

**IN THE MATTER OF INVESTMENT DISPUTE UNDER THE AGREEMENT
BETWEEN CANADA AND THE REPUBLIC OF SERBIA FOR THE PROMOTION
AND PROTECTION OF INVESTMENTS AND UNDER THE AGREEMENT
BETWEEN SERBIA AND MONTENEGRO AND THE REPUBLIC OF CYPRUS
ON RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS**

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

AND

**SEMBI INVESTMENT LIMITED
(CYPRUS)**

CLAIMANTS

- v -

THE REPUBLIC OF SERBIA

RESPONDENT

REQUEST FOR ARBITRATION

9 February 2018

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I. INTRODUCTION

A. Preliminary Statement

1. This Request for Arbitration (the “**Request**”) is served on behalf of (1) Rand Investments Ltd. (“**Rand Investments**”), a limited liability company incorporated under the laws of Canada, (2) Mr. William Archibald Rand (“**Mr. Rand**”), (3) Ms. Kathleen Elizabeth Rand, (4) Ms. Allison Ruth Rand and (5) Mr. Robert Harry Leander Rand, all such persons being nationals of Canada (Rand Investments and such persons being collectively, the “**Canadian Claimants**”), and (6) Sembi Investment Limited (“**Sembi**”), a limited liability company constituted under the laws of Cyprus (the Canadian Claimants and Sembi being collectively, the “**Claimants**”).
2. The Claimants were the beneficial owners of 75.87% of the shares in a Serbian agricultural company BD Agro AD, Dobanovci (“**BD Agro**”) that had been nominally owned by Mr. Djura (George) Obradović until their unlawful expropriation by the Republic of Serbia on 21 October 2015 (the “**Beneficially Owned Shares**”).
3. At the expropriation date, BD Agro was not only the most modern dairy farm in the Balkans, with hundreds of milk cows and hundreds of hectares of high quality arable land, but also the owner of almost 300 hectares of very valuable construction land located at the outskirts of the Serbian capital Belgrade, close to the Belgrade international airport. The net value of the Claimants’ expropriated beneficial interest in BD Agro, which the Claimants will claim in this arbitration, is at least EUR 67 million.

B. Summary of Claimants’ Claim

4. The history of the Claimants’ investment started in 2005 when the Government of Serbia, including the then Minister of Economy Mr. Predrag Bubalo, approached Mr. Rand and encouraged him to invest in the privatization of 70% of the shares in BD Agro (the “**Privatized Shares**”), which were put for sale in a public auction organized by the Privatization Agency of the Republic of Serbia and Montenegro (the “**Privatization Agency**”). The remaining 30% of the shares in BD Agro were, at

that time, held by a large number of small shareholders, comprised primarily of BD Agro's employees.

5. Mr. Rand decided to participate in the auction through Mr. Obradović, a Canadian-Serbian businessperson, with whom Mr. Rand had a business relationship in Serbia as far back as the late 1990's. Messrs. Rand and Obradović agreed that Mr. Obradović would be the nominal owner and Mr. Rand would be the beneficial owner of the Privatized Shares. Numerous government officials, both at the Ministry of Economy and at the local level, were informed about that arrangement and did not express any reservations.
6. Messrs. Rand and Obradović made the winning bid in the public auction and, on 4 October 2005, the Privatization Agency and Mr. Obradović entered into an agreement on sale of the Privatized Shares (the "**Privatization Agreement**"). Under the Privatization Agreement, Mr. Obradović was to pay a purchase price of approximately EUR 5,549,000, payable in six instalments over a period of five years, and invest an additional approximately EUR 2 million in BD Agro. The Privatization Agreement also included certain provisions restricting BD Agro's ability to dispose of and pledge its fixed assets until full payment of the purchase price. The parties also entered into a share pledge agreement (the "**Share Pledge Agreement**"), according to which Mr. Obradović pledged the Privatized Shares to the Privatization Agency for the five-year period within which he agreed to make full payment of the purchase price.¹ The Share Pledge Agreement expressly provided for the expiry of the pledge on the Privatized Shares upon the full payment of the purchase price.²
7. After becoming the beneficial owner of the Privatized Shares, Mr. Rand took control over BD Agro and directed a complete change in BD Agro's operations. BD Agro invested significant funds in an extensive overhaul of its premises, including purchasing a state-of-the-art milking parlor and sophisticated herd management information technology. BD Agro's herd was enlarged and replaced with new cows from the best

¹ Privatization Agreement, Schedule 1: Share Pledge Agreement, **CE-17**.

² Privatization Agreement, Schedule 1: Share Pledge Agreement, Article 2, **CE-17**.

genetic lines of the Holstein Friesian breed, which were purchased mostly in Canada and flown to Serbia at a personal cost to Mr. Rand of approximately EUR 2.2 million. BD Agro was repeatedly praised as the most modern dairy farm in the Balkans and the best milk producer in Serbia.

8. The additional EUR 2 million investment required under the Privatization Agreement was made by October 2006, and the shareholding in the beneficial ownership of Mr. Rand—and the nominal ownership of Mr. Obradović—increased to 75.87%.
9. In 2008, the beneficial ownership of BD Agro was restructured to also involve all of the other Claimants. Despite sharing his beneficial ownership with the other Claimants, Mr. Rand retained full control over the entire investment and continued to direct Mr. Obradović’s exercise of his shareholder rights.
10. By the end of 2010, the Privatization Agency had received approximately EUR 5 million in five instalments of the purchase price, and the last instalment was expected to be paid in early 2011.
11. On 1 March 2011, Mr. Obradović received from the Privatization Agency written notice alleging certain breaches of the Privatization Agreement. The Privatization Agency alleged, without providing specifics, that BD Agro had pledged some of its land to secure a loan or loans from the Serbian bank Agrobanka and that the loaned funds had been used, fully or partially, for the benefit of third parties rather than BD Agro. While BD Agro was perfectly free to loan money to any third parties, the Privatization Agency alleged that the pledge did not comply with the restrictions imposed under the Privatization Agreement. The Privatization Agency thus demanded, without any explanation, that BD Agro cure the alleged violations, *inter alia*, by removing the pledges and obtaining repayment from the third parties.
12. One month later, on 8 April 2011, the Privatization Agency received the last instalment of the purchase price, upon which the alleged violation of the restriction on BD Agro’s pledging its land became moot. With the required additional EUR 2 million investment having already been made in BD Agro, the Privatization

Agreement was fully consummated and the contractual restrictions on pledging BD Agro's land expired on their own terms upon the Privatization Agency receiving the full purchase price. The Privatization Agency got its part of the bargain and no longer had any legal right to supervise BD Agro's transactions or make demands under the Privatization Agreement.

13. Without any explanation, the Privatization Agency disregarded the express terms of the Privatization Agreement and continued insisting on the absurd remedial actions demanded on 1 March 2011.
14. The Privatization Agency's disregard for the express terms of the privatization did not stop there. Even though the Share Pledge Agreement expressly provided for the expiry of the pledge on the Privatized Shares upon full payment of the purchase price, the Privatization Agency simply refused to release the pledge. The Privatization Agency did not bother to offer any legal justification for the refusal.
15. Unbeknownst to the Claimants, Mr. Obradović and BD Agro, the Privatization Agency went as far as to explore whether BD Agro's refusal to comply with the Privatization Agency's unjustified demands gave the Privatization Agency the right to terminate the Privatization Agreement and seize the Privatized Shares.
16. On 30 March 2012, the Privatization Agency requested instructions from the Ministry of Economy. On 30 May 2012, the Ministry of Economy unequivocally concluded that *"there is no economic justification to terminate the [Privatization Agreement],"* among other things, because Mr. Obradović *"paid the entire amount of the sale and purchase price."*³
17. Despite the clear instruction from the Ministry of Economy, the Privatization Agency was still refusing to release the pledge. The only apparent concession was that at the end of 2012, the Privatization Agency stopped repeating its unjustified demands that BD Agro cure the purported violations of the Privatization Agreement.

³ Letter from the Ministry of Economy to the Privatization Agency dated 30 May 2012, **CE-33**.

18. The Privatization Agency, however, continued exploring whether it could terminate the Privatization Agreement and seize the Privatized Shares, this time with its long-time trusted outside advisors from the Radović & Ratković law firm. On 12 June 2013, Radović & Ratković provided a thorough legal opinion (the “**2013 Legal Opinion**”), unequivocally concluding that there was “*no economic justification [and] also no legal basis for termination of the [Privatization Agreement].*”⁴
19. Again, despite the unequivocal instructions from the Ministry of Economy and the 2013 Legal Opinion, which the Privatization Agency decided to keep secret at the time, the Privatization Agency’s approach did not change and it kept refusing to release the pledge. In the summer of 2013, Mr. Rand involved in such discussions Messrs. Erinn Broshko, the Managing Director of Rand Investments, and Igor Markićević, the new General Manager of BD Agro—but their involvement did not result in the Privatization Agency changing its position.
20. During 2014, notwithstanding the significant value of BD Agro’s underlying assets, particularly its construction land near the Belgrade international airport, the company was experiencing difficulty meeting its debt obligations due to lower cash flows from revenue generating operations. As a result, BD Agro entered into negotiations with its creditors to reorganize its debts in a court sanctioned pre-pack reorganization plan. The company’s creditors holding a majority of the then outstanding debt voted in favor of the reorganization.
21. However, BD Agro’s difficulties also drew the attention of the Serbian Ombudsman (the “**Ombudsman**”), Mr. Saša Janković, whose unlawful campaign against the privatization of BD Agro led directly to the expropriation of the Claimants’ investment one year later. Although the privatization of BD Agro clearly did not fall within the Ombudsman’s authority,⁵ he concocted an absurd legal theory that, by failing to

⁴ The 2013 Legal Opinion, p. 6, **CE-34**.

⁵ Under Serbian law, the Ombudsman is “*an independent state body that shall protect the rights of citizens and control the work of state administrative bodies, the body authorized for legal protection of property rights and interests of the Republic of Serbia and other bodies and organisations, enterprises and institutions which have been delegated public authorities.*” Law on Protector of Citizens, Article 1, **CE-112**.

terminate the Privatization Agreement, the Ministry of Economy and the Privatization Agency violated the human rights of BD Agro's employees. The Ombudsman thus requested the Ministry of Economy and the Privatization Agency to explain why they had not terminated the Privatization Agreement. The Claimants, Mr. Obradović and BD Agro were not informed about the Ombudsman's initiative.

22. Both the Ministry of Economy and the Privatization Agency explained to the Ombudsman that they had not terminated the Privatization Agreement because such termination would have been unlawful. The Ombudsman, however, ignored their explanations.
23. On 23 June 2015, the Ombudsman published on his official website a press release informing the Serbian public of his determination that the Ministry of Economy and the Privatization Agency violated the rights of BD Agro's employees by failing to terminate the Privatization Agreement. The press release was accompanied by a copy of his official "recommendation" to the Privatization Agency and the Ministry of Economy, dated 19 June 2015, asking the two institutions to decide on the issue.
24. The Ombudsman's unlawful intervention was—and still is—simply shocking. The Ombudsman clearly lacked any authority to opine on the matter, and his actions utterly lacked due process because he never heard the Claimants, Mr. Obradović and/or BD Agro. In fact, the Claimants, Mr. Obradović and BD Agro did not even know that the Ombudsman's investigation was underway. Leaving aside the fact that the Ombudsman did not have the jurisdiction to opine on the Privatization Agreement, in his travails he never investigated the facts to determine whether or not the Privatization Agreement was violated.
25. The Ombudsman's "recommendation" was, for all intents and purposes, an order. When the Privatization Agency reacted by making another demand for the absurd remedial action that it had first required on 1 March 2011, the Ombudsman responded

by explaining that such demand was not sufficient to “*achieve the goal*” of his “recommendation.”⁶

26. The Ministry of Economy and the Privatization Agency then gave in, disregarded their own economic assessment and the 2013 Legal Opinion and terminated the Privatization Agreement on 28 September 2015. The only purported justification for the termination decision was that BD Agro had failed to cure the alleged violation of the restriction on pledging BD Agro’s land in 2010.
27. The termination was clearly unlawful for any number of reasons. To name just a few: (i) the Privatization Agreement could not be terminated because it was fully consummated four and a half years earlier, on 8 April 2011, upon the full payment of the purchase price; (ii) the Privatization Agreement did not provide for termination in case of violation of the restriction on pledging; and (iii) BD Agro had already cured the alleged violation because the impugned rights of pledge no longer existed as the secured loans had all been repaid or refinanced.
28. On 21 October 2015, the Privatization Agency followed up on the termination. Without giving the Claimants and Mr. Obradović any opportunity to challenge the unlawful termination, the Privatization Agency used its special authority under the Serbian Privatization Act to direct the appropriation of the Beneficially Owned Shares to the Privatization Agency. Based on that special decision, the Central Securities Depository and Clearing House immediately registered the Beneficially Owned Shares on the securities account of the Privatization Agency.
29. The Serbian Government did not offer to pay any compensation, not even to return the purchase price paid for the Privatized Shares.
30. Serbia’s acts constitute a blatant example of direct expropriation and violation of several other substantive protections granted to the Canadian Claimants under the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, which entered into force on 27 April 2015 (the “**Canada-Serbia BIT**”).

⁶ Letter from the Ombudsman to the Privatization Agency dated 18 September 2015, **CE-88**.

These acts also violated investment protections granted to Sembi under the 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 (the “**Serbia-Cyprus BIT**” and, with the Canada-Serbia BIT, the “**Treaties**”).

31. On 8 August 2017, the Claimants served on Serbia a written notification of this investment dispute (the “**Notice of Dispute**”)⁷ and invited Serbia to settle it amicably. Serbia confirmed receipt of the Notice of Dispute,⁸ but did not respond further. The cooling-off periods under the Treaties lapsed without Serbia engaging in any amicable settlement process. Thus, the Claimants were left with no choice but to initiate these arbitration proceedings by submitting this Request in accordance with Article 24(1)(a) of the Canada-Serbia BIT, Article 9(2) of the Serbia-Cyprus BIT and Articles 25 and 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**ICSID Convention**”).

C. Organization of the Request for Arbitration

32. This Request is structured as follows:
- (a) Section I is this Introduction;
 - (b) Section II identifies the Parties to the Dispute;
 - (c) Section III describes the Factual Background to the Dispute;
 - (d) Section IV demonstrates that the Claimants’ claims fall within the jurisdictional ambit of the Treaties and the ICSID Convention;
 - (e) Section V establishes Serbia’s violations of the Treaties;
 - (f) Section VI outlines the Quantum of the Claimants’ claims;
 - (g) Section VII addresses several Procedural Matters; and

⁷ Claimants’ Notice of Dispute, **CE-82**. Exhibits to the Notice of Dispute are exhibited to this Request for Arbitration under the same exhibit number. Please note that certain exhibits attached to this Request have corrected names and dates.

⁸ Confirmations of receipt of Claimants’ Notice of Dispute on 8 August 2017 by the Public Attorney of the Republic of Serbia, the Office of the President of the Republic of Serbia, the Government of the Republic of Serbia and Ministry of Economy, **CE-118**; Letter from the Government of the Republic of Serbia to Squire Patton Boggs dated 24 August 2017, **CE-103**.

(h) Section VIII sets out the Claimants' Request for relief.

33. This submission is also accompanied by:

- (a) Witness Statement of Mr. William Rand;
- (b) Witness Statement of Mr. Djura Obradović;
- (c) Witness Statement of Mr. Erinn Broshko; and
- (d) Witness Statement of Mr. Igor Markićević.

II. THE PARTIES

A. Claimants

34. **Mr. Rand** is a Canadian national residing at 2136 Southwest Marine Drive, Vancouver, British Columbia, V6P 6B5, Canada.⁹
35. Mr. Rand had full control over the Beneficially Owned Shares from the moment of their acquisition by Mr. Obradović on 4 October 2005 until their unlawful expropriation by Serbia on 21 October 2015.
36. Between 4 October 2005 and 22 February 2008, Mr. Rand also was the sole beneficial owner of the Beneficially Owned Shares. At that time, his sole control and beneficial ownership were channeled through his company Marine Drive Holdings Inc. (“**MDH**”), a limited liability company incorporated under the laws of Canada.¹⁰
37. On 22 February 2008, the holding structure changed, and Mr. Rand shared the beneficial ownership of the Beneficially Owned Shares with his children. However, he kept the Beneficially Owned Shares under his sole control.
38. From 22 February 2008 to 21 October 2015, Mr. Rand’s control and partial beneficial ownership of the Beneficially Owned Shares were channeled through Rand Investments and Sembi, two other claimants. Mr. Rand is a 100% owner of Rand Investments, and Rand Investments is one of the two owners of Sembi.
39. Mr. Rand also is the indirect nominal and beneficial owner of another 3.9% of the shares in BD Agro, which he gradually acquired between October 2008 and October 2012 from minority shareholders. Mr. Rand has held this additional shareholding

⁹ Copy of Canadian passport issued to Mr. William Rand, **CE-2**.

¹⁰ MDH was originally owned 50% by Mr. William Rand and 50% by Rand Edgar Investment Corp. On 25 August 2006, Mr. William Rand became MDH’s sole owner. *See* Register of Shareholders of Marine Drive Holdings Inc. dated 3 June 2009, **CE-4**.

From the beginning of the investment until 25 August 2006, Rand Edgar Investment Corporation was owned 50% by Mr. William Rand and 50% by another individual, Mr. Brian Edgar. *See* Register of Members of Rand Edgar Investment Corp. dated 31 July 2017, **CE-5**.

through Marine Drive Holding d.o.o., a company wholly owned by Mr. Rand and incorporated under the laws of Serbia (“**MDH Serbia**”).¹¹

40. **Rand Investments** is a limited liability company incorporated under the laws of Canada. Its registered address is at Suite 2200, HSBC Building, 885 West Georgia Street, Vancouver, British Columbia V6C 3E8, Canada. Rand Investments is 100% owned by Mr. Rand.¹² Rand Investments is one of the two owners of Sembi, another claimant.
41. **Sembi** is a limited liability company organized under the laws of Cyprus with its seat at 2 Corner of Prodromos Street & Zinonos Kiteios, Palaceview House 2064, Nicosia, Cyprus.
42. Between 22 February 2008 and the unlawful expropriation on 21 October 2015, Sembi was the direct beneficial owner of the Beneficially Owned Shares.
43. Sembi was also a channel for Mr. Rand’s control over BD Agro.¹³ Mr. Rand is not only one of Sembi’s indirect owners, but also one of its directors and, most importantly, he has a control agreement with the remaining directors of Sembi.¹⁴
44. Sembi’s owners are the Ahola Family Trust, which holds 1,000 ordinary shares with a nominal value of EUR 1 per share, and Rand Investments, which holds 38,110 redeemable preferred shares with a nominal value of EUR 1 per share.¹⁵ In the event of Sembi’s liquidation, dissolution or winding-up or other distribution of its assets, Rand Investments is entitled to be paid in priority over holders of ordinary shares up to an amount of approximately EUR 9 million. Any remaining proceeds are to be distributed to the Ahola Family Trust.

¹¹ Statement of the Serbian Business Register Agency on the ownership of Marine Drive Holding d.o.o. dated 2 June 2017, **CE-3**.

¹² Copy of Register of Shareholders of Rand Investments dated 5 July 2017, **CE-9**.

¹³ Certificate of Shareholders of Sembi dated 8 June 2017, **CE-6**.

¹⁴ Instructions Letter from Rand Investments to HLB Axfentiou Limited dated 31 December 2007, **CE-7**.

¹⁵ Certificate of Shareholders of Sembi dated 8 June 2017, **CE-6**.

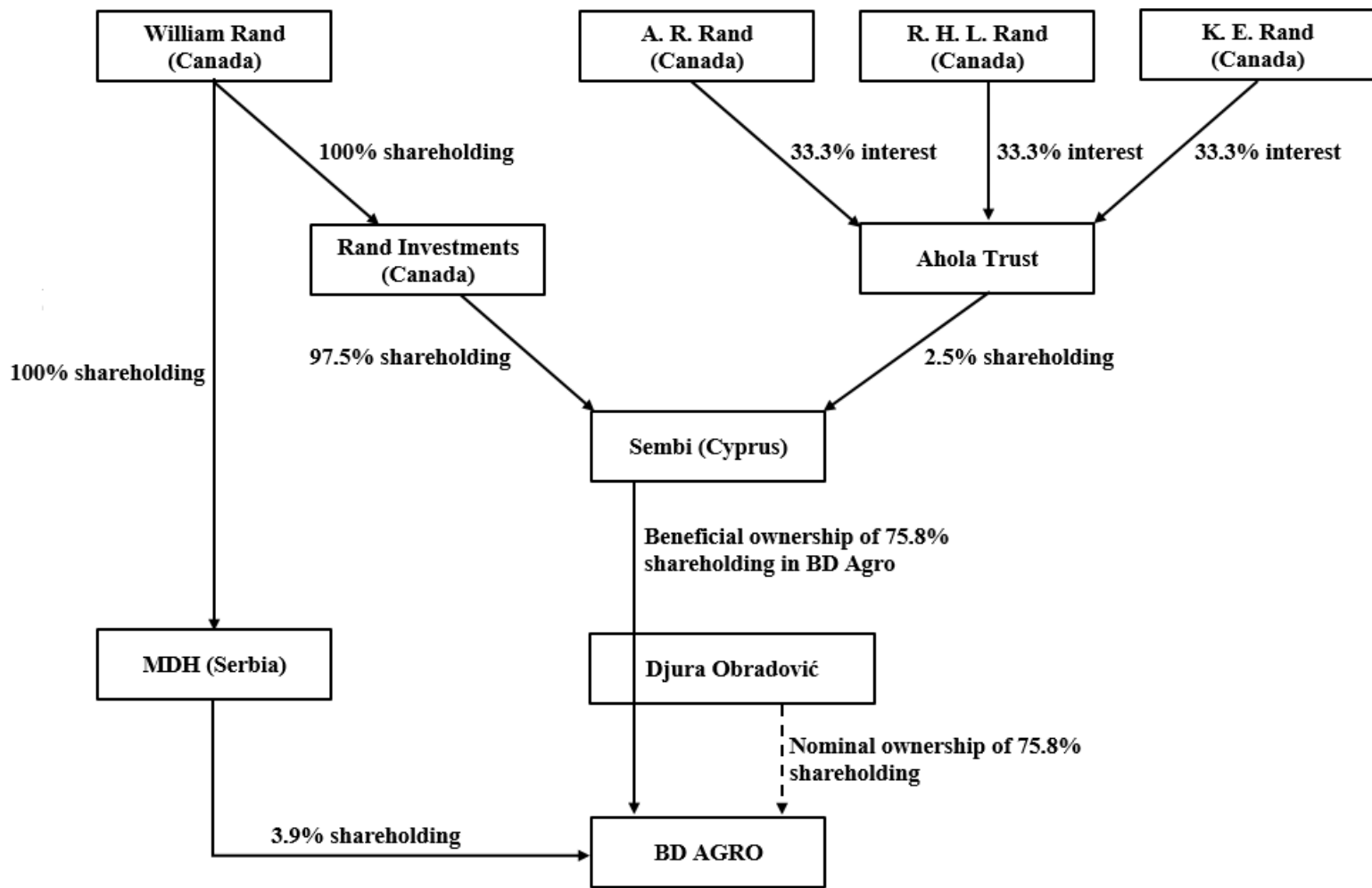
45. The Ahola Family Trust is a trust domiciled in Guernsey whose beneficiaries are, and always were, Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand.¹⁶ As such, Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand are also beneficial owners of the Beneficially Owned Shares.
46. **Ms. Kathleen Elizabeth Rand** is a daughter of Mr. Rand and a Canadian national residing at #105 - 338 Drake Street, Vancouver, British Columbia, V6B 6A8, Canada.¹⁷ As one of the beneficial owners of Sembi, Ms. Kathleen Elizabeth Rand also was a partial beneficial owner of the Beneficially Owned Shares.
47. **Ms. Allison Ruth Rand** is a daughter of Mr. Rand and a Canadian national residing at 2136 Southwest Marine Drive, Vancouver, British Columbia, V6P 6B5, Canada.¹⁸ As one of the beneficial owners of Sembi, Ms. Alison Ruth Rand also was a partial beneficial owner of the Beneficially Owned Shares.
48. **Mr. Robert Harry Leander Rand** is the son of Mr. Rand and a Canadian national residing at 2136 Southwest Marine Drive, Vancouver, British Columbia, V6P 6B5, Canada.¹⁹ As one of the beneficial owners of Sembi, Mr. Robert Harry Leander Rand also was a partial beneficial owner of the Beneficially Owned Shares.
49. The investment structure as of the expropriation date of 21 October 2015 is shown on the following chart:

¹⁶ The Ahola Family Trust Indenture, Schedule B, **CE-8**.

¹⁷ Copy of Canadian passport issued to Ms. Kathleen Rand, **CE-10**.

¹⁸ Copy of Canadian passport issued to Ms. Allison Rand, **CE-11**.

¹⁹ Copy of Canadian passport issued to Mr. Robert Rand, **CE-12**.



50. All Claimants are jointly represented by:

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51. The Claimants have taken all necessary internal actions to authorize this Request. As required by Institution Rule 2(2) of the Rules of Procedure for the Institution of Conciliation and Arbitration (the “**Institution Rules**”), the documentation supporting this authorization is exhibited to this Request.²⁰

52. All electronic and hardcopy correspondence in this arbitration should be sent solely to the Claimants’ counsel at the addresses set out above.

²⁰ Powers of Attorney issued by the Investors to Mr. Rostislav Pekař from Squire Patton Boggs s.r.o. and to Mr. Nenad Stanković and Ms. Sara Pendjer from Stankovic & partners law office, **CE-1**; Resolutions of the Sole Director of Rand Investments dated 26 January 2018, **CE-73**; Resolution of the Directors of Sembi dated 26 January 2018, **CE-74**.

B. Respondent

53. The Respondent is the Republic of Serbia represented by the Government of the Republic of Serbia. We understand that the following authority represents the Republic of Serbia in investment disputes:

Ms. Olivera Stanimirović

Public Attorney of the Republic of Serbia

Nemanjina 22 - 26

11000 Belgrade, Republic of Serbia

III. FACTUAL BACKGROUND

A. Pre-Privatization History of BD Agro

54. BD Agro was founded in 1947 as a farm cooperative focusing on milk production. In 1953, BD Agro became a state-owned producers cooperative. In the 1980's, BD Agro became one of the largest dairy farms in Serbia, with a capacity of more than 2,000 dairy cows. In 1989, it was transformed into a "socially-owned" company.
55. In the 1990's and early 2000's, the Serbian economy struggled due to the disintegration of Yugoslavia and the economic sanctions imposed by the United Nations, the European Union and the United States. Both the sanctions and the resulting economic breakdown heavily affected BD Agro. The sanctions denied BD Agro access to modern technology, know-how and best practices in dairy farming. During this time, BD Agro suffered from decreasing herd size and milk production, repeated losses and a lack of funds needed to replace or modernize its outdated equipment.

B. Privatization of BD Agro

56. In 2005, Serbia—then part of a short-lived union called Serbia and Montenegro—decided to privatize a 70% majority shareholding in BD Agro by putting the Privatized Shares up for sale in a public auction. The remaining 30% of BD Agro shares were owned by a large number of small shareholders, mainly BD Agro's employees. Accordingly, the Privatization Agency issued a public call for participation in the privatization process.
57. The Serbian Government brought this investment opportunity to the attention of Mr. Rand, a wealthy Canadian national and investor involved in financing and operating a number of business ventures in North America, Europe and Africa.²¹ Mr. Rand made several visits to BD Agro and repeatedly met with Serbian Government officials, including Mr. Predrag Bubalo, the then Minister of Economy, and his Assistant Minister, Mr. Ljubiša Jovanović, who was responsible for the department of

²¹ See e.g. E-mail from Mr. Ljubiša Jovanović to Mr. William Rand dated 16 May 2005, CE-13.

international relations and competitiveness. With the Government demonstrating their unequivocal support, Mr. Rand agreed to participate in the privatization process.²²

58. Mr. Rand decided to involve in the project Mr. Obradović, a Canadian-Serbian businessperson, with whom Mr. Rand had a business relationship in Serbia as far back as the late 1990's. Mr. Rand and Mr. Obradović agreed that Mr. Obradović would submit the bid in the auction and, if successful, would nominally acquire the Privatized Shares while Mr. Rand would become the beneficial owner.²³
59. Mr. Rand and Mr. Obradović disclosed the arrangement to numerous Serbian officials, including Minister Bubalo, who all understood that Mr. Rand would be the beneficial owner and Mr. Obradović only the nominal owner of BD Agro. None of the officials expressed any concerns regarding that arrangement.²⁴
60. On 19 September 2005, to formalize his agreement with Mr. Rand, Mr. Obradović entered into a share purchase agreement (the "**Share Purchase Agreement**") with MDH.
61. Under the Share Purchase Agreement, Mr. Obradović was to take part in the public auction and, if successful, become the owner of the Privatized Shares. MDH was to provide funding for the purchase price and additional investments in BD Agro. The agreement specified that Mr. Obradović would hold the shares at the risk of MDH and MDH would have a call option to purchase the Privatized Shares, as well as any shares in BD Agro subsequently acquired by Mr. Obradović, for a nominal price of EUR 1,000. Mr. Obradović further agreed to vote his shares and manage BD Agro in accordance with MDH's instructions and to appoint directors nominated or agreed to by MDH.²⁵ Since MDH was controlled and majority-owned by Mr. Rand, the Share Purchase Agreement gave Mr. Rand full control and economic rights associated with the Privatized Shares.

²² E-mail from Mr. William Rand to Mr. Predrag Bubalo dated 4 June 2005; E-mail from Mr. Ljubiša Jovanović to Mr. William Rand dated 6 June 2005, **CE-14**.

²³ Witness Statement of Mr. William Rand, ¶ 20; Witness Statement of Mr. Djura Obradović, ¶¶ 10-11.

²⁴ Witness Statement of Mr. William Rand, ¶ 15, ¶ 20; Witness Statement of Mr. Djura Obradović, ¶ 11.

²⁵ Share Purchase Agreement dated 19 September 2005, **CE-15**.

62. On 29 September 2005, Mr. Obradović was the successful bidder in the public auction for the Privatized Shares.
63. Mr. Obradović took part in the auction in his own name, in line with his contemplated role as BD Agro’s nominal owner. The Serbian Government was fully aware that Mr. Obradović would acquire the shares and that Mr. Rand would be the beneficial owner. Mr. Jovanović immediately reported the outcome of the auction to Mr. Rand. In his email, Mr. Jovanović stated that he “*presume[d] that [Mr. Obradović] ha[d] already informed [Mr. Rand] that [they] all succeeded in farm acquisition.*”²⁶
64. On 4 October 2005, Mr. Obradović entered into the Privatization Agreement with the Privatization Agency.²⁷ Under the Privatization Agreement, the Privatization Agency sold the Privatized Shares for a purchase price of approximately EUR 5,549,000, payable in six instalments during a period of five years,²⁸ and a commitment to invest further RSD 168,683,000 (approximately EUR 1,982,000)²⁹ in BD Agro within the following year.³⁰
65. On the same day of 4 October 2005, Mr. Obradović and the Privatization Agency entered into the Share Pledge Agreement, according to which Mr. Obradović pledged the Privatized Shares to the Privatization Agency for the five-year period within which he agreed to make full payment of the purchase price.³¹ The pledge was registered with the Central Securities Depository and Clearing House and could only be removed with the consent of the Privatization Agency. The pledge made it impossible to transfer the Privatized Shares without the consent of the Privatization Agency.
66. On 9 January 2006, the Privatization Agreement was amended, and the amount of additional investments in BD Agro required under Article 5.2.1 was increased from RSD 168,638,000 (approximately EUR 1,982,000) to EUR 1,998,554 and the deadlines

²⁶ E-mail from Mr. Ljubiša Jovanović to Mr. William Rand dated 29 September 2005, **CE-16**.

²⁷ Privatization Agreement, **CE-17**.

²⁸ Privatization Agreement, Article 1.2, **CE-17**.

²⁹ All amounts in Serbian dinars are converted into euros at historical exchange rates. *See* EUR/RSD Exchange Rate Table published by the National Bank of Serbia, **CE-102**.

³⁰ Privatization Agreement, Article 5.2., **CE-17**.

³¹ Privatization Agreement, Schedule 1: Share Pledge Agreement, **CE-17**.

for these contractually agreed upon investments were extended.³² On 15 March 2006, another amendment to the Privatization Agreement required the submission of four consecutive bank guarantees to the Privatization Agency: two for EUR 501,153 and another two for EUR 493,123.³³ The guarantees were provided as agreed.³⁴

67. 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 1,000.00 RSD per share, all of which were issued to Mr. Obradović (the "**New Shares**"). On 25 October 2006, the Serbian Business Register Agency registered this decision on capital increase. Accordingly, Mr. Obradović's registered shareholding, and, in turn, Mr. Rand's beneficial shareholding in BD Agro increased from 70% to 75.87%.
68. On 10 October 2006, the Privatization Agency issued a written confirmation that Mr. Obradović had made the required additional investments in BD Agro of almost EUR 2 million in satisfaction of Article 5.2.1 of the Privatization Agreement.³⁵ Consequently, the Privatization Agency released the bank guarantees securing this obligation.
69. The Privatization Agency also received the full amount of the agreed upon purchase price for the Privatized Shares. The last installment of the aggregate EUR 5.5 million purchase price was paid on 8 April 2011. On 30 December 2011, the Privatization Agency received full payment of the interest due for late payment of certain installments.³⁶
70. On 6 January 2012, the Privatization Agency issued a formal confirmation 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.*"³⁷

³² Amendment I to the Privatization Agreement dated 9 January 2006, Article 2, **CE-110**.

³³ Amendment II to the Privatization Agreement dated 15 March 2006, Article 2, **CE-76**.

³⁴ Report of Ministry of Economy on the Control over the Privatization Agency dated 7 April 2015, p. 10, **CE-98**.

³⁵ Confirmation of the Privatization Agency of the Completion of Investment dated 10 October 2006, **CE-18**.

³⁶ Confirmation of the Privatization Agency on the Buyer's full payment of the Purchase Price dated 6 January 2012, **CE-19**.

³⁷ See Confirmation of the Privatization Agency on the Buyer's full payment of the Purchase Price dated 6 January 2012, **CE-19**.

C. Operation of BD Agro After Privatization

71. In 2006, Mr. Rand caused BD Agro to adopt a new business plan contemplating a complete overhaul of the dairy farm. The plan contemplated the modernization of BD Agro's infrastructure and stables in order to increase the quality and volume of BD Agro's milk production and to bring its operation fully in line not only with the Serbian legislation, but also with the highest international hygienic standards.³⁸
72. BD Agro successfully implemented its 2006 business plan over the following three years. An important milestone occurred in 2007 when BD Agro purchased a state-of-the-art automated milking parlor from a world-class German manufacturer, replacing the old and inefficient system that exclusively relied on manual labor. The new system included sophisticated computerized herd management information technology that electronically identified each cow on the platform and collected valuable and actionable milk production data.³⁹ To increase the well-being of its animals and the quality of its milk production, BD Agro introduced a completely new system of stables and pastures that allowed the cows to walk freely rather than stand tied in a narrow box.⁴⁰ The total cost of these improvements was approximately EUR 8.7 million.⁴¹ BD Agro also spent more than EUR 3.5 million on buying state of the art farming equipment to increase the production of crops used to feed the cows.⁴²
73. To ensure full compliance with Serbian legislation and to minimize any health risks, BD Agro began to focus solely on milking cows and removed from the farm all other animal species, such as pigs and hens.⁴³
74. BD Agro's herd was entirely replaced in 2008 and 2009 with the purchase of more than 2,000 pregnant heifers of the Holstein Friesian breed and their transport to BD Agro's premises, mostly from Canada delivered to Serbia on chartered Boeing 747 aircraft.⁴⁴ The cost was approximately EUR 7.9 million, and was in part financed directly by

³⁸ BD Agro's Business Plan for the years 2006-2011 dated 10 March 2006, p. 6, pp. 27-30, **CE-20**.

³⁹ Witness Statement of Mr. William Rand, ¶ 26.

⁴⁰ Witness Statement of Mr. William Rand, ¶ 26.

⁴¹ Witness Statement of Mr. William Rand, ¶ 26.

⁴² Witness Statement of Mr. William Rand, ¶ 27.

⁴³ Witness Statement of Mr. William Rand, ¶ 26.

⁴⁴ Witness Statement of Mr. William Rand, ¶ 29.

Mr. Rand who paid the Canadian suppliers' invoices in the amount of more than CAD 3.38 million (approximately EUR 2.2 million) in BD Agro's stead.⁴⁵

75. The replacement of BD Agro's herd was motivated by Mr. Rand's plan to replace the existing lower-production Simmental breed by the higher-production Holstein Friesian breed.⁴⁶ The replacement was also prompted by the need to comply with the Serbian Ministry of Agriculture's 2007 order to slaughter a significant part of the existing herd due to leucosis.⁴⁷
76. Finally, BD Agro invested another EUR 8.5 million to purchase a large estate in Novi Bečej, located approximately 120 kilometers north from Dobanovci, which included 2,124 hectares of high quality arable land.⁴⁸
77. Mr. Rand's efforts and significant investment bore their fruits. BD Agro became one of the biggest farms in the Balkans and was recognized as "*the most modern cow farm not only in Serbia, but also in Europe.*"⁴⁹ Unsurprisingly, BD Agro's modernized facilities became a popular destination of official delegations. BD Agro also managed to develop a strong position on Serbia's dairy market and was several times recognized by Imlek—Serbia's largest milk processing company—as one of its most important suppliers of raw milk.⁵⁰

⁴⁵ Confirmation of wire transfer from William Rand to Wiljill Farms Inc. for CAD 175,000.00 executed on 3 April 2008; Confirmation of wire transfer from William Rand to Wiljill Farms Inc. for CAD 607, 759.00 executed on 21 October 2008; Confirmation of wire transfer from William Rand to Wiljill Farms Inc. for CAD 199,816.00 executed on 22 December 2008; Confirmation of wire transfer from William Rand to Wiljill Farms Inc. for CAD 460,216.00 executed on 24 December 2008 **CE-21**; Confirmation of 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, **CE-22**; Confirmation of wire transfer from William Rand to Trudeau International Farms for CAD 443,080.00 executed on 21 October 2008, **CE-23**; Confirmation of wire transfer from William Rand to BD Agro for EUR 219,000.00 executed on 5 December 2008, **CE-24**.

⁴⁶ Witness Statement of Mr. William Rand, ¶ 29.

⁴⁷ Decision of the Ministry of Agriculture, Forestry and Water Management dated 9 April 2007, **CE-25**.

⁴⁸ Witness Statement of Mr. William Rand, ¶ 27.

⁴⁹ News Article "*Where cows listen to Beethoven*" published on 27 November 2010, **CE-26**.

⁵⁰ News Article "*Record Holding Farmer's day*" published on 5 March 2012, **CE-27**.

D. 2008 Restructuring of Beneficial Ownership

78. A very significant part of the funding that Mr. Rand had arranged for the purchase and subsequent investments in BD Agro came from Mr. Rand's long-time business partners, the Lundin family from Geneva, Switzerland, and their investment bank, 1875 Finance S.A.⁵¹ In the beginning of 2008, the Lundin family decided to exit the project. Mr. Rand replaced the Lundins' funds with his own funds, channeled through Sembi.
79. 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.⁵² Sembi agreed to repay to the Lundin family EUR 9 million in respect of Mr. Obradović's then existing debt to the Lundin family and, in turn, the Lundin family extinguished any claims it had to the Privatization Agreement and BD Agro. Mr. Rand personally guaranteed all of Sembi's and Mr. Obradović's obligations to the Lundins.⁵³
80. This change in financing also led to a restructuring of BD Agro's beneficial ownership. On the same day of 22 February 2008, Mr. Obradović, as the nominal owner of the Beneficially Owned Shares, and Sembi entered into a contract whereby 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. In consideration thereof, Mr. Obradović agreed to transfer to Sembi all his right, title and interest under the Privatization Agreement, as well as any other assets held by him and related to BD Agro's business.⁵⁴ Sembi thus became the beneficial owner of all of BD Agro shares nominally held by Mr. Obradović.⁵⁵

E. Privatization Agency's 2011 Final Control

81. The Privatization Agreement included a number of provisions restricting BD Agro's transactions with its assets in the time period until full payment of the purchase price. The purpose of those types of provisions is to prevent investors from undertaking a fraud on the company and the state by stripping the privatized company of its valuable assets,

⁵¹ Witness Statement of Mr. William Rand, ¶ 16, ¶ 23; Witness Statement of Mr. Djura Obradović ¶ 15.

⁵² Agreement between Mr. Djura Obradović, The Lundin Family, Mr. William Rand and Sembi dated 22 February 2008, **CE-28**.

⁵³ *Ibid.*

⁵⁴ Agreement between Mr. Obradović and Sembi dated 22 February 2008, **CE-29**.

⁵⁵ Agreement between Mr. Obradović and Sembi dated 22 February 2008, Article 4, **CE-29**.

without paying the full purchase price and making the required investments. The Privatization Agency conducted periodic controls of BD Agro to monitor compliance with such restrictions.

82. The Privatization Agency performed the final compliance control on 17 January 2011, less than three months before the final installment of the purchase price for the Privatized Shares was eventually paid on 8 April 2011.⁵⁶ The report from the final control was delivered to Mr. Obradović on 1 March 2011.⁵⁷
83. The report from the final control and the accompanying notice incorrectly claimed certain violations of the terms of the Privatization Agreement, including the restriction on alienation of BD Agro's assets until full payment of the purchase price under Article 5.3.3, and the restriction on pledging BD Agro's fixed assets during the term of the Privatization Agreement, set out in Article 5.3.4.⁵⁸
84. The provisions of Articles 5.3.3 and 5.3.4 provided as follows:

5.3.3 The Buyer will not sell, assign or otherwise alienate any of the fixed assets of [BD Agro] in one or more transactions per year, in the amount higher than 10% of the total value of fixed assets of [BD Agro], shown in the final balance, and up to maximum 30% in total, until payment of the entire sale and purchase price. In case the Buyer paid the remaining portion of sale and purchase price within one year as of the day the action was held, the ban referred to in pervious paragraph will last in the period of one year from the day the Agreement was concluded.

5.3.4 The Buyer will not burden with pledge the fixed assets of the subject during the term of the Agreement, except for the purpose of securing claims towards [BD Agro] accrued based on regular business activities of [BD Agro], i.e. except for the purpose of acquiring of the funds to be used by [BD Agro].⁵⁹

85. According to the Privatization Agency, Article 5.3.3 of the Privatization Agreement was violated because BD Agro had alienated fixed assets worth more than 30% of the total value of BD Agro's fixed assets shown in BD Agro's final pre-privatization balance sheet.⁶⁰

⁵⁶ Report of the Privatization Agency on Control of BD Agro dated 25 February 2011, p. 2, **CE-30**.

⁵⁷ See Report of the Privatization Agency on Control of BD Agro dated 25 February 2011, **CE-30**.

⁵⁸ Report of the Privatization Agency on Control of BD Agro dated 25 February 2011, pp. 21-30, **CE-30**.

⁵⁹ Privatization Agreement, Articles 5.3.3 and 5.3.4, **CE-17**.

⁶⁰ Report of the Privatization Agency on Control of BD Agro dated 25 February 2011, p. 21, **CE-30**.

86. The Privatization Agency’s allegation was incorrect because the Privatization Agency’s calculation of the value of the fixed assets that BD Agro had disposed of included the value of BD Agro’s original herd that the Serbian authorities had ordered to be slaughtered due to leucosis.⁶¹ Such slaughter obviously constitutes an event of *force majeure*, which cannot violate the Privatization Agreement. Furthermore, the slaughtered herd was fully replaced by heifers of a superior breed that Mr. Rand directed to be flown from Canada at a personal cost to him of approximately EUR 2.2 million.⁶² The Privatization Agency admitted that, without including the value of the slaughtered herd, BD Agro’s disposal of its assets was well below the 30% threshold.⁶³ Consequently, it should have been clear to the Privatization Agency that Article 5.3.3 was not violated.
87. The Privatization Agency also alleged, without providing specifics, the violation of Article 5.3.4 on the basis that BD Agro had pledged certain land plots to secure a loan or loans from the Serbian bank Agrobanka and the loaned funds had been used, fully or partially, for the benefit of third parties rather than BD Agro.⁶⁴ The Privatization Agency did not explain why it believed that due to the partial use of the loan for the benefit of third parties, the pledge securing the loan did not qualify for the exception under Article 5.3.4, which authorized pledges for the purpose of securing loans contracted “*based on BD Agro’s regular business activities.*”⁶⁵
88. The Privatization Agency thus did not justify why the use of a minor part of the loan for the benefit of related companies would disqualify the pledge provided to secure the loan as a whole. The Privatization Agency also failed to review the arrangements between BD Agro and the related companies to justify why it considered that such use was not “*based on BD Agro’s regular business activities*” within the meaning of Article 5.3.4 of the Privatization Agreement.
89. Nonetheless, the Privatization Agency requested specific remedial actions to cure these purported breaches, including preparation of an audit report by an auditor acceptable to

⁶¹ Report of the Privatization Agency on Control of BD Agro dated 25 February 2011, p. 20, **CE-30**.

⁶² Witness Statement of Mr. William Rand, ¶ 29.

⁶³ Report of the Privatization Agency on Control of BD Agro dated 25 February 2011, p. 20, **CE-30**.

⁶⁴ Notice of the Privatization Agency on Additional Time Period dated 24 February 2011, **CE-31**.

⁶⁵ Privatization Agreement, Article 5.3.4, **CE-17**.

the Privatization Agency, repayment of the funds provided by BD Agro for the benefit of the related entities, and removal of pledges securing the Agrobanka loan to BD Agro. Again, the Privatization Agency did not justify why such remedial actions were required⁶⁶—even though the Privatization Agreement, for example, did not restrict BD Agro’s ability to provide loans to third parties.

F. Full Payment of Purchase Price

90. The Privatization Agency’s allegations of breach of the Privatization Agreement, however, became moot upon full payment of the purchase price and consequent consummation of the Privatization Agreement on 8 April 2011.⁶⁷ On their own terms, the restrictions under Articles 5.3.3 and 5.3.4 ceased to apply because they were agreed to last only “*until payment of the entire sale and purchase price*” and “*during the term of the [Privatization] Agreement,*” respectively.⁶⁸

91. Also, in accordance with Article 2 of the Share Pledge Agreement, the Privatization Agency’s rights of pledge on the Privatized Shares expired upon full payment of the purchase price. Article 2 of the Share Pledge Agreement provides:

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.**⁶⁹

92. Even though the Privatization Agency accepted the last installment of the purchase price, it subsequently continued to claim the purported violations of Articles 5.3.3 and 5.3.4, while insisting on the remedial actions demanded earlier. At the same time, the Privatization Agency violated the Share Pledge Agreement by refusing to release the pledge on the Privatized Shares despite the expiry of its rights of pledge.⁷⁰

⁶⁶ Notice of the Privatization Agency on Additional Time Period dated 24 February 2011, **CE-31**.

⁶⁷ Confirmation of the Privatization Agency on the Buyer’s full payment of the Purchase Price dated 6 January 2012, **CE-19**.

⁶⁸ Privatization Agreement, Articles 5.3.3 and 5.3.4, **CE-17**.

⁶⁹ Privatization Agreement, Schedule 1: Share Pledge Agreement, Article 2, **CE-17**.

⁷⁰ Notice of the Privatization Agency on Additional Time Period dated 22 June 2011, **CE-96**; Notice of the Privatization Agency on Additional Time Period dated 6 October 2011, **CE-97**; Notice of the Privatization Agency on Additional Time Period dated 22 December 2011, **CE-32**.

93. The Privatization Agency's approach was patently unlawful and unreasonable. Even assuming, *arguendo*, that BD Agro's transactions had violated the Privatization Agreement, it was nonsensical for the Privatization Agency to demand that BD Agro obtain repayment of the referenced loans and removal of the pledges. As BD Agro was perfectly free to engage in such transactions following the payment of the final installment of the purchase price on 8 April 2011, it did not make any sense for the Privatization Agency to insist, more than eight months later, in December 2011, that these transactions be reversed.
94. On 2 April 2012, Mr. Obradović sent a comprehensive letter to the Ministry of Economy where he explained in a great detail that he had fulfilled all of his obligations under the Privatization Agreement and protested that the Privatization Agency had not released the pledge on the Privatized Shares.⁷¹ The Ministry of Economy did not respond to the request to release the pledge.

G. Ministry of Economy's Instructions to Privatization Agency That There Was No Justification to Terminate Privatization Agreement

95. The Privatization Agency's insistence that BD Agro cure inexistent breaches of inapplicable obligations under the Privatization Agreement caused a deadlock.
96. Unbeknownst to the Claimants, Mr. Obradović and BD Agro, on 30 March 2012, the Privatization Agency requested instructions from the Ministry of Economy on how to resolve the continuing disagreement over the alleged non-compliance with the Privatization Agreement. The Privatization Agency's fundamental question was whether it should unilaterally terminate the Privatization Agreement due to a purported breach of the agreement and seize the Privatized Shares.
97. In its letter to the Privatization Agency dated 30 May 2012, the Ministry of Economy, "*after reviewing all delivered exhibits, as well as the website of [BD Agro],*" concluded that "*there is no economic justification to terminate the [Privatization Agreement].*" The Ministry of Economy justified its conclusion by referring, among other things, to the fact that Mr. Obradović "*paid the entire amount of the sale and purchase price*" and

⁷¹ Letter from Mr. Djura Obradović to the Ministry of Economy dated 2 April 2012, CE-77.

*“the stated disposal of [BD Agro’s] property did not threaten the continuity of [BD Agro’s] business activities.”*⁷²

98. Moreover, the Ministry of Economy praised Mr. Obradović for being able to *“achieve 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.”*⁷³
99. With the letter from the Ministry of Economy in hand confirming that there was no justification to terminate the Privatization Agreement, the Privatization Agency nevertheless continued to insist that BD Agro take the remedial action requested in February 2011. On 31 July 2012 and 8 November 2012, the Privatization Agency gave Mr. Obradović additional *“extensions”* to *“comply with the terms of the Privatization Agreement”*⁷⁴—even though the invoked provisions of the Privatization Agreement no longer applied.
100. The Claimants and Mr. Obradović maintained their view that the Privatization Agreement had been consummated with the full payment of the purchase price, and no remedial action was required. They did not need nor ask for the *“extensions”* that the Privatization Agency was *“granting”* unilaterally.

H. 2013 Legal Opinion by the Privatization Agency’s Outside Counsel That There Was No Legal Basis to Terminate Privatization Agreement

101. One year later, in 2013, and again unbeknownst to the Claimants, Mr. Obradović and BD Agro, the Privatization Agency decided to approach outside legal counsel and seek advice on the alleged violations of the Privatization Agreement.
102. On 12 June 2013, the Privatization Agency received the 2013 Legal Opinion regarding the legality of a potential termination of the Privatization Agreement by the Privatization Agency.⁷⁵ The 2013 Legal Opinion was authored by the Radović & Ratković law firm of Belgrade, Serbia. This law firm had been the Privatization Agency’s trusted advisors for several years, representing it in dozens of cases before

⁷² Letter from the Ministry of Economy to the Privatization Agency dated 30 May 2012, **CE-33**.

⁷³ *Ibid.*

⁷⁴ Notice of the Privatization Agency on Additional Time Period dated 31 July 2012, **CE-78**; Notice of the Privatization Agency on Additional Time Period dated 8 November 2012, **CE-79**.

⁷⁵ The 2013 Legal Opinion, **CE-34**.

Serbian courts. The 2013 Legal Opinion unequivocally concluded that such termination would, for a number of reasons, be unlawful.

103. *First*, the 2013 Legal Opinion clearly stated that it was impossible for the Privatization Agency to rescind the Privatization Agreement after it was “*completely fulfilled*” upon the payment of the last instalment of the purchase price on 8 April 2011 when “*all contractual and legal control authorities of the Privatization Agency ended.*”⁷⁶ The 2013 Legal Opinion stated:

Based on the data available, we conclude that the [Privatization Agreement] **was executed and fulfilled as of April 8, 2011**. After the payment of the purchase price, socially owned capital of the privatization subject was finally privatized and thus all contractual and legal control authorities of the Privatization Agency ended [...].

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.⁷⁷

104. The 2013 Legal Opinion also expressly rejected the legality of the Privatization Agency’s efforts to maintain control over the already consummated Privatization Agreement by repeatedly setting new deadlines for Mr. Obradović to remedy his alleged breaches of the Privatization Agreement:

The interpretation of the Center [for Control of Privatization] “that by 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 executed, one cannot set a subsequently 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.**⁷⁸

105. *Second*, the 2013 Legal Opinion stressed that Mr. Obradović had not only met, but also exceeded his legal duties by complying with the Privatization Agreement and with the instructions of the Privatization Agency even after the Privatization Agreement had

⁷⁶ *Ibid.*, p. 4.

⁷⁷ *Ibid.*, p. 4.

⁷⁸ *Ibid.*, p. 4.

been fully executed.⁷⁹ The 2013 Legal Opinion confirmed that Mr. Obradović had “fulfilled the following significant obligations”:

- 1) fully paid the purchase price, in the amount of 5,548,996.46 EUR, as of April 8, 2011;
- 2) fulfilled the obligation of investment in the fixed assets, in the agreed amount of 1,998,554.16 EUR;
- 3) submitted bank guarantees as security instruments for timely fulfillment of investment obligations, and these guarantees were returned to the buyer;
- 4) maintained continuity of business operations for the agreed period of two years;
- 5) fulfilled the obligations established by the social program from Annex 1 to the [Privatization] Agreement; and
- 6) did not violate the ban on the disposal of [BD Agro’s fixed assets] over the allowed percentage of disposal.⁸⁰

106. The 2013 Legal Opinion expressly rejected the Privatization Agency’s untenable theory that Mr. Obradović had violated Article 5.3.3 by allegedly alienating more than 30% of BD Agro’s fixed assets. This is because the 30% threshold would have been exceeded only if the calculation of the value of BD Agro’s fixed assets alienated after privatization were to include the forced slaughter of the initial herd of Simmental cows ordered by the Ministry of Agriculture for sanitary reasons.⁸¹ Such calculation was obviously legally impossible because the forced slaughter “*was the consequence of objective circumstances which appeared to the buyer as force majeure*”.⁸²

107. Accordingly, the 2013 Legal Opinion confirmed that Mr. Obradović “*alienated fixed assets in line with the contractually permitted percentage of alienation, and on this basis, there is – i.e. before April 8, 2011 there was – no reason for termination of the agreement.*”⁸³

108. The 2013 Legal Opinion also rejected any suggestion that Mr. Obradović had violated Article 5.3.4 of the Privatization Agreement, which placed restrictions on the mortgaging of BD Agro’s fixed assets during the term of the agreement. The 2013 Legal Opinion stated that “*it may be undoubtedly concluded that the buyer of the capital*

⁷⁹ *Ibid.*, p. 2.

⁸⁰ *Ibid.*, p. 2.

⁸¹ Decision of the Ministry of Agriculture, Forestry and Water Management dated 9 April 2007, **CE-25**.

⁸² The 2013 Legal Opinion, p. 5, **CE-34**.

⁸³ *Ibid.*, p. 5.

*(even though he was not obliged to) acted in line with the Privatization Agency’s warning letters even after the full payment of the purchase price, that is, after the end of control-related authorities of the [Privatization] Agency.”*⁸⁴

109. *Third, the 2013 Legal Opinion added that, even assuming that Mr. Obradović had violated Article 5.3.4 of the Privatization Agreement (which the 2013 Legal Opinion denied), “[a]ccording to the [Privatization Agreement] itself, the Agency does not have the right to terminate the [Privatization Agreement] due to violation of obligation stated in Article 5.3.4, because this is not stipulated as a reason for termination.”*⁸⁵
110. The 2013 Legal Opinion thus concluded: *“[B]esides the fact that there is no economic justification, there is also no legal basis for termination of the [Privatization Agreement].”*⁸⁶
111. Nonetheless, for reasons unknown, like with the instructions from the Ministry of Economy unequivocally concluding that *“there is no economic justification to terminate the [Privatization Agreement]”*⁸⁷, the Privatization Agency decided not to follow the unequivocal advice provided in the 2013 Legal Opinion. Worse yet, the Privatization Agency withheld the 2013 Legal Opinion not only from the Claimants, Mr. Obradović and BD Agro, but later also from certain decision-making bodies of the Serbian Government, as outlined below. The Claimants’ counsel obtained a copy of the 2013 Legal Opinion only in January 2017, pursuant to a request under the Serbian Law on Free Access to Information of Public Importance.⁸⁸

I. Privatization Agency’s Arbitrary Refusal to Allow for Transfer of Nominal Ownership of Beneficially Owned Shares

112. Flouting the unambiguous advice received in the 2013 Legal Opinion and the Ministry of Economy’s instructions, the Privatization Agency inexplicably continued to insist

⁸⁴ *Ibid.*, p. 5.

⁸⁵ *Ibid.*, p. 3.

⁸⁶ *Ibid.*, p. 6.

⁸⁷ Letter from the Ministry of Economy to the Privatization Agency dated 30 May 2012, **CE-33**.

⁸⁸ Letter from Mr. Nenad Stanković to the Ministry of Economy dated 27 December 2016, **CE-80**; Letter from the Ministry of Economy to Nenad Stanković dated 16 January 2017, **CE-81**.

that BD Agro remedy the non-existent breaches of the Privatization Agreement. The deadlock thus continued and ultimately brought BD Agro to the verge of bankruptcy.

113. Due to its extensive investments and temporary adverse market conditions, BD Agro's liquidity started to deteriorate. Between the years 2006 and 2013, a large number of Serbian milk producers were forced to limit their production or shut down. The number of cattle in Serbia dropped by 17%⁸⁹ and the overall milk production dropped by 9%.⁹⁰ This forced BD Agro to take additional bank loans and sell certain of its properties to finance its further modernization and development.
114. In the spring of 2013, Mr. Rand decided to make important changes in the management of BD Agro. Mr. Rand sent Mr. Erinn Broshko, the Managing Director of Rand Investments, to spend six months in Serbia overseeing Mr. Rand's investments in the country. With Mr. Broshko's help, Mr. Rand hired two new top managers for BD Agro: Mr. Igor Markićević, an experienced Serbian investment manager, and Mr. David Wood, a UK national with extensive experience with large herd management. In May 2013, Mr. Markićević became an executive member of the Board of Directors and the new General Manager, and Mr. Wood became Chairman of the Board of Directors, of BD Agro.⁹¹
115. BD Agro needed additional capital to improve its liquidity, repay certain of its bank loans and decrease financing costs. Mr. Rand was more than willing to inject new capital, but planned to do so only after having Mr. Obradović transfer the nominal ownership of BD Agro to himself or his nominee.
116. Therefore, in August 2013, Mr. Rand directed Mr. Obradović⁹² to conclude an agreement (the "**Coropi Agreement**") regarding transfer of his nominal shareholding of the Beneficially Owned Shares to Coropi Holdings Limited ("**Coropi**"), a Cypriot

⁸⁹ Livestock balance of cattle in Serbia for years 2006-2013, Statistical Office of the Republic of Serbia **CE-107**.

⁹⁰ Milk production in Serbia for years 2006-2013, Statistical Office of the Republic of Serbia, **CE-108**.

⁹¹ Confirmation of the Serbian Business Register Agency on the Members of Management Board and Board of Directors of BD Agro, **CE-72**; Witness Statement of Mr. Igor Markićević, ¶ 15.

⁹² Witness Statement of Mr. William Rand, ¶ 45; Witness Statement of Mr. Djura Obradović, ¶ 27.

company solely owned by Mr. Robert Jennings as the Trustee on behalf of the Ahola Family Trust.⁹³

117. The transfer was conditional upon the Privatization Agency's approval because the Privatization Agency had arbitrarily refused to remove the pledge over the Privatized Shares as was required by the terms of the Share Pledge Agreement.⁹⁴
118. Starting in June 2013, Mr. Broshko, Mr. Markićević and Mr. Slobodan Doklešić, then outside legal counsel to BD Agro, met, together or individually, with several senior representatives of the Serbian government. These included Mr. Vladislav Cvetković, Director of the Privatization Agency; Mr. Aleksandar Martinović, Chairman of the Privatization Agency; Mr. Muamer Redžović, Chairman of the Privatization Agency in replacement of Mr. Martinović; Mr. Dragan Stevanović, State Secretary to the Minister of Economy; and Ms. Neda Galić, Advisor to the Minister of Economy.⁹⁵
119. The meetings were frustrating because while many of these officials expressed support for Mr. Rand's and BD Agro's requests and arguments, no action followed.⁹⁶ The pledge remained in place, and the Coropi Agreement thus never came into effect.

J. BD Agro's Attempted Reorganization

120. BD Agro's financial condition worsened in 2014. Mr. Rand and BD Agro's managers reacted by preparing for creditor approval and court sanction a pre-pack reorganization plan to address BD Agro's lack of liquidity and high financing costs.
121. Paradoxically, the consent of BD Agro's biggest creditor Nova Agrobanka, a bank in bankruptcy 100% controlled by the Serbian state, was conditioned upon the assignment of the Privatization Agreement to Coropi, or another entity named by Mr. Rand. The state-controlled Nova Agrobanka and certain other creditors thus required essentially

⁹³ Agreement on Assignment of Agreement on Sale of Socially Owned Capital Through Public Auction between Djura Obradović and Coropi Holdings Limited dated 6 August 2013, **CE-35**; Certificate of Shareholders in Coropi Holdings Limited dated 15 July 2013, **CE-83**.

⁹⁴ *Ibid*, Article 8.

⁹⁵ Witness Statement of Mr. Igor Markićević, ¶¶ 22-23; Witness Statement of Mr. Erinn Broshko ¶ 27.

⁹⁶ Witness Statement of Mr. William Rand, ¶ 48, ¶¶ 51-52.

the same thing that Mr. Rand had been seeking to implement but which the Privatization Agency had been unlawfully preventing for more than three years.

122. On 26 October 2014, Messrs. Broshko, Markićević and Doklešić met with Mr. Dragan Stevanović, State Secretary to the Minister of Economy, and Ms. Neda Galić, Advisor to the Minister of Economy to again discuss the release of the pledge and Mr. Rand's request that the Privatization Agreement be assigned to Coropi.⁹⁷ The representatives of the Ministry of Economy declared that they were open to such proposal and only asked for documents evidencing that Coropi was "*a company within Rand Investment.*"⁹⁸ Mr. Broshko promptly provided the requested documents to Ms. Galić, but the Ministry of Economy did not respond.⁹⁹
123. The first reorganization plan was filed with the Commercial Court in Belgrade on 25 November 2014.¹⁰⁰ BD Agro's creditors provided the required consent to the reorganization plan. However, the consent of Nova Agrobanka and certain other creditors was still conditional upon transfer of the nominal ownership of the Beneficially Owned Shares to Mr. Rand or his nominee.
124. On 6 March 2015, the reorganization plan was corrected to take into account that BD Agro owned almost 295 hectares of construction land with a corresponding high market value that was not appropriately reflected in the first reorganization plan.¹⁰¹
125. Given the Privatization Agency's uncooperativeness and the increasing dire condition of BD Agro, Nova Agrobanka and certain other creditors agreed to withdraw the condition and approve the updated reorganization plan even without the assignment of the Privatization Agreement. On 25 June 2015, the Commercial Court in Belgrade held a hearing where the required majority of creditors, including Nova Agrobanka, voted in

⁹⁷ Witness Statement of Mr. Erinn Broshko, ¶ 27.

⁹⁸ E-mail from Neda Galić to Erinn Broshko of 9 November 2014, **CE-70**.

⁹⁹ Witness Statement of Mr. Erinn Broshko, ¶ 27.

¹⁰⁰ BD Agro's submission accompanying the Pre-pack Reorganization Plan received by the Commercial Court in Belgrade on 25 November 2014, **CE-85**.

¹⁰¹ Amendment to the Pre-pack Reorganization Plan of BD Agro dated 6 March 2015, **CE-101**; BD Agro's submission to Commercial Court accompanying the Pre-pack Reorganization Plan of 6 March 2015, **CE-116**.

favor of the pre-pack reorganization plan.¹⁰² However, a minority of creditors, including the Serbian Tax Authority, voted against the plan and appealed its approval.¹⁰³

K. Ombudsman’s Unlawful Intervention and “Recommendation” to Terminate Privatization Agreement

126. Shortly before the approval of the reorganization plan, the latent disagreement over the alleged violations of the Privatization Agreement got a completely new—and insidious—twist.
127. On 23 June 2015, Mr. Saša Janković, the Serbian Ombudsman, published his “recommendations” regarding the Privatization Agreement, where he arbitrarily determined that the Privatization Agreement ought to be terminated and reprimanded the Privatization Agency and the Ministry of Economy for not having done so back in 2011.
128. The Ombudsman’s “recommendations” came as a complete surprise to the Claimants, Mr. Obradović and BD Agro as the Ombudsman clearly lacked the jurisdiction, authority and expertise to opine on the issue. Article 1 of the Law on the Public Protector of Citizens provides that Ombudsman is:

[A]n independent state body that shall protect the rights of citizens and control the work of state administrative bodies, the body authorized for legal protection of property rights and interests of the Republic of Serbia and other bodies and organizations, enterprises and institutions which have been delegated public authority (hereinafter: administrative bodies).

The Ombudsman shall also ensure that human and minority freedoms and rights are protected and promoted.¹⁰⁴

129. Accordingly, the Ombudsman’s statutory role is to protect and promote human and minority rights. The Ombudsman controls whether Serbian state administration bodies treat the citizens of Serbia in accordance with Serbian law and in compliance with the principles of good administration.¹⁰⁵ The Ombudsman would typically opine on issues

¹⁰² Court hearing minutes dated 25 June 2015, **CE-39**.

¹⁰³ Court hearing minutes dated 25 June 2015, **CE-39**; Appeal of the City Administration of the City of Belgrade, Secretariat for Finance dated 12 August 2015, **CE-40**; Appeal of the Tax Administration of the Republic of Serbia dated 29 July 2015, **CE-41**.

¹⁰⁴ Law on Protector of Citizens, Article 1, **CE-112**.

¹⁰⁵ Extract from official Websites of the Ombudsman, **CE-86**.

such as access to public education, prisoners' rights, patients' rights or abuse of the powers of the police. The decision-making of the Ministry of Economy and the Privatization Agency regarding BD Agro did not fall under the Ombudsman's statutory authority at all.

130. The Claimants, Mr. Obradović and BD Agro were not even aware that the Ombudsman had been investigating the matter. Unbeknownst to them, in November 2013, the employees of BD Agro petitioned the Ombudsman to review the Privatization Agency's and the Ministry of Economy's alleged failure to properly address the purported violations of the Privatization Agreement identified in 2011.¹⁰⁶ The Ombudsman started an investigation even though he clearly lacked any authority to do so.
131. As explained above, the Ombudsman is authorized to investigate the actions of administrative authorities, such as the Ministry of Economy or the Privatization Agency, only to the extent that they infringe on human and minority rights and freedoms.¹⁰⁷ The decision-making of the Privatization Agency and the Ministry of Economy regarding the purported violations of the Privatization Agreement obviously had nothing to do with, and could not reasonably have been considered to be infringing upon, any human and minority rights and freedoms of any third parties, including BD Agro's employees. The Ombudsman thus acted in a clear excess of his authority.
132. The Ombudsman started his unlawful investigation by requesting the Privatization Agency to explain why it had not terminated the Privatization Agreement.¹⁰⁸ He did not inform the Claimants, Mr. Obradović and BD Agro of the investigation and the request, nor did he give them any opportunity to respond to the allegations of BD Agro's employees.
133. On 14 November 2014, the Privatization Agency responded to the Ombudsman, again without informing the Claimants, Mr. Obradović and BD Agro, that it had not terminated the Privatization Agreement for a number of reasons, among others because:

¹⁰⁶ See Opinion of the Ombudsman dated 19 June 2015, **CE-42**.

¹⁰⁷ Extract from official Websites of the Ombudsman, **CE-86**.

¹⁰⁸ See Letter from the Privatization Agency to the Ombudsman dated 14 November 2014, **CE-43**.

- i. the Ministry of Economy had opined that there was no economic justification for termination of the Privatization Agreement;¹⁰⁹
 - ii. the Privatization Agency had doubts whether the Privatization Agreement was still in force, given the “*expiration of deadlines for fulfillment of Buyer’s obligations at the moment of full payment of the purchase price, as stipulated by the Agreement*”;¹¹⁰
 - iii. the alleged violation of Article 5.3.3 “*occurred as a result of objective circumstances (force majeure), since one part of the production herd in [BD Agro] had to be eliminated in the process of suppression of communicable disease*”;¹¹¹ and
 - iv. the alleged violation of Article 5.3.4 was not a ground for lawful termination of the Privatization Agreement because it “*is not stipulated in the Privatization Agreement as a condition for termination*.”¹¹²
134. The Privatization Agency thus generally adopted the conclusions of the 2013 Legal Opinion, even though it did not provide the 2013 Legal Opinion to the Ombudsman. It also appears that the Privatization Agency did not inform the Ombudsman that Mr. Obradović had challenged the Privatization Agency’s allegations of purported breaches of the Privatization Agreement.
135. Half a year later, on 11 May 2015, the Ministry of Economy also wrote to the Ombudsman, again without informing the Claimants, Mr. Obradović and BD Agro. The Ministry of Economy explained that Article 5.3.4 of the Privatization Agreement had ceased to apply because “*the longest deadline from the Agreement is set by payment of the sale and purchase price, and that it was entirely paid on April 8, 2011 [...] the limitations from [Article 5.3.4] should be considered concluded on April 8, 2011*.”¹¹³

¹⁰⁹ *Ibid.*, p. 1.

¹¹⁰ *Ibid.*, p. 3.

¹¹¹ *Ibid.*, p. 3.

¹¹² *Ibid.*, p. 3.

¹¹³ Letter from the Ministry of Economy to the Ombudsman dated 11 May 2015, **CE-44**.

136. On 19 June 2015, the Ombudsman concluded the review of “*legality and correctness*” of the Privatization Agency’s and the Ministry of Economy’s conduct with respect to BD Agro and issued his “*recommendation*.” The Ombudsman determined that both the Privatization Agency and the Ministry of Economy “*made errors in their work to the detriment of the employees of [BD Agro]*.” The Ombudsman further stated that the Privatization Agency should have terminated the Privatization Agreement due to Mr. Obradović’s purported violation of Articles 5.3.3 and 5.3.4 of the Privatization Agreement:

During the control performed on January 17, 2011, at the seat of the subject of privatization, company “BD Agro AD” Dobanovci, the Privatization Agency determined that there was violation of the Agreement on sale of socially owned capital by the buyer of the subject of privatization who violated contractual obligation not to alienate assets over the agreed percentage, and encumbered the fixed assets of the privatization subject with pledge for a third party benefit. **The first circumstance constitutes a condition for termination as per the Agreement on sale, and the second one constitutes a condition for termination as per Article 41a of the Law on Privatization of 2001 [...].**¹¹⁴

137. On 23 June 2015, the Ombudsman made his findings publicly available on his official website. In his on-line statement, the Ombudsman opined that by not terminating the Privatization Agreement, the Privatization Agency and the Ministry of Economy violated rights of BD Agro’s employees:

The Ombudsman has determined that despite the fact that several years ago, it was ascertained that the buyer did not fulfil its contractual duties in the privatization procedure, the Privatization Agency and the Ministry of Economy have not terminated the Agreement, but rather have prolonged rendering of the final decision and thus breached the rights of employees of this company.¹¹⁵

138. The Ombudsman’s public calls for termination of the Privatization Agreement were shockingly unlawful for several reasons. *First*, the Ombudsman clearly did not have the jurisdiction to investigate the issue. The contention that the alleged failure to terminate the Privatization Agreement was within the Ombudsman’s jurisdiction because it violated human rights and freedoms of BD Agro’s employees is nothing short of ridiculous and does not merit any further comments.

¹¹⁴ The Opinion of the Ombudsman dated 19 June 2015, p. 6, **CE-42**.

¹¹⁵ The Ombudsman’s On-Line Statement dated 23 June 2015, **CE-45**.

139. *Second*, the Ombudsman clearly did not have the authority to opine on interpretation of the Privatization Agreement to determine whether any breaches had occurred, let alone whether such breaches justified termination of the Privatization Agreement.
140. *Third*, the Ombudsman issued his categorical opinion without hearing the affected parties. None of the Claimants, Mr. Obradović nor BD Agro even knew that the Ombudsman’s investigation was underway. The Ombudsman’s intervention thus blatantly violated even the most rudimentary notion of due process. To be clear, none of the Claimants, Mr. Obradović nor BD Agro were granted any due process at all.
141. *Fourth*, the Ombudsman accepted without any independent review the conclusions of the Privatization Agency’s control report of 25 February 2011, which alleged that Mr. Obradović had breached Articles 5.3.3 and 5.3.4 of the Privatization Agreement. However, the Ombudsman completely ignored:
- i. the Privatization Agency’s subsequent determination that the alienation of BD Agro’s fixed assets beyond the 30% threshold set forth in Article 5.3.3 had resulted from an event of *force majeure*;¹¹⁶
 - ii. the Ministry of Economy’s opinion that Article 5.3.4 no longer applied after 8 April 2011; and¹¹⁷
 - iii. the Privatization Agency’s reminder that the Privatization Agreement did not allow for termination even if Article 5.3.4 had still applied and been violated (*quod non*).¹¹⁸
142. Simply put, the Ombudsman cavalierly ignored the opinions of the competent Serbian authorities in charge of the Privatization Agreement and imposed, in a very public manner, his ill-conceived views on the Privatization Agency by demanding termination of the Privatization Agreement without having any authority to do so, without conducting any independent factual inquiries and without according any due process to the Claimants, Mr. Obradović or BD Agro. This was—and still is—simply shocking.

¹¹⁶ Letter from the Privatization Agency to the Ombudsman dated 14 November 2014, p.3, **CE-43**.

¹¹⁷ Letter from the Ministry of Economy to the Ombudsman dated 11 May 2015, p.2, **CE-44**.

¹¹⁸ Letter from the Privatization Agency to the Ombudsman dated 14 November 2014, p.3, **CE-43**.

L. Privatization Agency's Unjustified About-Face

143. On 2 July 2015, BD Agro again requested that the Privatization Agency proceed with the assignment of the Privatization Agreement to Coropi. Aware of the Ombudsman's interference, BD Agro decided to take a pragmatic approach despite its principled disagreement with the Privatization Agency's demands. BD Agro thus explained that it had taken virtually all of the "remedial actions" demanded by the Privatization Agency—despite not being required to do so under any reasonable interpretation of Serbian law.
144. BD Agro explained that it had addressed all of the Privatization Agency's outstanding demands other than those to obtain: (i) repayment of approximately EUR 700,000 from Inex Nova Varoš and Crveni Signal; and (ii) removal of the registration of certain pledges of BD Agro's land from the Land Register. While the corresponding rights of pledge no longer existed, BD Agro was unable to obtain the removal of their registration because the pledgee Nova Agrobanka, a bank in bankruptcy 100% controlled by the Serbian state, failed to timely issue a written confirmation that the underlying loan had been settled and that the registration thus could be deleted from the Land Register.¹¹⁹
145. On 20 July 2015, the Privatization Agency replied that BD Agro had not shown compliance with the duties under Articles 5.3.3 and 5.3.4 of the Privatization Agreement. The Privatization Agency specified that it believed Article 5.3.4 had been breached because, on 22 December 2010, BD Agro pledged some of its land to secure a EUR 2 million loan from the Serbian bank Agrobanka. EUR 700,000 from that loan was used for the benefit of two related companies, Inex Nova Varoš and Crveni Signal, and these two companies did not return that amount to BD Agro. The Privatization Agency insisted on the accusations despite the clear advice in the 2013 Legal Opinion that this specific pledge was not a cause of concern and that there was "no economic justification [and] also no legal basis for termination of the [Privatization Agreement]."¹²⁰
146. BD Agro repeatedly explained that the loan to third parties did not violate the Privatization Agreement and that, in any event, all of the obligations under the

¹¹⁹ See Letter from BD Agro to Privatization Agency dated 2 July 2015, **CE-46**.

¹²⁰ The 2013 Legal Opinion, p. 6, **CE-34**.

Privatization Agreement extinguished following the full payment of the purchase price.

147. Furthermore, the Privatization Agency also strangely accused Mr. Obradović of being in violation of Article 5.2.1 of the Privatization Agreement requiring the additional investment in BD Agro of approximately EUR 2 million.¹²¹ The accusation was absurd because it came nine years after the Privatization Agency: (i) provided written confirmation that Mr. Obradović had made the required additional investments in BD Agro in satisfaction of Article 5.2.1 of the Privatization Agreement; and (ii) subsequently released the bank guarantees securing such investment obligation.¹²²
148. Thus, the Privatization Agency completely changed its earlier opinion expressed in its response to the Ombudsman and disregarded the conclusions of the Ministry of Economy and the 2013 Legal Opinion prepared by its own outside legal counsel. The Privatization Agency demanded again that BD Agro submit an audit report “*making an unequivocal statement*” about Mr. Obradović’s compliance with Article 5.2.1, 5.3.3 and 5.3.4.¹²³ In so doing, the Privatization Agency purposefully laid the foundation for the termination of the Privatization Agreement to satisfy the very public demands of the Ombudsman.
149. The Privatization Agency’s repeated requests for new audit reports were clearly vexatious. In early 2015, to dispel whatever concerns the Privatization Agency may have had regarding the audit reports, BD Agro went so far as to invite representatives of the Privatization Agency to inspect the company’s books and operations directly at BD Agro’s premises where they would receive all the necessary information and full cooperation to investigate any issue that the Privatization Agency deemed relevant in their review of the audit reports. The Privatization Agency declined the invitation, with the absurd explanation that it cannot conduct any independent examination of the issue

¹²¹ Letter from Privatization Agency to BD Agro dated 20 July 2015, **CE-47**.

¹²² Confirmation of the Privatization Agency of the Completion of Investment dated 10 October 2006, **CE-18**.

¹²³ Letter from Privatization Agency to BD Agro dated 20 July 2015, **CE-47**.

and the underlying evidence, but, instead, may only rely on the information provided in the auditor reports.¹²⁴

150. On 4 September 2015, after more than six months of inactivity, the state-controlled Nova Agrobanka finally issued the confirmation required for removal of the pledge of BD Agro's land securing Crveni Signal's debt from the Land Register. BD Agro immediately applied to the Land Register on 7 September 2015 for removal of the pledge and, on 11 September 2015, BD Agro received confirmation that it was so removed.¹²⁵

M. Serbian Government's Continuing False Promises

151. On 8 September 2015, the Canadian Embassy initiated a meeting attended by Mr. Philip Pinnington, the Canadian Ambassador to Serbia, Ms. Djurdjevska Čeramilac, the Trade Commissioner of the Canadian Embassy in Belgrade, Mr. Rand, Mr. Markićević and Mr. Ivica Kojić, the Chief of Staff to the Prime Minister of Serbia. Mr. Kojić apologized to Mr. Rand for the conduct of the Privatization Agency and the Ministry of Economy and promised that all problems regarding BD Agro would be shortly resolved to Mr. Rand's satisfaction.¹²⁶
152. At Mr. Rand's direction, Mr. Obradović sent another letter to the Privatization Agency requesting the removal of the pledge on the Privatized Shares. Attached to the letter were documents showing BD Agro's request to the Land Register for removal of the pledge on BD Agro's land securing Crveni Signal's debt. The letter also reminded the Privatization Agency that BD Agro's auditors had confirmed that the conditions for removal of the remaining pledges had been met because the secured loans had been repaid.¹²⁷

¹²⁴ Witness Statement of Mr. Igor Markićević, ¶ 28.

¹²⁵ Decision of the Land Register dated 7 September 2015, **CE-87**.

¹²⁶ Witness Statement of Mr. William Rand, ¶ 51; Witness Statement of Mr. Igor Markićević, ¶ 29.

¹²⁷ Letter from Mr. Djura Obradović to Privatization Agency dated 8 September 2015, **CE-48**.

N. Ombudsman’s Insistence that the Privatization Agreement Be Terminated

153. The continuing efforts to resolve the absurd disagreement about BD Agro’s compliance with contractual duties that had expired more than four years earlier were again thwarted by another unlawful intervention of the Ombudsman.
154. On 18 September 2015, the Ombudsman continued his very public campaign to compel the Ministry of Economy and the Privatization Agency to terminate the Privatization Agreement. He wrote to the Privatization Agency again and clearly stated that the Privatization Agency’s requests sent to BD Agro and Mr. Obradović were not enough to achieve “*the goal for which the Ombudsman issued the recommendation [of 19 June 2015].*”¹²⁸ The Ombudsman then ordered the Ministry of Economy and the Privatization Agency to account for whether they complied with his earlier “recommendation” and submit a new report on their actions.¹²⁹

O. Meeting of the Privatization Agency Deciding to Terminate the Agreement

155. On 28 September 2015, under the continuing pressure from the Ombudsman and only ten days from his last dictum, a commission of the Privatization Agency for the control of performance of the obligations of the buyers (the “**Commission**”) was convened to decide on the termination of the Privatization Agreement. The three members of the Commission present at the meeting were Saša Novaković from the Ministry of Finance, Zoran Tadić from the Ministry of Economy and Slavica Tanasijević from the Privatization Agency.¹³⁰
156. The Commission concluded in its internal decision that Article 5.3.3 of the Privatization Agreement regarding disposal of BD Agro’s assets had not been violated because, among other reasons, “*on April 8, 2011 the Buyer paid the entire sale and purchase price, and the obligation referred to in Article 5.3.3 of the [Privatization] Agreement is terminated as of that date.*”¹³¹

¹²⁸ Letter from the Ombudsman to the Privatization Agency dated 18 September 2015, **CE-88**; Letter from the Ombudsman to the Ministry of Economy dated 18 September 2015, **CE-115**.

¹²⁹ Letter from the Ombudsman to the Privatization Agency dated 18 September 2015, **CE-88**; Letter from the Ombudsman to the Ministry of Economy dated 18 September 2015, **CE-115**.

¹³⁰ Minutes of the Session of the Commission dated 28 September 2015, p.1, **CE-117**.

¹³¹ Materials for the Session of the Commission held on 28 September 2015, p. 36, **CE-89**.

157. For reasons unknown, the Commission reached the opposite conclusion regarding the restrictions on pledging BD Agro’s property under Article 5.3.4.¹³² This conclusion was plainly arbitrary because it ignored the fact that the restriction on pledging also expired upon the payment of the entire purchase price on 8 April 2011, as confirmed also by the 2013 Legal Opinion prepared by the Privatization Agency’s trusted outside counsel. Tellingly, the 2013 Legal Opinion was never mentioned by the Commission.
158. Worse yet, the Commission also chose to ignore that any hypothetical violation of Article 5.3.4 had been remedied because the rights of pledge no longer existed and BD Agro had even obtained removal of one pledge in the Land Register several days earlier. All those facts had been brought to the Commission’s attention, but the Commission ignored them.¹³³
159. The Commission admitted that “*the Agreement does not stipulate the possibility for its termination due to violation of Article 5.3.4 of the Agreement.*”¹³⁴ However, without further elaboration and undisturbed by the principle of *pacta sunt servanda*, the Commission simply noted that “*the Law on Privatization stipulates the possibility to terminate the Agreement due to disposal contrary to the provisions of the [Privatization] Agreement.*”¹³⁵
160. The Commission thus concluded that the Privatization Agreement was to be terminated for the alleged breach of Article 5.3.4. The Commission made that shocking decision ten years after the Privatization Agreement was concluded, nine years after the contractually agreed additional investments in BD Agro were made and four and a half years after the Privatization Agency received full payment of the purchase price.
161. In this context, and given the glaring omissions and inconsistencies in the Commission’s reasoning, it is undeniable that the Commission resolved to terminate the Privatization Agreement without any valid reason and only because of the very public pressure and influence of the Ombudsman.

¹³² Materials for the Session of the Commission held on 28 September 2015, p. 28, p. 36, **CE-89**.

¹³³ Materials for the Session of the Commission held on 28 September 2015, p. 28, p. 8, **CE-89**.

¹³⁴ Materials for the Session of the Commission held on 28 September 2015, p. 28, p. 17, **CE-89**.

¹³⁵ Materials for the Session of the Commission held on 28 September 2015, p. 28, p. 17, **CE-89**.

162. The Ombudsman’s public campaign against the privatization of BD Agro was only one example of Mr. Janković overstepping the Ombudsman’s authority to further his personal populist political agenda. Only a few months earlier, in April 2015, after the Ombudsman presented his annual report to Serbian Parliament, Mr. Vladimir Djukanović, a member of the Parliament, described it as “*a political pamphlet,*” and invited Mr. Janković to “*resign, run in elections and start a political career.*”¹³⁶
163. Mr. Janković took the advice. In December 2016, he announced his candidacy for the President of the Republic of Serbia.¹³⁷ After running as an independent candidate and finishing second in the election, he started a centre-left political organization called the Movement of Free Citizens and became one of the most prominent opposition leaders in the current Serbian political landscape.¹³⁸

P. Unlawful Termination of Privatization Agreement

164. On 28 September 2015, the Privatization Agency issued a decision to terminate the Privatization Agreement due to the alleged non-remedied violation of Article 5.3.4 of the Privatization Agreement.
165. For a number of reasons, the Privatization Agency’s termination was clearly illegal and contrary to the plain language of the Privatization Agreement. *First*, Article 5.3.4 expressly states that it only applies “*within the term of the Agreement being in force.*” The obligations under Article 5.3.4 thus ceased to exist on 8 April 2011 with the payment of the last installment of the purchase price. Accordingly, there could not have been a breach of Article 5.3.4 after that date.
166. *Second*, the Privatization Agency did not have the right to terminate the Privatization Agreement after it received the last instalment of the purchase price on 8 April 2011, as it had been so advised by its own trusted legal counsel in the 2013 Legal Opinion and as it had itself advised the Ombudsman.¹³⁹ The impossibility to terminate a privatization agreement after the buyer’s fulfillment of its contractual obligations was

¹³⁶ News Article “Human rights situation “unsatisfactory” – ombudsman” published on 15 April 2015, **CE-99**.

¹³⁷ News Article “Ombudsman Jankovic announces presidential bid” published on 26 December 2016, **CE-100**.

¹³⁸ Wikipedia, Mr. Saša Janković, **CE-106**.

¹³⁹ Letter from the Privatization Agency to the Ombudsman dated 14 November 2014, **CE-43**.

also confirmed by the jurisprudence of Serbian courts. For example, the Commercial Appellate Court stated in no uncertain terms:

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.¹⁴⁰

167. *Third*, even assuming, *arguendo*, that the alleged breach of Article 5.3.4 could continue after 8 April 2011, it was cured when all the requirements for removal of the allegedly non-compliant pledge were met and the pledge was ultimately deleted from the Land Register on 7 September 2015.

168. *Fourth*, Article 5.3.4 is not included in the exhaustive list of grounds for termination contained in Article 7.1 of the Privatization Agreement. Accordingly, even assuming, *arguendo*, that there was a non-remedied continuing breach of Article 5.3.4 as of the termination date (*quod non*), such a breach was not a valid cause for termination of the Privatization Agreement.

169. Apart from the alleged violation of Article 5.3.4, the Privatization Agency vaguely referred in the termination letter to other considerations that the Commission purportedly took into account when deciding to terminate the Privatization Agreement:

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 amounts for the needs of the Subject, alienation and burdening 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).¹⁴¹

170. This statement is a purposeful misrepresentation of the Commission's deliberations. As clearly stated in the Commission's internal decision, the Commission had found only one purported violation of the Privatization Agreement, that of Article 5.3.4. The

¹⁴⁰ Excerpt from the Judgment of the Commercial Appellate Court Pz. 11202/2010 of 21 September 2011, **CE-49**.

¹⁴¹ Notice on Termination of the Privatization Agreement dated 28 September 2015, **CE-50**.

Privatization Agency's taking of such liberties with the facts is a clear effort to justify an unjustifiable and illegal termination of the Privatization Agreement.

171. The Privatization Agency failed to cite the provisions of the Privatization Agreement that it referred to, much less to substantiate its allegations. Nevertheless, it can be assumed that the Privatization Agency referred to the obligations under Articles 5.2.1 and 5.3.3.¹⁴²
172. The accusation of non-compliance with the investment duties stated in Article 5.2.1 is contradicted by the Privatization Agency's own earlier statements and actions. For example, on 25 July 2006, the Privatization Agency returned the bank guarantee posted by Mr. Obradović to secure his investment duties precisely because all investment duties had been fulfilled. On 10 October 2006, the Privatization Agency expressly confirmed to Mr. Obradović that he had complied with Article 5.2.1:

The Buyer Djura Obradović from Belgrade **acted in accordance with provision 5.2.1** of the [Privatization Agreement] **and completed investment in fixed assets of the Subject of privatization** which are used solely for performance of predominant business activity for which the company was registered on the day the auction was held in the amount defined by the Agreement.¹⁴³

173. Fulfillment of the investment duties was also confirmed in BD Agro's audit reports.¹⁴⁴ Accordingly, there can be no doubt that Article 5.2.1 was fully complied with and the Privatization Agency's allegations to the contrary lack any credible justification.
174. The Privatization Agency's allegations with respect to the Buyer's purported breach of Article 5.3.3 are equally unfounded. In the 2011 control report, the Privatization Agency claimed that BD Agro had alienated 35.11% of its fixed assets since 2005, which was above the 30% limit provided for in Article 5.3.3. However, the Privatization Agency expressly noted that this figure included the government-ordered slaughter of BD Agro's cows in 2007, which constituted 10.68% of BD Agro's total fixed assets.¹⁴⁵ Without the forced slaughter, the figure would have been less than 25%. Government-

¹⁴² Privatization Agreement, Articles 5.2.1 and 5.3.3, **CE-17**.

¹⁴³ Confirmation of the Privatization Agency of the Completion of Investment dated 10 October 2006, **CE-18**.

¹⁴⁴ Audit Report from Konsultant – revizija dated 10 March 2006, **CE-51**; Audit Report from Konsultant – revizija dated 9 June 2006, **CE-52**.

¹⁴⁵ Report of the Privatization Agency on Control of BD Agro dated 25 February 2011, **CE-30**.

ordered slaughter due to disease is a textbook example of *force majeure* and thus cannot count against the 30% limit under Article 5.3.3. Again, there can be no doubt that Article 5.3.3 was fully complied with.

Q. Direct Expropriation of Beneficially Owned Shares

175. After its unlawful termination of the Privatization Agreement, the Privatization Agency took immediate steps to expropriate the Beneficially Owned Shares. On 21 October 2015, the Privatization Agency rendered a decision on the transfer of BD Agro's capital to the Privatization Agency.¹⁴⁶ The decision was sent to the Central Securities Depository and Clearing House, who registered the Privatization Agency as the new owner of the Beneficially Owned Shares on 21 October 2015.
176. Neither the Privatization Agency, nor any other body of the Serbian Government offered to return the purchase price or pay any compensation for the expropriated shares.

R. Bankruptcy of BD Agro

177. The Privatization Agency's unlawful termination of the Privatization Agreement and seizure of the Beneficially Owned Shares caused a major disruption in BD Agro's business operations. Shortly after the expropriation of the Beneficially Owned Shares, the Privatization Agency replaced the management of BD Agro with its own nominees.¹⁴⁷ Less than a year later, on 30 August 2016, BD Agro was declared bankrupt.¹⁴⁸
178. It comes as a tragedy and a bitter irony that, upon the bankruptcy of BD Agro, all of the 161 employees of BD Agro, which the company had as of 31 December 2014 and whose rights and freedoms the Ombudsman purported to protect through his unlawful intervention, lost their jobs and livelihoods.

¹⁴⁶ Decision of the Privatization Agency on the Transfer of BD Agro's Capital dated 21 October 2015, **CE-105**.

¹⁴⁷ Witness Statement of Mr. Igor Markičević, ¶ 31.

¹⁴⁸ Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro dated August 30, 2016, **CE-109**.

IV. JURISDICTION

179. The Claimants bring their investment claims against Serbia under the Treaties and the ICSID Convention. As shown *seriatim* below, their claims comply with all the jurisdictional requirements of these instruments.

A. Claimants' Claims Meet the Jurisdictional Requirements of the Treaties

1. Jurisdiction *Ratione Personae*

a. The Canadian Claimants Are Investors Protected under the Canada-Serbia BIT

180. Article 1 of the Canada-Serbia BIT defines “investor” as a “*national or an enterprise of a Party, that seeks to make, is making or has made an investment.*”¹⁴⁹

181. The term “national” means “*for Canada, a natural person who is a citizen or permanent resident of Canada.*”¹⁵⁰ The term enterprise means “*entity constituted or organized under applicable law, whether or not for profit, whether privately owned or governmentally owned, including a corporation, trust, partnership, sole proprietorship, joint venture or other association and a branch of any such entity.*”¹⁵¹

182. Mr. Rand, Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand are all natural persons with Canadian citizenship permanently residing in Canada and thus qualify as protected investors under Article 1 of the Canada-Serbia BIT.

183. Rand Investments is a corporation constituted in accordance with the laws of Canada and as an “*enterprise of a Party*” qualifies as Canadian investors under Article 1 of the Canada-Serbia BIT.

¹⁴⁹ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, definition of “investor of a Party,” **CLA-1**; Extract from the website of the Government of Canada evidencing the entry into force of the Canada-Serbia BIT on 27 April 2015, **CE-91**.

¹⁵⁰ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, definition of “national,” **CLA-1**.

¹⁵¹ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, definition of “enterprise,” **CLA-1**.

b. Sembi is an Investor Protected under the Serbia-Cyprus BIT.

184. Under Article 1(3) of the Serbia-Cyprus BIT, an “investor” is “*a legal entity incorporated, constituted or otherwise duly organized according to the laws and regulations of one Contracting Party having its seat in the territory of that same Contracting Party and investing in the territory of the other Contracting Party.*”¹⁵²
185. Sembi is a legal entity incorporated¹⁵³ and having its seat in Cyprus.¹⁵⁴ Accordingly, Sembi is an “investor” within the meaning of Article 1(3) of the Serbia-Cyprus BIT.

2. Jurisdiction *Ratione Materiae*

a. Investments of the Canadian Claimants Are Protected under the Canada-Serbia BIT

186. Article 1 of the Canada-Serbia BIT defines “covered investment” as “*an investment in [the host state’s] 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.*”¹⁵⁵ The term “investment,” also laid down in Article 1 of the Canada-Serbia BIT, includes, among others:
- i. shares, stock or other form of equity participation in an enterprise;
 - ii. loan to an enterprise;
 - iii. interest in an enterprise that entitles the owner to share in income or profits of the enterprise; and

¹⁵² Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Article 1(3), **CLA-2**; Extract from the website of the Law Commissioner of the Republic of Cyprus evidencing the entry into force of the Serbia-Cyprus BIT on 23 December 2005, **CE-84**.

¹⁵³ Extract from the Company Register regarding Sembi dated 7 June 2017, **CE-53**.

¹⁵⁴ Certificate of Registered Office of Sembi dated 8 June 2017, **CE-54**.

¹⁵⁵ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, definition of “Covered Investment,” **CLA-1**.

- iv. any other tangible or intangible, moveable or immovable, property and related property rights acquired in the expectation of or used for the purpose of economic benefit or other business purpose.¹⁵⁶

187. When examining the existence of covered investment for the purposes of their jurisdiction, investment tribunals have repeatedly emphasized that ‘investment’ must be viewed as a complex economic operation, rather than as a series of separate economic transactions. The ICSID tribunal in *CSOB v. Slovakia* formulated this so-called doctrine of “general unity of an investment operation” as follows:

An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.¹⁵⁷

188. The investment operation of the Claimants consisted of the following assets:

- i. the Beneficially Owned Shares (comprised of the Privatized Shares and the New Shares);
- ii. The 3.9% shareholding in BD Agro held by Mr. Rand indirectly through MDH Serbia; and
- iii. 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.

189. These assets squarely meet the definition of “investment” as set forth by Article 1 of the Canada-Serbia BIT.

190. Moreover, Article 1 requires that the “investment” be “*owned or controlled, directly or indirectly, by an investor of the other Party.*” Such a requirement is squarely satisfied

¹⁵⁶ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, definition of “Investment,” **CLA-1**.

¹⁵⁷ *CSOB v. Slovakia*, Decision on Jurisdiction, 24 May 1999, 5 ICSID Reports 335, **CLA-3**.

here. As shown below, the investment was *both* owned *and* controlled by an investor of Canada.

191. The graph depicting the Claimants' ownership of BD Agro's shares immediately prior to the expropriation of the Beneficially Owned Shares by the Privatization Agency on 21 October 2015 is shown at page 13 above.
192. The Canada-Serbia BIT protects beneficial ownership. It is a well-established principle of public international law that a beneficial owner is entitled to prosecute its claims before international tribunal.¹⁵⁸ This principle was recently confirmed in the investment arbitration case *Occidental Petroleum v. Ecuador*, where the ICSID Annulment Committee held that where the ownership title is split between nominal and beneficial owners, beneficial owners shall be granted protection under an investment treaty of their nationality:

The position as regards beneficial ownership is a reflection of a more general principle of international investment law: claimants are only permitted to submit their own claims, held for their own benefit, not those held (be it as nominees, agents or otherwise) on behalf of third parties not protected by the relevant treaty.

[...]

Neither 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 the protection granted under the treaties which benefit their nationality.**¹⁵⁹

193. The holdings of the *Occidental* Annulment Committee apply with equal force here. In fact, the Claimants' beneficial ownership deserves protection under the Treaties also because unlike in *Occidental*, the Claimants' beneficial ownership was always disclosed to and acknowledged by Serbia. When Mr. Rand responded to Serbian officials' invitation to participate in the public auction for the Privatized Shares in 2005, he

¹⁵⁸ See *Trust Co. v. Hungary* (U.S. For. Cl. Settlement Comm'n 1957), where the trustee presenting the claim before a commission for settlement of U.S. citizens' claims against Hungary was a U.S. citizen, but its beneficiaries were not, the commission rejected the claim, noting that "[p]recedents for the foregoing well-settled proposition are so numerous that it is not deemed necessary to document it with a long list of authorities." **CLA-4.**

¹⁵⁹ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, ¶¶ 262 and 272, **CLA-5.**

informed them that he would do so through Mr. Obradović—and the Serbian officials did not express any reservations.¹⁶⁰

194. Serbia was fully aware of the Claimants' beneficial ownership also in the critical time period 2013 – 2015 when the Ministry of Economy and the Privatization Agency negotiated with Mr. Rand, Mr. Broshko and Mr. Markićević about the transfer of the Beneficially Owned Shares to Coropi.¹⁶¹
195. Consistent with this understanding, the Serbian officials treated Mr. Rand and his representatives Mr. Broshko and Mr. Markićević, rather than Mr. Obradović, as the competent representatives for addressing and negotiating all matters regarding BD Agro and the Privatized Shares.¹⁶² Before one such meeting relating to BD Agro shareholders' matters, the representatives of the Ministry of Economy even asked Mr. Obradović, who had been invited to this meeting by mistake, to leave its premises. After apologizing to Messrs. Broshko and Markićević for the oversight, the Ministry of Economy's officials, Mr. Stevanović and Ms. Galić, commenced the meeting and only discussed the issues with them as Mr. Rand's representatives.¹⁶³ The Ministry of Economy also expressly requested proof that Coropi was "*a company within Rand Investment.*"¹⁶⁴
196. Accordingly, the Canadian Claimants' beneficial ownership of the Beneficially Owned Shares satisfies the requirements of the Canada-Serbia BIT. These requirements are obviously also met with respect to Mr. Rand's indirect nominal and beneficial ownership of further 3.9% shares in BD Agro, his payments for BD Agro and his loans to that company. This alone would be sufficient to firmly ground the tribunal's jurisdiction *ratione materiae* under the Canada-Serbia BIT.
197. Moreover, the entirety of the investment was *controlled* by Mr. Rand, which also—and independently—satisfies the jurisdictional requirements of the Canada-Serbia BIT.

¹⁶⁰ Witness Statement of Mr. Djura Obradović, ¶ 11; Witness Statement of Mr. William Rand, ¶ 20.

¹⁶¹ Witness Statement of Mr. Erinn Broshko, ¶¶ 26-29; Witness Statement of Mr. Igor Markićević, ¶¶ 22-27.

¹⁶² Witness Statement of Mr. Erinn Broshko, ¶ 26; Witness Statement of Mr. Igor Markićević ¶ 24.

¹⁶³ Witness Statement of Mr. Erinn Broshko, ¶ 28; Witness Statement of Mr. Igor Markićević ¶¶ 25-26.

¹⁶⁴ E-mail from Neda Galić to Erinn Broshko of 9 November 2014, CE-70.

198. In *Caratube v. Kazakhstan*, the ICSID Annulment Committee held that control is the “capacity of a person or a company to decide the main actions to be undertaken by a juridical person.”¹⁶⁵ While such capacity is normally achieved through ownership of shares, it may equally be established by an agreement, even tacit, transferring the *actual control* from the nominal shareholder to a third party:

Control is normally achieved by ownership of a majority stake in the juridical person, which affords a sufficient number of votes, so that the controller can have a decisive influence on any decisions or resolutions.

But the owner of the equity may only formally be the owner or can by–tacit or explicit–agreement transfer actual control to a third party (e.g., the owner can enter into a fiduciary arrangement with a third party, holding ownership on behalf of such third party, or he can assign his voting rights to another person). **Thus third parties who are not owners of equity stakes can, by contractual arrangements with the formal owners, have actual control over juridical persons.**¹⁶⁶

199. Mr. Rand had the capacity to control BD Agro, and indeed exercised such control, based on his agreement with the nominal owner, Mr. Obradović. Their agreement was concluded prior to Mr. Obradović acquiring the Privatized Shares pursuant to the Privatization Agreement and the existence and basic terms of such arrangement between Messrs. Rand and Obradović were disclosed to Serbian officials prior to such acquisition. In accordance with that agreement, Mr. Rand had full control over the investment. Mr. Rand directed Mr. Obradović on all important matters relating to BD Agro, and Mr. Obradović always followed the directions.¹⁶⁷ Accordingly, Mr. Obradović always voted the Beneficially Owned Shares to appoint to BD Agro’s Managing Board and Board of Directors only persons selected by Mr. Rand.¹⁶⁸
200. In 2013, upon Mr. Rand’s direction, Mr. Obradović even desisted from any executive role at BD Agro and agreed to transfer the Beneficially Owned Shares to Coropi.¹⁶⁹ The Serbian officials repeatedly acknowledged Mr. Obradović’s purely formal status and

¹⁶⁵ *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment, 21 February 2014, ¶ 252, **CLA-16**.

¹⁶⁶ *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment, 21 February 2014, ¶¶ 253-254, **CLA-16**.

¹⁶⁷ Witness Statement of Mr. Djura Obradović ¶ 7, ¶¶ 17-18, and ¶¶ 22-30; Witness Statement of Mr. William Rand, ¶ 17.

¹⁶⁸ Witness Statement of Mr. Djura Obradović ¶ 16, ¶¶ 24-26; Witness Statement of Mr. William Rand, ¶¶ 39 and 43.

¹⁶⁹ Witness Statement of Mr. William Rand, ¶ 45.

Mr. Rand’s actual full control over BD Agro at their meetings with Messrs. Rand, Broshko and Markićević in 2013 to 2015.¹⁷⁰

201. Accordingly, the investment was both *owned* by the Canadian Claimants and *controlled* by Mr. Rand and thus satisfies all conditions set forth by Article 1 of the Canada-Serbia BIT.

b. Sembi’s Investments in Serbia Are Protected under the Serbia-Cyprus BIT.

202. Pursuant to Article 9 of the Serbia-Cyprus BIT, an investment tribunal has jurisdiction over disputes relating to an “investment” as defined in Article 1(1) of the Serbia-Cyprus BIT. According to this article, “*investment*” comprises “*any kind of assets invested by investor of one Contracting Party in the territory of the other Contracting Party in accordance with its laws and regulations,*” including, among others, shares and “*claims to money or to any performance under contract having economic value.*”¹⁷¹
203. Sembi’s investment in Serbia consists of its beneficial ownership of the Beneficially Owned Shares that it acquired against the repayment of Mr. Obradović’s EUR 9 million loan to the Lundin family and the repayment of Mr. Obradović’s other debts associated with the acquisition and operation of BD Agro.
204. The Serbia-Cyprus BIT also follows the general principle of public international law affording protection to beneficial owners as identified above. Accordingly, Sembi’s beneficial ownership enjoys protection under the Serbia-Cyprus BIT.

3. Jurisdiction *Ratione Temporis*

205. The Canada-Serbia BIT entered into force on 27 April 2015 and provides that it shall apply to all investment “*existing on the date of entry into force of this Agreement, as well as an investment made or acquired thereafter.*”¹⁷²

¹⁷⁰ Witness Statement of Mr. William Rand, ¶¶ 50-51; Witness Statement of Mr. Erinn Broshko, ¶¶ 26-29; Witness Statement of Mr. Igor Markićević ¶ 21, ¶¶ 24-27.

¹⁷¹ Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Article 1(1), **CLA-2**.

¹⁷² Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1, definition of “Covered Investment,” **CLA-1**.

206. The Serbia-Cyprus BIT entered into force on 23 December 2005 and provides that “[t]he provisions of this Agreement shall relate to investments made by investors of one Contracting Party prior to and after entry into force of this Agreement, but shall apply only to cases arisen after entry into force of this Agreement.”¹⁷³
207. The Privatization Agency’s unjustified decision to terminate the Privatization Agreement and seize the Beneficially Owned Shares took place after the entry into force of both the Canada-Serbia BIT and the Serbia-Cyprus BIT. Accordingly, the Claimants’ claims satisfy the *ratione temporis* requirements set forth in these Treaties.

B. Claimants’ Claims Meet the Jurisdictional Requirements of the ICSID Convention

208. In accordance with Article 24(1)(a) of the Canada-Serbia BIT¹⁷⁴ and Article 9(2) of the Serbia-Cyprus BIT¹⁷⁵, the Claimants have elected to resolve the present investment dispute in arbitration under the ICSID Convention.
209. Article 25(1) of the ICSID Convention sets forth the jurisdictional requirements for an investment dispute to be submitted to ICSID 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. When the parties have given their consent, no party may withdraw its consent unilaterally.”¹⁷⁶

210. Thus, an investment dispute may be submitted to an arbitral tribunal under the ICSID Convention if it (i) is a *legal dispute*; (ii) arising directly out of an *investment*; (iii) as between a *national* of a Contracting State and another Contracting State; and (iv) both Parties to the dispute have consented in writing to submit the dispute to ICSID.
211. The present investment dispute meets all of these jurisdictional requirements.

¹⁷³ Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Article 12, **CLA-2**.

¹⁷⁴ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 24(1)(a), **CLA-1**.

¹⁷⁵ Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Article 9(2), **CLA-2**.

¹⁷⁶ ICSID Convention, Article 25(1), **CLA-17**.

1. “Legal Dispute”

212. There is a *legal dispute* between the Claimants, on one hand, and Serbia, on the other hand, with respect to Serbia’s breaches of its obligations under the Treaties owed to the Claimants. This dispute arises out of the facts sets forth in Section III above.
213. The Permanent Court of International Justice famously defined a dispute in the *Mavrommatis* case as a “*disagreement on a point of law or fact, a conflict of legal views or interests between two persons.*”¹⁷⁷ A number of investment tribunals have subsequently upheld this definition.¹⁷⁸ *Legal disputes* have in turn been defined as “*controversies in which the Parties are in disagreement over a right*”.¹⁷⁹
214. Serbia’s silence shows that it disagrees with the Claimants’ claims that Serbia breached their legal rights as set forth in the Treaties and, as such, owes to them compensation. A legal dispute accordingly exists between the Claimants and Serbia within the meaning of Article 25(1) of the ICSID Convention.

2. “Arising Directly out of an Investment”

215. The ICSID Convention does not include a definition of *investment*. Investment tribunals have therefore held that it is the definition under the relevant investment treaty—here the Treaties—which is determinative for the existence of an *investment* under the ICSID Convention. As explained above, the Claimants have made *investments* within the meaning of the Treaties.
216. In addition, the Claimants’ investment also fulfils the typical hallmarks of an investment under the ICSID Convention identified by several ICSID tribunals under the so-called *Salini* test: commitment of financial resources or other assets, assumption of commercial risks and certain duration of the commercial operation.¹⁸⁰
217. The Claimants’ investment in BD Agro extended from 2005, when the Claimants acquired the Privatized Shares, to 2015, when it was expropriated by Serbia. The

¹⁷⁷ *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11, **CLA-18**.

¹⁷⁸ *See, e.g., El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, ¶ 61, **CLA-19**.

¹⁷⁹ *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, ¶ 61, **CLA-19**.

¹⁸⁰ *Salini v Morocco*, ICSID Case No Arb/00/04, Decision on Jurisdiction, 23 July 2001, ¶ 52, **CLA-20**.

investment required the commitment of substantial financial resources, which include, but are not limited to:

- i. the purchase price of approximately EUR 5,549,000EUR,¹⁸¹
- ii. the additional investment of approximately EUR 2 million;¹⁸²
- iii. the cost of approximately EUR 2.2 million for the replacement of BD Agro's herd financed in part directly by Mr. Rand¹⁸³ and other payments and loans for the benefit of BD Agro.¹⁸⁴

218. The Claimants have also undertaken a significant risk inherent to the volatile agricultural business, which materialized, for example, in the form of *leucosis* disease, which forced BD Agro to slaughter and replace a significant part of its production herd. The element of risk is further reinforced by the unpredictable legal and business environment in Serbia.

219. Moreover, due to the Claimants' significant investment and efforts, BD Agro became "*the most modern cow farm not only in Serbia, but also in Europe.*"¹⁸⁵ Even if the ICSID Convention required that an investment contribute to the host State's development (*quod non*), the Claimant's investment would squarely meet such a requirement.

¹⁸¹ Confirmation of the Privatization Agency on the Buyer's full payment of the Purchase Price dated 6 January 2012, **CE-19**.

¹⁸² Confirmation of the Privatization Agency of the Completion of Investment dated 10 October 2006, **CE-18**.

¹⁸³ Confirmation of wire transfer from William Rand to Wiljill Farms Inc. for CAD 175,000.00 executed on 3 April 2008; Confirmation of wire transfer from William Rand to Wiljill Farms Inc. for CAD 607, 759.00 executed on 21 October 2008; Confirmation of wire transfer from William Rand to Wiljill Farms Inc. for CAD 199,816.00 executed on 22 December 2008; Confirmation of wire transfer from William Rand to Wiljill Farms Inc. for CAD 460,216.00 executed on 24 December 2008 **CE-21**; Confirmation of 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, **CE-22**; Confirmation of wire transfer from William Rand to Trudeau International Farms for CAD 443,080.00 executed on 21 October 2008, **CE-23**; Confirmation of wire transfer from William Rand to BD Agro for EUR 219,000.00 executed on 5 December 2008, **CE-24**.

¹⁸⁴ Overview of Payments to Mr. David Wood, **CE-62**; Overview of Payments to Mr. Gligor Calin, **CE-68**. See Witness Statement of Mr. William Rand, ¶ 40, ¶ 44.

¹⁸⁵ News Article "*Where cows listen to Beethoven*" published on 27 November 2010, **CE-26**.

3. “Between a Contracting State and a National of another Contracting State”

220. This investment dispute has arisen as between the Canadian Claimants, nationals of Canada, and Sembi, a national of Cyprus, on the one hand,¹⁸⁶ and Serbia, on the other hand. Because Serbia, Canada and Cyprus are all Contracting States to the ICSID Convention,¹⁸⁷ the present dispute is “*between a Contracting State and a National of another Contracting State*” as required by Article 25 of the ICSID Convention.

4. “Which the Parties Consent in Writing to Submit to the Centre.”

221. Serbia’s consent to arbitration under the ICSID Convention is included in Article 24(1)(a) of the Canada-Serbia BIT and Article 9(2) of the Serbia-Cyprus BIT.

222. Article 24(1)(a) of the Canada-Serbia BIT provides:

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;¹⁸⁸

223. Article 22 of the Canada-Serbia BIT contain several conditions precedent to arbitration, which are addressed *seriatim* below.

224. *First*, Article 22(2)(a) of the Canada-Serbia BIT requires that the investor “*consent to arbitration in accordance with procedures set out in this agreement.*” By filing this request, the Canadian Claimants consent to arbitration in accordance with the Canada-Serbia BIT.

225. *Second*, Article 22(2)(b) of the Canada-Serbia BIT requires that “*at least six months have elapsed since the events giving rise to the claim.*” As described above, the dispute arose out of Serbia’s unlawful termination of the Privatization Agreement on 28 September 2015 and the consequent illegal seizure of the Privatized Shares on 21 October 2015. Accordingly, the requirements of Article 22(b) are satisfied.

¹⁸⁶ For the sake of completeness, Claimants declare that none of them holds, or ever held Serbian nationality.

¹⁸⁷ List of Contracting States to the ICSID Convention, **CE-104**.

¹⁸⁸ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 24(1)(a), **CLA-1**.

226. *Third*, Article 22(2)(c) of the Canada-Serbia BIT requires that “*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*”. Such notice shall specify:
- i. the name and address of the investor;
 - ii. the allegedly breached provision of the Canada-Serbia BIT;
 - iii. the legal and the factual basis for the claim; and
 - iv. the relief sought and the approximate amount of damages claimed.
227. Furthermore, under Article 22(2)(d) of the Canada-Serbia BIT, such notice shall include evidence that the investor is “*investor of the other Party*”.
228. The Notice of Dispute was served on Serbia on 8 August 2017 and contained all of the above-listed specification as well as the evidence that the Canadian Claimants are investors of Canada. Accordingly, the requirements of Article 22(2)(c) and Article 22(2)(d) of the Canada-Serbia BIT are satisfied.
229. *Fourth*, Article 22(2)(e)(i) of the Canada-Serbia BIT requires that “*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.*”¹⁸⁹ As shown above, Serbia breached the Treaties in September and October 2015. Accordingly, the requirements of Article 22(2)(e)(i) of the Canada-Serbia BIT are satisfied.
230. *Finally*, Article 22(2)(e)(ii) of the Canada-Serbia BIT requires the investor to “*waive 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*

¹⁸⁹ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 22(2)(e)(i), **CLA-1**.

- Article 21.*”¹⁹⁰ The Canadian Claimants attach to this Request their waivers in accordance with Article 22(2)(e)(ii) of the Canada-Serbia BIT.¹⁹¹
231. As demonstrated above, the Canadian Claimants have satisfied all conditions precedent required under Article 22 of the Canada-Serbia BIT and may thus submit its claim to arbitration under the ICSID Convention arbitration as envisaged by Article 24(1)(a) of the Canada-Serbia BIT.
232. Article 9 of the Serbia-Cyprus BIT provides:
1. Disputes between one Contracting Party and an investor of the other Contracting Party in relation to an investment for the purpose of this Agreement, shall be submitted in written form, with all detailed information, by the investor of the other Contracting Party. Where possible, the parties shall endeavour to settle these disputes amicably.
 2. If these disputes cannot be settled by negotiations within six months from the written notification under paragraph 1 of this Article, they may be submitted, by the choice of the investor, to: [...] International Centre for the Settlement of Investment Disputes (ICSID) set up by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, from 18th March 1965.¹⁹²
233. As shown above, Sembi has complied with all of the above requirements and is thus entitled to submit its claim to arbitration under the ICSID Convention as envisaged by Article 9(2) of the Serbia-Cyprus BIT.

¹⁹⁰ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 22(2)(e)(ii), **CLA-1**.

¹⁹¹ Resolutions of the Sole Director of Rand Investments dated 26 January 2018, **CE-73**; Resolution of the Directors of Sembi dated 26 January 2018, **CE-74**; Waiver of Rand Investments’ right to initiate or continue parallel proceedings, **CE-90**; Waiver of Ms. Kathleen Rand’s right to initiate or continue parallel proceedings, **CE-92**; Waiver of Ms. Allison Rand’s right to initiate or continue parallel proceedings, **CE-93**; Waiver of Mr. Robert Rand’s right to initiate or continue parallel proceedings, **CE-94**; Waiver of Mr. William Rand’s right to initiate or continue parallel proceedings, **CE-95**.

¹⁹² Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Article 9, **CLA-2**.

V.

SERBIA VIOLATED ITS OBLIGATIONS UNDER THE TREATIES

A. Serbia Unlawfully Expropriated The Claimants' Investments

234. Both the Canada-Serbia BIT and Serbia-Cyprus BIT protect covered investors from unlawful expropriation of their investment.

235. Article 10(1) of the Canada-Serbia BIT provides as follows:

A Party may not nationalize or expropriate a covered investment either directly or indirectly through measures having an effect equivalent to nationalization or expropriation (“expropriation”), except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on payment of compensation in accordance with paragraphs 2 and 3.¹⁹³

236. Article 5(1) of the Serbia-Cyprus BIT contains a similarly worded ban on unlawful expropriation, which provides:

Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to expropriation or nationalisation (hereinafter referred to as “expropriation”), except in cases when such measures are taken in public interest. The expropriation shall be made with due process of law, on a non-discriminatory basis and against adequate compensation made without undue delay.¹⁹⁴

237. Investment tribunals unanimously recognize that expropriation encompasses both:

- i. direct expropriation, where the host state takes legal title of the investment/expropriated asset or right; and
- ii. indirect expropriation, where the host state achieves the same result without taking legal title, e.g. by regulatory measures that make continued operation of the investment uneconomical.¹⁹⁵

¹⁹³ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 10(1), **CLA-1**.

¹⁹⁴ Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Article 5(1), **CLA-2**.

¹⁹⁵ *National Grid plc v The Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶¶ 144-153; **CLA-6**; *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 200, **CLA-7**; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 188, **CLA-8**.

238. Unlawful termination of a privatization agreement and seizure of the privatized assets constitutes direct expropriation. For example, in *Siag v. Egypt*, the claimants purchased through their Egyptian subsidiaries a plot of land from the Egyptian Ministry of Tourism (the “EMT”) for the purposes of developing a seaside tourist resort. After the investor had obtained all the necessary permits and completed a significant part of the construction work, the EMT conducted an inspection of the building sites and determined an alleged lack of progress in the development of the project. Shortly thereafter, the EMT issued a resolution cancelling the contract and redeeming all the land subject of the contract with all the structures thereon with no compensation to the investor.¹⁹⁶
239. The *Siag* tribunal concluded that the resolutions repudiating the contract and transferring the ownership title over the affected parcel of lands to the Egyptian state amounted to direct expropriation in violation of the applicable business investment treaty.
240. It is abundantly clear that the Privatization Agency’s termination of the Privatization Agreement and transfer of the Beneficially Owned Shares to the Privatization Agency in October 2015 amounted to direct expropriation.
241. The expropriation was unlawful because:
- i. the Privatization Agency’s termination of the Privatization Agreement and subsequent seizure of the Beneficially Owned Shares were contrary to the Privatization Agreement and Serbian law;
 - ii. the expropriation lacked due process because the Ombudsman lacked jurisdiction and issued his “recommendation” that the Privatization Agreement be terminated—obediently executed by the Privatization Agency—without affording Mr. Obradović or the Claimants any right to be heard or even notifying them of his investigations. The seizure of the

¹⁹⁶ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, ¶¶ 18-36, **CLA-9**.

Beneficially Owned Shares was the Privatization Agency’s unilateral act involving no legal process at all;

- iii. the expropriation was not in the public interest. While the Ombudsman’s “recommendation” that the Privatization Agency terminate the Privatization Agreement was purportedly made to protect the rights of BD Agro’s employees, this justification was bogus as there plainly was no connection at all between the purported breaches of the Privatization Agreement and the human rights of BD Agro’s employees; and
- iv. the expropriation was not compensated. Serbia did not make any compensation offer, whether before or after the Investors filed their Notice of Dispute.

242. Additionally, Serbia indirectly expropriated the 3.9% shareholding in BD Agro held by Mr. Rand indirectly through MDH Serbia because the Privatization Agency’s unlawful decision to terminate the Privatization Agreement and seize the Beneficially Owned Shares thwarted the creditor approved reorganization plan and forced BD Agro into bankruptcy, thus rendering the shares of BD Agro worthless.

B. Serbia Failed to Provide Fair and Equitable Treatment to the Claimants’ Investment

243. Under Article 6(1) of the Canada-Serbia BIT “*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.*”¹⁹⁷

244. The fair and equitable treatment standard (the “**FET standard**”) is also provided for in Article 2 of the Serbia-Cyprus BIT, which states that “*investments of investors of each Contracting Party shall at any time be accorded fair and equitable treatment.*”¹⁹⁸

245. The standard of fair and equitable treatment has been interpreted by investment tribunals to encompass, in particular, the state’s duty to act in a transparent manner and in good

¹⁹⁷ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 6(1), **CLA-1**.

¹⁹⁸ Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Article 2, **CLA-2**.

- faith, to refrain from conduct that would be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process, to respect procedural propriety and due process and not to frustrate the investor's reasonable and legitimate expectations.¹⁹⁹
246. The Privatization Agency's termination of the Privatization Agreement and expropriation of the Beneficially Owned Shares was taken in bad faith and was grossly unfair, disproportionate and lacking in due process and, therefore, violative of the FET standard. Indeed, as observed by Schreuer, "*it is difficult to envisage an uncompensated expropriation that would not also involve violation the FET standard.*"²⁰⁰
247. However, Serbia's violations of the FET standard do not stop there.
248. *First*, the Privatization Agency's refusal to release the pledge over the Privatized Shares despite full payment of the purchase price on 8 April 2011 clearly violated its obligations under the Share Pledge Agreement. The Privatization Agency also acted in bad faith with the sole purpose of coercing the Claimants into compliance with the Privatization Agency's illegitimate demands to remedy non-existent breaches of the Privatization Agreement.
249. *Second*, the Privatization Agency's refusal to allow transfer of nominal ownership of the Beneficially Owned Shares and assignment of the Privatization Agreement from Mr. Obradović to Coropi in 2013 was arbitrary and thus unfair and inequitable.
250. *Third*, the Ombudsman investigated BD Agro, made his "recommendations", and launched a very public and persistent campaign for termination of the Privatization Agreement even though he plainly lacked the jurisdiction, authority and expertise to do so. He disregarded the views of the authorities legally in charge of the privatization process, being the Privatization Agency and the Ministry of Economy, and did not even inform the Claimants, BD Agro or Mr. Obradović of his investigation.

¹⁹⁹ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 609, **CLA-10**.

²⁰⁰ Christoph Schreuer, *Standards of Investment Protection, Introduction: Interrelationship of Standards, Fair and Equitable Treatment*, p. 3, **CLA-11**.

C. Serbia Impaired Sembi’s Investment by Unreasonable and Discriminatory Measures

251. The most favorite nation clause (the “**MFN clause**”) contained in Article 3(1) of the Serbia-Cyprus BIT states that “*each Contracting Party shall accord, in its territory, to investments made by investors of the other Contracting Party treatment no less favourable than that which it accords to the investments made by its own investors or by investors of any third State, whichever is more favourable to the investor.*”²⁰¹
252. Sembi invokes the MFN Clause in the Serbia-Cyprus BIT to rely on the more favorable treatment provided to Moroccan investors under the non-impairment standard in Article 2(3) of the Morocco-Serbia BIT, which provides that “*neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment disposal of investments of investors in the territory of the other Contracting Party.*”²⁰²
253. The standard of reasonableness—while broader in scope—is closely related to the concept of non-arbitrariness. According to Schreuer, the following kinds of measures are arbitrary under international investment law:

[A.] a measure that inflicts damage on the investor without serving any apparent legitimate purpose; [B.] a measure that is not based on legal standards but on discretion, prejudice or personal preference; [C.] a measure taken for reasons that are different from those put forward by the decision maker; [D.] a measure taken in willful disregard of due process and proper procedure.²⁰³

254. In *LG&E Energy v Argentina*, the tribunal set out the criteria for determining the arbitrariness of the host State’s measures in the following terms:

It is apparent from the Bilateral Treaty that Argentina and the United States wanted to prohibit themselves from implementing measures that affect the investments of nationals of the other Party without engaging in a rational decision-making process. Such process would include a consideration of the

²⁰¹ Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, Article 3(1), **CLA-2**.

²⁰² Agreement between Serbia and Morocco on Reciprocal Promotion and Protection of Investments, Article 2(3), **CLA-12**.

²⁰³ Christopher Schreuer, Protection against Arbitrary or Discriminatory Measures, p. 188, in: *The Future of Investment Arbitration* (C. A. Rogers, R.P. Alford eds.), **CLA-13**.

effect of a measure on foreign investments and a balance of the interests of the State with any burden imposed on such investments.²⁰⁴

255. Serbia’s conduct was unreasonable, arbitrary and in breach of the non-impairment standard for a number of reasons. The termination of the Privatization Agreement did not serve any legitimate purpose. It was entirely disproportionate to the alleged breaches of the Privatization Agreement. The Ombudsman and the Privatization Agency acted without any “*consideration of the effect of a measure on foreign investments and a balance of the interests of the State with any burden imposed on such investments.*” The Privatization Agency completely disregarded not only the unequivocal instructions from the Ministry of Economy and the 2013 Legal Opinion, but also the assurances personally provided to Mr. Rand, his representatives and BD Agro by senior representatives of the Serbian government, including the Chief of Staff to the Prime Minister of Serbia. Last but not least, the Claimants’ due process rights were violated both by the Ombudsman, who did not even inform BD Agro or the Claimants of his investigation, and by the Privatization Agency, which appropriated the Beneficially Owned Shares without giving the Claimants any prior opportunity to challenge the unlawful termination of the Privatization Agreement.
256. Moreover, the Privatization Agency’s earlier refusal to release the pledge over the Privatized Shares was not only manifestly illegal, but also arbitrary and made for the sole reason to illegitimately and indefinitely maintain Serbia’s stranglehold over BD Agro.
257. Similarly, the Privatization Agency’s refusal to allow for the assignment of the Privatization Agreement from Mr. Obradović to Coropi significantly contributed to BD Agro’s insolvency and was nothing but a “*measure that inflicts damage on the investor without serving any apparent legitimate purpose.*”

D. Umbrella Clause

258. Sembi also invokes the Serbia-Cyprus BIT’s MFN clause to rely on the umbrella clause contained in Article 2(2) of the UK-Serbia BIT, which provides that “*each Contracting*

²⁰⁴ *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 158, **CLA-8**.

*Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.”*²⁰⁵

259. As articulated by the tribunal in *L.E.S.I Dipenta v Algeria* “*the effect of such clauses is to transform the violations of the State’s contractual commitments into violations of the treaty umbrella clause [...].*”²⁰⁶
260. The Privatization Agency violated its contractual commitments on at least two occasions. *First*, the Privatization Agency’s refusal to release the pledge over BD Agro’s shares after the full payment of the purchase price on 8 April 2011 was in clear violation of Article 2 of the Share Pledge Agreement. *Second*, the Privatization Agency’s termination of the Privatization Agreement was manifestly contrary to the plain language of the Privatization Agreement, as confirmed by (among others) the Ministry of Economy and the Privatization Agency’s outside legal counsel in the 2013 Legal Opinion.
261. The actions of the Privatization Agency thus violated the umbrella clause.

²⁰⁵ Agreement between UK and Yugoslavia on Reciprocal Promotion and Protection of Investments, Article 2(2), **CLA-14**.

²⁰⁶ *Consorzio Groupement L.E.S.I.-DIPENTA c. République algérienne démocratique et populaire*, ICSID case no ARB/03/08, Award, 10 January 2005, ¶ 25 (ii), Translation from the French original (“*Ces clauses ont pour effet de transformer les violations des engagements contractuels de l’Etat en violations de cette disposition du traité [...]*”, **CLA-15**).

VI.

CLAIMANTS ARE ENTITLED TO COMPENSATION FOR THEIR LOSSES

262. As a result of the foregoing breaches by Serbia of its obligations under the Treaties, the Investors have suffered losses presently estimated at no less than EUR 67 million plus interest. The main component of the loss is the substantial market value of BD Agro's 295 hectares of construction land, strategically located along a major communications axis in the suburbs of Belgrade and in close vicinity of the Belgrade international airport.
263. The Investors will supplement their submissions on quantum in due course.

VII.

PROCEDURAL MATTERS

A. The Constitution of the Tribunal

264. The Parties have not agreed to any provisions concerning the number of arbitrators or the method of their appointment in this arbitration.
265. In accordance with Rule 2(1)(a) of the ICSID Rules of Procedure for Arbitration Proceedings (the “**Arbitration Rules**”), the Claimants hereby propose to Serbia that the Tribunal be composed of three arbitrators, one arbitrator to be appointed by each of the Parties and the third arbitrator, who shall be the President of the Tribunal, to be appointed by agreement of the Party-appointed arbitrators following their consultation of the respective Party.
266. In accordance with Rule 2(1)(b) of the Arbitration Rules, Serbia should respond to this proposal of the Claimants within twenty days of its receipt of the Notice of Registration. If Serbia agrees with this proposal, the Claimants propose that both Parties appoint their arbitrators simultaneously within the time-limit of fifteen days from the receipt of Serbia’s agreement. The President of the Tribunal should then be appointed within the time-limit of thirty days after both Party-appointed arbitrators have confirmed their agreement to the appointment.

B. Language of the Proceedings

267. The Claimants will present and plead their case in this arbitration in English.

C. Transparency of the Proceedings

268. In accordance with Article 31(1) and (2) of the Canada-Serbia BIT, the public shall have access to oral hearing and documents submitted to, or issued by, the Tribunal in this arbitration.²⁰⁷

²⁰⁷ Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 31, **CLA-1**.

D. Place of Hearings

269. The Claimants propose that the first session and all hearings be held at the ICSID premises in Washington, D.C.

E. Required Copies and Payment

270. In accordance with Rule 4(1) of the Institution Rules, this Request is submitted in an original and six additional signed copies.

271. In accordance with Regulation 16 of the Administrative and Financial Regulations, Rand Investments deposited the fee for the institution of this arbitration, which fee is set at US\$25,000 by the Centre's Schedule of Fees. Proof of payment by Rand Investments of the prescribed lodging fee is attached to this Request.²⁰⁸

²⁰⁸ Confirmation of payment of ICSID's lodging fee, **CE-111**.


VIII.
REQUEST FOR RELIEF

272. The Claimants will request that, once constituted, the Tribunal issue an award:
- i. declaring that Serbia has breached the Canada-Serbia BIT with respect to Rand Investments, Mr. Rand, Ms. Kathleen Elizabeth Rand, Ms. Allison Ruth Rand and Mr. Robert Harry Leander Rand;
 - ii. declaring that Serbia has breached the Cyprus-Serbia BIT with respect to Sembi;
 - iii. ordering Serbia to pay compensation to the Claimants of no less than EUR 67 million plus pre- and post-award interest;
 - iv. ordering Serbia to pay the costs of this proceeding, including costs of legal representation; and
 - v. ordering such other relief as the Tribunal may deem appropriate in the circumstances.
273. The Claimants reserve the right to supplement or otherwise amend their claims and the relief sought.
274. The Claimants also hereby respectfully ask the Secretary-General of the Centre to:
- i. acknowledge receipt of the Request in accordance with Rule 5(1)(a) of the Institution Rules; and
 - ii. proceed to register the Request as soon as possible in the Arbitration Register and on the same date notify the Parties of the registration in accordance with Rule 6(1) of the Institution Rules.

Submitted on behalf of Rand Investments Ltd., Mr.
William Archibald Rand, Ms. Kathleen Elizabeth
Rand, Ms. Allison Ruth Rand, Mr. Robert Harry
Leander Rand and Sembi Investment Limited



Rostislav Pekař
David Seidl
SQUIRE PATTON BOGGS



Nenad Stanković
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STANKOVIC & PARTNERS