

**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**

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**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.<sup>1</sup> 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.<sup>2</sup> The bidder was Mr.

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<sup>1</sup> Award, paragraph 248.

<sup>2</sup> 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 an 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".<sup>3</sup>
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

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<sup>3</sup> CE-28

concerned into an “investor”, I consider that those facts are not conclusive.<sup>4</sup> 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.<sup>5</sup> It can be mentioned that Mr. Jovanović later became CEO of BD Agro.<sup>6</sup>
- 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.<sup>7</sup> 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<sup>8</sup>: 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

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<sup>4</sup> Cf. in particular paragraph 238 of the Award

<sup>5</sup> Award, paragraph 484

<sup>6</sup> **CE-429**

<sup>7</sup> **CE-769**

<sup>8</sup> **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.<sup>9</sup> One can expect that, in the 21<sup>st</sup> 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”.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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”<sup>13</sup>. 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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<sup>9</sup> Award, paragraph 379

<sup>10</sup> *Ibid.*

<sup>11</sup> Award, paragraph 244

<sup>12</sup> Award, paragraph 246

<sup>13</sup> **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”.<sup>14</sup> 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.”<sup>15</sup>

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.

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<sup>14</sup> CE-320

<sup>15</sup> 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".<sup>16</sup> 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.<sup>17</sup> 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.

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<sup>16</sup> Award, paragraph 237

<sup>17</sup> 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”.<sup>18</sup> 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.<sup>19</sup> 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”.<sup>20</sup> 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.”<sup>21</sup>

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

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<sup>18</sup> Award, paragraph 315

<sup>19</sup> **RE-111**, 2006 Law on Market in Securities and Other Financial Instruments, Art. 52(2).

<sup>20</sup> Award, paragraph 396

<sup>21</sup> **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.<sup>22</sup> 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)”.<sup>23</sup>

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<sup>22</sup> 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.

<sup>23</sup> **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*”.<sup>24</sup> 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”.<sup>25</sup> 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”.<sup>26</sup>

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

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<sup>24</sup> CE-350

<sup>25</sup> CE-46

<sup>26</sup> 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.<sup>27</sup> 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.



Professor Marcelo G. Kohen

26 June 2023

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<sup>27</sup> CE-42, CE-45, CE-88, CE-115