *BD Agro* ad Dobanovci, Lole Ribara bb, registration number: 07054688.
>
> […]
>
> Explanation
>
> […]
>
> *Since the Buyer failed to deliver evidence of compliance with the obligations referred to in item 5.3.4 of the Agreement*, within additionally granted term, and pursuant to the auditor's reports of 2011, 2012 and 2015, as well as documentations delivered along with auditor's reports, the obligation was not performed, at its 22nd session held on September 28, 2015, *the Commission for control of performance* of the obligations of the buyer or strategic investor from concluded agreements in privatization procedure *rendered the decision that the Agreement on sale* of socially owned capital through the method of public auction of the subject of privatization Poljoprivredno prehrambeni kombinat Buducnost Dobanovci (now: ad *Bd Agro Dobanovci*) *of October 4, 2005 was considered terminated due to default* in accordance with Article 88, paragraph 3 of the Law on Privatization, and in regards to Article 41a, paragraph 1, item 3 of the Law on Privatization (Official Gazette of the RS, no. 38/01, 18/03, 45/05, 123/07- other law, 30/10-other law, 93/12, 119/12, 51/14 and 52/14-CC) and pursuant to the Report of the Ministry of Economy on performed control of the work of the Privatization Agency of April 7, 2015.
>
> *Since the sale agreement was terminated, the Agency rendered the decision as in the wording*, pursuant to the provision of Article 41, paragraph 2 of the Law on Privatization."

[413] Exh. CE-105, Decision of the Privatization Agency on the Transfer of BD Agro's Capital, 21 October 2015 (emphasis added).

607. The decision just quoted makes it clear that the justification for the seizure of the shares of BD Agro lied in the termination of the Agreement. Hence, if the termination turned out to be invalid, the seizure would lack any justification and be invalid as well.

608. The Agreement was terminated pursuant to the Notice of Termination, which had the following main content:

> "*In accordance with item 5.3.4 of the Agreement, the Buyer undertook not to 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 accrued based on regular business activities of the subject, that is, except for the purpose of acquiring of the funds to be used by the subject.
>
> Having in mind that *in the procedure for control of performance of the obligations from the relevant Agreement it was concluded that the Buyer had not acted pursuant to the stated contractual obligation, the Buyer was granted additional terms for fulfillment, the last of which, by the Decision of the Commission for Control* of fulfilment of obligations of the buyer, or strategic investor from the agreements concluded in the privatization procedure (hereinafter: Commission) was *dated April 23, 2015*. *The stated Decision*, rendered in accordance with the Report of the Ministry of Economy on performed supervision of the work of the Privatization Agency of April 7, 2015, *stipulated for the Buyer*, inter alia, *to deliver*, within additionally granted term of 90 days after the date of receipt of the Notice, *evidence of actions in compliance with the Notice regarding the additionally granted term of November 9, 2012*, *and should*, among other things, *perform the obligation referred to in Article 5.3.4 of the Agreement concluding with* [i.e. ending on] *April 8, 2011*, and deliver evidence that all encumbrances have been deleted and all other security instruments for the obligations of third parties have been returned, and all encumbrances which have been registered on no grounds were deleted, as well as that 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 and deliver auditor's report where the auditor would declare on actions of the Buyer in line with all the items of the Decision of the Agency granting additional term for the Buyer.
>
> […]
>
> In respect of performance of the obligation referred to in item 5.3.4 of the Agreement within additionally granted term, and pursuant to auditor's reports of 2011, 2012 and 2015, as well as documentation delivered along with auditor's reports and subsequently, it was ascertained that the pledge was registered on the immovable property of the Subject as security instrument for the loan of the Subject in the amount of 221,000,000.00 dinars […], which the Subject received from Agrobanka Belgrade. Part of that loan in the amount of 70,944,422.77 RSD was used on the basis of the Guarantee Agreement no. J182/10-00 of June 2, 2010 (Subject is the guarantor), for settling of the obligations of the company AD "Crveni signal" Belgrade towards Agrobanka, which the said company had on the basis of the Short Term Loan Agreement 181/10-00 of June 2, 2010 in the

amount of 65,000,000.00 dinars. Subsequently, part of the stated loan in the amount of 221,000,000.00 was used for issuing a loan to the company AD "Ineks" Nova Varos, in the amount of 30,670,690.00 dinars. Pursuant to the report of the auditor "Prva revizija" doo Belgrade of January 2015 delivered to the Agency on April 30, 2015, BD Agro claimed the funds in the amount of 18,170,690.00 dinars from the company "Ineks" Nova Varos on the stated basis, and the funds in the amount of 65,904,569.84 dinars from "Crveni signal".

[…]

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 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 September 28, 2015, the Commission for control* of fulfilment of obligations of the buyer, or strategic investor from the agreements concluded in the privatization procedure *rendered the decision that the Agreement on sale of* socially owned capital through the method of public auction of the subject of privatization […] *BD Agro* ad Dobanovci, concluded on October 4, 2005, *is considered terminated due to non - fulfillment*, and in accordance with Article 88, paragraph 3 of the Law on Privatization […] and in regards to Article 41a, paragraph 1, item 3 of the Law on Privatization (….) in line with the Report of the Ministry of Economy on performed supervision of the work of the Privatization Agency of April 7, 2015.

[…]

In accordance with the stated Decision, the Decision on transfer of shares acquired by the Buyer on the basis of the Agreement on sale of socially owned capital through the method of public auction of the subject of privatization (BD Agro ad Dobanovci) to the Privatization Agency will be rendered."[414]

609. The Agreement was thus terminated on 28 September 2015 for an alleged breach of Article 5.3.4 of the Agreement, in respect of loans given to Crveni Signal and Inex in December 2010, which Serbia confirms.[415] The other breaches of the Agreement alleged by Serbia thus played no role in the termination.[416]

610. Article 5.3.4 of the Agreement expressly limits the prohibition to pledge assets to the duration of the Agreement:

[414] Exh. CE-50, Notice on Termination of the Privatization Agreement (emphasis added).

[415] C-Mem., §131.

[416] In its first post-hearing brief, Serbia argued that Mr. Obradović breached Article 5.3.4 also because BD Agro had pledged its assets as security for a EUR 0.6 million loan taken by Crveni Signal on 2 June 2010. The Notice of Termination does not mention this, and the loan was repaid on 29 December 2010, which Serbia admits. R-PHB 1, §199.

"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:

[…]

5.3.4 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 accrued based on regular business activities of the subject, that is, except for the purpose of acquiring of the funds to be used by the subject."[417]

611. Accordingly, a breach of Article 5.3.4 can only occur if BD Agro's assets are encumbered during the term of the Agreement.[418] The record shows that the term of the Agreement is tied to the payment of the purchase price:

- The Share Pledge Agreement provided that the Agreement would "conclude" on payment of the Purchase Price:

  "Article 2
  Confirmation of the shares referred to in Article 1 of this Agreement is pledged with the Agency by the Pledgor for the period of 5 years as of the day of conclusion of the sale and purchase agreement, that is, until final payment of sale and purchase price."[419]

- The Agency's Rulebook on Procedure for Control also required the release of the share upon full payment of the purchase price:

  "9.5. In the case of contracts for the sale via public auction of socially-owned capital where pledges have been established on the sold shares/shareholdings until the purchase price is paid in full, the project manager or assistant manager at the Contract Compliance Centre, on foot of an application by the buyer of the capital, accompanied by confirmation from the Finance Centre that the purchase price for the entity being privatised has been paid in full, shall draft a decision removing the pledge from the shares/shareholdings."[420]

- On 25 February 2011, the Privatization Agency alleged certain violations of the Privatization Agreement, particularly Articles 5.3.3 and 5.3.4. Doing

[417] Exh. CE-17, Privatization Agreement, p. 4 (emphasis added).

[418] The Claimants deny that Article 5.3.4 of the Agreement was breached, stating, for instance, that Article 5.3.4 does not apply to BD Agro as that provision only binds Mr. Obradović and that, in any event, Article 5.3.4 does not preclude re-lending money originally borrowed by BD Agro. The Tribunal need not examine these arguments. Indeed, for the reasons mentioned below, the Tribunal concludes that even if there had been a breach, it could not be invoked when the Agreement was terminated in September 2015.

[419] Exh. CE-17, Privatization Agreement, 4 October 2005.

[420] Exh. CE-763, Privatization Agency's Rulebook on Procedure for Control, 20 May 2010.

so, it expressly confirmed that those provisions were in effect during the term of the agreement, *i.e.* until the full payment of the purchase price:

"The last control was performed regarding the performance of obligations of the Buyer referred to in items 5.3.3 and 5.3.4 of the Agreement, namely the obligations which limit the disposal of the fixed assets of the Subject of privatization (alienation and encumbering).

[…]

The above stated obligations are in effect during the term of the agreement (October 04, 2010), which has been extended, since the Buyer failed to pay the sixth instalment of the sale and purchase price, on which basis the third and last additional term has been granted."[421]

- On 11 June 2013, the Agency's lawyers, Radović Ratković, concluded unequivocally that the term of the Agreement was until its "complete fulfilment", which occurred on 8 April 2011 when the full purchase price was paid. At that time, BD Agro was fully privatized and all legal and contractual prerogatives of the Agency ceased to exist. The Agreement could not be terminated for breach of Article 5.3.4 after that date:

  "Article 5.3.4 stipulates that 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 accrued based on regular business activities of the subject, that is, except for the purpose of acquiring of the funds to be used by the subject. As per this Agreement and the Law on Privatization, violation of this obligation is not sanctioned by termination of agreement. The duration of this ban equals the term of the Agreement. *The term of the Agreement is the period until its complete fulfilment. Fulfilment of the agreement occurred on April 8, 2011, when the buyer fully paid the agreed purchase price, by which the socially owned capital which was the subject of sale was completely privatized*.

  […]

  Based on the data available, we conclude that the Agreement on sale of the socially owned capital of the subject "BD AGRO a.d." was performed and fulfilled as of April 8, 2011. *After the payment of the sale and purchase price, socially owned capital of the subject of privatization was finally privatized and thus all contractual and legal control authorities of the Privatization Agency ended* […]."[422]

612. The full purchase price was paid on 8 April 2011. As the obligation contained in Article 5.3.4 ceased on that date, it could not be breached thereafter. This is a matter of simple logic. It also arises from the clear wording of Article 5.3.4, to which the Tribunal must give effect

[421] Exh. C-30, Report of the Privatization Agency on Control of BD Agro, 25 February 2011.

[422] Exh. CE-34, 2013 Legal Opinion, 11 June 2013 (emphasis added).

under Serbian law. The wording of Article 5.3.4 is clear in that it is limited to the term of the agreement, which, in turn is linked to the payment of the purchase price. The purpose of Article 5.3.4 also supports this interpretation: as the Serbian courts have observed, this provision is meant to prevent buyers from reselling or encumbering the company's assets when they have not yet fully paid the purchase price.[423] Once a buyer has paid the purchase price, the protection afforded by Article 5.3.4 becomes unnecessary.

613. The testimony of the Claimants' Serbian law expert, Mr. Milošević that, after payment of the purchase price on 8 April 2011, all essential obligations of the Agreement were performed, the term of the Privatization Agreement lapsed, and the obligations under Article 5.3.4 expired because they were to last only "during the term of the [Privatization] Agreement"[424] was not cogently challenged.[425]

614. On 21 September 2011, the Serbian Commercial Appellate Court confirmed that the Privatization Agency had "limited capacity" to terminate a privatization agreement, and that, once such an agreement was performed, it could not be terminated:

> "The Privatization Agency holds time limited capacity to terminate the privatization agreement for the period within which, in line with the provisions of the privatization agreement, there is a determined obligation of the buyer of the capital to comply with various obligations from the agreement. With expiration of control deadline for performance of privatization agreement, the agreement is performed in respect of the Agency as the seller of socially owned capital, and in that case, there is no room for termination of performed agreement."[426]

[423] Exh. CE-722, Judgment of the Commercial Appellate Court No. Pž 8687/2011, 18 December 2012 ("[t]he goal of the provision of Article 5.3.4 is to protect the property of the subject of privatization and to safeguard the material base of the business of the subject of privatization, without which the buyer, due to their nature and the nature of the contract, cannot fulfill other contractual obligations, cannot secure continuity of business operations of the enterprise and fulfillment of the agreed obligations.").

[424] Milošević ER II, §70.

[425] Professor Radović's oral testimony was not entirely clear on this issue. The Tribunal will avoid giving it much weight, which is in any event not necessary considering the other elements in the record. This said, the Tribunal understood that Professor Radović conceded that, after 8 April 2011, Mr. Obradović could not commit new breaches of the Privatization Agreement. While she insisted that even after 8 April 2011, Mr. Obradović was required to remedy the breach that had allegedly occurred, she later conceded that that interpretation was not supported by the text of the Privatization Law and that all the Agency could do after 8 April 2011 was determine if an alleged breach that pre-existed the determination of the Agreement still existed. See Tr., Hearing on Jurisdiction and Merits, Day 6, 21:1 et seq.

[426] Exh. CE-49, Excerpt from the Judgment of the Commercial Appellate Court Pz. 11202/2010, 21 September 2011, p. 3.

615. In light of these elements, the Tribunal concludes that the Privatization Agreement could not be terminated after 8 April 2011 for an alleged breach of Article 5.3.4 that had occurred before that date. Therefore, the termination of the Agreement was unlawful.

616. It is true that Serbia argues that it could terminate the Agreement pursuant to Article 41(a)(3) of the Privatization Law. However, that does not seem to be the case. Article 41(a)(3) of the Privatization Law provides that a privatization agreement must be terminated for "non-fulfillment" if, in spite of a grace period, the buyer disposes of the privatized assets in a manner contrary to the agreement or for the grounds provided in the agreement:

> "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;
> […]
> 7) in other cases provided for by the agreement."

617. This provision is of little assistance to the Respondent. Once the Agreement had ended, there was nothing left to be fulfilled, and hence no possible case of "non-fulfillment." In addition, as the Agreement specified that the obligation not to encumber assets was limited to the term of the Agreement, which had expired, no disposition of property could be contrary to the Agreement. Having thus concluded, the Tribunal need not examine the Claimants' argument that the Agreement could only be terminated as stipulated in Article 7 thereof and not Article 41(a)(3) of the Privatization Law. Indeed, even if Article 7 did not exclude Article 41(a)(3), the latter provision would not apply in this case.

618. Assuming that a contract that has ended could be terminated, Serbia would also be wrong in relying on Article 41(a)(3) of the Privatization Law, because, pursuant to Article 131 of the Law on Obligations, an agreement cannot be terminated for "non-performance of an insignificant part of an obligation."[427] The Parties' Serbian law experts appear to agree that a contract cannot be terminated for failure to perform a minor part of an obligation that does not endanger the purpose of the contract.[428] Here, the purpose of the privatization contract

[427] Exh CE-462, Certain provisions of the Law on Obligations, Art. 131: "[A]n agreement cannot be terminated due to non-performance of an insignificant part of the obligation."

[428] Milošević ER II, §96; Radović ER I, §34. See also Exh. CE-714, B. Vizner, Komentar Zakona o obveznim (obligacionim) odnosima [in English: Commentary on the Law on Contracts and Torts] (1978, Zagreb), p. 3 ("It follows that in cases of failure to fulfil a negligible part of an obligation, the court's assessment takes a

could not be endangered as it had already materialized. As was mentioned earlier, with the full payment of the price, the privatization was achieved.

619. Finally, Serbia invokes decisions of the Privatization Agency which allegedly represent a "well established practice" according to which privatization agreements were regularly terminated even after the full payment of the purchase price. Be this as it may, these decisions do not relate to terminations after payment of the full purchase price based only on a violation of the limitation on pledging the privatized company's assets. Moreover, even if such decisions existed, they would hardly allow the Tribunal to ignore the outcome of its legal analysis.

620. In considering all the facts and circumstances that led to the (unlawful) termination of the Agreement and the seizure of the Beneficially Owned Shares, the Tribunal finds it incumbent to also consider the Agency's own conduct.[429] Indeed, the record bears out that the Agency well knew that on payment of the full purchase price on 8 April 2011, it was bound to release the pledge. Had it done so, as it was contractually obligated to do, there would have been no restriction on Mr. Obradović pledging or otherwise transferring BD Agro's assets. The restriction on pledging BD Agro's assets contained in Article 5.3.4 no longer served any purpose. Rather than releasing the pledge over the Beneficially Owned Shares however, the Agency chose to retain it,[430] to then terminate the Agreement for breach of Article 5.3.4 of the Agreement and eventually to seize the Beneficially Owned Shares. The Agency thus willfully breached the Agreement:

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two-pronged approach: a subjective assessment - in relation to safeguarding the objective, purpose of the concluded contract, and an objective assessment - in relation to obtaining the more significant benefit that is usually obtained, having in mind, in particular, the interrelation between the scope of the fulfilled and unfulfilled part of the contractual obligation.").

[429] See, for instance, *Eco Oro*, where the tribunal in assessing whether there had been a breach of Article 805 (similar to Article 6 of the Canada-Serbia BIT) observed that it was "necessary" to consider all the facts and circumstances (*Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), §761). See also, Exh. RLA-118, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, §566, making reference to the fact that cumulative effects of State's measures or conduct as integrating a breach of the FET had been considered in *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, §459.

[430] The pledge over the Beneficially Owned Shares, could not cease to exist automatically. Under Serbian law, a confirmation issued by the Privatization Agency was required in order for the pledge to be deleted. See Milošević ER I, §130.

- On 25 February 2011, the Agency confirmed that the obligations under Article 5.3.4 were in effect only until the full payment of the purchase price, which was in line with the Privatization Agreement,[431] the Share Pledge Agreement,[432] and the Agency's Rulebook;[433]

- On 8 April 2011, the sixth instalment of the purchase price was paid.[434] The Privatization Agency could arguably refuse the payment and, defer the expiry of the Privatization Agreement. It chose not to do so;

- On 6 January 2012, the Privatization Agency confirmed that "the buyer, as of April 8, 2011, has settled his obligations in respect of the 1st, 2nd, 3rd, 4th, 5th and 6th installment and thus paid the entire sale and purchase price."[435] Thus, based on the Agency's own determinations above, the pledge should have been released on 8 April 2011;

- On 30 May 2012, the Ministry of Economy determined that there was "no economic justification" for terminating the Agreement:

> "We think that there is *no economic justification to terminate the agreement* of sale of socially owned capital of the subject of privatization, having in mind:
> - *That the buyer paid the entire amount of the sale and purchase price*,
> - That he used the funds received from disposal of the property to comply with the obligations of the subject of privatization towards the employees, state creditors and commercial banks, mostly through assignation payments, since his bank account was blocked,

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[431] Exh. CE-17, Privatization Agreement, 4 October 2005,Art. 3.1.2: "3.1.2 The Buyer and the Agency conclude the share pledge agreement (confirmation of the shares) based on which the Buyer submits the confirmation of the shares to the Agency, which is kept by the Agency until payment of sale and purchase price."

[432] Exh. CE-17, Privatization Agreement, Schedule 1: Share Pledge Agreement, 4 October 2005, Art. 2: "Confirmation of the shares referred to in Article 1 of this Agreement [Privatized Shares] is pledged with the Agency by the Pledgor for the period of 5 years as of the day of conclusion of the sale and purchase agreement, that is until final payment of the sale and purchase price."

[433] Exh. CE-763, Privatization Agency's Rulebook on Procedure for Control, 20 May 2010, Rule 9.5: "In the case of contracts for the sale via public auction of socially-owned capital where pledges have been established on the sold shares/shareholdings until the purchase price is paid in full, the project manager or assistant manager at the Contract Compliance Centre, on foot of an application by the buyer of the capital, accompanied by confirmation from the Finance Centre that the purchase price for the entity being privatised has been paid in full, shall draft a decision removing the pledge from the shares/shareholdings."

[434] Exh. CE-19, Confirmation of the Privatization Agency on the Buyer's full payment of the Purchase Price, 6 January 2012.

[435] Exh. CE-19, Confirmation of the Privatization Agency on the Buyer's full payment of the Purchase Price, 6 January 2012.

- That the stated disposal of the property did not threaten the continuity of business activities of this company,
- As well as that the buyer of the capital achieved the highest possible level of organization of this type of primary agricultural production with the application of the latest methods in the field of primary production."[436]

- In June 2012, BD Agro repaid the 2010 Loan that had caused the alleged breach;[437]

- Despite these events, throughout 2012, the Agency continued to insist that the breach of Article 5.3.4 be rectified;[438]

- On 11 June 2013, the Agency's lawyers, Radović Ratković concluded that the Agreement could not be terminated for breach of Article 5.3.4, because "all significant elements" of the contract had been performed by the buyer,[439] and that the "control activities" of the "Agency after 8 April 2011 were irrelevant" as the Agreement had ended by then.[440]

- They also disagreed with the approach taken by the Agency that it could "keep alive" a pre-existing breach by sending new notices with additional time limits for performance:

"In our determination of the buyer's deadline for meeting the obligations stipulated by Articles 5.3.3 and 5.3.4 of the agreement, and having in mind the fact that the buyer fully paid the sale and purchase price, we took into consideration the opinion stated by the Center for Privatization [i.e. the Agency], but we cannot agree with that opinion. The interpretation of the Center 'that by

[436] Exh. CE-33, Letter from the Ministry of Economy to the Privatization Agency, 30 May 2012 (emphasis added).

[437] Exh. CE-327, Report on Factual Findings from Prva Revizija, 12 January 2015, p. 5 (pdf).

[438] See notices of 2 April 2012 (Exh. CE-77, Letter from Mr. Djura Obradović to the Ministry of Economy), 31 July 2012 (Exh. CE-78, Notice of the Privatization Agency on Additional Time Period) and 8 November 2012 (Exh. CE-79, Notice of the Privatization Agency on Additional Time Period).

[439] Exh. CE-34, 2013 Legal Opinion, 11 June 2013.

[440] Exh. CE-34, 2013 Legal Opinion, 11 June 2013 ("Based on the data available, we conclude that the Agreement on sale of the socially owned capital of the subject 'BD AGRO a.d.' was performed and fulfilled as of April 8, 2011. After the payment of the sale and purchase price, socially owned capital of the subject of privatization was finally privatized and thus all contractual and legal control authorities of the Privatization Agency ended, regardless of the fact that after fulfillment of the agreement, the Agency was sending notices to the buyer about possible termination of the agreement, while setting additionally granted terms for fulfillment. We specifically emphasize this since the notices of the Agency referred to fulfillment of the buyer's obligation that could not be used as the basis for the termination of the agreement. The Agency is authorized to control fulfillment of contractual obligations until the date of execution of the contractual obligation with the longest deadline stipulated. In accordance with this, we believe that control activities taken by the Agency after April 8, 2011 were irrelevant, since it is impossible to terminate a completely fulfilled agreement.").

setting of an additionally granted term for fulfillment, the agreement stays in force' cannot be applied to this specific legal situation. Namely, in a situation when the buyer fulfilled all obligations defined as significant elements of the agreement and when the agreement was fully performed, one cannot set an additionally granted term for fulfillment per which the agreement would stay in force. The Agency's action cannot 'keep in force' a legal matter that was completely fulfilled and executed." [441]

- Despite these clear conclusions, the Agency repeatedly extended the time for compliance apparently in an effort to keep the Agreement alive;[442]

- Importantly, the Agency's lawyers also come to the conclusion that, even though the Agreement could not be terminated for breach of Article 5.3.4, the Buyer had in any event, "undoubtedly" corrected all irregularities for which the Agency had sent notices:

> "Regarding violation of the obligation of the buyer stipulated by Article 5.3.4 of the Agreement, even though such violation does not result in termination of the agreement, we state the following: Based on submitted auditor's reports, it may be undoubtedly concluded that the buyer of capital (even though he was not obliged to) acted in line with the notices of the Privatization Agency even after the full payment of the sale and purchase price, that is, after the end of control-related authorizations of the Agency. The buyer primarily corrected all the irregularities observed in the control process, the correction of which was requested by the Agency. In the last auditor's report, it is stated that all encumbrances (pledges) were deleted from the subject's movable property (fixed assets). The only remaining one was the pledge on the real estate registered in the land registry sheet 3229 at the Cadastral Municipality of Ugrinovci, as a security instrument for loan obligation of 'Crveni Signal a.d.' from Belgrade, for the amount of 65,000,000.00 dinars, as per the Loan Agreement K-181/10-00 dated June 2, 2010. However, in 2012, the subject of privatization and 'Crveni Signal' signed the agreement on restructuring (reprogramming) of the loan, in which the company 'Crveni Signal', being guarantor, obliged itself to pay due liabilities of 'BD AGRO a.d.', through payment of 20% of the sale and purchase price of two immovable, of the assessed market value several times higher than the liabilities of the subject of privatization. Thus, 'Crveni Signal' gave significantly higher security instrument than the subject of privatization itself. In addition, this disposal of the subject of privatization cannot be considered as disposal of high value assets, having in mind its share in the total value of the fixed assets of the subject."[443]

[441] Exh. CE-34, 2013 Legal Opinion, 11 June 2013.

[442] The Agency gave Mr. Obradović seven extensions of the deadline for remedying the breach of Article 5.3.4. over a period of five years. See Rej., Appendix.

[443] Exh. CE-34, 2013 Legal Opinion, 11 June 2013.

- Here again, despite their own lawyer's opinion, the Agency insisted that Mr. Obradovic had breached his obligations under Article 5.3.4 of the Agreement;[444]

- By 2013 therefore*, i.e.* two years after the payment of the Purchase Price and more than a year after the Ministry's conclusion that there was no economic reason to terminate the agreement and the opinion of the Agency's lawyers that there was no legal basis for termination, the Agency still insisted that the so-called breaches of the Agreement be rectified, failing which the Agreement would be terminated;[445]

- On 23 December 2013, the Ministry of Economy initiated a "procedure for supervision of the work of the Privatization Agency";[446]

- On 7 April 2015, the Ministry of Economy changed its position and instructed the Agency to grant Mr. Obradović 90 days to act in accordance with the terms of the Agreement.[447] This instruction was effectively a reversal of the position taken by the Ministry in May 2012 when it found that there was no economic justification for the termination. The reversal was all the more so surprising taking into account that in June 2012 BD Agro had repaid the 2010 Loan that was alleged to breach Article 5.3.4;

- In a meeting held on 23 April 2015, members of the Agency's Commission of Control repeatedly recognized that the pledge should have been released on full payment of the purchase price. The recording of the meeting also evidences the Commission's concern that Mr. Obradović may freely dispose of the shares once the price was paid and the pledge lifted:

> "Female voice 2: […] This is the first and the second is now the relation between the agreement and the proposal of a decision regarding these… pledge against shares, because, *in accordance with the agreement, the pledge should be deleted, practically, when [Mr. Obradović] pays the purchase price which [he] did pay*. On the other hand we have an uncertainty – what will [Mr. Obradović] do with the entire property since [Mr. Obradović] would then be free to dispose of

[444] Mr. Markićević testified that Ms. Julijana Vučković who was then the head of the Center for Control of Performance of Agreements at the Agency, told him that the Agency's staff had been asked to "forget" about the legal opinion. Markićević WS III, §83. Although this statement is hearsay, finds support in the way the Agency subsequently acted.

[445] Rej., Appendix I.

[446] Exh. CE-206, Decision of the Ministry of Economy, 23 December 2013.

[447] Exh. CE-328, 2001 Law on Privatization Agency.

[his] shares. In that case there is no necessity in providing this term or anything, because [Mr. Obradović] will do as [he] wants.

[…]

Julijana Vučković: Well because … So, *the agreement prescribes that the pledge is deleted once [Mr. Obradović] pays the purchase price*, and not when [he] fulfils its obligations.

[…]

Julijana Vučković: […] if the Agency was to render a decision on deletion of pledge against shares to [Mr. Obradović] registered to his benefit, [Mr. Obradović] would be free to dispose of them, which would be certain bearing in mind [Mr. Obradović's] request for assignment of the agreement. If the disposal of shares is permitted, and *[Mr. Obradović] is, I repeat, entitled to this in accordance with the agreement,* generally *the Agency would no longer be in a* contractual relation with someone and you would no longer *be able to take measures against the contracting party*, when the legal ground had generally ceased with it, and [Mr. Obradović] would be free to dispose of its shares.

[…]

Julijana Vučković: That is right, [Mr. Obradović] violated one of the provisions of the agreement; and the *release of the pledge* is not tied to the fulfilment of contractual obligations, rather *it is tied only to the payment of the purchase price*, which was clearly done carelessly in the agreement. Now, the new law rectifies this somewhat and it prescribes that the certificate on deletion of the pledge and fulfilment of contractual obligations is issued once all obligations are fulfilled, and not only payment of the price. And that is it and we are now between a rock and a hard place because on the one hand we have an obligation in accordance with the agreement, and on the other hand the consequences of this is clear to you."[448]

- Members of the Commission also observed that, despite the understanding that the Agency was contractually bound to lift the pledge, they would not do so, thereby compelling Mr. Obradović into suing them:

"Saša Novaković: And the agreement on purchase of capital, it stated that *[Mr. Obradović] can dispose of the shares*, right? Freely?

Female voice 2: That it can *once it had paid the purchase price. Which it did*. But if we were to decide like this, at least in my opinion, I would not be inclined to; although I have a problem with the provision of the agreement such as it is, *if we were now to release this pledge [Mr. Obradović] would be free to dispose of the*

[448] Exh. CE-767, Audio recording from meeting of the Commission for Control, 23 April 2015; Exh. CE-768, Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, pp. 4, 6, 11 (emphasis added).

shares freely, but then it is a problem, so *I would rather advocate that we postpone deletion of pledge* until execution, that is until expiry of this deadline until which [Mr. Obradović] had not fulfilled [his] contractual obligations we have ordered [him] to fulfil, that is, that is not us, but the minister ordered it. And we will confirm such decision [laugh].

[…]

Saša Novaković: All right then, *we can decide not to give [the pledge release] to [Mr. Obradović] and then we are forcing him* […] *into suing us*. This is…may the court rule."[449]

- At a subsequent meeting on 19 June 2015, the Commission discussed a request received from Mr. Obradović's attorney to release the pledge. It stated that it has debated this issue previously, and expressed relief that it would not have to decide the issue as the attorney had not provided a valid power-of-attorney:

"Julijana Vučković: […] I also have to mention that we received, on Wednesday, *a new request from [Mr. Obradović's] attorney in which he requests from the Agency, in accordance with its contractual obligations, to issue a confirmation of release of pledge* against shares, because [he] completed the payment of the purchase price.

Let me remind you, we have discussed on this request the previous time we gave that additional deadline, when it was said that, practically, *if we give this confirmation to release the pledge from shares, he will have absolute freedom to further sell its shares, whereby it did not fulfil obligations and we cannot request fulfilment of these obligations.* So we stated and rendered decision that we will decide on this issue after rendering the final decision on fulfilment of these obligations. *Fortunately, the attorney did not submit a valid power of attorney, so we will reply that we do not know who authorized him*, and so forth… I am hoping that by that time we will have an idea of what the buyer fulfilled and what it did not."[450]

- The recordings of the 23 April 2015 and of the 19 June 2015 meetings show that the Agency's Commission for Control deliberately chose not to release the pledge on the BD Agro shares despite knowing that were obligated to do so.

- On 28 September 2015, four years after the last instalment of the purchase price had been paid, and several years after the Agency's own determination that the pledge

[449] Exh. CE-767, Audio recording from meeting of the Commission for Control, 23 April 2015; Exh. CE-768, Transcript of the audio recording from meeting of the Commission for Control, 23 April 2015, pp. 10-11.

[450] Exh. CE-770, Transcript of the audio recording from meeting of the Commission for Control, 19 June 2015, p. 4; Audio recording from meeting of the Commission for Control, 19 June 2015, CE-771.

should have been released on full payment of the purchase price, the Agency's Commission for Control decided to terminate the Agreement based on an alleged violation of Article 5.3.4 alone,[451] which was done on that date and was followed by the seizure of the shares.[452]

621. To the Tribunal, the termination of the Agreement considered in the context of the Agency's conduct just described is undoubtedly unlawful.

622. As the Agreement could not be terminated for breach of Article 5.3.4, there is no reason to review the Claimants' arguments that termination of the Agreement was disproportionate and declared in bad faith.

623. As the termination of the Agreement was unlawful, the seizure of the Beneficially Owned Shares, which was the direct consequence of the termination and was carried out in the exercise of sovereign powers, was wrongful as well and meets the threshold for finding a breach of Article 6 of the Treaty.

b. Expropriation of the Beneficially Owned Shares

624. The Claimants contend that Serbia's termination of the Privatization Agreement and the seizure of the Beneficially Owned Shares are a "textbook" case of direct expropriation as they deprived the Claimants of both the legal title and the economic enjoyment of the shares,[453] which the Respondent disputes on multiple counts. Even if the Tribunal were to sustain these claims, no additional damages would be payable to the Claimants in addition to those due for the breach of FET, which resulted in the investors being fully deprived of their investment. Therefore, for reasons of judicial economy, the Tribunal will dispense with addressing this claim.

[451] Exh. CE-117, Minutes of the Session of the Commission, 28 September 2015, p. 4.

[452] Exh. CE-50, Notice of Termination, p. 3.

[453] Reply, §§164 et seq.

D. General Exception

1. Claimants' Position

625. The Claimants submit that the General Exception under Article 18(1) of the Canada-Serbia BIT is inapplicable in the present case.[454] Serbia has simply failed to prove its position that the Agency's conduct was either "designed" or "necessary" to secure compliance with Article 41a(1)(3) of the Law on Privatization.[455] On the contrary, it is clear that the Agency's conduct was unlawful under Serbian law and unjustified.[456]

626. In the alternative, the Claimants argue that the Agency's conduct was a "disguised restriction" on the Claimants' investment.[457] The reasons given for the Agency's conduct were only "pretext" and "plainly not genuine."[458]

2. Respondent's Position

627. In the event that the Tribunal concludes that the Agency's conduct was not commercial and can be attributed to the Respondent, the Respondent invokes the General Exception under Article 18(1) of the Canada-Serbia BIT.[459] In particular, Serbia insists that the termination of the Agreement, the refusal to release the pledge over the shares, and the refusal to consent to the assignment of the Agreement were measures necessary to ensure compliance with Serbian law, i.e. Article 41a(1)(3) of the Law on Privatization, thereby falling within the ambit of Article 18(1)(a)(ii) of the Treaty.[460]

628. The Respondent takes issue with the Claimants' position that the measures in question, in order to qualify for the General Exception, must be "designed" and "necessary" to ensure compliance with domestic law. According to Serbia, all that is needed is that the measures be "capable" of achieving the relevant goal, which they clearly were in this case.[461]

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[454] Reply, §§1050-1063.

[455] Reply, §1055, referring to Exh. CLA-113, *Korea - Various Measures on Beef* (WTO Appellate Body Report), §157.

[456] Reply, §§1056-1059.

[457] Reply, §§1060-1062.

[458] Reply, §1062.

[459] C-Mem., §§624-630; Rej., §§1155-1166.

[460] C-Mem., §627.

[461] Rej., §1158, referring, in particular, to Exh. RLA-143, *Indonesia –Measures Concerning the Importation of Chicken Meat and Chicken Products* (WTO Panel Report), §7.248.

629. The Respondent disputes the Claimants' contention that the Agency's conduct represented a "disguised restriction" on the Claimants' investment.[462] As already explained, the Agency's actions were in accordance with the Privatization Agreement and Serbian law.

3. Analysis

630. Article 18(1) of the Serbia-Canada BIT provides:

> "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
> (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."

631. For Article 18(1) to apply in this case, Serbia must establish that the seizure of the Beneficially Owned Shares was "necessary" to comply with Article 41(a)(3) of the Privatization Law. It has failed to do so. Quite to the contrary, as observed above, the seizure of the Shares was contrary to the terms of the Privatization Agreement and Serbian law. In the circumstances, Serbia cannot rely on Article 18(1) of the Canada-Serbia BIT to excuse its conduct.

E. Conclusion on Liability

632. For the reasons mentioned above, the Tribunal concludes that Serbia breached Article 6(1) of the Canada-Serbia BIT.

VIII. DAMAGES

633. The Tribunal having held that Serbia breached Article 6(1) of the Canada-Serbia BIT, turns to examining the damages payable for this breach.

A. Claimants' Position

[462] Rej., §1155.

1. Causation

634. The Claimants submit that, but for Serbia's unlawful conduct, "BD Agro would have implemented the […] reorganization plan and continued its operations […]" and that "Serbia destroyed the agreement between BD Agro and its creditors and caused a collapse of the company."[463] The Claimants also state that the loss of Mr. Rand's financial support was key to the collapse.[464]

635. The Claimants reject Serbia's allegations that BD Agro's bankruptcy was caused by Mr. Markićević's failure to comply with the decision of the Commercial Court ordering BD Agro to make certain amendments to the amended pre-pack reorganization plan. They contend that Mr. Markićević was under an obligation to seek the approval of the Privatization Agency before submitting a new version of the pre-pack reorganization plan, and that such approval was not forthcoming. They further argue that the amended pre-pack reorganization plan envisaged additional financing from Mr. Rand, who was no longer willing to provide such financing. Mr. Markićević therefore could not submit a new version of the pre-pack reorganization plan without obtaining information from the Privatization Agency as to how it intended to replace the funds that were to be provided by Mr. Rand.

2. Methodology

a. Dr. Hern's valuation

636. The Claimants claim full reparation for Serbia's breaches of the Canada-Serbia BIT, i.e. Mr. Rand's share of the fair market value of BD Agro at the time of the seizure of the Beneficially Owned Shares on 21 October 2015 plus interest.[465]

637. For determining the fair market value of BD Agro on 21 October 2015, the Claimants rely on the Expert Report of Dr. Hern. Dr. Hern divides BD Agro's assets into two categories: (i) core assets required for BD Agro's dairy production business, such as agricultural land, farm buildings, equipment, herd and other current assets; and (ii) non-core assets, such as BD Agro's commercial and industrial land in Dobanovci. To value (i), he uses a combination of

[463] Reply, §1291.
[464] Reply, §§1292-1293.
[465] Reply, §§1296-1297.

the Discount Cash Flow ("DCF") and Ajusted Book Value methods[466] and to value (ii), he only uses the second method,[467] adjusting the value of BD Agro's assets reported in its 2015 financial statements to their fair market value based on contemporaneous market evidence. Dr. Hern's valuation of core and non-core assets of BD Agro's amounts to EUR 121.2 million (pre-tax). Subtracting liabilities, the total equity value of BD Agro as of 21 October 2015 was EUR 78.2 million.

638. To calculate the value of Mr. Rand's individual interest in BD Agro's equity, the Claimants use the upper bound valuations provided by Dr. Hern, resulting in an equity value of EUR 81 million at the valuation date. For the Claimants, Mr. Rand's interest in the Beneficially Owned Shares is indirect, deriving from his shareholding in Sembi. Therefore, Mr. Rand's share in the value of the Beneficially Owned Shares is equal to his share in the value of Sembi. Together with interest to 27 September 2021 at the Serbian default interest rate, the value of Mr. Rand's indirect interest in BD Agro's equity (post-tax) equals to EUR 87.5 million.[468]

639. In the course of his analysis, Dr. Hern divides BD Agro's land, *i.e.* its non-core assets into three categories: (i) Construction Land in Zones A, B and C in Dobanovci (the "Construction Land"); (ii) additional construction land in Dobanovci and Bečmen (the "Other Construction Land"); and (iii) agricultural land in Ašanja, Deč, Ugrinovci and Dobanovci (the "Agricultural Land").

640. The Claimants stress that Dr. Hern's valuations of BD Agro's land resonate with the three contemporaneous valuations carried out between December 2014 and February 2016, according to which BD Agro was valued between EUR 56 million and EUR 71 million:[469]

    i. *The Mrgud Valuation of December 2014*: Mr. Mrgud's valuation of BD Agro as of 1 August 2014 was submitted to the Belgrade Commercial Court with the amended pre-pack reorganization plan on 6 March 2015

[466] See, for instance, Opening Presentation of of the Claimants' expert, Dr. Hern, p.10 ("I value the farm at […] using discounted cash-flow (DCF) methodology. I also use an Adjusted Book Value approach.").

[467] See, for instance, Opening Presentation of the Claimants' expert, Dr. Hern, p.7 ("I value Construction Land in Zone A, B and C using Adjusted Book Valuation method i.e. adjusting the book value of assets to their fair market value based on market evidence.").

[468] C-PHB 1, §353(f).

[469] Reply, §§1298 and 1300.

("Mrgud Valuation").[470] It appraises the value of the Construction Land. Taking the value of land calculated by Mr. Mrgud, the equity value of BD Agro, say the Claimants, was more than EUR 71 million. The Mrgud Valuation also finds support in the report of the Claimants' real estate valuation expert, Mr. Krzysztof Grzesik, who independently reviewed evidence from (i) comparable transactions; (ii) contemporaneous valuations by other valuators; (iii) contemporaneous valuations of tax authorities; and (iv) valuations prepared by Dr. Hern and Mr. Cowan, to value BD Agro's commercial and industrial land;

ii. *The First Confineks Valuation of 5 December 2015:* This valuation of BD Agro on 31 December 2014 (the "First Confineks Valuation")[471] was prepared at the behest of the Privatization Agency's representative Ms. Radmila Knežević, who was responsible for administering BD Agro after the seizure of the Beneficially Owned Shares. BD Agro's fair market value, according to this valuation, calculated as the total value of its assets less the total value of its liabilities as of 31 December 2014, was EUR 57.2 million;

iii. *The Second Confineks Valuation of 4 February 2016:* Confineks was asked to update the First Confineks Valuation as of 31 December 2015. It did so on 4 February 2016 (the "Second Confineks Valuation"). According to this valuation, BD Agro's fair market value, calculated as the total value of its assets less the total value of its liabilities as of 31 December 2015, was EUR 56.3 million.[472]

641. The Claimants point out that the First and Second Confineks Valuations were accepted by Serbia because their preparation was directed by the Privatization Agency and they were used to draw up BD Agro's financial statements for 2015 and the following years. In addition, Ms. Knežević, who administered BD Agro for the Agency after the seizure, expressly relied

[470] Exh. CE-175, 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, December 2014.

[471] Exh. CE-142, Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, December 2015.

[472] Exh. CE-172, Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, January 2016.

on the Second Confineks Valuation in her letter to the Ministry of Economy of 17 February 2016, showing that the Agency agreed with that valuation. Finally, when BD Agro submitted its 2016 pre-pack reorganization plan under the control of the Privatization Agency, the Agency once again relied on the First Confineks Valuation to value BD Agro's "assets, liabilities and capital."

642. The Claimants recognize that there were other contemporaneous valuations of BD Agro, but none of them were endorsed by the Agency as was just described. For the Claimants, the valuation prepared by Jones Lang LaSalle d.o.o. ("JLL") in February 2015 (the "JLL Valuation") on which Serbia relies is "fundamentally flawed." For instance, that valuation uses a price for BD Agro's land of 2 EUR/m2 for the construction land in Zone A and 1.5 EUR/m2 for the construction land in Zones B and C, which figures include a 50% discount. However, say the Claimants, there is no "evidence from contemporaneous transactions that would justify a valuation of BD Agro's construction land as low as that presented in the [JLL Valuation]."[473] Mr. Grzesik also concludes that the JLL Valuation does not provide any proof for either its base price or the arbitrary 50% discount it applies to it.[474] The JLL Valuation arrives at the lowest value of BD Agro's land amongst all the contemporaneous reports mentioned by Serbia.

b. Critique of Mr. Cowan's Valuations

643. Dr. Hern criticizes the different valuation approaches taken by Serbia's expert Mr. Cowan on the following counts:[475]

i. Mr. Cowan's "maximum valuation" is flawed because it applies downward adjustments to the value of assets mentioned in the Second Confineks Report to reflect a distressed sale of assets in his "bankruptcy scenario." This approach is entirely inappropriate as fair market value, by definition, excludes a distressed sale. Further, as of the expropriation date, BD Agro was a going concern and not a bankrupt company. In any event, say the Claimants, "the [bankruptcy] sale of BD Agro was conducted in a non-

[473] Hern ER II, §103.
[474] Grzesik ER, §§13.5-13.6.
[475] Hern ER II, §§166, 170-203.

transparent and flawed manner that in no way could have led to BD Agro being sold for its true market value";[476]

ii. Mr. Cowan's "alternative" valuations do not reflect the fair market value of BD Agro's equity either.[477] Mr. Cowan's valuation of BD Agro based on the JLL Valuation must be dismissed as it does not refer to any relevant evidence to support its conclusions on the value of BD Agro. The stock market valuation, another alternative used by Mr. Cowan, deserves to be dismissed as well as the Serbian stock market is highly illiquid and any share trading information has to be treated with caution. Moreover, the share price to which Mr. Cowan refers from the 2015 accounts relates to the last trade of BD Agro's stock which occurred in 2012. It does not, therefore, accurately reflect the situation of the business on the date of expropriation.[478]

644. The Claimants and Dr. Hern also dispute the new valuations advanced by Mr. Cowan in Serbia's Rejoinder, not only because they disagree with the land valuations on which they are based, but also because Mr. Cowan improperly lowers BD Agro's valuation.

3. Size of the Construction Land

645. The Claimants assert that BD Agro's most valuable asset was its land. In her first report, the Respondent's real estate expert Ms. Ilić stated that the size of the Construction Land was 279 hectares, with which Dr. Hern agrees. However, on instruction, she reduced this surface to 169 hectares in her second report. For the Claimants, this reduction cannot be sustained for several reasons:

i. The biggest part of the land area that was excluded represents land that was subject to a court dispute with [ZZ] Buducnost Dobanovci. The claim in that dispute was filed almost three years after the valuation date and it was rejected by the court on 21 December 2018. Therefore, this land should be considered in the valuation, which is further supported by the

[476] Reply, §1389.
[477] Hern ER II, §205.
[478] Hern ER II, §§207-219.

fact that, while excluded in the first bankruptcy sale, the bankruptcy trustee later included this land in the second sale that took place on 27 January 2021;

ii. No land should be excluded from BD Agro's valuation based on the court dispute between BD Agro and Serbia related to the land swapped between Serbia's Ministry of Agriculture and BD Agro pursuant to the "Agreement on exchange of land between the Ministry of Agriculture, Forestry and Water Management and BD Agro" of 4 January 2010 (the "Land Swap Agreement").[479] Court proceedings related to the land swap agreement are still pending;

iii. No land should be excluded from BD Agro's valuation based on the court dispute which Inter Kop Sabac initiated on 31 January 2018 in respect of the "Real Estate Purchase Agreement" of 30 April 2010 between the two entities (the "Real Estate Agreement").[480] Like the dispute initiated by [ZZ] Buducnost Dobanovci, this dispute too commenced several years after the valuation date. Further, the Real Estate Agreement provided that the land would be paid by way of services that Inter Kop Sabac was to provide to BD Agro.[481] The company did not provide any such services. It thus did not acquire any rights to BD Agro's land. This conclusion, say the Claimants, is confirmed by the fact that Inter Kop Sabac never registered its alleged ownership over the disputed land. In fact, it even voted in favor of the pre-pack reorganization plan that includes the disputed land as an asset of BD Agro;

iv. Land sold to Eko Elektrofrigo pursuant to the "Real Estate Purchase Agreement" of 27 October 2008 and its Annex of 10 April 2010 should not be excluded as doing so would effectively amount to double-counting.

[479] Exh. RE-396, Agreement on exchange of land between the Ministry of Agriculture, Forestry and Water Management and BD Agro, 4 January 2010.

[480] Exh. RE-589, Real Estate Purchase Agreement between BD Agro and Inter kop Sabac, 30 April 2010.

[481] Exh. RE-589, Real Estate Purchase Agreement between BD Agro and Inter kop Sabac, 30 April 2010, Art. 3.

Indeed, Dr. Hern already excluded this land from the calculation of BD Agro's Construction Land, and there is no reason to exclude it again;

v. No land should be excluded from BD Agro's valuation based on alleged restitution claims made in respect of certain land plots in Novi Bečej, as the Serbian Restitution Agency expressly confirmed that no restitution was claimed with respect to BD Agro's land. In any event, even if there were any such claims, they could not lead to a restitution of BD Agro's land because, being a private entity, it was not obliged to restitute property;

vi. No land should be excluded from BD Agro's valuation based on the "Purchase Agreement between BD Agro DB Dobanovci and Hypo Park Dobanovci" of 11 June 2008 (the "Hypo Park Agreement"). BD Agro owned the excluded land on the valuation date, which is confirmed by Ms. Ilić's calculation of the total area of BD Agro's land contained in her first report;

vii. Serbia has not furnished any good reasons for excluding other land parcels.

646. The Claimants further submit that Serbia's position is entirely based on the valuation report prepared by Mr. Bodolo in January 2019 for the purposes of the bankruptcy sale of BD Agro and a "List of BD Agro's land which was not sold." Neither of these documents refer to any evidence showing that the excluded land was not owned by BD Agro or that its legal status was at that time controversial, let alone on the valuation date.

4. Price per m2

647. Dr. Hern values the three categories of BD Agro's land using the following evidence:

i. Construction Land: Dr. Hern analyzes (i) comparable transactions; (ii) property tax information; (iii) the First and Second Confineks Valuation; (iv) the Mrgud Valuation; and (v) other contemporaneous valuation

reports.[482] On this basis, Dr. Hern values the Construction Land between EUR 62.9 million and EUR 82.9 million;

ii. The Other Construction Land: Dr. Hern reviews evidence from comparable transactions and the First and Second Confineks Valuations, and estimates the value of this land between EUR 1.1 million and EUR 3.4 million;[483]

iii. The Agricultural Land: Dr. Hern again relies on data from comparable transactions and the First and Second Confineks Valuations. Using these inputs, he values the Agricultural Land between EUR 4 million and 15.5 million.[484]

648. The Claimants' real estate expert Mr. Grzesik largely concurs with Dr. Hern's analysis. For the Construction Land, he arrives at the total value of EUR 85.3 million, slightly higher than the EUR 82.9 million upper range figure calculated by Dr. Hern. For the Other Construction Land, his figure is EUR 3.6 million, and for the Agricultural Land his estimate is EUR 10 million.

649. Dr. Hern rejects Mr. Cowan's criticism that BD Agro "encountered difficulties when it tried to sell the land in the past." He points out that Mr. Cowan refers to a single example of an alleged sale of land below market value, *i.e.* the 2012 sale of agricultural land in Novi Bečej. However, evidence shows that BD Agro made a profit on the sale.[485] Further, the conversion rate applied by Mr. Cowan is incorrect.[486] Dr. Hern equally rejects Ms. Ilić's criticism of his report. All of the evidence on which he relies is consistent with the broad principles underpinning the valuation standards, which Ms. Ilić also uses.[487]

650. Dr. Hern also disagrees with Serbia and Mr. Cowan's dismissal of the comparable land transactions in Batajnica, according to which in 2013 and 2016 Serbia expropriated that land for EUR 27/m2 (in 2013) and EUR 28/m2 to 37 (in 2016). The Batajnica land plots are

[482] Hern ER I, §§62-87.
[483] Hern ER I, §§102-103.
[484] Hern ER I, §109.
[485] Hern ER II, §119.
[486] Reply, §§1369 et seq.
[487] Hern ER III, §§31 et seq.

comparable to land plots in the Construction Land because they "are a similar distance from Belgrade and the Belgrade airport; are close to a railway; have a similar intended use; have a similar development potential; and have not been developed yet and are still used as arable land."[488]

5. 30% Discount

651. Dr. Hern also rejects Serbia and Ms. Ilić's approach in making downward adjustments for the differences in size between the comparable transactions used by Ms. Ilić and BD Agro's land, as such discounts would contravene the purpose of determining fair market value. According to him, if a higher value can be extracted by selling a large land plot in a number of smaller pieces, that value should be reflected in the fair market valuation. There is no basis to apply a size discount, given that the land does not need to be sold as a whole.[489] The Claimants also dismiss the other differences between Ms. Ilić's comparable transactions and BD Agro's land to justify the 30% discount that she applies.

6. Bankruptcy sale discount

652. In Dr. Hern's opinion, Mr. Cowan is wrong in applying a 50% bankruptcy sale discount. BD Agro was not in bankruptcy on the valuation date of 21 October 2015. It was a going concern, and had initiated reorganization proceedings, which culminated in the submission and approval of the "credible and feasible" amended pre-pack reorganization plan. In addition, such a discount would be contrary to the definition of fair market value applicable in public international law.

7. Liabilities

653. Dr. Hern disagrees with Mr. Cowan's deduction of certain liabilities in BD Agro's valuation. First, Mr. Cowan overstates the BD Agro's liabilities. Second, he applies an unjustified conversion fee. Third, he deducts EUR 200,000 for pending court proceedings, without giving any reason. Fourth, he overstates the applicable capital gains tax as he did not make necessary deductions. In fact, Mr. Cowan admits that he had not calculated this tax correctly. Fifth, Mr. Cowan wrongly includes redundancy payments in BD Agro's liabilities. These should not be included as they represent a voluntary program adopted and financed

[488] C-PHB 1, §297.

[489] Hern ER III, §§40 et seq.

by Serbia and thus have no place in a fair market valuation of BD Agro. Finally, Mr. Cowan inflates the bankruptcy costs by a significant margin of 1,400%.

8. Distress discount

654. Dr. Hern also opines that Mr. Cowan is wrong in applying a 30% distress discount. As already mentioned, on the valuation date, BD Agro was a going concern and such a discount is contrary to the definition of fair market.

9. Interest

655. The Claimants argue that pursuant to the preservation of rights clauses in Article 10 of the Serbia-Cyprus BIT and Article 13(1) of the Qatar-Serbia BIT, which the Canadian Claimants invoke under the most favored nation clause in Article 5 of the Canada-Serbia BIT, the more favorable provisions of Serbian law prevail over the Treaties. The Claimants can thus claim the most favorable statutory interest rate under Serbian law, which is "an annual rate […] equal [to] the key interest rate of the European Central Bank for main refinancing operations plus eight percentage points." They thus claim interest at 6-month average EURIBOR + 2%, compounded semi-annually.

B. Respondent's position

1. Causation

656. The Respondent points out that the Claimants are seeking damages on the basis that the termination of the Privatization Agreement and the transfer of the Beneficially Owned Shares to the Agency were expropriatory. The Claimants have not stated that they suffered damage due to Serbia's other alleged violations of the BITs.

657. Serbia also notes that the Claimants have not expressly alleged that the damages they claim were caused by the termination. Instead, they connect their damages claim with the bankruptcy of BD Agro,[490] arguing that their shareholding lost all value due to the termination of the Privatization Agreement and seizure of BD Agro's shares which prevented the realization of the amended pre-pack reorganization plan and forced BD Agro into bankruptcy. However, the termination of the Privatization Agreement and transfer of the shares did not prevent the adoption of the pre-pack plan or the eventual bankruptcy of BD

[490] Rej., §§1418 and 1421.

Agro. Indeed, the bankruptcy was caused by "long-term continuous insolvency of BD Agro" and Mr. Markićević's failures to follow court orders, which led to the initiation of the bankruptcy proceedings. In any event, the Claimants have failed to sufficiently establish that the reorganization plan would have worked.[491]

2. Methodology

a. Mr. Cowan's Valuation

658. Serbia relies on the reports of its expert Mr. Cowan to value BD Agro and to challenge Dr. Hern's valuation. Mr. Cowan values BD Agro adopting different approaches:

i. An asset based approach based on the Second Confineks Valuation, to which he applies certain discounts and adjusts the book values to reflect the bankruptcy scenario. He estimates a "maximum" value of EUR 4.4 million. Since the Claimants had 79.77% shareholding in BD Agro, this means that the maximum value of their claim would be EUR 3.5 million plus pre-award interest;

ii. 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 if it had to repossess and sell the business, *i.e.* if the business was in a bankruptcy situation."[492] JLL valued the land at EUR 4.7 million. On the basis of JLL Valuation, BD Agro's value would be EUR nil, since the liabilities would significantly exceed the assets;

iii. An alternative valuation based on stock market data amounting to EUR 4.4 million;

iv. An alternative valuation based on the auction of BD Agro's assets in the bankruptcy proceedings, which yields a value of zero.

659. In light of Serbia's later determination that over 40% of BD Agro's land was either not owned by it or that its ownership was in dispute and should, therefore, be excluded from the

[491] Rej., §1422.

[492] Cowan ER I, §8.23.

valuation, Mr. Cowan was asked to prepare further alternative valuations, taking into account the expert report of Serbia's real estate expert, Ms. Ilić, as well as the report of Mr. Badolo prepared in the course of the bankruptcy proceedings. Accordingly, Mr. Cowan provided the following alternative valuations:

i. A valuation based on the value of all BD Agro's land under the bankruptcy scenario, applying a bankruptcy sales discount of 50% "to represent the impact on value of undertaking a sales process of a distressed business" and including bankruptcy costs at 20% of BD Agro's discounted asset value. On this basis, Mr. Cowan values BD Agro at nil;

ii. A valuation based on the value of some of BD Agro's land, taking into account the findings of the reports of Mr. Badolo and Ms. Ilić concerning the ownership over BD Agro's land and accounting thus for only 164 ha, under the bankruptcy scenario, which leads Mr. Cowan to a nil value;

iii. A valuation based on the value of all BD Agro's land, under the going concern scenario, applying an asset-based method, making a provisions for pending court proceedings, and applying a 30% distress discount. On this basis, Mr. Cowan values BD Agro at EUR 13.8 million;

iv. Two valuations based on the value of some of BD Agro's land taking into account the findings in the reports of Mr. Badolo and Ms. Ilić concerning the ownership over the land, and accounting thus for 164 hectares of land. In the bankruptcy scenario this results in BD Agro's valuation being nil and, in the going concern scenario, EUR 100,000.[493]

660. The Respondent clarifies that "although these alternative calculations have been prepared for the benefit of the Tribunal, its position is that only a bankruptcy scenario taking into account the valuation of undisputed part of BD Agro's land is the proper basis for establishing the fair market value of the company."[494]

[493] Rej. §1471 citing Cowan ER II, §2.8.
[494] Rej., §1416.

b. Critique of Dr. Hern's valuation

661. Mr. Cowan identifies the following main flaws in Dr. Hern's approach:

i. *Valuing BD Agro as a going concern*: Dr. Hern is wrong in valuing BD Agro as a going concern. Even if the Agency recognized that BD Agro was a going concern in 2015, what is relevant is whether BD Agro was a going concern on an objective basis. Objectively, BD Agro was not a going concern. Indeed, BD Agro had submitted the pre-pack reorganization plan as far back as November 2014. At the beginning of 2015, Banca Intesa requested opening of bankruptcy proceedings. Thus, it was clear that BD Agro was unable to continue operations for the foreseeable future. Moreover, BD Agro's auditor's report for 2013 emphasized that the company would not be able to continue operating as a going concern unless it obtained additional operating capital, which had not happened. Further, BD Agro's bank accounts were blocked since 8 March 2013 and remained so until the valuation date;

ii. *Applying the DCF method:* Dr. Hern valued BD Agro based on the Claimants' plans for the future of the business, not as the business stood on 21 October 2015. He ignored the business' past performance. His cash flow projections are thus unrealistic. On the valuation date, BD Agro was not turning a profit. Neither was it earning any net positive cash flows. Therefore, BD Agro should have been valued on an asset basis;

iii. *Using an incorrect basis for the DCF calculation*: Dr. Hern's DCF projection is based on a business plan that was similar to two previous plans (providing for an increase of cows and volume of milk produced) which did not succeed when implemented and turned out not to be profitable. Dr. Hern has not explained why the plan would be successful the third time;

iv. *Applying an incorrect discount rate*: Dr. Hern used an unreasonable discount rate that does not take into account the risk of investing in a small business in financial difficulty, with the result that he inflated BD Agro's value.

662. Serbia submits that there were eight valuations of BD Agro's assets or land in the period between November 2014 and March 2017, which varied considerably. For example, the value of the Construction Land varied between EUR 4.7 million and EUR 87.1 million. The Claimants and Dr. Hern have relied on the highest value valuation reports and in particular have not mentioned the JLL Valuation that valued the Construction Land in February 2015 at the request of Banca Intesa at EUR 4.7 million. By contrast, the valuation prepared by Mr. Mrgud, used by the Claimants, assessed the value of this land at EUR 87.1 million on 31 August 2014.

663. Serbia denies that it is "estopped" from contesting the First and Second Confineks Valuations as the Claimants suggest. The Privatization Agency is a separate legal entity from Respondent; its conduct cannot bind Serbia. Moreover, it would be absurd to consider a party bound by a third party's valuation merely because it commissioned the valuation. Further, for the Respondent, the alleged acceptance of a financial report at a shareholders' meeting cannot be viewed as an acceptance of all documents on which that financial report was based.

3. Size of the Construction Land

664. Serbia contends that, in his valuation, Dr. Hern has included land that should be excluded due to "contentious ownership":

i. Although the land claim made by ZZ Buducnost Dobanovci was denied, it was not decided on its merits. Nothing prevents the company from bringing a new claim to establish its ownership rights;

ii. The Land Swap Agreement was found null and void by the Commercial Court in Belgrade on 14 September 2017. This decision was final. As a result, says Serbia "BD Agro will almost certainly have to return the land it received from Serbia in the exchange to the land that it did not own and will not receive compensation in return."[495] This land should thus not be considered for valuation purposes;

iii. In connection with the land claimed by Inter Kop Sabac, Serbia points out that the Real Estate Agreement was concluded before the valuation date,

[495] R-Submission on Quantum, §32.

which "represents sufficient ground for this land to be excluded from BD Agro's valuation."[496] It also notes that Inter Kop Sabac and BD Agro signed a "Declaration on set-off" and an "open item statement" in respect of the former's services to BD Agro in exchange for the latter's land. Finally, even though Inter Kop did not register the disputed land in its name, it did continuously pay the related property taxes;

iv. Certain land plots in Novi Bečej should be excluded because there was a possibility that restitution claims could be made in respect of those plots. Mr. Rand did not raise this issue in BD Agro's bankruptcy proceedings;

v. Land sold to Hypo Park must be excluded as the Hypo Park Agreement predates the valuation date;

vi. There are good reasons for the exclusion of other land parcels, including "the land distributed to the employees of BD Agro prior to the privatization, land labeled as public roads and the land expropriated in 1991"[497] as well as "the land conceded to the Municipality of Zemun and sold to Galenika."[498].

4. Price per m2

665. Serbia notes that the "major element" in the Claimants' valuation is the value of the Construction Land, which Dr. Hern assumes could be sold at high prices. This assumption is unfounded:

i. The actual sales of BD Agro's land were for amounts much lower than the land's estimated value. For example, in one transaction in 2012, land in Novi Becej was sold at 55% of its estimated value, *i.e.* at EUR 7.4 million out of an estimated EUR 13.5 million;

ii. Dr. Hern assumes too low a fee to convert of agricultural land to Construction Land. While he assumes a fee of 50% of the value of agricultural land, in fact the fee could be as high as 20% of the market

[496] R-Submission on Quantum, §36.
[497] R-PHB 2, §98.
[498] R-PHB 2, §98.

value for Construction Land. This alone could increase the conversion fee to between EUR 7.7 million to EUR 10.6 million, in contrast to Dr. Hern's estimate of EUR 1.2 million to EUR 3.8 million. In addition, the conversion could take years.

666. Serbia insists that the Batajnica transactions on which the Claimants rely are not an appropriate comparator. First, there is no evidence that those transactions were actual expropriations. Similarly, there is no evidence of the dates of the transactions or where a date is mentioned, it is in 2016, *i.e*. after the valuation date, rendering those valuations irrelevant. Further, the assessments on which the Claimants rely are based on recent decisions of the tax authorities, which do not reflect a market valuation according to international standards. Still further, the Batajnica land and the Construction Land are not comparable. For instance, the former is close to a railway while the latter is not, the former has direct access to roads while the latter does not. The Batajnica land was intended for development of a major infrastructure project supported by the EU while the Construction Land was to be developed for commercial purposes as a private initiative.

5. 30% Discount

667. Serbia contends that Ms. Ilić correctly applies a 30% discount to her estimated price of the Construction Land based on her experience with the Serbian real estate market. It stresses that the discount is also justified given the differences between the comparable transactions used by Ms. Ilić (such as size, the existence of infrastructure and access roads) and BD Agro's land. Mr. Cowan then imports this discounted price into his valuation of BD Agro.

6. Bankruptcy sale discount

668. In his bankruptcy scenario, Mr. Cowan applies a bankruptcy sales discount of 50%, stating that "it is typical to apply a discount to represent the impact on value of undertaking a sales process of a distressed business."[499] He adds that the choice of 50% is supported by the actual discount applied to BD Agro's assets in the bankruptcy sale in 2019 as well as by the amended pre-pack reorganization plan.

[499] Cowan ER II, §2.5.2.

7. Liabilities

669. Mr. Cowan submits that to ascertain BD Agro's fair market value, liabilities must be deducted from assets. He thus first deducts, relying on the Second Confineks Valuation and his own assessment, total estimated liabilities, excluding deferred tax liabilities, of EUR 42.2m. Second, he then deducts, based on Ms. Ilić's expert report, a conversion fee of EUR 1.8m. Third, he effects deductions for court expenses of EUR 200,000, capital gains tax of EUR 5.7m, and redundancy payments of EUR 700,000. Finally, in the bankruptcy scenario, he deducts bankruptcy costs.

8. Distress discount

670. Mr. Cowan also provides for a distress discount. He and Serbia reject the Claimants' objection about this discount as fair market value means that both buyer and seller are reasonably informed about the characteristics of the asset being sold. A willing buyer would thus know that BD Agro was going into bankruptcy.

9. Interest

671. Serbia disputes the Claimants' position that interest is to be calculated according to Serbian law, as the relevant treaty provisions only require the Tribunal to apply international law. Further and in any event, the MFN clause in the Canada-Serbia BIT is limited in scope and does not allow the importation of additional substantive standards like a preservation of rights clause from other BITs. Finally, preservation of rights clauses do not extend to compensation for treaty violations: the Claimants could ask for the 8% interest rate pursuant to Serbian law for a lawful expropriation, but cannot do so in cases of unlawful expropriation. Serbia contends that the appropriate interest rate would be a flat interbank rate (LIBOR/EURIBOR). The 2% increase which the Claimants' request should be rejected "considering […] revelations about BD Agro's mismanagement by Mr. Obradovic."[500]

C. Analysis

672. It is undisputed – and rightly so – that, in case of a breach, Serbia must fully repair the harm caused to the Claimants.[501] As the Tribunal has reached the conclusion that the seizure of BD Agro's shares breached Article 6 of the Serbia-Canada BIT, it must now assess

[500] Rej., §§1477-1481.

[501] Reply, §1296; C-Mem., §764.

damages. To this effect, it will first deal with causation ((1) below) and will then assess the proper valuation methodology ((2) below) and review the different valuation elements on which the Parties diverge ((3) to (9) below) before reaching its conclusion ((10) below).

1. Causation

673. It is common ground between the Parties that "payment of compensation presupposes a causal link between a treaty breach and the injury suffered for which compensation is sought."[502] Serbia argues that no such link exists because BD Agro's bankruptcy was not caused by the Agency's termination of the Agreement and seizure of the Beneficially Owned Shares but rather by BD Agro's "long-term" insolvency and Mr. Markićević's failure to comply with the relevant court procedures.

674. To assess the submissions, the Tribunal recalls the facts and chronology as they emerge from the record:

- On 25 November 2014, BD Agro filed a pre-pack reorganization plan with the Commercial Court in Belgrade to improve the financial situation of the company.[503] An amended plan was filed on 6 March 2015 (the "Amended pre-pack reorganization plan").[504]

- On 6 January 2015, Banca Intesa requested the Commercial Court in Belgrade to open bankruptcy proceedings over BD Agro alleging its permanent insolvency.[505] On 21 January 2015, the Commercial Court accepted Banca Intesa's request and initiated preliminary bankruptcy proceedings;[506]

- On 25 June 2015, that court approved the amended pre-pack reorganization plan. The required majority of creditors, including Nova Agrobanka, BD Agro's largest

[502] Reply, §1288; C-Mem. §765, relying on Exh. CLA-24, ILC Articles, Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, Article 31(2).

[503] Exh. CE-85, BD Agro's submission accompanying the pre-pack reorganization plan, 25 November 2014.

[504] Exh. CE-101, BD Agro's submission to Commercial Court accompanying the pre-pack reorganization plan, 6 March 2015; Exh. CE-116, Amendment to the pre-pack reorganization plan of BD Agro, 6 March 2015.

[505] Exh. CE-109, Decision of the Commercial Court in Belgrade opening bankruptcy proceedings over BD Agro, 30 August 2016, p. 8. See also Rej., §448.

[506] Exh. CE-109, Decision of the Commercial Court in Belgrade opening bankruptcy proceedings over BD Agro, 30 August 2016, p. 8. See also Rej., §448.

creditor at the time, voted in favor of the plan.[507] A minority of creditors, including Banca Intesa, however, filed appeals to the Commercial Appellate Court in Belgrade;[508]

- On 6 August 2015, since BD Agro's reorganization was ongoing, the Commercial Court denied Banca Intesa's request for opening bankruptcy proceedings over BD Agro;[509]

- On 30 September 2015, the Commercial Appellate Court allowed Banca Intesa's appeal, reversed the approval of the amended pre-pack reorganization plan, and remanded the case to the Commercial Court of Belgrade.[510] In particular, the Appellate Court stated (i) that it was necessary to verify the data in the amended plan, as there were substantial differences between BD Agro's property valuations in the original and the amended plans and (ii) that BD Agro needed to submit an extraordinary audit report and an updated amended plan in accordance with that report;

- On 1 October 2015, the Agency advised BD Agro of the termination of the Privatization Agreement on 28 September 2015;

- On 7 October 2015, the Commercial Appellate Court revoked the Commercial Court's decision of 6 August 2015 denying Banca Intesa's request for opening bankruptcy proceedings over BD Agro;[511]

[507] Exh. CE-39, Court hearing minutes, 25 June 2015.

[508] Exh. CE-41, Appeal of the City Administration of the City of Belgrade, Secretariat for Finance, 29 July 2015, CE-40; Appeal of the Tax Administration of the Republic of Serbia dated 29 July 2015; Exh. CE-354, Appeal of Banca Intesa, 12 August 2015.

[509] Exh. CE-109, Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro, 30 August 2016, p. 8.

[510] Exh. CE-358, Decision of the Appellate Court, 30 September 2015, p. 1. In addition to accepting Banca Intesa's appeal, Commercial Appellate Court also accepted appeals filed by Izoteks, Vihor, City of Belgrade and Tax Administration. See Exh. CE-358, Decision of the Appellate Court, 30 September 2015, p. 9.

[511] Exh. RE-465, Decision of the Commercial Appellate Court, 7 October 2015.

- On 16 October 2015, the Commercial Court ordered BD Agro to amend the reorganization plan in accordance with the decision of the Appellate Court within 15 days; [512]

- On 21 October 2015, the Agency seized the Beneficially Owned Shares;[513]

- On 26 October 2015, Mr. Markićević on behalf of BD Agro wrote to the Privatization Agency, seeking instructions on how to proceed with the reorganization process. He explained that the Commercial Court had ordered BD Agro to act in accordance with directions of the Appellate Court within 15 days, failing which the Commercial Court would reject the amended pre-pack reorganization plan. Mr. Markićević wrote this letter as he then was General Director of BD Agro, the Agency not having yet appointed a legal representative for the company after the Decision on Transfer of Capital;[514]

- The Agency did not respond within that period;

- On 8 December 2015, as BD Agro had not complied with the court's order of 16 October 2015, the Commercial Court dismissed BD Agro's proposal for conducting bankruptcy proceedings in accordance with the amended plan,[515] which decision became final on 5 January 2016;[516]

- On 30 August 2016, BD Agro was declared bankrupt.[517]

675. It is clear from this statement of the facts that Banca Intensa's request for bankruptcy of BD Agro, pursuant to which BD Agro was eventually declared bankrupt,[518] resumed because

[512] Exh. CE-359, Notice from the Commercial Court in Belgrade, 16 October 2015.

[513] Exh. CE-105, Decision of the Privatization Agency on the Transfer of BD Agro's Capital, 21 October 2015.

[514] Exh. CE-360, Letter from I. Markićević to the Privatization Agency, 26 October 2015. *See also* Markićević WS III, § 120.

[515] Exh. CE-361, Decision of the Commercial Court in Belgrade, 8 December 2015, p. 1.

[516] Exh. CE-109, Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro, 30 August 2016, p. 9.

[517] Exh. CE-109, Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro, 30 August 2016.

[518] Exh. CE-109, Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro, 30 August 2016; Exh. RE-467, Print screen from the course of proceedings before Commercial Court in Belgrade, regarding bankruptcy proceedings no. St. 15/16, 20 January 2020, p. 2.

BD Agro's reorganization failed. The reorganization, which had the requisite support of BD Agro's creditors, and which would have revived BD Agro, failed, in turn, because Mr. Markićević could not proceed without the Agency's approval, which was not forthcoming.

676. Serbia argues that Mr. Markićević, and hence BD Agro, "was neither obliged to request the Privatization Agency's approval, nor was the Privatization Agency authorized to give such approval."[519]

677. Mr. Markićević sought instructions from the Privatization after the termination of the Agreement. The question is thus what his powers were during the period in which the Agreement had been terminated but no new management was in place yet. The answer is found in Article 47 of the 2014 Law on Privatization, which provides that, after the termination of a privatization agreement, the management of the privatized company is prevented from making certain decisions, including, in particular, decisions on the reorganization of the company and that decisions violating this prohibition are null and void:

> "[Paragraphs 1 and 2]
>
> 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.
>
> The decision rendered contrary to paragraph 3 of this Article shall be null and void."[520]

678. Serbia does not appear to dispute that the matters contained in the amended pre-pack reorganization fall within the ambit of Article 47 and are thus outside the remit of the management of the formerly privatized company. Indeed, the amended plan concerned the reorganization of the company and included provisions on both acquisition of high value property (new heifers) and disposal of high value property (sale of non-core assets), all items falling within the ambit of Articles 47(2) and 47(3). In addition, the purpose of the pre-pack

[519] C-Mem., §203, relying on Markićević WS II, §195.

[520] Exh. CE-223, Law on Privatization, Official Gazette of the Republic of Serbia no, 83/2014 and 46/2015, Art. 47.

reorganization plan was to reach a settlement with BD Agro's creditors, which falls within the scope of Article 47(6).

679. Serbia objects that Article 47 of the 2014 Law on Privatization does not apply in this case as the decision to commence reorganization, as well as the decision to acquire and dispose of high value property were taken prior to the termination of the Agreement. Execution of those decisions, says Serbia, would not fall within the ambit of Article 47. This limitation of Article 47 does not arise from the legal text. Neither does Serbia offer any support by way of legal authorities or otherwise. In the Tribunal's view, the purpose of Article 47 is to restrict the pre-termination management of the company to the conduct of day to day business until a new management is in place, preventing it from making any decisions that may materially impact the business of the newly de-privatized/re-nationalized company. That seems a perfectly reasonable solution to handle the transition from the old to the new ownership. Hence, Mr. Markićević, acting for the pre-termination management of BD Agro, had no choice but to seek instructions in respect of the reorganization from the Privatization Agency. The fact that the instructions were about amendments to a pre-existing plan as opposed to a new plan does not appear sufficient to make the rationale underlying Article 47 inapplicable. The Commercial Court had ordered BD Agro to amend the reorganization plan in accordance with the decision of the Appellate Court, including submitting a new extraordinary auditor report and adding accounting data. It is not evident that such a revised reorganization plan would fall within the ambit of BD Agro's 25 April 2014 (pre-termination) decision to commence its reorganization.[521]

680. The Tribunal recalls that BD Agro was in a distressed situation at the time of the valuation. It had made no profits for several years, was in bankruptcy proceedings and had submitted a reorganization plan to overcome its operational and financial issues and restore its profitability. Its bank accounts were blocked since 8 March 2013.[522] The Tribunal has accounted for these difficulties in valuing BD Agro (§701).

2. Methodology

681. Both Parties have each relied on experts to value damages, who in turn cite contemporaneous valuations in support of their conclusions.

[521] Exh. RE-468, Decision of BD Agro's Shareholders Assembly, 25 April 2014.
[522] Exh. CE-511, Mr. Bodolo's Report, 24 January 2019, p. 6.

682. The experts agree on the valuation date being 21 October 2015, i.e. the date of seizure of BD Agro's shares. The Tribunal concurs as this is indeed the date when the breach was perpetrated.

683. The Parties also agree to use Dr. Hern's terminology when valuing BD Agro's so-called "core assets" separately from its non-core assets. The Tribunal sees no reason not to follow this approach.

684. Where the experts differ is whether, on the valuation date, BD Agro's farm business should be considered as a going concern and valued on a DCF basis or whether it should be considered "illiquid" and valued on an asset basis. The Tribunal recalls that, as a general matter, assets need to qualify as a going concern having a proven track record of profitability in order to be valued in accordance with the DCF method.[523] In *Vivendi*, for instance, the Tribunal observed that "international tribunals have stated that an award based on future profits is not appropriate unless the relevant enterprise is profitable and has operated for a sufficient period to establish its performance record."[524]

685. International valuation standards define a going concern as "a business enterprise that is expected to continue operations for the foreseeable future."[525] While it is true that BD Agro was experiencing financial difficulties, on the valuation date, it was not in bankruptcy. Its Amended pre-pack reorganization plan had been adopted by a majority of creditors, including a number of companies experienced in the dairy business.[526] By voting in favour of the reorganization, these companies expressed that they considered that BD Agro's business would continue to operate for the foreseeable future. The Agency too appears to have recognized this fact when it approved BD Agro's 2015 financial statements.[527] The Tribunal thus finds that, on the valuation date, BD Agro was a going concern.

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[523] See for instance, *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, 8 June 2010, §§71, 75.

[524] Exh. CLA-49, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, §8.3.3.

[525] Exh. RE-485, IVSC Glossary.

[526] Hern ER II, §76.

[527] Tr., Hearing on Jurisdiction and Merits, Day 8, 159:24-161:4 (Cowan) ("Mr. Pekař: Would it be fair to say that the Privatization Agency agreed that BD Agro was a going concern at the end of 2015? Mr. Cowan: I believe it's more the preparation of the statements, that's probably fair to say, yes. I would agree with that. Mr. Pekař: I don't understand. I believe that the financial statements of a company need to be approved by

686. This being so, BD Agro was making losses. It is not disputed that BD Agro was consistently loss-making from 2006-2014, *i.e.* during the years before the valuation date of 21 October 2015.[528]

687. In the absence of demonstrated profitability, the Tribunal does not consider it appropriate to apply the DCF methodology to value BD Agro's farm business. While investment tribunals have applied the DCF methodology in the absence of a proven track record of profitability, they have only done so when there was sufficient evidence of future profitability. In *Rusoro Mining v. Venezuela*, for instance, the tribunal observed that the application of the DCF methodology was appropriate not just for the valuation of going concerns with profitability, but also for enterprises that were not going concerns, but had detailed business plans, available financing, records of financial performance, predictability of performance with other projects, foreseeability of costs, and certainty of the price and sale of their products and services.[529] The Claimants have produced no evidence on any of these aspects that would allow the Tribunal to conclude that future profitability is sufficiently certain. In the circumstances, the Tribunal discards the DCF methodology.

688. It follows that the appropriate valuation methodology to value all of BD Agro's assets, *i.e*. core and non-core assets, is the asset-based methodology.

3. Size of the Construction Land

689. The Parties differ on the size of BD Agro's land, particularly the size of the Construction Land.

690. The Tribunal recalls that, at the hearing, Dr. Hern and Mr. Grzesik agreed with Ms. Ilić that the size of the Construction Land was 279.4 ha.[530] Serbia, however, insists that this figure

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the shareholders, is that your understanding? Mr. Cowan: Yes, prepared by management and approved by the shareholders. Mr. Pekař: If a shareholder does not believe that a company is a going concern, why would the shareholder approve the financial statements? Mr. Cowan: I agree.").

[528] Cowan ER II, §3.15. See also Expert Presentation of Mr. Cowan, p. 9.

[529] Exh. RLA-196, *Rusoro Mining Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/12/5, Award, 22 August 2016, §759. See also *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (I)*, PCA Case No. 2012-07, Award, 23 December 2019, §434 referring to *Rusoro Mining*, and Exh. CLA-49, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, §8.3.3.

[530] Mr. Grzesik's presentation, slide 4; Dr. Hern's presentation, slide 4; Tr., Hearing on Jurisdiction and Merits, Day 7, 57:8-12 (Grzesik); Tr., Hearing on Jurisdiction and Merits, Day 8, 5:11-15 (Hern); Hearing on Jurisdiction and Merits, Day 7, 144:11-145:4 (Ilić).

is wrong as it is not based on the area of BD Agro's land included in BD Agro's bankruptcy sale of 9 April 2019. The Tribunal does not agree:

- Serbia excludes certain lands subject to court disputes with [ZZ] Buducnost Dobanovci and Inter Kop. These court proceedings were initiated in 2018,[531] almost three years after the valuation date. Serbia has not advanced a cogent reason why events occurring after the valuation date should be taken into account. Its own expert, Ms. Ilić, testified that only reasons existing at the time of the valuation could present a potential reason for excluding land from valuation;[532]

- Serbia also excludes certain land plots based on litigation between itself and BD Agro related to the Land Swap Agreement.[533] The court action was brought to invalidate the swap and Serbia speculates that BD Agro would "almost certainly" have to return the land it had received from Serbia under the land swap agreement.[534] It admits that court proceedings related to the land swap were pending on the valuation date.[535] Thus, the Tribunal sees no reason to disregard the legal situation as it stood at the time of the valuation, being that the land in question was owned by BD Agro, not to speak of the fact that, if the swap were undone, another land asset would return into BD Agro's ownership or equivalent compensation at market value would become part of the valuation;

- No land should be excluded based on alleged restitution claims with respect to land plots in Novi Bečej Nos. 21842, 22062/2, 22062/5, 22414/2 and 2063/1.[536] Serbia concedes that the claims are a mere "possibility"[537] and that "not much information is available" concerning these claims.[538] Moreover, the Serbian

[531] Exh. CE-806, Overview of court proceedings No. P-3093/2018, 2 March 2020.

[532] Tr., Hearing on Jurisdiction and Merits, Day 7, 145:5-17.

[533] Exh. RE-396, Agreement on exchange of land between the Ministry of Agriculture, Forestry and Water Management and BD Agro, 4 January 2010, p. 3.

[534] R-Submission on Quantum, §32.

[535] R-Submission on Quantum, §29 ("Even though the proceedings related to this dispute are still ongoing […]").

[536] Exh. RE-451, List of BD Agro's land which was not sold, 30 June 2018.

[537] R-Submission on Quantum, §46.

[538] R-Submission on Quantum, §46.

Restitution Agency confirmed that there were no restitution requests submitted with respect to BD Agro's land on the valuation date;[539]

- Still for the same reason, Serbia's exclusion of land forming the subject-matter of the Hypo Park Agreement must be dismissed. On the date of valuation, BD Agro did own this land;[540]

- While Serbia initially sought to exclude land sold to Eko Elektrofrigo, it later conceded that this land should not be excluded.[541]

- The other exclusions sought by Serbia fail as well.[542] In respect of "the land distributed to the employees of BD Agro prior to the privatization"[543] Serbia has not established precisely which land plots were allegedly distributed to BD Agro's employees, when they were distributed or why these land plots were included in the other valuations of BD Agro's land. As far as the land plots "labeled as public roads"[544] is concerned, Serbia has not furnished any convincing evidence that BD Agro did not own these plots at the valuation date. In respect of "the land expropriated in 1991"[545], Serbia does not contest the Claimants' submission that BD Agro continues to use this land. Finally, at least some of "the land conceded to the Municipality of Zemun"[546] was already excluded from BD Agro's valuation and should not be excluded again.

691. In consequence, the Tribunal agrees with the experts Ms. Ilić, Dr. Hern and Mr. Grzesik that the size of the Construction Land was 279 hectares.[547]

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[539] Exh. CE-859, Response from the Serbian Restitution Agency, 28 February 2020.

[540] Claimants' Opening presentation, slide 280; Ilić ER I, p. 153 (pdf).

[541] R-PHB 2, fn.313 ("Respondent concedes that no further exclusion is necessary for the land sold to Eko Elektrofrigo because it was never included in Ms. Ilić's original calculation accepted by Claimants.").

[542] These include land plots Nos. 1281/2, 1281/3, 1281/4, 1281/5, 1281/6, 1281/8, 1281/9, 1281/10, 1281/11, 1281/12, 1281/13, 1281/14, 1281/15, 1281/16, 1281/17, 1281/18, 4054. See Claimants' Opening presentation, slide 281.

[543] R-PHB 2, §98.

[544] R-PHB 2, §98.

[545] R-PHB 2, §98.

[546] R-PHB 2, §98.

[547] Mr. Grzesik's presentation, slide 4; Dr. Hern's presentation, slide 4; Tr., Hearing on Jurisdiction and Merits, Day 7, 57:8-12 (Grzesik); Hearing on Jurisdiction and Merits, Day 7, 144:11-145:4 (Ilić).

4. Price per m2

692. The experts agree on the general approach to be taken to value the Construction Land.[548] They have different opinions, however, on the value of that land, Dr. Hern proposing a range between EUR 22-30/m2 and Mr. Cowan 14.7 EUR/m2, based on Ms. Ilić's first report.

693. The Tribunal finds Mr. Cowan's approach to be more reasonable:

- Dr. Hern states that his lower bound price of 22 EUR/m2 "reflects the valuation of BD Agro's as determined by Serbian tax authorities for calculating property taxes."[549] However, according to Mr. Grzesik, the Claimants' real estate expert, this principal source of Dr. Hern's lower bound price falls into a category of "mass appraisals", which "carry little evidentiary weight when valuing specific individual properties."[550] Further, Dr. Hern states that his lower price "is broadly consistent with the Dec 2015 Confineks report valuation of 24 EUR/m2."[551] However, once again, Mr. Grzesik does not rely on the First Confineks Valuation and treats it as "secondary evidence" because it does not refer to evidence of comparable transactions.[552] Finally, while Dr. Hern relies on BD Agro's transactions of 20 to 23 EUR/m2, Mr. Grzesik disregards them because they were too old and thus carried "little evidentiary weight";[553]

- Dr. Hern states that his upper bound price of 30 EUR/m2 "is based on weighted average price used in Mr. Mrgud's valuation."[554] However, Mr. Grzesik opined that Mr. Mrgud's valuation, based on asking prices, was flawed, because it provided no information about the sources of these prices or when they were published;[555]

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[548] Cowan ER I §2.17 ("Dr. Hern's approach to the valuation of the land relies on contemporaneous transactions, contemporaneous valuations by the tax authority and contemporaneous valuations prepared by third parties. I do not disagree with Dr. Hern's approach.").

[549] Hern ER I, §89(A).

[550] Grzesik ER I, §6.13, with reference to Hern ER I, §§71-72; Tr., Hearing on Jurisdiction and Merits, Day 7, 73:19-75:10.

[551] Hern ER I, §89(A).

[552] Grzesik ER I, §§6.6 & 8.1.

[553] Grzesik ER I, §§6.5 & 6.8; see, also, Tr., Hearing on Jurisdiction and Merits, Day 7, 72:14-73:1.

[554] Hern ER I, §89(B).

[555] Tr., Hearing on Jurisdiction and Merits, Day 7, 80:24-81:2 ("if you are relying on asking prices, then as much information as possible is needed, because asking prices are the lowest level of evidence that you can use in a valuation.")

- Dr. Hern relies on the value of the land in Batajnica as the main source of evidence for his upper bound price of 30 EUR/m2, finding that, by its characteristics, that land was comparable to the land in Zones A, B, and C. There are, however, major differences between the Batajnica land and Zones A, B, and C land that make the former an unsuitable comparator:

    i. The Batajnica transactions are based on value assessments by the tax administration for determining the tax on property transfer. They are thus different from property valuations based on international standards;[556]

    ii. It is well accepted that the information used for valuation should originate on or before the valuation date. The Batajnica assessments, dating from March to August 2016, do not meet this requirement.[557] Mr. Grzesik admitted that he was not sure when the assessments actually took place.[558] It is likely that the Batajnica assessments were based on the tax administration's previous assessments that also took place in 2016, not in 2015, because the tax administration is required to base its assessments of the property value on its most recent tax decisions concerning real estate sales;[559]

    iii. As far as location is concerned, Dr. Hern initially made a reservation about the comparability of the Batajnica land with Zones A, B, and C.[560] There are, in fact, several differences. Importantly, the Batajnica land is close to the Batajnica settlement and to major traffic infrastructure (highway, roads, and railway).[561] In contrast, Zones A, B, and C land is located some

[556] Ilić ER II, §§2.97-2.118.

[557] Exh. CE-159, Tax Administration Zemun Branch, Number 021-464-08-00029/2016-I1A02, Delivery of Information, 12 February 2016; Exh. CE-160, Tax Administration Zemun Branch, Number 021-464-08-00029-1/2016- I1A02, Delivery of Information, 25 May 2016; Exh. CE-161, Tax Administration Zemun Branch, Number 021-464-08-00125/2016-I1A02, Delivery of information, 28 July 2016.

[558] Tr., Hearing on Jurisdiction and Merits, Day 7, 98:22-24 ("*Q. And you don't know actual time of the transactions that they used for their assessment. A. No.*").

[559] Exh. RE-526, Instruction on the Procedure and Method of Determining Tax on the transfer of absolute rights, Sections 6,8,9,10,13,15, 2009, §13.

[560] Hern ER I, §69 ("broadly comparable […] [h]owever, while the Batajnica region lies next to the E75 road […] BD Agro would have to rely on the Sremska Gazela for a connection to the E70.").

[561] Tr., Hearing on Jurisdiction and Merits, Day 7, 126:1-128:8. See also Presentation of Danijela Ilić, slide 22.

distance away from Dobanovci[562] and has no access to any roads[563] or railway.[564]

694. The Tribunal thus accepts Mr. Cowan's use of the price of 14.7 EUR/m2 to value the Construction Land.

5. 30% Discount

695. In her first expert report, Ms. Ilić (i) compared construction land sale transactions with BD Agro's land; (ii) applied a 10% adjustment to account for "the willingness of [the] seller to negotiate the sale";[565] and (iii) applied a further 30% discount to account for the larger size of BD Agro's land[566] and other factors such as the existence of infrastructure and access road.[567] She concluded that the appropriate price for the Construction Land was 14.7 EUR/m2, which price Mr. Cowan then used in preparing his valuation.

696. The Tribunal finds Ms. Ilić's overall approach reasonable. She used asking prices in her analysis, first reducing them by 10% to account for likely price negotiations between buyer and seller, the usual practice in Serbia being to apply a 10-15% reduction between asking and actual price.[568] She then applied a 30% discount to reflect differences between the comparables which she uses and BD Agro's land.

697. 697. While the Claimants oppose this 30% discount, the Tribunal notes that the representative comparables chosen by Ms. Ilić and BD Agro's land were of a different size.[569] Dr. Hern himself accepted that size does matter when commenting that, in one

[562] Presentation of Krzystof Grzesik, slide 5. See also Presentation of Danijela Ilić, slide 22.

[563] Exh. CE-143, General Regulation Plan for the BD Agro Complex Zones A, B and C in the Suburb of Dobanovci, Municipality of Surčin, 31 December 2008.

[564] See Exh. CE-143, General Regulation Plan for the BD Agro Complex Zones A, B and C in the Suburb of Dobanovci, Municipality of Surčin, 31 December 2008, Section A.4 - Scope of the plan, compared to Exh. CE-521, Plan of Detailed Regulation for Intermodal Terminal and Logistical Centre "Batajnica", 23 June 2015, Section 2.1 - Plan Boundary.

[565] Ilić Presentation, p.11; Ilić ER I, §9.92.

[566] Ilić ER I, §9.48. The Tribunal understands that Ms. Ilić has applied the same discount in other instances because of the differences in the size of the land of the comparables and BD Agro's land (see, for e.g., Ilić ER I, §§9.48, §9.61, and §9.77), which the Claimants have not contested.

[567] Ilić Presentation, p.11.

[568] Ilić ER II, § 2.35 and 2.104. The Claimants do not appear to contest this.

[569] Ilić ER I, §9.1, p.115.

transaction, the large area of BD Agro's land on sale may have pushed the price down.[570] That said, BD Agro may have been able to split its land in smaller parcels before selling it, making any discount on the sale of the land as a whole inapposite. However, even if it had done so, it remains that there were other important differences between the comparators chosen by Ms. Ilić and BD Agro's land. While the comparators had access to the roads and other infrastructure,[571] this was not the case for BD Agro's land, which still needed to be developed.[572] Moreover, although the Claimants argue that it is not possible to establish the exact location of the comparators and to determine the differences between the comparators chosen by Ms. Ilić's and BD Agro's land,[573] the descriptions of the comparators make clear that they were equipped with infrastructure and had access to roads.[574] Ms. Ilić's testimony that these differences justify a discount was not seriously rebutted.[575] To the Tribunal, applying a discount appears reasonable as any buyer would incur costs and spend time in developing BD Agro's land and would factor the development costs and time into the price offered. Failing more precise indications in the record about the size of this deduction, it appears reasonable to the Tribunal to accept the 30% discount applied by Ms. Ilić. For the avoidance of doubt, the Tribunal stresses that this discount is already included in the 14.7 EUR/m2 price that Mr. Cowan used in his calculations and is thus reflected in the table below (§707).

[570] See Hern ER I, §65 ("the area sold was very large (around 102ha), which may have put a downward pressure on the price."); Hern ER III, §37 ("Ms Ilić discusses BD Agro's sale of 102ha land from 2008 at 15 EUR/m2, which I have not relied on in my valuation due to the large area which may have put a downward pressure on the sale price.").

[571] See Exh. RE-561, Asking prices for KO Dobanovci.

[572] Tr., Hearing on Jurisdiction and Merits, Day 7, 87:12-88:05 (Grzesik) ("THE PRESIDENT: […] I had questions on this, because it was unclear to me in what stage the land was, in terms of development, and what else was needed and how much time this would take. […] A. I think what I can say is that Zones A, B and C were under the regulation plan -- that was land which was suitable for the development of industrial and business uses. However, in order to get to those uses, a lot more work needs to be done in terms of provision of infrastructure, in terms of provision of roads, in terms of the whole planning procedure, so any developer buying this site would be fully aware of the enormous amount of work that still needed to be done to enable these sites to be put in a situation where you could start development.").

[573] C-PHB 1, §323.

[574] See Exh. RE-561, Asking prices for KO Dobanovci.

[575] Tr., Hearing on Jurisdiction and Merits, Day 7, 164:07 et seq. (Ilić). See also Presentation of Danijela Ilić, slide 11.

6. Bankruptcy sale discount

698. In his calculations, Mr. Cowan applied a bankruptcy sales discount of 50%. However, he accepted that such a discount would be inapplicable in case of a going concern.[576] As discussed above (§685), at the time of valuation, BD Agro was a going concern. Hence, this discount is inapposite.

7. Liabilities

699. It is common ground that liabilities must be deducted from assets to get to the near asset value of BD Agro. The Parties' experts had different opinions, however, on a number of elements of BD Agro's liabilities and, consequently, on their total amount:

i. *Total estimated liabilities (excluding deferred tax liabilities)*: Relying on the figures included in the Second Confineks Valuation and his own analysis, Mr. Cowan submits that BD Agro's estimated liabilities were EUR 42.2 million. Dr. Hern reaches a lower figure of EUR 37.8 million. The Second Confineks Valuation determined that BD Agro's liabilities amounted to EUR 40.4 million. That amount was also used as the basis for liability values in BD Agro's 31 December 2015 Financial Statements. To that amount, Mr. Cowan added EUR 1.8 million because the principal amount of a Banca Intesa (later Agrounija) loan accounted for in the Second Confineks Valuation increased,[577] resulting in an increase in the interest payable thereon (and thereby increasing BD Agro's liabilities by that amount).[578] The Tribunal finds Mr. Cowan's approach reasonable;

ii. *Conversion fee*: The experts agree that, for a buyer to develop BD Agro's land it would need to convert it from agricultural land to industrial land and to pay a corresponding conversion fee. That fee would then have to be deducted from the value of the land. The experts disagree, however, on the amount of the conversion fee. The Law on Agricultural Land specifies that the conversion fee is based on 50% of the average price of agricultural land or 20% of average price of construction land. The experts agree on using

[576] See, for instance, Cowan ER III, Table 4.8.

[577] Exh. RE-646, Agrounija's Registration of Claim with Enclosures, 13 January 2016; Exh. CE-551, Conclusion of the list of acknowledged and challenged claims, 30 March 2018, p. 2.

[578] Cowan ER III, §2.21 et seq.

the agricultural price as basis. In his expert report, Mr. Grzesik reaches an agricultural land price of EUR 1.85 million, to which he applies a conversion fee of EUR 1.5 million. By contrast, Ms. Ilić arrives at an agricultural land price of EUR 3.4 million to which she applies a conversion fee of EUR 3.1 million. In her first report[579] and at the hearing, Ms. Ilić furnished a detailed explanation for her approach[580] and explained why the fee must be calculated on the basis of the previous year's tax assessment.[581] Mr. Cowan then used Ms. Ilić's conversion fee amount in his expert report. [582] The Tribunal finds Ms. Ilić's reasons plausible. In the absence of any contrary indications provided by the Claimants, it adopts the conversion fee used by the Respondent's experts;

iii. *Payment to Canadian suppliers*: The experts agree that payments to Canadian suppliers amounting to EUR 2.2 million are to be deducted, which the Tribunal will follow;[583]

iv. *Court proceedings*: Mr. Cowan includes EUR 200,000 in BD Agro's liabilities. The Tribunal agrees, as the item was included in BD Agro's 2015 financial statements.[584]

v. *Capital gains tax*: Dr. Hern and Mr. Cowan disagree on the applicable capital gains tax. Dr. Hern calculates capital gains tax by using the "deferred tax liabilities" in BD Agro's 2015 balance sheet as a proxy for the

[579] Ilić ER I, Appendix 1.1.

[580] Tr., Hearing on Jurisdiction and Merits, Day 7, 177:09 et seq.

[581] Tr., Hearing on Jurisdiction and Merits, Day 7, 177:09 et seq. This explanation also addresses Mr. Grzesik's concern as to why Ms. Illic adopts an agricultural value of EUR 1/m2 in her main valuation, but a value of EUR 3.4/m2 for determining the conversion fee (Tr., Hearing on Jurisdiction and Merits, Day 7, 58: 13-25). As she explains, the tax authorities provide an annual assessment each year based on which the conversion fee is to be calculated. See, in particular, Tr., Hearing on Jurisdiction and Merits, Day 7, 177:22-178:09 ("[T]he authority that has to do the assessment of this conversion fee is the Tax Authority. How do they do it? They take from the previous year the assessment they made for tax purposes, the annual taxation calculations, and of course, if I am to simulate this procedure and arrive at what the realistic figure would be, I would then go and check what tax was assessed. There is a table I would need to look at which shows the prices in individual zones that were determined by the Tax Authority for the previous year, so for 2014, the €3.4 is the price of agricultural land in the zone in which BD Agro land was located.").

[582] Cowan ER III, Table 4.4.

[583] See, for instance, Cowan ER III, Table 4.8.

[584] See Cowan ER III, §§2.17-20 & 4.2 *et seq.* See also Exh. CE-172, Confineks d.o.o. Beograd, Report on the Valuation of Assets, Liabilities and Capital of BD Agro AD Dobanovci, January 2016.

capital gains, based on the Claimants' instruction.[585] By contrast, Mr. Cowan deducts the book value of BD Agro's tangible assets (*i.e.* BD Agro's land, plant, equipment and biological assets) as of 31 December 2013 as a proxy for the purchase price, from the value of land according to Ms. Ilić and applies a 15% capital gain tax rate.[586] The Tribunal adopts Mr. Cowan's approach, which it finds objective and logical.

vi. *Redundancy payments*: The experts disagree whether certain redundancy payments should be included in BD Agro's valuation. While the Claimants submit that the redundancy program was voluntary, they offer no authority in support. In any event, BD Agro was obliged to prepare a redundancy program in accordance with Annex 1 of the Privatisation Agreement.[587] Further, BD Agro's 2015 financial statements also recognize redundancy payments as being obligatory.[588] The Tribunal finds that these payments must be accounted for;

vii. *Bankruptcy costs*: As discussed above in the context of the bankruptcy discount, BD Agro was a going concern on the valuation date. This reduction in liabilities is thus inapplicable. This finding is confirmed by the fact that Mr. Cowan did not deduct these costs in his going concern scenario.[589]

8. Distress discount

700. Contrary to the bankruptcy sale discount that Mr. Cowan did not apply in his going concern scenario, Mr. Cowan applied a 30% distress discount in that scenario. He considered this

[585] Hern ER I, §§144-145.

[586] Cowan ER II, §6.12.

[587] Exh. CE-17, Annex 1 to the Privatization Agreement, p. 9.

[588] Exh. CE-171, BD Agro AD Dobanovci, Notes to the Financial Statements for Year 2015, Note 2.19 ("The Company recognizes severance at termination of employment when it is obviously obligatory: either to terminate the employment relationship with the employee, in accordance with adopted plan, without the possibility of withdrawal; or to provide severance pay for termination of employment as a result of an offer in order to encourage voluntary termination of employment with aim of reducing the number of employees.").

[589] See, for instance, Cowan ER III, Table 4.8.

discount reasonable, representing the impact on the price of selling a distressed business. Dr. Hern disputed this discount.

701. As discussed above, the record shows that, at the time of the valuation, BD Agro was a going concern. That it had made no profits for several years does not change this position. Its creditors had approved a reorganization plan. They thereby showed that they expected the business to overcome its operational and financial issues and become profitable. Moreover, the majority of BD Agro's assets, as the table in paragraph 707 shows, were constituted of land, the value of which would in any event not be impacted by the prospects of the business (subject to a pre-bankruptcy "fire sale", which would not come into play here for a going concern with a reorganization plan in place). For these reasons, the Tribunal comes to the conclusion that there is insufficient basis to apply Mr. Cowan's proposed 30% distress discount.

9. Interest

702. The Claimants invoke the most-favored nation provision contained in Article 5 of the Canada-Serbia BIT to argue that they are entitled to rely on the preservation of right clause in Article 10 of the Cyprus-Serbia BIT and Article 13(1) of the Qatar-Serbia BIT, with the result that they can claim interest according to the more favourable provisions in Serbian law.

703. Article 5 of the Canada-Serbia BIT contains a most favoured nation clause of the following content:

> "ARTICLE 5
> Most-Favoured-Nation Treatment
> 1. Each Party shall accord to an investor of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory.
> 2. Each Party shall accord to a covered investment treatment no less favourable than that it accords, in like circumstances, to investments of investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory.
> […]."

704. Accordingly, investors of a Contracting Party and covered investments shall be treated no less favorably than investors or investments of investors of a non-Party in respect of the "establishment, acquisition, expansion, management, conduct, operation and sale or other

disposition" of an investment. The Tribunal does not see how provisions on interest rates would fall within the ambit of this provision. Indeed, the interest rate prescribed by Serbian law is unrelated to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment. Consequently, the claim for interest under Serbian law through the operation of the Canada-Serbia MFN provision must be dismissed.

705. In the alternative, the Claimants seek interest at 6-month average EURIBOR + 2%, compounded semi-annually. Serbia agrees to pay interest on a flat interbank rate, but not with an increase of 2%, which it says should not be awarded "considering […] revelations about BD Agro's mismanagement by Mr. Obradovic."[590]

706. In accordance with the principle of full reparation, Mr. Rand is entitled to an interest rate calculated in a manner which "best approximates" the value lost.[591] Mr. Obradovic's conduct is irrelevant in this context and Serbia has not substantiated its argument that it should play a role here. The Respondent recognizes that tribunals have awarded interest at the interbank interest rate plus 2 percentage points.[592] Late interest on debts is intended to remedy the non-availability of funds due or, in other words, to pay for the time value of money. The time value of money can be compensated by taking into account the cost of borrowing funds to make up for the unpaid sums or the loss involved in not being able to invest those sums. Under both assumptions, the interest would exceed a rate applied between financial institutions exclusively. For these reasons, the Tribunal finds it reasonable to award interest at EURIBOR for 6 months deposits, plus 2% per annum, and to compound such interest semi-annually.

10. Conclusion

707. It follows from the above that the Tribunal has made several adjustments to the valuations prepared by the Parties' experts, as a result of which the final amounts are as follows:[593]

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[590] Rej., §1481.

[591] Exh. CLA-39, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, §440.

[592] Rej., §1480 relying on Exh. CLA-6, *National Grid v. Argentina*, Award, 3 November 2008, §294, and Exh. RLA-195, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, Award, 2 March 2015, §425.

[593] This table is based on the table in Cowan ER III, §4.4, after adjusting it as necessary in light of the Tribunal's conclusions above.

At 21 October 2015 in EUR m	Value in EUR m
Dobanovci Development Land [Construction Land]	41.9
Other Construction Land	1.3
Novi Becej	0.2
Non-farm assets	**43.4**
Agricultural land	6.4
Other fixed assets	18.8
Current assets	5.0
Deferred tax assets	0.1
Farm Assets	30.3
Total assets	**73.7**
Total estimate liabilities	(42.2)
Conversion fee	(3.1)
Payment to Canadian suppliers	(2.2)
Court proceedings	(0.2)
Capital Gains Tax	(5.7)
Redundancy payments	(0.7)
Total liabilities	**54.1**
Net asset value of BD Agro at 21 October 2015 / Value of 100% shares in BD Agro at 21 October 2015	**19.7**

708. Accounting for these adjustments, the value of 100% of the shares in BD Agro on 21 October 2015 was 19.7 million.[594] Mr. Rand indirectly owned 75.87% of BD Agro's shares, through Rand Investments (in which he had a 100% shareholding) and Sembi (in which he held a 97.5% shareholding),[595] resulting in a valuation of EUR 14,572,730. To this figure, interest should be added at 6-month average EURIBOR + 2%, compounded semi-annually until the date of payment (see above, §706).

IX. COSTS

A. Claimants' Position

709. In their submission of 12 November 2021, the Claimants argue that the Respondent should bear the totality of the arbitration costs they incurred, including their share of the Tribunal's fees and their legal fees and costs, in the amount of EUR 4,054,775.72, CAD 1,517,905.72 and USD 674,829.89, which are broken down as follows:

A. COUNSEL FEES AND EXPENSES	
Squire Patton Boggs fees	[redacted]
Squire Patton Boggs expenses (including travel expenses, translation costs, costs of courier services and phone charges)	[redacted]
Stankovic & Partners fees and expenses	[redacted]
	TOTAL: [redacted]
B. EXPERT WITNESSES' FEES AND EXPENSES	
Mr. Agis Georgiades	[redacted]
Mr. Miloš Milošević	[redacted]
Dr. Richard Hern	[redacted]
Ms. Bojana Tomić-Brkušanin	[redacted]

[594] Cowan ER III, Table 4.8.

[595] Mem., §54.

Mr. Krzystof Grzesik	[redacted]
Mr. Robert J.C. Dean	[redacted]
Mr. Uglješa Grušić	[redacted]
	TOTAL: [redacted]
C. ARBITRATION COSTS	
Arbitration costs	USD 625,000
	TOTAL: USD 625,000
D. ADDITIONAL COSTS	
Expenses incurred directly by Claimants and/or their representatives and fact witnesses during the arbitration	EUR 77,152.82 CAD 149,965.15
Mr. Broshko's fees	[redacted]
Mr. Markićević's fees	[redacted]
Canadian tax law analysis performed by Koffman Kalef	[redacted]
Canadian tax law analysis performed by Legacy Tax & Trust Lawyers	[redacted]
Guernsey trust law analysis performed by Ogier	[redacted]
	TOTAL: [redacted]

B. Respondent's Position

710. In its submission of 12 November 2021, the Respondent submits that the Claimants should bear all the costs and expenses of these proceedings, including the Respondent's legal fees and expenses totaling USD 600,000.00 and EUR [redacted] broken down as follows:

Advance payments made to ICSID	USD 600,000.00
Costs of Legal Representation	EUR [redacted]
Costs of Engaging Experts	EUR [redacted]
Costs of Attending the Hearing	EUR [redacted]
Translation Costs	EUR [redacted]

C. Arbitration Costs

711. The costs of the arbitration are composed of:

Tribunal's Fees:	
Gabrielle Kaufman-Kohler:	**USD 417,900.00**
Baiju Vasani	**USD 191,968.75**
Marcelo Kohen:	**USD 207,995.00**
Tribunal's Expenses:	**USD 17,252.46**
Assistant's Fees and Expenses:	
Rahul Donde:	**USD 221,084.55**
TOTAL:	**USD 1,056,200.76**
Administrative Fee:	**USD 252,000.00**
Other Direct Expenses:	**USD 281,941.60**
GRAND TOTAL:	**USD 1,590,142.36**

712. These costs have been paid out of the advances made by the Parties. The ICSID Secretariat will provide the Parties with a statement of the case account in due course and will return to the Parties any unused amount in equal shares.

D. Analysis

713. Article 61(2) of the ICSID Convention provides:

> "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award. "

714. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

715. There are generally three approaches for awarding costs in ICSID arbitrations: (i) some tribunals apportion arbitration costs equally and rule that each party should bear its own costs; (ii) others apply the "costs follow the event" principle, under which the losing party bears all or part of the costs of the proceedings, including those of the prevailing party and (iii) still others follow a mixed approach in which they take into account the outcome of the claims as well as the conduct of the parties in the arbitration and other appropriate circumstances.

716. In the exercise of its discretion, the Tribunal finds it appropriate that the Parties each bear half of the costs of the proceedings and bear their own legal and other costs. This approach seems fair and reasonable considering all the circumstances:

- The Tribunal concluded that it had jurisdiction only over Mr. Rand's claims under the ICSID Convention and the Canada-Serbia BIT in respect of his interest in the Beneficially Owned Shares. It lacked jurisdiction over his claims in respect of his payments for the benefit of BD Agro and his indirect shareholding in BD Agro. It also lacked jurisdiction over the claims of the other Claimants under the Canada-Serbia BIT, and over Sembi under the Cyprus-Serbia BIT;

- The issues involved were complicated because of Mr. Rand's unusual investment structure, which triggered objections and extensive debates;

- Mr. Rand has been awarded less than 20% of the amount claimed, and that by majority;

- While the Parties and their counsel conducted these proceedings in a professional, cooperative, and efficient manner incurring reasonable costs, there is a significant disparity between the Claimants' costs and those of the Respondent.

X. OPERATIVE PART

717. For the reasons set forth above, the Tribunal:

a. DECLARES that it has jurisdiction over Mr. Rand's claims under the Canada-Serbia BIT in respect of his interest in the Beneficially Owned Shares and that these claims are admissible;

b. DENIES jurisdiction over all other claims under the Canada-Serbia BIT and the Cyprus-Serbia BIT;

c. DECLARES that the Respondent has breached Article 6(1) of the Canada-Serbia BIT;

d. ORDERS the Respondent to pay EUR 14,572,730 to Mr. William Rand, together with interest at the average EURIBOR for 6 months deposits plus 2% per annum, compounded semi-annually, until the date of payment;

e. ORDERS the Parties to each bear 50% of the Tribunal's fees and expenses and ICSID's fees as notified by ICSID;

f. ORDERS the Parties to bear their own legal fees and other costs;

g. DISMISSES all remaining claims and requests for relief.

[signed]

Mr. Baiju S. Vasani
Arbitrator

Date: 27 June 2023

[signed]

Prof. Marcelo G. Kohen
Arbitrator

Date: 26 June 2023

(subject to the attached dissenting opinion)

[signed]

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal

Date: 23 June 2023

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

RAND INVESTMENTS LTD., WILLIAM ARCHIBALD RAND, KATHLEEN ELIZABETH RAND, ALLISON RUTH RAND, ROBERT HARRY LEANDER RAND AND SEMBI INVESTMENT LIMITED

Claimants

and

REPUBLIC OF SERBIA

Respondent

ICSID Case No. ARB/18/8

DISSENTING OPINION OF PROFESSOR MARCELO G. KOHEN

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1. While agreeing with some parts of the analysis in the Award, I disagree with others that I consider of fundamental importance. Hence my need to append this dissenting opinion. My major disagreement concerns some legal issues, and also the manner to approach some factual elements of the case.

A. Everything that is not explicitly prohibited in a treaty is not necessarily permitted

2. From a legal perspective, *i.e.* looking at the means to interpret the applicable law (the BIT Canada/Serbia, the ICSID Convention and relevant general international law, as well as Serbian Law, no matter whether it is considered a normative "fact" or applicable law on its own), the principal points of divergence with the majority are the questions of how to address conduct by investors not in accordance with the law, the identification of the "real" investor, and the origin of the capital invested. As to these three issues, the Award considers that, since there are no specific requirements contained in the ICSID Convention and in the BIT, then the issues of the legality of the investment in accordance with domestic law, and of the origin of the investment to determine who the investor is, are irrelevant. I strongly disagree.

3. It is not possible to justify a given conduct just because it is not expressly regulated in the relevant instrument. In the case at issue, one could also invoke the opposite: that the ICSID Convention and the BIT do not offer protection to illegal investments. The question indeed is one of treaty interpretation. If their text does not explicitly address the issue either way, but the treaties clearly relate to the question at issue, a good faith interpretation requires considering the object and purpose of the instruments concerned. I can hardly imagine the parties to a BIT or to the ICSID Convention having accepted the protection of investments made in disregard of their domestic legislations. *Ex injuria jus non oritur*. If there is a presumption, it is rather in favour of the requirement of legality, not of the acceptance of illegality. Whether the domestic legislation is in accordance with international law is another question. Nothing precludes the Tribunal from taking the domestic requirements into account at the time of its decision if they do not contradict international law. The promotion of foreign investment cannot be pursued at any cost.

4. The fact that other BITs expressly include the requirement that the investment be made in accordance with domestic law and that the Canada/Serbia BIT does not, is not an argument to admit *a contrario* transactions disregarding the domestic law, as the

Award does. The reason for the explicit inclusion of this requirement in some treaties is rather simple. Due to some unfortunate decisions by arbitral tribunals, the parties to investment treaties have been increasingly obliged to explicitly include rules or conditions going against those wrong arbitral decisions, or incorporating such rules *ex abundante cautela*, to prevent arbitrators from taking the liberty to make original and extensive interpretations, often against the will of the contracting parties.

B. An investment made in disregard of legal requirements is not protected

5. The Award, referring to prior decisions, considers that only the violation of "fundamental rules of law" can be taken into consideration. Apparently, foreign investors have the privilege of having to respect only "fundamental rules of law" whereas other investors are required to abide by the entire legal system. This creates an undue advantage against other investors. Again, the promotion of foreign investment cannot be pursued at any cost. Fortunately, up till now, no one has used the same argument claiming the same treatment to be applicable to State parties to investment treaties, *i.e.* only "fundamental" breaches of their international obligations could be taken into account.

C. Is the investment made by a foreign or a national investor?

6. I also disagree with another *a contrario* reasoning followed in the Award. It consists of considering that, since the BIT does not require that the host State know the foreign nature of the investment, whether Serbia knew that Mr. Rand owned or controlled BD Agro was irrelevant.[1] However, a basic legal reasoning imposes that, in order to protect a foreign investment on the basis of the obligations accepted by a State in a BIT, the State must know with whom it is dealing. Furthermore, in the instant case, if everything would be legal (the "MDH Agreement", the "Lundin Agreement", the "Sembi Agreement", the money transfers, etc), and if Mr. Rand wanted to be protected by the Canada/Serbia BIT, nothing would have prevented him from informing the Privatization Agency that he was the real owner of the shares in BD Agro. He chose not to do it.

7. This case concerns the privatization of BD Agro. According to the applicable law, only Serbian nationals could bid a proposal to pay in instalments.[2] The bidder was Mr.

[1] Award, paragraph 248.
[2] Article 39(1) of the Decree on the Sale of Capital and Assets by Public Auction (52/2005), **RE-218**

Obradović, a Serbian national. Mr. Rand claims to be the real person participating and winning the bid through Mr. Obradović's instalments' bid. Or rather, to be the winner through a complicated combination of different companies and friends which, behind them, was Mr. Rand himself.

8. The Award considers that this kind of conduct is not a problem. In other words, one of the purposes of the privatization legislation, which is to facilitate nationals participating in the privatization policy through the advantage of paying in installments, can simply be bypassed by foreigners just by making a citizen appear as the owner even if he is not so. This manner to perceive things deprives national legislation of any relevance. Nevertheless, assuming that only "fundamental" breaches of domestic law should be taken into account, for me, concealing the real owner in order to obtain and advantage in a public auction or encumbering 20% of the value of the privatized company, can be considered as such. The "MDH Agreement", the "Sembi Agreement", the "Lundin Agreement" and the "Coropi Agreement" aimed at circumventing the legal conditions. Their aim was contrary to the legal requirement for the privatization of BD Agro and, as a result, they are not opposable to the Respondent.

D. Mr. Rand did not prove his alleged ownership or control of BD Agro

9. Furthermore, the different agreements on the basis of which Mr. Rand intends to prove that he is the real majority owner of BD Agro are, in my view, not enough to meet the required standard of proof. The "MDH Agreement" is a declaration of intention in case Mr. Obradović won the auction. It does not prove that after Mr. Obradović won the auction, the MDH Agreement was implemented. The "Lundin Agreement" of 2008 rather proves the opposite: it mentions that Mr. Obradović acquired the 70% of BD Agro through a loan from the Lundin Family (not from Mr. Rand) and that Sembi was willing "to acquire all the interest in BD Agro from Mr. Obradović". It adds that "Mr Rand (…) guarantee[s] the obligations of the Purchaser (Sembi) to the Lundin Family".[3]

10. The Award mentions other facts that would allegedly prove that Mr. Rand "was the one bearing the financial burden of the investment". Leaving aside the question whether bearing the financial burden of an investment automatically transforms the person

[3] **CE-28**

concerned into an "investor", I consider that those facts are not conclusive.[4] For instance:

- The e-mail from Mr. Ljubisa Jovanović (Assistant Minister of Economy) to Mr. Rand congratulating him the same day the public auction occurred cannot be considered an official act of the State since it clearly was an irregular manner to notify the outcome of the auction. This is a personal message ("Dear Bill") and not the legal manner one can expect a process of privatization to be conducted. It just proves that Mr. Rand had important political contacts in Serbia. Furthermore, the process of privatization was conducted by an organ that was not part of or was not subordinated to the Ministry of Economy and was not considered by the Award as being even an organ of the State.[5] It can be mentioned that Mr. Jovanović later became CEO of BD Agro.[6]
- The email of 18 December 2013 mentioning that Mr. Rand "is a majority owner of PD BD Agro" is an email *from the President of the Council for Economy of the Serbian Progressive Party* to the Minister of Economy, requesting a meeting between a representative of Mr. Rand and the Minister.[7] This email and the fact that a meeting occurred cannot in and of themselves prove Mr. Rand's ownership or control of BD Agro.
- The fact that Mr. Rand was a member of the Board of BD Agro during a given period of time does not in and of itself prove ownership or control either. Mr. Lundin was also a member of BD Agro's Management Board. If one follows the Award, he could also be considered the owner or controller of BD Agro.
- Payment by Mr. Rand of EUR 2.2 million to Willjill Farms Inc[8]: the evidence does not prove that these transfers were for the benefit of BD Agro, and even if they were, in what capacity the payments were made.
- Contacts between Mr. Rand and BD Agro's Management Board: they undoubtedly prove a relationship between Mr. Rand and those in charge of the management of the company, but this does not say a word about the nature of the relationship.

11. The relationship between Mr. Rand and Mr. Obradović, the owner of the majority of the shares in BD Agro, is of particular importance. It is full of unclear situations. There

[4] Cf. in particular paragraph 238 of the Award
[5] Award, paragraph 484
[6] **CE-429**
[7] **CE-769**
[8] **CE-21**

is no evidence of any direct transfer of money made by Mr. Rand to Mr. Obradović or to BD Agro, there is no evidence of any payment made by Mr. Rand to Mr. Obradović for his services, let alone the payment of salaries by BD Agro to Mr. Obradović in his quality of President and General Manager. The only "evidence" advanced to prove Mr. Rand's ownership via the payments to Mr. Obradović for his services, was that Mr. Rand paid Mr. Obradović's daughter's tuition or helped him buy a house.[9] One can expect that, in the 21st century, remuneration for services is not made in such a manner.

12. The majority easily comes to the conclusion that Mr. Obradović "worked for Mr. Rand based on a success fee payable if and when Mr. Rand's investments became profitable".[10] Leaving aside the fact that this is a rather strange arrangement for someone to work on a daily basis in the management of a company and to expect to receive money at unpredictable times, there is no concrete evidence of this arrangement, except for the testimony of the interested individuals.

13. Equally, the Award easily explains transactions made by Mr. Obradović on behalf of BD Agro, *i.e*. the land assignment transaction or the loans to Inex and Crveni Signal, unbeknownst to Mr. Rand.[11] These were very important transactions that could not have been performed without the approval of an owner.

14. In order to prove ownership or control, the question of the instructions given by Mr, Rand regarding the management of the company was discussed. The majority contents itself with the explanation by Mr. Rand that he gave "oral instructions" to Mr. Obradović and that, for this reason, there is no written evidence of such instructions.[12] This is not a credible manner to manage an industrial enterprise. However, it is accepted, as an example of a written instruction, an alleged e-mail of 10 April 2013 "confirm[ing] our discussions of this morning that a BD Agro board meeting will be held at the offices of Crveni Signal"[13]. Even if this could demonstrate that Mr. Rand gave some instructions to Mr. Obradović, this e-mail, in itself, would not be enough to prove that the owner or controller of BD Agro was Mr. Rand.

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[9] Award, paragraph 379
[10] *Ibid.*
[11] Award, paragraph 244
[12] Award, paragraph 246
[13] **CE-428**

15. The Award also takes into account informal data while disregarding the regular communications from BD Agro to the Ministry of Economy and the Privatization Agency. For instance, the letters from BD Agro of 6 October 2014 and 6 November 2014 and from Mr. Rand himself to the Ministry of 18 September 2014 clearly mention that Mr. Rand "expressed serious interest in taking over the majority shareholding in BD Agro". The letters further mention that "Mr. Rand has, with no security, financially supported BD Agro a.d. Dobanovci with the amount of around 500,000 euros".[14] This evidence rather shows that Mr. Rand is not presented as the owner or controller.

16. The contrast with the formal evidence is blatant. The latter tends to prove the opposite of what the Award accepts. In particular, the letter sent by Mr. Obradović to the Privatization Agency on 10 September 2015 proves that Mr. Rand is not the owner or controller of the majority shares of BD Agro. On the contrary, it mentions:

> "Precondition for successful implementation of the PRPP is financial support to the business operations of BD Agro from an interested investor, without which the adopted PRPP simply cannot be implemented. As you know, reputable Canadian investor, Mr. William Rand, expressed on several occasions his willingness and interest in providing necessary financial support for the recovery of BD Agro through one of its companies (Corob Holdings Ltd). Representatives of Mr. Rand and BD Agro had several meetings on this topic with the representatives of the Agency and, in August 2013, a request was submitted for assignation of the Agreement to the company, but the Agency, to this date, has not made a decision regarding that request.
>
> However, a precondition for Mr. Rand (as well as for any other serious investor) to invest money in BD Agro is 1) completion of the BD Agro privatization procedure and 2) deletion of pledge on shares. These are minimal security conditions that every serious investor will need in order to invest money in BD Agro."[15]

17. Certainly, the evidence above shows Mr. Rand's involvement, but not as the owner or controller of BD Agro. While it is clear that Mr. Rand was not the official owner of BD Agro, the notion of "beneficial ownership" was introduced. I am not convinced that this term of art, coined in the field of international tax treaties to avoid fiscal evasion, can be so easily transposed to the field of foreign investment law. Much of the evidence which the Award relies upon is found in Mr. Rand's and Mr. Obradović's own testimonies. This is particularly the case with regard to the origin of the funds involved.

[14] **CE-320**
[15] **CE-48**

The fact is that there is no direct and conclusive evidence that the investment was performed with Mr. Rand's funds.

E. The origin of the funds is relevant

18. I also disagree with the idea that the origin of the capital is irrelevant or that the only thing that counts is "the economic reality of the contribution" and not "the formal arrangements".[16] In times in which States and the international community are making all efforts to avoid money laundering and fiscal fraud, when even for minor transactions the explanation of the origin of the money is required at all levels, to affirm that that requirement does not exist in investment arbitration, is not only regrettable, but also legally contrary to the object and purpose of the investment treaties concerned. The promotion of foreign investment to favour economic development requires clarity and normality of transactions. Investment arbitration cannot be the last area in economic relations in which the origin of the funds invested are of no relevance.

F. The "Sembi Agreement" could not have created interest in BD Agro in favour of Mr. Rand and opposable to Serbia

19. The Award attributes to the "Sembi Agreement" the capacity of creating an "interest" in the Privatization Agreement in favour of Mr. Rand.[17] This interest would be protected by the Canada/Serbia BIT. While the Privatization Agreement was a contract concluded between Mr. Obradović and the Privatization Agency in Serbia to deal with the privatization of a Serbian company in Serbian territory, the "Sembi Agreement" was a private contract between Mr. Obradović and Sembi, who chose Cypriot Law to govern their relations. This is simply not opposable to Serbia. The question is not, as Serbia claimed, a matter of invalidity of that Agreement, but one of non-opposability. In other words, a Cypriot contract cannot produce effect in Serbia if it was concluded in Cyprus to circumvent the impossibility of being subject to Serbian law (Art. 41 (ž) of the Privatization Law). At the most, if Mr. Rand has a claim based on the Cypriot transaction of the Sembi Agreement, this claim must be addressed to Mr. Obradović, not to Serbia.

[16] Award, paragraph 237
[17] Award, paragraph 314 and ff.

20. The Award plays with the difference between the "transfer of the shares" and the transfer of "interest in the Beneficially Owned Shares".[18] This is a cavalier manner to circumvent the legal obligation in the 2006 Securities Law, which prohibits the sale of shares in a public joint stock company outside the organized share market.[19] The argument is that there was not a transfer of ownership, only a transfer of the "interests". Article 1 (h) of the Canada/Serbia BIT requires that the "interest" must be acquired through the commitment of capital in Serbia. It is deeply troublesome that Mr. Rand was unable to prove with concrete evidence the manner in which his money ended up in BD Agro. All the evidence furnished is indirect: personal testimonies and contracts (the "Agreements") mentioning that this was done. Not a single bank transfer including the specific and appropriate indication of the sender and the beneficiary and the reason for it - which is the normal manner in which these important amounts of money must be transferred-, was filed as evidence to prove that Mr. Rand transferred money to BD Agro.

G. Mr. Rand's concealment does not allow BIT protection

21. I have great difficulty accepting the rationale of the Claimant's recital. For the majority, the fact that Mr. Rand acted behind Mr. Obradović and obtained an advantage that he, as a Canadian national, could not have benefited from, "do[es] not meet the high threshold set for an abuse, especially in circumstances where Mr. Rand advanced good reasons for involving M. Obradović".[20] According to Mr. Rand,

> "the reasons for the split of nominal and beneficial ownership of BD Agro was flexibility and convenience. As a nominal owner, Mr. Obradović was able to handle matters generated by ownership of my Serbian companies, such as attending and voting at the general meetings and communication with the Serbian Government and third parties, more efficiently than if he had been a mere representative acting on the basis of formal powers of attorney."[21]

22. It is very difficult to accept these "good reasons". It is not clear at all why doing things correctly (with Mr. Obradović acting as Mr. Rand's representative) would constitute a problem for the attendance of meetings and to vote, or to have contacts with the Government or other parties. Even assuming that the alleged manner of proceeding

[18] Award, paragraph 315
[19] **RE-111**, 2006 Law on Market in Securities and Other Financial Instruments, Art. 52(2).
[20] Award, paragraph 396
[21] **CWS-3**, Rand, paragraph 38

would be “more efficient”, *quod non*, efficiency cannot be achieved by concealing reality or bypassing duties.

23. Finally, I would add that the non-disclosure of Mr. Rand’s allegedly complicated combinations in relation to the privatization of BD Agro goes against the letter and the spirit of the Privatization Law. Its Article 2 mentions the *principle of transparency* as one of the basis for the process of privatization. The disclosure of the alleged “reality” of ownership would have been a required and elementary part of the transparency of such process. Transparency is not only required from the State. It plays both ways. This is particularly true in a public bid process . Accepting the conduct that the Award considers acceptable is tantamount to accepting that other actual or potential tenders who respected the conditions for the bid were placed in an unfair and unequal situation.

H. The Termination of the Privatization Agreement

24. Given the entire context of the transactions and actions relating to BD Agro, I consider that the decision to terminate the Privatization Agreement was legal. The Award focuses on the fact that the Privatization Agreement allowed such termination, on the basis of a breach of its Article 5.3.4, only during the duration of the agreement.[22] The Termination Decision mentioned other alleged breaches than that of Article 5.3.4 and also indicated that when rendering the stated Decision, 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)”.[23]

[22] There is a question whether the Privatization Agreement really ended on 8 April 2011. The Buyer had not complied with his obligations before and after, the parties to it were exchanging communications about this situation thereafter and I have not seen any argument by the Buyer during these protracted negotiations, in which he requested and obtained many new deadlines for compliance with his obligations, according to which the Privatization Agreement has come to an end. Furthermore, if there was a breach of Art. 5.3.4, it was of a *continuous* character, whether the Agreement ended or not.
[23] **CE-50**

25. Another important element that deserves mentioning is the fact that Mr. Obradović did not challenge the termination of the Agreement. The first challenge to it was made in this arbitration and by the Claimants.

26. Whether the Privatization Agency breached the Privatization Agreement by not removing the pledge is irrelevant, it would be a matter between Mr. Obradović and the Privatization Agency. Even if it were contrary to the Privatization Agreement, the Privatization Agency could have invoked either *inadimpleti non est adimplendum* and/or the Privatization Law.

I. Conclusion

27. On the whole, I consider that Mr. Rand has not proven that he was the owner or the beneficial owner of the 70% shares of BD Agro that were purchased by Mr. Obradović. The correspondence *between Mr. Rand and BD Agro* rather shows that he was acting as though he was not the owner or "beneficial owner". Besides what was mentioned above, I can also refer, as an example, to the letter of 7 May 2015: *"Expression of interest to continue providing financial support to BD Agro a.d. Dobanovci*".[24] The correspondence between BD Agro and the Privatization Agency concerning the assignment of the Agreement to Coropi mentioned above rather shows that Mr. Rand was not the owner or "beneficial owner" of the shares purchased by Mr. Obradović. It shows the interest of Mr. Rand to invest in BD Agro thereafter. The first time that BD Agro mentioned the name of Mr. Rand to the Privatization Agency was a letter of 2 July 2015, which mentions that Coropi is "owned by the Canadian investor William Rand".[25] The letter mentions "the interest and readiness of the Canadian investor to invest in the consolidation and further development of BD AGRO AD, if the issue of ownership was resolved within reasonable time and the conditions were created to complete the privatization of the company".[26]

28. The record shows that the Ombudsman, the Privatization Agency, and the Ministry acted in a manner that can be considered as the normal way of proceeding by each of these organs. Nothing proves that there was a State's concerted collusion in order to deprive Mr. Obradović, or the allegedly concealed owner Mr. Rand, of his property. On

[24] **CE-350**
[25] **CE-46**
[26] Ibid.

the contrary, it shows the Ombudsman performing his independent role with regard to the Privatization Agency and the Ministry of Finance and Economy, at the request of BD Agro's employees. It must be recalled that one third of the shares were owned by the employees of BD Agro. The record shows the Ministry disagreeing with the Privatization Agency, and the Ombudsman criticizing both in relation to the privatization of BD Agro.[27] The record also shows that the Privatization Agency warned Mr. Obradović about noncompliance with the Privatization Agreement many times and that the owner did not challenge this alleged noncompliance. It also shows that Mr. Obradović was granted many deadlines to overcome his noncompliance.

29 For all these reasons, I cannot subscribe to the decision rendered in the Award to which this dissenting opinion is appended.

[signed]

Professor Marcelo G. Kohen

26 June 2023

[27] **CE-42**, **CE-45**, **CE-88**, **CE-115**